HOUSE OF LORDS

Select Committee on the Constitution

2nd Report of Session 2009–10

Government Response to Fast-track Legislation: Constitutional Implications and Safeguards

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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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Government Response to Fast-track Legislation: Constitutional Implications and Safeguards

1. On 7 July 2009 we published a report[1] on Fast-track Legislation: Constitutional Implications and Safeguards.

2. The Government responded with a letter from Baroness Royall of Blaisdon, the Leader of the House dated 3 November 2009. The response is reproduced here, for the information of the House, in the Appendix.

[1] HL Paper 116-I, Session 2008–09

APPENDIX: GOVERNMENT RESPONSE

Letter from Baroness Royall of Blaisdon to the Chairman

The Government welcomes the Constitution Committee's report on *Fast-Track Legislation: Constitutional Implications and Safeguards*. This response seeks to address the committee's recommendations in turn.

Case Studies of fast-track primary legislation

These case studies of fast-track legislation illustrate the concerns expressed by many of our witnesses in terms of the problems and issues that the fast-tracking of legislation raises. Of course, many of these concerns are a matter of debate—was the case for fast-tracking made? Could more time have been provided even if the case was made? Did the legislation turn out to be effective? Was sufficient attention given to potential safeguards, and did they work in practice? The answers may differ in relation to each of these case studies, and indeed in relation to any piece of legislation where the fast-tracking procedure was utilised. Yet the fact that each one of these cases has prompted debate, even in those examples where the argument in favour of fast-tracking was generally accepted, makes a strong case for considering how the fast-track procedure can be improved and better scrutinised (Paragraph 97).

Response

The Government welcomes the committee's report on Fast-Track Legislation: Constitutional Implications and Safeguards and this response seeks to address the committee's recommendations in turn. The Government welcomes the Committee's adoption of the term 'fast-track legislation' (rather than 'emergency legislation') and believes it is helpful to the debate.

Late amendments

The tabling of late amendments to non-fast-track primary legislation is a distinct issue from fast-track legislation. Given that the central focus of our inquiry is an analysis of fast-track legislation, we have only been able to touch on the late tabling of amendments. Yet, as the Clerk of the Parliaments reminded us, it may amount to the same thing in terms of its effect. We are concerned at the number of examples of this phenomenon that have been brought to our attention during the course of this inquiry. Whilst noting the Deputy Leader of the House of Commons' assertions that "we very much dislike doing it", and that there are occasions on which it is necessary to bring forward such amendments, the late tabling of amendments inevitably means that there is less time available to scrutinise them. The Government should redouble their efforts to minimise the number of late amendments they table (Paragraph 106).

Response

As the Committee has stated, the Government does not like to table late amendments to Bills. We recognise that amendments tabled to Bills late in the Parliamentary process can receive less detailed scrutiny. On many occasions, late amendments are tabled by the Government in response to the scrutiny process and arguments put forward in debate during earlier stages of a bill's passage and are welcomed as concessions. However, the Government accepts the Committee's

recommendation and will continue to pursue efforts to limit the number of late amendments tabled that do not fall into this category.

Purdah

We do not accept the use of the term "purdah" by the Secretary State for Northern Ireland in relation to elections to the European Parliament. We urge the Government to clarify their interpretation of the meaning of the term in their response to this report (Paragraph 127).

Response

The term 'purdah' is most commonly used in reference to the period between the announcement of a general election and the day on which the election is held. However, the period before any election, including elections to the European Parliament, must be handled sensitively by Government in order to avoid criticism that official resources are being used to further party political interests. The Cabinet Office produced guidance on making announcements that could influence the outcome of the European election in the period between 14 May 2009 and the election on 4 June. The Northern Ireland Act 2009 was an important piece of legislation that gave effect to an agreement between the First Minister and deputy First Minister. It is certainly conceivable that introducing or debating of this legislation during the European election campaign could have had an effect on the outcome of that election.

As Sir Jonathan Phillips stated when he appeared before the Committee, elections in Northern Ireland have tended to be divisive, so at the time the legislation was introduced it was important to allow a period between the legislation receiving Royal Assent and the start of the election campaign. This period was important because it would have been necessary for the Assembly to pass a resolution on the devolution of policing and justice before the European election if significant progress were to have been made before the summer.

It was for these reasons that the Secretary of State for Northern Ireland used the term "purdah". It was meant in a more general sense than when used in the context of a general election.

Northern Ireland Legislation

Whilst we acknowledge that it has been necessary to fast-track the process of a number of pieces of Northern Ireland legislation in recent years in order to maintain the momentum of the peace process, fast-tracking should not be 'the norm' in the future in relation to Northern Ireland legislation. We welcome the Deputy Leader of the House of Commons' assertion that it is the Government's wish to treat Northern Ireland legislation normally, and we join with the Leader of the House of Lords in her express hope that the Northern Ireland Act 2009 was "the last piece in the emergency jigsaw" (Paragraph 128).

Response

The Government is grateful that the Committee understands the rationale for fast-tracking Northern Ireland legislation. Whilst expediting the passage of legislation has been essential at a number of points in the political process, the Government agrees that this must always be regarded an exceptional approach and certainly not become the norm.

Secondary Legislation

Whilst accepting that in a very limited number of circumstances there may be grounds for seeking to fast-track parliamentary procedure of draft affirmative instruments, we take this opportunity to remind the Government of the importance of executive self-restraint (Paragraph 139).

Response

The Government accepts the recommendation that it is important to show self-restraint when seeking to fast-track parliamentary procedures relating to draft affirmative instruments. We support the clear Parliamentary rules and guidelines for Departments when laying statutory instruments, for which Leaders of both Houses can hold Departments to account. However, on occasion it will remain necessary to expedite secondary legislation. This is usually done with the co-operation of the opposition parties and the relevant scrutiny Committees, thus allowing scrutiny of the decision to expedite.

Overarching improvements

Whilst we note the arguments made in favour of such proposals as the publication of formal legal advice that the government have received, a written constitution, or a Business Committee or Legislation Steering Committee, there are, of course, also arguments against each of these. In addition, the implications of such reforms go far beyond the remit of this inquiry (Paragraph 158).

Response

The Government recognises the need to keep the procedures of the House under review and welcomes the Committee's consideration of this topic in light of the evidence; and we recognise that it is a matter for the House of Lords to determine its own procedures.

In the House of Commons, we await the outcome of the Procedure Committee inquiry and that of the Committee on Reform of the House which are concerned with the timetabling of business in that House. If recommendations from those reports are implemented, there might be issues for the Lords to consider.

Improvements to the pre-legislative scrutiny process

We continue to affirm our strong support for pre-legislative scrutiny and our desire to see it used more routinely. We acknowledge that the opportunities for pre-legislative scrutiny of fast-track legislation will inevitably be constrained by the timescale. Nonetheless, we do not believe that such constraints make pre-legislative scrutiny impossible—the opportunity given to some interested parties to consider the Criminal Evidence (Witness Anonymity) Bill being a case in point. Yet any such scrutiny has thus far tended to occur on an ad hoc basis. We therefore urge the Government to put mechanisms in place to ensure that relevant parliamentary committees and stakeholders are consulted about and given the opportunity to respond to proposed fast-track legislation ahead of Second Reading in the House in which the bill is introduced. This should be possible in all but the most extreme circumstances (Paragraph 163).

Response

Fast-tracked bills, by their nature, often require flexibility in handling depending on the circumstances of their introduction. The pre-legislative scrutiny process is one that the Government is committed to, and we are pleased that the Committee recognises its value. We will consider how we can use and improve the pre legislative scrutiny process with future fast tracked-legislation, on a case by case basis. We recognise the Committee's concern around the different levels of scrutiny that different fast-tracked legislation receives. However, we believe it would be unhelpful to impose a fixed level of pre-legislative scrutiny on fast-tracked legislation.

No. 2 bill procedure

Whilst we note that the No. 2 bill procedure has been used on occasions, most recently in the case of the Banking Bill in 2008, it appears to us that in general its drawbacks outweigh its advantages. We do not therefore recommend any increase in the use of the No. 2 bill procedure in relation to fast-track legislation (Paragraph 170).

We do not recommend that a piece of fast-track legislation should pass from the Commons to the Lords after Second Reading, before returning after detailed scrutiny in the Lords has been completed (Paragraph 173).

Response

As the Committee notes, the No.2 Bill procedure is rarely used. Before it was last used in the case of the Banking Bill 2008, the previous occasion was in the 1970s. The Government accepts that it should not seek to increase the use of the No.2 Bill procedure. However, there may be rare occasions where its use may provide the opportunity for additional scrutiny time in the second House during a fast-track process.

A Ministerial Statement or certification justifying the use of the fast-track procedure

We are not in favour of a certification requirement along the lines of section 19 of the Human Rights Act 1998, nor any formal role for the Speakers of the two Houses. However we agree with the Leader of the House of Lords that it would be valuable for the Government to provide more information as to why a piece of legislation should be fast-tracked. The process by which the Government makes the case for fast-tracking is at present rather ad hoc. This process needs to be formalised and strengthened.

As such, we recommend that the Minister responsible for the bill should be required to make an oral statement to the House of Lords outlining the case for fast-tracking. This should take place when the bill is introduced to the House in order to allow a debate, as early as possible on the justification for fast-tracking the bill, which does not detract from the Second Reading debate. The details contained in the oral statement should also be set out in a written memorandum included in the Explanatory Notes. The parliamentary time allocated for the statement should not in any way impinge upon the time available for consideration of the bill (Paragraphs 184 & 185).

In the light of the evidence we have received about the potential problems and issues pertaining to the use of fast-track legislation, we recommend that the Ministerial Statement should be required to address the following principles:

(a) Why is fast-tracking necessary?

(b) What is the justification for fast-tracking each element of the bill?

(c) What efforts have been made to ensure the amount of time made available for parliamentary scrutiny has been maximised?

(d) To what extent have interested parties and outside groups been given an opportunity to influence the policy proposal?

(e) Does the bill include a sunset clause (as well as any appropriate renewal procedure)? If not, why do the Government judge that their inclusion is not appropriate?

(f) Are mechanisms for effective post-legislative scrutiny and review in place? If not, why do the Government judge that their inclusion is not appropriate?

(g) Has an assessment been made as to whether existing legislation is sufficient to deal with any or all of the issues in question?

(h) Have relevant parliamentary committees been given the opportunity to scrutinise the legislation? (Paragraph 186)

We recommend that in its consideration of whether to allow a bill to be fast-tracked through its legislative stages, the House should bear in mind whether the Government's Ministerial Statement justifying fast-tracking has adequately addressed these principles. We will do this in the course of our scrutiny of any bill that it is proposed should be fast-tracked (Paragraph 187).

We remind the House that it is open to any member who is not content with the Government's justification for the fast-tracking of a bill to seek the opinion of the House when the motion to suspend Standing Order 47 is moved. If in our own scrutiny we judge that any of the principles have not been met, we will recommend that the House does not support the motion to suspend Standing Order 47 (Paragraph 189).

Response

The Government firmly believes that all members of both Houses are entitled to a full explanation of why a piece of legislation is being proposed for fast tracking; and we would expect to be held account for its timetabling. Ministers remain prepared to justify the need for any expedition to the House, including covering those issues set out in the Committee's Report.

As the Committee notes, it is open to any member to speak to any motion to suspend Standing Order 47 and to test the opinion of the House, although Standing Order 47 would only be suspended where the timetable would require two stages to be taken in one day.

Sunset clauses or renewal procedures

Whilst we acknowledge that there may be cases when the use of sunset clauses or renewal procedures is inappropriate, we do not believe that the Government's position of judging each case on its merits provides a sufficient safeguard. Where fast-track bills are used, there needs to be an additional safeguard. We therefore

recommend that, in such cases, there should instead be a presumption in favour of the use of a sunset clause. By this process, a piece of legislation would expire after a certain date, unless Parliament chooses either to renew it or to replace it with a further piece of legislation subject to the normal legislative process. The Government should set out the proposed terms of the sunset clause in the Ministerial Statement. In cases where the Government judge that the use of sunset clauses or renewal procedures is inappropriate, it should be incumbent upon them to make the case for their exclusion in the Ministerial Statement (Paragraph 189).

Response

The Government agrees with the Committee that there are cases where the use of sunset clauses is inappropriate. Whilst on occasion a sunset or renewal clause is deemed necessary, the Government believes this must be approached on a case-by-case basis. The uniform inclusion of a sunset clause also has the potential to force Parliament to legislate to a timescale that may not be appropriate to the issues involved. The Government would expect to explain whether a sunset clause is appropriate, alongside the justification for fast-tracking a Bill, in line with the list of principles set out in the Committee's Report.

Improved post-legislative review

We believe that post-legislative scrutiny has an important role to play in relation to all legislation, and take note of the Government's 2008 proposals for post-legislative scrutiny. In relation to fast-track legislation, post-legislative review is vital, and we believe that additional safeguards need to be introduced. We therefore recommend that, in co-ordination with parliamentary committees, the Government should make the prompt review of fast-track legislation a priority (Paragraph 208).

Whilst we acknowledge that it may not always be appropriate to review a piece of legislation quickly, we believe that there should be a presumption in favour of the early review of fast-track legislation. We therefore recommend that any legislation subject to a fast-track parliamentary passage should be subject to post-legislative review, ideally within one year, and at most within two years. The Government should set out the arrangements for review and the case for either a one—or two—year review period in the Ministerial Statement. In cases where the Government judge that such an early review would be inappropriate, it should be incumbent upon the Government to make their case in the Ministerial Statement (Paragraph 209).

Response

The Government agrees with the committee that post-legislative scrutiny has an important role to play in legislation, as set out in our 2008 proposals. The issue of timing is crucial: there is no point trying to conduct post-legislative scrutiny until the impact of an Act can be well understood. In many cases the full implications of an Act will not be understood one year after Royal Assent. For example, the Independent Parliamentary Standards Authority (IPSA), will only have been fully operational for 3 months at the first anniversary of the Parliamentary Standards Act 2009 receiving Royal Assent.

However, the Government would like to re-affirm its commitment to post-legislative scrutiny and in as many cases as possible conduct post legislative scrutiny as early as possible in the current 3–5 year window.