NPF SUBMISSION

CONSTITUTION RESPONSE: ***In what ways can devolution and constitutional reform empower people and bring our communities closer together?***

1. **A British Citizenship Act**
2. **Equalisation of Resources**
3. **Filling the Gap: Providing Human Rights Protection for Privatised Services**

POLICY CONSULTATION: SAFE AND SECURE COMMUNITIES
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1. A British Citizenship Act

Genuinely safe and secure communities need to be underpinned by equality of status. British nationality laws too often do the opposite: they divide communities and undermine social bonds. The law in this area is too complex, too exclusionary of people who are British in every way except under the law and, ultimately, too lacking in content and meaning. There are no rights that are currently exclusively attached to British citizenship. It is an empty vessel; barely more than a form of immigration status. An incoming, reforming government can and should give British citizenship some real meaning in the post-Brexit era.

Over the last century, the United Kingdom has fundamentally reviewed its nationality laws every few decades, in 1914, 1948 and 1981. Piecemeal reforms since 2002 have patched some holes in British nationality law but other changes have created new, socially damaging gaps. Too many children are excluded from citizenship by complex laws on citizenship acquisition and sky-high fees. Some who are born British and live their whole lives in this country face the medieval punishment of banishment rather than a more appropriate court trial for their alleged crimes. A complex web of varieties of British nationality which label some people as "British" but give them no right to live in Britain have no place in the modern world. Meanwhile, the right to vote is not linked to citizenship or are obligations like serving on a jury.

<u>Citizenship not nationality</u>

Existing law is set out in the British Nationality Act 1981. This should be replaced with a new British Citizenship Act. The word 'citizenship' is a resonant one imbued with more meaning than mere 'nationality'. Citizenship is about rights, responsibilities, belonging and participation. Nationality is merely a formal status.

A reforming Labour government could take the opportunity to formally attach rights to citizenship for the first time. Gordon Brown's constitutional reform paper proposes exactly this type of reform:

> *There should be new, constitutionally protected social rights – like the right to health care for all based on need, not ability to pay - that reflect the current shared*

understanding of the minimum standards and public services that a British citizen should be guaranteed.

We need not stop there. The right to vote, the right of entry and residence, the right to a fair trial, the right to diplomatic assistance and the right to equal treatment free from discrimination could all be explicitly protected through citizenship. The old statutory right for citizens to be joined by family members could be restored. At the moment, British citizens are treated the same as settled migrants when it comes to their right to family life. This would also encourage settled migrants to fully integrate as equal citizens.

As Gordon Brown's report recognises, there are many ways that such rights might be expressed in law, some of which are primarily symbolic. A difficult and potentially controversial balance needs to be struck to ensure that any such rights are meaningful, realistic, durable and progressive.

One possibility might be to embed the rights set out in the European Convention on Human Rights into the new British Citizenship Act, thereby replacing and enhancing the protections currently set out in the Human Rights Act. Some rights expressed in the new legislation could be applicable to all people within the jurisdiction and some specifically to British citizens. Done right, this would protect the rights of all and enhance the rights of British citizens.

Obligations of citizenship

Perhaps more controversially, the obligations of citizenship could be spelled out, such as the duty to serve on a jury, the duty to pay taxes and the obligation of loyalty to the state.

The rules on citizenship deprivation could and should be considerably tightened. The 'conducive to the public good' test is completely inappropriate for something so weighty and serious as denaturalisation, and there is increasing evidence that the power is being used in cases of simple (but serious) criminal conduct like sex offences and human trafficking. Denaturalisation should be reserved as an ultimate sanction in cases of acts against the state.

Reform of citizenship law could also include reform of treason law. A treason charge in a court of law is a more appropriate state response to disloyalty by citizens than denaturalisation. The current law is defunct. It dates to 1351 and the last prosecution under the principal treason offence was in 1946.

Citizenship acquisition

Too many children born in the UK are denied full, equal status as citizens. The exclusionary nature of current laws serves to create a class of permanent residents with lesser status who are excluded from full civic participation. This can even be hereditary; if a person who lacks permanent status themselves has children, those children will not be born British and may never become British.

Birthright citizenship could be restored, so that those born in the United Kingdom are automatically born British. This was an ancient, historic right but it was abolished in 1981. The consequences have sometimes been disastrous, with some facing deportation later in life despite being born in the United Kingdom and living their whole lives here. The reform would not only be hugely beneficial to children born in the country but would also enable significant simplification of the underlying legislation. Enabling a route to optional retrospective acquisition of citizenship would also be a significant benefit to the children of EU citizens born before Brexit, many of whom will miss out on British citizenship because of the cost and the complexity of the law.

The criteria for naturalisation and registration could and should be re-thought. For example, the three year route to naturalisation for spouses and partners of British citizens should be revived. The good character test could be replaced with a more objective measure.

The fee charged to register a child born in the UK is currently over £1,000, putting this beyond the reach of many families. A right to citizenship should be established and sale and purchase of British citizenship should be prohibited. The charging of profit-making fees for citizenship could thus be ended.

Re-unification of British nationality status

British nationality could be reunified in a single status. At the moment there are six different forms of British nationality. These types of status were created in 1981 in order to prevent those who had previously been British subjects from being able to relocate to the UK. Times have moved on.

Hong Kong has returned to China. A visa route has already been opened to British Nationals (Overseas) from Hong Kong, albeit they are currently being charged very considerable fees. Labour already introduced reforms in 2002 to enable British Overseas Territories citizens to easy become British citizens. British Overseas Nationals with no other nationality can already register as British citizens if they choose. It is time to end the colonial legacies of British nationality law and recreate a single, equal status.

Proposals:

- Create a new British Citizenship Act fit for the post-Brexit era
- Re-establish a single, inclusive citizenship status
- Promote integration and pride by incorporating key citizenship rights into citizenship laws for the first time
- Solidify our social bonds by setting out the obligations of citizenship in law and reforming citizenship deprivation and treason laws

2. Equalisation of Resources

Meaningful devolution of power, particularly in England, can only be achieved through a progressive and secure system of resource distribution. Through this we can effectively

empower our communities to take the action needed to help create a fairer, more equal economy and society, where the accident of geography does not limit opportunity or determine how bright a person's future could be.

Introduction

The report recently published by the Labour Party's Commission on the UK's Future (the Report) explains that the UK is the most geographically unequal country in the developed world. It cites the fact that unbalanced economic development has "profound economic and social consequences" and that "a more balanced economy is needed on grounds of efficiency and fairness." To that end the Report stated that there be "an overarching constitutional obligation on governments to address territorial economic inequality." Consequently, Recommendation 4 of the Report states:

"There should be an explicit constitutional requirement to rebalance the UK's economy so that prosperity and investment can be spread more equally between different parts of the UK than it is today, thereby equalising living standards across the country." (the Duty)

The Report has based this recommendation on a number of constitutions, most notably the Canadian and German constitutions, which are specifically referenced in the Report. However, the Report points out that it is not as simple as copying other countries.

We agree with the Report that concrete constitutional and legal steps must be taken in order to facilitate a more equal economy. However, in our view, the Duty is not enough on its own. It must be accompanied by a legal requirement to equalise resources across the UK, as it is in other constitutions (like Germany and Canada).

Equalisation

Equalisation is the transfer of financial resources from wealthier regions to poorer ones, within a country. Broadly speaking, equalisation can seek to achieve two things, fiscal capacity equalisation and fiscal need equalisation.

Fiscal capacity equalisation seeks to equalise revenues across subnational units. How this benchmark is decided can be quite different across different federal systems. Whereas, fiscal need equalisation takes into account a number of different factors, such as historic underspending or the need for greater capital expenditure.

For example, the German constitution seeks to do both, whereas the Canadian system of equalisation only seeks to equalise fiscal capacity across provinces. It is telling that the Canadian constitution provides for equalisation within the same section as the commitments to equal opportunity. Indeed, it is broadly recognised that without actually transferring funds from the wealthier parts of the UK to less wealthy parts, any obligation to make the economy and opportunity more equal will be meaningless.

Equalisation in the UK

The Barnett Formula is well known, therefore we will not spend time here explaining how it functions. However, broadly, it simply makes a block grant to Wales, Scotland and Northern Ireland, based on spending in devolved areas of competence in England. This is, of course, complicated by the provision of revenue raising powers to the devolved institutions. However, the Barnett Formula does not attempt to achieve either fiscal capacity or fiscal need equalisation, nor is it set out in statute. Further, in relation to England there is no mechanism to ensure any measure of equalisation. This has led to severe regional inequalities. This is particularly the case when non-discretionary spending is separated from discretionary spending, which reveals that the most economically deprived regions of England receive the least capital spending.

The Calman Commission, set up following the Scottish Independence Referendum, recommended that the Barnett Formula should be reformed to take account of need. That is, fiscal need. This is a recommendation, which appears to us, would, as set out above, help achieve the Duty, i.e. to address geographical inequalities.

In our view therefore, the Calman Commission's recommendation ought to be taken up. We are of course cognisant of the political difficulties of reforming the Barnett Formula, particularly in relation to Scotland. As such, whilst we are hopeful that any such reform will eventually apply to the devolved nations, broad equalisation of resources, in the manner set out above, ought to at least in the first instance extend to the regions of England, where there is, arguably, greatest need for such reforms.

Therefore, if the Commission is minded to incorporate the Duty into a statute, given the foregoing analysis, in our view, it ought to be accompanied (as it is in the Canadian and German constitutions) with further provisions incorporating a reformed Barnett Formula. Such provisions should address both fiscal need (as recommended by the Calman Commission) and fiscal capacity. Further, that that statute should apply to the English regions, as well as the existing devolved jurisdictions.

Having come to this conclusion, there remains two further areas to consider. Firstly, what status ought this Barnett Formula Statute have and, secondly, how should the equalisation of revenues be determined?

<u>The Statute</u>

As set out above, in our view the reformed Barnett Formula and the Duty, however formulated, should be set out in statute. There is, in our view, three forms that this statute could take:

1. A form which states that revenues will be equalised on the basis of both need and capacity;

2. A form which sets out a number of factors that must be taken into account when determining the revenue transfers between the regions; or

3. A form which sets out in great detail the manner in which revenues are shared between regions.

In our view, whilst the reformed Barnett Formula should be put on a statutory footing, it ought to be a flexible regime. As such, we would not recommend 3, rather we would suggest either 1 or 2.

For example, the South African constitution sets out in Article 214(2) what factors are to be taken into account when determining equalisation, as follows:

a) "the national interest;

b) any provision that must be made in respect of the national debt and other national obligations; Chapter 13: Finance 111;

c) the needs and interests of the national government, determined by objective criteria;

d) the need to ensure that the provinces and municipalities are able to provide basic services and perform the functions allocated to them;

e) the fiscal capacity and efficiency of the provinces and municipalities;

f) developmental and other needs of provinces, local government and municipalities;

g) economic disparities within and among the provinces;

h) obligations of the provinces and municipalities in terms of national legislation;

i) the desirability of stable and predictable allocations of revenue shares; and

j) the need for flexibility in responding to emergencies or other temporary needs, and other factors based on similar objective criteria."

In our view, formulating the statutory basis for the reformed Barnett Formula in a manner similar to that of the South African constitution would allow the necessary flexibility, whilst also necessitating taking account of fiscal need (as recommended by the Calman Commission), as well as fiscal capacity.

How then, applying criteria of this kind, ought the share of revenues be determined? In our view an independent, objective and expert body should determine, in conjunction with the UK and devolved governments, the proper allocation of revenues.

It seems to us that the creation of such a body ought to be created by the statute described above, together with the requirement of the devolved governments to agree to any significant change in revenue allocation, ought to be adopted. We would therefore suggest that the statute described above, should include:

1. The creation of an independent body to advise as to the fair allocation of revenue; and
2. A mechanism for the creation of secondary legislation that sets the revenue distribution for a given period, that must be agreed to by the different governments of the UK taking account of the advice provided by the new independent body.

In our view, the terms of the statute described above ought to be protected from amendment without consent of the devolved governments. We are of this view because this statute ought to be seen, unequivocally, as a constitutional statute. Further, the devolved institutions must be given sufficient confidence that the regime will not be changed at the whim of the UK Government. This will, as Lisa Nandy has said, prevent the Hunger Games fight for funding and resources.

Summary

In summary, in our view a Labour Government ought to enact a statute which:

- Imposes a duty on the UK government which seeks to rebalance the UK's economy so that prosperity and investment can be spread more equally between different parts of the UK, in order to achieve greater equality of living standards across the country;
- Puts the Barnett Formula on a statutory footing;
- Reforms the Barnett Formula to become a mechanism through which resources are equalised across the UK, taking account of the differences in the fiscal capacity and fiscal need of the different parts of the UK;
- Creates a statutory body which decides how resources should be allocated; and
- Is protected from amendment, without the consent of the devolved governments.

3. Filling the Gap: Providing Human Rights Protection for Privatised Services

Should an individual's right to human rights protection depend on a choice by a local or national government to contract out a public service? Under current UK law, it does. This arbitrariness contrasts with the increasingly pivotal role private providers now play in delivering public services, either out of ideological choice or necessity. To bring about a fairer, more just society, Labour should propose empowering victims to claim under the Human Rights Act, even where services have been contracted out.

The Problem: Human Rights Protection in an Age of Austerity

The Human Rights Act ("HRA") currently prevents public authorities from acting incompatibly with the European Convention on Human Rights.[1] The definition of "public authority" includes "any person certain of whose functions are functions of a public nature". Therefore, for an individual to receive the HRA's protection, a question which has to be answered is whether (a) the service has been provided by a public authority, or (b) the act is not private in nature.[2]

Whilst in theory, this should have meant that the UK, devolved, or local governments could not contract out of its human rights obligations, the current interpretation of what "functions"

[1] Human Rights Act 1998, Section 6(1).
[2] Human Rights Act 1998, Section 6(3).

have a public nature has been so narrowly defined that it has resulted in a patchy, unfair and sometimes intentional degradation of individual's rights when receiving services which clearly have a public interest.

Many of the services which we traditionally recognized as public, even in the 1990s when the Human Rights Act was introduced, are now provided by the public sector. In the care industry alone, there has been a shift from the only 5% of home care being provided by private companies in the 1990s, to 80% in 2018.[3] There are now a number of markets which simply did not exist 30 to 40 years ago including prisons, probation services and support for unemployed people to return to work.[4] As Michael King, the previous Local Government and Social Care Ombudsman, recognised "there are few areas now where we do not see some sort of externalisation through contracts".[5]

This has been compounded by government cutbacks. Since the start of the period of Conservative Government in 2010, local governments have seen a 49% real-term reduction in government funding allocations.[6] This has led to radical cuts in the provision of much-needed public services, and the consequential resort to the private sector to meet the high demand.[7]

The Impact: An Unfair and Disempowering System

This shrinking of the government provision of public services has meant it is no longer feasible to distinguish between the public and private sectors institutionally. Whilst there are mixed views around the appropriate levels of private sector involvement in the delivery of public services, it should seem obvious that in our constitution, anyone who provides a public service must also be covered by public obligations.

However, there have now been many instances where an organisation "stands in the shoes of the State" and yet does not have responsibilities under the Human Rights Act. When individuals are suffering from predatory landlords,[8] polluted water systems,[9] a dangerously

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[3] House of Commons Public Administration and Constitutional Affairs Committee After Carillion: Public Sector Outsourcing and Contracting, Seventh Report of Session 2017-2019, ¶9.
[4] Nomura, M. (2021). Privatization of Public Utilities: Results from the UK Experiment. Privatization of Public City Gas Utilities, 73-96.
[5] House of Commons Public Administration and Constitutional Affairs Committee After Carillion: Public Sector Outsourcing and Contracting, Seventh Report of Session 2017-2019, ¶11.
[6] National Audit Office, Financial sustainability of local authority 2018, Ministry of Housing, Communities & Local Government, 8 March 2018, available at: https://www.nao.org.uk/wp-content/uploads/2018/03/Financial-sustainabilty-of-local-authorites-2018-Summary.pdf
[7] National Audit Office, Financial sustainability of local authorities: capital expenditure and resourcing, Department for Communities and Local Government, 15 June 2016, available at: Financial sustainability of local authorities capital expenditure and resourcing https://www.nao.org.uk/wp-content/uploads/2018/03/Financial-sustainabilty-of-local-authorites-2018-Summary.pdf (nao.org.uk)
[8] *Ali v Serco Ltd* [2019] CSIH 54.
[9] *R (Wild Justice) v OFWAT* [2023] EWCA Civ 28.

maintained railway line,[10] or an abusive teacher at a private school, [11] they have to hope that the provider is state-linked, rather than privately owned. [12] This is despite the fact that it is contracted-out service providers which in principle lack scrutiny and have a strong profit incentive, which are more likely to be abusive in the first place, as was abundantly obvious from the disaster following the collapse of Carillion.[13]

The unfairness of the system is clear and painful. It means that the protection of an individual's human rights is dependent not on whether the individual has chosen to use public or private services, not on the type of power being exercised, nor on its capacity to interfere with human rights, but on whether the institution using that power has links to the State. The European Convention on Human Rights provides no basis for such a limitation, and may in fact breach the UK's obligations under the Treaty.[14]

The Solution: Making Human Rights Fit for the 21st Century

As the Labour Party engages for the first time in many years in a concerted attempt at constitutional reform, now is the time to make the Human Rights Act adapted to the challenges of a privatised world. The solution is simple: change the meaning of "public authority" under section 6 of the Human Rights Act to include contracted-out services, and consideration of whether the services being provided by the private body include any of the following factors:

- Whether the state has assumed responsibility for seeing that the task is performed;
- Whether there is a public interest in having the task undertaken;
- The existence of public funding for the task. Providing a service to members of the public at public expense;
- Whether the function involves or may involve the use of statutory coercive powers; and
- The close connection between a service and the core values underlying Convention rights (and the risk that rights will be violated unless adequate steps are taken to protect them.[15]

Indeed, the solution is already ready-made, with the proposed changes having been outlined by the Scottish Human Rights Commission and implemented by the Scottish Government. [16] It would mean recognising the extent of private sector involvement in the delivery of our

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[10] *Cameron and Others v Network Rail Infrastructure Limited* [2006] EWHC 1133 (QB)
[11] The Educational Institute of Scotland, *Human Rights Act: Implications for Education*, information available at: https://www.eis.org.uk/Education-And-Professional-Publications/Human-Rights-Act-Implications-For-Education.
[12] *YL v Birmingham* [2007] UKHL 2, ¶105.
[13] House of Commons Public Administration and Constitutional Affairs Committee *After Carillion: Public Sector Outsourcing and Contracting,* Seventh Report of Session 2017-2019, ¶33.
[14] Joint Committee on Human Rights, the Meaning of Public Authority Under the Human Rights Act, 2003-4, H.L. 39, H.C. 382; J. Landau, 'Functional Public Authorities after YL', Public Law (2007), 630 at 636.
[15] These are based on Lady Hale's dissent in *YL v Birmingham* [2007] UKHL 2, ¶¶66-69.
[16] Scottish Human Rights Commission *Consultation Response on UN Convention on the Rights of the Child Bill to Equalities and Human Rights Committee (EHRiC) Inquiry,* October 2020, p6-10.

public services and responding appropriately, including by providing an inclusive list of services which by their nature are public goods.

The realisation of human rights cannot turn on whether a service is contracted out. Private companies deliver many essential services, and they must be held to the same human rights standards as their public sector counterparts.

Section 6 should therefore be amended as follows (amendments in red):

6 Acts of public authorities.

(1)It is unlawful for a public authority to act in a way which is incompatible with a Convention right.

(2)Subsection (1) does not apply to an act if—

(a)as the result of one or more provisions of primary legislation, the authority could not have acted differently; or

(b)in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights, the authority was acting so as to give effect to or enforce those provisions.

(3)In this section "public authority" includes—

(a) a court or tribunal, and

(b) any person certain of whose functions are functions of a public nature,

but does not include either House of Parliament or a person exercising functions in connection with proceedings in Parliament.

(3A) For the purposes of subsection (3)(b), "functions of a public nature" includes, in particular, functions carried out under a contract or other arrangement with a public authority.

(3B) Functions are not excluded from being functions of a public nature for the purposes of subsection (3)(b) solely because they are not publicly funded.

(3C) "Functions of a public nature" shall include but not limited to the provision of the following services:

(a) Caregiving

(b) Social Housing

(c) Public Utilities, such as:

a. Water

b. Electricity

c. Railway transport

d. Bus transport

e. Communication Systems.

(4)….

(5)In relation to a particular act, a person is not a public authority by virtue only of subsection (3)(b) if the nature of the act is private.

(6)“An act” includes a failure to act but does not include a failure to—

(a)introduce in, or lay before, Parliament a proposal for legislation; or

(b)make any primary legislation or remedial order.