

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

THE NORTHERN IRELAND (EXECUTIVE FORMATION AND ORGAN AND TISSUE DONATION) 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 and Organ and Tissue Donation) Bill (**the Bill**). The Bill was introduced in the House of Commons on 9 February 2023. This memorandum identifies the provisions of the Bill that confer powers 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. Northern Ireland Assembly elections were held on 5 May 2022, as five years had passed since the previous Assembly was elected. Prior to the election, there was no functioning Executive due to the resignation of the First Minister on 4 February 2022. The First Minister's resignation meant that the deputy First Minister also ceased to hold office and that there was no longer any functioning Executive Committee.
3. As a result of the election on 5 May, 90 Members of the Legislative Assembly were elected, forming a new Assembly. The Northern Ireland Act 1998 requires that the Assembly first meets within 8 days of a poll, and that meeting commences the period for filling Ministerial offices.
4. The Northern Ireland (Ministers, Elections and Petitions of Concern) Act 2022 implemented changes agreed within New Decade, New Approach (NDNA): the agreement that restored the devolved institutions in 2020. These changes include provision for a longer period of time in which to form an Executive, and now allows for an initial period of 6 weeks from the date that the Assembly first meets, followed by 3 successive periods of 6 weeks (i.e. 24 weeks in total), unless the Assembly resolves (with cross-community support) that the period should not be further extended. During this time, NI Ministers who were in post before the election are allowed to remain so in a caretaker capacity.
5. The period for filling Ministerial offices after the Assembly election in May 2022 initially came to an end on 28 October 2022. As those offices were not filled, the Secretary of State for Northern Ireland fell under a duty to propose a date for a further Assembly election as soon as practicable to take place within 12 weeks. NI Ministers in post before the election also lost office at this stage.
6. Parliament subsequently passed the Northern Ireland (Executive Formation etc) Act 2022 (**NIEFA 2022**) which retrospectively extended the period for Executive formation from when it ended on 27 October until 8 December 2022. It also provided a power for the Secretary of State to extend that period until 19 January 2023 by regulations. The Secretary of State exercised that power on 7 December, thereby extending the period

for Executive formation until 19 January 2023. As that deadline has now passed, without the Ministerial offices being filled, the Secretary of State is again under a legal duty to propose a date for a further Assembly election in Northern Ireland.

7. On 30 March 2022, shortly before its dissolution, the Northern Ireland Assembly passed the Organ and Tissue Donation (Deemed Consent) Act (Northern Ireland) 2022 (**Deemed Consent Act**). In short, that Act, which amends the Human Tissue Act 2004 (**Human Tissue Act**), changes the current system in Northern Ireland whereby a person must “opt-in” to the organ donation register to one in which – subject to some exceptions – they must now “opt out”. In order to bring that Act fully into force and enable its provisions to have effect, regulations defining “permitted material” need to be made under s.3(9A). Those regulations will set out the organs and tissue to which “deemed consent” will apply. Under s.52(4B), those regulations are subject to the draft affirmative resolution procedure in the Assembly.
8. At present, as the Assembly has been unable to elect a Presiding Officer and deputies since the May 2022 election, it is unable to conduct any other business¹. There is presently no mechanism therefore by which any draft regulations may be approved.

Purpose and effect of the Bill

9. Under the NIEFA 2022, the period for forming an Executive expired at the end of January 19. Clause 1(2) of the Bill amends section 1 of NIEFA 2022 which in turn 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 52 weeks. It will now expire at the end of 18 January 2024. Clause 1(3) confers a power on the Secretary of State to propose a date for an election at any time during the extended period for Executive formation. The dissolution of the Assembly prior to such an election taking place would have the effect of ending the period for forming an Executive.
10. Clause 2(1) temporarily disapplies s.52(4B) of the Human Tissue Act, which provides that regulations made by the Department of Health under s.3(9A) defining “permitted material” are subject to the draft affirmative procedure in the Assembly. Clause 2(2) temporarily replaces that procedure with the negative resolution procedure in the Assembly, by reference to the definition of “subject to negative resolution” in s.41(6) of the Interpretation Act (Northern Ireland) 1954. Clause 3(3) provides that the period for which subsections (1) and (2) apply ends once the Northern Ireland Assembly has elected a Presiding Officer and deputies under s.39(1) of the NIA 1998.

Delegated Powers

¹ See s. 39 of the Northern Ireland Act 1998.

11. The Bill amends the procedure for regulations to be made under a delegated power contained within the Human Tissue Act:

Clause 2: Organ and tissue donation in Northern Ireland: procedure for regulations defining permitted material

Power conferred on: the Northern Ireland Department of Health

Power exercised by: Regulations

Northern Ireland Assembly Procedure: subject to negative resolution within the meaning of s.41(6) Interpretation Act (Northern Ireland) 1954

Context and purpose

12. Section 3(9A) of the Human Tissue Act contains an existing power exercisable by the Northern Ireland Department of Health to make regulations defining “permitted material” for the purposes of the organ and tissue donation deemed consent regime. Clause 2 temporarily changes the procedure to which those regulations are subject in the Northern Ireland Assembly from the draft affirmative to the negative resolution procedure.

13. “Permitted material” in the context of the relevant provisions of the Human Tissue Act defines what, for the purpose of transplantation, may be removed from a deceased person, stored, and used.

14. In the context of paragraph 8 above, without a Presiding Officer and deputies having been elected by the Northern Ireland Assembly, there is currently no mechanism by which the Northern Ireland Department of Health may make regulations under s.3(9A) of the Human Tissue Act defining “permitted material”.

Explanation for delegation

15. We believe it is appropriate for the definition of “permitted material” to be left to regulations as the list of materials suitable for human transplantation may be subject to change. For example, advances in medical science may make new materials suitable, or the use of already listed material redundant. It would not be practical to account for all future medical developments via only provision in the Bill.

16. The power to make regulations has already been delegated to the Northern Ireland Department of Health by the Northern Ireland Assembly, via provision inserted into the Human Tissue Act by the Deemed Consent Act. That power corresponds to a similar power already available to the Secretary of State in respect of England and Wales, and we are not expanding the scope of the power in any way.

17. The definition of “permitted material” for the purposes of regulations under s.3(9A) is in any event limited to the use of those materials for transplantation, and no other purposes.

Explanation for Assembly process

18. Clause 2 temporarily changes the procedure to which regulations under s. 3(9A) are subject from the draft affirmative procedure to the negative resolution procedure. We believe it is appropriate for the procedure to remain with the Northern Ireland Assembly because the existing power to make regulations is exercisable by the Northern Ireland

Department of Health, which is ultimately accountable to that Assembly. The regulations deal only with transferred matters, being matters which have been devolved to the Northern Ireland Assembly.

19. While we accept the negative resolution procedure is less onerous than the draft affirmative procedure, we nevertheless consider it is appropriate in the circumstances. The change in procedure is time-limited and will expire upon the election of a Presiding Officer and deputies by the Assembly. That is currently the only barrier to the Department of Health being able to make regulations, and the negative resolution procedure will apply no longer than necessary before reverting to the draft affirmative procedure.
20. Regulations subject to the negative resolution procedure may be annulled by a resolution of the Assembly within the statutory period, defined in s.46(2) of the Interpretation Act (Northern Ireland) 1954, as the longest of 10 sitting days or 30 days. While the Northern Ireland Department of Health would be able to make regulations before they are then subject to the democratic control of the Assembly, our view is that it is entirely within the gift of the Assembly to elect a Presiding Officer and deputies, and to subsequently vote down any regulations with which the Assembly disagreed.
21. As provisions related to organ donation deal with transferred matters, it would similarly be within the gift of the Assembly to make provision amending or revoking any regulations with which it disagrees, even after the expiry of the statutory period.

Northern Ireland Office

22 February 2023