



## ***Legislation (Territorial Extent) Bill***

**Bill 10 of 2010-11**

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The *Legislation (Territorial Extent) Bill* is a Private Member's Bill. It was presented by Harriett Baldwin on 30 June 2010, and is due to have its second reading on 11 February 2011. It extends to England, Wales, Scotland and Northern Ireland.

The Bill applies to draft primary legislation and to secondary legislation published before the parent Act has gained Royal Assent. In these cases, it requires that the draft contain a statement setting out its legal effects on each nation of the United Kingdom, and that a memorandum accompany the draft showing its financial effects on each nation.

The Bill also creates new rights. These are for citizens to see how proposed changes in the law will affect them, and for Members of Parliament to see how those changes will affect their constituents. The Bill requires that the provisions of draft legislation are compatible with these rights, referred to as "the principles of legislative territorial clarity." The Secretary of State must make a statement to this effect, or a statement that s/he is unable to do so, but that the Government wishes to proceed nonetheless.

The Bill relates to the so-called West Lothian Question, whereby Members representing constituencies in Scotland, Wales and Northern Ireland may vote on legislation that applies only to England. If this were addressed by having a special way of voting on 'England only' legislation, then the present Bill would provide a means to identify some of those bills.

The Government has announced that it intends to establish a commission to look into the West Lothian Question, a statement on which is expected later this year.

Paul Bowers

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## Summary

The *Legislation (Territorial Extent) Bill* applies to draft primary legislation and to secondary legislation published before the parent Act has gained Royal Assent. The Bill requires that such legislation contain a statement setting out its legal effect on each nation of the United Kingdom. It also requires an accompanying financial memorandum, which will show the financial effects on each nation, including any impact on Barnett formula allocations.

These provisions relate to a possible way of tackling the so-called West Lothian Question. This is an anomaly which arises with devolution whereby MPs from devolved regions may, since they sit in the UK Parliament, vote on legislation that applies to England, even if that legislation does not apply to their own constituency because it concerns devolved subjects. One way of addressing this, known as ‘English votes for English laws,’ rests on certification by the Speaker that particular pieces of legislation affect only England. This would trigger special procedures for considering and/or voting on that legislation. These procedures, which vary from one model to another, would in some way restrict the role of MPs from non-English constituencies. There have been criticisms in the past that this process of certification might not always be simple, and that it might draw the Speaker into political controversy. The Bill evades this, in the case of draft legislation, by passing responsibility to the Secretary of State for identifying the effects on each nation of the UK. Another concern expressed about ‘English votes for English laws’ is that sometimes a bill may apply only to England, but, by depressing public expenditure there, it may have a negative impact on allocations to the devolved regions under the Barnett formula. This would suggest that Members representing constituencies in Scotland, Wales and Northern Ireland would have a direct interest in those bills. This explains the provision in the *Legislation (Territorial Extent) Bill* that the financial memorandum must spell out any impact on Barnett allocations.

The Bill also requires that, subject to an exception, the provisions of draft legislation are compatible with newly defined “principles of legislative territorial clarity.” These principles are that every citizen has a right to see how proposed changes in the law will affect them, and that Members of Parliament have a right to see how they will affect their constituents. The Secretary of State must make a statement that the provisions of the draft legislation are compatible with these principles. The exception is for legislation with which the Government wishes to proceed despite not being able to make such a statement.

## 1 The Bill

The *Legislation (Territorial Extent) Bill* applies to draft legislation. It requires the Secretary of State to ensure that the effects, legal and financial, of that legislation are clearly shown, separately for each nation within the UK. The legal effects should be set out in a statement in the draft legislation, which will state the effect for each nation of each clause and schedule.<sup>1</sup> The financial effects should be set out in a memorandum, and they should include any impact on allocations under the Barnett formula or any successor to it.

In addition, the Bill introduces a new concept, referred to as “the principles of legislative territorial clarity.” This has two parts. On the one hand, every citizen has the right to see how proposed changes in the law will affect them. On the other hand, MPs have the right to see how proposed changes will affect their constituents.

The Bill requires the Secretary of State, when publishing legislation in draft, to make a statement either that the provisions of the legislation would be compatible with these principles, or that s/he cannot make such a statement, but that the Government wishes to proceed in any case. These statements would be laid before each House of Parliament.

**Clause 1** requires the Secretary of State, when publishing draft legislation, to ensure that its effects on England, Wales, Scotland and Northern Ireland are “separately and clearly” identified. The effects are specified as legal and financial.

**Clause 2** defines “draft legislation” as either primary legislation published before a bill is introduced to Parliament, or secondary legislation published before the parent act has gained Royal Assent.

This clause also explains what must be done to satisfy the requirement in Clause 1 for clear and separate identification of the effects of a draft bill or premature statutory instrument. For legal effects, it means that there must be a statement within the draft legislation which sets out the legal effect on each part of the UK of each of its clauses and schedules. For financial effects, the requirement is for a memorandum accompanying the draft legislation, which sets out its financial effects on each part of the UK. This will include any impact on the Barnett formula allocations, or the allocations under any successor formula.

Clause 2 defines the parts of the UK as England, Scotland, Wales and Northern Ireland.

**Clause 3** requires the Secretary of State, when publishing draft legislation, to make one of two possible statements, which must be laid before each House of Parliament. One statement would be that, in his/her view, the provisions in the draft legislation are compatible with the principles of legislative territorial clarity, which are defined later. The alternative statement would be that the Secretary of State cannot confirm this compatibility, but that the Government still wishes to proceed.

**Clause 4** defines the principles of legislative territorial clarity. These are that every UK citizen “has the right to see how proposed changes to the law will affect them” and that MPs have the right to see how those changes will affect their constituents.

## 2 Discussion

### 2.1 West Lothian Question

The Bill is promoted by Harriett Baldwin. She has set it in the context of the West Lothian Question, the issue of Members who represent constituencies in devolved regions voting on

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<sup>1</sup> If the Bill progresses, this would need to be amended, as draft statutory instruments have articles, not clauses.

legislation that does not apply there, because the subject matter is devolved. It is often held that this gives rise to an anomaly, in that some Members vote on legislation that affects others, but not their own constituents.

Some of the approaches that have been suggested to tackle this rest on the idea of identifying those bills, or parts of bills, that give rise to the anomaly, and then debating or voting on them in a special way. The suggested approaches to dealing with the West Lothian Question are discussed in detail in House of Commons Library Standard Note [SN/PC/2586](#), 21 May 2010, which also covers a range of possible issues to arise from proposed solutions, and some analysis of the extent to which the anomaly arises in real terms.

As Leader of the Opposition, David Cameron established a Taskforce on Democracy, chaired by Kenneth Clarke, to look at the West Lothian Question. The report of the Taskforce suggested the following:

- Bills that are certified as 'English' would pass through the normal Commons processes as far as and including Second Reading. The whole House would vote on Second Reading.
- The Committee Stage, however, would be undertaken by English MPs only, in proportion to English party strengths.
- At Report Stage, the Bill would similarly be voted on by English Members only.
- However, at Third Reading the Bill would be voted on again by the whole House. Since no amendments are possible at this stage, the government party would have to accept any amendments made in Committee or at Report or have the Bill voted down and lost.<sup>2</sup>

The report went on:

By limiting the Committee and Report stage of Bills to English MPs, this measure would protect England from having measures that a majority of English MPs found unacceptable being passed by non-English votes. However, its provisions for the Third Reading stage would also protect a government from having measures relating to England which it found unacceptable foisted on it. The great value of this situation, in our opinion, is that it would give both sides an incentive to bargain. This incentive to compromise is critical. Sensible political compromise would offer a way of resolving any potential constitutional crisis.

Ms Baldwin gave the following account of where the present Bill would fit in:

It might be possible to use Standing Orders and Speaker certification to identify which Bills affect which parts of the UK. My private Member's Bill simply calls on draft legislation to identify and outline which parts of the UK it affects. It is a simple piece of preparatory, enabling legislation, and I urge all hon. Members who share an interest in the matter to come to me with their ideas.<sup>3</sup>

One objection which has been raised against the idea of certification is that it might politicise the role of Speaker, since it might not be easy to identify legislation with effects only on England in an uncontroversial way. The present Bill seeks to avoid this problem by putting the onus on the Secretary of State to make the identification, at least as far as draft

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<sup>2</sup> *Answering the question: devolution, the West Lothian Question and the future of the Union*, Conservative Democracy Task Force, July 2008, p1.

<sup>3</sup> 21 December 2010, c1332.

legislation is concerned. Another objection is that some bills which appear to apply only to England may have consequences for allocations under the Barnett formula, if they affect public spending. The Bill seeks to alleviate this by means of the financial memorandum, which would presumably be factored in to an assessment of the effects on the four nations before certification.

The Justice Committee addressed the West Lothian Question in 2009, in its report *Devolution: a decade on*.<sup>4</sup> In its conclusions and recommendations the Committee referred to 'English votes for English laws' as one approach to solving the conundrum:

**30.** The question of whether England-only legislation can be more clearly demarcated from other legislation has to be resolved if any scheme of English votes for English laws is to work. While technical difficulties in relation to Legislative Consent (Sewel) Motions could be overcome by changes in drafting practice and by resorting to additional separate Bills, demarcating English and Welsh legislation is more complex. (Paragraph 191)

**31.** Even if legislation could be more clearly distinguished, the current system of territorial financing in the UK post-devolution means that the levels of public finance decided for England determine levels of resource allocation to Scotland and Wales. While we agree that the system could be changed in order to remove this effect, such a change would be a necessary pre-requisite to any system of English votes for English laws. (Paragraph 194)

**32.** While some proposals for English votes for English laws can be presented as limited procedural change, any thorough application of the principle would have broader implications for Parliament and for the position of the UK Government. (Paragraph 198)

**33.** Proposals for English votes for English laws seek to make procedural adjustments to Westminster in order to remove the anomaly of Scottish MPs voting on matters in England which are devolved matters in Scotland. At present, such a scheme would be difficult to apply other than in limited form given both the current procedures for legislating for the UK and its constituent parts following devolution, and the current system of territorial finance. (Paragraph 199)

**34.** While these obstacles could be overcome, some fear that the full application of English votes for English laws could result in a Parliament within a Parliament, which could be unworkable and might pose as great a threat to the Union as the resentment it seeks to address. (Paragraph 200)

**35.** English votes for English laws seeks to deal with what is as much a political problem as a constitutional problem, represented by the traditional dominance of different parties in different nations and regions—an issue which, some suggest, could be addressed, in part, by reform of the electoral system which could reduce the risk of an English majority being overturned by Scottish and Welsh MPs. Others suggest that a further reduction in the number of Scottish seats at Westminster, and a possible reduction in Welsh seats following the devolution of greater powers, could also, to some extent reduce the same risk. Neither of these measures would, however, address the issue of principle about the voting rights of MPs representing nations with devolved governments and both of them give rise to controversy between parties because of the effect they have on party strengths at Westminster. (Paragraph 201)

The Labour Government made the following response:

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<sup>4</sup> [HC 529](#), 2008-09, 12 May 2009.



The Government believes that a fundamental principle of the United Kingdom Parliament is that all MPs have equal rights. This means that each MP can vote on any matter brought before them, whether they represent English, Scottish, or any other constituencies.

The Government believes that the proposal for English votes for English laws, would in the end, divide the United Kingdom fundamentally. Quite apart from the considerable difficulties of identifying laws that apply only to England (and some research suggests that it would be almost impossible in many cases), it would create two distinct classes of MPs – those who could vote on all matters before the House, and those whose voting rights would be curtailed by virtue of constituency location. MPs of the UK play a representative role for the whole of the UK in considering legislation, considering the welfare of the UK as a whole, rather than narrow geographic interests, and we believe it is right that all MPs continue to have equal voting rights on all matters before the UK Parliament.

Furthermore, the Government is of the view that even matters which may appear confined to England may have an impact on the United Kingdom as a whole. As the Committee have recognised, the funding settlement with the nations and regions of the United Kingdom, means that what is decided on public funding in England affects Scotland, Wales and Northern Ireland. These are national issues which need to be decided by all members in the United Kingdom, not by subsets of Members depending on the location of their constituency.

Accepting the principle of English Votes for English Laws would fundamentally alter the relationship between MPs and Parliament, and would lead to the de facto establishment of an English Parliament. As noted above, an English Parliament would lead to the eventual disintegration of the Union, and the Government will not put the Union at risk. In all respects, we are through the Union stronger together, and weaker apart.<sup>5</sup>

The current Government intends to set up a commission to look into the West Lothian Question, though this is dependent on developments in other areas:

Careful consideration is ongoing as to the timing, composition, scope and remit of the Commission to consider the West Lothian question. Its work will need to take account of our proposals to reform the House of Lords to create a wholly or mainly elected second chamber, the changes being made to the way this House does business and amendments to the devolution regimes, for example in the Scotland Bill presently before the House. We will make an announcement later this year.<sup>6</sup>

## 2.2 Draft legislation

The Bill is quite specific: it applies to ‘draft legislation,’ which it defines in clause 2 as “primary legislation published before a bill is introduced into Parliament or secondary legislation published before the bill creating the relevant instrument-making power has received Royal Assent.”

Information on draft bills is available in Standard Note 2822, *Pre-legislative scrutiny*, 9 April 2010. This includes a table showing that since 1997-98 the number of draft bills published each session has varied between two and 12, and in six of those sessions the total has been two, three or four. So far in the current session another four draft bills have been announced.

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<sup>5</sup> *Devolution: a decade on, Government Response*, Cm 7687, July 2009, pages not numbered in original.

<sup>6</sup> HC Deb 31 January 2011, c549W.

In the same period the total number of Government bills introduced each session has varied between 23 and 58.<sup>7</sup>

### 2.3 Specifying effects

As mentioned above, some concerns have been raised in the past about the feasibility of identifying legislation as applying to one or other nation. The Bill in one sense eases this, by passing responsibility to the Secretary of State to make a statement/memorandum, which would be open to challenge through the process of consultation on the draft. On the other hand, it creates a new potential problem by calling for statements of the effect on every citizen, as well as on constituents. In particular, by referring to constituents, there is a sense that some kind of assessment by constituency (or groups of constituencies) might be needed, so that impacts can be identified by each MP for his/her area.

These questions depend to some extent on how an 'effect' is defined. Depending on the nature of the measure, it might be difficult to anticipate every impact, especially where these arise as a result of interaction with unforeseen new legislation, or with case law. Even restricting the question to interactions with existing legislation, it might prove difficult to trace all possible impacts. If the effects are defined as the principal or intended ones only, then it should be more straightforward to make a statement about them. However, while the legal and financial effects in clause 1 might be specified in a technical sense, the effect on citizens or constituents might be less concrete.

The style of the statement on legal effect will be interesting. If it were highly technical, it might arguably defeat the object of the Bill. On the other hand, it might be difficult in some cases to couch the explanation in accessible terms, yet still create an instrument that can be relied upon. Since the Bill applies to draft legislation, the Secretary of State could remove these clauses before introducing the legislation to Parliament. The financial memorandum would be a separate text, so would raise fewer drafting difficulties.

### 2.4 Clarity

As to the principles of legislative territorial clarity, what will be the practical impact? A Minister publishing draft legislation will have to confirm (unless s/he chooses under Clause 3(1)(b) to state that s/he cannot so confirm) that the draft is compatible with the principle that every citizen has the right to see how proposed changes in the law will affect them. S/he will also have to confirm that it is compatible with the principle that MPs have the right to see how those changes will affect their constituents.

The concept of 'compatibility with the principle that a right exists' may be open to interpretation. If it equates to respecting that right, it raises the question of what, within the piece of draft legislation, would satisfy the rights gained by citizens and MPs under the Bill.

The statement on legal effect and the memorandum on financial effect might not be sufficient. They are designed to show the impact "on each part of the United Kingdom," as stated in Clause 1, where each part of the UK is defined in Clause 2 as England, Wales, Scotland or Northern Ireland. However, the rights conferred under the principles of legislative territorial clarity concern the impacts on each citizen, and on constituents.

Also, it could be argued that the identification of effects in clause 1 concerns the effects *in law* and *in finance*, whereas the rights under clause 4 are actually additional rights to see how the effects in law will impact on individuals as citizens or as constituents. In a crude sense, the one concerns what the change in the law will be, the other what difference that will make to people.

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<sup>7</sup> *Summary of Bills introduced since 1979*, [SN/PC/2283](#), 27 May 2010.

It seems that the requirement under clause 3(1)(a) is to ensure that the provisions of the draft legislation itself respect the rights of citizens to see how they are affected, and of MPs to see how their constituents are affected. This would have significant implications for the drafting of legislation, or, as mentioned above, it would entail that draft legislation differed routinely from the actual legislation subsequently introduced.

In addition, while the Secretary of State may take steps to “ensure” clear identification of the effects of legislation, in a statement/memorandum that sets them out, and thus to satisfy the requirements of clause 1 as defined in clause 2, it would be for the courts to decide if this had been achieved. In this sense, the Bill could open part of the legislative process (draft bills and premature SIs) to legal scrutiny.

## 2.5 Territorial impact

At present, primary legislation, draft or otherwise, includes a statement of territorial extent. However, this is a simple statement of the jurisdiction to which the instrument applies. It is not strictly speaking a statement of the territory in which the effects will be felt. Thus, if a bill concerns matters that have been devolved to the Scottish Parliament and the Northern Ireland Assembly, the territorial extent clause will state that it applies to England and Wales. If the matter is reserved across the UK, then the territorial extent clause will state that it applies to England and Wales, Scotland, and Northern Ireland. However, if the bill concerns matters that have been devolved to all three of the devolved legislatures, the clause will still state that it applies to England and Wales. This is in order to maintain the integrity of the legal system for England and Wales, which form a single jurisdiction, regardless of the fact that the National Assembly for Wales actually has responsibility for the matter in hand.

Another guide to territorial impact is the set of Written Statements which follows the Queen’s Speech, outlining the legislation which is planned for each of the devolved regions. As an example, Written Statements were made on 26 May 2010 for Scotland, Wales and Northern Ireland.<sup>8</sup> The Welsh Statement was as follows:

I am pleased to inform the House that the coalition Government’s first Session legislative programme, as outlined on 25 May, is a programme that will significantly benefit people living in Wales.

In this Session, the coalition Government will focus on tackling the deficit while supporting sustainable growth and enterprise; create a fairer and simpler tax and benefits system; and restore public trust in the political system.

This statement provides a list of the legislation announced in the Queen’s Speech and its application to Wales.

### *Bills that will apply to Wales*

The following Bills deal largely with non-devolved areas. Most will apply UK-wide.

Equitable Life Payments Scheme Bill

European Communities (Amendment) Referendum Lock Bill

Financial Services Regulation Bill

Freedom Bill

Identity Documents Bill

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<sup>8</sup> HC Deb 26 May 2010, cc5–10WS.

National Insurance Contributions Bill  
Office for Budget Responsibility Bill  
Parliamentary Reform Bill  
Pensions and Savings Bill  
Police Reform and Social Responsibility Bill  
Postal Services Bill  
Public Bodies Bill  
Welfare Reform Bill

*Bills where some provisions may apply to Wales*

The following Bills deal with areas that are wholly or partly devolved. A limited number of provisions in each Bill may apply to Wales, and the extent of each Bill's application to Wales will be the subject of further work on scope and content.

Decentralisation and Localism Bill  
Education and Children's Bill  
Energy Security and Green Economy Bill  
Health Bill

*Bills with limited impact or no application to Wales*

Academies Bill  
Local Government Bill  
Scotland Bill

*Draft Bill*

Parliamentary Privilege Bill

Further legislation—both primary and secondary—including a routine Finance Bill will be brought forward during the Session.<sup>9</sup>

This is a relatively recent development, having started after the Queen's Speech in 2006.

The present Bill, while working on a case by case basis with draft legislation only, calls for much greater detail. The statement and memorandum will not simply confirm that the legislation applies to whichever nation. Instead, they will set out what the legal and financial effects will be in those areas.

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<sup>9</sup> HC Deb 26 May 2010, cc9-10WS.