

The Constitution in Review

First Report from the United Kingdom Constitution Monitoring Group

For period 1 January -30 June 2021

THE

CONSTITUTION

SOCIETY

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Executive Summary

Constitutional change process

- At present the government is set upon legislating over a range of substantial matters with a constitutional dimension, including voter identification, the calling of UK general elections, and rules regarding political protest. This overall programme is notable for its scale, the speed with which it is being implemented, and its piecemeal character. Constitutional issues tend to be interconnected, and to consider them in isolation – let alone in haste – might inhibit appreciation of the wider context for a given change, and its potential consequences.
- A number of components of this legislative agenda are controversial. There will always be some opposition to any change, and this does not, in and of itself, necessitate a veto. But to each of these cases of proposed reform there are significant, informed and principled objections, either in their substance, or in the way they are being approached, or both.
- This is far from a model of good practice in constitutional change. A government with a comfortable majority in the House of Commons is in a strong position to pursue such good practice, should it choose to do so.
- It is the intention of this Monitoring Group, and the purpose of our report, to assist in the realisation of good practice in constitutional change in the UK. This contribution is particularly important given the ambition and implications of the current government's approach to constitutional change.

Elections

- The *Dissolution and Calling of Parliament Bill* touches on a number of constitutional issues. They include the principle that executives should not undermine the ability of legislatures to perform their constitutional functions and that the exercise of ministerial power should only exceptionally be exempt from review by the courts.
- The Bill also raises concerns in relation to the monarch and ensuring they are not exposed to controversy of a party-political nature.
- Finally, it is not clear that conventions that previously applied in this area will be revived. Therefore, the Bill, once it passes into law, will potentially create uncertainty about the proper functioning of what will once again become a core aspect of the UK constitution: the exercise of the prime-ministerial right to request an early general election from the head of state.

Legislatures

- There have been several occasions during the period covered by this first report in which there has been an alleged misleading of the UK Parliament by the Prime Minister, and, once identified, failures to correct ministerial errors satisfactorily. Ministers should provide accurate and truthful information to the legislature, correcting unintentional errors at the earliest point. However, important as this principle is, if the political leadership of a government is not committed to it, enforcement is difficult to achieve.
- The Prime Minister's conduct in dealing with the UK Parliament was further called into question, when the Speaker of the House of Commons rebuked the premier for making an important announcement regarding the pandemic to the media before Parliament, in contradiction of the *Ministerial Code*.
- There also remain doubts about the ability of the House of Commons to respond meaningfully to a lack of cooperation from non-members who are the subject of interest of committee inquiries.

Ministers and the Civil Service

- The UK executive and its devolved equivalents are regulated by a series of texts such as the *Ministerial Code* and the Business Appointment Rules for ministers and civil servants. During the report period, there were a number of incidents involving possible violations of the rules set out in these documents, and doubts were raised about the means by which these rules are enforced.
- The Committee on Standards in Public Life (CSPL) has put forward a number of proposals intended to promote greater adherence to standards within the executive as set out in various regulatory documents, and possible strengthening of their contents. We take the view that these recommendations, on which a fuller report is due from CSPL, should be closely considered.
- In June, the government issued a *Declaration on Government Reform*. This document emphasises the importance of maintaining existing Civil Service standards and principles, including appointment on merit on the basis of fair and open competition and avoiding conflicts of interest.
- But it also signals an intention to increase temporary appointments to the Civil Service, including from business, and to make appointments at senior level open by default to public competition. The document commits to an enhanced role for ministers and the Prime Minister in the appointments process. Given concerns about the results of the wider ministerial role in public appointments, including of departmental non-executive directors, we believe such changes in the Civil Service should be addressed with considerable caution.

Devolution and the Union

- Although the *Declaration on Government Reform* calls for the rewiring of government and the importance of partnership, it has nothing to say about working in partnership with devolved governments, and it makes no reference to local government. This is despite the fact that the way in which the UK and devolved executives interact with one another is an ongoing source of difficulty in the operation of the UK constitution. The machinery of intergovernmental relations in place has been widely judged unsatisfactory. A forum that might provide properly for the required engagement is lacking.
- The Dunlop review of UK Government Union Capability and the accompanying update on the review of intergovernmental relations offer means by which some of these problems might be addressed. To what extent the Dunlop proposals will be implemented and how they will work in practice remains to be seen. Moreover, there remain significant areas of disagreement between the different administrations involved. This lack of consensus over key constitutional arrangements is a point of concern.
- The *UK Internal Market Act 2020* raises concerns regarding what amounts to a serious and unacceptable curtailment of the authority of the devolved legislatures. The future use of the extensive delegated powers contained within the Act seems likely to prompt further political dispute and legal action, meaning uncertainty and lack of consensus about a significant aspect of the constitution. The Act represents a clear challenge to the principle that there is a need for cooperation and meaningful co-decision-making between devolved and UK governments, but it remains to be seen whether the UK government will adopt a more cooperative approach through the agreement and use of common frameworks. The *Subsidy Control Bill* introduced to the UK Parliament in June would shift further the relative balance of power from devolved to UK level.
- Implementation of the Protocol on Ireland/Northern Ireland of the European Union Withdrawal Agreement has proved a challenging task. It presents the novel proposition of a state applying the rules of a supranational organisation of which it is not (or no longer) a member within its own territory, leading to what is in effect an internal regulatory barrier. We recognise the sensitivity of this issue and the difficulties involved in reconciling departure from the EU with the Northern Ireland peace process. Complaints about the Protocol, and the legal challenges mounted against it, suggest that constitutional consensus is lacking in a crucial area.
- Doubts remain in Northern Ireland and Scotland (though the precise contexts differ) on what are the proper conditions in which a referendum should be held on possible departure from the UK. The 1998 Belfast/Good Friday Agreement and the *Northern Ireland Act 1998* sets certain principles for such a referendum in Northern Ireland, but there is still considerable scope for divergent interpretations of what these mean in practice. The existence of a substantial body of support for departure from the UK within both Scotland and Northern Ireland in and of itself shows the importance of clarifying potential exit referendum conditions. It also demonstrates the lack of consensus in the UK on an absolutely fundamental constitutional issue.

Judiciary and the rule of law

- Ministers in the UK government have suggested that they regard the judiciary as prone to overreach into political matters, a tendency that in their view might require correction. It is this outlook that provided the background to the commissioning of the Independent Review of Administrative Law (IRAL). We do not find the firm proposals made by IRAL objectionable from the point of view of our principles relating to the rule of law, although we note there have been doubts about the empirical basis for some of its conclusions.
- The government response to the IRAL report suggested that it intended to even go beyond these recommendations. There could be, therefore, a suspicion that the government had a predetermined objective to which the review it established was incidental. This approach, particularly in an area of such constitutional sensitivity, is problematic.
- The *Judicial Review and Courts Bill*, which had its first reading in July, did not include the most contentious of the measures that had been anticipated. Nevertheless, the Bill warrants close attention, as does the ongoing Independent Review of the Human Rights Act. It would be a subject of concern if the government were to seek to limit the ability of the courts to ensure that UK executive acts in accordance with basic legal and constitutional principles.
- We also note evidence of willingness within government to publicly accept but downgrade the significance of unfavourable judgments. For example, in relation to judicial findings that there has been a violation of transparency standards over the award of contracts. The loss of judicial review by the government does not necessarily in itself amount to a major constitutional problem. But if it occurs and is not responded to appropriately, there could be the perception of corruption, which would be a problem even if such concerns were misplaced.
- The unilateral decision to delay the full implementation of aspects of the Northern Ireland Protocol of the EU Withdrawal Agreement in March gave rise to a second round of legal action against the UK by the EU for breach of the Withdrawal Agreement that was only ratified in 2020.

Integrity in public life

- Without taking a position on specific allegations, it is clear that any incident of suspected distortion and manipulation of information by someone in public office is of grave concern. Misleading statements are not only problematic in themselves (breaching fundamental principles of openness and honesty), they have long-term damaging consequences.
- Another area in which it is important for UK ministers to maintain integrity is in the making of public appointments. The outgoing Commissioner for Public Appointments has expressed concern about the application of intense levels of political pressure. CSPL has echoed this sentiment and intends, in consultation with the Commissioner, to put forward recommendations for strengthening the role of the Commissioner. The broader ongoing work of CSPL reflects a

wide-ranging set of apprehensions about the effectiveness of mechanisms and systems designed to uphold integrity in public life, particularly as it relates to the operation of the UK executive.

The First Report

Introduction

The United Kingdom Constitution Monitoring Group (UKCMG) comprises experts and practitioners covering a range of areas of the UK constitution. Its principal purpose is to assess developments – actual and anticipated – in the UK constitution. To form a basis for its work, in the absence of a codified constitution for the UK, the UKCMG has identified a set of 20 general and desirable guiding principles that express what we believe to be the core values underpinning the proper operation of the UK system of governance. The UKCMG is impartial and has no party affiliation.

In this report we consider events and tendencies across a series of constitutional categories over a six-month period from 1 January to 30 June 2021. We assess them against our 20 principles, drawing attention to any areas of concern. At the beginning of each section, we identify key aspects of the principles engaged in the material that follows. The appendices contain more detailed accounts of the most important developments. We intend this publication to be the first in an ongoing, twice-annual, series. The principles we use are reproduced below.

Timeline of events

Pre-report period: December 2020

01 December: *Draft Fixed-term Parliaments Act (Repeal) Bill* published

07 December: Independent Human Rights Act Review announced by UK government

17 December: *United Kingdom Internal Market Act 2020* receives Royal Assent

31 December: *European Union (Future Relationship) Act 2020* receives Royal Assent, after passing through all its parliamentary stages the previous day

Report period, 1 January - 30 June 2021

January 2021

29 January: European Commission considered invoking Article 16 of the Protocol on Ireland/Northern Ireland as part of its measures to control vaccine exports out of the EU. It rescinded within a matter of hours following vigorous objections from the Irish and UK governments

February 2021

01 February: Independent Review of Administrative Law, chaired by Lord Faulks QC, submits its report to Lord Chancellor and Chancellor of the Duchy of Lancaster

19 February: High Court finds that the Health Secretary, Matt Hancock, acted unlawfully through failure to publish Covid-related government contracts within the required 30-day period

21 February: A coalition of unionist parties in Northern Ireland commence judicial review proceedings to challenge the compatibility of the Northern Ireland Protocol with the *Acts of Union 1800*, the *Northern Ireland Act 1998* and the 1998 Belfast/Good Friday Agreement

26 February: In the *Begum* case, UK Supreme Court finds in favour of the Home Secretary and against an individual seeking to appeal against their being stripped of citizenship on the grounds that to do so was conducive to public good

March 2021

03 March: UK government announces unilateral decision to delay the introduction of some controls and checks on goods moving from Great Britain to Northern Ireland (as provided for under the Northern Ireland Protocol), from 1 April to 1 October

04 March: Loyalist Communities Council, which represents groups in Northern Ireland including loyalist paramilitary organisations, announces temporary withdrawal of support for the 1998 Belfast/Good Friday Agreement because of concerns about the Northern Ireland Protocol

09 March: *Police, Crime, Sentencing and Courts Bill* has its first reading

09 March: Speaking in a podcast, Jacob Rees-Mogg, Leader of the House of Commons, expresses disagreement with the principle that the UK has no ‘selfish or strategic interest in Northern Ireland’

15 March: European Commission launches legal action against the UK for unilaterally extending the agreed ‘grace periods’ of controls and checks on certain goods entering Northern Ireland from Great Britain

18 March: Independent Review of Administrative Law (IRAL) report is published. The UK government responds by announcing a further consultation on possible reforms to judicial review

21 March: *The Sunday Times* publishes first report about lobbying of government by former Prime Minister David Cameron on behalf of the subsequently bankrupt supply-chain finance firm Greensill Capital

22 March: Scottish First Minister Nicola Sturgeon is cleared of having broken the *Scottish Ministerial Code* by an independent inquiry. James Hamilton, the senior Irish lawyer who carried out the inquiry, found that the First Minister did not intentionally mislead the Scottish Parliament in relation to allegations against her predecessor in the role, Alex Salmond

24 March: Joint Committee on the Fixed-term Parliaments Act publishes report

24 March: Lord Dunlop’s review of UK Government Union Capability is published

24 March: Update on the progress of the joint review of UK intergovernmental relations is published

29 March: Outbreak of unrest in Northern Ireland, with 12 days of intermittent rioting causing injury to almost a hundred police officers. The riots cease to mark the funeral of Prince Philip, but there are numerous unauthorised protests about the Protocol over the coming months

April 2021

13 April: Reports reveal that that senior civil servant Bill Crothers joined the board of Greensill Capital two months prior to departure from the role of the UK government Chief Commercial Officer in November 2015

15 April: Lord Evans, Chair of the Committee on Standards in Public Life, writes to the Prime Minister to recommend changes to the role of the Independent Adviser on Ministers' Interests

27 April: House of Commons Privileges Committee publishes its report *Select committees and contempt: clarifying and strengthening powers to call for persons, papers and records*

28 April: Lord Geidt is appointed as the Prime Minister's Independent Adviser on Ministers' Interests

28 April: Electoral Commission launches an investigation into the financing of refurbishment of the Prime Minister's Downing Street flat

May 2021

06 May: Elections to the Welsh Senedd and Scottish Parliament are held alongside local council, PCC and mayoral elections in Wales and England.

11 May: Queen's Speech is delivered at the State Opening of Parliament. It includes reference to a Dissolution and Calling of Parliament Bill, an Electoral Integrity Bill, and a Judicial Review Bill

12 May: *Dissolution and Calling of Parliament Bill* (formerly the *Draft Fixed-term Parliaments Act (Repeal) Bill*) has its first reading

12 May: Prime Minister announces a public inquiry into the government's handling of the coronavirus pandemic for Spring 2022

28 May: Prime Minister is cleared of breaching the *Ministerial Code* by his Independent Adviser on Ministers' Interests, Lord Geidt, who says the PM was 'unwise' to embark on refurbishing his flat without fully knowing how it was being paid for

June 2021

4 June: Coronavirus recovery summit takes place between the UK government and the leaders of the devolved administrations

9 June: Giving evidence to the Lords Constitution Committee, Lord Chancellor, Robert Buckland, promises a 'careful review and consultation' on the *Constitutional Reform Act 2005*

14 June: Speaker of the House of Commons accuses the Prime Minister of having ‘misled’ him over the announcement of a delay to the lifting of lockdown restrictions

23 June: Minister for the Cabinet Office, Michael Gove, says he does not envisage any situation in which a referendum on Scottish independence will be held before the next UK general election

29 June: Welsh government publishes second edition of its policy paper *Reforming our Union*, and announces it will be establishing a new Commission to foster a national civic conversation in Wales to consider its constitutional future

29 June: Counsel-General for Wales informs the Senedd that, following appeal, leave has been given for a judicial review of issues relating to the Internal Market Act. The case is said to raise important issues of principle regarding the constitutional relationship between the Senedd and the UK Parliament

30 June: High Court in Belfast rejects one of the legal challenges mounted by unionists to the Northern Ireland Protocol, finding that although it does conflict with the Acts of Union, it is lawful because of the supremacy of Parliament, which passed the *European Union (Withdrawal Agreement) Act 2020* that enacts the Protocol

30 June: UK and the EU reach an agreement to extend the Northern Ireland Protocol grace period on chilled meats moving from Great Britain to Northern Ireland until 30 September 2021

30 June: *Subsidy Control Bill* has its first reading

UKCMG Statement of Principles

The list of items that follows is neither exhaustive nor final. It is potentially subject to subsequent refinement, expansion, or addition. Where appropriate, we have drawn directly on the texts of laws and official documents in the public domain (using italics). In other instances, we have used our own words (unitalicised). Sources are indicated. We recognise that these principles can be applied in a variety of different ways. Some of them could legitimately change; but any such alterations should be carried out in accordance with item 1 of the list. As a whole they are intended to provide significant reference points against which to assess key developments significant to the UK constitution.

Nature of UK constitution, and constitutional change

1. It is essential that the constitutional arrangements of the UK are clear and knowable; that they should be, wherever possible, subject to robust and impartial enforcement; and that they should as far as possible command consensus. Constitutional change should take place in a considered fashion and as far as possible on a basis of consensus. The legislative authority of the UK Parliament should be exercised subject to underlying constitutional principles including those outlined in this text.

Representative democracy

2. The UK is a representative democracy. The existence of devolved and UK governments is derived from the broad support of the respective legislatures (see e.g.: *Cabinet Manual*, 2011, paragraph 2). The UK House of Commons and the devolved legislatures in turn derive legitimacy from the free and fair election of their members held at intervals of no more (except in the most exceptional of circumstances) than four or five years.

Governments and their accountability to legislatures

3. Ministers are accountable, individually or collectively, to their legislatures for the exercise of their ministerial responsibilities, and for the activities of the publicly-funded bodies within their remits (see e.g.: *Ministerial Code*, 2019, paragraph 1.3b). Ministers must provide information that is both accurate and truthful to their respective legislatures, and should correct unintended errors they make as soon as possible (see e.g.: *Ministerial Code*, paragraph 1.3c). Devolved and UK ministers should be as open as they can in their interactions with legislatures and the public. They should withhold information only if to do otherwise would compromise the public interest, as set out in freedom of information legislation and other specific legislation (see e.g.: *Ministerial Code*, paragraph 1.3d).
4. Governments should not use their powers to compromise the ability of legislatures autonomously to perform the constitutional functions they carry out on behalf of the public, such as holding the executive to account and making law.

5. At UK level, the House of Commons is rightly acknowledged as in a position of primacy over the House of Lords. But the House of Lords has a legitimate role in parliamentary processes, including scrutiny of primary and delegated legislation, and its special interest and expertise in constitutional matters should be acknowledged.
6. *Civil servants are accountable to ministers, who in turn are accountable to Parliament* [*Civil Service Code*, 2015]. There are limited exceptions to this general principle, including the role of specific officials (Accounting Officers or, in Scotland, Accountable Officers), who at UK level are personally responsible to the House of Commons Committee of Public Accounts *for keeping proper accounts; for the avoidance of waste and extravagance; and for the efficient and effective use of resources* [*Ministerial Code*, paragraph 5.3]. Similar exceptions apply at devolved level, with officials accountable for financial management to devolved legislatures.

Legal powers and obligations of ministers

7. *Ministers are under an overarching duty to comply with the law, including international law and treaty obligations, uphold the administration of justice and protect the integrity of public life. They are expected to observe the Seven Principles of Public Life: selflessness, integrity, objectivity, accountability, openness, honesty and leadership.* (*Cabinet Manual*, paragraph 3.46. For the *Seven Principles of Public Life* see below).
8. UK and devolved ministers' powers are derived from legislation; ministers may also exercise powers derived from the common law, including prerogative powers of the Crown. Ministerial powers should normally be specified in primary rather than secondary legislation. Such powers are subject to limits and constraints; they should be exercised, and public expenditure approved, only for the purposes authorised by the relevant legislation, and in accordance with established norms and reasonable expectation. The exercise of ministerial powers should only exceptionally be immune from challenge in the courts (see e.g.: *Cabinet Manual*, paragraph 3.24).
9. [UK] *Ministers must ensure that no conflict arises, or could reasonably be perceived to arise, between their public duties and their private interests, financial or otherwise* [*Ministerial Code* paragraph 7.1]. *Ministers must not use government resources for Party political purposes* [*Ministerial Code*, paragraph 1.3i]. These principles extend to devolved ministers also, and all holders of public office.

Civil Service

10. Civil servants, with the exceptions of 'special advisers' and certain others, must be *recruited on merit on the basis of fair and open competition*. They should be promoted on merit usually following a competitive process. They must be required to *carry out their duties with integrity and honesty, and objectivity and impartiality*. They must serve the government to the best of their ability in a way which maintains political impartiality, and act in a way that deserves and retains the confidence of ministers in the government of the day, while ensuring they will be

able to establish the same relationship with those they may be required to serve in a future government (see: *Constitutional Reform and Governance Act 2010*, Part 1 for the UK, Scottish and Welsh governments; *Civil Service Codes*; and similar provisions for the Northern Ireland Civil Service).

11. [UK] *Ministers must uphold the political impartiality of the Civil Service, and not ask civil servants to act in any way which would conflict with the Civil Service Code and the requirements of the Constitutional Reform and Governance Act 2010 [Ministerial Code, paragraph 5.1j]. [UK] Ministers have a duty to give fair consideration and due weight to informed and impartial advice from civil servants, as well as to other considerations and advice in reaching policy decisions, and should have regard to the Principles of Scientific Advice to Government [Ministerial Code, paragraph 5.2].* These principles extend to devolved ministers also.
12. ‘Special advisers’ to ministers are temporary civil servants who are not required to be recruited on merit through competition or to carry out their duties with objectivity and impartiality. They are an accepted part of government but should act in accordance with prescribed limitations (see: *Constitutional reform and Governance Act 2010, part 1; Special Advisers Codes, and similar provisions in Northern Ireland*).

Devolution and the Union

13. The devolved institutions of Wales and Scotland are ‘permanent’ parts of the United Kingdom constitution (see: *Scotland Act 2016*, section 1; *Wales Act 2017*, section 1). The devolved institutions of Northern Ireland are also constitutional fixtures; subject to the proviso that Northern Ireland can, after approval via a referendum, leave the UK (once the UK Parliament has legislated to this effect) and join the Republic of Ireland. The UK government has previously conceded the principle that Scotland could become independent from the UK subject to a referendum.
14. In those spheres of operation which have been devolved in Wales, Scotland and Northern Ireland, or those devolved in Scotland and Northern Ireland but not in Wales, responsibility for those functions in relation to England or England and Wales are exercised by ‘UK government’ ministers answerable to the UK Parliament.
15. The devolved institutions have the right to legislative and executive autonomy in their respective spheres of operation. [T]he UK Government will proceed in accordance with the convention that the UK Parliament would not normally legislate with regard to devolved matters except with the agreement of the devolved legislature. (*Memorandum of Understanding*, 2013, paragraph 14. See also: *Scotland Act 2016*, section 2; *Wales Act 2017*, section 2). The devolved institutions have a proper interest in decisions taken at UK level that impact upon them, and over international agreements entered into by the UK when their implementation would fall within devolved competence.

16. Appropriate structures, regulations and practices should exist to ensure that the principles set out in items 13 and 15 above are fully realised. They should allow in particular for liaison, co-ordination and genuine co-decision-making between devolved and UK executives; and between devolved and UK legislatures.

The judiciary and the rule of law

17. *The judiciary interprets and applies the law; and develops the common law in its decisions. It is a long-established constitutional principle that the judiciary is independent of both the government of the day and Parliament so as to ensure the even-handed administration of justice. Civil servants, ministers and, in particular, the Lord Chancellor are under a duty to uphold the continued independence of the judiciary, and must not seek to influence particular judicial decisions. (Cabinet Manual, paragraph 16. See also: Justice (Northern Ireland) Act 2002, section 1; Constitutional Reform Act 2005, part 2; Judiciary and Courts (Scotland) Act 2008).*
18. *The courts scrutinise the manner in which ministers' powers are exercised. The main route is through the mechanism of judicial review, which enables the actions of a minister to be challenged on the basis that he or she did not have the power to act in such a way (including on human rights grounds); that the action was unreasonable; or that the power was exercised in a procedurally unfair way [Cabinet Manual, paragraph 3.39]. The devolution statutes impose additional constraints on the competence of devolved ministers.*
19. The activities described in 17 and 18 must be recognised as central to the maintenance of the rule of law. All institutions and office holders dealt with in these principles are required to promote the rule of law. It encompasses concepts including the law being clear and possible to know; access to the law; equality before the law; governors and governed alike being subject to the law; impartiality in the application of the law; adherence to international law; and the protection of human rights.

Constitutional monarchy

20. The monarchy should not be drawn into party political controversy. The powers formally attached to the monarchy should not be deployed in ways that undermine the principles outlined in this text.

The Seven Principles of Public Life (1995)

In addition, those working in the public sector are expected to adhere to a set of ethical standards set out by Lord Nolan in the first report of the Committee on Standards in Public Life (1995). They are included in a range of Codes of Conduct across public life.

1.1 Selflessness

Holders of public office should act solely in terms of the public interest.

1.2 Integrity

Holders of public office must avoid placing themselves under any obligation to people or organisations that might try inappropriately to influence them in their work. They should not act or take decisions in order to gain financial or other material benefits for themselves, their family, or their friends. They must declare and resolve any interests and relationships.

1.3 Objectivity

Holders of public office must act and take decisions impartially, fairly and on merit, using the best evidence and without discrimination or bias.

1.4 Accountability

Holders of public office are accountable to the public for their decisions and actions and must submit themselves to the scrutiny necessary to ensure this.

1.5 Openness

Holders of public office should act and take decisions in an open and transparent manner. Information should not be withheld from the public unless there are clear and lawful reasons for so doing.

1.6 Honesty

Holders of public office should be truthful.

1.7 Leadership

Holders of public office should exhibit these principles in their own behaviour. They should actively promote and robustly support the principles and be willing to challenge poor behaviour wherever it occurs.

Analysis

Constitutional change process

Key principle: *Constitutional change should take place in a considered fashion and as far as possible on a basis of consensus. The legislative authority of the UK Parliament should be exercised subject to underlying constitutional principles including those outlined in this text (principle 1).*

1. In its 2019 General Election manifesto, the Conservative Party pledged, ‘[i]n our first year’, to form ‘a Constitution, Democracy & Rights Commission’ to consider a variety of ‘issues in depth, and come up with proposals to restore trust in our institutions and in how our democracy operates.’ The manifesto implied that the process would address matters including the relationship between the judiciary, legislature and executive; the Royal Prerogative; the position of the House of Lords; public access to justice; and a plan to ‘update’ administrative law and the *Human Rights Act 1998*.¹ However, the plan for a Commission appears to have been abandoned. The UK government approach to constitutional change seems at present to be to pursue a series of discrete initiatives, rather than undertake a single, overarching exercise. We do not seek to prescribe a single model to be followed for such purposes. **It is, however, worth noting that constitutional issues tend to be interconnected, and that to consider them in isolation might inhibit appreciation of the wider context for a given change.**

2. **The UK government is pursuing a constitutional legislative programme, therefore, that is of a piecemeal character.** It is also substantial in its scale, as appendix a, listing some of the main items, shows. Moreover, the UK government is approaching this task at a considerable pace. At present, the government seems set on legislating in a somewhat over-hasty fashion over matters with a constitutional dimension, including voter identification, the calling of UK general elections, and political protest. Its proposals are the subject of considerable controversy. There will always be some opposition to any measure, and it should not necessarily amount to a veto. **But there are significant, informed and principled objections to the envisaged changes, either in their substance, or in the way they are being approached, or both.** Such approaches are not models of good practice in constitutional change. Nonetheless, a government with a comfortable majority in the House of Commons is in a strong position to pursue them, should it choose to do so.

¹ Conservative Party, *Get Brexit Done: Unleash Britain’s Potential, The Conservative and Unionist Party Manifesto 2019* (Conservative Party, London, 2019), p.48.

Elections

Key principle: *The UK is a representative democracy. The existence of devolved and UK governments is derived from the broad support of the respective legislatures. The UK House of Commons and the devolved legislatures in turn derive legitimacy from the free and fair election of their members held at intervals of no more (except in the most exceptional of circumstances) than four or five years (principle 2).*

3. The report period saw significant developments towards change in the way UK general elections are called, and in which the UK Parliament is dissolved and subsequently reconvened. The government has introduced a *Dissolution and Calling of Parliament Bill*, following its inclusion in the Queen's Speech (see appendix b). The government accepted some changes proposed by the joint parliamentary committee that investigated its earlier draft legislation. However, it has left in place some controversial aspects, including a widely-drawn judicial ouster clause that seeks to make the power to call a general election non-reviewable by the courts. **Principle 8 states that the exercise of ministerial powers should only exceptionally be exempt from review by the courts. However, academic and political opinion is divided over whether the ouster clause is necessary or appropriate.** The Bill has also retained the dating of the five-year term limit as being from when the current Parliament first met rather than from when the previous Parliament was dissolved, meaning that the time between Parliaments may be marginally longer than five years. While the government conceded the point that the power to dissolve Parliament is exercised on the 'request' rather than the 'advice' of the Prime Minister, it did not agree to stipulating circumstances in which such a 'request' might be denied.

4. **The contents of this Bill raise a number of issues in relation to our principles.** They include principle 2 (that the UK is a representative democracy in which executives rest on the support of legislatures, to which there should be free and fair elections held at intervals of no more than four or five years except in the most exceptional of circumstances) and principle 4 (which stipulates that executives should not undermine the ability of legislatures to perform their constitutional functions). **We note that the Bill shifts power from the UK legislature to the UK executive. This prospective transfer has raised questions about whether it might, in extreme circumstances, be used to prevent the UK Parliament from scrutinising the UK government, one of the primary constitutional functions of the legislature.**

5. Furthermore, principle 20 stipulates that '[t]he monarchy should not be drawn into party political controversy. The powers formally attached to the monarchy should not be deployed in ways that undermine the principles outlined in this text.' Doubt about the circumstances in which it would be proper for a monarch to decline a request for a dissolution creates potentially problematic ambiguity in this regard. It is not clear that the Bill will succeed in reviving the conventions thought to apply under the previous system, which it seeks to recreate. Whether or not these prior understandings were satisfactory, a complete absence in this area is undesirable. The parliamentary Joint Committee on the Fixed-term Parliaments Act concluded that if a return to the pre-2011 system was to be successful, the surrounding

conventions on dissolution, government formation and confidence must be widely and easily understood. It criticised the government's 'Dissolution Principles' document as inadequate in this regard, and suggested the government publish a more comprehensive and detailed description. However, this recommendation was not taken forward (see appendix b). **This uncertainty, combined with the judicial ouster clause in the Bill, is not conducive to principle 1 and its statement that: 'It is essential that the constitutional arrangements of the UK are clear and knowable; that they should be, wherever possible, subject to robust and impartial enforcement'.**

6. As this discussion suggests, the *Dissolution and Calling of Parliament Bill* engages with a number of first-order constitutional principles. For this reason, the manner in which the UK government has approached this planned change is itself significant. Principle 1 goes on to state that 'Constitutional change should take place in a considered fashion and as far as possible on a basis of consensus.' Whether this approach has been adhered to with respect to the *Dissolution and Calling of Parliament Bill* is open to question. For instance, the government somewhat pre-empted the work of the Joint Committee by the publication of a draft bill, and then rejected some of its most significant recommendations.

7. The Queen's Speech also included plans to legislate for a requirement for individuals to produce photo identification at polling stations in order to be able to vote in elections. The justification offered for the measure is that it is a means of preventing fraud. However, the proposal has met with opposition. Critics hold that the problem supposedly being addressed is minimal in practice. They caution also that the intended measure is likely lead to certain social groups more than others being unable to exercise their right to vote. There are grounds for believing that trials of the plan have not yet been extensive enough to exclude this possibility.² **We take the view that caution is preferable in this regard. It would be regrettable if a law presented as a means of safeguarding the integrity of elections proved to be disproportionate in its negative impact on participation in democratic processes. The legitimacy of the 'free and fair elections' referred to in principle 2 rests on the fullest ability to participate among those who are eligible to do so.**

8. We note that, in May, a number of mayoral and local elections that had, as a consequence of the pandemic, exceptionally been delayed for a year, took place.

² For discussion of these issues, see e.g.: Neil Johnson and Elise Uberoi, *Voter ID* (House of Commons Library, London, 2021).

Legislatures

Key principles: *Ministers are accountable, individually or collectively, to their legislatures for the exercise of their ministerial responsibilities, and for the activities of the publicly-funded bodies within their remits...Ministers must provide information that is both accurate and truthful to their respective legislatures, and should correct unintended errors they make as soon as possible...Devolved and UK ministers should be as open as they can in their interactions with legislatures and the public... (principle 3).*

Governments should not use their powers to compromise the ability of legislatures autonomously to perform the constitutional functions they carry out on behalf of the public, such as holding the executive to account and making law (principle 4).

9. We note the existence of significant concern during the report period about the alleged misleading of the UK Parliament by the Prime Minister, and failures to correct errors satisfactorily once identified.³ This matter engages principle 3, and in particular its requirement that ‘[m]inisters must provide information that is both accurate and truthful to their respective legislatures, and should correct unintended errors they make as soon as possible’. However, important as this principle is, if the political leadership of a government is not committed to it, enforcement is difficult to achieve. This lacuna calls into question whether these constitutional arrangements can be said to be subject to ‘robust and impartial enforcement’ (principle 1). **If the Prime Minister is subject to doubts of this type, then questions around proper ‘leadership’, one of the *Seven Principles of Public Life*, arise.**

10. The Prime Minister’s conduct in dealing with the UK Parliament was further criticised, when on 14 June, the Speaker of the House of Commons rebuked the premier for making an important announcement regarding the pandemic to the media before informing Parliament, in contradiction of the *Ministerial Code*. The Speaker said that he did

‘not find it acceptable at all. Members of this House are elected to serve their constituents here, not via Sky or the BBC. Questions should be answered here. The Prime Minister should be here...I say now, Prime Minister, you are on my watch, and I want you to treat this House correctly.’⁴

Such behaviour on the part of the premier is a problem: the executive should not use its power to compromise the ability of Parliament to perform its constitutional functions (principle 4).

³ See e.g.: Andrew Sparrow, ‘Parties call for inquiry into Boris Johnson’s “failure to be honest”’, *Guardian*, 19 April 2021, available at: < <https://www.theguardian.com/politics/2021/apr/19/parties-inquiry-boris-johnson-failurehonest> >, last accessed 15 May 2021.

⁴ House of Commons (HC) Hansard, ‘Speaker’s Statement’, Vol. 697, Col. 74, 14 June 2021, available at: < <https://hansard.parliament.uk/commons/2021-06-14/debates/C3A21764-726C-468F-9B89-A0DF45C2E640/Speaker'SStatement> >, last accessed 3 July 2021.

11. There remain doubts about the ability of the House of Commons to respond meaningfully to a lack of cooperation from non-members who are the subject of interest of committee inquiries (see appendix c). While this issue might not impact directly upon the UK Parliament in its constitutional relationship with the UK executive, **it does pertain more generally to the effectiveness of select committees, which have become central to the work of the UK Parliament.** Furthermore, parliamentary privilege is long-established as central to the constitutional system of the UK. **That there is uncertainty surrounding the effectiveness of Parliament's enforcement powers is detrimental to the clarity that is needed to ensure the political system is effective (principle 1).** There is a contrast here with the position of the devolved legislatures, which have clear statutory enforcement powers.

12. We note that, for much of the report period, the effectiveness of legislatures throughout the UK was, to varying extents, constrained by coronavirus containment measures. **The pandemic response has entailed the executive taking on considerable delegated powers, which have meant a reduced role for legislatures in overseeing activities that might otherwise require the passing of primary legislation.** Some legislatures have fared better than others at ensuring that emergency measures receive proper scrutiny; all have faced challenges. Our third principle makes clear the importance of the accountability relationship between ministers and Parliament and it is to be hoped that, as the health emergency subsides, the effectiveness of legislatures and their power relative to executives will revive.⁵

13. **We note that the *Advance Research and Invention Agency Bill*, currently before Parliament, sets out to create extensive Henry VIII powers – that is, to provide ministers with the ability to make regulations amending or repealing any Act of Parliament. It is not clear that such broad powers are necessary and, as stipulated in principle 8, it is preferable to avoid creating widely drawn delegated ministerial powers.**

⁵ For the impact of the pandemic on the UK Parliament, see e.g.: House of Lords Select Committee on the Constitution, *COVID-19 and Parliament*, HL Paper 4 (House of Lords, London, 2021).

Ministers and the Civil Service

Key principles: Ministers...are expected to observe the Seven Principles of Public Life: selflessness, integrity, objectivity, accountability, openness, honesty and leadership (principle 7).

[They] must ensure that no conflict arises, or could reasonably be perceived to arise, between their public duties and their private interests, financial or otherwise (principle 9).

It is essential that the constitutional arrangements of the UK are clear and knowable; that they should be, wherever possible, subject to robust and impartial enforcement (principle 1).

Civil servants, with the exceptions of ‘special advisers’ and certain others, must be recruited on merit on the basis of fair and open competition. They should be promoted on merit usually following a competitive process. They must be required to carry out their duties with integrity and honesty, and objectivity and impartiality. They must serve the government to the best of their ability in a way which maintains political impartiality, and act in a way that deserves and retains the confidence of ministers in the government of the day, while ensuring they will be able to establish the same relationship with those they may be required to serve in a future government (principle 10).

14. Within the context of the ‘uncodified’ UK constitution, a series of codes and other similar documents play an important role in defining and sustaining the key features of the system (though not all of their contents would necessarily be included in a ‘codified’ constitution, if one existed for the UK). We draw upon a number of these documents in our statement of principles. They are of particular importance to the regulation of executives. These texts have a number of potential values. They can be sources of guidance on good practice for ministers and officials. Outside observers can use them as a means of assessing the actions of people within the executive, and helping to induce compliance with standards. They can also assist public understanding of the constitution. At the level of the UK executive, these documents include the *Ministerial Code* (see: appendix d), the *Cabinet Manual* and the Business Appointment Rules for former ministers and civil servants (see: appendix e). Similar documents operate at devolved executive level. Many of these texts (including the three already mentioned) lack a statutory basis (while some, such as the *Civil Service Code*⁶ and the Northern Ireland *Ministerial Code*⁷, are issued under the authority of Acts of the UK Parliament). During the period under consideration, documents of this nature – in particular the UK *Ministerial Code* – and the rules contained within them became a focus for public attention and controversy. Subjects that arose included:

- *Claimed contraventions.* Whether particular principles or rules set out within a text had been violated (with high profile cases involving the Scottish First Minister and the *Scottish Ministerial Code* and the UK Prime Minister and the UK *Ministerial Code*, though

⁶ See: *Constitutional Reform and Governance Act 2010*, Part 1, s.5.

⁷ See: *Northern Ireland Act 1998*, Part 3, s.28A.

both of them were cleared by investigations that they respectively commissioned).

- *Confusion.* Events associated with the Greensill case, which came to light during the report period, suggested confusion in relation to one regulatory text, the *Business Appointment Rules for Civil Servants* (see appendix e), specifically regarding the activities to which the contents did and did not apply. Such misconceptions were held both among those who were supposed to be subject to the rules and more widely.⁸
- *Out of date content.* The *Cabinet Manual*, the first and so far only edition of which was issued in 2011, contains many statements of fundamental constitutional significance. They include the principle that UK governments rest on the confidence of the House of Commons of the UK Parliament. The Manual also contains other content that has – or is likely shortly to become – outmoded, such as references to UK membership of the European Union and its consequences. During this report period, the House of Lords Select Committee on the Constitution held an inquiry into the possibility of producing a new edition of the *Cabinet Manual*.⁹ Failure to produce a new edition is a problem from the point of view of the authority of the Manual in two ways. First, it leads to some content being out-of-date. Second, it means that those aspects of the text that remain current are included in a document that generally suffers from containing this outmoded content.
- *Failure to self-regulate.* Any constitutional system, even one with harder enforcement mechanisms than those present in the UK, requires some degree of willingness on the part of those in positions of authority to adhere to the letter and spirit of the rules. The UK system is exceptionally dependent upon such voluntary compliance. As noted above, during this report period, concerns were raised by commentators and political actors about disregard by the Prime Minister for the constitutional requirement, contained in the *Ministerial Code*, for ministers to avoid misleading Parliament and promptly to correct any errors.¹⁰
- *Lack of autonomous interpretation and enforcement.* When criticising the Prime Minister in June for failing to make an important announcement to Parliament first, the Speaker of the House of Commons noted that failure to do so was a contravention of the *Ministerial Code*, and remarked that: ‘The Prime Minister polices the ministerial code. He wrote the

8 For correspondence with the Advisory Committee on Business Appointments on these points, see: < <https://www.gov.uk/government/publications/crothers-bill-government-chief-commercial-officer-cabinet-office-acoba-recommendation> >, last accessed 9 May 2021.

9 See: House of Lords Select Committee on the Constitution, *Revision of the Cabinet Manual*, HL Paper 34 (House of Lords, London, 2021).

10 See e.g.: Andrew Sparrow, ‘Parties call for inquiry into Boris Johnson’s “failure to be honest”’, *Guardian*, 19 April 2021, available at: < <https://www.theguardian.com/politics/2021/apr/19/parties-inquiry-boris-johnson-failurehonest> >, last accessed 15 May 2021.

foreword to it. He must now lead from the top and follow the guidance in it.’¹¹ During the report period there have been calls for more robust mechanisms for investigating alleged violations of the *Ministerial Code* (see appendix d).

15. We do not take a position on individual claims made about violations of these texts. But we note that **the existence even of plausible doubts about compliance and the means by which they are investigated are a cause for concern and can be detrimental to the legitimacy the UK constitution is able to command.** These matters engage a number of our principles. Most immediately, they are relevant to principle 1, and its statement that ‘[i]t is essential that the constitutional arrangements of the UK are clear and knowable; that they should be, wherever possible, subject to robust and impartial enforcement; and that they should as far as possible command consensus.’ The documents in question also deal with various other matters highlighted in our principles, such as 3, on the accountability of ministers to their legislatures; and 9, on the need for ministers and other public office holders to avoid both perceived and actual conflicts between their public duties and their private interests. Moreover, **if senior political figures are perceived (rightly or wrongly) as lacking sufficient regard for the rules to which they are supposed to be subject, and as being able to act with impunity, then questions arise about the role of ‘leadership’,** one of the *Seven Principles of Public Life* (which we endorse in principle 7).

16. During the period, an inquiry by the Committee on Standards in Public Life (CSPL) into the UK standards regime was ongoing (see appendix d). In the context of concerns of the type outlined above, it has taken the step of making two interventions in advance of the publication of its final report in Autumn 2021. First, in April, CSPL recommended that when appointing a new Independent Adviser on Ministers’ Interests, the Prime Minister should make changes to the role and the application of the *Ministerial Code*, including giving the Adviser the power to initiate investigations into alleged breaches of the Code. Second, it published the headline findings of its review early, in an interim report released in June 2021 (see appendix e). The Committee identified a number of areas of executive regulation that require reform, including the regulation of the Business Appointment Rules for former ministers and civil servants and the *Ministerial Code* (see appendix d and e). **These proposals reflect wider and growing concerns about adherence to standards within the executive as set out in various regulatory texts. We take the view that the recommendations merit close consideration, though the Prime Minister has already declined to follow the proposal regarding the Adviser on ministerial interests being able to initiate investigations (and publish their own findings).**

17. In June, the UK government issued a *Declaration on Government Reform* co-signed by the Prime Minister and the Cabinet Secretary on behalf of the Cabinet and Permanent Secretaries (see: appendix f). It addresses plans for the ‘re-wiring, and renewal, of government’ to make ‘government work better in service of citizens.’¹² It describes a number of reforms affecting both ministers and civil servants and

11 House of Commons (HC) Hansard, ‘Speaker’s Statement’, Vol. 697, Col. 74, 14 June 2021, available at: < <https://hansard.parliament.uk/commons/2021-06-14/debates/C3A21764-726C-468F-9B89-A0DF45C2E640/Speaker’SStatement> >, last accessed 3 July 2021.

12 Prime Minister and Cabinet Secretary, *Declaration on Government Reform* (HM Government, London, 2021), available at: < <https://www.gov.uk/government/publications/declaration-on-government-reform/declaration-on-government-reform> >, last accessed 3 July 2021.

includes 30 actions for 2021 alone. Actions are focused on three areas: people, performance and partnership. The aim is to improve government effectiveness but **some of the content, depending on how and whether it is implemented, could have constitutional significance.**

18. The people dimension reiterates the ‘inviolable’ principle that civil servants are ‘appointed on merit on the basis of fair and open competition.’ Within this framework it seeks to achieve more interchange with business and the opening up of appointments at senior level to public competition by default. The Declaration commits to departmental ministers having ‘visibility’ of senior appointments in their department and to giving the Prime Minister and the Cabinet Secretary the broadest possible choice in top appointments.¹³ **Given concerns about the results of the wider ministerial role in public appointments, including of departmental non-executive directors, it would seem reasonable to approach such changes with considerable caution.** The safeguards envisaged in the Declaration, including effective induction of new entrants from other sectors, will need to be delivered. Increased ‘visibility’ of senior appointments to departmental ministers risks shading into wider involvement in appointments and the personalisation if not politicisation of the appointments process. The Declaration states ‘we will set a new standard for diversity and inclusion, challenging tired prejudices and championing a diversity of backgrounds and opinions, with the merit principle front and centre.’¹⁴ The text does not define what this commitment means. **But a possible interpretation that could be placed on it is that the personal views of individual civil servants will be a factor in their recruitment and promotion,** and that the government feels at present that some ‘opinions’ are not as well represented within the profession as they should be.

19. The fundamental safeguards in respect of such concerns are the commitment to Civil Service values of ministers and top officials and the continued effectiveness of the Civil Service Commission in regulating the appointments process within a statutory framework. The enforceability of important principles expressed in the Declaration may be open to question where they rely on breaches of codes. For example, the Declaration commits the signatories to ‘take a zero tolerance approach to bullying, discrimination and harassment’ which is difficult to reconcile with the Prime Minister’s handling of the Priti Patel case (see appendix d).¹⁵

20. Other aspects of the declaration are not sufficiently detailed to make it possible to judge their potential constitutional implications. There are potentially important references to the relationship between ministers and officials (including ministerial directions), the accountability of departments, ministers and officials, and the role of departmental non-executive directors.

21. Two more general points are worth noting. The Declaration is not simply a statement of aims and actions for the reform of the machinery of government. Its first part sets out the challenges the present government faces and how they intend to respond expressed in party-political language. **Permanent**

¹³ Prime Minister and Cabinet Secretary, *Declaration on Government Reform* (HM Government, London, 2021), section 2, para. 2, available at: < <https://www.gov.uk/government/publications/declaration-on-government-reform/declaration-on-government-reform> >, last accessed 3 July 2021.

¹⁴ Ibid., section 2, para.6.

¹⁵ Ibid.

Secretaries are responsible for implementing this programme but it is not for them, as political-ly-impartial civil servants, to act as co-signatories of it. This distinction seems to have been lost in the way the Declaration is framed. Secondly, the Declaration is also framed in terms of the how ministers and civil servants in the UK government might work better to serve citizens across the whole UK. It also describes political goals and programmes where in fact the government's responsibility applies only in England or England and Wales. **It is striking and concerning how little attention the Declaration gives to defining responsibilities within government, or to working in partnership with devolved governments and local government (which is not referred to).**

Devolution and the Union

Key principles: *The devolved institutions of Wales and Scotland are ‘permanent’ parts of the United Kingdom constitution...The devolved institutions of Northern Ireland are also constitutional fixtures; subject to the proviso that Northern Ireland can, after approval via a referendum, leave the UK (once the UK Parliament has legislated to this effect) and join the Republic of Ireland. The UK government has previously conceded the principle that Scotland could become independent from the UK subject to a referendum (principle 13).*

The devolved institutions have the right to legislative and executive autonomy in their respective spheres of operation...The devolved institutions have a proper interest in decisions taken at UK level that impact upon them, and over international agreements entered into by the UK when their implementation would fall within devolved competence (principle 15).

Appropriate structures, regulations and practices should exist to ensure that the principles...above are fully realised. They should allow in particular for liaison, coordination and genuine co-decision-making between devolved and UK executives; and between devolved and UK legislatures (principle 16).

22. The way in which the UK and devolved executives interact within one-another is an ongoing source of difficulty in the operation of the UK constitution. The machinery of intergovernmental relations in place has been widely judged unsatisfactory. A forum that might provide properly for the required engagement is lacking. The Dunlop review, finally published during the report period, and the accompanying update on the review of intergovernmental relations, offer means by which some of these problems might be addressed (see appendix g). To what extent these proposals will be implemented and how they will work in practice remains to be seen. Moreover, **there remain significant areas of disagreement between the different administrations. Lack of consensus over key constitutional arrangements is a point of concern.** Furthermore, the emphasis the Dunlop review places on UK-wide spending and joint UK-devolved funding bids could raise questions regarding the autonomy of the devolved institutions. **Such approaches could arguably entail interference from the centre in devolved fields, or represent a blurring of the boundary between the two tiers, as well as possibly undermining the coherence of government.**

23. The *United Kingdom Internal Market Act 2020*, with its emphasis on the primacy of the UK tier of government, has been the cause of a significant strain in relations with the devolved administrations. One controversial aspect of the Act relates to its ‘market access principles’ of mutual recognition and non-discrimination. These provisions stipulate, in essence, that if goods and services are acceptable in one part of the UK, they must be accepted in its other parts too (with the partial exception of Northern Ireland, see below). This aspect of the legislation drew strong opposition from the Scottish and Welsh governments, which argued it undermines the regulatory autonomy essential to the devolution settlements. Given the size of the English market, the Act would in effect mean Scotland and Wales having

to accept English regulations, hampering their ability to achieve certain social and environmental objectives. Furthermore, although the stated aim of the Act is to establish a single UK market, in reality the UK is, in respect of trade in goods, divided into two trading areas, as Northern Ireland is governed by separate regulatory rules covered by the Northern Ireland Protocol (though goods coming from Northern Ireland to Great Britain can take advantage of market access principles). In the period prior to August 2020 the UK, Scottish and Welsh governments had agreed that the internal market would be shaped by common frameworks.¹⁶ Common frameworks were intended to replace the processes of the European Union in setting regulatory standards vital to the functioning of the internal market whilst allowing agreed divergence. No provision was initially made in the UK Internal Market Bill for common frameworks, but a provision was inserted into the Act to allow for them. Progress is being made in finalising the common frameworks and the UK government has recently voiced a more positive view towards the common framework approach.

24. The Internal Market Act remains controversial and raises concerns regarding what amounts to an unacceptable curtailment of the authority of the devolved legislatures. This issue engages principle 15 that '[t]he devolved institutions have the right to legislative and executive autonomy in their respective spheres of operation.' **The future use of the extensive delegated powers contained within the Act seems likely to prompt further political dispute and legal action.** It remains to be seen whether common frameworks will play the role originally envisaged and form part of a cohesive and cooperative approach to the Union consistent with the Dunlop Review, or whether the UK government will prefer to rely on the market access principles of the Act with the effect of imposing English standards across the UK.

25. Underlining the persistent uncertainty and lack of consensus about an important aspect of the constitution, in June the Counsel-General for Wales informed the Senedd that, following appeal, leave had been given for a judicial review of issues relating to the Internal Market Act. It was noted that the case raises important issues of principle regarding the constitutional relationship between the Senedd and the UK Parliament.

26. Part 6 of the Internal Market Act grants the UK government new wide-ranging 'financial assistance' powers that enable it to spend in various different areas of devolved competence. The UK government has since announced several initiatives using these powers, including the UK Community Renewal Fund and the Levelling Up Fund. This approach has also proved highly controversial with the Scottish and Welsh governments, who have argued it infringes on their powers of self-governance. Additionally, as a paper published when the Act was being debated noted, '[t]here is little or no mechanical connection between the Bill's main provisions on market access and these new spending powers, which the devolved governments see as highly provocative.'¹⁷ **The Act represents a clear challenge to the prin-**

16 See: Joint Ministerial Committee (EU Negotiations) communiqué, 16 October 2017, available at: < https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/652285/Joint_Ministerial_Committee_communique.pdf >, last accessed 25 July 2021.

17 Michael Dougan, Katy Hayward, Jo Hunt, Nicola McEwen, Aileen McHarg and Daniel Wincott, *UK Internal Market Bill, Devolution and the Union* (UK in a Changing Europe, London, 2020), p. 3., available at: < <https://ukandeu.ac.uk/wp-content/uploads/2020/10/UK-internal-Market-Bill-devolution-and-the-union.pdf> >, last accessed 25 June 2021.

ciple of ‘liaison, coordination and genuine co-decision-making’ between devolved and UK executives (principle 16). It might also raise credible concerns about public resources being targeted for purposes of party-political gain. In May, the UK government convened a summit with the devolved administrations on the coronavirus recovery (see timeline), which some have taken to signal a shift to a more conciliatory approach. However, it remains to be seen whether the UK government is serious about pursuing more harmonious relations. **The *Subsidy Control Bill* introduced to Parliament on 30 June would shift further the relative balance of power from the devolved to UK tier, since it grants powers to the UK Secretary of State to influence the subsidy regime that are not extended to devolved ministers. The Bill is additionally asymmetrical in placing constraints on the devolved parliaments which will not apply to the UK legislature.**¹⁸

27. Implementation of the Northern Ireland Protocol of the European Union Withdrawal Agreement has proved a challenging task. It presents the novel proposition of a state applying the rules of a supranational organisation of which it is not (or is no longer) a member within its own territory, leading to what is in effect an internal regulatory barrier. We recognise the sensitivity of this issue and the difficulties involved in reconciling departure from the EU with the Northern Ireland peace process. **We note the relevance of the tensions that have arisen from the point of view of principle 1. Complaints about the Protocol, and the legal challenges mounted against it, suggest that consensus is lacking in a crucial area.** In rejecting a challenge to the Protocol on 30 June, one of the findings of the High Court of Northern Ireland was that the Withdrawal Acts giving effect to the Protocol had overridden Article VI of the *Acts of Union 1800*.¹⁹ This judgment confirmed that a major change had taken place in the UK constitution, to which there were significant objections. The case, which is expected to be appealed, is likely to figure in future discussions of constitutional matters, including not only the 1800 Act and its status, but fundamental issues involving the supremacy or ‘sovereignty’ of the UK Parliament, the status of Northern Ireland, the European Convention on Human Rights, and European law. **That a legal case arising from the Protocol could open up such a range of considerations demonstrates how significant are the pronounced sensitivities around it.**

28. Doubts remain in Northern Ireland and Scotland (though the precise contexts differ) on what are the proper conditions in which a referendum should be held on a given subject; in this instance, the possible departure of a particular territory from the UK. For Northern Ireland, the prospect of such a vote rests in specific statutory provision, though ambiguities remain.²⁰ For Scotland, there is less clarity. Indeed, whether or not the Scottish Parliament can hold a referendum on its own initiative, rather than rely on consent from UK level as was the case for the 2014 Scottish independence referendum, remains a matter of doubt, potentially subject to judicial resolution. **The constitutional arrangements here are not**

18 See: George Peretz, ‘The Subsidy Control Bill and Devolution: A Balanced Regime?’, *UK State Aid Law Association*, 15 July 2021, available at: < <https://uksala.org/the-subsidy-control-bill-and-devolution-a-balanced-regime/> >, last accessed 20 July 2021.

19 Summary of Judgment - In re Jim Allister and others (EU Exit), 30 June 2021, available at: < <https://www.judiciaryni.uk/sites/judiciary/files/decisions/Summary%20of%20judgment%20-%20In%20re%20Jim%20Allister%20and%20others%20%28EU%20Exit%29%20-%20300621.pdf> >, last accessed 3 July 2021.

20 See: *Northern Ireland Act 1998*, Part 1, s. 1; and sch. 1. See also: *Working Group on Unification Referendums on the island of Ireland: Final Report* (Constitution Unit, London, 2021), available at: < https://www.ucl.ac.uk/constitution-unit/sites/constitution-unit/files/working_group_final_report.pdf >, last accessed 18 August 2021.

‘clear and knowable’, which our first principle makes clear is essential. The existence of a substantial body of support for departure from the UK within a given territory also suggests a lack of the ‘consensus’ called for in the same principle (though in Northern Ireland, divergence on this point is provided for within the system itself, through the 1998 Belfast/Good Friday Agreement).

29. There is some evidence of growing support for independence in Wales, though not on a scale equivalent to Scotland. Were demand to increase more firmly, some advocates might demand that the same principle of a right to leave the UK that has previously applied in theory to Scotland (and in a more established form for Northern Ireland) be afforded to Wales as well.

Judiciary and the rule of law

Key principles: *Ministers are under an overarching duty to comply with the law, including international law and treaty obligations, uphold the administration of justice and protect the integrity of public life (principle 7).*

The exercise of Ministerial powers should only exceptionally be immune from challenge in the courts (principle 8).

The judiciary is independent of both the government of the day and Parliament... Civil servants, ministers and, in particular, the Lord Chancellor are under a duty to uphold the continued independence of the judiciary, and must not seek to influence particular judicial decisions (principle 17).

The courts scrutinise the manner in which ministers' powers are exercised (principle 18).

All institutions and office holders dealt with in these principles are required to promote the rule of law (principle 19).

30. These key principles are important to protecting the public from the risk of exposure to arbitrary executive authority. The present government has made clear that it regards the judiciary as having over time extended beyond its proper remit in the conduct of judicial review, and having intruded upon matters that should be the preserve of politicians. It is this outlook that provided the background to the commissioning of the Independent Review of Administrative Law (IRAL), which reported during the period covered by this report (see appendix h). **We do not find the firm proposals made by IRAL objectionable from the point of view of our principles relating to the rule of law, although we note there have been doubts about the empirical basis for its conclusions on *Cart* judicial review.²¹ However, the government response to the IRAL report suggested that it even intended to go beyond these recommendations.** There could be, therefore, a suspicion that the government had a predetermined objective to which the review it established was incidental. This approach, particularly in an area of such constitutional sensitivity, is problematic. However, the *Judicial Review and Courts Bill*, which had its first reading in July, did not include the most contentious of the measures that had been anticipated, relating, in particular, to the enforcement of ouster clauses. Nevertheless, the Bill warrants close attention, as does the ongoing Independent Review of the Human Rights Act. The Lord Chancellor, Robert Buckland, has also expressed an intention to review the *Constitutional Reform Act 2005* (see timeline). **It would be a subject of concern if the government were to seek to seriously circumscribe the potential to ensure that UK executive acts in accordance with basic legal and constitutional principles.**

²¹ See: Joe Tomlinson and Alison Pickup, 'Putting the *Cart* before the horse? The Confused Empirical Basis for Reform of *Cart* Judicial Reviews', *U.K. Const. L. Blog*, 29 March 2021, available at: < <https://ukconstitutionallaw.org/2021/03/29/joe-tomlinson-and-alison-pickup-putting-the-cart-before-the-horse-the-confused-empirical-basis-for-reform-of-cart-judicial-reviews/> >, last accessed 22 July 2021.

31. We note that, during the report period, the courts displayed a continued willingness to find in favour of the executive in cases involving its use of discretionary powers. They did so with the *Begum* judgment of the Supreme Court of 26 February, which denied an individual the right to appeal against a decision by the Home Secretary to strip them of citizenship on public good grounds.²²

32. We also note **evidence of willingness within government to publicly accept but downgrade the significance of unfavourable judgments.** In February, the High Court found that the then-Secretary of State for Health and Social Care, Matt Hancock, had acted unlawfully in failing to publish contracts awarded by the government in relation to Covid within the necessary 30-day time limit. Hancock responded in a media interview that, while the judgment was correct:

‘People can make up their own view about whether I should have told my team to stop buying PPE and spend the time bringing forward those transparency returns... You tell me that that’s wrong. You can’t and the reason you can’t is because it was the right thing to do and legal cases about timings of transparency returns are completely second order compared to saving lives.’²³

33. There seem to have been further problems in complying with the need to publish all the relevant contracts, even after the judgment.²⁴

34. That a minister is found to have violated the law on a given occasion is not necessarily a serious problem from the point of view of the rule of law. What is important is that the decision reached by the court is treated respectfully and implemented properly. On these counts, there seems to be more cause for concern.

35. Principle 7 asserts the need for ministers to observe ‘international law and treaty obligations’. The decision in March unilaterally to delay the full implementation of aspects of the Northern Ireland Protocol of the EU Withdrawal Agreement was questionable in this regard.

36. During the period of this report, emergency powers provided to executives in the context of the pandemic continued to apply. **We do not dispute the need for exceptional measures in response to the pandemic. Nonetheless, they inevitably raise difficult questions from the point of view of the maintenance of the rule of law and human rights.**²⁵ **Continued vigilance is necessary in this regard, and it is important that efforts are made to restore more regular standards when it becomes appropriate to do so.**

37. The human rights implications of the measures pertaining to public protest in England and

²² Under the *British Nationality Act 1981*, ss.40(5) and 40(2).

²³ ‘Coronavirus: “Right” to delay contract transparency in pandemic, says Hancock’, *BBC News*, 21 February 2021, available at: < <https://www.bbc.co.uk/news/uk-politics-56145490> >, last accessed 16 May 2021.

²⁴ Nicholas Barrett and Anthony Reuben, ‘What is going on with government Covid contracts?’, *BBC News*, 5 March 2021, available at: < <https://www.bbc.co.uk/news/56174954> >, last accessed 16 May 2021.

²⁵ For an overview of some of the human rights issues, see: House of Commons/House of Lords Joint Committee on Human Rights, *The Government’s response to COVID-19: human rights implications*, HC265/HL Paper 125, Seventh Report of Session 2019-21 (House of Commons/House of Lords, London, 2020).

Wales contained in the *Police, Crime, Sentencing and Courts Bill* are an area of legitimate concern. During the report period, a number of observers have expressed concerns about its impact upon the freedoms of assembly and of expression.²⁶

²⁶ See e.g.: Joint Committee on Human Rights, Oral Evidence, *Legislative Scrutiny: Police, Crime, Sentencing and Courts Bill*, HC 1324, 28 April 2021, available at: < <https://committees.parliament.uk/oralevidence/2118/pdf/> >, last accessed 15 May 2021.

Further issues: Integrity in public life

Key principles: Ministers should be as open as they can in their interactions with legislatures and the public (principle 3).

Ministers are...expected to observe the Seven Principles of Public Life: selflessness, integrity, objectivity, accountability, openness, honesty and leadership (principle 7).

Public expenditure should be approved only for the purposes authorised by the relevant legislation, and in accordance with established norms and reasonable expectations (principle 8).

Ministers must ensure that no conflict arises, or could reasonably be perceived to arise, between their public duties and their private interests, financial or otherwise. Ministers must not use government resources for Party political purposes (principle 9).

38. Texts such as the UK *Ministerial Code* are important from the perspective of maintaining integrity in public life, for instance through its provisions relating to conflicts of interests between public duties and private interests. Problems with the enforcement of these documents, discussed above, are therefore concerning. Claims about misleading statements by the Prime Minister – both within Parliament, as noted previously, and outside it – also relate to the maintenance of integrity in public life. While not taking a position on the specific allegations, we note that **the possibility of distortion and manipulation of information by those in public office, as well as the perpetration of outright falsehoods, is a subject of concern. It engages the spirit of openness and honesty, both of which can be found among the *Seven Principles of Public Life*.** We note the potential for misleading statements, problematic in themselves, to have damaging consequences. One instance can be found in the rising tensions in Northern Ireland during the report period. Those who object to the Protocol claim that there is a discrepancy between guarantees given by the Prime Minister about the absence of barriers between Great Britain and Northern Ireland, and what has transpired in practice.²⁷

39. We note ongoing concerns about the lack of transparency surrounding government contracts awarded in the context of the pandemic. In a report published in April, for instance, the UK branch of the anti-corruption agency, Transparency International, found that what was equivalent to 20 per cent of all COVID-19 related contracts awarded between February and November 2020 merited closer scrutiny on the basis of possible corruption. It concluded that there were problems with lack of openness, with the waiving of normal procedures (such as those relating to competitive tendering) without sufficient cause being demonstrated, and that there was a bias towards service providers with political connections to the

²⁷ ‘Loyalist group withdraws support for Good Friday Agreement’, *BBC News*, 4 March 2021, available at: < <https://www.bbc.co.uk/news/uk-northern-ireland-56276653> >, last accessed 15 May 2021.

party of government, including of a financial nature.²⁸ We recognise that there has been a need for swift action and expedited procedures. However, it remains important to avoid the unnecessary abandonment of basic standards, and to comply with the law, for instance over the publication of contracts.

40. Another area in which it is important for UK ministers to maintain integrity is in the making of public appointments. The outgoing Commissioner for Public Appointments, Peter Riddell, suggested problems existed in this regard, writing in May that:

‘The integrity of the system is now under strain. The appointment of political allies has happened before and is consistent with the Governance Code. What is different now is the breadth of the campaign led from the top of the government. This raises questions about the overall pluralism of arms-length bodies. That is a matter for ministers to explain and defend.’²⁹

The Committee on Standards in Public Life (CSPL) has echoed the concerns of the outgoing Commissioner and intends, in consultation with the Commissioner, to put forward recommendations for strengthening the role. **The broader ongoing work of CSPL reflects a wide-ranging set of concerns about the effectiveness of mechanisms and systems designed to uphold integrity in public life, particularly as it relates to the operation of the UK executive (see appendix e).**

²⁸ Transparency International UK, *Track and Trace: Identifying Corruption Risks in UK Public Procurement for the COVID-19 Pandemic* (Transparency International UK, London, 2021), available at: < <https://www.transparency.org.uk/sites/default/files/pdf/publications/Track%20and%20Trace%20-%20Transparency%20International%20UK.pdf> >, last accessed 3 July 2021.

²⁹ Peter Riddell, ‘The public appointments system is under strain: it needs more clarity and transparency’, *Constitution Unit*, 16 May 2021, available at: < <https://constitution-unit.com/2021/05/16/the-public-appointments-system-is-under-strain-it-needs-more-clarity-and-transparency/> >, last accessed 16 May 2021.

Appendices

Appendix a: Johnson government programme of constitutional change

Background

The Conservative administration of Boris Johnson returned to office in December 2019 has been engaged in enacting and initiating a series of measures entailing significant change in the nature of the UK constitution. It was initially anticipated that some of these modifications would be considered by a ‘Constitution, Democracy and Rights Commission’, as promised in the 2019 Conservative manifesto. However, the government has opted instead for a series of discrete initiatives, over a more holistic exercise.

A summary of relevant legislation and other changes, both already implemented and in process, follows below.

Pre-report period (December 2019-December 2020)

Legislation

European Union (Withdrawal Agreement) Act 2020 (Royal Assent granted 23 January 2020)

- The Act ratified and incorporated the Brexit Withdrawal Agreement into UK domestic law, implementing the UK’s departure from the European Union: a hugely significant change to the UK constitution. The Withdrawal Agreement also included a Protocol on Ireland/Northern Ireland, the implementation of which remains a source of considerable uncertainty, controversy and legal dispute.

United Kingdom Internal Market Act 2020 (Royal Assent granted 17 December 2020)

- In the context of the UK’s withdrawal from the EU common market, the Act provided for the creation of a common, internal market for the UK. However, it is perceived by many to have altered the devolution settlements through centralising regulatory power with the UK government. It did not receive legislative consent from the Welsh or Scottish parliaments and is being challenged by the Welsh government in the courts.

Other initiatives

Independent Human Rights Act Review (announced 7 December 2020, work ongoing)

- The review was established ‘to examine the framework of the [*Human Rights Act 1998*], how it is operating in practice and whether any change is required.’ In particular, it is looking at ‘the relationship between domestic courts and the European Court of Human Rights’ and ‘the impact of the [*Human Rights Act*] on the relationship between the judiciary, the executive and the legislature.’

Report period (January 2021-June 2021)

Draft legislation and Bills

Police, Crime, Sentencing and Courts Bill (introduced 9 March 2021)

- The Bill contains controversial new powers for police forces to take ‘a more proactive approach in managing highly disruptive protests’. It has been criticised for its potential impact on freedom of assembly and expression. A particularly controversial aspect is the power it will create for the Home Secretary, through secondary legislation, to define conditions applied to protests.

Dissolution and Calling of Parliament Bill (introduced 12 May 2021)

- The Bill provides for the repeal of the *Fixed-term Parliaments Act 2011* and seeks to revive the Royal Prerogative of dissolution. It transfers the power to call an early general election from Parliament to the Prime Minister, and contains a controversial clause that removes the ability of the courts to challenge its improper use.

Draft Online Safety Bill (published 12 May 2021)

- The draft Bill provides for the regulation of digital technology companies with the aim of making the online environment safer. It establishes a new duty of care for companies in scope, who will need to demonstrate they are enforcing their terms and conditions. The Bill seeks to balance the duty of care with a responsibility to uphold freedom of expression, with specific protections for content deemed ‘democratically important’.

Subsidy Control Bill (introduced 30 June 2021)

- The Bill ‘sets out the government’s legislative proposal for a new UK subsidy control regime’ now the UK has exited the European Union. However, as with the UK Internal Market Act, the Bill has been criticised for bolstering the power of the UK government in relation to the devolved administrations.

Other initiatives

Independent Review of Administrative Law (report published 18 March 2021)

- The Independent Review of Administrative Law was commissioned in July 2020 to examine judicial review and whether it is ‘abused to conduct politics by another means’. Its report was published in March 2021, at which point a further consultation was announced by the Lord Chancellor. The Queen’s Speech in May made clear the government’s intention to bring forward legislation on judicial review, which appeared in July.

Official Secrets Act (consultation announced 13 May 2021)

- Following a review of the Official Secrets Acts (1911, 1920, 1939, 1989) by the Law Commission, the Home Office published a consultation paper setting out proposed reforms to the leg-

islation that would tighten the law and make it more extensive. Particular concerns have been raised about the effect of the proposed increased maximum sentences, which could encompass journalists reporting information from whistleblowers. The government has not taken forward the Law Commission's recommendation for a public interest defence.

Declaration on Government Reform (published 15 June 2021)

- The Chancellor of the Duchy of Lancaster expressed the government's intention to reform Whitehall in his June 2020 Ditchley Lecture. A Declaration on Government Reform, signed by the Prime Minister and the Cabinet Secretary, was issued in June 2021, giving further details on the government's planned changes to the Civil Service.

Post-report period

Elections Bill (introduced 5 July 2021)

- Under the provisions of the Bill '[v]oters will be required to show an approved form of photographic identification' to collect their ballot paper to vote in UK parliamentary elections, local elections in England, and PCC elections in England and Wales. The Bill also contains plans to reform the oversight of the Electoral Commission and a number of other electoral regulation measures.

Judicial Review and Courts Bill (introduced 21 July 2021)

- The Bill adds to the remedies available to judges if a decision or instrument is found to be unlawful. It will enable the courts to suspend quashing orders and limit their retrospective effect. Furthermore, the Bill will reverse the Supreme Court's *Cart* decision, limiting certain decisions of the Upper Tribunal from judicial review. However, it does not contain wider restrictions on judicial review such as measures relating to the enforcement of ouster clauses, which some suspected the government was interested in pursuing.

Appendix b: Joint Committee on the Fixed-term Parliaments Act and the *Dissolution and Calling of Parliament Bill*

Background

The *Fixed-term Parliaments Act 2011* (FTPA) required that a committee be established to review its operation between 1 June 2020 and 30 November 2020, and ‘if appropriate in consequence of its findings, to make recommendations for the repeal or amendment of this Act’ (s.7(4)(a)). The Joint Committee on the Fixed-term Parliaments Act was appointed in late November 2020.

Both main UK parties committed in their 2019 General Election manifestos to repealing the FTPA, with the Conservative Party promising that, ‘[w]e will get rid of the Fixed Term Parliaments Act – it has led to paralysis at a time the country needed decisive action.’ (p.48.)

On 1 December 2020, the government published its *Draft Fixed-term Parliaments Act (Repeal) Bill*, five days after the Committee’s first meeting. The renamed *Dissolution and Calling of Parliament Bill* had its first reading on 12 May 2021.

Joint Committee on the Fixed-term Parliaments Act

The Conservatives had a majority of one on the Joint Committee, and it was chaired by the Conservative Peer Lord (Patrick) McLoughlin.

The Committee was initially only given until 26 February 2021 to conclude its review. This was then extended to 31 March 2021. Its report was published on 24 March 2021.

By its own admission, the Committee focused more on repealing and replacing the Act than on its possible amendment. It justified this approach with reference to the manifesto pledges of the two main parties, which provided the ‘democratic context’ for the review. It was clear to the Committee that simply repealing the Act without statutory replacement was not a viable option as it would create a constitutional vacuum. Although it did look at other options for repealing and replacing the Act, the Committee focused considerable attention on the government’s draft Bill.

Draft Fixed-term Parliaments Act (Repeal) Bill

The FTPA placed statutory conditions on the calling of early elections. Unless the Commons agreed otherwise by a two-thirds majority, or a statutory motion of no confidence in the government was passed, and a different government could not be formed and the motion reversed within 14 days, then a full five years would pass between general elections. In essence, the Act transferred the power to call an early election from the executive to Parliament.

The draft repeal Bill (later superseded by the *Dissolution and Calling of Parliament Bill*, see below) set out largely to restore the arrangements that existed before the Fixed-term Parliaments Act was passed in 2011.

A complication in this regard was that, prior to the 2011 Act, the power to dissolve was a Royal Prerogative, exercised by convention on the request of the Prime Minister (arguably subject to certain limitations also existing in convention). The 2011 Act abolished this prerogative authority but the government's envisaged legislation contained provisions to restore it. However, the extent to which it is possible to use statute to revive a prerogative remains a subject of debate. Some argue that an equivalent arrangement can only be replicated in statutory form.

The government's draft Bill did not seek to do away with all aspects of the 2011 Act. It retained, for example, the 25-day election period. It also contained an 'ouster' clause removing the courts' jurisdiction over the powers in question, a further difference from the pre-2011 situation.

Alongside the draft Bill, the government also published a brief 'Dissolution Principles' document, covering some of the non-legislative conventions and practices surrounding the use of the prerogative power. This document did not refer to principles that were previously believed to exist regarding circumstances in which a monarch might decline a request from a Prime Minister to dissolve Parliament.

Report of the Joint Committee on the Fixed-term Parliaments Act

Review of the Fixed-term Parliaments Act 2011

The Committee first considered both the principled and practical arguments for fixing parliamentary terms and increasing parliamentary control over prerogative powers.

One of the primary principled arguments against the old system was that allowing the incumbent to choose the timing of an election gave them an unfair advantage. The Committee accepted that there was statistical evidence for an incumbency advantage – but also that the power to call early elections may nevertheless be justified in relation to other reasons, such as a new Prime Minister needing to secure a fresh mandate.

The Committee concluded that the FTPA fulfilled its primary practical purpose: the coalition government lasted a full five-year term. Furthermore, the Act did transfer power from the executive to the legislature. However, it also concluded that the FTPA played a role in the Brexit-related 'gridlock' that emerged between 2017 and 2019. It was suggested that whether possible gridlock is a price worth paying for the other benefits of fixed-term parliaments is a political decision for Parliament itself.

The report noted a number of defects with the 2011 legislation: principally, the supermajority requirement, the confidence provisions, and the fourteen-day period. The Committee stated that without the 2019 manifesto commitments giving a 'clear democratic steer that the 2011 Act should be replaced', it

would have recommended the Act be amended. (80.) Namely, it would have concluded that the supermajority be replaced with a simple majority, that the statutory no confidence mechanisms be removed, and that the date of an early election be stipulated in the motion. This approach would have simplified the rules while retaining a role for the House of Commons.

The Committee was, in the end, divided on whether the Commons should be given a vote on dissolution. However, a majority decided that this requirement would only be consequential if Parliament were deadlocked, in which case it could create problems in potentially blocking an ineffective government from calling an election.

The government's draft Bill

First, the Committee recommended that the short title of the Bill be changed to the 'Dissolution and Summoning of Parliament' Bill. This wording would better reflect its purpose and constitutional significance. Secondly, the novelty of what the draft Bill looked to achieve was remarked upon: '[w]hile governments have frequently legislated to supersede prerogative powers in the past, this is the first statute intended to revive prerogative powers.' (104.)

Under the old system, the Committee noted, the power to dissolve parliament for an early election lay formally with the monarch. Although, it held, the monarch had never refused a dissolution, it was understood that there were situations in which it would be appropriate for them to do so. It is often contended that the desire to keep the monarch from actually having to use this power acts as a deterrent against asking for an inappropriate dissolution.

The Committee concluded that the government's intention was to return to this position. However, the Dissolution Principles document did not make this objective clear. It referred to the monarch acting on the Prime Minister's 'advice', something the monarch is traditionally required to follow. The Committee therefore recommended that the language be changed to 'request'. This wording would make it clear the power in question is a personal prerogative of the monarch, and can thus be refused. The Committee suggested that the government should also be clearer about when the monarch might veto a dissolution.

On the controversial ouster clause, there were again divisions within the Committee. Some thought that a Commons vote would be the surest protection against judicial oversight. A majority agreed that generally speaking Parliament should not oust the jurisdiction of the courts. Nevertheless, it said that on some purely political matters Parliament could be justified in excluding the courts entirely, a position the Committee said was 'not inherently incompatible with the rule of law, even if ousting the courts' jurisdiction will often be at tension with it so that a complete ouster will rarely be appropriate.' In this case, the majority agreed it was appropriate because 'the power in question is to enable the electorate to determine who should hold power'. The Committee recommended that the government consider whether the ouster clause might be more effective if it was less broad.

Confidence, dissolution, calling of parliaments, and government formation: key principles

The Committee was unanimous in criticising the government’s Dissolution Principles document.

‘The “Dissolution Principles” document is inadequate. It does not reflect the nature of the Monarch’s personal prerogatives to do with dissolving Parliament prior to 2011. Further by not considering and setting out the interrelated matters to do with other aspects of the election cycle, confidence of the House of Commons and government formation, it cannot provide a proper guide as to how dissolution should operate under a prerogative. The document cannot form the basis of a “shared understanding” of political practice and conventions which will be needed in future.’ (231.)

The report set out the importance of constitutional conventions to a prerogative system. These powers are broad – without surrounding conventions that constrain their use, they would ‘appear to be incompatible with the norms of a modern Parliamentary democracy.’ For conventions to work, there must be a shared understanding of them. The government’s Dissolution Principles document, the Committee found, attempted to articulate the relevant conventions, but fell short.

The Committee provided its own, more comprehensive, articulation of the conventions on dissolution, government formation and confidence. If returning to the prerogative system is to work effectively, the relevant conventions and practices must be widely and easily understood. Its list ‘should assist the Government and provide the basis from which a new understanding of the shared conventions and practices is understood and how it should be set out in an updated Cabinet Manual.’(234.)

Government response and the *Dissolution and Calling of Parliament Bill*

Following the Queen’s Speech on 11 May, the government published its response to the report of the Joint Committee on the Fixed-term Parliaments Act and the renamed *Dissolution and Calling of Parliament Bill* had its first reading in Commons. The government accepted several of the Committee’s recommendations – most obviously that the name of the Bill be changed to more accurately reflect the constitutional significance and purpose of the legislation. Some of the Committee’s other proposals were also taken on board.

However, the government declined the Committee’s advice in several respects. Clause 3 (the ouster clause) would remain drafted in the same broad terms. Furthermore, the maximum five-year term for a Parliament would be tied to the first meeting of the new Parliament (as it was prior to the FTPA), rather than from the dissolution of the previous Parliament, as the Committee had recommended. The Committee also suggested that there should be a Standing Order stipulating that a motion of no confidence tabled by the Leader of the Opposition should be debated within three days of being tabled. The government stated that this ‘would unnecessarily curtail the flexibility of our constitution.’

As mentioned above, the Committee set out the conventions surrounding dissolution, government formation and confidence. Its list of principles and conventions contained detail on what might constitute a lack of confidence in the government of the day and when the monarch might decline a dissolution request. The government agreed that ‘these principles can only operate effectively when they are commonly understood’. But it said that ‘it is not possible or desirable’ to detail what constitutes a motion of no confidence nor ‘to predict scenarios in which the Sovereign might refuse a dissolution request.’ Despite the Committee calling the government’s dissolution principles document ‘inadequate’, no indication was given in the government’s response that it would be significantly amended.

On one point here the government did heed the Committee’s recommendation. It was clarified that the power to dissolve Parliament was a ‘personal prerogative power’, exercised at the ‘request’ of the Prime Minister not on their ‘advice’. The monarch is traditionally obliged to follow the Prime Minister’s advice, but can refuse a request.

Appendix c: Select committees and contempts

Background

Select committees have the power to summon witnesses and documentary evidence. But whether they can effectively enforce these powers has been a longstanding subject of debate and concern. Parliament has the historic power to fine, imprison and admonish. In recent years, however, admonishment by Resolution of the House has been the only ‘penal power’ used. It is unclear as to whether the other historic powers could or would ever be used. This raises the question as to whether there is any effective deterrent against treating Parliament with contempt – in particular, when individuals decline to attend select committee hearings, mislead select committees or refuse to hand over evidence.

The House of Commons passed a resolution referring this issue to the House of Commons Privileges Committee on 27 October 2016. Early impetus for this initiative came after several witnesses were subsequently found to have misled the Culture, Media and Sport Committee’s inquiry into phone hacking and related matters in 2009. Various select committees then experienced difficulties in obtaining cooperation from witnesses when inquiring into both BHS and Sports Direct, heightening the salience of the privilege issue.

Since the 2019 election, the Privileges Committee has taken undertaken a comparative analysis of practice in over 50 other legislatures. The Committee published its interim report on 27 April 2021. It intends to consult on its proposals before presenting its final report.

Select committees and contempts: clarifying and strengthening powers to call for persons, papers and records

The Privileges Committee started by weighing the arguments for and against what are widely accepted to be the three main possibilities when it comes to Parliament’s enforcement powers: (a) to do nothing; (b) to assert the House’s powers by resolution or in Standing Orders; or (c) to legislate. It built on the work of two joint committees which considered the subject in 1999 and 2013. Both took issue with the existing state of affairs. However, the 1999 Committee recommended placing enforcement powers in legislation, whereas the 2013 Committee proposed clarifying them via Standing Orders or by resolution. Neither option was taken forward.

The Privileges Committee agreed with the Clerk of the House that ‘recent high profile cases of non-Members refusing to appear before select committees or submit evidence’ had increased the salience and urgency of the issue since it was last examined. (25.)

(a): ‘Do nothing’

Some argue that no action is required. Witnesses that refuse to attend make up a small proportion of those who are called – by and large the threat of admonishment by resolution still acts as a deterrent. The

Committee rejected this option. Previous inquiries have all found cause for concern. There are several examples of witnesses refusing to attend that have impeded committee work.

The Committee concluded that, '[t]he problem of recurring recalcitrance, or simply open disregard of a Committee summons, is no longer a hypothetical one. Individuals invited to give evidence know that they can treat committees with disdain, and by extension the House, without any fear of meaningful penalty.' (46.)

(b) 'Reassert the House's existing powers by amending Standing Orders or by Resolution'

The main benefits of this approach are that it would clarify the present situation whilst avoiding giving the courts jurisdiction over parliamentary business. It would involve restating the traditional powers to punish contempts whilst detailing what is punishable and when the powers might be used. However, the Committee also rejected this option on the basis that it would not resolve the question of whether the traditional powers are actually enforceable in practice. Considerable ambiguity around their exercise would remain, especially as to whether their use would be contrary to the *Human Rights Act 1998* and the European Convention on Human Rights (ECHR).

(c) 'Legislate to provide a statutory regime'

The Committee instead reached the conclusion that if the House wants individuals to face real sanctions for contempt, then new legislation will be necessary. The major argument against this course of action is that it would give the courts some jurisdiction over parliamentary proceedings, thus encroaching on the 'exclusive cognisance' of Parliament (control of its own affairs) and the privileges protected by Article IX of the *Bill of Rights 1689*.³⁰

In support of its conclusion, the Committee cited international examples. The majority of the legislatures the Committee surveyed have some codified basis for their powers.

Fair treatment of witnesses

The Committee also considered the related issue of how select committee witnesses are treated. There is consensus that witnesses must be treated fairly and that processes should be clarified in order to make sure that this is the case. If Parliament is to have powers of punishment, it is essential that procedures are clarified to ensure due process and avoid legal challenge.

The Committee recommended that regardless of whether its other proposals are taken forward, the House should 'adopt new principles-based guidance for fair treatment of witnesses before committees' via Standing Orders or by resolution. (134.)

³⁰ 'That the freedom of speech and debates or proceedings in Parliament ought not be impeached or questioned in any court or place out of Parliament.'

The proposal

The Committee of Privileges set out its own legislative preference, opting for what it referred to as the ‘criminal offence’ model, whereby failure to comply with a select committee summons without reasonable excuse would be a criminal offence.

The Committee suggested a ‘gatekeeper’ committee which would review cases to ensure that witnesses had been treated fairly and summoned for a legitimate reason. Only when the ‘gatekeeper’ committee is satisfied would a motion be put before the House for the Speaker to issue a certificate to the courts. The Courts would then determine if there was a reasonable excuse and, if not, what punishment should be given. The Committee’s proposed statute would limit the Courts’ jurisdiction to ensuring the individual’s right to a fair trial had been respected in accordance with Article 6 of the ECHR. The courts would have the ability to consider the nature and purpose of the Committee’s summons, but not any other aspect of its proceedings.

Nevertheless, the Committee stated that it ‘did not seek to disguise the fact that our proposal would encroach upon protections previously afforded to parliamentary proceedings under Article IX of the Bill of Rights. However, a limited reduction in the extent of exclusive cognisance is a price worth paying to secure effective enforcement.’ (143.)

Appendix d: The UK *Ministerial Code* and Independent Adviser on Ministers' Interests

Background

The *Ministerial Code* plays an important role in the regulation of UK government, containing a set of ethical and constitutional principles. The established practice is for an updated edition to be issued at the outset of a new Parliament or after a new Prime Minister takes office between general elections. The devolved governments have their own ministerial codes, which include a similar but not identical set of principles.

Prior to 1997, the *Ministerial Code* was referred to as *Questions of Procedure for Ministers*. The origins of the text can be traced back to the First World War when Secretary of the War Cabinet, Sir Maurice Hankey, issued a document entitled *Rules of Procedure*.

Ministerial Code

The current version of the *Ministerial Code* was issued in August 2019 after Boris Johnson succeeded Theresa May as Prime Minister.

Core principles

The Code makes clear that the specific provisions it contains should be viewed in the context of overall obligations to 'comply with the law and uphold the integrity of public life.' The Code contains many stipulations. Some of the most fundamental among them are:

The principle of collective responsibility applies to all government ministers (1.3.a.)

Ministers have a duty to Parliament to account, and be held to account, for the policies, decisions and actions of their departments and agencies (1.3.b.)

It is of paramount importance that Ministers give accurate and truthful information to Parliament, correcting any inadvertent error at the earliest opportunity. Ministers who knowingly mislead Parliament will be expected to offer their resignation to the Prime Minister (1.3.c.)

Ministers should be as open as possible with Parliament and the public, refusing to provide information only when disclosure would not be in the public interest, which should be decided in accordance with the relevant statutes and the Freedom of Information Act 2000 (1.3.d.)

Ministers should not accept any gift or hospitality which might, or might reasonably appear to, compromise their judgement or place them under an improper obligation (1.3.g.)

Ministers must not use government resources for Party political purposes (1.3.i.)

Ministers have a duty to ensure that influence over civil service and public appointments is not abused for partisan purposes. (3.1.)

Ministers must uphold the political impartiality of the Civil Service, and not ask civil servants to act in any way which would conflict with the Civil Service Code and the requirements of the Constitutional Reform and Governance Act 2010. Ministers should be professional in their working relationships with the Civil Service and treat all those with whom they come into contact with consideration and respect. (5.1.)

Ministers must ensure that no conflict arises, or could reasonably be perceived to arise, between their public duties and their private interests, financial or otherwise. (7.1.)

On leaving office, Ministers will be prohibited from lobbying Government for two years. They must also seek advice from the independent Advisory Committee on Business Appointments (ACoBA) about any appointments or employment they wish to take up within two years of leaving office. (7.25.)

The *Business Appointment Rules for Former Ministers*, which inform the advice given by the Advisory Committee on Business Appointments (ACOBA), are also attached to the *Ministerial Code*.

Enforcement: the Prime Minister and the Independent Adviser on Ministers' Interests

The UK *Ministerial Code* has no statutory basis (in contrast to its Northern Ireland equivalent). While in theory a court could take it into account as part of a judicial review, it is not subject to direct, independent enforcement. The Code states that after consultation with the Cabinet Secretary the Prime Minister may choose to commission the Cabinet Office to inquire into the facts surrounding alleged violations, and/or refer the matter on to the Independent Adviser on Ministers' Interests (see below). But the text expressly precludes that the Cabinet Secretary or any other official is responsible for enforcing the Code. The Prime Minister is the final arbiter in such matters. The Code states: '[m]inisters only remain in office for so long as they retain the confidence of the Prime Minister. He is the ultimate judge of the standards of behaviour expected of a Minister and the appropriate consequences of a breach of those standards.' (1.6.)

Since 2006, the Prime Minister has had an Independent Adviser on Ministers' Interests who can be called on to investigate alleged breaches of the Code, but who lacks the power to instigate such an inquiry on their own account. The previous holder of the role, Sir Alex Allan, resigned in November 2020 after the Prime Minister rejected his finding that the Home Secretary, Priti Patel, had broken the Code. The post was then vacant until Lord Geidt, the Queen's former private secretary, was appointed in April 2021.

Ahead of the appointment of Lord Geidt, the Chair of the Committee on Standards in Public Life (CPSL), Lord Evans, wrote to the Prime Minister regarding the role. The position of CSPL was that the

authority of the Code derives from the Prime Minister and it should continue to be issued and owned by them. But Lord Evans recommended that the new Adviser ‘should be given authority to initiate investigations where, in their judgement, this is necessary in order to establish the facts surrounding allegations that the Ministerial Code had been breached.’

New terms of reference were set out with Lord Geidt’s appointment, which made certain modifications to the role. It would now be for a non-renewable five-year term. Furthermore, on completing an investigation the Adviser may ‘require’ that the advice given to the Prime Minister ‘is published in a timely manner.’ Nevertheless, despite the recommendation from CSPL, the independent Adviser was not given the authority independently to initiate investigations into alleged breaches of the Code. Investigations would continue to be conducted at the Prime Minister’s discretion.

CSPL also proposed a system of graduated sanctions for breaches of the Code. This approach would mean that ministers would not be expected to resign for any breach of the code; rather, a more proportionate scheme of sanctions would be applied. CSPL saw this idea as, in part, a means of removing a constitutional barrier to greater independence for the Adviser. Its rationale was that the composition of the government is a matter for the Prime Minister and it would not be appropriate for the Adviser to effectively have the discretion to force ministerial resignations and dismissals. If the choice of sanction rests with the Prime Minister, then less objection might be made to granting the Adviser the power to initiate their own investigations and publish their own findings. The Prime Minister accepted the proposal for variability in sanctions; but not the recommendations that this change was intended to facilitate. CSPL has reiterated its commitment to these two reforms.

Appendix e: The Committee on Standards in Public Life and *Standards Matter 2*

Background

The Committee on Standards in Public Life (CSPL) was established in 1994 ‘[t]o examine current concerns about standards of conduct of all holders of public office’. Its first report set out seven principles of public life (also known as the Nolan Principles, after the first chair of the committee, Lord Nolan). CSPL has since had a significant role in the expansion of standards regulation in the UK, including in the creation of the Independent Adviser on Ministers’ Interests and the Commissioner for Public Appointments (see appendix c). In September 2020, it launched a review of this system: *Standards Matter 2*. In June 2021, CSPL took the unusual step of publishing an interim report setting out its findings ahead of the publication of its final report arising from this inquiry. This interim report put forward a number of recommendations for reforming executive standards regulation in four main areas identified as requiring particular attention.

Standards Matter 2: Interim Findings

(1) The Ministerial Code and the Independent Adviser on Ministers’ Interests

For preliminary recommendations made in this area and their reception, see appendix c above.

(2) The Business Appointment Rules and the Advisory Committee on Business Appointments (ACOBA)

The Business Appointment Rules regulate the employment of former public office holders in the private sector. As it stands, the rules focus on where a former minister, civil servant or special adviser has had direct involvement in their public role with the prospective hiring company. CSPL agreed that this scope is too narrow. Rather, the rules should encompass companies ‘where the applicant has significant and direct responsibility for policy, regulation, or the awarding of contracts relevant to the hiring company.’ (41.) Employment by these firms, the report held, should be prohibited for two years. CSPL also recommended that the ban on lobbying be extended from two years to up to five years.

Furthermore, it called for a sanctions regime to underpin these reforms. ACOBA currently has no formal enforcement powers, and relies on public disclosure of breaches and reputational damage to encourage compliance. CSPL stated that, [t]he public credibility of any regulatory scheme depends on a visible range of sanctions, but neither ACOBA nor government departments can issue any.’ (48.) It recommended that the rules should be included in government employment contracts and, if this proposal was not legally viable, the government should consider introducing a statutory scheme with civil penalties.

(3) Transparency Around Lobbying

CSPL made clear that ‘[t]he government’s transparency output must enable the public to understand who is attempting to influence public policy and their connections to those taking decisions.’ (63.) But the current processes regarding lobbying transparency fail to achieve this objective. It made a number of specific recommendations as to how the quality of departmental transparency releases could be improved.

(4) The Regulation of Public Appointments

CSPL noted the concerns of the outgoing Commissioner for Public Appointments that the appropriate balance between ministerial choice and appointment by merit is being undermined. It noted the detrimental nature of the practice of briefing the media regarding the identity of preferred candidates. It held that ‘reforms are necessary to ensure the Commissioner has sufficient powers to uphold the integrity of the process by which a list of appointable candidates is produced.’ (85.) CSPL will put forward proposals intended to achieve this end in its final report. It also considered the issue of unregulated public appointments, which have become more commonplace during the Covid-19 pandemic, arguing for greater transparency around these appointments. Finally, CSPL proposed that the appointment process for regulators of executive standards, including the Chair of CSPL and the Commissioner for Public Appointments, should be more independent from government than that used for the filling of other roles.

Appendix f: Declaration on Government Reform

Background

On 15 June 2021, the Prime Minister and the Cabinet Secretary released a *Declaration on Government Reform*. The Declaration sets out the UK government's plans for 'the re-wiring and renewal of government.'

Framed in part as an opportunity to change the operation of government in the light of the lessons of the Covid-19 pandemic, the first part of the document puts forward the government's aims for change and its political priorities. The Declaration includes the statement that:

We have and expect high standards for conduct in public life. But we must continually reinforce these with leadership, proper process and transparency so that the public can have trust and confidence in the operation of government at all levels.

It goes on to commit the Cabinet and Permanent Secretaries 'to a collective vision for reform' with action focused on three areas: people; performance; and partnership. Whilst some of the priorities set out have been long discussed, there are also some newer ideas contained in the document. Some of the key points are set out below.

Declaration on Government Reform

People

The government reiterated its commitment to moving more civil servants out of London and for ministers to spend more time outside of London.

Changes to recruitment practices and interchange policies were also promised. The Declaration restated the 'inviolable' principle that civil servants are 'appointed on merit on the basis of fair and open competition'. (2.2.) Within this framework, however, it looks to attract a broader range of people to public service including more interchange between business and the Civil Service with appropriate safeguards including 'effective management of any potential or perceived conflicts of interest and induction which firmly instils the Civil Service Code and its values.' (2.2.) Guided by these principles all senior appointments are to be opened to public competition by default, ministers are to have 'visibility' of senior Civil Service appointments in the departments they lead, and the Prime Minister and Cabinet Secretary will have the broadest possible choice of new permanent secretaries and Directors General.

The Declaration committed to working with the devolved governments to increase interchange between civil servants supporting all four governments (as recommended by the Dunlop Review).

As well as a new Civil Service curriculum and training campus, the Declaration promised a training

programme for ministers.

It also stated that ‘we will set a new standard for diversity and inclusion, challenging tired prejudices and championing a diversity of backgrounds and opinions, with the merit principle front and centre.’ (2.6.)

Among other diversity considerations the Declaration committed the signatories to ‘[taking] a zero tolerance approach to bullying, discrimination and harassment’. (2.6.)

Performance

The government promised to ‘reinvigorate the principle of departmental accountability’ and establish an ‘Evaluation Task Force’, to scrutinise the effectiveness of policies against stated targets. (3.1.) Departmental Non-Executive Directors are to be given more responsibility to challenge departmental performance.

Partnership

The Declaration stressed the need to bring greater clarity to the roles, responsibilities and accountability of ministers and senior officials. How these roles should interact and be communicated and leaders held to account will be further considered, including ‘taking account of the role and design of ministerial directions.’ (4.2.)

The Declaration also committed ministers and permanent secretaries to ‘[operating] more seamlessly with institutions outside government, building partnerships with the wider public sector, private sector and community organizations to secure the best outcomes for citizens.’ (4.4.)

Appendix g: Lord Dunlop’s Review of UK Government Union Capability and the progress update on the review of intergovernmental relations

Background

The UK’s departure from the European Union provided the context for both the Dunlop Review of UK Government Union Capability and the joint review of intergovernmental relations. Relations between the UK government and the devolved administrations have been put under considerable strain by the negotiation and implementation of the UK’s exit from the EU. The reviews were, in part, an attempt by the Theresa May government to place relations on a more constructive footing and strengthen the Union despite the divisiveness of Brexit.

The review of intergovernmental relations – led by the Cabinet Office, but conducted jointly with the devolved governments – was commissioned at the plenary meeting of the Joint Ministerial Committee (JMC) in March 2018. Draft principles for future intergovernmental relations (IGR) were published in July 2019 (yet to be formally adopted at JMC (Plenary)) and an update on the progress of the review was issued on 24 March 2021.

Lord (Andrew) Dunlop – a former Parliamentary Under Secretary of State at the Northern Ireland and Scotland Offices – was commissioned to undertake a more overarching exercise shortly before Theresa May left office. His review, announced in July 2019, examined the question of whether ‘UK Government structures are configured in such a way as to strengthen the working of the Union’. It concluded its work in November 2019, shortly before the UK General Election. It remained unpublished for over a year, before being made public at the same time as the update on the joint IGR review in March 2021. Minister for the Cabinet Office, Michael Gove, explained to the Public Administration and Constitutional Affairs Committee in December 2020 that the delay, which had attracted criticism, was motivated by a desire to publish the two simultaneously.

Lord Dunlop’s Review of UK Government Union Capability

Lord Dunlop’s recommendations aimed to place the Union at the centre of UK government policy making and strengthen the processes of intergovernmental relations. The review focused on what would be needed to establish ‘a cohesive and co-operative approach’ that was more strategic, trusted and transparent. It took the existing devolution settlements as a given and did not consider the distribution of powers, the Barnett Formula, or abolition of the Territorial Offices and their respective Secretaries of State. Nevertheless, the report did put forward a series of substantial proposals with regards to the structure and culture of government, spending, the machinery of IGR, and the communication of Union-related matters.

Machinery

The review recommended the creation of a new Cabinet position with responsibility for the constitutional integrity of the UK. The new Secretary of State should be of the same status as the Chancellor and Foreign Secretary and have a duty, outlined in the Cabinet Manual, to defend the integrity of the constitution.

This change, the review held, should be accompanied by new government structures, including a Cabinet sub-committee.

Civil Service capability

The review proposed changes across the Civil Service to bring the Union to the forefront of policy making. Devolution teams, it argued, should be brought in from the peripheries of departments and devolution credentials should be a prerequisite for career advancement to senior Civil Service positions. To help achieve this latter goal, all Civil Service leadership programmes should have a prominent devolution dimension. Furthermore, each department should have a senior civil servant and non-executive board member focused specifically on devolution capability and Union strategy.

The report also recommended that UK government departments should establish a greater presence in Scotland, Wales and Northern Ireland.

Spending

The review proposed setting up a fund for UK-wide projects, to be overseen by the new Secretary of State but with input from the Scotland, Wales and Northern Ireland Offices, with the aim of incentivising different government departments to pursue projects that strengthen the Union. A second portion of the fund would be open to joint bids from UK government departments and the devolved governments.

Where the UK government is spending in Scotland, Wales and Northern Ireland, the review proposed that it should make this fact clear. The review justified this approach in terms of democratic accountability: that it must be clear to the public who is responsible for what. Lord Dunlop also suggested that the UK government keep better data on its spending in different parts of the UK and update its analysis on the benefits of the Union.

Intergovernmental relations

Observers and participants have been arguing for some years that the current structures supporting co-operation between the devolved administrations and UK government are not fit for purpose. The review concurred with this view, and outlined a series of proposed reforms to the machinery of intergovernmental relations. It suggested that the Joint Ministerial Committee should be scrapped and replaced by a UK Intergovernmental Council (UKIC). This body should continue to be based on political agreement rather than statute, which should be set out in an updated Memorandum of Understanding. It should also, the review found, continue to operate on a decision-making by consensus model, rather

than holding formal votes.

However, it should meet much more regularly than the JMC, with the Prime Minister hosting a summit at least twice a year. Further reforms to the structure of IGR should also be made, including various sub-committees and the possibility of more focused, inter-ministerial groups.

The dispute resolution process should be overhauled to restore confidence in this process and a standing independent secretariat established, with responsibility, amongst other matters, for administering the dispute resolution process. Finally, the UKIC should be more transparent than its predecessor, and subject to greater parliamentary oversight.

Communications

The report concluded that the benefits of the Union had not always been communicated effectively. Announcements and visits to the devolved nations had sometimes been badly timed and lacking in coherence. On this basis, it recommended that the new Secretary of State oversee UK government communications in Scotland, Wales and Northern Ireland, with input from the respective Territorial Offices.

Progress update on the review of intergovernmental relations

The joint review of intergovernmental relations reached many of the same conclusions as Lord Dunlop. Some of its reforms to the structures of IGR in fact go beyond Lord Dunlop's recommendations. However, not all of the changes outlined have been agreed by the UK and devolved governments.³¹

Machinery

It was agreed that decision-making should continue to operate on a consensus model but that new machinery designed to enable the parties to work 'more effectively together' should be put in place. This apparatus should include a new three-tier system (some aspects of which are still subject to approval), dispute resolution process and independent secretariat. Routine engagement at official-level should underpin effective relations between governments, but it should be accompanied by ministerial oversight. The fora put forward were intended to provide a 'place to consider and, where appropriate, reach agreement on issues of mutual interest across policy areas.' (5.)

Portfolio engagement (bottom tier of engagement)

Portfolio ministers should engage on a regular, quadrilateral basis (although allowing for some flexibility) with their counterparts in 'Interministerial Groups (IMGs)'. Any government should be able to request that an item discussed be passed up for consideration at the middle tier.

31 This is indicated through use of square brackets in the update document.

Middle tier of engagement

The middle tier should look at issues that cut across policy areas, with broader implications for inter-governmental relations and requiring a more strategic response. This should take place in an ‘Interministerial Standing Committee (ISC)’, that meets every other month.

Top tier of engagement

The top tier of engagement is yet to be agreed. It is proposed that it would consist of a ‘UK Government and Devolved Administrations Council (the Council)’. The Council should oversee the overall functioning of multi-level governance and cover areas that are of strategic importance to the UK as a whole. At a minimum, there should be an annual meeting of the Prime Minister and the First Ministers (and Deputy First Minister of Northern Ireland). It may, however, meet more regularly. (The Dunlop Review recommended biannual meetings.)

Secretariat

The creation of an independent secretariat has been agreed. This entity would be accountable to the Council itself, rather than any individual government. As well as providing administrative support to the ISC and the Council, it would oversee the dispute resolution process and should be staffed by officials from all of the governments.

Dispute avoidance and resolution

A seven-stage procedure for resolving potential disputes has also been agreed. If this process fails to produce agreement, each of the governments must report back to their legislatures on why it was not possible to reach a resolution.

Transparency and parliamentary accountability

Finally, governments should enhance the degree to which they report on IGR to their legislatures. They should ‘seek to promote a wider understanding of this activity.’(51.) The IGR Secretariat will assist in producing materials for this purpose. An annual IGR report should also be published online.

Appendix h: The Independent Review of Administrative Law

Background

The Independent Review of Administrative Law (IRAL) was announced on 31 July 2020. Its task was to examine the working of judicial review in the light of the Conservative Party's 2019 manifesto commitment to 'ensure that judicial review is available to protect the rights of the individuals against an overbearing state, while ensuring it is not abused to conduct politics by another means or create needless delays.' (p.48.)

The review was led by Lord Edward Faulks QC, a crossbench Peer, member of the House of Lords Constitution Committee and former Conservative Justice Minister between 2013 and 2016.

IRAL received 238 responses during its consultation period, which ran from 7 September 2020 to 26 October 2020. The panel's report was published on 18 March 2021, alongside a government response and announcement of a further consultation.

The Report of the Independent Review of Administrative Law

IRAL's terms of reference asked the panel to consider several core areas: codification, non-justiciability, the grounds of review and remedies, and procedure. The panel noted the short timeframe it was given to conduct the review and made clear that its report was by no means a comprehensive assessment of judicial review.

Before taking each of these particular subjects in turn, the panel outlined the political and constitutional background. First, it acknowledged the political context to the review – in particular the Supreme Court's decisions in *Miller 1* and *Miller 2*. It also made clear that tensions around the appropriate constitutional place of judicial review are nothing new. Opinions, the panel noted, would continue to diverge on the subject, as they have done in the past.

The panel worked from the basis of two fundamental constitutional principles: that government power should be used in accordance with the law; and that sovereignty lies with the Queen in Parliament. It expressed concern that Parliament was not mentioned in IRAL's terms of reference, and emphasised its fundamental role. The panel was wary of the potential 'unforeseen side effects' of constitutional reform and 'conscious of the need for coherence' – considerations which influenced its recommendations. Finally, the panel affirmed the fundamental place of an independent judiciary within the constitutional system as one of two main mechanisms of accountability, alongside Parliament.

Codification

The first question considered by the panel was whether the grounds of judicial review should be codified in statute. The panel articulated two ways in which this end might be approached:

- (1) a statement of general principle, or
- (2) a detailed list of the grounds for judicial review.

The panel noted that the first approach might bolster the legitimacy of judicial review through parliamentary approval and serve a useful educational function. Listing the specific grounds, on the other hand, would likely be restrictive of the courts. Furthermore, any codification would need to work within a common law framework, or abolish the common law of judicial review, which might not prove possible or desirable.

Of the responses received on codification, 110 were against it, whilst only six were in favour. Based on a review of international practice, the panel concluded that any marginal educational benefits were outweighed ‘by the many potential disadvantages.’ (1.42.)

Non-justiciability

The panel then considered the question of whether the legal principle of non-justiciability (that there are certain ‘no-go’ areas for judges) needed clarifying. It outlined the trajectory of the doctrine of non-justiciability over the last 40 years. The panel found that the idea that there are some exercises of public power (e.g., prerogative powers) that are off-limits for the judiciary has declined. It offered the *Miller 2* case as the most recent example of this expanded scope. Nevertheless, the panel did not think this case would ‘have wider ramifications’. (2.37.) Remaining non-justiciable powers, such as parliamentary privilege, would likely remain non-justiciable. The panel also considered the argument that increasingly judges were deciding cases in areas where they lacked the necessary expertise, or in which they were intruding into political matters. It took the view that the courts over the last 40 years have treated as justiciable some uses of public power that should not have been.

The panel then moved on to look at possible responses. It favoured a non-legislative response: that the courts should be trusted to continue determining the line between justiciability and non-justiciability. The panel warned against wholesale legislation in response to the very small proportion of judicial review cases that are constitutional. It pointed out that ‘[f]or every one controversial decision, there are many others... where judges have shown “restraint”.’ (2.75.) Furthermore, it was hopeful that the judiciary would adjust its approach to justiciability in response to past examples of overreach.

The panel nonetheless made clear that parliamentary intervention, if pursued, would in principle be legitimate. Were a legislative route taken, it advocated using ouster clauses or legislating to repeal particular decisions, rather than attempting comprehensive codification of non-justiciable powers. A more comprehensive approach would require changes to the Human Rights Act to be effective.

Moderating judicial review

The panel also examined whether judicial review should be ‘moderated’ by tailoring the grounds that can be applied to particular powers and changing the remedies available if the claim is successful.

It acknowledged two concerns in relation to an increased diversity of judicial review grounds: (1) that it enables judicial overreach and (2) that it makes judicial review less predictable for public bodies. Again, the panel did not recommend legislative intervention. Rather, the courts themselves must decide to be more restrained and reaffirm ‘the fundamental constitutional fact that it is not for them to pronounce on the wisdom of the exercise of public power’. (3.19.) However, the panel recommended that the grounds on which an exercise of public power may be set aside if it impinges on a constitutional right, value or principle be further clarified.

The panel’s two most substantial suggested changes came in this section: (1) that *Cart* judicial review applications be discontinued and (2) that the courts be given the option of issuing a suspended quashing order as a remedy. The panel stated that the latter might help alleviate concerns about the courts overstepping constitutional boundaries in providing Parliament time to legislate, should it wish, thus acting as an arbiter between the executive and the courts.

Procedure

The panel considered whether the judicial review process should be ‘streamlined’ through procedural reforms. It noted the high costs of judicial review for claimants and the implications for access to justice. The panel suggested this issue be explored fully by a body equipped to do so. It again recommended that ‘the temptation to legislate should be resisted’ in relation to whether an applicant has sufficient interest in the matter for the case to be taken forward. (4.98.)

The panel suggested that the requirement that a case be brought ‘promptly’ be dropped, given that it is rarely invoked. It stated that it ‘would certainly not favour any tightening of the current time limits for bringing claims for judicial review.’ (4.149.) It also recommended that ‘[m]ore should be done to make the procedures for bringing claims for judicial review accessible to ordinary individuals.’ (4.173.)

The territorial dimension

Submissions received relating to the territorial dimension of judicial review were ‘without exception opposed to, or at best not persuaded of, the need for reform.’ (5.38.) There was considerable concern ‘that statutory intervention might result in a “dual” or “fragmented” system in which “UK wide” reserved or excepted matters and “other” matters are treated differently.’ (5.42.) The fundamental importance of judicial review in upholding the rights set out in the Belfast/Good Friday Agreement and Northern Ireland Act was emphasised. The panel concluded that any statutory intervention to restrict judicial review of reserved powers would cause serious tensions with the devolved governments and extensive consultation would be crucial.

Conclusions

The panel concluded its report by emphasising the high regard in which the UK’s independent judiciary is held, which ‘should cause the government to think long and hard before seeking to curtail its powers.’ (10.) There was, however, ‘a continuing need for respect by judges for Parliament.’ (13.) The panel acknowledged that it is easier to provide this respect when there has been proper parliamentary scrutiny

of a measure – but harder when there is ‘excessive use of framework bills’. (14.) Finally, it stressed the need for government, the courts and Parliament to respect one another.

Judicial Review Reform: The Government Response to the Independent Review of Administrative Law (18 March 2021)

The government response committed to taking forward the two changes to the law suggested by the panel (reversing *Cart* and introducing suspended quashing orders). However, the Lord Chancellor, Robert Buckland, also expressed interest ‘in exploring proposals beyond these’ and announced another consultation. (3.) In particular, the consultation would look at ouster clauses (and the possibility of legislating to clarify their effect), remedies (including the possibility of a prospective quashing order), and clarification of the principles the courts use to determine remedies.

The government used the response as an opportunity to restate its position on judicial review: that the judiciary has been overreaching and increasingly making judgements based on values rather than just interpreting legislation. It interpreted IRAL’s report as providing ‘a convincing analysis of a steady expansion of Judicial Review, and growing trends where Judicial Review is used in a way which seems to go beyond its traditional role as a supervisory jurisdiction.’ (117.) Nevertheless, it did not think ‘there needs to be a radical restructuring of Judicial Review at this point.’ (32.)

The *Judicial Review and Courts Bill* was introduced to Parliament on 21 July 2021. The Bill seeks to add to the remedies available to judges and reverses the Supreme Court’s *Cart* decision, limiting certain decisions of the Upper Tribunal from judicial review. However, it did not contain wider restrictions on judicial review such as measures relating to the enforcement of ouster clauses, as had been suggested by the focus of the government’s consultation.

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