*Darbyshire on the ELS* 2020,

textbook update December 2022

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*Darbyshire on the English Legal System*, 13th ed. (London: Sweet & Maxwell, 2020) [here](https://www.sweetandmaxwell.co.uk/Product/Academic-Law/Darbyshire-on-the-English-Legal-System/Paperback-and-eBook-ProView/42728114)

*Sitting in Judgment – the working lives of judges* (Oxford: Hart/Bloomsbury 2011) [here](https://www.bloomsbury.com/uk/sitting-in-judgment-9781847318305/)

# Bibliography of this update

Ministry of Justice and Judiciary press releases via email alerts, Judiciary website (for stats, publications, training prospectus and judges’ speeches), Judicial Appointments Commission, *Westlaw UK* current awareness, including many journals cited here, *Lexis*, Law Society’s *Gazette*, Parliament website, websites as mentioned in this update and those listed in *Darbyshire on the ELS*, Chapter 1.

### Further reading

*The Times*, *The Guardian*, *New Law Journal*, on *Lexis, Legal Action* and *Counsel* may also be useful. *The Guardian* is available free, and all UK newspapers are usually free, online, via libraries which have subscribed to general newspaper databases. This update does not pretend to be complete. Research for the update was completed in mid-November 2022.

# Chapter 1 Understanding the ELS

Lord Chief Justice Burnett gave the 2022 Blackstone Lecture on 11th February [here](https://www.judiciary.uk/speech-by-the-lord-chief-justice-blackstone-lecture-2022/), “the hidden value of the rule of law and English law”. He cited the 2021 Oxera Report, “Economic Value of English Law”, commissioned by Legal UK [here](https://legaluk.org/wp-content/uploads/2021/09/The-value-of-English-law-to-the-UK-economy.pdf). As the foreword explains, “LegalUK was set up in 2017 by the Lord Chief Justice, as a group that is committed to encouraging, internationally, the wider use of English law and UK dispute resolution”. The report said that the value of English law to society as a whole had not been measured before.

**Bogus interpretations of common law promulgated by conspiracy theorists**

Judges and lawyers are concerned that Government attacks on them and on the rule of law are fuelling conspiracy theorists who invent fake “ancient common law” to attack the courts and the justice system, according to the Law Society. The *Guardian* newspaper provided excellent examples in an article by Ben Quin on February 12th, [here](https://www.theguardian.com/uk-news/2022/feb/12/ministers-accused-of-fuelling-conspiracy-theorists-bogus-common-law-ideas). The trend comes from the USA, unsurprisingly. For example, in the UK, the fascinating and alarming article, said that

“One group is running classes around the country at up to £20 a person to train “an army of common law constables” who are “mandated to uphold constitutional laws” by exercising arrests and attending where the “rights of members are subject to intervention from bailiffs, council employees or police officers and other agencies”. It claims to have trained 850 “constables.””

Incidentally, at least one former conspiracy theorist has explained that the more outrageous the conspiracy theory, the more money it makes for the promulgator.

**Wales**

In May 2022, the Welsh Government published *Delivering Justice for Wales* [here](https://gov.wales/sites/default/files/publications/2022-06/delivering-justice-for-wales-may-2022-v2.pdf). It follows the recommendations of the Commission on Justice in Wales, described in the textbook.

# Chapter 2 Sources of Law

**Case law**

In April 2022, the Government announced that the case law of the superior courts of record, meaning High Court, CA and UKSC and the upper tribunals, will be available in the National Archives to “boost” open justice by making it accessible to the public.

**Statute law**

In the 2021 Renton Lecture, Lady Arden examined “What Makes Good Statute Law: A Judge’s View”. It can be watched [here](https://vimeo.com/650588383/e701a616b1) and is reproduced in the Statute Law Review: Statute Law Review, 2022, Vol. 43, No. 2, 139–152.

**Retained EU Law**

I the autumn of 2022, the Retained EU Law (Revocation and Reform) Bill came as an alarming surprise to many lawyers. If enacted as an Act, it would, at the end of 2023, completely cancel the supremacy of EU law in every context and revoke all EU derived subordinate legislation and all retained direct EU legislation. It would therefore, in the meantime, require Government departments to scrutinise 2,400 laws and decide what to keep. This is examined in the *Law in Action* podcast released on November 1,2022. Everything *ministers* decided to amend or keep would have to get through Parliament by the end of 2023. Hilary Benn MP has remarked that he thought Brexit was about *Parliamentary* supremacy, yet this bill was about giving individual ministers power over whole swathes of legislation, cutting MPs and the public out. Cambridge Professor Catherine Barnard said the Bill/Act could leave workers, consumers and other groups absolutely unprotected. Examples are laws in relation to workers and consumers’ rights, health and safety, quality of food, working time regulations and so on. Government departments do not have enough staff to review all of this legislation. DEFRA would have to review 500 pieces of legislation and only have three people who could work on it fulltime. Obviously, there is nothing stopping a sovereign Parliament turning off a piece of retained EU law if they have had enough time to think about it.

# CHAPTER 4 The European Convention on Human Rights

**The ongoing Conservative plan to reform the Human Rights Act 1998**

In November 2021, the Independent HRA Review published their report. They are a government appointed independent group of experts. Their Government web-page is [here](https://www.gov.uk/guidance/independent-human-rights-act-review#the-panels-report). They considered “the relationship between domestic courts and the European Court of Human Rights (ECtHR)” and the impact of the HRA on the relationship between the judiciary, the executive and the legislature”.

In December 2021, the then Lord Chancellor and Minister of Justice under the Johnson government, Dominic Raab, published a new consultation, *Human Rights Act Reform: A Modern Bill Of Rights*, discussed below, but as I write, the position is uncertain. In June 2022, Rabb LC introduced the Bill of Rights Bill 2022-23 into the House of Commons. Furthermore, despite previous reassurances that the Government would not be seeking to break free of the European Convention on HR, in June they introduced the British Bill of Rights and Withdrawal from the ECHR Bill 2022-23, “A Bill to make provision for an application to the Council of Europe to withdraw from the European Convention on Human Rights and the introduction of a British Bill of Rights”. Nevertheless, in summer 2022, Liz Truss PM, whose administration famously lasted less than a 60p Tesco lettuce, depicted on a *Daily Star* webcam that went viral, announced that reform plans would be dropped. Then in October 2022, under Rishi Sunak PM, Raab was reinstated. In November 2022, ITV news announced that Raab’s Bill of Right Bill 2022-23 would resume its Parliamentary passage. (In October 2022 The House of Commons library published a research briefing on the background to the Bill). The library’s web page on human rights reform is [here](https://commonslibrary.parliament.uk/research-briefings/cbp-9581/).

This is what the Government proposed in the December 2021 consultation, Chapter 4:

“The government is proposing to reform UK human rights law by: • respecting our common law traditions and strengthening the role of the UK Supreme Court; • restoring a sharper focus on protecting fundamental rights; • preventing the incremental expansion of rights without proper democratic oversight; • emphasising the role of responsibilities within the human rights framework; and • facilitating dialogue with Strasbourg, while guaranteeing Parliament and the devolved legislatures their proper roles. We also are consulting on possible impacts of our proposals, including any equalities impacts…

…The government wants to introduce a Bill of Rights in a way that protects people’s fundamental rights whilst safeguarding the broader public interest. For that framework to work, it must command public confidence, and provide greater legal certainty and respect for the separation of powers between the judicial and legislative branches of government…

…We regard the Convention as offering a common-sense list of rights. The key problems have arisen from the way in which those rights have been applied in practice, at both the Strasbourg and domestic levels… These proposals will strengthen our common law traditions, reduce reliance on the Strasbourg case law and reinforce the supremacy of the UK Supreme Court in the interpretation of rights. They will restore sharper focus on fundamental rights, including by ensuring unmeritorious cases are filtered earlier, and giving the UK courts greater clarity regarding the interpretation of qualified rights and imposition by implication of ‘positive obligations’. They will prevent the incremental expansion of rights without proper democratic oversight, including by limiting the duty on UK courts to ‘read down’ legislation enacted by Parliament, and by clarifying restrictions on deportation. They will emphasise the role of responsibilities in interpreting qualified rights and awarding compensation. They will make clear and reinforce Parliamentary sovereignty in the exercise of the legislative function, whilst remaining in dialogue with Strasbourg and devolved administrations… there remains an over-reliance on Strasbourg case law, as well as too much uncertainty about how section 2 should be applied in practice… reference can and should also be made to wider common law principles and perspectives from other common law jurisdictions, rather than simply following the distinctive and expansive case law from Strasbourg… The starting point for the courts’ interpretation of rights should therefore be the text of the rights themselves, together with past decisions of the domestic courts on the point… We would like to establish a formulation that emphasises the primacy of domestic precedent, while setting out a broader range of case law – including, but not confined to, the Strasbourg case law – that UK courts may consider, if they so choose.”

The paper consulted on jury trial, freedom of expression, in the balance with privacy in media and social media and public interest. They asked whether there should be a permission stage to filter out weak cases. “Where human rights claims are brought for trivial matters, or by claimants who have abused their rights or the rights of others, it can bring human rights into disrepute.” They asked about deportations in the public interest “The government believes that the confidence of the wider public in our human rights framework is eroded when foreign criminals and others who present a serious threat to our society – including those linked with terrorist activity – can evade deportation”. They asked whether responsibilities could be emphasised in statute, taking account of the claimant’s behaviour. On the topic of “dialogue with Strasbourg”, the paper said “Under Article 46 of the Convention, States Parties are required to implement final judgments of the Strasbourg Court in cases brought against them. The implementation of judgments is overseen by the Committee of Ministers of the Council of Europe… Under our system, however, democratic responsibility for legislation, and the power to legislate, lies ultimately with Parliament. The government strongly believes that this should be reflected in our arrangements for responding to Strasbourg judgments”.

The Ministry of Justice published a post-consultation report in June 2022. In July, the House of Lords Library published a paper “The HRA 1998: does it need replacing?”, examining what the Act does, what the Government wants and reactions to Government plans, [here](https://lordslibrary.parliament.uk/human-rights-act-1998-does-it-need-replacing/).

In 2021-22, the announcements then the Bill have been the subject of widespread criticism. For example, in June 2021, 150 groups, led by the lawyers’ group Justice, wrote to Raab, urging him to allow detailed Parliamentary scrutiny of any Bill, concerned that the reforms "will alter the balance between freedom of expression and privacy and affect people's rights for many years". In 2022, seven expert rapporteurs wrote to the UN Commissioner for Human Rights. Many groups shared their concern that the Bill would constrain the independence of the UK judiciary in requiring them to adhere to a list of constraints when interpreting Convention rights. In July, the Council of Europe Commissioner for Human Rights said “Legal reforms should not weaken human rights protections in the United Kingdom…..  “It is worrying that the proposed legal reforms might weaken human rights protections at this pivotal moment for the UK, and it sends the wrong signal beyond the country’s borders at a time when human rights are under pressure throughout Europe” (Council of Europe press release [here](https://www.coe.int/en/web/commissioner/-/united-kingdom-backsliding-on-human-rights-must-be-prevented)). The Bill was also criticised by Law Society President, Stephanie Boyce (representing solicitors) and risk "Britain's international reputation as a standard bearer for justice, a champion of human rights and a stable international partner". In its submission to the Ministry of Justice the Society said “The government is taking a sledgehammer to a cornerstone of British justice” (Society press release, 8 March 2022). Speaking to the House of Commons Justice Select Committee in February, former UKSC Justice Lord Carnwath said that the obligation to take account of domestic law before Convention law could create uncertainty. In July 2022, the Parliamentary Joint Committee on HR published a special report, *HRA Reform: Govt response to the committee’s thirteenth report of session 2021-2*. They had said that the HRA 1998 did not need reforming. The Government had retorted that it had been in force for 20 years and needed updating. The Committee also called for evidence to inform its legislative scrutiny of the Bill. Media groups expressed concerns over plans to constrain press freedom to name suspects. On November 22, 2022, the Law Society published a press release entitled “City warning over Bill of Rights Bill harm to UK plc”. The Vice-President said “International businesses are drawn to markets with clear, predictable legal systems. UK plc has been attractive for trade in part because our jurisdiction has provided this stability. The Bill of Rights Bill contains several provisions that would create legal confusion and uncertainty…”.

Very importantly, on November 18th, 2022, the BBC released a full-length interview with Robert Spano, the outgoing President of the Strasbourg court. The podcast is on the BBC Sounds app and on the BBC website [here](https://www.bbc.co.uk/programmes/p0dgv5wx) and is part of the Law in Action series. In an episode released on November 15th 2022, it was pointed out that the UK had proportionally fewer cases against it before the court than any if the other 45 contracting states. Of the 1,100 judgments last year, only five found breaches by the UK Government. This led Spano to question the need for the Bill of Rights Bill. Spano warned that the UK Government should think carefully about the objections raised by the UK legal establishment. Any breach of Convention law which would constrain actors (meaning judges, here) from fulfilling their obligations under international law. In the full interview, Spano said that the judges of the ECtHR were very positive about their dialogue with the national courts. In the legal establishment there was a lot of admiration for English law and the bar and the historical contribution of the UK to the (human rights) system. The nature of the relationship between the Strasbourg court and the UK judiciary was a manifestation of success. “This is how the system should work”.

There is no point in discussing this highly controversial Bill further. By November 2022, its second reading is yet to be scheduled. In the meantime, however, Rishi Sunac’s government is currently incorporating some of its desired reforms in other Bills. For example, the Higher Education Freedom of Speech Bill 2022-23 aims to protect freedom of expression and academic freedom. It is targeting what has become known as “cancel culture”, for example instances of student unions cancelling guest speakers whose views they oppose and the use of litigation to stifle expression on matters of public interest. The Russell Group (top 20) universities have warned that it would clash with laws that require universities to protect equality and stop extremism. The Government is also promoting a Bill to curb SLAPPS (strategic lawsuits to prevent public participation), used by wealthy Russian oligarchs to silence critics: the Strategic Litigation Against Public Participation (Freedom of Expression) Bill 2022-23. The Public Order Bill 2022-23 is designed to curb protestors who cause serious disruption. Responding to critics, the Government said that the rights of freedom of expression and assembly do not include crime, disorder and infringing the right of others.

**Case law example: Articles 9, 10 and 11, criminal damage arising out of peaceful protest**

See below, under criminal procedure: *Attorney General’s reference on a point of law (no. 1 of 2022)* [2022] EWCA Crim 1259*.* AG Suella Braverman referred to the CA the four acquittals for criminal damage of some of the Bristol protestors who damaged a statue of a slave trader during a Black Lives Matter protest. The CACD held as follows. It was a well-established principle that the rights to freedom of expression and assembly were not to be interpreted restrictively BUT art. 11 only protected the right to “peaceful assembly”. This did not cover violence, its incitement or violent intentions, or where the protestors otherwise “rejected the foundations of a democratic society”. Damage inflicted in a violent or non-peaceful manner resulting in a criminal damage prosecution or conviction was not protected by the Convention. The proportionality of the conviction could not arise for consideration by the jury.

FURTHER READING *Legal Action* on human rights housing, community care, police misconduct; UKSC judgment summaries on website

# Chapters 6 and 7 Civil and criminal courts

**Court system still shambolic**

In June 2022, the Social Market Foundation, which calls itself “a non-partisan think tank” published “Future-proofing justice: Making the civil and criminal courts world-leading by 2030” [here](https://www.smf.co.uk/publications/future-proofing-justice/). It said that the courts in recent years had demonstrated significant failings. “These are causing considerable individual, societal and financial detriment and undermining the rule of law”. The aim should be to provide world leading courts by 2030. “The state of affairs is reflected in international rankings, as England and Wales are below a number of other common law countries.”

Similarly, in November 2022, the Bar Council published Access Denied, [here](https://www.barcouncil.org.uk/resource/access-denied-november-2022.html), a paper calling on the Government not to make further cuts in the justice budget. It reports on the courts, legal aid, and the reform programme ten years on from the LASPO Act 2012 (Legal Aid, Sentencing and Punishment of Offenders Act) and concludes that access to justice is severely hampered because of political decisions and budget cuts.

Continuing a decades-long trend, in July, the Law Society *Gazette* reported that it had found that “over 100 sitting days were lost in Crown Courts in the first six months of 2022 due to ongoing repair work, with £35 million worth of running repairs now outstanding across the estate. In total, 78 of the 84 Crown Court buildings within the HMCTS estate have a repair request that has yet to be completed”. (Westlaw abstract). Naturally, His Majesty’s Courts & Tribunals Service never reports these problems. Its weekly and monthly updates report good news, such as the development of new courts. For example, a £40 million pound county and magistrates’ court is being developed in Blackpool, funded by the Department for Levelling up, Housing and Communities, and they give updates on the “flagship” court in the City of London, now under construction. In April 2022, they reported that the courts are continuing to work at full capacity to try and shift the Covid backlog. The cap on Crown Court sitting days has been lifted and in 2021, the Crown Court sat for 1,700 more days. On 25th May, HMCTS announced the purchase of 7 Newgate Street, to house around 30 tribunal hearing rooms. HMCTS has never once referred to the monumental failure of the Common Platform IT system for the Crown Court, discussed below under the heading of criminal procedure.

**Problem solving courts**

In July 2022, the Justice Secretary announced the piloting of the first three “problem-solving courts”, at Teesside, Liverpool and Birmingham [here](https://www.gov.uk/government/news/new-problem-solving-courts-to-combat-drug-and-alcohol-fuelled-crime?utm_medium=email&utm_campaign=govuk-notifications-topic&utm_source=e442372a-cba5-452f-bd7c-f4630bf6eedb&utm_content=daily), described in the textbook. They are **criminal** courts which will take a tough approach to low level offenders. They will see the same judge at least once a month (not new) and receive intensive support and supervision from the Probation Service. They will get further tailored support, in relation to such problems as housing, substance misuse and education. They were provided for in the Police Crime Sentencing and Courts Act 2022. The press release said that “More people die every year as a result of drug misuse than from all knife crime and road traffic accidents combined. The total cost to society and taxpayers in today’s prices is nearly £22 billion.” The Government said they were spending £3 billion on combating drugs over the next three years. “The strategy is contributing to the prevention of three-quarters of a million crimes including 140,000 ‘neighbourhood’ crimes like theft robbery and burglary.” The press release reported on the success of civil problem-solving courts, family drug and alcohol courts, discussed in the 2021 update and the textbook.

**The Supreme Court**

In January 2022, the Court launched a two-week course, in conjunction with Royal Holloway, University of London. The course was free and was designed to promote better public understanding of the Court and the JCPC. It attracted over 3,000 subscribers.

**The Commercial Court**

In 2021, Russians were the biggest group of litigants in the London Commercial Courts but this is not likely to continue.

**The Chancery Division**

On January 14th, 2022, Sir Julian Flaux, Chancellor of the High Court and head of the CD gave an update to the Chancery Bar Association, [here](https://www.judiciary.uk/chancellors-speech-at-the-chancery-bar-associations-annual-conference/). He was newly appointed and remarked on his surprise at finding so few property cases in the High Court. Some members of the Association had expressed concerns, especially about cases which required an authoritative ruling, setting a precedent. There were at least three Chancery Division judges who were property specialists. He hoped to redress the balance by getting the Chancery Masters (case managers) to keep appropriate cases or transfer them into the Chancery Division from the High Court when asked to do so.

He made some interesting remarks on remote participation. Some judges thought that where witnesses gave evidence, they were more relaxed appearing from home and that improved the quality of their evidence. That, however was not the aim of cross-examination. It was to get at the truth.

Judges were concerned that during the pandemic solicitors and junior barristers’ participation was confined to being depicted as a tile, without picture or sound, on a Teams screen, with Queens Counsel doing all the advocacy. Judges had been trying to persuade parties to instruct junior counsel and solicitor advocates to do the advocacy at procedural meetings. “It is only by doing your own advocacy and making your own mistakes that you learn your trade”. (Various Online Court Guides for litigants already suggest this. For example [here](https://www.judiciary.uk/courts-and-tribunals/business-and-property-courts/commercial-court/litigating-in-the-commercial-court/commercial-court-guide/) on the Judiciary website). He felt that remote hearings should be the default for short hearings, especially those with no witnesses. There were exceptions, such as cases where parties would not cooperate with one another. Trials with witnesses should be conducted in the courtroom or at least in hybrid format. Following a Practice Note issued by him, the default procedure is that interim applications in chancery should be issued in person. This follows a similar decision by the regional judges of the Administrative Court.

# Chapter 10 Civil Procedure

**Pre-Action Protocols**

There are currently 18. The Civil Justice Council consulted on them in 2021-22. The web page on the Judiciary website is [here](https://www.judiciary.uk/related-offices-and-bodies/advisory-bodies/cjc/current-work/pre-action-protocols-working-group/) they consulted on an interim report, which was published in November 2021. They suggested making compliance with PAPs mandatory, except in urgent cases, and requiring a joint stocktake report, narrowing down what issues the parties agree on and what they disagree on as a final step before starting proceedings. They would be explained in more user-friendly language, in online portals. Where cases settled at the PAP stage, there would be a summary costs procedure, decided online, on written submissions only.

**“Increasing the use of mediation in the civil justice system”**

This is the title of a Governmental consultation, which closed in October 2022. The web page on Gov.UK is [here](https://www.gov.uk/government/consultations/increasing-the-use-of-mediation-in-the-civil-justice-system) and explains:

“This consultation sets out the Government’s proposal to automatically refer people involved in a civil dispute valued up to £10,000 for a free mediation session provided by Her Majesty’s Courts and Tribunals Service (HMCTS) as part of the court process. It also seeks stakeholders’ views on how the Government can support and strengthen the external civil mediation sector.

At present, the proposals would cover all types of cases allocated to the small claims track, including personal injury and housing disrepair claims (where the threshold is lower than £10,000). The Government is consulting on whether certain case types should be exempt from the requirement to mediate.”

The Law Society, representing solicitors, has responded on its website [here](https://www.lawsociety.org.uk/campaigns/consultation-responses/increasing-mediation-use-civil-justice-system). They think it would prevent some people from accessing justice.

**Damages claims portal project** [**here**](https://www.gov.uk/government/publications/hmcts-reform-civil-fact-sheets/fact-sheet-damages-claims) **(excluding road traffic accidents, see below)**

“The Damages Claims project is a digital service allowing registered legal professionals to issue a claim for damages on behalf of their client on an online portal.” (HMCTS, October 3, 2022, see link above).

“The Damages Claims Portal aims to provide legal professionals with an efficient and fast service that’s fully accessible. We’ve achieved several main outcomes so far, including: 24/7 access to the digital service; a self-service system letting you see the latest activity on your claims; introducing email notifications throughout the process; the ability to create, manage and maintain your firm’s MyHMCTS account - no need to contact HMCTS to add or remove users; the ability to add a correspondence address when a claim is issued so any paper correspondence can be sent to local offices; the ability to allocate unlimited litigators to individual claims as shared access.”

HMCTS said that 25,000 claims had been issued since the portal was launched in May 2021. They say the previous procedure was slow and difficult to use. They have responded to comments and improved the portal. By the end of 2022, the damages claims service will introduce the ability:

“to issue and respond to claims where there’s 1 claimant versus 2 defendants, or 2 claimants versus 1 defendant (multi-party) when legally represented; for a judge to provide Standard Directions Orders on a case after reviewing the digital case file - sometimes referred to as allocation to track (small claims, Fast and Multi Track); for a legal representative to request and receive an Interim Judgment with subsequent Judges Directions Order for damages; for a legal representative to issue a ‘general’ application, facilitate the respondent to reply to the application (if needed) and for the judge to make an order (the journey should allow one or more live applications to be processed at one point in time)”.

The portal is compulsory for professionals since April 2022. If they issue a claim on paper the court will determine whether it should have been issued using the portal and may issue sanctions.

**Small claims**

In January, The Civil Justice Council produced its final report on The Resolution of Small Claims [here](https://www.judiciary.uk/wp-content/uploads/2022/01/20220125-CJC-Small-Claims-Report-FINAL-2.pdf). Also in January, it held its 10th National Forum on Access to Justice.

**Practice Direction 51Zc** [**here**](https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part51/practice-direction-51zc-the-small-claims-paper-determination-pilot#:~:text=1.1%20This%20Practice%20Direction%20is,all%20parties%2C%20as%20is%20currently) **The Small Claims Determination Pilot in Six Courts**

**“1.1** This Practice Direction…provides for a pilot scheme to be called the ‘Small Claims Paper Determination Pilot’ to test a procedure which will enable the court to direct that a small claim will be determined without a hearing without requiring the agreement of all parties, as is currently required under rule 27.10 (“the Pilot”).

**1.2** The Pilot will commence on 01 June 2022…and will terminate on 01 June 2024 unless extended… Evaluation may be undertaken as the pilot proceeds and an interim report or reports may be made before the end of the pilot.

**1.3** Subject to [exceptions below] the Pilot shall apply to all small claims in the County Court sitting at Bedford, Luton, Guildford, Staines, Cardiff and Manchester…which are issued after the Commencement Date…”

In these small claims, the judge will give a reasoned decision as to whether the case can be determined on the papers, without a hearing. Critics have said that this removes the right to trial but the Ministry of Justice has denied this because litigants will have a right to appeal the determination before a different judge.

**RTA (Road Traffic Act) Portal (whiplash claims etc)**

This portal was meant to provide an easy procedure for litigants in person but the data for three months up to November 2021 showed that 6,233 claims were made by unrepresented claimants, yet 62,126 were represented by a traditional law firm or an ABS (alternative business structure). Only 108 claims came from claims management companies. Some polls show that many claims firms have moved away from handling small value road traffic claims.

**Costs**

The Civil Justice Council issued a consultation on costs which closed in September 2022. The Law Society’s response is [here](https://www.lawsociety.org.uk/campaigns/consultation-responses/civil-justice-council-consultation-on-costs).

**Fixed costs – update on Rupert Jackson’s reform proposals**

In November 2022, speaking to the Civil Justice Council national forum, Lord Bellamy said that the extension of fixed recoverable costs would be delayed until October 2023. Instead of expanding the fast track, the Government appears to be accepting Sir Rupert Jackson’s suggestion for a new intermediate track. While fixed costs would obviously allow parties to understand the cost of a bringing or defending a case and would ensure proportionality, the goal since the Woolf reforms of the 1990s, lawyers are worried that the costs might be fixed too low. They would be driven out of civil work and people would be left to represent themselves. Remember, however, that only the tiniest fraction of civil cases ever gets to court.

**SLAPPs, Strategic Lawsuits Against Public Participation – clamping down on wealthy litigants trying to gag critics**

Following widespread complaints about Russian oligarchs behaviour, and a consultation, the Government responded that it would clamp down on the misuse of these strategic lawsuits. It introduced amendments to the Economic Crime and Corporate Transparency Bill 2022-23. The court will be able to strike out as an abuse of process "any statement of case which can be reasonably understood as having the purpose of concealing, or preventing disclosure or publication of, any information likely to be relevant to the investigation of an economic crime".

**Collective actions and litigation funding**

The European Parliament has accepted a report by German MEP Alex Voss, which recommends a fully regulated litigation funding industry, with a 40% cap on fees that can be taken from damages awarded and a requirement for claimants to disclose that they are funded. Representors of litigation funders have retorted that that this would destroy part of their market. Litigation funders take high risks and defendants use every type of delaying tactic, which ramps of costs. See Law Society *Gazette*, October 24, 2022 (Online edition), abstracted on *Westlaw* on 25 October. (My comment: many funders are international businesses and London’s courts and arbitration services are heavily dependent on foreign parties litigating in London so this is important. Also, of course, the UK may well copy any EU legislation). The EU thinks that voluntary regulation and policing, the soft approach that exists in the UK, has not worked.

**Litigants in person**

On January 26, 2022, the Ministry of Justice published an interim report on the progress of a two year Legal Support for Litigants in Person (LSLIP) Grant, which commenced in 2020. The grant funded 11 projects:

“Early evidence suggests that the advice and support provided is improving client outcomes, including increasing client understanding of how to resolve their problem and increasing client confidence to take action promptly. This is helping to resolve problems at an earlier stage, before they reach court or tribunal.” (Press release [here](https://www.gov.uk/government/news/interim-report-on-the-legal-support-for-litigants-in-person-grant-published--2)).

**Open Justice – court watching**

On June 28, 2022, HMCTS updated their guidance on observing a court or tribunal [here](https://www.gov.uk/guidance/observe-a-court-or-tribunal-hearing). (Obviously this will be kept up to date). The webpage provides useful links and explains what an observer may and may not do, whether observing online or in the courtroom, such as not taking photographs). Judicial office holders were also issued with new guidance.

**Open Justice – Court Reporting**

The House of Commons Justice Committee published a report in November 2022, *Open justice: court reporting in the digital age Fifth Report of Session 2022–23* on the Parliament website [here](https://committees.parliament.uk/publications/31426/documents/176229/default/)

FURTHER READING

The many speeches of Vos MR, too many to list and analyse here.

For commentaries and news, see *Westlaw* current awareness, the Law Society, the NLJ and the *Solicitors Journal*.

# Chapter 11 alternatives to the civil courts

**Tribunals**

The Judicial Review and Courts Act received royal assent on 28 April. It protects some decisions of the Upper Tribunal from Judicial Review.

**Family breakdown and mediation**

In January, Minister of Justice Dominic Raab announced a further £1.3 million to extend the family mediation voucher scheme. The press release said that since its launch in 2021, 4,400 vouchers had been issued for disputes over children or finance. The aim was to avoid lengthy and costly battles clogging up the courts. 77% of the first 2000 mediated cases had reached full or partial agreement, said the Family Mediation Council, who runs the scheme. Mediation can be undertaken by other family members, not just separating parents. The press release very usefully explains to the public, in simple language the family mediation process [here](https://www.gov.uk/government/news/family-mediation-scheme-to-help-thousands-more-parents). An independent professional helps the parties to reach a solution which suits them both. The parties remain in control of the dispute, it is less stressful and is takes place in private, unlike a court hearing.

This is part of a major overhaul of family courts. Domestic violence courts have recently been introduced and in 2022, free legal aid has been provided for sufferers of domestic abuse applying for court orders. The Divorce, Dissolution and Separation Act 2020 came into force on 6 April, introducing “no fault” divorce. A couple can now apply jointly and make a joint statement to the effect that their relationship has broken down irretrievably. After a short wait, they will be granted a “conditional order of divorce”. I consider that this should have been done decades ago and I would expect that most professionals, including lawyers and judges, would agree with me:

“Previously, one spouse was forced to make accusations about the other’s conduct, such as ‘unreasonable behaviour’ or adultery, or face years of separation before a divorce could be granted. This was regardless of whether a couple had made a mutual decision to separate.” (Press release [here](https://www.gov.uk/government/news/blame-game-ends-as-no-fault-divorce-comes-into-force?utm_medium=email&utm_source=)).

The head of Relate said this was “the biggest shake-up in divorce law for 50 years”.

Unsurprisingly, following his extension of mediation, in November 2022 Mr Raab also announced that he was planning to make mediation the default process for divorce cases to stop “warring couples clogging up the family courts system”. Parents who bring vexatious claims to the family courts will face financial penalties. He believes “too many parents are overwhelming the overstretched courts system with claims motivated by personal revenge rather than the children's best interests”. “One option understood to be under consideration is measures to make it easier to award substantial legal costs against the parent thought to be abusing the court system for their own interests”. (*Westlaw UK* abstract, paraphrased).

Nevertheless, in November, the President of the Family Division, giving the 2022 John Cornwell Lecture at the Family Mediation Association conference, criticised the current nature of mediation information and assessment meetings, which are currently compulsory for most divorcing couples, pre-court. He said they were “not working as intended” and suggested that they should be replaced with a meeting with a generalist professional who could give people advice, guidance and information about parenting after separation and, if necessary, financial matters, referring the couple to a range of local services, not just family mediation.

**Increasing the use of mediation in civil disputes**

In 2022, the Government also consulted on referring all small claims (ie under £10,000) to a free mediation session as part of the court process. Responding in October 2022, the Civil Mediation Council suggested that the proposed one-hour meetings should be extendable and vouchers should be offered to allow parties to access further mediation.

**Mediation in commercial disputes in private international law**

In February 2022, the Government opened a consultation on whether the UK should sign and ratify the Singapore Convention on Mediation 2018.

“[A] Private International Law agreement which establishes a uniform framework for the effective recognition and enforcement of commercial mediated settlement agreements across borders. It provides a process whereby someone seeking to rely upon a mediated settlement agreement can apply directly to the competent authority of a Party to the Convention to enforce the agreement…

The Convention was negotiated by the United Nations Commission on International Trade Law (UNCITRAL) and came into force on September 12, 2020. It currently has 55 signatories and nine parties have ratified it”. (Press release, February 2nd).

I cannot explain the two year delay before the UK Government even launched this consultation, given that the press release acknowledges that the UK mediation sector was already estimated to be worth over £17 billion annually, back in 2020.

# Chapter 12 Criminal Procedure

**The usual chaos – but worse**

History repeats itself as the criminal courts have acquired a “common platform”, which is meant to link up the criminal courts with all of their related agencies and professional users. If one reads only HMCTS updates, one would imagine it to be working, as it is still being “rolled out” around England and Wales. Instead, I was alerted to its uselessness when I telephoned ten judges in September 2022. I had not even asked them about it. It has presented overwhelming problems since its introduction in September 2020. Court staff became so exasperated about it that they went on strike from 24th to 30th October 2022, causing many cases to be postponed. By January 2022, HMCTS had spent £236 million on it. By October, the system was live at 101 courts but the Government paused the further “roll-out” of the Common Platform and announced a review of it, in November 2022.

The barristers’ strike in September 2022 worsened the Crown Court backlog, which had reached almost 59,000 by June 2022. The Government aims to get the backlog reduced to 53,000 by 2025. In November 2022, appearing before the Justice Select Committee, the DPP said that in order to achieve this target, the Government would have to increase judicial sitting days, expand the CPS and pay prosecution lawyers more, in line with the increase promised to defence barristers.

**The Judicial Review and Courts Act 2022**

This has effected a number of changes to procedure in magistrates’ courts. It will enable more work to be processed without a hearing and this has made it, and plans for it, very controversial over the years. The changes are explained by P. Hungerford-Welch at [2022] Crim. L.R. 908. The article is descriptive, not evaluative so readers are recommended to search for the very many critiques, old and new. Most importantly, for years there has been concern that the proposed option to plead guilty online would risk people pleading guilty without legal advice and without understanding the legal requirements of the offence to which they were pleading guilty and thus whether they were indeed guilty in law. There were also concerns that people would thus generate a criminal record with no real understanding of the ramifications for their reputation, career and such issues as overseas entry and visa requirements. Of course, where elements of procedure can be conducted in writing without a hearing, these concerns are magnified when the accused is under 18.

1. **Automatic online conviction option**: this can be offered for offences specified by statutory instrument, under certain conditions, as follows. The provision only applies to summary, non-imprisonable offences. The accused must be an adult and have been served with relevant documents, including a written charge. They must have pleaded guilty and agreed to this procedure. Penalties are limited to a fine and the endorsement of a driver’s record, as well as compensation and costs. A magistrates’ court can set aside a conviction that appears to them to be “unjust”. There are some similarities to the existing single justice procedure.
2. **Plea before venue and allocation**: this can be done without a hearing. The court must give the accused written information, including a statement of the charge, an explanation of the process. They must ask whether the person wishes to give a written indication of plea and, if so, whether they plead guilty or not guilty. The rest of the procedure is explained in the article. Where the accused has made clear that they would not accept a summary trial, the court does not have to conduct an allocation hearing.
3. **Where an adult is charged with low value shoplifting**, the court must, in writing, ask whether they wish to elect trial in the Crown Court.
4. **Determining plea and venue in the absence of the accused:** s.9 of the Act provides the same procedure and conditions for allocation and plea before venue hearings which used to be different.
5. **Sending the case to the Crown Court:** can now be done without a hearing.
6. **Sending cases back to the magistrates’ court from the Crown Court:** this procedure and relevant conditions are now set out by s.11. This power is not new. Those under 18 do not and never have had the right to elect Crown Court trial. A Crown Court trial is permitted only in limited circumstances. The Act now requires a Crown Court to satisfy itself that trial on indictment is appropriate.
7. **What happens when a child turns 18 pre-trial?** This is made much clearer by s. 12 of the Act. Where the offence is summary or triable either way, the youth court can at any time pre-trial, remit the case to the adult magistrates’ court for trial.
8. **Parental involvement:** it was already a requirement that where a person is 16 or 17, the court MAY, and if they are under 16, MUST order the attendance of a parent or guardian, unless the court is satisfied it would be unreasonable to do so in the circumstances. The 2022 Act introduces a requirement that where any stage of the proceedings is conducted in writing, the court may/must ascertain whether a parent or guardian is aware that the proceedings are taking place. And, where it appears that no-one is aware, the court must provide written information to at least one such person. The same is required for a written indication of plea.
9. **Magistrates sentencing powers:** in May 2022, these were doubled to one year’s imprisonment, by bringing into force s. 13 of the 2022 Act. This originally appeared in Criminal Justice Act 2003 but was never brought into force. This is designed to free up 1,700 Crown Court sitting days.

**The Police, Crime, Sentencing and Courts Act 2022**

Elements of this “landmark” Act, as the Government has called it, have been subject to a lot of criticism too, when it was at the proposal stage and since it was published as a bill. Its proposers, who were then Conservative Minister of Justice and Lord Chancellor, published a useful letter to two prominent Labour MPs, David Lammy and Nick Thomas-Symonds, defending the Government’s aims in the Bill. They had spoken in the debate on the bill. The letter is in plain language and has been updated to November 2022. It is [here](https://www.gov.uk/government/publications/police-crime-sentencing-and-courts-bill-2021-overarching-documents/letter-from-home-secretary-and-lord-chancellor-following-second-reading). The revised version of the Act is on the legislation website [here](https://www.legislation.gov.uk/ukpga/2022/32/contents). Much of the Act does not concern this textbook, because it makes changes to criminal law and sentencing but the parts relevant to the chapter on criminal procedure are as follows.

s. 45 on pre-charge bail. This is an attempt to sort out mess and confusion produced by previous Conservative legislation. The letter usefully explains what is law and what is policy and Government policy on how the law ought to be used.

Part 6 on cautions. Many types of caution had been created, as can be seen from the 2020 edition of the textbook. This Part reduces them to two for adults, diversionary and community. It introduces a code of practice and provides for regulations to be made on multiple cautions.

Section 157. This amends the conditions for remanding a child other than on bail.

Sections 196 juries. This provides for British Sign Language interpreters for deaf jurors.

Sections 198-202 Transmission and recording of court and tribunal proceedings. S.198 provides that a court or tribunal may direct live streaming of proceedings to designated live-streaming premises (designated by the Lord Chancellor) or to an individual identified to the court. The court may direct recording. The Lord Chancellor, with the concurrence of the Lord Chief Justice or the President of Tribunals or both, may make regulations specifying the type of proceedings that this applies to and specifying the matters the court must take into account or be satisfied of before making a direction. S. 199 makes it an offence to make or attempt to make an unauthorised recording or transmission of an image or sound in relation to remote proceedings. S.200 permits directions for live links in criminal proceedings. These have been used in practice for a number of years. Where a juror is permitted to participate through a live link, this must apply to the whole jury. All of this merely puts into permanent legislation what happened during the pandemic under emergency legislation. It was normal practice in Crown Courts to place the jury in a second courtroom and the press and others in a third courtroom, with live links to proceedings in the main courtroom so that they could observe/participate in the trial.

**Advocates’ remote appearances at Crown Court hearings**

In February 2022, the LCJ posted a message giving practice guidance on advocates’ remote appearances at the Crown Court [here](https://www.judiciary.uk/guidance-and-resources/message-from-the-lord-chief-justice-remote-attendance-by-advocates-in-the-crown-court/#:~:text=Attendance%20by%20Advocates-,1.,are%20required%20as%20in%20court.). Naturally, lessons have been learned from the Covid-19 pandemic, when advocates and defendants were more likely to appear online (and this was almost universal in the civil courts, rather than the criminal court). Traditionally, during plea and case management hearings, courtrooms would be full of advocates waiting to be heard very briefly, for a few minutes’ exchange with the judge. All of this should have been done on screen, in my opinion, to save the advocates time and money in travelling to the court, especially as defence advocates are so badly paid. Now, at last, judges may permit this. Resident (managing) judges at Crown Court venues have set down their own protocols and practice guidance permitting this, as they may. The guidance issued by the LCJ is national guidance but judges are free to establish local guidance and expectations.

**SFO**

Companies under investigation are spending ten times as much as the SFO on legal and investigation fees. The Bureau of Investigative Journalism considers that this imbalance of resources and a reluctance to prosecute is hampering the battle against organised crime. Lisa Osofsky became the Director of the SFO in 2018 and dropped 30 cases by November 2021, by contrast with the preceding five years, when 13 cases were dropped. (*Times*, November 15th, 2021).

**Special measures in rape trials**

In November 2021, the DPP urged judges to use their power to exclude the public from jury trials, so that the victim was not faced with the defendant’s supporters, in the hope that more victims would pursue their attackers, by giving evidence.

**The quantum of proof and jury directions**

The arguments are visited again by P. McKeown in an article at [2022] Crim. L.R. 893. He is of the view that jurors should receive an explanation of the requirement that they should be satisfied that they are sure of guilt. I strongly disagree with him. He thinks that the phrase “beyond reasonable doubt” causes problems for jurors and juries in understanding the meaning of “beyond reasonable doubt” so he approves of the modern trend in successive editions of the Crown Court Compendium to encourage judges to direct juries that they must be satisfied that they are sure. I am very concerned about this because sure does not equate to BRD. BRD is the legal quantum of proof, throughout the common law world and juries are so instructed elsewhere, as they used to be here. I think 12 people can generally work out what a reasonable doubt is, as opposed to a fanciful or hypothetical doubt. He does not provide evidence of widespread difficulties in understanding the phrase, here or overseas (although this does occur occasionally, as case law shows).

**Attorney General’s references on a point of law, following an acquittal: example**

Suella Braverman AG, speaking to the Parliamentary Justice Committee on 25 January 2022, said she would refer the criminal damage acquittals of four people to the Court of Appeal. They were found not guilty by a jury after they tore down a statue of a slave trader in Bristol during Black Lives Matter protests in 2020. (*The Times*, January 26th, 2022). *The case is Attorney General’s Reference on a Point of Law (No. 1 of 2022).* See above, under Human Rights.

FURTHER READING

G. Branston and M. Oliver, “Increased sentencing powers in the magistrates’ court: a summary of problems” [2022] Crim. L.R. 837.

E. Cape and M. Hardcastle, “Recent cases on inferences from “silence”: what is left of the right to silence?” [2022] Crim. L.R. 796.

D. Ormerod and H Quirk, Editorial, “Reforming criminal appeals” [2022] Crim. L.R. 791.

*R. v Mohammad and Mohammad*, [2022] EWCA Crim 380 on the standard of proof and jury directions, see report and commentary at [2022] Crim. L.R. 856.

# Chapter 13 Lawyers

**Diversity stats**

Surveying all 180,000 lawyers in 8,700 law firms, a February 2022 SRA report said that 51% were women, 17% were non-white and 5% were disabled. The BSB published the Bar diversity statistics in January, showing the men still outnumbers women, black people are underrepresented at all levels of the Bar. Women and non-whites are underrepresented among QCs.

In December 2021, 101 new QCs were appointed, including 45 women, 15 non-whites and 5 solicitor advocates. A record number of women were appointed. The chair of the selection panel said this in the press release:

“We were particularly pleased that for the first year ever, the proportion of women amongst those appointed - 45% - exceeds the proportion of women in the relevant segment of the profession. This reflects the high standard of their applications and assessments. The proportion of applicants from a minority ethnic background who have been appointed is also broadly equal to the proportion of minority ethnic advocates in the relevant segment of the profession, although it is disappointing that within that group, there are comparatively few applicants from black African or black Caribbean backgrounds.”

**Diversity issues**

On February 8th, 2022, Lady Justice Nicola Davies gave an informative speech at the launch event of the Inns of Court Alliance for women. It is on the judiciary website [here](https://www.judiciary.uk/speech-the-inns-of-court-alliance-for-women-launch-event/).

In April, the SRA published its first ethnicity pay gap report. The mean average pay gap was 21.5% between whites and non-whites. In February, the BSB published research on gender and ethnicity pay gaps. White males were paid the most; black females the least. In October, the Bar Council produced another gender pay gap report. An October 2022 report by the Law Society and the Black Solicitors Network found that only 90 of 13,000 law firm partners are black.

From September 2022, the LSB is undertaking research into professionals lived experiences of counter-inclusive practices.

In autumn 2022, the UKSC is again offering one-week internships to underrepresented groups at the Bar.

In October 2022, the Bar Standards Board produced a report on tackling bullying and harassment. In November, it published a report setting out how it would support chambers to achieve high standards including in equality, inclusion and access to justice. In November, the Bar Council addressed the finding that minorities are less well paid and more liable to bullying than others.

**Training**

The Bar has scrapped the bar course aptitude test. From January 2023, the minimum pupillage award will be £20,703 for a 12-month pupillage in London and £18,884 for pupillages outside London.

**Training – Ethnicity attainment gap**

The Solicitors Regulation Authority (SRA) has commissioned research by Exeter University into the causes of the long-acknowledged and persistent ethnicity attainment gap in legal qualification outcomes in the UK and other countries. In August, the SRA said that pass rates were increasing. 77% of people who took the first ever SQE2 passed but there were attainment gaps: the higher a candidate’s degree classification, the better they scored, unsurprisingly. Disturbingly, the pass rates were 72% for Asians, 53% for blacks and 85% for whites.

**Lawyers business practices and work**

March 2022 was the 10th anniversary of Alternative Business Practices. There are now 1,500, about 100 of which were licensed by the SRA. The LSB published a report on the state of legal services 10 years on. The Legal Advice Centre at Nottingham Law School became an ABS in 2015. It has secured grants of £5.5 million and advises clients who cannot access of afford legal services. It advises 150 clients a year and holds public education sessions. See Law Society *Gazette*. 53% of law firms in England and Wales are now limited companies.

The unregulated legal services for-profit sector accounts for about 9% of the total market for individual consumers.

According to research by Big Hand on 836 leaders in UK and US lawyers in firms with over 50 lawyers, 45% would leave if asked to work fulltime and almost as many saying they would leave if they had to go to the office more than 3 times a week. half of UK law firms were under pressure from clients to diversify the teams they dealt with. (*Westlaw*, July 26, 2022).

**Consumers**

An October 2022 report by the Legal Services Consumers panel examined the reasons behind lower levels of satisfaction among minority consumers. Many felt they were not listened to or their needs were not understood.

**Money Laundering and SLAPPS (SLAPPS are explained above)**

This is a big international problem and the UK is a hotspot. 60% of firms visited by the SRA in 2020-21 fell short of compliance. An October 2022 report by Spotlight on Corruption found that supervisory bodies were ineffective. They applied too few or no sanctions. For example, the Council for Licensed Conveyancers did not impose any meaningful fines, despite the fact that 62% of the firms it supervised were non-compliant. By summer 2022, 20 firms were being investigated over their involvement in SLAPPS.

**LawTech**

The Council of Bars and Law Societies of Europe and the European Lawyers Foundation have launched a guide to AI.

In a January 2022 speech (one of very many – see Judiciary website) Vos MR again warned that the UK is running out of time to establish itself as the venue of choice for litigation about smart contracts, blockchain and crypto-assets, because practitioners have a tendency to glaze over, failing to understand how these can or will affect every aspect of our lives.

According to a report by software company Ultimedia, the largest law firms are failing to provide a modern digital experience for visitors to their websites, with 86 of the top 100 global practices lacking effective websites. The report states that sites were full of security flaws, ineffective messaging, slow load times and "abysmal" mobile experiences. It warns that firms which ignore the need for digital transformation will "cease to be relevant in a digital-first world". (*Westlaw* abstract, October 4, 2022).

“Daniel Cane, Chief Executive of Inheritance Data, has alleged that more than a billion pounds of inheritance lies uncollected because high street solicitors are failing to uncover bank accounts, share and insurance policies of deceased clients and failing to use the latest technology that could help trace more beneficiaries. Dormant assets held by the Reclaim Fund are currently estimated at £1.3 billion.” (*Times* article, *Westlaw* abstract October 12th, 2022).

LawTech UK received an extra £4 million in funding by summer 2022.

# Chapter 14 Judges

**Racial Bias and the Bench**

This is the Name of a Report published [here](https://documents.manchester.ac.uk/display.aspx?DocID=64125#:~:text=Racial%20Bias%20and%20the%20Bench%20was%20created%20in%20response%20to,judges%20and%20other%20legal%20professionals.) by the University of Manchester. The authors were Keir Monteith KC, Professor Eithne Quinn, Professor Andrea L. Dennis, Dr Remi Joseph-Salisbury, Erica Kane, Franklyn Addo and Professor Claire McGourlay. This report is very welcome on a subject which has been sadly and unforgivably (my words) neglected, as the authors rightly point out, forever (for over six decades in my observations) but readers should be aware of its limitations. 373 legal professionals were surveyed. the respondents do not represent the ethnic mix of the legal profession, the judiciary or the population of England and Wales. It is a report of “perceptions”, peoples’ stories of their experiences and observations, not an observational study. It has to be read very cautiously. For example, if you read the first “key finding”, it says: “Racial bias plays a significant role in the justice system. 95% of the legal-professional survey respondents said that racial bias plays some role in the processes and/or outcomes of the justice system, with 63% saying it plays a significant role, and 29% saying it plays a ‘fundamental role’.” I would observe that most lawyers working in the criminal justice system must, as a matter of common knowledge, acknowledge racial bias, because it is there for all the world to see in the statistics and this has been widely publicised and been the subject of limited research since the 1970s, which is before many of the respondents were born. This finding does not, therefore, tell us anything much. All of the comments on lived experience are necessarily subjective and anecdotal. This does not matter because it is inevitable but there are sweeping generalisations among the respondents’ comments and instances of detailed generalised conclusions based on very limited evidence. Having said that, the report makes some very well-founded and thought-provoking criticisms of, for example, the Judicial Diversity and Inclusion Strategy. There is not the space here to summarize and review the whole report but it makes for very important reading and any attention to this neglected subject is to be welcomed, as a starting point. The most important and valuable element of the report is the series of recommendations.

# Chapter 26 Magistrates

On January 24th, 2022, the Government launched a £1 million recruitment campaign in England and Wales. National recruitment campaigns are very rare but numbers have dwindled dramatically, as explained in this textbook, and 4000 new justices are needed to help tackle the backlog caused by the pandemic. The press release said this was the biggest recruitment effort in the 650 year history of magistrates. This came straight after the announcement about doubling magistrates’ sentencing powers to one year for a single offence, freeing up about 1,700 Crown Court days a year. The Gov.UK recruitment page is [here](https://www.gov.uk/become-magistrate/apply-to-be-a-magistrate). As the press release explains:

“A revised, streamlined recruitment process will be introduced, with applications made online via a new digital recruitment system to modernise candidate experience and enable MoJ to better monitor recruitment information, including the diversity of applicants.”

# Chapter 17 Legal Aid

**Everything gets worse – criminal legal aid**

The most important issue in 2022 is the dire state of criminal legal aid, starved of resources since before 2010. Solicitors are abandoning this work in droves. Barristers are so poorly remunerated they are refusing certain types of work and have been on strike. The Independent Review of Criminal Legal Aid [here](https://www.gov.uk/government/groups/independent-review-of-criminal-legal-aid) at last reported in late 2021. The expert team was chaired by Sir Christopher Bellamy. He decided to treat the job as a scrutiny of the criminal justice system. He recommended (paraphrased):

* Placing LA on a sound financial footing, to attract and retain talent and respect the equality of arms;
* Restructuring pay by removing perverse incentives and encourage efficiency, particularly in early engagement and case preparation; [comment: as recommended by Auld LJ in 2001 and Leveson LJ in 2015 so why has this not been done?];
* Focussing on the earlier stages or “front end” of the system, including police station work, and better engagement between defence and prosecution, not only pre-charge but also post-charge, before the first hearing in the Magistrates’ Court, and in the pre-trial procedure in the Crown Court;
* fostering a more joined-up approach to criminal legal aid in the criminal justice system as a whole, both nationally and locally;
* supporting full disclosure at the earliest opportunity, case ownership, and engagement much earlier than ‘the door of the court’;
* helping to improve communications between the defence, police, CPS, courts and prisons, with the principle of case ownership firmly in mind;
* paying particular attention to youth justice addressing diversity issues relating to criminal legal aid.

There is very little new here. I have been reading most of these recommendations since the 1990s so I read them again with head-banging frustration.

His central recommendation was a pay increase of at least 15%. In April, reacting to the Government’s response, the Law Society’s President said, in giving evidence to the House of Commons Justice Committee, that the pay increase for solicitors effectively amounted to only 9% and they had not had a significant pay rise for 25 years. In summer 2022, the Minister of Justice announced 15% for barristers but they still refused work and went on strike in September because it is not immediate but staggered. In October, solicitors called for parity. They yet again pointed out that even though solicitors cannot strike, they have voted with their feet. In February, the Law Society had warned that duty solicitor numbers had dwindled, thus depriving accused individuals of adequate advice.

“over 60% of duty solicitors in Bristol, Cornwall, Devon, East Sussex, Lincolnshire, Wiltshire and Worcestershire are over 50. There are no criminal duty solicitors under 35 in Cornwall, Lincolnshire, Wiltshire and Worcestershire, and only one in Norfolk, Shropshire, and Warwickshire. In 2018 nine counties had two or fewer duty solicitors under 35, which has now risen to 16.” (Westlaw).

The criminal justice system would be “brought to its knees” by an exodus. In November 2022, reacting to the Chancellor’s autumn statement, they commented that the criminal justice budget had effectively been cut and this might lead to a “system failure”. Access to justice had “never been so endangered”.

In May, in giving evidence to the House of Lords Constitution Committee, the exasperated Lord Chief Justice joined lawyers in urging the Government to accept all of Christopher Bellamy’s recommendations, above “and really get on with it”. Throughout 2021-22, barristers and solicitors were already refusing to do loss-making work.

So some criminal defendants were left unrepresented or inadequately represented. Judges who released defendants from custody and criticised the Government’s lack of funding were castigated by the High Court.

By September, Harrow Law Centre took the unusual step of applying for a criminal law contract because so many of their clients were victims of crime or in danger of being criminalised. Law Centres used to be banned from offering criminal legal advice so as not to put local criminal law firms in jeopardy.

**Everything gets worse – civil legal aid and civil support**

According to research published in November 2022, no fewer than 56% of local authorities could be considered “legal deserts”, leaving 12 million people without access to legal services over housing issues.

Some charities were struggling in 2022. In July, Support through Court, which helps litigants in person, pleaded for £400,000 as Government changed the way it distributed funds. Happily, by August, four universities stepped in to help out…but only in four locations.

Lawyers themselves stepped into the breach by establishing some free (pro bono) schemes. In Manchester, an advice scheme for victims of the Windrush scandal was reopened, with funding from the Access to Justice Fund and help from immigration lawyers and eight City firms. They aim to alert people to the compensation scheme, using community outreach tactics. In June, a scheme was established to encourage firms to allow their non-lawyer staff to offer pro bono services. Large law firms have had pro bono units of lawyers for decades. In august, Freshfields announced they had secured the largest ever pro bono costs order. The Ministry of Justice was ordered to pay them £130,000 in a case Freshfields had won in litigating for the rights of human trafficking survivors in custody. A fund established by City law firms to train social welfare lawyers has raised £600,000, including a £20,000 donation from the Law Society.

It is fair to say that the Ministry of Justice have not done nothing. In November 2021, they proposed a non-means tested scheme for people facing possession proceedings and thus homelessness. In December, they announce non-means tested legal representation at inquests. In January they announced an Early Legal Advice pilot for civil problems in Manchester and Middlesborough. This started in October 2022 for a 5 month testing period to prepare for a full-scale pilot. About 20,000 people may receive aid. In October 2022, they changed the legal aid scheme to offer £10 million a year to offer free advice and representation for victims of domestic abuse to obtain protection orders and notices.