English Votes for English Laws

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HOUSE OF COMMONS
PROCEDURE COMMITTEE

1. This written evidence reports some preliminary observations from an in-depth investigation into the implementation of 'English Votes for English Laws' (EVEL) in the Commons. The research is being conducted at the Mile End Institute at Queen Mary University of London, and is supported by the Centre on Constitutional Change and the Economic and Social Research Council. Our final conclusions and recommendations will be published in a detailed report later this year.

General Observations

2. The transfer of legislative powers to Scotland and Wales has created a series of constitutional anomalies, and there is evidence to suggest these are one source of a growing sense of grievance in England about its constitutional position within the UK.[1] The most high-profile anomaly is the 'West Lothian Question' (WLQ), which relates to the voting rights of MPs at Westminster. Other anomalies include the absence of any deliberative body that can claim to represent or speak for England as a whole (akin to the devolved legislatures), and of non-British institutions that are tasked with English governance. In recent years there has been an extensive debate about whether and how to resolve the WLQ in particular. Solutions have tended to fall along a continuum: from the more modest ambition of giving England greater 'voice', to a formal 'veto' in the legislative process. The most important contribution to debate on these issues was the McKay Commission's (2013) report, which proposed addressing the WLQ through mechanisms to give England greater 'voice' in the legislative process, but no formal veto.[2]

3. There are good reasons to support the development of procedures that give English MPs greater 'voice' within the Commons. Indeed, some of the proposals made by the McKay Commission have attracted support from different parties. The introduction of a 'veto' for English MPs is more controversial in constitutional terms. Our own judgement is that the case for some kind of veto right is now hard to refute. In a small number of high-profile cases since 1999 a UK-government has relied on Scottish MPs to pass legislation that did not apply in

[1] Wyn Jones, Richard et al. 2013. England and Its Two Unions: The Anatomy of a Nation and Its Discontents. London: IPPR.

[2] McKay Commission. 2013. "Report of the Commission on the Consequences of Devolution for the House of Commons." http://webarchive.nationalarchives.gov.uk/20130403030652/http://tmc.independent.gov.uk/wp-content/uploads/2013/03/The-McKay-Commission_Main-Report_25-March-20131.pdf

Scotland – notably foundation hospitals (2003) and tuition fees (2004).[3] These episodes generated considerable disquiet, and may well prove incendiary if repeated in the current political climate. The introduction of a veto, however, is bound to be complicated and fraught, as it flies in the face of hundreds of years of parliamentary practice and ingrained habit, and is being applied at a moment of heightened territorial tensions in politics. It would, we think, be wiser to adopt a more restricted, but also more flexible and transparent, version of the right to veto than that currently in operation.

4. The specific measures implemented by the government represent what has been termed a 'double veto' system. This means that England-only[4] legislation requires support from a majority of *both* England-only *and* UK-wide MPs in order to pass. The double veto does not prevent non-English MPs exercising a decisive influence on legislation applying to England. It is a key attribute of the current system, offering an important bulwark against the charge that it has created two different 'classes' of MP. Its existence means that some of the concerns raised in the Procedure Committee's interim report – specifically, cross-border effects and the potential for judicial challenge – may not be quite as serious as they first appear, since MPs from across the UK are in no weaker position to block legislation from entering the statute book than previously. Our view is that the double veto is an important foundational principle, but should be balanced by mechanisms for greater English 'voice'.

5. We believe that there are two main difficulties affecting the reforms introduced by the government. These are: first, the attempt to combine voice and veto in a single mechanism; and, second, the complex and legalistic character of the new procedures. These flaws militate against the government achieving its goals of giving a clearer form of voice to English MPs, and providing an effective protection for English interests in the legislature.

Voice and veto

6. The government has attempted to deliver both 'voice' and 'veto' to English MPs. It has done so by seeking to make the expressed will of a majority of English MPs binding at key points in the legislative process, meaning that English bills and clauses cannot pass unless they have indicated their assent. It is open to question whether there is any effective way of combining both voice and veto within a single institutional process.

7. A key example of the tension between voice and veto in the current system is the operation of the Legislative Grand Committees. The McKay Commission envisaged this stage being held prior to second reading, which in our view would have facilitated expression of England's voice. Yet the government's desire to bolt down a comprehensive veto means that the LGC stage is situated later, to take account of any amendments made in the Commons. As a

[3] Russell, Meg, and Guy Lodge. 2006. "The Government of England by Westminster." Pp. 64–95 in The English Question, edited by Robert Hazell. Manchester: Manchester University Press.

[4] The reforms also make provision for 'England and Wales' and 'England, Wales and Northern Ireland' only matters. For simplicity this briefing refers only to England, though the same principles apply more broadly.

consequence of holding the LGCs immediately between the substantive debates on report and third reading, 'voice' is hardly being achieved: the LGCs have so far been notable for the absence of substantive debate on the bill in question and many of them have been entirely ceremonial. Furthermore, the imperative to allow all UK MPs to speak on the floor of the Commons has diluted the LGCs' potential to act symbolically as a recognisably English body. We would urge the government to consider different ways of achieving a clearer expression of English 'voice' in the Commons.

8. There are various ways in which this might be achieved, and we would urge your Committee to consider this issue separately to the current review you are conducting. One fairly straightforward option to which we would draw your attention would involve the establishment of an English Affairs select committee, to sit alongside the existing Scottish, Welsh and Northern Ireland Affairs committees. Its remit could be to take a broad view on how major issues of concern (e.g. immigration or decentralisation) are playing out within England, including commenting on England-only legislative proposals where appropriate.

Complexity

9. The desire to provide a robust 'veto' engenders a second major flaw – the unduly complex nature of the new procedures. New Standing Orders Nos. 83J to 83X alone run to almost thirty pages, and reflect a desire to specify practice in almost every conceivable scenario. A number of experts expressed concerns to us about the quasi-statutory fashion in which the Standing Orders have been drafted. The idea of introducing a complicated, supposedly definitive, set of rules and procedures represents a notable departure from established approaches to the SOs, which are typically more modest in scope, and open to interpretation by Commons authorities.

10. The complexity and opaqueness of the rules presents a problem for several reasons. Both MPs and members of the public may find the new procedures hard to comprehend. This might not itself matter to the running of the system, but should a significant dispute or major political disagreement happen, the absence of widespread understanding of this system could well become destabilising. Legalistic rules may also make it harder for the Speaker to respond flexibly to pressures that arise. There is an additional risk that focus on detailed procedures might detract from a key part of rationale for EVEL: the transparent demonstration that England's interests are being considered in parliament. We believe that there is a strong case for moving towards a less complex set of procedures that gives greater discretion to the Speaker to implement the underlying principles of EVEL. One leading authority we interviewed suggested that the current SOs could be reduced to as little as two pages in length.

Specific Observations and Recommendations

11. With these general observations in mind, we offer below some specific reflections on questions that your Committee has indicated it wishes to consider.

Departures from the 'double veto'

12. Two elements of the new Standing Orders appear at odds with the double veto principle, and deserve careful examination. The first of these concerns Instruments subject to the negative procedure. Divisions on motions relating to Instruments are conducted using a double-majority vote, in which *both* English *and* UK-wide MPs must vote in support for the motion to pass (SO Nos. 83P&Q). Instruments subject to the affirmative procedure are taken on a motion that it 'be approved', meaning that double-majority voting is consistent with the double veto principle. But in the case of Instruments subject to the negative procedure, the motion is that the instrument 'be annulled'. The effect here is that the Instrument remains in force unless *both* groups of MP *oppose* the Instrument. This does not appear to be entirely congruent with the double veto principle. So far in this session there has been only one such vote, on the Education (Student Support) (Amendment) Regulations 2015 – almost certainly the most politically contentious Instrument certified. In this case, both categories of MP voted against annulment. Nevertheless, the real possibility exists that English MPs could in future be prevented from rejecting England-only secondary legislation due to the votes of UK-wide MPs (or *vice versa*). In order to deal with this anomaly, we recommend that the Standing Orders be amended so that, in the case of negative Instruments, the Instrument is annulled if a majority of *either* group of MPs votes in support of the motion.

13. A second possible instance concerns the treatment of Lords amendments. EVEL has not yet been applied to consideration of Lords amendments, and it is difficult to know for sure how the SOs will be interpreted. Two complexities are relevant. First, a Lords amendment can either insert or delete text from a bill.[5] Second, the SOs state that, where English and UK-wide MPs vote differently on a motion to reject a Lords amendment, the decision will be 'to disagree with it' (83O(9)) – but it is unclear whether the 'it' refers to the motion or the amendment it seeks to reject (and, if the former, whether the amendment would consequently be agreed). It thus seems possible that at CCLA stage, legislative text could potentially be agreed/retained without the support of both English and UK-wide MPs. We suggest that this needs clarification. The double veto principle would seem to imply that additions to the bill should require the support of *both* categories of MP, while deletions from the bill should require the support of *either* category of MP. We suggest that your committee considers whether and how the double veto principle should be reflected at CCLA stage.

[5] This is also true of amendments during the bill's initial passage. The difference is that disagreements at these early stages are ultimately resolved through 'remov[ing] any provisions of the bill which are not agreed' by both groups of MP (SO No. 83N(6)).

Certification of amendments

14. Subsequent to second reading, the Speaker is required to certify amendments that would change or eliminate an earlier certification. So far, this has applied on amendments to:

    a. delete a previously certified clause from the bill, resulting in it no longer being certifiable;[6]

    b. apply a previously England-only clause to England and Wales;[7]

    c. apply a previously England and Wales-only clause to England only;[8] and

    d. add a reserved power to a certified clause, resulting in it no longer being certifiable.[9]

15. It seems to us that the certification of amendments may well be superfluous, adding unnecessary complexity to these procedures. In the case of (b) and (c) above, it seems perverse for one subset of MPs to be asked to consent to an amendment to apply provisions to areas represented by a different subset. In the case of (a), the certification of amendments would allow English MPs to reinstate an England-only clause that was rejected by UK-wide MPs – but this can in turn be overridden by UK-wide MPs, and if the two groups continue to disagree the clause will still be removed under SO No. 83N(6).

16. The most persuasive argument we can see for certifying amendments is to prevent amendments being proposed purely in order to avoid an EVEL certification. For example, without this power, it would be theoretically possible that during 'ping pong' the Lords could turn an England-only provision into a UK-wide provision to avoid certification. But the SOs represent a highly legalistic way of dealing with this hypothetical scenario. An alternative might be for the Speaker to use his discretion either to rule as 'out of order' or deem 'disagreed to' any amendments that seem to him to have the primary purpose of artificially avoiding an EVEL certification – or alternatively to certify amendments only in these exceptional circumstances. Were the formal certification of amendments dispensed with, this might allow further simplification of the process. For example, certification at second reading would serve less purpose and could be redefined so that it serves the sole, and clearer, purpose of identifying England-only bills (which are themselves fairly rare).[10] We therefore recommend that your committee considers whether the certification of amendments should be dispensed with.

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[6] 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)

[7] Amendments 10-18 in committee (Enterprise Bill)

[8] Amendments 180-181 and 127-128 in committee (Housing and Planning Bill)

[9] Amendment 3 in committee (Childcare Bill)

[10] Against this, it might be felt that an early certification continues to serve a useful purpose, for example by allowing business managers to build in sufficient time for the LGC stage.

Other issues

17. Your interim report recommended that, during the first session in which the new SOs apply, the Speaker should not give reasons for his certification decisions (pp17-18). We observe, however, that on the Housing and Planning Bill he did give an explanation of his decision in response to a question raised by Lady Sylvia Hermon (13 January 2016, columns 861-862). This appears to have served a useful clarificatory purpose, helping defuse a perception of injustice and placing on the public record an important precedent for how the 'minor or consequential' criteria might be interpreted. Nevertheless, we agree that it is not necessary for the Speaker to provide explanations in every case, particularly where no questions have been raised. We recommend that the Speaker consider providing explanations where they are requested by MPs. Alternatively, he should consider issuing more general publicly-accessible guidance, updated as new cases arise, to illuminate precedent in less straightforward cases.

18. Your interim report recommended that policy intended to apply only to England should be drafted 'with the express intention of meeting the certification tests' (p30). The evidence we have gathered so far suggests that the drafting of legislation has not so far been significantly affected by the introduction of EVEL, a finding that will no doubt please some and disappoint others. We draw to your committee's attention New Clause 21 at committee stage on the Enterprise Bill (on Sunday trading). Although the primary topic of this New Clause was a high-profile policy that applied only to England and Wales, the New Clause drafted by the government also included provision that applied in Scotland, meaning that it would not have been certified by the Speaker had it remained after report.[11] It would be worth investigating why exactly this decision was taken by the government, and whether this represents an approach that will be replicated in future.

19. Your interim report questioned the value of activating EVEL on legislation that was likely to be politically uncontentious, particularly given that the government has a majority in both England and across the UK (pp29-30). We believe that the operation of EVEL during this session tends to confirm the force of this observation. So far there have been seven LGC stages, on five bills, and there is little evidence to suggest that the EVEL process added much value. Nevertheless, we are not fully persuaded by the solution proposed by your committee (i.e. that EVEL should be activated by a vote on a motion moved by a government minister). This would mean that the possibility of an English veto would rest entirely in the hands of a government which has an abiding interest in the passage of its legislative programme. Were a body established to give England greater 'voice' (e.g. an English Affairs Committee, as suggested above), one possible solution might be for there to be a (formal or informal) mechanism for it to also trigger the EVEL process.

[11] 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/.

20. Your inquiry, and the government's forthcoming review, provide important opportunities to take stock of this new system. But it is important to note that some of the key processes outlined in the new SOs have not, as yet, happened, including: an England-only committee stage; an LGC withholding consent and triggering the reconsideration process; certified amendments at CCLA stage (although this may occur on the Housing and Planning Bill); and the application of EVEL to income tax decisions. Future circumstances may also place pressures on the EVEL process which have not as yet been anticipated, for instance an unexpected decision at report stage that changes the Speaker's provisional certification. For these reasons we believe that your committee's review, and that which the government plans, be considered as provisional in kind. Given the constitutional importance and political sensitivity of issues that EVEL raises, we would suggest that an independent body be tasked with conducting a comprehensive review after three years of its operation, and its findings be subject to a Commons debate and vote before the end of the current parliament.

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