

**Written evidence submitted by Dr Daniel Gover and Professor Michael Kenny  
(TTC 01)**

1. This written evidence focuses on the operation and effect of the standing orders establishing the 'English Votes for English Laws' (EVEL) procedures.
2. It has been prepared by Dr Daniel Gover (Queen Mary University of London) and Professor Michael Kenny (University of Cambridge), drawing on an in-depth academic research project into the design and operation of EVEL. The authors have previously published detailed analyses of how EVEL operated during its first 12 months (Gover and Kenny 2016a) and throughout the 2015-17 parliament (Gover and Kenny 2018). Evidence based on this research was submitted to your predecessor committee's inquiry in April 2016 (Gover and Kenny 2016c). Many of the conclusions and recommendations in these earlier documents remain relevant to your current inquiry. Further information about the project, including ongoing data about EVEL's operation, is available at [www.evel.uk](http://www.evel.uk).

### **English Votes for English Laws in summary**

3. The version of EVEL introduced by the government in October 2015 provides English (and English and Welsh) MPs with the right to 'veto' legislation that applies only in England (or England and Wales).<sup>1</sup> However, MPs representing constituencies across the entire United Kingdom retain the right to speak and vote at most legislative stages. For this reason, EVEL has been referred to as a 'double veto' system, meaning that English (or English and Welsh) MPs *and* UK-wide MPs have the power to veto affected legislation at different stages.
4. This system has involved several important innovations within the legislative process. The Speaker is required to examine most government bills, and many statutory instruments, and to 'certify' certain provisions that meet both elements of a two-part test: that they apply only in England (or England and Wales); and that equivalent legislation would be within devolved competence elsewhere in the UK. The veto right is then achieved through two mechanisms. On primary legislation, 'legislative grand committees' composed only of English (or English and Welsh) MPs meet after report stage and are asked to 'consent' to the certified clauses. At the subsequent Lords amendments stages, and on secondary legislation, the veto right is exercised through 'double-majority' voting, meaning that a majority of English (and/or English and Welsh) *and* UK-wide MPs must back a proposal for it to pass. In addition, on any bill certified as England-only, committee stage is taken only by English MPs. This final change does not equate to an absolute veto for them, since the committee's decisions could still be overturned by the whole House on report.

### **The changing political context**

5. Before turning to the operation of the procedures themselves, it is important to recognise the wider context in which the system operates. Various designs for EVEL were aired in the years following the implementation of devolution in Scotland, Wales and Northern Ireland. But EVEL was eventually introduced in the immediate aftermath of the Scottish

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<sup>1</sup> These is also provision for legislation that applies only to England, Wales and Northern Ireland, though this is limited to certain financial matters.

independence referendum in 2014. Since then, the territorial politics of the UK have continued to evolve.

6. The system of legislative ‘consent’ within EVEL has been designed to mimic arrangements for ‘legislative consent motions’ in the three devolved legislatures. Yet devolved legislative consent has become considerably more contentious in the wake of the passage of legislation in the context of Brexit. On two occasions Westminster legislated despite devolved legislatures withholding their consent – in the case of the EU (Withdrawal Agreement) Bill by all three devolved bodies. Similar issues have recently resurfaced in the context of the UK Internal Market Bill. In the English case, the process for securing consent through EVEL is more opaque, raising questions about how meaningful this form of consent actually is. On the other hand, these recent episodes have highlighted that Westminster does retain the constitutional authority to override the withholding of consent in any part of the UK, something that may in the future become relevant on EVEL.
7. One of the main reasons for the introduction of EVEL was a recognition of growing dissatisfaction in England about its constitutional position. There was a perceived unfairness in 2003 and 2004 when key votes on legislation relating to foundation hospitals and top-up fees in England were passed despite a majority of English MPs voting against them. EVEL was also motivated by the rising feeling that England’s interests needed to be more clearly recognised and protected within the system of parliamentary government. In the context of Brexit – and the questions about Northern Ireland’s and Scotland’s futures in the UK which it has thrown up – polling evidence suggests that a majority of Brexit supporters in mainland Britain place this goal above the maintenance of the domestic union.<sup>2</sup> Most people still express a preference for the maintenance of the UK in its current form, but over the last decade and more there is growing support in England for the idea that the largest part of the UK may have been disadvantaged by devolution. There is no evidence of any marked shift in attitudes on domestic constitutional questions since the EU referendum.
8. Given that a clear majority of people in England voted in favour of Brexit, and many voted for the Conservative party at the election of 2019 in support of the promise to ‘get Brexit done’, it is worth reflecting on what would have happened if the parliamentary crisis of 2016-19 had resulted in this mandate not being delivered (if for instance a second referendum had been called by the government and supported by the House). In such a scenario, there is a very good chance that the question of how England’s wishes are treated in the UK parliament might well have surfaced as a prominent constitutional question. Such a scenario might also have thrown light on the relative weakness of EVEL.
9. Since its introduction, EVEL has not as yet become a salient issue in UK politics. Yet this system – and the questions of English consent and recognition which it seeks to address – have the potential to become significant, and potentially very divisive, in the near-term future. One plausible outcome of a future general election is a UK government that lacks a majority in England – or indeed one that is dependent for its UK majority on an alliance with parties that compete only outside of England. In such circumstances, questions around the authorisation of legislation that applies only in England may well return to the fore.

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<sup>2</sup> Smith, Matthew, ‘Four in ten mainland Britons don’t care about Northern Ireland’, 11 November 2019, <https://yougov.co.uk/topics/politics/articles-reports/2019/11/11/four-ten-mainland-britons-dont-care-about-northern>.

## The operation of English Votes for English Laws

10. Turning to how EVEL has functioned, it is possible to draw a series of conclusions about the system's operation and effect based on data from its first five years (23 October 2015 to 22 October 2020).

### *EVEL has been relatively functional in operational terms*

11. EVEL has operated relatively well in administrative terms during its first five years. Prior to 2015, critics argued that the introduction of this kind of scheme would be extremely difficult to implement (for a summary of various criticisms along these lines, see Gover and Kenny 2018). So far, these difficulties have not materialised – although it should be emphasised that the political environment in which the system has operated has been relatively benign. It is entirely possible – and indeed quite likely – that circumstances will arise in which much greater strain is placed upon it.
12. Some of the key objections to EVEL were practical in kind – for example centring on the logistical difficulties of identifying England-only legislation, the potential for certification decisions to place the Speaker in a difficult position, and the challenges of restricting Commons votes to particular subsets of MPs. In practice, EVEL has operated very effectively in these respects. Over these initial five years, the Speaker certified provisions of 51 bills, and 237 statutory instruments (of which 227 were subject to an affirmative procedure). As we have documented elsewhere, during the 2015-17 parliament over half of bills eligible for certification had at least one provision certified, while around a quarter of eligible affirmative statutory instruments were also certified (Gover and Kenny 2018, 771). There is little evidence that the certification of legislation has placed the Speaker in a difficult political position. Indeed, the Speaker has taken certification decisions that have conflicted with the assessments of the government, and this kind of independence may serve to insulate the office from political controversy in the future.<sup>3</sup> Divisions involving different subsets of MPs have been facilitated through the electronic counting of votes, and this too has generally operated smoothly – albeit with some early teething problems.<sup>4</sup> It is, however, true that EVEL has added considerably complexity and some disruption to Commons proceedings, particularly due to the requirement to convene legislative grand committees after report stage.
13. The more serious objections to EVEL were constitutional in character – particularly the worries that it might create 'two classes of MP', which would prevent MPs from voting on matters that indirectly affect their constituents (e.g. due to 'Barnett consequentials'), and that it might undermine the logic of parliamentary government (leading to what Bogdanor (2010) has referred to as 'bifurcated' government). The early experience of EVEL has not borne these objections out. To a large extent, these issues have been dealt with by the 'double veto' design of the EVEL system. This means that, for example, MPs from outside

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<sup>3</sup> Examples during the first year occurred on the Higher Education and Research Bill, the Childcare Bill, Housing and Planning Bill, the Enterprise Bill, the Policing and Crime Bill, and the Digital Economy Bill (Gover and Kenny 2016a, 21).

<sup>4</sup> On 19 January and 10 February 2016.

England (or England and Wales) who believe that a certified provision might indirectly harm their constituents' interests have the same rights as before to vote against, and ultimately block, it.

*EVEL has provided a relatively robust – though so far unused – ‘veto’ right for England’s MPs*

14. EVEL has succeeded in providing English (and English and Welsh) MPs with a relatively robust veto right. During the first five years of EVEL’s operation there have been no divisions on ‘consent’ motions in legislative grand committees, on which only MPs from England (or England and Wales) would have been entitled to vote.<sup>5</sup> However, there have been 43 double-majority divisions, for example on Lords amendments or on statutory instruments, on which a majority was required both across the whole House and among MPs from the area of certification. These divisions gave English (or English and Welsh) MPs the power to veto legislation, and had they done so their decision could not have been overturned by UK-wide MPs within the terms of the EVEL procedures.<sup>6</sup>
15. So far, English (or English and Welsh) MPs have never actually *applied* this veto in a division. In every case, MPs from the area of certification have voted in the same way as the whole House, meaning that the procedures have thus far made no difference to legislative outcomes. This is unsurprising, given that the UK government has consistently held a larger majority in England than across the whole House during this period. In light of these broader political circumstances, however, any conclusions about the effectiveness and implications of the veto right must at this stage be provisional.

*But this veto right is not entirely watertight*

16. Even so, the veto that EVEL gives to English MPs has limitations, for two main reasons. The first is that it remains possible for legislation that applies only in England (or England and Wales) to fail to meet the two-part certification test and therefore to not be certified by the Speaker. An example of this occurred on proposals to liberalise Sunday trading rules in England and Wales through the Enterprise Bill in 2016 (Gover and Kenny 2016b). On that occasion, the Speaker’s provisional certificate indicated that the clause would not have been certified under EVEL. The reason for this decision was that the relevant clause also contained material that applied in Scotland – whereas the EVEL certification test requires the Speaker to look at the territorial extent only of whole clauses. As such, the clause failed to meet the first part of the certification test, of relating exclusively to England and Wales. Another example occurred on the Childcare Bill in 2015. In this case, although the legislation essentially applied only in England, it contained provisions relating to HMRC, which is not devolved elsewhere in the UK – with the effect that some clauses failed to meet the second part of the two-part certification test.

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<sup>5</sup> However, there were three divisions in the legislative grand committee that took committee stage of the NHS Funding Bill.

<sup>6</sup> As noted in our evidence to your predecessor inquiry, it can be argued that the double veto principle is not properly reflected on statutory instruments subject to the negative procedure, which was the case on four of these divisions.

17. The second reason is that it is possible for EVEL to be easily suspended by the House – not least because it has been implemented through standing orders rather than statute. This might be seen as a virtue of the system, protecting the preeminent status of the UK legislature. And, some have argued that this feature is important in ensuring that a future UK government without a majority in England would nonetheless be able to govern.<sup>7</sup> But it does also illustrate the ambiguous, and vulnerable, position of this new system within the UK’s increasingly fragile constitutional order.
18. In response to changes resulting from the coronavirus pandemic, the EVEL standing orders have effectively been suspended since 22 April 2020.<sup>8</sup> As a consequence, no bills have been certified since this date, despite some containing provisions that appear to meet the two-part test,<sup>9</sup> while several bills with provisions certified at earlier legislative stages did not have legislative grand committee stages (and therefore an EVEL veto opportunity).<sup>10</sup> Statutory instruments have continued to be certified, but the double-majority voting requirements have not been applied. Hence, for example, despite being certified as England-only, the secondary legislation that implemented the ‘rule of six’ was not subject to double-majority voting when it was divided on in October 2020.<sup>11</sup> The reason given by the government for suspending EVEL was that ‘the new division arrangements [during the pandemic] are unlikely to be compatible with recording Double Majority votes’.<sup>12</sup> Initially this was because in-person divisions needed to be counted manually, making it hard to quickly discount MPs from outside the area of certification. Subsequently, despite the move to computer-counted divisions using card readers, it has still not been possible to quickly generate the result for different territorial subsets of MP.
19. During our initial research into EVEL in 2015, one senior interviewee commented to us: ‘if you have a set of rules that you don’t really need when you’ve got a Conservative majority in England, the whips then find it’s convenient to disapply them. So, they keep disapplying them, so everybody gets used to the fact these rules are disappplied, and when they’re needed nobody bats an eyelid when they’re disappplied again.’ The suspension of EVEL during the coronavirus pandemic may turn out to have a similar effect. The circumstances around the pandemic are clearly unique and unprecedented, yet it is hard to avoid the conclusion that a UK government has found it very easy to decommission these rules because of other priorities it wishes to pursue. This may well have set an important precedent.

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<sup>7</sup> This point was made in 2015 by Jacob Rees-Mogg, now Leader of the House of Commons (HC Deb 7 July 2015, cc205, 221).

<sup>8</sup> Due to Commons resolutions on 22 April, 12 May, 2 June, 1 July, 2 September, and 22 October 2020.

<sup>9</sup> For example, it seems likely that parts of the Business and Planning Bill and the Divorce, Dissolution and Separation Bill would have been certified had EVEL remained in operation.

<sup>10</sup> These were the Agriculture Bill, the Birmingham Commonwealth Games Bill, the Domestic Abuse Bill, the Non-Domestic Rating (Public Lavatories) Bill, the Finance Bill, and the Fire Safety Bill. The Environment Bill may eventually also fall into this category.

<sup>11</sup> The Health Protection (Coronavirus, Restrictions) (No. 2) (England) (Amendment) (No. 4) Regulations, on 6 October 2020. Other examples are Health Protection (Coronavirus, Restrictions) (No. 2) (England) (Amendment) (No. 5) Regulations 2020 (13 October 2020) and the Adoption and Children (Coronavirus) (Amendment) Regulations (10 June 2020). In none of these cases would EVEL have changed the outcome.

<sup>12</sup> ‘Explanatory Note for the Motion on Proceedings during the pandemic’, 2 June 2020,

<https://publications.parliament.uk/pa/cm5801/cmagenda/Pandemic%20EN.pdf>.

*EVEL does not constitute a genuinely 'English' legislative process*

20. It is also important to emphasise that – despite its name – EVEL has not introduced a genuinely 'English' legislative process. Again, while this may be regarded as a strength (protecting the preeminent status of the whole House), it also underscores the limitations of this system. All UK MPs retain the right to vote on all legislation before the House of Commons, including at most of its legislative stages. Consistent with the double veto principle, this means that legislation supported by a majority of English (or English and Welsh) MPs cannot be passed into law without the backing of the whole House.
21. In 2015, secondary legislation was laid before the Commons to relax fox hunting rules in England and Wales, but the planned vote was cancelled after the SNP confirmed that it would oppose the move. While this occurred prior to EVEL coming into operation, the fact that the matter was not returned to is illustrative of the fact that these procedures would not have enabled ministers to overcome the opposition of the whole House. Likewise, the proposals in 2016 to relax Sunday trading laws in England and Wales were rejected despite achieving the backing of MPs from England and Wales, with Scottish representatives proving decisive in the government defeat (further described in Gover and Kenny 2016a). Although this provision had not been certified under EVEL (as explained above), even if it had been this would not have helped the government to avoid this outcome. The same dynamic may help explain why more recent proposals to liberalise Sunday trading rules have similarly failed.

*EVEL has failed to institutionalise a genuinely English 'voice'*

22. EVEL has also failed to provide opportunities for a genuinely English 'voice' within the House of Commons. One of the stated aims of this reform was to enable 'English MPs to express their voice on matters affecting England only' (Conservative Party 2015, 8). So far, however, the procedures have not succeeded in facilitating greater deliberation or expression of English interests within the legislative process.
23. The key mechanism that could have promoted an English voice was the legislative grand committee stages convened after a bill's report stage. These committees comprise all MPs from constituencies in England (or England and Wales), and in principle provide opportunities for them to debate the distinct implications for the relevant part(s) of the UK. So far, however, they have not provided any meaningful expression of a separate voice. Since 2015 there have been 42 post-report legislative grand committee stages, on 35 bills. The majority of these were entirely perfunctory, featuring no debate at all. Only on four bills did the legislative grand committee stage(s) last longer than 10 minutes.<sup>13</sup> In many cases, the failure of the government to give protected time for the legislative grand committee in the programme order (presumably with agreement from the opposition within the usual channels) meant that, since the knife had already fallen, there was no opportunity to hold a debate even if MPs had wished to do so.<sup>14</sup> Where debates have taken place, these have

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<sup>13</sup> The Housing and Planning Bill (2015-16), the Charities (Protection and Social Investment) Bill (2015-16), the Rating (Property in Common Occupation) and Council Tax (Empty Dwellings) Bill (2017-19), and the Non-Domestic Rating (Nursery Grounds) Bill (2017-19).

<sup>14</sup> For example, on the Financial Guidance and Claims Bill (2017-19), the Data Protection Bill (2017-19), the Tenant Fees Bill (2017-19), the Finance (No. 3) Bill (2017-19), the Mental Capacity (Amendment) Bill (2017-

generally been dominated by MPs from outside of the area of certification, largely seeking to make a wider political point about the EVEL procedures.<sup>15</sup> Despite adding complexity and disruption to Commons proceedings, therefore, these stages have had little discernible benefit for the expression of a distinctively English voice.

24. This failure to provide for an English voice is also a consequence of the design of the EVEL procedures. The McKay Commission (2013), whose report provided the basis for the EVEL reforms, rejected arguments for giving English (or English and Welsh) MPs a hard ‘veto’, instead favouring mechanisms to give these MPs enhanced ‘voice’ within the process. Its reasoning was that, once the distinct preferences of English (or English and Welsh) MPs were more clearly articulated, it would be much harder politically for the whole House to override them. Reflecting this, the commission proposed an indicative, non-binding debate and vote on a ‘consent’ motion held early in a bill’s passage (prior to second reading), at which these interests could be expressed. The version of EVEL introduced in 2015, by contrast, implemented a hard veto right, which required the consent stage to occur later in the legislative process in order to take account of any changes made later in the bill’s passage. This means that the stage is sandwiched between two pre-existing substantive stages (report and third reading), and as a consequence there has consequently been little demand to make use of these stages for deliberation. Our findings indicate that there may be an inherent trade-off between the achievement of voice and veto within the same procedural mechanism.
25. EVEL does provide one additional device for the expression of an English voice. Where a bill is certified as England-only, its committee stage is taken only by English MPs. This has so far applied to only five bills. On two of these, committee stage was taken in specially constituted public bill committees.<sup>16</sup> On two of the others, the stage was taken in the chamber by a legislative grand committee comprising all MPs representing English constituencies.<sup>17</sup> On the remaining bill a regular public bill committee was held.<sup>18</sup> These are the only occasions so far on which there has been any substantive deliberation in any of the England-only mechanisms implemented by EVEL. Since wholly England-only bills are relatively rare, such opportunities are likely to remain the exception for the foreseeable future, and it remains too early to assess the value of these stages as a mechanism for achieving greater English voice.

*Whether EVEL has been a ‘success’ depends on what problems it was meant to solve*

26. In summary, the 2015 EVEL reform has introduced an English (and English and Welsh) veto right into the Westminster legislative process, and has done so in a way that has avoided many of the practical and constitutional challenges associated with such a reform. These are meaningful, albeit modest, achievements. But EVEL has not implemented a genuinely

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19), and the NHS Funding Bill (2019-21).

<sup>15</sup> For example, the Non-Domestic Rating (Nursery Grounds) Bill (2017-19) legislative grand committee featured contributions from two Members (both representing Scottish constituencies).

<sup>16</sup> The Secure Tenancies (Victims of Domestic Abuse) Bill (2017-19), and the Rating (Property in Common Occupation) and Council Tax (Empty Dwellings) Bill (2017-19).

<sup>17</sup> The Kew Gardens (Leases) (No. 3) Bill (2017-19), and the NHS Funding Bill (2019-21).

<sup>18</sup> It appears that that through an oversight the Selection Committee nominated a normal public bill committee on the Tenant Fees Bill (2017-19) even though the entire bill had been certified as relating only to England.

English legislative process, nor has it noticeably enhanced the voice of England (or England and Wales) at Westminster. Thus far, EVEL has had a much more limited effect than was anticipated by either its advocates or its opponents.

27. Whether EVEL has ‘succeeded’ is therefore a matter of perspective, depending on what one believes it was intended to achieve. From the start, supporters of such a scheme have had conflicting rationales (for further discussion see Gover and Kenny 2016a, 17–18). For some, EVEL was always intended to be a modest reform, designed to deal with the worst anomalies arising from devolution – as for example seen in the 2003 and 2004 Commons votes mentioned above. For others, it was hoped that reform of this kind would enable much more meaningful forms of English representation at Westminster that would be more comparable to the devolution enjoyed in other parts of the UK. EVEL may be regarded as a qualified success by the former group, but has clearly not achieved the ambitions of the latter.
28. Developing a more substantive form of English representation at Westminster would generate considerable difficulties. In some respects, the limited nature of EVEL is one of the central reasons why it has not resulted in the kinds of constitutional challenge its critics anticipated. In particular, the ‘double veto’ mechanism and the capacity of the whole House to suspend the procedures mean that the reform is far less vulnerable to the charge that it has created two classes of MP, or has undermined the principle of parliamentary sovereignty and the logic of parliamentary government. Based on the evidence so far, it may be that the current system of EVEL represents the limit of what can realistically be provided to English MPs – in *voting* terms – without effectively creating a distinct English legislative institution.
29. However, much more could be done to supplement EVEL with additional mechanisms – in particular, those designed to enhance England’s *voice* at Westminster. In our 2016 report, we recommended that a cross-party body such as the Procedure Committee should consider the case for, and design of, such mechanisms, highlighting two possibilities in particular (Gover and Kenny 2016a). The first was an English grand committee, modelled on the existing territorial grand committees in the Commons, with a remit beyond legislation including the capacity to question ministers, conduct short debates, and receive ministerial statements. The second was an English Affairs select committee, modelled partly on the existing Scottish Affairs, Welsh Affairs, and Northern Ireland Affairs select committees. This could have a cross-cutting remit to investigate matters of distinct English interest, and to review and draw to the attention of the House legislative proposals with particular implications for England.

### **More detailed recommendations**

30. In our report (Gover and Kenny 2016a, 37–38), and in our submission to your predecessor inquiry (Gover and Kenny 2016c), we also made a number of practical recommendations about how EVEL might be made less complex, more transparent and more effective. We draw these once again to your attention.

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