



Legislation (Territorial Extent) Bill: **committee stage report**

Bill 10 of 2010-12

RESEARCH PAPER 11/39 11 May 2011

The *Legislation (Territorial Extent) Bill* is a Private Member's Bill promoted by Harriet Baldwin. It is relevant to the West Lothian Question. This arises when Members representing constituencies in devolved areas may vote on legislation which affects another part of the UK, but not their own constituencies, because it relates to a devolved matter.

The Bill would require the Secretary of State, when publishing legislation in draft, to indicate its legal and financial effects on each of the nations of the UK, to confirm that it is compatible with citizens' rights to see how legislation will affect them, and to confirm that it is compatible with Members' rights to see how it will affect their constituents. The intention is that this would bring clarity about the territorial extent of legislation previously published in draft, which might support moves to tackle the West Lothian Question by treating bills differently according to their areas of impact.

This Paper covers the progress of the Bill so far. Further detail on the Bill itself is available in [Research Paper 11/17](#), 8 February 2011.

Paul Bowers

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Summary

The *Legislation (Territorial Extent) Bill*, a Private Member's Bill promoted by Harriet Baldwin, seeks to make a contribution to addressing the West Lothian Question. It calls on the Secretary of State, when publishing legislation in draft, to make statements as to its legal and financial effects on each of the nations of the UK, and to confirm that it is compatible with citizens' rights to see how legislation will affect them, and with Members' rights to see how it will affect their constituents.

The Bill was opposed on second reading by both the Government and the Opposition. However, it passed and went to committee, where it was considered on 30 March and 27 April 2011.

Amendments were tabled by Chris Bryant for the second day in committee. However, he was unable to attend for health reasons, so no amendments were moved. The Minister, Mark Harper, spoke against each clause stand part, but the Committee passed all the clauses without amendment.

Report is due on 10 June 2011.

1 Introduction

The *Legislation (Territorial Extent) Bill* is a Private Member's Bill promoted by Harriet Baldwin. It was presented on 30 June 2010, and had its second reading on 11 February 2011, when it was agreed on division by 19 votes to 17. Committee stage took place on 30 March and 27 April 2011. Report is due on 10 June 2011.

The Bill was opposed on second reading by both the Government and the Opposition. However, with the support mostly of Conservative backbenchers,¹ it passed and went to Committee.

The first day in Committee was brief, with Mrs Baldwin proposing a sittings motion to enable further consideration on successive sitting Wednesdays. For the second day, Opposition amendments were tabled by Chris Bryant. However, Mr Bryant was unable to attend the second day in Committee for health reasons, so no amendments were moved. The Minister, Mark Harper, spoke against each clause stand part, but the Committee passed all clauses without amendment.

2 Second reading

The Bill relates to the issue known as the West Lothian Question.² This refers to the fact that Members representing constituencies in Scotland, Wales or Northern Ireland may vote on legislation which extends to England, but neither they nor Members representing English seats can vote on subjects which have been devolved to the Scottish Parliament, the National Assembly for Wales or the Northern Ireland Assembly. This was raised with force by Tam Dalyell, Member for West Lothian, during the debates on devolution in the 1970s, and it has become a source of concern for some commentators and voters since the advent of devolution for Scotland, Wales and Northern Ireland, but not for England.

Mrs Baldwin explained that her Bill was designed to support one approach to tackling the West Lothian Question, which was put forward by the Conservative Party's Democracy Taskforce,³ chaired by Kenneth Clarke:

This proposal was that Bills be certified by the Speaker as English. They would pass through normal Commons processes as far as and including Second Reading, on which the whole House would vote. The Committee stage would be undertaken by English MPs in proportion to English party strengths. Report stage would be similarly voted on by English Members only, and Third Reading, when no amendments are possible, would again be voted on by the whole House. However, there are also problems with that approach, but it is those problems that my Bill seeks to solve.

The problem was best expressed by Iain MacLean of Nuffield college in his 2005 paper, in which he said:

"It will be hard for the Speaker to define what is an English bill, at least to do so without controversy - the Speaker could be politicised".

I would not want to put you in such an awkward position, Mr Speaker. Therefore, by requiring the Secretary of State to specify in draft legislation the territorial extent of a Bill, my expectation is that it would be much clearer in the drafting of Bills to which parts of the UK they applied. Indeed, the Clerk advises me that the Health and Social

¹ It was supported by 18 Conservatives, plus Kate Hoey.

² For further information see House of Commons Library Standard Note SN/PC/2586, [The West Lothian Question](#), 23 March 2011.

³ *Answering the question: devolution, the West Lothian Question and the future of the Union*, Conservative Democracy Task Force, July 2008.

Care Bill, which was mentioned earlier and which, really, applies only to England, would be hard to certify as being an England-only Bill, because of the way in which it is drafted. What I hope my Bill would achieve, once it received Royal Assent, is gently to guide those drafting Her Majesty's legislation to be clear enough in that drafting so that you, Mr Speaker, would have no problem certifying Bills.⁴

For the Labour Party, Chris Bryant summed up his concerns as follows:

It would be very dangerous to dismantle the fundamental principle of the equality of all Members of this House. That is why I think that, in the end, the direction of travel the hon. Member for West Worcestershire is moving in with this Bill is an unfortunate one.

[...]

The hon. Lady referred to the intended consequences of her Bill, but it would also have unintended consequences. As her colleague, the hon. Member for South Northamptonshire (Andrea Leadsom), has already in effect told us, press releases will be sent out the moment the Bill comes into force condemning some Members for taking part in debates and votes on matters that the Bill declares as being for England only. I presume that there would also be condemnation of English MPs taking part in debates and votes on legislation that applies only to Wales. If we are going to reduce the number of Members of Parliament for Wales to 30, it will be difficult to take such legislation through effectively if there are not enough Back Benchers to be able to make proper informed decisions about the measures under discussion. The direction of travel the hon. Member for West Worcestershire is taking us down is unfortunate.

I also think there will be unfortunate direct consequences, in that the number of Bills will increase, which will make things more difficult for us, and the number of clauses will also increase. We will end up with worse legislation because, as the hon. Lady has said, draftsmen will be required to try to provide absolute clarity that measures apply specifically to England, for example, or to Wales alone.⁵

The Minister for Political and Constitutional Reform, Mark Harper, argued that the Bill was unnecessary as it did not achieve much that was not already in place:

The flaw is that the Bill imposes requirements on Government that are already in place and with which the Government should comply. As has been noted, the Cabinet Office's "Guide to Making Legislation" already provides that the territorial extent and application of 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 addition, it provides that where a Bill makes different provision for the different nations of the United Kingdom, that should be outlined in the explanatory notes, setting out the territorial extent of each part of the Bill separately if necessary.

Harriett Baldwin: [...] The Bill moves civil service guidance on to a statutory footing, thus strengthening the whole process.

Mr Harper: I am grateful to my hon. Friend for that clarification. It comes back to the comments of my hon. Friend the Member for North East Somerset that the Bill does nothing harmful, but nor does it take us much further forward. I start from the position, as do the Government, that we should not legislate for unnecessary matters that do not add anything.

⁴ HC Deb 11 February 2011, c603.

⁵ HC Deb 11 February 2011, cc618-19.

[...]

In practice, the financial aspects of the Bill would also have little consequence, because the present arrangements already require all new UK-wide legislation to specify the financial impact and to be drafted within a Department's existing funding plans. Therefore, no new Barnett financial consequentials would arise, as a matter of course. Bills that deal with reserved matters have no Barnett consequentials attached and do not have significant impact on different Administrations.⁶

The Bill was agreed on division by 19 votes to 17.

3 Committee stage

The Bill was considered in Committee on 30 March and 27 April 2011.

3.1 Clause 1

This clause requires the Secretary of State, when publishing draft legislation, to ensure that its legal and financial effects on England, Wales, Scotland and Northern Ireland are separately and clearly identified.

Mrs Baldwin explained that “the term Secretary of State is chosen carefully, because this Bill is intended to influence Government legislation.”⁷ She also addressed the fact that the Bill applies only to legislation published in draft, which, hitherto, has been a relatively small proportion of total government legislation, explaining that, “the clause is also worded carefully to refer to draft legislation because, if it were to go any further than that, it might encroach on the exclusive cognizance of Parliament in respect of legislation.”⁸ Finally, she indicated that,

The purpose of the Bill is to ensure that, when legislation is passing through both Houses, everyone examining it will understand both its legal and financial effects throughout the United Kingdom.⁹

Michael Connarty called the clause “ridiculous,” and expressed concern over exactly how the legal and financial effects would be identified. He suggested two possible interpretations:

If what is meant is some sweeping statement, in some small clause as, for example, we usually get in a Bill about the financial or human rights effects - just a statement, with absolutely no facts - then the clause is worthless. If it genuinely means that the Secretary of State, when proposing any legislation, should have to calculate the amount that would fall to every jurisdiction, the task would be an interminable and difficult one. We would have to set up a whole department in the Treasury just to do that.¹⁰

Mrs Baldwin replied:

As a whole, the Bill allows for the possibility that legislation might be described as applying to the whole of the United Kingdom. It might not be possible to separate out in any specific piece of legislation what the effect on particular parts of the United Kingdom might be. However, in the case of legislation that could apply to one particular

⁶ HC Deb 11 February 2011, cc640-1.

⁷ PBC Deb 27 April 2011, c14.

⁸ PBC Deb 27 April 2011, c14.

⁹ PBC Deb 27 April 2011, c14.

¹⁰ PBC Deb 27 April 2011, c15.

part of the United Kingdom, the Bill might encourage parliamentary drafters to draft the proposed legislation in such a way that it would be easier to make such a statement.¹¹

James Gray supported the clause:

The proposal seems to be an extremely important first step towards addressing the West Lothian question. We know that something is wrong. We know that 70-odd Scottish MPs coming down to Westminster and voting on English matters is wrong. Why should the people of North Wiltshire have their futures voted on by Scottish MPs when I can have no say whatever on similar matters north of the border? Why should that be the case? That is the West Lothian question that Tam Dalyell enunciated so clearly. Only by dividing up legislation and assessing how it affects constituencies in different parts of the United Kingdom can we take a step towards addressing the problem.¹²

Mr Harper began by stressing the Government's view that the issue behind the Bill, the West Lothian Question, was a serious one:

It is important to solve the West Lothian question, which is exactly why the Government, made up of the two coalition parties, who come from different perspectives on this issue, have said that we will set up a commission to look at it and bring forward a solution. We will announce the details of that commission this year. It will work on this subject to bring forward some proposals.¹³

However, he went on to explain the Government's opposition to the Bill:

I said on Second Reading that the main problem was that the Bill would put extra burdens on the Government and on Ministers, without a commensurate increase in clarity and information for our constituents.¹⁴

On Clause 1 in particular, he said:

The concern that the Government have is that it is not particularly clear what "legal effect" or "financial effect" mean. Is "legal effect" simply a requirement to say to which part of the United Kingdom the law extends or, where the legislation extends to England and Wales - which are, of course, one legal jurisdiction - in which one it applies if it only applies in one of them? If that is what it means, it does not add a great deal to the information contained in the extent clause of a Bill or statutory instrument, or in the detailed notes that go with them to explain their territorial extent. If that is not what it means, I am not clear what it does mean. Given that it is not particularly clear, the duty may be very wide ranging, [...] and it may impose significant burdens on a Secretary of State and be unnecessarily burdensome when they were introducing draft primary and secondary legislation.¹⁵

He also addressed the financial effects, alluding to the concerns raised by Mr Connarty:

The second thing that clause 1 talks about is the duty in relation to the Bill's financial effect, which was one of the issues that the hon. Member for Linlithgow and East Falkirk raised when he talked about defence matters. Under the present arrangements, all new UK-wide legislation must already specify its financial impact, and it must be

¹¹ PBC Deb 27 April 2011, c15.

¹² PBC Deb 27 April 2011, c21.

¹³ PBC Deb 27 April 2011, c24.

¹⁴ PBC Deb 27 April 2011, c24.

¹⁵ PBC Deb 27 April 2011, c25.

drafted within Departments' existing spending plans. If a piece of legislation is brought forward, it cannot have any Barnett consequential, because it must be within existing plans that have been agreed by the Treasury in financial legislation.

Again, the Government are not clear what "financial effect" means. If it meant what the hon. Gentleman suggested, it would indeed be incredibly complicated to set out. However, I am not sure that it does, and that is part of the problem with the Bill.¹⁶

Mrs Baldwin replied to the debate by summarising her argument in favour of the clause:

The clause will put the requirement to spell out the territorial extent of legislation on a statutory footing, as opposed to relying simply on civil service guidance. Doing that will require drafters to think more carefully, when they draft legislation, about ensuring that it can be clearly identified in that way. The importance of that was discussed on Second Reading: it is possible that the House might ask the Speaker to certify that a Bill applied to a particular part of the United Kingdom and, unless it were set out in the measure, that might put the Speaker in an awkward position and politicise his role. Having it on a statutory basis and subject to discussion in the House is extremely important.¹⁷

The clause was agreed on division by five votes to three.

3.2 Clause 2

This clause defines "draft legislation" and the constituent parts of the UK. It also explains what must be done to satisfy the requirements of Clause 1 for clear and separate identification of the legal and financial effects of that legislation.

Mr Harper stated the Government's objections to the clause:

I still do not believe that the definitions of "separately and clearly identified" add anything to the current drafting of legislation in setting out the territorial extent clauses. Indeed, the definitions might make matters more complicated, because there would have to be

"a statement in the draft legislation setting out the legal effect on each part of the United Kingdom of each of the clauses and schedules of the bill".

Bills such as this one currently set out in the extent clause that the whole Act would extend to different parts of the United Kingdom. Clause 2 is not clear whether the specific territorial extent would have to be set out for each individual clause and schedule in a Bill.

The duty also extends to draft secondary legislation, as I said in the debate on clause 1. Whatever we are doing, the duty should apply only to primary legislation. Secondary legislation is already covered by the vires of its parent legislation. Even if secondary legislation were published in draft, it would have to conform to the territorial extent of its parent legislation. The territorial extent of that secondary legislation would therefore already have been considered during scrutiny of the draft Bill or during the Bill's passage before it is enacted. Again, therefore, I do not think the provisions add anything.

The final point relates to the definition of the parts of the United Kingdom, which refers to England, Wales, Scotland and Northern Ireland separately and does not take

¹⁶ PBC Deb 27 April 2011, c26.

¹⁷ PBC Deb 27 April 2011, c27.

account of the fact that England and Wales form a combined legal system. It is, of course, possible for legislation to take effect only in one of England or Wales, but it would still be the law of England and Wales, even if did not actually have any effect in one particular part.¹⁸

The clause was agreed on division by four votes to two.

3.3 Clause 3

This clause requires the Secretary of State, when publishing legislation in draft, to state either that it is compatible with the principles of legislative territorial clarity, defined in Clause 4, or that it is not possible to confirm compatibility, but that the Government still wishes to proceed.

Mrs Baldwin argued,

The debate on this clause focuses on particular circumstances such as a situation where it is simply not possible to make the statements required by the legislation. It gives the Secretary of State some leeway, but ensures that the House of Commons is made aware that the Secretary of State was unable to make that statement of compatibility, thereby opening the matter up to become a debatable issue.¹⁹

Mr Harper argued that it was not clear what a Secretary of State would have to do in order to comply with the requirements of the clause. This is explained further under Clause 4 below. As a result, “a Secretary of State would have a real problem in making such a declaration because it is not clear what the Bill is being declared compatible with.”²⁰

The clause was agreed on division by four votes to two.

3.4 Clause 4

This clause defines the “principles of legislative territorial clarity.” These are that citizens have the right to see how proposed changes in the law will affect them, and that Members of Parliament have the right to see how those changes will affect their constituents.

Mr Harper argued against the clause:

There is a lack of clarity about what is meant. For example, it is not clear how far the Bill would require the Secretary of State to go. In the case of a declaration of compatibility with the European convention, which is the comparison we have used, the convention exists and there is extensive case law so that we know with what the Bill is compatible. All we have here are the words in the Bill.

Would the Secretary of State, for example, be fulfilling the principles of legislative territorial clarity if he or she set out in legislation the legal and financial effect, as required in clause 1 and interpreted in clause 2? If that is the case - if including the extent clauses detailing the extent of the legal effect of legislation is required to fulfil the principles of legislative territorial clarity - clauses 3 and 4 are unnecessary. The Bill would do what it needs to do without them. If the clauses mean something else and the Minister has to go further, it is not clear what the Secretary of State would have to do to comply with them. Would a Bill, for example, have to detail the effect on citizens and on Members’ constituents, or would that detail have to be in the explanatory notes?

¹⁸ PBC Deb 27 April 2011, c30.

¹⁹ PBC Deb 27 April 2011, c31.

²⁰ PBC Deb 27 April 2011, c32.

The Bill applies only to draft legislation, which is almost always accompanied by a White Paper and is often subject to pre-legislative scrutiny. Those mechanisms, which are already used by the House, are useful for providing extra detail on the impact of legislation such as why Ministers are bringing it forward and why the Government think it is a good idea. I think those mechanisms are more effective than including many more words in legislation.

It would be a significant change if, rather than a Bill only containing the wording of the provisions that change the law, we started including descriptions of the effect that those changes would have. I am not clear - and I am not sure that draftsmen, Ministers and Members of Parliament are clear - about how people would comply with the requirements in clauses 3 and 4. That lack of clarity might risk creating a new ground on which people could challenge primary legislation in the courts, either on the basis that there had been no declaration or that a declaration was one that no reasonable Secretary of State would make.

The clause either does not add anything to the Bill or it is not clear. After listening to my hon. Friend's description I was not any clearer about what the Secretary of State would be certifying in his or her statement on a Bill's compatibility. I am not clear about the processes and steps that officials and Ministers would have to take to be able to make such a declaration.²¹

Mr Gray spoke for the clause:

If the Minister chooses to vote against the clause, he will be saying that every citizen of the United Kingdom does not have the right to see how proposed changes to the law will affect them. Of course they do; obviously, they do. As a Member of Parliament, he must recognise that they do. His argument against the clause was that he could not quite work out how the Secretary of State would conform to the terms of the clause. He said that it would be very difficult: would they do it in a White Paper? Would they do it in the explanatory notes? No doubt that can be sorted out down the road. Surely we can find a way in which the Secretary of State could comply?

For the Minister to say that he is uncertain about how the Secretary of State will comply and that that is a good reason for voting against our constituents' knowing what is happening in this place is bizarre.²²

The clause was agreed on division by four votes to two.

3.5 Clause 5

This clause sets out the short title, commencement and extent.

It was agreed on division by four votes to two.

²¹ PBC Deb 27 April 2011, cc32-33.

²² PBC Deb 27 April 2011, c34.

Appendix 1 – Membership of the Committee

Chair: Mr Roger Gale

Baldwin, Harriett (*West Worcestershire*) (Con)

Bryant, Chris (*Rhondda*) (Lab)

Chope, Mr Christopher (*Christchurch*) (Con)

Connarty, Michael (*Linlithgow and East Falkirk*) (Lab)

Gray, Mr James (*North Wiltshire*) (Con)

Green, Kate (*Stretford and Urmston*) (Lab)

Harper, Mr Mark (*Parliamentary Secretary, Cabinet Office*)

Hart, Simon (*Carmarthen West and South Pembrokeshire*) (Con)

Hinds, Damian (*East Hampshire*) (Con)

Hoey, Kate (*Vauxhall*) (Lab)

Hunt, Tristram (*Stoke-on-Trent Central*) (Lab)

Lloyd, Stephen (*Eastbourne*) (LD)

Paisley, Ian (*North Antrim*) (DUP)

Reynolds, Jonathan (*Stalybridge and Hyde*) (Lab/Co-op)

Stewart, Bob (*Beckenham*) (Con)

Stewart, Iain (*Milton Keynes South*) (Con)