

Report of the Commission on the Consequences of Devolution for the House of Commons

March 2013

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Consequences of Devolution
for the House of Commons**

(The McKay Commission)

Contents

Foreword	5
Executive Summary	7
PART 1 – Identifying the issue	11
PART 2 – Possible responses to the English Question	23
PART 3 – Recognising cross-border effects	29
PART 4 – A principle on which to base a voice for England	35
PART 5 – Objectives and criteria for procedural change	43
PART 6 – A voice for England in the House of Commons	47
PART 7 – A Devolution Committee	63
ANNEX A – Commissioners’ biographies	69
ANNEX B – List of witnesses and other sources of evidence and expertise	71
ANNEX C – Detailed issues for further resolution	75
ANNEX D – Procedural change flow diagrams	77



Foreword

The appointment of the Commission was announced in January 2012 by Mr Mark Harper, then Parliamentary Secretary in the Cabinet Office.¹ The Commission was established in February 2012 and was asked to consider:

how the House of Commons might deal with legislation which affects only part of the United Kingdom, following the devolution of certain legislative powers to the Scottish Parliament, the Northern Ireland Assembly and the National Assembly for Wales.

The Commission was not expected to deal with matters of finance in the context of the devolution settlements or with the representation of the devolved areas at Westminster.

The Commission was to complete its work during the course of the parliamentary session which will end in the spring of 2013.

Brief biographies of the Commissioners are given at Annex A. We wish to record our sincere appreciation of Sir Geoffrey Bowman's contribution to our work, prior to his resignation from the Commission, which took effect on 20 June 2012.

Within the limits of our terms of reference, Commissioners have taken an open-ended approach to the task before us. We invited views from any interested contributors and were grateful to receive an exceptionally

broad range of views from a spectrum of persons and bodies. We began by asking a group of academic experts to set the scene for us at an informal meeting. We then invited a number of those who had given us written evidence, and others, to present their views orally. Those who did so included senior politicians from the House of Commons and the devolved legislatures (including two former First Ministers) and officials of these bodies. We also heard from a range of local government, trade union and other political representatives, specialist observers and commentators, and members of the public. Finally, oral evidence was given by academics with research interests in devolution and related topics.

All our written evidence, along with transcripts of the oral evidence, was posted on the Commission's website, <http://tmc.independent.gov.uk>, forming a freely available and complete account of our proceedings. Details of all witnesses are given at Annex B.

We met to take evidence or deliberate on 14 occasions, not only in London but in Belfast, Cardiff and Edinburgh, and also in Sheffield. We are grateful to all those who gave evidence to us, both oral and written, and to those who facilitated our meetings outside London. Representatives of the Commission attended major conferences on constitutional matters held over the period of our inquiry.

¹ See also the interim Written Ministerial Statement made by Mr Harper on 8 September 2012 (HC Deb (2010–12) 532 c27 WS).

We wish to thank the Commission secretariat, Savio Barros and Olaf Dudley, on secondment from the Cabinet Office, for their support and assistance throughout the inquiry, and also Simon Patrick, Clerk of Bills in the Department of the Clerk of the House of Commons, for his advice on House of Commons procedure.

Our report falls into seven parts and we have collected our recommendations in the Executive Summary which follows this Foreword.

Sir William McKay
Chair

March 2013

Executive Summary

1. The Commission was asked to consider **how the House of Commons might deal with legislation which affects only part of the United Kingdom, following the devolution of certain legislative powers to the Scottish Parliament, the Northern Ireland Assembly and the National Assembly for Wales.**
2. Commissioners sought views widely. All written evidence and transcripts of oral evidence, taken not only in London but in the capitals of the devolved jurisdictions, was posted on the Commission's website, <http://tmc.independent.gov.uk/>.
3. The powers and institutional form of the devolved institutions in Northern Ireland, Scotland and Wales vary substantially and asymmetrically. Each now has wide-ranging legislative and executive responsibilities across many fields of domestic policy. The "West Lothian Question" raises the situation that then arises when MPs from outside England could help determine laws that apply in England while MPs from England would have no reciprocal influence on laws outside England in policy fields for which the devolved institutions are now responsible.
4. Some see this as an anomaly which is unfair to people in England, requiring remedial action to give MPs in England a fuller or decisive, even unique, role in making laws for England in policy areas which are devolved outside England. Specifically it raises the possibility that a majority opinion among MPs from England on such laws could be outvoted by a UK-wide majority of all UK MPs. But it is extremely rare for this to happen. Since 1919, only in the short-lived parliaments of 1964–66 and February–October 1974 has the party or coalition forming the UK Government not also enjoyed a majority in England.
5. The governing arrangements for England in the post-devolution era are emerging by default, a residual consequence of devolution elsewhere. While the UK Parliament is set to focus increasingly on England, its procedures for making laws for England have changed little post devolution, and do not differentiate between English and UK-wide matters.
6. Survey research on public attitudes in England reveals *differences of interest* that people in England perceive as distinct from the interests of other parts of the UK. Evidence suggests a significant level of grievance among the people of England, sparked by the perception that Scotland enjoys advantages relative to England under current governing arrangements, particularly in the distribution of public spending and economic benefit. There is a clear and enduring sense that England is materially disadvantaged relative to the other parts of the UK, especially Scotland.
7. In addition, there is a consistent message that the people of England do not think it right that MPs from Scotland should be allowed to vote in the House of Commons on laws that affect England only. The current institutional arrangements for making laws for England are seen fairly uniformly across England as wanting, and they need to be modified to establish some form of

England-specific legislative process. More than 50% of respondents supported some form of England-specific procedure for making laws for England, and some 60% did not trust any UK Government “very much” or “at all” to pursue the interests of England. The West Lothian Question, then, has a strong negative resonance in the surveys. Although its salience in practice may be much reduced, respondents want a significant response to their concerns – a voice for England.

8. None of the following potential solutions is a sustainable response:

- Abolishing devolution is not on the political agenda.
- Maintaining the status quo is a long-term risk.
- Strengthening local government in England does not tackle the governance of England.
- Federalism, both England-wide with an English parliament or with English regions, has compelling objections.
- Electoral reform, including proportional representation and reduction in the number of MPs returned for seats outside England, is not realistic and fails to tackle the underlying issue.

Cross-border effects

9. Laws and policies applying to England (or England-and-Wales) can have consequential cross-border legal and policy effects in the devolved nations in a number of distinct ways. Legal cross-border spillovers are managed through legislative consent motions (LCMs), whereby a devolved legislature can assent to the UK Parliament legislating in a devolved area on its behalf. Provision for LCMs is made in the Memorandum of Understanding between the UK Government and the devolved administrations. This emphasises that **the UK Government**

will proceed in accordance with the convention that the UK Parliament will not normally legislate with regard to devolved matters except with the agreement of the devolved legislatures.

10. Cross-border effects can occur outside the framework of a Westminster bill. These are largely a consequence of England’s weight relative to the rest of the UK. There are a number of examples. Spending decisions taken for England have particular significance for the financial capacities of the devolved administrations through the so-called “**Barnett consequentials**”. These consequential effects are often indirect and time-lagged.

11. There are instances when legislation in a devolved jurisdiction can have cross-border effects elsewhere in the UK. Another cross-border effect is the consequence of EU legislation as it differentially affects England compared with the devolved parts of the UK. The interrelationship of devolved, national and European laws and policies is complex. The lack of an identifiable political voice for English interests, despite the domination of England within the UK policy process, is a consequence of the asymmetric devolution settlements.

A principle to inform a response

12. A principle common to the devolution arrangements for Northern Ireland, Scotland and Wales exists on which to base proposals for modifying the procedures of the House of Commons to mitigate the unfairness felt by people in England. The constitutional principle that should be adopted for England (and for England-and-Wales) is that:

decisions at the United Kingdom level with a separate and distinct effect for England (or for England-and-Wales) should normally be taken only with

the consent of a majority of MPs for constituencies in England (or England-and-Wales).

This principle should be **adopted by a resolution of the House of Commons** and the generalised principle endorsed.

13. Adherence to the principle would be facilitated by the declaratory resolution and changes of Standing Orders to implement specific proposals. Principles applying to decision-making in Parliament necessarily apply to decision-taking by Government. **The internal processes of the UK Government for preparing legislation should include separate consideration of the interests of England.**

14. Devolution arrangements all contain legislative provisions which preserve the sovereignty of the UK Parliament. Similarly the principle contains flexibility to cover cases where the situation is not “normal” and where the interests of the whole of the UK need to be given greater weight than the interests of one part of it. **The right of the House of Commons as a whole to make the final decision should remain.** But there should be political accountability for any departure from the norm.

15. **MPs from outside England should not be prevented from voting on matters before Parliament.** This would create different classes of MP and could provoke deadlock between the UK Government and the majority of MPs in England. The concerns of England should be met without provoking an adverse reaction outside England. MPs from all parts of the UK need to have the opportunity to participate in the adoption of legislation, whatever the limits of its territorial effect. Instead, MPs from England (or England-and-Wales) should have new or additional ways to assert their interests. But MPs from outside England would then continue to vote on all legislation but with

prior knowledge of what the view from England is.

Implementing this principle

16. Procedures to give effect to the underlying principle should meet five objectives. They should ensure that:

- sufficient information is available to permit clear identification of the English-only dimension;
- there is an opportunity, separately, for views from England to be expressed;
- such views are heard and considered;
- the outcomes of such consideration are apparent; and
- consequences should follow through political and democratic accountability for subsequent decisions.

17. Where appropriate, the procedures should apply for England-and-Wales where the test for applying them for England alone is not satisfied but would be satisfied for both.

18. If perceived concerns and political expectations in England are to be met, any new procedures should be simple, comprehensible and accessible. Proposals must be widely regarded as fair, go with the grain of parliamentary procedure and practice, give politics the chance to work, and respect the prerogatives of all MPs.

Proposals which would support the principle by providing England with a voice

19. As well as the resolutions adopting the fundamental principle, this report offers a menu of proposed adaptations to parliamentary procedures to hear the voice from England. Bills should routinely indicate their territorial scope. Much has been done already. Drafting practice might identify (as far

as possible) parts of a bill or groups of clauses primarily separate and distinct to England.

20. In particular, we conclude that:

- an **equivalent to a legislative consent motion (LCM)** in Grand Committee or on the floor before second reading would be a useful procedure;
- use of a **specially-constituted public bill committee** with an English or English-and-Welsh party balance is the minimum needed as an effective means of allowing the voice from England (or England-and-Wales) to be heard; it would retain the opportunity at report stage for amendments to be made to a bill to implement compromises between the committee's amendments and the Government's view, or even – though we would expect rarely – overriding in the House what was done in committee;
- that procedure might however be disapplied in a particular case, provided that either (a) a **motion under the LCM-analogy** procedure or (b) a debatable motion disapplying committal to a specially-constituted public bill committee had been agreed to;
- the English (or English-and-Welsh) **report committee** and the **appeal after report** to a similar report committee are practicable and no less effective than the other options, though they depart further than other suggestions from familiar bill procedures, perhaps rendering them more likely to give rise to controversy;
- a specially-constituted committee for relevant **Lords Amendments** would be straightforward in operation;
- **pre-legislative scrutiny** is also likely to be useful, but only when circumstances allow; and

- the **double-count** is a good indicator of the views of England (or England-and-Wales) MPs and the part of the UK from which an MP is elected should be shown in division lists, but its impact might be easily disregarded.

21. These practical recommendations should be regarded as a menu from which the Government might wish to make a selection for implementation. Thereafter, once the House has considered the Government's procedural recommendations and taken its decision, the favoured options would then be applied under the Standing Orders, according to the circumstances of each bill.

22. We think that some time in the debate on the Queen's Speech each session should be specifically allocated to the Government's proposals for England. **Sections on policies for England in the manifestos** put forward by the UK parties at a General Election would usefully focus on the distinctively English element of the legislative programme for the ensuing Parliament.

23. Delegated legislation in the form of **statutory instruments** presents issues similar to, but not identical with, those of bills, and should be covered by any procedural change. This would require separate parallel consideration.

A Devolution Committee

24. A Devolution Committee of the House of Commons could consider the consequences of UK decisions on cross-border effects and hold UK/English ministers to account. It would also allow scope for an evaluation of LCMs and how they work in practice. The awareness of the implications of devolution in Parliament would be enhanced. The appointment by the House of Commons of a select committee with a broad remit is recommended.

PART 1 – Identifying the issue

25. This inquiry has a clear and specific focus: to examine how the House of Commons “can deal most effectively with business that affects England wholly or primarily, when at the same time similar matters” are the responsibility of the devolved institutions in Northern Ireland, Scotland and Wales.² (See the Commission’s terms of reference at the beginning of the Foreword.)

26. Following approval in referendums in September 1997 (in Scotland and Wales) and in April 1998 (in Northern Ireland), Acts of Parliament establishing the Scottish Parliament, the National Assembly for Wales and the Northern Ireland Assembly were passed in 1998, with all three institutions in full operation following inaugural elections by the end of 1999 (though the operation of the Northern Ireland Assembly was suspended on a number of occasions in the period 2000–07).

27. Acts of Parliament amending the initial devolution Acts have subsequently been passed for Northern Ireland, Scotland and Wales, and debates on the further development of devolution continue. While the particular set of powers and institutional form of the devolved institutions in Northern Ireland, Scotland and Wales vary substantially, each now has wide-ranging legislative and executive responsibilities across many fields of domestic policy.

28. While the UK Parliament retains the authority, in principle, to make laws on any issue, whether devolved or not, there is a common understanding (in UK constitutional terms a convention) recognised in a Memorandum of Understanding between the UK and the devolved governments that “the UK Parliament would not normally legislate with regard to devolved matters except with the agreement of the devolved legislature”.³

29. No equivalent devolution arrangements to those in Northern Ireland, Scotland and Wales have been established in England, either for England as a whole or for any of its component parts, though in Greater London and in other cities reforms have established new institutions of city government.

30. The question before the Commission is whether, and if so how, to adapt or augment procedures of the House of Commons for making laws that have effect mainly or wholly in England, now that there are distinct legislative procedures for devolved matters, based on distinct representative processes, in Northern Ireland, Scotland and Wales. We understand this question to cover the procedures of the House of Commons for both primary and secondary legislation.

² Interim Written Ministerial Statement made by Mr Harper on 8 September 2012 (HC Deb (2010–12) 532 c27 WS).

³ Memorandum of Understanding and Supplementary Agreements between the United Kingdom Government, the Scottish Ministers, the Welsh Ministers and the Northern Ireland Executive Committee (September 2012) p. 8.

The West Lothian Question

31. One aspect of this question that is often discussed is the “West Lothian Question”. This is named after the interventions of the then MP for West Lothian in central Scotland, Tam Dalyell, in the devolution debates of the late 1970s, though the same issue was raised in the Irish Home Rule debates of the late 19th and early 20th centuries. Mr Dalyell pointed, as did earlier opponents of Irish Home Rule, to the situation that could arise following devolution whereby MPs from outside England could help determine laws that apply in England, while MPs from England would have no reciprocal influence on laws outside England in policy fields for which the devolved institutions would now be responsible. For some observers this is an anomaly that is unfair to the voters of England and requires remedial action to give MPs from England a fuller, or even decisive, role in making laws for England in policy fields that are devolved outside England (this is often described as “English votes for English laws”).

32. The West Lothian Question is a consequence of the introduction of “asymmetrical” devolution arrangements that extend to Northern Ireland, Scotland and Wales, but not to England. The issues it raises are a constant presence in post-devolution UK politics as MPs from Northern Ireland, Scotland and Wales routinely vote on legislation that wholly or mainly affects England alone. But the political resonance of the West Lothian Question is at its greatest when it is possible for the majority opinion among MPs from England on a piece of England-specific legislation to be overruled by a majority of all UK MPs, including those from Northern Ireland, Scotland and Wales.

33. It is clear from evidence put to the Commission that instances when a majority of MPs from England is in fact overruled by the UK-wide majority are extremely rare.

Since the First World War, the party or coalition forming the UK Government has almost always had a majority in England, as well as in the UK as a whole. Only in the short-lived parliaments of 1964–66 and February–October 1974 was the party with a majority of MPs from England (the Conservatives) in opposition.⁴

34. Another situation in which the majority of MPs from England can be overruled is when a government with a majority of MPs both from England and across the UK as a whole suffers a parliamentary rebellion among its MPs from England. In such circumstances it may be that only a minority of MPs from England votes for a particular measure, but the government nonetheless maintains its overall majority by ensuring sufficient support from its MPs from outside England. Again, such instances are extremely rare. It is difficult to find examples beyond the frequently cited votes on the introduction of foundation hospitals in England (in 2003) and the introduction of university top-up fees in England (in 2004), when a substantial number of Labour MPs from England rebelled against the party whip, but Labour MPs from Scotland and Wales ensured that the Labour Government’s proposals maintained majority support in Parliament.⁵

35. A further scenario in which the majority in England could be overruled is where a party with a clear majority in England does not have a majority in the UK but forms a minority government. In that situation, the opposition could frustrate the UK Government’s legislative intentions for England by mobilising

⁴ In 1950–51 no party had an overall majority of MPs in England; Labour’s small UK-wide majority rested on its strength in Wales.

⁵ For an account of these and other controversies under the then Labour Government, see M Russell and G Lodge, “The Government of England by Westminster”, in R Hazell (ed.) (2006) *The English Question*, Manchester University Press, pp. 70–75.

the votes of members from Northern Ireland, Scotland and Wales. No government has so far been formed on this basis.

36. These scenarios in which a majority in England could be overruled are, in other words, rare or hypothetical. Should proposals to reduce the number, and equalise the size, of House of Commons constituencies come to fruition, the effect would be to decrease the number of constituencies outside England relative to those in England. This would diminish the likelihood of a majority in England being overruled by a UK-wide majority yet further. Any decision on these proposals is now not expected until after the next UK election in 2015.

37. Against this background, we do not see the West Lothian Question, if understood narrowly as the (actual or potential) overruling of the majority of MPs from England by the combination of a minority from England plus MPs from outside England, as the central question facing the Commission. Rather, we have considered the West Lothian Question in its broader sense – that of non-English MPs voting on English laws, whatever the majority relationships in the House of Commons. We see that as one illustration of a wider set of concerns about the balance and stability of the UK's territorial constitution which might be described compositely as an "English Question".

The English Question

38. The UK's territorial constitution comprises those sets of governing arrangements which give voice to the distinctive concerns of the UK and its different parts while maintaining an overall balance between them and maintaining the stability of the UK state as a whole.

39. Our analysis is that the governing arrangements for England in the post-devolution era are emerging more or less by default, as a residual category created by

the decision to establish distinct governing arrangements in Northern Ireland, Scotland and Wales. The result has been increasingly to limit the territorial coverage of significant amounts of UK Parliament legislation to England alone (or to England-and-Wales).

40. This increasing focus of the UK Parliament on England is set to continue. The new variant of legislative devolution endorsed in the March 2011 referendum in Wales has established full legislative powers for the National Assembly for Wales in 20 policy fields and will likely lead to a clearer demarcation between Welsh and English legislation. The debates on yet further devolution that are unfolding in Wales (as the Silk Commission deliberates) and in Scotland in the run-up to the 2014 independence referendum may also have the effect of further marking out England as a distinct legislative space.

41. Yet this process of demarcation of legislation for England is occurring within a Parliament that has not in any systematic way adapted its approach to making law for England (or, indeed, for England-and-Wales) from that which applied before devolution. The House of Commons does not differentiate its mode of operation for English as compared with UK-wide matters. It lacks a capacity to focus directly on England just at the point when more of its work deals with English matters. In the absence of change in the way the House of Commons works, the consequence – clearly unintended, but nonetheless important – may be to impede the voicing of any distinctively English concerns, or perceived concerns, that exist on wholly or mainly English matters. One of our most important considerations, therefore, was to discover what evidence there is that distinct, English concerns exist which lack procedures for their expression.

42. For this reason, we have given careful consideration to the findings of survey research on public attitudes in England that was presented to us by the National Centre for Social Research using data from the British Social Attitudes (BSA) Survey over the past decade and more,⁶ and by the team from the Institute for Public Policy Research (IPPR), Cardiff University and the University of Edinburgh that conducted the Future of England Survey (FoES) in 2011⁷ and 2012.⁸

43. We are aware of the different survey methods used by the BSA and the FoES and note that in some fields – notably national identity – similar, or even the same, survey questions can produce different findings. The FoES, for example, detected a strengthening of English, as distinct from British, national identity in 2011 (though this was less in evidence in the 2012 survey, perhaps as a consequence of the Diamond Jubilee and/or the Olympic Games) and an association of stronger Englishness with preferences for England-specific political institutions.⁹ However, the longer time series of the BSA, extending back to the late 1990s, suggests a broad stability (and balance) of English and British identities among the English since 1999, and finds a weaker relationship between stronger English identity and preferences for England-specific institutions.¹⁰

44. The most comprehensive survey of national identities in England ever undertaken was in the 2011 census, which asked about

national identities in each part of the UK for the first time. Of the 50.3 million respondents in England, some 60.4% claimed an “English-only” identity, while only 19.2% claimed a “British-only” identity.¹¹ There is no time series to enable us to tell whether these figures have changed over time. It is striking that they reveal a significantly higher proportion of English respondents claiming an exclusively English identity (and a significantly smaller proportion claiming an exclusively British identity) than in any other surveys of which we are aware.

45. We are mindful, though, of the very extensive academic literature that contests both the definition and the political significance of “national identity”, and are wary of exploring options for considering English matters differently in the House of Commons simply by reference to data on national identity. Our focus lies more in indicators in survey findings of *differences of interest* that those in England perceive as distinct from, or relative to, the interests of other parts of the UK. There is evidence across the BSA and FoES surveys that suggests a significant level of grievance among the those in England sparked in particular by the advantages that Scotland is perceived to enjoy, relative to England, under current governing arrangements.

46. Asked, for example, whether Scotland receives its fair share of public spending, more than its fair share, or less than its fair share, those respondents from England who expressed a view felt strongly that Scotland gets more than it should, and there

⁶ R Ormston (28 February 2012) *The English Question: How is England responding to devolution?*, NatCen Social Research.

⁷ R Wyn Jones, G Lodge, A Henderson and D Wincott (2012) *The dog that finally barked: England as an emerging political community*, IPPR.

⁸ We are grateful to the team from IPPR, the University of Edinburgh and Cardiff University for advance sight of the 2012 dataset (hereafter cited as FoES 2012).

⁹ Wyn Jones *et al.*, *op. cit.*, pp. 18–20, 26–30.

¹⁰ Ormston, *op. cit.*, pp. 12–15.

¹¹ See the *2011 Census: Key Statistics for England and Wales, March 2011* (December 2012) Office for National Statistics, pp. 12–13 and the link to Table KS202EW. The question allowed multiple identity choices to be made. The question also allowed a negative definition of identity. Fully 70.7% claimed to have “no British identity” and just 29.9% “no English identity”.

Table 1: English attitudes towards Scotland's share of public spending 2000–12

	BSA									FoES	
	2000	2001	2002	2003	2007	2008	2009	2010	2011	2011	2012
	%	%	%	%	%	%	%	%	%	%	%
More than fair	21	24	24	22	32	41	40	38	44	45	52
Pretty much fair	42	44	44	45	38	33	30	29	30	21	18
Less than fair	11	9	9	9	6	3	4	4	3	4	4
Don't know	25	23	22	25	22	23	25	28	23	31	35
n	1,928	2,761	2,897	1,917	859	982	980	913	967	1,507	3,600

Sources: Ormston, *op. cit.*, p. 6; Wyn Jones *et al.*, *op. cit.*, p. 10; FoES 2012

Note: n = sample size

Table 2: English attitudes towards shares of public spending in Northern Ireland, Wales and England

	2011			2012
	Northern Ireland	Wales	England	England
	%	%	%	%
More than fair	28	26	7	8
Pretty much fair	25	28	26	27
Less than fair	5	7	40	40
Don't know	42	38	27	24
n	1,509	1,509	1,509	3,600

Sources: Wyn Jones *et al.*, *op. cit.*; FoES 2012

Note: n = sample size

is evidence that that view has strengthened significantly over time (Table 1). Strikingly, in the 2012 FoES over half of the survey respondents in England felt that Scotland received more than its fair share of public spending.

47. The 2011 FoES found that Northern Ireland and Wales were also felt by respondents in England to get more than their fair shares, though less so than Scotland, and that England was significantly disadvantaged. In both 2011 and 2012, the FoES found that 40% of respondents felt that England received less than its fair share and fewer than 10% felt that it received more than its fair share (Table 2). There is a

clear perception in opinion in England that Scotland is strongly advantaged and England strongly disadvantaged in the distribution of public spending.

48. Similarly, when asked in the FoES “whether England’s economy benefits from having Scotland in the UK, whether Scotland benefits more from being part of the UK, or whether the benefits are about equal”, some 52% felt in 2011 (49% in 2012) that Scotland’s economy benefits more and just 7% the English economy (8% in 2012), while 23% identified equal benefit in 2011 (and 19% in 2012).¹²

¹² Wyn Jones *et al.*, *op. cit.*; FoES 2012.

Table 3: The Scottish Parliament should pay for its services out of taxes collected in Scotland

	BSA				FoES	
	2001	2003	2007	2009	2011	2012
	%	%	%	%	%	%
Strongly agree	20	22	28	36	44	49
Agree	53	52	47	46	36	29
TOTAL AGREE	73	74	75	82	80	78
Neither/nor	12	12	14	10	–*	11
Disagree	11	10	5	6	8	11
Strongly disagree	1	–	1	–	1	1
TOTAL DISAGREE	12	10	6	6	9	12
n	2,761	1,917	859	980	1,507	2,300

* The 2011 FoES did not provide a middle “neither/nor” option

Sources: Ormston, *op. cit.*, p. 8; Wyn Jones *et al.*, *op. cit.*; FoES 2012

Note: n = sample size

Table 4: Scottish MPs should not vote on English laws

	BSA					FoES	
	2000	2001	2003	2007	2009	2011	2012
	%	%	%	%	%	%	%
Strongly agree	18	19	22	25	31	53	55
Agree	45	38	38	36	35	26	26
TOTAL AGREE	63	57	60	61	66	79	81
Neither/nor	19	18	18	17	17	–*	8
Disagree	8	12	10	9	6	8	4
Strongly disagree	1	2	1	1	1	2	2
TOTAL DISAGREE	9	14	11	10	7	10	6
n	1,695	2,341	1,530	739	773	1,507	2,300

* The 2011 FoES did not provide a middle “neither/nor” option

Sources: Ormston, *op. cit.*, p. 9; Wyn Jones *et al.*, *op. cit.*; FoES 2012

Note: n = sample size

49. Alongside a clear perception of unfairness to England, especially in relation to Scotland, in the distribution of public spending and economic benefit there is a very strong view that the Scottish Parliament should be responsible through its own taxes for raising the money it spends (rather, though this is implicit in the survey question, than through general UK taxation revenues allocated to the Scottish Parliament by

HM Treasury) (Table 3). It is striking that, consistently, across surveys and over time, 75–80% of respondents agree or strongly agree that the Scottish Parliament should levy its own taxes. There is a powerful sense that Scotland should be more self-reliant, and less reliant on the UK taxpayer (and, it may be inferred, on the taxpayer in England in particular).

Table 5: Which of the following require urgent action or change at this time?

	%
The UK's relationship with the European Union	59
How England is governed now Scotland has a Parliament and Wales has an Assembly	42
A more proportional system for electing MPs at Westminster	29
Strengthening local government	27
Reforming the House of Lords	26
Scotland's future relationship with the UK	25
The future of Northern Ireland	5
None of these	4
Don't know	11
n	3,600

Source: FoES 2012. Respondents were asked to select up to three options.

Note: n = sample size

50. The preference for a clearer demarcation of England from Scotland extends beyond fiscal policy into representation in the legislative process. The broad issue of principle raised in the West Lothian Question – that it is anomalous if non-English MPs vote on England-specific legislation, whatever the majority relationships in the House of Commons – has a very strong resonance in English public opinion. There are clear, consistent and strong majorities over time and across different surveys suggesting that people in England do not think it right that Scottish MPs should be allowed to vote in the House of Commons on laws that affect England only. The BSA time series shows a marked growth in those strongly agreeing that Scottish MPs should not vote on English laws, and the FoES findings indicate an even higher level of strong agreement (Table 4).

51. These figures suggest that the West Lothian Question has a strong negative resonance. Respondents from England are strongly of the view that it is wrong, in the context of devolution, that MPs from Scotland should still be playing a role in shaping laws that affect England only.

52. Some witnesses¹³ were sceptical, however, that the issues raised by the West Lothian Question and other concerns about the balance of interests between England and the devolved nations were especially salient for people in England. That is, while these concerns may in principle be felt to prompt a sense of grievance, there was doubt that people in England felt that it was much of a priority, in practice, to address them. The 2012 FoES survey offered a new perspective on the question of salience by asking respondents to identify those constitutional issues that in their view needed “urgent action” (Table 5). It will surprise few that the UK's relationship with the EU was the most popular choice, at 59%. However, 42% felt that “urgent action” was also needed on “how England is governed now Scotland has a Parliament and Wales an Assembly”. This was a strong second preference for action and suggests that the complex of fiscal, economic and representational issues that produce a broad English Question does indeed have salience.

¹³ Bogdanor, Submission 3; Lord Robertson, Submission 27; Curtice and Ormston, Submission 28; Blunkett, Submission 47.

Table 6: With all the changes going on in the way different parts of the United Kingdom are run, which of the following do you think would be best for England?

	2011	2012
	%	%
For England to be governed as it is now, with laws made by all MPs in the UK Parliament	24	21
For England to be governed with laws made by English MPs in the UK Parliament	34	36
For each region in England to have its own elected assembly	9	8
For England as a whole to have its own new English parliament with law-making powers	20	20
Don't know	14	16
n	1,507	2,300

Source: Wyn Jones *et al.*, *op. cit.*; FoES 2012

Note: n = sample size

53. People in England appear less able to envision more concretely the set of governing arrangements that would better suit them than those they have currently. The BSA has a stock question asking whether respondents want England to be “governed as it is now, with laws made by the UK Parliament”, or through the alternative options of elected regional assemblies or an English parliament. The “as now” option has been fairly stable – at 50–55% since 2000 – with support for regional assemblies, which peaked at 26% in 2003 and stood at just 12% in 2011, ebbing in favour of an English parliament (17% in 2003 and 25% in 2011).¹⁴

54. But the BSA question does not offer insight into attitudes towards the possibility of introducing procedures within the UK Parliament for dealing with England-specific laws. The FoES, however, provides a different menu of options, including that of “England to be governed with laws made by English MPs in the UK Parliament”, alongside the more conventional options of the status

quo, an English parliament and regional assemblies (Table 6). The lead preference in both 2011 and 2012 was for “England to be governed with laws made by English MPs in the UK Parliament”, with a little over one-third of respondents in favour. Next, and only just edging out the option of an English parliament, was the status quo option of England governed “with laws made by all MPs in the UK Parliament”.

55. A further question in the 2012 FoES offers an alternative wording: “Thinking about possible arrangements for making laws for England, two options are often mentioned. If you had to choose, which one would you prefer?” In fact, three options were offered; top was for England to be governed with laws made solely by English MPs in the UK Parliament, at 30%, just ahead of an English parliament, at 29%, and keeping “things as they are at present” at 25%.¹⁵

56. These are extremely significant findings. In neither variant of the FoES questions does more than a quarter of the respondents favour the status quo. And, if support for law-making by English MPs in the UK Parliament

¹⁴ R Ormston (28 February 2012) *The English Question: How is England responding to devolution?*, NatCen Social Research, p. 10.

¹⁵ FoES 2012.

Table 7: How much do you trust the UK Government to work in the best long-term interests of England?

	2011	2012
	%	%
A great deal	4	3
A fair amount	31	27
Not very much	42	44
Not at all	17	18
Don't know	6	8
n	1,507	3,600

Source: Wyn Jones *et al.*, *op. cit.*; FoES 2012

Note: n = sample size

Table 8: Which party best stands up for the interests of England?

	2011	2012
	%	%
The Labour Party	21	19
The Conservative Party	20	16
The Liberal Democrats	4	3
ESTABLISHED PARTIES TOTAL	45	38
Not applicable, I do not think that any party stands up for the interests of England	23	22
The UK Independence Party	9	18
The British National Party	4	3
The English Democrats	2	2
The Greens	2	2
Another party	0	0
NON-ESTABLISHMENT TOTAL	38	47
Don't know	15	15
n	1,507	3,600

Source: Wyn Jones *et al.*, *op. cit.*; FoES 2012

Note: n = sample size

and support for an English parliament are added together, support for some form of England-specific procedure for making laws for England has the support of over half of the survey respondents.

57. This lack of support for the status quo, combined with an openness to England-specific institutional change, can usefully be

read together with two other findings in the FoES. Table 7 reveals a remarkably low level of trust in the UK Government at Westminster to “work in the best long-term interests of England”. Around six in ten respondents do not, it seems, trust the UK Government “very much” or “at all” to pursue the interests of England.

Table 9: Regional uniformity within England

	England	North East	North West	Yorks and the Humber	East Mids	West Mids	East	London	South East	South West
	% Agree	% Agree	% Agree	% Agree	% Agree	% Agree	% Agree	% Agree	% Agree	% Agree
Scottish MPs no longer to vote on English laws	81	82	78	80	84	81	82	76	83	81
Scottish Parliament to pay for services from own taxes	78	76	76	74	87	78	79	75	80	77
Scotland gets more than fair share of spending	52	55	49	44	54	53	56	51	54	53
Don't trust UK Government to work in English interest	62	62	65	63	61	67	59	56	59	58
n	3,600	170	481	373	338	350	400	532	588	367

Source: FoES 2012

Note: n = sample size

58. This finding may, of course, reflect to some extent the mid-term unpopularity of the incumbent government at a time of economic difficulty and/or amid a sense of disillusionment with politics. But the figures in Table 8 suggest that, beyond just short-term dissatisfaction with the government of the day, people in England think their interests are not currently being met. Asked which political party best stands up for the interests of England, the top preference in both 2011 and 2012 was that *no party* stands up for those interests. Strikingly, only 45% in 2011 and 38% in 2012 felt that any of the established parties – Labour, the Conservatives and the Liberal Democrats – stand up for the interests of England. Even more strikingly, the UK Independence Party (UKIP) overtook the Conservatives and was

pressing Labour as the leading defender of the interests of England in 2012. And, taking “none of the above”, UKIP, and the other non-establishment parties of right and left together, the “non-establishment” total clearly exceeded that of the established parties in 2012.

59. These survey findings suggest a potent combination of dissatisfactions in England. There is a clear and enduring sense that England is materially disadvantaged relative to the other parts of the UK, especially Scotland. There is a clear sense in recent surveys (and more enduringly around the West Lothian Question of Scottish MPs voting on English legislation) that the current institutional arrangements for making laws for England are wanting and need to be modified

to establish some form of England-specific legislative process. And there is a growing sense that people in England feel that they lack effective advocates for their interests in government or (conventional) opposition.

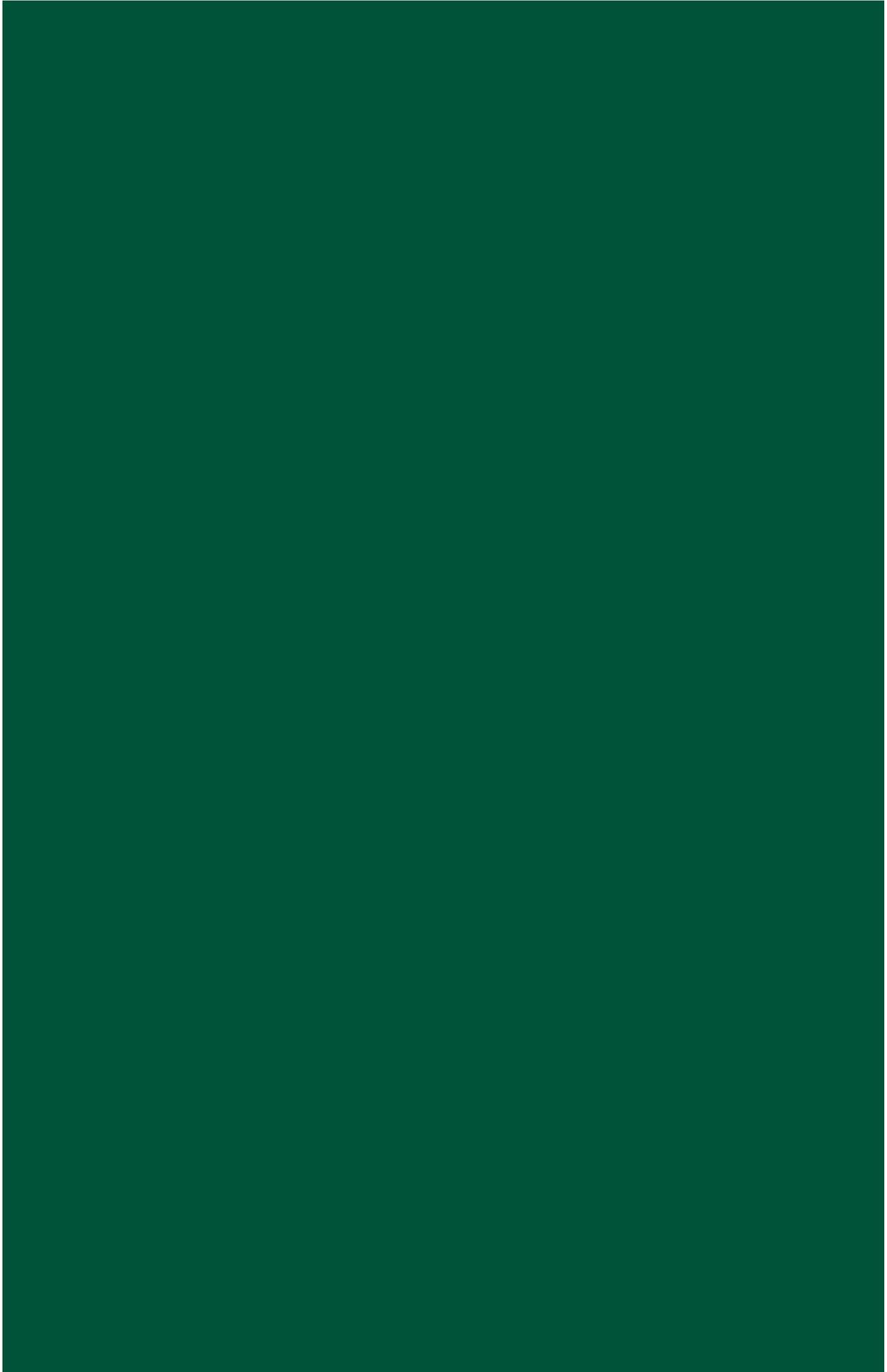
60. These dissatisfactions exist in a fairly uniform way across England. Table 9 sets out region-by-region findings on some of the indicators explored above which suggest that people in England feel that they are being unfairly treated. These findings are not skewed by unusually high responses in particular parts of England, but are strikingly similar in all parts of England. Variations around the mean are limited, and – with the exception of a sample of Londoners generally a little less dissatisfied than the average – are patternless. These are genuinely England-wide – not just northern, not just peripheral, but general – dissatisfactions.

61. Survey findings are of course a snapshot, and can be read in different ways. On balance, though, the findings set out above provide compelling evidence that there are distinct concerns, felt across England, that lack sufficient opportunity to be expressed through current institutional arrangements. We have heard evidence from a range of sources¹⁶ that reinforces this conclusion and suggests a need for a significant response to enable those distinct concerns to be – and to be seen to be – addressed, and for them to be addressed in a way that takes into account the measures taken since 1997 to give voice to the distinct concerns of Northern Ireland, Scotland and Wales. As Professor Arthur Aughey put it, the English feel that “if we are going to construct a

union that is open and fair and genuinely democratic, then our voice must be heard”.¹⁷

¹⁶ Sands, Submission 4, p. 1, para 2; Rifkind, Submission 19, p. 2, para 2; Lodge, Submission 20, p. 2, para 1; Conservative Party, Submission 21, p. 1, para 4, lines 3–4; Purvis, Submission 35, p. 1, para 4; Ayres, Submission 42, p. 5, para 3.7 and Day 5; Blunkett, Submission 47, p. 2, para 3, lines 1–3.

¹⁷ Aughey, Day 4, p. 165.



PART 2 – Possible responses to the English Question

62. We have heard a wide range of views on possible reforms that might be introduced to give a voice to England. Though many of these views take us outside our terms of reference, which are restricted to considering options for change within the House of Commons, it is nonetheless useful to present and evaluate them as a means of better understanding the challenges in responding to the English Question.

63. A number of suggestions made to us can be discounted quickly. **The abolition of devolution** outside England¹⁸ does not, for example, appear a proportionate, feasible or desirable means to remove some of the causes of dissatisfaction felt in England.

64. Nor are we persuaded that **maintaining the status quo** is a desirable option. Supporters of this position, among them Professor Vernon Bogdanor, argue that England has a de facto predominance in the UK anyway, has as a result “no need to bang the drum or blow the bugle”,¹⁹ and if given the opportunity to do so, could by virtue of that predominance destabilise the UK as a whole.

65. However, the discussion of public opinion in England set out above suggests that people in England do not *perceive* themselves as predominant, but rather as disadvantaged and lacking a voice under current arrangements. Some regard this perception, if not addressed by early reform, as likely to erode the legitimacy of the UK’s

political system in England. For example, Professor Jim Gallagher argues that: “It is arguably better to accommodate measured change now than to be forced into something damaging, in an unmanaged way, at a later date.”²⁰ Professor Michael Kenny puts it even more strongly: “If this slowly burgeoning sense of English nationhood remains unvoiced in mainstream politics then there is a greater chance that such sentiments will mutate into a harder-edged nationalism that frames the political system and the post-devolution constitution as alien impositions.”²¹

66. We agree that there is sufficient evidence to merit reform at this stage and that deferring such reform is likely to heighten dissatisfactions in England yet further. We are, though, concerned not to draw the implication from the survey data above and conclusions such as those of Professor Gallagher and Professor Kenny that England is a potentially “damaging” force that needs somehow to be contained. We prefer a more positive variant of their conclusion: **it is now the right time to enable a fuller, clearer and positive expression of a voice for England in the UK’s political system.**

67. Even so, Professor Bogdanor’s view that reforms focused on England might have a destabilising effect on the UK as a whole is an important consideration. There are powerful arguments that the continuing

¹⁸ Connell, Submission 60.

¹⁹ Bogdanor, Submission 3.

²⁰ Gallagher, Submission 23, p. 14.

²¹ M Kenny (2012) “The many faces of Englishness: Identity, diversity and nationhood in England”, *Juncture* 19 (3), p. 157.

pressures on the territorial constitution in all parts of the UK result from a piecemeal approach to reform which has failed to think through fully the consequences of reform in one part of the UK for other parts.²² Any reforms undertaken to respond to English concerns must therefore be mindful of possible impacts outside England and seek to mitigate such impacts. We were therefore careful to seek and take evidence from all parts of the UK about possible changes for England. Equally, any reforms need to be robust enough in themselves to accommodate any further changes outside England – fuller devolution in Scotland or Wales, or even Scottish independence. Any response to the English Question must, in these different ways, be consciously bedded in a UK-wide context.

68. We have heard powerful arguments from across the political spectrum²³ that a **strengthening of local government** in England may be a way of addressing and giving voice to English concerns. We recognise the force of these arguments. We do not, though, believe a strengthening of governance *within* England to be a sufficient response to an English Question which is about the governance *of* England *as a whole*. There is clear evidence that the people of England as a whole feel themselves to be disadvantaged under current arrangements (see Table 9). Giving fuller expression to local interests through stronger local government will not address that England-wide sense of disadvantage.

69. A number of our witnesses and others submitting written evidence viewed **federalism** as a solution to the English Question. Federalism would involve the devolved jurisdictions existing as units of a UK federation alongside a federal unit (or units) in England. Often the precise nature of the federal system envisaged was elusive.²⁴ There appear, though, to be two principal variants of federalism under discussion. The first envisages English regions as the federal units, the second England as a whole, represented by an English parliament with powers equivalent to those of the devolved legislatures.

70. We see little merit in considering a federal system based in England on **English regions** and heard little evidence in support. We are conscious of the swingeing rejection of such an approach in the North East of England in 2004 when four-fifths of the regional electorate voted against establishing an elected regional assembly. We are conscious too of the obvious and continuing lack of public appetite for regionalisation in England (see Table 6). More broadly, we note again the England-wide sense of disadvantage evident in public opinion (Table 9); it is not clear that establishing a set of regional assemblies would address this England-wide sense of disadvantage.

71. The establishment of an **English parliament** as an English component of a UK federation has a small number of vociferous advocates²⁵ and, as noted above, has significant resonance in English public opinion. The great majority of evidence submitted to us on this issue was, however, set firmly against the idea of an English

²² C Jeffery (2012) “Dis-United Kingdom”, *Juncture* 19 (1), pp. 14–16.

²³ Bogdanor, Submission 3, p. 11, para 2; Blunkett, Submission 47, p. 2, para 6; Local Government Association, Submission 54; Battle, Forbes and Dore, Submission 58; Cockell, Day 7.

²⁴ Liberal Democrats, Submission 6; Melding, Submission 41.

²⁵ English Democrats, Submission 8; Plaid Cymru, Submission 9; Campaign for an English Parliament, Submission 15.

parliament. The reasons were various and, in our view, compelling:

- There are no precedents of federal systems in which one component makes up over five-sixths of the overall population of a state. There is a wide view²⁶ that such a big unit would destabilise the state as a whole, both in relation to the three much smaller units in Northern Ireland, Scotland and Wales, but also in relation to the federal UK parliament and government, to which an English parliament would be likely to be a powerful rival.
- Any federal system requires a delineation of competences, which are usually arbitrated by a supreme court that would be able to overrule the UK parliament, as well as binding the devolved institutions. This would be a radical departure from UK constitutional practice. In this and in other respects, the “massive upheaval in governmental arrangements that would be needed to create a new Parliament for 50 million people”²⁷ would not appear a proportionate response to the current sense of disadvantage in England.
- It seems unlikely in the current climate that citizens would favour having more politicians than now, or the costs associated with establishing a new institution.²⁸

72. A final set of possible responses to the English Question focus on **changes within the House of Commons**. One approach would be to introduce **proportional representation** for Westminster elections; this would reduce the likelihood of particular

parties (the Conservatives in England, Labour in Scotland and Wales) winning the dominant positions in particular parts of the UK which makes it more likely that the majority of English MPs can be outvoted by the UK-wide majority.²⁹ However, the recent referendum on electoral reform suggests that there is – by a decisive margin – insufficient appetite for reform in this direction.

73. Another approach would be to **reduce the number of MPs outside England** so as to reduce the likelihood of the majority of MPs in England being outvoted. We note that proposals to equalise constituency electorate size across the UK, if implemented, would have the effect of reducing the number of MPs outside England. We note too that while this would reduce, it would not numerically preclude the possibility of the majority of MPs from England being outvoted by the UK-wide majority.³⁰ Nor would it have effect in the case of rebellions against the party whip in which a UK government failed to whip through a majority of its MPs from England but nonetheless secured a majority by mobilising its MPs outside England.

74. A “devolution discount” has also been put forward as a way of reducing the risk of a majority of MPs from England being outvoted by a UK majority. This discount would reduce the number of MPs in the devolved areas relative to England. We agree with critics of such a change that this would be – and would be seen to be – unfair and inimical to the link between representation and taxation falling on all UK citizens that is imposed at the UK level.³¹

²⁶ Bogdanor, Submission 3; Melding, Submission 41; Jenkin, Submission 49; R Hazell (ed.) (2006) *The English Question*.

²⁷ Bogdanor, Submission 3, p. 2.

²⁸ Baldwin, Submission 16.

²⁹ R Hazell, “Conclusion: What are the Answers to the English Question?”, in R Hazell (ed.) (2006) *The English Question*, p. 227.

³⁰ Pattie, Submission 64 and Day 8.

³¹ Gallagher, Submission 23, p. 17; Wincott and Lewis, Submission 40, p. 5.

75. Other parliamentary approaches address the English Question through **special procedures in the House of Commons for English laws**, often known in shorthand as “English votes for English laws”. A number of variants of such procedures have been proposed in the past, and were suggested in evidence to us. They each rely on an assumption that it would be possible for the House of Commons to identify which bills apply wholly or primarily to England and on the creation of a special mechanism for engaging MPs from England in the deliberation of those bills. There are three main variants, any of which could be applied to the principle or the detail of a bill (or to both the principle and the detail):

- The requirement for laws applying to England to be passed only if a majority of MPs from England is in favour.
- The requirement of a double-majority, or “double-lock”, in which legislation could only be passed if there is both a majority of MPs from England and a majority of the House of Commons as a whole in favour.
- A similar process of ascertaining the majority opinion of MPs from England separately from the balance of opinion in the House as a whole, but in which the majority in the House as a whole can overrule the majority from England.

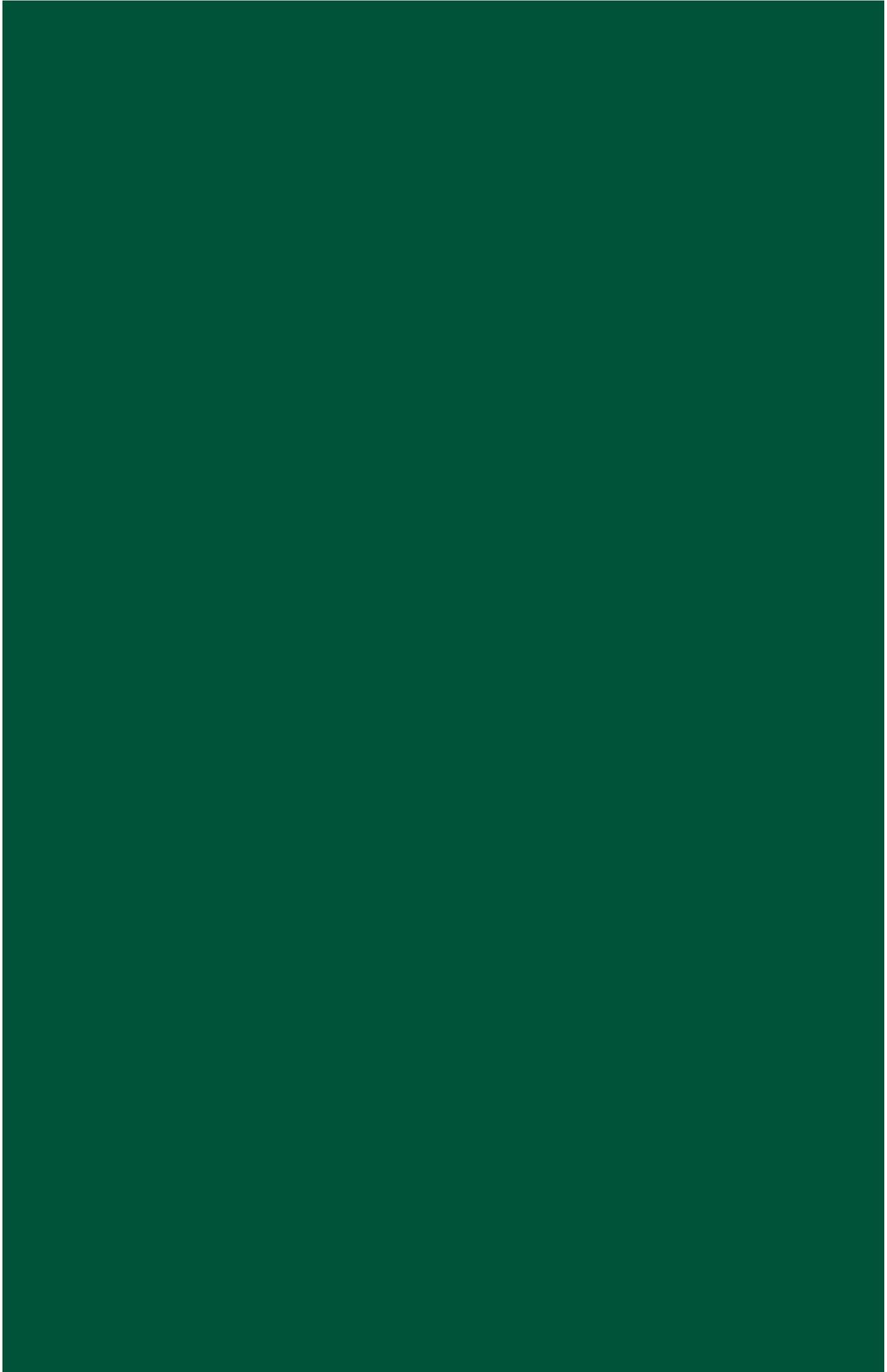
76. In Part 4 we set out a principle on which the introduction of special procedures for English laws in the House of Commons could be based. In Part 6 we set out proposals for a number of procedural changes which, in our view, will provide an effective and proportionate response to the English Question and encourage and facilitate adherence to that principle. The need for special consideration of bills that have an effect wholly or mainly in England would

focus parliamentary and public debate on English matters as distinguished from those in Parliament with a wider territorial reach. With special procedures for such matters the House of Commons would act as a forum for giving voice to England-specific concerns and for opening up to public scrutiny the decision-making on those concerns. Such procedures could establish a distinct and more explicit sense of accountability on English matters between voters in England and their representatives, enabling a fuller, clearer and more positive expression of the English voice in the UK’s political system.

77. In our view the introduction of such procedures could help to defuse the dissatisfactions evident in public opinion in England by enabling concerns specific to England to be represented in an explicit way in the House of Commons. As this would be an adaptation of an existing institution it would not involve the upheaval, cost and likely destabilising effects of establishing a new institution.

78. The devil, of course, is in the detail. We are conscious of the many concerns expressed about “English votes for English laws”. Like many observers, we do not favour variants which would exclude non-English MPs from voting on matters before Parliament. Such variants would create different classes of MP and could create deadlock between the UK Government and the majority of MPs from England. Such an interpretation of English votes for English laws would come close to the establishment of an English parliament nested within the UK Parliament, with many of the disadvantages noted above. So we favour procedures which retain the right of all MPs to express a view on all matters before the House of Commons.

79. England contains around 85% of the UK population. We are aware that any arrangements that apply to 85% of the inhabitants of a state are likely to have cross-border spillover effects on the other 15%. It is vital that any changes to procedure in the House of Commons that apply to England only must be accompanied by mechanisms that seek to identify and mitigate such effects and any instabilities that they might introduce. We explore a number of these cross-border effects in Part 3.



PART 3 – Recognising cross-border effects

80. During the course of our evidence-gathering, it became clear that laws and policies applying to England (or England-and-Wales) had consequential effects in the devolved nations. These cross-border legal and policy effects occur in a number of distinct ways³² and are largely the operational consequences of decisions taken for England, given England's weight relative to the rest of the UK. Each cross-border effect example sheds light on the rationale for including provisions encompassing the devolved parts of the UK in Westminster bills, and for policy responses from devolved governments. We separate these examples out for analytical clarity, but in practice the distinctions are not clear-cut.

81. Legal cross-border spillovers can be found in a Westminster bill under three circumstances:

- because a UK government wants to legislate in this manner for the devolved part of the UK and the devolved legislature to which the spillover effects apply is content for Westminster to legislate on its behalf (such as cross-border enforcement of legal and judicial procedures);
- because the devolved part of the UK to which the cross-border effects apply itself wants to follow suit on a matter of substance, or has participated in the formulation of a combined scheme and is content to see it enacted at

Westminster (such as the introduction of civil partnerships; or extending the vetting process of those seeking to work or volunteer with children and vulnerable adults); and

- because the devolved part of the UK to which the legislative spillovers apply feels it must follow suit as an alternative to making major changes in its own rules to fit the scheme that is being enacted, and considers that the legislation is best done at Westminster (such as changes to the law relating to the termination of company directors' appointments).³³

82. In the circumstances above, the consent of the devolved legislature is given to the UK Parliament to legislate in a devolved area on its behalf. Such consent is given through a legislative consent motion (LCM). In each example indicated, the devolved government has the option of giving legislative expression to the cross-border effect through its own devolved legislature rather than promoting an LCM for it to be done at Westminster.

83. However, in those circumstances, for the reasons stated, or others (such as urgency of the legislation or the priorities for legislative time in the devolved legislature), it chooses the Westminster route in preference to legislating for the cross-border effect through the devolved institutions. If it proceeds locally, there is still a cross-border effect but the means of taking it into account are different.

³² Winetrobe, Submission 10, p. 3.

³³ LCM in the Northern Ireland Assembly on the Mental Health (Discrimination) (No 2) Bill.

84. Provision for LCMs is made in the Memorandum of Understanding between the UK Government and the devolved administrations.³⁴ The principle on which an LCM is based provides that **the UK Government will proceed in accordance with the convention that the UK Parliament will not normally legislate with regard to devolved matters except with the agreement of the devolved legislature.**

85. By giving its consent through an LCM, the devolved legislature agrees that the UK Parliament can legislate in a specific area by means of a particular bill under the circumstances outlined above. Our understanding is that the total number of LCMs considered (though not necessarily passed) by each of the devolved legislatures from inception to the end of February 2013 is in the region of 41 in the Northern Ireland Assembly, 126 in the Scottish Parliament and 40 in the National Assembly for Wales. The content of the LCM usually relates only to certain specific provisions in Westminster bills.

86. The process for securing an LCM requires the devolved government to advise its legislature as early as possible of a bill that is likely to be subject to an LCM. During the course of consideration in the UK Parliament, amendments to a bill may mean that additional LCMs are required.³⁵

87. The LCM procedure is now a well-established convention. However, it does

not account for all instances of cross-border policy effects, some of which can have significant impact on the scope for action of a devolved legislature. LCMs can also apply in non-cross-border circumstances, as when a devolved government wants to short-cut or speed up putting its own legislation in place. For the purposes of this report, only the cross-border aspect is considered here.

88. Cross-border effects can also occur outside the framework of a Westminster bill. There are a number of examples:

- When there is a tradition of maintaining “parity” with policy in the rest of the UK in matters which fall within devolved competence. This is the case in particular in Northern Ireland where expectations of maintaining parity are strong, especially in the field of social security, but also in other fields of devolved responsibility.³⁶
- When the cross-border action that is required locally is non-legislative, and calls for a procedural or administrative response. One example would be the introduction of the new system of allowing tuition fees of up to £9,000 to be charged to home students in universities in England. Although there was no requirement to do so, each devolved government felt compelled to change its arrangements on undergraduate tuition fees to manage the cross-border implications of a policy applicable only in England.
- Where the spillover does not require action in the affected devolved part of the UK, but there are inevitable consequences there nonetheless. An obvious example is discussed in more detail below, that of **“Barnett consequentials”**.

³⁴ Devolution Guidance Note 10, para 2; for the LCM process in the devolved legislatures, see: Clerk to the Northern Ireland Assembly/Director General, Submission 51; Chief Executive and Clerk, National Assembly for Wales, Submission 52; and Clerk/Chief Executive to the Scottish Parliament, Submission 53.

³⁵ The Chief Executive and Clerk of the National Assembly for Wales drew our attention to this point, instancing the Localism Bill which required four separate LCMs and the Education Bill which required three in a short time-frame.

³⁶ Law, Day 4, pp. 42–48; Fitzpatrick, Day 4, pp. 167–170.

89. There are three further circumstances in which the cross-border effects of decisions taken in one part of the UK impact on one or more of the other parts. One is when legislation enacted by a devolved legislature has consequential effects in another part of the UK. A second is when some action of a devolved legislature has spillover effects in another part of the UK. The third is the spillover effect of European legislation as it differentially affects England, Northern Ireland, Scotland and Wales.

90. Our evidence indicated that, of the above circumstances in which cross-border effects can occur outside a Westminster bill, the consequences for the devolved administrations of spending decisions taken for England – the so-called “Barnett consequentials” – have particular significance.³⁷ A recent example is the Health and Social Care Act 2012, largely applying to England, but with appreciable effects on commitments to public spending in Northern Ireland, Scotland and Wales, even though health and social care is a devolved matter.³⁸

91. We recognise that these consequential effects are more indirect and time-lagged than is often perceived to be the case.³⁹ Even so, it is clear that over time and in the aggregate the consequential effects of decisions on public spending in policy fields in England which are comparable to those within devolved responsibility do significantly affect the financial capacities of the Northern Ireland Assembly, the Scottish Parliament and the National Assembly for Wales.

92. It is often argued that the task of protecting, and advocating, the financial capacities of the devolved governments in the

light of these consequential effects should rest with the MPs representing constituencies in the relevant devolved jurisdiction. For this to be effective, MPs from the relevant jurisdiction require a strong relationship with their counterparts in the relevant devolved legislature.

93. Yet we have not heard persuasive evidence that MPs from Scotland and Wales act in any systematic way as advocates for the finances of the Scottish or Welsh governments.⁴⁰ The exception appears to be MPs from Northern Ireland, who do maintain strong ties with their respective Assembly parties and discuss the financial consequences of decision-making at Westminster for the Northern Ireland Assembly.⁴¹

94. Many who gave evidence to us argued for reform or replacement of the Barnett Formula. Some suggested a “needs-based” approach as being more appropriate for allocating fiscal transfers to the devolved administrations. All who spoke on this subject advocated a more transparent system of territorial resource distribution.⁴² We are conscious too that public opinion in England identifies the higher levels of public spending allocated to the devolved governments by the Barnett Formula as an instance of how devolution is working against the interests of England (see Tables 1 and 2 and paragraphs 46–47).

95. Although we recognise the demand for reform that was expressed to us in this area, reforming the Barnett Formula does not fall into the category of a legislative procedure at

³⁷ Plaid Cymru, Submission 9, p. 2; Alliance Party, Submission 13; Gallagher, Submission 23, pp. 22–23; Holtham, Submission 48, p. 3.

³⁸ Wishart, Day 2, pp. 263–264.

³⁹ Gallagher, Day 3 and Submission 23.

⁴⁰ McLeish, Day 3, pp. 212–213.

⁴¹ Reynolds, Day 4, pp. 31–32; for the Northern Ireland context where multiple mandates are prevalent, see www.niassembly.gov.uk/researchandlibrary/2010/10010.pdf; Purvis, Day 4, pp. 82–83.

⁴² Keating, Day 3, pp. 115–117; Heald, Day 3, pp. 145–146.

Westminster. But the consequential effects of the Barnett Formula make more difficult the definition of proposals having an effect only in England, and increase the cases when MPs from the devolved jurisdictions may well argue that proposals have at least a second order effect elsewhere because of the spending implications. So though it is beyond our remit to propose changes to the system of financing devolution, we see scope for fuller consideration of “Barnett consequentials” in the House of Commons and address it in Part 7 (paragraph 277).

96. Another circumstance in which the cross-border effects of decisions taken in one part of the UK impact on one or more of the other parts is when policies developed by one devolved legislature have consequential effects on the other devolved legislatures or on England. In other words, cross-border effects are not exclusively from England outwards.

97. There are instances when legislation in a devolved jurisdiction can have cross-border effects elsewhere in the UK.⁴³ Orders under section 104 of the Scotland Act, for example, can make consequential modifications of the law of England (or England-and-Wales), and Northern Ireland (as well as consequential modifications of the law on reserved matters for Scotland). The power to make modifications under section 104 exists where the need for the modifications arises from an Act of the Scottish Parliament. All section 104 Orders are laid before the UK Parliament. An example is the Management of Offenders etc. (Scotland) Act 2005 (Disclosure of Information) Order 2010 (SI 2010/912), which enabled the UK Department for Work and Pensions and the Child Maintenance and Enforcement Commission to co-operate and

share relevant information held by them with Scottish authorities that deal with offenders.⁴⁴

98. More indirectly, policy innovations introduced in one of the devolved jurisdictions may have a diffusion effect which leads to their emulation in other devolved jurisdictions or in UK-level policies for England. Significant examples would be the bans on smoking in public places which now apply in more or less standard form across the UK following an initial reform in Scotland, or the Welsh initiative on a Children’s Commissioner which is now replicated in England, Northern Ireland and Scotland.

99. One often overlooked, yet relevant, cross-border effect is the consequence of EU legislation as it differentially affects England compared with the devolved nations. This point is relevant for England, as the devolved parliaments have mechanisms for scrutinising EU legislation where they have legal competence, while House of Commons structures do not differentiate between English and UK interests. This spillover effect draws attention to the complex interrelationship of devolved, UK and European laws and policies, and the exclusion of an identifiable political voice for English interests within it, in particular for the scrutiny and implementation of EU legislation.⁴⁵

100. This discussion of the cross-border spillover effects of legislation for England (or England-and-Wales) is framed in the context of our search for a procedural solution to the more general English Question arising from the asymmetrical working of devolution. The various aspects of legal and policy cross-border effects, then, illustrate the complex, multi-level policy interrelationships existing

⁴³ Devolution Guidance Note 15.

⁴⁴ Explanatory Memorandum to the Management of Offenders etc. (Scotland) Act 2005 (Disclosure of Information) Order 2010.

⁴⁵ Bulmer, Day 8, pp. 43–44.

in the UK. Yet cross-border effects are an inevitable consequence of the devolutionary settlement. Some effects are managed through the LCM route. But the non-legislative effects lack consistent procedures to facilitate their consideration. As such, they need a space within the parliamentary arrangements for considering the consequences for the devolved parts of the UK of decisions for England.

101. That space is not best located within the legislative procedure for legislation with its principal legal effect in England (or England-and-Wales). However, it could be provided by a select committee of the House of Commons. This committee would recognise the cross-border effects of English decisions. It would hold UK/English ministers to account for the way in which they handle these legal and policy spillovers. Given that our recommendations identify a greater emphasis on legislation for England, it is likely that these cross-border effects will become more apparent. Other issues which might sensibly fall within the order of reference of such a committee are discussed at paragraphs 259–278.

102. In conclusion, this part has sought to tease out the direct and indirect cross-border effects in the devolved jurisdictions of policy made in Westminster to address primarily English matters. The effects may be deliberate or incidental, avoidable or unavoidable. They fall into two categories: legal and policy. Legal spillovers – found when Westminster bills contain measures within devolved competence applying to one or more of the devolved jurisdictions – are addressed through LCMs. Policy effects are managed by legislative and administrative procedures (in combination or separately), depending on the circumstances and the issue in question.

103. The discussion of cross-border effects points to the dominance of England in the UK policy process. It also serves to underline the asymmetrical nature of the devolution settlement. If our recommendations on a voice for England in the legislative process are accepted, these cross-border effects will become more apparent. We elaborate on the suggestion of a select committee to address cross-border policy consequences in Part 7 of this report.



PART 4 – A principle on which to base a voice for England

Finding a principle

104. **The evidence shows that people in England have growing expectations of the UK’s constitutional arrangements and that they are increasingly discontented with the present arrangements. These sentiments are not dissimilar from those that previously existed elsewhere in the UK and have been met by devolution.**

105. We have explained why we are not recommending that these expectations are met by the creation of new institutions and mechanisms for England that would more closely correspond to those created for the purposes of devolution. There is no significant demand in England for arrangements that would replicate the devolution arrangements found in any of the other parts of the UK. That necessitates a different approach for England. As we argued in Part 2, we favour addressing those expectations for England in a timely way. We also concluded that the most appropriate way of doing so is through proposals about the operation of the House of Commons.

106. **However, because expectations in England echo those met by devolution elsewhere, we have sought to find a principle common to the devolution arrangements for Northern Ireland, Scotland and Wales on which we could base proposals for modifying the procedures of the House of Commons.** The aim, so far as possible, would be to mitigate the unfairness felt by people in

England by constitutional arrangements for England which reflect a principle supporting devolution elsewhere. It will matter less that the mechanisms for giving effect to the principle are different in the constituent parts of the UK. Respect for a principle the benefit of which was seen to be shared by all parts of the UK (including England) would be designed to meet the test of fairness for a constitution necessarily characterised by asymmetry.

107. A relevant principle does exist in the devolution arrangements and we set it out below. **In our view, if a consensus across the House of Commons were to endorse the applicability of this principle, that would substantially reduce the unfairness felt by people in England.**

108. It is important, however, that people in England should see that the principle has not only been adopted, but also that it has a practical effect on the day-to-day operation of the system. **We attach particular importance to the clear acceptance of the principle by a consensus across political opinion; but we think that that should also be accompanied by procedural changes which would be seen to integrate the principle into the whole political system. Both things are necessary before opinion in England will be affected.**

The principle we have identified

109. It seems to us that it is already an inherent feature of all the devolution settlements that:

Decisions at the United Kingdom level having a *separate and distinct* effect for a component part of the United Kingdom should *normally* be taken only with the consent of a majority of the elected representatives for that part of the United Kingdom.

110. The elected representatives whose consent is sought for a part of the UK differ according to the circumstances. When this principle is applied to matters that are devolved in Northern Ireland, Scotland or Wales, the relevant majority is the majority in the devolved legislature. This principle is expressed in the conventions that require a legislative consent motion (LCM) for the enactment of legislation at Westminster on a devolved matter.

111. However, the principle is also implicit in other aspects of the devolution settlements. The devolution legislation for parts of the UK outside England identifies what is within the executive and legislative competence of the devolved institutions. The practical effect of this is to clarify what decisions can “normally” be left to representatives elected to a devolved institution. The legislation, in each case, also provides in different ways for certain topics to continue to be decided at the UK level. This reflects the fact that the general principle we have set out is inapplicable, or less relevant, to decisions on those particular topics (for example, as in the case of air transport). Legislating on those topics for only one part of the UK would usually be impracticable or inappropriate. Even in the case of topics that are not within devolved competence, however, devolution guidance continues to acknowledge the relevance of the underlying

principle: by making it best practice for the UK Government to consult the devolved administrations before legislating on those topics.⁴⁶

112. In these ways devolution provides identifiable and largely transparent mechanisms for ensuring that the interests of a component part of the UK (other than England) are separately heard and respected in the decision-making processes that affect those interests. By contrast, the interests of England currently fall to be addressed in the course of decision-making for the whole UK by the UK Government or Parliament. These UK-level institutions will continue to have dual roles for England and for the UK. But the lack of clarity that currently exists in distinguishing their England-specific and UK-wide roles contributes to the sense that English interests are not being addressed.

113. The constitutional principle we have identified can be articulated generally (as it is above), or it can be set out specifically for only one part of the UK. As we have explained, it already finds its practical expression for each of the other parts of the UK in devolution. In addition, at Westminster, the Grand Committee arrangements for Northern Ireland, Scotland and Wales contribute a further and effective (if little used) expression of the principle.⁴⁷ The Grand Committee arrangements, together with the conventions about LCMs,⁴⁸ would be sufficient for what is now likely to be the rare case of legislation at Westminster that does not need an LCM but affects only one part

⁴⁶ Devolution Guidance Note (DGN) 1, para 32; DGN 8, para 2(iii); DGN 9, para 14; DGN 10, para 2.

⁴⁷ SOs Nos 93–116. Their moribund character, so far as legislative work is concerned, means we do not think there is any need to consider whether they should be modified.

⁴⁸ We also make further proposals about the procedure that should apply to LCMs. See paragraphs 263–274.

of the UK outside England without making parallel provisions elsewhere. What is missing is any practical expression of the general principle for England.

114. Before discussing how the general principle can be expressed and applied for England, however, we need to consider one special case. A number of those who gave evidence to us drew attention to how the legal relationship between England and Wales differs from the situation for Northern Ireland and Scotland.⁴⁹ England and Wales share a legal system. Despite this, we are confident that the concept of territorial application (the territorial limitation for a rule that is expressly or implicitly contained in the rule itself) can be a practical basis for determining whether the effect of legislation for England is sufficiently separate and distinct from its effect for Wales to make an England-only principle practicable.

115. Nevertheless, it is likely, for practical reasons, to continue to be much more common for legislation in the UK Parliament to combine provisions for England with provisions for Wales, than to combine them with provisions for Northern Ireland or Scotland. The practical reasons for this are connected with the more limited extent of the current devolution settlement for Wales and the shared legal system. The balance between England-only legislation and legislation that is confined to England-and-Wales may well change as the new arrangements for legislative devolution in Wales bed down; and further constitutional change could also affect it. In the meantime, however, there is likely to be a significant body of legislation with an effect that would fall outside an England-only principle; but would still have a separate and distinct effect for England-and-Wales.

116. It would not assuage feelings of unfairness in England if an England-only principle were seen to be relevant to only a very limited amount of legislation, because of the difficulty, in other cases, of untangling the effect of the legislation for Wales. It is necessary, both for England and for Wales, that legislation with a separate and distinct effect for the combined area of England-and-Wales is treated differently from UK-wide legislation. However, any different treatment must respect the interests of Wales, together with the interests of England. The general principle we have identified requires that. Accordingly, we think it is important, when it comes to endorsing the principle, that it is expressly recognised to be a principle that can, and should, operate separately for England alone and for the combined jurisdictional area of England-and-Wales.

117. Legislation that cannot be shown to have a separate and distinct effect for England alone should be subjected to an England-and-Wales analysis; and if it applies in both, but not – or not in the same way – elsewhere, the principle (appropriately modified) should be applied accordingly. As we indicate above, we think it is likely that the bedding-in of the 2011 changes to legislative devolution in Wales and possible future developments will, in due course, result in fewer cases needing to get as far as the second stage of that analysis.

118. It follows that our proposals for procedural changes to reinforce the principle we have identified will also need to be implemented with two limbs. The principal limb will use a test in relation to England alone to trigger a new procedure. The second limb will apply to cases that do not satisfy that test but do satisfy a corresponding test in relation to England-and-Wales.

⁴⁹ Melding, Day 5; Wincott and Lewis, Day 5 and Submission 40.

119. On this basis, we think that the constitutional principle that should be adopted for England (and for England-and-Wales) is that:

decisions at the United Kingdom level with a separate and distinct effect for England (or for England-and-Wales) should normally be taken only with the consent of a majority of MPs for constituencies in England (or England-and-Wales).

120. **We recommend the adoption of this principle by a resolution of the House of Commons.**

121. **As this is a specific application of a general principle we also recommend that the House of Commons reiterate, at the same time, its commitment to the generalised version of the principle set out in paragraph 109.**

122. Some of those who gave evidence to us⁵⁰ thought that the best response to our remit would include the creation of a constitutional convention of self-restraint. In many ways, this idea is attractive. It is compatible with the endorsement of the principle we have identified. However, despite the apparent precedent of the conventions that govern LCMs,⁵¹ we do not believe that a constitutional convention can be created at the will of government or by a commission such as ourselves. Nor can it be enacted by a resolution of the House of Commons.

123. **A constitutional convention has to emerge from practice, and be established and confirmed by it over time. With usage, the general acceptance of the principle we have identified may well result in practices that have the status of a constitutional**

convention. We hope it does. However, only practice is capable of clarifying a common understanding of where it will or will not be constitutionally acceptable to treat a case as covered by the principle. In the meantime, a commitment to the principle in general terms, if it is supported by procedural changes along the lines we propose below, should be an effective first step.

124. We believe that, once the principle has been articulated by a declaratory resolution, changes of Standing Orders along the lines proposed in Part 6 can set a context that will encourage and facilitate adherence to the principle in practice.

The detail of the principle

125. We need to comment on three specific aspects of the principle we have identified.

(a) Who is to be subject to the principle?

126. We have expressed the principle as one applying to decision-making at the UK level, where the work of Government and Parliament are inextricably connected.

127. In practice, legislation passes in the UK Parliament by a process that is undertaken by Government and Parliament working together. Decisions on the formulation and implementation of policy are made initially within Government. The legislative process itself is only one aspect of policy implementation – an important part of it, with its own procedures, but still only a part. It is the UK Government that is accountable for the policies that need legislation at Westminster, as it is accountable for related policies that do not. For almost all purposes, the UK Government has the initiative on legislation proposed in the UK Parliament and control over the use of parliamentary time for legislation in the House of Commons. The Government effectively has a veto on legislation; it can always withdraw a

⁵⁰ Rifkind, Day 1, pp. 23–25; Wishart, Day 2, pp. 282–289; Plaid Cymru, Submission 9, p. 2; SNP, Submission 11.

⁵¹ For more on the operation of LCMs, see paras 82–87.

proposal that Parliament is changing in a way it finds unacceptable. Decisions made in Parliament about legislation invariably involve an interaction with Government. In terms of practical politics, it is the UK Government that is democratically accountable for all legislation that Parliament passes and for its implementation.

128. So principles applying to decision-making in Parliament necessarily apply to decision-making by Government. Government decision-making on legislation has to have regard to the procedures and principles that are applied by Parliament when the legislation comes to be scrutinised. **If the House of Commons is going to ask UK ministers to justify their legislative proposals by reference to the interests of England (or England-and-Wales), then the internal processes of the UK Government for preparing legislation also need to include a separate consideration of the interests of England (or England-and-Wales).**

129. This inevitable, consequential effect of what we propose is likely, in our view, to enhance the impact of our proposals in assuaging feelings of unfairness in England. In practice, decision-making that is only indirectly associated with legislation is also likely to be affected.

(b) What is the significance of “separate and distinct”?

130. The concept of UK-level decisions having a “separate and distinct effect” for England (or England-and-Wales) determines *when* the principle we have set out applies.

131. The concept of a separate and distinct effect provides a test for when legislation affects people in one part of the UK in a way in which it does not affect people in other parts of the UK. This situation gives rise to a legitimate expectation by the affected people that their views will be

respected. It is clear from the evidence we have received and the research we set out in Part 1 that there is such an expectation in England.

132. The easiest case of a separate and distinct effect is, of course, where legislation has an effect for one part of the UK and no effect elsewhere. However, other cases (for example, where there are cross-border effects of the sort described in Part 3) need to be covered as well. This is one reason why the principle needs to have an element of flexibility. A consideration of whether legislation for England really is without any relevant effect for other parts of the UK⁵² is often likely to have a political element. Furthermore, where there are conflicting interests, it is politics which will resolve the question.

133. Evidence we received⁵³ suggested that it would be very difficult, or perhaps impossible, to achieve a water-tight definition of, for example, “English laws” for the purposes of a rule to exclude particular interests from consideration, or to determine which particular interest should prevail in the case of conflict. **We think, though, that it is quite possible to set out a clear and workable description of when the application and effect of legislation for one part of the UK create a need for the views of people from that part to be separately expressed, heard and respected. That is what the “separate and distinct” test provides.**

134. In this context, an assumption that views should be respected is likely to give rise to an inference that those views should be allowed to determine the matter unless a case can be made to the contrary. That case

⁵² DUP, Submission 7, p. 2; Plaid Cymru, Submission 9, p. 2; SNP, Submission 11; SDLP, Submission 12.

⁵³ Bogdanor, Submission 3; English Democrats, Submission 8.

might involve a separate and distinct effect for a part of the UK outside England (or England-and-Wales), where it is suggested that that effect merits greater respect; or it could involve some overwhelming interest of the UK as a whole. In practice, where there are competing interests, a frequent approach is likely to be for them to be reconciled with a compromise.

135. At the heart of our proposals is the requirement that views from England (or England-and-Wales) should be known before a final decision is made about something with a separate and distinct effect for England (or England-and-Wales). This should re-focus political debate onto the extent (if any) to which there are reasons why it would be legitimate to disregard the views of those who represent people in England (or England-and-Wales), as well as about the potential consequences of doing so. Better to focus on that positive question than on whether those who do not represent opinion in England (or England-and-Wales) are also entitled to express their views.

136. Finally, we note that the analysis of what is “separate and distinct” is likely to be easier to do in practice than it is to define in the abstract. Once the detail of a particular legislative proposal is known, the question will often have a clear answer.

137. It may be necessary, in some cases, for questions about the relative significance of the effect of legislation in different parts of the UK to form part of the tests we propose for triggering particular procedures. However, this does not need to be part of the test for the operation of the principle. The significance of the effect in different parts of the UK will be only one factor in any political case for departing from the norm set out in the principle.

138. For this purpose, the tests that trigger particular procedures for giving an opportunity for the expression of a separate voice for England (or England-and-Wales) may create a presumption that the principle is in play; but the tests will not be conclusive on that issue. This will become clearer from our discussion of the different procedures in Part 6.

(c) What is the significance of “normally”?

139. The condition that decisions with a separate and distinct effect for England (or England-and-Wales) should “normally” be taken only with the consent of a majority of MPs from England (or England-and-Wales) determines *how* the principle we have set out applies.

140. It is important to note that the principle we have identified is respected within the existing devolution arrangements for Northern Ireland, Scotland and Wales, even though those arrangements all contain clear legislative provisions⁵⁴ which preserve the sovereignty of the UK Parliament. Though the conventions relating to LCMs appear to qualify that doctrine, they nevertheless contain a flexibly worded exception for cases where the situation is not “normal”.

141. The same must apply for England (and England-and-Wales). The principle must allow for an exceptional case where, for example, the interests of the whole of the UK need to be given greater weight than the interests of England (and England-and-Wales). All the principle can do is to necessitate a political justification for a departure from what should be regarded as “normal”.

142. In practice, the need to find a political justification for a departure from the norm

⁵⁴ Northern Ireland Act 1998, s 5 (6); Scotland Act 1998, s 28 (7); Government of Wales Act 2006, s 107 (5).

will be a powerful practical incentive to find a compromise, in preference to trying to roll over a significant body of relevant opinion. In addition, there will be political accountability for any departure from the norm in the form of the likelihood of high-profile political controversy in the short term and electoral accountability to voters in England (or England-and-Wales) in the medium term. We would expect departures from the norm to occur only rarely in practice. We do not believe that regular departures from the norm would be justified just on the grounds that there is an electoral outcome that has provided a majority in the UK to a government without a majority in England (or England-and-Wales). As the evidence on public attitudes in England shows, there is a concern for interests of England to be heard and respected in all circumstances, including (but not only) when there are conflicting majorities.



PART 5 – Objectives and criteria for procedural change

Objectives of procedural changes to reinforce the principle

143. We were struck by the evidence we received that where a decision affecting only England was opposed by a majority of MPs from England, political imperatives would at least normally provide a strong incentive to government to avoid consciously using the votes of MPs from outside England to force a decision through.⁵⁵ In that situation a government would be influenced by the knowledge that it would be running a risk of paying a price for its conduct at the next election. It was pointed out to us that a party that aspires to a working majority in the UK Parliament needs, in practice, to seek a majority in England.⁵⁶

144. We are therefore encouraged to think that the principle we have set out is capable of attracting widespread support across the political spectrum. We are conscious too that it is in the nature of our unwritten constitution that constitutional change is generally likely to be effective only if it has that sort of support and goes with the grain of political reality.

145. On the other hand, we do not accept the arguments of those who see this as leading to the conclusion that there is no need for any procedural change in the House of Commons. We do not think it would be regarded as sufficient in England to assert the principle and to allow politics to do the

rest. Instead, we have used the political imperatives as a pointer to the form that our proposals for procedural change should take. Political imperatives can assert themselves most effectively, and be seen to do so, when processes on which they operate are open and transparent. Politicians would then know that there is a greater likelihood that they will be held to account if they act in defiance of the majority opinion of MPs from England (or England-and-Wales). **Changes to procedural rules can shift the balance in favour of securing adherence to the constitutional principle. We think such a shift is necessary.**

146. **In this connection also, our very strong view is that we need to address feelings in England without provoking an adverse reaction outside England.**⁵⁷ This means that our detailed procedural proposals should concentrate on enabling MPs from England (or England-and-Wales) to take advantage of new or additional ways to assert the interests of those parts of the UK. Our proposals should avoid taking functions or powers away from MPs from outside England (or England-and-Wales).

147. So it would be wrong, in our view, to exclude any MP totally from the principal stages of the work of the House of Commons on a piece of legislation, whatever the limits of its territorial effect. It may be necessary, in order to ensure clarity about the views of MPs from England (or England-and-Wales), to provide that MPs from other parts of

⁵⁵ Lord Robertson, Day 3, pp. 191–192; Morgan, Day 5, pp. 52–55.

⁵⁶ Gallagher, Day 3, p. 44.

⁵⁷ Jeffery, *op. cit.*, pp. 15–16.

the UK are differently represented in any process for discovering what those views are. However, MPs from all parts of the UK need to have the opportunity to participate in a consideration of the principle and the final detail of legislation. Involvement in the detail is important because changes to the detail are likely to be the most frequent means by which compromises about competing interests can be achieved.

148. Even within the parliamentary context, there are some “solutions” which we think should be avoided. The principal of these is anything which could be accused of creating, by whatever means, two classes of MP, or in-and-out voting – what Lord Foulkes of Cumnock called “legislative hokey-cokey”. Few had a good word for this expedient: a former Secretary of State for Scotland characterised it as “a very foolish response” and “a nationalist solution to a unionist problem”; it was criticised by a former minister in the Welsh Office; and it was particularly unacceptable to certain of the witnesses from Northern Ireland.⁵⁸

149. Democratic Unionist witnesses believed that attempts to tackle the West Lothian Question would not only be procedurally “a recipe for permanent rows”, but that a procedure delivering “English-votes-for-English-laws” in any form might be used to bring about the loosening of the Union.⁵⁹

150. An alternative view of the politics that was put strongly to us was that politics would sort things out: that is what politics is for, and if a government could not come to a political agreement with a majority in England, then they would lose their bill. The Conservative Democracy Task Force concluded that “the great value of this situation ... is that it would give both sides an incentive to bargain”. Such

bargaining would represent a sensible political compromise, capable of resolving crises. We are not convinced that this would be enough, though we concede that for short periods in the 1960s and 1970s what was described as “compromise and the acceptance of reality” played a part in parliamentary events from day to day.⁶⁰

But it is our view that, after due provision has been made for the views of England (or England-and-Wales) to be heard and taken into account, the UK majority should prevail, not least in order to retain the UK Government’s accountability at election time for decision-making during its time in office. Our recommendations are intended to enable a sensible balance to be struck.

151. Mr Bernard Jenkin MP suggested that the right of the House of Commons as a whole to override the voice from England should be both explicit and the exception, and other witnesses thought that it would be difficult to envisage frequent situations when the power would be exercised.⁶¹ We note that there has been no use so far of the override power by the UK Parliament in relation to the devolved legislatures. Our proposals are intended to keep to a minimum the use of the override power within the House of Commons by prompting a government to think hard before having recourse to it.

152. We recognise that rejecting an ultimate veto for the majority from England (or England-and-Wales) on either the principle or the detail of legislation may limit the extent to which our proposals can assuage English concerns. But we believe that the balance of argument favours that conclusion.

⁵⁸ Rifkind, Day 1, p. 6 and Submission 19; Howells, Day 5, p. 22; *ibid.*, pp. 8 and 123.

⁵⁹ Reynolds and Ross, Day 4, pp. 18 and 33.

⁶⁰ Rifkind, Day 1, pp. 8–9.

⁶¹ Jenkin, Day 6, p. 105; cf Gallagher, Day 3, pp. 44–45 and Keating, Day 3, pp. 105–106.

153. Furthermore, we think that **changes to procedural rules will in practice be very effective in supporting the principle we have identified if they meet the following five objectives:**

- Ensuring that sufficient information is available about the effect of legislation to facilitate the clear identification of the cases in which the views of MPs for constituencies in England (or England-and-Wales) need to be separately sought.
- Ensuring that there is an opportunity, separately within the House of Commons, for those views to be expressed, and to be seen to have been expressed.
- Ensuring that those views are heard and can be considered after they have been expressed.
- Ensuring that it is clear what outcomes have followed from a consideration of those views.
- Ensuring that consequences should follow in the form of political and democratic accountability for decisions reached following consideration of those views.

154. As well as the transparency and openness in decision-making that will be produced by meeting these objectives, procedural rules can also support the principle we have identified through their impact on parliamentary time.

155. A government's capacity to legislate is constrained by the amount of parliamentary time that is available to it for legislation. Governments invariably find that there is insufficient parliamentary time for everything they want to do. In the management of its legislative programme, a government needs to make the most efficient use of the limited time available. Legislation that is politically contentious uses up more parliamentary time than legislation that is not. In this way,

the limited availability of parliamentary time is one of a number of incentives for the UK Government to achieve as much consensus as possible on the legislation it puts before Parliament.

156. **Procedural rules should provide that a price would have to be paid in terms of parliamentary time for a departure from the principle we have identified.** A potential impact on its legislative programme would be a further encouragement for government to find a compromise that would avoid the need to pay that price.

Criteria which inform our procedural proposals

157. Having established a principle for respecting the voice from England and discussed its application, we now summarise the criteria which should influence the nature and detail of our procedural proposals. If political expectations in England are to be met, then any new procedures should be simple and comprehensible, not lost in the labyrinth of opaque Westminster arrangements. Self-evidently they must provide a response to the perceived concerns of England, and meet the requirements of paragraph 153. That entails transparency, an opportunity for the voice from England to be heard, and accountability for subsequent decisions.

158. Our proposal must be widely regarded as being fair and, crucially, must be seen both as fair to England, and as constituting a legitimate response to devolution in the other parts of the UK. Acceptability will be further enhanced if the proposals go with the grain of parliamentary procedure and practice, and respect the prerogatives of all MPs. The new specific roles for MPs from England (or England-and-Wales) are additional and relate only to legislative proposals that have a separate and distinct effect for those parts of the UK. Moreover, the right to trigger a

specific procedure should be guaranteed, but our proposals should also recognise that it may not always be needed or demanded.

159. The essence of Parliament is politics. Above all, politics should be given more space, opportunity and time to maximise the chances of outcomes that are acceptable to people in every part of the UK. As a minimum, they should be widely understood as being the fair result of a process which did give adequate opportunities to all, and ultimately was consistent with the sovereignty of Parliament.

PART 6 – A voice for England in the House of Commons

Introduction

160. **The more the process of devolution has moved areas and topics in which law may be made from Westminster to Belfast, Cardiff and Edinburgh, the more Westminster law-making has focused on England (or England-and-Wales). Yet parliamentary procedures for the enactment of law in England (or England-and-Wales) have not significantly changed since devolution began in the late 1990s.**

161. Many proposals emerged from our evidence as potential solutions to the issue before us (paragraphs 62–75). These included:

- abolishing devolution;
- maintaining the status quo;
- strengthening local government in England;
- federalism;
- the establishment of an English parliament; and
- electoral reform, including in particular proportional representation and a reduction in the number of MPs returned for seats outside England.⁶²

162. We favoured none of these, for reasons given in each case. We concluded that the most effective and proportionate response to the need to find a voice for England lay

⁶² Paragraph 3.8 of Submission 64 demonstrates why removing Scottish and Welsh overrepresentation does not wholly eliminate the bias in the system.

squarely within our terms of reference, in changes to parliamentary procedure in the House of Commons.

Providing a voice: a protective resolution

163. We have mentioned at paragraph 143ff some of the criteria underlying our proposals. In brief, **English concerns need an opportunity to be expressed in their own right, rather than under the guise of UK-wide matters.**

164. We have already advanced the principle that decisions with a separate and distinct effect for a part of the UK should normally be taken only with the consent of a majority of the elected representatives for that part of the UK (paragraph 109). At the same time, there may be exceptional cases where the interests of the whole of the UK, or of another part of it, need to outweigh those of the part. Our task is to find procedural ways to encourage the incorporation of this principle into the practice of the House of Commons.

165. Achieving that will not be easy, as succeeding paragraphs will illustrate. If our proposals are to gain support inside the House of Commons as well as outside, they should be straightforward, comprehensible and robust. Firstly, the procedures of the House are already complex. Had there been a simple and easily understood response to the West Lothian Question or its predecessors, it would have emerged long ago. At the same time, it is essential that a clear message should go out from

Westminster that anxieties in England are being heeded and the relevant action taken.

166. Secondly, the House of Commons takes decisions according to the majority view expressed, if necessary, in a vote. In that context, devising a procedure in which the English voice could be distinctively heard raises an obvious question: if the majority of MPs representing England (or England-and-Wales) differ from the overall UK majority on which the UK Government will usually depend, and if MPs from England-and-Wales use any special procedures to amend a bill in a way that is unacceptable to the government majority, how is the disagreement to be resolved?

167. There will have to be some expectation that, though the views of the representatives of England (or England-and-Wales) may not always be in a position finally to prevail on issues of concern to England (or England-and-Wales), they will nevertheless be heard and “normally” heeded.

168. The suggestion that statute should be invoked to insulate the right to be heard of an English (or English-and-Welsh) majority which is a minority in the House is one we hesitate to contemplate. A statutory provision would need to contain a rule with less flexibility than we think is necessary: it would potentially involve the courts in matters which have always been properly within the exclusive competence of the House; and it would not be proof against modification by a subsequent statute.

169. Internally, the House of Commons has always been free to manage and alter its own procedures by a decision of a majority. There has never been a procedural – or protective – wall which a majority cannot breach or sweep away. What a sovereign House can do in a single vote it can undo or bypass in the same way.

170. Nevertheless, the problem facing us in seeking to ensure adherence to a principle that should determine practice in the House of Commons is not unique. The practice of the House has been found to be flexible enough to admit declaratory resolutions which, though they cannot be formally entrenched, are nevertheless not usually challenged.

171. Of course, such an approach could be seen as fragile. Some of our witnesses certainly thought so. In the case at issue, a government might think the stakes so high that they are prepared to use their overall majority to overturn the procedures for seeking the views of the majority of MPs representing England (or England-and-Wales), and to do so with some regularity. As one witness put it to us, “governments quite quickly go through the pain barrier of disapproval or unpopularity.”⁶³ Respect for a declaratory resolution could disappear “like morning dew”.⁶⁴

172. There is, however, at least one contemporary example where a simple resolution has proved to be robust – the resolution on ministerial accountability of the mid-1990s.⁶⁵ We consider this a precedent worth following and we are recommending that the House of Commons should be invited to come to a resolution confirming and encapsulating for England-and-Wales the principle, and we have made the appropriate recommendation in paragraph 120.

173. The apparent fragility of the declaratory resolution approach can also be seen as flexibility. A government, after consideration, may decide that it is necessary in the interests of the UK as a whole, or an affected part of it, to invoke the exception

⁶³ Rogers, Day 1, pp. 192–193 and 215.

⁶⁴ *ibid.*, p. 228.

⁶⁵ M Jack *et al.* (2011) *Erskine May: Parliamentary Practice*, 24th edition, Butterworths Law, pp. 201–202.

implicit in the word “normally”. It would be able to use its overall majority to amend or reverse a decision taken to reflect the voice from England.

174. But we do not think that such a decision would be lightly taken. As we said in paragraph 142, **use of the power to override the voice from England will have to be defended politically.** A UK majority whose tanks too frequently roll over decisions representing the wishes of a majority from England will, eventually, recall the need to defend its seats in England at the next General Election.⁶⁶

175. Furthermore, within the House of Commons, in order to encourage a compliance which cannot be enforced, **consequences should be attached to instances where a government wished to escape the customary interpretation of “normal”. A motion to set aside a protective procedure or to overturn or amend what MPs had agreed for England would need to come with a price payable in the most valuable parliamentary currency, debating time on the floor of the House.** Setting aside the procedure or reversing an original decision other than by agreement would have to involve a substantive debate lasting in principle never less than three hours. **In most circumstances, we would expect governments to find compromise and consensus the more sensible and – what English opinion seems in particular to want – fairer policy.**

Procedural change: clearing the ground

Introduction

176. We turn now to ways by which MPs representing seats in England or Wales can be provided with the means to record their views on legislation, both bills and secondary

legislation, which has a separate and distinct effect there.

177. It will already be clear that, though the means of achieving that end may not be as simple as might be wished, **it is nevertheless possible – without creating two classes of MP or introducing in-and-out voting – to devise procedures which ensure that, in issues relating exclusively to England (or England-and-Wales), the voice of MPs from these parts of the UK can be separately and distinctly heard.** That voice should be capable of being as clearly expressed at Westminster as is the voice of those representing other parts of the UK in the devolved legislatures on devolved matters.

178. We believe that all our suggestions meet the five objectives in paragraph 153.

179. First, this section of this part sets out some background considerations to our detailed procedural suggestions. In the next section, a preliminary recommendation in paragraphs 191–195 in connection with the drafting of bills is intended to make more prominent the territorial effect of bills, both to the reader and within the procedure of the House. The proposed changes in procedure are divided into two broad categories. The first group (paragraphs 198–217) adds free-standing opportunities for English MPs to express their views in procedures that are separate from the career proper of a bill but in practice are linked politically to its fate. Few technical problems arise in these cases. The second group (paragraph 222ff) inserts the English procedures into standard legislative business; these are more complex, but because they are part of the law-making process itself they may be more directly effective.

The territorial application of bills and the procedural consequences

180. It is critical to find a solution to the difficult definitional issue of how to identify,

⁶⁶ Gallagher, Day 3, pp. 44–45.

for any new procedure, when the interests of England (or England-and-Wales) are particularly involved and should on that account engage special procedures.

181. The problem arises because (for reasons given in Part 3) bills do not typically concern only one part of the UK. In particular, very few bills currently make changes affecting England alone, though rather more affect only England-and-Wales. Sometimes, of course, even if the new provision is making significant change to the law in only one part of the UK, enforcement, consequential or similar clauses of varying relative significance will apply to one or more other parts of the UK. What adds even further complexity is that non-legal cross-border effects may often not appear on the face of a bill at all, though their significance may be appreciable (paragraphs 80–81 and 89–91).

182. Sometimes, hard definitional decisions can simply be avoided. In these cases, it is immaterial whether a bill relates exclusively to England (or England-and-Wales); only *that portion* of it which is clearly separately and distinctly applicable to England (or England-and-Wales) would be subject to special procedures. There would, for example, be no need for anyone to determine whether the supplementary clauses of a bill that have an effect beyond England (or England-and-Wales) are so clearly subordinate to the bill's main purposes that it would be right to engage a procedure for consulting specifically the representatives of England (or England-and-Wales). In other instances, such as where a question arises whether a bill is to be sent *in its entirety* to a specially-constituted committee, we suggest ways to ease the difficult decision on how to treat a bill which predominantly but not exclusively affects England (or England-and-Wales) (paragraphs 223 and 224).

183. Where a definitive view had to be taken on the procedure applicable to a bill with predominant but not exclusive effect in England, some of our witnesses concluded that if the bill could possibly have any implications (whether legal or practical) beyond England it should not be regarded as English-only. Consequently, MPs representing other parts of the UK should be entitled to participate fully in considering it. For these witnesses, it was:

a lesser evil that somebody whose interests are somewhat remote should have a vote than that somebody whose interests are real is excluded.⁶⁷

184. We do not accept that view. **We are envisaging additional roles for some MPs while retaining prerogatives for all MPs.** We have already set out the reasons why we think the principle (and the rules of procedure which support it) should not exclude them entirely from involvement in all matters relating to England (or England-and-Wales). **MPs from other parts of the UK must continue to enjoy the opportunity, at some point, to review in detail bills which have been considered in a body from which the opinion of England (or England-and-Wales) is being sought.**

Governments continue to control some critical motions

185. Though we have accepted that a UK majority in the House of Commons should, in the end, prevail over a majority from England (or England-and-Wales), this need not imply that governments without a majority in England (or England-and-Wales) would need to rely exclusively on the weapon of last resort. In each government bill, it is the government which has the initiative. In this way it has considerable control over the process and, for example, can limit the matters under consideration by the way in which it determines:

⁶⁷ Holtham, Day 6, pp. 22, 27 and 30–32.

- the terms of the motion initiating expenditure for new purposes (the Money resolution) and that authorising the imposition of taxation (the Ways and Means resolution); and
- the range of matters and places with which the bill may properly deal – what is known as its scope, within the limits of which amendments must normally be confined.

186. These, in particular, are powerful means available to a government to ensure that some avenues of attack are out of procedural bounds.

An option rejected: the double-lock

187. There is one particular suggestion favoured by several of those who gave evidence to us in which we ourselves see little merit. This is the double-majority, or double-lock procedure. All MPs would be able to vote on any question arising on an England-only (or England-and-Wales) bill, but some questions – perhaps the crucial questions on the second and third readings (the affirmation of principle and the final approval)⁶⁸ – would be determined not by the overall majority in favour alone, but by whether within that majority there was also a majority of MPs representing England (or England-and-Wales).⁶⁹

⁶⁸ Determination that individual clauses and amendments were English (or English-and-Welsh) would be very difficult to integrate with debate and even if achieved would be apt to stultify debate.

⁶⁹ Rifkind, Day 1, p. 40 (and cf Baldwin, Day 1, pp. 87–88) and Keating, Day 3, p. 106. Not all witnesses found the proposal attractive, since it seemed to them that it led straight back to the two-classes-of-MP objection. Cf s 66 of the Scotland Act 1978, which provided that if certain bills read a second time would not have received a second reading if MPs for Scottish seats had been excluded from the division, such bills should be deemed not to have been read a second time unless the House confirmed the earlier decision. The Act was repealed in 1979.

188. We believe (and some of our witnesses agreed⁷⁰) that **the double-lock approach is flawed**. If the second or third reading of a bill determined to be separately and distinctly English (though perhaps including supplemental or incidental provisions which were not) were:

- carried by the House at large, but
- lost on English (or English-and-Welsh) votes, and
- the first decision was effectively overridden by the second, two substantial objections immediately arise. The first is that such an outcome would be inconsistent with our fundamental principle enunciated at paragraphs 119–120: that matters of concern only to England (or England-and-Wales) should “normally” be settled by the elected representatives of those parts of the UK, but they should not have a veto.

189. The second objection is procedural. Applying the double-lock to a vote on the principle of a bill would leave no room for going back by way of negotiation. Applying the double-lock to every vote on the detail (which would, in theory, allow more room for negotiation and compromise) would seem to us to be quite impracticable.

The role of the House of Commons

190. Finally, in this connection, our terms of reference limit us to making proposals for change in the House of Commons. We have tried to bear in mind that there is a balance to be struck between the interests of the UK as a whole and those of its constituent parts. The defence of the interests of England (or England-and-Wales) must continue to rest with the elected House. In addition, we do not favour changes to the procedures of the House of Commons that would deprive it of the ability to protect UK-wide interests and

⁷⁰ Riddell, Day 1, pp. 119 and 122–124.

leave the House of Lords as the only House with the ability to defend those interests.

Procedural change: the options

Drafting

191. Bills should routinely be accompanied by a broad indication of their territorial scope (including legal and practical effect, as well as extent). So far as appropriate, their territorial application should be as clear as possible from the bill itself. Much has been done already. We note the helpful practice of issuing, at the time of the Queen's Speech, a note broadly identifying the territorial reach of the bills to which it refers.⁷¹ Standing instructions to those preparing bills for the UK Parliament prescribe that:

the territorial extent and application of the legislation should be set out in a statement at the beginning of the [explanatory] notes in whatever form of words is appropriate to the bill in question. The key point is that the person reading the notes should be able to find out quickly whether the bill affects Wales, Scotland or Northern Ireland and if it does what the general effect in each constituent part is.⁷²

192. The notes should also always indicate whether a legislative consent motion (LCM) is likely to be sought by the relevant devolved administration. We commend these initiatives.

We think they should be built upon. So far as possible, any agreement between the UK Government and the devolved administration about the seeking of an LCM should be disclosed and it should be made clear exactly which provisions of the bill necessitate the LCM.

⁷¹ Gallagher, Day 3, p. 80.

⁷² Cabinet Office (2012) *Guide to making legislation*, para 10.44; Rogers, Natzler and Patrick, Day 7, pp. 3–5; Rogers and Natzler, Day 2, pp. 183–184 and 205–207.

193. Drafting practice might take into account in particular the need to determine what is wholly or primarily separate and distinct for England (or England-and-Wales), by identifying so far as possible Parts of a bill or groups of clauses which fall into that category. Ministers in the House or in committee should, where appropriate, be prepared to amplify these assessments.

194. Generally, in order to place more emphasis on the territorial impact of a bill in its drafting and its parliamentary career, consideration should be given as a matter of regular practice to setting out the extent (including, where appropriate, the extent of the several Parts of a bill) in the long title.⁷³ At present, where no such statement is made in the long title, parliamentary practice treats the bill (subject to the other limitations on its scope provided by its subject matter) as freely capable of extension by amendment to the whole of the UK. Making clear in the title what the extent is will not prevent a bill, the long title of which restricts its effect to (for example) England-and-Wales, from being amended to apply in, say, Northern Ireland, but such an extension would need prior approval by the House.⁷⁴

195. Where there was general agreement on amendments to extend the provisions of a bill to parts of the UK not originally comprehended, the extra procedural hurdle might be cleared without much (if any) debate. Otherwise, the debate would be an

⁷³ The long title of a bill, which describes what is known as the scope of the bill, is (for example) "A bill to grant certain duties, to alter other duties and to amend the law relating to the national debt and the public revenue, and to make further provision in connection with finance". The short title is "Finance Bill".

⁷⁴ This would be done either by moving an instruction to a committee giving leave to make the amendment or, in the case of the report stage on the floor of the House, by an analogous motion under SO No 75 (amendments on report).

opportunity for the representatives of the part of the UK likely to be affected to be heard. In short, the procedure would reinforce the need to give this aspect of bills a higher profile in future, and would coincide with the rationale of the new procedures.

English matters in the manifestos

196. Though it is strictly beyond our terms of reference, we believe that some clear and distinct consideration of matters affecting England in the manifestos put forward by the UK parties at a General Election would be a useful focus on the distinctly English element of the legislative programme for the ensuing parliament. There are already separate manifestos by the major UK parties for Scotland and Wales.

Debate on the Queen's Speech

197. Again, before the commencement of a bill's career, we suggest agreement between the major parties to identify some of the time allotted to debate on the Queen's Speech as allocated to discussion of the government's proposals for England (and England-and-Wales). This would be useful in clearly delineating the policy and drawing public attention to the fact that MPs who represent constituencies there have a role distinguishable from those UK responsibilities which they share with the rest of the House.

Pre-legislative scrutiny

198. The first of the opportunities for introducing a particular procedure for matters affecting England (or England-and-Wales) is the pre-legislative scrutiny of draft bills by a committee composed of MPs constituted to reflect the party balance in England (or England-and-Wales).⁷⁵ (Annex D1 illustrates the current standard procedure for a government bill.) For pre-legislative

scrutiny,⁷⁶ we think it would also be an option to confine the membership of a committee so constituted to MPs from England (or England-and-Wales). Pre-legislative scrutiny has been regarded as a successful innovation. If adapted to the present case (Annex D2), it would have the advantage of sending a clear message to a government at a time when it was perfectly possible to alter a bill in response to a committee's views, and when such changes would not complicate the bill's legislative career proper. Such a procedure might speed subsequent progress,⁷⁷ though this could not of course be guaranteed.

199. Not the least of the advantages of this scheme is that there would be no need for a decision on, for example, whether clauses in a bill affecting other parts of the UK were substantial enough to prevent the referral to the committee of a draft bill which contained only some provisions with a separate and distinct effect for England (or England-and-Wales). Only individual clauses and schedules making separate and distinct provision for England (or England-and-Wales) could be sent to committee.

200. We do not envisage that every bill which might qualify would be the subject of pre-legislative scrutiny. The procedure would come into play on a motion in the House, which might either be agreed between the parties or allowed to proceed if supported by a substantial number of MPs from England (or England-and-Wales). It would be a matter for the relevant Standing Order to define the number required to support a motion to apply this procedure to a draft bill.

⁷⁵ We think this would be acceptable for the draft bills laid before the House for pre-legislative scrutiny; we do not think the same would be appropriate for the committee stage of a bill introduced for passage into law.

⁷⁷ Gallagher, Day 3, pp. 60–61 and 66–67; Lewis, Day 5, pp. 164–165.

⁷⁵ Riddell, Day 1, pp. 117–119.

201. To date, pre-legislative scrutiny has been the responsibility of joint committees, departmental select committees or select committees nominated ad hoc. These operate by taking evidence and reaching advisory conclusions (and, in the – probably rare – appropriate circumstances, there is no reason why what is proposed here should supersede committals of that kind). The suggestion here, however, is for something more in the nature of a public bill committee, engaging in party-political debate and reporting its opinion by way of resolutions or conclusions that specified changes ought to be made in the draft bill when formally introduced. It would be prudent for Standing Orders to prescribe a standard maximum period for the committee’s deliberations.

202. There are, however, weaknesses with this proposal. There is inevitably a difficulty in producing draft bills or parts of bills in due time for pre-legislative scrutiny, particularly in the first session of a parliament. It is not possible for all bills for which this might be appropriate to be subjected to this procedure. At the other end of the process, however politically persuasive the outcome of pre-legislative scrutiny might be, the work of a committee need have no necessary linkage to the career or the contents of the bill as subsequently introduced and passed. The committee could all too easily be bypassed. Or the matter at issue might be too urgent for pre-legislative treatment.

203. In conclusion, **there may be circumstances when it is agreed that it would be appropriate to devise a pre-legislative forum in which the voice from England (or England-and-Wales) may be heard. While in many ways this is likely to be useful and practicable, it cannot be expected to be a complete answer.**

A parallel to legislative consent motions: in Grand Committee

204. It would be possible to devise a means of bringing a motion analogous to an LCM before English (or English-and-Welsh) MPs in a Grand Committee (Annex D3). The motion⁷⁸ would have to relate to that part of a bill relating separately and distinctly to England (or England-and-Wales), whatever other provisions it contained. Such a procedure would reflect the principle of broad equivalence without perfect symmetry between the several constitutional arrangements across the UK. The Grand Committee would comprise all MPs sitting for constituencies in England (or England-and-Wales), and would be charged with considering the motion and reporting its opinion in a resolution.

205. For the procedure to come into play, a notice of motion would be required, which we suggest should be given only by an MP for a constituency in England (or, if appropriate, Wales), and there would have to be a minimum – but reasonably substantial – number of signatories. An alternative would be to empower the leader of the largest party in England (or England-and-Wales) not represented in the government.⁷⁹

A supplementary option might be to give the initiative to the government.

206. The resolution agreed at the conclusion of the Grand Committee’s proceedings would be reported to the House. It would be for the House as a whole to decide to accept or reject the opinion of the Grand Committee by giving or refusing the bill a second reading.

⁷⁸ The motion would not be likely to engage the House’s rule against anticipation.

⁷⁹ Cf the right of initiative on certain Opposition days under SO No 14 (2) (arrangement of public business) – though the Standing Order and the arrangement proposed here might stand in need of amendment in the event of a minority government in the UK with a majority in England.

207. A Grand Committee of quite such a size – far larger than any of the existing equivalents – would be something of a novelty, and it could sit only in the Chamber, but it could be argued that few other procedures would demonstrate more clearly outside the House what was being done to meet the demand in an organic development of existing procedures.

A parallel to legislative consent motions: on the floor

208. There is another form of procedure parallel to that for LCMs which would provide MPs representing England (or England-and-Wales) with an opportunity of making their voice heard on business that is exclusively English (or English-and-Welsh).⁸⁰ Like the preceding possibility, it would detach the expression of MPs' views from the career proper of a bill (Annex D3), and thereby limit complications.

209. In this scheme, after a bill had been introduced or brought from the Lords and printed,⁸¹ but before second reading, Standing Orders might provide for a limited time – say three hours – during which the House might debate a motion expressing an opinion on that part of a bill relating separately and distinctly to England (or England-and-Wales), whatever other provisions it contained. As in other cases, the procedure would be available but would not automatically be engaged unless the conditions of Standing Orders were satisfied. The limitation on who might give notice of the motion would most sensibly be similar to that

suggested in respect of the motion intended for discussion in Grand Committee.

210. As in the pre-legislative suggestion, there would be no need formally to devise a procedure to establish whether or not any “separate and distinct” provisions for England (or England-and-Wales) could be regarded as rendering the whole bill subject to the procedure: if any provisions related to England or England-and-Wales, they might properly be referred to in the motion.

211. One option would be for all MPs to be entitled to vote in a debate on such a motion. There are two possible ways of determining the outcome. Either the view of the House would be taken to be expressed by the votes of the majority of English (or English-and-Welsh) MPs participating, irrespective of the overall figures; or it would be the overall result which would, as is usual, express the opinion of the House. (In either case, the English or English-and-Welsh figures would as soon as convenient be made known separately.)

212. The first would have greater clarity and impact, and might escape the strictures of paragraph 189 since the decision would arise on a motion which was no more than an expression of opinion. Procedurally the second would be less revolutionary, though the views from England (or England-and-Wales) would have been just as clearly expressed in advance of the second reading and later stages of the bill.

A parallel to legislative consent motions: general

213. If, following a debate on the floor or in Grand Committee, and whatever the result overall, a hostile resolution was supported by a majority of MPs from England (or England-and-Wales), the bill in question could be withdrawn, and reintroduced in an amended form acceptable to England (or England-and-Wales), not much time having been lost. Alternatively, the government might

⁸⁰ The parallel would have to be broadly understood (Gallagher, Day 3, p. 55) though one witness found in the idea of an English LCM “a strong resonance” (Rogers, Day 7, p. 54). For a discussion of LCMs proper, see paragraphs 84–87.

⁸¹ A bill affecting *only* England-and-Wales could not, however, sensibly be subjected to this procedure, because the debate on the motion parallel to an LCM would wholly anticipate the second reading.

accept the setback and undertake to make appropriate amendments to the bill later. Should the government with their overall majority be determined to press on with their bill as originally drafted, however – in which case they would have to be prepared to pay the political price and give up time on the floor to debate the override – they could do so. Such action would, of course, be contrary to what it might be hoped would be the normal outcome.

214. Where the English majority *did not support* a hostile resolution, the time allotted for the second reading debate – normally an entire sitting day after Questions and statements – could be abbreviated by a period equivalent to the length of the debate on the motion. In addition, Standing Orders could make it clear that the remainder of the bill's career need not engage any other special procedures implemented in response to our report.

215. Finally, where there was *no earlier debate* on a free-standing motion, the second reading might proceed for the normal parliamentary day.

216. As with our pre-legislative scrutiny proposal, a procedure analogous to the LCM procedure, whether in Grand Committee or on the floor, would provide for the early identification of disagreement and would facilitate its resolution, if resolution could be achieved; but it would not entangle those proceedings in the normal career of a bill. The bill would proceed in the knowledge of the view from England (or England-and-Wales) on the bill.

217. It would be consistent with our view of the convention that we hope would attach to decisions by MPs from England (or England-and-Wales) on matters of particular concern to them that a government would not normally attempt to proceed with a bill or amend it in a way that is incompatible

with the views from England (or England-and-Wales). However, a government which believed that such action was essential and was prepared to pay the price in the time taken to agree a motion to set aside the earlier decision could not be prevented from going ahead.

The double-count

218. The criticism in paragraphs 187–189 directed at the double-lock does not attach to what may be described as the double-count.⁸² Like the double-lock, we believe that this procedure would be practical only on the second or third reading of a bill.

219. The balance of the votes from England (or England-and-Wales) would be announced as well as – though probably slightly later than – the result of the overall vote.⁸³ **In the double-count, the determining majority would be that in the overall vote, as has always been the case. But if a government was seen to have failed to attract the support of a majority of MPs from England (or England-and-Wales) for business affecting those interests, it would be likely to sustain severe political damage.**

220. This proposal would not formally make any procedural change to the present

⁸² A kind of double-count existed in the US House of Representatives between 1993 and 1995 and again between 2007 and 2011. The four (later five) Delegates and the Resident Commissioner, though not strictly Members of the House, were permitted to vote in the Committee of the Whole. The House had, however, the immediate and automatic ability to reconsider any such vote where the Delegates' vote was decisive in the outcome in Committee, as happened on several occasions. (The Delegates and the Resident Commissioner are returned by American territories such as Guam which are not States of the Union.) (W McKay and C Johnson (2012) *Parliament and Congress: Representation and scrutiny in the twenty-first century*, p. 115.) It should, of course, be recalled that in the American House votes are counted electronically.

⁸³ Rogers, Natzler and Patrick, Day 1, pp. 187–189.

arrangements regarding voting, other than by requiring the preparation of division lists (which record the names of the MPs participating in a vote) showing which part of the UK each MP represented. Its force would rest on the political consequences for a government which, having won the overall vote, chose to ignore the English outcome.

221. At the moment all division lists show the name of the MP voting and that MP's constituency. We think that it would be a useful general reform if a designation were added in all cases indicating the part of the UK in which the constituency is located.

Committal to a specially-constituted public bill committee

222. We turn now to the possibility of provisions in Standing Orders requiring the committal of appropriate bills to an English (or English-and-Welsh) public bill committee. Unlike the suggestions in preceding paragraphs, were this proposal to be adopted it would be necessary to take a broad view of whether a bill as a *whole* qualified for the procedure, rather than separating out for special treatment parts of the bill where the predominantly English or English-and-Welsh interest was clear and undiluted. That determination would rest principally on the inclusion of provisions with a separate and distinct effect for England (or England-and-Wales) unaccompanied by any provision with a separate and distinct effect elsewhere.

223. However, provisions with an effect elsewhere need not always prevent the committal of the bill to an English (or English-and-Welsh) public bill committee. Effects elsewhere that are no more than supplementary, incidental or ancillary to what is being done for England (or England-and-Wales) should in general be disregarded. Provisions qualifying as no more than supplementary, incidental or ancillary would be likely to include many provisions described

in Part 3. We believe that s 108 (5) of the Government of Wales Act 2006 provides a good precedent for identifying when bills that primarily but not exclusively affect England (or England-and-Wales) can be treated in the same way as those that do. That section gives the National Assembly for Wales legislative competence when it makes provisions for Wales also to make provisions applying to England if they:

- provide for the enforcement in England of the Welsh provisions;
- are otherwise appropriate for making the Welsh provisions effective;
- are incidental to or consequent on the Welsh provisions.

Similar wording could be built into the relevant Standing Order.

224. A further exception which need not disqualify a bill from being sent to an English or English-and-Welsh public bill committee is provisions not covered by the previous paragraph but nevertheless inserted in response to a request from a devolved administration and requiring an LCM. The detail of these provisions would remain capable of being discussed on report, and would in any case have been discussed – or would be soon to be discussed – in the relevant devolved legislature.

225. These provisions would, we believe, allow the House to treat the majority of relevant cases in a straightforward and sensible way. Where they did not, and where it was practicable to do so, a bill which in its entirety failed the “separate and distinct” test could be divided, part being sent to an English (or English-and-Welsh) public bill committee and the non-English remainder to another public bill committee.

226. Under these arrangements, the bill's career would begin in the usual way, with a second reading when all MPs would

be entitled to vote. **Such a public bill committee stage, as we are proposing, would ensure that the voice from England (or England-and-Wales) would be clearly heard** (Annex D4).

227. **The party balance of the committee should be that obtaining in England (or England-and-Wales), rather than that which reflects the overall composition of the House.**⁸⁴ Thus, though most committee members would sit for constituencies in England (or England-and-Wales), there would be no need to make special arrangements to accommodate ministers, shadow ministers and whips who might not represent seats in England or Wales.

228. In addition, when nominating MPs to public bill committees to consider bills defined as we have proposed in paragraphs 130–133 which have cross-border consequences or make provisions with an effect outside England (or England-and-Wales) of the sort described in paragraphs 81 and 223 above, the Committee of Selection (whose responsibility it is to select MPs to serve on public bill committees) might choose MPs from other relevant parts of the UK. The party balance in the committee should remain that of England (or England-and-Wales) and the membership should be substantially from England (or England-and-Wales).

229. After being reported from the public bill committee, the bill would proceed to report stage. At report stage the House currently considers a more limited range of amendments than the public bill committee, some implementing undertakings given by ministers in the committee, some raising new points, and some reconsidering committee decisions of most significance. To these categories could be added amendments reversing changes or proposing compromises

on issues where the specially-constituted public bill committee had come to decisions opposed by the government.

230. **Members who did not participate in the committee stage would be able to take part in the report stage debates. Any compromise amendments agreed between the UK majority and the majority from England (or England-and-Wales) could be written into the bill. Where no compromise was reachable, it would of course remain possible for the UK majority to impose its will.** All MPs could speak and vote on third reading, the final review of the bill.

A report committee

231. **Perhaps the most thoroughgoing English or English-and-Welsh procedure would be first to send an appropriately “separate and distinct” bill to a specially-constituted public bill committee** (paragraph 222ff) **and then to have some further protection for the voice from England (or England-and-Wales) at report stage. In order to deal with any significant amendments affecting England (or England-and-Wales) that emerged late in the bill’s career, the bill could be sent to a report committee** (Annex D5). This is a body which may comprise up to 80 MPs, and on which in this case the balance between the parties would be (as it was in the specially-constituted public bill committee) that obtaining in England (or England-and-Wales).⁸⁵

232. If the report committee amended a bill in a way unacceptable to the UK majority, ministers could move to discharge

⁸⁴ As stipulated in SO No 86 (2) (nomination of general committees).

⁸⁵ Amendments to SO No 92 (1) (consideration on report of certain bills by a general committee) would be required, to add bills separately and distinctly English (or English-and-Welsh) to those qualifying, and to remove the ability of 20 MPs to object to the procedure in that case.

the order for third reading – which would normally follow the conclusion of the report committee’s proceedings – and recommit the disputed parts of the bill to a Committee of the whole House, where of course they would have a majority and could in the end get their bill.⁸⁶

A report committee: an appeal for further consideration

233. In this possibility, **a bill containing provisions with a separate and distinct effect for England (or England-and-Wales) would follow the normal course of committal to a public bill committee (or, if our proposal for public bill committees has been implemented and applied to the bill in question, to a specially-constituted public bill committee). It would then have a report stage on the floor. After report stage, however, a motion might be made to recommit the bill to a committee constituted according to the balance of party representation in England (or England-and-Wales) (Annex D6). The motion would require the committee to consider any amendment made on report which:**

- added, omitted or altered a provision with separate and distinct effect for England (or England-and-Wales); and
- would have been decided differently if all MPs from outside England (or England-and-Wales) had abstained on the division at report stage.

234. It would be reasonable to provide that such a motion for a recommitment should stand in the name of the leader of the largest party in England (or England-and-Wales) not

⁸⁶ There would be no question of an everlasting procedural loop. In such circumstances, only the recommitted parts of the bill are open to debate in the Committee of the whole House, and if the bill is reported from the committee with amendments, the only amendments open to debate on report are those consequential on the changes made in committee.

represented in the government (cf paragraph 205) or, of course, a minister. If, subsequently, a specified number of co-signatories from England (or England-and-Wales) attached their names to the motion, then the motion would be deemed to be agreed.

235. If the committee’s decision on the amendment or amendments committed to it were not acceptable to the government, there would be a limited second report stage on the floor, when the UK majority would have an opportunity to assert its own view or some agreed compromise would be arrived at. The third reading would follow, voted on by the House at large, thus retaining the final and determining decision for the UK majority. In practice this procedure would require third readings of relevant bills to be programmed to take place on different days from their report stages.

Lords Amendments

236. We turn finally to Lords Amendments which add, omit or alter a provision with separate and distinct effect in England (or England-and-Wales). One of the proposed Crossman reforms several decades ago was that **Lords Amendments should be sent to a committee. This would be the simplest way of treating Lords Amendments dealing with matters of controversy affecting only England or England-and-Wales.**⁸⁷

237. If a committee, the membership of which reflected the political balance in England (or England-and-Wales), made a recommendation regarding a Lords Amendment which the government found unacceptable, they might move the House

⁸⁷ Gallagher, Day 3, p. 52. Where (as often happens) the Lords Amendments were technical or not contentious, the procedure might be dispensed with. Regular disapplication of any procedural provision is not in general advisable, but in this case there seems to be no alternative.

to reject the committee's conclusions and substitute their views. Should a government be disposed to agree with the committee, there presumably would not need to be a debate.

Primary legislation: our recommendations

238. In general, we have concluded that:

- whatever methods are favoured, the House should devise procedures for the consideration of bills making separate and distinct provision for England (or England-and-Wales);
- new procedures which are independent of a bill's legislative progress and do not require interpretation of the phrase "separate and distinct" have the merit of greater directness and simplicity, and are correspondingly less likely to ignite serious political controversy; and
- none of our proposals is a complete panacea, and all contain an element of complexity. Nevertheless, we believe that all are practicable, either altogether or in different combinations.

239. In particular, we conclude that:

- an equivalent to a legislative consent motion (LCM) in Grand Committee or on the floor (paragraphs 204–217) before second reading would be a useful procedure;
- use of a specially-constituted public bill committee with an English or English-and-Welsh party balance (paragraphs 222–230) is the minimum needed, as an effective means of allowing the voice from England or England-and-Wales to be heard; it would retain the opportunity at report stage for amendments to be made to a bill to implement compromises between the committee's amendments and the government's view, or even – though we

expect rarely – overriding in the House what was done in committee;

- that procedure might, however, be disapplied in a particular case, provided that either (a) a motion under the LCM-analogy procedure (paragraphs 205 and 209) or (b) a debatable motion disapplying committal to a specially-constituted public bill committee (paragraphs 226–227) had been agreed to;
- the English (or English-and-Welsh) report committee and the appeal after report to a similar report committee (paragraphs 231ff and 233ff) are practicable and no less effective than the other options, though they depart further than other suggestions from familiar bill procedures, perhaps rendering them more likely to give rise to controversy;
- a specially-constituted committee for relevant Lords Amendments (paragraphs 236–237) would be straightforward in operation;
- pre-legislative scrutiny (paragraphs 198–203) is also likely to be useful, but only when circumstances allow; and
- the double-count (paragraphs 218–221) is a good indicator of the views of MPs from England (or England-and-Wales), but its impact might be easily disregarded.

240. These recommendations, all of which, as we have said, we believe to be practicable, should be regarded as a menu from which the Government might wish to make a selection for implementation. Thereafter, once the House has considered the Government's procedural recommendations and taken its decision, the favoured options would then be applied, according to the circumstances of each bill.

Delegated legislation

241. We now turn to the complicated matter of delegated legislation or statutory instruments. These present issues similar to but not identical with those of bills. We think that so far as is practicable our proposals should also apply to secondary legislation.

242. When a motion is tabled “praying” for the annulment of or otherwise disapproving an instrument – the commonest type of parliamentary control – the government may move in the House to send the instrument to a Delegated Legislation Committee (a general committee akin to a public bill committee). That committee will debate the matter on the open question “that the Committee has considered the instrument”.⁸⁸ It would be consistent with our previous recommendations that, in appropriate cases (where the instrument satisfies the test – paragraphs 222–224 – comparable to that we have proposed for the English or English-and-Welsh public bill committee), the party balance of committee members entitled to vote⁸⁹ should be that in England (or England-and-Wales).

243. It is possible – if unusual – for a government to invite the House as a whole to consider a motion to annul an instrument. In such a case, where the instrument satisfies the test mentioned above, it might be agreed to arrange to have the instrument first considered on the usual open question in a Delegated Legislation Committee appropriately constituted. This would allow the view from England (or England-and-Wales) to be expressed before the debate on the floor of the House on any substantive motion expressing disapproval.

244. Instruments subject to the *affirmative* procedure, when the purpose is usually the approval of a draft instrument, may be considered either in a Delegated Legislation Committee or on the floor of the House. An affirmative instrument standing referred to committee is debated on an open question, but when reported to the House a motion for approval (the details varying according to the parent Act) is put without debate. An affirmative instrument taken on the floor of the House without being first committed is debated on the appropriate substantive motion for approval.

245. The unusual circumstances in paragraph 243 apart, the House of Commons takes substantive decisions on statutory instruments only on those subject to the affirmative procedure. Where an affirmative instrument satisfying the comparable test suggested above is reported by a committee, the views of MPs representing constituencies in England (or England-and-Wales) as expressed in debate *in committee* will usually be available before the final decision is taken, without further debate, on the floor.

246. Where, following debate *on the floor* to approve such instruments, a double-count (see paragraphs 218–219) reveals that there was not an English (or English-and-Welsh) majority in favour of the motion, the motion might be declared not to have been agreed to and referred to a Delegated Legislation Committee appropriately constituted. Following the debate in committee, the substantive motion might again be put in the House, this time without debate.

247. We recommend that our proposals for primary legislation be adapted to the different procedures followed by statutory instruments, where the instruments amend the law in England (or England-and-Wales).

⁸⁸ The proportion of such motions sent to a Delegated Legislation Committee is not high.

⁸⁹ Any MP may attend such a committee and speak, but only members of the committee may vote.

Next steps

248. **We envisage that the Government would first make an assessment of our proposals and put before the House those which it has concluded offer the best prospects of satisfying the demand in England for a voice in the making of legislation, primary or secondary, for England.**

249. **When the House has expressed its views, we suggest that the Government should move for a select committee to advise the House on the details, including:**

- assessing the relative robustness of each of the preferred options;
- examining the detail of what is needed to make the preferred options viable; and
- determining a number of related matters of detail which are set out in Annex C.

PART 7 – A Devolution Committee

A legislative partnership

250. For a decade and a half, the varying competences of the three devolved legislatures have all been extended, according to the varying trajectories of the devolution settlements. This is a process which is likely to continue. The impact on the Parliament at Westminster has been limited. Professor Jim Gallagher concluded:

Devolution was a remarkable disruption to the highly centralised British state, but it changed the institutions of Westminster and Whitehall hardly at all. Westminster in particular sailed on as if nothing had changed.⁹⁰

251. Though as we mention below there were some changes at Westminster, we see a need to review the parliamentary contribution to the operation of the complex and developing system of devolution, given the creation of what has been called a legislative partnership, as one of the more significant “consequences of devolution for the House of Commons”.

252. Attention has already been given to the need to update governmental (as opposed to parliamentary) systems of co-operation. Following the report of the House of Commons Justice Committee entitled *Devolution: A decade on*⁹¹ in 2008–09, the then Government conceded that “there

is room to improve the level of awareness and understanding about devolution” in government departments.⁹² The devolution machinery in the Cabinet Secretariat was strengthened, and the Joint Ministerial Committee, described by the select committee as “the central apparatus for inter-governmental relations within the UK”, was revived.

253. As far as inter-parliamentary relations were concerned, there was early progress. Soon after the enactment of the first devolution statutes, the Commons Procedure Committee recommended that “there should be as few procedural barriers as possible to co-operation between Members of Parliament and Members of other legislatures, where such co-operation is desired.”⁹³ Most Commons select committees have power to communicate their evidence to any of the three devolved legislatures or their committees (though in fact we understand that this has been overtaken by the practice of putting evidence on the committee websites).

254. In 2005 relations with the Scottish Parliament and National Assembly for Wales were added to the orders of reference of the Scottish and Welsh Affairs Committees. In June 2004, powers were given to the Welsh Affairs Committee of the House of

⁹⁰ Gallagher, Submission 23.

⁹¹ House of Commons Justice Committee (2009) *Devolution: A decade on. Fifth Report of Session 2008–09* (HC 529).

⁹² HM Government (2009) *Devolution: A decade on. Government response* (Cm 7687), responses to recommendations 5 and 16.

⁹³ House of Commons Procedure Committee (1999) *Fourth Report of Session 1998–99* (HC 185), para 5.

Commons (at its request) to invite members of any committee of the National Assembly to attend and participate in its proceedings. Though such meetings have not taken place very recently, the committee has since reported frequent contacts, formal and informal, with the National Assembly, Welsh government ministers and Assembly Members.⁹⁴ We would not wish our own proposals (in paragraph 259ff) to inhibit these initiatives in any way.

255. There have been observers who looked for parliamentary co-operation on a much broader front. In 2002–03, the Constitution Committee of the House of Lords reported in favour of legislature-to-legislature communication. More recently, in the interests of “greater interchange and understanding”, the Justice Committee in the Commons suggested a forum bringing together Members of the UK Parliament and of the three devolved legislatures. The Calman Commission on Scottish Devolution commented in 2009:

Other than the Sewel Convention, relatively few inter-parliamentary mechanisms, and arguably insufficient formal mechanisms for communication exist between the Parliaments. As the evidence we received from the House of Commons itself notes, “there is no single authorised channel of communication between the House of Commons and the Scottish Parliament, and there is no central oversight of those relationships which do exist”.⁹⁵

⁹⁴ House of Commons Welsh Affairs Committee (2004) *Second Report of Session 2003–04* (HC 178); House of Commons Welsh Affairs Committee (2005) *First Report of Session 2004–05* (HC 256), paras 29–37 and 44–45; Williams, Day 1, pp. 178–179; Rogers, Natzler and Patrick, Day 7, pp. 15–18; and see Morgan, Day 5, p. 38.

⁹⁵ Commission on Scottish Devolution (2009) *Serving Scotland Better: Scotland and the United Kingdom in the 21st century*, para 4.52.

256. That Commission recommended *inter alia* the establishment of a standing joint liaison committee to oversee relations and to consider the establishment of subject-specific ad hoc joint committees.⁹⁶ A range of other more detailed proposals followed, all directed at closely integrating the working of the two bodies in areas of common concern. Little progress seems to have been made with these initiatives.

257. Several of those who gave evidence to us clearly recognised a broad need to improve inter-parliamentary relations. Lord Robertson of Port Ellen “strongly believed” that co-operation of this kind was the “missing dimension after devolution took place”.⁹⁷ The sentiment was echoed by Mr Henry McLeish, formerly an MP, UK minister and First Minister of Scotland:

There is not a sense at Westminster that devolution means anything other than three pieces of legislation that were passed in 1998 ... Anything that could be done to actually bring the Parliaments and the governments together would be helpful ...⁹⁸

258. Mr Gerald Holtham too deplored the non-awareness of the implications of devolution in Parliament (and government),⁹⁹ and Mr Barry Winetrobe took the view that “inter-parliamentary relations [had] been a missing link in the whole devolution issue for the last twenty years or so”.¹⁰⁰

⁹⁶ *ibid.*, paras 4.139–4.149.

⁹⁷ Lord Robertson, Day 3, p. 178.

⁹⁸ McLeish, Day 3, p. 203. Dr Rhodri Morgan, a former First Minister of Wales, found the proposition that steps should be taken to make Westminster more aware of what the devolved legislatures think “hard to disagree with” (Day 5, p. 40).

⁹⁹ Holtham, Day 6, p. 24.

¹⁰⁰ Winetrobe, Day 5, p. 174.

The Devolution Committee

259. At paragraph 101, we indicated the appointment of a select committee of the House of Commons as a means of recognising and holding UK ministers to account for the legal and policy effects of cross-border spillovers – a Devolution Committee. We consider that such a body could in fact sustain a broader role in the context of a more articulated Westminster response to the challenges of devolution. Our proposals are incremental and do not envisage the immediate implementation of the kind of far-reaching reforms urged on governments over the past decade and a half, and they are not intended to cut across the responsibilities of any other select committee.

260. The Devolution Committee, in common with others such as the Joint Committee on Human Rights, might be expected to operate in a non-party-political way and, where it considers legislation, to do so in parallel with the House's more formal procedures for legislative scrutiny and in order to supplement and inform them. Expert advice and evidence would be readily available. Committee members would no doubt come to accumulate their own expertise, as the experience of other committees has demonstrated. No other type of body would be as appropriate to undertake such a sensitive constitutional task. At the same time, it will be of critical importance that the committee should in its order of reference be clearly distanced from matters of policy for which the devolved legislatures and administrations are responsible. This proposal is in no sense intended to challenge devolution, but to improve relevant decision-making at the UK level.

261. How the role of the committee might evolve over time remains to be seen, but we are confident that it would be in a position to become a key player in developing

Westminster's contribution to the co-operative aspect of devolution.

262. The membership of the committee is a matter for the House, but we suggest that it might be logical to build on the structures already in place which link Westminster to the devolved areas. The chairs of the three territorial select committees might be members of the committee *ex officio*, along with the chair of the Political and Constitutional Reform Committee. Subject to the practice of the House in electing members of select committees, the Devolution Committee might be expected to comprise MPs from across the UK, including England.

Legislative consent motions

263. One of the Devolution Committee's first concerns should be the system of legislative consent motions (LCMs), which are dealt with in detail at paragraphs 82–87.

264. These motions are an important connector in devolution, linking the devolved law-making bodies and Westminster, and concern has been expressed about the working of the system. The Committee on Procedures of the Northern Ireland Assembly¹⁰¹ recognised in 2009 that:

the current processes had been developed over time to meet circumstances. While they were adequate for purpose, there was potential not only to provide new and clearer guidance, but also to introduce processes which may encourage others to take a more active role.

265. A Committee of the Scottish Parliament a little earlier criticised the working of the LCM procedures for having “created the perception

¹⁰¹ Committee on Procedures of the Northern Ireland Assembly (2009) *Fourth Report of Session 2008–09: Legislative Consent Motions*, Executive Summary, para 1.

of an Executive-driven process in which the parliamentary role is secondary".¹⁰²

266. One of our academic witnesses told us:

As far as Westminster is concerned, this is something that happens in the background and governments tell them about. That is not right. There ought to be inter-parliamentary arrangements for that which are recognised in the institutions of Parliament. ... They should be communicated from one Parliament to the other ... [and] not merely be something transmitted by the minister from the front-bench.¹⁰³

267. We agree. **Giving LCMs a more formal status in a more clearly structured, explicitly parliamentary communication between Westminster and the devolved legislatures would answer the criticism and would emphasise the co-operative nature of the law-making process after devolution.** We see little advantage in the Calman proposal that the convention upon which the LCM procedure is based should be entrenched in parliamentary Standing Orders. Bringing the Westminster aspect of the LCM process within the responsibility of the Devolution Committee would be a more flexible approach.

268. In the meantime, however, we make suggestions of our own for the better working of the LCM system which can be implemented before the appointment of a committee, and will also illustrate the kind of issues with which we envisage that the Devolution Committee will be concerned.

269. Means of informing the House of Commons of a devolved body's agreement to an LCM vary. In the cases of the Northern Ireland Assembly and the Scottish Parliament,

the passing of an LCM is communicated by the Clerks in Belfast and Edinburgh to their counterparts at Westminster.¹⁰⁴ An LCM agreed by the National Assembly for Wales is transmitted by the Welsh Assembly Government to the relevant UK department, which passes it on to the House authorities¹⁰⁵ (though the Clerk of the National Assembly for Wales would welcome the establishment of "legislature-to-legislature communication" on the Scottish and Northern Irish pattern).

270. Informing MPs that an LCM relevant to a bill has been received by means of a note in the appropriate place on the Order of Business was recommended by the Procedures Committee of the Scottish Parliament in 2005 and repeated by the House's own Scottish Affairs Committee.¹⁰⁶ A "tag" – a short note on the Order of Business referring to an LCM under a pending stage of a bill – is now normal practice following appropriate communications from Belfast and Edinburgh.

271. No such system exists in respect of LCMs agreed in Cardiff. We believe that the Clerk-to-Clerk method is the more appropriate one, and that the receipt of an LCM from any of the devolved legislatures should be routinely recorded in the Votes and Proceedings, the formal record of the House of Commons, as well as on the Order

¹⁰⁴ Clerk/Chief Executive to the Scottish Parliament, Submission 53; Committee on Procedures of the Northern Ireland Assembly, *op. cit.*, para 44. See also Scottish Parliament Procedures Committee, *op. cit.*, paras 124 and 206; and House of Commons Scottish Affairs Committee (2006) *Fourth Report of Session 2005–06* (HC 983) and *Second Special Report of Session 2005–06* (HC 1634).

¹⁰⁵ Rogers and Patrick, Day 7, pp. 1–3; Clancy, Chief Executive and Clerk, National Assembly for Wales Submission 52.

¹⁰⁶ Scottish Parliament Procedures Committee, *op. cit.*, para 204; House of Commons Scottish Affairs Committee (2006) *Fourth Report of Session 2005–06* (HC 983).

¹⁰² Scottish Parliament Procedures Committee (2005) *7th Report 2005 (Session 2)*, para 135.

¹⁰³ Gallagher, Day 3, p. 81.

of Business when the relevant bill is before the House.

272. When an LCM is tagged on the Order of Business, a copy is readily available to MPs who wish to read it. When the bill is before a public bill committee, no intimation of the existence of an LCM is made, and the text is not available in the room.¹⁰⁷ It would be a useful improvement if the Chair of the public bill committee formally announced the existence of an LCM if – and otherwise as soon as – it has been received, and copies were made available.

273. **We further believe that it would be good practice for a minister in charge of a bill in respect of which an LCM is available to be invited by the Chair to make such a statement (at the outset of proceedings or as soon as an LCM is received) on its contents as he or she may wish. The statement ought to cover circumstances in which no LCM has been agreed but it is expected, on the basis of consultations between the governments, that one will be moved on behalf of the devolved administration.**

274. **Analogous procedures should be put in hand when a bill to which an LCM is relevant is considered on report in the House.** In December 2011 the Scottish Parliament agreed to a series of general and detailed provisions in the Welfare Reform Bill, but concluded by urging the UK Government to reconsider the bill and the underlying policy. The National Assembly for Wales demurred at a proposal connected with certain supervisory bodies proposed in the Police and Social Responsibility Bill 2010–11; and the Northern Ireland Assembly failed to carry – because the majority was

not sufficient¹⁰⁸ – an LCM in connection with the Crime and Courts Bill 2012–13. Where such decisions have been taken before the last stage of debate on the relevant bill in the House of Commons, MPs ought to be made aware of the devolved legislature’s view by the responsible minister.

The Devolution Committee’s scrutiny role

275. In the context of scrutiny, we believe that **the Devolution Committee should be a central element in the machinery by which the House of Commons holds UK ministers to account for their responsibilities in connection with devolution and their relations with the devolved administrations.** While the existing “territorial” select committees – Northern Ireland, Scottish and Welsh Affairs – take evidence from the appropriate Secretary of State on matters arising from the devolutionary process as it affects the relevant part of the UK, we think that there is a need to look across the process as a whole so far as it impacts on or concerns the responsibilities of the House of Commons for the whole UK, including England.

276. In the context of legislation, the committee would provide a framework for discussing and examining the incidental consequences of legislation for England (or England-and-Wales) separately from its content. It would also, where appropriate for the UK Parliament, consider the consequential effects that flow in the other direction.

277. The committee could, for instance, consider whether policy for England (or

¹⁰⁷ Rogers, Natzler and Patrick, Day 7, pp. 5–6.

¹⁰⁸ The Belfast/Good Friday Agreement requires that certain decisions of the Northern Ireland Assembly must have cross-community support to be passed. The provision and operation of cross-community votes are considered in more detail at <http://test.niassembly.gov.uk/io/research/factsheets/govseries04.pdf>

England-and-Wales) should necessitate legislation elsewhere; the financial cross-border effects of decisions for England (or England-and-Wales) – the “Barnett consequentials” – including those that require legislation to be implemented; and the incidental spillover effects in other parts of the UK of decisions taken for England (or England-and-Wales).

278. The committee should also be expected to:

- report to the House on difficulties and unusual circumstances occurring generally or in the course of a bill’s career, which may arise from whatever procedures are adopted in dealing with legislation affecting only England (or England-and-Wales). For example, if an MP believed that a public bill committee with a majority based on representation in England might not have given appropriate scrutiny to incidental clauses effective outside England, he or she could draw the attention of the Devolution Committee to the case, and if appropriate the latter could consider the matter and report to the House;
- have referred to them LCMs received from the devolved legislatures, and evaluate any necessary improvements to the system discussed in paragraphs 82–87, drawing to the attention of the House developments or difficulties (including difficulties between the UK Government and the devolved administrations) of which the House at large needs to be aware; and
- scrutinise Orders in Council which modify the law for England (or England-and-Wales) consequent on an Act of the Scottish Parliament or of the Northern Ireland Assembly¹⁰⁹ and are laid in

draft before the UK Parliament. Their cross-border significance should not be overlooked, and the membership of the Devolution Committee, on which all parts of the UK (including England) would be represented, would be particularly appropriate for the oversight of this legislation.

¹⁰⁹ s 104 of the Scotland Act 1998 and s 86 of the Northern Ireland Act 1998

ANNEX A – Commissioners' biographies

Sir William McKay KCB (Chairman)

Sir William entered the service of the House of Commons in 1961 and was Clerk of the House from 1998 to 2002. Since retirement, he has served on several bodies that consider complex legal and constitutional matters, including the Legal Questions Committee of the General Assembly of the Church of Scotland, and as an observer on the Law Society of Scotland's ruling Council.

Professor Yvonne Galligan

Professor Galligan holds a Chair in Comparative Politics at Queen's University Belfast. She is also the Director of the University's Gender Initiative and of the Centre for the Advancement of Women in Politics. She was a Fulbright Scholar at American University Washington, DC in 2005–06, and held a President's Award at the Australian National University in 2009–10. Professor Galligan has written extensively on questions of political and parliamentary representation. She provides expertise on gender politics, institutional reform and political representation to a wide range of parliamentary bodies, including the Council of Europe, the Northern Ireland Assembly, the Irish Parliament and the European Parliament.

Professor Charlie Jeffery

Professor Jeffery has held a Chair in Politics at the University of Edinburgh since October 2004 and is currently Vice Principal for Public Policy and Impact at the University.

He directed the Economic and Social Research Council's research programme on Devolution and Constitutional Change from 2000 to 2007. He was a member of Council of the Economic and Social Research Council from 2005 to 2011. He has been adviser to the House of Commons Select Committee on the Office of the Deputy Prime Minister, the Committee on Standards in Public Life, the EU Committee of the Regions, the Commission on Scottish Devolution and the Scotland Bill Committee of the Scottish Parliament. He chairs the Political Studies Association of the UK.

Sir Emyr Jones Parry GCMG

Sir Emyr is the President of Aberystwyth University. He is the former British Permanent Representative to the United Nations and former UK Permanent Representative on the North Atlantic Council (NATO). From 2007 to 2009 he chaired the All Wales Convention.

Sir Stephen Laws KCB QC

Sir Stephen was called to the Bar in 1973. He joined the Civil Service in 1975 and the Office of the Parliamentary Counsel in 1976. Sir Stephen was First Parliamentary Counsel from 2006 to January 2012. In that capacity, he was the permanent secretary in the Cabinet Office responsible for the Office of the Parliamentary Counsel and the Offices of the Government's Parliamentary Business Managers. Sir Stephen was an adviser to different governments on parliamentary and constitutional matters and, throughout

his Civil Service career, was involved in the drafting and procedural handling of government legislation. He is a Senior Associate Research Fellow at the Institute of Advanced Legal Studies.

ANNEX B – List of witnesses and other sources of evidence and expertise

Those who gave evidence to the Commission in public sessions

Graham Allen MP

Denis Arnold

Professor Arthur Aughey

Dr Sarah Ayres

Harriett Baldwin MP

Rt Hon David Blunkett MP

Professor Simon Bulmer

Campaign for an English Parliament
(represented by Scylla Cullen and
Eddie Bone)

Professor John Curtice

Democratic Unionist Party (represented by
Alastair Ross MLA and Lee Reynolds)

The English Democrats (represented by
Robin Tilbrook)

Barry Fitzpatrick

Professor Jim Gallagher CB FRSE

Professor David Heald

Gerald Holtham

Rt Hon Dr Kim Howells

Bernard Jenkin MP

Professor Michael Keating

Emyr Lewis

Liberal Democrats (represented by Lord Tyler
and Lord Marks of Henley-on-Thames QC)

Local Government Association (represented
by Councillor Sir Merrick Cockell)

Guy Lodge

John W Mackay

Manchester City Council (represented by
Councillor Jim Battle)

Henry McLeish

David Melding AM

Rt Hon Rhodri Morgan

David Natzler (Clerk Assistant,
House of Commons)

Newcastle City Council (represented by
Councillor Nick Forbes)

Northern Ireland Committee of the Irish
Congress of Trade Unions (represented by
Pamela Dooley and Patricia McKeown)

Northern Ireland Women's European Platform
(represented by Elizabeth Law)

Rachel Ormston

Simon Patrick (Clerk of Bills, House of
Commons)

Professor Charles Pattie

Plaid Cymru (represented by Hywel Williams
MP)

Dawn Purvis

Rt Hon Peter Riddell

Rt Hon Sir Malcolm Rifkind KCMG QC MP

Rt Hon Lord Robertson of Port Ellen
KT GCMG Hon FRSE PC

Sir Robert Rogers KCB (Clerk of the House of Commons)

Scottish National Party (represented by Pete Wishart MP)

Sheffield City Council (represented by Councillor Harry Harpham)

Social Democratic and Labour Party (represented by Mark Durkan MP)

Professor Thomas Watkin

Professor Daniel Wincott

Barry K Winetrobe

Those who provided written evidence to the Commission

Graham Allen MP

Alliance Party

Denis Arnold

Dr Robin Asby

Professor Arthur Aughey

Dr Sarah Ayres

Kieran Bailey

Harriett Baldwin MP

Sir Brian Barder KCMG

Councillor Jim Battle

Dr Paul Behrens

Rt Hon David Blunkett MP

Professor Vernon Bogdanor CBE FBA

Professor Simon Bulmer

Dr Paul Cairney

Campaign for an English Parliament

Chief Executive and Clerk to the National Assembly for Wales

Clerk/Chief Executive to the Scottish Parliament

Clerk/Director General to the Northern Ireland Assembly

Stewart Connell

Conservative Party

Robert Craig

Simon Cramp

Professor John Curtice

David T C Davies MP

Democratic Unionist Party

Councillor Julie Dore

The English Democrats

The English Lobby

Barry Fitzpatrick

Councillor Nick Forbes

Lord Foulkes of Cumnock

Professor Jim Gallagher CB FRSE

Councillor John Gillingham

Lady Hermon MP

Gerald Holtham

Bernard Jenkin MP

Professor Michael Keating

The Law Society of Scotland

Emyr Lewis

Liberal Democrat Parliamentary Team for Cornwall (consisting of Stephen Gilbert MP, Dan Rogerson MP and Andrew George MP)

Liberal Democrats

Local Government Association

Guy Lodge

John W Mackay

David Melding AM

Dr Gareth Mulvenna

Colin Neve

Northern Ireland Committee of the Irish
Congress of Trade Unions
Northern Ireland Women’s European Platform
Rachel Ormston
Parliament for Wales Campaign
Simon Patrick (Clerk of Bills,
House of Commons)
Professor Charles Pattie
George Pender
Plaid Cymru
Dawn Purvis
Rt Hon Peter Riddell
Rt Hon Sir Malcolm Rifkind KCMG QC MP
Rt Hon Lord Robertson of Port Ellen
KT GCMG Hon FRSE PC
Sir Roger Sands KCB
Scottish Affairs Committee
Scottish National Party
Social Democratic and Labour Party
Sam Trerise
Professor Graham Walker
Professor Thomas Watkin
Professor Daniel Wincott
Barry K Winetrobe

Those who met informally with the Commission

Lord Paul Bew
Dr Paul Cairney
Roger Gough
Professor Robert Hazell
Professor James Mitchell
Alan Trench
Professor Richard Wyn Jones



ANNEX C – Detailed issues for further resolution

The following are some of the more involved issues related to our recommendations which are referred to at paragraph 249:

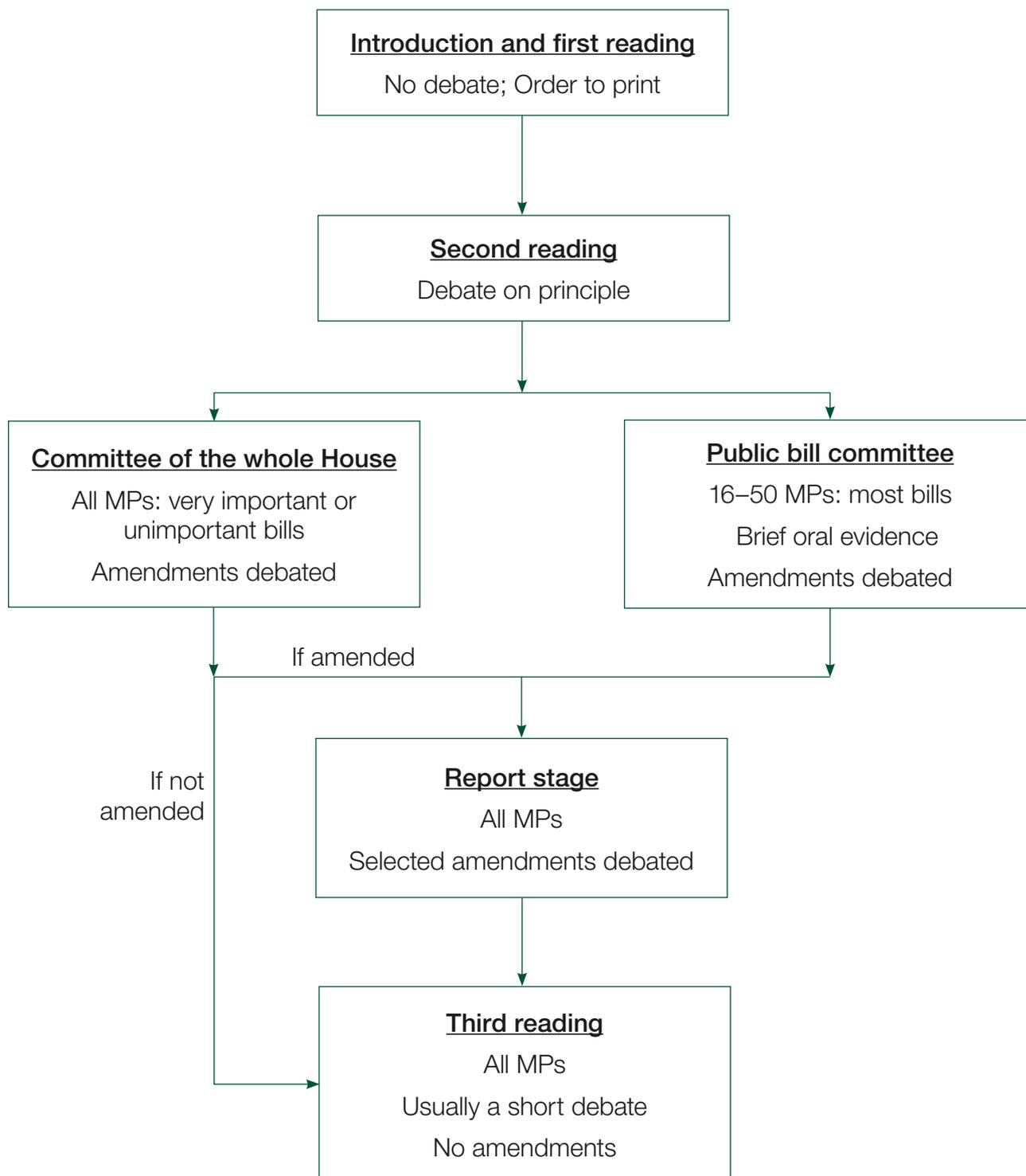
- Integrating any of our proposals with the Standing Orders concerning programme motions will not be easy.¹¹⁰ Applying what is said in paragraph 175 about the price which should be payable for setting aside the protective provisions we have proposed, and aware that SO No 83A already prevents programme motions from setting aside SO No 84A, we believe that it should similarly be impermissible for programme motions to set aside whatever provisions may be made in the Standing Orders to implement our recommendations.
- **Private Members' bills** ought to be included in whatever proposal is found acceptable. Some parts of the procedural options that we suggest are readily applicable to them; others fit the time-restricted opportunities for private Members only with great difficulty (if at all) and government assistance by way of a motion to adjust the rules to smooth the path of an otherwise successful bill or some special arrangement would be necessary – which, though not wholly unprecedented, would be unusual.
- Our proposals concern legislative procedure. There are arguments for not restricting **voting on motions** – Money or Ways and Means resolutions, for example – connected with bills relating only to England (or England-and-Wales).
- We do not think it would be necessary to put any limitation on **Members' rights to intervene in debates** on bills at any stage, even where they represent constituencies in (say) Northern Ireland, and the matter under debate arises only in England. To fetter the right of the Chair to call Members as the debate demands would be wrong.
- In a debate on a bill which makes new law for England or England-and-Wales, should a Scottish Member, for example, be permitted to move what might be called **incidental motions** – for instance, the closure of debate, or a dilatory motion such as the adjournment of the debate? The reasons for such motions are not always derived from the business which the Member seeks to defer or bring to a decision.

¹¹⁰ SO Nos 83A–I of the House of Commons set out the rules which underpin the programming of bills, including in particular means of allocating time to their various stages. See Rogers, Day 2, p. 190 and Day 7, p. 27.

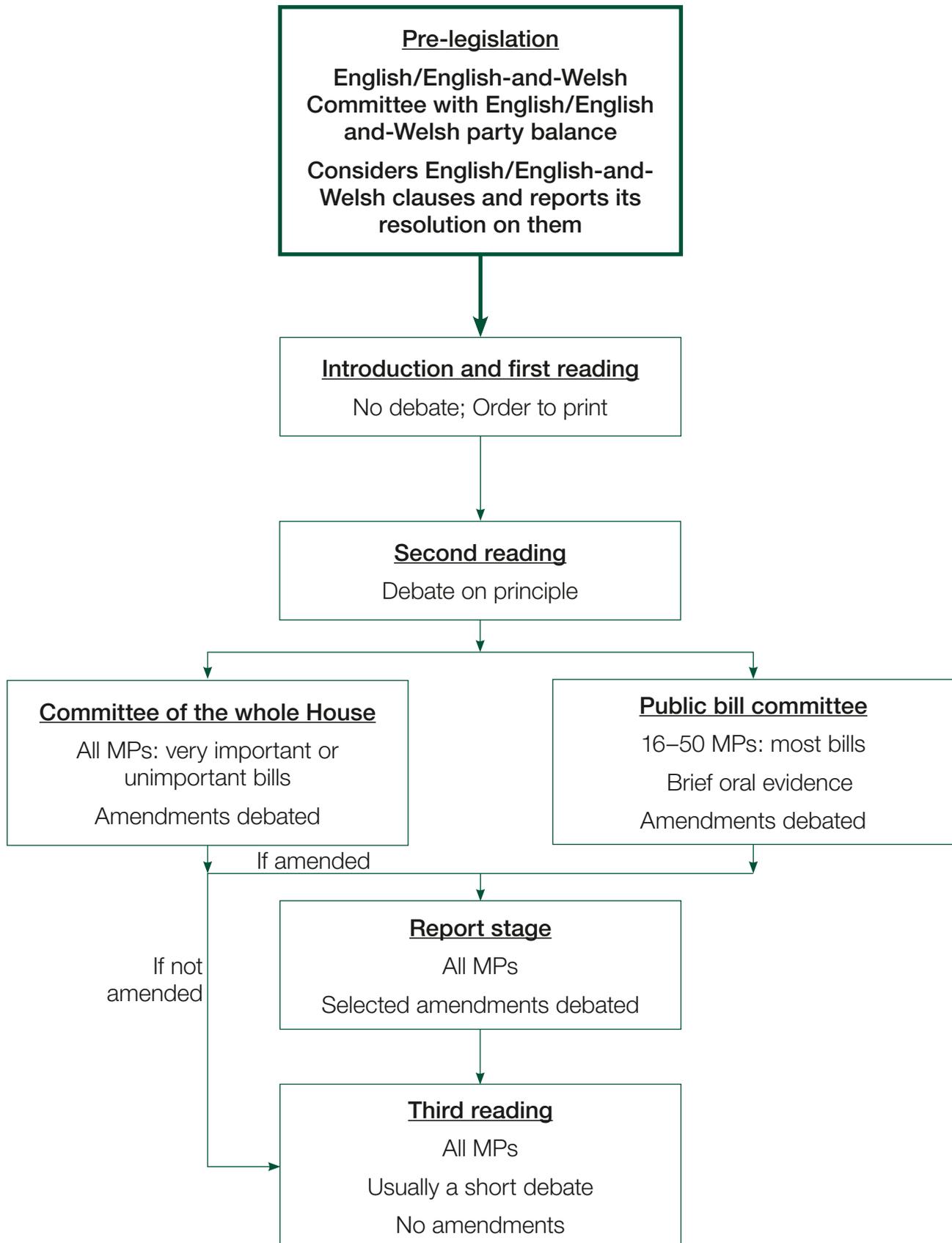


ANNEX D – Procedural change flow diagrams

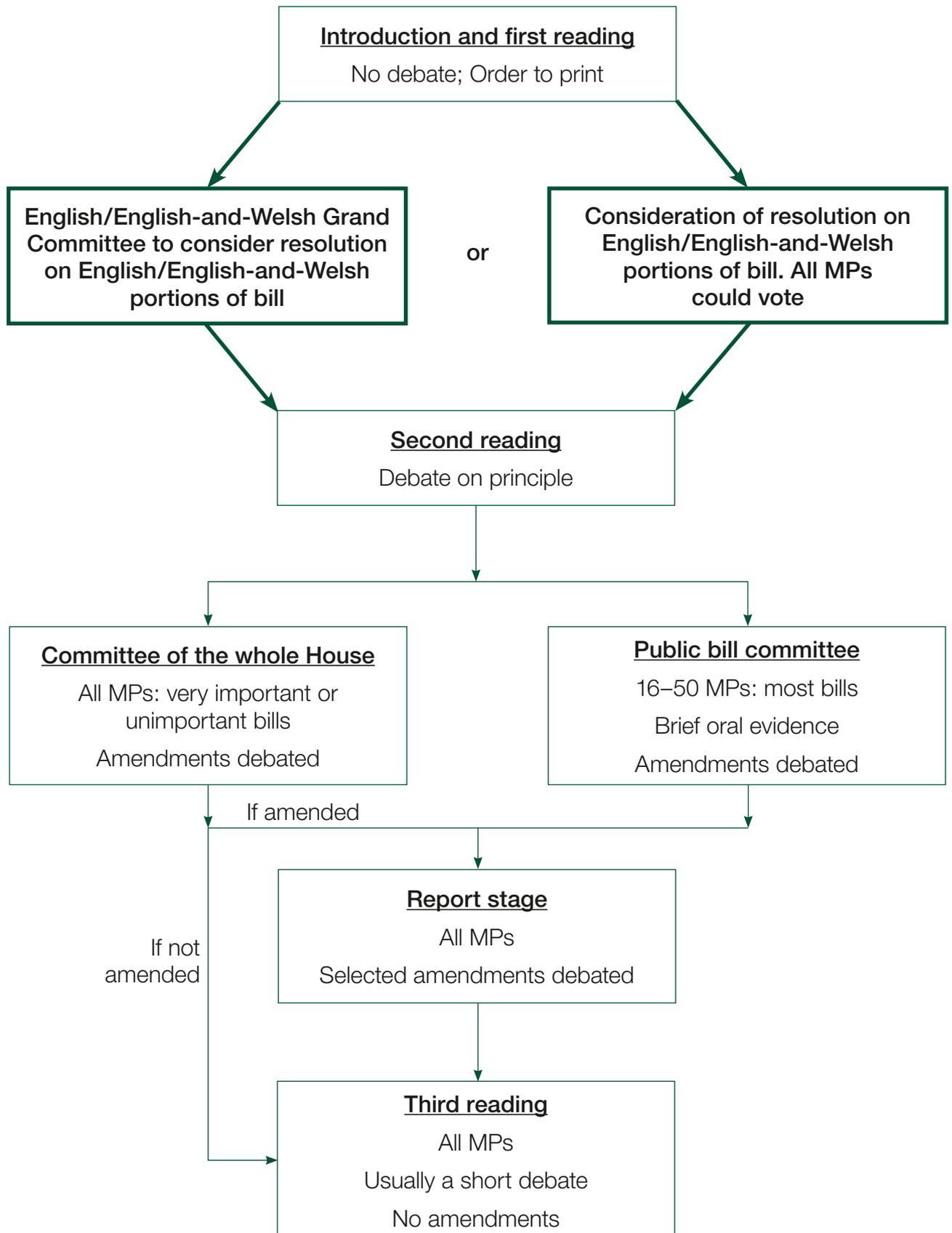
D1: Standard procedure for a government bill (paragraph 198)



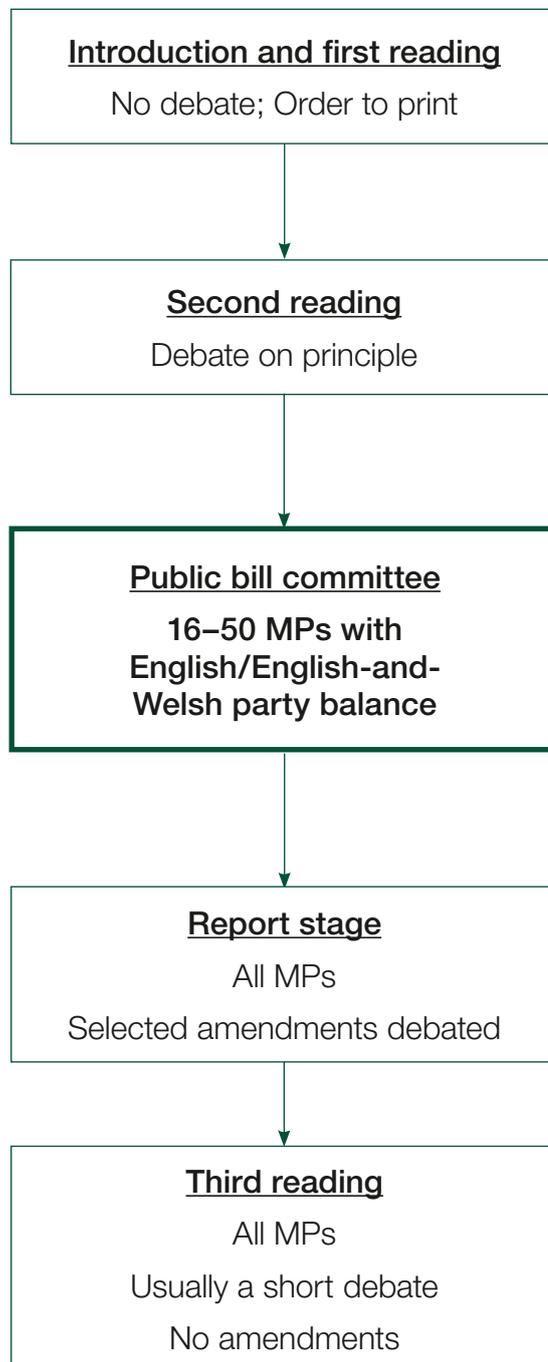
D2: Pre-legislative scrutiny (paragraph 198)



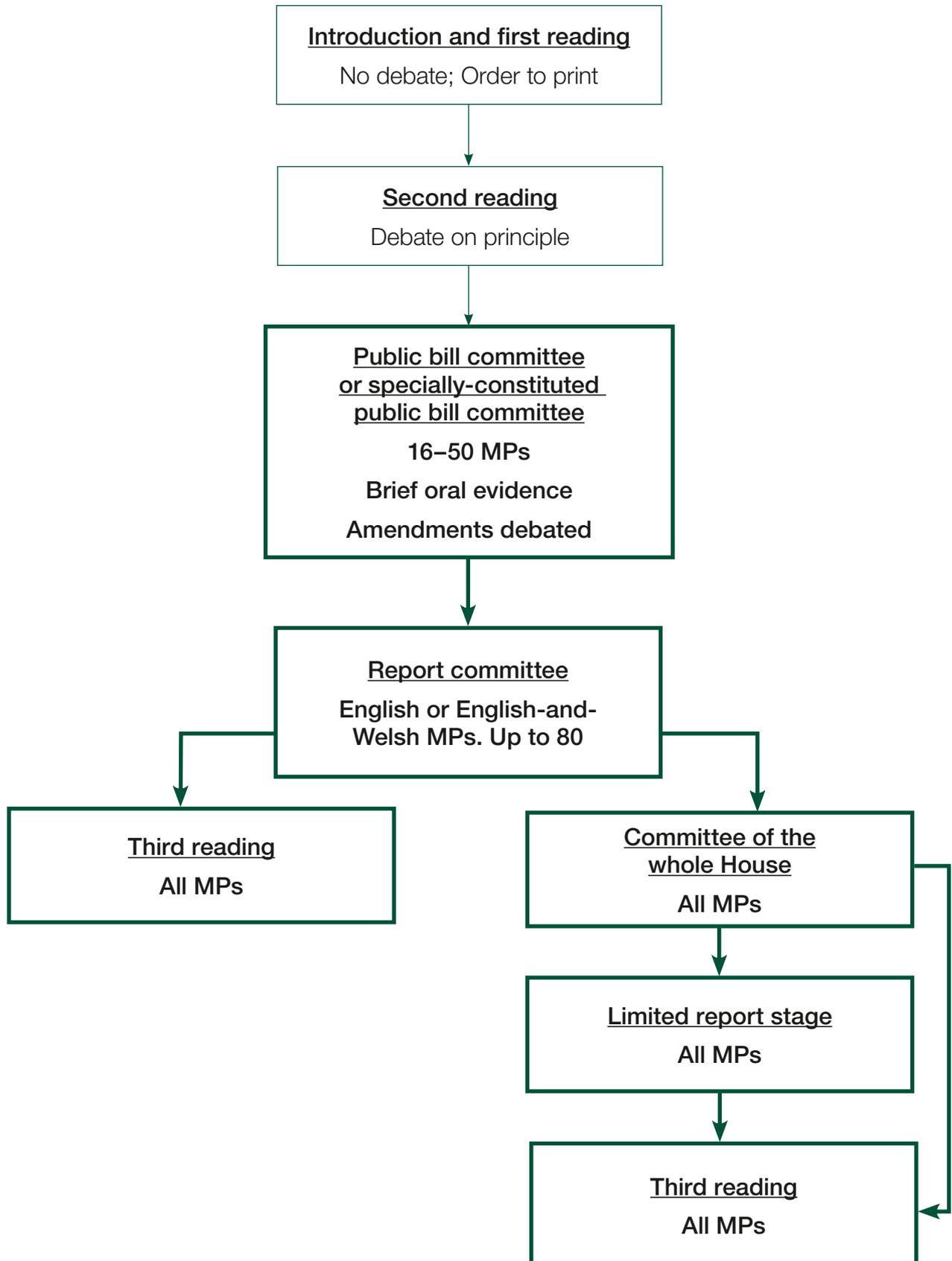
D3: The legislative consent motion (LCM) analogy (paragraphs 204 and 208)



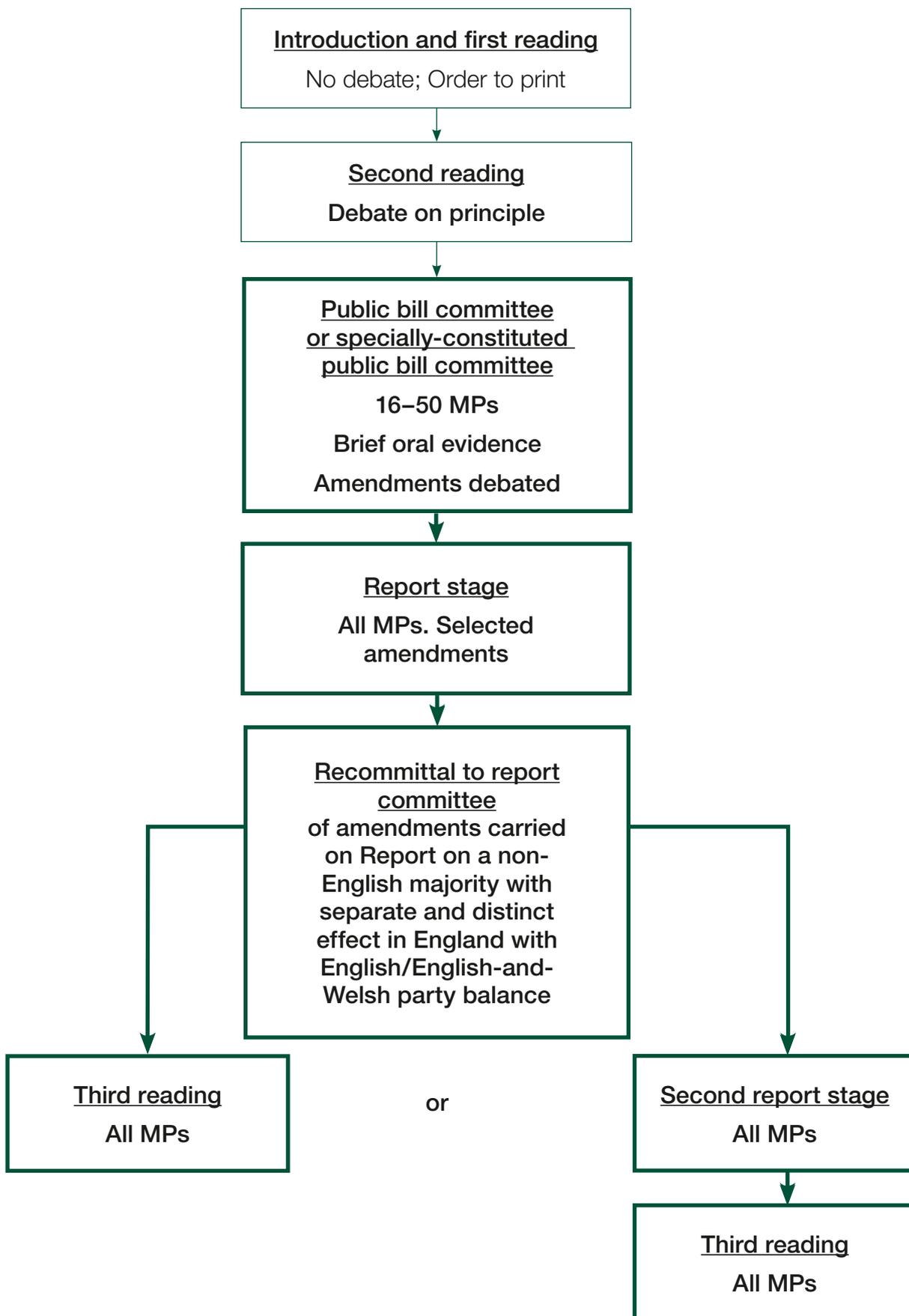
D4: Specially-constituted public bill committee (paragraph 226)



**D5: Report committee (where the bill relates separately and distinctly to England or England-and-Wales)
(paragraph 231)**



D6: Recommittal to report committee (where the bill relates separately and distinctly to England or England-and-Wales) (paragraph 233)



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