

HOUSE OF LORDS

Select Committee on the Constitution

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4th Report of Session 2006–07

**Justice and Security  
(Northern Ireland)  
Bill**

Report

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Ordered to be printed 21 February 2007 and published 23 February 2007

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Published by the Authority of the House of Lords

*London* : The Stationery Office Limited  
£price

HL Paper 54

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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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# Justice and Security (Northern Ireland) 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”.
2. **We draw clause 7 of the Justice and Security (Northern Ireland) Bill to the attention of the House as containing provisions that seek to limit the jurisdiction of the courts.** We share the concerns expressed by the Joint Committee on Human Rights in their Fifth Report.<sup>1</sup> The constitutional dangers of ouster clauses are too well-known to need lengthy discussion. The rule of law is diminished if an aggrieved citizen is barred from challenging an allegedly unlawful decision taken by a public authority. Clause 7 seeks to put onto the statute book an exclusion that would restrict the grounds upon which a challenge may be made to a decision by the Director of Public Prosecutions to issue a certificate requiring a defendant to be tried by a judge sitting alone rather than with a jury.
3. The clause was significantly modified during the passage of the bill through the other House. We welcome these concessions and the willingness of Government to listen to the criticisms that have been made of the clause. We remain unconvinced, however, that the clause is either necessary or constitutionally acceptable. The Government has sought to justify the ouster clause in two main ways. We do not find these arguments persuasive either individually or cumulatively.
4. First, it is said that the clause merely puts onto the statute book what has already been announced by the court in *In Re Shuker and Others* [2004] NI 367.<sup>2</sup> In that case the High Court in Northern Ireland considered whether a decision by the Attorney-General under the existing arrangements for ordering non-jury trials was subject to judicial review. The court held that although, in principle, orders for non-jury trials may be subject to judicial review challenges, “the courts should be reluctant to intrude”. The courts have demonstrated due deference to executive decisions in this context, consistent with their constitutional duty to uphold the rule of law. That being so, Parliament should in our opinion be wary of intervening to restrict the court’s jurisdiction unless there is a compelling reason to do so. It is one thing for a court, for constitutional or pragmatic reasons, to recognise the limits of its own jurisdiction; it is an altogether different thing when the court is deprived of its jurisdiction by statute.
5. Secondly, the Government says that the ouster clause necessarily follows on from its policy decision, expressed in clause 1, that certificates ordering non-jury trials should be issued “administratively” (by the Director of Public

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<sup>1</sup> Fifth report of Session 2006–07, *Legislative Scrutiny: Third Progress Report* (HL 46/HC 303), paragraphs 1.28 to 1.37.

<sup>2</sup> Explanatory Notes, paragraph 37.

Prosecutions) rather than judicially (by a senior judge).<sup>3</sup> We do not accept this. It is the very fact that the initial decision is made by the Executive branch of government that necessitates adequate supervision by the judicial branch. In a democracy committed to the rule of law, trust ought to be placed in the courts to exercise their judicial review powers appropriately to the circumstances of each case.

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<sup>3</sup> Paul Goggins MP (Parliamentary Under-Secretary of State at the Northern Ireland Office), Justice and Security (Northern Ireland) Bill Committee, Tuesday 16 January 2007, col. 83: “We are clear that that is coherent and absolutely consistent with our stance in relation to the statutory test on non-jury trials”.