

Professor Michael Kenny, Philip Rycroft and Jack Sheldon – written evidence (FGU0029)

**House of Lords Constitution Committee
Inquiry into the Future Governance of the UK**

1. This submission responds primarily to the second question in the committee's call for evidence: 'What are the current challenges for multi-level governance in the UK and how can these be addressed?'
2. Our evidence is based on the findings of our report, *Union at the Crossroads: Can the British state handle the challenges of devolution?*, published by the Constitution Society and Bennett Institute for Public Policy in April 2021.¹ The report and this submission draw on academic research related to several of the themes that the committee has requested evidence on conducted by Professor Michael Kenny and Jack Sheldon at the University of Cambridge, and on the extensive direct experience of Philip Rycroft, who was the lead civil servant on constitutional and devolution issues in the UK government between 2012 and 2019, having previously worked in the Scottish government from 1999 to 2009. We take a historical approach, discussing how the central state has engaged with devolved politics since the introduction of devolution, through the 2014 Scottish independence referendum campaign and its aftermath, and the recent challenges posed by Brexit and the coronavirus pandemic. The submission reflects our own views only.
3. We make the following key points:
 - Devolution changed the nature and structure of governance within the United Kingdom. Whitehall and UK governments have not yet adapted sufficiently to that new reality.
 - The British state's approach to the governance of the multi-level Union has often been reactive and *ad hoc*. The limitations of this approach have been exposed by Brexit and the coronavirus pandemic, contributing to a thinning out of trust between the UK government and the devolved governments.
 - Central government was complacent about what devolution meant for its role in the initial period following its introduction, which left it unprepared for the more challenging circumstances that emerged from 2011 onwards.
 - The 2014 Scottish independence referendum revealed the absence of a deep and strategic capability within the UK government in the field of territorial relations, but did not lead to far-reaching reforms to the British state's political and administrative centre.
 - Consultation and engagement between the UK and devolved governments must now be embedded far more deeply into the culture and machinery of the UK state. This should include engaging with the devolved governments from the earliest possible stage of the policy process where UK policies impact on devolved responsibilities or the interests of the devolved parts of the UK.
 - We support overhauling the Joint Ministerial Committee, the main institutional location for intergovernmental relations, which is widely considered to have been insufficient in the context of recent constitutional challenges. Reaching final agreement on a package of reforms ought to be a high priority for governments across the UK after the May 2021 elections to the Scottish and Welsh Parliaments.

- High levels of ignorance and misunderstanding about devolved politics and the territorial constitution within the UK's central political institutions must be addressed. Civil servants working in each government should be encouraged and incentivised to spend time on learning about how the other governments work. There is also a strong case for strengthening arrangements for interparliamentary relations which, among other benefits, would help to promote mutual understanding of the perspectives of politicians in different parliaments.

The early years of devolution

4. The (re)-introduction of devolution to Northern Ireland, Scotland and Wales in the late 1990s transformed the structures and character of the British system of territorial governance. These three systems differed in important respects, but each set of devolved institutions immediately took over responsibility for large fields of public policy previously administered by the territorial offices in Whitehall. Devolved powers in Northern Ireland, Scotland and Wales have since, through separate and incremental processes, been extended further. The UK government has increasingly been left responsible for England's administration only in some key fields, including health and education.
5. Devolution raised fundamental questions about the location of sovereignty within the multi-level constitution. When introduced these reforms were widely understood by academic analysts and some politicians, particularly those operating in the devolved territories, as reflecting a shift towards a quasi-federal model of governance and the partial acceptance that there are multiple sites of sovereignty within the UK.² The idea that the UK is a voluntary union relying on the consent of its four territorial parts was given formal expression in the Good Friday/Belfast Agreement, and later the Edinburgh Agreement that led to the holding of a legal referendum on independence in Scotland. Yet the notion of parliamentary sovereignty also remained hard-wired into the UK's constitutional order, and continued to be the default understanding of many actors at the political centre. Brexit and the coronavirus pandemic have had the effect of making the tensions between these competing visions of sovereignty in the UK increasingly visible, and difficult for politicians to manage.
6. During the first two terms of the new devolved institutions the coincidence of Labour-led UK, Scottish and Welsh administrations, together with a relatively benign fiscal and economic environment, meant intergovernmental relationships within the UK ran relatively smoothly. In the absence of major conflict or constitutional controversies of the type experienced more recently, the governance of the multi-level Union quickly fell down New Labour's list of priorities once devolution had been delivered. Relationships between the centre and the devolved institutions were managed mostly bilaterally, and often through informal Labour Party and civil service networks. This was facilitated in large part by the links to Westminster and Whitehall of the first generation of leaders of the devolved executives, who had previously been MPs, and their civil servants, many of whom had transferred from the pre-devolution territorial offices. At the time few recognised the need to develop institutional machinery fit for a more challenging context for territorial politics, or put much thought into how Westminster and Whitehall should perform their altered roles. With the considerable benefit of hindsight, those operating at the political centre became too disengaged from, and complacent about, the wider implications of devolution.

7. The intergovernmental Joint Ministerial Committee (JMC) was established in 1999 to bring together ministers from the UK government and devolved executives. Its remit was as a 'consultative body rather than an executive body', which would provide an opportunity for the sharing of perspectives and experience, but not make decisions itself.³ Three plenary meetings of heads of government were held between 2000 and 2002, and forums on 'Poverty', 'Health' and the 'Knowledge Economy' also met in this period.⁴ But between 2003 and 2008 the only JMC forum that took place was that on European affairs, which allowed devolved ministers to feed views into UK positions ahead of relevant EU council meetings and summits. The other parts of the JMC machinery quickly fell into disuse, reportedly because ministers had struggled to find a useful purpose for these meetings in the political context of the time.⁵ More extensive machinery including the British-Irish Council and the North-South Ministerial Council was established to support engagement between governments within the UK and Ireland in the context of the Good Friday/Belfast Agreement, but the Labour government did not think it necessary to mirror these structures for managing relationships between London and the devolved institutions.
8. The JMC machinery was revived during Gordon Brown's premiership, in recognition of the changed political landscape following the emergence for the first time of an SNP minority government in Scotland after the 2007 Holyrood election.⁶ A new 'Domestic' format was introduced and annual plenary meetings resumed. However, despite widespread misgivings about the prospects for productive relationships between the UK and Scottish governments and various warnings about imminent conflict, the effect of the new Scottish government upon cross-governmental relations was initially 'modest'.⁷ First Minister Alex Salmond's decision to prioritise establishing the SNP's reputation as a competent administration ensured that, at this point, the Scottish government had little appetite to make constitutional questions especially salient or to pick fights with London. At the time many in Whitehall and Westminster assumed that SNP government would be a temporary aberration in the normal pattern of Labour dominance of Scottish politics. This complacency was not punctured by the result of the 2010 general election, at which the SNP failed to improve on their six seats in the House of Commons. Devolution and the territorial constitution received only a cursory mention in the Conservative/Liberal Democrat coalition's programme for government, indicative of the fact that no crisis in relations with the devolved parts of the UK was then anticipated.⁸

The Scottish independence referendum and its aftermath

9. The initial catalyst for more troubled relationships between the UK and devolved governments was the outcome of the 2011 Scottish Parliament election, at which the SNP won a majority. The Conservative/Liberal Democrat coalition government in London was willing to agree to an independence referendum, considering that the SNP's mandate from the Holyrood election meant it was democratically the right thing to do.⁹
10. The stresses and strains associated with the referendum campaign exposed some of the institutional and political weaknesses of the British state's approach to territorial politics. There was a whirl of activity relating to the referendum in and around the centre of government during the course of the campaign, but this focus engaged only a tiny proportion of Whitehall officials and, until polls were narrowing close to the end, only a small part of Westminster's political attention. The institutional response within Whitehall instead involved an uncomfortable amalgam of teams and individuals from the Treasury, No 10, the Cabinet Office

and the Scotland Office, corralled through a series of working groups organised by the Deputy Prime Minister's office, and given overall political direction by a cabinet sub-committee. Buffeted by internal political pressures within the Whitehall machine, this arrangement unsurprisingly began to fray as the campaign wore on. For the most part, ministers and central government departments were no more visible in Scotland than in normal times – a striking reflection of the inability of the centre to make even an existential threat to its territorial integrity its main strategic priority.

11. In the aftermath of the referendum there was cross-party and cross-institutional agreement that further reform of the territorial constitution was needed. However, the resulting packages of reforms endorsed by the British government remained within the established pattern of dealing with devolved governments – seeking to undercut the appeal of nationalism through the award of additional powers to Scotland (through the Scotland Act 2016) and Wales (through the Wales Act 2017), rather than contemplating a more fundamental change to the central state itself. Arrangements for intergovernmental relations remained largely unchanged, although a fairly modest set of reforms in this area that could have pointed the way towards the possibility of converting the JMC into a more meaningful and important forum for collective discussion across the different administrations were nearly agreed in 2016.

Brexit

12. Over the past few years, Brexit and the coronavirus pandemic have further exposed the inadequacy of the British state's established reactive and *ad hoc* approach to handling intergovernmental relations within the UK. There have been regular public rows between the political centre and the devolved governments, a number of which can be traced to insensitive handling at the administrative centre of policy decisions that carry implications for devolution.
13. Given the extent of the upheaval for the British state, Brexit came to dominate all other aspects of cross-governmental relations within the UK following the result of the referendum in 2016. Theresa May's administration initially sought to rely on the existing machinery of intergovernmental relations to incorporate the devolved governments within a joint response to Brexit. In October 2016, the Joint Ministerial Committee (European Negotiations) was set up, with an expansive remit 'to seek to agree a UK approach' and provide 'oversight of the negotiations with the EU'.¹⁰ This language was negotiated by officials from the four governments and signed off by ministers in all four. But following this the UK government never came close to offering the kind of engagement and access that might have allowed it to demonstrate that it was attempting to meet the aspirations of the devolved governments in any meaningful way. The failure of this strategy was, in part, an inevitable result of the distance between these different governments over the UK's post-Brexit policy choices. However, it also threw into relief the dearth of experience among this generation of UK ministers and senior officials in dealing with the devolved governments. Engagement between Whitehall and the devolved governments on major questions of shared interest had been largely perfunctory since devolution was introduced, and the Brexit challenge exposed the shallowness of the intergovernmental processes that had grown up.
14. Intergovernmental tensions in relation to Brexit were deepened further by the UK government's proposal, in the initial draft of the European Union (Withdrawal) Bill published in 2017, to temporarily reserve the powers that would otherwise flow

from the EU to the devolved administrations. Central government underestimated the opposition this would invite from the Scottish and Welsh governments, who attacked this move as a 'naked power-grab' by the British state.¹¹ The UK government's overriding motivation stemmed from its concerns about the domestic economy after Brexit, but its stance was easily portrayed by the devolved governments as unreasonable. The conflict this triggered exposed incompatible views about the status of devolved competences in the constitutional order. The European Union (Withdrawal) Act ultimately became the first of several pieces of Brexit-related legislation to be passed without the consent of at least one of the devolved legislatures under the Sewel convention, where this would normally be required, due to the Scottish Parliament refusing to grant consent. In these cases parliamentary sovereignty trumped the notion of shared sovereignty within the multi-level UK.

15. Beneath the surface of the public standoff over Brexit, both the UK and devolved administrations recognised that collaboration was required for administrative reasons in order to manage the consequences of Brexit. As a result, a considerable amount of quiet engagement between officials took place, particularly in relation to the need to co-operate in developing plans to deal with the consequences of a 'no deal' Brexit. These unseen, and largely unreported, collaborative preparations were vitally important in establishing some administrative planning for this outcome, and straddled a range of devolved and reserved policy areas. Nevertheless, the British state was simply not prepared, either by precedent or inclination, to afford the devolved governments sufficient salience in the exit process in a way that might have enabled it to challenge their contention that they were being systematically excluded. The narrative that emerged from the territorial politics of this period was one of the British state's imperious disregard for the preferences of its devolved counterparts.

Coronavirus

16. Whereas Brexit highlighted the absence of ways available to the devolved governments to engage meaningfully in reserved matters with the UK government when they disagreed with the latter's priorities, coronavirus has drawn attention to a different kind of challenge for the existing governance arrangements – that of co-ordinating responses across the four administrations in areas where each has significant autonomy. At the same time, the inherent interconnections between the effects of decisions made by governments in territorial jurisdictions in close proximity to each other have created an imperative for closer forms of co-operation and co-ordination for various administrative reasons.
17. The initial outbreak led to a period of relatively productive co-operation across the UK. The leaders of the devolved administrations were invited to attend meetings of Whitehall's COBR (Cabinet Office Briefing Rooms) emergency committee. On 2 March 2020 this body agreed a joint 'action plan', endorsed by all of these administrations, and with the logos of all emblazoned on its cover.¹² This set out the key steps that might become necessary as the outbreak developed. Subsequent COBR meetings on this topic similarly led to actions agreed by all the governments, including many of the key decisions to escalate social distancing measures, culminating in the move to implement a statutory 'lockdown' across the whole UK on 23 March. As this period of national 'lockdown' began, the 'Stay Home, Protect the NHS, Save Lives' slogan was adopted as the central pillar of a shared communications strategy. Meetings of the heads of government within COBR were complemented by the participation of sectoral

ministers from each government in Ministerial Implementation Groups (MIGs), which met almost daily between late March and late May 2020, primarily as a vehicle for the pooling of information.¹³

18. Continued intergovernmental co-operation as the pandemic entered later phases was entirely conditional on the UK government's willingness to make appropriate institutional channels available, and these were effectively cut off for long periods from summer 2020 onwards. Extraordinarily, the Welsh First Minister reported having spoken to the Prime Minister only once between May and September 2020.¹⁴ Meanwhile, the MIGs had been wound down in late May when the UK government made important changes to the Whitehall machinery for handling the pandemic, aimed at streamlining decision-making within two cabinet committees on Covid-19 strategy and operations. These changes contributed to increasing divergence across the UK once the initial restrictions began to be eased. During the severe wave of coronavirus cases in winter 2020/21 the administrations in each part of the UK made separate decisions on when, and in what form, to impose new restrictions. There were also a number of damaging public rows between the governments, for instance over the continuation of the UK-wide 'furlough' scheme and intra-UK travel restrictions, which might well have been more muted had more regular, and more purposeful, intergovernmental meetings continued.
19. Given the geographical proximity between the different parts of the UK, and the nature of the interdependencies between their peoples and economies, the decline of effective co-operation and open communication over the course of the coronavirus pandemic is a telling indication of one of the enduring weaknesses of the UK model of territorial governance. Having worked together effectively according to ministers from each of the governments in spring 2020, intergovernmental co-operation had all but dried up by that autumn. The underdeveloped character of the UK's intergovernmental machinery more than two decades after devolution was first introduced, and the thinning out of trust between devolved and central government, were laid bare in the course of these events.

How can the challenges for multi-level governance in the UK be addressed?

20. Our historical overview leads us to make the case, in particular, for steps to be taken to embed intra-UK consultation and engagement far more deeply into the culture and machinery of the UK state. The *ad hoc* and reactive approach to the handling of devolution and territorial politics apparent since the late 1990s is no longer sustainable. Politicians and officials operating at the centre must become better equipped for, and far more accustomed to, engaging with issues relating to devolution and territorial politics. And they must be able to do so with a better feel for, and understanding of, the political cultures and histories of all parts of the UK.
21. With the changes brought about by recent alterations to the devolution arrangements, and the return of substantial powers from Brussels after Brexit, the number of domains in which shared powers have to be exercised has increased significantly. The mind-set of the centre, at both Whitehall and Westminster, needs to catch up with these changes. In the contemporary context, we particularly emphasise the need for reforms which create the conditions in which new kinds of partnership and co-operative working are more likely.

22. Some of the tensions that have grown up between the UK and devolved governments in recent years can be traced, in part, to insensitive handling in Westminster and Whitehall of policy decisions that carry implications for devolution. In particular, devolved ministers have frequently complained at not being alerted to policies that have profound consequences for their own competences before they enter the public domain. Such missteps make an already difficult context for handling intra-UK relationships even more challenging. One key ingredient of a revamped approach in this area would be to address the territorial implications of policy decisions at an earlier stage of the policy process. The reality of the 'jagged edge' between devolved and reserved competences means that there is often a good argument for some level of intra-UK consultation even before legislation is drafted. On such matters, the devolved governments should be engaged as soon as is feasible, before positions harden and differences escalate into public rows. There is, almost always, no good justification for devolved ministers hearing about policies that will have significant knock-on effects for their own territories at the last minute.
23. A related, significant shift is also required in the way that Whitehall 'devo-proofs' the policies it develops. The specific machinery needed to achieve this – whether a separate devolution or Union cabinet committee, or a devolution process embedded in the functioning of all cabinet committees – is less important than the overall objective. No policy should be advanced from the centre without a conscious acknowledgement of its likely impact on other affected territories within the UK.
24. Since devolution was introduced, the Joint Ministerial Committee has come to be regarded by both devolved governments and some in the UK government as insufficient in the context of the constitutional challenges of recent years. Its meetings have been intermittent, and often characterised by the raising of grievances rather than substantive discussion of policy issues of common interest. A new culture of consultation and mutual engagement needs therefore to be underpinned by more robust mechanisms for intergovernmental relationship-building, of the kinds that have been developed in many other multi-level states.¹⁵ A joint review of intergovernmental relations involving the four governments has been ongoing since 2018. Following several delays, an update on progress with this review was published in March 2021.¹⁶ This indicated agreement had been reached around a number of relatively modest, but potentially important, reforms that have been proposed for some years, including: incorporating consensus decision-making into the terms of reference for IGR; routinely rotating chairs and venues for some intergovernmental forums; establishing additional sub-forums for regular meetings of sectoral ministers with equivalent portfolios; and revising the dispute resolution process to provide for independent mediation. However, some differences between the governments still remain to be resolved in this area at the time of writing, including over whether to rebrand the plenary meetings of the Joint Ministerial Committee as the UK Government and Devolved Administrations Council, and whether the Prime Minister should be able to send a nominated deputy to these meetings rather than attending in person. Governments across the UK should make concluding an agreement on a reformed package of IGR an urgent priority following the devolved elections in May 2021.
25. There is a wider need as well to reflect upon the complacent and frequently un-strategic mindset that informs the ethos and thinking of central government in its dealings with other layers of government within the UK. Embedding intra-UK consultation and engagement into the operational culture of the British state means addressing the high levels of ignorance and misunderstanding about devolved politics and the territorial constitution in some of Whitehall's core

departments. There have already been some institutional initiatives focused on this challenge, notably the work of the UK Governance Group established in 2015, but these have not yet achieved a sea change in how ministers and civil servants engage with territorial politics. A greater focus on the character, legal framework and history of the British state and the post-devolved Union needs to be incorporated within civil service professional development programmes. Civil servants working in each government should be enabled to spend time on learning about how the other governments work, through developing and extending practices such as joint training events, shadowing schemes and secondments, all of which can help to promote mutual understanding of the different contexts across the UK, and strengthen professional connections between officials working in each government. A good understanding of UK governance and devolution should be a prerequisite for promotion into the senior civil service and direct experience of government outside Whitehall, either in devolved or local government, should be viewed as a positive advantage.

26. A culture of consultation and engagement between the centre and the devolved territories should extend to parliaments, as well as governments. To this end there is a strong case to be made for strengthening arrangements for intra-UK interparliamentary relations, which have been limited in frequency and scope since the introduction of devolution.¹⁷ This would leave legislatures across the UK better placed to engage with issues relating to territorial politics, and help to promote mutual understanding of the perspectives of politicians in different parliaments.
27. The bilateral, incremental and asymmetrical approach at the political and administrative centre to developing devolved institutions which we have charted in this submission has run its course. In its place there is a growing need for a more open and informed debate, more strategic thinking, and a more balanced, flexible and functional system of multi-layered governance with cross-governmental consultation and engagement at its heart. Without this, it is almost inevitable that relationships between the governments of the UK's component parts will continue to deteriorate, adding further to the already significant strains on the Union, and ultimately to the risk of its break-up.

30/04/2021

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² V. Bogdanor, 'Devolution: Decentralisation or Disintegration?', *Political Quarterly* 70:2 (1999), pp. 185-194; D. Judge, 'This is what democracy looks like': New Labour's Blind Spot and Peripheral Vision', *British Politics* 1:3 (2006), pp. 367-396.

³ UK Government, Scottish Executive and National Assembly for Wales, Memorandum of Understanding on Devolution, Cm 4444, October 1999.

⁴ Institute for Government, 'Devolution: Joint Ministerial Committee', <https://www.instituteforgovernment.org.uk/explainers/devolution-joint-ministerial-committee>, last accessed 26 April 2021.

⁵ A. Trench, 'Washing dirty linen in private: the processes of intergovernmental relations and the resolution of disputes', in A. Trench (ed.), *Devolution and Power in the United Kingdom* (Manchester: Manchester University Press, 2007c), pp. 160-197.

⁶ A. Paun and R. Munro, *Governing in an Ever Looser Union: How the four governments in the UK co-operate, negotiate and compete* (London: Institute for Government, 2015), p. 64.

⁷ P. Cairney, 'Intergovernmental Relations in Scotland: What was the SNP Effect?', *British Journal of Politics and International Relations* 14:2 (2012), pp. 231-249; N. McEwen, W. Swenden and N. Bolleyer, 'Intergovernmental Relations in the UK: Continuity in a Time of Change?', *British Journal of Politics and International Relations* 14:2 (2012), p. 324.

⁸ UK Government, *The Coalition: our programme for government*, 2010, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/78977/coalition_programme_for_government.pdf, last accessed 26 April 2021.

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- ⁹ D. Cameron, *For the Record* (London: William Collins, 2019), p. 315.
- ¹⁰ UK Government, 'Joint Ministerial Committee Communiqué: 24 October 2016', <https://www.gov.uk/government/publications/joint-ministerial-committee-communique-24-october-2016>, last accessed 16 February 2021.
- ¹¹ Scottish Government and Welsh Government, 'Joint Statement from First Ministers of Wales and Scotland in reaction to the EU (Withdrawal) Bill', 13 July 2017, <https://gov.wales/joint-statement-first-ministers-wales-and-scotland-reaction-eu-withdrawal-bill>, last accessed 26 April 2021.
- ¹² UK Government, Northern Ireland Executive, Scottish Government and Welsh Government, *Coronavirus: action plan - A guide to what you can expect across the UK*, 3 March 2020, <https://www.gov.uk/government/publications/coronavirus-action-plan>, last accessed 26 April 2021.
- ¹³ J. Sargeant, *Co-ordination and divergence: Devolution and coronavirus*, (London: Institute for Government, 2020).
- ¹⁴ ITV News, 'Drakeford calls on Johnson to 'engage' with devolved nations during 'most difficult week'', 18 September 2020, <https://www.itv.com/news/wales/2020-09-18/first-minister-gives-update-on-pandemic-after-first-covid-19-deaths-in-wales-since-august>, last accessed 26 April 2021.
- ¹⁵ N. McEwen, M. Kenny, J. Sheldon and C. Brown Swan, *Reforming Intergovernmental Relations in the United Kingdom* (Edinburgh: Centre on Constitutional Change, 2018).
- ¹⁶ UK Government, 'Progress Update on the Review of Intergovernmental Relations', March 2021, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/972983/Progress_update_on_the_review_of_intergovernmental_relations.pdf, last accessed 26 April 2021.
- ¹⁷ See J. Sheldon and H. Phylip, Written evidence to the House of Commons Procedure Committee inquiry on the procedure of the House of Commons and the territorial constitution, November 2020, <https://committees.parliament.uk/writtenevidence/14593/pdf/>, last accessed 26 April 2021.