



HOUSE OF LORDS

Select Committee on the Constitution

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4th Report of Session 2015–16

# Energy Bill [HL]

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### *Committee staff*

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# Energy Bill [HL]

## Background

1. The Energy Bill [HL] was introduced in the House of Lords on 9 July 2015. Its second reading is scheduled for 22 July, and the committee stage is due to commence on 7 September.
2. The Bill arises from the Government's commitment to implement recommendations made by the Wood Review concerning oil and gas production from the UK continental shelf. In particular, the Bill provides for a new body, the Oil and Gas Authority (OGA), which would serve as the principal operational regulator in respect of relevant activities as well as playing a key strategic role in securing "maximum economic recovery" of UK continental shelf hydrocarbon resources. The Bill also makes provision in respect of wind power: it would remove the need for ministerial consent in respect of larger wind-power schemes and makes provision concerning the closure of the "renewables obligation" in respect of onshore wind farms.
3. There is one matter to which we would draw the attention of the House, concerning the retrospective nature of some of the provisions in the Bill.

## Retrospective provisions

4. It has been the practice of the Department for Energy and Climate Change (DECC) to levy annual charges upon relevant oil and gas operators to cover the costs of performing certain of its functions (e.g. the granting of consents and issuing of licences). The Explanatory Notes accompanying the Bill refer to a DECC review which revealed that while the "majority of fees that were recovered were properly covered by fee schemes, there were elements that were not provided for by the current legislation".<sup>1</sup> Against this background, the Bill would do two things.
5. First, Clause 57 would insert new provisions into the Energy Act 2008 and the Marine and Coastal Access Act 2009 in order to supply a legal basis for the levying of relevant charges.
6. Second, Clause 58 is concerned with fees levied prior to the entry into force of the Bill. It provides that any such fee is to be "taken to have been lawfully charged" provided that it was levied in connection with the carrying out of functions under certain legislative provisions. Two of those provisions are the Parts of the Energy Act 2008 and the Marine and Coastal Access Act 2009 into which new sections concerning the charging of fees would be inserted by Clause 57 of the Bill.<sup>2</sup> The result would be to invest the new charging provisions envisaged by Clause 57 with retroactive effect. Fees charged prior to the entry into force of the Bill—and hence prior to the entry into force of the new charging provisions—would be rendered retrospectively valid by virtue of deeming the new charging provisions to have been in force at the relevant time, even though, at that time, they had not in fact been enacted.

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<sup>1</sup> Explanatory Notes, para 7.

<sup>2</sup> The other three provisions are Statutory Instruments which are presumably to be amended so as to provide a new (and retrospectively effective) legal basis for the charging of relevant fees.

7. As a category, retroactive legislation is inherently constitutionally suspect. Legislation that operates with retrospective effect, such that situations fall to be regulated by reference to laws that did not exist at the relevant time, is fundamentally inconsistent with the rule of law principle of legal certainty. Legislation that retrospectively criminalises conduct perhaps represents the most egregious example of retroactive legislation. Retroactive legislation may also be constitutionally dubious on separation of powers grounds if, for example, it is used as a means of reversing a judicial decision.
8. Clause 58 of the Energy Bill does not fall into either of those categories: it does not retrospectively criminalise any conduct, and, as far as can be ascertained, it does not seek to unpick any judicial decision holding fees levied under the present statutory regime to be unlawful. Nevertheless, the rule of law requires Government to have legal authority for the actions it undertakes. The reverse side of this coin is that where the Government commits acts for which authority is necessary but absent, it should be capable of being held to account for its unlawful actions.
9. The retrospective provisions in this Bill cover the levying of a narrow set of fees and it appears that no challenge as to their legality has been made. It may be, therefore, that the retrospective provisions of the bill could, on this occasion, be considered to be justified. However, this Committee has previously stated that, while there is no absolute prohibition on retrospective legislation in British constitutional law or practice, there does “need to be a compelling reason in the public interest for a departure from the general principle that retrospective legislation is undesirable.”<sup>3</sup> **On that basis, we draw the attention of the House to the retrospective nature of these provisions and invite the House to consider whether the Government has offered sufficient justification as to their necessity.**

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<sup>3</sup> Constitution Committee, *Banking Bill* (3rd Report, Session 2008–09, HL Paper 19), para 7.