



HOUSE OF LORDS

Select Committee on the Constitution

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15th Report of Session 2008–09

**Fast-track  
Legislation:  
Constitutional  
Implications and  
Safeguards**

Volume I: Report

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Ordered to be printed 17 June 2009 and published 7 July 2009

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Published by the Authority of the House of Lords

*London* : The Stationery Office Limited  
£price

HL Paper 116–I

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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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**NOTE:**

The Report of the Committee is published in Volume I (HL Paper 116-I)  
The Evidence of the Committee is published in Volume II (HL Paper 116-II)

References in the text of the Report are as follows:

- (Q) refers to a question in oral evidence
- (p) refers to a page of written evidence

# Fast-track Legislation: Constitutional Implications and Safeguards

## CHAPTER 1: INTRODUCTION

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### Background

1. We have maintained a longstanding interest in the operation of the legislative process. In 2003–04, we undertook an inquiry into Parliament and the Legislative Process, where we identified ways in which we believed that legislative scrutiny by Parliament could be improved. In our July 2008 report on the Criminal Evidence (Witness Anonymity) Bill, we noted that this was the third “emergency bill”—i.e. a bill whose parliamentary passage was expedited, or “fast-tracked”—to be considered in recent months, following on from the Northern Ireland (St Andrews Agreement) (No 2) Bill in March 2007 and the Banking (Special Provisions) Bill in February 2008. We then commented:

“While we accept that from time to time exceptional circumstances may arise requiring the Government to prepare, and Parliament to deliberate on, a bill according to an expedited timetable there are obvious risks, especially where the bill deals with a complex social and legal problem. We may consider this issue further in a future inquiry into the legislative process”<sup>1</sup>.
2. In the light of this, we decided to undertake an inquiry into “constitutional issues that may arise when there is resort to emergency legislation”, and in particular, “situations where bills receive an expedited passage through Parliament”. This inquiry has arisen not from a desire to consider theoretical constitutional principles or arcane parliamentary procedure, but rather from a wish to affirm the importance of the legislative process, and a desire to see it improved.
3. The pertinence of this inquiry was confirmed by the Government seeking to fast-track two bills through Parliament whilst we were engaged in this inquiry. The Northern Ireland Bill 2009 (see paras 120–8) was brought forward whilst we were hearing oral evidence in connection with this inquiry and we were therefore able to take account of it in this report. Just before this report was published, the Government introduced the Parliamentary Standards Bill to the House of Commons and announced that they would seek to fast-track its progress through Parliament in order to secure Royal Assent before the summer recess. We consider the issues around the fast-tracking of this Bill in our separate scrutiny report on the Bill.

### The inquiry process

4. We received written submissions from seven witnesses, and heard oral evidence from 14 witnesses over seven sessions. Witnesses included academics, legal,

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<sup>1</sup> 9th Report (2007–08), *Criminal Evidence (Witness Anonymity) Bill* (HL 147), para 19.

parliamentary and constitutional experts, politicians, campaign organisations, civil servants and parliamentary officials, thus providing us with a number of different perspectives on the issues that we were considering. We are grateful to all those who took the time to respond to our inquiry.

5. An inquiry of this nature of necessity requires us to consider the procedure and experience of the House of Commons as well as the House of Lords, and we are grateful to the Clerk of the House of Commons for his written submission, and to the then Deputy Leader of the House of Commons, Chris Bryant MP, for his oral evidence. We note in particular the Clerk of the House of Commons' observation that "the issues being examined by the Select Committee on the Constitution are, of course, of considerable interest to Committees of this House. I understand that our Procedure Committee has it in mind to conduct an inquiry into the programming of legislation, which will no doubt embrace issues raised by 'emergency' legislation" (p 146). We will follow the progress of any such inquiry with interest.
6. We also contacted other legislatures in the UK (the Scottish Parliament, the National Assembly for Wales and the Northern Ireland Assembly), as well as a number of 'Westminster-style' legislatures (including New Zealand, Australia and Canada) to seek to gain a sense of their own experience of fast-track legislation. A summary of their responses is included as Appendix 6 and we thank those who responded to our requests for information. We also thank the Hansard Society for the information they provided on experience in New Zealand. Whilst such comparisons are useful, we acknowledge that the constitutional, parliamentary and political contexts vary.

#### **Four specific issues**

7. During the course of the inquiry, we were conscious of four issues.

##### *a) The lack of previous research*

8. There is a scarcity of previous work on fast-track legislation in general terms. Professor David Miers, Professor of Law, University of Cardiff Law School, told us:

"It is quite remarkable how little academic work there is on emergency bills as a kind of generic ... if you look at the practitioner books, if you look at the books on drafting ... [and] on statutory interpretation, there is nothing there about emergency legislation" (Q 295).

9. The perception that little previous thought has been given to the subject was one strong motivation for our undertaking of the inquiry, and we hope that this report forms a useful contribution to consideration of fast-track legislation as a discrete issue. As the Leader of the House of Lords, Baroness Royall of Blaisdon, told us:

"The exercise in which this Committee is currently engaged is an invaluable stock-taking. I think it is very necessary for Parliament to look at procedures from time to time and to see whether or not procedures have been properly used, if they have been abused" (Q 342).

##### *b) The question of terminology*

10. The evidence that we received led us to the conclusion that the term "emergency legislation" is not a helpful one to use in this context. Professor

Anthony Bradley, visiting Fellow of the Institute of European and Comparative Law, University of Oxford, and Emeritus Professor of Constitutional Law, University of Edinburgh, told us:

“I find the term ‘emergency legislation’ a little difficult to use and I do not use it very much ... if one simply looks at a bill that can pass through both Houses very rapidly, it might refer to bills that really are of no great interest to anybody and no politician, in their senses, would wish to spend time discussing them” (Q 248).

11. The other problem with the term is the potential for confusion between bills whose parliamentary progress has been expedited, and bills that are brought forward to deal with an emergency (actual or foreseen). (See Mr Durno and Professor Bradley, Q 250) Professor Bradley reminded us that the Civil Contingencies Act 2004 defines an emergency as “an event or situation which threatens serious damage to human welfare or to the environment, or war or terrorism which threatens serious damage to the security of the United Kingdom, and these terms are themselves further defined” (p 90). Although some bills that seek to deal with an “emergency” thus defined may be subject to an expedited procedure, many others will be considered in the normal way. For the purposes of this report, we consider bills whose passage has been subject to an expedited procedure, whether or not they were brought forward to deal with an “emergency”.
12. Professor Bradley suggested some alternative terms for such bills, including “rapid legislation”, “fast-track legislation”, “accelerated procedure” and “instant legislation”. (pp 90–1, Q 248) “Expedited legislation” is another possibility—the Clerk of the House of Commons told us that Erskine May refers to legislation passed “with unusual expedition” (p 146). Although all these terms could equally describe the process which we are seeking to examine, we find the term “fast-track legislation” most appealing in terms of its descriptive value. Like an express train, a bill on the “fast-track” will pass through all its normal “stops” (i.e. the various stages in each House), but the intervals between each stop will be shorter than on the “slow line”. In this report we examine the process by which legislation passes through the stages of scrutiny in both Houses at a faster rate than normal. We use the term “fast-track legislation” to describe this process.

*c) Defining what is a “fast-track” bill*

13. The list of bills subject to a fast-track passage since 1974 at Appendix 5 shows that fast-track legislation has dealt with such serious issues as:
  - Responses to terrorist attacks (for example the Criminal Justice (Terrorism and Conspiracy) Bill 1998)
  - The response to the economic collapse (for example the Banking (Special Provisions) Bill 1998)
  - The Northern Ireland peace process and devolution settlement (for example the Northern Ireland Bill 2009)
  - Reform of the criminal law (for example the Dangerous Dogs Bill 1991)
  - Closing legal loopholes (for example the Human Reproductive Cloning Bill 2001)
14. The list at Appendix 5 runs to well over 30 bills, and there are several other examples that could be included depending upon how “fast-tracking” is defined. We should however emphasise that this report is not intended to

form a case-by-case dissection of each of these examples or a thorough analysis of the policy arguments behind each bill, but rather is intended to consider the constitutional principles and implications that relate to the use of a fast-track procedure. Nevertheless, where we find it useful to illustrate our arguments by way of case studies, we have done so.

#### *d) Northern Ireland*

15. The list of recent cases of fast-track legislation was made considerably longer by the large number of such bills brought forward relating to Northern Ireland. As we mentioned above<sup>2</sup>, during the course of our inquiry a Northern Ireland Bill was introduced, subjected to an accelerated passage, and passed as the Northern Ireland Act 2009. In our report on the Bill, we noted that “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”, and that as part of our new 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”<sup>3</sup>. We consider legislation relating to Northern Ireland in Chapter 4.

#### **Constitutional principles**

16. We have identified five constitutional principles which we believe should underpin the consideration of fast-track legislation:
- The need to ensure that effective parliamentary scrutiny is maintained in all situations. Can effective scrutiny still be undertaken when the progress of bills is fast-tracked, even to the extent of taking multiple stages in one day?
  - The need to maintain “good law”—i.e. to ensure that the technical quality of all legislation is maintained and improved. Is there any evidence that the fast-tracking of legislation has led to “bad law”?
  - The importance of providing interested bodies and affected organisations with the opportunity to influence the legislative process. Is Parliament able to take account of the work of campaigners in its scrutiny work when a bill completes its parliamentary passage so quickly?
  - The need to ensure that legislation is a proportionate, justified and appropriate response to the matter in hand and that fundamental constitutional rights and principles are not jeopardised.
  - The need to maintain transparency. To what extent are the transparency of the policy-making process within government and the parliamentary legislative process compromised when bills are fast-tracked?
17. Through the rest of this report, we examine the question of definitions of fast-track legislation and situations in which it is constitutionally acceptable to fast-track legislation through Parliament. We then consider the issues and problems which arise when the fast-track legislative mechanism is used. Having done so, we consider whether any reforms can be introduced that would improve the process in the future.

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<sup>2</sup> See para 3.

<sup>3</sup> 6th Report (2008–09), *Northern Ireland Bill* (HL 50), paras 6–7.

## CHAPTER 2: DEFINITIONS OF FAST-TRACK LEGISLATION

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18. At the start of this inquiry, we sought to ascertain whether it was possible to produce a definitive list of: a) recent cases of fast-track legislation; and b) the circumstances in which the use of fast-track legislation was acceptable. We produced a list of over 30 bills which have been fast-tracked through Parliament in the past 20 years<sup>4</sup>. We asked witnesses whether this number was acceptable and in what circumstances they considered it justifiable for a government to seek to fast-track a bill through Parliament.
19. We were reminded by Liberty that fast-track legislation “is not a new phenomenon” (p 49. See also Law Society, pp 96–7). As Sir John Chilcot, a retired senior Civil Servant and representative of the Better Government Initiative, reminded us, “we do not hark back to a non-existent golden age—we were there and it was not golden” (Q 3).
20. A number of our witnesses agreed that there is a need for there to be some recourse to a fast-track procedure, so long as its use can be justified. For instance, JUSTICE argued that “it is important that both the law and the law-making process are sufficiently flexible to address situations that require urgent action. The very nature of most emergencies is that they arise unforeseen, yet it is inevitable that crises will arise and it would be irresponsible for Parliament not to make some allowance for the need to make laws quickly and effectively should circumstances demand it” (p 40. See also Ms Sankey, Q 132; Dr Fox, Q 4). Whilst not disagreeing with this, Professor Bradley did warn that “it ought not to be assumed without question that the possibility of rapid legislation is an attractive feature of the United Kingdom’s flexible constitution” (p 91).
21. On the question of the amount of fast-track legislation, Professor Bradley asserted that it “occurs more frequently than is often realised” (p 91). Professor Miers estimated that our list of over 30 bills over the past 20 years formed “something less than five per cent of the total”. In his view, “numbers are not of themselves ... the issue” (Q 293). Whilst both Isabella Sankey, Policy Director, Liberty, and Dr Eric Metcalfe, Director of Human Rights Policy, JUSTICE, were concerned at the high number of bills which we listed, they both agreed that it was not the central issue. Ms Sankey felt that “it really is a question of judging on a case-by-case basis whether the justification has been made out and looking at potential repercussions if legislation is not expedited”. Dr Metcalfe agreed that “the main issue is quality not quantity” (Q 132).
22. Box 1 below shows some of the scenarios in which fast-track procedures have been used. This is not an exhaustive list but it gives some idea of the scope and variety of the justifications relied on by the government of the day for fast-tracking legislation.

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<sup>4</sup> We were greatly assisted in this by a research paper produced by the House of Commons Library, *Government Bills receiving their Second and Third Reading on the same day* (SN/PC/04974), which is available at <http://www.parliament.uk/commons/lib/research/briefings/snpc-04974.pdf>

## BOX 1

### Scenarios in which fast-track procedures have been used

|  |
|--|
| Justification relied on to fast-track a bill:  |
| Northern Ireland peace process and devolution settlement (the single largest category in terms of number of bills) |
| To remedy an anomaly, oversight, error or uncertainty that has come to light in legislation                        |
| To respond to the effects of a court judgment  |
| To ensure that legislation is in force in time for a forthcoming event   |
| To deal with economic crisis   |
| To change a public authority's borrowing or lending limit or other funding issues                                  |
| To deal with a crisis in prisons as a result of industrial action  |
| To respond to international agreements   |
| To implement Treasury announcements in the Budget or autumn statement  |
| To respond to public concerns  |
| Counter-terrorism related  |

23. There was a general consensus amongst our witnesses that there is a range of situations in which it is constitutionally acceptable for bills to be fast-tracked. Steven Durno, Legal Policy Officer, Law Society, told us that it was possible to make a reasoned case for the fast-tracking of most of the bills which were fast-tracked in the past twenty years (Q249). Professor John McEldowney, Professor of Law, University of Warwick School of Law, and Lord Baker of Dorking thought that fast-tracking a bill which is intended to fill a legal lacuna identified by the Courts and which has cross-party support was acceptable (QQ 59, 293).
24. Some witnesses identified occasions when, in their view, legislation had been fast-tracked for unacceptable reasons. Professor Miers told us that fast-track procedures should not be used for bills dealing with “something that was predictable or had been flagged ... at some point” (Q293). Dr Metcalfe criticised the use of fast-track procedures for legislation introduced primarily to respond to a public outcry (Q140). Lord Baker accepted that this was a “controversial and difficult area” but defended the use of fast-track procedures for what became the Aggravated Vehicle-Taking Act 1992 and the Dangerous Dogs Act 1991 which he had introduced, as Home Secretary, to respond to public concerns (QQ 59, 61, 75–85).
25. None of our witnesses was able to produce a definitive list of circumstances in which it is constitutionally acceptable to fast-track legislation. Sir John Chilcot explained that “the issue is one essentially of parliamentary judgment and decision” (Q3). Going further, Baroness Royall explained that the Government thought that it was “not only difficult but ... [also] wrong ... to define circumstances [in which it is constitutionally acceptable to use fast-track procedures] because expeditious legislation or emergency legislation is there precisely to react to certain circumstances which by their very nature are indefinable” (Q336). We agree that it is impossible to define all the circumstances in which it is constitutionally acceptable to use fast-track procedures.
26. It is equally difficult to come up with a definitive list of legislation that has been fast-tracked. The general procedures for parliamentary scrutiny of a bill are the same in terms of numbers of stages of consideration whether a bill is

fast-tracked or not, and the degree to which there has been a significant departure from the normal intervals between stages can vary considerably. There is, in essence, a fast-track “spectrum”, in terms of the degree to which the normal intervals between stages are departed from.

27. For the purposes of this report therefore we have used the following useful definition of fast-track legislation based on the evidence provided by the Clerk of the House of Commons: “bills ... which the Government of the day represents to Parliament must be enacted swiftly ... and then uses its power of legislative initiative and control of Parliamentary time to secure their passage” (p 146).
28. In practice any of the following procedural characteristics can define and identify fast-track legislation:
  - Legislation which has been taken through all its stages in the Commons in one day;
  - Legislation which has had two or more of its stages taken in one day in the Lords (Standing Order 47 having been dispensed with);
  - Legislation where there has been a significant departure from the normal intervals between stages;
  - Legislation which Parliament has been recalled to consider and pass;
  - Legislation which, even though none of the above apply, has been expedited because of an urgent situation (see for an example of this the Clerk of the Parliaments’ written evidence on the Prevention of Terrorism Act 2005, pp 159, 166).
29. During the course of our inquiry it became clear that some bills—British Shipbuilders (Borrowing Powers) Bill 1983, Town and Country Planning (Compensation) Bill 1985, Dangerous Dogs Bill 1991, Aggravated Vehicle-Taking Bill 1991, Humber Bridge (Debts) Bill 1995 and Hong Kong Economic and Trade Office Bill 1996—which had been fast-tracked through the House of Commons (with all stages being taken in one day) had had a normal passage in the House of Lords.
30. It was suggested that the use of normal procedures in the House of Lords for these bills called into question whether there really was an urgent situation requiring fast-tracked legislation in these cases. Whilst accepting that this may be an issue, there are at least three other possible reasons for this situation: first, what the Clerk of the House of Commons termed, “the disparity of time provided for debate in the House of Commons and in the House of Lords” (p 150); secondly, the Government generally have more direct power in the House of Commons to influence the timetable of a bill than they have in the House of Lords; and thirdly, in at least one of the cases mentioned above—the Dangerous Dogs Bill 1991—there was a clear desire on the part of the Government to ensure the legislation was passed before the long summer recess. The pattern of the parliamentary year with a recess lasting for the whole of August and September meant that this Bill, which was introduced in June, could not have been enacted before the summer recess had the normal timetable been followed in both Houses of Parliament. (Lord Baker, Q 77) But, once the Bill had received an expedited passage through the House of Commons, there was sufficient time before the recess for the usual timings to be observed in the House of Lords.
31. Having identified what we mean by “fast-track legislation”, in the next Chapter we consider the practical implications of the use of fast-tracking.

## CHAPTER 3: PRIMARY LEGISLATION WHICH IS FAST-TRACKED

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### Problems and issues concerning fast-track primary legislation

32. In Chapter 1 we set out five constitutional principles that we believe should underpin the consideration of fast-track legislation. Our witnesses identified a number of practical issues and problems that arise when primary legislation is fast-tracked, many of which touch upon these principles.

#### *i) Constrained parliamentary scrutiny*

33. Baroness Royall conceded that one of the major difficulties was that “there is not as much time for scrutiny with expedited legislation” (QQ 349, 361). Other witnesses agreed. Liberty argued that the need for proper parliamentary debate and scrutiny was “an essential feature of the UK’s constitutional structure ... when legislation is introduced into Parliament and passed within a few weeks or even days it is impossible for Parliament fully to analyse and debate the proposals put before it” (p 51. See also JUSTICE, p 43)
34. Professor Bradley pointed out that the truncated timescale posed particular problems for “watchdog committees” such as ourselves (Q 261, pp 91–2). The Clerk of the Parliaments made a similar point with reference to the work of the House of Lords Delegated Powers and Regulatory Reform Committee, arguing that “this might be viewed as one of the ways in which emergency legislation can entail a trade-off between speed and the quality of scrutiny by the House and its committees” (p 161).
35. The Government agreed that “good scrutiny is an essential part of making good law” (p 128). However, Mr Bryant told us that “sometimes a piece of legislation may not be as good as it could be but we have to balance the need for swift action against whether we are doing detriment to the quality of the legislation that is so significant that we would have been better to have taken more time” (Q 349). Baroness Royall argued that each of the bills that she had been acquainted with in the Lords had been properly scrutinised, and that she had never felt there had been “undue pressure” (Q 365).

#### *ii) The degree to which legislation is fast-tracked*

36. Dr Ruth Fox, Director of the Hansard Society’s Parliament and Government Programme, explained their concern that “in a number of cases, the nature of the fast-track is something that could be looked at in terms of greater flexibility ... whilst there may be a case” for fast-tracking, “in many instances the accelerated nature of the fast-track is beyond what in most instances is required” (Q 4. See also Hansard Society, p 5). Mr Durno argued that “in recent years there has not been anything that has been so pressing that it could not have allowed for a little bit more time” (Q 263).
37. Sir Joseph Pilling, a retired senior Civil Servant, thought that “it may be a mistake to look at this issue as a choice between the expedited or emergency procedure and the normal procedure. There may be an issue to be explored about how expedited and how emergency, as it were, the procedure ought to be” (Q 212).

*iii) Does fast-tracking of legislation lead to bad legislation?*

38. The constraints that fast-tracking places on the scrutiny process raises the question of whether the quality of the legislation that follows suffers as a result. Professor Brice Dickson, Professor of International and Comparative Law, and Director of the Human Rights Centre, Queen's University Belfast School of Law, argued that legislation "pushed through Parliament in an emergency tends to be bad legislation because it is ill-considered" (p 85). Liberty asserted that "legislation drafted in haste will inevitably contain errors be they minor or more substantial" (p 51. See also Dr Fox, Q 43).
39. The Law Society also claimed that "legislation that is introduced in a rushed manner is invariably bad" (p 96. See also Q 260). However, aside from the Dangerous Dogs Act 1991 (see paras 83–8 below), Mr Durno was unable to identify any examples of fast-track legislation that had subsequently turned out to be either redundant or unworkable (QQ 266–7). Professor McEldowney conceded that it was difficult to prove the effect of the amount of scrutiny on the quality of a piece of legislation (Q 296).
40. Baroness Royall denied that "there is necessarily a corollary between a bad piece of legislation and an expedited piece of legislation ... there are other pieces of legislation which have been expedited which I think have been very good pieces of legislation" (QQ 348–9).

*iv) Pressure on the procedural process*

41. Some witnesses referred to the pressure that fast-tracking placed on the process of preparation of legislation. Baroness Royall told us that, whilst there were mechanisms to alleviate the problem, fast-track legislation put "enormous pressure" on departments and "huge demands" on parliamentary counsel. Mr Bryant stated that this was "yet another reason why Government is very reluctant to do it unless it really has to", and that whilst parliamentary counsel did "a phenomenal job ... getting all the ducks lined up in a row at speed is quite difficult" (Q 397). Dr Fox told us that part of the problem was the technical nature of the drafting process, which only a limited number of people were equipped to undertake (Q 43).
42. The Clerk of the Parliaments and the Clerk of the House of Commons made similar points with reference to the preparation of relevant parliamentary papers. The Clerk of the Parliaments told us that "where two or more amendable stages of a bill take place on one day, the practical difficulties of tabling amendments between stages and producing the manuscript marshalled lists, groupings and briefs can become acute" (p 162). The Clerk of the House of Commons told us that whilst "the process of emergency legislation can be supported ... the margins are very narrow and the possibility of error increases with speed" (p 150).
43. Another distinct concern was the knock-on effect of the introduction of fast-track legislation on the rest of the legislative programme. Lord Baker told us that whilst the Aggravated Vehicle Taking Act 1992 and the Dangerous Dogs Act 1991 "did not actually displace legislation in either case; it probably slowed down legislation and it probably meant that the House might have to sit a few more days in July" (QQ 66–8). Baroness Royall agreed that "it is a great headache to have a piece of legislation which we were not expecting which suddenly we have to slot into a very crowded programme, so ... you

can be sure that we are arguing vociferously with our colleagues to ensure that the piece of legislation itself is absolutely necessary” (Q 367).

*v) Pressure on campaigners and interested organisations*

44. There was also consensus that fast-tracking creates difficulties for interested organisations who seek to influence the legislative process. Professor Dickson referred to the “important principle ... of participative democracy. The faster legislation is put through without prior notice, the more difficult it is for people outside Parliament, let alone parliamentarians, to express a view on the proposed legislation, and that is very regrettable” (Q 228). The Clerk of the House of Commons agreed that in the most extreme examples of fast-tracking, “public access to the legislative process is virtually impossible ... the ability of outside organisations, pressure groups and individuals to comment is in practice non-existent” (p 150).
45. We heard from a number of such organisations. Mr Durno told us that, whilst the Law Society could normally suggest improvements to legislation, there was “just not the scope” to do so when “passing legislation very, very quickly through” (Q 269). Ms Sankey told us that Liberty “feel significantly hampered by fast-track legislation” (QQ 141, 161). JUSTICE pointed out that “NGOs themselves typically operate with very limited resources and may well be covering more than one piece of legislation at the same time. Expedited passage of legislation therefore reduces not only the amount of scrutiny available for the legislation itself, but also diminishes the overall quality of public scrutiny of other legislation. The fact that NGOs such as JUSTICE are still able to produce briefings on—and draft suggested amendments in respect of—emergency legislation should not be taken as any kind of evidence that expedited proceedings are sufficient to allow effective public participation in the law-making process” (p 43).
46. Baroness Royall acknowledged that “as a Parliament, we have a duty to the outside world and we need to ensure that what we are doing inside Parliament is understood and open and transparent, and I think that is much more difficult with an expedited process. I think the outside world cannot be as involved as I would wish it to be in legislation when there is an expedited process” (Q 361).

*vi) The “something must be done” syndrome*

47. Another problem identified by a number of witnesses was what might be termed the “something must be done” syndrome. Lord Baker reflected upon the passage of the Aggravated Vehicle Taking Act in 1991 when he was Home Secretary:
 

“What happened was that gangs of youths would steal a car, usually a high performance car, and do the most amazing tricks with it at night to such an extent that people came and watched it as a spectator sport and the television cameras came and filmed them night after night after night ... The Chief Constables of both [the affected] authorities came to the Home Office to see me and said that something must be done. That was the birth of the aggravated vehicle taking offence” (Q 61).
48. Professor Bradley told us that “the desire to legislate rapidly may be a response to an event of current prominence in the media. It may be difficult to separate the need for rapid legislation from the government’s interest in

being seen to respond decisively to current issues. Critics of such legislation may argue that the government could and should have asked Parliament to legislate at a much earlier date” (p 91). Professor Dickson warned that “members of the public may feel that the government is engaging in a knee-jerk reaction so as to be seen to be ‘doing something’ about the incident that has just occurred, even though existing laws may be adequate to deal with that incident” (p 84). Liberty were also fearful that “the policy behind such legislation will at best be ill-thought out and at worst may be motivated by political objectives to be ‘seen’ to be responding to an event or judgment” (p 51). Dr Fox questioned whether “public opinion and media pressure—and public opinion is a fickle thing—would meet grounds for immediacy” (QQ 7, 9).

49. Having said this, other witnesses argued that the political reality of a situation may sometimes demand a response. Sir John Chilcot related the story of Lord Jenkins of Hillhead, who, reflecting on his political career, “said that the best headline he ever had ... was simply, ‘Jenkins acts’. It did not say what he had done or why or to what effect, but that he had acted. That in his judgment—and he was not entirely flippant—was part of the purpose of things politically” (Q 20). Professor Bradley conceded that there was a “symbolic purpose” to the legislative process: “It is valuable for the Government to be seen to be doing something and of course for Parliament also to be doing so. If there is a very great deal of public concern about an issue, then I am not against there being a response, but what one fears is that the response may be so hasty that it may be ill-considered and ... there still surely should be proper time for consideration of what is said” (Q 254).

*vii) Exaggerating the case for fast-tracking*

50. A linked issue is the concern expressed by some witnesses that there is a temptation for the government of the day to seek to fast-track legislation when there is little case for doing so. Mr Durno thought that “in the [security] situation that is prevailing just at present, there is a real possibility of legislators being bounced into taking legislative action ... when they themselves do not have any way of testing the arguments” (Q 264). JUSTICE likewise argued that “current arrangements make it too easy for the government to expedite legislation where it is not appropriate, and with little consequence for doing so” (p 44).
51. Liberty expressed particular concern about “court decisions being used as an excuse to bypass the ordinary legislative process on the basis that the decisions leave a gap in the law” (p 51). Professor Dickson was unsure why Parliament reacted quickly to some court decisions and not to others. (Q 228) James Lee, Lecturer in Law, University of Birmingham Law School, warned that fast-track legislation to reverse specific decisions should not become the norm, and that “it is unwise and constitutionally dangerous for the threat of a legislative reversal to be in the minds of the judiciary when they are deciding cases” (pp 173–4). The Law Society argued that the Government should make preparations in advance in relation to court cases “which may have major constitutional implications” (Q 263).

*viii) Including non-urgent matters in a fast-tracked bill*

52. Sir John Chilcot identified another temptation for those in government:

“If you have an emergency measure going through very fast and you have one or two things from the back pocket which you would quite like to tack on—it would be terribly convenient and tidy and neat—the temptation is nearly irresistible to advise ministers to try it on. That should not get through and in any post-review should be identified and picked out and dealt with properly” (Q 15).

53. The Law Society thought that “there may be a suspicion that the Home Office has on the shelf certain clauses in anticipation of a situation arising where they will have to legislate. I have no way of proving that” (Q 273). Liberty argued that this had happened a number of times, but that it was “totally unacceptable, and a clear perversion of the parliamentary process” (p 51). The Clerk of the House of Commons suggested that we might explore further “the need to ensure that a bill which is to be taken with ‘unusual expedition’ contains only those provisions which are urgent, and that the temptation to take advantage of a legislative vehicle to include other material is resisted” (p 150).
54. Mr Bryant told us that discussion of such points was part of the debate on the allocation of time motion. (Q 367) Baroness Royall told us that “we very strongly make the argument that every part of the bill should be, of necessity, expedited”, and to ensure that “every part of that [fast-track] legislation is necessary” (Q 367).

*ix) “Act in haste and repent at leisure”*

55. The Law Society was equally concerned that “emergency legislation can provide ministers with sweeping powers to use in further emergencies” (p 97). Tying in with this was the anxiety at what Professor Dickson termed “acting in haste and repenting at leisure”—namely, the likelihood that fast-track legislation, once enacted, will remain on the statute book (Q 233). Professor Dickson also expressed his fear that “unless the provisions are strictly time limited they may become a semi-permanent feature of the law and be resorted to in situations for which they were never designed ... At the moment there is no legal mechanism to stop emergency legislation being used for purposes for which it was never intended” (pp 84–5). Liberty asserted that “our recent legislative history powerfully demonstrates how powers introduced to deal with an ‘emergency’ are continued long after the emergency has passed” (p 53).

*x) Executive dominance of the fast-track process*

56. Such concerns reflected a wider sense of unease at the increased power and influence of the executive vis-à-vis Parliament when fast-track legislation is proposed. Although Mr Bryant told us that “the Government would prefer, full stop, not to have to expedite legislation and that should be the assumption of our constitutional settlement” (Q 349), Lord Baker contended that “governments like to use their power for all sorts of reasons when they want something to be done ... usually at the expense of some parliamentary scrutiny of one sort or another” (Q 94).
57. The Hansard Society told us that “the emergency legislation process is characterised, even more so than normal, by dominance of the Executive”, in that while Ministers assert that arrangements have been settled by the Usual Channels, “the initiative for organising business in Parliament lies with the Government” (pp 5–6). Professor Bradley warned that “a democratic vote,

meaning a vote in the House of Commons, is not enough in every situation to satisfy a democrat that proper procedures are being followed” (Q 268). Dr Metcalfe was not aware of a situation in the last 20 or 30 years when Parliament had refused a request from the executive to fast-track a bill’s passage. (Q 135)

58. However, the Government argued that the amount of time available to consider a bill is a matter for Parliament, and that they would “seek to make as much time as possible available for scrutiny, subject to the need to achieve Royal Assent by a given date” (pp 128–9). Baroness Royall told us that “bills are expedited in this way only because there is cross-party agreement on a deadline for Royal Assent ... ensuring the maximum possible degree of parliamentary scrutiny is paramount in such circumstances” (Q 335). Mr Bryant argued that “it is only Parliament that in the end decides whether we should be expediting legislation” (Q 340).
59. Yet Mr Bryant told us that “‘cross-party’ in the Commons means something slightly different from in the Lords ... there is not a veto ... in the House of Commons. In the end, we have a debate and a vote, if necessary. We do not proceed entirely by consensus. But we do understand that when it goes to the Lords we will have to be proceeding by consensus” (QQ 347, 356).
60. When we pointed out that some bills which went through the Commons in one day were not expedited at all in the Lords (although not under the present Government), Baroness Royall told us that that reflected “the fact that in the House of Commons the Government has a majority and therefore they can expedite bills in a day, but in the House of Lords there is no cross-party agreement and we are a self-regulating House” (Q 358). Professor Bradley agreed with our suggestion that, where the Commons fast-tracked a bill but the Lords did not do so, it tended to cast doubt on the question of urgency in such cases (Q 251).

*xi) Differences between the Commons and the Lords*

61. There are also a number of procedural differences between the Houses that impact upon the way that fast-track legislation is considered. The Clerk of the Parliaments pointed out that:
  - The Government has no formal control over parliamentary time in the Lords;
  - The House of Lords is self-regulating. The usual channels discuss matters of the timetabling of legislation, but cannot always determine in advance the amount of time which the House will spend on considering any bill;
  - There is no selection of amendments. All amendments tabled must be called and may be debated;
  - In the Commons, Report and Third Reading are almost always taken on the same day; in the Lords, Report and Third Reading amendments are nearly always taken on separate days and amendments may be tabled and considered at Third Reading. (pp 159–60)
62. He also told us that “it is unusual, though not impossible, for emergency legislation to pass all its Lords’ stages in a single day. This would require a high degree of consensus in the usual channels and in the House ... In recent sessions, emergency bills have generally been given a First Reading on one day (following their arrival from the Commons), followed by Second

Reading on a separate day, with Committee, Report and Third Reading being taken on a third day” (p 160). The Clerk of the House of Commons pointed out that “for Government bills proceeded with urgently, a comprehensive regulating motion is now invariably tabled—in its effect, a guillotine—which makes provision for the handling of each stage (including putting forthwith Questions which otherwise would be debatable) and allotting time to each stage, including exchanges with the Lords” (p 148).

63. Mr Bryant pointed out that “in the House of Commons we have to have an allocation of time motion for us to be able to proceed in the first place, and during that debate, inevitably, the whole nature of the discussion is whether or not we should be expediting this particular piece of legislation and the Government has to defend its argument” (Q 337). The Hansard Society were concerned that this debate and divisions could cut into the time available for consideration of the bill (p 6). However, it does mean that the debate on the merits (or otherwise) of the fast-track procedure is dealt with before Second Reading in the Commons, whereas in the Lords, the Second Reading debate may focus upon this debate, as much as upon the merits of the legislation at hand. The equivalent procedure in the Lords to the Allocation of Time motion is a motion to suspend the Standing Orders, although this is rarely debated. We discuss this further in Chapter 6.

### **Case Studies of fast-track primary legislation**

64. It is useful to consider the issues raised by witnesses in the light of some examples of where primary legislation has been fast-tracked. We now consider four case studies raised by witnesses, taken from different eras, under different administrations, and covering different policy issues.

#### *a) Anti-terrorism legislation*

65. The first case study is not a single example, but rather a series of pieces of anti-terrorism legislation whose parliamentary passage has been fast-tracked. Professor Clive Walker, Professor of Criminal Justice Studies, University of Leeds School of Law, asserted that “anti-terrorism legislation is replete with examples” of fast-track legislation (p 178). Professor Bradley suggested that “it is only when there has been a new terrorist event of some magnitude that the next instalment of anti-terrorist legislation is passed, and I have no answer to the question why these further instalments should be necessary” (Q 264). Ms Sankey argued that the sense that such legislation was “more of a political response, i.e. the Government needs to be seen to be doing something ... has been very apparent over the last few years” (Q 135).

#### *i) Prevention of Terrorism (Temporary Provisions) Act 1974*

66. Some witnesses went back to the example of the Prevention of Terrorism (Temporary Provisions) Act 1974. Professor Dickson cited this as “a bad example of hasty legislation on the terrorism issue ... I take the point that, very often in the aftermath of a terrorist atrocity, politicians must be seen to be doing something, and there is a public mood often that demands that. However, I do not necessarily think that means that draconian legislation needs to be put in place. The [Act], passed in the aftermath of the Guildford and Birmingham bombings, is a good example of Parliament acting in haste and repenting at leisure ... [it] was poorly drafted and hastily enacted. It did not, for example, take proper account of the requirements of the European

Convention on Human Rights ... Later, of course, it transpired that the seven-day detention power under the Act was struck down by the European Court of Human Rights, at a time when there was no derogation in place for the UK” (Q 233).

67. Professor Dickson also told us that the Act provided additional arrest powers for the police in Northern Ireland as well as the rest of the UK, even though police in Northern Ireland had already been provided with a special arrest power the previous year (Q 233). He was also critical of the way in which the provisions, “although timetabled to lapse after six months unless expressly renewed, were in fact constantly renewed in one form or another year after year, even though the Act still had ‘Temporary Provisions’ in its short title. Many of the provisions remain in force to this day, having been transposed into the (permanent) Terrorism Act 2000” (p 84).
68. Professor Walker asserted that “the Home Office has since admitted that it drew up contingency plans during 1973 ... What was objectionable was not this stage of preparedness but the secrecy in which it was undertaken and the cynicism with which it was revealed only when the vigilance of Parliament was at its lowest ebb” (pp 178–9). He claimed that “various faults” in the legislation, such as the provision for exclusion orders, the fact that other measures such as electronic surveillance were not included, and the limit of the Act to Irish terrorism “may be attributed to the process of parturition of the Act, many which [faults] persist today” (p 179).
69. Former Home Secretary Lord Baker told us that the annual renewal requirement “allowed Parliament to have a debate on the whole process, basically on the terrorist threat. It was always approved and it was always continued, but it allowed Parliament to comment upon it which I thought was very necessary” (QQ 94, 97–101). Similarly, the Law Society thought that this was a model of the use of sunset clauses in such legislation (p 97).
70. However, Professor Dickson argued that the renewal requirement “gave the impression of being effective and transparent but, in the end, was not” (Q 234), and was an inadequate safeguard “against the perpetuation of bad laws”. This was because the time available for debate was short, MPs were given little evidence on how the Act had been implemented, and the independent reviews of the emergency legislation did not address the central question of whether “the aims of the emergency legislation [could] be just as easily fulfilled through use of non-emergency laws ... In Northern Ireland several provisions of the emergency legislation were kept in place long after their sell-by date” (p 84).
71. Other witnesses sought to place the Act in the context of the time. Whilst Sir Joseph Pilling admitted that some elements of the legislation may have been deemed unpalatable later on, he also told us:

“I can remember the national mood at that point. Roy Jenkins was Home Secretary. He was not, as I recall, unresponsive to the national mood. That did not make him a bad politician. I can imagine what the Opposition would have said if he had said, ‘I’m going to set up a committee to look at this which will report in late 1975, and then we may have legislation on the statute book by the middle of 1977 or 1978.’ He would not have had a very comfortable time ... You cannot altogether ignore a national mood if you are a member of the Government” (Q 224).

*ii) Criminal Justice (Terrorism and Security) Act 1998*

72. The Criminal Justice (Terrorism and Security) Act 1998, was, according to the Northern Ireland Office, “introduced in response to the Omagh bomb in August 1998 and following attacks on US embassies in Nairobi and Dar es Salaam” (p 75). Parliament was recalled for the specific purpose of passing the legislation, and its parliamentary passage was completed in two days—according to Professor Walker, “a remarkably short space of time” (p 178). The Irish Oireachtas was also recalled to pass a parallel piece of legislation in the Irish Republic.
73. Professor Dickson agreed that the legislation was “put through much too quickly. It was another example of the Government wanting to be seen to be doing something. The main provision in it as regards allowing people to be convicted of membership of proscribed organisations on the word of a senior police officer was, as far as I know, never used ... that legislation was put through for the optics, not because it was a genuine security requirement” (Q 235).
74. The Director of Public Prosecutions for England and Wales told us that, to his knowledge, the legislation had not been used in the prosecution of any offence in England and Wales. The Director of Public Prosecutions for Northern Ireland told us that in relation to similar provisions in Northern Ireland, although consideration had been given to reliance on them, “having regard to the difficulties ... there have not been any cases in which the police have been prepared to disclose intelligence in support of the opinion of a senior officer”<sup>5</sup>.
75. Sir John Chilcot, who “was on the point of leaving” the civil service “when the preparation began”, agreed that “it was a bill that was a response to public outrage. Some of the provisions in it had been on the stocks for quite a long time, like the offence of directing terrorism. It is true that there had been, and I think probably continues to be, real debate about how useable some of these provisions are ... this was a sudden crisis of public outrage on to which were, if you like, tacked certain propositions which had been iffy but, in that climate, were carried into legislation very quickly and frankly without the kind of justification which proper primary legislation would have required” (Q 18).
76. The then Prime Minister, Tony Blair, had told the House of Commons that “we are ... taking the opportunity of Parliament’s recall to put into law long-held plans to make it a criminal offence of conspiracy to commit offences outside the UK”<sup>6</sup>. Professor Dickson argued that “the fact that additional clauses were added by the Government to deal with international terrorism I think was a disgrace at the time, and should not have been piggybacked onto the specific clauses for Northern Ireland” (Q 235). However, Sir Joseph Pilling was “slightly more committed to pragmatism” because “it has never been terribly easy to get bills into the normal legislative programme”, and, in his judgment, the matter was “not particularly controversial” (QQ 194, 202).

*iii) Anti-Terrorism, Crime and Security Act 2001*

77. The Anti-Terrorism, Crime and Security Act 2001 was introduced in the aftermath of the 9/11 attacks, and took a month to complete its

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<sup>5</sup> Appendix 3.

<sup>6</sup> HC Deb, 2 Sep 1998, col 695.

parliamentary passage. Liberty told us that “while the tragic events of 11 September were understandably of the gravest concern, there was no apparent need for an immediate legislative response. The *Terrorism Act 2000* had come into force only months earlier; designed to tidy up the powers in relation to terrorism and intended to be the last word on anti-terrorism powers and procedures for the foreseeable future. Despite this, the [Act] was rushed through Parliament and there was no proper opportunity for reasoned parliamentary debate ... that is perhaps the classic example of rushed legislation which was in fact unnecessary” (p 56, Q 144).

78. Liberty also criticised the inclusion of provisions not related to the terrorism threat, concerning disclosure of information for the purposes of general criminal investigations and the freezing of assets (p 49). JUSTICE cited the criticism made by the 2003 privy councillor committee (chaired by Lord Newton of Braintree), regarding “the importance of restricting legislation of this sort to dealing with terrorism, rather than using it as a vehicle for addressing more general criminal justice issues” (p 41).
79. JUSTICE, in common with Professor Dickson and Professor Walker, pointed out that Part 2 of the Act had subsequently been used to make the Landsbanki Freezing Order 2008, “freezing not only the assets of the eponymous bank but also those of several other bodies including the government of Iceland” (pp 41, 85, 181).
80. That being said, the Hansard Society argued that the Act provided a model in terms of safeguards, such as sunset clauses, an annual renewal procedure in relation to the detention provisions in Part 4 of the Act, and the provision that the Act should be reviewed by a privy councillor committee—the Newton Committee, referred to above (p 6).

*iv) Prevention of Terrorism Act 2005*

81. The Prevention of Terrorism Act 2005 was passed after the Law Lords ruled that Part 4 of the Anti-Terrorism, Crime and Security Act 2001, which had empowered the Home Secretary to detain without trial foreign nationals he suspected of being international terrorists, was incompatible with the European Convention on Human Rights (JUSTICE, p 41; Dickson, p 84). JUSTICE criticised the fact that the legislation “was pushed through Parliament in a mere 17 days” in order to meet “an artificial deadline imposed by its own earlier emergency legislation of 2001 ... it shows that emergency legislation can itself produce knock-on effects so that, four years down the line, you find that you are rushing through additional legislation in order to struggle to catch up” (p 42, Q 145). Dr Metcalfe argued that the 2001 and 2005 Acts were two of the “best examples I can think of where in policy preparation and the drafting of bills it is impossible for us to see on the outside how [the Government] are addressing these things.” (Q 160) Liberty expressed the fear that the control order regime is becoming “a permanent ‘parallel’ fixture of our legal landscape”, making it easier to renew the provisions “without proper consideration” (p 50).
82. The Clerk of the Parliaments considered the Act to be “a prime example of emergency legislation ... Though its passage in the Commons was not completed in one day, the final consideration of amendments in both Houses entailed a rare all-night sitting in order for the Bill to be passed by a certain date” (p 159). This was because of an “exceptional” case of “prolonged ping-pong”, involving a “36-hour sitting of both Houses to reconcile

differences of view ... where each House considered the bill on five occasions following Third Reading in the Lords” (pp 162–3, 166–7). The Clerk of the House of Commons agreed, and stated that it “demonstrates that exchanges between the Houses can require significant additional time and test the House’s ability to proceed with due attention and care and provide high level support service” (p 147). He also pointed out that the fast-tracking procedure “posed problems of scrutiny and timing” for the Joint Committee on Human Rights (JCHR) (p 149).

*b) Dangerous Dogs Act 1991*

83. The Dangerous Dogs Act 1991 is, for many, the *cause célèbre* of fast-track legislation. Dr Fox told us that this legislation “is exhibit A in the list of acts which exemplify the problem” (Q 4). The Law Society argued that the Act was “the standard example” of “legislation that is introduced in a rushed manner [that] is invariably bad” (p 96). Is this reputation justified?
84. Dr Fox questioned why it was necessary to “push it through” in a “very, very tight timetable”, since nobody “seriously thought that there was a prospect of dangerous dog savagery in the case of a 24/36 hour period”. She conceded that it was easy “to forget the media furore that existed at the time. A huge amount of opprobrium would have fallen on the heads of Government Ministers had there been another attack ... so I can understand the desire to legislate but it is the speed at which legislation takes place that is the real concern”. She cited “problems with poor drafting” that meant “you ended up with a good number of legal cases”, which “could have been avoided ... had it been better looked at over a period of time” (QQ 4, 12). Mr Durno and Liberty broadly agreed (QQ 249, 266; p 49).
85. Professor Bradley thought that it was “salutary to recall that the allocation of time motion for the Dangerous Dogs Bill ... provided for the procedural motion and the second reading debate to end at 10 p.m., with the committee stage to follow until 3 a.m., and the report stage and Third Reading to be completed by 4 a.m. In defence of this remarkable motion, which I believe would not be acceptable today, ministers said that this gave the Bill the ‘equivalent of two full days’” (p 92). By contrast, he added, the “House of Lords treated that Bill in precisely the amount of time that it deserved” (Q 250).
86. Lord Baker, who as Home Secretary had been responsible for the Bill, told us that after Home Office consultation had been conducted the year before, “horrific” offences in 1991 had led him to take advice. “All the bodies came in ... and all agreed that pit-bull terriers bred for fighting should be eliminated and legislation was designed to do that and also to stop three other breeds being brought into the country ... It also introduced the system of mandatory destruction of dogs. There was no appeal”. (Q 75)
87. He argued that the purpose of the legislation “was very clear”, and that the Act “worked very effectively” until later amendments “in effect eliminated mandatory destruction and that virtually undermined the main provision of the Bill because that allowed owners to go to court endlessly, endlessly and endlessly, and argue the toss as to what was a pit-bull terrier and a pit-bull terrier type ... That would have all stopped if the Bill had been properly implemented in the way that I intended. So, this is a case of legislation being changed fundamentally by subsequent legislation making it very difficult to operate” (QQ 75–6).

88. He also defended the fast-tracking of the Bill, on the grounds that “something needed to be done ... Now, suppose I had decided not to do anything and, at the end of July, another child had been killed by a pit-bull terrier. What would they have been saying to me as Home Secretary? ... If it happened again today ... there would certainly be enormous pressure to do [reform the Act] and, what is more, the pressure would be to do it as soon as possible” (QQ 78–81, 84). Lord Baker also argued that, when issues came up in the spring or early summer, as the Dangerous Dogs Act did, then it was a choice between acting immediately, or waiting for the Queen’s Speech, with the end result that legislation could not be passed for nearly a year. (QQ 62, 70)

*c) Criminal Evidence (Witness Anonymity) Act 2008*

89. The Criminal Evidence (Witness Anonymity) Bill took under three weeks to complete its parliamentary passage in July 2008. The Government told us that the Bill was introduced “in response to a ruling by the House of Lords that the use of anonymous witnesses in a specific case had hampered the conduct of the defence to the extent that the trial had been unfair”. They justified the fast-track procedure on the basis that “this judgment was unexpected” and “raised the prospect of a number of convictions for serious offences being overturned and could have compromised a number of pending prosecutions”. The Government also asserted that there was cross-party support for the need to legislate (p 128).

90. There was some disagreement amongst witnesses as to whether the Bill was a case of “best practice”. Mr Durno thought that the Bill was “an ideal model of how fast-tracking should be done ... there was a lapse of some six weeks between when the judgment was made and when the Act came into force, so ... there was scope for the Government to undertake limited consultation. The Law Society was consulted and it did feel that it had had an effect on the legislation” (Q 263).

91. The Hansard Society questioned whether the process “needed to be as fast as it was”, in that the Bill underwent only six hours of debate in the Commons. They suggested that the debate could have been extended beyond 10pm or recess delayed by a day (Q 4, p 5). Likewise, whilst Professor Bradley acknowledged that “there was a real need for some urgent change in the law”, he was also concerned at the short amount of time allowed for debate in the Commons, and the difficulties that the fast-track process created for the JCHR (Q 263, p 91). Professor Bradley drew our attention to the comments of Jack Straw, who, as Secretary of State for Justice, was responsible for the Bill:

“Parliament should never legislate at the speed at which I am proposing unless it is convinced that there are overwhelming reasons for doing so”<sup>7</sup>  
(p 91).

92. Ms Sankey told us that the fast-track procedure limited Liberty’s ability to produce briefings and propose amendments on the Bill. (QQ 141–2) JUSTICE claimed that the legislation was “poorly drafted and misconceived”, (p 43) and Dr Metcalfe was “extremely critical ... of even the need to introduce the legislation in the first place ... had this gone through at

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<sup>7</sup> HC Deb, 26 Jun 2008, col 516.

a much more considered pace ... there would have been a lot more opportunity for Parliament and for the Executive to determine the correct policy in this kind of area” (Q 143). JUSTICE also argued that “the problems with the use of anonymous witnesses had been obvious for quite some time”, and for this reason were keen to know what legal advice the Government had received (p 43, QQ 156, 160).

*d) Banking (Special Provisions) Act 2008*

93. The Banking (Special Provisions) Act 2008 was passed in three days in February 2008. The Government told us that “after the Government had decided and announced that it was necessary to take Northern Rock into temporary public ownership, the Bill was introduced on an expedited timetable in order to allow the position of the company to be resolved as quickly as possible. Extended uncertainty over who owned and ran Northern Rock would have risked destabilising the company, risking a loss of confidence on the part of customers, business counterparties or staff that might have led to substantial loss of value in the business or, worse, a further run on the bank. This would have potentially triggered the sort of financial instability that the Bill was intended to avert” (p 128). Mr Bryant asserted that “in the Banking (Special Provisions) Bill case I think we have been proven right. Prevarication would have undone us” (Q 349).
94. Dr Fox told us that “on the face of it, ostensibly it was not necessary for the nationalisation of Northern Rock to happen in a day but, in light of what we subsequently learned in the progress of the Banking Bill, we know that there were other issues about which the Government were concerned and one can understand in terms of the wider economic situation perhaps it was thought appropriate and necessary within government to push that through more quickly than might otherwise have been necessary” (Q 7). The Law Reform Committee of the Bar Council agreed (p 168).
95. However, Professor Bradley thought that there was “a difference between the attitude that Mr Jack Straw took in relation to the witness anonymity provision and the statement of the present Leader of the House of Commons, Harriet Harman” (Q 268) that “on occasions the Government can ask the House to act decisively when action is needed in respect of a certain situation once we decide that we want to ensure that the uncertainty is as short as possible and that we will bring in a Bill that will give the Government powers to act”<sup>8</sup>. Professor Bradley asserted that “that does not necessarily bring in a test of an emergency, an external event, justifying this; it is a government decision that decisive action is needed and then the House can respond ... the issue that [critical MPs] were dealing with there is: why did all stages of the Bill in the Commons have to be taken by midnight in a total of seven and a half hours, and why could the Bill, a 24-page bill, not have justified coming back to it on the following day? (Q 268)”
96. The Clerk of the Parliaments told us that though the House of Lords Delegated Powers and Regulatory Reform Committee was able to report on the Bill, and “only two of the Committee’s four recommendations were accepted, below the usual acceptance rate for non-emergency bills” (p 161).

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<sup>8</sup> HC Deb, 18 Feb 2008, col 41.

### Recommendation

97. **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.**

### The tabling of late amendments to a bill proceeding at the normal pace

98. One distinct but linked issue relates to the tabling of amendments at a late stage to a bill going through its legislative process at the normal pace. The Clerk of the Parliaments stated that “the late tabling of significant Government amendments to non-emergency bills ... may, in effect, amount to emergency legislation, particularly if tabled in the second House” (p 159).
99. The Law Society argued that this trend “needs to be curtailed” (p 96). Although the Society had no objection to amendments being tabled that reflected an earlier undertaking, “more frequently, the Government seems ready to introduce partially formulated Bills, leaving officials to continue to work on the drafting of further provisions right up until the last possible moment ... as a consequence, the Government is having to make quite significant and substantial changes to the legislation to get it into a decent state as it is going through Parliament ... The result is that these late tabled clauses are subjected to minimal or no scrutiny in Parliament, and there is little or no opportunity for interested parties to offer any effective comment” (pp 97–8, Q 276).

### *Case studies of late tabling of amendments*

100. As in the case of fast-track primary legislation, witnesses drew our attention to cases involving anti-terrorism legislation. Mr Durno referred to the example of the Counter-Terrorism Act 2008 (which we had raised in our Call for Evidence), when at Third Reading “the Government introduced provisions relating to anti-money laundering ... there was a great uncertainty ... and we had to seek an urgent meeting with the Treasury to clarify that these provisions would not have an effect on solicitors ... It was appropriate for money laundering to have been included in the Act, but it should have been included at a much earlier stage so that people had an opportunity to scrutinise the provisions and make sure that the provisions had the effect they were intended to have and not catch people, such as solicitors, unintentionally” (QQ 280–1).
101. Dr Metcalfe agreed that such provisions were “an excellent example of these kinds of problems ... something that was introduced at the last minute but, if the Government had thought about, it would have taken measures far in

advance” (Q 156). Ms Sankey told us that the provisions “were not expect[ed] in the slightest and really did seem to come out of the blue” (Q 156). She drew our attention to the problem that such late amendments pose for organisations such as Liberty which seek to influence the legislative process (Q 156, p 51).

102. The Law Reform Committee of the Bar Council told us that “the provisions regulating demonstrations within a designated area were introduced at a relatively late stage in the parliamentary history of the Serious Organised Crime and Terrorism Act 2005 (‘SOCTA’). They introduced a complex regime for regulating demonstrations which are now widely considered to be very difficult in practice for the police to operate ... and would undoubtedly have benefited from examination at greater length” (p 168).
103. Professor Bradley referred to section 55 of the Nationality, Immigration and Asylum Act 2002, which “was intended to prevent support from being given to destitute asylum seekers who did not claim asylum ‘as soon as reasonably practicable’ after arriving in the United Kingdom ... It was one of several government amendments tabled at a very late stage, when the Bill had passed through all stages in the Commons and had completed its committee stage in the Lords. Under pressure in the Lords, parts of the Bill were then sent back for further consideration in committee, the clause was debated and on a vote was added to the Bill. In the limited time available, the Joint Committee on Human Rights considered the human rights implications of the new clauses and reported that it was difficult to envisage a case where support could be withheld from a destitute asylum seeker without there being a breach of his or her Convention rights ... When the Bill returned to the House of Commons, which for the first time could consider the new clause, a guillotine motion applied to the consideration of the many Lords’ amendments to the Bill. Less than 15 minutes was available for the House to debate the clause restricting support to asylum-seekers, and a vote defeating an opposition amendment was taken when debate of the clause had barely started. This problematic provision gave rise to numerous cases of judicial review ... until the Law Lords eventually held that the section was unworkable, essentially for the reason given by the Joint Committee on Human Rights” (p 96. See also p 95, Q 280).
104. The Law Society told us that the Planning Act 2008 was a “good example of the abuse of tabling new clauses late” (para 13). Mr Durno told us that “they had 18 sessions looking at the Bill in committee and in the 17th and 18th sessions there were a dozen new government clauses introduced, and the majority of those clauses were introduced not by a minister, but by a government whip, and the explanation for the new clauses was a paragraph long in *Hansard* and there is then no subsequent debate. That seems, to me, to be a perfect example of producing bad legislation; it is not being scrutinised effectively” (Q 276).
105. Mr Bryant admitted that this was something “that can happen ... as a government we are very keen not to proceed in that direction and the business managers try to prevent as much as possible that from happening, but there are some very exceptional moments when that does happen ... Late stages are a bad idea because ... the quality of scrutiny is improved by going through different stages in both Houses against a different set of circumstances and with different ways of approaching an issue. We very much dislike doing it. We are constantly writing to ministers and saying,

‘Thou shalt not do it.’ ... ‘Is this bill really ready?’ and ‘Thou shalt not introduce new elements except in response to amendment from other parties, and that shall only be at committee stage’ and therefore very much fighting against the late introduction of amendments, in particular on new areas ... I would say there is a very robust process that goes on in government to clamp down on ministers who might just have had a good idea on a Thursday afternoon and want it in the bill by next Friday with as little scrutiny as possible. But there are very rare occasions when, for instance, an independent report comes out which calls for urgent action in a particular area, and there is a legislative channel that is available, and that is, again, when we would kick in with ‘Let’s talk to all the parties and see whether they are content with this process’” (QQ 367, 387, 398).

106. **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.**

## CHAPTER 4: FAST-TRACKED LEGISLATION RELATING TO NORTHERN IRELAND

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107. An analysis of fast-tracked primary legislation in recent years reveals one outstanding trend—the statistical preponderance of legislation relating to Northern Ireland.

### Fast-tracking before 1995

108. As with fast-track primary legislation more generally, the fast-tracking of Northern Ireland legislation is not a new phenomenon. Sir John Chilcot, former Permanent Secretary at the Northern Ireland Office (1990–97), reflected on his own experience in the civil service dating back to 1969, when the then Home Secretary, Jim Callaghan, had “commissioned contingency plans, including draft legislation, against the emerging crisis in Ulster and First Parliamentary Counsel produced not only draft provisions ... but an invaluable guide ... *The Passage of Bills with Unusual Expedition*. It was a handbook but also an analysis of how the processes of parliamentary scrutiny and endorsement could be carried through at great speed. It was not needed for four years but, when we came to 1973 to the Northern Ireland Emergency Provisions Bill of that year, that preparation of process, as well as the preparation of content, proved to be very important” (Q 3).
109. Professor Bradley referred to the remarkable circumstances pertaining to the Northern Ireland Act 1972, passed after a High Court ruling that the army did not have legal powers of arrest, search and seizure (see Professors Miers and McEldowney, p 111):

“The court decision was made public at around midday and by about three o’clock the Attorney General was saying, ‘There will be legislation today’, and the Lord Chancellor repeated this in the Lords at four o’clock. The Lord Chancellor, Lord Hailsham, said he had not had the advantage of reading the judgment and then Opposition Members asked to see the judgment which they were reversing and it was said, ‘Sorry, we do not have copies. It is a 30-page judgment and we couldn’t make copies available in the time’. It was coming through in instalments by telex and the telex was not easy to be photocopied, so the leaders of the Opposition Parties offered their photocopying facilities to the Government to help them. There was some humour of that kind, the point being that in both Houses procedures were adapted so that, even before most people had had a chance to read the judgment, the law was changed and there was considerable debate as to whether they were changing the law or declaring it” (Q 263).

### Fast-tracking since 1995

110. There has been a steady stream of fast-track legislation relating to Northern Ireland in recent years. The Northern Ireland Office’s written submission confirmed that, since 1995, thirteen bills have been taken through Parliament by Northern Ireland Office Ministers which were subject to expedited passage (p 69). Professor McEldowney told us that 40 per cent of Northern Ireland legislation had been fast-tracked (Q 332). In addition, as the Northern Ireland Office told us, two Home Office bills whose progress

was fast-tracked were taken through Parliament in that time following incidents related to Northern Ireland (p 70).

111. The current Permanent Secretary, Sir Jonathan Phillips, told us that “in a minority of cases the security background is a factor, but much more significantly ... the political context is the really dominating factor. I think creating categories is difficult, but if I had to go for two, I would identify maintaining momentum in what was always and remains a difficult political process, a rather fragile political process, and where it is not a question of maintaining momentum, it has been on a number of occasions a question of avoiding a collapse in that process” (Q 186).

*a) Was the fast-tracking of Northern Ireland legislation justified?*

112. Sir Jonathan Phillips and Sir Joseph Pilling, the previous Permanent Secretary (1997–2005), both defended the fast-track process as necessary in each case. Sir Jonathan cited the Location of Victims’ Remains Bill 1999 as the only piece of legislation “not clearly required to maintain the momentum of the process”, but asserted that “none of us would have wanted to stand in the way of the real humanitarian issue that arose once the IRA had said that they knew the whereabouts of a certain number of bodies. That is an odd exception” (Q 187). He also argued, with reference to the Northern Ireland Assembly Elections Act 2003 and the Northern Ireland Assembly (Elections and Periods of Suspension) Act 2003 that Parliament had been able to influence or amend the legislation. (Q 187)
113. Sir Joseph Pilling asserted that the set of fast-tracked bills “stood up quite well to being tested in reality ... This may be merely an illustration that Northern Ireland legislation is rather simpler than that of other government departments, I do not know, but I think that some legislation that goes through an exhaustive process in both Houses does sadly turn out to be faulty when it is tested in the harsh light of day. I think the record of these bills has really been quite good” (Q 187). Baroness Royall claimed that “where we are politically now in respect of Northern Ireland demonstrates that those pieces of legislation were necessary and it was necessary to expedite them” (Q 368).
114. Mr Durno broadly agreed that fast-tracking had been justified in relation to Northern Ireland legislation (Q 263), whilst Sir John Chilcot acknowledged that “the real-life human situation” of negotiations, for instance in Northern Ireland, “may require immediate legislative authority”. He added that there is often “a negotiating context of the signals you give to the other side outside the negotiating room by your firmness of intent of boldness in action”. (QQ 6, 21)
115. Professor Dickson also thought “Northern Ireland has been a special case for quite a long time ... [and] by and large there has been a justification for the enactment of that legislation quickly” (QQ 228–9). He accepted that the Location of Victims’ Remains Bill “is difficult to justify as requiring fast-tracking; although ... the humanitarian aspect of that bill may have been an alternative justification, and indeed I would support that” (Q 238). He did express some reservations about fast-tracking of the Remission of Sentences Bill 1995 (Q 235), but he was more concerned overall with the Order in Council procedure used during the direct rule period, “which is not a great way of passing legislation and there definitely is a democratic deficit in that respect” (Q 228).

*b) Has fast-tracking become 'the norm' in Northern Ireland?*

116. Having said this, Professor Dickson was conscious that the political parties in Northern Ireland “have to some extent become habituated to the fact that they can push the British Government to the limits when pressing for legislation. At the same time, of course, one must bear in mind that Sinn Féin MPs do not participate in Westminster debates. For them, the problem of legislating for Northern Ireland is not theirs: that is an English/British problem which they are quite happy to pass to the British authorities” (Q 229). Sir Joseph Pilling acknowledged that the exertion of pressure to bring a negotiation to an end “is of declining power as an argument when people can observe that Parliament will expedite legislation” (Q 217). Professor McEldowney agreed that the large proportion of fast-track legislation “created a question as to why that is so ... clearly there is a culture that arises from an existing practice, and if that practice becomes embedded without being questioned there are obvious dangers” (QQ 332–3).
117. Sir John Chilcot told us that his sense, “particularly since I left ten years ago, is that the bar has progressively been lowered. It has been seen to be really increasingly easy by other political parties in Northern Ireland and by other governments—‘Oh, the UK Government will get some legislation through in a hurry. If we need another eight weeks, we can have it and there is no problem about that’. That seems to me a weakening of what should be good and strong process control over emergency legislation. It should not be that easy to agree in the case of a taut negotiation, ‘Oh, it is all right, we will change it and make it all right by Thursday’” (Q 21).
118. Sir Jonathan Phillips did not think that that was “a fair way of describing the recent history”, because, especially since the 1998 Good Friday Agreement, “the Government has had ... a fundamental responsibility for keeping the show on the road. I think in each of the cases which we have listed, there is ... a good case for proceeding with urgency. I do not accept that because the circumstances are somewhat different from those which were pertaining when John Chilcot was Permanent Secretary that that necessarily means that the bar has been lowered” (Q 216).
119. However, Sir Jonathan Phillips did accept that “you can observe in a negotiating context that if an expedited procedure has been used once, then it may well have created an expectation in people’s minds that it could be used again. That of course must be a possibility” (Q 216). He also accepted that there was a sense of growing impatience with the circumstances pertaining to Northern Ireland legislation, and that there has been “a lot” of fast-tracked legislation in that context (Q 213). Yet “the most significant and substantial measures in the policing field, in the criminal justice field, in terms of processions, parades, and, indeed, the major 1998 Act, were not rushed through in that way. They were treated according to normal parliamentary procedure” (Q 213). Mr Bryant made a similar point. (Q 373)

**Case study: the Northern Ireland Act 2009**

120. During the course of our inquiry, a new piece of fast-track legislation was introduced and passed, the Northern Ireland Act 2009. According to the Northern Ireland Office, “the Act paved the way for the future devolution of policing and justice in Northern Ireland”, and was “required urgently both to maintain political momentum and give effect, at the earliest opportunity, to the agreement reached between the First and deputy First Minister” on 18

November 2008 (p 74). The Bill was introduced to the House of Commons on 23 February, took all other Commons stages on 4 March, and was debated by the House of Lords on 9 and 11 March. It received Royal Assent on 12 March.

121. In a letter to us, the Secretary of State for Northern Ireland, Shaun Woodward MP, emphasised that “the Government remains committed to ensuring that the necessary legislation is in place to enable the process to move as quickly as the Assembly wants it to. It is, in my view, absolutely critical that it is not the UK Government or Westminster that is seen to be delaying progress on the arrangements for devolution that the Government undertook to make”. He told us that, in order to leave open the possibility of completing the further necessary steps to achieve devolution by the summer, “it is necessary for the Northern Ireland Bill to receive Royal Assent by mid March”<sup>9</sup>. Sir Jonathan Phillips made similar points in his evidence to us. (Q 203) Professor Dickson agreed that “the devolution of policing and criminal justice is an exceptionally important issue in Northern Ireland and a very sensitive one for the political parties there ... and therefore I think that it was right to put it through as quickly as possible” (Q 230).
122. In Chapter 3, we reflected upon the Government’s evidence in relation to the need for cross-party agreement for fast-tracking to proceed. This concept takes on a different meaning in relation to Northern Ireland, given the different party political dynamic that operates there. Mr Bryant acknowledged the importance of working with the Northern Ireland parties in relation to such legislation (Q 355). When we asked if Northern Ireland’s political parties supported the fast-track procedure in relation to all 13 bills, Sir Jonathan Phillips replied that “my general answer ... is yes. In every single case did every single party? No” (QQ 189–90). He also told us that the Government seek to obtain broad support from the Northern Ireland parties to fast-track, except in circumstances where the Government themselves reach a conclusion that urgent action is necessary. (Q 191) Sir Joseph Pilling added that it would often have “seemed obvious” to all concerned that it would be necessary to fast-track legislation “in order to keep the process going ... it would be wrong to give the impression that the government of the day wanted it dealt with this way and tried to sort of talk people into it. It fell out from the process” (Q 192).
123. Yet in relation to the Northern Ireland Bill in 2009, MPs from across the parties, including the DUP and the SDLP, spoke against the Government’s proposed allocation of time motion. The DUP Leader, and First Minister for Northern Ireland, Peter Robinson MP MLA, told the House of Commons that the Bill was being dealt with in a “constitutionally tacky way”<sup>10</sup>. Sir Jonathan Phillips told us that he was “not sure his remarks were necessarily addressed to the question of expedited passage itself, or whether they were addressed to the precise question of the timetabling in the House of Commons” (Q 205). He did however acknowledge “on the record that the First Minister in Northern Ireland, as a Member of Parliament, did not support the fast-tracking” (Q 211).
124. There was also criticism of the fast-track process during the Second Reading debate in the House of Lords. In our report on the Bill we concluded that “while we understand the political requirements for progress to be made on the process of devolution of policing and justice functions to Northern

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<sup>9</sup> Appendix 4.

<sup>10</sup> HC Deb, 4 Mar 2009, col 870.

Ireland, it is not ... 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 consideration”<sup>11</sup>.

125. Baroness Royall acknowledged that “there were many complaints about the expedited nature of the bill of which I was well aware, but, having said that, I was never aware that anybody felt under pressure in debate. The noble Lords were able to raise whatever concerns they had and the Government were willing and able to respond, so I did not feel that scrutiny was jeopardised in any way” (Q 365).
126. The Secretary of State’s letter had also referred to “a purdah period for the European elections” as a further justification for fast-tracking.<sup>12</sup> The term was unknown to us in the context of European elections. Baroness Royall and Mr Bryant told us that they, too, were unfamiliar with the term in that context. (QQ 374–7) Sir Jonathan Phillips thought that the Secretary of State had in mind “a more general point, which is that elections in Northern Ireland are occasions for divisions being asserted rather than consensus being achieved ... To that extent, getting this legislation agreed and on the statute book is helpful before the divisiveness of an election campaign intervenes. I think the point he was making technically in relation to using the word ‘purdah’ was a reflection not of parliamentary activity but of activity in the Northern Ireland Assembly, which needs to take a resolution during that period if the summer deadline was to be met” (Q 206).
127. **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.**

### Conclusion

128. Mr Bryant told us that it was very much the Government’s ambition to be able to treat Northern Ireland legislation normally, but “I do not think it is quite where we have got to yet” (Q 371). Baroness Royall added that, “over the past 15 years or so, [Northern Ireland] probably has been a special case, but I think that is no longer the case. The last piece of legislation was, I would hope, the last piece in the emergency jigsaw in relation to Northern Ireland. I cannot be absolutely confident but I would hope that that is the case” (Q 373). **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”.**

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<sup>11</sup> *Northern Ireland Bill*, op. cit., para 9.

<sup>12</sup> Appendix 4.

## CHAPTER 5: DELEGATED LEGISLATION WHICH IS FAST-TRACKED

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129. The overwhelming majority of the evidence that the Committee received during its inquiry into fast-track legislation related to primary legislation. But, whereas each year a few dozen pieces of primary legislation are passed, several thousand pieces of delegated or secondary legislation are scrutinised by Parliament.
130. This Chapter considers issues surrounding delegated legislation which is fast-tracked through its parliamentary scrutiny. We also examine two pieces of primary legislation—the Civil Contingencies Act 2004 and the Health and Social Care Act 2008—which provide the government with emergency order-making powers. These powers—which have not been used to date—would be subject to fast-tracked parliamentary scrutiny if they were.

### Statutory instrument procedure

131. In his written evidence to us, the Clerk of the Parliaments most helpfully set out a great deal of technical information about the different kinds of parliamentary control over statutory instruments, and the role of the scrutiny committees. We have summarised the main points of that below. The full detail can be found in the Clerk of the Parliaments' written evidence (pp 163–6).
132. The main categories of parliamentary control over statutory instruments are:
- no formal procedure (instrument laid before Parliament but not subject to negative or affirmative procedure);
  - negative procedure;<sup>13</sup>
  - 'draft' affirmative procedure;
  - 'made' affirmative procedure.
133. The Joint Committee on Statutory Instruments (JCSI) provides technical and legal scrutiny of all statutory instruments within its terms of reference. The House of Lords Merits of Statutory Instruments Committee considers the merits of instruments within its terms of reference.

### Made affirmative procedure

134. The made affirmative procedure is often used in Acts where the intention is to allow significant powers to be exercised quickly. It is a kind of "fast-track" secondary legislation. In most cases the parent Act specifies which form of procedure should be applied to instruments made under it. In some cases however the Act may provide for either the draft affirmative or the made affirmative procedure to be used. If the made affirmative procedure is used then the instrument is effective immediately.
135. Instruments laid as made instruments almost inevitably place a serious time pressure on those drafting them. The JCSI's 8th report of this session<sup>14</sup> drew the special attention of both Houses to three statutory instruments which had

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<sup>13</sup> This is the most common procedure for statutory instruments laid before Parliament.

<sup>14</sup> Joint Committee on Statutory Instruments, *Eighth Report of Session 2008–09* (HL 53, HC 3–viii).

been laid as made affirmatives. In its memorandum to the JCSI, Her Majesty's Treasury explained that the process "had inevitably placed serious time pressure" on them and that "revisions were being made to the terms of the instruments down to the moment that they were made"<sup>15</sup>.

### Draft affirmative procedure

136. Once a draft affirmative instrument has been laid before Parliament, the JCSI will normally consider it within seven to 20 days. In the House of Lords, the terms of Standing Order (SO) 73 provide that an affirmative instrument may not be approved by the House until the JCSI has reported on it.
137. There are two ways by which the Government may seek to expedite these procedures. The first is for a Minister to write to the JCSI and request that an instrument be considered more quickly than the standard timeframe would allow. The Clerk of the Parliaments in his written evidence explained that sometimes this request was owing to genuine urgency and at other times was seemingly more for administrative convenience. It is for the Committee to decide whether to accede to such requests. The Clerk of the Parliaments pointed out that taking statutory instruments at short notice inevitably means that other work is disrupted (p 164).
138. The second way that a Government can seek to fast-track proceedings on a draft affirmative instrument is to move a motion that SO73 be dispensed with, allowing an approval motion to be moved very shortly after the instrument has been laid, but denying the House the measure of assurance offered by the JCSI. We see it as a measure of the high regard in which the JCSI is held that this has happened on only five occasions since 1990 (Clerk of the Parliaments, p 165).
139. **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.**

### Negative procedure

140. It is a convention that negative instruments should not come into force less than 21 days after laying before Parliament. During this time, a Member of the House may table a prayer to annul the negative instrument. Breaches of the 21 day convention, which are monitored by the JCSI and the House of Lords Merits of Statutory Instruments Committee, may be understandable, but in the interests of clarity and good governance should be avoided.

### Secondary legislation during parliamentary recesses

141. In Chapter 3 we considered the impact of parliamentary recesses on the passage of primary legislation, particularly fast-track primary legislation. The Clerk of the Parliaments' written evidence explained that draft affirmative instruments cannot be laid during a parliamentary recess. Negative instruments and made affirmative instruments may be laid during a recess but the periods specified in relation to negative and made affirmative

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<sup>15</sup> *ibid.*, Appendix, para 2 (p 5).

instruments (i.e. the 40 days for which a negative instrument must lie before both Houses, and the specified period within which a made affirmative instrument must be approved) are suspended. The effect of this is that “if a negative or made affirmative statutory instrument is laid at the start of a recess it can come into force and remain in force for a substantial period of time before it can be considered by either House” (p 166).

### Case studies of emergency order making powers

142. We now turn to consider the case studies of the Civil Contingencies Act 2004 and the Health and Social Care Act 2008, raised by witnesses, which provide the government with emergency order-making powers.
143. Part II of the Civil Contingencies Act 2004 confers on the Government the power to make temporary emergency regulations in the event of a large-scale national emergency. Such regulations are limited in duration to 21 days, unless Parliament votes to extend this period before it expires. Professor Walker told us that the “regulation-making powers [in Part II of the CCA 2004] are of awesome scope” (p 181). Mr Durno said that the Civil Contingencies Act has extraordinarily broad-ranging powers for ministers to make regulations (Q 275).
144. The order-making powers under Part II of this Act have not so far been used. Mr Durno told us that “it is very reassuring that ministers have been wary of having very fast recourse to the Civil Contingencies Act. They are dealing with it sensibly ... they are only going to use it in serious situations” (Q 283). Dr Metcalfe agreed with this (Q 158) and Ms Sankey went further in explaining that she believed “there is a political imperative ... for the Act not to be used as the Government is not keen on making a statement on the issue as to whether the country is facing a national emergency or bringing in powers under the Act” (Q 158).
145. The emergency powers allowed for under the Civil Contingencies Act 2004 were judged to be acceptable by some of our witnesses. Professor Dickson told us that it “provides for an approach to emergency powers which is consistent with the rule of law” and that its safeguards were appropriate (Q 242). Professor Miers agreed with this (Q 321). Professor Walker did not share this view and doubted whether the limits of the order-making powers were as “transparent and robust” as the Government claimed (p 181). Dr Metcalfe told us that he agreed with Professor Walker’s “analysis of the defects in the procedure, particularly relating to the level of proportionality, the seniority of the minister involved, the objectivity of the test required and the objectivity of the need to take emergency steps” (Q 158).
146. Mr Bryant told us that the order-making powers contained within the Civil Contingencies Act 2004 were not a template for all other emergency legislation. He pointed to the Health and Social Care Act 2008 which provides for a regime for dealing with a public health crisis and contains different order-making powers (Q 383). The Government submitted separate written evidence about the powers contained within the 2008 Act (pp 130–1).
147. In their report on the Health and Social Care Bill, the Joint Committee on Human Rights (JCHR) had criticised these order-making powers: “We consider that, in the light of the types of emergency which the Government considers these regulations may be necessary to meet ... the emergency

procedure in this Bill should be amended to reflect the provisions of the Civil Contingencies Act 2004”<sup>16</sup>.

148. Seeming to agree with this point of view, Mr Durno told us that the Civil Contingencies Act 2004 provided a useful starting point and that it might be used as a reference point for future pieces of legislation containing emergency powers to provide a common approach (Q 271).
149. We did not receive—or seek—sufficient evidence on this point to be able to judge whether the order-making powers in the Civil Contingencies Act 2004 are more or less appropriate than the bespoke order-making powers contained within the Health and Social Care Act 2008. **We shall, during the course of our bill scrutiny activities, pay close attention to future proposed emergency order-making powers.**

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<sup>16</sup> Joint Committee on Human Rights, 12th Report (2007–08), Legislative Scrutiny: 1) Health and Social Care Bill and 2) Child Maintenance and Other Payments Bill: Government Response (HL 66, HC 379), para 1.43.

## CHAPTER 6: POTENTIAL IMPROVEMENTS TO THE FAST-TRACK SCRUTINY PROCESS

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### Introduction

150. In Chapter 3, we examined the various problems and issues surrounding the use of fast-track legislation that were brought to our attention by witnesses. In this Chapter we consider potential safeguards and improvements that might be built in to the fast-tracking process, to help ensure that the constitutional principles that we identified in Chapter 1 are upheld when fast-track legislation is being considered
151. In considering such proposals, we also bear in mind three principles identified by our witnesses:
- (a) “The best way to deter the unnecessary resort to emergency legislation by governments is for Parliament to make clear that there is a constitutional price to be paid for bypassing the ordinary procedures for making law ... It is therefore incumbent upon Parliament to order its own procedures in such a way as to make the resort to emergency legislation not as difficult as possible but rather as unpalatable as it ought to be in a democracy governed by the rule of law” (JUSTICE, pp 44, 46).
  - (b) “There is a constitutional principle that bothers me. The constitutional principle is this, that urgency should not set the principle. The principle should be that the bill be given a robust, transparent analysis” (Professor McEldowney, Q 296).
  - (c) “The House of Lords should take its own decision as to what is required ... we have a bicameral legislature and it must be for this House to decide for itself what it wishes to do ... one would hope that this independent decision by the House of Lords is kept at all costs and is made a real test for the Government to satisfy” (Professor Bradley, Q 250).
152. We acknowledge that it may in certain circumstances be necessary to resort to the use of fast-track legislation, and as such, there should be some mechanism available for Parliament to allow a piece of legislation to be fast-tracked. That being said, it is imperative that such fast-tracking of normal parliamentary procedure should only occur where strictly necessary. In order to ensure this, we believe that a number of improvements to the current process can be made.
153. This House’s constitutional responsibilities are heightened in circumstances when fast-track legislation is being proposed. It is therefore incumbent upon this House to ensure that the standards of legislative scrutiny are maintained. Fast-track legislation affects both Houses of Parliament, and we therefore hope that our findings and recommendations will be of interest to colleagues in the House of Commons. It is however for that House to decide on its own procedures. Our recommendations are designed to improve the way that the House of Lords scrutinises fast-track legislation.

## Potential improvements

### *Overarching reforms*

154. Several witnesses recommended a number of overarching reforms. These include:

#### *i) Publication of formal legal advice*

155. JUSTICE argued that a mandatory requirement on government to make public the legal advice it had received on a piece of legislation would be “a valuable corrective” and “one of the strongest checks against the unnecessary resort to emergency legislation” (p 45. See also Q 163). Dr Metcalfe added that “when it comes to emergency legislation, you are stepping outside the normal bounds and I think that increases the case for disclosure of legal advice ... It seems to me that disclosing the legal advice may in fact reveal that the Government’s case for the assessment of necessity is much weaker than it maintains in public” (QQ 176–7).

#### *ii) Introduction of a written constitution*

156. JUSTICE also argued that “the problem of emergency legislation highlights one of the benefits of jurisdictions with written constitutions, in that the scope of emergency powers are typically defined by the constitution itself” (p 45). However, Dr Metcalfe added that “the debate about a written constitution is for another day but there are obviously mirrors. We would not press this point because I think even the war on terror on 9/11 has shown the limitations of written constitutions ... If there is a lesson from other jurisdictions, most of which have written constitutions, it is generally speaking that the clearer the limits on emergency powers the better” (Q 179).

#### *iii) Business Committee*

157. The Hansard Society argued that “a Business Committee or Legislation Steering Committee should be established to manage the parliamentary timetable. It would help improve agreement of and transparency in the management of emergency legislation and allow for greater flexibility in the timetabling of emergency debate thus improving the scrutiny process” (p 40. See also Q 30).

158. **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.**

### *Improvements to the pre-legislative scrutiny process*

159. A number of witnesses emphasised the importance of pre-legislative scrutiny. In the context of anti-terrorism legislation, Professor Walker argued that an “obvious step ... would be to demand from the executive the drafts of legislation well before they are launched in circumstances too fraught to allow proper scrutiny” (p 180).

160. Dr Fox stated that whilst formal consultation might not be possible, some form of internal consultation often does take place. She cited the example of the Criminal Evidence (Witness Anonymity) Bill. She suggested that an onus might be placed on the Government to contact “a standing list of stakeholders” in relation to a specific policy area, “and facilitate a means” for them “to put fast input into the process”. This might involve “in effect establishing a Standing Committee of experts in certain policy areas department by department”. She also suggested that it might be possible for a select committee to hold an urgent evidence session on occasions where the fast-tracking process is more extended. However, she “would not want that to be a procedural rule because I think that it would be very difficult to make that a hard and fast ruling. It would differ on a case-by-case basis” (QQ 44–5. See also Q 36).
161. Lord Baker told us that in the case of the fast-track legislation with which he had been involved, he “would have been quite happy” for “a backbench scrutiny committee” to have heard evidence from key witnesses: “I can see no harm in that at all, quite frankly ... but I think that it has to be a reasonable number. If you are doing fast-track legislation, you cannot have Uncle Tom Cobbley and all turning up. You have to have the reasonable interested parties” (QQ 107–8).
162. Mr Durno suggested that legislation should be “expose[d] ... before it is introduced to one or two parties ... If you can speak to one or two organisations that you are going to get sensible input from, it is at least one opportunity that you have got” (Q 285). Mr Bryant told us that, in relation to the Northern Ireland Act 2009, “we were very keen to have first reading as early as we could so that the bill was out there and people could refer to it and there could be proper public discussion, because that often happens long before second reading” (Q 366).
163. **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.**

*Improvements to the legislative scrutiny process*

164. Other witnesses suggested ways in which the scrutiny of fast-track bills could be improved, once they had been introduced:
- i) No. 2 bill procedure*
165. The Clerk of the Parliaments told us that the No. 2 bill procedure is occasionally used to pass a bill quickly. The procedure allows both Houses to

consider a bill simultaneously. The exact sequence of events varies from bill to bill, but it is usually along the following lines:

- A bill is introduced in the Commons;
- An identical bill (save for the addition of “No. 2” in the short title) is introduced in the Lords, either at the same time or shortly afterwards;
- The Commons bill is read a second time, goes through its Committee stage and remaining stages and is sent to the Lords;
- At some point before the Commons’ bill leaves that House, the No. 2 bill receives a Second Reading in the Lords;
- At the point at which the Lords receives the Commons’ bill, the No. 2 bill is withdrawn, and the original bill then proceeds through its Committee and remaining stages in the Lords (p 161).

166. The Clerk of the Parliaments also told us that “this procedure avoids the delay of up to a month which would occur if the Lords were to wait for the arrival of the Commons’ bill, and if the minimum intervals between First Reading, Second Reading and Committee stage were then observed in the Lords ... The procedure has rarely been used in recent times. The most recent example was in connection with the Banking Bill which was passed earlier this session. This bill had to be enacted by a particular deadline (on which the emergency legislation passed in 2008<sup>17</sup> would expire), but the bill was not emergency legislation—it was not passed until almost three months after its arrival in the Lords. The No. 2 bill procedure has not, in recent times, been used for emergency legislation in the generally understood sense” (p 161). The Clerk of the House of Commons also suggested that we consider “the possible use of ‘No 2’ bills to make the most of the total time available for Parliamentary consideration” (p 150).

167. Dr Fox thought that “there would be a case for saying up to Second Reading, you could make the case that they would run in parallel. Once you get into the amending stages, I think that it becomes extremely difficult” (Q 52). Lord Baker thought that “it is just too complicated in getting us all together with different rules and procedure and who moves amendments and all the rest of it. I think that it is sensible to keep the sequential change from one House to another” (Q 123). Ms Sankey, Dr Metcalfe, and Mr Durno also foresaw practical difficulties (QQ 180, 289).

168. On the other hand, Sir John Chilcot argued that such a mechanism was “not impossible” so long as the views and opinions of either House could be brought to the notice of the other (Q 52). Professor Bradley told us that though “Parliament is bicameral, I do not think this need prevent one House taking a sensible look down the corridor at what is happening in the other place and adjusting its own procedures” (Q 289).

169. Sir Joseph Pilling told us that the Northern Ireland (Temporary Provisions) Act 1972, which suspended Stormont and introduced Home Rule for the first time, “had some extraordinary features, one of which was that it was introduced in almost identical form in both Houses simultaneously. This House had the Northern Ireland (No 2) Bill introduced, which was later withdrawn, and the bill that had been introduced into the House of

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<sup>17</sup> See paras 93–6.

Commons, which was called the Northern Ireland Bill, came to this House and was taken through all stages entirely formally because the otherwise identical bill had been already debated in this House. One of the consequences of that particular procedure was that the Government could not let the bill be amended. I had the unhappy task of writing the speaking notes for Willie Whitelaw to explain in the Commons why the amendments were terrible amendments and should be rejected, and I could not include the only real argument, which was: 'If this bill is amended I will not be able to go to Northern Ireland on Maundy Thursday with the powers that I need to take over from Brian Faulkner's government.' That was the real reason. The procedure, I hope, has not been repeated recently. I would not be telling you about it if I thought it had been repeated recently. I tell it as an illustration of the fact that it is possible to do these things very badly or not so badly. Deplorable as it may always be from a Parliamentarian's point of view, there are some ways of doing it that are less deplorable than others" (Q 212).

170. **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.**

171. A related suggestion was that a bill could pass from the Commons to the Lords after Second Reading, where it would receive detailed scrutiny, before returning to the Commons for its remaining stages. Sir John Chilcot thought that "at first hearing, I find that very attractive, that the democratically legitimate House should endorse the principles of the fast-track legislation and then the details could at high speed be dealt with by those with time and expertise potentially and then return the fruits of their labour to the Commons presumably to go through the extremely accelerated remaining stages. It seems to me sensible" (QQ 53, 55).

172. Dr Fox thought that "it would be radical. In practical terms, I do not think it would find much favour in the House of Commons ... To take away from the elected representatives in the House of Commons the opportunity to comment on and amend legislation in Committee and Report and to get the detail of how the principles are enacted, I think I would have grave reservations about that" (Q 54).

173. **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.**

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

174. Professors Miers and McEldowney argued in favour of "clear statements by [a bill's] proposers of how an emergency bill meets core constitutional (or other) requirements" (p 114). Professor McEldowney suggested that such a statement could include a "full explanation" of the reasons for the expedited procedure being used, an explanation of the consequences "of accelerated passage not being granted", as well as "where it is appropriate, any steps that should be taken to minimise the future use of the accelerated passage procedure". He cited the Standing Orders of the Northern Ireland Assembly as an example of how such a procedure could work. (Q 298) The Better

Government Initiative agreed that, even in cases of fast-track legislation, “there should still be a statement for the public, setting out the purposes and justification of the bill. In particular it should draw attention to, explain and justify any request for retrospective or indeterminate powers” (p 3).

175. The Law Society argued that such a statement could be similar to the “certification of compliance with regard to the Human Rights Act”, and “strengthened by the independent scrutiny of such statements ... by the Speakers of the two Houses of Parliament” (p 97).
176. Mr Durno explained that the problem with human rights certification “is that the certification is obviously open to debate. It may be the view of the minister who is introducing the legislation that there are no human rights implications, but during the course of the debate it is often the case that those points are addressed and teased out. Whilst it would be very easy for ministers to certify on the face of a fast-tracked piece of legislation that in their view it is necessary to fast-track it, there is always the possibility that that is a political judgment rather than an objective judgment. What we are looking for is to try to find an alternative to just the self-certification by a minister. The reason why we came up with the Speaker is the Speaker in the House of Lords is now no longer the Lord Chancellor, so you have got an independent individual in that role. They are there as the protectors of the rights of the two Houses, so if they looked at the legislation, looked at the arguments presented by the minister to justify the fast-tracking and they came to an independent judgment, to a certain degree they are, if you like, ticking off the self-certification by a minister” (Q 287).
177. However, Professor Bradley thought that involvement of the Speaker would create “all sorts of difficulties ... the Speaker would be under great pressure to accede to the Government’s request and would get political opprobrium himself from some sections of Parliament for that reason” (Q 287).
178. Professor Dickson told us that he was sceptical about the effectiveness of a certification procedure, because “the equivalent process under the Human Rights Act, the so-called Section 19 statements, [have not] been particularly effective in ensuring that Convention-compliant legislation is enacted, mainly because the minister is not obliged to give detailed reasons for why he or she thinks the legislation is consistent with the Act” (Q 243). Dr Metcalfe likewise argued that “for a long time, ministers would simply certify something as compatible but there would not be argumentation to follow it up ... We would welcome certification but whether it is by itself a sufficient safeguard I would be very sceptical about” (Q 163. See also Q 170).
179. On the other hand, Lord Baker could see “no harm ... at all” in ministerial certification (Q 109). Sir John Chilcot “very much” favoured a certification process, because “it requires the official machine then to advise the minister concerned to go through a process and to be able to justify it in public and in Parliament” (Q 22. See also Q 25). He also thought that a certification procedure could additionally be used in relation to new clauses and amendments to a fast-track bill (Q 24).
180. Whilst Baroness Royall thought that “it would be valuable to have more and better information and explanation from the Government as to why this specific piece of legislation should be expedited”, she argued “against certification because I think in many ways that would be raising the issue to the level of compliance with the Human Rights Act. I think it is an extremely

important matter whether or not a bill should be expedited but I would not raise it to the level of Human Rights compliance” (Q 390. See also Mr Bryant, QQ 393–4).

181. A number of witnesses suggested some form of checklist which Parliament could adopt, against which it could judge whether or not the case for fast-tracking a piece of legislation had been properly made. Professor Walker advocated a set of “limiting principles” which “should act as a parliamentary check-list against which future legislation can be judged in a more systematic and rational way than at present” (pp 179–80).
182. In his written evidence Professor Bradley listed several conditions that should apply if fast-track legislation is to be acceptable (p 92). In oral evidence he went further, arguing that “it might be of value in the House of Lords if a statement were drawn up setting out that there should be certain principles that should be followed in all but the most pressing cases” (Q 287).
183. Professor McEldowney was supportive of the idea of a checklist against which the propriety of fast-track legislation could be judged (QQ 292–3). He and Professor Miers further advocated the use of a system of templates drawn up by the Government to provide reassurance that the fast-tracking of a bill was necessary:

“It is the template you have to look at to ensure that the internal systems of checks and control, parliamentary draftsmen and so on, are made more public, so therefore there is a standard set of expectations when an urgency bill comes before the House that meet a certain minimum requirement of explanation and you can drill back to find out whether the explanation is realistic or not” (Q 293).
184. **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.**
185. **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.**
186. **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? (see para 198)**
- (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? (see paras 208–9)**
- (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?**

187. **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.**

188. This in turn raises the question of what action the House might take if it judges that any of these principles have not been met. Standing Order 47 of the House of Lords prevents more than one stage of a bill from being taken in one day, and therefore if the Government wishes to fast-track a piece of legislation and take more than one stage in a day, a motion is tabled to suspend Standing Order 47. This motion can be debated and voted on. When we asked Baroness Royall about this, she told us:

“I think it is an issue which we as a House should look at closely. I know that this Committee is looking at ways ... whereby perhaps the Government could/should be more open ... to discussion about timetables on expedited legislation. To date, when the motion is put before the House it usually just goes through, which from a business manager’s perspective is absolutely great, and it obviously reflects the agreement which has been made between the usual channels, but of course it is open to any Member of the House to speak to that motion, and perhaps that is something the Committee should look at” (Q 343).

189. **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.**

*d) Improvements to the post-legislative scrutiny process*

190. Witnesses also suggested a number of improvements to the post-legislative scrutiny process.

*i) Sunset clauses and renewal procedures*

191. A number of witnesses argued in favour of both sunset clauses and renewal procedures in relation to fast-track legislation. The Hansard Society argued that “whenever possible sunset clauses should be incorporated into emergency legislation particularly in relation to legislation that impacts upon civil liberties” (p 4). They also argued that “any renewal process should be carried out through non-emergency primary legislation” in order to allow “the normal processes and procedures of good scrutiny (e.g. pre-legislative scrutiny, consultation etc)” (p 7).
192. The Law Society recommended that “every item of emergency legislation should include a ‘sunset clause’”, taking the form of a renewal procedure which would normally require an affirmative resolution by Parliament (p 97). In cases where renewal was required urgently, “the Speakers of both Houses of Parliament would be required to accept the Minister’s justification for emergency legislation. Once it has received Royal Assent, such emergency legislation should in turn be subjected to the appropriate post legislative scrutiny by a Parliamentary committee, and in turn any adverse criticism from that committee should be persuasive in determining whether an order should be extended or not, once it reaches the limit of its prescribed life” (p 97).
193. Liberty (p 51) and Professor Miers also argued that sunset clauses were particularly important in cases impinging upon human rights. Professor Miers told us that “the beauty of a sunset clause is that it allows Parliament ... a commitment from the minister ... that a bill will be forthcoming which then will be subject to scrutiny” (Q 327). Professor Dickson (Q 243), the Law Reform Committee of the Bar Council (p 168) and the Better Government Initiative (pp 2–3) were also sympathetic towards the use of sunset clauses. The Better Government Initiative also argued in favour of “strict renewal requirements” (p 3).
194. Professor Bradley argued that “the use of accelerated procedure should be conditional upon government willingness to include a ‘sunset clause’ of some kind in the legislation, to ensure that the government will provide an opportunity for Parliament to re-visit the matter, failing which the legislation will lapse at a stated date ... if Parliament is asked to legislate so hurriedly, then the Government should always give an opportunity, or take on itself the burden of providing an opportunity, for the thing to be looked at again” (p 92, Q 275).
195. However, JUSTICE argued that such provisions “are necessary but not sufficient conditions for effective post-legislative scrutiny” because “the experience of recent years raises doubts about the effectiveness of these measures” (p 45). The Hansard Society also acknowledged such limitations (p 6, Q 48).
196. Lord Baker argued that “in the two bills with which I was concerned I do not think that would have been effective. Sunset clauses are quite draconian things, so I am not in favour of that” (Q 109). Neither was he in favour of the replacement of a piece of fast-track legislation with a new bill in a

subsequent session, because “you have to have time to see whether it is effective or not” and the subsequent session “is too soon” (Q 109).

197. The Government agreed that it was possible for “provisions for an Act or provisions in it to be renewed at regular intervals by statutory instrument” (p 129). However, “suitability for sunset clauses and renewals procedure depends ... on the nature of the legislation. The fact that the passage of a bill is expedited does not, in and of itself, justify the inclusion of sunset or renewal provisions. The case for sunset or renewal provisions must be considered on its merits in relation to each bill, having regard to all the relevant circumstances” (p 129). Baroness Royall added that whilst sunset clauses are sometimes “appropriate and, indeed, invaluable .... In other cases, it can cause instability and disquiet, I would suggest, because people need the necessary certainty that is being given by the legislation and so a sunset clause could have an adverse effect” (Q 389).
198. **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.**

*ii) Improved post-legislative review*

199. Several witnesses cited the importance of post-legislative review in cases of fast-track legislation. The Better Government Initiative argued that “post-legislative scrutiny is all the more necessary” in cases of fast-track legislation, and that “it should perhaps be more frequent” (p 3). Professors Miers and McEldowney also affirmed its importance (pp 114–5, Q 327). Professor Bradley suggested that “relevant committees at Westminster may wish to monitor the operation of the new law” (p 92). The Hansard Society argued that “emergency legislation should automatically be subject to post-legislative review” (pp 4, 6–7).
200. Lord Baker told us that in the case of complex legislation, “there should be a review reasonably quickly afterwards to see whether the objectives of the legislation are actually being met because very often they are not ... I would have a clause that the effectiveness of this legislation should be reported to Parliament after two years and after another two years ... I would favour a clause in the Bill saying something like that if a bill is fast-tracked, there should be a proper report to Parliament ... as to the effectiveness of it and, if it seemed to be effective, then it would become part and parcel of the political framework of our country” (QQ 74, 86).
201. JUSTICE argued that “post-legislative scrutiny including independent statutory review within six months should be a mandatory requirement for all emergency legislation”. Yet “the experience of recent years” raised doubts as

to the effectiveness of statutory review (pp 44–5). Ms Sankey expressed similar concerns, arguing that “the fact that [the independent reviewer of anti-terrorism legislation] is one individual who is fulfilling the function I think is particularly unhelpful”. She thought that the model of the Privy Councillor committee which had scrutinised the Anti-Terrorism, Crime and Security Act 2001 was “far preferable” (Q 169).

202. On the other hand, Sir John Chilcot thought that the independent reviewer of anti-terrorism legislation was “a trusted external auditor”, and “in principle it seems to me that the notion of audit leading to, as it were, a scrutiny session has a great deal to commend it” (QQ 46–8). The Government also cited such independent reviews as a potential mechanism for ongoing scrutiny (p 129). Professor Dickson made the case for automatic review after six or 12 months, accompanied by an independent review “concerning both the operation of the emergency legislation and whether its necessity has indeed been demonstrated during the intervening period. If it were possible ... for select committees or other committees of Parliament to conduct comparable reviews prior to the renewal debates, I think that would be very appropriate as well” (Q 243).
203. Several other witnesses also highlighted the value of parliamentary post-legislative review. The Hansard Society suggested that “an Emergency Legislation Review Committee should be established, composed of members of both Houses, whose responsibility would be to review emergency legislation at an agreed date after Royal Assent, to determine whether or not the legislation had sufficient constitutional and policy implications to justify being referred back to Parliament for further consideration”. They also argued in favour of a requirement on the Government to report to the Committee, “setting out its view on issues such as whether the legislation had met the Government’s aims, whether it had unintended consequences that were not foreseen at the time of its passage through Parliament and what lessons had been learned” (pp 4, 6–7. See also Q 25).
204. Similarly, JUSTICE proposed that “for every piece of emergency legislation passed”, a joint parliamentary committee should review “all aspects of the Act, and required to produce its first report within six months of enactment. This should be in addition to, not in place of, the appointment of statutory reviewers” (p 45). In his oral evidence, Dr Metcalfe added that a House of Lords Committee may be an alternative way forward, and acknowledged that “there has already been a proposal for a Standing Committee on post-legislative scrutiny, so maybe you could roll those functions up into that” (QQ 172–3, 184).
205. The latter statement was a reference to a recommendation by the Law Commission in its 2006 report on post-legislative scrutiny. The Government’s proposals, published in March 2008, recommended that “3 years after a law has been passed, it is reviewed by the relevant Government Department and then by Parliament, to see how the law has worked out in practice”. They did not support the proposal for a new Joint Committee on post-legislative scrutiny, recommending instead that parliamentary review should be undertaken by Commons departmental select committees in the first instance, but that review might also be undertaken by a Lords Committee or a Joint Committee (though not ordinarily where the Commons Committee had decided to undertake scrutiny).<sup>18</sup>

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<sup>18</sup> Office of the Leader of the House of Commons, *Post-legislative Scrutiny—The Government’s Approach*, Cm 7320, March 2008.

206. On the question of timing, the Government told us that “there may be a case for making legislation which has been passed with unusual expedition subject to earlier post-legislative scrutiny under the new arrangements ... This might involve, for example, an undertaking to publish post-legislative scrutiny memoranda after one or two years” (p 129). As we have seen, Lord Baker could see no reason why post-legislative scrutiny should not take place within two years (QQ 86, 118), whilst Dr Metcalfe and Professor Dickson thought that it should ideally take place within a year. (QQ 173–4, 243)
207. Baroness Royall confirmed that the feasibility of earlier post-legislative review of fast-track legislation was an issue “we should consider as a government. Just because a piece of legislation has been expedited it does not mean to say that two years would be an adequate time to see the bill in operation, and so perhaps two years would be too short a timescale, but I think perhaps we should give some consideration to it” (QQ 391–2). Mr Bryant did “not think it would apply in every case. For instance, with the Northern Ireland Act we have just passed, we will know by the summer whether it was necessary to have done it because they will have either proceeded or they will not have proceeded. Indeed, we are very much trying to push forward as a government and as business managers with the post-legislative scrutiny process at the moment, and government departments are keen to get stuck into it but their keenness varies” (Q 391).
208. **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.**
209. **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.**

## APPENDIX 1: SELECT COMMITTEE ON THE CONSTITUTION

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The members of the Committee which conducted this inquiry were:

Lord Goodlad (Chairman)  
 Lord Lyell of Markyate  
 Lord Morris of Aberavon  
 Lord Norton of Louth  
 Lord Pannick  
 Lord Peston  
 Baroness Quin  
 Lord Rodgers of Quarry Bank  
 Lord Rowlands  
 Lord Shaw of Northstead  
 Lord Wallace of Tankerness  
 Lord Woolf

### Declaration of Interests

GOODLAD, Lord

*\*12(f) Regular remunerated employment*  
*15(d) Office-holder in voluntary organisations*  
*Sir Robert Menzies Memorial Trust*  
*Opera Australia Capital Fund*

LYELL OF MARKYATE, Lord

*\*13(b) Landholdings*  
*Shared ownership with my wife of a house in London, a property in Burgundy and some farmland, woodlands, and a pair of cottages in Hertfordshire*  
*15(a) Membership of public bodies*  
*Chairman of the St Albans Cathedral Trust (until October 2007)*  
*Member of the Court of the Universities of Hertfordshire and Luton*  
*15(b) Trusteeships of cultural bodies*  
*Chairman of the Federation of British Artists (the Mall Galleries) (a charity)*  
*(I took up office at the meeting of the board on 19 July 2007)*

MORRIS OF ABERAVON, Lord

*15(a) Membership of public bodies*  
*Chancellor of University of Glamorgan*  
*Hon Fellow of Gonville of Caius College, Cambridge*  
*Hon Fellow of University College of Wales, Aberystwyth*  
*Hon Fellow of University College of Wales, Swansea*  
*Hon Fellow of Trinity College Carmarthen*  
*Bencher of Gray's Inn*  
*Member of Council of Prince of Wales' Trust (Cymru)*  
*Prime Minister's Advisory Committee on Business Appointments*

NORTON OF LOUTH, Lord

*\*12(f) Regular remunerated employment*  
*Professor of Government, University of Hull (Director, Centre for Legislative Studies)*  
*Director of Studies, Hansard Society*  
*15(a) Membership of public bodies*  
*Governor, King Edward VI Grammar School, Louth*  
*15(b) Trusteeships of cultural bodies*

*Trustee, History of Parliament Trust*  
*Trustee, Elizabeth Russell Fund (a charity)*  
 15(c) *Office-holder in pressure groups or trade unions*  
*Chairman, Conservative Academic Group*  
*Member, Advisory Board, Centre for Policy Studies*  
*Member, Committee, Conservative History Group*  
 15(d) *Office-holder in voluntary organisations*  
*Vice President, Political Studies Association of the UK*  
*Member of Council, Hansard Society for Parliamentary Government*  
*Editor, Journal of Legislative Studies (unremunerated but published by commercial publisher)*  
*Council Member, Constitution Unit*  
 16(b) *Voluntary organisations*  
*Member, Study of Parliament Group*

PANNICK, Lord

*\*12(f) Regular remunerated employment*  
*Practising member of the Bar*  
*Fortnightly column on legal issues for The Times*  
 15(a) *Membership of public bodies*  
*Fellow of All Souls College, Oxford*  
*Hon. Fellow of Hertford College, Oxford*  
 15(d) *Office-holder in voluntary organisations*  
*Chairman of the Legal Friends of The Hebrew University, Jerusalem*  
*Bencher of Gray's Inn*

PESTON, Lord

*\*12(e) Remunerated directorships*  
*Chairman of the Pharmaceutical Price Regulation Scheme Arbitration Panel*  
 15(d) *Office-holder in voluntary organisations*  
*Vice President, Speakability*

QUIN, Baroness

15(a) *Membership of public bodies*  
*Member of Academic Board of Wilton Park*  
*Member of Durham Cathedral Council (**unpaid**)*  
 15(d) *Office-holder in voluntary organisations*  
*President, Gateshead Arthritis Care Association*  
 16(b) *Voluntary organisations*  
*Chair of Franco-British Council*

RODGERS OF QUARRY BANK, Lord

*No relevant interests*

ROWLANDS, Lord

*\*12(d) Non-parliamentary consultant*  
*Consultant to the National Training Federation, Wales*  
*Consultant to Tydfil Training, Merthyr Tydfil*  
*\*12(e) Remunerated directorships*  
*Chairman, More Than Just a Game*  
*\*13(d) Hospitality or gifts*  
*I have occasionally been a guest of Dyfed Steels at the Llanelli/Scarlets' matches*  
 15(b) *Trusteeships of cultural bodies*  
*Trustee and Member of the History of Parliament Trust*  
 15(d) *Office-holder in voluntary organisations*  
*Trustee of the Winston Churchill Memorial Fund for travelling scholarships*

*16(b) Voluntary organisations*

*Member of the Pfizer Foundation on health inequalities*

SHAW OF NORTHSTEAD, Lord

*No relevant interests*

WALLACE OF TANKERNESS, Lord

*\*12(d) Non-parliamentary consultant*

*I run a company, Jim Wallace Consultancy Ltd*

*Consultancy advice may involve advising on issues and procedures in relation to the Scottish Parliament; arranging meetings with public bodies in Scotland; attending meetings between the client company and members of the Scottish Parliament or members of the Scottish Executive.*

*Through the company, I have undertaken consultancy work for:*

*Aquatera Ltd, a provider of environmental and sustainability services, with particular interests in the renewable energy sector;*

*Consultancy with Quatro Public Relations in relation to specific renewable energy projects*

*Simpson & Marwick WS, Edinburgh;*

*Infinis Ltd;*

*Hays Specialist Recruitment;*

*Retail Loss Prevention;*

*Loganair Ltd*

*\*12(e) Remunerated directorships*

*Director and Chairman, Northwind Associates Ltd (wind energy)*

*Director and Chairman, Jim Wallace Consultancy Ltd (general public affairs, speech making, articles)*

*\*12(f) Regular remunerated employment*

*Employed by Jim Wallace Consultancy Ltd*

*\*12(g) Controlling shareholdings*

*80% shareholding in Jim Wallace Consultancy Ltd - general consultancy on public policy issues, speech making, articles*

*\*12(i) Visits*

*Visit with spouse to Guardian Festival of Literature at Hay-on-Wye (22-25 May 2009) as guests of SkyARTS; accommodation and meals provided by Sky*

*\*13(a) Significant shareholdings*

*20% interest in Northwind Associates Ltd (wind energy)*

*\*13(b) Landholdings*

*One-half share in two dwelling houses in Annan, Dumfriesshire (no rental income)*

*One-half share in 2 acre field at Annan, Dumfriesshire*

*15(a) Membership of public bodies*

*Non-practicing member of Faculty of Advocates*

*Hon. Professor in Institute of Petroleum Engineering, Heriot Watt University*

*15(d) Office-holder in voluntary organisations*

*Board Member, St. Magnus Festival Ltd (unremunerated)*

*Chair of Relationships Scotland (the new organisation which embodies the merger between Family Mediation Scotland and Relate Scotland) (from 1 April 2008) (unpaid)*

*Board Member, Centre for Scottish Public Policy (independent think tank) (unpaid)*

*Co-Convenor of the Poverty & Truth Commission in Scotland. It is an independent Commission run under the auspices of the Priority Area division of the Church of Scotland's Ministries Council*

**WOOLF, Lord**

*\*12(f) Regular remunerated employment*

*Non-permanent judge of Hong Kong Final Court of Appeal – Law Lord  
Mediator and Arbitrator practising from Blackstone Chambers, Temple,  
London EC4*

*Visiting Professor UCL, Chinese University Hong Kong, and Fellow UC and  
Institute of Medical Sciences (**unremunerated**)*

*June 2007-May 2008: Chairman, of the Woolf Committee, which reviewed  
and propose standards of ethics and integrity for adoption in existing and  
future contracts for the manufacture and supply of arms by BAE Systems  
Limited*

*Senior Judge, Commercial Court, Qatar*

*Chancellor of the Open University of Israel*

*Regular income from speeches, writing articles and books on the above subjects*

*15(a) Membership of public bodies*

*Bencher Inner Temple, Grays Inn, Kings Inn and the Inn of Northern Ireland*

*15(d) Office-holder in voluntary organisations*

*President, Chairman or Patron of numerous voluntary bodies working in the  
areas of prison and justice*

*Patron Woolf Institute of Abrahamic Faiths and Council of Jewish  
Leadership*

## APPENDIX 2: LIST OF WITNESSES

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The following witnesses gave evidence. Those marked with \* gave oral evidence.

- \* Lord Baker of Dorking
- \* Professor Anthony Bradley
- \* Chris Bryant MP, Deputy Leader of the House of Commons
- \* Sir John Chilcot, Better Government Initiative  
Clerk of the House of Commons  
Clerk of the Parliaments
- \* Professor Brice Dickson, Queen's University Belfast
- \* Mr Steven Durno, Legal Policy Adviser, The Law Society
- \* Dr Ruth Fox, Director, Parliament and Government Programme, Hansard Society  
House of Commons Library (evidence not published)  
Law Reform Committee of the Bar Council  
Mr James Lee, University of Birmingham
- \* Professor John McEldowney, University of Warwick
- \* Dr Eric Metcalfe, Director of Human Rights Policy, JUSTICE
- \* Professor David Miers, University of Cardiff
- \* Sir Jonathan Phillips, Permanent Secretary, Northern Ireland Office
- \* Sir Joseph Pilling, former Permanent Secretary, Northern Ireland Office
- \* Baroness Royall of Blaisdon, a Member of the House, Leader of the House of Lords
- \* Ms Isabella Sankey, Policy Director, Liberty  
Mr Mark Tushnet, Harvard University  
Professor Clive Walker, University of Leeds

### **APPENDIX 3: CORRESPONDENCE WITH THE DIRECTOR OF PUBLIC PROSECUTIONS FOR ENGLAND AND WALES AND THE DIRECTOR OF PUBLIC PROSECUTIONS FOR NORTHERN IRELAND**

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#### **Letter from the Chairman to Kier Starmer QC, Director of Public Prosecutions for England and Wales, 11 February 2009**

The Constitution Committee, which I chair, is conducting an inquiry into bills that are ‘fast-tracked’ through the legislative process. As part of the inquiry, the Committee is looking in detail at some particular bills. The Committee would be grateful for the assistance of your office in relation to the use of a power contained in the Criminal Justice (Terrorism and Conspiracy) Act 1998 (which, you will recall, was passed when Parliament was recalled after the Omagh bomb).

Section 1 of the 1998 Act inserted a new section 2A into the Prevention of Terrorism (Temporary Provisions) Act 1989 under which a police officer may give admissible oral evidence as to his opinion that an accused person belongs or belonged to a ‘specified organisation’.

The Committee would be interested to have an assessment of how this particular provision has operated in practice, including (if possible) an indication of how many times it has been relied on in courts in Great Britain.

I am writing in similar terms to the Director of Public Prosecutions for Northern Ireland about the comparable provision inserted by the 1998 Act into the Northern Ireland (Emergency Provisions) Act 1996.

The Committee may in due course choose to publish your response as part of their report.

#### **Response from Kier Starmer, 20 February 2009**

Thank you for your letter of 11 February 2009. I have now received a report from Susan Hemming, the Head of my Counter Terrorism Division.

As far as we can ascertain, this piece of legislation has not been used in the prosecution of any offence in England and Wales. We can say that it has not been used in any prosecution since September 2002 and are unable to find any evidence of its use prior to that.

#### **Letter from the Chairman to Sir Alasdair Fraser QC, Director of Public Prosecutions for Northern Ireland, 11 February 2009**

The Constitution Committee, which I chair, is conducting an inquiry into bills that are ‘fast-tracked’ through the legislative process. As part of the inquiry, the Committee is looking in detail at some particular bills. The Committee would be grateful for the assistance of your office in relation to the use of a power contained in the Criminal Justice (Terrorism and Conspiracy) Act 1998 (which, you will recall, was passed when Parliament was recalled after the Omagh bomb).

Section 1 of the 1998 Act inserted a new section 30A into the Northern Ireland (Emergency Provisions) Act 1996, under which a police officer may give admissible oral evidence as to his opinion that an accused person belongs or belonged to a ‘specified organisation’.

The Committee would be interested to have an assessment of how this particular provision has operated in practice, including (if possible) an indication of how many times it has been relied on in courts in Northern Ireland.

I am writing in similar terms to Kier Starmer QC about the comparable provision inserted by the 1998 Act in relation to Great Britain.

The Committee may in due course choose to publish your response as part of their report.

### **Response from Sir Alasdair Fraser QC, 18 March 2009**

1. Section 30A of the Northern Ireland (Emergency Provisions) Act 1996 provides that the statement of a police officer of at least the rank of Superintendent given in oral evidence of his opinion that an accused person belongs to an organisation which is specified or belonged to an organisation at a time when it was specified shall be admissible as evidence of the matter stated. The Section also provides that an accused person should not be committed for trial or found to have a case to answer or be convicted solely on the basis of that statement.

2. Section 1 of the Criminal Justice (Terrorism and Conspiracy) Act 1998 inserted Section 30A into the Northern Ireland (Emergency Provisions) Act 1996. A similar provision was inserted as Section 2A into the Prevention of Terrorism (Temporary Provisions) Act 1989.

3. The Terrorism Act 2000 replaced the Northern Ireland (Emergency Provisions) Act 1996. However, a similar statutory provision was included by way of Section 108 of that Act.

4. By virtue of Section 1(2)(b) of the Terrorism (Northern Ireland) Act 2006, Section 108 of the Terrorism Act 2000 ceased to have effect as from 31<sup>st</sup> July 2007.

5. The provision that evidence of opinion of a police officer is admissible to prove membership is contrary to the general rule of common law that the opinions, beliefs and inferences of a witness are inadmissible to prove the truth of the matters believed or inferred if such matters are in issue or relevant to facts in issue in the case, subject to three important exceptions:

- (a) general reputation to prove the good or bad character of a person; pedigree or the existence of a marriage; and certain matters of public concern
- (b) expert opinion to prove matters of specialised knowledge
- (c) non expert evidence on matters within the competence and experience of lay persons generally.

6. No case has been identified in which consideration was given to reliance upon Section 30A of the Northern Ireland (Emergency Provisions) Act 1996 or Section 2A of the Prevention of Terrorism (Temporary Provisions) Act 1989.

7. Consideration has been given to reliance upon Section 108 of the Terrorism Act 2000 in a number of cases in Northern Ireland. The information available to police in forming an opinion can derive from a range of sources including the circumstances giving rise to the arrest of an accused, the possession of items associated with paramilitary organisations and intelligence. It is unlikely that a court would attach significant weight to the opinion of a senior officer based on the circumstances of the accused's arrest beyond what the court could infer from the same evidence. Similarly, the possession of items is often equally consistent with support for, as distinct from membership of, the organisation in question.

8. Particular issues arise from the use of intelligence to support the opinion of a senior police officer. In seeking to rely upon intelligence information as a basis for the opinion that a person belongs to a specified organisation police must take account of the need not to compromise the safety of the informant and the need

not to undermine the continued use of CHIS as an effective investigative tool. In deciding whether it is in the public interest to rely upon such information police and the Public Prosecution Service must have regard to the right to life of the informant enshrined under Article 2 of the European Convention on Human Rights as well as the accused's right to a fair trial. Whereas the existence of such information would normally be protected, it is likely that a certain amount of material will require disclosure in order to ensure a fair trial and to permit the court to assess the appropriate weight to be given to the evidence of opinion.

9. The protection of intelligence material was considered in Northern Ireland in a bail application made by **Dennis Donaldson**. In a written judgment delivered in 2002 Mr Justice Shiel ruled that the prosecution may rely upon intelligence when opposing bail only where the defence are in a position to challenge it through the disclosure of sufficient information. In this case bail had previously been refused by a different judge who had heard evidence from a senior officer who had referred to an intelligence document shown to the court but not to defence or prosecution counsel. Mr Justice Shiel found that reliance upon the evidence of the senior officer, insofar as he relied on the contents of the document disclosure of which was denied to the defence, was not compatible with the applicant's rights under Article 5.4 of the European Convention on Human Rights. He did not consider that the fact that the previous judge had read the contents of the document, valuable though that safeguard was, was sufficient to satisfy the requirements of Article 5.4 in the present case. Having regard to the decisions of the European Court of Human Rights in **Garcia Alba v Germany** and **Lanz v Austria** Mr Justice Shiel ruled that if the Crown intends to rely on intelligence material in a bail application and the defence seeks disclosure thereof, that material must be disclosed. The material could however be edited so as not to disclose directly or indirectly the identity of informants or other sensitive material upon which no reliance was being placed by the Crown in the bail application. In the event of a dispute as to disclosure, or the extent thereof, the judge would play an important role in ensuring equality of arms and fairness as between the parties.

10. The court must be satisfied that the intelligence upon which an opinion is based is reliable. In order to satisfy a court as to reliability it may be necessary to disclose details about the source of the information, including, for example, whether other information provided by the same source has in the past proved reliable in the sense that police have acted upon it and have recovered weapons or explosives or been able to take steps to frustrate a terrorist attack. The greater the degree of detail disclosed, the greater the risk that the source may be identified and his or her security compromised.

11. Having regard to the difficulties outlined above there have not been any cases in which police have been prepared to disclose intelligence in support of the opinion of a senior officer. The Director in considering where the public interest lies has agreed with police recommendations. Hence there is no judicial authority touching upon the weight to be attached to such evidence.

12. It should be noted that a different approach to that articulated in **Donaldson** has been taken by the Supreme Court in the Republic of Ireland when dealing with an appeal arising from a conviction for an offence of membership of a proscribed organisation based, in part, on the belief of a senior police officer which was admitted in evidence pursuant to a similar provision. In the case of **DPP v Kelly** (2006) IESC20 the Supreme Court found that there had been no unfairness in the trial of the appellant who had been prevented from cross examining the senior officer as to the grounds for his belief on the basis that such information was privileged.

13. In his judgment Mr Justice Geoghegan considered the argument of the Director of Public Prosecutions that while the legislation permitted evidence of belief it did not permit evidence about the basis for the belief and that a contrary interpretation would appear to defeat the purpose of the section partly on the basis that it might defeat informer privilege and partly on the basis that in practice it might involve the admission of hearsay evidence. The judge preferred the alternative construction that the section authorised the giving of evidence about the basis for the officer's belief but not to the extent that it interfered with or defeated a legitimate plea of privilege.

14. Mr Justice Fennelly found that the claim of privilege made by the senior officer constituted an undoubted infringement of the normal right of the accused to have access to the material which underlay the belief expressed. To that extent, it had constituted a restriction on the effectiveness of the right of the appellant to cross examine his true accusers and it had, for that reason, the potential for unfairness. The judge nevertheless found a number of compelling circumstances to justify the course of action which had been adopted. Firstly, the exceptional resort to the evidence of the senior officer applied only in the case of organisations which in their nature represented a threat not only to the institutions of the State but to individuals who were prepared quite properly to co-operate with the State in securing the conviction of members of such organisations. Secondly the legislation was confined to evidence to be given by members of the Garda Síochána of particularly high rank. Thirdly the procedure applied only where there was in force a declaration that the ordinary courts were inadequate to secure the effective administration of justice; that is to say cases involving such evidence would be heard only by the Special Criminal Court. The judge found that these circumstances constituted sufficient justification for the restriction on the right to cross examine while at the same time demonstrating a concern to respect such necessary limitations. In the particular circumstances of the trial the judge found that there was no overall unfairness. He observed however that the matter might be quite different in a case where the evidence of the police officer was the sole plank in the prosecution case.

15. The provision in Section 108 of the Terrorism Act 2000 has been the subject of comment by Lord Carlisle of Berriew QC in his series of reports on the operation of the Terrorism Act 2000. In his report on the operation of the Act in 2001 he commented that his present opinion and recommendation was that the provision remained proportionate and necessary. In his report on the operation of the Act in 2002 he noted that he had received no further representations opposed to the retention of the present law and concluded and recommended as before. In his report on the operation of the Act in 2003 he noted that Section 108 had not been used so far as he was aware. He commented that he found it difficult to envisage a situation in which a court would find itself able to attach significant weight to evidence given under Section 108. In this context weight, not admissibility, was the true issue. He concluded that in his view Section 108 could be repealed without any measurable disadvantage to the cause of public protection from terrorism. He noted that it was a provision that lay uncomfortably in the broader context of normalisation and the Good Friday Agreement and recommended that very serious consideration be given to its repeal. In his report on the operation of the Act in 2005 Lord Carlisle observed that Section 108 had not been used and repeated his observation that he found it difficult to impossible to envisage a situation in which a court would find itself able to attach significant weight to evidence given under Section 108 and that in this context weight, not admissibility was the true issue. Similar observations appear in Lord Carlisle's report on the operation of the Act in 2007.

#### **APPENDIX 4: LETTER FROM RT HON SHAUN WOODWARD MP, SECRETARY OF STATE FOR NORTHERN IRELAND, 6 MARCH 2009**

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I have read your Committee's report on the Northern Ireland Bill and I thought it would be helpful to you and your Committee members if I explained why the Government has asked Parliament to expedite the bill's passage.

The Government made clear, in bringing forward the Northern Ireland (Miscellaneous Provisions) Bill in 2006 that it was committed to ensuring that, when the Assembly was ready to ask for the transfer of policing and justice powers, the necessary enabling legislation would be in place. This commitment was further strengthened by the St Andrews Agreement reached later that year.

On 18 November 2008, the Northern Ireland First Minister and deputy First Minister wrote to the Assembly and Executive Review Committee (AERC) of the Northern Ireland Assembly to say that they had reached agreement on a way forward to the completion of devolution. In January this year, the Committee reported on its deliberations on the devolution of policing and justice powers and the Assembly agreed the report on a cross-community vote. The agreement and the subsequent report of the AERC contained a number of recommendations on the shape of the post-devolution framework for the administration of policing and justice in Northern Ireland.

The Northern Ireland Bill is intended to give effect to those elements of the November statement and the AERC report that require primary legislation. Of course, the Bill does not provide for when devolution will happen, nor does it provide for what is to devolve – both of these still require further consideration by the Assembly and ultimately by Parliament.

However, given the undertakings we made at the time of the 2006 legislation, both before and after the St Andrews Agreement, the Government remains committed to ensuring that the necessary legislation is in place to enable the process to move as quickly as the Assembly wants it to. It is, in my view, absolutely critical that it is not the UK Government or Westminster that is seen to be delaying progress on the arrangements for devolution that the Government undertook to make.

The bill will enable the possibility of an early resolution to the issue of the devolution of policing and justice. It is not, however, the final step in the process of achieving devolution of policing and justice. The next stage would be a Bill in the Assembly to establish the Department of Justice. Then the Assembly would need to pass a resolution to request the transfer of responsibility for policing and justice. Finally, Parliament would consider a series of Orders in Council to effect the transfer of powers. To leave open the possibility of completing these steps during the period between now and the summer recess (which includes a purdah period for the European elections) it is necessary for the Northern Ireland Bill to receive Royal Assent by mid March. It would not have been possible to publish the Bill in draft or make it subject to pre-legislative scrutiny in Parliament and meet this timescale.

The report also questions, in the context of the draft Constitutional Renewal Bill published in 2008, whether the Prime Minister should have a role in senior judicial appointments and removals processes. The provisions in the Northern Ireland Bill are essentially to remove the post-devolution role of the First Minister and deputy First Minister in these processes, which are set out in the Justice (Northern Ireland) Act 2002, and to transfer these functions to the Northern Ireland Judicial Appointments Commission. However, both the legislation under which

appointments and removals are currently governed (the Judicature (Northern Ireland) Act 1978) and the 2002 Act provide significant roles for the Prime Minister. The Northern Ireland Bill does not substantively change the role of the Prime Minister as set out in the 1978 and 2002 Acts. The Prime Minister also has a comparable role in Scotland under the Scotland Act 1998.

The provisions on the 2002 Act that deal with senior judicial appointments and removals were based on the recommendations of the Criminal Justice Review, which envisaged a specific role for the Prime Minister. The Criminal Justice Review, published in March 2000, was the most important and far-reaching survey of criminal justice in Northern Ireland in over 30 years and flowed from the Belfast (Good Friday) Agreement.

The key recommendations are as follows:

#### Recommendation 75 APPOINTMENT OF LORD CHIEF JUSTICE AND LORD JUSTICES OF APPEAL

For the appointment of the Lord Chief Justice and Lord Justices of Appeal, responsibility for making recommendations to Her Majesty The Queen would lie with the Prime Minister, as now, but on the basis of recommendations from the First Minister and the Deputy First Minister. [para. 6.96]

#### Recommendation 103 TENURE

We endorse the current arrangements that give full-time judges and magistrates tenure during good behaviour until a statutory retirement age. [para. 6.136]

The Northern Ireland Bill does provide for a change to this process, in that the First and deputy First Minister will no longer have a role. This change was part of the agreement of the First and deputy First Minister of 18 November last year. Any further change to the appointments or removals processes would be outside the scope of that agreement. I am not, therefore, minded to alter the Prime Minister's role at this time.

I hope that this provides a helpful exposition of the Government's position on these issues. I am pleased that Sir Jonathan Phillips, Permanent Secretary of the NIO and his predecessor, Sir Joseph Pilling, are appearing before your Committee on 18 March. I know that they will be able to give the Committee a helpful insight into the history of urgent Northern Ireland legislation.

## APPENDIX 5: LIST OF BILLS SUBJECT TO A FAST-TRACK PASSAGE SINCE 1974

| Justification relied on to fast-track a bill  | Examples of fast-tracked bills  | Time spent on the Bill in the HL (All bills, unless otherwise stated, went through the HC in one day)  |
|---|---|--|
| To remedy an anomaly, oversight, error or uncertainty that has come to light in legislation | <p>Lands Valuation Amendment (Scotland) Bill 1982: to nullify the unintended consequences of a repeal made by the Local Government (Scotland) Act 1975</p> <p>Companies (Beneficial Interests) Bill 1983: the legal profession had become concerned that certain common practices were contrary to the Companies Act 1948—‘in the Government’s view, it is right and proper not only to validate transactions in the past that would otherwise be void, but to enable past practices to continue in future’<sup>1</sup></p> <p>Local Authorities (Expenditure Powers) Bill 1983: doubts had arisen about the scope of local authorities under section 137 of the Local Government Act 1972 to ‘grant aid’ land acquisition and building works comprised in projects approved for urban development grant</p> <p>Caravans (Standard Community Charge and Rating) Bill 1990: to rectify an unintended consequence of the Local Government Finance Act 1988, which had made holiday caravan owners liable to the standard community charge</p> <p>Representation of the People Bill 1993: to clarify the status of members of the Royal Irish Regiment (formed by the merger of the Ulster Defence Regiment and Royal Irish Rangers) in relation to the electoral role in time for the annual registration round</p> <p>British Transport (Police) Jurisdiction Bill 1994: the jurisdiction of the British Transport Police would have been inadvertently curtailed by the coming into force of the Railways Act 1993</p> <p>Statutory Instruments (Production and Sale) Bill 1996: to correct an anomaly in existing legislation, whereby HMSO was permitted to contract out the printing of all legislative and official material, with the single exception of statutory instruments; HMSO had for over 30 years been acting unlawfully in charging for SIs</p> | <p>Second Reading, Committee, Report and Third Reading in one day</p> <p>Second Reading and Third Reading in one day (Committee negated)</p> <p>First Reading, Second Reading, Committee, Report and Third Reading in one day</p> <p>Second Reading on 20/12/90<br/>Committee and Report on 22/1/91<br/>Third Reading on 28/1/91</p> <p>Second Reading, Committee, Report and Third Reading in one day</p> <p>Second Reading, Committee, Report and Third Reading and Royal Assent in one day</p> <p>Second Reading on 16/7/96<br/>Committee and Report on 23/7/96<br/>3a on 24/7/96</p> |

<sup>1</sup> HC Deb, 11 Jul 1983, cols 712–8: the Under-Secretary of State for Trade and Industry (Mr. Alexander Fletcher).

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|---|---|--|
| <p>To respond to the effects of a court judgment</p>                          | <p>Importation of Milk Bill 1983: European Court of Justice held that import regime for UHT milk and cream contrary to EU law and new regime had to be created<br/>                 Town and Country Planning (Compensation) Bill 1985: a response to the Court of Appeal ruling in <i>Camden BC v Peaktop Properties (Hampstead) Ltd</i>: “The effect of the court’s decision has been dramatic and wholly unacceptable to the Government”<sup>2</sup>.<br/>                 Insolvency (No. 2) Bill 1994: <i>Paramount Airways Ltd</i> in Court of Appeal cast doubt on effectiveness of disclaimers in receivership cases<br/>                 Public Order (Amendment) Act 1996: to clarify power of arrest under section 5 of the Public Order Act 1986 following Court of Appeal judgment and doubts expressed by the Crown Prosecution Service<br/>                 Social Security (Overpayments) Bill 1996: in response to ruling of the Social Security Commissioner on section 71 of the Social Security Administration Act 1992<br/>                 Evidence (Witness Anonymity) Bill 2008</p> | <p>Second Reading, Committee, Report, Third Reading in one day<br/>                 Usual intervals seem to have been observed<br/>                 Second Reading, Committee, Report, Third Reading in one day<br/>                 Second Reading on 24/7/96<br/>                 Third Reading (Committee negated) on 16/10<br/>                 Committee, Report and Third Reading taken in one day<br/>                 Committee, Report and Third Reading in one day</p> |
| <p>To ensure that legislation is in force in time for a forthcoming event</p> | <p>Sporting Events (Control of Alcohol etc.) Bill 1985: to put in place restrictions in time for the start of the football season.<br/>                 Parliamentary Corporate Bodies Bill 1992: necessary step in the implementation of the Ibbs report on House of Commons services</p>  | <p>Commons – all stages apart from First Reading taken in 1 day.<br/>                 Lords – Second Reading and Committee on 11/7/85<br/>                 Rpt and Third Reading taken on 17/7/85<br/>                 Second Reading on 6/3/92<br/>                 Order of commitment discharged 10/3/92<br/>                 Third Reading on 12/3/92</p>  |

<sup>2</sup> HC Deb, 5 Feb 1985, col 897.

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| <p>To deal with economic crisis</p>  | <p>Gold Standard (Amendment) Bill 1931<br/> Social Security (Mortgage Interest Payments) Bill 1992: in order to reduce the number of repossessions of homes, the bill provided for the direct payment to qualifying lenders of the mortgage interest component of income support<br/> Stamp Duty (Temporary Provisions) Bill 1992: in response to the problem of mortgage arrears and repossessions and to stimulate the housing market generally, the Bill increased the stamp duty threshold from £30,000 to £250,000 for eight months starting from 20 December 1991<br/> Banking (Special Provisions) Bill 2008</p>   | <p>All stages in one day<br/> Second Reading on 24/2/92<br/> Committee 5/3/92<br/> Third Reading 12/3/92<br/> Second Reading, Committee, Report, Third Reading in one day<br/> First Reading and Second Reading on 20/2/08<br/> Committee, Report and Third Reading on 21/2/08</p>  |
| <p>To change a public authority's borrowing or lending limit or other funding issues</p> | <p>Iron and Steel (Borrowing Powers) Bill 1981: to raise from £5,500m to £6,000m the statutory limit of the amount of finance which the British Steel Corporation and its wholly-owned subsidiaries could raise by borrowing and by receipt of sums paid by the Secretary of State<br/> Redundancy Fund Bill 1981: to the amount that could be borrowed by the redundancy fund from the national loans fund<br/> Commonwealth Development Corporation Bill 1982<br/> British Shipbuilders (Borrowing Powers) Bill 1983<br/> International Monetary Arrangements Bill 1983: to substitute a new limit for the limit on lending to the IMF imposed by the International Monetary Fund Act 1979<br/> Welsh Development Agency Bill 1991<br/> Humber Bridge (Debts) Bill 1995</p> | <p>2a on 24/2/81 and Committee negated<br/> Third Reading on 26/2/81<br/> Money Bill<br/> Second Reading, Committee, Report, Third Reading in one day<br/> Usual intervals seem to have been observed<br/> Second Reading on 18/7/83 and Committee negated<br/> Third Reading on 21/7/83<br/> Second Reading (Committee negated) and Third Reading on one day<br/> Usual intervals seem to have been observed</p> |

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| <p>To deal with a crisis in prisons as a result of industrial action</p>     | <p>Imprisonment (Temporary Provisions) Bill 1980: a response to industrial action by the Prison Officers' Association, the bill allowed among other things the establishment of temporary accommodation to which the Prison Rules could be applied; removed the duty to produce remand prisons to court; and provided the Home Secretary with powers to override the decisions of courts and to authorise the release of unsentenced prisoners whom courts have decided should be kept in custody.</p>  | <p>All stages in one day</p>  |
| <p>To respond to international agreements</p>                                | <p>Zimbabwe Bill 1980: providing for the establishment of the independent Republic of Zimbabwe, citizenship and an amnesty in UK law for certain acts. The urgency related to the need to have an Act on the statute book rather than to bring it into force immediately.<sup>3</sup></p> <p>Belize Bill 1981: providing for the independence of Belize. As with the Zimbabwe Bill, the Belize Bill was put on the statute book in anticipation of continued negotiations with Guatemala and the approval of a constitution</p> <p>Hong Kong Economic and Trade Office Bill 1996: providing for the future Hong Kong Special Administrative Region's London economic and trade office with a limited range of privileges and immunities</p> <p>Landmines Bill 1998: to enable ratification of the Ottawa Convention</p> | <p>Second Reading, Committee, Report and Third Reading in one day</p> <p>Second Reading, Committee, Report and Third Reading in one day</p> <p>Usual intervals seem to have been observed</p> <p>Committee, Report and Third Reading in one day</p> |
| <p>To implement Treasury announcements in the Budget or autumn statement</p> | <p>Community Charges (General Reduction) Bill 1991: to give effect to an announcement made in the Budget the week previously that there would be a substantial switch from local to central taxation and the a reduction in the personal community charge by £140</p> <p>Car Tax (Abolition) Bill 1992: to give effect to an announcement made the Chancellor's autumn statement</p>  | <p>First Reading, Second Reading, Committee, Report and Third Reading in one day</p> <p>Second Reading, Committee, Report and Third Reading in one day</p>  |

<sup>3</sup> HL Deb, 17 Dec 1979, col 1440 (Lord Hailsham: "It is essential that the independence Bill should pass before the actual occurrence of independence so that elections may be held before Independence Day and all affected by the granting of independence—particularly individuals—shall know in advance the arrangements to be made").

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| To respond to public concerns                            | <p>Dangerous Dogs Bill 1991 (“During the past few weeks, a number of horrific attacks by dogs on adults and young children had led to a clear demand for swift action by the Government to end this menace”<sup>4</sup> .</p> <p>Aggravated Vehicle-Taking Bill 1991: “The Bill is one of a wide range of urgent measures that we are taking to stop the plague of car crime getting out of hand”<sup>5</sup> .</p>  | <p>Usual intervals seem to have been observed – the bill was passed just a few days before a summer recess.</p> <p>Usual intervals seem to have been observed</p> |
| Counter-terrorism related                                | <p>Prevention of Terrorism (Temporary Provisions) Bill 1974</p> <p>Reinsurance (Acts of Terrorism) Bill 1993: in response to the insurance industry announcement that, with effect from 1 January 1993, it would cease to renew or to provide new insurance cover on industrial and commercial property which included provision for damage or loss caused by acts of terrorism</p> <p>Prevention of Terrorism (Additional Powers) Bill 1996: in response to the bombing of South Quay in London. Provisions related to stop and search powers, cordoning off areas and the imposition of temporary parking restrictions</p> <p>Criminal Justice (Terrorism and Conspiracy) Bill 1998: a response to the bombing of Omagh and ‘and the clear and present danger from international terrorism’.</p> <p>Provisions included powers intended to make it easier to secure conviction of those who are members of specified proscribed organisations; enabling a court to draw inferences from a failure to answer relevant questions in respect of a membership offence; and extra-territorial jurisdiction for terrorist offences committed abroad.</p> | <p>All stages in one day</p> <p>Second Reading, Committee, Report and Third Reading in one day</p> <p>All stages in one day</p> <p>All stages in one day</p>      |
| Northern Ireland peace process and devolution settlement | <p>Northern Ireland (Remission of Sentences) Bill 1995: to restore the practice which existed in Northern Ireland until 1989 and which had obtained since 1976, that all prisoners serving fixed terms of imprisonment, regardless of the nature of their offence, became eligible for release at the halfway point of their sentence</p> <p>Northern Ireland Bill 1999: provisions on devolution and decommissioning of weapons following proposals put forward by the Prime Minister and the Taoiseach</p>   | <p>Second Reading, Committee, Report and Third Reading in one day</p> <p>Committee, Report and Third Reading in one day</p>                                       |

<sup>4</sup> HC Deb, 10 Jun 1991, col 644 (Secretary of State for the Home Department, Mr. Kenneth Baker).

<sup>5</sup> HC Deb, 9 Dec 1991, col 620 (Secretary of State for the Home Department, Mr. Kenneth Baker).

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|               | <p>Northern Ireland Bill 2000: enabled the temporary return to Northern Ireland of direct rule</p> <p>Northern Ireland Assembly Elections Bill 2003: provided for a 28-day postponement of the Northern Ireland Assembly elections scheduled for 1 May 2003</p> <p>Northern Ireland Assembly (Elections and Periods of Suspension) Bill 2003: provided for the deferment of elections for the Northern Ireland Assembly that were due to be held on 29 May 2003</p> <p>Northern Ireland (Monitoring Commission etc) Bill 2002–2003: gave the Secretary of State powers to exclude Ministers from the Assembly when certain conditions were met.</p> <p>Northern Ireland Bill 2006. Required recall of Assembly for purposes of electing an Executive.</p> <p>Northern Ireland (St Andrews Agreement) Bill 2006: to make provision for preparations for the restoration of devolved government</p> <p>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</p> | <p>Committee, Report and Third Reading in one day</p> <p>Second Reading, Committee, Report, Third Reading in one day</p> <p>2a on 13/5/03</p> <p>Committee, rpt and Third Reading on 14/5/03</p> <p>Second Reading on 12/9/03</p> <p>Committee, Report, Third Reading on 15/9/03</p> <p>Commons – Second Reading on 26/4/06, Committee, Report, and Third Reading on 27/4/06</p> <p>Second Reading on 2/5/06, Committee, Report, Third Reading and Royal Assent on 8/5/06</p> <p>Committee, Report, Third Reading and Royal Assent in one day</p> <p>First Reading, Second Reading, Committee, rpt and Third Reading in one day</p> |
| Miscellaneous | Elections Bill 2001: to postpone local elections because of foot-and-mouth disease   | Committee, Report, Third Reading and RA in one day  |

## APPENDIX 6: FAST-TRACK LEGISLATION—THE EXPERIENCE OF OTHER LEGISLATIVE BODIES

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### 1. Do you have a definition of “emergency legislation”? If so, what is this?

**Canada:** No, neither the Standing Orders of the House of Commons, nor the Rules of the Senate contain a definition of emergency legislation.

**Australia (Senate):** No. There are no special procedures for emergency legislation in the Australian Parliament. If the executive government considers that legislation is urgent, it uses the same procedures available for any legislation to expedite it.

**Australia (House of Representatives):** There is no technical definition of emergency legislation in either the standing orders or practice of the House. Legislation is sometimes referred to as urgent or as necessary because of an emergency of some kind, and action is taken to limit the time available for its consideration by the House – see below.

**New Zealand:** There is no statutory definition of “emergency legislation” in New Zealand.

**Scotland:** An emergency bill can be any Executive bill which, subject to the Parliament’s agreement, undergoes a faster legislative process. For example, all stages of the bill are considered by the whole Parliament rather than by a specific committee, and the usual requirements for intervals between stages do not apply. Emergency bills are regulated by Standing Orders rule 9.21.

#### **Wales:**

*Emergency primary legislation:* We have a standing order which covers ‘Government proposed Emergency Measures’ (‘Measures’ being our equivalent of Bills) [SO23.107 – 23.116]. The SO does not provide a definition of an ‘emergency Measure’, stating instead that: “If it appears to a member of the government that an Emergency Measure is required, he or she may by motion propose that a government proposed Measure, to be introduced in the Assembly, be treated as a government proposed Emergency Measure.”

**Northern Ireland:** Neither the Standing Orders nor the Conventions of the Northern Ireland Assembly refer to emergency legislation. However, Standing Order 42 (attached as Annex 1 for reference) provides for “accelerated passage” of a Bill which excludes Committee Stage and enables the Bill to pass its required stages in the Assembly in not less than ten days. It is recognised that situations may arise where the Assembly will wish to pass legislation more quickly than is currently provided for within Standing Orders.

### 2. How do you handle emergency (a) primary and (b) secondary legislation?

**In particular: how is it agreed that it is emergency legislation? What parliamentary processes does it go through?**

**Canada:** For purposes of simplification, it is possible to establish two categories of responses to emergency situations in the Canadian parliamentary context. On the one hand, perhaps no more than once or twice per parliamentary session, an issue arises to which a legislative response is deemed to be required with relative urgency. In these instances, discussion would then occur between party leaders prior to a sitting. When the House convenes, during the business of the house, a Minister of the government will rise and state to the Speaker that he or she will

find that unanimous consent exists to depart from the standard rules and practices of the House, and that agreement exists to “fast-track” a piece of legislation to respond to the urgent issue.

A recent example of this would be Bill C-38, *An Act to permit the resumption and continuation of the operation of the National Research Universal Reactor at Chalk River*, which was introduced on 11 December 2007 in the House of Commons and passed through all legislative stages in the same sitting. The Senate followed suit, introducing the bill and passing it through all legislative stages on 12 December 2007. It was deemed at the time that the shutdown of the nuclear reactor at Chalk River required an urgent legislative response because it was said to have caused a critical shortage of medical isotopes, which led to delays and cancellations of medical procedures throughout Canada.

The second type of response to an emergency situation would be for a Member to rise in the House and request of the Speaker an emergency debate (S.O. 52). It is left to the Speaker’s discretion whether the situation in question warrants an emergency debate or not. Normally, though, emergency debates do not produce legislation, but instead the House resolves to take some sort of non-binding action.

Of note: in the Canadian parliamentary context, no such distinction exists between primary and secondary legislation.

**Australia (Senate):** Primary legislation may be formally declared to be urgent by majority vote in each House under provisions no doubt familiar to you and known as the “guillotine”. Basically this involves a minister moving a series of motions to limit the time for debate on legislation. This is easy for a government in the House of Representatives where the government has a party majority and party discipline is tight, but in the Senate, where no party normally holds a majority, the government has to persuade a majority of senators to treat a bill as urgent and limit the time for debate.

There are no provisions for secondary legislation to be treated as urgent. Basically, secondary legislation here is subject to disallowance by either House. Where a government faces the prospect of disallowance in the Senate of a vital piece of secondary legislation, it may seek the agreement of the Senate to deal expeditiously with any disallowance motion.

**Australia (House of Representatives):**

### *Primary legislation*

The standing orders allow for a Minister to declare a bill urgent. When this happens a question is put immediately ‘That the bill be considered urgent’. If this question is agreed to by the House, a motion is moved to allot time for the various stages – this is known as applying a guillotine. If the motion to allot time is agreed to, at the set time for each stage the Chair interrupts the debate and puts the relevant question or questions – standing order 82, and see *House of Representatives Practice*, 5th edn, pp 384–9.

If it is desired to limit debate on more than one bill at a time it is necessary to suspend standing orders – the provisions of standing order 82 are not sufficient, as they are only applicable in respect of one bill at a time.

There have been many cases over the years of standing orders being suspended and detailed motions being moved and agreed to providing for various restrictions on the ordinary processes.

The most recent example of this approach occurred in the last sitting fortnight 3–12 February. Six bills dealing with financial and related issues were introduced on 4 February. Standing orders were suspended to allow debate to continue immediately after the last bill in the package had been introduced.

The motion imposed a cognate (joint) debate on the whole package and provided that after that debate had concluded the questions necessary for passage of the first bill would be put, and when they were resolved those necessary for each other bill were to be put without further debate. The debate extended from 10am on Wednesday 4 February until 4.45am on 5 February, with the only break being for Question Time at 2pm. In this case the suspension of standing orders did not impose a time limit, although a ‘gag’ motion was moved and agreed to at 4.45am, the final bill being passed by 5.34. It is more common for such motions to also contain provisions which limit the time available for debate.

There is no specific procedure or process to determine what legislation will be dealt with in an expedited manner. Ultimately by force of numbers a government can impose restrictions on normal processes, and while there are many examples of this, in other cases, such as in the recent consideration of financial measures, there has been a degree of acceptance by non-government members that some curtailment was warranted.

### *Secondary legislation*

Primary legislation contains provisions for the making of a wide range of secondary or delegated legislation – regulations, by-laws, determinations, ordinances etc. The processes involved in the making of such delegated legislation occur within the executive branch, and I am not able to comment on them. The ordinary provisions for parliamentary disallowance do not distinguish between those instruments made as a matter of urgency and others.

Some legislation, both primary and secondary, has ‘sunset’ provisions inserted, but this is not confined to matters dealt with under conditions of urgency in a procedural sense. The Joint Committee on Intelligence and Security has responsibilities in relation to the assessment and continuation of legislative provisions concerning terrorism.

### **New Zealand:**

#### *Primary Legislation*

##### *The parliamentary process*

Standing Orders 54 to 58 of the *Standing Orders of the House of Representatives* (2008) set out the process of according “urgency” and “extraordinary urgency” to certain business.

Standing Order 54 states:

#### **54 Urgency**

(1) A Minister may move, without notice, a motion to accord urgency to certain business.

(2) A motion for urgency may not be moved until after the completion of general business.

- (3) There is no amendment or debate on the question, but the Minister must, on moving the motion, inform the House with some particularity why the motion is being moved.

Standing Order 56 states:

**56 Extraordinary urgency**

- (1) An urgency motion may be moved as a motion for extraordinary urgency or, after the House has accorded urgency, a Minister may move, without notice, a motion to accord extraordinary urgency to some or all of the business being considered under urgency.
- (2) There is no amendment or debate on the question, but the Minister must, on moving the motion, inform the House of the nature of the business and the circumstances that warrant the claim for extraordinary urgency.
- (3) Extraordinary urgency may be claimed only if the Speaker agrees that the business to be taken justifies it.

David McGee writes in *Parliamentary Practice in New Zealand* (at page 154):<sup>1</sup>

Urgency enables the business for which it has been accorded (usually a bill or bills) to be completed before the House rises on that day. The sitting is accordingly extended for that purpose beyond the time for the normal adjournment of the House. Urgency may be taken for the single stage of a bill, for one or more stages of one bill, for one or more stages of different bills, or for a combination of these.

Of extraordinary urgency, McGee writes (at page 155):

Extraordinary urgency is designed to facilitate the passing of a particularly urgent piece of legislation, such as Budget legislation or legislation to deal with the collapse of a commercial or financial organisation, or a matter involving state security.

For a detailed description of the process of urgency and extraordinary urgency, see *Parliamentary Practice in New Zealand*<sup>2</sup>.

The Standing Orders of the House of Representatives (2008) is available at:

<http://www.parliament.nz/en-NZ/PB/Reference/StOrders/1/b/6/00HOHPBReferenceStOrders2-Standing-Orders-of-the-House-of-Representatives.htm>

*Agreement that it is emergency legislation: urgency*

Please see Standing Order 54 (3) above.

In *Parliamentary Practice in New Zealand*, David McGee writes:<sup>3</sup>

***Reasons for urgency***

<sup>1</sup> David McGee, *Parliamentary Practice in New Zealand* (3rd edition, 2005), p 154.

<sup>2</sup> *ibid.*, pp 153–7.

<sup>3</sup> *ibid.*, p 154.

An urgency motion is not properly moved unless a reason for it of some description is given by the Minister. The motion will be disallowed if a reason is not forthcoming before the question for urgency is determined. ... The reasons which the Minister gives are not required to be very detailed but they do require some particularity. Merely to say that progress needs to be made is not sufficient, and any bills to be introduced must be identified. But, reasons having been given, the Speaker is not the judge of their adequacy (unlike for extraordinary urgency); that is solely a matter for the House.

(Footnotes to this extract are available in the scanned pages attached to this document. It appears that footnote 73 has been left off. It is a reference to *Hansard* and reads: 1998, Vol 569, p 10121.)

A recent example of a motion for urgency (with a discussion of reasons for the motion) and of the vote taken on the question that urgency be accorded is available at: (16 December 2008) NZPD: [http://www.parliament.nz/en-NZ/PB/Debates/Debates/a/c/4/49HansD\\_20081216\\_00000795-Urgency.htm](http://www.parliament.nz/en-NZ/PB/Debates/Debates/a/c/4/49HansD_20081216_00000795-Urgency.htm)

*Agreement that it is emergency legislation: extraordinary urgency*

Please see Standing Order 56(2) and (3) above.

In *Parliamentary Practice in New Zealand*, David McGee writes: <sup>4</sup>

***Extraordinary urgency***

As with ordinary urgency, there is no amendment or debate on a motion for extraordinary urgency, but the Minister moving it must inform the House of the nature of the business or the circumstances which warrant extraordinary urgency. In this case, unlike for ordinary urgency, the Speaker has to make a judgment as to the justification for the Government asking for extraordinary urgency. It would not be justified, for instance, if the legislation for which it was claimed was not designed to come into force immediately on enactment. Extraordinary urgency is particularly designed for use in connection with legislation for a tax change with immediate effect.

An explanation of urgency, published on Parliament's website on 17 February 2009, is available at: <http://www.parliament.nz/en-NZ/8/f/a/00NZPHomeNews170220091-What-is-urgency.htm>

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<sup>4</sup> *ibid.*, p 155.

*Secondary legislation: regulations<sup>5</sup>*

In *Parliamentary Practice in New Zealand*, David McGee writes:<sup>6</sup>

Generally ... neither Parliament nor the House has any part to play in the actual making of regulations. Parliament has played its part by passing the legislation conferring the power to make the regulations. The exercise of that power is in the hands of another authority.

*Scrutiny of regulations generally*

In New Zealand, the Regulations Review Committee:<sup>7</sup>

- scrutinises all regulations
- considers draft regulations referred by Ministers of the Crown and reports back to them
- examines regulation-making powers in bills before other committees
- investigates complaints about the operation of regulations
- conducts inquiries into any matters related to regulations.

Under the Regulations (Disallowance) Act 1989, the House has “a general power to disallow any regulations or any provisions of regulations, and to amend or to revoke and substitute regulations.”<sup>8</sup>

*Scrutiny of regulations made under the authority of statutes that provide for action to be taken in an emergency*

A number of statutes provide for action to be taken in times of emergency such as civil defence emergencies.

- The Biosecurity Act 1993 provides that, while a declaration of biosecurity emergency is in force, regulations may be made by Order in Council for dealing with the emergency (see section 150(1)). Under section 150(5) biosecurity regulations must be laid before the House of Representatives not later than the second sitting day after they are made. They are deemed to have been revoked unless confirmed by an Act of Parliament (see section 151).

<sup>5</sup> Regulations are defined by section 2 of the Regulations (Disallowance) Act 1989 as follows:

Regulations means—

- (a) Regulations, rules, or bylaws made under an Act by the Governor-General in Council or by a Minister of the Crown
- (b) An Order in Council, Proclamation, notice, Warrant, or instrument, made under an enactment that varies or extends the scope or provisions of an enactment
- (c) An Order in Council that brings into force, repeals, or suspends an enactment
- (d) Regulations, rules, or an instrument made under an Imperial Act or the Royal prerogative and having the force of law in New Zealand
- (e) An instrument that is a regulation or that is required to be treated as a regulation for the purposes of the Regulations Act 1936 or Acts and Regulations Publication Act 1989 or this Act
- (f) An instrument that revokes regulations, rules, bylaws, an Order in Council, a Proclamation, a notice, a Warrant, or an instrument, referred to in paragraphs (a) to (e).

<sup>6</sup> *Parliamentary Practice in New Zealand*, op. cit., p 396.

<sup>7</sup> Report of the Regulations Review Committee Activities of the Regulations Review Committee in 2008, p 5. [http://www.parliament.nz/NR/rdonlyres/E12763DC-ED1A-4C5E-AD18-5B1FD0335062/93918/DBSCH\\_SCR\\_4227\\_6298.pdf](http://www.parliament.nz/NR/rdonlyres/E12763DC-ED1A-4C5E-AD18-5B1FD0335062/93918/DBSCH_SCR_4227_6298.pdf)

<sup>8</sup> *Parliamentary Practice in New Zealand*, op. cit., p 604.

The entire Biosecurity Act 1993 is available at:

<http://www.legislation.govt.nz/act/public/1993/0095/latest/contents.html>

- The Epidemic Preparedness Act 2006 provides for the making of “immediate modification orders” (see sections 14 and 15). Every immediate modification order must be presented to the House of Representatives as soon as is practicable after it is made (see section 16). Immediate modification orders may also be disallowed under section 17 of the Act.

The entire Epidemic Preparedness Act 2006 is available at:

<http://www.legislation.govt.nz/act/public/2006/0085/latest/contents.html>.

## **Scotland:**

### *Primary legislation*

Emergency bills have been used to amend the law in response to court judgements which have exposed loopholes or problems of interpretation in existing legislation. Such Bills must first be introduced as Executive Bills and are then converted to Emergency Bills by the Parliament, on a motion laid by a Minister (or junior Minister).

In session 2 (2003–2007) the Procedures Committee, in line with a paper prepared by the Legislation Team Clerk, agreed to procedural changes to the rule on emergency bills (Procedures Committee 2004). The new version of the Rule clarified the default timetable that applies once it has been decided to treat a Bill as an Emergency Bill, ensuring that the normal minimum intervals between Stages do not apply and making clear that the Parliament retains the right, at Stage 3, to adjourn the remaining Stage 3 proceedings or refer part of the Bill back to a committee. It removed any obligation on a lead committee at Stage 1, or on the Subordinate Legislation Committee at that Stage or after Stage 2, to consider an Emergency Bill, while preserving their right to do so in appropriate circumstances. The Presiding Officer was given an ability to set lodging deadlines for amendments appropriate to the timescale adopted for the Bill.

The Parliament accepted the proposed changes to Standing Orders in February 2004 (SP OR 12 February 2004).

### *Secondary legislation*

There are no specific emergency procedures laid down for secondary legislation in the Standing Orders. However, under rules 10.1.3 and 10.7 of Standing Orders, a statutory instrument can be taken by the whole Parliament, rather than by a lead committee.

In session 2 the Subordinate Legislation Committee carried out an inquiry into the Regulatory Framework in Scotland (Subordinate Legislation Committee 2007). The Committee identified two problems with the existing procedure for handling emergency instruments. Firstly, an emergency order, such as a food order is usually made and brought into force before it is laid. This breaches the rule which requires an SSI (Scottish Statutory Instrument) to be laid before it is due to come into force and, in the case of negative instruments, this breaches the rule that an instrument should be laid for at least 21 days before it comes into force.

The second problem identified relates to emergency orders that are subject to the type of affirmative procedure which requires them to be approved by the Parliament before the expiry of a specified period, usually 28 days, for them to

continue in force. The Committee noted that there is nothing to prevent successive orders being made after the original order has expired. This could allow such orders to continue to be in force long after the 28 day period, without any further approval from the Parliament.

To deal with these problems the Committee recommended that:

There should be a separate procedure for emergency and urgent instruments where they could be made and, if necessary, brought into force before they are laid, but would be subject to being annulled within 40 days.

Emergency instruments should not be subject to the 28 day rule or to any rule which requires them to be laid before being brought into force but, where the instrument is brought into force before being laid or within the 28 day period, the need for this should be explained in the accompanying Executive Note.

An emergency instrument should be defined for this purpose as an instrument which –

- in the case of future Acts, is identified in the parent Act which authorises the making of that instrument as being an emergency instrument;
- in the case of past Acts, is subject in the parent Act to the draft affirmative procedure or the negative procedure and that Act has been amended to identify the instrument as an emergency instrument.

The Scottish Ministers should be given a power, by order made by SSI, to identify and make the appropriate amendments to Acts prior to 1946 (i.e. prior to the Statutory Instruments Act 1946) to identify instruments as emergency instruments.

The Standing Orders should provide that –

- where the Executive adopts the exceptional procedure, it should be required to explain to the Parliament why it has done so;
- the Subordinate Legislation Committee (SLC) should be charged with examining the reasons given by the Executive; and
- the SLC should be empowered to report to the Parliament any case where it considers that it was unnecessary to adopt that procedure.

In session 3, (May 2007-) as the Parliament did not have time to consider the session 2 Committee's recommendations before the dissolution of Parliament in April 2007 the session 3 Committee considered the report and make new recommendations to Parliament.

In their report (Subordinate Legislation Committee 2008a) the session 3 Committee recommended introducing a new procedure, the Statutory Instrument Procedure (SSIP). For the Committee one attraction of SSIP was that it would provide a formal procedure for emergency or urgent instruments. So in Recommendation 9 of their report the Committee recommended that –

- Class 3 procedure be retained as an option for dealing with certain sorts of emergency procedure; and
- a specific procedure should be introduced for emergency negative instruments, including the elements outlined in this report; and this should only extend to emergency instruments as defined and not to

urgent instruments which should continue to be dealt with in the same way as breaches of the 21 day rule are at present.

A class 3 procedure is an affirmative procedure where the instrument is laid before Parliament after making and comes into force immediately but cannot remain in force after a specified period (usually 28 days from the date it was made) unless approved by resolution of the Parliament within that period. This procedure has been used in the past for emergency food orders. It may be described as for use in “expected emergencies” i.e. the parent Act anticipates that emergency action may be needed and accordingly makes procedural provision for it. The only other means of making an affirmative instrument quickly is to accelerate its progress through Parliament by taking the motion to approve in the Chamber at the earliest possible date after laying. Other than class 3, affirmative instruments cannot be brought into force immediately on laying.

The Scottish Government responded to the Committee report on 17 June 2008 (Subordinate Legislation Committee 2008b), saying that they wanted to give further consideration to Recommendation 9, but that they intended introducing a bill to give effect to the proposed improvements.

The Committee discussed a number of follow-up issues at their away day on 16 September and then received a paper from the Committee Clerk, with suggested responses to the Government, which they discussed on 30 September 2008 (Subordinate Legislation Committee 2008c).

Following this meeting the Committee Convener wrote to the Minister for Parliamentary Business (Subordinate Legislation Committee 2008d)

to say that Committee agreed with the Minister on how to proceed and recommended that the option of strengthening the scrutiny of compliance with the “21 day rule” be pursued, rather than introducing a new category of emergency procedure.

The Minister responded on the 23 October 2008 (Subordinate Legislation Committee 2008e) to confirm the intention to use the proposed Legislative Reform Bill to take forward the Committee’s recommendation on emergency procedures for secondary legislation.

## **Wales:**

*Emergency primary legislation:* The standing order does provide for:

- an emergency Measure to be accompanied by a statement on legislative competence from the Member in charge of the legislation;
- the Member in charge to propose a timetable for consideration of Stages 1–4 of the emergency Measure (for info – stage 1 = consideration of general principles of proposed Measure; stage 2 = detailed consideration by a committee [amendments]; stage 3 = detailed consideration in plenary [amendments]; stage 4 = final stage to formally agree the proposed Measure);
- a motion to proposed that all stages be taken on a single working day;
- stage 2 must be taken by a committee of the whole Assembly.

*Emergency subordinate legislation:* According to section 11A(4) of the Statutory Instruments Act 1946 (as inserted by Schedule 10 paragraph 3 of the Government of Wales Act 2006), if an instrument is not laid before the National Assembly at

least 21 days before it comes into operation, notification must be sent to the Presiding Officer when it is laid to draw the Assembly's attention to the fact that this 21 day rule has been breached and explaining why this happened. All Assembly Members are notified of the breach of the rule.

There is no reference to the 21 day rule in that form in Standing Orders, other than SO 24.6 which states that SIs subject to the affirmative procedure may not be considered in plenary until 20 days have elapsed since it was laid.

There is therefore no process for challenging the breach of the 21 day, other than the usual opportunity to table a motion to annul (which would mean undoing a law retrospectively) or rejecting it at the vote. The emergency legislation that's been tabled to date in the Third Assembly has always been subject to negative procedure, so we haven't dealt with an emergency vote on an affirmative procedure SI.

The notification of the breach of the 21 day rule is also copied to the Chair of the Subordinate Legislation Committee. There are no special provisions under Standing Orders on how these SIs should be considered by the Committee, therefore they are considered by the Subordinate Legislation Committee in the same way as any other SI. The Committee reports on all legislation which is not made bilingually, amongst other grounds (Standing Order 15.2). This type of "emergency" legislation is the most likely to be a justifiable exception to the principle that Assembly legislation is made bilingually (section 98(5) of the Government of Wales Act).

**Northern Ireland:** Under Standing Order 42(3), the Member in charge of the Bill is required, before introduction of the Bill in the Assembly to explain to the appropriate Committee:

- (a) the reason or reasons for accelerated passage;
- (b) the consequences of accelerated passage not being granted; and, if appropriate,
- (c) any steps he or she has taken to minimise the future use of the accelerated passage procedure.

Before Second Stage, the Member is then required to move a motion in plenary session seeking the Assembly's approval for accelerated passage. Such a motion requires 'cross-community support', a type of weighted majority vote within Assembly, designed to ensure both unionist and nationalist support for important decisions.

The effect of accelerated passage is to exclude Committee Stage, remove the requirement that there be five working days between the main stages of the Bill and enable a Bill to complete its Assembly stages in not less than 10 working days. In addition, the full text of the Bill must be submitted to the Speaker 7 days before introduction. Further time is required, of course, to seek Royal Assent.

### **3. Are there any constitutional safeguards in place—for example is emergency legislation subject to scrutiny by a special parliamentary or other committee? Does emergency legislation lapse after a specified time, if not renewed?**

**Canada:** No differentiation exists between legislation that is passed over the course of several months, and legislation that responds to an emergency situation and is consequently "fast-tracked" through all-party consent in the House and

Senate. As such, review provisions for legislation passed in response to an emergency situation would have to be included in the text of the bill.

**Australia (Senate):** The only constitutional safeguard is the lack of a government party majority in the Senate, which means that, even where legislation is declared by the government to be urgent, it is likely to be subjected to more intensive scrutiny than in the House of Representatives, particularly by committee hearings. Occasionally the government has been able to persuade the Senate that legislation is really urgent and that the normal Senate scrutiny process should be attenuated.

**Australia (House of Representatives):** No special constitutional safeguards apply to bills considered through expedited procedures, but see comments under 2 above in respect of sunset provisions. Whether such provisions are included in bills is ultimately a matter of policy and political negotiation, rather than a matter of procedure.

**New Zealand:** There is no select committee established specifically to scrutinise bills that have been accorded urgency.

In the ordinary course of legislative events, a bill is referred to a select committee when it has received its first reading. Bills that have received their first reading under urgency can be referred to select committee for consideration. For instance, the Sentencing and Parole Reform Bill was introduced and received its first reading under urgency on 18 February 2009. It was referred to the Law and Order Committee which is due to report back to the House in August 2009.

A fact sheet entitled “Parliament Brief: The legislative process” is available at: <http://www.parliament.nz/en-NZ/PubRes/About/FactSheets/6/1/5/00HOOOCPubResAboutFactSheetsProcess1-Parliament-Brief-The-legislative.htm>

**Scotland:** There are no such safeguards in place, but, as stated above, Stage 2 of an emergency bill is taken by a Committee of the Whole Parliament.

The first Act of the Scottish Parliament which was subject to emergency bill procedures was the Mental Health (Public Safety and Appeals (Scotland) Act 1999 asp 1. The Bill was introduced to close a gap in the Mental Health (Scotland) Act 1984 identified by a Sheriff court decision in *Noel Ruddle v The Secretary of State for Scotland* on 2 August 1999. The 1999 Act was later repealed by the Mental Health (Care and Treatment) (Scotland) Act 2003 asp 13.

The second Act subject to emergency bill procedures was the Erskine Bridge Tolls Act 2001 asp 12. The Bill was introduced to redress an administrative oversight, which meant that the Scottish Executive had failed to renew an order extending the Executive’s power under the Erskine Bridge Tolls Act 1968 to toll vehicles crossing the Bridge. The 2001 Act was later repealed by the Abolition of Bridge Tolls (Scotland) Act 2008.

**Northern Ireland:** As referred to above, there are requirements on the sponsoring Member to explain the case for accelerated passage to the relevant statutory committee and to the Assembly in plenary and the motion to the Assembly seeking accelerated passage must be passed by ‘cross-community consent’, a safeguard involving a weighted majority vote. There are, however, no special votes in relation to the bill itself and no procedure by which legislation lapses.

#### 4. How many pieces of emergency legislation have been agreed to in the past ten years (or other convenient timescale)?

**Canada:** A rough approximation might be that a half-dozen bills have been fast-tracked in response to an emergency in the past ten years. It may be worth noting that prior to the break for winter holidays and summer recess, a not-insignificant number of bills are fast-tracked in the same manner as bills introduced in response to an emergency situation.

**Australia (Senate):** Not really applicable. I could give you figures for the use of the guillotine in each House, but that would not indicate that the legislation involved fell into the category of emergency legislation; time limits are often put in place simply because time is running out at the end of sittings, not because the legislation is really urgent.

**Australia (House of Representatives):** Between 1998 and 2008, 27 bills were subject to declarations of urgency in the House. We do not keep records of bills subject to other forms of curtailment but I am confident in saying that it would be a considerably larger number than the number of bills subject to a traditional guillotine.

#### **New Zealand:**

##### *47<sup>th</sup> Parliament August 2002–August 2005*

*Extraordinary Urgency.* One bill, the Customs and Excise (Alcoholic Beverages) Amendment Bill, was introduced and passed under extraordinary urgency.

*Urgency.* There were fifteen urgency motions during the 47<sup>th</sup> Parliament and over 100 bills were advanced. They were either introduced into Parliament, or a stage was debated under urgency or it was passed. The urgency motion also applied to “any bills into which those bills may be divided.”

The following 68 bills were “passed through their remaining stages” under urgency:

*Land Transport (Street and Illegal Drag Racing) Amendment Bill*

*Motor Vehicle Sales Bill*

*Maori Purposes Bill (No. 2)*

*Hop Industry Restructuring Bill*

*Social Workers Registration Bill*

*Counter-Terrorism Bill*

*Copyright (Parallel Importation of Films and Onus of Proof) Amendment Bill*

*Retirement Villages Bill*

*Criminal Investigations (Bodily Samples) Amendment Bill*

*Wine Bill*

*Criminal Justice Amendment Bill (No. 7)*

*Intellectual Disability (Compulsory Care) Bill*

*New Zealand Horticulture Export Authority Amendment Bill (No.2)*

*Immigration Amendment Bill (No.2)*

*Fair Trading Amendment Bill (No.3)*  
*Consumer Protection (definitions of Goods and Services) Bill*  
*Importers and Exporters (restrictions) Amendment Bill*  
*Hazardous Substances and New Organisms (Stockholm Convention) Amendment Bill*  
*Bio security Amendment Bill*  
*Crimes Amendment Bill (No. 6)*  
*Health Practitioners Competence Assurance Bill*  
*Wool Industry Restructuring Bill*  
*Electoral (Vacancies) Amendment Bill*  
*Education (disestablishment of Early Childhood Development Board) Amendment Bill*  
*State Sector Amendment Bill (No.3)*  
*Maritime Security Bill*  
*Crimes and Misconduct (Overseas Operations) Bill*  
*Radio New Zealand Amendment Bill*  
*Telecommunications (Interception Capability) Bill*  
*New Zealand Symphony Orchestra Bill*  
*Sale of Liquor Amendment Bill (No.2)*  
*Future Directions (Working for Families) Bill*  
*Local Government (Auckland) Amendment Bill*  
*Meat Board Restructuring Bill*  
*Visiting Forces Bill*  
*Local Government Law Reform (No.3)*  
*Parole (Extended Supervision) and Sentencing Amendment Bill*  
*Mercenary Activities (Prohibition) Bill*  
*Secondhand Dealers and Pawnbrokers Bill*  
*Foreshore and Seabed Bill*  
*Acquaculture Reform Bill*  
*Subordinate Legislation (Conformation and Validation) Bill (No.3)*  
*Taxation (Annual Rates, Venture Capital and Miscellaneous Provisions) Bill*  
*Public Finance (State Sector Management) Bill*  
*Lawyers and Conveyancers Bill*  
*Legislation (Incorporation by Reference) Bill*  
*Gambling Amendment Bill*  
*Fiordland Marine Management Bill*  
*Railways Bill*  
*Architects Bill*

*Charities Bill*  
*Public Records Bill*  
*Crimes Amendment Bill (No. 2)*  
*New Zealand Superannuation Amendment Bill*  
*Identity (citizenship and Travel Documents) Bill*  
*Injury Prevention, Rehabilitation, and Compensation Amendment Bill (No. 3)*  
*Courts and Criminal Matters Bill*  
*Prisoners' and Victims' Claims Bill*  
*Land Transport Amendment Bill*  
*Tariff (New Zealand – Thailand Closer Economic Partnership) Bill*  
*Taxation (Base Maintenance and Miscellaneous Provisions) Bill*  
*Misuse of Drugs Amendment Bill (No. 3)*  
*Overseas Investment Bill*  
*Terrorism Suppression Amendment Bill (No. 2)*  
*Courts and Criminal matters Bill*  
*Appropriation (2005/06) Estimates Bill*  
*Imprest Supply (Second for 2005/06)*  
*Resource Management and Electricity Legislation Amendment Bill*

#### *48<sup>th</sup> Parliament November 2005–September 2008*

*Extraordinary urgency.* No bills advanced under extraordinary urgency in this Parliament.

*Urgency.* There were ten urgency motions during the 48<sup>th</sup> Parliament and over 104 bills advanced. They were either introduced into Parliament, or a stage was debated under urgency or it was passed. The urgency motion also applied to “any bills into which those bills may be divided.”

The following 49 bills were “passed through their remaining stages” under urgency:

*Taxation (Annual Rates and Urgent Measures) Bill*  
*Hazardous Substances and New Organisms (Approvals and Enforcement) Amendment Bill*  
*Biosecurity (Status of Specific Ports) Amendment Bill*  
*Subordinate Legislation (Confirmation and Validation) Bill*  
*Veterinarians Bill*  
*Land Transport Amendment Bill*  
*Appropriation (Parliamentary Expenditure Validation) Bill*  
*Taxation (Annual Rates, Savings Investment, and Miscellaneous Provisions) Bill*  
*Telecommunications Amendment Bill*  
*Weathertight Homes Resolution Services Amendment Bill*

*Epidemic preparedness Bill*  
*Health Amendment Bill*  
*Immigration Amendment Bill (No.2)*  
*Parole Amendment Bill*  
*Sentencing Amendment Bill (No.2)*  
*Social Security Amendment Bill (No.2)*  
*Summary proceedings Amendment Bill (No.2)*  
*Taxation (Kiwisaver and Company Tax Rate Amendments) Bill*  
*Education (Tertiary Reforms) Amendment Bill*  
*Taxation (Annual Rates, Business Taxation, Kiwisaver, and Remedial Matters) Bill*  
*Dairy Industry Restructuring Amendment Bill (No.2)*  
*Taxation (Personal Tax Cuts, Annual Rates, and Remedial Matters) Bill*  
*Climate Change Response (Emissions Trading) Amendment Bill*  
*Electricity (Renewable Preference) Amendment Bill*  
*Public Transport Management Bill*  
*Corrections (Mothers with Babies) Amendment Bill*  
*Employment Relations (Breaks and Infant Feeding) Amendment Bill*  
*Reserve Bank of New Zealand Amendment Bill (No.3)*  
*Biofuel Bill*  
*Commerce Amendment Bill*  
*Disability (United Nations Convention on Rights of Persons with Disabilities) Bill*  
*Real estate Agents Bill*  
*Affordable Housing: Enabling Territorial Authorities Bill*  
*Customs and Excise Amendment Bill (No.3)*  
*Companies (Minority Buy-out Rights) Amendment Bill*  
*Electricity Industry Reform Amendment Bill*  
*Family Courts Matters Bill*  
*Walking Access Bill*  
*Policing Bill*  
*Affiliate Te Arawa Iwi and Hapu Claims Settlement Bill*  
*Central North Island Forests Land Collective Settlement Bill*  
*Financial Advisers Bill*  
*Aquaculture Legislation Amendment Bill*  
*Fisheries Act 1996 Amendment Bill (No.2)*  
*Te Roroa Claims Settlement Bill*  
*Walking Access Bill*

*Public Lending Right for New Zealand Authors Bill*

*Financial Service Providers (Registration and Dispute Resolution) Bill*

*Holidays (Transfer of Public Holidays) Amendment Bill*

Source : New Zealand Parliamentary Debates, 2002 – 2008.

*49th Parliament December 2008-: Bills accorded urgency by week (up to week beginning Tuesday 17 February 2009).*

*Week beginning Tuesday 9 December 2008*

Urgency was accorded the introduction and passing of:

*Taxation (Urgent Measures and Annual Rates) Bill*

*Employment Relations Amendment Bill*

*Bail Amendment Bill*

*Education (National Standards) Amendment Bill*

*Sentencing (Offences Against Children) Amendment Bill*

*Week beginning Tuesday 16 December 2008*

Urgency was accorded the introduction and passing of:

*Energy (Fuels, Levies, and References) Biofuel Obligation Repeal Bill*

*Electricity (Renewable Preference) Repeal Bill*

*Domestic Violence (Enhancing Safety) Amendment Bill*

The second reading of the:

*Corrections Amendment Bill (No.2)*

*Week beginning Tuesday 10 February 2009*

Urgency was accorded the introduction and first reading of:

*Taxation (Business Tax Measures) Bill*

*Gangs and Organised Crime Bill*

*Criminal Investigations (Bodily Samples) Amendment Bill*

*Sentencing (Offender Levy) Amendment Bill*

*Week beginning Tuesday 17 February 2009*

Hansard is not yet available for this week's debates. The following list is compiled from urgency motions provided by Office of the Clerk.

Urgency was accorded first reading and remaining stages of the:

*Electoral Amendment Bill*

The introduction and first reading of:

*Sentencing and Parole Reform Bill*

*Children, Young Persons, and Their Families (Youth Courts Jurisdiction and Orders) Amendment Bill*

Introduction and first reading of the:

*Resource Management (Simplifying and Streamlining) Amendment Bill*

**Scotland:** The first Bill that the Parliament passed was an emergency bill. Since then there have been 4 more. The latest was dealt with on 4 February 2009:

*Mental Health (Public Safety and Appeals (Scotland) Bill 1999 (SP Bill 1, Session 1)*

*Erskine Bridge Tolls Bill (SP Bill 33, Session 1)*

*Criminal Procedure (Amendment) (Scotland) Bill (SP Bill 49 Session 1)*

*Senior Judiciary (Vacancies and Incapacity) (Scotland) Bill (SP Bill 65, session 2)*

*Budget (Scotland) (No.3) Bill (SP Bill 20, Session 3)*

**Wales:**

*Primary legislation:* As yet, we have had no instances of this procedure being used (as the Assembly currently has no legislative competence in area where emergency legislation is likely to be appropriate).

*Secondary legislation:* A list of the SIs in breach of the 21 day rule in the Third Assembly (May 2007 – present) can be found here:

<http://www.assemblywales.org/bus-home/bus-legislation/bus-legislation-sub/bus-legislation-sub-21-day-rule.htm> They mostly address animal health / food safety issues. Some of them are only in force for a limited period of time.

**Northern Ireland:** 27 Executive Bills have been introduced since restoration of devolved powers to the Assembly on 8 May 2007. Of these, 13 were given accelerated passage: Budget (2007), Welfare Reform, Children (Emergency Protection Orders), Pensions, Budget (2008), Commission for Victims and Survivors, Local Government (Boundaries), Mesothelioma, etc., Child Maintenance, Budget (No. 2) Pensions (No. 2), Financial Assistance and Budget (2009).

Standing Order 42(2) provides for accelerated passage to be granted for Budget Bills on the basis that the Minister has engaged in appropriate consultation with the Committee for Finance and Personnel.

Bills involving social security issues are also typically done by accelerated passage due to a long-standing Executive decision to maintain “parity” with the rest of the UK in this area of legislation.

**5. Has the current global economic downturn caused any emergency legislation to be brought forward? If so, what process has been followed for this legislation?**

**Canada:** No emergency legislation was brought forward in response to the global economic downturn. It might be worth noting that an economic update in the form of a speech to Parliament was given by the Minister of Finance in December 2008, as a sort of “mini-budget.”

**Australia (Senate):** The current government has introduced several pieces of legislation to respond to the global financial crisis, and some of these have been passed very speedily, such as a government guarantee of deposits in all of the banks, for obvious reasons. Again, the treatment of the legislation depends on the government persuading the Senate that the usual Senate scrutiny should be curtailed.

**Australia (House of Representatives):** Yes; late in 2008 a package of financial and related bills was passed; and this year, as mentioned above, a further package was passed (in fact when the 2009 package was defeated in the Senate at the third reading stage, a replacement package, modified to accommodate amendments made in the Senate to the original package, was introduced, passed by the House under restricted debate and agreed by the Senate).

**New Zealand:** A new National-led government was formed in late 2008 following a general election in early November. Before the election, National Party Leader John Key laid out his plans for the first 100 days of being sworn into office, should National be elected, in a press release entitled “Key launches action plan” stating (available at <http://www.scoop.co.nz/stories/PA0811/S00073.htm>):

There are big challenges ahead. National is ready to deliver a fresh approach. That will start almost straight away, with a strong economic plan, and improvements to law & order, health, and education.

On 8 December 2008, the Forty-ninth Parliament opened. On 9 December, the Leader of the House moved that urgency be accorded (among other business) the introduction and passing of Government bills dealing with taxation, employment relations, bail, education, and sentencing. The motion was agreed to.<sup>9</sup>

A list of bills accorded urgency to date during the 49<sup>th</sup> Parliament is above.

**Scotland:** No such emergency legislation has been introduced.

**Northern Ireland:** In an effort to deal with some of the consequences of the current economic down-turn, the Assembly recently passed the Financial Assistance Bill by accelerated passage. It took 16 days to complete its Assembly stages plus a further 9 days to receive Royal Assent.

## 6. Emergency legislation at Westminster is sometimes used to close legal loopholes (for example, one identified by a court ruling). How would legal loopholes be closed by your legislature?

**Canada:** If the Governor-in-Council has been delegated the power to close the loophole, it will do so by enacting a regulation. Otherwise, an act of Parliament would be required; a government bill emanating from either House or possibly a Senate Private Bill should the matter relate to a legal exception, right or privilege being extended to a private interest.

**Australia (Senate):** There have been some pieces of legislation to close legal loopholes which have been treated as urgent, but they have been fairly rare.

**Australia (House of Representatives):** Provision to close legal loopholes can be inserted in bills which have wider purposes (for example bills which may propose a number of amendments to an existing Act), or they can be introduced as bills for the purpose only of closing the loophole. We do not maintain records showing which bills could be regarded as closing such loopholes, but my assessment is that such provisions would usually be included in bills having wider purposes.

**New Zealand:** *The Taxation (Annual Rates and Remedial Matters) Bill 1999* provides an example of urgency being accorded the passage of a bill so that a legal loophole could be closed. In moving that the House take note of the report of the

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<sup>9</sup> (9 December 2008) Vol 651 NZPD p 58.

[http://www.parliament.nz/en-NZ/PB/Debates/Debates/3/2/3/49HansD\\_20081209\\_00000453-Urgency.htm](http://www.parliament.nz/en-NZ/PB/Debates/Debates/3/2/3/49HansD_20081209_00000453-Urgency.htm)

Finance and Expenditure Committee on the Bill, the Minister of Finance (the Rt Hon Sir William Birch) stated:<sup>10</sup>

The predominant theme of the Bill is protection of the revenue base by closing loopholes in GST and income tax law.

On 1 June 1999, the second reading of the *Taxation (Annual Rates and Remedial Matters) Bill 1999* was accorded urgency. On 2 September 1999, urgency was accorded the remaining stages of the Bill.

**Scotland:** As stated in the answers to question 2 and 3 emergency legislation has also been used by the Scottish Parliament to respond to such legal loopholes.

**Northern Ireland:** The Children (Emergency Protection Orders) Act (Northern Ireland) 2007 was passed, by accelerated passage, as a consequence of a court ruling and completed its Assembly stages in 17 working days. By way of background, the judge had held in a judicial review case, that Article 64(8) of the Children (Northern Ireland) Order 1995 was incompatible with Article 6(1) and Article 8 of the European Convention on Human Rights.

**7. Many of the bills passed in a short timeframe by the UK parliament relate to Northern Ireland. Are you aware of any examples where parallel legislation was required to be passed by both the Republic of Ireland and the UK? How, for example, did you deal with the Offences Against the State (Amendment) Bill during its passage in 1998? As we understand it, this was legislation similar to the Criminal Justice (Terrorism and Conspiracy) Act 1998 which was introduced to the House of Commons in the aftermath of the Omagh bombing and went through all its stages there in one day. Are there any other examples you would cite?**

**Northern Ireland:** The example cited occurred prior to the devolution of powers to the Northern Ireland Assembly.

## Annex 1

### Extract from Standing Orders of the Northern Ireland Assembly

#### 42. PUBLIC BILLS: SPECIAL SCHEDULING REQUIREMENTS

(1) There shall be a minimum interval of five working days between each stage of a Bill, save in the following cases -

- (a) between Second Stage and Committee Stage; and
- (b) where a Bill is subject to the accelerated passage procedure in accordance with paragraph (2) or (4).

(2) Where on or before the Second Stage of a Budget Bill the chairperson of the Committee for Finance and Personnel (or another member of that committee acting on his or her behalf) confirms to the Assembly that the committee is satisfied that there has been appropriate consultation with it on

the public expenditure proposals contained in the Bill, the Bill shall proceed under the accelerated passage procedure which shall exclude any Committee Stage.

(3) Where, exceptionally, a Bill (other than a Budget Bill) is thought to require accelerated passage, which shall exclude any Committee Stage, the member in

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<sup>10</sup> (2 September 1999) Vol 580, NZPD p 19254.

charge of the Bill shall, before introduction of the Bill in the Assembly, explain to the appropriate committee -

- (a) the reason or reasons for accelerated passage;
- (b) the consequences of accelerated passage not being granted; and, if appropriate,
- (c) any steps he or she has taken to minimise the future use of the accelerated passage procedure.

(4) Before Second Stage the member in charge of the Bill shall move a motion "That the .... Bill proceed under the accelerated passage procedure". In moving the motion the member shall explain to the Assembly-

- (a) the reason or reasons for accelerated passage;
- (b) the consequences of accelerated passage not being granted; and, if appropriate,
- (c) any steps he or she has taken to minimise the future use of the accelerated passage procedure.

A motion under this Standing Order shall require cross-community support within the meaning of section 4(5) of the Northern Ireland Act 1998.

(5) No Bill shall pass all its required stages in the Assembly in less than ten days.

(6) Where a Bill has not completed its passage by the end of an Assembly session it shall be carried forth and its passage continued into the next session.

(7) A Bill shall not be carried forth if the Assembly stands dissolved.

## **Annex 2: Scottish Parliament listed sources**

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30th Meeting, 2008 (Session 3) 4 November 2008 agenda paper SL/S3/08/30/7*

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