The Constitution in Review

Second Report from the United Kingdom Constitution Monitoring Group

For period 1 July -31 December 2021

THE CONSTITUTION SOCIETY

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United Kingdom Constitution Monitoring Group

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. Edmund Burke once said that 'to make us love our country, our country ought to be lovely'. It is with such an observation in mind that we hope to encourage adherence to our principles.

In this report we consider events and tendencies across a series of constitutional categories over a six-month period from 1 July to 31 December 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. This publication is the second in an ongoing, twice-annual, series. The principles we use are reproduced in appendix a. The UKCMG is impartial and has no party affiliation.

Our methodology involves working within fixed time periods. However, we are aware that certain tendencies identified in this report became more pronounced beyond the cut-off date used. We take the view that subsequent developments served to emphasise rather than diminish the importance of the points we raise. Moreover, they will retain their relevance even in the event of the departure from office of individuals whose behaviour we identify as problematic, since they engage fundamental issues greater than any one actor or group of politicians.

Members of the group participate in a personal capacity, and not as representatives of any other organisations or institutions with which they are associated.

<u>The members are:</u>

Professor Linda Colley
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Executive summary

An important theme is common to much of this report. It is that of arbitrary power and the United Kingdom (UK) executive. We note the existence of pronounced doubts about the effectiveness of mechanisms intended to ensure that the UK executive conforms to standards of various kinds, which to a significant extent involve self-regulation. The enforcement of good practice in areas such as the avoidance of actual or perceived conflicts of interest and appropriate ministerial engagement with Parliament seems difficult to achieve if ministers and others do not wish to conform to the rules. It seems there is a willingness on the part of individuals within the executive to exploit this flexibility. Furthermore, the current legislative programme of the UK government contains within it provisions that would provide it with more freedom of action still. It presses on with a number of bills despite considerable dissent. They deal with matters such as the regulation of elections, restrictions upon the right to protest, and the treatment of refugees. Between them they would enhance the discretion of the UK executive in troublesome ways. Post-Brexit laws have already tilted the balance of power towards the UK-level of government, to the detriment of the devolved institutions. Furthermore, observers detect a tendency for the UK government to create and extensively deploy delegated law-making powers, enabling it to act with reduced parliamentary oversight.

We regard these general tendencies in the constitutional position of the UK executive as undesirable and in tension with many of the principles we support. They are problematic from the perspective of the UK Parliament; the territorial system of government of the UK; the regulation of and relationship between ministers and civil servants; the maintenance of integrity in public life; the holding of free and fair elections; the rule of law; adherence to international treaty obligations; and the general need for constitutional arrangements and changes to them to be as clear, consensual and considered as possible. We note that, while it might appear to be the beneficiary of this pattern of development, an excess of arbitrary power can threaten and undermine even the UK executive itself. A perceived failure to adhere to standards and the apparent ineffectiveness of the regulatory system was the source of the serious political difficulties being experienced by the UK government by the end of 2021, and which remain ongoing. If no other realisation can encourage decision-makers within the UK executive seriously to consider options for reform, perhaps one founded in self-interest might. They might also consider that those who hold office today will not do so indefinitely. Others could come into possession of the same arbitrary authority that the current occupants of government positions have exercised and enhanced, potentially using it to the detriment of those who previously cultivated it for themselves.

Integrity in public life

In our previous report, we raised concerns regarding the maintenance of integrity of public life in the UK. During the present period these issues came to the forefront of public and political attention. Various controversies that occurred suggest serious grounds for doubt about the willingness of holders of public office, including the UK Prime Minister, UK ministers and Westminster MPs outside government, to adhere to, and promote observance among others, of rules and principles intended to maintain standards. There is room for concern about the extent of conformance to every one of the Seven Principles of Public Life.

The seriousness of these matters is emphasised by the realisation that some of the conduct in question was connected to possible or actual violations of the law. This observation, pertaining as it does to holders of high public office arguably believing themselves able to act with impunity, raises concerns about maintenance of the rule of law.

Acceptance of the rules on the part of those in positions of responsibility is vital to any system. Within the context of the UK constitution, which has a tradition of self-regulation, its importance is arguably even greater than it might otherwise be. The absence of voluntary compliance and promotion of respect for the rules is therefore potentially a serious problem.

Recent experience has exposed problems with more informal, self-regulation in the UK constitution. But it has also suggested a desire on the part of the UK government to undermine forms of regulation that are firmer and more autonomous in nature. The Prime Minister has committed to providing the Independent Adviser on Ministers' Interests with more cooperation and material support in future; and to engaging with other proposals made for the reform of the office of Adviser and the *Ministerial Code*. We hope that these pledges will be honoured with the degree of urgency and seriousness they demand.

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.

A response to weaknesses in the maintenance of standards in public life should take into account the final recommendations of the Committee on Standards in Public Life (CSPL), as part of its Standards Matter inquiry. They would complement the proposals contained in the Boardman review, focused specifically on avoiding conflicts of interest in the relationship between government and outside commercial interests.

Constitutional change process

It is best, when carrying out substantial constitutional alterations of the type suggested in the 2019 Conservative manifesto, to adhere to certain standards. Envisaged measures should be carefully devised and evaluated and – as far as possible – consensus should be sought for them. The way in which they interact both with each other and the wider constitutional environment should be given close attention. In pursuit of its current extensive constitutional legislative programme, the UK government has fallen short of the ideal approach.

The *Elections Bill* is one example of a change of a constitutional nature being pursued by the present UK government despite its divisive aspects, and arguably not being based on a thorough enough consideration of evidence and arguments. Other manifestations of this tendency might be found in, for instance, the *Nationality and Borders Bill* and in the *Police, Crime, Sentencing and Courts Bill*.

Furthermore, the UK government has on separate occasions established an expert, independent panel to consider an area for reform, before then announcing its own consultation on a series of proposals that ignore or substantially diverge from the recommendations of the independent review it set up. This approach is not a model for good practice in constitutional reform.

Elections

In our previous report, we discussed government plans to legislate for a requirement for individuals to produce photo identification at polling stations in order to be able to vote in certain elections. The *Elections Bill*, passing through Parliament during the present report period, seeks to provide for this measure for Great Britain. In our previous report we concluded that 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.

Critics have raised further objections to the *Elections Bill*. They include the process by which it has been devised and taken through Parliament; and the delegated powers it seeks to create. As regards substantive content, a particular source of controversy involves the proposals for the Electoral Commission. We share concerns expressed in this regard. An independent body charged with the oversight of elections and related matters is of particular value to the maintenance of free and fair elections. The proposed changes threaten to reduce the autonomy and powers of the Commission and create new potential for ministerial interference in its work.

These proposals could create grounds for suspicion of the present government as seeking to increase possibilities for it to manipulate electoral and other processes and to act with impunity in these areas.

Legislatures

In our previous report, we remarked upon the existence of significant concerns regarding the alleged misleading of the UK Parliament by the Prime Minister, and failures to correct errors satisfactorily once identified. These concerns retained salience during the present report period.

The UK government relied extensively on delegated law-making powers in dealing with Brexit and the coronavirus pandemic. There is reason to believe that this approach has catalysed a pre-existing tendency towards the overuse of delegated legislation, which recent bills look set to continue. In diminishing ministerial accountability to Parliament and lessening legislative constraints on ministerial powers, such a pattern is problematic from the point of view of our principles.

Ministers and the Civil Service

We do not take a position on the desirability or otherwise of there being more movement between the Civil Service and other sectors. We are pleased that the Cabinet Secretary acknowledges the need for ‘a clear and rigorous propriety framework’ in this context. However, we also note the existence of a credible view that the existing ‘propriety framework’ that applies to the UK executive is not sufficiently ‘clear and rigorous’; and that it may be in a condition of further deterioration.

We should be cautious about targeting civil servants for shortcomings responsibility for which properly rests with ministers, who – as well as issuing direct instructions – are able to shape the cultural environment within which officials operate. There is nonetheless reason to give careful attention to the regulation of the Civil Service and how well the system is working.

The Civil Service Commission must uphold the values of an impartial Civil Service against possible interference from ministers. We do not believe that, if appointed as First Civil Service Commissioner, Baroness Stuart will be perceived as independent from senior ministers in the present government. The appointment could set a bad precedent.

Devolution and the Union

A major source of concern related to the territorial constitution of the UK (and its external relations) has involved the post-Brexit status of Northern Ireland. Tensions continue to surround the operation of the Protocol. Such controversy and the uncertainty it creates is a problem from the point of view of the desirability of the existence of consensus around the constitutional arrangements of the UK.

In our view the UK government has failed to meet standards that can reasonably be expected of it in relation to such an important and sensitive matter, contributing to these constitutional difficulties, and raising further issues in the process. The tone of its communications seems at times to be unnecessarily combative, and is possibly calculated as such. Perhaps even more seriously, further cause to doubt the firm commitment of UK ministers to their obligations under the Protocol emerged during the report period. Another problem is the repeated threat by the UK government to invoke Article 16 of the Protocol. Even if the government does not seriously contemplate employing Article 16 or chooses not to do so, whether it should be using the possibility of invoking it as a negotiating tool is questionable.

It is positive that the UK government and the devolved governments have now agreed new structures and ways of working aimed at making intergovernmental relations in the UK more functional. Yet significant areas of disagreement between the UK government and the devolved governments persist; as does lack of consensus over key constitutional arrangements. The *UK Internal Market Act 2020* remains controversial and raises concerns regarding what amounts to an unacceptable curtailment of the authority of the devolved legislatures.

The *Subsidy Control Bill* 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.

We note that the Scottish and Welsh governments are recommending that legislative consent for the *Subsidy Control Bill* and the *Elections Bill* be withheld. The UK government has justified recent breaches of the Sewel convention in relation to the exceptional nature of the Brexit process. But if the passing of non-Brexit related legislation from which devolved consent has been withheld becomes commonplace, the viability of the Sewel convention will come increasingly into doubt.

Judiciary and the rule of law

For the rule of law to be meaningful, the process by which law is made should be inclusive and not arbitrary. In this context, concerns regarding an intense and excessive use of delegated legislation are problematic. If the UK executive is able to change the law subject only to minimal scrutiny and restraint, the rule of law might become compromised. Moreover, practices such as the use of 'disguised' legislation

have the potential to create confusion among the public and those responsible for enforcement.

Ongoing developments and claims in relation to the Northern Ireland Protocol are problematic from the standpoint of the UK government's duty to uphold its treaty obligations.

While there is reason to believe that participants in the Conservative government might be inclined to take measures significantly to reduce the scope of judicial review, firm legislative proposals to this effect have yet to emerge. Nonetheless, it remains plausible that such a programme might yet appear. Furthermore, the government appears to wish to pursue a radical overhaul of the *Human Rights Act 1998*. The government's proposals for replacing the Human Rights Act with a 'modern Bill of Rights' depart significantly from the recommendations of the independent review it commissioned to consider the subject. It has been observed that the government's proposals rest on weak evidence. Substantial concerns have also been raised about the impact the government's reforms to mechanisms for the upholding of human rights would have on access to justice.

The existing legislative programme of the UK government continued to be a source of controversy from the point of view of the rule of law. In September, the House of Lords Select Committee on the Constitution produced a report on the *Police, Crime, Sentencing and Courts Bill*. The Committee raised a variety of constitutional concerns regarding the Bill.

The *Nationality and Borders Bill*, passing through Parliament during this report period, was a subject of controversy with a constitutional aspect. In September the United Nations High Commissioner for Refugees issued a set of 'Observations' on the Bill. It held that the Bill was 'fundamentally at odds with the Government's avowed commitment to upholding the United Kingdom's international obligations under the Refugee Convention'.

A number of the issues we identify in this report, such as those pertaining to standards in public life, might be regarded as associated with the character of individuals, and in particular that of the present Prime Minister. It is entirely proper that office-holders such as UK ministers should be held responsible for their own actions, and should not be excused by broader observations. But neither should we conclude that any problems there may be are connected to one personality, the implication being that they might pass when that individual has left office, whenever that might be. There are wider matters at stake. It would be better to regard recent experiences as having exposed vulnerabilities that must be corrected if the repetition of problems is to be avoided.

The Second Report

Analysis

Integrity in public life

Key principles:

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 (principle 1).

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. 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). (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).

Ministers are under an overarching duty to comply with the law…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. (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).

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1. **In our previous report, we noted the existence of unease regarding the maintenance of integrity of public life in the UK. During the present period this issue came to the forefront of public and political attention.** Ongoing interest focused on matters such as the appointment of Conservative donors to the House of Lords.[1] A marked intensification of concern came about as a consequence of the Owen Paterson affair (see appendix c). This episode, coupled with others including the Electoral Commission fining the Conservative Party on 9 December for failing properly to report a donation, and the onset of the scandal around allegations about parties held in Whitehall whilst there were coronavirus

1 See eg: 'Labour claims peerages for Tory donors show party has "cash for access culture"', *Guardian*, 6 November 2021, available at: < https://www.theguardian.com/politics/2021/nov/06/labour-claim-tories-have-a-cash-for-access-culture >, last accessed 16 January 2022.

restrictions in place, ensured that integrity in public life was arguably the most salient political matter of the day in the UK by the turn of 2021-22.

2. **This sequence of events and the debates it prompted engages a number of our principles. It suggests there are serious grounds for doubt about the willingness of holders of public office, including the UK Prime Minister, UK ministers and Westminster MPs outside government, to adhere to, and promote observance among others, of rules and principles intended to maintain standards. There is room for concern about the extent of conformance to every one of the Seven Principles of Public Life (selflessness, integrity, objectivity, accountability, openness, honesty and leadership) (principle 7); to the requirement to be open with the public and legislatures (principle 3); and to the obligation to avoid conflicts of interest (principle 9).**

3. **The seriousness of these matters is emphasised by the realisation that some of the conduct in question was connected to possible or actual violation of the law – actual in the case of the Electoral Commission investigation, and possible with respect to the alleged parties episode. This observation, pertaining as it does to holders of high public office arguably regarding themselves as able to act with legal impunity, raises concerns about maintenance of the rule of law.**

4. **Acceptance of the rules on the part of those in positions of responsibility is vital to any system. Within the context of the UK constitution, which has a tradition of self-regulation, its importance is arguably even greater than it might otherwise be. The absence of voluntary compliance and promotion of respect for the rules, suggested by recent experience, is therefore potentially a serious problem.** It is detrimental to the effectiveness of certain mechanisms that are supposed to achieve 'robust and impartial enforcement' of constitutional arrangements (principle 1). For instance, as during the previous report period, the effectiveness of the *Ministerial Code* and the Independent Adviser on Ministers' Interests have been called into question as tools of ethical regulation (see appendix b: Timeline of events). We do not take a specific position on the substance of the episode involving Lord Brownlow, or on the failure to keep Lord Geidt properly apprised of matters involving evidence that had a bearing on the investigation Lord Geidt had conducted but to which he had not had access. But we recognise, with Lord Geidt, that the way in which he was treated in his capacity as Adviser over this case was unsatisfactory.[2] We take the view that this poor practice has served to undermine further the credibility of a mechanism for the application of key ethical standards to the executive that was already under strain. **The Prime Minister, in responding to Lord Geidt, apologised and committed to providing the Adviser with more cooperation and material support in future; and to engaging with other proposals made for the reform of the office of Adviser and the *Ministerial Code*.[3] We hope that these pledges will be honoured with the degree of urgency and seriousness they demand.**

5. **It is notable, when considering the role of the *Ministerial Code* and the Adviser on Ministers' Interests, that in December, the High Court found that the *Ministerial Code* can play a part in judicial review proceedings (see appendix b: Timeline of events).** The union for senior civil servants, the FDA, had brought a case arguing that the Prime Minister had misinterpreted paragraph 1.2 of the *Ministerial Code*, dealing with various forms of inappropriate behaviour, with respect to allegations

2 See eg: The Right Hon. the Lord Geidt to the Prime Minister, 23 December 2021.
3 Prime Minister to The Right Hon. the Lord Geidt, 21 December 2021.

about bullying by the Home Secretary (discussed in our previous report). The court did not find in favour of the FDA on the central issue. But it rejected the claim by the defendant that the *Ministerial Code* was not justiciable:

> 'We accept that the Ministerial Code has no statutory basis but that of itself is not conclusive. We accept that the interpretation of parts, perhaps most, of the provisions of the Ministerial Code would not be justiciable because they involve political matters (such as references to collective Cabinet responsibility) or ministerial relations with Parliament. Such matters are intended to be subject to the judgement of the Prime Minister not the courts. But it does not follow that all parts of the Ministerial Code should be treated as non-justiciable. Such an approach would be inconsistent with the need to focus not on the source but on the particular subject-matter.'[4]

6. **This view does not suggest an immediate shift towards hard legal enforcement of the Code in its entirety, which would not, in any case, necessarily be a desirable or practical outcome. But the judgement does point to a potentially different model for the upholding of standards, in which the independent oversight of the courts could play a more active role.**[5] The UK government (along with various participants in and observers of the UK constitution) might object to such a shift and seek to resist it. But it is the very testing of public confidence in standards in which the UK government has played a leading part that has created an incentive to explore different means of enforcement. We note, however, that an unfortunate potential side-effect of any shift to harder enforcement is the downgrading of the status of non-statutory rule and codes.

7. **Recent experience has exposed problems with more informal, self-regulation in the UK constitution. But it has also suggested a desire on the part of the UK government to undermine mechanisms for maintaining standards that are firmer and more autonomous in nature.** It displayed this propensity when supporting the Leadsom amendment tabled in the House of Commons in response to the Paterson case. A further example of such an approach comes in the proposed changes to the status of the Electoral Commission included in the *Elections Bill* currently passing through Parliament (see below). There have also been suggestions it might seek significantly to curtail judicial review (see below). The latter measure, if pursued, would be another weakening of a formal, autonomous means of enforcement of standards.

8. **In driving through, in the face of objections, legislation such as the *Elections Bill*, the UK government is falling short of the need for constitutional change to be addressed in a considered fashion and as far as possible on the basis of consensus (principle 1; see also below). Such legislative initiatives also arguably fail to fulfil the need for the legislative authority of the UK Parliament to be exercised with regard to constitutional principles (principle 1). The lessening of protections as presently proposed in the *Elections Bill* (and elsewhere) reveals another vulnerability in the UK constitution. Parliamentarians, especially those from the governing group, can wield influence. But a UK government with a secure majority in the House of Commons is limited principally by**

4 [2021] EWHC 3279 (Admin) Case No: CO/618/2021, in the High Court of Justice Queen's Bench Division Divisional Court, 6 December 2021, para. 39.

5 For discussion, see eg: Nicholas Reed Langen, 'Should the Ministerial Code have the force of law?', *Prospect*, 23 December 2022, available at: < https://www.prospectmagazine.co.uk/politics/should-the-ministerial-code-have-the-force-of-law-boris-johnson-government >, last accessed 13 January 2021.

its own inhibitions and practical and political constraints. If sufficiently determined, it is in theory capable of perpetrating constitutional abuses, as when the UK executive pressured Conservative MPs into supporting the Leadsom amendment under a three-line whip. It was only in the wake of public criticism, including from usually supportive sources, and the decision of the Labour and Scottish National parties to boycott the proposed select committee, that the decision was reversed. In coercing its MPs as it did, the UK government had departed from established practice in relation to such decisions, and used its 'powers to compromise the ability of' MPs 'autonomously to perform the constitutional functions they carry out on behalf of the public' (principle 4). One of the techniques it reportedly employed in its efforts to secure the votes of MPs was the threat to deny public funds to their constituencies. Such methods would raise difficult questions from the point of view of the need to avoid using 'government resources for Party political purposes' (principle 9).[6] How an MP voted on an unrelated matter could not possibly be a relevant consideration in the allocation of public funds, and to deny a constituency funding on this basis would be likely to be unlawful.

9. In our previous report, we noted claims made about misleading statements by the Prime Minister – both within Parliament and outside it. While not taking a position on the specific allegations, we remarked 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 our third principle; and the concepts of openness and honesty, both of which can be found among the *Seven Principles of Public Life* (principle 7). These concerns persisted during the present report period**, for instance with regard to the emergence of doubts about how open the Prime Minister had been with the Independent Adviser on Ministers' Interests over the Brownlow case. Information to which Lord Geidt – for whatever reason – was deprived of access in turn had consequences for the findings Geidt initially reported to the public, though not his substantive conclusions. By the end of the report period, the manner of the government response to revelations and allegations about parties held in Whitehall during 2020, created further doubts about how far the Prime Minister and others within the UK government were adhering to standards of openness and honesty (developments following the end of the present report period have intensified suspicions about such shortcomings). We discuss below a possible tendency on the part of the Prime Minister to distance himself from the actions of officials in relation to these alleged parties. This type of response to controversy arguably creates confusion around and undermines key constitutional principles stipulating that ministers are generally accountable to legislatures for the activities of those staff working within their remits (principles 1; 3; 6; 7). Such a practice might be seen as a means of evading responsibilities and transferring them to those less well-placed to represent themselves. We consider the possible misleading of Parliament specifically further below.

10. **We note that a general deterioration in standards, as well as being unwelcome in itself, has the potential to generate further constitutional difficulties and sensitivities. For instance, it might create tensions for civil servants.** They are required, on the one hand, to support the government of the day and also, on the other hand, to adhere to various other constitutional values set out in the civil service code and other guidance. Failure by ministers (and perhaps fellow officials) to uphold proper standards might make it difficult for them to do both. Such problems can intensify further when senior

6 For discussion of parliamentary management of the vote, see: George Parker, Laura Hughes and Sebastian Payne, 'Boris Johnson's bruising defeat over standards reform angers Tory MPs', *Financial Times*, available at: < https://www.ft.com/content/51c93ba3-4a59-4e88-92ed-3e152a896493 >, last accessed 13 January 2022.

civil servants are called upon to investigate possible misdeeds, as first Simon Case and then Sue Gray were in response to claims and evidence about parties. The public expectation, or even demand, might be for a wholly independent process, and ministers might present it as being such. But this perception is difficult to reconcile with the constitutional position of civil servants; and places those carrying out such inquiries in a difficult position.

11. **Misconduct – or concerns about it – can trigger further departures from established norms through leading to the questioning in Parliament of the personal integrity of individual members by their fellow-parliamentarians (see below). It can also place those responsible for enforcing the law in uncomfortable positions.** The police and the courts can find themselves being drawn into politically sensitive matters with which they might understandably be reluctant to become involved, but which could require their engagement if they are satisfactorily to be resolved, and if the rule of law is to be maintained.

12. In our previous report, we noted ongoing concerns about the lack of transparency surrounding government contracts awarded in the context of the pandemic (principle 8). The National Audit Office has two inquiries underway in related areas, one of which pertains to Randox, one of the two companies by which Owen Paterson was engaged as a lobbyist.[7]

13. **We conclude that urgent attention needs to be given to reinforcing standards in public life. Existing protections seem increasingly to lack the capacity to command the public confidence required of them; and the UK government appears set upon weakening an already insecure framework.** Therefore, while the Prime Minister might have presented himself, in correspondence with Lord Geidt, as inclined towards enhanced protections, actual movement appears to be in the opposite direction. (Notably, beyond the end of the report period, in January 2022, whilst responding to the publication of the update on Sue Gray's inquiry into government gatherings during Covid restrictions, the Prime Minister said that the enforcement of the Civil Service and special adviser codes would be reviewed, but made no mention of the Ministerial Code.[8]) Political difficulties experienced by the UK Conservative government from late 2021 and into 2022 in particular suggests it is possible that an absence of effective controls can generate problems even for those who are thereby provided with greater freedom of action. Ethical regulation of the UK executive protects everyone, even the executive from itself. It is in the direct interests of the UK government, as well as the wider system, that reform proposals are given full consideration and made subject to an inclusive decision-making process.

14. Such an approach should take into account not only the more obvious difficulties, but underlying issues. **Much recent commentary on standards in public life has focused on the character of individuals, and in particular that of the present Prime Minister. It is entirely proper that office-holders such as UK ministers should be held responsible for their own actions, and should not be excused by broader observations. But neither should we conclude that any problems there may be are connected to one personality, the implication being that they might pass when that individual has left**

7 For details, see: National Audit Office, 'Investigation in government's management of COVID-19 contracts', < https://www.nao.org.uk/work-in-progress/investigation-into-governments-management-of-covid-19-contracts/ > and 'Investigation into government's contracts with Randox', < https://www.nao.org.uk/work-in-progress/investigation-into-governments-contracts-with-randox/ >, last accessed 13 January 2022.

8 'Sue Gray Report', House of Commons Debates, 31 January 2022.

office, whenever that might be. It would be better to regard recent experiences as having exposed vulnerabilities that must be corrected if the repetition of such problems is to be avoided.

15. **The response to such revealed weaknesses should incorporate the final recommendations of the Committee on Standards in Public Life (CSPL), as part of its Standards Matter 2 inquiry, that appeared during the present report period (see appendix d).** The course followed by the CSPL programme signified a recognition by the Committee (and those from whom it took evidence) of problems of the type discussed in our two reports to date. CSPL made proposals in relation to the *Ministerial Code* and Independent Adviser on Ministers' Interests; the Advisory Committee on Business Appointments; the regulation of public appointments; and transparency around lobbying. While the changes CSPL advocated are not as comprehensive as some hoped, if implemented they would amount to a significant package. **They would complement the proposals contained in the Boardman review, focused specifically on avoiding conflicts of interest in the relationship between government and outside commercial interests (see appendix e). The overall effect of such a programme could be a more formalised system, with more coherent rules, and a greater statutory underpinning. Ethical practices in the operation of the ethical system itself would be better protected.**

Constitutional change process

***Key principle:** 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 (principle 1).*

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16. We noted in our previous report how, in its 2019 General Election manifesto, the Conservative Party pledged to undertake a major programme of constitutional reform. The text stated that '[i]n our first year', a Conservative administration would 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*.[9]

17. We do not comment here on whether the specific changes the government might be disposed towards are desirable, or if the premises on which they are founded are correct. However, we argue that **it is best, when carrying out substantial constitutional alterations of the type suggested in the 2019 manifesto, to adhere to certain standards. Envisaged measures should be carefully devised and evaluated and – as far as possible – consensus should be sought for them. The way in which they interact both with each other and the wider constitutional environment should be given close attention.**

18. **There are various examples of constitutional change processes in the UK that have sought in different ways to achieve these ends.** They include the Scottish Constitutional Convention, a civil society initiative that paved the way for devolution in Scotland; and various manifestations of the Northern Ireland peace process. The Independent Commission on the Constitutional Future of Wales, which began work in November 2021, is a recently established initiative designed to facilitate a wide-ranging and inclusive discussion of options. **For the present UK government, the proposed Constitution, Democracy and Rights Commission might have been a vehicle to help achieve considered, consensual constitutional change, through enabling consultation prior to the introduction of bills to Parliament. However, the government has not moved forward with its plan for a Commission. In the absence of such a mechanism, its extensive constitutional legislative programme (see appendix f) has fallen short of the ideal approach.**

19. **The *Elections Bill* (see appendix g) currently before Parliament suffers from these procedural defects.** Containing some exceptionally controversial aspects, its passage through Parliament began

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

without a preceding period of consultation. The government has added important and divisive content to the Bill during the legislative process itself, reducing the chances for meaningful scrutiny further.

20. We raise specific concerns about the content of the Bill below, including its possible impact upon election practice and the delegated powers it seeks to create. But we note here that the Bill also contains content – for instance, relating to the financing of campaigns – which has received approval. It is regrettable that sound measures might be included within legislation that is in other ways flawed; the desirable contents of which might have been made better still were a more satisfactory process followed. Moreover, while the *Elections Bill* deals with some substantial and important matters, critics have noted that it is not as comprehensive as it might have been, representing a missed opportunity to consolidate election law. A better process might have identified and corrected this shortcoming, contributing to a constitution that is, in line with our principle 1, more 'clear and knowable'.

21. **Despite widespread reservations regarding the *Elections Bill* from the standpoint of fundamental constitutional principles, the government has proceeded with it regardless.** The recommendation made in December by the House of Commons Public Administration and Constitutional Affairs Committee that the Bill be paused and reviewed, has not been acted upon. **The UK government seems determined to drive through these measures, notwithstanding extensive criticism – including from within Parliament itself – that could hardly be dismissed as solely partisan in motivation. In so doing it exposes itself to the charge that it is seeking to deploy the law-making power of Parliament without proper regard to key constitutional values** (see principle 1).

22. As noted above, the UK government chose not to pursue its programme of constitutional reform via the work of an overarching commission. In several areas, it opted instead for a series of separate independent reviews. **While this way of proceeding is not in itself objectionable, the government's approach in these instances has been unsatisfactory. It has established panels to consider in-depth an area for reform, before overshadowing the outcome of these evidence-based reviews by then announcing its own consultation on a series of proposals that ignore or substantially diverge from the recommendations of the initiative the executive set up.** The most recent example of this tendency can be found in the case of the Independent Human Rights Act Review (IHRAR), which published its findings during the present report period (see appendix b: Timeline of events). IHRAR published a thoroughly researched report – the result of an extensive consultation and a series of 'roadshows' through which it engaged with a variety of views. A majority on the panel recommended minor changes to the Human Rights Act 1998 (HRA), along with a programme of civic and constitutional education in relation to rights in the UK. However, the government published a consultation on proposals that went beyond IHRAR's recommendations and which it has been observed have a weak evidential basis.[10] If taken forward, they would amount to major changes to the UK's rights regime. This follows a similar pattern to that noted in our last report in relation to the Independent Review of Administrative Law (IRAL). **As we concluded then, this is not a model of good practice in constitutional change.**

10 See: Tatiana Kazim, Mia Leslie and Lee Marsons, 'The government's Human Rights Act consultation: divergence, context and evidence', *The Constitution Society Blog*, 27 January 2022, available at: < https://consoc.org.uk/the-governments-human-rights-act-consultation-divergence-context-and-evidence/ >, last accessed 03 February 2022.

23. **The *Elections Bill* is just one example of a change of a constitutional nature being pursued by the present UK government despite its divisive aspects, and arguably not being based on a thorough enough consideration of evidence and arguments. Other manifestations of this tendency, the issues with which are considered elsewhere in this paper, might be found in, for instance, the *Nationality and Borders Bill* and in the *Police, Crime, Sentencing and Courts Bill*.** Potential (but not confirmed) plans to alter the way in which human rights are upheld and to weaken the system of judicial review of the actions of the executive could well – if implemented – amount to further cases of substantial constitutional measures that lack wide support and adequate prior consideration. A unilateral action by the UK government to suspend the operation of all or part of the Northern Ireland Protocol of the EU exit agreement could represent a significant change in the post-Brexit constitutional arrangements of Northern Ireland, of an arbitrary nature. Moreover, further testing our principles, taken as a whole, the various changes that the present UK government is in the process of bringing about could create a reconfigured system for the UK founded in significantly less consensus than was previously the case.

24. **A number of the possible changes discussed in this report could be criticised for addressing problems the existence of which has not been satisfactorily established, or in as far as they are real, seeking to deal with them in ways that are excessive and risk causing more harm than they avert. At the same time, there is far clearer evidence of a series of constitutional difficulties, some of which the UK government itself is causing or aggravating. Proposed measures designed to help remedy some of these problems – most notably those issued by the Committee on Standards in Public Life – produced following wide discussion and careful deliberation, are already available to implement, should UK ministers wish to do so. If they were to adopt such a programme it might amount to a more consensual and considered constitutional approach than that currently being followed.**

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).*

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25. In our previous report, we discussed government 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 *Elections Bill*, passing through Parliament during the present report period, seeks to provide for this measure for Great Britain, replicating the approach already in place in Northern Ireland since 2003 (see appendix g). The justification the government has offered for this policy, provided for in the *Elections Bill*, is that it is a means of preventing fraud and promoting trust in the electoral system. However, the proposal has met with opposition. Critics held that the problem supposedly being addressed is, in practice, minimal. They cautioned also that the intended measure might lead to certain social groups more than others being unable to exercise their right to vote. **We continue to 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.**

26. **During the present report period, concerns about the voter identification aspects of the *Elections Bill* have persisted. Critics have also raised objections regarding the approach the government has taken over the Bill. They include the process by which it has been devised and taken through Parliament (see above); and the delegated powers it seeks to create. On substantive content, a particular source of controversy involves the proposals for the Electoral Commission. We share concerns expressed in this regard. An independent body charged with the oversight of elections and related matters is of particular value to the maintenance of free and fair elections. The proposed changes threaten to reduce the autonomy of the Commission and create new potential for ministerial interference in its work. The Bill also removes the ability of the Commission to initiate (in England and Wales) criminal prosecutions – despite the Commission actually having taken the position that its powers in this respect should be increased, rather than removed.**

27. The tasks of the Electoral Commission extend beyond matters directly connected to elections and election campaigns – important enough though they are in themselves. It also plays a more general role in overseeing propriety in the funding of the party-political system, and in the conduct of referendums. It can become involved in matters of considerable political sensitivity that are crucial to the maintenance of the integrity of the system, as the recent investigation into the financing of refurbishments for the Prime Minister's accommodation demonstrate. For a body performing such a range of functions, independence – including from ministers, whom it might need to investigate – is vital. A lack of this quality would be detrimental to the attainment of the requirement stated in our first principle that 'the

constitutional arrangements of the UK…should be, wherever possible, subject to robust and impartial enforcement'.

28. **These proposals could create grounds for suspicion that the present government was seeking to increase possibilities for it to manipulate electoral and other processes and to act with legal impunity in these areas. Such a perception – whether or not it represents the actual intentions of the government – is problematic from the point of view of public confidence in the conduct of free and fair elections and in the wider political system. The changes might also amount to a genuine threat to the integrity of the political activities with which the Commission is concerned. Taken together with the *Dissolution and Calling of Parliament Bill* (discussed in our previous report and still progressing through Parliament during the present period), these changes represent a significant and troublesome shift in the direction of increased executive power with respect to the conduct of elections.**

29. **We do not take a position on the relative merits of different voting systems. But the manner in which provisions to change the system used for mayoral and police and crime commissioner elections were introduced – while the *Elections Bill* was already passing through Parliament – was regrettable. Furthermore, that commentators regard the arguments offered in support of this measure as questionable is problematic.**[11] This approach is difficult to reconcile with the provision in principle 1, that '[c]onstitutional change should take place in a considered fashion and as far as possible on a basis of consensus.'

30. We note that some of the contents of the *Elections Bill* – for instance, the changes planned for campaign finance rules, and the introduction of imprints for digital campaign materials – have proved less controversial, and have been welcomed by commentators.

11 See: Alan Renwick and Alejandro Castillo-Powell, 'Reforming the mayoral voting system: do ministers' arguments stack up?', *Constitution Unit,* 29 October 2021, available at: < Reforming the mayoral voting system: do ministers' arguments stack up? | The Constitution Unit Blog (constitution-unit.com) >, last accessed 17 December 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).

Ministerial powers should normally be specified in primary rather than secondary legislation. Such powers are subject to limits and constraints (principle 8).

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31. **In our previous report, we remarked upon the existence of significant concerns regarding the alleged misleading of the UK Parliament by the Prime Minister, and failures to correct errors satisfactorily once identified.** 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'. We noted that, important as this principle is, if the political leadership of a government is not committed to it, enforcement is difficult to achieve. Such a circumstance calls into question whether constitutional arrangements regarding the relationship between ministers and legislatures 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 (see principle 7).

32. **These concerns retained salience during the present report period. Complaints have continued about the UK Prime Minister displaying a general lack of honesty and openness, including in his interactions with the Westminster Parliament.** It would be understandable, for instance, were some to take the view that, in late 2021, the Prime Minister was less open than was ideal in relation to allegations about parties during lockdown.

33. On 30 November, the House of Commons held a debate on the conduct of the Prime Minister. The censure motion under discussion (see appendix h), moved by the Scottish National Party MP, Ian Blackford, included reference to the Prime Minister 'frequently violating the sixth Principle of Public Life' – which is 'honesty'. Providing examples to illustrate his case, Blackford made reference to two claims by the Prime Minister – about the nurses' bursary and families living in poverty – contained in the parliamentary record that Blackford held were untrue.

34. At the outset of the debate, the Deputy Speaker noted that a proper discussion of the motion would be difficult to reconcile with the usual etiquette as set out in Erskine May, according to which 'Good temper and moderation are the characteristics of parliamentary language', particularly in relation to 'the

opinions and conduct of…opponents in debate'. On this occasion, exceptionally, the Deputy Speaker would relax, though not remove, this rule, since 'this debate is on a substantive motion directly relating to the conduct of the right hon. Member for Uxbridge and South Ruislip (Boris Johnson)'. The Deputy Speaker judged that 'arguments intended to criticise or defend that conduct are in order. Therefore, things may be said that the Chair would not normally permit in other proceedings.'

During the course of his speech, Blackford stated that:

> 'It is right to be careful in terms of the language that we use in this House, but when it comes to language it is also right to be accurate and honest. On the basis of all the evidence, I can only conclude that the Prime Minister has repeatedly broken the sixth principle of public life. I can only conclude that the Prime Minister has demonstrated himself to be a liar.'[12]

35. On this same occasion, the Labour MP Dawn Butler also referred to the Prime Minister as a liar, describing him as 'the chief liar in charge' of the government. The use of the word 'liar' to describe a fellow-parliamentarian was particularly controversial, but was, as already discussed, allowed on this occasion. **We do not take a position on the specific charges levelled against the Prime Minister; or on whether a waiving of the normal rules should have been sought or granted on this occasion. However, that this debate was held at all was evidence of the scale of concern about the maintenance of standards in general, including those pertaining to the conduct of the Prime Minister towards the UK Parliament. Moreover, that a temporary loosening of certain rules was required shows that a perceived threat to some principles can in turn lead to a retaliatory response that itself entails the further weakening of the rules of the system. It is regrettable that a connected set of norms, all of which exist for good reason, has been undermined. This episode is evidence of a constitutional system struggling to regulate itself.**

36. **In our previous report, we noted concerns about the UK government making important announcements to the media before informing Parliament. We concluded that such behaviour is a problem, since the executive should not use its power to compromise the ability of Parliament to perform its constitutional functions (principle 4). In the present period, confirming persistent doubts in this regard, on 26 October, the Commons Speaker complained about repeated 'briefings issued to the media about the Budget'.**[13]

37. The nature of the UK executive's engagement with the Westminster legislature raises further issues. As noted above, in applying a three-line whip to the Leadsom amendment, and possibly in the tactics it allegedly deployed to secure victory in the vote, the UK government sought to undermine the ability of the UK Parliament to perform one of its constitutionally proper functions (principle 4). (In this instance, the compromised activity was that of taking steps to enforce adherence to standards among its own members.) We have also noted the tendency of the Prime Minister, in response to controversy surrounding alleged parties during lockdown, arguably to try to create distance between himself and the actions of officials for whom he should answer to Parliament. On 8 December, for instance, in the wake of leaked footage of officials discussing parties in a test press briefing, Johnson told the Commons that:

12 'Conduct of the Right Honourable Member for Uxbridge and South Uxbridge', House of Commons Debates, 30 November 2021.
13 'Pre-announcement of provisions', House of Commons Debates, 26 October 2021.

> 'I understand and share the anger up and down the country at seeing No. 10 staff seeming to make light of lockdown measures…I can understand how infuriating it must be to think that the people who have been setting the rules have not been following the rules, because I was also furious to see that clip. I apologise unreservedly for the offence that it has caused up and down the country, and I apologise for the impression that it gives.
>
> I repeat that I have been repeatedly assured since these allegations emerged that there was no party and that no covid rules were broken. That is what I have been repeatedly assured. But I have asked the Cabinet Secretary to establish all the facts and to report back as soon as possible. It goes without saying that if those rules were broken, there will be disciplinary action for all those involved.'

38. **Separate from questions about gatherings and the role of the Prime Minister in them, we note that his response to allegations has the potential to undermine the chain of accountability from civil servants via ministers to the legislature, and create doubts about this key aspect of the constitution (principle 1). The departure of multiple No.10 officials in February 2022 might be interpreted as in part offering evidence for the development of this tendency.**

39. The previous report noted that the effectiveness of legislatures throughout the UK had, to varying extents, been constrained by coronavirus containment measures. The pandemic response, we remarked, had entailed executives 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, we concluded, had fared better than others at ensuring that emergency measures received proper scrutiny; all faced challenges. Our third principle makes clear the importance of the accountability relationship between ministers and legislatures. We expressed the hope that, as the health emergency subsided, the effectiveness of legislatures and their power relative to executives would revive.

40. **There is reason to believe that a more lasting shift is underway, involving the UK government seeking to create and deploy extensive delegated law-making powers. The advent of Brexit and the pandemic have provided impetus for this tendency. It appears possibly to be part of a more general pattern of the UK government expanding its discretionary power and reducing the extent to which it can be checked in its actions by institutions such as the UK Parliament, the courts, and regulatory bodies.**

41. An example of an ambitious approach towards the use of secondary law-making powers was provided during the present report period by Lord Frost, before resigning from post in December. Frost had appeared to commit to a major programme of legal change, facilitating divergence from European Union regulations, that would be implemented using delegated powers rather than primary legislation (see Timeline of events). **We note that two exceptional recent events – the UK's withdrawal from the European Union and the coronavirus pandemic – have required extensive use of delegated legislation. Their combined impact might have been to normalise the use of delegated legislation even in circumstances where the justification for doing so is less compelling.**

42. **The effect of this reliance on delegated legislation is to increase the discretion of the UK executive, a development which is problematic from the point of view of a number of our principles. The heavy use of delegated legislation challenges the constitutional principle that ministerial powers should normally be set out in primary as opposed to secondary legislation (principle 8). There is tension with principle 3 regarding ministerial accountability to legislatures, arising because delegated legislation is not subject to parliamentary procedures as rigorous as those applied to primary legislation. The relative lessening of controls exercised by the UK legislature is also in tension with the tenet that ministerial powers should be 'subject to limits and constraints' (principle 8). Furthermore, when asked to approve the creation of delegated powers, Parliament might not be made sufficiently aware of the purposes to which they might be put. This lack of knowledge is unsatisfactory from the point of view of the need for executives to be open with legislatures (principle 3). In both pressing the legislature to provide vaguely defined powers, and then utilising those authorities to maximise its discretion, the UK government risks undermining the ability of the Westminster Parliament effectively to perform its constitutional functions on behalf of the public, such as law-making and holding the executive to account (principle 4). Delegated powers can also raise concerns with regard to the potential diminution of the autonomy of the devolved systems; and the undermining of the rule of law, both discussed below.**

43. Two House of Lords committees working in tandem – the Secondary Legislation Scrutiny Committee (SLSC) and the Delegated Powers and Regulatory Reform Committee (DPRRC) – published reports in November that emphasised such concerns about delegated legislation (see appendix i). They identified a number of potentially problematic practices:

- Skeleton legislation creating delegated powers, the specific uses of which it was difficult for Parliament to anticipate when passing the parent Act;
- 'Henry VIII' powers allowing for the repeal and amendment of primary legislation using secondary powers;
- 'Disguised' legislation, entailing the production of guidance, adherence to which is compulsory; and
- Tertiary powers, allowing ministers, through the use of delegated legislation, to confer law-making powers upon themselves or other bodies.

44. DPRRC expressed the view that, when making decisions about the inclusion of provision for delegated powers within legislation, bill teams within the Civil Service were guided by matters of political and practical expediency rather than constitutional principle. This assessment points to a conflict with the requirement (expressed in our principle 1) that '[t]he legislative authority of the UK Parliament should be exercised subject to underlying constitutional principles'. **We endorse the view expressed by both Lords committees that the creation of delegated law-making authority should be subject to firm constitutional considerations. We also commend the various other proposals made by the committees intended to redress possible imbalances between the UK Parliament and UK government as meriting close consideration.**

45. We acknowledge that redressing this imbalance will require Parliament to scrutinise more detailed and complex primary legislation. Without a corresponding increase in the legislature's resources and capacity, this may prove a difficult task.

Ministers and the Civil Service

***Key principles:** 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).*

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 (principle 3).

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

[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 (principle 9).

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).

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46. **Ministers and the Civil Service between them comprise the central UK executive. It is the UK executive that lies at the centre of many of the concerns about the maintenance of standards and of constitutional principles discussed in various parts of this report. Furthermore, as we record, there is a prospect that, while there are doubts about the existing framework for the upholding of such rules and values, there are plans in place to weaken it further, in particular in as far as it applies to the executive.**

47. In our previous report we noted the publication by the UK government, in June, of a *Declaration on Government Reform* co-signed by the Prime Minister and the Cabinet Secretary on behalf of the Cabinet and Permanent Secretaries. It addressed plans for the 're-wiring, and renewal, of government' to make 'government work better in service of citizens.'[14] We noted that some of the content, depending on how and whether it is implemented, could have constitutional significance, including for the impartiality and probity of the Civil Service, the relationship between officials and ministers, and the political accountability of the executive.

14 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.

48. In October, the Cabinet Secretary and Head of the Civil Service, Simon Case, gave a speech which updated on progress.[15] Remarking that 'we are only in the foothills of these reforms and there is much more to do' he covered, first, the structure of the Cabinet committee system. Case emphasised the application of a distinction between strategy and operations. In a model he described as used for Brexit and then in responding to the pandemic, he noted that for the 'Operations' meetings:

> 'as well as having experienced officials at the table next to their ministers, we invited outside partners to contribute their expertise – including the devolved administrations, business leaders, local government and third sector organisations – all interested parties with frontline experience that would play a vital operational role'.

49. **While we do not take a position on who it is appropriate for the government to invite to attend Cabinet committee meetings, we note that the practice described by Case raises issues that require careful consideration. Including 'business leaders', for instance, creates increased potential for actual or perceived conflicts of interest around information revealed or decisions made that might be commercially sensitive. We expect that there is an awareness of this point inside government. However, within the present context of credible doubts about the maintenance of standards and integrity within the UK executive, it requires emphasis. We return to questions of this type below.**

50. A second area the Cabinet Secretary covered was delivery. He described how the present administration had developed mechanisms inspired by the approach used under the Tony Blair governments in its pursuit of improved performance in public services. A notable aspect of the model Case depicted was its centralised character. For instance, he said that 'On appointment, Cabinet ministers receive clear instructions from the Prime Minister, setting out what he expects them to deliver.'

51. **Previous prime ministers, such as Blair and numerous others before him, have sought to drive their governments from the centre. We recognise that each prime minister will want to configure their government in their own way, and that they might want to find means of increasing the exercise of influence from the centre. However, the established constitutional position (though some may hold that the reality differs) in the UK is that key decisions are made collectively, not by the Prime Minister alone. Furthermore, parliamentary accountability, which is key to the UK constitutional system, is achieved by ministers answering individually to the Westminster legislature (principle 3). The proposition that ministers 'receive clear instructions from the Prime Minister, setting out what he expects them to deliver' might be difficult fully to align with the idea of that minister being the point of authority upon which the UK Parliament should focus in achieving accountability.**

52. A further area Case addressed was personnel. Alongside training to equip staff with the skills they needed, there would be more movement in and out to provide the Civil Service with valuable outside experience:

> 'We want it to be natural for people who have built a career in business, industry, academia or the third sector to serve, even for a relatively brief time – just as it will be as valuable for those

15 'Cabinet Secretary Lecture', Wednesday 13 October 2021

> presently in public service to experience life in another organisation.
>
> That is why a new secondments unit has been established in the Cabinet Office to increase the two-way traffic at a senior level; for the long-term national good.
>
> All done, of course, within a clear and rigorous propriety framework.'

53. **We do not take a position on the desirability or otherwise of there being more movement between the Civil Service and the outside. We are pleased that the Cabinet Secretary acknowledges the need for 'a clear and rigorous propriety framework'. However, we also note – as discussed elsewhere in this and our previous report – the existence of a credible view that the existing 'propriety framework' that applies to the UK executive is not sufficiently 'clear and rigorous'; and that it may be in a condition of further – and possibly intended - deterioration.**

54. **Recent and serious concerns about adherence to principles such as those used in our work have involved not only ministers but also civil servants.** In our previous report, we noted the existence of confusion about the *Business Appointment Rules for Civil Servants*, specifically regarding the activities to which the contents did and did not apply.[16] During the present report period, for instance, the controversy about alleged lockdown parties appeared to implicate officials (and subsequent developments have supported this view further). Civil servants played a part of some kind in the failings of which Lord Geidt complained in the provision of information to him in his work by the Cabinet Office. It is difficult to establish how far in such circumstances officials were acting with ministerial encouragement or authorisation, whether express or implicit. The Prime Minister has arguably exhibited a tendency, already discussed, to seek to allow civil servants to bear the responsibility for the controversial holding of parties. We do not take a precise position on the actual role of the Prime Minister with respect to these events. But the way in which he began responding to allegations and evidence during the report period was problematic from the point of view of civil servants and the efforts of Parliament and others to achieve accountability for the executive for its actions, creating uncertainty around the key constitutional concept of individual responsibility for UK ministers (principles 1; 3; 7; 10). This impression was reinforced after the end of this report period by the Prime Minister's response to the January 2022 update on Sue Gray's inquiry into government gatherings during Covid restrictions. The Prime Minister resolved to establish an 'Office of the Prime Minister', led by a Permanent Secretary, and review the enforcement of the civil service and special adviser codes.[17] **Whatever the individual merits of these changes, as a response they ignore questions about the Prime Minister's leadership and imply that responsibility for rule-breaking lies elsewhere.**

55. **We should be cautious about targeting civil servants for shortcomings the responsibility for which properly rests with ministers, who – as well as issuing direct instructions – are able to shape the cultural environment within which officials operate. If ministers exercise these functions in an inappropriate way, it can place civil servants in particularly uncomfortable positions, as we have**

16 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.

17 'Sue Gray Report', House of Commons Debates, 31 January 2022.

noted. There is nonetheless reason to give careful attention to the regulation of the Civil Service and how well the system is working. In his report published in July arising from his investigation into the Greensill affair and related matters, Nigel Boardman remarked that:

> 'The Civil Service has tended, in governance and compliance developments, to lag behind other institutions that are subject to greater external pressures, and has remained self-regulatory where other organisations have moved towards a more structured regulatory framework. The 'patchwork' approach to the ethics system … needs to be streamlined and stronger, with more consistent enforcement applied.'[18]

56. **With such needs in mind, the recommendations made both by Nigel Boardman and by the Committee on Standards in Public Life (see appendix d and appendix e) could be a useful starting point in promoting the sustained integrity of the Civil Service, and of the wider constitutional setting with which it operates.**

57. **In this context, another issue that arose during the report period requires attention. The Civil Service Commission is crucial to the upholding of constitutional standards with respect to the UK Civil Service: recruitment on merit on the basis of fair and open competition; and the key principles of integrity, honesty, objectivity and impartiality (principle 10). It is important to the maintenance of these values that the Commission itself is configured in a way that aligns with these values, and is perceived as being so. From this point of view, the decision of the government over its preferred candidate as the next First Civil Service Commissioner is problematic.** The proposal of Baroness Stuart represents an attempt to break with a pattern of more than a century, during which time the head of the Commission has not been someone with a background as a party politician.[19] Perhaps more problematic than the previous role as a Labour MP and minister (Stuart now sits in the Lords as a crossbencher) is that they were chair of one of the lead campaigns during the 2016 referendum, with which the present Prime Minister (and some of his close allies past and present) was also closely associated, and which provided a cause around which his government coalesced.

58. **We do not question the personal integrity of Baroness Stuart or their capacity effectively to fulfil the role of First Commissioner. However, regardless of how they might perform the role, a perceptual problem exists. To uphold the values of an impartial Civil Service against possible interference from ministers, the holder should be independent from government. It is undesirable that its occupant should have a visible political connection with senior figures within a particular government. The appointment could also create a bad precedent. Future governments might seek to displace incumbents they judged were politically too close to predecessors; and appoint individuals who were from their point of view more reliable.**

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18 'A review into the development and use of Supply Chain Finance in government: A report by Nigel Boardman into the development and use of supply chain finance (and associated schemes) related to Greensill Capital in government.', available at: < https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1018176/A_report_by_Nigel_Boardman_into_the_Development_and_Use_of_Supply_Chain_Finance__and_associated_schemes__related_to_Greensill_Capital_in_Government_-_Recommendations_and_Suggestions.pdf, last accessed 15 January 2022.

19 Alex Thomas, 'It's not right to appoint a politician to lead the Civil Service Commission', *Institute for Government*, 9 December 2021, available at: < https://www.instituteforgovernment.org.uk/blog/civil-service-commissioner >, last accessed 8 January 2022.

59. We note the statement in Sue Gray's update on her investigation into government gatherings during Covid restrictions: '[s]ome staff wanted to raise concerns about behaviours they witnessed at work but at times felt unable to do so. No member of staff should feel unable to report or challenge poor conduct where they witness it. There should be easier ways for staff to raise such concerns informally, outside of the line of management chain.'[20] Recent events have highlighted the importance of whisteblowers in revealing wrongdoing by those in power. **We note with concern the government's plans to introduce new legislation, including reform of the Official Secrets Acts, which would tighten restrictions on 'unauthorised disclosures', and its rejection of the Law Commission's recommendation to introduce a 'public interest' defence to protect journalists and their sources.[21]**

20 Sue Gray, 'Investigation into alleged gatherings on government premises during Covid restrictions – update', pp.7-8, available at: < https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1051374/Investigation_into_alleged_gatherings_on_government_premises_during_Covid_restrictions_-_Update.pdf >, last accessed 03 February 2022.

21 *Legislation to Counter State Threats (Hostile State Activity) Government Consultation* (Home Office, London, 2021)

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).

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60. **A major source of concern related to the territorial constitution of the UK (and its external relations) during the report period involved the post-Brexit status of Northern Ireland.** The Northern Ireland Protocol of the European Union Withdrawal Agreement offers a mechanism by which UK departure from the European Union might be reconciled with both the status of Northern Ireland as a part of the UK, and with the requirements of the Northern Ireland peace process, including the 1998 Belfast/Good Friday Agreement. As noted in our previous report, the Protocol 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. Even with goodwill on different sides, the implementation of the Protocol was always likely to present considerable challenges. Yet, given the decision by the UK to leave the EU, it is vital that every effort be made to ensure the success of the Protocol, the model agreed by both the EU and UK to manage the post-Brexit situation in Northern Ireland.

61. **As during the previous report period, tensions continue to surround the Protocol. They include opposition to the Protocol from within the Unionist community and the political parties that represent it; and complaints from the UK government that the Protocol is not working satisfactorily and requires a full overhaul (see appendix j). Such controversy and the uncertainty it creates is a problem from the point of view of the desirability of the existence of consensus around the constitutional arrangements of the UK (principle 1).**

62. **In our view the UK government has failed to meet standards that can reasonably be expected of it in relation to such an important and sensitive matter, contributing to these constitutional difficulties, and raising further issues in the process. The tone of its communications seems at**

times to be unnecessarily combative, and is possibly calculated as such.[22] After setting out the European Union's proposals for improving the application of the Protocol in October 2021 (see appendix j), Vice-President of the European Commission, Maros Šefčovič, wrote in *The Telegraph* that 'I am increasingly concerned that the UK Government will refuse to engage with [the EU's proposals] and embark on a path of confrontation.'[23]Around the same time, Lord Frost accused the EU of having 'destroyed cross-community consent well before the four-year mark.'[24] **Given the delicacy of the situation such an approach to negotiations is questionable. The conduct of ministers responsible for policy in this area might be found wanting if assessed against the *Seven Principles of Public Life*.** Prior to the Protocol coming into force, for instance, the Prime Minister insisted, incorrectly, that it would not entail checks on goods moving between Great Britain and Northern Ireland (see previous UKCMG report), raising questions about his adherence to the principle of 'honesty'.[25] Moreover, in distancing themselves from the Protocol that they previously themselves negotiated and then extolled, senior ministers in the UK government have appeared to show a less than adequate regard to the 'accountability' principle.

63. **Further cause to doubt the firm commitment of UK ministers to their obligations under the Protocol emerged during the report period (see appendix b: Timeline of events).**[26] **We do not take a final view here on whether or how far such claims are correct. However, the facts of UK policy since the conclusion of the Protocol do not conflict with such interpretations of its motivation. The bill that eventually became the *United Kingdom Internal Market Act 2020* initially provided for ministers to depart from the terms of the Protocol. The government eventually relented to pressure, including from within the House of Lords, to abandon this hugely controversial plan. Yet that ministers contemplated such a course of action is suggestive of a lack of regard for their 'overarching duty to comply with the law, including international law and treaty obligations' (principle 7).**

64. **During the present report period, the UK government continued the practice of unilaterally extending grace periods. This approach is questionable in terms of the obligation on ministers to uphold the UK's treaty commitments, though the EU has chosen, seemingly for political reasons, not to take further the legal action it had initially instigated in this area. A further problem is the**

22 See, for instance, a speech given by Lord Frost, the assertions contained within included that, in its approach to discussions around the Protocol, the EU might be accepting 'societal disruption and trade distortion' as 'an acceptable price for Northern Ireland to pay to demonstrate that "Brexit has not worked".' Lord Frost, 'Observations on the present state of the nation', 12 October 2021, available at: < https://www.gov.uk/government/speeches/lord-frost-speech-observations-on-the-present-state-of-the-nation-12-october-2021 >, last accessed 16 January 2022.

23 Maros Šefčovič, 'We must now give Northern Ireland the stability it deserves', *The Telegraph,* 31 October 2021, available at: < https://www.telegraph.co.uk/politics/2021/10/31/must-now-give-northern-ireland-stability-deserves/ >, last accessed 02 February 2022.

24 Lord Frost, 'Foreword', *The Northern Ireland Protocol: The Origins of the Current Crisis,* (Policy Exchange, London, 2021), p.7.

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

26 See eg: Lisa O'Carroll, 'Dominic Cummings says UK always intended to ditch NI protocol', *Guardian*, 13 October 2021, available at: < https://www.theguardian.com/politics/2021/oct/13/dominic-cummings-says-uk-always-intended-to-ditch-ni-protocol-brexit >, last accessed 16 January 2022.

repeated threat by the UK government to invoke Article 16 of the Protocol.[27] This Article allows for unilateral suspension of aspects of the Protocol in limited ways and for carefully defined purposes. It is not clear whether the government intends to make good on its threats. But if it were to do so, the proper applications of Article 16 are not boundless. Even if the government does not seriously contemplate employing Article 16 or chooses not to do so, whether it should be using the possibility of invoking it as a negotiating tool is questionable.

65. As we noted in our previous report, 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 existing machinery of intergovernmental relations has been widely judged unsatisfactory. The Dunlop review, finally published during the previous report period, and the accompanying update on the review of intergovernmental relations (IGR), offered means by which some of these problems might be addressed. We remarked in our previous report that the extent to which these proposals would be implemented and how they would work in practice was yet to be seen. It is positive, therefore, that the UK government and the devolved governments have now agreed new structures and ways of working aimed at making intergovernmental relations in the UK more functional. These mechanisms include a council comprising the Prime Minister and the heads of the devolved governments, which will meet at least once year, an independent IGR secretariat, and a new dispute resolution process. The agreement of these new structures represents a step in the right direction. **Nonetheless, significant areas of disagreement between the different administrations persist; as does lack of consensus over key constitutional arrangements. It remains to be seen what impact the new mechanisms of engagement will have on relations between the administrations.** The emphasis the Dunlop review placed on UK-wide spending and joint UK-devolved funding bids, for example, continues potentially to raise questions regarding the autonomy of the devolved institutions. **Such approaches, as we noted in our previous report, could arguably entail interference from the centre in devolved fields as well as possibly undermining the coherence of government.**

66. As during the previous report period, the UK Internal Market Act, with its emphasis on the primacy of the UK tier of government, continues to be the cause of 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).

27 An approach maintained following the departure of Lord Frost, when Liz Truss as Foreign Secretary took on the brief. See eg: Andrew Woodock, 'Liz Truss accused of using Article 16 threat to bolster position with Brexiteers', *Independent*, 21 December 2021, available at: < https://www.independent.co.uk/news/uk/politics/liz-truss-brexit-article-16-b1980187.html >, last accessed 16 January 2022.

67. 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.[28] Common frameworks were intended to ensure that the autonomous policy-making capacity of the devolved administrations did not give rise to internal difficulties for the UK once outside the common regulatory basket of the EU's single market. They are mutually agreed frameworks between the four parts of the UK – some legislative and some non-legislative – to enable a degree of regulatory consistency even where there is policy 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. However, the House of Lords Common Frameworks Scrutiny Committee observed in March 2021 that, '[u]nless the UK Government exercises its power to exempt policy divergence agreed through common frameworks in an appropriate manner, the Act still could constrain the ability of the devolved administrations to regulate effectively in areas of devolved competence.'[29] The Committee noted several further issues with common frameworks that should be addressed including: a lack of transparency and stakeholder input; difficulties for scrutiny, especially for the devolved legislatures; and a lack of clarity regarding their relationship with the Northern Ireland Protocol.

68. **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, and undermine consensus and clarity around the constitutional arrangements of the UK (principle 1).** 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.

69. As we noted in our previous report, 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 subsequently 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.'[30] **The Act represents a clear challenge to the principle of 'liaison, coordination and genuine co-decision-making' between devolved and UK executives (principle 16). It might also raise credible concerns about**

28 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.

29 House of Lords Common Framework Scrutiny Committee, *Common frameworks: building a cooperative Union,* (House of Lords, London, 2021), p.3.

30 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.

public resources being targeted for purposes of party-political gain.

70. **The *Subsidy Control Bill*, currently passing through Parliament, would – as we noted in our previous report – 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.**[31]**There are similar issues at play with the *Health and Care Bill*, which includes Henry VIII clauses that would enable devolved legislation to be changed without consent. It would be a worrying development if delegated powers are used to circumvent the convention of seeking consent from the devolved legislatures for matters relating to their competences (known as the Sewel convention, now also referred to in statute with respect to Wales and Scotland). This concern connects to other issues raised regarding delegated powers, discussed above.**

71. The Scottish and Welsh governments are both recommending that legislative consent to the *Subsidy Control Bill* be withheld. It has recently been reported, however, that there will be no concessions from the UK government on the Bill.[32] It is likely therefore that the Sewel convention – where the UK government would not normally legislate with regard to devolved matters without the consent of the devolved legislatures – will be breached. The Scottish and Welsh governments are also withholding consent for the *Elections Bill.* Whilst the UK government can conceivably invoke, as it has in the past, an exemption from the Sewel convention on Brexit-related grounds for the *Subsidy Control Bill,* this justification will not be credible for the *Elections Bill.* Concessions were granted on the *Health and Care Bill* in order to secure the consent of the devolved legislatures. But if the UK government opts to disregard the Sewel convention in non-Brexit-related instances, such as with regard to the *Elections Bill,* such action will call into question the continuing viability of the convention.[33]

72. In the *UNCRC Incorporation Reference* the Supreme Court concluded that some provisions within two Bills of the Scottish Parliament, designed to incorporate the United Nations Convention on the Rights of the Child and the European Charter of Local Self-Government, were beyond the scope of competence of the Scottish Parliament. The Supreme Court confirmed that Scottish Parliament did have the power to incorporate these international treaties into Scotland. However, problems arose from the manner in which these treaties were incorporated, in particular their effect on the interpretation and application of UK legislation affecting devolved policy areas.

31 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.

32 See: Henry Hill, 'Another Cabinet clash with Gove over the Government's pro-Union approach', *Conservative Home,* January 27 2022, available at: < https://www.conservativehome.com/thecolumnists/2022/01/henry-hill-another-cabinet-clash-with-gove-over-the-governments-pro-union-approach.html >, last accessed 03 February 2022.

33 Before 2018, it was rare for Legislative Consent Motions (LCMs) to be rejected. The Institute for Government found nine occasions prior to 2018 where LCMs had been partially or completely rejected. With the passing of the *UK Internal Market Act 2020* without consent in December 2020, this total had gone up to 13 (see Askash Paun, Jess Sargeant, and Elspeth Nicholson 'Sewel Convention', *Institute for Government,* 8 December 2020, available at: < https://www.instituteforgovernment.org.uk/explainers/sewel-convention >, last accessed 02 February 2022). The Scottish and Welsh governments are both withholding consent for the *Elections Bill* and the *Subsidy Control Bill,* and the Senedd have also voted to withhold consent for aspects of the *Police, Crime, Sentencing and Courts Bill*.

73. In reaching this conclusion, the Supreme Court followed its broad interpretation of the sovereignty of the Westminster Parliament first developed in the *Continuity Bill* case.[34] The Bill incorporating the UNCRC instructed Scottish Courts to read and give effect to all legislation (both UK and Scottish, so long as within devolved competence) in a manner compatible with the UNCRC so far as possible to do so. When this was not possible, courts were empowered to issue a 'strike down' declarator for legislation enacted before the Bill came into force, and a 'declarator of incompatibility' as regards legislation enacted after the Bill came into force. In addition, the Bill made it unlawful for public authorities to act contrary to the requirements of the UNCRC. All four of these provisions were deemed to modify the ability of the Westminster Parliament to legislate for Scotland. Consequently, the reasoning ran, the Bills modified s.28(7) of the *Scotland Act 1998* and were thereby beyond the scope of Holyrood's legislative competence.

74. **The decision has been regarded by some as providing support for interpretations of devolution based on 'muscular unionism', which focuses on the hierarchical relationship between Westminster and the devolved legislatures and governments as opposed to a relationship based on shared power and collaboration. This interpretation is particularly apt as regards the conclusion that even declarators of incompatibility, which would not affect the legality, validity or effect of legislation declared incompatible, modified the ability of the Westminster Parliament to enact legislation for Scotland. The Supreme Court stated that a 'judicial condemnation' of legislation 'would plainly affect Parliament's power to make laws for Scotland, since it would impose pressure on Parliament to avoid the opprobrium which such a finding would entail' (at para [52] of the judgment). This conclusion also has possible consequences as regards response to the Independent Human Rights Act Review. In his judgment, Lord Reed states that sections 3 and 4 of the Human Rights Act 1998 also modify the sovereignty of the Westminster Parliament. It remains to be seen whether this conclusion will influence the outcome of the proposed review of the Human Rights Act.**

75. As during the previous report period, 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.[35] 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 'clear and knowable', which our first principle deems an important requirement. 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).**

34 *Withdrawal from the European Union (Legal Continuity)(Scotland) Bill – A Reference by the Attorney General and the Advocate General for Scotland* [2018] UKSC 64.

35 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.

76. 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. We note that the Independent Commission on the Constitutional Future of Wales will include independence as a possible option within its remit, a significant development.

77. The new Cooperation Agreement between the Welsh Government and Plaid Cymru, given that it effectively allows designated members of the Plaid Cymru group in the Senedd to be 'half-in and half-out' of Welsh processes of government, is likely to raise difficult questions in coming months about accountability for those members' exercise of influence in governmental decision-making in Wales. Our third principle stresses the importance of ministerial accountability to their legislatures; if arrangements such as those in the Welsh Cooperation Agreement become more widely adopted, the scope of that principle might need to be expanded to insist on proper accountability regimes for key stakeholders operating under such agreements.

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).***

Ministerial powers should normally be specified in primary rather than secondary legislation. Such powers are subject to limits and constraints; they should be exercised…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 (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. 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 (principle 18).***

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 (principle 19).

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78. As we noted in our previous report, these key principles are important to protecting the public from the risk of exposure to arbitrary executive authority. The political leadership of the present UK 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 the application of the Human Rights Act, and having intruded upon matters that should be the preserve of politicians. **It would be a subject of concern if the government were to seek seriously to circumscribe the potential to ensure that the UK executive acts in accordance with basic legal and constitutional principles.**

79. Although it did not go as far as some expected (as noted in our previous report), the *Judicial Review and Courts Bill*, passing through Parliament during the present report period, nonetheless raises issues regarding the rule of law. The Bill would reverse the Supreme Court's decision in the *Cart* case through an 'ouster clause', thereby excluding the High Court's supervisory jurisdiction over the Tribunal system. The evidence base for this decision has been called into question and concerns have been

raised about its impact on effective rights protection, particularly in relation to immigration and asylum cases.[36] Furthermore, the clause drafted to 'oust' the jurisdiction of the High Court in these instances has been intentionally formulated in relation to previous judgements in order to make the removal of judicial oversight as watertight as possible. **This measure forms part of a broader move towards the greater use of 'ouster clauses' on the part of the UK government. The consultation document preceding the *Judicial Review and Courts Bill* made clear the government's intention to replicate the ouster clause contained in the Bill in the future. A controversial ouster clause was initially included in the *UK Internal Market Bill* before being removed, and there is also a clause of this nature in the *Dissolution and Calling of Parliament Bill* (discussed in our previous report). Although 'ouster clauses' can in rare circumstances be justified, their frequent use in legislation problematically diminishes executive accountability through the courts.**

80. **Maintenance of the rule of law is a fundamental constitutional principle for which all those who operate the system share some degree of responsibility (principle 19). While defining the rule of law in full is a difficult task, it is widely accepted that it entails more than simply obeying the law whatever it may happen to be. For the rule of law to be meaningful, the process by which law is made should be inclusive and not arbitrary. In this context, concerns regarding an intense and excessive use of delegated legislation are problematic. If the UK executive is able to change the law subject only to minimal scrutiny and restraint, the rule of law might become compromised. Moreover, practices such as the use of 'disguised' legislation have the potential to create confusion among the public and those responsible for enforcement. Such a tendency challenges another core feature of the rule of law: that the law should be clear and transparent.**

81. **Principle 7 asserts the need for ministers to observe UK treaty obligations. Ongoing developments in relation to the Northern Ireland Protocol are problematic from this standpoint, as discussed above.**

82. **As we noted in our last report, while there is reason to believe that participants in the Conservative UK government might be inclined to take measures significantly to reduce the scope of judicial review, firm legislative proposals to this effect have yet to emerge. Nonetheless, it remains plausible that such a programme might yet appear.** During the present report period, media accounts suggested that the Secretary of State for Justice and Lord Chancellor, who has a history of promoting ideas of this type, might be inclined to provide ministers with a relatively easy means of annulling review outcomes with which they disagreed (see: Timeline of events). **Furthermore, the government appears to wish to pursue a radical overhaul of the Human Rights Act (HRA) and the means by which the rights guaranteed by the European Convention on Human Rights can be relied upon in UK law. (**The present Secretary of State for Justice and Lord Chancellor has a history of criticism of the Human Rights Act).[37] **The proposals for replacing the HRA with a 'modern Bill of Rights' contained in the government's consultation document depart significantly from the recommendations of the independent review it commissioned to thoroughly consider the subject (see appendix k). It**

36 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.

37 Dominic Raab, *The Assault on Liberty: What Went Wrong With Rights* (Fourth Estate, London, 2009).

has been observed that, contrary to the independent review, the government's proposals rest on a weak evidence base.[38] Substantial concerns have also been raised about the impact the government's reforms would have on access to justice.

83. **The material content of possible changes to the scope of judicial review and to the HRA could raise legitimate constitutional objections in as far as they amounted to a restriction of the ability of courts independently to uphold legality in the actions of the executive, and human rights (principles 7; 8; 17; 18; 19). Furthermore, both judicial review and human rights reform might be constitutionally problematic in that they would represent (as noted above) departure from good practice in constitutional change. The government would in effect be rejecting the findings of investigations it had commissioned itself, respectively into administrative and human rights law. Neither identified a need for the more extensive change in which the government remains interested (principle 1).**

84. **Aside from speculation about what it might do in future, the existing legislative programme of the UK government continued to be a source of controversy from the point of view of the rule of law and human rights. In September, the House of Lords Select Committee on the Constitution produced a report on the *Police, Crime, Sentencing and Courts Bill*.[39] The Committee raised a variety of constitutional concerns regarding the Bill.** The first was its scale and complexity, making meaningful parliamentary scrutiny of an important set of measures difficult to achieve. The Committee objected to legislative proposals of this type, which it found to be a recurrent practice. It argued that the Bill lacked necessary protections for victims with regard to the extraction of information from electronic devices. Concurring with the Joint Committee on Human Rights, provisions contained in the Bill, the Select Committee on the Constitution found, were an improper infringement upon the right to protest and on freedom of assembly, on the basis of a 'noise trigger'. The Committee objected to the Bill being designed to allow for the definition of 'serious disruption' in secondary legislation, which would again allow for restrictions on the rights to assemble and to protest. Agreeing with the parliamentary Joint Committee on Human Rights once more, the Select Committee on the Constitution advocated removing from the Bill heightened penalties for those failing to comply with measures to restrict the rights to assembly and to protest. Criminal sanctions for unauthorised encampments, the Committee held, were un-needed and 'unacceptable in a democratic society'. It argued for safeguards and caution around the use of remote court proceedings.

85. **The *Nationality and Borders Bill*, passing through Parliament during this report period, was a subject of controversy with a constitutional aspect, in particular pertaining to adherence to the UK's international commitments. In September the United Nations High Commissioner for Refugees issued a set of 'Observations' on the Bill.[40] It held that the Bill was 'fundamentally at odds with the Government's avowed commitment to upholding the United Kingdom's international obligations under the Refugee Convention'.** The High Commissioner identified a series of problems

38 See: Tatiana Kazim, Mia Leslie and Lee Marsons, 'The government's Human Rights Act consultation: divergence, context and evidence', *The Constitution Society Blog*, 27 January 2022, available at: < https://consoc.org.uk/the-governments-human-rights-act-consultation-divergence-context-and-evidence/ >, last accessed 03 February 2022.
39 House of Lords Select Committee on the Constitution, *Police, Crime, Sentencing and Courts Bill*, 7th Report of Session 2021-22, HL Paper 64 (House of Lords, London, 2021).
40 UNHCR, *Observations on the Nationality and Borders Bill 141, 2021-22*, September 2021.

with the proposed legislation. The principle the UK government had advanced that 'people should claim asylum in the first safe country they arrive in' was, according to the Observations, not part of the Refugee Convention and did not exist under international law. The High Commissioner concluded that the Bill – which set out to establish two different categories of refugee – would have the effect of depriving refugees of rights that they possessed under the Refugee Convention and under international law. One further specific potential conflict would be with Article 8 of the European Convention on Human Rights, providing for the right to respect for family life. A recent source of pronounced concern with respect to the Bill has been the clause, introduced in committee stage, allowing for the secretary of state to deprive individuals of their citizenship without notice. This provision was the subject of marked criticism, from within and beyond Parliament, for what was regarded as its arbitrary and harsh nature.[41]

86. **We note the tendency of the UK government to seek to legislate for measures that raise widespread concerns with regard to the rule of law and human rights; and to do so in a way that tends to restrict the potential for proper parliamentary scrutiny. Such practices entail the UK executive employing discretion it already possesses with regard to parliamentary processes to attain further discretionary powers for itself. They are not desirable from a constitutional perspective (principles 1; 4; 7; 8; 17; 18; 19).**

87. As stated in principle 19, **all institutions and office holders dealt with in the principles are subject to an obligation to promote the rule of law. Members of the House of Commons clearly come within the scope of this requirement. In July, the Commons Committee on Standards issued a report finding five MPs in violation of the Parliamentary Code of Conduct. Their transgression was their attempt to influence a judicial process involving the trial of a former MP. It is important that the independence of the judiciary is respected from within other branches of the constitution. This episode is therefore a constitutionally problematic one, and we hope not part of a wider pattern.**

41 See: James Tobin, *Nationality and Borders Bill, HL Bill 82 or 2021-22* (House of Lords Library, London, 2021), p.4.

Appendices

Appendix a: UK Constitution Monitoring Group 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 gov-

ernment (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.

Appendix b: Timeline of events

July 2021

05 July: *Elections Bill* has its first reading in the House of Commons

07 July: Committee on Standards in Public Life publishes its *Regulating Election Finance* report

13 July: 'English Votes for English Laws' procedures are removed from the House of Commons Standing Orders

21 July: UK government publishes its Command Paper on the Protocol on Ireland/Northern Ireland *Northern Ireland Protocol: the way forward*

21 July: House of Commons Committee on Standards publishes a report on the conduct of five MPs, finding that they breached the Parliamentary Code of Conduct by attempting improperly to influence the judicial process in the trial of former MP Charlie Elphicke

22 July: *A review into the development and use of Supply Chain Finance in government* conducted by Nigel Boardman, is published

August 2021

30 August: Scottish National Party and the Scottish Green party agree cooperation agreement

September 2021

06 September: UK government unilaterally extends grace periods on goods entering Northern Ireland from Great Britain for the second time

06 September: European Union (EU) takes note of the unilateral extension of grace periods on goods entering Northern Ireland from Great Britain, but does not initiate additional legal proceedings

07 September: Scottish government publishes its *Programme for Government*

08 September: Boundary Commission for Wales publishes initial proposals for boundaries for 32 new constituencies (down from 40), giving effect in Wales to the *Parliamentary Constituencies Act 2020*

09 September: Democratic Unionist Party (DUP) threatens to resign from the Northern Ireland power-sharing government if its demands relating to the Northern Ireland Protocol are not met

15 September: Prime Minister Boris Johnson conducts a major reshuffle of the UK government, with changes made to responsibilities for constitutional policies. Michael Gove moves from the Cabinet Office to the Department for Levelling Up, Housing and Communities (DLUHC) and receives the new role of Minister for Intergovernmental Relations. Chloe Smith, formerly the Minister for the Constitution and Devolution, moves to the Department for Work and Pensions. Responsibility for elections,

including the *Elections Bill*, is transferred to Kemi Badenoch at DLUHC. The new Chancellor of the Duchy of Lancaster, Stephen Barclay, retains 'oversight of constitutional advice' at the Cabinet Office

15 September: Minister of State at the Cabinet Office, Lord Frost, makes a statement to the House of Lords in which he announces a review of retained European Union law with a view to amending, replacing or repealing all EU law 'not right for the UK'

15 September: Government announces that *Elections Bill* will be amended so as to change the voting system for mayoral and Police and Crime Commissioner elections in England and Wales from the Supplementary Vote system to First-Past-the-Post

October 2021

01 October: William Shawcross succeeds Peter Riddell as Commissioner for Public Appointments

05 October: Secretary of State for Justice and Lord Chancellor Dominic Raab states in his Conservative Party conference speech that he intends to 'overhaul' the *Human Rights Act 1998*

6 October: Senedd votes to establish an all-party Special Purpose Committee on Senedd Reform, to consider the Senedd's size and system for electing Members; measures to improve its diversity; and creating a system for reviewing constituency boundaries and seat distribution. The Committee is required to report by 31 May 2022 with recommendations for a Welsh Government Bill on Senedd Reform

6 October: The Supreme Court concluded that two Bills of the Scottish Parliament, designed to incorporate the United Nations Convention on the Rights of the Child (UNCRC) and the European Charter of Local Self-Government (ECSG) into Scotland, were beyond the competence of the Scottish Parliament. This is only the second time that legislation of the Scottish Parliament has been referred to the Supreme Court using the reference procedure established under the *Scotland Act 1998*, section 33(1)[42]

13 October: EU publishes 'non-papers' setting out its own proposals with regards to the Northern Ireland Protocol, offering bespoke arrangements

13 October: Cabinet Secretary Simon Case gives a speech at Newcastle University setting out priorities for Civil Service reform

13 October: Former Downing Street Chief of Staff Dominic Cummings claims that the UK government consented to the Withdrawal Agreement with the (unstated) intention of intending unilaterally to override certain provisions within it

14 October: DUP MP Ian Paisley Jr states that the Prime Minister personally assured him in October 2019 that the UK government would seek to change or 'tear up' the Northern Ireland Protocol after agreeing to it

42 *Reference by the Attorney General and the Advocate General for Scotland – United Nations Convention on the Rights of the Child (Incorporation)(Scotland) Bill; Reference for the Attorney General and the Advocate General for Scotland – European Charter of Local Self-Government (Incorporation)(Scotland) Bill* [2021] UKSC 42 (*UNCRC Incorporation Reference*).

17 October: Dominic Raab tells *The Sunday Telegraph* that he intends to establish a mechanism whereby the UK government can 'correct' rulings by the European Court of Human Rights

19 October: Attorney General Suella Braverman delivers a speech on the UK constitution which reiterates the position that, in considering and deciding upon political and policy matters, the courts have engaged increasingly in overreach

19 October: Counsel General for Wales notifies the Senedd of the appointment of Dr Rowan Williams and Professor Laura McAllister as co-chairs of a new independent Constitutional Commission. Other members will be announced before the Commission's first meeting in November. The Commission will be supported by an appointed Expert Panel, which will provide analysis and advice on the matters under consideration. In broad terms, the remit is to review future constitutional options for Wales within either a continuing United Kingdom or a dissolving Union; independence for Wales will be one option for consideration. The Commission will produce an interim Report in 2022 and a final Report by the end of 2023

November

3 November: Conservative MPs are whipped to support an amendment which declines to consider the Committee on Standard's report on the conduct of MP for North Shropshire, Owen Paterson, and provides instead for the establishment of a Select Committee to review the current standards system and whether Paterson's case should be reconsidered

4 November: Amidst backlash at the decision to bypass the suspension of Owen Paterson, the Chair of the Committee on Standards in Public Life, Lord Evans, gives a speech calling the vote 'a very serious and damaging moment for Parliament and for public standards in this country'

4 November: Secretary of State for Business, Energy and Industrial Strategy Kwasi Kwarteng suggests that the Parliamentary Commissioner for Standards, Kathryn Stone, should consider resigning, leading to rebuke by Speaker of the House, Lindsay Hoyle

4 November: Leader of the House of Commons, Jacob Rees-Mogg, gives a statement to the House reversing the government's position on reforming the parliamentary standards system and bypassing Owen Paterson's suspension, saying 'we will bring forward more detailed proposals once there have been cross-party discussions'

8 November: News emerges that former Attorney General, Geoffrey Cox, has earnt more than £1 million from outside legal work during the preceding year, recently advising the government of the British Virgin Islands (BVI) on a corruption case. During the pandemic, Cox voted by proxy from the BVI, before missing a number of votes when the pandemic proxy arrangements were brought to an end

8 November: An emergency debate is held in the House of Commons to consider 'the matter of the consequences of the decision of the House on 3 November relating to Standards' during which the Chancellor of the Duchy of Lancaster, Steve Barclay, says the government made a 'mistake'

18 November: Government tables an amendment to an Opposition Day motion on Strengthening Standards in Public Life which endorses two recommendations made by Committee on Standards in Public Life in 2018 regarding MPs' outside interests

18 November: Lord Frost implies during a House of Lords debate that broad changes to retained EU law will not be dealt with through primary legislation

22 November: Welsh Labour and Plaid Cymru announce a cooperation agreement (not a coalition) which will provide a detailed policy programme for the Welsh Government until 2024. Among other things, the agreement commits the parties to increasing the size of the Senedd to '80-100 Members' and reforming its electoral system; a move to the Single Transferrable Vote system is likely. (See also entry for 6 October)

24 November: 18 additional pages of legislation are added to the *Police, Crime, Sentencing and Courts Bill*, including further measures relating to the right to protest, after the bill has already been approved by the Commons and after its Second Reading in the House of Lords

24 November: House of Lords Delegated Powers and Regulatory Reform Committee and House of Lords Secondary Legislation Scrutiny Committee publish co-ordinated reports, respectively: *Democracy Denied? The urgent need to rebalance power between Parliament and the Executive*; and *Government by Diktat: A call to return power to Parliament*

December

6 December: In the *FDA v Prime Minister* case[43] challenging the Prime Minister's decision to clear the Home Secretary of breaching the *Ministerial Code* in 2020, the High Court finds parts of the Code to be justiciable, but does not conclude that the Prime Minister misinterpreted the term bullying in reaching his decision regarding whether the Home Secretary breached the Code

6 December: *The Times* reports that the Prime Minister is considering a proposal put forward by Lord Chancellor, Dominic Raab, and Attorney General, Suella Braverman, for an annual 'Interpretation Bill' through which to overturn judicial review decisions the government disagrees with

8 December: Cabinet Secretary, Simon Case, is asked by the Prime Minister to conduct an investigation to 'establish the facts' regarding allegations that several gatherings took place across government, including No.10 Downing Street, in November and December 2020 in breach of coronavirus restrictions in place at the time

9 December: Conservative Party is fined £17,800 by the Electoral Commission for failing accurately to report a donation from Conservative Peer and donor, Lord Brownlow, that helped pay for the refurbishment of the No.10 Downing Street flat

9 December: Electoral Commission investigation into the flat refurbishment appears to point to the possibility that the Prime Minister misled the Independent Adviser on Ministers' Interests, Lord Geidt, by

43 [2021] EWHC 3279 (Admin).

telling him that he was not aware of Lord Brownlow's donation. *The Telegraph* reports that Lord Geidt is considering his position if the discrepancy cannot be adequately explained. Geidt and the Prime Minister exchange letters on the subject on 17, 21 and 23 December (published 6 January). Geidt concludes that his main finding of the previous May – that no conflict of interest, actual or reasonably perceived, had occurred – should stand. But he complains about not being kept informed about developments involving evidence that was not made available to him

9 December: Baroness Stuart, a former Labour politician and chair of the Vote Leave campaign at the 2016 European Union referendum, is announced as the government's preferred candidate for the next First Civil Service Commissioner

9 December: Lord Frost announces two reviews into retained EU law and reiterates the government's intention to 'amend, replace, or repeal all the retained EU law that is not right for the UK'

9 December: *Nationality and Borders Bill* passes the House of Commons and progresses to the House of Lords

14 December: Report of the Independent Human Rights Act Review, led by Sir Peter Gross and submitted to the Lord Chancellor, Dominic Raab, in October 2021, is published

14 December: Dominic Raab announces a consultation on the government's proposals to overhaul the Human Rights Act 1998 through replacing it with a Bill of Rights

13 December: Public Administration and Constitutional Affairs Committee publishes its report on the *Elections Bill* calling on the government to pause the passage of the bill while multiple issues with the legislation are addressed

17 December: Lord Frost issues a statement on progress in negotiations with the European Union over the operation of the Protocol on Ireland/Northern Ireland. Whilst the statement expresses regret over the lack of a comprehensive agreement, it indicates the UK government's willingness to address the issues with the Protocol in stages, through an interim agreement if necessary

17 December: Simon Case recuses himself from the investigation into 2020 government Christmas gatherings after reports emerge that he was aware of a Christmas event taking place in his own private office on 17 December 2020. The task is taken on by Sue Gray, Second Permanent Secretary, Cabinet Office

19 December: Lord Frost resigns from the government citing 'concerns about the current direction of travel' of the government, including on economic policy and new coronavirus restrictions

19 December: Foreign Secretary, Liz Truss, replaces Lord Frost as Chief Negotiator of Task Force Europe

Appendix c: Parliamentary standards and the Owen Paterson case

During the report period, parliamentary and executive standards have been in the spotlight. The government's approach towards the parliamentary standards system has been called into question, in particular, in relation to one case involving the former MP for North Shropshire, Owen Paterson. This appendix briefly summarises the system, the specific case in question, and ensuing developments.

Background

The House of Commons Committee on Standards and the Parliamentary Commissioner for Standards (PCS) were established by Standing Order in 1995. The PCS and the Standards Committee are responsible for overseeing adherence to the Code of Conduct for MPs, which contains rules and principles relating to the ethical conduct of MPs and is based on the Seven Principles of Public Life.

The Code of Conduct contains rules pertaining to extra income and outside interests, as well as general standards of expected behaviour. Accepting 'payment in return for advocating a particular matter in the House' is prohibited, for example (p. 35.). The Code of Conduct is accompanied by a Guide to the Rules Relating to the Conduct of Members.

When an MP is accused of misconduct, or the Commissioner believes misconduct may have taken place, the PCS considers whether the instance meets the threshold for formal investigation. If they believe the threshold has been met, the PCS will then conduct a formal investigation into the matter. In some less serious cases, the MP is given the opportunity to rectify the issue themselves. However, where the PCS believes a more serious breach has occurred, their report will be passed to the Committee on Standards who then review the findings. Comprising seven lay members and seven MPs, the Committee is responsible for determining sanctions, the more serious of which have to be approved via a Commons vote. The PCS is also responsible for maintaining the Register of Members' Financial Interests.

Committee on Standards, *Mr Owen Paterson: Third Report of Session 2021-22*

The PCS decided to open an investigation into Owen Paterson following reports in the media that he had been engaged in paid lobbying. The findings of the PCS's investigation were then presented to the Standards Committee, as they were of a serious nature. The Standards Committee then conducted its own review. It published a report setting out the details of the case on 26 October 2021. Paterson had made complaints about the process followed in the investigation, which were also considered in the report. The Committee noted a personal loss suffered by Owen Paterson during the investigation, but said that the lobbying allegations predated this event and must be adjudicated on 'without fear or favour, and with a sole eye to the rules of the House and the requirements of natural justice.' (p. 5.).

The PCS concluded that Paterson had breached the Code in several ways between 2016 and 2020. Whilst a paid consultant for two companies – Randox and Lynn's Country Foods – he initiated a number of approaches to the Food Standards Agency and the Department for International Trade which would have accrued benefit to the companies he was being paid by had the approaches been successful. Less

seriously, he used his parliamentary office for outside business on 25 occasions and sent two letters for outside purposes on House of Commons headed letter paper.

Paterson sought to justify his actions with reference to a provision in the Guide that stipulates that MPs may approach ministers to make them aware of a 'serious wrong or substantial injustice'. However, the Committee argued that this was a conditional exemption, and that the relevant conditions had not been met. In particular, any benefit to a third-party that would arise from such an approach has to be incidental, rather than integral. The PCS concluded that potential third-party benefit was integral to Paterson's approaches and that he went beyond providing evidence of what he believed to be at issue by promoting the products of the companies he was being paid by.

The Committee agreed with the PCS's investigation, finding Paterson's actions to be 'an egregious case of paid advocacy' that had 'brought the House into disrepute'. (p. 48.). It recommended a 30-day suspension. Serious sanctions such as suspension and expulsion have to be approved by the House.

Leadsom amendment

A motion was tabled for 3 November by the Leader of the House, Jacob Rees-Mogg, seeking approval from the House for the recommended 30-day suspension.

However, an amendment was put forward by Andrea Leadsom MP seeking to ignore the Standards Committee's recommended sanction and instead reform the parliamentary standards system itself. It stated that the Commons 'notes concerns expressed about potential defects in the standards system and therefore declines to consider the report at this time'. Furthermore, it required that a select committee be appointed to consider: whether the standards system should be changed to give MPs rights of representation, examination of witnesses and appeal, and whether Paterson's case should be reconsidered. It stipulated that the proposed committee would have a government majority, a change from the existing composition.

The government whipped Conservative MPs to vote for the Leadsom amendment, which passed by 250 votes to 232.

Response

The government's backing for the plan to reform the entire parliamentary standards system seemingly on the basis of disagreement with the conclusion of one particular investigation sparked a considerable backlash. Criticism of the move came from across the political spectrum, with normally sympathetic outlets running highly critical coverage of the vote.

Labour and the Scottish National Party both announced that they would boycott the proposed select committee charged with overseeing reform to the standards regime, calling into question the viability of the new committee.

Chair of CSPL, Lord Evans, gave a keynote speech at an Institute for Government conference on ethical standards in government on 4 November, in which he said the following on the matter:

In my view yesterday's vote on the report of the Commons Standards Committee was a very serious and damaging moment for Parliament and for public standards in this country.

It cannot be right that MPs should reject, after one short debate, the conclusions of the independent Commissioner for Standards and the House of Commons Committee on Standards – conclusions that arose from an investigation lasting two years.

It cannot be right to propose an overhaul of the entire regulatory system in order to postpone or prevent sanctions in a very serious case of paid lobbying by an MP.

It cannot be right that this was accompanied by repeated attempts to question the integrity of the Commissioner for Standards herself, who is working within the system that the House of Commons agreed in 2010.

And it cannot be right to propose that the standards system in the House of Commons should be reviewed by a Select Committee chaired by a member of the ruling party, and with a majority of members from that same party. This extraordinary proposal is deeply at odds with the best traditions of British democracy. The political system in this country does not belong to one party, or even to one government. It is a common good that we have all inherited from our forebears and that we all have a responsibility to preserve and to improve.

Government U-turn 4 November and Paterson resignation

On 4 November, Jacob Rees-Mogg told the House of Commons that the government would be reversing its previous position due to the lack of cross-party support for its proposed means of reforming the standards system. He claimed there was support for an appeals process but that the 'individual case' had been conflated 'with the general concern'. The government would 'bring forward more detailed proposals once there have been cross-party discussions.' This meant that the new committee would not be established and Paterson would face suspension.

Following this announcement, Paterson resigned as the Conservative Member of Parliament for North Shropshire.

Emergency debate and further revelations regarding MPs' second jobs

On November 8, an emergency debate was held in the Commons on the motion that 'this House has considered the matter of the consequences of the decision of the House on 3 November relating to Standards.'

Chancellor of the Duchy of Lancaster and Minister for the Cabinet Office, Steve Barclay, expressed his 'regret and that of my ministerial colleagues over the mistake made last week.' The issue of standards among MPs retained salience, as various reports emerged over the following weeks about MPs earning significant amounts from outside work.

Opposition Day debate and government proposals

Labour used its Opposition Day on 17 November to call a debate on strengthening standards in public life. The opposition tabled a motion endorsing CSPL's 2018 recommendation that members should be banned from providing paid services as parliamentary strategists, advisers or consultants.

The government tabled an amendment to the motion which included a further recommendation from the same CSPL report. It proposed that: '[any] outside activity undertaken by a MP, whether remunerated or unremunerated, should be within reasonable limits and should not prevent them from fully carrying out their range of duties.' (Recommendation 1).

The amendment stipulated that the Committee on Standards should consider these proposals and bring forward any further recommendations to update the Code by the end of January 2022. The amendment in the Prime Minister's name was supported by 297 votes to none.

There was some criticism of this move, including from the Chair of the Committee on Standards, Chris Bryant, given that the Committee was already in the process of conducting a major review of the Code of Conduct, which would encompass these matters. He said 'people were trying to bounce [the Committee] in to doing something it was already in the process of'.[44]

Committee on Standards, *Review of the Code of Conduct: proposals for consultation: Fourth Report of Session 2021-22*

The Standards Committee published its report on the parliamentary Code of Conduct, which it had been preparing for over a year, on 23 November 2021. It stated that regardless of the vote on 17 November, 'it is important to consider the whole of the Code and its operation – and any proposals for change – as a whole, rather than piecemeal.' (p. 6.). The report included draft recommendations of changes to the Code, to be consulted on and debate by the House in 2022.

The Committee observed that there are discrepancies between the Ministerial Code and the parliamentary Code of Conduct which are unhelpful. In particular, MPs are at present subject to more stringent and onerous requirements when it comes to registering financial interests than ministers. MPs must register their interests in full within 28 days, whilst ministers' interests are often only released in scant detail after many months. The Committee proposed that the two codes be as closely aligned as possible, and that consideration should be given as to whether ministers' interests should be included in the Register of Members' Financial Interests. Regardless, the timeliness and quality of ministerial transparency releases should be improved across government.

The Committee also proposed that MPs taking on outside work should have to obtain a contract stipulating that their duties cannot include lobbying on behalf of the employer. The Committee agreed with CSPL's recommendation, which was also endorsed in the 17 November Commons vote, that MPs

44 Aubrey Allegretti, 'MPs back Johnson amendment over second jobs', *The Guardian*, 17 November 2021, available at: < https://www.theguardian.com/politics/2021/nov/17/mps-back-johnson-amendment-over-second-jobs >, last accessed 03 February 2022.

should be prevented from providing paid parliamentary advice, consultancy or strategy services.

However, the Committee was less enthusiastic about the proposal that MPs' outside work should be within 'reasonable limits' (as also proposed by the Prime Minister on 17 November). The Committee agreed with the principle that outside work should not impinge upon MPs discharging their parliamentary obligations. Nevertheless, it suggested that this principle would be difficult to define and enforce, and would perhaps involve asking the PSC to make highly subjective judgements about whether an MP is being suitably diligent.

Although the report was primarily concerned with the Code, it also addressed some of the procedural criticisms that had been raised in the course of the Paterson affair. It expressed its view that MPs essentially already have a right of appeal, as disputed findings of the PSC are always reviewed by the Standards Committee, giving the individual the opportunity to convince the Committee that an error has been made. It conceded that there is no means of appealing the Committee's decision regarding sanctions. It drafted four possible options for such a mechanism, all of which it said came with disadvantages. Whilst the Committee stated that it believed the current process was fair and just, given the recent complaints from some quarters it intended 'to request a senior judicial figure to carry out a review of whether the House's current system of investigating and deciding upon breaches of the Code of Conduct for Members of Parliament is compatible with fairness and natural justice' (p. 46.).

Appendix d: The Committee on Standards in Public Life – Standards Matter 2 review

Background

The Committee on Standards in Public Life (CSPL) launched its review of the UK standards landscape in September 2020. Although initially intended to encompass public life as a whole, in the course of receiving evidence CSPL decided to focus primarily on standards in UK central government. This decision reflected the fact that such an exercise had not been undertaken in over 15 years. A number of recent incidents have also raised the profile of the executive standards regime, and prompted questions about whether it is working effectively. CSPL does not comment on or investigate individual cases, but this context of heightened concern underpinned the publication of an interim report in June 2021 which set out findings in relation to areas CSPL 'considered in most urgent need of reform'. These areas were: the Ministerial Code; the Advisory Committee on Business Appointments; the regulation of public appointments; and transparency around lobbying.

CSPL's proposals in these four areas were summarised in our first report. In that report we stated that, '[t]hese 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' (*UKCMG Report 1*, p. 29.). The final *Standards Matter 2* report, published in November 2021, reiterated the position advanced in the interim report, saying that '[t]he balance of evidence submitted to this review indicates to us that the existing standards framework is not functioning as well as it should.' (p. 25.). The report made 34 specific recommendations to government intended to improve the system and thereby 'restore public confidence in the regulation of ethical standards in government.' (p. 4.). The core proposals are summarised below.

Upholding Standards in Public Life: Final report of the Standards Matter 2 review

CSPL did not cite particular instances or individuals, but did mention the 'close scrutiny' and 'significant criticism' given to government integrity over the months preceding the report's publication (p. 4.). One of the headline conclusions of the report was that a system of ethical regulation that depended largely on conventions was no longer sufficient or effective. It recommended the codification of core aspects of the system.

In particular, CSPL proposed that primary legislation be introduced to place the Advisory Committee on Business Appointments, the Independent Adviser on Ministers' Interests and the Public Appointments Commissioner on a statutory footing. These enactments would include the various codes for which these entities are responsible. CSPL did not, however, come out in favour of consolidating the various committees and codes into a single overarching regulator, as has been proposed by some sources.

The revelations surrounding former Prime Minister David Cameron's lobbying on behalf of supply chain finance firm Greensill Capital was one incident that raised serious questions about whether government ethics rules were being adequately adhered to (see: *UKCMG Report 1*, p. 28.). Nigel Boardman's investigation into the matter was published in July 2021. His review criticised the 'patchwork'

approach to ethics across government, and recommended that the system be made more streamlined and consistent, with stronger mechanisms of enforcement. CSPL's report endorsed Boardman's proposal that a proper compliance function should be developed and applied across government.

The Ministerial Code and the Independent Adviser on Ministers' Interests

CSPL's recommendations in June 2021 that the Independent Adviser be given the power to initiative their own investigations, determine breaches and publish their reports were not taken forward by the Prime Minister at the time. These proposals were restated in the final report and supplemented with further recommendations, including that the Ministerial Code should become a document concerned only with the ethical conduct of ministers. According to CSPL, principles and practices relating to the operation of government should be separated out from the Code.

The Committee proposed that the Prime Minister should have a statutory obligation to issue the Code. It was argued that this would give it a more appropriate constitutional status. Additionally, CSPL suggested that the consultation of the Independent Adviser in relation to any revision or reissue of the Code should be formalised. However, the Code would continue to be owned and enforced by the Prime Minister and the text of the Code itself would not be placed in primary legislation. The Code should stipulate the range of sanctions the Prime Minister may issue in response to breaches of the rules: CSPL had already proposed moving away from the idea of removal from office being the sole sanction for violation.

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

CSPL's report made clear that ACOBA should be more than an advisory body with no enforcement power. Rather, it should take on a formal regulatory role, stipulated in primary legislation, with its decisions binding on applicants regardless of ministerial discretion. CSPL stated that the Business Appointment Rules should be legally enforceable for civil servants, special advisers and ministers, with proper sanctions for breaches stipulated by the government. As in the interim report, it was recommended that ACOBA be able to issue a ban on lobbying of up to five years.

The regulation of public appointments

In June, CSPL cited the concerns of the outgoing Commissioner for Public Appointments, Peter Riddell, that independent element of the appointments process was increasingly being undermined. In the final report, it concluded that although the present system has operated well in the past, its effectiveness is highly dependent on the restraint of ministers and the presence of a Commissioner who is willing to be vocal about abuses of the system.

CSPL highlighted that ministers retain the power to appoint individuals even if they have been deemed not suitable for appointment by an assessment panel. It recommended these appointments should not be made, with ministers required to appear before a select committee to justify their decision if they appoint an individual considered inappropriate by the panel.

CSPL also endorsed two of Riddell's proposals. First was that Senior Independent Panel Members, who are required on the panels for 'significant appointments', should have a stipulated duty to report on the

conduct of the competition they are involved in. Second was that the Commissioner should be consulted on the make-up of panels for 'significant appointments', in the light of the recent complaints about a tendency towards panels being loaded with political allies.

Certain 'unregulated appointments' such as departmental Non-Executive Directors (NEDs) have lately been the source of controversy. CSPL recommended that given the 'role and significance' of NEDs, their appointments should be regulated. Furthermore, the report concluded that there is a general lack of transparency around unregulated appointments, such as policy 'tsars' or envoys. It was recommended that departments publish a full list of both regulated and unregulated appointments.

The appointments process for standards regulators

The report also outlined specific proposals for the regulation of the chairs of standards regulators. It is the role of these bodies to scrutinise the government and regulate its conduct. It concluded, therefore, that independence is especially key in the selection of these individuals. Recommendation 22 (p. 15.) stated that:

> *The chairs of ACOBA and HOLAC, the Registrar of Consultant Lobbyists, the Commissioner for Public Appointments and the Independent Adviser on Ministers' Interests should all be appointed through the process for significant public appointments, and the assessment panel for each should have a majority of independent members.*

Transparency around lobbying

CSPL found that 'the current system of transparency around lobbying is not fit for purpose.' (p. 11.). Transparency releases are often late, hard to navigate, the information provided opaque, and the data spread across government in a way that is difficult to cross-reference.

It proposed that the Cabinet Office take responsibility for collecting and centrally publishing all transparency releases in a database format that is easy to search and understand. This should be done monthly rather than quarterly, and to a greater degree of detail. The Committee also recommended expanding on who should be covered and what they should be declaring. Senior civil servants below Permanent Secretary level should be encompassed, as should special advisers. Finally, lobbying that takes place through 'alternative means of communication' such as WhatsApp and Zoom should be included.

Appendix e: Boardman review into the development and use of supply chain finance (and associated schemes) in government

Background

Nigel Boardman was tasked with investigating the use of supply chain finance in government following revelations during March and April 2021 regarding former Prime Minister David Cameron's lobbying on behalf of Greensill Capital, and other connections between the failed supply chain finance firm and central government.

His review was published in two parts in August 2021. The first part was concerned with the facts around the development and use of supply chain finance in government. The second, however, looked more broadly at standards in central government. Boardman set out 19 recommendations covering areas such as conflicts of interest, appointments, hiring, transparency and lobbying. These recommendations were made with the government's Declaration on Government Reform in mind – Boardman quoted the statement from the Declaration 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.' (p. 2.).

As mentioned above, CSPL explicitly endorsed some of Boardman's recommendations. On several other issues – such as improving transparency, tightening the rules around lobbying and codifying certain rules – the two reports were singing from the same hymn sheet, despite their different focuses. What follows is a summary of Boardman's 19 recommendations.

Recommendations

Recommendation 1: Government should establish an effective method for ensuring compliance with governance processes and the wider regulatory framework.

Recommendation 2: Pre-appointment rules should be introduced which prevent civil servants dealing with or promoting their former employer after joining the Civil Service.

Recommendation 3: Improvements should be made to the management and monitoring of conflicts of interest in the Civil Service.

Recommendation 4: Whistleblowing processes in the Civil Service should be strengthened.

Recommendation 5: There should be clearer, more transparent processes around direct ministerial appointments (remunerated or unremunerated) set out in a Code of Practice.

Recommendation 6: The oversight of the honours process within departments should be strengthened.

Recommendation 7: Supply chain finance should only be used in government in exceptional circumstances.

Recommendation 8: Employee Salary Advance Schemes should only be used by government in exceptional circumstances and when no other option is available.

Recommendation 9: Government should regularly review the experience of external hires into the Civil Service to ensure impediments to effective recruitment are eliminated.

Recommendation 10: The application process for secondary employment civil servants should be more transparent and clearly regulated.

Recommendation 11: Government should make post-employment restrictions on civil servants and ministers legally binding.

Recommendation 12: Government should coordinate with ACOBA to produce a memorandum of understanding setting out clearly how they can work more effectively together.

Recommendation 13: Government should strengthen transparency reporting by:

- requiring more frequent transparency returns;
- defining more clearly what should be in transparency returns, so that there is a sufficient explanation of the purpose of a meeting and who was present;
- designating a senior responsible departmental official with proper training to supervise transparency returns; and
- requiring Accounting Officers to explain to Select Committees any failure to publish transparency returns on time.

Recommendation 14: Government should extend the definition of a meeting so that it includes non-public interactive dialogue (for example, telephone calls and messaging), which if it were face-to-face would constitute a meeting and be required in a transparency return.

Recommendation 15: Principles should be published defining when interactive communication should be considered official business and therefore disclosed.

Recommendation 16: The requirement to register as a consultant lobbyist should be extended to include further categories, such as former civil servants and ministers who engage in lobbying.

Recommendation 17: The rules on lobbying transparency should be strengthened by:

- requiring lobbyists to disclose who is ultimately paying for or benefiting from their lobbying;
- requiring that quarterly returns detail the number of incidents of lobbying and the subject of said lobbying in sufficient depth that it can be understood by a third party;
- requiring that registered lobbyists adhere to a statutory Code of Conduct, which sets out

minimum standards; and

- considering whether there should be more meaningful penalties for non-compliance, including a criminal offence for knowingly deceiving in the process of lobbying.

Recommendation 18: Government should impose a contractual prohibition on contractors referring to government contracts in marketing material without government consent.

Recommendation 19: A requirement should be introduced for those tendering for public contracts to disclose any former minister or civil servant employed by them and explain the steps they have taken to ensure they have not benefited from an unfair advantage in the procurement process.

The Boardman review also made several suggestions beyond the core 19 recommendations. These included:

- establishing a regular cycle of compliance reviews;
- placing the Code of Conduct for Board Members of Public Bodies and the Corporate Governance Code for central government departments on a statutory basis;
- extending transparency requirements to Special Advisers and more civil servants;
- consulting on whether think tanks, research institutes and lobbying academics should have to disclose their sources of funding and whether there are circumstances in which they should be registered as consultant lobbyists; and
- introducing legislation to regulate lobbying by foreign countries.

Appendix f: 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-June 2021)

Legislation, bills and draft bills

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. The Withdrawal Agreement also included a Protocol on Ireland/Northern Ireland, the implementation of which remains a source of considerable uncertainty and controversy.

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.

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 through requiring companies to tackle illegal and harmful con-

tent on their platforms. It would establish several new duties for companies in scope, who will need to demonstrate, amongst other things, that they are enforcing their terms and conditions. The Bill seeks to balance their care duties with a responsibility to uphold freedom of expression, with specific protections for journalistic content and content deemed 'democratically important'. The Joint Committee on the Draft Online Safety Bill, which has been scrutinising the draft bill, published its findings in December 2021. It recommended several significant changes to the regulatory approach, including restructuring the Bill.

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 *Judicial Review and Courts Bill* was then introduced in July 2021.

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 legislation 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. The Cabinet Secretary, Simon Case, reiterated the aims of the Declaration in a speech at Newcastle University in October 2021.

Report period (June 2021-December 2021)

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. 18 additional pages of legislation, including further controversial measures relating to the right to protest, were added to the bill in November 2021. The bill had already been approved by the House of Commons and had its Second Reading in the House of Lords, limiting the scope for these measures to be scrutinised by Parliament.

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 measures regarding the oversight of the Electoral Commission, postal and proxy voting, campaign finance, intimidation and undue influence, digital political advertising, overseas electors, and EU voting and candidacy rights.

Nationality and Borders Bill (introduced 6 July 2021)

- The Bill's three main stated objectives are to: make the immigration system fairer and more effective; deter illegal entry into the UK; and remove individuals from the UK who do not have a right to be in the country. The primary source of controversy in the Bill is clause 9, which was added in Committee. Clause 9 expands on the power of the Home Secretary to deprive individuals of their British citizenship, as set out in the *British Nationality Act 1981*. It would amend the requirement that the Secretary of State give written notice of deprivation, setting out expansive circumstances in which the Secretary of State would be able to issue a deprivation order without any notice.

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 would enable the courts to issue suspended quashing orders and limit their retrospective effect. Furthermore, the Bill will reverse the Supreme Court's *Cart* decision and exclude the High Court's supervisory jurisdiction over the Upper Tribunal through an ouster clause. Whilst the Bill does not contain wider restrictions on judicial review, as some had anticipated, the government implied it was minded to replicate the form of the *Cart* ouster clause in other instances.

Other initiatives

Independent Human Rights Act Review (IHRAR) (published 14 December 2021)

- IHRAR was established 'to examine the framework of the [*Human Rights Act 1998*], how it is operating in practice and whether any change is required.' Its terms of reference required it to look in particular 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.' Following its inquiry, IHRAR recommended several relatively minor changes to the Human Rights Act, including amending section 2 and section 3 to clarify the order of consideration and interpretation.

Government proposals for 'A Modern Bill of Rights' (announced 14 December 2021)

- At the same time as the publication of the IHRAR report, the government announced its intention to replace the Human Rights Act with a 'Modern Bill of Rights', setting out a number of potential reforms to the UK human rights system. A consultation on the measures, running until March 2022, was launched. The government proposed: amending section 2 and section 3; introducing a permission stage; limiting the scope for deportations to be prevented on human rights grounds; and placing greater emphasis on personal responsibility, the UK Supreme Court and 'quintessentially UK rights'.

Post-report period

Review of intergovernmental relations (published 13 January 2022)

- A joint review of the mechanisms to support engagement between the UK government, Scottish government, Welsh government and Northern Ireland executive was commissioned in 2018. An update on the progress of the review was published in March 2021, but many of the proposals were yet to be agreed at this stage. The conclusions of the review were published on 13 January 2022, setting out new processes and ways of working to enable the administrations to engage with each other more effectively. A new council of the Prime Minister and the heads of the devolved governments to oversee intergovernmental relations in the UK was agreed. It will meet at least once a year and be supported by an independent secretariat.

Levelling Up White Paper (02 February 2022)

- The government set out twelve national levelling up 'missions' to be achieved by 2030 in its long-awaited white paper on the flagship policy. The policy objectives covered in the document encompass a broad range of areas, including employment, research and development, transport, internet coverage, education, skills, health and crime. It would also see devolution extended across England through the expansion of county deals and mayoral combined authorities. The government stated that '[b]y 2030, every part of England that wishes to have a 'London-style' devolution deal will have one.'

Appendix g: *Elections Bill*

Background

The government's *Elections Bill* was introduced to the House of Commons on 5 July 2021. It passed Second Reading on 7 September 2021 and was considered by the Public Bill Committee between 15 September to 27 October. The government's press release stated that the aim of the Bill is to 'protect our democracy, and ensure that it remains secure, modern, transparent and fair.' It followed several election-related commitments in the 2019 Conservative manifesto, including on voter identification, postal voting and overseas electors.

The Bill was introduced without first being published in draft, with only limited opportunity for wider public input; and without being preceded by an independent review or engagement with other parties. This absence of prior consultation was one of the several objections raised by the Public Administration and Constitutional Affairs Committee (PACAC) in a critical report on the Bill published on 7 December 2021. Several of the measures in the Bill have drawn wider criticism from civil society; in particular, the introduction of voter identification and the changes to the oversight of the Electoral Commission.

Furthermore, in September, whilst the Bill was being considered by the Public Bill Committee, the government moved to amend the legislation to change the voting system for all local mayoral and Police and Crime Commissioner (PCC) elections from the Supplementary Vote system to First Past the Post. Aside from its substantive content, this late addition also drew procedural criticism, as it meant the changes would not be properly debated during the Bill's Second Reading.

The announcement of this change came on the same day as the government reshuffle which saw the minister responsible for the Elections Bill, Chloe Smith, moved from their position, midway through its passage. For a period it was unclear who would be taking up this responsibility. It was eventually clarified that Kemi Badenoch, Minister for Levelling Up Communities in the newly renamed Department for Levelling Up, Housing and Communities, would take over the handling of the Bill in the Commons.

It is additionally worth noting that aspects of the Bill require the consent of the devolved legislatures under the Sewel convention, and that the Welsh and Scottish governments are recommending that consent be withheld.

Voter identification

The *Elections Bill* would introduce a requirement that individuals show an approved form of photographic identification when collecting their ballot papers at polling stations. Representing the extension of an equivalent system already in place in Northern Ireland since 2003, it would apply to UK parliamentary elections in Great Britain, local elections in England and PCC elections in England and Wales. The Bill details the types of photographic identification that would be acceptable, as well as plans for a new local Voter Card, available on request from local authorities.

This measure has been the most controversial and commented upon aspect of the Bill. In support of the introduction of voter ID, the government points to the Electoral Commission's finding that confidence in

elections is consistently higher in Northern Ireland than the rest of the UK. The government has argued that the introduction of voter ID will guard against the crime of personation, where an individual fraudulently casts another person's vote. It holds that the risk of this crime is a problem in itself, compounded by the perception of its occurrence, that serves to undermine public trust in the democratic process. Finally, the government has pointed out that showing identification is a commonplace requirement for a range of activities less important than elections.

This prospective change has been challenged on a number of fronts. The two most common objections have been that: (1) it is a far-reaching solution to a minimal problem and (2) it will make voting harder, discouraging in particular those within sections of the population who are already the least likely to vote.

In its briefing on the Bill, the House of Commons Library reported that '[in] 2019, 33 cases of polling station irregularities were reported (either personation, voting more than once or voting while disqualified from voting). This led to one conviction and one caution for personation.'[45] Those who oppose the measure have argued that it is a disproportionate response given the rarity of personation offences.

The government conducted pilots at local elections in five local authority areas in 2018, and in ten local authorities in 2019. The Cabinet Office interpreted the pilots as a success. However, in 2019, 700 individuals did not come back to vote having been turned away for not having the correct identification. Assessments by the Electoral Commission and the Local Government Information Unit were more equivocal about the results. The Electoral Commission concluded the pilots were well run, but that it was difficult to draw any definitive judgements regarding the potential wider impact of voter ID. The Local Government Information Unit said that the Cabinet Office evaluation was 'an optimistic interpretation of extremely limit evidence'.[46]

The House of Commons Library briefing calculated that on the basis of the evidence from the pilots between 46,000 and 324,000 individuals might be turned away from polling stations and not return to vote.[47]

Human rights organisations such as Liberty, as well as the Labour Party, the Liberal Democrats, the Scottish National Party and several high-profile Conservative politicians have opposed the measure. Our first report stated that '[i]t 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.'[48]

Postal and proxy voting

Less controversially, the Bill would also see new restrictions on postal and proxy voting introduced. It stipulates that those using a postal vote long-term will have to reapply every three years. The legislation also seeks to prohibit political campaigners from handling postal votes and to establish a limit on how

45 Neil Johnston and Elise Uberoi, *Elections Bill 2021-22* (House of Commons Library, London, 2021), p.13.
46 *Ibid.,* p. 14.
47 *Ibid.,* p. 31.
48 UK Constitution Monitoring Group, *The Constitution in Review: Report 1* (Constitution Society, London, 2021), p. 24.

many postal votes an individual can hand in at polling stations on behalf of others. Furthermore, the Bill stops one person acting as a proxy for more than four people.

The Electoral Commission

The Bill makes changes to the oversight of the Electoral Commission, the stated aim of which is to improve its parliamentary accountability.

The legislation provides for the introduction of a 'Strategy and Policy Statement' which the Electoral Commission 'must have regard to in the discharge of their functions.' The Speaker's Committee, to which the Commission is accountable, will have an enlarged role in ensuring compliance with the statement. The Bill also changes the composition of the Speaker's Committee to allow for the junior minister with responsibility for the constitution to be a member. Finally, the Bill removes the Electoral Commission's power to bring criminal prosecutions in England and Wales.

Aside from the introduction of voter ID, these measures have proved the next most controversial aspect of the Bill. It has been argued that the changes would see the Electoral Commission's independence undermined. The Strategy and Policy Statement will be drafted by government, subject to approval by Parliament via the 'affirmative' procedure. In September 2021, the government produced an illustrative statement which included the requirement that the 'Commission in their work must have regard to the government's delivery of legitimate executive priorities in relation to elections during this Parliament'. This proposed form of oversight has prompted concerns that the new measures would impinge on the Commission's independence, giving the government of the day greater control over the activities of the body charged with regulating the UK's elections.

Whilst the Commission had been seeking to expand its prosecutions role, the Bill explicitly takes away this capability.

Overseas electors

At present, those who have lived outside the UK for more than 15 years lose their right to vote in UK parliamentary elections. As promised in the 2019 Conservative manifesto, the Bill provides for the removal of the 15-year limit. When the Bill becomes law, anyone who has previously had the right to vote in parliamentary elections will remain able to do so for life.

EU voting and candidacy rights

Whilst the UK was part of the EU, EU citizens had the right to vote in local elections in the UK. The Bill sets out to change this arrangement. EU citizens would only be able to vote in local elections if the UK has a reciprocal agreement on voting rights with their home country. At present, the UK has agreements of this nature with Spain, Portugal, Luxembourg and Poland.

However, local election policy is devolved to Scotland and Wales and both countries have already legislated to enable any foreign citizen legally resident to vote in local elections.

Political finance

The Bill introduces five new campaign finance measures.

- A new tier of registration with the Electoral Commission for third-party campaigns that spend above £10,000 across the UK. Campaigns that fall into this category will have to meet certain transparency requirements and be based in the UK.
- A restriction on third party campaigning to UK-based entities.
- A ban on registering as both a political party and a third-party campaign.
- A restriction on coordinated spending between political parties and third-party campaigns.
- A requirement for new political parties to declare their assets and liabilities to the Electoral Commission when registering if they have assets over £500.

The government has stated that these measures are intended to improve transparency and guard against foreign finance influencing UK elections.

Digital imprints

Under the *Political Parties, Elections and Referendums Act 2000*, campaign material must include an imprint stating clearly who is promoting it. Various experts and bodies have recommended over a number years that this requirement be extended to digital material. The Bill introduces such a requirement, a move which has been broadly welcomed. All paid for digital political material will need an imprint stating who the campaigner is and on whose behalf they are promoting the material in question. Some campaigners will also need to include an imprint on organic, non-paid-for content.

Intimidation and undue influence

The *Elections Bill* creates a new sanction for those convicted of intimidation towards campaigners and office-holders: a five-year ban on standing for public office.

The Bill also clarifies and updates the offence of undue influence**.**

Change of electoral system for mayoral and Police and Crime Commissioner elections

As mentioned above, the Bill was amended to include this change whilst it was in committee. Because the amendments were not within the scope of the Bill as initially drafted, the government had to table a motion of instruction to allow the Public Bill Committee to consider these additional proposals.

On 16 March 2021, the Home Secretary issued a statement saying that the government intended to change the system for the election of Combined Authority Mayors, the Mayor of London and PCCs to First Past the Post (FPTP) from the Supplementary Vote (SV) system. However, it was only on 15 September 2021 that Chloe Smith announced that this change (which was expanded to include all local authority mayors) would be taken forward in the Elections Bill.

The 2019 Conservative manifesto included the statement that '[we] will continue to support the First Past the Post system of voting, as it allows voters to kick out politicians who don't deliver'.[49] The government gave several further arguments in support of the change in its press release on 15 September 2021.

- SV leads to more void, wasted and blank votes, reflecting voter confusion.
- SV leads to 'loser' candidates winning through second preference votes.
- FPTP is the world's most widely used electoral system.
- FPTP will strengthen accountability, making it easier for voter to express a clear preference.
- SV is an anomaly, which is out of step with the system(s) used for other elections in England.

Aside from the criticism that this addition to the Bill was added too late to be given adequate scrutiny, objections to the substance of each of these arguments have also been raised.[50]

Public Administration and Constitutional Affairs Committee, *The Elections Bill* report

The Public Administration and Constitutional Affairs Committee (PACAC) published a highly critical report on the *Elections Bill* in December 2021. The committee recommended that the passage of the Bill be paused while the various deficiencies they identified were addressed.

In line with many election specialists, the committee argued that the *Elections Bill* represents a missed opportunity in not addressing 'the widely recognised need for consolidating a voluminous and fragmented body of election law.' (p. 3.). It added that the piecemeal measures in the Bill would only add to overall complexity. In response to the diffuse quality of law in this area, the Law Commissions had published in March 2020 a joint report recommending that UK elections law should be rationalised into a single legislative framework.[51] The committee agreed that parliamentary time for this kind of overarching legislative exercise is scarce – 'which makes it all the more regrettable that the government has not shown the requisite ambition to undertake this necessary reform.' (p. 3.).

The committee recommended that a requirement for post-legislative scrutiny should be included on the face of the Bill given the lack of public consultation that preceded its introduction. The committee also raised concerns about the 'raft' of delegated legislation enabled by the Bill, which it argued would further add to the complexity of electoral law. Furthermore, the committee expressed its desire to see all secondary legislation laid before the House in draft so that it can be properly considered.

49 Conservative Party, *Get Brexit Done: Unleash Britain's Potential, The Conservative and Unionist Party Manifesto 2019* (Conservative party, London, 2019), p. 48.
50 See: Alan Renwick and Alejandro Castillo-Powell, 'Reforming the mayoral voting system: do ministers' arguments stack up?', *Constitution Unit,* 29 October 2021, available at: <Reforming the mayoral voting system: do ministers' arguments stack up? | The Constitution Unit Blog (constitution-unit.com) >, last accessed 17 December 2021.
51 Law Commission of England and Wales and Scottish Law Commission, *Electoral Law: A joint final report,* (House of Commons, London, 2020).

The committee's strongest reservations were to the introduction of the voter ID requirement. It said '[we] are concerned that the evidence to support the voter ID requirement simply is not good enough. It is likely that it will reduce turnout for future elections given the comparable evidence following the introduction of such measures in Northern Ireland.' (p.4.).

The committee was supportive of the new measures on postal and proxy voting, the removal of the 15-year limit on overseas voting and the expansion of polling station support for disabled electors.

However, it was critical of the changes to the Electoral Commission, stating that insufficient evidence had been provided to 'justify why the proposed measures are both necessary and proportionate.' (pp. 4-5.). It recommended that, at a minimum, additional safeguards should be included to protect the Commission's independence. These measures should include: a specification that the Commission can depart from the Strategy and Policy Statement when fulfilling a statutory duty or if it is justified in a particular circumstance; the use of the 'super-affirmative' procedure to approve the statement; and increased transparency regarding the Speaker's Committee assessment of compliance with the statement.

In principle, PACAC supported the new campaign finance measures, but expressed concern that the government did not wait to take account of the Committee on Standards in Public Life's (CSPL) substantial recommendations on the subject, published shortly after the Bill was introduced in July 2021.[52]

52 Committee on Standards in Public Life, *Regulating Election Finance* (London, 2021).

Appendix h: Motion of censure against Prime Minister

Moved by Ian Blackford MP (Scottish National Party) debated in the House of Commons on 30 November 2021:

'That this House censures the Prime Minister, the Right Honourable Member for Uxbridge and South Ruislip, for frequently violating the sixth Principle of Public Life, for seeking to undermine the recommendations of the Standards Committee on Owen Paterson, for regularly ignoring independent advice on matters such as international treaties and breaches of the Ministerial Code by his ministers, for putting forward proposals to diminish the powers of the Electoral Commission, for ignoring independent advice concerning the granting of peerages to Conservative party donors and nominations to public bodies such as Ofcom; and further calls for his ministerial salary to be reduced by £41,567 per year.'[53]

53 'Conduct of the Right Honourable Member for Uxbridge and South Uxbridge', House of Commons Debates, 30 November 2021.

Appendix i: Reports of the Secondary Legislation Scrutiny Committee and Delegated Powers and Regulatory Reform Committee

Background

On 24 November 2021, two committees of the House of Lords, the Secondary Legislation Scrutiny Committee (SLSC) and the Delegated Powers and Regulatory Reform Committee (DPRRC), published *Government by Diktat: A call to return power to Parliament* and *Democracy Denied? The urgent need to rebalance power between Parliament and the Executive*, respectively. They took the rare step of collaborating to indicate the high levels of concern felt by both committees, as suggested by the striking titles of the reports.

The purpose of the reports was to highlight what they depicted as a worrying constitutional development: that the UK executive has been accruing power at the expense of the UK Parliament; an ongoing trend, but one which has been exacerbated by Brexit and the coronavirus pandemic. The DPRRC issued the following warning:

> *This report is about the relationship between Parliament and the executive. Its purpose is to alert members of both Houses, and the wider public, to a potentially serious threat to a cornerstone of our constitution — effective parliamentary scrutiny of legislation. Based upon Committee reports since its inception in 1992 and covering pre- and post-Brexit and the COVID-19 pandemic, we highlight a disturbing trend in the way in which bills are framed with the effect that they often limit or even avoid appropriate legislative scrutiny. We have concluded that it is now a matter of urgency that Parliament should take stock and consider how the balance of power can be re-set.* (p. 3.).

This balance of power between Parliament and the government is established, in part, through the balance between primary and secondary legislation, the committees argued. This balance, they held, has been tilted in favour of the government through the use of bills that provide only the most basic indication of their purpose and content, leaving the principal aspects of the legislation, as well as the detail, to be worked out by ministers through secondary legislation. These measures are referred to as 'skeleton' bills.

The committees agreed that this increasing reliance on secondary legislation is problematic because it is not subject to the same levels of scrutiny as primary legislation. In particular, it cannot be amended, it sometimes becomes law without any debate, there is no legislative dialogue between the two Houses ('ping pong'), and the all-or-nothing nature of accepting or rejecting it means there is a presumption in favour of acceptance. The effect of this perceived excessive use of delegated legislation, they found, is to drastically diminish Parliament's role in scrutinising the government and holding it to account.

The committees drew attention to a number of devices that accord broad powers to ministers that are not adequately scrutinised. These include:

- 'Henry VIII' powers, which give ministers the ability to amend or repeal Acts of Parliament through regulations;

- legislative sub-delegation of power (sometimes referred to as 'tertiary' legislation), where ministers can confer further law-making powers on themselves or other bodies through delegated legislation; and

- 'disguised' legislation, where ministers exercise legislative powers through devices that do not appear clearly legislative.

The DPRRC set out clearly why parliamentary scrutiny is of fundamental importance: '[t]he way our laws are made can have a profound effect upon the lives of millions of citizens — granting rights, imposing obligations, involving enforcement measures possibly including criminal sanctions and imprisonment.' (pp. 4-5.). It concluded that the government of the day is 'impatient of parliamentary legislative constraints… But Parliament rightly demands patience in fulfilling its most important role – the making of our laws.' (p. 5.).

The committees made a number of recommendations, outlined below, intended to 're-set' the relationship they diagnosed as having gone awry.

Delegated Powers and Regulatory Reform Committee, *Democracy Denied? The urgent need to rebalance power between Parliament and the Executive*

The DPRRC report gave an account of the concerns about delegated legislation over the years. Broad delegated powers have long been identified as problematic from a democratic perspective. Critiques of skeleton legislation and Henry VIII powers, it noted, remain as salient today as when they were first made during the twentieth century. However, Brexit and the pandemic have exacerbated the issue, and new challenges to parliamentary scrutiny have emerged. The need for change is now urgent, the committee argued.

Skeleton legislation

The DPRRC recommended that skeleton legislation and legislation containing skeleton clauses should be identified as such. The delegated powers memorandum accompanying the legislation should contain a full justification as to why the government believes it to be necessary in that particular instance.

The DPRRC also proposed a new procedure: a 'scrutiny reserve'. This would mean that where the committee feels there has been an insufficient justification for wide delegated powers in a bill, or where it believes a bill contains skeleton provisions that have not been identified as such, it can call a minister to appear before the committee to provide further justification. The Committee would then deliver a report to the House on the matter before second reading.

Henry VIII powers

The Committee agreed that in certain circumstances Henry VIII powers are necessary. However, they should never be included in a bill 'just in case'. It recommended that when powers of this nature are

included in a bill they should again be fully justified and have their scope constrained on the face of the bill. When it comes to parliamentary scrutiny of the exercise of these powers, the more robust 'affirmative' scrutiny procedure should always be required.

Disguised legislation

The DPRRC drew attention to the issuing of guidance that is mandatory, issued especially during the coronavirus pandemic, as an example of what it referred to as a 'disguised' legislative instrument. The Committee expressed concern that mandatory guidance is used as a means of evading the proper regulatory process. It said that '[t]he very concept is a contradiction in terms and a power to make mandatory guidance will never be appropriate. Requirements which have legislative effect should always be expressed in legislative language, either in primary or secondary legislation, and subject to parliamentary oversight.' (p. 34.).

The Committee noted other devices being used by government to in effect evade parliamentary scrutiny, including 'determinations', 'directions', 'arrangements', and 'public notices'; all of which, in the instances noted, have essentially been used to create law but without the appropriate parliamentary procedures that should accompany this.

It called this 'an unacceptable ploy' that is confusing for both the public and Parliament and which does not promote good law principles of clarity and accessibility.

Legislative sub-delegation of power

The DPRRC similarly recommended that the inclusion of tertiary legislative powers (where ministers can use secondary legislation to further delegate law-making) should always be fully justified, and that there should be constraints on the use of such powers stipulated in the enabling act along with the level of scrutiny that should be applied. The Committee also suggested that a statutory consultation duty should be considered for such powers.

Culture change within Whitehall

The committees jointly took evidence from three Permanent Secretaries and the Lord President of the Council and Leader of the House of Commons, Jacob Rees-Mogg MP. The DPRRC drew the conclusion from this evidence that departmental bill teams are encouraged to make decisions on whether to include delegated legislation on a practical and political basis. Both committees made clear that these decisions should be made primarily with constitutional principle in mind rather than on the basis of expediency. They recommended that when considering the appropriate extent of delegated legislation in a bill, departments should have in mind the principles of parliamentary democracy: parliamentary sovereignty, the rule of law, and government accountability to Parliament.

The DPRRC report observed that the Cabinet Office Guide to Making Legislation – referred to as the 'bible' of bill drafting – contains no reference to these fundamental principles. It recommended that a statement of the core constitutional principles which should underpin decisions about whether delegated powers are appropriate be included in the Guide.

The DPRRC's guidance to departments on these matters is referenced in the Guide. But the committee proposed that this guidance, which is updated in the report, be set out in full in the Guide.

Secondary Legislation Scrutiny Committee, *Government by Diktat: A call to return power to Parliament*

The SLSC report endorsed many of the recommendations made by the DLRRC outlined above. It also set out some additional proposals. The committee stated its concern that the increasing reliance on skeleton bills and secondary legislation was the 'result of a general strategic shift by the government', rather than the exceptional nature of the circumstances, as they were reassured by the Permanent Secretaries. (p. 12.).

The SLSC supported the DPRRC recommendation that skeleton bills should be identified as such and that the DPRRC be provided with a 'scrutiny reserve' (see above). However, it added that when a bill or clauses in a bill are identified as skeletal the democratic deficit inherent in this provision should be compensated for by more challenging scrutiny procedures at the secondary legislation stage. This could take the form of the 'super-affirmative' procedure or some other enhanced scrutiny process. The *Statutory Instruments Act 1946* could be amended to include a requirement for enhanced scrutiny for skeleton provisions. It did not detail exactly how to classify skeleton bills and what the scrutiny requirements should be in these instances, but stated that these were questions that should be addressed through consultation between the committees, Parliament and government.

The SLSC raised further points regarding: improving the quality of impact assessments; using sunset provisions in secondary legislation more frequently; and avoiding the abnormal use of the 'made affirmative' procedure, which, on occasion, has been used so that instruments come into effect before being laid before Parliament.

Appendix j: Protocol on Ireland/Northern Ireland

Background

The Protocol on Ireland/Northern Ireland forms an annex to the Withdrawal Agreement 2020 with the European Union (EU) providing for the United Kingdom's (UK) exit from the EU. It establishes special post-Brexit arrangements for Northern Ireland intended to protect the 1998 Belfast/Good Friday Agreement and ensure there is no friction at the border between Northern Ireland and the Republic of Ireland. It allows for Northern Ireland to be *de jure* in the UK internal market but *de facto* part of the EU customs union. On this basis, checks are carried out on goods moving from Great Britain to Northern Ireland creating new barriers to trade, and what has become referred to as the 'Irish Sea Border'. The purpose of this arrangement is to remove the need for such checks to take place at the border between Northern Ireland and the Republic of Ireland. Northern Ireland continues to align with EU rules on product standards to prevent the need for any North-South checks.

The Protocol has been a continual source of controversy and division at UK and devolved level since it came into effect in January 2021. Opposition is particularly pronounced among unionist/loyalist communities, who argue that it creates an unacceptable barrier between Great Britain and Northern Ireland. In remaining aligned with the EU in many areas, it is said that the Protocol draws Northern Ireland closer to the Republic of Ireland at the expense of attachments to Great Britain. There have been a series of changes in the leadership of the two main Unionist parties in Northern Ireland underpinned by internal contestation over the issue.

Legal challenges have also been brought. As we noted in our last report, '[i]n rejecting a challenge to the Protocol on 30 June [2021], 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*. This judgment confirmed that a major change had taken place in the UK constitution, to which there were significant objections.' (*UKCMG Report 1*, p. 34.). The case is now under appeal.

The Protocol on Ireland/Northern Ireland

The Protocol on Ireland/Northern Ireland includes a declaration that the 1998 Belfast/Good Friday Agreement 'should be protected in all its parts' (p. 1.). It also stipulates that the Protocol should 'impact as little as possible on the everyday life of communities in Ireland and Northern Ireland' and that there should be 'no customs and regulatory checks or controls and related physical infrastructure at the border between Ireland and Northern Ireland' (p. 2.). It consists of 19 Articles.

Article 1 sets out the objectives of the Protocol as referred to above.

Article 2 guarantees that there will be no diminution of individual rights as a result of the UK's departure from the EU.

Article 3 maintains the Common Travel Area between the UK and Ireland.

Article 4 states that Northern Ireland is in the UK's customs territory.

Article 5 establishes that customs duties are liable to be collected on goods moving from Great Britain to Northern Ireland, when there is a risk of the good subsequently being transported into the EU. Goods are assumed to be at risk of moving into the EU unless it can be shown that they will not be subject to commercial processing in Northern Ireland.

Article 6 relates to ensuring unfettered market access for Northern Ireland to the UK's internal market.

Article 7 sets out what technical regulations apply to goods in Northern Ireland. Whether a good can placed on the market in Northern Ireland is governed by UK law, as well as EU law in respect of goods imported from the EU.

Article 8 stipulates that EU VAT and excise duties (as set out in Annex 3 to the Protocol) apply to goods in Northern Ireland, and that it is the responsibility of the UK to implement these provisions.

Article 9 states that certain provisions of EU law relating to the single electricity market apply to Northern Ireland.

Article 10 establishes that EU state aid law (as set out in Annex 5) applies to the UK in as far as UK measures affect trade between Northern Ireland and the EU.

Article 11 stipulates that the Protocol 'shall be implemented and applied so as to maintain the necessary conditions for continued North-South cooperation' on the island of Ireland.

Article 12 establishes the UK's duty in implementing the provisions of EU law set out above that continue to apply to Northern Ireland. The EU has the right to oversee and access information relevant to implementation activities. Article 12 also provides for the jurisdiction of Court of Justice of the European Union in adjudicating on the areas of EU law that apply and for the UK's application of said areas.

Article 13 outlines the process for the application of new EU law in areas relevant to the provisions of the Protocol. If EU Acts mentioned in the Protocol are amended or replaced, they should be automatically read as such. If the EU intends to adopt a new Act that relates to the Protocol, the UK should be informed through the Joint Committee, in which an 'exchange of views on the implications' can be had. The Joint Committee must then make a decision on whether to add the new Act as an Annex to the Protocol.

Article 13 also allows for the Protocol to be superseded, in part or in whole, by a subsequent agreement between the UK and the EU.

Article 14 refers to the role of the Specialised Committee, as established by Article 165 of the Withdrawal Agreement, which has responsibility for facilitating the implementation of the Protocol.

Article 15 establishes a joint working group to exchange information and consult on the implementation of the Protocol.

Article 16 allows either the EU or the UK to take safeguarding action if the Protocol is causing 'serious economic, societal or environmental difficulties that are liable to persist, or to diversion of trade'. The

Article stipulates that these measures must be related to the identified issues with the application of the Protocol and involve only what is necessary to address the situation.

Furthermore, either the UK or the EU is permitted to take 'proportionate rebalancing measures as are strictly necessary to remedy' any imbalance that might be caused by the use of said safeguard measures by the other party.

Article 17 relates to joint efforts to counter fraud.

Article 18 establishes that democratic consent must be sought from Northern Ireland to the continued application of Articles 5 to 10. This must be sought 4 years after the end of the transition period. If consent is given by a majority of Members of the Northern Ireland Assembly, then no further consent needs to be sought for another 4 years. But if consent is given on a cross-community basis, then the process does not need to be repeated for another 8 years. If consent is withdrawn then the relevant Articles cease to apply 2 years after the decision.

Article 19 states that the 7 Annexes to the Protocol form an integral part of it.

***Northern Ireland Protocol: the way forward* UK government command paper**

On 21 July, the UK government published a command paper outlining what it saw as the major issues with the Protocol. The command paper asked the EU to reopen negotiations and set out a number of ways in which the UK would like to see the Protocol changed. This followed tensions at UK-EU level after the EU came close to triggering Article 16 in January 2021 in relation to its vaccine supply issues and the UK three times extended the grace periods (twice unilaterally) applying to the movement of certain goods from Great Britain to Northern Ireland.

In the command paper, the UK government accused the EU of being 'rigid' and 'inflexible' in its application of the Protocol. It concluded that the present circumstances would justify safeguarding measures under Article 16 (see above). It justified this in relation to the perception that the Protocol is a cause of separation between Northern Ireland and the rest of the UK; that it is a cause of ill-will between the UK and the EU; and that it is having adverse political, social and economic impacts.

Nevertheless, the UK said it would prefer to engage with the EU to agree 'a new balance in how the Protocol operates' (p. 3.). The command paper put forward the UK's proposals for what this 'new balance' would look like.

The government argued that at present many goods moving from Great Britain to Northern Ireland are subject to extensive processes, despite there being little risk of them moving into the EU. The command paper proposed that these processes only be applied to those goods which are bound for the EU.

The UK government noted disruption it held was caused by the operation of the Protocol. It claimed that 200 companies have stopped selling to the Northern Irish market because of the burdensomeness of moving goods from Great Britain to Northern Ireland. It also pointed to issues experienced by pet owners and the risk of certain medicines being discontinued. It argued that this trade diversion will only

get worse once the grace periods on certain products such as chilled meats end.

The command paper added that the Protocol has contributed to: political instability; unrest; a perception of separation; and tensions within the power-sharing institutions, due to a lack of unionist support. These problems, coupled with the practical difficulties cited above, would, the UK government held, be sufficient cause to take safeguarding action as provided for by Article 16.

UK government proposals

The UK government's proposals were presented as structured around 3 main aims:

1) lessening the burden involved in moving goods from Great Britain to Northern Ireland by only applying full customs and SPS checks (additional processes are required for certain 'sanitary and phytosanitary' goods to protect plant, animal or public health) on goods that will be moving into the EU;

2) making sure that people in Northern Ireland can continue to access goods from the rest of the UK through allowing for goods made to UK rules to circulate freely in Northern Ireland;

3) removing the oversight role of EU institutions, including the Court of Justice of the European Union, and establishing alternative means of dispute resolution, for instance through processes of international arbitration.

The command paper set out ways of facilitating these ends through more effectively differentiating goods destined for the EU from those that will stay in the UK. It suggested more data-sharing, visibility of supply chains, market surveillance, additional labelling requirements, and new penalties for those who break the rules.

The UK also called for 'greater freedom to set VAT and excise rates and structures in Northern Ireland' and a dual regulatory regime to allow for the circulation of any goods in Northern Ireland that meet EU or UK standards, rather than all manufactured goods having to abide by EU rules (p. 18.).

Furthermore, the government claimed that the jurisdiction of the European Court of Justice in relation to the Protocol has not been conducive to 'problem solving', and has contributed to the perception of Northern Ireland as separated from the rest of the UK. It called this the 'most unusual feature of the current Protocol' and proposed that disputes be managed instead through mechanisms of international arbitration (p. 21.).

Finally, the UK called for more consideration of and input for Northern Ireland when relevant EU law is made, amended or replaced.

European Union 'non-papers': proposed bespoke arrangements

The EU Commission put forward its own proposals for adjusting some aspects of the operation of the Protocol – 'bespoke arrangements to benefit Northern Ireland' – on 13 October 2021. These measures focused primarily on lessening the friction in terms of customs and SPS checks on goods coming into Northern Ireland.

The EU claimed that its proposals for simplifying SPS processes would reduce checks by 80 per cent. For customs, it said it is prepared to increase the range of goods considered not at risk of entering the Single Market and reduce the amount information on goods that is required. Also included in the proposals were bespoke arrangements to allow the UK to continue to supplying medicines to Northern Ireland, despite Northern Ireland being aligned with EU rules in this area.

Finally, the Commission addressed some of the concerns around democratic input for Northern Ireland. It said it would make the application of the Protocol more transparent through establishing better lines of communication with key stakeholders in Northern Ireland and inviting participation in some of the specialised committees. The documents also included a promise to set up a new website to explain which EU laws apply in Northern Ireland.

Talks between the EU and the UK

Following the publication of the Commission's 'non-papers', talks on the Protocol began between the EU and the UK.

Appendix k: *Human Rights Act 1998*

Background

The Conservative Party's 2019 manifesto included the promise to 'update the Human Rights Act and administrative law to ensure that there is a proper balance between the rights of individuals, our vital national security and effective government.'[54]

Then Lord Chancellor and Secretary of State for Justice, Robert Buckland, announced the formation of the Independent Human Rights Act Review (IHRAR) in December 2020. There have been three prior reviews of the Act since it came into force in 2000. The creation of IHRAR followed the establishment of the Independent Review of Administrative Law (IRAL) in July 2020.

IHRAR's report was published on 14 December 2021. At the same time, the government announced a consultation on its own proposals – set out in a command paper – for replacing the Human Rights Act with a 'Modern Bill of Rights'. The parliamentary Joint Committee on Human Rights (JCHR) also ran its own inquiry into the operation of the Act whilst the independent review was ongoing. Its report was published in June 2021. The government, IHRAR, and JCHR took varying stances on the Human Rights Act, putting forward different recommendations.

IHRAR recommended some amendments to the existing legislation, but proposed keeping the architecture of the Act intact. The government suggested it is minded to make broader changes, replacing the Human Rights Act with a 'Bill of Rights', whilst remaining in the European Convention on Human Rights (ECHR). JCHR, however, recommended keeping the Act as it is, arguing that it has served its purpose well. The key recommendations and conclusions contained each document are summarised below.

The Independent Human Rights Act Review

IHRAR was asked to consider two main themes: (1) the relationship between UK courts and the European Court of Human Rights in Strasbourg (ECtHR) and (2) the impact of the Human Rights Act (HRA) on the constitutional balance between the judiciary, the executive, and the legislature in the UK. IHRAR were informed that the government intended to remain part of the European Convention on Human Rights.

The aspects of the Act the panel were asked to consider included:

- section 2 of the HRA, which requires that UK judges must take into account ECtHR jurisprudence;
- the 'margin of appreciation', which allows domestic courts a degree of latitude when applying the Convention rights within their own political and social contexts:
- section 3 of the HRA, which requires that UK judges read legislation as far as is possible so that

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

it is compatible with the Convention rights, even when there is no ambiguity as to the statute's meaning;

- section 4 of the HRA, which allows UK courts to issue a 'declaration of incompatibility' stating that a piece of primary legislation has been found to be in breach of human rights, if it is not possible to interpret the statute as compatible under section 3;
- the ability of judges to quash secondary legislation that is found to be in breach of human rights; and
- remedial orders, whereby the government can alter legislation found by the courts to be in breach of human rights.

Section 2

IHRAR expressed concern that the requirement under section 2 to take into account ECtHR case law meant that insufficient attention was being paid to UK statutes, common law and case law. It recommended that section 2 therefore be amended to specify that UK law should be given priority in terms of consideration. It said this would align with the established Convention principle of subsidiarity: that states are primarily responsible for securing effective rights protection within their own domestic contexts. However, IHRAR acknowledged that it would be detrimental for too great a gap to open up between UK rights jurisprudence and that of the ECtHR.

Margin of appreciation

IHRAR also considered the domestic margin of appreciation: the latitude and respect the courts accord government and Parliament when interpreting if their decisions comply with the Convention rights. Typically, the courts allow a wider margin of appreciation where the issue in question is of a more political and contested nature. IHRAR concluded that the courts have on the whole been 'careful and cautious' on this front, showing due respect to the differing constitutional roles of the branches of state. No changes were recommended.

Section 3 and section 4

Minor changes were suggested to section 3 of the HRA. Whilst IHRAR observed that there were particular instances in which the courts had interpreted an Act inconsistently with the intention of Parliament, the panel did not believe that section 3 should be repealed. Much like with section 2, it suggested amending the provision 'to clarify the priority of interpretation'. This would make clear that normal means of interpretation should be considered before resorting to the unconventional interpretative powers provided for under section 3. The effect of this would not, however, be to go beyond the current position, but simply clarify it in statute.

IHRAR did not recommend changing the balance between section 3 and section 4, so that declarations of incompatibility under section 4 were more readily used. The panel did propose establishing a database recording instances where section 3 had been used. It suggested that the ready availability of this data might assuage concerns about the courts using section 3 to go beyond their proper remit.

Secondary legislation

IHRAR was also asked to look at the power of judges to quash secondary legislation on human rights grounds. It concluded that this power should be retained, as it is consistent with the broader judicial review power of the courts to quash secondary legislation that is *ultra vires*. The *Judicial Review and Courts Bill* seeks to introduce suspended and prospective quashing orders in these instances. The panel proposed that they be given the ability to also issue these in cases where secondary legislation is found to be in breach of human rights.

Extra-territorial application

On the issue of the application of the Convention rights beyond UK territory, IHRAR concluded that the territorial scope of the Convention had expanded in ways not anticipated by the 1998 Human Rights Act. It did not, however, put forward a specific proposal on this issue, as, in order to be effective, any change would have to be pursued at member state level, rather than through amending domestic legislation. It therefore suggested a national conversation and discussions in the Council of Europe.

Remedial orders

Finally, IHRAR recommended that remedial orders – a Henry VIII power contained in the HRA allowing the government to amend legislation in breach of the Convention rights – be subject to more extensive parliamentary scrutiny. Furthermore, remedial orders should not be used to amend the Human Rights Act itself, which – as an important piece of constitutional legislation – should only be changed through primary legislation.

Public awareness and civic education

More overarchingly, the panel expressed its belief that public awareness and ownership of the Human Rights Act could be improved. It proposed 'a focus on civic, constitutional education on the HRA and rights more generally, including the difficult balances human rights questions often require, and on individual responsibilities.'

Joint Committee on Human rights, *The Government's Independent Review of the Human Rights Act*

The Joint Committee on Human Rights (JCHR) conducted its inquiry with IHRAR's terms of reference in mind, but before the independent review's report had been published. It concluded that, on the basis of the evidence heard, 'there is no case for changing the Human Rights Act' (p. 5.). The Committee criticised the scope of the independent review as focusing exclusively on possible defects, leaving outside of its consideration whether the Act had been successful in securing rights for the most vulnerable in society.

Section 2

JCHR argued against any changes to section 2 of the Human Rights Act (HRA). It said that the more UK human rights jurisprudence deviates from ECtHR jurisprudence, the more successful appeals there will

be to the court in Strasbourg. This would defeat the aim of the HRA to 'bring rights home'. Furthermore, JCHR suggested that whilst UK judges are currently accorded a wide margin of appreciation in their application of Convention rights, if UK courts were no longer required to closely follow ECtHR case law this degree of discretion might be reduced.

Section 3 and section 4

On section 3, JCHR said that '[insofar] as there is a concern that the courts might be using section 3 HRA to beyond what Parliament intended when legislating, it is not one that we share.' (p. 36.). Section 3 'supports the overarching intention of Parliament that legislation should not violate Convention rights.' On declarations of incompatibility, the committee said 'section 4 HRA provides an elegant solution to the potential conflict between the protection of fundamental rights and the sovereignty of Parliament.' (p. 42.). It did not believe there should be an increase in use of declarations of incompatibility at the expense of section 3 interpretations.

Extra-territorial application

With regards to the question of the Convention's extra-territorial application, JCHR argued that 'effective investigations into allegations of human rights violations by troops overseas are valuable and important and allow lessons to be learned. Changes to the HRA that would threaten the conduct and quality of such investigations would be of significant concern.' (p. 56.).

Remedial orders

The JCHR inquiry did not conclude that remedial orders needed to be subject to any further parliamentary scrutiny, as they are already subject to enhanced scrutiny by the committee and parliamentary time is scarce.

The committee also warned that any changes to HRA must take 'account of its unique role in the constitutional arrangements of the devolved nations'. (p. 74.). Finally, it praised the HRA for embedding rights in public service delivery through requiring that public authorities act in accordance with the rights in the Convention.

Human Rights Act Reform: A Modern Bill of Rights

The government's own proposals for reforming human rights law took account of IHRAR's recommendations, but suggested it was intending to go beyond them. The command paper clearly stated the government's ideological position, but in several areas left the detail regarding how it would achieve its stated aims unclear. It posed a number consultation questions, open for response until 8 March 2022.

In the foreword to the command paper the government expressed its intention to replace the Human Rights Act with a modern Bill of Rights 'which reinforces our freedoms under the rule of law, but also provides a clearer demarcation of the separation of powers between the courts and Parliament.' (p. 3.). It would do this, however, whilst remaining part of the European Convention on Human Rights. The new Bill of Rights would place more emphasis on 'quintessentially UK rights' and on personal responsibil-

ity, as well as on UK case law and the role of the Supreme Court.

The government was critical of the 'living document doctrine' – whereby the meaning of the Convention rights can evolve in relation to changing circumstances. It argued that this had led to a situation in which positive rights obligations that were not initially envisaged had been imposed on institutions. However, it praised the margin of appreciation and the principle of subsidiarity as counterweights to this.

In chapter three of the command paper, the government laid out its case for reforming human rights law in the UK. It cited a number of longstanding criticisms of the Human Right Act. The government argued that the section 2 requirement to take account of ECtHR case law had been interpreted as a demand that UK courts keep pace with the ECtHR. Furthermore, the document was critical of section 3, suggesting that the expansive requirement to interpret legislation compatibly with the HRA had '[diverted] the courts from their normal function… into straightforward judicial amendment.'

The government also took aim at the 'rights culture' it believes has developed at the expense of personal responsibility and the public interest. It also questioned the extra-territorial scope of the HRA and suggested that at times the courts had been encouraged into areas of social policy that should be decided by Parliament, rather than in relation to individual cases. The command paper stated that: '[the] incremental expansion of rights into novel areas… creates a democratic tension with the prerogative of elected representatives to determine what may amount to finely balanced questions of public policy.' (p. 47.).

The government's proposals

Section 2

The government's new Bill of Rights would amend section 2 so that it stipulates that UK courts should first have reference to domestic precedents, and a broader range of case law, alongside that of the ECtHR. This proposal was broadly in line with IHRAR's recommendation on section 2.

UK Supreme Court and 'quintessentially UK rights'

The government was keen that the UK Supreme Court's position as the ultimate arbiter of rights in the UK be reinforced in the new legislation. It asked how the Bill of Rights might 'achieve this with greater certainty and authority than the current position', but did not offer a draft proposal on this (p. 62.).

The government also sought views on whether the right to a jury trial could be included in the Bill of Rights and ways in which freedom of expression might be strengthened. The legislation would seek to steer the courts towards a presumption in favour of free speech over countervailing rights.

Permission stage

The government also proposed introducing a permission stage for human rights claims in which individuals would have to prove they have suffered a disadvantage in order for their case to progress. This was in order to reduce the number of claims it believes are spurious. Furthermore, the document asked how the Bill of Rights might address the extent of the 'positive obligations' it argued have increasingly been imposed on institutions, so as to reduce 'costly human rights litigation' (p. 7.).

Section 3 and section 4

Whilst the government did not propose repealing section 3 of the HRA entirely, it did argue for a 'less expansive interpretive duty' (p. 69.). The government's amended version of the requirement would codify the common law presumption that where the language of a statute is ambiguous legislation should be interpreted so it is compatible with the convention. This would limit the existing duty, which allows judges to change the express meaning of an Act so as to make it compliant with Convention rights. In instances where previously the courts would have had to change the wording of an Act to ensure compatibility, they should instead issue a declaration of incompatibility. The command paper also asked for views on whether the courts should have to issue declarations of incompatibility for secondary legislation as well, as opposed to being able to declare it void, as they can at present.

Remedial orders

On remedial orders, the government stated its position that the Henry VIII power should only be used in the most urgent of cases. There should be a presumption in favour of more conventional parliamentary processes, such as primary legislation.

Deportations

The command paper also expressed the government's unhappiness that deportations it believes to be in the public interest are being frustrated on human rights grounds. It put forward three possible legislative options for limiting the scope for this to happen.

Personal responsibility

Furthermore, the document set out how responsibilities might be emphasised within the reformed human rights framework. In particular, the government proposed that the courts should be instructed to have regard to whether a claimant has fulfilled their responsibilities when deciding on the proportionality of an interference and in awarding damages.

Adverse rulings and the role of Parliament

Finally, it is the government who currently responds when there is an adverse judgement of the ECtHR. However, the command paper suggested that Parliament should be given an increased role in this process. For example, a requirement that the government lay notice before Parliament in such instances, perhaps with the possibility of a debate and a vote, could be introduced. It also proposed to introduce a 'democratic shield' into the system: a provision in legislation affirming Parliamentary sovereignty in the face of adverse ECtHR rulings (p. 87.).

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