House of Commons

Procedure Committee

Government proposals for English votes for English laws Standing Orders: interim report

First Report of Session 2015–16

HC 410

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Report, together with formal minutes relating to the report

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The Procedure Committee

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Publication

Committee reports are published on the Committee's website at Procedure Committee (Commons) UK Parliament and by The Stationery Office by Order of the House.

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Summary

The Procedure Committee has examined the Government's revised proposals, published on 14 July 2015, to deliver its policy of 'English votes for English laws' in the House of Commons. The principal element of the Government's proposals is the creation of a mechanism whereby Members of the House representing English, English and Welsh or (occasionally) English, Welsh and Northern Ireland constituencies can consent to, or veto, elements of Bills proposed by the Government. This new legislative stage, which is termed in this report the "consent stage", would be inserted between the current Report stage of a Bill and its Third Reading and would involve a new procedural vehicle which is given the title of a "legislative grand committee". The Government proposes to do this by way of new and amended Standing Orders. This report considers that mechanism and associated processes, including those which it is proposed to apply to secondary legislation.

In its initial review the Committee has considered the clarity of the new procedures, the proposed arrangements for the Speaker to identify Bills and instruments to which the new procedures are intended to apply, the impact of the new procedures on existing arrangements for considering legislation in the House, particularly at Report stage and Third Reading; and the likely impact of the new procedures on future legislative drafting.

This report is an interim report. The Committee will assess the implementation of any new procedures agreed to by the House, and recommends that the proposed new procedures be piloted on no more than three Bills in the remainder of this Session. Following Royal Assent to the last of those Bills, the Committee will undertake a technical assessment of how the procedures have operated, and will make further recommendations to the House.

The Committee's principal conclusions and recommendations are summarised below. They apply to the revised proposals published by the Government on 14 July 2015.

Piloting the Government's proposals

- The Committee considers that the Government's proposals represent a substantial change to the practices and procedures of the House in its consideration of legislation. Accordingly, it is only prudent that the new procedures should be piloted.
- The Committee recommends that the Government's proposals be piloted on statutory instruments and on no more than three Bills in the remainder of the present session. The House should approve any proposals for piloting the new procedures on Bills.
- The Committee will undertake a technical assessment of the operation of the new procedures as piloted, and will report to the House as soon as possible after Royal Assent has been granted to the last Bill so piloted. No further Bills should be subject to the new process until after the Committee has reported the outcome of its assessment.

- The Committee recommends that when making proposals for the programming of stages of Bills to which these new procedures may apply, the Government should allocate set periods of time for the consideration of amendments or groups of amendments, for elements of Consent Stage and for Third Reading. Time already available for consideration on Report should not be reduced as a consequence of the introduction of any new stages. As part of its technical assessment, the Committee will pay particular attention to the time spent on the proposed new Consent Stage of the legislative process and its impact on arrangements for programming of legislation.

- The Committee will also gather data on the impact of the new procedures on the House Service, including on the resources required to provide advice to the Speaker on certification of Bills and instruments.

Applying the new procedures

- The Committee recommends that, following the pilot stage, the proposed procedures be applied to specific Bills and instruments only following a debate and vote in the House.

- The Committee recommends that the consent of Members for constituencies in England, or England and Wales, to primary legislative provisions relating to England, or England and Wales, at Report stage be determined through applying a double majority requirement to the votes held at that stage. This would largely replace the separate consent stage which the Government has proposed, though the Government's proposed legislative grand committees would be retained for resolution of any disagreements between the House and Members representing constituencies in England or England and Wales.

- The Committee considers that all Members should be able to speak in any House body which undertakes its proceedings in the Chamber. This includes the proposed new legislative grand committees.

Certification

- The Committee notes that the proposed Standing Orders do not allow the Speaker to take any potential cross-border effects of legislation into account when deciding whether to certify Bills or parts of Bills as relating to England or England and Wales only. Similarly, the Speaker will not be allowed to take into account, in his certification decisions, any potential consequences for devolved administration block grants arising from the enactment of legislation applying to England or England and Wales only.

- The Committee observes that it is highly likely that Ministers, Opposition front benchers, back benchers with particular constituency interests and those in devolved administrations and legislatures may wish to make representations to the Speaker on his certification decisions. There is a case for the Speaker to establish and publish a procedure for how such representations will be handled.

- While it is appropriate that in the pilot stage the Speaker should not give reasons for certification decisions to the House, the Committee considers that it is not appropriate to make this stipulation in Standing Orders: the matter should be left to the Speaker's discretion.
- Two senior members of the Panel of Chairs should be appointed for the Speaker to consult, if he wishes, before reaching decisions on certification.
- The Committee is satisfied that certifications by the Speaker in pursuit of Standing Orders of the House should not be subject to any form of review in the courts. Since it is for the courts to determine the application of Article IX of the Bill of Rights, which prevents judicial review of proceedings in Parliament, the Committee cannot rule out the possibility that a determined challenger to a certification might be granted leave to apply for judicial review or succeed in the application.
- The Committee notes that the process of certification may take time, particularly on complex issues, and recommends that the Government allow adequate time for the Speaker to complete his deliberations on certification decisions, especially after Report stage and on motions arising from Lords Amendments.
- The Committee recommends that legislation intended to apply to England, or England and Wales, only should be prepared with the express intention of meeting the two proposed certification tests, namely territorial application and devolved competence.

Further Committee work

- In its monitoring of the implementation of any new procedures, the Committee will pay particular attention to the handling of issues around the Barnett formula and any consequential effects of legislation passed under the new procedures on the block grants to the devolved administrations.
- The Committee will also undertake a more detailed review of the procedures which are proposed to apply to Finance Bills and other Budget legislation following the passage of the present Scotland Bill.
- The Committee will also undertake a more general inquiry into the adequacy of the House's procedures for approving Government taxation and expenditure proposals.

1 The Government's proposals and our review

1. The Government has published proposals to change the Standing Orders of the House to deliver an outcome commonly known as 'English votes for English laws'.[1] Under these proposals certain elements of future government-sponsored draft legislation which are to apply only to England and Wales (or sometimes only to England) may become law only with the consent of Members representing constituencies located in those parts of the UK.

2. So far as primary legislation (bills paving the way to Acts of Parliament) is concerned, where a whole Bill would be deemed to relate exclusively to England, any public bill committee to which it were committed would have its membership restricted to Members representing constituencies in England. But the Government's proposals would principally have binding effect by the introduction of a novel stage in the legislative process following on from the current report stage (denoted in the proposals as a "Legislative Grand Committee") to allow Members representing constituencies in England, or England and Wales, to consent to, or withhold consent from, proposals with a specified territorial application. For brevity, we have termed this the Consent Stage. Without that consent, these elements of legislation would not be able to be submitted to the whole House at Third Reading, and could not therefore be included in any Bill passed by the House without the consent of the relevant part of the House.

3. Members from outside England, or outside England and Wales, cannot table or move amendments to consent motions at the Consent Stage as they cannot be members of the Legislative Grand Committee.

4. Amendments proposed by the House of Lords to Bills with distinct territorial application would, to pass the Commons, require the assent of not only a majority of members of the House, but also a majority of Members representing constituencies in England, or England and Wales.

5. A similar requirement for a "double majority" would be required for delegated legislation (normally in the form of draft statutory instruments) subject to the affirmative procedure in order to be deemed to have been approved by the House.

6. In the case of both primary and secondary legislative proposals, the decision as to whether these would be subject to the new procedures would rest, ultimately, with the Speaker of the House of Commons. He would be required to apply two tests: the first relating to whether the legislative proposal would have a distinct and limited territorial effect within the UK; the second as to whether the relevant devolved jurisdictions outside that limit would be lawfully competent to legislate in the same area if they chose to do so. The Speaker's decisions would be communicated through a process of "certification": once certified, those proposals would fall to be subject to the new requirements proposed in the draft standing orders. The process of certification may be required at several stages of the career of a legislative proposal and, perhaps most controversially, would also apply to proposed changes made by the Lords to Bills passed by this House.

1 The proposals also provide for English and Welsh votes on English and Welsh laws, and, on occasion, English, Welsh and Northern Ireland votes on English, Welsh and Northern Ireland laws (although the latter provision applies almost exclusively to taxation).

7. This report gives the initial and interim findings of our review of these proposals, in order to inform colleagues in advance of any debate and vote. This report relates to the revised proposals published by the Government on 14 July 2015.

8. We examine below the procedure whereby Bills and instruments would be certified as eligible for the proposed new procedures and the procedures themselves. We have not considered in any detail the proposed arrangements relating to Budget resolutions and Finance Bills which the Leader of the House told us could apply to consideration of measures arising from the Financial Statement and Budget Report as early as 2016.[2] Should the devolution of powers over income tax to the Scottish Parliament proposed in the Scotland Bill proceed, the principles and practicalities of such arrangements will require close scrutiny.

Introduction of the Government's proposals

9. The Government's intention to introduce these proposals was signalled in the Queen's Speech:

> My government will bring forward changes to the standing orders of the House of Commons. These changes will create fairer procedures to ensure that decisions affecting England, or England and Wales, can be taken only with the consent of the majority of Members of Parliament representing constituencies in those parts of our United Kingdom.[3]

10. The policy had previously been set out in the Conservative Party Manifesto for the 2015 General Election and in rather more detail in the Conservative Party's English Manifesto for that election. [4]

11. The Leader of the House published his proposals on 2 July 2015 and made an oral statement to the House.[5] On 7 July Rt Hon Alistair Carmichael MP secured an emergency debate under Standing Order No. 24 on the means the Government was using to give effect to its policy.[6]

12. On 14 July the Government published revised proposals intended to address concerns that Members representing constituencies outside England (or England and Wales) would be unable to vote on the consequences for public expenditure in other parts of the UK of legislation applying to England (or England and Wales) only.[7]

13. On 15 July the Leader of the House introduced a general debate on the Government's proposals and indicated that a further day of debate would be held before the House would be invited to vote on any proposals.[8] We also note, for completeness, the debate in the House of Lords on 16 July arising on a question tabled by Lord Butler of Brockwell, and

2 Q 146
3 HC Deb, 27 May 2015, col 32
4 The Conservative Party Manifesto 2015, p 70; The Conservative Party English Manifesto 2015, p. 9
5 Cabinet Office, English Votes for English Laws: Proposed Changes to the Standing Orders of the House of Commons and Explanatory Memorandum,2 July 2015; HC Deb, 2 July 2015, col 1646–1668
6 HC Deb, 7 July 2015, col 185–239
7 Cabinet Office, English Votes for English Laws: Revised Proposed Changes to the Standing Orders of the House of Commons and Explanatory Memorandum, 14 July 2015.
8 HC Deb, 15 July 2015, cols 936–1049

the subsequent debate and vote in the House of Lords on the proposals on 21 July 2015, which resulted in a Message to this House from the other.[9]

14. The Government has made clear that its proposals are put forward on an experimental basis, and that it will carry out a review of their operation at the end of the 2015–16 session.[10] If they proceed, so shall we.

The Committee's initial review

15. On 2 July, the Leader of the House had indicated that he had written to the Chair of the Procedure Committee (who had been elected on 17 June 2015) to invite this Committee to scrutinise the proposals and to undertake a 'technical assessment' of the measures during the first year of their operation.[11] However, he initially appeared intent on introducing his proposals before the other members of this Committee had been appointed.[12] The pause in the process following publication of the revised proposals on 14 July has allowed us an opportunity to reflect, with the help of expert witnesses, on the proposals.

16. At our first meeting of this Parliament, held on 14 July, we therefore resolved to conduct an initial review, focusing on the clarity of the new procedures; the arrangements for certification of Bills and instruments to which the new procedures are intended to apply; the impact of the new procedures on existing arrangements for considering legislation in the House, particularly at Report stage and Third Reading; and the likely impact of the new procedures on future legislative drafting.[13]

17. In the debates in the House, and in evidence we have taken, several Members have expressed fundamental and principled objections to the proposals.[14] While we acknowledge these views, our role in this inquiry has been to examine whether the Government's proposals are sufficiently comprehensible to work as part of the House's procedures for the consideration of legislation.

18. The question has also been raised within and without the House (and was the substantive grounds for the holding of the emergency debate on 7 July) as to whether standing orders are the proper vehicle for effecting a change of this magnitude. Again, we have quite deliberately eschewed offering an opinion on this question, but it is perhaps worth recording that there was agreement amongst many of our witnesses that trying to achieve these aims through legislation would risk a number of potentially undesirable consequences.[15] The most obvious advantage to all sides of the argument for using standing orders at this stage is that they are easily amended, easily set aside with the consent of a majority of the House, and well-suited to the kind of tinkering, or indeed

9 HL Deb, 21 July 2015, col 1007–1031, and 16 July 2015, col 754–766. The Lords Message of 21 July read as follows: "That it is expedient that a joint committee of Lords and Commons be appointed to consider and report on the constitutional implications of the Government's 14 July revised proposals to change the Standing Orders of the House of Commons in order to give effect to English Votes for English Laws, and that the committee should report on the proposals by 30 March 2016."

10 HC Deb, 2 July 2015, col. 1648

11 *Ibid.*

12 The Chair of the Committee, Mr Charles Walker, was elected unopposed by the House on 17 June 2015. The Committee of Selection proposed the membership of the Committee on 9 July, and the House approved the proposed membership on 13 July.

13 "Proposed English votes for English laws Standing Orders", Procedure Committee press notice, 16 July 2015.

14 For example, Pete Wishart MP (Q 70) and Angela Eagle MP (Q 90)

15 EVL 05, para 14 (Sir William McKay); EVL 02, para 20 (Professor Tomkins)

wholesale change, that is implicit in their status as experimental. At least for the duration of the experiment, this vehicle may be the least risky approach to delivering an outcome which, as we recognise, is itself quite energetically contested. We note that the Leader of the House has not ruled out seeking to achieve the Government's policy objective through primary legislation.[16]

19. In this report we have not, therefore, considered the overall principle behind the Government's policy, any alternative means of delivering it, or the broader implications of the proposals for the UK's constitutional settlement. We have focused solely on the proposals that are before the House and their practicality in procedural terms. That we think is the appropriate task of this committee; other committees may choose to examine the wider questions.[17]

20. Our inquiry has necessarily been very compressed at this stage. While a formal call for evidence was not issued, interested parties were invited to contribute written submissions to our review. We received six written submissions, and took oral evidence from Sir William McKay KCB, a former Clerk of the House and the former Chairman of the Commission on the consequences of devolution for the House of Commons; Professor Adam Tomkins, John Millar Professor of Public Law at the University of Glasgow and a member of the Smith Commission; Pete Wishart MP, SNP Shadow Leader of the House; Angela Eagle MP, then Shadow Leader of the House; and Rt Hon Chris Grayling MP, Leader of the House and David Cook CB of the Office of Parliamentary Counsel. We are most grateful to all those who made submissions or gave oral evidence.[18]

21. The Chair also wrote to the presiding officers of the Scottish Parliament, the National Assembly for Wales and the Northern Ireland Assembly to ask for information on the procedures which each presiding officer undertakes prior to certifying that draft legislation presented to each legislature falls within its legislative competence. We are most grateful for the replies we received.[19]

22. Further time is required to undertake a full analysis of the proposals: this report can only be interim and provisional.

16 HC Deb, 2 July 2015, col 1655

17 The Scottish Affairs Committee has held two sessions of oral evidence on the issue to date, and the Public Administration and Constitutional Affairs Committee has commenced an inquiry into English Votes for English Laws and the Future of the Union.

18 The oral evidence taken and written evidence received is listed at the end of this Report.

19 The correspondence is published on the Committee's webpage for this inquiry at http://www.parliament.uk/business/committees/committees-a-z/commons-select/procedure-committee/inquiries/parliament-2015/english-votes-for-english-laws/publications/

2 Certification by the Speaker

23. Under the Government's proposals, Members representing constituencies in England or England and Wales are to be given the ability to consent to, or veto, proposed primary or secondary legislation which applies only to those parts of the UK.[20] There are nevertheless many anomalies remaining in the devolution settlement. For example, the Government's proposals do not address the issue of whether Members from Wales alone, Scotland and Northern Ireland should be able to consent to, or veto, proposed primary or secondary legislation in non-devolved areas which applies in only those parts of the UK.

24. The Speaker is to decide whether in his opinion Government Bills, elements of Bills, proposals to change Bills in the form of new clauses, new schedules and amendments (whatever their source, whether from Government or otherwise) and secondary legislative instruments are to pass through the new process. He is to do this through an act of certification. Certification may occur at a number of stages: in the primary legislative process, it may happen before Second Reading, after consideration on Report, and on Commons consideration of Lords Amendments.[21] In the secondary legislation process it may occur once a motion for approval of an instrument has been tabled.[22]

25. A Bill, amendment, new clause, new schedule, motion relating to a Lords Amendment or affirmative instrument falls to be certified if, in the Speaker's opinion, it passes two tests:

a) it must apply exclusively to England or to England and Wales (disregarding any minor or consequential effects outside the area in question).

b) it must be within devolved legislative competence: it meets this test if the following conditions are met:

   i) for a clause, schedule or amendment relating exclusively to England,

   - it would be within the legislative competence of the Scottish Parliament to make any corresponding provision for Scotland in an Act of that Parliament
   - it would be within the legislative competence of the National Assembly for Wales to make any corresponding provision for Wales in an Act of that Assembly, or
   - it would be within the legislative competence of the Northern Ireland Assembly to make any corresponding provision for Northern Ireland in an Act of that Assembly and the corresponding provision would deal with a transferred matter.

   ii) for a clause, schedule or amendment relating exclusively to England and Wales, it would be within the legislative competence of the Scottish Parliament or Northern Ireland Assembly as set out above. [23]

20 The Government's proposals for voting on Budget resolutions and Finance Bills contemplate procedures which will involve the consent of MPs from constituencies representing England, Wales and Northern Ireland. We have not explicitly considered these proposals in this initial review.

21 Proposed Standing Order Nos. 83J, 83L and 83O..

22 Proposed Standing Order No. 83P. Certification may will also occur if an instrument subject to negative resolution which has been prayed against is referred to a delegated legislation committee for consideration or if the prayer is set down for debate in the House.

23 Proposed Standing Order No. 83J.

Bills shall be certified as relating to England, or England and Wales, only if every clause and schedule of the Bill applies exclusively to England or England and Wales and falls within the relevant devolved legislative competences set out above.[24]

26. Certain Bills do not fall to be certified under this procedure, and therefore are not subject to the procedures set out in the Government's proposals. These are:

- Private Members' Bills
- Bills certified by the Speaker as relating exclusively to Scotland, Wales or Northern Ireland under the relevant Standing Orders and consequently referred to the appropriate Grand Committee for consideration in relation to their principle[25]
- Bills which fall to be considered by the select committee appointed under Standing Order No. 140 (Joint Committee on Consolidation, &c., Bills)
- Bills whose main purpose is to give effect to proposals contained in a report by a Law Commission
- Tax law rewrite bills
- Bills introduced under the Statutory Orders (Special Procedure) Act 1945 or for confirming a provisional order[26]
- Consolidated Fund or Appropriation Bills.[27]
- Bills relating exclusively to Scotland, Wales and Northern Ireland in non-devolved areas.

27. In announcing his decisions on certification the Speaker would not be permitted under the terms of the proposed standing orders to give reasons for his decisions to the House.[28] We interpret this proposal to mean that the Speaker could not make any statement about the reasoning behind his certification, either inside or outside the House, and that he could not respond substantively to any points of order on certification or any correspondence from Members or others on the matter. We discuss this matter, and the issue of pre-certification representations to the Speaker, further below.

Determining devolved competence

28. Whether a Bill or instrument applies only to England (or England and Wales) may appear on the face of it a relatively straightforward test to apply, though we have received evidence to indicate the challenges involved in applying this test. Determining whether the provisions of a Bill, or modifications proposed to a Bill, fall within the legislative competence of the devolved legislatures is a potentially more complex operation. The papers we received from the presiding officers of the devolved legislatures indicated the work which each service undertakes to determine whether proposed primary legislation to

24 Proposed Standing Order No. 83J(5)
25 Standing Order No. 97(1) (Scottish Grand Committee (bills in relation to their principle, Standing Order No. 106(1) (Welsh Grand Committee (bills)), and Standing Order No. 113(1) (Northern Ireland Grand Committee (bills in relation to their principle))
26 Proposed SO No 83J(10)
27 Proposed SO No 83J(11)
28 Proposed SO No 83J(9)

be presented in each legislature falls within each institution's competence and is therefore within its legislative power. Legislation falling outside the competence of each institution, as provided for in the relevant Acts of Parliament, may be challenged in the courts and ultimately struck down.

29. Sir William McKay told us that the proposal that the Speaker should certify that a matter was within devolved legislative competence "appears to have a different rationale from that applicable to devolved legislatures".[29] Since their legislative authority is statutory and subject to the determinations of the courts as to their powers, Sir William thought it "only prudent [for devolved legislatures] to be certain so far as possible" that the legislation they passed was not likely to attract "hostile action in court". The UK Parliament was not in this position: since the courts may not "'impeach or question' proceedings in Parliament . . . these considerations do not affect the freedom of the House."[30] Sir William nevertheless considered that advice to the Speaker on devolved competence "may turn out to be the mirror image of—and can hardly be less thorough than—that given to the Presiding Officers", and indicated that the parallel decisions to be made by the Presiding Officer of the Scottish Parliament were often "far from straightforward".[31] This view was corroborated by the note we received from the Solicitor to the Scottish Parliament, writing on behalf of the Presiding Officer.[32]

30. Professor Adam Tomkins indicated that there would be difficulties in applying both tests of certification. He told us that the tests of devolved competence in the corpus of devolution legislation "have not always been able to apply in practice", not through any error in drafting, but simply because of the inevitability of border disputes at the boundaries of legislative competence. He pointed to the developing body of case law in the Supreme Court on the meaning and application of the relevant provisions of the Scotland Act 1998 and the Government of Wales Act 2006, and drew the following conclusion:

> [D]etermining what legislation "relates exclusively" to England may not always be straightforward and may on occasion be contested and open to different reasonable interpretations.[33]

31. The Scottish Government, in its submission, indicated its direct interest in the process whereby the Speaker would form his opinion on certification, particularly around "what may be difficult legal issues about the interpretation of the Scotland Acts".[34] The Scottish Government was also concerned to know whether the UK Government would have "any role or influence" in advising the Speaker on its views on devolved competence or the effect of legislation in Scotland, and whether there would be a role for the Scottish Government or the Presiding Officer of the Scottish Parliament to advise the Speaker of their views on such matters.[35]

Role of the Speaker

32. The requirement for the Speaker to certify legislative provisions which may pass through the proposed procedures is on the face of it not inconsistent with the present

29 EVL 07, para 4
30 *Ibid.*
31 *Ibid.*, para 6
32 Letter to the Chair and memorandum from the Solicitor to the Scottish Parliament, published 9 September 2015
33 EVL 02, para 13
34 EVL 04, para 13
35 *Ibid.*, para 14

powers of the Speaker to make decisions which have a substantive effect on the passage of public business in the House. In the course of the parliamentary day the Speaker is called upon to make many judgments which affect the ability of Members to participate in proceedings: on the selection and grouping of amendments, new clauses and new schedules to Bills to be considered on report, on the Members to be called to participate in debates, on the Members to be called to ask supplementary questions of Ministers, on the admissibility of urgent questions and on whether applications for emergency debates under Standing Order No. 24 should be put to the House for decision.

33. The Speaker already has powers to affect the passage of certain Bills through the legislative process through the issue of a certificate:

- Under the Parliament Act 1911, as amended, he shall issue a certificate to any Commons Bill identical in content to a Bill sent to, but not passed by, the Lords in the previous session: thus certified, the Bill may be presented, once certain conditions have been met, for Royal Assent without further consideration by the Lords.[36]
- Under the same Act, if a public bill is certified by the Speaker as a 'money bill'[37] the House of Lords is unable to amend it or to delay its presentation for Royal Assent.[38]
- Bills certified by the Speaker as relating exclusively to Scotland, Wales or Northern Ireland may be referred, on a motion moved by a Minister, to the relevant territorial Grand Committee for consideration in relation to their principle before Second Reading, and, should the House agree, may also be referred to territorial public bill committees for consideration in lieu of any or all subsequent stages on the floor of the House.[39]

34. The certification powers over Bills in the Parliament Acts are of constitutional significance, enabling as they do the elimination of the House of Lords from consideration or amendment of certain legislation. The new powers of certification proposed by the Government would nonetheless be a new departure in giving the Speaker the power routinely to exclude classes of members of the House of Commons from voting for or against already present elements of primary and secondary legislation (as opposed to changes proposed to such legislation) or from securing amendments to Bills which have been supported by a majority of the House. These powers, it seems to us, are of a different order to the already considerable powers enjoyed by the Speaker in terms of selection of amendments. Moreover, unlike the procedures consequent on certification of Scotland, Wales or Northern Ireland-only legislation, the procedures proposed by the Government give the House as a whole no opportunity to determine whether legislation certified as England or England and Wales-only should be subject to the proposed procedures.

36 Parliament Act 1911, s. 1(1)

37 Defined in the 1911 Act as "a Public Bill which in the opinion of the Speaker of the House of Commons contains only provisions dealing with all or any of the following subjects, namely, the imposition, repeal, remission, alteration, or regulation of taxation; the imposition for the payment of debt or other financial purposes of charges on the Consolidated Fund, the National Loans Fund, or on money provided by Parliament, or the variation or repeal of any such charges; supply; the appropriation, receipt, custody, issue or audit of accounts of public money; the raising or guarantee of any loan or the repayment thereof; or subordinate matters incidental to those subjects or any of them"

38 Parliament Act 1911, s. 2

39 Standing Order No. 97; Standing Order No. 106; Standing Order No. 113.

Restrictions on the Speaker

'Minor or consequential' effects

35. Under the proposed Standing Orders, the Speaker must treat any clause or schedule whose only effects outside England, or England and Wales, are "minor or consequential" as relating exclusively to that area.[40] The interpretation of 'minor effects' may be considered straightforward. The interpretation of 'consequential effects', in the overall context of the devolution settlement, is much less clear cut.

Cross-border effects

36. England-only legislation may well affect constituencies in Wales adjacent or close to the border with England. Legislation for the NHS in England which has an effect on the structure or services provided by NHS Trusts or Foundation Trusts near the border with Wales will inevitably affect people in Wales referred to such services. Members with constituents likely to be affected by such changes may wish to argue for the right to vote on such measures. On a strict interpretation of the proposed standing orders, as drafted, the Speaker is not able to consider such effects in deciding whether to certify.

Effects on public expenditure

37. Similar issues may arise in consideration of the consequences of England-only legislation on the operation of the Barnett formula, whereby the block grant allocation from the Treasury to the devolved institutions is set with reference to proposed public expenditure on services in England. The Scottish Government, in its submission to our review, argued that changes to levels of public expenditure in England are consequential on legislation implementing Government policy in England, and therefore have a consequential effect on the arithmetical formula used by the Chancellor of the Exchequer to calculate the level of block grant to be provided to the Scottish Parliament for allocation to public services in Scotland.[41]

38. Professor Adam Tomkins explained why he believed the argument advanced by the Scottish Government and others was, in his view, erroneous:

> [L]egislation itself does not change departments' budget provision. The House of Commons votes on this as part of the estimates process, not as part of the ordinary business of debates on legislation.[42]

However, he cast doubt on the idea that the estimates process gave Members the means to carry out full scrutiny of any "Barnett consequentials" for public expenditure of legislation applying to England or England and Wales only.[43]

39. It is possible to interpret the procedure in the House and in the Treasury relating to public expenditure as supporting the position outlined by Professor Tomkins. It is highly uncommon for public bills—other than Consolidated Fund or Appropriation Bills—to make direct provision for levels of public expenditure. The Government's revision to the proposed Standing Orders, published on 14 July, introduced a provision which made it

40 Proposed Standing Order No. 83J(6)
41 EVL 04, paras 4–7
42 EVL 02, para 16
43 *Ibid.*, para 18

clear that the certification process would not affect the right of any Member to vote on the consideration of estimates or on ways and means motions or money resolutions (save for certain Budget resolutions on which Finance Bills are to be founded), nor would it apply to Consolidated Fund or Appropriation Bills (more accurately to be known, when the Standing Orders have been revised in accordance with our predecessors' recommendations, as Supply and Appropriation Bills).[44]

40. However, in reality, the estimates and supply procedures of the House validate prior decisions about policy, including those which have been given effect through primary legislation. In practice, there are extremely limited opportunities for Members to have any substantive effect on departmental spending plans through the Estimates approval process (not least because of the rule of Crown initiative, which restricts Members who are not Ministers to making reductions and forbids them from proposing increases in Estimates). The House cannot reverse its previous legislative choices by tampering with the Estimates, except in the bluntest way by removing the resources to give effect to those choices.

41. Members representing constituencies outside England or England and Wales are therefore likely to demand to vote on legislation which they consider will have a direct (or even indirect) effect on levels of public expenditure in their local jurisdictions or constituencies. This may give rise to representations to the Speaker asking him to take consequential matters into account when considering certification. Neither money resolutions nor ways and means resolutions are, in modern practice, used as instruments for fine-tuning public spending. Indeed, we suspect that few Members regard them as having any significance whatsoever in determining either policy or spending levels, and most regard them (if they register them at all) as a quaint constitutional relic. We discuss below the implications of this situation for the future of supply procedure.

42. The drafting of proposed Standing Order No. 83J removes the Speaker's discretion to determine the extent to which the legislation before him for certification may affect the interests of Members representing constituencies to which the proposed legislation does not directly apply. **We note that the proposed Standing Orders do not allow the Speaker discretion to take into account unstated, yet potentially substantial, consequential effects elsewhere in the UK of bills, clauses and schedules relating to England or England and Wales only. We therefore draw the attention of the House to the drafting of proposed Standing Order No. 83J(2) and (6). We will keep the operation of this Standing Order under close review, with particular attention to the issue of Barnett consequentials.**

Representations to the Speaker

43. The proposed Standing Orders make no specific provision for the Speaker to receive representations prior to his decision on certification. Nor do they prohibit him from receiving representations from Members or non-Members on certification, or from discussing such representations. The representatives of the two largest opposition parties indicated that their front benches would be prepared to make representations to the Speaker on certification[45], and the Leader of the House indicated that Ministers

44 Proposed Standing Order No. 83J(11); Procedure Committee, Sixth Report of Session 2014–15. *Revision of Standing Orders*, HC (2014–15) 654.

45 Q 77 (Pete Wishart); Q 92 (Angela Eagle)

would likewise be prepared to make representations.[46] It is highly likely that Members for Welsh constituencies adjacent to the English border would make representations if they considered that certification of legislation would exclude them from voting on matters affecting the interests of their constituents. The evidence we have heard is that under the proposed Standing Orders the Speaker would not be entitled to take into account cross-border effects, even if representations were received from Members for constituencies in Wales.[47] The Scottish Government has also called for a "clear process" for the Speaker to have "access to advice agreed by the UK and Scottish Governments" on the extent of devolved competence and the likely effect on Scotland of any legislation passed at Westminster.[48] **We consider it likely that Ministers, opposition front bench Members pursuing their territorial or policy portfolios, back bench members with a particular local interest, and Ministers in devolved administrations, will all be likely to make representations to the Speaker on certification. We recognise that there is a case for the Speaker to establish and publish a procedure for how he would handle such representations.**

Publication of reasons

44. Under the proposed Standing Orders the Speaker will not be allowed to give reasons for his certification decisions in the House. We received evidence arguing both for and against the principle. Professor Adam Tomkins argued strongly that the reasoning behind certification decisions should be published, in the interests of transparency.[49] The Speaker of the Northern Ireland Assembly indicated firmly that his decision on whether a Bill was within the legislative competence of the Assembly was final and that he would give no reasons for his decision.[50] Sir William McKay saw risks to the Chair in requiring the Speaker to give the reasoning behind a non-partisan and legally-informed opinion on certification:

> Once you start making the Speaker explain to the House, or other than very privately to a Member, the two planes do not meet: the Speaker's legal, practical view and the House's or the complaining Member's political views do not meet and it involves the Chair in a political row that he did not really want to get into.[51]

45. There is one precedent for the proposed restriction in Standing Orders already: Standing Order No. 24 requires the Speaker to announce whether he is satisfied that a request for an emergency debate is on "a matter proper to be discussed", without giving the reasons for his decision to the House. On the whole, however, it has been the House's custom to give the Speaker the discretion to provide explanations for his decisions where he sees fit, while respecting the authority of the Chair in not questioning the Speaker's decisions. The Speaker has always had the right to publish rulings indicating the general principles underlying decisions taken from the Chair, and these are invariably helpful to the House. **In the experimental phase following the introduction of any new Standing Orders, we consider that the Speaker should not give the reasons for his decisions on certification to the House.** ***We nevertheless consider it inappropriate that the role of the Speaker should be confined in this way through Standing Orders proposed by***

46 Q 141
47 Q8
48 EVL 04, para 14
49 EVL 02, para 21
50 Letter to the Chair from the Speaker of the Northern Ireland Assembly, published 9 September 2015.
51 Q 9

the Government, and we recommend that the matter should be left to the Speaker's discretion, so that he may choose to enter into the spirit of this experiment by being himself free to experiment.

46. The Parliament Act 1911 makes provision for the Speaker to consult, before certifying any money bill, two members of the Panel of Chairs. Sir William McKay thought that there was merit in making express provision for the Speaker to consult other Members on difficult issues around certification.[52] We agree, though we note that nothing in the proposed Standing Orders prevents the Speaker from consulting others on a certification decision. ***We recommend that provision should be made for the Speaker to consult two senior members of the Panel of Chairs, to be appointed by the Committee of Selection, if he chooses before determining his opinion on certification, but should not be obliged to do so. This provision would, we believe, help underpin the House's confidence in the Speaker's decisions.***

Risks of judicial challenge

47. The Government's proposed procedure will direct the Speaker, when issuing his certification, to form an opinion on the existing state of the law in respect of territorial application and devolved competence. The decision on certification arising from that opinion will have an effect on the legislative procedure to which Bills, amendments, new clauses and new schedules are subject, as well as Lords Amendments and affirmative instruments. Some commentators have suggested that such opinions on the state of the law could be challenged in the courts, or might be shown by later court judgments to have been erroneous.

48. Sir William McKay thought that the Speaker's certification was unlikely to be challenged in the courts, as it was a parliamentary proceeding protected by Article IX of the Bill of Rights 1689:

> When the House tells the Speaker in the Chair to make a certain decision about parliamentary procedure, if that is not a proceeding in Parliament, it is difficult to tell what is.[53]

He did recognise the difficulties of requiring the Speaker to apply the certification tests:

> Although the courts cannot get into Parliament, you are asking the Speaker to give an almost unchallengeable definition of what the law says. Is something devolved or is it not? The devolution statutes try to be clear, but in the nature of things they may occasionally want judicial review to see what they mean. That is the hard bit for the Speaker, but it is not impossible. He has a lot of legal assistance—he can have his Counsel, the Clerk of the House and [Parliamentary Counsel], who work in absolute good faith. So the Speaker will be taking his decision on behalf of the House with the best possible advice he can get.[54]

Professor Adam Tomkins also thought that decisions on certification by the Speaker would require him to take expert constitutional and legal advice.[55]

49. **In making the certifications on legislation required by the House under the proposed Standing Orders, the Speaker may be considered to be ruling on matters of devolution law which will have an effect on the legislative process. Certifications by the**

52 Q 9
53 Q 5
54 Q 6
55 Q 49

Speaker, in pursuit of Standing Orders of the House, must be considered proceedings in Parliament and therefore should not, as our constitutional conventions and statute law currently stand, be subject to any form of review in the courts. But since, rightly, it is for the courts to determine the ambit and application of Article IX of the Bill of Rights, we cannot rule out the prospect that a determined challenger to a certificate issued by the Speaker might be granted leave to apply for judicial review, or might be successful in such an application. We bring this matter to the attention of the House.

Resource implications

50. We note from the memoranda we have received from the devolved legislatures that the workload involved in examining legislation for compatibility with devolved competence is substantial, and requires a number of expert legal professionals to advise presiding officers. As we have already noted, the circumstances are not precisely analogous: the devolved institutions operate under a statutory framework and are subject to judicial review. But, as Sir William McKay noted, the procedures for certification at Westminster can hardly be less thorough than those which apply in similar circumstances in Cardiff, Belfast and Edinburgh.[56]

51. The Speaker will have available to him advice from the Clerk of the House, his principal procedural adviser, from the Clerk of Legislation, his principal adviser on certification of legislation, and from Speaker's Counsel. He will also have the benefit of explanatory material about Bills and instruments provided by the Government which will set out the Government's view of the territorial application of proposed legislation and whether such legislation falls within the competence of any devolved legislature.

52. Nevertheless, the workload involved in certification is likely to be considerable. Certification requires the following actions:

a) Consideration before second reading of all Government bills falling within the scope of the proposed Standing Order which are introduced in the Commons or brought from the Lords, and consideration of each clause of and schedule to such bills; [57]

b) Consideration after Report stage of all bills eligible for certification, any amendments made to them and any new clauses or new schedules added to them;

c) Consideration of motions relating to Lords Amendments, or Lords Messages, in respect of most Government bills

d) Consideration of most instruments subject to affirmative resolution[58]

e) Consideration of all Budget resolutions.

56 EVL 07, para 6

57 The classes of Bill excluded from certification are set out in proposed Standing Order No. 83J(10).

58 The classes of affirmative instrument which self-evidently apply to England only, and therefore do not require certification, are set out in proposed Standing Order No. 83R. They are: reports laid before the House pursuant to Chapter 2 of Part 5 of the Local Government Finance Act 1988 (revenue support grant: England); reports laid before the House under section 52ZD of the Local Government Finance Act 1992 (referendums relating to council tax increases: principles); reports laid before the House pursuant to section 46 of the Police Act 1996 (police grant); and motions for resolution under section 26(2)(b)(ii) of the Higher Education Act 2004 (student fees).

Preparatory analysis of Bills and instruments may of course take place some time in advance of their introduction. Nevertheless there are stages in the proposed procedures where certification will be required at short notice:

- The Government envisages certification of elements of Bills emerging from Report stage immediately after the conclusion of such proceedings, wherever possible.[59] While this may be possible in many cases, in the case of a complex series of amendments on report, or an amendment unexpectedly passed, it may not be possible or prudent to provide for certification immediately or even at the same sitting.

- Motions relating to Lords Amendments or Lords Messages are often proposed at short notice, or without notice, particularly in extended passages of 'ping-pong' between the Houses. Motions relating to Lords Messages (that is, at exchanges between the Houses subsequent to the first exchange relating to any Bill) can often be complex and their precise effect at times is opaque to all but the most expert and informed reader. Time will be required to consider and certify motions, particularly if their intended effect is not immediately clear.

- The proposed Standing Order 83N, on reconsideration of Bills if consent is withheld by a legislative grand committee, envisages a procedure of reconsideration of a Bill or elements thereof in order to achieve consensus between the House and the Committee. This requires any amendments tabled at the reconsideration stage to be certified before they return to the Committee.

53. Further tasks will fall to the Speaker in the course of any procedure to resolve differences between a legislative grand committee and the House. The proposed standing order stipulates that this procedure shall only be used for the purpose of considering changes to the Bill to resolve matters in dispute between the House and the Committee:[60] this will require the Speaker to examine all proposed amendments and select only those which meet this test. Should elements be removed from the Bill following a second consideration by the Committee, a consequential consideration stage may be required in the House, solely to consider any minor or technical changes required to the Bill as a consequence of its passage through Grand Committee.[61] Again, this process will require the Speaker to examine and select amendments to ensure they are within the scope of the Standing Order. This provision will potentially require detailed and complex amendments to be considered for selection to a tight timescale.

54. **The Government should not underestimate the time required to undertake proper and robust certification of legislation under its proposed procedures, especially given what is potentially at stake politically. It would be prudent for business managers to allow for the possibility that decisions on certification may not be possible immediately after Report stage on a bill is concluded. It is equally important that the Speaker be given adequate time to take decisions on certification of any motions arising from Lords Amendments and any other stages in the new process.**

59 Proposed Standing Order No. 83L(7)
60 Proposed Standing Order No. 83N(2)
61 Proposed Standing Order No. 83N(9)

3 Effects on legislative procedure

The proposed new legislative procedures

55. We summarise below the proposed new procedures as they are intended to apply to the passage of primary and secondary legislation.

Primary legislation

56. All Bills liable for certification are examined by the Speaker after presentation and First Reading. Those certified take one of two routes, depending on their territorial application.

Committee stage

57. Bills certified as applying only to England receive a Second Reading in the whole House. They are then committed to a public bill committee or the Legislative Grand Committee (England). Any public bill committee nominated to consider such a bill shall comprise Members for English constituencies only, and the Committee of Selection will be directed to nominate Members to it with regard to the composition of the House in relation to English constituencies. The Legislative Grand Committee (England) will comprise Members for English constituencies only. We discuss the Legislative Grand Committees further below.

58. All other certified Bills, or Bills containing certified provisions, are committed to a public bill committee to which any Member may be nominated, or to a Committee of the Whole House. In Committee, these certified Bills or parts of Bills are given no special treatment.

Consideration on Report

59. Likewise, the stage where Bills emerging from Committee are considered by the whole House on Report remains unchanged for certified Bills or Bills containing certified provisions, irrespective of the route they have taken.

60. However, following Report stage, the Speaker examines all amendments made and new clauses and new schedules added to a Bill since Second Reading. If no part of the Bill when originally certified before Second Reading remains, or if nothing added since falls to be certified, the Bill proceeds directly to Third Reading.

61. If any of the original provisions of the Bill, or any changes made to the Bill since second reading, are certified by the Speaker as relating exclusively to England, or to England and Wales, and within devolved legislative competence, the Bill falls to be considered by a legislative grand committee.

Consent in Legislative Grand Committee

62. The proposed Standing Orders provide for three types of legislative grand committee: England, Wales and Northern Ireland; England and Wales; and England only. Membership

of each Committee is confined to Members representing constituencies in the relevant part of the UK only. The meetings of such committees are proposed to take place in the Chamber: and the Leader of the House has indicated that Members who are not members of a legislative grand committee should still be entitled to speak in committee. We address participation in legislative grand committees further below.

63. The sole functions of a legislative grand committee at this stage are to grant consent to, or withhold consent from, legislation certified as relating to the relevant geographical area and within devolved legislative competence. Once a Minister signifies the intention to move a consent motion in committee, the House resolves itself into the relevant Legislative Grand Committee to consider the consent motion.

64. The form of the consent motion is prescribed in the proposed Standing Orders: the committee may be asked to consent to an entire bill, or to clauses, schedules or amendments certified as relating only to England, England and Wales or England, Wales and Northern Ireland. A Minister may also propose that the committee does not consent to certain clauses, schedules or amendments. All these propositions are combined in the form of a single portmanteau motion. Amendments to such motions may be proposed and, if selected by the Chair, moved, put and decided within the Grand Committee. Proceedings in Legislative Grand Committee are likely to be programmed.

65. In the case of a Bill containing provisions certified as relating to two or three territorial configurations, substantive debate on a consent motion takes place in the larger or largest of the grand committees, and votes are taken without debate in the smaller committees. So, for example, for a Bill containing provisions certified under all three territorial criteria, there would be a debate (for the period allowed in any programme motion) in the Legislative Grand Committee (England, Wales and Northern Ireland) (this is likely only to be the case for Finance Bills); at the end of the debate that Committee would come to a decision on the relevant motion proposed by the Minister; after that decision the Committee would automatically resolve itself into the Legislative Grand Committee (England and Wales) and come to a decision without further debate on another motion proposed by the Minister; immediately after that decision the Committee would reduce further in number to become the Legislative Grand Committee (England) and reach a decision, again without further debate, on yet another motion proposed by the Minister.[62] If the Legislative Grand Committee consents to a bill, or all elements of a bill proposed for consent, then the bill proceeds to Third Reading.

Reconsideration, veto and consequential consideration

66. If the Legislative Grand Committee withholds consent from a bill, or any element of a bill—whether at the instigation of a Minister or by disagreeing to a motion for consent to all or part of a Bill—the order for Third Reading of the Bill is discharged and the bill is set down for reconsideration in the House. This reconsideration stage is solely to resolve matters in dispute as a result of the withholding of consent in a Legislative Grand Committee, and the Speaker shall therefore only select amendments which are tabled to this end.

67. Following reconsideration, the Speaker examines any amendments made to the Bill and certifies them. The bill then returns to Legislative Grand Committee, where a consent

62 Proposed Standing Order Nos. 83M(4) and 83S(5)

motion is again proposed. If the motion is agreed to, and all provisions are consented to, then the bill passes to Third Reading.

68. If the Legislative Grand Committee at this second consideration withholds consent from a whole bill, then the bill may not proceed to Third Reading and cannot pass. If the legislative grand committee withholds consent at this second stage from any provision of the bill, then the bill is amended to remove the provision not consented to and may pass to Third Reading.

69. If, as a result of the provisions removed from the Bill, "minor or technical changes" are required to enable the legislation to operate, then a Minister may move that the House consider the amended Bill again in an additional stage termed "consequential consideration". The Speaker will be required to select the amendments to be moved at this stage, which would be in manuscript if the consequential consideration stage were to follow immediately after the second Legislative Grand Committee. Following completion of this stage the bill passes to Third Reading.

70. If a Bill were to pass through all the stages contemplated under the new procedure, the sequence (for Finance Bills), in addition to Second and Third Reading and Committee, would therefore be:

i) Consideration on Report

ii) Legislative Grand Committee (England, Wales and Northern Ireland)

iii) Legislative Grand Committee (England and Wales)

iv) Legislative Grand Committee (England)

v) Reconsideration

vi) Legislative Grand Committee (England, Wales and Northern Ireland)

vii) Legislative Grand Committee (England and Wales)

viii) Legislative Grand Committee (England)

ix) Consequential consideration

So the number of additional stages provided for under the Government's proposals could be between one and eight.

71. Sir William McKay pointed out to us a major constitutional departure in the Government's proposals relating to these new stages: a provision vetoed in Legislative Grand Committee can, under these proposals, be removed from a Bill which would then pass to Third Reading without any subsequent consideration by the whole House.[63]

Third Reading

72. Third Reading on all bills is undertaken by the whole House: if the Bill is given a Third Reading is granted then it, passes to the Lords for consideration.

63 Q 32

Lords Amendments and Lords Messages

73. The Speaker is required to consider Lords Amendments and motions relating to Lords Amendments on eligible bills and to certify them if they would result in adding, or omitting, provisions of bills applying to England and/or England and Wales, or (perhaps most controversially) if they would result in a previously certified provision ceasing to be certifiable, or becoming eligible to be certified in relation to a different territorial extent.

74. Certified motions relating to Lords Amendments and Lords Messages shall only pass if they are supported by a double majority when voted on in the House: that is, a majority of all Members voting in a division, and a majority of Members representing constituencies in England and/or England and Wales.[64]

75. We note that there is considerable risk and difficulty here, both in the technical execution of complex and fast-moving legislative stages in relation to Lords Amendments and Messages, and in the management of the relationship between the two Houses. Should the Government's proposals for changes to Commons procedure pass, it remains to be seen whether the Lords will seek to amend England-only provisions consented to by Members for English constituencies by, for instance, seeking to broaden their territorial application.[65] It may be wise, in the experimental stage, to leave more to good sense and comity between the Houses and to avoid the risk of entangling the two Houses in unnecessary complexity and a desire to control more detail than is politically healthy. It is here, in the relations between the two Houses, where the argument for a legislative approach carries more force (as with the Parliament Acts). It is all very well for this House to regulate its own procedures: it must be very careful not to trespass on those of the other House, even indirectly, except through mutual agreement on the establishment of conventions or, in the last resort, the instrument of primary legislation.

Delegated legislation

76. Under the proposed new procedures, certain items of secondary legislation subject to parliamentary approval will require the consent of the majority of Members representing constituencies in England or England and Wales to proceed.

77. The Speaker is required to apply the certification tests to the following classes of delegated legislation:

a) Instruments subject to affirmative resolution, once an approval motion has been tabled by a Minister

b) Instruments subject to negative resolution which have been prayed against and either referred to a delegated legislation committee for debate or set down for debate in the Chamber, and

64 Division clerks will record the names of those voting in such divisions on tablet computers, which will at the end of the division provide a figure for each of the majorities required.

65 A Bill certified in the Commons as relating to England and Wales might have a provision added in the Lords which related to a matter in Scotland. The Lords amendment relating to Scotland, having changed the territorial application of part of the Bill, would fall to be certified when it came to the Commons, and if it failed to achieve the support of a majority of Members for English and Welsh constituencies it could not be agreed to by the Commons.

c) Draft orders subject to affirmative resolution under the Regulatory Reform Act 2001 or the Localism Act 2011 where the Regulatory Reform Committee has made a recommendation to the House on approval.

78. In order to be deemed approved by the House for the purposes of their parent Acts, (or, in the case of negative instruments prayed against, annulled in pursuance of the Statutory Instruments Act 1948), the relevant motion for a certified instrument will have to be passed by a double majority analogous to the double majority required for the passage of a certified Lords Amendment. In other words, only if a majority of Members for the relevant constituencies votes to approve a measure will a majority of all Members also be effective. Conversely, even if a majority of Members for the relevant constituencies are in favour, they cannot override the decision of the whole House to reject a measure.

79. Certain other instruments requiring approval are self-evidently applicable to England or England and Wales only: local government finance reports, revenue support grant reports, police grant reports, statutory motions to approve reports relating to council tax referendums in England and statutory motions relating to changes in the tuition fee ceiling stipulated in the Higher Education Act 2004.[66] These will not require certification but will be subject to a double majority in order to be agreed.

Budget resolutions and Finance Bills

80. The proposed Standing Orders make special provision for certification of Finance Bills. Under these provisions, elements of Finance Bills may be certified if they relate only to England, Wales and Northern Ireland and are within the devolved legislative competence of the Scottish Parliament. The procedure foreshadows the passage of the Scotland Bill currently before Parliament, which is intended to amend the Scotland Acts to further extend the competence of the Scottish Parliament in matters of taxation. Provision is made for elements of Finance Bills to pass only if they have the consent of a legislative grand committee comprising Members for constituencies in England, Wales and Northern Ireland.

81. Similarly, secondary legislation arising from powers in a Finance Act can be certified as relating exclusively to England, Wales and Northern Ireland if it applies only to those parts of the UK and is within the devolved competence of the Scottish Parliament: the double majority procedures will apply to the passage of approval motions relating to such instruments.

82. Provision is made for certification of certain Budget resolutions. These are the motions for resolutions under the Provisional Collection of Taxes Act 1968 which have temporary statutory effect, and the motions authorising the provisions of a Finance Bill, which are published once the Chancellor of the Exchequer has delivered his Financial Statement and Budget Report and which are subsequently debated and voted upon either on the first or last day of the Budget debate. Such motions, if certified as relating to England, England and Wales or England, Wales and Northern Ireland and also passing the test of devolved legislative competence, may only be deemed approved if they are approved by a double majority.[67]

66 Proposed Standing Order No. 83R
67 Proposed Standing Order Nos. 83U and 83V

83. By custom, and for obvious operational reasons, the contents of Budget resolutions are not published until the moment they are tabled in the House. This presents additional challenges for the certification process. **Although votes on Budget resolutions are frequently taken at the end of the Budget debate, which lasts for several days, the first motion for a resolution under the Provisional Collection of Taxes Act 1968 may be taken immediately after the Chancellor's statement. It will therefore be helpful to the House to have notice of the Speaker's decision on certification at least one sitting day in advance of the day on which the Budget debate is to conclude. This may well require the sharing of information with the Speaker and the House authorities about the likely subject matter of the Budget resolutions in advance of Budget Day.**

84. **We will examine the implications of the procedure to apply to Finance Bills, financial instruments and Budget resolutions in greater detail in a subsequent inquiry and in the light of the passage of the Scotland Bill.**

Supply procedure

85. We have discussed the application or otherwise of the Government's proposals to the House's procedure on Supply and Appropriation Bills at some length above. To recap: although the Government has amended its proposals to make it clear that any Member may take part in all proceedings on Supply and Appropriation Bills, ways and means resolutions and money resolutions (except those relating to the Budget), the present operation of those procedures, and the constitutional conventions on financial initiative, make it largely impossible for Members concerned about the spending consequences of bills to exercise any effective control over the Government's proposals for public expenditure which the House is invited to approve. **We will consider the adequacy of the House's procedures for examining and approving Government taxation and expenditure proposals in a subsequent report.**

Comprehensibility

86. Underpinning the Government's proposals are two particular requirements:

a) for a separate committee stage for consideration of, and consent to, legislation with a separate and distinct effect on England or England and Wales, and

b) for a majority of Members representing constituencies in the part of the UK so affected to be able to veto such legislation if they disagree with it.

87. These two requirements have resulted in procedures which are undeniably very complex in their expression and their operation. Sir William McKay has indicated where they differ from the proposals made by the Commission which he chaired.[68] The McKay Commission offered a menu of procedural options to be deployed as necessary to achieve the objective of consent by Members representing constituencies in part of the UK to legislation with a separate and distinct effect on that part of the UK. Under the McKay proposals, a refusal to consent could be overridden by a majority in the House, but in order to achieve that override Ministers would have to incur a cost in parliamentary time and would have to explain their decision to override the withholding of consent.

68 EVL 04, paras 11–25

88. The Government's proposals for consent, reconciliation, veto and consequential consideration are procedurally complicated and will not necessarily be understood in the way that the present legislative process is generally accepted and understood. The Leader of the House indicated in his evidence to us that many of the stages could be taken *pro forma* in cases where there was general political agreement. That may be so: but rattling through complex procedures to satisfy the requirements of Standing Orders will not be readily understood by the public. To give another example, the rococo procedures which the proposals contemplate for a complex and controversial Finance Bill are unlikely to be clear and explicable. They do not sit well with the proposals our predecessors made in the last Session to revise the House's Standing Orders relating to public business "to improve the ability of all Members […] to use the House's procedures effectively."[69]

Time

89. The proposed Consent Stage—between Report and Third Reading—is the area where we are most concerned about the effect of the proposals on the overall time available for detailed consideration of legislation by the House. Our predecessors made clear their concerns about the adequacy of time already available for consideration of Bills on report, and the effective use of that time by the House to consider amendments under existing programming arrangements.[70] We are continuing to monitor the experiment in additional notice of amendments on report which our predecessors proposed and which the House agreed to extend to the present Session.

90. Dr Louise Thompson, of the University of Surrey, expressed particular concern about the potential effect of the new proposals on the opportunities available for legislative scrutiny at report stage.[71]

91. The Leader of the House gave us a commitment that additional time would be made available for the completion of the new legislative stages introduced by the Government's proposals.[72] We welcome this commitment. **We will, in our technical evaluation of these proposals, undertake detailed monitoring of the time spent on the various elements of the new Consent Stage and the treatment of Consent Stage on arrangements for programming.**

92. The "knives" included in a typical programme motion generally take one of three forms. They may set a specified hour of the clock at which proceedings on a particular stage or section of a Bill are to be brought to a conclusion without further debate; they may set a specified period of time from the commencement of proceedings on a Bill on a particular day; or they may set a specified and protected period of time for the consideration of each separate section or stage. Our predecessors recommended that programming of later stages of Bills should proceed on the principle of allocating set periods of time for the consideration of amendments, or groups of amendments, on report, and the allocation of a set period of time for Third Reading, a stage often compressed in time by the application of a 'knife' at a predetermined hour or after a pre-determined period from the commencement of consideration of some earlier stage or section. ***We recommend***

69 Procedure Committee, Sixth Report of Session 2014–15. Revision of Standing Orders, HC (2014–15) 654, para 5
70 Procedure Committee, Third Report of Session 2012–13, *Programming*, HC (2012–13) 757
71 EVL 01
72 Q 106: "[Legislative Grand Committee] is an extra section which, if there was a debate, would have to have extra time in the consideration of the Bill."

that, in considering the interaction of the proposed new procedures with the present procedures for programming stages of Bills, the Government should allocate set periods of time for the consideration of amendments or groups of amendments, for elements of Consent Stage and for Third Reading. Without such protected time, there is a high risk of bringing the procedures of the House in considering legislation into further disrepute and of failing to show the electorate that we take our task of making the law seriously and are prepared to give sufficient time to do the task properly.

Asymmetry

93. We note an anomaly in the process proposed for consent to legislation with a separate and distinct effect on part of the UK. The proposed procedures only apply to legislation relating to England or England and Wales only which is within devolved legislative competence. There is no analogous procedure for Members for parts of the UK outside England to consider Bills on matters where legislative competence is reserved to Westminster, not transferred to Stormont or Holyrood or not conferred on Cardiff Bay. Bills on such matters may still be referred to grand committees for consideration in relation to their principle, but the procedures presently proposed by the Government do not allow Members representing those parts of the UK to veto legislation in the way which is contemplated for Members representing England or England and Wales under these proposals.

4 Implementation of the Government's proposals

Application

94. The new and complex legislative procedures proposed by the Government are likely to have substantial implications for how the House arranges its legislative business, particularly in the later stages of politically contentious Bills. Sir William McKay indicated that the practical application of the procedures would be likely to lead to a compressed legislative schedule, particularly towards the end of the parliamentary session, and would introduce the potential for confusion and error.[73]

95. It is clear to us that the additional work involved in the preparation of Government legislation to be presented under the new procedure may be substantial. For the certification mechanism to operate as envisaged, Departments will have to publish prompt and accurate information on the territorial application of Bills and the competence of devolved institutions to legislate for their provisions. House staff will be required to examine legislation closely in order to advise the Speaker on whether their provisions meet the certification tests: as we have discussed above, the tests may in many circumstances not be straightforward to apply. Since each clause of and schedule to a Bill must be considered for certification, together with any amendment made or new clause or schedule added to a Bill in committee or on Report and any motion to agree with Lords Amendments or Lords Messages relating to Commons Amendments to Bills which started there, not to mention most instruments subject to affirmative resolution, the demand on House officials advising the Speaker is likely to be substantial. **In our monitoring of the implementation of the Government's proposals we will collect data on the impact of certification procedures on the House Service.**

96. We have already commented on the complexity the proposed procedures add to existing House procedure on legislation, and the risk that public understanding of the legislative process of the UK Parliament will be further reduced.

97. In a House which has a majority of Government members across the UK and in constituencies in England, it is not clear to us why, on a practical basis, the new procedures need to be implemented for every Government Bill and measure, with the consequent burden on parliamentary and government resources and legislative time. Where there is likely to be broad political agreement on legislation, we question why the burdensome and risky certification procedure needs to be activated.

98. **There may well be occasions when the Government finds it is politically necessary to demonstrate an English majority on an issue. In those cases the Government should invite the House to debate and vote on activating these experimental procedures in relation to specified measures. This would ensure that the House's time and resources are allocated to items which are politically important. It would also provide a procedure analogous to that already in existence for the House to refer legislation for consideration by territorial Grand Committees.** ***We recommend that the Government amend its proposals for Standing Orders to provide that Bills and instruments be sent***

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for the Speaker's decision on certification only after the House has debated and agreed to a motion to this effect moved by a Minister of the Crown.

Drafting

99. Work to improve the quality of legislative drafting on devolved matters should continue. Where policy intended explicitly for England or England and Wales is being developed, the legislative drafting should expressly reflect the proposed application. ***We recommend that Departments should as a matter of course instruct Parliamentary Counsel to draft legislation intended to apply to England or England and Wales only with the express intention of meeting the certification tests.***

Making procedures simpler

100. The most challenging element of the Government's scheme, because it is not only the most complex part but it is also the procedure which is proposed to be invoked with little notice at the latest and most unpredictable stage of a Bill's career, seems to us to be the somewhat over-engineered provisions for the legislative grand committee procedures which are to follow from the Report stage. The proposed process could be very easily simplified by using the double-majority procedure to demonstrate English (or English and Welsh) consent to certified provisions at Report stage. This would require certification of amendments, new schedules and new clauses before Report stage, rather than immediately afterwards as at present proposed. Additional debating time otherwise earmarked for legislative grand committees would be available for better consideration of amendments on report and to allow for the selection of more amendments for separate division. ***We recommend that the Government's proposals be amended to provide that certified amendments, new clauses and new schedules, whether made in Committee or proposed on Report, only pass Report stage if they are unopposed or, if put to a vote, when an appropriate double majority in the House has voted in favour***.

101. Only where there was a difference of outcome between the whole House's decision and that of the votes of the Members representing the relevant constituencies would there then be any need for a legislative grand committee stage. If an amendment were, for example, passed by the House but not passed by Members representing English constituencies (or vice versa), the amendment could then be referred to the Legislative Grand Committee (England), where a full and nuanced debate could take place on the substantive issues rather than a potentially wide-ranging and generalised debate on a portmanteau consent motion relating to all certified provisions, most of which may not be contentious. If no certified provisions failed the double majority requirement, no legislative grand committee (or committees) would need to be convened.

Participation

102. For centuries business in the House has proceeded according to the axiom that in proceedings in the Chamber all Members of the House should be able to participate, on grounds of principle as well as on issues of practicality. **We find any proposal for proceedings in the Chamber which exclude Members from speaking there to be incompatible with the traditions and procedures of the House, and we cannot support any such proposal.**

103. The Leader of the House indicated that his intention was that all Members should be able to speak in all debates in the Chamber.[74] We welcome this intention. ***We recommend that the Government's proposals should be amended to make it clear that all Members can speak and intervene in legislative grand committee proceedings in the Chamber at the discretion of the Chair. We note that in common with analogous proceedings in Delegated Legislation Committees, Members who are not members of a legislative grand committee will not be able to move motions, propose amendments or vote.***

Piloting

104. The experimental procedures may work well in theory, but the risk of collapse in practice is very real. The Shadow Leader of the House indicated to us her strong preference for substantial reforms to House procedures to be trialled and piloted before full introduction. **There is no question that the Government's proposals represent a substantial change to the practices and procedures of the House in its consideration of legislation.** ***We recommend that the procedures be piloted on statutory instruments, and no more than three Bills, in the remainder of the 2015–16 Session. The House should be invited to agree to the Bills to be piloted under these procedures, using the process we have outlined in paragraph 98 above.***

105. **We will undertake a thorough technical evaluation of this experiment, as it applies to the bills selected for piloting, and report our findings to the House as soon as is practicable following the granting of Royal Assent to the last of the Bills to be so piloted. The findings will also be available to the Government's proposed review of the experimental procedures.** ***We recommend that the new procedures should not be applied to any Bill in the 2016–17 Session until after we have reported on our evaluation.***

106. We will continue to examine the further implications of the Government's proposals, not least in respect of Budget resolutions and Finance Bills, in the light of the eventual passage of the Scotland Bill.

107. We will also examine the means whereby Members can, through the House's supply procedure and otherwise, effectively examine the block grant allocations to the devolved legislatures which derive from legislative changes. Given the manifest concern expressed about the adequacy of supply procedure provoked by the Government's proposals, we will also consider the merits of a broader inquiry into the House's control of Government expenditure plans.

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Conclusions and recommendations

Certification by the Speaker

1. We note that the proposed Standing Orders do not allow the Speaker discretion to take into account unstated, yet potentially substantial, consequential effects elsewhere in the UK of bills, clauses and schedules relating to England or England and Wales only. We therefore draw the attention of the House to the drafting of proposed Standing Order No. 83J(2) and (6). We will keep the operation of this Standing Order under close review, with particular attention to the issue of Barnett consequentials. (Paragraph 43)

2. We consider it likely that Ministers, opposition front bench Members pursuing their territorial or policy portfolios, back bench members with a particular local interest, and Ministers in devolved administrations, will all be likely to make representations to the Speaker on certification. We recognise that there is a case for the Speaker to establish and publish a procedure for how he would handle such representations. (Paragraph 44)

3. In the experimental phase following the introduction of any new Standing Orders, we consider that the Speaker should not give the reasons for his decisions on certification to the House. *We nevertheless consider it inappropriate that the role of the Speaker should be confined in this way through Standing Orders proposed by the Government, and we recommend that the matter should be left to the Speaker's discretion, so that he may choose to enter into the spirit of this experiment by being himself free to experiment.* (Paragraph 46)

4. *We recommend that provision should be made for the Speaker to consult two senior members of the Panel of Chairs, to be appointed by the Committee of Selection, if he chooses before determining his opinion on certification, but should not be obliged to do so. This provision would, we believe, help underpin the House's confidence in the Speaker's decisions.* (Paragraph 47)

5. In making the certifications on legislation required by the House under the proposed Standing Orders, the Speaker may be considered to be ruling on matters of devolution law which will have an effect on the legislative process. Certifications by the Speaker, in pursuit of Standing Orders of the House, must be considered proceedings in Parliament and therefore should not, as our constitutional conventions and statute law currently stand, be subject to any form of review in the courts. But since, rightly, it is for the courts to determine the ambit and application of Article IX of the Bill of Rights, we cannot rule out the prospect that a determined challenger to a certificate issued by the Speaker might be granted leave to apply for judicial review, or might be successful in such an application. We bring this matter to the attention of the House. (Paragraph 49)

6. The Government should not underestimate the time required to undertake proper and robust certification of legislation under its proposed procedures, especially given what is potentially at stake politically. It would be prudent for business managers to allow for the possibility that decisions on certification may not be possible immediately after Report stage on a bill is concluded. It is equally important that the Speaker be given adequate time to take decisions on certification of any motions arising from Lords Amendments and any other stages in the new process. (Paragraph 54)

Effects on legislative procedure

7. Although votes on Budget resolutions are frequently taken at the end of the Budget debate, which lasts for several days, the first motion for a resolution under the Provisional Collection of Taxes Act 1968 may be taken immediately after the Chancellor's statement. It will therefore be helpful to the House to have notice of the Speaker's decision on certification at least one sitting day in advance of the day on which the Budget debate is to conclude. This may well require the sharing of information with

the Speaker and the House authorities about the likely subject matter of the Budget resolutions in advance of Budget Day. (Paragraph 83)

8. We will examine the implications of the procedure to apply to Finance Bills, financial instruments and Budget resolutions in greater detail in a subsequent inquiry and in the light of the passage of the Scotland Bill. (Paragraph 84)

9. We will consider the adequacy of the House's procedures for examining and approving Government taxation and expenditure proposals in a subsequent report. (Paragraph 87)

10. We will, in our technical evaluation of these proposals, undertake detailed monitoring of the time spent on the various elements of the new Consent Stage and the treatment of Consent Stage on arrangements for programming. (Paragraph 91)

11. *We recommend that, in considering the interaction of the proposed new procedures with the present procedures for programming stages of Bills, the Government should allocate set periods of time for the consideration of amendments or groups of amendments, for elements of Consent Stage and for Third Reading. Without such protected time, there is a high risk of bringing the procedures of the House in considering legislation into further disrepute and of failing to show the electorate that we take our task of making the law seriously and are prepared to give sufficient time to do the task properly.* (Paragraph 92)

Implementation of the Government's proposals

12. In our monitoring of the implementation of the Government's proposals we will collect data on the impact of certification procedures on the House Service. (Paragraph 95)

13. There may well be occasions when the Government finds it is politically necessary to demonstrate an English majority on an issue. In those cases the Government should invite the House to debate and vote on activating these experimental procedures in relation to specified measures. This would ensure that the House's time and resources are allocated to items which are politically important. It would also provide a procedure analogous to that already in existence for the House to refer legislation for consideration by territorial Grand Committees. *We recommend that the Government amend its proposals for Standing Orders to provide that Bills and instruments be sent for the Speaker's decision on certification only after the House has debated and agreed to a motion to this effect moved by a Minister of the Crown.* (Paragraph 98)

14. *We recommend that Departments should as a matter of course instruct Parliamentary Counsel to draft legislation intended to apply to England or England and Wales only with the express intention of meeting the certification tests.* (Paragraph 99)

15. *We recommend that the Government's proposals be amended to provide that certified amendments, new clauses and new schedules, whether made in Committee or proposed on Report, only pass Report stage if they are unopposed or, if put to a vote, when an appropriate double majority in the House has voted in favour.* (Paragraph 100)

16. We find any proposal for proceedings in the Chamber which exclude Members from speaking there to be incompatible with the traditions and procedures of the House, and we cannot support any such proposal. (Paragraph 102)

17. *We recommend that the Government's proposals should be amended to make it clear that all Members can speak and intervene in legislative grand committee proceedings in the Chamber at the discretion of the Chair. We note that in common with analogous proceedings in Delegated Legislation Committees, Members who are not members of a legislative grand committee will not be able to move motions, propose amendments or vote.* (Paragraph 103)

18. There is no question that the Government's proposals represent a substantial change to the practices and procedures of the House in its consideration of legislation. *We recommend that the procedures be piloted on statutory instruments, and no more than*

three Bills, in the remainder of the 2015–16 Session. The House should be invited to agree to the Bills to be piloted under these procedures, using the process we have outlined in paragraph 98 above. (Paragraph 104)

19. We will undertake a thorough technical evaluation of this experiment, as it applies to the bills selected for piloting, and report our findings to the House as soon as is practicable following the granting of Royal Assent to the last of the Bills to be so piloted. The findings will also be available to the Government's proposed review of the experimental procedures. *We recommend that the new procedures should not be applied to any Bill in the 2016–17 Session until after we have reported on our evaluation.* (Paragraph 105)

Formal Minutes

Wednesday 14 October 2015

Members present:

Mr Charles Walker, in the Chair

Edward Argar
Bob Blackman
Jenny Chapman
Yvonne Fovargue
Patricia Gibson
Patrick Grady
Simon Hoare
Sir Edward Leigh
Ian C. Lucas
Mr Alan Mak
Mr David Nuttall

Draft Report (Government proposals for English votes for English laws Standing Orders: interim report), proposed by the Chair, brought up and read.

Ordered, That the draft Report be read a second time, paragraph by paragraph.

Paragraphs 1 to 107 read and agreed to.

Summary agreed to.

Motion made, and Question put, That the Report be the First Report of the Committee to the House.

The Committee divided:

Ayes, 9	Noes, 2
Edward Argar	Patricia Gibson
Bob Blackman	Patrick Grady
Jenny Chapman	
Yvonne Fovargue	
Simon Hoare	
Sir Edward Leigh	
Ian C. Lucas	
Mr Alan Mak	
Mr David Nuttall	

Resolved, That the Report, as amended, be the First Report of the Committee to the House.

Motion made, and Question put, That the Chair make the report to the House.

The Committee divided:

Ayes, 9	Noes, 2
Edward Argar	Patricia Gibson
Bob Blackman	Patrick Grady
Jenny Chapman	
Yvonne Fovargue	
Simon Hoare	
Sir Edward Leigh	
Ian C. Lucas	
Mr Alan Mak	
Mr David Nuttall	

Resolved, That the Chair make the Report to the House.

Ordered, That embargoed copies of the Report be made available, in accordance with the provisions of Standing Order No. 134.

[Adjourned till Wednesday 21 October at 2.30 pm

Witnesses

The following witnesses gave evidence. Transcripts can be viewed on the Committee's inquiry page at www.parliament.uk/proccom.

Tuesday 8 September 2015

	Question number
Sir William McKay KCB, Chairman, Commission on the consequences of devolution for the House of Commons (February 2012–March 2013)	Q1–45
Professor Adam Tomkins, John Millar Professor of Public Law, University of Glasgow	Q46–60

Wednesday 9 September 2015

Pete Wishart MP, SNP Shadow Leader of the House of Commons	Q70–85
Ms Angela Eagle MP, Shadow Leader of the House of Commons	Q86–99
Rt Hon Chris Grayling MP, Leader of the House of Commons, and **David Cook CB,** Office of Parliamentary Counsel	Q100–156

Published written evidence

The following written evidence was received and can be viewed on the Committee's inquiry web page at www.parliament.uk/proccom. EVL numbers are generated by the evidence processing system and so may not be complete.

1 Dr Louise Thompson (EVL0001)

2 Professor Adam Tomkins (EVL0002)

3 Professor Jim D Gallagher CBE FRSE (EVL0003)

4 Sir William McKay KCB (EVL0005)

5 Sir William McKay KCB (EVL0007)

6 The Electoral Reform Society (EVL0006)

7 The Scottish Government (EVL0004)