



HOUSE OF LORDS

Select Committee on the Constitution

3rd Report of Session 2008–09

Banking 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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Banking Bill

1. The 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 regard our main task as being to identify questions of principle that arise from proposed legislation and which affect a principal part or parts of the constitution. This report draws to the attention of the House issues of constitutional principle arising from Part 1 of the Banking Bill.
2. Clause 75 of the bill is what is popularly known as a Henry VIII clause. It empowers the Executive (in the form of the Treasury), by an order laid before Parliament, to “disapply or modify the effect of a provision” in any Act of Parliament (other than what will become the Banking Act 2009, itself), delegated legislation or rule of the common law. **We agree with the assessment of the Delegated Powers and Regulatory Reform Committee that this is “an extremely wide power”.**¹
3. In the British constitution, there is not an absolute prohibition on Parliament giving the Executive power, by order, to repeal, disapply or otherwise amend Acts of Parliament, delegated legislation or the common law. Constitutional principle does, however, require (a) that any such power should be granted by Parliament only where there is a compelling justification, (b) that the scope of the power conferred should be limited to the minimum necessary to meet the pressing need for such an exceptional measure, and (c) that any order made should normally be subject to parliamentary control (either by negative or affirmative resolution).
4. The first question in assessing the constitutional acceptability of clause 75 is therefore whether the Government have made a compelling case for the necessity of the law-changing power. As we understand the Government’s case,² the power is sought to be justified on the grounds that the new legal regime created by Part 1 of the bill will operate against a complicated background of legal rules contained in other legislation and the common law; that it is not possible to foresee every way in which these other laws may impinge on the new Banking Act; and that there is in consequence a real risk that the authorities may not be able to fully put into effect one of the stabilisation options for a failing bank—transfer to a private sector purchaser, transfer to a “bridge bank” or transfer to temporary public ownership.
5. **We accept that there is force in the Government’s general explanation of the need for the Treasury to have a power to change the law by order.** In doing so, we must make clear that the need to make a new legislative regime “fully effective” cannot be regarded as a blanket justification for the inclusion of an extremely wide Henry VIII power in future bills. Any such claim by the Government must be assessed in the particular context of the bill in question.

¹ First Report of 2008–09, HL 12, para 6.

² We draw on the explanation given by the Economic Secretary to the Treasury (Ian Pearson MP) on 13 November 2008 in the 15th sitting of the Public Bill Committee during the bill’s Committee stage in the House of Commons, col 468.

6. A second question to be addressed in relation to clause 75 is whether it is drawn no more broadly than is strictly necessary. Clause 75(3) provides that an order “may make provision which has retrospective effect in so far as the Treasury consider it necessary or desirable for giving effect to the particular exercise of a power under this Act in connection with which the order is made”. In the House of Commons, the Government sought to justify the inclusion of this retrospective element in this way:

“Retrospective provision may be required in circumstances where a transfer has occurred with particular swiftness, which, as recent events have shown, is perfectly possible. Given the incredibly complex affairs of banks, it may not be possible to identify each and every precise statutory barrier in any given circumstance before making a transfer. For example, if it were necessary to amend a statutory provision that threatened to impede a property transfer, an unacceptable level of legal uncertainty would be likely to arise if the change did not have effect simultaneously with the property transfer. In a fast-burn situation, the due diligence to identify the impediment may not be completed until after the transfer has taken place.”³

7. **As we have noted in a recent report, there is no absolute prohibition on retrospective legislation in British constitutional law or practice.⁴ There does, however, need to be a compelling reason in the public interest for a departure from the general principle that retrospective legislation is undesirable. There is therefore a heavy onus on the Government to justify to the House why a retrospective provision of such breadth as that contained in clause 75(3) is required in the particular context of this bill, and whether further consideration should be given to narrowing the retrospective nature of the bill. On the basis of the arguments advanced by the Government so far,⁵ we are not wholly persuaded that this burden has been discharged. We welcome the Government’s indication to the House on 20 January that they will re-examine the clause to consider whether a more limited and targeted retrospection power could meet the requirements of the situation.**

³ Economic Secretary to the Treasury (Ian Pearson MP), 13 November 2008, 15th sitting of the Public Bill Committee, col 473.

⁴ Criminal Evidence (Witness Anonymity) Bill, 9th Report of 2007–08, HL 147, paras 16–17.

⁵ Economic Secretary to the Treasury (Ian Pearson MP), 13 November 2008, 15th sitting of the Public Bill Committee and HL Deb 20 January cols 1609–1615.