

## **Written evidence from the United Kingdom Constitution Monitoring Group (CDR 07)**

### **Public Administration and Constitutional Affairs Committee The Government's Constitution, Democracy and Rights Commission**

#### **Introduction**

1. The United Kingdom Constitution Monitoring Group (UKCMG) comprises experts and practitioners covering a range of areas of the UK constitution. It was formed in mid-2020 in the light of recent controversy around arrangements for the governance of the UK. The principal purpose of the initiative is to assess developments – actual and proposed – in the UK constitution. Areas of interest include – but are not confined to – government accountability; arrangements for the upholding of the rule of law and individual rights; and the territorial governance of the UK. In evaluating proposals and initiatives, we consider the analysis in which they are grounded, and how far they are likely to deliver the objectives claimed for them. The UKCMG is impartial and has no party affiliation.
2. We welcome this inquiry by PACAC. It is particularly valuable given the uncertainty that has developed around the intentions of the government in this area. In its 2019 General Election manifesto, the Conservative Party pledged that ‘In our first year we will set up a Constitution, Democracy & Rights Commission.’ This commitment was reiterated in the Queen’s Speech.
3. But this Commission has yet to appear; and the deadline of a year looms. Given the circumstances of the pandemic, a delay in this area would be entirely understandable. But it is unclear what government plans might be, whether on a changed timetable or otherwise. The important matters addressed in the PACAC call for evidence, discussed below, remain matters of pronounced uncertainty at the time of writing.
4. Furthermore, in July, the government announced the Independent Review of Administrative Law. It has presented this initiative as fulfilling the ‘manifesto commitment to guarantee that judicial review is available to protect the rights of the individuals against an overbearing state, while ensuring that it is not abused to conduct politics by another means or to create needless delays.’ It was not clear at the time of its launch whether the government intended a further, fuller Commission to follow; what the precise division of responsibilities would be between the Review and such a Commission; whether, conversely, it intended a series of more limited reviews; or whether it intended any further inquiries.
5. This uncertainty illustrates an important point: the extent to which constitutional change should be dependent upon the initiative of the UK executive and its political leadership at a particular time or developed and designed to command widespread political and public support and to be sustained over governments of different political persuasions, a theme to which we will return. We now address the Committee questions in turn:

#### **What form should the Commission take?**

*How should it be composed?*

6. We believe that, if it and its outputs are to command maximum legitimacy, the Commission should be composed in such a way as to contain genuine expertise and a diversity of outlooks on the subject matter with which it will engage. It should also represent the diversity of the UK, including its territorial composition. Ideally the composition of the Commission would be subject to agreement from both Houses of Parliament, and the devolved legislatures. The various devolved First Ministers should be empowered to propose names of individuals for membership. The Commission would need the support of a full-strength secretariat, ensuring that it had an effective structure, strategy and procedure and was able to fulfil its remit. This staff could comprise civil servants seconded from the UK and devolved executives.

*Should the Commission engage the public, and if so how?*

7. If it is to help to tackle issues of public trust in our constitutional arrangements, it is important that the Commission engages with the public in appropriate ways. The precise form this interaction took would depend on a range of factors: the subject matter involved; the timeframe on which it was operating; and the resources at its disposal. There are a range of options on offer, from a more regular call for evidence to deliberative mechanisms. The latter, if employed, would need to be approached carefully, with due regard to the complexity of some of the issues involved. If used, such engagement methods would need to be a supplement to rather than substitute for the judgement of the Commission.

*How should the Commission proceed in its work? Over what timescale?*

8. The Commission would ideally proceed by consensus and in as transparent a fashion possible. It would hold public hearings (online and – circumstances permitting – physical); and would have a user-friendly website. As a default, it would publish all evidence received, oral and written (with exceptions as necessary).
9. The scope of the Commission as suggested by the government is potentially immense, and would be difficult to deal with in a single contained exercise. For this reason, we believe it could be preferable for a standing body, with rotating membership, to carry out a rolling review of constitutional matters that it identified as meriting attention. Models for this kind of body include the Law Commission; and the former Royal Commission on Environmental Pollution.
10. If continuously operating, the Commission would be able to approach its task by dealing with subjects of a scale it judged to be manageable. At the same time, it could consider the subjects of its individual investigations as part of the constitutional whole with which it was concerned. It might therefore be possible to avoid the problem sometimes identified in the UK context of uncoordinated, piecemeal change.

**What should be the main purpose and output of the commission?**

11. The purpose of the Commission is crucial. We believe that decisions about the constitutional future of the UK should be approached in an inclusive, open minded fashion which commands widespread support and confidence. The concerns of the present UK government should, of course, be addressed within the work of a

Commission – but alongside other inputs and conceptions. To state the obvious, the constitution should not be a matter of short-term political partisanship, whether in the hands of the present or a future administration nor can it be sustained on the basis of narrow majoritarianism. In this context there are, of course, contested views about the constitutional lessons to be drawn from the referendum on EU membership and its aftermath but we doubt that the highly-charged political debates at the time about these events in themselves provide a satisfactory basis for constitutional deliberation.

*How should the Commission report its findings?*

12. Potentially the Commission could report to Parliament and also to the devolved legislatures. The model we envisage would be for a standing Commission to issue regular reports dealing with those issues it judged to require its attention. Its reports would contain specific proposals for action, of a legislative nature or otherwise.

**Given the remit of the Commission to look at “the broader aspects of our constitution” and “come up with proposals to restore trust in our institutions and in how our democracy operates” are there issues not on the Government’s list that need to be examined?**

13. A notable apparent absence from the government list is territorial governance. The status of the devolved institutions and their relations with each-other and the centre is a pressing concern, particularly in the context of post-Brexit apportionment of powers. A further subject, the salience of which has intensified lately, is that of relations between the centre and devolved government in England. If dealing with such topics, the need to involve the tiers of governance involved in the Commission becomes more pressing.
14. In the context of the reference to the relationship between the government, Parliament and the courts we would emphasise the importance within our existing constitutional framework of giving Parliament more control over its agenda and of improving the quality of legislation and ensuring it responds to clearly identified needs. Proposals in these areas have been considered by both Houses of Parliament but not implemented and would provide a good starting point for review by the Commission. The Commission might also consider the ability of the UK Parliament – and devolved institutions – to involve themselves in the negotiation and conclusion of international agreements.
15. We also note that the list of measures for consideration includes the *role* (our italics) of the House of Lords. We do not consider its role should be considered in isolation from its composition and size, with the last consideration a clear constitutional absurdity.
16. Finally we note that the list does not include the role of a permanent Civil Service recruited on merit through open competition, accountable to Ministers who are in turn accountable to Parliament, or more generally the relationships between Ministers, special advisers and civil servants and their respective roles. Some comments by ministers, special advisers and the media imply that the government’s actions since coming into office and its intention (like its predecessors) to reform the Civil Service may include revisiting the conventions in this area and perhaps the statutory basis for

these relationships. If the government were to pursue such a course of action, we would regard it as a matter of constitutional significance that would need to be addressed on a non-partisan basis through the Commission.

**What areas should be a priority for the Commission and why?**

17. A Commission properly constituted would be able to identify its own priorities and would have control of its own agenda, though it could receive recommendations from the UK and devolved executives. Initially, it might identify pressing concerns arising from matters such as Brexit, including the various subjects discussed above. Over time, it might come to investigate longer-term issues. The form we propose here for the Commission would ensure that the choice of subject matter was made independently.
18. We hope that, when it reports, PACAC will be able to bring these ideas to the attention of the UK government.

*November 2020*