



The Government's Constitution, Democracy and Rights Commission Inquiry

JUSTICE response to the Public Administration and Constitutional Affairs Committee's Call for Evidence

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Introduction

1. JUSTICE is an all-party law reform and human rights organisation working to strengthen the justice system in the United Kingdom. It is the UK section of the International Commission of Jurists. Established in 1957, our vision is of fair, accessible and efficient legal processes, in which the individual's rights are protected, and which reflect the country's international reputation for upholding and promoting the rule of law.
2. This briefing responds to the Public Administration and Constitutional Affairs Committee's call for evidence in relation to their inquiry regarding the Government's manifesto pledge to create a Constitution, Democracy and Rights Commission (the "Commission") to look at "the broader aspects of our constitution".
3. In summary:
 - a. It is unclear to us whether the Government is going to form a Commission given that it has already set up / committed to setting up individual reviews looking at specific topics. Consideration will need to be given as to how any Commission will deal with issues overlapping with other reviews.
 - b. If a Commission is going to be set up, it should examine ways in which the rule of law and fundamental rights and liberties can be further protected and embedded in our constitution. It should not be used as an opportunity to undermine the rule of law or reduce protections of rights.
 - c. We cannot see how the Commission can consider fundamental constitutional questions without considering the devolved nations and the impact of any constitutional changes on the devolved settlements. We also believe that the legislative scrutiny process needs to be examined.
 - d. The Commission (i) must be, and be seen to be, genuinely independent from the Government; (ii) adopt an evidence-based approach; and (iii) must be as inclusive as possible in its evidence gathering, including ensuring that it has an effective engagement with the public, including disenfranchised groups.

Q1 What form should the Commission take? a. How should it be composed? b. Should the Commission engage the public, and if so how? c. How should the Commission proceed in its work? Over what timescale?

4. It is unclear whether the Government's intention remains to set up a single Commission to examine all of the topics identified in its manifesto. We note that some of the elements that were meant to be included within the remit of Commission are already being

examined, or it appears to be the Government's intention to examine, by way of separate specific reviews. The Independent Review of Administrative Law ("IRAL"), looking specifically at judicial review, has closed its call for evidence and is due to report by the end of year. The Lord Chancellor has confirmed that there will be an independent review of the Human Rights Act ("HRA")¹ and there has been recent speculation regarding proposals to reform the United Kingdom Supreme Court.²

5. In addition, a number of the other topics that are listed in the manifesto as being the subject of the Commission clearly overlap with those topics that are already being reviewed or are slated for separate review. For example, judicial review is clearly relevant to the relationship between Government, Parliament and the Courts, the functioning of the Royal Prerogative, access to justice for ordinary people and the HRA. It is also impossible to discuss fundamental questions regarding access to justice for ordinary people without considering legal aid provision. This was severely restricted by the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ("LASPO"), which has itself been subject to a Post-Implementation Review, resulting in the Ministry of Justice's Legal Action Support Plan. If the Government still intends to set up a Commission, there will need to be clarity regarding how the Commission will interact with the IRAL and any other reviews and to what extent it will consider and be bound by the findings of such reviews.
6. The composition of the Commission will of course depend on exactly what subjects are covered by its terms of reference, however it must be constituted of members with sufficient expertise in the relevant areas as well as people who are able to properly evaluate the evidence that will be taken by the Commission. The membership must be diverse. It should also include representatives from each of the four nations in order to ensure that the impact on, and views of, the devolved nations are properly considered and reflected (see further response to question 3 below).
7. Importantly, if the Commission is to address fundamental questions regarding the UK's constitutional settlement, in order to have legitimacy and buy-in from across the population, it must: (i) be, and be seen to be, genuinely independent from the Government; (ii) adopt an evidence-based approach; and (iii) be as inclusive as possible in its evidence gathering, including ensuring that it has an effective engagement with the public, including disenfranchised and disadvantaged groups.

¹ 'Government to review Human Rights Act', *Law Gazette*, 7 October 2020, available at <https://www.lawgazette.co.uk/news/government-to-review-human-rights-act/5105899.article>

² 'Supreme Court to be overhauled to curtail its constitutional powers' *The Telegraph*, 14 November 2020, available at <https://www.telegraph.co.uk/politics/2020/11/14/britains-supreme-court-faces-overhaul-concerns-us-style-election/>

8. The timescale of the Commission will depend on exactly what it is going to cover. However, the Commission must have sufficient time to enable it to gather a detailed evidence base, including engaging with the public and properly analyse the evidence gathered. The Commission should be able to set its own timescale as they will be best placed to know how much time will be required to do this.

Q2 What should be the main purpose and output of the commission? a. How should the Commission report its findings?

9. The main purpose of the Commission should be to examine ways in which the rule of law and fundamental rights and liberties can be further protected and embedded in our constitution. The Commission should not be used as an opportunity to undermine the rule of law or reduce protections of rights.
10. One topic listed in the manifesto that we are particularly concerned about is the “updating” of the HRA. We understand that this is going to be subject to a separate review so it is unclear to what extent the HRA would be considered by a Commission. However, in our view the HRA performs the vital task of ensuring that fundamental rights and liberties are protected and respected by the institutions of Government, that individuals enjoy each of the substantive rights enshrined in the European Convention on Human Rights (ECHR) and that they have a right to an effective remedy in our domestic courts for violation of those rights. The majority of rights enshrined in the ECHR are not absolute and already have built in the ability for courts to balance the rights of individuals against national security and effective government. We therefore do not see a need for the Commission to focus on “updating” the HRA.
11. In terms of how the Commission should report its findings, this should be done in a way that is accessible to the public. We commend to the Committee the way in which the House of Commons Justice Select Committee recently presented the key findings of its inquiry into the youth justice system, with an interactive summary covering the key points, well presented and spaced text, hyperlinks to key materials and an embedded video from a young person with lived experience of the youth justice system.³

Q3 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?

³ <https://houseofcommons.shorthandstories.com/justice-youth-justice-population/index.html>

12. There are two key issues we believe are not currently covered by the Government's list of topics for the Commission. These are (i) the legislative scrutiny process; and (ii) devolution.
13. First, both Brexit and Covid-19 related legislation has recently highlighted the lack of scrutiny which delegated legislation is subject to. This is particularly concerning given the increasing use of skeleton bills which allow fundamental issues to be decided or amended at a later date by ministers through the use of delegated powers, including Henry VIII powers, whereby secondary legislation can be used to amend or repeal primary legislation. The way in which law is made and scrutinised is fundamental to our democracy and constitution.
14. Second, it seems impossible that a Commission can consider the UK constitution without considering devolution. Even if the Commission is going to focus on UK-wide institutions and powers, this clearly will impact the devolved nations and the devolution settlements. For example, the IRAL Call for Evidence stated that it would only consider UK-wide and England and Wales powers. However, as explained in our response, changes to UK-wide and England and Wales powers and procedures could have significant consequences for Scotland and Northern Ireland, including for example, impacts on the jurisdiction of the Court of Session and implications for the Belfast/ Good Friday Agreement.⁴ There are also questions that will arise about how any recommendations made by a Commission would be implemented, would they require legislation by the devolved assemblies and/or legislative consent motions in Westminster?

Q4 What areas should be a priority for the Commission and why?

15. In practice, the areas that will be a priority for the Commission will depend on the topics that have already been addressed by separate reviews. However, as stated above, we believe that if a Commission is set up, its priority should be to examine ways in which the rule of law and fundamental rights and liberties can be further protected and embedded in our constitution. As a crucial part of this we believe that the legislative scrutiny process requires urgent attention.

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⁴ JUSTICE, 'The Independent Review of Administrative Law, Call for Evidence – Response' (October 2020), available at <https://justice.org.uk/wp-content/uploads/2020/10/JUSTICE-response-to-IRAL-October-2020.pdf>, p.6-7, 12, 17-19.