

**Dr Daniel Gover and Professor Michael Kenny – written evidence  
(FGU0025)**

**House of Lords Constitution Committee  
Inquiry into the Future Governance of the UK**

1. This written submission concerns question 3 of the call for evidence, about devolution within England. It focuses specifically on the impact of 'English Votes for English Laws' (EVEL).
2. The submission 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). Many of the conclusions and recommendations in these earlier documents remain relevant. Further information, including ongoing data about EVEL's operation, is available at [www.evel.uk](http://www.evel.uk).

**English Votes for English Laws and the territorial constitution**

3. The EVEL standing orders in the House of Commons give English (and English and Welsh) MPs the right to 'veto' certain legislation that applies only in England (or England and Wales).<sup>1</sup> However, the bulk of the Westminster legislative process remains unchanged, with MPs from across the United Kingdom retaining the right to speak and vote at most of the Commons legislative stages. EVEL has consequently been described as a 'double veto' system, reflecting the fact that English (or English and Welsh) MPs and UK-wide MPs each have the power to veto affected legislation.
4. The EVEL system has been designed to be roughly analogous to arrangements for 'legislative consent' in the three devolved legislatures. In accordance with the 'Sewel convention', the Westminster parliament will not normally legislate in devolved areas except with the agreement of the relevant devolved legislature. This convention manifests itself through the practice whereby the devolved legislatures pass 'legislative consent motions' (LCMs) to signal their agreement to relevant legislation before Westminster. These arrangements directly informed the design of the EVEL standing orders. The independent McKay Commission (2013) – which laid much of the groundwork for the reform – explicitly drew on the LCM process in developing its proposals. This in turn developed into the central innovation within EVEL of English (or English and Welsh) MPs being asked to consider 'consent motions' on relevant legislative provisions.<sup>2</sup>

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

<sup>2</sup> In contrast to the McKay Commission, however, the EVEL standing orders provide for the consent motion to facilitate a binding veto rather than being advisory.

5. Despite the similarities, it should be noted that there are some differences between EVEL and LCMs. In certain respects, EVEL may be regarded as the stronger of the two mechanisms. For example, the EVEL veto can be seen as 'binding' (i.e. it cannot be overruled by UK-wide MPs within the terms of the EVEL standing orders) and LCMs as 'advisory' (albeit they may be politically difficult to ignore).<sup>3</sup> Likewise, whereas the three devolved legislatures consider LCMs within their own legislative competence, EVEL can apply in areas devolved to *any* other part of the UK. Yet, in other respects, EVEL may be regarded as weaker than LCMs elsewhere. For example, EVEL only applies on primary legislation where an entire clause/schedule meets the certification criteria, and the process does not apply to private members' bills. Significantly, whereas the LCM processes involve various actors that are independent of the UK government and that can claim to 'speak' for the territory concerned within the consent process,<sup>4</sup> equivalents do not always exist for England under EVEL. This comparison serves, we would suggest, to illuminate the extent to which EVEL has added to the *ad hoc* and asymmetrical nature of the UK's territorial constitution.
6. Recent developments have also placed considerable additional strain on the LCM process. On three occasions, Westminster has passed Brexit-related legislation despite at least one devolved legislature withholding its consent – and in the case of the EU (Withdrawal Agreement) Bill, all three devolved legislatures did so. This has led to repeated and widespread calls for the expectations and processes around devolved legislative consent to be clarified.<sup>5</sup> These episodes have made clear that Westminster retains the constitutional authority to override the withholding of consent in any part of the UK – and this may in the future become relevant in relation to EVEL. Indeed, the ease with which the EVEL standing orders were suspended by the House of Commons in 2020, in response to the coronavirus pandemic, is itself notable, and may have set an important precedent.
7. One of the motivations for introducing 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 (for details see Gover & Kenny 2016: 9-10). EVEL was also motivated by the rising sense 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>6</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.

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<sup>3</sup> See also oral evidence by Paul Evans to the Commons Procedure Committee inquiry, 'The procedure of the House of Commons and the territorial constitution', HC 838, 19 April 2021, Q49.

<sup>4</sup> E.g. the devolved executive usually prepares a 'legislative consent memorandum' and a committee of the devolved legislature then reports on it, informing the subsequent plenary debate.

<sup>5</sup> E.g. Constitution Committee 2020: 17-19; Finance and Constitution Committee 2018: 3-5; Legislation, Justice and Constitution Committee 2021: 13-15; Paun and Shuttleworth 2020; Public Administration and Constitutional Affairs Committee 2018: 15-23.

<sup>6</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>.

8. Given that a clear majority of people in England voted in favour of Brexit, and many voted for the Conservative party at the 2019 general election 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 not being delivered (if for instance a second referendum had been called by the government and supported by parliament). In such a scenario, there is a very good chance that the question of how English preferences 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 weaknesses of the current model 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 outside England. In such circumstances, questions around the authorisation of legislation that applies only in England may well return to the fore.

### **The operation of English Votes for English Laws**

10. Turning to the detailed operation of EVEL, it is possible to draw several conclusions based on the system's operation over its first five years (23 October 2015 to 22 October 2020).<sup>7</sup>

*EVEL has been relatively functional in operational terms*

11. EVEL has so far operated relatively smoothly in administrative terms. For the process to apply, the Commons Speaker must 'certify' that a legislative provision meets certain criteria. 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). 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, many of the difficulties feared 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 – indeed quite likely – that circumstances will arise in which much greater strain is placed upon it.
12. The most serious objections to EVEL were always constitutional in character – in particular, 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 fears 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 England (or England and Wales) who believe that a certified provision might indirectly harm

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<sup>7</sup> The EVEL standing orders have been suspended due to the pandemic since April 2020, currently with effect until 21 June 2021. As such the figures remain correct at the time of writing.

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*

13. EVEL has succeeded in providing English (and English and Welsh) MPs with a relatively robust veto right. This veto can be applied in two ways: through a 'consent' motion at a new 'legislative grand committee' stage during the bill's Commons passage; and through 'double-majority' voting on Lords amendments and secondary legislation (in which majorities are required across the whole House and among MPs from the area of certification). During the first five years of EVEL's operation there have been no divisions on consent motions in legislative grand committees, but there have been 43 double-majority divisions. 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.
14. So far, English (or English and Welsh) MPs have never *applied* this veto in a division. In every case, MPs from the area of certification 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*

15. 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 certification criteria and therefore to not be certified. 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).
16. The second reason is that, even though the EVEL veto is 'binding' within the terms of the EVEL procedures, it is possible for these procedures to be easily suspended by the House – as illustrated by the system's suspension in April 2020 in response to the coronavirus pandemic. This is one consequence of the decision to implement EVEL 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>8</sup> But it does also illustrate the ambiguous, and vulnerable, position of this system within the UK's increasingly fragile constitutional order.

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<sup>8</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).

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

17. It is also important to emphasise that – despite its name – EVEL has not introduced a genuinely 'English' legislative process into parliament. Again, while this may be regarded as a strength (protecting the pre-eminent status of the whole House of Commons), 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. This was again illustrated in the case of the 2016 proposals to relax Sunday trading laws in England and Wales (further described in Gover and Kenny 2016b).

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

18. EVEL has also failed to provide opportunities for a genuinely English 'voice' within the Westminster parliament. 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.
19. The key mechanism that could have promoted an English voice was the legislative grand committee stages convened after a bill's Commons 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>9</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 there was no opportunity to hold a debate even if MPs had wished to do so.

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

20. 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 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.

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<sup>9</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).

21. 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.
22. 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. However, more could be done to supplement EVEL with additional mechanisms at Westminster – in particular, those designed to enhance England’s ‘voice’.

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