



HOUSE OF LORDS

Select Committee on the Constitution

3rd Report of Session 2009–10

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.
2. An earlier version of the Co-operative and Community Benefit Societies and Credit Unions Bill was introduced in the 2008–09 Session. That Bill passed all its stages in the House of Commons (and did so unamended). In the House of Lords the Bill was read for a second time (on 10 July 2009) but was the subject of a critical report from this Committee.¹ The Bill progressed no further.
3. The Bill was re-introduced in the House of Lords at the start of the current Session.² As before, the Bill is a private member’s bill, albeit that, as before, it has Government support. In the House of Lords the Member in charge of the Bill is Lord Tomlinson.
4. The current Bill is in identical terms to the previous Bill, save that it has been re-drafted in two respects in order to take account of this Committee’s concerns. **The Committee welcomes the fact that the Government has responded positively to our concerns.**
5. The House will recall that the substance of the Bill is as follows: it 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 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. As we stated in our Report on the Bill in the last Session, **the subject-matter of the Bill is uncontroversial. No objection to its subject-matter was raised in that Report, and none is raised here.**
6. Our concerns related not to subject-matter, but to drafting and, in particular, to the breadth of the ‘Henry VIII clauses’ contained in the Bill. In our Report we raised concerns about clauses 4, 5 and 6.

Clause 4

7. Clause 4 provides that the Treasury may by regulations make provision for certain aspects of company law to apply to co-operative and community

¹ Constitution Committee, 19th Report (2008–09), HL 158.

² On 19 November 2009.

benefit societies.³ This power includes the power to create criminal offences by order.

8. 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 ...”⁴ 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”.⁵ 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”.⁶
9. In our Report on the Bill we expressed concern about the use of assurances of this kind. We questioned 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. We were further concerned that it is not only a matter of maximum sentence, but that it should also be the case that the *substance* of criminal offences in this field is the same as between companies on the one hand and co-operative and community benefit societies on the other. **We are pleased to note that the Government has acknowledged our concerns and has accepted these recommendations.**
10. Thus, in our Report on the Bill in the last Session, we recommended that both the maximum penalty and “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” and that “such a prescription should appear on the face on the Act”.⁷ **We are pleased to report that clause 4(7)(b) has now been redrafted accordingly.** It reads as follows (the italicized words are new):

“Regulations under this section may—b) create criminal offences, *but only—(i) in circumstances corresponding to an offence under the Companies Acts, and (ii) subject to a maximum penalty no greater than is provided for in respect of the corresponding offence*”
11. The Committee further noted in its Report on the Bill that, as previously drafted, clause 4 imposed no express duty on the Treasury to consult before making regulations under this provision. **Again, we are pleased to report that such a duty has now been provided for,** clause 4(8) having been added, in the following terms:

“Before making any regulations under this section the Treasury must consult such persons as appear to them to be appropriate”.

Clause 5

12. 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

³ Namely, provisions of company law relating to investigations, company names, and dissolution and restoration to the register.

⁴ Delegated Powers and Regulatory Reform Committee, 11th Report (2008–09), HL 135, para. 6.

⁵ HL Deb 10 July 2009, col. 886.

⁶ Ibid.

⁷ Constitution Committee, 19th Report (2008–09), HL 158, para. 12.

to make consequential amendments to other Acts) so as to make corresponding statutory provisions for credit unions to those applicable to building societies. As under clause 4, the Treasury's power under clause 5 includes the power to create criminal offences by order. In our Report on the Bill in the last Session we concluded that the concerns we raised about the scope of this power with regard to clause 4 applied also to clause 5. As with that clause, **we are pleased to report that clause 5 has also now been redrafted to incorporate our recommendations.**

Clause 6

13. Clause 6 confers on the Treasury a widely drafted power to make consequential amendments. The Committee was concerned about the breadth of this power and recommended as follows: "it would 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".⁸
14. Unlike clauses 4 and 5, clause 6 has not been redrafted to meet the Committee's concerns. Rather, the Financial Services Secretary to the Treasury (Lord Myners) wrote on 4 November 2009 to our Chairman, with the following explanation: "There are 811 existing statutory references to industrial and provident societies (more than half in primary legislation) that will need amendment in consequence. It would simply not be practical to deal with all this in the Bill."⁹ In addition, Lord Myners noted that it was the Treasury's view that the power contained in clause 6 was "in line with current practice".¹⁰ **While we undertake to remain vigilant in our scrutiny of such provisions, we are grateful to the Minister for his explanation, and we accept it.**

Conclusions

15. In our Report on this Bill in the previous Session we described it as "skeleton legislation" and argued that, from a constitutional point of view, it would have been preferable for the Treasury first to identify which provisions of company law need to be applied to co-operative and community benefit societies and then to come to Parliament with legislation in which all of this is set out, rather than leave the matter to the discretion of the Treasury.¹¹ **This remains the Committee's strong view as to how the legislative process should work, as it is by legislating in this way that parliamentary scrutiny can be rendered most fully effective.** However, we are on balance satisfied that in this instance sufficient safeguards have now been incorporated into the Bill so as to protect against any abuse. First, the substance and scope of the Treasury's ability to create criminal offences and to provide for their maximum penalty has been defined and curtailed. Secondly, the statutory duties on the Treasury to consult with appropriate parties have been extended. And thirdly, as before, all regulations made under this Bill are subject to affirmative resolution procedure.

⁸ Ibid, para. 21.

⁹ See Appendix, para 14.

¹⁰ Ibid, para 12.

¹¹ Constitution Committee, 19th Report (2008–09), HL 158, para. 9.

APPENDIX: LETTER FROM LORD MYNERS TO LORD GOODLAD

1. I am writing about the Co-operative and Community Benefit Societies and Credit Unions Bill, which will not now be able to complete its passage through Parliament.
2. I believe that this Bill contains measures which are essential to help industrial and provident societies and credit unions to thrive, and to bring much-needed diversity to the provision of financial services. The Government would strongly support the reintroduction of this Bill, amended as necessary to meet the concerns expressed by your Committee.

The Clauses

3. In examining the Bill, the Committee expressed a general concern that clauses 4, 5 and 6 of the Bill confer inappropriate general powers on the Treasury.
4. Clause 4 of the Bill enables the application of certain provisions of company law to industrial and provident societies. The applicable provisions cover investigations, company names and dissolution and restoration to the register. Application of provisions of company law on investigations is needed to improve corporate governance of industrial and provident societies by the Treasury giving the FSA (as registrar of industrial and provident societies) powers to investigate industrial and provident societies greater than it currently has and similar to the wider powers that the Secretary of State for Business, Innovation and Skills has to investigate companies. Application of legislation concerning company names would allow the Treasury to introduce provisions that deal with issues such as similarity of the name to other names, or to names giving a misleading indication of the activities of a society. Finally, application of provisions of company law concerning dissolution and restoration to the register would enable the Treasury to introduce procedures that could deal more efficiently with cancellation of defunct societies from the register and related issues.
5. Clause 5 enables the application of building societies legislation to credit unions. Safeguards within the provision are intended to prevent the application of building society law that would modify the constitution of credit unions. For example, amendments may not be made, using this route, to alter registration as a credit union, amalgamations and transfers of engagements, or the conversion of a credit union into a company. The powers granted by clause 5 would enable the Treasury to help credit unions law to keep pace with credit unions' expanding membership and operations by mirroring provisions of building society law. The Treasury considers that it would be appropriate to apply a number of provisions of building society law to credit unions as those provisions are tailored to deal with issues specific to deposit-taking institutions.
6. Clause 6 of the Bill provides for consequential amendments that may be needed in connection with changes in legislation introduced by other clauses in the Bill.
7. It may be of assistance to the Committee if I explain something of the background to the Bill. The Bill is a significant part of a programme to amend and update mutuals legislation and complements other measures being introduced by means of a Legislative Reform Order (LRO). Finding time for a full programme Bill to amend legislation affecting cooperatives and credit unions has not been possible, however the measures introduced in both the Bill and the LRO have been subject to public consultation and in detail with a working group of

representative experts from the sector—so that the legislation reflects the needs and wishes of the sector as far as possible.

8. The Delegated Powers Committee did not share the same general concern. They were content that the Treasury had made out the case for making these detailed technical amendments by subordinate instrument, having obtained the approval of Parliament both for the principle of what is proposed (in the Bill) and for the resulting amendments (by affirmative resolution). They concluded (11th Report para. 8) “we do not suggest that the delegation is inappropriate bearing in mind the precedents”. The Treasury remains of the view that, for the reasons stated in its memorandum to the Delegated Powers Committee, this is a proper and practical way of proceeding.

The Committee’s Concerns

9. I move to the specific concerns raised by the Committee in relation to clauses 4(7) and 5(3) of the Bill. The Committee considers that these provisions, as drafted, potentially create the ability for Treasury to create new criminal offences by order or to increase existing penalties. As I confirmed to the House during the second reading of the Bill, it has never been the intention of the Treasury to create new offences or increase penalties.

10. However, the Government understands the concerns of the Committee and has considered, in conjunction with Parliamentary Counsel, how best to make amendments to clauses 4 and 5 that will address these issues. The Treasury plans to include in clauses 4 and 5 provisions to the effect that regulations made under those clauses can only create criminal offences (a) in circumstances corresponding to an offence in the legislation being applied and (b) subject to a maximum penalty no greater than is provided in the corresponding offence. I attach an amended version of the Bill containing the proposed changes at clauses 4(7) and 5(1)(inserted section 23 A(3)(b)).

11. In relation to clause 4, the Committee raised the point that there is no express duty on the Treasury to consult before making regulations under the provision. In drafting the Bill, the Treasury did not see the need to specify a duty on the face of the Bill, given its obligations under the Better Regulation Executive *Code of Practice on Consultation*. In order to meet the Committee’s concerns, the Government is nevertheless content to amend clause 4 to include an express duty to consult, like the one provided in clause 5. (See clause 4(8) of the attached amended Bill.)

12. In relation to clause 6, which confers power to make consequential amendments, the Committee take the view that the power is open to the same criticism as the substantive powers in clauses 4 and 5. However, in the view of the Treasury, this power is in line with current practice.

13. Powers of this kind to tidy up the statute book are commonplace. In the Acts passed so far this session alone there are more than 20 examples¹².

14. Another issue is that clause 6 is relevant not just to clauses 4 and 5, but also to clause 3 which “re-brands” industrial and provident societies as cooperative or community benefit societies. There are 811 existing statutory references to

¹² Banking Act 2009 ss.88(2), 135(2), 168(2); Borders, Citizenship and Immigration Act 2009 s.36(2); Business Rate Supplements Act 2009 s.28(2); Corporation Tax Act 2009 s.132(3); Finance Act 2009 ss.73(9)(a), 74(8)(a), 95(3)(b), 96(6)(b), 100(4)(b) and (5), 104(6), 106(5), 107(5), 124(4), Sch.3 para.10(2)(b), Sch.61 para.23(1)(b); Northern Ireland Act 2009 s.5(4)(a); Political Parties and Elections Act 2009 ss.34(2) and (3), 43(4), Sch.2 para.16(1)(b) and (3)

industrial and provident societies (more than half in primary legislation, the rest in secondary legislation) that will need amendment in consequence. It would simply not be practical to deal with all this in the Bill.

15. In summary, the Treasury considers that it would be right to make amendments to the Bill covering the Committee's concerns over criminal offences and a duty to consult when bringing forward regulations under Clause 4.

16. The Treasury considers that this, combined with the fact that any regulations made under the Bill would be made under the affirmative resolution procedure and would be the subject of detailed consultation, will ensure that all suitable checks and balances are in place to avoid the danger of any potential abuse.

4 November 2009

