

A JUSTICE Report

The State We're In: Addressing Threats & Challenges to the Rule of Law

September 2023

For further information contact

Tyrone Steele, Interim Legal Director
tsteele@justice.org.uk



Established in 1957 by a group of leading jurists, JUSTICE is a cross-party law reform and human rights organisation working to strengthen the justice system – administrative, civil, and criminal – in the United Kingdom. We are a membership organisation, composed largely of legal professionals, ranging from law students to the senior judiciary.

Our vision is of fair, accessible, and efficient legal processes, in which the individual's rights are protected, and which reflect the country's international reputation for upholding and promoting the Rule of Law. To this end:

- We carry out research and analysis to generate, develop and evaluate ideas for law reform, drawing on the experience and insights of our members.
- We intervene in superior domestic and international courts, sharing our legal research, analysis and arguments to promote strong and effective judgments.
- We promote a better understanding of the fair administration of justice among political decision-makers and public servants.
- We bring people together to discuss critical issues relating to the justice system, and to provide a thoughtful legal framework to inform policy debate.

© JUSTICE 2023



2nd Floor Lincoln House
296-302 High Holborn,
London, WC1V 7JH

Contents

Executive Summary	1
I. Introduction	3
II. Legality and the Law-Making Process.....	10
III: Human Rights.....	29
IV. Legal Certainty and the Misuse of Power	43
V. Access to Justice	54
VI: Equality and Non-Discrimination.....	72
VII. Conclusion and Recommendations	94
VIII. Acknowledgements	98
VIII. Abbreviations	99

EXECUTIVE SUMMARY

The rule of law is the foundation of a democratic society. When it is stable and secure, it protects the citizen from arbitrary state power, provides certainty to domestic and international commerce, and preserves the independence and impartiality of our judiciary. Like any foundation, however, there is no guarantee that serious damage will be noticeable at first glance; close inspection is required.

The report finds that over the past decade and particularly in the last five years, the process of lawmaking has become less transparent, less accountable, less inclusive, and less democratic. Using the framework of the Venice Commission's Rule of Law Toolkit, we assess the cumulative impact of these changes on our democracy against five rule of law benchmarks:

1. **Legality:** law-making must be transparent, accountable, inclusive and democratic. And nobody is above the law, including Government and public authorities.
2. **Human rights:** the law safeguards the inherent and inalienable dignity of all human beings.
3. **Legal certainty and the prevention of the misuse of power:** the law should be clear and foreseeable, and those exercising legal powers must not do so arbitrarily.
4. **Access to justice:** there must be an independent and impartial judiciary, a robust legal profession, and practical and effective access to the courts.
5. **Equality and non-discrimination:** individuals must receive equal treatment in law and be equal before the law.

In our assessment against these benchmarks, we observe that recent developments have been corrosive to the rule of law. For example:

- Public consultations, valuable for ensuring the Government considers a wide range of views and evidence, are too often poorly conducted, if at all. This is clear from the Illegal Migration Act 2023, which was not subject to any public consultation or pre-legislative scrutiny despite having profound implications for the UK's asylum system and human rights adherence. Equally, the Bill of Rights Bill consultation, which received 12,000 responses, with up to 90% of respondents opposed to key reforms, was completely sidelined.
- There has been a growing legislative disregard for human rights. The health of the UK's civic space has been downgraded from 'narrowed' to 'obstructed' by the Civicus Monitor, a platform that monitors the state of civil society freedoms globally. Laws like the Public Order Act 2023 could have a chilling effect on our rights to freedom of thought, expression, and peaceful assembly.
- 'Henry VIII' powers, which allow ministers to amend or repeal laws through secondary legislation with little parliamentary oversight or scrutiny, have become more prevalent, adversely affecting the principle of legal certainty. This is evident in the European Union (Withdrawal) Act 2018, in which power is bounded by whether the minister thinks its exercise is 'appropriate', rather than it being objectively 'necessary'.
- Cuts to legal aid have decimated universal access to justice and victims, witnesses, small businesses are left waiting months if not years for a trial. This has been compounded by the ongoing courts backlog crisis, where, as of March 2023, over 340,000 cases are outstanding in the Magistrates' courts and over 62,000 in the Crown Court. Annual public expenditure on legal aid dropped by a quarter between 2009 and March 2022, resulting in 'legal aid deserts', with no access to legal advice at all.

- Significant systemic inequalities still need to be addressed in our society. Yet our approaches to tackling inequality and discrimination are unfit for purpose. The budget of the Equality and Human Rights Commission has plummeted from a peak of £70.3 million in 2007 to £17.1m today. Moreover, policymakers do not, as a matter of course, conduct Equality Impact Assessments, as seen most recently where the Illegal Migration Act 2023 lacked such an assessment until after its passage through the House of Commons. Often discrimination goes entirely undetected due to data being uncollected, unpublished, or of poor quality. In modern slavery cases, for instance, no data is regularly researched or published in relation to complainant ethnicity.

We do not make these conclusions without hope; the damage can be reversed. Our 20 recommendations set out what repairs are necessary. In summary:

- Parliamentary scrutiny must be enhanced in the legislative process and the executive must be prevented from exerting undue control.
- Human rights legislation should be protected and recent legislation undermining rights protections for vulnerable groups should be repealed (including the Covert Human Intelligence Sources (Criminal Conduct) Act 2021; parts 3 and 4 of the Police, Crime, Sentencing and Courts Act 2022, the Public Order Act 2023, and the Illegal Migration Act 2023).
- Constitutionally exceptional legislation, such as that which contains Henry VIII powers or has retrospective effect, must be clearly justified as being necessary, not desirable or easy.
- Clarity in the law – and the rights, obligations, liabilities and sanctions it imposes on legal persons – is crucial to prevent arbitrary abuses of power, with emergencies being no exception.
- The justice system must be adequately resourced.
- Judicial review has become a key civic tool against arbitrary use of the state’s extensive powers. There must be no further undermining of the individual’s ability to hold the state to account and judicial review must be protected from further curtailment.
- Open justice is not an optional add-on but a core principle, and justice system reform must recognise it as such.
- The Government must wholly reject and must not themselves engage in hostile and disparaging attacks on the judiciary and the legal profession. This will ensure that an independent and impartial judiciary, and a robust legal profession, can continue to support the rule of law on society’s behalf.
- The Government should collect, publish and monitor equalities data systematically; increase the use of Equality and Impact Assessments for legislation; and strengthen and protect the powers and independence of the Equality and Human Rights Commission.

These recommendations will take hard work and consensus across the political spectrum. However, their implementation is absolutely necessary to restore the UK as a state that enthusiastically adheres to its domestic and international legal obligations, thereby reclaiming its reputation as a global leader in upholding the rule of law.

I. INTRODUCTION

*“The rule of law is non-negotiable”*¹

The Rt Hon. Rishi Sunak MP

*“I regard the rule of law, as one of the things that makes Britain great”*²

The Rt Hon. Sir Keir Starmer KC MP

*“Underpinning our approach will be our continuing commitment to the rule of law...”*³

The Rt Hon. Humza Yousaf MSP

*“...one of our greatest British values, the rule of law”*⁴

The Rt Hon. Sir Ed Davey MP

The rule of law

- 1.1 The rule of law is not an idealistic or abstract concept without any real consequences for the general public. On the contrary, its importance can hardly be overstated; it sits alongside parliamentary sovereignty as a fundamental pillar of our constitution.⁵ The principle finds expression in a range of sources, from the preamble of the European Convention on Human Rights (“**ECHR**”) which came into force in 1953, to the Constitutional Reform Act 2005. The Cabinet Manual requires ministers to act in accordance with the rule of law, and the Ministerial Code articulates an “*overarching duty on Ministers to comply with the law and to protect the integrity of public life*”.⁶
- 1.2 Nevertheless, the precise definition of the rule of law is contested. Indeed, “*it is a phrase much used and little explained*”.⁷ In its most basic form, it requires all Government action to have positive legal authority. In the words of the late eminent jurist and Law Lord, Lord Bingham, who perhaps encapsulates the concept best, its essential elements require that “*all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future and publicly administered in the courts*”.⁸ The Government may not, therefore, interfere with the freedoms of individuals without the approval of Parliament and where necessary as adjudicated by the courts. What underpins this is the notion that all are equal before the law – both individuals and the state.
- 1.3 Perhaps, most importantly, a system governed by the rule of law “*prevents the abuse of state power*”.⁹ As Lord Bingham goes on to explain:

¹ J. Rozenberg, ‘*PM supports rule of law*’, (A Lawyer Writes, 8 May 2023).

² K. Starmer, ‘*Keir Starmer’s speech setting out Labour’s Contract with the British people*’, (Labour, 4 January 2022).

³ H. Yousaf, ‘*Coronavirus (COVID-19) – Justice Cabinet Secretary speech 24 March 2020*’, (Scottish Government, 24 March 2020).

⁴ HC Deb, 4 July 2022, Vol 717, Col. 593.

⁵ AV Dicey set out the pillars of the UK Constitution in his seminal book entitled “*An Introduction to the Study of the Law of the Constitution*”, published in 1885. He identified the rule of law and parliamentary sovereignty as twin pillars of the UK Constitution.

⁶ s.6.4 Cabinet Manual; s.1.3 Ministerial Code.

⁷ JUSTICE, ‘*Law for Lawmakers: A JUSTICE guide to the law*’, (2015), p. 8.

⁸ T. Bingham, *The Rule of Law* (2010).

⁹ L. James and J. van Zyl Smit, ‘*The rule of law: what is it, and why does it matter?*’, (The Constitution Unit, 15 December 2022).

*“The hallmarks of a regime which flouts the rule of law are, alas, all too familiar: the midnight knock on the door, the sudden disappearance, the show trial, the subjection of prisoners to genetic experiment, the confession extracted by torture, the gulag and the concentration camp, the gas chamber, the practice of genocide or ethnic cleansing, the waging of aggressive war. The list is endless.”*¹⁰

- 1.4 The benefits of the rule of law extend also to the financial well-being of the country, serving to support “*stable economies and economic growth*”¹¹ through the enforcement of contracts and property rights. Data provided by the World Justice Project, as set out in the LexisNexis Rule of Law Impact Tracker, demonstrates that a country with a strong rule of law will generally also have a high GDP per capita.¹² The economic case for a strong rule of law was highlighted in a speech by Lord Hodge, Deputy President of the Supreme Court. As he notes, “*a commitment to the rule of law is widely recognised as underpinning economic prosperity*”.¹³ This is because the rule of law enables the law and legal institutions to offer “*predictability and confidence for commercial parties to transact*”.¹⁴ In Lord Hodge’s view, it is this feature of the legal system that sets the United Kingdom apart, and allows our legal system to “*punch above [its] weight in international commerce and international dispute resolution when compared with larger economies*”.¹⁵
- 1.5 There are also clear links between the rule of law and democracy, with features of the former proving of vital importance to the latter. This is the case for both the public at large, who expect the State to behave in a responsible and accountable manner, as well as for ensuring that the rights of minorities, the vulnerable, and other disadvantaged groups are upheld. In much in the same way, it has been argued that “*a strong regime of Rule of Law is vital to the protection of human rights*”.¹⁶ We go further in adopting the view, as many do,¹⁷ that human rights and the rule of law are not simply standalone, mutually reinforcing concepts, but that the definition of the rule of law requires adherence to a minimal baseline of human rights. Indeed, “*the Rule of Law would be just an empty shell without permitting access to human rights*”.¹⁸
- 1.6 This stems from the view that the rule of law requires a state to act in a lawful manner, which is respectful of its obligations, both domestic and international.¹⁹ As such, adherence to the rule of law would include respecting international human rights instruments like the ECHR. In essence: “*It is a good start for public authorities to observe the letter of the law, but not enough if the law in a particular country does not protect what are there regarded as the basic entitlements of a human being*”.²⁰

¹⁰ T. Bingham, *The Rule of Law*, (2010), p. 25.

¹¹ L. James and J. van Zyl Smit, ‘*The rule of law: what is it, and why does it matter?*’, (*The Constitution Unit*, 15 December 2022).

¹² LexisNexis, ‘*Rule of Law Impact Tracker*’, (2015).

¹³ Lord Hodge, ‘*The Rule of Law, the Courts and the British Economy*’, (2022) p. 2. See also, Lord Burnett, ‘*The Hidden Value of the Rule of Law and English Law: Blackstone Lecture 2022*’, (2022).

¹⁴ Lord Hodge, ‘*The Rule of Law, the Courts and the British Economy*’, (2022), p. 1.

¹⁵ *ibid*, p. 11.

¹⁶ Venice Commission of the Council of Europe, ‘*The Rule of Law Checklist*’, (2016), p. 13.

¹⁷ See, for example, the UN and the Rule of Law, ‘*What is the Rule of Law?*’; Venice Commission of the Council of Europe, ‘*The Rule of Law Checklist*’, (2016); T. Bingham, *The Rule of Law*, (2010).

¹⁸ Venice Commission of the Council of Europe, ‘*The Rule of Law Checklist*’, (2016), p. 13.

¹⁹ See, for example, Venice Commission of the Council of Europe, ‘*The Rule of Law Checklist*’, (2016), pp. 19–20.

²⁰ T. Bingham, *The Rule of Law*, (2010), p. 144.

1.7 The UK was, in fact, a key architect of the post-war settlement and an advocate of the modern human rights movement, which led to the involvement in drafting and adoption of the ECHR. The United Nations General Assembly, born out of the horrors of the Second World War and a promise of ‘never again’, adopted the Universal Declaration of Human Rights in 1948, proclaiming the inalienable rights to which every human being is entitled. At the time, the UK was frustrated that the Declaration did not go far enough, as it had only a moral – not legal – obligation.²¹ Therefore, it is no surprise that the UK, with Winston Churchill as a leading proponent, proceeded to craft and adopt a European equivalent, armed with a specialist court to oversee its enforcement. In a speech delivered in the Hague, Churchill proclaimed that at “*the centre of our movement stands the idea of a Charter of Human Rights, guarded by freedom and sustained by law*”.²² From this gathering, work began on a legally-binding instrument — the ECHR — under the aegis of the newly-formed Council of Europe. With British lawyers at the coalface of articulating its principles, the UK became one of the very first states to ratify the Convention in 1951.

The challenge for the UK

- 1.8 Following careful analysis of the impact of legislation and policy introduced over recent years, the conclusion that the rule of law is under threat is unavoidable. On a number of fronts, indicators that measure the health of the rule of law in the UK paint a worrying picture. Sir Robert Neill MP, Chair of the Parliamentary Justice Committee and Chair of the All-Party Parliamentary Groups (“**APPG**”) on the Rule of Law, warned that the UK’s “*illustrious hinterland in forging the rule of law has led to a creeping complacency which should be of equal concern. In short, we are too often guilty of taking the rule of law for granted [...] Those who truly believe in the rule of law know that it applies consistently and cannot be approached as if perusing some sort of legal pick’n’mix*”.²³
- 1.9 Furthermore, several recently-published indicators point towards a narrowing of fundamental freedoms in the UK and diminishing trust in the impartiality of institutions — both of which spell trouble for UK’s commitment to the rule of law. The Index on Censorship, which monitors freedom of expression around the world, considers the UK to be only “*partially open*” in terms of academic, digital and media freedom, alongside countries such as Botswana, Czechia, Greece, Moldova, Panama, Romania, South Africa and Tunisia. This stands in contrast to other states enjoying the highest ranking (“*open*”), such as Australia, Belgium, Costa Rica, Estonia, Germany and Portugal.²⁴ Likewise, the UK’s civic space rating on the Civicus Monitor, which tracks fundamental freedoms in 197 countries, has been downgraded from ‘narrowed’ to ‘obstructed’.²⁵ This is defined as follows:

“Although civil society organisations exist, state authorities undermine them, including through the use of illegal surveillance, bureaucratic harassment and demeaning public statements. Citizens can organise and assemble peacefully but they are vulnerable to frequent use of excessive force by law enforcement agencies, including rubber bullets, tear gas and baton charges. There is some space for non-state media and editorial independence, but journalists

²¹ S. Waltz, ‘*Reclaiming and rebuilding the history of the Universal Declaration of Human Rights*’, (2002) 23(3) Third World Quarterly 437, p. 446.

²² Quoted in [HC Deb](#), 24 Oct 2022, Vol 721, Col. 30WH.

²³ R. Neill, ‘*The rule of law needs continuous investment and nurturing, says Bob Neill MP*’, (*The Bar Council*, 22 June 2022).

²⁴ Index on Censorship, ‘*Major new global free expression index sees UK ranking stumble across academic, digital and media freedom*’, (2023).

²⁵ Civicus, ‘*United Kingdom Downgraded in Global Ratings Report on Civic Freedoms*’, (2023).

face the risk of physical attack and criminal defamation charges, which encourage self-censorship".²⁶

- 1.10 Other countries rated as 'obstructed' include Poland, Hungary, and South Africa.²⁷ Transparency International considers the UK to be a 'country to watch' over the coming year, with its score on the Corruption Perceptions Index plummeting to a decade low of 73.²⁸ For context, the UK's score has dropped by nearly ten points — a statistically significant change — between 2017 and 2022.²⁹
- 1.11 The COVID-19 pandemic also saw the widespread use of delegated powers, with limited Parliamentary scrutiny, thus "*affecting the ability of all citizens to actively participate in democratic practices*".³⁰ This trend towards executive law-making, however, pre-dates the onset of the Pandemic. As Dr Hannah White, Director of the Institute for Government, highlights, the worry is that for the third of MPs who have joined the House of Commons since 2017, this type of law-making has become the norm, and therefore our "*expectations of legislative scrutiny have plummeted*".³¹ In essence, these developments demonstrate that it is a troubling time for the rule of law in the UK.³²
- 1.12 Since Brexit, and throughout the pandemic, successive Governments have pursued a legislative agenda that has put the UK's adherence to the rule of law under severe strain. Several laws have been passed which expand the state's powers whilst limiting its accountability, many of which also conflict with the UK's obligations under the ECHR. Examples include:

- a. **Covert Human Intelligence Sources (Criminal Conduct) Act 2021**, which allows for the granting of immunity for criminal offences committed by undercover operatives. Not only does this conflict with the principle of equality before the law, but it also curtails access to justice for those whose rights have been violated by the actions of such individuals.
- b. **Overseas Operations (Service Personnel and Veterans) Act 2021**, which grants immunity to members of the armed forces facing prosecution for certain offences.
- c. **Judicial Review and Courts Act 2022**, which creates new judicial review remedies and abolishes *Cart* judicial reviews. These changes insulate certain decisions of public bodies from review from the High Court, thus limiting access to justice for those impacted by unlawful decision-making.
- d. **Nationality and Borders Act 2022**, which reforms the immigration and asylum systems, increasing the standard of proof for establishing refugee status and affording vulnerable individuals with less support when arriving in the UK. The reforms impinge on access to justice and potentially put the UK in contravention of its international obligations.

²⁶ Civicus, '*Ratings*'.

²⁷ Civicus, '*United Kingdom Downgraded in Global Ratings Report on Civic Freedoms*', (2023).

²⁸ Transparency International, '*9 Countries to Watch on the 2022 Corruption Perceptions Index*', (2023).

²⁹ Transparency International, '*Corruption Perceptions Index*', (2022).

³⁰ C. Ogden, '*The thin end of the wedge: the UK and escalating authoritarianism*', (*The Foreign Policy Centre*, 2022).

³¹ Institute for Government, '*Illegal Migration Act Highlights how Expectations of Legislative Scrutiny Have Plummeted*', (2023).

³² See also, R. Forest, '*Public Order Bill: New restrictions to protest tempered but will still bite*', (*Bond*, 2023).

e. **Police, Crime, Sentencing and Courts Act 2022**, which introduces a vast array of measures that encroach on domestic and international human rights protections, from increased powers to restrict protest, to the criminalisation of Gypsy, Roma, and Traveller communities' way of life. **The Public Order Act 2023** takes many of these measures further. It creates several new protest-related offences, increases stop and search powers, and introduces Serious Disruption Prevention Orders (“SDPOs”), which will prevent certain named individuals from exercising their fundamental protest rights.

1.13 Further troubling measures have also progressed at pace, including the **Elections Act 2022**, the **Retained EU Law (Revocation and Reform) Act 2023**, and, most recently, the **Illegal Migration Act 2023**. Together, these laws impose further hurdles to the right to vote, expand the power of the state to change laws with reduced scrutiny, diminish state accountability, and could deprive individuals wronged by the state of real redress.

1.14 Many issues have persisted even before these latest reforms. Severe cuts to legal aid and a staggering court backlog risk depriving individuals of access to justice. Last year's pay deal offered by the Government to legal aid solicitors was lower than the Government's commissioned report said should be the “*bare minimum*” and may be the “*fatal blow*” to a profession whose fees that have been frozen since the 1990s.³³ Furthermore, verbal attacks by senior politicians on the judiciary and legal professionals branding them as ‘lefty’, ‘woke’, or associated with ‘criminal gangs’³⁴ for taking on cases that might challenge the Government³⁵ — undermines public trust in the independence of the legal profession.

1.15 In the round, these developments raise serious concerns. Various aspects of the rule of law face attacks from multiple directions. What is yet to be determined, however, is the cumulative effect of these developments. As such, this report seeks to take stock of the state of the UK and its adherence to the rule of law. With the war in Ukraine entering its second year and a resurgence of challenges to the rule of law across Europe, including Poland, Hungary, and Turkey, the timing for this assessment could not be more critical.³⁶ This is an opportunity for the UK to be leading the way as a stalwart of democracy and the rule of law, not seeking to roll back domestic protections.

1.16 Therefore, we will conclude with recommendations to reverse these trends, and guide the UK back to being a state that enthusiastically upholds its domestic and international legal obligations, thereby restoring its reputation as being governed by – and respectful of – the rule of law.

³³ D. Casciani, ‘*Solicitors’ pay deal ‘fatal blow’ to justice, says Law Society*’, (BBC News, 2022).

³⁴ In a tweet, Prime Minister Rishi Sunak said: “*The Labour Party, a subset of lawyers, criminal gangs - they're all on the same side, propping up a system of exploitation that profits from getting people to the UK illegally*”. K. Devlin, ‘*Row as Rishi Sunak claims Labour on the “same side” as trafficking gangs*’. (The Independent, 25 July 2023).

³⁵ Two recent examples include then Prime Minister Boris Johnson, at the Conservative Party Conference in 2020, stating that the criminal justice system was being “*hamstrung by...lefty human rights lawyers and other do-gooders*.” O. Bowcott, ‘*Legal profession hits back at Johnson over ‘lefty lawyers’ speech*’, (The Guardian, 2020). Furthermore, in response to the court proceedings attempting to halt the first planned flight to Rwanda in 2022, then Prime Minister Boris Johnson said that those lawyers who opposed the Rwanda policy were “*abetting the work of the criminal gangs*.” D. Hughes, ‘*Boris Johnson defends Rwanda migrants policy with first flight set to leave*’, (Independent, 2022). See Chapter five for a more extensive list of examples.

³⁶ M. Bernhard, ‘*Democratic Backsliding in Poland and Hungary*’, (2021) 80(3) Slavic Review. See also the work of Kim Lane Scheppele.

Structure of the report

1.17 Whilst the above discussion offers a starting point for understanding the features of the rule of law, they do not provide us with clear standards against which to assess the UK's adherence to the rule of law. To this end, the structure of this report broadly adopts the Rule of Law Checklist disseminated by the European Commission for Democracy Through Law (the "**Venice Commission**"). The Venice Commission is an "*independent and consultative body*"³⁷ of the Council of Europe,³⁸ whose aim is to promote the rule of law and democracy in member states, such as the UK, and interested non-member states. The principles from which the Venice Commission's checklist took inspiration are based on the ingredients of the definition which Lord Bingham famously articulated.³⁹

1.18 The benefit of using the Venice Commission Toolkit is that it provides a general framework, composed of several practical indicators, to assess the health of the rule of law in any given state. In this way, the checklist takes the opaque concept of the rule of law and enables "*an objective, thorough, transparent and equal assessment*".⁴⁰ Furthermore, the Commission is made up of independent experts "*who have achieved eminence through their experience in democratic institutions or by their contribution to the enhancement of law and political science*".⁴¹

1.19 The checklist introduces five benchmarks, outlined briefly below:⁴²

- a. **Legality.** Essentially, this refers to the idea that nobody is above the law. This includes the Government and public authorities, who must act in accordance with domestic law, as well as their obligations under international law. This criterion also requires the law-making process to be "*transparent, accountable, inclusive and democratic*".⁴³ The public should have adequate time to comment on proposed legislation and the Government should prepare impact assessments, where appropriate. Finally, Parliament should be supreme when it comes to determining the content of the law and any law-making powers delegated to the executive should be clearly defined and limited in scope.
- b. **Legal certainty.** It is necessary for the law to be accessible, stable, and consistent in its application. The law must also be foreseeable in its effects. This means that one must be able to know, in advance of any act, whether such an act will attract liability or criminal sanction. As a consequence, laws should not apply with retrospective effect.
- c. **Prevention of the abuse (misuse) of powers.** There should be legal safeguards in place to prevent "*arbitrary*" use and "*abuse of power*" by public authorities.⁴⁴ The scope for discretion in public decision-making should, therefore, be circumscribed and clearly delineated. Where a public authority makes a decision that impinges on the rights of

³⁷ Res (2002) 3 Adopting the Revised Statute of the European Commission for Democracy through Law, art. 1(1).

³⁸ The Council of Europe should not be confused with the European Union. The United Kingdom is a member of the former, but not the latter. The judicial arm of the Council of Europe is the European Court of Human Rights.

³⁹ Venice Commission of the Council of Europe, '*Report on the Rule of Law*', (26 March 2011).

⁴⁰ Venice Commission of the Council of Europe, '*The Rule of Law Checklist*', (2016), p. 12.

⁴¹ Res (2002) 3 Adopting the Revised Statute of the European Commission for Democracy through La, Art. 2(1).

⁴² Venice Commission of the Council of Europe, '*The Rule of Law Checklist*', (2016).

⁴³ *ibid*, p. 21.

⁴⁴ *ibid*, pp. 29–30.

individuals, it should give reasons for such a decision. Remedies should be available where the discretionary use of power is abused.

- d. **Equality before the law and non-discrimination.** It is fundamental to the rule of law that all individuals are equal in and before the law. Save for situations where positive discrimination is required to rectify historic inequality, the law should ensure that all individuals have the right to be free from discrimination. Laws that violate the principle of equality should be open to challenge. Furthermore, the law should be equally and consistently applied. Where it is not, access to remedies should be available to those affected.
- e. **Access to justice.** The judiciary must be, and must be perceived to be, independent and impartial. Likewise, there must be a robust and independent legal profession. It is also crucial that individuals have “*effective access*” to legal assistance and to the courts, both in theory and in practice.⁴⁵ This requires that legal aid is made available for those who cannot afford legal representation, where the interests of justice so dictate, and that any proceedings are started in a timely manner, amongst other fair trial guarantees.

1.20 At this stage, we make one comment on the Venice Commission benchmarks. As is evident from the foregoing, the legality criterion has numerous and diverse sub-indicators that broadly fall into two categories: 1) the law-making process, and 2) whether the state’s actions accord with the law. As a result, we have decided to split consideration of this criterion into two chapters, in line with these two main sub-indicators. Furthermore, owing to their substantial crossover, we will merge our examination of the second and third benchmarks (legal certainty, and prevention of the abuse (misuse) of powers). Where appropriate, the indicators outlined above may come under consideration in multiple chapters.

⁴⁵ *ibid*, p. 42.

II. LEGALITY AND THE LAW-MAKING PROCESS

“Let us remind ourselves of the foundations of our constitution. We live in a representative democracy. The House of Commons exists because the people have elected its members. ... The Government exists because it has the confidence of the House of Commons. It has no democratic legitimacy other than that. This means that it is accountable to the House of Commons — and indeed to the House of Lords — for its actions...”

Lord Reed and Lady Hale in *R (on the application of Miller) v The Prime Minister* [2019]

Introduction

- 2.1 In a state that respects the rule of law, no one is above the law, not even the Government. It is, therefore, crucial that checks and balances are embedded in the constitution to prevent the executive from exerting undue control. The key concern for this chapter is to explore whether, in recent years, Parliament’s ability to scrutinise has been diminished, and the extent to which our expectations of the law-making process have similarly declined. There exist palpable concerns that a reduction in Parliament’s role in examining both primary and secondary legislation is becoming the norm, and that the law-making process has become less transparent and inclusive, as the Government has rushed to advance its legislative agenda. Particularly when it comes to controversial aspects of policy, the need for consultation and scrutiny are crucial to improving the quality and intelligibility of the final product, as well as its ultimate legitimacy.
- 2.2 Nevertheless, it appears that the role of the executive in the legislative process has expanded whilst control over it has weakened.⁴⁶ This spells trouble for the UK’s continued commitment to the rule of law and principles of ‘good law-making’, as “[u]nlimited powers of the executive are... a central feature of absolutist and dictatorial systems”.⁴⁷ Though we may be far from that point at present, vigilance is essential, particularly given the fragility of adherence to the rule of law globally.⁴⁸

Legality and the law-making process

- 2.3 The essence of legality is that action by the state and its agents is both “*in accordance with and authorised by the law*”.⁴⁹ According to the Venice Commission’s rule of law checklist, legality entails several factors, which will be split across two chapters. The focus of this chapter will be on those factors that assess the law-making process, and whether it is transparent, accountable and democratic.⁵⁰ The next chapter will focus primarily on whether the UK’s domestic legal system ensures that the state complies with binding obligations under international law, particularly international human rights standards that are domestically incorporated through the Human Rights Act 1998.
- 2.4 For the purposes of this chapter, according to the Venice Commission, the law-making process must ensure the supremacy of the legislature (Parliament, in the case of the UK). It is not necessarily inimical to the rule of law that Parliament delegates law-making powers to the executive, so long

⁴⁶ Lord Judge, ‘*Toulson Law Lecture 2022 | University of Surrey*’, (2022). See also J. Sargeant and J. Pannell, ‘*The legislative process: how to empower Parliament*’, (2022), p. 52.

⁴⁷ Venice Commission of the Council of Europe, ‘*Rule of Law Checklist*’, (2016), p. 20.

⁴⁸ Globally, the Rule of Law is on its fifth straight year of decline. See the World Justice Project, ‘*WJP Rule of Law Index 2022 Global Press Release*’, (2022).

⁴⁹ Venice Commission of the Council of Europe, ‘*Rule of Law Checklist*’, (2016), p. 18.

⁵⁰ *ibid*, p. 11.

as the “*objectives, contents and scope of the delegation... [are] defined in a legislative act*”.⁵¹ Any exceptions to the regular law-making process that may arise in emergency situations must similarly be “*limited in duration, circumstance and scope*”.⁵²

2.5 In this regard, we will focus on certain trends that have proven particularly worrying. The overarching concern is that our expectations of what constitutes ‘good lawmaking’, as well as Parliament’s role within that process, have “*plummeted*”.⁵³ As explained by Dr White, Director of the Institute for Government:

*“our current generation of ministers have got used to the apparent benefits of legislating at speed. They have forgotten the downsides. And MPs generally – one third of whom have joined the House since 2017 – have lost institutional memory of what used to count as adequate scrutiny.”*⁵⁴

2.6 Furthermore, the Government’s frequent recourse to skeleton legislation,⁵⁵ which contain a substantial delegation of powers, means that law-making power has decisively shifted in favour of the executive — a shift that the Secondary Legislation Scrutiny Committee (“SLSC”) worries might be “*strategic*”.⁵⁶ In other words, although Government has sought to rely on the exceptional context of Brexit and the Pandemic to justify executive law-making, these circumstantial factors fail to account fully for the prevailing trends in law-making across successive governments.

2.7 This raises twin concerns for the rule of law. First, regularly endowing the executive with considerable law-making powers, which extend beyond mere gap-filling, is a departure from the idea that Parliament has supremacy when it comes to the legislative process. Second, executive law-making necessarily entails the use of secondary legislative instruments, which lack the same level of Parliamentary scrutiny as primary legislation. Together, these concerns portend a *de facto* weakened voice of Parliament and, as a result, diminishing checks and balances on the Government’s legislative agenda.⁵⁷

The legislative process

Consultations

2.8 Before introducing a new or updated piece of legislation or policy, the Government may engage in roundtables or publish a formal consultation document, outlining its intentions and seeking opinions from key stakeholders on any potential issues. Consultation allows for a wide range of views and evidence to be considered, which aids both its legitimacy and quality. This is especially important when a particular policy is not a manifesto commitment, as such a policy will not have benefitted from a democratic ‘stamp of approval’ from the electorate. Indeed, the Government’s own Consultation Principles provide that consultations should “*consider the full range of people,*

⁵¹ *ibid*, p. 12.

⁵² *ibid*, p. 13.

⁵³ H. White, ‘*Illegal Migration Act Highlights how Expectations of Legislative Scrutiny Have Plummeted*’, (Institute for Government, 2023).

⁵⁴ *ibid*.

⁵⁵ Skeleton legislation has been described as when “*little of the policy is included on the face of the bill*” but nevertheless Parliament is asked “*to pass primary legislation so insubstantial that it leaves the real operation of the legislation to be decided by ministers*”. See House of Lords, Delegated Powers and Regulatory Reform Committee, *Democracy Denied? The urgent need to rebalance power between Parliament and the Executive*, HL Paper 106 12th Report of Session 2021–22, pp. 3 and 26.

⁵⁶ Secondary Legislation Scrutiny Committee, ‘*Government by Diktat: a Call to Return Power to Parliament*’ (2021), p. 12.

⁵⁷ JUSTICE, ‘*Current Threats to the Rule of Law*’, (8 February 2023).

business and voluntary bodies affected by the policy... Consider targeting specific groups if appropriate. Ensure they are aware of the consultation and can access it".⁵⁸

- 2.9 A robust consultation procedure, therefore, allows for greater transparency, accountability and inclusivity in the law-making process — key components of the rule of law.⁵⁹ Furthermore, consultation increases the evidence base for a particular policy or piece of legislation, inevitably improving the quality of the final product. As explained by former Treasury Solicitor and Permanent Secretary of the Government Legal Department, Sir Jonathan Jones KCB KC: “[p]olicy developed at speed and finalised at the last minute, with minimal consultation ...will tend to be worse policy — less well thought-through, more inconsistent, more prone to unintended gaps and anomalies”.⁶⁰
- 2.10 Despite these considerations, in recent years, the Government’s approach to consultation has fallen short of expectations. The Government has sought to push through significant policy developments with little outside scrutiny. The approach to the Illegal Migration Act 2023 demonstrates this point. As we will explain in the next chapter, the Act has significant implications for the UK’s asylum system and its commitment to its obligations under the European Convention on Human Rights and other international legal instruments (such as the Refugee Convention), yet it was not subject to any public consultation or pre-legislative scrutiny. By contrast, the last significant immigration legislation, the Nationality and Borders Act 2022, underwent a six-week public consultation,⁶¹ and was not introduced to Parliament for two months after the end of that process.
- 2.11 Furthermore, even when the Government does engage in consultation, all too often it appears to treat the process as a box-ticking exercise. Important in this regard is the fact that the Consultation Principles state that Government departments should not “consult for the sake of it” and should “not ask questions about issues on which [they] have a final view”.⁶² A pertinent example is the way in which the Government sought to undertake human rights reform prior to shelving their plans more recently. In December 2020, the Government established the Independent Human Rights Act Review (“IHRAR”), chaired by Sir Peter Gross, to examine the Human Rights Act (“HRA”) and how it has been operating in practice. The IHRAR Report was published in December 2021,⁶³ finding that the HRA was “generally working well” and making some modest recommendations for reform.⁶⁴
- 2.12 Despite this, the Government simultaneously published a consultation with proposals that went far beyond the recommendations in the IHRAR Report. Sir Peter Gross said that the Ministry of Justice consultation “does not respond to [IHRAR], is not grounded in anything even approximating the exercise we conducted, but nevertheless asserts that the Human Rights Act is not working well”.⁶⁵ Effectively ignoring the independent evidence-based review, the Government proposed to scrap the HRA and replace it with a new ‘Bill of Rights’.

⁵⁸ Cabinet Office, ‘*Consultation Principles 2018*’, (2018), p. 1.

⁵⁹ Venice Commission of the Council of Europe, ‘*Rule of Law Checklist*’, (2016), p. 21.

⁶⁰ J. Jones KCB KC, ‘*Remarks to the Statute Law Society (edited) The Rule of Law and Subordinate Legislation*’, (UCL, 2021), p. 4.

⁶¹ The Home Office, ‘*New Plan for Immigration*’, (2021).

⁶² Cabinet Office, ‘*Consultation Principles 2018*’, (2018), p. 1.

⁶³ ‘*The Independent Human Rights Act Review*’, (2021).

⁶⁴ J. Rozenberg, ‘*Raab’s reforms under attack*’, (A Lawyer Writes, 31 March 2022).

⁶⁵ *ibid.*

- 2.13 This consultation received 12,000 responses.⁶⁶ It is notable that there were high levels of responses against the Government’s proposals, including 90% who opposed a permission test, 90% who opposed changes to section 3 HRA and 80% who preferred no change to the deportation test.⁶⁷ Nevertheless, the Government completely ignored the majority of these views, publishing its response less than two months after the Consultation had closed and introducing the Bill of Rights Bill to Parliament 10 days after that.
- 2.14 The way in which the Government went about such a fundamental constitutional change did not demonstrate a desire to be evidence-led. Fortunately, the new Lord Chancellor and Secretary of State for Justice, Alex Chalk MP has confirmed that the Government are now not intending to proceed with the Bill of Rights Bill. However, if the Government had followed the evidence of its independent review and public consultations, it may have realised sooner that the legislation was unworkable and unnecessary. This was no way to attempt to legislate in an area which has such significant implications for the rule of law.
- 2.15 Finally, when consultations are undertaken, they should be given adequate time to allow for the submission of views and evidence. An example of this was the Government’s approach to consultation regarding the draft revised Code of Practice issued pursuant to the Covert Human Intelligence Sources (Criminal Conduct) Act 2021. The eight-week consultation was launched on 13 December 2021, right before the Christmas holiday and at the height of disruption caused by the Omicron COVID-19 variant. This was further compounded by a lack of proactive promotion of the consultation — several key stakeholders were not made aware of its existence, including JUSTICE. We raised these concerns in a letter to the former Minister for Security and Borders, calling on the Home Office to reopen the Consultation and to “*afford it sufficient time to gather the appropriate range of views and expertise that it deserves*”.⁶⁸ In the end, the Consultation received a mere 10 responses.⁶⁹
- 2.16 Interestingly, until 2016, the Government’s Consultation Principles mentioned that “*12 weeks or more*” might be an appropriate consultation period for “*new and contentious policy*”.⁷⁰ In 2016, reference to a specific timeframe was deleted, opting instead to retain a vague commitment that “*consultations should last for a proportionate amount of time*”.⁷¹

Pre-legislative scrutiny

- 2.17 Once the Government has settled on its policy in a particular area, it may choose to undergo pre-legislative scrutiny (“PLS”) of the proposed legislation. This involves the “*detailed examination of an early draft of a Bill that is done by a parliamentary select committee before the final version is drawn up by the Government*”.⁷² Again, from a rule of law perspective, undertaking pre-legislative scrutiny means that it is more likely that any potential gaps in the legislation are addressed and

⁶⁶ UK Parliament, ‘*Bill of Rights: Question for Ministry of Justice*’ (6 June 2022).

⁶⁷ Ministry of Justice, ‘*Human Rights Act Reform: A Modern Bill of Rights – Consultation Response*’ (June 2022).

⁶⁸ JUSTICE and the Centre for Women’s Justice, ‘*Letter to the Rt Hon. Damian Hinds MP regarding the CHIS Draft Code of Conduct Consultation*’, (2022), p.3. On 28 March and 4 April 2022, the Home Office responded, refusing to reopen the consultation but inviting JUSTICE to provide additional comments by 11 April 2022.

⁶⁹ Home Office, ‘*Government response to consultation on the draft revised Covert Human Intelligence Source code of practice*’, (2022)

⁷⁰ Cabinet Office, ‘*Consultation Principles*’, (2013), p. 2.

⁷¹ Cabinet Office, ‘*Consultation Principles*’, (2016), p. 1.

⁷² UK Parliament, ‘*Pre-legislative scrutiny*’.

unintended consequences are ironed out before the Bill takes its final form.⁷³ It also gives stakeholders ample opportunity to voice any concerns with the Bill and suggest amendments whilst the Bill is still malleable.⁷⁴ As such, pre-legislative scrutiny will likely improve the quality of legislation and introduce greater accountability into the legislative process, both of which will enhance public confidence in the final product.

2.18 The Government states in the Cabinet Office Guide that it “*is committed to, wherever possible, publishing bills in draft for pre-legislative scrutiny*”.⁷⁵ Across successive governments, however, there has been a notable and “*persistent lack of... uptake*”.⁷⁶ A 2022 Report by the Institute for Government and the Bennett Institute explains that:

*“Only a handful of bills are put to PLS in each parliamentary session. Just 53 since June 2007 have undergone PLS.”*⁷⁷

2.19 There is no clear trend, over time, with regard to the use of PLS; its uptake has been “*sporadic*”.⁷⁸ Nevertheless, the report does point out that “*Boris Johnson made minimal use of PLS*” having published no bills in draft until the 2021–22 parliamentary session, when PLS was conducted on two bills (still well below the average across all parliamentary sessions since 1997 of five Bills per session).⁷⁹

2.20 Whilst it may not be feasible to suggest that all Bills are subject to pre-legislative scrutiny, in our view, the case for PLS is especially strong for Bills with significant constitutional implications, and for those that were not in the Government’s manifesto for the reasons outlined above. Nevertheless, where PLS has been undertaken, it has “*largely been limited to non-partisan bills*”.⁸⁰ Legislation like the Public Order Act 2023 and the Illegal Migration Act 2023, both of which undoubtedly contain a range of problematic and controversial measures, not least with respect to the UK’s

⁷³ As the Select Committee on the Constitution explain, pre-legislative scrutiny, offers a number of benefits that are relevant to the rule of law. For example: “*pre-legislative scrutiny of draft legislation by parliamentary committees has proven effective at improving such legislation; [and] the reports published and evidence taken by pre-legislative committees contribute to parliamentarians’ understanding of the legislation and enhances the quality of scrutiny during the formal legislative process*”. Select Committee on the Constitution, ‘*4th Report of Session 2017–19 HL Paper 27 The Legislative Process: Preparing Legislation for Parliament*’, (2017), p. 21.

⁷⁴ As Lord Anderson explains, by the time that a Bill reaches the Committee stage in the legislative process, the Government has already tied itself to the mast of the Bill. As such, it is likely far more difficult to secure walk backs from the Government on its promises. British Institute of International and Comparative Law, ‘*The Form of Legislation and the Rule of Law*’, (2023). A similar point was made in a 2022 report published by the Institute for Government and Bennett Institute: “*It is difficult for parliamentarians to amend a bill once it has been introduced into parliament. Government defeats on amendments are rare, and the threshold for government concessions is high. Amendments require further political sign-off, analysis and drafting capacity, which from the government’s point of view can add unwanted time and complexity to a bill’s passage. While this may be understandable, the attitude limits parliament’s ability to influence the content of legislation, beyond what the government has set out in the original bill.*” J. Sargeant and J. Pannell, ‘*The legislative process: how to empower Parliament*’, (2022), p. 5.

⁷⁵ Cabinet Office, ‘*Guide to Making Legislation*’, (2022), p. 166.

⁷⁶ J. Sargeant and J. Pannell, ‘*The legislative process: how to empower Parliament*’, (Institute for Government, 2022), p. 6.

⁷⁷ *ibid*, p. 25.

⁷⁸ *ibid*, p. 37.

⁷⁹ The report explains that the lack of PLS until the 2021–22 session might be down to Brexit and the Pandemic. Nevertheless, this does not explain its minimal use during the 2021–22 session itself. J. Sargeant and J. Pannell, ‘*The legislative process: how to empower Parliament*’, (Institute for Government, 2022), p. 37.

⁸⁰ J. Sargeant and J. Pannell, ‘*The legislative process: how to empower Parliament*’, (Institute for Government, 2022), p. 25.

compliance with international human rights standards, did not have the chance to undergo PLS. In fact, it is quite the opposite for the latter Act, which raced through Parliament at breakneck speed.⁸¹

Post-legislative scrutiny

2.21 Royal Assent need not represent the end of the process of legislative scrutiny. Indeed, Parliament can undertake what is called ‘post-legislative scrutiny’ in order to determine “*whether... laws are working as intended and propose possible solutions where they are not*”.⁸² Extensive research undertaken by Thomas Caygill and the Westminster Foundation for Democracy, however, reveals a significant post-legislative scrutiny gap.

2.22 Since 2008, Government departments have been responsible for producing post-legislative memoranda for Acts relevant to their respective responsibilities, three to five years following Royal Assent.⁸³ The idea is that the memoranda will be submitted to the relevant House of Commons Departmental Select Committee, which will decide whether it should undertake a more comprehensive post-legislative inquiry into the Act. In the period between 2008–2019, however, only 91 memoranda were published, which is “*some way below the amount of legislation that went on to receive royal assent in the same time period*”,⁸⁴ namely 374 Acts of Parliament.⁸⁵ Despite there having been some enthusiasm for the process early on, between 2012–2019, the number of memoranda produced steadily decreased “*to single figures each year*”.⁸⁶ As the Westminster Foundation for Democracy notes, “*this decline in publishing may mean committees are not receiving as many prompts to undertake [post-legislative scrutiny] as they would usually receive.*”⁸⁷

2.23 A second sticking point, however, appears to be the number of memoranda that result in full, post-legislative inquiries by Parliamentary committees. Between 2008 and 2019, for example, only 23 full, post-legislative inquiries took place in Parliament.⁸⁸ Furthermore, certain committees appear to be more active than others when it comes to post-legislative scrutiny. As Caygill points out, between 2008 and 2019, the Home Office published 18 post-legislative memoranda. Yet, the Home Affairs Committee only undertook one post-legislative inquiry in the decade preceding 2017.⁸⁹

⁸¹ As Dr White from the Institute for Government notes: “*Less than a decade ago, expectations of the scrutiny that a major policy bill of this sort would ... were radically different. It was normal for this sort of legislation to be considered over a period of weeks with parliamentarians genuinely engaged in the detail of what was proposed: the Criminal Justice and Immigration Act 2008 underwent detailed scrutiny in 24 committee sittings, the immigration Act 2014 had 11 committee sittings and received 66 pieces of written evidence and the Immigration Act 2016 had 15 committee sessions and received 55 written pieces of evidence.*” Institute for Government, ‘*Illegal Migration Act Highlights how Expectations of Legislative Scrutiny Have Plummeted*’, (2023).

⁸² J. Sargeant and J. Pannell, ‘*The legislative process: how to empower Parliament*’, (Institute for Government, 2022), p. 31.

⁸³ Then Leader of the House of Commons, Harriet Harman MP, announced by way of Written Ministerial Statement this “*new process for post-legislative scrutiny*” with Committees of the House of Commons providing a “*“reality check” of new laws after three to five years*”. HC Deb, 20 Mar 2008, Vol 473, Col 74WS. 6 The full approach was detailed in the Government’s response to the Law Commission Report on Post-legislative Scrutiny, published simultaneously: [here](#).

⁸⁴ T. Caygill, ‘*The UK post-legislative scrutiny gap*’, (2020) 26(3) The Journal of Legislative Studies 387, p. 397.

⁸⁵ The number of UK Public General Acts passed between 2008 and 2019 are as follows: 2008 – 33; 2009 – 27; 2010 – 41; 2011 – 25; 2012 – 23; 2013 – 33; 2014 – 30; 2015 – 37; 2016 – 25; 2017 – 35; 2018 – 34; 2019 – 31. See [here](#).

⁸⁶ With the exception of 2014, when 11 were produced. The highest years were 2011 and 2012, when 19 and 20 memoranda were produced, respectively. T. Caygill, ‘*The UK post-legislative scrutiny gap*’, (2020) 26(3) The Journal of Legislative Studies 387, p. 397. Caygill also notes that perhaps this is not surprising, given that in that period (i.e., between 2011 and 2014) it was Labour legislation” that was “*within the time-frame for post-legislative review.*” p.397. As such, he suggests that there might have been a bias in the selection of legislation for post-legislative review.

⁸⁷ T. Caygill, ‘*Post-legislative scrutiny in the UK Parliament*’, (Westminster Foundation for Democracy, 2021), p. 7.

⁸⁸ *ibid*, p. 12.

⁸⁹ T. Caygill, ‘*The UK post-legislative scrutiny gap*’, (2020) 26(3) The Journal of Legislative Studies 387, pp. 391 and 396.

Although not every piece of legislation will require a full-blown post-legislative inquiry, this significant discrepancy suggests that there is also a problem with committees picking up memoranda published by Governmental departments for post-legislative review.⁹⁰

2.24 Beyond Parliament, another body that is tasked with a more general review of the state of the law is the Law Commission. It is the statutory body that makes recommendations to the Government for reform of the law to ensure that it is fair, modern, simple and cost-effective.⁹¹ The Lord Chancellor is under a statutory obligation to report annually on the implementation of the Law Commission's proposals.⁹² However, the last report from the Lord Chancellor was published in July 2018.⁹³ In combination with the lack of enthusiasm for publishing post-legislative memoranda, what these trends appear to suggest is a general unwillingness, by successive Governments, to engage in an ongoing process of monitoring and continually developing legislation post-enactment.

2.25 Our work on Behavioural Control Orders (civil orders that impose conditions designed to prevent a particular outcome, and that result in a criminal conviction if breached), has highlighted the dangers associated with a failure to monitor and evaluate the impact and effectiveness of existing legislation.⁹⁴ For example, whilst there has been an increase in their use since the Anti-Social Behaviour Order was introduced in 1998, little to no review has been conducted to assess their on recipients, nor the general effectiveness of the model as a means to prevent crime and protect victims.

2.26 This is particularly problematic given that the imposition of a Behavioural Control Order necessitates an interference with a recipient's rights under Article 5 ECHR (Right to liberty and security) and Article 8 ECHR (Right to respect for private and family life), due to the way in which they impose restrictions upon a recipient's daily life. Behavioural Control Orders have also been criticised for making it easier to criminalise a recipient, via a civil process that lacks the safeguards implicit within the criminal law.

2.27 Given the obvious human rights implications, the use of Behavioural Control Orders within the justice system should be monitored closely. Unfortunately, our Working Party identified a failure to do so. For example, whilst some orders are introduced by way of a pilot, this is not true of all types of order. Even where pilots have been commenced, difficulties in assessing the effectiveness of Behavioural Control Orders due to their subjective focus on "prevention" and "protection", means that are not always conclusive and/or, it is not necessarily possible to assess the impact of the orders, in isolation from other interventions.⁹⁵ Evidence provided to the Working Party has suggested that some pilots have been compromised due to the failure to set evaluative criteria in advance of them being commenced. Others have struggled to engage with recipients meaning that they do not provide a comprehensive picture. Furthermore, data collection and sharing across the Behavioural Control Order regime is poor, exacerbating inconsistent enforcement practices and often leading to situations where victims are left unprotected when orders are breached. The Working Party was also made aware that some Behavioural Control Orders are being enforced in

⁹⁰ It is a far less systematic process for Committees. Unlike Government Departments, who are expected to produce post-legislative memoranda, the decision to initiate a post-legislative inquiry is discretionary for committees. It should also be noted that committees do not need memoranda in order to undertake post-legislative scrutiny.

⁹¹ Law Commission, '*Welcome*'.

⁹² Law Commission Act 2009, s. 1.

⁹³ Ministry of Justice, '*Report on the implementation of Law Commission proposals: January 2017 to January 2018*', (2018).

⁹⁴ JUSTICE, '*The function and operation of Behavioural Control Orders*' (2023).

⁹⁵ L. Kelly, J. R. Adler, M. A. H. Horvath, J. Lovett, M. Coulson, D. Kernohan and M. Gray. '*Evaluation of the Pilot of Domestic Violence Protection Orders*', (Home Office, 2013).

ways that disproportionately impact certain populations within society, including those who are experiencing mental health challenges, are experiencing homeless and/ or are from racially minoritised communities.

Skeleton legislation and Statutory Instruments – secondary legislation

2.28 Of course, delegating legislative power is an essential part of the modern democratic State. The growth in bureaucracy, as the UK transitioned to an industrialised, welfare state, meant that such delegation was “inevitable”.⁹⁶ Indeed, “*Parliament and Government would grind to a halt if there were not built into our constitution an adequate system of Executive legislation*”.⁹⁷ This is because the legislature has neither the ability nor the time to devote to all the nuts and bolts of the tasks under its remit. In delegating legislative power to deal with the “*minor, technical and mundane*”⁹⁸ aspects of implementation, therefore, Parliament can focus on issues of major policy significance.

2.29 The problem is that, increasingly, delegated powers are “*drafted in broad and poorly-defined language*”⁹⁹ — a far cry from the Venice Commission’s requirement that delegated legislative powers are explicitly defined in their scope.¹⁰⁰ These broad powers have allowed successive governments to utilise secondary legislation to attend to issues of policy, rather than mere technical matters. Far too often, primary legislation is skeletal, meaning that it is short on substance and is “*left to be filled up in all its substantial and material particulars*”¹⁰¹ by a piece of secondary legislation. In the words of the Bar Council, skeleton bills are “*simply shorthand for [the Government saying] ‘we have not thought through what we intend to do’*”¹⁰², or are akin to Parliament signing a “*legislative blank cheque*”,¹⁰³ in the view of the SLSC. One example is the Childcare Act 2016, which aimed to provide childcare for parents who work.¹⁰⁴ The Act itself contained just eight brief sections and was denounced as being “*flawed*”, containing “*virtually nothing of substance beyond the vague mission statement in clause 1*”.¹⁰⁵ Details of how the Act would actually affect the lives of members of the public were to be left to secondary legislation.

2.30 The key problem with the use of secondary legislation to introduce substantive policy changes is that, while primary legislation is afforded rigorous parliamentary scrutiny, the scrutiny of secondary legislation is “*far less robust*.”¹⁰⁶ Even though parliamentary scrutiny of Statutory Instruments

⁹⁶ M. Taggart, ‘*From ‘Parliamentary Powers’ to Privatization: The History of Delegated Legislation in the Twentieth Century*’, (2005) 55(3) University of Toronto Law Journal 575, p. 585.

⁹⁷ Joint Committee on Statutory Instruments, ‘*First Special Report (1977-78)*’, para. 37.

⁹⁸ Select Committee on the Constitution Committee, ‘*Corrected oral evidence: The Legislative Process*’, Q143, response of Rt Hon. Baroness Smith of Basildon, Shadow Leader of the House of Lords.

⁹⁹ Select Committee on the Constitution, ‘*9th Report of Session 2015-16*’, (2016), para. 7.

¹⁰⁰ Venice Commission of the Council of Europe, ‘*Rule of Law Checklist*’, (2016), p. 12.

¹⁰¹ *Institute of Patent Agents v Lockwood* [1894] AC 347 (HL).

¹⁰² Select Committee on the Constitution, ‘*16th Report of Session 2017–19. The Legislative Process: The Delegation of Powers*’, (2018), para. 55, citing the written evidence of the Bar Council.

¹⁰³ House of Lords Secondary Legislation Scrutiny Committee, ‘*Government by Diktat: a Call to Return Power to Parliament*’ (2021), p. 13.

¹⁰⁴ Other examples include the Haulage Permits and Trailer Registration Act 2018 and the Medicines and Medical Devices Act 2021. See Letter to Rt Hon. Michael Gove MP and Rt Hon. Jacob Rees-Mogg from Lord Hodgson, Rt Hon. Baroness Taylor and Rt Hon. Lord Blencathra, ‘*Skeleton bills and skeleton provision*’, (2020), p. 3.

¹⁰⁵ Delegated Powers and Regulatory Reform Committee, ‘*Second Report*’, 2015, para. 8.

¹⁰⁶ Delegated Powers and Regulatory Reform Committee, ‘*12th Report of Session 2021–22. Democracy Denied: The urgent need to rebalance power*’, (2021), p. 28.

("SIs") is available in theory, it will most likely be "*perfunctory: instead of weeks... of consideration by committee and in the various stages of the legislative process*"¹⁰⁷ that occurs with primary legislation, secondary legislation does not undergo line-by-line examination in the same way. The two main procedures for scrutiny of SIs are the negative and affirmative procedures, though variations of each exist. The former will only invalidate a statutory instrument in the case that either House passes a motion for annulment. The latter procedure is more stringent, in that it requires parliamentary approval before a statutory instrument can come into force. According to a study by the Institute for Government, "*around 75%*" of SIs are subject to the less stringent, negative procedure.¹⁰⁸ Perhaps this would be less problematic if such a procedure was preserved for highly technical matters. Yet, even matters of significant policy concern, such as the reduction of magistrates' sentencing powers,¹⁰⁹ have been subject to the negative resolution procedure.

2.31 Furthermore, if SIs are debated, which they most often are not, they will only be debated once in each House and often allocated limited time.¹¹⁰ Lord Judge has commented that "*Regulations put before the Commons are given the level of consideration which it would be an exaggeration to describe as cursory*";¹¹¹ meanwhile research by the Hansard Society found that in 2013-2014 the average length of debate on a piece of secondary legislation was 26 minutes.¹¹²

2.32 Furthermore, the scrutiny procedures for SIs typically will not allow for their amendment. As such, each House has "*an 'all or nothing' choice — to accept or reject the legislation in its entirety, even if members of either House may wish to object only to parts of an instrument*".¹¹³

2.33 Ultimately, rejection is rare. Since 1979, not a single SI has been rejected by the House of Commons. A mere 17 SIs have been rejected by either House since 1950,¹¹⁴ leading to the conclusion that Parliament is "*virtually habituated to approve them*".¹¹⁵ For context, since 2010, the number of SIs that have entered into force each year has ranged from 1243 to 3481.¹¹⁶ To emphasise the sheer volume of secondary legislation that passes into law, Lord Judge explains that "*[b]etween 2005 until 2009, in every single year, between 11,000 and 13,000 pages of statutory instruments came in to force*".¹¹⁷ It is difficult therefore *not* to conclude that the Government will face little resistance from Parliament. It is such lack of scrutiny which has led many to fear abuse of the process by government, and to be concerned that "*the delegation of power is seen by at least*

¹⁰⁷ R. Gordon KC, '*Why Henry VIII Clauses Should be Consigned to the Dustbin of History*', (2015), p. 2.

¹⁰⁸ J. Marshall, '*Secondary Legislation: how is it scrutinised?*', (Institute For Government, 2020). NB: Hansard Society 65% figure for 'made negative' procedure only, a form of negative procedure. D. Vangimalla and T. West, '*Living on a prayer (motion): How do parliamentarians debate 'made negative' statutory instruments*' (Hansard Society, 2022). See also: JUSTICE, '*Human Rights Act Reform: A dangerous or welcome change?*', (12 January 2023).

¹⁰⁹ The Sentencing Act 2020 (Magistrates' Court Sentencing Powers) (Amendment) Regulations 2023.

¹¹⁰ Delegated Powers and Regulatory Reform Committee, '*12th Report of Session 2021–22. Democracy Denied: The urgent need to rebalance power*', (2021), p. 11.

¹¹¹ Lord Judge, '*A Judge's View on the Rule of Law*' (Annual Bingham Lecture London, 3 May 2017).

¹¹² Ruth Fox and Joel Blackwell, '*Devil is in the Detail: Parliament and Delegated Legislation*' (Hansard Society 2014), p. 80.

¹¹³ Secondary Legislation Scrutiny Committee, '*Government by Diktat: a Call to Return Power to Parliament*' (2021), p. 10.

¹¹⁴ The Constitution Committee, '*Delegated Legislation and Parliament: A response to the Strathclyde Review*', (2016). The figure has not changed since publication of this response.

¹¹⁵ The Rt Hon. Lord Judge, '*Ceding Power to the Executive: the Resurrection of Henry VIII*', (2016), p. 12.

¹¹⁶ Data available [here](#).

¹¹⁷ Lord Judge, '*Toulson Law Lecture 2022, University of Surrey*', (YouTube, 2022).

*some in the Government as a matter of what powers they can get past Parliament.*¹¹⁸ This has in recent years led to the Delegated Powers and Regulatory Reform Committee (“DPRRC”) calling out such excessive use of delegated powers and legislation as “*an abuse of Parliament and an abuse of democracy*”.¹¹⁹

2.34 Particularly significant was the Government’s response to the House of Lords’ decision to delay the passage of an SI in 2015.¹²⁰ Rather than treating this as a proper, albeit rare, instance of legislative scrutiny of executive powers, it prompted the Government to announce the Strathclyde Review to “*examine how to protect the ability of elected Governments to secure their business in Parliament*”.¹²¹ It suggested three options for such reform. The Review’s preferred approach would have created “*a new procedure — set out in statute — allowing the Lords to invite the Commons to think again when a disagreement exists*” and if the Commons votes again to approve the SI, then the Commons overrides the decision of the Lords.¹²² While none of the potential reforms were ultimately pursued by the Government, its attitude was clear:

*“We do not believe that it is something that can remain unchanged if the House of Lords seeks to vote against SIs approved by the House of Commons when there is no mechanism for the will of the elected House to prevail. We must, therefore, keep the situation under review and remain prepared to act...”*¹²³

2.35 In our view, this represents a failure on the part of the Government to understand the risks to the rule of law associated with the habitual approval of SIs. As the Constitution Committee pointed out at the time, the Government misdiagnosed the issue that arises out of delegated legislation as that of a battle between the two Houses of Parliament, rather than one between the executive and Parliament. Furthermore, as Lord Hodgson has argued, the Review has had a chilling effect such that the House of Lords’ continued role in providing scrutiny for secondary legislation will *de facto* be curtailed, even if not formally. As Lord Hodgson stated, “*when the alternative is constitutional nuclear warfare, it is hardly a fair and open-minded decision [whether to approve or reject SIs]*”.¹²⁴

¹¹⁸ Select Committee on the Constitution, ‘*Select Committee on the Constitution: The Legislative Process: The Delegation of Powers*’, (2018), para. 15.

¹¹⁹ House of Lords Select Committee on Delegated Powers and Regulatory Reform, ‘*Democracy Denied? The urgent need to rebalance power between Parliament and the Executive*’, (2021), p.3. Professor Meg Russell of the UCL Constitution Unit takes a softer view, arguing that “*scrutiny processes undoubtedly need tightening up. But even here, ministers may occasionally climb down and withdraw instruments in the face of private back-room resistance. On primary legislation, recent events for example over the Levelling up and Regeneration Bill, or the Online Safety Bill, illustrate how the government often amends its own legislation to avoid humiliating defeats*”. M. Russell, ‘*Lord Judge’s warnings about executive overreach: overstated, understated, or just right?*’, (Policy Exchange, 2023).

¹²⁰ Tax Credits (Income Thresholds and Determination of Rates) (Amendment) Regulations 2015.

¹²¹ ‘*Strathclyde Review: Secondary legislation and the primacy of the House of Commons*’, (2015), p. 25.

¹²² *ibid*, p. 5.

¹²³ ‘*Government Response to the Strathclyde Review: Secondary legislation and the primacy of the House of Commons and the related Select Committee Reports*’, (2016), p. 1.

¹²⁴ HL Deb, 12 January 2023, Vol 826, Col. 1538.

- 2.36 Admittedly, the use of skeleton legislation with substantial delegated powers is not a new concern.¹²⁵ Various committees have drawn attention to the issue across successive governments.¹²⁶ Indeed, in September 2020, the Chairs of three Committees involved in the scrutiny of legislation became so concerned with these trends that they wrote a letter to then Leader of the House of Commons, Jacob Rees-Mogg, and Minister for the Cabinet Office, Michael Gove, citing the “*growing tendency of the Government to introduce skeleton bills, in which broad delegated powers are sought in lieu of policy detail*”.¹²⁷ Whilst recognising that the challenges of Brexit and COVID-19 may have increased the need for such legislation, they noted that the number of skeleton bills with substantial delegations of power grew “*markedly*”¹²⁸ in the 2017–19 and 2019–21 parliamentary sessions. They explained that Parliament was essentially “*being asked to pass legislation without knowing how the powers conferred may be exercised by ministers and so without knowing what impact the legislation may have on members of the public affected by it*”.¹²⁹
- 2.37 In coordinated thematic reports published by the DPRRC and the SLSC in 2021, it was argued that Brexit and the Pandemic “*did not mark the beginning of a shift*”¹³⁰ towards executive law-making, but instead accelerated existing trends to such a critical point that rebalancing in favour of parliamentary control of law-making has now become a necessity. The DPRRC, having tracked the evolution of the use of delegated powers over the past 90 years, concluded that there had been a significant “*worsening over the last 20 years*”.¹³¹
- 2.38 Since the publication of these two reports, little has changed. This is despite the reports having been met with “*cross-party... reasoned and unanimous approval*”.¹³² In its responses to the reports the Government rejected almost all of the recommendations for reform put forward by both committees.¹³³ In fact, the Government was seemingly reticent to admit that there was any significant problem at all, arguing that, amongst other things: there is no inherent democratic deficit in skeleton legislation; it is sometimes appropriate for a Bill to provide for a significant delegation of powers; and that it was not the case that laws are passed with little or no scrutiny. In Lord Judge’s view, the Government’s responses demonstrate a lack of understanding regarding the urgency of the issues raised, noting that the Committees were hitting their heads “*against a brick wall*”¹³⁴ in trying to secure meaningful reforms from the Government. Indeed, the latter half of the 2021/2022

¹²⁵ In a recent symposium, Lord Judge argued, in reference to the expansion of secondary legislation during the pandemic that “*we must not fool ourselves that this was either a new or a temporary phenomenon, or confined to emergency situations.*” Lord Judge, ‘*The King’s Prerogative, 1622; the Prime Minister’s Prerogative, 2022*’, (2023).

¹²⁶ See, for example: Select Committee on the Constitution, ‘*16th Report of Session 2017–19. The Legislative Process: The Delegation of Powers*’, (2018); Secondary Legislation Scrutiny Committee, ‘*Government by Diktat: a Call to Return Power to Parliament*’ (2021); Delegated Powers and Regulatory Reform Committee, ‘*12th Report of Session 2021–22. Democracy Denied: The urgent need to rebalance power*’, (2021). See also, J. Sargeant and J. Pannell, ‘*The legislative process: how to empower Parliament*’, (Institute for Government, 2022) p. 5.

¹²⁷ Letter to Rt Hon. Michael Gove MP and Rt Hon. Jacob Rees-Mogg from Lord Hodgson, Rt Hon. Baroness Taylor and Rt Hon. Lord Blencathra, ‘*Skeleton bills and skeleton provision*’, (2020), p. 1.

¹²⁸ *ibid*, p. 3.

¹²⁹ *ibid*, p. 1.

¹³⁰ Delegated Powers and Regulatory Reform Committee, ‘*12th Report of Session 2021–22. Democracy Denied: The urgent need to rebalance power*’, (2021), p. 7.

¹³¹ Lord Blencathra, *HL Deb*, 12 Jan 2023, Vol 826, Col. 1532.

¹³² Lord Judge, ‘*Response*’, (Policy Exchange, 17 March 2023).

¹³³ The Rt Hon. Jacob Rees-Mogg M.P., ‘*Government Response to the Delegated Powers and Regulatory Reform Committee’s Twelfth Report of Session 2021–22 ‘Democracy Denied? The Urgent Need to Rebalance Power Between Parliament and the Executive*’, (2022); The Rt Hon. Jacob Rees-Mogg M.P., ‘*Government Response to the Secondary Legislation Scrutiny Committee’s Twentieth Report of Session 2021–22 ‘Government by Diktat: A Call to Return Power to Parliament*’, (2022).

¹³⁴ Lord Judge, *HL Deb*, 12 May 2022, Vol 822, Col.129.

Session showed no changes in the Government’s approach to the law-making process. The DPRRC remarked that the Bills introduced in the latter half “reinforced”¹³⁵ the findings of their earlier thematic report, and the SLSC highlighted that even as “the need to take emergency action [due to the Pandemic] receded”, it continued to see “legislative practices that... restricted the ability of Parliament to scrutinise legislation effectively”.¹³⁶

2.39 It is sometimes argued that there is little harm in the use of secondary legislation. In a recent Symposium, Sir Stephen Laws remarked, for example, that

“[i]t is a mistake to assume that governments ever seek powers to legislate by secondary legislation in order to introduce politically salient reforms with only limited scrutiny. Most rational politicians only do controversial things because they think they will be beneficial and they want to take credit for the benefits.”¹³⁷

2.40 Yet recent secondary legislation appears intended to “introduce politically salient reforms with only limited scrutiny”. For example, in June 2023, the Government introduced the Serious Disruption to the Life of the Community Regulations.¹³⁸ These regulations further and considerably restrict the right to protest by amending the Public Order Act 2023 to lower the threshold for imposing conditions on protests.¹³⁹ The measures introduced in these regulations were previously dismissed

¹³⁵ Delegated Powers and Regulatory Reform Committee, ‘*End of Session 2021–2022 Report*’, (2022) p. 10.

¹³⁶ “These included:

- Instruments being brought into effect immediately or almost immediately without due cause.
- Making permanent certain changes, without adequate explanation, which were introduced on a temporary basis under the pretext of an emergency.
- Failing to take into account concerns raised by the House.
- Failing to send instruments to the SLSC for scrutiny.
- A legislative backlog at the Department for Transport.
- A loss of parliamentary oversight.”

Secondary Legislation Scrutiny Committee, ‘*What Next?: The Growing Imbalance between Parliament and the Executive: End of Session Report 2021–22*’, (2022), p.5. Note that non-Brexit/Pandemic-related secondary legislation now forms the majority (75%) of the SLSC’s scrutiny activity. Baroness Butler-Sloss recently raised similar concerns in an interview with Lord McFall of Alcluith. She remarked “that parliament was increasingly being denied its “proper say” in legislation. She referred to “bills that say the minister will make regulations — and you don’t actually know what the regulations will be”. See coverage by J. Rozenberg, ‘*Holding ministers to account*’, (A Lawyer Writes, 2023). The full interview can be found [here](#).

¹³⁷ S. Laws, ‘*Legislative and executive function: tensions and balance*’, (Policy Exchange, 2023). His view is that: “The most common reason for seeking wide delegated powers is ... that the government is unable to achieve a consensus on a settled policy in time to meet the legislative timetable for implementing it.”

¹³⁸ The Public Order Act 1986 (Serious Disruption to the Life of the Community) Regulations 2023.

¹³⁹ To include any protest that may, “by way of physical obstruction” result in:

- the prevention of, or a hindrance that is more than minor to, the carrying out of day-to-day activities (including in particular the making of a journey),
- the prevention of, or a delay that is more than minor to, the delivery of a time-sensitive product to consumers of that product, or
- the prevention of, or a disruption that is more than minor to, access to any essential goods or any essential service.

Section 3(2)(a) Amendments to section 14 of the Public Order Act 1986 The Public Order Act 1986 (Serious Disruption to the Life of the Community) Regulations 2023.

as “unworkable” by and “disproportionate” by a number of police officers,¹⁴⁰ and subsequently rejected by Parliament during the legislative process.

2.41 Yet, between their rejection in the then Public Order Bill and their coming into force as regulations, “the Home Office has not provided any new arguments as to why they should now be approved.”¹⁴¹ Furthermore, the House of Lords SLSC expressed: “concerns that the explanatory memorandum (EM) does not mention the defeat during the debates on the bill. The EM should acknowledge and address significant concerns expressed about the policy”.¹⁴²

2.42 Moreover, the ‘re-consultation’ process mostly relied on the fact that the measures had previously been consulted on, yet without flagging any of the key concerns that had been raised. Another weakness in the ‘re-consultation’ process was that it was “confined to groups likely to support the measures”,¹⁴³ such as the police. According to the Government’s own Code of Practice on Consultation,¹⁴⁴ the Home Office should have consulted more broadly before bringing forward the proposals.

2.43 Two further examples are illustrative of the trends laid out below.

Retained EU Law (Revocation and Reform) Act 2023

2.44 The Retained EU Law (Revocation and Reform) Act 2023 (the “**REUL Act**”) is a prime example of skeletal legislation. As we stated in our briefing to the House of Lords at Committee Stage, we were “unaware of a more skeletal bill having been laid before Parliament”.¹⁴⁵ Indeed, the DPRRC labelled it as “hyper-skeletal”,¹⁴⁶ and the SLSC considered it to be “an extreme example of a skeleton bill”.¹⁴⁷ This is because the Act affects vast swathes of substantive law, including employment rights, environmental protections and consumer safety standards, yet was introduced containing almost nothing by way of substantive policy on the face of the Act.

2.45 Instead, the Act grants ministers the extremely broad power to revoke or reform these laws as they deem appropriate, with the only substantive restriction being that changes could “not increase the regulatory burden”.¹⁴⁸ “Burden” is defined widely in the Act,¹⁴⁹ and triggered significant concern from environmental and employment organisations, for whom “regulatory burdens” were in fact vital safeguards to ensure clean waters, safe habitats, and employment rights. The executive power over such large swathes of law, subject only to secondary legislative procedures, caused concern,

¹⁴⁰ “One senior police officer believed that banning orders would “unnecessarily curtail people’s democratic right to protest”. Another commented that a protest banning order is “a massive civil liberty infringement”. We also heard a view that “the proposal is a severe restriction on a person’s rights to protest and in reality, is unworkable” His Majesty’s Inspector of Constabulary and Fire & Rescue Services, *Getting the balance right? An inspection of how effectively the police deal with protests*, (March 2021), p. 137.

¹⁴¹ Secondary Legislation Scrutiny Committee, ‘*38th Report of Session 2022–23*’, (11 May 2023), p. 4.

¹⁴² *ibid.*

¹⁴³ *ibid.*

¹⁴⁴ HM Government, ‘*Code of Practice on Consultation*’, (July 2008).

¹⁴⁵ JUSTICE, ‘*Retained EU Law (Revocation and Reform) Bill, House of Lords: Response to marshalled list of amendments at Committee Stages — briefing 2 of 2*’, (2023), p. 8.

¹⁴⁶ Delegated Powers and Regulatory Reform Committee, ‘*Twenty Fifth Report: Retained EU Law (Revocation and Reform) Bill*’, (2023), para. 63.

¹⁴⁷ Secondary Legislation Scrutiny Committee, ‘*28th Report of Session 2022–23. Losing Control?: The Implications for Parliament of the Retained EU Law (Revocation and Reform) Bill*’, (2023), p.2.

¹⁴⁸ REUL Act, s. 14 (5).

¹⁴⁹ s. 14 (10).

as Sir Jonathan Jones KCB KC commented, it is “*a further step down [the] road’ towards the shift in power from Parliament to the executive*”.¹⁵⁰

2.46 Peers made several attempts to improve the scrutiny of such powers during the final stages of the Bill, including the option of a Commons Committee which could amend secondary legislation. However, all attempts were defeated in the Commons. The Act passed into law containing these ministerial powers subject to normal procedures, with no obligation for ministers to consult the public before reforming laws, and even without a clear picture of how many pieces of ‘retained EU law’ the Act could actually impact. The lack of transparency and legal certainty for parliamentarians and the public as to how those powers will be exercised and how the law might change, is a legislative scenario which is adverse to the rule of law.

2.47 It should be noted that the Government has both denied that the REUL Act constitutes “*framework legislation*” (another term for skeleton legislation) and argued that “*every effort has been made to ensure that the powers in the Bill are as narrow as possible*”.¹⁵¹

COVID-19 powers

2.48 Undoubtedly, the COVID-19 pandemic represented an exceptional emergency. At least in the initial stages of the crisis, the Government needed to act quickly and decisively, unhindered by excessive deliberation in order to save lives from a global, fast moving, and unknown threat. Nevertheless, the pandemic brought to the fore a number of concerning trends, particularly as it regards executive law-making and the resultant lack of scrutiny from Parliament.

2.49 Although the Government fast-tracked the Coronavirus Act 2020 through to passage in three parliamentary sitting days,¹⁵² the majority of the Government’s legal response to the pandemic took the form of secondary legislation, relying on powers delegated by the Public Health (Control of Disease) Act 1984. As Lord Judge highlighted in a 2022 speech, “[o]ver 500 SIs...were used to tackle the pandemic”.¹⁵³ Although the increasing use of delegated legislation is a trend that pre-dates the onset of the pandemic, as outlined above, the nature and scope of COVID-19-related regulations was unprecedented. Indeed, these regulations were the “*most restrictive peacetime laws*”,¹⁵⁴ granting the Government wide-ranging powers. These included powers to require individuals to wear a face covering on public transport, to stay at home, and to restrict the numbers of individuals who could attend family gatherings, such as funerals. Breach of COVID-19 Regulations was a criminal offence, resulting in the imposition of a Fixed Penalty Notice (“FPN”).

¹⁵⁰ Secondary Legislation Scrutiny Committee, ‘*28th Report of Session 2022–23. Losing Control?: The Implications for Parliament of the Retained EU Law (Revocation and Reform) Bill*’, (2023), p.6, citing the oral evidence given to the Committee by Sir Jonathan Jones on 22 November 2022.

¹⁵¹ Department for Energy Security & Net Zero, ‘*Government Response to the Select Committee on the Constitution Report - Retained EU Law (Revocation and Reform) Bill (13th Report of Session 2022– 23)*’, (2023), pp. 1–2.

¹⁵² It contained, amongst other things, “*temporary measures designed to increase the available health and social care workforce and to support frontline staff.*” Select Committee on the Constitution, ‘*COVID-19 and the use and scrutiny of emergency powers*’, (2021), p. 8.

¹⁵³ Lord Judge, ‘*Toulson Law Lecture 2022 | University of Surrey*’, (YouTube, 2022).

¹⁵⁴ R. Fox, M. Russel, J. Tomlinson, and R. Cormacain, ‘*The marginalisation of the House of Commons under Covid has been shocking: a year on, Parliament’s role must urgently be restored*’, (The Hansard Society, 2021).

The level of the penalty depended on the nature and severity of the breach.¹⁵⁵ From 27 March 2020 to 27 February 2022, 118,978 FPNs were issued in England and Wales.¹⁵⁶

2.50 The fear is that the extensive recourse to delegated legislation will not “fade again into the background... [i]t will remain the principal legislative vehicle for delivering the Government’s agenda in critical policy areas in the coming years”.¹⁵⁷ One of the key issues identified with the extensive use of secondary legislation in the Government’s COVID-19 response is that “parliamentary oversight of these significant policy decisions [was] limited”.¹⁵⁸ This was not simply a result of the sheer volume of SIs, but also due to the use of “fast-track legislative procedures”,¹⁵⁹ which severely restricted parliamentary scrutiny. According to the Hansard Society, of the 582 SIs laid before Parliament between January 2020 and March 2022, 537 were subject to scrutiny procedures that allowed the instrument to be made into law (that is, signed by the relevant minister) in advance of being laid before Parliament.¹⁶⁰ Of those 537, 66 also *entered into force* before the SI was even laid before Parliament.

2.51 This is an event that the Statutory Instruments Act 1946 considered would be exceptional,¹⁶¹ yet as the Joint Committee on Statutory Instruments argued in its 2021 Report on Rule of Law Themes from COVID-19 Regulations, this exceptional event became “commonplace” during the pandemic.¹⁶² Furthermore, looking specifically at SIs subject to the negative procedure, it is the convention that the SI will be laid before Parliament 21 days in advance of it entering into force. Throughout the Pandemic, this convention was breached over half of the time.¹⁶³

2.52 Of course, some of this would be expected in the early stages of the pandemic, when the Government was grasping the nature and scale of the crisis. Yet, as time pressed on, these legislative habits persisted, even where urgent measures were patently unnecessary.¹⁶⁴ Indeed, use of the urgent procedure under the Public Health Act 1984¹⁶⁵ became “the default means of law-making”¹⁶⁶.

¹⁵⁵ For example, see: Joint Committee on Human Rights, ‘*Chapter 2: The Government response to covid-19: fixed penalty notices*’, (2021).

¹⁵⁶ National Police Chiefs’ Council, ‘*Fixed Penalty Notices (FPNs) issued under COVID-19 emergency health regulations by police forces in England and Wales*’, (2022).

¹⁵⁷ The Hansard Society, ‘*Delegated Legislation the problems with the process*’, (2021), p. 5.

¹⁵⁸ Select Committee on the Constitution, ‘*COVID-19 and the use and scrutiny of emergency powers*’, (2021), p. 2.

¹⁵⁹ *ibid.*, p. 19.

¹⁶⁰ The Hansard Society, ‘*Coronavirus Statutory Instruments Dashboard, 2020–2022*’, (2022).

¹⁶¹ *ibid.*

¹⁶² The Joint Committee on Statutory Instruments, ‘*Rule of Law Themes from COVID-19 Regulations*’, (2021), p. 20.

¹⁶³ The Hansard Society, ‘*Coronavirus Statutory Instruments Dashboard, 2020–2022*’, (2022).

¹⁶⁴ The Select Committee on the Constitution remarked, for example: “... the regulations requiring the public to wear face coverings on public transport arguably did not need to be subject to the urgent procedure. The Government first advised the public to wear face masks on 11 May 2020. Face coverings then became mandatory in different public places under various sets of regulations made on 15 June, 24 July, 8 and 22 August. In each case, the use of the urgent procedure meant that the regulations were made before being laid before Parliament.” Select Committee on the Constitution, ‘*COVID-19 and the use and scrutiny of emergency powers*’, (2021), pp. 16–17.

¹⁶⁵ Under the Public Health (Control of Disease) Act 1984 Section 45R (2), the urgent procedure allows a statutory instrument to be made without a draft being laid before and approved by Parliament. The procedure can be used if the person making it is of the opinion that, by reason of urgency, it is necessary to make the order without a draft being so laid and approved.

¹⁶⁶ K. Lines, ‘*18 months of COVID-19 legislation in England: a rule of law analysis*’, (*The Constitution Unit*, 2021). The Joint Committee on Statutory Instruments made this same observation: “better knowledge of the virus and its impact has not been reflected in decreased reliance on last-minute legislation. ... in several cases, instruments were made on a Friday, came into force at some time during the weekend, and were laid the following Monday; or were made on a sitting day, came into force at

with its use not always being considered as “*justified*”,¹⁶⁷ in the words of the Select Committee on the Constitution. As Adam Wagner explains in his recent book, “... *worrying aspects of those first few weeks... [became] a pattern lasting two years, and even beyond.*”¹⁶⁸

Conclusion and recommendations

2.53 Scrutiny of legislation is essential to the rule of law, particularly in times of emergency: it provides both a crucial check on executive law-making powers and provides an extra layer of review to ensure the quality of the law is maintained.¹⁶⁹ Not only is the lack of scrutiny a barrier to the public’s understanding of what the law requires of them (the topic of Chapter 4) — but it flies in the face of the idea that Parliament has legislative authority.

2.54 Additionally, the trend towards less scrutiny of legislation is not democratic in another sense – it is unpopular. When asked whether “*Parliament should be strengthened, so that ministers’ proposals are scrutinised more carefully*” or alternatively that the “*Government should be strengthened, so that ministers can get things done more easily*”, 47% of respondents said Parliament should be strengthened, compared to only 13% in favour of the Government.¹⁷⁰ More strikingly still, 77% of respondents agreed that “*Parliament should always need to consider and approve changes in the law*”, whilst only 4% thought the “*Government should be able to change the law without full scrutiny by parliament*”.¹⁷¹ If the strongest argument for less scrutiny is efficiency,¹⁷² it is not an argument that resonates with the public who demand a robust Parliament to scrutinise even only “*minor*” changes to the law by the Government.¹⁷³

2.55 While it is true that many of the recommendations outlined below have been made before, some most recently by the SLSC or the DPRRC, they are worth restating here given the Government’s rejection of almost each one. Lord Janvrin, cross-bench peer and former Private Secretary to the Sovereign, makes the point well when he remarked that “*[o]f course, it is easy to see why nothing gets done. ... [T]urkeys do not vote for Christmas, and Ministers are not going to fall over themselves to limit their own powers*”.¹⁷⁴ Nevertheless, if we are to enhance the UK’s respect for the rule of law and principles of good law-making, the following changes are essential.

midnight, and were laid the following day.” The Joint Committee on Statutory Instruments, ‘*Rule of Law Themes from COVID-19 Regulations*’, (2021), p. 18 [Footnotes omitted].

¹⁶⁷ Select Committee on the Constitution, ‘*COVID-19 and the use and scrutiny of emergency powers*’, (2021), p. 16.

¹⁶⁸ A. Wagner, *The Emergency State: How We Lost Our Freedoms in the Pandemic and Why It Matters* (2022), p.4. See also Baroness Cavendish, who remarked that she was “*staggered to discover how keen Ministers... [were] to use this route.*” HL Deb, 6 January 2022, Vol. 817, Col. 760.

¹⁶⁹ Select Committee on the Constitution, ‘*COVID-19 and the use and scrutiny of emergency powers*’, (2021), p. 7.

¹⁷⁰ A. Renwick, B. Lauderdale, M. Russell and J. Cleaver, ‘*Public Preferences for Integrity and Accountability in Politics*’, (*The Constitution Unit*, March 2023), p. 6.

¹⁷¹ *ibid*, p. 7.

¹⁷² Erskine May, the authoritative text on parliamentary procedures, notes that “[t]he justification and advantages of delegated legislation arise from its speed, flexibility and adaptability” UK Parliament, ‘*Erskine May*’, para. 31.1.

¹⁷³ Only 14% of respondents agreed that “*Government should be able to change the law on minor matters without full scrutiny by parliament*”, compared with 65% who said “*Parliament should always need to consider and approve changes in the law*” A. Renwick, B. Lauderdale, M. Russell and J. Cleaver, ‘*Public Preferences for Integrity and Accountability in Politics*’, (*The Constitution Unit*, March 2023), p. 7.

¹⁷⁴ HL Deb, 12 January 2023, Vol. 826, Col. 1543. See also J. Sargeant and J. Pannell, ‘*The legislative process: how to empower Parliament*’, (2022) p.52: “*There have been many proposals for reforms to improve the legislative process in ways that would redress this imbalance. Parliament itself has made many recommendations – many of which this report highlights and adds to.*”

2.56 Recommendation 1: The Government must strengthen the principles underpinning the creation of delegated legislation. The Cabinet Office Guide to Making Legislation makes passing reference to the principles of parliamentary sovereignty and the Rule of Law by simply pasting the DPRRC’s suggested principles into the Guide. This is accompanied by non-mandatory language: the Government “*can*”, rather than ‘should’ or ‘must’, use these principles when considering the use of delegated powers in a Bill.¹⁷⁵ As Lord Blencathra suggests, the “*subtext [is] that [drafters] can take it or leave it.*”¹⁷⁶ To engender a shift in the mindset of legislative drafters and in departmental culture, it is crucial to ensure that the effect on parliamentary sovereignty of the recourse to delegated powers is thoroughly considered. A stronger commitment to first principles within the Guide is necessary to this end.

2.57 Recommendation 2: The Government must improve and expand on its use of consultation and pre-legislative scrutiny. It is important for stakeholders to be able to comment on and highlight any deficiencies in policy and legislation, particularly those that will have a significant impact on the rights and duties of individuals. We therefore recommended that the Government engage in meaningful consultation and/or pre-legislative scrutiny for legislation that will have significant constitutional implications, or for policies that were not contained within the Government’s manifesto, given the lack of democratic legitimacy. This is not a new suggestion. Indeed, the Institute for Government and the Bennett Institute, in their 2022 report, noted that “[e]ight select committee reports since 1997 have suggested expanding the use of PLS” and that it is “*the most common recommendation parliamentary committees have made for improving the legislative process.*”¹⁷⁷ Using Ireland as an example of best practice, they argue that the process of pre-legislative scrutiny should be formalised. Parliament should be given “*the opportunity to choose which bills it conducts pre-legislative scrutiny on, rather than being at the complete discretion of the government*”, which could be the result of a negotiation between Parliament and the Government.¹⁷⁸

2.58 Recommendation 3: The Government must make greater use of post-legislative scrutiny. As outlined in this chapter, the pace of legislation is increasing and parliamentary time to scrutinise Bills before enactment is decreasing. This is especially critical where Bills are skeletal and pre-enactment scrutiny procedures may be perfunctory or weak. Caygill, for example, suggests two reforms that may encourage greater use of post-legislative scrutiny. First, putting the commitment to undertake post-legislative scrutiny three to five years after Royal Assent on “*firmer footing*”¹⁷⁹ would lead to a greater number of post-legislative memoranda being produced by Government departments. Second, introducing an enforcement mechanism for when memoranda are not produced, with oversight provided by the Liaison Committees of both Houses of Parliament.¹⁸⁰

2.59 Recommendation 4: The Government must establish clear principles for the use of skeletal bills and delegated powers. The extensive use of skeleton legislation and delegated powers was vividly exposed by both Brexit and the pandemic. However, this is not to say that the Government’s

But for these to be implemented they require government support, and a willingness to cede some power. Many governments have proven unwilling to do so.”

¹⁷⁵ Cabinet Office, ‘*Guide to Making Legislation*’, (2022), p. 140.

¹⁷⁶ HL Deb, 12 January 2023, Vol. 826, Col. 1535.

¹⁷⁷ J. Sargeant and J. Pannell, ‘*The legislative process: how to empower Parliament*’, (2022), p. 25.

¹⁷⁸ *ibid*, p. 38.

¹⁷⁹ At present, the commitment only exists as guidance in the Cabinet Office Guide to Making Legislation. T. Caygill, ‘*The UK post-legislative scrutiny gap*’, *The Journal of Legislative Studies*, (2020) 26(3) 387, pp. 398 and 402.

¹⁸⁰ T. Caygill, ‘*The UK post-legislative scrutiny gap*’, *The Journal of Legislative Studies*, (2020) 26(3) 387, p. 402.

legislative habits before these events were a satisfactory state of affairs. Indeed, the balance between Parliament and the Government “*must be re-set: not restored to how things were immediately before these exceptional recent events but re-set afresh*”.¹⁸¹

2.60 At the very least, as recommended by the DPRRC, SLSC and the Bingham Centre for the Rule of Law, “*skeleton legislation should be reserved for the most exceptional cases*”¹⁸² and where it is sought, the onus is on the Government to fully explain and justify why such a Bill or clause is necessary. In the same vein, broad delegated powers should not be included within a Bill merely to paper over poor policy development at the primary legislation stage. We echo the DPRRC in stating that “[t]he appropriate threshold between primary and secondary legislation should not be dependent on the exigencies of timing”.¹⁸³

2.61 Furthermore, it should be standard practice for the Government to publish draft secondary legislation, where a broad, delegated power is sought. As the DPRRC explains, this would “*allow Parliament to assess [the power’s] potential usage when each House is considering the primary legislation*”,¹⁸⁴ rather than blindly accepting a provision of which the potential consequences are unknown. This is contrary to Parliament’s role as the authoritative legislative organ. Even where the use of a skeleton provision may be justified, post-enactment safeguards should be included within the Bill “*to ensure a more challenging scrutiny procedure at the secondary legislation stage*.”¹⁸⁵ The idea is that scrutiny that was missed at the primary legislation stage could be, at least in part, made up later on. This might take the form of, for example, “*an enhanced scrutiny procedure... that enables Parliament... to comment on a draft of any instrument before it is laid in its final form and to propose amendments to the draft*”.¹⁸⁶

2.62 **Recommendation 5: Parliament should adopt enhanced procedures for the scrutiny of statutory instruments, with increased opportunities for amendments.** The ‘all-or-nothing’ nature of scrutiny when it comes to secondary legislation means that if either House detects an issue with one or a couple of provisions within an SI, it will need to reject the SI outright to prevent the problematic provisions from entering into or remaining in force. As explained in this chapter, however, outright rejection is incredibly rare. The Hansard Society aptly explain the knock-on effect that this might have for the scrutiny of statutory instruments:

*“A ‘take it or leave it’ decision acts as a powerful disincentive to scrutiny. Even when MPs or Peers identify specific concerns with an SI, they have no mechanisms to oblige the government to think again, other than the drastic step of rejecting an Instrument in its entirety.”*¹⁸⁷

¹⁸¹ Secondary Legislation Scrutiny Committee, ‘*Government by Diktat: a Call to Return Power to Parliament*’ (2021), p. 2.

¹⁸² Delegated Powers and Regulatory Reform Committee, ‘*Guidance for Departments on the role and requirements of the Committee*’, (2021), p. 5. See also, ‘*Bingham Centre for the Rule of Law—Written evidence (LEG0052)*’.

¹⁸³ Delegated Powers and Regulatory Reform Committee, ‘*12th Report of Session 2021–22. Democracy Denied: The urgent need to rebalance power*’, (2021), p. 26.

¹⁸⁴ Select Committee on the Constitution, ‘*16th Report of Session 2017–19. The Legislative Process: The Delegation of Powers*’, (2018), para. 49.

¹⁸⁵ Secondary Legislation Scrutiny Committee, ‘*Government by Diktat: a Call to Return Power to Parliament*’ (2021), p. 16.

¹⁸⁶ *ibid*, p.16. See also Baroness Andrews, who remarked that “*The Hansard Society has made an excellent start in exploring how explicit principles for delegated legislation could be established, possibly by a new statutory instrument Act, for better processes to be created.*” HL Deb, 12 January 2023, Vol. 826, Col. 1540.

¹⁸⁷ B. Fowler, R. Fox, T. West and D. Vangimalla, ‘*Delegated legislation: the problems with the process*’, (*The Hansard Society*, 2021), p. 15.

2.63 Parliament should be empowered to properly scrutinise and amend SIs where necessary, given their ever-increasing role in the legal framework of the country.

2.64 **Recommendation 6: The Government must establish a clear framework for law-making in an emergency.** Although the Pandemic brought with it unprecedented and fast-moving challenges, there were ways of ensuring that Parliament retained a measure of control over the process, and these learnings should provide insight on how to approach law-making in any future civil emergency. As aptly put by the Select Committee on the Constitution, the overarching sentiment to remember is that “*powers are lent, not granted, by the legislature to the executive, and such powers should be returned as swiftly and completely as possible, avoiding any spill over into permanence*”.¹⁸⁸

2.65 Finally, the Terms of Reference of the ongoing COVID-19 Inquiry mention the need to investigate the public health response across the UK, including: how decisions were made, communicated, recorded and implemented; legislative and regulatory control and enforcement; and the justice system.¹⁸⁹ We would urge the Inquiry to assess, as part of this, the impact of recourse to emergency powers on the legislative process and parliamentary sovereignty, with a view to preparing for any future civil emergency. This could include the use of sunset clauses in regulations introduced during national emergencies,¹⁹⁰ and refined guidance on the use of the urgent procedure within Parliament, to allow for its examination of the content of the regulations before such scrutiny became redundant.¹⁹¹

¹⁸⁸ Select Committee on the Constitution, ‘*COVID-19 and the use and scrutiny of emergency powers: 3rd Report of Session 2019–21*’ (2021), p. 8.

¹⁸⁹ Cabinet Office, ‘*UK COVID-19 Inquiry: terms of reference*’, (2022).

¹⁹⁰ Select Committee on the Constitution, ‘*COVID-19 and the use and scrutiny of emergency powers: 3rd Report of Session 2019–21*’, (2021), p. 18.

¹⁹¹ The Select Committee on the Constitution suggests that, at the very least, the Government should “*set out the rationale for using the urgent procedure under the Public Health (Control of Disease) Act 1984 in the explanatory memorandum accompanying an instrument made using that procedure*”. See Select Committee on the Constitution, ‘*COVID-19 and the use and scrutiny of emergency powers: 3rd Report of Session 2019–21*’, (2021), p. 17.

III: HUMAN RIGHTS

*“The rule of law requires that the law afford adequate protection of fundamental human rights. It is a good start for public authorities to observe the letter of the law, but not enough if the law within a country does not protect what are there regarded as the basic entitlements of a human being”*¹⁹²

Lord Bingham of Cornhill, former Senior Law Lord

Introduction

- 3.1 The UK’s history in the development of human rights spans 800 years, beginning with the Magna Carta of 1215, which recognised that laws bound the monarch and that their subjects had rights. Over the last century, international consensus, often spearheaded by the UK,¹⁹³ has developed to establish the sophisticated tapestry of human rights norms and standards that we enjoy today. As Prime Minister Winston Churchill remarked in the wake of the horrors of World War II, *“in the centre of our movement stands the idea of a Charter of Human Rights, guarded by freedom and sustained by law”*.¹⁹⁴
- 3.2 That Charter of Human Rights became the Convention for the Protection of Human Rights and Fundamental Freedoms, also known as the ECHR, signed in 1950 and coming into force in 1953. This very same instrument has come under increasing attack in the UK today, from the Government threatening to repeal the HRA or to withdraw from the ECHR outright.¹⁹⁵ These threats correlate with a clear and persistent trend in recent years of deteriorating global human rights norms, with well-established and mature democracies reckoning with *“weaknesses in their social fabrics and institutional designs”*.¹⁹⁶
- 3.3 The attacks on human rights in the UK demonstrate a persistent and increasing disregard for the important role which international human rights law plays within the domestic context. Human rights are essential to safeguarding the inherent dignity and worth of all human beings. They include the right to life and liberty, freedom from slavery and torture, freedom of opinion and expression, and many more.¹⁹⁷ Concretely, the benefits of this framework are manifold. From an individual experiencing a mental health crisis and detained in hospital, to ensuring the rights of bereaved family members that their loved one’s death will be properly investigated, everyday people across the UK rely on human rights protections in some of the most complex and sensitive circumstances. It is important that everyone should remain entitled to these rights without discrimination.
- 3.4 Human rights and the rule of law are intimately intertwined and mutually reinforcing. There can be no rule of law within societies if human rights are not protected. Human rights, in turn, cannot be protected in societies without a strong rule of law. The United Nations states, *“The rule of law is the implementation mechanism for human rights, turning them from a principle into a reality”*.¹⁹⁸ In

¹⁹² Lord Bingham, *The Rule of Law*, (2010).

¹⁹³ The National Archives, *‘800 years of human rights in the United Kingdom explored using original documents from The National Archives’*, (2022).

¹⁹⁴ W. Churchill, (7 May 1948).

¹⁹⁵ T. Shipman, *‘Rishi Sunak’s threat to pull UK out of the ECHR’*, (*Sunday Times*, 4 February 2023).

¹⁹⁶ Pew Research Center, *‘Global Public Opinion in an Era of Democratic Anxiety’*, (7 December 2021).

¹⁹⁷ United Nations, *‘Human Rights’*.

¹⁹⁸ United Nations, *‘Rule of Law and Human Rights’*.

democracies, human rights and the rule of law serve to “*promote development, protect individuals from discrimination and ensure equal access to justice for all*”.¹⁹⁹

Legislative disregard for human rights

3.5 There is a clear growing legislative disregard for human rights. In successive parliamentary sessions, we have seen fundamental human rights protections diluted, to the detriment of society’s most vulnerable and stigmatised groups. The forthcoming analysis focuses on the experience of migrants, victims of police actions, protestors and prisoners. Whilst the examples identified in this chapter are not exhaustive, they do illustrate the nature of the issues JUSTICE has encountered in our analysis of Bills in briefings to Parliament.

Migrants

- 3.6 Despite the universality of human rights outlined above, migrants in the UK have suffered a diminution of their rights under successive Governments. As early as 2003, shortly after the HRA took effect, then Labour Home Secretary David Blunkett said he was “*personally fed up with having to deal with a situation where Parliament debates issues and judges overturn them*”,²⁰⁰ following a decision requiring the state to help destitute asylum seekers”.²⁰¹ This sense that human rights enforcement is unjustly obstructing policies remains salient. Indeed, immigration reform continues to be at the cutting edge of human rights-reducing legislation in the UK.
- 3.7 The UK and Rwanda agreed to a Migration and Economic Development Partnership in April 2022. It includes a five-year “*asylum partnership arrangement*”.²⁰² This would enable the UK to send people who would otherwise claim asylum in the UK to Rwanda. The germ of this partnership has its roots in a proposed Labour policy to the European Union in 2003. Under that proposal asylum seekers would have their applications processed in third countries. According to a 2004 Foreign and Commonwealth Office report, the proposal “*would involve governments sending asylum seekers to centres in third countries in order to have their asylum claims processed*”.²⁰³ However, by contrast, the Rwanda policy is not just for processing as individuals will remain in Rwanda even if they are found to be refugees. The first scheduled flight under the asylum partnership arrangement on 14 June 2022 did not depart after an injunction was issued by the European Court of Human Rights (“**ECtHR**”).²⁰⁴ Since then, the Court of Appeal ruled that the plan to send asylum seekers to Rwanda is unlawful. This was on the basis that there were substantial grounds for believing there to be a real risk that asylum-seekers would be returned to their home countries where they faced persecution or other inhumane treatment. This meant the Government’s policy contravened Article 3 ECHR (the prohibition on torture, inhuman or degrading treatment or punishment).²⁰⁵ The Lord Chief Justice dissented, and the Government have been granted permission to appeal, with a hearing due to take

¹⁹⁹ OHCHR, ‘*United Nations Forum on Human Rights, Democracy and the Rule of law*’.

²⁰⁰ A. Travis, ‘*Blunkett to fight asylum ruling*’, (*The Guardian*, 2003).

²⁰¹ *R (Q, D, J, M, F & B) v Secretary of State for the Home Department* (2003) EWHC 195 (Admin).

²⁰² Home Office, ‘*Memorandum of Understanding between the government of the United Kingdom of Great Britain and Northern Ireland and the government of the Republic of Rwanda for the provision of an asylum partnership arrangement*’, (14 April 2022).

²⁰³ On the matter of whether asylum seekers could be sent from an EU country to a third country, David Blunkett, who spearheaded the proposal, said in 2003 that the centres “*would process claims without people travelling to the countries in which they want to seek asylum*” Full Fact, ‘*Did David Blunkett propose sending asylum seekers abroad in 2004?*’, (22 April 2022).

²⁰⁴ *K.N. v. the United Kingdom* ECHR 197 (2022).

²⁰⁵ It is worth noting that under the Court of Appeal ruling, deportations to other - crucially, safe third countries - are lawful. *R (AAA) v. SSHD* [2023] EWCA Civ 745.

place later in the year. No transfers to Rwanda will take place before the Supreme Court has reached a verdict.

- 3.8 JUSTICE has wider concerns that this arrangement risks denying individuals effective access to justice, undermining the rule of law, and failing to protect those in desperate need of asylum. The United Nations High Commissioner for Refugees (“UNHCR”) has expressed serious concerns regarding the lack of access to fair and efficient procedures for the determination of refugee status in Rwanda with consequent risks of the state forcibly returning individuals into harm’s way (known as *refoulement*).²⁰⁶
- 3.9 The Rwandan asylum system lacks some of the basic safeguards required to secure effective access to justice: a lack of access to legal representation; no independent appeal route; no provision of reasons for negative decisions, which renders appeal rights impossible to exercise in practice; significant delays in decision making; insufficient access to interpreters; and discrimination against LGBTQIA+ persons.²⁰⁷ We are deeply concerned that this policy manifestly contravenes the UK’s domestic and international human rights obligations.
- 3.10 Roughly 45,000 individuals made the journey across the Channel from France to the UK in 2022.²⁰⁸ In response, the Illegal Migration Act 2023 received Royal Assent on 20 July 2023, intended to “*prevent and deter unlawful migration*” on small boats. Small boats crossing the Channel also gave impetus to the Nationality and Borders Act 2022,²⁰⁹ which was only passed last year. However, this Illegal Migration Act 2023 is now proposing to disapply or dilute several provisions in its immediate predecessor.²¹⁰ The 2023 Act gives the Government two powers with the purported aim of deterring these migrants. First, anyone making the journey by way of a small boat will be denied access to the UK asylum system. Second, individuals will be sent to a third country.
- 3.11 The Illegal Migration Act 2023 expressly disapplies section 3 HRA, which means that the provisions of the Act are not to be “*read and given effect in a way which is compatible with the Convention rights*”. From its inception, therefore, this Act is seemingly designed to ride roughshod over the UK’s human rights obligations. Whilst the Government have maintained its provisions are compatible with our ECHR obligations,²¹¹ it was notable that, on the face of the Bill when presented to Parliament, the Home Secretary confirmed, pursuant to section 19(1)(b) HRA, that she was “*unable to make a statement that, in [her] view, the provisions of the Illegal Migration Bill [as then it was] are compatible with the Convention rights*”.²¹² Section 54 of the 2023 Act also gives the Minister the discretion to ignore interim measures of the European Court of Human Rights, which are binding under Article 34 ECHR.

²⁰⁶ UNHCR, ‘*News Comment: UNHCR notes UK High Court judgement on transfer of asylum-seekers from the UK to Rwanda*’, (December 2021).

²⁰⁷ UNHCR, ‘*Analysis of the Legality and Appropriateness of the Transfer of Asylum Seekers under the UK-Rwanda arrangement*’, (June 2022).

²⁰⁸ E. Harrison, D. Casciani, D. and M. Sheils McNamee, ‘*Small boat arrivals to be swiftly removed - Suella Braverman*’, (BBC, 8 March 2023).

²⁰⁹ Home Office, ‘*Nationality and Borders Bill Explanatory Notes*’, (6 July 2021), para. 38 and 450.

²¹⁰ Home Office, ‘*Illegal Migration Act Explanatory Notes*’, (7 March 2023).

²¹¹ Home Office, ‘*Illegal Migration Bill: European Convention On Human Rights Memorandum*’, (7 March 2023).

²¹² *Illegal Migration Bill*, 262 2022-23 (as introduced) (7 March 2023).

- 3.12 Most people making the journey in small boats apply for asylum.²¹³ Yet under the Illegal Migration Act 2023, many applications for asylum are automatically “*inadmissible*”, meaning that they “*cannot be considered under the immigration rules*”.²¹⁴ The UNHCR has said that this measure amounts to an “*asylum ban – extinguishing the right to seek refugee protection in the United Kingdom for those who arrive irregularly, no matter how genuine and compelling their claim may be, and with no consideration of their individual circumstances*”.²¹⁵ The same also applies to human rights claims, such as that removal would breach an individual’s Article 3 ECHR rights (to not face torture or ill-treatment).
- 3.13 The Act introduced a duty for the Home Secretary to detain and remove individuals arriving in the UK without a visa either to Rwanda or another safe third country, regardless of whether they fulfilled asylum criteria.²¹⁶ The Home Office will not consider the asylum or human rights claim of any asylum-seeker who arrives irregularly. The Home Secretary will also have unprecedented powers to detain individuals, with no access to judicial review or immigration bail for the first 28 days.²¹⁷ Once removed from the UK, individuals will face restrictions on returning and from seeking British citizenship in the future.²¹⁸ The only route to challenge deportation is through a fast-track suspensive claim procedure in the Upper Tribunal. Under the partnerships that the UK presently has with would-be third countries, it is not clear how migrants or at least the majority of them will actually be removed. Rwanda, for example, only has capacity for 200 individuals.²¹⁹ Consequently, Home Secretary Suella Braverman MP may be unable to fulfil a duty she has imposed on herself.
- 3.14 The 2023 Act weakens important requirements outlined in the European Convention Against Trafficking (“**ECAT**”), including some entered into domestic law by the Nationality and Borders Act 2022. Concerningly, the power to detain, remove, and deny future protection even applies to victims of modern slavery. Article 13 of the ECAT requires the UK to implement a recovery and reflection period of at least 30 days. Under the Illegal Migration Act 2023, this will no longer apply unless they are actively cooperating with a police investigation and the Home Secretary considers that it is necessary to be in the UK for that cooperation (and there is no public interest in removal due to the threat of them posing serious harm). The Government justifies this suspension by referencing the “*public order*” exception set out in ECAT.²²⁰ However, that exception was envisaged to be used as an individual assessment of risk, not as a blanket measure for all claimants who arrive in the UK via irregular means. During the passage of the Nationality and Borders Act 2022, there were serious concerns raised that it reduced the ‘public order’ threshold to receiving a criminal sentence of one year’s imprisonment, which would not be compatible with the ECAT.²²¹ The Illegal Migration Act goes even further and risks further contravening both ECAT and Article 4 ECHR.

²¹³ BBC News, ‘*How is the UK stopping Channel crossings and what are the legal routes to the UK?*’, (8 March 2023).

²¹⁴ Illegal Migration Act 2023, s. 5.

²¹⁵ UNHCR, ‘*Statement on UK Asylum Bill*’, (March 2023).

²¹⁶ Illegal Migration Act 2023, s. 2.

²¹⁷ There are carve-outs for pregnant women and girls as well as unaccompanied minors. Under the Act, the detention of pregnant women will continue to be subject to a 72-hour time limit. With regards to unaccompanied minors, the First-tier Tribunal is able to review their detention after eight days, where the detention is for the purposes of removal. HL Deb 12 July 2023 Vol. 831, Col. 1835.

²¹⁸ Illegal Migration Act 2023, s. 31-35.

²¹⁹ Commons Library, ‘*UK-Rwanda Migration and Economic Development Partnership*’, (20 December 2022).

²²⁰ Home Office, ‘*Illegal Migration Bill Explanatory Notes*’, (7 March 2023), para. 135.

²²¹ Joint Committee on Human Rights. ‘*Legislative Scrutiny: Nationality and Borders Bill (Part 5)—Modern slavery, Victims that won’t receive protection: the public order and bad faith exceptions*’, (21 December 2021).

3.15 Whilst not identical, there are overlaps between the Government’s obligations under ECAT and Article 4 ECHR (the prohibition on slavery and forced labour). Under Article 4 ECHR, the European Court of Human Rights (ECtHR) have held that member states have a duty to take operational measures to protect victims of trafficking and a procedural obligation to investigate situations of trafficking.²²² Indeed, the Government’s ECHR memorandum for the Act suggests that issues of human trafficking and Article 4 ECHR are one of the areas the Government are most concerned about; they are only able to state that they consider that the provisions of the Illegal Migration Act are “*capable of being applied compatibly with Article 4 ECHR*”.²²³ However, as the previous Prime Minister and former Home Secretary Theresa May MP said, there are “*genuine questions of incompatibility*” with Article 4 ECHR and aspects of ECAT.²²⁴

Victims of police action

3.16 The Covert Human Intelligence Sources (Criminal Conduct) Act 2021 created a statutory process for public bodies to authorise covert human intelligence sources to engage in criminal activities with impunity. The Act has been referred to as the ‘Spy Cops’ Act in reference to the ongoing Public Inquiry into Undercover Policing more colloquially known as the ‘Spy Cops Inquiry’.²²⁵ The Inquiry has revealed that undercover agents infiltrated more than 1,000 political groups between 1968 and 2008.²²⁶

3.17 The Inquiry has also uncovered that some undercover agents had been in relationships with women as part of their cover, and some women have since alleged that they were victims of a “*conspiracy to rape*”.²²⁷ The Act is at risk of violating the right to respect for private and family life, home and correspondence by failing to address the risk of intimacy arising out of agents’ undercover activities.²²⁸ Where an undercover agent adopts a new identity and forms relationships with investigative targets, the target’s Article 8 rights to develop private relationships are at risk. The 2020 College of Policing Professional Practice guidance makes clear, “*It is never acceptable for [an undercover agent] to have an intimate sexual relationship with those they are deployed to infiltrate and target or encounter during their deployment*”.²²⁹ Concerningly, this guidance is not reflected in the Act.

3.18 The Act created the ability for a number of public authorities to provide ‘Criminal Conduct Authorisations’.²³⁰ The scope of such authorisations extends beyond national security purposes, including operations to “*prevent disorder*” and to promote “*the interests of economic wellbeing of the UK*”.²³¹ This means that those public authorities which that Act empowers, from police forces to the Environment Agency, could approve an undercover agent to undertake any criminal offence in an alarmingly unspecified number of contexts. Notably, amendments to prevent the use of

²²² 31 V.C.L and A.N v The United Kingdom (Application Nos 77587/12 and 74603/12).

²²³ ‘*Illegal Migration Bill European Convention on Human Rights Memorandum*’, p. 10.

²²⁴ HC Deb, 28 March 2023, Vo. 730, Col. 887.

²²⁵ Under Cover Policing Inquiry, ‘*Published Evidence*’.

²²⁶ B. Heron, ‘*Spycops: When the Public is the Enemy*’, (Declassified UK, May 2023).

²²⁷ BBC, ‘*Undercover police: Women were “victims of co-ordinated rape”*’ (4 March 2019).

²²⁸ Contrary to article 8 ECHR.

²²⁹ College of Policing, ‘*Undercover policing Authorised Professional Practice*’, (October 2020), Para. 7.5.

²³⁰ s. 29B.

²³¹ s. 29B(5).

children or vulnerable individuals, as well as to introduce a prohibition on the most serious crimes (for example, murder and torture), were ultimately not successful.

3.19 As a consequence of passing this Act, the Government has risked incurring serious violations of the procedural obligations under Articles 2, 3 and 4 ECHR to conduct an effective investigation into allegations of unlawful killings, torture or slavery. *Da Silva v UK* established that “national courts should not under any circumstances be prepared to allow life-endangering offences to go unpunished” yet, this Act does exactly that.²³² Equally, international treaties mandate the prohibition of both torture²³³ and slavery²³⁴ in all circumstances. The Act could afford immunity for such crimes, notwithstanding the Government’s assurances to the contrary.²³⁵ Alarming, the Act even denies victims the right to compensation for harm suffered as a result of Criminal Conduct Authorisations, as legally no crime would have been committed in the first place. This contravenes Article 13 ECHR, which guarantees the right to an effective remedy before a national authority.²³⁶

Protesters

3.20 The ability to voice grievances, stand up for a cause and demonstrate one’s beliefs are not only central to human rights and protected by the ECHR,²³⁷ they also enhance the rule of law by increasing public discussion, awareness, and state accountability.

3.21 Yet, the Government has introduced legislation that restricts and indeed criminalises many forms of the ways in which individuals have sought to process, assemble, and ultimately protest. The ostensible aim has been to address specific tactics used by protest movements campaigning for the environment and equality.²³⁸ However, the legislation has been constructed vaguely so that even peaceful protestors and passers-by could be sanctioned.²³⁹ These reforms have upended a regime of legislation, guidance, and practice that has existed since the overarching framework of protest law in the UK was first introduced, albeit not without its own problems, through the Public Order Act 1986.

3.22 The Police, Crime, Sentencing and Courts Act 2022 (“PCSC Act”) severely restricts the right to protest. The PCSC Act has received criticism from almost every corner of UK society. Ex-police chiefs, senior advisers,²⁴⁰ three UN Special Rapporteurs,²⁴¹ over 800,000 individuals, and a

²³² Pursuant to Article 15 ECHR, these obligations are non-derogable, and individuals enjoy absolute protection from their infringement.

²³³ UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, (1984).

²³⁴ UN Slavery Convention, (1926).

²³⁵ The Government has admitted as much, stating that they “will not go into the limits of what can and cannot be done” because it would provide “a list against which sources can be tested” HC Deb, 5 October 2020, Vol. 681, Col. 656.

²³⁶ JUSTICE, ‘*Covert Human Intelligence Sources (Criminal Conduct) Bill Joint Committee on Human Rights Inquiry Written Evidence*’, (October 2020).

²³⁷ The right to freedom of thought, conscience and religion (Art. 9); the right to freedom of expression (Art. 10), and; the right to freedom of peaceful assembly and to freedom of association with others (Art. 11).

²³⁸ During Commons debates on the Police, Crime, Sentencing and Courts Bill, then Home Secretary Priti Patel said, “we have seen a significant change of protest tactics, with protesters exploiting gaps in the law” HC Deb, 15 March 2021, Vol. 691, Col. 65. See also: Home Office, ‘*Public Order Bill: Factsheet*’.

²³⁹ B. Davis, ‘*Moment award-winning journalist Peter Macdiarmid arrested after police mistake him for Just Stop Oil activist*’, (*Evening Standard*, 24 August 2022); D. Ponsford, ‘*Three journalists locked up for covering M25 protest: Herts Police “personally apologises”*’, (*Press Gazette*, 9 November 2022).

²⁴⁰ M. Smith, “*New police laws could undermine trust and exacerbate violence, ex chiefs warn*”, (*The Mirror*, 25 Oct 2021).

²⁴¹ United Nations, ‘*Mandates of the Special Rapporteur on the rights to freedom of peaceful assembly and of association; and the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression*’, (25 May 2021).

coalition of over 350 civil society organisations²⁴² expressed their concerns over its human rights implications. Despite this opposition, the Public Order Act 2023 builds on the PCSC Act and presents further risks to the right to protest. The later Act, itself a bundle of clauses rejected by the House of Lords during the PCSC Act's passage, represents a stark escalation in the ability of the police to repress protest movements, raising serious concerns for human rights and freedom of speech.²⁴³

3.23 Under the PCSC Act, the police may impose restrictions on public processions,²⁴⁴ public assemblies,²⁴⁵ or one-person protests²⁴⁶ if the noise they generate causes “*alarm or distress*”.²⁴⁷ Even when it causes disruption, generating noise is a normal exercise of the right to peaceful assembly.²⁴⁸ Protests tend to be noisy and are often meant to be challenging. People who disagree with the cause of a protest may well feel alarmed or distressed by the noise. In a democracy, this must be tolerated.²⁴⁹ JUSTICE agrees with Dunja Mijatović, the Commissioner for Human Rights of the Council of Europe, who said in her report on the UK in 2022:

“Peaceful assemblies carried out in public places often temporarily disrupt the life of a community, including through the generation of noise, the obstruction of road traffic, or other types of nuisance. This temporary alteration of ordinary life does not exempt state authorities from their positive obligation to facilitate the effective exercise of the right to peaceful assembly”.

3.24 Specifically in relation to noise generated by protests, the ECtHR has suggested that where such noise does not involve obscenity or incitement to violence, it will be difficult for a state to satisfy the requirement that restrictions on Article 11 ECHR are necessary for a democratic society.²⁵⁰ As such, we welcome the Home Office's intention to review the noise provision in 2024.²⁵¹

3.25 Under the PCSC Act, an individual can commit an offence unwittingly by attending a protest when the individual “*knows or ought to know that a condition has been imposed*”.²⁵² A huge swathe of individuals risk prosecution as the PCSC Act applies a strict liability test. For example, members of the public who happen to be in an area on which conditions are imposed risk being in accidental breach through no fault of their own. This is clearly unacceptable as it would represent an

²⁴² T. Helm, ‘*Patel faces widening revolt over policing bill's restrictions on protest*’, (*The Guardian*, 12 September 2021).

²⁴³ JUSTICE briefings and analyses can be found [here](#).

²⁴⁴ s. 73.

²⁴⁵ s. 74.

²⁴⁶ s. 79.

²⁴⁷ The noise generated by persons taking part in a public procession, public assembly or one-person protest may have a relevant impact on persons in the vicinity of those activities “*if it may result in the intimidation or harassment of persons of reasonable firmness with the characteristics of persons likely to be in the vicinity, or it may cause such persons to suffer alarm or distress*”. Police Crime Sentencing and Courts Act 2022, s. 73, 74 and 79.

²⁴⁸ As suggested in *Galstyan v Armenia* (App. No. 26986/03) (Judgment of 15 November 2007) ECtHR, para 116, where the court noted that it was, “*hard to imagine a huge political demonstration, at which people express their opinion, not generating a certain amount of noise.*”

²⁴⁹ *Kudrevičius and Others v. Lithuania* (App. No. 37553/05) (Judgment of 15 October 2015) ECtHR (GC), para 173.

²⁵⁰ *Galstyan v Armenia* (App. No. 26986/03) (Judgment of 15 November 2007) ECtHR, para 116-177; *Ashughyan v Armenia* (App. No. 33268/03) (Judgment of 17 July 2008) ECtHR, para 75-77.

²⁵¹ HL Deb, 26 April 2022, Vol. 821, Col. 248.

²⁵² s. 75(5)(5A)(a) removes the requirement that conditions imposed on a public procession or assembly need to be knowingly breached. Rather, the standard is that the person “*knows or ought to know that a condition has been imposed*”. The same knowledge test for one-person protests applies under s. 79(10)(c).

interference with the right to freedom of assembly and association and the requirement for legal certainty.

- 3.26** The Public Order Act further diminishes the right to protest by allowing the police to stop and search individuals without suspicion in certain circumstances.²⁵³ Whereas such powers were previously preserved for violent crime and terrorism-related offences,²⁵⁴ these measures could be used to target almost anyone under the Act.²⁵⁵ The officer may then seize any object found if they reasonably suspect it is prohibited.²⁵⁶ Arts and crafts supplies, a first aid kit, and even a camera could conceivably constitute a prohibited object for use in connection with a protest that could be seized.
- 3.27** Demonstrators and their supporters can be denied access to protest sites via the imposition of SDPOs.²⁵⁷ The threshold for their application is low,²⁵⁸ and once imposed SDPOs can last for up to two years and restrict movement or participation in particular activities. SDPOs can even lead to imprisonment if breached.
- 3.28** Offences like “*being equipped to lock on*” in the Public Order Act are so vague that they could be committed even if an individual did not lock on and even if the object they were equipped with could not be used to lock on.²⁵⁹ For example, a bystander who carries a bottle of water to share with a demonstrator who has locked on, or might lock on, could inadvertently fall foul of this offence. This is because the bottle could constitute an object used in connection with the offence of locking on.
- 3.29** The London Metropolitan Police arrested 52 individuals during the Coronation of King Charles III on suspicion that they intended to disrupt the event. At least six arrests were made pursuant to the offence of being equipped for locking on.²⁶⁰ The arrests were made after the police found items belonging to Republican protestors, which, at the time, the police said they had reasonable grounds to believe could be used for locking-on. After protestors were detained for 16 hours, all six were released, with no further action required. The police said in a statement, “*We regret that those six people arrested were unable to join the wider group of protesters in Trafalgar Square and elsewhere on the procession route.*”²⁶¹
- 3.30** The police acknowledged that the arrests were wrong, as they could not prove there was ever any intention to use the items to lock on and disrupt the Coronation.²⁶² However, ‘intention to lock on’ is not the relevant test. The Republican protestors could have been charged if the items they carried could have been used “*in connection with*” the locking on of another person. JUSTICE is concerned

²⁵³ Public Order Act 2023, s. 11.

²⁵⁴ The use of these powers in the context of terrorism and violent crime also drew heavy criticism, see: His Majesty's Inspectorate of Constabulary and Fire & Rescue Services, ‘*Disproportionate use of police powers A spotlight on stop and search and the use of force*’, (26 February 2021).

²⁵⁵ Criminal Justice and Public Order Act 1994, s. 60; Terrorism Act 2000, s. 47A.

²⁵⁶ Public Order Act 2023, s. 11(8).

²⁵⁷ *ibid.*, s. 20-21.

²⁵⁸ *ibid.*, s. 21(2)(a).

²⁵⁹ *ibid.*, s. 2(1).

²⁶⁰ F. Luck, ‘*Arrest is concerning for democracy, protester says*’, (BBC News, May 2023).

²⁶¹ S. Seddon, ‘*Coronation: Met expresses 'regret' over arresting six anti-monarchy protesters*’, (BBC, 9 May 2023).

²⁶² *ibid.*

that such a vague offence risks more “*regrettable*” arrests that, even without subsequent charges, could have a chilling effect on protests.

3.31 The UK is on track to join countries like South Africa, Poland and Hungary in its civic freedom ranking due to the Government’s “*increasingly authoritarian*” measures that restrict laws on public protest.²⁶³ Lord Denning put it cogently when he noted that protest “*is often the only means by which grievances can be brought to the knowledge of those in authority—at any rate with such impact as to gain a remedy. Our history is full of warnings against suppression of these rights*”.²⁶⁴

Prisoners

3.32 Through the parole system, the state exercises one of its most important functions – the protection of the public from serious criminal offending – as well as its most coercive power – the deprivation of individual liberty. It is, therefore, vital that the process operates effectively and that the decision-making body responsible for deciding upon release or continued detention carries out this duty fairly, independently, and in a human rights-compliant manner.

3.33 Concerningly, the Victims and Prisoners Bill currently before Parliament would disapply section 3 HRA from all provisions (and subsequent legislation) relating to the release, licence, supervision, and recall of indeterminate and determinate sentence offenders.²⁶⁵ The Government has said the disapplication of section 3 is necessary to ensure that the intention of Parliament with respect to prisoners who may be or have been released is maintained. It has explained that section 3 has previously required courts to adopt interpretations that depart from “*the unambiguous meaning of... legislation*”.²⁶⁶

3.34 When the Bill was introduced into the House of Commons, former Justice Secretary Dominic Raab made a statement that, in his view, its provisions were compatible with rights secured under the ECHR.²⁶⁷ Yet, the proposed disapplication of section 3 appears to be wholly contrary to such a view, indicating instead a preference for legislation to be interpreted in a manner that gives priority to the Government’s desired outcomes, regardless of the human rights implications.

3.35 If section 3 is disappplied, the courts will still be able to make declarations of incompatibility with respect to provisions of primary or subordinate legislation found to be incompatible with the ECHR.²⁶⁸ However, a declaration of incompatibility does not affect the validity, operation, or enforcement of an incompatible law. Instead, it merely prompts Parliament to decide whether to amend the law. Given the tone and intention of the Victims and Prisoners Bill, JUSTICE is concerned that the Government would not legislate to rectify such incompatibility. In any event,

²⁶³ Civicus, ‘*United Kingdom downgraded in global ratings report on civic freedoms*’, (16 March 2023).

²⁶⁴ *Hubbard v Pitt* [1976] QB 142.

²⁶⁵ Clauses 42, 43 and 44.

²⁶⁶ Ministry of Justice, ‘*Victims and Prisoners Bill Explanatory Notes*’, paras. 651-655. Research by the Independent Human Rights Act Review has found that section 3 has been used cautiously and in limited circumstances by the courts, in a way that allows the effectiveness of the legislation in question to be upheld and remain consistent with, and in fact support, the intention of Parliament. See Ministry of Justice, ‘*The Independent Human Rights Act Review*’, (December 2021). JUSTICE analysed 593 cases between 1 January 2013 and 31 December 2020, where section 3 HRA was referred to. In 24 cases, section 3 HRA was used to interpret legislation that would otherwise have been incompatible with Convention rights. In another 30 cases, section 3 was used to support (or as an alternative to) an interpretation reached using normal statutory interpretation.

²⁶⁷ HRA s. 19(1)(a).

²⁶⁸ HRA, s. 4.

the parliamentary process takes time, and in the intervening period, a rights-infringing instrument would remain on the statute book and in effect.

3.36 The most important substantive change proposed in the prisoner-related part of the Bill concerns *who* would make parole decisions. Under the Bill, substantive decision-making authority would transfer from the Parole Board to the Secretary of State. Clauses 35 and 36 of the Bill would create a “*top-tier*” cohort of offenders. Prisoners who have committed the offences of murder, rape, serious terrorism or terrorism-connected offences, and caused or allowed the death of a child would fall into this category.²⁶⁹ JUSTICE is concerned that giving the Secretary of State parole decision-making powers for top-tier prisoners will violate Article 5 ECHR and so undermine the UK's commitment to the universal protection of human rights. Pursuant to Article 5(4) ECHR, all post-tariff detention of prisoners must be speedily reviewed by a court that is “*independent of the executive*”.²⁷⁰ Under the Bill, the Parole Board's role in the parole process would no longer, by itself, appear to satisfy the “independence requirement” of Article 5(4). At least in respect of top-tier cases, it would remove the Parole Board's decision-making capacity.

3.37 JUSTICE is concerned that these provisions would severely undermine the principle of judicial independence by allowing the state to impose its decision over the Parole Board as a court-like body. This damages proper judicial processes which are in place to ensure decisions concerning release are taken by independent experts.

Threats to repeal the Human Rights Act 1998

3.38 The piecemeal erosion of human rights could be eclipsed by the dismantling of the human rights system entirely if the threat to repeal the HRA is realised.

3.39 The HRA is a vital, human rights-enhancing piece of legislation, enabling individuals to enforce their rights in UK courts and hold public authorities to high standards whilst maintaining parliamentary sovereignty. Despite being one of the first signatory states to the ECHR in 1951, human rights protections in the Convention only became domestically enforceable once the HRA took effect in October 2000. Prior to the HRA, individuals could enforce their Convention rights only in the ECtHR. The eminent British judge, Lord Bingham, author of ‘The Rule of Law’,²⁷¹ said this about the pre-HRA human rights architecture:

*“The ability of English Judges to protect human rights in this country and reconcile existing rights in the manner indicated is inhibited by the failure of successive governments over many years to incorporate into United Kingdom law the European Convention on Human Rights.”*²⁷²

3.40 The HRA, for the first time, allowed individuals in the UK to rely on human rights as set out in the ECHR in domestic courts and required all public authorities to act compatibly with the ECHR. This, in effect, reduced the time and cost required to enforce one's human rights by compelling the Government to honour remedies in domestic courts, which it would discharge in the ECtHR.

²⁶⁹ Clauses 35 and 36 introduce Sections 327ZAB(1) and 256AZBB(1), which specify the complete list of offences that comprise the new “*top tier*”.

²⁷⁰ *R (Girling) v Parole Board* [2007] QB 783, [13].

²⁷¹ T. Bingham, *The Rule of Law* (Penguin Books Limited 2011).

²⁷² T. Bingham, ‘*The European Convention on Human Rights: Time to Incorporate Denning lecture 1993*’ in T. Bingham, *The Business of Judging: Selected Essays and Speeches* (OUP 2000).

- 3.41 On 22 June 2022, the Government introduced the Bill of Rights Bill to Parliament. This Bill was intended to repeal and replace the HRA. Repealing the HRA would be a fundamental change to the rule of law in the UK, which should require a democratic mandate to undertake. Yet, the 2019 Conservative manifesto promised that the Government would “*update the Human Rights Act...*” (emphasis added).²⁷³ There was no commitment to repeal or replace the HRA with a Bill of Rights, as has been confirmed by the previous Lord Chancellor Sir Robert Buckland KC MP, who helped to draft the manifesto commitment.²⁷⁴
- 3.42 Successive governments have contemplated a Bill of Rights. Indeed, in 2008 the Labour Government led by former Prime Minister Gordon Brown, considered a Bill of Rights as a natural next step to continue from the HRA. Advocacy organisations at that time saw the Bill as an opportunity to further incorporate international and regional human rights standards.²⁷⁵ However, as the Joint Committee on Human Rights noted at the time, “*The Government does not appear to have any plans to use the Bill or Rights [sic] as an opportunity to give effect to any human rights in international law which are not yet part of our law.*”²⁷⁶ Instead, the exact intention for the Labour Government’s Bill of Rights was vague, in places the then Government reassured the public that rights would not depend on the exercise of responsibilities, whilst elsewhere it suggested that “*it would be possible in a future [Bill of Rights] to highlight the importance of factors such as the applicant’s own behaviour and the importance of public safety and security*”²⁷⁷ The present Government opted to initially focus their Bill of Rights Bill on repealing the HRA and replacing it with a much more restrictive set of human rights protections.
- 3.43 We welcome the news confirmed by the new Secretary of State for Justice Alex Chalk MP that the Bill of Rights Bill has been permanently shelved.²⁷⁸ The Bill was widely condemned on a cross-party basis. However, JUSTICE remains concerned that some of the Bill’s underlying ideas may still resurface in other legislation in a more piecemeal fashion. Indeed, the Justice Secretary has said the Government will update the Human Rights Act 1998 to “*recalibrate and rebalance our constitution over time*”.²⁷⁹ It is, therefore, important to interrogate the merit of the Bill of Rights Bill as previously constituted and to set out policy and legal reasons for ensuring similar reforms to the HRA are not introduced in the future.

The Bill of Rights Bill

- 3.44 The Bill would have diminished the universality of human rights. For example, by setting new complicated legal tests which would aim to reduce the scope of positive obligations, where the state is required to act to protect human rights. Such positive obligations have helped victims of crime challenge the police for inadequate investigations and seriously unwell hospital patients challenge negligent care.²⁸⁰ This measure would have undermined a human-rights-based approach to public

²⁷³ The Conservative and Unionist Party, ‘*Manifesto 2019*’, (2019).

²⁷⁴ “*I wanted to use my time before you to further develop what was in my mind as I worked to implement the Government’s 2019 manifesto commitment, when I helped to draft, of updating the Human Rights Act. Updating, not replacing, you will note*”. R. Buckland, ‘*Human Rights Act reform: getting the focus right*, (UK in a Changing Europe, 30 March 2022).

²⁷⁵ For example, the Children’s Rights Alliance for England and the Royal National Institute of Blind People, both organisation’s gave evidence to the Joint Committee on Human Rights for its ‘*A Bill of Rights for the UK?*’, (August 2008).

²⁷⁶ Joint Committee on Human Rights for its ‘*A Bill of Rights for the UK?*’, (August 2008), para 134.

²⁷⁷ See paragraph 2.22 compared with paragraph 2.25 of Ministry of Justice, ‘*Rights and Responsibilities: developing our constitutional framework*’, (March 2009).

²⁷⁸ HC Deb, 27 June 2023, Vol. 734, Col. 145.

²⁷⁹ *ibid.*

²⁸⁰ Clause 5(7) Bill of Rights Bill.

services which we all benefit from. We wholly agree with the End Violence Against Women Coalition, which has said:

*“There is no reasonable justification for seeking to curb obligations on public authorities to protect people’s human rights; this move simply seeks to absolve the state of responsibility in this area and will drastically impact victims and survivors of abuse”.*²⁸¹

3.45 The former Victims’ Commissioner and current Domestic Abuse Commissioner have jointly said that *“the restriction of positive obligations in the proposals would disproportionately hinder victims and survivors of domestic abuse and sexual violence from being able to enforce their rights to support”.*²⁸² This restriction would have sent a dangerous message to public authorities that they could reduce standards and focus less on the dignity of individuals.

3.46 Other measures included a proposed permission stage for human rights claims that would have increased the length, cost and complexity of human rights litigation for claimants and public body defendants. There are already barriers to bringing human rights claims in domestic courts, such as the legal aid merits test, and tools for the courts to dispose of unmeritorious claims. The permission stage would have added a further barrier to rights claims, likely dissuading individuals to enforce their rights in the courts and reducing the accountability of public bodies. It would also be a recipe for legal uncertainty, adding further bureaucracy and costs to the justice system.²⁸³

3.47 This Bill was rife with examples of the Government seeking to restrict what UK judges are able to consider when deciding human rights cases.²⁸⁴ The Bill would have repealed section 3 HRA, the impetus for which was based on the perception of a democratic deficit resulting from the judicial *“amendment”* of legislation. However, as found by the Government commissioned IHRAR, and JUSTICE’s own analysis,²⁸⁵ section 3 has been used cautiously and in limited circumstances by the courts, in a way that allows the effectiveness of the legislation in question to be upheld and remain consistent with, and in fact support, the intention of Parliament.²⁸⁶ Without section 3, the courts would only be able to issue a declaration of incompatibility,²⁸⁷ which would risk increasing the number of cases being decided in Strasbourg, rather than by UK judges, incurring greater delays, costs, and legal uncertainty. As mentioned above disapplication of section 3 HRA has been included in recent legislation, including the Illegal Migration Act and the Victims and Prisoners Bill. This sets a worrying precedent for the protection of human rights in future legislation.

3.48 Finally, the HRA is deeply embedded in the devolved settlements and respects the different interests, histories, and legal traditions of the four constituent parts of the UK. By seeking to drastically narrow how Convention rights would be interpreted, the legislation would have had the

²⁸¹ The End Violence Against Women Coalition, *‘British Bill of Rights is a major step back for women and survivors’*, (21 June 2022).

²⁸² Victims Commissioner and Domestic Abuse Commissioner, *‘Letter to Dominic Raab MP’*, (10 June 2022).

²⁸³ Clause 15 Bill of Rights Bill.

²⁸⁴ HRA, s.2(2).

²⁸⁵ Ministry of Justice, *‘Victims and Prisoners Bill Explanatory Notes’*, paras. 651-655. Research by the Independent Human Rights Act Review has found that section 3 has been used cautiously and in limited circumstances by the courts, in a way that allows the effectiveness of the legislation in question to be upheld and remain consistent with, and in fact support, the intention of Parliament. See Ministry of Justice, *‘The Independent Human Rights Act Review’*, (December 2021). JUSTICE analysed 593 cases between 1 January 2013 and 31 December 2020, where section 3 HRA was referred to. In 24 cases, section 3 HRA was used to interpret legislation that would otherwise have been incompatible with Convention rights. In another 30 cases, section 3 was used to support (or as an alternative to) an interpretation reached using normal statutory interpretation.

²⁸⁶ Ministry of Justice, *‘The Independent Human Rights Act Review’*, (December 2021).

²⁸⁷ HRA, s.4; Clause 10 Bill of Rights Bill.

effect of imposing a ‘rights ceiling’ on the devolved nations, preventing them from providing greater rights protection in their specific legislatures. These proposals were ill-thought through and risked upsetting our delicate constitutional balance.

3.49 Further, given the Good Friday Agreement required ‘complete incorporation’ of the ECHR into Northern Ireland law, with direct access to the courts, the Bill would have risked breaching the Good Friday Agreement. Limiting the interpretation of ECHR rights in relation to positive obligations, which have been central to policing in Northern Ireland under the peace process, and introducing a permission stage would risk undermining the requirements of the Good Friday Agreement.

3.50 Threats to leave the ECHR entirely have also been made by senior members of the Government. The Home Secretary Suella Braverman MP has stated that her personal view is that the UK should leave the ECHR, though this has never been Government policy.²⁸⁸ The Prime Minister has suggested that, if the European Court of Human Rights rule against the Illegal Migration Act, then he would be ‘willing to reconsider whether being part of the ECHR is in the UK’s long-term interests’.²⁸⁹ Analysts and policymakers suggest leaving the ECHR may become a Conservative manifesto pledge in the next general election.²⁹⁰

3.51 However, there have also been some more positive recent signs. In May 2023, Prime Minister Rishi Sunak, alongside other Council of Europe member state leaders, “reaffirm[ed] our deep and abiding commitment to the European Convention on Human Rights and the European Court of Human Rights as the ultimate guarantors of human rights”.²⁹¹ In February 2023, the Prime Minister told the House of Commons that the UK “is and will remain a member of the ECHR”.²⁹² Sir Robert Neill MP, Conservative chair of the Commons Justice Committee, commented in relation to the possibility of leaving the ECHR, “if Conservatives don’t believe in the rule of law, what do we believe in? Are we going to put ourselves in the same company as Russia and Belarus?”.²⁹³ This is a pertinent question and one which those who are in favour of withdrawal from the ECHR should carefully consider.

Conclusion and recommendations

3.52 Human rights in the UK are becoming ever more precarious as recent legislation incrementally erodes the grounds on which human rights can be invoked. This chapter has shown that the most vulnerable and stigmatised, such as migrants, victims of police action, protestors and prisoners, have experienced the most acute diminishment of their human rights. The disapplication of human rights to these groups in the aforementioned contexts may seem ‘very specific and limited’. However, the strength of human rights protections lies in their universality and setting of minimum standards. Any form of exceptionalism which excludes certain individuals or groups from the protection of human rights is both impermissible and, owing to its unprincipled nature, opens the door to further derogations. The examples of curtailment of human rights in the UK, such as the

²⁸⁸ ITV News, ‘*Home Secretary’s desire for UK to leave European Convention on Human Rights branded “worrying”*’, (4 October 2022).

²⁸⁹ T. Shipman, ‘*Rishi Sunak’s threat to pull UK out of the ECHR*’, (4 February 2023).

²⁹⁰ K. Allen, ‘*Tories consider UK’s exit from European Convention on Human Rights*’, (*The Justice Gap*, 8 February 2023).

²⁹¹ Council of Europe, ‘*Reykjavík Declaration United around our values*’, (May 2023), p. 4.

²⁹² HC Deb, 27 February 2023, Vol. 728, Col. 594.

²⁹³ G. Parker, W. Wallis and J. Cameron-Chileshe, ‘*Rishi Sunak warned of Tory backlash if he tries to take UK out of ECHR*’, (*Financial Times*, 5 February 2023).

restrictions on protestors' ability to make noise, should be understood as a litmus test for our collective human rights, and soon we will not be able to hear them.

- 3.53 Recommendation 7: The Human Rights Act 1998, and the UK's membership of the ECHR, should be safeguarded, and efforts explored to expand its protections.** Whilst we welcome the withdrawal of the Bill of Rights Bill as an important step in the right direction, the Government should not pursue its provisions through other legislative means, nor attempt similar policies that will carve out rights protections for certain groups, and confirm that it will not pursue a policy of leaving the ECHR. The Government must explore ways of entrenching domestic human rights safeguards, especially for the most vulnerable.
- 3.54 Recommendation 8: The Government must be prepared to take bold action, including repealing some of the more problematic legislation passed since 2019.** While not exhaustive, this recommendation concerns at a minimum the Covert Human Intelligence Sources (Criminal Conduct) Act 2021, Parts 3 (Public Order) and 4 (Unauthorised Encampments) of the Police, Crime, Sentencing and Courts Act 2022, the Public Order Act 2023, and the Illegal Migration Act 2023. While covering a range of important areas of public policy, it is clear that rights-based considerations were neglected or totally ignored. This is not to say that the status-quo prior to the introduction of the Acts was satisfactory, but rather that their impact represents a significant deterioration in protections for the groups concerned.
- 3.55 Recommendation 9: The Government should strengthen awareness raising and public ownership of human rights.** The trend of human-rights-diminishing legislation suggests the Government is confident that the public does not value human rights. In fact, 73% of UK adults believe that rights, laws, and protections must apply to everybody equally, and only 18% think that reviewing the HRA should be a priority for the Government.²⁹⁴ However, even among those who do not espouse human rights, that could be indicative of a lack of knowledge of what exactly human rights are and how everyone benefits from them. As such, we echo the IHRAR's call on all authorities to take measures that strengthen human rights education.²⁹⁵

²⁹⁴ Savanta ComRes, '*Amnesty International – Human Rights Poll*', (2021).

²⁹⁵ Independent Human Rights Act Review, '*Full Report*', (December 2021).

IV. LEGAL CERTAINTY AND THE MISUSE OF POWER

“The acceptance of the rule of law as a constitutional principle requires that a citizen, before committing himself to any course of action, should be able to know in advance what are the legal consequences that will flow from it.”

Lord Diplock, Black-Clawson International v Papierwerke AG²⁹⁶

Introduction

- 4.1 Legal certainty requires the law to be as clear as possible as to what it prohibits or allows in a given circumstance. In practical terms, that means that individuals must be able to know and understand their rights and duties. It must be possible for members of the public, in advance of a particular course of action (or omission), to assess broadly whether that conduct could incur legal liability. As Lord Bingham noted, it is also crucial for *“the successful conduct of trade, investment and business”* that rights and obligations are clearly delineated and publicly accessible, as few would willingly enter the marketplace in a setting where such rights and duties *“were vague and undecided”*.²⁹⁷ It is in this way that the subject of this chapter — legal certainty — is a crucial aspect of the rule of law.
- 4.2 The crux of this principle is that *“[t]he law must be accessible... intelligible, clear and predictable”*.²⁹⁸ Further to this, the Venice Commission specifies a number of sub-indicators to measure a state’s adherence to the principle.²⁹⁹ These include whether the law is stable over time, and whether a law’s effects and applications are foreseeable when it is introduced. Respecting the principle of legal certainty also means that the law should not apply retrospectively, particularly where it regards individual rights; any duties imposed by a given law should generally apply from its passage onwards. This is because *“[t]he law must be certain at the time when the subject has to act by reference to it”* — otherwise, no one can tailor their actions accordingly.
- 4.3 As such, in the absence of exceptional circumstances, an individual must not be expected to act in accordance with a law that has not yet been enacted and should not be punished for an act that was not prohibited by law at the time that the act was undertaken. Nevertheless, the legislation examined in this chapter suggests that policymakers may not be alive to concerns of legal certainty, and that speed and efficiency may instead be the main drivers underpinning legislative choices.
- 4.4 Furthermore, as explained in the introductory chapter of this report, we examine legal certainty alongside another important criterion of the rule of law, namely the prevention of the misuse of power. This requires that any discretion afforded to the executive or public authorities is not unfettered, so as to *“protect against arbitrariness”*.³⁰⁰ It is clear that any *“exercise of power that*

²⁹⁶ [1975] UKHL 2.

²⁹⁷ T. Bingham, *The Rule of Law* (Penguin 2010), p. 67. Lord Bingham references the famous quote by Lord Mansfield, which states that *“[i]n all mercantile transactions the great object should be certainty: and therefore, it is of more consequence that a rule should be certain than whether the rule is established one way or the other. Because speculators then know what ground to go upon.”* *Vallejo v Wheeler* (1774) 1 Cowp 143, 153. Lord Mance further points out that Lord Bingham himself recognised this principle in *Golden Straight Corporation v Nippon YKK* (The “Golden Victory”) [2007] UKHL 12, when he stated that *“the quality of certainty [is] a traditional strength and major selling point of English commercial law”*. Lord Mance, *‘Should the law be certain? The Oxford Shrieval lecture’*, (2011), p. 2.

²⁹⁸ T. Bingham, *The Rule of Law* (Penguin 2010), p. 66.

²⁹⁹ Venice Commission of the Council of Europe, *‘The Rule of Law Checklist’*, (2016), pp. 25–28.

³⁰⁰ *ibid*, p. 29.

leads to substantively unfair, unreasonable, irrational or oppressive decisions violates the Rule of Law”.³⁰¹

- 4.5 Thematically, it is appropriate to combine these two criteria, given that legal uncertainty has the potential to spill over into the arbitrary (mis)use of power. In a 2011 speech on the Rule of Law, Lord Mance similarly acknowledged the connection between the two themes.³⁰² Lord Bingham, writing on the subject, emphasised that “[q]uestions of legal right and liability should ordinarily be resolved by the application of the law and not the exercise of discretion”.³⁰³ Indeed, as we shall explain, where the law is unclear or not well-understood (as was the case during the COVID-19 pandemic), those charged with its enforcement may ‘get it wrong’, and may unwittingly, yet arbitrarily, interfere with the lives of members of the public.

Skeleton legislation and delegated powers

- 4.6 As outlined in Chapter 2, the use of skeleton legislation and delegated powers has increased over the past 20 years. Not only is this an issue of the balance of power between Parliament and the executive, but it also raises real concerns for legal certainty. For example, when an act is skeletal and is largely filled in with delegated powers, it is not at all clear what policy will guide ministers in the creation of secondary legislation. It is therefore difficult, at the time of passage, to foresee what the impact of the law will be and how one’s rights and obligations under the law may change. Indeed, the Chairs of the SLSC, the Constitution Committee, and the Delegated Powers and Regulatory Reform Committee have argued that:

“[w]ithout substantive provision on the face of the Bill, Parliament is being asked to pass legislation without knowing how the powers conferred may be exercised by ministers and so without knowing what impact the legislation may have on members of the public affected by it.”³⁰⁴

- 4.7 Perhaps the most controversial type of delegated power is a ‘Henry VIII clause’, defined as “a provision in a Bill which enables primary legislation to be amended or repealed by subordinate [secondary] legislation.”³⁰⁵ This is despite the fact that primary legislation will have received a degree of scrutiny and a stamp of approval from Parliament. Nevertheless, the Select Committee on the Constitution has observed that Henry VIII clauses are “an increasingly common feature of legislation”³⁰⁶ and that the breadth of the powers granted can be significant.³⁰⁷ The Committee has, for instance, reported on bills where such powers have been considered “for matters of policy significance, such as the creation of new criminal offences or public bodies.”³⁰⁸

³⁰¹ *ibid.*, p. 29.

³⁰² Lord Mance, ‘*Should the law be certain? The Oxford Shrieval lecture*’, (2011), p. 1.

³⁰³ T. Bingham, *The Rule of Law* (Penguin 2010), p. 84.

³⁰⁴ Letter to Rt Hon. Michael Gove MP and Rt Hon. Jacob Rees-Mogg from Lord Hodgson, Rt Hon. Baroness Taylor and Rt Hon. Lord Blencathra, ‘*Skeleton bills and skeleton provision*’, (25 September 2020), p. 1.

³⁰⁵ The House of Lords Select Committee on the Scrutiny of Delegated Powers, ‘*First Report of 1992-93*’, para.10.

³⁰⁶ Select Committee on the Constitution, ‘*The Legislative Process: The Delegation of Powers*’, HL Paper 225, (2018), p. 20, citing its own briefing on the Data Protection Bill.

³⁰⁷ For example, Clause 40 of The Bill of Rights Bill contained an “unprecedented” Henry VIII power. See our briefing here: JUSTICE, ‘*Bill of Rights Bill: House of Commons Second Reading Briefing*’, (2022), paras 50–51.

³⁰⁸ Select Committee on the Constitution, ‘*The Legislative Process: The Delegation of Powers*’, HL Paper 225, (2018), p. 16. The Committee gives the example of clause 34 of the Children and Social Work Bill in 2016–17, which “provided for criminal

4.8 Again, from the point of view of foreseeability of the law’s impact, it is often not possible to know exactly what a minister may use the Henry VIII power to do at the time the power is granted, or even to know which pieces of primary or secondary legislation might be altered using the power. This is particularly true where such delegations of power are “widely drawn”.³⁰⁹ For example, when a power is bound by whether the minister thinks its exercise is ‘appropriate’ — a subjective test — rather than it being objectively ‘necessary’.³¹⁰ A further concern is that this might spill over into the rule of law requirements against arbitrariness. Indeed, as explained by the Venice Commission, “it is contrary to the rule of law for executive discretion to be unfettered power”.³¹¹ Yet, frequent recourse to broad Henry VIII powers in the drafting of bills may lead to an increasingly powerful, yet less constrained executive.

Recent legislative developments

The Retained EU Law (Revocation and Reform) Act 2023

4.9 As initially introduced, the REUL Act raised serious concerns regarding various aspects of legal certainty. By way of context, the European Union (Withdrawal) Act 2018 allowed for EU laws in force on exit day to be enshrined in domestic legislation to prevent a legal vacuum. This created a category of domestic law called ‘retained EU law’ (“**REUL**”). The REUL Act seeks to accelerate the process of getting any such law off the books. In doing so, the original Bill intended to introduce a deadline of 31 December 2023, at which point any REUL would “automatically” be revoked, “unless steps [were] taken to avoid the revocation”.³¹² This raises several issues of legal certainty.

4.10 Legal certainty requires that the laws are “stable”, such that “they are changed only with fair warning”.³¹³ UCL’s Constitution Unit raises a similar point, arguing that adherence to the rule of law requires that “rapid large-scale alteration of the law, and the uncertainty it can create, should be avoided.”³¹⁴ It should be noted that REUL forms “a significant part of the governing law in many areas of commercial and general life, in areas such as consumer rights, data protection, safety regulation, VAT, employment law, and financial services.”³¹⁵ Wholesale repeal of REUL would, therefore, create a legal vacuum where there had previously been relative stability; indeed, the vacuum that the European Union (Withdrawal) Act 2018 intended to prevent in the first place.

4.11 Moreover, identifying REUL has proven challenging, and estimates of the number of pieces of REUL that remain on the statute book have varied significantly since the Government first

offences to be created in relation to other clauses which contained little detail and were themselves expected to be defined and implemented by delegated legislation.” Clause 34 became Section 45 in the finalised Act.

³⁰⁹ Select Committee on the Constitution, ‘*The Legislative Process: The Delegation of Powers*’, HL Paper 225, (2018), p. 20.

³¹⁰ *European Union (Withdrawal) Act 2018*, s. 8. The Select Committee on the Constitution raised this as a concern in its scrutiny of the Bill (when Section 8 was Clause 7). Select Committee on the Constitution, ‘*9th Report of Session 2017–19: European Union (Withdrawal) Bill*’, HL Paper 69, (2018).

³¹¹ Venice Commission of the Council of Europe, ‘*The Rule of Law Checklist*’, (2016), p. 29.

³¹² Per Clause 1 of the *Retained EU Law (Revocation and Reform) Bill*, as introduced. The Select Committee on the Constitution, ‘*13th Report of Session 2022–23: Retained EU Law (Revocation and Reform) Bill*’, HL Paper 151, (2023), p. 10

³¹³ Venice Commission of the Council of Europe, ‘*The Rule of Law Checklist*’, (2016), p. 26.

³¹⁴ UCL’s Constitution Unit makes a similar point, arguing that the rule of law requires that “rapid large-scale alteration of the law, and the uncertainty it can create, should be avoided.” L. James and J. van Zyl Smit, ‘*The Constitution Unit Briefing. The Rule of Law: What is it and Why Does it Matter?*’, (2022), p. 2.

³¹⁵ The Bar Council, ‘*House of Commons’ European Scrutiny Committee Inquiry into retained EU law – where next? Bar Council written evidence*’ (2022) para. 5.

introduced the Bill.³¹⁶ It is fair to assume that not all pieces of REUL have yet been identified. Therefore, as we explained in our briefings on the Bill, the result is that REUL may delete unidentified law unintentionally, with consequent uncertainty.³¹⁷

4.12 As introduced, Clause 2 of the Bill would also have allowed for the end-of-year deadline to be extended for a specified instrument or a specified description of legislation up to 23 June 2026 at the latest. The Hansard Society rightly argued that this had the potential to create a “*patchwork quilt of sunset dates across different policy areas, resulting in even greater legal complexity*”.³¹⁸

4.13 This is all in addition to the issues raised about the Bill in Chapter 2 — its skeletal nature and the significant delegation of powers to ministers — which are also worrying from a legal certainty standpoint. Indeed, very little policy is provided on the face of the Bill that would explain what will guide Governmental decisions on whether to retain, modify or delete certain pieces of REUL, as well as what will replace any revoked REUL³¹⁹ — a far cry from the rule of law requirement that the impact of legislation be foreseeable.³²⁰

4.14 JUSTICE is not alone in making the criticisms outlined above. In the words of the Delegated Powers and Regulatory Reform Committee, no explanation was given for “*the headlong rush and the impending and arbitrary end-of-year deadline*”.³²¹ Furthermore, Stephen Denyer, Chair of the International Bar Association’s Rule of Law Forum called the Bill a “*thoroughly bad piece of prospective legislation*”, which might “*seriously curtail legal certainty*”.³²² Concern about legal uncertainty was also expressed by more than a dozen other organisations, including the Institute of Directors, the Trade Union Congress and the Chartered Institute of Personnel and Development, who warned that the Bill would “*cause significant confusion and disruption*” for businesses, workers, consumers and conservationists.³²³ Catherine Barnard, Professor of Law at the University of Cambridge, stated in her evidence to the Public Bill Committee that the Bill “*undermines the*

³¹⁶ “It was originally estimated that some 2,400 laws would require review and conversion. However, the *Financial Times* ... reported that ministers, together with the National Archives, [had] ‘discovered’ a further 1,400 pieces of legislation.” J. Pratt, “*The end of retained EU law?*”, (2023). The latest iteration of the REUL Dashboard published by the Government on 12 May 2023, identifies “over 4,800 individual pieces of REUL in total”. Department for Business and Trade, “*Retained EU Law Dashboard*”, (2023).

³¹⁷ The Shadow Secretary of State for Business and Industrial Strategy, Jonathan Reynolds, described the Bill as “*a charter for uncertainty, confusion and the regression of essential British rights*”. HC Deb, 18 January 2023, Vol 726, Col. 491.

³¹⁸ The Hansard Society, “*Five problems with the Retained EU Law (Revocation and Reform) Bill*”, (2022). See also, The Delegated Powers and Regulatory Reform Committee, “*25th Report of Session 2022–23: Retained EU Law (Revocation and Reform) Bill Northern Ireland Budget Bill Neonatal Care (Leave and Pay) Bill Employment (Allocation of Tips) Bill*”, HL Paper 147, (2023), p.4; and the Select Committee on the Constitution, “*13th Report of Session 2022–23: Retained EU Law (Revocation and Reform) Bill*”, HL Paper 151, (2023), p.10. The Select Committee on the Constitution lists a number of other issues for legal certainty created by the Bill (pp.10–12). For example, “[i]t is possible that retained EU law was implemented by secondary legislation in one part of the United Kingdom but by primary legislation in another. This could entail the automatic revocation in one part of the UK of measures to implement an EU obligation that is preserved in another.”

³¹⁹ The Delegated Powers and Regulatory Reform Committee, “*25th Report of Session 2022–23: Retained EU Law (Revocation and Reform) Bill Northern Ireland Budget Bill Neonatal Care (Leave and Pay) Bill Employment (Allocation of Tips) Bill*”, HL Paper 147, (2023), p. 4.

³²⁰ See, for example, Venice Commission of the Council of Europe, “*The Rule of Law Checklist*”, (2016), pp. 25–26.

³²¹ The Delegated Powers and Regulatory Reform Committee, “*25th Report of Session 2022–23: Retained EU Law (Revocation and Reform) Bill Northern Ireland Budget Bill Neonatal Care (Leave and Pay) Bill Employment (Allocation of Tips) Bill*”, HL Paper 147, (2023), p. 4.

³²² M. Taylor, “*Brexit: UK’s “sunset” law bill to “seriously curtail legal certainty”*”, (International Bar Association, 2023).

³²³ D. Thomas, P. Foster, G. Parker, “*UK business and unions demand scrapping of planned bonfire of EU rules*”, (*Financial Times*, 2022).

UK's international reputation as a stable system for investment and in which to settle legal disputes."³²⁴

4.15 The Government ultimately retreated from the “*cliff-edge sunset clause*”³²⁵ that would automatically repeal any unsaved REUL instruments by the end of the year, but only after receiving significant pressure from various quarters. The Secretary of State for Business and Trade, Kemi Badenoch, announced, through a written ministerial statement, that the Government would be tabling an amendment to:

*“replace the current sunset in the Bill with a list of the retained EU laws that [the government intends] to revoke under the Bill at the end of 2023... instead of highlighting only the REUL that would be saved.”*³²⁶

4.16 It is true that this change will avoid REUL being automatically deleted by mistake. Nevertheless, concerns regarding legal certainty remain. First, as the Institute for Government argued, the “*long list of rules*” that the Government put forward for removal had to be considered by members of Parliament in a short amount of time, given they were introduced near the end of the Bill’s passage in the Lords. This made it difficult for them to “*engage substantively*” with the list before the legislation passed.³²⁷ Second, the Act still removes the interpretive effect of EU law by the end of 2023,³²⁸ while encouraging higher courts to depart from EU-influenced case law.³²⁹ The result is that this will create “*uncertainty as to the meaning and status of... REUL by removing established principles by which it is to be interpreted.*”³³⁰

The Illegal Migration Act 2023

4.17 The Illegal Migration Act 2023 also presents issues of legal certainty. The original Bill would have meant that the majority of its provisions, including the duty to deport, would have applied retrospectively (that is, to people who arrived in the UK before this law passed). As we have argued in our briefings on the Bill, legal certainty is especially important when the UK’s international legal obligations are at stake and when extremely vulnerable individuals will be affected.

4.18 A late Government concession to the Bill meant that provisions such as the duty to deport and the disapplication of an individual’s asylum claim would only come into effect once the section of the Bill came into force. This was a welcome development, and we hope any future Government will be dissuaded from future attempts to give itself such extensive retrospective powers.

4.19 Nevertheless, the Act, which received Royal Assent on 20 July 2023, does still contain some concerning retrospective powers for the Home Secretary, such as those concerning the accommodation of unaccompanied children and restrictions to the entitlement for leave or citizenship of those who arrived after 7 March 2023. Section 21 removes protections for individuals

³²⁴ C. Barnard and J. Grogan, ‘*Retained EU Law (Revocation and Reform) Bill Written evidence for HC Public Bills Committee*’, (2022).

³²⁵ The Delegated Powers and Regulatory Reform Committee, ‘*25th Report of Session 2022–23: Retained EU Law (Revocation and Reform) Bill Northern Ireland Budget Bill Neonatal Care (Leave and Pay) Bill Employment (Allocation of Tips) Bill*’, HL Paper 147, (2023), p. 3.

³²⁶ K. Badenoch, ‘*Regulatory Reform Update : Statement made on 10 May 2023*’, UIN HCWS764, (2023).

³²⁷ J. Rutter, ‘*Government sees some sense at last on the Retained EU Law Bill*’, Institute for Government, (2023).

³²⁸ REUL Act 2023, s. 3 and 4.

³²⁹ Section 6(3) and 6(4) REUL Act 2023, amending Section 6 of the European Union (Withdrawal) Act 2018.

³³⁰ The Bar Council, ‘*Retained EU Law (Revocation and Reform) Bill: Bar Council written evidence and proposed/planned amendments, Public Bill Committee*’, (2022), p. 5.

in the Nationality and Borders Act 2022 not to be removed during their recovery period (the time when public authorities gather information to decide whether the individual was a victim of modern slavery) and to grant individuals limited leave to remain in certain circumstances. It gives the Home Secretary broad powers retrospectively to revoke leave granted legitimately to victims of trafficking or modern slavery under legislation approved by Parliament last year. This is no way to legislate in an area that involves how we, as a country, protect victims of human trafficking and modern slavery, further undermining the UK's reputation as a democratic state governed by the rule of law.³³¹

Clarity of the rules during the COVID-19 pandemic

4.20 As explained in Chapter 2, it is undoubtedly the case that the COVID-19 pandemic was a unique and unprecedented situation. Nevertheless, it arguably represented a set of circumstances (namely, a public health emergency) where it was even more important that the public could access, understand, and ultimately comply with the legal rules required to prevent transmission of the virus.

4.21 However, several issues regarding legal certainty beset the Government's handling of the pandemic.³³² Primary among them was a tendency to blur the distinction between regulations (which are binding) and guidance (which is not). From the perspective of legal certainty, it is crucial that the public understands what the law requires of them. This is particularly important where, as was the case during the pandemic, criminal sanctions suddenly attached to ordinary, everyday activities such as visiting friends and going to work. Indeed, as highlighted by Pippa Woodrow, a barrister at Doughty Street Chambers, in oral evidence to the Justice Select Committee inquiry on COVID-19 and the criminal law:

*“It is a basic common law requirement, as well as a feature of human rights protections, that criminal prohibitions in particular must be accessible, and they must be sufficiently certain for people to regulate their conduct and know in advance whether what they plan to do is or is not an offence...”*³³³

4.22 It is necessary that a bright red line be drawn between binding regulations and non-binding guidance. Whereas the latter may “influence” an individual's actions, the former “requires compliance”.³³⁴ In other words, there exists an element of choice when it comes to following Government guidance that does not exist when it comes to following the law.³³⁵

4.23 Throughout the pandemic, however, several parliamentary committees noted a distinct lack of clarity in the Government's messaging around what was legally prohibited and what was merely

³³¹ Joint Committee on Human Rights, *‘Inquiry into Illegal Migration Act launched – Home Secretary asked to appear before Committee’*, (6 March 2023).

³³² J. Grogan, *‘Rule of law and COVID-19: the need for clarity, certainty, transparency and coordination’*, (26 October 2020).

³³³ House of Commons Justice Committee, *‘Covid-19 and the criminal law: Fourth Report of Session 2019–21’*, HC 71, (2021), p.13, citing P. Woodrow, *‘Oral evidence: Covid-19 and the criminal law, HC 1316’*, (2021), Q27.

³³⁴ The Joint Committee on Statutory Instruments, *‘Rule of Law Themes from COVID-19 Regulations: First Special Report of Session 2021–22’*, HL 57, HC 600, (2021), p. 14.

³³⁵ At least not without legal consequences.

suggested action, both in its statements³³⁶ and in its published guidance.³³⁷ Examples abound of instances where the Government’s accompanying guidance did not accurately reflect the requirements imposed by legislation. In fact, guidance often “*impose[d] more severe restrictions than [were] imposed by law*”.³³⁸ One such example was the rules outlining the frequency of exercise allowed outside of the home during the first national lockdown, which began in March 2020. Government guidance specified that individuals could “*go outside once a day for a walk, run, cycle*”.³³⁹ As the JCHR pointed out, however, this limit was not expressed in the regulations in force in England at the time. The regulations allowed individuals to leave their house for a ‘reasonable excuse’, for which exercise was explicitly included; there was “*no limit on the number of times a person can... exercise*” each day.³⁴⁰ What’s more, a report published by the Joint Committee on Statutory Instruments (“**JCSI**”) on Rule of Law Themes during the pandemic explains that this phenomenon was not limited to the early stages of the pandemic; it happened yet again during the 2021 national lockdown.³⁴¹

4.24 It was also not uncommon for the regulations themselves to be “*widely and... ambiguously worded*”, making it challenging for members of the public to know whether they were complying with the law.³⁴² This is contrary to the Venice Commission’s requirement that legislation is “*formulated with sufficient precision and clarity to enable legal subjects to regulate their conduct*

³³⁶ As the Joint Committee on Human Rights noted, ministers were often “not...clear as to whether they were stating activities [that] were illegal or simply advising against them.” The Joint Committee on Human Rights, ‘*The Government’s response to COVID-19: human rights implications, Seventh Report of Session 2019–21*’, HC 265, HL Paper 125, (2020), p.21. The Select Committee on the Constitution made the same observation, noting that “*Government publications and statements did not distinguish between public health advice and legal requirements*”. Select Committee on the Constitution, ‘*3rd Report of Session 2021–22: COVID-19 and the use and scrutiny of emergency powers*’, HL Paper 15, (2021), p.31 [footnote omitted].

³³⁷ It is true that this issue goes beyond the COVID-19 pandemic. Both the DPRRC and SLSC identified in their 2021 thematic reports (introduced in Chapter 2) a new trend towards the use of “*disguised legislative instruments*”. That is, instruments that are “*legislative in effect*” but regularly evade parliamentary scrutiny, such as mandatory guidance. Delegated Powers and Regulatory Reform Committee, ‘*12th Report of Session 2021–22. Democracy Denied: The urgent need to rebalance power*’, (2021), p. 33. Nevertheless, the pandemic provides a particularly interesting case study for the use of such instruments, given that public action and compliance were both necessary to prevent transmission of an infectious disease, and there were criminal consequences of not complying.

³³⁸ The Joint Committee on Statutory Instruments, ‘*Rule of Law Themes from COVID-19 Regulations: First Special Report of Session 2021–22*’, HL 57, HC 600, (2021), p. 13.

³³⁹ The Joint Committee on Human Rights, ‘*The Government’s response to COVID-19: human rights implications, Seventh Report of Session 2019–21*’, HC 265, HL Paper 125, (2020), p. 21.

³⁴⁰ What’s more, updated guidance issued in May made it appear as though the rules around exercise had changed: “*The guidance...referred to being able to ‘exercise outdoors as often as you wish’ as something which people could do but could not before, although there was never a legal prohibition in England against exercising more than once per day.*” The Joint Committee on Human Rights, ‘*The Government’s response to COVID-19: human rights implications, Seventh Report of Session 2019–21*’, HC 265, HL Paper 125, (2020), p. 21.

³⁴¹ The Joint Committee explains that “*regulations...prohibited people from leaving their home without reasonable excuse and listed some, but not all, of the excuses that would be considered reasonable. But the guidance went beyond what was in the regulations. It directed people to limit exercise to once a day, not to ‘travel outside your local area’—which was defined as ‘avoiding travelling outside of your village, town or the part of a city where you live’—to maintain a set distance from people not in their household or support bubble, and to leave home to shop only for ‘basic necessities’.* None of these restrictions was included in the regulations and they were not legally enforceable...” The Joint Committee on Statutory Instruments, ‘*Rule of Law Themes from COVID-19 Regulations: First Special Report of Session 2021–22*’, HL 57, HC 600, (2021), p. 13 [footnotes omitted].

³⁴² The Joint Committee on Human Rights, ‘*The Government’s response to COVID-19: human rights implications, Seventh Report of Session 2019–21*’, HC 265, HL Paper 125, (2020), p.21. The JCSI also “*reported a number of provisions where the terms of the restrictions had not been cast with sufficient clarity. Isolation regulations, for example, required people to stay in a ‘suitable place’, without objective criteria on the face of the regulations setting out how the suitability of accommodation was to be determined. It would have been possible to articulate factors of that kind; and in their absence it will have been difficult or impossible for a significant number of people to know whether or not they were isolating in a manner that protected them from criminal liability.*” The Joint Committee on Statutory Instruments, ‘*Rule of Law Themes from COVID-19 Regulations: First Special Report of Session 2021–22*’, HL 57, HC 600, (2021), p. 10 [footnotes omitted].

in conformity with it".³⁴³ The case is particularly strong where criminal sanctions attach to a breach of the regulations. Worse still, a number of committees documented how guidance was used to 'fill gaps' or 'provide gloss' on COVID-19 regulations.³⁴⁴ The SLSC, for example, noted that the definition of a 'critical worker' in the Health Protection (Coronavirus, Restrictions) (No. 3) and (All Tiers) (England) (Amendment) Regulations 2021 was left to guidance, rather than defined in the regulations.³⁴⁵ Furthermore, the JCSI highlighted how the loose wording in the regulations on international travel restrictions³⁴⁶ regarding the procedures to be followed by COVID-19 test providers was to be 'tightened up' in guidance.³⁴⁷ Again, this links back to the idea that to comply with the rule of law requirements of legal certainty, optional guidance must not be treated as though it carries the same weight and compulsion as the law. This renders illusory the discretionary nature of guidance.

4.25 These issues were further compounded by those outlined in Chapter 2, namely, the speed with which the rules were updated, with the effect that some regulations were published after changes had already been announced.³⁴⁸ For the average citizen, it was very difficult to stay abreast of what the law required during a time when compliance was necessary to prevent transmission of the virus.³⁴⁹

4.26 Undoubtedly, the trends outlined above were a recipe for confusion, and run counter to the rule of law requirement of legal certainty. This has obvious knock-on consequences for compliance. Indeed, as the Select Committee on the Constitution succinctly put it, "[w]hen people are unable to understand what the rules are, they cannot hope to follow them."³⁵⁰ Although it is impossible to know whether breaches of COVID-19 regulations were deliberate or through ignorance, over the course of March 2020–March 2022, over 100,000 FPNs were issued, "including, most notoriously, to the Prime Minister himself, along with 125 other officials at the heart of government".³⁵¹ This

³⁴³ Venice Commission of the Council of Europe, *The Rule of Law Checklist*, (2016), p. 26 [footnotes omitted].

³⁴⁴ The Joint Committee on Statutory Instruments, *Rule of Law Themes from COVID-19 Regulations: First Special Report of Session 2021–22*, HL 57, HC 600, (2021), pp.15–17; Secondary Legislation Scrutiny Committee, *Government by Diktat: A call to return power to Parliament*, HL Paper 105, (24 November 2021), p. 21.

³⁴⁵ Secondary Legislation Scrutiny Committee, *Government by Diktat: A call to return power to Parliament*, HL Paper 105, (24 November 2021), pp. 20–21.

³⁴⁶ *The Health Protection (Coronavirus, International Travel) (England) (Amendment) (No. 26) Regulations 2020*, SI No.1337.

³⁴⁷ The Joint Committee on Statutory Instruments, *Rule of Law Themes from COVID-19 Regulations: First Special Report of Session 2021–22*, HL 57, HC 600, (2021), p. 16.

³⁴⁸ The Joint Committee on Human Rights notes e.g., "the North of England local lockdown was announced on 30 July but regulations underpinning it were not made until 4 August and did not come into force until 5 August." The Joint Committee on Human Rights, *The Government's response to COVID-19: human rights implications, Seventh Report of Session 2019–21*, HC 265, HL Paper 125, (2020), p. 21 at footnote 46. See also the Select Committee on the Constitution, *3rd Report of Session 2021–22: COVID-19 and the use and scrutiny of emergency powers*, HL Paper 15, (2021), p. 31, noting the same example.

³⁴⁹ The Joint Committee on Human Rights aptly summarises the numerous trends in the communication of COVID-19 rules that led to substantial legal uncertainty: "The communications of the guidance and laws has at times been confusing leading to widespread misunderstanding as to what people are and are not permitted to do. There have been a number of causes of this, including (i) guidance usually being stricter than restrictions imposed by accompanying legal regulations, (ii) regulations being made and published a substantial time after a new lockdown had been announced, (iii) regulations being widely and often ambiguously worded and (iv) ministers not being clear as to whether they were stating activities were illegal or simply advising against them." The Joint Committee on Human Rights, *The Government's response to COVID-19: human rights implications, Seventh Report of Session 2019–21*, HC 265, HL Paper 125, (2020), p. 21 [footnote omitted].

³⁵⁰ Select Committee on the Constitution, *3rd Report of Session 2021–22: COVID-19 and the use and scrutiny of emergency powers*, HL Paper 15, (2021), p. 53.

³⁵¹ A. Wagner, 'The Emergency State: How We Lost Our Freedoms in the Pandemic and Why it Matters', (2022), p. 3 [footnote omitted].

begs the question: if lawmakers themselves had little sense of whether their actions were compliant with COVID-19 regulations, then what hope did members of the public have?

- 4.27 The confusion over COVID-19 regulations also extended to those charged with their enforcement. Indeed, the lack of clarity regarding what was legally binding led to “*public health advice [being] incorrectly enforced by the police as though it were law*” and “*public authorities ... misstat[ing], incorrectly suggest[ing], that guidance had the force of law*”.³⁵² In evidence given to the Select Committee on the Constitution, for example, it was highlighted that there were instances of individual police officers, as well as the National Police Chiefs’ Council, incorrectly suggesting that social distancing requirements were legally enforceable.³⁵³ Officers expressed “*frequent frustration at the lack of notice they were given about some changes in the law and guidance*”³⁵⁴ and a survey carried out by the Police Federation found that “*9 out of 10 officers felt that the regulations were not clear*”.³⁵⁵
- 4.28 More problematically, this confusion manifested in instances of wrongful charging of individuals for breaches of COVID-19 regulations. The Justice Committee explains that there were “*incidents where confusion between the guidance and the law... led to misunderstanding about what was acceptable to do*”³⁵⁶, citing the example of two women who were incorrectly fined during the third national lockdown for driving seven miles to go for a walk. In fact, investigations undertaken by the Crown Prosecution Service (“CPS”) in the first year that the regulations were in place show that of those who challenged their FPNs, around 30% were incorrectly charged. 18% of those who were charged under the Health Protection (Coronavirus, Restrictions) Regulations and pleaded not guilty were incorrectly charged; none of those charged under the Coronavirus Act 2020 were correctly charged.³⁵⁷
- 4.29 Legal uncertainty and the lack of understanding of the regulations by the police had the potential to severely undermine both “*compliance and confidence*” in COVID-19 regulations.³⁵⁸ However, this is not only an issue of legal certainty, but it also poses a threat to rule of law requirements against arbitrariness and misuse of power. When public authorities lack understanding of the legal requirements this can lead to arbitrary interference in the lives of members of the public, as it undoubtedly did during the pandemic. Indeed, as aptly summarised by the Select Committee on the

³⁵² Select Committee on the Constitution, ‘*3rd Report of Session 2021–22: COVID-19 and the use and scrutiny of emergency powers*’, HL Paper 15, (2021), p. 32 [footnotes omitted].

³⁵³ Select Committee on the Constitution, ‘*3rd Report of Session 2021–22: COVID-19 and the use and scrutiny of emergency powers*’, HL Paper 15, (2021), p.32, see footnotes 129 and 130. See also A. Wagner, ‘The Emergency State: How We Lost Our Freedoms in the Pandemic and Why it Matters’, (2022), pp. 64–70, 78.

³⁵⁴ Joint Committee on Human Rights, ‘*The government response to covid-19: fixed penalty notices, Fourteenth Report of Sessions 2019–21*’, HC 1364, HL Paper 272, (2021), p. 23, citing Her Majesty’s Inspectorate of Constabulary and Fire & Rescue Services.

³⁵⁵ Joint Committee on Human Rights, ‘*The government response to covid-19: fixed penalty notices, Fourteenth Report of Sessions 2019–21*’, HC 1364, HL Paper 272, (2021), p. 24, citing evidence given to the committee by the Former National Chair of the Police Federation of England and Wales.

³⁵⁶ House of Commons Justice Committee, ‘*Covid-19 and the criminal law: Fourth Report of Session 2021–22*’, HC 71, (2021), p.13. See also Joint Committee on Human Rights, ‘*The government response to covid-19: fixed penalty notices, Fourteenth Report of Sessions 2019–21*’, HC 1364, HL Paper 272, (2021), p. 23.

³⁵⁷ CPS, ‘*6,500 coronavirus-related prosecutions in first six months of pandemic*’, (2021). For fuller context, see: L. Dearden, ‘*All 270 charges brought under Coronavirus Act wrongful, official review finds*’, *The Guardian*, (2021). See Also Joint Committee on Human Rights, ‘*The government response to covid-19: fixed penalty notices, Fourteenth Report of Sessions 2019–21*’, HC 1364, HL Paper 272, (2021), pp. 21–22.

³⁵⁸ Select Committee on the Constitution, ‘*3rd Report of Session 2021–22: COVID-19 and the use and scrutiny of emergency powers*’, HL Paper 15, (2021), p. 37.

Constitution, “[t]he Government does not have, and must not assume, authority to mandate public behaviour other than as required by law.”³⁵⁹

4.30 Even so, when the Justice Select Committee recommended that the Government “ensure that the public and the police have a clear understanding of the distinction between guidance and the law”³⁶⁰, the Government’s response was lacklustre. It noted that the Government has been “clear” in distinguishing between guidance and regulations, and stressed the operational independence of the police.³⁶¹ The Government explained that it had “worked closely with policing partners to ensure that the restrictions set out in the regulations [were] reasonably and lawfully enforced” and remarked that the police had “used their common sense, discretion and experience to enforce the COVID-19 regulations”.³⁶²

Conclusion and recommendations

4.31 Legal certainty is an important guiding principle for the rule of law, on which many depend on a daily basis across the realms of commerce and trade as well as with respect to fundamental human rights. As this chapter explains, legislative habits have progressed in such a way as to render the law ever more uncertain in each of these areas. As a consequence, individuals are disempowered and the risk of arbitrary actions on the part of the state increased. In response, we recommend improvements to legislative practices and guidance to engender a cultural shift within Government that places higher value on the importance of legal certainty, so as to safeguard and promote confidence in our legal system as one that operates predictability and in an evidence-based manner.

4.32 **Recommendation 10: The Government must improve its legislative practices with respect to the use of ‘Henry VIII’ powers.** We agree with the Select Committee on the Constitution that Henry VIII powers are “a departure from constitutional principle” and that “[d]epartures from constitutional principle should be contemplated only where a full and clear explanation and justification is provided.”³⁶³ If such powers are sought, they must be tightly drafted to ensure that they are used only when it is objectively necessary to do so, not merely ‘appropriate’.³⁶⁴ In other words, the Government cannot justify their use “solely by the need for speed and flexibility”.³⁶⁵ To ensure that parliamentarians are fully informed about the impacts of delegating their power, the

³⁵⁹ *ibid.*, p. 37.

³⁶⁰ House of Commons Justice Committee, ‘*Covid-19 and the criminal law: Fourth Report of Session 2021–22*’, HC 71, (2021), p. 15.

³⁶¹ House of Commons Justice Committee, ‘*Covid-19 and the criminal law: Government Response to the Committee’s Fourth Report of Session 2021–22, Second Special Report of Session 2022–23*’, HC 544, (2022), p. 7.

³⁶² *ibid.*

³⁶³ Select Committee on the Constitution, ‘*6th Report of Session 2010–11: Public Bodies Bill [HLL]*’, HL Paper 51, (2010), p. 4.

³⁶⁴ The Select Committee on the Constitution, for example, has “criticised the use of ‘appropriateness’ as a test for the use of powers, particularly when it involves a policy choice.” Select Committee on the Constitution, ‘*13th Report of Session 2022–23: Retained EU Law (Revocation and Reform) Bill*’, HL Paper 151, (2023), p.7, citing an earlier report: Select Committee on the Constitution, ‘*9th Report, Session 2017–19: European Union (Withdrawal) Bill*’, HL Paper 69, (2018), p.46. The Government has rejected the use of a necessity test with regard to the use of delegated powers more broadly (that is, not just Henry VIII powers) contained in the REUL Bill, remarking that “[a]ppropriateness tests are a common means of limiting the exercise of discretionary power and the use of appropriateness tests are well established in UK law.” Department for Energy Security & Net Zero, ‘*Government Response to the Select Committee on the Constitution Report - Retained EU Law (Revocation and Reform) Bill (13th Report of Session 2022–23)*’, (2023), p. 5.

³⁶⁵ Select Committee on the Constitution, ‘*The Legislative Process: The Delegation of Powers*’, HL Paper 225, (2018), p. 20, citing written evidence submitted by Professor John McEldowney, ‘*Written evidence (LEG0053)*’.

Government should explain “*the specific purpose that the Henry VIII power is designed to serve and how the power will be used.*”³⁶⁶

4.33 Recommendation 11: The Government must uphold legal certainty, ensuring that retrospective legislation is rarely used, and only in cases where it is absolutely necessary. We welcome the Government’s decision to retreat from the end-of-year deadline for dealing with all remaining REUL on the statute book. REUL spans numerous, important policy areas; individuals and businesses rely on the stability and certainty of the law to conduct their affairs. As such, the wholesale modification or removal of REUL would have been hugely detrimental to legal certainty. JUSTICE supports the “*responsible, measured approach*”³⁶⁷ being taken with regard to financial services and markets, that is, taking discrete policy areas separately and consulting with relevant stakeholders before making any changes to the law. Where proposed reforms will affect significant changes to the law (as opposed to making simple or technical modifications), the Government should adopt a consultative approach that is both well-evidenced and open to input from stakeholders and Parliament. The Government must not prize speed over legal certainty.³⁶⁸ Likewise, with respect to the Illegal Migration Act 2023, we recommend that, at the very least, the Government repeals the provisions that allow for retrospective application of the law. It is inimical to legal certainty that one’s rights and entitlements might be affected by a law not yet in place when they arrived in the UK.

4.34 Recommendation 12: The Government must be clear in distinguishing between legally enforceable regulations and non-binding guidance. It is undoubtedly true that guidance and statements “*have the potential to enhance legal clarity by explaining the law in non-technical language*”.³⁶⁹ It is, however, crucial that the distinction between law and guidance is made clear to the public and to those charged with the enforcement of the law. Ministers should not, in their public statements, conflate the two. This undermines understanding of the law and may lead to the enforcement of rules that are not strictly legally binding — an arbitrary use of power.

4.35 Recommendation 13: The Government must ensure that any regulations in an emergency must be drafted clearly, to ensure that individuals know whether their actions will attract liability or sanction. We agree with the Select Committee on the Constitution in recommending that when it comes to law-making in an emergency, “*the Government should be guided by the principles of certainty, clarity and transparency*”.³⁷⁰ This means that regulations should be clearly drafted and unambiguous in their meaning, but it also means giving Parliament, the public, and law enforcement authorities enough notice before enacting new regulations.

³⁶⁶ Select Committee on the Constitution, ‘*The Legislative Process: The Delegation of Powers*’, HL Paper 225, (2018), p. 20.

³⁶⁷ ‘*Retained EU Law (Revocation and Reform) Bill (First sitting)*’ HC Deb, 8 November 2022, Vol. Col 28.

³⁶⁸ We note here that the Government has stated that where it “*is reforming REUL in a way that fundamentally changes existing legislative and policy frameworks it has used, and will continue to use, primary legislation to make those changes*”, but that “*relying purely on primary legislation to reform REUL would neither be a good use of parliamentary time, nor allow Departments to make straightforward changes to REUL that could support economic growth.*” Delegated Powers and Regulatory Reform Committee, ‘*33rd Report of Session 2022–23, Retained EU Law (Revocation and Reform) Bill: Government Response*’, (2023), p. 5.

³⁶⁹ Select Committee on the Constitution, ‘*3rd Report of Session 2021–22: COVID-19 and the use and scrutiny of emergency powers*’, HL Paper 15, (2021), p. 31.

³⁷⁰ Of course, this is true of all legislative circumstances, but the rationale for clear and accessible regulations is even more evident during an emergency. Select Committee on the Constitution, ‘*3rd Report of Session 2021–22: COVID-19 and the use and scrutiny of emergency powers*’, HL Paper 15, (2021), p. 44. The Committee makes a number of specific recommendations regarding lawmaking in an emergency like COVID-19, see Chapter 4 of the above referenced report.

V. ACCESS TO JUSTICE

“It is a principle of our law that every citizen has a right of unimpeded access to a court... [It] is a ‘basic right’. Even in our unwritten constitution it must rank as a constitutional right.”
Steyn LJ, R v Secretary of State for the Home Department, ex parte Leech [1994]

Introduction

- 5.1** Access to justice is fundamental to the rule of law. In essence, it requires that individuals are able to access the courts in order to vindicate their rights, or defend themselves against claims or charges. This principle is “*firmly embedded in our legal history*”,³⁷¹ dating back to the *Magna Carta*, which declared that “*to no one will we sell, to no one deny or delay right or justice.*”³⁷² In more recent times, it has been confirmed that access to justice occupies a key position in our legal system. In *Unison v Lord Chancellor*, for example, Lord Reed, now President of the Supreme Court, remarked that the principle “*has long been deeply embedded in our constitutional law*”.³⁷³
- 5.2** The ability to access the courts is crucial in a number of respects. It allows individuals to hold public authorities accountable for the decisions that they have made; prevents unnecessary incursions into our liberty from the criminal law; and smooths the rough edges of majoritarianism by ensuring that the rights of minorities, even when unpopular, are upheld. Despite this, issues in accessing justice permeate the entirety of our justice system — criminal, civil and administrative.
- 5.3** As will be demonstrated by this chapter, successive governments have eroded various aspects of access to justice and erected numerous barriers for individuals seeking to access the courts. From a lack of proper resourcing of the justice system to attempts to shield the actions of public authorities from legal accountability, it is clear that this constitutional principle is increasingly strained. It would not be an exaggeration to say that the ability of individuals to effectively access justice has been noticeably and dangerously curtailed, with little sign of this trend abating.

Resourcing of the justice system

- 5.4** The legal system is complex and difficult to navigate. The average individual is “*not in a position to bring judicial proceedings on their own*”.³⁷⁴ It is, therefore, critical that legal advice, assistance and representation is both readily available and affordable. Where individuals are unable to pay for legal representation, individuals should be able to access legal aid, where the public interest dictates, so as to ensure an effective right of access to the courts.³⁷⁵ Parliament recognised this fact when it introduced the Legal Aid and Advice Act 1949, which provided access to free legal help for those who were unable to pay for a solicitor. As Sir Hartley Shawcross wryly observed during

³⁷¹ I. Stephanie Boyce, ‘“Rule of law” or “rules of law”? Public perceptions of the law and what it means for those who uphold it’, (2022), p. 9.

³⁷² ‘*English translation of Magna Carta*’, (British Library, 2014), art. 40.

³⁷³ [2017] UKSC 51 [64].

³⁷⁴ Venice Commission of the Council of Europe, ‘*Rule of Law Checklist*’, (2016), p. 25.

³⁷⁵ See e.g., *Golder v. the United Kingdom*, 4451/70, 21 January 1975, § 26ff.

the passage of the Act: “[t]here is the old taunt, the familiar taunt, about His Majesty’s courts being open to all just as the grill room at the Ritz hotel is open to all.”³⁷⁶

- 5.5 However, continual cuts to legal aid have decimated access to justice in the UK. Overall annual expenditure on legal aid dropped by a quarter between 2009 and March 2022.³⁷⁷ The watershed moment was the passage of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (“LASPO”), which cut legal aid for a range of civil disputes, such as those pertaining to welfare benefits, employment and private law family cases. Therefore, those who might have previously been granted legal aid were no longer eligible, yet still unable to afford legal representation. Individuals accessing legal aid for matters on welfare benefits, for example, fell by 99.5% between 2012/13 to 2016/17.³⁷⁸
- 5.6 It is true that there are exceptions for cases involving domestic violence or for those that qualify under the exceptional case funding mechanism. The latter acts as a critical safety net and is available on an individual basis for those who require funding but fall outside of the scope of legal aid. However, this emergency mechanism is currently under-utilised because there is a lack of awareness as to its availability. The Justice Select Committee remarked in 2015 that “the MoJ estimated that 5,000-7,000 applications for exceptional cases funding would be made annually, of which around 3,700 (74%-53%) would be granted.”³⁷⁹ Only 3724 applications in total were received in 2021/22, of which 2824 were granted.³⁸⁰
- 5.7 The cumulative effect of the reductions in legal aid has forced individuals to represent themselves in court — a notably stressful and emotional experience. The latest data shows that the proportion of disposals in private family cases, for example, where neither party was legally represented had reached 40% by Q4 of 2022 — a stark increase from 13% in Q1 of 2013. Furthermore, in only 18% of cases were both parties legally represented in the Q4 of 2022, compared to 41% in Q1 of 2013.³⁸¹ This has dire consequences for the proper administration of justice. Compared to a litigant in person, a barrister is much better able to understand the pertinent legal issues and present an objective view, thus assisting judges to carry out justice effectively.
- 5.8 Our previous work into the family justice system also highlights that the proliferation of litigants in person will introduce greater delays into the system and affect those most vulnerable. For example, we have found that the families in private law children proceedings in the Family Court “are disproportionately economically deprived, mental health difficulties and domestic abuse are

³⁷⁶ HC Deb, 15 Dec 1948, Vol 549, Col. 1221.

³⁷⁷ ‘Justice in Numbers: Access to justice’, (Gov.uk). This breaks down into a 30% drop in total criminal legal aid expenditure and a 10% in civil legal aid expenditure. Legal Aid Agency & Ministry of Justice, ‘National Statistics: England and Wales bulletin Oct to Dec 2022’, (2023). When looking at claim volume, the picture is complex, particularly for civil legal aid. Grants for civil representation have, for example, dropped by 35% since 2009, but so has the number of applications (they have dropped by 43%). It is possible that individuals do not think legal aid will be available and therefore do not apply. A significant drop in the civil legal aid sphere has occurred at the stage of ‘legal help’ (when an individual is given advice or assistance regarding a legal problem). It has dropped by nearly 90% since 2009. As for criminal legal aid, it tells a somewhat similar story. These statistics have been drawn from the Government’s [Legal Aid Statistics Dashboards](#).

³⁷⁸ R. Merrick, ‘Legal aid cuts trigger 99.5% drop in numbers receiving state help in benefits cases’, (*The Independent*, 2017).

³⁷⁹ House of Commons Justice Committee, ‘Impact of changes to civil legal aid under Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012: Eighth Report of Session 2014–15’, HC 311 (2015), p. 14.

³⁸⁰ UK Government Justice Data, ‘Legal aid data: Exceptional case funding’ (Gov.uk).

³⁸¹ Ministry of Justice, ‘Family Court Statistics Quarterly: October to December 2022’, (2023).

*more prevalent for them than the population at large, and some ethnic minorities are overrepresented in court proceedings”.*³⁸²

5.9 Furthermore, cuts have resulted in ‘legal aid deserts’, in which large swathes of England and Wales are unable to provide access to advice owing to the unavailability of providers. The latest data published by the Law Society highlights that, with respect to welfare legal aid providers, for example, “84% of the population do not have access to a welfare legal aid provider”.³⁸³ Moreover, there has been a 21% drop in the number of providers since April 2022.³⁸⁴ The result is an increasingly two-tier civil justice system, with the poorest in our society facing significant barriers to accessing the courts, let alone early legal advice which might aid to resolve disputes before they become too entrenched.

5.10 On 25 May 2023, the Ministry of Justice pledged an additional £25 million for legal aid every year.³⁸⁵ Following the increase in funding domestic abuse victims on universal credit who seek a protective order for themselves or their children against their attackers will be able to access legal aid without facing a means test. Additionally, victims who share a house with their abuser will benefit from changes to disputed or inaccessible assets as these will not be considered when assessing someone’s financial eligibility for legal aid. Other legal aid enhancing measures are set to be rolled out in the next two years. This includes making legal aid available to all persons under the age of 18. In addition, the ‘innocence tax’, through which individuals found not guilty have to pay towards their legal fees will be abolished. The amount of income someone can receive before having to contribute to legal aid fees will also be increased by over £3,000 for civil cases and over £12,000 for criminal cases in the magistrates’ court.³⁸⁶

5.11 JUSTICE welcomes these measures. We agree with the Secretary of State for Justice, Alex Chalk, who said this in relation to the expansion of legal aid, “[w]idening access to legal aid secures justice and strengthens the rule of law”.³⁸⁷ To that end, the Government must ensure anyone who needs legal aid has timely access to it. We echo the Bar Council’s concerns about the slow pace of reform at a time of high inflation, which may result in many people still being unable to access justice. Nick Vineall KC, Chair of the Bar Council, said:

*“The extension of legal aid eligibility is welcome as it means fewer people are excluded from access to justice, but these are slow steps of progress. It has already been a year since the proposals were made and we are concerned that the changes announced will now take up to two years to be implemented.”*³⁸⁸

5.12 A lack of proper resourcing of the justice system has not only led to issues of affordability, but also pervasive delays in the system. Turning to the criminal justice system, the backlog of cases has, for example, reached staggering proportions. The latest data shows that by the end of March 2023 there were 340,126 outstanding cases at the Magistrates’ courts and another 62,235 cases in the Crown

³⁸² JUSTICE, *‘Improving Access to Justice for Separating Families’*, (2022), p. 1.

³⁸³ The Law Society, *‘Welfare benefits — legal aid deserts’*, (2023).

³⁸⁴ *ibid.*

³⁸⁵ Ministry of Justice, *‘Government Response to Legal Aid Means Test Review’*, (May 2023).

³⁸⁶ From £22,325 to £34,950 for magistrates’ court representation and from £31,884 to £34,950 for civil legal aid. Ministry of Justice, *‘Press release: Access to vital legal support extended to millions of vulnerable people’*, (25 May 2023).

³⁸⁷ *ibid.*

³⁸⁸ The Bar Council, *‘Slow steps of progress on widening access to legal aid’*, (25 May 2023).

Court.³⁸⁹ Although tackling the backlog is an operational priority for the Ministry of Justice,³⁹⁰ progress has been slow: the aforementioned totals represent a mere 1% decrease on the previous quarter for the Magistrates' courts and a 0.4% decrease on the previous quarter for the Crown Court.³⁹¹ Both totals remain higher than pre-pandemic levels.

5.13 Practically speaking, this manifests in long waiting times for those coming before the criminal justice system, particularly in the Crown Court. For example, the median waiting time between a case being sent to the Crown Court and the first main hearing has nearly doubled since the onset of the pandemic (5.3 weeks in Q1 2020 versus 10.1 weeks in Q1 2023).³⁹² Furthermore, of the cases outstanding at the Crown Court, “*the average age... has increased markedly on pre-COVID levels*”³⁹³ — an increase on the previous quarter.³⁹⁴ By the end of March 2023, 29% of cases at the Crown Court had been pending for a year or more and 10% for over two years.³⁹⁵

5.14 In this way, the backlog greatly affects the system's ability to ensure that proceedings are started, and judicial decisions are made without undue delay³⁹⁶ — a crucial aspect of access to justice. For vulnerable complainants and witnesses, particularly those in cases involving serious allegations like rape or domestic violence, delayed justice may needlessly prolong suffering. Furthermore, as the time from an alleged crime increases, there is a greater likelihood that a case will collapse or that key witnesses — whether for the prosecution or defence — will forget the details of the incident.

5.15 As the Venice Commission explains, for access to justice to be maintained, “[i]t is...crucial that [the legal profession] is organised so as to ensure its independence and proper functioning”.³⁹⁷ However, the effect of legal aid cuts on criminal lawyers came to a head last year. Reportedly, “22% of junior barristers have abandoned the profession since 2016”, and without further investment, the Law Society anticipates that in as little as five to ten years “*there may be insufficient criminal lawyers to represent suspects entitled to free legal advice*”³⁹⁸ — a clear indication that the profession cannot be considered as ‘properly functioning’. Indeed, the Independent Criminal Legal Aid Review, published in December 2021, recommended that funding for legal aid be increased by 15%, which amounts to an additional £135 million per year.³⁹⁹ Crucially, the Review stressed that this amount was “*the minimum necessary as the first step in nursing the system of criminal legal aid back to health after years of neglect*”.⁴⁰⁰ The Government announced in June 2022 that criminal barristers would receive a 15% fee rise from September 2022 onwards and criminal solicitors would

³⁸⁹ Ministry of Justice, ‘*National statistics Criminal court statistics quarterly: January to March 2023*’, (29 June 2023).

³⁹⁰ House of Commons Justice Committee, ‘*Oral evidence: The work of the Ministry of Justice HC 1085*’, (2023). The permanent Secretary of the Ministry of Justice stated that the Department has made significant progress since the COVID-19 pandemic but that there was an increase because of the Criminal Bar Association strike action in October. The number of outstanding cases has come down again and is stabilising. They are recruiting an additional 1000 judges at all levels, investing on court maintenance to keep courts online; there are 30 additional nightingale courts, 24 that will be kept into the next financial year. The department is bearing down on backlog. The goal is 53,000 cases by March 2025.

³⁹¹ Ministry of Justice, ‘*National statistics Criminal court statistics quarterly: January to March 2023*’, (29 June 2023).

³⁹² *ibid*, p. 9.

³⁹³ *ibid*, p. 7.

³⁹⁴ *ibid*, p. 9.

³⁹⁵ *ibid*, p. 8.

³⁹⁶ Venice Commission of the Council of Europe, ‘*Rule of Law Checklist*’, (2016), p. 26.

³⁹⁷ *ibid*, p. 24.

³⁹⁸ ‘*The Guardian view on the Barristers’ strike: justice is on their side*’, (*The Guardian*, 2022).

³⁹⁹ Sir Christopher Bellamy, ‘*Independent Review of Criminal Legal Aid*’, (2021), p. 10.

⁴⁰⁰ *ibid*.

receive a 15% fee increase for defence work done in police stations or magistrates' courts.⁴⁰¹ The Criminal Bar Association (“CBA”) rejected this pay offer, arguing that the pay increase would not apply to the significant backlog of cases and that a 25% increase was necessary in light of inflation and the cost of living crisis.

5.16 After a summer of escalating action, the CBA announced that its members had voted for an all-out, indefinite strike beginning on 5 September 2022. A new deal was put on the table by the then Secretary of State for Justice, Brandon Lewis, which resulted in the CBA members voting to end the strike, by a slim majority of 57%.⁴⁰² The deal offered a 15% pay increase but included the majority of Crown Court cases in the backlog. The package also included injections of money into other aspects of criminal legal work, such as case preparation.⁴⁰³

5.17 Nevertheless, the criminal justice system is far from being in an ideal state. Although the strike action ended, Chair of the CBA, Kirsty Brimelow KC, remarked that “[b]arristers’ acceptance of this deal is a first step in working with government for long-term reform. If the deal falls short in implementation, the CBA will ballot its members again on taking action.”⁴⁰⁴ Furthermore, the Law Society has claimed that the Government’s final response to the Independent Criminal Legal Aid Review, published in late 2022, fails to implement the recommendations of the Review for solicitors. It argues that criminal defence solicitors “are set to receive a 9% increase to criminal legal aid funding in 2022 and a further 2% by 2024.”⁴⁰⁵ The Law Society has now issued judicial review proceedings to challenge the Government’s decision not to increase criminal defence solicitors’ legal aid rates by the 15% recommended in the Independent Criminal Legal Aid Review.⁴⁰⁶ As of 22 June 2023, the High Court had granted the Law Society permission to bring the case.⁴⁰⁷

Attempts to undermine judicial review

5.18 Another crucial aspect of access to justice is the ability of individuals to “challenge governmental actions and decisions adverse to their rights or interests.”⁴⁰⁸ This is primarily accomplished through judicial review, which assesses the lawfulness of decisions made by public authorities. In the administrative justice system, judicial review is crucial in order to ensure accountability of all public bodies and provide a check on state power — both of which are essential to the rule of law.

⁴⁰¹ Ministry of Justice, Legal Aid Agency & James Cartlidge MP, *‘Criminal barristers to receive 15 percent fee rise in September’*, (2022).

⁴⁰² *ibid.*

⁴⁰³ *ibid.*

⁴⁰⁴ *ibid.*

⁴⁰⁵ The Law Society, *‘Criminal Legal Aid Review’*, (2023).

⁴⁰⁶ On the basis “the government’s decision not to increase criminal defence solicitors’ legal aid rates by the recommended minimum 15% is both unlawful and irrational”. The Law Society, *‘Criminal Legal Aid Review’*, (2023), quoting Law Society President Lubna Shuja.

⁴⁰⁷ The Law Society, *‘Law Society vs government: High Court case gets go-ahead’*, (2023). The Law Society believes that “the Government’s decision not to implement the key recommendation of the Bellamy review is

- *irrational*
- *lacking reasons, and*
- *in breach of the constitutional right of access to justice*

The High Court has granted permission on all three grounds.”

⁴⁰⁸ Venice Commission of the Council of Europe, *‘Report on the Rule of Law’*, (2011), p. 11.

- 5.19 The Conservative Party’s 2019 Manifesto contained a commitment to “*update... administrative law to ensure that there is a proper balance between the rights of individuals, ... national security and effective government*”.⁴⁰⁹ Part of this ‘rebalancing’ effort would be to ensure that judicial review “*is not abused to conduct politics by another means or to create needless delays*”.⁴¹⁰ This commitment starts from the false premise that judicial review was being ‘abused’ in this way in the first place. Indeed, as Lord Dyson argued in his book *Justice, Continuity and Change*, he was “*not aware of a widespread sense of unease that judges are routinely overstepping the mark and impermissibly quashing executive decisions*”.⁴¹¹
- 5.20 Upholding the rights of individuals and examining the legality of decisions made by public bodies fall squarely within the province of courts. That judges address issues of a political nature in making these decisions speaks to the “*expansion of the scope of public authority*”⁴¹², rather than a desire by judges to get involved with politics.
- 5.21 In July 2020, the Government launched the Independent Review of Administrative Law (“**IRAL**”), led by Lord Faulks. Although there had been fear that publication of the report “*would lead to wholesale reform of judicial review in the United Kingdom*”, the final report instead made relatively modest recommendations for reform, highlighting “*the importance of the judicial review jurisdiction as a backstop against misuse or abuse of power by public bodies*”.⁴¹³ In the Government’s response to the IRAL, it accepted these recommendations and made further proposals for reform of judicial review, which appeared to “*go far beyond the scope and findings of the IRAL Report*”.⁴¹⁴ Far from “*restoring the balance of the constitution*”,⁴¹⁵ the Government’s reform agenda sought to take power away from individuals and erect significant barriers to testing the lawfulness of state action.
- 5.22 Admittedly, only a handful of the Government’s initial proposals with respect to judicial review made it to legislation, in the form of the Judicial Review and Courts Act 2022. Nevertheless, two particular provisions concerningly seek to reduce oversight over executive action.
- 5.23 First, the Act gives judges new remedial powers, including the ability to grant prospective only quashing orders (“**POQOs**”). Unlike a regular quashing order, POQOs have no retrospective effect. In other words, any actions taken before the quashing order was issued remain lawful. No redress is, therefore, afforded to those who were impacted before the court’s decision, including the claimant themselves.
- 5.24 There are several intersecting problems for the rule of law with these orders. First, it is an important element of access to justice that an individual can obtain redress for any harm that they have suffered as a result of unlawful governmental action. Second, they create an arbitrary distinction between people who have been affected by the unlawful measure before the court’s judgment, and

⁴⁰⁹ Conservatives, ‘*Get Brexit done, Unleash Britain’s potential: the Conservative and Unionist Party Manifesto 2019*’, (2019), p. 48.

⁴¹⁰ *ibid.*

⁴¹¹ J. Dyson, *Justice, Continuity and Change*, (2018), pp. 59-60.

⁴¹² I. Stephanie Boyce, ‘“Rule of law” or “rules of law”? Public perceptions of the law and what it means for those who uphold it’, (2022), p. 15.

⁴¹³ P. Daly, ‘*Reviewing Judicial Review: the Faulks Report*’, (2021).

⁴¹⁴ JUSTICE, ‘*Judicial Review Reform: The Government Response to the Independent Review of Administrative Law: Consultation Call for Evidence – Response*’, (2021).

⁴¹⁵ R. Ekins, ‘*The Government’s judicial review legislation is welcome, but could go even further*’, (2021). See also the Conservative Party Manifesto of 2019.

those who avoid such detriment after the judgment. Those in the former category remain wronged, but also without route to a remedy. POQOs therefore risk creating unjust outcomes and weaken the protection of citizens against abuse of power.

5.25 If claimants are denied redress because a quashing order has no retrospective effect, then the use of POQOs may disincentivise potential claimants from bringing a judicial review. Therefore, POQOs could have a chilling effect. This, in turn, would undermine Government accountability, good administration and the quality of decision-making by allowing the executive to act unchecked, safe in the knowledge that were a decision found to be unlawful, the implications would be limited. In essence, it “*disadvantage[s] claimants, while allowing the state to minimise the extent to which it will need to rectify its own mistakes*”.⁴¹⁶

5.26 Second, the Act renders certain decisions of the Upper Tribunal (Immigration and Asylum Chamber) — namely, those decisions where there is a refusal to grant permission to challenge a decision of the First-Tier Tribunal — immune from judicial review by the Administrative Court. Ousting the jurisdiction of the High Court has serious implications for an individual’s ability to access justice for decisions that have been incorrectly made.

5.27 Importantly, many of the cases in this chamber of the Upper Tribunal are related to asylum and human rights appeals, which engage the most fundamental of rights.⁴¹⁷ In the past, *Cart* Judicial Reviews have prevented serious injustices, serving to ensure that errors of law made by the First-Tier Tribunal and Upper Tribunal were identified and not perpetuated within the ‘closed’ tribunals system.⁴¹⁸ Examples include those where legal errors had been made in determining whether individuals in the following circumstances could remain in the UK:

- a. a child in need of life saving treatment;
- b. a victim of trafficking who was at risk of being re-trafficked and forced into prostitution if returned to Nigeria, and her daughter who was at risk of female genital mutilation;
- c. an individual with learning difficulties who faced being returned to Iran where they were at risk of persecution and inhuman and degrading treatment.⁴¹⁹

5.28 Of course, attempts to undermine judicial review are not a new concern. Indeed, as Lord Pannick explains, “*governments over the years have made threats to curtail judicial review (normally immediately after they have lost celebrated cases)*”.⁴²⁰ Former Lord Chancellor Chris Grayling, for example, launched a consultation to take action on ‘time-wasting’ judicial reviews.⁴²¹ Furthermore, the former Labour Home Secretary, David Blunkett, was also an outspoken critic of judicial power,

⁴¹⁶ I. Stephanie Boyce, ‘“Rule of law” or “rules of law”? Public perceptions of the law and what it means for those who uphold it’, (2022), p. 15.

⁴¹⁷ JUSTICE, ‘*Judicial Review and Courts Bill (Part 1 – Judicial Review): House of Lords Second Reading Briefing*’, (2022), p. 13. As Lord Dyson remarked in *R (on the application of Cart) v The Upper Tribunal and R (on the application of MR (Pakistan)) (FC) v The Upper Tribunal (Immigration & Asylum Chamber) and Secretary of State for the Home Department* [2011] UKSC 28 at [112], “*In asylum cases, fundamental human rights are in play, often including the right to life and the right not to be subjected to torture.*” See also M. Barcentewicz, ‘*Cart Judicial Reviews through the Lens of the Upper Tribunal*’, (2021), *Judicial Review* 26(3), which found that of *Cart* JRs between 2018 and 2020, over two-thirds of appeals raised human rights grounds, with 71% of “successful” *Cart* JRs involving human rights.

⁴¹⁸ JUSTICE, ‘*Judicial Review and Courts Bill (Part 1 – Judicial Review): House of Lords Second Reading Briefing*’, (2022), p. 14.

⁴¹⁹ ILPA, ‘*ILPA’s response to the government’s consultation on Judicial Review Reform*’ (2021).

⁴²⁰ Support Through Court, ‘*In Conversation with Lord Pannick KC, Joshua Rozenberg KC (hon) and Lord Dyson*’, (YouTube, 2023).

⁴²¹ Ministry of Justice, ‘*Action on time-wasting judicial reviews*’, (2013).

having argued (in 2001) that it was “*very much the case*” that judges had “*established judicial review as an almost boundless jurisdiction over almost every kind of governmental activity*”.⁴²²

Secret justice

5.29 Access to justice also requires that hearings are both fair and open, and that any evidence is publicly disclosed.⁴²³ As Lord Hope explained in *Bank Mellat v HM Treasury*:

*“The right to know and effectively challenge the opposing party’s case is a fundamental feature of the judicial process. The right to a fair trial includes the right to be confronted by one’s accusers and the right to know the reasons for the outcome. It is fundamental to our system of justice that, subject to certain established and limited exceptions, trials should be conducted and judgments given in public.”*⁴²⁴

5.30 Requirements of openness and fairness in the administration of justice are enshrined in both the common law⁴²⁵ and in Article 6 ECHR. Nevertheless, certain developments over the past decade have contradicted well-established principles of open justice.

The Single Justice Procedure

5.31 For certain summary, non-imprisonable offences, the Single Justice Procedure (“SJP”) allows for a lone magistrate, assisted by a legal adviser, to make a decision solely based on written material. The case is dealt with ‘behind closed doors’, with neither the prosecutor nor the defendant required to attend a hearing. The SJP, which was introduced by the Criminal Justice and Courts Act 2015, applies to individuals who have either pleaded guilty or have failed to respond within 21 days to a notice, sent by post, which outlines that they are being prosecuted and explains how to enter a plea. Those who plead ‘not guilty’ are entitled to a traditional hearing.

5.32 The idea behind introduction of the SJP is that it drives efficiency. It “*speed[s] up the hearing of less serious offences*”, giving magistrates more time to tackle “*serious and complicated cases*”.⁴²⁶ Offences covered by the SJP include, for example, watching live TV without a licence or failing to present a valid ticket on a train.⁴²⁷ Notably, use of the procedure extended to breaches of COVID-

⁴²² David Blunkett is quoting Professor Sir William Wade in the eighth edition of *Administrative Law*. D. Blunkett, ‘*Reviewing Democracy and Civil Society, A Lecture presented to Civitas: the Institute for the Study of Civil Society, October 2001*,’ (2001), p. 2.

⁴²³ House of Commons Justice Committee, ‘*Open justice: court reporting in the digital age*’, (2022) states that “[t]he Judicial College’s Guide to Reporting Restrictions explains that the general rule that justice must be administered in public can be broken down into the following elements:

- *Proceedings must be held in public.*
- *Evidence must be communicated publicly.*

Fair, accurate and contemporaneous media reporting of proceedings should not be prevented by any action of the court unless strictly necessary.”

⁴²⁴ [2013] UKSC 38 [81].

⁴²⁵ *Scott v Scott* [1913] HL 5, AC 417.

⁴²⁶ LexisNexis, ‘*Single justice procedure*’.

⁴²⁷ HM Courts & Tribunals Service, ‘*Promotional Material fact sheet: Single Justice Service*’, (2023).

19 regulations.⁴²⁸ As of January 2023, the procedure also applies to corporations, rather than merely natural persons (individuals).⁴²⁹

5.33 In an effort to drive down costs even further, the Ministry of Justice has trialled a new SJP system, which “*relax[es] the rules on legal advice provided to magistrates*”.⁴³⁰ Three magistrates (working separately on their own SJP cases) will share access to “*a single legal adviser who can be reached by phone or videocall*”.⁴³¹ Rather than having advisors sit with magistrates, they will have to be proactively called to obtain legal advice.⁴³² Last year, freedom of information requests revealed the results of a pilot of this new system, and it reveals that “*magistrates were tested against a target time of just 90 seconds to deal with each prosecution*.”⁴³³ Some magistrates have far exceeded this target. Research undertaken by the Evening Standard, for example, has revealed that one SJP magistrate in Swindon dealt with 40 cases in 15 minutes (at an average of 22.5 seconds per case), handing out £54,000 worth of fines in the process.⁴³⁴ Furthermore, although HMCTS had apparently set a target for 75% to be checked by legal advisers for any mistakes, “[*a]cross the five-month pilot in London, legal advisers managed to carry out quality checks on just 28 per cent of SJP cases*”.⁴³⁵

5.34 Recent reporting has revealed that 60.5% of all magistrates’ court cases in the third quarter of 2021 – around 175,450 cases – were handled using the SJP.⁴³⁶ Furthermore, in the first three-quarters of 2022, “*over 530,000 criminal cases were completed through the Single Justice Procedure*”.⁴³⁷ However, its use seems to have exploded without attendant scrutiny or investigation into the many problems associated with the procedure for issues related to access to justice. This adds to the concerns, outlined above, that potential miscarriages of justice might be taking place.

5.35 First, the data shows a total lack of engagement with the SJP. In 2020, 71% of individuals did not respond to the initial charge notice and therefore entered no plea — a proportion that rises to almost 90% when looking at charges brought under the Coronavirus Act 2020.⁴³⁸ The reasons for such a high non-response rate have not been effectively explored by the Government.⁴³⁹ It is possible that some individuals did not receive the charging notice in the post, or failed to understand its ramifications, in which case some of those convicted under the SJP may not even be aware of their

⁴²⁸ The Prosecution of Offences Act 1985 (Specified Proceedings) (Amendment) Order 2020, (SI 2020/562).

⁴²⁹ The Judicial Review and Courts Act 2022 (Commencement No. 2) Regulations 2022, (SI 2022/1358).

⁴³⁰ C. Hymas and B. Butcher, ‘*Record number of court cases are being heard in secret*’, (*The Telegraph*, 2022).

⁴³¹ T. Kirk, ‘*Magistrates handing out criminal convictions in private court hearings that last just 90 seconds*’, (*Evening Standard*, 2022).

⁴³² In the London pilot, that happened in just 0.5% of cases. T. Kirk, ‘*Magistrates handing out criminal convictions in private court hearings that last just 90 seconds*’, (*Evening Standard*, 2022).

⁴³³ *ibid.*

⁴³⁴ According to this reporting by the Evening Standard, in the pilot’s final phase in London, “*magistrates dealt with 1830 cases and 14 errors were spotted. But the data shows less than 500 cases were actually checked by legal advisers*.” T. Kirk, ‘*Magistrates handing out criminal convictions in private court hearings that last just 90 seconds*’, (*Evening Standard*, 2022).

⁴³⁵ *ibid.*

⁴³⁶ C. Hymas and B. Butcher, ‘*Record number of court cases are being heard in secret*’, (*The Telegraph*, 2022).

⁴³⁷ HM Courts & Tribunals Service, ‘*Promotional Material fact sheet: Single Justice Service*’, (2023).

⁴³⁸ JUSTICE, ‘*Judicial Review and Courts Bill (Part 2 – Criminal Procedure): House of Commons Committee Stage*’, (2021), p. 4.

⁴³⁹ The Government has carried out only two small, regional, pilot reviews regarding a behaviourally-redesigned Single Justice Procedure Notice, but this does little to address the problems raised in this chapter. See: HMCTS, ‘*Findings from the Metropolitan Police Pilot and TV Licencing Pilot of the behaviourally-redesigned Single Justice Procedure Notice (SJPN)*’, (2022).

convictions until it raises further issues down the line.⁴⁴⁰ This raises a number of red flags when it comes to compliance with one’s right to a fair trial, an essential component of access to justice. In the context of COVID-related offences, the Joint Committee on Human Rights, for example, expressed concerns that the SJP “*is an inadequate tool to provide the necessary fair trial protections for people accused of offences that are so poorly understood and lacking in clarity*”.⁴⁴¹ It is important to note here that the right to a fair trial under the ECHR requires that an individual is able to “*participate effectively*” in their trial.⁴⁴² This is clearly compromised when there is a “*lack of participation altogether, let alone effective participation*”.⁴⁴³

5.36 Second, we have, in the past, explained our concerns regarding transparency of the SJP.⁴⁴⁴ Notably, the Government’s recently opened Consultation on Open Justice asks consultees to provide their views on how the Government could enhance transparency of the SJP.⁴⁴⁵ We would highlight that the Government does not publish regular statistics on the use of the SJP.⁴⁴⁶ Any such data is typically uncovered through parliamentary questions or Freedom of Information Requests.⁴⁴⁷ The Justice Select Committee has similarly raised these concerns on several occasions,⁴⁴⁸ urging the Government to review the SJP and “*enhance its transparency by ensuring that any information that would have been available ... in open court is published in a timely fashion*”.⁴⁴⁹ APPEAL has argued that this might include “*how many people are being prosecuted under the SJP, for which offences, including the number that have pleaded guilty, not guilty or entered no plea*”.⁴⁵⁰ As the current Chair of the Justice Select Committee, Sir Bob Neill, explains, greater transparency would help to ensure that “*justice is seen to be delivered*”⁴⁵¹ — a critical factor in promoting access to justice.

5.37 Finally, use of the SJP to handle breaches of the COVID-19 regulations brought to the fore the dangers of prizing efficiency over quality of justice. As introduced in Chapter 4, investigations by the CPS into those who challenged their FPNs and chose to take their cases to an open court (in other words, those who pleaded not guilty), show that nearly a third of such individuals were

⁴⁴⁰ APPEAL, ‘*Conveyor Belt Justice: The case against the Single Justice procedure*’, (2021), p. 4.

⁴⁴¹ Joint Committee on Human Rights, ‘*The government response to covid-19: fixed penalty notices, Fourteenth Report of Sessions 2019–21*’, HC 1364, HL Paper 272, (2021), p.30. This links to the issues laid out in chapter 4, regarding legal certainty and the clarity with which COVID-19 offences were drafted. See also House of Commons Justice Committee, ‘*Covid-19 and the criminal law: Fourth Report of Session 2021–22*’, HC 71, (2021), pp. 26–27.

⁴⁴² *Stanford v UK* (1994) Series A/282.

⁴⁴³ There may be more detrimental impacts on vulnerable groups of people, such as women or neurodivergent individuals. Transform Justice, ‘*Computer says yes – you will pay a fine and get a criminal record*’, (2021).

⁴⁴⁴ JUSTICE, ‘*Judicial Review and Courts Bill (Part 2 – Criminal Procedure): House of Commons Committee Stage*’, (2021), p. 4.

⁴⁴⁵ Ministry of Justice, ‘*Open justice, the way forward*’, (2023).

⁴⁴⁶ The last time the Government published statistics specifically on the SJP was in its Q1 Criminal Court Statistics in 2019. Ministry of Justice, ‘*Criminal court statistics quarterly, England and Wales, January to March 2019*’, (2019), p. 10.

⁴⁴⁷ For example, UIN 143756, tabled on 26 January 2021.

⁴⁴⁸ House of Commons Justice Committee, ‘*Covid-19 and the criminal law*’, (2021); House of Commons Justice Committee, ‘*Open justice: court reporting in the digital age*’, (2022).

⁴⁴⁹ House of Commons Justice Committee, ‘*Open justice: court reporting in the digital age*’, (2022).

⁴⁵⁰ ‘*Written Evidence from APPEAL*’, (2021).

⁴⁵¹ C. Hymas and B. Butcher, ‘*Record number of court cases are being heard in secret*’, (*The Telegraph*, 2022).

incorrectly charged.⁴⁵² It is not known how many individuals pleaded guilty under the SJP and were convicted of breaching COVID-19 regulations but were, in reality, incorrectly charged.⁴⁵³ Nevertheless, use of the SJP in these circumstances, where regulations were being amended rapidly and often, bring the risks to fair trial rights associated with the procedure into sharp focus. Indeed, the Joint Committee on Human Rights highlighted its concerns regarding the effect of the SJP on fair trial protections for those accused of COVID-19 breaches. It argued that the SJP might be an “*inadequate tool*”, particularly given that authorities had made numerous mistakes when enforcing the regulations.⁴⁵⁴

Automatic Online Conviction and Standard Statutory Penalty

5.38 Section 3 of the Judicial Review and Courts Act 2022 takes the SJP a significant step further and establishes the Automatic Online Conviction and Standard Statutory Penalty (“AOCSSP”) procedure. Whereas the SJP relies on a lone magistrate to make a decision, the AOCSSP procedure cuts out their involvement completely. Defendants can opt to have their case dealt with entirely online, by a computer, for summary, non-imprisonable offences specified by the Lord Chancellor.⁴⁵⁵ As explained by the Ministry of Justice: “[i]f defendants choose this option, they can be convicted, sentenced, and pay their fine quickly online, without the involvement of a magistrate, or the need to attend court in-person.”⁴⁵⁶

5.39 The AOCSSP procedure is not yet in force. However, the Government has not explained how the well-documented issues with the SJP will be addressed with the new framework. For example, it is not clear how the AOCSSP procedure will encourage greater engagement than the SJP. As we have argued before:

*“Although the new AOCSSP is optional (unlike the SJP, the defendant will not be convicted and sentenced if they do not respond to the electronic notification), it is unclear what will happen if they do not respond to the notification. Presumably they will be filtered back into the SJP where non-engagement will result in conviction”.*⁴⁵⁷

5.40 This is particularly concerning given that the consequences of conviction are serious: the individual may end up with a criminal record, which will have knock on effects for employment, amongst other things. In short, the lack of transparency, engagement and underlying issues associated with the SJP makes it difficult to conclude that the AOCSSP procedure will be compliant with the requirements of access to justice.

The closed material procedure

5.41 Although it is a well-accepted feature of access to justice that the administration of justice is best done in public, tightly circumscribed exceptions to this principle may be justified in the public

⁴⁵² CPS, ‘*CPS review findings for first year of Coronavirus prosecutions*’, (2021). Investigations by the Evening Standard early on during the Pandemic raised these concerns, highlighting cases where individuals have been incorrectly charged. T. Kirk, ‘*Covid rule breakers targeted in secret London prosecutions*’, (Evening Standard, 2020).

⁴⁵³ The vast majority of individuals pleaded guilty. For SJP cases more generally, “[j]ust five per cent of [SJP] cases are dealt with in open court due to not guilty pleas, according to the MoJ data obtained by *The Telegraph*.” C. Hymas and B. Butcher, ‘*Record number of court cases are being heard in secret*’ (*The Telegraph*, 2022).

⁴⁵⁴ Joint Committee on Human Rights, ‘*The Government response to covid-19: fixed penalty notices: Fourteenth Report of Session 2019–21*’, (2021), p. 30.

⁴⁵⁵ Judicial Review and Courts Act 2022, s. 3.

⁴⁵⁶ ‘*Written Submission by the Ministry of Justice*’, (2021).

⁴⁵⁷ JUSTICE, ‘*Judicial Review and Courts Bill (Part 2 – Criminal Procedure): House of Commons Committee Stage Briefing*’, (2021), p. 5.

interest. This might include, for example, “*providing screens to protect witnesses or hearing some evidence in private to limit publicity and to protect the identities of children*”.⁴⁵⁸ Such measures are largely uncontroversial; they are designed to protect vulnerable individuals.

5.42 The closed material procedure (“**CMP**”), however, aims to protect the state and its national security interests.⁴⁵⁹ It permits one party to be shut out of court for part, or all, of the hearing of a case involving evidence that might be damaging to national security. The excluded party is appointed a ‘Special Advocate’ to represent their interests during the closed proceedings.

5.43 The Justice and Security Act 2013 significantly expanded the scope of the CMP beyond national security cases. It can now be deployed in *any* civil proceedings where the disclosure of material that is damaging to national security interests is required, and where it is in the interests of the fair and effective administration of justice for the procedure to apply.⁴⁶⁰

5.44 The CMP raises a number of concerns with regard to the open administration of justice and it is a “*major deviation from the usual... principle that justice must not only be done, but be seen to be done*”⁴⁶¹. This is because it prevents the disclosure of sensitive material to one of the parties to the case, their counsel and the public. That one party is not privy to evidence and is unable to comment on or challenge the evidence that is submitted to the court by the Government undermines the fundamental common law principles of natural justice, including “*audi alteram partem*”: being able to know and respond to the case against you.⁴⁶²

5.45 Before the Justice and Security Act 2013 was in force, we conducted a review of the operation of CMP. Our conclusions highlighted the major access to justice and fair trial concerns that arise with its use.⁴⁶³ In particular, we concluded that secret evidence cannot be challenged and is inherently unreliable, rendering the CMP unfair, undemocratic, opaque, and thereby damaging the integrity of courts and the rule of law.⁴⁶⁴ In our view, there are other means than using secret evidence that protect national security and provide greater respect for the right to open justice and a fair hearing. For example, public interest immunity (“**PII**”), as well as confidentiality rings, redactions and anonymity orders, prevent any disclosure which could endanger national security.⁴⁶⁵

5.46 Nearly a decade of practice since the passage of the Justice and Security Act 2013 has further informed our concerns. For example, when the Government carried out its statutory review of the operation of the CMP in 2021, we convened a roundtable of experienced lawyers with a range of experience in representing claimants in proceedings involving CMP. We noted three concerns that raise particular issues for access to justice for the litigants in CMP proceedings. First, the Government’s approach towards CMP can be excessively adversarial, seeking to withhold as much information as possible. This not only causes delays, but risks CMP becoming commonplace and

⁴⁵⁸ JUSTICE, *Law for Lawmakers: A JUSTICE Guide to the Law*, (2015), p. 17.

⁴⁵⁹ Justice and Security Act 2013, Section 6. See also JUSTICE, *Statutory review of the “closed material procedure” provisions in the Justice and Security Act 2013: JUSTICE’s response*, (June 2021).

⁴⁶⁰ Justice and Security Act 2013, s. 6(4) – (5).

⁴⁶¹ A. Henderson, *When can a Closed Material Procedure be used?*, (UK Human Rights Blog, 2017).

⁴⁶² *Ridge v Baldwin* [1964] AC 40.

⁴⁶³ JUSTICE, *Secret Evidence*, (2009), p.213. See also: JUSTICE, *Statutory review of the ‘closed material procedure’ provisions in the Justice and Security Act 2013 Call for evidence: JUSTICE’s response*, (2021), p. 9.

⁴⁶⁴ JUSTICE, *Statutory review of the ‘closed material procedure’ provisions in the Justice and Security Act 2013 Call for evidence: JUSTICE’s response*, (2021), p. 9.

⁴⁶⁵ *ibid.*

having an unjustifiable impact on open and fair justice. Second, the courts in their approach towards CMP appear to be too ready to accept Government claims for withholding information, which foregoes the necessary exacting scrutiny required to protect litigants' rights to an open and fair trial. Third, numerous procedural concerns arise out of the use of the CMP which exacerbate unfairness for litigants. These include delays, a lack of a library of judgments regarding CMP-related decisions which undermines the system of precedent, and costs risks for claimants and appellants who do not have sight of the closed material.

Covert human intelligence sources

5.47 As outlined in Chapter 3, the Covert Human Intelligence Sources Act 2021 authorises criminal conduct undertaken in the course of, or in connection with, the conduct of agents – known as covert human intelligence sources (“CHIS”). Far from being highly trained in espionage, CHIS are usually ordinary members of the public, many of whom are seasoned, serious criminals. With immunity from prosecution, along with no restriction on the type of offence which can be authorised, we are concerned that they may commit crime without restraint. There are several issues that this raises with regard to access to justice.

5.48 First, the immunity granted by the Act creates serious inconsistencies between the immunity afforded by Criminal Conduct Authorisations and the UK's human rights obligations to prevent and/or investigate and prosecute improper conduct, as explained in Chapter 3.⁴⁶⁶

5.49 Second, given that the granting of Criminal Conduct Authorisations inherently means that the Government is content to create victims of crime, it is necessary that the necessary safeguards are in place and that victims can access justice. Yet, the Revised Code of Practice, which provides guidance to public authorities on the use of CHIS and Criminal Conduct Authorisations, makes no mention of victims' rights, nor the entitlement of victims of crimes committed through a Criminal Conduct Authorisation to compensation pursuant to the Criminal Injuries Compensation Authority. It was our view that the Revised Code of Practice should have proactively encouraged Public Bodies to inform victims of actions committed through Criminal Conduct Authorisations of their potential entitlements.⁴⁶⁷

5.50 Third, and worse still, a Criminal Conduct Authorisation may be wrongly given in the first place, or abused thereafter, creating victims of what may be serious crime. The ‘SpyCops’ scandal acts as a pertinent example. In one case, Kate Wilson, one of at least 10 women who Mark Kennedy (an undercover police officer) had sexual relationships with, later brought — and won — a case at the Investigatory Powers Tribunal.⁴⁶⁸ The Tribunal found that the Police had violated five articles of the ECHR; “*a formidable list of [...] violations*”. It concluded that the case is not just about “*a renegade police officer who took advantage of his undercover deployment to indulge his sexual proclivities, serious though this aspect of the case unquestionably is*”. Rather, “*the authorisations under [the Regulation of Investigatory Powers Act 2000] were fatally flawed and the undercover operation could not be justified as ‘necessary in a democratic society’ ... reveal[ing] disturbing and lamentable failings at the most fundamental levels*”.⁴⁶⁹ A failure to ensure that victims have

⁴⁶⁶ For example, the Act might breach procedural obligations under Article 2 ECHR to conduct an effective investigation into allegations of unlawful killings and the provision of immunity would make impossible any investigation of allegations of Article 3 infringement. See JUSTICE, ‘*Covert Human Intelligence Sources (Criminal Conduct) Bill, House of Lords Ping Pong Briefing*’, (2021).

⁴⁶⁷ JUSTICE, ‘*Covert Human Intelligence Sources (Criminal Conduct) Act 2021 Revised Code of Conduct, Home Office Consultation, Second Response*’, (2022), p. 5.

⁴⁶⁸ BBC, ‘*Deceived activist Kate Wilson wins tribunal against Met Police*’, (2021).

⁴⁶⁹ *Wilson v Commissioner of the Police of the Metropolis and the National Police Chiefs’ Council* IPT/11/167/H, [17].

proper recourse to compensation could leave the UK in violation of Article 13 ECHR, which guarantees a right to an effective remedy before a national authority. Victims should not suffer additional loss because of the operational decisions of state bodies which are outside their control.

Disparagement of lawyers and judges

5.51 The final facet of access to justice to be explored in this chapter pertains to the public's perception of the independence of the judiciary and the legal profession. The recent Goa Declaration by the Commonwealth Lawyers Association makes clear that, amongst other things:

- a) “*The independence and impartiality of the judiciary must be upheld and protected by governments*”;
- b) “*Lawyers must not be identified with their clients and/ their clients’ causes or interests, as a result of performing their professional duties and functions*”; and
- c) “*Lawyers must be free to perform all their professional duties without threats, intimidation, hindrance, harassment or improper interference or influence*”.⁴⁷⁰

5.52 While lawyers and judges are certainly not above criticism, a general attack on the profession risks severely undermining the rule of law. As argued by I. Stephanie Boyce, the former Law Society President: “...*politicians should not castigate judges for finding that the law does not fit with their political objectives, or conflate lawyers’ actions on behalf of their clients with support for the political views and motivations of those clients.*”⁴⁷¹ It is necessary for members of the public to believe that lawyers and judges are not influenced by external pressure, influence or manipulation.⁴⁷²

5.53 Examples abound, however, of incendiary rhetoric that might impact the public's perception of the independence of judges and the integrity of the legal profession. Though, undoubtedly, examples of such rhetoric exist under the previous Labour Government,⁴⁷³ there exists a palpable trend over the past five years of increasing derogatory remarks being made against practitioners, evident from the rise in the use of terms such as ‘lefty lawyer’ and ‘activist lawyer’, amongst others.⁴⁷⁴ A cross-party Inquiry on Judicial Independence undertaken by the APPG on Democracy and the

⁴⁷⁰ Commonwealth Lawyers Association, ‘*Commonwealth Bar Leaders Declaration on Preserving and Strengthening the Independence of the Judiciary and on Ensuring the Independence of the Legal Profession*’, (2023), p. 3.

⁴⁷¹ I. Stephanie Boyce, ‘*“Rule of law” or “rules of law”? Public perceptions of the law and what it means for those who uphold it*’, (2022), p. 17.

⁴⁷² Venice Commission of the Council of Europe, ‘*Rule of Law Checklist*’, (2016), pp. 20–24.

⁴⁷³ For example:

- Then Home Secretary David Blunkett was well known for his verbal attacks on the judiciary and lawyers. In response to the judgement about provision of support to destitute asylum seekers, he stated that it was time “*for judges to learn their place*”. See, the Select Committee on the Constitution, ‘*Sixth Report*’, (2007), para. 44. Furthermore, after resigning from Government (but still as a sitting MP) Blunkett also used a Sun newspaper column to insult judges including headlines such as “*Give that judge a brain transplant*” and “*Bewigged menaces who make the law look an ass*”. N. Stadlen, ‘*Brief Encounter: David Blunkett*’, (*The Guardian*, 2006).
- In 2006 then Home Secretary John Reid criticised a high profile sentencing of a man who had been convicted of sexually assaulting a 3 year old girl as unduly lenient and implied the AG should think the same. Alun Michael MP invited judges to “*wake up and smell the coffee*” because they “*simply [weren’t] getting it*”. Select Committee on the Constitution, ‘*Sixth Report*’, (2007), Table 1.
- In response to a judgement of Sullivan J that held six Afghan nationals who had hijacked a plane to escape the Taliban could not be deported, Tony Blair stated “*it’s an abuse of common sense frankly to be in a position where we can’t [deport these men]*”. Lord Dyson, *Justice: Continuity and Change* (2018), p. 20.

⁴⁷⁴ Venice Commission of the Council of Europe, ‘*Rule of Law Checklist*’, (2016), pp. 33–41.

Constitution also highlights the main instances of such rhetoric, listing examples of the independence of the judiciary being impinged since 2003.⁴⁷⁵ As a result, over 800 legal professionals, including three former members of Supreme Court, signed a letter to the Government in 2020 that condemned its hostile comments towards the profession. The letter invited, in vain, both the former Prime Minister, Boris Johnson, and former Home Secretary, Priti Patel, to apologise, given that these attacks “*undermine the rule of law, which ministers and lawyers alike are duty-bound to uphold*”.⁴⁷⁶

5.54 In each of the examples below, verbal attacks were either instigated by elected officials themselves, or were made by others, such as the media, and were not swiftly and strongly condemned by the Government:

- In response to the ruling of the High Court in the first *Miller* case in 2016, the Daily Mail splashed the infamous headline “*Enemies of the People*” on its front page, underneath pictures of the three judges who heard the case. In the article, Dominic Raab was quoted as saying that “[a]n unholy alliance of diehard Remain campaigners, a fund manager, an unelected judiciary and the House of Lords must not be allowed to thwart the wishes of the British public.”⁴⁷⁷ Former Prime Minister and then Lord Chancellor Liz Truss, issued a brief, weak and delayed statement that failed to directly address and condemn the headline.⁴⁷⁸
- In 2019, following the Supreme Court’s unanimous decision finding Prime Minister Boris Johnson’s prorogation of Parliament to be unlawful, then Leader of the House of Commons Jacob Rees-Mogg was reported by the Daily Mail to have accused Supreme Court judges of launching a “*constitutional coup*” and “*the most extraordinary overthrowing of the constitution*”.⁴⁷⁹ Some in civil society have pegged these recent decisions of the Supreme Court as examples of ‘judicial activism’, proposing major reforms and even abolition of the Court.⁴⁸⁰
- At the Conservative Party conference in October 2020, then Prime Minister Boris Johnson said that the criminal justice system was being “*hamstrung by what the home Secretary would doubtless — and rightly — call the lefty human rights lawyers and other do-gooders.*”⁴⁸¹

⁴⁷⁵ All Party Parliamentary Group on Democracy and the Constitution, ‘*An Independent judiciary – Challenges Since 2016*’, (2022), pp. 15–26.

⁴⁷⁶ O. Bowcott, ‘*Lawyers call for apology from Johnson and Patel for endangering colleagues*’, (The Guardian, 2020). The letter did not elicit an apology from the Government. Though, a few weeks later, a Government spokesperson stated that “*The government is clear any form of violence against lawyers is unacceptable. Lawyers play an important role in upholding the law and ensuring people have access to justice. They are however not immune from criticism.*” L. Dearden, ‘*Government attacks on lawyers ‘undermine rule of law’, says Lord Chief Justice*’, (The Independent, 2020). The Lord Chief Justice further explained that “*he had discussed the issue with Robert Buckland, the Lord Chancellor, and was satisfied with his response.*”

⁴⁷⁷ J. Slack, ‘*Enemies of the people: Fury over ‘out of touch’ judges who have ‘declared war on democracy’ by defying 17.4m Brexit voters and who could trigger constitutional crisis*’, (Daily Mail, 2016).

⁴⁷⁸ W. Worley, ‘*Liz Truss breaks silence but fails to condemn backlash over ruling*’ (Independent, 2016).

⁴⁷⁹ J. Doyle, A. Martin and S. Doughty, ‘*Jacob Rees-Mogg accuses the Supreme Court of a ‘constitutional coup’ over its stunning ruling*’, (Daily Mail, 2019).

⁴⁸⁰ D. Wyatt and R. Ekins, ‘*Reforming the Supreme Court*’, (Policy Exchange, 2020).

⁴⁸¹ O. Bowcott, ‘*Legal profession hits back at Johnson over ‘lefty lawyers’ speech*’, (The Guardian, 2020)

- In response to the court proceedings attempting to halt the first planned flight to Rwanda in June 2022, then Prime Minister Boris Johnson said that those lawyers who opposed the Rwanda policy were “*abetting the work of criminal gangs.*”⁴⁸²
- Even recently, a Home Office minister admitted to Parliament that they were “*monitoring the activities... of a small number of legal practitioners*”⁴⁸³ who provide advice to individuals who have entered the UK via small boat. In May 2023, Rob Richardson, the head of the National Crime Agency’s (“NCA”) modern slavery and human trafficking unit, said the agency was in “*target identification*” mode to identify immigration lawyers who “*support organised crime groups*”. Richardson said as many as 100 lawyers may be assisting the criminal gangs.⁴⁸⁴ However, at that time, the NCA acknowledged that it did not already have a “*target list of lawyers*”.⁴⁸⁵ The Home Office’s monitoring of lawyers appears to pre-empt the work of the NCA and gives the impression that the integrity of the legal profession might be undermined by external pressure without any evidence to that effect.
- The Conservative Central headquarters shared a dossier of information on immigration solicitor Jacqueline McKenzie with the national media in August 2023. The subsequent coverage of McKenzie framed her political and voluntary associations as explaining her motivation for representing migrants at risk of deportations to Rwanda. This coverage implied further criticism that the legal profession is ideologically motivated or identifying with the causes of their clients, rather than representing their clients best interests.⁴⁸⁶

5.55 It is uncontroversial to say that “[r]easonable disagreement on the merits of a particular decision is unobjectionable.”⁴⁸⁷ However, what these examples demonstrate is that rather than engage with in a principled debate on the legal issues within the cases, both the Government and the media has often (and increasingly) resorted to *ad hominem* attacks on lawyers and judges.⁴⁸⁸ Whether due to ignorance or a deliberate and “*strategic shift in rhetoric*”⁴⁸⁹, the effect of these attacks is dangerous for the public’s perception of the judicial independence. Indeed, the Judicial Independence Inquiry concluded that “*ministers have, from a constitutional perspective, acted improperly in attacking judges...doing so in a way that might reduce public confidence in the judiciary*”⁴⁹⁰. Compared to elected officials, whose legitimacy rests in the democratic process, the Supreme Court justices, in

⁴⁸² D. Hughes, ‘*Boris Johnson defends Rwanda migrants policy with first flight set to leave*’, (Independent, 2022).

⁴⁸³ J. Hyde, ‘*Home Office monitoring immigration lawyers’ activities, says minister*’, (The Law Society Gazette, 2023).

⁴⁸⁴ D. Boffey, ‘*UK crime agency to pursue up to 100 lawyers accused of helping traffickers*’, (The Guardian, 2023).

⁴⁸⁵ M. Fouzder, ‘*No “target” list of solicitors aiding traffickers - NCA*’, (The Law Society Gazette, 2023).

⁴⁸⁶ J. McKenzie, ‘*I’m an immigration lawyer, and now the target of a Braverman smear campaign. It will backfire*’, (The Guardian, 8 October 2023).

⁴⁸⁷ I. Stephanie Boyce, ‘*“Rule of law” or “rules of law”? Public perceptions of the law and what it means for those who uphold it*’, (2022), p. 18. See also R. Ekins, ‘*Protecting the Constitution: How and why Parliament should limit judicial power*’, (2020), p. 10.

⁴⁸⁸ It should also be noted here that beyond rhetoric, more overt attempts at interference with the judiciary have also been alleged. This includes claims that the Home Office tried to interfere with immigration judges during the COVID-19 Pandemic by requesting judges to provide written reasons for their bail decisions, when they are not required in law to do. See, D. Taylor, ‘*Home Office accused of pressuring judiciary over immigration decisions*’, (The Guardian, 2020). It also includes structural changes that were mooted by Dominic Raab MP when he was Justice Secretary that would have given the executive the power to correct court judgments. See E. Malnick, ‘*Dominic Raab: I’ll overhaul the Human Rights Act to stop Strasbourg dictating to us*’, (The Telegraph, 2021).

⁴⁸⁹ JUSTICE, ‘*Parliamentary and Media Attacks on Lawyers: A Threat to the Rule of Law*’, (8 March 2023).

⁴⁹⁰ All Party Parliamentary Group on Democracy and the Constitution, ‘*An Independent judiciary – Challenges Since 2016*’, (2022), p. 55.

the words of its President, Lord Reed, “*are not accountable for [their] judgments to any institution*”.⁴⁹¹ To safeguard judicial independence, this is necessarily so. Making suggestions that a judge is, therefore, “*motivated by their individual views, political or otherwise...serves to undermine their vital role in the administration of justice*”.⁴⁹²

5.56 It cannot be known what the exact effect of this rhetoric might have been on judges. The Inquiry concluded that there have been a: “*relatively high number of instances since 2020 in which the Supreme Court has departed from its previous decisions and adopted new positions which appear to fall closer into line with the executive’s political preferences*”.⁴⁹³

5.57 This is an observation that several others have made, including Professor Gearty⁴⁹⁴ and Sir Robert Buckland MP.⁴⁹⁵ Nevertheless, even if the two phenomena are unrelated, it might give the perception that the Court “*has been influenced by ministerial pressure*”.⁴⁹⁶

5.58 As for the effects on lawyers, these are possibly more tangible. In September 2020, lawyers were accused by the then Home Secretary, Priti Patel, of frustrating removals of those who cross the English Channel.⁴⁹⁷ A few days later immigration law firm Duncan Lewis was attacked by a man who allegedly blamed lawyers at the firm for preventing the removal of immigrants from the UK. He was charged with a number of offences including preparation of terrorist acts and making a threat to kill.⁴⁹⁸ In the words of Amanda Pinto KC, then Chair of the Bar Council, “*[i]rresponsible, misleading communications from the Government, around the job that lawyers do in the public interest, are extremely damaging to our society*”.⁴⁹⁹ It is vital that lawyers should be able to represent clients without fear or favour — a necessary aspect of access to justice. An attack on the legal professionals for doing their job is an attack on the rule of law itself. This was observed in a joint statement by Nick Vineall KC, Chair of the Bar Council, and Lubna Shuja, President of the Law Society: “*[l]anguage and actions that unfairly undermine confidence in the independence of the legal professions, and potentially risk the safety of lawyers, will ultimately undermine confidence in our entire justice system and the rule of law.*”⁵⁰⁰

Conclusion and recommendations

5.59 Access to justice is an integral element of a thriving democracy, ensuring disputes between individuals take place in a lawful, consistent, and peaceful manner, and that the power of the state is checked when it unduly infringes on the rights of ordinary people. Equally, the adage “*Justice must not only be done, but must also be seen to be done*” applies as truly today as it did when Lord

⁴⁹¹ House of Lords Constitution Committee, ‘*Corrected oral evidence: Annual evidence session with the President and Deputy President of the Supreme Court*’, (6 April 2022), p. 10.

⁴⁹² W. Worley, ‘*Liz Truss breaks silence but fails to condemn backlash over ruling*’, (Independent, 2016), quoting former chair of the Bar Council, Chantal-Aimée Doerries KC.

⁴⁹³ All Party Parliamentary Group on Democracy and the Constitution, ‘*An Independent judiciary – Challenges Since 2016*’, (2022), p. 55.

⁴⁹⁴ C. Gearty, ‘*In the Shallow End: Conor Gearty on the UK Supreme Court*’, (London Review of Books, 2022).

⁴⁹⁵ R. Buckland, ‘*Lecture on the ECHR*’, (Conservatives, 2022).

⁴⁹⁶ All Party Parliamentary Group on Democracy and the Constitution, ‘*An Independent judiciary – Challenges Since 2016*’, (2022), p. 9.

⁴⁹⁷ R. Speare-Cole, ‘*Priti Patel slammed for comments over ‘activist lawyers’ frustrating removals of migrants*’, (2020).

⁴⁹⁸ BBC, ‘*Man charged with right-wing terror plot to kill immigration solicitor*’, (2020).

⁴⁹⁹ T. Batchelor, ‘*“Knife attack on law firm inspired by Priti Patel activist lawyer remarks”*’ (Independent, 12 October 2020).

⁵⁰⁰ N. Vineall, and L. Shuja, ‘*Legal community gravely concerned: joint statement from the Bar Council and Law Society*’, (The Bar Council, 9 August 2023).

Hewart wrote those words almost a century ago.⁵⁰¹ Public confidence depends on trust that decisions are taken fairly, and can be scrutinised, challenged, and appealed when they fall short. Responsibility for safeguarding trust in the legal system rests not only with the profession, but the wider community too, represented by elected politicians who often communicate through the media. Disagreement or disappointment with judicial decisions is natural. Yet all too often and at an increasing rate, we have seen hostility from lawmakers descend into highly damaging and inflammatory attacks, serving only to diminish the integrity of the courts in the eyes of the public.

5.60 Reversing and unpicking these issues is far from simple. Trust built over centuries can be damaged in a matter of years, if not less. To that end, we make the following recommendations to stem the damaging trends we have identified and ensure the development of our legal system aligns with the aspirations for a fairer and more just future.

5.61 Recommendation 14: The Government must commit to properly resourcing the justice system. Adequate funding of the justice system, from ensuring access is possible for those without means to the courts infrastructure itself, is vital. Whereas future developments and reforms aimed at efficiency or greater use of new technologies, such as Artificial Intelligence, may, with the right data and principles, make this task easier, the Government must recognise that appropriate levels of investment are undoubtedly essential to ensure the sustainability of the justice system.

5.62 Recommendation 15: The Government must affirm the importance of judicial review. This means, at a minimum, relenting from further attempts to undermine access to judicial review, and recognise its importance as a way for individuals and communities to hold the state to account. In this regard, we agree with the conclusion of the IRAL, which considered “that the independence of our judiciary and the high reputation in which it is held internationally should cause the government to think long and hard before seeking to curtail its powers”.

5.63 Recommendation 16: The Government must uphold the principle of open justice. The Ministry of Justice has recently launched a consultation entitled ‘Open Justice: the way forward’, which seeks to “support and strengthen the openness of our court and tribunal services.”⁵⁰² As part of this, it should use the consultation as an opportunity to reflect, more holistically, on the issues we have identified, and retrench from those developments that give rise to unduly ‘secret’ justice. Use of the SJP, AOCSSP, CMP, for example, all, as currently designed, serve to reduce the transparency of the justice system.⁵⁰³ The Government should review the evidence base for these developments and consider whether more transparent means of achieving the same ends are available.

5.64 Recommendation 17: The Government must safeguard judicial independence and the legal profession. The Government must commit to the principles laid out in the Goa Declaration and reject the use of inflammatory language against the legal profession. Both lawyers and the judiciary play a crucial role in supporting the rule of law and, in particular, facilitating access to justice in the UK. Hostile comments that attack these professions may undermine the public’s perception of the judiciary’s independence, as well as the motives of lawyers — both key components of access to justice. As such, government officials and parliamentarians should refrain from disparaging lawyers and judges for carrying out their jobs.

⁵⁰¹ *R v Sussex Justices* [1924] 1 KB 256.

⁵⁰² Ministry of Justice, ‘*Call for Evidence document: Open Justice, the way forward*’, (2023).

⁵⁰³ During the passage of the Judicial Review and Courts Act, we recommended removing clause 3, regarding the AOCSSP, in its entirety.

VI: EQUALITY AND NON-DISCRIMINATION

“...it is a purpose of all human rights instruments to secure the protection of the essential rights of members of minority groups, even when they are unpopular with the majority. Democracy values everyone equally even if the majority does not.”⁵⁰⁴

Baroness Hale of Richmond

Introduction

- 6.1 The rule of law requires that all individuals are equal before the law, free from unjustified discrimination. The legitimacy of the law and its coercive power “rests on a commitment to an ideal of impartiality, manifesting due regard for the moral equality of persons”.⁵⁰⁵ Nevertheless, equality is a contested concept. As Lady Hale remarked, “[i]s it about where you start — with equal opportunities — or where you end up — with equal outcomes — or something in between — like a level playing field?”⁵⁰⁶ In broad terms, equality of opportunity, or ‘formal equality’, requires that all individuals are subject to equal treatment. ‘Substantive equality’, however, refers to equality of outcomes. This might, therefore, require treating individuals with additional assistance on the basis that they have suffered a historical disadvantage, (through, for example, affirmative action).
- 6.2 Like other principles discussed in this report, equality before the law, in one form or another, has a long legal heritage in the UK finding expression as far back as the Magna Carta.⁵⁰⁷ Early judicial reference to the principle of equality can be found in *Rooke v Withers*,⁵⁰⁸ published in 1597, where Lord Coke “relied explicitly on the connection between common law reason and the value of equality”⁵⁰⁹ to resolve the case. It is therefore no surprise that the Courts of England and Wales, in the present day, have characterised the principle of equality as “the cornerstone of our law”.⁵¹⁰
- 6.3 Indeed, the importance of the principle of equality within and underpinning the concept of the rule of law cannot be understated. The Venice Commission explains that “[e]quality before the law is probably the principle that most embodies the concept of [r]ule of [l]aw.”⁵¹¹ Renowned British constitutional theorist, Professor AV Dicey, also stressed that one of the defining features of the rule of law is “equality before the law, or the equal subjection of all classes to the ordinary law of the land administered by the ordinary law courts.”⁵¹²

⁵⁰⁴ *Ghaidan v. Godin-Mendoza* [2004] UKHL 30 [132].

⁵⁰⁵ M. Foran, ‘*The Cornerstone of our Law: Equality, Consistency and Judicial Review*’, (2022) *Cambridge Law Journal* 81(2) 249, p. 253. As Foran explains, this is seen as necessary by legal philosopher, Ronald Dworkin, in order to “justify the coercive power on the part of the state”.

⁵⁰⁶ Lady Hale, ‘*Oxford Equality Lecture 2018*’, (2018), p. 1.

⁵⁰⁷ As previously referred to in Chapter 5, the principle of equality before the law is encapsulated in Article 40 of the Magna Carta, which states that “...to no one we will deny... right or justice”. ‘*English translation of Magna Carta*’, (British Library, 2014), art. 40. This refers to the principle’s British origins. As a principle, it is, of course, older.

⁵⁰⁸ (1597) 5 Co. Rep 99.

⁵⁰⁹ In the case, Lord Coke reasoned that “the said statutes require equality”, referring to “cases of equality grounded on reason”, M. Foran, ‘*The Constitutional Foundations of Reasonableness Review: Artificial Reason and Wrongful Discrimination*’, (2022), SSRN, p.19, citing *Rooke v Withers* (1597) 5 Co. Rep 99, 100a.

⁵¹⁰ *Gurung v Ministry of Defence* [2002] EWHC (Admin) 2463, [55].

⁵¹¹ Venice Commission of the Council of Europe, ‘*Rule of Law*’.

⁵¹² A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (Liberty Classics 1982), p. 120.

- 6.4 The principles of non-discrimination and equality impinge on several of the other rule of law indicators specified by the Venice Commission and *vice versa*. Indeed, equality in and before the law ensures that no one is above the law — a key aspect of the legality principle covered in Chapter 2.⁵¹³ Moreover, the defining feature of human rights is that they are available to all. Nevertheless, Chapter 3 details how certain groups may not be afforded equal protection of their human rights. One of the principles expounded in Chapter 4 specifies that the executive and public authorities may not arbitrarily discriminate between similar situations by considering irrelevant considerations; similar situations must be dealt with in a similar manner.⁵¹⁴ This is a crucial aspect of formal equality before the law. Finally, individuals must be guaranteed access to effective remedies for discriminatory or unequal treatment,⁵¹⁵ yet Chapter 5 details some of the ways in which access to justice may not be evenly available to all.
- 6.5 In this chapter, we will distinguish between equality in law and equality before the law as a framework for our ensuing analysis. The former refers to whether the legislative and policy development process respects and embeds the principle of equality. In other words, do they “*treat similar situations equally and different situations differently and guarantee equality with respect to any ground of potential discrimination*”?⁵¹⁶ The latter refers to the application of the law. It requires the “*universal subjugation of all to law*” and that the law is “*equally applied, and consistently implemented*”.⁵¹⁷ Where the law is applied on a discriminatory or unequal basis without good reason, individuals should have access to an effective remedy.⁵¹⁸
- 6.6 To this end, this chapter will address equality concerns chronologically through the system, from policy development to the application of the law, as well as enforcement of the laws that entrench the right to equality and the right to be free from discrimination – both at the individual level in the court, and at a broader, institutional level, via the Equality and Human Rights Commission (“**EHRC**”). This chapter will show that there are concerns at each stage albeit we must not forget that the areas of equality and non-discrimination are vast. Although JUSTICE has a long history of working to secure respect for equality in UK law generally,⁵¹⁹ this chapter will focus on areas in which we have specific expertise and have undertaken recent work, spotlighting key examples along the way.

Legal basis for ensuring equality and non-discrimination in the UK

- 6.7 In the UK, the legal basis for the principles underlying equality are manifold. Their statutory basis finds expression in the Equality Act 2010 (the “**Equality Act**”). The Equality Act consolidated

⁵¹³ As Foran explains, “[t]he equal subjugation of all, including legal officials, to the rule of law is a key feature of our constitutional settlement”, M. Foran, ‘*The Cornerstone of our Law: Equality, Consistency and Judicial Review*’, (2022) *Cambridge Law Journal* 81(2) 249, 254, citing *M v Home Office* [1994] 1 A.C. 377, p. 395.

⁵¹⁴ See also *Edwards v Society of Graphical and Allied Trades* [1971] Ch. 354, 376D, where Lord Denning M.R remarked that “[t]he courts of this country will not allow so great a power to be exercised arbitrarily or capriciously or with unfair discrimination, neither in the making of rules or in the enforcement of them”.

⁵¹⁵ Venice Commission of the Council of Europe, ‘*The Rule of Law Checklist*’, (2016), p. 32.

⁵¹⁶ *ibid*, p. 31.

⁵¹⁷ *ibid*, p. 32.

⁵¹⁸ Lord Bingham’s third rule of law principle is “[t]he laws of the land should apply equally to all, save to the extent that objective differences justify differentiation” T. Bingham, *The Rule of Law* (Penguin 2010).

⁵¹⁹ JUSTICE, ‘*Equality*’. For example, see JUSTICE ‘*Tackling Racial Injustice: Children and the Youth Justice System*’ (2021); JUSTICE ‘*Reforming Benefits Decision-Making*’, (2021); JUSTICE, ‘*Immigration and Asylum Appeals – a Fresh Look*’, (2018); JUSTICE ‘*Increasing judicial diversity*’, (2017).

several pieces of legislation that had hitherto formed the piecemeal foundation of equality and non-discrimination law in the UK, and enhanced overall protection.⁵²⁰

6.8 In essence, the Equality Act provides “*protection against direct and indirect discrimination, harassment and victimisation in services and public functions, premi[ses], work, education, associations and transport*”⁵²¹ on the basis of a closed list of protected characteristics.⁵²² It should be noted that positive *action* is permitted under domestic equality legislation, whereas positive *discrimination* is generally unlawful.⁵²³ Using recruitment as an analogy, the difference is that the latter involves giving “*preferential treatment*”⁵²⁴ to an individual because of their protected characteristic, whereas the former involves “*a form of encouragement to increase candidates [from underrepresented backgrounds] for a post*”.⁵²⁵

6.9 Article 14 ECHR, given expression domestically via the Human Rights Act, provides another manifestation of non-discrimination and equality principles. Compared to the Equality Act, the characteristics protected under Article 14 are more expansive and the list itself is not exhaustive.⁵²⁶ ECHR jurisprudence not only protects from inequality in a negative sense, but it also places a positive obligation on the state to “*prevent, stop or punish discrimination*”.⁵²⁷ It is also true that Article 14 does not prevent states from “*treating groups differently in order to correct ‘factual inequalities’ between them*”.⁵²⁸ In failing to treat individuals (perhaps by way of factual inequality) differently, a state might, in fact, be in breach of its obligations.

6.10 Importantly, however, these protections are narrower in application than those set out in the Equality Act insofar as Article 14 ECHR is not “*free-standing*”; it is dependent on another ECHR right being engaged as well. As Lady Hale explains, for Article 14 to operate, there must be “*less favourable treatment in the enjoyment of a Convention right for which there is no objective justification*”.⁵²⁹ Importantly, however, as the ECtHR held in *Schmidt v Germany*,⁵³⁰ this does not

⁵²⁰ The pieces of legislation that were consolidated include: the Equal Pay Act 1970; the Sex Discrimination Act 1975; the Race Relations Act 1976; the Disability Discrimination Act 1995; the Employment Equality (Religion or Belief) Regulations 2003; the Employment Equality (Sexual Orientation) Regulations 2003; the Employment Equality (Age) Regulations 2006; the Equality Act 2006, Part 2; the Equality Act (Sexual Orientation) Regulations 2007. Schedule 27 of the Equality Act 2010 lists the pieces of legislation that were repealed or revoked by the 2010 Act.

⁵²¹ Government Equalities Office and the Equality and Human Rights Commission, ‘*Equality Act 2010: guidance*’, (2013).

⁵²² These are age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex, sexual orientation. Equality Act 2010, s. 4.

⁵²³ The exception to this is positive discrimination on the basis of disability, Equality Act 2010 s. 13(3).

⁵²⁴ J. Robertson, ‘*Positive action or positive discrimination — What’s the difference?*’, (University of Dundee, 2022). See also T. Jarrett, ‘*The Equality Act 2010 and positive action*’, (2011) *House of Commons Library*, pp. 3–4.

⁵²⁵ L. Jobson, ‘*Positive Action vs Positive Discrimination: What’s the difference?*’, (EW Group). To elaborate, with positive action, “[t]he selection process for the post however is the same for every candidate and the successful candidate is appointed on their ability for the post, irrespective of race or gender etc.”

⁵²⁶ For example: ‘habitual residence’, see *R (Carson) v Secretary of State for Work and Pensions* [2005] UKHL 37, [2006] 1 AC 173. See also, Lady Hale, ‘*Oxford Equality Lecture 2018*’, (2018), p. 4: “‘*other status*’ has been given a very broad meaning in order to make the rights practical and effective.... Unlike the list of protected characteristics in the Equality Act, this is not a closed list.”

⁵²⁷ European Court of Human Rights, ‘*Guide on Article 14 of the European Convention on Human Rights and on Article 1 of Protocol No. 12 to the Convention: Prohibition of discrimination*’, (2022), p. 14.

⁵²⁸ *ibid.*

⁵²⁹ Lady Hale, ‘*Oxford Equality Lecture 2018*’, (2018), p.4. It is also important to note that the Human Rights Act applies to public authorities or bodies exercising public powers. The Equality Act applies more broadly.

⁵³⁰ App no 13580/88 (ECHR, 18 July 1994).

mean that another right has to have been *breached* for Article 14 ECHR to be effective; the other right must simply be engaged.⁵³¹

6.11 Article 1 of Protocol 12 ECHR further expands the protections available by introducing a general prohibition of discrimination. It reads:

“The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.”

6.12 Unlike Article 14 ECHR, Article 1 of Protocol 12 is not predicated on the engagement of another Convention right. However, the protections afforded under Article 1 of Protocol 12 are not available in the UK, as the Government has not ratified it.⁵³² In 2005, the then Labour Government declined to ratify the Protocol, saying that, while agreeing in principle that the ECHR should contain a free-standing guarantee of non-discrimination, the Government considered that the text of Article 1 of Protocol 12 contains “*unacceptable uncertainties*”.⁵³³ The Government was particularly concerned that the broad application of the Protocol could trigger an “*explosion of litigation*”⁵³⁴ if the Protocol does not permit a defence of objective and reasonable justification, as applies under Article 14 ECHR. In its Seventeenth Report, the Joint Committee on Human Rights concluded that the idea of an “*explosion of litigation*” was “*alarmist*”.⁵³⁵ While the ECtHR has not definitively stated whether reasonable justification grounds are available to the state in Protocol 12 cases,⁵³⁶ the Joint Committee on Human Rights is confident that, as for Article 14, reasonable justification could permit differential treatment under Protocol 12.⁵³⁷

6.13 In any case, the statutory expressions of equality and non-discrimination in both the Equality Act and Article 14 ECHR “*provide extensive legislative protection*”⁵³⁸. Nevertheless, as outlined above, their scope and application are necessarily circumscribed: the Equality Act only applies to a closed list of protected characteristics, while Article 14 is dependent upon the engagement of another ECHR right.⁵³⁹

⁵³¹ This means that Article 14 only prohibits discrimination when it concerns one of the other rights enshrined in the ECHR, for example, Article 14 could be used to address discrimination regarding the right to marry because the right to marry is enshrined in Article 12 ECHR, even if the right to marry has not itself been violated.

⁵³² ‘Simplified Chart of signatures and ratifications’, (Council of Europe).

⁵³³ Joint Committee on Human Rights, “Instruments not yet ratified”, (2005).

⁵³⁴ *ibid.*

⁵³⁵ *ibid.*

⁵³⁶ European Court of Human Rights, ‘Guide on Article 14 of the European Convention on Human Rights and on Article 1 of Protocol No. 12 to the Convention: Prohibition of discrimination’, (2022).

⁵³⁷ Joint Committee on Human Rights, “Instruments not yet ratified”, (2005).

⁵³⁸ C. O’Cinneide, ‘Equality — a Core Common Law Principle, or ‘Mere’ Rationality?’ in M. Elliott and K. Hughes (eds.) *Common Law Constitutional Rights*. (Hart Publishing, Oxford: 2020), p. 191.

⁵³⁹ Professor O’Cinneide further explains that the Equality Act “*does apply to the performance of public functions, but only insofar as the discriminatory behaviour in question is not ‘authorised’ by primary or secondary legislation.*” (Citation omitted). Furthermore, while the HRA is “*wider in scope... it only prohibits unjustified discrimination in the enjoyment of other Convention rights, and does not apply to unequal treatment that is not based upon a status ground, i.e., it has limited applicability to formal equality.*” C. O’Cinneide, ‘Equality — a Core Common Law Principle, or ‘Mere’ Rationality?’ in M. Elliott and K. Hughes (eds.) *Common Law Constitutional Rights*. (Hart Publishing, Oxford: 2020), pp. 191–192.

6.14 As alluded to at the start of this chapter, the common law provides another avenue by which these principles may be protected apart from the modern legislative framework in place. As Colm O’Cinneide, Professor of Human Rights Law at UCL explains, the common law protection of equality principles can fill:

*“gaps left by the HRA and the anti-discrimination legislative framework, especially in relation to (i) breaches of formal equality and (ii) substantive status-based discrimination that falls outside the ‘ambit’ of other ECHR rights.”*⁵⁴⁰

6.15 The courts have routinely recognised the significance of equality and non-discrimination. Indeed, *“it has become common for judges to genuflect to the constitutional significance of equality of status”*.⁵⁴¹ Nevertheless, the principle of equality is not recognised as a free-standing right in the common law; it only *“informs the application of rationality review”*.⁵⁴² That is to say, where individuals in similar circumstances are subject to different treatment by public authorities, such treatment is amenable to judicial review. Without objective justification, such action *“may be struck down [by the courts] on the basis that it is... unreasonable”*.⁵⁴³ Beyond rationality review, however, the common law *“has historically lacked a well-developed equality dimension”*.⁵⁴⁴

Policy development

6.16 It is one thing for the law to enshrine equality and protection from discrimination, as outlined in the previous section. It is another to operationalise such principles in developing further policy and legislation, which is done by way of the Public Sector Equality Duty (“**PSED**”) introduced in the Equality Act.⁵⁴⁵ The PSED requires public bodies to have due regard for the need to eliminate discrimination, advance equality of opportunity, and foster good relations between different people when carrying out their activities.⁵⁴⁶

6.17 A key way in which policymakers can ensure that legislation complies with the PSED is by undertaking Equality Impact Assessments (“**EIAs**”). EIAs are assessments that public authorities often carry out prior to implementing policies, with a view to predicting their effects on differing individuals. Publishing an EIA alongside a Bill is helpful for those who implement policy to ensure they are doing so correctly; it also helps the public to understand the potential impact of legislation and, demonstrates that policymakers are taking equality issues seriously. This section outlines two concerns JUSTICE has identified regarding EIAs. Firstly, EIAs are not viewed as a necessary part of the legislative process, to the detriment of the PSED. The second concern relates to the content of EIAs, which may draw general conclusions that obscure inequality or discrimination.

6.18 The Equality Act does not specifically require EIAs to be carried out. Indeed, a note by the Equality and Human Rights Commission explains that the case law on this matter established that while

⁵⁴⁰ M. Elliott and K. Hughes (eds.) *Common Law Constitutional Rights* (Hart Publishing, Oxford: 2020), p. 192.

⁵⁴¹ C. O’Cinneide, *‘Equality — a Core Common Law Principle, or ‘Mere’ Rationality?’* in M. Elliott and K. Hughes (eds.) *Common Law Constitutional Rights*. (Hart Publishing, Oxford: 2020), p. 180.

⁵⁴² *ibid*, p. 168.

⁵⁴³ *ibid*, p. 181.

⁵⁴⁴ *ibid*, p. 177.

⁵⁴⁵ The provisions relating to PSED came into force in April 2011, whilst many of the other provisions within the Act came into force in October 2010.

⁵⁴⁶ Equality Act 2010 s.149. Section 29 of the Equality Act 2010 sets out that a service-provider must not discriminate against a person requiring a service. Some limited exceptions to this are set out in Schedule 3 to the Equality Act 2010. The effect of these exceptions is that if certain conditions are met, a service-provider will not be discriminating contrary to section 29.

“public authorities [do] have to assess the impact their proposed policies [have] on equality [...] there [is] no prescriptive way to do so”.⁵⁴⁷ In 2012, David Cameron, as Prime Minister, further announced that Government departments would no longer be required to carry out EIAs:

“Let me be very clear. I care about making sure that government policy never marginalises or discriminates. I care about making sure we treat people equally. But let’s have the courage to say it: caring about these things does not have to mean churning out reams of bureaucratic nonsense [...] You no longer have to do [Equality Impact Assessments] if these issues have been properly considered.”⁵⁴⁸

6.19 David Cameron’s comment framed the formal process of EIAs as additional to the legislative process. This view is problematic. Assessing the impact that proposed legislation would have on equality, in a structured and well-documented manner, should be part of the legislative process, not an optional add-on. There are two reasons why EIAs should be a mandatory part of the legislative process. Firstly, EIAs ensure policy drafters consider any unequal or discriminatory effects of legislation. They are regarded as a valuable “*tool to encourage service managers to consider the equality issues within their service and to act upon the findings of the assessments*”.⁵⁴⁹ In this way EIAs help achieve PSED from the point at which legislation is first conceived, right through to its implementation.

6.20 Secondly, EIAs are a useful tool by which a public body can document and explain its decision-making processes. Indeed, in *R (Brown) v Secretary of State for Work and Pensions*, it was said that:

“it is good practice for those exercising public functions in public authorities to keep an adequate record showing that they had actually considered their... equality duties and pondered relevant questions. Proper record-keeping encourages transparency and will discipline those carrying out the relevant function to undertake their disability equality duties conscientiously. **If records are not kept it may make it more difficult, evidentially, for a public authority to persuade a court that it has fulfilled the duty**” [emphasis added].⁵⁵⁰

6.21 This was the case in *R (D) v Worcestershire County Council* in which a Council’s EIA was instrumental in proving compliance with the PSED.⁵⁵¹ Even though there is no legal obligation on public authorities to carry out EIAs, the courts clearly place considerable weight on any form of documented evidence showing a public body complied with its equality duty when determining judicial review cases.⁵⁵²

6.22 As such, EIAs are clearly not mere ‘*bureaucratic nonsense*’; they ensure that equality concerns are embedded in the process of policy and legislative development. Unfortunately, this is not always

⁵⁴⁷ D. Pyper, “*The Public Sector Equality Duty and Equality Impact Assessments*”, House of Commons Library, (2020), p. 24, citing the Equality and Human Rights Commission, ‘*Relevant Case Law*’, (2019).

⁵⁴⁸ D. Pyper, “*The Public Sector Equality Duty and Equality Impact Assessments*”, House of Commons Library, (2020), p. 23, citing D. Cameron, ‘*Prime Minister’s Speech to CBI*’, (2023).

⁵⁴⁹ H. Conley and M. Page, ‘*The gender equality duty in local government: the prospects for integration*’, *Industrial Law Journal*, 39(3), 2010, 321–325.

⁵⁵⁰ [2008] EWHC 3158 [96].

⁵⁵¹ [2013] EWHC 2490 [95].

⁵⁵² T. Hickman, ‘*Too hot, too cold or just right? The development of the public sector equality duties in administrative law*’, [2013] *Public Law*, 325–344.

how EIAs are used. For example, the EIA for the then Illegal Migration Bill was only published on 26 April 2023⁵⁵³ – when the legislation had already passed the House of Commons.⁵⁵⁴

6.23 The EIA for the Elections Act 2022 is one recent example of how a generalised conclusion obscures potential inequality or discrimination. The Government has used the spectre of voter fraud to introduce the requirement that voters in England, Scotland and Wales must present identification at polling stations. The EIA for the Act concluded that “[o]verall it is expected that the **vast majority** of eligible electors seeking to vote will be able to do so, as was the case in the 2018 and 2019 voter identification pilots” [emphasis added]. However, there is some evidence that the voter ID requirement could disenfranchise a small but meaningful minority of the electorate. During the May 2019 local elections, the ID requirement was piloted in 10 areas in England. Across all 10 pilot polling stations, 1,968 individuals were turned away for lack of ID, and 740 people did not return to cast their vote. While this figure represents only 0.03% - 0.7% of the total votes cast in those 10 pilot areas,⁵⁵⁵ it is significantly more than the four individuals convicted of voter fraud across the entire UK in 2019.⁵⁵⁶

6.24 Research commissioned by the Government suggests that 4% of the population does not hold a form of photo ID with a photo that respondents thought was recognisable.⁵⁵⁷ In particular, younger people could be adversely affected because neither young people’s travel passes,⁵⁵⁸ nor student IDs are a valid form of identification for the purposes of voting. The Joseph Rowntree Foundation estimates that as many as 1.7 million low-income voters do not have a recognisable photo ID.⁵⁵⁹ A Runnymede Trust report from 2021 reveals that: “[w]hite people are most likely to hold one form of photo ID – 76% hold a full driving licence. But [...] nearly half of Black people (48%) do not”.⁵⁶⁰ A Stonewall report from 2021 found that “nearly a quarter of trans respondents and nearly one in five non-binary respondents said they do not own usable photo ID”.⁵⁶¹ These differences in ID possession could mean certain groups will be disproportionately unable to cast their ballot during forthcoming elections. Concerningly, neither the Government nor councils appear to be required to collect data on any protected characteristics of individuals who do not bring an ID to polling stations. Therefore, it will be difficult to determine the discriminatory effects, if any, of the ID requirement in practice.

6.25 Voter IDs, known as Voter Authority Certificates, are available for free.⁵⁶² However, the onus is on the individual to apply for the ID. To apply for an ID, a person requires a national insurance number

⁵⁵³ Home Office, ‘*Equality Impact Assessment: The Illegal Migration Bill*’, (26 April 2023).

⁵⁵⁴ Parliament, ‘*Stages: Illegal Migration Act 2023*’.

⁵⁵⁵ Because the pilot schemes had disparate ID requirements and because the pilots represent a small sample size of the electorate more broadly, it is difficult to forecast the impact on voting generally based on the pilot schemes alone. J. Reland, ‘*Voter ID scheme: far more turned away than convicted of electoral fraud*’ (*Full Fact*, 16 October 2019).

⁵⁵⁶ The Electoral Commission, ‘*2019 electoral fraud data*’.

⁵⁵⁷ The Cabinet Office, ‘*Photographic ID Research - Headline Findings*’, (*IFF Research*, 31 March 2021).

⁵⁵⁸ Whilst an “older person’s bus pass” or “disabled person’s bus pass” are acceptable forms of ID. ‘*How to vote*’, (*Gov.uk*).

⁵⁵⁹ M. Moore, R. Earwaker, ‘*The Government must not disenfranchise low-income voters at the polls*’, (18 March 2022).

⁵⁶⁰ A. Kapoor, ‘*Voter ID: a disproportionate solution to an invisible problem*’, (*Runnymede Trust*, 9 August 2021).

⁵⁶¹ M. Rhodes, ‘*Needing ID could stop LGBTQ+ people voting*’, (*Stonewall*, 23 November 2021).

⁵⁶² ‘*Apply for photo ID to vote (called a ‘Voter Authority Certificate’)*’, (*Gov.uk*).

and a recent photograph of themselves. Research commissioned by the Cabinet Office in 2021 suggests this individual responsibility may inhibit many individuals from voting.⁵⁶³

- 6.26 Whilst the EIA for the Elections Act 2022 concludes that the “*vast majority*” will be able to vote even with the ID requirement in effect, some individuals will be turned away at polling stations in the forthcoming elections. Research suggests this may especially impact certain portions of the population. This risk should have been clearly stated in the EIA. Every single vote counts. This is particularly true in the UK where in the last General Election 26 seats were won by margins slighter than 2%, and some by fewer than 200 votes.⁵⁶⁴ Given that there is virtually no voter fraud in the UK, there are palpable concerns that the overall cost of the ID requirement significantly outweighs any purported benefit.
- 6.27 There are organisations who wish for the EIA process to be strengthened so as “*to ensure action rather than tick boxing*”.⁵⁶⁵ They contend that “[*i*]mpact assessments need to not only outline disproportionality but also meaningful remedies to mitigate the impact”.⁵⁶⁶ JUSTICE encourages viewing EIAs as having a prescriptive quality. EIAs should not merely identify equality-reducing legislation; they should also offer a remedy to improve the quality of legislation. Furthermore, there are links here with the issues outlined in Chapter 2. The imperative by successive governments to legislate quickly appears to have prized efficiency over quality and concern for the impact of legislation.

Application of policy and legislation

- 6.28 Once a policy has been developed, or legislation has been enacted, it is then necessary to consider whether it respects the rule of law requirement that the law is “*equally applied, and consistently implemented*”.⁵⁶⁷ As this section will demonstrate, however, data regarding the application of law and policy can be difficult to find. The point here is that if adequate, high-quality data is not collected and published, then it becomes impossible to assess any inequalities in the application of the law properly. Where data is available, we find there to be real concerns regarding the equal application of law and policy, which will be illustrated through a case study of policing in the criminal justice system.

Data collection

- 6.29 ‘Equality data’ refers to any disaggregated data that is useful for the purposes of describing and assessing the comparative situation of a specific group at risk of discrimination. Accurate equality data is essential in enabling policymakers and the public to scrutinise the scale and nature of discrimination suffered by vulnerable and marginalised groups. Beyond merely being a means of analysing policies, equality data is also a critical tool in the process of improving them. Indeed, equality data can and should feed into the policy process to enhance evidence-based policymaking.

⁵⁶³ The research found that 42% of respondents with no photo ID said that they would be unlikely or very unlikely to apply for a voter card. The same research found that over a quarter (27%) of those without any form of photo ID and a fifth (19%) of those with no recognisable photo ID would be less likely to vote if they had to present photo ID. Cabinet Office, ‘*Photographic ID Research - Headline Findings*’, (IFF Research, 31 March 2021).

⁵⁶⁴ House of Commons Library, ‘*General Election 2019: Marginality*’, (7 January 2020).

⁵⁶⁵ House of Commons Women and Equalities Committee, ‘*Enforcing the Equality Act: the law and the role of the Equality and Human Rights Commission: Tenth Report of Session 2017–19*’, HC 1470, (2019), p.42, citing written evidence given to the WEC by The Runnymede Trust and Race on the Agenda, ‘*EEA0213*’, (2018).

⁵⁶⁶ *ibid.*

⁵⁶⁷ Venice Commission of the Council of Europe, ‘*The Rule of Law Checklist*’, (2016), p. 32.

In this way, equality data can be deployed to better design, evaluate and reform policies. In short, equality data is a powerful tool in the fight against discrimination.

- 6.30 Despite their importance, the process of collecting equality data and making it available for analysis is, at times, haphazard. JUSTICE has identified a number of examples of this, from which three key issues can be seen. Firstly, there are crucial policy areas for which equality data is not collected, or at least not in any systematic manner. Secondly, when equality data is collected, it may not be published until it is made the subject of a freedom of information (“FOI”) request – and sometimes, not even then. Finally, even when published, the data can be of poor quality, limiting its utility. These categories of deficiency are not mutually exclusive and can overlap. For example, if data is not collected systematically and consistently, that can lead to poor quality data because it contains large gaps.
- 6.31 Whilst the examples of shortcomings of equality data identified in this chapter are not indicative of the scale of the problem, they do illustrate the nature of the issues JUSTICE has encountered while trying to assess policies’ equality impact.

Uncollected data

- 6.32 Some key policy areas where inequality and discrimination are a concern remain outside the scope of data collection. This means that we are effectively blind to any discrimination in that policy area. This makes it virtually impossible to assess whether the principle of equality is being respected in the application of certain legislation.
- 6.33 There appear to be various reasons why equality data is not collected in practice. In many cases, it seems that because the public authorities in question are not required to gather equality data in a systematic way that allows for easy collation and analysis, they simply do not do so. This means that, when they come to respond to an FOI request, they can reject it on the basis that they simply do not hold the data in question, or the work required to extract and collate the data would exceed the cost limit. An example of this is the ethnicity data held by individual police forces in respect of Prevent referrals (see below).
- 6.34 Certain equality data may not be collected for safeguarding reasons, for example, in the national referral mechanism (“NRM”). The NRM is a framework for identifying potential victims of modern slavery and referring them to the appropriate support services. The NRM, which the Home Office manages, is the only route for victims of trafficking to access safe housing, medical attention, and in some cases, an allowance. It is considered the best measure of potential child victims of modern slavery.⁵⁶⁸ However, there are significant limitations with the NRM as a measure of the prevalence of trafficking, including the fact that consent for referral is needed from victims aged 18 or over.⁵⁶⁹ Indeed, the Office for National Statistics, in its 2020 Modern Slavery Report 2020, found that data from the NRM does:

*“...not show the number of victims [entering] the NRM [who] do not engage with the support services. Additionally, the data only provide[s] the number of detected potential victims who have given consent to enter the NRM. [It does] not include those not identified or referred”.*⁵⁷⁰

- 6.35 As such, the equality data regarding potential adult victims is limited by the consent criterion. Whilst consent is an important safeguarding mechanism that provides a reason for not collecting

⁵⁶⁸ Office for National Statistics, “*Sourcing data on child victims of modern slavery, UK: progress report*”, (2022).

⁵⁶⁹ Home Office ‘*Guidance National referral mechanism guidance: adult (England and Wales)*’, (2022).

⁵⁷⁰ Office for National Statistics, ‘*Modern slavery in the UK: March 2020*’, (2020).

this equality data, some data omissions do not have a similar justification. For example, the Home Office does not include any ethnicity data whatsoever in its otherwise relatively detailed annual publication of data relating to Prevent referrals⁵⁷¹. We understand that this may be at least in part because of the lack of any consistent recording and collating of ethnicity data by the source of the referral. This missing ethnicity data is crucial for assessing whether the programme is being implemented equitably. Without equality data, the PSED cannot earnestly be fulfilled.

6.36 Clearly, when equality data remains uncollected, discrimination may be obscured. Yet, there is a further concern that a lack of data might exacerbate discrimination. For example, data collection regarding gangs and county lines focuses on young men. This focus on young men and boys in the data may obscure the involvement of young women and girls in gangs and county lines in reality. There is a strong suggestion that this may result in a vicious cycle whereby, because the police do not expect women and girls to be involved in gangs and other criminal activity, they do not, for example, stop or check up on them, which leads to continued under-reporting of the cases their involvement, which in itself fuels the perception that women and girls are not involved. This appears to make it more attractive for criminals to use girls and young women in county lines, for example, because they are less likely to be stopped by the police. Precisely because there is little data collected, this possible causal cycle is not well evidenced; however, there is some anecdotal evidence that warrants further investigation.⁵⁷²

Unpublished data

6.37 Even when equality data is being collected, it may not be publicly available. When equality data goes unpublished, the public cannot interrogate it. This reduces transparency and prevents organisations from addressing hidden inequities. In order to access this data, interested parties must make arduous FOI requests, which somewhat act as a barrier, even if the data is eventually provided in response to the request. Two examples of unpublished data are discussed below. The first shows how publishing data can affect the overall understanding of how crimes impact the public. The second example shows how publication can reveal the poor quality of data that is being gathered by a public body – which may indicate a correspondingly poor understanding of the policy area.

6.38 Unpublished equality data may have a substantial impact on the public understanding of how crimes affect individuals with certain protected characteristics. Whilst the CPS regularly publishes data relating to the gender of the defendant in modern slavery-flagged cases, it does not do so in respect of complainants. Following an FOI, the CPS provided data on complainant sex for the period from 2017 to 2022.⁵⁷³ This FOI revealed that women were twice as likely as men to be victims of human trafficking in this period.

6.39 Unpublished equality data may also be concealing poor-quality data that is being gathered by a public body. Using the example of modern slavery cases, no data is regularly published in relation to complainant ethnicity. Following an FOI, the CPS provided this data for the period from 2017

⁵⁷¹ Prevent is one part of the Government’s overall counter-terrorism strategy, CONTEST. Its stated aims are (i) tackling the ideological causes of terrorism; (ii) intervening early to support people susceptible to radicalisation; and (iii) enabling people who have already engaged in terrorism to disengage and rehabilitate. Home Office, ‘*Counter-terrorism strategy (CONTEST) 2023*’, (18 July 2023).

⁵⁷² A female former gang member who was asked to carry weapons and drugs for the gang because she was a girl and therefore a “safer” option, explains how she wishes the police would stop and search girls more because increased police intervention would allow girls to explain to police that they were being groomed. ‘*Gangs: Call to use stop and search more often on women*’, (BBC News, 25 February 2022)

⁵⁷³ The data provided in the response to the freedom of information request refers to “*Complainant Sex*”, but other prosecution data published generally by the CPS refers to “*Complainant Gender*”. For the purposes of this analysis, we have assumed that the CPS intended to refer to the same concept in its response.

to 2022. The FOI revealed a gap in that the two largest ethnicity categories were “Not Provided” and “Not Stated”. Adding these two categories together, they equated to well over half of all complainants across the five-year period, demonstrating a material gap in knowledge surrounding ethnicity in modern slavery-flagged cases.

6.40 In 2014, the Independent Anti-Slavery Commissioner examined and rejected allegations of nationality bias in the NRM.⁵⁷⁴ However, following the publication of the 2019 full-year NRM statistics, it was noted by After Exploitation that non-EU nationals were “*nearly five times more likely to be rejected than EU claims*”.⁵⁷⁵ Concerningly, since then, the figures on the status of UK, EU and non-EU claims have not been included in the government’s annual statistics. While there is no suggestion that this data is being withheld to obscure discrimination, it is imperative that the data is published to increase transparency and enhance evidence-based policymaking.

Low-quality data

6.41 Even when data is collected and published, it may be of poor quality, rendering it of limited use. There is significant variation between government bodies and institutions as to how data is recorded and collated. For example, data on ethnicity is broken down into different ethnic groups, some more granular than others.⁵⁷⁶ Similarly, some data is presented and searchable intersectionally,⁵⁷⁷ but elsewhere it is presented in a more one-dimensional manner.⁵⁷⁸

6.42 For example, CPS statistics concerning prosecutions for domestic abuse, modern slavery, and rape/sexual violence are of low utility. One reason for this is that it is not possible to interrogate more than one datum at a time; for example, it is not possible to identify prosecutions where women under the age of 25 are the complainants. Following multiple FOI requests for prosecution data in respect of domestic abuse, modern slavery, and rape/sexual violence, the CPS confirmed that data is not collated on an intersectional basis. Given that this information is currently inputted and stored within the CPS Witness Management System, this data should be capable of being processed more effectively as connected pieces of data rather than entirely disaggregated. If the CPS made the relevant changes to their data capture, storage and management, there could be significant implications for the utility of the data. This lack of intersectionality is a recurrent problem across many of the datasets that JUSTICE has reviewed.

6.43 Another example of poor-quality data are the Home Office statistics on the age of individuals arrested. All people aged 21 and over are lumped together within one age group band, which accounts for the vast majority of total arrests.⁵⁷⁹ More granular age bands could reveal more specific

⁵⁷⁴ Home Office, ‘*Review of the National Referral Mechanism for victims of human trafficking*’, (2014).

⁵⁷⁵ After Exploitation, ‘*Briefing: National Referral Mechanism Statistics 2019*’, (2022).

⁵⁷⁶ The Home Office collects statistics regarding police use of stop and search and arrest powers. These ethnicity categories are: White; Black (or Black British) ; Asian (or Asian British); Mixed; Other and; Black, Asian and other minority ethnic groups. By contrast, CPS data on the ethnicity of complainants in rape-flagged prosecutions is more granular: Indian; Pakistani; Bangladeshi; Chinese; Any Other Asian Background; Caribbean; African; Any Other Black Background; White and Black Caribbean; White and Black African; White and Asian; Any Other Mixed Background; Not Provided; Not Stated; Arab; Any Other Ethnic Group; British; Irish; Gypsy or Irish Traveller; Any Other White Background.

⁵⁷⁷ The London Metropolitan Police Service Dashboard on stop and searches permits intersectional analysis.

⁵⁷⁸ CPS data on the number of prosecutions for domestic violence, modern slavery and rape/sexual violence is stored in a way that renders it impossible to interrogate more than one datapoint.

⁵⁷⁹ Home Office, ‘*National statistics Police powers and procedures: Stop and search and arrests, England and Wales, year ending 31 March 2021 second edition*’, (5 May 2022).

trends amongst certain adult age cohorts. It is noteworthy that younger age groups are in much smaller bands.⁵⁸⁰

6.44 The lack of recognition that analysis of discrimination requires a structural approach is clear from the types of data police forces are not collating. For example, JUSTICE has made a number of FOI requests to individual police forces for intersectional data on race and gender, some of which have been refused on the grounds that collating this data would incur costs exceeding the “appropriate limit”, often because it would require a review of individual files to extract the information sought.⁵⁸¹ This suggests that, even where such data is recorded at source (which is not always the case), it is not then properly collated or analysed by the police, meaning that the police force itself is unable to view the data in question in an intersectional manner and therefore identify where their policies and procedures might be discriminatory. This could mean the police force is blind to, and inadvertently perpetuating, discriminatory practices and/or outcomes.

Case study: data evidencing discrimination in the Criminal Justice System

6.45 Whilst our previous work points to issues of inequality across the entirety of the justice system,⁵⁸² we will spotlight one striking example, where the data available points to stark and incontrovertible inequalities in the application of the law.

6.46 The police are often the first point of contact for people interacting with the Criminal Justice System (“CJS”). Police decisions impact the trajectory of an individual's experience of, and trust in, the CJS. It is, therefore, vital that the police force address any issues of discrimination. To do this, it must first be recognised that there *is* discrimination in the police force. Concerningly, the Government’s recent Commission on Race and Ethnic Disparities fails to fully grapple with this reality.

6.47 For example, in the Commission’s discussion on racism and policing, the report focuses on the racism experienced by police officers,⁵⁸³ and while such racism should be called out, it should not come at the expense of a discussion of discrimination by the police. When the Commission does address racism by the police, the report effectively frames the issue as one of “*bad apples*”. Referring to the issue of discrimination in the force, the report suggests: “*How the police are perceived can be shaped by a small minority whose prejudiced behaviour attracts media attention*” [emphasis added].⁵⁸⁴

6.48 The scale of systemic discrimination within police forces nationally is concerning. For example, 36.4% of Roma, and 34.6% of Gypsy/Traveller people reported police-related racial discrimination in the UK prior to the COVID-19 pandemic.⁵⁸⁵ This experience of the police can exacerbate the

⁵⁸⁰ Under 10, 10-17, and 18-20.

⁵⁸¹ Regulation 3 of the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulation 2004 SI 2004 No 3244 states that the appropriate cost limit for the police is £450.

⁵⁸² For example, see: JUSTICE, ‘Mental health and fair trial’ (2017); JUSTICE ‘Tackling Racial Injustice: Children and the Youth Justice System’ (2021); JUSTICE ‘Reforming Benefits Decision-Making’, (2021); JUSTICE, ‘Immigration and Asylum Appeals – a Fresh Look’, (2018); JUSTICE ‘Increasing judicial diversity’, (2017).

⁵⁸³ Commission on Race and Ethnic Disparities, ‘The Report’, (2021), pp. 188, 191.

⁵⁸⁴ *ibid.* p. 191.

⁵⁸⁵ The researchers do not include figures for the pandemic because “*The task of comparing the prevalence of racist assault and racial discrimination experienced in the pre-pandemic and pandemic periods is not straightforward, primarily because the periods of time considered in this chapter are of different lengths*”. However, they nonetheless conclude that the “*survey provides robust evidence of the existence of racism and racial discrimination in the UK. We show persistent and extensive experiences of racial discrimination over time and across a multitude of settings*” [emphasis added]. D. Ellingworth, L.

longstanding mistrust that many Gypsy, Roma and Traveller (“GRT”) communities have in the police and other elements of the criminal justice system due to decades of over-policing.⁵⁸⁶ The majority of those who submitted to the Report Racism GRT website said they were reluctant to report when they are victims of crimes to the police.⁵⁸⁷ The most common reason given was lack of confidence that the police would act.⁵⁸⁸

6.49 This mistrust is worsened by the PCSC Act, which introduced measures criminalising trespass and unauthorised encampments.⁵⁸⁹ The PCSC Act also provides for the confiscation of any property involved in the offence.⁵⁹⁰ The Home Office recognised that this may disadvantage GRT communities but claimed “*any indirect discrimination towards [these] communities can be objectively justified*” for the purposes of preventing and investigating crimes and protecting the rights of others.⁵⁹¹ The Council of Europe Advisory Committee on the Framework Convention for the Protection of National Minorities warned these measures “[...] *run against key aims of the Framework Convention: protection from discrimination and the achievement of full and effective equality between persons belonging to national minorities and those belonging to the majority, by criminalising the protected way of life which forms part of the identity of persons belonging to these communities*”.⁵⁹²

6.50 While the measures in the PCSC Act were introduced to prevent and investigate crimes, the feeling of mistrust and over policing that the Act exacerbates may actually prevent the GRT community from reporting crime. Consequently, the prevention and investigation of crime may to some extent, be hindered, and discrimination may be facilitated. Indeed, hate crimes have been reported to be the most common issue that individuals from GRT communities report to the police.⁵⁹³

6.51 INQUEST have reviewed data that suggests that Black people are seven times more likely to die than White people in or following the use of restraint in police custody.⁵⁹⁴ INQUEST concludes the finding “*clearly evidence[s] the existence of racial disproportionality*”.⁵⁹⁵ Moreover, recent scandals have rightly attracted media attention. Serial rapist David Carrick used his position as a

Bécares, M. Šťastná, and J. Nazroo, ‘*Racism and racial discrimination*’, N. Finney, J. Nazroo, L. Bécares, D. Kapadia, and N. Shlomo (eds) *Racism and Ethnic Inequality in a Time of Crisis* (Bristol University Press 2023).

⁵⁸⁶ A. Kirkby, I. Manning, E. Nuttall, E. Popenko, ‘*Race hate and prejudice faced by Gypsies and Travellers in England, March 2023*’, (*Friends, Families and Travellers*, May 2023).

⁵⁸⁷ ‘*Report Racism*’, (*GATE Hertfordshire*).

⁵⁸⁸ N. Thompson and D. Woodger, ‘*Recognise, Report, Resolve*’, (*GATE Hertfordshire*), p. 9.

⁵⁸⁹ Part 4 Police, Crime, Sentencing and Courts Act 2022.

⁵⁹⁰ Home office, ‘*Policy paper Unauthorised encampments: Police, Crime, Sentencing and Courts Act 2022 factsheet*’, (20 August 2022).

⁵⁹¹ Home Office, ‘*Home Office measures in the Police, Crime, Sentencing and Courts Bill: Equalities Impact Assessment*’, (*Gov.uk*, 2 August 2023).

⁵⁹² Advisory Committee on the Framework Convention for the Protection of National Minorities, ‘*Fifth Opinion on the United Kingdom*’, (*Council of Europe*, 8 December 2022).

⁵⁹³ Police officers from 45 police forces in England, Scotland and Wales considered hate crime to be the most common issue Gypsy, Roma and Traveller people report to the police. The Traveller Movement, ‘*Policing by consent: Understanding and improving relations between Gypsies, Roma, Travellers and the police*’.

⁵⁹⁴ INQUEST does note that the Independent Office for Police Conduct “*argues that these figures ought to be treated with some caution, particularly given the numbers of deaths are relatively low and says the data does not provide a definitive picture of racial disproportionality. The watchdog also indicated that the circumstances vary in these cases. It says that even if one were to look at arrests alone, there is no data that gives a ‘demographic breakdown’ of those arrested or detained to use as a comparison.*” INQUEST, ‘*I Can’t Breathe*’, (20 February 2023), p. 46.

⁵⁹⁵ *ibid.*

police officer to scare victims from reporting his crimes. The kidnapping, rape and murder of Sarah Everard by police officer Wayne Couzens shocked the nation. However, these are not isolated “*bad apple*” incidents. More than 1,500 police officers were accused of violence against women and girls from October 2021 to April 2022.⁵⁹⁶ The roots of this discrimination in the Metropolitan Police Service (the “**Met**”) has been exhaustively outlined in the independent review into the standards of behaviour and internal culture of the Metropolitan Police Service by Baroness Casey.

6.52 This is an independent review of the standards of behaviour and internal culture of the Met. The Review’s focus on culture speaks to the systemic scale of discrimination within and by the Met. The excuse of individual “*bad apples*” is refuted by the review due to the scale of this endemic problem, bolstered by a proclivity for silence and the discouragement of whistleblowing. This has meant that the “*system supports wrongdoers*” and misogyny, racism and homophobia are “*tolerated, ignored, or dismissed as ‘banter’*”⁵⁹⁷ while those who reported this behaviour are subject to bullying. The Met’s culture of misogyny, racism and homophobia is so severe that Commissioner Mark Rowley predicted that two to three police officers will face trial every week until 2025 for crimes such as dishonesty, violence against women and girls, domestic abuse, and sexual offences.⁵⁹⁸

6.53 Police discrimination assumes multiple forms. One of the most persistent is the disproportionate use of stop and search powers. Around 700,000 searches were conducted in 2020/21.⁵⁹⁹ Black people experienced the highest search rate at 53 per 1,000 compared to a rate of 7.5 per 1,000 for White people.⁶⁰⁰ Reports from Stopwatch, Release, the Criminal Justice Alliance, and the Equality and Human Rights Commission,⁶⁰¹ among others, have detailed the disproportionate use of stop and search powers, and the impact on people from ethnic minority backgrounds. For example, the Casey Review noted that Black Londoners “*are more likely to be stopped and searched, handcuffed, batoned and Tasered*”, which has led to “*generational mistrust of the police among Black Londoners*”.⁶⁰² Consequently, the Report concludes that “*Stop and search is currently deployed by the Met at the cost of legitimacy, trust and, therefore, consent*”.⁶⁰³

6.54 Nevertheless, the Met are known to praise the purported value of stop and search in addressing crime. The Commissioner Mark Rowley said in a speech in January 2023 that:

“*As a forthcoming global review of evidence for the Oxford Journal of Policing will report, stop and search in weapons crime hot spots can cut attempted murders in those small areas by 50% or more.*”⁶⁰⁴

6.55 However, the latest meta-analysis in the Oxford Journal of Policing do not cast stop and search practices in such a positive light. While it may be difficult to determine how the cost of stop and

⁵⁹⁶ National Police Chiefs’ Council, ‘*First violence against women and girls benchmark published*’, (2023).

⁵⁹⁷ Baroness Casey, ‘*Baroness Casey Review Final Report: March 2023*’, (2023), p. 14.

⁵⁹⁸ L. Jackson, ‘*Two or three Met officers to face court a week, commissioner says*’, (BBC, 2023).

⁵⁹⁹ Home Office, ‘*National statistics Police powers and procedures: Stop and search and arrests, England and Wales, year ending 31 March 2021 second edition*’, (2022).

⁶⁰⁰ House of Commons Library, ‘*Research Briefing: Police powers: stop and search*’, (2022).

⁶⁰¹ See, for example, Equality and Human Rights Commission, ‘*Stop and Think: a critical review of the use of stop and search powers in England and Wales*’, (2010).

⁶⁰² Baroness Casey, ‘*Baroness Casey Review Final Report: March 2023*’, (2023), p. 17.

⁶⁰³ *ibid*, p. 17.

⁶⁰⁴ Sir Mark Rowley, ‘*More Trust, Less Crime, High Standards*’, (2023), p. 13.

search practices should be weighed against any benefits, the police and policymakers should at least be aware of the significant harm that preventative stop and search measures can have. Stop and search measures may reduce the rates of crime in targeted areas, but even so, any benefits are:

“likely offset by the negative outcomes found for people who are stopped. It may be that [stop and search practices] are required in dealing with the most serious crime and violence problems, but that is yet to be shown. At present, scientific evidence does not support the widespread use of [stop and search] as a proactive policing strategy” [emphasis added].⁶⁰⁵

6.56 Whilst this meta-analysis includes global data, a longitudinal review focused on London alone draws similar conclusions:

*“[O]ur analysis of ten years’ worth of London-wide data suggests that although stop and search had a weak association with some forms of crime, this effect was at the outer margins of statistical and social significance. We found no evidence for effects on robbery and theft, vehicle crime or criminal damage, and inconsistent evidence of very small effects on burglary, non-domestic violent crime and total crime. When we looked separately at s60 searches, it did not appear that a sudden surge in use had any effect on the underlying trend in non-domestic violent crime.”*⁶⁰⁶

6.57 It is worth noting that the use of stop and search powers is often justified as an investigatory tool, not a crime prevention tool,⁶⁰⁷ so emphasising its benefit in the latter context is something of a non-sequitur. There is greater justification for stop and search as an investigative measure when there are reasonable grounds to suspect that someone has evidence on their person regarding the commission of a crime. In this way, and when properly circumscribed, the use of stop and search can be a legitimate measure for evidence-based policing. Nonetheless, whether investigatory or preventative, the use of stop and search powers must be viewed in light of its detrimental effects: discriminatory stop-and-search practices deepen distrust from the outset of an individual’s experience of the criminal justice system. Marginalisation, exclusion and even an increased propensity to commit crimes may be the long-term consequence of discriminatory stop-and-search practices.⁶⁰⁸

Enforcement of equality and non-discrimination rights

6.58 The final, logical step is to consider whether breaches of the Equality Act can be remedied, and whether rights to equality are being protected and properly enforced. In the UK, there are several ways in which the rights to equality and to be free from discrimination may be enforced. First, an individual can enforce their rights under the Equality Act by bringing a claim to the courts.⁶⁰⁹ Second, at a broader, institutional level, the EHRC is the non-departmental body charged with enforcing the Equality Act 2010. As this section will demonstrate, there are issues with both avenues of enforcement. It is important to note that sector-specific enforcement mechanisms (such

⁶⁰⁵ D. Weisburd, K. Petersen, and S. Fay, *‘Does Scientific Evidence Support the Widespread Use of SOFs as a Proactive Policing Strategy?’* Oxford University Press, (2023), p. 14.

⁶⁰⁶ B. Bradford and M. Tiratelli, *‘Does stop and search reduce crime?’*, (UK Justice Policy Review Focus, 2019).

⁶⁰⁷ Police and Criminal Evidence Act 1984, s. 1.

⁶⁰⁸ B. Bradford, ‘Assessing the impact of stop and search powers on individuals and communities’, in R. Delsol, and M. Shiner (eds), *Stop and Search* (Palgrave Macmillan 2015); J. Jackson, B. Bradford, M. Hough, A. Myhill, P. Quinton, and T.R. Tyler, ‘*Why do People Comply with the Law? Legitimacy and the Influence of Legal Institutions*’ [2012] 52(6) *British Journal of Criminology*; T.R. Tyler, J. Jackson, and A. Mentovich, ‘*On the Consequences of Being a Target of Suspicion: Potential Pitfalls of Proactive Police Contact*’ [2015] 12(4) *Journal of Empirical Legal Studies*.

⁶⁰⁹ Equality Act 2010, s. 114, 120 and 127.

as ombudsmen or inspectorates) are also part of the enforcement jigsaw puzzle, but this remains beyond the scope of this section.

Individual enforcement

6.59 Litigation brought by individuals is the predominant way in which rights provided for by the Equality Act are currently enforced.⁶¹⁰ Various challenges face individuals seeking to enforce their rights under this Act,⁶¹¹ however the cost of bringing an action, coupled with the limited availability of legal support, stand tall among them. Legal aid has been discussed in more depth in Chapter 5, but it is nonetheless worth considering again for two reasons. First, accessing legal aid is “*the most significant way that costs can be met for individuals seeking to enforce their rights under the Equality Act 2010*”.⁶¹² Second, in practice, the cuts to legal aid restrict the UK’s adherence to the principle of equality before the law.

6.60 LASPO severely restricted the eligibility criteria for receiving legal aid, which has meant that some people in need of legal advice cannot afford it.⁶¹³ Even for matters still covered by legal aid, individuals in those areas cannot access legal advice.⁶¹⁴ This lack of access and affordability has, therefore, forced some to represent themselves as litigants in person. A report by the Civil Justice Council has stated that there is “*an inequality of arms*” in terms of the many disadvantages associated with representing oneself — whether in terms of expertise or confidence in a court setting.⁶¹⁵ As such, LASPO increases inequality by effectively restricting access to justice for the most vulnerable in society.⁶¹⁶ These findings challenge the UK’s adherence to the Venice Commission’s requirement that victims of unequal treatment have access to a remedy. Indeed, as explained above, such access cannot be merely nominal but must also be practical and effective. As the Women and Equalities Committee (“WEC”) argues, “*the individual approach to enforcement...is not fit for purpose*” and “*the system of enforcement [of rights to equality] should ensure that [individual action] is only rarely needed*”.⁶¹⁷

⁶¹⁰ House of Commons Women and Equalities Committee, ‘*Enforcing the Equality Act: the law and the role of the Equality and Human Rights Commission: Tenth Report of Session 2017–19*’, HC 1470, (2019), p. 7.

⁶¹¹ “*Inclusion London set out a range of reasons that echoed evidence from other witnesses: poor knowledge of rights; unwillingness to go up against a large organisation with many more resources; complexity of the law; a lack of specialist legal support; the high cost of legal action and very limited access to legal aid*”. House of Commons Women and Equalities Committee, ‘*Enforcing the Equality Act: the law and the role of the Equality and Human Rights Commission: Tenth Report of Session 2017–19*’, HC 1470, (2019), p. 7.

⁶¹² *ibid.* p. 55.

⁶¹³ The Law Society, ‘*Legal aid deserts*’, (2023).

⁶¹⁴ Spending cuts have also led to the loss of jobs in some areas of law, which has led to legal aid deserts in the most deprived areas. LexisNexis, ‘*The LexisNexis Legal Aid Deserts report*’, (2022), quoting the President of the Law Society, Lubna Shuja.

⁶¹⁵ These inequalities are exacerbated by the presence of additional socio-economic disadvantages, like caring responsibilities, unemployment, or a mental or physical disability. Civil Justice Council, ‘*Access to Justice for Litigants in Person (or self-represented litigants)*’, (2011).

⁶¹⁶ The EHRC, in its inquiry into legal aid for victims of discrimination, found that “*recent years have seen access to justice restricted to such an extent that many people experiencing discrimination are not getting the help they need to seek redress.*” Equality and Human Rights Commission, ‘*Access to Legal Aid for Discrimination Cases*’, (2019), p. 5.

⁶¹⁷ House of Commons Women and Equalities Committee, ‘*Enforcing the Equality Act: the law and the role of the Equality and Human Rights Commission: Tenth Report of Session 2017–19*’, HC 1470, (2019), p. 3.

Institutional enforcement

6.61 The Equality and Human Rights Commission was established in 2007,⁶¹⁸ it functions on an institutional level, overseeing the Equality Act and its enforcement.⁶¹⁹ The EHRC's role in this respect is important, because it has the power to drive broader, systemic change in the way that bringing an individual case may not. For example, the Royal National Institute of Blind People, in evidence given to the WEC, explained that:

*“inaccessible websites and a lack of accessible information were forms of discrimination affecting blind and partially sighted people ‘as a class’ meaning that ‘relying on individual enforcement is not effective.’”*⁶²⁰

6.62 With these points in mind, it is important to interrogate the role the EHRC in delivering material improvements to the equality and human rights culture in the UK since its establishment. This section will show that there are real concerns in this regard. Indeed, the Government's Tailored Review of the EHRC in 2018 (the “**Tailored Review**”) concluded that “*the EHRC is not meeting its potential and its domestic reputation suffers accordingly*”.⁶²¹ The following year, a WEC Inquiry found that the EHRC was “*failing to act in areas of significant inequality*” and it was “*unable to provide adequate explanation of why it appear[ed] not to be able to fulfil the role of a robust enforcer of equality law*”.⁶²²

6.63 These findings are not surprising. The EHRC has been marred by problems and controversies since its inception, which have tended to distract from its role as an enforcement body. First of all, critics point to an alleged politicisation of the process of appointments.⁶²³ The Chair and the Commissioners of the EHRC are appointed by the Minister for Women and Equalities. As part of the appointment process for the Chair of the Commission, the appointee undergoes a pre-appointment hearing with the Joint Committee on Human Rights (“**JCHR**”) and the WEC. Any issues that arise are brought to the attention of the Minister for Women and Equalities, who then decides whether to go ahead with the appointment. David Isaac's appointment as potential chair sparked concerns from the WEC and JCHR. They had raised a potential conflict of interest in that Isaac had planned to “*continue as a senior equity partner*” at Pinsent Masons despite the fact that the firm has “*undertaken significant work for the Government*”.⁶²⁴ They insinuated that this might be an issue for the EHRC's independence from the Government — even if only optically.

6.64 Concerns surrounding infringements of the EHRC's independence have continued into recent years, with now former Chair, David Isaac, remarking that the watchdog “*was being undermined*

⁶¹⁸ The EHRC brings together the functions of three commissions (the Equal Opportunities Commission, the Disability Rights Commission and the Commission for Racial Equality) under the umbrella of one non-departmental public body.

⁶¹⁹ Equality Act 2006, s. 1–42.

⁶²⁰ House of Commons Women and Equalities Committee, ‘*Enforcing the Equality Act: the law and the role of the Equality and Human Rights Commission: Tenth Report of Session 2017–19*’, HC 1470, (2019), p. 8.

⁶²¹ HM Government, ‘*Tailored Review of The Equality and Human Rights Commission*’, (2018), p. 3.

⁶²² House of Commons Women and Equalities Committee, ‘*Enforcing the Equality Act: the law and the role of the Equality and Human Rights Commission: Tenth Report of Session 2017–19*’, HC 1470, (2019), p. 5.

⁶²³ H. Siddique, ‘*EHRC undermined by pressure to support No 10 agenda, says ex-chair*’, (*The Guardian*, 2021); J. Parry, ‘*Rights watchdog ‘should lose status’ over trans row*’, (*BBC*, 2022); H. Siddique, ‘*Politicising the EHRC? Five controversial appointments*’, *The Guardian*, (2020). See also the open letter sent by charity leaders to then Prime Minister Johnson regarding the findings of the Sewell Report (a copy of which can be found [here](#)). It highlighted “*the eroded independence of the Equality and Human Rights Commission (EHRC), which has recently been compromised by the political nature of ... appointments.*”

⁶²⁴ For example, see the House of Commons Women and Equalities Committee, ‘*Appointment of the Chair of the Equality and Human Rights Commission: Third Report of Session 2015–16*’, (2016), p. 6.

by pressure to support the Conservative government’s agenda” and that it was his view that “an independent regulator shouldn’t be in a position where the governments of the day can actually influence the appointments of that body to support a particular ideology”.⁶²⁵ Two former legal directors of the Commission have also spoken out with concerns over its independence, in light of the EHRC’s interventions regarding transgender rights.⁶²⁶

- 6.65 In the Tailored Review, the Government argued that changing the form of the EHRC to give it even greater independence might “carry risks of disruption” and that it is generally perceived to be independent.⁶²⁷ Yet, there are clear organisational implications which flow from executive interference. Indeed, it was reported that “two in five LGBTQ+ staff left the EHRC last year”.⁶²⁸ As a result, the WEC remarked that the rate of turnover in staff appears to be “calling into question the management style at the Commission”.⁶²⁹ The latest tranche of allegations regarding bullying and concerns over the impartiality and independence of the organisation⁶³⁰ have, in fact, led the WEC to ask for a full breakdown of the data regarding staff turnover since 2019.⁶³¹
- 6.66 The EHRC is the UK’s National Human Rights Institution (“NHRI”). All NHRIs are independently monitored and accredited by the Global Alliance of National Human Rights Institutions (“GANHRI”) for their adherence to the Paris Principles, which articulate the roles, requirements and responsibilities of NHRIs. All NHRIs are periodically reviewed by the Sub-Committee on Accreditation (“SCA”) of GANHRI and are given a grade of A, B or C. The SCA may also undertake a special review where it seems that “the circumstances of any A-status NHRI may have changed in a way that affects compliance with the Paris Principles”.⁶³²
- 6.67 A number of civil society organisations brought concerns about the EHRC’s independence to the SCA in February 2022 and requested a special review, largely in response to the EHRC’s position on transgender rights.⁶³³ The SCA declined a special review but encouraged civil society organisations to provide submissions to the periodic review, which was to be published later that year.⁶³⁴ This group of civil society organisations argued that the EHRC should lose its ‘A’ status given, in their view, the:

*“failings of the UK Government to provide the EHRC with adequate statutory powers, an independent appointments process and sufficient funding, and the failings of its leadership to work effectively with civil society organisations. These together have had a severe impact on the EHRC’s ability and its motivation to effectively and independently perform its mandate to protect and promote human rights.”*⁶³⁵

⁶²⁵ H. Siddique, ‘*EHRC undermined by pressure to support No 10 agenda, says ex-chair*’, (The Guardian, 2021).

⁶²⁶ X. Richards, ‘*Former EHRC legal directors call for it to lose independent status amid trans rights row*’, (The National, 2022).

⁶²⁷ HM Government, ‘*Tailored Review of The Equality and Human Rights Commission*’, (2018), p. 34.

⁶²⁸ L. Moss, ‘*Equality watchdog head Baroness Falkner investigated over complaints*’, (BBC, 2023).

⁶²⁹ Chamber UK, ‘*A Toxic Environment? Chair of EHRC to be Investigated*’, (2023).

⁶³⁰ *ibid.*

⁶³¹ *Letter from Chair of Women and Equalities Committee to CEO of the Equalities and Human Rights Commission regarding EHRC Staffing*, (2023).

⁶³² GANHRI, ‘*Practice Note 2: Special Reviews*’, (6 March 2017).

⁶³³ J. Parry, ‘*Rights watchdog ‘should lose status’ over trans row*’, (BBC, 2022).

⁶³⁴ ‘*Letter from Stonewall to the Geneva Representative of GANHRI*’, (2023).

⁶³⁵ Good Law Project, ‘*Human rights are for everyone*’, (2022). See the submissions to the SCA [here](#).

6.68 Although the SCA gave the EHRC an ‘A’ rating in the periodic review, it did recommend that the EHRC “*continues its efforts to advocate for a separate ring-fenced budget line to enhance its financial autonomy*”.⁶³⁶ It also stressed the need for the EHRC to “*address key human rights issues in an independent, effective, public and transparent manner*” and “*to strengthen its working relationship with civil society organizations*”,⁶³⁷ presumably referring to the tensions outlined above. With regard to the latter two recommendations, in particular, the EHRC states that it will “*take forward [these recommendations] as a matter of course*”.⁶³⁸ However, Stonewall and other civil society organisations have recently written again to GANHRI, arguing that the SCA’s concerns, in this regard, have not been addressed.⁶³⁹

6.69 A further, common criticism of the EHRC is that it could make greater use of its enforcement powers. Beyond supporting discrimination complaints made by individual claimants or bringing a judicial review against a public authority of its own accord, the EHRC has unique enforcement powers.⁶⁴⁰ The EHRC can conduct investigations into potential breaches of equalities law and issue ‘unlawful act notices’, which require action by those in receipt, or it can issue action plans or agreements.⁶⁴¹ The EHRC can also apply for an injunction in order to prevent breaches of the equalities law.⁶⁴²

6.70 The Tailored Review noted that stakeholders of the Commission saw its primary role as that of an information provider; only secondarily was it viewed as an “*agent of change*”⁶⁴³ or an enforcer of the Equality Act. It is true that during David Isaac’s tenure as Chair of the Commission, he announced his intentions for the Commission to become a “*more muscular regulator*”.⁶⁴⁴ The WEC inquiry, however, concluded that the evidence provided to them did not support the conclusion that this ambition had been set in motion.⁶⁴⁵ Baroness Falkner, who succeeded Isaac as Chair in 2020, remarked in her pre-appointment hearing that “*the Commission has been unfairly criticised sometimes for not being a policeman*”⁶⁴⁶ — a comment, which the WEC argued demonstrated “*a lack of conviction in relation to enforcement action in relation to equality law*”.⁶⁴⁷

6.71 In its response to the WEC Inquiry, the EHRC remarked that a “*key component*” of their strategy was “*to use enforcement action to secure real change for people facing discrimination*”. It

⁶³⁶ Global Alliance of National Human Rights Institutions, ‘*Report and Recommendations of the Session of the Sub-Committee on Accreditation (SCA)*’, (2022), pp. 19–22.

⁶³⁷ *ibid.*

⁶³⁸ ‘*Letter from Chair of the EHRC to the Chair of the Women and Equalities Committee regarding the Commission’s re-accreditation as a National Human Rights Institution*’, (2003).

⁶³⁹ ‘*Letter from Stonewall to the Geneva Representative of GANHRI*’, (2023).

⁶⁴⁰ Note also that “[p]re-enforcement is also of crucial importan[ce]. The EHRC often corresponds with organisations who are at risk of breaching the law, which can lead to changes in practice.” HM Government, ‘*Tailored Review of The Equality and Human Rights Commission*’, (2018), p. 7.

⁶⁴¹ Equality Act 2006, s. 20–23.

⁶⁴² *ibid.*, s. 24.

⁶⁴³ HM Government, ‘*Tailored Review of The Equality and Human Rights Commission*’, (2018), p. 3.

⁶⁴⁴ D. Isaac, ‘*Prioritising our legal work*’, (EHRC, 2017).

⁶⁴⁵ House of Commons Women and Equalities Committee, ‘*Enforcing the Equality Act: the law and the role of the Equality and Human Rights Commission: Tenth Report of Session 2017–19*’, HC 1470, (2019), p. 11.

⁶⁴⁶ See, e.g., House of Commons Women and Equalities Committee, ‘*Appointment of the Chair of the Equality and Human Rights Commission: Second Report of Session 2019–21*’, HC 966, (2020), p. 11.

⁶⁴⁷ Baroness Falkner so qualified this remark later on by stating that the EHRC could “*perhaps step up a little in terms of the public sector equality duty*”. See, e.g., House of Commons Women and Equalities Committee, ‘*Appointment of the Chair of the Equality and Human Rights Commission: Second Report of Session 2019–21*’, HC 966, (2020), p. 11.

contended that it had “*significantly increased... enforcement activity*” and that, subject to resourcing capacity, it accepted the WEC’s recommendation to “*volume, transparency and publicity of its enforcement work*”.⁶⁴⁸

- 6.72 Finally, it is necessary to consider the funding arrangements of the EHRC. In terms of funding, the Minister for Women and Equalities, as well as the Cabinet Office Accounting Officer, are responsible for allocating funds to the EHRC annually.⁶⁴⁹ Since its inception, the EHRC’s budget has shrunk from a high of £70.3 million in 2007⁶⁵⁰ to £17.1 million for the year 2023–24.⁶⁵¹ As such, the EHRC has expressed that this means it will have “*to absorb all inflationary costs, as well as respond positively to requests... to take on additional work, within a real-terms funding cut*”.⁶⁵² It is true that several of the EHRC’s functions were removed as a result of significant reforms to the body in 2011 and, consequently, its budget was reduced.⁶⁵³ Nevertheless, as explained by the WEC, this does not account for the entirety of the reduction in the EHRC’s budget. In their estimation, putting to one side the reductions resulting from the 2011 reforms, “*the EHRC has had its budget [further] reduced by nearly £42 million since 2007*”.⁶⁵⁴
- 6.73 The Government argued in its Comprehensive Budget Review of the EHRC in 2012 that £17.1 million was the amount necessary for the body “*to discharge its functions effectively*”.⁶⁵⁵ The Government cite this figure in its 2018 Tailored Review of the EHRC but came to no conclusions as to what the appropriate budget for the EHRC should be.⁶⁵⁶ The EHRC now contends that there are real concerns that their overall impact in “*tackl[ing] discrimination and promot[ing] equality will be lessened without additional funding*”.⁶⁵⁷ Even the Commission on Race and Ethnic

⁶⁴⁸ Women and Equalities Committee, ‘*Enforcing the Equality Act: the law and the role of the Equality and Human Rights Commission: Government and Equality and Human Rights Commission Responses to the Committee’s Tenth Report of Session 2017–19, First Special Report of Session 2019*’, HC 96, (2019), pp. 13–18.

⁶⁴⁹ Cabinet Office & Equality and Human Rights Commission, ‘*Framework Document*’, (2019), p. 13.

⁶⁵⁰ HM Government, ‘*Tailored Review of The Equality and Human Rights Commission*’, (2018).

⁶⁵¹ Government Equalities Office, ‘*EHRC annual report and accounts 2022 to 2023*’, (26 July 2023).

⁶⁵² *Letter from the Chair of the EHRC to the Chair of the Women and Equalities Committee concerning the EHRC’s 2023–24 Business Plan* (2023).

⁶⁵³ “*The grants budget was removed...the EHRC’s power to make arrangements for the provision of conciliation in non-workplace disputes was repealed [and] funding to deliver a helpline was removed*”. HM Government, ‘*Tailored Review of The Equality and Human Rights Commission*’, (2018), p. 7. Tonkiss (2016) demonstrates that “*the remit of the EHRC was fundamentally changed and its independence systematically reduced*.” K. Tonkiss, ‘*Contesting human rights through institutional reform: the case of the UK Equality and Human Rights Commission*’, (2016) 20(4) *The Journal of International Human Rights* 491, p. 502. Concerns were raised by the International Coordinating Committee (former name for GANHRI), stating that the reforms could call into question the independence of the EHRC and its compliance with the Paris Principles. See Equality and Human Rights Commission, ‘*Enterprise and Regulatory Reform Bill 2012–13: Report stage and third reading briefing House of Commons*’, (2012), pp. 18–19.

⁶⁵⁴ House of Commons Women and Equalities Committee, ‘*Enforcing the Equality Act: the law and the role of the Equality and Human Rights Commission: Tenth Report of Session 2017–19*’, HC 1470, (2019), p. 25.

⁶⁵⁵ HM Government, ‘*Tailored Review of The Equality and Human Rights Commission*’, (2018), p. 8; Government Equalities Office, ‘*Comprehensive Budget Review of the Equality and Human Rights Commission*’, (2013), p. 2.

⁶⁵⁶ The Government stated that the Commission needed “*a clear purpose and set of priorities*” (key recommendations of the Review) before determining the level of resources that would be appropriate. HM Government, ‘*Tailored Review of The Equality and Human Rights Commission*’, (2018), p. 27. The Women and Equalities Committee agreed that at the time, this was “*a sensible approach, especially given the pivotal organisation and policy issues contained within this report and as well as the consistent underspends outlined*” in their inquiry report. House of Commons Women and Equalities Committee, ‘*Enforcing the Equality Act: the law and the role of the Equality and Human Rights Commission: Tenth Report of Session 2017–19*’, HC 1470, (2019), p. 26. Nevertheless, no increase has been seen as of yet.

⁶⁵⁷ *Letter from the Chair of the EHRC to the Chair of the Women and Equalities Committee concerning the EHRC’s 2023–24 Business Plan* (2023). See also ‘*Oral evidence: Enforcing Human Rights*’, HC 669, where David Isaac (then Chair of the EHRC) suggested a 30% increase to its budget.

Disparities (set up by the Government in 2020) supported funding the EHRC to encourage it to “use its compliance, enforcement and litigation powers”.⁶⁵⁸ The Commission considered it necessary that the EHRC have the resources to investigate and stamp out racism in order to “build trust in institutions and organisations”.⁶⁵⁹ It should be noted that the WEC explained in its Inquiry report that resourcing issues do not entirely account for the EHRC’s apparent ineffectiveness. The EHRC’s lack of “organisational confidence” and its under-utilisation of existing enforcement powers also underpinned the body’s ineffectiveness.⁶⁶⁰ Indeed, they recommend that the body “overcome its timidity and be bolder”⁶⁶¹ — a characterisation that the EHRC refutes in its response to the WEC.⁶⁶²

Conclusion and recommendations

6.74 Equality and non-discrimination and cornerstone principles of a society that respects the rule of law. Yet, the persistent nature of inequality presents a profound challenge for the UK, with individuals every day facing discrimination and unequal treatment because of state action. While this manifests itself across multiple sectors and public bodies, it is important to consider the overarching equalities architecture and the importance of ensure our systems remain robust at the institutional level. The starting point must be ensuring that there is a standardised approach to collecting and publishing equalities data, without which the necessary analysis and solutions become all the more difficult to proffer.

6.75 Further, we have seen that considerations surrounding evidenced-based assessments of inequalities at the policy development and legislative levels remain inadequate. EIAs are too often perfunctory, treated as a ‘tick box’ exercise as opposed to a meaningful attempt on the part of the Government to ensure proposals serve to eliminate rather than exacerbate the challenges of some of the country’s most marginalised.

6.76 Enforcement, at both the individual and institutional levels, is also deeply unsatisfactory. From funding and independence to the ability to hold public bodies to account, more can be done to ensure that the EHRC lives up to its potential as a national watchdog in promoting equality and human rights across the nation.

6.77 Recommendation 18: The Government must improve the collection, storage, management and provision of equalities data. JUSTICE recommends that public bodies including police forces make the necessary improvements required to collect intersectional data. With this insight, public bodies should analyse the data to proactively seek out discriminatory practices or outcomes. Furthermore, JUSTICE recommends that all public bodies should take responsibility for ensuring

⁶⁵⁸ Commission on Racial and Ethnic Disparities, *‘The Report’*, (2021), p. 12.

⁶⁵⁹ *ibid*, p. 37.

⁶⁶⁰ House of Commons Women and Equalities Committee, *‘Enforcing the Equality Act: the law and the role of the Equality and Human Rights Commission: Tenth Report of Session 2017–19’*, HC 1470, (2019), p. 25, citing evidence provided to the Committee by Sam Smethers, *‘Oral evidence: Enforcing the Equality Act: the law and the role of the Equality and Human Rights Commission.’* HC 1470, (2018). As the WEC notes, if the EHRC was more effective, it would have a stronger case for asking for increased funding. House of Commons Women and Equalities Committee, *‘Enforcing the Equality Act: the law and the role of the Equality and Human Rights Commission: Tenth Report of Session 2017–19’*, HC 1470, (2019), p. 25.

⁶⁶¹ House of Commons Women and Equalities Committee, *‘Enforcing the Equality Act: the law and the role of the Equality and Human Rights Commission: Tenth Report of Session 2017–19’*, HC 1470, (2019), p. 3.

⁶⁶² Women and Equalities Committee, *‘Enforcing the Equality Act: the law and the role of the Equality and Human Rights Commission: Government and Equality and Human Rights Commission Responses to the Committee’s Tenth Report of Session 2017–19, First Special Report of Session 2019’*, HC 96, (2019), p. 16.

high level of data standards (given the likely use) and make it public (insofar as it is proportionate to do so) so as to improve transparency and trust and eliminate inequalities and discrimination.

6.78 Recommendation 19: The Government must increase the use and quality of Equality Impact Assessments for legislation. JUSTICE recommends that EIAs become a mandatory part of the legislative process. This will help legislators ensure they comply with the obligation set out in the Equality Act 2010. Moreover, EIAs would increase transparency and provide a clear rationale for the Government's position and decision-making in the event of judicial review proceedings. Additionally, EIAs should be prescriptive, outlining practical steps that public bodies can take to improve equality-deficient legislation.

6.79 Recommendation 20: The Government must strengthen the enforcement powers of the Equality and Human Rights Commission and commit to ensuring its independence. It is necessary for the UK to have a robust, institutional mechanism to oversee and enforce the rights contained within the Equality Act 2010. This chapter raises concerns/questions over the functioning and independence of the EHRC. In order to ensure the independence of the EHRC, JUSTICE proposes that the appointment process for EHRC Commissioners, as established under the Equality Act 2006, is taken out of the purview of the Government Equality Office. Appointments should be made by a separate body entirely independently of the Government. Furthermore, the EHRC's budget should reflect its role and other duties so as to allow it to make greater strategic use of its enforcement powers. Finally, the EHRC should regularly publish data, statistics and case studies on its enforcement actions (including pre-enforcement action) and publicise such information to increase the deterrent force of its work.⁶⁶³ It is noted here that several of the pages on the EHRC's website have not been updated in several years.⁶⁶⁴

⁶⁶³ House of Commons Women and Equalities Committee, *'Enforcing the Equality Act: the law and the role of the Equality and Human Rights Commission: Tenth Report of Session 2017–19'*, HC 1470, (2019), p. 19.

⁶⁶⁴ For example, as of 23 June 2023:

- The page on '[Inquiries and investigations](#)' has not been updated since 19 Jul 2021.
- The page on '[Pre-enforcement work](#)' has not been updated since 11 Dec 2017.
- The page on '[Enforcement work](#)' has not been updated since 2 May 2018.

VII. CONCLUSION AND RECOMMENDATIONS

- 7.1 The rule of law has been critiqued for being an overly broad, amorphous term, difficult to define in a way that resonates with politicians, let alone the public.⁶⁶⁵ While a precise definition may be contested, its core features – access to justice, equality before the law, and controls on the exercise of discretion – are of vital importance to a well-functioning democracy. Underpinning each of these concepts should be human rights, as the late Lord Bingham, esteemed judge and author of *The Rule of Law* rightly observed. This is vital, both for the public at large, who expect the state to behave in a responsible manner, and to ensure due respect for the rights of society’s most marginalised.
- 7.2 The value of the rule of law shines most brightly when we consider a world in its absence. A state that neither respects nor adheres to this principle can impose obligations but is itself unbound by any. The universality of human rights, in recognition of each person’s inherent dignity, is supplanted by privileges afforded to the few. Onerous rules apply to some but not others. Challenging the validity of these rules, for example through a court, is rendered wholly ineffective because the judicial system is neither independent nor impartial.
- 7.3 Arriving at this undesirable system of governance may not happen overnight. In the words of former Prime Minister, Margaret Thatcher, “[a]ny country or government which wants to proceed towards tyranny starts to undermine legal rights and undermine the law”.⁶⁶⁶ This can take the form of many incremental steps; the restriction of certain groups’ rights; increasing barriers to the courts; eroding judicial oversight; failing to investigate, let alone address, burning inequalities and injustices. Each one, viewed in isolation, may not forebode the wholesale negation of the rule of law. But together, they can herald a worrying trajectory.
- 7.4 In this report, we have seen that the UK has regressed significantly on multiple fronts. Lawmaking has become less transparent, accountable, inclusive, and democratic. The use of secondary legislation and Henry VIII powers have afforded the Government with enormous amounts of discretion to change swathes of law without appropriate levels of scrutiny or oversight. Poorly-defined regulations, introduced at great speed and frequency throughout the pandemic, undoubtedly undermined the principle of legal certainty. Parliament is ceding power to the executive. As Baroness Butler-Sloss, one of the most senior retired judges in the House of Lords, warned, there is a “distinct creep in the last 10 - and possibly mainly the last five - years to move away from parliamentary scrutiny”, which risks making Parliament a “yes man” of the Government.⁶⁶⁷ The role of Parliament, as a democratic body, is becoming increasingly sidelined.
- 7.5 The United Nations General Assembly, borne out of the horrors of the Second World War, adopted the Universal Declaration of Human Rights proclaiming the inalienable rights to which every human being is entitled. At the time, Britain was frustrated that the Declaration did not go far enough, as it had only a moral – not legal – obligation. It is no surprise, then, that the UK proceeded to craft and adopt its European equivalent, armed with a specialist court, only five years later. Yet, it is hard to imagine contemporary decision-makers expressing a similar desire to gold-plate, expand and strengthen our domestic human rights architecture in a context where successive Governments have shown a clear, growing legislative disregard for human rights affects everyone, from migrants to protestors and people who have been victims of police action. While the abandonment of the Bill of Rights Bill represented a welcome retrenchment from this approach, it

⁶⁶⁵ P. Craig, *The Rule of Law*, Appendix 5 of the Sixth Report by the Select Committee on the Constitution, (2007).

⁶⁶⁶ M. Thatcher, *Speech to Conservative Party Conference 12 October 1966*. (Margaret Thatcher Foundation).

⁶⁶⁷ Baroness Butler-Sloss, *Lord Speaker’s Corner*, (YouTube, 23 June 2023).

is regrettable that legislation such as the Public Order Act and the Illegal Migration Act were contemplated, let alone passed onto on the statute books.

- 7.6 A central pillar of the rule of law is access to justice, with lawyers working hard to ensure their clients have access to good legal advice and representation before the courts. This is as true for criminal proceedings with the risk of imprisonment, as for civil disputes where families may be divided, or severe financial consequences imposed. Yet the harsh cuts to legal aid and court services have resulted in justice all-too-often delayed, and increasingly denied. Likewise, cost-saving measures, like the Single Justice Procedure, and restrictions to certain judicial review proceedings have reduced the openness and accountability of decision-makers further. The ability of lawyers to uphold the rule of law is also diminished by verbal attacks on the profession by the Government and senior politicians alike; branding lawyers as “lefty” or “woke” for taking cases that might challenge the state or be perceived as unpopular. In fact, our whole legal system is based on the idea that lawyers must speak truth to power, to act for their clients regardless of who they are, and to do so without fear or favour.
- 7.7 Racial injustice runs deep throughout our society, and this is especially so within the justice system. This is indisputable and well-documented, from the Scarman Report following the Brixton riots in 1981, to the Lammy Review in 2017. Despite these reports, public attention, and successive Government’s commitments to address these issues, too little has changed. From the need for greater data collection to identify the problems, to a properly empowered equalities watchdog to address the issues, the UK is failing to live up to the legitimate expectations of communities up and down the country.
- 7.8 The UK strives to be a leading figure on the global stage. Indeed, an express goal of successive Governments has been to “*take back control*” so that we may become a ‘Global Britain’ that champions “*the rules-based international order*”.⁶⁶⁸ However, we cannot take with one hand and give with the other; our credibility abroad undoubtedly depends on how we respect the rule of law at home. While it is true that some aspects of the rule of law have succumbed to more challenges than others, our analysis has shown that each raises concern. We are backsliding on the rule of law. That this should be so, despite the apparent political consensus as to its importance, heralds the challenge ahead.
- 7.9 Reversing these trends will take hard work and consensus across the political spectrum. Just as the problems we have identified compound the concerns in a cumulative fashion, so too will the solutions need to be iterative and complementary. Each recommendation stands testament to our firm goal of ensuring that we have a justice system that is fair, accessible and respects the rights of all. We are confident that it is far from too late to change course, even if the road might remain bumpy ahead.

⁶⁶⁸ Foreign & Commonwealth Office and Foreign, Commonwealth & Development Office, ‘Global Britain: delivering on our international ambition’ (13 June 2018).

Recommendations

Chapter 2 – Legality and the Law-Making Process

1. **Recommendation 1:** The Government must strengthen the principles underpinning the creation of delegated legislation (**para 2.56**).
2. **Recommendation 2:** The Government must improve and expand on its use of consultation and pre-legislative scrutiny (**para 2.57**).
3. **Recommendation 3:** The Government must make greater use of post-legislative scrutiny (**para 2.58**).
4. **Recommendation 4:** The Government must establish clear principles for the use of skeletal bills and delegated powers (**para 2.59**).
5. **Recommendation 5:** Parliament should adopt enhanced procedures for the scrutiny of statutory instruments, with increased opportunities for amendments (**para 2.62**).
6. **Recommendation 6:** The Government must establish a clear framework for law-making in an emergency (**para 2.64**).

Chapter 3 – Human Rights

7. **Recommendation 7:** The Human Rights Act 1998, and the UK’s membership of the ECHR, should be safeguarded, and efforts explored to expand its protections (**para 3.53**).
8. **Recommendation 8:** The Government must be prepared to take bold action, including repealing some of the more problematic legislation passed since 2019 (**para 3.54**).
9. **Recommendation 9:** The Government should strengthen awareness raising and public ownership of human rights (**para 3.55**).

Chapter 4 – Legal Certainty and the Misuse of Power

10. **Recommendation 10:** The Government must improve its legislative practices with respect to the use of ‘Henry VIII’ powers (**para 4.32**).
11. **Recommendation 11:** The Government must uphold legal certainty, ensuring that retrospective legislation is rarely used, and only in cases where it is absolutely necessary (**para 4.33**).
12. **Recommendation 12:** The Government must be clear in distinguishing between legally enforceable regulations and non-binding guidance (**para 4.34**).
13. **Recommendation 13:** The Government must ensure that any regulations in an emergency must be drafted clearly, to ensure that individuals know whether their actions will attract liability or sanction (**para 4.35**).

Chapter 5 – Access to Justice

14. **Recommendation 14:** The Government must commit to properly resourcing the justice system (**para 5.61**).
15. **Recommendation 15:** The Government must affirm the importance of judicial review (**para 5.62**).

16. **Recommendation 16:** The Government must uphold the principle of open justice (**para 5.63**).
17. **Recommendation 17:** The Government must safeguard judicial independence and the legal profession (**para 5.64**).

Chapter 6 – Equality and Non-Discrimination

18. **Recommendation 18:** The Government must improve the collection, storage, management and provision of equalities data (**para 6.77**).
19. **Recommendation 19:** The Government must increase the use and quality of Equality Impact Assessments for legislation (**para 6.78**).
20. **Recommendation 20:** The Government must strengthen the enforcement powers of the Equality and Human Rights Commission, and commit to ensuring its independence (**para 6.79**).

VIII. ACKNOWLEDGEMENTS

The last few years have been incredibly busy for JUSTICE. Following the UK's departure from the European Union, the country experienced a global pandemic followed by a dramatic increase in the cost of living, severely straining communities and demanding ever more solutions to meet the problems which have arisen. Despite this context, the Government's legislative agenda not abated, requiring JUSTICE to scrutinise a broad range of Bills at a level unprecedented for us as an organisation.

Throughout our history, we are proud to have successfully assisted and informed parliamentarians and members of the public of the importance of the rule of law, and our human rights architecture. Yet, as this report shows, the tide has undoubtedly moved, at an increasing pace, in a negative direction.

This report represents the cumulation of years of JUSTICE's work in developing and advocating for policies and laws which promote the highest standards of human rights compliance. It would not have been possible without the hard work and dedication of each member of the past and current team, including the report's author and Interim Legal Director, **Tyrone Steele**, our Legal Director, **Stephanie Needleman**, and each of the lawyers, **Ellen Lefley**, **Andrea Fraser**, **Philip Armitage**, and **Ailsa McKeon**.

A special thanks must also go to JUSTICE intern **Chloe Gershon** and **Seán Binder**, NYU Legal Fellow, who together undertook copious amounts of research, drafting, and editing, and **Mannat Malhi**, who joined JUSTICE on secondment from **Sidley Austin LLP** and ensured through the scoping phase that the report was able to have the firmest of foundations.

We are also enormously grateful to **Clifford Chance LLP** and **Travers Smith LLP** for their pro bono research in support of the report, as well as **JRSST Charitable Trust** and the **Legal Education Foundation** for their important contribution to this work.

In addition, we are grateful to all those with whom we spoke, as well as our illustrious panellists for the JUSTICE 'Rule of Law' series of panel events: **I. Stephanie Boyce**, **the Rt Hon. Lord Dyson**, **the Rt Hon. the Lord Falconer of Thoroton KC**, **Saima Hanif KC**, **the Rt Hon. Dame Elizabeth Gloster DBE PC**, **the Rt Hon. Sir Peter Gross**, **Phillippa Kaufmann KC**, **Professor Francesca Klug OBE**, **Ali Malek KC**, **the Rt Hon. the Lord Mance**, **Helen Mountfield KC**, **the Rt Hon. the Lord Neuberger of Abbotsbury**, **Helen Pitcher OBE**, **Michael Plaut OBE**, **Jessica Simor KC**, **the Rt Hon. the Lord Thomas of Cwmgiedd**, **Nicholas Vineall KC**, **the Rt Hon. Sir Geoffrey Vos**, **Lord Wolfson of Tredegar KC**, and **Professor Alison Young**. We are also grateful to those who contributed through as members of the audience and our generous hosts for these events, **Gibson Dunn LLP** and **Farrer LLP**.

Part of the thinking for both the JUSTICE 'Rule of Law' Series and indeed this report came from three of our lectures last year; the first from Uganda's **Chief Justice Emeritus Bart Katureebe** (sponsored by 3VB's International Advisory and Dispute Resolution Unit); followed by the **Rt Hon. Dominic Grieve KC** in Manchester and the **Rt Hon. Lord Dyson** in Leeds. We remain grateful to all three brilliant speakers as well as those who generously provided their research, guidance, or time in progressing this project so as to identify those very issues we strive to address.

VIII. ABBREVIATIONS

AOCSSP Automatic Online Conviction and Standard Statutory Penalty

APPG: All-Party Parliamentary Groups

CBA Criminal Bar Association

CHIS covert human intelligence sources

CJS Criminal Justice System

CMP closed material procedure

CPS Crown Prosecution Service

DPRRRC Delegated Powers and Regulatory Reform Committee

ECAT European Convention Against Trafficking

ECHR European Convention on Human Rights

ECtHR European Court of Human Rights

EHRC Equality and Human Rights Commission

EIAs Equality Impact Assessments

FOI freedom of information

FPN Fixed Penalty Notice

GANHRI Global Alliance of National Human Rights Institutions

GRT Gypsy, Roma and Traveller

HRA Human Rights Act

IHRAR Independent Human Rights Act Review

IRAL Independent Review of Administrative Law

JCHR Joint Committee on Human Rights

JCSI Joint Committee on Statutory Instruments

LASPO Legal Aid, Sentencing and Punishment of Offenders Act 2012

Met Metropolitan Police Service

NCA National Crime Agency

NHRI National Human Rights Institution

NRM National Referral Mechanism

PCSC Act Police, Crime, Sentencing and Courts Act 2022

PII public interest immunity

PLS pre-legislative scrutiny

POQOs prospective only quashing orders

PSED Public Sector Equality Duty

REUL Act Retained EU Law (Revocation and Reform) Act 2023

REUL retained EU law

SCA Sub-Committee on Accreditation

SDPO Serious Disruption Prevention Orders

SIs Statutory Instruments

SJP Single Justice Procedure

SLSC Secondary Legislation Scrutiny Committee

Tailored Review Government's Tailored Review of the EHRC

UNHCR United Nations High Commissioner for Refugees

WEC Women and Equalities Committee

JUSTICE

Baroness Kennedy of the Shaws KC

President of JUSTICE Council

The Rt Hon. Dominic Grieve KC

Vice-President of JUSTICE Council

Baroness Sarah Ludford

Vice-President of JUSTICE Council

Chief Executive

Legal Director

Director of Operations

Director of Development

Interim Legal Director

Deputy Director of Development

Lawyer

Lawyer

Lawyer

Criminal Lawyer

Engagement and
Communications Executive

Operations Coordinator

Senior Legal Fellow

Senior Legal Fellow

Trusts and Foundations Fundraiser

Secretary to the Administrative Justice Council and
Administrative Justice Policy Lead

Legal and Administrative Justice Council
Coordinator

Development Administrator

Fiona Rutherford

Stephanie Needleman

Samantha Burridge

Amanda Miller

Tyrone Steele

Jane Collier

Philip Armitage

Andrea Fraser

Ellen Lefley

Ailsa McKeon

Madeleine Breen

Josie Williams

Emma Snell

Seán Binder

Riikka Andersson

Heidi Bancroft

Sally Hunt

Honor Johnston

Peter Binning

Chair of JUSTICE Board



JUSTICE

2nd Floor Lincoln House,
296-302 High Holborn
London, WC1V 7JH
www.justice.org.uk