The Constitution in Review

Third Report from the United Kingdom Constitution Monitoring Group

For period 1 January - 31 July 2022

THE CONSTITUTION SOCIETY

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Foreword

In the following report, we identify a set of serious and interconnected problems involving the constitutional system of the United Kingdom. They are important in themselves. But there is also a wider context. The challenges faced today by democracy on an international scale are well acknowledged. Alongside authoritarian states and recently emerged democracies, the stability and quality of democracy in a number of long-established liberal states is under strain. The UK is, regrettably, one such state – as evidenced by the tendencies examined in the reports of our Group to date. The stakes, therefore, are even higher than they would be if the UK alone faced challenges to its core constitutional principles.

Furthermore, because the problems are constitutional and institutional – and greater than any one individual or department - they are fundamental in nature and will have lasting consequences. The previous Prime Minister, Boris Johnson, exploited, drew attention to, and worsened these deficiencies. But such weaknesses predated his tenure, and they will continue now it has ended unless lessons are learned and the norms of good government are respected and reinforced by proper accountability and oversight.

The departure of Boris Johnson should not, therefore, be an excuse for complacency. It should, instead, provide impetus for deep consideration of changes that might serve better to promote and maintain UK constitutional principles. The flawless process for the accession of King Charles as head of state and his explicit emphasis on constitutional principles in his role are encouraging in this respect. The near simultaneous appointment of Liz Truss as Prime Minister following the Conservative leadership election provides the opportunity for a reset of standards in the way the government works and its respect for constitutional norms. The risks are that this will not be a priority or indeed recognised as an issue to be addressed. We will return to the approach of the Truss administration in our next report.

The members of the United Kingdom Constitution Monitoring Group,
in individual capacity,
October 2022.

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 31 July 2022. 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 third in an ongoing, twice-annual, series. The principles we use are reproduced in appendix a. The UKCMG is impartial and has no party affiliation.

Our methodology involves working within fixed time periods, normally of six months. For the purposes of the present report, we extended the regular period from the end of June – as it would have been – to the end of July. Our reason for doing so was to make it possible to include coverage of events that commenced early in July. At this point, further revelations about the conduct of the Prime Minister, Boris Johnson, led to his conceding his leadership of the Conservative Party and by extension that his successor would replace him as premier. We took the view that showing flexibility around our deadline would significantly strengthen the analysis contained in the report, avoiding an abrupt and arbitrary cut-off point.

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:

Professor Linda Colley
Professor Katy Hayward
Professor Michael Kenny
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Dr Hugh Rawlings
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The issue of integrity and standards in public life, especially within the UK executive, received an exceptional degree of public and political attention. In July 2022, members of the Conservative parliamentary party and government ministers took steps to force the Prime Minister, Boris Johnson, out of office, citing concerns in this area. Nevertheless, the end of the Johnson administration does not mean that the problems of integrity in public life have been resolved. The number and scale of revelations surrounding the behaviour of UK ministers and officials suggests underlying weaknesses in the system. Problems during the present report period included: law-breaking by ministers and officials; irregularities related to the disbursal of public money; the dissemination of misleading information, both outside and within Parliament; poor leadership on matters of integrity; reluctance to take measures to improve the protection of standards; and deliberate erosion of those safeguards that exist. With these issues in mind, **we recommend full implementation of the recommendations of the Committee on Standards in Public Life arising from its Standards Matter inquiry, and the proposals advocated by the Boardman Review**. These measures could bring about a more formalised system with more coherent rules that are underpinned by statue.

Constitutional change process
The Johnson governments pursued a major programme of constitutional reform. Any such agendas should be carefully devised and evaluated. There should be, as far as possible, consensus for reform, and its possible wider effects should be carefully considered. The government's proposed Constitution, Democracy and Rights Commission could have been used to facilitate considered, careful and consensual constitutional change. However, the Commission was not established. Various legislative measures and other changes of a constitutional nature have been problematic due to their substantive content and the process used in their development and implementation.

Elections
The *Elections Act 2022*, which passed into law during the report period, has concerning aspects to it. Its voter ID requirements could potentially have negative consequences for participation in elections, in particular among already more excluded groups, unless steps are taken to avoid this. **Worryingly, it reduces the independence of the Electoral Commission from the UK executive.**

Speculation at the time of Johnson's exchange with the House of Commons Liaison Committee and surrounding his removal from office highlighted doubts about the principles that apply to requests for dissolutions of Parliament. This follows the repeal of the *Fixed-term Parliaments Act 2011* by the *Dissolution and Calling of Parliament Act 2022* during this report period. This legislative change enhances the discretion available to the executive and Prime Minister in the calling of general elections. Further undermining the traditional electoral process, the internal Conservative leadership competition has seen the last three prime ministers come into office without a General Election taking place. This process is notoriously opaque and is not regulated to anywhere near the same extent as general or local elections, leaving potential room for suspicion that a less than free and fair exercise in democracy has taken place.

Legislatures
Various norms pertaining to the relationship between the executive and Parliament have been tested. The government resisted holding a confidence vote tabled by the Opposition on the basis that it referred specifically to the Prime Minister. This is concerning because the House of Commons' ability to express its confidence in the government is a central feature of executive accountability to Parliament and of parliamentary democracy. Concerns persisted regarding UK ministers providing misleading information to Parliament. Ministers have continued to rely, extensively, on delegated powers to create law and implement key policies, even where primary legislation would have been more appropriate. Precisely because delegated legislation receives minimal scrutiny, its present use and scale undermines executive accountability to Parliament and the rule of law.

Ministers and the Civil Service
This reporting period has seen further revelations concerning integrity and standards in public life and the failure to adhere to basic norms of conduct among ministers and civil servants. The means by which some of these problems were uncovered and the unconventional processes associated with them (i.e. the investigations conducted by Sue Gray and the police into gatherings) were less than satisfactory. Nevertheless, such investigations revealed that ministers and civil servants had disregarded the law and basic norms. It is not clear that the organisational changes embarked upon in response to the scandal will fully address the problems.

Generalised allegations made by UK ministers about the supposed failure of civil servants to live up to principles such as objectivity and impartiality risk the corrosion of relations between ministers and officials. The UK government has taken and presented a decision about reducing the number of Civil Service staff in an arbitrary way. This approach would seem likely to adversely affect Civil Service morale, and by extension the effectiveness of this institution in performing its constitutionally essential role.

The ousting of Boris Johnson as Prime Minister might be seen as a case of the internal mechanisms of the political system responding to improper conduct. But the final drive to remove the premier came only after a prolonged period of serious concerns. Moreover, those who moved against him were not motivated solely by the desire to uphold standards. **The means by which Johnson was replaced brought to attention troubling uncertainties surrounding the ways in which prime ministers are removed and their successors chosen**.

Devolution and the rule of law
Difficulties and uncertainties regarding the territorial constitution continued. The UK government once again introduced legislation that would enable it to override the Northern Ireland Protocol, despite concerns about possible negative impact on the peace process and the breaching of international law.

There is continuing uncertainty surrounding the circumstances in which a referendum can be held on the possible departure of a particular territory from the UK. In June, the Lord Advocate referred a Draft Bill legislating for an advisory referendum on Scottish independence to the UK Supreme Court.

However, the Scottish First Minister has stated that even if the Scottish Parliament cannot hold such a referendum on its own authority, her party will contest the next election solely on the question of Scottish independence.

The process of shifting the relative balance of power away from the devolved institutions and towards Westminster has continued. Doubts about the viability of the Sewel convention as a means of regulating the exercise of the law-making power of the UK Parliament in as far as it has devolved implications have continued to grow.

Judiciary and the rule of law

From a rule of law and human rights standpoint, various worrying measures have continued into this report period. These measures included the passing of the *Police and Crime Sentencing Act 2022* and the *Nationality and Borders Act 2022*. As noted by the Joint Committee on Human Rights, the *Police and Crime Sentencing Act 2022* contains an improper infringement on the right to protest and the freedom of assembly based on a 'noise trigger'. The United Nations High Commissioner for Human Rights described the *Nationality and Borders Bill* as 'fundamentally at odds' with the government's commitment to uphold the United Kingdom's obligations under the Refugee Convention. In addition, the policy of seeking to deport refugees to Rwanda raises serious concerns, including from the point of view of human rights and adherence to international obligations.

The problematic practice of creating 'ouster clauses' – as was included in the *Dissolution and Calling of Parliament Act 2022* – continued. The *Bill of Rights Bill* sought to overhaul the *Human Rights Act 1998*. This Bill (which now seems to have been set aside from the current legislative timetable) appeared likely to curtail judicial scrutiny of human rights and departed significantly from the findings of the independent review into the subject.

Over the report period, ministers continued to make misleading statements about legal professionals. These statements are dangerous, as they call into question the independence and integrity of lawyers, and risk eroding public trust in the legal system.

The Third 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. Ministers must not use government resources for party political purposes (principle 9).

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1. **In our previous two reports, we have noted widespread concerns about integrity in public life, centring on the UK executive. Throughout the present report period this issue was arguably the foremost subject of public attention in domestic politics.** A series of controversial episodes culminated in a concerted effort from within his own government and parliamentary party to remove Boris Johnson as Prime Minister. **For a premier to be forced from office (albeit with delayed effect) so clearly**

amid highly visible public doubt about their maintenance of standards is without precedent. Furthermore, the manner in which Johnson was removed raised further concerns in itself. The episode should not inspire confidence in the way integrity in the system is maintained. Many of those who moved against Johnson were arguably slow to act. Moreover, they were not necessarily motivated principally by a desire to uphold standards in government. For instance, alongside his questionable activities, evidence of his declining popularity seems to have been an important factor. **The process used for replacing Johnson was also a source of concern from the point of view of certainty and consensus over constitutional arrangements**, discussed further below**.**

2. **Circumstances leading to and surrounding the departure of Johnson gave rise to numerous troubling matters involving integrity in public life.** They are not dispelled, moreover, by the departure of Johnson from No. 10. **The successor administration of Liz Truss includes within it numerous ministers and officials who were in different ways involved in the problems. Furthermore, there is as yet no sign of an intention within the new government to address the underlying flaws in the system,** nor to address the fundamental flaws in ministerial behaviour that the Johnson administration exposed.

3. The following account of problems, then, is more than an historic record of a worrisome episode in UK constitutional history, and is a live account of ongoing deficiencies which should be of the utmost concern to those with an interest in public probity and constitutional standards. **Concerns spread across a series of interlinked themes, which included:**

4. **Violation of criminal law by holders of the highest public office.** Following a police investigation that took place during this period, both the Prime Minister and the Chancellor of the Exchequer were found in violation of criminal law for their participation in gatherings during a time when Covid restrictions were in force (we discuss the merits of the investigatory process used below). They were served with, and paid, fixed penalty notices for their attendance at an event celebrating the Prime Minister's birthday on 19 June 2020.[1] No precedent can be found for holders of these offices being found to have committed criminal acts.[2] Consequently there is no established practice regarding what the consequence should be. Neither office-holder resigned. The episode, it can reasonably be inferred, contributed to the ultimate downfall of Johnson. But that being found to have acted illegally did not lead directly to their departure is notable. Nor did it disqualify the former Chancellor from standing to replace Boris Johnson as Prime Minister. **We do not take a specific position on when precisely it is appropriate for a Prime Minister or other senior minister to resign. But we note that this episode has exposed uncertainties, involving a scenario of a type that might previously never have been expected to come about, over the point at which the conduct of a Prime Minister (or other minister) makes**

1 'Partygate: Which Downing Street parties have resulted in fines', *BBC News*, 27 May 2022, available at: < https://www.bbc.co.uk/news/uk-politics-60124162 >, last accessed 18 July 2022.

2 Rowena Mason and Aubrey Allegretti, 'Boris Johnson defies calls to quit after he and Rishi Sunak fined', *Guardian*, 12 April 2022, available at: < https://www.theguardian.com/politics/2022/apr/12/boris-johnson-and-rishi-sunak-fined-for-breaking-covid-lockdown-laws >, last accessed 5 July 2022.

their continuation in office unacceptable. Numerous officials involved in related gatherings in the Downing Street area were also made subject to fixed penalty notices. In total, 126 notices were issued to 83 people, 28 of whom received between 2 and 5 fixed penalty notices.[3] (principles 1; 7).

5. **The dissemination of misleading information by the UK executive.** This was a recurring aspect of the report period. To give some examples, the UK government was found to have made misleading claims, both within and outside Parliament, sometimes repeatedly, over matters such as crime figures and employment statistics. In a letter dated 3 February, Sir Alistair Norgrove, Chair of the UK Statistics Authority, stated that: a recent 'Home Office news release' had 'presented the latest figures in a misleading way.' It had:

> 'in two places presented the statistics to give a positive picture of trends in crime in England and Wales, based on a fall in total crime excluding fraud and computer misuse of 17% between the year ending June 2019 and the year ending September 2021. The exclusion was stated. However in the title and in two other places the release refers to a fall in crime, without making clear that this is true only if fraud and computer misuse are excluded.'

6. Furthermore, Johnson had 'referred to a 14% reduction in crime, which is the change between the year ending September 2019 and the year ending September 2021. This figure also excludes fraud and computer misuse, though the Prime Minister did not make that clear.'[4] **The Johnson statement that 'we have been cutting crime by 14%' was made to the House of Commons on 31 January[5], the venue in which it was made adding an extra dimension to its constitutionally problematic nature.** A similar problem occurred the following month. On 24 February 2022, Norgrove wrote to Johnson noting that:

> 'You said at Prime Minister's Questions yesterday that there are now more people in employment than before the pandemic began.
>
> According to the latest ONS figures, it is wrong to claim that there are now more people in work than before the pandemic began: the increase in the number of people who are on payrolls is more than offset by the reduction in the number of people who are self-employed…I hope you will agree that public trust requires a complete statement of this important measure of the economy.'[6]

3 'Partygate: Which Downing Street parties have resulted in fines', *BBC News*, 27 May 2022, available at: < https://www.bbc.co.uk/news/uk-politics-60124162 >, last accessed 18 July 2022.

4 'Response from Sir David Norgrove to Alistair Carmichael MP – Use of official crime statistics by Prime Minister, Home Secretary and Home Office', 3 February 2022, available at: < https://uksa.statisticsauthority.gov.uk/correspondence/response-from-sir-david-norgrove-to-alistair-carmichael-mp-misuse-of-official-crime-statistics-by-prime-minister-home-secretary-and-home-office/ >, last accessed 19 June 2022.

5 House of Commons (HC) Hansard for 31 January 2022, 'Sue Gray Report', available at: < https://hansard.parliament.uk/commons/2022-01-31/debates/6B412B49-AB7D-4FE3-9F82-B9EAE93FB6AC/SueGrayReport >, last accessed 9 August 2022.

6 'Sir David Norgrove to the Prime Minister – employment statistics', 24 February 2022, available at: < https://uksa.statisticsauthority.gov.uk/correspondence/sir-david-norgrove-to-prime-minister-employment-statistics/ , https://uksa.statisticsauthority.gov.uk/correspondence/sir-david-norgrove-to-prime-minister-employment-statistics/ >, last accessed 9 August 2022.

7. In May 2022, contradictory accounts emerged of the nature of contact between the Prime Minister's Office and Sue Gray, the Cabinet Office official charged with the internal investigation into gatherings during lockdown, prior to the publication of her final report.[7] By this point, Johnson had already been made subject to an inquiry by the House of Commons Committee on Privileges into whether his statements on this subject, which the House judged appeared to be 'misleading', 'amounted to a contempt of the House.'[8] By the middle of the year, the government issued incorrect accounts of the background to the case of Chris Pincher MP, who resigned as Deputy Chief Whip at the end of June after inappropriate conduct. An intervention by a former senior civil servant revealed that Johnson had possessed prior knowledge about Pincher. The former Permanent Secretary at the Foreign Office, Lord McDonald of Salford, issued a statement that: '[i]naccurate claims by 10 Downing Street continue to be repeated in the media.' Seeking to rebut reports that there were no 'official complaints' against Pincher, McDonald recounted that three years' previously, 'shortly after he was appointed minister of state at the Foreign Office, a group of officials complained to me about Mr Pincher's behaviour'. There had been '[a]n investigation' which had 'upheld the complaint'. 'Mr Pincher', MacDonald went on, 'apologised and promised not to repeat the inappropriate behaviour'. Johnson had received a briefing 'in person about the initiation and outcome of the investigation.'[9] This revelation forced the Prime Minister to concede that he should not have appointed Pincher to the post of Deputy Chief Whip.[10] The episode led to multiple ministerial resignations from government and wider pressure from within the Conservative parliamentary party, eventually leading Johnson effectively (and reluctantly) to concede his leadership and by extension his position as Prime Minister on 7 July[11] (we discuss the various constitutional uncertainties surrounding the departure and replacement of Johnson below) (principles 3; 7).[12]

8. **Failure by senior figures within the UK executive to adhere to and to promote basic standards of conduct.** The police and Sue Gray investigations into gatherings on government premises during Covid restrictions revealed improper behaviour amounting to the violation of criminal law by the most senior ministers and by officials. It also, as Gray found, exposed a failure at the highest level to provide

7 John-Paul Ford Rojas, 'Downing St admits instigating Sue Gray meeting - contradicting a cabinet minister's account hours earlier', *Sky News*, 23 May 2022, available at: < https://news.sky.com/story/minister-condemns-playing-politics-briefing-against-sue-gray-ahead-of-partygate-report-12619564 >, last accessed 9 August 2022.

8 HC Hansard for 21 April 2022, 'Votes and proceedings', , available at: < https://commonsbusiness.parliament.uk/Document/56399/Html?subType=Standard#anchor-3 >, last accessed 9 August 2022.

9 'Chris Pincher: Lord McDonald's letter in full', *BBC News*, 5 July 2022, available at: < https://www.bbc.co.uk/news/uk-politics-62047757 >, last accessed 30 July 2022.

10 Sophie Morris, 'Boris Johnson apologises for appointing Chris Pincher as deputy chief whip and said "it was the wrong thing to do"', Sky News, 5 July 2022, available at: < https://news.sky.com/story/boris-johnson-apologises-for-appointing-chris-pincher-as-deputy-chief-whip-and-said-it-was-the-wrong-thing-to-do-12646408 >, last accessed 30 July 2022.

11 For the text of Jonson's statement, see: 'Prime Minister Boris Johnson's statement in Downing Street: 7 July 2022', available at: < https://www.gov.uk/government/speeches/prime-minister-boris-johnsons-statement-in-downing-street-7-july-2022 >, last accessed 10 August 2022.

12 Laura Kuenssberg, 'Boris Johnson: the inside story of the prime minister's downfall', *BBC News*, 14 July 2022, available at: < https://www.bbc.co.uk/news/uk-politics-62150409 >, last accessed 16 July 2022.

proper leadership.[13] The working environment around Downing Street was one in which more junior staff felt unable to challenge improper conduct and were drawn into it. The conduct of Chris Pincher was a serious problem in itself. Similarly concerning was the failure of the Prime Minister, despite having prior knowledge of the background issues to the case, to properly take them into account in his decision-making. Johnson was criticised during this period for comments he made in parliamentary debates that could have the effect of legitimising dangerous conspiracy theories[14] (principle 7).

9. **Concerns about the disbursal of public money. Critical scrutiny of the processes by which pandemic-related contracts were awarded continued during the report period.** The House of Commons Committee of Public Accounts published, in July 2022, the report of its inquiry into government contracts for Randox Laboratories Ltd. The Committee noted that 'During the COVID-19 pandemic, the Department of Health & Social Care (the Department) awarded contracts worth almost £777 million to Randox Laboratories Ltd (Randox) for COVID-19 testing services and goods.' The report raised issues regarding 'the Department's poor record-keeping', which meant that 'we cannot be sure that all these contracts were awarded properly…basic Civil Service practices to document contract decision making were not followed.' Moreover, the Committee went on, the Department had 'failed in its duties to be transparent about meetings that its ministers had with Randox.' While '[t]he potential for conflicts of interest was obvious…the Department neglected to explicitly consider conflicts of interest in its awarding of contracts to Randox.'[15] **We draw no express conclusions on this matter, beyond noting that the concerns that the Committee raised are relevant from the point of view of proper use of public money and propriety in public office** (principles 8; 9).

10. **Disregard from within the UK executive for mechanisms and processes intended to enforce standards and ensure that ministers are held to account for any failure to adhere to them.** The House of Commons took the view that an investigation was required into Boris Johnson for possibly showing contempt for Parliament in answering questions about gatherings during lockdown. We do not seek to pre-empt the outcome of this inquiry by the Committee on Privileges. But we note the extraordinary nature of such scrutiny of a Prime Minister, and that it could lead to the conclusion that Johnson deliberately sought to evade parliamentary accountability for his departure from standards.

Contradictory accounts of other events given outside Parliament – in particular in relation to Chris Pincher – had the effect of making political accountability more difficult to achieve, regardless of whether they were intentional or otherwise. When facts were revealed about transgressions, the Prime Minister, while appearing to acknowledge wrongdoing, tended to do so in ways that did not accept responsibility as fully as might have been ideal. The Independent Adviser on Ministers' Interests, Lord Geidt, criticised Johnson for failing to account for the lockdown gatherings specifically in the context

13 *Findings of the Second Permanent Secretary's investigation into alleged gatherings on government premises during Covid restrictions* (Cabinet Office, London, 2022), p.36, available at: < https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1078404/2022-05-25_FINAL_FINDINGS_OF_SECOND_PERMANENT_SECRETARY_INTO_ALLEGED_GATHERINGS.pdf >, last accessed 10 June 2022.

14 Morgan Jones, 'Boris Johnson's readiness to mention deep state conspiracy theories will have a dangerous ripple effect', *New Statesman*, 20 July 2022, available at: < https://inews.co.uk/opinion/boris-johnson-deep-state-conspiracy-theories-ripple-effect-1752148 >, last accessed 30 July 2022.

15 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 31 July 2022.

of the *Ministerial Code* (see: Appendix b, Timeline of events). Lord Geidt subsequently resigned in response to behaviour on the part of Johnson that Lord Geidt felt amounted to attempting to use the Adviser as 'cover' for anticipated questionable activity. Initial coverage of his departure conveyed the impression that it was over a specific issue of steel tariffs and their relationship with international law. Geidt clarified the reasons for his leaving in a letter to the House of Commons Public Administration and Constitutional Affairs Committee, approvingly quoting Lord Butler of Brockwell's explanation for his departure. Butler had said that:

> 'He [Lord Geidt] thought it odious and impossible that he should be asked to give cover on something that might be in breach of international law and he didn't think that that was something that ought to be asked of him. This isn't about steel. It's about whether Lord Geidt should be asked to give advanced cover to the Prime Minister where there is contemplation of doing something that may be in breach of international law. ... When the Prime Minister is asking his own adviser to advise on the Prime Minister's conduct it really doesn't work.'

11. Geidt held:

> 'This represents my position precisely. Emphasis on the steel tariffs question is a distraction. It was simply one example of what might yet constitute deliberate breaches by the United Kingdom of its obligations under international law, given the Government's widely publicised openness to this.'[16]

12. Lord Geidt was the second of two holders of the post of Adviser during the Johnson premiership. His predecessor, Alex Allan, had also left abruptly (principle 3).

13. **Undermining mechanisms for the maintenance of standards; and failing fully to adopt recommendations for their improvement**. That Johnson lost two Independent Advisers on Ministers' Interests in succession was suggestive that the post itself was being compromised. The role remains unfilled at the time of writing. The text of the new *Ministerial Code* issued in May confirmed that recommendations for the strengthening of the Adviser and the Code previously made by the Committee on Standards in Public Life (CSPL) were not being implemented in full. For instance, while the Adviser would now (as CSPL proposed) be able to initiate investigations into possible breaches of the Code – which represented significant progress – such inquiries needed to have the approval of the premier (a limitation CSPL had not advocated). In effect, this means investigations are subject to a prime ministerial veto: an Independent Adviser can ask for the reasons it has been denied approval, but a Prime Minister is not compelled to provide them (though a Prime Minister might in practice feel under considerable pressure to agree to an inquiry). In the foreword to the new Code, moreover, the **Prime Minister appeared to present the text as applying to ministers rather than the premier**, stressing the idea that he answered to Parliament and the electorate. Johnson described the Code as:

16 House of Commons Public Administration and Constitutional Affairs Committee, email from Lord Geidt received on 17 June 2022, available at: < https://committees.parliament.uk/publications/22732/documents/167114/default/ >, last accessed 17 July 2022.

> 'guiding my Ministers on how they should act and arrange their affairs. As the Leader of Her Majesty's Government, my accountability is to Parliament and, via the ballot box, to the British people.'

14. Other changes put forward by CSPL, such as providing the Adviser with a statutory basis, and making the Adviser rather than the Prime Minister able to make final determinations about whether a violation had taken place – were fully rejected (see: Appendix c). In our previous report we noted that legislation then passing through Parliament would have negative consequences for the independence from the executive of the Electoral Commission, a body with an important role in overseeing the integrity of elections, referendums, and party finance. This law – in the form of the *Elections Act 2022* – came into being during the current report period (principles 1; 3).

15. In our previous report, we noted that **a general deterioration in standards, as well as being unwelcome in itself, has the potential to generate further constitutional difficulties and sensitivities.** This tendency continued to manifest itself during the present period. For instance, when under pressure for alleged misdemeanours during parliamentary debates, Johnson was prone to engaging in further arguably problematic behaviour, for instance through the claim discussed above about crime figures, made during a debate on the first Sue Gray report. **Being required to investigate activities – potentially of a criminal nature – taking place within the UK executive, involving senior officials and ministers (including the Prime Minister) inevitably places civil servants and the police in an uncomfortable position given the need to maintain, and be seen to maintain, political impartiality.** The Pincher episode generated a specific issue involving the requirement for civil servants to maintain confidentiality even after they had left their posts. When the government was promoting misleading accounts of past events in a clearly problematic way, Lord McDonald publicly corrected the record based on his direct experience when inside government. Immediately after and in response to this incident, mass ministerial resignations on an unprecedented scale took place in an effort to force the Prime Minister, who was compromised by the Pincher episode, to resign. The principle of collective responsibility – a crucial component of ministerial responsibility – came under intolerable strain, with some ministers calling upon Johnson to depart while remaining in their posts[17] (principles 1; 3).

16. The final ousting of Johnson came after a long build-up of objections to his conduct of the premiership, first from outside the Conservative Party, then within it, reaching a peak in July. **This experience reveals an important weakness in the system of protection for standards in public life in the UK. It rests to a significant extent upon self-regulation – that is, senior office holders being willing to abide by rules and less precise understandings, and being willing to value such adherence over and above their personal or partisan gains. Within this system of voluntary conformance, the Prime Minister is a central figure.** The premier has a special role in the setting out and enforcement of ethical standards in government – for instance, through the drafting, promulgation, and enforcement of the *Ministerial Code*, and their relationship with other documents and bodies that have a role in the maintenance of standards (see: Appendix c). During the Johnson period, the occupant of the premiership himself was a problem, both through falling short in performing this function, and because his own behaviour was

17 Rowena Mason, 'New Chancellor Zahawi tells Johnson to go as Donelan quits after 48 hours in job', *Guardian*, 7 July 2022, available at: < https://www.theguardian.com/politics/2022/jul/07/new-chancellor-zahawi-tells-johnson-to-go-as-donelan-quits-after-48-hours-in-job >, last accessed 14 July 2022.

a subject of concern. This difficulty was onerous to resolve, since acting against a Prime Minister was a political and practical challenge. As discussed above, it eventually required mass ministerial resignations and other protests, but these only occurred after a prolonged period in which multiple transgressions were exposed.

17. **We restate the general conclusion from our previous report that urgent attention needs to be given to reinforcing standards in public life. The Johnson premiership exposed weaknesses in existing protections and weakened further an already insecure framework.** Such steps as were taken or committed to under Johnson to improve the enforcement of standards – such as changes to the *Ministerial Code* and the role of the Adviser, or the establishment of a new Office of the Prime Minister – did not seem adequate to the task, and certainly failed to offset other, growing problems. Furthermore, they did not prevent the continuation of difficulties which in July led to Johnson conceding his leadership.

18. **As we have stated, the departure of Johnson should not be treated as the end of a problem, but as creating the need and opportunity for measures to prevent their recurrence, to reverse damage incurred, and to halt any objectionable measures in progress or being contemplated.** The fate of the Johnson premiership should highlight that no-one ultimately benefits from a failure to adhere to standards, even those who might initiate such courses of action in pursuit of political or personal gain.

19. **We re-iterate here the support expressed in our previous report for the full implementation of the final recommendations of CSPL 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.**

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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20. As we have noted in previous reports, in its 2019 General Election Manifesto, the Conservative Party pledged to undertake a major programme of constitutional reform. The text stated that '[i]n our first year', a Conservative administration would form 'a Constitution, Democracy & Rights Commission' to consider a variety of 'issues in depth, and come up with proposals to restore trust in our institutions and in how our democracy operates.' The Manifesto implied that the process would address matters including the relationship between the judiciary, legislature and executive; the Royal Prerogative; the position of the House of Lords; public access to justice; and a plan to 'update' administrative law and the *Human Rights Act 1998*.[18]

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

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

23. The present report period saw numerous examples of a less than satisfactory approach to constitutional change from the UK government. **In our previous report, we noted that the Elections Bill (see Appendix g, Second Report) then passing through Parliament suffered from these procedural**

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

defects. Containing some exceptionally controversial aspects (alongside other content which by contrast received praise), its passage through Parliament began without a preceding period of consultation. The government added important and divisive content to the Bill during the legislative process itself, further reducing the chances for meaningful scrutiny.

24. **Despite widespread reservations expressed regarding the *Elections Bill* from the standpoint of fundamental constitutional principles, including objections from the House of Commons Public Administration and Constitutional Affairs Committee and resistance from within the House of Lords, the government proceeded with it regardless. It passed into law in the present report period, after the "ping pong" process at the end of the parliamentary session. Other constitutionally controversial measures received Royal Assent at the same time: the *Nationality and Borders Bill*, the *Judicial Review and Courts Bill*, and the *Police, Crime, Sentencing and Courts Bill*.** Principled amendments passed by the Lords were largely or wholly rejected (see: Appendix d). Such practices, as we have previously noted, **suggest the UK government is deploying the law-making power of Parliament without regard to key constitutional values** (see: Appendix d) (principles 1; 5).

25. **The Queen's Speech, setting out the legislative programme for the coming session, suggested that this pattern was likely to continue** (see: Appendix e)**. For instance, it included a proposal for a Bill of Rights. The process leading to this measure, as we noted in our previous report, 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 the last 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.[19] No draft of the Bill was offered by the Government to permit scrutiny by either interest groups or the Joint Committee on Human Rights.[20] **The legislative proposals for a Bill of Rights have confirmed concerns raised in our previous report. The rationale in which they are founded is questionable; they lack coherence in key respects; they relate to a treaty commitment; they have devolution implications; and they contain negative implications for rights protection. Furthermore, they are notably controversial in an area in which change would ideally rest on some degree of consensus** (see: Appendix h) (principles 1; 7; 8; 18; 19).

26. **In June, the UK government introduced legislation intended to provide it 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**

19 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 3 February 2022.

20 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 25 August 2022.

and the majority of MLAs in the NI Assembly,[21] and 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 below and Appendix f).

27. As the experience of these and other constitutional change initiatives pursued by the Johnson administration has demonstrated, **constitutional processes are important in their own right; and because failure to adhere to good practice is likely to lead to questionable outcomes.**

21 See: 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 27 September 2022.

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 government plans to legislate for a requirement for individuals to produce photo identification at polling stations in order to be able to vote in elections (see Appendix g, Second Report). The justification the government has offered for this policy is 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 has now passed into law as part of the Elections Act 2022. We maintain our existing 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. **A further source of controversy associated with the Election Act 2022 involves its provisions for the Electoral Commission.** We have already stated that we share concerns expressed in this regard. An independent body charged with the oversight of elections and related matters is of particular value to the maintenance of free and fair elections. **The change the Act brings about in this area amounts to a threat to reduce the autonomy of the Commission and create new potential for ministerial interference in its work. The Act also removes the ability of the Commission to initiate (in England and Wales) criminal prosecutions – despite the Commission actually having taken the position that its powers in this respect should be increased, rather than removed** (principles 1; 2).

30. **As we stated in our last report, these proposals could create grounds for suspicion that the government was seeking to increase possibilities for it to manipulate electoral and other processes and to act with legal impunity in these areas. Such a perception – whether or not it represents the actual intentions of the government – is problematic from the point of view of public confidence in the conduct of free and fair elections and in the wider political system (principle 2).**

31. A **further source of concern regarding a shift in the direction of increased executive power with respect to the conduct of elections is the *Dissolution and Calling of Parliament Act 2022*, which received Royal Assent in the current report period (on 24 March).** This law has the effect of providing the government – and in particular the Prime Minister – with greater flexibility in determining the timing of general elections, ending the role for the House of Commons that the *Fixed-term Parliaments Act 2011* sought to create (though it proved to be vulnerable to being bypassed) (principle 2).

32. Furthermore, as we warned in our first report, the way in which the 2022 Act went about attempting to restore the position prior to the passing of the 2011 Act created the potential for uncertainty about when it was and was not appropriate for a Prime Minister to ask for a Dissolution (principle 1).

33. **This issue became live in the summer, when concerns arose over how Johnson might respond to mounting pressure on his position, and whether he might threaten to use, or actually deploy, his ability to request a Dissolution as a means of forestalling his removal.[22] In our judgement, such an attempted utilisation of prime-ministerial power would without doubt constitute an abuse.** The House of Commons Liaison Committee happened to have a scheduled session with Johnson on 6 July, the day before he conceded the leadership, when still struggling to retain his position. The Committee took the opportunity to press him on the Dissolution issue. The way in which Johnson responded suggested he was not aware of or willing to acknowledge conventions that might apply in this area, or that he was bound by constitutional principles rather than political considerations.

34. When William Wragg MP asked Johnson whether he was 'familiar with the Lascelles principles?' Johnson appeared not to be, and seemed to confirm that he had heard of the person after whom they were named, Sir Alan (or 'Tommy') Lascelles, only from watching the streaming service drama 'The Crown', in which Lascelles was depicted. Lascelles, Private Secretary to George VI, wrote a letter under the pseudonym 'Senex' published in *The Times* on 2 May 1950 setting out the circumstances under which a monarch might wisely deny a Dissolution when asked for one by a Prime Minister. They were that '(1) the existing Parliament was still vital, viable, and capable of doing its job; (2) a General Election would be detrimental to the national economy; (3) he could rely on finding another Prime Minister who could carry on his Government, for a reasonable period.' Wragg asked: '[i]f you were to go to Her Majesty and request—it is a request; you would not go to advise—a Dissolution of Parliament, could you give me two conditions under which Her Majesty would be justified in declining your request?' Johnson was reluctant to answer, stating that **'**You are asking about something that is not going to happen, unless everybody is so crazy as to try to have a new—we are going to get on**…**I don't think the people of this country want to have an election, and I certainly don't.'

35. The Chair, Sir Bernard Jenkin MP, then intervened, asking: 'Prime Minister, you said it is not going to happen "unless". Unless what?' Jenkin persisted on this point, and Johnson eventually said: '[u] nless people ignore that very good principle that history teaches us that the best way to avoid pointless political disturbance is to allow the Government that has a mandate to get on and deliver its mandate'. After further evasions from Johnson, Wragg put it to the Prime Minister: '[s]o I am taking it that you

22 Oliver Wright, Chris Smyth and Matt Dathan, 'Tories fear snap election in "Trumpian" survival attempt', *The Times*, 7 July 2022, available at: < https://www.thetimes.co.uk/article/tories-fear-snap-election-in-trumpian-survival-attempt-wf3wmsjnk >, last accessed 10 July 2022.

accept the Lascelles principles' to which Johnson replied '[i]nsofar as they are designed to prevent pointless wildcat elections, they sound sensible to me.' The most that could be extracted from the Prime Minister was that 'I see no reason…whatever for a general election now. On the contrary, what we need is stable Government, to love each other as Conservatives and to get on with our priorities. That is what we need to do, Sir Bernard, okay?'[23]

36. **Though Johnson did not ultimately make an inappropriate request for a Dissolution, his answers to the Committee (and his reluctance to give them) were far from reassuring. They demonstrated the existence of uncertainty in an area of crucial importance, entailing in turn a reliance on the forbearance of prime ministers. Future prime ministers' conduct with respect to matters of a constitutional nature might – as was the case with Johnson - prove questionable**. If a genuine problem arose in this area, there would be potential for placing the Monarch in a position of pronounced discomfort. It would be hard for the head of state to refuse any request for a Dissolution, however dubious; but to agree to it might make them appear associated with a decision widely perceived as a democratic abuse (principles 1; 2; 20). **The precise applicability of the Lascelles principles in the contemporary environment is debatable, though something similar would seem appropriate.**

37. We note that, when it published the *Draft Fixed-term Parliaments Act 2011 (Repeal) Bill* in December 2020, the government issued alongside it a set of Dissolution Principles. Relatively vague in nature, the Principles were criticised by the Joint Committee set up to scrutinise the draft bill, which recommended that they should include reference to the circumstances in which it might and might not be proper for a Prime Minister to request a Dissolution. The government did not accept these recommendations or publish a revised version of the Principles. Furthermore, Johnson did not refer to them in his Liaison Committee appearance, nor did any member of the Committee press him on them. **There is, therefore, considerable doubt regarding what are the relevant constitutional principles in the context of the movement away from fixed-term parliaments. This lack of clarity in such an important constitutional area is a source of concern.**

38. The process for determining the replacement for Johnson also involved two elections: one within the Conservative parliamentary party, the other among the whole membership of the Conservative Party. These votes are not public votes in the same way as other elections discussed here. However, they could be held in practice to comprise part of the functioning of the constitution since, in practice, their outcome is accepted as determining who will be appointed Prime Minister. Given the importance of these processes, it is worth noting that the norms to which they are subject differ significantly from those that apply to public elections, and might in some senses be judged wanting.[24] Identification requirements for the membership stage, for instance, might not be as rigorous as those the government recently insisted on introducing via the Elections Act. Furthermore, decisions about the way in which the contest is triggered and takes place, which rest with the Conservative Party, have significant consequences for

23 House of Commons Liaison Committee, Oral Evidence, The Work of the Prime Minister, Rt. Hon. Boris Johnson MP, Prime Minister, HC 453, 6 July 2022, Qs 148-155; 218-219, available at: < https://committees.parliament.uk/oralevidence/10543/pdf/ >, last accessed 9 August 2022.

24 David Klemperer, 'Party members choosing prime ministers – a constitutional concern?', *Constitution Society Blog*, 4 August 2022, available at: < https://consoc.org.uk/party-members-and-prime-ministers/ >, last accessed 10 August 2022.

the operation of the political system, determining the means by which prime ministers are removed, and for how long, once the decision to oust them is taken, they will continue to remain in office while their successor is selected (principles 1; 2).

Legislatures

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

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

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

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39. **In this report period, various norms involving the relationship between the UK executive and Parliament continued to be tested**, as they were in previous report periods. One issue that arose involved the government resisting the holding of a confidence vote tabled by the official Opposition in July 2022 because it referred specifically to the Prime Minister (the government held its own vote subsequently, with generalised wording). As with many such practices, there is an absence of precision over the obligations to which the government is subject.[25] Nonetheless, **the ability of the House of Commons to vest and remove confidence in the government of the day is the central feature of the accountability relationship between the two, and ensures a connection between the votes of members of the public as cast in general elections and the formation and disbanding of governments: in other words, parliamentary democracy. For confusion to appear with respect to the requirements applying to the executive in submitting itself to votes of confidence is therefore a matter of constitutional concern.**

40. **In previous reports, we have remarked upon the existence of significant concerns regarding the alleged misleading of the UK Parliament by the Prime Minister, and failures to correct errors satisfactorily once identified.** This matter engages principle 3, and in particular its requirement that '[m]inisters must provide information that is both accurate and truthful to their respective legislatures, and should correct unintended errors they make as soon as possible'. We noted that, important as this principle is, if the political leadership of a government is not committed to it, enforcement is difficult to achieve. Such a circumstance calls into question whether constitutional arrangements regarding the relationship between ministers and legislatures can be said to be subject to 'robust and impartial enforcement' (principle 1). If the Prime Minister is subject to doubts of this type, then questions around proper 'leadership', one of the *Seven Principles of Public Life*, arise (see principle 7).

25 Alison Young, 'Votes of no confidence – upholding the constitution or playing politics?', *UK in a Changing Europe*, 15 July 2022, available at: < https://ukandeu.ac.uk/votes-of-no-confidence-upholding-the-constitution-or-playing-politics/ >, last accessed 9 August 2022.

41. **During the present report period, credible complaints persisted about the misleading of Parliament, whether intentional or otherwise** (see, for instance, claims by Johnson about crime and employment)**.** Paragraph 1.3 (c) of the *Ministerial Code* restates an important convention that: '[i]t is of paramount importance that Ministers give accurate and truthful information to Parliament, correcting any inadvertent error at the earliest opportunity. Ministers who knowingly mislead Parliament will be expected to offer their resignation to the Prime Minister'. But if the Prime Minister is at the centre of such concerns, then the credibility of the system of enforcement via the Code can become compromised (see: Appendix c). Parliament has the potential to take steps in this area. It initiated them on 22 April, when the Commons agreed a motion in the name of the Leader of the Opposition:

> 'That this House—
>
> (1) notes that, given the issue of fixed penalty notices by the police in relation to events in 10 Downing Street and the Cabinet Office, assertions the Rt hon Member for Uxbridge and South Ruislip has made on the floor of the House about the legality of activities in 10 Downing Street and the Cabinet Office under Covid regulations…appear to amount to misleading the House; and
>
> (2) orders that this matter be referred to the Committee of Privileges to consider whether the Rt hon Member's conduct amounted to a contempt of the House'.[26]

42. **We note that this process is a cumbersome one, and that any conclusion arrived at will be reached after the Prime Minister concerned has departed office.**

43. **In previous reports, we have recorded concerns over the UK government making important announcements to the media before informing Parliament about their content. Such behaviour, we have previously concluded, is a problem since the executive should not use its power to compromise the ability of Parliament to perform its constitutional functions** (principle 4)**.** An example of a minister failing to inform Parliament first came in January when Nadine Dorries MP, Secretary of State for Digital, Culture, Media and Sport, implied in a tweet that the BBC licence fee would not be renewed in future. On 17 January, the House of Commons Speaker, Lindsay Hoyle, stated in the House that:

> 'Before I call the Secretary of State for Digital, Culture Media and Sport, I want to point out that there were extensive stories in the media over the weekend about the future of the licence fee and the BBC's funding arrangements. I also understand that the Secretary of State tweeted about the subject—either that or she lost her phone—stating:
>
> "This licence fee announcement will be the last."

26 HC Hansard for 21 April 2022, 'Votes and proceedings'available at: < https://commonsbusiness.parliament.uk/Document/56399/Html?subType=Standard#anchor-3 >, last accessed 9 August 2022.

> These are very important matters that affect all our constituents, and this House quite rightly has a keen interest in them. Any statement on a substantial policy development should have been made to this House before being made to the media.'[27]

44. It is possible to find at devolved level an example of a firmer response to such practices, going beyond a reprimand. At Holyrood in March, the Presiding Officer, Alison Johnson, prevented a minister from making a statement to Members of the Scottish Parliament after it was extensively trailed in national media outlets.[28]

45. **The way in which Johnson reacted in Parliament to revelations about conduct within his government did not always seem to amount to a full acceptance of individual responsibility to the legislature.** When responding to the final Sue Gray report, and having received a fixed penalty notice (along with numerous colleagues) for involvement in one of the gatherings at Downing Street, Johnson told the Commons on 25 May that

> 'I want to begin today by renewing my apology to the House and to the whole country for the short lunchtime gathering on 19 June 2020 in the Cabinet Room, during which I stood at my place at the Cabinet table and for which I received a fixed penalty notice.'

46. The reference to the 'short' length of the gathering and that he 'stood at my place at the Cabinet table' could be seen as part of an attempt to minimise the significance of his offence, even while ostensibly apologising for it. Johnson went on to say that 'above all…I take full responsibility for everything that took place on my watch. Sue Gray's report has emphasised that it is up to the political leadership in No. 10 to take ultimate responsibility, and, of course, I do.' Yet, 'since these investigations have now come to an end' he wanted to make use of 'my first opportunity to set out some of the context'. In providing this 'context', Johnson noted that, while he 'briefly attended…gatherings…which I believe is one of the essential duties of leadership…I had no knowledge of subsequent proceedings, because I simply was not there, and I have been as surprised and disappointed as anyone else in this House as the revelations have unfolded. Frankly, I have been appalled by some of the behaviour'.[29] **In some senses this manner of engagement seemed to amount to an effort to transfer blame to civil servants, in contradiction of the established constitutional principle. Such an approach could be perceived as resisting accountability to Parliament, thereby calling into question this aspect of the system** (principles 1; 3).

27 HC Hansard for 17 January 2022, 'BBC Funding', available at: < https://hansard.parliament.uk/commons/2022-01-17/debates/7E590668-43C9-43D8-9C49-9D29B8530977/BBCFunding >, last accessed 9 August 2022.

28 'Minister's statement blocked over disrespecting rules, *BBC News*, 14 March 2022, available at: <https://www.bbc.co.uk/news/av/uk-scotland-61799853>, last accessed 23 August 2022.

29 HC Hansard for 25 May 2022, 'Sue Gray Report', available at: < https://hansard.parliament.uk/Commons/2022-05-25/debates/E888D0F8-37F7-48A5-8598-4449887A0935/SueGrayReport >, last accessed 9 August 2022.

47. As we have discussed, at the close of the parliamentary session in 2022, the UK government, deploying its majority in the House of Commons, forced through a number of bills which included constitutionally problematic content, largely ignoring amendments that the House of Lords had made to them. In so doing, the executive showed disregard for the special role that the Lords has taken in this area (see: Appendix d) (principle 5).

48. **We have previously noted signs of a tendency for the UK executive to create and deploy extensive delegated law-making powers. The advent of Brexit and the pandemic provided impetus for this tendency. It appears, we have noted, possibly to be part of a more general pattern of the UK government expanding its discretionary power and reducing the extent to which it can be checked in its actions by institutions such as the UK Parliament, the courts, and regulatory bodies.**

49. The 'Brexit Freedoms Bill' included in the Queen's Speech is intended to create delegated law-making powers of considerable breadth, to be used as part of a programme of post-Brexit divergence in the UK legal system. Depending on the way it is realised, it has the potential to further erode the position of Parliament relative to the executive with respect to law making.[30]

50. **We restate here our view that the effect of reliance on delegated legislation is to increase the discretion of the UK executive, a development which is problematic from the point of view of a number of our principles. The heavy use of delegated legislation challenges the constitutional principle that ministerial powers should normally be set out in primary as opposed to secondary legislation (principle 8). There is tension with principle 3 regarding ministerial accountability to legislatures, arising because delegated legislation is not subject to parliamentary procedures as rigorous as those applied to primary legislation.**

51. **The relative lessening of controls exercised by the UK legislature is also in tension with the tenet that ministerial powers should be 'subject to limits and constraints' (principle 8). Furthermore, when asked to approve the creation of delegated powers, Parliament might not be made sufficiently aware of the purposes to which they might be put.** This lack of knowledge is unsatisfactory from the point of view of the need for executives to be open with legislatures (principle 3). **In both pressing the legislature to provide vaguely defined powers, and then utilising those authorities to maximise its discretion, the UK government risks undermining the ability of the Westminster Parliament to effectively perform its constitutional functions on behalf of the public, such as law-making and holding the executive to account (principle 4).** One example of this phenomenon is the Northern Ireland Protocol Bill, described by the House of Lords Delegated Powers and Regulatory Reform Committee as 'as stark a transfer of power from Parliament to the Executive as we have seen throughout the Brexit process. The Bill is unprecedented in its cavalier treatment of Parliament, the EU and the Government's international obligations.'[31] **Delegated powers can also raise concerns with regard to the potential diminution of the autonomy of the devolved systems; and the undermining of the rule of law (principles 16-19).**

30 Tom West and Oliver Garner, 'Brexit "freedoms", risks and opportunities? Certainty and uncertainty in the revision of retained EU law', *Hansard Society*, 24 February 2022, available at: < https://www.hansardsociety.org.uk/publications/articles/brexit-freedoms-risks-and-opportunities-certainty-and-uncertainty-in-the >, last accessed 9 August 2022.

31 House of Lords Select Committee on Delegated Powers and Regulatory Reform, *Northern Ireland Protocol Bill*, 7th Report of Session 2021-22, HL Paper 40 (House of Lords, London, 2022).

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

53. As we discuss below, the process by which a successor to Johnson as Prime Minister was chosen created doubts about the central constitutional principle that possession of the confidence of the House of Commons should be the decisive factor in appointments to the UK premiership (principles 1; 2)

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).

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

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

*[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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54. **Various issues about integrity and standards highlighted in this report, involving violation of criminal law during Covid restrictions, the dissemination of misleading information, the resisting of meaningful political accountability, the handling of pandemic-related contracts, and the failure to adhere to basic norms of conduct, point to constitutional problems with ministers, civil servants and the relationship between them** (principles 1; 3; 7; 9; 10; 11).

55. **We consider that neither of the investigations by Sue Gray and the police were appropriate or adequate mechanisms for investigating the breaches of Covid regulations by ministers and officials.** A senior official, even of Ms Gray's distinction and experience, should not have been expected to investigate potential wrongdoing by the Prime Minister. **The public has no means of knowing the basis on which the police reached their conclusions in relation to ministers or the Leader of the Opposition.** For a process pertaining to past events in which the political stakes were so high, a more conventional approach, with those accused able to defend themselves in court, might have been employed.

56. **This said, the Sue Gray and police investigations into gatherings revealed disregard for norms and to the law by both ministers and civil servants of serious concern, including given that they had framed the restrictions which all were required to follow.** Gray identified shortcomings at the highest level among both groups. At the same time, **we note that – within the UK constitutional system – ultimate responsibility within the executive rests with the political leadership. If senior ministers fail to uphold standards then they place others in difficult positions.** For instance, if a Prime Minister is set upon presenting a misleading version of events, they may do so through an official spokesperson who can thereby be drawn into a deception. If senior officials are themselves instigating or participating in questionable activities they are in breach of their responsibility to provide leadership to their staff. In an environment in which both political and Civil Service leadership are failing, it can be difficult for more junior officials to avoid becoming involved. During the present report period (and referred to in our previous report covering an earlier period) we noted the statement in Sue Gray's update on her investigation into government gatherings during Covid restrictions that '[s]ome staff wanted to raise concerns about behaviours they witnessed at work but at times felt unable to do so. No member of staff should feel unable to report or challenge poor conduct where they witness it. There should be easier ways for staff to raise such concerns informally, outside of the line of management chain.'[32] (principles 6; 7; 10; 11).

57. In his response to revelations about illegal activities during lockdown in Downing Street, Johnson appeared to attempt to some extent to distance himself from them, despite being found to have broken the law himself (see above). This approach could have the effect of creating uncertainty about a core feature of the UK constitution: that civil servants answer to ministers, who are in turn accountable to Parliament and public (principles 1; 6).

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

58. **More broadly, effective government depends upon the joint commitment of ministers and officials to the principles set out above and working relationships between them based on mutual respect and trust. These relationships can be put at risk by generalised allegations by ministers with no supporting evidence about the failure of civil servants to live up to the values in the Civil Service code, including objectivity and impartiality.** Such allegations can be corrosive of trust including because officials have no means of responding to them. **This seems a particular issue in the case of the UK government rather than the devolved administrations** (though devolved opposition politicians can be critical of the Civil Service, for instance in Scotland)**.** An example of conduct of this kind came in a July press interview given by the Attorney General, Suella Braverman, who – in discussing the attitude of civil servants – claimed that 'time and time again, both in policymaking and in broader decision making' she had witnessed 'a Remain bias.'[33]

59. **The UK government announced its intention to reduce the size of the UK Civil Service (on a full-time equivalent [fte] basis) by 2025 to the figure of 384,250 immediately prior to the Brexit referendum. This implies a reduction of 94,790 fte staff on the latest published figure for Civil Service numbers at March 2022.** We do not take a position on what is an appropriate size for the Civil Service. However, **the arbitrary way in which this decision was taken and presented would seem likely to adversely affect Civil Service morale, and by extension the effectiveness of this institution in performing its constitutionally essential role.** Furthermore, whatever the optimum size of the Civil Service may be, **reductions on this scale must have implications for what the Civil Service is able practically to deliver, and by extension the wider capacity of government.**[34]

60. In response to the scandal over gatherings during Covid restrictions, there were some announcements about changes in the structure of 10 Downing Street and appointments to key posts presented as intended to strengthen the maintenance of standards within the UK government. In response to the final Sue Gray report, Boris Johnson explained to the Commons on 25 May that:

> 'No. 10 now has its own permanent secretary, charged with applying the highest standards of governance. There are now easier ways for staff to voice any worries, and Sue Gray welcomes the fact that
>
> "steps have since been taken to introduce more easily accessible means by which to raise concerns electronically, in person or online, including directly with the Permanent Secretary".

33 Becky Smith, 'Attorney General's "Remain bias" jibe "damaging to civil service morale"', *Civil Service World*, 4 July 2022, available at: < https://www.civilserviceworld.com/professions/article/unsubstantiated-criticism-damaging-civil-service-morale-after-attorney-general-slams-remain-bias >, last accessed 10 August 2022.

34 Rhys Clyne, 'Civil Service cuts will force ministers to choose between painful options', *Institute for Government*, 13 May 2022, available at: < https://www.instituteforgovernment.org.uk/blog/civil-service-cuts-will-force-ministers >, last accessed 10 August 2022.

> The entire senior management has changed. There is a new chief of staff, an elected Member of this House who commands the status of a Cabinet Minister. There is a new director of communications, a new principal private secretary and a number of other key appointments in my office. I am confident, with the changes and new structures that are now in place, that we are humbled by the experience and we have learned our lesson.'[35]

61. **Events that have transpired since Johnson made these announcements suggest that they were not successful in preventing further departures from basic standards**, for instance circumstances leading to another resignation by a holder of the office of Independent Adviser on Ministers' Interests on 15 June; and handling of the Pincher episode of late June and early July (principle 1).

62. **To focus specifically on the structural changes involved in the Office of the Prime Minister, it is not entirely clear why this change would have dealt with problems of the type suggested by lockdown gathering**s, which seem to be more to do with personal failings on the part some of the people involved than administrative arrangements.

63. **However, while the idea of an enhancement in the prime-ministerial support team might seem incongruous in the context in which Johnson advanced it, there is another, longstanding debate about this subject**. Some argue that prime ministers should be supported by structures more akin to a full Whitehall department than those that they argue are currently available to them. Others hold that such mechanisms already in practice exist, spread between Downing Street and the main Cabinet Office. Another perspective is that any such development is undesirable, partly on the grounds that it would represent a challenge to the traditional constitutional principle of collective, Cabinet government, and represent movement in the direction of prime-ministerial government. A further point of view still is that this transition has already taken place, and whatever administrative arrangements are in place should reflect this reality.[36]

64. We would observe that the traditional distinction between 10 Downing Street supporting the Prime Minister and the Cabinet Office supporting the Cabinet and other mechanisms of collective government has long since been superseded. The Cabinet Office for administrative purposes includes No 10 Downing Street and states its purpose as: 'We support the Prime Minister and ensure the effective running of government'. The combined entity currently has 13 ministers, 58 special advisers out of a total for government of 126, and 9750 civil servants (a fourfold increase since 2016). We suggest that the issue is not inadequate resources available to support the Prime Minister but diffuse responsibilities at the centre and unclear accountabilities and reporting lines. We take no position on the desirability of the formal creation of a department of the Prime Minister and the Cabinet (as in New Zealand, for example). But **if such a change is to take place, it should be given careful consideration in relation to constitutional issues of the type set out above** (principle 1).

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35 HC Hansard for 25 May 2022, 'Sue Gray Report', available at: < https://hansard.parliament.uk/Commons/2022-05-25/debates/E888D0F8-37F7-48A5-8598-4449887A0935/SueGrayReport >, last accessed 9 August 2022.

36 For a discussion of some of the issues in the context of the response to Sue Gray, see: Patrick Diamond, 'A Prime Minister's Department might strengthen accountability and capacity in British government, but can also have serious repercussions', *LSE Politics and Policy*, 1 February 2022, available at: < https://blogs.lse.ac.uk/politicsandpolicy/prime-ministers-department/ >, last accessed 9 August 2022.

65. **Questions of propriety and basic standards of conduct were clearly a central factor in resignations from the government and the loss of support for the Prime Minister amongst Conservative MPs.** On 5 July, for instance, Sajid Javid resigned as Secretary of State for Health and Social Care, stating that: 'I am instinctively a team player but the British people also rightly expect integrity from their Government.'[37] Stepping down as Chancellor of the Exchequer on the same day, Rishi Sunak (who had himself already been found to have violated the criminal law) explained that: 'the public rightly expect government to be conducted properly, competently and seriously…I believe these standards are worth fighting for and that is why I am resigning.'[38] These developments led to the Prime Minister's statement of 7 July announcing that 'it is now clearly the will of the parliamentary Conservative Party that there should be a new leader of the Party and therefore a new Prime Minister'. **It is noteworthy that Johnson – despite his problematic behaviour providing the immediate cause for this set of circumstances – was nonetheless permitted to remain in post pending the selection of a successor (or decided unilaterally that he would and was not prevented from doing so). This prolonged departure also served to draw attention more generally to the lack of a clearly defined set of caretaker principles applying in such circumstances** (principles 1; 7).

66. **The process by which Johnson was replaced raised various doubts about what is a crucial procedure within the UK constitution: the selection and replacement of the Prime Minister, the senior figure within the UK government.** The timetable for and choice of the new Prime Minister has been driven by two internal processes of the Conservative Party – successive ballots of MPs organised by the 1922 committee and a ballot of Party members organised by Party Headquarters- without any external regulation of those entitled to vote. **The ultimate determination about who would become Prime Minister in practice rested with members of the Conservative Party in the country. Yet according to established constitutional principle, it is the will of the House of Commons that is supposed to be decisive. Ultimately, the winner of the Conservative leadership contest was the candidate who finished second among Conservative MPs (principles 1; 2). We note that there is precedent at devolved level for heads of government to be appointed by the Monarch following votes in the legislature.**

37 Samuel Lovett, 'Sajid Javid resignation letter in full', *Independent*, 6 July 2022, available at: < https://www.independent.co.uk/news/uk/politics/savid-javid-resignation-letter-boris-johnson-b2116400.html >, last accessed 31 July 2022.

38 Emily Atkinson, 'Rishi Sunak's damning resignation letter to Boris Johnson in full', *Independent*, 5 July 2022, available at: < https://www.independent.co.uk/news/uk/politics/rishi-sunak-resignation-letter-boris-johnson-b2116416.html >, last accessed 31 July 2022.

Devolution and the Union

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

The devolved institutions have the right to legislative and executive autonomy in their respective spheres of operation. [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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67. **We noted in our previous report 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. Partly as a consequence of the actions of the UK government, in the present report period, these problems intensified.** As we have previously iterated, the Northern Ireland Protocol of the European Union Withdrawal Agreement offers a mechanism by which UK departure from the European Union might be reconciled with both the status of Northern Ireland as a part of the UK, and with the requirements of the Northern Ireland peace process, including the 1998 Belfast/Good Friday Agreement. As noted in our previous report, the Protocol presents the novel proposition of a state applying the rules of a supranational organisation of which it is not (or is no longer) a member within its own territory, leading to what is in effect an internal regulatory barrier. We recognise the sensitivity of this issue. Even with goodwill on different sides, the implementation of the Protocol was always likely to present considerable challenges. Yet, given the decision by the UK to leave the EU, it was desirable that every effort be made to ensure the success of the Protocol, the model agreed by both the EU and UK to manage the post-Brexit situation in Northern Ireland.

68. **Tensions have surrounded the Protocol during all of our reporting periods. They have included opposition to the Protocol from within the Unionist community and the political parties that represent it; and complaints from the UK government that the Protocol is not working satisfactorily and requires a full overhaul (see Appendix j, Second Report).**

69. 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, in second place, refused to participate in the Executive. The power-sharing arrangements prescribed in the Belfast/Good Friday Agreement, the central component of the Northern Ireland peace process, were thereby unable to function properly.

70. Resurrecting an approach it had instigated in 2020 and then abandoned under pressure including from the Lords, on 13 June 2022 the government introduced legislation into Parliament that would enable it to override the Protocol: the Northern Ireland Protocol Bill (see: Appendix f). The UK government asserted that the course of action it was following was a means of safeguarding the peace process, and was in accordance with international law. **We disagree with the first of these claims, and are highly sceptical regarding the second.**

71. **In our last report, we concluded that the UK government has failed to meet standards that can reasonably be expected of it in relation to such an important and sensitive matter, contributing to constitutional difficulties, and raising further issues in the process. The tone of its communications seemed at times to be unnecessarily combative, and was possibly calculated to be such.[39] The conduct of ministers responsible for policy in this area might be found wanting if assessed against the *Seven Principles of Public Life*.** Prior to the Protocol coming into force, for instance, the Prime Minister insisted, incorrectly, that it would not entail checks on goods moving between Great Britain and Northern Ireland (see Second Report), raising questions about his adherence to the principle of 'honesty'.[40] Moreover, in distancing themselves from the Protocol that they previously themselves negotiated and then extolled, senior ministers in the UK government appeared to show a less than adequate regard to the 'accountability' principle. **The UK government has, in the present period, compounded its constitutionally problematic approach by introducing legislation that is questionable in a number of ways, including from the perspective of international law. It has been less than open about the nature of its claimed legal case; and its assertions that it is a preserver of the peace process in the face of destabilisation from the EU are dubious. Such conduct has the effect of undermining arrangements for peaceful governance in Northern Ireland** (principles 1; 7; 13). We note the scale of criticism of the Northern Ireland Protocol Bill, including some from within the Conservative Party who are supportive of other aspects of the position of the UK government. At the Second Reading debate in the Commons on 27 June, for instance, the Conservative MP Andrew Mitchell explained that:

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

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

> 'I have an immense amount of sympathy with what the Foreign Secretary is saying, and it does seem to me as though the EU is not being particularly constructive in trying to get the solution that we all want to see. But many of us are extremely concerned that the Bill brazenly breaks a solemn international treaty, trashes our international reputation, threatens a trade war at a time when our economy is flat, and puts us at odds with our most important ally.'[41]

72. While other Conservative MPs were supportive of the Bill, another member of the Party, Simon Hoare MP, complained that:

> 'This Bill represents a failure of statecraft and puts at risk the reputation of the United Kingdom. The arguments in support of it are flimsy at best and irrational at worst. The Bill risks economically harmful retaliation and runs the risk of shredding our reputation as a guardian of international law and the rules-based system. How in the name of heaven can we expect to speak to others with authority when we ourselves shun, at a moment's notice, our legal obligations?'[42]

73. As during both our previous report periods, doubts exist in Northern Ireland and Scotland (though the precise contexts differ) on what are the proper conditions in which a referendum should be held on a given subject; in this instance, the possible departure of a particular territory from the UK. For Northern Ireland, the prospect of such a vote rests in specific statutory provision, though ambiguities remain.[43] For Scotland, there is less clarity. Indeed, whether or not the Scottish Parliament can hold a referendum on its own initiative, rather than rely on consent from UK level as was the case for the 2014 Scottish independence referendum, remains a matter of doubt, potentially subject to judicial resolution. The Lord Advocate has now referred a bill that would allow it to hold such a vote to the UK Supreme Court (Appendix g). Yet while this case may resolve the specific issue of whether the Scottish Parliament has the power to hold a referendum on independence, it does not resolve deeper lying constitutional matters, such as when it is appropriate to do so. Furthermore, if the Scottish Government loses the case, it has stated that it will contest the next UK General Election solely on the question of independence, and seek a mandate by this means. The legitimacy of such an initiative, if it takes place, would surely lack universal acceptance.

74. **The constitutional arrangements here are not 'clear and knowable', which our first principle deems an important requirement. The existence of a substantial body of support for departure from the UK within a given territory also suggests a lack of the 'consensus' called for in the same principle (though in Northern Ireland, divergence on this point is provided for within the system itself through the 1998 Belfast/Good Friday Agreement).**

41 HC Hansard for 27 June 2022, 'Northern Ireland Protocol Bill', available at: < https://hansard.parliament.uk/commons/2022-06-27/debates/2FA67D37-816A-4F05-AFE2-AFD4CC4D4B5F/NorthernIrelandProtocolBill >, last accessed 9 July 2022.

42 HC Hansard for 27 June 2022, 'Northern Ireland Protocol Bill', available at: < https://hansard.parliament.uk/commons/2022-06-27/debates/2FA67D37-816A-4F05-AFE2-AFD4CC4D4B5F/NorthernIrelandProtocolBill >, last accessed 9 July 2022.

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

75. As we noted in our report, there is some evidence of growing support for independence in Wales, though not on a scale equivalent to Scotland. Were support to increase more significantly, some advocates might demand that the same principle of a right to leave the UK that has previously applied in theory to Scotland (and in a more established form for Northern Ireland) be afforded to Wales as well. We note that the Independent Commission on the Constitutional Future of Wales is including independence as a possible option within its remit, a significant development (principle 1).

76. **In our previous report we noted that the Subsidy Control Bill, then passing through Parliament, would shift further the relative balance of power from the devolved to the UK tier, since it grants powers to the UK Secretary of State to influence the subsidy regime that are not extended to devolved ministers. The legislation, we noted, was additionally asymmetrical in placing constraints on the devolved parliaments which will not apply to the UK legislature.**[44] (principles 1; 14; 16)

77. **The Bill passed into law in 2022, notwithstanding its being denied legislative consent by the Welsh and Scottish Parliaments.** This development marked a continuation in the pattern of exercising the opt out implied by the Sewel convention rule that the UK Parliament would not normally legislate with regard to devolved matters without the consent of the devolved legislatures. The UK government has tended to invoke a Brexit justification for departures from Sewel. How valid such claims are in every possible Brexit-related case is open to debate. But **regardless of the extent to which Brexit can legitimately provide for opt outs from Sewel, while it was plausible to describe the *Subsidy Control Act* as Brexit-related, such claims could not be invoked for other legislation passed notwithstanding the withholding of devolved consent. The *Professional Qualifications Act 2022* passed into law without consent from either the Welsh Senedd or Scottish Parliament. Such developments can call further into question the viability of Sewel.**[45] **Furthermore, there are grounds for concern about the increasing conferral of delegated powers upon UK ministers enabling them to act in devolved areas, subject to erratic consent provisions (principles 1; 15; 16).**

78. **The management of UK intergovernmental relations is an important constitutional function, ownership of which should be regarded as shared between UK and devolved executives.** Any change to the arrangements in place for this activity are of constitutional significance and should be approached in that spirit. **We note that during the report period, responsibility for the operation of these processes shifted within Whitehall, along with the UK-level ministerial devolution portfolio, out of the Cabinet Office, where it was previously based, to the Department for Levelling Up, Housing and Communities. We do not take a specific position on where this function should be located. However, decisions of this sort, and any consequent changes to arrangements, should be approached in a considered and inclusive fashion, involving the participation of all affected parties.** This principle has not been adhered to satisfactorily in this instance (responsibility for intergovernmental relations seems since to have reverted once more to the Cabinet Office). Reasons for

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

45 Before 2018, it was rare for Legislative Consent Motions (LCM) to be rejected. The Institute for Government found nine occasions prior to 2018 where LCMs had been partially or completely rejected. With the passing of the *UK Internal Market Act 2020* without consent in December 2020, this total had gone up to 13 (see Akash Paun, Jess Sargeant, and Elspeth Nicholson 'Sewel Convention', *Institute for Government,* 8 December 2020, available at: < https://www.instituteforgovernment.org.uk/explainers/sewel-convention >, last accessed 2 February 2022.

concern about the management of UK intergovernmental relations were also evident in a House of Lords Committee report published in July which pointed to the way in which Common Frameworks were developing as processes of working rather than as an opportunity for the coordination of policy.[46]

46 House of Lords Select Committee on Common Frameworks Scrutiny, *Common frameworks: an unfulfilled opportunity?* 1st Report of Session 2022-23, HL Paper 41 (House of Lords, London, 2022).

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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79. As we have noted in our previous reports, these key principles are important to protecting the public from the risk of exposure to arbitrary executive authority. Over a number of years, various figures within the governing (at UK level) Conservative Party have made clear that they regard the judiciary as having over time extended its influence beyond its proper remit in the conduct of judicial review and the application of the Human Rights Act, and having intruded upon matters that should be the preserve of politicians. **We have taken the view that it would be of concern if the government were to seek to circumscribe the potential to ensure that the UK executive acts in accordance with basic legal and constitutional principles. Furthermore, individual legislative measures that are detrimental to human rights are constitutionally problematic.**

80. **Two bills that we have previously noted as presenting problems from the perspective of the rule of law and human rights passed into law during this report period. The first was the *Police, Crime, Sentencing and Courts Act 2022*. In September 2021, the House of Lords Select Committee**

on the Constitution had produced a report on this legislation when in bill form.[47] The Committee raised a variety of constitutional concerns regarding the Bill. For instance, concurring with the Joint Committee on Human Rights, it held that provisions contained in the Bill were an improper infringement upon the right to protest and on freedom of assembly, on the basis of a 'noise trigger'.

81. **Another problematic piece of legislation passing into law was the *Nationality and Borders Act* 2022. In our previous report we noted the controversial nature of this legislation. In September 2021, for instance, the United Nations High Commissioner for Refugees had issued a set of 'Observations' on the Bill.[48]** It held that the Bill was 'fundamentally at odds with the Government's avowed commitment to upholding the United Kingdom's international obligations under the Refugee Convention'.

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

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

84. **During the report period, the UK government was less inclusive than it might have been in its approach to the passing of Acts of Parliament. It used its strength within Parliament to force various Acts onto the statute book, notwithstanding their being controversial in nature, including from a rule of law or human rights standpoint. They included the *Police, Crime, Sentencing and Courts Act 2022*.**

85. **A further tendency that is problematic from the point of view of the rule of law comes from the introduction of 'ouster clauses' in legislation intended to exclude the courts from scrutiny of the exercise of executive powers. An example of such a provision can be found in the *Dissolution and Calling of Parliament Act 2022* (section 3), which received Royal Assent during the report period.**

47 House of Lords Select Committee on the Constitution, *Police, Crime, Sentencing and Courts Bill*, 7th Report of Session 2021-22, HL Paper 64 (House of Lords, London, 2021).

48 UNHCR, *Observations on the Nationality and Borders Bill 141, 2021-22*, September 2021.

86. **Principle 7 asserts the need for ministers to observe UK treaty obligations. Legislation introduced into Parliament in the present report period that would allow the UK government to override the Northern Ireland Protocol of the EU Exit Agreement is a clear concern from this standpoint. So too is the *Nationality and Borders Act 2022*, from the point of view of international commitments with respect to the treatment of refugees** (see above).

87. **The policy of seeking to deport refugees to Rwanda is problematic from the perspective of international human rights norms and domestic law; and both the European Court of Human Rights and the UK courts have found against aspects of it (see: Appendix i).**

88. **During the report period, the government brought forward 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. Whatever the fate of the proposal in the post-Johnson era, that it was introduced at all is a source of concern from the point of view of various constitutional principles.** The then-Secretary of State for Justice and Lord Chancellor, as we have previously noted, had a history of criticism of the Human Rights Act.[49] **The provisions the government produced depart significantly from the recommendations of the independent review it commissioned to thoroughly consider the subject (see Appendix k, Second Report). It has been observed that, contrary to the independent review, the government's intended measures rest on a weak evidence base.[50] Substantial concerns have also been raised about the impact the government's reforms would have on access to justice.**

89. **The content of the Bill of Rights proposal raised legitimate constitutional objections in as far as it amounted to a restriction of the ability of courts to independently uphold legality in the actions of the executive, and human rights (principles 7; 8; 17; 18; 19). Furthermore, this envisaged change was constitutionally problematic in that it represented a departure from good practice in constitutional change (principle 1).** The Bill as drafted would have a substantial impact on the powers of the devolved legislatures, and it is likely to be opposed by them. It also raises potential issues in its interaction with the Belfast/Good Friday Agreement[51] (principle 15).

90. **We note that the legal systems of the UK operate within a wider social environment. Cultural tendencies can and do impact upon the way in which they function. It is possible for ministers in the UK executive to undermine the rule of law, therefore, without recourse to actual legal measures, for instance by making hostile statements, or declining to defend the judiciary and other legal professionals against unfair or distorting depictions.[52] Such tendencies manifested themselves in the present report period**. For instance, even before the policy had been subject to any legal challenge,

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

50 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 3 February 2022.

51 Joanna George, 'Why the proposed 'Modern' Bill of Rights is contradictory constitutionalism', *Constitution Society,* 1 August 2022, available at: < https://consoc.org.uk/modern-bill-of-rights/ >, last accessed 25 August 2022.

52 See eg: All-Party Parliamentary Group on Democracy and the Constitution, *An Independent Judiciary: Challenges Since 2016* (Institute for Constitutional and Democratic Research, London, 2022), pp.32-37; available at: < https://static1.squarespace.com/static/6033d6547502c200670fd98c/t/62a05b38f1b9b809f61853ef/1654676281940/SOPI+Report+FINAL.pdf >, last accessed 12 June 2022.

in April, Johnson made reference to the 'politically motivated lawyers' who had supposedly forced the adoption of the Rwanda refugee policy and would, he anticipated, resist it.[53] Support for this narrative came from some sections of the media, with one press article referring to 'Lefty' and 'liberal-Left lawyers'.[54]

53 Haroon Siddique, 'Boris Johnson take pre-emptive shot at lawyers over Rwanda scheme', *Guardian*, 14 April 2022, available at: < https://www.theguardian.com/uk-news/2022/apr/14/boris-johnson-takes-pre-emptive-shot-at-lawyers-over-rwanda-scheme >, last accessed 10 August 2022.

54 Macer Hall, 'Boris Johnson defies "Leftie lawyers" to push Rwanda solution', *Express*, 5 May 2022, available at: < https://www.express.co.uk/news/politics/1605589/rwanda-solution-boris-johnson-refugees-asylum-seekers >, last accessed 10 August 2022.

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*).

Devolution and the Union

13. The devolved institutions of Wales and Scotland are 'permanent' parts of the United Kingdom constitution (see: *Scotland Act 2016*, section 1; *Wales Act 2017,* section 1). The devolved institutions of Northern Ireland are also constitutional fixtures; subject to the proviso that Northern Ireland can, after approval via a referendum, leave the UK (once the UK Parliament has legislated to this effect) and join the Republic of Ireland. The UK government has previously conceded the principle that Scotland could become independent from the UK subject to a referendum.

14. In those spheres of operation which have been devolved in Wales, Scotland and Northern Ireland, or those devolved in Scotland and Northern Ireland but not in Wales, responsibility for those functions in relation to England or England and Wales are exercised by 'UK government' ministers answerable to the UK Parliament.

15. The devolved institutions have the right to legislative and executive autonomy in their respective spheres of operation. [T]*he UK Government will proceed in accordance with the convention that the UK Parliament would not normally legislate with regard to devolved matters except with the agreement of the devolved legislature.* (*Memorandum of Understanding,* 2013, paragraph 14. See also: *Scotland Act 2016*, section 2; *Wales Act 2017*, section 2). The devolved institutions have a proper interest in decisions taken at UK level that impact upon them, and over international agreements entered into by the UK when their implementation would fall within devolved competence.

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

The judiciary and the rule of law

17. *The judiciary interprets and applies the law; and develops the common law in its decisions. It is a long-established constitutional principle that the judiciary is independent of both the government of the day and Parliament so as to ensure the even-handed administration of justice. Civil servants, ministers and, in particular, the Lord Chancellor are under a duty to uphold the continued independence of the judiciary, and must not seek to influence particular judicial decisions.* (*Cabinet Manual*, paragraph 16. See also: *Justice (Northern Ireland) Act 2002*, section 1; *Constitutional Reform Act 2005,* part 2; *Judiciary and Courts (Scotland) Act 2008*).

18. *The courts scrutinise the manner in which ministers' powers are exercised. The main route is through the mechanism of judicial review, which enables the actions of a minister to be challenged on the basis that he or she did not have the power to act in such a way (including on human rights grounds); that the action was unreasonable; or that the power was exercised in a procedurally unfair way* [*Cabinet Manual*, paragraph 3.39]. *The devolution statutes impose additional constraints on the competence of devolved ministers.*

19. The activities described in 17 and 18 must be recognised as central to the maintenance of the rule of law. All institutions and office holders dealt with in these principles are required to promote the rule of law. It encompasses concepts including the law being clear and possible to know; access to the law; equality before the law; governors and governed alike being subject to the law; impartiality in the application of the law; adherence to international law; and the protection of human rights.

Constitutional monarchy

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

The Seven Principles of Public Life **(1995)**

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

1.1 Selflessness

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

1.2 Integrity

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

1.3 Objectivity

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

1.4 Accountability

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

1.5 Openness

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

1.6 Honesty

Holders of public office should be truthful.

1.7 Leadership

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

Appendix b: Timeline of events

January

13 January: Conclusions of the joint review of intergovernmental relations are published setting out new structures and ways of working between UK and devolved levels of government

17 January: Government is defeated on fourteen amendments to the *Police, Crime, Sentencing and Courts Bill*, the most in a day since the House of Lords was reformed in 1999

19 January: Joint Committee on Human Rights publishes legislative scrutiny report on the *Nationality and Borders Bill*, concluding the Bill would make a number of changes to the UK's asylum system that are not compatible with the UK's international rights commitments

20 January: House of Lords Constitution Committee publishes its report 'Respect and Co-operation: Building a Stronger Union for the 21st Century'

Chair of the Public Administration and Constitutional Affairs Committee William Wragg suggests that if MPs are being improperly intimidated by government whips, they should report it to the police

24 January: Lord Agnew resigns as a Treasury minister, citing the government's handling of fraudulent Covid business loans

25 January: Metropolitan Police announces that it will be investigating potentially unlawful gatherings held in Downing Street during the coronavirus pandemic

31 January: Second Permanent Secretary in the Cabinet Office Sue Gray publishes interim report on gatherings in Downing Street during the coronavirus pandemic, concluding there were 'failures of leadership and judgements'; in response, the Prime Minister announces that a new Prime Minister's department will be created and the special adviser and Civil Service codes reviewed

February

2 February: Government publishes its white paper 'Levelling up the United Kingdom', which includes a new framework for English devolution

Democratic Unionist Party minister Edwin Poots orders officials to stop conducting checks at the Irish Sea border; a UK government spokesperson says the operation of checks 'is a matter for the Northern Ireland Executive'

3 February: Northern Ireland First Minister Paul Givan announces his resignation from the power-sharing Executive of Northern Ireland

5 February: Reports emerge that Business Secretary Kwasi Kwarteng intervened to block the appointment of Jonathan Michie to the role of executive chair of the Economic and Social Research Council because of his supposed political leanings

Steve Barclay is appointed Downing Street Chief of Staff whilst remaining Chancellor of the Duchy of Lancaster and a Member of Parliament

9 February: The Court of Appeal dismisses an appeal by the Welsh Counsel General against a refusal of leave to seek judicial review in connection with interpretation of provisions in the UK Internal Market Act which might serve to constrain the Senedd's legislative competence

21 February: Commissioners of the Electoral Commission send a letter to the government objecting to the measures in the Elections Bill seeking to change the Commission's oversight arrangements, saying that the measures are 'inconsistent with the role that an independent electoral commission plays in a healthy democracy'

March

8 March: Committee on Standards in Public Life announces review on leadership and public standards

11 March: The High Court holds that the Metropolitan Police repeatedly violated the freedom of speech and freedom of assembly of the four organisers of the Sarah Everard vigil and had unlawfully prevented them from organising the vigil. This is a landmark judgment for the right to protest.

14 March: Northern Ireland Protocol is found to be lawful by Court of Appeal in an appeal of the case brought by the head of the Traditional Unionist Voice Jim Allister and other unionists

17 March: *Online Safety Bill* has its first reading in the House of Commons

Reports emerge that the government has dropped plans to cap MPs' earnings from second jobs, saying such a restriction would be 'impractical'

19 March: Welsh Labour and Plaid Cymru Spring Conferences adopt resolutions authorising their leaders to negotiate new arrangements for elections to the Senedd. These are likely to lead to a significant increase in the size of the Senedd, and the use of a different electoral system

23 March: First meeting takes place of the Inter-Ministerial Standing Committee established under the new arrangements for managing intergovernmental relations. Chaired by the Secretary of State for Levelling Up, Housing and Communities (and Minister for IGR), the agenda includes items on Ukraine; UK legislation and the Sewel Convention; the Levelling Up White Paper; and a stocktake of implementation of the IGR Review

24 March: *Dissolution and Calling of Parliament Act* receives Royal Assent

31 March: The Commission on Wales' Constitutional Future issues an invitation, with seven broad questions, to the public in Wales to identify issues and preferences for the Commission to consider in coming months

April

4 April: Provision in the *Nationality and Borders Bill* allowing removal of citizenship without notice is removed from the Bill by Lords amendment and it is returned to the Commons

6 April: Provision in the *Elections Bill* requiring photographic identification at polling stations is amended by the House of Lords to expand the types of accepted identification to include non-photographic forms of identification

12 April: Prime Minister and Chancellor of the Exchequer receive Fixed Penalty Notices from the Metropolitan Police for breaching lockdown restrictions during the coronavirus pandemic

13 April: Justice minister Lord Wolfson resigns following the announcement that the Prime Minister has received a Fixed Penalty Notice

Joint Committee on Human Rights publishes a report on the government's plans to replace the *Human Rights Act 1998* with a Bill of Rights, saying that '[we] do not think a case has been made for replacing the Human Rights Act with the British Bill of Rights in the form proposed by the Government'

14 April: Government announces plans to fly certain asylum seekers to Rwanda, where their claims will be processed

25 April: Supreme Court will hear the *Allister et al* challenge to the lawfulness of the Northern Ireland Protocol as it raises legal points of public importance which merit consideration by the Supreme Court; the Protocol was previously found lawful by the Northern Ireland High Court and the Court of Appeal

27 April: Parliament is prorogued, ending the 2021-2022 parliamentary session

Lord Geidt finds that Chancellor of the Exchequer did not breach the Ministerial Code in relation to four possible conflicts of interest

28 April: After extensive "ping pong" between the House of Lords and the House of Commons several controversial pieces of constitutional legislation receive Royal Assent and pass into law with only minimal concessions on points of constitutional controversy; the government is accused of 'back-load[ing]' the session with 'very controversial bills' by the Labour Lords Chief Whip

Elections Act receives Royal Assent

Nationality and Borders Act receives Royal Assent

Police, Crime, Sentencing and Courts Act receives Royal Assent

Judicial Review and Courts Act receives Royal Assent

29 April: Administrative Court finds that it is not contrary to the *Public Records Act 1958* or the *Freedom of Information Act 2000* for ministers to use encrypted or self-deleting messaging platforms to communicate regarding government business

May

3 May: Welsh government announces a detailed plan of action 'which will explore incorporating UN Conventions into Welsh law which could potentially lead to a Welsh Bill of Rights'

5 May: Local elections are held in England, Wales and Scotland and Assembly elections are held in Northern Ireland

7 May: Sinn Féin allocated 27 seats, to become the largest party in the Northern Ireland Assembly for the first time

10 May: UK government outlines its legislative agenda for the next parliamentary session in the Queen's Speech; including several bills with likely constitutional implications, such as the 'Brexit Freedoms Bill', Bill of Rights, Levelling Up Bill and Public Order Bill

Welsh First Minister Mark Drakeford, together with Plaid Cymru leader Adam Price, publish proposals for Senedd reform. Following the 2026 elections, the Senedd would have 96 Members (up from 60), elected from party closed lists in 16 constituencies. Provision would be made for 'integrated statutory gender quotas and mandatory zipping' (i.e., party lists to have alternate women/men) to maintain/improve female membership of the Senedd. The Senedd's Special Purpose Committee considering these matters will report by 31 May; the Conservative representative on the Committee has resigned

13 May: Democratic Unionist Party refuse to nominate a speaker to the Northern Ireland Assembly meaning that it cannot function, despite the provisions of the *Northern Ireland (Ministers, Elections and Petitions of Concern) Act 2022*

Reports emerge that the Prime Minister intends to reduce size of the Civil Service by up to 91,000 posts, with the aim of returning to 2016 staffing levels within three years

Government publishes its response to the House of Commons' humble address motion seeking publication of documents relating to the appointment of Lord Lebedev, but the response omits internal correspondence between the Cabinet Office, the Prime Minister's office and the House of Lords Appointment Commission on the basis it would not be in the public interest

17 May: Foreign Secretary Liz Truss announces in the House of Commons that the UK will introduce domestic legislation to disapply aspects of the NI Protocol, but insists that the government's intention is still to reach a negotiated settlement with the European Union.

The European Union issues a statement in response the UK government's announcement saying that 'unilateral actions contradicting an international agreement are not acceptable' and that if the UK moves ahead the EU 'will need to respond with all measures at its disposal'
24 May: Welsh government publishes 'Delivering Justice for Wales', a comprehensive account of work it is undertaking on Policing and Justice, including on proposals in the Thomas Commission Report of 2019
27 May: UK government publishes a policy statement on standards in public life alongside an updated version of the Ministerial Code and revised terms of reference for the Independent Adviser on Ministers' Interests
30 May: The Special Purpose Committee publishes its final report with recommendations relating to election of a 96-Member Senedd in 2026 (see also entry for 10 May)
31 May: Independent Adviser on Ministers' Interests, Lord Geidt, publishes his annual report in which he says that the Prime Minister receiving a Fixed Penalty Notice has raised legitimate questions about whether he breached the Ministerial Code, and criticising the fact that the Prime Minister has not explained his conduct in relation to the Code
Metropolitan Police refused decision to appeal High Court ruling on Leigh and others, by the Court of Appeal. The decision that the Police breached the rights of organisers of the Sarah Everard vigil was upheld (see entry for 11 March)

June
1 June: Chair of the Committee on Standards in Public Life, Lord Evans, publishes an article criticising the government's 'low level of ambition' on the Ministerial Code
6 June: Vote of no confidence held on Boris Johnson's leadership of the Conservative Party after the requisite number of letters are sent to the Chair of the 1922 Committee, Sir Graham Brady. Boris Johnson wins by 211 votes to 148
8 June: Scottish government publishes aspects of its legal advice on a second independence referendum after being ordered to do so by the Scottish Independence Commissioner, although advice on the central issue of whether a referendum would be within the legislative competence of the Scottish Parliament is withheld
Case lodged with the High Court by various charities and action groups, ahead of the first deportation flight to Rwanda
9 June: General injunction on Rwanda flight refused by the High Court. High Court also refuses to issue a general pause on removing refugees
14 June: Supreme Court rules that the flight to Rwanda can take off; permission to appeal the decision of the Court of Appeal was refused. The Court of Appeal itself had upheld the High Court's decision to refuse an injunction prohibiting an asylum seeker from being deported on the first flight.
Despite criticisms including from Justin Welby, Archbishop of Canterbury and reportedly from the then-Prince of Wales, Charles, the Prime Minister defends the Rwanda plans, declaring that they will go ahead, and the first asylum seekers will be deported that day.
However, at 19.30, the European Court of Human Rights grants an injunction to stop one of the asylum seekers from being deported; this allows the lawyers representing the remaining passengers to apply for last minute injunctions from the ECtHR. Consequently, the flight does not take off
15 June: Lord Geidt resigns as the PM's ethics advisor
EU announces restarting/new infringement proceedings over Northern Ireland Protocol

17 June: The Home Secretary, Priti Patel, signs order approving Julian Assange's extradition to the US to face espionage charges
22 June: The government announces a plan to ignore ECHR rulings and deport asylum seekers to Rwanda. This includes a new Bill of Rights Bill
24 June: The Conservatives are defeated in an historic double by-election. Wakefield turns Labour on 12.7% swing. Tiverton & Honiton turns Liberal Democrat in a 30% swing.
Conservative Party chairman Oliver Dowden resigns, citing the by-election and mentioning distress & disappointments at recent events
28 June: Nicola Sturgeon announces that she will be seeking a second independence referendum
Metropolitan Police placed into special measures; this follows failures over Sarah Everard vigil and Stephen Port murders
30 June: Chris Pincher, Conservative Deputy Chief Whip, resigns over claims of personal misconduct

July
4 July: Sir Keir Starmer recommits to resigning as Labour party leader if found in breach of lockdown rules
5 July: Rumours break that Conservative backbenchers are coordinating fresh letters for a vote of no confidence in the Prime Minister despite a leadership contest not being technically possible until next year
Health Secretary, Sajid Javid, resigns citing the British people's need for integrity from the government. The Chancellor of the Exchequer, Rishi Sunak, resigns at the same time, citing fundamentally 'different approaches' and the public's needs for ethical standards. String of ministerial resignations begin
Steve Barclay is appointed Health Secretary and Nadhim Zahawi is appointed Chancellor of the Exchequer
It is revealed that the Prime Minister was aware of the fact that Chris Pincher groped a man in gay bar in 2018
6 July: More MPs go public with letters of no-confidence in Boris Johnson. Javid gives damning resignation speech in the Commons, claiming that the Prime Minister should not be asking others in government to 'trot lies' over partygate and over knowledge of the allegations against Pincher
String of resignations ensues, including five ministerial resignations in one letter. Resigning ministers include former loyalists to Johnson, such as Rachel Maclean who vouched for the Prime Minister during the partygate saga
Suella Braverman calls for the Prime Minister to resign, breaking the convention of collective responsibility. Braverman announces her intention to remain as Attorney General and to run for leader of the Conservative Party at the next leadership election
Delegation of ministers, including Michael Gove, tell the Prime Minister to resign. Michael Gove consequently sacked
7 July: Ministerial resignations continue; amongst those to resign are the secretaries for Wales and Northern Ireland
Zahawi, the newly minted Chancellor, releases an official letter calling for Boris Johnson to resign. The constitutionally unconventional letter follows the footsteps of Braverman, who called for Johnson resignation despite remaining in government

After a record-breaking 28 ministerial resignations since 5 July, Boris Johnson announces that he will step down. Johnson states that he will remain Prime Minister until the Conservative Party selects a leader in the autumn

An entire cabinet reshuffle is announced. New ministerial appointments include James Cleverly as Education Secretary, Kit Malthouse as Chancellor of the Duchy of Lancaster, Greg Clark as Levelling up Secretary and Robert Buckland as Wales Secretary

Tom Tugendhat announces his bid for leadership of the Conservative Party

8 July: Rishi Sunak announces that he will be standing for leadership of the Conservative Party. Former Equalities Minister, Kemi Badenoch, also declares that she will enter the leadership race

Labour leader Sir Keir Starmer is cleared by Durham Police after an investigation into whether he breached lockdown rules by sharing a beer and curry with party workers in April 2021

9 July: Jeremy Hunt, Nadhim Zahawi and Grant Shapps each declare that they will be running for leadership of the Conservative Party. No. 10 deny the theory that Boris Johnson might attempt to stand in a leadership contest

10 July: Liz Truss, Penny Mordaunt, Sajid Javid and Rehman Chishti each declare their bids for leadership of the Conservative Party. There are now 11 candidates who have declared their interest

11 July: The Conservative Party's new 1922 Committee is appointed. Sir Graham Brady remains as chair; Nus Ghani and William Wragg are re-elected as vice-chairs. It is announced that nominations for the Conservative leadership race will open and close on 12 July. Specific, new rules are set for the leadership race. To enter the first round candidates will need to obtain 20 nominations from MPs. Candidates will require 30 nominations for the second round. The first ballot is announced for 13 July. It is announced that that result of the leadership contest will be announced on 5 September

12 July: Chishti withdraws from the leadership race, after failing to win the support of any other Tory MPs; he subsequently endorses Tugendhat. Grant Shapps withdraws from the race and endorses Rishi Sunak. Sajid Javid also withdraws from the leadership contest and declares his endorsement of Liz Truss. There are now eight candidates that proceed to the first round of the Conservative leadership contest

13 July: No. 10 announces that Boris Johnson will formally tender his resignation to the Queen on 6 September, which is the day after the conclusion of the leadership contest

The results of the first ballot of the leadership contest are announced. The leading candidates are Rishi Sunak (88) and Penny Mordaunt (67). Jeremy Hunt (18) and Nadhim Zahawi (25) fail to meet the threshold, leaving a total of six candidates for the next round

14 July: The results of the second ballot for the party Conservative leadership are announced: Suella Braverman is eliminated. Rishi Sunak (101) and Penny Mordaunt (83) are the leading candidates

17 July: ITV hosts a leadership debate with the remaining five candidates standing for leadership of the Conservative Party

Tugendhat publicly criticises Boris Johnson's handling of the "partygate" affair, describing Johnson's version of events as 'more fiction than reality'

18 July: The results of the third Conservative leadership ballot are announce. Rishi Sunak is the frontrunner with 115 votes, with Mordaunt coming in second with 82 votes. Tugendhat is eliminated from the contest

19 July: The results of the fourth Conservative leadership ballot are announced. Kemi Badenoch is eliminated from the race, having received 59 votes. The remaining three candidates are Rishi Sunak (118), Penny Mordaunt (92) and Liz Truss (86)

The Scottish government's request for a Supreme Court ruling on whether an independence referendum would be constitutional will be given a full hearing; though the Supreme Court could still hold the reference to be too hypothetical

20 July: In the House of Commons, Boris Johnson takes his final Prime Ministers Questions. The Conservative Party announces that Conservative Party members will be able to change their votes between August and September. Voting can be conducted by post or online, but only the last vote will count

21 July: MPs vote for the final two candidates for the Conservative Party leader: Rishi Sunak leads with 137 votes. By contrast, Liz Truss wins 113 votes. Penny Mordaunt is eliminated from the contest, having received 105 votes. Mordaunt endorses Truss

A provisional date is set for the hearing of the reference by the Lord Advocate to the Supreme Court: 11 and 12 October 2022

A public inquiry into the UK government's handling of the COVID-19 pandemic is launched; the chair, Baroness Hallett, promises a robust investigation that will cover whether more could have been done

22 July: The European Commission launches four new infringement proceedings against the UK for not complying with significant parts of the Northern Ireland Protocol

28 July For the first time, cameras are allowed into the crown courts including the Old Bailey, albeit only to film or broadcast sentencing and not entire trials

Appendix c: Ministerial Code and the Independent Adviser on Ministers' Interests

Background

On 9 December 2021, the Electoral Commission fined the Conservative Party for failing to accurately report a donation from the Conservative Peer and donor, Lord Brownlow, that helped pay for the refurbishment of the No.10 Downing Street flat. The contents of this investigation revealed to the Independent Adviser on Ministers' Interests, Lord Geidt, that certain information had not been disclosed to him in the course of his own investigation into the matter. Lord Geidt was reported at the time to be considering his position and an exchange of letters with the Prime Minister occurred on 17, 21 and 23 December 2021. In the exchange, the Prime Minister promised more dedicated support for the Independent Adviser and said he was considering 'a number of reports recommending changes to the wider remit of the Independent Adviser and to the Ministerial Code.' Lord Geidt concluded the exchange by saying that he would expect 'to be able to describe the role of the Independent Adviser in terms of considerably greater authority, independence and effect' by the time of his next annual report. As set out in detail in our last report (see Second Report, p. 60), the Committee on Standards in Public Life put forward its proposals – including placing the role on a statutory footing and giving the Adviser the power to initiate investigations – in November 2021.

Subsequent events again called into question whether the Prime Minister's own conduct was in keeping with the Ministerial Code. In particular, it has been said that his statements to the Commons regarding gatherings held in Downing Street during Covid restrictions misled the House and that his receipt of a Fixed Penalty Notice was inconsistent with the overarching obligation in the Code to obey the law.

Statement of government policy: standards in public life

On 27 May, the government belatedly followed up on the commitment made to Lord Geidt in December 2021 and issued a statement setting out its position on standards in public life. At the same time, the Ministerial Code was reissued and the Independent Adviser's terms of reference revised. The changes made did not implement the CSPL recommendations and were 'at a low level of ambition' according to Geidt himself.

In its statement, the government made clear it was opposed to bolstering the power and independence of the Adviser and to placing the role and the Code on a statutory footing. It was implied that giving the Independent Adviser greater independence (e.g., the ability to initiate investigations without the Prime Minister's permission) would interfere with the constitutional principle 'that the Prime Minister, as the head of the Executive, has sole responsibility for the organisation of Her Majesty's Government.'
The statement emphasised that 'the Ministerial Code and its application is a matter for the Executive and – as with all matters of the Prerogative – wholly separate from the legislature.' Furthermore, it stated that the government 'does not consider it appropriate to legislate for the Code or for the office of Independent Adviser, as this would undermine the constitutional settlement by conflating the executive

and legislature'. It argued that legislating for the Code and the Adviser would lead to 'politically-motivated judicial reviews' and draw the judiciary into political matters, which 'would not be in the public interest'.

Changes to the Independent Adviser's terms of reference

In April 2021, some initial changes were made to the Independent Adviser's terms of reference as Lord Geidt took up the role. These included being able to offer advice on the initiation of an investigation and the requirement that the Adviser's findings are published in a timely manner. A more proportionate approach to sanctions was also introduced, meaning that it was made explicit that not all breaches would be considered resigning matters.

In response to the incident regarding Lord Geidt's investigation into the Downing Street flat refurbishment, further changes to the role were announced on 27 May 2022. These included an independent secretariat for the Adviser, a role in discussions about changes to the Code, and a statement in the Code requiring that the Adviser be provided with all the information relevant to their inquiries. Although the Adviser was not granted the power to initiate investigations without the Prime Minister's permission, changes to the Code and the terms of reference make clear that the Prime Minister would normally consent, unless it would not be in the public interest to do so. Furthermore, if permission is refused it would be expected that the reasons for doing so would normally be made public.

Changes to the Ministerial Code

The Ministerial Code was also updated and reissued on 27 May 2022. The new Code included more extensive and formal mention of the role of the Independent Adviser, including the expectations regarding information gathering and the initiation of investigations set out above.

In addition to this, the Prime Minister also provided a new foreword to the Code. This was criticised for removing the statement that ministers should 'uphold the very highest standards of propriety'.[55] The previous foreword stated that, '[we] must uphold the very highest standards of propriety… There must be no bullying and no harassment; no leaking; no breach of collective responsibility. No misuse of taxpayer money and no actual or perceived conflicts of interest'.

Annual report of the Independent Adviser on Ministers' Interests

On 31 May, the Independent Adviser, Lord Geidt, published his annual report. While the changes represented a 'low level of ambition', he stated that they would provide 'greater transparency in the event of a Prime Minister intervening to prevent an independently-initiated inquiry from proceeding'. He called them 'an important step in allowing the Independent Adviser to initiate investigations.'

55 Henry Dyer, 'Boris Johnson removes instruction to ministers to 'uphold the very highest standards of propriety' in new Ministerial Code foreword', *Business Insider*, 27 May 2022, available at: < https://www.businessinsider.com/boris-johnson-cuts-highest-standards-propriety-instruction-ministerial-code-foreword-2022-5?r=US&IR=T >, last accessed 10 June 2022.

This said, Lord Geidt outlined concerns about the Prime Minister's own conduct in relation to the Code and the Adviser's role in regulating it. The report stated that 'an impression has developed that the Prime Minister may be unwilling to have his own conduct judged against the Code's obligations.' According to Geidt, those subject to the Code must justify their conduct to Parliament and the public in relation to its provisions. He said that the issuance of a Fixed Penalty Notice to the Prime Minister had raised legitimate questions about whether the Code had been breached. Furthermore, he expressed his displeasure that the Prime Minister had not set out clearly why he believed that no such breach of the Code had taken place, saying that 'in relation to the allegations about unlawful gatherings in Downing Street, the Prime Minister has made not a single public reference to the Ministerial Code.'

Lord Geidt explained that he set out to avoid offering advice on the Prime Minister's own conduct because if the Prime Minister believes there is no case to answer then the advice would be rejected, forcing the resignation of the Adviser. This 'circular process could only risk placing the Ministerial Code in a place of ridicule', he concluded.

Nonetheless, he recommended that the Prime Minister set out publicly why he did not believe his actions to be in breach of the Ministerial Code. The Prime Minister did so in a letter to Lord Geidt on 31 May 2022.

Lord Evans, 'The government should go beyond a "low level of ambition" on the Ministerial Code'

On 1 June 2022, the Chair of CSPL, Lord Evans, published an article responding to the government's policy statement and the Independent Adviser's annual report. He agreed with Lord Geidt's assessment that the reform represent a 'low level of ambition' but went further stating that it was clear they 'do not go far enough, nor do they implement the package of measures [CSPL] called for.'

In the article he set out CSPL's position. The Committee had recommended a graduated system of sanctions in 2021 as part of a package of proposed changes that included giving the Adviser the power to initiate investigations. The longstanding argument against this was that as long as there was an expectation for ministers to resign over breaches of the Code it would be improper to allow the Adviser to initiate investigations and determine breaches. In effect, this would amount to a power over the composition of government, which should constitutionally belong to the Prime Minister. However, revising the expectation towards a hierarchy of possible sanctions was intended to mitigate this possibility and therefore allow for greater independence for the Adviser within the bounds of constitutional propriety. As Lord Evans described it, graduated sanctions and the full independent power to investigate were 'part of a mutually dependent package of reforms, designed to be taken together'.

Whilst a graduated approach to sanctions has been adopted, Lords Evans wrote that 'the new process for initiating investigations does not create the degree of independence we called for.' Whilst the changes were 'an improvement in process', they do 'not fundamentally change the powers of the Independent Adviser.' He concluded by predicting that a system where the Independent Adviser must still seek the Prime Minister's permission for an investigation would not restore public trust in ethical standards.

Appendix d: Constitutional legislation and the House of Lords (2021-2022 session)

The 2021-2022 Parliament, which was prorogued on 28 April 2022, saw a number of controversial bills with constitutional implications introduced by the UK government. Our last report referenced the bills and identified the controversies surrounding them, including the ways in which they engaged with our principles. Particular attention was paid to the Elections Bill (Second Report, p.70), the Judicial Review and Courts Bill (Second Report, p.40), the Police, Crime, Sentencing and Court Bill (Second Report, p.42), and the Nationality and Borders Bill (Second Report, p.42).

During the course of the parliamentary process, the House of Lords also raised significant concerns about aspects of these pieces of legislation. In many instances, Peers voted to remove or modify the provisions in the legislation which they believed were constitutionally questionable. This led to a significant number of government defeats in the Lords and a protracted process of parliamentary "ping pong". However, the outcome in most of the instances detailed below was a lack of significant concession from the government and the eventual acquiescence of the Lords as the Parliament drew to a close.

Elections Act

Controversial clauses[56]

Part 1: Administration and conduct of elections, Clause 1, Voter identification

- Schedule 1 stipulated that a ballot paper must not be given to a voter unless they show photographic identification. The types of accepted photographic identification are listed.

Part 3: The Electoral Commission, Clauses 14 and 15, Strategy and policy statement

- Stated that the Electoral Commission must have regard to a Strategy and Policy Statement prepared by the Secretary of State which sets out the strategic and policy priorities of the government relating to elections, referendums and other matters in respect of the Commission's functions.

House of Lords amendments

On 6 April 2022, the House of Lords voted (by a majority of 29) to expand the list of forms of identification listed in Schedule 1 of the Elections Bill to include more widely and easily accessible forms of identification, such as non-photographic forms of ID including financial documents.[57]

On 25 April, the House of Lords voted (by a majority of 66) to remove Clauses 14 and 15 requiring the Electoral Commission to have regard to a Strategy and Policy Statement prepared by the Secretary of State.

56 In each instance this refers to the clauses as they were when the bill was introduced to the House of Lords.

57 For a full list of government defeats in the House of Lords, including voting records and break down by party, see: < https://www.ucl.ac.uk/constitution-unit/research-areas/parliament/changing-role-house-lords/government-defeats-house-lords >, last accessed 31 May 2022.

Outcome
On 27 April, the House of Commons disagreed with the Lords amendments. Clauses 14 and 15, relating to the Strategy and Policy Statement for the Electoral Commission were restored to the Bill, with some minor changes. The minor changes moved by the government were intended to allay fears that the Strategy and Policy Statement might be used to interfere in individual cases. The amended version read: '[the] statement must not contain provision about the carrying out by the Commission of their functions under Schedule 19B (investigatory powers) or Schedule 19C (civil sanctions) in relation to a particular person.'
The expanded list of acceptable identification was rejected '[because] the Commons consider the requirement to provide adequate photographic identification to be the most effective means of securing the integrity of the electoral system.'
The Lords acquiesced and the Bill received Royal Assent on 28 April 2022.

Judicial Review and Courts Act

Controversial clauses
Part 1: Judicial review, Clause 1, Quashing orders
- Sought to introduce suspended quashing orders (where the effect of an order quashing an unlawful decision is suspending for a specific time) and prospective quashing orders (where the unlawful decision is only void from the judgement onwards).
- Sought to introduce a presumption in favour of a suspended or prospective quashing order if they would 'offer adequate redress in relation to the relevant defect'.

Part 1: Judicial review, Clause 2, Exclusion of review of Upper Tribunal's permission-to-appeal decisions
- Sought to remove judicial review of decisions of the Upper Tribunal ('*Cart* judicial review') so that the 'decision is final, and not liable to be questioned or set aside in any other court.'
- Stipulated that the Upper Tribunal is not 'to be regarded as having exceeded its powers by reason of any error made in reaching the decision' and that 'decision' includes 'any purported decision'.

House of Lords amendments
On 31 March, the House of Lords amended the Judicial Review and Courts Bill to remove Clause 2 (seeking to abolish *Cart* judicial review), instead replacing it with a more limited right of judicial review, whereby the decision of the High Court/Court of Session would be final, unless either the reviewing court or the Supreme Court certified that the case raised a point of law of general public importance, in which case appeal would lie to the Supreme Court..
The Lords also removed the presumption in favour of suspended or prospective quashing orders contained in Clause 1. Instead, it required a presumption in favour of ordinary quashing orders. Additionally, Peers took out the provision that the retrospective effect of quashing orders may be removed or limited.

Outcome
On 26 April, the Commons considered the Lords amendments. It was maintained that it is appropriate for the courts to be able to remove or limit the retrospective effect of quashing orders and the amendments to remove this provision were disagreed with.

On the removal of *Cart* judicial review, some limited concessions were granted by the government by way of a mechanism of appeal to the Supreme Court where a point of law of general public importance is involved.
The Commons agreed with the Lords amendment to remove the presumption in favour of prospective or suspended quashing orders, and this presumption was dropped from the Bill in favour of ordinary quashing orders.

Nationality and Borders Act

Controversial clauses
Following the Nationality and Borders Bill's introduction in July 2022, the UNHRC issued a detailed legal opinion outlining its considered view that 'the Bill is fundamentally at odds with the Government's avowed commitment to upholding the United Kingdom's international obligations under the Refugee Convention'.[58]
The controversial aspects of the Bill, as identified by the UNHRC and others, were numerous but included the following areas:
Part 2 Asylum, Clause 11, Differential treatment of refugees

- Sought to create two categories of refugee: (a) a refugee is a Group 1 refugee if they have complied with both of the requirements set out in subsection (2) and, where applicable, the additional requirement in subsection (3); (b) otherwise, a refugee is a Group 2 refugee.

The UNHRC legal opinion concluded that this clause would deny rights to refuges recognised under the Refugee Convention and international law by creating two tiers of refugee, only the first of which would be able to access the rights guaranteed by the Convention by meeting certain criteria (such as whether they have come directly from a country or territory where their life or freedom was threated). The UNHRC said this reduced status has no basis in international law and is in direct contravention of the UK's obligations under the Convention.
Part 2 Asylum, Clause 9, Notice of decision to deprive a person of citizenship without notice

- Sought to amend the British Nationality Act 1981 so that the Secretary of State can deprive an individual of their citizenship without notice if certain conditions are met such as that it would 'not be reasonably practicable to give notice'.

The UNHRC expressed concerns that this power would increase the chances of individuals, including children, being made stateless.

House of Lords
On 28 February 2022, the government was defeated five times on the Nationality and Borders Bill. The Lords removed Clauses 11 and 9 and inserted a clause prior to Clause 11 intended to ensure that the Bill is read as subject to the UK's international obligations under the Refugee Convention (this provision passed by a majority of 79).
On 4 April, the government was defeated 12 times on the Bill. The defeats included insisting that Clause 11, creating two tiers of asylum seekers, be removed. Subsections of Clause 9 relating to retrospective application of earlier deprivation of citizenship orders were removed, but the Lords acquiesced on

58 The UNHRC performs a supervisory role with regard to the 1951 Convention and its 1967 Protocol, which together form the Refugee Convention.

deprivation of citizenship without notice. A clause stating that the provisions are in keeping with the UK's obligations under the Refugee Convention was inserted into the Bill (this revised the previous clause which said that the provisions had to be read as such by the courts, which was rejected by the Commons).
On 26 April, the government was defeated three times on the Bill. In a final attempt to secure concessions from the Commons, the Lords amended Clause 11 to modify the criteria for attaining Group 1 status so that those who have stopped briefly in another country may obtain it. Furthermore, rather than insist on stating that the asylum provisions comply with the UK's Refugee Convention obligations, the Lords included a Clause requiring that the courts declare if an action is incompatible with the Convention.

Outcome
The government refused to support the Lords amendments, and they were rejected by the Commons. The clause relating to the role of the Courts was disagreed with '[because] the Commons consider that the provisions of Part 2 are compliant with the Refugee Convention without the need for an interpretation provision; and that it is not appropriate to give the courts a power to make a declaration of incompatibility.'
The Commons also disagreed with the amendment qualifying Clause 11 to expand the conditions on which refugees would qualify for Group 1 status.
The Bill received Royal Assent on 28 April with very few concessions to the concerns raised by the Lords.

Police, Crime, Sentencing and Courts Act

Controversial clauses
Part 3 Public order, Clause 55, Imposing conditions on public processions

- Sought to allow for conditions to be placed on public processions if 'the noise generated by persons taking part in the procession may result in serious disruption to the activities of an organisation which are carried on in the vicinity of the procession' or if 'the noise generated by persons taking part in the procession may have a relevant impact on persons in the vicinity of the procession'.
- Sought to permit the Secretary of State by regulations to make provision about the meaning for the purposes of this section of— (a) serious disruption to the activities of an organisation which are carried on in the vicinity of a public procession, or (b) serious disruption to the life of the community.

Part 3 Public order, Clause 56, Imposing conditions on public assemblies

- Sought to provide for the same noise-related trigger for imposing conditions on public assemblies as that which the Bill seeks to apply to public processions (see above).

Part 3 Public order, Clause 61, Imposing conditions on one-person protests

- Sought to provide for the same noise-related trigger for imposing conditions on one-person protests as that which the Bill seeks to apply to public processions and public assemblies (see above).

House of Lords

On 24 November 2021, 18 additional pages of legislation were added to the Bill, including further measures concerning the right to protest which sought to criminalise a range of protest-related actions such as the practice of "locking on", obstructing roadways, and interfering with infrastructure projects and transport works.

On 17 Jan 2022, the government was defeated 14 times on amendments to the Bill, the most defeats on a piece of legislation in a day since the Lords was reformed in 1999. This included on the clauses allowing restrictions to be placed on protests due to noise levels. Many of the additional clauses relating to new offences for particular types of disruption were also removed from the Bill, including those relating to 'locking on' and interference with transport works.

On 22 March, the Lords insisted on removing the clauses that sought to allow conditions to be imposed on protests if they produce serious disruption through noise.

On 31 March, the Lords insisted for a second time that the clauses imposing conditions on public assemblies, processions and one-person protests if they produce a serious noise disruption be removed from the Bill. Limits on timings of public assembly were accepted, as was the government's definition of serious disruption.

Outcome

The Lords' attempts to remove the noise-related triggers for the imposition of conditions on the different types of protest were not supported by the government and were rejected by the Commons. The only concession agreed was that the Secretary of State must prepare and publish a report on the operation of the changes and lay the report before Parliament.

The extensive new provisions inserted on 24 November relating to the criminalisation of various actions such as locking on were successfully removed from the Bill. Given that they were added at Lords Report Stage and not considered by the Commons, it was not possible for the Commons to disagree with their removal and reinsert them into the Bill. However, the government then brought forward a Public Order Bill in the Queen's Speech which included many of the measures that were removed by the Lords from the Police, Crime, Sentencing and Court Act.

Appendix e: Bills before Parliament

There are, at the time of writing,185 bills before Parliament: 26 Government Bills and 159 Private Members Bills. The following government bills are currently before Parliament, and will be considered in this session:

- Animal Welfare (Kept Animals) Bill
- Bill of Rights Bill[59]
- Data Protection and Digital Information Bill
- Energy Bill
- Energy (Oil and Gas) Profits Levy Act 2022
- Financial Services and Markets Bill
- Genetic Technology (Precision Breeding) Bill
- Higher Education (Freedom of Speech) Bill
- Identity and Language (Northern Ireland Bill)
- Levelling-up and Regeneration Bill
- National Security Bill
- Northern Ireland Protocol Bill
- Northern Ireland Troubles (Legacy and Reconciliation Bill)
- Online Safety Bill
- Procurement Bill
- Product Security and Telecommunications Infrastructure Bill
- Public Order Bill
- Schools Bill
- Seafarers' Wages Bill
- Social Housing (Regulation) Bill
- Social Security (Additional Payments Act) 2022
- Social Security (Special Rules for End of Life) Bill
- Trade (Australia and New Zealand) Bill
- UK Infrastructure Bank Bill

The following Acts received Royal Assent during beginning of this parliamentary session (between May 2022 and 20 July 2022):

- Energy (Oil and Gas) Profits Levy Act 2022
- Social Security (Additional Payments Act) 2022
- Supply and Appropriations (Main Estimates) Act 2022

59 The Bill of Rights Bill seems now to have been abandoned by the Truss administration.

Appendix f: The Northern Ireland Protocol Bill

Background

The Northern Ireland Protocol ("the Protocol") forms an essential part of the UK's Withdrawal Agreement with the EU. The Withdrawal Agreement is currently given effect in domestic law via Section 7A of the EU (Withdrawal) Act 2018. Section 8C of the Act also gives ministers certain powers to ensure that the Protocol is implemented. The Protocol outlines special trade arrangements for Northern Ireland to ensure that the island of Ireland remains border-free. Our last report summarised the contents of the Protocol.

During the report period, the government expressed 'fundamental concerns' about the Protocol. As Foreign Secretary, Liz Truss stated that the government's preference was to have a negotiated deal with the EU, while the government announced its intention to introduce legislation designed to 'fix' parts of the Protocol.

On 13 June 2022, the government introduced the **Northern Ireland Protocol Bill** to provide ministers with powers to 'make changes to the operation of the Northern Ireland Protocol in domestic law which protect the Belfast Agreement and to safeguard peace and stability in Northern Ireland.'

The Protocol Bill contained broad delegated powers allowing ministers to disapply the Protocol, alongside any relevant part of the Withdrawal Agreement.

In a policy paper published alongside the Protocol Bill, the government outlined its concerns over the Protocol. These included 'trade disruption and diversion, significant costs and bureaucracy for traders and areas where people in Northern Ireland have not been able to benefit fully from the same advantages as those in the rest of the United Kingdom.'[60] The government argued that such disruptions have 'contributed to a deep sense of concern that the links between Great Britain and Northern Ireland have been undermined'.

The Protocol Bill completed its passage in the House of Commons on 20 July 2022. No Conservative MP voted against the Bill. However, 70 Conservative MPs abstained from voting on it at the second reading. The Bill's first reading in the House of Lords took place on 21 July 2022.

The Bill's provisions[61]

Clause 2 partially disapplies Section 7(A) of the 2018 Act, in order to limit the direct effect of the Withdrawal Agreement. Clause 2 qualifies Section 7(A) (3) so that the amended Protocol would take precedence in domestic law. This means that domestic courts will not be able to give effect to provisions that are 'excluded'.

60 Foreign Commonwealth and Development Office, 'Northern Ireland Protocol: The UK's Solution', 14 July 2022.

61 Selected provisions of the Bill, as introduced into Parliament, have been summarised.

Clause 4 excludes certain parts of Article 5 of the Protocol; namely, those that relate to customs and the movement of goods between the UK and Northern Ireland. Clause 4 contains two broad rulemaking powers that would enable the relevant minister to create regulations concerning the 'qualifying' movement of goods.

Clause 5 facilitates the establishment of a "green lane" for goods, that avoids various customs and sanitary checks. This is facilitated by a wide discretionary power for the relevant minister to make regulations concerning how various goods are to be treated (Clause 5(1)).

Clause 8 excludes certain parts of Article 5 and Annex 2 of the Protocol, insofar as they relate to the regulation of goods. This provision is intended to allow the UK to set up a 'dual regulatory regime' in Northern Ireland, so that businesses will be able to choose whether to follow UK or EU rules on the manufacturing of goods.

Clause 12 excludes Article 10 and Annexes 5 and 6 of the Protocol insofar as these provisions concern state aid and subsidy control. This means that Northern Ireland will be able to follow the UK's subsidy regime, instead of the EU's State Aid rules.

Clause 13 excludes any part of the Withdrawal Agreement that allows the Court of Justice of the European Union (CJEU) to play a role in enforcing the Protocol and its provisions. This clause purports to exclude the supervisory role of the CJEU, which was provided for and agreed to in the Withdrawal Agreement.

Clause 14 disapplies the dispute settlement process that is set by the Withdrawal Agreement, in relation to parts of the Protocol that are excluded.

Clauses 15 outlines the scope of certain rulemaking powers concerning changes to and exceptions from excluded provisions. These powers may be exercised to modify the effects of excluded provisions, or to alleviate parts of the Protocol or the Withdrawal Agreement from being excluded. Clause 15(1) loosely defines the 'permitted purposes'; the term is defined so as to include 'safeguarding social or economic stability in Northern Ireland' and 'safeguarding the territorial or constitutional integrity of the United Kingdom'. However, Clause 15(3) prevents ministers from being able to exclude three articles of the Protocol. These are: Article 2, on the rights of individuals; Article 3 on the Common Travel Area; and Article 11 on other areas of North-South Co-operation.

Clause 20 removes the "binding" status of case law by the CJEU concerning the Protocol or related provisions. Clause 20(2) prevents references from being made to the CJEU, despite the fact that this is a requirement of the Protocol. Clause 20 is in direct conflict with Articles 4(3)- 4(5) of the Withdrawal Agreement as these articles actively require adherence to EU law in some form or another.

Article 4(3) of the Withdrawal Agreement requires the UK courts to interpret the relevant provisions of EU law in accordance with certain general principles and methods. Article 4(4) requires the courts to follow the case law of the CJEU handed down before the end of the transition period. Article 4(5) requires the UK courts to have 'due regard' to the relevant CJEU case law after the transition period. However, these requirements are each contradicted and overwritten by Clause 20.

Questions over breaking international law

The Withdrawal Agreement – and by extension the Protocol – is an international treaty between the UK and the EU. The Vienna Convention on the Law of Treaties governs how international treaties are created, terminated, violated and interpreted. The Vienna Convention is directly applicable to the Withdrawal Agreement.

Article 4 of the Withdrawal Agreement obliges the UK to ensure that the relevant parts of the treaty are given the same legal effects in domestic law as they would be in EU law. Under Article 5, on 'good faith', the UK committed to faithfully enacting the measures required to fulfil obligations under the Withdrawal Agreement.

Under Article 26 of the Vienna Convention, a state has a general obligation to abide by its undertakings in a treaty in good faith. This codifies the principle that agreements must be kept. Further, under Article 27 of the Vienna Convention, a state cannot 'invoke the provisions of its internal law as justification for its failure to perform a treaty'.

The Protocol Bill appears to facilitate numerous breaches of the UK's obligations under the Withdrawal Agreement. Accordingly, a number of academics, lawyers and politicians have argued that, if passed, the Bill will violate international law.[62]

The government's position: "necessity"

The government's published legal position accepts that the Protocol Bill involves the non-performance of the UK's international obligations. It is acknowledged that the Bill allows ministers to, via broad delegated powers, override wide-ranging elements of the Protocol. This has been justified by the government by the doctrine of "necessity" in customary international law. The government has argued that the Bill is the only way to alleviate the socio-political conditions in the 'unique circumstances of Northern Ireland'.

Nevertheless, the doctrine of necessity applies in a prescribed set of 'circumstances precluding wrongfulness'. Necessity is a narrow and limited legal defence. The doctrine permits an otherwise unlawful breach of international law only in exceptional circumstances. For example, necessity requires a state to be faced with 'grave and imminent peril' to that state's basic interests.[63]

Invoking necessity with respect to the Protocol Bill is seen to be tenuous, not least because the Withdrawal Agreement was negotiated and signed by the present government. There is also evidence to suggest that the disruptive effects of the Protocol were anticipated at the time the Agreement was signed.

In addition, the UK government could first invoke the emergency mechanism contained within the Protocol itself. Article 16 can be relied on by either the UK or EU to introduce temporary, targeted measures to protect the economy and society. Article 16 should only be relied on if the application of

62 See, for example, criticisms by former Prime Minister Theresa May, Professor Mark Elliott, Sir James Eadie QC and Sir Jonathan Jones. These criticisms are summarised in the final page of this appendix.

63 Joshua Rozenberg, 'Grave and imminent peril: The protocol — or the government?', *A Lawyer Writes*, 14 June 2022, available at: < https://rozenberg.substack.com/p/grave-and-imminent-peril >, last accessed 14 September 2022; Leonardo Carpentieri, Antolín Fernández Antuña, 'Necessity as a Defence', *Jus Mundi*, 25 July 2022, available at < https://jusmundi.com/en/document/wiki/en-necessity-as-a-defence >, last accessed 14 September 2022.

the Protocol leads to 'serious economic, societal or environmental difficulties that are liable to persist', or to 'diversion of trade'.[64] While the party seeking to rely on this mechanism must first consider other proposals, Article 16 can enable the temporary suspension of the Protocol. In other words, the very fact that this mechanism exists and is available, undermines the UK's government's ability to rely on the doctrine of necessity; necessity is only normally relied on as a last resort.

On 15 June 2022, and in response to the UK government's arguments on disapplying the Protocol, Vice President Maros Sefcovic of the European Commission announced that the Commission would re-open infringement proceedings against the UK government, and that two new counts on breaching the Protocol would be included. Sefcovic argued that the Bill was illegal and had 'no legal nor political justification.'[65]

Criticisms

The Protocol Bill has generated controversy in legal and political circles. Various lawyers and academics, including Professor Mark Elliott and Sir Jonathan Jones, have argued that the Protocol Bill is likely to amount to a violation of international law.[66] The Protocol Bill was denounced by the former Prime Minister, Theresa May, who stated that it would breach international law. May argued that it would 'diminish the standing of the United Kingdom in the eyes of the world'.[67] Furthermore, it was claimed the government's first Treasury Counsel, Sir James Eadie QC, found it very difficult for the UK to argue that it was not 'breaching international law'.[68]

The Bill has received opposition from members of the devolved legislatures. 52 Members of the Northern Ireland Assembly wrote to the Prime Minister, Boris Johnson, stating that the Bill would be contrary to the wishes of the majority of citizens in Northern Ireland. The Scottish Parliament unanimously adopted a motion asking the UK government to withdraw the Bill.

64 Northern Ireland Protocol, Article 16(1).

65 Maroš Šefčovič, 'Remarks by Vice-President Maroš Šefčovič at the press conference on the Protocol of Ireland / Northern Ireland' European Commission', *European Commission*, 15 June 2022, available at: < https://ec.europa.eu/commission/presscorner/detail/en/speech_22_3758 >, last accessed 14 September 2022.

66 Mark Elliot, 'The Northern Ireland Protocol Bill', *Public Law for Everyone,* 13 June 2022, available at: < https://publiclawforeveryone.com/2022/06/13/the-northern-ireland-protocol-bill/ >, last accessed 28 September 2022; Henry Zeffman, 'Northern Ireland protocol bill: 'Grave threat to peace justifies move', *The Times,* 14 June 2022, available at: < https://www.thetimes.co.uk/article/northern-ireland-protocol-bill-grave-threat-to-peace-justifies-move-vj59gqph3 >, last accessed 28 September 2022.

67 HC Hansard for 27 June 2022, 'Northern Ireland Protocol Bill', available at: < https://hansard.parliament.uk/commons/2022-06-27/debates/2FA67D37-816A-4F05-AFE2-AFD4CC4D4B5F/NorthernIrelandProtocolBill >, last accessed 14 September 2022.

68 Allegedly, Eadie was not asked to opine on whether the Protocol Bill breached international law. It is widely speculated that he was asked to advise on whether the Bill met the Government's aims as a matter of domestic law, and its prospects of challenge in the UK Courts. Nevertheless, Eadie stated that he found an argument (that the Bill was in breach) 'considerably easier to follow and more convincing'. For a summary of the advice, see Sir Jonathan Jones, 'The Northern Ireland Protocol: legal (and perhaps illegal) goings on)' *The Institute for Government blog,* 14 June 2022, available at: < https://www.instituteforgovernment.org.uk/blog/northern-ireland-protocol-bill >, last accessed 28 September 2022.

Appendix g: Reference by the Lord Advocate to the Supreme Court

Summary
The UK Supreme Court has been asked to consider whether the Scottish Parliament can pass a draft bill legislating for an advisory referendum on Scottish independence ("the Reference"). This matter was referred to the Supreme Court by the Lord Advocate under paragraph 34 of Schedule 6 of the Scotland Act 1998. It is the first time this kind of reference has been made under the Scotland Act (although there have been two, unsuccessful, references under the equivalent provisions in the Northern Ireland Act 1998) and it is an open legal question whether the Reference will be heard.[69] The Supreme Court will hear legal arguments on behalf of the Lord Advocate and on behalf of the Advocate General for Scotland on 11 and 12 October 2022.[70] The Scottish National Party has also been given permission to intervene by way of written submissions.

Background
The Scottish Parliament cannot legislate in relation to a 'reserved matter' so long as the legislation relates to those matters in more than a minor or inconsequential way. These matters are listed in Schedule 5 to the Scotland Act 1998 and are instead determined by Westminster. These matters include issues concerning the 'Union'; legislation which 'relates to' the 'Union of the Kingdoms of Scotland and England' therefore lies outside of the Scottish Parliament's competence.

The first referendum on Scottish Independence was facilitated by an Order in Council enacted under Section 30 of the Scotland Act 1998. A Section 30 Order is a kind of subordinate legislation that can be used to increase or restrict the Scottish Parliament's legislative authority, either on a permanent or temporary basis. Section 30 allows UK ministers to modify reserved matters where it is considered 'necessary or expedient'.

Through a Section 30 Order, ministers in Westminster made a temporary modification to the Scotland Act to make clear that a referendum on independence was excepted from reservation, provided that such a referendum was held before 31 December 2014. This permitted the Scottish Parliament to legislate to authorise and regulate the 2014 referendum.[71] That Order has now expired, and the amendment was removed from the Scotland Act 1998 by the Scotland Act 2016. Thus, in order for the Scottish Parliament to legislate to hold another referendum either a further amendment to the Scotland Act is required or it must be established that an independence referendum is not in fact a reserved matter. This was a matter of some controversy prior to the 2014 referendum. While the UK government argued that a referendum was not within the Scottish Parliament's competence, the Scottish government did not

69 See the Lord Advocate's initial request to decide the issue, explained below.
70 The Lord Advocate is a member of the Scottish government and is one of Scotland's two law officers. The current Lord Advocate is Rt Hon Dorothy Bain QC. She represents the Scottish government in high profile civil proceedings and is the principal legal advisor to the Scottish government. The opposing case is filed by the Advocate General for Scotland. In contrast to the Lord Advocate, the Advocate General is a member of the UK government and is one of the UK government's three law officers. The Advocate General is the principal legal advisor to the UK government on Scots Law. The current Advocate General is Lord Keith Stewart QC.
71 Scotland Act 1998 (Modification of Schedule 5) Order 2013

concede this point. It regarded the Section 30 Order as *clarifying* the legal situation, so as to avoid a legal challenge to the referendum, rather than *conferring* competence on the Scottish Parliament to hold the referendum.

While a Section 30 Order may be initiated by either the Scottish or UK government, it requires the approval of both legislatures, including both Houses of the Westminster Parliament, before becoming law. This means that the UK government of the day – which normally retains a majority of seats in the House of Commons – needs to be in favour of passing the Order.

On 28 June 2022, Scotland's First Minister, Nicola Sturgeon, wrote to Boris Johnson requesting another Section 30 Order to facilitate a second referendum on the question of Scottish independence. This was the third time since the EU referendum that Sturgeon has requested a Section 30 Order. Sturgeon expressed her willingness to negotiate the terms of such an Order, but that such an Order was required of the UK government 'to respect the mandate given [to her] by the people of Scotland'. Nevertheless, Johnson refused Sturgeon's request, arguing that the question of Scottish independence 'was clearly answered by the people of Scotland in 2014'.[72]

Given that it was always unlikely that the UK government would agree to the Order, Sturgeon has sought to accelerate the process through the Draft Scottish Independence Referendum Bill. This Bill was published on 28 June.

The Draft Bill: What does it say?

The Draft Scottish Referendum Bill seeks to 'make provision for ascertaining the views of the people of Scotland on whether Scotland should be an independent country.' Section 2(2) of the Bill sets out the future wording of the question on the ballot paper to be: 'should Scotland be an independent country?' Section 2(4) states that the referendum poll will be held on 19 October 2023, unless other provisions are made under the Act.

The Bill also modifies the franchise applicable to the referendum and applies the general regulatory framework contained in the Referendums (Scotland) Act 2020 to the independence referendum.

Before a bill is introduced to the Scottish Parliament, the minister in charge of the bill is required to state that that bill's provision are within the Scottish Parliament's legislative competence. Under the Scottish Ministerial Code, this statement must be 'cleared with the law officers'.[73] In order to clear such a statement, the Lord Advocate must have a certain degree of confidence that the bill in question would be within devolved competence.

In relation to the Draft Scottish Referendum Bill, the Lord Advocate stated that she does not have 'the necessary degree of confidence' to make such a statement.

72 'Boris Johnson rejects Nicola Sturgeon's Section 30 order as his Cabinet falls apart' *The National,* 6 July 2022, available at: < www.thenational.scot/news/20261080.boris-johnson-rejects-nicola-sturgeons-section-30-order-cabinet-falls-apart/ >, last accessed 14 September 2022.

73 *The Scottish Ministerial Code* (2018 Edn), 'Ministers and the Scottish People', para 3.4, available at: < www.gov.scot/publications/scottish-ministerial-code-2018-edition/pages/4/ >, last accessed 14 September 2022.

The Lord Advocate's Reference

Subsequently, the Lord Advocate relied on paragraph 34, schedule 6 of the Scotland Act 1998 to refer the Draft Bill and a related question to the Supreme Court. This is the first time that this procedure has been used to test the *vires* of a Bill.

The Lord Advocate's Reference has been published.[74] The Reference includes the Bill and the following question:

> *Does the provision of the proposed Scottish Independence Referendum Bill that provides that the question to be asked in a referendum would be "Should Scotland be an independent country?" relate to reserved matters?*
>
> *In particular, does it relate to:*
>
> *(i) the Union of the Kingdoms of Scotland and England; and/or*
>
> *(ii) the Parliament of the United Kingdom?*

The Reference states that the Scottish government accepts that an act to dissolve the Union is not within the competence of the Scottish Parliament. However, it argues that it does not necessarily follow that the proposed Bill relates to a reserved matter – as the referendum would be merely advisory. It is argued that the Bill does not prescribe what should happen as a result. Accordingly, the Bill's proposed question for a referendum is 'neutral' on the issue of Scottish independence itself.

What happens now?

On 28 June 2022, the Supreme Court confirmed that it had received the Reference. The Supreme Court has held that there are two main issues for the Court to consider:

1. Whether the court can or should accept the reference (the procedural issue); and
2. If so, how it should answer the question the Lord Advocate has referred to it? (the substantive issue)

The Advocate General initially argued that the Court should deal with the first issue as a preliminary matter, and should refuse to accept the reference. The Advocate General argued that since the Scotland Act 1998 provides, in Section 33, a procedure for referring questions about the *vires* of Bills to the Supreme Court after they have been passed by the Scottish Parliament, it would be premature and inappropriate to do this by any other procedural route. However, the Lord Advocate argues that if it is not possible to introduce a bill into the Parliament in the first place, the Section 33 reference procedure cannot be used to settle what she regards as a disputed legal issue of considerable public importance.

74 *A Reference by the Lord Advocate: The Lord Advocate's Written Case,* 12 July 2022, available at: < https://www.gov.scot/binaries/content/documents/govscot/publications/strategy-plan/2022/06/reference-to-the-supreme-court-publication-of-the-lord-advocates-written-case/documents/lord-advocates-written-case/lord-advocates-written-case/govscot%3Adocument/Lord%2BAdvocate%2527s%2BReference-%2BLord%2BAdvocate%2527s%2BWritten%2BCase%2B-%2B12%2BJuly%2B2022%2B-%2BRedacted%2Bfor%2BPublication.pdf >, last accessed 14 September 2022.

On 15 July, the Supreme Court refused the Advocate General's request to deal with the procedural issue as a preliminary matter. The Court stated that it is in the interests of justice and the efficient disposal of the proceeding that arguments on both the procedural and substantive issue are heard together. It may be that the Court will decide that the reference procedure has not been properly used, and it may therefore refuse to decide the substantive issue. However, having heard arguments on the substantive issue, it seems more likely that the Court will express an opinion on that point even if it decides that the reference should not have been made.

At the time of writing, both parties have filed and published their written cases. The Lord Advocate's Written Case sets out competing arguments on the issues (in keeping with the law officers' statutory duty to act in the public interest). However, at the hearing, the Lord Advocate is expected to make oral submissions on behalf of the Scottish government's interests. By contrast, the Advocate General's Written Case (and oral submissions) will reflect the interests of the UK government.

The Supreme Court hearing has been scheduled to take place on 10 and 11 October 2022.[75]

75 UKSC, 'Update on the reference by the Lord Advocate', 19 July 2022, available at: < https://www.supremecourt.uk/news/update-on-the-reference-by-the-lord-advocate.html >, last accessed 14 September 2022.

Appendix h: The Bill of Rights Bill

Background

While this legislative proposal now appears to have been dropped, both its contents and the means by which it was developed, and that it was considered at all by a government, means that it merits consideration. The Conservative Party pledged in its 2019 General Election Manifesto to 'update' the Human Rights Act 1998 (HRA).[76] Our last report summarised the conclusions of the Independent Human Rights Act Review (IHRAR) in December 2021. The Review's long-awaited final report recommended minimal changes to the HRA and declared no substantial support for a new Bill of Rights.[77] However, on 14 December 2021, the same day that IHRAR's report was published, the government declared its intention to repeal the HRA. A new consultation was convened by the Ministry of Justice for a 'Modern Bill of Rights'. The Bill of Rights Bill is the product of this consultation.

Introduced into Parliament on 22 June 2022, the Bill of Rights Bill has incurred much criticism from parliamentary committees, lawyers, and academics. The Bill was not subject to pre-legislative scrutiny, despite a joint request by four parliamentary committees.[78] The Bill's second reading was scheduled to take place on 12 September 2022, but it emerged on 7 September that the Bill had been shelved and was unlikely to progress as was.[79]

The Bill as introduced

Clause 1 sets outs the Bill's aims, which include: 'repealing and replacing' the HRA, S. 1(1) and 'rebalancing' the relationship between the domestic courts, and the Strasbourg courts. This provision effectively repeals Section 3 of the HRA; there is also no specific provision in the Bill on interpretation.

Clause 2 defines 'Convention Rights' as those listed in Articles 2 to 12 and 14 of the Convention, in addition to Articles 1 and 3 of the Protocol and Article 1 of the 13th Protocol. These rights are the same as those given effect by the HRA.

Clause 3 sets out various rules for interpreting the Convention. These rules place limits on how domestic courts are to interpret Convention rights. Domestic courts are encouraged to adopt an originalist approach, by considering the 'preparatory work' behind articles of the ECHR.

Clause 4 requires domestic courts to give the 'greatest weight' to Article 10, which is the right of the freedom of speech. However, this is qualified by Clause 4(3), which abolishes this right for those involved in criminal proceedings, immigration proceedings, national security proceedings or those subject to an obligation of confidence (such as a professional agreement requiring confidentiality).

76 Conservative Party, *Get Brexit Done: Unleash Britain's Potential, The Conservative and Unionist Party Manifesto* (London, 2021), p.48.

77 *The Independent Human Rights Act Review* (December 2021), CP 586, para 19.

78 The Joint Committee on Human Rights, the House of Lords Constitution Committee, the House of Commons Public Administration Committee and Constitutional Affairs Committee and the House of Commons Justice Committee, *Joint Letter*, 'Pre-Legislative Scrutiny of a 'Bill of Rights'', 27 May 2022, available at: < https://committees.parliament.uk/publications/22473/documents/165604/default/ >, last accessed 14 September 2022.

79 *BBC News*, 'Bill of Rights: Liz Truss shelves plans to reform human rights law', 7 September 2022, available at: < https://www.bbc.co.uk/news/uk-politics-62818286 >, accessed 28 September 2022.

Clause 5 concerns positive obligations on domestic public authorities under the Convention. It prevents the creation of any new positive obligations on public authorities and lists certain circumstances during which courts must give 'great weight' when considering existing positive obligations. The courts are required to, amongst other matters, consider whether the obligation would: affect the ability of the public authority to perform its functions; undermine the public interest or the authority's ability to deploy its own expertise in circumstances that require particular professional judgments or require an investigation or inquiry 'to be conducted to a standard that is higher than is reasonable'.

Clause 6 limits the circumstances in which domestic courts can favour or apply the rights of those subject to custodial sentences. Domestic courts are required to give 'the greatest possible weight' to public protection.

Clause 7 identifies new rules for how domestic courts are required to resolve questions involving competing Convention rights. Clause 7(2)(a) stipulates that domestic courts must regard Parliament as having decided that an act strikes an appropriate balance between different policy aims and Convention rights. Clause 7(2)(b) requires the courts to give 'the greatest possible weight' to the principle that decisions on how the balance should be struck between competing rights are a matter for Parliament .

Clause 8 shields deportation decisions from being challenged under Article 8. It declares that no deportation decision 'may be found to be incompatible with Article 8' absent the threat of 'extreme harm'.

Clause 9 enshrines the right to 'trial by jury', although this right already exists and is not incompatible with Article 6 (the right to a fair trial).

Clause 10 mirrors the existing powers of domestic courts to issue declarations of incompatibility under the HRA.

Clause 12 mirrors Section 6 of the HRA, by imposing a duty on public authorities to act in accordance with Convention rights. But this duty is alleviated in circumstances where primary or secondary legislation is found to be contrary to the Convention.

Clause 14 excludes bringing human rights claims against public authorities or the military in relation to actions committed in the course of an overseas military operation ('outside of the British Islands').

Clause 15 creates a new requirement on any potential litigants under Clause 12 seeking to obtain the court's permission (the equivalent of HRA S.6 claims). The courts are only able to grant permission if it is shown that the alleged breach has or would cause significant harm or disadvantage.

Clause 20 places extensive limits on appeals against deportation. It compels the relevant court to dismiss the appeal unless it considers that deportation would result in 'the nullification' of the right to a fair trial (not merely the breach of this right, but its abrogation, which is a high bar).

Clause 24 prohibits domestic courts from having regard to any interim measure by the ECtHR (even though such an action could amount to a breach of treaty obligations in international law).

Clause 26 mirrors the prospective Henry VIII clause in section 10 of the HRA, allowing ministers to take remedial action following declarations of incompatibility. This provision empowers ministers to amend primary or secondary legislation if there are 'compelling reasons to do so' and in order to remove any inconsistency between such legislation and Convention rights.

Clause 40 is another prospective Henry VIII clause. Clause 40 empowers the Secretary of State to amend any legislation for the purposes of ensuring a smooth transition between old and new legislation. Subsection 2 empowers the Secretary to amend any legislation to preserve or restore the effect of a judgment where a domestic court exercised Section 3 of the HRA (the power to interpret legislation compatibly with Convention rights). Subsection 6 is a two-year sunset clause, which means that the Secretary may only exercise the powers to preserve legislation for two years following the repeal of the HRA.

Schedule 1 lists various Articles of the ECHR. The Convention rights listed are the same as those in the HRA.

Schedule 5, paragraph 2 repeals the HRA in its entirety.

Potential opposition in the Lords: the Salisbury Addison Convention

The HRA, in its entirety, will be repealed by Schedule 5(2) of the Bill. Clause 1(1) also states that the Bill seeks to repeal and replace the HRA. The government could have made the same changes through amending the HRA, but this Bill takes a more wholesale approach. This matters because whether the House of Lords could oppose the Bill would have depended on the effect of the Bill and the application of the Salisbury Addison Convention.[80] According to the Convention, the Lords may not oppose a government bill that seeks to enact manifesto commitments that the government was elected on. Given the difference between minor reform in the form of updating the HRA and wholesale repeal, it could have been argued that the Salisbury-Addison Convention would not apply. In the event that the House of Lords followed this view, it would have been almost certain to oppose the Bill (insofar as allowed by the Parliament Acts).

Provisions of the Human Rights Act to be repealed

There are three major provisions in the HRA which the Bill of Rights seeks to repeal in their entirety. Without offering suitable replacements, the Bill seeks to repeal Sections 2 and 3 of the HRA, as well as Section 19.

Section 2 of the HRA obliges domestic courts to take into account judgments, decisions and opinions of the Strasbourg Court. This duty is entirely removed. Instead, Clause 3 of the Bill contains a complex requirement for domestic courts to have 'particular regard' to Convention rights alongside the development of equivalent rights in the common law. Even if this provision is read as a replacement, it requires domestic courts to search for similar rights in age old case law that may or may not exist in the same form and scope.

80 House of Lords Constitution Committee, 'The Salisbury Addison Convention' (5th Report: session 2017-2019) HL 28, Appendix 1: Written evidence, available at: < https://publications.parliament.uk/pa/ld201719/ldselect/ldconst/28/2804.htm >, last accessed 14 September 2022.

Section 3 of the HRA empowers domestic courts to 'so far as it is possible' interpret all domestic legislation compatibly with Convention rights. Over the years, this provision has been instrumental in ensuring that domestic law is interpreted expansively, in sync with certain rights. This interpretive obligation has limited the number of times domestic law has been found to be incompatible with Convention rights. By encouraging domestic courts to interpret legislation in line with Convention rights, it has limited the number of rulings by the Strasbourg courts against the UK. The new Bill does not contain any substitute for the interpretative powers contained in Section 3 of the HRA.

Furthermore, Clause 40 of the Bill gives ministers the power to create regulations reversing judgments where the courts have deployed Section 3 of the HRA. While the specifics of Clause 40 are open to interpretation, domestic courts will not have the flexibility to ensure that Convention rights are in sync with UK legislation. The prospects of domestic legislation being held incompatible with Convention rights will increase.

Section 19 of the HRA requires ministers, when introducing Bills into Parliament to state whether or not the provisions in the Bill are compatible with Convention rights. This does not prevent Parliament from enacting provisions which are incompatible with the Convention, but is intended to draw Parliament's attention to potential incompatibilities and facilitate parliamentary scrutiny, including by the Joint Committee on Human Rights. There is no equivalent provision in the Bill of Rights Bill. The Explanatory Notes to the Bill state that ministers will still co-operate with the Joint Committee to facilitate scrutiny for Convention-compliance, but there are no mechanisms to ensure that it does so.

New rights

The Bill of Rights Bill purports to add the right to trial by jury and to further the protection afforded by the freedom of speech. But these new rights are thin in substance. Clause 9, codifying the right to trial by jury, does not add anything of substance in the form of a new right as the right to trial by jury already exists for certain criminal offences. Clause 4, which purports to further the protection afforded to freedom of speech is a qualified right; it is expressly inapplicable to those involved in criminal and immigration proceedings.

Controversial Clauses

Generally speaking, the Bill is seen to dilute the existing protections afforded to a range of rights under the HRA. The Bill is widely held to be controversial for a range of reasons, some of which are detailed below.

Clause 1 does not contain any substantive law, despite claiming to 'rebalance' the relationship between different arms of the state. Clause 1(3)(b) reiterates that which is already true and cannot be changed: that measures of and decisions by the ECtHR do not affect Parliament's right to legislate. This is because the UK's decision to adhere to its obligations under an international treaty is a separate matter from the legislature's ability to legislate.

While Clause 4 purports to promote free speech, it does not apply to those involved in criminal or immigration proceedings. This extended right to free speech is contentious because it is not available to a specific class of individuals.

Clause 5(1) forbids domestic courts from imposing new positive obligations on public authorities. Clause 5(2) restricts the circumstances in which the courts can impose existing positive obligations on public authorities (such as the *Osman*-based duty imposed on the police to protect those whose lives are under threat). Accordingly, this provision curtails the degree to which public authorities may be held accountable for actions that could violate Convention rights.

Clause 7 appears to deter domestic courts from holding that legislation contains a disproportionate interference with certain rights. Clause 7(2) in particular requires the courts to give 'the greatest possible weight' to the concept that Parliament should decide how the balance is struck between competing rights and policy aims.

Clause 14 excludes the possibility of domestic proceedings against members of the British military for alleged violations of the Convention in overseas military operations. This provision appears to severely limit the extra-territorial application of the ECHR. The Convention's extraterritorial application has been a contested matter in a number of previous cases including *Al Skeini v UK* on the actions of British troops in Iraq. If Clause 14(5) becomes law, prospective litigants will only have recourse in domestic proceedings in tort against the military for overseas violations.

Some provisions appear to be drafted in order to facilitate controversial government policies. For example, Clauses 20 and 24 appear to facilitate the Home Office's deportation of certain asylum seekers to Rwanda, contrary to the recent injunctions granted by the ECtHR.

Given the highly controversial nature of the Bill and the scale of constitutional change it would implement, the House of Lords was very likely to oppose it.

Appendix i: The Rwanda Asylum Partnership Agreement

Summary
In April 2022, the UK and Rwanda finalised the Migration and Economic Partnership Agreement.[81] It contains a five-year non-binding arrangement – the Rwanda Asylum Partnership Agreement – which allows the UK to send certain individuals seeking asylum in the UK to Rwanda instead. The Agreement is presently used for those who make dangerous journeys to the UK and who are considered 'inadmissible' by the government for UK asylum. These asylum seekers will not be able to return to the UK. Their asylum applications will be considered by the Rwandan authorities instead, who will either grant them permission to stay in Rwanda or return them to their country of origin. The UK has committed to provide Rwanda with £120 million and to pay for the costs of transporting and relocating the asylum-seekers.[82]

The asylum plan is part of a series of asylum reforms. The government has announced its desire to discourage asylum-seekers from travelling to the UK having not sought asylum in other safe countries.

On 1 June 2022, the Home Office began issuing formal removal direction letters, in preparation for removing the first group of people to Rwanda. In response, applications for judicial review were filed by the asylum seekers. Several last-minute injunctions were sought to prevent the flight from Rwanda from taking off on 14 June 2022. The injunctions were initially refused by the High Court on 10 June 2022. However, on the evening of the 14 June, the European Court of Human Rights (ECtHR) issued interim injunctions preventing certain asylum-seekers from being imminently removed. Consequently, the removal orders were revoked, and the flight was cancelled.

At time of writing, the asylum plan is subject to various legal challenges by asylum-seekers, campaign groups and a trade union. These challenges have been merged into two main hearings. The hearing where the court was due to consider the lawfulness of the policy as a whole was adjourned until 5 September 2022. However, the second, a legal challenge by Asylum Aid, will be heard separately on 10 October 2022.

The asylum plan has been heavily criticised by politicians and NGOs due to its costs, impracticality and its implications for human rights. The information published by the Home Office has been vague. It is not known how many refugees the UK has committed to relocate to Rwanda. Furthermore, the government's Memorandum of Understanding – setting out the plan – has not received formal parliamentary scrutiny and has not been voted upon.

81 House of Commons Library, *UK-Rwanda Migration and Economic Development Partnership*, 28 June 2022.
82 *BBC News*, 'Why are asylum seekers being sent to Rwanda and how many could go?', 16 August 2022, available at: < www.bbc.com/news/explainers-61782866 >, last accessed 14 September 2022.

Who qualifies for deportation to Rwanda?

As it stands, the Home Office has used the asylum arrangement to transfer adult refugees who have travelled to the UK but are considered 'inadmissible'. An asylum-seeker is considered inadmissible to the system if they satisfy either of two conditions. First, if the asylum seeker has undertaken an irregular and 'dangerous' journey to the UK.[83] And second, if the asylum seeker has a connection with a safe third country.

A dangerous or irregular journey to the UK is a journey that is likely or able to cause harm or injury. This includes asylum-seekers who travel in small boats across the English channel or those transported in lorries. Those who have reached the UK after 9 May 2022 have been deemed the highest priority for relocation.

An asylum seeker will be held to have a connection to a safe third country, if they meet any of the following criteria:

- if the individual is recognised as a refugee or has been granted international protection in another country;
- if the individual has an outstanding or refused claim in another country;
- if the individual crossed another country and failed to take advantage of an opportunity to claim asylum, where it would have been reasonable to do so; and
- where, considering a person's particular circumstances, it would have been reasonable for them to claim asylum in a safe third country, instead of the UK.

The Home Office has announced that, initially, only a subset of inadmissible cases will be relocated to Rwanda or safe third countries. For instance, the UK will still consider inadmissible claims that are not suited to removal or if removal is not plausible within a realistic timeframe. Adults accompanied by young children will not be initially considered for relocation.

Until 28 June 2022, the Immigration Rules set out the requirements for 'inadmissibility' as regards a non-EU application for asylum. These rules have mostly been repealed and replaced by provisions in the Nationality and Borders Act 2022. The most recent changes stipulate that individuals who were previously present or have another connection with a safe third country will be categorised as inadmissible to the UK's asylum system. This means that those asylum-seekers can be removed to the any safe third country that agrees to receive them, without the UK having to consider their claim.[84]

Exceptions

There remains some scope for the Home Office to make exceptions for certain applications. For example, an asylum application that is deemed to be inadmissible can still be considered in the UK if 'there are exceptional circumstances in the particular case that mean the claim should be considered'. In addition, inadmissible claims can still be considered if it is unlikely that the applicant's removal to safe country will occur with a reasonable period of time.

83 Home Office, *Inadmissibility: safe third country cases*, 28 June 2022, available at: < www.gov.uk/government/publications/inadmissibility-third-country-cases/inadmissibility-safe-third-country-cases-accessible >, last accessed 14 September 2022.

84 The most recent changes are essentially setting out the condition of having a link to a third, safe country.

Unanswered Questions

Several questions remain unanswered around who exactly can be relocated, the precise details of the Rwanda Asylum Arrangement and its likely outcomes. It is not known whether asylum claims can be deemed inadmissible on other grounds. The Home Office has not publicly identified all the cohorts of asylum-seekers who will be suitable for relocation.

Criticism

The Asylum Arrangement has received significant criticism from practitioners, NGOs, campaign groups, officials and politicians. Academics specialising in refugee law and practitioners have argued that the Arrangement erodes international legal protections established in the aftermath of World War Two. The Migration Policy Institute argued that the plan derogates from, and openly questions, the principles that the UK signed up to under the 1951 Geneva Convention. The UN refugee agency, UNHCR, declared that the UK was relinquishing its responsibilities and threatening 'the international refugee protection regime, which has stood the test of time, and saved millions of lives'.[85]

In a formal letter, the Permanent Secretary of the Home Office, Matthew Rycroft expressed his doubts surrounding the efficacy of the asylum plan. Writing to the Home Secretary on 13 April 2022, Rycroft stated that he does not believe there is sufficient evidence to demonstrate that the policy will be 'a deterrent significant enough to make the policy value for money'.[86]

Former Prime Minister, Theresa May questioned the 'legality, practicality and efficacy' of the scheme.[87] Shadow Home Secretary, Yvette Cooper described the plan as 'unworkable, unethical and extortionate'. The Archbishop of Canterbury, Justin Welby, described the plan as being 'opposite to the nature of God'.[88]

Parliamentary scrutiny

While the Memorandum of Understanding (MoU) is publicly available, it has not been put to Parliament for a vote or for formal scrutiny. By contrast to a formal treaty, a MoU is a non-binding agreement and does not create any legal obligations between the parties involved. MoUs are distinguished from formal international agreements because they are primarily political agreements.

85 UNHCR, 'Analysis of the Legality and Appropriateness of the Transfer of Asylum Seekers under the UK-Rwanda arrangement', 8 June 2022, available at: < www.unhcr.org/publications/legal/62a317d34/unhcr-analysis-of-the-legality-and-appropriateness-of-the-transfer-of-asylum.html >, last accessed 14 September 2022.

86 *Matthew Rycroft to Home Secretary*, 13 April 2022, available at: < https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1069388/AO_Letter_from_Matthew_Rycroft__to_the_Home_Secretary_-_MIGRATION_AND_ECONOMIC_DEVELOPMENT_PARTNERSHIP.pdf >, last accessed 14 September 2022.

87 *BBC News*, 'Rwanda asylum seeker policy: Ex-PM Theresa May criticises government plan', 19 April 2022, available at: < www.bbc.com/news/uk-61153677 >, last accessed 14 September 2022.

88 Amar Mehta, 'Rwanda asylum scheme: Archbishop of Canterbury hits out at government plans, saying they are ungodly' *Sky News*, 17 April 2022, available at < https://news.sky.com/story/rwanda-asylum-scheme-archbishop-of-canterbury-hits-out-at-government-plans-saying-they-are-ungodly-12592037 >, last accessed 14 September 2022.

Given that it is a MoU, the Rwanda-Asylum Arrangement is not subject to the requirements for formal parliamentary scrutiny set out by the Constitutional Reform and Governance Act 2010 (CRAG). However, as argued by the Lords European Union Committee, it is misleading to say the requirements for treaty scrutiny are all contained in CRAG; the Act only codifies one part of the Ponsonby Rule on international treaties and agreements.

According to the European Union Committee and International Agreements sub-committee, the third limb of the Ponsonby Rule requires the government to draw to the attention of Parliament 'other agreements, commitments and understandings which may in any way bind the nation to specific action in certain circumstances and which may involve international obligations of a serious character, although no signed sealed document may exist'. This limb encompasses politically important Memoranda of Understanding, such as the Rwanda Asylum Partnership agreement.[89]

Nevertheless, whether the government is required to lay MoUs before Parliament for scrutiny has been disputed. The government holds that there is no requirement for the House of Commons to be informed of a non-treaty arrangement. The European Union Committee invited the government to enter into a discussion about the extent of the third limb of the Ponsonby rule and regarding how far it covers politically important Memoranda of Understanding. The government rejected this invitation, arguing that while the third limb of the Ponsonby Rule exists, it does not amount to a binding constitutional convention.[90]

At the time of writing, the Rwanda Asylum Partnership Arrangement has not been subject to a vote in Parliament or to formal scrutiny. Based on the government's position, it is unlikely that the Arrangement will formally be considered by Parliament. The government has relied on the fact that the MoU itself has been made public.

Legal challenges

The asylum plan has been challenged, via judicial review in the High Court, both by individual asylum seekers and by campaign groups. These legal challenges concern a variety of issues: the legality of the scheme as a whole; the legality of the removal directions of asylum seekers; whether Rwanda is a safe destination; and whether the scheme is compatible with the UK's treaty obligations under the ECHR. The grounds for challenge by some of these parties has been summarised below.

In late April, shortly after the asylum plan was announced, PCS, Care4Calais and Detention Action confirmed that they would challenge the policy, in addition to the removal orders faced by specific asylum seekers. The High Court granted these claimants permission to apply for judicial review, though the hearing has been adjourned until September 2022. The UNCHR was granted permission to intervene in these proceedings as an interested party; its submissions highlight concerns surrounding the policy's legality under international law.

89 House of Lords European Union Committee, 'Treaty Scrutiny: working practices' (11th Report: session 2019-2021) HL 97, paras 97-106 <https://committees.parliament.uk/publications/1826/documents/17747/default/>.

90 House of Commons Library, *UK-Rwanda Migration and Economic Development Partnership*, 28 June 2022. pp.58-59.

Asylum Aid has sought judicial review of the procedures that will be used for the Asylum Arrangement. This challenge focuses on three issues. First, the fact that removal to Rwanda as a blanket policy is inconsistent with the government's commitment to case-by-case consideration of asylum claims. Second, the Arrangement is procedurally unfair as asylum seekers only have 14 days to seek legal advice and pursue any action. And third, the nature of the arrangement gives rise to a real concern that asylum seekers will be deprived of access to legal advice and the courts.

Freedom from Torture have challenged the policy on a different basis. First, they have argued that the conclusion that Rwanda is a safe country to send asylum seekers to is 'irrational' and that the decision has not been taken based on sufficient evidence or inquiries.[91] Second, they argued that, based on several of her statements, there is a real possibility that the Home Secretary was biased in (or otherwise predetermined) her decision to classify Rwanda as a 'safe third country'. Third, Freedom from Torture have argued that the policy breaches the Home Secretary's common law duty not to induce violations of Article 3 of the ECHR (freedom from torture or inhuman or degrading treatment or punishment). Fourth, they have argued that the asylum plan is contrary to the Home Secretary's statutory duty under Section 2 of the Asylum and Immigration Appeals Act 1993 to comply with the 1951 Refugee Convention.[92]

In addition, Open Rights Group have declared their intention to challenge the legality of transferring individual asylum seekers' data to the Rwandan government.[93]

The last-minute injunction

Before the first flight to Rwanda took off on 14 June 2022, a last-minute injunction was sought by the asylum seekers due to be removed. The injunction was refused by the High Court on 10 June 2022. However, at 19:30 on the day of the planned flight, the European Court of Human Rights granted an interim measure, under the 'rule 39 procedure' prohibiting the deportation of an Iraqi man who would have faced 'a real risk of irreversible harm'.[94] This measure led the six remaining passengers to seek appeal. Subsequently, the removal orders were scrapped and the flight to Rwanda was cancelled. So far, many asylum seekers have had their removal directions cancelled, though the government may still pursue the asylum plan with regards to other asylum seekers with inadmissible claims.

At present, it appears that the challenges to the asylum policy will be grouped in two main hearings. The challenges involving individual asylum seekers, in addition to Freedom from Torture, PCS, Care4Calais, Detention Action and the UNHRC will be heard in a 5-day hearing beginning on 5 September 2022. Asylum Aid's case will be heard separately on 10 and 11 October. The court's ruling as regards to both

91 Four grounds of challenge are summarised here: Leigh Day, 'Freedom from Torture launches urgent challenge to decision to send asylum seekers to Rwanda', 24 May 2022, available at: < https://www.leighday.co.uk/latest-updates/news/2022-news/freedom-from-torture-launches-urgent-challenge-to-decision-to-send-asylum-seekers-to-rwanda/ >, last accessed 14 September 2022.

92 Asylum and Immigration Appeals Act 1993, S.2.

93 Open Rights Group, 'Newsletter: Migrant Digital Justice', 20 May 2022, available at: < https://www.openrightsgroup.org/blog/migrant-digital-justice-programme-newsletter/ >, last accessed 14 September 2022.

94 'The European Court grants urgent interim measure in case concerning asylum- seeker's imminent removal from the UK to Rwanda', Press Release Issued by Registrar of the court, The European Court of Human Rights, 197 (2022) < https://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=003-7359967-10054452&filename=Interim%20measure%20granted%20in%20case%20concerning%20asylum-seeker%E2%80%99s%20imminent%20removal%20from%20the%20UK%20to%20Rwanda.pdf >, last accessed 14 September 2022.

hearings will be delivered at the same time.[95] This means that the question of whether the Rwanda Asylum Arrangement is lawful – and can therefore proceed – will not be determined until at least the middle of October 2022.

95 Joshua Rozenberg, 'Rwanda hearing next week', 30 August 2022, accessible at: < https://rozenberg.substack.com/p/rwanda-hearing-next-week >, last accessed 14 September 2022.

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