

Amicus *Curiae*

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and submission information.

EDITOR'S INTRODUCTION

MICHAEL PALMER

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Welcome to the first issue of the third volume of the new series of *Amicus Curiae*. We thank contributors, readers and others for supporting the progress that the relaunched journal is making.

In this issue, a number of contributions comprise the first of two special sections which will feature in this and the next issue of the journal, guest-edited by Professor Carl Stychin, and addressing questions of 'Law, Public Policy and the Covid Crisis'. Based on a series of IALS remote seminars held in the academic year 2020–2021, the essays that have been contributed to this collection offer important analysis of various aspects of the impact of Covid-19. Professor Stychin's introduction contextualizes the first special section in the emerging discourses on the nature of the legal changes often made in response to the pandemic, and broader issues such as social justice and the debate about the use of public health for purposes of (sometimes manifest, sometimes latent) enhanced state control at the expense of individual liberties. In this way, the essays help us better understand central

issues in access to justice, legal reform and public health.

The contribution by Dr Patricia Ng (Mary Ward Legal Centre), entitled 'Delivering a Pro Bono Clinic During the Pandemic: Some Thoughts on Access to Justice, Everyday Problems and the Current Legal Landscape', looks at the manner in which the Mary Ward Legal Centre has assisted many people through its legal clinic's pro bono provision of legal services, and analyses the impact of Covid-19 on the manner in which these services are delivered. She gives particular attention to issues of access to justice, the relationship between law and everyday problems and digitalization of the courts.

In his Note, Bilika Simamba provides an analysis, with reference to the Cayman Islands, of (i) the manner in which matters pending before the courts or public authorities are sometimes affected by new legislation, and (ii) issues such as retrospectivity, to which amendment of laws may give rise.

In her Visual Law contribution, 'Repealing the Vagrancy Act 1824', Dr Patricia Ng examines and illustrates the question of homeless persons and their

difficulties, especially those arising from the 1824 Act. That legislation continues to impact on society in England and Wales, in particular by criminalizing the act of rough sleeping, which unfairly disadvantages some of the most vulnerable people in society, and with enforcement measures often causing street homeless people much distress. The 1824 Act has the effect of entrenching street homelessness, and should be repealed.

The Editor also thanks Amy Kellam, Maria Federica Moscati, Simon Palmer, Patricia Ng and Marie Selwood, for their kind efforts in making this Issue possible.

**INTRODUCTION TO THE SPECIAL SECTION:
LAW, PUBLIC POLICY AND THE COVID CRISIS—
PART ONE**

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[A] BACKGROUND TO THE SPECIAL SECTION

It is impossible to overstate the worldwide impact of the Covid-19 pandemic on law and public policy since 2020. In fact, prior to the pandemic, the scale of the legal response to the disease would have been unimaginable, as lives have been changed beyond recognition. Whether through ‘stay-at-home’ orders, the closing of businesses and schools, the furlough scheme, the moratorium on housing evictions, the curtailment of public procurement requirements, or the development of online courts, every aspect of society was forced to adapt. Moreover, the process of lawmaking itself changed, as the accountability of the government to legislatures around the world was severely curtailed because of the emergency. In the midst of these dramatic developments, and as the ‘first wave’ of the pandemic ravaged the United Kingdom (UK) under national ‘lockdown’, my colleagues and I at the Institute of Advanced Legal Studies (IALS) sought to respond with a range of online events designed to document this new reality.

Throughout the 2020–2021 academic year, it was my privilege to host a series of remote seminars featuring speakers who had responded to a call for papers on the broad topic of ‘Law and Humanities in a Pandemic’. This theme was designed to recognize the location of IALS within the School of Advanced Study of the University of London. The School’s aim is to promote and facilitate academic research in the humanities. Within the School, we have been keen to stress the important role of the humanities in ‘making sense’ of Covid-19. As well, we wanted to emphasize the importance of law in being ‘centre stage’ within the humanities. The result was a wide-ranging and fascinating monthly series of seminars which attracted a worldwide audience as we moved through the various stages of the pandemic. The seminars remain accessible on the Institute’s

website, and we believe that they form an important part of the historical record of our time (see Institute of Advanced Legal Studies: 2021)

Following on from the seminar series, the participants were invited to submit written versions of their papers for publication. This has led to three complementary outputs. We begin with this special section—the first of two—on ‘Law, Public Policy and the Covid Crisis’ in our open access journal, *Amicus Curiae*. The second special section will follow in issue two of this volume. In addition, the remaining papers arising from the series will appear in an edited book entitled, *Law, Humanities and the Covid Crisis*, which will be published in the OBserving Law series of open access publications by the University of London Press (Stychin 2022). Together these collections provide an important intervention in our understanding of the ongoing changes wrought by the pandemic.

[B] THE EMERGING SCHOLARSHIP

These articles can be located within a rapidly developing body of scholarship which has sought to understand the legal landscape of Covid-19. An early contribution to this literature, from an American perspective, underscores the huge range of legal fields upon which the response to the virus has had an impact. In *Law in the Time of COVID-19*, academics from Columbia Law School have documented the impact of Covid-19 on such diverse fields as prisoners’ rights, elections law, the justice system, environmental law, the right to privacy, bankruptcy law, corporate transactions and contactless payments (Pistor 2020).¹ Such work is of the utmost practical importance in order to map the widespread and rapid legal changes which have resulted from the pandemic.

Further, the impact of governments’ responses to the pandemic on ‘justice’ itself has been subjected to detailed analysis and critique by a number of commentators. For example, in *Justice Matters: Essays from the Pandemic*, the focus is on the relationship between the public health crisis and the wider issues of social justice which have been laid bare by Covid-19. As stated in the ‘Preface’ to that collection,

as the pandemic gathered pace, we started to see much more clearly that those in food poverty, from BAME backgrounds, in poor housing, insecure employment, the homeless, the elderly and the disabled were the worst affected. The virus exposed the underlying structural health, race and class inequality in British society (Brennan & Ors 2020).

¹ A similar compilation which demonstrates the plethora and diversity of legal areas which have been shaped by Covid-19 has been assembled by the Dickson Poon School of Law (nd).

The contributors to that collection highlight the wide range of ways in which the pandemic (and, more importantly, the responses to it) not only have reflected, but also have exacerbated those social injustices. Whether it be in the fields of immigration, housing, welfare, discrimination, or youth justice—to name only a few—Covid-19 has demonstrated that the UK Government’s oft-repeated claim that the pandemic does not discriminate is far from the reality of the pandemic, both domestically and internationally.

Those uneven and unequal ways in which the pandemic has operated is also the focus of *Pandemic Legalities* (Cowan & Mumford 2021). In this important book, the analysis is organized around two key concepts—justice and the social. Crucially, the pandemic is not seen in isolation, but within the broader context of the many years of the deliberate UK Government policy of austerity which preceded it. As the editors argue in their introduction:

[t]he COVID-19 pandemic has impacted on all areas of law, and the impact has been experienced disproportionately along the lines of race and poverty. ... demonstrating the ways that the responses to the pandemic have often exaggerated and made apparent the issues which were already in place, often submerged or obscured (Cowan & Mumford 2021: 6).

As well as these analyses of substantive legal responses to the pandemic, no less important has been critique of how the pandemic has shaped the law-making process in the UK and elsewhere. In this regard, the pandemic has demonstrated the continuing relevance of the fundamental question ‘What is law?’ within the context of executive rulemaking and the curtailment of legislative oversight. This concern has been articulated most forcefully by the former President of the UK Supreme Court, Baroness Hale of Richmond (2020). She argues that the Coronavirus Fund Act 2020 provided the Treasury with massive spending power, which was combined with sweeping powers granted to the Government through the Coronavirus Act 2020. Baroness Hale’s central argument is that regulations enacted under the legislation contained ‘draconian powers for the police and some others to enforce the lockdown’ (ibid 5). However, they also caused confusion for the general public regarding the relationship between law and guidance, particularly through the concept of ‘reasonable excuse’. Although Baroness Hale recognizes that this surrender of control may have been ‘inevitable’, she also emphasizes the need for the restoration of parliamentary oversight in order to ‘get back to a properly functioning Constitution as soon as we possibly can’ (ibid 5).

Although the emphasis on the draconian character of the restrictions on freedom has been a source of concern for many—as being emblematic of an increasingly authoritarian state—an alternative interpretation of the laws of coronavirus has been put forward by Kirton-Darling & Ors (2020). They dispute the claim that the regulations amounted to a ‘power grab by an overbearing executive determined to outlaw freedoms’ (S303-S304). Rather, their argument is that the law of the pandemic is best understood in terms of Bevir’s (2020) concept of the ‘stateless state’. Specifically, in Bevir’s analysis, the state can be conceptualized as ‘inherently made up of different and competing actors inspired by different beliefs and traditions’ (ibid 6). For Kirton-Darling & Ors, a close reading through the lens of the ‘stateless state’ reveals Covid-19 law to be a site of ‘contestations and complexities’ (2020: S304) with ‘competing narratives and rationalities’ (S306). Thus, for example, by virtue of section 55 and Schedule 25 of the Coronavirus Act 2020, remote court hearings are made publicly accessible for the first time. Similarly, in the context of social care, legislation emphasized the role of ‘values and principles’ (Kirton-Darling & Ors 2020: S313), as well as professional discretion and ‘local knowledge’ (ibid S314). In this way, an understanding of legal interventions during the pandemic becomes more complex and nuanced.

[C] OUTLINE OF THE SPECIAL SECTION

The three contributions to this section explore a range of legal and public policy arenas that arise out of the Covid-19 crisis. The diversity of the articles demonstrates the breadth of the issues. The authors here focus on lawmaking, governance and the management of an emergency situation. Their analyses illuminate both the response to Covid-19 itself, as well as the broader political context in which the virus appeared.

The section begins with an examination of pandemic decision-making by governments and the role of data. In this article, Ting Xu examines the relationship between mathematical modelling and rulemaking. She unpacks the challenges of model-based governance in the context of the extreme uncertainty which the pandemic presented. This is followed by a contribution by Sabrina Germain, whose focus is on the wider issues of healthcare resource allocation in the context of the UK’s National Health Service. She explores the role of medical professionals in healthcare law, guidance and policymaking during the pandemic. Her article raises important issues regarding the ethical dilemmas which healthcare workers have faced as a result of governmental responses to Covid-19. Finally, Peter Edge demonstrates the importance of the geographic, constitutional and historical context of responses to the pandemic. He

provides a close examination of the distinctive legal interventions on the Isle of Man. This article raises wider issues of democratic accountability when a situation is characterized as an emergency.

These three excellent contributions to last year's seminar series are complemented by the second special section devoted to the pandemic. This will appear in volume 3, number 2 of *Amicus Curiae*.

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Legislation

Coronavirus Act 2020

Coronavirus Fund Act 2020

UNCERTAINTY, IGNORANCE AND DECISION-MAKING: LOOKING THROUGH THE LENS OF MODELLING THE COVID-19 PANDEMIC

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Abstract

A great deal of decision-making during crises is about coping with uncertainty. For rulemakers, this poses a fundamental challenge, as there has been a lack of a rigorous framework for understanding and analysing the nature and function of uncertainty in the context of rulemaking. In coping with crises, modelling has become a governance tool to navigate and tame uncertainty and justify decisions. This is because models, in particular mathematical models, can be useful to produce precise answers in numbers. This article examines the challenges rulemakers are facing in an uncertain world and argues that one of the most important challenges lies in rulemakers' failures to understand the nature of uncertainty and ignorance in the contested arena of science for decision-making. It focuses on the relationship between uncertainty, ignorance and decision-making through a case study of the interaction between modelling and rulemaking in the Covid-19 pandemic. In so doing, this article provides an alternative strategy to number- and model-based rulemaking in an uncertain world. It provokes a rethinking of using science to measure and govern human affairs and the impact of numbers and quantification on law.

Keywords: uncertainty; ignorance; decision-making; rulemaking; models; mathematical modelling; quantification; Covid-19.

¹ The author would like to thank Roger Cotterrell, Monica Di Fiore, Theodore Konstadinides, Tim Murphy, Amanda Perry-Kessaris, Andrea Saltelli, Carl Stychin and Maurice Sunkin for their suggestions and comments on an earlier draft of this article. All remaining errors are my responsibility.

[A] INTRODUCTION

Risks and uncertainties have greatly increased in contemporary society and posed a fundamental challenge to decision-making;² the sudden outbreak of Covid-19 being one of the prominent examples. The novel coronavirus, SARS-COV-2—about which we knew very little when it emerged—quickly spread all over the world. ‘Part of the considerable difficulty in managing this epidemic’, a UK government health adviser wrote to Richard Horton, Editor-in-Chief of *The Lancet*, is that we ‘have some major gaps in knowledge (especially around asymptomatic transmission by age)’ (Horton 2020: 935). The scale of uncertainty and ignorance about Covid-19 is unnerving (Harford: 2020). Rulemakers need to make decisions on intervention measures. But they also need to minimize the negative impact of interventions on aspects of health, both physical and mental, as well as on wider social and economic life. As a result, rulemakers resort to modelling when making rules to prevent the spread of the epidemic.

Modelling has greatly influenced decision-making and mobilizing resources in managing the pandemic. Mathematical modelling has produced various sets of data on Covid-19, including the number of infections and fatalities etc. Countless rules made by the UK Government to prevent the spread of the epidemic, including maintaining social distance, isolation and lockdowns, are based on these data. The Imperial College team’s model updated in March 2020, in particular ‘Report 9’ (Ferguson & Ors 2020), played a crucial role in changing the UK Government’s policy on the pandemic (Adam 2020a: 318). Prior to the dramatic change in policy, the UK Government had hoped to rely on herd immunity—large

² The term ‘decision-making’ in this article primarily refers to ‘rulemaking’, although it encompasses ‘law-making’, which is also within the scope of this article. In the UK the term ‘law-makers’ is usually synonymous with ‘Parliament’ rather than ‘government’. But the rules to deal with crises such as the pandemic are made by the Government. Indeed, the question of how much legislative scrutiny governmental decisions to deal with crises should receive (and how much opposition in systems where this is relevant) is itself a topic of active discussion. Related to this is the wide range of regulatory powers which modern governments have (the precise form depending on particular constitutional arrangements) which mean that parliaments are not central or even important to much rulemaking. For a discussion of legislation and rulemaking and the delegation of rulemaking functions to the government, see eg Baldwin (2003). I am aware that the term ‘government’ has a broad meaning, as Foucault (1982: 789-790) suggested:

This word [government] must be allowed the very broad meaning it had in the sixteenth century. ‘Government’ did not refer only to political structures or to the management of states; rather, it designated the way in which the conduct of individuals or of groups might be directed: the government of children, of souls, of communities, of the sick ... To govern, in this sense, is to control the possible field of action of others.

When discussed in this article, the term ‘government’ refers to its narrow meaning, that is, ‘the political structures or the management of states’. It is also mainly concerned with the UK Government.

proportions of the population getting ill first and then getting better and becoming immune to the virus (Boseley 2020).

Managing the Covid-19 pandemic has posed a fundamental challenge to the ways in which rules³ and decisions are made and to what number- and model-based rulemaking can achieve. The UK's Coronavirus Act 2020, for example, has granted government emergency powers to respond to the pandemic. The Covid-19 pandemic has been subject to extensive rules, predominantly by national governments. Further, in an uncertain world such as during a global pandemic, rules need to be made under circumstances where 'facts are uncertain, values in dispute, stakes high and decisions urgent' (Funtowicz & Ravetz 1993: 744). In such an uncertain world rulemaking is being increasingly influenced by knowledge produced by experts across disciplines (see eg Murphy 1997)—the most pertinent example being the reliance by rulemakers upon mathematical models (primarily the officials in the Ministry of Health and the Treasury in the UK context). But the time horizons of epidemiologists and those of rulemakers may differ owing to their different orientations. For example, due to political short-termism, the pressure from business on the Johnson Government has led to a lifting of lockdown when it may not be epidemiologically justified. To what extent can rulemakers navigate and tame uncertainty through mathematical modelling? Or is their reliance on mathematical modelling increasing the uncertainty of rules?

The Covid-19 pandemic has provoked a need to rethink the nature and function of uncertainty in relation to rulemaking and to re-evaluate the relationship between uncertainty, ignorance and knowledge. However, there is lacking a proper taxonomy for understanding and assessing the degree of uncertainty as well as the uncertainty associated with the making of mathematical models. Further, in the UK and elsewhere, rulemakers have relied on models in communicating to the public around key decisions. But outside the relatively circumscribed community of sociologists studying the influence of quantification on governance and the intersection of numbers and power, there is a paucity of serious reflection on using modelling as a governance technique. These problems, if they remain unsolved, will undermine trust in public bodies and the accountability of rulemakers.

This article examines the challenges rulemakers are facing in an uncertain world and argues that one of the most important challenges

³ Rules discussed in this article include legislation and 'governmental' rules that aim to manage and control the Covid-19 pandemic. For a discussion of rule types, see eg Baldwin (2003).

lies in rulemakers' failures to understand the nature of uncertainty and ignorance in the contested arena of science for decision-making. It explores the interaction between mathematical modelling and rulemaking in managing the Covid-19 pandemic as a case study. It draws on interdisciplinary literature on the notions of uncertainty and ignorance, including economics, sociology and philosophy of science, and marks a significant step forward in extending the conceptual framework of understanding these concepts in the context of rulemaking. It also draws upon secondary sources, such as reports on Covid-19, to map the ways in which uncertainty and ignorance have been articulated, constructed and communicated through the interaction between modelling and rulemaking in the Covid-19 crisis. It removes barriers between traditional disciplines such as law and science and pushes the study of the interaction between modelling and rulemaking in fresh directions. First, however, it is necessary to define the scope of this article. Various kinds of modelling have been used in managing the Covid-19 pandemic, including mathematical modelling, financial and economic modelling, as well as social modelling (see the first section of this article for detailed discussion). But due to limited space, this article focuses on mathematical modelling. Likewise, it does not examine whether various techniques (using rules or discretionary powers) are, or are not, helpful to decision-makers when confronted with uncertain data but a need to act.⁴ This important topic will be the subject of a further article. The study in this article also focuses on the interaction between mathematical modelling and rulemaking in the UK.

The first section of this article traces the origin of the influence of numbers and quantification on law to 'the Cartesian dream' (see eg Reinert & Ors 2021) and examines the nature of mathematical modelling. It argues that an examination of the interaction between mathematical modelling and decision-making in a global pandemic is not about finding the 'right numbers' for reducing uncertainties. Rather, it looks at a complex process whereby scientific, political and social factors are blended with the production of numbers to predict the future. This process requires us to look at not only the predictive outputs of models but also the inputs into models, including 'the theoretical underpinnings, the quality and quantity of the empirical data base, and the independence of the evidence supporting the model conceptualization' (Oreskes 2000: 37). The second section of this article argues that it is important to consider the extent of uncertainty both associated with mathematical modelling and embedded in crises. To achieve this goal, it dissects the typology and develops a

⁴ For a general overview of rules and discretion, see eg Harlow & Rawlings (2009: chapter 5).

taxonomy of uncertainty. The third section of this article explains the reason why the conventional views on the relationship between ignorance, uncertainty and knowledge are problematic and re-evaluates the relationship between ignorance and knowledge. The 'Conclusion' summarizes the main findings and provides an alternative strategy to number- and model-based rulemaking.

[B] TRACING THE ORIGIN: THE CARTESIAN DREAM VERSUS UNCERTAINTY EMBEDDED IN MATHEMATICAL MODELLING

Uncertainty and ignorance were under-researched topics in the human sciences for decades, as Smithson (1989: 1) argued. The neglect of uncertainty and ignorance is due to the Western intellectual mentality which has been obsessed with the pursuit of 'absolutely certain knowledge' (Smithson 1989: 1). The subsequent absence of a rigorous framework for studying these concepts in legal studies has made rulemaking in crises such as the Covid-19 pandemic difficult and challenging.

This section traces the origin of the failure to acknowledge the importance of studying uncertainty and ignorance to 'the Cartesian dream': an assumption deriving from René Descartes (1596–1650) that 'science can produce certain truths and absolute power' (Ravetz 2015: xvii). Mathematics and quantification are the key to this vision, as they enable prediction and control (Funtowicz & Pereira 2015: 2). Within this paradigm, it is assumed that it is easy to tame uncertainty with mathematics and quantification, and ignorance is overcome (Ravetz 2015: xviii). Reinert & Ors (2021: 8) also argued that, in the Cartesian dream, 'uncertainty is to be evicted. It exists only in the form of "subtle" scientific inquiry, at the edge of scientific knowledge, and ignorance must be pushed beyond the research problem's boundaries' (see also Ravetz 1994).

Notions of indeterminacy and complexity in mathematics and physics, however, began to emerge at the beginning of the 20th century and cast doubt on beliefs in the absolute certainty of scientific knowledge and complete power of prediction and control (Funtowicz & Pereira 2015: 2). That said, the emergence of these concepts has not challenged the institutional foundations of 'the Cartesian dream', which have been entrenched in 'national and international constitutional, legal and administrative arrangements' (Funtowicz & Pereira 2015: 3).

The 1980s witnessed the dramatic increase in the use of quantification in governing social life, and this trend continues (Rottenburg & Ors 2015). Merry (2016: 1), for example, argued that ‘quantification is seductive’. By quantification, she meant ‘the use of numbers to describe social phenomena in countable and commensurable terms’ (Merry 2016: 1). Quantification is seductive in the sense that it has the capacity of producing numbers which provide ‘knowledge of a complex and murky world’ (Merry 2016: 1). These numbers then formed a basis for decision-making which is also seen as ‘scientific’ and ‘evidence-based’ (Merry 2016: 4).⁵ For instance, when unveiling plans to lift England’s lockdown, Boris Johnson said that ‘data will be used to inform “every step” of lifting restrictions’ (BBC News 2021). Numbers generated by mathematical modelling, such as the reproduction number (R), contributed significantly to creating a public consciousness of the urgent need to control the pandemic: to bring the reproduction number below 1 (Nouvellet & Ors 2020). These numbers, however, could be flawed, misused and misleading. For example, a prestigious 2019 Global Health Security Index ranked the United States as the safest place to be in case of a pandemic (Johns Hopkins Center for Health Security 2019). Prediction based on these numbers clearly contrasts with what happened in the Covid-19 pandemic.

Numbers and quantification are exerting strong influence on law and governance (see eg Perry-Kessaris 2011a, 2011b, 2017; Nelken & Siems 2021). Supiot (2017) argued that human action has been increasingly governed by numbers and quantification rather than by law. Indeed, modelling has become a governance technique and has been heavily relied upon by rulemakers to navigate and tame the increasing uncertainty of social and economic life. Assumptions and outputs of models and policy recommendations by modellers have been embedded in law, regulation and policy. Rules informed by the research of the Imperial College team to suppress the spread of Covid-19, for example, which contained a combination of social distancing, home isolation of cases and household quarantine of their family members, have caused significant change to the ways in which social and economic life is organized in the pandemic. Jones (2020) pointed out that ‘public attention should be devoted to the world-making effects of models’. Models are ‘artifacts with politics’, establishing and normalizing certain patterns of power and authority (Winner 1980: 134). However, ‘the promise of control and prediction rooted in the Cartesian dream of rigorous technical models and precise scientific metrics in handling the uncertainties did not survive the test of a radically uncertain world’ (Reinert & Ors 2021: 8; see also Scoones &

⁵ For a critique of ‘evidence-based’ policymaking, see also eg Funtowicz & Saltelli (2015).

Stirling 2020). Managing the Covid-19 pandemic provides an important lens through which we can assess the challenges posed by the interaction between modelling and rulemaking and, more broadly, on the effect of numbers and quantification on governance and the rule of law.

Models function as one of the critical instruments in many disciplines, including science and economics, mediating between theories and the real world. Models can serve many purposes. They are used for the examination and elaboration of theories; for the exploration of the processes and consequences of applying theories; for the measurement of risks; for giving precise answers in numbers; and for the justification of intervention measures. The use of models also has limits, especially under circumstances where modelling is based on a paucity of data and a significant degree of abstraction and uncertainty is involved (Spiegelhalter 2019). Models are by no means neutral: they are shaped by the modellers' disciplinary orientations, made in a particular context, and embody the modellers' interests, assumptions and biases (Saltelli & Ors 2020). 'Different contexts—different markets, social settings, countries, time periods and so on—require different models' (Rodrik 2015: 11).⁶ For example, using models out of their context fuelled the financial crisis (Reinert 2009)⁷ and delayed action on Covid-19.

Modelling, in particular mathematical modelling, has dominated experiences of and controversies surrounding the Covid-19 pandemic (Jewell & Ors 2020: 1893). In addition to mathematical modelling, various kinds of modelling have been used in estimating the impact of Covid-19, including financial and economic modelling and social modelling. For example, the Organisation for Economic Co-operation and Development (OECD) (2020) provided an economic assessment of the impact of Covid-19, using NiGEM, a global macro-econometric policy model, maintained by the National Institute of Economic and Social Research in the UK. The economic assessment focused on the adverse impact of Covid-19 on particular areas, including financial markets, the travel sector and supply chains, rather than the underlying, structural features of the economy, such as inequality and the uneven distribution of access to healthcare for those suffering from the effects of Covid-19 (Jones 2020). In the pandemic, individuals bear the burden of restrictions on individual rights unequally (people with or without disability or people living in a densely populated area or not, for instance). But financial and economic modelling does not usually take these factors into account. Examples

⁶ For a discussion of studying economics while ignoring the context, see eg McCloskey (2002).

⁷ For critiques of how financiers respond to uncertainty around the possibility of a financial crisis, see eg Taleb (2010).

of social modelling include the ‘Singapore model’ (see eg Bowie 2020) or the ‘Swedish model’ (see eg Mann 2020), depicting different national responses to Covid-19. The Swedish model caused much controversy surrounding whether it could effectively build up herd immunity and help balance competing priorities of coping with the health crisis and mitigating the adverse economic impacts of Covid-19. Social modelling suggests a ‘getting something off the shelf’ approach to making policy recommendations (Jones 2020).

Mathematical modelling describes ‘our beliefs about how the world functions’, using mathematical concepts and languages (Lawson & Marion 2008: 1). Mathematical models, enabled by computer simulations, have been used by rulemakers to communicate with the public and to establish rules on various interventions (Adam 2020a: 316). But, instead of justifying the certainty of the rules, estimates from mathematical models about Covid-19 can lead to uncertainty and anxiety, for example, when these models estimate tens of thousands of deaths (Jewell & Ors 2020: 1893). Inaccurate assumptions can be made because of the poor quality of data on infections, deaths and tests. Decisions made based on the outputs of models may mislead. This was evidenced at the early stage of the Covid-19 pandemic when detection was limited and reporting was delayed (Jewell & Ors 2020: 1893).

Mathematical models are imbued with uncertainty: to predict Covid-19 transmission rates, models rely on hundreds of parameters (Adam 2020b: 533), which are poorly understood (Holmdahl & Buckee 2020). Mathematical models can only ‘estimate the relative effect of various interventions in reducing disease burden rather than to produce precise quantitative predictions about extent or duration of disease burdens’ (Jewell & Ors 2020: 1893; see also Whitty 2015: 4). Nevertheless, ‘consumers’ of mathematical models, including rulemakers, the media and the public, ‘often focus on the quantitative predictions of infections and mortality estimates’ (Jewell & Ors 2020: 1893). The resulting model uncertainty is not always properly communicated to the public (Holmdahl & Buckee 2020).

[C] DEVELOPING A TAXONOMY OF UNCERTAINTY

From the above analysis, we know that uncertainty is associated with the making of mathematical modelling and that decisions based on the outputs of models are often made under conditions of uncertainty in crises. It is necessary to dissect this typology by developing a taxonomy of

uncertainty to ascertain the nature and degree of uncertainty in modelling and rulemaking in crises. Uncertainty in the broad sense means that ‘given current knowledge, there are multiple possible future states of nature’ (Stewart 2000: 41). Uncertainty is also defined as ‘the result of our incomplete knowledge of the world, or about the connection between our present actions and their future outcomes’ (Kay & King 2020:13). The degree of the connection between current human actions and their future consequences varies, giving rise to different types of uncertainty. But how can we gauge the extent of their connection?

The conventional measure of uncertainty is probability. Probability theory as a discipline originated in the 17th century and was discussed precisely for the first time by Pierre Simon Laplace (1749–1827) in his *Essai philosophique des probabilités* (von Mises 1957 [1928]: vii). Probability can be divided into two categories: frequentist and subjectivist views of probabilities (Stewart 2000: 41; see also Morgan & Henrion 1990). Frequentist probability is based on ‘long-run observations of the occurrence of an event’, while subjective probability is determined by one’s belief on whether an event will occur (Stewart 2000: 41). The frequentist approach to probability was proposed by von Mises (1957 [1928]). He argued that a quantitative probability concept ‘must be defined in terms of potentially unlimited sequences of observations or experiments’ (ibid: viii). He also argued that ‘the relative frequency of the repetition is the “measure” of probability, just as the length of a column of mercury is the “measure” of temperature’ (ibid). The essence of the frequentist interpretation of probability is to explain how often a phenomenon occurs. For example, in the management of the Covid-19 pandemic, data on infection rates, hospital admission rates and fatalities are based on the frequentist approach to probability.

Uncertainty can also be categorized as aleatory or epistemic. Aleatory uncertainty refers to random processes which can still be quantified or can be ‘statistically characterizable’ (Stewart 2000: 41). For example, we know that a fair dice has six sides and that each of the faces has the same probability of landing facing up. But we cannot reduce the uncertainty about which face will next land facing up (Stewart 2000: 41). Aleatory uncertainty can still be measured by the frequentist approach to probability, while epistemic uncertainty arises from our ‘incomplete knowledge of processes that influence events’ (Stewart 2000: 42). The result of epistemic uncertainty, for instance, is that mathematical modelling may omit important factors which should have been considered in its production. ‘Total uncertainty, either subjective or frequentist, is the sum of epistemic and aleatory uncertainty’ (Stewart 2000: 42).

Making decisions to cope with uncertainty brought about by the Covid-19 epidemic cannot rely on the frequentist approach to probability, although the collection of various sets of data on Covid-19 can do so. For example, in preventing the spread of Covid-19, too strict isolation measures may cause serious economic problems and may also squeeze the space for treatment of other diseases. Rulemakers need to balance the costs and benefits of adopting prevention and control measures. For instance, the fatality rate caused by Covid-19 infections may decrease, but the fatality rate caused by other diseases may increase (see eg Katz & Sanger-Katz 2021). Further, epistemic uncertainty is unavoidable in making decisions under the Covid-19 pandemic. Rulemakers need to make holistic decisions based on both different sets of data and non-data-based criteria such as public acceptability, but their incomplete knowledge of processes that influence managing the Covid-19 pandemic is profound. We have witnessed the difficulty in coping with epistemic uncertainty in the Covid-19 pandemic due to incomplete information on the virus and misunderstanding of the processes of its spread. As a result, experts leaned towards the wrong answer.

Since World War II, the application of modern probability theory has arisen in several major fields where humans interact with complex technologies, including economics, management science, computer science and artificial intelligence (Smithson 1989: 3). The popularity of modern probability theory constitutes a major response to the increasing complexity of technologies and organizations and provides an alternative to deterministic, mechanical approaches to dealing with complexity and uncertainty embedded in these systems (Smithson 1989: 3).

Probability theory has been applied to solving legal problems. In fact, ‘Leibniz’ [Gottfried Wilhelm (von) Leibniz, 1646–1716] early formulations of probability theory were motivated by problems of legal inference’ (Smithson 1989: 24). However, there are challenges to applying probability theory in the legal field. Judges and juries make decisions based on evidence, which is primarily qualitative rather than quantitative and cannot be easily measured by probability. Judges deal with imperfect information, unreliable witnesses and doubtful ‘facts’ (Smithson 1989: 23). Their judgments may also be influenced by socio-economic and political factors. The law is subject to interpretations and revisions. As Endicott (2000: 1) argued, ‘vagueness, and resultant indeterminacies, are essential features of law. Although not all laws are vague, legal systems necessarily include vague laws’.⁸ Legal problems cannot easily be formulated by probabilistic language. A misunderstanding of probability in judgments may even turn

⁸ For a discussion of vagueness in law, see also Asgeirsson (2020).

on the ‘prosecutor’s fallacy’; a fallacy that uses statistical reasoning to test an occurrence. Prominent examples include the rape conviction of Andrew Deen in 1990 based on DNA evidence and the heart-breaking case of Sally Clark in 1999 (Chivers 2021).⁹

From the above analysis, we can see that the study of uncertainty deals with probability and other concepts such as vagueness which cannot be explained in probabilistic language. To decipher the complexity of uncertainty under which rules are made in managing the Covid-19 pandemic, it is important to evaluate different kinds of uncertainty. This can be divided into at least two types according to the degree of connection between current human actions and their future consequences, namely, external risk (resolvable uncertainty) and manufactured risk (radical uncertainty, with ignorance as one important dimension).¹⁰ In developing this taxonomy of uncertainty, it is important to bear in mind that we cannot ‘apply probabilities to every instance of our imperfect knowledge of the future’ (Kay & King 2020: 12).

Analysis of risk and the risk society figure prominently in the writings of some preeminent sociologists researching modernity, in particular Ulrich Beck and Anthony Giddens. For example, Beck’s definition of risk, which differs from danger, is closely associated with reflexive modernization. He argued that risk may be defined as ‘*a systematic way of dealing with hazards and insecurities induced and introduced by modernization itself*’ (Beck 1992: 21, italics original). By ‘reflexive modernization’, Beck meant that modernization ‘is becoming its own theme’:

Questions of the development and employment of technologies (in the realms of nature, society and the personality) are being eclipsed by questions of the political and economic ‘management’ of the risks of actually or potentially utilized technologies — discovering, administering, acknowledging, avoiding or concealing such hazards with respect to specially defined horizons of relevance (Beck 1992: 19-20).

Giddens (1999: 3) also pointed out that risk differs from hazard or danger, but he emphasized that ‘the idea of risk is bound up with the aspiration to control and particularly with the idea of controlling the future’. The term

⁹ In 1990 Andrew Deen was convicted of rape. His conviction was partly based on DNA evidence and a statement from an expert witness that ‘the chance that the DNA came from someone else was just one in 3m’ (Chivers 2021). In 1999, Sally Clark was convicted of murdering her two children. Her conviction was again partly based on an expert witness statement that ‘the chance of two babies dying of sudden infant death syndrome (Sids) in one family was one in 73m’. Her conviction was overturned in 2003 for not taking into account ‘the prior probability—that is, the likelihood that someone was a double murderer, which is, mercifully, even rarer than Sids’ (Chivers 2021).

¹⁰ For the difference between external and manufactured risk, see Giddens (1999). For the difference between resolvable uncertainty and radical uncertainty, see Kay & King (2020).

'risk society' was coined in the 1980s and became a popular topic in the 1990s. Risk society refers to 'a society increasingly preoccupied with the future (and also with safety), which generates the notion of risk' (Giddens & Pierson 1998: 209). The reason why a risk society is preoccupied with the future, as Giddens further explained in his Chorley Lecture,¹¹ is that 'we increasingly live on a high technological frontier which absolutely no one completely understands and which generates a diversity of possible futures' (Giddens 1999: 3).

The analysis of uncertainty and risk so far has shown that these two concepts are closely related, as both are the result of our incomplete knowledge of the world and its connections with possible futures. That said, there are differences between risk and uncertainty. Economists (used to) highlight the distinction between risk and uncertainty: risk refers to 'unknowns which could be described with probabilities', while uncertainty means unknowns which could not be described with probabilities (Kay & King 2020: 12). Frank Knight (1885–1972) and John Maynard Keynes (1883–1946) were the two key figures in economics who argued for the continued importance of the distinction. Knight (1921: 20), for example, argued that risk is 'measurable' and that we should 'restrict the term "uncertainty" to cases of the non-quantitative type'. Keynes (1937: 214) pointed out that for uncertainty 'there is no scientific basis on which to form any calculable probability whatever'. Keynes (1937: 222) also argued that 'the hypothesis of a calculable future leads to ... an underestimation of the concealed factors of utter doubt, precariousness, hope and fear'. These factors are ubiquitous in decision-making in managing crises such as the Covid-19 pandemic but are easily concealed by the illusion of truth and control generated by mathematical modelling.¹² This is despite flaws in the theoretical underpinnings and the quality and quantity of data, as well as biases and human fallibility in making mathematical models. The distinction between risk and uncertainty has been sidelined by mainstream economics over the last century through applying 'probabilities to every instance of our imperfect knowledge of the future' (Kay & King 2020: 12).

Given the differences and overlaps between risk and uncertainty, attempts have been made to specify various categories of risk and uncertainty to make sense of the distinction, reveal the overlaps, and illuminate better approaches to their similarities and differences. Giddens (1999: 4) made a distinction between 'external and manufactured risk'. External risk is 'risk of events that may strike individuals unexpectedly

¹¹ The lecture was delivered at the London School of Economics on 27 May 1998.

¹² See eg Drechsler (2011: 50) arguing that it is wrong to assume that the use of mathematics necessarily leads to 'truth'.

(from the outside, as it were) but that happen regularly enough and often enough in a whole population of people to be broadly predictable, and so insurable' (Giddens 1999: 4). Manufactured risk refers to 'new risk environments for which history provides us with very little previous experience. We often don't really know what the risks are, let alone how to calculate them accurately in terms of probability tables' (Giddens 1999: 4). The Covid-19 pandemic, for example, provides a new risk environment where we can rely little on experience with previous epidemics. It is a noteworthy example of manufactured risk. Kay & King have chosen to replace the distinction between risk and uncertainty with a distinction between 'resolvable and radical uncertainty':

Resolvable uncertainty is uncertainty which can be removed by looking something up (I am uncertain which city is the capital of Pennsylvania) or which can be represented by a known probability distribution of outcomes (the spin of a roulette wheel). With radical uncertainty, however, there is no similar means of resolving the uncertainty – we simply do not know. Radical uncertainty has many dimensions: obscurity; ignorance; vagueness; ambiguity; ill-defined problems; and a lack of information that in some cases but not all we might hope to rectify at a future date (Kay & King 2020: 14).

The distinction between external and manufactured risk made by Giddens, and the distinction between resolvable and radical uncertainty drawn by Kay and King, both help us develop a taxonomy of uncertainty. External risk has overlaps with resolvable uncertainty, while manufactured risk comes close to radical uncertainty. Most challenges to decision-making in managing the Covid-19 pandemic come from manufactured risk or radical uncertainty. Further, radical uncertainty cannot be described in terms of well-defined, numerical probabilities (Kay & King 2020). Increasing radical uncertainty has led to more complexity in decision-making. The key questions that rulemakers need to reflect upon include: is uncertainty something to overcome in rulemaking? Should rulemakers eliminate uncertainty in rulemaking? Scoones & Stirling (2020: 12), for example, argued that claims to be able to control uncertainty seem to 'underpin the securing of authority, justification, legitimacy, trust and wider public acceptance'. But for rulemakers, if they simply make these claims without awareness of the nature of risk and uncertainty, and the importance of communicating 'the unknown' to the public, their accountability will be undermined.

[D] RE-EVALUATING THE RELATIONSHIP BETWEEN IGNORANCE, UNCERTAINTY AND KNOWLEDGE

This section continues to examine one important dimension of radical uncertainty, that is, ignorance, as well as the ways in which rulemakers should deal with it. It focuses on the notion and function of ‘ignorance’ and the dynamism between ignorance and knowledge in the context of rulemaking. It also examines the nature and significance of ignorance for reassessing the role of mathematical modelling in rulemaking and for finding an alternative strategy to number- and model-based rulemaking.

Under conditions of radical uncertainty, ignorance is unavoidable. As discussed in the first section of this article, within Western intellectual culture which can trace its origin to ‘the Cartesian dream’, ignorance is often regarded as ‘either the absence or the distortion of “true” knowledge’ (Smithson 1989: 1). The conventional approach to ignorance is therefore to eliminate or tame it by using some kind of ‘scientific method’ (Smithson 1989: 1). The ways in which ignorance has been tamed by mathematical modelling through probabilistic judgments in the context of rulemaking in the Covid-19 pandemic is one of the noteworthy examples of exercising this conventional approach. The key problem in managing the Covid-19 pandemic, echoing Friedman’s observation of the nature of ignorance (2005: xiv), however, is not just gaps in our knowledge about the virus. Rather, the central problem is that the information presented by experts to rulemakers, even if supported by mathematical models, only provides a veneer of certainty and may mislead.

Ignorance is ‘socially constructed and negotiated’ and ‘multiple’ (Smithson 1989: 6). Acknowledging this reminds us of the famous quote from Rumsfeld on ‘known unknowns’ and ‘unknown unknowns’:

There are known unknowns. That is to say there are things that we now know we don’t know. But there are also unknown unknowns. There are things we don’t know we don’t know.¹³

There are other instances of ignorance which have been overlooked by Rumsfeld such as ‘what we don’t know we know’ (Rayner 2012). Accordingly, there are various ways that rulemakers try to cope with ignorance, such as taming it with a technical solution.

¹³ Rayner (2012: 107-108), quoting former US Secretary for Defence, Donald Rumsfeld, NATO Headquarters, 6 June 2002.

Taming ignorance in rulemaking leads to several consequences. Rulemakers fail to understand that uncertainties are ‘conditions of knowledge itself’ (Scoones & Stirling 2020: 4). The ways in which we ‘understand, frame and construct possible futures’ are ‘hard-wired into “objective” situations’ (Scoones & Stirling 2020: 4), including the application of probabilities to every kind of uncertainty. Rulemakers may tend to use models to justify predetermined agendas and to undermine the importance of communicating what is not known (Saltelli & Ors 2020). Rulemakers may also offload accountability to the models they choose (Saltelli & Ors 2020).¹⁴ Thus, in managing the Covid-19 pandemic, the UK Government’s claim that it is ‘following the science’ has been criticized by scientists as a way to ‘abdicate responsibility for political decisions’ (Devlin & Boseley 2020).

In some disciplines, including philosophy, sociology and economics, there have been challenges to the conventional way we approach the nature and function of ignorance. After all, ‘learned ignorance’ (*docta ignorantia*), or self-awareness of ignorance, was regarded as a virtue for most of the history of Western philosophy (Ravetz 2015). Popper (1985: 55) argued that:

the more we learn about the world, and the deeper our learning, the more conscious, specific, and articulate will be our knowledge of what we do not know, our knowledge of our ignorance. For this, indeed, is the main source of our ignorance – the fact that our knowledge can only be finite, while our ignorance must necessarily be infinite.

Hayek (1945), as well as Knight and Keynes discussed above, questioned the nature of ‘perfect knowledge’ and warned us of the dangers of projecting excessive certainty about the future (Davies & McGoey 2012: 76). However, the virtue of learned ignorance has been neglected in contemporary society. Rather, it is a common assumption that modern society is based on the accumulation of reliable and calculable knowledge. Yet, past crises such as the financial crisis 2007–2008 have taught us important lessons. In contrast to the common assumption, many institutions that survived the financial crisis are not those which had a firm faith in the reliability of credit-rating agencies. Rather, they were those ‘most able to suggest risks were unknowable or not predictable in advance’ (Davies & McGoey 2012: 65). The financial crisis thus was not only an economic crisis but also an epistemological and scientific one (Davies & McGoey 2012: 66; see also Best 2010). These lessons, however, have not been taken seriously by rulemakers in the UK in coping with the Covid-19 pandemic.

¹⁴ See also Snow (2021). Please note that experts such as modellers may oversell their predictions and tend to offload accountability to a technical solution like rulemakers.

Ignorance and knowledge are not antithetical, as Nietzsche argued (2003 [1973]: 24; see also Ravetz 1987: 100). Rather, ignorance should be regarded as the ‘refinement’ of knowledge. Ignorance can serve as ‘a productive force’ and ‘the twin and not the opposite of knowledge’ (McGoey 2012). This does not mean that there is value in knowing what we don’t know as opposed to not knowing what we don’t know. ‘Knowing what we don’t know’ is productive in the sense that it generates a constant need for solutions to crises that experts and rulemakers failed to identify earlier (Davies & McCoey 2012: 79). We need to ‘lean into the reality of not knowing’ (Snow 2021) and even embrace uncertainty (Scoone & Stirling 2020: 11):

In embracing uncertainty in modelling practice, the emphasis must therefore shift towards active advocacy of qualities of doubt (rather than certainty), scepticism (rather than credulity) and dissent (rather than conformity) – and so towards creative care rather than calculative control. With indeterminacy thus embraced and irreducible plurality accepted, non-control and ignorance emerge as positive values in any attempt to create narratives for policy under conditions of uncertainty.

[E] CONCLUSION

A great deal of decision-making during crises is about coping with uncertainty. For rulemakers, this poses a fundamental challenge, as there has been a lack of a rigorous framework for understanding and analysing the nature and function of uncertainty in the context of rulemaking. Although in some disciplines, including philosophy, sociology and economics, there have been new studies of and reflection on the way we approach uncertainty and ignorance, responses from legal studies have been slow. Rulemakers rely heavily on numbers and quantification, trying to give precise answers and assert control when making decisions in crises. Drawing on interdisciplinary literature on uncertainty and ignorance and a case study of the interaction between mathematical modelling and rulemaking in the Covid-19 pandemic, this article sets out three steps to analyse the challenges posed by reliance on mathematical modelling by rulemakers under conditions of uncertainty.

The first step examines the nature of mathematical modelling and traces the origin of rulemakers’ tendency to rely on numbers and quantification in decision-making to the ‘Cartesian dream’, which involved the firm belief in absolute certainty of scientific knowledge and its complete power of prediction and control. The discussion of this article, however, shows that mathematical modelling is closely associated with uncertainty.

Mathematical models are also by no means neutral: they are shaped by the modellers' disciplinary orientations, made in a particular context, and embody the modellers' interests and biases.

The second step develops a taxonomy of uncertainty and helps establish a framework for rulemakers to understand and analyse the kinds of uncertainty with which they are coping. This taxonomy clarifies different kinds of risks and uncertainty associated with mathematical modelling and embedded in crises. Although mathematical models can minimize the complexity of the real world and give precise answers in numbers, their role is limited under conditions of uncertainty, as not all kinds of uncertainty can be described as well-defined, numerical probabilities. If rulemakers approach mathematical modelling as 'truth' and manipulate it as 'evidence' to support predetermined agendas under conditions of radical uncertainty, their approach is flawed, and the public cannot really know what works and how to effectively address the challenge. Reliance on mathematical models may also downplay other sources of knowledge and expertise. For example, experts argued that in coping with the Covid-19 pandemic, the UK Government gave too much weight to the views of modellers while overlooking the views of public health experts (Devlin & Boseley 2020).

The third step re-evaluates the nature and function of ignorance and its relationship to uncertainty and knowledge. It supports the view that ignorance is a condition of knowledge. It argues that, rather than eliminating uncertainty or hiding ignorance behind their expertise, rulemakers should instead embrace untruth, uncertainty and even ignorance. Embracing 'what we don't know' is productive in that it prompts rulemakers to seek solutions to crises that they failed to identify earlier, which may then form a positive component in managing the Covid-19 pandemic. In so doing, rulemakers will be able to find an alternative strategy to number- and model-based rulemaking so that they can improve their accountability in an uncertain world.

The new strategy includes three essential aspects, corresponding to the three steps set out in this article. First, rulemakers need to reflect on the uncertainty embedded in mathematical modelling, including how data is gathered and how information is captured. They should ask: what data is missing? What factors are not considered? What assumptions are made behind the making of mathematical modelling? Second, rulemakers should assess the kind of uncertainty embedded in the crisis with which they are coping. Third, rulemakers need to communicate the unknown in decision-making. 'Communicating the unknown' means that rulemakers

should not conceal fear, doubt and dissent behind claims of truth and absolute control made through the outputs of mathematical modelling. Instead, rulemakers should embrace and work with uncertainty, acknowledging that our ignorance is infinite. Recognizing the virtue of self-awareness of ignorance encourages rulemakers to find missing data and listen to unheard voices that they and other experts failed to identify earlier. Learned ignorance pushes rulemakers to find solutions to crises but also to accept that not all is knowable. Developing an alternative strategy to number- and model-based rulemaking will also provoke a rethinking of the impact of numbers and quantification on governance and the rule of law.

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Legislation

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THE ROLE OF MEDICAL PROFESSIONALS IN SHAPING HEALTHCARE LAW DURING COVID-19

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Abstract

This article explores the changing nature of the allocation of healthcare resources during the Covid-19 crisis and how it may have shaped a new role for medical professionals in healthcare law and policymaking. It contrasts the traditional input of medical professionals in systemic healthcare reforms (1946, 1990 and 2012) with their role in the elaboration of ethical emergency guidance published by the British Medical Association and the Royal College of Physicians in March–April 2020, using a discourse analysis methodology and concepts borrowed from political philosophy.

Keywords: Covid-19; medical professionals; healthcare law and policy; ethics; justice; emergency guidance.

[A] INTRODUCTION

During the spring of 2020, the first peak of Covid-19 infections in England led to an immediate reorganization of healthcare services (Propper & Ors 2020). As the entire system came under pressure, the reality of triage changed. Clinicians were told that decisions could no longer be based solely on the best interests of their patients but had to account for crucially limited healthcare resources (British Medical Association (BMA) 2020a; Royal College of Physicians (RCP) 2020). Medical needs became a secondary consideration after assessing how a proposed treatment might affect resources and impact on a patient's chances of survival (Sokol 2020).

Medical professionals were thus put at the centre of the systemic healthcare rationing process, a role traditionally fulfilled by the Government when dictating the allocation of resources for the National Health Service (NHS) (Baggott 2015). Although the raging crisis did

not allow for the traditional law and policy process to take its course, frontline workers were still in urgent need of rules to manage patients and allocate human resources and personal protective equipment (PPE). Decisions were therefore taken at an organizational level (Royal Colleges of Medicine and BMA) to support the difficult decision-making process at the ‘bedside level’ in primary and secondary care settings.

This article considers whether the unusual circumstances of the pandemic have substantially changed the way in which medical professionals shape healthcare law. It will do so using a discourse analysis methodology and concepts borrowed from political philosophy to compare the traditional role of medical professionals in healthcare reforms with their role in formulating ethical emergency guidance.

The first part of the article looks at tools used in healthcare law and policy to allocate scarce resources, in theory (models of distributive justice) and in practice (rhetoric and discourses). This is drawn from the theoretical framework used by the author in her prior research to analyse the role played by medical professionals in healthcare reforms (Germain 2019). The second part of the article presents these findings and exposes how medical professionals have used an egalitarian rhetoric to halt or modify governments’ ambitions and to protect their professional autonomy during three major systemic reforms (1946, 1990 and 2012) (Germain 2019). The third part of the article analyses the more recent role played by medical professionals in healthcare law and policy-making by paying attention to written discourses and the rhetoric of justice enclosed in the ethical emergency guidance documents published by the BMA and RCP in March–April 2020. This portion of the analysis aims to determine whether the unusual circumstances of the pandemic created an opportunity for medical professionals to change their role in healthcare lawmaking. The article concludes that, although the first wave of the pandemic was unprecedented in the history of the NHS, it has not shaped a substantially new role for medical professionals in the law and policy arena.

[B] ALLOCATING SCARCE RESOURCES

Healthcare law and policy formalizes rationing patterns as demands put on healthcare systems are often infinite and resources greatly limited (Mallia 2020: 1). The Covid-19 pandemic exemplifies the importance of this process. The fear of not having sufficient resources to meet the needs of the population in the first months of lockdown in England mandated that allocation rules be put in place swiftly.

The distributive justice models presented in this section theorize the allocation of scarce resources and to a greater or lesser extent underpin systemic and institutional healthcare laws and policies (Fleischacker 2009: 1-17). More specifically, the egalitarian, utilitarian and libertarian models have provided principles to ration healthcare resources. This section discusses the fact that, in practice, these models are part of oral or written discourses and rhetoric used by actors in the healthcare law and policy arena to shape allocation rules. Together they form the basis of a theoretical framework that can be used to analyse the role of medical professionals in healthcare law and policymaking (Germain 2019).

The remainder of the article uses this framework to consider whether medical professionals have promoted a specific model to allocate resources during the elaboration of systemic reforms and whether they have promoted the same or an alternative model in the drafting of Covid-19 emergency guidance. This analysis will help reveal whether the medical profession's perspective on the rationing process was altered at the onset of the Covid-19 crisis. The analysis will also speak to its ability to shape healthcare law and policy if it transpires that their position was ultimately formalized into law.

In Theory

Even though healthcare resources do not possess any attributes that make them stand out from other health determinants in the contribution they make to good health, the article argues that their allocation should follow principles that focus on the attainment of justice. The seriousness of healthcare needs, especially in pandemic times, makes these resources stand out from mere consumer goods, and their potential to alleviate pain and help avoid absolute harm makes them a central component of our society (Segall 2007; Schramme 2009: 17).

Justice also requires that we treat equally those who are alike and that we balance individuals' needs with the claims of the community by providing rules to distribute resources and to structure human relationships (Joachim & Rees 1953). Therefore, both procedural and distributive justice are at play in rationing healthcare resources. To ensure fairness and consistency, procedural justice requires that the process of allocating resources accounts for three elements: accountability for reasonableness; transparency; and relevant decision criteria and regulatory frameworks (Michaels 2020: 1). Just allocation, on the other hand, is theorized differently under the egalitarian, utilitarian and libertarian models as presented herein.

The Egalitarian Model

Egalitarianism posits that justice in healthcare can be achieved through patterns of equality. Redistribution of resources is needed to help level up good health capabilities or life opportunities, since we have not all been provided with the same allotment of capabilities or potential for good health at birth. Even though no amount of resources can entirely eradicate inequalities in health, healthcare law and policy should focus on principles of equality to allocate resources fairly (Hoedemaekers & Dekkers 2003: 327-328). Liberal egalitarianism only tolerates an unequal distribution of resources to provide greater benefit to the least advantaged (Rawls 2005: 302-303).

Laws and policies that adopt a liberal egalitarian approach to allocate healthcare resources at a systemic level often prescribe a universal and equal access to services. The ambition set for the national system is to 'level the playing field' in healthcare which may result in dedicating more resources to the least favoured and have the most vulnerable patients guaranteed an equal access to care regardless of their income. Patients with equivalent healthcare needs would be treated alike, but may be treated differently from other patients (Gutmann 1983).

Ethical guidance taking an egalitarian approach would not give priority to Covid-19 positive patients over non-Covid patients suffering from similar health issues in accessing healthcare services. Instead, it may use a random process, such as a lottery system, to allocate resources (Persad & Ors 2009: 423).

The Utilitarian Model

Utilitarianism is preoccupied with utility (good health) maximization. Certain groups of patients may be prioritized if they have the potential to derive greater health outcomes from limited resources. Focus is set on consequences of actions and in the context of healthcare on treatment outcomes and chances of survival. This model of allocation, however, should aim to do the least harm to the fewest people and prevent most harm for the greatest number (Bentham 1879). Just utilitarian distribution does not imply fair distribution, and it is almost inevitable that resources will be distributed unequally (Kymlicka 2002: 27).

Governments tend to turn to utilitarian healthcare policies to rationalize limited healthcare resources. For example, treatments are compared and ranked and only the interventions that will do 'the greatest good' (increase life years and quality of life) are covered under the system's healthcare entitlements (Williams 1998: 29-97).

Guidance following a utilitarian approach prioritizes patients with the greatest likelihood of survival. Therefore, acutely sick Covid-19 patients or infected patients with survival-limiting comorbidities may be least favoured to receive treatment (Tolchin & Ors 2020: 1). Conversely, individuals in key roles such as medical professionals could also be given priority in treatment, regardless of their clinical state, as their recovery would indirectly improve society's aggregate health status as they become available again to treat patients (Persad & Ors 2009: 426). These instances of discrimination at the clinical level would be tolerated because of the extreme scarcity resulting from the pandemic.

The Libertarian Model

Libertarian justice does not recognize healthcare as an entitlement and posits that market forces are most optimal for the allocation of healthcare resources. A private, deregulated and decentralized allocation of healthcare resources is deemed to generate the best cost-efficient quality solutions for individuals' needs (McGregor 2001).

Healthcare law and policy adopting a libertarian and consumerist approach tends to focus on patients' autonomy and their liberty to choose. Resources are made available to support choices in healthcare and competition amongst providers is strongly encouraged (Terris 1999: 151-152).

Libertarian ethical guidance might suggest that during a public health crisis such as the Covid-19 pandemic, non-priority patients should be seen in the private sector to reduce backlog and give them the opportunity to receive care more promptly.

In Practice

Ideas of justice in healthcare policy are often reflected in stakeholders' public discourses when putting forward or commenting on healthcare policy proposals. Members of the government, Members of Parliament (MPs) and members of the medical profession convey opinions and values reflecting one or more distributive justice theory when formulating healthcare policy or debating healthcare rulemaking (Germain 2019). Sometimes these discourses are even present in the final version of a law or the rule formalizing the proposal.

Discourses are social practices that shape situations and institutions (Fairclough & Ors 2011: 2). The analysis of discourses highlights these dimensions and helps unpack how stakeholders such as the medical profession pursue particular goals by advancing a rhetoric that reflects

their values when intervening in the healthcare rulemaking process (Drew & Sorjonen 2011: 2). Medical professionals engage in discussions as part of civil society and formulate formal discourses through medical professional associations that interact with various political institutions. The use they make of the rhetoric of justice in these contexts operates beyond the art of verbal persuasion. Because their words are socially embedded, their oral and written discourses also reflect the role they play in social relations (Jorgensen & Philips 2002: 61; Freeman & Maylin 2020: 158). Account should be taken of these elements and the impact they may have had on the design of allocation rules (Harrington 2017). In the words of Foucault, '[w]e must make allowance for the complex and unstable process whereby discourse can be both an instrument and an effect of power, but also a stumbling block, a point of resistance and a starting point for an opposing strategy' (Foucault 1980: 101).

This thus requires that we pay attention to key texts that may translate formal manifestations of ideas of justice. In non-pandemic times they take the form of White Papers and healthcare laws and, in times of a public health crisis like Covid-19, they take the form of emergency guidance documents. All of these documents speak to the process of making rules to allocate healthcare resources, but they are also an expression of the agency of the author(s) and often combine or consolidate multiple interests (Freeman & Maylin 2020: 2020: 158-160). These documents coordinate and connect stakeholders within an institution, be it the government or a professional medical association, as laws and guidelines provide governing practices to allocate resources (ibid: 159-160).

[C] THE ROLE OF MEDICAL PROFESSIONALS IN SYSTEMIC HEALTHCARE REFORMS

It is only possible to determine whether (or not) the pandemic was an opportunity for medical professionals to change the nature of their involvement. Covid-19 has certainly marked a watershed moment because of the deep and unprecedented disruption it has caused in the system. It may have also changed the original role played by medical professionals in setting rules to allocate resources. Therefore, the part they have taken in shaping these emergency rules should be contextualized and analysed in comparison to the traditional role the profession has played in healthcare law and policymaking.

To this effect, this section presents research findings shedding light on the part traditionally played by medical professionals in three major systemic reforms: the National Health Service Act 1946 establishing the

place of the medical profession in the system; the National Health Service and Community Care Act 1990 creating the internal market in healthcare; and the Health and Social Care Act 2012 proposing a drastic overhaul of the system. This analysis reveals that medical professionals have consistently used egalitarian rhetoric when engaging in the reformative process. Even though they have not proactively engaged in policymaking, their goal has remained consistent, halting or modifying governments' ambitions in order to protect their professional autonomy.

A Commitment to the Foundational Egalitarian Utopia

The foundations of the healthcare system in England were laid on a utopian misconception. After the war, Aneurin Bevan had a vision. In order to stamp down on ill-health in the country, he would reform the social security system and 'provide the people of Great Britain, no matter where they [were], the same level of service' (National Health Service Act 1946, Part I). The rationale behind the project was obviously flawed, as even the most efficient healthcare system could not eliminate all healthcare needs and productivity losses (Hunter 1997: 20).

But as Harrington argued, the NHS was conceived as an anti-market 'enclave, an exemplary zone of non-commodified human relations ... separated from the wider world' (Harrington 2017: 90). This required the support of the medical profession for its realization and survival. Harrington's image also speaks to the liberal egalitarian rhetoric that was used to unveil the project and construct the system, appealing to both the profession and the population's solidarity to provide all with equal life opportunities.

Addressing the House of Commons (HC) during the debate on the foundational Bill, Bevan mentioned his desire to make the services 'available to the whole population freely' (HC 1946a: 45-49). He based his remarks on the report of the Committee on Social Insurance and Allied Service led by William Beveridge which explicitly stated that the system had to be equal, universal and based on 'need' rather than 'means' (Beveridge 1942: 1). According to Beveridge, account had to be taken of inequalities, and financial capacity should be side-lined as 'each individual [had to] stand on the same terms; [as] none should claim to pay less because he is healthier or has more regular employment' (Beveridge 1942: 6-7).

Ideas of liberal equality also emerge in the analysis of the transcripts of these debates. In particular, the importance of providing equal access to healthcare to enable the realization of life plans was the theme of many interventions (HC 1946a: 43-142, 147; HC 1946b: 59-313.)

However, the Government's vision did not resonate with those medical professionals who had launched an attack on the reform plans to create a unified system of care in the United Kingdom (UK). Disagreements precluded the achievement of a consensus as the BMA actively blocked the initiative (Webster 1988: 76). Members of the medical professional association found an ally in the Conservative Party, which also opposed Bevan's reform efforts. The animosity between the medical profession and the Government was striking in Parliament. The profession was eager to preserve its professional autonomy and felt threatened by the creation of a national system.

Conservative MP Richard Law was adamant. Directly addressing Bevan, he said that: 'The British Hospital Association and the British Medical Association [were] opposed to this Bill.' (HC 1946a: 64) He went even further in saying that 'the plain fact [was] that everybody of informed and expert opinion outside [the] House [was] against the Minister on one part of the Bill or another' (HC 1946a: 66).

Efforts to bring the medical profession on board were deployed beyond the enactment of the foundational Act creating the NHS. Eventually, medical professionals agreed to take part in the system. For both primary and secondary care medical professionals, a publicly financed healthcare system guaranteed absolute clinical autonomy. But the 'deal' struck with the post-war Government had also implicitly created a co-dependent relationship between the profession and Whitehall. The system needed medical professionals to deliver and organize healthcare services, and the profession needed the system to survive (Crimson 2009: 111). The victorious negotiations gave medical professionals a central role in healthcare law and policymaking. With professional autonomy came the power to spend and indirectly impact the allocation of healthcare resources in the NHS. Medical professionals were made the gatekeepers of the system. From that point on, clinical decisions, planning and management would have to involve them. Medical professionals would therefore always aim to safeguard the system's egalitarian utopia in order to protect their autonomy (Eckstein 1960: 1069).

A Continued Opposition to Governments' Utilitarian Libertarian Ambitions in Healthcare

Medical professionals' involvement (or the lack thereof) in healthcare law and policy in the 1980s and the profession's mobilization against the overhaul of the system in 2012 marked a change of tone. This contrasted

with the consensus that had been built with the Government at the creation of the system.

During the first three decades of the NHS, the medical profession had established a monopoly of legitimacy that was reinforced by the BMA and the Royal Medical Colleges' presence in healthcare law and policy (Klein 2013: 51-52; Baggott 2015: 118). However, public spending was untenable, and rationalization was considered in many sectors including the NHS. Margaret Thatcher's Conservative Government took a unilateral approach, signalling its desire to take control and to impose a more passive role in healthcare law and policymaking for medical professionals (Day & Klein 1983: 1813).

The relationship was tense. Clashes between the profession and the Government on healthcare spending, the organization of services, and GP contracts were intensified with the publication of the White Paper *Working for Patients* in 1989 (Baggott 2015: 26). The BMA was open about its opposition to the proposal and organized a campaign to derail the reform. It published an editorial in the *British Medical Journal* (Beecham 1989) to voice its outrage. One of the main critiques of the proposal was that it undermined the egalitarian core of the system as it would 'lead to a fragmented service [that would] destroy the comprehensive nature of the existing NHS' (ibid: 676). Medical professionals were also frustrated with the Government's decision to ignore them, as it had taken 'no steps to discuss the proposals with representatives of the profession' (ibid: 676).

Prior to the offensive launched by the medical professional organization, *Working for Patients* was debated five times in Parliament. Conservative and Labour MPs played out the conflict between the Government and medical professionals. The Labour Party accused the Government of having done 'some terribly foolish things in relation to health' and it had 'done nothing more foolish than slamming the door on the heads of the royal colleges' (HC 1989: 43-44). Indeed, the Government was proposing to restructure the system to create an internal market where the sale and purchase of healthcare services would be subject to competition. In a nutshell, *Working for Patients* proposed to introduce principles of libertarian justice in healthcare to leave internal market forces to achieve a more cost-efficient and competitive service (Davies & Powell 1991: 154).

The policy proposal was eventually formalized, and a Bill was introduced in Parliament. A libertarian but also utilitarian rhetoric gathered momentum (House of Lords (HL) 1990: 1289, 1304, 1382). The reform aimed to maximize utility in healthcare by optimizing available resources. The Government had a 'duty to make sure that money [was]

used to bring the maximum benefit' (HL 1990: 1382). In the House of Lords, Conservative Lord McColl of Dulwich made a similar case and countered the medical professionals' grievances arguing that:

the solution lies in the introduction of competition. We believe that it will help to solve that problem. It is fair to say that the Royal Colleges are fearful that competition will result in some hospitals going to the wall. Competition is much more subtle than that. It will provide the missing incentive for people to make sure that they give the kind of service that customers will appreciate. It will keep them just that little bit more on their toes (HL 1990: 1255-1387).

On the other hand, numerous members of the Lords put forward arguments in favour of universality, comprehensiveness and equality in healthcare, in supporting medical professionals (HL 1990: 1276, 1292, 1322-1323, 1332, 1354). Former Vice-President of the Royal College of Nursing and cross-bench member Baroness Cox spoke of the NHS as 'a popular and generally equitable health service' and suggested that her professional colleagues '[could] not and [would] not support proposals which appear[ed] to risk damaging this precious institution and thereby possibly harming those whom it serves' (HL 1990:1322).

The reform that resulted from these exchanges and negotiations provided a mixed result. It established the internal market in healthcare but also preserved the egalitarian foundations of the NHS (Bevan & Robinson 2005: 55). The most drastic change for medical professionals was not their redefined clinical roles, but the place they were now given in healthcare law and policy. They had preserved their autonomy, but the Government had proven that it had the ability to change the system without their policy input. Although vehement, medical professionals were confined to a reactionary role. However, they had also made no concerted effort to put forward a proposal for a new allocation of healthcare resources.

A few years on, the culture change that involved libertarian and utilitarian strategies in healthcare initiated during the Thatcher era was taken forward by New Labour in the 1990s and climaxed under the Coalition Government in 2012 (Newman & Vilder 2006: 199). This was by far the most extensive overhaul of the NHS since its creation, and the Government faced significant push-back from medical professionals. Consumerist rhetoric focusing on patients' choice, as well as the introduction of formal partnership with private and independent providers in healthcare, had infiltrated the policy discourse (Glennerster 2015: 297).

Medical professionals most adamantly vested themselves with the role of guardian of the NHS, and this transpired during the debate on the Second Reading of the Health and Social Care Bill. During these

exchanges, two groups formed and used distinct discourses of justice. On one side, members in support of the reforms adopted libertarian and consumerist rhetoric aiming to empower patients offering more choice and a more efficient healthcare system with the introduction of greater competition among providers (HL 2011: 1469-1720). Conversely, members acting as ‘spokespersons’ of the medical profession returned to the traditional egalitarian rhetoric, focusing on equality in access to care in order to provide all with services meeting their needs, particularly the most vulnerable (HL 2011: 1479, 1481, 1482, 1497, 1499, 1500, 1502, 1506, 1507, 1508, 1509, 1511, 1675, 1680, 1689, 1702, 1703, 1708).

Here again, medical professionals had tried to make a substantial entrance in the healthcare law and policy arena, but their contribution to change was limited to critique. They had secured the egalitarian core, but the consumerist approach had gained significant traction. This also meant that, in the systemic allocation of healthcare resources, they would continue to be limited to their clinical role.

[D] THE ROLE OF MEDICAL PROFESSIONALS IN SHAPING HEALTHCARE LAW DURING THE COVID-19 CRISIS

Within its structure and in order to run the system the NHS has established a specific relationship between medical professionals and the state. Medical professionals’ lack of proactivity in healthcare policy over the past 70 years is also a result of this organization and power dynamics. However, the pandemic has brought about game-changing circumstances that marked a turning point in healthcare law and policy. The absence of systemic rules to allocate resources during the first weeks of the crisis bestowed upon the medical profession an opportunity to play a central role in drafting new rules.

Medical professionals first reacted by openly expressing their disappointment with the Government’s handling of the Covid-19 crisis and in particular the lack of national guidance (Glover-Thomas 2020: 362-363). The militaristic language and rhetoric portraying frontline workers as heroes fighting a war against the virus was acting as a distraction from the Government’s duty to outline rules to allocate resources fairly (Cox 2020: 511-512).

The communication from the trusts to doctors was also uncoordinated because of the confusion around the course of treatment and illness management (BMA News 2020c). Frontline workers were approaching

Royal Medical Colleges and the BMA with pressing questions on how to deliver ethical care to their patients, manage staff and allocate scarce PPE under unprecedented circumstances (Huxtable 2020a: 1). These professional organizations then took on the responsibility of filling the regulatory void.

On 1 April 2020, the BMA published its guidance document ‘COVID-19 – Ethical Issues. A Guidance Note’ (BMA 2020a: 1). The Association saw great responsibility in providing its members with ethical advice and to help them avoid future litigation. The BMA’s strategic position as the largest registered trade union also meant that it might get some attention from the Government on pressing issues around scarce resources specifically relating to the use of PPE (Huxtable 2020b: 2). A few days after the BMA had issued its note (BMA 2020a), the RCP published its guidance on the ‘Ethical Dimensions of COVID-19 for Frontline Staff’ (RCP 2020). This was supported by the medical profession’s regulator and 16 Royal Medical Colleges and Faculties.¹

The two pieces of guidance followed a similar structure and addressed similar themes. Perhaps the guidance drafters expected that if these documents echoed one another, it would be clearer for clinicians to provide ethical care and help preserve some form of equal access to services wherever possible. Regardless, both documents remain deeply utilitarian in the principles they outline, marking a notable departure from the traditional egalitarian rhetoric the medical profession had thus far consistently and exclusively adopted in its commentary and input on major healthcare reforms.

BMA Ethical Guidance

The BMA’s 10-page note is structured around three themes: the importance of an ethical framework for guidance; appropriate guidelines for the allocation of resources; and solutions for potential triage issues. The guidelines were drafted with the overarching goal of providing frontline medical professionals with clarity and principles on how to ethically ration healthcare resources as the pandemic was unfolding. Throughout,

¹ Supporting the guidance document from the Royal College of Physicians were: the Faculty of Occupational Medicine of the Royal College of Physicians; the Faculty of Pharmaceutical Medicine; the Faculty of Sexual and Reproductive Healthcare; the Royal College of Surgeons of Edinburgh; the Faculty of Intensive Care Medicine; the Royal College of Anaesthetists; the Royal College of Psychiatrists; the Royal College of Emergency Medicine; the Royal College of Ophthalmologists; the Royal College of General Practitioners; the Royal College of Nursing; the Faculty of Sport and Exercise Medicine UK; the Royal College of Physicians of Edinburgh; the Royal College of Radiologists; the Royal College of Physicians and Surgeons of Glasgow; and the Faculty of Health.

emphasis is placed on the importance of openness and transparency in the process (BMA 2020a: 3, 4, 8, 9). The document thereby speaks directly to issues of both distributive and procedural justice in times of crisis.

The opening summary relates the difficult climate that led to the publication of the document and acknowledges the difficult decisions that are confronting medical staff. It mentions resources 'becoming increasingly restricted and choices of available care [being] limited' (BMA 2020a: 1). It implicitly acknowledges the Government's strategy or absence thereof by stating that 'the allocation of potentially life-saving treatment to individual patients [would] fall [on] health care providers and individual health professionals' (BMA 2020a: 2).

It is noted, however, that the intention should remain to meet 'all patients' clinical needs but, if they become necessary, prioritization and triage decisions will be professionally challenging' (BMA 2020a: 1). This particular statement strikes at the heart of the dilemma confronting medical professionals in their clinical roles and the BMA experts in their guidance-drafting role. As early as the first weeks of lockdown in England, sustaining the equal access to services approach in healthcare was becoming increasingly challenging because of unusual working conditions and lack of resources. In fact, the guidance bluntly refers to '[the] little or no surge capacity in the NHS' (BMA 2020a: 2).

The BMA chose to rely on the existing UK Government framework developed during the 2009 flu pandemic to elaborate its Covid-19 ethical guidelines (Department of Health and Social Care 2017). This decision speaks to the urgency of developing guidance to provide answers and solutions to medical professionals acting 'blind' on the frontlines, and to how they were forced to multi-task and double their role as clinicians with guidance drafting. The medical profession also did not depart from its traditionally more passive role in healthcare policymaking, relying on the Government's established position to frame the allocation process and offering more of a commentary than a different stance.

This framework provided essential core principles for the elaboration of guidelines. It lists and defines values of: 'equal respect'; 'respect'; 'minimising the harm of the pandemic'; 'fairness'; 'working together'; 'reciprocity'; 'keeping things in proportion'; 'flexibility'; and 'open and transparent decision-making' (BMA 2020a: 2). Interestingly, three out of nine principles convey elements of an egalitarian rhetoric speaking to equality ('everyone matters equally'), equality of opportunity ('an equal chance of benefiting from a resource') and proportionality ('increased burdens should be supported'). The framework also points to procedural

justice by prescribing ‘inclusive, transparent and reasonable’ decisions. (BMA 2020a: 2).

The subsequent section of the guidance addresses resource allocation and healthcare rationing issues in the event that the system becomes overwhelmed. Of all guidance documents published by medical professional organizations at the time,² the BMA’s is the most explicit about this topic. In this portion of the document, the guidance is framed in utilitarian terms as resource allocation becomes synonymous with priority-setting. The worst-case scenario is described as having all facilities and equipment used at capacity leading to ‘inescapable’ decisions and ‘strictly utilitarian considerations to be applied, and decisions about how to meet individual need giv[ing] way to decisions about how to maximize overall benefit’ (BMA 2020a: 3). This marks a notable departure from the traditional egalitarian rhetoric used by the medical profession in advocating equal access to resources for all in major healthcare reforms.

Interestingly, within the same section, the BMA suggests a conflicting and contradictory approach, explaining that ‘the ethical balance of all doctors and health care workers must shift towards the utilitarian objective of equitable concern for all’ (BMA 2020a: 2). It is difficult to reconcile utilitarian objectives with equal concerns for all, since utilitarianism mandates prioritizing only preferences achieving the greatest level of utility (Bentham 1879). As resources get scarcer it is unlikely that providing equal concern/access to medical services for all would maximize health outcomes. On the contrary, greater ‘demand on health services may outstrip the ability of the NHS to deliver services to pre-pandemic standards’, putting some patients at a higher risk of death (BMA 2020a: 3). However, pre-pandemic levels of access to care certainly did not provide a ‘utopian’ equality. Vulnerable groups have faced and continue to face significant barriers to accessing healthcare services (Germain & Yong 2020).

Directly addressing admissions to intensive care and withdrawal of treatment, the guidance reiterates a utilitarian approach for the rationing of emergency healthcare resources. It suggests ‘maximising the overall reduction of mortality and morbidity’ and

implement[ing] decision-making policies which mean some patients may be denied intensive forms of treatment that they would have received outside a pandemic. Health professionals may be obliged to

² Other than the BMA and RCP’s ethical guidance, the General Medical Council updated its guidance to the medical profession, NICE introduced critical care guidance (as mentioned above) and the Royal College of Surgeons published its ‘Good Practice for Surgeons and Surgical Teams’, offering specialized guidance for the allocation of healthcare resources for surgeon clinicians.

withdraw treatment from some patients to enable treatment of other patients with a higher survival probability (BMA 2020a: 3).

This forms the basis of the utility calculation that may be stripping clinicians of their professional autonomy, something they have so vigorously defended over the past 70 years of healthcare reforms. Medical professionals' assessment shall no longer be based on treatment plans designed for the best interests of their patients but will be constrained by the limited resources available. Emphasis is put on the potential consequences of providing treatment in a utilitarian fashion, looking at survival outcomes rather than equal access to care.

In its final section the guidance document fleshes out guidelines for triage. It addresses the process separately from the more systemic allocation of resources, triage being 'a form of rationing or allocation of scarce resources under critical or emergency circumstances where decisions about who should receive treatment must be made immediately because more individuals have life-threatening conditions than can be treated at once' (BMA 2020a: 4). Here, urgency would be the central element dictating the decision-making process. Nonetheless, it is expected that 'the principles underlying the decisions [should be] systematically applied' (ibid) and that 'decisions at all levels [should be] made openly, accountably, transparently' (ibid: 9), perhaps to guarantee consistency and procedural justice.

Rationing scarce healthcare resources through triage involves 'sort[ing] or grad[ing] persons according to their needs and the probable outcomes of intervention. It can also involve identifying those who are so ill or badly injured that even with aggressive treatment they are unlikely to survive and should therefore receive a lower priority for acute emergency interventions while nonetheless receiving the best available symptomatic relief (ibid: 4).

The presence of comorbidities that are known to be associated with lower survival rates 'may exclude individuals from eligibility'. (Ibid: 4) This may lead to potential instances of discrimination. On this point the guidelines specifically mention that 'decisions must not be solely based on age or disability. Ethically, triage requires identification of clinically relevant facts about individual patients and their likelihood of benefiting from available resources. Younger patients will not be automatically prioritised over older ones.' (ibid) Nonetheless, the outlined principle remains sharply focused on treatment outcomes rather than equal access to treatment for all.

Generally, the guidance is most explicit in referring to the utilitarian rhetoric to frame the triage process. Medical utility is key as medical professionals are urged to focus on ‘delivering the greatest medical benefit to the greatest number of people’ (BMA 2020a: 5). The process for ranking patients for admission into intensive care is explicitly spelled out, and the guidance suggests applying benchmarks and ‘thresholds’ in order ‘[t]o maximise benefit from admission to intensive care’ (ibid).

But when presenting its approach, the BMA suggests that it should be reconciled with ‘an egalitarian approach that ensures a fair distribution of resources’ (BMA 2020a: 5). In the event that patients with a similar chance of survival and anticipated lengths of treatment need to be admitted to the Intensive Care Unit (ICU), the BMA recommends a ‘modified queuing’ system embracing a ‘first come first served’ approach (ibid). Admittedly this approach would not guarantee equality in access to healthcare as it is ‘likely to give priority to those who are mobile, who have access to transport, or who live close to hospitals and other sites of health provision’ (ibid).

In parallel to the guidance document, the BMA also issued a series of communications on its Covid-19 emergency ethical framework and the professional association’s position on issues relating to resource allocation. A call to prioritize NHS staff for the allocation of PPE dominated the BMA’s blog posts and press releases (BMA 2020b; BMA News 2020a, 2020b). The guidance document was the BMA’s first step into arguing for the prioritization of treatment and access to PPE for the medical profession (BMA 2020a: 8), ‘both for [their] own sake and as part of maintaining effective clinical services’ (ibid: 4). Interestingly, the BMA nonetheless voiced a certain discomfort in advocating for this utilitarian approach that would prioritize individuals with the greatest social utility. It acknowledged that ‘[g]iving priority to those working in essential services in this way would move beyond [the] usual system of resource allocation and decision-makers could face criticism for discriminating between individuals on the basis of social, rather than solely medical, factors’ (ibid: 7).

The Royal College of Physicians’ Covid-19 Guidance

Similar to its BMA companion, the RCP’s guidance first spells out the ethical framework that has supported its development. Distributive justice is explicitly mentioned because it ‘is the most often cited ethical principle during a pandemic’ (RCP 2020: 3). The Royal College emphasizes that its approach must be based on fairness. This is described as more suitable

for the clinical workforce and the best way to understand and approach the ethical issues the workforce would be facing (ibid).

These framing principles mostly speak to the importance of procedural justice in looking at the decision-making process in time of crisis. All five principles ('accountability', 'inclusivity', 'transparency', 'reasonableness' and 'responsiveness') are presented as the 'principal values that inform [the] guidance' (RCP 2020: 3). Noticeably absent, however, is the idea of consistency. The guidance is clear that the fast-paced nature of the situation does not allow for permanent guidelines to inform clinical decisions. In fact, '*flexibility*' is encouraged for greater '*responsiveness*' to better meet the needs of the population (ibid: emphasis added).

The remainder of the document provides 'specific recommendations for ethical practice and decision-making' (RCP 2020: 4) addressing various ethical dimensions of the resource allocation process. The first set of recommendations focuses on the clinical decision-making process and the management of patients. Under the heading 'Ensuring fair and equitable care', it is stated that, irrespective of the system's potentially varying capacity, no group shall be disproportionately disadvantaged and that 'treatment should be provided, irrespective of the individual's background (eg disability)' (ibid). Equality in treatment is explicitly spelled out in that like patients should be treated alike and without discrimination. It is further clarified that 'decision-making should not be disease specific', but only a brief explanation without greater details is given along with a direct reference to national guidance (ibid).

Regarding the allocation of resources among patients, the guidance is deferential to clinicians and provides advice solely on how to validate difficult decisions through a collaborative process. It suggested that more than one medical professional shall consider the impact of these difficult decisions. The Royal College recognizes that it may not be possible to guarantee equal access to treatment for all as '[r]esources will be inevitably stretched, with doctors having to make decisions about whether patients can or cannot receive treatment' (RCP 2020: 4). Addressing the issue of ICU beds and resources, the Royal College provides a link to the National Institute for Health and Care Excellence (NICE) guidance without detailing any other specific guiding principles (ibid: 5). Here again, the medical profession was explicit about its desire to rely on the Government's position. This is perhaps due to its natural inclination to remain more of a commentator on healthcare policy rather than an active policymaker, but also because of the controversial nature of the intensive care admissions guidance.

However, an important and interesting feature is the specific mention given to '[m]edical ethicists (sometimes referred to as bioethicists)' (RCP 2020: 5). They are designated as those that 'can help frontline staff with difficult decisions, particularly where there is significant disagreement or a stakeholder might wish some form of external appeal other than a second opinion' (ibid). Perhaps the Royal College wanted to highlight the importance of making sound and ethical decisions. It underscores the difficulty some clinicians could have in appreciating and applying the given criteria, particularly if it meant deviating from the traditional line of providing equal access to all patients.

On the topic of human resources and staff management, the guidance only invokes principles of solidarity and equity for medical professionals working outside of their specialty (RCP 2020: 5). But with regard to an issue that was highly sensitive at the time of writing because of a lack of resources, the document refers to the guidance of Public Health England on the use and allocation of PPE. However, it does make clear the need for medical staff to be properly shielded from harm in order to fulfil their clinical duties (ibid: 6). The lack of detail and precise guidelines on the topic speaks to the issue of the availability and allocation of PPE at the time and the anger that was building in the ranks of the medical profession towards the Government.

On the whole, both guidance documents expose the tension between public health ethics focusing on the health of the population and clinical ethics that focus on patient autonomy and best interests (Paton 2020). This translated into a mixed rhetoric in the guidance which promoted a utilitarian approach focusing on health outcomes to ration critically scarce resources, which was in direct tension with an egalitarian undertone that highlights the difficult decisions frontline workers will face making when the equal access approach is untenable.

Most certainly, the role of medical professionals in guidance drafting deviated from the traditional egalitarian rhetoric the medical profession has adopted when commenting on healthcare reforms. When holding the pen to draft the allocation rules for their colleagues, guidance drafters had to account for the crisis. In so doing, they reluctantly deferred to utilitarian principles since an egalitarian approach to access to care as well as their professional autonomy could not be preserved.

[E] CONCLUSION

For the past 70 years, medical professionals have mostly reacted and commented on the design and content of major reforms rather than being directly invested in healthcare rationing at a systemic level (Ham 2009; Klein 2013). In virtually all major reforms they have used the rhetoric of liberal equality to sway the debate and to protect an approach promoting equal access to universal healthcare services as well as to safeguard their professional autonomy. Although at a clinical level medical professionals have had the freedom to allocate treatment to their patients, during reformative periods they have never made concrete policy proposals for the distribution of resources in the NHS. However, for the first time, in the context of the Covid-19 public health crisis, the medical profession has had to exercise dual agency, both as clinicians on the frontlines and as healthcare rulemakers drafting emergency ethical guidance.

The nature and scale of the pandemic is incomparable to any other event affecting the NHS throughout its existence. It has brought into sharper focus ethical dilemmas that have gone beyond the firefighting of the allocation of intensive care beds during the first weeks of the crisis in England.³ It has called attention to the strain on the system present even prior to the outbreak (Antova 2020: 1) and made healthcare rationing even more of a focal point. However, the public health crisis has not substantially changed the role of medical professionals in healthcare policymaking.

The absence of national guidance during the first peak of infections presented a unique opportunity to make a bold policy proposition and for medical professionals to shape the allocation process. But circumstances that caused medical professionals to step in promptly to provide guidance led them to fall back on pre-existing frameworks. However, the distributive justice rhetoric that emerged in the drafting of the BMA and RCP's guidance documents differed from the traditional egalitarian approach in that it engaged more substantially with utilitarianism.

The suspension in the equal access to healthcare services approach, in favour of an allocation of healthcare resources focusing on outcomes and social utility, might also signal a more profound shift in the system. The pandemic, with no conscious intent on the part of the medical profession, may have shaped a distribution of healthcare resources that will have an impact on healthcare law and policymaking for many years to come.

³ NICE published its Covid-19 rapid guidelines in March 2020 to help clinicians in their assessment of patients in need of admission into critical care.

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A NATIONAL EMERGENCY OR A PUBLIC HEALTH CRISIS? REFLECTING ON THE 2020 AND 2021 MANX RESPONSES TO THE GLOBAL PANDEMIC

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Abstract

The Isle of Man, a self-governing Crown Dependency, developed its own response to the global pandemic, including strict border controls and periods of lockdown. In 2020, this was given legal effect through the declaration of a formal State of Emergency, while, in 2021, similar measures were implemented under public health legislation without a State of Emergency. Framing the 2021 lockdowns as a public health crisis led to a more tightly focused response than the 2020 framing as a national emergency. Within this narrower range, however, the structure of the public health legislation as implemented provided less democratic accountability than the emergency powers legislation and reduced the emphasis given to the rules as laws, leading to a decrease in formality in relation to both creation and publication of these legal rules, and exacerbating a blurring between law and advice. These disadvantages were not, however, intrinsic to the public health legislation itself, and if corrected the public health response is to be preferred.

Keywords: pandemic; State of Emergency; public health, Isle of Man.

[A] INTRODUCTION

The Isle of Man is a Crown Dependency which constitutes a distinct jurisdiction and is largely autonomous in relation to internal affairs. Before the 20th century, emergencies were dealt with by a mix of prerogative powers and emergency legislation by the Manx legislature, the Tynwald. In the 20th century, emergencies in the form of warfare were handled not as a Manx issue, but as an imperial concern dealt with primarily by imperial laws, including emergency provisions. Below the imperial level, the influenza pandemic of 1918–1920, and

later recurrences throughout the 1920s and 1930s, were dealt with as a local health issue.

In 2020, after a very brief period treating the pandemic under the specific provisions of the Public Health Act 1990 (PHA), the Isle of Man responded to the coronavirus pandemic with the declaration of a State of Emergency under the Emergency Powers Act 1936 (EPA) and exceptional governance of the Isle of Man under a regime of emergency powers regulations (EPRs). This was the first time the Isle of Man had responded to a national emergency at a national level. The State of Emergency lasted from 16 March to 26 June 2020. There then followed an unusual, and potentially unlawful, period of managing the crisis in a post-State of Emergency continuation period. Even proponents of this continuation period recognized that it would end six months after the State of Emergency, and so it was replaced by amendments to public health legislation. In late December 2020, but primarily through January 2021, this different legal regime was used to implement a second national lockdown through public health regulations (PHRs) and government circulars (GCs) made under the PHA, followed by a third national lockdown in March and April 2021.

The Manx response to the global pandemic was shaped by a specifically Manx geographical, constitutional and historical context—in particular, by the Manx status as a democratic small island Dependency (Edge 2021). It also made use of specifically Manx institutions, of which the most important are Tynwald and the Council of Ministers (CoMin). Tynwald consists of 24 directly elected Members of the House of Keys (MHKs), from whom the equivalent of the UK Cabinet, CoMin, is drawn; and a second chamber, the Legislative Council (LC), which consists of eight members appointed by the House of Keys (HK), the Lord Bishop of Sodor and Man, the (non-voting) Attorney General and the President of Tynwald. Unusually, as the only surviving tricameral legislature, there are occasions when the two Branches of Tynwald sit together as a third chamber, Tynwald Court (TC)—most significantly for our purposes during the consideration of secondary legislation (Edge 1997: 12-38, 134-142; Lisvane 2016: 15-22).

Of more general interest, however, the change in the legal regime between the two sets of lockdowns—from national Emergency in 2020 to public health crisis in 2021—provides an opportunity to compare the two forms of response within a single jurisdiction. Comparing the two within the same jurisdiction reveals some significant differences. I argue that framing the 2021 lockdowns as a public health crisis led to a more

tightly focused response than the 2020 framing as a national emergency. A very much smaller range of issues was covered, in part because of a recognition by CoMin and Tynwald that the PHA provided less freedom of action than a State of Emergency. Within this narrower range, however, the structure of the PHA provided less democratic accountability than the EPA. The decision to rely upon GCs made under PHRs, rather than PHRs themselves, for the principal provisions of the lockdowns led to less emphasis on the rules as laws: leading to a decrease in formality in relation to both creation and publication of these legal rules, and exacerbating a blurring between law and advice. These disadvantages of the PHA response were not, however, intrinsic to the PHA itself; but instead can be traced back to the decision to use GCs rather than PHRs to create the content of generally applicable legal rules.

This brief article begins by mapping out the legal structures underpinning the EPA lockdown in 2020, then does the same for the PHA lockdowns in 2021. I then draw out the differences between a pandemic response framed as a national emergency and one framed as a public health crisis.

[B] THE 2020 LOCKDOWN: THE EPA IN ACTION

The EPA was based on the United Kingdom's (UK) Emergency Powers Act 1920. Attempts by the Manx Government (Isle of Man Government (IOMG)) to introduce legislation based on this 1920 Act had failed during the 1920s. Part of the failure was due to a focus on 'lightning strikes that interfere with the life or health of the community' (The Lieutenant-Governor, LC 11 February 1921 at 38) which led members of Tynwald associated with the labour movement to see it as 'a piece of class legislation' (Mr Shimmin, HK 3 May 1921 at 720). A substantial further factor was the link to the deeper constitutional struggle between Tynwald, which included elected MHKs, and the Crown-appointed Lieutenant-Governor over control over executive government. The Manx Constitution of the 1920s decisively put executive power in the hands of the Lieutenant-Governor acting alone, and many MHKs were loath to accede to government requests to add to this even during an emergency (see more broadly Rooney 2019: 4-6). In June 1935, however, there had been a substantial and effective strike by the Transport and General Workers Union, and, as a direct result of this acrimonious dispute, Tynwald returned to the 1920 Act. Disingenuously, at times IOMG described the Bill as one that did not 'primarily deal with labour disputes or any particular occasion of emergency' (The Attorney

General, LC 1 November 1935 at 54). The EPA was, however, limited to man-made emergencies, section 3 requiring action ‘taken or ... immediately threatened by any person or body of persons’. Although this was changed with the adoption in 1964 of a UK provision widening the 1920 Act, the only times before 2020 that IOMG seems to have considered a State of Emergency were all related to industrial disputes: the National Union of Seamen Strike in 1966 (The Attorney General, TC 17 May 1966 at 1512), a postal strike in 1971 (The Speaker, TC 19 January 1971 at T324), and the disputes between seamen and the Manx ferry companies in 1985 (Mr Cannan, HK 3 May 2006 at 1056 K123) and 1986 (The Chief Minister, TC 16 February 1988 at T730).

On 16 March 2020, the Lieutenant-Governor, acting on the binding advice of CoMin, proclaimed a State of Emergency on the basis that ‘there is a pandemic of Coronavirus ... it appears that there is a threat of that disease affecting the Island and causing serious damage to human health on, and the economic well-being of the Island’. Such a proclamation was limited to one month, but was repeatedly renewed until the ending of the Emergency on 26 June 2020.

The proclamation of an Emergency is a declaration that ‘the government is too constrained by existing institutions to efficiently deal with the shock’ of the crisis confronting it (Fisunoglu & Rooney 2020: 1). In the Manx system, the Emergency Proclamation allowed the Governor-in-Council—again, the Governor acting on the binding advice of CoMin—to make EPRs with a tremendously wide reach. Such EPRs could be backed with criminal sanctions, including serious fines and imprisonment for up to three months. Although created by the executive, and coming into effect immediately, there was an element of democratic control. EPRs had to be laid before Tynwald within seven days of being made, and if not approved by Tynwald ceased to have effect seven days thereafter.

Eighty-six EPRs were made during the Emergency. We can identify three central pillars to the Manx response to the pandemic.

First, border control. An early Regulation allowing control of ports of entry (Port Operations Regulations 2020) was quickly supplemented by the Entry Restrictions Regulations 2020, which prohibited entry to the Isle of Man for both residents and non-residents, with exceptions for persons vital to critical national infrastructure, essential medical experts, persons returning to the Island after essential medical treatment, and individuals specified by the Council of Ministers. Repeatedly amended, these regulations were entirely replaced with the Entry Restrictions (No 2) Regulations 2020 in May 2020. A key controversy during the Emergency

was the stringency of border control, and the position of residents seeking to return to the Island from overseas (including the UK). Border controls remained in place after the Emergency ended: initially through the continuation EPR, later through an amendment to the PHA.

Second, control of internal movement and interaction. Restrictions on movement of persons who were potentially infected, including those who had recently come to the Isle of Man from a territory such as the UK, were included in the first EPR, the Potentially Infectious Persons Regulations 2020. Of much broader reach were the Prohibition on Movement Regulations 2020, which introduced a general prohibition on leaving a residence, subject to a number of detailed exemptions. The details of these exemptions was an area of considerable activity, with no less than six EPRs passed to amend these regulations. These restrictions were not in effect at the end of the Emergency and were not continued.

Thirdly, closure of businesses. The first EPR closing business premises, the Closure of Premises Regulations 2020, was created on 22 March, closing restaurants and bars, and a range of leisure destinations such as museums and galleries. This was supplemented by the Schools Regulations 2020 allowing the closure of schools. The two sets were consolidated in the Closure of Businesses and Other Premises Regulations 2020, which created three categories of premises—those which were required to close, those which could remain open for particular purposes and under particular conditions related to their sector, and those which could remain open. The extremely detailed provisions of this regulation were repeatedly amended, the final ninth amending regulation being created on 22 May, before being replaced by a revised, very much narrower, restriction at the end of the Emergency. These regulations were not continued after the end of the Emergency.

These three pillars together constituted 45 of the 86 EPRs, so a majority but not an overwhelming one. The remainder dealt with simplifying administration (15), protecting public sector capacity (12), transport (5), housing (3), elections (2), economic intervention (2) and general provisions such as the introduction of fixed penalty notices as an alternative to criminal prosecution (2). Together, these categories dealt with a very wide range of issues, from prohibiting certain classes of employee from leaving the Island, through implementing virtual meetings of public bodies, to allowing MHKs with medical and nursing qualifications to take up offices of profit without automatically losing their seat.

Not every EPR was backed by criminal sanctions, but a very significant number were, including the three central planks of the response

discussed above. The penalties were not merely theoretical, as the Manx courts showed throughout the pandemic. For instance, between March and June 2020, 96 people had been arrested under the EPRs, and 26 had been jailed (Minister for Home Affairs, HK 2 June 2020 at 875-878 K137). High-profile punishments included penalties such as 35 days for being absent from home, 35 days for instigating a gathering, and 30 days for drinking at a friend's house. One which drew international attention was Dale McLaughlan, who crossed to the Isle of Man from Scotland on a jetski to visit his girlfriend, having been refused an entry permit, and was imprisoned for four weeks (BBC News 2020).

The End of the Emergency and the Continuation EPR Period

After 7 June 2020 no active cases of coronavirus were recorded on the Island (IOMG 2020). The Government had already lost, for the first time, a motion to have Tynwald approve an EPR, a loss described as indicative of 'a new spirit abroad in this Honourable Court now' (Mr Robertshaw, TC 26 May 2020 at 2059 T137). One theme from critics was that the regulations were 'unnecessary at this time ... clearly not proportionate to the current emergency' (Mrs Caine, TC 26 May 2020 at 2056 T137) and the situation would be better addressed by normal legislative means. There was also scepticism about the continued need for an emergency powers regime (Mrs Lord Brennan, TC 26 May 2020 at 2057 T137). One of the votes against in the Keys was from a minister, Chris Thomas, who was dismissed as a result. Mr Thomas later moved a number of motions to define the end of the Emergency period, which were not debated as CoMin moved speedily in the same direction. Only two further EPRs were approved by Tynwald: the Closure of Businesses and Other Premises (Amendment No 9) Regulations 2020, and the Continuation (No 2) Regulations 2020. One EPR, the Educational Institutions (Amendment) Regulations 2020, was lost, while seven were not moved for approval, including a key regulation addressing both internal movement and closure of businesses—the People, Places and Activities Regulations 2020—which I will return to below.

The Emergency ended at 18.00 on 26 June 2020. During the Emergency, it was recognized that some EPRs might need to continue past the end of the State of Emergency. The EPA, as amended in 2020, allowed for the creation of Continuation Regulations which could last up to six months after the ending of the Emergency. The Continuation Regulations as passed during the Emergency were surprisingly expansive. All EPRs were continued for the same period, the maximum allowed under the primary

legislation; and the majority of extant EPRs were continued with or without modification. This last point should not be overemphasized. Key features of the Emergency period EPRs had already been repealed during the Emergency. Nonetheless, the continuation EPR does not suggest that the continued existence of each provision of each EPR was seen as an anomaly which needed to be justified and, even where justified, retained for as short a period as practical.

Most controversially, on 17 July 2020 the Lieutenant-Governor purported to create a new EPR, amending the Continuation Regulations. The Attorney General indicated to Tynwald, which approved the measure, that:

Although the original regulations were required to be made during the period of an emergency proclamation, given the purpose for which continuation regulations are authorised to be made under section 4A, namely to secure the intended effect of the regulations during the 6 month period, there is implied within the section a power to amend them during that period in the light of changing circumstances (Attorney General 2020).

The lawfulness of EPRs made other than during a State of Emergency is, however, contested (Edge 2021). One consequence of emergency powers exercisable other than during an emergency is the erosion of the crucial distinction between a State of Emergency—a constitutional enormity which allocates legal powers exceptionally—and the post-Emergency continuation period, and so normalizing these exceptional powers (de Wilde 2015).

Although the EPR was passed by Tynwald, a query was raised by Mr Chris Thomas MHK as to the basis for the power to create EPRs during the continuation period. The Government remained confident of its power to do so, purporting to create a total of seven amending EPRs after the end of the Emergency. The continuation period EPRs, doubts as to their legality aside, were subject to less democratic oversight than normal EPRs. A normal EPR, as discussed above, had to be considered by Tynwald within seven days and, if not approved, ceased to be of effect within seven days thereafter. Continuation EPRs, on the other hand, were not required to be placed before Tynwald within a set period, but rather ‘as soon as practicable’ (Legislation Act 2015, section 31). This was used to allow a continuation EPR made, and taking effect, on 10 August 2020 to be laid before Tynwald on 20 October 2020.

[C] THE 2021 LOCKDOWNS: THE PHA IN ACTION

Even with this expansive understanding of the continuation EPRs, a legal regime based on the EPA could not be sustained beyond the end of December 2020, six months after the end of the Emergency. For the longer term, Tynwald returned to the PHA.

It will be recalled that the 1918–1920 pandemic was dealt with as a local health crisis. It was addressed under very specific legislation, the Local Government Consolidation Act 1916, section 195, which allowed the creation of regulations, mostly based on what we would now describe as ‘reactive social distancing’ (D’Onofrio & Ors 2007), with a view to preventing, mitigating and guarding against the spreading of epidemic disease. Regulations under this 1916 Act were made 23 times between 1918 and 1973, principally concerning influenza. The 1916 Act was replaced by the PHA. This Act was the legal basis for the first emergency regulations in the 2020 crisis, the Health Protection (Coronavirus) Regulations 2020, made on 26 February, and ceasing to have effect on 24 March 2020. From 24 March, EPRs under the EPA were instead the primary tool for dealing with the first stage of the pandemic.

As the EPR continuation period neared its end, CoMin and Tynwald sought to amend the PHA to ensure that it provided a suitable tool for dealing with the need for further restrictions as the global pandemic continued. Longer-term reflections on the EPA were moved up the policy agenda, but not sufficiently urgently to fit with the (statutory) end of the continuation period, with consultation on a Civil Contingencies Bill based on the UK Civil Contingencies Act 2004 not currently resulting in legislation or a Bill before Tynwald (Cabinet Office 2020).

Tynwald amended the PHA by the Courts, Tribunals and Local Authority Procedures and Miscellaneous Provisions Act 2020. The key section for current purposes is Part IIA—Public Health Protection, in particular sections 51B–51F. In contrast to the EPA, this does not require a formal State of Emergency to be declared—but neither is it usable in as wide a range of emergencies, nor does it have any application beyond threats to public health.

This Part gives the power to the Council of Ministers to make regulations controlling international travel (section 51B), and ‘preventing, protecting against, controlling or providing a public health response to the incidence, spread or effect of infection or contamination in the Island’ (section 51C), which can include ‘imposing or enabling the imposition of restrictions or

requirements on or in relation to persons, things or premises’ (section 51C(3)(c)). The latter is most important for non-travellers and is subject to some specific restrictions: it must not be considered disproportionate by the authority imposing the restriction (section 51D(2)) and must be imposed in response to a serious and imminent threat to public health (section 51D(4)). This section cannot be used to order an individual to submit to medical examination, to be removed or detained in a hospital, or to be kept in isolation or quarantine—the power to do these things is instead vested in a judicial officer (section 51(G)(2)(a)-(d)). Neither power may be used to require a person to undergo medical treatment, including vaccination (section 51E).

These two powers may be used to create health protection regulations (PHRs), with very broad effect (section 51F(2)), including amending primary legislation (section 51F(3)). This can include creating criminal offences punishable by a fine equivalent to four times level 5 (as of today, £40,000), custody for a term not exceeding three months, and a further fine of up to £100 per day for continued default after conviction (section 51F(5)). Compared with the EPA, there is no provision for forfeiture of property as a punishment, a similar maximum prison sentence, a sharply increased maximum fine, and the possibility of a penalty continuing to accrue so long as the defendant remains in default. PHR offences are triable summarily. Regulations can also create fixed penalty notices (section 51F(2)(i)).

Before exercising these powers, CoMin must consult the Department of Health and Social Care and such other persons as appear to it to be appropriate if practicable to do so (section 51PA). PHRs, unlike EPRs, do not generally come into operation until approved by Tynwald (section 51Q(2)). A PHR may come into effect prior to Tynwald approval if it is declared, by the person making it, ‘that, by reason of urgency, it is necessary for it to come into operation before it is approved’ (section 51Q(3)). In that case it must be laid before Tynwald and approved by Tynwald within 14 days (section 51Q(5)), or cease to have effect. There is a little more leeway than under the EPA: the EPA required approval within seven days (although the expiry period was the same) and had no provision in case it proved impossible for the President to summon Tynwald within the period (contained in section 51Q(5A-5C)).

The first PHR, the Public Health Protection (Coronavirus) Regulations 2020, created as it was to deal with the expiration of the continuation period, did not come into effect until after consideration by Tynwald. This

created the framework for post-EPA responses to the pandemic, with an emphasis on border control, self-isolation and testing.

Further action was needed in the wake of the UK crisis at the end of 2020 and an outbreak of cases in the Isle of Man over the Christmas period. Border control was amended in late December, by the Public Health Protection (Coronavirus) (Amendment) Regulations 2020, which came into effect before approval by Tynwald. In early January, the Public Health Protection (Coronavirus) (Amendment) Regulations 2021, while further modifying border control, created important new restrictions around internal movement, events and gatherings, and the operation of businesses, again before approval by Tynwald.

Thus, at 00:01 on 7 January 2021, the Isle of Man entered a second lockdown, this time based on the PHA rather than the EPA; but based on the same foundations of border control, control of internal movement and closure of businesses. The second lockdown was shorter, ending on 1 February 2021.

Unfortunately, having experienced virtual freedom from internal restrictions for more than six months between the first and second lockdowns, the Isle of Man entered a third lockdown on 3 March 2021. The need for a third lockdown was much more politically charged than in the preceding cases, as a very substantial number of cases in the Manx community followed coverage of possible failings in the border control mechanisms around mariners employed by state-owned Isle of Man Steam Packet (IOMSPC). The government response to criticism of this element of border control, and confusion over the workings of control in relation to the IOMSPC was itself criticized, leading to the commissioning of a formal independent review (Hind 2021).

This political controversy flowed into criticism of a short—but perhaps significant—initial delay in establishing a third lockdown. One of the reasons at times suggested by the Chief Minister for the initial delay in creating the third lockdown was the time taken to prepare necessary legislation. The PHA and PHR remained in effect, and when the lockdown was given effect by GCs, the legislation was very similar—certainly the two PHA lockdowns are much closer in content than different stages of the EPA regime. Accordingly, I will consider the PHA response for the second and third lockdowns together.

One significant difference between the first and second PHA lockdowns is, however, worth highlighting. The first PHA lockdown had a closure of schools and childcare facilities similar to that of England—they were

physically closed for the majority of children, but vulnerable children and children of key workers could still attend a hub school. The surge leading to the second PHA lockdown was significantly associated with school-age children. Controversially, therefore, during this lockdown schools and childcare facilities were closed even to these children (under, for instance, GC 2020/0039).

[D] COMPARING EMERGENCY POWERS AND PUBLIC HEALTH RESPONSES

The PHA Response Covered a Narrower Range of Issues

The foundations of the EPA and the PHA lockdowns were measures around border control, restriction of movement and closure of premises. Measures predominantly concerned with these three topics constituted 45 of the 86 EPRs made during the EPA period (excluding the continuation period). The remaining 48% of the EPRs, however, addressed civil administration, public sector capacity, transport, housing, elections, economics and pervasive issues across multiple EPRs (for instance fixed penalty notice terms)—topics not dealt with under the PHA. Every one of the PHRs, and the GCs made under them, dealt with these three central topics.

How can this tighter focus be explained? One explanation may be that lessons were learnt about what measures were needed to deal with the pandemic during the first, EPA, lockdown; and so some measures were simply not seen as proportionate on policy grounds by 2021. Another, and one with some support from the public record, is that the PHA was seen as intrinsically narrower than the EPA, and so not everything that could be done under the EPA was possible under the PHA.

In some cases, issues which had been seen as significant enough to warrant legal intervention in the 2020 lockdown were not covered at all. For instance, special restrictions on the ability of particular classes of employees to leave the Isle of Man were not introduced. In other cases, issues which had been dealt with under the EPA were addressed, but by different legal mechanisms. The best example concerns local elections. Under the EPA, local by-elections had been postponed by an EPR, the Local Government Regulations 2020. On 9 March 2021, Tynwald members voted to support a government plan to delay local authority elections. The relevant minister cited the absence of EPA powers, ‘without those powers this time, we will need to push ahead with bespoke changes

to primary legislation' (Mr Baker, TC 9 March 2021 at 1704-1710). The Speaker queried the need for this, suggesting that bringing into effect a section of the House of Keys and Local Authorities Act 2020 would allow the postponement. A number of members strongly favoured bespoke legislation—whether primary or secondary—over triggering a State of Emergency to deal with this particular problem. Primary legislation, the Elections and Meetings (Local Authorities) Act 2021, rather than a special regulation was passed to deal with the issue.

The PHA Response made Significant Use of Government Circulars

The tighter focus of the PHR response may be part of the explanation for a sharp difference in the number of regulations made under the two regimes. Against the 86 EPRs made other than in the continuation period, we have 15 amending PHRs across both lockdowns. The better explanation, however, is the reliance upon GCs, discussed more fully below, to provide the detail for every aspect of the regime. Including the GCs, we have 82 documents across both PHR lockdowns, as compared to the 86 under the EPA.

These GCs were used to provide the substantive rules of the PHA lockdowns. This may be illustrated by reference to one of the three foundations—that of restrictions on freedom of movement. These are dealt with under four clauses, which had the effect of allowing CoMin to issue a GC prohibiting persons from leaving their homes for any purpose, such GC being 'general or specific' (Public Health Regulations 2020, section 26C(2)(a)). The first GC made under this provision, GC 2021/0004, ran to five pages, the second to seven, the third to ten.

I discuss two significant drawbacks to this change of direction below. A great advantage of this approach, however, is that these GCs were drafted with a view to being accessed by the general public, and thought was put into making them as accessible as possible. For instance, a single active GC was kept for each of the key areas of regulation and, even for quite small amendments, the entire preceding GC was removed. Almost invariably, the GCs were drafted to be self-contained and not require experience of legal analysis to parse. As documents aimed at the general public, needing to be assimilated and acted upon swiftly, this was a real improvement.

The PHA Response was Better Drafted and more Clearly Communicated

Perhaps as a result of the tighter focus and the ability to draw on the experience of the 2020 lockdown, drafting showed notably fewer errors; even in the more numerous GCs. One example was permitting individuals to leave their homes in order to access dog daycare and grooming, when such services were required to be closed (GC 2021/004, Schedule paragraph 3(i)). Another, corrected within hours and before the PHR was published, imposed less serious masking requirements on persons who were required to self-isolate as a contact of a coronavirus-positive person than on persons sharing the traced person's household (Public Health (Amendment) (No 9) Regulations, corrected by Public Health (Amendment) (No 10) Regulations).

This improvement in drafting is striking since a number of features which posed a challenge to high-quality drafting were present under both the EPA and the PHA. Given the close similarity between UK and Manx drafting styles, there is no intrinsic reason why a Manx law should take any less professional time to draft than one in the larger jurisdiction, with a larger team of legislative draftspersons (Cain 1990; Hewagama 2010). There were limits in both sets of lockdowns to how far the Manx capacity for drafting could be stretched. Part of the stress on Manx drafting capacity was caused by the fast-moving nature of the pandemic, and the need for a very high volume of legislation. It was exacerbated, however, by the choice to allow these laws to come into effect before scrutiny by Tynwald.

EPRs, and then the overwhelming majority of PHRs, were created by the executive and became law when signed and were only later subjected to scrutiny by the members of the legislature. Legislators frequently identified drafting errors both within and outside the legislative chamber, however, and in some cases voted in favour of an EPR only on the basis that an error would be speedily addressed, or upon receiving an assurance that issues raised in debate would be dealt with by 'further legislation' (The Chief Minister, TC 27 March 2020 at 1497 T137). GCs were not subject to formal scrutiny by Tynwald at all.

The PHA Response Blurred the Distinction between Law and Guidance more than the EPA Response

In the first Manx lockdown, the EPA allowed EPRs, which themselves occasionally referred to guidance on the Manx government website for legal content. In the PHA lockdowns, another layer was added.

The PHA allowed PHRs, but the principal effect of these PHRs was to allow the creation of Directions (published as GCs), which themselves frequently referred to guidance on the government website. For instance, permission to leave home became dependent upon a PHA (approved by the legislature), allowing a PHR (created by the executive but approved by the legislature), which permitted the creation of Directions (created by the executive), which made permission to leave subject to complying with ‘guidance published on www.gov.im’ (GC 2021/0014).

The shift down in formality and constitutional process through each level may have contributed to casualness around the publication of legal documents. There are numerous examples of GCs coming into effect before they were publicly available, although none were signed to have retrospective effect. One extreme example concerns closures of schools and childcare providers to all children. The two GCs doing so were not published until after they had been replaced by new GCs covering the same topics (GC 2020/2036, replaced by GC 2021/0040; GC 2021/0037, replaced by GC 2021/0039).

The incorporation of guidance into law exacerbates the blurring, found elsewhere during the pandemic, between binding law and government guidance. The most striking example of this occurred towards the end of the second lockdown. The closure of business premises included a provision allowing the operators to return to closed premises in order to ‘prepare the business for re-opening in line with any Government directions’ (GC 2021/0011, paragraph 6(f)). Just ahead of the weekend before premises were to be permitted to open, the Chief Minister tweeted: ‘Ahead of possible lifting of measures from 1 February, we recognize some businesses may want to prepare over the weekend. This is OK as long as social distancing and other measures are respected. We are almost there. Let’s continue making the right decisions. #isleofman’.¹ No government Direction, nor even guidance on the IOMG website, was created to give effect to this.

The PHA Responses were Less Closely Subject to Democratic Oversight

As will be recalled, EPRs came into effect when made, but had to be confirmed by Tynwald within seven days or lapse. PHRs, too, were subject to confirmation by Tynwald. In a minority of cases this was before they came into effect, but the majority came into effect subject to confirmation.

¹ See twitter.com/HowardQuayleMHK/status/1354782949930110977 1.26pm, 28 January 2021.

Confirmation was required within 14, rather than seven, days. I have argued elsewhere that, given modern technology, seven days under the EPA was already too long (Edge 2021).

More significantly, however, the overwhelming majority of the detail of the PHR lockdowns was given effect by GCs, not PHRs. Unlike EPRs and PHRs, the GCs, as noted above, provided the detail of the restrictions on much of Manx life during the PHA lockdowns. For instance, in relation to restrictions on gatherings, although there are some specific limits on the power due to interpretation and savings in the PHR itself, regulation 33C of the PHR provides ‘The Council of Ministers may give a direction notice prohibiting an event or gathering’, and such a direction notice may be general, and apply to the entire Island. Changes to the PHR were subject to democratic oversight by Tynwald. Changes to GCs, on the other hand, were not.

GCs were not required to be affirmed by Tynwald. Instead, they were laid before Tynwald as items ‘subject to no procedure’, typically in batches; for instance ten being laid before Tynwald on 20 January 2021. Such documents do not require approval by Tynwald before coming into effect, or approval by Tynwald if they are to continue in effect (Legislation Act 2015, sections 30-32). Instead, the only obligation is to lay the document before Tynwald ‘as soon as practicable after it is made’ (Legislation Act 2015, section 34, 36). A failure to meet even this minimal obligation does not affect validity (Legislation Act 2015, section 36). Although GCs were regularly tabled throughout the two PHA lockdowns, no GC was at any point subject to debate, or a vote.

Towards the end of the EPA lockdown, CoMin intended to replace much of the EPR regime with the People, Places and Activities Regulation 2020 which would cover prohibition on movement, closure of businesses, and events and gatherings. This EPR would have empowered the executive to detail restrictions similar to the GCs in the PHR regime, subject only to laying before Tynwald as soon as practicable after it was made. Although coming into effect before consideration by Tynwald, this EPR was criticized as an enabling measure which reduced democratic oversight too much and was not tabled for approval by CoMin at the next Tynwald—and so did not become law. My understanding is that the decision not to table the EPR was because CoMin had received substantial criticism of the measure from members of Tynwald, and were not confident that it would receive support.

The different shape of EPA and PHA powers may explain why Tynwald was more relaxed over the introduction of GCs under the PHR. The

tighter focus of PHRs was well-recognized in Tynwald, and was being taken account of by CoMin. It may also be that, as the Isle of Man became used to the shape of pandemic restrictions, concerns over excessive use of executive rulemaking powers reduced. Nonetheless, it is the case that major changes to criminal liability for breach of pandemic rules were made without requiring approval by Tynwald. In the areas covered by both regimes, they were not significantly less onerous under the PHA than the EPA. The shift to GCs which did not require Tynwald approval—not an inevitable feature of the PHA by any means—shifted rulemaking power away from the democratically elected Tynwald to CoMin, the responsible Government.

[E] CONCLUSIONS

The first lockdown was under the provisions of the EPA—a significant disruption to the normal constitutional order. The Emergency lasted for some considerable time, and the decision of the Manx Government to interpret the power to make EPRs as extending beyond the Emergency meant that these powers were available for much of 2020. The same dynamics which had led to the end of the Emergency, however, made it imperative to shift continued management of Manx borders, and the possibility of further lockdowns, out of the EPA regime.

The shift to the PHA has, generally, been positive. The PHRs have been notably more narrowly focused than the EPRs, with a recognition that some issues addressed by EPRs should not be addressed by PHRs. Perhaps as a result of previous experience, and the availability of previous models, drafting of the PHRs and their associated GCs has been more consistently strong than drafting of EPRs. Determining the law—issues around the timely dissemination of the law to the general public aside—has been made quicker and easier by the drafting decisions.

This has, however, not been without cost. The creation of laws very substantially burdening the everyday life of Manx residents was less subject to democratic oversight in the PHA lockdowns than the EPA lockdown. This is because of the decision to move these burdens into GCs, which are not subject to the control of Tynwald. The ease of making laws has continued the move away from formality in law-making, with an adverse impact on a key aspect of the rule of law—the ability of those who will be required to obey a law to have access to it in advance.

In sharp contrast to the major emergencies of the 20th century, this 21st-century emergency was responded to with Manx resources—political

leadership, technical drafting and legislative scrutiny of executive action. The extent to which exceptional powers have been exercised by Manx political figures is unique in Manx history. It would be optimistic to assume that similar powers will not need to be exercised in the future. In the 1920s and 1930s, for instance, the public health restrictions on influenza became routinized in the Isle of Man. There is some evidence of a movement in the same direction in the modern Manx context through the three lockdowns. How can the advantages of the PHR/GC response be retained for future lockdowns, while minimizing the damage to democracy and the rule of law?

The first harm requires, in the Manx context, the return to active involvement by Tynwald in the creation of pandemic law. Tynwald had a crucial role to play in the first lockdown, but the extent to which GCs dominated the shape of the later lockdowns means that it was much less substantially involved in the second and third. Requiring some form of active engagement by Tynwald with every GC would reintroduce an element of democratic accountability into the process. If the EPA requirement of positive approval within seven days is unacceptable, one possibility would be the negative resolution process. Where a statutory document is noted in authorizing legislation as using this process:

(2) The responsible authority for the document must cause the document to be laid before Tynwald as soon as practicable after it is made; (3) If Tynwald at the sitting at which it is laid or the next subsequent sitting resolves that the document is to be annulled it ceases to have effect (Legislation Act 2015, section 32).

The second requires that pandemic laws be easily available to the public and, ideally, understandable by those required to act in accordance with them. Laws should not come into effect before they are publicly available. Ideally, they should be drafted so as to minimize the burden on members of the public in learning of them and understanding them, as opposed to complying with them. Keeping up with the changes to the Manx pandemic laws throughout the first lockdown in particular was not easy. Well-drafted laws, made available in a timely fashion before they come into effect, take time to create; and each iteration takes time to understand.

One way to combine these two suggestions would be the creation of a standardized framework for responding to future pandemics. We have already begun to see this in relation to border controls, but the concept could be extended to the restrictions on the internal life of the Isle of Man. The PHR lockdown response to the coronavirus pandemic was, fundamentally, intended to reduce the interaction of individuals in circumstances where infection was a significant risk. When coronavirus

was not in the Manx community, this was achieved by tight restrictions on those entering the Isle of Man and those interacting with them in their households. When it was in, or feared to be in, the community, this was achieved by varying levels of restrictions on interaction—from interacting at events, through workplaces, schools, and ultimately preventing leaving home unnecessarily. Regulations to give effect to these restrictions could be drafted, debated and subject to democratic approval before they are needed, and brought into effect as necessary; with that decision itself being subject to democratic oversight.

If we should face a period similar to the two decades following the 1918 pandemic, then governance would benefit from some element of standardization. The laws used to deal with the 1918 pandemic saw regular use through a long lifetime. Regulations to deal with influenza were completely routine during the 1920s and 1930s, albeit much less intrusive than the 1919 set and rarely subject to scrutiny or query in Tynwald. Mr Crellin, moving approval of one set in 1933, constituted the entire discussion of the motion: ‘This is rather important, and it won’t take a minute. I beg to move this resolution. The regulations are the usual regulations issued when there is an influenza epidemic in the Island.’ (TC 27 January 1933) The danger of exceptional restrictions to deal with exceptional threats, of course, is that the restrictions become routinized too. As the Lord Bishop noted in discussion of exceptional control of the Manx economy in 1973, ‘it is quite right that emergency powers should not turn into regular powers’ (LC 12 June 1973 at C244). The usual regulations issued when facing infectious disease similar to the 2020–2021 pandemic need to respect democracy and the rule of law.

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DELIVERING A PRO BONO CLINIC DURING THE PANDEMIC: SOME THOUGHTS ON ACCESS TO JUSTICE, EVERYDAY PROBLEMS AND THE CURRENT LEGAL LANDSCAPE

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Abstract

This article provides a snapshot of the modified pro bono clinic that the Mary Ward Legal Centre has been delivering since the start of the pandemic and contextualizes the work that the pro bono clinic delivers within a discussion on access to justice, everyday problems and the current legal landscape.

Keywords: pandemic; access to justice; vulnerable litigants-in-person; pro bono clinics; digitization of courts.

[A] INTRODUCTION

Everyday problems arising out of ‘common place transactions and relationships’ include anything from experiencing difficulties with rented accommodation, such as getting a landlord to carry out repairs, a relationship breakdown with a partner, or a mental health issue that could involve care, to struggles with money, products or services, problems with employers or welfare benefits. Yet, how do everyday troubles become transformed² into a perception when there are legal issues involved, that is, in a sense, possessing a legal consciousness? A question that Ewick & Silbey ask in connection with ‘legal consciousness’ and everyday problems is ‘How do common place transactions and relationships come

¹ I am grateful to my team leader, Jacqui (Access to Legal Services Team Leader and Pro Bono Co-ordinator) for her insightful comments and suggestions, also to Professor Michael Palmer for his helpful comments and observations. Any errors remain entirely my responsibility. The views contained in this article are solely those of the author.

² See Felstiner & Ors (1980–1981) and the dispute transformation process from perception of a problem, to naming the problem as a legal problem, blaming and then making a claim.

to assume or not assume a legal character?’ (1998: 22).³ For common place transactions and relationships to assume a legal character, a connection would need to be made between experiencing a problem and characterizing the problem as one that involves the law, with the idea that there could be a remedy that might be acquired by engaging with the law. The next step would be taking the problem to the external environment to find out exactly what remedy (or remedies) exists, and what actions would need to be taken to engage the law and its relevant procedures in order to obtain such remedy-seeking legal advice, assistance and representation. Moreover, who would most likely seek legal advice or take action to address problems using law? Or as Genn and colleagues point out, ‘[what] kinds of problem ... are taken to lawyers’ (Genn & Ors 1999: 6)? In his essay about the ‘welfare poor’, Sarat succinctly explains that, ‘Law is, for people on welfare, repeatedly encountered in the most ordinary transactions and events of their lives’ (1990: 344). This comment is appropriate within the context of the work of the Mary Ward Legal Centre (MWLC) and its clients. The centre’s services are for people on a low income, and it so happens that many of its clients are also in receipt of welfare benefits. Those who are on a low income could also be characterized as being financially vulnerable and would benefit the most from being assisted by the state with the expenses associated with seeking legal advice and assistance (for example, by provision of legal aid).⁴ In essence we may say that the role of the Legal Centre is to enable persons with a potential legal challenge, and who are often financially and socially disadvantaged, to understand the legal nature of their problem and, where appropriate, to assist them in the pursuit of their claim should they wish to take their case further.

Over time, in addition to the safety-net of government-funded legal aid services delivered by solicitors firms and legal aid providers of legal help, various pro bono services have been established. The pro bono clinics, in

³ Legal consciousness is the idea of problems becoming ‘juridified’ (Cowan & Ors 2003), the reframing of problems that people experience as legal problems (Pleasence & Ors 2017). Whether somebody has legal consciousness could be the vital factor in determining whether someone seeks legal advice and assistance (Silbey 2005). For Ewick & Silbey, legal consciousness is ‘to name participation in the process of constructing legality ... Every time a person interprets some event in terms of legal concepts or terminology—whether to applaud or to criticize, whether to appropriate or to resist—legality is produced’ (1998: 45).

⁴ Being financially vulnerable within the context of this article means that the clients who would fall into this category are likely to experience difficulties with money. The clients who are financially vulnerable might find that their outgoings exceed their income, which could impact on decisions they have to make between paying their utility bills or having sufficient money to pay for groceries, housekeeping costs or care and health costs. In the worst possible scenario, the money problems could destabilize the client’s housing situation if rent arrears are accrued, which, potentially could cause homelessness.

the main, are delivered by volunteer barristers and solicitors in a variety of settings, predominantly in the voluntary sector within advice centres and universities, as well as community centres, libraries and church halls (see Carney & Ors 2014; Drummond and McKeever 2015; LawWorks 2021). The pro bono clinics usually only assist people who are on a low income, who do not qualify for legal aid, and who otherwise would not be able to afford to pay for the costs of legal advice and assistance. So, for those experiencing everyday problems which assume a legal character how do they fare when seeking legal advice and assistance? This article focuses on what Genn and colleagues (1999) call ‘justiciable event[s]’ that are also ‘non-trivial’,⁵ as experienced by people whose level of income would be low enough to be equivalent to the financial eligibility level for government legal aid, or just over the amount, and who would not be able to afford to pay for legal advice.

Areas of law that could assist with the specific everyday issues raised above would include the ‘many areas of civil law that impact on poor and disadvantaged communities. Housing, welfare benefits, immigration, debt, employment, community care, education and other areas of public law’ (Hynes 2012: 33). Collectively known as social welfare law, these areas of civil law traditionally have been funded by legal aid, to ensure that some assistance at least is given to those who cannot afford the costs of legal advice and assistance.

However, since the implementation of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (hereafter the 2012 Act), the scope has narrowed considerably in the areas of law funded by the Legal Aid Agency.⁶ Unfortunately, employment issues (unless they involve discrimination) are not currently funded. In addition to the aforementioned areas of law, the Legal Aid Agency also funds, albeit with very narrow criteria, cases concerning discrimination, family, immigration and asylum.⁷ For everyday legal problems that do not fall within the scope of legal aid, such as consumer cases, civil litigation—which includes the small claims procedure—family issues, as well as the areas of social welfare law that do not fall within the Legal Aid Agency purview, individuals will have to

⁵ ‘[A] matter experienced by the respondent which raised legal issues, whether or not it was recognised by a respondent as being “legal” and whether or not any action taken by the respondent to deal with the event involved the use of any part of the civil justice system.’ (Genn & Ors 1999: 12).

⁶ The Legal Aid Agency is an executive agency of the Government tasked to provide civil and criminal legal aid and advice in England and Wales to assist eligible people to address their legal problems.

⁷ See Schedule 1 of the 2012 Act.

seek advice from organizations that are able to offer free legal advice, or from a pro bono service.⁸

The 2012 Act, which was implemented during a period when the Conservative–Liberal Democrat Coalition Government applied austerity measures in relation to the public spending on civil legal aid, has continued to erode the availability of legal advice, assistance and representation⁹ for people on low income who are experiencing problems connected to social welfare law (see Low Commission 2014, 2015; House of Commons Justice Committee 2021).¹⁰ Despite pressure from legal advice providers, the Government did not review the impact of the 2012 Act until 2019 (see Ministry of Justice 2019a, 2019b).¹¹ The impact of the deep cuts on civil legal aid can broadly be viewed from three different perspectives, with issues related to the different positions that are, in fact, interconnected. First, in relation to difficulties experienced by people with problems attempting to secure legal advice and assistance. Secondly, the situation in terms of legal advice provision, and the impact on legal practitioners specializing in social welfare law funded by civil legal aid contracts. Thirdly, the digitization of courts leading to the provision of ‘remote justice’, and the impact on court users, both professionals and litigants-in-person (LIPs) or lay users. The Government’s plan to digitize courts began in 2016 and has continued to proceed while the fallout or impact from the 2012 Act continues to cause hardship to people who most need legal advice, assistance and representation. This article will focus on the position of LIPs.

Following this ‘Introduction’, the present article will begin with a description of the pro bono clinic that the MWLC delivers. The pro bono work of the Legal Centre is then contextualized in section [C] within a discussion of some of the access to justice issues. The impact of the 2012 Act on civil legal aid funding has been well documented, but some

⁸ Other than Citizens Advice, some voluntary sector organizations are able to offer free legal advice delivered by the staff who work for the organizations. This work might be funded by a local authority or by a grant-making charity.

⁹ In terms of the nature of assistance that could be gained through legal aid, see Ministry of Justice (2019a: paragraph 114).

¹⁰ See also Logan Green & Sandbach (2016). [The Low Commission on the Future of Advice and Legal Support](#), chaired by cross-bench peer and disability rights campaigner Lord Low, was launched on 4 December 2012 in order to develop a strategy for access to advice and support on social welfare law in England and Wales. It is reported that the Low Commission is the largest independent enquiry into social welfare law ever undertaken in the United Kingdom: see ‘[Low Commission reports on the future of advice and legal support](#)’.

¹¹ See also House of Commons Justice Committee (2021). In its 2021 report, the Justice Committee suggested the ‘Government should take a whole justice system approach to the reform of the civil legal aid framework’ (2021: paragraph 89).

comments are merited here.¹² Finally, section [D] of the article will consider some of the access to justice issues that have had a greater impact on people who are on a low income and have problems, and who needed legal advice and assistance during the pandemic and national shutdown. Suggestions will be made in terms of actions that could be taken to encourage greater inclusion or integration of vulnerable people who experience legal problems in the present-day digital legal environment.

[B] THE PRO BONO CLINIC AT MWLC

MWLC is part of the Mary Ward Settlement, which was established over 100 years ago to provide education and social services for the local community. The settlement provided a free legal advice service for the local community, known as the ‘Poor Man’s Lawyer’ service, a precursor to the post-war legal aid scheme. Today, the Settlement continues to provide legal advice to people who are on a low income, through its Legal Centre, as well as delivering education and training courses via the adult education centre.

The Legal Centre promotes access to justice, and its core legal services are debt, housing and welfare benefits casework, which involve tribunal or court proceedings, and comply with standards set by the Legal Aid Agency and Lexcel. The pro bono clinic at MWLC provides one-off legal advice to eligible clients, which is delivered by volunteer qualified solicitors and barristers.¹³ The areas of law the pro bono clinic might be able to assist with depend upon the specialist area of the volunteer lawyer. The areas of law the pro bono clinic is currently able to assist with are employment, contract, consumer, tax, family, housing and disputed debt—which includes initiating small claims proceedings. There are slight overlaps in the core service with the pro bono clinic in relation to two legal areas: housing and debt. However, the pro bono clinic will only assist with specific housing problems that are not within the scope

¹² See, for example, Hynes (2012). To contextualize the deep cuts made on civil legal aid, following the implementation of the 2012 Act, in previous years, there had been a steady decline in government funding in this area of public spending over the years (see Legal Action Group 1992, 1995; Smith 1997b; and generally Legal Action Group’s monthly publication, *Legal Action*). However, it was the 2012 Act, implemented during the period in which the Conservative and Liberal Democrat Coalition Government pursued a policy of austerity in relation to public spending, that has caused ongoing problems for people who are on a low income and in need of legal advice and assistance.

¹³ MWLC is fortunate to be able to work with high-calibre lawyers, who are often based in large solicitor firms, some of whom are senior practitioners. People who need legal advice and assistance benefit from the expertise of these lawyers who volunteer at the pro bono clinic, and such expertise would usually be out of reach for our clients because of the high costs involved if the Legal Centre had not connected the client to the lawyer through its pro bono service. This is also the case in relation to the experienced barristers with whom the pro bono clinic at MWLC works.

of legal aid. To this end, MWLC operates a separate pro bono housing clinic to assist clients with a limited range of housing problems, such as issues with a private landlord returning a former tenant's rent deposit, complaints against social landlords, including making a complaint to the respective Ombudsman services, and problems arising from Housing Register applications. Finally, clients with contentious disputed debts are assisted at the pro bono clinic because the Legal Centre's core legal service only assists clients with personal debts that are non-contentious. The Legal Centre also makes referrals to a pro bono clinic delivered by a Law School for people who are deemed not to be on a low income to be able to access the pro bono clinic at the Legal Centre. Should MWLC be in a position to offer a client a one-off appointment to seek advice and assistance at the pro bono clinic, clients would need to be able to continue to take full responsibility in relation to their case.

It is only LIPs who access the pro bono clinic, and the LIPs rely on the service to be able to participate in civil legal proceedings. The LIPs need much more support—in terms of guidance in the next steps in legal procedure—which could involve advice and guidance, assistance in completing court forms, gathering and organizing evidence during the different stages of legal proceedings. For example, in relation to a claim at the employment tribunal, the client would need to start working with ACAS on early conciliation before seeking legal advice about the merits of the claim prior to making a claim, which can be done online. This is followed by a preliminary hearing, organizing documents and witnesses, and complying with the different directions from the judge before a full hearing. In relation to civil litigation, from the claimant's perspective, there is the pre-action stage, followed by making a claim, which might involve the need to submit a Particulars of Claim. If the claim is defended, then the claimant will receive a Reply and details of the counterclaim, if there is one. The Case Management stage then follows before Disclosure, the drafting of witness statements and then the need to serve these statements on the other party. A bundle of documents will then have to be prepared and lodged at court before the trial or hearing. At every stage of the proceedings, the LIP will need to manage the submission of documents at court, which needs to be done within each deadline. Our experience in relation to pro bono clients is that many clients need assistance at every stage of the court proceedings. However, every time a client needs assistance, he or she will need to contact the Legal Centre to request an appointment. We will then assess whether we would be able to assist. The LIP lives with his or her case, from experiencing the problems in the first place, to struggling with seeking legal advice and assistance to

understand how to apply the law to the case, to attempting to make sense of the applicable court procedure and the legal environment within which he or she is operating. The LIP is very much the layperson competing against a qualified lawyer within a legal system that has been designed for litigants to be represented by legal professionals. For the person who has been able to instruct a solicitor, everything is done for that individual who will benefit continuously from assistance at every stage of the legal proceedings.

Individuals who approach the Legal Centre for assistance have diverse vulnerabilities or have special needs and often require additional assistance. The vulnerabilities or special needs could include communication complexities, including learning difficulties, where English is not the client's first language, or dyslexia. Some clients may have health issues, an illness whether mental or physical, severe or long-term, which could affect their ability to concentrate or remember, to process information, causes severe anxiety, or they may become overwhelmed very quickly. There are also clients who experience difficulty in articulating the problems they are experiencing. The struggles connected with articulating problems might not necessarily be associated with specific health issues, but might occur because of the length of time a client has had to endure the difficulties before being able to seek advice. The impact in the delay in being able to seek legal advice could lead to the client infusing facts with emotion and speculation in the narration of the legal problems and the manner in which the problems arose. Literacy could be a factor, too, and some could have verbal competence but not necessarily writing skills because English is a second or even third language. Some clients have special needs, such as sight impairment or profound deafness. Yet others may be experiencing abuse, whether physical, emotional, verbal or financial.

People who are on a low income who experience problems often approach the Legal Centre with multiple legal problems and many require assistance with unravelling these problems during the triage stage. As Genn and colleagues have noted: 'those who seek advice ostensibly about a single issue may have a bundle of underlying problems or difficulties that require unpacking before any viable resolution can be achieved' (1999: 36). Further, clients who approach the Legal Centre for advice, tend to experience 'clusters' of problems, now widely noted in the literature (see eg Pleasence & Ors 2006). For example, a client who has a consumer matter, who approaches MWLC for pro bono assistance, might simultaneously be experiencing problems with debts and housing; while a client who has a housing problem could also experience money

and welfare benefits problems.¹⁴ Genn and colleagues note that some of the problem clusters could include employment problems that have been experienced during the past five years, which might also result in money or consumer problems or problems concerning owning property; a person who had been involved in divorce proceedings within the past five years may also experience family problems, which could include children or money problems. While somebody who had been a victim of accidental injury or work-related ill-health within five years could also have money or employment problems (1999: 31-36).

Prior to the pandemic and national shutdown, MWLC delivered an in-person pro bono clinic. Clients brought their documents with them at the time of their appointment, ensuring they completed an initial enquiry form prior to their appointment. After the appointment, the lawyer would complete his or her attendance note. The Pro Bono Co-ordinator reviewed the note for each client and held onto the note where the lawyer had agreed to do follow-up work, so that any follow-up work and its progress could be monitored. The onset of the pandemic meant that MWLC could not continue to provide an in-person service. A solution had to be found as quickly as possible after the national shutdown had started, and decisions had to be made about the nature of service the Legal Centre could provide in the interim while emergency national restrictions were in place.

Since the start of the pandemic, apart from one session in March 2020 at the very start of the pandemic, MWLC delivered at least one pro bono session each week. The volunteer lawyers' commitment enabled us to keep the service running, and also enabled the Legal Centre to run two sessions in the first week of the month: an employment session on the first Tuesday, and a general session on the Thursday. The Legal Centre recognized that it was important for the pro bono clinic to offer a remote service that was reliable and accessible to clients in need of assistance, therefore advice was given via telephone. This was partly because many clients did not want to be given advice by video conference. In any case, video conferences would have required much more input from staff, in terms of ensuring that such conferences could take place for clients who needed assistance with technology. However, not all clients had the technology to be able to join a video conference. In making the decision to

¹⁴ MWLC has found that for clients who contact the Legal Centre to access the pro bono clinic, after triage, in addition to being assisted by the pro bono clinic, at the same time, they could be connected to the core legal services of housing, debt or welfare benefits. This seems to happen more frequently with people experiencing employment problems. A similar pattern occurs with clients who contact the MWLC wishing to be assisted by one or more of the core legal services, who are then referred to the pro bono clinic for assistance in relation to a non-core area of law, such as employment, a disputed debt or a consumer matter.

offer telephone advice, MWLC took into account clients with special needs: for example, some clients required written advice. Around the time of the appointment, the lawyer would call the client from a withheld number. Even then, some clients experienced problems, with some not having a strong signal on their mobile phones, and some clients did not realize that their phone could not accept calls where the caller's identity had been withheld. In addition, MWLC adjusted the service to the needs of the lawyers and clients. Prior to the pandemic, appointments were only offered at 6.15 pm and 7 pm on alternative Tuesdays and Thursdays. Although appointments are still offered on alternative Tuesdays and Thursdays, since the start of the pandemic, the Legal Centre has had the flexibility of being able to offer appointments on other days, as well as other times during the day, which includes evenings, from Monday to Friday.

There are some issues remaining in the provision of a remote service, especially in relation to gathering documents from clients. Many clients were not able to scan and email their documents. In this situation, and where possible, clients would email photographs of individual pages of their documents. The quality of the photographs varied. Sometimes it was not possible to read the text in the photographs, and time was needed to work with the documents before they became more readable so that they could be uploaded to the Legal Centre's casework management system. Even when clients were able to scan and email us their documents, sometimes we were just not able to open them. Some of the clients live close to the Legal Centre and wanted to drop off their documents. However, while staff were mainly working from home, it was not possible for us to receive hard-copy documents. Furthermore, it was necessary for staff who came into the Legal Centre to follow the Covid-19 guidelines for the Legal Centre. Factors that had to be considered included clients not being able to turn up whenever they wanted; PPE was required; and the client had to be well.

The reality was that only a limited service could be provided, which essentially meant that the pro bono clinic could only assist those who could receive telephone calls and would be able to email us relevant documents prior to their appointment. In addition, clients who faced a language barrier while shielding at the same time, and who did not have anybody at home who could assist were in effect excluded from the clinic. Even if a friend was willing to help in this situation, the client would need to be able to participate and would also need to have the technology to be able to set up a conference call. Finally, the delivery of a telephone service meant that the administration increased heavily before each session. The increase in administration was mainly connected to the gathering

of documents from clients and uploading them onto the system, as well emailing advance information to the lawyers before each session.

The work involved in the provision of a remote pro bono clinic session now included the following steps: after triaging the client, we book a provisional appointment with the most appropriate lawyer. We send an email to the client, with an initial enquiry form and privacy notice attached. We ask clients to complete the e-form and return it to us by email, along with any relevant documents that would assist the lawyer. We enter the client's details and upload their documents onto the casework management system because some lawyers have access to the pro bono part of our system. We then email advance information to the lawyers, along with any relevant documents clients have emailed us. Staff have to be available for the appointments in the event that there are problems. This means that both clients and lawyers can email us during the session. Usually, two staff members would be available to assist during the sessions. Lawyers aim to email us the attendance notes within 24 hours after the appointment. The Pro Bono Co-ordinator reviews the notes and uploads them onto the casework management system. The Co-ordinator retains the notes in order to monitor any follow-up work agreed by the lawyer, ensuring that the lawyers are assisted in such work as and when required.

Preparation for the telephone appointments is a much longer process. As a team, we are still refining the steps involved in the process. For example, we are trying to ensure that one person who books the appointment becomes responsible for following through the document gathering and uploading, and chasing clients to complete initial enquiry forms. Despite the limitations of the service, we have been able to assist clients who do not own a computer. For example, we assisted a client with the documentation-gathering process and completing the enquiry form, which was all done by post, which was only possible because there was sufficient time to do so before the client's appointment. The reality is that clients cannot always complete the initial enquiry e-form, either because they do not have the appropriate software or need assistance to complete e-forms or would prefer someone to assist with the form completion by phone.

Many of the clients were given legal advice and assistance during the 'pre-courtroom' stage in preparing for their claim or in defending a claim brought against them. Clients have been given varying levels of assistance depending upon the lawyer's experience and available time. The LIPs who approach the Legal Centre for assistance vary in their

abilities in preparing for their legal case, in navigating the court processes or completing paperwork. LIPs also have varying levels of digital literacy. Most clients who use the pro bono service are not digitally literate, with some requiring the assistance of family members to send and respond to emails. At MWLC, we found that LIPs experience different levels of digital poverty in terms of access to devices, with some having only smartphones, while others did not even have access to a smartphone or a computer, relying on being able to use the computers at their local library, which were closed for a long period. Still others were reliant on printing shops, and staff who worked there, who could assist with accessing the documents clients had stored on their phones.

Many more people requested assistance from the pro bono clinic than it has been possible to assist. Apart from demand exceeding the availability of such service, it has not always been possible for the Legal Centre to offer clients appointments before a deadline, such as completing and filing a defence. In addition, some people who request assistance might be described as not being ready yet to seek legal advice. These are clients who would benefit from advice to help them to understand whether they had a legal problem, at what stage their problem is at, and any action that should be taken, which might require clarification from the other party about what decisions have been made, and whether legal advice is now needed. For example, a client who is an employee with an employment problem might have been trying to obtain answers from his or her employer. However, the answers might be forthcoming only if the client took grievance action. Unfortunately, while waiting for an outcome to the grievance, other issues connected with the employment come to the fore. This then prompts the client to seek legal advice, but the situation might well involve both legal and non-legal issues. Again, it is general advice that would assist in defining which issues are legal.

Transforming an in-person service to a remote one, so that clients could continue to be assisted, was only one of the many issues that the MWLC and staff at other pro bono clinics experienced. A significant problem prior to the pandemic has been the need for digital support for vulnerable users following the digitization of court processes. A major concern associated with access to justice has been, and continues to be, the availability of legal advice, assistance and representation, as well as being able to obtain such legal assistance. Since 2016, the digitization of courts or 'remote justice' has fast become a connected and yet also a significant issue by itself. At this point, it would be useful to explore some of the access to justice issues that were a cause of concern prior to the pandemic.

[C] ACCESS TO JUSTICE ISSUES EXISTING PRIOR TO THE PANDEMIC

It is helpful at this stage to be reminded that the different areas of social welfare law would be a significant factor in the clusters of legal problems that many people on low income might experience. McKeever and colleagues found, in their study on destitution and paths to justice, that ‘the triggers of destitution tended to be justiciable problems—legal problems that could have a legal resolution’ (2018: 5). The authors comment that a major problem has been the difficulties people have experienced in identifying legal advice providers and securing an appointment in obtaining advice or in acquiring assistance in the range of problems they experience. Yet, although being assisted with legal advice or legal intervention is not in itself a solution, McKeever and colleagues suggest that ‘there is potential for legal and other forms of expert advice and support to help individuals experiencing destitution to improve their situation, particularly in the key fields of social security, debt and housing’ (2018: 8).

A critical access to justice issue, as has already been mentioned above, is the deep cuts made to civil legal aid and access to legal advice, assistance and representation, following implementation of the 2012 Act. Since April 2013, legal aid has been greatly restricted in terms of financial eligibility and scope. Yet, when the cuts to legal aid are considered within the context of the provision of public services then it could be argued that the significant reduction in public spending on civil legal aid would inevitably cause an increase in other areas of public spending. For example, not being able to resolve problems potentially has an impact on health (Low Commission 2015). Chris Minnoch (2020) has succinctly stated that: ‘I suspect the financial and resourcing impact on a number of public services (courts and tribunals, health, social services, education, housing and homelessness ...) far outweigh the cuts introduced by LASPO’.

While legal aid applicants who are in receipt of certain welfare benefits are ‘passported’ through the financial eligibility gateway, the beneficiaries are only assisted with an extremely narrow range of problems.¹⁵ The impact of the 2012 Act has resulted in an ‘advice deficit’ (JUSTICE 2015), with the

¹⁵ For example, in terms of housing, it is only possible to seek assistance in cases where there is a risk of homelessness, possession or eviction, housing disrepair that could cause a risk of serious harm to an individual or cases involving anti-social conduct. While in relation to debt, the three main areas where it would be possible to seek assistance are in connection with the loss of a home (owner-occupier). In terms of welfare benefits, Legal help is only available for appeals in the Upper Tribunal, Court of Appeal or the Supreme Court, where the case involves a point of law, or where there has been an error of law and the case involves an appeal to the First-Level Tribunal reviewing its own decision.

needs of those requiring advice often being unmet (Advice Services Alliance 2020). An additional problem has been the creation of legal aid ‘deserts’ (Pepin & Ors 2018) in housing law, community care law and immigration law, where people have struggled to access legal advice and assistance when they have been entitled to it because of the declining number of providers delivering a legal aid service (Low Commission 2015; Bach Commission 2017; McKeever & Ors 2018; Advice Services Alliance 2020).

The lack of available representation, particularly in relation to family matters not long after the implementation of the 2012 Act, had led to an increase in LIPs (Owen 2014). There is a need to understand the implications of the paucity of legal advice and assistance in relation to LIPs and the impact of their experience in court.¹⁶ There are a greater number of LIPs because of the lack of availability of representation through legal aid, and, yet at the same time, there has been a continuing lack of data on the experience of LIPs (Donoghue 2017). Unfortunately, the resulting impact of the restriction of legal aid has caused a tremendous pressure on pro bono clinics to be able to provide the necessary legal advice and assistance to LIPs (see eg Hynes 2020). However, pro bono services should only be viewed as a complementary service to ‘a properly-funded state system of legal aid’ (Hynes 2012: 8; see also LawWorks 2021).

Just as crucial an issue is the impact of the legal aid cuts on private solicitors’ firms with civil legal aid contracts, which had been a significant concern well before the 2012 Act. Commenting on the Ministry of Justice’s belated review of the 2012 Act, Carol Storer lists problems that her own firm experienced—that are common to many others—when she realized that it was not financially viable to run a legal aid practice in London in 2000: ‘Low rates, too much unbillable work, inability to retain staff as they could obtain higher salaries in firms not carrying out legal aid work, the failure of lawyers to have a decent work/life balance’ (2019). Storer goes on to add that the situation has since become much worse. An impact which flows from the difficulties experienced by firms with civil legal aid contracts has been the decreasing number of lawyers specializing in social welfare law (see eg Slingo 2021; see also Ministry of Justice 2019a: paras 48-50), which is part of the reason why people have been struggling to obtain legal help. In a recent report, the House of Commons Justice Committee acknowledged that, after almost a decade since the implementation of the 2012 Act, the sector is still ‘adjusting to the dramatic reduction in the level of civil legal aid’ (2021: paragraph 81).

¹⁶ Criticisms have been directed particularly at the Ministry of Justice for the limitations of its data, see National Audit Office (2014: 6-7); House of Commons Justice Committee (2021: paragraph 105).

A consequence of a paucity of affordable legal advice services led to the rise in fee-paying McKenzie friends, particularly in family proceedings, where many of the LIPs needed assistance (Owen 2014; Sorabji 2015)—an issue of concern being the lack of regulation of fee-paying McKenzie Friends (Legal Services Consumer Panel 2014).¹⁷ This was also the case in the United States (US), where a similar situation had arisen in relation to a scarcity of affordable legal advice from lawyers and the proliferation of legal advice from non-lawyers (Sandefur 2020). Finally, although more commonly used as a means to pay for legal fees by those with a personal injury case, conditional fee agreements are also being used by those with housing problems that are not in scope for legal aid, such as disrepairs which are significant but not detrimental to the individual's health, and for those with an employment case. Unfortunately, some have had to abandon their conditional fee arrangement-funded case for various reasons, including problems with paying certain expenses associated with the case, or a lack of understanding of how the contingent fee arrangement works in practice (see also Bach Commission 2017).

In England and Wales, the Government has embarked on an ambitious court modernization programme from 2016 onwards (Ministry of Justice 2016; see also Briggs 2016), which involved the closing of a great number of courts at the start of the programme, but with work barely started on the digitization of courts (Caird & Priddy 2018).¹⁸ As Donoghue puts it:

Government has simultaneously withdrawn funding for legal aid while closing local courthouses and eroding local justice, while anticipating that digital technologies will provide the 'transformative' panacea for improving efficiency and access to justice that will 'liberate tens of thousands of individuals from injustice' (2017: 1025).

At the same time, there has been a move from paper to online claims for some welfare benefits, such as universal credit and personal independence payments—also housing benefit, council tax support or reduction, discretionary housing payment.¹⁹

There have been concerns about the integrity of the justice system and the erosion of principles of legal justice, specifically in relation to

¹⁷ See also see Legal Choices, 'McKenzie Friends'.

¹⁸ This includes the development of an online court, to be separate from the county court, with an automated online triage stage, to ensure that LIPs would be able to use the court. The conciliation stage will be looked after by case officers. The determination stage—for cases that cannot be settled—would be determined by a judge, either at a face-to-face trial, by video or telephone hearing or even to be determined by documents, whichever method would be the most appropriate (Briggs 2016: section 6). Lord Justice Briggs proposed that the online court could resolve money claims up to the value of £25,000.

¹⁹ This has resulted in a greater demand for advice, see Advice Services Alliance (2020).

the situation of the online courts in England and Wales (Genn 2017). In the US, where the development of online dispute resolution (ODR) is at a much more advanced stage, concerns have also been raised in relation to remote justice, one of the questions being whether ODR would advance access to justice (Schmitz 2020). Sternlight pointed out that ‘human disputes are intimately connected to human psychology’, that ‘our human brains often function quite differently than computers’ and the question is ‘whether and how to incorporate technology to dispute resolution’ (2020: 2-4). Sternlight concludes that there is a need to test technological approaches empirically (2020: 29). A crucial concern has been the ability of the more vulnerable in society to be able to participate in the newly digitized processes (JUSTICE 2018), particularly when, for a number of years, it has already been a struggle for people who are financially eligible for legal aid to access legal advice and assistance in a timely manner (Donoghue 2017; Administrative Justice Council 2020). There have been calls for integrated services where more vulnerable clients are given legal advice and assistance at the same time as being assisted with the digital processes (Administrative Justice Council 2020).

The result of restricted government funding for civil legal aid, at the same time as the implementation of a programme of the digitization of courts, without adequate consideration of the needs of the more vulnerable court users, has led to difficulties in participation for such court users, many of whom are LIPs. Being an LIP without adequate access to legal advice and assistance when the other party has representation means that power between the two parties is unequally distributed. This affects the ability of the LIP to respond during the different stages in the legal proceedings, and in understanding the interactions between the parties during the different stages of the proceedings. The LIP has less power to negotiate, not having the same level of legal understanding as the other party’s representative or a comprehension of the legal framework within which the two parties are disputing. In short, the LIP is not able to participate effectively in the legal arena. As a guide, McKeever suggests that the different types of legal participation in relation to litigation can be ‘defined by the extent to which the intellectual, practical, emotional and attitudinal barriers to participation can be managed or overcome’ (2020: 4). The intellectual barriers which could prevent participation are LIPs not being able to understand the legal language used in court documents and proceedings; and LIPs not comprehending how to apply legal rules to their case or the legal framework within which the judge would use to make decisions (2020: 3). Practical barriers include the lack of knowledge in terms of how to obtain assistance in order to be able to

manage the legal process and connected issues. McKeever mentions two main problems, the first being ‘a lack of information and resources to assist either with the general legal issues or the task of self-representation’ (2020: 3). The second main problem being ‘the information sources that existed were disparate, unknown and LIPs were unclear as to the extent to which they could be trusted’ (2020: 3). The emotional barriers are connected to negative feelings, which are related to the process as well as the issue being litigated, which could be exacerbated if the intellectual or practical barriers are not overcome.

The different types of legal participation can be viewed as a ladder with seven rungs, the higher up on the ladder, the greater the level of participation. The lowest of the rungs is ‘isolation’, with the participant ‘feeling excluded and unable or unwilling to engage with legal proceedings’ (McKeever 2020: 4). Moving upwards on the ladder, the next rung above ‘isolation’ is ‘segregation’. These two lowest rungs on the ladder also represent non-participatory experiences. The next two rungs, moving upwards, are ‘obstruction’ and ‘placation’, representing tokenistic experiences in participation. This is followed by the final three rungs of ‘engagement’, ‘collaboration’ and with the highest rung of the ladder ‘being enabled’. All three of the higher rungs represent participative experiences, when the participant feels able to be engaged with the legal process, as well as feeling confident in representing him or herself in court (McKeever 2020: 4).²⁰

Furthermore, an increase of LIPs as a result of the deep legal aid cuts has naturally led to an increase in more inquisitorial and investigative processes in English procedure (Sorabji 2015). Not long after the implementation of the 2012 Act, proponents of greater access to justice, including the Law Society, argued for the need for early intervention or early advice (Low Commission 2015; Bach Commission 2017; Ipsos Mori & Law Society 2017). The idea was to ‘[g]et in early before issues escalate, before one legal problem generates more complex and costly issues to resolve’ (Minnoch 2019). As the Bar Council explains: ‘Legal aid intervention at an early stage is cheaper than only having legal aid when the matter has escalated to crisis point and the matter is more

²⁰ Many of the clients who approach MWLC’s pro bono clinic for assistance could be viewed as hovering on the third from bottom rung of the ladder, ‘obstruction’ with participation being defined as tokenistic. The pro bono clinic would enable LIPs to be able to engage in the litigation process on a step-by-step basis at least. In reality, this might mean that at each stage of the litigation process, a client might contact us for assistance with completing a court form or to seek advice to be able to understand court documents they have received.

expensive to put right’ (House of Commons Justice Committee 2021: paragraph 91).²¹ In addition to the recommendation of early intervention, the Low Commission also argued for the need for prevention work and the greater provision of information along with advice (Low Commission 2014). The context of the recommendations made by Lord Low involved ‘measures to reduce the need for advice and legal support in the first place, while developing more cost-effective approaches to service provision, both centrally and locally’ (2014: viii). Meanwhile the Bach Commission recommended the creation of a Rights to Justice Act, among other things, to ‘codify our existing rights to justice and establish a new right for individuals to receive reasonable legal assistance without costs they cannot afford’ (Bach Commission 2017: 6). In addition, JUSTICE suggested a new model for dispute resolution designed to be accessed by unrepresented parties (JUSTICE 2015). When it finally reviewed the impact of the 2012 Act on legal services in 2019, the Ministry of Justice was willing ‘to pilot and evaluate several forms of early legal support’ (Ministry of Justice 2019c: 6), which included legal support through technology.

[D] ACCESS TO JUSTICE ISSUES ARISING DURING THE PANDEMIC AND NATIONAL SHUTDOWN, AND MOVING FORWARD

In some respects, the access to justice literature focusing on difficulties experienced by individuals attempting to secure legal advice and assistance during the pandemic and national shutdown has concerned those who are either already or potentially involved with court proceedings. A critical problem during the national shutdown has been the issue of job insecurity—people who have recently become impoverished now joining the ‘traditional’ poorer clients (Law Centres Network (LCN) 2020). The LCN identified an emerging new client group, consisting of people who ‘before Covid-19 lived in relative financial security but on losing their jobs discover that the systemic protections they assumed would be there “just in case” are not able to support them’. The LCN calls this emerging client group ‘Living Outside of Legal Aid’ (2020: 5). Unsurprisingly, the LCN reports that enquiries in relation to employment advice at law centres (across England, Wales, the Isle of Wight and Northern Ireland) have

²¹ See Minnoch (2019) for a discussion of the definition of ‘early advice’.

increased from 90% to 500% between March and June 2020.²² Secondly, in terms of the situation with legal advice provision, although it is not surprising that access to legal advice and representation would have been affected by the pandemic and national shutdown, the context of legal advice provision over the years should also be borne in mind. The House of Commons Justice Committee, as we noted above, acknowledged in its recent report that almost a decade after the implementation of the 2012 Act, the sector is still adjusting to the remarkable reduction in the provision of civil legal aid. The restrictions that were in place during the periods when the United Kingdom was shut down appear to have ‘shone a light’ on the struggles of legal advice providers. Thirdly, in relation to the digitization of courts leading to the provision of ‘remote justice’, implementation of the modernization of courts plan has continued, regardless of any negative impact on the LIPs or ‘lay users’ of the courts.

In gaining an understanding of the position of individuals in need of legal advice and assistance during the pandemic, it is useful at this point to be aware of some of the issues that arose in connection with clients who sought assistance from MWLC’s pro bono clinic. As other voluntary sector organizations have done, MWLC has been able to deliver pro bono clinic sessions remotely. Yet, it has not always been possible for us to be able to offer appointments to clients prior to their deadlines. Some clients have contacted us at a crisis point, when a first hearing has imminently been due, and they were in need of general legal advice, in terms of understanding what to expect during the hearing and how to prepare for the hearing. A significant problem has been clients not being able to secure an appointment to seek advice from a pro bono lawyer, either because they have not been able to contact us to request an appointment or there have been no appointments available prior to their deadline. Further clients who have been eligible for legal aid have approached the pro bono service at MWLC for legal advice and assistance: for example, in relation to employment discrimination, where the client had not been able to obtain legal help from any legal aid provider because the providers the client had approached had not been able to take on the case. Clients have also contacted us for assistance in situations where the client might have failed in obtaining legal help because the merits of his or her case had not been strong, but the client had disagreed. It is not always possible to assess clients’ evaluation of their own case in the

²² The number of clients with disability discrimination cases accessing legal advice and assistance at the MWLC pro bono clinic had also increased significantly between March and June 2020. Unfortunately, it is much easier for employers to dismiss an employee with a disability because of the costs involved in making reasonable adjustments. The increase in the number of employment queries was also connected with issues arising in relation to the Government’s furlough scheme.

situation where clients believed they had a strong case, but felt that the solicitor appraising the evidence in connection with their case did not fully understand their situation. Regardless, the pro bono clinic would not be able to offer a second opinion, although usually, clients who fall into this situation might have other legal issues that need clarification. Should a client's case have low or no merit, the lawyer will only give general advice and will also advise about costs implications.

In terms of the nature of some of the problems experienced, clients with special needs have required much more support during the pre-action phase of the claim, in addition to contacting courts and submitting forms and documents online. Further, the issue in relation to a client not understanding the legal framework within which he or she might need to make a claim impacts more significantly on clients whose first language is not English. In general, though, clients needed guidance in understanding the need to follow the pre-action protocol prior to making a claim, in terms of legal procedure. Clients also experienced difficulties in understanding legal terms, court procedure and the meaning or significance of different documents they have been sent or must complete. Some clients have ended up having a short deadline to return a form to court and needed advice to complete the form because they did not understand what the form was about. Yet others did not understand the decisions made by judges, nor the nature of action they had to take following the decision, nor the implications of the decision. Finally, in general, clients have needed assistance with digital aspects of accessing courts, with some needing guidance in completing an online form, particularly in relation to starting a small claim, and some of the lawyers have been able to assist with these issues.

In terms of areas of the literature focusing on access to justice during the pandemic, the onset of the pandemic drew attention to access to justice issues that had already existed prior to the national shutdown. In its rapid review on *The Impact of Covid-19 Measures on the Civil Justice System*, the Civil Justice Council found that the national restrictions brought about by the pandemic 'had reduced the availability and accessibility of legal advice, with the impact of reductions in advice disproportionately affecting those on low incomes' (2020: paragraph 1.10). While Creutzfeldt & Sechi pointed out that, since the onset of the pandemic, the advice landscape has 'dramatically' changed, with the provision of advice since then becoming 'a question of having the appropriate IT equipment for a home office, a reliable internet and telephone connection, and a new set of skills to provide remote service delivery' (2021: 3). Although the House of Commons Justice Committee 2021 report did not focus on the pandemic,

the 2021 report provides a very necessary connection to the different issues associated with civil legal aid and changes that need to be made. The report acknowledged recently that there are sustainability issues for legal aid providers, which are having an impact on the ability of those entitled to legal aid to access lawyers for legal advice and representation. As a result, there is a need for a complete overhaul of the legal aid system (House of Commons Justice Committee 2021: paragraph 126).

The continuing lack of data on LIPs was an issue that Donoghue raised in 2017 in her essay on digital justice and public participation, and McKeever, writing about remote justice and the participation of LIPs in court processes during the pandemic, emphasized this continuing lack of data on LIPs in 2020. Witnesses appearing in front of the Justice Committee to give evidence highlighted the impact on courts by LIPs, with a few witnesses indicating the need to collect data, as well as better data on LIPs and their experience of the justice system. Without such data, it would be harder to make a case for more funding for legal representation (House of Commons Justice Committee 2021: paragraph 105). Suggestions were made to improve the situation of the LIPs. There were arguments to reform court processes to make them more inquisitorial as a potential solution to address the increase of LIPs, yet there was also the need to be cautious at the same time, with the requirement for the judiciary to be retrained. Another possible solution being the provision of early advice (House of Commons Justice Committee 2021: paragraph 104).

In terms of the digitization of courts, the Coronavirus Act 2020 enabled, for a temporary period, certain aspects of the court modernization programme to proceed, such as remote hearings (Sorabji 2020). During the pandemic, the programme to modernize courts has continued, and it is possible now to access courts and tribunals digitally, to make an application online, and to manage the case digitally in the following areas:

- ◇ making a claim for money (Money Claims Court Online);
- ◇ in relation to domestic violence, for unrepresented applicants to be able to make an application for a Family Law Act 1996 injunction;
- ◇ family private law in relation to childcare arrangements;
- ◇ family public law in relation to making and managing care and supervision orders (available in some family courts in specific areas);
- and
- ◇ financial remedy—which is also connected to divorce.

In relation to tribunals, the following procedures can be handled digitally:

- ◇ appeals in terms of a welfare benefits decision (employment support allowance, personal independence payments, universal credit);
- ◇ employment tribunal claims;
- ◇ tax tribunal appeals; and
- ◇ appeals against a visa or immigration decision.

However, the online divorce and probate services are for use by professionals only.

The digitization of court processes and remote hearings is clearly here to stay, but work still needs to be done to increase the participation of LIPs. As mentioned above, the Administrative Justice Council, argued for the need to address the important requirement ‘for an integrated service [on digital literacy while] providing adequate legal advice and support, especially for those most vulnerable’ (2020: ‘Summary’). However, any significant and long-lasting changes to how courts are accessed need to be proceeded with great care. Denault & Patterson (2021) commenting across different jurisdictions—in particular, the US and Canada—and providing evidence-based data on nonverbal communication, caution against making remote hearings a permanent change. The authors argue that such a decision could harm the integrity of the justice system.

Given that the existing adversarial justice system has been developed ‘on the assumption that people will be legally represented’ (JUSTICE 2015) and taking into account the current impoverished state of legal aid and decreased funding for legal advice services—which has led to a decrease in providers of legal advice, assistance, and representation, thereby causing an increase in LIPs—what is needed to re-balance access to justice? Would the modernization of courts along with adequate digital support for people who need it be sufficient? The House of Commons Justice Committee cautions against the Government merely making available legal support and information, and notes that such measures ‘should not be seen as an alternative to tailored legal advice’ (2021: paragraph 108). Genn asserts that:

When we are looking at a fundamental rethink of the justice system, of making it cheaper for those with lawyers and more accessible and comprehensive for those who have to navigate the processes alone, the key challenge is always to find a balance between rules that will deliver uncomplicated, fair processes and the best chance of a substantive just outcome (2017: 7).

Genn and colleagues raised an important point in 1999, which is still pertinent today, which is that:

The central dilemma in the access to justice argument is whether the objective of legal policy should be to enhance access to legal forums for the resolution of disputes, or whether it should be aimed at preventing problems and disputes from arising, equipping as many members of the public as possible to solve problems when they do arise without recourse to legal action, and diverting cases away from the courts into private dispute resolution forums (1999: 263).

The Low Commission in 2014 argued for the reduction in the need for advice and support in the first place, which could partly be achieved by simplifying the legal system. Early intervention and action could prevent problems from escalating.²³ While investment in the basic level of provision of information and advice, and embedding advice in settings where people go regularly, could also assist. Five years later in 2019, and following an assessment of the impact of the 2012 Act on legal advice and assistance providers, the Ministry of Justice finally acknowledged the benefits of early intervention, with the Government agreeing to pilot early legal advice.²⁴ In addition to stating that ‘Digital services should not ... be inappropriately substituted for traditional advice, representation and support’ (2121: paragraph 4), in its recent report the House of Commons Justice Committee suggested that the civil legal aid system could benefit from an updated Green Form scheme. The Green Form scheme was first introduced in 1973, and the hope is that suitably refurbished it might enable ‘individuals to access timely legal and expert advice. Rather than being constrained by issues of scope, such a scheme should be strategically targeted at those who would most benefit from early advice’ (2021: paragraph 99).²⁵

The digitization of the courts is inevitable, given that society is embracing online technology. However, any court-modernizing programme should be balanced against the needs of the more vulnerable members of society,

²³ The Low Commission’s six overarching recommendations included giving higher priority in the provision of public legal education in schools, to be given alongside financial literacy, and in education for life. Also the development by the next UK Government of a National Strategy for Advice and Legal Support in England, preferably with all-party support, with the Welsh Government developing a similar strategy for Wales. As part of the recommendation, the Commission prescribed the need for a Minister for Advice and Legal Support. Another recommendation was the co-production or commission by local authorities of local advice and legal support plans with local ‘not-for-profit and commercial advice agencies’ (2014: x). To contextualize the Low Commission’s recommendations in relation to public legal education, this was an area that had already been raised as a necessity in the early 1990s by the Legal Action Group (1992: 113-115).

²⁴ Minnoch (2019) argued against the need for a pilot, suggesting that the Government already has sufficient data.

²⁵ See also Legal Action Group (1992) and Bach Commission (2017) report on *The History of Legal Aid* by Sir Henry Brooke (appendix 6: 8-9). Within the context of the history of legal aid and legal aid providers, see also Smith (1997a). For the Green Form scheme to work, adequate remuneration needs to be given to the scheme providers, see Pickup (2012).

the integrity of the justice system and legal justice principles. Crucially, there is an urgent need to address the important requirement ‘for an integrated service [on digital literacy while] providing adequate legal advice and support, especially for those most vulnerable’ (Administrative Justice Council 2020: ‘Summary’).

For those experiencing everyday problems, which assume a legal character, while there continues to be a lack of data on LIPs, it means that for now, the current legal landscape does not provide adequate resources to enable LIPs to feel supported and, therefore, better able to participate in legal proceedings from the highest rung of the participation ladder, ‘being enabled’. Without the support provided by pro bono clinics delivered by volunteer qualified lawyers, the current legal landscape would be far rockier, yet the pro bono services should really only be viewed as complementary to legal aid provision and should not be so heavily relied upon by LIPs. Nevertheless, without these clinics and without the volunteer lawyers’ dedicated assistance, ‘For the wronged party, too often the best course of action is to abandon justice, swallow pride and accept being the victim of the unlawful actions of a more powerful adversary’ (Bach Commission 2017: 11).

A final comment needs to be made in relation to the pro bono clinic at MWLC. Without the commitment of the volunteer qualified solicitors and barristers, the Legal Centre would not have been able to provide the level of assistance or achieve the many positive outcomes for its clients, many of whom had struggled during the national shutdowns in seeking legal advice and assistance. As with any voluntary sector legal service, increased and longer-term funding would ensure that the Legal Centre would be able to maintain an adequate number of staff to be able to continue to meet the continuing high demand for its assistance.

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Legislation

Family Law Act 1996

Legal Aid, Sentencing and Punishment of Offenders Act 2012

THE PLAIN MEANING RULE AND TRANSITIONAL PROVISIONS IN LEGISLATION: OCCASIONAL MISUNDERSTANDINGS

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Abstract

In the Cayman Islands, a British Overseas Territory, the Grand Court, purportedly applying the plain meaning rule, held that the Health Services Authority Law barred suits against government hospitals unless there was bad faith. Within about six weeks, the Government amended the provision to expressly add negligence as a ground of suit. An attempt to apply the amended legislation to the case that led to the amendment failed. This note examines whether the plain meaning rule was properly applied and the extent to which matters pending before courts and other public authorities can be affected by new legislation.

Keywords: presumption against retrospectivity; transitional; procedural legislation; vested rights; pending; immediate effect; Hansard; retrospective; retroactive.

[A] INTRODUCTION

Section 12 of the Health Services Authority Law (HSA Law),² Cayman legislation, provided that the Authority, which runs government hospitals, was ‘not liable in damages’ unless there was ‘bad faith’. Despite nuanced arguments contending that negligence was not, in law, excluded, Justice Richard Williams decided in *Thompson v Health Services Authority* (2016: 93) (*Thompson 1*) that the authority was protected unless there was bad faith. Following that decision, the court had to determine whether section 12, so interpreted, was incompatible with the right to life protected

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² Before the coming into force of the Cayman Islands Constitution (Amendment) Order 2020 UKSI 1283, which renamed the Legislative Assembly as Parliament, what are now called ‘Acts’ were called ‘Laws’.

by section 2 of the Constitution of the Cayman Islands 2009.³ This was heard as *Thompson v Health Services Authority* (2018: 442) (*Thompson 2*). By the time the second phase was heard, the Government had passed the Health Services Authority (Amendment) Law 2016 (the 2016 amendment) to expressly include negligence as a ground of suit. The plaintiff amended the pleading to take advantage of the change but was unsuccessful.

Thompson 2 decided that there was no violation of the right to life as the material facts took place before the Bill of Rights came into force in 2012. As to the 2016 amendment, it was held that it did not apply to the case at hand as there was nothing in the amendment that evinced an intention to make the legislation retrospective or retroactive.

At this time, there were cases which had been filed, and it was thought that there were others that could have been filed and were still within the three-year limitation period for negligence prescribed by section 13 of the Limitation Law (1996 Revision). The issue whether the 2016 amendment could apply to cases which had not been decided at the time of enactment has never been decided by the courts. Despite that, the issue remains important as some of these matters were never formally dismissed.

Thus, the purpose of this article is to examine whether the plain meaning rule was properly applied in *Thompson 1* and whether, in *Thompson 2*, the court took the right approach to the application or otherwise of new legislation to pending matters. It will be posited (a) that the plaintiff's arguments regarding the meaning of section 12, even if they could have been better supported by authorities, were nonetheless better, and (b) that the court's approach to retrospectivity and the related issue of transitional provisions was also flawed.

The significance of all this lies in the fact that the defendant admitted in *Thompson 1* that, in the period from 2005 to 2015 when it was heard, there were 'around 17 claims', eight of which were settled (paragraph 100). In a jurisdiction with a population of 56,672 (World Bank: 2010) mid-way through that 10-year period, this was a significant number of claims. Further, even with the restricted meaning that had been given to section 12, if the courts had had an opportunity to hold that the 2016 amendment applied to matters pending before the courts but in which no decisions had been rendered, a significant number of litigants would have benefited from the change. Also, persons still within the limitation period but who had not filed actions would have benefited.

³ Schedule 2 to Cayman Islands Constitution Order 2009, UKSI 2009/1379. In such a case, section 23 of the Constitution requires a declaration of incompatibility to be made. However, this does not prevent 'the continuation in force and operation of the legislation'.

[B] MISAPPLICATION OF THE PLAIN MEANING RULE

In *Thompson 1*, the plaintiff, a girl who was ten years old at the time of the hearing, was from birth bed-ridden, unable to stand, walk, talk or eat solid food. It was claimed that this was due to poor pre-natal care and delivery. The defendant invoked section 12 which stipulated that the defendant was not liable in damages unless there was bad faith. No bad faith was alleged.

The plaintiff advanced three main categories of argument. First, there was the internal context argument. It was said that section 12 had to be read in light of other provisions of the HSA Law, especially section 5(2), which obliged the defendant to ‘maintain and promote the health and wellness’ of patients. Second, in relation to the external context, reference was made to one statute *in pari materia*. It was argued that the section also had to be read consistently with section 15(2) of the Health Practice Law (HP Law) which required all medical practitioners, both in the private and public sectors, to take out malpractice insurance. At the material time, there was no distinction as to the level of coverage required. Third, still in the external context, the court was invited to take account of the Cayman Islands Legislative Assembly Official Hansard Reports to buttress the plaintiff’s arguments as to the intention of the legislature.

Williams J rejected these arguments in the following words:

[W]hen I consider the primary reading of the words in s.12, construed in the context of and with reference to other sections in the HSAL 2004, I find the words to be clear and that there is no ambiguity or absurdity which requires the court to apply any other rules of statutory interpretation, or any external aid, including the highlighted parliamentary statements (Thompson1: paragraph 89).

This approach to the plain meaning rule is contradicted by a long line of cases, some of which will be given here. One of the most quoted words in this regard are those of Lord Wensleydale in *Grey v Pearson* (1857) who said:

In construing wills and indeed statutes, and all written instruments, the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnance or inconsistency *with the rest of the instrument*, in which case the grammatical and ordinary sense of the words may be modified, so as to avoid the absurdity, repugnance and inconsistency but no farther (106 emphasis added).

The High Court of Australia in *WACB v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) has followed the same approach stating :

[W]here the language of a statutory provision is clear and unambiguous, and is consistent and harmonious with the other provisions of the enactment, it must be given its ordinary and grammatical meaning (190, 200).

The same approach is also seen in the leading Supreme Court of Canada case of *Re Rizzo and Rizzo Shoes Ltd* (1998: 27). There, the issue was whether employees who lost their jobs through the bankruptcy of the company had a right to severance pay under Ontario's Employment Standards Act (RSO 1980, c 137). Section 40 of that Act provided that, subject to certain conditions, where employment was 'terminated by an employer', the employer was to 'pay severance pay'. The Ontario Court of Appeal, purportedly applying the plain meaning rule, accepted the argument that this applied only to regular terminations and not termination through bankruptcy.

On appeal, the Supreme Court of Canada rejected the approach. Iacobucci J said:

Consistent with the finding of the Court of Appeal, the plain meaning of the words of the provision here in question appears to restrict the obligation to pay termination and severance pay to those employers who have actively terminated the employment of their employees. At first blush, bankruptcy does not fit comfortably into this interpretation. However, with respect, I believe this analysis is incomplete (*Rizzo*: 40).

He went on to say:

Although the Court of Appeal looked to the plain meaning of the specific question in the present case, with respect, I believe that the court did not pay sufficient attention to the scheme of the ESA [Employment Standards Act], its object or the intention of the legislature; nor was the context of the words in issue appropriately recognized (*Rizzo*: 41).

Accordingly, the Supreme Court of Canada held that persons losing their jobs due to bankruptcy were also entitled to severance pay. These authorities were not cited to Justice Williams, nor were any others which take the same approach.

All that said, the plain meaning ship was somewhat steadied in Cayman by Justice Ingrid Mangatal in *BDO v Governor in Cabinet* (2019: 457). Relying on various UK court cases as well as *Bennion on Statutory Interpretation* (2013),⁴ she rejected the approach in *Thompson 1* regarding the plain meaning rule, in particular, that a statute does not need to be read in its internal and external context if it is clear and unambiguous. She took the approach, well established in some jurisdictions, that even if

⁴ Edition by O Jones, for example s 363, at 1058; s 195, at 507-508; s 193, at 504.

a statute appears to be clear and unambiguous at first blush, it still must be read in its entire context. If, at that stage, an ambiguity emerges which was not apparent when the relevant provision was read in isolation, the court must try to find a meaning that reconciles the provisions. If this approach had been well argued in *Thompson 1*, it would have been more challenging for the defendant in that case to succeed. It is hoped that this article will contribute towards a better understanding of the rule, especially that the dichotomy between *Thompson 1* and *BDO* regarding the plain meaning rule has never been ruled upon by the Cayman Islands Court of Appeal.

[C] PRESUMPTION AGAINST RETROSPECTIVITY

General Approach to Retrospectivity

As a prelude to considering what should have been the effect of the 2016 amendment on pending court cases, and because issues of transition are related to issues of retrospectivity, it is necessary to consider the correct approach to the latter in general as well as in relation to specific subject-matters.

It was argued by the defendant that holding the Authority liable in damages would make the statute retrospective. First, it was rightly contended that retrospectivity is permitted in law only where the language is clear and unambiguous. Second, and more relevantly, the defendant, again rightly, argued that the presumption does not generally apply where the change is procedural. These two approaches are aptly summarized in the following oft-quoted passage found in the Privy Council case of *Yew Bon Tew v Kenderaan Bas Mera* (1982: 833 at 836). There Lord Brightman, delivering the judgment of the Board, had this to say:

Apart from the provisions of the interpretation statutes, there is at common law a prima facie rule of construction that a statute should not be interpreted retrospectively so as to impair an existing right or obligation unless that result is unavoidable on the language used. A statute is retrospective if it takes away or impairs a vested right acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability, in regard to events already past. There is however said to be an exception in the case of a statute which is purely procedural, because no person has a vested right in any particular course of procedure, but only a right to prosecute or defend a suit according to the rules for the conduct of an action for the time being prescribed. ...

Whether a statute is to be construed in a retrospective sense, and if so to what extent, depends on the intention of the legislature as expressed in the wording of the statute, having regard to the normal canons of construction and to the relevant provisions of any interpretation statute.

Rules of evidence are of course considered to be procedural. An example is the case of *Diaz (Anthony) v The State* (1989: 425) decided by the Court of Appeal of Trinidad and Tobago. There, the appellant was convicted of rape. At his trial, evidence was admitted by the court of how the prosecutrix complained to a neighbour about the rape. The neighbour gave evidence of the complaint and the victim's distressed condition. Since the alleged rape, section 31 of the Sexual Offences Act 1986 had abolished the English common law rule that allowed evidence of a recent complaint to be admitted in evidence. That Act came into force on 11 November 1986. The issue was whether this aspect of the Act applied to the case since, at the time of the alleged rape, the rule had not been abolished. The Court of Appeal of Trinidad and Tobago held that, in the absence of a clear statutory provision to the contrary, that rule of evidence applied to all cases that had not been determined by that date, even where the rape took place before the amendment. Accordingly, because evidence of recent complaint had been admitted, the appeal was allowed. To put it another way, it was held that there was no vested right in a rule of evidence.⁵

Returning to *Thompson 2*, even if the 2016 amendment were to be viewed as removing any immunity (assuming it existed at all before), it is submitted that the correct interpretation is that this was a procedural change, and, therefore, the amendment should have been held to apply also to cases where the material facts occurred before the amendment.

Further, on retrospectivity in general, Lord Reid gave a relatively more recent summary of the legal position. He said in *Sunshine Porcelain Potteries Pty Ltd v Nash* (1961):

Generally, there is a strong presumption that a legislature does not intend to impose a new liability in respect of something that has already happened, because generally it would not be reasonable for a legislature to do that ... (927)

But this presumption may be overcome not only by express words in the Act but also by the circumstances sufficiently strong to displace it (938).

⁵ See also *William (Early) v The State* (1994) (CA of Trinidad and Tobago), as well the Eastern Caribbean Supreme Court case of *Richardson and Others v Richardson* (1995) (from Anguilla). Retrospectivity was also considered in *A G Ebanks v R* (2007) (CA of the Cayman Islands), where the introduction of a mandatory sentence was held not to amount to a 'heavier penalty'. For a more comprehensive study, see Sampford & Ors (2006).

Also, courts have held that they can take into account acts committed before a statute is passed in deciding current issues. For example, the English Court of Appeal held that legislation that prohibited convicted persons from working with children was applicable to offences committed before the legislation was passed. This argument was presented by counsel for the Secretary of State in the following terms and approved by Kay LJ in *R v Field* (2003):

Assuming that a disqualification order is not a criminal penalty, the Secretary of State's interpretation does not offend against the presumption against retrospective legislation. That presumption is based on concepts of fairness and legal certainty, which dictate that accrued rights and the legal status of past acts should not be altered by subsequent legislation. But the effect of a disqualification order is entirely prospective, because it affects only future conduct ... (769)

Finally, the purpose of section 28 is plainly to protect children. That purpose would be severely undermined if a disqualification order could only be imposed in relation to offences committed after the section came into force. The courts should take a more relaxed approach to a potentially retrospective element in legislation where its intended purpose is to protect the public (982-983).

Extrapolated to the facts of *Thompson*, therefore, it is safe to say that the application of the amended section 12 to pending matters was, properly conceived, to be entirely prospective, because it affected only future judgments for damages, this for a breach of duty of care that existed even before the amendment. The purpose of the amendment, which was clearly to correct an egregious omission, would have been severely undermined if the section were to apply only to facts occurring after the amendment.

Finally, on retrospectivity in general, the mere fact that legislation affects existing rights does not technically make it retrospective. This was clarified a long time ago by Buckley LJ in *West v Gwynne* (1911) in the English Court of Appeal in the following terms:

Retrospective operation is one matter. Interference with existing rights is another. If an Act provides that as at a past date the law shall be taken to have been that which it was not, that Act I understand to be retrospective. That is not this case ... As a matter of principle an Act of Parliament is not without sufficient reason taken to be retrospective. There is, so to speak, a presumption that it speaks only as to the future. But there is no like presumption that an Act is not intended to interfere with existing rights. Most Acts of Parliament, in fact, do interfere with existing rights (11).

Approach to Pending Actions

Regarding pending actions, Langan has noted in his edition of the classic work *Maxwell on the Interpretation of Statutes* (Langan 1976) that:

In general, when a substantive law is altered during the pendency of an action, the rights of the parties are decided according to the law as it existed when the action was begun, unless the new statute shows a clear intention to vary such rights.

...

But if the necessary intendment of a statute is to affect the rights of parties to pending actions, the court must give effect to the intention of the legislature and apply the law as it stands at the time of the judgment even though there is no express reference to pending actions (220-221).

So, the mere fact that the amendment (or Hansard) is silent about pending actions does not *per se* imply that it will not apply to pending actions.

In support of that quote, he further states that this principle was applied to the Landlord and Tenant (Rent Control) Act 1949 in *Hutchinson v Jauncey* (1950: 574) where the English Court of Appeal expressed the view that the holding in an earlier case (that only express words could alter the rights of the parties in relation to pending rights of action) was incorrect.

Approach to Damages and Costs

Langan also deals with the general rule as to procedural legislation, which is relevant to the question whether the awarding of damages is a procedure or not (Langan 1976: 222 *et seq*). It is worth noting in this regard that costs have been held to be a procedure for purposes of the law of retrospectivity. An account is also given of *Wright v Hale* (1860: 227).⁶ There, section 34 of the Common Law Procedure Act 1860 deprived the plaintiff of costs if they recovered, by the verdict of a jury, less than five pounds sterling. The section was held to apply to actions begun before the Act had come into operation, but which were tried afterwards. Significantly, in the same *Wright* case, Baron Wilde also said: 'where the enactment deals with procedure only, unless the contrary is expressed, the enactment applies to all actions, whether commenced before or after the passing of the Act' (*Wright*: 232).

⁶ (1860) 6 H & N 227. Also found in 30 LI Ex 40 and 158 ER 94. Page 232 quoted further down is from 6 H & N.

The only aspect of this which was disavowed, as noted above, is the fact that a contrary intention cannot be implied. In *Kimbray v Draper* (1868: 160), it was similarly held that section 10 of the County Courts Act 1867, which dealt with orders for security for costs in county court actions, applied to pending actions. These cases show that what is considered to be procedural is liberally construed.

Immediate Effect and Retrospective Effect

There is also the need to distinguish between immediate effect and retrospective effect. Sullivan states in *Sullivan and Driedger on the Construction of Statutes* (2002) that:

Where a provision is found to be purely procedural, it is given immediate effect. It is *not* given retroactive effect. The presumption against the retroactive application of legislation applies to procedural provisions as it does to all legislation, without exception. Thus, any attempt to apply a provision to a stage in a proceeding that was completed before the provision came into force would be refused, subject to a legislative direction to the contrary (587 emphasis in the original).

In this regard, the legislature in the Cayman Islands showed how immediate it wanted the 2016 amendment to have effect:

- ◇ 19 February 2016: the judgment in *Thompson 1* is rendered and a public outcry follows;
- ◇ 1 April 2016: the HSA (Amendment) Bill 2016 is published;
- ◇ 20 June 2016: the resulting legislation, the 2016 amendment is published and comes into force, 40 days (5 weeks and 6 days) after judgment.

Therefore, it is submitted that this suggests that the Legislative Assembly intended the legislation to have immediate effect in all cases that had not been finally determined. However, admittedly, since the assembly did not determine what immediate effect was in relation to the different categories of cases, the interpretation of ‘immediate effect’ remained for the court to determine.

Further, a court must consider the kind of amendment that is being introduced. If the amendment is just an improvement on an old provision in a non-fundamental way, the court might consider that the introduction of the measure need not be immediate. However, where an amendment is one which was correcting an egregious ‘error’, as in the *Thompson* cases, that is, one that went to a fundamental concept in the administration of justice, the court must take a liberal approach and allow the legislation

to come into effect immediately so that the largest number of people can benefit. And, in so doing, the HSA would not have been prejudiced as it always had a duty of care.

[D] LEGISLATION AFFECTING MATTERS ON THE GROUND

Reference was made above to how legislation is sometimes intended to affect matters on the ground. In *R v Levine* (1926: 342), the accused was charged under the Manitoba liquor licensing legislation with being in possession of liquor on premises of a kind not allowed under the Act. At the time she acquired the liquor, it was lawful to have that liquor on that kind of premises. The Act was amended, making it an offence to have liquor exceeding a certain quantity on such premises. The Manitoba Court of Appeal upheld the conviction despite the liquor having been lawfully acquired and therefore lawfully possessed before the commencement of the amending Act. Prendargast JA, in a majority judgment, said that such application of the amendment did not make it retrospective. He further explained:

The existence or presence of the liquor on the premises only refers to its existence or presence there on the 27th. Of course, the appellant's status was altered by the amendment, and certain rights which she previously had, came thereby to an end. But that is the effect and in fact the function of most, if not all, public enactments of a regulating character (*Levine*: 348-349).

So, the mere fact that there is a matter that is already in the courts, or whose material facts have already taken place, does not necessarily imply that new legislation cannot apply to it.

[E] STATUTORY PROVISIONS RELATING TO TRANSITION

Most jurisdictions in the Commonwealth have an Act in the nature of an Interpretation Act or Legislation Act that deals with some of the more common issues relating to transition. Many of these Acts are, at least in this respect, based on, or are similar to, section 16 of the UK Interpretation Act 1978.⁷ The Interpretation Act (1995 Revision) of Cayman, which is similar to the UK provision, is fairly typical in relation to the effect of repeals and the related issue of transitional matters:

⁷ Interpretation Act, RSC 1985, c I-21 (Canada) section 43; Interpretation Act 1987 (New South Wales) section 30; Interpretation Act 1999 (New Zealand) section 17.

- 25** (1) Where any Law repeals and re-enacts, with or without modification, any provision of any Law in force, reference in any other Law to the provision so repealed shall, unless the contrary intention appears, be construed as references to the provisions so re-enacted.
- (2) Where any Law repeals any other enactment, then, unless the contrary intention appears, the repeal shall not—
- (a) revive anything not in force or existing at the time at which the repeal takes effect;
 - (b) affect the previous operation of any enactment so repealed or anything duly done or suffered under any enactment so repealed;
 - (c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed;
 - (d) affect any penalty, fine, forfeiture or punishment incurred in respect of any offence committed against any enactment so repealed; or
 - (e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, fine, forfeiture or punishment as aforesaid; and any such investigation, legal proceedings or remedy may be instituted, continued, or enforced, and any such penalty, fine, forfeiture or punishment may be imposed as if the repealing Law had not been passed.⁸

This section is of course only a default position.

[F] BEFORE AND AFTER THE 2016 AMENDMENT

Position before the 2016 Amendment

The judge in *Thompson 1* readily recognized that the defendant did not enjoy immunity against all forms of legal process as, in addition to suit in tort based on bad faith, it could be sued in judicial review proceedings (paragraph 75). Though the court did not elaborate on this, one can easily envisage how the spouse of a terminally ill patient could seek a declaration, injunction, prohibition or *certiorari* from a court of law, depending on circumstances.

Having appropriately recognized what was implicit in the section in relation to judicial review, the court then failed to recognize what was probably the next logical step, which is that the word ‘liable in damages’ spoke to the prohibition of a particular form of remedy rather than legal process. Instead, it took a blunderbuss approach by holding that, by

⁸ In Interpretation Act 1978 for the UK, in paragraph (e), the portion after the semi-colon is not part of the paragraph and goes out full to the left.

implication, there was also immunity from legal process in cases of negligence.

For analytical purposes, the process in a civil matter can be divided into the following parts. First, a suit is received by a court. Second, the court conducts a trial and makes a declaration as to the rights of the parties, as required by section 7 of the Constitution of the Cayman Islands. Third, in an appropriate case, it awards damages. Viewed through this prism, section 12 took away only the third of these stages, leaving intact the validity of the legal process and the declaration of the rights. This conclusion would have been supported by the rule, for which no authority need be cited, that courts are slow to interpret a statute as abolishing the common law unless there are clear words to the contrary.⁹

This approach could be criticized as unduly mixing issues of tort and those of public law. But this argument would be misplaced. Whenever the common law is overlaid with statute law, the result can be unusual and even awkward, but that has to be accepted as the effect of the statute. What is more, some of the old distinctions between different kinds of proceedings have to some degree been eroded. For example, Order 53 rule 7 of the UK-inspired Grand Court Rules allows an application for judicial review to be endorsed with a claim for damages. Also, under rule 9 of the same Order, the court has power, in certain circumstances (where the relief sought is a declaration, an injunction or damages) to order the proceedings to continue as if they had been begun by writ rather than refusing the application. Even more significant is Order 15 rule 16 which provides that:

No action or other proceeding shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the Court may make binding declarations of right whether or not any consequential relief is or could be claimed.

Thus, the position advocated above would not be a novelty within the current civil procedure regime.

Position after the 2016 Amendment

As stated above, following the decision in *Thompson 1*, the Legislative Assembly passed the 2016 amendment to make it clear that one could sue also for negligence. As to whether that amendment applied to acts committed before the change, the court in *Thompson 2* said that: 'The

⁹ See short discussion in Simamba (2016: 146).

cause of action arises at the time of the alleged negligent act and s. 12 excluded liability and has effect from that time’ (paragraph 105).

Accordingly, it rejected the notion that the plaintiff could benefit from the 2016 amendment. The court reasoned that if the defendant was to be held liable for things that happened before the amendment, that would have made an act retrospectively illegal. Essentially, the principle the court applied was similar to that applied in criminal matters, namely that one cannot be found guilty of an offence that did not exist at the time of commission of the act.

In so holding, the court misdirected itself. In criminal cases, needless to say, there is no duty to obey a law that did not exist at the time of the act, and therefore no obligation existed not to commit the particular act. That was not the case with *Thompson 2*. In that case, there was always a cause of action under common law even before the 2016 amendment. What is more, section 5(2) of the HSA Law imposed on the Authority a declaratory duty to provide for the ‘health and wellness’ of its patients. So, even if the court were to hold that no damages could be awarded for negligence under the old provision, the correct interpretation would have been that, even before the amendment, a litigant could obtain a declaration that the duty of care was breached in relation to them.

The repeal and replacement of section 12 (to add negligence) only removed the procedural impediment to suing the defendant not only for prospective actions but also for matters whose material facts took place before that date. It was wrong in law to conflate the cause of action, that is, legal process, and the exclusion of a particular form of remedy, namely, damages.

So, it is submitted that, if section 12 were to be held to confer immunity of some kind, then it would have been immunity only from damages, but not from the duty of care, which continued to exist by virtue of section 5(1) of the Law. The immunity having been removed, one could now sue and recover damages in the same way that the removal of immunity from a diplomat would make him or her amenable to prosecution for anything done while they enjoyed immunity.

In answer to the plaintiff’s argument in *Thompson 2* that the 2016 amendment must be interpreted as being intended to be for the public benefit and therefore be given retroactive effect, the court stated:

I accept that a significant benefit to the wider public without detriment can be evidence of an intention of the Legislature. However, it is also clear that the Defendants would suffer detriment if their statutory defence was removed retroactively (*Thompson 1*: paragraph 109).

Again, the court in *Thompson 2* treated the limitation of remedies as if it were a substantive defence. This too was wrong in law. The holding would have been correct if, for example, there had been no duty of care and the 2006 amendment was introducing a duty of care but that was, of course, not the case. Accordingly, there was no substantive defence that was available before 2016 that was not available after the amendment. There was only a procedural impediment.

[G] RELEVANCE OF HANSARD

Parliamentary material is relevant to this discourse because there was reliance on it in both *Thompson* cases. It is therefore important to appreciate the proper approach to Hansard. In particular, it will be argued in relation to *Thompson 2* that the debates were misunderstood in a manner that adversely affected the plaintiff's case.

Before *Pepper v Hart* (1993: 593) there was a rule excluding reference to parliamentary material as an aid to statutory construction. The rule was later relaxed so as to permit such reference where:

- (a) legislation was ambiguous or obscure or led to absurdity, (b) the material relied upon consisted of one or more statements by a Minister or other promoter of the Bill together if necessary with such other Parliamentary material as was necessary to understand such statements and their effect, and (c) the statements relied upon were clear (*Pepper*: 'Headnote').

In the same case, Lord Griffiths, speaking for the majority, stated the doctrine of purposive interpretation as follows:

The days have long passed when the courts adopted a strict constructionist view of interpretation which required them to adopt the literal meaning of the language. The courts now adopt a purposive approach which seeks to give effect to the true purpose of legislation and are prepared to look at much extraneous material that bears upon the background against which the legislation was enacted (*Pepper*: 617).

Thus, in light of the plain meaning rule and its caveat, coupled with the purposive approach to statutory interpretation, parliamentary material has assumed greater importance, though, admittedly, courts have been cautious in referring to them.

Regarding the rule in *Pepper*, the following must be noted in relation to the *Thompson* cases. The back and forth of the debate as reported in Hansard (both at the time of passage of the original Law and the 2016 amendment) shows that the views of the Members of the Legislative

Assembly (MLAs) were not confluent as to what was intended in the principal Law. Significantly, MLA Alden McLaughlin, then in opposition in 2004, but Premier in 2016, in a detailed submission, questioned the correctness at the time of imposing such a blanket immunity if the section was passed.¹⁰

The differences of views in these debates, some of them summarized in *Thompson 2* (paragraphs 110 and 113) is the reason that for a long time the courts did not resort to these reports: you can never be sure that all the members of the legislature agreed on the meaning of the words they used or the intention of the legislature as a group. Thus, the words in the legislation remain the primary purveyors of meaning. To put it another way, this is so because the legislature enacts legislation using the letter of the law (from which the spirit can be gleaned) and not through the letter of Hansard.

In particular, the court in *Thompson 2* noted that, during the second reading of the HSA (Amendment) Bill on 29 April 2016, the Premier said that the legislation would not be retroactive (paragraph 113). But this is not quite accurate. What he actually said in part was that:

We have no way of knowing how many potential claims are out there. ...

The insurance policies which have been obtained by the Health Services Authority over that period and the premiums paid would have been and were on the basis of this immunity provided for in the legislation. ...

And so, for those reasons, as empathetic as the Government is to potential plaintiffs who have been shut out by the legislation which has been in place since 2002 until now, almost 14 years, it is not a policy decision that we can take to make this legislation retroactive (Hansard, Friday, 29 April 2016, page 19).

The first issue in this regard is that it is not clear what the Premier meant to convey. All that he can safely be taken to have said is that he did not want the amendment to allow *all persons* attended as far back as 2002 to have a right to sue. It would not be a fair interpretation to hold that every category of case during that time *should* be excluded.

What is more, the following issues were never expressly mentioned:

- ◇ Did the Premier mean to also convey that cases where the material facts had already taken place but where no proceedings had been filed at the date of the amendment would not benefit (even if the three-

¹⁰ See Cayman Islands Legislative Assembly Official Hansard Report of 28 April 2016 from 56 to 60, and 29 April 2016, which also quote extensively from debates which took place in 2004.

year limitation period under the Limitation Act had not expired), but those where suits had been filed would benefit?

- ◇ Did he mean to say that even among those which had been filed, only those where no ruling had been made on the issue would benefit? In other words, was he saying that *Thompson 1* (where the ruling had been rendered) could not benefit but that a case before the courts (where no ruling had been made) would?

To put it another way, there were various categories of cases in that 14-year period:

- a) there were those cases where the limitation period had expired by the time the law was amended;
- b) there were those where the limitation period had not expired but suits had not been filed;
- c) there were those where the limitation period had not expired and suits were filed but *had been determined* on the issue; and
- d) there were those where the limitation period had not expired and suits were filed but *had not been determined* on the issue.

It is unclear from the debates how the legislature intended to deal with especially categories c) and d).

What is more, the Premier's statement as to the implications for insurance must be interpreted with caution. The judgment in *Thompson 1* disclosed, as noted above, that in the ten-year period ending in 2015 there were around 17 claims and at least eight were settled (paragraph 100). In any case, insurance was an internal matter for the Authority. That had no direct bearing on whether or not the Authority would be liable as this is a matter of statutory interpretation. Besides, if the application of the provision were to be limited to cases whose limitation period of three years had not expired, filed or not filed, there would have been no major exposure of the defendant to claims not covered by insurance.

If the Legislative Assembly intended that the 2016 amendment (which was intended to correct an egregious and fundamental apparent omission in the HSA Law) was to have such a limited application and totally exclude all categories of cases that were still alive in one shape or form, the Assembly should have used words that are clear and unambiguous. Following the rule in *Pepper*, one cannot rely on the words of the Premier in Hansard, which were themselves vague as to the intended scope of the amendment, to limit the fair meaning of the words used in the legislation.

[H] CONCLUDING REMARKS

A proper application of the plain meaning rule would probably have resulted in negligence being also actionable even before the 2016 amendment or, at the very least, have led to a holding that a declaration could be made as to the rights of the parties, a right protected by section 7 of the Constitution of the Cayman Islands. Also, a proper understanding of the potential of the amendment to apply to cases that had not been decided would have enabled more people to credibly sue with a reasonable likelihood of success on the application of the amendment.

It is also worth noting that it is not the general practice in many jurisdictions to grant immunity to government agencies in cases where a private individual can be held liable, although there can be cases where, for budgetary or policy reasons, it may exist. Where it is granted, this is often in relation to regulatory bodies. For example, consider what would happen if a hotels licensing board did not enjoy immunity or a high threshold for being sued such as bad faith. This would mean that, if it denied a licence to an investor who later won a judicial review case, the investor might be able to successfully sue for loss of profits. Closer to home, if a lawyers' licensing body did not enjoy the same protection, a lawyer who is denied a licence but is able to obtain it following a successful court challenge may be able to recover damages. Needless to say, this would greatly impair regulatory bodies in the exercise of their functions. Protection of government hospitals against suits for negligence does not fall into this category.

Following *Thompson 1*, the attempt in the 2016 amendment to correct what was seen as a mistake was not entirely satisfactory. Though negligence was added as an additional ground for suing, the change did not deal with the different categories of cases that have been outlined above. Whereas there may have been good reasons why this was not done, those would be outside the scope of this article. One has to accept them as reflecting the realities of enacting legislation on a subject-matter that is not only potentially emotional but in which there were many vested interests.

As a practical note, it has to be remembered that, where there is an issue of transitional provisions, one needs to examine the pertinent legislation to see if there is a specific provision. This provision is often towards the end of the legislation, but this is also determined by the legislative practice in the jurisdiction concerned. In the absence of such provisions, as noted above, the Interpretation Act, Legislation Act or equivalent will usually prescribe the default position. If that too is silent or the application of

the default position is unclear, case law, where it exists on the point, becomes the place of last resort. All in all, the extent to which a default position or specific provision in particular legislation will apply is always subject to a higher legal norm such as the Constitution of the Cayman Islands.¹¹

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- Health Services Authority Law (2003 Revision) (Cayman)

¹¹ Also, the European Convention on Human Rights applies to the Islands and the European Court of Human Rights is the final court of appeal in human rights matters. See *Ebanks v the United Kingdom* (2010).

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Date and Time: Wednesday
10 November 2021, 18.00-19.00

Venue: Senedd, Cardiff Bay
See [website](#) for details.

The Future of Advocacy

Speaker: Lord Pannick QC,
Blackstone Chambers

Date and Time: Thursday 11
November 2021, 18.00-19.00

Venue: Law Faculty Building,
Gulbenkian Theatre, Oxford
See [website](#) for details.

The Director's Online Seminar Series

The Role of Border Cities in International Law

Speaker: Professor Chris Waters,
Faculty of Law University of
Windsor

Date and time: Thursday
4 November 2020, 16:00-17:30

Chair: Professor Carl Stychin,
Director of the Institute of
Advanced Legal Studies

See [website](#) for details.

The role of cities in redefining international law and international relations is increasingly a subject of interest. Whether tackling climate change through city networks or acting as 'sanctuary' cities, cities have found innovative ways to (re)assert their role as international actors. Yet the role of border cities in international law remains underexplored. Border cities, often considered marginal or even suspect, have unique practical interactive and interpretive experiences on international law and international relations which provide insight into governance in borderlands and beyond.

Finding Time in Abortion Law

Speaker: Dr Ruth Fletcher,
School of Law Queen Mary
University of London

Date and time: Thursday
4 November 2020, 16:00-17:30

Chair: Professor Carl Stychin,
Director of the Institute of
Advanced Legal Studies

See [website](#) for details.

This paper turns to literatures working at the interstices of law, time and social reproduction to assist with the theoretical and methodological challenge of developing a set of tools for working the time-related requirements in abortion law. The author identifies three different, if connected, dimensions of legal time, which we need to consider together in order to understand better how such requirements (eg gestational time limits, waiting periods, crisis management) work in managing the withdrawal of gestational labour.

First, we could find time in the different material resources and processes (calendars, clocks, menstrual cycles, certification, illness, diagnosis, crisis, futures) that are used to measure legal time, including the gestational time regulated by abortion law.

Second, we could see how different norms of timeliness (punctuality, earliness, improvement, pro-

gression, repair, urgency, speculation) are legally prescribed in dissuading or encouraging certain behaviour, and how they contribute to the legal understanding of when abortion is timely.

Third, we can trace how temporality is felt as different atmospheres (relief, pressure, vulnerability, anxiety, emergency, hopelessness) are conjured up by time-related requirements, atmospheres which may help explain the effects of abortion law's arrangements.

Finding this complexity of multi-dimensional time in abortion law provides us with the beginnings of a collection of timely tools – materials, norms, atmospheres – for crafting better law, one which is more accountable to those who spend time gestating pregnancies, and those who care for them.

A Reparative History of Race & Health Inequalities

Speaker: Professor Michael Thomson, Faculty of Law,
University of Technology Sydney

Date and time: Wednesday
26 January 2022, 9:00-10:30

Chair: Professor Carl Stychin,
Director of the Institute of
Advanced Legal Studies

See [website](#) for details.

The question of reparations has a long and contentious history. Reparations were part of the

Slavery Abolition Act 1833, where payments were made to slave owners for their economic loss. These payments compounded and entrenched wealth and power in many institutional and family names familiar today. Conversely, the issue of reparations to families, communities and populations who lived through or continue to experience the deprivations and racism caused and entrenched by slavery are fiercely contested.

Drawing on Social Determinants of Health (SDH) research, this article brings together reparatory justice and health justice. SDH research has long linked social disadvantage to poor health and other outcomes, supporting the case for improved social welfare provision. Education is engaged here as an example of how state provisions can help to address health inequalities that have their origins in historic wrongs and the enduring inequalities these have caused.

In addressing race and health inequalities in this way, this paper provides what Catherine Hall has termed a reparative history, exploring the past to understand how injustices may be acknowledged and addressed. Looking at data on educational attainment and health outcomes, the paper argues for a radical reconceptualization of education funding as one element of reparatory justice.

The History of Arbitration: Legislation and Practice

Speaker: Dr Francis Boorman,
Institute of Advanced Legal
Studies

Date and time: Thursday
24 February 2022, 16:00 to 17:30

Chair: Professor Carl Stychin,
Director of the Institute of
Advanced Legal Studies

See [website](#) for details.

This paper will take a long view of the history of arbitration in England, from the 17th to the 19th century, contrasting parliamentary efforts to shape the process and enforcement of arbitration with the experience of arbitrators and parties. The Arbitration Acts of 1698 and 1889 have been interpreted as totemic events, important markers in a process of modernization or even improvement of arbitration, that also incorporates changes made in tandem with the legal reforms of the mid-19th century. This paper will reassess the status of legislation that concentrated on the relationship between arbitration and the courts, by exploring the practices of arbitrators, popular attitudes to arbitration and detailing how Parliament applied arbitration in many other contexts, including the enclosure of common land, labour relations and regulation of the railways.

**Information Law and Policy
Centre Online Conference:
Data in a Pandemic—Rights
and Responsibilities**

Speaker: Professor Diane Coyle CBE

Date: 18 and 19 November 2021

Annual Lecture: An Economist's
Perspective on Data and its Value

Conference topics to be covered:

- ◇ emergency powers and the rule of law;
- ◇ policymaking in a pandemic;
- ◇ health monitoring systems (certification/passports);
- ◇ algorithmic discrimination and vulnerable groups;
- ◇ data-driven tools for law enforcement;
- ◇ trustworthy institutions, online safety, and disinformation;
- ◇ data sharing and rebuilding local and global communities.

See [website](#) for details.

**IALS European Criminal Law
Webinar**

Speakers: Stephen Goadby, Crown Prosecution Service; Frederic Raffray, former Crown Advocate, Guernsey; Anthony Wilson, former SFO International Assistance

Date and time: Tuesday
7 December 2021, 16:15 to 18:15

Theme: Proceeds of Crime: International and Domestic Strategies; Cooperation and Cases

Chair: HHJ Michael Hopmeier
See [website](#) for details.

The event will review international and domestic developments in recovery of the proceeds of crime including new arrangements and strategies for international recovery.

IALS News

PhD Thesis Success

Dr Rita da Cunha has been awarded the Mitchell B Carroll prize based on her PhD thesis awarded this year. The Mitchell B Carroll prize is awarded by the International Fiscal Association for research dealing with international fiscal questions or comparative fiscal law.

Rita's PhD was entitled 'A NEW GAAR MODEL: Countering Tax Avoidance and Promoting Investment through Legal Certainty and the Rule of Law'. She was supervised by Professor Philip Baker QC. Rita's thesis will be published in the prestigious International Bureau for Fiscal Documentation Doctoral Series.

Podcasts: Law videos on SAS IALS YouTube channel

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- ◇ Sundays: 12.30-20.30

See [website](#) for details and reservations.

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REPEALING THE VAGRANCY ACT 1824

PATRICIA NG¹

Mary Ward Legal Centre

It is not always possible to identify the reasons why a person is begging. In some cases, the person who is begging is also street homeless and really needs money for the basic necessities of life. However, while street homelessness²—a more visible form of homelessness—has now been accepted as a social problem,³ a homeless person’s lack of stable housing had long been perceived by the state more as a criminal problem. Legislation

¹ The author is grateful to Professor Michael Palmer for his helpful comments. Any errors remain my responsibility. The views contained in this article are solely those of the author.

² There are different forms of homelessness. At one end of the spectrum are rough sleepers or street homeless people and, at the other end of the spectrum, are the ‘hidden homeless. See [Crisis: Rough sleeping](#). The Ministry of Housing, Communities and Local Government defines street homelessness or ‘people sleeping rough’ as:

People sleeping, about to bed down (sitting on/in or standing next to their bedding) or bedded down in the open air (such as on the streets, in tents, doorways, parks, bus shelters or encampments). People in buildings or other places not designed for habitation (such as stairwells, barns, sheds, car parks, cars, derelict boats, stations, or ‘bashes’ which are makeshift shelters, often comprised of cardboard boxes) ‘[Rough sleeping snapshot in England: autumn 2020](#)’.

‘Bedded down’ is defined as ‘either lying down or sleeping’, while ‘about to bed down includes those who are sitting in/on or near a sleeping bag or other bedding’. The Government’s definition of rough sleeping is used by local authorities with voluntary sector organizations to count the number of visible people sleeping rough in a single night snapshot. See also Wilson & Barton (2021).

³ Accurate statistical data on homeless people is difficult to obtain. Given that there are also a number of homeless people who are ‘hidden’ and remain invisible and therefore cannot be counted—those who stay with friends or relatives, have never been in contact with agencies for support or assistance, and have not self-identified as being homeless—it will never be possible to know for certain the true number of people who are homeless. The Ministry of Housing, Communities and Local Government collates the statistics for the statutory homeless, however, this only represents the households that have been included in the local government statistics: [Official Statistics – Statutory Homelessness in England: January to March 2021](#). See also, an explanation of the statistics for street homeless people, which are from different sources, noting that even the process of counting rough sleepers is not so straightforward (Geraghty 2021a). The official statistics for the statutory homeless and rough sleepers can be put into context when we take into consideration that the UK population is approximately 67,081,000 (mid-year estimate in 2020): [Office for National Statistics](#).



Photo by Tom Parsons on Unsplash

from several centuries ago and longer, as well as more recent legislation, has functioned to address the perceived problem of ‘persistent’ begging. The characterization of street homelessness as a criminal offence in part stemmed from negative social attitudes and was something of a legacy from early poor law and labour law going back to Tudor times and before.

An extremely important dimension of the history of homelessness in England and Wales is the Vagrancy Act 1824 (the 1824 Act). This is a consolidating Act which brought the previously existing vagrancy laws into one consolidating code, and at the same time incorporated an approach stemming from the Poor Law which sought to separate those seen as the deserving poor from those seen as the undeserving poor (Beier 2008: 36; Ocobock 2008: 8, 22-23).

Responsibility for the jobless and homeless was placed on local parishes with respect to their local residents when the 1824 Act was implemented: punishment or assistance was given (Ocobock 2008: 11). The vagrancy laws compelled labourers to work, or poor young men were impressed into military service, and prevented from ‘engaging in trades that threatened merchants and industrialists’ (ibid 2008: 12). In connection with the poor law system, from the 17th century, workhouses were created, which were places where the destitute who were able-bodied were given accommodation in return for work. Eventually, the Poor Law Amendment Act 1834 was created to restructure the administration of poor relief, when groups of

parishes became a union, taking on the collective responsibility of the administration of poor relief for those areas. The Metropolitan Houseless Poor Act 1864 imposed a legal duty on the Poor Law Unions in London to provide temporary accommodation for the ‘destitute wanderers’ (Vorspan 1977; Tanner 1999; see also 1900s.org). This meant that two types of workhouses were now in operation: the workhouses were for local people who were destitute, while the ‘casual wards’ were for people who were destitute and did not have a fixed address. In both workhouses, the residents had to work in order to be able to stay. People who stayed in the casual wards could usually only stay for one night and had to queue to secure shelter for the night. The need to wait in a queue for assistance, or a bedspace, is a condition that has been imposed on those who are destitute, and living in unstable accommodation, or are homeless. Just as people had to wait in a queue to be admitted into a casual ward in the previous centuries, today, a street homeless person will have to queue, possibly on a nightly basis to secure a bedspace for the night at a shelter, where spaces are limited ([Shelter: Night shelters](#)).

The 1824 Act was passed by Parliament in an era when people who were jobless, or ‘idle individuals who could labour but choose not to’ and who were ‘rootless’, ‘roofless’ and ‘seemingly unfettered by traditional domestic life and free to travel outside the surveillance of the state’, could be brought within the control of the state (Ocobock 2008: 1-2). This meant that ‘every person [found] wandering abroad and lodging in any barn or outhouse, or in any deserted or unoccupied building, or in the open air, or under a tent, or in any cart or waggon ... and not giving a good account of himself or herself’ (section 4, 1824 Act) would have committed



Houseless
and Hungry
by Sir Luke
Fildes (1869)
The Graphic.
Source: Cardiff
University
Library.



A Victorian two-penny hangover.
Source: [Historic UK](#)

an offence within the 1824 Act and could be punished. Various parts of the 1824 Act have been repealed over the years so that, for example, there are now only seven sections remaining (see [legislation.gov.uk](#)). A reading of homelessness policy existing in the early 19th century would reveal just how outdated are the values still held today which regard poverty as something of a crime and street homeless people as unworthy of assistance (Aziz 2019; Greenfield & Marsh 2019).

The 1824 Act continues to impact on society in England and Wales, by criminalizing the act of rough sleeping, which thereby criminalizes some of the most vulnerable people in society, with enforcement measures often causing street homeless people to feel ashamed of being homeless, and labelling rough sleepers as ‘vagrants’, thus, perpetuating an image of the street homeless as criminals and reinforcing other negative stereotypes.⁴ The Act does not address the root causes of homelessness, but, rather, has the opposite effect of entrenching street homelessness (Centrepoin 2019). Yet, the root causes of homelessness include poverty, the lack of affordable accommodation and unemployment—the very same issues that created the ‘vagrants’ and ‘wanderers’ many centuries ago still exist in today’s society. The misery of living in poverty has been portrayed in his novels by Charles Dickens (see Gurney 2014; Varalakshmi & Ors 2017), who worked with artists, such as Luke Fildes who reproduced his engraving of *Houseless and Hungry* as an oil painting, titled *Applicants for Admission to a Casual Ward* exhibited at the Royal Academy in 1874.⁵ Gustave Doré, a French artist, collaborated with British journalist, Blanchard Jerrold on an illustrated record of ‘deprivation and squalor of mid-Victorian London’.⁶

⁴ The number of prosecutions and convictions in relation to rough sleeping (section 4) has declined from at least 2017 (Cromarty & Ors 2012: 2).

⁵ The engraving, *Houseless and Hungry*, originally appeared in the first edition of *Graphic* magazine, in December 1869, to accompany an article on the Houseless Poor Act: Spartacus Education: [Luke Fildes; Applicants for Admission to a Casual Ward](#).

⁶ The book, *London: A Pilgrimage*, was published in 1872. See also, ‘[London, a pilgrimage: Gustave Doré’s historic visions of the capital city](#)’ *The Guardian* 28 December 2015.

The Vagrancy Act 1824 applies to England and Wales, and almost two centuries after its introduction, continues to enable the state to criminalize people who are street homeless or those who beg. Fines can be imposed up to £1,000. The police are able to move street homeless people on,⁷ possibly to a less visible place, which can also have the negative effect of preventing rough sleepers from seeking assistance.

Homelessness is a problem that could potentially affect anybody—through circumstances and personal decision-making in relation to events in life as they unfold, which occur alongside decisions made by other people, perhaps creating a series of events that lead to homelessness.



Wentworth Street, Whitechapel
(1872) by Gustave Doré.

Thus, it is easier than we might imagine for single men, women and families to become street homeless—a very visible and public experience, involving very basic human needs. Images spring to mind of a man or woman sitting on the pavement, somewhere along a street surrounded by many bags; someone sleeping in a doorway at night—sometimes shielded by umbrellas—or exposed to the elements somewhere on a street, or on a park bench in the daytime; a row of tents in the street, pitched outside the large windows of a well-known furniture store, along Tottenham Court Road, after the store has closed for the day. Any street homeless person would be vulnerable, and questions arise in terms of personal safety, particularly for women and ‘black, minority ethnic’ men and women.⁸

⁷ The most well-known example being the 2018 royal wedding, which took place in Windsor. The Leader of the Royal Borough of Windsor and Maidenhead, Simon Dudley, wrote to Thames Valley Police asking them to exercise their powers under the 1824 Act and the Anti-Social Behaviour, Crime and Policing Act 2014, to deal with begging and rough sleeping before the royal wedding was due to take place: see Sherwood (2018).

⁸ Women tend to be ‘hidden homeless’ and less likely to be street homeless, see Geraghty (2021b). In relation to the situation of people from the respective ‘black, minority ethnic and Asian’ (BAME) communities, in the main they are also ‘hidden homeless’. See Garvie (2017); Gulliver (2017); Geraghty (2020); Institute of Race Relations, ‘[BME statistics on poverty and housing and employment](#)’.



*'Coffin beds'
at a Salvation
Army shelter
in London.
Photograph:
Salvation
Army.*

Other questions are: how to stay clean and healthy, how to keep personal belongings safe, how to secure funds or a more stable income? For those who manage to keep working while street homeless, how is it possible to stay presentable and maintain a job?

Sources of immediate or overnight accommodation, and for which there is no or only a minimal charge, for people who are street homeless, such as night shelters, could probably be characterized as basic, with a limited number of usually shared sleeping spaces being available ([Shelter: 'Night shelters'](#)). During the Victorian era, overnight 'accommodation' would only have been accessible to those who could afford to pay such cost, and included the 'two-penny hangover' and 'coffin beds'—literally the size of the wooden box for sleeping in overnight. The 'two-penny hangover' provided a safe place to sleep at night, at least, for someone who could afford the cost. The 'hangover' would involve a person either having to stand or sit while sleeping draped over a rope. In contrast, a 'four-penny



*Photo by Ilse Orsel on
Unsplash*

coffin’ allowed the person to sleep while lying down, providing a slightly more comfortable night (see [History Daily](#)). The Salvation Army has provided shelter to homeless people from 1865, and continues to do so today (see [Our History](#); [Night Shelters](#)).

‘Street activity’ is a social reality, and there are ‘complex reasons behind any such activity, such as begging and rough sleeping’ (Centrepoint 2019), also street drinking. Voluntary sector organizations involved in a campaign⁹ to repeal the 1824 Act have argued that there is more modern legislation, for example, the Anti-social Behaviour, Crime and Policing Act 2014, which could be used, as a last resort, to address the perceived issue of persistent begging. The 2014 Act, which enables a court to grant public spaces protection orders and criminal behaviour orders, is increasingly being used to target street homeless people ([St Mungo’s Briefing](#)). In any event, unless a rough sleeper is assisted with support and accommodation, enforcement measures will only criminalize homelessness and further marginalize the homeless from the rest of society (Cromarty & Ors 2012: 6).

The 1824 Act is outdated, not only in terms of values, but in treating street homelessness as a criminal offence despite the reality that there are many, understandable, reasons why someone could become street homeless. The Government’s stance towards homeless people did change significantly when the National Assistance Act 1948 brought to an end poor law that had been in place for several more centuries. The 1948 Act shifted responsibilities from local parishes to local authorities,

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[Unsplash](#)



⁹ Layla Moran MP started the campaign in 2017 to repeal the 1824 Act: see below note 12, Column 42WH. See also Cromarty & Ors (2012: 6-9); Crisis (2020).



*Photo by Dan
Burton on
Unsplash*

empowering authorities to make arrangements to provide accommodation for those who are aged 18 and over, who are destitute, and have an illness, disability or because of their age or for any other reason, means they are in need of care or attention, which is not available to them.

Furthermore, over a century-and-a-half after the 1824 Act was first implemented, the Housing (Homeless Persons) Act 1977 placed a duty on authorities to provide housing for the priority homeless. Three decades still later, the Homelessness Act 2002 was introduced, imposing a strategic duty on local authorities to gather information on the local homeless population, review existing services to assist the homeless and to plan ahead. Then, in addition to the strategic duty placed on authorities, and reactive duty, the Homelessness Reduction Act 2017 placed an additional homelessness prevention duty on authorities, intended to prevent individual housing applicants from homelessness.

For those seeking housing assistance from the local authority,¹⁰ it is vital for local government decision-makers to connect the loss of stable accommodation—a basic human need—to human dignity, compassion, respect and understanding, taking time to comprehend the root causes of any form of homelessness. An issue to bear in mind is that of the bureaucrat working within an organizational culture that might well tend to view homeless applicants as ‘undeserving’, with a number of decision-makers processing applications for housing assistance from socially vulnerable applicants without the much-needed sensitivity.¹¹ In contemporary society, we should be able to ensure that public-funded

¹⁰ This has been possible since the implementation of the Housing (Homeless Persons) Act 1977, which imposed a duty on authorities to provide housing to those in priority need.

¹¹ See, for example, Cowan & Ors (2003).



Photo by [Andriyko Podilnyk](#) on [Unsplash](#)

resources are available to assist those who wish to come off the streets and that they are assisted holistically. Rather than being given short-term bedspace, meeting their need for adequate and long-term accommodation should remain a continuing priority in terms of public spending. The enquiry into the nature of the society which we wish to live in should include a questioning of values which underpin existing and emerging legislation on homelessness.

In a recent House of Commons debate, which took place on 13 April 2021, Members of Parliament (MPs) confirmed that they did not want the state to be able to continue to criminalize street homeless people, with some MPs acknowledging that many of the street homeless people, in fact, needed practical assistance with their substance abuse problems.¹² Furthermore, a number of MPs argued that a different policy approach would be required to assist street homeless people, for example, a ‘housing-first’ approach, advocated by Bob Blackman: ‘We take people off the streets, provide them with secure accommodation, and then build a network of support around them.’¹³ Despite the Parliamentary Under-Secretary of State for Housing, Communities and Local Government noting that the 1824 Act needs to be ‘replaced’, reporting that, ‘We are currently finalizing the conclusions of the review and will announce our

¹² [Hansard, 13 April 2021](#).

¹³ *Ibid* column 38WH.

position shortly',¹⁴ the repeal of the 1824 Act was not included in the [Queen's Speech](#) delivered on 11 May 2021.¹⁵

The hardships endured while street homeless, means that such homeless people have a much shorter life span compared to those who have stable accommodation, where time does not have to be spent in trying to stay clean, safe, protected from harsh weather and ensuring that personal belongings are secured. The sad reality is that the life span of a street homeless person is likely to be much shorter, with the mean age of death for men being 45.9 years, and the mean age of death for women being 43.4 years in 2019. The mean age at death for the general population of England and Wales at that time was 76.1 years for men, and 80.9 years for women (see [Office for National Statistics](#)). Helping to bring an end to rough sleeping by reform or abolition of the Vagrancy Act 1824 will assist in reducing such inequality.

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¹⁴ In terms of the experiences 'of those on the frontline, including the police, local authorities and the homelessness sector ... those with experience of rough sleeping initiatives' in order to be able to acquire a 'full picture' of the 1824 Act, see above note 12, Hansard column 49WH.

¹⁵ Hansard 11 May 2021 [Queen's Speech debate](#); Demianyk (2021).

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Poor Law Amendment Act 1834

Vagrancy Act 1824