

NORTHERN IRELAND (EXECUTIVE FORMATION AND EXERCISE OF FUNCTIONS) BILL

EXPLANATORY NOTES

What these notes do

These Explanatory Notes relate to the Northern Ireland (Executive Formation and Exercise of Functions) Bill as brought from the House of Commons on 25 October 2018 (HL Bill 137).

- These Explanatory Notes have been prepared by the Northern Ireland Office in order to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by Parliament.
- These Explanatory Notes explain what each part of the Bill will mean in practice; provide background information on the development of policy; and provide additional information on how the Bill will affect existing legislation in this area.
- These Explanatory Notes might best be read alongside the Bill. They are not, and are not intended to be, a comprehensive description of the Bill.

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These Explanatory Notes relate to the Northern Ireland (Executive Formation and Exercise of Functions) Bill as brought from the House of Commons on 25 October 2018 (HL Bill 137)

Overview of the Bill

1 The Bill would:

- Extend the period provided in the Northern Ireland Act 1998 for Northern Ireland Ministers to be appointed until 26 March 2019 with the possibility to extend that period for up to 5 months with the agreement of Parliament,
- Clarify that a senior officer of a Northern Ireland department is not prevented from exercising a function of the department during the period for forming an Executive if they are satisfied that it is in the public interest to do so,
- Require the Secretary of State to provide guidance to Northern Ireland departments about the exercise of those functions,
- Enable the Secretary of State and the Lord Chancellor to exercise appointment functions normally exercised by Northern Ireland Ministers in relation to specified offices, and enable by regulations further such functions to be exercised by UK Ministers,
- Replace the requirement for UK Ministers to consult, or obtain the approval of, Northern Ireland Ministers or the Executive Committee before exercising appointment functions with a requirement to consult the relevant Northern Ireland department, and
- Enable the Secretary of State to exercise any appointment function of a Northern Ireland Minister that is exercisable jointly with other persons who include the Secretary of State, following consultation with the relevant Northern Ireland department.

Policy background

- 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. All other Northern Ireland Ministers ceased to hold office when an extraordinary Assembly election was held on 2 March 2017. The period for the appointment of Ministers to form an Executive after that election was extended to 29 June 2017 by the Northern Ireland (Ministerial Appointments and Regional Rates) Act 2017 (“MARRA”), but no Ministers were appointed.
- 3 Since then, Parliament has intervened when necessary to ensure the continuity of public services in Northern Ireland. Examples include providing authority for expenditure for Northern Ireland departments and other bodies through the Budget Acts for 2017-18 and 2018-19, enabling the continued operation of the Renewable Heat Incentive scheme and collection of regional rates, and empowering the Secretary of State to make changes to the pay and allowances for Members of the Northern Ireland Assembly.¹

¹ In the Northern Ireland Budget Act 2017, Northern Ireland Budget (Anticipation and Adjustments) Act 2018, Northern Ireland Budget Act 2018, Northern Ireland (Regional Rates and Energy) Act 2018 and Northern Ireland Assembly Members (Pay) Act 2018 respectively.

- 4 The principal aim and function of this Bill is to facilitate a period where the Executive can be formed and talks can take place. This Bill is part of a package of measures aimed at restoring the devolved power-sharing Executive and Assembly and ensuring the continued delivery of public services in Northern Ireland. Those measures provided for in the Bill are:
 - a. Executive formation: provides a limited and prescribed period where Executive Ministers can be appointed and a Government can be formed at any time. During this period the Secretary of State has no legal duty to propose a date for an Assembly election. The Secretary of State will, however, have a discretionary power to call an election if she judges that it is in the public interest to do so.
 - b. Departmental decision-making: provisions to give greater clarity and certainty to enable Northern Ireland departments to continue to take decisions in Northern Ireland in the public interest to ensure the continued delivery of public services; and
 - c. Public appointments: enable key public appointments to be made in the absence of Northern Ireland Ministers.

Extension of Executive formation period

- 5 Section 16A of the Northern Ireland Act 1998 (“1998 Act”) provides for a 14 day period following an Assembly election in which Northern Ireland Ministers – including the First Minister and deputy First Minister – must be appointed. If they are not, then the Secretary of State is required to propose a date for another election under section 32(3). That period initially expired on 27 March 2017 but was extended by the MARRA so as to expire on 29 June 2017. The Bill extends the time under section 16A of the 1998 Act for Ministers to be appointed until 26 March 2019, with the possibility to further extend that period for up to 5 months with the agreement of Parliament.

Exercise of departmental functions during the period for Executive formation

- 6 The Court held in *Buick*² that powers exercisable by departments in the absence of Ministers are subject to limitations. In particular – and for the purposes of that appeal – that departments may not exercise functions in respect of matters that would normally be required to be referred to the Executive Committee of the Assembly because they are cross-cutting, significant or controversial. It also observed that decisions which, although conferred on departments, would normally be referred to Ministers for approval lie beyond the competence of civil servants. This ruling is significantly restricting the ability of senior officers of Northern Ireland departments to take decisions that are necessary to ensure the continued delivery of public services. The Bill will clarify that a senior officer of a Northern Ireland department is not prevented from exercising functions of the department during the period for forming an Executive (i.e. the period established under Clause 1) where it is in the public interest to do so. “Senior officer” is given the same meaning as in the Departments (Northern Ireland) Order 1999, namely: a person who is employed in that department and is (a) a member of the Northern Ireland senior civil service; or (b) a member of the Northern Ireland civil service designated by the department as a senior officer for the purposes of that Order.
- 7 The Bill requires the Secretary of State to issue guidance about the exercise of departments’ functions, and departments are to have regard to that guidance. It is intended that the guidance will provide a framework to support Accounting Officers and Senior Officers when considering whether a decision should or should not be taken to exercise a departmental function in the absence of Ministers, and will provide a set of principles and factors to be taken into account when

² *Buick* [2018] NICA 26.

making this decision. This guidance will not identify or direct specific decisions but will set out principles to be taken into account when deciding whether or not it is in the public interest to exercise a function in the absence of Ministers.

- 8 The Bill also makes provision in respect of the exercise of functions since 2 March 2017, when Ministers ceased to be in place, to provide clarity around functions that have already been exercised.

Northern Ireland Minister appointment functions

- 9 Where appointment functions are conferred on Northern Ireland Ministers, they cannot be exercised while there are no Northern Ireland Ministers in post. The Bill would address the most urgent cases, where the making of an appointment is necessary to maintain good governance and public confidence in the institutions in Northern Ireland, particularly focussing on the sensitive area of policing and justice. Those offices are:
- a. The Northern Ireland Judicial Appointments Commission (NIJAC), which was established in 2005 under the Justice (Northern Ireland) Act 2002 to select and appoint, or recommend for appointment, in respect of all listed judicial offices up to and including High Court Judge.³ Chaired by the Lord Chief Justice of Northern Ireland (LCJ), its full membership is five judicial members nominated by the LCJ, ‘legal professional’ members nominated by the Law Society of Northern Ireland and the General Council of the Bar of Northern Ireland, and five ‘lay’ members appointed by the First Minister and deputy First Minister acting jointly. The nominated members are also appointed by the First Minister and deputy First Minister so cannot be appointed without those ministers in place.
 - b. The Northern Ireland Policing Board, which was established in 2001 under the Police (Northern Ireland) Act 2000 following the report of the Independent Commission on Policing for Northern Ireland (the Patten report), provides oversight for the Police Service of Northern Ireland (PSNI) and Chief Constable, including the appointment of the Chief Constable, Deputy Chief Constable and Assistant Chief Constables. The Board should consist of ten political members (nominated by Northern Ireland parties on the basis of their representation in the Assembly) and nine independent members, appointed by the Minister of Justice. In line with legislation the political members ceased to hold office after the March 2017 Assembly election; since 30 June 2018, the Board has also been without three of its nine independent members.
 - c. Appointments of senior officers in the PSNI are made by the Northern Ireland Policing Board under the Police (Northern Ireland) Act 2000, as noted above, but require ministerial approval from the Minister of Justice. These are appointments of officers above the rank of Chief Superintendent: the Chief Constable, Deputy Chief Constable, and Assistant Chief Constables (ACCs). The absence of any capacity for the Board to make these appointments has meant that two of the five ACCs are currently on temporary promotions and one of the substantive ACCs is currently covering the role of Deputy Chief Constable following the latter’s appointment to An Garda Síochána.⁴ The Chief Constable raised his concerns about reliance on temporary appointments in evidence to the House of Commons Northern Ireland Affairs Committee.⁵

³ The ‘listed’ judicial offices are those set out in Schedule 1 of the Justice (Northern Ireland) Act 2002.

⁴ Ireland’s National Police and Security Service.

⁵ Chief Constable George Hamilton, [Evidence to the Northern Ireland Affairs Committee](#), 27 June 2018, Q41.

- d. The Probation Board for Northern Ireland, appointed under the Probation Board (Northern Ireland) Order 1982, has the following mandatory functions: secure the maintenance of an adequate and efficient probation service; make arrangements for persons to perform work under Community Service orders; provide such probation officers and other staff as the Department of Justice considers necessary to perform social welfare duties in Prisons and Young Offenders Centres; and undertake other such duties as may be prescribed. It consists of a Chair, a Deputy Chair and not less than 10 or more than 18 other members. Including the Chair and Deputy Chair there are currently 12 Board Members and one vacancy on the Board. The Chair and Board Members are appointed for a maximum of three years by the Minister of Justice. The tenure of all the current members expires on 30 November 2018.
- e. The Police Ombudsman for Northern Ireland is responsible for the independent and impartial investigation of complaints against the police, and for the investigation of a range of other matters referred by the Department of Justice, Policing Board and the Chief Constable, or in respect of matters considered by the Ombudsman to be in the public interest. The Ombudsman investigates complaints against the PSNI, the Belfast Harbour Police, the Belfast International Airport Police, National Crime Agency Officers in Northern Ireland, Ministry of Defence Police in Northern Ireland and certain complaints about Immigration Officers and Designated Customs Officials when operating in Northern Ireland. The appointment is for seven years (or up to retirement at 70 years old) and is made by Her Majesty on the recommendation of the First Minister and deputy First Minister acting jointly, under the Police (Northern Ireland) Act 1998.

Minister of the Crown appointment functions and joint appointments

- 10 The absence of Northern Ireland 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 Northern Ireland Ministers, this cannot be achieved in the absence of an Executive. Where appointments are made by UK Ministers jointly with Northern Ireland Ministers (and, in some cases, also with Scottish and Welsh Ministers), these appointments also cannot be made at present.

Legal background

- 11 The relevant legal background is set out in the policy background to these notes.

Territorial extent and application

- 12 Clause 9 sets out the territorial extent of the Bill, that is the jurisdictions in which the Bill forms part of the law. The extent of a Bill can be different from its application. Application is about where the Bill produces a practical effect. The Bill would extend to England and Wales, Scotland and Northern Ireland. In terms of application, Clauses 1 to 5 would apply to Northern Ireland only. Clauses 6 to 11 would apply to England and Wales, Scotland and Northern Ireland.
- 13 This Bill affects matters within the devolved (transferred) competence of the Northern Ireland Assembly. The Sewel Convention sets out that the UK Parliament will not normally legislate in an area of devolved competence without the agreement of the devolved legislatures. In the absence of the Executive and a sitting Assembly, it is not possible for the Assembly to provide a Legislative Consent Motion. The Government are satisfied that the circumstances of this Bill come within the exception allowed by the convention.

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- 14 See the table in Annex A for a summary of the position regarding territorial extent and application in the United Kingdom. The table also summarises the position regarding legislative consent motions.

Fast-track legislation

- 15 The Government intends to ask Parliament to expedite the Parliamentary progress of this Bill. In their report *Fast-track Legislation: Constitutional Implications and Safeguards*, the House of Lords Constitution Committee recommended that the Government should provide more information as to why a piece of legislation should be fast-tracked.⁶

Why is Fast-tracking necessary?

- 16 These provisions are required urgently to 1) provide clarity about the obligation the Secretary of State is under to propose a date for a fresh election by providing for a limited and prescribed period during which an Executive may be formed at any point without the requirement for further legislation, 2) clarify the powers of Northern Ireland Departments to exercise functions in the absence of Ministers, and 3) enable key appointments to be made, both in Northern Ireland and on a UK-wide basis, and ensure that vital public offices (such as the Chair of the Disclosure and Barring Service) are able to be filled. Together these measures form a package of interventions which the Government judge to be the minimum required to allow the parties space to seek to form an Executive and to fulfil the Government's commitment to take those decisions which are necessary to ensure the continued delivery of vital public services in Northern Ireland.
- 17 It would not have been appropriate for the UK Government to bring forward this Bill earlier as it was hoped that a restored Executive could have taken forward elements such as those related to public appointments.

What is the justification for Fast-tracking each element of the bill?

Extension of period for Executive formation

- 18 As the Secretary of State set out in her statement to Parliament on 6 September, in the absence of an Executive, she has kept her duty to set a date for a fresh election under review. She has not set a date and does not believe that holding an election during this time would be helpful or would increase the prospects of restoring the Executive. In order to ensure certainty and clarity on this issue, the Bill provides for a limited and prescribed period during which there will be no legal requirement to set a date for a further election and, importantly, during which an Executive may be formed at any point without the requirement for further legislation. She hopes that this will provide a further opportunity to re-establish political dialogue, with the aim of restoring the Executive as soon as possible. Fast-tracking this Bill would help to create that environment in which political dialogue can be re-established.

Exercise of departmental functions during the period for Executive formation

- 19 Following the judgment in the recent *Buick* case (where the Court of Appeal ruled that civil servants did not have the legal power to approve a major waste disposal and energy generation facility and more generally cannot exercise functions in respect of cross-cutting, significant or controversial matters that would normally have to be referred to the Executive Committee for

⁶ [House of Lords' Constitution Committee, 15th report of session 2008/09, HL paper 116-I](#), para. 186.

discussion and agreement) the Government need to give the NI Civil Service greater clarity for the continued delivery of public services. There are a wide range of issues that require decision-making by the NI Civil Service (including the exercise of some appointment functions). This Bill is being fast-tracked to provide that certainty – and guidance in respect of the parameters for that decision-making – as soon as reasonably possible.

Public appointments

- 20 Both the Northern Ireland Policing Board and the Northern Ireland Judicial Appointments Commission (NIJAC) are already operating at a diminished level, significantly increasing the workload of the remaining NIJAC members. The Policing Board needs to be fully operational to fulfil its general oversight functions as soon as possible, and particularly, given that the term of office of the Chief Constable expires in July 2019, in good time to ensure there is no vacancy in this important position given there is a lead-in period of six months from the Board's decision on the method of appointment. As well as enabling the Board to be reconstituted, the Bill would enable it to appoint senior police officers; as noted above, there is a pressing need for appointments and an increasing reliance on temporary promotions that the Chief Constable has raised as an issue with the Northern Ireland Affairs Committee.
- 21 The Probation Board for Northern Ireland's current members' appointments cease at the end of November 2018 and no appointments can be made without having this legislation in place, potentially putting at risk the Board's ability to continue to deliver its existing statutory functions and its capacity to provide strategic oversight for the probation service. The appointment of a new Chair for the Disclosure and Barring Service is also needed before the current Chair's appointment expires at the end of November 2018; fast-tracking this Bill would allow that appointment to be made.

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

- 22 The Secretary of State for Northern Ireland's Oral Statement of 6 September 2018 informed Parliament of the need for this legislation being brought forward, as did the 18 July Written Ministerial Statement on public appointments. The Government have engaged various MPs and Peers to offer detailed briefings on the planned legislation, and these have been discussed in detail with the Northern Ireland parties.

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

- 23 As mentioned above, the policy intent has been announced in Parliament. Substantial engagement been undertaken alongside and after those announcements. Ministers and officials have engaged with the Northern Ireland political parties on the various components of this Bill and the associated guidance and received oral representations. The Bill provides that prior to issuing guidance the Secretary of State must have regard to representations made by those parties. All five main political parties have received several briefings, and have met the Secretary of State on a number of occasions to discuss the proposals.
- 24 Briefings have also been offered to key Parliamentarians ahead of introduction.
- 25 The Northern Ireland Office has also consulted with the Northern Ireland Civil Service prior to drafting this Bill and the associated draft guidance.

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

26 The extension of the period for forming an Executive and the provisions concerning decision-making during that period sunset on 26 March 2019 (or when Ministerial offices are filled or the Assembly dissolved, if earlier). Given the timings attached to particular appointments to be made by UK Ministers in the absence of their Northern Ireland counterparts, the provisions concerning public appointments sunsets when Northern Ireland Ministers are in post (which could potentially, therefore, be for a longer period).

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

27 The Government does not consider post-legislative scrutiny to be appropriate. The provisions of this Bill are time-bound (all sunsetted as described above) and a series of measures to manage the current period without Northern Ireland Ministers. Given that sunset provisions are included, without the capacity for the Bill's provisions to apply again in future, post-legislative scrutiny is not appropriate.

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

28 Existing legislation does not suffice to deal with the issues in question. The period for formation of an Executive has passed and requires legislation to amend it. The provisions of this Bill relating to decision-making seek to provide clarity following a recent Court ruling. The appointment functions dealt with in Clauses 5, 6 and 7 cannot be exercised as existing primary legislation requires them to be exercised by – or following actions of – Northern Ireland Ministers.

Has the relevant parliamentary committee been given the opportunity to scrutinise the legislation?

29 Given time pressure on the Bill, there has been no opportunity for the Bill to be scrutinised by the House of Commons Northern Ireland Affairs Committee, but the Committee received a briefing from officials on its content on Wednesday 10 October 2018. Other Committees' staff have also been briefed including the House of Commons Northern Ireland Affairs Committee, the House of Lords Constitution Committee and the House of Lords Delegated Powers and Regulatory Reform Committee. The latter Committee published a report on the Bill on 22 October,⁷ as a result of which the Secretary of State tabled amendments to the regulation-making power in Clauses 5 and 8; and the Bill was amended accordingly.

⁷ [House of Lords Delegated Powers and Regulatory Reform Committee 36th Report of Session 2017-19.](#)

Commentary on provisions of Bill

Clause 1: Extension of period for Executive formation

30 This clause extends the statutory time limit for the appointment of Northern Ireland Ministers for a limited and prescribed period, during which time an Executive may be formed at any point without the requirement for further legislation. This will have the effect of setting aside the current legal requirement to propose a date for a further election. Clause 1(1) amends section 16A(3) of the Northern Ireland Act 1998 which says:

“(3) Within a period of 14 days beginning with the first meeting of the Assembly –

(a) the offices of First Minister and deputy First Minister shall be filled by applying subsections (4) to (7); and

(b) the Ministerial offices to be held by Northern Ireland Ministers shall be filled by applying section 18(2) to (6).”

Clause 1 has the effect of substituting 26 March 2019 date for the “period of 14 days”.

31 Clause 1(2) provides that change is treated as having been the case since 2 March 2017, being the date of the last election to the Assembly. Clause 1(4) removes the previous legal provision in the MARRA to extend the period to 29 June 2017.

32 Clause 1(3) allows the Secretary of State to propose a date for an election earlier than the date at which these provisions expire.

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

33 This clause enables the Secretary of State to make regulations to extend the time for Executive formation by one further period of up to five months. Clause 2(2) provides that this power may only be exercised on or before 26 March 2019 and may only be used on one occasion.

34 The Secretary of State would be required either to lay the statutory instrument containing regulations before Parliament for approval, or to make the regulations before they are approved by Parliament if she considers it to be expedient for the regulations to be made without that approval. If the regulations are made without the prior approval of Parliament, then they must be approved within the period of 28 days beginning with the date on which they are made. If they are not, they cease to have effect. However, that is subject to one exception where the replacement date is earlier than the expiry of the period of 28 days. In that case, whilst the regulations must be laid, they are not subject to any Parliamentary procedure. (Clause 2(5)).

35 Subsections (6) and (7) clarify when the period for Executive formation would end in the event that Parliament does not approve regulations extending this period within 28 days. Clause 2(8) provides that if Parliament is dissolved, prorogued or adjourned for more than four days then those days are not included in the calculation of the 28 days.

Clause 3: Exercise of departmental functions during period for Executive formation

36 Clause 3 makes provision for the exercise of Northern Ireland departmental powers during the period for forming an Executive. In particular, 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 do so during the period for forming an Executive (Clause 3(1)).

37 The Secretary of State is required to publish guidance about the exercise of departmental 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

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guidance (subsections (2) and (3)). Before publishing this guidance, including any subsequent revisions, the Secretary of State is required to have regard to any representations made to her by Members of the Northern Ireland Assembly (subsection (9)).

- 38 Subsections (4),(5), (7) and (8) clarify that the absence of Ministers or the Executive Committee of the Assembly is not to be treated as having prevented departments from exercising their functions in the period since 2 March 2017. Subsection (6) preserves the rights of existing litigants to proceed with their pending claims. Such claims will not be affected by the retrospective provision. But departments will not be prevented from retaking such decisions.

Clause 4: Equal Rights for people of Northern Ireland

- 39 This clause requires the Secretary of State to issue guidance to Northern Ireland departments on how to exercise their functions in relation to “the incompatibility of the human rights of the people of Northern Ireland” with sections 58 and 59 of the Offences against the Person Act 1861 and article 13(e) of the Matrimonial Causes (Northern Ireland) Order 1978. The Secretary of State shall report guidance under this section on a quarterly basis to the House of Commons and set out her plans to address the impact of the absence of Northern Ireland Ministers on human rights obligations within three months of the day on which the Bill is passed.

Clause 5: Northern Ireland Ministerial appointment functions: specified offices

- 40 This clause provides a limited power for the relevant UK Minister to exercise appointment functions, in relation to the offices specified in the clause, during the current period without an Executive. Appointment functions in relation to those specified offices are currently conferred on Northern Ireland Ministers. It would transfer *only* those powers that are currently conferred on Northern Ireland Ministers and would make no further changes to the appointment functions affected. The appointments would be made in accordance with the existing legislation, for a period and subject to the terms and conditions decided by the Ministers (or the full statutory term in the case of the Police Ombudsman). Clause 5(8) requires the UK Minister to consult a Northern Ireland department prior to exercising these powers; this reflects the continued responsibility of the sponsor department for all matters to do with the bodies in question other than the appointment functions covered by this Bill.
- 41 The table in Clause 5(2) sets out the offices over which appointment functions (as defined in Clause 8(1)) normally exercised by Northern Ireland Ministers would be exercised by the “relevant Minister of the Crown”, following consultation with the relevant Northern Ireland department. Unless stated otherwise below, the following appointment functions would be exercised by the Secretary of State:
- a. Members of the Northern Ireland Judicial Appointments Commission (NIJAC) would be appointed by the Lord Chancellor. As set out above, most members are nominated by the Lord Chief Justice or professional bodies, and the Bill would allow the Lord Chancellor to make the formal appointment of those members in place of the First Minister and deputy First Minister. The Lord Chancellor would also be able to appoint or reappoint lay members as necessary and to exercise other appointment functions conferred on the First Minister and deputy First Minister. The Lord Chancellor was responsible for appointment functions relating to NIJAC prior to the devolution of policing and justice in 2010.
 - b. Members of the Northern Ireland Policing Board. Similarly to NIJAC, many of these appointments would be nominees, in this case ten nominees of the political parties; to make these nominated appointments, the Secretary of State’s role would be to invite nominations from the parties and receive the required correspondence from new members. The Secretary of State would also be able to appoint independent members; when doing so, there is a requirement to ensure that the Board as a whole is

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representative of the community and to consult the relevant Northern Ireland department,⁸ district councils and others before making the appointment. The Secretary of State would also be able to exercise the other appointment functions of the Justice Minister.

- c. Members of the PSNI above the rank of Chief Superintendent – including the Chief Constable and Deputy Chief Constable – are appointed by the Northern Ireland Policing Board, under section 35 of the Police (Northern Ireland) Act 2000, and would continue to be under this Bill. However, as the appointments require the approval of the Minister of Justice, the Bill would allow the Secretary of State to exercise this appointment function and others already conferred on the Minister. This will enable the Policing Board to make these appointments as it sees fit, including those where, like the post of Deputy Chief Constable, offices are currently filled by temporary appointees.
- d. Members, Chair and Deputy Chair of the Probation Board for Northern Ireland. The Secretary of State would take on the Northern Ireland Minister's appointment functions, including the appointment of members, Chair and Deputy-Chair. Members may self-nominate for the post of Deputy Chair: the successful applicant is formally appointed by the Minister.
- e. The Police Ombudsman for Northern Ireland. This is a non-renewable seven-year (or until retirement) appointment made by Her Majesty on the recommendation of the First Minister and deputy First Minister acting jointly; under this clause, the Secretary of State would take on the First Minister and deputy First Ministers' appointment functions including making the recommendation.

- 42 In combination with the definition in Clause 8, the power to exercise appointment functions in relation to these offices would cease when there is next a Northern Ireland Executive. This means that these powers would return to Northern Ireland Ministers as soon as they are in post, and any pending appointments or other appointment functions would again fall to them to exercise.
- 43 The Secretary of State would be empowered by Clause 5(3) to amend the list of offices in Clause 5(2) through a statutory instrument, transferring to the relevant UK Minister appointment functions in relation to other bodies and offices in respect of which legislation currently confers those functions on Northern Ireland Ministers. This is included to ensure that vacancies that need to be filled as a matter of urgency can be filled without the need for further primary legislation. Similarly, it would allow other appointment functions to be exercised if needed urgently – for example the removal from an office not covered in Clause 5 of someone who is no longer eligible to hold that office (for example following bankruptcy) but who can only be removed by a Minister.
- 44 Under Clause 5(4), an instrument under Clause 5(3) is subject to the affirmative resolution procedure. The regulations must be laid before Parliament for approval, unless the Secretary of State considers it to be expedient for the regulations to be made without that approval. If the regulations are made without the prior approval of Parliament, then they must be approved within the period of 28 days beginning with the date on which they are made. If they are not, they cease to have effect and any additions made to the table in Clause 5(2) under the regulations are omitted. This would not affect the result of any appointment functions already exercised under

⁸ Under the Police (Northern Ireland) Act 2000, the Justice Minister is required to consult the First Minister and deputy First Minister; under clause 6 of this Bill, the requirement would be to consult the relevant Northern Ireland department. The Minister is also required to consult district councils in Northern Ireland, and such other bodies as the Minister considers appropriate.

the provisions in the regulations. As with the Bill itself and the offices set out in Clause 5, the Government is clear that any further additions to the list by regulations would only be made where they were urgent and necessary for continued good governance and following discussions with the main Northern Ireland political parties.

Clause 6: Minister of the Crown appointment functions

- 45 This clause addresses those appointments functions already conferred on UK Ministers that cannot be exercised in the absence of Northern Ireland Ministers. Where legislation requires that UK Ministers consult or obtain the agreement of Northern Ireland Ministers or the Executive Committee before exercising an appointment function, this clause replaces that with a requirement that the Northern Ireland department is consulted.
- 46 This clause does not allow UK Ministers to make additional appointments other than in the circumstances provided for by this Bill: the ability to exercise appointment functions where the functions are conferred solely on Northern Ireland Ministers is within Clause 5; joint appointments are covered by Clause 7.

Clause 7: Joint UK appointment functions etc.

- 47 This clause addresses appointment functions exercised jointly by UK Ministers and Northern Ireland Ministers, including those made alongside Scottish and Welsh Ministers. In these cases, it would enable those functions to be exercised in the absence of the Northern Ireland Minister. Instead of acting jointly with the Northern Ireland Minister, the Secretary of State would be required, before exercising the appointment functions, to consult the relevant Northern Ireland department. The functions of the Scottish and Welsh Ministers are not affected, meaning that an appointment that would otherwise be made jointly by Ministers from the UK Government and the three devolved administrations would instead be made by UK, Scottish and Welsh Ministers, following consultation (by the Secretary of State) with the relevant Northern Ireland department. This does not affect appointments made by Northern Ireland Ministers alone to joint bodies; these would be within the scope of Clause 5.

Clause 8: Interpretation of sections 5 to 7

- 48 The key terms used in Clauses 5 to 7 of the Bill are defined in Clause 8(1). Of note are the following definitions:
- a. “appointment function” covers the range of functions affected by the Bill including making appointments, recommending a person for appointment, requesting nominations and approving the resulting nominations (as in the cases of NIJAC and the Policing Board), determining terms of office and remuneration (where that is not the responsibility of the department), and functions around resignations and removals. Clause 8(3) allows the Secretary of State to amend this definition using a statutory instrument subject to the affirmative procedure (see Clause 8(4)).
 - b. “Northern Ireland Minister” includes both references to the generic post, specific posts (such as the Justice Minister) or First Minister and deputy First Minister; the term includes references to “head of department” (used in legislation before 1998⁹).
 - c. “the period while there is no Executive” is the period during which the provisions set out at Clauses 5 to 7 of the Bill apply and it is the period beginning when the Bill is passed and ending when a new Northern Ireland Executive is formed, with all Northern Ireland Minister posts filled.

⁹ Under paragraph 11 of Schedule 12 to the Northern Ireland Act 1998, references to head of a Northern Ireland department “shall be construed as a reference to a Northern Ireland Minister”.

Commencement

49 The Bill would come into force on Royal Assent.

Financial implications of the Bill

50 The Bill does not have financial implications.

Parliamentary approval for financial costs or for charges imposed

51 The Bill does not have financial implications.

Compatibility with the European Convention on Human Rights

52 Section 19 of the Human Rights Act 1998 requires a Minister in charge of a Bill in either House of Parliament to make a statement about the compatibility of the Bill with Convention rights (as defined by section 1 of that Act).

53 The Bill Minister, Lord Duncan of Springbank, has made the following statement:

"In my view, the provisions of the Northern Ireland (Executive Formation and Exercise of Functions) Bill are compatible with Convention rights."

54 To the extent that subsections (4) and (5) of Clause 3 engage Article 6, the right of existing claimants to proceed with ongoing claims is preserved by subsection (6).

Related documents

55 The following documents are relevant to the Bill and can be read at the stated locations:

- Written Ministerial Statement, 18 July 2018:
<https://www.parliament.uk/business/publications/written-questions-answers-statements/written-statement/Commons/2018-07-18/HCWS868/>
- Oral Statement by the Secretary of State, 6 September 2018:
<https://hansard.parliament.uk/Commons/2018-09-06/debates/A285188A-3A88-4413-A0EF-6665B735627F/NorthernIrelandGovernment#contribution-26BB05AD-B899-477B-A5DC-43D4E5D8B3C4/>
- Draft Guidance on decision-making for Northern Ireland Departments during the temporary period for Northern Ireland Executive formation:
http://data.parliament.uk/DepositedPapers/Files/DEP2018-1050/Guidance_to_NI_Departments_on_temp_period_for_Executive_formation.pdf

These Explanatory Notes relate to the Northern Ireland (Executive Formation and Exercise of Functions) Bill as brought from the House of Commons on 25 October 2018 (HL Bill 137)

Annex A- Territorial extent and application in the United Kingdom

Provision	Extends to E & W and applies to England?	Extends to E & W and applies to Wales?	Extends and applies to Scotland?	Extends and applies to Northern Ireland?	Legislative Consent Motion needed?
Clause 1	No	No	No	Yes	No
Clause 2	No	No	No	Yes	No
Clause 3	No	No	No	Yes	No
Clause 4	No	No	No	Yes	No
Clause 5	No	No	No	Yes	No
Clause 6	Yes	Yes	Yes	Yes	No
Clause 7	Yes	Yes	Yes	Yes	No
Clause 8	Yes	Yes	Yes	Yes	No
Clause 9	Yes	Yes	Yes	Yes	No
Clause 10	Yes	Yes	Yes	Yes	No
Clause 11	Yes	Yes	Yes	Yes	No

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NORTHERN IRELAND (EXECUTIVE FORMATION AND EXERCISE OF FUNCTIONS) BILL

EXPLANATORY NOTES

These Explanatory Notes relate to the Northern Ireland (Executive Formation and Exercise of Functions) Bill as brought from the House of Commons on 25 October 2018 (HL Bill 137).

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