



HOUSE OF LORDS

Select Committee on the Constitution

11th Report of Session 2008–09

**Banking Act 2009:
Supplementary
report on
retrospective
legislation**

Report

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Select Committee on the Constitution

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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.

Current Membership

Lord Goodlad (Chairman)
Lord Lyell of Markyate
Lord Morris of Aberavon
Lord Norton of Louth
Lord Pannick
Lord Peston
Baroness Quin
Lord Rodgers of Quarry Bank
Lord Rowlands
Lord Shaw of Northstead
Lord Wallace of Tankerness
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Banking Act 2009: Supplementary report on retrospective legislation

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.
2. On 21 January 2009 we published a report on the Banking Bill. By clause 75, the bill proposed to give the Treasury order-making powers to “amend the law for the purpose of enabling the powers under [Part 1 of the bill] to be used effectively, having regard to the special resolution objectives”. We were particularly concerned that the order-making power would enable the Treasury to “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” (our emphasis).
3. We drew to the attention of the House the need for there 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, 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.”
4. We reiterate our thanks to Lord Myners for meeting members of the Committee to discuss our concerns. During the passage of the bill, an amendment was tabled in the name of several members of the Committee to leave out the words “or desirable”.¹
5. At Third Reading, Lord Myners made a detailed speech explaining the Government’s position. He received no support from anyone in the Chamber. As our Chairman noted on that occasion, “The Front Benches of the Conservative Party and the Liberal Democrat Party were silent on the matter, which is, according to taste, welcome, disgraceful or sinister”.²
6. An amendment moved by the Government resulted in section 75(3) of the Banking Act 2009 providing as follows:

¹ For debates on clause 75, see House of Lords Debates, 20 January 2009, cols 1592–1615 (4th day of Committee); House of Lords Debates, 3 February 2009, cols 556–580 (2nd day of Report); House of Lords Debates, 9 February 2009, cols 950–963 (Third Reading).

² House of Lords Debates, 9 February 2009, col 973.

“An order under subsection (2)(c) 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 **(but in relying on this subsection the Treasury shall have regard to the fact that it is in the public interest to avoid retrospective legislation)**”.

7. While we welcomed the recognition on the face of the legislation that there is a public interest in avoiding retrospective legislation, we remained concerned that, in enacting a retrospective law-changing power that may be invoked on the basis of “desirability” rather than “necessity”, a dangerous precedent might have been thought to have been created. After the Banking Bill’s enactment as the Banking Act 2009, we therefore engaged in correspondence with the Government about the retrospective power contained in section 75 of the Act. The chain of correspondence is published in this report.
8. In the correspondence, the Committee note that there is no exact precedent for retrospective law-changing powers based on a minister’s perception of what is desirable rather than what is necessary.
9. On 6 May 2009, the House of Lords debated the Amendments to the Law (Resolution of Dunfermline Building Society) Order 2009, which was made under the section 75 powers referred to above. The order was approved by the House.
10. **It remains our view that “desirability” should not be a basis on which to allow ministers to change the law retrospectively. We note Lord Myners’ statement that section 75(3) of the Banking Act 2009 “does not set a precedent for the use of retrospective powers”. The fact of the matter is, however, that a precedent has been set. It is not, in our view, an acceptable precedent.**

APPENDIX: CORRESPONDENCE ON THE BANKING ACT 2009

Letter from Lord Goodlad to Lord Myners, 22 January 2009

Enclosed is a copy of the Constitution Committee's report on the Banking Bill which was published today.

There are two particular issues on which the Committee would like your view ahead of the Report Stage. It would be particularly helpful to have your response in time for the Committee to consider it at our meeting on Wednesday 28 January 2009 at 10 am.

First, the wording of clause 75(3) as currently drafted is broad and apparently far-reaching. We say in the report that, if a retrospection provision is needed, it would be possible to limit and target the scope of retrospection power. Do you agree?

Secondly, it would be helpful to the Committee and to the House as a whole if you would provide further illustrations of the type of situations in which you envisage a retrospection power to be used.

I look forward to your response. A copy of this letter will be posted on the Committee's website. I am also sending copies to the Conservative and Liberal Democrat spokesmen in the Lords and the Convenor of the Crossbench peers.

Response from Lord Myners to Lord Goodlad, 28 January 2009

Thank you very much for the report of your Committee.

You identify a number of important issues that have also been the subject of detailed debate during the Bill's Committee stage. As you will be aware, the Committee concluded its discussions in the early hours of this morning and the Government is currently reflecting on the points raised during debate, and those raised by your Committee and the Delegated Powers Committee in preparing its approach in advance of this Monday's Report Stage.

Letter from Lord Goodlad to the Chancellor of the Exchequer, 16 February 2009

The remit of the Constitution Committee, of which I am the Chairman, is to draw the constitutional implications of bills to the attention of the House of Lords. In our report on the Banking Bill (3rd Report of 2008–09, HL 19), we expressed concerns about clause 75, which confers on the Treasury powers to change the law. We said that, while we accepted that there was a need for a 'Henry VIII clause' enabling the Government to alter the law, we were unconvinced that the inclusion of a very broad retrospective power was justified.

At the bill's Third Reading on 9 February there was detailed debate on amendments tabled by members of this Committee which sought to limit the power of retrospection. Our particular concern is that clause 75 gives the Treasury power to change the law retrospectively when it was of the view that this was necessary "or desirable". We accepted that, in the particular context of this bill, powers to change the law retrospectively where it is necessary to do so are constitutionally acceptable; what we did not accept is that it can ever be constitutionally appropriate for the executive branch of government to impose retrospective changes in the law on the basis that it is merely desirable to do so.

Parliament has now decided the issue, but the Committee want to put on the public record our continuing view that it can never be constitutionally acceptable for a power to change the law retrospectively to be exercised merely on the grounds of its “desirability”. As a matter of constitutional principle, retrospective legislation should only be used where there is a necessity to do so, justified by a compelling public interest. We wish to make clear beyond doubt that we do not regard clause 75 as setting a precedent on the constitutional acceptability of retrospective powers based on assessments of “desirability”. We understand that this is also the Government’s position, as explained by Lord Davies of Oldham, who told the House that the Government “are not establishing a precedent for retrospection” in this bill (HL Debates, 9 February 2009, col 962).

During the passage of the bill, there was debate as to whether there was any precedent for retrospective changes to the law to be made on the basis of a criterion of “desirability”. During the Third Reading, Lord Davies of Oldham told the House “a retrospective power can be used when it is expedient to make changes in respect of national insurance contributions under sections of the 2006 Act. I mentioned this on Report” (HL Debates, 9 February 2009, col 962). I recognised that this was “a very different context”. At Report stage, Lord Davies of Oldham had said this: “A second example is Sections 3 and 4 of the National Insurance Contributions Act 2006, which contain regulation-making powers enabling retrospective provision to be made” (HL Debates, 3 February 2009, col 563). Again, Lord Davies was careful to tell the House “none of the examples I am about to give will be directly comparable, because we are dealing with different pieces of legislation and therefore very different contexts”.

The Committee note that the Government were not able to provide the House with a precedent for retrospective changes to the law to be made on the basis of a criterion of “desirability”.

The Committee will remain vigilant, in scrutinising the constitutional acceptability of bills, so as to identify and assess provisions that seek to change, or empower ministers to change, the law retrospectively. We welcome the Government’s amendment to clause 75, made at the Third Reading, which places on the face of the statute book the constitutional principle, “that it is in the public interest to avoid retrospective legislation”.

The Committee would welcome your observations on the points raised in this letter, which will be placed on the Committee’s web pages. It is our intention to publish a short report in due course.

Response from Lord Myners to Lord Goodlad, 19 March 2009

Thank you for your letter of 16 February concerning the retrospective power contained in Section 75 of the Banking Act, which received Royal Assent on Thursday 12 February. The Chancellor of the Exchequer has asked me to respond as the relevant Minister. I apologise for the delay in my response. The Government was grateful for the constructive approach taken by the Constitution Committee during the passage of the Bill, and in particular for the committee’s report, which was balanced and measured.

First let me say that the Government has made clear that the Act does not set a precedent for the use of retrospective powers. During the debate we made clear a number of times that each power must be considered on its merits and context

On this matter the Government entirely agrees with the Committee’s recommendation. In light of the Committee’s report and your own contribution to

the debate on this provision in the House, the Government considered that it was appropriate to affirm on the face of the Act the public interest in avoiding retrospection. The Government made this amendment having considered carefully the particular features of this power, including the fact that the power involves the amendment of the law, is exercisable by statutory instrument and the possible use of the 28-day affirmative procedure. However, I would note that the Government certainly does not consider that such a provision will be appropriate for inclusion in every Bill that confers a power that can be exercised with retrospective effect.

As to your specific point about the exercise of the power if ‘desirable’, it may assist the Committee if I restate the Government’s position as to why this term has been included. At Third Reading, my noble friend Lord Davies gave examples where the power to amend the law might be used with retrospective effect to correct errors in the transfer order or instrument that had cast into doubt the legal position of those affected by a transfer. In such examples, the power to make retrospective provision would be exercised simply in order to put all parties in the position that they thought they were in. This would be of obvious benefit to all, through the restoration of legal certainty and the avoidance of unnecessary litigation. Similarly there may be cases where the effect of the transfer is to expose the private sector purchaser, or in other cases the Authorities themselves, to regulatory sanctions or other adverse consequences. In such cases, the breach of the law will have been occasioned by virtue of the transfer order or instrument, rather than due to the fault of the private sector purchaser or the Authorities. It may be entirely appropriate to modify the law with retrospective effect so as to disapply the relevant provision of the law and to relieve the private sector purchaser or Authority of the consequences of the breach.

The Government believes, however, that in such cases it may not always be possible to say that the use of the power to amend the law with retrospective effect is “necessary”. It may for example be perfectly possible for the private sector purchaser to incur the regulatory sanction that has been triggered by the transfer. Nonetheless, this does not mean it would be unfair or inappropriate to amend the law so as to relieve him of that sanction. In such cases, the public interest in treating the private sector purchaser fairly will need to be balanced against the public interest in avoiding retrospective legislation. It may well be that overall it is in the public interest to legislate with retrospective effect notwithstanding that it cannot be clearly said that it is “necessary” to do so. The test included in the Act—“necessary or desirable”—ensures that the Government can take appropriate action to ensure that the transfers affected under the Act operate in an effective manner.

Further, as you will be aware, there are significant constraints on the use of powers such as these. Not all of these constraints appear on the face of the Act, or need to. These include restrictions imposed by the European Convention on Human Rights, the duty to act reasonably and of course the Government’s respect for the rule of law and legal certainty—values that form the bedrock of the common law system of justice. The Government is of course obliged to have regard to the special resolution objectives in exercising any of the powers in the Act.

The Government was pleased to be able to respond to Parliamentary concerns through amendments that have placed extra limitation on the use of this power. Firstly, we amended the Bill to provide that the power cannot be used to amend the Act itself or standing secondary legislation under it. Secondly, we modified the Parliamentary procedure for the power. Finally, we included an express duty on

the Treasury to have regard to the fact that it is in the public interest to avoid retrospection.

On the basis of these amendments Parliament has accepted the Government's position. I believe that following the detailed process of Parliamentary scrutiny, the power under Section 75 is now more thoroughly understood and tightly worded. I would like to thank you and your committee for the role you played in this thorough scrutiny of Section 75.

I am copying this letter to the Chancellor of the Exchequer and Lord Davies of Oldham.

Letter from Lord Goodlad to Lord Myners, 2 April 2009

Thank you for your letter of 19 March in response to mine of 16 February about the Banking Act 2009.

The Committee considered your letter with interest and have asked me to press you further on whether there is a precedent for retrospective changes to the law to be made on the basis of a criterion of "desirability". Can you confirm whether there is or is not such a precedent?

I look forward to your response which will be published in a short report by the Committee in due course.

Response from Lord Myners to Lord Goodlad, 15 April 2009

Thank you for your letter of 2 April 2009, which concerned the 'necessary or desirable' criterion in section 75(3) of the Banking Act 2009. During debates on the Act, the Government sought to explain section 75 by referring to examples of powers with similar aspects in other legislation. My noble colleague Lord Davies presented to the House a number of examples of legislation with retrospective elements, and also set out at length why section 75(3) is drafted as it is. As you know, the House agreed that there was no exact parallel for these powers.

Parliament judges legislation on its merits. This is proper, as clearly the inclusion of a power in one piece of legislation does not necessarily justify the inclusion of a similar power in another piece of legislation. The onus is on the Government to justify the specific powers that are being taken in the context of the particular legislation in which they appear. In our debates, both in the House and outside, the scrutiny of section 75 was particularly thorough.

On the specific point of the use of 'necessary or desirable' in section 75(3), the Government was clear that this wording had been adopted because of the demands of the unusual context in which power would be used. The Government was also clear that there are no examples of other powers that are directly comparable. The Government put forward several different examples of legislation with retrospective effect, and I believe that the House found these helpful. I am not aware of other examples that might provide a better match for section 75 in respect of the 'necessary or desirable' test.

I hope this information is useful. The Constitution Committee's report on section 75 was an important contribution to our debates, and I look forward to reading your next report when it is published in due course.