



HOUSE OF LORDS

Select Committee on the Constitution

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6th Report of Session 2008–09

# Northern Ireland 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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# Northern Ireland 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 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 constitutional issues arising from the Northern Ireland Bill.
2. The bill has two aims which are of constitutional significance. First, it seeks to provide an interim framework for a Northern Ireland department and minister responsible for police and justice ahead of devolution of those functions. Secondly, the bill contains interim provisions arrangements for judicial appointments and removals. The bill requires the Northern Ireland Assembly to carry out reviews of both sets of arrangements by 1 May 2012.

## Pre-legislative, legislative, and post-legislative scrutiny

3. We have expressed the view in several previous reports that, as a matter of general principle, bills which deal with issues of constitutional significance should be published in draft and be subject to pre-legislative scrutiny. There can be little doubt that the Northern Ireland Bill seeks to legislate on matters of constitutional significance. It amends the Northern Ireland Act 1998, a piece of legislation described by the Appellate Committee of this House as “in effect a constitution” for that part of the United Kingdom.<sup>1</sup> In addition to the devolution framework, the bill deals with judicial appointments and removals, and the role of ministers in that process.
4. When the Lord Chancellor gave evidence to the Constitution Committee on 28 January 2009, we asked him whether there should be a constitutional convention that any bill which carries constitutional change of any significance should automatically be subject to pre-legislative scrutiny. Mr Straw told us that “that will be the rule unless there is some emergency, which I do not anticipate, which would mean that you have to rush the whole thing through”.<sup>2</sup>
5. In the present case, there has been no opportunity for pre-legislative scrutiny of a draft bill by the United Kingdom Parliament. Moreover, the bill has had an expedited passage in the House of Commons.
6. Many bills relating to the Northern Ireland peace process and devolution settlement have similarly been introduced to Parliament on an emergency basis, with Parliament being called upon to give legislative effect to negotiations: the Northern Ireland Bill 1999 (containing provisions on devolution and decommissioning of weapons following proposals put forward by the Prime Minister and the Taoiseach); the Northern Ireland Bill 2000 (enabling the temporary return to Northern Ireland of direct rule); the

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<sup>1</sup> *Robinson v Secretary of State for Northern Ireland* [2002] UKHL 32, paragraph 11 (Lord Bingham of Cornhill).

<sup>2</sup> House of Lords Minutes of Evidence taken before the Select Committee on the Constitution, Meeting with the Lord Chancellor, 28 January 2009, Q 23 (unrevised transcript).

Northern Ireland Assembly Elections Bill 2003 (providing for a 28-day postponement of the Northern Ireland Assembly elections scheduled for 1 May 2003); the Northern Ireland Assembly (Elections and Periods of Suspension) Bill 2003 (providing for the deferment of elections for the Northern Ireland Assembly that were due to be held on 29 May 2003); the Northern Ireland (Monitoring Commission etc) Bill 2003 (providing the Secretary of State with powers to exclude Ministers from the Northern Ireland Executive); the Northern Ireland Bill 2006 (providing for the recall of the Northern Ireland Assembly for the purpose of electing an Executive); the Northern Ireland (St Andrews Agreement) Bill 2006 (to make provision for preparations for the restoration of devolved government); the Northern Ireland (St Andrews Agreement) Bill 2007 (to modify the effect of the Northern Ireland (St Andrews Agreement) Act 2006 by altering dates from March to May).

7. This Committee is currently engaged on an inquiry into ‘emergency legislation’ (broadly defined to include all bills that receive a fast-track passage through Parliament). As part of this inquiry, we are considering the reasons for and the constitutional implications of the practice in recent years of routinely giving bills relating to Northern Ireland constitutional matters expedited consideration by Parliament. We will report to the House in due course.
8. The present bill contains express provision for what is, in effect, a kind of post-legislative scrutiny (though this will not be carried out by the United Kingdom Parliament). Schedules 1 and 6 require the Northern Ireland Assembly to reconsider the continuing operation of the new department responsible for policing and justice and to review of the arrangements relating to judicial appointments and removals before 1 May 2012.
9. **While we understand the political requirements for progress to be made on the process of devolution of policing and justice functions to Northern Ireland, it is not clear to us that there is an emergency situation that in and of itself justifies the departure from the principle that bills of constitutional significance should be subject to pre-legislative scrutiny in the United Kingdom Parliament. Nor is it obvious to us that circumstances exist which justify the bill being put on a fast-track legislative process in the House of Commons and the House of Lords. The bill is, in effect, amending the uncodified constitution of the United Kingdom and such changes should be made only after careful deliberation.**

#### **The role of the Prime Minister in judicial appointments and removals**

10. The bill sets out an interim framework for judicial appointments and removals from office: schedule 6 requires a committee of the Northern Ireland Assembly to review the operation of the new framework before 1 May 2012.
11. The interim framework (reflecting current arrangements) gives the Prime Minister the power of recommendation in the appointments process to fill a vacancy for the most senior members of the Northern Ireland judiciary—the Lord Chief Justice of Northern Ireland and for Lords Justices of Appeal. Before making such a recommendation to Her Majesty, the Prime Minister is required to consult the Lord Chief Justice of Northern Ireland or the senior

Lord Justice of Appeal and the Northern Ireland Judicial Appointments Commission.

12. The Prime Minister will also have a role in any process to remove from office the Lord Chief Justice of Northern Ireland, a Lord Justice of Appeal of Northern Ireland and certain Northern Ireland High Court judges. Ultimately, such senior judges may only be removed from office, on grounds of misbehaviour, upon an address to Her Majesty from both Houses of Parliament. The Prime Minister's functions would be to convene a tribunal (after consulting the Lord Chancellor) to investigate the matter and consider whether to recommend removal. The motion for such an address would be made by the Prime Minister in the House of Commons.
13. **While we accept that there is a need for ministers to be involved in both the appointment of and any steps to remove a member of the senior judiciary in Northern Ireland, we question whether the Prime Minister should have a role in these processes.**
14. In March 2008, the Draft Constitutional Renewal Bill proposed removing the Prime Minister from the process of appointments to the United Kingdom Supreme Court.<sup>3</sup> There is a case for saying that, in the new constitutional settlement that has emerged from the Constitutional Reform Act 2005, if a minister within the United Kingdom Government is to be made responsible for judiciary-related matters, that minister should be the Lord Chancellor.<sup>4</sup> The Lord Chancellor's constitutional role in relation to the rule of law is expressly recognised by section 1 of the 2005 Act; he has a statutory duty to "defend" the independence of the judiciary, distinguishing him from other ministers whose duty is to "uphold" that independence (section 3),<sup>5</sup> and his distinct oath of office requires him to respect the rule of law and defend judicial independence (section 17 of the 2005 Act).

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<sup>3</sup> *The Governance of Britain—Draft Constitutional Renewal Bill*, schedule 3 to the Bill (Cm 7342-II).

<sup>4</sup> See generally House of Lords Constitution Committee, Sixth Report of 2006–07, *Relations between the executive, the judiciary and Parliament* (HL 151).

<sup>5</sup> The Justice (Northern Ireland) Act 2002 similarly creates duties to "uphold" rather than "defend" judicial independence.