



Llywodraeth Cymru  
Welsh Government

POLICY AND STRATEGY, DOCUMENT

# Reforming our Union: Shared governance in the UK June 2021

The 2nd edition of the Welsh Government's views on the reforms needed to put the Union on a sustainable footing for the future.

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# Foreword



How can our Union be made strong and durable? For anyone committed to a long-term future for the United Kingdom this is one of the major questions of our time.

The Welsh Government believes that our partnership of nations, when it works well, is good for Wales. Throughout my political life I have advanced the case for solidarity among the peoples and nations of the Union. I believe that we all benefit from the pooling of our resources, the values we hold in common and our shared history of social progress. Our differences, when recognised and treated with respect, are part of our collective strength.

However, it has become harder and harder to make the case for the Union, and

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the threat to it has never been greater during my lifetime. In some important ways the Union has failed to keep pace with the full and real implications of the creation of legislatures in Wales, Scotland and Northern Ireland, in part because insufficient overall attention has been given to how the nations should talk and act together on matters which affect all parts of the UK. Moreover, where the UK government acts in an aggressively unilateral way on behalf of the whole UK, without regard for the status of the nations and the democratic mandates of their government, this inevitably creates anger and alienation. We have not seen the constructive and collaborative relationship between the governments of the UK that is essential.

It doesn't have to be this way. A United Kingdom which stands still will be overtaken by competing loyalties and the lure of separatism. But it is possible to renew and revitalise our union in ways that will allow it to thrive and prosper for the long-term, not in spite of devolution but because of it. This requires thought, imagination and co-operation, and above all an acceptance that the status quo cannot and will not continue. The case for the break-up of the UK is made vigorously across the nations, including here in Wales. Those who believe in the benefits of union cannot take it for granted. The case for union has to be made positively, based on a capacity for reform and a sense of the future rather than a retreat into the past or a misguided belief that the existing system works well.

Beyond slogans, buildings and flag flying, the current UK government has contributed little to thinking about an energised and viable future for the Union. The Welsh Government has actively tried to stimulate wider debate about UK reform. This document, containing our proposals to protect and reform the Union, was first published in October 2019. We have by no means all the answers. However, it is a contribution to a debate that needs to happen on a range of issues as seen from a Welsh Government perspective.

Things move quickly and much has happened since the first publication, and we have updated the document accordingly. Following our election the people of Wales have given a broad endorsement to the Welsh Government's vision and

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the need to revitalise our Union. In the period ahead we will be engaging directly with civil society and citizens to think through the issues we need to progress in greater detail. I hope that the UK government in particular will accept the role it needs to play in co-operating with us and others to mould a forward-looking Union, fit-for-purpose and capable of earning the goodwill and respect of all its peoples.

In the election of May this year the choice could not have been clearer. I shared a platform with leaders of parties which argued to abolish devolution on the one hand, and to take Wales out of the UK on the other. The result was an unambiguous rejection of both these positions, and an endorsement of my party's policy of strong, entrenched devolution in a reformed and truly united United Kingdom.

Mark Drakeford MS  
First Minister of Wales

## 1: Introduction

In the original 'Reforming our Union' document, we cited the Report published in July 2018 by the House of Commons Public Administration and Constitutional Affairs Committee (PACAC) on 'Devolution and Exiting the EU: reconciling differences and building strong relationships' (8th Report of Session 2017-19, HC 1485). In particular, we drew attention to the Committee's conclusion that devolution is "an established and significant feature of the UK constitutional architecture", and the United Kingdom Government needed to set out its Devolution Policy for the Union.

In its response published in September 2018 (8th Special Report of Session 2017-19, HC1574), the UK government noted the committee's recommendation and declared its intention "to publish a statement on the Union in due course",

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but when we published the original 'Reforming our Union', more than a year later, no such statement had emerged.

At the time, we surmised that this was due to the all-consuming character of the UK's exit from the European Union, on which the UK government had been almost entirely focused, but we argued that the very fact of the UK's withdrawal from the European Union reinforced the need for clearer policy perspectives on the future governance of the Union. Since early 2020, the focus of the UK government and the devolved governments has quite rightly been on the response to the COVID-19 pandemic, but the pandemic has only sharpened the need for a proper debate about the future of the UK, not least because Covid has served to raise awareness of devolution and of the extent of the responsibilities of – and the powers available to – the devolved governments and legislatures. Where the response to the pandemic has seen close and collaborative working between the 4 nations, it has demonstrated the effectiveness of joint working and the positive outcomes it can achieve, such as in respect of the vaccination programme.

However, even when the pandemic has produced examples of good and sustained working across the UK it has been ad hoc in nature. The sort of entrenched, rule based system which we set out in the original version of this document has been wholly absent. The machinery which was intended to bear the weight of intergovernmental relations has been entirely absent, without a single meeting of the JMC(P) since the current Prime Minister took office nearly 2 years ago. The positive examples stand out because they are small islands in a sea of hand-to-mouth short-termism.

Beyond coronavirus, the UK government appears to have rejected a 4 nation approach, in favour of a greater emphasis on the strength of the Union expressed through an 'aggressive unilateralism' – most clearly manifested by the United Kingdom Internal Market Act 2020 for example – and it has downplayed the multi-national character of the UK. It seems that the UK government perceives a tension between these 2 visions of the UK, and is seeking to assert

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one at the expense of the other; our view is that these 2 visions are entirely compatible with one another, and that an acknowledgement of that will actually strengthen the Union.

There have also been further contributions to the debate since we published the original 'Reforming our Union' document. As we publish this document, the House of Lords Constitution Committee is undertaking an inquiry into the future governance of the UK (**Future Governance of the UK – Committees – UK Parliament**). It does so in the context of what it describes as a United Kingdom under strain, and the tensions in intergovernmental relations which have been highlighted by both EU exit and the response to Covid.

In its **evidence to the House of Lords Constitution Committee's inquiry**, the United Kingdom Constitution Monitoring Group (UKCMG) argues that "the absence of a culture of intergovernmental cooperation within the UK presents a serious challenge for effective multi-level governance" and draws attention to "the [continued] absence of any authoritative statement on the nature of the United Kingdom, whether in the form of a constitutional document or a policy declaration by the UK Government". Moreover, in January this year Radical Federalism published a report, '**We The People, The Case For Radical Federalism**' which argued that 'Radical constitutional reform is no longer an option, it is an unavoidable necessity' and that the conflicts within the current structure of the UK needed to be addressed.

Concerns about the future of the UK are being expressed across the political spectrum. In May 2021, Sir David Lidington delivered a lecture on the future of the constitution and the Union (**Antcliffe Lecture 13 May 2021 Final Version**). In his lecture, Sir David, who served as a Cabinet Office Minister and Chancellor of the Duchy of Lancaster in Theresa May's government, describes the United Kingdom as being 'in greater peril than at any moment in my lifetime', and says that 'there can be no question today of the United Kingdom holding together save through consent'.

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And earlier this year, the UK government published Lord Dunlop's [review of the UK government's union capability](#). His report includes recommendations on the constitutional and intergovernmental relations agenda, which overlaps with ongoing work on the joint Review of Intergovernmental Relations. While helpful in some ways, the context in which the review was completed (2019) and date of issue by the UK government (24 March 2021) has since changed. The recommendations to establish a UK Intergovernmental Council, supported by a standing independent secretariat, and to improve the transparency and accountability of intergovernmental relations, are reforms we have been calling for over a number of years. But, the UK government's interpretation and selective approach will result in potential tensions which may arise from, for example, UK government financial instruments, communication and branding, as well as establishing offices in the devolved nations, particularly if these are in competition with devolved government responsibilities and priorities.

## This document

In discussing these matters, our starting point continues to be our support both of devolution and of the UK: we stand for entrenched devolution settlements within a successful United Kingdom.

It continues to be our view that some of the early tensions with devolution originated in the highly restrictive interpretation in Whitehall of the meaning of devolution itself. In the early days of devolution, it was understood to provide special governance arrangements in the devolved territories, so that so-called "national" policy could be flexed to meet local circumstances. Today, after nearly a quarter of a century of devolution, the facts on the ground are very different: sovereignty is now located in 4 different legislatures, and recognition of that fact has to be our starting point. By starting from a presumption of subsidiarity and sovereignty shared within the UK, we can focus on how to make the Union work effectively, to join its constituent parts in a shared enterprise of governing the UK.

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In other words, devolution is not only about how each of Wales, Scotland and Northern Ireland are separately governed, in different forms of association with England. Rather, devolution is concerned with how the UK as a whole should be governed, with proper account taken of the interests of all of its parts. It is a joint project between England, Wales, Scotland and Northern Ireland, based on a voluntary pooling of sovereignty for agreed joint purposes, which then require an agreed form of governance. However, shared governance means recognising the presumption of subsidiarity and shared sovereignty: it does not mean the UK government reaching into and duplicating matters which are the responsibility of the devolved governments.

And most importantly, devolution requires consistent, constructive co-operation and collaboration between the governments of the UK, if we are to deliver the best possible outcomes for citizens, and to preserve and strengthen the Union. Regrettably, this has not been our experience since we published the original 'Reforming our Union' in 2019.

The original 'Reforming our Union' set out for public debate a series of propositions, twenty in total, reflecting that perspective. The propositions are organised under the headings of General Principles; Legislatures and Legislative Powers; Executive Powers: Governments, Agencies and Civil Service; Finance; Justice and the Courts; and Constitutional Reform. Each proposition is fleshed out as necessary by explanatory or amplifying text.

The 20 propositions are then brought together in Annex 1, and the Welsh Government's continued view is that, taken together, they provide a coherent vision of the way that the United Kingdom should be governed in future years for the benefit of all of its citizens in each of its parts. The propositions are presented from a Welsh perspective, and some examples drawn from the Welsh devolution settlement are referred to, but this document is intended as a contribution to public debate on the future of the UK, rather than an argument about Welsh devolution as such. We do not express views about the appropriate structures of government, including executive devolution, internal to England.

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The rationale for publishing this refreshed version of ‘Reforming our Union’ now is to try to create a renewed momentum for a debate that cannot be ignored or ‘kicked into the long grass’ any longer.

Our proposals are designed to strengthen and improve the existing devolution settlements, and in our view they represent the minimum that should be put in place. But they should not preclude consideration of a more radical approach to reform in the UK (including the need for a written or codified constitution); the case for this grows increasingly strong as devolution matures, and as compliance with traditional constitutional conventions and understandings breaks down.

This is a debate of very long standing: over 100 years ago, a Speaker’s Conference on Devolution was appointed ‘To consider and report upon a measure of Federal Devolution’ for the United Kingdom. It produced proposals on a wide range of issues with which we continue to grapple today, although nothing ultimately came of those endeavours. But the need for change is urgent now; from the Welsh Government’s standpoint, nothing in this paper should be taken as ruling out a yet more ambitious approach to constitutional reform.

## 2: General principles

### Proposition 1

Whatever its historical origins, the United Kingdom is best seen now as a voluntary association of nations taking the form of a multi-national state, whose members share and redistribute resources and risks amongst themselves to advance their common interests. Wales is committed to this association, which must be based on the recognition of popular sovereignty in each part of the UK; Parliamentary sovereignty as traditionally understood no longer provides a sound foundation for this evolving constitution.

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## Narrative

“ The United Kingdom was constructed not through any conscious plan, but pragmatically as a result of decisions [in respect of Wales] by Henry VIII in the sixteenth century, by the Whigs who negotiated the Anglo-Scottish Union in 1707, and by Lloyd George, who negotiated a treaty with Irish nationalists in 1921.” [Bogdanor, “Beyond Brexit”, p.171] ”

Given this long, convoluted and at times contested history, it is the Welsh Government’s view that developments in the governance of the UK to face the challenges of the new century should be informed by our history, but not constrained by it. The modern recognition of the UK as a multi-national state based on each nation’s choice to be a part of the United Kingdom follows from the establishment of national devolution for Scotland and Wales in 1999, and the endorsement in Northern Ireland of the Good Friday Agreement. The devolved institutions for each of Wales, Scotland and Northern Ireland within the UK were established on the basis of popular endorsement through referendums in each territory held specifically for that purpose.

The then Prime Minister Theresa May MP, in her speech about the Union on 4 July 2019, said that:

“ “Our Union rests on and is defined by the support of its people... it will endure as long as people want it to – for as long as it enjoys the popular support of the people of Scotland and Wales, England and Northern Ireland.” ”

Although their existence is legally authorised by way of Acts of Parliament, the devolved institutions gained, and retain, their legitimacy by reason of democratic approval.

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If, as this first proposition maintains, the UK is conceived of as a voluntary association of nations, it must be open to any of its parts democratically to choose to withdraw from the Union. If this were not so, a nation could conceivably be bound into the UK against its will, a situation both undemocratic and inconsistent with the idea of a Union based on shared values and interests.

In the case of Northern Ireland, provision is made for periodic “border polls”, and in certain circumstances the Secretary of State is statutorily obliged to arrange for the holding of one. There are no equivalent standing statutory arrangements for Scotland or Wales for the holding of referendums on continuing membership of the Union, but it remains our view that, provided a government in either country has secured an explicit electoral mandate for the holding of a referendum, and enjoys continuing support from its parliament to do so, it is entitled to expect the UK Parliament to take whatever action is necessary to ensure that the appropriate arrangements can be made.

That said, it would be unreasonable for such referendums to be held too frequently (and the Northern Ireland provisions require a minimum of 7 years between border polls). More importantly, as a government committed to the United Kingdom, we would hope that in any such referendum the relevant electorate would vote for its territory to remain in membership of a UK reformed along the lines proposed in this document. However that would be the choice of the electorate, and the outcome would undoubtedly be influenced by how they perceived the benefits of membership of the union, the status of their nation within it, and its relationship with the other nations of the UK.

If, further, it is accepted that sovereignty (some of which should be shared) lies with each part of the UK, the traditional doctrine of the sovereignty of Parliament no longer provides a firm foundation for the constitution of the UK. It needs to be adjusted to take account of the realities of devolution, just as it was adjusted to take account of the UK’s membership of the European Union.

Parliamentary sovereignty is primarily concerned with the apparently unlimited

character of Westminster’s legislative competence in respect of the whole of the UK. That Parliamentary legislative competence therefore overlaps with the competences of the devolved legislatures, and we say more about the implications of this in discussion of proposition 5 below. But it follows from the general approach to UK governance advocated here that the Welsh Government sees merit in at least some of the **proposals of the Constitution Reform Group for a new Act of Union Bill**, explicitly predicated on an affirmation “that the peoples of [the constituent nations and parts of the UK] have chosen ... to continue to pool their sovereignty for specified purposes; and to protect social and economic rights for citizens”, and which provides for mechanisms to give effect to this principle.

## Proposition 2

The principles underpinning devolution should be recognised as fundamental to the UK constitution. The devolved institutions must be regarded as permanent features of the UK’s constitutional arrangements; any proposals for the abolition of such institutions should be subject to their consent and to the consent of the relevant electorate.

## Narrative

In the original ‘Reforming our Union’, we drew attention to the PACAC Report recommendation, which noted that “Devolution is now an established and significant feature of the UK constitutional architecture”. In the same vein, Mrs May, in her speech in July 2019, observed that

“ “For those of us who believe in the Union, devolution is the accepted and permanent constitutional expression of the unique multinational character of our Union. ”

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This is reflected in statutory provisions for both Wales and Scotland, which note that the devolved institutions for each country “are a permanent part of the United Kingdom’s constitutional arrangements.” (see for Wales, Government of Wales Act 2006, s.A1, inserted by Wales Act 2017, s.1) Of course, Parliamentary sovereignty means that this may not provide the permanent protection for Senedd Cymru and the Scottish Parliament that a simple reading of the provision might imply. However, the legislation further declares that the devolved institutions “are not to be abolished except on the basis of a decision of the people of Wales/Scotland voting in a referendum”. The UK government has also committed normally to seek the Senedd’s legislative consent for Parliamentary legislation altering the Senedd’s legislative competence. (This is a particular aspect of the Sewel Convention, discussed under Proposition 5 below). Compliance with this commitment should protect the Senedd (and the other devolved legislatures) from progressive erosion of their powers and responsibilities (although we also discuss under Proposition 5 the UK government’s growing disregard for the provisions of the Sewel Convention).

It is clear that, although these legal provisions and extra-statutory commitments cannot, within the existing UK constitution, provide an absolute protection for devolution (because the protecting provisions could in theory be repealed by later Parliamentary legislation), any UK government which proposed to legislate for abolition of the devolved institutions without prior popular approval in referendums, or for reduction of their powers without the relevant legislatures’ legislative consent, could do so only at extreme political cost. For all practical purposes, therefore (and setting aside for present purposes the particular circumstances in Northern Ireland), proposition 2 sets out the existing constitutional position, and the devolved institutions are, and will continue to be, intrinsic to the UK’s constitutional arrangements for as long as they retain popular support.

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## Proposition 3

The powers of the devolved institutions should be founded on a coherent set of responsibilities allocated in accordance with the subsidiarity principle. Those powers should be defined by the listing of the specific matters which it is agreed should be reserved to Westminster in respect of each territory, all other matters (in the case of Wales) being or becoming the responsibility of Senedd Cymru and/or the Welsh Government.

### Narrative

Following the changes made to the Welsh devolution settlement by the Wales Act 2017, the reserved powers model, whereby a list of specific matters is excluded from the competences of the devolved legislatures and retained for Westminster, is now the preferred model for legislative devolution within the UK (although the particular form of the model in Northern Ireland differs from that in Wales and Scotland). In the original 'Reforming our Union', we suggested that the apparent corollary, that all other matters should be or become the exclusive responsibility of the devolved legislatures, is in conflict with the current doctrine of parliamentary sovereignty.

In addition, although the reserved powers model is a technically superior method of providing devolved institutions with legislative competences, it cannot answer the question as to exactly which competences should be devolved (or, more accurately, which should be reserved). The subsidiarity principle requires that legislative and governmental responsibilities should be allocated to the most local level at which they can be performed efficiently and effectively. Central authorities' functions should be subsidiary, being only those which cannot be discharged satisfactorily at local level; the starting assumption should be that responsibilities will be devolved.

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In the original 'Reforming our Union', we noted that subsidiarity has not been used as an organising principle of allocation of responsibilities under the devolution settlements within the UK. Instead, each settlement derives from the history and circumstances of the particular territory to which it relates, rather than from logic or constitutional principle. The result is an asymmetric patchwork of settlements, which in the Welsh case has led to an inappropriately lengthy set of matters reserved to Westminster, and an incoherent set of functions lying with the Welsh Ministers. In addition, even where matters are not reserved to Westminster, the requirement for UK Ministers' consent to enact certain provisions (within policy areas universally understood to be devolved - Section 108A of and Schedule 7B to the Government of Wales Act) is a restriction unique to the Welsh settlement. This is an opaque and undemocratic clog on the Senedd's powers, in the sense that (a) it means that the UK government retains control over matters which are otherwise presented as devolved, and (b) UK Ministers are not democratically accountable (at least, in Wales) for decisions as to whether or not they grant consent.

It remains our position that the argument for recognition of the subsidiarity principle is not an argument for identical settlements for each of Wales, Scotland and Northern Ireland, but the differences between the settlements should be capable of rational justification (which they are not currently). The Welsh Government agrees with PACAC that "the [UK] Government should... be held accountable for representational and institutional asymmetries within the UK political system." (PACAC Report, n.1 above, paragraph 21).

### **3. Legislatures and legislative powers**

#### **Proposition 4**

It should be a matter for each legislature to determine its own size, electoral arrangements and internal organisation, with locally-determined Standing Order

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provision for the relevant legislature in respect of these matters as required.

## Narrative

In the original ‘Reforming our Union’, we argued that the devolved legislatures should be empowered to be self-governing in terms of the numbers of their members, the rules they put in place about who is eligible for membership, the arrangements they make about their elections, and the standing orders they adopt for conduct of their business. We noted that provision to this effect is now to be found in the devolution legislation for Wales and Scotland, subject to requirements for “super-majorities” of devolved legislature members voting for legislation on most of these matters.

The devolved legislatures in Wales and Scotland are now therefore for all practical purposes both permanent features of the UK’s constitutional arrangements and self-governing institutions, in both respects largely immune from external interference. Different prescriptive requirements apply in certain respects to the Northern Ireland Assembly’s arrangements for conduct of its business, given the particular history and circumstances of Northern Ireland.

Since the original ‘Reforming our Union’, a Committee on Senedd Electoral Reform has been established (in September 2019), to examine the recommendations of the Expert Panel on Assembly Electoral Reform ([footnote 1](#)) in respect of the size of the Senedd and how Members are elected. It reported in September 2020 and its report was debated in the Senedd in October 2020.

The Committee agreed that the Senedd is currently too small, and recommended that it should be expanded to between 80 and 90 Members. The Committee also recommended the introduction of the Single Transferable Vote (STV), and the establishment of boundary review arrangements. The Welsh Government will build upon the work of the Committee, and develop proposals to improve the representation of the people of Wales in the Senedd. We agree

with the Committee that if reforms are to take effect at the 2026 election, political consensus needs to be reached very early in the 6th Senedd on the proposed reforms.

## Proposition 5

The relations of the 4 legislatures of the United Kingdom should proceed on the basis of mutual respect. Although, as matters currently stand, the UK Parliament still formally possesses legal authority to legislate for Wales, Scotland and Northern Ireland on all matters (including those devolved), it should not normally seek to legislate for a territory, in relation to matters within the competence of the devolved legislature of that territory, without that legislature's explicit consent. The 'not normally' requirement should be entrenched and codified by proper definition and criteria governing its application, giving it real rather than symbolic acknowledgement in our constitutional arrangements. Alternatively, a new constitutional settlement could simply provide that the UK Parliament will not legislate on matters within devolved competence, or seek to modify legislative competence or the functions of the devolved governments, without the consent of the relevant devolved legislature.

## Narrative

Under the traditional understanding of parliamentary sovereignty, legislative devolution does not mean the transfer by the UK Parliament of legislative powers to the devolved legislatures. Currently, the UK Parliament continues to have unlimited legislative competence in respect of all parts of the UK (including, in respect of the devolved territories, competence about devolved matters), and the devolved legislatures are additional legislatures for their territories, with competences overlapping that of the UK Parliament.

If legislative devolution is to have real meaning, this situation therefore requires

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the UK Parliament to adopt a self-denying ordinance in respect of legislation on matters in the devolved sphere, thereby acknowledging the primary responsibility of the devolved legislatures for legislation in their territories on devolved matters. It has done this through adoption of the “Sewel convention”: that Parliament will not normally legislate for Wales, Scotland or Northern Ireland with regard to devolved matters without the consent of the relevant devolved legislature. In the case of Wales and Scotland, the convention has been restated in statutory form.

However, we know (as per the Supreme Court judgement in the Miller Case, R (Miller) v Secretary of State for Exiting the European Union [2017] UKSC 5) that questions about compliance with the convention are not currently justiciable meaning that the UK government and Parliament have considerable discretion in deciding what circumstances are “abnormal”. That enables them to proceed with legislation on matters within devolved competence notwithstanding any refusal by a devolved legislature of its consent.

This discretion enabled the UK government and Parliament to proceed with the UK Internal Market Act 2020, despite overwhelming opposition and the withholding of Legislative Consent by both the Senedd and Scottish Parliament ([footnote 2](#)), and despite the Act cutting across matters squarely within devolved competence. This was not an ‘abnormal’ situation; and yet Wales is left with an Act which changed the scope of the devolution settlement in direct opposition to the views of the elected Senedd and puts at risk years of collaboration via the Common Frameworks programme.

Indeed, under the current UK government the Sewel Convention appears now to be regarded as entirely optional. While the Senedd was in recess prior to the May 2021 elections, the UK government proceeded with the Animal Sentencing Bill in full knowledge that it had not secured the consent of the Senedd. So little force did the Sewel Convention have for the UK government that it preferred to prioritise the convenience of its own parliamentary timetabling over the consent of an entire legislature.

It was already our view that the ability of the UK government and Parliament to proceed with legislation without consent is not sustainable if devolution is to be properly respected, and recent events have placed this into even sharper focus. We agree with the Institute for Government, which concluded in its report on the Sewel Convention published in September 2020, that "the future of the Union could be put at risk without reforms to the principle of legislative consent which lies at the heart of the devolution settlement."

In the original 'Reforming our Union', we identified a simple – if radical – solution to this issue. We suggested that, as an element in a new constitutional settlement, the principle should be established that the UK Parliament should not be able to legislate on devolved matters, or seek by Parliamentary legislation to modify the competences of the devolved institutions, without the consent of the relevant devolved legislature. In other words, the "not normally" qualification, with all its potential for creating uncertainty, misunderstanding and distrust between the UK Parliament and the devolved institutions, would be removed, and a simpler and clearer relationship established between the institutions.

The actions taken by the UK government in the time which has elapsed since publication of the original Reforming our Union – in particular the United Kingdom Internal Market Act 2020, which has undermined trust in the UK government's commitment to the Sewel convention, as enshrined in the Government of Wales Act 2006 – only add weight to the arguments for this approach. Unless the UK government changes its approach, and demonstrates that it fully respects the Sewel convention, it will become inevitable that a radical safeguard of this sort is the only way to re-establish the integrity of the devolution settlement. This would be a major reform with far-reaching implications, but it will become essential if the UK government persists with the approach it has taken to the Sewel convention since 2019.

In the meantime, we propose again 2 linked reforms. First, there must be a clearer specification of the circumstances when refusals of devolved legislatures' consent can be legitimately overridden, and secondly there should be a more

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explicit stage of Parliamentary consideration of the implications of proceeding regardless of the lack of consent.

On the first point, the governments of the UK need to negotiate a new Memorandum of Understanding, setting out the circumstances and criteria under which the UK government may in extremis proceed with its legislation, notwithstanding a lack of devolved legislative consent. Consideration should also be given to setting out these criteria in statute, in a manner which would better facilitate judicial oversight of decisions by the UK government to proceed with legislation notwithstanding the absence of consent.

Secondly, while some limited progress has been made, further thought should be given as to how the UK Parliament itself, when faced with a Bill for which devolved consent has been refused, should deal with the matter. In the original 'Reforming our Union', we proposed that Parliament should have a specific opportunity to consider the constitutional implications of allowing the Bill to proceed to Royal Assent without consent. When the Scottish Parliament refused its consent to the EU (Withdrawal) Bill in 2018, neither House of Parliament was given any real opportunity to consider the implications of proceeding without that consent. Similarly, with the UK Internal Market Act 2020, the UK government rushed the Bill through Parliament in a very short time, culminating in the Senedd debating its legislative consent to the Bill at the very end of the process, which left little opportunity for Parliament to consider the views expressed in that legislature, or implications of proceeding without the Senedd's consent.

At the instigation of its Constitution Committee, the House of Lords has now adopted a procedure that when legislative consent has been refused, or not yet granted by the time of third reading, a minister should orally draw it to the attention of the House before third reading commences. In doing this the minister should set out the efforts that were made to secure consent and the reasons for the disagreement. This is a welcome step; but a statement made at this point leaves no scope for further dialogue between the legislatures, which is a core part of the intention behind the current Sewel Convention. There is also

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no similar procedure in the House of Commons, although we note that this is the subject of an inquiry by the Procedure Committee in that House.

So it is more important than ever that these matters are handled with greater respect for the views of the devolved legislatures than has been the case. It remains our view that Parliamentary legislative process should be adjusted so that a proper opportunity is given to each House, during the final stages of a Bill's consideration, to consider whether it wishes to proceed with a Bill when the relevant devolved legislature has refused consent. UK ministers should be required to justify, by way of Statements in each House, why they wish to proceed with a Bill notwithstanding the absence of devolved consent, and the relevant devolved legislature should have the opportunity to provide to Parliament its reasons for not giving consent. Parliamentary consideration could also be informed by reports from the relevant Parliamentary Committees on the constitutional implications of proceeding with the Bill in these circumstances.

As we publish this document, the House of Commons Procedure Committee is undertaking an inquiry (**The procedure of the House of Commons and the territorial constitution**) into the ways in which the practice and procedure of the House of Commons engages with the United Kingdom's territorial constitution, taking account of relevant work undertaken by PACAC, by the House of Commons Liaison Committee, and by the Interparliamentary Forum on Brexit. We encourage the Committee to engage with the question of how the UK Parliament and Government could improve the way in which it deals with matters of legislative consent.

## Proposition 6

It should be recognised that the legislative powers of the UK state are now exercisable by 4 legislatures rather than one, and so the running costs of the 4 legislatures should in future be covered together on the same basis as those of the UK Parliament currently, ie through a specified funding line (but one covering

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all 4 legislatures), 'top-sliced' from the total of budget provision for the UK.

## Narrative

It remains our view that the current arrangements, whereby each devolved legislature has to finance its own running costs out of totals of resources calculated for distribution to the executive branch for public services, are inconsistent both with citizens' expectations on the use of resources provided for such services, and with the constitutional principle of the separation of powers. In the Welsh case, the current Senedd Commission budget for 2020-21 for running the Senedd is £62.9 million; their audited spend for the 2019-20 year was £56.3 million. This money is "top-sliced" from the allocation of central funds for devolved public services, and is therefore not available for expenditure on those services. Whitehall Departments in contrast would be surprised at any suggestion that their allocations should be top-sliced to meet the running costs of the UK Parliament.

However, we also continue to recognise the potential tension between propositions 4 and 6, in that the freedom provided by proposition 4 for each devolved legislature to determine its own size and internal organisation might theoretically leave open a disproportionate claim being made by one legislature on the total of resources to be shared among the four legislatures in accordance with proposition 6. Our suggested solution continues to be that as and when a specific funding line is established to cover the running costs of all four legislatures, it is supplemented by a memorandum of understanding between the legislatures as to how the relevant resources are to be allocated between them, and what procedures should be established to secure transparency and scrutiny in respect of the use of these resources.

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## Proposition 7

Each of Wales, Scotland and Northern Ireland should continue to be represented in the House of Commons. A reformed Upper House of Parliament should be constituted, with a membership which takes proper account of the multi-national character of the Union, rather than (as the House of Commons is) being based very largely on population. This Upper House should have explicit responsibility for ensuring that the constitutional position of the devolved institutions is properly taken into account in UK parliamentary legislation.

### Narrative

As an administration committed to the UK, the Welsh Government strongly supports continued Welsh representation in the House of Commons. Further, consistently with proposition 4, it must be for that House to decide on member numbers, and how members are to be elected.

It is our view that the allocation of seats to each part of the UK should be fixed.

This would provide the Senedd with a firmer foundation on which to construct new electoral arrangements, if it wanted to do so. Without that foundation, it would in all likelihood have to create a quite separate and different geography for those arrangements, but there would be obvious advantages, both for voters and for political parties in local organisational terms, in having coterminous Parliamentary and Senedd constituencies. (This is already the situation in Northern Ireland, where the existing Parliamentary constituencies are used to return numbers of MLAs to the Northern Ireland Assembly, and that would continue to be the case even if the number of such constituencies is reduced; the Assembly would simply be smaller). And it could be beneficial from a wider United Kingdom standpoint to have common geographies that enabled MPs and MSs to work effectively together in serving the same electorates.

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In relation to the House of Lords, any future proposals for reform should take full and proper account of the developments in the UK's territorial constitution which is the subject of this paper. We also continue to believe that a reformed Upper House of Parliament should be established with an elected membership, which takes into account the multi-national character of the Union.

We also noted in the original 'Reforming our Union' that the House of Lords has claimed for itself a particular responsibility in respect of UK constitutional issues, which we believe could be built upon if a reformed Upper House was given explicit responsibility for ensuring that the interests of the devolved territories and their institutions are protected and properly respected in UK parliamentary legislation.

## **4. Executive powers: governments, agencies and civil service**

### **Proposition 8**

The United Kingdom is governed by 4 administrations, each of which (including the UK government in respect of England) has separate responsibilities, which should be recognised by all of the other partners as part of the shared enterprise of the governance of the UK. The relations of the 4 governments should therefore proceed on the basis of a partnership of equals, in a spirit of mutual respect (and comment on the policies of other administrations should, within a culture of robust political debate, properly reflect that respect).

### **Proposition 9**

Save where other arrangements have been agreed (and provided for as

necessary in legislation), ministers in each administration should have exclusive authority, and be fully accountable locally, for the exercise of statutory functions in their territories in accordance with their legal powers, without challenge, review or oversight by ministers of another administration.

## **Narrative**

These 2 propositions can be considered together.

Within their territories, whereas the devolved legislatures' powers would traditionally be seen as additional to those of the UK Parliament (see proposition 5), the devolved governments have exclusive responsibility for the exercise of the functions which have been transferred to them (unless the functions have been explicitly provided to be available for concurrent exercise). Although, under each of the devolution settlements, intervention powers are available to the Secretary of State on specified and limited grounds to control the exercise of devolved competences (in respect of the Welsh settlement, see ss. 82 and 114 (as amended) of the Government of Wales Act 2006), these powers have never been used, and any attempt to do so would no doubt lead to very serious intergovernmental difficulties.

In the UK, the 4 governments, being in practice each exclusively responsible within their territories for the exercise of relevant functions, are not, and must not be seen as, in an hierarchical relationship one to another. To the extent that they choose to coordinate, co-operate and collaborate with each other, they should therefore do so on the basis of mutual respect, equality and fairness. Their accountability for the exercise of those functions will lie to the relevant legislature, rather than (in the devolved governments' case) to Westminster. In this context, the COVID-19 restrictions have cemented a much greater understanding across the UK about the respective responsibilities of the 4 governments.

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In the Welsh Government's view, it further follows that the UK government, even if authorised by statute to do so, should not, save by prior agreement with the relevant devolved government, incur public expenditure in Wales, Scotland or Northern Ireland in respect of matters for which responsibility has been transferred to devolved governments.

## Proposition 10

There should be well-founded arrangements and/or machinery to enable the various administrations to work effectively together on matters of mutual interest. These may be of a bilateral or multilateral nature as appropriate. Where all 4 administrations (or however many have the relevant powers) agree that there is a need for a common approach, common frameworks, shared delivery mechanisms and joint governance arrangements should be developed on a collaborative and consensual basis. Any such machinery must make provision for the speedy and efficient resolution of disagreements between one government and another, or between several governments, with a clear and agreed role for independent input (whether advice, mediation or arbitration).

## Narrative

We need to reset intergovernmental relations to create a reformed and strengthened United Kingdom, in which all the governments treat each other with respect and work together constructively, in a spirit of cooperation and collaboration, for our mutual benefit.

A Review of Intergovernmental Relations in the UK has long been underway and has made some positive progress. It is important the Review is urgently concluded to enable the implementation of robust new machinery to enable genuine dialogue, underpinned by a robust dispute avoidance and resolution mechanism. On completion, we hope that the Review will result in proposals for

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reform which will then be codified in a revised Memorandum of Understanding. We also believe that these reforms should be underpinned in statute.

In 2018, the year the intergovernmental relations review was commissioned, the Interparliamentary Forum on Brexit – comprising members from across the UK’s parliamentary committees and cross party in nature – noted the concerns about existing intergovernmental relations identified by numerous parliamentary committees. The Forum stated that the “current system of intergovernmental relations in the UK is not fit for purpose” and called for substantial reform. Forum members further encouraged setting out intergovernmental relations mechanisms in statute.

However, in the 3 years since the Review was commissioned, intergovernmental relations have deteriorated. Recent announcements by the UK government have demonstrated hostility towards devolution by pursuing a centralising agenda. These announcements suggested a determination to undermine and marginalise the role of both the devolved governments and legislatures and to put in place UK government structures designed directly to challenge, duplicate and compete with those of the devolved parliaments and governments in areas of devolved competence. We have not seen the constructive, cooperative approach from the UK government which is essential if devolution is to work effectively, and the Union itself strengthened.

That is why we must renew the overall relationship between the UK and the devolved governments to one of shared governance in the UK. The Common Frameworks programme has shown that this shared governance can be successful – that the 4 nations can come together and agree ways of working across a huge range of issues, where there is a shared commitment to doing so.

We acknowledge the progress made towards achieving some of our key priorities – as set out in ‘Brexit and Devolution’ (2017) and reiterated in ‘Reforming our Union: Shared Governance in the UK’ (2019) – notably a reformed dispute avoidance and resolution mechanism and an independent

secretariat.

The draft proposals set out in the **Intergovernmental Relations Review document** flow from the principles for joint working published in July 2019, in the spirit of “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.”

Under the draft proposals, the JMC(Plenary) (which has not met since December 2018) would be replaced with a new top-tier forum. Below that forum would be standing committees, with one for cross-cutting business and another specific to finance. There would be flexibility to establish other committees as well, with the UK government proposing one for cross-cutting international affairs. Responsibility for chairing these committees would be shared between the governments. The standing committee would oversee portfolio-level engagement and provide an escalation route for matters of strategic importance.

The success of this new machinery would very much depend on meaningful portfolio-level ministerial engagement. Engagement must improve, and must be fair and equal. Quadrilateral meetings already take place in several portfolios, but the document proposes bringing these within a robust framework, expanding the range of engagement, and setting out minimum requirements whilst allowing flexibility to reflect the needs of specific policy areas. Regular and tailored engagement within these fora will strengthen the governments’ shared ambition to operate a culture change across all governments in their conduct of intergovernmental relations.

The document also proposes an independent standing secretariat to support the new machinery. The secretariat would co-ordinate business at the top and cross-cutting tiers and oversee disputes, according to an agreed set of guidelines.

The proposed mechanism for dispute avoidance and resolution enshrines each

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government's right to refer and escalate a dispute. It requires independent chairing and independent secretariat arrangements at each stage. The proposal includes a presumption that there will be independent input through advice and mediation, and allows for adjudication and arbitration to be used if all governments agree. New requirements for transparency will ensure legislatures and stakeholders are kept informed about disputes.

The document has the potential to be a firmer foundation on which to attempt to reach agreement but further work is needed to protect Wales' interests, urgently to complete the terms of the operation of the finance committee and its role in disputes; and establish effective machinery for international engagement – including the governance of the Trade and Cooperation Agreement between the UK and the EU.

## **Proposition 11**

In relation to the UK's international relations and trade, Ministers and officials of the devolved administrations should be involved through formal inter-governmental machinery in discussion with the UK government about the formulation of the UK's policy position on matters which may be the subject of international negotiations, particularly where these could have important implications for matters within devolved competence. The UK government should not normally proceed with negotiating mandates on devolved matters which have not been agreed with the relevant devolved administration, and the devolved governments should be closely involved with the process of negotiation. It should be for the devolved administrations, in consultation with the UK government (and other administrations as necessary) and subsequently with their devolved legislatures, to consider how obligations within devolved competence arising from the UK's international agreements should be implemented, including whether the devolved institutions should implement these through their own legislation or agree to be covered in UK/GB legislation.

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## Narrative

Ministers of the UK government conduct the UK's international relations, including negotiations in respect of trade, under powers derived from the Royal Prerogative. And the devolution settlements all provide intervention powers for the Secretary of State to take action to ensure that the devolved institutions, in exercise of their powers, do so in line with the UK's international obligations.

It is however too simple a view to conclude from this that the devolved institutions have no legitimate interests to pursue in relation to the UK government's conduct of international relations. As was made clear by the Supreme Court in the Scottish Continuity Bill case (UKSC 64, 2018), the provisions in the devolution legislation reserving competence on International Relations to the UK Parliament do not extend to the implementation of the UK's international obligations in the devolved sphere. Certain consequences follow from this.

The Welsh Government sees the UK's acceptance and implementation of international obligations as part of a single, albeit staged, process – agreeing within the UK what we wish to achieve in the negotiations; undertaking the negotiating; securing approval ('ratification') for what has been agreed; and giving effect to the resulting obligations (with, as noted, the possibility of use of Secretary of State intervention powers in extremis). In this process, different government actors at different times must take the lead, but in a context that all are involved in a shared or joint enterprise.

Settling the UK's negotiating mandate and doing the negotiating is clearly a UK government lead, but the devolved governments will wish to be involved in both of those matters because implementing the obligations, at least in the devolved sphere, resulting from negotiations is their responsibility. It would be artificial in the extreme to separate the UK's negotiation of new international obligations from the process of giving effect to them, and it would serve no-one's interests if

the UK government entered into international obligations which the devolved institutions were then not prepared to implement.

So, intergovernmental machinery needs to be put in place to support a single, staged, process enabling the UK to enter into and implement new international obligations, with the UK and devolved governments each having their respective parts to play in a shared collaborative effort. Further, the UK government needs to give an undertaking that it will work with the devolved governments to seek agreement on all negotiating positions which touch on devolved matters, and not pursue negotiating mandates on those matters without the agreement of the devolved governments. Awareness that the devolved institutions are standing in partnership with the UK government on negotiating mandates in the devolved sphere, and engaged in the negotiations themselves, should give negotiating partners confidence that any agreements they enter into will be properly implemented within the UK.

For their part, the devolved institutions will need on each occasion to give careful consideration as to whether and how new international obligations in the devolved sphere should be given effect. Assuming that the devolved governments have been properly engaged and involved in the negotiating process, this will come down either to consenting to implementation on a UK-wide basis via Westminster legislation, or (as would be likely to be the Welsh Government's starting assumption) deciding to legislate themselves to enable international obligations to be fitted into their own particular circumstances and legal systems. Consultations between the various governments will need to play a part in deciding on the best way forward.

The governance within the UK to implement international agreements must respect the devolution settlement and operate on the basis set out above under point 10. Specifically, the devolved governments must be involved in the UK structures to implement the Trade and Cooperation Agreement and other international agreements for those matters where implementation responsibilities are within our competence.

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## Proposition 12

Whenever creation, or repurposing, of a public body or agency with executive responsibilities for more than one part of the UK is in prospect, consideration must always be given in its institutional design to the views of the relevant devolved administrations, to enable appropriate account to be taken of the interests of each of the parts of the UK within the agency's remit. This should include arrangements relating both to a body's governance and funding, and to scrutiny and oversight of its activities.

### Narrative

The variety of circumstances in which this issue can arise means that there is no single solution appropriate to every case. The options include appointments by devolved ministers to membership of the Board of the public body or agency; consent by devolved ministers to appointments proposed by a Secretary of State; formal commitments to consultation about procedures for recruitment of Board members; and agreements or protocols about officials' dealings with agency officials as a routine part of the body's management of its business, including input into its corporate planning. (As a generalisation, the greater the involvement of the public body in matters within the devolved sphere, the more likely it is that devolved interests will need to be protected through direct influence on Board membership appointments).

Accountability arrangements to devolved legislatures will also need to feature in consideration of this issue. It is commonly the case that public bodies are required to send copies of their annual reports to devolved ministers for laying before devolved legislatures, to facilitate scrutiny.

One example where we have a keen interest is in the development of the UK Infrastructure Bank. Of particular interest is the role of the devolved

governments in the governance of the bank, which is intended to be a UK institution.

## Proposition 13

Ministers in each administration should continue to be supported by civil servants subject to common rules and codes as to appointment and professional conduct; and arrangements should be in place to facilitate exchanges and transfers of staff from one administration to another.

### Narrative

The Welsh Government supports the continuation of arrangements whereby members of a single Home Civil Service are able to provide support for ministers in each of the Welsh, Scottish and UK governments. (For historical reasons, there is a separate Northern Ireland Civil Service). Such arrangements guarantee the maintenance of common professional standards and codes of conduct across the 3 governments, which facilitates intergovernmental working on a day-to-day basis. They also enable transfers and loans of staff to take place without difficulty between governments, enabling individual civil servants to broaden their experience and understanding of the perspectives, processes and practices of other governments within the UK.

Over time, it is possible that individual governments may wish to re-organise public administrative resources within their territories in order to secure greater efficiency and coherence. In Wales, this is sometimes referred to as the desirability of establishing a 'single Welsh public service'. The benefits of a single Home Civil Service will need to be recalibrated against such new developments.

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## 5. Finance

### Proposition 14

It is for the UK government to determine levels of public expenditure, both for programmes operating at UK/GB/England and Wales level and for England in respect of policy areas which are devolved. Spending power for the devolved administrations should be determined, having regard to proposed levels of spending for England, by reference to a set of agreed objective indicators of relative need, so that spending power is fair across the different administrations and an equivalent level and quality of public goods can be delivered in all parts of the UK. The UK government should not be able arbitrarily to allocate additional funding to any particular part of the UK outside these arrangements.

### Narrative

In the current system funding is, in general, allocated to the devolved governments through the Barnett formula, where changes in funding for the devolved governments is a population share of changes in comparable programmes, with adjustments for revenues from devolved taxes. The system does not take into account the relative needs of each nation. There have been instances where the UK government has acted outside the normal rules in a way which is not seen as fair by one or more of the devolved governments.

In 2016, changes were made to the Barnett formula as it applies to Wales. This change – known as the ‘Holtham floor’ – adds in a specific, needs-based factor, currently set at 105% but which will rise to 115% at the point that spending per person in Wales on devolved functions reaches 115% of the English level. This Wales-specific adjustment to the Barnett formula goes some way to delivering a fairer system. However, the Welsh Government believes that the Barnett formula should be replaced and a new relative needs-based system implemented, within

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a comprehensive and consistent fiscal framework to which all governments in the UK agree.

Devolved governments also have a legitimate interest in the levels and fairness in distribution of spending on UK/GB/England and Wales programmes, for example in relation to welfare benefits, research and development and rail infrastructure. The levels and fairness in distribution of expenditure on such programmes is important for the devolved governments for a variety of reasons but particularly because of the interactions between UK/GB/ England and Wales programmes on the one hand and devolved programmes on the other.

The devolved governments are wholly opposed to the creation of the financial assistance powers for UK ministers in devolved areas in the UK Internal Market Act 2020. It is inappropriate for the UK government to use these powers to usurp the functions that clearly sit within the competence of the devolved governments and their respective Parliaments. Far from strengthening the Union this approach will only serve to increase divisions and inequalities. It risks duplicating efforts, impeding value for money and blurring accountability resulting in an incoherent delivery landscape for programmes and services. The UK government should only use these powers with the explicit consent of the devolved governments.

## **Proposition 15**

The devolved administrations should be resourced by a combination of needs-based grant from the UK government, resources raised through devolved and local taxation, and capital borrowing.

### **Narrative**

The balance of funding for each devolved administration as between UK

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government grant and revenue raised through devolved and local taxation will reflect particular circumstances and local political preferences. There is no assumption that the balance of funding or the scope of devolved taxation powers will be identical across all devolved governments.

The agreements underpinning fiscal relationships between the UK government and the devolved governments should be based on common principles of partnership, transparency, and recognition of the interconnected nature of the UK and devolved administration fiscal landscape. The Welsh Government recognises that different circumstances and political preferences in different parts of the UK has led to an asymmetry in fiscal devolution. However, asymmetry does not have to mean an ad hoc, unsystematic approach to fiscal devolution and there is a risk that the growing lack of coherence will lead to instability if not addressed. The Welsh Government considers that all governments in the UK should agree a core set of principles and aims which can apply to all governments but also allow scope for necessary diversity.

So the Welsh Government argues for a single UK fiscal framework, agreed by all Governments. At its core we would expect this agreement to be underpinned by the principles of parity of participation, collaborative working, and shared responsibility for outcomes. The framework should also provide for a rules-based approach which does not allow for political influence over funding which can create inequality and distrust. The framework should apply in all but exceptional circumstances with any deviation from the framework to be agreed by all governments through an open and transparent system.

A key element of the fiscal framework should be scope for devolved governments to introduce new devolved taxes. We believe the existing process for conferring legislative competence for new taxes needs to be reformed. The constitutional question of whether it is appropriate to devolve competence for a particular area of taxation should be clearly separated from the policy development and assessment of fiscal impact of a particular tax in that area. The substantive policy development in relation to any new tax is a matter for

devolved governments and their parliaments; it should not be a matter for the UK government or the UK Parliament to assess or rule on the merits of devolved policy.

## Proposition 16

The operation of these resourcing arrangements, including determinations of devolved administrations' spending power and borrowing limits, should be the responsibility of a public agency accountable to all 4 administrations jointly.

### Narrative

The legitimacy of a UK fiscal framework can only be properly secured if it is jointly agreed and independently operated and assured. Without the existence of an independent, jointly accountable body it is highly likely that even an agreed fiscal framework will be unable to prevent all potential disputes and grievances.

The principle of third-party assistance by an independent body in the resolution of disputes is recognised in both the fiscal frameworks of the Welsh and Scottish Governments and forms a core component of the new Inter-Governmental Relations review document being finalised by the UK and devolved governments. The Welsh Government believes that there is an essential role for an independent body which can ensure the necessary parity of treatment, recognising the importance of the subsidiarity principle but at its core recognising that all parts of the UK are interdependent.

## Proposition 17

It is for the devolved administrations to determine, within the powers and resources available to them, their own priorities for taxation and public

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expenditure relating to their devolved responsibilities, and to account for their decisions to their own legislatures. However, decisions taken by the devolved administrations or bodies under their jurisdiction can have financial implications for departments or agencies of the UK government ('spill-over' effects). Alternatively, decisions of UK departments or agencies can lead to financial implications for the devolved administrations. In these cases, the Government responsible for the decisions leading to financial implications for others must take responsibility for dealing with those implications. Disagreements on the operation of this principle should be subject to independent assessment.

## **Narrative**

Existing arrangements for recognising and dealing with the potential spillover effects of decisions made by one Government on others are not fully effective and disputes often arise. The Welsh Government believes a clear, agreed, independent mechanism for dealing with spillover effects and a clear approach to the resolution of disputes should be articulated through the new intergovernmental relations document.

## **6. Justice and the courts**

### **Proposition 18**

The devolved institutions (and the UK government and Parliament in respect of England) should be responsible for policing and the administration of justice in their territories. Jurisdictional arrangements and court structures should reflect the devolved institutions' distinctive responsibilities for their territories in respect of these and related matters.

## Narrative

This proposition is a particular application of proposition 3, that the powers of the devolved institutions should be founded on a coherent set of responsibilities and allocated in accordance with the subsidiarity principle. It is of distinctive significance for Wales, where (unlike Scotland and Northern Ireland) these powers are not presently devolved.

In the other jurisdictions the lines between what is devolved and what is not are drawn in such a way as to confer coherent sets of powers on the devolved institutions. But in the Welsh case an arbitrary division has been drawn between what can be legislated for and what cannot. So, Senedd Cymru can legislate, but the enforcement of that legislation is through the courts system, for which the UK Government has responsibility in Wales.

The Welsh Government is not aware of any decentralised system of government in the common law world which is as limited. In other jurisdictions all or most “domestic” matters are devolved, which includes all public services and other matters that do not have to be regulated centrally. So there are no reasons why the police, most aspects of civil and criminal law, anti-social behaviour, or the administration of justice and related matters need be controlled centrally – and so, in Scotland and Northern Ireland as elsewhere, they are not.

As a result, it is clear what each government is responsible for, and they are able to develop coherent and comprehensive joined-up policies and laws, including in respect of policing and justice, to tackle the social problems they face. Given that responsibilities for policing and justice are currently not devolved, that is not an option at present available to the Welsh Government. If responsibilities for policing and justice are matters appropriate for devolution to Senedd Cymru and the Welsh Government in accordance with the subsidiarity principle, this would serve to reinforce the case for the creation of a discrete system of courts for Wales, but in our view that case stands in its own right on



general constitutional grounds.

Since the original publication of this document in 2019, the independent Commission on Justice in Wales (chaired by Lord Thomas of Cwmgiedd) has also found that the interests of Wales are not served by the present arrangements, and that “the people of Wales are being let down by the system in its current state” (Paragraph 1 of the [Executive Summary of the report of the Commission on Justice in Wales](#)). This followed the largest ever inquiry into the operation of the justice system in Wales, with over 200 respondents. The Commission’s rigorous work and detailed findings demonstrated that the inability of devolved institutions to align the work of the police and justice agencies with that of other public services was not just a matter of abstract constitutional theory, but undermined the effective delivery of government policy and of justice. Based on the extensive evidence they considered and the views of a wide range of stakeholders, the Commission unanimously recommended full legislative devolution of justice and policing.

Any argument that the justice system could not operate effectively in an environment where the criminal law differed substantively between England and Wales was also undermined by the experience of the COVID-19 pandemic. Indeed, the pandemic shone a light on the arbitrary and artificial divisions between reserved and devolved responsibilities. As part of Welsh Ministers’ exercise of their function to protect the people of Wales the Welsh Government created wide-ranging criminal offences, that were unprecedented in their effect; yet political responsibility for policing and enforcing these offences still remained nominally with the Home Secretary, with no accountability to the democratic institutions of Wales.

Finally, the legislative response to the COVID-19 pandemic was a very public illustration of how the law which applies in Wales can diverge from the law that applies in England. Although these particular differences will be time-limited, overall divergence will continue to increase, and it will become increasingly difficult to argue that there is, in reality, a single England and Wales jurisdiction.

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That the single jurisdiction is an anomaly that is inconsistent with constitutional reality is all the more clear (see further the [supplementary evidence of the Welsh Government on the law and the constitution](#)). The Welsh Government therefore agrees with the Commission on Justice in Wales that “the law applicable in Wales should be formally identified as the law of Wales”, and that as a natural consequence of that recognition, a distinct Welsh judiciary should be established to rule on the law of Wales (albeit that in many instances individual judges could in practice serve in both the English and Welsh judiciary, as is already the case with members of devolved tribunals in Wales).

## Proposition 19

The Supreme Court, as the ultimate court of appeal for most matters within the United Kingdom, should have in membership individuals identified with each and every part of the UK. The opportunity should be taken, when vacancies come to be filled, to ensure that at least one suitably-qualified person identified with Wales is a member of the Supreme Court.

## Narrative

In a sense, this proposition is simply a particular application of the principle in proposition 12, that appropriate account must be taken in a public body’s institutional design of the interests of each of the parts of the UK within its remit. But it also follows logically from the argument in proposition 18 in support of a discrete courts system for Wales.

The Supreme Court stands at the apex of the legal systems of England and Wales; Northern Ireland; and, for most matters, Scotland. Section 27(8) of the Constitutional Reform Act 2005 provides that:

“ “In making selections for the appointment of judges of the [Supreme]

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Court the commission must ensure that between them the judges will have knowledge of, and experience of practice in, the law of each part of the United Kingdom.” ”

On its face, this would appear to require judicial representation from Wales on the Court, as from the other parts of the UK. The initial interpretation however was that for this purpose, a “part of the United Kingdom” was a reference to one of the existing 3 legal jurisdictions within the United Kingdom; on that basis, Wales, as part of the jurisdiction of England and Wales, was not entitled to separate representation on the Court.

This is not a sustainable position, and both Lord Thomas of Cwmgiedd (as Lord Chief Justice of England and Wales, but now retired) and Lord Lloyd-Jones have served the Court with distinction. But their appointments appear to have depended upon their personal qualifications and expertise, rather than a recognition of Wales as a distinct entity for legal purposes.

If the Supreme Court is truly to be perceived as serving all parts of the United Kingdom, it will be essential, from a constitutional standpoint, that when Lord Lloyd-Jones retires, he is replaced by someone who has “knowledge of, and experience of practice in, the law” of Wales, and that from henceforth Wales is represented on the Supreme Court in its own right. Creation of a discrete Welsh courts system, as argued for in proposition 18, would reinforce the case for this.

We also note that since this document was originally published, the Commission on Justice in Wales, referenced above, has recommended that “Wales should be put in a similar position to Scotland and Northern Ireland in the Supreme Court as regards the appointment of judges to the Supreme Court” (Recommendation 67 *ibid.*).

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## 7. Constitutional reform

### Proposition 20

Future constitutional developments in the United Kingdom should be considered on a holistic basis and on the basis of constitutional principle, rather than by way of ad hoc reforms to particular constitutional settlements. This should be undertaken by a constitutional convention. The Welsh Government and the other devolved administrations must have seats at the convention table, and have the opportunity to press their particular constitutional aspirations, informed by proposed developments elsewhere in the UK. Citizens across the UK should also have an organised ability to contribute to any convention.

### Narrative

In the original 'Reforming our Union', we noted that the UK Constitution is uniquely malleable. It is not codified, nor is there any special procedure to give effect to proposals for constitutional reform. We also said that our experience of policy conversations about devolution were of a series of bilateral exchanges between the UK government and the relevant devolved administration, to some degree without reference to how devolution is developing in other parts of the UK. This has resulted in a piecemeal approach, not obviously based on any intellectual rationale, to devolving powers, leading to a patchwork of different arrangements across the UK. This is also part of the reasons why, for devolution to work effectively, it requires consistently constructive co-operation and collaboration between the governments of the UK.

The Welsh Government has for nearly a decade argued for the creation of a constitutional convention, primarily tasked with examining the full set of relationships between the devolved governments and the UK government, in the context of our joint enterprise of the governance of the UK. We made that call

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again when we published 'Reforming our Union' in October 2019, and we said that the case for a written constitution, and a debate about the nature of such a written codification needed to form part of these deliberations.

We publish this refreshed document now because we believe there is a growing momentum for the sort of discussion about the future of the Union we have been consistently advocating. We have already referred to the House of Lords Constitution Committee's inquiry into the future governance of the UK, and to the report published earlier this year by Radical Federalism. There is also further work to be undertaken by the Review of Intergovernmental Relations. And the Labour Party has established a Constitutional Convention, headed by Gordon Brown.

It continues to be our view that future constitutional reform needs to be considered from a UK-wide perspective, but there is as yet no commitment from the UK government for the national debate across the UK which is clearly needed. It is for that reason that we will be taking forward our commitment to foster a national, civic conversation in Wales about our future, by establishing an independent Commission to consider the constitutional future of Wales. Our aim is that the Commission and the civic conversation will engage inclusively with individuals, communities and all parts of civic society. It will seek to build a consensus on the issues which most impact on people's lives and the reforms that would be necessary to achieve changes which would empower and benefit Wales and our communities, increase prosperity and improve quality of life and wellbeing.

## Footnotes

[1] A parliament that works for Wales ([senedd.wales](https://www.senedd.wales)). The panel was established by the Llywydd in February 2017, to provide robust, politically impartial advice on the number of members needed to effectively represent the people of Wales, the most suitable electoral system, and the minimum voting

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age.

[2] The Northern Ireland Assembly did not formally consider legislative consent, although an opposition motion rejecting the Bill was passed in September 2020.

## 8. Annex: the 20 propositions

### General principles

1. Whatever its historical origins, the United Kingdom is best seen now as a voluntary association of nations taking the form of a multi-national state, whose members share and redistribute resources and risks amongst themselves to advance their common interests. Wales is committed to this association, which must be based on the recognition of popular sovereignty in each part of the UK; Parliamentary sovereignty as traditionally understood no longer provides a sound foundation for this evolving constitution.
2. The principles underpinning devolution should be recognised as fundamental to the UK constitution. The devolved institutions must be regarded as permanent features of the UK's constitutional arrangements; any proposals for the abolition of such institutions should be subject to their consent and to the consent of the relevant electorate.
3. The powers of the devolved institutions should be founded on a coherent set of responsibilities allocated in accordance with the subsidiarity principle. Those powers be defined by the listing of the specific matters which it is agreed should be reserved to Westminster in respect of each territory, all other matters (in the case of Wales) being or becoming the responsibility of Senedd Cymru and/or the Welsh Government.

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## Legislatures and legislative powers

4. It should be a matter for each legislature to determine its own size, electoral arrangements and internal organisation, with locally-determined Standing Order provision for the relevant legislature in respect of these matters as required.
5. The relations of the 4 legislatures of the United Kingdom should proceed on the basis of mutual respect. Although, as matters currently stand, the UK Parliament still formally possesses legal authority to legislate for Wales, Scotland and Northern Ireland on all matters (including those devolved), it should not normally seek to legislate for a territory, in relation to matters within the competence of the devolved legislature of that territory, without that legislature's explicit consent. The 'not normally' requirement should be entrenched and codified by proper definition and criteria governing its application, giving it real rather than symbolic acknowledgement in our constitutional arrangements.

Alternatively, a new constitutional settlement could simply provide that the UK Parliament will not legislate on matters within devolved competence, or seek to modify legislative competence or the functions of the devolved governments, without the consent of the relevant devolved legislature.

6. It should be recognised that the legislative powers of the UK state are now exercisable by 4 legislatures rather than one, and so the running costs of the 4 legislatures should in future be covered together on the same basis as those of the UK Parliament currently, ie through a specified funding line (but one covering all 4 legislatures), 'top-sliced' from the total of budget provision for the UK.
7. Each of Wales, Scotland and Northern Ireland should continue to be represented in the House of Commons. A reformed Upper House of Parliament should be constituted, with a membership which takes proper account of the multi-national character of the Union, rather than (as the House of Commons is) being based very largely on population. That Upper

House should have explicit responsibility for ensuring that the constitutional position of the devolved institutions is properly taken into account in UK parliamentary legislation.

## **Executive powers: governments, agencies and civil service**

8. The United Kingdom is governed by 4 administrations, each of which (including the UK government in respect of England) has separate responsibilities, which should be recognised by all of the other partners as part of the shared enterprise of the governance of the UK. The relations of the 4 governments should therefore proceed on the basis of a partnership of equals, in a spirit of mutual respect (and comment on the policies of other administrations should, within a culture of robust political debate, properly reflect that respect).
9. Save where other arrangements have been agreed (and provided for as necessary in legislation), ministers in each administration should have exclusive authority, and be fully accountable locally, for the exercise of statutory functions in their territories in accordance with their legal powers, without challenge, review or oversight by ministers of another administration.
10. There should be well-founded arrangements and/or machinery to enable the various administrations to work effectively together on matters of mutual interest. These may be of a bilateral or multilateral nature as appropriate. Where all 4 administrations (or however many have the relevant powers) agree that there is a need for a common approach, common frameworks, shared delivery mechanisms and joint governance arrangements should be developed on a collaborative and consensual basis. Any such machinery must make provision for the speedy and efficient resolution of disagreements between one government and another, or between several governments, with a clear and agreed role for independent input (whether advice, mediation or arbitration).

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11. In relation to the UK's international relations and trade, ministers and officials of the devolved administrations should be involved through formal inter-governmental machinery in discussion with the UK government about the formulation of the UK's policy position on matters which may be the subject of international negotiations, particularly where these could have important implications for matters within devolved competence. The UK government should not normally proceed with negotiating mandates on devolved matters which have not been agreed with the relevant devolved institutions, and the devolved governments should be closely involved with the process of negotiation. It should be for the devolved administrations, in consultation with the UK government (and other administrations as necessary) and subsequently with their devolved legislatures, to consider how obligations within devolved competence arising from the UK's international agreements should be implemented, including whether the devolved institutions should implement these through their own legislation or agree to be covered in UK/GB legislation.
12. Whenever creation, or repurposing, of a public body or agency with executive responsibilities for more than one part of the UK is in prospect, consideration must always be given in its institutional design to the views of the relevant devolved administrations, to enable appropriate account to be taken of the interests of each of the parts of the UK within the agency's remit. This should include arrangements relating both to a body's governance and funding, and to scrutiny and oversight of its activities.
13. Ministers in each administration should continue to be supported by civil servants, whether or not organised on a territorial basis, subject to rules and codes as to appointment and professional conduct; and arrangements should be in place to facilitate exchanges and transfers of staff from one administration to another.

## Finance

14. It is for the UK government to determine levels of public expenditure, both for programmes operating at UK/GB/England and Wales level and for England in respect of policy areas which are devolved. Spending power for the devolved administrations should be determined, having regard to proposed levels of spending for England, by reference to a set of agreed objective indicators of relative need, so that spending power is fair across the different administrations and an equivalent level and quality of public goods can be delivered in all parts of the UK. The UK government should not be able arbitrarily to allocate additional funding to any particular part of the UK outside these arrangements.
15. The devolved administrations should be resourced by a combination of needs-based grant from the UK government, resources raised through devolved and local taxation, and capital borrowing.
16. The operation of these resourcing arrangements, including determinations of devolved administrations' spending power and borrowing limits, should be the responsibility of a public agency accountable to all 4 administrations jointly.
17. It is for the devolved administrations to determine, within the powers and resources available to them, their own priorities for taxation and public expenditure relating to their devolved responsibilities, and to account for their decisions to their own legislatures. However, decisions taken by the devolved administrations or bodies under their jurisdiction can have financial implications for departments or agencies of the UK government ('spill-over' effects). Alternatively, decisions of UK departments or agencies can lead to financial implications for the devolved administrations. In these cases, the Government responsible for the decisions leading to financial implications for others must take responsibility for dealing with those implications. Disagreements on the operation of this principle should be subject to independent assessment.

## Justice and the courts

18. The devolved institutions (and the UK government and Parliament in respect of England) should be responsible for policing and the administration of justice in their territories. Jurisdictional arrangements and court structures should reflect the devolved institutions' distinctive responsibilities for their territories in respect of these and related matters.
19. The Supreme Court, as the ultimate court of appeal for most matters within the United Kingdom, should have in membership individuals identified with each and every part of the UK. The opportunity should be taken, when vacancies come to be filled, to ensure that at least one suitably-qualified person identified with Wales is a member of the Supreme Court.

## Constitutional reform

20. Future constitutional developments in the United Kingdom should be considered on a holistic basis and on the basis of constitutional principle, rather than by way of ad hoc reforms to particular constitutional settlements. This should be undertaken by a constitutional convention. The Welsh Government and the other devolved administrations must have seats at the convention table, and have the opportunity to press their particular constitutional aspirations, informed by proposed developments elsewhere in the UK. Citizens across the UK should be able to participate in any convention. The case for a written constitution should form part of the convention's deliberations.

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