ALL PARTY PARLIAMENTARY GROUP ON DEMOCRACY AND THE CONSTITUTION

AN INDEPENDENT JUDICIARY - CHALLENGES SINCE 2016

An Inquiry into the impact of the actions and rhetoric of the Executive since 2016 on the constitutional role of the Judiciary.

Funded by the Joseph Rowntree Reform Trust

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INSTITUTE for CONSTITUTIONAL and DEMOCRATIC RESEARCH

The bedrock of… democracy is the rule of law and that means we have to have an independent judiciary, judges who can make decisions independent of the political winds that are blowing.

- Caroline Kennedy

FOREWORD

Our Independent Judiciary needs safeguarding

The rule of law and the independence of our judiciary who administer it have been under attack from the media and from government ministers when they don't get their way.

This report puts the spotlight on the affect this has had upon our judiciary and its ability to administer the rule of law without fear or favour.

Democracy, human rights, and the rule of law are our fundamental values. They rely on an independent judicial system to protect the rights of the citizen from the state and to defend our democracy.

However, in recent years we have seen Law Ministers including the Lord Chancellor, no longer seeing their only priority as defending the rule of law and the independence of the judiciary but also to actively promote Government interests. This has included turning a blind eye to accusations of "the enemy within" or even to encourage doubt in the impartiality of our judges which risks undermining public confidence in the law itself.

The courts act as a safeguard to protect our democracy and to ensure that the government acts within the law. This has been most notable in protecting Parliament's role in triggering leaving the EU and not facing a prolonged suspension of our democracy.

Historically, the response of the Government being found to act unlawfully has been to correct its ways and to act in accordance with the law. However, we now see a tendency for the Government to seek to change, or threaten to change, the law or the powers of the courts instead.

This report considers whether this has been reflected in a chilling effect upon both the wellbeing and behaviour of the courts.

In fact, the 2020 Judicial Attitudes Survey found 94% are now concerned over the lack of respect from the Government and 85% from the media. The Supreme Court, repopulated since the Miller case, has made a total of seven reversals of its previous decisions, in relation to the government. This, in the past two years alone, is unprecedented and it is noteworthy that in 2021 the then Lord Chancellor responded by saying he was "encouraged by recent decisions".

Prior to 2005 the position of Lord Chancellor was viewed as a constitutional safeguard to our independent judiciary and before 2012 the average incumbent stayed 4.7 years. However, since then the position appears as a stepping-stone by ambitious politicians with an average tenure of just 1.4 years.

Our report concludes that these issues around the safeguarding of our independent judiciary need to be centre stage in forthcoming legislation. At a time that the rule of law has been broken at No 10 and human rights, in particular of refugees, has been cast into the turbulent swell of public opinion, it is important that we sure up anchorage of our judicial system.

We are indebted to our esteemed expert witnesses who gave both written and oral evidence, to the Institute of Constitutional and Democratic Research for writing our report with such rigour, to the Joseph Rowntree Foundation Trust for funding it and to the Parliamentarians who participated in our hearings.

This report is timed to influence future legislation and we welcome support for its findings in this respect.

Geraint Davies MP

Chair of the All-Party Parliamentary Group on Democracy and the Constitution

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EXECUTIVE SUMMARY

1. Since 2016 (or arguably for some years before) the judiciary has been subject to intense political scrutiny. This inquiry has examined the extent to which this has impacted on the judiciary's performance of its constitutional role.

2. The inquiry is limited to the "public law" role of the judiciary. This is, *inter alia*, to arbitrate disputes between citizens and the state and ensure that the executive obeys the law. To do this, the judiciary must be able to exercise its functions independently of the executive. The respective constitutional roles of the judiciary and executive inevitably cause tension between the two. Sometimes the judiciary will have to tell the executive that it is acting unlawfully. The executive's own guidance suggests that losses in court should be used as a guide to improve future performance. Nevertheless, no minister will be happy about this. In recent years ministers have reacted to losing cases by accusing judges of bias or incompetence.

3. The executive has certain constitutional duties towards the judiciary. Ministers must uphold the independence of the judiciary and the Lord Chancellor must have regard to defending it. A constitutional convention traditionally required ministers to refrain from criticising judicial decisions, save in measured terms within parliament itself. Moreover, ministers are in a uniquely powerful position to communicate with the public about the judiciary, shape its perceptions, and influence public confidence towards it.

4. Recent years have seen the judiciary accused, by both politicians and the media, of "interfering in politics". Two independent reviews (the Independent Review of Administrative Law and the Independent Review of the Human Rights Act) found no persuasive evidence of this.

5. By contrast, the behaviour of the executive towards the judiciary may be considered constitutionally problematic. Although we have only seen evidence of one direct attempt by a minister to influence a particular judicial decision, ministers have generally acted in a manner that may be considered improper or unhelpful given their constitutional role. This includes making public statements which misrepresent judicial decisions, launching ad-hominem attacks on judges who decide against them, responding to adverse decisions with threats to "reform" the judiciary (including to bring it under political control), and conflating "decisions

with political consequences" with "political decisions", thereby giving the misleading impression that judges are stepping outside their constitutional bounds. This behaviour can, in extremis, be constitutionally improper because it erodes public confidence in the judiciary and implies that ministers are better able to decide on matters of law than judges. Rather than the judiciary trespassing on the territory of the executive, therefore, ministers overstep onto constitutional ground properly reserved for judges. Ministers lack both the expertise and the constitutional right to take judicial decisions.

6. The actions of the executive have had a concerning impact on the judiciary. A significant majority of judges report low morale and serious concern about the respect in which they are held by ministers. Judges may be subject to a context of soft pressure, in which the constant threat of political reform hangs over them if they decide against the executive. Several commentators have suggested that this may influence judicial decisions.

7. The witnesses before this inquiry were split on that possibility so the APPG examined the recent decisions of the Supreme Court itself (it should be noted that the APPG does not assume any authority to determine whether these decisions were "right" or "wrong" on the law or the facts). Seven decisions were identified, since 2020, in which the Supreme Court has departed from its previous authority and assumed a position more palatable to the executive. In some of these, the Court appears to adopt similar language to that used in the executive's political talking points. The Court has decided fewer than 40 public law matters since in this time, so this represents a notable portion.

8. Correlation does not necessarily equate to causation and the APPG has not had sufficient evidence (or time) to reach a definitive conclusion. Nonetheless, the mere appearance of the Supreme Court departing from its previous interpretations of the law and, instead, adopting positions favoured by the executive, is worthy of note if not of concern.

9. In the light of the evidence considered the APPG has drawn four conclusions:

    i Ministers have, in attacking judges, sometimes failed to act in a constitutionally proper or in a helpful manner.

    ii The constitutional safeguards which should ensure a proper relationship between the executive and the judiciary are not sufficiently effective. In particular, the

politicisation of the offices of Lord Chancellor and Attorney General, and the appointment of politicians with little or no legal experience or standing, has left the executive without a strong figure to assist ministers' understanding of their constitutional duties. Moreover, the possibility that politicians may see the offices of Lord Chancellor and Attorney General as "stepping stones" to subsequent promotions may conflict with their constitutional duties to safeguard the independence of the judiciary.

iii This has caused significant concerns amongst the judiciary.

iv It may also have created the impression that the Supreme Court has been influenced by ministerial pressure (even if indirect).

10. Accordingly, we offer three recommendations:

i Foreground the independence of the judiciary in the forthcoming independent review of the Constitutional Reform Act/Supreme Court.

ii Provide statutory guidance for ministers on their constitutional duties towards the judiciary.

iii Provide statutory guidance on the appointment and conduct of Law Ministers.

INTRODUCTION

11. The context for this inquiry is the heightened political focus on the judiciary since 2016. This inquiry is confined to "public law", this means disputes between the executive and citizens (i.e., cases in which the executive is a litigant). While some of the evidence considered touches on other areas of law (particularly criminal law), this has been considered only so far as it bears on public law. It appears to be the position of the executive (and promoted by a number of newspapers and think tanks) that the judiciary has "interfered" in politics by making decisions that should properly be made by politicians.

12. Two independent inquiries have examined these claims. The Independent Review of Administrative Law ("IRAL"), chaired by Lord Faulks (a former government minister) considered these claims in the context of judicial review. The Independent Review of the Human Rights Act ("the Gross Review"), chaired by Sir Peter Gross, a retired Court of Appeal judge, considered the claims in the context of the Human Rights Act 1998. Neither the IRAL nor the Gross Review found persuasive evidence to support such claims.

13. Since the establishment of the Supreme Court in 2009, however, the judiciary has been subject to both public pressure from politicians and the press and repeated "reforms" to its funding, powers, and constitutional role. These are often justified by the sort of claims that were found to be unpersuasive by the IRAL and Gross Review. It is necessary, therefore, to consider whether (if at all) this heightened political focus on the judicial branch has impacted on the independence of the judiciary.

14. There was a degree of difference amongst those who submitted evidence about what is meant by "judicial independence" At one end of the scale is (what might be termed) the "thin" conception. Under this view, most prominently advanced by Professor Graham Gee and Dr Patrick O'Brien, "judicial independence" seems to mean little more than the absence of direct coercion by politicians.

15. At the other end of the scale is the "thick" conception of judicial independence. This is adopted, *inter alia*, by the Secret Barrister, Sir Jonathan Jones QC (Hon), Lord McDonald QC, and Professor Cheryl Thomas QC. Under the thick conception, judicial independence focuses on the extent to which the judiciary is able to fulfil its constitutional role free from both direct coercion and (inappropriate) indirect pressure.

16. If the APPG is to centre the citizen in its approach, then a thicker conception of judicial independence seems more appropriate. From the perspective of the citizen, the question of importance is, "can I obtain a remedy when the state treats me unlawfully?". Answering such a question requires consideration going beyond simply whether ministers are able to instruct judges to draw favourable conclusions. To this end the APPG has focused its inquiry on two overarching questions:

    (a) What barriers exist to the judiciary discharging its constitutional role in respect of public law?

    (b) To what extent (if at all) is the executive responsible for erecting (or failing to mitigate) those barriers.[1]

[1] The inquiry considered a number of pieces of evidence suggesting that the high cost of public law litigation limits access to justice. This, in effect, represents the executive or legislature stepping into the constitutional realm properly occupied by the judiciary. It means that disputes between citizens and state are no longer determined purely on their legal merits but on the basis of whether the claimant can afford the price that the executive and/or legislature has determined must first be paid. However, in our internal discussions we noted that there are various private mechanisms by which citizens may overcome the hurdle of the cost of litigation (such as litigation funding or through litigation NGO like the Good Law Project). Given our lack of consensus on this issue we believe it would be better considered on the basis of further evidence and perhaps as the basis of a dedicated piece of work. For that reason, it is not considered further in detail in this report. The relevant evidence is, of course, included in the appendix to this report.

EVIDENCE

17. The evidence for this inquiry is obtained from three principal sources:

(a) Public call for evidence published on the APPGDC website (www.icdr.co.uk/judicial-independence-inquiry).

(b) Direct invitations to individuals with particular expertise and experience (where relevant, care was taken to ensure that such invitations were sent to individuals with a range of political perspectives).

(c) Desk research identifying relevant events, articles, and public statements.

Submissions

18. Written evidence was received from the following witnesses.

NAME	**RELEVANCE**
Lord McDonald QC	Former Director of Prosecutions
Sir Jonathan Jones QC	Former Treasury Solicitor and Head of the Government Legal Department
Alex Dean	Senior Editor at Prospect, specialising in law and the constitution
The Secret Barrister	Leading legal commentator and practicing barrister. Author of "The Secret Barrister" (2018) and "Fake Law" (2020)
Professor Cheryl Thomas QC	Professor of Judicial Studies at UCL, Co -Director of the UCL Judicial Institute and lead investigator for the UK Judicial Attitudes Survey.

Dr Patrick O'Brien	Senior Lecturer in Law at Oxford Brookes University. Co-Author of "The Politics of Judicial Independence" (2015)
Professor Graham Gee	Professor of Public Law at the University of Sheffield and part of the Policy Exchange "Judicial Power Project".
Dr Christopher Stanley	Consultant at KRW Law, expert in legacy issues arising from the conflict in Northern Ireland.
Aidan O'Neil QC	Barrister specialising in constitutional law.
Satvinder Juss	Barrister specialising in public law.
Alexander Horne	Former legal advisor to the House of Lords European Union Committee and International Agreements Committee, Counsel at Hackett and Dabbs, visiting Professor at Durham University.
Kirsty Brimelow QC	Vice-Chair of the Criminal Bar Association and former Chair of the Bar Human Rights Committee.

Oral Evidence

19. The APPG heard oral evidence at a public hearing on 16 March 2022. The following witnesses appeared:

NAME	**RELEVANCE**
Sir Jonathan Jones QC	Former Treasury Solicitor and Head of the Government Legal Department

Alex Dean	Senior Editor at Prospect, specialising in law and the constitution
Professor Cheryl Thomas QC	Professor of Judicial Studies at UCL, Co -Director of the UCL Judicial Institute and lead investigator for the UK Judicial Attitudes Survey.
Alexander Horne	Former legal advisor to the House of Lords European Union Committee and International Agreements Committee, Counsel at Hackett and Dabbs, visiting Professor at Durham University.
Kirsty Brimelow QC	Vice-Chair of the Criminal Bar Association and former Chair of the Bar Human Rights Committee.

CHRONOLOGY OF RELEVANT EVENTS

DATE	EVENT	REF
1 July 2003	The Executive misleadingly briefed the press that judges were giving increasingly soft sentences (the opposite was true, judges were giving more custodial sentences and for longer, in line with the sentencing guidelines at the time) calling them "confused old codgers".	
2003	David Blunkett, then Home Secretary, invited senior judges to a private dinner to "informally" agree an approach to judicial decision-making.	
30 September 2003	Tony Blair criticised "judicial interference" in asylum decisions. The "interference" appeared to be no more than applying the law as it stood. Blair's speech to the Labour Party conference made clear that his real objection was to the appeals processes and legal aid available to asylum seekers.	
2004	David Blunkett, then Home Secretary, attacked judges who ruled against him as "out of touch" and not "live[ing] in the same world as the rest of us". He also appeared to suggest that judges should not enforce certain legal rights, calling them "airy-fairy civil liberties"	
2004 onward	David Blunkett used a column in The Sun to insult judges. Headlines includes "Our justice system is a sick joke", "Give that judge a brain transplant", and "Bewigged menaces who make the law look an ass". The articles do not appear to disclose any error on the part of the judges in question beyond making decisions (which were within the bounds of the law at the time) with which Mr Blunkett disagreed.	Secret Barrister, p. 3

2009	Various newspapers reported that the courts had struck down a deportation order because the "illegal immigrant" concerned had a "pet cat". This was entirely misleading. The matter had been determined on ordinary statutory grounds. The reference to the pet cat arose from a joke. Theresa May (then Home Secretary) subsequently repeated the claim in a speech.	
February 2013	Theresa May, then Home Secretary, claimed (in an op-ed for the Daily Mail) "It's my job to deport foreigners who commit serious crime – and I'll fight any judge who stands in my way". The article did not acknowledge that the only way a judge could "stand in Mrs May's way" was if the Home Secretary or her officials made a decision or took an action that went outside the law as set down by Parliament. In the same article, Mrs May claimed that judges who made decisions with which she disagreed were "subverting democracy".	
6 September 2013	Chris Grayling ,then Lord Chancellor, describes judicial review as "a promotional tool for left-wing campaigners".	link
October 2013	Theresa May claimed, in a Commons debate, that "some judges have… chosen to ignore the will of Parliament and go on putting the law on the side of foreign criminals instead of the public." There is no evidence that the judges to whom she was referring did anything other than apply the law as it stood.	HC Deb, 22 October 2013, col. 156
22 April 2014	Legal Aid (Remuneration) (Amendment) (No. 3) Regulations 2014 take effect. These remove legal aid from all judicial review cases unless permission has been granted.	link

November 2016	After the Divisional Court found that parliament, not the executive, has the power to trigger Brexit, various newspapers and politicians attacked the court. • The Daily Mail: Headline "Enemies of the People" over photographs of the three judges who decided the case. Inside, the paper accused the judges of "declar[ing] war on democracy" and disclosed details about their personal lives. The article also appeared to criticise one of the judges for being "openly gay". • The Telegraph: Headline "Judges vs the people". • The Daily Express: The decision was "a crisis as grave as anything since the dark days when Churchill vowed we would fight them on the beaches." It urged readers to "rise up people of Britain and fight, fight, fight." • Sajid Javid told Question Time the decision flew in the face of democracy and "this is an attempt to frustrate the will of the British people and is unacceptable" • Dominic Raab described the decision as "An unholy alliance of diehard Remain campaigners, a fund manager, and an unelected judiciary" which had "thwart[ed] the wishes of the British public." • The then Lord Chancellor, Liz Truss, declined to defend judges publicly.	
July 2019	Boris Johnson uses a column in the Telegraph to promise to "root out the leftist culture" of the judiciary.	link

October 2019	The Supreme Court ruled that the Johnson government's decision to prorogue parliament for five weeks (with the effect of blocking MPs from scrutinising Brexit trade agreements) was unlawful after the government refused to give the court a reason for the prorogation. Reactions from ministers included: • Kwasi Kwarteng – Accused the judges of bias. • Downing Street "unnamed source" – Briefed the Sun's political editor Tom Newton-Dunn that judges were "politically biased" (no evidence was offered other than that they had decided against the government). • Jacob Rees-Mogg described the ruling as a "constitutional coup" • The Attorney General, Sir Geoffrey Cox QC, claimed in Parliament that the Supreme Court had "invented new law" in order to rule against the prorogation. This misrepresented both the powers of the court and the reasoning of its decision. Cox also suggested that politicians should vet judges before they could be appointed. • The Prime Minister implied that the Supreme Court had made its decision with the intention of "frustrating" Brexit. Media reaction included:	HC Deb, 25 September 2019, Vol 664, Cols. 356, 659, 660, 665, and 669

	• The Mail – "11 unaccountable individuals will consider a case that could thwart the will of the majority on Brexit" (this was clearly untrue. The case had nothing to do with whether Brexit would or would not happen). The paper also published profiles on each member of the Supreme Court and a "Europhile rating" based on various speculations about the judges' personal beliefs. • UKIP politicians Nigel Farage and Suzanne Evans were given a platform to claim that the public should be permitted to sack judges and to threaten judges with "the public anger they will provoke" if they did not reach a decision with which UKIP agreed. • The Sun suggested that the Spouses of Supreme Court judges should be interrogated on their voting history and insinuated "corruption" against Lady Hale, the President of the Supreme Court, on the basis that she accepted an unpaid position at Oxford on her retirement.	
29 September 2019	The Prime Minister threatened "consequences" for the Supreme Court after it decided against the executive in *Miller/Cherry*.	Professor Cheryl Thomas QC, p. 2
30 September 2019	The Prime Minister, in his speech to his party conference, suggested political vetting of judges.	
November 2019	Ministers alleged that judicial review was "abused to conduct politics by other means"	

30 December 2019	The Sun warned that "no judge is safe in their bed" following the 2019 general election.	Professor Cheryl Thomas QC, p. 2
January 2020	An unnamed Downing Street source briefed the media that Dominic Cummings, then Boris Johnson's senior advisor "wants to get the judges sorted"	
11 February 2020	The government detained 50 immigrants without access to legal advice for several weeks. When the court ruled this was unlawful, Dominic Cummings threatened "urgent action on the farce that judicial review has become"	link
27 February 2020	The Court of Appeal held that the, per s. 5 of the Planning Act 2008, the executive was required to take the Paris Climate Agreement into account when formulating it's decision on a third runway at Heathrow [R(Friends of the Earth) v Secretary of State]. The former Chancellor of the Exchequer, George Osborne, accused the court of "overreaching undemocratic judicial activism". The decision was subsequently overturned on appeal.	link
May 2020	Home Office wrote directly to the President of the Immigration and Asylum Tribunal appearing to attempt to influence the Tribunal to grant fewer bail applications.	Secret Barrister, p. 4
18 July 2020	The Daily Telegraph reported "Judges could be banned from making political rulings under a Government review"	Christopher Stanley, p. 2

19 July 2020	The Court of Appeal ruled that Shamima Begum should be permitted to return to the UK to fight her case (on the basis that it was impossible for her to effectively instruct counsel or lawyers from the refugee camp where she was placed). Boris Johnson told the Sunday Telegraph: "some ways in which judicial review does indeed go too far or does indeed have perverse consequences that were not perhaps envisaged when the tradition of judicial review began."	link
31 July 2020	On the launch of the Independent review of Administrative law ("IRAL"), newspapers reported that it would consider the balance between "the right of citizens to challenge government through the courts and the elected government's right to govern". This introduced an entirely new constitutional principle – that the executive has a "right" to govern. Constitutionally the executive governs at the sufferance of parliament and within the parameters of law enforced by the courts (see *Miller/Cherry* [2020] AC 373 at §55).	Christopher Stanley, p. 5
August 2020	The Home Office, using official social media accounts, accused "activist lawyers" of frustrating deportations of immigrants. In fact, those deportations failed because the Home Office had not followed the procedure set down by the law.	
October 2020	The Home Secretary, Priti Patel, attacked "do-gooders" and "lefty lawyers" in a speech. In the same month a law firm suffered a "violent, racist attack" by a knife wielding man. The attack was linked to Ms Patel's comments.	

November 2020	The Attorney General, Suella Braverman, appeared to indirectly pressurise judges when she endorsed a comment from an unnamed "friend" (which may have been Ms Braverman herself) claiming that, if judges ruled against her when she appeared personally in an appeal, it "will be another example of wet, liberal judges being soft on crime".	Secret Barrister, p. 5
March 2021	The "Independent Review of Administrative Law" (set up by the Executive, with a panel selected by the Executive, and chaired by a former minister) concluded that there was no case for substantial reform to judicial review and did not find evidence to support legislating to address any problem of judges "interfering" in politics. The (then) Lord Chancellor, Robert Buckland, on announcing the IRAL's findings, claimed "The Panel's analysis identified a growing tendency for the courts in judicial review cases to edge away from a strictly supervisory jurisdiction, becoming more willing to review the merits of the decisions themselves, instead of the way in which those decisions were made." He also claimed "The reasoning of the decision makers has been replaced, in essence, with that of the court." This account was uncritically reported by the BBC. The Telegraph reported Buckland's account as if it were a quote from the IRAL's report. The IRAL's chair, Lord Faulks, publicly stated that the Lord Chancellor had misrepresented the IRAL's conclusions.	link link link link link
June 2021	The Joint committee on Human Rights, after its own review of the Human Rights Act 1998, concluded that the Human Rights Act does not permit the courts to trespass on the	link

	privileges of parliament and that there is "no case for changing the Human Rights Act".	
July 2021	The Lord Chancellor, in an article for The Telegraph, commented that he believed judges had become more "restrained" since the "backlash" over the Supreme Court's decision in Miller II. The article seemed to imply that judges had responded to criticism by becoming more "deferential" towards the executive.	link
21 July 2021	The (then) Lord chancellor, Robert Buckland (in a speech to Policy Exchange) claimed that judges were exercising more "restraint" after being "encouraged" to do so by the executive. As Policy Exchange reported the speech: "The Lord Chancellor reasoned that the Supreme Court, under the leadership of Lord Reed, had begun to correct some of the excesses of recent years."	Christopher Stanley, p. 7
5 October 2021	The Lord Chancellor, Dominic Raab, promised to "overhaul" the Human Rights Act, claiming that it was being "abused" by "dangerous criminals". (The Gross Review found no evidence of this.) Raab also claimed that a man who was "guilty of domestic abuse" had been permitted to remain in the UK based on his right to family life. While technically not , this statement is misleading. The case in question revolved around the man's family life before meeting his partner (he had come to the UK aged 4 and never left).	link
16 October 2021	The Lord Chancellor, Dominic Raab, publicly criticised judges for "harpooning" major infrastructure projects. He appears to have been referring to *Save Stonehenge* [2021] EWHC 2161	Sir Jonathan Jones QC (Hon) §11

	(Admin), in which the High Court did no more the find that the Secretary of State had failed to follow the steps required by law before making an order (it's notable that the relevant law was made by the current government).	
19 October 2021	The Attorney General, Suella Braverman, in a speech at Policy Exchange, criticised the "huge increase in political litigation" and the Supreme Court for stepping into matters of "high policy" in the Miller cases. She also criticised various other judgements with which she disagreed in strident terms. Her speech does not seem to have taken account of the extensive legal authority on justiciability or the Supreme Court's own extensive consideration of the issue in *Miller/Cherry*. In the same speech, the Attorney General welcomed a return to a "more orthodox" i.e., more deferential) approach to judicial decision making.	Sir Jonathan Jones QC (Hon), §11
November 2021	The Attorney General, Suella Braverman suggested that ministers may seek to respond to a "growth" in JR brought for "political ends" and that JR is used as a "political tool by those who have already lost the arguments". She particularly identified the two *Miller* cases as examples. The Lord Chancellor, Dominic Raab, speculated that a "mechanism" may be set up to allow ministers to overturn judicial decisions with which they disagree.	link
2 December 2021	After the Court of Appeal found that Associated Media had breached the Duchess of Sussex' privacy rights, the former Culture Secretary accused judges of expanding privacy law without the consent of Parliament.	link
6 December 2021	A government advisor, writing in The Telegraph accused judges of "adhering to their own political views when	link

	interpreting the law" and "activist QCs", and "Left wing campaigners" of using "activist judges" to impose social policies against the will of the electorate.	
December 2021	The Gross Review published its report, concluding that the HRA 1998 has generally been a success and there is no case for substantial change. The review proposed a small number of technical amendments to the Act. On the same day the Lord Chancellor launched a consultation on replacing the Act wholesale, including a number of proposals that had been dismissed by the Gross Review. The consultation is based on a number of premises previously rejected by both the Gross Review and IRAL, including the suggestion that judges have expanded the ambit of human rights law.	link
January 2022	The Crown Court at Bristol acquitted four protestors accused of criminal damage in connection with the toppling of a statue of Edward Colston in the summer of 2020. The BBC represented this as the four being "cleared of pulling down a statue of… Edward Colston" (misleading, as the defendants admitted pulling down the statue but denied that it amounted to criminal damage). A number of MPs claimed that this "set a dangerous precedent" (misleading – jury decisions to not set precedents). The Attorney General, rather than correcting the errors, claimed that the decision was causing "confusion" and threatened to use her powers to refer it to the Court of Appeal.	link

4 March 2022	Bob Seely MP used parliamentary privilege to accuse a number of law firms and lawyers of "amorality" after they acted for clients linked to Russia.	

BACKGROUND

The Constitutional Role of the Judiciary

20. The focus of this inquiry is on the role of the judiciary in respect of public law, i.e., the law that governs the exercise of executive power (at both national and local government level). This is not the judiciary's only constitutional role and its others, particular concerning criminal law, may be tangentially relevant (but will not be a focus).

21. The public-law role of the judiciary is to ensure that the executive behaves lawfully. This means complying with:

    (a) Statute, i.e., the provisions of acts of parliament and secondary legislation. Sometimes this means ensuring that secondary legislation does not conflict with acts of parliament; and

    (b) Common law, i.e., the established rights which exist independently of statute but (unless set aside by an act of parliament) have equivalent force.

22. The judiciary and the citizenry have a symbiotic relationship. The citizenry ensures that the judiciary can fulfil its constitutional function by bringing before the courts its legal disputes with the executive.

23. The judiciary must be able to discharge this role without being influenced by the executive.

Tension between the Judiciary and Executive

24. As Professor Graham Gee put it, tension between the judiciary and the executive is a "feature not a bug" of the constitution[2]. The role of the judiciary is to keep the executive in check by ensuring that it does not step outside the bounds if its lawful powers (i.e., those granted to it by parliament and the common law). It is inevitable, therefore, that the judiciary will sometimes need to rule against the executive (and that the executive may well find an adverse ruling practically or politically inconvenient).

25. Public law is often the site of greatest tension. In the words of Sir Jonathan Jones QC:

[2] Professor Graham Gee, 48

> *The relationship between judiciary and government is most obviously in play in cases to which the government is itself a party – where the courts are called on to adjudicate on the legality of government action (in particular in judicial review cases or cases under the Human Rights Act 1998), or to determine private law questions affecting the government (employment, personal injury, property cases and so on).*[3]

26. These points of tension have increased in recent years for two principal reasons. First, we have seen an increase in the size and complexity of legislation, particularly secondary legislation. Since 1980 the number of statutory instruments made every year has more than doubled (from around 2000 per year to around 4500 per year). Acts of parliament have become longer and more complicated. This increases the potential for legal disputes between the executive and citizens: there is simply more law to litigate about.

27. Second, since the turn of the century there has been an increase in "rights based" legislation. This specifies rights for citizens (and concurrent duties on the part of the state). Examples include the Human Rights Act 1998, Freedom of Information Act 2000, and Equality Act 2010. This sort of legislation brings clarity to the relationship between state and citizen and, consequently, makes it easier for citizens to enforce their rights against the government in court.[4]

Media Coverage

26. Concurrently with the increase in potential or state/citizen litigation, a number of witnesses described a tendency from certain sections of the press to report legal issues in a manner that distorts or misrepresents.[5] The Secret Barrister put it, perhaps, most strongly:

> *The vast majority of media coverage and commentary concerning judicial decisions, and indeed the justice system as a whole, is regrettably and frequently inaccurate.*[6]

28. As Lord McDonald QC put it:

[3] Sir Jonathan Jones QC (Hon), 37
[4] Sir Jonathan Jones QC (Hon), 37
[5] The Secret Barrister, 22-30; Christopher Stanley, 51-63; Lord McDonald QC, 64-65;
[6] The Secret Barrister, 27

> *…there has certainly been a degree of 'them' and 'us' in the coverage. Some of the coverage is just abusive, other commentary takes a perfectly respectable view around judicial overreach (though I don't agree with it).*[7]

29. We have reviewed a substantial volume of press coverage of high-profile public law disputes (many of the examples are set out in the Chronology above). While several witnesses drew our attention specifically to coverage of *Miller I* (discussed below). We note that three common misrepresentations arise:

    (a) Misrepresenting the impacts of judgments, such as by suggesting that *Miller I* somehow had the effect of blocking Brexit.

    (b) Misrepresenting the content of cases, such as by claiming that an "illegal immigrant" was permitted to remain in Britain because he had a pet cat (a claim later repeated by Theresa May, as Home Secretary, in speech).

    (c) Conflating parliament and/or the electorate with the executive, such as by claiming that when a court finds that the executive has acted unlawfully, it is frustrating the "will of the people".

[7] Lord McDonald QC, 64

THE CONDUCT OF THE EXECUTIVE TOWARDS THE JUDICIARY

The Constitutional Relationship

30. A small minority of submissions, notably from Professor Gee, suggested that politicians must essentially be free to criticise judges without restraint. There are, however, both legal and conventional duties bearing on ministers in respect of their treatment of judges.

31. All ministers are subject to a statutory duty, under section 3 of the Constitutional Reform Act 2005, to "uphold the independence of the judiciary". The 2005 Act specifies that this duty includes a prohibition on ministers attempting to interfere directly with judicial decision. It is clear, however, from the drafting of section 3, that this but part of the duty, not its entirety. As Sir Jonathan Jones QC (Hon) noted, ministers' duty extends beyond merely paying lip service to judicial independence, they must also proactively maintain it (especially where it is threatened).[8]

32. The Lord Chancellor is subject to a further legal duty "to have regard to":

    (a) the need to defend that independence;

    (b) the need for the judiciary to have the support necessary to enable them to exercise their functions; (c) the need for the public interest in regard to matters relating to the judiciary or otherwise to the administration of justice to be properly represented in decisions affecting those matters.

33. Beyond the 2005 Act, there is (or was) a constitutional convention by which ministers (and MPs) will "show due inhibition" when commenting in Parliament on judicial words and deeds and, outside parliament, ministers will never criticise the judiciary. This convention is "the other side of the coin" from the convention that judges, even when speaking extra-judicially, will not criticise the executive or legislature.[9]

34. The rationale for these conventions lies in the separation of powers. The executive is neither constitutionally or institutionally equipped to pronounce on judicial decisions with the same

[8] Sir Jonathan Jones QC, 39

[9] Constitution Committee, *Relations between the executive, the judiciary, and parliament*, (HL, 2006-07, HL paper 151)

authority as judges. Institutionally, ministers (even those who are legally qualified) are not judges. The latter are selected and promoted through a rigorous and merit-based process and are held accountable for their understanding and interpretation of the law to an extremely exacting standard (in that their decisions are forensically scrutinised, often over days of argument and consideration, by superior courts). Ministers have neither the capacity nor the expertise to subject judicial decisions to the same scrutiny, consideration, and analysis as the courts themselves. The issue of institutional capability is particularly acute where the government (including the "legal ministers") does not contain any member who has reached the senior ranks of the legal profession. Similarly, judges are not equipped to comment on questions of politics, public policy, or ministerial conduct (unless the latter steps outside what is permitted or required by law and the matter is brought before the courts in the proper manner).

35. Constitutionally, the executive and judiciary perform different roles. The judiciary must pronounce on what the law is and whether it has been complied with. The executive (through its power to instigate legislation and make policy) is concerned with what the law should be and how to implement existing law. It is constitutionally necessary that these two functions be kept separate because, otherwise the executive would be effectively unconstrained by law.

36. There is some uncertainty, however, as to whether the convention remains in place. In a 2014 lecture, Lord Dyson speculated that it was no longer observed by ministers. It is certainly observed by judges. While Alexander Horne noted in oral evidence that, since the establishment of the Supreme Court, senior judges have become more high profile in talking about legal issues (Kirsty Brimelow QC disagreed, suggesting that senior judges have always been relatively well known), none of our witnesses (or additional evidence gathering) suggested that judges have spoken publicly on matters properly within the purview of the executive or legislature.

37. The executive's own guide to judicial review "Judge over Your Shoulder"[10] encourages members of the executive to embrace public law as a guide to good decision-making. It makes

[10] 253-356

clear that even adverse decisions by the courts can be beneficial to the executive because they act as a guide for lawful use of its powers.

Attempting to Influence Judicial Decisions

38. We have seen evidence of one instance in which ministers appear to have actively and directly attempted to influence judicial decision-making, in the evidence of the Secret Barrister:

> *In 2020, the current Home Secretary, Priti Patel, instructed a senior civil servant to write to the President of the Tribunal, Immigration and Asylum Chamber to express "surprise", and demand an explanation, as to the number of grants of bail in immigration proceedings. This cannot sensibly be interpreted as anything other than an attempt to influence the decisions of the independent judiciary. The robust response of Michael Clements, reminding the Home Office that "as independent judiciary we decide bail applications in accordance with the law", should not have to be spelled out to any minister with respect for the rule of law.*[11]

Criticism/Attacks on the Judiciary

39. The majority of submissions acknowledged that political criticism of the judiciary has been part of our national discourse for some considerable time. In the words of Lord McDonald QC:

> *I believe that a vogue for ministerial attacks on judicial decisions began in the late 1990's and early 2000's. This seemed to be part of New Labour's attempt to present itself as tough on crime (particularly on the part of some Labour Home Secretaries), but it has paved the way for more egregious ministerial attitudes since.*

[11] The Secret Barrister, p. 24 there is a further reference, in the evidence of Professor Graham Gee [**49**], referring to an incident in which a number of backbench MPs wrote to a judge making a sentencing decision in respect of one of their colleagues. It is noted, however, that backbench MPs are not subject to the duties in the 2005 Act and the MPs in question were reprimanded by the parliamentary Standards Commissioner.

40. They also argued, however, that the tenor of these criticisms has changed in recent years, an evolution that might be described as from "critique" to "attack".[12] Four characteristics, in particular, are increasingly relevant:

(a) Misrepresentation – ministers imply or suggest that the courts make decisions on a basis or with an effect that is incorrect. For example, the previous Lord Chancellor's claim that the IRAL had "identified a growing tendency" for the courts to interfere in political decisions. It had, in fact, concluded the opposite.

(b) Ad-hominem attacks – ministers suggest that judges make decisions on the basis of conspiracy or political bias. For example, the Prime Minister's suggestion (by implication) that the Supreme Court overturned the unlawful prorogation of parliament in 2019 because judges wanted to "frustrate" Brexit.

(c) Threats – ministers hint at or threaten "reforms" in response to losing cases. For example, the Prime Minister's declaration that judges would face "consequences" for ruling against him.

(d) Conflating "cases with political consequences" with "the courts determining political questions" – Such as Theresa May's claim that judges who decided against her (i.e., determined that the Home Office had not complied with statutory duties), were "ignoring the will of parliament" when, by applying the law set down by parliament, judges were actually doing the opposite.

41. A number of specific instances were brought to our attention:

(a) After *Miller I*, the Secretary of State for Housing claimed that the decision of the Supreme Court was "an attempt to frustrate the will of the British people and it is unacceptable." This was clearly misleading as the court had not made any decision on whether the UK must comply with the Brexit referendum result (which was, presumably, the "will of the British people" to which the Secretary of State was referring). It had merely determined that parliament, not the executive, must

[12] The Secret Barrister, 22-30; Sir Jonathan Jones QC (Hon), 37-41; Alex Dean, 42-44; Dr Christopher Stanley, 51-63; Lord McDonald QC, 64-66; Alexander Horne, 162-167; Satvinder Juss, 168-171; Kirsty Brimelow QC (oral evidence).

authorise the sending of a notice under article 50 of the Treaty on European Union. The (now) Lord Chancellor called the decision "[A]n unholy alliance of diehard Remain campaigners, a fund manager [and] an unelected judiciary" had "thwart[ed] the wishes of the British public." This, again, misrepresented the nature of the decision and appears to impugn the right of the judiciary to rule on the matter (despite the question of justiciability never being raised by the government's lawyers before the courts).[13]

(b) After *Miller II* a junior minister told the BBC that "many people…are saying that the judges are biased". A "Downing Street source" warned ominously "Dom [Cummings – senior advisor to the Prime Minister] wants to get the judges sorted".[14]

(c) In advance of the Court of Appeal considering the Attorney General's application to impose a harsher sentence on those convicted of killing PC Harper, a "friend" of the Attorney General told a newspaper: "If the judges uphold the original sentences then she will still have done the right thing and it will be another example of wet, liberal judges being soft on crime". This is both misleading and sinister. Sentencing in criminal matters is governed by law and extensive guidelines. The Court of Appeal must apply these. It has no ability to be "soft on crime" because the "softness" or "hardness" of a sentence is determined by the law set by parliament (and the Sentencing Council – an executive body). The court merely applies that law to the facts. Coming in advance of the Attorney General appearing before the court, it may be seen as an attempt to pressurise the judges to rule in favour of the Attorney General (who, according to her chambers profile, had never led a case before the Court of Appeal while in practice).[15]

(d) In a speech at the Policy Exchange think tank, the Attorney General listed (without any substantial legal analysis) a series of matters that she claimed the Supreme Court had decided wrongly:

[13] The Secret Barrister, 25
[14] The Secret barrister, 25
[15] The Secret Barrister, 26

> *…the Attorney General strongly criticised the "huge increase in political litigation" – and by implication the courts for entertaining it; the Supreme Court had (she said) wrongly stepped into matters of "high policy"; its decision in Miller 2 (prorogation) was "inapt"; its decision in Privacy International (reviewability of the Investigatory Powers Tribunal) was "profoundly troubling"; its reasoning in Adams (on the extent to which Ministerial functions could be delegated to civil servants under the Carltona doctrine) was "deeply strained, if not implausible"*[16]

(e) The Lord Chancellor, in an interview with the Telegraph, accused judges of "harpooning" major infrastructure projects.[17] This was, once again, entirely misleading. Judges have no power to "harpoon" projects, merely determine whether planning permission has been lawfully granted (a decision that planning permission has not been so granted does not prevent the decision-maker from re-taking the decision in a lawful manner). Further, it implies that judges are trespassing on the political realm by striking down projects that they don't like. The Lord Chancellor presented no evidence or analysis to support his accusation and, based on the research conducted for this inquiry (as well as the conclusions of the IRAL) no such evidence exists.

42. Several witnesses also noted the change in the approach of the Lord Chancellor and Attorney General. The role of the former was traditionally as a guardian of the rule of law and an advocate for the independent judiciary in cabinet. The role of the latter was as a legal advisor to (and occasionally courtroom advocate for) the executive. Neither were traditionally considered political roles in the same sense as other members of the executive. It appears, however, that both of these offices have become politicised, with the Lord Chancellor and Attorney General often on the "front line" of attacks by the executive on the judiciary. As Sir Jonathan Jones QC (Hon) put it in oral evidence:

> *There is a difference between law ministers attacking judges and ordinary ministers doing so. Historically the law ministers have kept out of public debates save for when it*

[16] Sir Jonathan Jones QC, 39
[17] Sir Jonathan Jones QC, 39

became necessary to publicly defend judges. Now they are leading the criticism. This, at the very least, creates a problem of perception.

43. During the oral evidence session several witnesses were asked whether this change in the executive approach was merely a matter of tone or rose to the level of a constitutional issue. The consensus amongst witnesses was that it falls into the latter class. Sir Jonathan Jones QC (Hon) reminded us that "tone is important". Kirsty Brimelow QC suggested that, even if ministers have not "leaned on" the judiciary directly, public attacks by the executive on the judiciary amount to a "constitutional problem" because they represent attacks on the judiciary as "an independent body insulated from the executive".

44. Several witnesses drew our attention to the perceived failure of successive Lord Chancellors to defend the judiciary against attacks in the press. Liz Truss' initial silence in the face of the "Enemies of the people" headline in the Daily Mail was given as a particular example but it was not the only one raised (further examples are set out in the Chronology). Two submissions attempted to defend Ms Truss on the grounds that it would have been wrong for her to interfere with the free press. It is difficult to see the logic of these submissions. Given the flawed premise of the headlines (that judges had somehow "blocked Brexit"), Ms Truss could certainly have used her platform to correct the misinformation they promoted without suggesting that the press should be gagged or controlled in any way. Press freedom does not mean freedom from being told that it has got its facts wrong (and, unlike the judiciary, the press is not a branch of the constitutional state). It is not clear why Ms Truss, given her statutory obligations, permitted the false account of the *Miller I* case to persist without correction. The same analysis applies to the other examples raised with equal force.

Conclusions

45. In the light of the above evidence, we have reached the following conclusions on this point:

    (a) While ministers and MPs must be free to speak their mind, there is a difference between what can be said and what it is constitutionally proper to say given one's position. Ministers are, or course, legally free to criticise judges as they wish and should remain so. But this does not mean it is necessarily right for them to do so. Ministers have a particular constitutional role and responsibility. Regardless of whether there remains a constitutional convention restricting the criticism of the judiciary by the

executive, there is clearly a constitutional reason for ministers to exercise restraint. Ministers have neither the constitutional role nor institutional competence to second guess judges on the legal cases before them.

(b) Many of the attacks by the executive on the judiciary step outside what is constitutionally proper or helpful. Their tone and content often suggests that ministers know better than judges how to determine complex issues of law. This is transparently not the case. It creates the perception of politicisation of the judiciary and misleads the public. We are entitled to expect better of those who hold offices of state.

(c) Further, it is entirely inappropriate for ministers to make unsubstantiated allegations about the motivations or reasoning of judges. Similarly, it is always inappropriate for ministers to respond to adverse rulings by making threats, even if indirectly.

(d) The principle of the rule of law includes the proposition that citizens generally respect (and therefore abide by) the law. Criticism of judges which suggests they are not impartial (unless well founded) can undermine citizens' respect for and allegiance to the law. This can diminish the rule of law (even when not intended to do so).

(e) There is evidence that ministers, and successive Lord Chancellors in particular, have not properly discharged their duties under the 2005 Act. While we agree that it is not for ministers to attempt to gag the press or tell their colleagues what they can and can't say, they are nonetheless able to use their considerable platform to correct misrepresentations and encourage a more productive public debate. Ministers (and the Lord Chancellor in particular) must, in particular, refrain from making misleading statements about legal issues.

IMPACT ON THE JUDICIARY

46. We did not take evidence directly from serving judges because to do so would have risked putting them in the awkward position of having to engage in a process that might be seen as "political". Nevertheless, we are of the view that it is important that the voice of serving judges is heard in this inquiry. The APPG therefore relied on the UK Judicial Attitudes Survey ("the JAS"), and the evidence of its lead investigator, Professor Cheryl Thomas QC.

47. Professor Thomas informed us that the JAS attains a response-rate of more than 99%. In her words:

> *These high response rates mean the JAS findings are highly reliable, and as a recurring study it is uniquely placed to provide evidence of recent changes in judicial attitudes over the 7- year time period 2014-2020[4]. In this respect comparing the JAS findings from 2014/2016 with those in 2020 can be particularly valuable for this Inquiry. The 2016 JAS was run in June-July 2016, before the November 2016 High Court ruling [5]which prompted the Daily Mail "Enemies of the People" headline [6]in reference to the judges who decided that case.*[18]

48. The "headline" conclusion of the JAS is that a vast majority of judges are concerned about the executive's conduct towards the judiciary:

> *…the most notable development in 2020 was the appearance of two new changes in the judiciary that most concerned judges: the loss of respect for the judiciary by the government (94% concerned; 78% extremely concerned) and attacks on the judiciary by the media (85% concerned, 53% extremely concerned).*
>
> …

[18] Professor Cheryl Thomas QC, 67

Given the recent government challenges to judicial authority, it is perhaps not surprising that almost three-quarters (70%) of all judges in 2020 were also concerned over the loss of judicial independence.[19]

49. Alexander Horne, in oral evidence, described the contextual pressure (what might be termed "soft pressure") which may appear to be exerted on judges by the executive (even if it is not intended in such a way). Since 2020 the judiciary has been subjected to two separate inquiries touching on its decision-making in cases in which the executive is a litigant and the prospect of at least two major reform bills (not to mention speculation about more aggressive reforms such as empowering the executive to overturn judicial decisions with which it disagrees or the political vetting of Supreme Court judges). This may create a context in which it would be understandable for the judiciary to feel pressurised by the executive.

50. A number of witnesses noted a change in the judicial approach of the post-2020 Supreme Court:

    (a) Alex Dean noted that the language of a number of significant decisions appears to adopt a "pro-executive" standpoint, and, in some cases, the court seems to have adopted the executive's political talking points.[20]

    (b) Alexander Horne observed that "Following significant changes of personnel at the Supreme Court (the majority of the 12 Supreme Court judges in place when *Miller 2* was decided have now retired), some public lawyers have highlighted a more deferential approach from the Supreme Court.[21]

    (c) Aidan O'Neil QC concluded that "the balance it [the court] has fixed upon now favours government power over claims of individuals' rights."[22]

51. We were also referred to legal and academic commentators who had reached a similar conclusion. Of particular note:

[19] Professor Cheryl Thomas QC, 68
[20] Alex Dean, 42-43
[21] Alexander Horne, 167
[22] Aidan O'Neil QC 104-105

(a) Professor Conor Gearty QC takes the view that the post-2020 court has

> *"reverted to an approach rooted in legal formalism, an extremely narrow reading of the rule of law, while displaying an old-school lack of interest in the lived experiences of those whose plights have brought them to the judges' attention."*[23]

(b) Lord Sumption QC, a former Supreme Court Justice, while arguing from a rather different perspective, has suggested that the post-2020 court is now correcting various (in his view) errors of the past.[24]

52. There is evidence that the executive itself believes that the post-2020 court has changed its approach as a result of the criticism it has received from ministers:

(a) In 2021 the (then) Lord Chancellor said in a speech that it is incumbent on the courts to correct "any potential problems of judicial overreach," adding that he was "encouraged by recent decisions of the Supreme Court."[25]

(b) In 2021 the Attorney General welcomed "at least one recent decision the Court [which] seemed keen to reassert a more traditional approach to judicial review"[26]

53. Similarly, the think tank Policy Exchange (which has been at the forefront of pushing claims that judges are "interfering in politics", in a response to the executive's proposed reforms of judicial review suggested (referring to the decisions of the post-2020 court) that "there are reasons to hope that the Supreme Court is beginning to mend its ways…"[27]

54. Several other witnesses, however, indicated that they did not believe that judges would be influenced, in their decision-making, by the ire of the executive. It was suggested that any change in the Supreme Court's approach, if there was such a change, was rather propelled by the change in personnel since 2020 (in particular, the more conservative tendencies of the new President, Lord Reed).[28]

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[23] Aidan O'Neil QC, 102
[24] Aidan O'Neil QC, 102
[25] Alex Dean, 43
[26] Sir Jonathan Jones QC (Hon)
[27] Dr Christopher Stanley, 57
[28] Alexander Horne, 166-167, Sir Jonathan Jones QC, oral evidence

Review of Relevant Decisions

55. In the light of the disagreement between witnesses, we took the view that the appropriate way to proceed was for the APPG to analyse the post-2020 court's decisions itself. Counsel to the inquiry therefore undertook an analysis of several cases referred to by witnesses and other relevant matters. We have also been assisted by the substantial analysis in the submission of Aidan O'Neil QC. With 18 appearances before the Supreme Court in the last ten years (ranking joint seventh in the entire legal profession)[29], including in several leading constitutional matters, we are comfortable giving Dr O'Neil's evidence substantial weight.

56. In conducting this exercise, there has been no attempt to determine whether the court reached the "right" or "wrong" conclusions in the cases examined (for the reasons set out above it would be no more appropriate for this group to engage in such speculation than it is for ministers to do so). Rather, we have simply asked whether the court has departed from its previous decisions and/or established law in a manner likely to find favour with the positions advanced by the executive. The examination has focused on the Supreme Court as both the site of greatest controversy and the "last word" on questions of domestic law.

57. Of necessity, the consideration of each case is, in this report, somewhat brief. We acknowledge that the decisions examined can (and have) been subject to more in depth analysis and we have relied on such (by Dr O'Neil and the APPG's own counsel) in preparing these summaries.

R (SC) v Secretary of State for Work and Pensions [2021] UKSC 26 at 162

58. The Supreme Court, in a judgment authored by Lord Reed PSC, departed from an established line of authority (including several decisions in which Lord Reed had agreed) regarding the weight to be given to international treaty commitments. The approach established by this line of authority was that, as the court (which included both Lords Reed and Hodge, the current Deputy President of the Supreme Court, who was part of the majority, with Lord reed, in SC) put it in *Moohan v. Lord Advocate* [2014] UKSC 67 [2015] 1 AC 901, "judges can take into account rules of international law which are binding on the United Kingdom when

[29] https://www.legalcheek.com/2021/03/revealed-the-top-barristers-by-supreme-court-appearances/ 25 Aidan O'Neil QC, 125

interpreting statutes and in developing the common law"[25] (even when these have not been given direct effect in domestic law through statute). This approach was affirmed in *SG v. v Secretary of State for Work and Pensions* [2015] UKSC 16 [2015] 1 WLR 1449 (in which Lord Reed also agreed).

59. In *SC*, Lord Reed (with whom Lord Hodge and the other members of the panel agreed) reversed the position, holding that the United Nations Convention on the Rights of the Child (which had been considered by the court in a number of previous matters), could not be taken into account (even though it appeared relevant to the facts of the case). Lord Reed's justification for this was that the previous decisions of the court (even those which he had, himself, agreed with or helped author) failed to take into account the dualist nature of the UK constitution (i.e., international treaties do not have direct effect in domestic law unless incorporated through statute). As Dr O'Neill points out, however, this explanation is a little confusing. The dualist principle is, in fact, considered extensively in *SG* (in which Lord Reed was on the bench), where the court concluded that, although an unincorporated treaty did not have direct effect, it was nonetheless relevant to the court's interpretation of domestic law (representing, as it did, the UK's obligation to act in a certain manner). In any case, as Dr O'Neil rightly points out, it is difficult to believe that successive majorities in the highest court in the land would simply forget such a basic point of constitutional law as the dualist principle.[30]

60. Perhaps more striking than this departure (from the court's previous approach, is the language adopted by Lord Reid in a discussion which went beyond the points of law on which he was required decide:

> *In practice, challenges to legislation on the ground of discrimination have become increasingly common in the United Kingdom. They are usually brought by campaigning organisations which lobbied unsuccessfully against the measure when it was being considered in Parliament, and then act as solicitors for persons affected by the legislation, or otherwise support legal challenges brought in their names, as a means of continuing their campaign.*

[30] Aidan O'Neil QC, 126

61. Lord Reid does not appear to have had evidence before him of the numbers of discrimination cases brought, the identity of the claimants and their legal representation, or the issues raised so his assertions of "fact "in this paragraph cannot be more than speculation. A search of Westlaw (a legal database) did not find evidence to support Lord Reid's characterisation. His language does, however, reflect the executive talking point that litigation is used by "activist lawyers" to "conduct politics by other means".

R(Elan-Cane) v Home Secretary [2021] UKSC 56 [2022] 2 WLR 133

62. This case concerned the question of whether, inter alia, Article 8 of the European Convention on Human Rights required the Home Secretary to allow a person who identified as non-gendered to select a "none of the above" response to a passport application question regarding their gender. It is notable, not for the result, but for the extensive *obiter dicta* (discussion of matters which do not bear on the decision that the court is required to take). Lord Reed (with whom the other members of the five-judge panel agreed), determined the matter on the basis of orthodox human rights principles. He also, however, spent some considerable time arguing that, even if the court was minded to go beyond the case-law of the European Court of Human Rights (which, Lord Reed had already made clear, it had no intention of doing), it had no power to do so.

63. This position reversed the established law, which was that, pursuant to section 2 of the Human Rights Act 1998, domestic courts must "take into account" the decisions of the Strasbourg Court but are not required to slavishly follow them. I.e., domestic courts may take a more or less stringent approach to human rights as necessary in the domestic context. This approach was long-established in cases including *in re G (Adoption: Unmarried Couple*) [2008] UKHL 38, [2009] 1 AC 173, In re Recovery of Medical Costs for Asbestos Diseases

64. *(Wales) Bill* [2015] UKSC 3 [2015] 2 WLR 481, *Moohan v Lord Advocate* [2014] UKSC 67 [2015] AC 901, 2015 SC (UKSC), and *R (DA) v Work and Pensions Secretary* [2019] UKSC 21 [2019] PTSR 1072. In *Moohan*, at least, Lord Reed was a member of the court that made the decision. [31]

[31] Aidan O'Neil, 111-117

Anwar v Advocate General for Scotland [2021] UKSC 44 [2022] ICR 146

65. In this case the court departed from its previous decision in *R(UNISON) v Lord Chancellor [2017]* UKSC 51 [2020] AC 869 (in which Lord Reed gave the leading judgment). UNISON highlighted a common law rule that an order imposing fees bringing a court claim would be unlawful where the level of those fees created "a real risk that persons will effectively be prevented from having access to justice". In Anwar the court (which did not include Lord Reed) appears to have declined to apply the *UNISON* rule, instead permitting fees of £1500 for enforcing certain Employment Tribunal judgments even though the level of fees left more than a third of successful claimants before the Tribunal unable to obtain the money they are owed by their employers.[32]

In re McQuillan [2021] UKSC 51 [2022] 2 WLR 49

66. This case concerned the government's obligation, under Articles 2 and 3 of the ECHR, to investigate historic suspicious deaths involving state agents in Northern Ireland. The question before the court was, simply put, did the duty apply to events that occurred before the Human Rights Act came into force. The existing authority on this point was the case of *Re Finucane* [2019] UKSC 7 [2019] 3 All ER 191, in which the court held that the investigative duty did apply to events that occurred before the Act came into force. While it would not normally apply to events more than ten years prior to the Act, it could do so where the circumstances required.

67. In *McQuillan* the court departed from Finucane and imposed a hard ten-year deadline. It justified this on the basis of the European Court of Human Rights' decision in *Janowiec v Russia* [2013] ECHR 1003, in which the Strasbourg court held that the Convention rights could apply up to ten years prior to ratification of the treaty. The Supreme Court, in *McQuillan*, held that this meant that no domestic claim could be brought relating to human rights abuses before 1990 (even though the UK actually ratified the Convention in 1966).[33]

[32] Aidan O'Neil QC, 119
[33] Aidan O'Neil QC, 120-121

Begum v Special Immigration Appeals Commission [2021] A.C. 765

68. This case concerned the Home Secretary's decision to deprive Shamima Begum, a woman who left/was groomed to leave the UK to join ISIS as a child, of her British citizenship. It was common ground that, unless allowed to return to the UK to contest her case, Ms Begum could not receive a fair trial. The decision for the court was, therefore, whether she should be permitted to enter the UK for a short period in order to contest the decision. It is important to note that SIAC appeals are "full merits" appeals. This means that the court is entitled to decide whether the executive reached the correct judgment as well as the correct position in law.

69. The Court of Appeal seems to have adopted the orthodox approach to questions of human rights. In considering Ms Begum's Article 6 right to a fair trial, conducted a proportionality assessment. This is the test set down in Article 6 and requires, inter alia, the court to ask whether there is any alternative measure that would achieve the same public policy objective but has a less deleterious impact on the rights of the individual. In this case, after considering open evidence from the executive about the security risk posed by Ms Begum, the court concluded that the risk could be mitigated by detaining Ms Begum in custody in the UK rather than preventing her from entering altogether.

70. The Court of Appeal may be seen as following the approach set out by the Supreme Court (which included Lord Reed) in *Pham v Home Secretary* [2015] UKSC 19 [2015] 1 WLR 1591. In that case the court acknowledged that, given the importance of the right to citizenship, the decision to deprive a person of that right must be subject to "strict scrutiny" (essentially a consideration of the proportionality of the measure). As Lord Reed put it in that case:

> *One can infer from these cases [concerning the exercise of discretion in contexts where fundamental rights are at stake] that, where Parliament authorises significant interferences with important legal rights, the courts may interpret the legislation as requiring that any such interference should be no greater than is objectively established to be necessary to achieve the legitimate aim of the interference: in substance, a requirement of proportionality.*
>
> *The present case concerns the Secretary of State's power under section 40(2) of the British Nationality Act 1981 to deprive a person of a citizenship status if satisfied that*

deprivation is conducive to the public good. Given the fundamental importance of citizenship, it may be arguable that the power to deprive a British citizen of that status should be interpreted as being subject to an implied requirement that its exercise should be justified as being necessary to achieve the legitimate aim pursued.

71. The Supreme Court (chaired by Lord Reed), in *Begum*, reversed Lord Reed's previous approach. It held that, where the executive determined that the interests of national security required depriving Ms Begum of her citizenship, the court must take the executive at its word. The court also appears to have adopted some of the executive's political criticisms of the judiciary in its decision:

    (a) The Court of Appeal had not given the executive's national security conclusion "the respect which it should have received" [**134**]. Given that the Court of Appeal had the executive's full reasoning before it (b) accepted its assertion that Ms Begum was a security risk, (c) the executive does not appear to have offered any reason why it could not mitigate the risk by remanding Ms begum in custody, it is difficult to interpret "respect" in any way other than "unquestioning acceptance".

    (b) The right to a fair trial is not a "trump card". This use of language seems strange given the Supreme Court, in effect, treated the executive's invocation of "national security" as a "trump card". It is also, arguably, an unfair characterisation of the Court of Appeal's reasoning, which was based on a proportionality test rather than a bare assertion along the lines of "Article 6 trumps national security".

CPRE-Kent v Secretary of State for Communities and Local Government [2021] UKSC 36

72. This case concerned the award of costs against the losing party at the permission stage of a judicial review claim. For clarification, a judicial review has two stages: (1) Permission, in which the court determines whether the claimant has a properly arguable claim, and (2) substantive, in which the court decides whether the claim should succeed. In many cases, particularly those concerning planning and construction, the defendant is supported by an "interested party" (often the developer who has been given planning permission by the public authority defendant).

73. The established practice was that:

(a) A losing claimant will generally only be required to pay one set of costs.[34]

(b) Costs are not recoverable at permission stage (broadly because it is a matter between the claimant and the court, the defendant need not involve itself until the court has indicated that it considers the claim arguable).[35]

74. The Supreme Court, in effect, reversed this practice by determining that interested parties could recover the costs of responding in writing to the claim at permission stage. This was a case in which the court's reasoning was arguably sound but, at the same time, could quite conceivably have led to the contrary conclusion. The court reached its decision on the basis that, since the *Bolton* case, new rules (the "Civil Procedure Rules") had been introduced which require any party wishing to participate in the permission hearing to file a short or summary written response to the claim (an "acknowledgement of service").[36] The court concluded that, given the new rules essentially require the interested party's involvement at permission stage, it was justified in changing the previous approach to costs.

75. The court does not seem to have grappled, however, with rule 54.9 of the Civil Procedure Rules, which allows defendants and interested parties to take part in the substantive stage of a judicial review, even if they haven't filed an acknowledgement of service at permission stage. The CPR, therefore, does not actually require the interested party's involvement at permission stage. This seems to undercut the court's rationale for changing its approach.

76. Perhaps more relevantly for this inquiry, the court was made aware that changing its practice would likely have a chilling effect on meritorious judicial review claims because potential claimants (largely unable to access legal aid) are likely to be put off by the increased costs risk. The court does not appear to have grappled with this issue.

Friends of the Earth v Heathrow Airport Ltd [2020] UKSC 52

77. This matter concerned the designation of the Airports National Policy Statement ("ANPS" - which effectively granted permission for a third runway at Heathrow Airport). The executive lost the case in the Court of Appeal and subsequently conceded that it could not win in the

[34] *Bolton MDC v Secretary of State for the Environment (Practice Note)* [1995] 1 WLR 1176
[35] Practice Direction 54A, 8.6
[36] Civil Procedure Rules, 54.8.

Supreme Court. The interested party (Heathrow Airport), however, continued the appeal to the Supreme Court where it succeeded.

78. The relevant aspect of the matter is the Supreme Court's analysis of the government's obligation to "take into account" its own policies on climate change before designating its ANPS. The Court of Appeal held that the UK's ratification of the Paris Agreement amounted to government policy and ordered the government to re-make its decision taking the Paris Agreement into account.

79. The Supreme Court reversed this decision. It determined that the ratification of an international agreement could not be taken as a statement that the government intended to act in a way which complies with that agreement. This represents a departure from previous authority, in which the courts acknowledge that (while international law does not have direct effect domestically unless given such by legislation) there is a "strong presumption" that domestic law must be read compatibly with the UK's international obligations and (by extension) that the government intends to comply with international law.[37]

80. The Supreme Court's approach seems to reflect that of the executive, which has indicated that the UK's ratification of an international treaty does not mean that the executive is will necessarily comply with international law. This was evident from the executive's approach to breaching elements of the Brexit treaty. The Supreme Court's decision also coheres with an argument put forward on behalf of the executive in other cases (notably *Vince v Prime Minister* [2019] CSOH 77) that statements by ministers, even where "clear, unambiguous, and devoid of relevant qualification", should be considered "political policy" (i.e., part of the rough and tumble of political debate) rather than as indications of what the executive thinks or intends to do.

Conclusions

81. The APPG does not doubt that the members of the Supreme Court are judges of the highest ability and integrity. Nevertheless, the evidence examined above gives cause for concern:

[37] *Assange v The Swedish Prosecutor* [2012] UKSC 22

(a) For senior members of the executive to express satisfaction at a perceived change of direction by the court, in the light of several years of political pressure, risks creating the impression that the executive believes that it has been successful in pressurising the court to behave more favourably to its wishes.

(b) Regardless of whether this impression is correct, the actions of the executive have clearly had a deleterious impact on the judiciary (as perceived by the judiciary themselves). The JAS makes for concerning reading. Members of the executive would be well advised to consider the impacts of their words and actions on the morale of judges and their ability to discharge their constitutional role.

(c) The high number of instances in which the Supreme Court has reversed its previous position on the law, so as to adopt an approach that is more favourable to the executive, is notable. Since 1 Jan 2020 (the first judicial term after the executive intensified its rhetoric in the wake of the *Miller II* case), the court has made fewer than 40 public law judgments (i.e., decisions in cases in which the executive was a litigant).[38] Generally it is relatively rare for the court to reverse its previous judgments (indeed the legal doctrine of *stare decisis* discourages it from doing so). It is, therefore, somewhat surprising that it has done so at least seven times in two years.

(d) It is more surprising still that, in reversing itself to take a position more favourable to the executive, the court should adopt (whether deliberately or accidently) the language or ideas used in political talking points used by the executive.

(e) We are not wholly convinced that the reversals considered above can be ascribed solely to the changing personnel of the court or the philosophy of its president. Lord Reed PSC and Lord Hodge DPSC both participated in a number of the court's older judgments which have since been overturned.

(f) Correlation does not necessarily equate to causation, and we have no wish to level any accusation at the Supreme Court. The above evidence, however, creates a

[38] 30 According to the legal database Westlaw.

troubling impression in the light of the executive's recent approach towards the judiciary.

CONSTITUTIONAL SAFEGUARDS

82. There are three principal constitutional safeguards intended to secure the constitutional position of the judiciary. These are:

    (a) The Lord Chancellor's duty to have regard to the need to defend the independence of the judiciary;

    (b) Ministers' general duty to uphold the independence of the judiciary.

    (c) The constitutional convention that members of the executive and legislature will not criticise judicial decisions save, on occasion, in parliament in measured terms.

83. All of these are discussed above. In the view of the majority[39] of submissions to this inquiry, ministers (and particularly successive Lord Chancellors) have not properly discharged their duties. For example:

    (a) The Secret Barrister describes ministers as acting with "at best widespread ignorance, and at worst conscious defiance, of their duties".[40]

    (b) Lord McDonald QC suggests that ministers have not discharged their duties "well in recent years".[41]

    (c) Satvinder Juss notes:

> *A former Lord Chief Justice, Lord Igor Judge, even thought that in failing in her statutory duties Liz Truss, the Lord Chancellor, may have broken the law 'by keeping a near-silence in the face of a torrent of abuse targeting three high court judges,' and that her 'failure to come to the defence of the judiciary for nearly 48 hours – and her lukewarm response when she did– means if she were taken to court she would likely be found to have acted unlawfully….*[42]

[39] Including the Secret Barrister, Alex Dean, Sir Jonathan Jones QC (Hon), Lord McDonald QC, and Satvinder Juss, Kirsty Brimelow QC,
[40] Secret Barrister, 22
[41] Lord McDonald QC, 64
[42] Satvinder Juss, 169

84. Sir Jonathan Jones QC (Hon) suggested that it was unlikely that the Lord Chancellor's legal duty would ever be enforced and could, at most, be described as carrying "symbolic" weight.[43]

85. Professor Gee took a contrary view but did not provide an example of a Lord Chancellor discharging the duty effectively after 2016 save for when the perceived threat to the independence of the judiciary came from a politician of a different party to themselves.

86. The view of many witnesses was that one cause may be the politicisation of the "law ministers" (meaning, broadly, the Lord Chancellor and Attorney General). It was argued that, prior to the Constitutional Reform Act 2005, the office of Lord Chancellor was held by a senior lawyer, who generally saw the office as the peak of their career and had no real political ambitions. Similarly, the office of Attorney General was held by those whose ambitions were in the legal, rather than political, field.[44]

87. This meant that the law ministers were not only rooted in their constitutional duty, but also carried real authority in matters of law and were generally respected by the legal professions and the judiciary. As Lord Kingsland put it, during the parliamentary debates on the 2005 Act:

> *…the Lord Chancellor in the Cabinet is a great inconvenience to the executive. That is the reason he should stay there.*[45]

88. Section 2 of the 2005 Act removed the requirement for the Lord Chancellor to be legally qualified. Since that provision came into force both law ministers have become increasingly "political" roles. As Dr O'Brien described:

> *Under the Constitutional Reform Act 2005, the judicial responsibilities of the Lord Chancellor were removed. The office need no longer be held by a lawyer. The 'new' Lord Chancellor is a more junior and more political figure than the 'old' Lord Chancellor. The role is increasingly filled by junior ranking politicians and often appears to be regarded as a career stepping-stone. This has been particularly clear with Lord Chancellors*

[43] Sir Jonathan Jones QC (Hon), 38
[44] Alexander Horne, 163-165, Patrick O'Brien, 31-36
[45] Patrick O'Brien, 33

appointed after 2012 (when Chris Grayling, the first nonlawyer Lord Chancellor, was appointed).[46]

89. As a result, the incentives which operate on the current law ministers tend towards political advancement rather than constitutional duty:

> There were three Lord Chancellors between 1990 and 2005. Between 2005 and 2022 there have been ten, including the incumbent (Dominic Raab). [1]If we again take 2012 as a turning point, tenure in office for Lord Chancellors who served from 1970-2012 was 4.7 years. For Lord Chancellors who served after 2012 it has been 1.4 years. The result of this trend towards shorter appointments of more junior figures is that Lord Chancellors are rarely in post long enough to make much impact or gain much authority. There is a powerful incentive for career-minded incumbents not to rock the boat, in the hope of promotion.[47]

90. Dr O'Brien suggested that political law ministers might still discharge their constitutional duties but do so in a "political" manner (i.e., subject to the requirements of party policy). This argument is a little different to understand. The law ministers' constitutional duties are distinct in that they take effect outside the demands of party politics (the Lord Chancellor must defend the independence of the judiciary regardless of political convenience and the Attorney General must give legal advice without fear or favour). It is difficult to see how they can be effectively discharged if they are subject to political convenience.

91. The inquiry received evidence from Alexander Horne of the Attorney General failing to discharge her duties to the standard that might be expected. In providing legal advice on the international law implications of the proposed Internal Market Bill the Attorney General argued that "treaty obligations only become binding to the extent that they are enshrined in domestic legislation." This was a very basic legal error.

92. We note, as well, that, while both current law officers are legally qualified, neither progressed beyond a junior level in their legal careers. While the Attorney General uses the letters

[46] Patrick O'Brien, 32
[47] Patrick O'Brien, 32

"QC" (signifying "Queen's Counsel", the title of a senior barrister) after her name, this distinction was given to her by virtue of her political position rather than on merit.

93. Further, several of our witnesses noted that the law officers have taken a leading role in promulgating attacks on the judiciary. Some examples are set out above. Both Alexander Horne and Sir Jonathan Jones QC (Hon) compared the conduct of recent law ministers with their predecessors, who remained outside the political fray save where it became necessary to defend the independence of the judiciary.

94. During the hearing, witnesses were asked whether amending section 2 of the 2005 Act would remedy these issues. The consensus was that this would be an important, but insufficient, step. Kirsty Brimelow QC, in oral evidence, noted that there is a substantial difference between a senior lawyer and someone "with a law degree who may have practiced for a few years". The consensus was that candidates for the position of Lord Chancellor should have attained a level of seniority in the legal profession broadly equivalent to that of a senior judge (although there was no suggestion that they must actually be a serving judge). This would, in practice, mean that candidates would need to have achieved the rank of Queen's Counsel on merit and be of at least 20 years call (20 years since they started practicing). Similarly, candidates for the position of Attorney General should be senior lawyers rather than politicians with ambitions of political advancement.

95. Further, it was argued, a change in the culture of the executive is required. Ministers, and particularly law ministers, need to give more consideration to their constitutional role, even when it runs contrary to their short-term political interests.[48]

[48] Sir Jonathan Jones QC (Hon), Alexander Horne, Kirsty Brimelow QC (oral evidence)

CONCLUSIONS

96. In the light of the evidence considered, the APPG draws four conclusions:

97. **First**, ministers have, from a constitutional perspective, acted improperly in attacking judges and, in particular doing so in a way that might reduce public confidence in the judiciary and/or implies that ministers know better than judges on questions of fact and law. While ministers are, like anyone, entitled to their freedom of speech, the offices they hold come with responsibilities. These include comporting themselves in a constitutionally proper manner. It is not helpful for ministers to attack the integrity or competence of judges or to suggest that the executive has expertise or constitutional competence that it does not possess.

98. **Second**, the constitutional safeguards, intended to ensure that the executive behaves properly towards the judiciary are insufficiently effective. In particular, the informal constitutional convention that ministers do not attack judicial decisions and the statutory duties placed on ministers and the Lord Chancellor, have not ensured that the executive behaves in a constitutionally proper manner. The politicisation of the law ministers means that the members of the executive who might be expected to champion the independence of the judiciary lack the authority and expertise to do so effectively (an, arguably, the incentive to do so at all).

99. **Third**, the above has led to low morale amongst the judiciary and significant concern as to the apparent growing disrespect for judges on the part of ministers. Judges have been placed under soft pressure by a combination of ministerial attacks and threats of "reform" if they do not decide cases in a manner which suits the executive.

100. **Fourth**, these create a problematic picture. The 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 may be coincidental or explained by a variety of factors. In the light of the above, however, it creates the troubling appearance (even if it is only an appearance) of the politicisation of the judiciary. This is not helped by comments from members of the executive to the effect that the judiciary is beginning to set right its previous "errors".

RECOMMENDATIONS

101. On the basis of the above evidence and analysis, we make three recommendations. These are intended to address the relatively narrow issues dealt with in this inquiry, rather than remedy the many problems faced by the justice system and judicial branch. The focus of our recommendations is, conversely, on the executive rather than the judiciary. This is because, on the evidence available, we take the view that, if the executive can find a way to observe its own constitutional boundaries with respect to the judiciary, the latter is likely to discharge its constitutional role without interference.

Recommendation 1: Foreground the independence of the judiciary in the forthcoming independent review of the Constitutional Reform Act/Supreme Court

102. The executive has long suggested that it will commission a third independent review (to join the IRAL and Gross Review) focusing on the Constitutional Reform Act 2005 and/or the Supreme Court (or similar). This review should focus on ensuring that the judiciary is able to discharge its constitutional role without fear or favour. It should, in particular, look further into the relationship between the executive and the judiciary and at how the former might address its behaviour to give the latter the space to perform its constitutional role. While this inquiry was intended to begin that process, the greater resources available to a government-sponsored independent review will allow it to go further and into greater detail.

Recommendation 2: Provide statutory guidance for ministers on their constitutional duties towards the judiciary

103. The consensus amongst the witnesses before this inquiry was that the problems raised in evidence flowed from a failure of culture amongst the executive. There was no enthusiasm, and we see no reason, for the imposition of hard rules restricting the speech of ministers. Indeed, to do so would be constitutionally problematic in its own way. Ministers should, however, be better informed about their constitutional duties and competencies and how to behave towards the judiciary in a proper manner.

104. It is suggested, therefore, that the Secretary of State (likely the Prime Minister) be required to publish guidance setting out the duties incumbent upon, and constitutional conventions guiding minsters (and the Lord Chancellor in particular). The Prime Minister should, in drafting this guidance, take into account the views of the judiciary and legal profession. A sample clause might take the following form:

> **Guidance on the Constitutional Duties of the Executive towards the Judiciary**
>
> (1) The Prime Minister shall produce guidance setting out the duties bearing on ministers in respect of the judiciary and how these duties should be discharged.
>
> (2) The duties in sub-section (1) include:
>
> (a) The duties of ministers under section 3 of the Constitutional Reform Act 2005;
>
> (b) The duties of the Lord Chancellor under section 3 of the Constitutional Reform Act 2005;
>
> (c) The requirements of constitutional conventions governing the behaviour of ministers towards the Judiciary.
>
> (d) Anything else the Prime Minister reasonably considers to be relevant.
>
> (3) In discharging his duties under this section the Prime Minister shall have regard to the views of:
>
> (a) The members of the Supreme Court;
>
> (b) The members of the Court of Appeal;
>
> (c) Other members of the judiciary;
>
> (d) The members of the Bar;
>
> (e) The members of the Roll;
>
> (f) Other members of the legal professions.

(4) All members of parliament must have regard to the guidance for which this section provides.

(5) In (4) "members of parliament" include:

(a) Members of the House of Commons

(b) Members of the House of Lords

(c) The Speaker of the House of Commons

(d) The Speaker of the House of Lords

Recommendation 3: Guidance on the Appointment of Law Ministers

105. Recommendation 2 will be more effective if the guidance is superintended by objective and authoritative law ministers, particularly the Lord Chancellor. It may be impractical to set out in statute the exact qualifications required to hold the offices, but statutory guidance may assist in both the qualification and transparency of the relevant offices. It is, of course, unusual for guidance to be required for the appointment of ministers (who normally serve simply at the pleasure of the Prime Minister), but the law ministers are not like other members of the executive. First, they have a constitutional role outside that of normal ministers, second, that role requires them to be able to step outside the ordinary milieu of political combat, third, it appears that individuals with a certain level of expertise are likely to be more capable of discharging the duties of the offices.

106. We therefore recommend that the Prime Minister produce guidance setting out the criteria to be applied in the appointment of the Lord Chancellor, Attorney General, and Solicitor General. A sample clause may take the following form:

Guidance on the Appointment of the Law Ministers

(1) The Prime Minister shall produce guidance setting out criteria to be applied in the appointment of the Law Ministers.

(2) The Law Ministers are:

(a) The Lord Chancellor;

(b) The Attorney General;

(c)The Solicitor General

(3) In producing the guidance in sub-section 1 the Prime Minister shall have regard to:

(a) The level of legal expertise and qualification required to discharge the respective duties of the law ministers;

(b) The level of seniority in the legal professions or their equivalents required to discharge the respective duties of the law ministers;

(c) The necessity for Law Ministers to be able to discharge certain of their duties in a non-political manner.

(4) In discharging his duties under this section the Prime Minister shall have regard to the views of:

(a) The members of the Supreme Court;

(b) The members of the Court of Appeal;

(c) Other members of the judiciary;

(d) The members of the Bar;

(e) The members of the Roll;

(f) Other members of the legal professions.

107. 107. This particular recommendation may also be considered by the Lords Constitution Committee as part of its current work on the role of the Lord Chancellor.