



Scottish Affairs Committee

Oral evidence: [English Votes for English Laws](#), HC 399

8 September 2015

Ordered by the House of Commons to be published on 8 September 2015

Written evidence from witnesses:

- [Law Society of Scotland](#)

[Watch the meeting](#)

Members present: Pete Wishart (Chair); Kirsty Blackman; Mr Christopher Chope; Mr Jim Cunningham; Margaret Ferrier; Chris Law; John Stevenson.

Questions 1-51

Witnesses: **Charlie Jeffery**, Professor of Politics and Senior Vice-Principal, University of Edinburgh, **Sir William McKay**, former Clerk of the House of Commons and Chair of the Commission on the consequences of devolution for the House of Commons, and **Michael Clancy OBE**, Director of Law Reform, Law Society of Scotland, gave evidence.

Q1 Chair: Good morning, gentlemen. This is the first public evidence session of the new Scottish Affairs Committee, and what a distinguished group of constitutionalists we have in front of us this morning. You are very much welcome. Perhaps you could start by saying who you are and what particular interests or organisations you represent. We will start with you, Sir William.

Sir William McKay: I have two qualifications—one primary and one secondary. The primary one is that I was chair of the Commission on the consequences of devolution for the House. The second one is that I was Clerk of the House before that for a very long time, it seemed.

Chair: We remember you well, with great affection too.

Michael Clancy: Good morning, ladies and gentlemen. My name is Michael Clancy and I am the director of law reform at the Law Society of Scotland, which takes a deep interest in constitutional and legal matters.

Professor Jeffery: Charlie Jeffery, professor of politics at the University of Edinburgh. I was a member of Sir William's Commission on the consequences of devolution for this House.

Q2 Chair: We are very grateful to you all for attending this morning. We will ask you to make an opening statement, if you want to, but I would like you to think of this as you give us your opening statement: is all of this necessary? Given that there is an English majority in the House of Commons, and that so few pieces of legislation have been determined by Scottish Members of Parliament, is this being made a huge fuss of? Is the Government right in pursuing English votes for English laws? Could you give your own observations about where we are thus far in the process and what you think we need to do? We will start with you, Sir William, if that is okay.

Sir William McKay: I think, Chairman, that there is probably a stronger political need than a practical need. It is the clarity and finality of an English veto that is driving the demand for the change. The difficulty is that you can only arrange an English veto in a different way from arranging a devolutionary arrangement for Scotland, Wales and Northern Ireland. It is very difficult, because if you are going to have an English veto, you have to arrange devolution within the House of Commons.

Q3 Chair: One of the major distinguishing features of the Leader of the House's proposals and your own Commission's conclusions is the issue of the veto. When you saw the veto, I don't know what you felt about it. Was it something that your Commission looked at and considered as part of its recommendations?

Sir William McKay: In a way it was, because we constructed a separate kind of solution and—implicitly at least—rejected the veto in favour of the voice.

Q4 Chair: Thank you. Michael Clancy.

Michael Clancy: You asked, Mr Chairman, whether there is a need for this. Whether there is a need for it or not, we are where we are and we have to deal with the proposals on the table. As you know, this issue has been in the public eye for a very long time. It started off as the West Lothian question, but those who read back to the 19th century will see that Mr Gladstone encountered exactly the same issue in relation to Ireland, so there is not very much that is new about the idea.

Will it affect much by the way of legislation? Sometimes yes and sometimes no. The latest Queen's Speech had, to my reckoning, six Bills that have specific provisions that are England only, and a couple that had England, Wales, Scotland and Northern Ireland in them as well. I think that if it passes it will be used on some occasions.

Q5 Chair: Thank you. Professor Jeffery.

Professor Jeffery: Let me take a slightly different tack. I would say that some kind of reform to give England as a whole an institutional voice in the UK political system is necessary, in the sense that it is clear from academic survey research on public opinion in England that people in England are deeply dissatisfied with how they are governed at the moment. In work I have done with colleagues in Cardiff, we have not found more than 29% of respondents in our surveys endorsing the status quo of governing arrangements for

England. We have found that, whatever permutation of options you offer, a majority of people in England wish for an England-wide institutional arrangement, whether it is English votes on English laws, an English Parliament or, indeed, an independent state called England. Among those options, in all cases the most popular is English votes on English laws—some kind of special arrangements in the UK Parliament.

In that sense, I think there is a need for institutional change. Whether this institutional change meets that need is a different matter. We can, no doubt, talk at great length about parliamentary procedure, but I think that is a downstream or end-of-pipe measure. That kind of change to how Parliament works is likely to be effective only if there are upstream changes of various kinds. It is tinkering at the end of a decision-making process, and thought needs to be given to the earlier stages of the process. I will be happy to elaborate on that as we move through the discussion.

Q6 Chair: Thank you, Professor. These are the sort of issues that we will be looking to get into, but we will start where all this will begin, which is the certification process. We kindly heard from representatives, including the Speaker's Counsel, in private session before we asked you fine gentlemen to join us. A feature of a number of the debates that we have had thus far on English votes for English laws is the very clear concern that the Speaker, through certification, will be drawn into making a political judgment and whatever he decides might deny or exclude certain Members of Parliament representing certain constituencies from participating in sections of a piece of legislation. What do you feel about how far the Speaker needs to consult, and what skills and resources he has available to make decisions about certification? Do you have any concerns about the politicisation of the Speaker of the House of Commons?

Michael Clancy: In the submission that we made to the Committee, we said that it would be quite a difficult task. It is not an easy task to be able to certify Bills as being one thing or another. The proposal says that, "The Speaker shall, before second reading consider every public bill" and "certify any such bill, or any clause or schedule of any such bill, which, in the Speaker's opinion relates exclusively to England or to England and Wales, and is within devolved...competence." There are two legs to that: a territorial leg and a competence leg.

This Parliament does not have to think about competence very much because it is a sovereign Parliament and considers itself to be a sovereign Parliament. Therefore, issues of competence—what is within the bounds of its vires—do not come up very much. They might come up in relation to EU law but by and large it is a bit of a novelty, whereas the devolved Parliament and Assemblies have to consider competence all the time. Part of the key element about the way in which devolution works in the UK is that these institutions have been set up to make law for their territory and they are to do so within a framework of competence.

I am most familiar with the Scottish parliamentary scene. In section 29 of the Scotland Act, you will find the building blocks of that competence decision. It says that, "An Act of the Scottish Parliament is not law" if it "is outside the legislative competence of the Parliament." That is a clear limitation on the legislative powers of the Parliament and you determine that competence so far as any of the following apply: whether that law would

apply outside Scotland; whether it would relate to reserved matters to this Parliament; whether it would breach aspects of schedule 4 of the Scotland Act, which relates to things such as the Act of Union; where it would be incompatible with European Convention on Human Rights matters or EU law; or whether it would do anything to affect the position of the Lord Advocate. Those are quite significant constraints on the competence of the Parliament in Scotland but, of course, leave a wide range of powers for the Parliament to exercise its legislative power.

The Wales arrangements are slightly different and the Northern Ireland arrangements are slightly different again. Therefore, when we are asking the Speaker, in this set of amendments to Standing Orders, to have an opinion on devolved legislative competence, that seems to be unlimited. It is not limited to devolved competence of the Scottish Parliament; it could be any devolved competence in that sense. I am reinforced in that, because Standing Order No. 83J(3) states: “A clause or schedule which relates exclusively to England is within devolved legislative competence if...it would be within the legislative competence of the Scottish Parliament...the National Assembly for Wales” or “the Northern Ireland Assembly”. The Speaker has to acquire omniscience about devolved arrangements in all these areas. Sometimes those arrangements correspond and sometimes they might conflict. Something might be within devolved competence in Scotland and not in Wales. Sometimes you might get extraordinary issues, such as the raising of corporation tax in Northern Ireland, which is not devolved in Scotland or Wales. It is a big issue.

Q7 Chair: Thank you. I will come back on that issue to Professor Jeffery and you, Sir William, but something else that was picked up in our conversations with Speaker’s Counsel is that the decision by the Speaker is unchallengeable. There is a possibility, if I can put it as elegantly as that, that he may come into conflict with Scottish Members of Parliament who take a particular view that there are issues to do with Scotland, such as Barnett consequentials—that example is often cited. When I gave evidence to your committee, Sir William, Barnett consequentials were the key feature. Should the Speaker possibly explain why he has come to the decision to break convention and tell the House and Scottish Members of Parliament and their constituents in Scottish constituencies why he has made that decision?

Professor Jeffery: I will pick up the point that I left at the end of my first comment: what is proposed here is very much the downstream element. The concerns about the Speaker’s role and the contentions that could apply might well best be addressed by thinking further upstream. That includes, for example, thinking in a much more rigorous way about the drafting of Bills in relation to territorial extent. To do that probably means thinking harder about how Whitehall Departments are organised in relation to English business.

To make that work, you probably need to have something like a manifesto of the parties standing in England of policies for England. We heard that language in the last election campaign very fleetingly from the Conservative party, which I think was a tactical device, but it shows the potential that is there to say, “Given that we are now thinking concretely about England as a jurisdiction, in effect, we ought to have a set of policies that we are offering people in England that would then be addressed by those who form the Government through Whitehall Ministries and would be reflected much more rigorously in the drafting of legislation.”

You raised Barnett, which is another much wider issue. If one were to think seriously and in the round about an institutional representation of England in the UK political system, you would probably have to get rid of the Barnett formula. Pretty much every inquiry that has been launched by whichever legislature around the UK in the past 15 years has suggested that the Barnett formula is problematic, and pretty much every bit of academic analysis around the issue has said that the Barnett formula is problematic.

Q8 Chair: But protected by the vow.

Professor Jeffery: I wonder about the constitutional status of the vow.

Q9 Chair: I am going to believe that when—

Professor Jeffery: It was only ever written down on the front page of a daily newspaper. It is a strange form of constitutional document.

Q10 Chair: Sir William, you served the Speaker stoutly and resolutely for a number of years. What are your concerns, if any, about being drawn into a political decision-making process?

Sir William McKay: I agree entirely with what Professor Jeffery said about the need for drafting changes. If you can make that work, you obviously reduce the number of disputed areas. That being done, I think you can leave the Speaker's powers unchanged, except in one regard. He has got a responsibility under the Parliament Act to consult two Members to discover whether a particular Bill is a money Bill under that Act. It has come to be more or less a formality. This would not be, but it may indicate one way in which, with co-operation from the draftsmen, narrowing the Speaker's difficulties, he could be, not insulated but his decisions could inspire more confidence, because they would not be hugger-mugger—something that is done in the Speaker's rooms and that's the end of it.

I do not think, however, that if the drafting changes were made and the Speaker was left with that decision that he should declare to the House why he took it, and thereby inevitably ignite—inevitably; why not?—a political argument. Reduce the size of the problem, then trust the Speaker.

Q11 Chair: Thank you for that. Michael, do you want to add something?

Michael Clancy: I think there was one other aspect. Sir William mentioned the Parliament Act 1911. Under that Act, what the Speaker certifies is not justiciable in any court; and that is specifically stated. The lack of such a proscription here leads one to some difficult territory. It would be far better, if the intention is to exclude these matters from court interference as some people would do—

Q12 Chair: Just on that, is there not a body of feeling that is starting emerge that, if this is challengeable, it will be judicial review and we could really be involving the courts if there is

a conflict about a Speaker certification and a sense that Scottish Members have been unjustifiably excluded from considering parts of legislation?

Michael Clancy: But at the moment, in the Scottish Parliament, the decision of the Presiding Officer about the competence of a Bill is not open to that kind of justiciability either. You can see the direct parallel. One can see why it might be necessary, to preserve impartiality of the Speaker, that these decisions are kept quiet or behind closed doors. But if there is room for judicial review, and the intention is that there should not be, then it should be clearly stated that there should not be.

Sir William McKay: The trouble with that is, if you put something in a statute it becomes justiciable. I cannot see how the exercise of powers by the Speaker, conferred on him by the House, relating to the business of the House, could possibly be anything to do with a court.

Q13 Kirsty Blackman: Specifically on that point, Mr Clancy, about the competence, you discussed earlier that there is a restriction on the competence of the Scottish Parliament. It can make law only in relation to things within the devolution settlement. In terms of this, there is no restriction on the competence as such of the decisions that the UK Parliament can make. It seems to me that, even though this was done under English votes for English laws, it would still be competent, even though it had an effect on Scotland. Is that right?

Michael Clancy: The Order says that it is to relate first to England. It relates exclusively to England, or to England and Wales, and is within the devolved legislative competence. So long as the first leg of territoriality is satisfied, it would not necessarily—I say “necessarily”—apply to Scotland. There may be some consequential impact in Scotland, but if the Speaker keeps to that territorial description and, provided that these things are written as tightly as Professor Jeffery and Sir William have stated, that would work.

Chair: We want to go into some of the territoriality issues and how they impact on minor pieces of legislation, but I think it is generally accepted that we have gone down the route of a change to Standing Orders as opposed to legislation so as to avoid any legal challenge—a Speaker’s ruling is beyond challenge from Members of the House or from the courts. Kirsty has a question about the choice of Standing Orders versus legislation, which has become quite hot. The sense from Scottish Members is that this has been rushed through at almost breakneck speed. We have had so little opportunity to scrutinise what has been proposed by the Government. We have hastily convened this sitting today to try to take evidence from fine constitutionalists such as yourselves, but there has been very little opportunity for the scrutiny that would have been afforded us had this gone through the proper parliamentary process and there had been a Bill.

Q14 Kirsty Blackman: The honourable Member for North East Somerset, Jacob Rees-Mogg, said that the Scottish people had a referendum and got their own Parliament, whereas the English people are going to get a Standing Order. It seems to me that there is not the same level of scrutiny. The plans for devolution published by the Government last Christmas said that initially there would be a Standing Order, before legislation came through. Would there

be advantages to using legislation in the first place, rather than going through Standing Orders initially?

Sir William McKay: I think legislation would simply result in a dog's breakfast. Everybody would be in the courts.

Chair: That was a very straightforward and direct analysis.

Q15 Kirsty Blackman: As opposed to a procedural change, which would not have that result?

Sir William McKay: At the very worst, you would restrict the dog's breakfast to the Floor of the House, and it is the House that this concerns.

Professor Jeffery: May I say a little about the thinking that we developed in the Commission? Even though this is effectively a very important constitutional matter, we wanted to avoid thinking about the legal codification that you might expect with constitutional matters and facilitate a situation in which that extraordinary UK constitutional device—the convention—might emerge. You cannot legislate for a convention and you cannot write a convention down in Standing Orders, but you can possibly—we'll see—establish a sense of a principled approach to an issue around which a consensus might cohere that could then assume the status of a convention over time. That was one reason why we avoided the legislative route, because that takes us in a rather different direction than that peculiar British tradition of informal constitution making.

Q16 Chair: There has always been this binary choice between changes to Standing Orders and legislation. Could this matter have been progressed in any other way without resorting to either of these two difficult issues—the dog's breakfast to which Sir William refers and a process that seems to be unsatisfactory to so many other people? I know your Commission looked at this, Sir William. Was there no other way to do it whereby a consensus could have emerged without using blunt instruments such as changing the rules of the House?

Sir William McKay: You have a better chance of a consensus emerging if it is a matter of discussion across the Floor of the House. If you put these decisions to a court, you would have to amend the Bill of Rights 1689. These things are proceedings in Parliament. Ever since the 17th century, the House has said to the courts, "Keep out"—except in one or two minor cases, which are so minor that I cannot remember them—and it has worked. The kind of conventions that Professor Jeffery has been mentioning have built up like coral on the back of parliamentary decisions enshrined in Standing Orders.

Q17 Kirsty Blackman: I will let you come back in, Mr Clancy—I know that you are keen—but I want to move on to the idea of a veto. I know you have discussed the idea of a veto because you pointed out one of the Scotland-only Bills that was introduced by Westminster: the Partnerships (Prosecution) (Scotland) Act. Can you explain a bit more about that and the possibility for Scottish Members to have a veto?

Michael Clancy: That particular Bill arose out of difficult circumstances concerning a prosecution against a partnership in Scotland where the partnership had been dissolved and the partners could not consequently be prosecuted. It arose out of a very tragic failure to comply with health and safety regulations, which resulted in a number of deaths at a nursing home.

The Law Commission looked at this and partnership law—business associations—is a reserved matter under the Scotland Act, but criminal law, of course, is devolved. Having a massive report from the Law Commission, which included the whole of partnership law, it was not thought plausible to bring that forward in its entirety as a Bill through this Parliament. So in 2013-14, the simple element relating to the criminal liability of the dissolved partnership and the partners of that partnership was split off from the Law Commission report and brought forward as a fast-track Bill through the procedure.

The proposed changes to the Standing Orders relate only to Members from England and Wales. Scottish Members are not included in the provision to consider Bills which relate exclusively to England. There is no provision for the Speaker to certify Bills which relate exclusively to Scotland and one could say that that is an omission, but, again, we are where we are with this. It is worth saying, from the point of view of equality of perspective, that if there were a Bill going through this Parliament which related exclusively to Scotland, this procedure could be adapted to deal with that, but that is currently not on the table. The point—

Q18 Chair: Can I just stop you there? This is a very interesting point and I do not want to lose this. We have got the Scotland Bill that is going through the House of Commons just now and I think there is a sense among Scottish Members that there seems to be a demand from the Scottish Parliament that this was the expressed view of the Devolution Committee, which represented all parties, in order to secure the further powers. This has been agreed in the Scottish Parliament, but it was effectively vetoed by English Members of Parliament—all the amendments that were tabled to the Scotland Bill, where I think in some cases 95% to 98% of all Scottish Members of Parliament were voting for them. If English votes for English laws is the solution to what is perceived as an issue, difficulty and problem in England, is there a case, in the unitary UK Parliament of Great Britain and Northern Ireland, for Scottish votes for Scottish laws on measures such as the Scotland Bill?

Sir William McKay: It is already in the Standing Orders, Chairman. And I know, because I drafted them. They have never been used—these things are probably connected.

Michael Clancy: That is the reason why—[Laughter.] I do not mean because you drafted them.

Sir William McKay: I am saying that. SO No. 93 and various ones onwards came in the early '90s as a kind of surrogate way to avoid more radical devolution. These allow the Scottish Grand Committee to do all sorts of things: short debates; Bills; Adjournment debates; questions; delegated legislation; substantive motions for the Adjournment—all these are there. And, to a degree, the Welsh Members have one similar and Northern Ireland Members have a cut-down version. A good look at those might at least deal with non-devolved subjects that are of particular interest to Scottish Members. You could work

that. There was, as I say, an attempt to build a little Scottish Parliament on the Grand Committee in Westminster.

Q19 Chair: I suppose this gets to the heart of some of the Government's proposals: it is possibly like trying to create a little English Parliament within the confines of the unitary UK Parliament. Is that a fair characterisation of what is being attempted and proposed in the Government's plans?

Sir William McKay: Until you come to the last fence, at which the English horse cannot fall, but the Scottish, Irish and Welsh horses can.

Q20 Chair: Thank you for that. Professor Jeffery, do you have views on any of these issues?

Professor Jeffery: Just a couple of comments. One is about the unexpected treasures that you can find hidden in the Standing Orders. A second is—Sir William's formulation was, as ever, very precise: non-devolved subjects of specific interest to Scottish Members. I wonder how that might be interpreted in the light of the provisions in the Standing Orders in relation to the Scotland Bill, which is certainly a constitutional and non-devolved matter. It is certainly of specific interest to Scottish Members, but it may be thought that a constitutional matter of such importance is of interest to all Members. It is another variant of the problem of determining territorial extent that is applied when discussing the matter in the context of England.

Q21 Kirsty Blackman: I have one more question, which is on the procedure as it is written and how it works. The Government have said that matters with a financial impact are excluded, specifically the estimates process. How much influence do parliamentarians have to make changes at the point of the estimates or is it too late by then?

Sir William McKay: There is neither possibility nor opportunity. There are three days of estimates debates, the subjects of which are given by the Liaison Committee, so they cannot be chosen. Scottish Members cannot go to the Government and say, "We would really like to have a talk about this." They have to go to the Liaison Committee, which, very properly, will have all sorts of other things on its plate. There is also the normal restraint on almost any legislature: you cannot spend more than the Government wants you to spend. I therefore cannot understand that bit of the Government's proposals. The estimates opportunities are limited in both time and matter.

Q22 Chair: That has been a feature of the debate, which has shone a bit of light on the whole estimates process, and on how little opportunity Members of Parliament have to scrutinise what is being discussed, and how only two or three Departments, through Select Committees, are actually considered on the Floor of the House. Does that not suggest to you that this is a really inadequate way to deal with some of the financial issues surrounding English votes for English laws?

Sir William McKay: I think that's right, Chairman. Now that what is called the British constitution is moving into quite different waters, somebody—the Commission suggested

a Select Committee of Members because the House needs to get control of this—has to look at the adequacy of the House’s estimates, Consolidated Fund and appropriation procedures, because estimates, as I said, are limited in all sorts of ways. Appropriation is not even debatable. This all plays back into Barnett.

Chair: We want to discuss financial issues and Jim Cunningham has a question about some of the wider budgetary issues.

Q23 Mr Cunningham: Coming on to the wider budget in relation to what you would call the English veto, which could effectively allow English MPs to hold the Government to ransom in areas such as taxation distribution or local government finance. What are your views on that?

Sir William McKay: It has all got to be part of a big pooling up of the House’s control of finance, because of devolution and because this sort of possibility might arise. It would be a real tour de force of any group of Members to make this threat become reality, but it might.

Q24 Mr Cunningham: Given that the House is responsible for the Budget, what you are effectively saying is that you could end up in a situation in which there could be a compromise.

Sir William McKay: I suppose that would be right, but it is all uncharted territory.

Q25 Chair: This goes to some of the concerns that we have. When we look at the Budget and the Finance Bill, a quarter of the Budget is predicated on income tax, and apparently we are to be excluded, according to English votes for English laws strictly applied, from considering income tax for what would be the United Kingdom. This is like setting a quasi-English Budget within the confines of the Houses of Parliament.

Professor Jeffery: I have two comments. First, this is rowing back from one of the commitments in the Smith Commission report, which was upheld by all the relevant political parties in Scotland. Secondly, going back to the Commission that Sir William chaired, we did not envisage a hard veto, but other mechanisms, through penalties either of parliamentary time or of being seen to override the views of a particular group of territorial representatives in the House—perhaps a penalty in terms of the next election. But we did avoid a situation where a double lock—a double veto—would be introduced.

Chair: That brings us very conveniently on to our good friend Barnett and Barnett consequential. Christopher Chope has a number of questions on these issues.

Q26 Mr Chope: Can I put this in context? Do you accept that it is desirable from a national UK policy perspective to minimise ambiguity in this area and thereby minimise the recipe for conflict? What we are trying to do is to get a settlement right across the United Kingdom that commands public support, rather than allowing people who have their own agendas in different parts of the United Kingdom to promote a feeling of discontent. It seems there is so

much ambiguity here, and where you have ambiguity there is a recipe for conflict. Do you agree?

Sir William McKay: It depends what the alternative is. Ambiguity is in a sense what has kept the British constitution working. Once you solve a problem like the English veto, you may open the way to resentment by people who have not got a veto.

Professor Jeffery: Can I add to that? We do have, as Sir William said, many ambiguities in the way this political system works, and many of those are constructive and helpful. But what I think we have seen in constitutional politics in the last period is a lot of incremental, largely tactical moves that do not cohere into a bigger picture that might provide stability; and that open up, because the responses are reactive and short-term, the possibility of having to do something reactive and short-term to address the issues raised by the last tactical move. So I think ambiguity can come in different guises. It can be helpful and constructive, but, in this context, with tactical incrementalism in constitutional matters, it is probably not that, and there is a need to stand back and think of a bigger package that could help to create greater clarity. Finance has to be a part of that.

We had an invitation from the Chair to talk about Barnett. I will just observe for the moment that I do not think there is any other system of territorial allocation of finance in the world that determines the budgets available to devolved Administrations through the accumulation of separated decisions about the money to be spent in one part of a state. It seems to be unique. There are two things you can infer from uniqueness: one is that it is a brilliant invention that nobody else has ever come up with, and the alternative is that it is not necessarily entirely fit for purpose.

Michael Clancy: Ambiguity, of course, is something that you might expect someone who represents lawyers to relish. The fact is that even if we rely on the ambiguity that exists in our constitution in terms of constitutional conventions—the debate being had about what “normally” means in the context of the Sewel convention is one such example currently in play—that should not prevent us from striving for the greatest clarity possible. To strike that balance is what we ought to be looking to do. Whether that means three separate Committees of this House and the Chamber seeking clarity and benign ambiguity in the context of these proposals is the way to do it, I do not know—I think we might be able to think of other solutions, as a means of discussing the work-through of what this means and how it will operate in future.

Q27 Mr Chope: When the Prime Minister said, on the steps of Downing Street immediately after the referendum, this month last year, that he wanted to ensure there was devolution in England in tandem with and at the same pace as Scotland, I interpreted that as him pleading for parity of treatment for all parts of the United Kingdom and thereby satisfying people in England who were particularly concerned about the implications of the vow. But we now have a situation in which the Scottish Parliament can legislate on matters relating exclusively to Scotland, irrespective of the consequences for the rest of the United Kingdom.

For example, tuition fees for students have a directly adverse effect on students from England seeking to go to Scottish universities, and yet in Standing Order No. 83(J)(2), we will not have that same reciprocity, because a clause will only be deemed to relate exclusively to England if it does not have significant consequential effects outside the area

in question. At the moment, it is drafted as disregarding “any minor or consequential effects”. It could be argued, for example, that if the English wanted to remove tuition fees, it could ironically have an implication for Scottish universities and is therefore something on which the Scots should have a say. Particularly in relation to Barnett, it could be argued that almost everything that goes through this House has more than a minor or consequential effect outside England. In Scotland, if we have that situation, will that not create the conflict to which I was referring before?

Professor Jeffery: Tuition fees are a subject close to my heart. First, a comment on the Prime Minister on 19 September: I think his comments were a surprise, given what had been decided the day before. Also, as I said in the opening, in the light of the real dissatisfaction about how people in England feel that they are governed, it was a legitimate thing for him to say. You are also right about spillovers. There is a different perspective on the issue of tuition fees. My university obviously is one of those that charge fees to people from England, but not to people from Scotland or other parts of the EU. That decision was taken with a very heavy heart, both by the universities and by the Scottish Parliament at the time. It was a reaction to a change in the UK, to a decision by this Parliament as applied to England that had a tremendous spillover effect into Scotland. With fees first at a lower level in Scotland and then removed entirely, if there were a choice for students between paying £9,000 in England and nothing at the University of Edinburgh, there was a real danger that the Scottish university system would be overwhelmed by applicants from England. There would then not be enough places to teach local students, given the size of England.

That shows the kind of spillover effect that can work across the different jurisdictions in the UK. It is not necessarily about Barnett, although there was a Barnett dimension. It is about the size of England and the way that decisions for England can have a knock-on consequence outside England. The reverse is also possible, as you made clear. One of the things that we felt would be a useful addition to our institutional portfolio, when thinking about the different jurisdictions in the UK, was a Committee in this House to consider those matters. It would not necessarily stop them, because these were legitimate decisions made by the relevant authorities, but it would produce a clearer understanding of these spillover effects so that the decision makers in each case might be better aware of the consequences of their decisions.

Q28 Chair: The example of tuition fees is always raised, and Christopher’s view is that it is the spillover that has an impact. Decisions made in the Scottish Parliament impact on the workings and arrangements in this House, and in particular on the constituents that Christopher and other English Members represent. Everybody accepts that. We have the institution of the Scottish Parliament, which makes these decisions for us. However, in asymmetric Britain there are devolved assemblies and legislatures, but there are none in England. This is partly a difficulty when we consider issues such as English votes for English laws. The natural conclusion to this is to have a federal arrangement across the United Kingdom, with a Scottish Parliament, a Welsh Parliament and an English Parliament. We would then all come together in the unitary Parliament of Great Britain and Northern Ireland to decide on reserved issues, such as defence, foreign affairs, and multilateral arrangements and relationships. Is that not the only real, elegant solution to this vexed question of English votes for English laws?

Sir William McKay: It might well be, Chairman. I think what Professor Jeffery was saying might or might not be a step in the direction of getting the House of Commons upstream of these problems. At the moment the Scottish and Welsh Select Committees have the power to look into relations between this House and the relevant devolved legislatures. What the Commission was suggesting was a Committee which had that at the very front of its agenda, with its *raison d'être* being to look at these relationships.

Q29 Chair: I know that all of us on this Committee take a really keen interest in these things. There seems to be a demand for English legislative decision making, but there is no appetite for an English Parliament. Is that not almost contradictory in terms of what the English want? Do we have a real sense of what they actually do want? I know that they are unhappy with the present arrangements, and there does seem to be a genuine concern that Scottish Members of Parliament are influencing decision making. Yet, as Professor Jeffery said, is there a contradiction at the heart of the demand that is coming from England about how this will be worked out, resolved and got upstream?

Sir William McKay: As Michael Clancy was saying, we are where we are. These things are true. The Commission's approach, in distinction from the Government, was 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.

Q30 Chair: So it is a case of a sticking plaster, and adapting as we go along? Is EVEL just part of that trend that we have just now, a little bit of sticking plaster to satisfy emerging concerns? Is there perhaps a bit of hysteria about Scottish Members of Parliament coming down and voting on all this legislation, and is this something that has been generated and whipped up?

Sir William McKay:

"I do not ask to see
The distant scene; one step enough for me."

Q31 Chris Law: I was thinking of an analogy to the situation that we are in. It is a bit like that game, Mouse Trap; we are building piece by piece as we go—ad hoc. I want to ask wider questions about what other cross-border effects the Committee should consider in its scrutiny. Could you give us examples of what those might be?

Professor Jeffery: I guess that is not directly on Barnett.

Q32 Chris Law: Outside of Barnett.

Professor Jeffery: Okay. I gave one, which was about higher education. That is in a situation where, although policy-making responsibilities are dispersed between different decision-making authorities, the UK as a whole works more or less as a market. Something that you do in one part of that market can have effects on the other parts.

Normally, because of England's size, that will be an English spillover into other parts of the UK, but it can be the reverse.

Another area that the Commission heard about when we were taking evidence relates to Northern Ireland. It is not so easily generalisable, but it has some resonances. It is the quest in Northern Ireland—partly financially driven—to retain parity around social security arrangements with what is happening in the rest of the UK. There is a quite direct spillover effect. Changes elsewhere in the UK challenge the system in Northern Ireland to produce parity, with potential financial consequences if parity is not maintained, and that is one reason for the real challenges in Northern Ireland at the moment.

There are variants of that issue around the interface between welfare policies at the UK level and what devolved Administrations do. We have seen that with free personal care in the case of the Scottish Parliament and with challenges on local government taxation reform, where reform has not been pursued because there was a fear that there would be a financial penalty to deviating from a system applicable in the wider UK. There is a pressure, which can be a pressure towards conformity especially in the area around welfare.

Michael Clancy: It is a very interesting question about the impact of legislation in one part of the UK as opposed to another. Of course, the starting point has to be that the United Kingdom Parliament can still legislate right across the United Kingdom for whatever purposes it wants but, in terms of respecting the devolved arrangements, the Sewel convention says that the UK Parliament will not legislate normally without the consent of the Scottish Parliament in particular, in my experience.

Therefore, the effect of legislation is slightly different from the effect of changes in policy, and is perhaps slightly more manageable than changes in policy. Of course, policy is frequently expressed through legislation. One can think of impact in terms of the creation of a tax rate in Scotland—let's say land and buildings transaction tax and the potential that that might have for influencing stamp duty land tax in England and Wales or vice versa. We might have seen some of that impact already in changes to stamp duty land tax in England and Wales, the knock-on effect in Scotland and the thinking in policy development about the land and buildings transactions tax there.

There might be other issues around private international law. Changes in succession law in Scotland might cause people to think about which legal domicile they might want to assume—what they consider to be their legal home and what law applies to them. The old cases tell us about dock workers from Glasgow who lived in Liverpool but always got the *Daily Record* delivered and had a train ticket to Glasgow Central in their back pockets when they were found deceased; was it the case that they always considered themselves to be Scottish domiciled? Which law governed the disposition of their estate? There is that kind of issue.

I was interested to ask a colleague earlier about the changes to drink-driving limits in Scotland as opposed to England, and whether that has a knock-on effect on behaviours, particularly in Cumbria and Northumberland. People from Scotland might go to England, where the drink-driving limit is 80 mg of alcohol per unit of blood, or whatever it is, as opposed to 50 mg in Scotland. There are possibilities there for impacts of changes in the law on behaviour in another part of the country.

We have not yet bottomed out the full impact of devolution, but we always knew that it would have impacts like that. Devolution was meant to create a situation where laws were made in territories around the UK that the people of those territories wanted. That has a consequence right across the board.

Q33 Chris Law: Thank you very much for that. The other question is about the English-only Bill Committees. Can you envisage a situation where Ministers may be excluded because they are MPs for a non-English constituency? How would you get round that, and what would the Prime Minister be left with in terms of whether people could hold a ministerial post?

Chair: The John Reid question.

Sir William McKay: That is not difficult. It is already in the Standing Orders. Say the Scottish Grand Committee needed to do this, that or the next; if the responsible Minister sits for Somerset, that is all right—the Standing Order says he can come along. He cannot be counted in the quorum or vote, but he can participate. So you get the Government's point of view by a kind of extra-territorial—

Q34 Chair: Would that not seem ridiculous? Here is a Minister, responsible for a Department running a multi-million pound budget and taking legislation through Parliament, but he or she does not have a vote on the relevant issue that they are considering?

Sir William McKay: Well, then you just amend the Standing Order to give them a vote. These things are flexible.

Michael Clancy: That is one solution; or you could choose the Scottish Parliament's solution, which is that the Minister argues his or her case before the relevant Committee but is not a member of that Committee. There are many ways to cut this particular procedural cake.

Q35 Chair: This is where several of us have a number of difficulties with what is being proposed. Some of the solutions verge almost on the absurd. We are trying to resolve an issue that seems to me to be almost inconsequential in terms of the number of occasions where Scottish Members actually outvote or have an influence on English-only legislation. Are we not in danger of making ourselves look absolutely ridiculous with what is being suggested and proposed here?

Sir William McKay: I don't think the great British public would focus on, say, Standing Order No. 107(23). I don't wish to appear too much in debt to English pragmatism, but whatever works is right.

“There are nine and sixty ways of constructing tribal lays,
And every single one of them is right!”

Q36 Chair: Are we getting to the realms of the ridiculous?

Professor Jeffery: I am not an initiate in parliamentary procedure. When I worked with Sir William, I learned a lot about those hidden treasures, but I am not sure that that is entirely the point behind thinking about—

Q37 Chair: What is the point?

Professor Jeffery: The point in thinking about an institutional recognition of England in the House of Commons is to address concerns, which are clearly widely felt by people in England, that they do not have a voice, or a sense of representation, in the UK political system. Whatever the parliamentary procedure says, the key point is giving that platform for an English voice and a sense of responsiveness to opinion in England. Grafting that on to a pre-existing political system and doing new things is going to add to those little treasures in Bill's blue book, but that is not necessarily what ordinary people will see. What I hope they would see in due course is a clear and impassioned debate about issues related to England by representatives from England that takes due account through procedures in Parliament of spillover effects on other parts of the UK.

Q38 Chair: Resolving something that is undefined—an English vote sentiment or movement in England that is not certain what it wants—is actually making Scottish Members of Parliament second class in the UK Parliament. Is all this worth while to create quite a lot of unhappiness among Scottish Members of Parliament, particularly if there is a feeling that we will be excluded from vital sections of legislation, where we feel we have a job to do on behalf of our constituents?

Professor Jeffery: I would just reiterate that not everybody thinks there should be a double veto—a double lock.

Q39 Chris Law: The last question from me is, what would happen in an England-only Bill Committee if an amendment was proposed expanding the Bill's scope to the UK? Do you envisage that going back to the House of Commons? Where would it go?

Sir William McKay: You can't do that without the leave of the House. If a Bill says, "These things shall happen in England and Wales," and you want them to happen in Scotland, you have to go back to the House.

Q40 Chair: Yes, that's the process, but the key concern is that in, say, a piece of legislation that is certified as English only, where Scottish Members are excluded, a legitimate amendment comes forward in the House extending the scope of that legislation to include the whole United Kingdom. Surely, Scottish Members of Parliament lost the opportunity, in the previous sections of that Bill, to become involved in it, and they will be naturally excluded from being able to consider something that may have an impact on Scotland. Is that not an issue and a problem?

Sir William McKay: That would arise much less with the Commission's proposals, if at all.

Chair: Yes, I totally agree. We are where we are.

Michael Clancy: Lord Lisvane identified this as an issue in the debate on Lord Butler's motion in July, so it is a concern. But if there were an amendment which then extended the process of the Bill, the Speaker has to recertify it, doesn't he?

Q41 Chair: But that doesn't solve the initial issue that, if it is recertified, we have lost the opportunity to make amendments, or to be part of the debate, where the scope of the Bill is being extended.

Michael Clancy: But it would also require the consent of the Scottish Parliament if the scope were being extended to Scotland and this were a devolved matter.

Q42 Margaret Ferrier: Just on that point, we could have a valid Act of law passed by Parliament, but the certification done by the Speaker could be defective at the time. If Scottish parliamentarians do not get a chance to contribute as well, there could be the complaint later that the law could have been better if we had had the chance to be part of the process.

Sir William McKay: That is perfectly possible.

Michael Clancy: That was the situation on whether a failure to have proper legal assessment meant that a public body's decision was invalid or ultra vires. But as Sir William has said—he has educated me about the role of the Standing Orders in this sort of situation—because this is done by the Speaker in the context of Standing Orders, that would not be justiciable. I was proceeding on the basis that, had this been put into legislation, you would have had to have a provision in the legislation that this could not be taken to court. I think there was a wee bit of misunderstanding of where we were on that.

Sir William McKay: It is not the Standing Orders that would protect it; it is the Bill of Rights.

Michael Clancy: Exactly, it is the Bill of Rights, which is not justiciable.

Q43 Kirsty Blackman: It seems to me that Standing Orders have been cobbled together over the past 150 years. I am sure that that was by very intelligent people trying to do the right things, but the case is that the Standing Orders can just be changed and things added on. English votes for English laws seems to me to be quite a fundamental change to Standing Orders, in terms of the way in which the House deals with business and MPs work in relation to each other. Would there be a case for having a wholesale review of all the Standing Orders, looking at them properly, rather than just cobbling on extra things every now and again?

Sir William McKay: Yes. It would not be a small job.

Michael Clancy: Yes. And you might want to volunteer to sit on the Committee!

Kirsty Blackman: I think I would be one of the very few volunteers to sit on that Committee, to be honest. Any views, Professor Jeffery?

Professor Jeffery: I can only agree with my colleagues, who know much more about Standing Orders than I do and of the challenges in doing a comprehensive review of them, but I see no reason why we should not take on that challenge.

Sir William McKay: I think that devolution has changed the ground rules.

Q44 Chair: On the issue with Standing Orders, at the beginning of this Session of Parliament I participated in a debate on Standing Orders—I think it was to get rid of the constitutional Committee and to put in place the membership of the different Committees—and they are so easily amended and suspended. Is there not a concern that by going down the Standing Orders route nothing is set in stone? Things remain particularly fluid if there is a desire and a request from the House to look at this again. Unlike with legislation, which is there and in place for as long as we do not amend it, Standing Orders are always challengeable. We have this fundamental constitutional change to the membership of this House through something that remains totally fluid at nearly all times and on all occasions.

Michael Clancy: Did I mishear you, Chair, but did you say that Standing Orders are unchallengeable?

Chair: I said that they challengeable. Members of Parliament can always suspend, challenge, adapt or change Standing Orders, so is this the way to do something that is so significant, with such historical and constitutional significance?

Sir William McKay: Maybe not, Chair, but would you prefer a judge disallowing your vote?

Chair: I don't know. This is why we have got you guys here.

Sir William McKay: That is the alternative. If this thing goes into legislation and a mistake is made in good faith about the territoriality of a Bill, and therefore the ability of Members to vote on it, it would go to court and then all sorts of clever arguments would come up and half a dozen votes, representing constituents, might be disallowed.

Professor Jeffery: Going back to the McKay Commission report, it did not recommend proceeding in the way that the UK Government has proceeded on this. It recommended proceeding in steps. Amendment of the Standing Orders was to be the second step and the first step would have been to produce—there is a challenge in the production—a resolution of the House of Commons to declare a principle that “decisions at the United Kingdom level with a separate and distinct effect for England...should normally be taken only with the consent of a majority of MPs for constituencies in England”. That implies that there would be a full and frank debate on the Floor of the House to produce a cross-party consensus around that principle, which would be endorsed by resolution of the House. We have not had that.

Chair: No, we definitely have not. What we have is a very divided House—between Government and all the Opposition parties. This process cannot be described as consensual. In fact, it can only be described as “conflictual” in the way that it has been presented and in the response that was seen from all the parties apart from the Government

one. Should we be proceeding with something so historically significant and of such constitutional importance when there is absolutely no sense of consensus at all?

Sir William McKay: I agree, Chairman. That is why the Commission said it has got to rest on principle and on the text, which Professor Jeffery has just read out.

Q45 Margaret Ferrier: My question is on secondary legislation and I will go to Sir William first. I believe that your Commission recommended that proposals for primary legislation be adapted to the different procedures for all the statutory instruments, where the instruments amend the law in England, subject to further consideration. The question is: do you believe that the Government are right to extend their proposals to secondary legislation? Do you foresee any problems in how they might work in that area?

Sir William McKay: Yes. The Commission had a different set of proposals, which are complicated, depending on whether an instrument is negative or affirmative, depending on whether you go to a Committee or take the decision in the House. So there are all sorts of possibilities, but all the possibilities that the Commission backed obeyed the principles that Professor Jeffery has just read out to the Committee.

Delegated legislation is difficult to deal with at the best of times and to retain in your mind what you are supposed to be doing next, but the principles are there. If it is distinct and clearly English, it goes in the decision making to the English Members, with the House respecting that decision. You can do it. It is complicated but it can be done.

Chair: Thanks. We'll leave that there, if that is okay, because I am keen to get John Stevenson in who has a couple of questions about an enduring settlement and if this needs to be revisited. John, I leave it with you.

Q45 John Stevenson: Professor Jeffery, making the assumption that the Standing Orders do go through, are we saying, "That's it. It is settled. We move on"? Or do you think that at some point in the future another Government or Parliament will come back and review these changes of Standing Orders?

Professor Jeffery: I think that the approach taken has been one that is not driven by the kind of principle that the Commission enunciated but has a lot more to do with shorter-term considerations of tactical advantage. I think that is characteristic of decision making on constitutional matters in the UK. I think it has a further consequential characteristic. That is, whatever is decided one day, is not necessarily stable for long, because one reveals additional problems through the tactical adjustment.

That is a long way of saying that I agree. I doubt this is the final word and I doubt that this is likely, in this form, to be a stable solution, without consideration of interrelationships across institutions in the UK as a whole, and without building a clearer and more fully principled understanding of how those relationships should work.

Q46 John Stevenson: Would that be a view shared?

Michael Clancy: The instability is already there, even if this set of proposals is passed, because the Lord Privy Seal in a debate on 21 July in the House of Lords indicated that we have not ruled out introducing legislation in future and this would be under review. Already we are in a situation where the Government are suggesting that there may be further change. The question would inevitably be: which Government in future would it be to advantage to change these rules? That could be a Government that did not have an overall majority of Members in one jurisdiction, in England.

Q47 John Stevenson: May I change the subject completely? There seem to be a lot of questions about the new changes to Standing Orders and people are concerned that they are complicated and create all sorts of anomalies and difficulties. Would the logical solution, therefore, be to say that Scotland has got a lot of devolved powers, which is different from England, so the simplest solution is to reflect that by reducing the number of MPs that Scotland sends to the Parliament by, say, 30%, 50% or whatever number? In that way, all the MPs are still in exactly the same position in terms of legislation going through Parliament and you do not need changes to Standing Orders and so on. Would that be a far simpler and more logical conclusion to what we are trying to achieve?

Sir William McKay: It might well be more logical; its political acceptability would be another matter.

John Stevenson: But there is a precedent for it.

Sir William McKay: I know, yes. In addition to what Mr Clancy was mentioning, the Government seemed to be saying in their explanatory note on the present set of changes that, after the first Bills have been passed, the Procedure Committee will be invited to assess the new procedures. In other words, “We think that we have got the principles right; we had just better get the details right in the light of our earlier experience.” So it does seem that the Government’s view is short to medium term: “This is what we suppose is best at the moment and we will fine-tune it.” More radical solutions, however logical, do not seem to be on the horizon.

Q48 John Stevenson: But do you personally see the solution I just put forward to you as better?

Sir William McKay: I would if it were accompanied by the breadth of expansion of devolutionary authority to the devolved legislatures.

Q49 John Stevenson: So what you are saying is: give more devolved powers and, as a consequence, reduce the number of representatives, quid pro quo.

Sir William McKay: There would be a balance.

Q50 Chair: There was also a proposal put to Scotland last year that would have reduced the Scottish membership of this House to zero, which would mean that we took care of our own

affairs away from the rest of the United Kingdom. That is also an elegant solution, which was rejected by the Scottish people.

Michael Clancy: Yes. I do not have a mandate to comment on such a proposal.

Professor Jeffery: Academics do not need mandates, I guess. I see that as problematic and I will illustrate the problem with an example. At some point, we will come towards a decision on whether or not to renew Trident, which is an issue of UK national defence and so a matter for here, but it is an issue with a particular resonance in Scotland through both location but also through a rather different political debate in Scotland about that issue. I think it would be politically extraordinarily challenging to say that Scots voters would have less say on such a decision than voters elsewhere in the UK, if their representation at Westminster were reduced. I think that is an example which undermines the logic of that idea.

Q51 Chair: I think we are roughly at the end, unless any Committee members have got any pressing to ask while we have got these three fine gentlemen here. If not, have any of you gentlemen got any closing remarks or observation statements you would like to make?

Professor Jeffery: Just one thought. The Future of England Survey—the work that I do with colleagues in Cardiff—is in the field with YouGov and in a few weeks, or perhaps sooner, there will be some findings on that about the current state of public opinion in England about the way that people in England think they are governed. I will be delighted to forward that to the Committee as soon as it is available.

Chair: The Committee would be very interested in that; that is a very kind offer. Thank you, Professor Jeffery. I thank all of you for attending the first public evidence session of the new Scottish Affairs Committee today and giving us your time for what I think was a very helpful and useful session. Safe journey home, and thank you again.