

REGULATING THE EVIDENTIARY USE OF AI IN CRIMINAL PROCEEDINGS

THE UK COUNTRY REPORT: FIRST FINDINGS



Final aim: identifying potential negative impacts that the use of AI has on England & Wells fair-trial rights and the principles of the rule of law



Starting point: What is the Existing Legal Framework for, and/or Policy Relating to, the Use of Evidentiary AI in Criminal Proceedings?



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EVOLVING POLICY AND DISCUSSION ON AI

- **Over 30 public bodies, initiatives and programmes are advising, commenting upon and scrutinising the use of AI, and the governance of AI:**
 - Parliamentary Committees [e.g. Justice and Home Affairs Committee].
 - The *Office for AI* [comprising of experts].
 - ~~The *Centre for Data Ethics and Innovation* (CDEI)~~ [disbanded: Sept.23]
 - The *Frontier AI Taskforce* [focused on generative AI and longer-term national security issues]. [Sept.23]
 - ~~The *AI Council* (independent advisory committee)~~ [final meeting: June 23]
 - Regulatory bodies – e.g., the Bar Council for E&W; the Law Society.
 - The Courts of England and Wales.

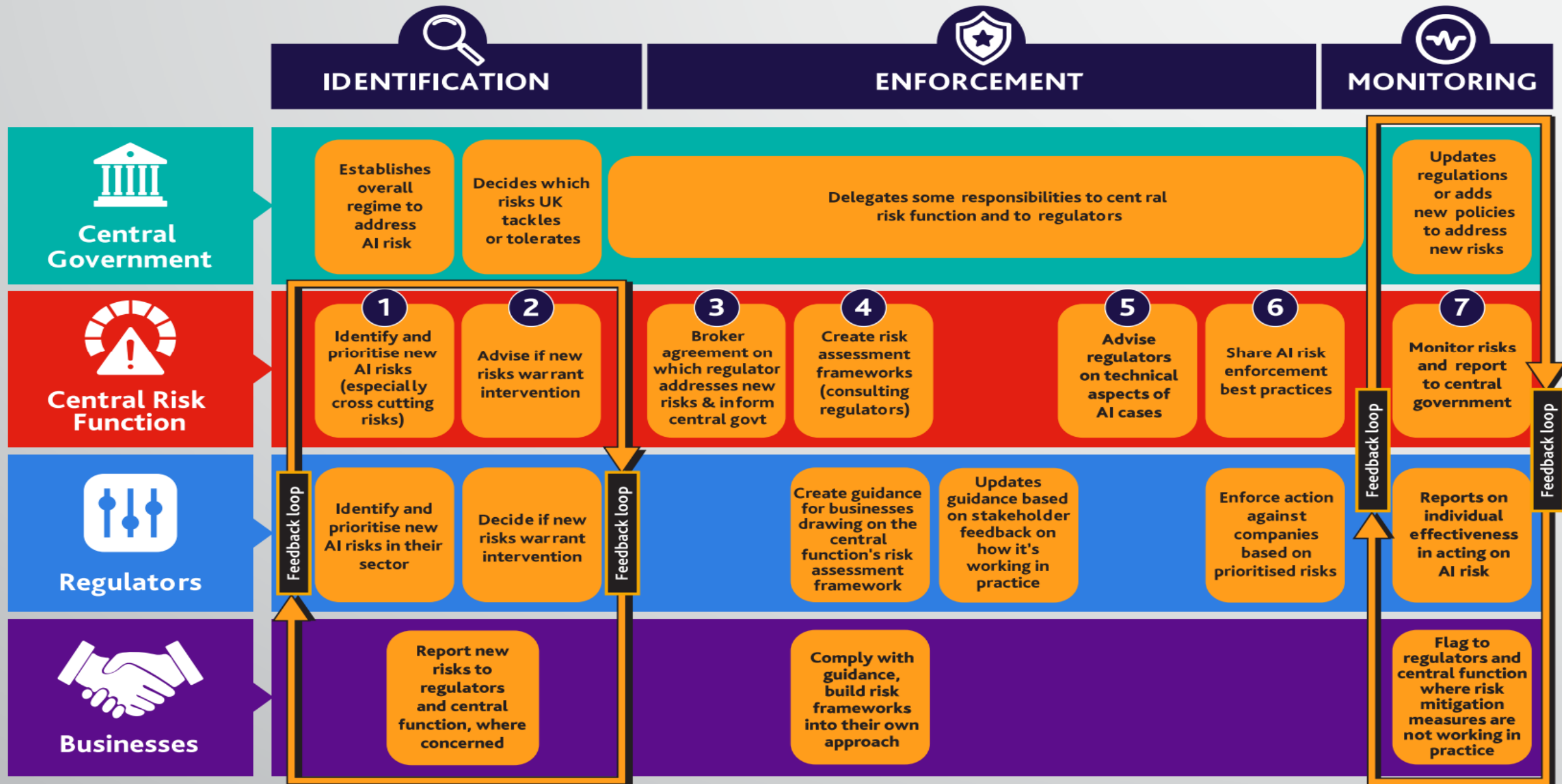
EVOLVING POLICY AND DISCUSSION ON AI: UK GOVERNMENT APPROACH

- ❖ **AI Governance initiatives based on a sector-led approach – which delegates responsibility for governing AI to existing regulators who focus on applications falling within their regulatory remit (Roberts, Floridi 2023)**
- From **2016**: Number of national-level AI policy documents released (between 2016-2021: 53 documents)
- **2018: First-national level position on AI governance**: «Blanket AI-specific regulation, at this stage, would be inappropriate» (*AI in the UK: Ready, Willing and Able*, 2018).
- **2021**: National AI Strategy (last updated December 2022): a ten-year plan for AI in the UK to build «the **most trusted and pro-innovation system of [AI] governance in the world**».
- **2022**: Consultation paper (towards the AI white paper): **Introducing a new framework for «clarity and coherence» in the AI regulatory landscape**:
«due to our reputation for high-quality regulators and our strong approach to the rule of law, supported by our technology-neutral legislation and regulations», Ministers contend that UK laws, regulators and courts already address some of the emerging risks posed by AI technologies.
However, «**while AI is currently regulated through existing legal frameworks like financial services regulation, some AI risks have arisen and will arise across, or in the gaps between, existing regulatory remits.**» (GOV, 2022)

POLICY – GOVERNMENT APPROACH

- **March 2023: AI white paper ‘AI Regulation: a pro-innovation approach’ → Aims: (i) “driving responsible innovation” and (ii) “maintaining public trust in the technology”.**
- **There is no general uniform definition of “Artificial Intelligence” that can be adopted.**
- **That framework is underpinned by 5 principles:**
 1. - safety, security and robustness;
 2. - transparency and explainability;
 3. - fairness;
 4. - accountability and governance;
 5. - contestability and redress.
- **‘Regulatory sandboxes’ (controlled environments where organisations can trial innovations with the oversight of a regulator, often with real data)**
- **The Central risk function (so far: no statutory duty to report on regulators):** support and coordinate regulators in their own risk assessments, to identify and prioritise new and emerging risks, potential warning and interventions
- ❖ On the one hand, it is consistent with previous policy papers, the UK Government, when releasing the paper, has made clear that one of its primary aims is to avoid “heavy-handed legislation which could stifle innovation and [instead] take an adaptable approach to regulating AI” On the other hand, to mitigate AI risks the role of Central Risk Function as a way of keeping a grip on AI developments sector by sector
- ❖ Points for discussion: 1. **Opaque role of the "Central Risk Function" and its relationship with rgeylators;** 2. **Should the central government move to place the AI principles outlined in the White Paper on a statutory footing?**

WHAT 7 THINGS WILL THE CENTRAL RISK FUNCTION DO?





Central Government

Establishes overall regime to address AI risk

Decides which risks UK tackles or tolerates

Establishes overall regime to address AI risks

Decides which risks UK tackles or tolerates



Central Risk Function

1

Identify and prioritise new AI risks (especially cross cutting risks)

2

Advise if new risks warrant intervention

Identify and prioritise new AI risks (especially cross cutting risks)

Advise if new risks warrant intervention



Regulators

Identify and prioritise new AI risks in their sector

Decide if new risks warrant intervention

Identify new and prioritise new AI risks in their sector

Decide if new risks warrant intervention



Businesses

Report new risks to regulators and central function, where concerned

Report new risks to regulators and central functions, where concerned

Feedback loop

Feedback loop

FROM GENERAL POLICY FRAMEWORK TO CRIMINAL JUSTICE

NAVIGATING A FRAGMENTED FRAMEWORK

- The general approach is reflected also in the justice system and criminal justice system: there is no specific legislative basis for the use of AI in the application of the law, but soft-laws, regulations from different bodies.
- Four related bodies of law applicable to the use of technologies, i.e. AI, in the application of the law: human rights, data protection, discrimination, and public administration: “The framework includes police common law powers to prevent and detect crime, the Data Protection Act 2018, Human Rights Act 1998, Equality Act 2010, the Police and Criminal Evidence Act 1984 (PACE), the Protection of Freedoms Act 2012 (POFA), and law enforcement bodies’ own published policies”(House of Lords Justice and Home Affairs Committee report, 2022).
- **Key role:** the **Courts** can review the use of tools in various ways including judicial review and rulings on the admissibility of evidence.
- Bar Council 2022: “For some technologies, such as AI, it is not clear that there is an effective existing legal framework. It was also clear that the framework is “fragmented” (Written evidence (nTL0048), 2022).
- **Calls for strengthened legal framework?** - “the risks inherent in the use of advanced technologies were so severe that a stronger statutory basis was required” (HL Report, 2022).