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CHANGE

# Finding the good in EVEL:

An evaluation of 'English  
Votes for English Laws' in  
the House of Commons



Daniel Gover and Michael Kenny

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# Executive summary

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Recent political developments have focused attention on the 'English Question'. In response to the 2014 Scottish referendum result, the UK government initiated a procedural reform in the House of Commons known as 'English Votes for English Laws' (EVEL), which was formally adopted in October 2015.

This report results from an in-depth academic research project into EVEL. It evaluates how the procedures fared during their first year in operation, and weighs arguments for and against such a reform. Based on this analysis, it makes a series of constructive proposals to improve the current system.

## The return of the English Question

- From Gladstone onwards, attempts to introduce devolution to parts of the UK have provoked counter-claims that the interests of the other parts needed compensatory protection at Westminster. The focus particularly shifted to England's interests in the 1970s, when proposals for devolution were bedevilled by the notorious 'West Lothian Question'. Yet attempts to provide such compensatory protection ran into serious difficulties.
- Following the implementation of devolution to Scotland, Wales and Northern Ireland in the late 1990s, these earlier debates re-emerged. A series of proposals from within the Conservative party were developed, culminating in the recommendations of the independent McKay Commission in 2013. In many cases, these proposals were presented as precautionary adjustments to avoid English resentment and protect the union.
- The anomaly that these proposals sought to address concerned the possibility that legislation affecting only England could be passed by parliament without the support of England's democratic representatives. This happened after devolution on votes concerning tuition fees and foundation hospitals.
- Evidence suggests growing irritation among many of the English at England's constitutional position, including about its representation at Westminster. The most popular solution for addressing this has consistently been to reform Commons voting arrangements to give greater priority to English MPs.
- In addition to these factors, there has also been suspicion that the introduction of EVEL by David Cameron's government was motivated by party self-interest. This has left a legacy in terms of the legitimacy of the reform, which has so far failed to attract the cross-party support necessary for it to become widely accepted.

## The new EVEL procedures explained

- The EVEL procedures primarily affect the scrutiny of legislation in the House of Commons. They give English (or English and Welsh) MPs the opportunity to veto entire bills, or clauses of bills, that relate exclusively to that part of the UK. EVEL does not provide English (or English and Welsh) MPs with sole control over English (or English and Welsh) legislation. Nor does it change procedure in the House of Lords.
- The decision about whether EVEL applies on a particular piece of legislation is taken by the Commons Speaker. This is known as 'certification'. To be certified, the relevant unit of legislation must meet both elements of a two-part test: it applies exclusively to the area in question; and it would be within the power of a devolved legislature in another part of the UK to make equivalent provision.
- The most important characteristic of the EVEL reform is that it implements a 'double veto' right. This means that certified legislation must be supported by a majority of both English (or English and Welsh) and UK-wide MPs to pass into law. Under the double veto principle, it is therefore not possible for English (or English and Welsh) MPs to force through legislation against the wishes of the whole House.

## Evaluating EVEL

- Different justifications have been offered for the introduction of EVEL, and various types of criticism registered against it.
- There are broadly two types of rationale for it: first, as a pragmatic response to new territorial pressures; and second, as a commitment to the principle of procedural equality between the four parts of the UK. These justifications are not mutually exclusive, and proponents frequently employ both. But they are nevertheless different, and point in subtly different directions in terms of the form that EVEL should take.
- The government itself has not been entirely consistent in its arguments for EVEL. While the government's reform can be understood as broadly consistent with the first justification, ministers have at times also employed arguments and language more closely associated with the second. This tendency to 'over claim' may present problems for public understanding of the reform, as well as difficulties when expectations of its effect are not met.

- Five important criticisms of EVEL are evaluated, and empirical data about how EVEL operated during its first 12 months is offered.
- The first criticism is that EVEL will politicise the office of the Speaker. This concern focuses primarily on the potential for the Speaker's certification decisions to be contested by MPs. Based on the first year of EVEL's operation, there is little evidence that this has happened. The Speaker has also taken a significant number of decisions that conflict with the advice provided by government, thus underscoring his independence.
- A second criticism is that EVEL creates two classes of MP, and that this not only undermines the status of those from outside England (or England and Wales) but also inhibits their ability to represent their constituents on legislation that legally applies only in England (or England and Wales) despite having consequential effects elsewhere. As a point of principle, it seems reasonable to treat direct effects differently from indirect ones. But even where legislation certified as England-only has indirect effects in other parts of the UK – for example through the 'Barnett consequentials' – the double veto means that MPs from those affected territories are in no weaker a position under EVEL to block it.
- A third criticism is the claim that EVEL will undermine the coherence of UK-wide government. This criticism would be particularly relevant in the event that a UK government did not have a majority in England (or England and Wales). In such circumstances, much would depend on how the main parties responded to this new political situation. But it seems plausible that a UK government would be able to bargain with English (or English and Welsh) MPs in many foreseeable circumstances.
- A fourth criticism is that EVEL fails to facilitate expression of England's voice in parliament. The government's reform effectively conflates expression of England's voice with its capacity to apply a veto, but parliaments and legislatures fulfil other functions than merely voting on legislation. During EVEL's first year of operation, its mechanisms have not noticeably enhanced England's voice.
- A fifth criticism of EVEL is that it is unhelpfully complex and opaque in character. The primary cause of this complexity is the substantive design of the system, including the new stages and processes it establishes, but the standing orders that underpin them have also been criticised for their overly legalistic drafting. Complexity may undermine EVEL's capacity to achieve its goal of addressing English grievance and, if certified legislation becomes the subject of territorial conflict, this complexity may prove destabilising.

## Improving EVEL

- Drawing on the broader analysis above, several options are discussed with the aim of improving EVEL.
- Greater priority should be given to facilitating England's voice, in addition to providing a veto right on legislation. While this could, in principle, be achieved through further changes within the legislative process, it would be better to separate voice from veto and to encourage voice outside the legislative process. Potential mechanisms for enhancing the voice of English MPs include an English grand committee (but with a remit that extends beyond legislation) and an English Affairs select committee. Both would be broadly consistent with Westminster's existing procedural mechanisms.
- The double veto should be further entrenched. Two elements of the EVEL processes do not appear to be consistent with the double veto principle: consideration of instruments subject to the negative procedure, and the Commons' consideration of certain types of Lords amendment. Given the centrality of the double veto to the integrity of this reform, these two anomalies should be rectified.
- The complexity of EVEL should be reduced. A menu of five broad options for simplification is presented. Two of these seek to avoid EVEL stages from being triggered unless necessary: either by activating EVEL on fewer bills; or by eliminating the automatic requirement to convene the legislative grand committee stages (at which the English, or English and Welsh, veto may be applied). Two further options seek to reduce the complexity of the process itself: by reducing the number of veto points; and by no longer certifying certain types of provision, notably legislative amendments. A final option is to consolidate the standing orders that underpin the EVEL process.
- Further steps should be taken to improve the legitimacy of EVEL, including: renaming the procedure to better signal its purpose; and initiating new cross-party discussions on the reform. The system should be made as transparent as possible, including through the provision of clearer and more consistent information about certification. Separately, the Speaker should consider giving public explanations for his certification decisions where they are requested. Further review of this system should be conducted, both before the end of the current parliament and beyond.

## Conclusion and recommendations

- A full list of recommendations is given in the final chapter of this report.



# Introduction

One of the most striking outcomes of the dramatic political and constitutional events that have taken place in the UK since the Scottish referendum has been the sudden, unforeseen, re-emergence of the ‘English Question’. Misleadingly labelled as a single question, the phrase signals several distinct queries about the governance and constitutional position of England in the era after devolution.

The referendum on Scottish independence, in September 2014, brought to a head a steadily growing concern among many English voters about the implications of the post-devolution settlement for England, propelling to the forefront of British politics the question of what the English might now want in constitutional terms. It also breathed new life into a debate about whether the English are developing a form of nationalism that breaks from older styles of British patriotism and affiliation, and which requires some form of constitutional expression. The promise of new powers for Scotland, made in the fraught final weeks of the campaign, confirmed in the minds of many the conviction that the British state was increasingly inclined towards the sensibilities and interests of its minority nations rather than the English. David Cameron, in his response to the result on the steps of Downing Street, committed his government to reforming Westminster’s voting arrangements to give greater priority to the English. In so doing, he became the most senior British politician to acknowledge and respond to the shifting pattern of English national sentiments.

For some observers, this emergent nationalism was one of the key dynamics at work in the vote for Brexit that followed in June 2016. During the campaign, some groups of English voters were seen to be amenable to the call to ‘take back control’ in a context where England itself lacked mechanisms for political and institutional sovereignty. Given the widespread belief that a developing sense of English nationalism may have played a role in shaping the referendum’s outcome, the different faces of the English Question are likely to remain salient for some considerable while. Yet, Brexit aside, there has been a notable growth of interest in recent years in the question of whether England should be offered devolution, in keeping with its sister countries, and the accompanying debate about whether this should take the form of decentralisation within England or some form of deal to England as a whole.

These developments and debates represent an important backdrop to the particular issue with which this report is concerned: the introduction in October 2015 by the Conservative government of new rules in the House of Commons known as ‘English Votes for English Laws’ (hereafter EVEL). The reform gives English (and English and Welsh) MPs a veto over legislation that applies only in that part of the UK.<sup>1</sup> As we will see, the government’s aims in introducing these procedures have not always been entirely consistent, but the most common and widely understood justification for EVEL is that it is designed to answer the so-called ‘West Lothian Question’. This conundrum is closely related to the key concerns signalled by the English Question, and references the anomaly whereby MPs representing constituencies in Scotland, Wales and Northern Ireland may vote at Westminster on policy matters that affect only

England, whereas English representatives may no longer vote on matters that have been devolved to one of those territories.

In this report we provide a rigorous evaluation of these new procedural rules. Our analysis results from an in-depth academic research project into the implementation of EVEL, conducted at the Mile End Institute at Queen Mary University of London, and supported by the Centre on Constitutional Change and the Economic and Social Research Council. Much of our research has focused on the detailed design and working of EVEL, for which we have carried out exhaustive analysis of parliamentary records and conducted interviews with a range of politicians, officials, and other experts and authorities. Drawing on this, the report presents summary data on how EVEL operated during its first 12 months of operation.<sup>2</sup> But this report is not merely a technical evaluation. We also consider the main arguments for and against the procedures, and seek to offer a wider perspective on them in the light of the re-emergence of the English Question, asking what they mean for the UK’s constitutional system at a time when it is under considerable strain. Based on this analysis, we make a series of constructive proposals setting out ways in which the current version of EVEL might be improved.

The report is presented in four chapters. We begin, in chapter 1, by placing the government’s EVEL reform in wider historical context. As we will see, the idea that devolution elsewhere presents dilemmas for England is not new. Over the past century or more, various schemes have been devised and abandoned to address these dilemmas, but it is since the devolution settlements of the late 1990s that considerable pressure for change has grown. This overview is intended to help us understand how the current version of EVEL emerged. Chapter 2 then presents a basic overview of the EVEL process introduced by David Cameron’s government. Chapter 3 evaluates these new procedures in depth, sifting both the arguments made in support of reform and the most common objections to it. It is in this section that we present and draw upon empirical data on how EVEL worked during its first year in operation. Our central argument is that EVEL can, in principle, be justified, and that some of the specific criticisms made of the reform are, to a degree, limited by the ‘double veto’ feature of the government’s scheme. Nevertheless, we also find that the reform suffers from a number of specific flaws – in particular, its complexity and opacity, and its conflation of the goals of ‘voice’ and ‘veto’. Based on this analysis, chapter 4 offers some specific proposals for how EVEL should be improved, suggesting ways of separating voice and veto, entrenching the important double veto, reducing complexity, and improving legitimacy. A final chapter then draws conclusions and provides a brief list of our main recommendations.

<sup>1</sup> Throughout this report, we generally refer to only these two geographical categories. However, in rare circumstances, as described in chapter 2, similar provision also exists for England, Wales and Northern Ireland.

<sup>2</sup> Our data covers the 12-month period from 23 October 2015 (when EVEL came into force) until 22 October 2016.

# 1. The return of the English Question

On the morning after the Scottish independence referendum, David Cameron stood on the steps of Downing Street and signalled a shift in the UK government's approach to territorial management. 'We have heard the voice of Scotland – and now the millions of voices of England must also be heard', he said. 'The question of English votes for English laws – the so-called West Lothian question – requires a decisive answer'.<sup>3</sup> This important statement – widely criticised by Cameron's political opponents – paved the way for the reform that provides the focus of this report.

EVEL has been dismissed by some as a political gimmick designed to respond to partisan political pressures. But, while such motives provide part of the explanation for the reform, EVEL is also the culmination of over a century of debate about how to represent the constituent parts of the UK at Westminster in the context of devolution to some of its territories. The so-called English Question has long lain dormant in British politics. In an unusual, and highly prescient, book published in 2006, Robert Hazell (2006:240) correctly noted that the question 'can remain unresolved for as long as the English want'. How it moved to the fore of British politics, and what we can learn from these earlier debates and trends, are important parts of the contemporary context.

The aim of this chapter is to place the current debate over EVEL in its wider setting. The chapter is divided into five sections. In the first we offer a broad historical perspective, showing how, from Gladstone onwards, attempts to introduce devolution to parts of the UK have been bedevilled by the question of its consequences for Westminster, including for English representation. The remaining four sections then consider developments during the period after the implementation of devolution in the late 1990s. In the second section we consider various specific proposals that have been made for reform at Westminster. A third section discusses how pressure for reform grew, following a small number of controversial Commons votes, while the fourth looks at how public opinion in England has developed during this period. All of these trends fed into the development of EVEL under David Cameron's government, which is the focus of the final section of the chapter.

## The historical backdrop

The British system of parliamentary government has evolved incrementally over centuries and has, in very broad terms, developed a distinctive approach to the management of the patchwork of territories which the British state has come to govern. Put simply, this has involved a statecraft which leans towards the granting of strategic concessions to local powers in order that the autonomy of the central state, and the fundamental character of British rule, be maintained. Special arrangements for the governance of its most far-flung territories have long been a feature of British history. Despite the mythology of the unitary kingdom that prevailed in the English heartland, the UK was always a state that worked differently and had different relations with its constituent peoples, in part because of the differential character of the unions it encompassed. And while the English parliament

ceased formally to exist in 1707, in practice it expanded after union with Scotland, absorbing territories from other parts of Britain, thus becoming the legislature that served the whole of the United Kingdom. Securing the hegemony of the state within this expanded territory was premised upon the recognition that significant concessions were necessary in terms of how the non-English territories were governed. These included granting various degrees of autonomy to the different peoples within its borders.

Proposals to introduce devolution to Scotland and Wales – ultimately realised in 1999 – represented an attempt to undercut nationalist ambitions and alleviate disputes between London and the peripheries. They were therefore consistent with this earlier approach to territorial statecraft. Yet, in the wake of devolution's implementation, the British system of representative government became notably more lopsided and asymmetrical in character, and another question – concerning some form of compensatory or equivalent settlement for England – made its way into the political ether. This was not the first time that questions about how England was to be represented and governed within the British political system had become politically contentious. On a number of earlier occasions, similar issues had been raised in the context of concerns about the implications of devolution for the union parliament.

Questions about representation of the four nations at Westminster were most notably aired during debates about Gladstone's plans for Irish 'home rule'. In response to growing political unrest in Ireland, Gladstone attempted to introduce home rule, giving control of domestic matters to an Irish legislature, but retaining the management of foreign affairs issues at Westminster. The second of his Home Rule Bills, of 1893, is particularly pertinent from a contemporary perspective. It proposed that the number of Irish MPs at Westminster be reduced as a result of the powers passed to the Irish, and that the remaining Irish representatives be unable to vote on matters that did not affect Ireland. This became known as Gladstone's 'in and out' solution, and it was abandoned by him as unworkable after considerable soul-searching. According to Vernon Bogdanor (2001), this was for two reasons: first, because of the difficulty of separating Irish and UK matters, particularly around legislation that affected funding; and second, because of its potential to undermine parliamentary government through the creation of alternative majorities in the Commons. Both of these criticisms have re-emerged in relation to EVEL, and are discussed in chapter 3. When home rule was finally implemented for Northern Ireland in the 1920s,

<sup>3</sup> 'Scottish Independence Referendum: statement by the Prime Minister', 19 September 2016, <https://www.gov.uk/government/news/scottish-independence-referendum-statement-by-the-prime-minister> [accessed on 29 September 2016].



the territory retained a reduced number of Westminster MPs but with full voting rights – a slightly different solution known as the ‘devolution discount’.

Similar issues were raised in the 1919-20 Conference on Devolution, a notable gathering of MPs and peers that considered proposals to implement devolution to England, Scotland and Wales (Conference on Devolution 1920; Evans 2015a, 2015b). The conference reached agreement on several significant matters, including those policy areas that might be passed to territorial governments, and the merits of devolution to England as a whole rather than its constituent English regions. But its participants were divided over the *form* such an arrangement should take, and their disagreement foreshadowed later differences on this score. Some favoured devolution to subordinate legislatures with separate elections, similar to today’s devolved legislatures. Others advocated the devolution of powers to ‘grand councils’ of existing parliamentarians within the Westminster parliament, an idea closer in some respects to today’s EVEL arrangements. Failure to reach agreement on this crucial matter undermined the prospects of the ideas produced by this historic gathering.

Issues of territorial representation at Westminster then disappeared from view for the bulk of the last century, with a couple of notable exceptions. Following the implementation of the Government of Ireland Act 1920, Northern Ireland was the only territory within the UK to enjoy devolution. Yet, despite the number of its MPs being reduced after devolution’s introduction, their ability to vote on matters that did not affect Northern Ireland became a thorny issue in the mid-1960s when Harold Wilson’s Labour government held a small majority in the Commons. Wilson’s initiative to nationalise the steel industry looked set to be defeated due to the votes of Northern Ireland’s MPs, even though the policy would not have affected that part of the UK. Wilson briefly considered reforms to prevent them from voting, but relented once he was appraised of the constitutional complexities this would involve (Walker and Mulvenna 2015). Even for a territory as small as Northern Ireland, the ‘devolution discount’ could not entirely eliminate the possibility of its MPs decisively affecting votes on matters applying elsewhere.

In the 1970s, the focus of these debates shifted decisively to the potential effect of devolution on England, in the context of proposals from the Labour government to devolve power to Scotland and Wales. The pressure to introduce devolution built up from the 1960s onwards and enjoyed the broad support of the Labour and Liberal parties. Attempts by the Callaghan government to establish Scottish and Welsh devolved institutions in the late 1970s failed when the people of Wales rejected such a move in a referendum, and a Scottish vote on the establishment of an assembly with legislative powers failed – notwithstanding a majority vote in favour – due to a statutory requirement that 40% of the Scottish electorate support the initiative.

In the course of parliamentary debates on this issue, the question of what devolution would mean for England became an important point of contention. One staunch opponent of the Scotland Bill of 1977-78, the Labour MP for West Lothian, Tam Dalyell, posed what later became known as the ‘West Lothian Question’:



*For how long will English constituencies and English hon. Members tolerate not just 71 Scots, 36 Welsh and a number of Ulstermen but at least 119 hon. Members from Scotland, Wales and Northern Ireland exercising an important, and probably often decisive, effect on English politics while they themselves have no say in the same matters in Scotland, Wales and Ireland?<sup>4</sup>*

In essence, his complaint was that devolution elsewhere would accentuate an anomaly in legislative voting arrangements. MPs representing Scotland, Wales and Northern Ireland would continue to be able to vote on legislation that affected only England, but it would no longer be possible for English representatives to reciprocate by voting on matters that had been devolved to those territories. Behind this seemingly arcane conundrum lay the deeper question of whether devolution resulted in too much power being amassed – both at the peripheries and at the centre – by the smaller nations, at England’s expense. It has since been largely forgotten that during consideration of Labour’s devolution legislation, its parliamentary opponents succeeded in incorporating a new provision (which Dalyell himself supported) that would have made it possible for certain votes on bills that did not relate to Scotland, but were passed with the support of Scottish MPs, to be confirmed two weeks later through a second vote.<sup>5</sup> This innovation, though never put into effect, may well represent the first occasion when a form of EVEL achieved support from a majority of members in the House.

This brief review of previous moments when concerns about national representation at Westminster has become salient in British politics yields two key insights. First, it suggests that it has been the acquisition by some territories of enhanced powers of self-government that has historically been the catalyst for the counter-claims of others. This has given today’s English Question a defensive and reactive quality. And, second, the question of how to handle legislation at Westminster that only affects certain parts of the UK, has always been a matter of both considerable technical complexity and great symbolic significance. Most recently, this dilemma has been the site of an angst-ridden debate about where the England sits within parliament’s structures and processes, and whether England’s needs and interests are rendered secondary by the state’s need to strike bargains with its more distant territorial members.

## Post-devolution proposals for reform

Dalyell’s concerns were averted in the short run, but the same issues surfaced again, this time more resonantly in the context of the devolution settlements introduced by Tony Blair’s Labour government. In 1999 the Scottish Parliament and the National Assembly for Wales were established, alongside their respective executive bodies. Likewise, while the earlier Northern Ireland devolution settlement had collapsed in the early 1970s, the Belfast Agreement in 1998 paved the way for its return, and led to the establishment of the Northern Ireland Assembly and Executive. But while devolution was intended to offset concerns about England’s dominance within the union, it also gave rise to renewed unease about England’s constitutional

<sup>4</sup> HC Deb 14 November 1977, column 123.

<sup>5</sup> Scotland Act 1978, section 66.

position. During the parliamentary debates on the Scotland Bill, the anomaly identified by Dalyell cropped up once more, and was connected by some Conservatives to the question of a constitutional imbalance and its possible effects upon England. Former prime minister John Major asked the following question in the Commons:



*Can he tell us why Scottish Members should be able to vote on such matters as health and education in England and Wales, whereas English, Welsh and Northern Irish Members will not be able to vote on those matters as they affect Scotland? It is not just the West Lothian question; it is the west Dorset, west Hampshire and west Lancashire question, and we still await an answer.<sup>6</sup>*

In anticipation of the introduction of devolution, various suggestions for reform at Westminster were mooted. In particular, the Commons Procedure Committee (1999) proposed the fairly modest step (which was never implemented) of using territorially-constituted second reading committees on bills that applied to only one part of the UK. The legislation that established devolution to Scotland also removed the overrepresentation of Scottish MPs at Westminster, a provision that was put into effect in time for the 2005 general election.<sup>7</sup>

But following the formal implementation and subsequent expansion of devolution, awareness of the West Lothian anomaly has grown, and it became a repeated complaint among those disenchanted with the Labour government. The Conservative party began to call for reform of Westminster's voting arrangements, and it included commitments to introduce a version of EVEL in all of its general election manifestos from 2001 onwards (Conservative Party 2001, 2005, 2010, 2015a). During the 2000s, various ideas for resolving the West Lothian Question were aired within the Conservative party, and the issues associated with EVEL became much more widely familiar. Each of these proposals contributed to a developing body of specialist knowledge within the party about this question.

In 2000, the Commission to Strengthen Parliament, established by party leader William Hague and chaired by Conservative peer Lord (Philip) Norton of Louth, examined how England-only legislation should be dealt with post-devolution (Commission to Strengthen Parliament 2000). The commission explicitly rejected the notion of an English parliament, in part because such an arrangement might risk destabilising the UK given the relative size of England within it. Instead, it offered arguments for England-only legislation to be voted on effectively by English MPs alone. Under its proposals, the Commons Speaker would be required to certify the territorial application of legislation, and any provisions applying exclusively to England (or England and Wales) would then pass through a revised Commons legislative process, with second reading, committee and report stages all voted on by English (or English and Welsh) MPs only, and reflecting the party balance in that part of the UK. For third reading (the bill's final stage during its initial Commons passage), all MPs would formally be entitled to

vote, but the commission anticipated the development of a 'convention' that those representing parts of the UK not affected by the legislation would not do so.

A different model was proposed some years later by senior Conservative Sir Malcolm Rifkind, formerly Scotland Secretary in Margaret Thatcher's government. He proposed that England-only legislation should be considered and voted on by an English grand committee, which he argued would not circumvent the constitutional position of MPs from across the UK. This he modelled on the existing Scottish grand committee arrangements. Rifkind allowed for the possibility of the UK-wide House overturning the decision of English MPs, but he also supported the adoption of a convention whereby they would not seek to do so (see Rifkind 2010).

A similar idea was elaborated in a report by the Conservative Democracy Task Force, set up by party leader David Cameron and chaired by Kenneth Clarke. This recommended that legislation certified as English should pass through a Commons legislative process that provided both English and UK-wide MPs veto rights at different stages (Conservative Democracy Task Force 2008). The second and third reading stages would be voted on by the whole House, allowing UK-wide MPs to veto the entire bill at either end of its Commons passage. But English MPs would have control at committee and report stages – the two Commons stages at which a bill is amendable – enabling them to delete any provisions that they disagreed with (and/or to add new ones). Consequently, the passage of England-only legislation would require the assent of both English and UK-wide MPs, but neither would have the power to force through legislation against the wishes of the other. A design similar to this was subsequently proposed by former civil servant Jim Gallagher (2012) in a report published by the centre-left think tank, the Institute for Public Policy Research.

Perhaps the most influential and important document setting out the arguments for reform, and considering different institutional options, was produced by the independent McKay Commission (2013). Appointed by the coalition government, the commission was tasked with reflecting on the territorial implications of devolution for the House of Commons. In its final report it offered some important arguments for the creation of a clearer English dimension at Westminster, and for the development of some form of 'voice' for the English in particular. It set out different ways in which this might be achieved within the House of Commons, arguing that voice was a more important and feasible goal than moving to establish a watertight veto on the part of English MPs.

A key assumption of the McKay Commission's conclusions was that, once England's collective voice on England-only matters was more clearly articulated at Westminster, it would be much harder politically for the House to override the will of England's representatives. Instead of the formal veto that others had proposed, the McKay Commission therefore provided a model for a more informal arrangement built upon the establishment of a greater sense of English recognition within parliament. Its argument rested in part upon the assumption that electoral incentives would serve to compel the political parties to listen to English preferences:

<sup>6</sup> HC Deb 14 May 1997, column 58.

<sup>7</sup> Scotland Act 1998, section 86.

a party wishing to appeal to voters in England would be reluctant to impose policy on them against the wishes of their democratic representatives. The commission floated a menu of procedural changes that might reinforce these incentives, including: territorially-constituted pre-legislative scrutiny committees; new English (and English and Welsh) 'grand committees' to debate whether to give 'consent' to affected legislation; specially-constituted public bill committees reflecting the party balance in England (or England and Wales); and reporting the result of divisions among only English (or English and Welsh) MPs separately from the UK-wide result.

None of these mechanisms were intended to be formally binding, but rather to make it politically harder to override England's expressed interests. As such, the McKay Commission's suggestions were designed to enhance the role of English MPs without eroding the sovereignty of the House as a whole. Its principal arguments might have supplied the basis for a wider agreement among the political parties. But any such prospect was undermined by the Labour party's refusal to engage with these, suspicious that this kind of reform was little more than a politically inspired ruse by the Conservative party given the latter's traditionally stronger electoral performance in England. The McKay Commission's report was welcomed in many other quarters, however (and subsequently to some extent by Labour),<sup>8</sup> and supplied the most important extended engagement with the case for, and implementation of, EVEL in official circles. Its thinking and ideas still merit consideration by those tasked with developing this system. But a key question about its arguments is whether their guiding assumption – that politicians could be trusted to show self-restraint on bills that only affect England – still holds. The idea that the Commons can continue without a binding procedure in such instances is now more questionable in the wake of the politicisation of the English Question since 2014.

These various attempts to answer the West Lothian Question reflected the growing conviction in parts of the political world that some kind of balancing reform was required to alleviate the asymmetries bequeathed by devolution. This change was sometimes depicted in reactive and precautionary terms, designed to obviate the potential growth of English grievance, and, as such, was envisaged by some Conservatives as a measure to prolong the political structures of the union. But there also emerged in some quarters a slightly different view – both in parts of the Conservative party and beyond it – that the English were entitled to expect a more substantive degree of recognition and protection, and that the hitherto overlooked principle of national sovereignty now needed to be given its due in relation to them too (Kenny 2015). Such a justification underpinned the arguments of some politicians in the Conservative party for the creation of a much clearer and more transparent English process within Westminster. As we will demonstrate below, these subtly differing rationales for introducing EVEL are connected to slightly different conceptions of how it should operate.

## Commons votes post-devolution

When David Cameron insisted in September 2014 that the English Question now deserved political attention, he chose to focus upon the resolution of the West Lothian conundrum as the primary site for dealing with the vexed questions of how England should be governed and politically represented. In so doing, he generated the expectation that the procedural changes this involved would do much to reconcile the English to the parliamentary system from which they had become estranged. In political terms, he tapped into the collective memory of earlier episodes, under Blair's government, when the majority preference of English MPs was overruled. These have played an iconic role in Conservative thinking about devolution and its implications.

The prelude to them arose over the controversial question of the banning of hunting with dogs. Following devolution, this was no longer an issue applicable to Scotland. Conservative MP David Lidington – currently Leader of the House and responsible for the new EVEL procedures – emphasised this territorial anomaly when he called upon Scottish MPs to desist from voting in 2000.<sup>9</sup> Ultimately, as Russell and Lodge (2006) explain, the vote at second reading was passed by a sufficiently large margin that Scottish representatives made no difference to the outcome.

But the question moved to the fore in the 2001-05 parliament. On two notable occasions the Commons backed contentious legislation that applied primarily to England (or England and Wales) due to the votes of non-English (or English and Welsh) MPs. The first was the Health and Social Care (Community Health and Standards) Bill (2002-03), which provided for the establishment of foundation hospitals in England. At its Commons report stage, in July 2003, MPs voted effectively to delete the foundation hospital provisions from the bill. Although the government won by 35 votes, among English MPs it would have been defeated by a single vote (Lodge 2003b). Four months later, in November 2003, MPs voted on an amendment with the same effect that had been passed in the Lords. As shown in Table 1, this time MPs voted with the government to reject the amendment by 17 votes, but among only those representing English constituencies the government would instead have been defeated by 17 votes.

**Table 1: Territorial breakdown of Commons division on motion disagreeing to Lords amendment 1 (on foundation hospitals) on Health and Social Care (Community Health and Standards) Bill 2002-03, 19 November 2003**

|                         | For Govt   | Against Govt | Govt win?        |
|-------------------------|------------|--------------|------------------|
| <b>England</b>          | 234        | 251          | No (-17)         |
| <b>Scotland</b>         | 44         | 17           | Yes (+27)        |
| <b>Wales</b>            | 24         | 11           | Yes (+13)        |
| <b>Northern Ireland</b> | 0          | 6            | No (-6)          |
| <b>Total</b>            | <b>302</b> | <b>285</b>   | <b>Yes (+17)</b> |

Source: Adapted from Lodge (2003a).

<sup>8</sup> Labour's 2015 general election manifesto stated that the McKay Commission's recommendation of an England-only committee stage 'must now be considered as part of the Constitutional Convention process' (Labour Party 2015:64).

<sup>9</sup> HC Deb 12 June 2000, column 642.

A similar situation occurred in January 2004, on the second reading of the Higher Education Bill (2003-04). Unlike on foundation hospitals, this vote did not strictly apply to only one part of the UK: second reading is taken on the bill as a whole, and this legislation included other provisions that applied across the UK. Nevertheless, its most contentious provisions allowed universities to increase student tuition fees, a policy that was to apply only in England and Wales (and in the latter case, the National Assembly for Wales would decide whether to use the powers) (Lodge 2004). As shown in Table 2, although the House voted with the government in support of the bill, among MPs representing only England (and England and Wales) the government would have been defeated (by 15 and 6 votes respectively).

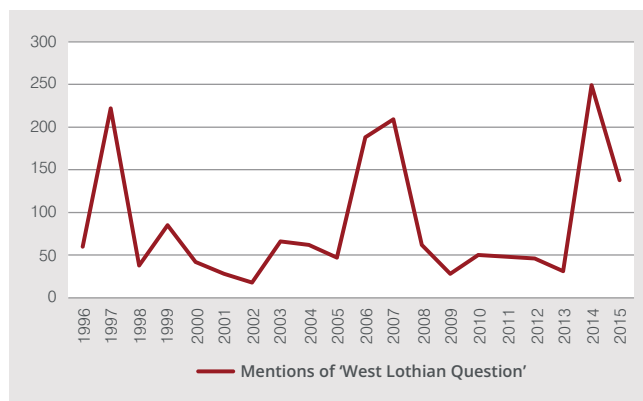
**Table 2: Territorial breakdown of Commons division on second reading of Higher Education Bill 2003-04, 27 January 2004**

|                  | For Govt   | Against Govt | Govt win?       |
|------------------|------------|--------------|-----------------|
| England          | 246        | 261          | No (-15)        |
| Scotland         | 46         | 21           | Yes (+25)       |
| Wales            | 24         | 15           | Yes (+9)        |
| Northern Ireland | 0          | 14           | No (-14)        |
| <b>Total</b>     | <b>316</b> | <b>311</b>   | <b>Yes (+5)</b> |

Source: Adapted from Lodge (2004).

These outcomes attracted extensive commentary and some criticism about the injustice being done to England from press and politicians alike. In anticipation of the vote on tuition fees columnist Simon Heffer criticised ‘the morally indefensible action of Scots MPs’, arguing that ‘the reputation of Parliament itself is at stake’.<sup>10</sup> After that vote, Conservative frontbencher Tim Yeo argued in the Commons that it was ‘completely wrong that a Bill that imposes higher charges on students attending English universities should be carried by this House only by using the votes of Scottish Members of Parliament’.<sup>11</sup> While Commons divisions such as these have occurred very rarely, there is some evidence that they may have provoked a wider-reaching debate about this constitutional anomaly. It is indeed noteworthy that mentions of the West Lothian Question in the UK press spiked significantly in the few years subsequently, as shown in Figure 1.

**Figure 1: Newspaper mentions of West Lothian Question per year, 1996-2015**



Source: LexisNexis search of UK national newspapers conducted by the authors, 1 January 1996 to 31 December 2015.

## Public attitudes

One of the most important, and contentious, aspects of the debate about EVEL concerns public perceptions and expectations, and specifically whether this new process is favoured by a majority of people in England and across the UK. There has been much rhetoric and numerous, often unsubstantiated, claims about what the English now want in constitutional terms. In this section we consider the available polling evidence, as well as research and evidence gathered by Kenny in his study of the transformation of English national consciousness since the 1990s. We seek to shed light on two questions in particular: (a) have the English become more disgruntled with the union settlement in recent years, as many advocates of this reform claim?; and (b) does EVEL appear congruent with the shifting constitutional preferences of the English?

Before attempting to answer these questions, it is useful to trace some wider trends in English identity. In very broad terms, there is a quite considerable body of evidence to suggest that there has been a notable rise in national self-consciousness among the English over the past 20 years. Questions about who the English are and what defines Englishness have become far more culturally salient; and there is some evidence that the national sentiments of a growing number of the English have come to acquire a political resonance (Kenny 2014; Wellings 2012). But, importantly, this has not in any straightforward way resulted in the abandonment of existing kinds of identification for most people. An affinity with locality, regional identity and affiliation to the UK remain important for the majority of the English. Nevertheless, as the British Social Attitudes survey shows, when people are forced to choose which identity they are more attached to, Englishness has grown in popularity in relation to Britishness. It grew, first, in the years between 1992 and 1999, and then again after 1999, in the wake of devolution.<sup>12</sup> Thereafter, pollsters disagree about whether there has been a further growth and deepening of English national sentiment (Ormston and Curtice 2010; Wyn Jones et al. 2012).

<sup>10</sup> Simon Heffer, ‘The deadly dangers of this abuse’, *Daily Mail*, 19 January 2004.

<sup>11</sup> HC Deb 27 January 2004, column 275.

<sup>12</sup> David Goodhart and Eric Kaufman, ‘A respectable Englishness’, *Fabian Review*, 16 August 2016, <http://www.fabians.org.uk/a-respectable-englishness/> [accessed on 29 September 2016].



There is an important qualitative dimension to this change – which polling does not always capture – whereby a sense of English national identity appears to have become a more important and meaningful attachment in this period, according to various studies (Kenny 2014; Skey 2011). But as the desire to express or celebrate a pride in Englishness has grown, the paucity of opportunities to do so – in institutional and political terms – has become an issue of growing frustration for some. During the Blair and Brown years, Englishness was rarely depicted by public authorities and politicians in positive terms, while ‘Britishness’ was presented as a preferred civic and multi-cultural form of patriotism. From the mid-2000s, there is some evidence to suggest that a growing number of the English (with the notable exception of those living in London) were inclined to prioritise English identity as their preferred form of national identification. Several surveys have reported that a majority of those who felt this way were most likely to be Eurosceptic, and to be more disgruntled at England’s position within the domestic union (Wyn Jones et al. 2012). During the course of the EU referendum campaign, this striking correlation between English identity and a vote to leave was reflected in various surveys.<sup>13</sup>

In comparison, how the English feel about the UK’s constitutional structure remains harder to divine. The indifference towards constitutional issues, and low levels of awareness about devolution, which have typified English attitudes, do appear to have changed in the last few years. Various surveys reported quite considerable irritation at particular features of the post-devolution settlement, and

in some polling this disenchantment rose during the 2000s (while in others, such as the BSA survey, it remained constant). But disgruntlement on two specific issues is apparent across all available survey data. As former senior civil servant Jim Gallagher put it in 2012:



*So far, the English have been pretty tolerant about the Scottish variation, but increasingly two issues concern them: money and representation. Does Scotland do unfairly well in the distribution of common resources, and do Scottish Westminster representatives have too much say on English questions?<sup>14</sup>*

We focus here on the second of these: the potential influence of Scottish MPs on English legislative matters, which the government’s EVEL reform is designed to address. On this issue public attitudes have been measured regularly in surveys since the implementation of devolution. Below we present key results of the British Social Attitudes and the Future of England surveys. There has been consistent and growing agreement from English respondents over this period that Scottish MPs should no longer vote on England-only laws in the House of Commons, as Table 3 shows. What is especially striking here is the proportion of respondents who ‘strongly’ agreed with this proposition, which has risen from 18% in 2000 to 55% in 2012. According to psephologists Rachel Ormston and John Curtice (2010:156), public opinion in England ‘consistently expresses some disquiet at the apparent inequity of the WLQ [West Lothian Question]’.

**Table 3: English opinion on Scottish MPs voting on England-only legislation, 2000-2012**

|                                   | 2000 | 2001 | 2003 | 2007 | 2009 | 2011 | 2012 |
|-----------------------------------|------|------|------|------|------|------|------|
| <b>Strongly agree</b>             | 18   | 19   | 22   | 25   | 31   | 53   | 55   |
| <b>Agree</b>                      | 45   | 38   | 38   | 36   | 35   | 26   | 26   |
| <b>Total agree</b>                | 63   | 57   | 60   | 61   | 66   | 79   | 81   |
| <b>Neither agree nor disagree</b> | 19   | 18   | 18   | 17   | 17   | *    | 8    |
| <b>Disagree</b>                   | 8    | 12   | 10   | 9    | 6    | 8    | 4    |
| <b>Strongly disagree</b>          | 1    | 2    | 1    | 1    | 1    | 2    | 2    |
| <b>Total disagree</b>             | 9    | 14   | 11   | 10   | 7    | 10   | 6    |

Source: Wyn Jones et. al. (2013), based on British Social Attitudes survey (2000–09) & Future of England survey (2011–12). Question: ‘Now that Scotland has its own parliament, Scottish MPs should no longer be allowed to vote in the House of Commons on laws that only affect England’.

Note: Figures given as percentages.

<sup>13</sup> E.g. James Kanagasooriam, ‘The English question’, *Populus*, June 2016, <http://www.populus.co.uk/2016/06/the-english-question/> [accessed on 5 October 2016].

<sup>14</sup> Jim Gallagher, ‘So, what about England?’, *The Scotsman*, 21 November 2012, <http://www.scotsman.com/news/opinion/jim-gallagher-so-what-about-england-1-2647129> [accessed on 29 September 2016].



Importantly, evidence supplied by the Scottish Social Attitudes survey suggests that the principle that only English MPs should vote on England-only legislation has been supported by many Scots too, with around half of respondents generally in support and up to a quarter opposed. In January 2013, 53% agreed with the proposition, compared to 18% who disagreed.<sup>15</sup>

Table 4 approaches this issue from a different angle, reporting data only from the Future of England survey. It shows that in recent years only a minority of the English favoured the then *status quo* and, when presented with various possible options for change, some form of EVEL was the most popular preference. Support for radical solutions to the English Question, like an English parliament, lags significantly behind more incremental reform to Westminster voting arrangements. Quite how these ideas are understood by respondents remains an open question, but there does appear to be a majority among the English to give English MPs greater say on English legislative matters.

**Table 4: Constitutional preferences for the governance of England, 2011-2014**

|   | 2011 | 2012 | 2014 |
|---|------|------|------|
| <b>For England to be governed as it is now with laws made by all MPs in the UK parliament</b> | 24   | 21   | 18   |
| <b>For England to be governed with laws made by English MPs in the UK parliament</b>          | 34   | 36   | 40   |
| <b>For England as a whole to have its own new English parliament with law-making powers</b>   | 20   | 20   | 16   |
| <b>For each region of England to have its own assembly</b>                                    | 9    | 8    | 9    |
| <b>Don't know</b>   | 14   | 16   | 17   |

Sources: Wyn Jones et al. (2012, 2013); Jeffery et al. (2014). Question: 'With all the changes going on in the way different parts of the United Kingdom are run, which of the following do you think would be best for England?'

Note: Figures given as percentages.

These findings have become an important point of reference in debates about the English Question, amidst growing interest from 2010 onwards in the political dimensions of a perceived rise in English nationalism. Since the EU referendum, there has been a notable growth of interest in the implications of English nationalism and the role it may have played in shaping the preferences of English voters towards Brexit. A key question now is whether the disenchantment reflected in that vote extends as well to the political system and domestic union. This forms a key backdrop to the government's efforts to answer the West Lothian Question.

## Development of EVEL under the coalition and Conservative governments

David Cameron's decision to inject political energy into the English Question in 2014 therefore reflected a number of developments in popular attitudes and constitutional thinking. The desire he expressed to respond to a perceived imbalance in the UK's territorial constitution was widely shared. But it was also, in part, a partisan calculation by the leader of the Conservative party determined to outflank his political rivals on either side.

The Conservatives' position was, to some extent, motivated by the growing willingness of senior figures in UKIP to speak to English grievances during the Scottish referendum campaign. In the run-up to the referendum vote, UKIP leader Nigel Farage argued that 'the English are feeling rather ignored in all of this', adding: 'We have been talking about Scotland, Wales and Northern Ireland a lot over the last 16, 17 years and a new constitutional settlement for a federal UK will suit everybody'.<sup>16</sup> But EVEL also helped the Conservatives to outmanoeuvre their more traditional rivals. Both the Labour and Liberal Democrat parties had generally favoured schemes for greater regional self-government in England as their preferred response to the English Question. This position had become particularly vulnerable in political terms once the only referendum on regional assemblies, held in north east England in 2004, resulted in an overwhelming rejection. Both of these parties responded to the Conservatives' interest in the West Lothian anomaly by challenging the latter's unionist credentials, and instead promoted the decentralisation of powers to local and/or regional government. But, in a context where a rising sense of English national sentiment has been an especially powerful trend, this position lacked the resonance and popular connection that the Conservatives' focus upon English interests and sensibilities came to acquire.

In addition to this electoral interest, perceptions of EVEL were coloured by the suspicion that it was a device designed to ensnare a prospective Labour-led government at some point in the future. This is because, in recent years, the Conservatives have tended to be better represented among constituencies in England, while Labour has performed better in Wales and, until very recently, Scotland.

Having delivered his rhetoric about the need for English voices to be more clearly heard within the political system, Cameron established a cabinet committee chaired by William Hague to consider possible solutions to the West Lothian Question, and its focus quickly moved on to some of the technical and procedural complications associated with EVEL. Reflecting internal disagreements within the government – not only between the coalition parties but also on the Conservative backbenches – the government took the

<sup>15</sup> 'Do you agree or disagree that Scottish MPs should not be allowed to vote on England only laws?', <http://whatscotlandthinks.org/questions/do-you-agree-or-disagree-that-scottish-mps-should-not-be-allowed-to-vote-on-en-6#table> [accessed on 5 October 2016].

<sup>16</sup> 'Nick Clegg backs 'radical' English devolution plan', *BBC News*, 12 September 2014, <http://www.bbc.co.uk/news/uk-politics-29155854> [accessed on 5 October 2016].

unusual step of publishing a command paper that set out four different options for reform: three Conservative and one Liberal Democrat (Leader of the House of Commons 2014). The Labour party was also invited to participate, but declined.

The three Conservative options were based on the various proposals discussed above: one on Norton's Commission to Strengthen Parliament; the second on Clarke's Conservative Democracy Task Force; and the third a strengthened version of some of the McKay Commission's proposals.<sup>17</sup> The party plumped for the third of these, but was unable to secure support from the Liberal Democrats to put the matter to a vote in the Commons. In the 2015 general election campaign the Conservatives included the proposals in their UK and English manifestos (Conservative Party 2015a, 2015b). Following the party's election victory, the new government moved swiftly to implement its proposals, publishing draft standing orders in July.

Yet the suspicion that EVEL was being pursued for partisan reasons has hung over its implementation and legitimacy. While the dissolution of the coalition might have resolved the impasse on the government benches themselves, it did nothing to generate wider support for this reform. This is shown by the highly partisan breakdown of the final Commons vote to approve the changes, presented in Table 5. The very apparent lack of support outside the Conservative party for these rules has merely reinforced suspicions of their partisan character. As a consequence, the new EVEL standing orders lack the sense of legitimacy required of constitutional innovations if they are to become embedded features of the parliamentary system.

Supported only by one party in the Commons, the longer-term viability of this system depends upon persuading a wider range of political actors that some form of EVEL is now needed to renew the confidence of the English in the parliamentary process. While accusations of political self-interest have long accompanied moments of constitutional change in Britain, in previous cases – for instance Labour's devolution programme – momentous reforms have been quickly accepted by their one-time foes. But because EVEL was introduced by a single vote of the House – rather than through legislation – it could well be suspended in the same fashion. This prospect alone gives the reform a less durable appearance and raises the concerning prospect of governments of different political stripes introducing 'rules of the game' which they perceive to be most advantageous to their political interests. This is exactly the kind of situation which the British political system has, for the most part, previously managed to avoid. The legitimacy of this reform is able to command is therefore of central importance to its long-term survival.

Reflecting this lack of consensus, a series of objections have been made against EVEL, including the contentions that it will: politicise the office of the Speaker; create two classes of MP; undermine UK-level government; and is unacceptably complex and opaque. These criticisms deserve careful analysis, and we will return to them in chapter 3. But before we consider arguments for and against these procedures, it is necessary first to set out how the new processes are actually intended to work.

**Table 5: Party breakdown of Commons division to approve the EVEL standing orders, 22 October 2015**

|                                       | For EVEL   | Against EVEL |
|---------------------------------------|------------|--------------|
| <b>Conservative</b>                   | 312        | 0            |
| <b>Labour</b>                         | 0          | 200          |
| <b>Scottish National</b>              | 0          | 54           |
| <b>Democratic Unionist</b>            | 0          | 6            |
| <b>Liberal Democrat</b>               | 0          | 3            |
| <b>Plaid Cymru</b>                    | 0          | 3            |
| <b>Social Democratic &amp; Labour</b> | 0          | 3            |
| <b>Ulster Unionist</b>                | 0          | 0            |
| <b>Green</b>                          | 0          | 0            |
| <b>UK Independence</b>                | 0          | 0            |
| <b>Independent*</b>                   | 0          | 1            |
| <b>Total</b>                          | <b>312</b> | <b>270</b>   |

\* Lady Sylvia Hermon.

<sup>17</sup> The Liberal Democrat submission argued that any new England-only stage should represent parties in proportion to their vote share in England, rather than in proportion to their number of MPs.

## 2. The new EVEL procedures explained

The EVEL reform introduced by the government in October 2015 has been much caricatured and misunderstood, in part as a consequence of its complex character. In this chapter we present a brief explanation of how the EVEL procedures work. In doing so, we give particular emphasis to one of EVEL's key features: the 'double veto'. Put simply, this means that both English (or English and Welsh) MPs, on the one hand, and the whole House, on the other, have the power to veto legislation that applies exclusively to England (or England and Wales). As such, both groups of MPs must support such a provision for it to be passed by the Commons. This important characteristic of the EVEL system has not been sufficiently appreciated by most commentary on it.

### Certification process

The EVEL procedures implement a series of changes to the House of Commons' scrutiny of legislation that applies exclusively to a particular geographical area within the UK.<sup>18</sup> For these new stages and processes to occur, it is first necessary for somebody to determine whether or not a particular piece of legislation relates to a relevant part of the UK. Under the EVEL procedures, this process is conducted by the Commons Speaker, and is known as 'certification'. It is reminiscent of – although not identical to – the Speaker's existing certification responsibilities on bills that relate exclusively to Scotland, and also on money bills.<sup>19</sup>

The EVEL procedures apply to legislation that relates exclusively to one of three geographical areas: England; England and Wales; and England, Wales and Northern Ireland. The third of these is relevant only to Finance Bills (and related business), so we do not routinely refer to it in this report. The most high-profile type of legislation to which EVEL applies is government-sponsored primary legislation (i.e. bills, which if passed become Acts of Parliament).<sup>20</sup> On primary legislation, the Speaker must effectively break down the bill into 'units' and consider each for certification separately. These units are principally the *clauses* and *schedules* that make up the bill (and by extension whole *bills*) – plus, less frequently, *agreed amendments that change or eliminate an earlier certification decision* and *motions relating to Lords amendments and messages*. Aside from primary legislation, the most important other type of business on which EVEL applies is secondary legislation (i.e. statutory instruments, which generally take the form of 'regulations' and 'orders'). On secondary legislation, the unit considered by the Speaker is the instrument as a whole.

To issue a 'certificate', the Speaker must be satisfied that the entire unit in question (i.e. usually the clause, schedule, or statutory instrument) meets both elements of a two-part test: first, it applies exclusively to that part of the UK (excluding 'minor or consequential' effects); and second, that it would be within the power of at least one devolved assembly in a different part of the UK to make comparable provision. So, for example, for a clause to be certified as relating exclusively to England and Wales, the Speaker must be satisfied that

it applies only in England and Wales, and that the Scottish Parliament and/or the Northern Ireland Assembly would have the power to make equivalent legislation.

Several aspects of this process deserve emphasis. One is that the unit of legislation under consideration must meet both parts of the test – for example, a clause that applies only in England cannot be certified if the policy area is not devolved elsewhere. Another is that the entire unit in question must meet the test – so a clause or statutory instrument cannot be certified if even one element within it fails to meet both parts of the test. In addition, the Speaker cannot certify legislation as relating to any area other than the three listed above. When making his decisions, the Speaker relies on advice from a senior Commons clerk and legal experts in the Office of Speaker's Counsel. In addition, the government publishes its own advice, which necessarily informs these decisions, and the Speaker has indicated his willingness to receive representations from other interested parties.<sup>21</sup>

### The double veto

Once legislation has been certified, the most important change to the process is that MPs from England (or England and Wales) have the opportunity to veto it. This right is in addition to the whole House's existing veto rights, and for this reason we refer to EVEL as a 'double veto' system. As such, both English (or English and Welsh) and UK-wide MPs have the opportunity to veto certified legislation.

On primary legislation, the double veto is implemented through a fairly elaborate system of new legislative stages. Figure 2 gives a diagrammatic representation of the pre-existing process on primary legislation (in grey) and the new, additional EVEL stages (in red).<sup>22</sup> As shown, once a bill has been introduced, the Speaker conducts his initial certification. The bill then passes through most of its stages as usual (with the potential exception of committee stage, described below), with MPs from across the UK entitled to speak and to vote. Consequently, even on a bill certified as England-only, MPs from across the whole UK have the opportunity to amend the bill as they wish, including the chance to delete individual provisions or even to reject the entire bill outright.

<sup>18</sup> EVEL also applies to a small number of non-legislative items, notably certain reports that require parliamentary approval (which are automatically subject to EVEL without the need for certification: see Standing Order No. 83R).

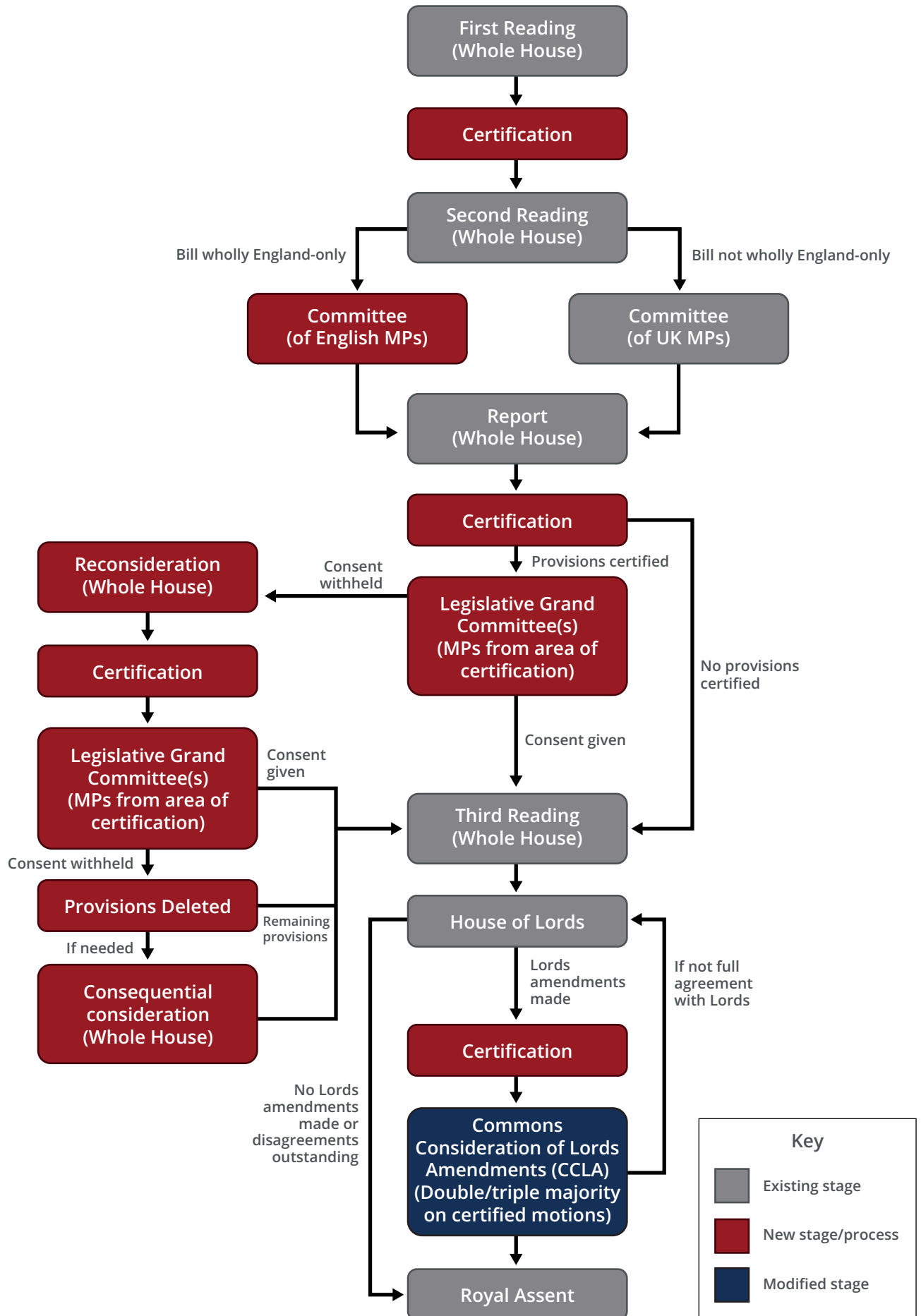
<sup>19</sup> For Scottish bills, see Standing Order No. 97. For money bills, see the Parliament Act 1911, section 1.

<sup>20</sup> EVEL does not apply to private members' bills.

<sup>21</sup> The government's advice is usually published on the relevant bill's page on the parliament website and/or deposited in the House of Commons Library.

<sup>22</sup> Strictly speaking Figure 2 shows a Commons-starting bill; the process for Lords-starters is almost, although not exactly, identical.

**Figure 2: The EVEL process on primary legislation**



At the conclusion of report stage (the final stage during a bill's initial Commons passage at which it may be amended), the Speaker is required to re-examine the bill and certify any clause or schedule that meets the two-part test, plus any amendments passed by MPs that resulted in a change to his initial certification decisions. If at this point the bill includes any provision certified by the Speaker, this triggers the need for new 'legislative grand committee' stages, which are the mechanism through which the English (and/or English and Welsh) veto may be exercised.

A legislative grand committee stage is held for each territorial area identified in the certification, and comprises all MPs representing constituencies in the area in question (others may attend and speak, but not vote). So, for example, a bill with certain clauses certified as relating to England and Wales, and others to England, will hold legislative grand committees for each of these areas in succession. In principle, these stages enable MPs from the areas concerned to debate the relevant provisions.<sup>23</sup> However, the primary purpose is to give them the opportunity to 'consent' to the certified provisions, including, if necessary, through formal votes. If the consent motion is passed, the bill moves to third reading as usual. But if consent is withheld, this triggers a series of new stages to resolve any conflict, most importantly a new 'reconsideration' stage to allow UK MPs to propose a compromise. If consent is withheld a second time, the English (or English and Welsh) veto is automatically applied, and the certified provisions are deleted from the bill.<sup>24</sup> Any non-certified provisions, along with others on which consent was given, then pass to third reading stage, at which MPs from the whole UK may vote on whether or not to approve the bill in its final form. This series of stages means that a certified provision cannot be passed by the Commons unless approved both by the whole House and by the relevant subset of MPs.

In other cases, a simpler way of implementing the double veto applies, whereby divisions require a 'double majority' to pass. Under this procedure, in any division a majority of both UK MPs and those representing constituencies in England (or England and Wales) must vote in support of a proposal for it to be approved. This applies on primary legislation at the 'Commons consideration of Lords amendments' (CCLA) stages, which occur if the Lords makes amendments following a bill's initial passage through the Commons. The Speaker is required to examine motions relating to Lords messages and amendments at each CCLA stage, and to certify any that meet the two-part test. If any such motion is put to a division, double majority voting is required.<sup>25</sup> Double majority voting also applies on certified secondary legislation that is put to a division.

## Discussion of the double veto

Many of these mechanisms draw on the recommendations of the independent McKay Commission (2013), which we outlined in chapter 1. However, whereas the McKay Commission intended them to facilitate expression of England's voice, they have been adapted by the government to provide for a hard veto right. For example, the central innovation of the legislative grand committee is very similar to the 'English grand committee' proposed by the McKay Commission. Both mechanisms were intended to debate 'consent motions' but, under the McKay Commission's proposals, the English grand committee's consent vote was intended to be advisory, held prior to the second reading stage, allowing the whole House to decide whether or not to accept English MPs' decisions. Likewise, the use of double majority voting in the Commons is comparable to the 'double-count' proposed by the McKay Commission – but the McKay Commission explicitly rejected the notion that both groups of MPs should be required to support the motion for it to pass.

Nevertheless, the double veto system introduced by the government does provide more limited rights to English (or English and Welsh) MPs than some of the other models for EVEL discussed in chapter 1. Most notably, it does not go as far as the recommendations of the Commission to Strengthen Parliament (2000), which essentially amounted to an England-only legislative process on certified legislation. It is also arguably more limited than the Conservative Democracy Task Force's (2008) proposals, which restricted UK-wide MPs to vetoing the entire bill, rather than (as in the current reform) also having the power to amend specific legislative provisions.

## England-only committee stage

The new standing orders involve one further important institutional innovation. If every clause and schedule of a bill is certified by the Speaker as relating exclusively to England, its committee stage will be taken by a committee composed only of MPs representing constituencies in England and reflecting the party balance in that part of the UK. No comparable provision is made for England and Wales-only bills. This aspect of the EVEL system does not constitute a veto right for English MPs, because any changes made by this committee may in principle be overridden by UK-wide MPs at report stage.

<sup>23</sup> Substantive debate is only possible in the first of the committees, which is always the committee relating to the largest territorial area of certification, but this debate may relate to any of the consent motions to be moved.

<sup>24</sup> The removal of these provisions may result in inconsistencies within the legislation; a new 'consequential consideration' stage allows these to be corrected.

<sup>25</sup> Such motions may also be certified as relating to both England and England and Wales, thus requiring a 'triple majority'.



# 3. Evaluating EVEL

The introduction of EVEL in the Commons has proved highly politically contentious. As yet, there is little sign of any prospective cross-party consensus in favour of it, and this partly reflects the ingrained suspicion that it is motivated primarily by partisan considerations. Some of the complaints about it, however, also reprise more substantive concerns about this type of reform, and may also signal a lack of clarity about what precisely EVEL is supposed to achieve.

In this chapter we evaluate the version of EVEL introduced by the government in the context of a series of arguments made both in support of, and against, such a reform. The chapter is divided into two main parts. In the first part, we assess two justifications for introducing this kind of change, and assess the government's proposals against them. In the second, we evaluate the reform in light of some of the most common criticisms that are made against EVEL, including by drawing on empirical data we have gathered about how EVEL operated during its first 12 months in force. Ultimately, we conclude that the system introduced by the government can be regarded as a positive innovation, and that some of the most common criticisms made of it are at least partially answered by the double veto that is central to it. But we also argue that the government's reform suffers from a number of more specific weaknesses. These arguments provide the basis for chapter 4, in which we make more detailed proposals for improving the working of this new system.

## The main justifications for EVEL

As discussed in chapter 1, the idea of compensating for England's anomalous status through changes to Westminster representation has, in broad terms, commanded increasing support in England. But there is a considerable disjuncture between support for this general principle and the technical challenges associated with its institutionalisation. In this section we identify two forms of justification: first, as a pragmatic response to new territorial pressures in the wake of devolution, designed to bring greater stability to the political system and to head off potential English grievance; and, second, as a principled commitment to the notion that all four parts of the UK should be treated equally in procedural terms, and that the English deserve the same basic rights of self-government now accorded to other nations within the UK. In making this distinction, we are not claiming that these two arguments are necessarily mutually exclusive: they are in fact often made together. But they do, nevertheless, point in subtly different directions in terms of the detailed institutional mechanisms which EVEL involves. An important point arising from our analysis is that any attempt to introduce this constitutional innovation needs to be founded upon a clear understanding of the ulterior purpose behind it.

### EVEL as a pragmatic response to new pressures

The most widely aired and well established argument for the introduction of EVEL focuses on the sense of grievance that has been, or might yet be, generated among the English by the devolution settlements. Following the introduction of devolution elsewhere, England's anomalous position has become

more visible. Specific episodes, such as the Commons votes highlighted in chapter 1, have played a part in this. But it has also occurred through a greater awareness of policy divergence across the different parts of the UK, as well as the growing conviction among some of the English that devolution has cemented the disadvantageous position of England within the UK. In the years after its introduction, devolution was often framed in the London media in relation to the costs that English tax-payers were being asked to bear so that the Scots could enjoy benefits such as a more generous healthcare system than their counterparts south of the border. And, as we have seen, there has been a shift in popular opinion in England on aspects of the post-devolved union, including the question of voting arrangements at Westminster.

In response to the emergence of this sharper mood in England, the argument has increasingly been made that further incremental change to the UK's territorial constitution – this time for the English – was now necessary in order to protect the stability and integrity of the post-devolution constitution. Indeed, several of the proposals for EVEL discussed in chapter 1 – in particular those made by Clarke and McKay – reflected this kind of argument. Thus, Kenneth Clarke's 2008 proposal for a form of EVEL was justified as a failsafe designed to prevent governments passing legislation that was fundamentally objectionable to the English. As he put it in an interview with one of the authors, conducted in 2008, this was 'a sensible constitutional change' designed to 'nip that [English nationalism] in the bud' and to complete the unfinished business of devolution. He added:



*If there is, in the middle of what I regard as a load of silly attitudes, a genuinely slightly niggling point that has substance, then remove it, because there is always a risk that something dramatic might happen when something very unpopular is imposed on the English by a parliament in which the majority of English MPs voted against it. (Kenny 2014:223)*

In a similar vein, Sir William McKay, chair of the McKay Commission, described his commission's approach as being 'cautiously to move forward. We never thought we were rewriting the constitution for the next two centuries, just getting round the corner that we are at' (Scottish Affairs Committee 2015b:13).

The idea that some form of pragmatic rebalancing was needed has been quite widely echoed. Former First Minister for Scotland Henry McLeish, in his evidence to the Calman

Commission in 2008, suggested that the English needed a voice, and the current system of asymmetrical devolution could no longer be sustained. He argued: 'We must move towards a balanced, quasi-federal framework of which we can make sense rather than the English feeling aggrieved and their grief and anger spilling over on to us' (cit. in Kenny 2014:209). Similarly, the Scottish Affairs Committee in 2006 – then dominated by Scottish MPs and chaired by Glasgow Central Labour MP Mohammad Sarwar – reported its 'concern' at 'signs that English discontent' in relation to the West Lothian Question, and recorded its 'hope that the matter will be comprehensively debated, and resolved, before the situation is reached whereby it could actually undermine the whole devolution settlement' (Scottish Affairs Committee 2006:15).

Those who have made this kind of precautionary case for reform have tended also to be mindful that, although there may be benefits to change, there may also be risks to achieving it in a way that infringes some of the long-established conventions and practices of the UK parliament. On this view, it is vital that any such reform appears consonant with the ethos of the House, and represents an evolution of its practice – rather than the introduction of an alien set of rules that might jeopardise its standing as a union-wide chamber and impinge upon the equality of all its members. Broadly put, this kind of argument is entirely congruent with the whiggish commitment to evolutionary, adaptive change that has been central to the ethos of the British parliamentary system, and has been used on various prior occasions to justify important reforms to the voting system or parliamentary practice. In this sense, EVEL can be, and has been, presented as a measure designed to ensure the longer term stability of the union.

### **EVEL as principled commitment to procedural equality**

A subtly different justification for EVEL evokes a different principle. Rather than treating EVEL as an incremental adjustment designed to stave off real or anticipated grievance, this perspective is committed to reform as a way of ensuring procedural equality between the four parts of the UK. On this view, devolution has resulted in the three non-English parts of the UK being accorded institutions and rights – most visibly, in separate legislatures and executives – that England has hitherto been denied. Moreover, devolution is seen to have compromised the integrity of the UK-level institutions that govern England by removing the reciprocity that previously characterised territorial relations between the different parts of the UK. The West Lothian Question is a totemic example of this new relationship. According to this perspective, while there may have been only a small number of cases when the West Lothian anomaly has become apparent, its persistence represents a considerable infringement of English rights, and symbolises for many the state's indifference to the interests of its majority English population. The moral case for change here is less about the perils of inaction, and much more about a demand for procedural justice.

In its purest form, this justification leads towards demands for a more symmetrical devolution settlement across the UK. For some, it underpins an argument for the establishment of an English parliament and executive, on the basis that this is what other peoples in the UK now enjoy. However, relatively few senior Conservatives adopt a purist interpretation of this principle, and for most proponents the priority is to deal with the potential for English disadvantage rather than achieve symmetry – a goal which is widely viewed as incompatible with the survival of the UK. This kind of argument has underpinned calls for a particularly robust version of EVEL. Conservative backbencher John Redwood, for example, has argued that as a component of 'justice for all parts of the UK in a new settlement', England-only legislation should now be dealt with only by English MPs. The question of procedural fairness was central to his case:



*In a world in which the Scottish Parliament gets to vote on how all the money for Scottish local government should be allocated by Council and function, surely English MPs should have the same power over the lump sum that the UK Parliament has voted for English local government? As the Scottish Parliament makes all the decisions on the NHS in Scotland once the overall budget has been set by the UK Parliament, shouldn't English MPs alone make similar decisions for the English NHS?<sup>26</sup>*

This sort of justification potentially leads in a rather different direction to the incrementalist one outlined above. In the wake of devolution, a new constitutional principle has in many eyes been tacitly conceded: the idea of the union as a voluntary association of free nations. Whether this understanding sits easily with the constitutional tradition of parliamentary sovereignty remains a moot point in legal and political terms. But the increasingly widespread acceptance of this principle, and its application to the English situation, carries important legal and constitutional implications. The argument against this particular procedural injustice lends itself naturally to an attempt to amend parliamentary processes in order to ensure that England's disadvantage is removed. In institutional terms, it points towards solutions that seek to eliminate the anomalies in rights between the four parts of the UK – potentially resulting in institutional solutions that stand at some remove from traditional interpretations of parliamentary government in the UK. The assertion of the equal treatment of all nations within the union is a less familiar, and – for the Westminster system – rather heterodox constitutional argument. But it has gained considerable credence and growing legitimacy within British politics.

<sup>26</sup> John Redwood, 'England wants to get EVEN. Now Hague must ensure that it does', *Conservative Home*, 2 February 2015, <http://www.conservativehome.com/platform/2015/02/john-redwood-mp-england-wants-to-get-even-now-hague-must-ensure-that-it-does.html> [accessed on 29 September 2016].

## Evaluating arguments for EVEL

Broadly put, these represent two distinct justifications for introducing some variant of EVEL. In practice advocates frequently draw on, or mix aspects of, both, and they may also derive different institutional conclusions from the same principle. But there are some connections between argument and institutional preference which are notable, and have been a recurrent pattern in these debates. The first kind of justification points towards a reform that is intended to remain congruent with the established ethos and conventions of parliament. The second tends to allow space for a more wholesale solution which is intended to reflect the overriding goal of procedural equality for England.

Cameron's statement on the morning after the referendum can be interpreted as broadly consistent with the precautionary approach associated with the first justification identified above. Such thinking continued to flow into the case made by government, as for instance when Chris Grayling, then Leader of the Commons, contended that EVEL represented a 'relatively modest step that [...] provides a balance of fairness across the Union'.<sup>27</sup>

Yet, the second kind of justification has also made an appearance in the government's case. In his speech after the Scottish independence referendum result, Cameron drew attention to procedural asymmetry, arguing that 'just as Scotland will vote separately in the Scottish Parliament on their issues of tax, spending and welfare, so too England, as well as Wales and Northern Ireland, should be able to vote on these issues'.<sup>28</sup> This kind of argument has been accompanied by the suggestion that the English now deserved their own devolution, which EVEL has now delivered. For example, Chris Grayling argued in the Commons that EVEL would 'enable us to give an answer to the West Lothian question and to our constituents by saying that England will have its own piece of the devolution settlement'.<sup>29</sup> But such a conviction, which borrows more from the second position outlined above, is arguably out of kilter with the kind of reform which the government envisaged, and which it has delivered.

Strictly speaking, EVEL does not eliminate the West Lothian anomaly. To do so would require the establishment of an English body comparable to the devolved legislatures – for example an English parliament – with the power to pass, and not only to block, legislation for England. Instead, EVEL implements the more modest ambition of a veto right. Rather than being equivalent to devolution itself, this veto right is comparable to one specific element of the devolved settlements: the 'Sewel convention', under which the UK parliament will not normally legislate on devolved matters without the consent of the devolved bodies. This is given expression through the practice of the devolved legislatures passing 'legislative consent motions' to signal assent to Westminster legislating in devolved areas. EVEL is best understood as an attempt to mirror this specific element of devolution, by allowing English (or English and Welsh) representatives similarly to consent to decisions taken at the UK level – although, unlike in the Sewel convention, there is within EVEL no explicit acknowledgement that this veto right should apply only 'normally'.

This basic lack of clarity about what EVEL is designed to achieve, and the tendency to muddle the precautionary argument for incremental change with more ambitious rhetoric about some kind of equivalent devolution for England, has done much to cloud understanding of the nature of, and rationale for, the new procedures. A tendency to 'over claim' regarding the implications and character of EVEL may well store up difficulties of expectation and understanding over the longer term.

One further feature of arguments for EVEL is also worthy of note. Debate about the English Question, and its potential resolution, has tended to lean heavily on the assumption that the legislative process is the place where concerns about English representation and governance can best be addressed (hence the widely held assumption that solving the West Lothian Question is the most effective way to answer the much wider English Question). Yet the anomalies associated with the UK's devolution settlement extend far beyond voting rights in the legislature. Indeed, given that a good deal of the actual governance of England is undertaken by the departments of central government (as well as a variety of local, city, county and regional authorities), there is much to be said for broadening the focus of any enquiry into how England is governed beyond the West Lothian conundrum. It may well be that the new system of EVEL is a prelude to arguments about additional changes to the way in which England is governed, and not just how legislation is produced. Such a focus might lead to the consideration of reforms directed at processes and institutions that lie further 'upstream' in the governing process – including, for instance, the remit, operation and naming of Whitehall departments whose remit is effectively English only. The current and previous government's interest in decentralising some powers to authorities within England is also an important aspect of this agenda.

Seeking to provide a legislative veto is, however, also clearly important – in part because West Lothian-related anomalies may drain the well of tacit consent upon which the legitimacy of the Westminster parliament depends. Ensuring that the English feel that there are spaces for their representatives to consider issues that impact in distinct and substantive ways upon England ought to be a clearer ambition for any system of EVEL – a point to which we return below.

More generally, there is a strong case for the government clarifying its overarching goals in relation to this new system, and linking these more clearly to the changes it has introduced. Some of the confusion which attaches to the new standing orders may be the result of a lack of clarity about purpose and communication on the government's part. Over the longer term, EVEL will come to be more widely understood and accepted if its introduction is informed by a clear account of the merits and purposes of the union and also the need for a clearer English dimension within its political structures. But presenting the new veto as a complete equivalent to devolution elsewhere is both misleading and likely to generate expectations that cannot be met. Instead, depicting EVEL as one element within an evolving constitutional system would better establish in the popular mind, and among MPs, the purposes, remit and potential limits of these new

<sup>27</sup> HC Deb 15 July 2015, column 940.

<sup>28</sup> 'Scottish Independence Referendum: statement by the Prime Minister', 19 September 2016, <https://www.gov.uk/government/news/scottish-independence-referendum-statement-by-the-prime-minister> [accessed on 29 September 2016].

<sup>29</sup> HC Deb 22 October 2015, column 1184.

procedures. Indeed, making and communicating a clear, principled argument for EVEL is in some ways as important as recalibrating its precise design and application.

## Evaluating arguments against EVEL

In addition to these arguments in support of reform, EVEL has been the subject of a series of objections – both of principle and in relation to some of the specific features of the scheme introduced by the government. While the majority of EVEL's critics contend that the government's reform goes too far in its institutionalisation of an English veto, a minority make the opposite case. It is beyond the scope of this report to evaluate every possible objection to EVEL. Instead, we focus on five of the most important and familiar complaints: that its operation will inevitably politicise the office of the Commons Speaker; that it has created two classes of MP; that it will undermine UK-level government; that it has failed to facilitate expression of England's voice; and that the procedures as implemented are unnecessarily complex. In assessing these objections we draw on a range of evidence, including empirical data about how EVEL worked during its first 12 months of operation.

### Politicisation of the Speaker

An obvious place to begin is with the certification process, through which the Speaker identifies legislation on which the EVEL procedures should apply. Given the fears that some critics have about the consequences of EVEL for parliament and government (which we will turn to below), it has been argued that the certification process might politicise the office of Speaker, potentially compromising his or her ability to act as an impartial arbiter of debate in that chamber. The SNP's Pete Wishart, for example, has argued that the Speaker's responsibility to certify legislation will place him in an 'intolerable and politically invidious situation'.<sup>30</sup>

In broad terms, certification may well place the Speaker in an uncomfortable position. MPs from across the UK may feel very strongly that a specific provision should – or should not – be certified as relating exclusively to a particular territorial area. But it is also important to emphasise that the office of Speaker already requires extensive, and sometimes contentious, political judgement, and Commons procedures place considerable authority in the hands of its occupant. As a consequence, the Speaker routinely takes decisions that have a substantive effect on proceedings and outcomes, including: the selection, or not, of amendments (which can in principle affect the final text agreed by the Commons); the granting of urgent questions; and the certification of legislation as a 'money bill' (which severely limits the ability of the Lords to scrutinise it). Requiring the Speaker to certify legislation under EVEL may be a different order of responsibility, in that it affects the voting rights of a territorially-based subset of MPs; but it does not appear to represent a fundamental breach with established practice.

During EVEL's first 12 months of operation, the Speaker certified provisions of nine bills. This represents around half of the 20 bills that were eligible to be considered for certification. As shown in Table 6, the extent of certification varied significantly across bills, ranging – at the initial certification prior to second reading – from just one clause on the Energy Bill, to 148 clauses and schedules on the Housing and Planning Bill, and all 17 clauses of the Charities (Protection and Social Investment) Bill. Once broken down into individual certifiable units of legislation, over a fifth of clauses and schedules were certified prior to second reading. In addition to primary legislation, the Speaker certified around 30 pieces of secondary legislation (listed in Appendix B), representing approximately a fifth of all affirmative statutory instruments laid before the Commons during this period.<sup>31</sup> These figures make clear that a significant minority of legislative provisions have been certified by the Speaker, and that on certain bills certification was extensive.

**Table 6: Certification prior to second reading on primary legislation, as a proportion of the total considered, October 2015–October 2016**

|  | Clauses & schedules in bill | Clauses & schedules certified | % of clauses & schedules certified | Area of certification |
|--|-----------------------------|-------------------------------|------------------------------------|-----------------------|
| <b>Housing and Planning Bill</b>                         | 156                         | 148                           | 95%                                | E, EW                 |
| <b>Childcare Bill</b>                                    | 9                           | 3                             | 33%                                | E                     |
| <b>Charities (Protection and Social Investment) Bill</b> | 17                          | 17                            | 100%                               | EW                    |
| <b>Energy Bill</b>                                       | 86                          | 1                             | 1%                                 | EW                    |
| <b>Enterprise Bill</b>                                   | 44                          | 6                             | 14%                                | E, EW                 |
| <b>Policing and Crime Bill</b>                           | 124                         | 69                            | 56%                                | E, EW                 |
| <b>Finance (No. 2) Bill</b>                              | 204                         | 10                            | 5%                                 | EWNI                  |
| <b>Higher Education and Research Bill</b>                | 125                         | 8                             | 6%                                 | E                     |
| <b>Neighbourhood Planning Bill</b>                       | 38                          | 32                            | 84%                                | E, EW                 |
| <b>All eligible bills (20 in total)</b>                  | 1317                        | 294                           | 22%                                | E, EW, EWNI           |

Key: E (England), EW (England and Wales), EWNI (England, Wales and Northern Ireland).

Notes: Bills listed are those with provisions certified. Eligible bills are those that were eligible to be considered by the Speaker for certification. Ineligible bills include those whose Commons second reading took place before 23 October 2015, private members' bills, and Consolidated Fund or Appropriation Bills. Figures also exclude bills that were not considered for certification by 22 October 2016. Data refers to the version of the bill as introduced in the Commons or brought from the Lords, and to the initial certification prior to second reading.

<sup>30</sup> HC Deb 2 July 2015, column 1651.

<sup>31</sup> Only those statutory instruments subject to the affirmative procedure (of which 29 were certified) are automatically considered for certification.



Despite this, the Speaker's decisions have not, during the first 12 months of EVEL's operation, provoked any significant controversy. On a very small number of occasions MPs sought to clarify on the floor of the House the rationale behind the Speaker's certification decisions – in particular Tasmina Ahmed-Sheikh and Lady Sylvia Hermon at different stages of the Housing and Planning Bill.<sup>32</sup> Yet on neither occasion did these questions develop into serious political disquiet. Subsequently, MPs expressed concerns about how EVEL was applied on particular pieces of legislation, often related to indirect effects of the legislation upon other parts of the UK.<sup>33</sup> On the Charities (Protection and Social Investment) Bill, for instance, Lady Sylvia Hermon argued that many charities operating in her constituency in Northern Ireland had their headquarters in England, with the implication that they (and consequently her constituents) would be affected by the legislation.<sup>34</sup> However, these have generally been presented as objections to the principle of EVEL itself rather than to the Speaker's conduct in certifying legislation. In his evidence to the Commons Procedure Committee in October 2016, Pete Wishart acknowledged that 'thus far there has been no issue because I believe the Speaker has gone about this business diligently and responsibly' (Commons Procedure Committee 2016:5).

That the Speaker has not during this period found his decisions to be the focus of political controversy is partly a reflection of broader factors: so far the legislation certified has not been the subject of serious territorially-based political disagreement, and the current composition of the House means that certification decisions were unlikely in any case to affect legislative outcomes. But it is also in part because the Speaker's authority is well established within the ethos of the Commons. Thus far there are few signs that certification decisions will damage the Speaker's standing, even where MPs disapprove of the EVEL procedures.

An additional important observation concerns the Speaker's decisions themselves. On a number of occasions, the Speaker has arrived at different conclusions to those anticipated in published government advice. The most extensive disagreement occurred on the Higher Education and Research Bill. The government's explanatory notes indicated that 71 of this bill's 125 clauses and schedules prior to second reading met the two-part certification test; in fact, the Speaker certified only eight of them. The reason for this disagreement centred on whether an 'English higher education provider' – defined in the bill as a provider whose activities are carried out 'principally' in England – met the test of applying only to England. The Childcare Bill was similarly expected by government to be certified as wholly England-only, but the Speaker certified only particular clauses. In this case, the cause of disagreement with the government was

that the bill contained provision relating to HMRC on which, as a reserved matter, a devolved legislature could not have made comparable provision. We are aware of similar apparent discrepancies between the government's advice and the Speaker's certification decision on the Housing and Planning Bill,<sup>35</sup> the Enterprise Bill,<sup>36</sup> the Policing and Crime Bill,<sup>37</sup> and the Digital Economy Bill.<sup>38</sup>

These early disagreements are important for two main reasons. First, they show that certification decisions are sometimes going to be hard to make. Indeed, such decisions may well become more complicated as the UK's devolution settlements continue to expand and evolve. Written rules always require a degree of interpretation when applied to real-life scenarios, and so it is unsurprising that differences of opinion have occurred. The potential for future disagreement is therefore real, and there is nothing in principle to prevent this arising on legislation that is the focus of intense political controversy. Second, the first year of EVEL's operation has helped demonstrate the impartiality and independence of the Speaker as a neutral arbiter of the system. When EVEL was first implemented, some questioned whether the government's publication of advice on the territorial application of legislation might mean, in effect, that 'the Speaker will be asked maybe just to rubber stamp' government decisions (Pete Wishart in Scottish Affairs Committee 2015a:11) – a situation that would have potentially resulted in the extension of executive influence over the legislature. As yet there is no sign that this has happened, and this may serve to protect the office of Speaker against future politicisation.

A related concern expressed by some is that the Speaker's decisions may be open to a different kind of pressure as a result of legal challenges. Parliamentary proceedings are protected from interference by the courts under Article 9 of the Bill of Rights. Indeed, one of the main justifications given for implementing EVEL through standing orders, rather than by legislation, was the fear that the latter might increase the possibility of the operation of these rules becoming subject to judicial review.<sup>39</sup> Yet some commentators have argued that, even under the existing standing orders, the possibility of judicial interference is not entirely eliminated. This is largely because one of the two components of the certification test centres on whether a policy area is devolved to another part of the UK. This assessment is far more legally contestable than is sometimes assumed, potentially involving interpretations of convention rights and (for the time being) EU law. In relation to cases involving the devolved legislatures, disagreements over legislative competence may ultimately be referred to the Supreme Court.<sup>40</sup> Even if the Speaker's decisions were not directly challenged, it has been suggested that a court decision

<sup>32</sup> HC Deb 2 November 2015, column 719; 12 January 2016, column 805.

<sup>33</sup> E.g. Alan Brown, HC Deb 2 November 2015, column 747; Patrick Grady, HC Deb 19 January 2016, column 1308; Hywel Williams, HC Deb 19 January 2016, column 1312; Lady Sylvia Hermon, HC Deb 25 January 2016, column 75.

<sup>34</sup> HC Deb 26 January 2016, column 228.

<sup>35</sup> Initial certification on clauses 59, 71, 85 and 108-110; post-report certification on new schedule 3; and CCLA certification on Lords amendments 22 and 111.

<sup>36</sup> Initial certification on clause 25.

<sup>37</sup> Initial certification on clauses 28, 35, 63, 71 and 72; and post-report certification on clauses 7, 44 and 79.

<sup>38</sup> Initial certification on clause 38.

<sup>39</sup> Chris Grayling, HC Deb 7 July 2015, column 197.

<sup>40</sup> Most notably, the Supreme Court ruled, in opposition to the assessment of the UK government, that the Agricultural Sector (Wales) Bill 2013 was within the competence of the National Assembly for Wales.



could reveal a Speaker's certificate to have relied on an interpretation at variance with subsequent case law.

But the consensus among our interviewees was that direct challenge of the Speaker's rulings is unlikely. And it is worth noting that the double veto may provide an additional layer of protection that further limits the possibility of this scenario. This is because certified legislation continues to require majority support among all UK MPs, even where EVEL requires that English (or English and Welsh) MPs must also consent to it. Consequently, were the Speaker to take a decision subsequently contradicted in the courts, it is only possible for this certification decision to have resulted in legislation *not* having been passed by parliament when it would otherwise have been. Except in relation to the specific anomalies we highlight in chapter 4, EVEL cannot result in parliament passing legislation that it would otherwise have rejected. Moreover, any decision made by a legislative grand committee would subsequently have been effectively endorsed by the whole House at the bill's third reading. As a result, we are sceptical about the likelihood of the Speaker's decisions being directly challenged in the courts.

### Two classes of MP

A second complaint widely made about EVEL concerns the implications of providing a subset of MPs with the right to veto legislation made by the whole House. There has long been a fear that such a shift would infringe one of the foundational tenets of the union parliament: that all MPs have equal status and voting rights.

While the provision of a veto for English (or English and Welsh) MPs might be considered by some to be a pragmatic adjustment to devolution, it is also undeniable that it

represents a significant departure from established practice at Westminster. It is worth noting that EVEL is not the first occasion when some MPs have been accorded special rights based on the geographical location of their constituency.<sup>41</sup> Nor is it the first moment when participation in specific divisions has been restricted to particular MPs: divisions in committees of the House are routinely restricted to members of the committee, for example on public bill committees. But what does appear to be significant about these procedures is that they provide geographical subsets of the House with a potentially *binding* negative vote: if English MPs wish to veto a certified clause, the whole House cannot, under the terms of the standing orders, overturn that decision. It is because of this that opponents have argued that EVEL establishes 'two classes of Members of Parliament',<sup>42</sup> 'second-class MPs',<sup>43</sup> or even 'fourth-class citizens' of the Commons.<sup>44</sup> As a consequence, concerns have been expressed that EVEL might result in non-English MPs having a 'a second-class say' on matters that affect their constituents, on the basis that England-only legislation backed by the whole House may nevertheless be vetoed by a majority of MPs representing English constituencies – even if that legislation has indirect consequences outside of England.<sup>45</sup>

During the first year of EVEL's operation, no division conducted using its procedures produced a different result than would otherwise have applied, as is apparent in Table 7. This finding, however, needs to be understood in relation to the current political composition of the Commons and the nature of the legislation that has come before it. In order to assess the force of this particular objection, it is therefore necessary to look beyond the empirical evidence about how EVEL has so far operated, and consider some of the arguments over principle which it involves.

**Table 7: Number of Commons divisions subject to EVEL, October 2015-October 2016**

|  | Number of divisions | Number on which EVEL affected outcome | Area of certification |
|--|---------------------|---------------------------------------|-----------------------|
| <b>Divisions in legislative grand committee</b>    | 0                   | 0                                     | N/A                   |
| <b>Double majority divisions at CCLA</b>           | 9                   | 0                                     | E, EW                 |
| <b>Double majority divisions on other business</b> | 5                   | 0                                     | E, EW                 |
| <b>Total</b>                                       | 14                  | 0                                     | E, EW                 |

Key: E (England), EW (England and Wales).

Note: Data covers period from 23 October 2015 to 22 October 2016.

<sup>41</sup> For instance, the Commons standing orders state that the Scottish grand committee 'shall consist of all Members representing Scottish constituencies' (Standing Order No. 93(1)).

<sup>42</sup> Wayne David, HC Deb 7 July 2015, column 228.

<sup>43</sup> Alan Brown, HC Deb 22 October 2015, column 1223.

<sup>44</sup> Angus MacNeil HC Deb 15 July 2015, column 975. The 'fourth-class' is presumably a reference to Scottish Members not being included in any of the three territorial areas to which legislation may be certified.

<sup>45</sup> Ian C. Lucas, HC Deb 22 October 2015, column 1206.

The question of whether EVEL has created two classes of MP – particularly when viewed against the backdrop of a representative system that is already asymmetrical – is one that continues to attract debate. However, a central characteristic of the new standing orders, as indicated above, is that that they implement a double veto. While this does not necessarily rebut the argument that EVEL has created two classes of MP, it does mean that MPs from outside England (or England and Wales) are in no weaker a position to block legislative changes than they were previously: all legislation continues to require the backing of the whole House. They are, however, in a weaker position to force through legislation that applies only in England (or England and Wales) against the wishes of English (or English and Welsh) MPs.

Two cases during the current parliament illustrate the implications of the double veto very well. In July 2015 the government laid before parliament secondary legislation to relax fox hunting rules in England and Wales,<sup>46</sup> but a planned debate, to be followed by a vote to approve the legislation, was cancelled after the SNP confirmed that its MPs would oppose the move. Although this issue unfolded before EVEL came into force, the fact that the government did not subsequently return to the matter illustrates that this new process would not have enabled it to circumvent the SNP's opposition. The government ran into similar problems when attempting to relax Sunday trading rules in England and Wales through the Enterprise Bill. A Commons vote in March 2016 revealed majority support for the Sunday trading provisions among English and Welsh MPs, but not across the whole House, with opposition from Scottish MPs proving decisive.<sup>47</sup> As with the fox hunting vote, the EVEL procedures did not in fact apply, this time because the proposal had been drafted in such a way that it failed to meet the two-part certification test. Yet, even if the provision had been drafted differently, the legislation could not have been forced through by English and Welsh MPs: the double veto meant that the support of the whole House remained essential. It may well be that the limitations of the double veto will surface again in a future vote on the government's policy on grammar schools.

Certain policy decisions undoubtedly have consequences that carry across national borders. So, for example, Welsh constituents who live close to a border might be dependent on public services, such as a medical facility, that is located in England. But it is worth noting that the devolution settlements are premised on the understanding that direct effects have a special status. Some English constituents living close to a border are likewise reliant on public services operated by a devolved administration, yet are unable to elect representatives to influence those policy decisions. It is therefore hard to argue against an arrangement that gives priority to the direct effects of legislation. Indeed, at the level of principle, the insistence that even indirect effects in other territories necessarily invalidate any attempt to delineate legislation primarily applicable to England (or England and Wales) is questionable. Such an argument erodes the possibility of creating a meaningful distinction between direct and indirect consequences. There may well be good reasons

to deal with direct consequences as a matter of urgency or priority, and to regard indirect ones as still important, but potentially secondary in kind. Equally this kind of argument supports a long established indifference to another 'right' that is at stake here: that of English constituents whose interests can be overridden by legislators from other parts of the UK who are not accountable to them. At the same time, the disproportionate size of England relative to the other parts of the UK means that indirect effects from England are likely to have a greater impact on the non-English parts than *vice versa*, and the double veto provides an important protection to the non-English territories on this score.

One particularly contentious kind of cross-border effect concerns the so-called 'Barnett consequentials' generated by some legislation, whereby public spending in Scotland, Wales and Northern Ireland is adjusted by reference to spending in England under the 'Barnett formula'. The argument here is that policy decisions that affect the overall levels of spending in England may have financial implications for the other parts of the UK, and that it is therefore imperative for MPs from those territories to have the opportunity to vote on such matters. The First Minister of Wales, Carwyn Jones, has pointed to a hypothetical scenario in which a UK government's introduction a different funding model for the English NHS would result in a lower overall level of public spending and thus reduce the funding of the devolved bodies via the Barnett formula (Constitution Committee 2016:16). This is a particularly difficult form of cross-border effect, since it concerns consequences that are by definition not reciprocal, in that decisions taken by the devolved legislatures have no equivalent effect on English spending.

The extent to which the Barnett consequentials represent a meaningful objection to EVEL remains disputed, and they have been described by the former Leader of the House Chris Grayling as 'an illusion and a side issue' (Commons Procedure Committee 2015b:33). Strictly speaking, legislation on English policy matters does not directly change the overall level of expenditure in England (or, by extension, spending in other parts of the UK). As Gallagher (2012, 2015) correctly observes, government spending is authorised through the annual estimates and supply process, and indeed any spending commitment arising from policy legislation could, in principle, be met by reducing expenditure elsewhere (which might not necessarily require legislation) rather than through increasing overall expenditure levels. Moreover, the Barnett formula is an administrative mechanism and has 'no legal or constitutional status' (Gallagher 2012:23). Nevertheless, we disagree with the implication that Barnett consequentials are therefore irrelevant. It seems to us that legislative decisions can potentially carry consequences for overall levels of spending and, although spending is formally authorised through a separate process, the estimates process does not make it possible for MPs to increase the overall amount proposed by the government.<sup>48</sup> This means that legislation in fact provides the only real opportunity that MPs have to vote against a proposal that might well reduce the level of spending available to a devolved administration.

<sup>46</sup> The Draft Hunting Act 2004 (Exempt Hunting) (Amendment) Order 2015.

<sup>47</sup> For further discussion see Daniel Gover and Michael Kenny, 'Sunday trading and the limits of EVEL', *Constitution Unit blog*, 10 March 2016, <https://constitution-unit.com/2016/03/10/sunday-trading-and-the-limits-of-evel/> [accessed on 29 September 2016].

<sup>48</sup> Erskine May states: 'In accordance with the principle that only the Crown can initiate expenditure, no amendment to an Estimates motion is in order which seeks to increase a total amount sought' (Erskine May 24th edn. 2011:738).

Even so, we do not conclude that the Barnett consequential objection is ultimately convincing. This is because of the specific design of the version of EVEL introduced by the government, and in particular the incorporation of a double veto. As shown above, under this principle, certified legislation must be approved by both English (or English and Welsh) and UK-wide MPs for it to pass into law. MPs from outside England are therefore in no weaker a position under EVEL to block legislation that applies exclusively to England than they were previously. Returning to Carwyn Jones' example, a proposal to reduce public spending on the English NHS could be vetoed by the whole House (including its Welsh members), even if English MPs supported the policy.

A second difficult type of cross-border effect concerns the financial implications of English tax decisions. Under EVEL, provisions of the Finance Bill (which legislates for taxation) can be certified as relating to one of three territorial areas within the UK. However, as Gallagher (2015) observes, if a subset of MPs vetoes a certified tax provision, this may result in government adjusting expenditure in ways that affect the other part(s) of the UK (for example through a reduction in spending on reserved policy matters that apply to all four nations). As such, taxation decisions taken by one subset of MPs may spill over into spending consequences for other parts. The double veto does not protect against this form of indirect effect.

The provision of special veto rights to a subset of MPs within the union parliament does undoubtedly represent a significant constitutional development, and it does have the potential to disrupt existing parliamentary arrangements. And these aspects of EVEL need to be more fully acknowledged. But some of the concerns that are routinely raised against this change do not appear to be borne out. The government's decision to retain the right of all MPs to vote down legislation represents an important protection against some of these worries, offering a vital bulwark against the allocation of different substantive rights to different groups of MPs. And it is for this reason that we would suggest that the government consider very carefully elements of the new system that are potentially inconsistent with this foundational principle, a matter we return to in chapter 4.

### **Undermining UK government**

The provision of special voting rights to a subset of MPs has given rise to a third major criticism: that EVEL risks undermining the integrity of UK-level government. In this vein, it has been argued that under the EVEL standing orders, 'if a Government do not command a majority in England, it is doubtful that they could actually govern'.<sup>49</sup> It is not possible to assess this against empirical data relating to the new system's first 12 months of operation, as during this period the government commanded a larger majority among English MPs than across the whole House.

In the UK's parliamentary system, the government is accountable to, and ultimately dependent for its survival upon, parliament (and in particular the House of Commons). Any alteration to the voting rights of particular groups of MPs on some parts of the legislative programme would mean that

the size of the government's majority could vary depending on the policy area and its territorial application. Indeed, it is conceivable that one party could have a majority on some policy issues, and another on others. This has fed the fears of some commentators that EVEL might result in different parties being required to govern on different issues – a situation which constitutional scholar Vernon Bogdanor (2009) labels the 'bifurcation' of government. He posits a scenario in which '[m]inisters would have to switch rapidly to the opposition front bench when an English matter was under discussion, while the opposition front benchers would come to take their places on the ministerial benches' (Bogdanor 2009:102).

The possibility of this extreme form of 'bifurcated' government, in which an opposition with a majority of English MPs might effectively become the government in England, seems unlikely. This is particularly because it is hard to imagine an opposition party claiming the privileges of government within the Commons procedures. Even under the existing procedures, the government has various mechanisms it can employ to prevent the passage of legislation it opposes, including by denying it the Commons time it needs. Moreover, EVEL applies only on government-sponsored bills, and the government can restrict the potential for certain hostile amendments (or even potentially avoid certification) through the careful drafting of a bill. It also retains the power to withdraw its legislation if necessary. The double veto provides the government with further tools, as it means that the whole House – in which the UK government would presumably have a majority – would be able to block any specific amendments supported by the English majority. A UK government would only find itself unable to fend off such amendments if it were unable to marshal a majority of the whole House against them. But this would have been the situation irrespective of EVEL.

A more plausible scenario is that a UK government without a majority in England (or with a very slim majority there) may find itself unable to pass key aspects of its legislative agenda on England-only policy areas, such as health and education. The double veto does not protect against this eventuality. In such circumstances, it is likely that a UK government would be required to compromise on its legislative programme because of the balance of opinion among English representatives. In principle, this is little different to a situation in which a government lacks a majority among the whole House, and may indeed lead to the kinds of bargaining that might be seen as a welcome bulwark upon executive power. How effectively such an arrangement would work in practice, particularly given Westminster's often adversarial political culture, remains difficult to predict. A UK opposition with a majority in England could, if it so wished, make it very difficult for a UK government to legislate for England, and there is a risk that this could prove politically destabilising. Nevertheless, as Gallagher (2015) has argued, it is also the case that an inability to pass new primary legislation would not necessarily prevent a UK government from actually governing England, under powers conferred by existing legislation. Were the government to find itself unable to govern, it would also retain the ability to ask UK-wide MPs to suspend or even revoke the EVEL standing orders.

<sup>49</sup> Angela Eagle, HC Deb 15 July 2015, column 955.

There is, however, an important possible circumstance in which EVEL could pose even more serious difficulties for the UK government. As Gallagher (2015) observes, certain legislation effectively lapses if it is not regularly renewed by parliament. This is the case on certain types of secondary legislation, as well as income tax decisions that are implemented through Finance Bills. On such types of business, Gallagher argues that the provision of a veto means that a subset of MPs could effectively hold the UK government to 'ransom', as the exercise of a veto would result not in maintenance of the status quo but in there being no legislation at all. In the case of income tax, this would be highly destabilising, and suspension of the procedures might here prove the only solution. We return to this point in the subsequent chapter.

A separate, though related, concern raised by some about EVEL's impact on the UK government is that it might undermine the possibility of MPs from outside England holding key UK government positions, including the office of prime minister. It has been claimed that the provision of special voting rights to English MPs casts doubt on the legitimacy of an MP from outside that area leading the UK government that is ultimately responsible for English legislation. Hence, during the 2016 Conservative party leadership election, one anonymous party figure apparently briefed the media on the 'constitutional problem' of Stephen Crabb being elected: '[a]s a Welsh MP, he can't vote for English-only laws'.<sup>50</sup> Similarly, Scottish government minister Fiona Hyslop has argued that, '[p]olitically, you could not effectively in practice have a Scottish Member of Parliament ever becoming Prime Minister' (Constitution Committee 2015:19).

In assessing this claim, it is important to distinguish between the EVEL procedures themselves and any wider political dynamics. In terms of the former, EVEL does not make it procedurally more difficult for an MP from outside England to become prime minister. The office of prime minister is held by the person judged to command the confidence of the House of Commons. This is determined chiefly by the political balance across the House of Commons, and EVEL does not disrupt this principle. Nor does EVEL affect the usual functions of the premiership: EVEL primarily concerns the passage of legislation, and the prime minister is not typically involved in piloting legislation through the Commons. In terms of the wider political situation, however, it is clear that the territorial dimensions of British politics have become increasingly prominent in recent years, and this may factor into the decisions parties make when they elect their leaders. It is possible that EVEL may reinforce this political trend, to the extent that the certification process makes explicit that certain legislation applies only in England. But it should also be recognised that the normative principles that underpin EVEL – particularly as expressed through the double veto – do actually affirm that even certified legislation is of legitimate interest of all UK MPs. The claim that an MP from outside England has no right to lead a government that legislates for England is therefore significantly at odds with the rationale behind the EVEL procedures.

## A lack of voice for England

A fourth criticism is that EVEL has failed to facilitate expression of England's 'voice' in parliament. This complaint has so far been less widely aired in popular debate, but is in our estimation one of the most serious potential weaknesses of the new system. The distinction between voice and veto was central to the McKay Commission's report, and was highlighted in a subsequent report by Roger Gough and Andrew Tyrie (2015) for the Centre for Policy Studies.

Speaking on the morning after the Scottish independence referendum in September 2014, David Cameron contended that 'now the millions of voices of England must also be heard'. He went on to connect this idea to 'the so-called West Lothian question' and the right of English (alongside Welsh and Northern Irish) representatives to vote separately on policy decisions that apply only in those parts of the UK.<sup>51</sup> In making this argument, Cameron essentially conflated the case for providing England with a voice with that for veto. It is certainly reasonable to see a close connection between them, and indeed voting may be one of the mechanisms through which voice is expressed. But it is in fact much harder than is usually realised to promote both through a single institutional reform.

Following Cameron's lead, the EVEL procedures have effectively prioritised veto over the establishment of a deliberative space for the English. This is apparent from a consideration of the operation of the new legislative grand committee stage introduced by the new procedures. As already noted, the McKay Commission (2013:55) recommended the establishment of a very similar mechanism – an English grand committee stage – and argued that 'few other procedures would demonstrate more clearly outside the House what was being done to meet the demand'. Under the McKay Commission's recommendations, this stage would have been held prior to second reading, rendering it the site of the first Commons debate on any affected bill. In order to bolt down a comprehensive veto right, however, under the current system the equivalent stages are held at the end of a bill's Commons passage, when most scrutiny and debate has already taken place.

There has consequently been very little demand to conduct any substantive debate in these English stages. Indeed, as shown in Table 8, the legislative grand committee stages have so far been almost entirely perfunctory. Most have lasted around two minutes, and have been almost invisible within the legislative process. During the first year of operation, only two bills had legislative grand committee stages that lasted for any significant length of time – specifically 43 minutes on the Housing and Planning Bill, and 14 minutes on the Charities (Protection and Social Investment) Bill. In both cases, much of the time taken was by MPs from outside England questioning aspects of the new procedures.<sup>52</sup> And, while in principle the consent votes could have formed part of the expression of England's voice, there has not as yet been a division in the legislative grand committee stages. Any hope that this mechanism might have added a sense of English voice to parliament has therefore been confounded.

<sup>50</sup> David Williamson, 'Politicians are furious at claims senior Tories are briefing Stephen Crabb can't become PM because he's a Welsh MP', *WalesOnline*, 5 July 2016, <http://www.walesonline.co.uk/news/politics/politicians-furious-claims-senior-tories-11566969> [accessed on 29 September 2016].

<sup>51</sup> 'Scottish Independence Referendum: statement by the Prime Minister', 19 September 2016, <https://www.gov.uk/government/news/scottish-independence-referendum-statement-by-the-prime-minister> [accessed on 29 September 2016].

<sup>52</sup> As explained in chapter 2, although only MPs from the relevant territory are members of the committee and may vote, all UK MPs are entitled to speak.



**Table 8: Length of legislative grand committees and number of speakers, October 2015-October 2016**

|  | LGCs      | Length (mins) | Participants |   |   |    |    |
|--|-----------|---------------|--------------|---|---|----|----|
|  |           |               | E            | S | W | NI | UK |
| <b>Housing and Planning Bill</b>                         | 2 (EW, E) | 43            | 13           | 3 | 1 | 1  | 18 |
| <b>Childcare Bill</b>                                    | 1 (E)     | 2             | 0            | 0 | 0 | 0  | 0  |
| <b>Charities (Protection and Social Investment) Bill</b> | 1 (EW)    | 14            | 3            | 0 | 0 | 1  | 4  |
| <b>Energy Bill</b>                                       | 1 (EW)    | 2             | 0            | 0 | 0 | 0  | 0  |
| <b>Enterprise Bill</b>                                   | 2 (EW, E) | 4             | 0            | 0 | 0 | 0  | 0  |
| <b>Policing and Crime Bill</b>                           | 2 (EW, E) | 4             | 0            | 0 | 0 | 0  | 0  |
| <b>Finance (No. 2) Bill</b>                              | 1 (EWNl)  | 2             | 0            | 0 | 0 | 0  | 0  |

Key: E (England), S (Scotland), W (Wales), NI (Northern Ireland), UK (United Kingdom), EW (England and Wales), EWNl (England, Wales and Northern Ireland), LGC (legislative grand committee).

Notes: Length of time calculated from time Deputy Speaker took chair until start of third reading. Where more than one legislative grand committee, length is therefore for all added together. Participants are the number of unique MPs who spoke in the legislative grand committee on that bill, excluding the committee chair and any interventions to move the consent motion or to raise a point of order. Data covers period from 23 October 2015 to 22 October 2016.

One further potential opportunity for engendering a more visible English dimension for relevant legislation has also had a rather minimal impact. The government's decision to implement a specially constituted committee stage for bills whose every clause is certified as relating exclusively to England appears to have the potential to offer a significant opportunity for English scrutiny and deliberation. But there are in practice likely to be very few such bills, and there were none during EVEL's first year in operation.<sup>53</sup> Specially constituted committee stages therefore appear to provide limited opportunities for the expression of an English voice within the UK parliament.

It may be that the desire to rectify the West Lothian anomaly – associated particularly with the controversial votes that occurred under Blair's second term in office, which we discussed in chapter 1 – has weighed particularly heavily on the architects of the new system, and as a result the achievement of voice has been much less prominent in their thinking. Yet these votes were highly unusual, and seem likely to remain very rare unless the party balance in the Commons changes quite significantly. If the ambition underpinning EVEL is to respond to growing popular pressure among the English, it may well be that mechanisms for voice have a much greater prospect of demonstrating to people in England that their interests are being considered within the legislative system.

Parliaments and legislatures perform many different functions, only some of which concern voting on legislation. Indeed, during the 2015-16 session less than a third of time on the floor of the Commons was spent on government bills, private members' bills or secondary legislation. Other important types of business included opposition day debates (which allow opposition parties to trigger debate on issues of their choosing), backbench business debates (which allow backbenchers to select the topics debated), and oral questions to ministers. In addition to the 1215 hours of proceedings in the Commons chamber, around 460 hours were spent on similar types of debate in Westminster Hall,

and almost 1500 Early Day Motions were tabled by MPs to highlight particular issues. Commons select committees held over 1250 formal meetings, and published 226 reports (House of Commons 2016). All of these offer important opportunities for scrutiny, deliberation, the airing of new issues, and the reflection of public concerns, and can be considered as opportunities for the exercise of voice.

The independent McKay Commission (2013:49) concluded that England's 'voice should be capable of being as clearly expressed at Westminster as is the voice of those representing other parts of the UK in the devolved legislatures on devolved matters'. It is worth noting that the devolved legislatures in Scotland, Wales and Northern Ireland do not only consider legislation, but also conduct debates that allow for deliberation and the expression of a collective voice for those parts of the UK. It is of course the case that English representatives are not prohibited from expressing such a voice within the existing mechanisms of Westminster business. Indeed, debates in the Commons are mostly dominated by English MPs, and those on policy areas that have been devolved elsewhere, such as health and education, are de facto England-only. But such mechanisms are not badged, or even explicitly acknowledged, as being about England, and consequently they lack salience as spaces for debate about England's interests. As the McKay Commission (2013:47) put it, 'English concerns need an opportunity to be expressed in their own right, rather than under the guise of UK-wide matters'. The provision of some kind of visibility and separate deliberative opportunity for English concerns would represent a valuable opportunity to improve English representation at Westminster.

In its current form, EVEL does not give adequate opportunity for the expression of England's voice. We would suggest that this lack is a significant deficiency, and in chapter 4 we offer some specific proposals for addressing it.

<sup>53</sup> It is possible that the forthcoming Local Jobs and Growth Bill will meet the criteria.



## Complexity of EVEL

The final complaint we highlight is the claim that the EVEL procedures are unduly complicated. This objection has been very widely expressed, and has been directed towards both the EVEL processes themselves and the standing orders that underpin them. In the Commons debates, for instance, the reform was variously described as a ‘total dog’s breakfast’,<sup>54</sup> ‘unbelievably obscure’,<sup>55</sup> and ‘incomprehensible to most Members of this House let alone the wider public’.<sup>56</sup>

The primary cause of EVEL’s complexity is the substantive design of the new processes – in other words, the new legislative stages it introduces. This is largely a product of the government’s ambition to provide a robust and watertight form of veto right for English representatives. The complexity of EVEL was illustrated in Figure 2 (in chapter 2), which provided a diagrammatic representation of the process on primary legislation. To ensure that English (or English and Welsh) MPs have the opportunity to consent to the final form of legislation as passed by the Commons, EVEL implements veto points prior to third reading (implemented through the legislative grand committees) and at each CCLA stage (via double or triple majority voting). In order to reconcile disagreements between the legislative grand committees and the whole House, and to ensure that any technical inconsistencies can be corrected, two additional stages have been added, known as ‘reconsideration’ and ‘consequential consideration’. In fact, Figure 2 actually understates EVEL’s potential complexity, because each legislative grand committee box can comprise up to three separate legislative grand committees, each constituted by different (overlapping) territorial groups of MPs. As the Commons Procedure Committee’s (2015a) interim report pointed out, this potentially adds up to eight additional stages during a bill’s Commons passage.

For this process to function, the Speaker is required to conduct certification on multiple occasions, and this is a further source of complexity. Almost every government-sponsored bill, regardless of whether any provisions are ultimately certified, must usually be considered by the Speaker at least twice (and potentially three times) during its initial Commons passage, as shown in Figure 2. At each CCLA stage, the Speaker must also consider Commons motions for certification, and this can recur repeatedly given that there is no limit to the number of times a bill can ‘ping pong’ between the two chambers. In addition, the Speaker must consider various other types of business, including secondary legislation. Moreover, the desire to provide for a robust veto right has necessitated a fairly definitive certification test – and, as outlined above, the specific nature of the test that has been introduced is itself a potential source of legal complexity. It is notable that, for a similar exercise at

the Scottish Parliament, legal experts are allotted three weeks to complete their analysis of a bill.<sup>57</sup> All of this potentially adds up to an exceptionally demanding process for determining whether a particular provision should be certified.

In addition to these substantive procedural effects, the standing orders that underpin the new processes have been criticised for their complexity and opacity. In their evidence to the Public Administration and Constitutional Affairs Committee (2015:19, 36), two former Clerks of the House of Commons – the most senior procedural authority in that chamber – confirmed this complaint. Sir William McKay confessed that he had ‘great difficulty in discovering what each of these Standing Orders that the Government proposed means’, while Lord Lisvane suggested that the standing orders showed evidence of ‘over-specification’. Among our interviewees, we frequently heard the concern that the quasi-legal drafting of the EVEL standing orders was out of keeping with the existing standing orders, which tend to be less specific and give greater discretion to the Speaker. As an indication of this complexity, Standing Orders Nos. 83J-83X (which form the bulk of the EVEL provisions) run to almost 30 pages. This represents around 13% of the total standing orders on public business, and exceeds the length of the basic procedures for public bills.<sup>58</sup> In places the EVEL standing orders are close to being impenetrable, most notably those concerning the ‘reconsideration’ stage and on Finance Bills, both of which take the form of a series of amendments to earlier standing orders, and in relation to the CCLA stages.

It might be countered that the complexity of the system has as yet not mattered much in practical terms. Although EVEL can theoretically add up to eight additional stages to the initial passage of a bill, this is an unlikely eventuality (indeed it can only occur on a Finance Bill) and, during the first year of EVEL’s operation, the largest number of further stages was two. The new legislative grand committee stages, while modestly disruptive, have not during this period put an intolerable strain on Commons business or curtailed the opportunity for debate at other stages. Indeed, according to analysis by Louise Thompson, bills that had provisions certified under EVEL in fact received greater time for scrutiny at report and third reading stages than those that did not; whether this will continue to be the case remains to be seen.<sup>59</sup> Nevertheless, EVEL certainly has the potential to be more disruptive in future, and in certain circumstances the complexity of the certification process might be expected to have a knock-on consequence for Commons business. For example, to reduce disruption caused by the legislative grand committee stages, the Speaker has developed the practice of issuing a ‘provisional certificate’ in advance, based on the assumption that only government amendments will pass at report stage. This has so far allowed a swift transition to third reading. But were other amendments to be passed

<sup>54</sup> Alex Salmond, HC Deb 15 July 2015, column 967.

<sup>55</sup> William Cash, HC Deb 22 October 2015, column 1218.

<sup>56</sup> Chris Bryant, HC Deb 22 October 2015, column 1186.

<sup>57</sup> Letter and memorandum from the Solicitor of the Scottish Parliament to the Chair of the Commons Procedure Committee, 26 August 2015, <http://www.parliament.uk/documents/commons-committees/procedure/Letter-to-the-Chair-and-memorandum-from-the-Solicitor-to-the-Scottish-Parliament-on-EVEL.pdf> [accessed on 29 September 2016]. Similar documents from the National Assembly for Wales and the Northern Ireland Assembly are also available on the Commons Procedure Committee’s website.

<sup>58</sup> Standing Orders Nos. 57-83, which in February 2016 ran to just over 16 pages.

<sup>59</sup> Louise Thompson, written evidence to the Commons Procedure Committee, April 2016, <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/procedure-committee/english-votes-for-english-laws-standing-orders/written/31860.pdf> [accessed on 6 October 2016].

unexpectedly at report, the Speaker would be required to reconsider the certificate, and this could take some time. A similar risk of disruption could potentially arise at the CCLA stages were a bill to 'ping pong' rapidly between the two Houses, especially towards the end of a parliamentary session.

More substantively, the highly opaque and complex character of this system could serve to undermine EVEL's capacity to achieve its more foundational goals. As we have already indicated, the complexity of the process has elicited extensive comment, and may well be one source of the scheme's failure to acquire legitimacy. Even more worryingly, complexity could be a significant obstacle to the goal of ensuring that EVEL offers the English a sense of reassurance about, and connection with, the Westminster parliament. It may also run counter to wider attempts to make the proceedings of parliament more accessible to the public (Digital Democracy Commission 2015). This is a particular problem if EVEL is conceived of as a pragmatic response to pressure, rather than being driven by the need for absolute procedural symmetry, as discussed above. As the report of the McKay Commission (2013:45) put it, '[i]f political expectations in England are to be met, then any new procedures should be simple and comprehensible, not lost in the labyrinth of opaque Westminster arrangements'. It is difficult to argue that this challenge has been met by the current system. The opacity of this new process is not just an aesthetic issue. It would matter considerably should a political crisis be sparked by an important issue which divided MPs along territorial lines. Under such circumstances, it is essential that both MPs and the public are broadly able to understand the processes that are being employed, and regard them, in general terms, as legitimate.

In this chapter, we have discussed EVEL in rather broad terms. This leads us to the conclusion that the specific design of the system – in particular the double veto – has served to offset some, although by no means all, of the major concerns about it. Our analysis is to some extent provisional, in that it is not possible given the current composition of the Commons to assess the workings of this new system in the context of the more challenging scenario presented by a UK government that lacked a majority in England. We have also identified several concrete flaws with the current system, notably its failure to facilitate expression to England's voice and its complexity, and have pointed out the problems which have reduced the sense of its legitimacy. In addition, despite being the main bulwark of the new procedures, the double veto is not, as we will see, consistently built into every aspect of this system's design. With these general observations in mind, we now turn to consider how the current design of EVEL might be improved upon.

## 4. Improving EVEL

In the previous chapter we argued that, although in broad terms many of the common criticisms of EVEL are not as convincing as they may first appear, the scheme introduced by the government nevertheless suffers from a number of flaws. In this chapter we make a series of proposals that are intended to mitigate these and improve the working of the current system.

One of the central conclusions of the previous chapter was that, although EVEL provides a veto right for English (and English and Welsh) MPs, it is far less effective at providing England with a voice at Westminster. We therefore begin by considering ways of addressing this deficit. In the second section we turn to the double veto, which we have argued is foundational to the new standing orders and helps them withstand some of the common criticisms made of EVEL. Yet we also show that certain elements of the new procedures are in fact inconsistent with the double veto principle, and, unless these are addressed, may well serve to undermine the case for this reform. The third section considers the complexity of the new procedures, and outlines five different ways in which they might be made simpler and less opaque. In the final section we consider additional measures that are intended to enhance the legitimacy of this new system.

### Separating voice and veto

In the previous chapter we drew attention to the difficulty of achieving the goals of voice and veto through a single institutional reform. We have also argued that the new procedures introduced by the government have not proved effective in relation to the idea of voice. But, if one of the aims of this reform is to give greater confidence to the people of England that their interests are being considered in parliament, achieving a clearer sense of voice is essential.

In principle England's voice could be better expressed within the legislative process itself. For example, as already indicated, the McKay Commission's (2013) proposal that 'grand committee' debates on whether to 'consent' to legislation be held prior to second reading – rather than after report stage as in the government's scheme – may have provided greater incentive for substantive debate than under the current system. However, to retain the government's objective of a formal veto right, this debate would need to occur in addition to the existing legislative grand committee stages, and this would most likely make EVEL even more complex than it already is. Similarly, the specially-constituted Commons committee stage could be applied to England and Wales-only bills, in addition to England-only bills as at present. Yet this is likely to be used rarely (in the first year of operation it would have applied to only one bill), and would similarly accentuate the complexity of the system.

A less cumbersome way of improving England's voice on legislative scrutiny would be to implement the McKay Commission's recommendation for a selection of bills to be subject to pre-legislative scrutiny by committees comprising only English (or English and Welsh) MPs. This would take place before the formal legislative process began, though would feed into it. Such a move would be relatively straightforward to implement, and is unlikely to prove particularly contentious

given that the recommendations of such committees would be purely advisory. A forum such as this is far more likely than the existing legislative grand committees to result in substantive contributions, and there is even a possibility that some of the issues and debates aired may capture the interest of the media and the public. There is a strong case for experimenting with such processes. But, as acknowledged by the McKay Commission itself, this mechanism could only reasonably be applied to a fraction of government legislation.

So while it might in principle be possible to amplify England's (or England's and Wales') voice within the legislative process, none of the solutions that are to hand appear ideal. There is a danger that some of them, if combined with the existing veto, might make this new system even more complex. It would, in our view, be preferable to accept that EVEL is primarily designed to achieve some form of veto, and that voice should be facilitated through alternative mechanisms. As we have observed, legislatures fulfil a variety of functions, in addition to debating and approving legislation, and it is in relation to some of these important, additional roles that opportunities for an English voice might be most readily achieved.

Below, we therefore consider briefly the merits of two specific mechanisms – an English grand committee, and an English Affairs select committee. On balance, the latter appears to us the most attractive of these options, although both could in principle be introduced together. The case for, and detailed design of, these and other mechanisms should be considered by a cross-party body such as the Commons Procedure Committee.

### An English grand committee

One potential institutional innovation worth considering is an English grand committee. The House of Commons already has a well established set of territorial grand committee arrangements for representing the three non-English parts of the UK. The addition of an English body would constitute an incremental step within the evolution of parliamentary government, rather than an alien implantation, and has the added virtue of providing for England an equivalent to bodies that already exist in parliament for other parts of the UK.

The system of territorial grand committees has existed for over a century. The first of these to be established was the Scottish grand committee in 1907, followed by those for Wales in 1960, and Northern Ireland in 1996 (Birrell 2007; Russell and Lodge 2006). Since their establishment, the formal powers of these bodies have been revised on multiple occasions, and continue to vary between the three. One of their key roles has been to scrutinise legislation that applied to the relevant part of the UK. Indeed, they appear to have provided inspiration for the McKay Commission's separate 'English grand committee' innovation within the legislative

process, which has in turn been converted by the government into the legislative grand committee stage. But the existing territorial grand committees have also had wider remits, including the capacity to question ministers, conduct short debates and receive ministerial statements. Following the implementation of devolution in Scotland, Wales and Northern Ireland in the late 1990s, the roles performed by these bodies largely passed to the devolved legislatures, and the Scottish grand committee has not met since 2003. Nevertheless, arrangements for all of them remain in the Commons standing orders, and some are still occasionally convened. The Northern Ireland grand committee met in September 2013 to question ministers and conduct a debate on 'peace and progress' in Northern Ireland, and more recently the Welsh grand committee met in February 2016 to debate the Draft Wales Bill.

This system has as yet not been applied to England as a whole, though it has been developed for its regions. A standing committee on regional affairs was established and met for a short period in the late 1970s, before falling into disuse, and then being resurrected by Labour in 2000. In response to a report from the Modernisation Committee in 2008, this committee was later temporarily replaced under Gordon Brown's government with eight regional grand committees (Modernisation Committee 2008). These each met only once in 2009; arrangements for them expired at the end of the 2005-10 parliament and the incoming coalition government in 2010 chose not to re-establish them. Applying similar arrangements on an England-wide basis would therefore represent a continuation with previous territorial arrangements in the House of Commons.

Careful consideration would need to be given to the remit and membership of such a body. Arrangements for the existing grand committees differ on the question of membership eligibility. The Scottish grand committee comprises all MPs representing Scottish constituencies, whereas the Northern Ireland and Welsh grand committees each include some additional members.<sup>60</sup> But in the case of an English grand committee, the most difficult question would not be whether to include additional members, but whether it should comprise all those sitting for English constituencies or only a representative subset. And the question of its size is connected to the issue of where it might meet. Were it to comprise all English MPs, it would perhaps have to be held in the main Commons chamber, and there is a risk that this would then look, in symbolic terms, like an English parliament in all but name – but one incubated within the UK's national legislature. If its membership were restricted, criteria for selection of members and party balance would need to be devised. However, the expected renovation works on the Palace of Westminster may well present an opportunity to overcome any problems created by the constraints associated with the physical layout of the building.

## An English Affairs select committee

A more promising way of boosting a sense of English voice at Westminster comes from the establishment of an English Affairs select committee. The House of Commons has a longstanding network of such bodies. The current system of departmental select committees was established in 1979, but the origins of the mechanism date back much further. As with the grand committee proposal, there is every chance that introducing an English Affairs select committee would therefore be seen as an incremental evolution rather than an innovation introduced from outside the parameters of the existing system.

At present, the Commons is home to Scottish Affairs, Welsh Affairs, and Northern Ireland Affairs select committees. These are departmental select committees, meaning that their remit is 'to examine the expenditure, administration and policy of the principal government departments' – in these cases the Scotland Office, the Wales Office, and the Northern Ireland Office respectively.<sup>61</sup> In reality, however, they have tended to interpret their roles more broadly, and they have conducted inquiries, collected evidence and made recommendations on a wide range of non-devolved or reserved matters of particular interest to the relevant part of the UK.<sup>62</sup> In the current parliament, for example, the Scottish Affairs Committee has conducted inquiries on the implications of the EU referendum for Scotland, the post-study work visa scheme, and Scotland's creative industries – all of which also fall within the remits of committees scrutinising other government departments. The innovative element here is that the select committee model has not previously been applied to England as a whole; the Commons did experiment with regional select committees within England alongside the regional grand committees mentioned above, and they were similarly disbanded.

But extending the select committee model on an all-England basis does present particular challenges that would need careful consideration. Such a body might be harder to fit into the existing architecture of parliamentary scrutiny. There is no UK government department specifically responsible for English affairs, and so this could not be a select committee shadowing a particular department. It would, therefore, need a different, and more explicitly cross-cutting, remit, a characteristic that already applies to non-departmental committees. But such committees present a risk of duplication, and this would be particularly acute for an English Affairs committee, for two reasons. First, on non-devolved matters, England is a much larger part of the UK 'whole' than are other parts of the UK, and so it is by definition harder to define English concerns in very precise terms. And second, on matters devolved elsewhere, other select committees will already have responsibility for scrutiny of *de facto* England-only policy, whether for whole departments focused almost entirely on England (e.g. the Health and Education select committees) or individual policy portfolios held by departments with a wider remit (e.g. English regional policy by the Communities and Local Government Committee).

<sup>60</sup> The relevant standing orders also provide for ministers to participate if they are not committee members, although they may not vote.

<sup>61</sup> Commons Standing Order No. 152(1).

<sup>62</sup> The Welsh Affairs Committee, for example, states that its 'terms of reference are to examine matters within the responsibility of the Secretary of State for Wales (including relations with the National Assembly for Wales). In practice, the Committee examines policies of the UK Government which have an impact in Wales (for example strategic transport, welfare and defence)'. See: 'Role - Welsh Affairs Committee', <http://www.parliament.uk/business/committees/committees-a-z/commons-select/welsh-affairs-committee/role/> [accessed on 27 October 2016].



Even so, the potential for duplication and overlapping remits are not insurmountable challenges, and could be resolved through pro-active coordination between the committees. One way around the dilemma might be for it to be tasked specifically with considering issues and trends that fall across departmental lines – for instance the impact of migration upon public services, or learning and skills gaps in different parts of England. It might also take on the role of reviewing, and drawing to the attention of the House, legislative proposals from across government that may be of particular interest to England – or even of triggering the EVEL process on specific bills (as further discussed below). The role of examining and reporting on legislation is not dissimilar to the current practices of the European Scrutiny Committee, the Joint Committee on Human Rights, the Constitution Committee, and the Delegated Powers and Regulatory Reform Committee; it might also be regarded as similar to the role performed by committees of the Scottish Parliament in considering and reporting on legislative consent memorandums.<sup>63</sup> Although fairly modest in scope, such a function might conceivably contribute powerfully to the aim of showing that England's interests are being voiced and heard at Westminster. In terms of its putative membership, there is a debate to be had about whether the normal convention that its party balance should reflect the House as a whole – as opposed to in England alone – would be appropriate in this instance.

It would be perfectly possible to envisage an English grand committee and an English Affairs select committee working alongside each other, and informing each other's work. Indeed, it is worth noting that the experiment with English regional grand committees and select committees in 2008-10 was presented as a single package. The report of the Modernisation Committee (2008:19), which led to those reforms, argued that '[s]elect committees provide a focus and a consistency of effort that would not be present if regional accountability were purely dealt with in grand committees, which are primarily forums for debate', but it observed too that grand committees nevertheless allow participation beyond the narrow membership of a select committee. A similar justification might well apply to the establishment of new all-England bodies.

### Entrenching the double veto

We have argued in previous chapters that the double veto helps to protect EVEL against several criticisms commonly made against this type of reform, including the charge that it has created two classes of MP and that it prevents MPs from outside England from properly defending the interests of their constituents. The retention of full veto rights for the UK-wide House should be seen as a bedrock principle of the union parliament. The double veto represents the best basis for introducing a veto right for English representatives without fundamentally undermining the ethos of the Westminster parliament.

However, certain types of business appear to not be well-suited to the double veto. In the previous chapter we highlighted Gallagher's (2015) observation that the application of EVEL on legislation that must regularly be reapproved by parliament – on taxation and certain forms of secondary legislation – could enable a subset of MPs to hold the UK

government to ransom. This objection warrants careful consideration by the government. Possible solutions might be to devise some mechanism by which the application of a veto results in the maintenance of the status quo rather than the existing legislation lapsing, or alternatively for the EVEL procedures to no longer apply to such forms of legislation.

In addition, there are two aspects of the current EVEL procedures that depart from the double veto. These relate to the consideration of instruments subject to the negative procedure, and certain scenarios during the consideration of Lords messages at the CCLA stages. Should the double veto be circumvented in practice, there is a serious risk that the very principle of the reform, and its impact on UK-wide representation, may be called into question.

To understand these departures from the double veto, it is important to emphasise what this term actually means – and, specifically, what it represents a veto *over*. Its introduction means that two groups of MPs – English (or English and Welsh) and UK-wide – have the ability to veto *proposed text from being passed into law*. If either group of MPs votes against the proposed wording of legislation at specific points in the process, that text cannot become law.

The first apparent departure from this principle in the EVEL standing orders concerns instruments (usually secondary legislation) that are subject to the negative procedure. Unlike those subject to the affirmative procedure (which are considered on a motion that the instrument be approved), those subject to the negative procedure are considered on a motion that the instrument be annulled (meaning that it will remain, or become, law unless parliament actively rejects it). Under EVEL, it is this motion that is subject to the double majority voting procedure, meaning that the instrument will come into, or remain in, force unless both groups of MPs vote to annul it. In effect, the double veto principle is here applied not to the legislative text, but to a motion to delete the legislative text. As a consequence, the new system creates the possibility that English representatives may be unable to block such legislation in future due to the votes of the whole House (or vice versa). For this reason, we regard procedure here as inconsistent with the double veto principle.

Procedure on negative instruments is admittedly a highly technical matter. The negative procedure is usually applied on instruments considered to be less controversial, and it is rare for any statutory instrument to be rejected by the Commons: Fox and Blackwell (2014) found just 11 cases between 1950-2014, of which six were subject to the negative procedure. But their significance should not be entirely understated, particularly if part of the purpose of EVEL is to signal that England's interests are being heard at Westminster. Unlike instruments subject to the affirmative procedure, negative instruments are not routinely presented for a formal decision: they are usually only debated if this is requested by the opposition, and votes on them are even rarer. If such a division did take place, therefore, it might suggest a degree of salience.

During the first year of EVEL's operation, only one such vote was held: on the Education (Student Support) (Amendment) Regulations 2015. This was almost certainly the most contentious division on which EVEL applied over this period, and indeed was the only piece of legislation on which the Commons authorities received representations from outside

<sup>63</sup> See the standing orders of the Scottish Parliament, chapter 9B.



parliament on certification.<sup>64</sup> If English MPs had voted to annul the statutory instrument but UK MPs had not, so that it remained in force against the wishes of English MPs, this would have put into question whether English MPs truly have a veto right on certified legislation. If UK MPs had voted to annul the statutory instrument but English MPs had not, so that it remained in force against the wishes of UK MPs, it would have undermined the government's claim to have protected the position of the UK-wide House. To correct this, we would suggest, the EVEL standing orders should be amended so that, in the case of instruments subject to the negative procedure, the instrument is annulled if a majority of either group of MPs votes in support of the motion to annul it.

An important caveat here is that, were this change to be made, it would mean that English (or English and Welsh) MPs would gain the ability to veto instruments subject to the negative procedure. As such, the problem identified by Gallagher (discussed above) – concerning secondary legislation that must be regularly reapproved by parliament – might become salient in relation to instruments subject to the negative procedure. We therefore recommend that the change applying the double veto to the negative procedure be made in conjunction with an effort to correct the problem identified by Gallagher.

The second departure from the double veto principle relates to Lords amendments at the CCLA stages. As explained in chapter 2, any Commons motion relating to Lords amendments is subject to double majority voting, and requires the support of both English (and/or English and Welsh) and UK-wide MPs for the Lords amendment(s) to be agreed to. Lords amendments may seek to add text to a bill, in which case double majority voting is consistent with the double veto principle. However, Lords amendments may alternatively delete text from the bill. In this case, and in common with negative statutory instruments, this means that the double veto here applies not to the draft legislative text, but to a proposal to delete text from the bill. As such, legislative text could be retained even if one of the two groups of MPs wished to prevent it from becoming law.

It might be countered that this situation can only arise once such text has already been approved by MPs during the bill's initial passage through the Commons, and therefore that it is reasonable for the double veto to *not* be applied to the bill's text at these later stages. However, this is to misunderstand the bicameral nature of the Westminster legislative process. Parliament's scrutiny of primary legislation brings together both chambers, and within it the House of Lords performs an important and well-established constitutional role in highlighting particular issues and asking the Commons to 'think again'. As Meg Russell (2013) has demonstrated, the relationship between the two chambers is not a zero sum game: in performing its role the Lords often serves to enhance the bargaining power of MPs, and in particular government backbenchers, in securing policy change. Indeed, MPs will often not have previously voted on the specific provision objected to by the Lords. To assume that the Commons' initial assent to a bill is the end of the matter is therefore a mistake: the right of MPs to reconsider following any subsequent consideration by peers is an important and valuable part of

the scrutiny process. We therefore regard it as problematic for the double veto to apply in its current form to Lords proposals that delete text from a bill.

The double veto principle would seem to imply that motions at CCLA that propose additions to the bill should require the support of both groups of MPs, whereas those proposing deletions from the bill should require the support of only one. In practice, however, such a solution is likely to prove highly challenging, and perhaps unworkable. A single motion relating to Lords amendments may make multiple changes, some of which add text and others which delete it; indeed, a single Lords amendment may make both additions and deletions, for example where substituting text. Yet the double veto is central to the government's reform, and so the failure to reflect it at these later stages is a serious flaw. Unless a satisfactory solution can be found, it may well be preferable to accept that the EVEL veto cannot be applied to motions at CCLA without undermining Westminster's status as a UK-wide legislature. If this is the conclusion reached, there is a case for no longer applying EVEL at the CCLA stages, a suggestion to which we return below.

## Reducing complexity

During the course of our research, we have repeatedly heard the concern that the new procedures are too complex and burdensome for their primary users – MPs – with some stakeholders describing them to us as incomprehensible. Given that one of the key reasons for introducing EVEL was to renew the confidence of the English public in the UK parliament, there is good reason to think that reforming the current system to ensure greater visibility and comprehensibility is imperative. Achieving this goal is congruent with giving more emphasis to voice.

In this section we present a menu of options for reducing the complexity of the system. These are divided into five categories. Two seek to avoid the new procedures being triggered unnecessarily: by activating EVEL only on specific bills; and by reducing the need to formally convene the legislative grand committee stages. Two further proposals are designed to reduce the complexity of the stages and mechanisms themselves: by providing fewer veto points during the process; and by certifying fewer types of provision. The final option is to reduce the complexity of the standing orders that underpin the new processes. In proposing this menu of options, we seek to present a range of possible solutions to the problem of complexity, from which others can select. Some of the options do have potential downsides, and these are identified in our discussion.

### Activating EVEL on fewer bills

One option for reducing the complexity of EVEL is to activate the process only on specific bills where there is a demand for EVEL stages and votes. At present, the Speaker is required to consider for certification almost all government-sponsored bills that come before the Commons. If any provision is certified, those parts of the bill are automatically subject to the revised EVEL legislative process, including the legislative grand committee stages.

<sup>64</sup> This was from the presidents of the National Union of Students, NUS Scotland, NUS Wales and NUS-USI. See the Commons Public Bill Office, written evidence to the Procedure Committee, 31 August 2016, <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/procedure-committee/english-votes-for-english-laws-standing-orders/written/36694.pdf> [accessed on 5 October 2016].

As already indicated, during their first year of operation none of the new EVEL stages have in practice been used to debate the implications of the relevant bill on England (or England and Wales), and most have been entirely perfunctory. Nor has there been any serious attempt by English (or English and Welsh) MPs to apply the veto. Contrary to the claims of some critics, this does not necessarily mean that EVEL serves no purpose. Importantly, it provides the *right* to a veto and the opportunity to exercise it. Yet if what matters is the establishment of a new right to exercise a veto, it remains far from clear why the entire EVEL process should automatically be activated on every provision that meets the two-part certification test. A more selectively applied veto would be less disruptive, more comprehensible and more likely to satisfy a majority of MPs. It would, accordingly, be sensible to apply the EVEL process only to specific bills where there is clear evidence that MPs wish to make use of its mechanisms. This was indeed one of the conclusions reached by the Commons Procedure Committee (2015a) in its interim report into EVEL.

There are several different mechanisms through which the EVEL process could be more selectively activated. The solution proposed by the Procedure Committee was for it to be achieved through a vote of the House on a motion moved by a minister. The weakness of this proposal, however, is that it places control entirely in the hands of government (subject to approval by the House), which has an abiding interest in the passage of its legislation. Ministers are unlikely to activate the veto process unless they are confident that English (or English and Welsh) MPs will support their legislation.

There are, however, alternative options worthy of consideration. Above we suggested the establishment of bodies to facilitate England's voice within the Commons. Such a body could be entrusted with the ability to activate the process, whether through formal or informal mechanisms – for example, through a convention that the process is always activated where the English Affairs committee has requested it. In addition, the McKay Commission (2013:54) made two further proposals for the triggering of a similar process, and these could be adapted to the government's current EVEL reform. The first was for activation through a motion tabled by any MP representing a constituency in England (or England and Wales), provided it attracted a minimum number of signatures from other MPs from the area concerned. A second option was for the power to table such a motion to be given to the leader of the largest opposition party in England (or England and Wales).

Applying EVEL to a selection of bills would have the advantage of retaining the right to a veto, but without triggering all of the elaborate procedural changes set out in the standing orders unless there was a clear political demand to make use of them. Once EVEL was activated, the strength of the veto could, in principle, remain as robust as at present. One limitation, however, is that it may be more challenging to envisage how EVEL could be activated on a bill part-way through its passage, in the event that unexpected and contentious new provisions were added.

## Avoiding the legislative grand committee stages

A second method of simplifying the EVEL process would be to avoid convening the legislative grand committees unnecessarily. In common with the first option, this would not reduce the complexity of the procedures themselves, but would simplify their practical operation in many cases. As explained above, all bills with certified provisions must pass through one or more legislative grand committee stages. These stages have so far provided little obvious benefit, yet they invariably require Commons business to be briefly suspended and are often incomprehensible to MPs. Under this approach, the legislative grand committees would only be triggered where there is evidence of some demand for them.

Proposals in this vein have taken two broad forms. The first is to determine the need for a legislative grand committee based on whether MPs from England (or England and Wales) voted differently from the UK-wide House on amendments at report stage. In its interim report, the Commons Procedure Committee (2015a) recommended that, prior to report stage, the Speaker should certify amendments tabled by MPs, and that the legislative grand committee stage be triggered only where the two groups of MPs arrived at different decisions in any vote on a certified amendment. A variant on this proposal has been suggested by the Commons Public Bill Office. This would involve the Speaker certifying clauses and schedules prior to report stage, and the legislative grand committees being triggered where a vote on an amendment relating to a certified clause or schedule resulted in a split decision.<sup>65</sup>

We are not fully persuaded by either form of this proposal. Certifying amendments prior to report stage has the potential to increase the workload of the Speaker quite considerably, as he would be required to consider for certification every amendment that could potentially be put to a division. At present, by contrast, the Speaker issues 'provisional certificates' prior to report stage, but only takes into account government-sponsored amendments (which in practice are likely to be the only amendments passed by MPs). Certifying clauses and schedules avoids this difficulty, but also means that, where an amendment changes the area of certification, only MPs representing the original territorial area would be able to trigger the new stages. The government's response to the Procedure Committee's interim report also highlights some additional challenges to this type of solution, including that some mechanism would need to be devised for giving consent to amendments passed at the earlier committee stage.<sup>66</sup>

The second proposal for avoiding automatic consideration by the legislative grand committees would be for the consent motion to be considered, in the first instance, by the UK-wide House. This proposal was also made by the Commons Public Bill Office, and has greater merit than that considered above.<sup>67</sup> Under this scheme, the legislative consent motion – which at present is moved and passed in the legislative grand committee – would be moved in the whole House. Only if an MP objected to it would it be necessary to trigger the legislative grand committee stages; in all other cases, the motion would be agreed to, and the bill would pass

<sup>65</sup> Commons Public Bill Office, written evidence to the Procedure Committee, 31 August 2016, <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/procedure-committee/english-votes-for-english-laws-standing-orders/written/36694.pdf> [accessed on 5 October 2016].

<sup>66</sup> Chris Grayling, written statement, 20 October 2015, HCWS251.

<sup>67</sup> See the Commons Public Bill Committee written evidence to the Procedure Committee, cited above.

immediately to its third reading. As such, the opportunity for a legislative grand committee vote and debate would be retained, but these stages would not actually be convened unless required, thus minimising disruption.

### Fewer veto points

A third way in which the EVEL veto might be simplified would be for it to apply at fewer points during the legislative process. Unlike the first two options, this would simplify the actual processes themselves, rather than merely avoiding them being triggered unnecessarily. At present, as set out in chapter 2, English (or English and Welsh) MPs may exercise a veto towards the end of a bill's initial Commons passage, and then again at each CCLA stage. The Speaker is consequently required to consider bills for certification on multiple occasions during their passage. During the first year of EVEL's operation, the largest number of veto points on a single bill was four, on the Housing and Planning Bill (the initial passage, followed by three CCLA stages).

The application of EVEL to the CCLA stages does provide a more robust veto right than would otherwise be the case, ensuring that English (or English and Welsh) MPs have the opportunity to veto any amendments made by the Lords, as well as any Commons proposals in response. But it achieves this at the cost of greater complexity and reduced comprehensibility. Moreover, because procedure at CCLA is itself complicated, the standing order that applies EVEL to this part of the legislative process is necessarily complicated, running to four pages in length. There is a case therefore for considering whether a single veto point, implemented at the end of a bill's initial passage through the Commons, might be more effective and transparent than the current procedures which create the possibility of veto points at various different stages of a bill's life.

We have already noted above that the double veto principle is not adequately reflected at CCLA and that, unless this issue can be resolved, it may be preferable for EVEL to not apply at these stages. The additional complexity these stages bring to the process constitutes a further justification for reconsidering whether the application of EVEL to the CCLA stages is proportionate.

### Fewer items for certification

A fourth proposal to achieve simplification would be for the Speaker to be required to consider fewer types of provision for certification. In common with a reduction in the number of veto points, this option would simplify the actual processes themselves rather than just limiting their practical effects.

As we explained in chapter 2, on primary legislation the Speaker is required to consider for certification *agreed amendments that change or eliminate an earlier certification decision*. We are not convinced by this requirement. If this duty were removed alongside no longer certifying at CCLA (as discussed above), the Speaker would be left with the much more straightforward task of certifying only clauses and schedules (and, by extension, bills).

The certification of amendments operates in the following way. Except at the initial certification prior to second reading, the Speaker is required to identify any agreed amendments that had the effect of changing or eliminating an earlier certification decision. He must certify these amendments as relating to the territorial area to which the clause or schedule would have been certified, had the amendment not been made. So, for example, an amendment to make a previously England-only clause apply to the whole UK would be certified as relating to England. The Speaker is not required to certify any other amendments that have been passed by MPs.

During the first year of EVEL's operation, the Speaker certified amendments to:

- a) delete a previously certified clause from the bill, resulting in it no longer being certifiable;<sup>68</sup>
- b) apply a previously England-only clause to England and Wales;<sup>69</sup>
- c) apply a previously England and Wales-only clause to England only;<sup>70</sup> and
- d) add a reserved provision, or a provision that applies beyond the area in question, to a certified clause, resulting in it no longer being certified.<sup>71</sup>

The justification offered by the government for the certification of amendments is 'to prevent the whole House amending the bill at Report stage as it relates to England or England and Wales without MPs from England or England and Wales having the opportunity to consent to, or veto, such changes' (Cabinet Office 2015b:25) – in other words, to prevent the gaming of the system. However, as a point of principle it is not entirely clear why English (or English and Welsh) MPs should have the right to veto proposals that no longer meet the certification test. In cases (b)-(d) above, the result is that one territorial subset of MPs was asked to consent to a provision being applied to an area represented by a different (albeit overlapping) group of MPs. But the overarching aim of EVEL should be to prevent legislation that applies only to England (or England and Wales) from passing into law without the consent of its own democratic representatives; the certification of amendments appears superfluous to this principle.

The certification of these amendments also gives rise to certain unforeseen inconsistencies. Had the government itself incorporated the amendments in the original version of the bill as introduced, English (or English and Welsh) MPs would not have had this power of veto. Nor would they have had this right had the Lords passed the amendments before the bill reached the Commons. It appears perverse for a territorial subset of MPs to have the power to veto amendments made by the UK's elected House, but not identical changes made in the Lords or by the government prior to introduction. And it is difficult to regard it as a point of democratic principle for English MPs to have the right to veto the first type of amendment but not the latter two.

It also seems unclear that the 'gaming' scenario highlighted by the government could be used to avoid an English veto. This is because, for such gaming to be achieved, we expect

<sup>68</sup> Omission of clauses 35 and 36 in committee, and amendments 4, 111 and 129 on report (Housing and Planning Bill); and omission of clauses 33 and 34 in committee (Enterprise Bill).

<sup>69</sup> Amendments 10-18 in committee (Enterprise Bill).

<sup>70</sup> Amendments 180-181 and 127-128 in committee (Housing and Planning Bill).

<sup>71</sup> Amendment 3 in committee (Childcare Bill); amendment 145 in committee (Policing and Crime Bill); and any motion relating to Lords amendment 22 (Housing and Planning Bill).

that ministers would usually need to support the move – but there are in truth easier and more effective mechanisms available to ministers to game the system. At present 642 MPs are eligible to vote in the whole House, of which 529 represent English constituencies.<sup>72</sup> Assuming that all MPs participated in any vote, 265 would therefore be needed to veto legislation on division in the English legislative grand committee. This leaves up to 377 UK-wide MPs who might oppose this move, and who might potentially be willing to join such a plan to avoid the veto. Ministers are expected to be in this latter category: EVEL applies only on government bills, and it seems improbable that they would vote to withhold consent to their own legislation. Those who might oppose the veto therefore break down into two groups: around 130<sup>73</sup> members of the payroll vote; plus a maximum of around 247 other UK-wide MPs.<sup>74</sup> For there to be a majority of UK-wide MPs in support of gaming the system to avoid a veto, and a majority of English MPs intent on applying the veto, we therefore anticipate that ministers would normally need to vote with the former. But, as we have already indicated, ministers have better ways of working around the system if this is their goal: they have the power to avoid the veto by introducing their legislation with any such amendments already incorporated.

Even if the government is persuaded of the need to guard against amendments that attempt to avoid certification, however, the requirement that the Speaker certifies all amendments that change or eliminate an earlier certification decision represents a highly convoluted and legalistic response. Different mechanisms should therefore be considered. One possible solution is for the Speaker to be given the discretionary power to certify amendments that seem to him to have the primary purpose of avoiding certification. An alternative might be for the Speaker to rule as 'out of order', or deem 'disagreed to',<sup>75</sup> any such amendments.

It is incumbent upon the government to present a more compelling case for why certification of such amendments is necessary and proportionate. If it cannot do so, this part of the procedures should be dispensed with, a decision that would result in the simplification of the current procedures.

### **Simplifying the standing orders**

A final option is to reduce the complexity of the standing orders themselves. Some of the options set out above for simplifying the process would also have the effect of reducing the length of the standing orders. For example, were the application of EVEL to Lords amendments dispensed with, Standing Order No. 83O would no longer be required. Similarly, were amendments that change the area of certification no longer certified, provisions could be deleted from some of the other standing orders.

Nevertheless, it also seems probable that the standing orders could be redrafted to reduce their complicated character more generally. One of the most common criticisms we have heard

during this research is that they are written in too legalistic a fashion. At the minimum, Commons clerks should be asked to redraft them with the aim of consolidating the existing text and eliminating any unnecessary over-specification. The revised procedures ought to set out the broad principles of EVEL, and only the most essential detail, rather than setting out all the terms of, and rules governing, their application.

### **Improving legitimacy**

The general thrust of the proposals considered here – to provide more meaningful mechanisms for the expression of England's voice, to entrench the double veto principle more consistently, and to move towards a less cumbersome and complex veto model – is also pertinent to the challenge of enhancing the legitimacy of a set of procedures that is currently viewed in starkly partisan terms. While it is unrealistic to expect attitudes towards EVEL to change markedly in the short term, there are, nevertheless, opportunities for bridges to be built to the opposition parties on this issue, and for the strongly partisan perception of EVEL to be diminished.

It is worth noting that at least some of the McKay Commission's proposals for reform were included in the general election manifestos of both the Labour party (2015) and the Liberal Democrats (2015). Before that election, in late 2014, the Labour party publicly signed up to some of the McKay Commission's proposals in an article written by Sadiq Khan (then Shadow Justice Secretary) and Hilary Benn (then Shadow Communities Secretary).<sup>76</sup> But it is worth stressing that areas of agreement have tended to coalesce around proposals for greater voice rather than veto. This approach has also been apparent in the party's response to the more detailed proposals published after the general election. Angela Eagle, when Shadow Leader of the Commons, emphasised Labour's support for the notion that 'English MPs must be heard on matters that relate purely to England', but criticised the government's proposals for having 'created a veto rather than strengthening the English voice'.<sup>77</sup> Her successor, Chris Bryant, likewise argued that 'England needs a distinctive voice in this Parliament' and that '[t]here should be a voice, but not a veto'.<sup>78</sup>

As such, there is good reason to believe that our recommendations for giving greater voice to England might provide a more stable basis for cross-party agreement. Equally, some of the other changes outlined above are designed in part to replicate arrangements that are already employed in relation to other territories within the UK, and can thus be presented as ways of ensuring that England's position in the union is better protected and recognised after devolution – a stance that has the potential to attract support from representatives in other parties as well as publics across the UK.

One move that may particularly serve to improve the legitimacy and viability of the current reform is to reconsider the name given to it. The term 'English Votes for English Laws' has been

<sup>72</sup> These figures exclude the Speaker, his three deputies, and four Sinn Fein MPs, none of whom vote.

<sup>73</sup> This is based on figures from July 2016, and includes parliamentary private secretaries (Maer and Kelly 2016).

<sup>74</sup> In reality it is unlikely that turnout would be 100 percent, but the figures nevertheless serve to illustrate our point.

<sup>75</sup> The latter would apply to Lords amendments, and is comparable to existing procedure on Lords amendments that engage 'unwaivable' financial privilege (Russell and Gover 2014). However, such a move would require consultation between the chambers, and would not be necessary were EVEL no longer applied at the CCLA stages, as suggested above.

<sup>76</sup> Hilary Benn and Sadiq Khan, 'We need to give English MPs a greater say over English laws', *PoliticsHome*, 12 December 2014, <https://www.politicshome.com/news/uk/social-affairs/politics/news/64951/hilary-benn-sadiq-khan-we-need-give-english-mps-greater> [accessed on 29 September 2016].

<sup>77</sup> HC Deb 7 July 2015, column 201; 15 July 2015, column 956.

<sup>78</sup> HC Deb 22 October 2015, columns 1187, 1192.



associated with this type of reform for some time. And while it does not feature in the standing orders introduced by the government, this name – and its associated acronym – has stuck, and has been widely used, including in David Cameron's statement after the Scottish referendum, the documents that set out the government's draft proposals (e.g. Cabinet Office 2015a), and the parliament website. But this name is in key respects misleading. EVEL does not implement a separate process on which only English MPs may vote, but instead offers a veto right. The name creates the impression that certain MPs have been entirely excluded from voting on certain legislation, and also represents a form of 'over claiming' that may store up problems for the future. Serious consideration should therefore be given to using a different name for these procedures. We would recommend 'English Consent to English Laws' (ECEL), which not only accurately conveys the scope of the reform but also emphasises its equivalence to the legislative consent motions that already operate for the other three parts of the UK.

A different mechanism might also help the government improve perceptions of the new procedures among both MPs and the public at large. The idea was floated in the McKay Commission's (2013) report that, prior to voting on any detailed procedural changes, the House of Commons should be invited to vote on a resolution affirming the principles underpinning EVEL. Indeed, the commission's report stated that it 'attach[ed] particular importance to the clear acceptance of the principle by a consensus across political opinion' (McKay Commission 2013:35). Were this proposal expressed in broad terms, applying equally to all four parts of the UK, there is a reasonable chance that such a principle might attract cross-party support. The Cameron government elected in May 2015 proceeded rather differently, however, presenting a relatively complex package and seeking consent for all of it at once, without offering MPs an opportunity to hear and debate the underlying principles at stake in the reform. Given the legitimacy issues that still afflict these rules, the government may wish to consider the merits of pursuing cross-party discussions about these processes, and seeking to reconfigure them on the basis of a set of shared principles of the kind that McKay identified.

More specifically, further thought should be given to how to make the operation and application of EVEL as transparent as possible. This applies particularly to the certification process. The government has so far experimented with different ways of presenting its certification advice, and this process has considerably improved transparency. Similarly, the practice of the Speaker's certificates being published online has made them easily accessible. But there is still more that could be done in this area. In particular, it could be made easier in these documents to track advice across the life of a bill, by always cross-referencing to the numbering of the clauses and schedules in the version of the bill as first published in the Commons. On bills that have been certified under the EVEL process, the publication of memoranda on the parliament website has not always been consistent, with some advice published on the relevant bill's page, some deposited in the Commons Library, and advice at particular stages on some bills not published at all.<sup>79</sup> On bills that have not been certified,

the government has tended not to publish any additional memoranda, though occasionally has done so.<sup>80</sup> The consistent publication of clear government advice on all bills – whether or not expected to be certified – would undoubtedly help to improve the transparency of this part of the process.

More substantively, transparency might be improved by the Speaker providing explanations of his certification decisions where these have been requested. Whether the Speaker should provide explanations has long been debated, on a range of different issues, with a key source of the reluctance being the fear that the Speaker might be drawn into political controversy. In the case of EVEL, the Speaker announced that, in line with the recommendation of the Procedure Committee, he would 'not, as a rule, [...] give reasons for decisions on certification during this experimental phase of the new regime'.<sup>81</sup> But he did make an exception to this on the Housing and Planning Bill, when he provided an explanation in response to a question posed by Lady Sylvia Hermon.<sup>82</sup> Not only did this not attract any political controversy, but his explanation helped defuse a perception of injustice, and placed on public record an important precedent for how the 'minor and consequential' criteria within the standing orders might be interpreted. Lady Hermon has subsequently made clear her view that 'it should be for the Speaker to give reasons in the Chamber' (Northern Ireland Affairs Committee 2016:18). The wider public interest in such explanations – particularly on a politically contentious piece of legislation – should also not be underestimated. We would recommend that the Speaker therefore consider giving explanations where they are requested by MPs, provided that his decisions continue to be treated as final. An alternative would be for him to publish more general guidance, updated as new cases emerge, to illuminate precedent on less straightforward certification decisions.

Finally, the review process being conducted by the government offers an important opportunity to listen to perspectives and experiences from different political quarters, and to learn from the operation of EVEL during its first 12 months. But it should also be acknowledged that some of the processes included in the new standing orders have not yet occurred. Specifically, there has not yet been an England-only committee stage, an unexpected decision at report stage that changed the Speaker's provisional certification, the withholding of consent by a legislative grand committee, or multiple CCLA stages on the same day on a bill. Nor has EVEL yet faced the more challenging scenario of a UK government that lacks a majority in England. The conduct of the government's review after only one year of operation means that there is only a limited amount of data available and that the system as a whole has not as yet been properly 'stress tested'. In subsequent sessions, a higher number of bills may well place a greater administrative and logistical burden on relevant authorities, while new scenarios may emerge that unexpectedly call into question aspects of the current procedures. There is therefore a strong case for the government's current review to be considered as provisional in kind, and for the procedures to be reviewed again by an independent body – for example the Commons Procedure Committee – both towards the end of the current parliament and during future parliaments.

<sup>79</sup> For example, on both the Housing and Planning Bill and the Energy Bill, most of the advice was published on the relevant bill's page on the parliament website, but those relating to report stage were available only as deposited papers in the House of Commons Library.

<sup>80</sup> For example, government memoranda on certification were published for the Bank of England and Financial Services Bill (2015-16) and the Wales Bill (2016-17), neither of which had provisions certified.

<sup>81</sup> HC Deb 26 October 2015, column 23.

<sup>82</sup> HC Deb, 13 January 2016, columns 861-862.



# Conclusion and recommendations

Within this report we set out to analyse the new ‘English Votes for English Laws’ procedures that were adopted by the House of Commons in October 2015. Although they were introduced relatively recently, it is important to appreciate that they follow on from more than a century of debate about devolution in different parts of the UK, and its implications for territorial representation at Westminster. This historical backdrop was set out in chapter 1.

In the late 1990s, devolved government was returned to Northern Ireland, and was introduced for the first time in Scotland and Wales. Since then there has been considerable concern about the so-called West Lothian Question – the anomaly whereby policy matters that have been devolved are voted on only by representatives from the relevant constituent part of the UK, but equivalent matters concerning only England may be voted on by MPs from across the UK. Survey data suggests growing irritation about England’s constitutional position within the UK among its inhabitants, and there is clear support for giving English MPs greater say on legislative matters that affect England only.

In chapter 3 of the report we considered the main justifications for, and objections to, EVEL. We argued that there are broadly two kinds of reasoning for it: first, as a pragmatic response to new territorial pressures; and second, as a principled commitment to procedural equality between the four parts of the UK. The government has not been entirely consistent in its arguments for the new standing orders, and there has been a degree of ‘over claiming’ about EVEL which may store up problems for the future. We also considered five key objections that have been made about this reform: that it will politicise the office of Speaker; will create two classes of MP; risks undermine the coherence of UK-wide government; has failed to facilitate expression of England’s voice; and is unhelpfully complex and opaque. Based on the first 12 months of EVEL’s operation, we conclude that key features of EVEL – in particular the double veto it offers – have served to limit the force of some of these objections. But our analysis does point to various flaws in the current system, notably in relation to its complexity and its failure to provide a meaningful expression of English voice.

This led us in chapter 4 to set out a series of proposals designed to improve EVEL and its future operation. These focus on four key goals: separating voice and veto; entrenching the double veto; reducing complexity; and improving legitimacy. Our main recommendations are set out more fully below.

## List of recommendations

### Separating voice and veto

- Greater attention should be paid to the challenge of finding ways of enhancing England’s voice in the UK parliament.
- One option within the legislative process, broadly defined, would be to commit to sending certain bills to territorially-constituted pre-legislative scrutiny committees.
- More substantively, a cross-party body such as the Commons Procedure Committee should consider the case for, and detailed design of, additional mechanisms for facilitating England’s voice. These should include an English grand committee and/or an English Affairs select committee.
- An English grand committee should have a remit beyond scrutiny of legislation, including the capacity to question ministers, conduct short debates, and receive ministerial statements. Serious consideration should be given to how such a body would be composed, and whether it is practical for it to comprise all English MPs or only a representative subset. Its size is related to the question of where it should meet; holding it in the main Commons chamber may be undesirable.
- An English Affairs select committee should have a cross-cutting remit, in order to reduce the potential for duplication with the work of existing select committees. It may also be given the role of reviewing, and drawing to the attention of the House, legislative proposals from across government departments. Consideration should be given to whether this committee should reflect the party balance in the whole House or in England alone.

## Entrenching the double veto

- The double veto should be regarded as a bulwark of the current system. Any move towards an England-only legislative process within the confines of the Westminster parliament would render the new procedures vulnerable to many of the criticisms commonly made against them.
- The government should eliminate the situation whereby legislation that must be regularly reapproved by parliament – such as certain taxation and secondary legislation – is subject to veto by a subset of MPs.
- The government should correct two elements of the system that are not fully congruent with the double veto principle:
  - In the case of instruments subject to the negative procedure, the standing orders should be amended so that such an instrument is annulled if either English (or English and Welsh) or UK-wide MPs (rather than both as at present) vote in support of the motion to annul it.
  - In the case of the anomaly surrounding Lords amendments that delete legislative text, the government should devise a solution for how the double veto principle can be reflected at CCLA. If a satisfactory solution cannot be found, it may be preferable to accept that EVEL cannot be applied to motions at CCLA without undermining Westminster's status as a UK-wide legislature.

## Reducing complexity

- The complexity of the current procedures could and should be reduced. Options that might be considered here include: only activating the new stages and processes where required; reducing the complexity of the new stages and processes that are possible under the rules; and addressing the complexity of the standing orders that underpin the new processes.
- There are two main options for triggering the new stages and processes only when required.
  - The first is to activate the EVEL process in a more discretionary fashion – on specific bills, or clauses. The decision to activate the processes should not rest solely in the hands of ministers. Other options for activation include giving the power to: any new body established to give voice to England (as discussed above); English (or English and Welsh) MPs, with a minimum number of signatures required; or the leader of the largest opposition party in England (or England and Wales).
  - The second is to avoid convening legislative grand committees unless they are required. This could be achieved by allowing the consent motion to be agreed to in the whole House, provided it attracts no objection, and proceeding to the legislative grand committees only where an objection is registered.

- Two main options for reducing the complexity of the new stages and processes themselves are suggested:
  - The first is to reduce the number of veto points on primary legislation. In particular, serious consideration should be given to whether it is necessary for EVEL to apply at the CCLA stages. While such a move might make the veto less comprehensive, it would also make it more comprehensible and transparent.
  - The second is for certification to apply to fewer types of provision. In particular, serious consideration should be given to whether it is necessary to certify amendments that change or eliminate an earlier certification decision.
- The standing orders themselves should be reviewed, ideally by Commons clerks, to establish whether they could be consolidated and simplified. The revised procedures should set out the broad principles of EVEL, and only the most essential detail, rather than specifying all the terms of their application. Simplification of the standing orders would be further facilitated if the substantive procedures themselves were made simpler in line with the recommendations above.

## Improving legitimacy

- If EVEL is to prove durable, it is essential that the government takes steps to improve its standing and legitimacy in parliament.
- The name currently attached to this reform, 'English Votes for English Laws', is misleading and potentially divisive. We suggest that it be changed to 'English Consent to English Laws' (ECEL), which would underscore its equivalence to the legislative consent motions passed by the devolved legislatures.
- The government should consider pursuing cross-party discussions about these processes, and seek to establish agreement on the principles underpinning them.
- The government should continue to experiment with ways of making its certification advice as clear and accessible as possible.
- The Speaker should consider offering publicly accessible explanations for his certification decisions where these are requested by MPs. Alternatively, he should consider publishing more general guidance, updated as new cases emerge, to illuminate precedent in less straightforward cases.
- The current review being conducted by government should be considered as provisional in kind. A body independent of government, such as the Commons Procedure Committee, should review the operation of EVEL before the end of the current parliament, and in subsequent parliaments.

# Appendix A: EVEL certification and practice on primary legislation, October 2015-October 2016

|   | Initial certification  | Date of Commons second reading | English bill committee | Post-report certification   | Legislative grand committee(s) |                |           | Reconsideration |   | CCLA               |           |
|---|--|--------------------------------|------------------------|---|--------------------------------|----------------|-----------|-----------------|---|--------------------|-----------|
|   |  |                                |                        |   | Territory                      | Length (mins)* | Divisions |                 |   | CCLA certification | Divisions |
| Housing and Planning Bill (DCLG)  | 28/10/2015<br>E: 103 clauses & 5 schedules<br>EW: 34 clauses & 6 schedules | 02/11/2015                     | No                     | 12/01/2016<br>E: 127 clauses, 11 schedules & 5 amdt<br>EW: 33 clauses, 7 schedules & 4 amdt | EW & E                         | 43             | 0         | No              | 04/05/2016<br>E: 19 motions<br>EW: 3 motions<br>09/05/2016<br>E: 5 motions<br>E & EW: 1 motion<br>11/05/2016<br>E: 1 motion | 9                  |           |
| Childcare Bill [HL] (Education)   | 18/11/2015<br>E: 3 clauses   | 25/11/2015                     | No                     | 25/01/2016<br>E: 2 clauses & 1 amdt   | E                              | 2              | 0         | No              | None  | 0                  |           |
| Charities (Protection and Social Investment) Bill [HL] (Cabinet Office) | 04/11/2015<br>EW: whole bill   | 03/12/2015                     | No                     | 26/01/2016<br>EW: whole bill  | EW                             | 14             | 0         | No              | None  | 0                  |           |
| Energy Bill [HL] (DECC)   | 18/11/2015<br>EW: 1 clause   | 18/01/2016                     | No                     | 14/03/2016<br>EW: 1 clause  | EW                             | 2              | 0         | No              | None  | 0                  |           |
| Enterprise Bill [HL] (BIS)  | 27/01/2016<br>E: 3 clauses<br>EW: 3 clauses                                | 02/02/2016                     | No                     | 09/03/2016<br>E: 5 clauses, 1 schedule & 9 amdt<br>EW: 4 clauses & 2 amdt                   | EW & E                         | 4              | 0         | No              | None  | 0                  |           |
| Policing and Crime Bill (Home Office)                                   | 02/03/2016<br>E: 9 clauses & 2 schedules<br>EW: 52 clauses & 6 schedules   | 07/03/2016                     | No                     | 13/06/2016<br>E: 9 clauses & 2 schedules<br>EW: 65 clauses, 7 schedules & 1 amdt            | EW & E                         | 4              | 0         | No              |   |                    |           |
| Finance (No. 2) Bill (Treasury)   | 11/04/2016<br>EWNI: 9 clauses & 1 schedule                                 | 11/04/2016                     | No                     | 06/09/2016<br>EWNI: 9 clauses & 1 schedule  | EWNI                           | 2              | 0         | No              | N/A   | N/A                |           |
| Higher Education and Research Bill (BIS)                                | 06/07/2016<br>E: 6 clauses & 2 schedules                                   | 19/07/2016                     | No                     |   |                                |                |           |                 |   |                    |           |
| Neighbourhood Planning Bill (DCLG)                                      | 14/09/2016<br>E: 10 clauses & 2 schedules<br>EW: 20 clauses                | 10/10/2016                     | No                     |   |                                |                |           |                 |   |                    |           |

Key: E (England), EW (England and Wales), EWNI (England, Wales and Northern Ireland).

Date given is that on which record of certificate included in Votes and Proceedings document.

\* Calculated from time Deputy Speaker took chair until start of third reading. Where more than one Legislative Grand Committee (e.g. EW & E), length is therefore for all added together.

Note: Data covers period from 23 October 2015 to 22 October 2016. Blank cells indicate data not yet known by end of this period.

# Appendix B: EVEL certification and practice on other business, October 2015-October 2016

|   | Certification date | Territory | Control procedure | Division |
|---|--------------------|-----------|-------------------|----------|
| Statutory instruments   |                    |           |                   |          |
| Draft Non-Domestic Rating (Levy and Safety Net) (Amendment) (No. 2) Regulations 2015  | 18/11/2015         | E         | Affirmative       | No       |
| Draft Police and Criminal Evidence Act 1984 (Codes of Practice) (Revision of Code E) Order 2015   | 18/11/2015         | EW        | Affirmative       | No       |
| Draft Legal Services Act 2007 (Claims Management Complaints) (Fees) (Amendment) Regulations 2016  | 25/11/2015         | EW        | Affirmative       | No       |
| Draft Agricultural Holdings Act 1986 (Variation of Schedule 8) (England) Order 2015   | 09/12/2015         | E         | Affirmative       | No       |
| Education (Student Support) (Amendment) Regulations 2015 (S.I., 2015, No. 1951)   | 06/01/2016         | E         | Negative          | Yes      |
| Draft Infrastructure Planning (Onshore Wind Generating Stations) Order 2016   | 20/01/2016         | EW        | Affirmative       | No       |
| Draft Warrington (Electoral Changes) Order 2016   | 27/01/2016         | E         | Negative          | N/A±±    |
| Draft Greater Manchester Combined Authority (Election of Mayor with Police and Crime Commissioner Functions) Order 2016                                       | 09/02/2016         | E         | Affirmative       | No       |
| Draft Tees Valley Combined Authority Order 2016   | 24/02/2016         | E         | Affirmative       | No       |
| Draft Crown Court (Recording) Order 2016  | 11/04/2016         | EW        | Affirmative       | No       |
| Draft Access to Justice Act 1999 (Destination of Appeals) (Family Proceedings) (Amendment) Order 2016   | 20/04/2016**       | EW        | Affirmative       | No       |
| Draft Energy Efficiency (Private Rented Property) (England and Wales) (Amendment) Regulations 2016  | 20/04/2016**       | EW        | Affirmative       | No       |
| Draft Licensing Act 2003 (Her Majesty the Queen's Birthday Licensing Hours) Order 2016  | 20/04/2016         | EW        | Affirmative       | No       |
| Draft Pubs Code etc. Regulations 2016   | 20/04/2016         | EW        | Affirmative       | N/A±     |
| Draft Pubs Code (Fees, Costs and Financial Penalties) Regulations 2016  | 20/04/2016         | EW        | Affirmative       | N/A±     |
| Draft West Midlands Combined Authority Order 2016   | 03/05/2016**       | E         | Affirmative       | Yes      |
| Draft Access to Justice Act (Destination of Appeals) Order 2016   | 11/05/2016**       | EW        | Affirmative       | No       |
| School Governance (Constitution and Federations) (England) (Amendment) Regulations 2016 (S.I., 2016, No. 204)   | 08/06/2016         | E         | Negative          | N/A±±    |
| Town and Country Planning (General Permitted Development) (England) (Amendment) Order 2016 (S.I., 2016, No. 332)  | 08/06/2016         | E         | Negative          | N/A±±    |
| Draft Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975 (Amendment) (England and Wales) Order 2016   | 08/06/2016         | EW        | Affirmative       | No       |
| Draft Telecommunications Restriction Orders (Custodial Institutions) (England and Wales) Regulations 2016   | 08/06/2016         | EW        | Affirmative       | No       |
| Draft Water and Sewerage Undertakers (Exit from Non-household Retail Market) Regulations 2016   | 08/06/2016         | EW        | Affirmative       | No       |
| Draft Halton, Knowsley, Liverpool, St Helens, Sefton and Wirral Combined Authority (Election of Mayor) Order 2016   | 15/06/2016         | E         | Affirmative       | No       |
| Draft Tees Valley Combined Authority (Election of Mayor) Order 2016   | 29/06/2016         | E         | Affirmative       | No       |
| Draft Criminal Justice Act 1988 (Offensive Weapons) (Amendment) Order 2016  | 29/06/2016         | EW        | Affirmative       | No       |
| Draft Pubs Code etc. Regulations 2016*  | 29/06/2016         | EW        | Affirmative       | No       |
| Draft Pubs Code (Fees, Costs and Financial Penalties) Regulations 2016*   | 29/06/2016         | EW        | Affirmative       | No       |
| Draft Barnsley, Doncaster, Rotherham and Sheffield Combined Authority (Election of Mayor) Order 2016  | 06/07/2016         | E         | Affirmative       | No       |
| Draft Neighbourhood Planning (Referendums) (Amendment) Regulations 2016   | 06/07/2016         | E         | Affirmative       | No       |
| Draft West Midlands Combined Authority (Election of Mayor) Order 2016   | 06/07/2016         | E         | Affirmative       | Yes      |
| Draft Durham, Gateshead, Newcastle Upon Tyne, North Tyneside, Northumberland, South Tyneside and Sunderland Combined Authority (Election of Mayor) Order 2016 | 13/07/2016         | E         | Affirmative       | N/A±     |
| Draft Self-build and Custom Housebuilding (Time for Compliance and Fees) Regulations 2016   | 20/07/2016         | E         | Affirmative       | No       |
| Civil Legal Aid (Merits Criteria) (Amendment) Regulations 2016 (S.I., 2016, No. 781)  | 07/09/2016         | EW        | Affirmative       | No±±±    |
| Other instruments   |                    |           |                   |          |
| Police Grant Report (England and Wales) for 2016–17 (HC 753)  | N/A***             | EW        | Affirmative       | Yes      |
| Report on Local Government Finance (England) 2016–17 (HC 789)   | N/A***             | E         | Affirmative       | Yes      |
| Referendums Relating to Council Tax Increases (Alternative Notional Amounts) (England) Report 2016/2017   | 09/02/2016         | E         | Affirmative       | No       |
| Referendums Relating to Council Tax Increases (Principles) (England) 2016–17 (HC 790)   | N/A***             | E         | Affirmative       | No       |
| Budget resolutions  |                    |           |                   |          |
| Stamp duty land tax (calculating tax on non-residential and mixed transactions) (45)  | 21/03/2016         | EWNI      | N/A               | No       |
| Stamp duty land tax (higher rates for additional dwellings etc.) (46)   | 21/03/2016         | EWNI      | N/A               | No       |
| SDLT higher rate (land purchased for commercial use) (47)   | 21/03/2016         | EWNI      | N/A               | No       |
| SDLT higher rate (acquisition under home reversion plan) (48)   | 21/03/2016         | EWNI      | N/A               | No       |
| SDLT higher rate (properties occupied by certain employees) (49)  | 21/03/2016         | EWNI      | N/A               | No       |
| Stamp duty land tax (co-ownership authorized contractual schemes) (50)  | 21/03/2016         | EWNI      | N/A               | No       |
| Landfill tax (rates) (57)   | 21/03/2016         | EWNI      | N/A               | No       |
| Motion on Procedure (Future Taxation) relating to rates of landfill tax   | 21/03/2016         | EWNI      | N/A               | No       |

Key: E (England), EW (England and Wales), EWNI (England, Wales and Northern Ireland).

\* Revised version of previously certified SI. \*\* Subsequently re-certified in 2016-17 session. \*\*\* Automatically subject to EVEL without certification (Standing Order No. 83R). ± Instrument withdrawn. ±± Not put for decision. ±±± Approved after the end of the period studied.

Note: Data covers period from 23 October 2015 to 22 October 2016, unless stated.

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In October 2015 the House of Commons approved an important set of procedural changes, designed by the government, known as ‘English Votes for English Laws’. This new system has proved contentious in both political and constitutional terms, provoking claims that it has fundamentally altered the terms of representation at Westminster. But what should be made of this and other criticisms? This report results from a major academic investigation into EVEL. It includes detailed analysis of how the new procedures worked in practice during their first 12 months in operation, and discusses their wider constitutional implications. Based on this analysis, the report makes a series of constructive proposals for how EVEL could be improved.

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