The Constitution in Review

Fifth Report from the United Kingdom Constitution Monitoring Group

For period 1 January - 30 June 2023

THE CONSTITUTION SOCIETY

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Foreword

The period has seen serious challenges to constitutional standards and norms continue, especially at UK level. Such difficulties can be seen as part of wider international political patterns, that include within them unacceptable behaviour by holders of high office in a number of countries and by Donald Trump in the US. But the period has also provided examples of the UK system responding appropriately to such tendencies. That certain oversight mechanisms have proved effective is to be welcomed. Yet complacency should be avoided.

The objectionable tendencies we have observed take a number of different forms. First, there are departures from expected standards of behaviour, for instance those of Dominic Raab during his ministerial tenure. The manner in which the Raab controversy was resolved demonstrates the existence of means of identifying and dealing with problems, although the devices themselves can be cumbersome and may not always be effective.

A second issue which arises is that those who have challenged or violated rules and principles (and their allies and supporters in Parliament and the media) may seek to undermine and demean the mechanisms used for resisting or investigating them. Such malign activity can take place both while processes are underway and after they are formally complete. They can involve personalised attacks on individuals charged with operating the safeguards. The response of Raab to the finding that he had bullied officials; as well as the behaviour of Johnson (and others) towards the Committee of Privileges and its inquiry into his contempt of Parliament, illustrate these tendencies. Other senior figures, while not actively denigrating processes for the upholding of principles and good practice, have failed to offer them the degree of support that they might, when it was needed. Consequently, the upholding of constitutional standards can require considerable levels of commitment and resilience on the part of the individuals who are entrusted with such tasks.

Third, there is evidence of a desire wholly to bypass or even remove barriers to the violation of constitutional norms. For instance, the practice of using statutory instruments as a means of introducing major legislative changes, thereby evading fuller parliamentary scrutiny, has continued; and the government continues to display a concerning attitude towards treaty commitments and the international rule of law, lately with respect to policy towards refugees.

Some of the problems experienced during the present period are a legacy of the Johnson premiership, demonstrating the protracted difficulties that can arise from allowing an individual who fails to recognise the need to regulate their own behaviour to hold high office. However, new difficulties have continued to arise, for instance the behaviour of the UK government towards the Covid inquiry.

We have seen evidence of elements of an oversight system that can work. That it was subject to duress is both a source of concern, and of optimism – in that it could function despite this hostile environment. Regrettably, there is reason to believe such tests will continue in coming report periods.

The members of the United Kingdom Constitutional Monitoring Group, in individual capacity, September 2023.

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 January to 30 June 2023. 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 fifth in an ongoing, twice-annual, series. The principles we use are reproduced in Appendix a. The UKCMG is impartial and has no party affiliation.

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

The members are:

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Integrity in Public Life

In previous reports we have noted serious concerns about adherence to standards in public life, especially at the level of the UK executive. They continued in the present report period. A series of senior current or serving holders of high offices – Nadhim Zahawi, Dominic Raab and Boris Johnson – were all found by official inquiries to have failed to have lived up to appropriate expectations, in serious ways. That individuals in positions of such responsibility have behaved in this way is a source of concern. However, that such misconduct can be exposed and condemned, with serious consequences for its perpetrators, and the existence of mechanisms for this purpose, is encouraging. Though initiating such processes could involve substantial pressure, and they might seem protracted, they could prove effective. Yet it is important also to acknowledge the resistance these proceedings faced. Furthermore, while each of the individuals discussed above left their posts in response to the inquiries into their activities, they issued accompanying statements that to varying degrees failed to accord due respect to – or positively denigrated – the processes concerned.

This tendency for senior politicians established clearly to have transgressed standards to fail properly to accept such outcomes and to question the procedures that have found against them is constitutionally objectionable. It echoes contemporary practices elsewhere in the world on the part of politicians who seek to deny the legitimacy of outcomes which they dislike, with a corrosive impact upon the democratic system. An extreme illustration of this tendency is the attempt by Donald Trump and his supporters to prevent the implementation of the result of the 2020 presidential election, and to seek to undermine confidence in the political system as a whole. It is deeply regrettable that the UK should form part of such a worrying international pattern. Better behaviour is possible and has been observable in the past in the UK, even in relatively recent times.

Constitutional Change Process

The ending of the ministerial career of Dominic Raab during the present report period led on to abandonment of the Bill of Rights legislation. While it is no longer on the agenda, that such an initiative could be considered, devised and introduced to Parliament in the way it was is a source of constitutional concern. Furthermore, during the present report period, the government announced that, in place of the Bill of Rights proposal, it would address the Human Rights Act – that is, reduce its scope – in specific areas, referring to the Illegal Migration Bill, the Victims and Prisoners Bill, the Overseas Operations (Service Personnel and Veterans) Act 2021 and the Northern Ireland Troubles (Legacy and Reconciliation) Bill. This announcement suggests the adoption of a new approach with considerable constitutional implications and which is arguably detrimental to human rights, not proceeded by deliberation of a sort that might be appropriate.

We have previously noted concerns regarding the Northern Ireland Protocol Bill, intended to provide ministers with the power to override aspects of the Protocol on Ireland/Northern Ireland in the UK/EU Withdrawal Agreement. The agreeing of the Windsor Framework on 27 February rendered this bill irrelevant. Yet – like the Bill of Rights Bill – that it was initiated at all by a UK government is sufficiently troubling in itself.

A further bill with considerable constitutional implications was the *Retained EU Law (Revocation and Reform) Bill*, which, without devolved consent, has now become an Act. In May, the Secretary of State for Business and Trade, Kemi Badenoch, announced a considerable dilution in the scope of the Bill. This change represents a significant reduction in the potential for constitutional harm. Nonetheless, difficulties associated with it – such as its potential to provide the executive with excessive discretionary power – remain. Furthermore, the way in which Badenoch first announced the alteration – via a press article and written parliamentary statement – fell short of proper expectations for the communication of such a decision.

Another area where the maintenance of high standards is important is in the drafting of legislation. The Office of the Parliamentary Counsel is central to this process for the UK government. It describes itself as "committed to promoting good law". Issues we have raised in successive reports regarding legislation of substantial constitutional significance suggest that the Office has for some reason been unable fully to succeed in its objectives with regards to legislative standards.

Elections

In previous reports, we have discussed the UK government policy of introducing a new requirement in Great Britain for individuals to produce photo identification at polling stations in order to be able to vote in elections. The measure passed into law as part of the Elections Act 2022. It cannot be excluded that to some degree cynical political calculation lay behind this policy. We have expressed the view that it will be regrettable if a law presented as a means of safeguarding the integrity of elections proves to be disproportionate in its negative impact on participation in democratic processes. In our previous report, we noted that a major test for the ID requirement would come during this report period, with the local elections taking place in May 2023.

There is now clear evidence of voter ID having significant negative consequences on the numbers voting, especially among particular groups. Research conducted by the Electoral Commission found that at least 0.25 per cent of those who attempted to vote in the English local elections were prevented from doing so under the new ID rules. The 0.25 figure represents about 14,000 voters – an absolute total that would be far higher at a General Election, with a higher turnout and voting across the whole of the UK. Moreover, the Electoral Commission holds that the real number of those unable to vote was higher because of "data quality issues" and because some people would not have been recorded. Furthermore, polling carried out for the Electoral Commission of non-voters in the English local elections suggested that there were more people still who did not attempt to vote at all for reasons connected to the ID requirement. The Electoral Commission identified evidence that unemployed people and people with disabilities found it more difficult to meet the ID requirement. In another assessment of the elections, Democracy Volunteers, an election observer group, found that 1.2 per cent of all voters it saw were turned away on ID grounds, of whom its observers identified 53 per cent as being "non-white passing".

Legislatures

The House of Commons Privileges Committee concluded its investigation into Boris Johnson and his responses to questions about lockdown gatherings in June. The Committee concluded that Johnson had engaged in deliberately misleading not only the House but also the Committee. He had, also, the Committee found, breached confidence; and had impugned the Committee and by extension undermined the democratic processes of the House. He was, moreover, "complicit in the campaign of abuse and

attempted intimidation of the Committee." In a further report, the Committee noted its "concern at the improper pressure brought to bear on the Committee and its members throughout this inquiry." It was "concerned in particular at the involvement of Members of both Houses in attempting to influence the outcome of the inquiry."

That the Committee, a cross-party group, was able to complete its task and do so when subject to inappropriate pressure, is encouraging. It suggests that the system of parliamentary self-regulation can be effective. But while the Privileges Committee inquiry was a success for the protection of constitutional standards, that such a process was needed at all is regrettable – as were the efforts to undermine it. Furthermore, it could have received more positive support on the Conservative side when its recommendations were voted on in the House of Commons.

There remains a tendency for ministers to make dubious or misleading statements to the legislature. As noted above, there have been a variety of questionable claims related to refugee policy made inside as well as outside Parliament. Other claims hard to reconcile with existing evidence include a statement Sunak made at Prime Minister's Questions on 3 May 2023 about the number of NHS dentists.

Delegated legislation remains an issue of constitutional concern. The shift towards 'hyper-skeletal' bills means that Parliament is increasingly being asked to endorse transfers of power without clear knowledge of the use to which that power will be put. The ability of Parliament properly to exercise its role in scrutinising legislation, holding the executive to account, and assessing whether particular secondary law-making powers are required, is challenged by such a tendency. Once such authorities are created, their actual use can create further problems for the constitutional position of the UK Parliament and its relationship with the executive. They can be a means of bypassing more appropriate levels of Parliament's involvement in the making of law.

The latitude afforded to premiers in their resignation honours lists is concerning. In the present report period, there was understandable controversy regarding nominations made by Johnson to the House of Lords. We find it unacceptable that outgoing prime ministers are potentially able to abuse the process by which people are appointed to one of the chambers of the UK Parliament. This practice constitutes an affront to core constitutional values.

Ministers and the Civil Service

Serious examples of issues of integrity identified in this report have involved ministers operating within the UK executive. The individuals concerned behaved in ways that departed from rules stipulated in the *Ministerial Code* concerning such subjects as good personal conduct (Raab); disclosure of relevant information (Zahawi); and dealing properly with Parliament (Raab). In all cases, not only ministers but also civil servants were in different ways involved.

During the report period, an issue which generated much attention was that of whether Johnson could and would provide WhatsApp messages, dating from his time as Prime Minister, to the UK Covid-19 Inquiry. We note that in March the Cabinet Office issued new guidance on the use of "non-corporate communication channels" including WhatsApp as well as SMS and private email for the conduct of "government business". We welcome the introduction of new guidance in this area, and that the document commits itself to being reviewed by the end of 2025. The forms of communication it deals with raise difficult questions about good practice within the executive, and ensuring that it is subject to proper accountability; it is therefore essential that guidance in this area should be effective.

The territorial constitution

Throughout the report period, the Democratic Unionist Party (DUP) sustained its refusal to participate in the Northern Ireland Executive, denying Northern Ireland democratically accountable government at devolved level. The UK government has gone to considerable lengths to accommodate the DUP, without success in persuading it to re-enter the executive. We judge the position in Northern Ireland to be constitutionally problematic in a number of senses. It has created general uncertainty over the stability of the peace process, the government of Northern Ireland, and when an election might take place. Furthermore, it has entailed Northern Ireland being denied its own tier of democratically accountable devolved government, and arrangements being imposed from the centre. Finally, it has meant that responsibility for important decisions relating to the political future of Northern Ireland were taken on, at ultimate political level, by a UK-level minister, and by senior civil servants in Northern Ireland. These deficiencies manifested themselves in the report period and were to the considerable constitutional, democratic and material detriment of Northern Ireland. The UK government imposed strict financial retrenchment measures, with severe implications for the delivery of public services. It is entirely inappropriate for civil servants to be required to make decisions about spending reductions, which, moreover, raised questions about the delivery of basic public services in Northern Ireland.

On 27 February the EU and UK reached an agreement on the operation of the Protocol in the form of the Windsor Framework. As part of this arrangement, the UK government dropped legislation it had introduced to Parliament which would allow it unilaterally to override parts of the Northern Ireland Protocol. We welcome the Framework, which demonstrates the benefits that can be achieved by working constructively within the framework of international law rather than departing from it (or threatening to do so). However, the Protocol does not entail the end of the Brexit-related difficulties experienced by Northern Ireland.

The Sewel convention has been central to the functioning of the territorial constitution, and in particular in ensuring that the legislative power of the UK Parliament is exercised in a way that does not encroach inappropriately upon the devolved spheres of operation. Ongoing developments suggest serious problems with Sewel. The practice of proceeding with UK-wide legislation notwithstanding the withholding of devolved consent is becoming normal, in contravention of the specific wording of the convention; and there are serious differences of interpretation regarding when consent is or is not required.

A new development of considerable significance and concern was the first ever use on 17 January of powers under Section 35 of the *Scotland Act 1998*. These powers were employed to in practice block legislation passed (with cross-party support) by the Scottish Parliament, the Gender Recognition Reform (Scotland) Bill. We do not take a position on the merits of the legislation concerned. However, there are arguments that the use of the Section 35 powers in this instance, which are the subject of a legal proceeding, was an inappropriate and arbitrary interference in the legislative authority of the Scottish Parliament.

Judiciary and the rule of law

A bill referred to at various points in this report for its constitutionally troubling aspects is the Strikes (Minimum Service Levels) Bill (now Act). The Bill (now Act) raises considerable rule of law and human rights issues, both for its form and its content. The rule of law requires clarity, avoidance of the

potential for arbitrary executive action, and attention to good practice in legislative processes. These qualities have been lacking in the case of this measure. Furthermore, it seems likely to be deleterious in its consequences for human rights.

We have previously noted that we judged the policy of seeking to deport refugees to Rwanda to be problematic from the perspective of international human rights norms and domestic law. The UK government remained committed to implementing this plan during the present report period. It also pursued further legislative measures in this policy area. The Illegal Migration Bill 2023 became an Act of Parliament in July 2023, just outside our reporting period. The Bill raises serious concerns as regards the rule of law.

In previous reports, we raised concerns as to the use of ouster clauses in the Judicial Review and Courts Act 2022 – clauses that remove judicial review of the courts over decisions of administrative bodies. The Illegal Migration Bill (now Act) has pursued the same ends.

The Fifth 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 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*****, 2022, 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) (principle 3).***

Ministers are under an overarching duty to comply with the law…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. (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 (principle 9)

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 (principle 20).

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1. **In all our previous reports, we have noted widespread concerns about integrity in public life, centring on the UK executive. Prominent within them was the former Prime Minister, Boris Johnson, who was perceived as suffering from shortcomings in his own right, and as failing properly to apply rules to others. However, as we noted in our third report, the departure of Johnson in itself should not be assumed to have brought these problems to an end.**

2. **We have noted that the successor administrations of Liz Truss and Rishi Sunak have included within them numerous ministers and officials who were in different ways involved in the problems that manifested themselves under Johnson. In our previous report we also noted lack of clear material signs under Truss or under Sunak of a desire to address the underlying flaws in the**

system for the maintenance of public integrity, (though Sunak did suggest at the outset of his premiership, and in the foreword to the edition of the *Ministerial Code* he issued, that he had prioritised improvements in this area).

3. During the current report period, various official investigations into perceived wrongdoing by previous or existing members of the government concluded, finding that the individuals involved had transgressed. Consequences for the individuals involved followed.

4. **Nadhim Zahawi resigned as Minister without Portfolio in the Cabinet Office/Chairman of the Conservative Party on 29 January.** The Independent Adviser on Ministers' Interests, Laurie Magnus, had investigated internal declarations and public statements Zahawi had made regarding his tax affairs (see appendix E). Magnus found that Zahawi's behaviour amounted to "a serious failure to meet the standards set out in the Ministerial Code". **The Adviser concluded that Zahawi, while holding posts including that of Chancellor of the Exchequer, had "shown insufficient regard for the General Principles of the Ministerial Code and the requirements in particular, under the seven Principles of Public Life, to be honest, open and an exemplary leader through his own behaviour." (principles 7; 9)**[1]

5. **On 4 May, Dominic Raab resigned as Deputy Prime Minister and Secretary of State for Justice.** Adam Tolley KC (who Sunak had commissioned at a time when the Independent Adviser post was vacant) had investigated multiple formal complaints made by civil servants against Raab relating to his conduct in various ministerial posts and Whitehall departments (see appendix F). The investigation focused on bullying. **It reached adverse findings including that, as Foreign Secretary, "he acted in a way which was intimidating, in the sense of unreasonably and persistently aggressive conduct in the context of a work meeting". (principle 7)**[2]

6. **On 9 June, Boris Johnson announced his resignation as an MP in advance of a report by the House of Commons Committee of Privileges** (see Appendix d). Carrying out a task referred to it in April 2022, the Committee considered statements Johnson had made to the House when Prime Minister in response to questions about gatherings at Downing Street during Covid restrictions. **It concluded that he had "committed a serious contempt of the House."**[3] The Committee also raised further issues regarding the conduct of Johnson and his allies in relation to its own inquiry, discussed later (principles 3; 7).

7. **That individuals in positions of such responsibility have behaved in this way is a source of concern. However, that such misconduct can be exposed and condemned, with serious consequences for its perpetrators, and the existence of mechanisms for this purpose, is encouraging. Though initiating such processes could involve substantial pressure, and though they are protracted, they could prove effective. Yet it is important also to acknowledge the resistance these proceedings**

1 The relevant exchange of letters between the Prime Minister, Zahawi, and the Adviser can be readily accessed at: 'In full: the letters between Nadhim Zahawi, Rishi Sunak and his ethics adviser', *Guardian*, 29 January 2023, available at: < https://www.theguardian.com/uk-news/2023/jan/29/in-full-the-letters-between-nadhim-zahawi-rishi-sunak-and-his-ethics-adviser#:~:text=Rishi%20Sunak%20has%20sacked%20the,investigation%20into%20his%20tax%20affairs. >, last accessed 1 September 2023.

2 Adam Tolley, KC, 'Investigation Report to the Prime Minister', 20 April 2023, p.45, available at: < https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1152026/2023.04.20_Investigation_Report_to_the_Prime_Minister.pdf >, last accessed 2 September 2023.

3 House of Commons Committee of Privileges, *Matter referred on 21 April 2022 (conduct of Rt Hon Boris Johnson): Final Report*, Fifth Report of Session 2022 – 23, HC 564 (House of Commons, London, 2023), p.6, available at: < https://committees.parliament.uk/publications/40412/documents/197897/default/ >, last accessed 2 September 2023.

faced. We discuss the efforts to undermine the Privileges Committee inquiry below. Furthermore, while each of the individuals discussed above left their posts in response to the inquiries into their activities, they issued accompanying statements that to varying degrees failed to accord due respect to – or positively denigrated – the processes concerned (principles 1; 3).

8. In the letter he sent to the Prime Minister at the time of his exit from government, Zahawi did not refer to the investigation into his activities or its outcome directly, but complained about the media coverage it had received, writing that "I am concerned…about the conduct from some of the fourth estate in recent weeks". In his resignation letter to Sunak, Raab wrote that:

> "Whilst I feel duty bound to accept the outcome of the inquiry, it dismissed all but two of the claims levelled against me. I also believe that its two adverse findings are flawed and set a dangerous precedent for the conduct of good government."[4]

9. In his resignation statement pre-empting the Committee of Privileges report, Johnson made complaints including that the Committee was:

> "determined to use the proceedings against me to drive me out of Parliament. They have still not produced a shred of evidence that I knowingly or recklessly misled the Commons…they have wilfully chosen to ignore the truth because from the outset their purpose has not been to discover the truth, or genuinely to understand what was in my mind when I spoke in the Commons. Their purpose from the beginning has been to find me guilty, regardless of the facts. This is the very definition of a kangaroo court."[5]

10. **This tendency for senior politicians established clearly to have transgressed standards to fail properly to accept such outcomes and to question the procedures that have found against them is constitutionally objectionable. It echoes contemporary practices elsewhere in the world on the part of politicians who seek to deny the legitimacy of outcomes which they dislike, with a corrosive impact upon the democratic system.** An extreme illustration of this tendency is the attempt by Donald Trump and his supporters to prevent the implementation of the result of the 2020 presidential election, and to seek to undermine confidence in the political system as a whole. It is deeply regrettable that the UK should form part of such a worrying international pattern. **Better behaviour is possible and has been observed in the past in the UK, even in relatively recent times. For instance, senior ministers have shown a markedly greater willingness to accept responsibility for departure from the rules, such as Amber Rudd, who resigned as Home Secretary in April 2018 for the inadvertent misleading of Parliament over targets for the removal of migrants.**

4 '"A dangerous precedent":Raab's letter of resignation and Sunak's reply in full', *Guardian*, 21 April 2023, available at: < https://www.theguardian.com/politics/2023/apr/21/dominic-raab-resignation-letter-rishi-sunak-reply-full >, last accessed 5 September 2023.

5 'Boris Johnson's resignation statement in full as ex-prime minister quits as MP', *ITV News*, 9 June 2023, available at: < https://www.itv.com/news/2023-06-09/boris-johnsons-resignation-statement-in-full-as-ex-prime-minister-quits-as-mp >, last accessed 5 September 2023.

11. **As well as matters connected to the Privileges Committee report, other issues of integrity associated with the Johnson premiership manifested themselves during the report period.** On 28 April, Richard Sharp announced that he was resigning as Chair of the BBC. When recruited to the post early in 2021, Sharp had failed properly to declare his part in seeking to arrange a loan facility for Johnson (principle 9).[6]

12. **A further difficulty involved Johnson's resignation honours list** (see Appendix c)**.** He issued his 9 June statement announcing his departure as an MP only after the list had been announced. Its contents were a source of political controversy (following a long period of public speculation). **This episode was a further instance of a constitutionally regrettable incident associated with Johnson, from a number of perspectives. It raised doubts about integrity both in the conferral of honours and – in as far as it pertained to the creation of Life Peers – in determining membership of the legislature. Furthermore, it is concerning that a processes with which the monarchy is closely associated can become subject to scrutiny of this type (principles 1; 7; 9; 20).**[7]

13. **We have noted in previous reports a recurring problem of the dissemination of misleading information by the UK executive. Incidents during the present report period reenforced these concerns.** For instance, ministers including Sunak and the Home Secretary, Suella Braverman, made questionable statements inside and outside Parliament relating to refugee policy.[8]

14. Our previous reports have drawn attention to **concerns about the disbursal of public money, in particular involving processes related to the award of pandemic-related contracts.**[9] **We drew and have drawn no express conclusions on this matter, beyond noting that the concerns were relevant from the point of view of proper use of public money and propriety in public office** (principle 8). In January, the international agency Transparency International issued its annual global Corruption Perceptions Index, which scores and ranks countries according to perceptions of the extent of corruption in their public sectors. The UK had dropped to its lowest score in comparable years (since 2012), and from 11th place to 18th place in the rankings. Transparency International UK (TIUK) noted that this reputational decline had occurred in the context of emerging information about the use of a 'VIP' lane in the award of government contracts for personal protective equipment (PPE); revelations about large donors to the Conservative Party becoming party treasurers and then receiving peerages; a failure to investigate 40 possible violations of the *Ministerial Code* identified by TIUK; and parliamentary concerns expressed about the use of the £3.6 billion towns fund.[10]

6 Geneva Abdul, 'Who is Richard Sharp and why is he quitting the BBC?', *Guardian*, 28 April 2023, available at: < https://www.theguardian.com/media/2023/apr/28/who-is-richard-sharp-why-quitting-bbc-boris-johnson >, last accessed 6 September 2023.

7 Hannah White, 'Five reasons we should be troubled by Boris Johnson's resignation honours', *Institute for Government*, 9 June 2023, available at: < https://www.instituteforgovernment.org.uk/comment/boris-johnsons-resignations-honours#:~:text=There%20are%20concerns%20about%20the,life%20in%20the%20upper%20house. >, last accessed 5 September 2023.

8 See eg: 'MPs who have not corrected the record', *Full Fact*, available at: < https://fullfact.org/updates/mps-who-have-not-corrected-the-record/ >, last accessed 5 September 2023.

9 See: House of Commons Committee of Public Accounts, *Government's contracts with Randox Laboratories Ltd*, Seventeenth Report of Session 2022-23, HC 28 (House of Commons, London, 2022), p.3, available at: < https://committees.parliament.uk/publications/23257/documents/169721/default/ >, last accessed 30 January 2023.

10 'UK plunges to lowest ever position in Corruption Perceptions Index', *Transparency International UK*, 31 January 2023, available at: < https://www.transparency.org.uk/uk-corruption-perceptions-index-2022-score-CPI >, last accessed 5 September 2023.

15. **We restate once again the general conclusion from our previous reports that urgent attention needs to be given to reinforcing standards in public life. We re-iterate here once again the support expressed in our previous reports for the full implementation of the final recommendations of Committee on Standards in Public Life arising from its Standards Matter inquiry (see Appendix d, Second Report).** 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 were 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, Second Report). As we have previously held, 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.**

16. **We also note related recommendations produced by the House of Commons Public Administration and Constitutional Affairs Committee in December 2022. They include that:**

> "The Commissioner for Public Appointments should be placed on a statutory basis in an Act of Parliament at the earliest opportunity. The legislation should make clear that the Commissioner's role is to ensure that public appointments made by Ministers are in compliance with the Governance Code. It should also detail the process by which the Commissioner is appointed, the term of office, and their role in revisions to the Governance Code for Public Appointments. (Paragraph 55)…
>
> Primary legislation should be introduced at the earliest opportunity to establish the Independent Adviser as a statutory position to end the uncertainty about whether future appointments will be made at all…(Paragraph 81)
>
> The Independent Adviser should be subject to the Commissioner for Public Appointments process applicable to Significant Appointments. In addition, in accordance with our recommendation in this report concerning revisions to that process, the Independent Adviser's appointment should be subject to a pre-appointment hearing with the relevant Select Committee and should require its endorsement. (Paragraph 87)"[11]

11 House of Commons Public Administration and Constitutional Affairs Committee, *Propriety of Governance in Light of Grensill*, Fourth Report of Session 2022-2023, HC 888 (House of Commons, London, 2022), available at: < https://publications.parliament.uk/pa/cm5803/cmselect/cmpubadm/888/report.html#heading-3 >, last accessed 14 January 2023.

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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17. Previous reports have identified numerous examples of a less than satisfactory approach to constitutional change from the UK government. **The late Queen's Speech of 2022, setting out the legislative programme for the coming session, suggested that this pattern was likely to continue** (see: Appendix e, Third Report)**. For instance, it included a proposal for a Bill of Rights. The process leading to this measure, as we have noted in previous reports, has so far been questionable.** Following on from one of the proposals contained in the 2019 Conservative General Election Manifesto, it began with the establishment of the Independent Human Rights Act Review (IHRAR), the report of which appeared in a previous report phase (see Appendix b: Second Report). Following a thorough consideration and wide consultation exercise, a majority of members of the Review group recommended only minor changes to the Human Rights Act (HRA) and a programme of civic and constitutional education about rights in the UK. However, the government then published a consultation on proposals that went beyond IHRAR's recommendations and which it has been observed had a weak evidential basis.[12] No draft of the Bill was offered by the government to permit scrutiny by either interest groups or the Joint Committee on Human Rights.[13] **The legislative proposals for a Bill of Rights confirmed concerns we had raised. The rationale on which they were founded was questionable; they lacked coherence in key respects; they related to a treaty commitment; they had devolution implications; and they contained negative implications for rights protection. Furthermore, they were notably controversial in an area in which change would ideally rest on some degree of consensus.** (see: Appendix h, Third Report) (principles 1; 7; 8; 18; 19).

18. Moreover, the fate of a measure of such potential constitutional importance has been tied not to an inclusive discussion of its merits or otherwise, but the fate of an individual politician. A key advocate of the Bill of Rights proposal has been Dominic Raab, who has a longstanding interest in this area dating back to the 2000s. Raab pursued the measure as Secretary of State for Justice and Lord Chancellor under Johnson. The removal of Raab from the Cabinet under Truss appeared to signal the end of this initiative; while the restoration of Raab to the same post under Sunak suggested its possible revival. Now he has permanently exited the Cabinet, the measure has fallen. But that such an initiative could be considered, devised and introduced to Parliament in the way it was is a source of constitutional concern. **Moreover, this experience suggests that the introduction or otherwise of substantial and questionable alterations to the UK constitution can turn on political fortunes, involving the ascent**

12 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 30 January 2023.

13 See: Liberty, 'What are they so afraid of': MPs call for pre-legislative scrutiny for proposed bill of rights', *Liberty website*, 21 June 2022, available at: < https://www.libertyhumanrights.org.uk/issue/what-are-they-so-afraid-of-mps-call-for-pre-legislative-scrutiny-for-proposed-bill-of-rights/ >, last accessed 30 January 2023.

and fall of prime ministers and the people they appoint to particular Cabinet posts. Such considerations can be expected to play a part in constitutional processes. But that they should be so decisive, and not mediated by other considerations and principles, is less than ideal. **Furthermore, while Alex Chalk, the Lord Chancellor and Secretary of State for Justice announced on 27 June that the Bill of Rights proposal was no longer being pursued, he noted that the government would address the Human Rights Act – that is, reduce its scope – in specific areas**, referring to the Illegal Migration Bill, the Victims and Prisoners Bill, the Overseas Operations (Service Personnel and Veterans) Act 2021 and the Northern Ireland Troubles (Legacy and Reconciliation) Bill. **This announcement suggests the adoption of a new approach with considerable constitutional implications and which is arguably detrimental to human rights, not proceeded by deliberation of a sort that might be appropriate** (principles 1; 18; 19)

19. **We have also previously noted concerns regarding the Northern Ireland Protocol Bill, intended to provide ministers with the power to override aspects of the Protocol on Ireland/ Northern Ireland in the UK/EU Withdrawal Agreement. It was subject to widespread criticism, including from within the Conservative Party and the majority of MLAs in the NI Assembly.**[14] **It was also constitutionally challenging from a number of perspectives, including doubts about its compliance with international law and its possible negative consequences for arrangements for the governance of Northern Ireland** (principles 1; 7) (see Appendix f, Third Report).

20. **The agreeing of the Windsor Framework on 27 February rendered this bill, like the Bill of Rights Bill, redundant. Yet – also like the Bill of Rights - that it was initiated at all by a UK government is sufficiently troubling in itself.** Moreover, it was part of a general policy approach that has undermined political stability in Northern Ireland. Many of the problems that have come about persist. Furthermore, as we discuss below, while the Windsor Framework was indicative of a more constructive attitude towards the EU on the part of UK ministers, there remains cause for concern about the government's conduct.

21. **A further bill with considerable constitutional implications was the *Retained EU Law (Revocation and Reform) Bill*, which has now become an Act.** We have previously noted that the bill has been the subject of considerable objections from a range of sources, discussed below, involving, for instance, the role of Parliament, the discretionary powers of ministers, the rule of law, and the legal system as a whole. **In May, the Secretary of State for Business and Trade, Kemi Badenoch, announced a considerable dilution in the scope of the Bill. This change represents a significant reduction in the potential for constitutional harm. Nonetheless, difficulties associated with it – such as its potential to provide the executive with excessive discretionary power – remain.**[15] **Furthermore, the way in which Badenoch first announced the alteration – via a press article and written parliamentary statement – fell short of proper expectations for the communication of such a decision. Badenoch was reprimanded by the Speaker of the House of Commons, Lindsay Hoyle, for falling short in this way.**[16]

14 See: Rebecca Black, '52 of 90 MLAs sign letter to Johnson rejecting legislation to amend NI Protocol', *Belfast Telegraph*, 13 June 2022, available at < https://www.belfasttelegraph.co.uk/news/northern-ireland/52-of-90-mlas-sign-letter-to-johnson-rejecting-legislation-to-amend-ni-protocol-41748039.html>, last accessed 30 January 2023.

15 See: Jill Rutter, 'Government sees some sense at last on the Retained EU Law Bill', *Institute for Government*, 11 May 2023, available at: < https://www.instituteforgovernment.org.uk/comment/government-sense-retained-eu-law-bill >, last accessed 6 September 2023.

16 Ben Quinn, 'Kemi Badenoch challenged over "massive climbdown" on EU laws', *Guardian*, 11 May 2023, available at: < https://www.theguardian.com/politics/2023/may/11/kemi-badenoch-challenged-over-massive-climbdown-on-eu-laws >, last accessed 6 September 2023.

22. **This episode illustrates the importance of good practice in the relationship between the executive and legislature, and the challenges that the parliamentary authorities can face in ensuring adherence to it by ministers.**

23. Another area where the maintenance of high standards is important is in the drafting of legislation. The Office of the Parliamentary Counsel is central to this process for the UK government. It describes itself as "committed to promoting good law", by which it means

> "law that is:
> - necessary
> - clear
> - coherent
> - effective
> - accessible"[17]

24. **These principles extend well beyond minimum standards and entail active commitment to good practice. Issues we have raised in successive reports regarding legislation of substantial constitutional significance suggest that the Office has for some reason been unable fully to adhere to these values in its work. In the present report period, for example, the government introduced the Strikes Bill. The Bill, discussed further below, has negative implications for the right to freedom of association, but rests heavily on difficult-to-scrutinise delegated powers; is lacking in clarity; and the need for it has not properly been established by the government.**[18]

25. **The creation and use of delegated powers for purposes of constitutional change is a particular cause of concern.** In successive reports, we have highlighted the problems associated with the use of statutory instruments generally, which is in tension with our principle 8, that "Ministerial powers should normally be specified in primary rather than secondary legislation. Such powers are subject to limits and constraints". They raise various constitutional issues: it can be difficult for Parliament to appreciate the implications of delegated powers when asked to agree to their creation in primary legislation. **Once introduced, by its nature their employment is subject to lower levels of parliamentary scrutiny than an Act of Parliament. They tend to tilt the constitutional-legislative power balance towards ministers, or whatever entity they are attached to.**

26. **We note a general tendency towards the introduction of 'hyper-skeletal' bills which magnify all of these problems, since they minimise clarity for Parliament and maximise discretion for the executive. This trend might be regarded as representing a constitutional change in its own right, towards a different model of law-making. A shift of this type, if it has occurred, is objectionable in itself, and has come about without proper and open deliberation, in contradiction of our principle 1.**

17 'About Us', Office of the Parliamentary Counsel, available at: < https://www.gov.uk/government/organisations/office-of-the-parliamentary-counsel/about >, last accessed 6 September 2023.

18 See eg: 'Strikes bill fails to meet human rights obligations – JCHR', UK Parliament, 6 March 2023, available at: < https://committees.parliament.uk/committee/93/human-rights-joint-committee/news/186524/strikes-bill-fails-to-meet-human-rights-obligations-jchr/#:~:text=The%20Bill%20would%20allow%20ministers,meet%20the%20minimum%20service%20level. >, last accessed 6 September 2023.

27. **The difficulties discussed here are intensified further when the delegated powers concerned have specifically constitutional implications, such as those included in the Strikes (Minimum Service Levels) Act 2023 (which received Royal Assent on 20 July). With these various issues in mind, there is a strong case for a change in approach from the government to the creation of such powers, with an emphasis on a narrowing of their scope and greater precision of drafting in parent legislation.**

Elections

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).

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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28. In previous reports, we have discussed the UK government policy of introducing a requirement for individuals to produce photo identification at polling stations in order to be able to vote in elections (see Appendix g, Second Report). The justification the government offered for this policy was that it is a means of preventing fraud and promoting trust in the electoral system. However, the proposal met with opposition. Critics argued 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. **This measure passed into law as part of the Elections Act 2022. We have expressed the view that it will be regrettable if a law presented as a means of safeguarding the integrity of elections proves 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.**

29. In our previous report, we noted that **a major test for this new requirement would come during this report period, with the local elections taking place in May 2023.** There is now clear evidence of the impact of voter ID. Research conducted by the Electoral Commission found that at least 0.25 per cent of those who attempted to vote in the English local elections were prevented from doing so under the new ID rules (0.7 per cent were turned away on this basis initially, but 63 per cent of them subsequently came back to the polling station with the necessary documentation, and voted). The 0.25 figure represents about 14,000 voters – an absolute total that would be far higher at a General Election, with a higher turnout and voting across the whole of the UK. Moreover, the Electoral Commission holds that the real number of those unable to vote was higher because of "data quality issues" and because some people would not have been recorded.

30. Furthermore, these figures only relate to those who tried to vote and were told they could not. Polling carried out for the Electoral Commission of non-voters in the English local elections suggested that there were more people still who did not attempt to vote at all for reasons connected to the ID requirement. When asked, **4 per cent of the non-voter group raised the ID issue unprompted. 3 per cent said they did not vote because they lacked the required ID; while 1 per cent objected to having to show ID. The percentage of non-voters referring to ID rose from 4 to 7 when they were shown a list of options to choose from. The Electoral Commission identified evidence that unemployed people and**

people with disabilities found it more difficult to meet the ID requirement.[19] **(A further Electoral Commission report, which appeared after the end of the present report period, confirmed these concerning aspects of the impact of the legislation.) In its assessment of the elections, Democracy Volunteers, an election observer group, found that 1.2 per cent of all voters it saw were turned away on ID grounds, of whom its observers identified 53 per cent as being "non-white passing".**[20]

31. **We note that the voter ID regulations are an example of measures of constitutional significance that were introduced in the face of significant and widespread concern; and that there are now firm grounds for believing that the very outcomes that were feared of it are coming about. Moreover, it cannot be excluded that to some degree cynical (though possibly mistaken) political calculation, rather than a desire to address a problem in a proportionate way, lay behind these changes.** The former Conservative Cabinet minister, Jacob Rees Mogg, provided evidence in support of such a thesis when speaking at the National Conservative Conference on 15 May. He stated that "Parties that try and gerrymander end up finding their clever scheme comes back to bite them – as dare I say we found by insisting on voter ID for elections." Rees-Mogg went on: "We found the people who didn't have ID were elderly and they by and large voted Conservative, so we made it hard for our own voters and we upset a system that worked perfectly well".[21]

32. In our previous report, we reported on the government's draft Strategy and Policy statement for the Electoral Commission. Under the provisions of the Elections Act 2022, the government is required to consult with the Speaker's Committee on the Electoral Commission and the Levelling Up, Housing and Communities Committee on the content of the draft statement. **In our previous reporting period, we reported that these Committees had strongly criticised the draft statement, with the Speaker's Committee on the Electoral Commission concluding that it was not fit for purpose. The government laid a further statement before Parliament on 8 June 2023.**[22] **However, the revised statement, whilst providing some helpful clarification, does not appear to answer all of the concerns raised by these two parliamentary committees, particularly those regarding the need to maintain the operational independence of the Electoral Commission.**

19 'Voter ID at the May 2023 local elections in England', *Electoral Commission*, 19 June 2023, available at: < https://www.electoralcommission.org.uk/who-we-are-and-what-we-do/our-views-and-research/our-research/voter-id-may-2023-local-elections-england-interim-analysis >, last accessed 7 September 2023.

20 'Final Report – English Local Elections 2023', *Democracy Volunteers*, 12 May 2023, available at: < https://democracyvolunteers.org/final-report-english-local-elections-2023/ >, last accessed 7 September 2023.

21 Doug Cowan, 'Voter ID is a "gerrymandering scheme" suggests Jacob Rees-Mogg', *Electoral Reform Society*, 16 May 2023, available at: < https://www.electoral-reform.org.uk/voter-id-is-a-gerrymandering-scheme-admits-jacob-rees-mogg/ >, last accessed 7 September 2023.

22 Elections Act 2022 Implementation, Statement made on 19 June 2023, HCWS864; Government response to the consultation on the draft Strategy and Policy Statement for the Electoral Commission, 19 June 2023.

Legislatures

Key principles:

The UK is a representative democracy. The existence of devolved and UK governments is derived from the broad support of the respective legislatures (principle 2).

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).

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 (principle 5).

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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33. **As discussed above, in the present report period, the House of Commons Committee of Privileges completed its investigation into whether then Prime Minister Boris Johnson's statements to the House about gatherings during Covid restrictions amounted to a contempt of Parliament. Establishing the importance of its task, the Committee stated in its report of 15 June that:**

> "This inquiry goes to the very heart of our democracy. Misleading the House is not a technical issue, but a matter of great importance. Our democracy is based on people electing Members of Parliament not just to enable a government to be formed and supported but to scrutinise legislation and hold the Executive to account for its actions. Our democracy depends on MPs being able to trust that what Ministers tell them in the House of Commons is the truth. If Ministers cannot be trusted to tell the truth, the House cannot do its job and the confidence of the public in our democracy is undermined."[23]

34. As discussed above, Johnson had already announced his resignation as an MP when he became aware of the provisional finding of the Committee that he "deliberately misled the House and should be sanctioned for it by being suspended for a period that would trigger the provisions of the Recall of MPs Act 2015." In so doing, he compounded his transgressions. The Committee concluded that:

23 House of Commons Committee of Privileges, *Matter referred on 21 April 2022 (conduct of Rt Hon Boris Johnson): Final Report*, Fifth Report of Session 2022 – 23, HC 564 (House of Commons, London, 2023), p.3, available at: < https://committees.parliament.uk/publications/40412/documents/197897/default/ >, last accessed 2 September 2023.

> "In light of Mr Johnson's conduct in committing a further contempt on 9 June 2023, the Committee now considers that if Mr Johnson were still a Member he should be suspended from the service of the House for 90 days for repeated contempts and for seeking to undermine the parliamentary process, by:
>
> a) Deliberately misleading the House
>
> b) Deliberately misleading the Committee
>
> c) Breaching confidence
>
> d) Impugning the Committee and thereby undermining the democratic process of the House
>
> e) Being complicit in the campaign of abuse and attempted intimidation of the Committee.
>
> We recommend that he should not be entitled to a former Member's pass."[24]

35. The Committee published a further report on 29 June, placing:

> "on record our concern at the improper pressure brought to bear on the Committee and its members throughout this inquiry. We are concerned in particular at the involvement of Members of both Houses in attempting to influence the outcome of the inquiry. Those Members did not choose to engage through any proper process such as the submission of letters or evidence to our inquiry, but by attacking the members of the Committee, in order to influence their judgement. Their aim was to (1) influence the outcome of the inquiry, (2) impede the work of the Committee by inducing members to resign from it, (3) discredit the Committee's conclusions if those conclusions were not what they wanted, and (4) discredit the Committee as a whole."[25]

36. The Committee named various parliamentarians who had engaged in this activity via social and broadcast media, including former Cabinet members Nadine Dorries, Rees-Mogg, and Priti Patel. Rees-Mogg, for instance, said on GB News on 20 March that: "The privileges committee is not even a proper legal setup. It has a gossamer of constitutional propriety thrown over it, but it is in fact a political committee against Boris Johnson." Two days later, speaking on Radio 4, he said that the inquiry "makes kangaroo courts look respectable.[26] The Privileges Committee also described pressure exerted on Committee members by the Conservative Post, an online outlet connected to the Conservative Democratic Organisation campaign group.[27]

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24 House of Commons Committee of Privileges, *Matter referred on 21 April 2022 (conduct of Rt Hon Boris Johnson): Final Report*, Fifth Report of Session 2022 – 23, HC 564 (House of Commons, London, 2023), p.3, available at: < https://committees.parliament.uk/publications/40412/documents/197897/default/ >, last accessed 2 September 2023.

25 House of Commons Committee of Privileges, *Matter referred on 21 April 2022: Co-ordinated campaign of interference in the work of the Privileges Committee*, First Special Report of Session 2022 – 23, HC 1652 (House of Commons, London, 2023), p.3, available at: < https://committees.parliament.uk/publications/40679/documents/198237/default/ >, last accessed 2 September 2023.

26 House of Commons Committee of Privileges, *Matter referred on 21 April 2022: Co-ordinated campaign of interference in the work of the Privileges Committee*, First Special Report of Session 2022 – 23, HC 1652 (House of Commons, London, 2023), pp.8- 9, available at: < https://committees.parliament.uk/publications/40679/documents/198237/default/ >, last accessed 2 September 2023.

27 House of Commons Committee of Privileges, *Matter referred on 21 April 2022: Co-ordinated campaign of interference in the work of the Privileges Committee*, First Special Report of Session 2022 – 23, HC 1652 (House of Commons, London, 2023), pp.10 -11, available at: < https://committees.parliament.uk/publications/40679/documents/198237/default/ >, last accessed 2 September 2023.

37. **That the Committee, a cross-party group, was able to complete its task and do so when subject to inappropriate pressure, is encouraging. It suggests that the system of parliamentary self-regulation can be effective. A cross-party group – four of the seven members of which were Conservatives – was able to achieve consensus on a highly sensitive and important matter on behalf of the House, which subsequently approved its findings. One criticism of the Privileges Committee process, voiced by Rees-Mogg among others, is that it was "political" rather than "legal" in nature. However, the Committee had already introduced new procedures, taking into account such concerns, specifically in advance of the Johnson inquiry. It is possible that a case being heard by the European Court of Human Rights, relating to an earlier parliamentary investigation into Owen Paterson, may force additional changes.**

38. **While the Privileges Committee inquiry was a success for the protection of constitutional standards, that such a process was needed at all is regrettable, as were the efforts to undermine it. Furthermore, it could have received more positive support when its recommendations were voted on in the House of Commons.** On 15 June, in a free vote, the Commons approved the report finding Johnson in contempt, by 354 votes to 7 against. However, there were 225 Conservative abstentions, including Rishi Sunak, whose spokesperson declined to say whether he agreed with the report, merely saying that Sunak "respects" the conclusion that the Commons reached.[28] It is correct that the executive should avoid interfering in votes of this type, which are parliamentary matters. However, as well as being the head of government, the Prime Minister is also a parliamentarian, and the leader of the largest party in the House of Commons, the party of which the individual who committed the contempt (and the allies who attempted to pressurise the Privileges Committee) was a member (and former leader). In this sense, appearing to behave as though he was a bystander over such a critical matter was a questionable course of action.

39. **Aside from the individual case of Sunak, the large number of abstentions suggested less than full-hearted parliamentary support from the Conservative side. It is concerning that one factor contributing to this pattern may have been fear of activist reprisals against MPs who voted to endorse the report (principles 3, 4, 7; 8).**[29]

40. Various problems in the relationship between the UK government and Parliament have been identified in previous reports and have persisted. While Johnson eventually suffered condemnation for his contemptuous behaviour towards Parliament, **there remains a tendency for ministers to make dubious or misleading statements to the legislature**. As noted above, there have been a variety of questionable claims related to refugee policy made inside as well as outside Parliament. Other claims hard to reconcile with existing evidence include a statement Sunak made at Prime Minister's Questions on 3 May 2023 about numbers of NHS dentists (principle 3).[30]

41. **Further inappropriate executive behaviour towards the UK Parliament came in May when, as discussed above, Kemi Badenoch failed to inform Parliament first in an oral statement regarding substantial changes to the *Retained EU Law (Revocation and Reform) Bill* (principles 3; 4). This transgression produced the following exchanges in the Commons:**

28 Peter Walker, 'No 10 refuses to say if Sunak agrees with Commons vote to punish Johnson', *Guardian*, 20 June 2023, available at: < https://www.theguardian.com/politics/2023/jun/20/boris-johnson-rishi-sunak-commons-vote-partygate >, last accessed 8 September 2023.

29 Peter Walker and Sammy Gecsoyler, 'Boris Johnson allies threaten to target Tories who back partygate report for deselection', *Guardian*, 15 June 2023, last accessed 8 September 2023.

30 'NHS dentist statistics don't support PM's claim that there are over 500 more "this year"', *Full Fact*, 8 June 2023, available at: < https://fullfact.org/health/nhs-dentists-rishi-sunak-bda/ >, last accessed 8 September 2023.

"Mr Speaker

Before we begin the urgent question, I note that it is highly regrettable that the Government decided not to offer an oral statement on this matter yesterday, given the importance of the announcement. On such matters, full engagement with Parliament and its Committees is essential. Before I call the Chair of the European Scrutiny Committee, I remind the Government that we are elected to hear it first, not to hear it in The Telegraph, and a written ministerial statement is certainly not satisfactory for such an important matter.

Sir William Cash (Stone) (Con)

(Urgent Question): *To ask the Secretary of State for Business and Trade if she will make a statement on her failure to come to the House before she made the written ministerial statement on the Retained EU Law (Revocation and Reform) Bill and the article today in The Telegraph?*

The Secretary of State for Business and Trade (Kemi Badenoch)

I am very sorry, Mr Speaker, that the sequencing that we chose was not to your satisfaction. I was—

Mr Speaker

Order. That is totally not acceptable—

Kemi Badenoch

It was not the right procedure.

Mr Speaker

Who do you think you are speaking to, Secretary of State? I think we need to understand each other. I am the defender of this House and these Benches on both sides. I am not going to be spoken to by a Secretary of State who is absolutely not accepting my ruling. Take it with good grace and accept it that Members should hear it first, not through a WMS or what you decide. These Members have been elected by their constituents and they have the right to hear it first. It is time this Government recognised that we are all elected—we are all Members of Parliament—and used the correct manners.

Kemi Badenoch

Mr Speaker, I apologise. What I was trying to say was that I am very sorry that I did not meet the standards that you expect of Secretaries of State. Forgive my language. I have been trying to make sure that I provide as much clarity as possible, so I am actually very pleased to have come to the House to speak on this issue."

42. **As we have noted, delegated legislation remains an issue of constitutional concern**. The shift towards hyper-skeletal bills means that **Parliament is increasingly being asked to endorse transfers of power without clear knowledge of the use to which that power will be put. The ability of Parliament properly to exercise its role in scrutinising legislation, holding the executive to account,**

and assessing whether a particular secondary law making powers are required, is challenged by such a tendency. Once such authorities are created, their actual use can create further problems for the constitutional position of the UK Parliament and its relationship with the executive. **They can be a means of bypassing more appropriate levels of Parliament involvement in the making of law.** A controversial use of a statutory instrument came in June 2023 when the government used such an instrument to change the definition of a "disruptive protest" in the *Public Order Act 2023*, despite the same change having been rejected when that Act was passing through Parliament earlier in the year, following a defeat in the Lords.[31] This episode was a further example of a constitutionally questionable end pursued using constitutionally questionable means (principles 3; 4; 5; 8).

43. **Continued doubts about integrity in the honours system and the role of serving and former prime ministers in this system are particularly worrying from the point of view of Parliament. The latitude afforded to premiers in their resignation honours lists is concerning. In the present report period, there was understandable controversy regarding nominations made by Johnson to the House of Lords (see Appendix c). We find it unacceptable that outgoing prime ministers are potentially able to abuse the process by which people are appointed to one of the chambers of the UK Parliament. This practice constitutes an affront to core constitutional values (principles 4; 5).**

31 James Goddard, 'Draft Public Order Act 1986 (Serious Disruption to the Life of the Community) Regulation 2023: "Fatal" and "regret" motions', *House of Lords Library*, 12 June 2023, available at: < https://lordslibrary.parliament.uk/draft-public-order-act-1986-serious-disruption-to-the-life-of-the-community-regulations-2023-fatal-and-regret-motions/ >, last accessed 8 September 2023.

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).

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 (principle 6).***

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

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).

[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 (principle 11).

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44. Serious examples of issues of integrity identified in this report have involved ministers operating within the UK executive. The individuals concerned behaved in ways that departed from rules stipulated in the *Ministerial Code* concerning such subjects as good personal conduct (Raab); disclosure of relevant information (Zahawi); and dealing properly with Parliament (Raab). In all cases, not only ministers but also civil servants were in different ways involved. In the case of Zahawi, there was a failure properly to notify relevant officials of pertinent information. With Johnson, civil servants were participants in gatherings about which Johnson misled Parliament: they were – whether willingly or by pressure –

implicated in these incidents, a number of them receiving fixed penalty notices for doing so. In the case of Raab, the inquiry and its outcome turned specifically on his behaviour towards Whitehall staff. The Tolley report found that Raab had, while serving as Foreign Secretary:

> "as part of the process towards and implementation of…[a]…management choice…acted in a way which was intimidating, in the sense of unreasonably and persistently aggressive in the context of a workplace meeting. His conduct also involved an abuse or misuse of power in a way that undermines or humiliates. In particular, he went beyond what was reasonably necessary in order to give effect to his decision and introduced a punitive element. His conduct was bound to be experienced as undermining or humiliating by the affected individual, and it was so experienced. I infer that the DPM must have been aware of this effect; at the very least, he ought reasonably to have been so aware."[32]

Furthermore,

> "on a separate but closely related occasion concerned with the same subject- matter, the DPM referred to the Civil Service Code in a way which could reasonably have been understood as suggesting that those involved had acted in breach of the Civil Service Code (and so would have been in breach of their contracts of employment). This had a significant adverse effect on a particular individual (a different person from the individual who made the FCDO Complaint), who took it seriously. The DPM's conduct was a form of intimidating behaviour, in the sense of conveying a threat of unspecified disciplinary action. He did not target any individual, nor intend to threaten anyone with disciplinary action. However, he ought to have realised that referring in this way to the Civil Service Code could have been understood as such a threat."[33]

45. Raab, however, regarded his behaviour as acceptable on the grounds that he was acting on behalf of the public and in doing so needed to overcome resistance on the part of the Civil Service. In the resignation letter in which he condemned the inquiry as flawed, he defended the right of ministers to "be able to exercise direct oversight with respect to senior officials over critical negotiations conducted on behalf of the British people, otherwise the democratic and constitutional principle of ministerial responsibility will be lost." Furthermore, "ministers must be able to give direct critical feedback on briefings and submissions to senior officials, in order to set the standards and drive the reform the public expect of us…I am genuinely sorry for any unintended stress or offence that any officials felt, as a result of the pace, standards and challenge that I brought to the Ministry of Justice. That is, however, what the public expect of ministers working on their behalf." Raab claimed that by "setting the threshold for bullying so low, this inquiry has set a dangerous precedent." It would, Raab held, "encourage spurious complaints against ministers, and have a chilling effect on those driving change on behalf of your government – and ultimately the British people." He complained further about "improprieties" including "systematic leaking of skewed and fabricated claims to the media in breach of the rules of the inquiry and the Civil Service Code of Conduct, and the coercive removal by a senior official of dedicated private secretaries from my Ministry of Justice private office, in October of last year."[34]

32 Adam Tolley, KC, 'Investigation Report to the Prime Minister', 20 April 2023, p.35, available at: < https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1152026/2023.04.20_Investigation_Report_to_the_Prime_Minister.pdf >, last accessed 2 September 2023.

33 Adam Tolley, KC, 'Investigation Report to the Prime Minister', 20 April 2023, pp.35 – 36, available at: < https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1152026/2023.04.20_Investigation_Report_to_the_Prime_Minister.pdf >, last accessed 2 September 2023.

34 '"A dangerous precedent":Raab's letter of resignation and Sunak's reply in full', *Guardian*, 21 April 2023, available at: < https://www.theguardian.com/politics/2023/apr/21/dominic-raab-resignation-letter-rishi-sunak-reply-full >, last accessed 5 September 2023.

46. **One possible interpretation of this episode is that it is mainly connected to the personality of one particular individual, Raab. However, as we have noted previously, Raab is not the only minister in the present government lately to have shown public hostility towards the Civil Service. Moreover, the challenging of constitutional norms in ways which serve to undermine public institutions is part of a wider pattern associated with the present UK government, which has exhibited similar tendencies towards, for instance, Parliament, the judiciary, and the devolved bodies.**

47. **During the report period, an issue which generated much attention was that of whether Johnson could and would provide WhatsApp messages, dating from his time as Prime Minister, to the UK Covid-19 Inquiry.**[35] We note that in March the Cabinet Office issued new guidance on the use of "non-corporate communication channels" including WhatsApp as well as SMS and private email for the conduct of "government business". The objectives of the guidance are:

1. To facilitate efficient day-to-day government discussions in a modern way;
2. To reduce risks to the security of information;
3. To comply with the principles of good government, including record-keeping, accountability and transparency.[36]

48. **We welcome the introduction of new guidance in this area, and that the document commits itself to being reviewed by the end of 2025. The forms of communication it deals with raise difficult questions about good practice within the executive, and ensuring that it is subject to proper accountability; it is therefore essential that guidance in this area should be effective (principles 1; 3; 6; 7).**

49. Near the end of the report period, the Advisory Committee on Business Appointments reported on a request from Sue Gray, Second Permanent Secretary at the Cabinet Office, on taking up a post as Chief of Staff to the Leader of the Opposition. The Committee recommended a waiting period of six months with certain conditions. It found that:

> "The risk associated with Ms Gray's access to information is potentially broad. However, the departments identified no particular information that would be of specific risk; and there is evidence that some of the work she was involved in is no longer sensitive. This reduces the risk associated with Ms Gray's access to information and insight. Further, Ms Gray is prevented from drawing on privileged information and has an ongoing duty of confidentiality. Nevertheless, it would be difficult to argue that Ms Gray would not be seen to offer the employer insight into government matters it might not otherwise have access to."[37]

35 Lewis Denison and Rachel Dixon, 'The Boris Johnson WhatsApp row explained as Covid inquiry saga continues', *ITV News*, 4 June 2023, available at: < https://www.itv.com/news/2023-06-01/sunak-rejects-inquirys-demand-for-johnsons-whatsapps-what-now >, last accessed 11 September 2023.

36 'Using non-corporate communication channels (e.g. WhatsApp, private email, SMS) for government business', *Cabinet Office*, 30 March 2023, available at: < https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1147629/2023-03-30_Non-corporate_communications_channels_guidance.pdf >, last accessed 11 September 2023.

37 Advisory Committee on Business Appointments, *Susan Gray CBE, former Second Permanent Secretary at the Department for Levelling Up, Housing and Communities and the Cabinet Office. Paid appointment, Chief of Staff, Leader of HM Official Opposition*, pp.3 – 4, available at: < https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1166859/2023-06_Final_Advice_SG_for_publication.pdf >, last accessed 11 September 2023.

50. In a written statement to the House of Commons published on 3 July, shortly after the end of this report period, Jeremy Quin, Minister for the Cabinet Office and HM Paymaster General, announced that a Cabinet Office inquiry had "found that the Civil Service Code was prima facie broken as a result of the undeclared contact between Ms Gray and the Leader of the Opposition." Gray had declined to make representations to the process. It was unusual for the findings of such an inquiry to be made public.[38]

38 House of Commons Written Answers, 3 July 2023.

The territorial constitution

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. **[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…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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51. **We have noted in previous reports that a major source of concern related to the territorial constitution of the UK (and its external relations) involved the post-Brexit status of Northern Ireland. This issue arose partly as a consequence of the decision of the UK government to leave the customs union and single market. The contention around that decision has been exacerbated at times by the discourse and actions of the UK government.** As we have previously iterated, the Protocol on Ireland/Northern Ireland in 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.

52. **Tensions have surrounded the Protocol during all our reporting periods. Their manifestations have included opposition to the Protocol from some, particularly within the Unionist community and the political parties that represent them and from some Conservative Party politicians associated with the Euroean Research Group.**

53. Elections to the Northern Ireland Assembly, held in May 2022, took place in this context. For the first time, Sinn Fein, a republican party, became the largest party in the Assembly. The Democratic Unionist Party (DUP), in second place, refused to participate in the Executive or to nominate a Speaker for the Assembly, which means that neither the devolved legislature nor its executive can function. **The DUP has persisted in non-participation thereafter, and has received privileged treatment from the UK government as part of an effort to persuade it to reengage.** In an exchange in the House of Commons with the DUP leader Sir Jeffrey Donaldson on 27 June, the Secretary of State for Northern Ireland, Chris Heaton-Harris, stated that:

> "I very much look forward to being in a space where, following further conversations with the right hon. Gentleman, I can bring forward legislation in this place that does exactly what he needs it to do for his party to be able to give me a date when it will go back into the Executive in Northern Ireland."[39]

The UK Government's apparent willingness to create legislation in response to the demands of one regional party of 8 MPs is unusual in and of itself; that such legislation may well affect the implementation/interpretation of two international agreements (namely the Withdrawal Agreement [Windsor Framework] and the 1998 Belfast Agreement) is unprecedented and risky.

54. **We judge the position in Northern Ireland with respect to the failure to form an executive to be constitutionally problematic in a number of senses. It has created general uncertainty over the stability of the peace process, the government of Northern Ireland, and when an election might take place.** The Northern Ireland (Executive Formation and Organ and Tissue Donation) Act 2023 further changed what was agreed with the Irish Government and the main Northern Ireland parties in the New Decade, New Approach deal (2020) by extending the deadline for the Secretary of State to call an Assembly election until end January 2024, but he may call one before then if he chooses. **This sees Northern Ireland being denied its own tier of democratically-accountable devolved government.** The Northern Ireland (Interim Arrangements) Act 2023 sees the Northern Ireland civil service (which is independent from Whitehall) being tasked with an unusual level of responsibility. The accompanying Guidance on decision-making for Northern Ireland Departments issued in May 2023 allows 'a senior officer of a NI department' to exercise 'a function of the department if the officer is satisfied that it is in the public interest to exercise the function during the period until an Executive is formed'.[40] The Guidance also states that, 'In carrying out their functions, Northern Ireland departments must also take into consideration wider pressures on the Northern Ireland Budget and the departmental spending limits and Budget position as set out by the Secretary of State for Northern Ireland'. **This has meant that responsibility for important decisions relating to the political future of Northern Ireland were taken on unilaterally by a UK-level minister and important decisions relating to the welfare of citizens in Northern Ireland (e.g. severe spending cuts) were being made by senior civil servants** (principles 1; 2; 13; 15; 16). Thus, an unprecedented situation requiring 'emergency' legislation has become extended and near-normalised.

55. **These deficiencies manifested themselves in the report period and were to the considerable constitutional, democratic and material detriment of Northern Ireland. The UK government imposed strict financial retrenchment measures, with severe implications for the delivery of public services. There is reason to believe that the move was motivated by a desire to pressure the DUP into returning to the executive. The lack of a functioning government meant a lack of ministers able to seek to mitigate the cuts.** Moreover, it meant that specific decisions about their implementation would have to be made not by democratically accountable ministers, but by officials. During the report

39 HC Hansard for 21 June 2023, available at: < https://hansard.parliament.uk/commons/2023-06-21/debates/85E009F2-E04B-432A-92EF-40DEDD33CC9F/PowerSharing >, last accessed 7 October 2023.

40 Guidance on decision-making for Northern Ireland Departments issued by the Northern Ireland Office, May 2023, available at: < https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1159124/Guidance_on_decision-making_for_Northern_Ireland_Departments_May_2023.pdf >, last accessed 7 October 2023.

period, Sir David Sterling, the former head of the Northern Ireland Civil Service, raised concerns about the way the spending reductions were being imposed and the implications, describing them as "fundamentally undemocratic" and "fundamentally unconstitutional".[41]

56. **On 27 February the EU and UK reached an agreement on the operation of the Protocol in the form of the Windsor Framework.** As part of this arrangement, the UK government dropped legislation it had introduced to Parliament which would allow it unilaterally to override parts of the Protocol. **We welcome the Framework, which demonstrates the benefits that can be achieved by working constructively within the framework of international law rather than departing from it (or threatening to do so).**

57. **However, the Windsor Framework does not mean the end of the Brexit-related difficulties experienced by Northern Ireland. Uncertainties exist as to how exactly it will be operated in practice. And regulatory divergence between the EU and UK has the potential to create practical, political and legal complexities and difficulties for Northern Ireland. The 'Stormont Brake' introduced by the Framework could potentially compound such difficulties, either by being proven to be effective to use (in which case it could raise concerns among EU member-states regarding Northern Ireland's position) or by being ineffective (whereby unionist suspicion and cynicism towards the UK/EU would grow) (principles 1; 13; 15).**

58. **We have noted in previous reports problems with the process and substance of UK legislation in its implications for the devolved systems. A consideration of what is now the *Strikes (Minimum Service Levels) Act 2023* illustrates how such problems have persisted during the present period.** The law has implications for the operation of devolved level public services such as hospitals. It includes within it extensive and vaguely defined delegated broad powers, including Henry VIII powers, which could be used to alter devolved as well as UK primary legislation.[42] It was opposed by both the Welsh and Scottish governments, which objected to the way in which the UK government – which took the view that the Bill did not engage the Sewel Convention – interacted with them over the legislation.[43] The Welsh Senedd expressly denied legislative consent to the bill on 25 May, but the UK government continued to proceed regardless.[44] Another Bill over which legislative consent was not sought, but which the devolved governments felt was needed, was the Illegal Migration Bill. The Senedd withheld consent to this legislation despite the UK government not regarding it has needed; while the Presiding Officer in Holyrood ruled a Legislative Consent Motion from the Scottish government out of order, meaning that the Scottish Parliament did not have the opportunity to withhold or grant consent.

41 See eg: Rebecca Black, 'Public services could be "collateral damage" in Northern Ireland political stalemate, warns former head of Northern Ireland Civil Service, Sir David Sterling', *News Letter*, 23 April 2023, available at: < https://www.newsletter.co.uk/news/politics/public-services-could-be-collateral-damage-in-northern-ireland-political-stalemate-warns-former-head-of-civil-service-sir-david-sterling-4115532 >, last accessed 7 October 2023.

42 See eg: 'Liberty Briefing on the Strikes (Minimum Service Levels) Bill', *Liberty website*, February 2023, available at: < https://www.libertyhumanrights.org.uk/wp-content/uploads/2023/01/Libertys-briefing-on-the-Strikes-Minimum-Service-Levels-Bill-for-second-reading-in-the-House-of-Lords-February-2023.pdf >, last accessed 14 September 2023.

43 'Strikes (Minimum Service Levels) Bill: Letter to UK government', 24 January 2023, available at: < https://www.gov.scot/publications/strikes-minimum-service-levels-bill-letter-to-uk-government/ >, last accessed 14 September 2023.

44 See: 'Written statement: the UK government's Strikes (Minimum Service Levels) Bill', 22 May 2023, available at: < https://www.gov.wales/written-statement-uk-governments-strikes-minimum-service-levels-bill >, last accessed 14 September 2023.

59. **More broadly, evidence of the ineffectiveness of Legislative Consent Motions (or their voting down) continued in this period.** For example, the *Trade (Australia and New Zealand) Act* received Royal Assent in the report period notwithstanding the Welsh Senedd and Scottish Parliament withholding legislative consent to it. This Act raised further issues of the uneven power balance between devolved and central institutions. It created a power to make regulations in devolved areas by the devolved authorities, but only subject to approval at the UK level. At the same time, it vested the power in UK ministers to issue regulations impacting in the devolved field without requiring devolved consent for such action. However, during the passage of the Bill, the government committed that it would normally seek such consent.[45]

60. **The Sewel convention has been central to the functioning of the territorial constitution, and in particular in ensuring that the legislative power of the UK Parliament is exercised in a way that does not encroach inappropriately upon the devolved spheres of operation. Ongoing developments suggest serious problems with Sewel. The practice of proceeding with UK-wide legislation notwithstanding the withholding of devolved consent is becoming normal, in contravention of the specific wording of the convention; and there are serious differences of interpretation regarding when consent is or is not required. Taken together, these changes point to a change in the operation of the UK constitution, in the direction of a more centralised and less consensual model, which has taken place without proper consideration or wide agreement being secured. We are concerned about both the form and substance of this change** (principles 1; 15; 16).

61. A new development of considerable significance was the first ever use on 17 January of powers under Section 35 of the *Scotland Act 1998*. These powers were employed to veto legislation passed (with cross-party support) by the Scottish Parliament, the Gender Recognition (Reform) Scotland Bill (see Appendix e). **We do not take a position on the merits of the legislation concerned. However, there are strong arguments that the use of the Section 35 powers in this instance was an inappropriate and arbitrary interference in the legislative authority of the Scottish Parliament.** We await with interest the outcome of the legal challenge to this action by the Scottish Government. Aside from its being legal or otherwise, the use of Section 35 powers in this way could be construed as further evidence of excessive deployment of its power by the UK government, to the detriment of devolved autonomy. **There are grounds for believing that this intervention was motivated by party political gain without regard for constitutional sensitivities; as suggested by the failure on the part of the UK government to seek a political resolution before deploying its powers under Section 35** (principles 1; 15; 16).

62. A further example of this same tendency came with the UK government decision that the Scottish government needed to dilute its deposit return scheme, in order to achieve consistency with the UK government's proposed scheme, although this was a matter within devolved competence and where divergence had been contemplated via the Common Frameworks process. (see Appendix e). This episode adds to the evidence that mechanisms for UK intergovernmental coordination are not at present effective at delivering meaningful cooperation between the different tiers.[46]

45 House of Lords Select Committee on the Constitution, *Trade (Australia and New Zealand) Bill*, Eleventh Report of Session 2022-23, HL 135 (House of Lords, London, 2023), p.4, available at: < https://committees.parliament.uk/publications/33616/documents/183200/default/ >, last accessed 14 September 2023.

46 See eg: Alex Walker, 'The intergovernmental relations system and Scotland's deposit returns scheme', *UK in a Changing Europe*, 2 June 2023, available at: < https://ukandeu.ac.uk/the-intergovernmental-relations-system-and-scotlands-deposit-return-scheme/ >, last accessed 14 September 2023.

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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63. **We have previously noted concerns about the tendency of the UK government to legislate for measures that raise widespread concerns with regard to the rule of law and human rights. In our previous report, we noted that a measure of this type was progressing through Parliament, the *Public Order Bill*. It became an Act in the present report period. It was subject to criticism for imposing improper restrictions on the ability of members of the public to engage in protest.** Aspects of the legislation that the parliamentary Joint Committee on Human Rights found objectionable from a human rights perspective included the provisions dealing with 'locking on', the obstruction of transport projects, and interference with major infrastructure. It called for the removal of clauses providing for "serious disruption prevention orders" and allowing for the police to conduct stop and search without suspicion. The Committee judged that the bill would inappropriately restrict the freedoms of movement and of expression, and might be in violation of the European Convention on Human Rights.

64. A bill referred to at various points in this report for its constitutionally troubling aspects is the Strikes (Minimum Service Levels) Bill. The Bill raises considerable rule of law and human rights issues, both for its form and its content. It was a 'hyper-skeletal' bill, enabling ministers to act through secondary legislation while giving minimal indication to the parliamentarians engaged in scrutinising it as to the precise uses to which it would be put. The legislation fails properly to define important terms (including "Minimum Service Levels" itself), leaving much of the task to regulations. It also creates a Henry VIII power that applies not only to legislation already passed, but that may be passed during the parliamentary session. This seems to have become be the standard wording of Henry VIII residual powers clauses, now set out in OPC guidance. The government fell short of making an adequate case for the need for such a power.[47] **The rule of law requires clarity, avoidance of the potential for arbitrary executive action, and attention to good practice in legislative processes. These qualities have been lacking in the case of this measure. Furthermore, it seems likely to be deleterious in its consequences for human rights.** The Joint Committee on Human Rights found fault with the Bill in a number of regards, including that it might violate Article 14 of the ECHR prohibiting discrimination and Article 11 on freedom of association.[48] (principles 7; 8; 19).

65. We have previously noted that we judged **the policy of seeking to deport refugees to Rwanda to be problematic from the perspective of international human rights norms and domestic law. The UK government remained committed to implementing this plan during the present report period. It also pursued further legislative measures in this policy area.** The Illegal Migration Bill 2023 became an Act of Parliament in July 2023, just outside our reporting period. The Bill raises serious concerns as regards the rule of law.

66. First, the Bill either removes or reduces legal checks over decisions of the Home Secretary to remove an individual, who arrived in the UK illegally, from the UK. The Bill places the Home Secretary under a duty to remove those arriving illegally in the UK. In addition, the Secretary of State must declare inadmissible any human rights claim or protection claim brought by an individual in the UK courts to prevent their removal from the UK – i.e., any claim based on the argument that removal from the UK would harm an individual's Convention rights, or a claim for humanitarian protection under the Refugee Convention. Those wishing to bring such claims may only do so after they have been removed from the UK.

67. The only means through which an individual can prevent their removal from the UK is to bring a suspensive harm claim or a factual suspensive claim to the Home Secretary. A suspensive harm claim applies when an individual would face a real, imminent, and foreseeable risk of serious and irreversible harm were they to be removed from the UK to a third country or their country of origin. A factual suspensive claim arises when the individual can prove that the Secretary of State made a mistake of fact when determining that an individual should be removed from the UK. There is a very short time limit for these claims (8 days), as well as only a limited form of judicial oversight over these claims through the tribunal system.

47 House of Lords Select Committee on the Constitution, *Strikes (Minimum Service Levels) Bill*, Fourteenth Report of Session 2022 – 23, HL 162, (House of Lords, London, 2023), pp.1 – 4, available at: < https://committees.parliament.uk/publications/34248/documents/188507/default/ >, last accessed 14 September 2023.

48 House of Commons/House of Lords Joint Committee on Human Rights, *Legislative Scrutiny: Strikes (Minimum Service Levels) Bill*, Tenth Report of Session 2022 – 23, HC 1088 HL 157 (House of Commons, London, 2023), available at: < https://committees.parliament.uk/publications/39320/documents/192958/default/ >, last accessed 14 September 2023.

68. Second, there is a reduction in the legal checks over decisions of the Home Secretary to detain an individual pending their removal from the UK. The Bill extends the period of time for which an individual can be detained without bail from 8 days to 28 days, although this does not remove the writ of habeas corpus. In addition, the Bill includes a partial ouster clause, limiting judicial review of the decision to detain an individual to instances where the minister acted in bad faith, or in such a procedurally defective manner as to amount to a fundamental breach of the principles of natural justice.

69. Third, the Bill restricts the scope of application of the Human Rights Act 1998. Section 3 of the Human Rights Act requires the courts to interpret legislation, so far as it is possible to do so, in a manner compatible with Convention rights. However, clause 1 of the Bill sets out that the provisions of the HRA do not apply to the Illegal Migration Bill, although section 4 remains in place (empowering the court to issue a declaration of incompatibility). Moreover, the courts are required to interpret the Bill's provisions in a manner compatible with the purpose of the Illegal Migration Bill; to "prevent and deter illegal migration" particularly "migration by unsafe and illegal routes". This restricts the extent to which the courts can apply the principle of legality, reading down broad provisions in the Act to ensure that they are not applied in a manner which would undermine fundamental common law rights. It can be seen as a manifestation of the stated intention of the government to deliver, in specific areas, on the general objectives of the now abandoned Bill of Rights Bill. That Bill, if passed, would have repealed Section 3 of the Human Rights Act altogether.

70. Fourth, the Bill has been widely criticised for breaching international law, specifically the Refugee Convention and the European Convention on Human Rights.[49] In particular, the Bill instructs courts and ministers to ignore interim injunctions issued by the European Court of Human Rights. Although the Bill became an Act shortly after this reporting period, this aspect has not yet been brought into force. This may be pending the decision of the Supreme Court concerning the removal of individuals from the UK to Rwanda. Whilst the first instance court concluded that this was compatible with Convention rights, the Court of Appeal reversed this decision. The Supreme Court will hear the case in the week of 9 October, outside of this reporting period.

71. **In previous reports, we have noted that the government initiated legislation for the overhaul of the *Human Rights Act 1998* (HRA) and the means by which the rights guaranteed by the European Convention on Human Rights can be relied upon in UK law. After various vacillations, the departure of Dominic Raab has – as we have noted – been followed by the abandonment of this particular project. But that such legislation was introduced at all is a source of concern from the point of view of various constitutional principles. We again record concern regarding the way in which decisions over a matter of such constitutional significance should seemingly rest more on political contingency than inclusive, considered deliberation. Furthermore, the approach of the UK government towards the Human Rights Act remains a concern, since it has stated the objective of bypassing protections in specific areas rather than the more general weakening envisaged in the Bill of Rights Bill.**

49 Joint Committee on Human Rights, *Legislative Scrutiny Bill: The Illegal Migration Bill*, Twelfth Report of Session 2022-23, HC 1241 HL 208 (House of Commons, London, 2023), available at: < https://committees.parliament.uk/publications/40298/documents/196781/default/ >, last accessed 7 October 2023;

House of Lords Select Committee on the Constitution, *The Illegal Migration Bill*, Sixteenth Report of Session 2022-23, HL Paper 200 (House of Lords, London, 2023), available at: < https://committees.parliament.uk/publications/40026/documents/195422/default/ >, last accessed 7 October 2023.

72. **A further government change of position over an issue about which we have previously raised concern involved the *Retained EU Law (Revocation and Reform) Bill*. This legislation, as we have noted, raised rule of law issues in a number of ways. It has now been considerably reduced in its scope, though certain objections remain, as noted above.**

73. In previous reports, we raised concerns as to the use of ouster clauses in the Judicial Review and Courts Act 2022 – clauses that remove judicial review of the courts over decisions of administrative bodies. The Judicial Review and Courts Act, section 2, inserts section 11A into the Tribunals and Courts Act 2007, setting out the finality of decisions of the Upper Tribunal. Specifically, this is a partial ouster clause, restricting the ability of the courts to review a decision of the Upper Tribunal to refuse to hear an appeal from the First-tier Tribunal. Judicial review can only occur where a decision was made in bad faith, or where the decision was so procedurally defective a to amount to a fundamental breach of the principles of natural justice. In *R* (*Oceana) v Upper Tribunal (Immigration and Asylum Chamber)*, the high court clarified that the ouster clause should not be read down and provided a clear intention to restrict judicial review.[50] It therefore succeeded in limiting judicial review over decisions of the Upper Tribunal.

74. Whilst this may be acceptable given the wording of the clause and its narrow application, what is concerning is the extent to which the high court reached this conclusion merely in reliance on the wording of legislation and the importance of parliamentary sovereignty. This contrasts with the approach of Lord Carnwath, who gave the lead judgment in *R* (*Privacy International) v Investigatory Powers Tribunal*, which adopted a more balanced approach between the requirements of parliamentary sovereignty and the rule of law.[51]

75. It is likely that Lord Carnwath's approach would have reached the same conclusion in *Oceana*. The partial ouster clause is narrow in its scope and applies to situations where applicants have already had a chance to have their case heard by a body which, whilst technically part of the administration, acts in a similar manner to a judicial body. Nevertheless, concerns arise as to the approach taken by the administrative division of the high court which may give too much weight to parliamentary sovereignty at the cost of protecting the rule of law. **This is particularly concerning as regards the rule of law given the repetition of the wording of the ouster clause in the Judicial Review and Courts Act in other provisions – most notably the Illegal Migration Bill – in areas where there may be less of a justification for limiting judicial review.**

50 [2023] EWHC 791 (Admin). Available at: < https://www.bailii.org/ew/cases/EWHC/Admin/2023/791.html >, last accessed 7 October 2023.
51 [2019] UKSC 22, [2020] AC 49.

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*, 2022, paragraph 1.3b). Ministers must provide information that is both accurate and truthful to their respective legislatures, and should correct unintended errors they make as soon as possible (see e.g.: *Ministerial Code*, paragraph 1.3c). Devolved and UK ministers should be as open as they can in their interactions with legislatures and the public. They should withhold information only if to do otherwise would compromise the public interest, as set out in freedom of information legislation and other specific legislation (see e.g.: *Ministerial Code*, paragraph 1.3d).

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

5. At UK level, the House of Commons is rightly acknowledged as in a position of primacy over the House of Lords. But the House of Lords has a legitimate role in parliamentary processes, including scrutiny of primary and delegated legislation, and its special interest and expertise in constitutional matters should be acknowledged.

6. *Civil servants are accountable to ministers, who in turn are accountable to Parliament* [*Civil Service Code*, 2015]. There are limited exceptions to this general principle, including the role of specific officials (Accounting Officers or, in Scotland, Accountable Officers), who at UK level are personally responsible to the House of Commons Committee of Public Accounts *for keeping proper accounts; for the avoidance of waste and extravagance; and for the efficient and effective use of resources* [*Ministerial Code*, paragraph 5.3]. Similar exceptions apply at devolved level, with officials accountable for financial management to devolved legislatures.

Legal powers and obligations of ministers

7. *Ministers are under an overarching duty to comply with the law, including international law and treaty obligations, uphold the administration of justice and protect the integrity of public life. They are expected to observe the Seven Principles of Public Life: selflessness, integrity, objectivity, accountability, openness, honesty and leadership.* (*Cabinet Manual,* paragraph 3.46. For the *Seven Principles of Public Life* see below).

8. UK and devolved ministers' powers are derived from legislation; ministers may also exercise powers derived from the common law, including prerogative powers of the Crown. Ministerial powers should normally be specified in primary rather than secondary legislation. Such powers are subject to limits and constraints; they should be exercised, and public expenditure approved, only for the purposes authorised by the relevant legislation, and in accordance with established norms and reasonable expectation. The exercise of ministerial powers should only exceptionally be immune from challenge in the courts (see e.g.: *Cabinet Manual,* paragraph 3.24).

9. [UK] *Ministers must ensure that no conflict arises, or could reasonably be perceived to arise, between their public duties and their private interests, financial or otherwise* [*Ministerial Code* paragraph 7.1]. *Ministers must not use government resources for Party political purposes* [*Ministerial Code*, paragraph 1.3i]. These principles extend to devolved ministers also, and all holders of public office.

Civil Service

10. Civil servants, with the exceptions of 'special advisers' and certain others, must be *recruited on merit on the basis of fair and open competition.* They should be promoted on merit usually following a competitive process. They must be required to *carry out their duties with integrity and honesty, and objectivity and impartiality.* They must serve the government to the best of their ability in a way which maintains political impartiality, and act in a way that deserves and retains the confidence of ministers in the government of the day, while ensuring they will be able to establish the same relationship with those they may be required to serve in a future government (see: *Constitutional Reform and Governance Act 2010,* Part 1 for the UK, Scottish and Welsh governments; *Civil Service Codes;* and similar provisions for the Northern Ireland Civil Service).

11. [UK] *Ministers must uphold the political impartiality of the Civil Service, and not ask civil servants to act in any way which would conflict with the Civil Service Code and the requirements of the Constitutional Reform and Governance Act 2010* [*Ministerial Code*, paragraph 5.1j]. [UK] *Ministers have a duty to give fair consideration and due weight to informed and impartial*

advice from civil servants, as well as to other considerations and advice in reaching policy decisions, and should have regard to the Principles of Scientific Advice to Government [*Ministerial Code*, paragraph 5.2]. These principles extend to devolved ministers also.

12. 'Special advisers' to ministers are temporary civil servants who are not required to be recruited on merit through competition or to carry out their duties with objectivity and impartiality. They are an accepted part of government but should act in accordance with prescribed limitations (see: *Constitutional reform and Governance Act 2010, part 1; Special Advisers Codes, and similar provisions in Northern Ireland*).

The territorial constitution

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

January

5 January: The Government announces the introduction of new anti-strike laws to include and extended minimum service levels across the public sector
16 January: The Government invokes Section 35 of the Scotland Act 1998 to block the Gender Recognition Reform (Scotland) Bill
16 January: The Government announces new plans to widen police powers for disruptive protest in the form of an amendment to the Public Order Bill
18 January: The House of Lords Constitution Committee publishes its inquiry into the lord chancellor and law officers which criticises recent Government actions relating to the rule of law
20 January: The deadline for the restoration of the Northern Ireland Assembly again passes, requiring an election within 12 weeks or another delay via legislation at Westminster
20 January: Prime Minister Rishi Sunak receives a fixed penalty fine for his failure to wear a seatbelt in a clip uploaded to social media
23 January: William Shawcross, the Commissioner for Public Appointments begins his review into the appointment of BBC chairman Richard Sharp
25 January: The Joint Committee on Human Rights makes a statement criticising the Government's proposed Bill of Rights Bill
28 January: Nadine Dorries MP is criticised by the Advisory Committee on Business Appointments (ACOBA) for breaking the Ministerial Code by failing to disclose new TalkTV role
29 January: Nadhim Zahawi is fired as Conservative Party chairman over his tax affairs after an inquiry found he was in serious breach of the Ministerial Code
30 January: William Shawcross recuses himself from his inquiry into Richard Sharp's appointment because he says he has met Mr Sharp on previous occasions

February

6 February: Mark Fullbrook is given permission by ACOBA to return to lobbying position without the standard two-year break following his 49-day role as Liz Truss' chief of staff
7 February: The Prime Minister breaks up the Department of Business, Energy, Innovation and Skills during a Cabinet reshuffle following Zahawi's sacking
7 February: The Government passes legislation to prevent Stormont collapse
8 February: The Supreme Court dismisses the Allister Case challenging the Northern Ireland Protocol
12 February: MPs on the Department for Culture, Media and Sport Committee conclude BBC chairman Richard Sharp made "significant errors of judgement" in the facilitation of a loan to Boris Johnson
15 February: Nicola Sturgeon announces she will resign as Scottish First Minister and leader of the Scottish National Party
16 February: The Home Office accepts a High Court ruling against its proposed changes to right to residence rules for EU citizens living in the UK
22 February: Suella Braverman breaches Cabinet responsibility in an interview with GB News criticising proposed Northern Ireland Protocol plans
22 February: Senedd Legislation, Justice and Constitution Committee publishes memorandum criticising the Retained EU Law (Revocation and Reform) Bill

23 February: The Prime Minister's ethics advisor, Sir Laurie Magnus, tells the Public Administration and Constitutional Affairs Committee that there should be greater rigour in the reporting of Members' interests
26 February: Dominic Raab states he will resign if the bullying claims against him are upheld by the inquiry on the subject
27 February: The Windsor Framework is agreed between Westminster and the EU on the Northern Ireland Protocol, including the so called "Stormont Brake"
27 February: The King meets Ursula von der Leyen
28 February: The Telegraph publishes leaked WhatsApp conversations from Matt Hancock detailing COVID-19 decision making
28 February: The Constitution Committee launches inquiry into the appointment and dismissal of senior civil servants

March

3 March: Kier Starmer offers Sue Gray employment as his chief of staff
7 March: The Illegal Migration Bill is introduced to Parliament
8 March: Suella Braverman sends a letter to Conservative Party supporters accusing the civil service of blocking government action on "small boats"
10 March: Suella Braverman accuses the ECHR of being "at odds with British values"
13 March: The SNP leadership race begins, with members voting to choose the party leader and First Minister of Scotland
15 March: Alister Jack, the Scotland Secretary, breaches Cabinet responsibility by claiming he lobbied against the duty on whisky imposed by the UK government
19 March: SNP chief executive Peter Murrell resigns apparently over errors in membership figure reporting
22 March: Boris Johnson gives oral evidence to the Privileges Committee inquiry against him
22 March: MP's overwhelmingly back the Windsor Framework and Stormont Brake in a vote in Parliament
24 March: *The Sun* reports Liz Truss is to name four peers to the House of Lords in her resignation honours
24 March: The Windsor Framework is enacted by the EU and the UK government
27 March: Humza Yousaf wins the SNP leadership election
28 March: Nicola Sturgeon resigns as First Minister
28 March: Humza Yousaf is confirmed at Holyrood as First Minister
29 March: The Senedd votes to withhold approval of Retained EU Law Bill
30 March: The Standards Committee rules that Margaret Ferrier MP be suspended from Parliament over Covid-19 train journey
31 March: Foreign Secretary writes to heads of missions with instructions on how to handle oversees visits by members of the Scottish government

April

3 April: Ofcom announces an investigation into GB news programmes apparently hosted by MPs in a breach of its rules
4 April: The high court rules on *R* (*Oceana) v Upper Tribunal (Immigration and Asylum Chamber)*

5 April: Former SNP chief executive Peter Murrell is arrested in connection with SNP finance probe. He is released without charge
7 April: Long-standing SNP financial auditors, Johnston Carmichael, resign
11 April: Spotlight on Corruption research reveals only four of 57 key recommendations for improving ethical standards in public life from the Committee on Standards in Public Life's review following the Greensill lobbying scandal have been enacted
12 April: SNP warns Electoral Commission it may struggle to submit accounts on time after "difficulty" finding new auditors
12 April: The Scottish government announces it will challenge UK government in court over the latter's intervention on gender reform
12 April: It is disclosed that Parliament's standards commissioner, Daniel Greenberg, is investigating three MP's including former health secretary Matt Hancock
17 April: Prime Minister Rishi Sunak is investigated by standards commissioner over possible failure to declare an interest relating a childcare firm his wife holds shares in
19 April: Prime Minister Rishi Sunak declares his wife's shares in childcare firm in his register of interests
19 April: Colin Beattie resigns as SNP treasurer following arrest and release without charge in SNP finance probe
20 April: Amendment is made to the Illegal Migration Bill to empower Home Secretary to ignore attempts by European judges to halt migrant deportations from the UK
21 April: Dominic Raab resigns as Deputy Prime Minister following Adam Tolley KC's conclusion he engaged in bullying behaviour
24 April: The Equality and Human Rights Commission suggests the Illegal Migration Bill could breach the UK's human rights obligations
24 April: SNP Westminster group leader Stephen Flynn MP warns Party may fail to submit audited accounts to the House of Commons by 31 May deadline due to the difficulty in finding an auditor, thus putting at risk the party's Short Money (The SNP ultimately submitted accounts on time to both the House of Commons and the Electoral Commission.)
25 April: The Government announce only 4 percent of an estimated two million eligible voters without ID have signed up for the Government scheme providing an alternative ID
26 April: Sinn Fein's Michelle O'Neill accepts her invitation to the coronation of King Charles III
26 April: Jess Philips MP is to be investigated by parliamentary commissioner for standards after "repeated" late declarations of interests
28 April: Richard Sharp resigns as BBC chairman
28 April: The High Court rules Sinn Fein's Gerry Adams was wrongly denied access to compensation after his convictions for attempting to escape prison were quashed

May

4 May: Voters are required to present ID to vote in an election for the first time in Great Britain
6 May: King Charles III is crowned in coronation ceremony at Westminster Abbey
6 May: Republican protesters are arrested at the Coronation under new terms of the Public Order Act
10 May: Plaid Cymru leader Adam Price steps down after report find he had failed to "detoxify" the party's culture
11 May: Kemi Badenoch is rebuked by the speaker of the house for announcing policy to the press before it has appeared before the House of Commons

11 May: The UK government drops its commitment to allow thousands of EU-era laws to expire in the Retained EU Law Bill
11 May: The Higher Education (Freedom of Speech) Bill receives royal assent
15 May: Jacob Rees-Mogg gives a speech to the National Conservative conference appearing to suggest Voter ID laws were an effort to "gerrymander"
15 May: The Government is defeated in the House of Lords over various remaining aspects of the Retained EU Law Bill
16 May: Questions are raised in Parliament over "money for access" claims relating to Conservative Party doner Javad Marandi
17 May: Face recognition software is used by police at a Beyonce concert in Cardiff after similar software was used at the coronation
19 May: A private members bill from Lord Wigley receives its third reading in the House of Lords on strengthening the protections for devolved powers in Wales
21 May: Sinn Fein becomes the largest party in local government in Northern Ireland
21 May: After it emerges that Suella Braverman attempted to use her influence to attend a speed awareness course privately, the Prime Minister refers the matter to his ethics advisor.
22 May: The Government announces plans to add additional checks for proxy and postal votes
23 May: Boris Johnson is referred to police by the Cabinet Office over Covid rule breaches. The justice secretary then defends civil servants for passing the information over. The Covid inquiry then threatens the Government with legal action if it fails to release unredacted Whatsapp messages and diary entries
24 May: Prime Minister Rishi Sunak announces there will be no inquiry over the Suella Braverman speed awareness incident
24 May: Michael Gove orders a probe into "Teesworks" after allegations of corruption are made
24 May: David Davis and John McDonnell call for parliamentary investigation into potentially misleading information given to Parliament by the Bank of England over inflation rates in 2012
27 May: The UK government agrees a temporary partial exemption from the UK Internal Market Act for the Scottish deposit return scheme, on condition that glass is removed from the scope of the scheme and that it is fully interoperable with the yet-to-be enacted UK deposit return scheme
30 May: Number 10 denies a "cover up" over Boris Johnson Whatsapp messages

June

1 June: The Covid inquiry's deadline for the Government to hand over unredacted Boris Johnson Whatsapp messages passes
1 June: The Cabinet Office announces it will seek a judicial review of the limits of the powers of the Covid Inquiry to require the provision of the material
2 June: Boris Johnson offers to hand over personal Whatsapp messages to the inquiry
7 June: Lorna Slater MSP confirms the Scottish Deposit Return Scheme is delayed until at least October 2025, prompting accusations the UK government deliberately derailed the Scheme
8 June: Conservative whips push through the Illegal Migration Bill through the Lords with the House sitting until 4am
9 June: Boris Johnson's resignation honours list is confirmed and published
9 June: Nadine Dorries announces she will stand down as an MP after being neglected in Boris Johnson's resignation honours list
9 June: Boris Johnson resigns as an MP after receiving the verdict of the Privileges Committee inquiry
11 June: Nicola Sturgeon is arrested and released without charge in connection with the SNP finance probe

12 June: The Welsh Government announces its intention to proceed with a deposit return scheme, including glass
12 June: Prime Minister Rishi Sunak suggests Boris Johnson asked him to overrule the Honours Committee regarding his resignation honours list. Boris Johnson denies these allegations
12 June: Ofcom announces a review of the rules governing MP's ability to present news programming
15 June: The Privileges Committee releases its report concluding that Boris Johnson misled Parliament
16 June: Rhun ap lorwerth confirmed as new leader of Plaid Cymru
17 June: Having taken a position writing for the Daily Mail, ACOBA accuses Boris Johnson of having broken the Ministerial Code by failing to inform them of the post
17 June: The Mirror releases a video apparently showing breaches of Covid regulations at Conservative Party HQ during a national lockdown. Michael Gove later apologises for the video
18 June: British and Irish representatives at the British Irish Intergovernmental Conference clash over the "Troubles Legacy Bill"
19 June: Scottish First Minister Humza Yousaf announces updated plans for a written constitution in an independent Scotland
19 June: The UK government introduces the Economic Activity of Public Bodies (Overseas Matters) Bill
20 June: MP's vote 354 to seven to approve the Privileges Committee report on Boris Johnson
23 June: The Electoral Commission suggests 14,000 people were prevented from voting by the introduction of Voter ID requirements at the May 4th local elections
27 June: Justice secretary Alex Chalk confirms the plans for a Bill of Rights Bill have once again been abandoned
28 June: The Government is criticised over possible invasion of privacy issues regarding its Online Safety Bill
28 June: It is reported that proposed constituency boundary changes would cut the number of Welsh seats in Parliament from 40 to 32
28 June: Scottish Parliament votes to withhold legislative consent from the "Troubles Legacy Bill"
29 June: The Government is defeated in a series of votes in the House of Lords on the Illegal Migration Bill
29 June: The Court of Appeal rules against the Government in Rwanda policy case R (AAA) v SSHD
29 June: A report by the Privileges Committee accuses seven MPs and three Peers of interfering with its inquiry into Boris Johnson

Appendix c: Boris Johnson's nominations for peerages during report period

Boris Johnson was Prime Minister between 24 July 2019 and 6 September 2022. During that time, he created 94 peers. With 779 Lords, over 10% of the second chamber has now been directly appointed by Johnson.

Beyond the sheer number of appointments, though, criticism has rightly been levelled at some of the individuals he has selected for appointment. Across his political peerages and resignation honours list (the appointments covered by this report period) two groups appear prevalently.

The first is made up of former and current Conservative MPs. While some of these have enjoyed good reputations in the House of Commons, others have not. Rather than long experience in the House, involvement in specialist policy areas or unusually glittering records, it seems that what links the MPs favoured by Johnson is instead their close relationships to him.

The second group features other individuals who have rendered political service or financial support to Johnson and the Conservative Party. Clearly, the trend of awarding honours to those who have been ardent supporters of a prime minister or government predates the Johnson administration, but its acceleration is nonetheless worrying.

In addition to those actually appointed, great controversy occurred over those of Johnson's proposed appointments which were not supported by the House of Lords Appointment Commission. On 12 June 2023 the Commission released a statement that they had "not supported" eight nominations from the former Prime Minister, translating to 50 percent of his nominations. Hannah White of the Institute for Government suggests the previous average rejection rate was just ten percent.[52] Beyond this statement of fact from the Commission, though, a further war of words erupted between Johnson and current Prime Minister Rishi Sunak over the apparent decision of the Commission to deny peerages to Conservative MPs Nadine Dorries, Nigel Adams and Alok Sharma. Sunak publicly accused Johnson of asking him to "Overrule the Holac committee, or make promises to people".[53] Johnson denies these allegations. Clearly any efforts to undermine or over-rule the work of the Commission represent serious over-reach on the part of any former Prime Minister.

While many of the appointments have merit, others have been cloaked in such controversy that their ultimate suitability may justifiably be questioned. That such questions exist over a great number of Johnson's proposed and actualised appointments is again deeply concerning.

52 Hannah White, 'Five reasons we should be troubled by Boris Johnson's resignation honours', *Institute for Government Blog,* 9 June 2023, available at: < https://www.instituteforgovernment.org.uk/comment/boris-johnsons-resignations-honours >, last accessed 15 August 2023.

53 Tim Baker, ''Talking rubbish': Boris Johnson hits back at Rishi Sunak in row over peerages list', *Sky News,* 12 June 2023, available at: < https://news.sky.com/story/i-didnt-think-it-was-right-rishi-sunak-explains-not-ennobling-boris-johnson-allies-12900837 >, last accessed 15 August 2023.

Political peerages 2022

Angie Bray – Bray was formerly a Conservative MP and the leader of the Conservative Group in the London Assembly.

Graham Evans – Evans was the Conservative Member of Parliament for Weaver Vale between 2010 and 2017.

Michael Hintze – A businessman and founder of the Hintze Family Charitable Foundation, Hintze is a Trustee of the National Gallery. Hintze has donated around £4.5 million to the Conservative Party.[54]

Stewart Jackson – Jackson was formerly the Conservative Member of Parliament for Peterborough. He was a member of the Conservative Voice group within the Conservative parliamentary party and, after losing his seat, served as a special adviser at the Department for Exiting the European Union.

Kate Lampard – Lampard is the chair of the charity GambleAware and lead non-executive director of the Department for Health and Social Care.

Sheila Lawlor – Lawlor is an academic and the founder and director of research at the Politeia think tank.

Ruth Lea – Lea is an economist and former civil servant. She is a former director of the right-wing think tank, the Centre for Policy Studies.

Dambisa Moyo – An economist and author, Moyo has previously acted as Commissioner for the Commission on Race and Ethnic Disparities.

Teresa O'Neill – O'Neill was leader of the council in the London Borough of Bexley and the deputy chair of the Local Government Association.

Andrew Roberts – A prominent historian and journalist, in the past Roberts has received significant criticism for his portrayal of the British Empire.[55]

Cleveland Anthony Sewell – Sewell was formerly chair of the Commission on Race and Ethnic Disparities. In 2020 he was forced to apologise for homophobic comments he had made in 1990.[56]

Nicholas Soames – Member of Parliament for Mid Sussex from 1997 to 2019, Soames served as Minister of State for the Armed Forces, 1994 to 1997. In 2005 Soames was accused of misogynistic behaviour by at least six MPs.[57] In 2017, he attracted publicity after reportedly making dog noises at then SNP MP Tasmina Ahmed-Sheikh in Parliament.[58]

Hugo Swire – Swire was Conservative Member of Parliament for East Devon, 2001 to 2009 and was Minister of State at the Foreign and Commonwealth Office, 2012 to 2016.

54 'Rowena Mason, 'One in 10 Tory peers have given more than £100,000 to party', *The Guardian,* 29 December 2022, available at: < https://www.theguardian.com/politics/2022/dec/29/one-in-10-tory-peers-have-given-more-than-100000-to-party >, last accessed 15 August 2023.

55 Johann Hari, 'Johann Hari: The dark side of Andrew Roberts', *The Independent,* 31 July 2009, available at: < https://www.independent.co.uk/voices/commentators/johann-hari/johann-hari-the-dark-side-of-andrew-roberts-1765229.html >, last accessed 15 August 2023.

56 Simon Murphy, Heather Stewart, Vikram Dodd and Peter Walker, 'Race commission head Tony Sewell apologises for anti-gay comments', *The Guardian,* 16 July 2020, available at: < https://www.theguardian.com/world/2020/jul/16/concern-choice-charity-boss-tony-sewell-head-uk-race-commission >, last accessed 15 August 2023.

57 'Sleazy Soames a 'serial sex pest'', *The Mirror,* 5 September 2005, available at: < https://www.mirror.co.uk/news/uk-news/exclusive-sleazy-soames-a-serial-sex-556238 >, last accessed 15 August 2023.

58 Martha Gill, 'Nicholas Soames says he made 'woof woof' noises at female MP as 'friendly canine salute'', *Huffington Post,* 30 January 2017, available at: < https://www.huffingtonpost.co.uk/entry/nicholas-soames-says-he-made-woof-woof-noises-at-female-mp-as-friendly-canine-salute_uk_588f8226e4b03ab749dd65f6 >, last accessed 15 August 2023.

Resignation honours list appointments

Shaun Bailey AM – Bailey is a former London mayoral candidate and is a member of the London Assembly. He was forced to resign as chair of the London Assembly's police and crime committee after *The Times* and *Daily Record* published photographs of him attending a gathering in apparent contravention of tier 2 coronavirus restrictions.[59]

Ben Gascoigne – Gascoigne is the former deputy chief of staff to Boris Johnson. Gascoigne worked for Johnson throughout his tenure as Mayor of London, during the Vote Leave campaign, through his premiership and on into the present.

Ross Kempsell – A former advisor to Johnson, Johnson also appointed Kempsell as director of research for the Conservative Party. Aged 30, Kempsell would become the second-youngest life peer ever. Kempsell is the former chief reporter of the right-wing news site *Guido Fawkes*.[60]

Charlotte Owen – A former parliamentary assistant to Johnson and a special adviser jointly to Johnson and the Chief Whip outranked in terms of pay level reflecting experience by 30 of the 43 Spads in No 10. Owen, who is believed to be in her late 20s, would become the youngest ever life peer in the House of Lords. Post-Johnson premiership, Owen worked between Liz Truss and Penny Mordent's offices.

Dan Rosenfield – Rosenfield worked as principle private secretary to chancellors of the exchequer Alistair Darling and George Osborn. He was chief of staff to Johnson in Downing Street.

Benjamin Houchen – Conservative Tees Valley Mayor, Houchen has been a prominent northern Conservative since his election in 2017. In 2023 allegations of corruption were made against the "Teesworks" regeneration project taking place at the Teeside freeport.[61] On 23 May 2023, Michael Gove ordered independent inquiry to be set up to investigate the issue.[62]

Kulveer Singh Ranger – Ranger is a management consultant who worked for Boris Johnson as Director of Transport when Johnson was Mayor of London. Ranger was placed on the long-list for Conservative Party candidate for Mayor of London in 2021.

59 Oliver Wright and George Grylls, 'Former mayoral hopeful Shaun Bailey quits after attending party', *The Times,* 15 December 2021, available at: < https://www.thetimes.co.uk/article/downing-street-staff-to-be-summoned-in-christmas-parties-investigation-pnd7mx8vw >, last accessed 15 August 2023 and Pippa Crerar, 'Image emerges of 'raucous' party thrown by Tory aides during coronavirus restrictions last Christmas', *Daily Record,* 14 December 2021, available at: < https://www.dailyrecord.co.uk/news/uk-world-news/image-emerges-raucous-party-thrown-25699805 >, last accessed 15 August 2023.

60 James Walker, 'Talkradio's Ross Kempsell becomes second ex-chicken to enter Downing Street', *Press Gazette*, 31 July 2019, available at: < https://pressgazette.co.uk/news/talkradios-ross-kempsell-becomes-second-ex-chicken-to-enter-downing-street/ >, last accessed 9 January 2023.

61 'Tees Valley mayor denies Labour MP's Teesworks corruption claims', *BBC News,* 21 April 2023, available at: < https://www.bbc.co.uk/news/uk-england-tees-65350891 >, last accessed 15 August 2023.

62 Michael Gove to Ben Houchen, 24 May 2023, available at: < https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1158964/SoS_to_Ben_Houchen.pdf >, last accessed 15 August 2023.

Appendix d: Reports of the Privileges Committee

In the last three reports published by this Group extensive comment has been made of the allegations of wrongdoing by former Prime Minister Boris Johnson with regard to parties held in No. 10 Downing Street in the midst of national lockdown restrictions. Be it through questions in the House of Commons, the Sue Gray Report into the events or the initiation of a Privileges Committee inquiry, such stories have dominated the news agenda since November of 2021. The seriousness of the matter extends beyond the parties themselves. Instead, as the Privileges Committee notes in its report of June 2023, the behaviour of the former Prime Minister and his political allies has had a significant and detrimental effect on public trust in government and Parliament.

While this Group was unaware of these events in its first report, it nonetheless regrettably foreshadowed what was to come by noting "the existence of significant concern during the report period about the alleged mis-leading of the UK Parliament by the Prime Minister, and failures to correct errors satisfactorily once identified."[63] That warning, combined with the new conclusions of the Privileges Committee, demonstrates the dangers posed by breaches of constitutional norms and standards in public life by those in elected office. It demonstrates that if not addressed with appropriate seriousness, such breaches can have serious and lasting consequences.

Having been covered in significant detail in previous reports and elsewhere, we are not here concerned with the breaches of Covid guidance themselves. Instead, during this report period the Privileges Committee released two reports which merit further comment. The first was the much-anticipated report, instigated 22 April 2022, on whether in relation to the issuing of fixed penalty notices, former Prime Minister Boris Johnson had misled the House of Commons. Following the publication of this report, conduct by Boris Johnson and other Conservative MPs and Peers led the Committee to publish a further special report detailing the Committee's "concern at the improper pressure brought to bear on the Committee and its members" throughout its inquiry.[64]

As is detailed below, the content of the reports together has worrying implications for principles 3, 4, 6 and 7.

Fifth Report – Matter referred on 21 April 2022 (conduct Rt Hon Boris Johnson)

Published 15 June 2023, the Privileges Committee report into the conduct of Boris Johnson was unequivocal in its condemnation of the former Prime Minister. The Committee concluded that with knowledge of the Covid rules and guidance and knowledge of much of what went on in No. 10, Johnson had misled the house as follows:

63 UKCMG, Report 1, p. 25, available at: < https://consoc.org.uk/wp-content/uploads/2021/09/UKCMG-CONSTITUTION-IN-REVIEW-1.pdf >.

64 Privileges Committee, *Matter referred on 21 April 2022: Co-ordinated campaign of interference in the work of the Privileges Committee*, First Special Report of Session 2022-23, HC 1652 (House of Commons, London, 2023), p. 3, available at: < https://committees.parliament.uk/publications/40679/documents/198237/default/ >, last accessed, 4 September 2023.

> "[c] i) when he said that Guidance was followed completely in No. 10, that the Rules and Guidance were followed at all times, that events in No. 10 were within the Rules and Guidance, and that the Rules and Guidance had been followed at all times when he was present at gatherings
> ii) when he failed to tell the House about his own knowledge of the gatherings where rules or guidance had been broken
> iii) when he said that he relied on repeated assurances that the rules had not been broken. The assurances he received were not accurately represented by him to the House, nor were they appropriate to be cited to the House as an authoritative indication of No. 10's compliance with Covid restrictions
> iv) when he gave the impression that there needed to be an investigation by Sue Gray before he could answer questions when he had personal knowledge that he did not reveal.
> v) when he purported to correct the record but instead continued to mislead the House and, by his continuing denials, this Committee
> d) was deliberately disingenuous when he tried to reinterpret his statements to the House to avoid their plain meaning and reframe the clear impression that he intended to give, namely
> i) when he advanced unsustainable interpretations of the Rules and Guidance to advance the argument that the lack of social distancing at gatherings was permissible within the exceptions which allowed for gatherings, and
> ii) when he advanced legally impermissible reasons to justify the gatherings."[65]

Among different charges levelled, it is perhaps the Committee's finding that Johnson was deliberate and sustained in his continuing to mislead the House and the Committee that was the most concerning. The report is entirely clear that Johnson's efforts at deception were not isolated incidents and instead represented a pattern of behaviour attempting to justify evident wrongdoing. In addition to this, a number of "after-the-event realisations" evidenced, the Committee found, "deliberate attempts to mislead the Committee and the House, while others demonstrated deliberation because of the frequency with which he closed his mind to the truth."[66]

The severity of the accusations within the report was revealed to Johnson on 8 June 2023 when the Committee shared with the former Prime Minister their provisional conclusions and invited him to make any further representations. While the report should have remained confidential, Johnson used the opportunity to make a public statement criticising the Committee and the inquiry on 9 June 2023.[67] It was as part of this statement that Johnson resigned as an MP, avoiding a number of potential sanctions. He accused the Committee of a "witch-hunt", suggested the process was "anti-democratic" and suggested the Committee was "the very definition of a kangaroo court".[68] The Committee could not reply to this statement given that same requirement of confidentiality.

When the Privileges Committee released their final report into the incidents, both Johnson's attempt to mislead the Committee and his efforts to discredit its work were taken into consideration. As a result, the sanctions imposed by the Committee against the former Prime Minister were unprecedented. They

65 Privileges Committee, *Matter referred on 21 April 2022 (conduct of Rt Hon Boris Johnson): Final Report*, Fifth Report of Session 2022-23, HC 564 (House of Commons, London, 2023), pp 4-5, available at: < https://committees.parliament.uk/publications/40412/documents/197897/default/ >, last accessed, 4 September 2023.
66 *Ibid*, p. 14.
67 Boris Johnson, *Resignation Statement,* 10 June 2023, available at: < https://www.independent.co.uk/news/uk/politics/boris-johnson-resignation-statement-full-text-b2354893.html >, last accessed: 4 September 2023.
68 *Ibid.*

advised that, were he still a Member of the House, Johnson should have been suspended for 90 days. Tellingly, they also suggested he should not be entitled to a former Members' pass.[69] It is not for this Group to make statements as to the historic significance of these events, but it is clear that the end to the Johnson premiership and his subsequent behaviour as an MP fall well short of the standards which are expected of public servants and Members of the House of Commons.

Matter referred on 28 June 2022: Co-ordinated campaign of interference in the work of the Privileges Committee

Once the Privileges Committee had published their report into Johnson, a vote of the House was still required to authorise it. Commons leader Penny Mordant duly confirmed a free vote of MPs would take place on 19 June 2023.

In advance of the vote there was concern that a number of Conservative MPs would vote against the report, in de facto support of the former Prime Minister. In the event, though, only seven MPs voted against the report, all well-known political allies of Johnson.[70] Several other MPs including former leader of the house Jacob Rees Mogg spoke against the report and the Committee, but did not themselves vote. Prime Minister Rishi Sunak was criticised for failing to attend the vote.[71]

It is disappointing that the findings of the cross-party Committee, as important as they were, attracted criticism. Despite this, that such a large majority across the House, including 118 Conservative MPs, voted in favour of the report is encouraging. It demonstrates in principle at least that the processes of the House continue to be observed by a substantial majority of MPs. That a recent Prime Minister was sanctioned in this way demonstrates both the severity of his actions, but also the willingness of the House to act in defence of Parliament and the Committee itself. While acknowledging this, though, reference must be made to the minority of Members and Peers whose behaviour fell short of this standard.

On social media platforms and in the chamber itself, a number of MPs echoed Boris Johnson's comments defaming the Privileges Committee. These criticisms were made throughout the investigation but intensified after Johnson's resignation. Such was the severity of the attacks upon its independence, though, that the Committee felt obliged to publish an extraordinary special report on 28 June 2023. Addressing what it called the "co-ordinated campaign of interference" with its work, the Committee singled out MPs Nadine Dorries, Mark Jenkinson, Michael Fabricant, Brendan Clarke-Smith, Jacob Rees-Mogg, Andrea Jenkyns and Priti Patel, and Peers Lords Cruddas, Goldsmith and Greenhalgh.[72] The Committee accused these individuals of aiming to:

> "(1) influence the outcome of the inquiry
> (2) impede the work of the Committee by inducing members to resign from it
> (3) discredit the Committee's conclusions if those conclusions were not what they wanted, and

69 Privileges Committee, *Conduct of Rt Hon Boris Johnson*, pp 6-7.
70 Sean Clarke, 'How did your MP vote on the Boris Johnson privileges committee report?', *The Guardian,* 19 June 2023, available at: < https://www.theguardian.com/politics/ng-interactive/2023/jun/19/how-did-your-mp-vote-on-the-boris-johnson-privileges-committee-report >, last accessed, 4 September 2023.
71 Lucy Fisher, Jim Pickard and George Parker, 'Johnson partygate report approved as Sunak criticised for missing debate', *Financial Times,* 19 June 2023,, available at: < https://www.ft.com/content/da105db1-2b2e-4429-8c04-d0755bcf9f10 >, last accessed, 4 September 2023.
72 Privileges Committee, *Co-ordinated campaign of interference*, pp 8-11.

> (4) discredit the Committee as a whole."[73]

In response to these actions, the Committee recommended that the House agree to a resolution to be tabled by either the Government or, failing that, by a Member of the House with the permission of the Speaker. The resolution would support the Committee's special report and note:

> "that where the House has agreed to refer a matter relating to individual conduct to the Committee of Privileges, Members of this House should not impugn the integrity of that Committee or its members or attempt to lobby or intimidate those members or to encourage others to do so, since such behaviour undermines the proceedings of the House and is itself capable of being a contempt"[74]

The resolution would also permit similar action to be taken in the House of Lords on the same matter. This was again agreed to, and a debate scheduled for 10 July 2023.

Penny Mordant opened the debate, and in particular highlighted that "undermining a Committee should not be confused with the expression of legitimate concerns about the work or its processes. Members must be free to raise such concerns and there are appropriate ways of doing so."[75] In a similar vein, while the MPs named in the report were perfectly entitled to explain their actions and offer a defence of their behaviour in the debate on 10 July, it is disappointing that many instead chose to suggest that they had no knowledge of the matters in question. Despite being presented with ample evidence in the report itself, most suggested, incorrectly, that the accusations were entirely without merit.

The motion raised by the leader of the house in support of the Committee was passed by an overwhelming majority.

Concluding notes

As has occurred elsewhere in this report, the votes in the Commons relating to the Privileges Committee repots can, in one sense, be viewed as the appropriate conclusion of UK constitutional processes. In both cases, breaches of constitutional principles and standards in public life were identified by a non-partisan authority, brought to the attention of our elected representatives and addressed appropriately. Indeed, the consequences of these votes are themselves significant. Never has a former Prime Minister been so sanctioned by the House, or such action been taken by a committee in defence of its independence.

Alternative to this view, though, are two points of significant concern. The first is that such drastic action was itself necessary. That a former Prime Minister was found to have consistently and deliberately misled the House on an issue of national importance offers a worrying encapsulation of the Johnson premiership. This behaviour has unquestionably damaged public faith in our systems of government As our previous report noted, though, it seems beyond this that this behaviour set a precedent which has been followed by his successors to the detriment of the UK's uncodified constitution. Similarly, while the Privileges Committee was correct to identify and report on the attacks to its independence, that

73 *Ibid*, p. 3.
74 *Ibid,* p. 7.
75 HC Hansard for 10 July 2023, 'Privileges Committee Special Report', column 13, available at: < https://hansard.parliament.uk/commons/2023-07-10/debates/2418BAC2-BCDE-4C0D-82EE-ABB04C8B6ED0/PrivilegesCommitteeSpecialReport >, last accessed 4 September 2023.

such attacks took place and required a response shows that a small but significant minority of elected Members are prepared defy both constitutional convention and the written processes of the House to advance their own political projects. Again, this may be seen as a worrying indicator of the current state of UK politics.

The second point, which follows on from the above, is that while appropriate action was taken by the Privileges Committee in both cases and significant consequences followed, in both instances these processes or findings were themselves undermined by the behaviour of those involved in the original offenses. In this sense, while the constitution functioned properly, there was a clear lack of respect for that constitution and its processes.

Consequently, the events surrounding the publication of two reports of the Privileges Committee during the report period have deleteriously impacted on a number of the constitutional principles identified by this Group. Namely, principles 3, 4, 6 and 7. It remains to be seen whether these events strengthened or weakened the standing and independence of the select committees which are vital to the proper functioning of parliamentary democracy in the United Kingdom.

Appendix e: The Windsor Framework

The Protocol

Resolving issues around the movement of goods and services between Great Britain, Northern Ireland and the Republic of Ireland has been one of the most difficult aspects of the United Kingdom's withdrawal from the European Union and the Single Market. After challenging negotiations and failure to secure parliamentary approval for a previous deal, an agreement was reached between the UK government under Boris Johnson and the EU in October of 2019.

Principally at issue was the border between Northern Ireland and the Republic of Ireland which, solidified by the Belfast/Good Friday Agreement, has no checkpoints. In the years since 1998, the border has been essentially frictionless. With the UK's withdrawal from the Single Market, though, this arrangement was put in jeopardy. Without regulatory alignment, goods entering the Republic of Ireland through Northern Ireland would necessarily be subject to checks at the border. All parties feared the impact this would have on the Northern Irish and Republic of Ireland economies, as well as, potentially, on the security of the principles laid out in the Belfast/Good Friday Agreement.[76]

To avoid such an impact, the UK and the European Union agreed the Protocol on Ireland/Northern Ireland, signed 24 January 2020 and coming into force 1 January 2021. According to the Protocol, there were to be no checks on goods moving between Northern Ireland and Ireland. Instead, Single Market regulations were applied on goods entering Northern Ireland from the rest of the United Kingdom. While avoiding the problem of a hard border on the island of Ireland, the agreement came to be associated with other political problems.

The Northern Ireland Protocol Bill

The Protocol successfully avoided imposing checks on goods between the Republic of Ireland and Northern Ireland, but within Northern Ireland, unionists including the Democratic Unionist Party objected. By imposing goods checks between Northern Ireland and Great Britain, many unionists argued that the Protocol threatened the integrity of the union, in turn threatening the principles of the Belfast/Good Friday Agreement. Partly in response to this, and the apparent obstructions to the UK internal market, in July 2021 the UK government issued a command paper demanding reform of the Protocol.[77] The EU refused these demands and instead suggested its own reforms to the Protocol in October 2021.[78] The two sides were unable to reach agreement over reform.

76 'The Protocol on Ireland/Northern Ireland', *UK in a Changing Europe,* 8 April 2021, available at: < https://ukandeu.ac.uk/explainers/the-protocol-on-ireland-northern-ireland/ >, last accessed 29 September 2023.

77 UK government command paper, *Northern Ireland Protocol: the way forward,* July 2021, CP 502, available at: < https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1008451/CCS207_CCS0721914902-005_Northern_Ireland_Protocol_Web_Accessible__1_.pdf >, last accessed 29 September 2023.

78 European Commission, *Protocol on Ireland and Northern Ireland – Non-Paper – Engagement with Northern Ireland stakeholders and authorities,* 13 October 2021, available at: < https://commission.europa.eu/document/5e1400c6-1c31-4d52-8c3e-e2d2bc72b15c_en >, last accessed 29 September 2023.

Such were the objections of the Democratic Unionist Party when the operation of the Protocol did not improve, that DUP First Minister Paul Givan resigned on 4 February 2022.[79] This in turn triggered the collapse of the Northern Ireland executive which has yet to reconvene, 20 months later. The move also increased tensions between the UK, the Republic of Ireland and the European Union.[80]

The Group has recorded that the lack of an executive in Northern Ireland is deeply concerning. It endangers principles 1; 2; 13; 15 and 16 identified by this Group, and beyond this, it has meant the stagnation of governance in Northern Ireland.

Met with this challenge, in June of 2022 the UK government, led by Boris Johnson, announced plans to introduce the Northern Ireland Protocol Bill. Ostensibly seeking to remove the barriers to the UK internal market created by the Protocol, the Bill sought to remove the effect of many aspects of the Protocol and Withdrawal Agreement. Fundamentally, this amounted to a unilateral decision by the UK government to renounce its commitments under the Agreement. Covered extensively in the Third Report of this Group the Bill represented, according to many, an effort to violate international law (see Appendix f, Third Report).

The Windsor Framework

The Northern Ireland Protocol Bill made slow progress through Parliament, understandably subject to significant amendment. During this progress, the premierships of both Boris Johnson and Liz Truss ended, and with those ends came a softening of position by the UK government. Under a new Prime Minister, negotiations with the European Union recommenced and intensified such that, by early 2023, there were widespread reports that an accommodation had been reached by both parties. This accommodation became the Windsor Framework, agreed by the UK government and the EU on 27 February 2023.[81]

Under the framework the checks imposed on goods entering Northern Ireland are lessened through the formalising of a "two-lane" system which had already been operating for some months. The Framework establishes a so-called "green-lane" for goods deemed "not at risk" and destined for Northern Ireland. Such goods are subject to much simpler customs paperwork. Goods intended for the Republic of Ireland and the EU remain subject to such checks. A similar streamlining process has been developed for agri-foods, easing the burden placed on supermarkets and consumers in Northern Ireland under the

79 Clare Rice, 'Why has Northern Ireland's First Minister Resigned?', *The Constitution Society,* 9 February 2022, available at: < https://consoc.org.uk/why-has-northern-irelands-first-minister-resigned/ >, last accessed 29 September 2023.

80 Freya McClements and Cormac McQuinn, 'DUP withdrawal from First Minister post 'very damaging to politics' – Martin', *Irish Times,* 5 February 2022, available at: < https://www.irishtimes.com/news/politics/dup-withdrawal-from-first-minister-post-very-damaging-to-politics-martin-1.4794142 >, last accessed 29 September 2023;

Nicola Newson, 'Impact of the Protocol on Ireland/Northern Ireland on recent political developments in Northern Ireland', *In Focus: House of Lords,* 28 February 2022, available at: < https://lordslibrary.parliament.uk/impact-of-the-protocol-on-ireland-northern-ireland-on-recent-political-developments-in-northern-ireland/ >, last accessed 29 September 2023.

81 UK government, *The Windsor Framework: a new way forward,* 27 February 2023, available at: < https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1138989/The_Windsor_Framework_a_new_way_forward.pdf >, last accessed 29 September 2023.

Protocol.[82] In addition, the framework creates a scheme whereby the UK government reimburses "EU customs duties paid on goods moved into Northern Ireland that were not sold or used in the EU."[83] The scheme is backdated to the beginning of the Protocol.

Alongside these directly economic concerns, an area of contention about the Protocol had been the position of the EU law and the jurisdiction of the European Court of Justice in Northern Ireland. The Protocol determined that the application of EU law in Northern Ireland was supervised by the EU, which could, should the situation arise, take the UK government to the European Court of Justice in the case of non-compliance. The tensions this situation creates have not been fully resolved by the Windsor Framework. While the Framework contains an agreement to strengthen existing dispute resolution mechanisms between the UK and the EU, the ultimate arbiter in cases of disagreement remains the ECJ. It also introduces the possibility of intra-UK divergence between Great Britain and Northern Ireland. This remains a point of contention for many within the unionist community.

In order to address some of the concerns of unionists, a key feature of the new Windsor Framework is the creation of the so called "Stormont Brake". The Brake gives Stormont, when in operation, the ability to object to changes in certain EU laws which apply to Northern Ireland. More specifically, "to changes to EU goods, agriculture, and some customs laws (also known as rules or acts) within the scope of the original Protocol".[84] Through the Break, should 30 Members of the Northern Ireland Assembly of two or more parties notify the UK government of their objection, then, subject to conditions, that objection would be passed by the UK government to the EU and that law would not apply in Northern Ireland. A dispute resolution process would then be followed by the UK government and the EU. Any resolution would then still require cross community consent in the Northern Ireland Assembly. There are certain exceptions to this, and while ostensibly the Stormont Brake hands tremendous power over the application of EU legislation to MLAs, concerns remain about the potential political and practical difficulties in operating the Brake.[85]

While the Windsor Framework has been heralded by many as a positive resolution to many of the issues raised by the Northern Ireland Protocol, it has failed to attract support from much of the unionist community, and in particular from the Democratic Unionist Party. The DUP suggest that the Agreement solidifies impediments to trade, confirms a border between Northern Ireland and the United Kingdom and ensures "there will be different laws applying in Northern Ireland without any democratic control, because EU law will apply to Northern Ireland."[86] Even for those that take a more pragmatic view, though, there are challenges within the Framework which "can be expected to make the already complex

82 As part of this process, retail outlets and suppliers must clearly mark which goods are for consumption in Northern Ireland and which are destined for the EU. "Not for EU" posters and labels are now visible in stores and on goods. See 'First 'Not for EU' posters begin appearing in NI supermarkets', *BBC News,* 28 September 2023, available at: < https://www.bbc.co.uk/news/uk-northern-ireland-66949354 >, last accessed 29 September 2023.

83 'An overview of the Windsor Framework', *Northern Ireland Customs & Trade Academy,* available at: < https://www.nicustomstradeacademy.co.uk/overview-of-windsor-framework/ >, last accessed 29 September 2023.

84 David Torrance, *Northern Ireland: The Stormont Break,* Research Briefing, 30 March 2023, p. 11, available at: < https://researchbriefings.files.parliament.uk/documents/CBP-9757/CBP-9757.pdf >, last accessed, 29 September 2023.

85 Simon Carswell, 'Windsor Framework: what is the Stormont Brake in the Brexit deal for Northern Ireland?', *The Irish Times,* 28 February 2023, available at: < https://www.irishtimes.com/politics/2023/02/28/northern-ireland-brexit-deal-what-is-the-stormont-brake/ >, last accessed 29 September 2023.

86 Jonathan McCambridge, 'Windsor Framework implementation confirms Irish Sea border, DUP MP says', *The Independent,* 29 September 2023, available at: < https://www.independent.co.uk/news/uk/sammy-wilson-northern-ireland-irish-sea-stormont-dup-b2420862.html >, last accessed 29 September 2023.

governing environment of post-Brexit Northern Ireland even more so."[87] In particular with regard to the Stormont Brake, an obligation is created for NI officials to monitor changes in EU law and policy. Despite this drastic escalation in workload, plans for how it is to be administered have yet to materialise.

Concluding notes

It is reassuring that the UK government was able to retreat from its position as expressed in the Northern Ireland Protocol Bill, to re-enter negotiations with the European Union and to agree the Windsor Framework. While not addressing all concerns and issues created by the Northern Ireland Protocol, it marks in some respects an improvement in the situation in Northern Ireland and in the Government's treatment of its international obligations. In this sense, the concerns raised by this Group regarding the Northern Ireland Protocol Bill in its Third Report have lessened, though concerns remain about similar attitudes expressed regarding other international obligations.

It is disappointing that that progress which has been made in the Windsor Framework has not been enough to encourage the Democratic Unionist Party back into the Northern Ireland Assembly. The lack of a Northern Ireland executive marks a major threat to constitutional stability in the region, and one regrettably without a clear resolution in sight.

87 Lisa Claire Whitten, 'Northern Ireland and its (other) constitutional issues', *The Constitution Society,* 1 August 2023, available at: < https://consoc.org.uk/northern-irelands-other-constitutional-issues/ >, last accessed 29 September 2023.

Appendix f: Scottish/UK government relations

Across the report period of January through June 2023, intergovernmental relations between the UK and Scottish governments deteriorated significantly from what was already a low starting point. It is unsurprising that two governments with very different political objectives have found it difficult to cooperate on certain policy areas. However, the acrimony with which disputes have been conducted has itself had a damaging effect. Disagreements over contested policy areas quickly became so heated that conciliation and progress became impossible. Beyond this, other areas where the governments might be expected to work closely together have suffered as a result of the breakdown of this relationship.[88] Whatever the cause, the increasing denial of legislative consent to a number of UK government bills provides evidence of the extent of the breakdown in working relationships between governments and governmental institutions more broadly.

Of the incidents occurring during the report period, two stand out as especially important. The first, towards the beginning of the report period, was the UK government's decision to make a Section 35 Order preventing the passage of the Gender Recognition Reform (Scotland) Bill. The unprecedented use of Section 35 of the Scotland Act 1998 in February of this year, whatever the merits or demerits of the Bill itself, is of pronounced constitutional significance. Second, the UK government's decision not to include glass in the exclusion it granted Scotland's planned Deposit Return Scheme from the Internal Market Act 2020 towards the end of the report period bookended months of rancour. The decision has had significant political consequences for intergovernmental relations and the devolution settlement.

The Gender Recognition Reform (Scotland) Bill

On 22 December 2022 the Scottish Parliament passed the Gender Recognition Reform (Scotland) Bill at a stage three vote. Despite some controversy, the Bill passed by a substantial majority, 86 to 39, with votes in favour coming from across all parties represented in Holyrood. The Bill seeks to reform the Gender Recognition Act 2004 such that it will be easier and faster for transgender people to obtain gender recognition certificates. It reduces the minimum age from 18 to 16 at which certificates can be obtained and removes the requirement of a medical diagnosis of gender dysphoria.[89] The Group does not comment on the content of the Bill itself. However, the consequences of its passage and the UK government's use of a Section 35 Order to prevent its enactment merit consideration for their constitutional aspects.

In the days immediately following the vote at Holyrood, the UK government highlighted that it had concerns with the Bill and that it was considering employing a Section 35 Order.[90] Such use of the Section would be an extreme measure. The Memorandum of Understanding agreed between the UK and devolved governments in 1999 (and last updated in 2012) confirmed that "[a]lthough the UK

88 See for example: Andrew Quinn, 'SNP slams Alister Jack after he claims Scottish government want to 'destroy' UK', *Daily Record,* 22 May 2023, available at: < https://www.dailyrecord.co.uk/news/politics/snp-slams-alister-jack-after-30046723 >, last accessed 29 September 2023.

89 *Gender Recognition Reform (Scotland) Bill [As Passed],* 22 December 2022, available at: < https://www.parliament.scot/-/media/files/legislation/bills/s6-bills/gender-recognition-reform-scotland-bill/stage-3/bill-as-passed.pdf >, 29 September 2023.

90 Libby Brooks and Peter Walker, 'Sunak government threatens to block Scottish gender recognition law', *The Guardian,* 22 December 2023, available at: < https://www.theguardian.com/society/2022/dec/22/sunak-government-threatens-to-block-scottish-gender-recognition-law >, last accessed 29 September 2023.

government is prepared to use these powers if necessary, it sees them very much as a matter of last resort."[91] Section 35 of the Scotland Act 1998 has never been used by the UK government to prevent the enactment of devolved legislation, nor have equivalent powers under the other devolution statutes. Although, references to the Supreme Court by the UK Government (under section 33 of the Scotland Act) have had the same effect of preventing devolved legislation from receiving Royal Assent if it is judged to be outwith the Scottish Parliament's competence, the Section 35 power differs in that it can be used in relation to legislation that is *within* devolved competence, and is exercised on essentially political grounds, by a member of the UK executive, rather than on legal grounds by an impartial court. The nearest equivalent to a Section 35 Order that has been seriously contemplated is instead perhaps the threatened withholding of consent to a Northern Irish bill in 1922 attempting to abolish the STV system for local government elections.[92] After the Northern Ireland Prime Minister James Craig threatened to resign, the UK government ultimately concluded that such interference would be unwise.

By the first days of 2023, though, the UK government's criticisms of the Bill became more vocal and rumours that the Secretary of State for Scotland, Alister Jack MP, was considering making a Section 35 Order were reported in the press.[93] These were confirmed on 16 January by Jack before a policy statement was issued on 17 January detailing the reasons for the decision to use Section 35 powers.[94] Here, Jack argued that the Bill as written would modify and have adverse effects on the operation of the law as it applies to reserved matters should it be enacted. In particular, it would impact the Equality Act 2010. In addition, he argued that the Bill creates a "dual system" for the granting of a gender recognition certificate, along with a number of other issues. Jack said he "did not make the decision lightly" to block the legislation, and expressed his hopes the Scottish government would work to redraft the Bill.[95] In response to this, then First Minister Nicola Sturgeon labelled the use of the Section 35 Order as a "full-frontal attack on our democratically elected Scottish Parliament.[96]

Of particular significance in this exchange is that while the Secretary of State for Scotland has claimed that the Order was a matter of last resort, in truth there appears relatively little evidence of the UK government attempting to engage productively in the shaping of this legislation. Indeed, despite an offer to work constructively to find a way forward, "both Alister Jack and the UK Equalities Minister, Kemi Badenoch MP, have refused to assist either the Scottish government or the Scottish Parliament's

91 *Memorandum of Understanding and Supplementary Agreements,* October, 2013, p. 10. Available at: < https://assets.publishing.service.gov.uk/media/5a7e2e6ce5274a2e87db0159/MoU_between_the_UK_and_the_Devolved_Administrations.pdf >, last accessed 29 September 2023.

92 David Torrance and Doug Pyper, 'The Secretary of State's veto and the Gender Recognition Reform (Scotland) Bill', *Research Briefing*, 13 September 2023,, p. 12. Available at: < https://researchbriefings.files.parliament.uk/documents/CBP-9705/CBP-9705.pdf >, last accessed 29 September 2023.

93 Harry Yorke and John Boothman, 'Westminster poised to intervene over gender bill assent', *The Times,* 7 January 2023, available at: < https://www.thetimes.co.uk/article/westminster-poised-to-intervene-over-gender-bill-assent-rqq6wmfb8 >, last accessed 29 September 2023;
David Wallace Lockhart, 'Clash looms on Scottish gender bill as UK government considers veto', *BBC News,* 14 January 2023, available at: < https://www.bbc.co.uk/news/uk-politics-64255623 >, last accessed 29 September 2023.

94 Secretary of State for Scotland, 'Policy statement of reasons on the decision to use section 35 powers with respect to the Gender Recognition Reform (Scotland) Bill', 17 January 2023, available at: < https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1129495/policy-statement-section-35-powers-Gender-Recognition-Reform-_Scotland_-Bill.pdf >, last accessed 29 September 2023.

95 Alister Jack, 'Gender Recognition Reform (Scotland) Bill: Statement from Alister Jack', 16 January 2023, available at: < https://www.gov.uk/government/news/gender-recognition-reform-scotland-bill-statement-from-alister-jack#:~:text=News%20story-,Gender%20Recognition%20Reform%20(Scotland)%20Bill%3A%20statement%20from%20Alister%20Jack,from%20proceeding%20to%20Royal%20Assent >, last accessed 29 September 2023.

96 Ema Sabljak, 'Section 35 Scotland Act: What is it and why is Alister Jack using it?', *The Herald,* 16 January 2023, available at: < https://www.heraldscotland.com/politics/23255122.section-35-scotland-act-alister-jack-using/ >, last accessed 29 September 2023.

committees in identifying appropriate amendments."[97] In response to an urgent question in the Scottish Parliament, the Cabinet Secretary for Social Justice, Housing and Local Government, Shona Robison MSP, argued:

> "The secretary of state has said that he wants to find a constructive way forward. The UK government had multiple opportunities to provide constructive comments during the extensive consultation on the bill and during its passage, but it did not do so. It does not agree with the bill, so it has blocked it. The decision that it has taken is political. This is a sad day for democracy and for devolution."[98]

Triggering previously unused constitutional powers to limit the ability of the Scottish Parliament to legislate is a significant action, regardless of the individual merits of a case. That the UK government has failed to consult widely or attempt to find agreement with the Scottish government has had a profoundly negative impact on intergovernmental relations and the security of aspects of the devolution settlement.

This has been reflected in the criticisms made by both the First Minister of Wales, Mark Drakeford, who suggested the move set a "very dangerous precedent" and in evidence given by Charles Falconer to the Women and Equalities Committee.[99] Reflecting on the use of Section 35, Lord Falconer suggested the mechanism was not intended to be used, save in the most exceptional of circumstances: "between 1999 when the [Scotland] Bill came into force and 2007, there was never any question of section 35 being used."[100]

While opponents of the Gender Recognition Reform (Scotland) Bill may argue that it was necessary to prevent its enactment to preserve the Equality Act, the manner in which a Section 35 Order was used by the UK government, and indeed that it was necessary to use it all, marks a low point in the history of devolution since the creation of the Scottish Parliament. It is a failure for which the UK government must accept a significant degree of responsibility.

Following the Secretary of State's decision, the Scottish government announced it would seek judicial review of the Section 35 Order in the Court of Session. The Scottish government believe that the Section 35 Order is made on the basis of: 1) a material error of law 2) that the Secretary of State's concerns are irrational 3) that some of these concerns are irrelevant to the basis of a Section 35 Order

97 Chris McCorkingdale and Aileen McHarg, 'Rescuing the Gender Recognition Reform (Scotland) Bill? The Scottish government 's Challenge to the Section 35 Order', *UK Constitutional Law Association Blog,* 25 April 2023,, available at: < https://ukconstitutionallaw.org/2023/04/25/chris-mccorkindale-and-aileen-mcharg-rescuing-the-gender-recognition-reform-scotland-bill-the-scottish-governments-challenge-to-the-section-35-order/ >, last accessed 29 September 2023.

98 Shona Robinson, *Response to urgent question, Meeting of the Parliament,* Session 6, 17 January 2023, available at: < https://www.parliament.scot/api/sitecore/CustomMedia/OfficialReport?meetingId=14093 >, last accessed 29 September 2023.

99 David Deans, 'Gender reform: Drakeford says Scottish law block is dangerous precedent', *BBC News* (17 January 2023), available at: < https://www.bbc.co.uk/news/uk-wales-politics-64304540 >, last accessed 29 September 2023.

100 Charles Falconer, *Women and Equalities Committee, Oral evidence: Gender Recognition Reform (Scotland) Bill and Equality Act 2010*, HC 1098, 31 January 2023, available at: < https://committees.parliament.uk/oralevidence/12639/html/ >, last accessed 29 September 2023.

and 4) that the Secretary of State has failed to provide adequate reasons for the issuing of the Order.[101] These arguments were submitted to the Court on 19 April 2023. A procedural hearing followed on 16 August, before a two-day hearing on 19 and 20 September 2023.

It is not for this Group to speculate on the likely outcome of the case, but it seems likely given the breakdown in relations between the governments that the case will be appealed up to the Supreme Court, meaning it may be some considerable time before a final resolution is reached. Again, this must be considered a failure to resolve political differences in the spirit of conciliation and compromise which is required of our elected leaders. The profoundly negative impact of the debate over the Gender Recognition Reform (Scotland) Bill and the implementation of a Section 35 Order is concerning from the point of view of Principles 1, 15 and 16 identified by this Group.

The Deposit Return Scheme

Deposit return schemes operate in dozens of countries and territories across the world.[102] The operating principle generally remains the same across jurisdictions: a small charge is levied on containers like milk bottles at the point of purchase, this charge may then be redeemed when the container is returned. Some schemes have a remarkable success rate, Germany, to take the most successful example, sees 98 per cent of target containers returned.

Following consultation in 2018, the Scottish government announced plans for a Scottish Deposit Return Scheme (DRS) and regulations were by the Scottish Parliament (under powers conferred by the Climate Change (Scotland) Act 2009) in 2020 to this end. Under the Scheme, consumers would pay a refundable 20 pence deposit when they buy a single use container made of glass, aluminium or plastic, and, as with other such schemes, this would be redeemed by retailers who would receive handling fees for their services. In 2022, the "go live" date was delayed from July 2022 to August 2023, "after a review found that due to the pandemic and EU exit the 2022 date was not practical."[103]

A key requirement for the effective function of the DRS in Scotland is the grant of an exclusion for the Scheme from the United Kingdom Internal Market Act 2020 by the UK government. The 2020 Act itself introduces principles for market access across the UK which must be adhered to.[104] In the first instance, products or services available in one part of the UK are entitled to unrestricted access to the

101 *Petition of the Scottish Ministers for Judicial Review of the Gender Recognition Reform (Scotland) Bill (Prohibition on Submission for Royal Assent) Order 2023 made and laid before the UK Parliament by the Secretary of State (under s.35 of the Scotland Act 1998) on 17 January 2023*, 19 April 2023, adjusted 9 August 2023, available at: < https://www.gov.scot/binaries/content/documents/govscot/publications/factsheet/2023/04/gender-recognition-reform-section-35-order-challenge-petition/documents/gender-recognition-reform-section-35-order-challenge-petition/gender-recognition-reform-section-35-order-challenge-petition/govscot%3Adocument/Scottish%2BMinisters%2B-%2Bpetition%2Bfor%2Bjudicial%2Breview%2Bof%2Bthe%2BGender%2BRecognition%2BReform%2BScotland%2BBill%2BProhibition%2Bon%2BSubmisssion%2Bfor%2BRoyal%2BAssent%2B%2BOrder%2B2023.pdf >, last accessed 29 September 2023.

102 'Deposit Return Scheme Background', *Zero Waste Scotland,* 11 May 2023, available at: < https://www.zerowastescotland.org.uk/resources/deposit-return-scheme-background#:~:text=Scheme%20design&text=Deposit%20return%20schemes%20are%20already,to%2098%25%20of%20target%20containers >, last accessed 29 September 2023.

103 The Scottish Parliament Information Centre, 'Progress with a Scottish Deposit Return Scheme – where are we now?' , 2 March 2023, available at: < https://spice-spotlight.scot/2023/03/02/progress-with-a-scottish-deposit-return-scheme-where-are-we-now/ >, last accessed 29 September 2023.

104 United Kingdom Internal Market Act 2020, available at: < https://www.legislation.gov.uk/ukpga/2020/27/contents/enacted >, last accessed 29 September 2023.

rest of the UK's internal market. Second, the Act ensures that goods or services from different parts of the UK are treated the same as goods or services produced or rendered locally. This creates a problem for Scotland's Deposit Return Scheme. "For example, the proper functioning of the system will likely depend on the ability to identify regulated containers in some way, via a label or barcode."[105] The slow progress of similar DRS schemes outside of Scotland means that rest-of-the-UK suppliers are unlikely to conform to these requirements, creating divergence inside the UK's internal market. Thus, although it is within the legal competence of the devolved institutions in Scotland to introduce the DRS scheme, its effective operation requires the UK Government's agreement to make the necessary exclusion from the market access principles.

Following disputes about whether, and if so when, the Scottish Government had actually requested an internal market exemption, the UK government decided to grant a *temporary* and *partial* exemption only. Noting "widespread and serious concerns expressed by businesses about the development of different approaches to deposit return schemes across the UK", the exemption would be temporary until the UK Government's own, as yet unenacted, deposit return scheme for England, Wales and Northern Ireland came into effect, at which point, the Scottish scheme would have to be fully interoperable with the UK scheme. [106] In addition, the UK Government was unable to support one aspect of the requested exclusion. Publishing a statement on 27 May 2023, the UK government agreed to exclude "PET plastic, aluminium and steel cans only". Crucially, the exclusion did not apply to glass on the basis that its inclusion "would add cost and complexity to the schemes in particular to hospitality and retail sectors, as well as adding consumer inconvenience."[107] Little detail is provided of why glass in particular would cause these issues more acutely than other materials, nor had objections previously been expressed at the intention of the Welsh and Scottish Governments to proceed with schemes including glass, although the UK Government intended to exclude it for schemes in England and Northern Ireland.[108] It should be noted, too, that the Scottish Parliament had expressed concern at the time of the passage of the UK Internal Market Act that it might curtail devolved policy. Indeed, the Scottish Parliament (and the Senedd) denied legislative consent to the Act, which was passed notwithstanding the withholding of devolved legislative consent, which – according to the Sewel Convention – should not normally happen. The Scottish government argue that: "If the UK government had observed the convention, the Act would not have been passed in its current form and the Scottish Parliament would have retained its powers to introduce important environmental measures, like the ban on single use plastics and the Deposit Return Scheme."[109]

The failure to grant an exclusion to all aspects of the DRS has been seen by many as a political move by the UK government, particularly given some degree of divergence had been contemplated during the Common Frameworks process. First Minister Humza Yousaf wrote to Prime Minister Rishi Sunak on 3

105 Seán Patrick Griffin, 'The Deposit Return Scheme and the UK Internal Market', *The Constitution Society,* 7 July 2023, available at: < https://consoc.org.uk/the-deposit-return-scheme/ >, last accessed 29 September 2023.

106 UK government, 'Policy statement: Scottish Deposit Return Scheme – UK internal market exclusion', *Policy paper,* 27 May 2023, available at: < https://www.gov.uk/government/publications/scottish-deposit-return-scheme-uk-internal-market-exclusion/policy-statement-scottish-deposit-return-scheme-uk-internal-market-exclusion >, last accessed 29 September 2023.

107 *Ibid.*

108 'Introducing a Deposit Return Scheme for drinks containers in England Wales and Northern Ireland', *Government Response,* 20 January 2023, available at: < https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1130296/DRS_Government_response_Jan_2023.pdf >, last accessed 7 October 2023.

109 Scottish Government , 'Devolution since the Brexit Referendum', *Publication – Factsheet,* 14 June 2023, available at: < https://www.gov.scot/publications/devolution-since-the-brexit-referendum/pages/effects-of-uk-government-actions-since-the-brexit-referendum/#:~:text=The%20Internal%20Market%20Act%20was,for%20Scotland%20in%20devolved%20areas >, last accessed 29 September 2023.

June to this effect, suggesting that the Government's decision to intervene "at such a late stage demonstrates a major erosion of the devolution settlement".[110] Days later, he confirmed that without glass, the viability of the Deposit Return Scheme in Scotland was doubtful, and that the Prime Minister had yet to reply to his letter.[111] As with the Gender Recognition Reform (Scotland) Bill, this lack of engagement with the Scottish government is concerning. While the Deposit Return Scheme in Scotland may indeed create issues for producers in the rest of the UK, that the UK government has failed to properly engage with the Scottish government over potential solutions to the issue is disappointing. By 7 June 2023 Circular Economy Minister Lorna Slater MSP had confirmed that the implementation of the DRS had been pushed back until at least October of 2025. It was her opinion that this delay was entirely the fault of the UK government which she regarded as "more intent on sabotaging this parliament than protecting our environment."[112] While this Group does not take a position on the individual merits of the Deposit Return Scheme, it is frustrating that intergovernmental relations between Edinburgh and Westminster have deteriorated to the point that areas for potential collaboration are now the site of battles over the devolution settlement.

In its policy statement regarding the DRS in May, the UK government pledged that it would "continue to work closely with the Welsh Government to ensure that the schemes are fully interoperable with regard to material in scope, deposit level, and scheme logo and marking (e.g. barcode)."[113] However, on a visit to Edinburgh, Welsh First Minister Mark Drakeford expressed his discomfort that the UK government's decision over the Scottish DRS, saying he "would dispute the use of the internal market act for these purposes".[114] He also confirmed that the Welsh scheme would continue to include glass. This threatens the possibility that the row over deposit return schemes and the devolution settlement may extend beyond Scotland.

Concluding notes

Across the six months of the report period as the relationship between the UK and Scottish governments weakened and rhetoric intensified, the constitutional principles which this Group has identified with regard to the territorial constitution were undermined. As has been noted above, when two governments within the United Kingdom have opposing positions on policy, disagreement is to be expected. However, in the face of such disagreement adherence to basic constitutional principles becomes more, not less, important. If intergovernmental relations are to be sustained through such disagreement it is imperative that both governments seek to act in the best interests of compromise and conciliation. This has not happened during the report period with regard to either the Gender Recognition Reform (Scotland) Bill or Scotland's Deposit Return Scheme. While both governments must take their share of responsibility for the heightened temperature of relations, the transgression of the UK government of principles identified by this Group is of particular concern. That principles 15 and 16 relating to the respect of the structures of devolution have not been adhered to is extremely disappointing and provides worrying indications of future relations between the UK's constituent parts.

110 Humza Yousaf to Rishi Sunak, 3 June 2023, available at: < https://www.gov.scot/news/first-minister-writes-to-prime-minister/ >, last accessed 29 September 2023.
111 'Yousaf warning on deposit return scheme deadline day', *BBC News,* 5 June 2023, available at: < https://www.bbc.co.uk/news/uk-scotland-scotland-politics-65808060 >, last accessed 29 September 2023.
112 Scottish Government, 'Deposit Return', *News,* 7 June 2023, available at: < https://www.gov.scot/news/deposit-return/ >, last accessed 29 September 2023.
113 UK Government, 'Policy statement: Scottish Deposit Return Scheme'.
114 Glenn Campbell, 'Wales FM enters deposit return scheme row', *BBC News,* 1 June 2023, available at: < https://www.bbc.co.uk/news/uk-scotland-scotland-politics-65783480 >, last accessed 29 September 2023.

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