Written evidence submitted by Kenneth Campbell QC (AMC 130)

Introductory
1. As a practising member of the Bars of Scotland and England & Wales working in the area of public law (that is, cases involving rights-based claims against public bodies), as well as a doctoral researcher in constitutional law, I very much welcome the opportunity to respond to this call for evidence.

2. In summary, my position is that whatever may have been the past virtues of the uncodified British constitution (and I believe that there is something to be said for the flexibility and adaptability narrative), a written constitution is now essential. I argue that is so for four broad reasons: first, the complexity of the relationship between individual citizens and the state demands it; secondly, the Hailsham critique of executive control of Parliament; thirdly, the effects of the UK’s international obligations, particularly, but not only, in Europe; and finally, in order to secure and enhance devolution within the UK. There are also attractive arguments in the papers produced by King’s College London about the possibility of a written constitution coming to be a symbol of a modern Britain; that may well prove correct, though that is not by itself a sufficient reason for change. Nonetheless, the idea of loyalty to the constitution and the values it contains is one which is worth developing in wider political discourse.

3. In this response, I deal briefly with each of these before turning to the models of codification proposed for discussion, and setting out those aspects of the model written constitution which are either essential or which require revisal.

Rationale for a written constitution for the UK
4. That constitutional codification is a serious topic on the Committee’s agenda is, I suggest, at least part of an answer to the ‘it ain’t broke’ argument. In other words, that a Parliamentary committee should feel it appropriate to entertain the question suggests that there is at least a question to be explored, if not a case positively to be answered.

5. However providential their origins, our current constitutional arrangements are not adequate for the needs of a complex modern state. Arguably, we see evidence of that in the debates which have opened up following the referendum on Scottish independence about the relationships between the devolved nations and the centre, and even more so between the regions of England and the centre. Likewise, while the effort of the King’s College researchers in gathering together constitutional material is commendable, it is unsatisfactory that such a large proportion of the material is in non-legal form, and the remainder is so disparate. Of course it is correct, as some of the commentators cited in the literature review observe, that a written constitution would not be comprehensive; all government structures will involve constitutional conventions. However the objection to the current UK arrangements are the extent to which that is so. One need look no further than the controversy about Parliamentary expenses in the last Parliament for an acute example; the boundary of ministerial responsibility for executive agencies is a more nuanced but equally important instance.

6. It is nearly 40 years since Lord Hailsham of St Marylebone coined the phrase ‘elective dictatorship’ to describe the control of Parliamentary business in the hands of the
executive. That analysis remains as valid as when it was first written if not more so, and is at the root of the need to enact a more formal separation of powers and to address the mischief to which the notion of Parliamentary sovereignty gives rise.

7. A standard defence of the status quo is to invoke the sovereignty of parliament as embodying the will of the people. It is arguable that this argument is one of convenience, for at the time the notion of parliamentary sovereignty was coined by A V Dicey in the late nineteenth century, Parliament was representative but imperfectly democratic. That rather neatly explodes the difference between parliamentary sovereignty and popular, democratic, sovereignty. At any event, a constitutional model in which all citizens and all institutions were expressly subject to the same basic law is surely the better model for a modern representative democracy. Thus the model of constitution which I would advocate would replace the traditional conception of parliamentary sovereignty with the supremacy of the constitution, about which the UK Supreme Court would be the ultimate arbiter. Doing so would also acknowledge what seems to me to be the fact that parliamentary sovereignty is no longer unconstrained at present and without a written constitution (or indeed either of the other options proposed) - a matter which is discussed further below.

8. Objections to such a model include the claims that Parliament’s democratic credentials are downgraded, and that the judiciary is at risk of being politicised. I suggest that both claims are overstated. So far as Parliament is concerned, it is at least arguable that by more clearly defining the role of Parliament vis à vis the Executive, the scrutiny role of the legislature would be enhanced. While a written constitution would not provide detail to the level of the Standing Orders of each House, a clear statement of the rights and responsibilities of Parliament might well provide a basis for the enhanced oversight of the Executive which some parliamentarians desire.

9. So far as the position of the judiciary is concerned, the UK Supreme Court, like the Judicial Committee of the House of Lords (the ‘Law Lords’) before it, is already well used to adjudicating on matters of public importance and political controversy. One need think of control orders, the entitlement of prisoners to vote, and assisted suicide for important examples which have been the subject of judicial determination in the last decade. Thus a written constitution would not be exposing the UK Supreme Court to new issues; the model which I advocate would give that court the final word on the constitutionality of legislation and executive acts, and the first of those would be a significant new departure. I suggest that is not an affront to democracy, which is a standard objection, but rather an acceptance that all elements of the state - like all citizens - are bound by the same basic law.

10. A written constitution would also allow the UK’s international obligations, particularly but not exclusively in relation to the rights of its citizens, to be set out more clearly and coherently. Membership of both the EU and of the Council of Europe (under whose auspices the European Convention on Human Rights is supervised) has significantly extended the rights of British citizens in many areas. In some instances, the rights existed in common law, other rights are new; all have the advantage of being articulated. That articulation is typically either in EU or Council of Europe instruments, and it would be desirable for the boundaries to be clearly set out in a domestic basic law. To some extent, this has been achieved for the European Convention on Human Rights by means of the Human Rights Act 1998. Nevertheless, the Human Rights Act, like all parliamentary
legislation, is open to the possibility, however remote, of repeal or qualification. Although there has been some discussion by judicial and academic commentators about the limits on the power of Parliament to alter statutes which are constitutional in character, it is clear that more effective protection - and an end to such debate - would result from a written constitution.

11. The UK is also party to a wide range of international treaties beyond the EU and the Council of Europe. Some of those describe rights of a variety of forms, some more aspirational than others. As a matter of English and Scots law, treaties which the UK has ratified do not form part of national law unless there is parliamentary legislation to effect that. Such a principle could continue to form part of a written constitution, and equally the framing of such a constitution would be an opportunity to consider which if any of those rights should properly be embodied in the constitution. Some of the provisions of the UN Convention on the Rights of the Child immediately suggest themselves, while there would also likely be debate around economic and social rights found in the International Covenant of Economic, Social and Cultural Rights, and similar conventions - some of which are included in the model written constitution. While I do not myself advocate it, the process of framing a written constitution would also be an opportunity to widen the debate to consider whether that should continue to be the law: some states (for example the Netherlands) recognise citizens’ rights under treaties at the point of ratification.

12. Turning to devolution and to the relationship between the English regions and the centre. There are now very complex structures for governance across the UK and within its constituent parts. There is a likelihood of further significant change following the report of the Smith Commission in Scotland, and as a consequence of the debate about the governance of England initiated by the Prime Minister following the Scottish referendum. A written constitution is the appropriate place for the fundamental principles about the relationships amongst these various institutions to be gathered.

The options proposed

13. From the preceding paragraphs, it will be evident that my preferred option would be a written constitution. While applauding the work of the King’s College team in marshalling material for the draft Constitutional Code and Constitutional Consolidation Act, in my view these are both flawed documents. The objections can be quite shortly stated. While gathering material in a constitutional code might be useful, in a sense, much of the non-statutory material is derived from a collection already existing, albeit in a different form: namely the Ministerial Code and the Cabinet Manual. Of course it seeks to add statutory material and to do so in one place. However, that does not overcome the fundamental defect, which is found in paragraph 92, namely that the code is neither legally enforceable nor may it be referred to in judicial proceedings. That is an affront to the rule of law - while the courts are of course familiar with statutory codes of practice which are not of themselves justiciable, this document is of a different character, seeking as it does to describe the workings of the constitution.

14. So long as the theory of parliamentary sovereignty remains alive, a Constitutional Consolidation Act suffers from a defect (from the rights perspective) inherent in that
theory, namely that entrenchment of fundamental rights is difficult. On the model proposed, this is not even attempted - see section 223(1).

**What should a written constitution contain?**

15. While a line by line commentary is not appropriate, I consider that the draft identifies all of the main topics which ought to be included except for the supremacy of the constitution. That ought to be stated for two reasons: first, a written constitution provides an opportunity to depart from the imperfections of the theory of Parliamentary supremacy, and this is the place to do it. Secondly, there are articles discussed below rightly imposing primary duties to the constitution, and these would be buttressed by the assertion of the constitution’s primacy.

16. The question of a preamble is alluded to, and while there is merit in a statement of the founding principles and values, depending on the constitution-making process adopted, it is possible that framing such a preamble might become disproportionately distracting. Assuming a constitutional commission model were adopted, and my view is that would be the best way forward, a good deal of media and public attention would likely focus on this. However, in operational terms, article 2 is particularly important for it states that the UK is “founded on the values of liberty, equality, tolerance, and the rule of law”. Consequently, those values (or any others added here) would be the touchstones for judicial interpretation of the constitution. I think as a statement of the fundamental values of the British constitution, article 2 has much to commend it; the only further point I would wish to add would be a reference to social solidarity as a value in recognition of the importance of the welfare state to everyone who lives in Britain.

17. There is a point which arises about citizenship and nationality. These are distinct legal concepts, so that the heading to article 6 is appropriate, however the content of that article is not helpful. The article ought to deal with citizenship rather than nationality. There are two reasons for that: one legal, one political. Politically, the idea of citizenship is one with a strong history and it is one which ought to bind us together. Legally, nationality has a meaning in international law, and is distinguished from citizenship, which is a matter of the law of individual states - in other words, at the very least, there is apt to be confusion as a result of this formulation. This distinction is addressed in the response submitted to this committee by my colleague Eric Fripp, barrister. I have seen his response in draft and I agree with it on this issue.

18. I do not support the proposal in article 12 for a Director of Civil Proceedings. In my view, based on experience, the existing law officers (as reconfigured) are able to discharge this function in each of the jurisdictions of the UK. However, constitutional recognition of the office of the DPP is welcome, and reflects the constitutional status of the Lord Advocate as head of the prosecution service in Scotland.

19. Articles 13(2) and 13(3) are very welcome. By putting loyalty to the constitution at the core of public service, as well, presumably, of citizenship, the rule of law is reinforced. This is an essential provision in a written constitution.

20. While the notion of devolution structures in a “constitutional framework giving greater uniformity across the Union” (p 283) is superficially attractive, the existing devolved structures have been carefully calibrated for the distinct conditions of Scotland, Wales
and Northern Ireland. It would be unfortunate for that to be lost, as seems likely in this formulation. It is a matter of concern from the Scottish perspective in particular that article 32 of the model constitution appears to contain a less extensive devolution of powers and competences than is currently extant under the Scotland Acts 1998 & 2012. That is unlikely to be politically acceptable in Scotland.

21. A Bill of Rights ought to be a core component of a written constitution, and the inclusion in article 36 of civil and political rights based on the existing Convention rights under the Human Rights Act is a sensible model. This builds on existing practice, and acknowledges that, contrary to common portrayal, the Convention rights are firmly rooted in the British constitutional tradition. In other words, this is restatement rather than imposition.

22. Likewise, the explicit reference to social and economic rights in article 38 is an important acknowledgement of these rights. While they are rather more aspirational in character, they reflect international obligations which the UK has undertaken on behalf of its citizens, and it is right that they should appear in a written constitution. I take no quarrel with article 38(3), providing that these rights are not to be enforceable in a court of law; it is reasonable to anticipate that such rights (and their enforceability) will provoke interest in any constitutional commission process. Were they to be directly enforceable in law, the concern about judicial politicisation discussed at 9 above might become much more acute.

23. Articles 40(2) and 40(5) are essential provisions of a written constitution, both as an affirmation of the constitution as a basic law, but also as explicit reminders to the other branches of the state that there are proper boundaries between the branches, and that the rule of law is at the centre of a well-functioning democracy.

24. Article 42 ought to make clear that the long-established inherent jurisdiction of the superior courts of each of the three jurisdictions is unaffected by the constitution. This is an important power which the Court of Session (in Scotland) and High Court (in England and Wales, and Northern Ireland) has to deal with procedural lacunae, or unusual and anomalous cases. While it is not frequently invoked, it does enable the courts to do justice in cases where there is an unforeseen gap or novel development. Sometimes its exercise has alerted Parliament to the need for more general legislative action.

25. With a written constitution logically comes a constitution-compatibility jurisdiction for the Supreme Court. However the approach adopted by Article 43 needs to be refined. It is clear that the UK Supreme Court would have power to make declarations of unconstitutionality; however article 43(3)(c) is not clear because the draft does not explain which articles it applies to (this appears to be a typographical error). Rather more fundamentally, article 43(3)(b) appears to be modelled on the declaration of incompatibility provisions of the Human Rights Act. However the Human Rights Act is designed to preserve the theory of Parliamentary supremacy; under a written constitution, however, the constitution is supreme, and the Supreme Court is the arbiter of constitutionality. It follows that the declaration of unconstitutionality powers ought to reflect that. A possible model is art 172 of the South African Constitution.

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