

Royal Society of Edinburgh – written evidence (FGU0047)

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

Summary

- The inquiry by the House of Lords Constitution Committee on the Future Governance of the UK is welcomed by the Royal Society of Edinburgh (RSE). The inquiry comes at a time when there is increased attention on the role of intergovernmental relations due to the implications of Brexit, the COVID-19 pandemic, Lord Dunlop's Review of UK Government Union Capability, and an ongoing review by the four administrations on the system of intergovernmental relations. Some of the recommendations of these reviews align with recommendations previously made by the RSE in responses and papers, which are listed in the response (see paragraph three).
- Since the first devolution of power in 1999, different circumstances and objectives have led to differentiated journeys in devolution in Scotland, Northern Ireland, and Wales, while some devolution exists in England via the Metro Mayor structure. However, the numerical dominance of a unitary England with 84% of the UK population and lack of a decentralised system of government for England remains a significant impediment to the emergence of a conventionally federal system.
- UK Government departments lack sufficient knowledge of devolution, to the detriment of intergovernmental relations. The Dunlop Review has highlighted the issues within the system of intergovernmental relations, and the recommendations presented by Lord Dunlop may help. Across the UK, there is varying public opinion towards the distribution of powers as there is both support for greater devolution and resistance to 'postcode lotteries' over the standards of public services.
- Some of the challenges for intergovernmental relations in the UK have been long-standing, on issues such as territorial finance. New challenges have emerged due to post-Brexit repatriation of EU competencies and the creation of new complex interdependencies where areas of reserved competence interact with devolved responsibilities. Governments have been working together to agree on common frameworks, but tensions arise when governments act unilaterally. There will always be areas where governments diverge, and disputes are likely to emerge. It is important that the system of intergovernmental relations has mechanisms that serve to de-escalate tensions and resolve disputes.
- There is little evidence of significant differences among the nations and regions of the UK on fundamental issues such as basic freedoms and democracy or the principle of universal health care and school education, which are key values of the UK. However, nationalists in Scotland, Wales, and Northern Ireland do not accept that the Union is needed to realise these shared values. It is likely that these values would continue to be shared, irrespective of the constitutional arrangements across these islands.
- The RSE recommend that consideration be given to whether the current inclusion of the Sewel convention in the devolution acts provides sufficient constitutional protection to the authority of devolved institutions.
- Within the current funding arrangements there is further room for improvement.

Firstly, the Barnett formula arrangements lack sufficient transparency (recently highlighted by the Public Accounts Committee). Secondly, the varying levels of devolution across the UK make it challenging to construct alternative mechanisms. In the present devolution settlement, there is quite a clear division between what is devolved and reserved. However, this is challenged by the UK Internal Market Act, City Deals and the proposed Shared Prosperity Fund, which increases UK Government funding on projects outside the Barnett formula. These developments may blur political responsibility and accountability for devolved services and distort priorities between governments. In addition, although these funding streams will be presented as new money, they are more likely to be equivalents to funding programmes in England but with money spent directly in the devolved territories rather than generating Barnett consequential and thus increases in the block allocation.

Introduction and General Comments

1. The Royal Society of Edinburgh (RSE), Scotland's National Academy, welcomes the work of the House of Lords Constitution Committee around the future of constitutional settlement across the United Kingdom (UK).
2. The RSE has provided independent and impartial evidence-based advice to the Scottish and UK Governments and Parliaments on the UK's withdrawal from the EU. Areas on which the RSE has focused include post-Brexit public policy, regional funding and the internal market, the evolution of the UK's territorial constitution, intergovernmental relations, and common frameworks.
3. The RSE has published the following Advice Papers, which are of particular relevance to this consultation, with many of the themes explored remaining highly relevant and deserving of reiteration in this response:
 - Scotland and the Shared Prosperity Fund (February 2021)¹
 - UK Internal Market White Paper (August 2020)²
 - Scotland and the UK Internal Market (February 2020)³
 - Environmental Principles and Governance Post Brexit (May 2019)⁴
 - The Future of Scottish Agriculture Post Brexit (January 2019)⁵
 - Intergovernmental Relations (November 2018)⁶
 - Common UK Frameworks (August 2018)⁷
4. The inquiry by the Committee is welcomed and has aligned with the publication of the Dunlop Review into UK Government Union Capability.⁸ The Dunlop Review presented several recommendations, including:

¹ The Royal Society of Edinburgh. 2021. 'Scotland and the Shared Prosperity Fund'. URL: <https://www.rse.org.uk/wp-content/uploads/2021/03/RSE-Response-to-Scotland-and-Shared-Prosperity-Fund-Inquiry.pdf>

² The Royal Society of Edinburgh. 2020. 'The UK Internal Market White Paper'. URL: <https://www.rse.org.uk/wp-content/uploads/2020/08/UK-Internal-Market-White-Paper.pdf>

³ The Royal Society of Edinburgh. 2020. 'Scotland and the UK Internal Market Bill'. URL: https://www.rse.org.uk/wp-content/uploads/2020/03/AP20_03.pdf

⁴ The Royal Society of Edinburgh. 2019. 'Environmental Principles and Governance Post Brexit'. URL: https://www.rse.org.uk/wp-content/uploads/2019/05/AP19_06.

⁵ The Royal Society of Edinburgh. 2019. 'The Future of Scottish Agriculture Post Brexit'. URL: https://www.rse.org.uk/wp-content/uploads/2019/02/RSE_Agriculture_SAC_Final.pdf

⁶ The Royal Society of Edinburgh. 2018. 'Intergovernmental Relations'. URL: <https://www.rse.org.uk/wp-content/uploads/2018/11/AP18-21.pdf>

⁷ The Royal Society of Edinburgh. 2018. 'Common UK Frameworks'. URL: <https://www.rse.org.uk/wp-content/uploads/2018/10/AP18-15.pdf>

⁸ Dunlop, A. 2021. 'The Dunlop Review Into UK Government Union Capability'. URL: <https://www.gov.uk/government/publications/the-dunlop-review-into-uk-government-union-capability>

- A new Great Office of State in the UK Government Cabinet.
 - A new structure supporting the separate offices of the Secretaries of State for Scotland, Wales and Northern Ireland with a single Permanent Secretary.
 - A new fund for UK-wide projects, including joint projects with devolved governments.
 - A new UK Intergovernmental Council (replacing the Joint Ministerial Committee), supported by an independent secretariat and a new, clear dispute handling process.
5. The inquiry also coincides with the UK Government's Progress update on the review of intergovernmental relations.⁹ This makes proposals for reforms to intergovernmental processes and machinery. These include:
- revised principles.
 - replacing the Joint Ministerial Committee with a three-tiered structure incorporating (i) portfolio engagement at official and ministerial level (ii) engagement on cross-cutting issues, including an Inter-ministerial Standing Committee and a Financial Inter-ministerial Standing Committee; and (iii) a plenary-style intergovernmental council.
 - a standing secretariat, operating independently of the administrations.
 - revised procedures for dispute avoidance and resolution.
6. These reviews are welcomed and some of their recommendations align with RSE's earlier representations. Our work to date has highlighted weaknesses in the UK's intergovernmental system. These pre-dated but have been amplified by Brexit, and have contributed to, and reflected, constitutional and political tensions between the UK Government and devolved governments. The RSE has consistently recommended a review and reform of intergovernmental relations, including the introduction of an independent secretariat and an improved dispute handling process.
7. Given the RSE's standing as Scotland's National Academy and the Society's impartiality, the response to the inquiry can only specifically answer certain questions. We do not offer recommendations on the future of English devolution. However, several of our Fellows are experts in the area and would be happy to give written or oral evidence.
8. Since 1999 devolved power has gradually involved more taxation powers, but also additional legislative powers. Constitutional objectives and practical circumstances have differentiated the journeys of Scotland, Wales and Northern Ireland, and the long-term direction of travel cannot be known. The 2004 North East of England referendum appears to have closed the door on at least one vision of regionalised England, although some form of regionalised England does exist through Metro Mayors. The numerical dominance of a unitary England, with 84% of the UK population, remains a significant impediment to the emergence of a conventionally federal system.
9. Perhaps in consequence, some of the problems that arise in relation to devolution are less about powers than about relationships. These are exacerbated by various practical difficulties associated with the detailed operation of the system. Disputes have for example arisen because of UK Government failure to consult and obtain consent to legislate in areas of devolved competence, in violation of the Sewel Convention.

⁹ <https://www.gov.uk/government/publications/progress-update-on-the-review-of-intergovernmental-relations>

Committee Questions:

Question 1: Is the current balance of powers within the UK optimal, or does power need to be shared differently?

Do any changes to the current constitutional arrangements enjoy widespread public support across the UK? What would be the impact of different constitutional arrangements?

10. It is unclear what the Committee means by the terms 'optimal' and 'need'. What balance of power is 'optimal' would be highly subjective. With this in mind, the RSE can only provide an overview of the current distribution of powers as it stands, what this means, and the extent to which it enjoys political and public support.
11. As we have said in previous responses linked above, the current intergovernmental experience within the UK may be detrimental to the union itself. As the devolution settlements have evolved and changed, UK Government departments' imperfect knowledge of the role of devolved governments has affected intergovernmental relations, while political divergences have also contributed to growing mistrust. There is widespread and longstanding recognition that the system of intergovernmental relations is not fit for purpose, especially in light of the implications of Brexit for devolution and the UK's territorial constitution.
12. Some of these issues have been highlighted by the Dunlop Review, whose recommendations to improve intergovernmental relations we welcome. The RSE recognises that the UK and devolved governments have been engaged in a joint review of intergovernmental relations since 2018. While the recent publication indicates that some progress has been made in agreeing reforms, it is clear that areas of disagreement remain. In addition, there appears to be a widening gulf between the principles and proposals in the progress update and the practice of intergovernmental relations, especially in relation to recent developments such as the United Kingdom Internal Market Act 2020 and proposals for regional aid. These developments have contributed to a further deterioration of relationships between the administrations that revised structures alone are unlikely to restore.
13. There is a variation in attitudes towards the distribution of powers and resources in different parts of the UK. There is often, paradoxically, support for greater devolution and resistance to so-called 'postcode lotteries' over standards of public services.¹⁰ The introduction of English Votes for English Laws does not seem to have reduced dissatisfaction amongst the English electorate. This dissatisfaction may stem from the relationship between culture and national identity, as it can be argued that the 'English voice' is underrepresented in the current constitutional settlement.

Question 2: What are the current challenges for multilevel governance in the UK, and how can these be addressed?

To what extent are any challenges historical, structural, operational, political, economic or identity-driven? Are there issues about attitude, tone, and civil service capability in Whitehall and the devolved administrations? Is a cultural shift required among all concerned to adjust properly to and engage with the new constitutional landscape? Can the UK learn anything from other countries with multilevel governance structures, or from existing structures like the British-Irish Council? Should any changes be accompanied by greater inter- parliamentary scrutiny?

¹⁰ Henderson, A; Jeffery, C; Wincott, D. 2013. 'Citizenship after the Nation-State', Basingstoke: Macmillan.

14. There are challenges with multilevel government in the UK. Some of these are long-standing challenges related to the system of territorial finance (see below). Many have emerged because of Brexit and the 'repatriation' of EU competences. Where these coincided with devolved competences, the governments have been working together to explore where common (legislative or non-statutory) frameworks were necessary. The legal underpinning provided to the UK-wide domestic market by the UK internal market legislation also creates new uncertainties over the scope of laws passed within each of the four territories. The European Union-United Kingdom Trade and Cooperation Agreement adds further complexities to the system of multi-level government, especially in relation to Northern Ireland. Brexit has also brought underlying problems around complex interdependencies where areas of devolved competence interact with reserved responsibilities, most notably in relation to international trade.
15. A cultural shift may be required within UK Government departments and political parties to adjust appropriately to the changing constitutional landscape. Despite being 23 years into devolution, there appears to be a lack of understanding of devolution within UK Government departments, which Lord Dunlop has highlighted in his report.
16. The UK system of territorially devolved union is distinctive in that there is an absence of autonomy for one nation (England) and there are no easy international comparisons. However, we mention some relevant examples of multilevel government. **Canada**, with a three-tier system of federalism encompassing the federal government and parliament, provinces/ territories and municipalities, and where nationhood is sometimes contested, offers some examples of good practice. The Canadian constitution provides limited opportunities for the federal government to operate within areas of provincial jurisdiction, although this has proved contentious.
17. The **Spanish** system of sectoral conferences, in which decisions are taken and consensus sought, provides more formal powers and voting rights for the regions than do the UK Joint Ministerial Committees. However, the Spanish system has proven less effective in addressing demands for recognition in the regions with distinct identities and aspirations.
18. The biggest intergovernmental issue over the last year has been the response to the pandemic. The UK and devolved governments adopted the language of a 'four nations' approach. This did not have a consistent meaning. At some points, the governments coordinated decision making, for example, in imposing the first lockdown restrictions, agreeing restrictions around Christmas and the roll-out of vaccine programme. At other times they developed policy approaches autonomously, generating distinctive rules and frameworks (for example, 'levels' and tiers') across the UK. There is not enough evidence of the effectiveness of this approach just yet, and a review of the lessons to be learnt would be helpful. We explored intergovernmental relations during the pandemic in our response to the Scottish Affairs Committee inquiry on 'Coronavirus and Scotland',¹¹ in which we drew attention to the **Australian** response to the pandemic. In Australia, the Commonwealth Government, and the governments of the states and territories created a new 'National Cabinet' to coordinate their response to the pandemic. This involves the Prime Minister, the Premiers and Chief Ministers of the states and territories and focuses more attention than usual on the federal system¹². The Cabinet has two core functions: to coordinate decisions and actions across all

¹¹ Royal Society of Edinburgh, 2020. 'Coronavirus and Scotland'. URL: <https://www.rse.org.uk/wp-content/uploads/2020/07/AP20-07.pdf>

¹² Saunders, C. 'COVID-19: What is Australia's National Cabinet?'. University of Melbourne. 2020. URL: <https://law.unimelb.edu.au/covid-19/covid-19-what-is-australias-national-cabinet>

jurisdictions where necessary (including procurement and overarching public health restrictions), while preserving states' abilities to pursue and own their own distinctive responses. In contrast to the centralised system of intergovernmental relations for which Australia was known previously, the National Cabinet has been genuinely intergovernmental, providing a forum for dialogue, sharing of ideas, coordinated and collective action among governments led by competing political parties. This is credited with contributing to Australia's effective Covid response and is providing the basis for broader reforms to intergovernmental relations.¹³

19. Unlike any of these comparators, the UK Government has a dual responsibility to represent the whole of the UK in some matters and England in others, which may contribute to the confusion and lack of understanding on the role of the devolved governments.
20. There should be an effective intergovernmental framework with clarity over responsibility, a reasonable level of transparency, and confidence in the process for resolving disputes, all of which can help to build trust between the governments. In the UK there remains a lack of transparency on the content and conduct of meetings. This has a detrimental effect on the ability of parliaments and the public to scrutinise intergovernmental relations and hold governments to account for their actions.
21. Within the previous responses and papers by the RSE (listed in paragraph three), we have consistently encouraged that any changes to the system of intergovernmental relations and constitutional structure should be accompanied by inter-parliamentary scrutiny; and that proposals should only be ratified when agreed by all four administrations.

Question 3: Should there be a greater degree of devolution within England and, if so, how should these arrangements relate to the UK as a whole? *Does local government in England, including the introduction of combined authorities/mayors, need to be rationalised? Should local areas enjoy greater autonomy in raising and allocating expenditure? Should there be a greater distinction between UK and 'English' government in Whitehall, and what would be the impact on the UK? What has been the impact of English Votes for English Laws in the parliamentary context and how might the current arrangements be improved?*

22. As noted, the RSE is not in a position to offer comments or recommendations on English devolution. However, we would note that changes applied to England and its regions have consequences within the devolved nations. Furthermore, there are consequences when the UK Government does not clarify whether it is acting on behalf of England or the UK. This can impact negatively on public knowledge and understanding of the constitutional arrangements and of intergovernmental relations.

Question 4: How well understood in its constituent parts is the UK's common purpose and the collective provision it makes? And what impact does this have on democratic accountability?

Areas of common purpose may include economic, social, trade, international relations, security, including counter-terrorism capacity and security networks, defence, and responding to international crises.

¹³ Saunders ,C. 'The National Cabinet Has Worked, Can it Last?'. University of Melbourne. 2020. URL: <https://pursuit.unimelb.edu.au/articles/the-national-cabinet-has-worked-can-it-last>

23. The extent to which there is a common purpose, and what that purpose entails, is appropriately a matter of political debate, especially across the four territories of the UK. There is little evidence of large differences among the nations and regions of the UK on fundamental issues such as basic freedoms and democracy or the principle of universal health care. Nationalists in Scotland, Wales, and Northern Ireland, however, do not accept that the Union is needed to realise these common values. Despite these common values, disputes are likely as they are a normal feature of an intergovernmental system. When these give rise to disputes over competence or between administrations, there should be confidence in processes aimed at resolving these within the formal intergovernmental framework.
24. Specifically, each government should consider when to raise legal disputes as this can impact the perception of intergovernmental frameworks and the common purpose of the UK. For example, the current legal dispute raised by the UK Government over incorporating the UN Convention on the Rights of the Child (UNCRC) into Scots law which has been referred to the UK Supreme Court, which was passed unanimously by the Scottish Parliament at Stage 3 on 16 March 2021¹⁴, may be ill-advised as the convention aligns with the common values of the UK and may be damaging to the spirit of cooperation. This contrasts with the UK approach on The Hague International Protection of Adults Convention as this was ratified by the UK for Scotland and implemented into Scots law by the Scottish Parliament many years before it was legislated for by the UK Parliament for England and Wales. It has not yet been ratified by the UK Government for England and Wales and Northern Ireland.¹⁵

Question 5: How can the existing constitutional arrangements regarding the governance of the UK be made more coherent and accessible, or should the overall structure be revisited?

Should the constitutional arrangements continue to be bespoke or become more formalised? Should principles and parameters for a new constitutional framework be articulated? How can any new arrangements be embedded in the constitution such as suggestions for a new Act of Union or Charter of Union? How is the public currently informed about the arrangements? Does there need to be greater public awareness of, and education about, the arrangements and if so, how can this be achieved?

25. The questions posed by the Committee focus on constitutional issues which are contested politically by parties across the UK. Administrations and political parties must work together to achieve changes to the current UK constitutional structure, this may require a change in culture in how governments regard and interact with each other.
26. A more orderly structure might help improve intergovernmental relations and dispute resolution, but these changes have to be made by agreement among all governments and follow a transparent public process so that there is trust in the system. It is now over 50 years since the report of the Kilbrandon Commission on the Constitution and the time may perhaps be ripe for another such review.
27. Intergovernmental discussions and processes should become more transparent, which may help to improve how governments raise disputes and how these are addressed through mediation. We recommend that consideration be given to whether the current inclusion of the Sewel convention in the devolution Acts provides sufficient constitutional protection to the authority of the devolved

¹⁴ <https://www.parliament.scot/bills-and-laws/bills/united-nations-convention-on-the-rights-of-the-child-incorporation-scotland-bill#target4>

¹⁵ <https://www.hcch.net/en/instruments/conventions/status-table/notifications/?csid=46&disp=resdn>.

institutions.

Question 6: How effective are the current funding arrangements for the UK and to what constitutional implications do they give rise?

How well have the fiscal frameworks introduced five years ago worked? Is the current approach to the distribution and deployment of funding and resources across the UK fair and efficient, and if not, how can this be improved? What impact will the UK Shared Prosperity, Levelling Up, UK Community Renewal, Towns and Community Ownership Funds have on the overall arrangements?

28. Since 1999 the United Kingdom has experienced asymmetric devolution, with the initially mostly expenditure-based system gradually involving more taxation powers. Constitutional objectives and practical circumstances have differentiated the journeys of Scotland, Wales and Northern Ireland, and the final destinations cannot be known. There are no tidy solutions either to constitutional structures or to associated financing mechanisms for a continuing United Kingdom. The reasons for this are partly technical (differences in population size and prosperity) and partly political (the future of the Union is challenged, especially in Scotland and Northern Ireland).
29. Devolution, and particularly the devolution of fiscal power, has been developed piecemeal. The Calman and Smith Commissions introduced a degree of Scottish tax devolution. The Holtham and Silk Commissions started Wales on the path for tax devolution. Scotland has the Scottish Fiscal Commission as an independent fiscal forecaster, while Northern Ireland has recently established a Fiscal Commission and Fiscal Council. While the Calman and Smith Commissions have encouraged the devolution of certain fiscal powers, this has not been smooth. Of the Calman proposals, devolution of Aggregates Levy and Air Departure Tax (Air Passenger Duty in the rest of the UK) have not been implemented. The Smith proposals for partial VAT assignment have not progressed. The Smith Commission's first 'No Detriment' principle (when a UK tax is first devolved, then the devolved government neither gains nor loses revenue) has been observed; however, the second 'No Detriment' principle (that tax policy in one jurisdiction should not damage the revenues of another jurisdiction) has not been as, if taken seriously, it would prevent the effective exercise of most devolved tax powers.
30. Due to Brexit and COVID-19, it might be more challenging to reach a consensus in the pending renegotiation of Scotland's 2016 Fiscal Framework between the UK and Scottish Governments. A planned review was built into the 2016 agreement between the two Governments. A key issue will be the Block Grant Adjustment (BGA) design in the year of tax or spending devolution and the revaluation mechanism in subsequent years. A much more critical issue in this renegotiation will be the size of borrowing powers the Scottish Government may seek to cope with adverse reconciliations of BGAs when the final out-turn figures for Scottish tax revenues are known.
31. There are continuing arguments about the effectiveness, merits and demerits of the current funding system. The RSE does not have a collective view on whether the system is 'fair and efficient'. However, two points might be made. First, though there has been substantial improvement through time, the Barnett formula arrangements have lacked sufficient transparency, which has been highlighted by the House of Commons Public Accounts Committee.¹⁶ Second, the constitutional asymmetries discussed above make it challenging to construct

¹⁶ House of Commons Public Accounts Committee, 2019. 'Funding for Scotland Wales and Northern Ireland'. URL: <https://publications.parliament.uk/pa/cm201719/cmselect/cmpublicacc/1751/175102.htm>

alternative mechanisms that would command consent in the devolved nations and England.

32. The devolution settlement and clear division between what is devolved and reserved are now challenged by two developments interpreted by some in the devolved nations as threats to the devolution settlement. First, Brexit led to the United Kingdom Internal Market Act 2020, to which the Scottish and Welsh Parliaments declined to give legislative consent. Using new powers to provide financial assistance in devolved areas, provided for in this legislation, the UK Government has established policy control over funding streams that previously came from the European Union to the devolved governments. Second, the UK Government has shown its intent to increase direct funding on projects and programmes in Scotland via funding streams outside the Barnett formula, e.g., for City Deals, the UK Shared Prosperity Fund, UK Community Renewal, and Towns and Community Ownership Funds.
33. These actions illustrate that there seems to be a developing agenda within UK Government policy to bypass the devolved governments to spend on devolved matters. There are three reasons to be concerned about this, namely that it blurs political responsibility and accountability for devolved services; and distorts priorities between governments. Thirdly, although these funding streams will be presented as new money, they are more likely to be equivalents to funding programmes in England but with money spent directly in the devolved territories rather than generating Barnett consequentials and thus increases in the block allocation.

Conclusion

34. The RSE has long highlighted that the current system for intergovernmental relations is not effective and urgently needs to be reviewed and reformed. The publication of the Dunlop Review alongside the UK Government's progress update on the review of intergovernmental relations are welcome. Both underline the need to continue to pursue a joint approach across the administrations to reforming intergovernmental relations, and to work towards ensuring that any changes in machinery and processes are reflected in the spirit in which the governments engage with one another in areas of mutual concern.
35. An important feature of the UK is that one nation outweighs the rest in population and economic output, to a degree not found in any comparable system. Even if little can be done about that, changes can be made to improve intergovernmental relations and political and public support for the constitutional settlement. Implementing the Dunlop Review's recommendations on a more high-profile Intergovernmental Council,

independent secretariat (which could have more powers and bigger budget than suggested by Lord Dunlop, as recommended by the RSE in the response noted above) and a clear dispute handling process, is a way forward for improving intergovernmental relations that should be welcomed even if the current Union of the nations of the UK is not supported by all participants.

13/05/2021