HOUSE OF LORDS

Select Committee on the Constitution

19th Report of Session 2008–09

Co-operative and Community Benefit Societies and Credit Unions Bill

Report

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To examine the constitutional implications of all public bills coming before the House; and to keep under review the operation of the constitution.

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Co-operative and Community Benefit Societies and Credit Unions Bill

1. The Constitution Committee is appointed "to examine the constitutional implications of all public Bills coming before the House; and to keep under review the operation of the constitution". In carrying out the former function, we endeavour to identify questions of principle that arise from proposed legislation and which affect a principal part of the constitution. This report draws to the attention of the House clauses in the Co-operative and Community Benefit Societies and Credit Unions Bill.

2. This Bill, which has all-party support, passed all its stages in the House of Commons without amendment. The committee stage in the Commons was particularly swift: occupying the committee for only 14 minutes.[1] The Bill's second reading debate took place in the House of Lords on 10 July 2009. The Bill is formally a Private Member's Bill (introduced by Malcolm Wicks MP) but it has Government support and its clauses were prepared by the Government on Mr Wicks' behalf. The Bill is short, comprising eight clauses and no schedules.

3. A number of the reforms contained in the Bill were consulted upon in a public consultation on "Review of the GB Co-operative and Credit Union Legislation" conducted by HM Treasury between 21 June and 12 September 2007. The responses (some 200 in number) and Government reaction are published on the Treasury's website.[2] The explanatory notes accompanying the Bill claim that that the reform proposals "received the support of the sector".[3]

4. **From a constitutional point of view, the subject-matter of the Bill is straightforward and uncontroversial, and no objection to it is raised in this Report. The Committee's concerns relate to drafting and, in particular, to the powers the Bill would confer on the Treasury to amend legislation by order: so-called "Henry VIII clauses".**

5. The House of Lords Delegated Powers and Regulatory Reform Committee has already reported on this aspect of the Bill.[4] Its criticisms and its suggestion for amendment were rehearsed during the debate at second reading with an indication being given that the matter would be returned to during the committee stage.[5]

6. As for substance, the Bill seeks (a) to re-brand "industrial and provident societies" as "co-operative societies" or "community benefit societies"; (b) to require new co-operative or community benefit societies to register as such with the Financial Services Authority; (c) to apply the provisions of the

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1 On 10 June 2009.

2 See: http://www.hm-treasury.gov.uk/consult_creditunions_index.htm.

3 Explanatory notes, June 2009, para. 10.

4 Delegated Powers and Regulatory Reform Committee, 11th Report (2008–09) HL Paper 135, paras 3–9

5 See HL Deb 10 July 2009 col. 883 (Baroness Noakes) and col. 886 (Lord Myners' reply for the Government).

Company Directors Disqualification Act 1986 to such societies; (d) to give to the Treasury various powers to apply to such societies certain provisions of company law (if necessary with modifications) pertaining, for example, to investigations, company names, dissolution and restoration to the register; (e) to give to the Treasury powers to make provisions for credit unions corresponding to any provisions applying to building societies.

7. Three clauses—clauses 4, 5 and 6—confer a range of powers on the Treasury to make regulations. In each case the power includes a power to amend or repeal legislation by order. **The powers include the power to create new criminal offences by order** (clauses 4(7) and 5(3)), as well as other matters. In some instances these powers are relatively tightly drafted. In others they are more open-ended. In all cases under the Bill the Treasury's regulations will be subject to the affirmative resolution procedure (clause 7(3)). More detailed consideration of each of clauses 4, 5 and 6 follows.

Clause 4

8. Clauses 4(1) and (2) provide that the Treasury may by regulations make provision for certain aspects of company law to apply to co-operative and community benefit societies: namely, provisions of company law relating to investigations, company names, and dissolution and restoration to the register. Clauses 4(3), (4) and (5) list a series of provisions in the Industrial and Provident Societies Act 1965 that may be amended or repealed by regulations made under clauses 4(1) or (2) (namely, sections 47, 48 and 49 of the 1965 Act, which concern inspection of books, production of documents and the appointment of inspectors; section 5 of the 1965 Act, which concerns names; and sections 16 and 59 of the 1965 Act, which concern cancellation of registration). The explanatory notes accompanying the Bill state that clause 4(1) "gives to the Treasury the flexibility to decide whether to apply existing provisions or to make new, equivalent provisions and, in either case, to make appropriate modifications. These powers will enable the Treasury to choose the most appropriate legislative technique … and to make modifications so as to adapt company law …"[6]

9. From a constitutional point of view the question this statement gives rise to is obvious: why should it be the Treasury making these decisions rather than Parliament itself? If the relevant decisions have yet to be made, is this legislation not premature? **Constitutionally, it would be more desirable for the Treasury to take the matter away, to consider in detail which provisions of company law do and do not need to be applied to co-operative and community benefit societies, and to return to Parliament with a fresh Bill in which all of this is set out, rather than leaving it to the subsequent discretion of the Treasury.** No reason is given as to why skeleton legislation such as this is required to be proceeded with. If there is some reason of urgency, it should be disclosed.

10. Clause 4 goes on to make two further provisions with regard to these powers. First, clause 4(6) makes plain that the detailed lists of provisions of the 1965 Act contained in clauses 4(3), (4) and (5) "are not to be read as restricting" the much more open-ended power to make regulations which is conferred upon the Treasury by clause 6 (below). Secondly, clause 4(7) provides that

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6 Explanatory notes, June 2009, para. 42.

"regulations made under this section may … create criminal offences" and may "provide for the charging of fees".

11. The House of Lords Delegated Powers and Regulatory Reform Committee reported in July 2009 that: "it is for consideration by the House whether the Bill should be amended to include a provision whereby the maximum penalty for an offence created by the regulations may not exceed that for the corresponding offence under the legislation being applied (such as may be found in section 468 of the Companies Act 2006)".[7] The matter was raised during the second reading debate on the Bill, with the Minister (Lord Myners) stating that "the Government do not intend to use regulations under Clauses 4 or 5 to impose an increased penalty for offences".[8] The Minister expressed the hope that his statement would persuade the House that there is "no need for an amendment of the type described by the Committee".[9]

12. **The Constitution Committee is concerned about the use of assurances of this kind. We question the desirability, from a constitutional point of view, of the ambit of the law and, in particular, of the criminal law, being dependent on ministerial statements rather than being as clear as possible on the face of statute.** Further, we are concerned that it is not only a matter of maximum sentence. Is it not also the case that the *substance* of criminal offences in this field should be the same as between companies on the one hand and co-operative and community benefit societies on the other? **If so, such a prescription should appear on the face on the Act.** As the Bill stands, what is to stop the Treasury from creating new criminal offences for co-operative and community benefit societies for which there is no corresponding offence in company law?

13. The Delegated Powers Committee has pointed out that there are some precedents in the area, including the Limited Liability Partnerships Act 2000, which includes a power (in s.17) to create criminal offences by regulation.[10] However, the House may wish to recall what this Committee stated in 2006 in our report on what was then the Legislative and Regulatory Reform Bill:

> "Constitutional safeguards cannot depend on ministerial assurances. Although no doubt sincerely made, ministerial pledges may not be regarded as binding by future governments and are liable to be eroded by exceptions. Moreover, such assurances may not be in the mind of future Ministers, legislators and officials. The rule of law and the principle of constitutional government require the security of procedures and limitations which are set out expressly on the face of any enactment which empowers Ministers to change the statute book by order."[11]

14. Echoing the point made in paragraph 9 above, from a constitutional point of view, the Bill appears premature. **It would it be preferable for the Treasury first to decide which offences and penalties it wished to**

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7 Delegated Powers and Regulatory Reform Committee, 11th Report (2008–09) HL Paper 135, para. 6.

8 HL Deb 10 July 2009 col. 886.

9 Ibid.

10 Delegated Powers and Regulatory Reform Committee, 11th Report (2008–09) HL Paper 135, para. 5.

11 Constitution Committee, 11th Report (2005–06) *Legislative and Regulatory Reform Bill*, (HL Paper 194) para. 23.

provide for, and then come to Parliament with legislation, rather than (as appears to be the case here) first asking Parliament for the power to create new offences and only afterwards deciding what offences should be created. In the Committee's respectful view, this order of events would be more desirable notwithstanding the fact that, formally at least, this is a Private Member's Bill.

15. A final point to note about clause 4 is that, unlike in clause 5 (below), in clause 4 there is no express duty on the Treasury to consult before making regulations under this provision.

Clause 5

16. Clause 5 inserts a new provision (section 23A) into the Credit Unions Act 1979. It empowers the Treasury to make regulations to amend that Act (and to make consequential amendments to other Acts) so as to make corresponding statutory provisions for credit unions to those applicable to building societies. As the explanatory notes accompanying the Bill accurately state, "The power is widely drawn".[12] Certain provisions of the Credit Unions Act 1979 are listed (in s.23A(2)) as being excluded from amendment or repeal by order but, as with clause 4, the Treasury's powers include powers to create criminal offences and to provide for the charging of fees.

17. The power of consequential amendment to other legislation is broadly drawn and confers on the Treasury extensive discretion (s. 23A(4)): "The Treasury may by regulations make such amendments of enactments as appear to them to be appropriate in consequence of any provision made under subsection (1)." The "standard definition" of enactments is given: namely that the term includes not only Acts of Parliament and subordinate legislation, but also acts and measures adopted by the devolved institutions.

18. While the Delegated Powers Committee sought to draw the extent of these powers to the attention of the House, it did not consider them to be inappropriate, bearing in mind the precedents, the excluded provisions of the 1979 Act, and the use of affirmative resolution procedure.[13] That said, the Committee stated that its concerns about the maximum penalty with regard to new criminal offences applied to clause 5 as well as to clause 4.

19. Likewise**, the concerns raised here in relation to clause 4 apply also to clause 5.**

Clause 6

20. Clause 6 confers on the Treasury a widely drafted power to make consequential amendments: "(1) The Treasury may by regulations make such amendments of enactments as appear to them to be appropriate in consequence of any provision made by or under this Act. (2) This power is exercisable in relation to any enactment passed or made before the commencement of the relevant provision, and accordingly extends to the provisions of this Act (apart from this section)." The Delegated Powers Committee did not report (positively or negatively) on this clause.

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12 Explanatory notes, June 2009, para. 55.

13 Delegated Powers and Regulatory Reform Committee, 11th Report (2008–09) HL Paper 135, para. 8.

21. The Constitution Committee is concerned about desirability, from a constitutional point of view, of such broadly drafted powers to be included in statute. In the Committee's view, **it would it be preferable for such provisions as require amendment to be identified before the Bill is introduced and to be included in a schedule to the Bill, rather than for the matter to be left to the subsequent discretion of the Treasury.** As the matter stands the Committee is concerned whether the affirmative resolution procedure, taken alone, provides an adequate constitutional safeguard against potential abuse by the Treasury of these considerable law-making powers.

Conclusion

22. The House may wish to recall the approach this Committee outlined in our 2006 report on the Legislative and Regulatory Reform Bill. In that report, the Committee noted that while the "delegation to Ministers by Parliament of powers to change the statute book has … become a well-established feature of the law-making process in this country", their routine use does not diminish the "constitutional oddity of allowing the executive branch of government to set aside or amend primary legislation … The practical necessity for such an arrangement must be matched by clearly limited powers, to be exercised for specific purposes, and to be subject to adequate parliamentary oversight."[14] The Committee further noted that: "The *general* acceptability of delegating powers to Ministers to change the statute book is now accepted within the United Kingdom's constitutional system. The question in relation to the Bill is therefore whether Ministers should have the power to change the statute book for the *specific purposes* provided for in the Bill and, if so, whether there are adequate procedural safeguards …"[15]

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[14] Constitution Committee, 11th Report (2005–06) *Legislative and Regulatory Reform Bill*, (HL Paper 194) para. 34.

[15] Ibid, para. 35.