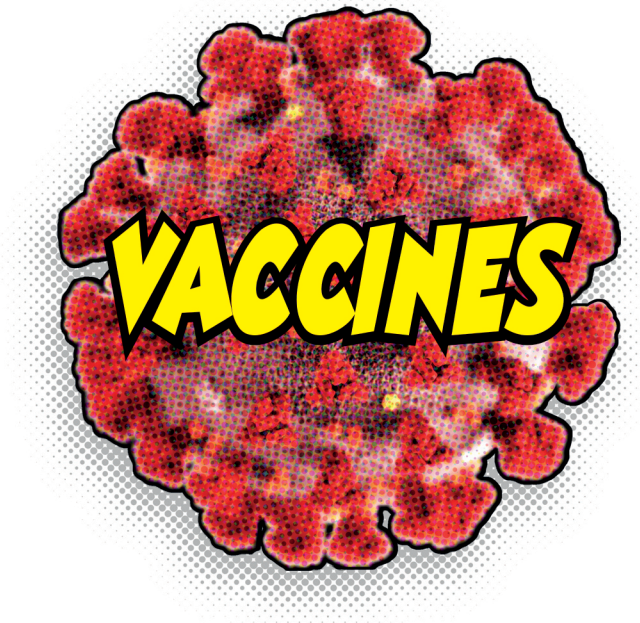
Law Commission
Reforming the law

# Model Law Commission Report 2020

BIG VOICE LONDON







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# Contents



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# Foreword note by the Big Voice London Chief Executive Officer

This year has been hard for everyone in one way or another. Young people in particular have struggled in the face of school closures, cancelled exams and a results day unlike any other. In response to these difficulties it would have been quite understandable if students had chosen to focus solely on their home lives and studies, leaving bolder ambitions to another time. Instead, through Big Voice London I have seen students rising to and conquering the challenges thrown up by the pandemic. Young people have taken up the opportunities offered by Big Voice London in bigger numbers than ever before and have fought through two lockdowns, self-isolation and unreliable wi-fi to do it.

The students who contributed to this report are especially impressive. The Model Law Commission is Big Voice London's most demanding project, requiring our students who are currently studying for their A-Levels to commit to attending a two-hour workshop every Thursday evening, in addition to many more hours reading and researching the law outside of that time. The Model Law Commission asks our students to mirror the work of the Law Commission, by building their own knowledge on an area of law which is ripe for change and eventually putting forward proposals on how the law should be reformed. The topics our students consider are not easy and this year is no exception. In 2020 the students have explored the very relevant topics of vaccines, transgender rights, police powers and law and technology. Upon reading this report I am sure you will agree that the students' unique perspective shines through and that their ideas should be taken seriously by those in Westminster with responsibility for advancing changes to the law.


It is also important to remember that Big Voice London students take away much more from our projects than legal knowledge. I asked the participants of this year's Model Law Commission to tell me in their own words what they will take away from their experience. The students responded:

Amaya, Heathcote Sixth Form, London: *"The Model Law Commission has really helped me gain an insight into not only what the Law Commission does, but what studying Law will be like."*

Connor, Portsmouth College, Portsmouth: *"The Model Law Commission has helped grow my knowledge of the law and has greatly boosted my confidence in pursuing a career in law."*


These testimonials are evidence of the hard work of our volunteers and students alike and of the importance of offering these opportunities to young people. I am exceptionally proud that we have been able to continue to do so even during these difficult times.

In order to provide these opportunities this year, Big Voice London as a charity has also had to rise up to challenges and adapt. When lockdown was announced in March, we were days away from the semi-final of our annual mooting competition, which as with everything at that time, had to be postponed. Within weeks of that announcement, I was approached by Felix Schulte-Strathaus, a regular Big Voice London volunteer who was then assisting with the mooting competition. With his background in legal technology, Felix immediately saw that Big Voice London could not only take its projects online, but could use the shift to virtual programming to its advantage. By mid-April the Big Voice London volunteer team were working through over 500 applications from A-Level students for our first online project. In addition to having our largest number of applicants, that project also saw Big Voice London opening our opportunities up to students across the whole of England and Wales. Where before we were limited to offering places to only those who could make their way to central London each week, we are now seeing an even more diverse range of candidates access our projects.


That initial success of our first online project has continued throughout the year, with every single one of our annual projects going ahead bigger and better than they have since the charity's inception in 2011. We have also been able to offer a virtual work experience programme with Radcliffe Chambers (at a time when work experience has been particularly difficult to offer to students) and numerous additional weekend careers Q&A sessions with legal professionals. This included a series of crucial sessions immediately after A-Level results day, aimed at helping students who were struggling to understand their options. I am extremely proud of our team for working hard to provide these opportunities when they were needed more than ever.

To support Big Voice London's growth we have also received invaluable sponsorship from legal technology consultancy, BamLegal, which has funded our Zoom subscription, enabling us to take our projects online. Whilst I am of course grateful to everyone who has supported Big Voice London this year, I am sure I speak for the whole Big Voice London team and our students when I offer my sincere thanks to Felix and BamLegal for their support without which we would have struggled to provide our opportunities this year.

Finally, it is now my great pleasure to present you with the report of the Model Law Commission 2020. I invite you to read it, enjoy it and share it, to help our students' voices be heard far and wide, as I'm sure you will agree they should be.

*Victoria Anderson, CEO*

# Introduction

## Big Voice London

Big Voice London is a social mobility and legal education charity, which seeks to engage young people from non-traditional backgrounds between the ages of 16 and 18 years old with law and legal policy, with the aim of assisting them in entering the legal profession should they choose to pursue a career in law. To further this aim, we take students from non-fee paying schools and provide them with opportunities to give them insight into the law, such as the Model Law Commission.

Since Big Voice London's inception in 2011, Big Voice London has gone from a small student run organisation, to a registered charity and continues to grow, reaching out to more students each year. We now run a total of six main programmes, namely: a Mooting Competition with the UK Supreme Court, an Introduction to the Legal System project, also in association with the UK Supreme Court, a Summer School in association with Linklaters LLP, the Model Law Commission and a two day student barrister experience with Radcliffe Chambers.

Uniquely in 2020 as a result of the Covid-19 pandemic, Big Voice London took its projects online and has offered this year's projects, including the Model Law Commission, to students across the whole of England and Wales.

We are delighted to be able to name BamLegal as a financial donor and sponsor of the charity, in addition to ongoing support from LexisNexis, Linklaters LLP, Radcliffe Chambers, the Law Commission and the University of Law. We also extend our appreciation to the UK Supreme Court for their continued support of our objectives.

## Model Law Commission 2020

The Model Law Commission is a three-month long project that provides A-Level students with the chance to simulate the work of the Law Commission. We split our pool of students into four groups, each tasked with the reform of one of the following areas of law: (1) Family, Trusts or Land Law; (2) Criminal Law; (3) Commercial and Common Law; or (4) Public Law. From October to December, the young people undertook a five-stage process: research, formulating recommendations, consulting with their peers, reporting on their proposals and devising their legislation.

Each year, the Model Law Commission begins with a two-day conference, which this year was hosted entirely online via Zoom. It is over the course of these two days that our students were introduced to their respective topics by experts in the field who spoke to them from all over the country. The young people then took that information and over the following weeks discussed reform ideas with each other, their Group Leaders and their peers. Finally, in late November, individuals from the Law Commission itself spoke to our students and advised on the difficulties in reforming the law and how to write a law reform report.

The results of these weeks of hard work are contained within this report. This is a reflection of what these young people believe should be the law governing these particular issues and is written entirely in their own words.

## Our students

When recruiting students, our only requirement is that applicants come from non-fee paying schools, we do not set grade boundaries or have entrance exams, we only ask that students be keen to learn and commit to the project.

All the students that participate in the Model Law Commission apply to this project entirely independently. It is not a school run activity; these are students who want to learn about and have their voices heard in the law. With sessions run every week in the evenings after school, this is not a small commitment to undertake alongside studying for all-important A-Level exams. We hope that as we expand, we will be able to provide this valuable opportunity to more ambitious young people.

## The Authors/Commissioners

The young people that have contributed to this briefing paper are:

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## Acknowledgment

We are extremely grateful to the LexisNexis team for kindly sponsoring this publication and for their continued support of Big Voice London. Additionally we would like to thank BamLegal for sponsoring our Zoom subscription, which has enabled us to take this and our other projects this year online.

Finally, we would also like to thank the Big Voice Management Board for their assistance in bringing the Model Law Commission to life.

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***Big Voice London, December 2020***

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## Disclaimer

The work, recommendations and opinions contained in this report are solely those of the student authors listed. The views expressed do not represent those of any other external organisation or individuals, including guest speakers listed in this report and the UK Supreme Court and the Law Commission. Big Voice London is an entirely independent organisation, and while we value the ongoing support and guidance of many organisations all views expressed are our own.

# Part One: Property, Family & Trusts

Recommendations on the laws governing transgender rights.

Compiled with thanks to:

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Hannah Markham QC, The 36 Group
Luke Williams, Vice Chair, LGBT+ Lawyers Division Committee, The Law Society
Dr Peter Dunne, Senior Lecturer, University of Bristol Law School, Garden Court Chambers
Professor Stephen Whittle, Professor of Equalities Law, Manchester Metropolitan University

## Introduction

There are areas of reform that need to be considered concerning transgender people and their rights. Over the years there has been an evident increase in social acceptance but we believe there is still much room for legal development and change as the law remains outdated. We would like to propose reform in the following sections: **Education, Marriage, the Gender Recognition Act** and **Parental Status**, which we will explore in our report. We aim to create greater social acceptance, awareness and benefit the lives of those who choose to transition.

### Education

#### Current Law

In 1988, section 28 of the Local Government Act[1] banned local authorities from "promoting homosexuality" in education and teachers were essentially prohibited from enforcing punishments on those who used homophobic slurs. This was only amended in 2003 when the appeal was passed in the Commons.

*Currently, The Equality Act 2010[2] says you must not be discriminated against because:*

- You are heterosexual, gay, lesbian or bisexual
- Someone thinks you have a particular sexual orientation
- You are connected to someone who has a particular sexual orientation

#### Need for Change

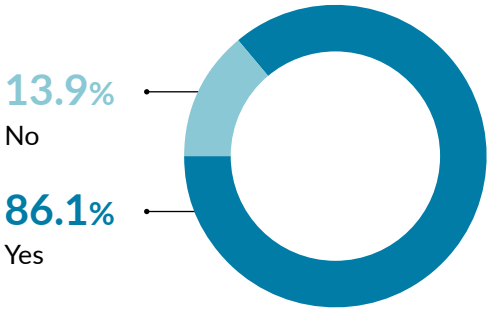
There is a need for change in LGBTQ+ education and according to the government website[3] LGBTQ+ education will be compulsory for all primary age pupils as of September 2020[4]. Adding transgender education to the curriculum for younger students will allow children to have a better understanding of what being part of the LGBTQ+ community is, to defeat stereotypes and potentially help decrease hate crime and reduce hostility in the long term. Although LGBTQ+ education is seemingly new, there are many ways to incorporate the relevant topics into the educational system, which are suggested below.

1 https://www.legislation.gov.uk/ukpga/1988/9/section/28/enacted
2 https://www.legislation.gov.uk/ukpga/2010/15/part/2/chapter/1
3 www.gov.uk
4 https://www.gov.uk/government/publications/relationships-education-relationships-and-sex-education-rse-and-health-education

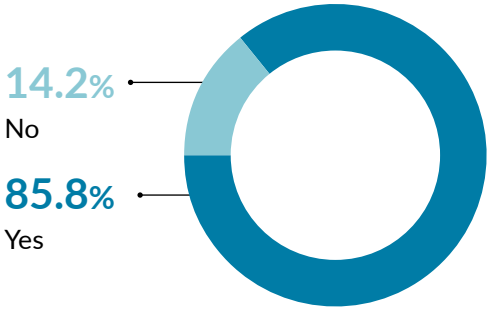
## Statistics

As a group, we asked 321 members of the public a series of questions regarding LGBTQ+ education and their opinions/ experiences on the topic. Some of the responses we received can be found below:

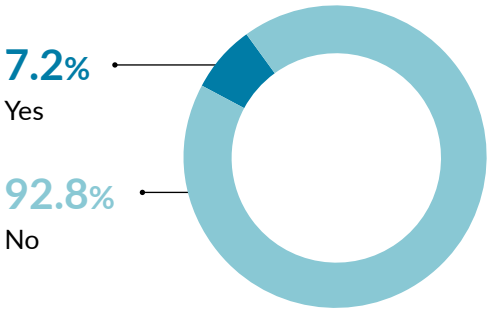
1. Do you think educational institutions should draw more attention to LGBT discussion points and unconventional relationships during awareness and sex education sessions?




2. Currently, the state curriculum does not include any awareness on LGBT rights based on possible religious and political reasons, do you think this should be changed?




3. Were transgender rights covered in your own formal education (primary, secondary school)?




The first two results depict a demand from the majority of people for change in the National Curriculum (NC). Overall, the results obtained are significant because a majority of the respondents did not go through such a curriculum and may have a lack of knowledge on the subject but still believe it should be taught within schools. This highlights how society is attempting to develop and actively support the LGBTQ+ community.

## Reform proposals

By comparing various LGBTQ+ curriculums, we have come to the conclusion that although LGBTQ+ education is mandatory from September 2020, there is still the possibility that children may not receive of all the necessary information available. Furthermore, we believe from our personal experiences that these lessons may not be taught in a way that engages the students so that they take in the information and have conversations around it outside of the classroom.

To help improve this, we have devised the following reforms:

1. Standardised LGBTQ+ community education

   Our NC still allows teachers to have control over what they teach, meaning that there is a lack of standardisation in what is taught and how it is taught. Scotland (one of the first countries to introduce LGBTQ+ education) specifies what is mandatory for schools to teach, including tackling homophobia, transphobia, and promoting LGBTQ+ history. Following Scotland's methods, standardisation would prevent any obstacles regarding the information received by students due to potential biases. Consequently, schools would teach about different sexual orientations, discrimination faced, transgender history and various other topics.

2. Integration of LGBTQ+ education in core subjects

   From our personal experiences and conversations with peers, we have found that creating separate days or lessons dedicated to LGBTQ+ (distinct from normal core subjects) develops a sense of 'outsider-ness' and further ostracises the LGBTQ+ community. To tackle this growing stigma and lack of engagement from students, LGBTQ+ education should be integrated into core lessons. Especially as pupils are graded in their core subjects, they will engage in the lessons through note-taking, class activities, homework and thus actually absorb the information provided.

## Implementation

Level of integration:

- Key stage 1: reading books and movies on the LGBTQ+ community
- Key stages 2 - 3: full integration in core subjects

*The subjects that can be subject to integration are:*

- English - Studying literature from people within the LGBTQ+ community
- History - Studying LGBTQ+ history (movements, changes in discrimination and rights)

According to the NC, the purpose of history is to help pupils understand complexity of people's lives, diversity of societies, relationships between different groups, own identity, challenges in their time[5]. Transgender rights have been a large topic of discussion in recent years and it would be beneficial for pupils to learn relevant topics and what shapes today's society.

## Impact

Cost impacts

- The costs of required materials (e.g. books) will increase.
- Teacher training and the associated costs will increase (average of £23,000 for initial training).
- However, as awareness and education increases, dispute and court costs will decrease as less people will file claims and go to court for discrimination-related issues.

5 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/239075/SECONDARY_national_curriculum_-_History.pdf

Social impacts:

- This will help transgender children with their gender identity and hopefully make the subject less daunting.
- A more supportive environment will be created for those who wish to transition.
- There will be greater acceptance among younger year groups and by ensuring that more people are educated, the subject will continue to be taken more seriously.
- Diversity will be encouraged in the legal sector, where it has traditionally remained slow to social change.

## Marriage

### The current law

*Matrimonial Causes Act 1973*[6]
Creates a legal obligation for a transgender individual to reveal their gender history prior to marriage. It allows grounds to void a marriage (annulment), as long as a court believes the spouse has been 'ignorant of the facts' of their marriage. In this way, a spouse can argue that they did not know of the existence of their partner's transgender identity or ownership of a Gender Recognition Certificate ('GRC') and demand for the marriage to be annulled.

*Gender Recognition Act 2004*[7]
Describes how a spouse's statutory declaration (consent) is required for a transgender individual within a marriage to obtain a full GRC. This also applies to civil partnerships: without this consent, the previous Act outlines additional grounds for marital annulment. This allows a spouse to terminate the marriage if they are displeased with their partner's transition.

*Spousal Veto*[8]
After a transgender applicant receives an interim GRC, if their spouse does not consent to the marriage continuing, they must seek termination of the marriage within six months to then qualify for the full certificate.

### Need for change

The Spousal Veto grants the non-transitioning spouse control over the terms of the marriage which can be used to delay the transitioning spouse from obtaining a GRC and therefore being legally recognised in their desired gender.

*Main issues:*

1. The Spousal Veto could be used to exploit the transitioning spouse. The non-transitioning spouse might threaten to use their veto to leverage a better divorce settlement. Therefore, interfering with the transgender's right to non-discrimination.

2. Annulment or divorce proceedings can extend for long periods of time which can exacerbate the effects of gender dysphoria.

3. Delay to legal recognition of gender identity arguably interferes with their right to private life.

### The legal obligation to disclose a transgender's gender history

Fundamentally, it:

1. Impedes a transgender individual's right to a private life;

2. Gives the partner the ability to annul a partnership solely on the basis that the other person has transitioned; and

3. Is open to interpretation of a judge and possible exploitation of a persuasive partner, whether that partner was indeed 'ignorant of the facts'.

6 https://www.legislation.gov.uk/ukpga/1973/18
7 https://www.legislation.gov.uk/ukpga/2004/7/contents
8 Appears in Schedule 5 of the Marriage (Same Sex Couples Act 2013) in various subsections, the first being Part 1, section 2; where it inserts subsection (6B)(a) into the Gender Recognition Act 2004.

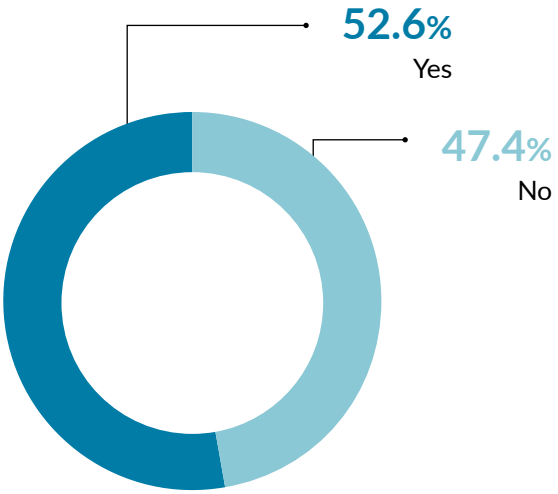
## Statistics

As a group, we asked members of the public a series of questions on their views on the Spousal Veto and other transgender issues. Some of the responses we received can be found below.

A spouse has the right to stop the process of gaining a gender recognition certificate by not consenting. For example, if you were married and your significant other declared that they wanted to change their gender, you would have the power to stop it. Do you agree with this?

Our survey revealed **74.3%** of respondents were unsupportive of Spousal Veto and would want it overturned.

In your opinion, should a transgender person be legally required to disclose their gender history prior to marriage?




Our results were inconclusive on the second question, with **47.4%** respondents disagreeing and **52.6%** agreeing, showing how divisive an issue this is.

Some might believe a spouse should have a right to know about their partner's transgender history, and others persist that a transgender individual should not be coerced into revealing private information that they are uncomfortable sharing.

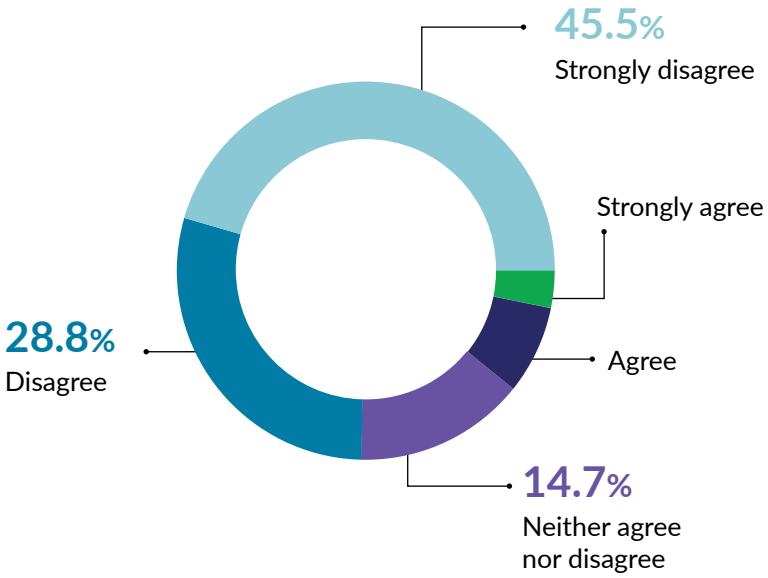
## Reform proposals

*Spousal Veto reform proposal*

This proposal stops the non-transitioning spouse from delaying the issuing of a GRC. It amends:

1. The Gender Recognition Act S.4[9] with the suggestion that if a five-month period has passed since the issuing of an interim certificate, spousal consent will no longer be needed for the granting of a GRC.

2. The Matrimonial Causes Act: initiating annulment proceedings automatically under the grounds presented in section 12 (g)[10] when the former point occurs.




Currently, couples must seek marriage termination within six months of the interim certificate for the qualification of a full certificate and a GRC is only issued at the final termination of the marriage, however long that might be.

These amendments would mean that annulment is automatically initiated alongside the transgender partner qualifying to receive the GRC without their partner's statutory declaration after five months. This allows a month to apply before the 6-month deadline elapses.

9 https://www.legislation.gov.uk/ukpga/2004/7/section/4
10 https://www.legislation.gov.uk/ukpga/1973/18/section/12

## Additional Proposal

We considered amending the Matrimonial Causes Act to allow transgender persons not to be obligated to disclose their gender history, but there is no clear public consensus for this. There is a moral obligation for someone to disclose one's gender history to a prospective partner. However, there is also an obligation to protect the right to the private life of any person. We instead request that the Government execute further consultations or similar methods to conclude if this consensus change and legal reform is needed.

## Impact

*Cost*
Our proposal's automatic initiation of annulment after five months could cut legal costs by ensuring there is a smooth transition into annulment proceedings, rather than a prolonged decline into divorce. It could reduce the visits to court and cut costs, especially where couples have had to rely on legal aid.

*Social*
It would minimize the delay for transgender spouses to transition legally. Automatic initiation could also avoid extended legal procedures. 11% of survey respondents supported Spousal Veto, and by extension, a spouse having control over their partner transitioning, but arguably a spouse can only possess such control when the partnership exists. By allowing a GRC to be granted whilst starting an annulment, the control a spouse has over their marriage terms is not interfered with, and the transgender partner's right to private life is upheld.

*Legal*
The legislature would have to impose reforms of the relevant acts as identified, which would then have to pass through the Houses of Parliament for approval.

*Non-transitioning partner*
It would limit this partner's control over the terms of the marriage, in order to enable the transgender partner to transition. But an automatic annulment initiation after five months will stop the partnership being labelled as a same-sex marriage, which may benefit the non-transitioning partner (e.g. religious reasons). In communities where divorce is frowned upon, the non-transitioning spouse will benefit from this annulment initiation, which prevents either party from the blame of having terminated the marriage.

# The Gender Recognition Act

The Gender Recognition Act (GRA) 2004[11] allows a person wishing to change their gender to transition legally. However, there are many issues regarding this Act. We have outlined these below with reform proposals.

## Current Law

Requirements to gain Gender Recognition Certificate:

1. A doctor has to diagnose the person with **Gender Dysphoria**[12].
2. Proof that shows you have lived in the acquired gender for at least **2 years**[13].
3. The person has to take a **statutory declaration** that they will not transition back to their old gender until death[14].

Currently, fewer than 1/10 trans people have legal recognition meaning that while they may have socially transitioned, they are not legally recognised in their desired gender.

## Reform Proposals

*Medical Reforms Proposals*

1. Removing the Gender Dysphoria medical diagnosis. This is to be replaced by a system of self-determination through the use of a form/questionnaire regarding how the person feels in their chosen gender. This would then

11 https://www.legislation.gov.uk/ukpga/2004/7/introduction
12 Section 3(1)(a) of the GRA 2004 https://www.legislation.gov.uk/ukpga/2004/7/section/3
13 Section 2(1)(b) of the GRA 2004 https://www.legislation.gov.uk/ukpga/2004/7/section/2
14 Section 2(1)(c) of the GRA 2004 https://www.legislation.gov.uk/ukpga/2004/7/section/2

be assessed by a specialist and approved allowing the individual to change their gender in all of their documents legally.

2. Removing the need for a medical diagnosis to obtain a GRC would reduce or even eliminate the waiting time needed for an NHS appointment. According to NHS guidelines, NHS appointments have waiting times as long as 18 months.

3. We also suggest reforming the cost of medical care and reducing the cost of private medical treatment which can cost up to £19,236[15] (not including post-surgery medication costs).

*Reform policy*

The requirements needed to gain a GRC have many issues:

- Requirement 1 is intrusive, humiliating and violates a transgender person's right to privacy.
- Requirement 2 means a person has to wait too long to be able to transition infringing on their personal rights.
- Requirement 3 enforces a heavy burden upon the person transitioning.

To tackle these issues, a process of **self-determination** of gender by the person should be implemented. This system is already implemented in countries such as the Republic of Ireland, Norway and Argentina and should be introduced into our legal system. For example, Ireland passed the Gender Recognition Act 2015[16] that allowed people to transition without intervention or medical assessment. In the span of 2 years, 230 people had been granted legal gender recognition[17].

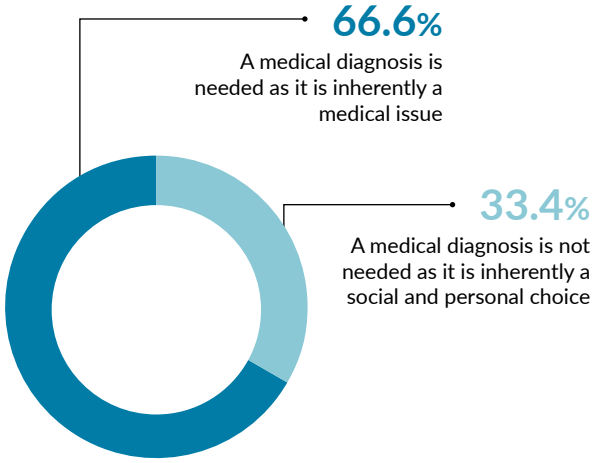
*Statistics*

In 2018, 100,000 individuals took part in the 'Reform of the Gender Recognition Act – Government Consultation'[18] and a vast majority of participants supported medical reform of the GRA to improve transgender people's lives in particular.

Some key findings from the consultation included:

- **64.1%** called for the requirement for the diagnosis of Gender Dysphoria to be removed[19].
- **80.3%** supported the removal of the requirement for a medical report detailing all treatment.[20]

Additionally, people in the LGBTQ+ community experience mental health issues at higher rates. For instance, **61% have depression, 45% have PTSD and 36% have an anxiety disorder**[21]. An easier legal process may, in time, reduce these figures and aim to further positively support the LGBTQ community.




In addition, as a group we conducted a public survey, to gauge the public opinion on the requirement for a medical diagnosis. The results indicate that there is more support for the removal of a medical diagnosis, with **66.6%** of respondents responding that they did not feel that a medical diagnosis is needed.

The numbers from both the national survey and our small independent survey, explicitly display a support to de-medicalise the system and relieve the stress individuals undergo during this process to gain their identity.

15 https://www.itv.com/news/2015-10-29/transgender
16 http://www.irishstatutebook.ie/eli/2015/act/25/enacted/en/html
17 https://www.irishexaminer.com/news/arid-20450656.html
18 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/721725/GRA-Consultation-document.pdf
19 King, D., Paechter, C. and Ridgway, M., 2020. *Gender Recognition Act - Analysis of Consultation Responses*. Government Equalities Office, p.41. Available at: <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/919890/Analysis_of_responses_Gender_Recognition_Act.pdf>
20 Ibid at page 47.
21 https://www.healthpartners.com/blog/mental-health-in-the-lgbtq-community/

*De-transitioning Proposal*

The proposal is as follows:

1. The removal of the requirement of a legal oath to be taken. This would decriminalise the act of de-transitioning.

2. The current declaration should be amended from a life oath to a declaration that gives a person a two-year window to de-transition.

3. This would be done through the self-determination form which is mentioned in the Medical Reforms Proposal above, by having the person sign the oath.

## Statistics

- Research conducted by Stonewall concludes that **14%** of transgender people are not open about their gender identity to anyone in their family[22], while **25%**[23] were discriminated against when looking for a house or flat.
- The most common reason found for de-transitioning is due to the person being unable to cope with the loss of family and community support coupled with transphobia.
- Other factors for de-transitioning could be the inability to find jobs or housing.

*Case Study*

Keira Bell against the Tavistock and the Portman NHS Trust.

Keira Bell is an example of an individual who faced difficulty de-transitioning. At 17, she decided to transition from female to male. Years later, Bell realised that she had made the wrong decision and wished to return to her previous gender (female). Keira Bell is now taking legal action against an NHS gender clinic as she argues that medical staff should have given her greater warning and advice before deciding to make the life-changing decision to transition. A judge has given the go-ahead for a full hearing against the Tavistock and the Portman NHS Trust.

Due to the current law, Keira does not have the option to 'de-transition' back to her desired gender, as after taking the oath required by the GRA, an individual is bound to the gender they have decided to transition into. This can make people like Bell feel extremely alienated within their community as the overall societal view around de-transitioning can be seen as unsupportive.

## Impact

The impact of implementing this proposal and allowing someone to de-transition can create a much smoother process. As is the case of Keira Bell, some may feel extremely isolated from the LGBTQ+ community because of a legal oath impeding on their ability to de-transition and fully express their gender identity. Additionally, people who would like to de-transition also do not have specialised help readily available to them as the "whole area of transgender medicine is very under researched"[24] according to psychotherapist James Caspian. By enforcing the removal of the legal oath, transgender people are positively impacted as they can transition back and live according to the gender they identify with in an easier manner.

# Parental Status

## What is Considered a Parent?

**Legal parenthood** involves two biological parents of a child.

**Gestational parenthood** can involve somebody other than the biological parents, including surrogate or adopted parents.

**Social/psychological parenthood** refers to someone, who society or the child perceives as their parent but is not legally their parent. For example, a step-parent or foster parent.

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22 Bachmann, C. and Gooch, B., LGBT In Britain - Trans Report. Stonewall and YouGov, pp.14-15. Available at: <https://www.stonewall.org.uk/system/files/lgbt_in_britain_-_trans_report_final.pdf>

23 Ibid

24 Barnes, H. and Cohen, D. (2019). "How do I go back to the Debbie I was?" BBC News. [online] 26 Nov. Available at: https://www.bbc.co.uk/news/health-50548473

## Current Law

Currently the law[25] allows the following to register as the legal parents on birth certificates:

*To attain Mother and Father registration*

1. Mother and married husband
2. Mother and unmarried registered male partner
3. Mother and male civil partner

*To attain Mother and Parent registration*

1. Mother and married female partner
2. Mother and female civil partner
3. Mother and unmarried female partner who has signed appropriate consents and has engagement in Human Fertilisation and Embryology Authority

GRA s.12 states this in relation to the parental status of a transgender person: "The fact that a person's gender has become the acquired gender under this Act does not affect the status of the person as the father or mother of a child."[26]

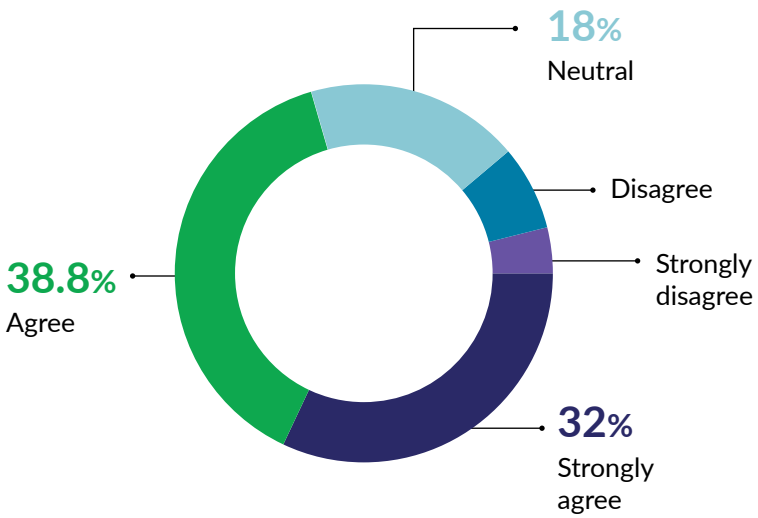
This means that the person who conceived the child is named mother which is always required to be stated and the other parent is named father, although the father doesn't always have to be named.

*Case Study*

***Re TT and YY***[27]

In this case, Fred McConnell gave birth after transitioning from female to male. On the birth certificate he wanted to be registered as 'father' and instead was labelled as 'mother'. Sir Andrew McFarlane ruled that the word 'mother' is a gender-neutral term therefore referring to the biological process of conception.

Following this, our group's survey asked the question: Should a transgender person be able to legally change their gender based on their own self-choice and self-determination without reference to anything else?




The respondent's mixed responses to this statement highlights the necessity for reform. It reflects a public dissatisfaction with stereotypical gender norms which are enshrined in the law and determine the ruling of cases brought forward by transgender people.

25 As per section 2(1) of the Children Act 1989 https://www.legislation.gov.uk/ukpga/1989/41/section/2
26 https://www.legislation.gov.uk/ukpga/2004/7/section/12
27 [2019] EWHC 1823 (Fam)

***JK, R v Secretary of State for the Home Department***[28]

Here, the transgender claimant challenged a refusal by the Registrar General to highlight the claimant as 'parent' rather than 'father' on her two children's birth certificates. This application was refused and they stated that a male who transitions into a female is required to be listed as 'father' on the birth certificate (this was not breaching Article 8 and 14 of the European Convention on Human Rights).

## Need for Change

Legislation has failed to keep up with society's progression in gender acknowledgement in these key areas:

- The UK law continues to take stereotypical, set notions of gender which excludes other gender identities.
- Legislation regarding parental status fails to provide transgender parents with the necessary affirmation needed for their transgender identity.
- Whilst the current law recognises the importance and diversity of parenthood, this fails to recognise heteronormative identities.
- To recognise transgender parenthood, thus reflecting our understanding of gender identity and parenthood.
- Inaccurate documentation permanently denies transgender parents of their identities and works at the expense of several LGBTQ+ groups.
- Current law can be seen as a direct breach of section 7, Gender Reassignment, of the Equality Act[29] and the Human Rights Act.
- Transgender parents face issues as direct consequences of the law such as forcibly 'outing' their birth gender on legal documentation.
- Our survey found that over half of our respondents agreed that the term 'parent' should suffice in place of 'mother' and 'father' on birth certificates.

## Reform Proposals

1. Ensure that the UK law provides the flexibility for parents to choose whether they identify as their child's mother, father or parent. This should be recognised and recorded on legal documents to prevent unwanted outings and discrimination.
2. We propose the option for individuals to register as the child's mother, father or parent, as is current law for homosexual parents. In an equal world, this option would have been implemented from the introduction of parental status reform.

## There are contradictions in the law as outlined in the Gender Recognition Act under section 9[30]:

*Where a full gender recognition certificate is issued to a person, the person's gender becomes for all purposes the acquired gender (so that, if the acquired gender is the male gender, the person's sex becomes that of a man and, if it is the female gender, the person's sex becomes that of a woman).*

**The phrase** *"all purposes"*, **directly juxtaposed (contrasts/conflicts) with the issuing of a child's birth certificate as it misgenders the parent —** causing a dispute between three legal documents. The Gender Recognition Certificate, the transgender parent's birth certificate and the child's birth certificate, that should be mutually exclusive where all align.

28 [2015] EWHC 990 (Admin)
29 **https://www.legislation.gov.uk/ukpga/2010/15/section/7/2011-04-05**
30 **https://www.legislation.gov.uk/ukpga/2004/7/section/9**

## Alternative proposal

We propose that the parental status a transgender person identifies with should be put in brackets on legal documents, next to their legal parental status.

## Impacts

*Social impact*
The possibility of introducing parent 1 or 2 may be inconsiderate towards people who believe their identity as a child's parent is being overlooked in order to become more inclusive. Our survey has shown that 23.5% of the sample disagree with the removal of the terms "mother" and "father". However, this is outweighed by the majority, who neither agree nor disagree, therefore suggesting that the impact causes little to no inconvenience. Our proposal therefore considers transgender parental status without excluding others in society.

*Legal impact*
The legality of this reform will not hinder the child's nor parents' rights. In particular, Article 7 in United Nations Convention on the Rights of the Child[31] outlines that, as far as possible, the child has the right to know and be cared for by his or her parents. The child's right is incorporated in this reform as they will know the identity of their parents. Lastly, the law must limit choice. We should look to other countries where the choice of parental title has not inhibited law and documentation and has evolved with modernity.

*Economic impact*
The proposal's scope is strengthened since there will be little economic impact and minor financial concerns.

31 https://www.ohchr.org/en/professionalinterest/pages/crc.aspx

# Part Two: Commercial & Common Law

Recommendations on the laws governing technology.

Compiled with thanks to:

Alex Smith, iManage
Busisiwe Mathonsi, Zeotap
Catherine Bamford, CEO and Founder of BamLegal
Dana Denis-Smith, Founder and CEO of Obelisk Support; Founder of First 100 Years
Giles Thompson, Avvoka
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Jeremy Coleman, Norton Rose Fulbright
Karol Valencia, eID and Lawcus
Morgane Van Ermengem, Simmons Wavelength
Nabiha Khwaja, CEO and Co-Founder of N & T's Legal Tech
Tanja Podinic, Dentons

## Education

### Current Law

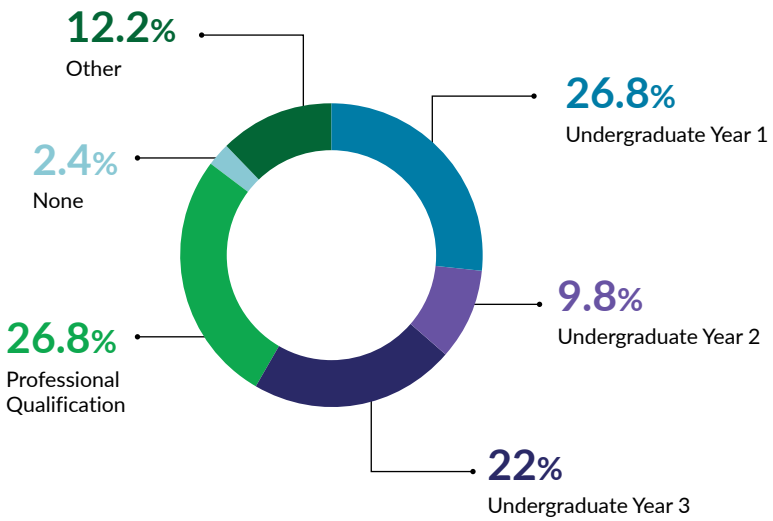
At present, no laws in the UK stipulate that lawyers need any knowledge of technology to inform their work, which is holding back the advancement of the legal services field. However, other countries, such as the United States, are setting a precedent for mandatory legal tech education. For example, in Florida and North Carolina, there is a compulsory hour of tech education, which must be completed annually to continue legal education. This inclusion of legal tech education in law is important as it acknowledges the digital age in which we live and the benefits of incorporating technology into commercial law. Indeed, document automation and search functions (the current main forms of legal tech in law firms) is making law much more accessible, cases more manageable and resolved much faster, solutions more accurate and allows junior lawyers to carry out more interesting work. However, although legal tech education is not compulsory in the UK, it is still widely considered to be necessary and is often encouraged informally. Recent efforts include Clifford Chance's launch of IGNITE, a new training contract centred entirely around legal technology, and in new legal tech modules being created for Linklaters trainees, BPP students and University of York law students, among many others. While the previous examples show opportunities for legal technology education at different levels (i.e., student and trainee), more should be done to educate more senior lawyers in legal tech, much like the USA's system of continuous education for all lawyers. The wide variety of legal tech resources that are targeted at lawyers, mostly by commercial law firms, highlights the integral role that tech plays in law today. Therefore, the next step in furthering legal tech innovation is putting legal tech education into law.

### Need for Change

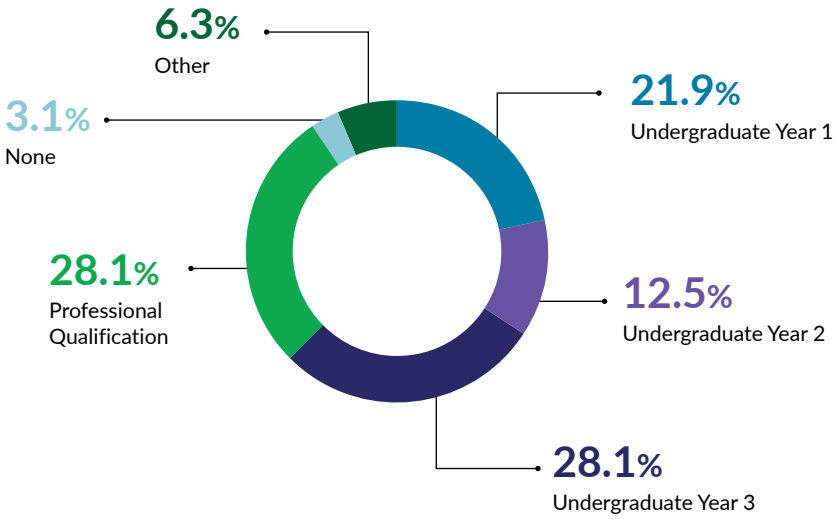
Currently, there is little education with regard to legal tech in universities and law firms. Tech is constantly used in workplaces by individuals who are not adequately trained on how to get the most from it. This can lead to inefficiency and may incur avoidable expenses. This will have a negative impact on law firms, which must invest money into training programmes, since most graduates go into employment without an ability to use legal tech competently. Further, law firms are increasingly listing legal tech skills on their job specifications, which shows an expectation for students to know how to use legal tech before going into employment. Therefore, education on legal tech should likely begin at university level, to improve graduate employability. In addition, tech is constantly innovating methods to simplify legal workloads; for instance, automating contracts will allow newly qualified lawyers to undertake more interesting work than basic administration. Lastly, the majority of respondents to our questionnaire showed a demand for education on legal tech (see Figure 1). Teaching legal tech at an earlier stage in one's career development will incentivise junior lawyers to continue learning in order to maintain a competitive edge in the legal field. In the long term, this will benefit both the lawyer and the client.

**Figure 1: When should a law and technology module be introduced?**

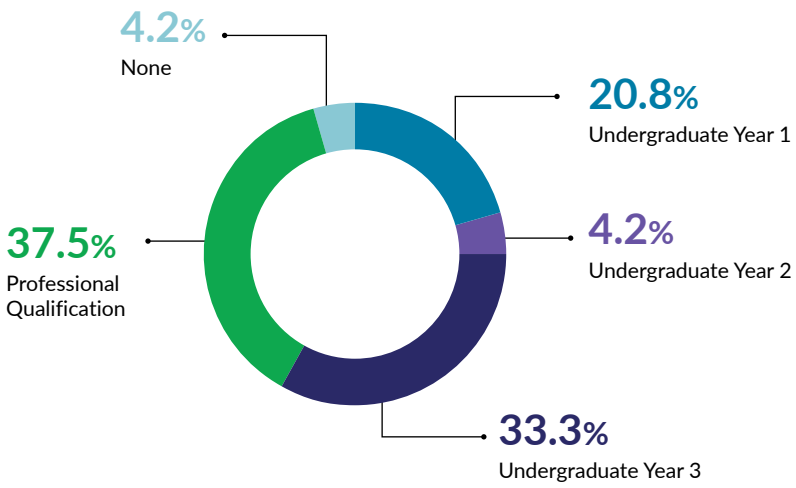
Legal, tech/IT and financial services sectors




Legal and tech/IT sectors




Legal sector



## Reform Proposal

The first question with regard to reforming legal tech education is: at what stage do we begin? From the quantitative data collected in our questionnaire, it seems wise to begin at years two to three of the qualifying law degree. Legal tech education could have greater emphasis at university if an additional module were added to the degree, which focused entirely on legal tech or if additions were made to the law degree module so that they cover legal tech in each area of law. After university, legal tech education should be provided at the vocational training stage of becoming a solicitor, barrister or legal executive. The to-be-finalised Solicitors Qualifying Exams (SQE) are a good opportunity to place greater emphasis on legal tech in solicitors' practice. A unit on legal tech would fit in well with the second SQE as this exam is meant to focus on practical skills involved with qualifying as a solicitor. We would make this recommendation directly to the Solicitors Regulatory Authority (SRA).

## Impact

As the legal profession rapidly changes, the introduction of legal tech into the education system will provide students with a foundational knowledge of the subject, which will benefit them in their future careers. If a firm is going to invest in technology it would be sensible to ensure that students learn how to use legal technology efficiently. Teaching students in a large audience would be cheaper and more cost effective than mentoring individual trainees when hired in the future.

Legal tech is relatively easy to use and helps lawyers: to work collaboratively to create stronger arguments for litigating cases and due diligence, to store documents, and to automate contract review. Teaching these skills to students would enable them to get a head start in the legal industry. Junior lawyers, who are often tasked with time-consuming research and review processes, will have time to work on more intellectual tasks. As this would require a rethink of how teams are structured, this would hopefully lead to more progressive ways of working.

# Encouraging Tech

## Current Law

All AI systems in the UK need to be compliant with the Data Protection Act 2018 (DPA 2018[32]). In May 2019, member countries of the Organisation for Economic Co-Operation and Development (OECD), including the UK, adopted the OECD Principles on Artificial Intelligence: the first set of intergovernmental Policy Guidelines.

The General Data Protection Regulation (GDPR[33]) has a significant focus on large-scale automated processing of personal data, in particular automated decision-making. We do not believe the law needs to change because existing legislation is able to accommodate artificial intelligence (AI)[34]:

- The AI Sector Deal, in collaboration with the Alan Turing Institute, the Information Commissioner's Office (ICO) has developed guidelines on how organisations can best explain the use of AI for individuals[35].
- The ICO has developed guidance for auditing AI, offering organisations best practices for data compliance of AI applications.
- The ICO has also introduced the sandbox service that allows 10 organisations to receive free support when facing complications with data[36].

## Need for Change

The use of legal tech is becoming a necessity, as it allows law firms to operate efficiently by reducing the time spent on repetitive tasks. This in turn makes going through the legal process cheaper for consumers. Alongside this, there is an increase in jobs relating to the field of legal tech, especially in large firms with the resources to implement this tech.

However, the small firms that wish to use legal tech, and the small companies that wish to develop it, often struggle to find the funds to do so. This hinders the advancement of the sector, while also putting smaller firms at an unfair disadvantage. One issue with prompting law firms to change is that it may create resistance from traditional law firms who profit from billable hours. However, increased knowledge of legal tech education would also help to dispel the myth of legal technology 'stealing jobs'.

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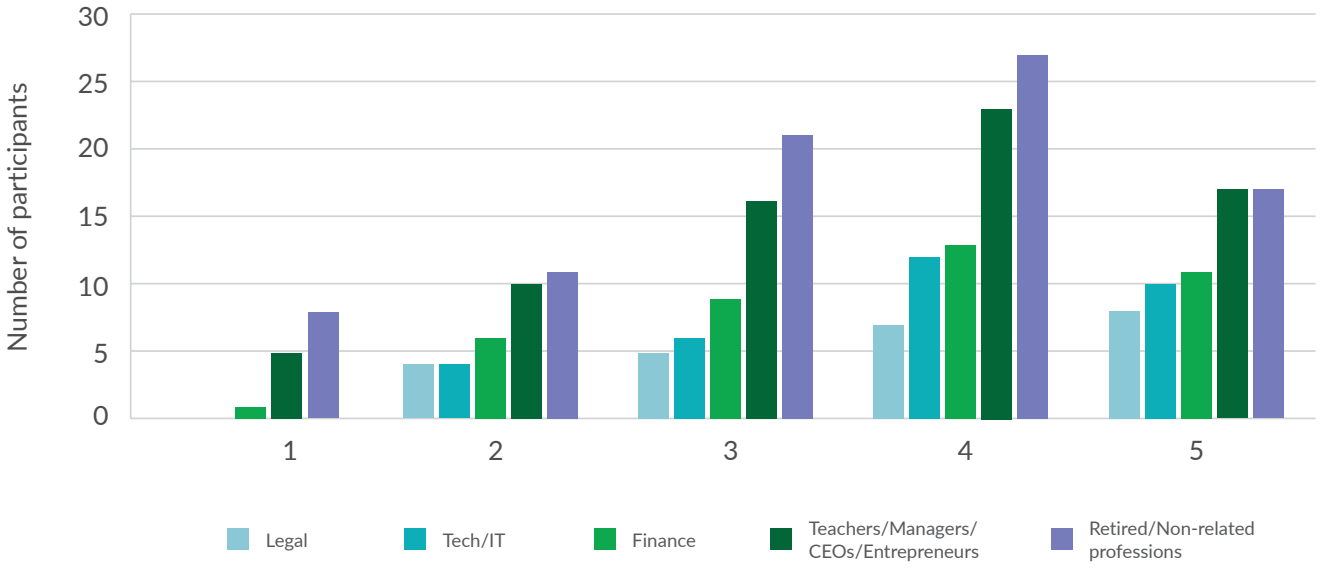
32 Data Protection Act 2018 (henceforth 'DPA 2018')
33 Regulation (EU) 2016/679 (General Data Protection Regulation) (henceforth 'GDPR')
34 Matt Berkowitz, 'AI, Machine Learning & Big Data Laws and Regulations 2020' (2020) <https://www.globallegalinsights.com/practice-areas/ai-machine-learning-and-big-data-laws-and-regulations> accessed 28 November 2020
35 https://www.gov.uk/government/publications/artificial-intelligence-sector-deal/ai-sector-deal
36 Lynn Sedgwick, 'Artificial Intelligence and The Future of Law Firms' <https://www.clayton-legal.co.uk/blog/artificial-intelligence-and-the-future-of-law-firms-73428114913> accessed 28 November 2020

## Statistics

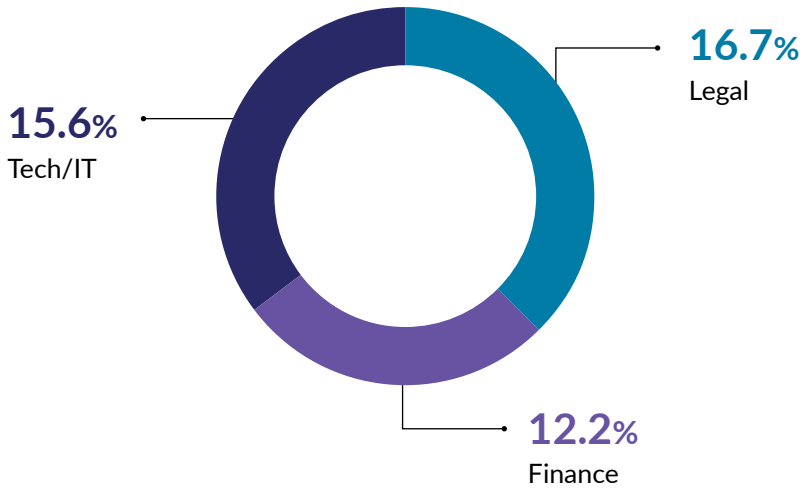
Online legal services should be more widespread in business. While tech has been widely implemented in many industries, the legal sector is slow to implement online legal service (see Figure 2). One of the main reasons for this is the idea that people prefer meeting with a real person because it is seen as more 'reliable'. In turn, businesses do not have the incentive to provide this service, although the technology is available.

Figure 2: How likely are you to use an online legal service?




Further, as technology advances, those in certain sectors may fear the effects that the new developments might have on their work. However, this is not the case in the legal sector as lawyers want to embrace technology (see Figure 3).

Figure 3: Do you fear the advancement of technology in the legal sector?




## Reform Proposal

1. **A uniform standard of technological competence**
   We propose that employers are required to educate their employees to a certain technological standard[37]. Setting a standard of tech competency is clearer, more authoritative, and encourages use and normalisation of legal technology, thereby boosting the growth of the sector itself. This standard could include a compulsory government-funded course followed by a lawtech skills assessment, which all lawyers must take periodically (e.g., every 2 to 5 years). A short course and assessment would update more traditional lawyers.

37 Tech Nation, 'Plans announced for UK Lawtech R&D 'Sandbox' <https://technation.io/news/plans-for-lawtech-rd-sandbox/> accessed 28 November 2020

2. **Encourage law tech implementation**
There are several government and legal authority-backed initiatives, which encourage the growth of legal tech, including £2 million government funding for Lawtech UK[38], and £213k for Oxford University for research and development in this field[39].

To facilitate the adoption of legal tech, government and legal authority-backed initiatives could:

- introduce a scheme helping law firms looking to adopt law tech, but without the knowledge, including financial aid or advice on cybersecurity;
- promote a new standard of using Excel or other tech programmes instead of Word in law firms to make data processing easier;
- reduce fear of legal technology by setting clear guidelines giving an authoritative answer on how to proceed with and/or trust legal tech (for example smart contracts were recently recognised[40]), which could be reviewed by a specialised regulatory body including tech and legal experts; and
- regularly review existing legislation (eg, the GDPR or DPA) as technology is constantly changing.

### Impact

The efficiency of legal tech reduces the time wasted by lawyers doing repetitive tasks that do not necessarily require human intervention or surveillance. It would have a positive environmental impact as less paper would be used.

AI is less prone to error than humans when it comes to automating complex legal documents. Statistics suggest that 23% of lawyers' tasks can be automated[41], including the laborious drafting process; hence this process is rid of any possibility of human error, which accounts for 80% of the cause of data loss or theft.

## Liability

### Current Law

In the absence of law specific to legal technology, claims for problems with data breaches can be made under the tort of negligence if:


Legislation only holds humans responsible. A technology is not yet considered autonomous to be personally liable for a fault it caused.

Causes of action when there are data breaches include:

- breach of express or implied contractual terms; and
- link between the defect and damage suffered in consumer protection liability claims.

38 Tech Nation, 'Transforming the UK legal sector through tech' <https://technation.io/lawtechuk-vision/#our-vision> accessed 28 November 2020 (Lawtech UK is a collaboration between Tech Nation, the Lawtech Delivery Panel and the Ministry of Justice)

39 Legal IT Insider, 'Oxford University awarded £213k to study LawTech ecosystem PLUS launches law and computer science course' <https://legaltechnology.com/oxford-university-awarded-213k-to-study-lawtech-ecosystem-plus-launches-law-and-computer-science-course/> accessed 28 November 2020; 'LawTechUK sandbox will "accelerate and embed" innovation' <https://legaltechnology.com/lawtechuk-sandbox-will-accelerate-and-embed-innovation/> accessed 28 November 2020: "The adoption of new technologies could boost the sector up from 1.3% per year to 2.7% per year - and every £1 spent on legal services supports nearly £1.50 in spending across the entire UK economy."

40 Sam Quicke, Richard Hay and Michael Voisin, 'UK confirms legal status of cryptoassets and smart contracts' <https://www.linklaters.com/en/insights/blogs/fintechlinks/2019/november/uk-confirms-legal-status-of-crypto-assets-and-smart-contracts> accessed 28 November 2020

41 https://www.mckinsey.com/featured-insights/digital-disruption/harnessing-automation-for-a-future-that-works, accessed 29 November 2020

Under EU regulations, data processors must follow several principles when processing data. A key principle is transparency, which raises issues around the presentation of privacy policies. Generally, however, if a breach occurs, the data controller is liable.

*WM Morrisons plc v Various Claimants*[42] shows that employers should implement preventive measures to protect data, such as: safeguards for 'sensitive processing' (ss35[43] and 42[44] DPA 2018); Data Protection Impact Assessments (s64 DPA 2018[45]); and encryption and anonymisation.

The lack of prescriptive measures for data protection between employers, employees and even technology creates inconsistent results.

## Need for Change

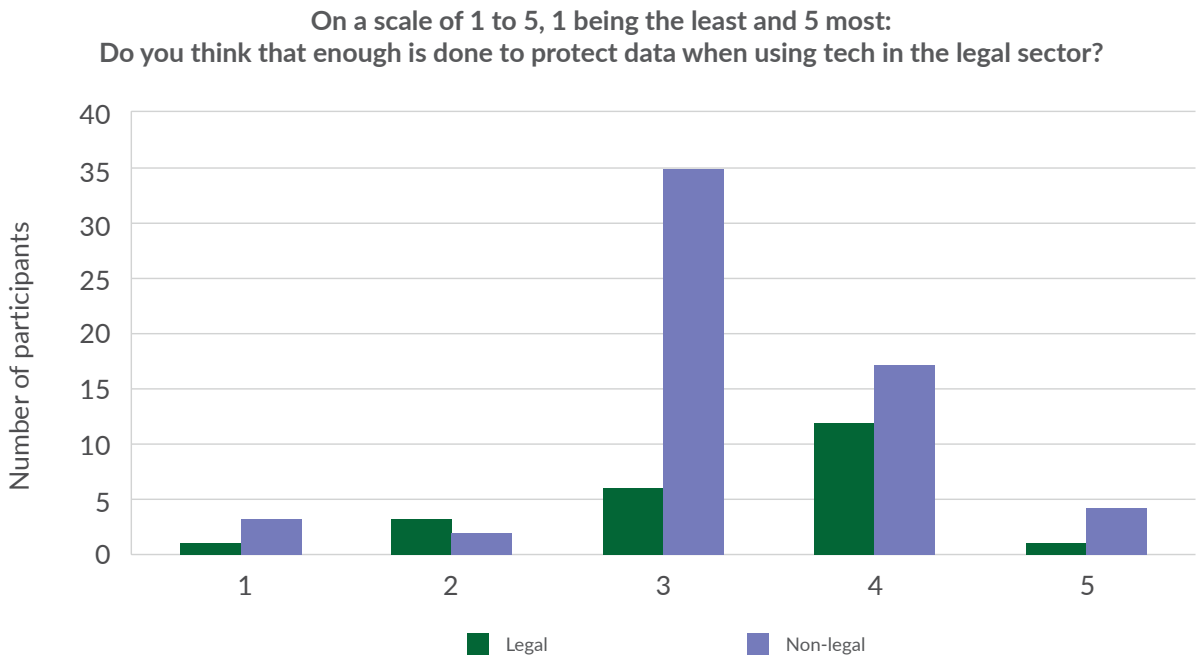
The extraordinary, recent surge in use of digital technology (particularly AI and mass data) has ushered in more complex and intricate legal issues.[46] The possibilities for harm caused and the issues with liability are amplified, as both AI applications and mass data use have a widening range of privacy and ethical implications, as exemplified by the case of *Bridges v CC South Wales*[47]. Crucially, the more we use technology, the more data we create and the more protection that data needs.

An example where problems due to liability and data have been caused, even with the strict privacy and security laws introduced by GDPR[48], is Uber's recent UK driver firings[49]. Thousands of British drivers were fired due to undisclosed algorithms without any further information about their dismissal or how and what to appeal (due to the lack of clear liability parameters).[50]

Making reforms to create a more robust liability framework regarding algorithms, data and new technology use would ensure the duty of care is better protected and instil greater confidence in the law. The rapid development of digital technology and data use illustrates why changes to liability and designating accountability are absolutely necessary.

## Statistics

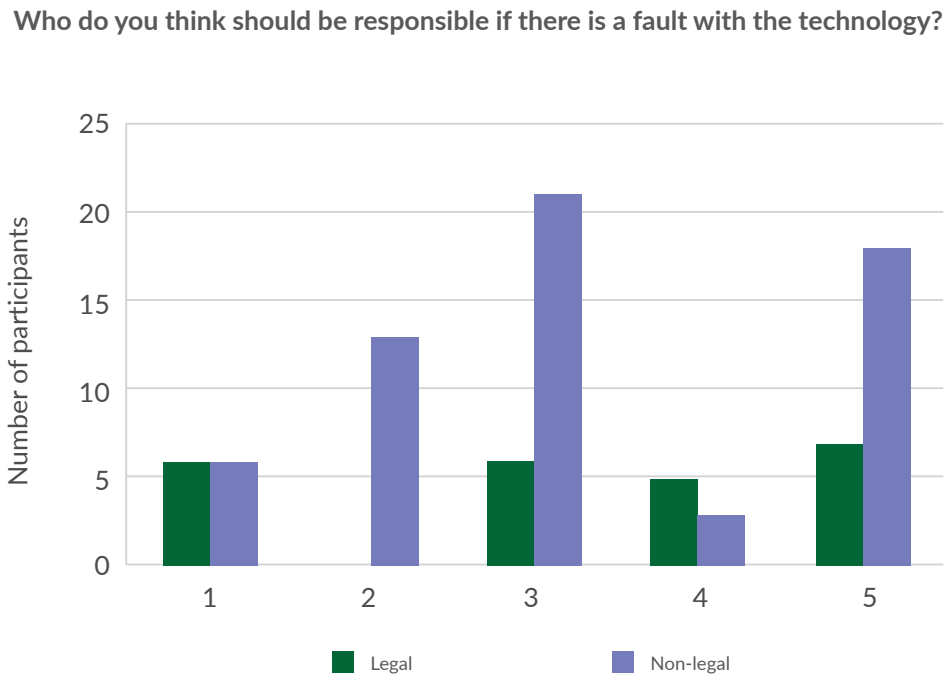
The majority of lawyers expressed that clients oppose AI use, highlighting a resistance to developing processes that deal with AI.




42 *WM Morrisons plc v Various Claimants* [2020] UKSC 12
43 DPA 2018, s35
44 DPA 2018, s42
45 DPIA 2018, s64
46 Marc-Antoine Dilhac, 'The ethical risks of AI' (United Nations Educational, Scientific and Cultural Organization, 2018) <https://en.unesco.org/courier/2018-3/ethical-risks-ai> accessed 28 November 2020
47 *Bridges v CC South Wales* [2020] EWCA Civ 1058
48 Ben Wolford, 'What is the GDPR, the EU's new data protection law?' <https://gdpr.eu/what-is-gdpr/> accessed 28 November 2020
49 App Drivers & Couriers Union, 'App Drivers & Couriers Union files ground-breaking legal challenge against Uber's dismissal of drivers by algorithm in the UK and Portugal' <https://www.adcu.org.uk/news-posts/app-drivers-couriers-union-files-ground-breaking-legal-challenge-against-ubers-dismissal-of-drivers-by-algorithm-in-the-uk-and-portugal> accessed 28 November 2020
50 Information Commissioner's Office, 'Rights related to automated decision making including profiling' <https://ico.org.uk/for-organisations/guide-to-data-protection/guide-to-the-general-data-protection-regulation-gdpr/individual-rights/rights-related-to-automated-decision-making-including-profiling/> accessed 28 November 2020

Technological advancements bring concerns, malfunctions and hacks. It was reported that the average cost of a security breach could reach £1.2 million (converted to GBP)[51].

However, our survey showed that 88% were not afraid to use AI in case they were to be held accountable for a fault, showing that law firms already have regulations for such matters.




Noel Sharkey, Co-Founder of International Committee on Robot Arms Control, said "no one, no computer programmes nor manufacturers nor military personnel can hide or blame software,"[52] conveying how error within these technologies would be human error.

## Reform Proposal

As the legal sector continues to embrace technology, the industry is at growing risk of data breaches either through human error or malicious cyber attacks. In order to reduce the liability of individuals and companies in data breaches, we need to do more work on the 'legal design' of products and processes in order to protect the increasing amount of data used in the legal sector.

*Do you know where your data is?*

Bad decisions made by a few people can easily snowball into a devastating breach for many. The result is often a loss of revenue and customer trust.

Our proposal for avoiding data breaches and advice to firms who handle sensitive client information would be to introduce 'legal design' in data privacy notices for clients to help them have a better understanding of what the law is and what their rights are.

Simply stated, legal design is a set of tools aimed to design better products and to better communicate legal information to users and stakeholders. Legal design is the process of applying design-thinking to complex legal information, to make the law more accessible and easier to understand for its intended audience (in this case the clients, whose data is at risk[53]). Implementing legal design is done by having very clear steps, instructions and accountability measures for clients.

51 Neill Feather, 'Don't Let Your Law Firm Get Served with Cyber Attacks' (Law Technology Today, 2016) <https://www.lawtechnologytoday.org/2016/07/dont-let-law-firm-get-served-cyber-attacks/> accessed 28 November 2020

52 Isabella Ford, 'Who Would Be Responsible for "Killer Robots"?' (The Lawyer Portal, 2018) <https://www.thelawyerportal.com/blog/killer-robots-responsible/> accessed 28 November 2020

53 <https://www.scl.org/articles/10490-legal-design-explained-part-1-what-is-legal-design#:~:text='Legal%20design'%20is%20a%20new,the%20legal%20industry%20by%20storm.&text=Legal%20design%20is%20about%20delivering,and%20more%20accessible%20for%20people> accessed 29 November 2020

It is important to have a clear link with your client when it comes to their potential losses of personal data within the law firm. This would overall set a clear boundary between the knowledge of who is responsible and the client's expectations.

Instead of worrying about how to avoid blame for a data breach[54], it is far better to reduce the chance that an incident will occur in the first place by preventing and ensuring the client is aware of all possible threats.

## Impact

### GDPR and Brexit

The UK government has already implemented regulations to deal with GDPR once the UK leaves the European Union. These regulations incorporate GDPR into the laws of the UK with only the necessary changes to reflect that the UK will no longer be in the EU (this law is known as UK GDPR). So, the concepts, principles and detail of GDPR will remain in place following the end of the Brexit transition period.

However, as we have argued, the problem is not with data protection, but with data collection, which has nothing to do with GDPR. The best way to reduce the liability of individuals and companies in data breaches is to do more work on the legal design of products and processes in the legal sector.

## Discrimination

### Current Law

'Legal technology' refers to the use of technology and software to provide legal services. This is an umbrella term which encompasses a broad sector that we can expect to see incorporated into the legal sector in the near future.

In regard to the current law of discrimination, pursuant to the Equality Act 2010 (EA 2010), it is against the law to discriminate against anyone on the grounds of age, gender reassignment, being married or in a civil partnership, being pregnant or on maternity leave, disability, race or colour, nationality, ethnicity or nationality, religion or belief, sex or sexual orientation.

### Need for Change

In the traditional sense of 'discrimination', we often see prejudice being exhibited by one human being to another. Legal technology could help to decide a large proportion of decisions in discrimination law. However, this raises a question: how can we measure the discrimination of a source that supposedly cannot offer bias as it is not human?

As it does in humans, unconscious bias crops up in AI. This may occur in AI due to the human link: the coders may sometimes, unintentionally, code software to be subjective, which leads to a discriminatory system. This is why we believe extensive and rigorous testing of these systems must be conducted. Extant legal tech programmes are expected to follow current discrimination laws, the key one being the EA 2010.

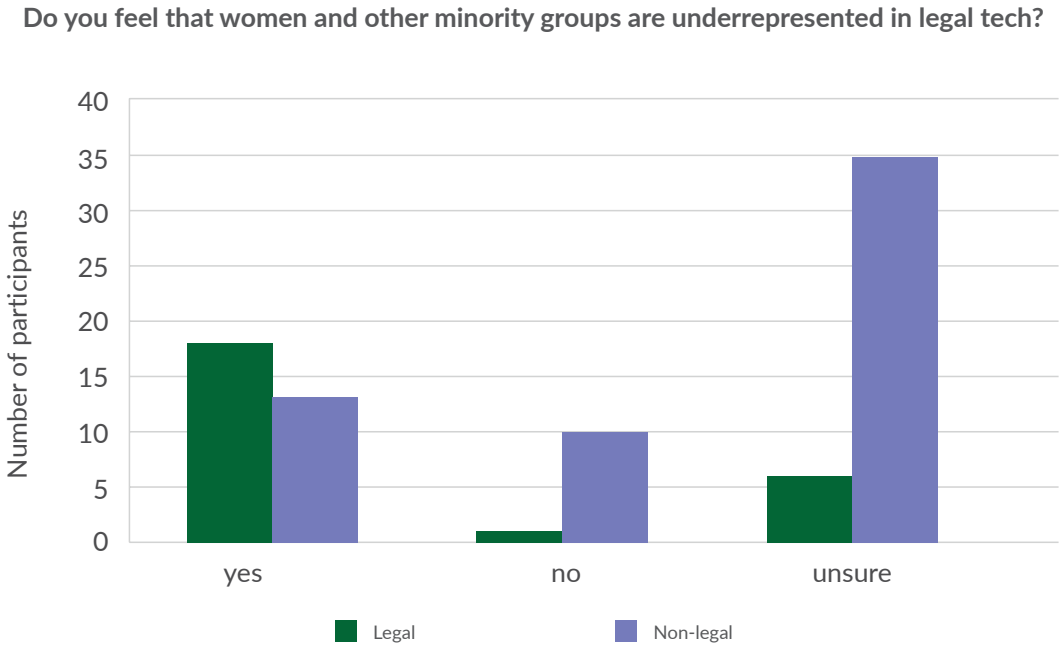
Algorithms are often seen as 'black boxes' because you cannot inspect how they work. This creates problems within AI discrimination as algorithms cannot easily be regulated. It is difficult to find the cause of discrimination and change the algorithm. The 'black box' issue comes up within algorithms predicting legal outcomes, as people involved in the case may not be able to understand the algorithm and may be unsure whether the algorithm is discriminatory. This may be caused by the complexity of the algorithms, and may make them more difficult to regulate. This means that the cause of discrimination from an algorithm may be extremely difficult to discover, and issues may arise over the fact that discrimination may have come from something that cannot be understood.

Issues can arise from AI being used in court cases to determine legal outcomes, as the 'black box' view means that complainants and defendants may not be able to see an algorithm that may discriminate against them. Algorithms can easily develop prejudices from who they were made by and past information, as algorithms can learn. Unconscious biases can be common in algorithms, such as a person's postcode being a proxy for race, perhaps leading to more discrimination. Humans may judge differently from algorithms, leading to different sentences for the same crime.

54 Ramona Carr, 'Data Breach Accountability and Responsibility: Who Gets Blamed for Data Breaches?' (Zettaset) <https://www.zettaset.com/blog/data-breach-accountability-and-responsibility-who-gets-blamed-data-breaches> accessed 28 November 2020

## Statistics

Joy Buolamwini's research uncovered large gender and racial bias in AI systems sold by tech giants such as IBM, Microsoft, and Amazon[55]. The companies that Buolamwini evaluated had error rates of 1% or less for lighter-skinned men. For darker-skinned women, the errors soared to 35%. Buolamwini found one government dataset of faces collected for testing that contained 75% men and 80% lighter-skinned individuals and less than 5% women of colour – echoing the pale male data problem that excludes so much of society in the data that fuels AI. Therefore, the under-representation of women and other minority groups is clearly an issue in legal tech, as evident in the statistics drawn from our questionnaire.




## Reform Proposal

*Discrimination in Accessibility and Legal Practice*
Disability discrimination in legal tech can be halted with technology such as 'accesiBe', which provides full automatic machine-learning and computer compliance software for people with disabilities. Foundations such as the SRA, Bar Standards Board (BSB) and UK Government should provide funding to firms to increase accessibility and access despite physical limitations. Likewise, lack of investment into female startup firms exemplifies discrimination against women: SRA/BSB/government intervention will remove inequalities. Investments and accessibility would relieve discrimination to minority groups, resulting in institutions insisting on quota systems alongside the Capital Grant Scheme to fund inclusivity.

*Algorithmic discrimination*
Algorithmic systems (such as COMPAS) discriminate in the US, where frequently, black people will not be granted parole.[56] Algorithms consider numerous factors when created, making it non-subjective to individuals and unrepresentative of the 328.2 million people estimated to be in the United States in 2019[57].

Mandatory laws for algorithms should be developed to enable third-party auditing outside establishments. Subjecting the release of algorithms to Freedom of Information (FOI) induces an obligation to share possibly discriminatory data, therefore ensuring that public bodies act in line with the Public Sector Equality Duty[58]. Individual institutions (as well as the BSB/SRA) should oversee algorithmic usage when creating algorithms, generating accountability by setting mandatory AI education.

55 <https://time.com/5520558/artificial-intelligence-racial-gender-bias/> accessed 29 November 2020
56 <https://www.propublica.org/article/how-we-analyzed-the-compas-recidivism-algorithm> accessed 29 November 2020
57 <https://www.census.gov/library/stories/2019/12/new-estimates-show-us-population-growth-continues-to-slow.html> accessed 29 November 2020
58 <https://www.tandfonline.com/doi/full/10.1080/13642987.2020.1743976> accessed 29 November 2020

## Impact

*Transparency*
Transparency laws identify discrimination in algorithmic decision-making. Preventatively, algorithms will only be shared with independent regulatory bodies. Therefore, identifying algorithmic discrimination can continue without undermining current legal precedents. Transparency in decision-making would encourage trust in AI and firms through diminishing opportunities for algorithmic discrimination and increased accountability.

*Social impact*
Automated risk assessments that judges use to determine bail and sentencing can generate incorrect conclusions, resulting in cumulative effects, such as longer prison sentences and higher bails for black people.[59] Costs for governments subsidising the SRA/BSB would incur the introduction of a quota system in firms to increase gender and ethnic diversity within law firms, as without better diversity in legal tech.

*Accountability*
Escalated accountability for breaching GDPR and releasing algorithmic outcomes by prosecuting individuals and corporations who misuse data will encourage the correct use of legal tech – this will increase consumer protection in using online legal services. Expanded online legal services will influence legal tech use, making it easier for ordinary people to access legal services comfortably.

59 <https://www.brookings.edu/research/algorithmic-bias-detection-and-mitigation-best-practices-and-policies-to-reduce-consumer-harms/> accessed 29 November 2020

# Part Three: Public Law

Recommendations on the laws governing vaccines.

Compiled with thanks to:

Simon Brown, Berry & Lamberts Solicitors
Dr Alberto Giubilini, The Oxford Uehiro Centre for Practical Ethics, University of Oxford
Peter Todd, Hodge Jones & Allen Solicitors
Professor Max Weaver, London South Bank University

## Introduction

Vaccines are vital to public health and save millions of lives. However, since Dr. Wakefield's now discredited research on vaccines, there has been an increase in vaccine hesitancy and a decrease in vaccination uptake in the UK. Vaccines do not produce a noticeable effect when working correctly, resulting in omission bias: feeling less responsible for the consequences of abstaining from an action than those arising from taking an action. This has led some parents to be less willing to vaccinate their children for fear that vaccinations pose greater risks than the disease itself. This has resulted in the rate of vaccine uptake being too low to achieve herd immunity. Without herd immunity, the most vulnerable in society face an avoidable risk. The Coronavirus pandemic highlights this problem, with immense levels of public distrust and vaccine hesitancy. Our reforms aim to restore public trust in vaccinations to achieve herd immunity, and to ensure that in the rare case of an adverse reaction to a vaccine, those affected are adequately compensated.

### Information and Education

Globally, an average of 1.5 million people die from vaccine-preventable diseases annually, while immunisations currently prevent 2 to 3 million deaths per year. With the rise in anti-vaxxers and the increased use of social media spreading inconsistent information, it has become more difficult to differentiate between real and fake news. With the number of people willing to vaccinate dropping, we are proposing that a vaccine education scheme is incorporated into the school curriculum and that the Government invest in an independent body to educate the wider public.

#### Current Law

Currently, the Education Act 2002 sets out the requirements for the education of schoolchildren. However, it is vague leading to important topics being disregarded. In particular, students are not taught about the ethical issues surrounding vaccines or the benefits to public health in sufficient depth. As vaccinations are a key element to healthcare, this contradicts s.78(1)(b) of the Education Act 2002 which states that a curriculum must prepare schoolchildren for '*opportunities, responsibilities and experiences of later life*'.[60]

#### Proposals

- We propose the specific inclusion and requirement of vaccine education in the National Curriculum from ages 11-16. Our research shows that 51.8% of people rated their knowledge of vaccines, their safety and the role they play in public health as below 5 out of 10. Vaccine education would include information about how and why vaccines are made, used and administered, and the laws surrounding them. We suggest these lessons be introduced in year 7, around the age where children are said to develop a greater awareness of morality, justice and their rights and responsibilities, and a year before HPV vaccines are offered through schools.
- We also propose the establishment of an independent statutory body to tackle misconceptions concerning vaccines and educate wider society on the risks and benefits of vaccines. The body would be responsible for running national information campaigns on vaccines whilst providing a source of unbiased information. As there is no single source that is able to provide up to date, unbiased and scientifically accurate vaccine information, the public are often relying on multiple online sources. In addition, doctors and health experts should educate couples planning on having a child; pregnant women; and family members on the benefits, limitations and risks of vaccination.

60 Education Act 2002, s.78(1)(b)

## Impact Assessment

*Impact of 11-16 education proposal*

**Positives**: Our survey showed that 61.9% of our consultees did not feel informed enough by their GP or medical professional at the time of their vaccination about the risks and side effects. The inclusion of vaccine education in the curriculum would help solve this problem by providing students with factual, unbiased information to learn from.

**Negatives**: Although it may be argued that any incorporation of a vaccine education scheme could also result in biased information being taught and provided to the students, this problem could be balanced out through our previous proposal of an independent body regulator.

*Impact of independent body proposal*

**Positives**: Out of the 258 people we consulted, 88% agreed that there was a need for an independent body responsible for providing unbiased information. The body could be used to settle court debates between parents concerning the vaccination of children as both parties would receive the same information and be able to make an informed decision. It would also help to tackle the issue of misinformation spread online.

**Negatives**: Depending on how the independent body is funded, the public's opinion may change. An independent body funded by the Government may be seen as the government's way to try and push a certain agenda.

# Limitation Period and Eligibility

## The Current Law

*In order to be eligible to make a claim under the Vaccine Damage Payments Act (VDPA) 1979, the following requirements need to be met:*

1. To claim under the scheme, an individual must be 60% disabled as a result of vaccine injury
2. Claimants need to have been under the age of 18 at time of vaccination or vaccine was taken during a live outbreak
3. Children under 2 who die or are injured as a consequence of vaccination are excluded from the scheme
4. A claim must be brought within 6 years of vaccination
5. Only certain diseases are covered under the scheme

## Proposals

1. **The 60% disablement threshold be replaced with sliding scale**

   The 60% disablement threshold is too high making compensation inaccessible. In 2009, a 7-year-old who suffered narcolepsy as a consequence of vaccination needed continuous supervision because of his risk of collapsing. The tribunal rejected his claim with the view that his disability did not constitute 60% disablement[61]. He was, however, compensated as the tribunal took account of the likelihood of future disablement. In 2016, the Secretary of State appealed. Whilst the appeal was dismissed, it illustrates the inflexible nature of the threshold. For instance, those who are 59% disabled require the same amount of care as those 61% disabled. Furthermore, between 2000 and 2010, only 26 out of 1483 claims resulted in compensation, illustrating the scheme's inefficiency.[62]

   We believe that any degree of disablement should be compensated, because vaccination is promoted and encouraged as a public good. We propose that the threshold is replaced by a sliding scale, this is the fairest method of assessing compensation because it accommodates all affected. In our consultation, 83.2% of respondents agreed that there should not be a 60% threshold under the VDPA. Although more people would be entitled to compensation, it would still be a small amount as vaccine injury is rare.

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61 *Secretary of state for work and pensions V FG on behalf of John (minor)*

62 **https://hansard.parliament.uk/Commons/2015-03-24/debates/15032478000001/VaccineDamagePaymentsAct** (Vaccine Damage Payments Act - Hansard, 2020)

2. **The requirement to be under 18 be abolished**

To claim under the VDPA, an individual has to be under the age of 18 or be vaccinated during an outbreak, excluding rubella and poliomyelitis. This is problematic because, while seasonal flu vaccines and Meningitis-C are recommended in student populations, they are not covered. These are taken over the age of 18 and are not included in the Childhood Vaccination Programme[63]. Over 18s should be able to bring a claim under the scheme in these circumstances. Furthermore, the definition of outbreak is unclear as it does not state whether outbreak constitutes to local, national or global extent.

3. **Children under 2 to be eligible under the Act**

Under section 2(1)(c) VDPA, infants under the age of 2 are not eligible for any compensation. The conditions of entitlement neglect children under the age of 2 from being able to claim or their parent/guardian claiming on their behalf[3]. A child injured as a result of vaccination still has a possibility of living a lifetime and therefore, they are perhaps the most important age group that needs to be compensated. A child under the age of 2 should be eligible under this Act. 85.9% of consultees agreed with this proposal.

4. **The time limit to bring a claim be extended to 10 years**

We believe that 6 years to claim seems crude as it is likely that negative effects of a vaccine are not apparent until after this time period. For example, narcolepsy often arises during adolescence but is not usually diagnosed until between the ages of 20-40, showing that a 6-year time limit would not cover anyone who may develop narcolepsy from a vaccine.[64]

An extension from 6 years to 10 years in addition to 3 years from the date of knowledge seems reasonable. This allows for the disability to manifest and applicants to have greater knowledge of the extent of injury.

5. **All diseases which are routinely vaccinated for be covered by the scheme**

The current Act covers measles and rubella however it does not cover mumps. We propose all vaccines administered under the vaccination schedule and in schools be covered, including the new COVID-19 vaccine when it is introduced.

The swine flu vaccine is also not covered by the scheme, despite the proven link between the vaccine and narcolepsy. The proposed reforms ensure that these people are given the support they need and deserve. We hope this change will increase public confidence in vaccines leading to improved public health and better chances of achieving herd immunity.

## Legal Aid and Statutory Presumption

### Current law

The Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) could benefit from a number of reforms to ensure that individuals feel confident that they will be adequately supported in bringing legal claims forward in the event of vaccine injury regardless of their financial circumstances.

### Legal Aid

Since April 2013, legal aid for clinical negligence is only available in limited circumstances.[65] This needs reform, and personal injury as a result of vaccination should be included under LASPO. Increased legal aid overall would have a considerable impact in reducing 'legal aid deserts' and allow legal professionals to carry work effectively, whilst supporting the most vulnerable.

Legal aid funding is also unavailable to appeal an unsuccessful vaccine injury claim under the VDPA. We believe individuals should be supported throughout the whole legal process: 99.2% of consultees were in favour of claimants receiving Legal Aid. It is important that the law ensures access to justice by providing legal representation for the most disadvantaged in society.

63 The Green Book. Cited At no. 32
64 https://www.nhs.uk/conditions/narcolepsy/#:~:text=Men%20and%20women%20are%20thought,ages%20of%2020%20and%2040
65 https://www.leighday.co.uk/LeighDay/media/LeighDay/documents/Human%20rights/Civil-Legal-Aid-in-CN-Cases.pdf

## Statutory Presumption

The cost and complex nature of litigation discourages claimants from bringing vaccination injury claims. We propose the implementation of a statutory presumption for certain injuries caused by adverse reactions to vaccinations. This would make decision making far easier, reduce the number of appeals, and save money. It would be necessary for evidence to prove this causal relationship. A clearly specified list of injuries and their relationship to a particular vaccine would need to be drafted.

Evidence from across the world has demonstrated the importance of an effective safety-net in encouraging vaccine uptake. In the USA. All legal claims are brought to the federal courts under a vaccination programme, rather than individuals facing the often-deterring prospect of bringing claims against large-scale pharmaceutical manufacturers. This safety-net may be the reason for the large vaccination uptake of 98% in the USA, as opposed to the UK where uptake has decreased year-on-year. Coverage declined in all routine vaccinations in the UK in 2018-19, failing to meet the 95% target in all DTaP/IPV/Hib, MMR1 and MMR2 vaccinations.[66]

# Measure of Damages and Payment Type

## The Current Law

S.1(1)(a) of the VDPA 1979 states that a person who is, or was immediately before their death, severely disabled as a result of vaccination against a disease is able to be considered for compensation.

S.1(1)(A) states that when the conditions for entitlement are met, a statutory sum of £120,000 or such other sum as specified by the SoS can be claimed.

The VDPA, requires reform in relation to compensation. We propose changing the current statutory sum of £120,000 or specified amount to[67]:

a. compensation on a sliding scale for under 25s;

b. An individual assessment for each case which is evaluated on a contextual basis leading to an annual payment where the person receives an amount of money according to their situation/circumstances and living standards before they were damaged from a vaccination for the over 25s.

## Statistics

Our proposal to replace the lump-sum award with a sliding scale is informed by the fact 83.2% of the people surveyed believed that anyone who suffers from vaccine injury, irrespective of the extent of injury, should be compensated. Moreover, 75.3% supported the idea that compensation should be assessed on a case by case basis. We believe that replacing the arbitrary lump-sum payment with individually assessed compensation would help mitigate any harmful effects that vaccine injury may have on an individual's livelihood and quality of life.

In October 2001, the Association of Personal Injury Lawyers outlined in their report, on amendment of the VDPA, that compensation under the scheme was still too low regardless of the fact that the lump sum had been raised substantially over recent years from £10,000. Despite this report being 19 years old, no action has been taken by the Government to reform this outdated piece of legislation. While vaccine injury is rare it is not unprecedented. Our proposal ensures that the small percentage of people damaged by vaccines are not neglected but are able to receive sufficient compensation and support.

## Proposals

We would like to abolish the lump-sum award of £120,000. We strongly believe that the implementation of individual assessments, and a more socially just system of compensation would go some way to restore public confidence in vaccination.

66 Mr. Russell Brown MP speaking in Parliament, as detailed in Hansard (24th March, 2015) https://hansard.parliament.uk/Commons/2015-03-24/debates/15032478000001/VaccineDamagePaymentsAct

67 Vaccine Damage Payments Act 1979, s1

*Compensation for under 25-year-olds*

Compared to people over 25, it often proves more difficult to assess for under 25's what they would grow up to be and how much they would have lost due to their adverse reaction to the vaccine. Over 25's are usually financially independent and have an income for which the state can compensate and calculate losses. Therefore, individuals under 25 who suffer vaccine injury would be assessed individually (just like over 25-year-olds are) and receive money annually according to which bracket they fall under.

| 1-20% | 21-40% | 41-60% | 61-80% | 81-100% |
|---|---|---|---|---|
| £2,500 per annum | £6,000 per annum | £9,500 per annum | £12,000 per annum | £15,500 per annum |

*Compensation for over 25-year-olds*

Vaccine-injured individuals aged 25 and over will be entitled to compensation which is determined on an individual contextual basis, removing the arbitrary £120,000 lump sum payment. It is more effective for the individual as they are supported on a yearly basis rather than being given a single lump sum which will not be suitable for every individual case of disablement.

### Impact

We found a marked distrust in relation to vaccine safety potentially due to conspiracy, highlighted by the coronavirus pandemic. Our reform proposals aim to incentivise vaccination and help to achieve herd immunity. The information outlined in this report should be made accessible to the public and the law should promote transparency and honesty throughout the vaccination process. Reforming statutory compensation under the VDPA would also help to deliver social justice, as a more specific assessment of damages under the sliding scale would accommodate the specific needs of vaccine-injured individuals and equip them with the funds necessary to mitigate the financial consequences of injury.

## Compulsory and Mandatory Vaccination

### Current law

Whilst there is no law within England and Wales relating to mandatory or compulsory vaccinations, during the consultation phase and given the current coronavirus pandemic, we thought it necessary to give consideration to both.

**Compulsory vaccination** is when it is illegal not to be vaccinated and a penalty can be imposed.[68] In 2017, when Italy introduced a national law that extended the number of compulsory vaccines from four to ten, vaccine uptake increased from 87.3% in 2016 to 91.8%.[69] Fines were introduced for parents and children under the age of 6 were not permitted to attend or use pre-school services if they were unvaccinated. However, fines have proven to be difficult to implement with some educational services having to delay the implementation of these measures until 2019 due to pressure groups and "anti-vax" movements.[70] Additionally, further pressure was placed on the Italian healthcare system with 4.6 million doses required to catch up with the increased number of compulsory vaccines for children aged between 1 and 16.[71] It was also noted that, although compulsory vaccinations increased vaccine coverage, vaccine hesitancy was still prevalent[72]. The UN described vaccine hesitancy as one of the gravest threats to global health in 2019[73].

For the UK, we noted that the added pressure a fine would place on those from lower socio-economic backgrounds could be deemed discriminatory. This was reiterated by the experts consulted in relation to this report. Given that vaccine hesitancy still remains in Italy and the potentially discriminatory nature thereof, it is unlikely compulsory vaccinations could be successfully implemented.

68 Alberto Giubilini, The Ethics of Vaccination (2020)
69 Fortunato D'Ancona, Claudio D'Amario, Francesco Maraglino, Giovanni Rezza and Stefania Iannazzo, 'The law on compulsory vaccination in Italy: an update two years after introduction' [2019] Euro Surveill.
70 Fortunato D'Ancona, Claudio D'Amario, Francesco Maraglino, Giovanni Rezza and Stefania Iannazzo, 'The law on compulsory vaccination in Italy: an update two years after introduction' [2019] Euro Surveill.
71 ibid
72 ibid
73 https://www.who.int/news-room/spotlight/ten-threats-to-global-health-in-2019

**Mandatory vaccination** is the restriction of access to services such as schools - not being vaccinated is lawful[74]. This is the case for most of the US, where all 50 states have linked vaccination to public school entry since 1980, with varying restrictions being imposed on those who do not vaccinate[75]. In Australia, families with unvaccinated children are denied financial assistance (unless there are specific medical reasons). Policies such as this may disparately affect those from lower socio-economic backgrounds. California has been a forerunner in mandatory vaccination, in 2016 it was made illegal to opt out of vaccination for any non-medical reason: the result being the number of children in kindergarten who were not up to date with their vaccinations halving to 4.9% between 2013 and 2017, boosting herd immunity[76].

Mandatory policies are in place for inbound travelers, particularly to Asia and Africa, entry to the unvaccinated is prohibited. Public support for this principle is potentially encouraging, suggesting mandatory vaccination as a policy could be viable: 64% of our consultees supported a vaccination card/system for accessing large public events.

### European Convention on Human Rights (ECHR)

Article 8(1) ECHR provides that everyone has a right to private and family life and thus needs to be considered in relation to compulsory and mandatory vaccinations. The right is not absolute and so under Art.8(2) ECHR state interference can be permitted for the purposes of "*national security, public safety or … protection of health*.' Therefore, a compulsory or mandatory vaccination programme could be seen as proportionate and justified, and not a breach of a person's human rights under Art.8 ECHR.

### Impact assessment

- Establishing a database and successfully updating and monitoring it would require considerable funding and manpower.
- People who refuse to vaccinate may refuse to register onto any sort of database and/or no longer complete Government censuses so the Government cannot know their vaccination status.
- Infectious disease reduction could reduce the workload for the NHS overall but it's hard to predict to what extent.
- Successfully monitoring and collecting fines could require considerable manpower and money to run successfully. However, the money made from fines could offset this financial cost.

We believe compulsory and mandatory vaccinations are viable but largely unnecessary. Systems are in place within the UK to implement such policies but there are other options to consider before taking a more restrictive approach: "if two interventions can both efficaciously and effectively address a public health or health policy issue and are equal in all other morally relevant respects, the intervention least restrictive of personal liberties ought to be preferred."[77] We consulted and investigated this proposal and have taken the decision not to progress it any further.

## Indemnity for Manufacturers

In our consultation responses, we noticed significant public distrust of the Government and vaccine manufacturers. When respondents were asked "Do you feel that when you consented to the vaccination either for yourself or on behalf of your child, you were given sufficient information by the GP/medical professional in relation to any side effects or possible injury?" 61.9% of participants answered "No".

In an effort to regain public trust and increase vaccination uptake, we explored the legal liability of vaccine manufacturers for vaccine injury. Our proposals aim to both protect vaccine manufacturers from high litigation costs, whilst still holding them accountable for vaccine injury.

### Current Law

Under current law, vaccine manufacturers are liable to be sued in negligence. However, due to immense legal costs of filing claims, and the small chance of success, most who suffer adverse reactions to vaccines seek compensation from the Government scheme instead under the VDPA (which as previously stated is deeply limited and exclusive).

In their consultation document, *changes to Human Medicine Regulations to support the rollout of COVID-19 vaccines*, the Government proposed granting immunity to manufacturers of the COVID-19 vaccine on the basis that it would be unlicensed. This means that those who suffer an adverse reaction cannot hold manufacturers liable.

74 Dr Alberto Giubilini, The Ethics of Vaccination, (2020)
75 C. Lee Ventola, 'Immunization in the United States: Recommendations, Barriers, and Measures to Improve Compliance' [2016] PT 426 - 436
76 Liam Drew, 'The case for mandatory vaccination', (2019), https://www.nature.com/articles/d41586-019-03642-w
77 Yashar Saghai, John Hopkins University, (2014) 350

## Proposal

Firstly, we propose that the Government provide an indemnity to vaccine manufacturers for vaccine injury during a pandemic. Secondly, we propose a small tax paid by manufacturers to cover the cost of the indemnity. This aims to hold manufacturers accountable for vaccine injury, whilst protecting them under the circumstances detailed below.

We propose that in ordinary circumstances (where a vaccine is licensed), manufacturers remain entirely liable. However, in the case of emergency, such as the current outbreak, we believe that the risks associated with waiting for a vaccine outweigh the risk of a rare adverse reaction. It is possible that by exposing them to risk of expensive litigation, vaccine manufacturers may take longer to develop a vaccine. To protect manufacturers, instead of immunity, we propose the Government provides an indemnity. This means that the Government will reimburse manufacturers for compensation paid out, protecting them from excessive costs.

In considering cost effectiveness, we acknowledged that adverse reactions to vaccines are rare, and so Government indemnity would be inexpensive. Ruth Tindley proposed that, instead of the Government providing compensation solely from the Social Security budget (funded by taxation), vaccine manufacturers pay a small tax on each dose of the vaccine administered (as in the US)[78]. A similar model in the UK would provide a fund to cover the cost of the Government indemnity in the case of an adverse reaction and would at the same time hold manufacturers (instead of the taxpayer) accountable.

## Conclusion

The Coronavirus pandemic has highlighted the requirement to review the law on vaccination in the UK. Vaccination rates are currently below that required for herd immunity, and misinformation and public distrust is widespread. Vaccination affects the public at large, regardless of personal opinion. The risk of vaccine-preventable diseases to a population is undoubtedly greater than the risk of an adverse reaction, and a fully functioning compensation scheme would reflect that. Ultimately, it is clear that the positive perception of vaccines is declining, and policy must address this growing distrust head on. We propose that this should be done not through restrictive and coercive policies of mandatory and compulsory vaccination, but by restoring much needed public trust in vaccinations through education and the implementation of better support systems for those who suffer adverse effects as a result of a vaccination.

78 Ruth Tindley, *'A Critical Analysis of the Vaccine Damage Payment Scheme' (2008)*

# Part Four: Criminal Law

Recommendations on the law governing police powers.

Compiled with thanks to:

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## Introduction

The police can exercise a lot of power but there is a clear need to curb some of this. We conducted a survey and asked 252 members of the public about their views regarding police powers in the following areas:

1. Stop and search,
2. Search warrants,
3. The State's obligation to protect life; and
4. Policing people with mental health and capacity issues.

The results reveal

i. that the public lack knowledge of their rights during a stop and search and believe it is discriminatory,

ii. there is an unclear process for requesting and granting search warrants,

iii. there are concerns around the area of a suspect's body the police should aim to shoot at in a high-risk situation considering their right to life; and

iv. there are concerns around the handling of people with mental health and capacity issues.

Based on this, we have proposed several reforms to police powers.

### 1. Stop and Search

#### Current law

Historically, the police could stop and search anybody they wished which was problematic as the police disproportionately targeted black and minority ethnic (BAME) groups. Due to this, there was a nationwide inquiry in to stop and search powers following the Brixton Riots in 1981. Lord Scarman found that there was a great deal of discrimination in the police's application of their power which in turn led to the creation of PACE and the Crown Prosecution Service in 1985.

Under Section 1(1) of PACE the police have the power to stop you if they have reasonable grounds to believe that you have been involved in a crime, or if they think that you are in possession of a prohibited item. PACE and the accompanying Codes of Practice (Code A 2015) also allow the police to stop and search individuals, to arrest them either with or without a warrant, and question individuals in relation to alleged offences. Police can also conduct a search in public or in a 'dwelling' if the officer reasonably believes that they do not live there. Code A also states that suspicions based on stereotypes may not be acted upon, it should be linked to accurate and current intelligence or information. This prohibits officers from searching people without legal grounds, even where they have consent to do so.

## Problems with the law

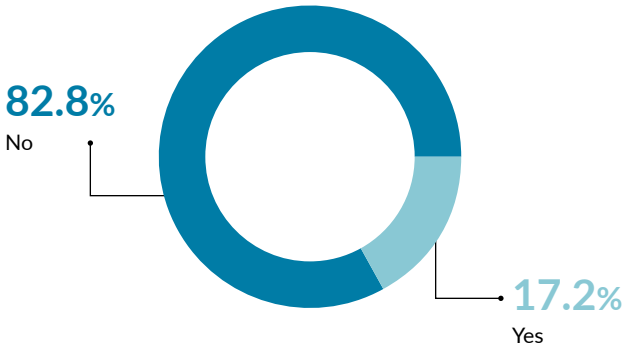
The current law is ineffective at reducing crime and disproportionately targets members of the BAME community.

According to a study on the effectiveness of stop and search, it was estimated that it reduced the number of 'disruptable' crimes by just 0.2%.[79] The study also revealed that although many stop and searches were carried out for suspicion of the possession of drugs, it was unlikely that they contributed to reducing drug-related crime.

According to the latest "Stop and Search" report by the government,[80] almost half of all stop and searches took place in the Metropolitan Police force area in London, the city with the highest BAME population and the highest stop and search rates for all ethnic groups (apart from Dorset and Merseyside). This disproportionate targeting of BAME communities creates a build-up of mistrust between those communities and law enforcement and, if left to fester, could lead to situations like the Brixton Riots. It also creates a lack of willingness to trust the police even where the police are acting legitimately and lawfully.

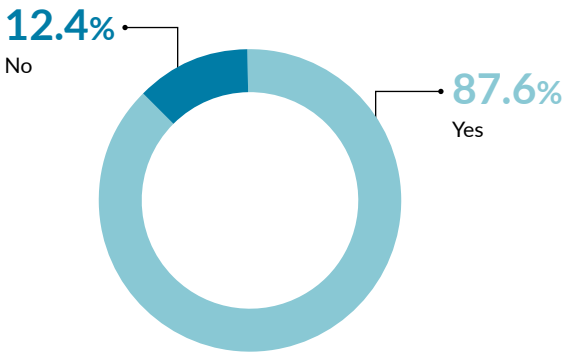
## Questionnaire results

**If you were stopped and searched, would you know all of your rights?**
256 responses




Less than twenty percent answered 'Yes' to this. Very few people know their rights – a cause for concern for vulnerable people in particular.

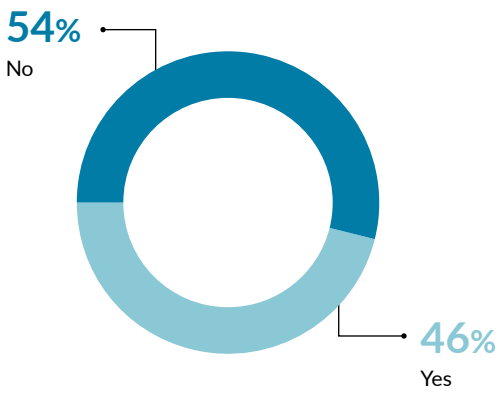
**Do you think that the disproportionate stop and search to particular demographics undermines the principles of innocent until proven guilty?**
250 responses




This demonstrates the detrimental impact on individuals within their community when stopped and searched disproportionately, undermining a very fundamental right belonging to everyone.

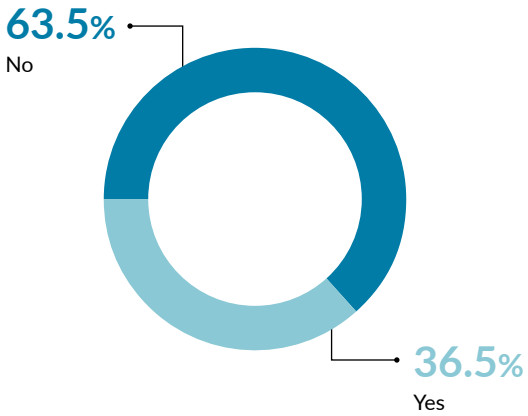
79 https://www.equalityhumanrights.com/sites/default/files/ehrc_stop_and_search_report.pdf
80 https://www.ethnicity-facts-figures.service.gov.uk/crime-justice-and-the-law/policing/stop-and-search/latest

**Does the use of stop and search within certain communities increase crime?**
250 responses



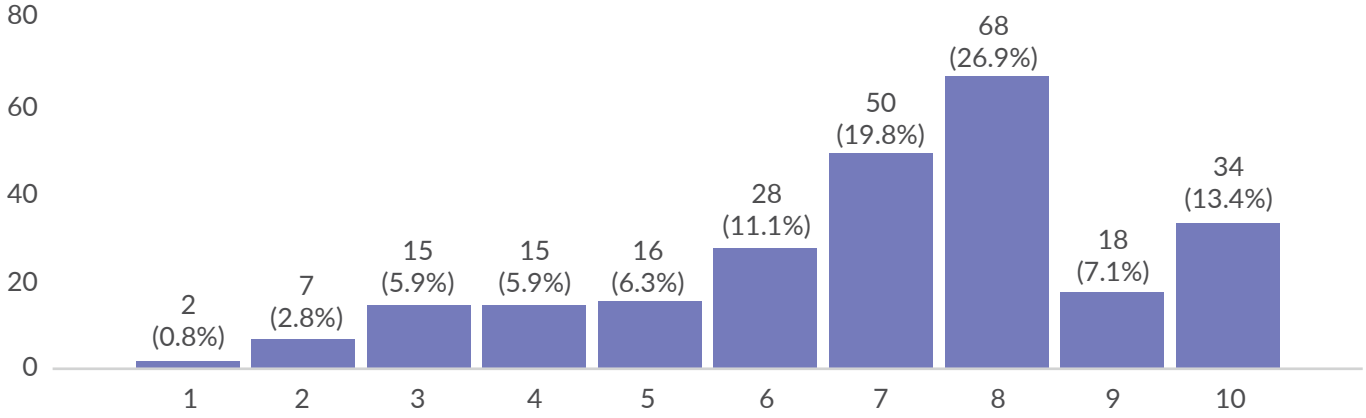

The responses are almost equal with this question. There may be reasons why crime is higher in certain communities, such as deprivation and poverty. This is a cause for concern since frustration amongst members of the community could lead to rebellion against police interference.

**Do you think use of stop and search is an effective method in combatting crime?**
252 responses

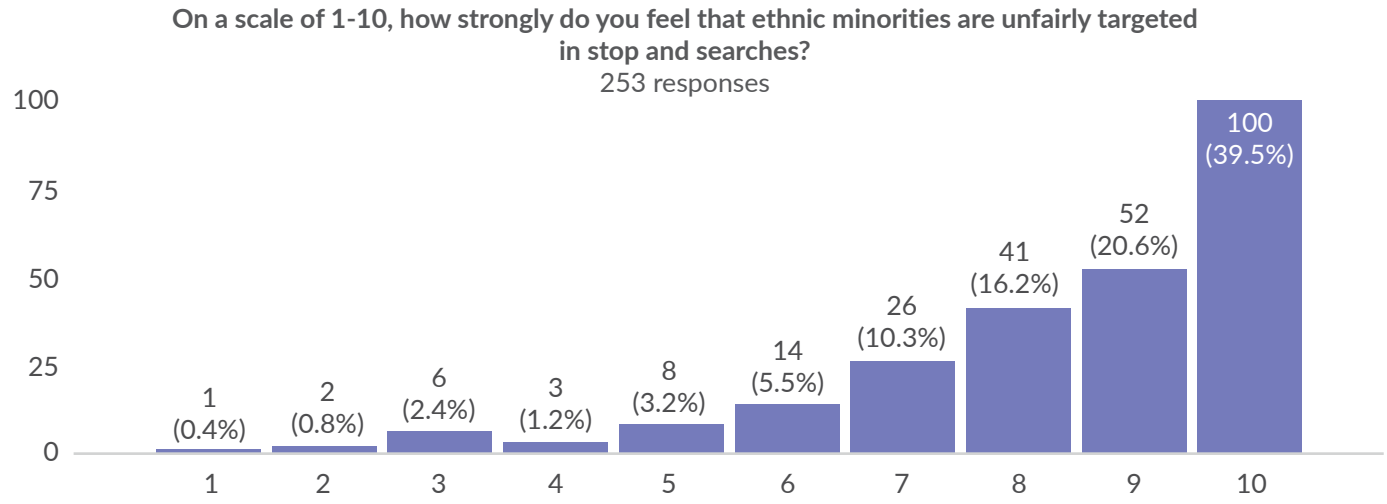



A high percentage believe that stop and search is not an effective method in combating crime.

**On a scale of 1-10, how strongly do you feel the police abuse their power in stop and searches?**
253 responses




Most people felt strongly that the police abuse their power in stop and searches.




Most people felt strongly that ethnic minorities are unfairly targeted in stop and searches. The statistics support this[81]– a black person is nine times more likely to be stopped and searched than a white person.

## Reforms

We propose that all individuals should be taught their rights before leaving school so that if stopped by the police, they know what should/should not be happening. As 63.5% of those surveyed do not believe stop and search to effectively tackle crime, there must be more investment in communities, the youth, and educational systems to improve relations between certain communities and the police and reduce discriminatory stop and search.

The public strongly felt that ethnic minorities are unfairly targeted by stop and search. An equality impact assessment by the Home Office concluded that people from BAME backgrounds "*are more likely to be the subject of s60 searches than white individuals*".[82] Methods to tackle bias towards ethnic minorities in stop and searches should be implemented such as requiring unconscious bias training for all police officers and creating a space where the police can communicate with young people and people from BAME backgrounds without treating them like suspects. Instead of detaining an individual straight away, the police could calmly explain to the person what their concern is and the procedures that will take place to address that concern.

## Conclusion

Our aim with this report has been to highlight the areas of stop and search that deserve attention. Primarily, there is a need to educate the public on their rights when they are stopped and searched as only 17.2% of the sample surveyed seem to know them. Misuse of stop and search powers has a detrimental impact on young people and communities. Further investment into improving relations will help to thaw existing tensions. The reforms proposed in this report – in particular, providing further training to police officers and pursuing alternative methods to stop and search – will be even more effective in combating crime without unfairly discriminating against ethnic minorities.

# 2. Search Warrants

## Current Law

Under Section 8 and 9 PACE 1984, police constables are empowered to apply for search warrants before magistrates and if granted, allow the police to search a premise.[83] A search warrant will be granted if the magistrates are satisfied that there are reasonable grounds for believing:

- An indictable offence has been committed.
- There is material on the premises which is likely to be of substantial value to the investigation.
- That the material is likely to be relevant evidence.
- That it does not consist of or include items subject to legal privilege, excluded material or special procedure material.
- The police could not do it another way.

81 http://criminaljusticealliance.org/blog/black-people-9-times-likely-white-people-stopped-searched/
82 https://www.countytimes.co.uk/news/national-news/17976713.stop-search-likely-bame-people-relaxed-rules---report/
83 https://www.legislation.gov.uk/ukpga/1984/60/section/8/2002-07-24

## Problems with the law

It is at the magistrates' discretion as to whether a search warrant should be granted. However, magistrates are all too ready to grant warrants and the police are requesting those warrants more frequently than is necessary. Furthermore, there are issues in relation to how rigorously magistrates scrutinise requests for search warrants. Magistrates are not legally trained and do not receive any special training in relation to search warrant applications. This can lead to them reaching decisions without properly scrutinising the circumstances of an application for a search warrant. Given the ease with which the police can apply for search warrants, there is a risk of the police misusing their power, which may result in a violation of the rights of individuals whose properties are being searched.

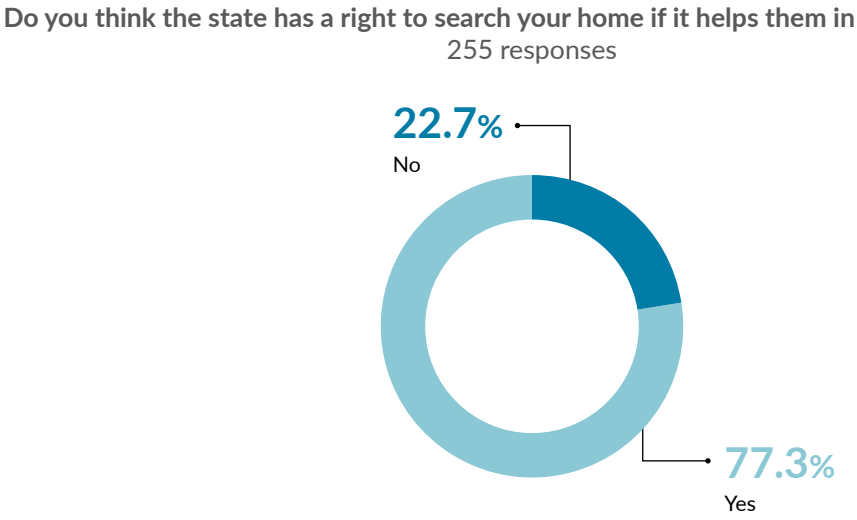
## Comparing Foreign Law

*Canada:*
In Canada, the law dictates that an application for a search warrant must describe the items to be searched for and their relevance to the investigation of a specific offence. There must also be reasonable grounds for dispensing with an application for a search warrant.

*US:*
The 4th Amendment of the United States Constitution means that people are protected from searches and seizures that are considered 'unreasonable under the law'.[84] Only judges and magistrates are permitted to issue warrants and they must be 'neutral and detached'.[85] For a search warrant to be approved, the officer must show there is 'probable cause' that the search is justifiable.[86]

*Germany:*
In Germany, a public prosecutor's office or court are able to request search warrants 'for the purpose of obtaining evidence for criminal proceedings' and this covers both the seizure of suspects and evidence on the premises of the suspect or a third party involved.[87] There are 'serious consequences' to the misuse in requesting and handling search warrants therefore the state faces restrictions for mismanagement. It is for this reason that the state must provide you 'with a document stating the reasons for the search and the offence you are accused of' upon request.[88]

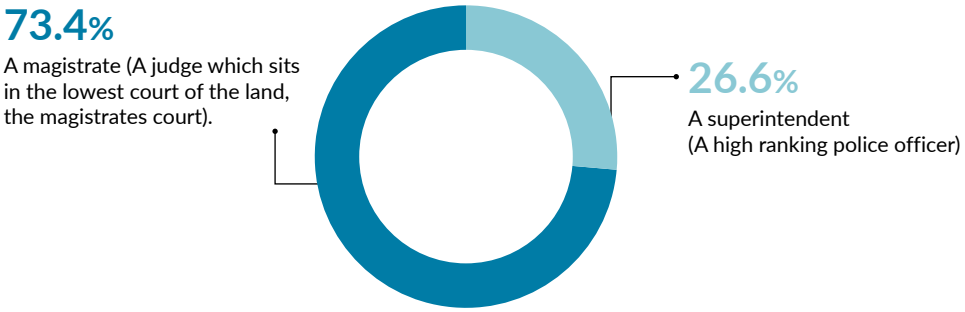
## Survey Results




77.3% answered that the state has a right to search your home if it helps with an investigation, indicating that a majority would want the state to have all the evidence for the case. 22.7% of people answered 'No' as perhaps they do not appreciate the violation of privacy.

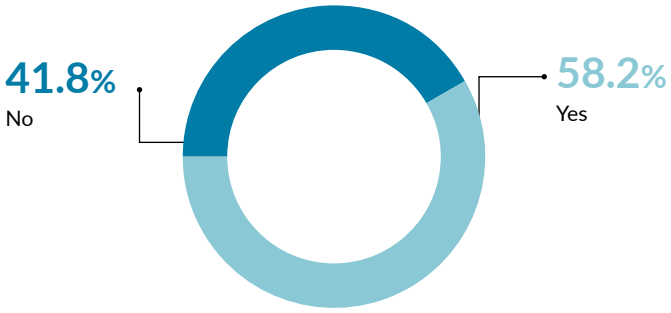
84 https://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/what-does-0
85 https://supreme.justia.com/cases/federal/us/403/443/
86 https://www.law.cornell.edu/wex/probable_cause
https://www.law.cornell.edu/wex/search_warrant
87 https://se-legal.de/criminal-defense-lawyer/house-searches-seizure-in-german-criminal-law/?lang=en
88 https://e-justice.europa.eu/content_rights_of_defendants_in_criminal_proceedings_-169-DE-maximizeMS-en.do?clang=en&idSubpage=3#No3

Who do you think should decide whether a search warrant should be issued to the police?
256 responses



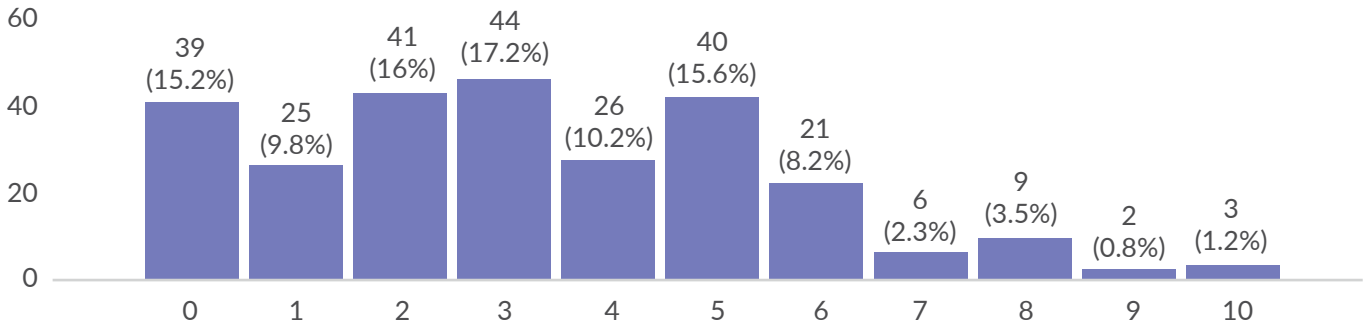

73.4% think that a magistrate should issue a search warrant as they may believe they have more legal knowledge. On the other hand, 26.6% think that a superintendent should be the one to issue a search warrant.

Do you agree that previous convictions should make you more likely to get your house searched?
256 responses




58.2% believe that previous convictions should make it more likely to get your house searched. 41.8% disagree perhaps believing they have completed their punishment and should not be held responsible for what you have done in the past.

How much force do you think the police should be allowed to use when searching people's houses?
256 responses




84% of 256 people think that on a scale from 1-10, police should not be allowed to use more than 5 for force, leaning toward a more suspect sympathetic approach. Only 16% of people think that they should be allowed to use more force.

## Reform

We propose that there should be 2-year compulsory training and an exam that magistrates would have to complete to make sure that they are only issuing search warrants where necessary. Such reforms would reduce the infringement of personal liberties and the number of legal processes that need to happen as a result. In addition to this, such reform would change the attitudes of police and superintendents as they would realise that applying for a search warrant would be harder. As a result, it is hoped that search warrants would only be requested when absolutely necessary. It may also encourage the use of alternative methods or less force when completing the warrants and help to make investigations less intrusive.

## Conclusion

Magistrates are the preferred vessel to grant search warrants, but they are not properly trained to scrutinise requests for a search warrant which is an issue when it comes to an invasion of someone's privacy. As suggested, a minimum of two years' training followed by an exam would adequately reform the current law. The results of the survey show that the public are more sympathetic to the person subjected to the search warrant and lean towards providing more protections for them. If a magistrate is not trained to consider these protections this can have devastating effects, for example wrongful convictions. Therefore, the training of magistrates would ensure that individual liberties are not infringed and that the law is properly upheld.

# 3. Failure to protect life by the State

## Current Law

The Human Rights Act 1998 (HRA) sets out the fundamental rights and freedoms such as Article 2 which enables the lawful protection of the right to life, meaning nobody can try to end the life of another.[89] The government has a positive and negative obligation to uphold this right: the latter being the role of the state not to kill anybody, and the former involving a duty to take reasonable steps to protect life when it knows or ought to know of a real and immediate threat to life. With the lack of safety barriers present in the 2017 Westminster attacks,[90] this was an example of where the state failed to meet its positive obligation.

On lawful killing, the state must use the minimum force necessary. Section 3 of the Criminal Law Act 1967[91] dictates that 'a person may use such force as is reasonable… in the prevention of crime'. They may do so to stop a crime and to arrest someone who is putting someone else in danger. If someone's life is at risk, a police officer can intervene. If someone is armed or otherwise so dangerous and if an officer honestly believes that person poses a threat to their life, or to the life of others, reasonable force may be used. The case of Mark Duggan demonstrates where the standards for lawful killing 'fully satisfied the requirements of the procedural obligation'.[92]

## Problems with the law

Police are trained to shoot at the central body mass which increases the chance of killing the suspect if they had started to run or tried to escape from the officer. This is an issue as it then leads to a higher number of inquests into unlawful killings because the officers fail to incapacitate them instead. Therefore, a higher number of inquests are more likely to lead to inconclusive results, and people will lose confidence in the police and the jury as their decisions will be contradicted by the evidence submitted.

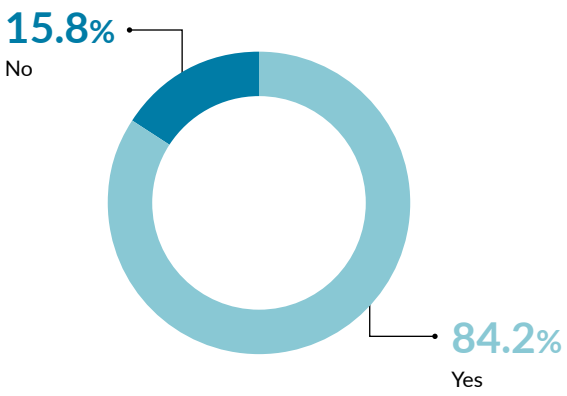
The law currently states that a killing is lawful if the police officer acted in self-defence. The standard of proof is the balance of probabilities and the police officer must have honestly believed that their life was at risk and the suspect was a threat to life for the surrounding public. The police are more likely to avoid prosecution due to the lower threshold.

In the Mark Duggan case, the inquest resulted in a questionable result. His death was classed as a lawful killing, as the police officer (V53), honestly believed that Mark Duggan was in possession of a gun when he exited his car. However, the evidence submitted and used in the case contradicted V53's statement. It proved that a witness had seen Mark Duggan throw the gun out of the window before he got out of his car.

89 https://www.legislation.gov.uk/ukpga/1998/42/schedule/1
90 https://www.theguardian.com/uk-news/2019/jun/21/london-bridge-inquest-hears-safety-barriers-could-have-been-fitted
91 https://www.legislation.gov.uk/ukpga/1967/58/section/3
92 https://www.bailii.org/ew/cases/EWHC/Admin/2014/3343.html

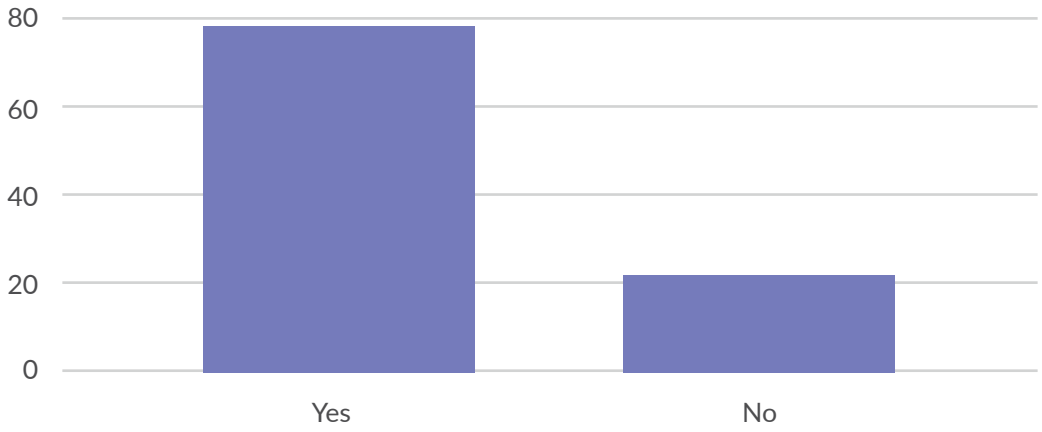
## Survey Results

**Should police officers be trained to incapacitate a suspect (i.e. by shooting the limbs) instead of shooting the central body mass and risk killing the suspect?**

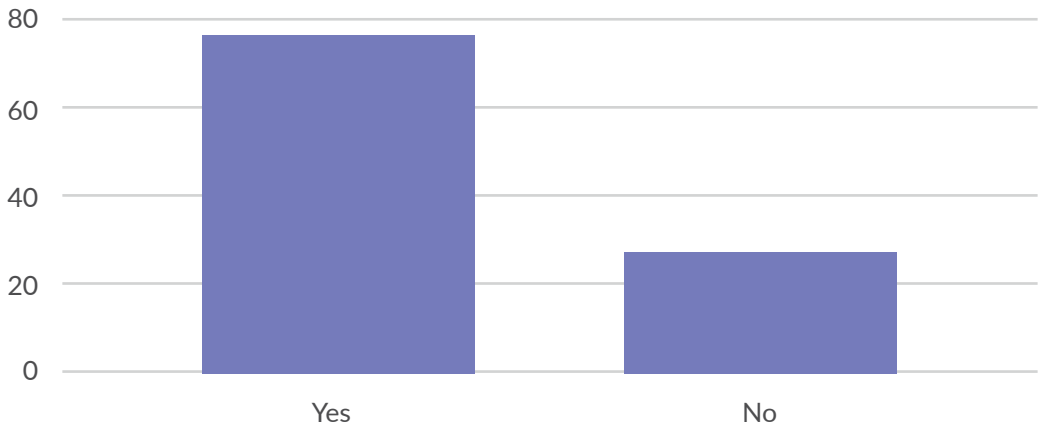



According to our questionnaire results, 85% of people believe that police officers should be trained to shoot to incapacitate suspects such as by shooting limbs, rather than by shooting the central body mass, which is current practice. This change would significantly reduce the risk of death.

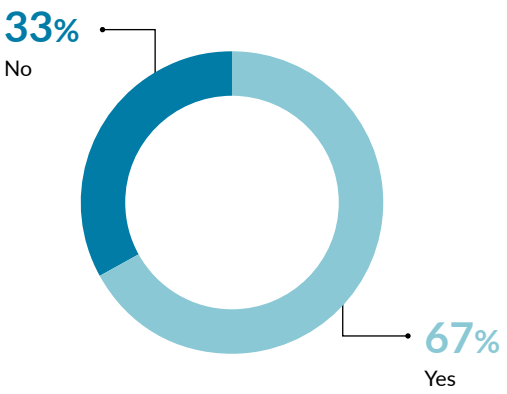
**Do you believe that when it comes to both inquests and criminal trials following verdicts of an unlawful killing, the police are favoured?**




**Should members representing the state (e.g. police officers) be tried as regular citizens, if they fail to protect life?**



To those who answered yes, should there still be a more rigorous process to try them?




78% of people perceive criminal trials and inquests to favour the police. This is unsurprising given that there have been no successful prosecutions of any serving police officer for manslaughter, homicide or assault, relating to the death of a person in their custody since 1969.[93] According to the 2017 Angiolini Review there has never been a successful prosecution for manslaughter in such cases, despite unlawful killing verdicts in Coroner's Inquests.[94] There are also low prosecution rates following verdicts of unlawful killings as there have been only 8 prosecutions of police officers in connection with a death in custody in the last 15 years and all have ended in acquittals.

When asked in the questionnaire if police officers should be tried as regular citizens if they fail to protect life, as a possible way of combating the lack of successful prosecutions 74% agreed and of those, 67% also believed that there should be a more rigorous process to try police officers.

## Reforms

We have considered whether the standard of proof for lawful killing should be raised so that police officers cannot get away with murder. The public opinion above is in favour of putting police officers under more scrutiny in criminal trials following a verdict of unlawful killing. Police officers who have failed to protect the life of citizens should not be given leniency or protection in custody either, especially as they have been highly trained in this area. Therefore, police officers should be treated more like regular citizens in order to ensure that they fully understand the gravity of their actions and to ensure that this does not happen in future situations.

Police have been traditionally trained to shoot at the centre of the body mass in a situation where they feel they are facing a threat. However, this creates the risk of a shooting resulting in vital organs being seriously harmed, potentially taking an innocent person's life. We therefore propose the police officers are trained to shoot in the leg or another part of the body where there is less risk of death. Officers should be put through mandatory training in relation to less dangerous and life-threatening areas of the body to fire at. Shooting at the leg will mean that the threat has been demobilised enough to ensure that they cannot do anything that potentially harms the officer. Aside from this, officers can also be taught of alternative ways to apprehend a suspect who poses a threat, in a way that does not involve firing at them as this could potentially be life-threatening.

## Conclusion

Article 2 enshrines the right to life, but police training to shoot at the central body mass directly contradicts this. Therefore, officers should be trained to shoot less dangerous and life-threatening areas of the body especially when 85% of those surveyed believe that officers should aim at the shot in the limbs. We also saw that there was a high percentage of people who believe police officers should be tried as regular citizens if they fail to protect life. This would certainly improve public confidence in the investigation of police processes.

93 https://www.bbc.co.uk/news/uk-england-leeds-47946556
94 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/655401/Report_of_Angiolini_Review_ISBN_Accessible.pdf

## 4. Policing People with Mental Health and Capacity Issues

### Current Law

In the 2017 report 'Picking up the Pieces,' Lord Adebowale said that 'mental health is one of the core parts of police work because 1 in 4 people in any one year are likely to face a mental health issue'.[95] The report identified that nearly 6,000 suicides equated to roughly 16 people taking their life every day.[96]

The Mental Health Act 1983 (MHA) and the Mental Capacity Act 2005 (MCA) are the key acts to consider. Section 1(2) MHA states that a 'mental disorder' is any disorder or disability of the mind. This act also gives several powers to the police to assist those suffering from mental health issues. Section 135 allows the police to apply to a magistrates' court for a warrant to enter the premises of those they believe to be suffering from a mental disorder and to remove that individual to a place of safety if deemed necessary. Section 136 of the MHA allows a police officer to remove an individual suffering from a mental disorder from a public place to a place of safety or to keep someone in a place of safety until they can be assessed by a mental health professional.

The MCA governs the law on mental capacity and what would happen if someone were to lose capacity. Section 2(1) of the act states that:

> a person lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or disturbance in the functioning of, the mind or brain.

### Problems with the law

Due to government cuts to mental health services, police are often overwhelmed with calls. Consequently, the police's use of section 136 has increased, when it should be used after careful consideration rather than being the first point of action.

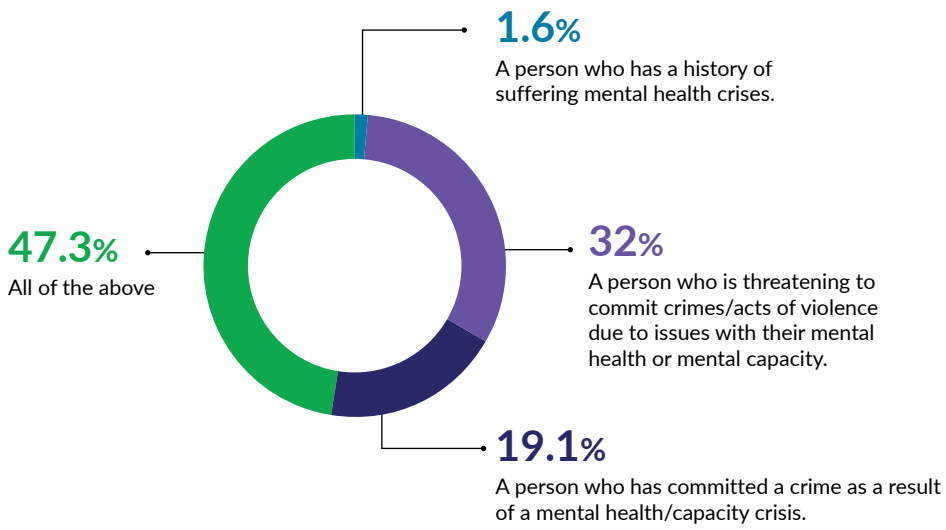
Although the police station should be a last resort, the increased use of police stations as places of safety under section 136 may be considered harmful. According to the mental health charity Mind's report 'Police and Mental Health'[97] in 2017 the police can keep the detained individual at the place of safety for up to 24 hours, extended for another 12 hours if it was not possible to assess them in that time. This could be a prolonged and unnecessary risk to the person's mental health, due to feeling criminalised and overwhelmed by their environment.

Although the police have some training in dealing with people with mental health and capacity issues, their training lacks the expertise of a mental health professional which would be required by the person in need.

### Survey results

**The word sectioned means to be detained under the Mental Health Act. Given this, which of the following best describes what you think would be a cause for someone to be sectioned?**

256 responses



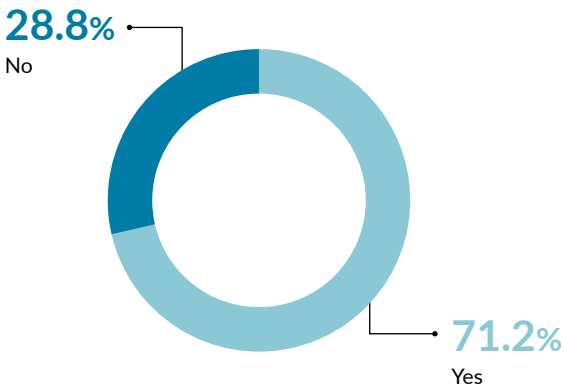

95 Independent Commission on Mental Health and Policing https://www.basw.co.uk/system/files/resources/basw_22916-3_0.pdf

96 Picking up the Pieces 2018 (HM's Inspectorate of Constabulary and Fire & Rescue Services) https://www.justiceinspectorates.gov.uk/hmicfrs/wp-content/uploads/policing-and-mental-health-picking-up-the-pieces.pdf

97 https://www.mind.org.uk/media-a/2912/police-and-mental-health-2017.pdf

47.3% of the public believe that a person should be sectioned in all scenarios suggested. A further 32% believe this should include anyone who is threatening to commit crimes or acts of violence due to issues with their mental health or mental capacity. This raises concerns about the general public's knowledge of their rights, which is worrying when the Mental Health and Wellbeing in England Adult Psychiatric Morbidity Survey 2014 found that 1 in 6 adults in England have experienced a common mental health problem in the past week.[98]

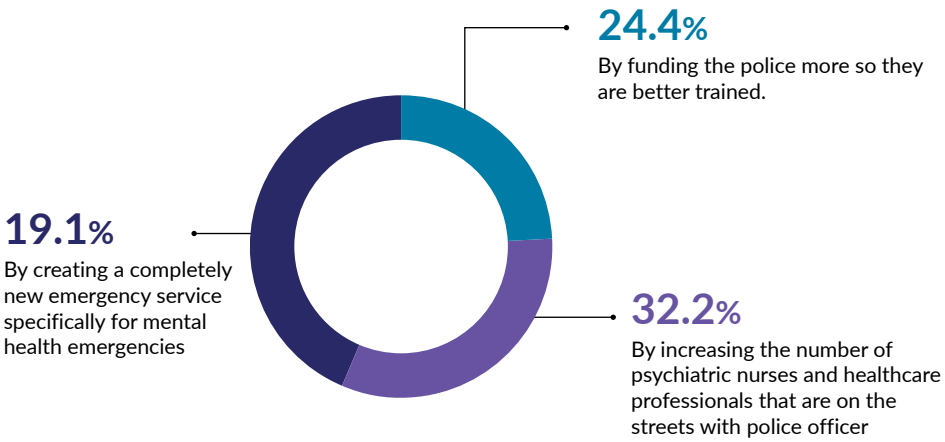
**Under Section 136 of the Mental Health Act, a person experiencing a mental health crisis can be removed from a public place to a place of safety by the police, if they think it is necessary. In very exceptional cases, a police station can be used. This is only the case when there are no better options. A police station cannot be used for people under 18. Do you think this is suitable?**
257 responses




71.1% agree that the use of a police station is a suitable holding place for someone experiencing a mental health crisis so they do not pose a threat to the public as they would do in a healthcare setting, like a hospital ward. This contrasts with the Law Commission's initial concerns that placing a person experiencing a mental health crisis in a police station could be distressing. As the Care Quality Commission found, while the Police can be kind and compassionate, police stations can be stressful places and access to healthcare in them can be more difficult than in a health-based location.[99]

An estimated 11,000 people a year are detained in police stations as places of safety whereas, only 6,400 people a year are detained in hospitals under section 136. Many of these detentions occurred due to the unavailability of alternatives. As the Sainsbury Centre for Mental Health Briefing on the police and mental health notes, there has been no guidance or funding provided by the Department of Health on how to transfer the use of police stations to hospitals as places of safety.[100]

**How could mental health and capacity response teams be best improved?**
180 responses




98 https://webarchive.nationalarchives.gov.uk/20180328130852tf_/http://content.digital.nhs.uk/catalogue/PUB21748/apms-2014-full-rpt.pdf/
99 https://www.cqc.org.uk/sites/default/files/20141021%20CQC_SaferPlace_2014_07_FINAL%20for%20WEB.pdf
100 https://www.centreformentalhealth.org.uk/sites/default/files/2018-09/SainsburyCentre_briefing36_police_final_small.pdf

This data set shows that when trying to improve the response to mental health and capacity crises, even while considering factors like cost, time and difficulty, corners cannot be cut. Rather, by increasing the number of healthcare professionals with specialisms in mental health and mental capacity to work with the police, it may lead to a shortage in the number of mental health-specialising professionals elsewhere. Staff shortages have begun to have a negative impact on the quality of care received by patients with significant gaps in the quality of care given to mental health patients, in particular[101].

## Reform

The funding for triage teams should be increased to provide more resources and equipment to help the triage and mental health services when tackling a crisis. This would allow the triage teams to provide psychiatric medicine if needed. Another suggestion is that more experienced and senior police officers should respond and be the first to arrive at the scene involving mental health and capacity issues.

We also suggest that an emergency helpline is created exclusively for people with mental health and capacity issues, giving them quicker and direct access to someone trained and with knowledge of mental health and capacity issues. This would be more effective and efficient than requiring a redistribution of mental health professionals within the service.

Finally, the Department of Health should release guidelines on how hospitals should be used as places of safety rather than police stations to facilitates the swift transferral of this power and to reduce the use of police stations over hospitals

## Conclusion

This report reaffirms the necessity for change to the current law and for greater synergy between law enforcement and psychiatric professionals. In the 'Research into the Mental Health Street Triage Pilot' by MOPAC in 2015, analysis of police performance data demonstrates the complex and demanding aspect of policing mental health related incidents, particularly in terms of: training, audit and review of mental health needs.[102] Additionally, the mounting concerns expressed in the survey results show the current law to be inefficient and ineffective. Therefore, it is of paramount importance that the reforms recommended in this report are taken into consideration.

101 https://www.kingsfund.org.uk/blog/2019/10/mental-health-staff-shortage
102 https://www.london.gov.uk/sites/default/files/mopac_research_into_the_london_mental_health_street_triage_pilot_dec_2015.pdf

# Notes

Big Voice London is always looking to grow our support from organisations and individuals who share our passion for increasing youth access to the legal system. For more information or to view our other publications, please visit our website at **http://bigvoicelondon.co.uk**.