

**NORTHERN IRELAND OFFICE MEMORANDUM FOR THE DELEGATED POWERS AND
REGULATORY REFORM COMMITTEE**

THE NORTHERN IRELAND (EXECUTIVE FORMATION) BILL

Introduction

1. This memorandum has been prepared for the Delegated Powers and Regulatory Reform Committee to assist with its scrutiny of the Northern Ireland (Executive Formation Bill (“the Bill”). The Bill was introduced in the House of Commons on 4 July 2019. This memorandum identifies the provision in the Bill that confers a power to make delegated legislation. It explains why the power has been taken and explains the nature of, and the reason for, the procedure selected.
2. There has been no functioning Northern Ireland Executive since 9 January 2017, when the then deputy First Minister of Northern Ireland resigned, which also resulted in the First Minister ceasing to hold office. The period for the appointment of Ministers to form an Executive after the extraordinary Assembly election in March 2017 was extended to 29 June 2017 (by the Northern Ireland (Ministerial Appointments and Regional Rates) Act 2017 (“MARRA”)), but no Ministers were appointed.
3. That period was further extended by the Northern Ireland (Executive Formation and Exercise of Functions) Act 2018 (“EFEF Act”) so as to expire on 26 March 2019. That Act included a power to extend the period by way of regulations on one occasion only and for a maximum of five months¹. The Secretary of State exercised that power on 20 March 2019² and the period was extended so as to expire on 25 August 2019. As at the date of this memorandum, no agreement has been reached between the Northern Ireland parties as to the formation of an Executive.
4. This Bill extends the period for forming an Executive further so as to expire on 21 October 2019. By that date the Secretary of State will also be required to publish and lay before Parliament a report explaining what progress has been made towards the formation of an Executive, unless one has already been formed. The Bill will confer a power on the Secretary of State to extend the period for forming an Executive until 13 January 2020. She may exercise it once only so as to extend the period until that date.

Purpose and effect of the Bill

Executive Formation

5. Section 16A of the Northern Ireland Act 1998 (“1998 Act”) provides for a 14 day period following an Assembly election in which NI Ministers – including the First Minister and deputy First Minister – must be appointed. If they are not, then the Secretary of State for Northern Ireland is required to propose a date for another election under s. 32(3).

¹ See the Committee’s 36th report of this session and the NIO’s accompanying memorandum

² The Northern Ireland (Extension of Period for Executive Formation) Regulations 2019 (SI. 2019/616).

That period initially expired on 27 March 2017 but has been extended on three occasions as mentioned above so as to expire on 25 August 2019. Clause 1 of the Bill amends section 1 of the EFEF Act such that the period for forming an Executive will now expire on 21 October 2019. The Bill will also enable the Secretary of State, by regulations subject to the made affirmative procedure to extend that period so as to expire on 13 January 2020.

Exercise of Functions

6. Under s. 22 of the 1998 Act, statutory functions can be conferred on Northern Ireland departments by name as well as on Ministers. This is consistent with the position under article 5 of the Departments (Northern Ireland) Order 1999 (“1999 Order”) that departments have separate legal personality. Article 4(1) of the 1999 Order requires that Departments at all times exercise their functions subject to the direction and control of the Minister in charge of the department. Subject to that, functions may be exercised by the Minister in charge of the department or a senior officer of the department (a. 4(3)). Departments have interpreted the obligation under a. 4(1) as an empowering one that applies only when Ministers are in post and have thus continued to exercise departmental functions. This interpretation is consistent with that of the Court of Appeal of Northern Ireland in its judgment in *Buick*³.
7. However, the Court indicated in *Buick* that departments’ powers to exercise their functions were subject to limitations. In particular, it held that they are not able to exercise functions in respect of matters that would normally (if Ministers were in post) be referred to the Executive Committee of the Northern Ireland Assembly for discussion and agreement because they are cross-cutting, significant or controversial. It also indicated that matters that would normally be referred to Ministers for approval are outside the competence of a department (although this was strictly obiter). Section 3 of the EFEF Act, therefore, clarified that senior officers of Northern Ireland departments are not prevented from exercising the functions of a department during the period for forming an Executive where the officer is satisfied it is in the public interest to do so.
8. By extending the period for forming an Executive, this Bill will also have the effect of extending the period during which section 3 of the EFEF Act applies in respect of the exercise of NI departmental functions.

Delegated Powers

9. The Bill contains one delegated power. Clause 2 substitutes new section 2 of the EFEF Act. As substituted section 2 will confer a power on the Secretary of State to make regulations subject to the made affirmative procedure to further extend the period for forming an Executive until 13 January 2020.

Clause 2: Limited power to further extend period for Executive formation

Power conferred on: the Secretary of State

³ Re *Buick* [2018] NICA 26

Power exercised by: Regulations

Parliamentary Procedure: made affirmative procedure

Context and purpose

10. Clause 1 of the Bill amends section 1 of the EFEF Act which in turn extends the period in section 16A of the 1998 Act in which Ministers may be appointed (defined in the EFEF Act as the “period for forming an Executive”). That period is due to expire on 25 August 2019. Clause 1 will extend it so that it now expires on 21 October 2019.
11. By substituting new section 2, this Clause enables the Secretary of State to extend the period for forming an Executive until 13 January 2020. She may only exercise the power so as to substitute that date and she must exercise it on or before 21 October 2019. This means that if Ministers have not been appointed, but the Secretary of State is of the view that further time is needed to enable this, she may extend the period without further primary legislation. This, therefore, constitutes a Henry VIII power.

Explanation for delegation

12. Whilst the primary purpose and intention of the UK Government is to ensure that an Executive is formed by 21 October 2019, it cannot rule out that further time may be needed. That will depend on how any talks between the parties are progressing or have progressed. This power is intended to provide the opportunity to provide for further time and enable an Executive to be formed without further primary legislation. The power to extend the period is limited and may only be exercised once and so as to expire on 13 January 2020.
13. This power will provide the Secretary of State with the flexibility that she may need to respond to events as they are happening. If it is clear that further time is going to be needed she will be able to extend the time so as to enable talks to continue and an Executive to be formed. Including 13 January 2020 on the face of the Bill would risk losing momentum on the progress of any talks after the summer break and those concerned would be focussed on that date, rather than an imminent October date.

Explanation for Parliamentary process

14. The Government proposes Regulations under this Clause (which will have the effect of extending the period set out in section 16A of the 1998 Act) are subject to the made affirmative procedure. This means that they must be laid before Parliament after being made, and will cease to have effect if they are not approved by both Houses within 28 days of the day on which they are made⁴.

⁴ Note that in calculating the 28 days no account is taken of any time during which Parliament is dissolved or prorogued or during which both Houses are adjourned for more than 4 days.

15. We have considered whether the power should be exercisable instead or as well by the draft affirmative procedure⁵, however have concluded, given the time in the Parliamentary year and the proximity of 21 October to the existing expiry date, this would not be practicable. If the regulations were subject to the draft affirmative procedure, consideration would need to be given to laying draft extension regulations between the end of the summer recess and the start of the conference recess so as to allow consideration by the JCSI and approval by both Houses before the expiry date of 21 October. This would not enable proper consideration by the Secretary of State as to whether the period for forming an Executive needs to be or should be extended or whether other steps should be taken, especially if there are ongoing efforts to restore the devolved institutions in Northern Ireland.
16. The made affirmative procedure will enable the Secretary of State to consider closer to the October expiry date whether time needs to be extended, taking into account progress made by the parties after the summer. Whilst she may extend time without the prior approval of Parliament, the extension will require the subsequent approval of Parliament, ensuring Parliamentary scrutiny of how and why she has exercised the power.
17. To ensure legal certainty over the replacement date it is necessary to make provision for what the replacement date is if the regulations are not approved. This is because the effect of an amending instrument ceasing to have effect is not necessarily to restore the amended text to what it would have been if the regulations had never been made.
18. If the regulations cease to have effect on or before 21 October 2019, because they have not been approved within the 28 days and that period ends before 21 October then the period for forming an Executive is to be treated for all purposes as ending on 21 October. In other words, the date reverts to what it would have been had the regulations never been made.
19. If the regulations cease to have effect after 21 October 2019, then the period for forming an Executive is to be treated for all purposes as ending when the regulations cease to have effect. So, for example, if
 - a. the Secretary of State makes regulations on 20 October 2019,
 - b. the replacement date is 13 January 2020, and
 - c. the 28-day period expires before 13 January 2020 without Parliament having approved the regulations,the period for forming an Executive is treated as expiring on the date on which the 28 days expired, and therefore earlier than the date in the regulations as made.

⁵ Section 2 of the EFEF Act as currently enacted enabled the Secretary of State to extend the period for forming an Executive by a period of up to 5 months by regulations. Those regulations were subject to the draft affirmative procedure or, where the Secretary of State considered it to be expedient, the made affirmative procedure.

Northern Ireland Office

3 July 2019