



**Bennett Institute  
for Public Policy**  
Cambridge

**INSTITUTE  
FOR  
GOVERNMENT**

# Review of the UK Constitution

Final report



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## About this report

In 2022 the Institute for Government and the Bennett Institute for Public Policy embarked on an ambitious project to review the UK constitution. This report, the final in a series of papers published over the past 18 months, concludes that review.

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## Foreword

Eighteen months ago, our two organisations – the Institute for Government and the Bennett Institute for Public Policy – embarked on an ambitious project to review the UK constitution. Our aim was to take stock of the functioning of our core political institutions after a tumultuous period in British political life that had produced many vivid illustrations of long-standing constitutional problems.

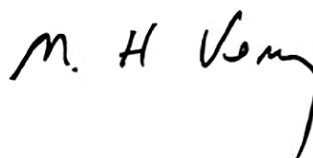
In this final paper we set out our view of the state of the UK constitution, and our proposals for improving how it works, drawing on research we have conducted and commissioned, additional recommendations we have made as part of the review, and discussions we have curated during the last year and a half. But we do not intend for this to be the end of the conversation. We hope that the recommendations we have set out here and in other papers we have published prompt further debate, dialogue and ultimately action – to ensure the much needed renewal of the UK's political constitution.



**Hannah White**

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# Summary

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In February 2022, the Institute for Government and the Bennett Institute for Public Policy at the University of Cambridge launched the Review of the UK Constitution. Our aim was to take stock of the constitution after a tumultuous period in UK politics. The past five to ten years have been characterised by prolonged battles involving parliament, government and the courts over Brexit, and repeated questions over integrity and ethics in government – leading in no small part to the UK having had five prime ministers in seven years. This period also included the pandemic, the government response to which placed restrictions on personal freedoms not seen for generations, if ever.

In the context of the increasing polarisation of constitutional debate in the UK, we set out to take a non-partisan and evidence-based approach to assessing the functioning of the UK constitution and to make robust recommendations for reform.

Guided by our expert advisory panel, we have published our own original research papers, commissioned a series of specialist papers from leading academics and constitutional experts, and held roundtables and events across the UK. In this final report, we examine the UK's constitutional system as a whole, identify the most pressing problems and set out detailed proposals to improve the way it works.

## **The case for renewing the UK constitution**

The UK's constitution is unusual in that it is not based on a single written document or higher law. Instead, the UK's central constitutional principle is parliamentary sovereignty: that parliament can make or unmake any law – including constitutional law. Constitutional power is constrained, at least in theory, by a series of political checks and balances within and between the government, parliament, the courts, the monarch and different layers of government.

However, we highlight three particularly acute problems with the UK's constitutional model that urgently need to be addressed.

**Weaknesses in the system of checks and balances have been exposed** – the UK system is in theory self-regulating. It relies on those within it being willing to exercise restraint, adhering to largely unwritten rules of behaviour, and, when they fail to do so, facing political consequences. In recent years, various political actors have shown an increased willingness to test constitutional boundaries – seen most brazenly in proposals to break international law and by the executive repeatedly passing legislation on devolved matters without consent from their respective legislatures – with such political checks providing little impediment to them doing so. Debates over constitutional principle have increasingly been considered secondary to other political goals, and MPs, the media and the public have lacked sufficient understanding of the constitution to hold decision makers to account.

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**Existing processes for constitutional change do not recognise the constitution's special character** – most constitutions set out a clear process for constitutional change, requiring additional scrutiny or a higher threshold for amendments to be made. In the UK, the only procedural requirement for constitutional change is a simple majority in parliament. As a result, constitutional changes are often made at speed, and driven by narrow political party interests, without establishing broad consensus or a sense of wider public legitimacy.

This means key aspects of the constitution remain contested, and major changes can be easily undone – as demonstrated by the Fixed-term Parliaments Act 2011 and the English Votes for English Laws procedure from 2015, both since reversed. This creates yet more constitutional instability. Important decisions can be taken without adequate consideration of their knock-on implications for other parts of the constitution and, 25 years on, Westminster and Whitehall are still adjusting to the realities of devolution to Scotland, Wales and Northern Ireland.

Furthermore, the role of the public in relation to major constitutional change remains unclear, with emerging precedent surrounding the use of referendums on key constitutional issues (Scottish independence in 2014 and EU membership in 2016) but growing concern about the divisive effect of their binary nature.

**The lack of clarity in the UK constitution is problematic** – being drawn from a range of sources including law, treaties, guidance and norms and convention, the UK constitution relies on actors to interpret constitutional norms, existing precedent and broad principles. This allows for political debate over constitutional issues rather than strict legal interpretation but it carries risks. Actors can interpret it to suit their own objectives and there is no independent and authoritative source of constitutional knowledge to provide insight on constitutional issues or challenge short-sighted policy. Increasingly there are also legitimately held but differing views of the constitution, between political parties, parliament and government, the UK government and devolved governments. In the absence of an authoritative and independent voice on constitutional affairs, there is no mechanism for resolving disagreements that arise from these. Under such circumstances, the will of the executive will usually prevail.

Brexit, the pandemic and recent governments willing to test boundaries have exposed important risks in the system that urgently need to be addressed. Some would argue that a solution to addressing these problems would be for the UK to adopt a written constitution, but in the absence of public and political demand for what would be an enormously significant constitutional change. Under current circumstances it is unlikely that this would be able to command widespread acceptance and legitimacy.

Our proposals for reform therefore instead focus on strengthening the existing political constitution by: supporting and reinforcing its network of checks and balances; bringing greater clarity around the constitution; creating mechanisms for managing disagreement in its interpretation; and ensuring there are robust processes for constitutional change that encourage building political and public support.

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This report set out detailed recommendations to improve the functioning of the constitution.

## Recommendations

### **1. Establish a new Parliamentary Committee on the Constitution to express an authoritative view on constitutional matters independent from the government of the day, scrutinise constitutional policy and monitor adherence to norms and conventions.**

- The House of Lords Constitution Committee and constitutional responsibilities of the House of Commons Public Administration and Constitutional Affairs Committee should be amalgamated into a newly established Parliamentary Committee on the Constitution (PCC).
- Membership of the committee should be drawn from both the House of Commons and the House of Lords, combining the democratic legitimacy of the former and experience and expertise of the latter. Expert lay members should also be considered, as should the use of the 'guesting' procedure to invite members or presiding officers of the devolved legislatures to meetings where appropriate.
- The new committee should have greater powers than a normal select committee, including the power to delay legislation to allow for further scrutiny and to refer a matter for a vote on the floor of the House of Commons, which would be given precedence by the Speaker. It should make a practice of tabling amendments to reflect its recommendations about legislation with constitutional implications.

We also propose that powers and responsibilities in other recommendations should be granted to this body. These include the power to certify constitutional bills, to conduct mandatory pre-legislative scrutiny, to scrutinise ministerial directions related to constitutional propriety and to establish a list of high-level constitutional principles.

- The work of the committee should be supported by an independent Office for the Constitution, creating a relationship similar to that between the House of Commons Public Accounts Committee and the National Audit Office (NAO). The office should be resourced to conduct detailed research and provide analysis on constitutional matters, to inform the committee's scrutiny and decisions. Like the NAO, the office should be funded by and accountable to parliament and be led by an official who is an officer of parliament, like the NAO's comptroller and auditor general.

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## **2. Create a new category of 'constitutional acts' to formally recognise the importance of key pieces of legislation that underpin our political system.**

- Our proposed Parliamentary Committee on the Constitution should be tasked with establishing a list of existing constitutional acts. It should take a broadly minimalist approach, only including acts on which there is clear cross-party political consensus.\*
- A process should be established for certifying new constitutional bills. We propose that the Parliamentary Committee on the Constitution should be given this responsibility.\*\*

## **3. Constitutional acts should be afforded additional protections to promote constitutional stability.**

- Constitutional acts should be protected from implied repeal – where a newer act of parliament automatically supersedes a previous one – so that they can only be repealed or amended if this is done explicitly on the face of a bill. All bills should be accompanied by a constitutional impact assessment setting out their implications for and compatibility with existing constitutional acts.
- Constitutional acts should only be amended by primary legislation. They should not be considered in scope of delegated powers that enable ministers to amend primary legislation (known as 'Henry VIII powers'). This should be established by convention and by changes to Office for Parliamentary Counsel guidance.

## **4. Parliament should establish a more extensive scrutiny process for constitutional bills to ensure proposals are thoroughly tested and attract cross-party support.**

- All constitutional bills should be published in draft and subject to pre-legislative scrutiny by the proposed Parliamentary Committee on the Constitution.\*\*\*
- Committee stage in the House of Commons should continue to take place on the floor of the House so that all MPs can take part in the debate. All constitutional bills should be put to an additional 'select committee stage' in the House of Commons, enabling the new Parliamentary Committee on the Constitution\*\*\*\* to take evidence and express a view on the bill, including publishing draft amendments where appropriate.

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\* If our recommendation to establish a Parliamentary Committee on the Constitution is not adopted, we propose that a cross-party committee should be established for this purpose.

\*\* Again if the new committee is not created, we set out several alternatives including certification by another parliamentary committee, the Speaker, or proposed by the government and subject to a vote on the floor of the House.

\*\*\* If the Parliamentary Committee on the Constitution is not established, pre-legislative scrutiny should be undertaken by other parliamentary committees such as the House of Lords Constitution Committee, and the House of Commons Public Administration and Constitutional Affairs Committee.

\*\*\*\* Or another select committee with a constitutional remit, if the Parliamentary Committee on the Constitution is not established.



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- Conventions on minimum timescales for the passage of constitutional bills should be established. We recommend a minimum of 26 sitting weeks between the introduction of such a bill and royal assent, with at least 13 weeks spent in each House.

#### **5. Government should clarify the role of the civil service and strengthen its capacity to give constitutional advice.**

- The civil service should be put on a statutory basis to clarify its role and responsibilities. The role of the cabinet secretary as the primary constitutional adviser should be made more explicit.
- The government should establish a permanent centre for constitutional expertise within the Cabinet Office. This should bring together key constitutional advisory functions – including advice on constitutional law, parliamentary procedure, intergovernmental relations and legislation – under the cabinet secretary. The government should be able to organise its constitutional policy functions as it thinks fit to best deliver its agenda, although as many constitutional policy proposals have cross-cutting implications, there is a strong case that these too should sit in the Cabinet Office.
- The centre for constitutional expertise should offer services to ministers and officials in government departments, including giving advice on constitutional matters, providing training and education on the constitution, and acting as a point of reference for questions on constitutional propriety.
- Where the cabinet secretary cannot assure ministers of the constitutional propriety of their proposals, they should be able to seek a ministerial direction. Ministerial directions should be deposited to the new Parliamentary Committee on the Constitution, to enable scrutiny of the policy, and to encourage ministers to consider the political consequences of proceeding.

#### **6. Constitutional guidance should be strengthened to provide more clarity about the functioning of the UK constitution.**

- The *Cabinet Manual* should be updated and reissued at the start of every parliament by the centre for constitutional expertise. The cabinet should endorse it at the first meeting after an election, and ministers should be expected to act in accordance with it.
- The new Intergovernmental Relations Secretariat – established by the 2021 Review of Intergovernmental Relations, and staffed by officials from all four governments of the UK – should be given explicit responsibility for maintaining all intergovernmental agreements and ensuring greater transparency.

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- The first task of the Parliamentary Committee on the Constitution should be to restate the UK's core constitutional principles. This should be a high-level list, similar to the seven 'Nolan principles' of public life. The principles should then be endorsed by a vote in each House.

**7. Public engagement should be integrated into processes of constitutional change to enhance the legitimacy of decision making and provide a level of political entrenchment.**

- There is established precedent that referendums should be held on certain constitutional questions. Where possible these should be held on specific detailed proposals that have been set out in legislation before the vote is held, rather than on general principles or ideas.
- The government should use deliberative exercises such as citizens' assemblies, citizens' juries and constitutional conventions to gain representative, informed and considered evidence of the public's views on constitutional questions.
- Where the government is contemplating constitutional change, it should consider commissioning deliberative exercises:
  - to establish principles to inform the development of a specific policy proposal within government and their subsequent scrutiny in parliament
  - where the government has decided to bring forward major constitutional change, to develop specific proposals for how this should be done (for example, proposals for a reformed second chamber) – these could then be translated into legislation and enacted by parliament and/or put to a referendum
  - to develop public information to be disseminated during a referendum campaign (for example, to explain different options for electoral reform and their strengths and weaknesses).
- Parliament should also consider commissioning deliberative exercises to inform its own scrutiny of legislation during its passage through parliament, or on other parliamentary matters; for example, rules and standards of MPs' behaviour.
- The government should establish a unit on deliberative engagement to build up knowledge and understanding around its use. The unit should advise on how and when different exercises should be used, and develop guidance on best practice.

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## **The case for action**

The UK is facing a crisis in trust in politics and political institutions. Recent political instability has undermined the UK's reputation as a stable democracy, damaging its international reputation and, as a consequence, its economic prospects. Action is urgently needed to reassert the UK's fundamental constitutional principles, establish them as a stable basis for the operation of government and reassure the public that they will be enforced.

Our proposals will help governments address emerging challenges in particular areas of the constitution. They will help strengthen the checks and balances on which the current system relies. They will renew the devolution settlement, injecting authoritative and independent analysis of the constitution into increasingly polarised debates between the UK and devolved governments, and providing additional protection for the legislation underpinning devolution. And they will help future governments deliver long-lasting constitutional change, ensuring that future reforms are better considered, more robustly scrutinised and command broad political and public support.

Constitutional policy should be driven by principles, not partisan interests. Governments may be tempted to act in what they perceive to be their own short-term interests, wary of taking action that may place checks on their power; they must remember that they will one day be in opposition. As we approach a general election, we hope this report and the proposals it puts forward, the culmination of 18 months of extensive research and thorough consideration by the Institute for Government and Bennett Institute for Public Policy, will be welcomed by all political parties that hold a genuine desire to improve the way the UK constitution works – for the government, for parliament and ultimately for the public.

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# Introduction

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The strengths and weaknesses of the UK's constitution have long been a source of considerable debate. Lacking a central, codified source and resting on the concept of parliamentary sovereignty, the UK constitution is an outlier internationally, with its historic reliance on the self-restraint of political actors rather than legal checks. Its core features have been viewed as either a blessing or a critical flaw.\*

Over the past few years, external events and domestic political turmoil have fuelled debates about its merits and flaws. The politically contentious decision to leave the European Union (EU) generated a clash between the ideas of parliamentary and popular sovereignty and stoked controversy about the appropriate balance of power between the UK's governing institutions.<sup>1</sup> On two occasions, the UK Supreme Court ruled to set limits on the power of the executive, including in response to Boris Johnson's attempt to prorogue parliament for five weeks in September 2019.<sup>2</sup> Decisions that the UK government made without the consent of the devolved legislatures raised questions about the nature of the territorial constitution,<sup>3</sup> with tensions particularly evident in Northern Ireland, where the UK's departure from the EU had profound implications for the Good Friday Agreement and the stability of the devolved institutions.

Subsequently, the UK government's response to the Covid pandemic heightened existing concerns about parliament's ability to hold ministers to account. The seismic public health threat posed by the virus also proved challenging for the UK's multi-level system of territorial governance.

Questions of ethics and integrity in politics have also been prominent in recent years. Boris Johnson's attempt to prorogue parliament, disregard for the *Ministerial Code*, willingness to break the law while in office and misleading of parliament were all examples of a prime minister who, in the words of his cabinet secretary, believed he had "a mandate to test established boundaries".<sup>4</sup> Not all of his misdemeanours were unprecedented;<sup>5</sup> but his premiership shone a light on existing problems within the UK's governing arrangements, and heightened the concern that there has been a steady erosion of the tacit norms on which government in the UK rests.

In a wider global context of deepening public suspicion of governmental institutions and heightened political polarisation,<sup>6</sup> the events of the past decade have placed the UK's constitution under immense strain, underlining the urgent need for serious thinking about the nature and trajectory of the UK's constitution.

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\* For a brief discussion of differing perspectives, see Douglas-Scott S and Tomkins A, 'Does Britain need a proper constitution?', *Prospect*, 2 April 2019, retrieved 5 September 2023, [www.prospectmagazine.co.uk/essays/42443/does-britain-need-a-proper-constitution](http://www.prospectmagazine.co.uk/essays/42443/does-britain-need-a-proper-constitution)

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## Our approach

Over the past 18 months, the Institute for Government and the Bennett Institute for Public Policy have conducted a joint review of the UK constitution, examining relationships between some of the core institutions of British government, the challenges facing its increasingly discordant territorial constitution, and ways of improving the engagement of citizens.<sup>7</sup> The main principle informing this project was the need for long-term, academically rigorous and politically impartial thinking about the UK's constitution.

Debate on the UK constitution has become increasingly polarised. Some see the events of recent years as supplying yet more evidence of the need to establish a written constitution, arguing that this would clarify the rules that underpin Britain's governance, enhance democracy and create a formal separation of powers as a barrier to executive overreach.<sup>8</sup> Conversely, others argue that recent events have demonstrated the ability of the UK's political constitution to rectify itself and punish actors who stray beyond accepted norms.<sup>9</sup> Advocates of this view are often concerned that judicial overreach remains the biggest problem in the operation of the UK constitution.<sup>10</sup> Others focus on institutional changes, such as electoral or House of Lords reform, as ways to change political incentive structures, offset executive overreach and create a more democratic and pluralistic political culture.<sup>11</sup> Proponents of this view do not necessarily reject the UK's political constitution but believe that reform is needed to ensure its better operation.

This debate extends beyond the pages of academic articles and think-tank reports. Competing interpretations of the UK's constitution have been weaponised in politics, most notably during the extended Brexit crisis, and there has been a notable division between what some term the 'Whitehall' understanding of the constitution, which centres on the merits of executive authority and discretion, and the 'Westminster' view, which stresses the need to restore the authority and role of parliament.<sup>12</sup> These deeply polarised debates have raised fundamental questions about the UK's constitutional arrangements. Throughout this project, we have endeavoured to engage widely with figures holding different constitutional perspectives, in a bid to understand the challenges that our constitution faces, while also seeking to develop independent and evidence-based perspectives on the issues under consideration.

We have also looked beyond our own borders to understand how constitutions elsewhere operate and consider what we can learn from other countries' experiences and institutional set-ups. Recognising the shared challenges facing democracies across the world, we have situated our work in the wider context of rising discontent with liberal democracy right across the world.<sup>13</sup> Typically, constitutional debate in the UK has an insular and overly exceptionalist character, both a consequence of its very distinctive constitutional arrangements and also a reflection of the assumption that, as one of the world's oldest democracies, the UK state has little to learn from elsewhere. But the UK's constitutional traditions, far from being unique, have much in common with some other countries – in particular with other 'Westminster' systems and other states that stress the political nature of their constitution – and there are important insights to be gained from comparative analysis.<sup>14</sup>

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## Our work so far

An expert advisory panel of constitutional practitioners drawn from across the UK – including figures from the worlds of politics (both the devolved and UK levels), the civil service, law and civil society – has guided the review. While members of our advisory panel do not necessarily subscribe to every recommendation from the review, their input has been invaluable in shaping both our approach and the conclusions we draw from it.

The review's primary outputs have been based on research we have conducted on several major constitutional questions. These include papers on:

- strengthening the UK's network of constitutional guardians
- how to empower parliament's ability to scrutinise the government
- the perennial issues of English governance in the context of devolution
- the constitutional consequences of electoral reform.

We also commissioned guest papers on a wide range of constitutional topics, including the future of the monarchy, the House of Lords, political parties, devolution and the relationship between the civil service and ministers. We drew on both academic and practical expertise, asking leaders in their fields to examine some of the key constitutional questions that our own research did not cover. We are very grateful to all our authors for their valuable contributions. We have also drawn on existing and ongoing programmes of work at the Institute for Government and the Bennett Institute for Public Policy.

Finally, we have sought to understand the diversity and nuance of constitutional debates across the UK, conducting four roundtables in Belfast, Edinburgh, Cardiff and Newcastle with a range of academics, current and former civil servants, journalists, former politicians and members of the private sector.\*

The review has identified and explored a number of potential reforms that could be made to specific institutions and to the relationships between them, and considered how these might improve the functioning of the constitution in key respects. Many of these, such as reform of the House of Lords or the electoral system, could be pursued alongside the proposals made here. But our overriding aim has been to keep in focus the wider constitutional system, as well as its constituent parts, and to promote a more informed and balanced understanding of its strengths and weaknesses. This is the subject of our final report.

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\* We have included a more detailed discussion of our various outputs in Annex 1, which readers may refer to should they wish to understand more about the wider project and the antecedents of our thinking.

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## **Outline of the report**

The report begins by setting out how we understand the UK constitution and what we believe are the key challenges it currently faces. The chapters that follow set out in detail seven key proposals, which are designed to address the main problems that we identify. We conclude by outlining why our proposals should be adopted, arguing that doing so would significantly strengthen Britain's constitutional arrangements by increasing the clarity of key aspects of the constitution, enhancing parliamentary scrutiny of constitutional matters and encouraging greater citizen engagement in constitutional questions.

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# The case for renewing the constitution

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## The UK's political constitution

There is a vibrant (and often heated) academic and policy debate on the definition and character of the UK constitution.\* The UK constitution is an outlier in international terms, with no codified set of fundamental or basic laws, and is the result of a process of broadly continuous historical evolution over a number of centuries.

The UK constitution is commonly depicted as a political, rather than legal, entity. Most famously articulated in the British context by J.A.G. Griffith in 1979, the idea of a political constitution is one in which politics, not the law, is the organising principle, and political mechanisms and conventions take precedence over legal constraints and rules.<sup>1</sup> The notion of a political constitution is, in the UK case, closely tied to the idea of parliamentary sovereignty, which means that, in practice, parliament can make or unmake any law (constitutional or otherwise) with a simple majority vote. This model of the political constitution sits in contrast with the legally enshrined constitutionalism of countries such as Germany and the United States, which is characterised by higher law, a Supreme Court and a fixed separation of powers.<sup>2</sup> A key distinction between these two models of the constitution is the ability of the judiciary to overrule parliament should legislation contravene a higher law.

The quarter century since the Labour Party took power in 1997 has been a period of considerable constitutional change in the UK. As constitutional expert Sir Vernon Bogdanor points out, Labour promoted a brand of constitutional modernisation centred around the establishment of a fixed bill of rights in the form of the Human Rights Act 1998, the devolution of power to Scotland and Wales and the establishment of a Supreme Court.<sup>3</sup> Under subsequent Conservative-led governments, there have been further momentous changes – most notably the UK's departure from the EU and also the establishment (and subsequent abolition) of fixed-term parliaments and the rules known as English Votes for English Laws (EVEL) in the House of Commons.<sup>4</sup>

However, while these constitutional changes have been significant and impactful, they have not fundamentally altered the nature and structures of the UK's constitution.<sup>5</sup> For example, the devolved institutions were established within the context of parliamentary sovereignty, their standing written into UK law.<sup>6</sup> The Human Rights Act does not empower the judiciary to override parliamentary decision making, but instead to exert political pressure on parliament (and government), through devices such as declarations of incompatibility.<sup>7</sup> And, far from paving the way to codification, new constitutional guidance documents such as the *Cabinet Manual* and *Ministerial Code*<sup>8</sup> increase the political incentives to adhere to unwritten norms and conventions,

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\* For a summary of these debates, see Taylor R.B., 'The contested constitution: an analysis of the competing models of British constitutionalism', Aberdeen University Research Archive, 2018, <https://files.core.ac.uk/pdf/1/222446991.pdf>



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rather than compelling constitutional actors to do so.<sup>9</sup> Parliament still maintains ultimate authority over the making or unmaking of any law; and it is the only true ‘veto player’ within the UK constitution.<sup>10</sup>

## Political checks and balances in the UK constitution

Unlike other constitutions that have a strict separation between branches of government, with each allocated clearly prescribed and legally limited powers, a dense network of *political* checks and balances underpins the UK’s constitutional system. In theory, these checks function in ways that set limits on the power of each institution, but in practice their effectiveness can vary depending on the political conditions in which they operate.

Within government, ministers can direct civil servants (within limits)\* to ensure that they are delivering government priorities, while advice from officials about legality or constitutional propriety should influence a minister’s decisions and actions. The judgment of individual ministers, and discussions with the prime minister or cabinet colleagues, can potentially serve as a check – and ultimately, ministerial resignations can affect a government’s course of action.

Parliament must approve certain government proposals, including all primary and some secondary legislation. Political parties can exert pressure on MPs and peers to deliver or oppose the government’s agenda, and scrutiny from select committees and individual backbenchers can be influential. Parliament can decline to support the government even when it commands the votes of a majority of MPs, as it did over Theresa May’s Brexit deal in 2019 and David Cameron’s decision to deploy troops in Syria in 2013. Even the threat of defeat can cause the government to rethink – as when the coalition government dropped its 2012 House of Lords Bill. Backbench MPs and peers can use parliamentary mechanisms such as debates and questions, and forums such as the Parliamentary Labour Party or the Conservatives’ 1922 Committee, to exert pressure on the executive. Backbench Conservative MPs effectively used such tactics to convince the government to hold a referendum on EU membership, for example. Ultimately, the survival of the government depends on its ability to command the confidence of the House of Commons.

The two Houses of Parliament provide checks on each other, with the Lords frequently asking the Commons to ‘think again’ by proposing amendments to bills. The Commons can then choose whether to accept these proposals or not. And quite often a government will make concessions in response. On constitutional matters, interventions from experienced or high-profile peers, such as former ministers or judges, can act as checks, as can detailed and authoritative scrutiny through House of Lords committees, including the Constitution Committee, the Delegated Powers and Regulatory Reform Committee and the Secondary Legislation Scrutiny Committee. All of these bodies have at times been influential in ensuring that legislation is designed according to established constitutional standards.

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\* *The Civil Service Code*, first published in 1996, sets out its core values – integrity, honesty, objectivity and impartiality – as well as expected standards of behaviour, which include to “comply with the law and uphold the administration of justice”. HM Government, *The Civil Service Code*, 16 March 2015, [www.gov.uk/government/publications/civil-service-code/the-civil-service-code](http://www.gov.uk/government/publications/civil-service-code/the-civil-service-code)

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The powers of the monarch are limited by convention. The King exercises prerogative power on the advice of, or in a few cases at the request of, ministers – including when granting royal assent to bills, or granting the prorogation or dissolution of parliament. For their part, ministers are compelled not to risk compromising the impartiality of the monarch by ensuring that their advice does not draw him into political controversy. And this convention can also serve as an important political check.

The courts and judiciary play their part in the system of political checks and balances, by ensuring that laws are implemented in the way that parliament intended. Parliament retains the ability to pass new legislation if the government believes that judgments do not reflect the way in which it believes the law should operate. While the Human Rights Act 1998 does not allow the judiciary to overrule parliament, it does permit rights issues to be referred back to parliament for reconsideration via declarations of incompatibility.<sup>11</sup> One ex-minister described such declarations as like “an unexploded bomb in the middle of a minister’s room”.<sup>12</sup>

The devolved governments in Scotland, Wales and Northern Ireland can object to UK government policies in various ways, including through intergovernmental forums, through public comment, by launching a formal dispute or, in certain circumstances, through recourse to the Supreme Court. In theory, a decision of one of the devolved legislatures to refuse legislative consent for a UK bill affecting devolved matters can put pressure on the UK government to address its concerns.<sup>13</sup> Local leaders and metro mayors can also influence the government and parliament through formal and informal channels. A prominent example of subnational governments placing effective political pressure on the executive was in the passage of the European Union (Withdrawal) Bill, when the Welsh government managed to secure the UK government’s commitment to the ‘common frameworks’ process after publicly criticising the initial legislation.<sup>14</sup>

The network of checks and balances within the UK constitution extends beyond the UK’s core institutions. As we set out in our paper *Constitutional Guardians*, there are numerous ‘constitutional watchdogs’ that have a role in monitoring the constitution.<sup>15</sup> These include the Electoral Commission, the Committee on Standards in Public Life, the National Audit Office and the commissioner for public appointments, to name but a few.\* Political parties themselves act as a political constraint on executive power. Party members can provide a check on their parliamentary party, influence policy through internal party mechanisms and through leadership elections, determine the choice of the next prime minister.

Civil society groups and interest groups can also provide a check on government by running campaigns and lobbying decision makers on particular policy matters. The media also play a role in holding decision makers to account and drawing issues to the attention of the wider public.

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\* For a full account, see Thimont Jack M and Pannell J, *Constitutional Guardians*, Institute for Government and Bennett Institute for Public Policy, 2022, [www.instituteforgovernment.org.uk/sites/default/files/publications/constitutional-guardians.pdf](http://www.instituteforgovernment.org.uk/sites/default/files/publications/constitutional-guardians.pdf)

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The public are, in theory, the ultimate check on the core institutions of British government, exerting pressure directly on their representatives and ministers in the UK and devolved governments through general elections, recall petitions and referendums, but also indirectly, through petitions and protests. Public opinion as determined through opinion polling and focus groups can act as a key constraint on, or a stimulus for, political action.

## **Problems with the functioning of the UK constitution**

While the UK has a complex network of political checks and balances, we believe that recent events have shown that these checks and balances are not robust enough. In the UK system, a government commanding a majority in the House of Commons faces few legal constraints, and has regularly been able to evade or ignore the political checks that exist within parliament and beyond. Key features of this system therefore require reform and renewal. There are three key problems with the UK's political constitution as it currently operates.

### **Weaknesses in the system of checks and balances have been exposed**

The principle of parliamentary sovereignty means that, in legal terms, parliament has the ultimate authority within the governing system. As indicated above, the main constraints on it are political ones, which work so long as actors in different institutions are able to exercise political pressure, within limits, and key constitutional actors are willing to be constrained by the norms and conventions that govern the UK constitution. The UK's constitution is often understood to rely on what Peter Hennessy calls the ethos of "good chaps".<sup>16</sup> On this view, the UK constitution has historically been self-regulating: political actors know the unwritten rules and generally abide by these accepted norms. Equally, when actors do contravene established rules and conventions, they are supposed to face political (as opposed to legal) consequences. But in recent years, constitutional actors have shown a willingness to push the boundaries of the constitution much further, and in doing so have raised questions about the adequacy of the system of checks and balances to constrain political power.

Ministers were willing to override international law (in the form of the UK–EU Withdrawal Agreement) over the implementation of the Northern Ireland protocol.\* Despite resignations from senior civil servants, interventions from former prime ministers and concern that the international community expressed, legislation easily passed the House of Commons in just over a month, with not a single rebellion from the Conservative backbenches. The UK parliament placed new constraints on the exercise of devolved powers, despite strong objection from the devolved governments and the devolved legislatures' refusal of legislative consent. Again, this legislation passed quickly through the House of Commons, with limited debate about its broader implications for devolution – or how the concerns of the devolved governments might be addressed.

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\* Initially in the United Kingdom Internal Market Bill and later in the Northern Ireland Protocol Bill, which both initially intended to disapply parts of the European Union (Withdrawal Agreement) Act 2020 and override the UK–EU Withdrawal Agreement.

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Equally, when the government has not had a majority, parliament has shown willing to contravene accepted practice – most notably when a decision by the then Speaker of the House of Commons, John Bercow, enabled MPs to take control of the order paper and pass a bill (known as the ‘Benn Act’) requiring the government to seek an extension of the period for negotiating the UK–EU Withdrawal Agreement, despite vocal opposition from the government and various constitutional experts that the Speaker was overstepping his constitutional role.<sup>17</sup>

The possibility of stretching constitutional norms some way beyond their generally accepted content applies also to other powerful institutions in the British system. The relationship between the House of Lords and the House of Commons is governed by convention, and for the most part peers have exercised considerable self-restraint in choosing to defer to the primary chamber, particularly on issues to which the Salisbury Convention applies. But it would certainly be feasible for peers to use the full extent of their power and significantly delay the government’s agenda. Some authorities argued that they overstepped the Salisbury Convention with their amendments to the European Union (Withdrawal) Act 2018.<sup>\*18</sup> And the risk of a major, divisive confrontation over the Lords’ power could well arise if reforms to the second chamber were adopted, and the House came to see itself as more legitimate than it currently does. Similarly, the powers of the monarch are primarily constrained by convention. They too could, in theory, be exercised in constitutionally inappropriate ways. For example, opponents of the Benn Act proposed that the Queen should withhold royal assent.<sup>19</sup>

There are several factors that have contributed to the weakening of a sense of self-restraint in relation to constitutional norms on the part of government and politicians. First, questions of constitutional process and propriety have often been seen as secondary to broader policy aims, and this deep-seated trend appears to have been amplified in recent years. Political actors have been increasingly willing to contravene key conventions or deviate from accepted practice to deliver their preferred outcome. While conventions are flexible, and evolve and change over time, too little consideration is given to the consequences of breaching them for the health and legitimacy of the constitution as a whole. During the Brexit process, those on either side of the debate were guilty of weaponising constitutional processes and procedures to achieve specific policy ends. There are few points in the UK political system to require actors to consider in a robust way the specific constitutional implications of their actions, or the proposals they are being asked to consider.

Second, those with the power to hold decision makers to account, such as MPs, the media and the public, may lack the understanding or confidence to challenge actions that deviate from democratic norms and practice. Or perhaps, they may not even see this as their role. This can lead to action going unchallenged, and can therefore permit governments to shape the constitutional order and increase their power without enough political scrutiny.

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\* That the House of Lords will not block a bill that was set out in the governing party’s manifesto, see Beamish D, ‘What is the Salisbury Convention, and have the Lords broken it over Brexit?’, The Constitution Unit, 12 June 2018, retrieved 5 September 2023, <https://constitution-unit.com/2018/06/12/what-is-the-salisbury-convention-and-have-the-lords-broken-it-over-brexite>

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In recent years, notable weaknesses in the system of checks and balances have been exposed. To renew and reinforce the political constitution, we need to ensure that actors in the system have the authority, the legitimacy, the opportunities and the understanding to provide meaningful checks in the system.

### **Existing processes for constitutional change do not recognise the constitution's special character**

All codified constitutions set out processes for amending the constitution, usually involving special procedures, requirements or processes in terms of legislative decision making.

In the UK, the only formal procedural requirement for changing the constitution is a simple majority in parliament. On this model, constitutional change can happen without any broad political consensus being achieved or adequate parliamentary scrutiny. As Tim Bale argues in his paper, *Britain's Political Parties and the Constitution*, published as part of our Review of the UK Constitution, political parties are “the ghosts in the machine” of the UK constitution, with the case for constitutional change often driven by short-term political incentives rather than robust principles or long-term vision.<sup>20</sup> As a result, some aspects of the UK constitution remain highly contested, with some reforms associated with a government being reversed or rolled back by the next, most prominently the Fixed-term Parliaments Act 2011 and the process for English Votes for English Laws (EVEL). There are even examples of changes to the constitution being tied to specific ministers – for example, the proposed Bill of Rights, which would have altered the application of the Human Rights Act 1998, was closely tied to the fate of the then justice minister, Dominic Raab.<sup>21</sup>

The lack of long-term thinking about the UK constitution is a closely associated weakness. Philip Rycroft has highlighted the “erratic” evolution of the constitution, arguing that major constitutional changes have taken place without adequate consideration of their knock-on implications for other parts of the governing system. Devolution to Scotland, Wales and Northern Ireland was initiated without enough consideration as to its implications for the UK's central institutions.<sup>22</sup> As a result, mechanisms for managing intergovernmental relations are underdeveloped and are still maturing two decades after these reforms first happened.

Furthermore, when and how the public should be involved in approving major constitutional changes remains somewhat unclear in the British model. The use of referendums is an established practice – particularly in relation to the introduction of, and changes to, devolved governance in different parts of the UK – but has also become more controversial in the light of the polls held on Scottish independence in 2014 and the UK's membership of the EU in 2016. Critics are quick to detect “political pragmatism rather than constitutional principle”<sup>23</sup> behind the decisions taken to hold these votes, and the lack of clarity about the circumstances in which they should be held has added considerably to the deep political divisions associated with both. Equally, other questions of similar constitutional significance, such as whether to adopt the Maastricht or Lisbon EU treaties, were not put to a public vote at all.

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There is, we suggest, a good case for concerted focus on the processes of constitutional change, and the role in particular of parliament and the public in approving it.

### **The lack of constitutional clarity in the UK system is problematic**

The lack of clarity within the UK system is destabilising for other reasons too. The UK constitution consists of a range of sources, including laws, treaties, guidance documents, parliamentary procedure, norms and conventions. Rather than establishing clear and binding rules, the UK constitution requires actors to advance interpretations of constitutional norms through reference to precedent, established practice and broad – usually ill-defined – principles.

These characteristics may have their merits, encouraging questions of constitutional propriety to be discussed in the political arena rather than being determined in a court of law. But this system also means that constitutional actors can interpret core principles at the heart of the constitution in ways that very clearly suit their political objectives, even if these deviate significantly from accepted understandings of political conventions and norms. For example, in the final days of his premiership Boris Johnson claimed that he could not be deposed because he had a personal mandate from the electorate, even though in the UK's parliamentary system voters select MPs, not the prime minister.<sup>24</sup> The first minister of Scotland, Humza Yousaf, has claimed that a Scottish National Party (SNP) majority in the next general election could constitute a mandate for Scottish independence – despite clearly established precedent that a referendum would be required.<sup>25</sup>

While these are perhaps some of the most egregious examples, in other cases different actors hold legitimate but differing constitutional understandings or interpretations. But in the absence of any mechanisms for managing such disputes, or any body empowered to express an independent or authoritative view, the will of the executive will usually prevail.

This system also may serve to stymie productive constitutional debate. Without a shared understanding of constitutional principles, rules and norms, debates on constitutional issues are often conducted on the grounds of party-political interests, rather than being grounded in an understanding of constitutional principle and history. Greater clarity on the nature of the UK's constitution is a much-needed step towards addressing these trends.

### **Should the UK have a written constitution?**

One of the most commonly supplied answers to these long-standing problems is for the UK to adopt a single written document setting out its core constitutional principles, a proposal that has a long pedigree in British political life.<sup>26</sup> Its proponents argue that a single written document would bring coherence and clarity to the UK's political system, and would set enforceable legal limits on the power of the state.<sup>27</sup>

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At present, there is little evidence of much public interest in a written constitution. There is no significant campaign for such a documented constitution (although there has been in the recent past) and neither of the two major political parties endorses the idea. International examples, such as the repatriation of the Canadian constitution under the former Canadian prime minister, Pierre Trudeau, suggest that such an undertaking would become the overriding purpose of a government that committed to develop such an entity for a significant period of time.<sup>28</sup> Closer to home, recent debates over Brexit and Scottish independence have shown how constitutional contestation can lead to wider paralysis in the legislative agenda. Equally, it is clear that a written constitution would not automatically solve many of the weaknesses in the UK's governing system. Nearly all established democracies are experiencing fairly similar challenges in terms of the erosion of democratic norms and conventions. In this respect, addressing issues of political culture and the behavioural norms of politicians is a priority, and it remains open to question whether systems with written constitutions are more effective in addressing these issues.<sup>29</sup>

Ultimately, constitutions of any kind only have authority because they command widespread political acceptance and broad public legitimacy. For this reason, a well-functioning constitution must reflect a country's values and history and be understandable to its citizenry. Moving away from a system based on parliamentary sovereignty, developed over many centuries, to one based on higher law and judicial enforcement would be a major undertaking, which would require a huge exercise in public engagement and deliberation. There are, we would suggest, important changes and innovations that can be introduced within the UK constitutional model in the nearer term, and which – if implemented properly – would have beneficial effects on its democratic life.

The flexibility of the UK constitution at times creates challenges, but it is also one of its greatest strengths. In the absence of formalised, rigid procedures for constitutional change, the UK's constitution can adapt to circumstances and change according to shifting political contexts and norms. But for its benefits to be realised, some of the increasingly apparent weaknesses of the British model need to be addressed.

### **Principles for strengthening the UK's political constitution**

The principles that we have used to frame our thinking about the most pressing constitutional reforms that are required to address these weaknesses are set out below.

- **Strengthen parliament's role in the constitution.** Parliamentary sovereignty is the UK's central constitutional principle, and enforcement of the constitution is bound to be subject to political dynamics and processes. Parliament's role is pivotal in providing political checks on the executive and there is a strong public interest in making sure that it has both the opportunities and resources to fulfil this function.

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- **Support and reinforce the network of checks and balances.** The best way to safeguard democratic norms and conventions is through ensuring that there are meaningful checks and balances across branches and at differing geographical levels. Rather than rely on one document, one body or one person, a network approach should ensure a more robust system of countervailing authority. Those with a role in protecting the constitution should be empowered to recognise that they have to play this role, and have enough authority, accountability and independence to perform it effectively.
  - **Increase constitutional understanding.** It is desirable to pursue greater clarity on constitutional principles, norms and rules. Constitutional information and analysis should be made more accessible to parliamentarians, policy makers and the public so that they can more easily hold decision makers to account.
  - **Create mechanisms for managing disagreement around different interpretations of the constitution.** There is an imperative to ensure authoritative and impartial input into political debates on the constitution, and for disputes over core principles to be resolved on a more impartial basis than is currently the case. Such mechanisms should endure beyond the terms of any particular government to provide institutional memory and constitutional consistency.
  - **Ensure there are robust processes for considering and examining constitutional change.** Proposals for constitutional change should be well developed, thoroughly scrutinised and subject to sufficient consideration. But the UK constitution should also aim to maintain enough flexibility so as not to erect insurmountable barriers to reform.
  - **Encourage politicians to use mechanisms for building political support and public engagement into processes of constitutional change.** To ensure the legitimacy and stability of the constitution, policy makers should engage the public in processes and questions of constitutional change.

Our aim is to renew the UK's political constitution, rather than make it unassailable and resistant to all potential future challenges. The robustness of the constitution depends in large part on the health of the broader democratic and constitutional culture. Our recommendations aim, as far as possible, to promote and encourage such a culture.

The remainder of this report set outs our proposals for recommendations to improve the functioning of the UK's constitution.



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# 1. Establishing a new constitutional body

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To address the problems outlined in earlier sections of this report, we propose the establishment of a new constitutional body. This would have the following purposes and functions.

**To provide a central source of constitutional authority and knowledge.** As we argued above, there are currently a large number of dispersed sources of constitutional understanding in the UK system. Many actors with a role in interpreting constitutional principles may not consider this their primary function or be entirely comfortable with the role – for example, the civil service. Others are limited by their perceived lack of legitimacy, such as the House of Lords. Different actors have different interpretations of the constitution, often influenced by broader political aims, and there are few independent and authoritative sources of constitutional knowledge and expertise on which government and politicians can draw.

A new body could help build institutional memory and understanding of constitutional principles, precedents and their evolution, and give authoritative opinions on constitutional matters. This could include, for example, whether conventions, such as the Sewel Convention\* or the Salisbury Convention, had been broken, injecting impartial expertise and understanding into potential disputes between different constitutional actors.

We do not propose that such a body would have the ability to make binding judgments (this quasi-judicial function would challenge parliamentary sovereignty), but it could feed directly into the legislative process in the UK parliament, and provide third-party advice on intergovernmental disputes as provided for in the 2019 Review of Intergovernmental Relations.\*\* It would also inform wider constitutional debate in parliament, in the media and among the public, strengthening the UK's weakened system of checks and balances.

**To provide long-term and holistic thinking on the constitution.** The body would help ensure that proposals for constitutional change are well developed and that the knock-on implications for other parts of the constitution are thoroughly examined. Historically, governments have established temporary royal commissions or expert advisory groups on issues such as voting reform, House of Lords reform and reform of the Human Rights Act 1998. A standing cross-party body could conduct exercises

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\* That the UK parliament will 'not normally' pass legislation on devolved matters without the consent of the devolved legislatures, see Paun A, Sargeant J, Nicholson E and Rycroft L, 'Sewel Convention', Institute for Government, 16 January 2018, retrieved 5 September 2023, [www.instituteforgovernment.org.uk/explainer/sewel-convention](http://www.instituteforgovernment.org.uk/explainer/sewel-convention)

\*\* See Cabinet Office and Department for Levelling Up, Housing and Communities, 'The review of intergovernmental relations', 2022, [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1046083/The\\_Review\\_of\\_Intergovernmental\\_Relations.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1046083/The_Review_of_Intergovernmental_Relations.pdf), p. 17.

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of a similar nature, and play an advisory role as proposals are developed and then implemented. Such a body would be well placed to consider the implications of proposals for constitutional change for the operation of the constitution as a whole.

**To provide detailed and expert constitutional scrutiny.** Another key role would be scrutiny of constitutional legislation. In Chapter 4, we recommend an enhanced process for scrutinising constitutional bills and set out a role for a committee in conducting pre-legislative scrutiny of draft legislation, and at committee stage in the House of Commons. Working with existing committees, an expert constitutional body could also consider other constitutional issues related to legislation, such as the use of delegated legislation, and implications for the devolved governments.

### **There is no UK body currently able to perform these functions**

As we argued in our paper *Constitutional Guardians*, the UK has a large network of bodies that play an advisory role in relation to the constitution.<sup>1</sup> These include the Committee on Standards in Public Life (CSPL), a public body that “advises the Prime Minister on upholding ethical standards in public life”, and several parliamentary committees with a role in constitutional scrutiny, most notably the House of Lords Constitution Committee, the House of Commons Public Administration and Constitutional Affairs Committee (PACAC) and the Joint Committee on Human Rights.

While the work that these bodies undertake is influential and important, none of them performs the role we envisage for a centralised and authoritative constitutional body. The CSPL has been effective in bringing ethical standards to the forefront of British political life, bringing forward recommendations for legislation to regulate election spending, to establish an Electoral Commission and to create the role of parliamentary commissioner for standards, for example.<sup>2</sup> But its remit lies firmly in the realm of public standards and it cannot speak to wider constitutional issues. Furthermore, the existence of a constitution-focused committee in each House has prevented the emergence of a single authoritative constitutional body in parliament. The House of Lords Constitution Committee is a highly respected body in constitutional circles but, like other Lords committees, the upper house’s lack of democratic legitimacy and profile inevitably dilutes its impact, diminishing its ability to gain credibility with the public and the media. Meanwhile, PACAC has a broad remit covering the civil service and the Parliamentary and Health Service Ombudsman, and therefore has less capacity to devote specifically to constitutional questions.

The Supreme Court has made a series of high-profile judgments over the past decade, including declaring Boris Johnson’s attempt to prorogue parliament unlawful. But such interventions have provoked a backlash about whether the judiciary has too great a role in the governing system. A body that could intervene to help resolve disputes within the political realm could help prevent difficult and contentious constitutional matters ending up in the courts.

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Several constitutional experts have argued for a new body to fulfil these constitutional functions. Andrew Blick and Peter Hennessy maintain that such a body would allow parliament “to take fuller responsibility for upholding its constitutional standards”.<sup>3</sup> In a piece for our Review of the UK Constitution, Philip Rycroft proposes a body that could act as a “constitutional conscience” for the government and advise it on how to make more effective, long-term constitutional policy.<sup>4</sup> And the former Supreme Court judge Lord Jonathan Sumption has claimed that “we need a constitutional arbiter” that can interpret and adjudicate on the misuse of the royal prerogative.<sup>5</sup>

## **Other countries have established constitutional bodies**

In countries with a codified constitution and a strong tradition of judicial review, such as Germany and the United States, the courts play the role of ultimate arbiter of the constitution. These systems, which exist in a majority of countries worldwide, have constitutional courts that sit above parliament and can override the decisions of the legislature should they deem them unconstitutional.

Other countries, such as New Zealand, the Nordic states and the Netherlands, have systems that are closer to the UK model, particularly in terms of the centrality of parliament in constitutional decision making and wariness towards the idea of judicial supremacy.<sup>6</sup> A number of these countries possess a constitutional body that is independent of government and expresses evidence-based perspectives on constitutional issues that are seen as legitimate.<sup>7</sup> Examining how these bodies help strengthen constitutions under parliamentary sovereignty is a worthwhile task for those interested in constitutional renewal in the UK.

These bodies take different forms internationally. Finland and Sweden have parliamentary committees on the constitution. Several European states (including Belgium, France, Greece, Italy, Luxembourg, the Netherlands and Spain) have councils of state – independent advisory bodies that consult with the government (and in some cases parliament) on the constitutional standing of bills as they pass through the legislative process.<sup>8</sup> These bodies provide impartial constitutional and legal advice, intended to ensure that the government does not violate the national constitution in its legislation. Usually, they possess only ‘soft’ advisory powers and cannot overrule laws, a feature that means they do not challenge the core tenets of parliamentary sovereignty, although these countries all have constitutional courts with the power to override constitutional law.

In Boxes 1 and 2 we consider two particularly useful models in a bit more depth: the Council of State in the Netherlands and the Finnish Constitutional Law Committee.

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### Box 1 Council of State – the Netherlands

The Netherlands' central constitutional arbiter is the advisory division of the Council of State – an independent body that advises government and parliament on the constitutional standing and legality of bills before they become law.\* This is essentially a constitutional 'preview' body, which helps scrutinise legislation for constitutional discrepancies in a political system that does not incorporate constitutional review by courts or strong constitutional committees in parliament.<sup>9</sup> Its role is simply to issue advice to the government, which is not required to adhere to its analysis or judgments but is obligated to justify any departures from its advice in writing. Both the advice and the reaction of the government are made public.

The Council of State consists of two separate divisions: an administrative division, which is the country's highest administrative court; and an advisory division, which is responsible for advising the government on legislative and constitutional matters. It was initially established as an advisory body to the Dutch monarch (not unlike the Privy Council in the UK) but has since evolved to advise government and parliament. As a matter of tradition, the King is the president of the Council of State but, for all practical purposes, the vice-president (usually an eminent constitutional expert) assumes this role. The advisory division contains 15 members who are appointed for life by government via an open application process and members tend to be highly experienced in the fields of politics, law and academia.

The advisory division is, as its name suggests, an advisory body. It delivers opinions on the suitability, feasibility and desirability of bills (proposals in general coming from government but which could come from the lower house of parliament as well), as well as critiquing their technical quality and compatibility with the constitution. It performs this role at the pre-legislative stage, allowing it to have an impact on legislation and promote dialogue at an early point in its development. If it approves a bill, it may proceed to the next stage of the legislative process, but if it finds defects, the government must reconsider and re-debate the bill before continuing with the process. Even though the advisory division possesses no formal veto powers, the legal necessity for the government to respond to its findings in writing creates an additional layer of constitutional dialogue, which often facilitates a wider political debate and level of engagement.

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\* For more in-depth discussions of the Dutch Council of State, see De Visser M, *Constitutional Review in Europe: A comparative analysis*, Bloomsbury, 2015, pp. 52–4; De Poorter JCA, 'Constitutional review in the Netherlands: a joint responsibility', *Utrecht Law Review*, 2013, vol. 9, no. 2, retrieved 5 September 2023, <https://utrechtlawreview.org/articles/10.18352/ulr.229>

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## Box 2 **Constitutional Law Committee – Finland**

In Finland, constitutional review is provided by a parliamentary Constitutional Law Committee (PeV).<sup>\*</sup> Its role is to assess the “constitutionality of legislative proposals” and to determine “their relation to international human rights treaties”.<sup>10</sup> The opinions of the committee are treated as binding and are typically adopted by government, making it essentially the ultimate arbiter of constitutional affairs.

The committee consists of 17 members of Finland’s parliament (which is unicameral), who are elected by secret ballot for a single parliamentary term (but can be re-elected). The committee membership reflects the make-up of parliament but Finland’s proportional electoral system means that the committee is not dominated by a single governing party and usually works by consensus. Bills can be referred to it by the chancellor of justice (the government’s chief legal officer), by the Speaker’s council or by another committee. The committee presents detailed legal opinions or reports on bills and determines whether they are constitutionally compatible, by considering the advice of experienced academic and legal advisers.

A ‘weak’ form of judicial review by courts remains possible in Finland but it is intended to be confined to occasions on which the PeV has failed to foresee something in its review, when the constitution has changed since the committee scrutinised the bill or when bills contradict EU law. Like in the UK, courts do not possess a ‘strike-down’ power but they are obliged to give primacy to the constitution if the application of an act is in “evident conflict” with the constitution. They do so sparingly.

One of the major benefits of this model is that constitutional review occurs before the bill becomes law. Problems with bills are caught at an early stage and are then subjected to parliamentary debate or a rethink by government. But because the committee is parliamentary, there is the possibility for constitutional issues to become politicised, which has been highlighted as a growing problem in recent years.

These two models demonstrate some of the kinds of value that a constitutional body can add to a political constitution and highlight important issues to bear in mind when thinking about how such a model could apply in the UK. But both the examples we have given are of constitutional bodies that tend to take a technical and legalistic approach to the constitution, assessing the compatibility of legislation or government activity against a single codified document. In the UK, where the constitution consists

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<sup>\*</sup> For more in-depth discussions of the Finnish Constitutional Law Committee, see Tuori K, ‘Constitutional review in Finland’, in von Bogdandy A, Huber P and Grabenwater C eds, *The Max Planck Handbooks in European Public Law: Volume III: Constitutional adjudication: Institutions*, Oxford University Press, 2020; Ojanen T, ‘Finnish constitutional exceptionalism: the pluralist system of constitutional review combining ex ante and ex post functions of review’, in Granat M ed, *Constitutionality of Law without a Constitutional Court*, Routledge, 2023.

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of a very wide range of sources, both written and unwritten, the role of a constitutional body would be more complex and potentially contestable. Nor would such a body benefit from legitimacy born of longevity – the perceived legitimacy of both the Dutch Council of State and the Finnish Constitutional Law Committee is something that has built up over time (they were established in 1531 and 1906 respectively). If an equivalent body were to be established in the UK, consideration would need to be given to how best to build its legitimacy from the ground up.

### **What form should a UK constitutional body take?**

A new constitutional body in the UK might take a number of different forms. Philip Rycroft and Dawn Oliver have (separately) proposed an extra-parliamentary body, composed of expert members independent of government – similar to the council of state model.<sup>11</sup> Others have proposed a parliamentary model such as a joint committee, made up of MPs and peers, and some have proposed combining the two.<sup>12</sup> Each option has strengths and weaknesses.

A non-parliamentary commission could include a wide range of experts in its membership, and would not be limited to sitting MPs and peers. It could draw on senior civil servants, judges, ministers, parliamentary clerks, academics and civil society leaders. It would be more independent than a parliamentary body, and more removed from party politics, so it would likely be perceived as more impartial. And it would probably be better resourced than a parliamentary committee. Total spending on the select committees team in the House of Commons, which supported 47 committees, was £18.2 million in 2021/22, compared with £98 million for the National Audit Office, for example.<sup>13</sup>

However, because the key to the success of a new constitutional body would be its perceived legitimacy, and given the significant backlash that has emerged in political life against expert advisory bodies, there is a risk that a non-parliamentary body could be open to political challenge from the outset. Equally, the lack of a direct link to the parliamentary process might limit the extent to which MPs and peers use its advice. A public body of this kind would also be vulnerable to changes to its remit, resourcing and independence. For example, in response to government concerns about the operation of the Electoral Commission, the Elections Act 2022 required the commission to “have regard” for a strategy published by the government, which the commission argued would compromise its independence.<sup>14</sup> While noting the strengths of this model, we do not think it would be appropriate as a constitutional body for the UK.

Instead, **we recommend that the UK parliament should establish a new Parliamentary Committee on the Constitution (PCC)**, with membership drawn from both Houses of Parliament, aligning more comfortably with the principle of parliamentary sovereignty. Such a committee would command greater political legitimacy, drawing on the democratic accountability of its MP members, and benefit from the expertise of members from the House of Lords. Although such a committee would be less independent from day-to-day politics than an external commission, smart institutional design could prevent it from being perceived as partial.

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Situated within parliament itself, a joint committee of this kind would be well placed to influence parliamentary proceedings, both through its formal powers but also by enabling members to build support for the committee's position among their colleagues. While differing from our proposed committee by virtue of its investigative, verdict-reaching role, the recent Privileges Committee investigation into Boris Johnson's misleading of parliament showed how a cross-party committee process can ensure accountability and create political pressure in response to unconstitutional behaviour.<sup>15</sup>

Given the fundamental importance of constitutional affairs to democratic life, the Parliamentary Committee on the Constitution should have powers beyond those of a standard select committee, as we set out in detail below, but these should not extend to a quasi-judicial function or a formal right to veto constitutional proposals.

The committee should also have resources beyond a normal select committee to enable it to provide detailed, impartial and expert analysis, and to make evidence-based and authoritative judgments on constitutional issues. Here, the relationship between the House of Commons Public Accounts Committee and the National Audit Office provides a useful model (we explore this in greater detail below). Therefore, we argue that **the Parliamentary Committee on the Constitution should be supported by an Office for the Constitution.**

The remainder of this chapter considers how these dual bodies would be constituted and operate.

### **Parliamentary Committee on the Constitution**

We propose the establishment of a joint committee – the Parliamentary Committee on the Constitution (PCC), which draws in some respects on the model that the Joint Committee on Human Rights supplies (see Box 3). We propose amalgamating PACAC's constitutional responsibilities with those of the House of Lords Constitution Committee, with the intention of combining the democratic legitimacy of the former with the expertise and established reputation of the latter. We believe that combining the two committees would create a powerful voice in parliament, which would enhance consideration of the constitution among MPs and peers.

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### Box 3 **Joint Committee on Human Rights (JCHR)**

Founded in 2000 after the passage of the Human Rights Act 1998, the JCHR was envisaged as part of a dispersed form of rights protection that involved the executive, legislature and judiciary working together.\* It consists of 12 members who are appointed from the House of Commons and House of Lords. As it is designed to reflect the political constellations across both Houses, it does not usually have a majority from the governing party. It seeks to fulfil its mandate by scrutinising bills for their compatibility with human rights legislation, undertaking post-legislative scrutiny of the application of laws, and holding the government to account when it does not address human rights concerns raised by the JCHR itself, the courts or third parties.

Aileen Kavanagh has pointed out that although the establishment of the JCHR may not appear to have had a significant impact on government legislation, it has helped to foster a 'culture of rights' by bringing human rights to the forefront of parliamentarians' minds (although others have noted that such a culture is precarious).<sup>16</sup> Even when its analysis and recommendations are ignored, its status as a 'reason-demanding body' can create an important political challenge for the government and may generate a deterrent effect so that the government becomes more conscious of human rights issues in the future.

A new constitutional body could have a similar effect – generating a greater focus on constitutional matters in the two Houses of Parliament and seeking to engage politicians from all parties.

### **Approach**

The uncodified nature of the UK constitution means that the approach of such a committee would need to differ from that of bodies in democracies that rest on single constitutional documents. Effective scrutiny and authoritative advice and judgments would require the committee to develop standards by which to measure the constitutional implications of legislation or government decisions.

The PCC may want to build on the approach that the House of Lords Constitution Committee takes – it uses a precedent-based approach, drawing on a deep knowledge of the UK's constitutional norms and traditions to assess whether legislation is deviating from established precedent.<sup>17</sup> The committee also relies on its previous writings and analysis to inform future decisions. This is similar to the model that the Finnish Constitutional Law Committee adopts and would allow a new constitutional body to build established precedents that would become embedded within parliament's institutional memory to help ensure consistency over time.<sup>18</sup>

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\* For a more in-depth analysis of the role of the JCHR, see Kavanagh A, 'The Joint Committee on Human Rights: a hybrid breed of constitutional watchdog', in Hunt M, Hooper HJ and Yowell P eds, *Parliaments and Human Rights: Redressing the democratic deficit*, Hart Publishing, 2015.



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The PCC might wish to publish a set of constitutional principles that it would use as a guide for its analysis of constitutional matters. We explore the idea of this approach in Chapter 6.

## Composition

**The size of the committee.** The JCHR has 12 members, not dissimilar in size to a House of Commons select committee. There are also examples of larger committees designed to ensure that a greater diversity of opinions are represented – the National Security Strategy Joint Committee currently has 22 members (10 from the Lords and 12 from the Commons). Ultimately, there is a trade-off between size and representation: larger committees find it harder to reach consensus on difficult issues, but can allow for a wider range of perspectives to be represented.

**Party representation.** House of Commons select committee membership is usually proportionate to the composition of the House overall, meaning that many smaller parties are rarely represented. Given that part of the value of a PCC would lie in its ability to generate cross-party consensus, there may be a case for it to include wider representation. The method of selecting members would also need to be considered. Chamber-wide elections would ensure a greater degree of independence from political parties than selection by the whips.

To prevent the reality or perception of partiality and enable the committee to promote cross-party consensus, it would be advisable to prevent either a government or an opposition majority. This could be achieved through the presence of a wide range of parties and crossbenchers. The committee could also include lay members, following the precedent of the House of Commons Committee on Standards, which includes 50% non-MP members. This could allow for the inclusion of experts in other fields, such as law or civil society, or people from under-represented groups.

**Representation of nations and regions.** There would be a case for ensuring broad territorial representation on the PCC, particularly if the committee was to be charged with considering devolution matters and offering advice in cases of dispute, although a requirement to ensure the representation of MPs from different parties in Scotland, Wales and Northern Ireland would make this an unusually large body.

Another option could be for the PCC to make use of the 'guesting' procedure, whereby members from the devolved legislatures could join the committee as guest members. There is currently provision for members of the Senedd Cymru to attend meetings of the House of Commons Welsh Affairs Committee. Similar arrangements could be used to enable members of the devolved legislatures to attend meetings of the PCC. For example, if the committee was considering a matter related to the Sewel Convention, the presiding officers of the devolved legislatures could be invited to attend.

**Balance between the House of Commons and the House of Lords.** Consideration should be given to the balance of members between the Commons and the Lords. Should the committee have an odd number of members, the majority could be representatives from the Commons, reflecting its primacy. Alternatively, the Lords and

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the Commons could be given equal representation. Whether the chair was a member of the House of Commons or the House of Lords would also need to be determined. A Commons chair would likely bring with it a higher profile, but a Lords chair from the crossbenches might enhance perceptions of independence.

### **Powers and practices**

We propose that the PCC be given a range of powers and adopts a range of practices to enable it to perform its role effectively. As we argued above, the committee should be given a central role in scrutinising constitutional legislation (this role is discussed in more detail in Chapters 3 and 4). It should be able to conduct its own inquiries, take evidence, publish reports and letters, and make public interventions.

We propose that the committee adopts the following approach:

**Tabling recommendations as amendments.** The JCHR has pursued the tabling of amendments by committee, and the PCC could adopt a similar approach.<sup>19</sup> Any recommendations that the committee makes relating to the drafting of bills could be tabled as amendments, in the name of the chair of the committee. This process would draw attention to key issues, help generate debate on substantive problems with a bill and, ultimately, give MPs the opportunity to amend bills in accordance with the committee's recommendation. The Speaker of the House should recognise the importance of amendments that the committee proposes and select them for debate as a matter of principle.

The committee should also be given the following powers:

**Scrutiny delay.** The committee could be given the power to delay, or request a delay to, the progress of a piece of legislation where the committee had serious concerns around constitutional issues – enabling more time for scrutiny. This power could operate similarly to the House of Commons European Scrutiny Committee and House of Lords European Union Committee's scrutiny reserve for EU legislation, under which ministers would not agree to adopt EU legislation until the committees had reported.<sup>20</sup>

**Referring a matter to a vote on the floor of the House.** Where there was a constitutional issue that did not relate to a legislative proposition, the committee could be given the power to refer a matter for debate in the House of Commons and/or House of Lords. As is the case for a breach of privilege or contempt of parliament, concerns that the PCC raises could be given priority over other government business.

### **Office for the Constitution**

The Parliamentary Committee on the Constitution could be established as a stand-alone body and play a valuable role, but the establishment of a separate Office for the Constitution (OFC) would enhance its contribution. This office could provide technical research and analysis of constitutional proposals or questions, while the committee would offer judgments based on the evidence provided.

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This model is similar to the relationship between the National Audit Office and the House of Commons Public Accounts Committee (see Box 4), which has proved successful at holding the government to account on public spending and its value for money.

#### Box 4 **National Audit Office**

Established under the National Audit Act in 1983 to report to the existing comptroller and auditor general, the National Audit Office (NAO) audits government accounts and makes assessments of the value for money that government spending provides. It is accountable to parliament and works closely with the Public Accounts Committee on its work programme and to ensure that parliament is well informed about how its approved spending is being used.<sup>21</sup>

The NAO supports parliament in different ways. It audits and reports on the annual accounts of all government departments and other public bodies; analyses the economy, efficiency and effectiveness of government spending; and performs a neutral 'fact-finding' role in relation to how government has spent its money. The Public Accounts Committee uses this evidence to inform its own reports and recommendations.<sup>22</sup>

Nonetheless, the NAO has the freedom to pursue its own agenda within the confines of the NAO Acts and report publicly without political influence.<sup>23</sup> It is widely viewed by the media and parliamentarians as an independent and legitimate source of public finance knowledge.

### **Approach**

The OFC should take an evidenced-based approach to the constitution. It should conduct detailed analysis to inform the PCC's scrutiny – including on current and past legislation, the implementation of constitutional policy, and proposals for constitutional change – providing legal and policy analysis.

It should work with officials from the different governments of the UK and with other key stakeholders to understand the impact of constitutional policy. It should engage regularly with experts, and could commission public engagement exercises to gather evidence of public views on the constitution.

Unlike the relationship between the NAO and the Public Accounts Committee, the PCC should be able to commission reports from the OFC on specific constitutional issues as well as constitutional legislation currently before parliament. In the cases where the office needs to investigate live and politically sensitive issues, it should provide the relevant constitutional information to allow the PCC to make its own judgments.

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Assessing the functioning of the constitution may require more subjective analysis than those that bodies operating in technical areas such as financial regulation make. Nonetheless, there are examples of other bodies successfully making these sorts of judgments. For example, the NAO judges value for money in relation to three broad criteria: economic impact, efficiency and effectiveness. As the work of the OFC is intended to inform the work of the PCC, it would be for parliamentarians to make the final assessment, rather than officials.

## Composition

**Governance.** Public bodies can be made accountable to either government or parliament.<sup>24</sup> For example, the Committee on Standards in Public Life is a non-departmental public body sponsored by the Cabinet Office. The NAO, on the other hand, is an independent parliamentary body. Its head, the comptroller and auditor general, is a parliamentary officer. We propose that a model similar to the NAO be adopted, as this would mean the OFC is funded by and accountable to parliament. Funding could be decided by the PCC, or a separate committee could be established to regulate funding, as is the case with the NAO and the Public Accounts Commission.

**Appointments.** An impartial official, with significant constitutional expertise and experience, should lead the OFC. The PCC should hold a pre-appointment hearing and, like the comptroller and auditor general, the appointment should not be made without the agreement of the chair of the committee. The appointment should also be subject to a confirmatory vote in both Houses of Parliament. The role should also be non-renewable, to ensure impartiality, and a desire to continue in the role should not affect the head's actions.

## Powers and practices

The work of the OFC should complement the work of the PCC. The OFC should have the power to initiate its own inquiries and direct its own work. But it should do so in close consultation with the members of the PCC – focusing on detailed scrutiny of policy areas, legal analysis and international research – while the PCC might focus on more politically topical questions and opinions in relation to specific cases.

Unlike the PCC, the OFC would have access to information without needing to publish it, and therefore could be given power to request information from government departments and other public bodies, in a similar vein to the NAO and the Electoral Commission. This would enable it to examine private ministerial exchanges, royal correspondence and other publicly embargoed information to reach its conclusions. It could also be required to produce annual reports on the functioning and health of the UK constitution.

## Building legitimacy

As argued above, the effectiveness of any new constitutional body will be determined to a large extent by its legitimacy. Ultimately, the legitimacy of an institution depends to a considerable degree on political factors, and there is no single strategy that can ensure it achieves its intended aims. But there is evidence available on the positive relationship between 'procedural justice' and institutional legitimacy, which suggests

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that perceptions of fair process do much to enhance the legitimacy of an institution.<sup>25</sup> With this in mind, we believe the Parliamentary Committee on the Constitution and the Office for the Constitution could build legitimacy via the following processes.

**Establishment of cross-party support.** Many of the landmark constitutional changes in recent history have been initiated without cross-party support. Sometimes this may be inevitable. But if a party has supported a constitutional reform when in opposition, it is less likely to revoke or challenge such a proposal when in government. Any future government that wishes to establish a constitutional body should make every effort to engage with opposition parties and hear their concerns about the form and function of such a body.

**Engagement with government.** We emphasise that the role of a constitutional body should not necessarily be to *oppose* the government but to *advise* it on how to make better constitutional policy. The establishment of a new constitutional body is designed to facilitate a dialogue in which both government and the expert body can share their reasoning and concerns about proposed constitutional changes. The Dutch Council of State is a good example of this process, seeking not to over-scrutinise the government on minor issues and instead engaging constructively with it in areas where it feels that more significant constitutional issues are at stake.<sup>26</sup> The government, aware of the body's scrutiny functions, may in future be more careful in considering the constitutional implications of its legislation.

**Engagement with expert advice.** Both the OFC and the PCC should engage widely with the UK's constitutional experts, and work to ensure that the evidence base on which judgments are made is robust. This is seen as key to the success of the Finnish Constitutional Law Committee, whose judgments are informed by broad evidence taking, and tend to be consistent with the weight of academic and expert opinion.

**Engagement with evidence from the public.** Given that constitutions reflect the values of the wider political culture, public input is a crucial part of evidence collection. The body's legitimacy will be increased if it is seen to incorporate the views of the public into its reports and opinions. The OFC should have the ability to commission public engagement exercises, including polling, on key questions.

**Consensus-based decision making.** The PCC should aim to deliver consensual decisions and reports. This is standard practice among select committees and ensures that members do not engage purely along party lines so that committees are not unduly politicised.

**Appointment of qualified members.** The House of Lords Constitution Committee has been lauded for including peers with high levels of constitutional expertise, who have contributed to its credibility.<sup>27</sup> Parliamentarians should aim to elect MPs and Lords with a committed interest and experience in constitutional affairs.

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## Recommendations

### **1. Establish a new Parliamentary Committee on the Constitution to express an authoritative view on constitutional matters independent from the government of the day, scrutinise constitutional policy and monitor adherence to norms and conventions.**

- The House of Lords Constitution Committee and constitutional responsibilities of the House of Commons Public Administration and Constitutional Affairs Committee should be amalgamated into a newly established Parliamentary Committee on the Constitution (PCC).
- Membership of the committee should be drawn from both the House of Commons and the House of Lords, combining the democratic legitimacy of the former and experience and expertise of the latter. Expert lay members should also be considered, as should the use of the 'guesting' procedure to invite members or presiding officers of the devolved legislatures to meetings where appropriate.
- The new committee should have greater powers than a normal select committee, including the power to delay legislation to allow for further scrutiny and to refer a matter for a vote on the floor of the House of Commons that the Speaker would give precedence to. It should make a practice of tabling amendments to reflect its recommendations about legislation with constitutional implications.

We also propose that powers and responsibilities in other recommendations should be granted to this body. These include the power to certify constitutional bills, to conduct mandatory pre-legislative scrutiny, to scrutinise ministerial directions related to the constitution and to establish a list of high-level constitutional principles.

- The work of the committee should be supported by an independent Office for the Constitution, creating a relationship similar to that between the House of Commons Public Accounts Committee and the National Audit Office (NAO). The office should be resourced to conduct detailed research and provide analysis on constitutional matters, to inform the committee's scrutiny and decisions. Like the NAO, the office should be funded by and accountable to parliament and be led by an official who is an officer of parliament, like the NAO's comptroller and auditor general.

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## 2. A category of constitutional acts

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While the UK constitution consists of a range of sources, key parts of the constitution exist in legislation, such as the Bill of Rights 1689, the Parliament Acts 1911 and 1949, the Government of Wales Act 1998, the Human Rights Act 1998, the Northern Ireland Act 1998, the Scotland Act 1998 and the Representation of the People Acts. But there is little formal recognition of their special status in UK law.

As we set out in earlier parts of this report, the government with a parliamentary majority can easily set aside key parts of the constitution or easily enact new constitutional policies without the need for special process or consideration. Constitutional changes can have long-lasting and wide-ranging implications for the political system. These proposals should be robustly considered, scrutinised and tested. They should ideally command a higher level of support and consensus than ordinary policy.

For this reason, most other democracies set out defined processes for a constitutional amendment, with additional specific requirements to ensure that changes have broad-based and cross-party support. For example, special processes for their passage through the legislature include supermajorities in the legislature. In some federal countries such as Canada, a specified level of support from subnational governments is required, to ensure broad geographic support.<sup>1</sup> And in many countries, including Australia, Italy, Japan and Switzerland, referendums are required to amend the constitution, testing public assent for major changes. Even in countries without codified constitutions, additional protections can be placed around the amendment of key cornerstones of the constitution; for example, New Zealand's Electoral Act 1956. But in the UK, there are few additional requirements for legislation that amends key constitutional acts.

Many of these examples of requirements are set out in codified constitutions, and we are not proposing that the UK adopts a single written document. But we believe there is a strong case for creating a clearer distinction between ordinary and major constitutional legislation, both to create greater clarity on the UK constitution and to improve the processes for constitutional change. Therefore, we argue in favour of creating a new category of constitutional acts, which should be subject to:

- an enhanced process of parliamentary scrutiny
- additional constitutional protections.

We set out what those should be in Chapters 3 and 4 respectively, but before doing so we must consider how constitutional acts should be identified both now and in the future in order to ensure that enhanced scrutiny and protection can be applied consistently.

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## Current processes for identifying constitutional legislation are inadequate

The idea of distinguishing between ordinary and constitutional legislation is not completely alien in the UK constitution. There are currently only two instances in which this is done: one in parliament and one in the courts. But neither of these processes is robust or democratic enough to form a clear category of constitutional acts that could be subject to enhanced scrutiny procedures or protection. This would require a more robust definition of what is constitutional.

## Parliamentary conventions for constitutional legislation are weak and inconsistently applied

There is a parliamentary convention that bills with constitutional implications have their committee stage on the floor of the House of Commons rather than in a public bill committee. According to Erskine May:

**It is common practice for government bills of 'first-class' constitutional importance to be committed to a Committee of the Whole House, although there is no invariable rule to that effect, nor any settled definition of what "'first-class" constitutional importance' should be taken to mean.<sup>2</sup>**

This is intended to ensure that all members have a chance to contribute to the debate, but this same process is also used for emergency bills to fast-track them. While, in theory, it is for the House of Commons to decide whether the convention should be applied, in practice the government's bill managers have strong control of the process.<sup>3</sup>

According to the House of Commons Library, since 1997 there have been 74 constitutional bills that have had a committee stage on the floor of the House.<sup>\*4</sup> Of these, the most common topic was devolution, on which there have been 32 bills, followed by the EU with 16 bills and 10 on elections. But while these bills can be argued to have some constitutional implications, not all have necessarily been bills of 'first-class' importance. Many of them will have been put to the Committee of the Whole House to expedite their passage, rather than on a point of constitutional convention. Of the 74 constitutional bills, 18 were passed in 20 days or less, many of which related to addressing political crises in Northern Ireland or issues related to elections; 11 completed all their stages in a single week.

There are also a number of bills that could be considered constitutional that were not put to the Committee of the Whole House. For example, in the 2021–22 parliamentary session, the Election Bill, which introduced requirements for voter ID at elections and made significant changes to how the Electoral Commission operates, and the Judicial Review and Courts Bill, which according to the UK government was aimed at "restoring the balance between Government, Parliament and the Courts", were not subject to this procedure.<sup>5</sup> As this convention is so inconsistently applied, it is not a useful foundation on which to build further requirements or to define what acts are constitutional.

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\* Data updated to include the 2021–22 parliamentary session.



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## The role of the courts in determining constitutional legislation remains contested

As Alison Young outlines in her guest paper for this Review of the UK Constitution, *Constitutional Entrenchment and Parliamentary Sovereignty*, since 2002 the courts have begun to define some acts as 'constitutional statutes', making them harder for parliament to repeal.<sup>6</sup> In the 2002 court case, *Thoburn v Sunderland City Council*, Lord Justice Laws identified two tiers of parliamentary act: 'ordinary statutes' and 'constitutional statutes'.<sup>7</sup> This means that courts will treat subsequent legislation in areas that these constitutional acts cover differently. In UK law, when two statutes conflict with one another, the courts will give precedence to the more recent statute. Because parliament is sovereign and has subsequently overridden the older legislation, it is taken to be subject to 'implied repeal'. Young argues that constitutional statutes have been protected from implied repeal. If an act does not specifically state it is intended to override a constitutional statute, then the courts should interpret the wording of that statute as the higher law, prevailing over the later act.

However, there is ongoing legal debate about whether the courts are applying these principles in practice and there is no agreement about which laws, or parts of laws, are constitutional.\* For example, the Supreme Court rejected the argument made in the Allister and Peebles application for judicial review that the Northern Ireland protocol was incompatible with the Act of Union 1800 and thus amounted to implied repeal. This was in part due to a section in the legislation that implemented the protocol – the European Union (Withdrawal) Act 2018 – that explicitly stated that every prior enactment was subject to the Act. Some legal experts have suggested that this is a move away from *Thoburn*, while others have argued that the case does not relate as it deals with the explicit, rather than implicit, repeal of constitutional acts.<sup>8</sup> Either way, there is not a defined consensus on what exact role the courts play in protecting constitutional acts from implied repeal.

Further, as Alison Young argues: "The courts are not democratically elected or democratically accountable. It is more legitimate for parliament to have a say in the determination of constitutional principles that should be entrenched, particularly if this entrenchment is to have a stronger effect."<sup>9</sup>

Therefore, in order to create a category of constitutional acts that could be subject to consistent protections and scrutiny by parliament, we argue that the UK parliament itself would need to establish a process for identifying existing constitutional legislation, and new constitutional bills.

## Defining constitutional legislation

A key barrier to introducing greater process and protection around constitutional acts is the difficulty of defining them. A process for enhanced scrutiny of constitutional bills, for example, would require new bills to be designated as constitutional before their passage. But there is currently no agreed upon definition of what makes

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\* See the debate over the *Allister* case on the courts' interpretation of constitutional debate – Murray C, 'Maybe we like the misery: the culmination of the Northern Ireland Protocol litigation', EU Law Analysis, 8 February 2023, retrieved 5 September 2023, <https://eulawanalysis.blogspot.com/2023/02/maybe-we-like-misery-culmination-of.html>

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legislation constitutional in the UK. Attempts to provide a definition have been made many times before, from historic attempts by constitutional scholar A.V. Dicey as far back as 1885.<sup>10</sup> The House of Lords Constitution Committee also came up with its own definition in its first report in 2001.<sup>11</sup> Other definitions include those that Sir John Baker and Lord Justice Laws have provided.<sup>12</sup> The Constitution Society has also produced a list of acts that could be considered constitutional.<sup>13</sup>

Given broad conceptions of what can be constitutional, much of the legislation that parliament passes will likely have a clause that could be considered to have constitutional implications. We argue that a category of constitutional law that brings in additional protections and enhanced scrutiny should be applied primarily to bills and acts with major constitutional implications. These should be defined through a certification process in parliament.

### **Definitions of constitutional law struggle with being too wide or too narrow**

There has been a great deal of debate over the years as to what should fall under the category of constitutional law. A.V. Dicey, the constitutional scholar who popularised the concept of the 'rule of law', defined constitutional law in 1885 as "all rules which directly or indirectly affect the distribution or the exercise of the sovereign power in the state".<sup>14</sup> The problem with this definition, and others that prioritise simplicity, is that they can be so broad as to let most laws fall under the category of constitutional.

At the other end of the spectrum, there are definitions that are too rigid, and could exclude laws that many would consider to be constitutional. For example, the legal historian Sir John Baker provided a list of eight categories that might make a piece of legislation constitutional (see Box 5).<sup>15</sup> While a great deal of legislation that is considered constitutional would fit his criteria, as the Constitution Society's report *Distinguishing Constitutional Legislation* notes, several laws that are clearly constitutional, such as the Representation of the People Act 1928, which brought about universal suffrage, would not be considered constitutional.<sup>16</sup>

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### Box 5 **Sir John Baker's eight categories of constitutional legislation**

- Any alteration to the structure and composition of parliament.
- Any alteration to the powers of parliament, or any transfer of power, as by devolution or international treaty, which would in practice be difficult to reverse.
- Any alteration to the succession to the Crown or the functions of the monarch.
- Any substantial alteration to the balance of power between parliament and government, including the conferment of unduly broad or ill-defined powers to legislate by order.
- Any substantial alteration to the balance of power between the UK government and local authorities.
- Any substantial alteration to the establishment and jurisdiction of the courts of law, including any measure that would place the exercise of power beyond the purview of the courts, or which would affect the independence of the judiciary.
- Any substantial alteration to the establishment of the Church of England.
- Any substantial alteration to the liberties of the subject, including the right to *habeas corpus* and trial by jury.

### **There is some consensus on key constitutional acts**

Despite the difficulties of definition, across the political spectrum, some acts are widely agreed to be of great constitutional importance. These include the Parliament Acts 1911 and 1949, the Representation of the People Acts, the Human Rights Act 1998, the devolution statutes\* and the European Union (Withdrawal) Act 2018. All of these Acts help to define the structure of the UK state, including the relationship between the House of Commons and the House of Lords, the territorial division of power across the UK and the rights of citizens. This shared agreement that these Acts are of great constitutional importance gives them a level of political protection. For example, opposition to the proposed Bill of Rights Bill was centred on the important constitutional status of the Human Rights Act 1998, which the new bill was trying to replace. A formal recognition of this status and extending its application to other acts could create further protection.

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\* Including the Northern Ireland Act 1998, the Scotland Act 1998 and the Government of Wales Act 2006.

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As discussed above, the courts have also begun to distinguish between constitutional and ordinary legislation. These constitutional measures and statutes include the Bill of Rights 1689, the Acts of Union 1707, the Reform Acts, the European Communities Act 1972, the Human Rights Act 1998, the Scotland Act 1998 and the Government of Wales Act 1998.

### **A cross-party committee should be tasked with establishing a list of existing constitutional statutes**

In order for a new category of constitutional acts to command widespread agreement and legitimacy, we should not focus on capturing any statute or clause that *might* be considered constitutional, but on those acts whose fundamental constitutional character is beyond doubt.

A comprehensive list of all acts with constitutional implications would be a highly contentious process, and the protections suggested in the next section are best reserved for major constitutional legislation. So, we propose that the UK takes a minimalist approach that seeks to capture a list of constitutional statutes on which there is political consensus. This is similar to the approach that Canada has taken – it sought to create constitutional statutes from similarly disparate statute books when it repatriated its constitution from the UK in 1982.<sup>17</sup>

We propose that a cross-party committee be tasked with deliberating on this matter, and establishing a list of constitutional statutes. Ideally, this role should be given to our proposed Parliamentary Committee on the Constitution (see Chapter 1), but if the recommendation is not taken up, we propose that a new joint committee should be established for this purpose. This could follow the precedent of the Joint Committee on Conventions that ran between 2005 and 2006, which considered “the practicality of codifying the key conventions on the relationship between the two Houses of Parliament”.<sup>18</sup>

Legal expertise would need to support the committee. Indeed, the constitutional statutes identified in the *Thoburn* case could be used as a starting point for such an exercise. While the *Thoburn* case set a potential guide for constitutional acts, and included the Bill of Rights 1689, the Acts of Union 1707, the Reform Acts, the European Communities Act 1972, the Human Rights Act 1998, the Scotland Act 1998 and the Government of Wales Act 1998, it set out an indicative, but not definitive, list.

Only acts on which there is unanimity on the committee should be included on the list, and the list should later be subject to a confirmatory vote in parliament. While this task would not be straightforward, there is clear consensus in many cases on acts such as the Devolution Acts, the Parliament Acts and the Constitutional Reform Act 2005. The Constitution Society, in its report *Distinguishing Constitutional Legislation: A modest proposal*, sets out a list of constitutional acts.<sup>19</sup> While it is not within the scope of the present report to provide such a list, it is not an impossible task.

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Producing such a list would also not bind the courts in future to consider other legislation as constitutional, but would allow for the most evidently constitutional acts to be better protected within the UK constitution. It would not act as a definitive list of all constitutional legislation, but rather fit into the existing parliamentary traditions for acts 'of major constitutional significance'.

## **The UK parliament should establish a process for certifying new constitutional legislation**

In order to have a defined process for the scrutiny of new constitutional legislation, a process for certifying new legislation in the forms of bills introduced into parliament as constitutional would also need to be established in addition to establishing a process for existing constitutional acts. Here there is a distinction to be made between new constitutional bills of major significance that should be added to the list of constitutional statutes once passed, and bills that amend existing constitutional statutes. For example, the Scotland Act 1997 should be considered a constitutional statute, but the Scotland Act 2016 that amended the 1997 Act should not. Both should be subject to enhanced scrutiny, but only the 1997 Act would be awarded constitutional statute status once passed.

There will, of course, be some cases that are not clear-cut. A process that takes each bill on its own merit would avoid some of the pitfalls of a strict definitional approach. Therefore, we propose to establish a certification process for new legislation. The House of Lords Constitution Committee does this already, using the definition from its first report in 2001 to guide what bills it thinks have constitutional implications.<sup>20</sup> It defines the constitution as "the set of laws, rules and practices that create the basic institutions of the state and its component and related parts, and stipulate the powers of those institutions and the relationship between the different institutions and between those institutions and the individual".<sup>21</sup> But rather than rigidly applying this definition to determine which bills to examine, the committee looks at bills on a case-by-case basis, factoring in how important the legislation is as well as committee time when deciding what scrutiny to apply.

A key question is who should be given responsibility for certifying bills as constitutional. There are several options for determining such a process:

### **Speaker certification**

The Speaker of the House of Commons could be responsible for certifying which bills are constitutional. This would have some precedent, as under the English Votes for English Laws (EVEL) procedure, the Speaker was responsible for certifying when a bill met the criteria for EVEL and did so for provisions on 51 bills and just under 250 statutory instruments between 2015 and 2020.<sup>22</sup> As a non-partisan figure, the Speaker would be able to bring in an independent assessment on what legislation is constitutional, and remove the decision from the government or opposition MPs.

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However, giving the Speaker this power over constitutional legislation could be more contentious than EVEL, which had a limited impact. If the process for passing constitutional legislation was strengthened in some of the ways suggested in the next chapter, defining which bills should be subject to this process would be an enormous power for the Speaker to hold, and might risk politicising the office. Wider parliamentary input in certification would carry fewer risks and so giving the Speaker this responsibility is not the best way to proceed.

### **Government certification**

A second option could be to enable the government to propose that a bill be considered constitutional. This could be by including a clause in the text of the bill itself that it should be added to the list of constitutional statutes or by a proposition in the programme motion where a bill affected the constitution. At the very least it would create clearer expectations on constitutional legislation.

The main drawback of this approach is that the government would likely maintain a lot of control over the process. Governments with a majority would feel confident they would not lose a vote on their classification of a bill, and so there is a risk that political aims drive the classification, rather than the substance of the bill. This could lead to the government avoiding classifying legislation as constitutional in order to avoid any enhanced scrutiny or an extended timeline for passage. It could also risk the government using certification to build in additional protections for legislation that has less clear constitutional implications. For example, the New Zealand government recently attempted (but later withdrew) to include a 'double entrenchment' provision in a bill providing public ownership of water assets.<sup>23</sup> This would have required a 60% majority in parliament or a public referendum to overturn or amend the bill. While there is precedent for this entrenchment in New Zealand, it had previously only been applied to its Electoral Act.

This could be somewhat mitigated by requiring that all bills be accompanied by a constitutional impact assessment statement, setting out the bill's constitutional implications, and the government's views as to whether or not it should be considered a constitutional bill. Such statements would allow for parliamentary scrutiny when the government chooses not to certify a bill as constitutional, and would increase political pressures on the government to certify, even if it does not, in practice, affect its ability to pass the legislation in the House of Commons with a majority.

### **Certification by a committee**

Our preferred option for certifying constitutional acts would be to give this role to the Parliamentary Committee on the Constitution we propose to establish, ensuring cross-party and expert certification. The committee could liaise with the government on upcoming bills and indicate which should be defined as important constitutional bills. It could also examine any bills published in draft for constitutional clauses. This approach would require the government to work with the committee and indicate what bills are in the pipeline, perhaps publishing a green or white paper well ahead of its planned publication.

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In cases where the government did not give appropriate forewarning, and sought to introduce a bill that the committee considered constitutional without the scrutiny recommended in Chapter 4, the committee could be empowered to pause proceedings to allow for proper scrutiny of the constitutional legislation.

This would be a major power for such a committee to have but would function more as an incentive for the government. It would encourage the government to designate legislation as constitutional when it suspects that the committee would hold that view, and publish the bill in draft form, as recommended below. The government's desire to avoid disruption to its legislative timescales should ensure that the use of this power is minimal. Just as with the Speaker, however, exercising this power would risk becoming a political conflict rather than a non-partisan assessment of the constitutionality of a bill.

### **Implementing certification**

All of these approaches would require clearly setting out the certification rules, including the criteria on which the certifier operates.

In some cases, only certain clauses of a bill may have major constitutional implications, and so the government may object to applying the full enhanced scrutiny proposed in Chapter 4. But for the passage of bills, even if one clause is constitutional, it should still go through full scrutiny.

Depending on the manner of certification chosen, there are different options for giving effect to this process. There could be primary legislation defining the process for new bills. This would provide strong protection for certification but may run up against parliamentary sovereignty. The second option is a formal agreement between parliament and the government to abide by a certification procedure. This could follow the model of the 1932 concordat between the Public Accounts Committee and the Treasury, which established the principle that departments will not spend without legal authority from parliament, even though it is legal for them to do so under the Appropriation Acts.<sup>24</sup> As the House of Lords Constitution Committee has noted, the concordat is the Treasury and the government agreeing to limit themselves "in the interests of constitutional propriety".<sup>25</sup> This agreement has held up for nearly 100 years and so presents a possible way to establish certification through a formal agreement between the new Parliamentary Committee on the Constitution, PACAC or House of Lords Constitution Committee and the Cabinet Office.

The most straightforward process would be an amendment to the standing orders of the House of Commons, stating that bills should undergo examination and certification by the chosen certifier.

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## Recommendations

### **2. Create a new category of 'constitutional acts' to formally recognise the importance of key pieces of legislation that underpin our political system.**

- Our proposed Parliamentary Committee on the Constitution should be tasked with establishing a list of existing constitutional acts. It should take a broadly minimalist approach, only including acts on which there is clear cross-party political consensus.\*
- A process should be established for certifying new constitutional bills. We propose that the Parliamentary Committee on the Constitution should be given this responsibility.\*\*

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\* If our recommendation to establish a Parliamentary Committee on the Constitution is not adopted, we propose that a cross-party committee should be established for this purpose.

\*\* Again, if the new committee is not created, we have set out several alternatives, including certification by another parliamentary committee, the Speaker, or proposed by the government and subject to a vote on the floor of the House.



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## 3. Embedding constitutional acts

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While defining constitutional legislation would build in political protections, there are further changes that could be made to create greater constitutional stability. As Alison Young has noted, there are two main interpretations of parliamentary sovereignty. While one states that the UK parliament cannot bind any future parliament, the other posits that parliament can only be sovereign if it has the ability to limit the law-making ability of a future parliament.<sup>1</sup> In this second interpretation, parliament could include certain requirements for passing and amending constitutional legislation. Even within the UK's political constitution, there is precedent for additional protections for certain bills.

In relation to constitutional legislation, these protections could be embedded through a single piece of legislation, setting out the rules for amending constitutional legislation, through new parliamentary conventions, through clauses in constitutional bills or through changes to the parliamentary rules for passing certain legislation. These protections could be applied to entire acts, or to specific clauses within acts. There are multiple options for embedding constitutional legislation.

### **Protection from implied repeal**

As outlined in the previous chapter, several acts already have protection from implied repeal through the courts. The Allister case of 2023 raised questions as to how far the courts are willing to apply this interpretation.<sup>2</sup> A formal mechanism within parliament to encourage the courts to exempt constitutional law from implied repeal would strengthen its protection and assuage potential concerns about judicial overreach.

Such a provision could be included in constitutional clauses of new legislation and by amending existing constitutional acts. This would involve either passing an act specifying that all legislation that parliament defines as constitutional cannot be overridden by later legislation unless it explicitly states its intention to do so. Or it could be applied on an ad hoc basis, by placing this protection into specific legislation, following the lead of section 7 of the European Union (Withdrawal) Act 2018, which specifies that the enactments in the Act are not subject to implied repeal.<sup>3</sup>

A list of constitutional acts defined by parliament would have the benefit of establishing these laws as of long-term importance and would require future parliaments to explicitly state if and how they propose to amend or override them. This would not affect future parliaments' right to change constitutional legislation, but it would cement the importance of constitutional acts. The risk of this approach is that it could open more laws to judicial review and give the courts a greater influence over legislation if they felt more empowered to declare new legislation as incompatible with existing constitutional law. Nonetheless, the enhanced scrutiny proposals we set out below should mitigate the risk of this happening, ensuring that the implications of new legislation affecting the constitution for existing constitutional acts are fully explored.

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## Protection from amendment through secondary legislation

Currently, acts with significant constitutional implications can even be amended through secondary legislation through the use of 'Henry VIII powers', which allow ministers to amend primary legislation through secondary legislation if such powers are granted in primary legislation. For example, despite objections of the Scottish and Welsh governments, the European Union (Withdrawal Agreement) Act 2020 gave ministers broad powers to amend primary legislation, including the devolution statutes themselves.<sup>4</sup> Secondary legislation is subject to significantly less scrutiny than primary legislation and cannot be amended. Statutory instruments are the most common form of secondary legislation that ministers use but while parliament can vote to block them, the House of Commons has not voted down a piece of secondary legislation since 1979, and the House of Lords since 2000.<sup>5</sup>

While all powers to make secondary legislation must be voted through parliament when the parent act is passed, the constitutional implications of the powers granted may not be explicitly identified and therefore not fully understood. The government's majority in the House of Commons also means it can usually define the scope of such legislation without much difficulty.

The use of Henry VIII powers is controversial and the Delegated Powers and Regulatory Reform Committee, among others, has raised concerns about their growing use.<sup>6</sup> Their use is particularly concerning in relation to constitutional legislation. There is precedent for the government to include specific restrictions on the scope of these powers, including for some key constitutional acts. For example, section 8(7) of the European Union (Withdrawal) Act 2018 states that the powers cannot be used to:

- impose or increase taxation or fees
- make retrospective provision
- create a relevant criminal offence (that is, with a penalty exceeding two years' imprisonment)
- establish a public authority
- amend, repeal or revoke the Human Rights Act 1998 or any subordinate legislation made under it
- amend or repeal the Northern Ireland Act 1998, the Scotland Act 1998 or the Government of Wales Act 2006.

However, these restrictions are not required in all legislation. Similar powers granted in the European Union (Withdrawal Agreement) Act 2020 were not subject to the same limitations. Consequently, secondary legislation was used to amend the Northern Ireland Act 1998, and implement the controversial 'Stormont brake' mechanism, a controversial arrangement that the UK and the EU agreed as part of the deal to make changes to the Northern Ireland protocol. As a result, there was much less opportunity for scrutiny, and the mechanism was implemented without the full legislative process.

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By creating a more definitive list of constitutional acts, these acts could also be protected from amendment by secondary legislation. This could be done either in law or by establishing a new convention that constitutional acts are not within the scope of any broad delegated powers granted to the ministers. This should be paired with an update to the Office of the Parliamentary Counsel's drafting guidance so that, by default, constitutional legislation is exempted from standard delegated powers.

## **Supermajorities**

In many other democracies, a higher threshold is required to pass legislation that amends the constitution. Almost all countries in the Council of Europe require a supermajority for the passage of constitutional amendments (except Denmark, Iceland, Ireland, Israel and Malta, although these require other processes including referendums).<sup>7</sup> Most require a two-thirds majority, but some require three fifths or three quarters.

The purpose of this is to ensure that constitutional change has a high level of consensus, rather than being implemented by narrow majorities or based on one party. Such requirements are not insurmountable, however. For example, the Hungarian prime minister, Viktor Orbán, was able to make several controversial changes to the constitution, including limiting the powers of the constitutional courts, after his party won more than two thirds of the seats in the Hungarian parliament.<sup>8</sup> But requiring a supermajority rather than a simple majority could make it more difficult for governments to make changes to the constitution to their benefit, without broad support in parliament.

A less extreme form of this would be a time-limited supermajority requirement, which could give an act a set timeframe during which amendment or repeal is given a higher legislative barrier. This could require, for example, a two-thirds majority for amendment or repeal for a specified number of parliamentary sessions or years, but after that allows for changes to take place on a simple majority – once its implications have become apparent. This could also provide a level of legal protection, while political protections are being developed.

As Philip Rycroft notes, consensus on constitutional changes often develops after reforms have bedded in.<sup>9</sup> For example, devolution to Wales only passed by the narrowest of margins in the 1997 referendum, yet in the 26 years since, support has grown considerably. But the desire to reverse constitutional change can be most acute immediately after it has been implemented, in part owing to the political disruption it can create and the need for political actors to adjust.

## **Referendum requirements**

More vigorous requirements for amending legislation, such as referendum requirements for amending constitutional legislation, have precedent in the UK. An example of a referendum lock is the Scotland Act 2016, which states that neither the Scottish parliament nor the Scottish government can be abolished without a referendum. This referendum lock may be more politically than legally binding if challenged in the courts.<sup>10</sup> A convention is also emerging in the UK that major

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constitutional changes will be subject to a referendum. Since 1973 there have been several referendums on constitutional matters, including on the UK's relationship with the EU, the Good Friday Agreement, the voting system and devolution – to Scotland and Wales and within England.

These referendum requirements would run into some of the same issues as supermajorities, making constitutional change overly difficult. It would also only be applicable to constitutional issues that have a strong degree of public interest. As Chapter 7 lays out, there are alternatives to referendums to bring the public into constitutional change.

### **Protection from implied repeal and secondary legislation would produce the least controversy**

Protecting constitutional legislation from implied repeal and change via secondary legislation would be the most straightforward changes to make and would make an immediate difference in embedding constitutional legislation. Both changes would help to set out constitutional laws as distinct from other legislation, provide tangible protection and produce less controversy over their implications for parliamentary sovereignty than the other options set out above.

Neither of these changes would have a major bearing on the sovereignty of parliament, as future parliaments would maintain the ability to amend the constitution, just only when explicitly stating their intention to do so. They would help increase the political costs of amendment by requiring any amendments to constitutional acts to be subject to the full primary legislation scrutiny process, allowing parliamentarians to see exactly which parts of the constitution are affected by new legislation and ensuring the implications of doing so can be fully considered.

### **Supermajorities and referendum requirements could be used in specific cases**

Other changes to constitutional amendment are more likely to be controversial and their implications for parliamentary sovereignty are more problematic. There is a question as to whether imposing a supermajority or referendums would be possible under the UK constitution – as the requirement itself could be repealed by a simple majority. The Fixed-term Parliaments Act 2011, which required a two-thirds majority to trigger an early general election, was eventually overridden with a simple majority by the Johnson government's Early Parliament General Election Act 2019 after the government failed three times to reach the threshold to call an election.<sup>11</sup> Likewise, a referendum requirement in an act could also be circumvented by legislation passed by a simple majority.

Some have proposed that the supermajority or referendum requirement could be doubly entrenched, meaning that amending the act requires a supermajority or referendum but so do any changes to the clause that sets that requirement. In theory, this would avoid parliament removing supermajority or referendum requirements through a simple majority. This is the model used in New Zealand for its Electoral Act 1956, which includes clauses that require either a 75% supermajority or a referendum

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to amend it.<sup>12</sup> This has protected the Act, but also gives the courts the power to strike down legislation that contravenes the Act. While it has worked in New Zealand in this individual case, it has not been expanded to other cases and interviewees who participated in this research noted that it remains unlikely that New Zealand would use this mechanism in other constitutional law. As Alison Young notes:

**As we have no examples of double entrenchment provisions, it is hard to know whether parliament believes it could enact these provisions without breaching parliamentary sovereignty. It is also hard to know whether the courts would be prepared to uphold doubly entrenched provisions given that these place a greater restriction on parliamentary sovereignty.<sup>13</sup>**

With that said, double entrenchment would increase political pressure to obtain a supermajority as the government would need to explicitly override a clearly set out intention that such an act be afforded additional protection.

Nonetheless, a supermajority would be a high bar. Many pieces of constitutional legislation in recent years have not met such a threshold. For example, the European Union (Withdrawal Act) passed by 327 votes to 299, just over 50%. Making it harder to change the constitution, by consequence, could also entrench existing aspects of the constitution for which supermajorities are not required. This could lead to a lack of modernising reform and make addressing constitutional problems more difficult, negating the main advantage of having a political constitution in the first place. Therefore, we argue that if supermajorities are to be used, they should be reserved for a small number of acts or clauses of bills that are of fundamental importance to the way the UK democracy functions.

Similarly, the need to hold a referendum to amend or repeal all constitutional acts would be overly burdensome. Requiring a public vote to change constitutional provisions could disincentivise the government from making updates or modernising reforms and lead to constitutional inertia. But referendum requirements could be placed on specific clauses of constitutional acts, setting out the fundamental provisions of an aspect of the constitution. This could be applied to matters on which there is existing precedent for referendums (as set out above) or future acts that come into being based on endorsement in a referendum.

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## Recommendations

### **3. Constitutional acts should be afforded additional protections to promote constitutional stability.**

- Constitutional acts should be protected from implied repeal – where a newer act of parliament automatically supersedes a previous one – so that they can only be repealed or amended if this is done explicitly on the face of a bill. All bills should be accompanied by a constitutional impact assessment setting out their implications for and compatibility with existing constitutional acts.
- Constitutional acts should only be amended by primary legislation. They should not be considered in scope of delegated powers that enable ministers to amend primary legislation (known as 'Henry VIII powers'). This should be established by convention and by changes to Office for Parliamentary Counsel guidance.

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## 4. Improving constitutional scrutiny

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Constitutional bills have wide-reaching and long-term implications, which can change the basic structures of government and parliament. Therefore, it is imperative that they are subject to detailed scrutiny to ensure their implications are fully explored and understood. In its 2011 report *The Process of Constitutional Change*, the House of Lords Constitution Committee stated that “constitutional legislation is qualitatively different from other forms of legislation and that the process leading to its introduction should recognise this difference”.<sup>1</sup> In an analysis of the constitutional amendment processes of members of the Council of Europe, the European Commission for Democracy Through Law noted that: “In most countries Parliament serves both as ordinary legislator and as the constitutional legislator. The function as constitutional legislator is almost always subject to special procedures and requirements.”<sup>2</sup> Therefore, there is a strong case that constitutional bills that the UK parliament considers should be subject to requirements beyond those of ordinary legislation.

### **Scrutiny of constitutional legislation is poor, particularly in the House of Commons**

However, scrutiny of constitutional legislation is much the same as that for ordinary legislation.\* As outlined above, there is an existing convention that bills of ‘first-rate constitutional importance’ are put to a Committee of the Whole House in the Commons. This practice is intended to allow all MPs the opportunity to contribute to the scrutiny of legislation with wide-reaching implications, as opposed to being limited to 17 MPs sitting on a public bill committee.<sup>3</sup> Where a bill has particular implications for one part of the UK, it can also enable a wide range of representatives from that nation or region to contribute, where there may only be one or two representatives on a committee. But these existing scrutiny practices can also lead to more rushed and less detailed scrutiny.<sup>4</sup>

Time on the floor of the House is precious, and therefore business managers are likely to only permit a few days for debate, whereas public bill committees, which take place off the floor of the House, are often given more time and are able to take evidence.

Further, governments usually command a majority in the House of Commons, and as we argued earlier in this report, constitutional questions are increasingly seen as secondary to policy questions and constitutional scrutiny is often viewed through a partisan lens. Raising concerns about constitutional issues may be seen as obstructive to the government’s policy and so MPs from the governing party may be unwilling to rebel. For example, despite several high-profile Conservative MPs raising concerns

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\* We have previously raised concerns about the quality of the scrutiny of legislation in the House of Commons more broadly: MPs lack the time, the resources and the opportunities to influence the content of legislation, see Sargeant J and Pannell J, *The Legislative Process: How to empower parliament*, Institute for Government, 2022, retrieved 6 September 2023, [www.instituteforgovernment.org.uk/publication/legislative-process-empower-parliament](http://www.instituteforgovernment.org.uk/publication/legislative-process-empower-parliament)

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about the legality of the Northern Ireland Protocol Bill, which would have overridden the UK–EU Withdrawal Agreement, no Conservative MPs voted against the bill at the second reading, and the legislation passed through the House of Commons without any amendments.<sup>5</sup>

Constitutional scrutiny in the House of Lords is of a higher quality, and the second chamber has been the arena for the most constitutional consideration in recent years. Peers have been able to extract concessions from the government on key constitutional issues, including on the Public Order Act 1986, the European Union (Withdrawal) Act 2018 and the United Kingdom Internal Market Act 2020.<sup>6</sup> But this means that where bills start in the House of Commons, major changes on big constitutional issues get little discussion in the primary chamber and there is little time allocated for the consideration of Lords amendments.

To ensure better scrutiny of constitutional change, and ensure that debate on the constitutional implications of government proposals takes place, an enhanced scrutiny process for constitutional acts (as certified through the process outlined in Chapter 2) is required. This process should build in opportunities for cross-party consideration, expert analysis and time to fully consider legislation. In the remainder of this chapter, we consider what this process might be.

### **All constitutional bills should be published in draft and subject to pre-legislative scrutiny**

Pre-legislative scrutiny is when a bill is published in draft and a parliamentary committee is given the opportunity to consider it, take evidence and report on it. Our report for the Review of the UK Constitution, [The Legislative Process: How to empower parliament](#), set out the benefits of pre-legislative scrutiny:

- it can create opportunities for parliament to influence legislation at an early stage when it can have the most impact
- committees can draw on members' policy expertise
- it is a key tool for engaging experts, civil society and the public on legislative proposals
- it can help the government tease out political problems
- it can ultimately lead to better-quality legislation.<sup>7</sup>

Since 1997, eight parliamentary committees have recommended that pre-legislative scrutiny should be considered a core part of the legislative process.<sup>8</sup> We recommended that the government should be required to publish all bills in draft form and either establish a Parliamentary Committee on the Constitution to consider them, or give a House of Commons select committee the opportunity to request to scrutinise them.



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For all the reasons set out above, the case for applying this enhanced scrutiny procedure to constitutional bills is even stronger. But since 1997 just seven of the 74 constitutional bills that the House of Commons Library identified were published in draft, and just six were subject to pre-legislative scrutiny by a committee.<sup>9</sup> According to the constitutional expert Professor Robert Hazell, of the Constitution Unit, UCL, publishing constitutional bills in draft is the “single most important change” that could be made to improve scrutiny.<sup>10</sup>

Pre-legislative scrutiny by a cross-party committee also provides an opportunity to build consensus around constitutional proposals. The committee’s report and recommendations can aid the government in identifying divisive issues and seeking to find solutions and could provide vital resources for parliamentarians to aid their scrutiny efforts at later stages of the process. If our proposal for a Parliamentary Committee on the Constitution is adopted, such a committee would be a prime candidate for this role. Under existing structures, the House of Commons Public Administration and Constitutional Affairs Committee and the House of Lords Constitution Committee could be given such a role. Parliament may also establish a joint committee to consider specific pieces of legislation; where the legislation affects particular parts of the constitution this could inform the composition of the committee, as is the case with current pre-legislative scrutiny. For example, there could be greater representation of lawyers on committees considering legislation related to the courts, and greater representation from the devolved nations on bills considering devolution.

### **There should be an opportunity for a cross-party committee to take evidence on constitutional bills**

As outlined above, there are benefits to constitutional bills being subject to the Committee of the Whole House, allowing a wide range of MPs the opportunity to contribute to the debate. But only considering constitutional bills through this manner means there are no opportunities for MPs to take evidence, or conduct scrutiny in a cross-party committee. There is a special procedure known as ‘split committal’, which allows some parts of a bill to be debated on the floor of the House and others in a committee. This procedure has only been used six times for constitutional bills since 1997 (see Table 1). Some technical bills have had serious consideration in a public bill committee (previously known as standing committees) – for example, the Greater London Authority Bill had 26 days of scrutiny, and the Political Parties, Elections and Referendums Bill had 17 days. But more recently the process has been used for bills on expedited timescales – for example, Northern Ireland legislation – and has not been used at all on constitutional bills since the 2013–14 parliamentary session.

Table 1 **Constitutional bills subject to split committal procedure, 1997–2022**

Session	Bill	Number of days in the Committee of the Whole House	Number of days in a public bill/standing committee
1998–99	Greater London Authority Bill	2	26
1999–2000	Political Parties, Elections and Referendums Bill	2	17
2002–03	Regional Assemblies (Preparations) Bill	1	9
2005–06	Northern Ireland (Miscellaneous Provisions) Bill	2	2
2005–06	Electoral Administration Bill	1	5
2013–14	Northern Ireland (Miscellaneous Provisions) Bill	1	2

Source: Kelly R, *Timetabling of Constitutional Bills since 1997*, Briefing Paper 6371, House of Commons Library, 2020; data updated to include the 2021–22 parliamentary session.

One option to allow for more time and detailed scrutiny of constitutional legislation would be to require split committal. In 2006, Robert Hazell of the Constitution Unit suggested that a new convention should be established for “debating the clauses of principle on the floor but scrutinising the detail upstairs”, although he acknowledged the challenges of drawing the line here.<sup>11</sup>

However, we have raised concerns elsewhere about the quality of scrutiny in public bill committees, which remain highly partisan and the witnesses are tightly controlled by government and opposition whips.<sup>12</sup> Instead, we proposed a ‘select committee’ stage on legislation, which would give the opportunity for committees with an interest and expertise in the subject to consider the legislation, take evidence and express a view on the bill including draft amendments. This could be made mandatory for constitutional bills, allowing for detailed scrutiny of legislation in a cross-party setting, while still allowing the formal committee stage to take place on the floor of the House. The views of the committee could also help improve the quality of this debate, and draft amendments that the committee puts forward could be tabled at this stage.

The committee could be the same as the committee that has conducted pre-legislative scrutiny, allowing committee members the opportunity to follow up on their original recommendations and hold ministers to account where their concerns have not been addressed.

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## Conventions on the minimum timescales for the passage of constitutional legislation should be established

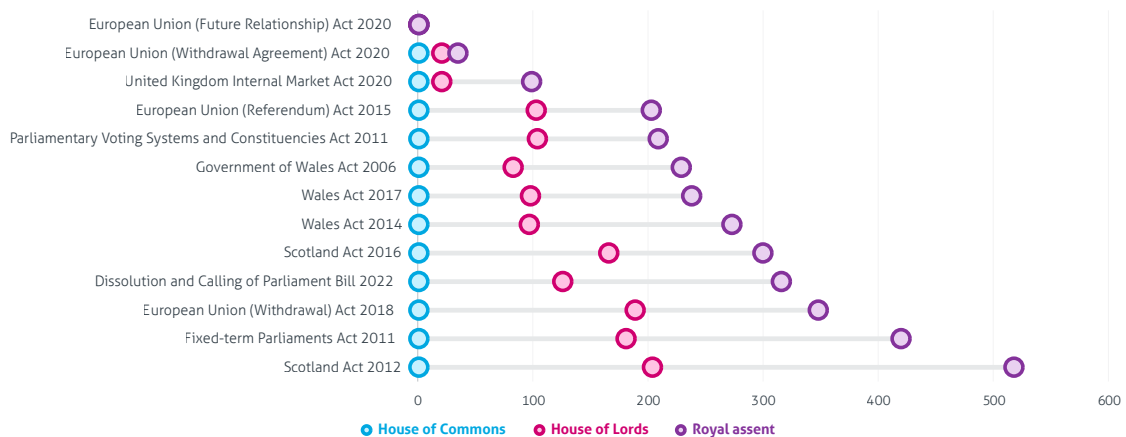
Mandatory time delays are a common feature of constitutional amendment processes in countries in the Council of Europe. Most commonly this is between the introduction of a bill and the first debate; in other cases, bills require multiple readings with three to six months between them. The intention of this is to prevent important constitutional legislation from being rushed through and to allow parliamentarians time to reflect. In Belgium, Denmark, Estonia, Finland, Greece, Iceland, Luxembourg, the Netherlands, Norway, Spain and Sweden, an intervening election is required before a constitutional bill can be passed, to secure approval from two different parliaments, although this can be bypassed in some circumstances.<sup>13</sup>

In the UK parliament, the same conventions apply to constitutional bills as to normal legislation. The usual practice in the House of Commons is two weeks between first and second readings; one week between second reading, committee and report stage; and the third reading can follow directly after that. In the House of Lords, the usual timescales are two weekends, 14 days and three sitting days, respectively.<sup>14</sup> But these timescales can be fast-tracked, particularly in the House of Commons, where the government has strong control of the timetable.

Figure 1 sets out the timescale of some key pieces of constitutional legislation. For most bills there are at least six months between introduction and royal assent; however, there are some examples of major constitutional legislation being rushed through on curtailed timetables. The European Union (Future Relationship) Act 2020 was passed in a single day, and the European Union (Withdrawal Agreement) Act 2020 gained royal assent in 35 days. In both cases, the UK government needed to give domestic effect to treaties it had agreed with the EU before a specific deadline, creating an urgency that could be used to justify fast-tracking these bills. Several parliamentarians raised concerns that the government was also seeking to evade scrutiny and opposition to contentious policies.<sup>15</sup> The rushed timetable also meant that there was not enough time for the devolved legislatures to complete the legislative consent process, which is required by convention where the government is legislating on devolved matters.

The urgency for the United Kingdom Internal Market Act 2020, which concerned the domestic implications of Brexit, was also less clear. The Scottish and Welsh governments strongly opposed the bill and the UK government also admitted that several clauses related to Northern Ireland would breach international law in “limited and specific ways”, although these were withdrawn before the bill was enacted.<sup>16</sup> The bill was rushed through the House of Commons in just 21 days.

Figure 1 **Time taken to pass key constitutional bills in days, 2005–2022**



Source: Institute for Government analysis of parliamentary data. Notes: Time is calculated in total calendar days.

In recognition of the importance of constitutional legislation, and to counter recent precedent for passing it on an expedited timetable, a convention for a minimum timescale for constitutional legislation should be established. The median time between the introduction of the bills in Figure 1 and royal assent is 260 days, and the average is 246 days – around eight and a half months. We believe no bill should receive fewer than six months of scrutiny, with an equal amount of time for debate and scrutiny in each House of Parliament.

### **A reformed second chamber could be given more power over constitutional bills**

Bicameral systems usually require approval in both Houses of Parliament for a constitutional amendment. In the UK, legislation has to pass both Houses, but the House of Lords only has the power to delay legislation. The House of Lords has long been considered to have a particular role in protecting the constitution.<sup>17</sup> As outlined above, constitutional scrutiny is generally of higher quality in the second chamber. In recognition of this role as ‘constitutional guardians’, the powers of the House of Lords could be extended, to give it the power to block – not just delay – legislation related to the constitution. The Labour Party has put forward similar proposals as part of Gordon Brown’s Commission on the Future of the UK.<sup>18</sup> Other proposals have also suggested disapplying the Parliament Act for constitutional legislation as is the case for legislation that seeks to extend the life of a parliament for more than five years.

However, in the context of current questions about the legitimacy of the House of Lords and the current process of appointments, extending its powers may not be wise. The House of Lords rarely exercises its existing power to delay to the full extent – the last time the Parliament Acts were used was in 2004, on the Hunting Act – and even so, its activities, such as amendments to bills, are often characterised as undemocratic and illegitimate, and are met with calls for reform.<sup>19</sup> In a 2023 YouGov survey, 66% of the people surveyed lacked confidence in the House of Lords – and 35% of those said they had no confidence in the House at all.<sup>20</sup>

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Therefore, reform of the second chamber would need to accompany an enhanced power on the constitution. But the form the revised second chamber would take will also have implications for how well it is able to conduct constitutional scrutiny. For example, a chamber composed of indirectly elected members – for example, mayors or officials – may not have enough time to dedicate to detailed scrutiny. A chamber of political-party representatives that enabled the government to command a majority in both chambers may not act as an effective check on the constitutionality of legislation, instead prioritising party interests. Therefore, proponents of House of Lords reform should consider these features when developing their proposals.

## Recommendations

### **4. Parliament should establish a more extensive scrutiny process for constitutional bills to ensure proposals are thoroughly tested and attract cross-party support.**

- All constitutional bills should be published in draft and subject to pre-legislative scrutiny by the proposed Parliamentary Committee on the Constitution.\*
- Committee stage in the House of Commons should continue to take place on the floor of the House so that all MPs can take part in the debate. All constitutional bills should be put to an additional ‘select committee stage’ in the House of Commons, enabling the new Parliamentary Committee on the Constitution to take evidence and express a view on the bill, including publishing draft amendments where appropriate.
- Conventions on minimum timescales for the passage of constitutional bills should be established. We recommend a minimum of 26 sitting weeks between the introduction of such a bill and royal assent, with at least 13 weeks spent in each House.

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\* If the proposed committee is not established, other parliamentary committees should undertake pre-legislative scrutiny – such as the House of Lords Constitution Committee and the House of Commons Public Administration and Constitutional Affairs Committee.

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## 5. Strengthening the constitution within the government

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While many of the checks and balances in the UK constitution exist between institutions, many also exist within institutions. Within government, the relationships within the cabinet, and between ministers and officials, are key to a well-functioning constitution. Ministers are the primary initiators of constitutional change, supported by officials in government departments, and key actors in the political system. Officials are responsible for informing, and where necessary warning, ministers of legal obligations, constitutional precedent and other potential implications of the way they choose to engage with the constitution.

The constitution is rooted in precedent and institutional memory but based on often unclear precedent and convention, in which the average civil servant is given little grounding. The consequences of not following advice may also feel remote, intangible or even insignificant to ministers, and the political consequences much more persuasive. Therefore, when considering how to ensure the good functioning of the constitution, and make sure that proposals for constitutional change are well developed and thoroughly considered, we must consider how to strengthen the constitution within government.

### **Senior officials are key guardians of the constitution**

The civil service also has an important role in helping the government understand the constitution and the consequences of its decisions for it, and in delivering constitutional change. This role is especially important as the UK's uncodified constitution relies on self-regulation as opposed to judicial enforcement.

Individual civil servants have particular responsibilities. The cabinet secretary's primary role is to support the prime minister and the cabinet but he (and it has so far always been a 'he') also has "a role in advising the prime minister on constitutional matters".<sup>1</sup> Officials with a role in providing advice on the law, parliamentary procedure, propriety and ethics among other things also play a constitutional role, and permanent secretaries, and others who perform the role of accounting officer, also have a responsibility to ensure that "public spending meets the criteria of regularity, propriety, value for money, and feasibility".<sup>2</sup> These roles are allowing advice to be given, concerns to be raised and issues to be resolved in private.

However, there are limits to the effectiveness with which civil servants can perform their constitutional role. The average civil servant may have limited knowledge and understanding of constitutional precedent and principles. The effectiveness of the advice that officials offer to ministers depends on the personalities of key figures, civil servants' perceptions of their own role, their feelings about job security, their aspirations for advancement and their relationship with their ministers and in particular their secretary of state. The role of the cabinet secretary, and the balance

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he strikes between supporting and challenging the government, depend on the views and personalities of the office holder, and their respective prime minister(s). Few other senior officials see constitutional issues as a key part of their role. According to Philip Rycroft, former UK government permanent secretary and head of the Cabinet Office Constitution Group, “[i]t is rare for the collective of permanent secretaries to ponder the constitutional state of the country in the round”.<sup>3</sup>

Ultimately, this advisory role relies on ministers being willing to listen, and the past five years have exposed the limits of this arrangement. For example, ministers have proceeded with an unlawful prorogation, and proposals to breach international law, despite advice about the constitutional implications of these actions.<sup>4</sup> Brexit and the government showing an increased willingness to test boundaries have put the relationship between ministers and civil servants under strain. As articulated by Jill Rutter in her paper for our Review of the UK Constitution:

**In the past most ministers, most of the time, would heed the warnings about the potentially damaging consequences of crossing those boundaries, and that allowed the civil service to ensure that propriety rules were observed. Certainly in the Johnson era this was not the case, and the upshot is that the civil service has become collateral damage as ministers refuse to be bound by it.**<sup>5</sup>

Perhaps in response, officials have apparently found it increasingly difficult to challenge ministers or key advisers on constitutional matters and have found themselves at risk of detriment to their wellbeing or career if they have done so. There is at the heart of the relationship

**a tension between serving the government of the day and civil service values, and the civil service is finding it increasingly hard to reconcile its obligation to service the government of the day and act as part of the constitutional guard rail over propriety and regularity with an administration determined to test limits.**<sup>6</sup>

## **The constitution has no permanent home in government**

Effectively performing this constitutional safeguarding role also requires deep understanding of the UK constitution, its history, procedure, precedent and the development of institutional memory. But as Philip Rycroft contends, constitutional policy has often been short term, driven by political priorities and incentives, rather than considering long-term implications. He argues:

**The civil service does not have a view of the constitution that is independent of the position of the government of the day. It holds no idealised model of the functioning of the constitution against which to judge ministerial proposals; advice on each proposition for constitutional change tends to be offered on its own individual merits, rather than in the context of the constitutional whole.**<sup>7</sup>

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The place of the constitution and the attention paid to it change from administration to administration, and are subject to the whims of government (see Box 6).

### **Box 6 The place of the constitution in UK government, 1997–present**

As demonstrated in Figure 2, since 1997, six government departments have held responsibility for the constitution. The nature and extent of this responsibility have changed as the brief has shifted from department to department. Between 1997 and 2003, the Lord Chancellor’s Office performed a constitutional oversight and guardianship role, seeking to ensure constitutional propriety in the government of the day, alongside having responsibility for judicial appointments and judicial discipline.<sup>8</sup>

In 2003, as part of the Labour government’s ambitious constitutional reform agenda, including establishing an independent Supreme Court, the office was abolished and replaced with the Department for Constitutional Affairs (DCA). Still led by the lord chancellor, the DCA was responsible for political and constitutional reform.<sup>9</sup> In 2007, the DCA was disbanded and its functions transferred to the newly created Ministry of Justice (MoJ).<sup>10</sup> Here, the lord chancellor was responsible for major constitutional issues alongside judicial policy.

From 2010 under the coalition government, constitutional responsibility was split between the MoJ and the Office of the Deputy Prime Minister (ODPM) situated within the Cabinet Office – to give Nick Clegg ownership over the Liberal Democrat-led constitutional reform agenda. Constitutional matters affecting parliament, elections and reform were transferred to the ODPM, while the MoJ retained constitutional matters related to the justice system.<sup>11</sup>

In 2015, after the Conservative government gained a majority, the constitutional brief was fully transferred to the Cabinet Office, with the chancellor of the Duchy of Lancaster (CDL) responsible for constitutional affairs and maintaining the “integrity of the Union”.<sup>12</sup> Responsibility for other constitutional issues, such as the management of the relationship with the Crown Dependencies, remained in the MoJ.<sup>13</sup> In 2015, the UK Governance Group was established as an umbrella organisation to co-ordinate constitutional and devolution policy across government departments. Comprised of the Cabinet Constitution Group, the secretaries of state for Scotland and Wales (who still also maintained distinct offices and departments), and the advocate general for Scotland, it also acted as the primary source of constitutional advice for UK government departments.<sup>14</sup>

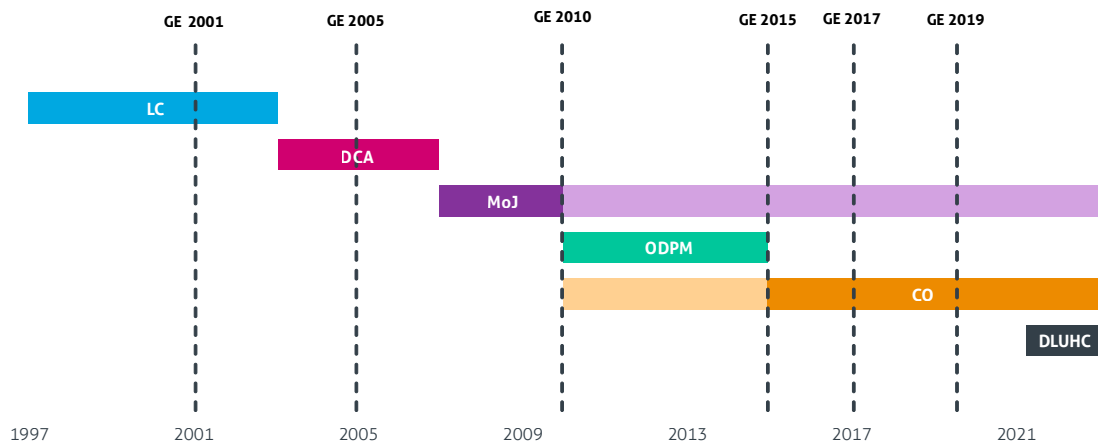
However, in September 2021, several constitutional areas, including devolution, the Union, governance and elections, were transferred to the newly created Department for Levelling Up, Housing and Communities (DLUHC) after a government reshuffle in which Michael Gove was moved from CDL to the



department, taking with him key aspects of his brief.<sup>15</sup> Ministerial responsibility for intergovernmental relations briefly returned to the Cabinet Office under Liz Truss’s government, but returned to the DLUHC – with Michael Gove – under Rishi Sunak.<sup>16</sup>

Currently, responsibility for the constitution is split across the Cabinet Office, the DLUHC and the MoJ. The three territorial offices, the Scotland Office, Wales Office and Northern Ireland Office, have also had a role in devolved policy across this period, and continue to do so.

Figure 2 **UK government departments with primary responsibility for the constitution, 1997–2023**



Source: Institute for Government analysis of IfG ministers database. Notes: Lighter shades indicate departments with partial responsibility for the constitution. LC = Lord Chancellor’s Office; DCA = Department for Constitutional Affairs.

As described in Box 6, the location of the constitution in government has been subject to frequent change. As the constitution brief has moved between departments, the focus of each department’s constitutional responsibilities has also changed. The Lord Chancellor’s Office prioritised a constitutional stewardship role; the Department for Constitutional Affairs and the Ministry of Justice focused on constitutional renewal, implementing the Labour government’s ambitious constitutional reform agenda; and the Office of the Deputy Prime Minister prioritised the coalition government’s political and constitutional reform agenda, seeking to drive change from the centre of government and implement the junior coalition partner’s priorities. The DLUHC, meanwhile, focused on devolution and the constitution, allowing the government to bring together its Union strategy with other UK-wide economic regeneration programmes.

The flexibility of UK government structures has allowed each successive prime minister to organise government how he or she sees fit, in line with their constitutional priorities. But successive governments’ constant tinkering has harmed the civil service’s institutional constitutional memory and made it difficult for officials to consider the big picture and long-term impacts on the constitution beyond the immediate priorities of the incumbent government.

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## **There should be a permanent hub of constitutional expertise and guidance for government**

There is growing consensus around the need for a centre for the constitution within government, building on the precedent that the UK Governance Group established. Philip Rycroft recommended a “permanent constitutional secretariat in the Cabinet Office”.<sup>17</sup> Similarly, the Dunlop Review of UK Union Capability, which Theresa May commissioned, recommended a centre for the constitution and devolution in the Cabinet Office, incorporating the offices of the secretaries of state for Scotland, Wales and Northern Ireland to strengthen the Union within the centre of government.<sup>18</sup> Lord Dunlop proposed that such a unit should be overseen by a single permanent secretary, with a shared policy function.

We agree that there is a need for a permanent centre for constitutional matters within the Cabinet Office, but we would distinguish between constitutional policy functions – when officials support ministers to deliver their desired constitutional policy objectives – and constitutional advisory functions. The exact boundaries of the latter are hard to determine but officials in the Office for Parliamentary Counsel, parliamentary experts and clerks working within government, the intergovernmental relations secretariat, and ethics and legal advisers all play this role. Not all policy functions need to sit in a central unit – the government of the day should be able to organise the machinery of government to best deliver its priorities – although as issues that cut across policy areas, there is a strong case for them to sit at the centre. However, all advisory functions should be centralised to enable the civil service to develop.

Constitutional advisory functions are core functions that would be necessary under any government. They are an essential resource for ministers and officials across government, as well as supporting the cabinet secretary in his role as a key constitutional adviser to the government. Performing such functions requires expertise, experience and in-depth knowledge, and therefore we recommend the establishment of a permanent Centre for Constitutional Expertise in the Cabinet Office.

## **The government should establish a Centre for Constitutional Expertise**

The Centre for Constitutional Expertise should be centred around the cabinet secretary and the *Cabinet Manual* (we set out recommendations on how to further strengthen the manual in Chapter 6). This should provide it with a degree of permanence at the heart of government, preventing its continued existence from being intertwined with the fate of any particular minister, or the government of the day’s agenda.

Establishing the centre as a distinct unit would also enable it to attract constitutional experts from both inside and outside the UK’s political institutions, attracting talent from academia, and promoting an interchange between the different branches of government, including parliament and the judiciary.

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The centre should fulfil both existing and new functions:

- It should be responsible for maintaining and updating the *Cabinet Manual* on a regular basis, working to the cabinet secretary.
- It should remain a source of private, confidential advice for both officials and ministers on practical constitutional questions, and provide advice on the wider constitutional implications of specific policy proposals.
- Officials should be able to refer questions to the Centre for Constitutional Expertise where they are concerned that certain policies would be in breach of existing legal obligations or constitutional conventions.
- The centre should also be responsible for providing training and promoting constitutional understanding across government more widely.
- The centre could be responsible for improving constitutional understanding among ministers to ensure they understand their constitutional role and powers. This could take the form of induction and training for ministers and their private offices and special advisers, as well as written guidance specific to their role, setting out key constitutional concepts and how they might apply to the different activities they undertake, the powers they hold and where they stem from, the accountability mechanisms to which they are subject, and the constitutional relationship with civil servants.
- It should work closely with parliamentary committees responsible for the constitution. As currently constituted, this would include the House of Commons Public Administration and Constitutional Affairs Committee and the House of Lords Constitution Committee. If proposals elsewhere in this report are adopted, this should include the Parliamentary Committee on the Constitution.

Establishing such an office would encourage the retention of institutional memory, and the development of constitutional expertise within government. It would create an authoritative centre, able to develop a continuous and consistent view of the constitution and help empower civil servants more broadly to safeguard the constitution.

### **The role of the civil service should be strengthened and clarified**

As well as building up constitutional capability, great clarity on the role of the civil service in respect of the constitution is needed to ensure that the authority of officials to give advice in respect of these matters is beyond doubt.

Ministers, as with all aspects of government, should be able to question and challenge on constitutional matters and are ultimately responsible for the decisions that they make. But explaining and defending constitutional norms and best practice should be seen as fundamental to a healthy democratic culture and well-functioning government, not as an obstructive behaviour. Therefore, it is important that the role of the civil service is strengthened and clarified to reflect that.

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The Institute for Government has recommended that there should be a statutory role for the civil service to address concerns about its lack of clear identity and unclear accountability, which have fuelled tensions between ministers and officials. The civil service statute should set out:

**the institution’s purpose, remit and responsibilities in legislation. It would preserve ministerial accountability for policy decisions and the ultimate operation of government, and improve the understanding and oversight of those areas where civil servants should be held responsible.<sup>19</sup>**

In addition to this, existing mechanisms to ensure propriety in government could be extended to highlight constitutional risks, and require ministers to assume personal responsibility for decisions that may be inconsistent with established constitutional practice. For example, permanent secretaries have a duty as accounting officers to ensure value for money. When they are unable to assure a minister that spending proposals meet the criteria of regularity, propriety, feasibility and value for money, the permanent secretary can ask the minister for a formal instruction – known as a ‘ministerial direction’ – to proceed.<sup>20</sup>

The role of the cabinet secretary as the primary constitutional adviser could be made explicit in a new constitutional statute. And a new category of ministerial direction on the grounds of ‘constitutional propriety’ could be created. This would allow the cabinet secretary to raise concerns publicly, where, in their judgment, they are unable to assure ministers of the constitutional propriety of their proposals, without undermining ministers’ ability to implement those decisions.

We propose that this mechanism should be reserved for the most senior government official, but other officials should be able to raise issues to the Centre for Constitutional Expertise. These issues could be escalated if necessary, leaving the cabinet secretary to make the final call as to whether a direction is needed. While this will necessarily require a degree of judgment, consistency with the *Cabinet Manual* could be a key factor taken into account.

The cabinet secretary could also be required to deposit documents such as ministerial directions sought based on constitutional propriety with a parliamentary committee, including the Parliamentary Committee on the Constitution we proposed be established in Chapter 1. This will ensure enhanced scrutiny when officials have concerns about constitutional propriety, and force ministers to consider the political consequences when making a decision as to whether to heed advice.

### **A minister for the constitution could bring benefits, but could not be relied on as a central safeguard**

Another common recommendation to strengthen the constitution in government is to establish a minister for the constitution. Like departmental responsibilities, this role has often featured among the ministerial ranks but the role and responsibilities have varied significantly, as we set out in Box 7.

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## Box 7 Constitution ministers, 1997–present

As Figure 3 demonstrates, there have been 19 ministers with explicit constitutional responsibility in the past 25 years, although the seniority of their role and the length of their tenures has varied significantly. Between 1997 and 2003, Lord Irvine had a constitutional stewardship function as lord chancellor. The role of lord chancellor dates back centuries, and at this time the office holder also acted as Speaker of the House of Lords, the head of the judiciary and a senior judge in the House of Lords.<sup>21</sup> The lord chancellor had unique responsibilities within government to uphold the rule of law and the independence of the judiciary, acting as a voice for the judiciary within the cabinet. In 2003, Lord Falconer inherited the brief as secretary of state for the Department for Constitutional Affairs and lord chancellor.<sup>22</sup>

The Constitutional Reform Act 2005 fundamentally altered the role of the lord chancellor, creating separation between the executive and judiciary as part of wider reforms to remove the judicial functions from the House of Lords and create the Supreme Court.<sup>23</sup> While the lord chancellor retained some responsibilities related to justice, since these reforms, the role has become more akin to other cabinet ministers.

Under the coalition government, Nick Clegg oversaw constitutional reform as deputy prime minister and minister for intergovernmental relations and devolution, supported by a minister for constitutional and political reform.<sup>24</sup> In 2010, Conservative MP Mark Harper was appointed to this role, followed by Chloe Smith in 2012 and Jo Johnson as minister for constitutional reform in 2013.<sup>25</sup> This junior ministerial role gave the Conservative Party oversight of the constitutional reform agenda in the centre of government during the coalition government.

Between 2018 and 2021, the chancellor of the Duchy of Lancaster (CDL) oversaw constitutional matters and intergovernmental relations.<sup>26</sup> But the role covers a wide remit within the Cabinet Office, and therefore the extent of ministers' focus on constitutional issues has been dependent on the office holder's interests and inclination. While David Lidington and Michael Gove took on key constitutional responsibilities, subsequent CDLs such as Steve Barclay and Oliver Dowden have focused on other issues.

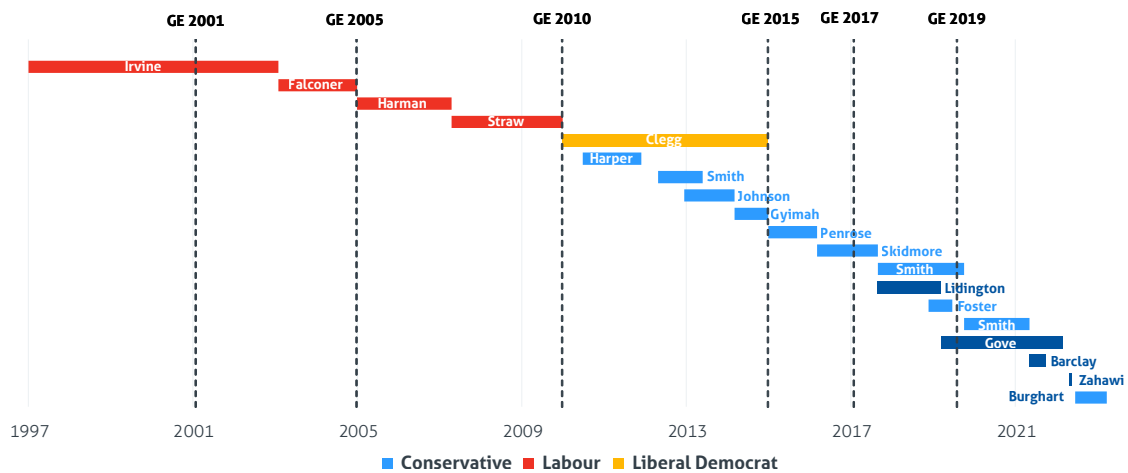
The CDL's role has been supported by a series of junior ministers. In 2015, Cameron appointed John Penrose as minister for constitutional reform. In 2016, Theresa May created the role of minister for the constitution, appointing Chris Skidmore in 2016, Chloe Smith between 2018 and 2021, and Kevin Forster briefly in 2019. After a year in office, Johnson appointed Chloe Smith as minister for constitutional and political reform in 2020. These roles have tended to focus mostly on the practical implementation of constitutional policy.

Between September 2021 and October 2022, there was no constitution minister. In October 2022, Alex Burghardt was given responsibility for the constitution as a parliamentary secretary for the Cabinet Office.

At the cabinet level, constitutional responsibilities remain confused. Michael Gove has adopted various constitutional responsibilities as secretary of state for the DLUHC and minister for intergovernmental relations; however, the government has said that the deputy prime minister has ministerial responsibility for the constitution.<sup>27</sup>

Throughout this period, the UK government has retained cabinet-level posts for the secretaries of state for Scotland, Wales and Northern Ireland. The nature and purpose of these roles remain contested, in particular with regard to the extent to which their priorities should be driven by the interests or opinions of their respective nation, or by the political priorities of the government of the day. These tensions have become more apparent in recent years, with different parties in power in Scotland, Wales and Northern Ireland than in the UK government and a more competitive approach to devolution since Brexit.

Figure 3 UK government ministers with responsibility for the constitution, 1997–2023



Source: Institute for Government analysis of IfG ministers database. Notes: Darker shades indicate cabinet-level posts and lighter shades indicate junior ministers.

The Dunlop Review recommended that “a senior Cabinet position with specific responsibility for the constitutional integrity and operation of the United Kingdom needs to be more formally recognised within the machinery of government”, which Dunlop proposed be titled the secretary of state for intergovernmental relations and constitutional affairs. He suggested that such a role could be akin to the lord chancellor, with an explicit responsibility for ensuring compliance with constitutional norms and convention, with responsibilities transcending traditional political divides.

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Having such a position could have many benefits. It could ensure that constitutional issues are represented in cabinet discussions and provide constitutional advice and expertise at a political level. It could clarify constitutional responsibility in government and bring coherence and cohesion to the government's constitutional agenda, and provide a level of protection for the civil service structures supporting this role. It could be combined with a number of existing cabinet positions, such as chancellor of the Duchy of Lancaster, the deputy prime minister or the leader of the House, ensuring that it is integrated in the day-to-day work of government related to the constitution and not merely a ceremonial and titular role. But there remains a risk that it could become secondary or sidelined in comparison with the primary role.

Establishing a minister for a key policy area can bring a renewed focus and prominence to that area in broader government discussion. However, the effectiveness of this can depend on the degree of status afforded to that minister, the personality of the office holder and the priorities of the prime minister. The ability of the office holder to develop expertise and authority in this role would also depend on wider factors such as the level of ministerial churn.

Any ministerial role brings with it the inherent challenge of achieving political aims, not a guardianship role. Recreating the role of lord chancellor with its specific history dating back to its traditions of judicial independence would be difficult. The prime minister may also be incentivised to appoint loyal MPs to this position, to ensure they were not obstructive or critical of the government's policy proposals. In recent years we have seen similar behaviour in the politicisation of the attorney general, whose position was used to legitimise rather than constrain the government's plans to override international law through the Northern Ireland Protocol Bill, despite widespread scepticism among the legal community of the legality of the action.

Therefore, we conclude that while a minister for the constitution could be useful and advisable when the government has a big constitutional reform agenda, it cannot be relied on as a key constitutional safeguard.

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## Recommendations

### **5. Government should clarify the role and strengthen the capacity of the civil service to give constitutional advice.**

- The civil service should be put on a statutory basis to clarify its role and responsibilities. The role of the cabinet secretary as the primary constitutional adviser should be made more explicit.
- The government should establish a permanent Centre for Constitutional Expertise within the Cabinet Office. This should bring together key constitutional advisory functions – including advice on constitutional law, parliamentary procedure, intergovernmental relations and legislation – under the cabinet secretary. The government should be able to organise its constitutional policy functions as it thinks fit to best deliver its agenda, although as many constitutional policy proposals have cross-cutting implications, there is a strong case that these too should sit in the Cabinet Office.
- The Centre for Constitutional Expertise should offer services to ministers and officials in government departments, including giving advice on constitutional matters, providing training and education on the constitution, and acting as a point of reference for questions on constitutional propriety.
- Where the cabinet secretary cannot assure ministers of the constitutional propriety of their proposals, they should be able to seek a ministerial direction. Ministerial directions should be deposited to the new Parliamentary Committee on the Constitution, to enable scrutiny of the policy, and to encourage ministers to consider the political consequences of proceeding.



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## 6. Constitutional guidance

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Constitutional conventions and precedent take on a greater role in countries that do not possess a written constitution. With the absence of a codified document, UK politicians must rely on their understanding of various constitutional conventions to determine the constitutionality of their own behaviour and that of others. But there are some key weaknesses to this system as it currently exists. There is not enough clarity about the nature of the UK's constitutional conventions and guiding constitutional principles, which means that it is difficult to hold actors who break precedent accountable for their actions.

In the UK, written guidance to provide clarity on constitutional affairs already exists and could potentially be strengthened. There are myriad constitutional guidance documents (which include codes of conduct, memoranda and handbooks) that are not statutory but nonetheless offer a degree of predictability to constitutional behaviour and serve to constrain the behaviour of various actors in public life – politically if not legally.

There has been a sharp increase in the number of these guidance instruments in the UK in recent decades.<sup>1</sup> Established in their current form in 1992 and 1996 respectively, the Ministerial and Civil Service Codes are perhaps the most prominent constitutional guidance documents in the UK – providing ethical guidance about how ministers and civil servants should approach their roles. The *Ministerial Code* has been successful in facilitating the scrutiny of ministers, including most recently Dominic Raab, Priti Patel and Nadhim Zahawi, demonstrating the capacity for guidance documents to act as a political accountability tool.<sup>2</sup> There is also guidance on ethical principles in public life more broadly (the oft-mentioned Nolan principles), as well as parliamentary guidance documents (including Standing Orders and Erskine May), and numerous agreements, frameworks and memoranda of understanding that relate to devolution. Notably, in 2011, the UK established a *Cabinet Manual* to provide an official account of the UK's unwritten conventions as they relate to ministerial government.

Despite these prominent examples, we believe that constitutional guidance in the UK can and should be strengthened. We propose three ways to do this: by producing a statement of constitutional principles, updating the *Cabinet Manual* and establishing stronger devolution guidance.

### **The *Cabinet Manual* was created to provide constitutional clarity**

The emergence of the *Cabinet Manual* as a publicly available document, which began under Gordon Brown's government, can be attributed to multiple factors. First, its drafting was initiated as a potential mechanism to kick-start discussions around wider constitutional codification.<sup>3</sup> Second, it was seen as an expedient way to provide clarity on the UK's constitutional arrangements, especially considering the widely recognised potential of a hung parliament in the 2010 general election.<sup>4</sup> Lastly, many scholars

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and think tanks advocating for the innovation had taken inspiration from New Zealand, which had established a cabinet manual in 1979 as a way to promote public understanding and political stability under an uncodified constitution.<sup>5</sup>

Finally published by the Cabinet Office in 2011, the *Cabinet Manual* sets out the government's understanding of the UK's constitutional conventions – the “informal rules that bind political actors to behave in a certain way”.<sup>6</sup> It includes chapters on the sovereign, elections, parliament and government (among other things) and, in a preface written by David Cameron, is described as “an authoritative guide for ministers and officials”.<sup>7</sup> The manual is intended to provide greater clarity on the exact nature of the UK's constitutional conventions and allow political actors and the public alike to understand when they have been observed and when not.

### **Guidance documents are a valuable tool for accountability**

The *Cabinet Manual* is not the final word on constitutional conventions, as parliament or other political actors may challenge the executive interpretation of those it represents. Rather than providing a fixed set of sacrosanct constitutional rules, the *Cabinet Manual* gives an overview of how constitutional laws are to be interpreted and applied and of the conventions and rules the government sees as important for the operation of government. As one observer has noted (with reference to the New Zealand variant), the *Cabinet Manual* is akin to a dictionary – an amendable understanding of existing practice.<sup>8</sup>

Cabinet manuals have value as vehicles to improve constitutional clarity. The archetypal example of this was the 2010 general election, before which there was great uncertainty over the exact rules when it came to the formation of an executive in the event of a hung parliament. Historian Peter Hennessy describes how, without the existence of the draft of the *Cabinet Manual*, it would “have been very difficult for us to say what the constitutional understandings were” regarding executive formation.<sup>9</sup>

Conversely, the lack of such clarity can engender significant constitutional crises, as evidenced in Australia in 1975 (when the prime minister, Gough Whitlam, was controversially dismissed by the governor general, John Kerr) and Canada in 2008/09 (when there was a significant public dispute about the propriety of the prime minister Steven Harper's prorogation of parliament).<sup>10</sup> In the former case, it led to parliament's attempt to “recognise and declare” a selection of constitutional conventions, while in the latter, several scholars advocated, unsuccessfully, for the establishment of a Canadian cabinet manual.<sup>11</sup> One of the key benefits of a cabinet manual is that, by providing an “orderly and clear set of indicators of how the system works”, it provides a shared starting point for different constitutional actors in the event of a constitutional crisis.<sup>12</sup>

When necessary, a well-functioning cabinet manual may form part of an ecosystem of political checks on attempts to act against established constitutional practice. Although, as Alison Young outlines, it possesses no legal standing and has no mechanism for enforcement, it can facilitate the placing of political pressure on those who neglect its contents.<sup>13</sup> In other words, if a government sets out its understanding

of constitutional conventions, rules and how laws should be applied, the media, the opposition and civil society can more readily hold it to account if it does not adhere to these. In addition, if a government chooses to alter the *Cabinet Manual*, the changes it chooses to make will be visible to the public and may be subject to challenge and parliamentary and media scrutiny.

### **The *Cabinet Manual* is not fulfilling its constitutional potential**

As it stands, the UK *Cabinet Manual* is not currently fulfilling its constitutional potential. Compared with similar guidance documents, the *Cabinet Manual* has a low citation rate in both the Houses of Parliament (see Table 2) and the media (see Table 3). Furthermore, compared with its New Zealand counterpart, the *Cabinet Manual*'s profile in public life is low – the New Zealand *Cabinet Manual* has had more than double the number of mentions in major news outlets over the past five years.\* This may be because the radical constitutional change of electoral reform in New Zealand gave the *Cabinet Manual* status as a key tool facilitating constitutional transition, with the document helping to provide clarity on cabinet collective responsibility in an era of power sharing.<sup>14</sup> Another reason for the *Cabinet Manual*'s prominence in New Zealand is because its equivalent of the *Ministerial Code* is contained within the manual. This meant, for example, that when opposition parties challenged the former transport minister Michael Wood over his failure to declare his shareholdings in an airport to parliament, they did so by invoking the *Cabinet Manual*.<sup>15</sup>

The UK *Cabinet Manual* has not been updated since its publication in 2011. The consequence is that several of the conventions it contains are out of date, notably those concerning the calling of elections, confidence in government and the EU.<sup>16</sup> The risk here is that the *Cabinet Manual* is seen as a historic relic as opposed to a constitutional rulebook with contemporary relevance – the 1968 Canadian 'Manual of Official Procedure' is viewed by some as anachronistic, a result of its failure to be updated for more than 50 years.<sup>17</sup> If the *Cabinet Manual* is supposed to be an authoritative account of the government's view on constitutional conventions, then an outdated version is likely to cause confusion and raise questions about its legitimacy.

Table 2 **Number of mentions of constitutional guidance documents in *Hansard*, 2018–23**

<b>Guidance document</b>	<b>Number of <i>Hansard</i> mentions</b>
<i>Cabinet Manual</i>	63
<i>Civil Service Code</i>	228
<i>Ministerial Code</i>	1,044

Source: UK parliament *Hansard*, 23 August 2018 to 23 August 2023.

\* Bay of Plenty Times, The Dominion Post, Hawke's Bay Today, The New Zealand Herald, Otago Daily Times, The Press, The Southland Times and Waikato Times (obtained from Factiva).

Table 3 **Number of mentions of constitutional guidance documents in major UK newspapers, 2018–23**

Guidance document	Number of major newspaper mentions
<i>Cabinet Manual</i>	91
<i>Civil Service Code</i>	384
<i>Ministerial Code</i>	5,206

Source: Analysis from Factiva, 23 August 2018 to 23 August 2023. Notes: Major newspapers = *Daily Express*, *Daily Mail*, *Daily Mirror*, *Daily Star*, *The Daily Telegraph*, *Evening Standard*, *Financial Times*, *The Guardian*, *The Independent*, *Mail on Sunday*, *Metro*, *The Observer*, *The Sun*, *The Sunday Times* and *The Times*.

## How to strengthen the *Cabinet Manual*

We recommend a rethink of the UK’s approach to the *Cabinet Manual* to ensure it can play its most useful constitutional role.

We recommend that:

**The *Cabinet Manual* should be updated more consistently.** The government has committed to issuing an updated *Cabinet Manual* in the coming months, a positive development that ought to strengthen its legitimacy and usefulness. But a more consistent reissue at the start of every parliament would be a good way to embed the UK version into public consciousness and ensure that its articulation of norms and conventions remains relevant. The *Cabinet Manual* should continue to be owned by the Cabinet Office, which should have responsibility for monitoring the manual and be responsible for presenting a new government with a draft revised *Cabinet Manual* at the beginning of every parliamentary term. Where possible, this revision process should begin towards the end of the preceding parliamentary term, with input from relevant experts and parliamentary committees.<sup>18</sup>

**The *Cabinet Manual* should be endorsed by government.** One of the key reasons that the *Cabinet Manual* has become an established part of constitutional culture in New Zealand is that governments endorse it at the beginning of each term, “accept[ing] it as the primary source of their working rules”.<sup>19</sup> Rhetorical endorsement can play a huge role in binding politicians to certain commitments, with the opposition and the media quick to pick up if the government subsequently breaks explicit promises. A public endorsement of the legitimacy of the *Cabinet Manual* by an incoming prime minister would go some way in tying them to the constitutional conventions it outlines.

**The *Cabinet Manual* should be placed on a statutory basis.** Philip Rycroft has suggested that placing the *Cabinet Manual* on a statutory basis would go some way to entrenching its legitimacy.<sup>20</sup> This would not necessarily mean codifying the content within the *Cabinet Manual* (for example, the specific norms and conventions) but merely placing its existence and regular revision on the statute book. The process of passing these requirements into law would heighten awareness of the manual’s existence and make it more difficult for any government who wanted to abolish or neuter it.

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**The *Cabinet Manual* should be scrutinised by parliament.** Some scholars have questioned whether it is appropriate for parliament to approve the *Cabinet Manual*.<sup>21</sup> Given much within the *Cabinet Manual* addresses parliamentary matters (especially Chapter 5 on the executive's relationship with parliament), it could be argued that parliament should have a say in approving or amending its contents. But we think such an approach would come too close to a formal codification process. As is already the case, it is important for the Cabinet Office to obtain the input of external experts and allow for parliamentary committees to scrutinise the manual to help build as much consensus as possible over key constitutional issues. But, in terms of formal ownership, the *Cabinet Manual* should remain a document where the government sets out its own view of convention.

The New Zealand case teaches us that cabinet manuals do not gain purchase and legitimacy overnight – the manual's road to constitutional centrality was a gradual one from its first publication in 1979, when it was established as an opaque and non-public document for executive guidance.<sup>22</sup> But should an incoming government initiate the reforms recommended above, we envisage that the UK *Cabinet Manual's* profile would increase in parliamentary, civil service and media circles.

### **The four governments of the UK should jointly own devolution guidance**

The *Cabinet Manual* is owned by the UK government, and provides a useful tool to judge its actions against its own interpretation of the constitution. But in other areas, such as the conventions around how the four governments of the UK relate to each other, guidance should be the product of agreement, and therefore jointly owned by the four governments of the UK. There are several key documents that govern intergovernmental relations:

- **2012 Memorandum of Understanding.** Aspects of the Memorandum of Understanding have been superseded by the Review of Intergovernmental Relations (see below), but the document set expectations and agreed ways of working in areas such as communication and consultation, co-operation and information sharing, confidentiality, correspondence and parliamentary business, which remain relevant today. But the Memorandum of Understanding has not been updated since 2012 and does not reflect the UK's exit from the EU.
- **2022 Review of Intergovernmental Relations.** In 2019, the four governments of the UK jointly developed draft principles to govern intergovernmental relations (see Box 8). These then informed the Review of Intergovernmental Relations, which concluded in January 2022, which paved the way for the establishment of new formats for meetings between the leaders and ministers of the different governments, a new dispute resolution procedure and a joint secretariat.
- **Common frameworks.** These agreements were developed in response to the UK's exit from the EU, to set out processes for co-ordination in policy areas previously governed by EU law, and in which divergence may create barriers to trade within the UK internal market.

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### Box 8 **Draft principles for intergovernmental relations, 2019**

- A. Maintaining positive and constructive relations, based on mutual respect for the responsibilities of governments across the UK and their shared role in the governance of the UK
- B. Building and maintaining trust, based on effective communication
- C. Sharing information and respecting confidentiality
- D. Promoting understanding of, and accountability for, their intergovernmental activity
- E. Resolving disputes according to a clear and agreed process.<sup>23</sup>

In recent years there have been frequent disputes about the ways of working and terms of engagement between the UK government and the devolved administrations. For example, the Welsh government has regularly complained about late engagement from the UK government and a lack of information sharing on legislation touching on devolved issues, which it says is a reason why it has refused legislative consent on some occasions.<sup>24</sup> The increasing complexity of the post-Brexit landscape has created the need for guidance in new areas, including common frameworks, which set out detailed and technical consultation processes.

Significant guidance about best practice on intergovernmental working exists in the form of these agreements, but there is a lack of transparency around them, and poor understanding among many officials. While politics will remain the primary determinate of future disagreements, having clearly agreed and up-to-date ways of working could help manage questions of process, and provide a mechanism according to which the four governments of the UK can hold each other accountable should they deviate.

Like the *Cabinet Manual*, we recommend that these documents should be regularly updated and endorsed in the Prime Minister and Heads of the Devolved Governments Forum. The intergovernmental relations review established a new independent intergovernmental relations secretariat, staffed by officials from all four governments, which should have responsibility for owning, compiling and maintaining these agreements. They should ensure that guidance is easily accessible and available to officials in all four administrations and act as a point of reference for questions about agreed working practices, information sharing and consultation processes.

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## The UK should produce a list of its core constitutional principles

In many cases, questions of whether an action is consistent with the UK constitution do not rest on technical discussion of whether best practice has been followed but whether a more general constitutional principle has been violated. A well-functioning political constitution requires a shared understanding of constitutional principles from which political debate can commence. Currently there is no clear and widely agreed articulation of those principles in the UK.

The establishment of a collection of high-level constitutional principles could act as an overarching lodestar for constitutional best practice.\* These principles would sit above other conventions, being as nearly as possible unanimously agreed among actors of all political dispositions. Examples of such key principles could include parliamentary sovereignty, the rule of law, and democracy; there currently exists no centralised statement of these overarching principles that can be used as a reference point to understand the UK's constitutional tradition.<sup>25</sup>

In countries with written constitutions, such high-level principles are often embedded in constitutional preambles. For example, France's constitution states that "France shall be an indivisible, secular, democratic and social Republic", which "shall ensure the equality of all citizens before the law", outlining the overarching principles that guide its democratic republic.<sup>26</sup> Closer to home, the seven Nolan principles of public life (selflessness, integrity, objectivity, accountability, openness, honesty and leadership) have proven general enough to achieve widespread political buy-in and remain part of the UK's political language almost 30 years later.

A statement of constitutional principles would create constitutional standards that would generate greater clarity on the overarching political principles that animate the UK's democracy, provide a shared basis from which discussions about the UK constitution could begin and, if necessary, provide a basis for the challenge of actions that might contravene them. These principles would not be statutory but could be used as a high-level guide to constitutional best practice and could be referenced in political and public debates to hold constitutional actors to account. They may also be used to underpin civic education programmes in schools and as a basis for cultivating greater constitutional understanding among the public.

It is not for us to delineate on what the exact constitutional principles should be – to be credible, a statement of constitutional principles would need to emerge from a legitimate and proper process. We believe formulating such a list should be an early task for a new cross-party Parliamentary Committee on the Constitution (outlined in Chapter 1). There is precedent for this – the establishment of the Committee on Standards in Public Life in 1994 saw the body tasked with developing a set of normative principles on ethical behaviour in public life, which have become known as the aforementioned Nolan principles, after the name of the inaugural chair of the committee.

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\* For a discussion of this, see Brazier R, 'The non-legal constitution: thoughts on convention, practice and principle', *Northern Ireland Legal Quarterly*, 1992, vol. 43, no. 3, p. 262, retrieved 6 September 2023, [https://heinonline.org/HOL/Page?handle=hein:journals/nilq43&div=27&g\\_sent=1&casa\\_token=&collection=journals](https://heinonline.org/HOL/Page?handle=hein:journals/nilq43&div=27&g_sent=1&casa_token=&collection=journals)

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However, if constitutions are meant to reflect the unique political dispositions of the countries from which they emerge, then a statement of constitutional principles would need an element of democratic approval.<sup>27</sup> The high-level list of principles that the committee develops should be voted on in parliament, to ensure the wider legitimacy and raise the profile of the list.

There are other possible mechanisms by which a list of constitutional principles could be developed. One is the creation of a dedicated, temporary parliamentary committee to develop a list that could be put before parliament. Another could be to hold a parliamentary convention, in a similar manner to the constitutional congresses that the Australian parliament held in the 1970s and 1980s, which sought to “recognise and declare” a list of constitutional conventions.<sup>28</sup> This would involve members of the Houses of Parliament, as well as representatives from the devolved administrations and English local government, convening to debate and recognise key constitutional principles.

## Recommendations

### **6. Constitutional guidance should be strengthened to provide more clarity about the functioning of the UK constitution.**

- The *Cabinet Manual* should be updated and reissued at the start of every parliament by the Centre for Constitutional Expertise. The cabinet should endorse it at the first meeting after an election, and ministers should be expected to act in accordance with it.
- The new Intergovernmental Relations Secretariat – established by the 2021 Review of Intergovernmental Relations, and staffed by officials from all four governments of the UK – should be given explicit responsibility for maintaining all intergovernmental agreements and ensuring greater transparency.
- The first task of the Parliamentary Committee on the Constitution should be to restate the UK’s core constitutional principles. This should be a high-level list, similar to the seven Nolan principles of public life. The principles should then be endorsed by a vote in each House.



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## 7. The role of the public in constitutional change

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As we set out earlier in this report, a key problem in the UK constitution is that short-term party-political interest can often drive constitutional change, and without widespread public support. Parties, and the political actors within them, set the rules that are the foundation of the democratic system but also operate within those rules, which gives them a partisan interest in how they function. On some constitutional issues, for example the voting system, political parties have a strong self-interest because they are motivated to gain and retain power.

As players in the system, political actors should not be left to determine the rules of the game alone. For this reason, many constitutions internationally make explicit reference to 'the people'<sup>\*</sup> or require public approval before any amendments can be made.<sup>\*\*</sup> Involving the public in constitutional change is important for ensuring that changes secure widespread support and therefore command legitimacy. A clear public mandate can also act as a form of entrenchment, making it more difficult for changes to be overturned without a further reference to the people, promoting constitutional stability. For example, the establishment of the Scottish and Welsh parliaments was approved in a referendum, and the convention that they should not be abolished without further recourse to the people is now enshrined in law.

Historically, the primary mechanism through which citizens have had an input into the UK political system has been through elections. However, some big constitutional changes have been made without clear public endorsement. For example, the Fixed-term Parliaments Act 2011 had only appeared in the 2010 manifesto of the Liberal Democrats, the junior coalition party. The Human Rights Act, introduced after the 1997 election, was not a central issue during the election campaign.

Even when proposals for constitutional change are included in a party's manifesto, the detail is usually light in terms of both the intended outcomes and the process for achieving change. For example, before the coalition government's attempt at Lords reform, the 2010 Conservative manifesto simply committed to "build a consensus for a mainly-elected second chamber to replace the current House of Lords"<sup>1</sup> and the Liberal Democrats' manifesto simply said it would "[r]eplace the House of Lords with a fully-elected second chamber with considerably fewer members than the current House", with no further detail on either the form the new chamber would take or the

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\* The 1789 US constitution begins "We the people", while the preamble to the 1958 French constitution states that "national sovereignty shall vest in the people", see Thimont Jack M, Sargeant J and Pannell J, *A Framework for Reviewing the UK Constitution*, Institute for Government and Bennett Institute for Public Policy, 2022, retrieved 6 September 2023, [www.instituteforgovernment.org.uk/publication/report/framework-reviewing-uk-constitution](http://www.instituteforgovernment.org.uk/publication/report/framework-reviewing-uk-constitution)

\*\* For example, Australia, Denmark, Ireland, Japan and Switzerland require referendums to approve any constitutional amendments, and Austria and Spain require referendums on amendments to key parts, see Independent Commission on Referendums, *Report of the Independent Commission on Referendums*, The Constitution Unit, University College London, 2018, retrieved 6 September 2023, [www.ucl.ac.uk/constitution-unit/research-areas/elections-and-referendums/independent-commission-referendums](http://www.ucl.ac.uk/constitution-unit/research-areas/elections-and-referendums/independent-commission-referendums)

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process by which the change would be achieved.<sup>2</sup> While an election win may be seen as public endorsement for the principle of change, it does not necessarily constitute a mandate for how that change should be made. Therefore, there is a strong case for engaging the public in constitutional change in other ways.

### **Referendums play an important role in constitutional change but they can be a blunt instrument for decision making**

More recently, referendums – which ask direct, and usually binary, questions of the electorate – have been used as a means of obtaining public approval for constitutional change. Since the first referendum in the UK in 1973, there have been 12 further referendums – three of which have been UK-wide. Several of these have been held exclusively on constitutional matters, including the UK’s relationship with the EU, the Good Friday Agreement, the voting system and devolution – to Scotland and Wales and within England. There is now an emerging precedent that referendums should be held on certain constitutional issues and it would be difficult to see the UK rejoining the EU, or Scotland leaving the Union, without another vote taking place. Referendums are an established part of the UK constitution, and will undoubtedly be used in future. But there have been several criticisms of their use in practice.

Political or partisan interests, rather than constitutional principle, can often drive decisions to call a referendum.<sup>3</sup> For example, the 1975 European Communities membership referendum was reportedly called to manage divisions in the Labour Party, and the 2016 EU referendum divisions in the Conservative Party. Referendum requirements have also sometimes been driven by those opposed to a change, as a means of making that change more difficult. For example, the referendums on the 1979 proposals for devolution to Scotland and Wales arose as a result of a backbench amendment to the implementing legislation from Labour MPs opposed to devolution. The amendment also required that 40% of the electorate (as opposed to those voting) needed to vote for devolution in order for the proposition to be implemented, meaning devolution to Scotland failed, despite more than 50% of those voting supporting devolution.

Referendums can pose challenges, if not properly integrated into broader representative policy making processes. For example, in 2016, the UK government was opposed to leaving the EU, and little preparation was done in advance of the EU referendum to develop a plan or proposals for a Leave vote. This, combined with the government’s narrow majority and divisions within parties, meant that parliamentary battles over the terms on which to leave the bloc characterised the subsequent five years.

On some matters there are ways to guard against these risks. Referendums can be held after legislation, so that the details of the proposed change are fully developed in law, to be commenced only after a successful referendum vote. For example, had the public voted in favour of the alternative vote system in the 2011 referendum, the change, already legislated for in the Parliamentary Voting System and Constituencies Act 2011, would have come into effect automatically. But this is not possible in all circumstances; for example, where a change would require negotiations between

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parties. The 2017 UCL Independent Commission on Referendums recommended that “wherever possible, referendums should be held post-legislatively” and if the proposal for change is not set out clearly before a referendum, the implementing legislation should trigger a second referendum.<sup>4</sup>

Referendums can be blunt instruments for involving the public. Where there is not enough public interest in a topic, turnout can be low. For example, turnout in the 1998 referendum establishing the Greater London Authority was just 34%,<sup>5</sup> which can call into question the legitimacy of the process. By contrast, referendums that lead to high levels of engagement – such as the Brexit and Scottish independence referendums – can polarise public debate. Additionally, they require a question to be framed with a binary answer. While some constitutional questions are suited to this – such as a choice between two clearly defined options – others are not. These include questions relating to the balance of membership of the House of Lords, or rules and standards for MPs and ministers.

While there is some evidence that public support for referendums has declined in recent years, with ‘referendum fatigue’ cited as a possible cause,<sup>6</sup> a survey by UCL’s Constitution Unit found that a sizeable proportion of the public still supported their continued use. It found that 48% of people thought that decisions on important issues should be made by referendums, compared with 23% who thought they should be made by MPs alone; 19% thought they should be made by both equally.<sup>7</sup> Nonetheless, given their challenges, referendums are not the only, or necessarily the best, way that the public can be engaged in constitutional questions.

### **Deliberative processes can offer something unique to decision makers**

Elections and referendums enable citizens to take part in decision making directly, seeking to maximise citizen participation and influence. But in the past decade there has been increased interest in and use of other tools around the world, including deliberative processes such as citizens’ assemblies, citizens’ juries and people’s panels. In the UK this has primarily been at the local level, although the UK parliament and Scottish government have experimented with citizen engagement exercises. These tools work by selecting a small, representative group of citizens to learn about an issue, deliberate in depth and make decisions. Deliberative engagement has been used extensively to tackle policy issues, but these tools can be particularly beneficial for constitutional questions, which can be unfamiliar to the public, involve complex subject matters and would benefit from a high level of consensus. The case for deliberative public engagement in constitutional questions has been recognised elsewhere, including Canada, Ireland, Luxembourg, Mongolia and the Netherlands.<sup>8</sup> The benefits these processes offer over other forms of engagement are as follows:

- **They can provide decision makers with informed public opinion.** Key features of deliberative processes are their phases. They include: a ‘learning phase’, where participants are provided with impartial information through expert presentations and written resources and are able to question experts directly; and a ‘deliberation phase’, where participants discuss the evidence with each other. These phases

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enable participants to learn from experts and the other participants, who are selected to be broadly representative of the wider population. The result for decision makers is a set of recommendations that reveal a more nuanced set of public attitudes than opinion polls, petitions, consultations, focus groups or other forms of evidence.

- **They can promote constructive dialogue.** Participants are confronted with competing views both from the evidence they receive and from the other members with whom they deliberate. The set-up allows participants to explore trade-offs, and indicate where they stand on these trade-offs after consideration of the evidence and discussions with the other participants. This can promote constructive dialogue, which may be missing from more adversarial formats for citizen participation, such as elections and referendums. They can allow participants to come to a compromise, finding a middle ground, rather than choosing between two binary options as in referendums.
- **They can unlock difficult issues.** Representative deliberative processes have helped decision makers take difficult decisions on a wide range of policy issues, at all levels of government, over which there was previously political stalemate. This could be particularly valuable for constitutional issues that have been the subject of long-standing debate. For example, recommendations from a citizens' assembly paved the way for the government to call referendums, and subsequently change the constitution, in relation to same-sex marriage in the Republic of Ireland.<sup>9</sup> While constitutional change is procedurally easy, requiring only a simple majority in parliament, it is often politically difficult – in many areas where there is consensus on a problem, there is a lack of agreement on the alternative. For example, successive attempts at House of Lords reform have failed due to disagreement as to the form a new chamber should take. Involving the public can break the deadlock on difficult questions.

Deliberative tools have been used widely on constitutional questions across the world. The Organisation for Economic Co-operation and Development's database of representative deliberative processes includes four specifically on constitutional reform, 27 on improving engagement between citizens and the political system, five on electoral reform and four on legislative reform.<sup>10</sup> Citizens' assemblies – perhaps the most well-known form of deliberative exercise – were used in Canada on the topic of electoral reform in 2004 and 2006. The Irish Constitutional Convention in 2012 brought attention to such tools, which have now become an established part of Irish constitutional decision making.

The UK has begun to experiment with these tools. There has been a proliferation of citizens' assemblies at the local level, designed to feed into local government decision making,<sup>11</sup> but as yet only the Scottish government has initiated assemblies to inform government decision making – on climate change and on the very broad remit of the future of Scotland. The UK parliament has experimented with deliberative tools to inform its future work on particular policy areas: it has held two national citizens' assemblies, one on the funding of social care and one on climate change.

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Climate Assembly UK, the most recent, was held between 2019 and 2020 and was commissioned by six select committees to inform their future work.<sup>12</sup> But deliberative exercises have not yet been used in the UK in relation to major constitutional change.

## The barriers to greater use of deliberative exercises can be addressed

There are challenges around the use of deliberative exercises in the UK.

- **Deliberative processes are expensive and take time, so should be used sparingly.** The average time for deliberation varies depending on the process, its scope and the number of people involved. Citizens' juries (smaller, around 20 people) last for around four days over five weeks, on average, while national citizens' assemblies (larger, around 100–200 people) can run for more than a year.<sup>13</sup> The Citizens' Assembly of Scotland cost almost £1 million, a considerable cost, although lower than the original budget of £1.37 million.<sup>14</sup> The Citizens' Assembly in Ireland, convened over two years from August 2016 to May 2018, cost €1,505,960 (£1.3 million).<sup>15</sup> These were both large national processes, which included participants from across the country and were supported by a secretariat, research and support services. The larger the group, the longer it will take to deliberate and form recommendations, and the more it will cost. These costs should be balanced against benefits, and the broader costs of policy failure. Nonetheless, deliberative processes are resource intensive and should only be used sparingly, on suitable issues and when there is a commitment from decision makers to engage with the process.
- **Deliberative exercises need to command wider public legitimacy.** By their nature, deliberative exercises involve fewer people than a larger participatory process. Citizens may not feel represented by a process they did not take part in. Deliberative exercises remain unfamiliar to the public, and so this can create suspicion or undermine their legitimacy. Wider public engagement and well-planned communication, and transparency strategies that explain the process, could mitigate the risk but not remove it. For example, in Ireland, citizens' assemblies have become so well known that several of the members of a recent assembly said they joined because they recognised it as a way of influencing the government.<sup>16</sup> The use of deliberative exercises can also be combined with referendums to ensure a wider public mandate.
- **The concerns of sceptical politicians may need to be overcome.** While there is growing interest in deliberative methods among MPs,<sup>17</sup> there also remains considerable scepticism. This includes concerns that deliberative exercises may conflict with or undermine representative democracy, or that the process and information given to participants may not be impartial. To address these concerns, deliberative exercises need to be properly integrated into existing democratic processes. To be successful, there needs to be consideration of how politicians could be brought along with the process and assured of the quality and impartiality of it. Options include inviting MPs to take part in an advisory board, or even to attend the process or take part themselves, as happened in the first citizens'

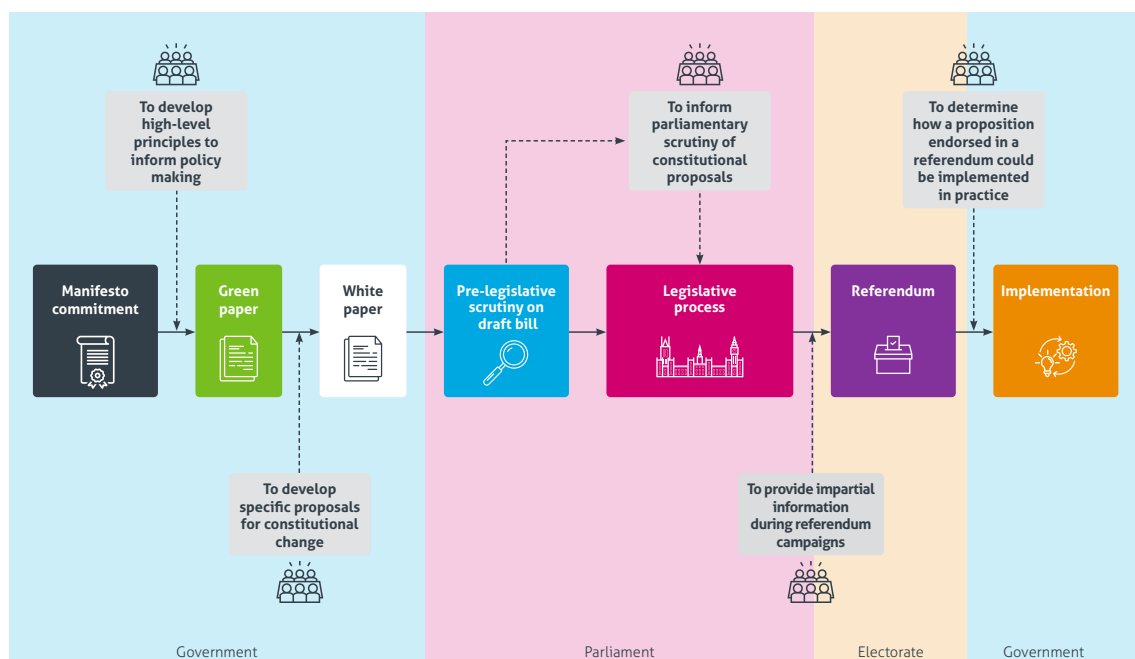
assemblies in Ireland. Reforms to the process of constitutional change should look to rebalance the decision making process so that it isn't only politicians – who have a vested interest – who are making the decisions. Any process of constitutional change should look to balance these roles, not set them at odds with each other.

While an increasing amount of evidence highlights the advantages of deliberative processes,<sup>18</sup> they are not a silver bullet. They represent just one among several participatory tools that can be employed. The suitability of the method largely depends on the specific goals and the desired outcomes. The political context also matters. Deliberative processes should not be used when a decision has already been made or if there is no clear decision making process into which the outcomes and recommendations of the process can be fed. The process is less likely to be effective if there is opposition from key decision makers and disagreement within and between key stakeholders, such as political parties, over the value and legitimacy of the process. Political buy-in is key.

## Deliberative engagement should be integrated into processes of constitutional change

The benefits of deliberative democracy do not mean that it should replace the role of parliament or government in processes of constitutional change. These forms of democracy can complement each other if deliberative processes are explicitly designed to run alongside existing democratic events (elections or referendums) or integrated into the legislative process. Deliberative democracy can serve as a complement rather than a competitor to representative, or direct, democracy. Options for how this might be done are presented below and summarised in Figure 4.

Figure 4 **Where deliberative processes can fit within the decision making cycle**



Source: Institute for Government analysis.

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## To inform proposals for the constitution

At an early stage in the policy process, the government could establish a constitutional convention – a representative body that convenes to inform proposals for constitutional change. There are various models that can be used, including citizens' assemblies, which are made up of a group of randomly selected members of the public. Other options include: 'mixed models', which involve citizens and politicians; civil society conventions, where citizens are represented by groups from civil society; and directly elected constituent conventions that work alongside a legislature<sup>19</sup> – the model chosen for the 2021 Chilean Constitutional Convention.<sup>20</sup>

These models have been used elsewhere to inform specific proposals for constitution reform. For example, in two provinces in Canada (British Columbia in 2005 and Ontario in 2006–07) and in the Netherlands (2006), citizens' assemblies were tasked with developing proposals for electoral reform. In Ireland, the constitutional convention was a series of citizens' assemblies, which were tasked by the government to "consider what changes should be made to Ireland's political and government system".<sup>21</sup>

Constitutional conventions can provide an opportunity to build cross-party and public consensus around constitutional issues and proposals for major change. In the UK, a convention could be tasked with developing high-level principles that inform government decision making, develop new proposals for constitutional change or choose between clearly defined options for change – depending on the stage in the decision making process. This approach could be useful for a party considering House of Lords reform or electoral reform in the UK.

The recommendations that a constitutional convention produces could be further developed by government or parliament, and then put to a referendum, like the Citizens' Assembly on the Eighth Amendment in Ireland in 2016 (see Box 9).

A citizens' assembly could even be held after a referendum, to determine how a proposition endorsed in principle could be implemented in practice. For example, if Scottish voters chose to vote for independence in a future referendum, the assembly could be used to set out proposals for constitutional structures, powers and the relationship between Scotland and the rest of the UK.<sup>22</sup>

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### Box 9 **Citizens' Assembly on the Eighth Amendment, Ireland, 2016**

In 2016, the Irish Citizens' Assembly was established and tasked with deliberating on the Eighth Amendment – “the right to life of the unborn” – among other issues. Comprising a government-appointed chairperson and 99 citizens representing diverse demographics, the assembly met over five sessions to discuss the issue. Members were briefed on the subject, engaged with 25 experts and examined 300 public and interest-group submissions (selected from approximately 12,000 received). They heard from people from both sides of the abortion debate, including medical, legal and ethical specialists, and people giving personal testimonies about their experiences. Members were also given the opportunity to deliberate among themselves, and to listen and reflect on the views of others in the room.

The assembly overwhelmingly agreed to repeal and replace the amendment. A final report was submitted to the Oireachtas (Irish parliament) in June 2017. In line with the process set out when the assembly was established, the Joint Committee of both Houses of the Oireachtas reviewed the findings. The joint committee's subsequent report was debated in parliament and was followed by a referendum bill, which set in motion a referendum in 2018. In the referendum, 66.8% voted to repeal the eighth amendment, which was similar to the 64% of assembly participants who voted in favour of “termination without restrictions”.

The Irish case demonstrates the importance of integrating deliberative bodies into the decision making process from the start and maintaining openness and transparency throughout to ensure public legitimacy. Many of the expert contributions and speeches to the assembly were streamed online and the submissions made, as well as the assembly's recommendations, were made publicly available. The process successfully helped politicians understand evolving public sentiment and effectively engaged the public in the constitutional change process.

### **To provide information during a referendum campaign**

Referendums ask binary questions on often complex issues. Voters often do not have the time or resources to critically assess and weigh the balance of evidence; this is especially the case when the information available is of poor quality or coming from partisan interests. Yes/no campaigns that are led by advocacy groups or politicians with an active interest in the question create incentives for division and misinformation and fuel mistrust.

To combat this, some countries have introduced representative deliberative processes that are integrated into information provision during a campaign. The process sees citizens weigh the options before a vote and provides information for voters during the campaign. Evidence from Ireland shows that deliberative processes used in pre-referendum activities help voters make more informed choices, with better alignment between voters' fundamental values and the votes cast.<sup>23</sup>



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A selection of members of the public could be given the opportunity to learn from and question experts, then deliberate on the issue and develop outputs that can be disseminated among voters. The outputs could then be published so that the wider public can benefit from the time and effort put in by those involved in the exercise and be given valuable evidence and information. This has been tried in a limited way in the United States (see the case study below) but it could be developed much further – those involved could flag claims they think are misleading, or ask for clarification on certain points or for more information. This model has most recently been discussed in Australia, where later in 2023 the public will vote on a referendum relating to formalising a role for Indigenous voices in the constitution.<sup>24</sup>

### Box 10 **Citizens' Initiative Review, United States**

The Citizens' Initiative Review (CIR) is a unique and distinct deliberative model.<sup>25</sup> It was established in the state of Oregon to provide voters with information about citizen-initiated ballot measures.

The CIR model is taken from the model of citizens' juries, giving a representative group of citizens a platform to evaluate proposed ballot measures and provide the wider public with informed arguments for both sides. The process takes between four and five days, with 20–24 demographically representative members who are randomly selected to sit on the review board. The members receive testimony from experts on the issue and deliberate the ballot measure with each other. At the end the members of the board draft a 'citizens' statement' in which they present their key findings, reasons to vote for the measure and reasons not to vote for the measure. The statement is presented in a press conference and is included in a voters' pamphlet, which is distributed to all voters.

There are three key takeaways from this case study. First, the CIR process in Oregon has benefited from being institutionalised and set in state legislation. This means the output is given an official place in the voters' pamphlet, which reaches all households in the state. Second, the CIR is overseen by a commission, which is made up of a mixture of politicians from different parties, former facilitators and former participants, which brings a variety of perspectives and interests to the organising and lends greater legitimacy to the process. Third, the practitioners who run the process and the academics who select the experts are hired independently from the commission, providing an institutionalised separation from the political decisions of the commission and the process.

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### To inform parliamentary decision making

In some cases of constitutional change, it would not be proportionate to hold large citizens' assemblies and/or referendums. Smaller deliberative exercises, such as citizens' juries, can be used to inform the legislative process, and provide information about informed public opinion on particular topics. The select committees in the Scottish parliament already do this and have used citizens' juries to broaden their evidence taking beyond the usual suspects on policy questions such as land use and primary care (see Box 11).<sup>26</sup> The institutionalisation of citizens' juries in select committee work was a recommendation of the 2016 Commission on Parliamentary Reform to "assist committees and witnesses in undertaking more innovative and meaningful engagement".<sup>27</sup>

Deliberative exercises are not well suited to line-by-line legislative scrutiny, which is best left to people with the relevant expertise. Instead, they could be used to inform MPs' views on key policy aspects of legislation or to assess the impact of a constitutional change on the wider public, or a particular section of the public. For example, one could have been used to examine opinions on, and the potential impact of, the introduction of voter ID for general elections.

Elsewhere in this report (see Chapter 4) we have set out proposals for an enhanced legislative process for constitutional bills; citizens' juries could be commissioned at the pre-legislative scrutiny phase or at committee stage to allow the views of the public to feed into parliamentary decision making. On constitutional legislation, the Office for the Constitution could commission deliberative exercises to inform the work of the Parliamentary Committee on the Constitution (see Chapter 1).

Such exercises might be appropriate for more technical constitutional issues, such as campaign finance questions. Or they could be used on normative issues such as MPs' behaviour and tasked with reviewing rules and standards.<sup>28</sup> There is precedent for involving the public in parliamentary decision making: both the Speaker's Committee for the Independent Parliamentary Standards Authority (SCIPSA) and the Committee on Standards both look at standards and the regulation of MPs and include lay members among their membership.

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### Box 11 **Case study: Scottish parliamentary select committees' use of citizens' juries**

The Commission on Parliamentary Reform in Scotland was established in 2017 to consider, among other things, how the committee system functioned and make recommendations for improvement. The commission recommended that the Citizen Engagement Unit should pilot mini-publics as part of "moving towards a more participative approach to scrutiny".<sup>29</sup> The rationale for institutionalising mini-publics, such as citizens' juries, into the decision making process was to build capacity, complementing the current model by bringing in external knowledge and skills from the public. The commission reported that deliberative approaches were "well suited to bill scrutiny or to examining issues where it is important to understand the public's views on a complex moral or social issue".

The two citizens' juries that have taken place were on the topics of land management and the natural environment, and primary care. The first, in 2019, was sponsored by the Environment, Climate Change and Land Reform (ECCLR) Committee and organised by the Committee Engagement Unit. The 21 participants were tasked with coming up with a set of principles that the ECCLR Committee should consider in relation to the funding of land management. Evaluation of the citizens' jury found that there were concerns among both staff and members that the process challenged rather than complemented the legitimacy of the parliament. Yet some did express that they felt that having had the process would enhance the influence of the committee over government and enhance scrutiny.<sup>30</sup>

Both of the pilots in the Scottish parliament so far have looked at a specific policy question in order to feed into the select committees' future work. They were not used to directly scrutinise current legislation. But the model, once established, could be used to examine the impact of constitutional change relating to current legislative proposals.

### **The success of deliberative exercises is contingent on adherence to best practice**

Deliberative exercises could be very valuable in constitutional change, but to ensure they are able to command widespread legitimacy, they must be run according to best practice. Like other tools for democratic engagement, such as referendums, they can be designed and used poorly. Exercises that have little or no impact on decision making, are not genuinely representative of the population or are seen as a tool to 'rubber stamp' politicians' preferred solutions, risk further undermining public trust, and the perceived legitimacy of constitutional change.

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There are several considerations to be taken into account:

- **The process of feeding in recommendations to decision makers.** One of the key things to decide from the start is how decision makers will consider and respond to the recommendations from a process. They will need to manage expectations about how the recommendations will be taken forward. A failure to do so can undermine the benefits, as was the case for the recent French Citizens' Convention for Climate (CCC). Despite earlier promises from the president, Emmanuel Macron, that the recommendations would be 'transmitted without filter' to parliament, a nationwide referendum or sent for direct executive implementation, the government accepted without modification just 10% of the CCC's recommendations, while 37% were modified and 53% were rejected.<sup>31</sup> The Irish government, in contrast, has developed a very clear process. The recommendations are sent to a dedicated parliamentary committee, which considers them before writing a report for the government. The government is not obliged to accept the recommendations but it sets a timetable for implementation and if it is not accepting any of the recommendations it has to say why and justify the decision.
- **The question.** Deliberative processes can succeed or fail based on the question asked. Questions that work well have a clear subject, are neither too broad nor too narrow in scope and include a range of possible trade-offs and tensions on which participants can deliberate. An inappropriate question would be one that is too broad, is purely technical or requires only a yes or no answer.<sup>32</sup> Although it should not be binary, the question should include a choice. The questions covered by the Scottish Citizens' Assembly were arguably too broad. This made it difficult to find the expertise needed for members to properly take evidence and resulted in a broad and wide-ranging set of recommendations that have been hard to develop into policy.<sup>33</sup>
- **The governance framework.** To ensure the independence of the commissioning institution – government, parliament or local government – it should have oversight of the process as it is responsible for linking it to decision making, but it should not have responsibility for scoping and providing the expertise nor for design and delivery. The process would also benefit from having an advisory body that includes people with all relevant perspectives. For example, a citizens' assembly that looks at constitutional change with an impact on the devolution settlement should have an advisory body that represents the interests of the relevant devolved administrations.
- **Representation and accessibility.** The gold standard of recruitment to deliberative exercises is to use a lottery process. In the UK this is done through the postcode address finder sending invitations to a random selection of addresses. A lottery recruitment process will likely still result in a skewed group of participants because the rates at which people accept these invitations may be linked to factors such as socio-economic background, education and political interest. To mitigate this risk, once participants have opted in, they should be selected to take part in the exercise based on demographic criteria such as age, gender and ethnicity, to

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ensure the group is broadly representative of the wider population. The criteria can also include where they live or their attitudes towards political parties or certain policies if it is deemed important to have this represented. Beyond this, barriers to participation can be reduced by providing accessible information about the process, helping with childcare costs and having professional facilitators to oversee the discussions. Participants are also paid for their time.

The government should task a unit with building up knowledge and expertise in commissioning and running deliberative exercises so as to learn from what works and what does not, and advise on how and when to use the process, including how to feed the outcomes into government decision making. The Scottish government's Institutionalising Participatory and Deliberative Democracy (IPDD) Working Group has done much of the thinking on how to do this, and how best to institutionalise deliberative processes.<sup>34</sup>

## Recommendations

### **7. Public engagement should be integrated into processes of constitutional change to enhance the legitimacy of decision making and provide a level of political entrenchment.**

- There is established precedent that referendums should be held on certain constitutional questions. Where possible these should be held on specific detailed proposals that have been set out in legislation before the vote is held, rather than on general principles or ideas.
- The government should use deliberative exercises such as citizens' assemblies, citizens' juries and constitutional conventions to gain representative, informed and considered evidence of the public's views on constitutional questions.
- Where the government is contemplating constitutional change, it should consider commissioning deliberative exercises:
  - to establish principles to inform the development of a specific policy proposal within government and their subsequent scrutiny in parliament
  - where the government has decided to bring forward major constitutional change, to develop specific proposals for how this should be done (for example, proposals for a reformed second chamber) – these could then be translated into legislation and enacted by parliament and/or put to a referendum
  - to develop public information to be disseminated during a referendum campaign (for example, to explain different options for electoral reform and their strengths and weaknesses).

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- Parliament should also consider commissioning deliberative exercises to inform its own scrutiny of legislation during its passage through parliament, or on other parliamentary matters; for example, rules and standards of MPs' behaviour.
  - The government should establish a unit on deliberative engagement to build up knowledge and understanding around its use. The unit should advise on how and when different exercises should be used, and develop guidance on best practice.

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# The need for action

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As we have indicated throughout this report, constitutional reform can be closely bound up with party-political interests. Our recommendations arise from the need to ensure there are meaningful checks on the power of the executive. We seek to create a set of effective political constraints to ensure that a government considering constitutional reform is able to implement it with the broadest possible support and having considered all of its wider implications.

Why, then, should a government choose to implement proposals that will place checks on its powers?

## **There is a clear need for action to renew the constitution**

### **There is a crisis in trust in politics and political institutions**

There is certainly precedent for UK political leaders bringing in reforms that are not in their party's narrow interests but which are intended to strengthen parliamentary scrutiny and the wider constitution. Examples include the Wright reforms, which were intended to increase the power of parliament by introducing elections for members and chairs of committees and establishing a new, backbench business committee. These reforms strengthened parliament, after what was widely viewed as a lengthy period of executive dominance.<sup>1</sup> Similarly, the Committee on Standards in Public Life (CSPL) was introduced by the then prime minister, John Major. The Nolan principles it defined are now to be found across the public sector, including at the highest levels of government in the *Ministerial Code*, and the House of Commons' and House of Lords' codes of conduct.<sup>2</sup> Both these reforms were introduced after major political crises: the Wright committee "was established in the wake of the expenses crisis, which triggered demand for wider parliamentary and political reforms"<sup>3</sup> and the CSPL reform was in response to a series of scandals, including the cash-for-questions affair.

The UK finds itself at such a moment now, with a wave of scandals including bullying, sexual harassment and misconduct by individual MPs, and allegations of breaches of the rule of law at the very top of government, undermining public confidence in government. All this has led to an intense focus on the question of ethics and integrity in government, and heightened the widespread perception that politicians believe that they are above the rules they set for others.

At this moment, political parties need to demonstrate that they are willing to act to reassert the UK's fundamental constitutional principles, and strengthen mechanisms for enforcing them. If trust in the UK's constitution is to be restored, a reset is urgently required. Proponents of the political constitution would be wise to address its shortcomings. If they do not, calls for a more radical reset will grow ever louder.

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## **The UK's reputation as a stable democracy needs to be restored**

The fraught process of leaving the EU pitted the government against parliament frequently, with periods of extended deadlock and attempts on both sides to weaponise the constitutional process to frustrate the other's intentions. Judges and Conservative rebels were accused, in a populist vein, of being 'enemies of the people' and 'traitors'.<sup>4</sup> And many voters felt increasingly frustrated that politicians seemed ready to thwart the major constitutional change for which they had voted in the referendum of June 2016. Considerable political instability and great constitutional uncertainty characterised the five years between the referendum and the signing of the UK–EU co-operation agreement. This instability and uncertainty has not disappeared, with intense debates over Covid rule-breaking, a large number of ministerial resignations, and three prime ministers succeeding each other in office in less than a year. Meanwhile, looking ahead, the UK faces ongoing questions about its future, with a continued absence of a functioning government in Northern Ireland and the Scottish government's continuing efforts to secure a second independence referendum.

This uncertainty and instability has had a damaging impact on the UK's international reputation. The UK is one of the world's major economies and has a seat at many of the most important international tables, including as a member of the G7, G20 and Nato and as a permanent member of the United Nations Security Council. But the chaos of the past decade has cast doubt on the UK's commitment and reliability as an international partner, weakened its ability to speak with moral authority on the rule of law in other parts of the world, and strained relations with some of its key allies.

Political instability can also affect investor confidence. If the UK is perceived as politically unstable, this undermines the country's fiscal credibility and makes further economic downturns more likely.<sup>5</sup> The UK's recent political instability has had consequences: Moody's – the bond credit-rating organisation – has downgraded the government's credit rating at several points, and in October 2022 it was downgraded from 'stable' to 'negative'. Moody's cited "heightened unpredictability in policymaking amid a volatile domestic political landscape" as the reason for this reassessment.<sup>6</sup> By introducing more robust constitutional safeguards and a clearer and more established process for managing constitutional change, our recommendations will help restore the UK's reputation for political and constitutional stability.

## **Our recommendations will help future governments address emerging constitutional challenges**

### **Our recommendations will help renew the devolution settlement in the UK**

During the Brexit period, relationships between the UK and devolved governments were more troubled than at any other point since the latter were established at the millennium. Effective government requires the four governments of the UK to work together as far as possible, and there is a growing recognition in UK politics of the need to reset these relationships. Our recommendations, by addressing some of the underlying causes of conflicts between these governments, are intended to aid this process.



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One role for the Parliamentary Committee on the Constitution will be to mediate between the UK government and devolved governments, finding a middle ground between them on specific issues and wider questions concerning devolution. Where the devolved governments are seeking to challenge the UK government for acting outside established constitutional practice – for example, by passing legislation without legislative consent as normally required by the Sewel Convention – an authoritative judgment from the committee will take a position on the legitimacy of their concerns. Equally, if the devolved governments make demands and manufacture grievances for political purposes, the committee will also be able impartially to assess the grounds for their challenge in a way that is much harder for the UK government to do.

In addition, creating a category of constitutional acts will provide greater protection for the devolution statutes. It will create more robust protections for the foundational underpinnings of devolution. Enhanced parliamentary scrutiny will ensure that changes to the system of devolved government – including in England – will be subject to full consideration and robust scrutiny.

Moreover, establishing a permanent Centre for Constitutional Expertise in government should improve the calibre of advice given to ministers on issues relating to devolution and intergovernmental relations, and improve understanding among the civil service more widely. It will help ensure that the implications of UK government policy for devolution and the devolved institutions are fully considered in the policy making process, providing a source of constitutional advice and resource on best practice to officials who may be expert in other policy areas. Bringing together devolution-related guidance under the auspices of the Intergovernmental Relations Secretariat will provide greater transparency and accessibility to existing agreements about ways of working. All of this should help prevent unnecessary disputes between the governments of the UK, and embed greater respect for, and understanding of, devolution within Whitehall.

Making greater use of deliberative exercises to engage the public in constitutional decision making will enable the government to find consensus-based solutions on devolution – in Scotland, Wales, Northern Ireland and England – where referendums have entrenched divisions and led to polarised debates.

These recommendations would address concerns about the vulnerability of the devolution settlement in the UK constitution, stabilising relationships and improving government across the UK.

### **Our recommendations will help deliver long-lasting constitutional change**

While many of our recommendations are intended to introduce new requirements to the process of making constitutional change, they are not intended to serve as blocks on policies in this area, serving instead to make swift policy reversals and short-sighted changes less likely. They are designed to ensure that future reforms are better considered, more robustly scrutinised and introduced with a wider range of political and public support.

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Establishing a Centre for Constitutional Expertise in the civil service will enable officials to advise ministers better and more authoritatively in this area and to foresee any potential consequential problems before they arise. Establishing a more rigorous process for scrutinising constitutional legislation would provide better opportunities to address concerns about proposals for constitutional change, and to build cross-party consensus as a result. The new category of constitutional acts will afford such changes additional protections once they have been enacted. Deliberative exercises may also help the government break impasses on some of the age-old problems that have plagued the UK constitution, such as the form a reformed House of Lords should take.

### **Politicians should consider the constitution from the point of view of the government and the opposition**

Narrow and short-term considerations often shape politicians' positions on constitutional issues. When in government, parties may support greater powers for the executive, introducing reforms and promoting practices that prioritise its ability to deliver its agenda over ensuring robust scrutiny and deliberation. But once out of government, they may come to regret such an approach, given that it is their political opponents who will then reap the disproportionate benefits of executive pre-eminence. The underlying principle that should inform how politicians approach these issues is the recognition that they may well one day be in opposition.

The recommendations in this report have been made based on extensive research, rigorous testing and widespread consultation. We believe they would significantly improve the functioning of the UK constitution, restore a much-needed degree of constitutional stability, and help restore the public's lost faith in our governing institutions.

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# Annex 1: Summary of outputs of the Review of the UK Constitution

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Constitutions set out the distribution of power, and the network of checks and balances, between different institutions. The UK constitution is multidimensional, and power is distributed along different axes. In our paper *A Framework for Reviewing the UK Constitution* we set out these three:

- institutional: the relationship between the UK's central institutions: parliament, the government, the courts and the monarchy
- territorial: the relationship between different levels of government, including between the UK government and the devolved administrations and between local government
- democratic: the relationship between the state and its citizens.<sup>1</sup>

As part of our Review of the UK Constitution, we have explored what reforms are necessary to different institutions and relationships along each of these axes, through original research, guest papers by experts and academics, and roundtables and events. In this annex we summarise our findings.

## The institutional axis

The UK constitution has several core institutions, each with different roles and responsibilities. As outlined in our framework paper:

**The UK parliament is the centre of the UK constitution, but it is the UK government that sets the direction and delivers policy, with the judiciary ensuring it acts in accordance with the law. The monarch also holds constitutional powers over both parliament and government, but exercises these on behalf of the government.<sup>2</sup>**

While it is the UK parliament that is sovereign, there are a range of checks and balances both between and within institutions that should prevent the accumulation of too much power in any one part of the constitution. But there are growing concerns about an imbalance of power between the UK's central institutions.<sup>3</sup>

## Strengthening the House of Commons can help strengthen the constitution

As we said in our framework paper, “[p]arliament is... the ultimate source of power, but it is the executive that wields much of this power in practice”.<sup>4</sup> The UK's majoritarian electoral system and strong party discipline can often mean that a single party in government faces little challenge in the House of Commons. The executive's control of parliamentary processes and the mechanisms for reforming parliamentary procedure can be deployed to limit opportunities for parliamentary scrutiny of government policy. Some argue that a strong executive with a high degree of control over

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parliament is a key strength of the UK constitution, allowing a democratically elected government to deliver its manifesto commitments. But as we argued in our paper *The Legislative Process: How to empower parliament*, an electoral mandate does not mean that a government should be able to act without political constraint; democratic legitimacy derives from the House of Commons, elected to represent the whole of the UK. Empowering parliament to better scrutinise, test and occasionally reject government proposals can act as a key check on the executive.<sup>5</sup>

Several institutional reforms to strengthen the role of the legislature could help address this imbalance; parliament could be given more control over its own timetable<sup>6</sup> and more resources and opportunities to influence legislation. Our paper *The Legislative Process* set out detailed proposals in this area, including requiring all bills to be published in draft, with an opportunity for pre-legislative scrutiny, and a new 'select committee stage' to give members an opportunity to take evidence and express a view on a bill.<sup>7</sup>

A more radical solution to single-party control of parliament, and one that appears to have growing support, despite the rejection of the alternative vote system in the 2011 referendum, is electoral reform. One way to constrain the power of the executive could be to replace the first-past-the-post (FPTP) electoral system for the House of Commons with a more proportional one. Our paper *Electoral Reform and the Constitution* examined the implications of changing the voting system for the workings of government, parliament and the Union. We found that international evidence shows that moving to a multi-party system that requires parties to negotiate with each other can promote a more consensus-based politics.<sup>8</sup> This could prevent policies with significant constitutional implications from being pushed through on the basis of narrow majorities.

However, such benefits are by no means guaranteed. A coalition government may behave in much the same way as a simple majority government with a larger combined majority and a less clear electoral mandate. Therefore, as we set out in our paper, if electoral reform were to take place it would be essential that any change was accompanied by wider reforms to the way that government, parliament and the Union work. In particular, reforms to enable a more pluralist and multi-party House of Commons would be needed for the potential benefits to be realised.<sup>9</sup>

### **Reforms are needed to increase the legitimacy of the House of Lords and the monarchy**

A further problem at the centre of the UK constitution is that two of the key institutions required to carry out important roles and functions – the House of Lords and the monarchy – are limited in their effectiveness due to their lack of democratic legitimacy. Under the current arrangements, the House of Lords is a key arena for constitutional scrutiny and challenge, but peers are unelected and ultimately defer to the primacy of the House of Commons. Recent scandals over the process of appointments to the House of Lords have further weakened its credibility.<sup>10</sup>

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Most attempts to reform the second chamber have failed as a result of disagreement over the exact form its replacement should take – whether appointed or elected and the proportions of each. In a guest paper for our Review of the UK Constitution, *House of Lords Reform: Navigating the obstacles*, Meg Russell concludes that “House of Lords reform is desirable, but very difficult to achieve”. The Labour Party’s Commission on the UK’s Future, led by Gordon Brown, proposes replacing the House of Lords with an elected ‘Assembly of the Nations and Regions’, and reform of the Lords is expected to feature in the party’s next general election manifesto.<sup>11</sup> To help overcome previous challenges, any decision on the form a reformed House of Lords should take should be led by careful thought on the functions it should have, not just what it looks like. As Russell argues, the process of achieving House of Lords reform requires just as much thought as the proposals for reform themselves.

The UK is a constitutional monarchy, although as Robert Hazell argues in his guest paper *Future Challenges for the Monarchy*,<sup>12</sup> in the modern context the monarchy is tightly regulated by law. There are a few remaining functions where the monarch still personally has a role – primarily the appointment of ministers (particularly the prime minister), the dissolution, summoning and prorogation of parliament and the granting of royal assent to bills that parliament passes. As Hazell explains, the amount of discretion the monarch has to exercise each of these powers varies: while royal assent is essentially granted automatically, other powers such as the prorogation and dissolution of parliament are exercised at the request of the prime minister and so the monarch only has the ability to exercise discretion in a very limited number of circumstances.

The question of how the monarch should approach these decisions when a request is contentious was drawn into sharp focus by the recent Supreme Court decision that the September 2019 prorogation of parliament was unlawful. As Hazell explains, “[t]he UK is almost alone among European parliamentary democracies in allowing the executive to suspend parliament through prorogation”. He suggests that if a future UK government wanted to remedy this,

parliament itself could be given power to decide when it was suspended. Or if the power remains with the executive, parliament could have the power to veto prorogation or to ‘un-prorogue’ itself. As with dissolution, giving parliament control over prorogation would remove the risk of the monarch being drawn into political controversy.<sup>13</sup>

And, perhaps more importantly, it would strengthen the role of the legislature vis-à-vis the executive.

### **Constitutional questions should be resolved through politics where possible, but the courts play an important role**

In the UK constitution, the courts’ primary role is to interpret the will of parliament. As we explained in our framework paper, “[t]he courts cannot prevent parliament from legislating as it chooses, but they do place important limits on the actions of government, ensuring that it acts in accordance with the law”.<sup>14</sup>

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As we argue in the main body of this paper, enforcement of the UK constitution is primarily political, but there remains an important role for the courts. In her guest paper *Constitutional Entrenchment and Parliamentary Sovereignty*, Alison Young explores the concept of 'judicial entrenchment' and analyses the various examples via which the judiciary may protect foundational constitutional principles. These include refusing to apply legislation in 'exceptional circumstances' when parliamentary democracy is no longer functioning, through the recognition of constitutional statutes, and applying principles of interpretation in which the courts interpret legislation in line with existing common law rights and principles. Young concludes that, while potentially powerful, judicial entrenchment effects will be more legitimate and effective if underpinned by legislation passed by parliament.<sup>15</sup>

The appropriate role and the limits of the judiciary are highly contested, as highlighted in our event '*Does the UK's human rights regime need reform?*'. For some on the panel, the Human Rights Act 1998 affords too much power to the judiciary and undermines parliamentary sovereignty, while, for others, attempts at reform were examples of executive aggrandisement. In his guest paper *In Defence of the UK's Unwritten Political Constitution*, Brian Christopher Jones argues that the UK's current rights protection system strikes the right balance. He highlights how countries like the UK and New Zealand have positive records on human rights, despite the existence of parliamentary sovereignty and the inability of courts to strike down legislation.<sup>16</sup>

### **The relationship between ministers and the civil service should be strengthened**

The civil service plays a key role in the constitution, both in enacting the will of the government of the day, but also in providing advice to ministers on the constitutionality and propriety of their actions. But as Jill Rutter argues in her paper *Relationship Breakdown: Civil service–ministerial relations: Time for a reset*, this relationship has been damaged in recent years.<sup>17</sup> This has been due to both difficult challenges for government and the civil service, such as Brexit and Covid, but also critiques of civil servants from those inside and outside government.

Resolving these issues as well as the role of the civil service in maintaining good constitutional behaviour among ministers are also considered in Rutter's paper. She argues that the role of the civil service should be placed on a statutory footing to better establish its role, and that this should include a duty to 'uphold the public interest' so that civil servants can protect this value when it clashes with a minister's interests.

### **The territorial axis**

As we outlined in our framework paper, the UK's territorial constitution has come under increasing strain in the past five years. There is fundamental disagreement about the nature of the UK state, the relationship between the four constituent parts – England, Wales, Scotland and Northern Ireland – and the terms by which they should engage. As we argued, "the question of whether the UK should be seen as a union of nations or a unitary state – and therefore the nature of the relationship between the constituent parts – remains a recurring source of debate. Perhaps most significantly, opinion is now divided between the four governments."<sup>18</sup>

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When looking to the future, questions of reform run into the different constitutional aims, ambitions and understandings of different parts of the UK. These were highlighted through a [series of roundtables](#) in different parts of the UK as part of our review of the UK constitution:

**In Northern Ireland, devolution is tied to the Good Friday Agreement and its unique power-sharing arrangements; any changes will require the agreement of all the political parties. In Scotland, the process of devolution and questions on its future are centred on the issue of independence, and how and if Scotland could have the opportunity to vote on this again. In Wales, there is strong support for devolution and a desire in the Senedd for a stronger working model of devolution within the union. Within England itself there is a great deal of variation in the devolution deals that areas have, and there are areas that have rejected the option of a deal entirely.**<sup>19</sup>

In Northern Ireland, the assembly and executive have been subject to frequent collapse, putting the very future of devolution in the region under question. In her guest paper [Constitutional Change in Northern Ireland](#), Lisa Claire Whitten sets out detailed proposals to improve the stability of the power-sharing institutions, the quality of government and the UK government's approach to Northern Ireland and its post-Brexit arrangements.<sup>20</sup>

In the Welsh context, Dan Wincott highlights the ad hoc evolutionary approach taken towards devolution, in which greater power and autonomy have been devolved in stages over the past 25 years – with a growing desire for a more comprehensive settlement.<sup>21</sup> In his paper *The Union and the State: Contested visions of the UK's future and central government's approach*, Ciaran Martin argues that while Scottish independence may feel less imminent under current political circumstances, secessionist debates are likely to continue, especially if the UK is economically weak.<sup>22</sup>

Questions remain about future models for the Union. Wincott argues that “a new territorial constitution across the UK is needed if devolution is to survive and thrive”. Martin outlines three potential ‘visions’ for the future of the Union: separation, ‘devomax’ or integrationist, ‘muscular’ unionism. While there are distinct differences in the devolution conversations in each part of the UK, there are also common challenges that could be addressed within the UK's current constitutional arrangements.

### **The conventions that govern devolution need strengthening**

In our framework paper, we identified the lack of constitutional protection for devolution as a problem for the UK constitution. This was also a clear theme of our subsequent roundtables, in which participants from Scotland, Wales, Northern Ireland and the north of England all expressed concern that “the UK parliament retains the power to override, or even theoretically reverse, devolution. This leaves the devolved institutions vulnerable to the whims of the UK government with a majority in the House of Commons.”<sup>23</sup>

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For decades, convention protected the autonomy of the devolved administrations, specifically the Sewel Convention<sup>24</sup> – that the UK parliament would “not normally” legislate on devolved matters without the consent of the relevant devolved legislatures. But since 2016, the convention has been brought into question. The UK parliament has proceeded to legislate despite consent being withheld multiple times, including on key pieces of constitutional legislation, such as the European Union (Future Relationship) Act 2020 and the United Kingdom Internal Market Act 2020. While the UK government argues that exceptional circumstances justified such an action, the devolved administrations argued that the convention had been broken beyond repair.<sup>25</sup>

In a guest paper, *The Contested Boundaries of Devolved Legislative Competence*, Aileen McHarg argues in favour of “revitalising and reinforcing political constraints on the sovereignty of the Westminster parliament” by strengthening the Sewel Convention. At a minimum, she recommends the “clarification of, and recommitment to, the principles and process of seeking devolved consent”.<sup>26</sup> Drawing on earlier recommendations that the [Institute for Government](#)<sup>27</sup> and the House of Lords Constitution Committee<sup>28</sup> had made, McHarg argues in favour of improving parliamentary procedure in Westminster – through requirements for parliamentary statements, committee scrutiny or even vetoes – to raise the political costs of seeking to pass legislation without consent, where sought.

### **The UK needs to reset relations between nations**

As McHarg outlines, the boundaries between devolved and reserved competencies have become increasingly contested. In part this is a result of Brexit, where the return of devolved powers over areas like agriculture and fisheries from an EU level has raised questions about how the UK can manage divergence between its constituent parts. But it is also a result of increasing tensions between the UK government and the devolved governments, leading to “more frequent disputes about devolved competence, followed by more frequent resort to the courts to resolve those disputes”. McHarg argues that this leads to uncertainty over the legislation that can be passed, which undermines the extent to which “devolved legislatures can give effect to local political preferences and pursue their own priorities, without being at risk of arbitrary modification or [overridden] by UK legislation, or dependent upon the prior agreement of the UK government or decisions being skewed by actions taken at the UK level”. McHarg makes a range of recommendations, including amalgamating the devolution statutes, bringing greater consistency of language between them and giving more direction on interpretation to the courts.<sup>29</sup>

However, the best way to avoid frequent legal disputes and manage the increasingly complex policy landscape is to seek to resolve problems through agreement and develop a habit of early engagement on common issues. The mechanisms for intergovernmental relations, the forums and structure for meetings of the four governments of the UK, have been a key focus of debate about devolution. Numerous experts, parliamentary committees and all four governments have critiqued the old Joint Ministerial Committee (JMC) structures. A new system for intergovernmental relations was launched in January 2022 on the publication of the review of



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intergovernmental relations. It established forums that are more jointly owned, new ministerial groups, including at portfolio level, a new dispute resolution mechanism and an independent secretariat.<sup>30</sup> It is too soon to judge what difference these have made.

As set out in our framework paper, "successful intergovernmental working relies heavily on good relationships between ministers in different parts of the UK and a willingness to compromise and reach agreement. These conditions are not always present."<sup>31</sup> As Ciaran Martin argues in his guest paper *The Union and the State*, although the immediate challenges of Brexit and building pressure for a second independence referendum have abated, such relief may only be temporary and instability in the Union is likely to reoccur in future. He sets out several key challenges of statecraft that the four governments of the UK will need to manage, including:

- establishing the rules of secession
- the role and limits of the civil service in debates about the future of the Union
- the limits of UK government activity in devolved areas
- managing the boundaries between reserved and devolved competences and areas of shared competence, where co-ordination is required.<sup>32</sup>

Over the past five years, the UK government has taken a 'muscular' approach to devolution, seeking to assert itself as the government of the whole of the UK, including taking power to spend money in devolved areas, and passing legislation that places new constraints on the exercise of devolved powers. Equally, the devolved governments have been incentivised to 'manufacture grievance' to make the case for their constitutional position. Now that new intergovernmental machinery has been established, a more co-operative approach is required to make the constitution work better.

### **The government needs to develop a stable model for English devolution**

As we set out in our report *Devolving English Government*, the story of subnational governance reform in England has been one of a cycle in which new institutions are created, only to be abolished or reorganised, leaving little opportunity for devolution to take root. We found that government in England is over-centralised, lacks coherence and does not have sufficient accountability mechanisms, creating a democratic deficit. At the centre there is a "disconnect between Whitehall's increasingly Anglo-focused operations and its continued insistence that it governs at a UK-wide level, with a failure to differentiate between its UK-wide and England-specific functions".<sup>33</sup>

There is growing political interest in the devolution agenda in England. The House of Commons Public Administration and Constitutional Affairs Committee stated that: "The current state of the governance arrangements for England is a significant and pressing problem that has been neglected by successive Governments for too long. There is an urgent need for significant reform to the way that England is governed."<sup>34</sup> The Conservative government has committed to further devolution deals as part of its

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'levelling-up agenda'<sup>35</sup> and the Labour Party has announced an ambition for 'radical devolution' if it wins the next general election.<sup>36</sup> We argue that "to avoid a repetition of past mistakes, it is imperative that further reforms are accompanied by institutional changes at the administrative centre".<sup>37</sup>

These include:

- the establishment of an independent commission on English government to ascertain citizens' views on further devolution within England to inform the government's approach
- a new English Governance Bill to clarify the powers and responsibilities of different layers of government
- a new English Devolution Council to provide a forum for intergovernmental relations between local leaders in England
- a territorial office for England and a Cabinet Committee for England.<sup>38</sup>

## The democratic axis

In our framework paper, we noted the significant challenges facing the democratic pillar of the UK constitution.<sup>39</sup> Citizens are disenchanted with the way the UK is governed, but this problem is not unique to the UK – across the globe, democracy is in a state of malaise. In Western nations, escalating political divisions, economic dissatisfaction and the rise of populist parties have undermined the capacity of democratic institutions to make good on their promise to provide governance that has popular support and offers stability.<sup>40</sup> Even in developed democracies, public satisfaction with democracy has eroded, with the highest levels of dissatisfaction since records began in the 1990s.<sup>41</sup> Other indicators of democratic fatigue and disenchantment include a lack of public engagement, low trust in institutions and politicians, and declining party membership.<sup>42</sup>

In his paper *In Defence of the UK's Unwritten Political Constitution*, Brian Christopher Jones argues that in the UK the public are closer to the constitution than under other nations' systems, where they have a supreme document that is very difficult to change. With an uncodified constitution, the public can exercise influence by directly electing representatives with the power to change the constitution rather than freeze it in a particular point in time.<sup>43</sup>

However, the two-party majoritarian system has resulted in both Labour and the Conservatives having an outsized influence over constitutional reform over the past two centuries. Political parties are not well suited to effectively translate public preferences, without partisan incentives, into the system to deliver legitimate constitutional change.<sup>44</sup> Tim Bale outlines the problems in his paper *Britain's Political Parties and the Constitution*, arguing that constitutional change is driven primarily by party political interest, with this model becoming increasingly problematic in recent years.<sup>45</sup> This problem is compounded by the fact that as party memberships have

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shrunk, the leaders of parties have been chosen by smaller, less-diverse members of the public. Politicians are therefore incentivised to act for party members that have a far more skewed view on an issue than the wider public. With few opportunities for the wider public to engage on constitutional policy, and little say over who leads the governing parties, decisions have likely become increasingly unrepresentative of the views of the public at large in recent years.

### **Reform of the voting system would bring greater proportionality, but requires further changes to the UK system**

One problem with the UK constitution, as we set out in our framework paper, is that the voting system means not all voters' political preferences are represented.<sup>46</sup> It is therefore unclear whether a vote in a general election, under the FPTP 'winner takes all' system, can provide the public legitimacy for a political mandate that constitutional change might require. Under FPTP, votes are wasted, voters engage in tactical voting and the party of government is often formed from less than 50% of the public vote, although this has occurred less frequently in recent years.<sup>47</sup>

Changing the voting system to a more proportional one would ensure that parties in the UK parliament represent a greater range of political preferences rather than having two main parties each encompassing a broad church of views.<sup>48</sup> As we set out in our paper *Electoral Reform and the Constitution*, there are many different possible electoral systems, with significant variation within them, all of which would produce different outcomes.<sup>49</sup> Many systems – such as the additional member system used in Scotland or Wales or the single transferable vote used in Northern Ireland – would allow the constituency link to be maintained. FPTP exaggerates small variations in voting trends across the UK, and rewards parties with geographically concentrated support, so moving to a more proportional voting system could reduce the disparity in terms of representation in each constituent part of the UK.

A more proportional system would make large majority government less likely, increasing the frequency of coalition governments, or other forms of non-majority government. This could ensure that governments had the support of the majority of the population, although the implications of this for policy outcomes remain unclear. On constitutional policy, non-majority government could help ensure cross-party support for major changes. But as was arguably the case with the constitutional reform agenda under the Conservative–Liberal Democrat coalition government, it could also enable junior coalition parties to push reforms with only a minority of public support.

If a government were to decide to change the voting system to a more proportionate one, this would have knock-on implications across the constitution. As outlined in our paper *Electoral Reform and the Constitution*, for electoral reform to work well, wider reforms would be needed.

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## There is scope within the constitution for greater public input into decision making

A problem we identified in our framework paper is that, beyond elections, there are few opportunities for people to participate directly in decision making.<sup>50</sup> Referendums have been used in the UK, since the 1970s, for several major constitutional questions, including electoral reform, Scottish independence and the UK's exit from the EU. But the polarising effect of referendums has become evident and there is some evidence of a decline in public and political support for them as a decision making tool since the EU vote in 2016,<sup>51</sup> although the public are still supportive of referendums being used on some specific and important issues.<sup>52</sup> Meanwhile, the post financial crisis era has seen a resurgence in alternative forms of non-electoral political participation, particularly among young people, including boycotts, demonstrations and sharing political content online.<sup>53</sup>

Petitioning has also been part of this. Speaking at our public event '[Citizens and the constitution: education and engagement](#)', Catherine McKinnell MP, chair of the Petitions Committee, explained that "people with no voice have used petitions to gain that voice within our political system".<sup>54</sup> The use of non-electoral participation methods reflects the public desire to be consulted or have influence on big issues like NHS reform, the cost of living and climate change. Speaking at the same event, Professor Alan Renwick discussed results from a recent UCL survey citing that 77% of people felt 'people like them' had too little influence on how the UK is governed. But the same survey showed that 74% of people said they do not get involved in politics more because they feel they do not know enough, and 71% because they do not like how politics works. This speaks to the problem, already highlighted elsewhere, about the lack of political literacy and the need to improve citizens' education on the constitution.<sup>55</sup>

Concern about democratic fatigue has led some governments to seek new ways of engaging and involving the public, bringing them closer to the political process. This has triggered a wave of democratic participatory innovations that have been specifically designed to increase and deepen participation in the political decision making process, with the aim to establish a more direct link between citizens and political outcomes.<sup>56</sup> Some of these were outlined in our public event '[Reinvigorating democracy: how to bridge the gap between citizens and the state](#)'.<sup>57</sup> Different levels of government around the world have used citizens' assemblies and citizens' juries to address a range of policies.<sup>58</sup> Deliberative processes can open difficult topics as well as give politicians a better insight into what the public want than either polling or consultations. As Miriam Levin pointed out at our public event, deliberative processes can also help address the disconnect between politicians and the public:

**"[T]hey [citizens' assemblies] can increase awareness of the complexities of political decision making. It is not binary, and it is not simple what governments and politicians have to do all the time and bringing citizens into that space and letting them see how difficult it is and work through the trade-offs is only positive."<sup>59</sup>**

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In his paper for our Review of the UK Constitution, *Putting Citizens at the Heart of the UK Constitution*, Tim Hughes argues that the “UK’s model of democracy does not put citizens and their interests at the heart of decision making” and he advocates for greater citizen engagement to increase the accountability and legitimacy of decision making.<sup>60</sup> The UK’s uncodified constitution offers the ability to experiment with new approaches to government and embrace more tangible connections between citizens and the state.

It need not be the case that democratic innovations that favour a more direct or deliberative democracy stand in contrast with representative, indirect democracy. The promotion of new methods of public engagement does not imply replacing representative democracy – as Miriam Levin commented at our public event: “Citizens’ assemblies, deliberation, digital democracy, they are just tools.”<sup>61</sup>

### **Standards and ethics require strengthening**

The issues of standards and ethics in government have been a consistent theme over the past few years. As we argued in our framework paper, political scandals have exposed weaknesses in systems for maintaining standards in public life and the so-called ‘good chaps’ theory of government where norms and conventions constrain politicians’ behaviour seems to have eroded.<sup>62</sup>

The Institute for Government has previously made recommendations about how to improve standards, which include putting the *Ministerial Code* and the Advisory Committee on Business Appointments on a statutory basis and increasing the transparency of the process for appointing the independent adviser on ministerial interests.<sup>63</sup> The Labour Party has committed to establishing an independent Ethics and Integrity Commission if it wins the next general election. Its plans include giving the commission the power to initiate investigations into ministers without asking permission from the prime minister, and the power to determine breaches and recommend sanctions.<sup>64</sup>

It is important to get the balance right between introducing further regulation and other interventions to improve political culture, and ensuring political consequences for wrongdoing. Here, we can learn from other areas of the constitution. In his paper *The Regulation of Political Finance*, Justin Fisher notes the need to strike a balance between rules and a willingness to comply by political actors.<sup>65</sup> There is a risk of over-regulation, which may make rules impossible to enforce or encourage a mindset that anything not *expressly* prohibited is permissible. In regulating standards, it is important to ensure that morality rather than legality is the prevailing test.

When considering establishing new bodies, it is important to consider how they should be constituted and how they fit in to the existing network of bodies, groups and individuals that regulate the relationships between institutions and the conduct of political actors. Our paper *Constitutional Guardians* sets out recommendations for improving the independence and efficacy of these guardians, while ensuring a balance of accountability to make sure that unelected figures do not wield excess power in the UK.<sup>66</sup> We recommend that all guardians should be placed on a statutory footing

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unless there is a strong reason not to. This would help to strengthen their position and protect them from abolition. Parliament's relationship with these guardians should be strengthened in order to increase transparency and avoid undue government influence amounting to 'marking their own homework'. This could include select committee hearings and a veto for appointments to these roles. Finally, ethics guardians should be able to initiate and publish investigations and reports at their own discretion, strengthening transparency and the scrutiny of government and politicians.

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# Annex 2: List of publications

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## **Institute for Government and Bennett Institute for Public Policy**

Jack Newman and Michael Kenny – *Devolving English Government*

Jess Sargeant and Jack Pannell – *The Legislative Process: How to empower parliament*

Jess Sargeant, Jack Pannell, Rebecca McKee, Alice Lilly, Alex Thomas and Catherine Haddon – *Electoral Reform and the Constitution: What might a different voting system mean for the UK?*

Maddy Thimont Jack and Jack Pannell – *Constitutional Guardians*

Maddy Thimont Jack, Jess Sargeant and Jack Pannell – *A Framework for Reviewing the UK Constitution*

## **Guest papers**

Aileen McHarg – *The Contested Boundaries of Devolved Legislative Competence: Securing better devolution settlements*

Alison L Young – *Constitutional Entrenchment and Parliamentary Sovereignty*

Brian Christopher Jones – *In Defence of the UK's Unwritten Political Constitution*

Ciaran Martin – *The Union and the State: Contested visions of the UK's future and central government's approach* (forthcoming)

Dan Wincott – *Devolution and Constitutional Change in Wales* (forthcoming)

Jill Rutter – *Relationship Breakdown: Civil service–ministerial relations: Time for a reset*

Justin Fisher – *The Regulation of Political Finance*

Lisa Claire Whitten – *Constitutional Change in Northern Ireland*

Meg Russell – *House of Lords Reform: Navigating the obstacles*

Philip Rycroft – *Not by Design: The erratic evolution of the British constitution since 1997*

Robert Hazell – *Future Challenges for the Monarchy*

Tim Bale – *Britain's Political Parties and the Constitution*

Tim Hughes – *Putting Citizens at the Heart of the UK Constitution*

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# Annex 3: List of advisory panel members

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**Joanne Anderson**, former mayor of Liverpool

**Lord Anderson of Ipswich KBE KC**, crossbench peer, member of the House of Lords Constitution Committee and barrister at Brick Court Chambers

**Dr Halima Begum**, chief executive officer at ActionAid, former chief executive officer at the Runnymede Trust

**Sir Robert Buckland KC MP**, MP for South Swindon, former secretary of state for Wales and secretary of state for justice

**Van DuBose**, former investment banker at Goldman Sachs, advisory board member at the Institute for Policy Research at University of Bath and London Futures at Centre for London

**Bill Emmott**, former editor of *The Economist*, chairman of the International Institute for Strategic Studies and author

**Baroness Hale of Richmond DBE PC LLD FBA**, former Supreme Court justice and president

**Sir Emyr Jones Parry GCMC FInstP**, former diplomat and UK permanent representative to Nato. Former chair of the All Wales Convention

**Sir David Lidington KCB CBE**, former chancellor of the Duchy of Lancaster

**Dame Clare Moriarty DCB**, chief executive of Citizens Advice for England and Wales, former permanent secretary at Defra and DExEU

**Baroness Smith of Basildon PC**, shadow leader of the House of Lords

**Sir David Sterling KCB**, former head of the Northern Ireland Civil Service and chair of the Chief Executives' Forum

**Andrew Wilson**, director of communications and responsible banking at Santander, former MSP and shadow minister

Full details of our advisory panel can be found on our [website](#).



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## The need for action

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## Annex 1: Summary of outputs of the Review of the UK Constitution

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