

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

## THE NORTHERN IRELAND (EXECUTIVE FORMATION ETC) BILL

### Introduction and background

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 etc) Bill (**the Bill**). The Bill will be introduced in the House of Commons on 22 November 2022. This memorandum identifies the provisions of the Bill that confer powers to make delegated legislation. It explains in each case 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 4 February 2022, when the then First Minister resigned, which also resulted in the deputy First Minister ceasing to hold office. All other Northern Ireland Ministers remained in office. On 5 May 2022 there was a general election to the Northern Ireland Assembly. After the first meeting of that Assembly, which took place on Friday 13 May, there was a period of 24 weeks in which all NI Ministers, including the First Minister and deputy First Minister could be appointed<sup>1</sup>. That period ended at the end of October 27 whereupon the Secretary of State came under a duty to propose a date as soon as practicable for a further election.
3. In the meantime, following the election in May, all remaining NI Ministers remained in office on a caretaker basis. The period in which they were to remain in office on that basis, in the absence of an Executive having formed, also ended at the end of October 27. Since that time there have therefore been no Ministers in charge of NI departments.
4. During the period since the election, the Assembly has not been sitting as it has up to now been unable to elect a presiding officer and deputies, which must be its first business.
5. The provisions in the Bill concerning executive formation, departmental functions and public appointments are similar to those contained in the Northern Ireland (Executive Formation and Exercise of Functions) Act 2018 (**2018 Act**). The committee reported on that Bill in its 36th report of session (2017-19), and in response to the Government's amendment tabled as a result of that report, its 37th report. In its 36th report the committee criticised the proposed use of the negative procedure to add to the list of specified public appointments. The then Bill was amended so as to allow instead for the draft or made affirmative procedure to be used. That was the only matter it drew to the attention of the House of Lords.

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<sup>1</sup> The period for forming an Executive after an election was extended from 14 days after the Assembly first meets to a maximum of 24 weeks after the Assembly first meets by the Northern Ireland (Ministers, Elections and Petitions of Concern) Act 2022. That Act also made provision for NI Ministers to remain in office following an election. Prior to that change they ceased to hold office on the day of the poll.

6. The provisions on MLA pay are similar to those contained in the Assembly Members (Pay) Act 2018. The committee reported on that Bill in its 19th report of session (2017-19). There was nothing in that Bill that the committee drew to the attention of the House of Lords.
7. The provisions on regional rates, whilst conferring an enabling power on the Secretary of State, are otherwise similar to those contained in the Northern Ireland (Ministerial Appointments and Regional Rates) Act 2017, the Northern Ireland (Regional Rates and Energy) Act 2018 and the Northern Ireland (Regional Rates and Energy) Act 2019. In its 28th report of session (2016-2017) the Committee queried the legal basis for the claim by the department in its memorandum relating to the 2017 Act that the department of Finance's powers under a. 7 of the Rates (Northern Ireland) Order 1977 were unaffected by the provisions in the then Bill and that it would be able to exercise those powers so as to vary the rate. The department provided clarification, which the committee accepted.

## **Purpose and effect of the Bill**

### Executive Formation

8. The period for forming an Executive expired at the end of October 27. Clause 1 of the Bill modifies the effect of s. 16A of the Northern Ireland Act 1998 (**NIA 1998**) so that the period for forming an Executive is extended, partially retrospectively, by a further period of six weeks. It will now expire on 8 December 2022. Clause 2 confers a power on the Secretary of State exercisable by regulations to extend the period by another period of six weeks so as to end on 19 January 2023.

### Exercise of Functions

9. Clause 3 of the Bill makes provision in respect of the exercise of departmental functions by senior officers of a Northern Ireland department during the period while there is no Executive or in the period of six months after the Bill is passed, whichever is shortest. In particular, it provides that the absence of NI Ministers does not prevent the exercise of a departmental function, if the senior officer is satisfied it is in the public interest to exercise it during the period mentioned above.
10. Under s. 22 of the NIA 1998, statutory functions can be conferred on Northern Ireland departments by name as well as on NI Ministers. Article 4(1) of the Departments (Northern Ireland) Order 1999 (SI 1999/283 (N.I. 1)) 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)).
11. In the NI Court of Appeal case of *Buick*<sup>2</sup> the Court held that departments' powers to exercise their functions in the absence of Ministers were subject to limitations. In particular it held that they are not able to exercise functions in respect of matters that

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<sup>2</sup> [2018] NICA 26

would normally (if Ministers were in post) be referred to the Executive Committee of the Assembly for discussion and agreement because they are cross-cutting, significant or controversial. Whilst not having to decide the matter for the purposes of the appeal, it also indicated that matters that would normally be referred to Ministers for approval are outside the competence of a department. The Bill, therefore - in the same way as the 2018 Act which applied during the previous period without an NI Executive - clarifies that senior officers of Northern Ireland departments are not prevented from exercising the functions of a department until an Executive is next formed, or for six months after Royal Assent, whichever happens first, where the officer is satisfied it is in the public interest to do so.

12. The Court's findings in *Buick* were considered again in the case of JR80<sup>3</sup>. The Court of Appeal in that case considered the validity of the provisions included in the 2018 Act and, in particular, the arrangements for decision making in the absence of NI Ministers. It did not accept the challenge to the validity of the provisions, noting the exceptionally high threshold for any challenge to a limit on Parliamentary sovereignty which had not been reached in this case. It accepted that the guidance published under those provisions provided an attenuated degree of accountability and that if departments followed it there would remain areas in respect of which senior officers would not exercise functions in the absence of Ministers.
13. As under the 2018 Act, the Secretary of State will be required to publish guidance for departments about the exercise of their functions, and senior officers will be required to have regard to that guidance.

#### Public appointments

14. Similar to the provision made in the 2018 Act, clauses 6 to 9 make provision enabling public appointments to be made in the absence of NI Ministers.
15. Where appointment functions are conferred on NI Ministers (rather than departments which is not infrequently the case in relation to appointments), they cannot be exercised while there are no Northern Ireland Ministers in office. The Bill will confer powers on a Minister of the Crown to make the specified appointments during the current period without an Executive.
16. The absence of NI Ministers also affects some appointments made by UK Ministers. Where current legislation states that, in making an appointment, Ministers must consult or obtain the agreement of NI Ministers or the Executive Committee of the Assembly<sup>4</sup>, this cannot be achieved in the absence of an Executive. This situation represents a risk to the delivery of UK-wide services if appointments cannot be made. The Bill would enable these appointments to be made by replacing a requirement for UK Ministers to consult with NI Ministers with a requirement to instead consult with a Northern Ireland department.

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<sup>3</sup> [2019] NICA 58

<sup>4</sup> See section 20 NIA 1998. ExCo comprises all NI Ministers and is chaired by the First Minister and deputy First Minister.

17. Where appointments are made by UK Ministers jointly with NI Ministers (and, in some cases, also with Scottish and Welsh Ministers), these appointments also cannot be made at present. The Bill would enable these appointments to be made following consultation with a Northern Ireland department.

#### MLA pay

18. Section 47 of the NIA 1998 makes provision for the Assembly to determine, or provide for another person to determine, the salary and allowances of members of the Assembly (MLAs). Section 48 of the NIA 1998 makes provision for the Assembly to determine, or provide for another person to determine, the pensions, gratuities or allowances of persons who have ceased to be MLAs or a person who, whilst remaining an MLA, is no longer an office holder.

19. MLAs and office-holders currently receive their salary and allowances consistently with the Assembly Members (Salaries and Expenses) Determination (Northern Ireland) 2016. This means that even though the Assembly is not sitting and nor can it carry out any business, they continue to receive their full salary and allowances as MLAs or, where relevant, as office-holders.

20. Clause 10 will enable the Secretary of State to make a determination as to the salaries or allowances payable to MLAs and office-holders during any period in which the Assembly is not functioning. It will also enable the Secretary of State to make a determination as to the gratuities or allowances payable to a person who ceases to be an MLA or office-holder during such a period.

21. The Secretary of State may not make a determination in respect of MLAs pensions and any determination otherwise made in respect of pensions is to treat MLAs as having whatever salary they would have but for any determination of the Secretary of State.

22. The provision made is similar to that made by the Assembly Members (Pay) Act 2018, which applied during the last period without an Executive. Whilst that Act enabled a determination made to apply during any future period without an Executive (unless revoked), it didn't enable the Secretary of State to re-exercise the power during any future periods. This Bill will enable them to do so.

#### Regional rates

23. Domestic and non-domestic rates in Northern Ireland comprise two elements, a district rate and a regional rate. The district rate is set by district councils. The regional rate is set annually by the department of Finance by way of affirmative order in the Assembly. It must be set in respect of each financial year.

24. In the absence of an Executive and sitting Assembly, the rate for the financial year 23/24 cannot be set. The Bill will therefore confer powers on the Secretary of State to set the rate for that financial year by regulations during the period while there is no Executive (clause 11). This is without prejudice to the department of Finance's ability to vary the rate by affirmative order in the Assembly if an Executive is formed.

25. In summary, the Bill will:

- a. extend the time for appointing Ministers under s. 16A of the 1998 Act so that it expires on 8 December 2022 and enable the Secretary of State to extend this period for a further period of six weeks (clauses 1 and 2);
- b. clarify that the absence of an Executive does not prevent Northern Ireland departments from exercising their functions if it is in the public interest to do so until an Executive is next formed or for six months whichever is shortest (clause 3);
- c. enable a specified Minister of the Crown, having first consulted a Northern Ireland department, to exercise the appointment functions of a NI Minister in relation to a specified office during the current period without an Executive, and enable further offices to be specified in regulations (clause 6).
- d. replace the requirement for UK Ministers to consult, or obtain the approval of, Northern Ireland Ministers or the Executive Committee before exercising appointment functions during the current period without an Executive with a requirement to consult a Northern Ireland department (clause 7);
- e. enable the Secretary of State, having first consulted a Northern Ireland department, to exercise any appointment function of a NI Minister that is exercisable jointly with other persons who include the Secretary of State during the current period without an Executive (clause 8);
- f. enable the Secretary of State to determine the salary or allowances of MLAs, and the gratuities or allowances of persons ceasing to be MLAs, during any period in which the Assembly is not functioning (clause 10);
- g. enable the Secretary of State to set the regional rate for the financial year 2023/24 by regulations during the current period without an Executive (clause 11).

### **Delegated Powers**

26. In summary, the Bill contains seven delegated powers:

- a. Clause 2(1) will confer a power on the Secretary of State to extend the period for forming an Executive until 19 January 2023 by regulations which must be laid after being made;
- b. Clause 3(4) will impose a duty on the Secretary of State to publish guidance about the exercise of departmental functions in reliance on clause 3(1);
- c. Clause 6(3) will confer a power on the Secretary of State to add to the list of specified offices in clause 6(2) by regulations subject to the draft or made affirmative procedure;

- d. Clause 9(3) will confer a power on the Secretary of State to amend the definition of “appointment function” in clause 9(1) by regulations subject to the draft affirmative procedure;
- e. Clause 10(1) will confer a power on the Secretary of State to make a determination as to the salary or allowances of MLAs and gratuities or allowances of persons ceasing to be MLAs;
- f. Clause 11(1) will confer a power on the Secretary of State to set the regional rate for the financial year 2023/24 by regulations subject to the negative procedure in the House of Commons only;
- g. Clause 14(1) will confer a power on the Secretary of State to commence clauses 6 to 9 (appointment functions) by regulations.

**Clause 2(1): power to extend period for Executive formation until 19 January 2023**

*Power conferred on: the Secretary of State*

*Power exercised by: Regulations*

*Parliamentary Procedure: none (laid before Parliament after being made)*

Context and purpose

27. Clause 1 of the Bill extends the period for forming an Executive for a further six weeks expiring on 8 December 2022. If Ministers are not appointed in that period the Secretary of State must, as soon as practicable, propose a date for a further election, with such election taking place within 12 weeks<sup>5</sup>.

28. Clause 2 enables the Secretary of State to extend that period for a further period of six weeks expiring on 19 January 2023. The power must be exercised within seven days of Royal Assent (which may or may not be before 8 December and so may need to make retrospective provision). If the period is extended this will enable a further six weeks for NI Ministers to be appointed and also delay the onset of the Secretary of State’s duty to propose a date for a further election. If Ministers are not appointed on or before 19 January, the Secretary of State will again, come under a duty to propose a date for an election.

29. This constitutes a Henry VIII power.

Explanation for delegation

30. The period for forming an Executive is extended to 8 December as set out in clause 1. Whilst the primary purpose and intention of the UK Government is to ensure that an Executive is formed on or before that date, it cannot rule out that further time may be needed. That will depend on how any talks between the NI parties and the

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<sup>5</sup> Section 32(3) NIA 1998

Government 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 being needed.

31. This power will provide the Secretary of State with the flexibility that he may need to respond to events as they are happening. If it is clear that further time is going to be needed he will be able to extend the time to enable an Executive to be formed.

#### Explanation for Parliamentary process

32. Given the close proximity between the expedited passage, Royal Assent of the Bill and 8 December, the Secretary of State will have to decide quickly whether he wishes to extend the period for forming an Executive until 19 January 2023.
33. In the circumstances we believe a no procedure SI which must be laid after being made is the most appropriate. It enables the Secretary of State to respond quickly to events, which he is likely to have to do in the time available.
34. We have considered carefully the Committee's recommendations that there should be a presumption in favour of the affirmative procedure in the case of Henry VIII powers<sup>6</sup> and considered in detail the practicalities of a made-affirmative SI in the context of those timings. Even with a 28 day approval period (which is the period that has been used for similar powers), given the dates of recess, the period would have lapsed after 19 January, so in the event that the extension was not approved and the regulations ceased to have effect after 28 days, the extension would have already been effective.
35. A similar timing issue arose under the 2018 Act<sup>7</sup> and the same approach was taken as here.
36. The Secretary of State will have no discretion over how the power is exercised. He may decide to extend the period until 19 January or decide not to extend it. Parliament will have an opportunity during the passage of the Bill to scrutinise fully his likely decision and the basis on which he will make it. Any decision he takes will necessarily have to be made very shortly afterwards.

### **Clause 3(4): Exercise of departmental functions: duty to publish guidance**

*Power conferred on: the Secretary of State*

*Power exercised by: Guidance*

*Parliamentary Procedure: none*

#### Context and purpose

37. Clause 3 makes provision for the exercise of Northern Ireland departmental powers until an Executive is next formed or for six months whichever is shorter. In particular,

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<sup>6</sup> "Democracy denied" 12<sup>th</sup> report of session 2021-22

<sup>7</sup> See section 2(5) of that Act

it clarifies that the absence of Ministers does not prevent a senior officer of a Northern Ireland department from exercising a function of the department if she or he is satisfied that it is in the public interest to exercise the function during the period for forming an Executive (subsection (1)).

38. The Secretary of State is required to publish guidance to departments about the exercise of their functions, including guidance as to the principles to be taken into account in deciding whether or not to exercise a function, and senior officers of departments are required to have regard to that guidance (subsections (4) and (5)).
39. Departments may only exercise functions where it is in the public interest to do so. The Secretary of State recognises, and the guidance will recognise, that there is an important and countervailing public interest in waiting for the return of NI Ministers and a functioning Assembly before exercising certain functions, although this is something that would need to be kept under review. MLAs will also have the opportunity to make representations about these and other aspects of the guidance and the Secretary of State is required to have regard to these representations (subsection (6)).

#### Explanation for delegation

40. Whether and how functions should be exercised entails the consideration of various factors. The Secretary of State will be able to give guidance about the factors that he considers should be taken into account, especially in the current context, in relation to public spending, whilst giving departments the flexibility and discretion they need to reach appropriate and necessary decisions to ensure the continued delivery of public services in Northern Ireland in the absence of locally elected Ministers.

#### Explanation for Parliamentary process

41. The guidance is not subject to any Parliamentary process.
42. The draft guidance is being developed following extensive engagement with the Northern Ireland Civil Service. As per the requirement in the Bill, the Secretary of State is required to have regard to representations made by MLAs giving NI parties and independent members the opportunity to comment on and make representations about the proposed guidance.
43. The matters dealt with by the Bill and the guidance are devolved and are therefore rightly for the devolved executive authorities and locally elected politicians. They are the ones who are best able to assess what is necessary and appropriate in relation to local Northern Ireland matters. It is for this reason that the Secretary of State must have regard to representations made by locally elected politicians before publishing any guidance. He has also, as noted above, already engaged extensively with the Northern Ireland Civil Service.
44. We have carefully considered the Committee's various reports on guidance, including its 12<sup>th</sup> report of session 2021-22 mentioned above, and in particular its recommendation that guidance to which a recipient must have regard should be laid before Parliament and subject to Parliamentary scrutiny.

45. However, in this case we believe that the circumstances of this Bill and the guidance are such that while it is right that the broad framework for the guidance set out in the Bill is subject to Parliamentary scrutiny, a formal scrutiny process for the guidance would be disproportionate. It is intended that the guidance will be a framework of principles that are intended to support decision making, it will not be an exhaustive list of public interest tests that NI departments are bound to and it will not direct specific decision making. Rather it will leave the balance of the judgement in exercising departmental functions in the absence of Ministers to NI departments, providing they do so within the parameters of the Bill and other statutory provisions<sup>8</sup>.
46. Moreover, the provisions in clause 3 only apply until an Executive is formed or for six months after this Bill is passed, whichever is shorter. Early clarity on the exercise of departmental functions is crucial, especially in light of the decisions on public spending that will need to be made as a matter of urgency by NI departments so as to balance their budgets. It is intended that the guidance will be published as soon as possible – having had regard to any representations by MLAs – after Royal Assent. If at any point further or revised guidance is needed, it is likely that the Secretary of State would need to publish it – again having had regard to any representations from MLAs – without delay.
47. For these reasons, we believe that, exceptionally, it is appropriate in these circumstances that the guidance is not subject to any Parliamentary process.

***Clause 6(3): Northern Ireland Ministerial functions: specified offices***

*Power conferred on: the Secretary of State*

*Power exercised by: Regulations*

*Parliamentary Procedure: draft or made affirmative procedure*

Context and purpose

48. The power in clause 6(3) would permit the Secretary of State to make regulations, subject to the draft or made affirmative procedure, adding entries to the table of specified offices in clause 6(2). This is a Henry VIII power.
49. Existing legislation confers responsibility for certain public appointments in Northern Ireland on NI Ministers (rather than departments). Because these appointment functions may only be exercised by the named Minister or Ministers and therefore cannot be exercised in the absence of NI Ministers, clause 6(1) and (2) enables UK Ministers to exercise them during the current period in which there is no Executive. Both “the current period in which there is no Executive” and “appointment functions” are defined terms in the Bill (see clause 9(1)). The current period in which is no Executive is defined so as to begin when the relevant public appointment provisions

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<sup>8</sup> Such as Budget legislation establishing departmental spending limits

come into force<sup>9</sup> and end on the next occasion when an Executive is formed, meaning the powers will not be available to the relevant UK Minister once the Northern Ireland Executive is restored.

50. Parliament is being asked to approve the provision at clause 6(1) and (2) of the Bill in order to enable appointment functions to be exercised in the most pressing cases identified by Northern Ireland departments and considered necessary for maintaining public services and public confidence in the institutions in Northern Ireland. The threshold for a public appointment to be included in these provisions, and the threshold in any subsequent SI, is that failure to do so will have a significant adverse impact on the delivery of public services in Northern Ireland or create demonstrable real world impacts.
51. Clause 6(1) and (2) do not confer on the relevant UK Minister any appointment functions in relation to each specified office that are not currently conferred on Northern Ireland Ministers. Clause 6(1) and (2) make no further changes in relation to these appointment functions. Clause 6(8) requires the UK Minister to consult the relevant Northern Ireland department prior to exercising the appointment functions conferred by subsection (1).
52. Although the Government's priority remains reaching agreement on restoring an inclusive power-sharing Executive in Northern Ireland, given that certain, often significant, public appointment powers in Northern Ireland are conferred on Northern Ireland Ministers, it is possible that the continuation of the current period without an Executive may see an urgent need for appointment functions to be exercised in relation to other offices. For example, an unexpected vacancy could arise in relation to an office not specified in clause 6(2) and need to be filled as matter of urgency or the need to fill an existing or expected vacancy could become essential to the good governance and public confidence in Northern Ireland owing to unexpected events.
53. The appointment functions set out in the Bill are not confined to making appointments, but also extend to other functions including consultation, decisions on remuneration and the ability to remove an appointee from office. The urgent exercise of the latter may become necessary for example, if the holder of an office not already covered by the Bill was declared bankrupt or convicted of a criminal offence and did not resign, in which case they could not be removed from office without a UK Minister being able to exercise the 'appointment function' of removing them from office. More generally, resignation from office is frequently required to be made to the Minister.
54. Given the current circumstances in Northern Ireland, it is not possible to say whether it will be necessary to exercise the power in clause 6(3). The Government does not believe that in these circumstances it would be helpful to speculate about the likelihood of an unexpected vacancy or the need to exercise any other functions, as these are inherently unpredictable and citing any examples could prompt unnecessary and potentially destabilising speculation. For the same reason, draft regulations have not been provided.

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<sup>9</sup> Clauses 6 to 8 are to be commenced by regulations

55. The purpose of the power in clause 6(3) is to ensure that, if necessary, any such appointment can be made, or other appointment functions exercised, as a matter of urgency, in relation to offices not already specified in clause 6(2), without the need for further primary legislation. As Parliament would have approved the principle that NI Ministers' appointment functions in relation to certain posts may be exercised by UK Ministers, regulations under clause 6(3) would be applying that same principle to one or more further specified offices.

#### Explanation for the delegation

56. Working closely with the Northern Ireland Civil Service, the Secretary of State has identified the most immediate cases in which appointment functions, currently conferred on Northern Ireland Ministers will need to be exercised. These are the offices specified in clause 6(2).

57. Given the devolution settlement, the Government does not intend to seek to intervene in relation to transferred matters and the functions of Northern Ireland Ministers other than where there is a pressing need to do so in order to maintain governance and public confidence in the institutions in Northern Ireland. The Bill does not therefore set out an extensive list of offices appointed by Northern Ireland Ministers, or propose a general power for UK Ministers to exercise Northern Ireland Ministers' appointment functions. The Bill instead takes a narrower approach, focussed on the more immediate and identifiable need of the appointment functions being exercised in respect of certain offices set out in clause 6(2).

58. However, the Secretary of State considers that it is appropriate to delegate a power by regulations to add further offices to clause 6(2) so that it is possible, should it become necessary, to exercise appointment functions in relation to other offices in order to ensure in order to ensure good governance and public confidence in the institutions in Northern Ireland.

#### Explanation for the choice of parliamentary process

59. As mentioned above, in the Committee's 36th report of session (2017-2019), the Committee recommended that the equivalent delegated power contained in the 2018 Act should be subject to the affirmative procedure, acknowledging the potential need for urgent action using the made affirmative procedure.<sup>10</sup> Those recommendations were accepted by the Government and the 2018 Act therefore made provision for further offices to be added by regulations subject to the draft affirmative or made affirmative procedure.

60. We have taken the same approach in this Bill. The effect of clause 6(4) is that, regulations under clause 6(3) will be subject to the draft affirmative procedure unless the Secretary of State considers it to be expedient for the regulations to be made more quickly than the draft affirmative procedure would allow. In that case they will be

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<sup>10</sup> [House of Lords Delegated Powers and Regulatory Reform Committee 36th Report of Session 2017-19](#)

subject to the made affirmative procedure and the regulations must be approved within 28 days of being made.

61. The made affirmative procedure is included because of the potential need to add to the entries in clause 6(2) at short notice, especially in the event of a pressing vacancy (or other function that needs exercising as mentioned above) in relation to a public office.
62. The made affirmative procedure can only be used to add to the entries in the table of specified offices in clause 6(2). It cannot be used to amend the appointment functions to be exercised in relation to the specified offices. The power also cannot be used to amend the definition of “appointment functions” in clause 9 (which provides only for the draft affirmative procedure). Therefore, where the Bill would establish the principle that a UK Minister may exercise a range of appointment functions (defined in clause 9) that would normally be exercised by Northern Ireland Ministers in relation to certain specified offices, regulations under clause 6(3) would extend that principle to one or more further specified office(s), including at short notice if necessary. It could not change the principle or the limits set by the Bill in terms of the appointment functions, nor could it go beyond the appointment functions conferred on Northern Ireland Ministers.

### **Clause 9(3): core definitions**

*Power conferred on: the Secretary of State*

*Power exercised by: Regulations*

*Parliamentary Procedure: draft affirmative procedure*

#### Context and purpose

63. Clause 9(3) would permit the Secretary of State by regulations subject to the draft affirmative procedure to amend the definition of “appointment function” set out in clause 9(1). This definition relates to the exercise of appointment functions in clauses 6 to 8. The wider context for the Bill and the provisions in each of these clauses is set out above.
64. Although the Northern Ireland Office is confident that the current definition captures the necessary “appointment functions” for the purposes of all clauses, the purpose of the power is to allow the definition of “appointment function” to be amended should this become necessary. In particular, given the number and variety of appointment functions that may need exercising, for an uncertain period of time, we cannot rule out that there may be appointment functions not anticipated here; although as noted above, we have sought to ensure that the current definition is as comprehensive as possible. This is most likely to be used should UK Ministers have need to add further to the list in clause 6(2). This is a Henry VIII power.

#### Explanation for the delegation

65. As explained above, the Northern Ireland Office is confident that the current definition of “appointment function” in clause 9(1) adequately captures the functions conferred on Northern Ireland Ministers or UK Ministers that would be affected by the provisions in the Bill. However, this power would enable the list to be amended if necessary. Should any change be needed, it cannot broaden the definition beyond the appointment functions conferred on Northern Ireland Ministers (in respect of clause 6), UK Ministers (clause 7) or jointly by UK and Northern Ireland Ministers (clause 8); the functions must be set out elsewhere to be subject to the provisions of this Bill or regulations made under it.
66. Should further appointment functions be needed in clause 9, the Secretary of State considers that it would be necessary to have the ability to amend the definition of “appointment functions” without the need for the further primary legislation, to ensure that the necessary appointment functions can be exercised and good governance and public confidence in the Northern Ireland institutions maintained. However, as mentioned above we are confident that the current definition anticipates as far as possible any function that may need exercising UK Ministers.

#### Explanation for the choice of parliamentary process

67. It is proposed that regulations under clause 9(3) are subject to the draft affirmative procedure because any use of the power would affect the definition of appointment function in the Bill. The affirmative procedure would provide for scrutiny of any such regulations seeking to amend the definition of “appointment function” as agreed by Parliament in passing the Bill.

### **Clause 10(1): power to determine the salaries and allowances of MLAs**

*Power conferred on: the Secretary of State*

*Power exercised by: written determination*

*Parliamentary Procedure: none*

#### Context and purpose

68. Section 47 of the NIA 1998 makes provision for the payment of salaries and allowances to MLAs; it enables the Assembly to make provision for the determination of such salaries and allowances. Section 48 of the 1998 Act enables the Assembly to make provision for the payment of gratuities or allowances to persons who have ceased to be MLAs.
69. Pursuant to sections 47 and 48, the Assembly passed the Assembly Members (Independent Financial Review and Standards) Act (Northern Ireland) 2011 (**2011 Act**). That Act established the Independent Financial Review Panel (IFRP) and conferred functions on it to determine the salaries and allowances of MLAs and the gratuities and allowances of persons who had ceased to be MLAs.

70. The determination that applies in respect of the current Assembly is the Assembly Members (Salaries and Expenses) Determination (Northern Ireland) 2016<sup>11</sup>. Members of the panel are appointed by the Assembly Commission. In June 2016 the terms of appointment of the then panel members came to an end, and since then no new members of the panel have been appointed. In the absence of a panel, by resolution of the Assembly passed on 30 June 2020, the Assembly conferred powers on the Assembly Commission to determine the allowances (not salaries) of MLAs. It did this by way of variation to the 2016 determination that came into effect on 27 August 2020.
71. Since the May 2022 Assembly elections, the Assembly has not been able to conduct business, save for attempts to elect a Presiding Officer and an extraordinary session to pay respects to the Queen. Nevertheless, MLAs continue to be paid salaries and allowances in accordance with the 2016 determination.
72. Clause 10(1) enables the Secretary of State to make a determination as to the salaries or allowances payable to MLAs or the allowances or gratuities payable to MLAs who cease to be members (MLAs for, example, receive resettlement allowances if they step down at an election or are not returned) during the current period and any future periods in which the Assembly is not functioning.
73. It is a similar power to that conferred on the Secretary of State by the Assembly Members (Pay) Act 2018. However, unlike the power conferred under that Act, the proposed powers here apply to the current period in which there is no functioning Assembly and any future periods in which there is no functioning Assembly.
74. This will enable the Secretary of State to adjust salaries and allowances so as to reflect the responsibilities and duties that MLAs have during periods when, as now, MLAs are unable to elect a Presiding Officer or deputies after an Assembly election. Any determination made will only apply to period in respect of which it is made enabling the Secretary of State to consider fully the circumstances as they exist at the time.

#### Explanation for the delegation

75. That MLAs continue to be paid their full salary is a matter of considerable public interest and concern. During the previous period in which there was no Executive the then Secretary of State asked for and received advice from Trevor Reaney, former Clerk and Chief Executive of the Assembly on what pay and allowances might be paid to MLAs where there is no Executive or sitting Assembly. Based on this advice, the then Secretary of State implemented a reduction in the salaries and allowances of MLAs to reflect better the duties they were carrying out.
76. The Secretary of State believes that he needs to be able to respond to the public's concern and ensure that the salary and allowances of MLAs and the allowances and gratuities of those ceasing to be MLAs properly reflects the duties that they are carrying out, especially during a period of financial crisis and hardship. To allow MLAs to continue to receive their full remuneration when they are not carrying out, or able to

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<sup>11</sup> Which has been amended, including in 2020 by the Assembly Commission pursuant to powers conferred on it by the Assembly by resolution.

carry out, all their functions as legislators risks undermining the public's confidence in the institutions and their elected representatives.

77. As mentioned above the power will be available during this and similar periods. This will ensure that the Secretary of State can respond flexibly and in a timely manner to any similar periods in which the institutions are not functioning. This will enable him to address the public's concerns. The Secretary of State is conscious that this also has to be balanced against the need to ensure a diverse and varied legislature and he would not wish to use this power in a way that disincentivises people from all backgrounds seeking elected office.

#### Explanation for the choice of Parliamentary process

78. A determination made by the Secretary of State will not be subject to any parliamentary procedure. The department does not believe that this is necessary. The IFRP's own determinations are not subject to any procedure in the Assembly and the same would be the case here.

79. The Secretary of State will be required to send any determination to the Assembly Commission which will be required to publish it.

80. Under the 2018 Pay Act, there was similarly no parliamentary procedure and the determination was only required to be published as here. Similarly, under the Northern Ireland Act 2000, during periods when the institutions were suspended, the Assembly's powers to determine salaries, allowances and pensions under sections 47 and 48 of the 1998 Act were exercisable by the Secretary of State<sup>12</sup>. The exercise of powers were not subject to any procedures, Parliamentary or otherwise.

### **Clause 11(1): power to set the regional rate**

*Power conferred on: the Secretary of State*

*Power exercised by: regulations*

*Parliamentary Procedure: negative (Commons only)*

#### Context and purpose

81. Domestic and non-domestic rates in Northern Ireland comprise a district and regional element. The district rate is set by district councils, the regional rate is set by the Department of Finance by affirmative order made in the Northern Ireland Assembly. Rates are set in respect of each financial year. The regional rate is critical for ensuring the delivery of public services by both district councils and NI departments.

82. In the current period without an Executive, clause 11(1) will enable the Secretary of State to set the rate for the year 23/24. Although the Government will do all that it can to encourage an Executive to form, it believes that it is prudent to take a power now to

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<sup>12</sup> See Schedule 1, paragraph 9 of that Act prior to revocation

set the regional rate for 23/24 in the event that no Executive is formed and to ensure further primary legislation is not required.

83. The Secretary of State's power to set the rate in regulations is without prejudice to the power of the Department of Finance to set it in respect of the whole year in the usual way under Article 7(1) of the Rates (Northern Ireland) Order 1977 once an Executive is formed.

#### Explanation for the delegation

84. As mentioned above, the regional rate is vital for ensuring the delivery of public services and maintaining confidence in the institutions in Northern Ireland. The Secretary of State is mindful that setting a rate before or at the beginning of the financial year will ensure that the public have certainty over the rate they will be paying and the amount can be collected over 10 instalments.
85. But the clause also gives the Secretary of State flexibility as to when to exercise the power himself and ensures the Executive has sufficient opportunity to form and set the rate for itself before the start of the financial year.
86. If the rate were not capable of being set in regulations, primary legislation would be needed as was the case in the period 2017-2020 when three Acts providing for the regional rate in Northern Ireland were passed.

#### Explanation for the choice of Parliamentary procedure

87. The regulations will be subject to House of Commons scrutiny only as the regulations will be a tax (albeit a local one). Whilst the order setting the rate in the Assembly is subject to the affirmative procedure, we believe that the negative procedure is appropriate here. There is well established precedent for instruments that are subject to affirmative procedure in the Assembly being subject to negative procedure in Parliament<sup>13</sup>.
88. Once an Executive is formed it remains an option for the Department of Finance to make an order in the usual way under Article 7(1) of the Rates (Northern Ireland) Order 1977. That Order may be made in respect of the whole year and may vary the rate set by the Secretary of State. The Assembly will therefore have an opportunity to scrutinise any alternative rate proposed by the Department of Finance and have the opportunity to vary that made by the Secretary of State.

### **Clause 14(1): commencement of clauses 6 to 9**

*Power conferred on: the Secretary of State*

*Power exercised by: regulations*

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<sup>13</sup> See the Northern Ireland Act 2000 for example (repealed)

*Parliamentary Procedure: none*

Context and purpose

89. Clauses 6 to 9 (appointment functions) will come into force by commencement regulations made by the Secretary of State. Other provisions in the Bill will come into force on Royal Assent.

Explanation for delegation

90. Provision for these provisions to be commenced by regulations will enable them to be brought into force at the appropriate point. It is not clear at this stage whether they will be needed within two months of Royal Assent and so commencement has not been provided for on the face of the Bill.

Explanation for Parliamentary procedure

91. Commencement regulations are only exceptionally subject to any Parliamentary procedure. The commencement power enables the commencement of provisions that have already been scrutinised by Parliament. There are no additional powers (to make further consequential for example) so in line with usual procedure we think no procedure is the correct approach here.

**Northern Ireland Office**

**16 November 2022**