

HOUSE OF LORDS

Select Committee on the Constitution

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# **Northern Ireland (Executive Formation and Exercise of Functions) Bill**

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# Northern Ireland (Executive Formation and Exercise of Functions) Bill

## Introduction

1. The Northern Ireland (Executive Formation and Exercise of Functions) Bill was introduced in the House of Commons on 18 October. The Bill completed all its stages in the Commons on Wednesday 24 October and is expected to complete all stages in the Lords on Tuesday 30 October.
2. The context for the Bill is the continued absence of a power-sharing Executive in Northern Ireland and one of its purposes is to facilitate the formation of an Executive. In effect, the Bill suspends the statutory duty on the Secretary of State to call a Northern Ireland Assembly election and extends for a second time the period in which ministerial appointments can be made following the election of the Northern Ireland Assembly on 2 March 2017: the appointment of a First Minister and deputy First Minister being the essential first steps in the formation of the Executive. In April 2017 the statutory time limit for creating an Executive was extended to 108 days.<sup>1</sup>
3. The Bill also provides for the exercise of governmental functions in relation to Northern Ireland in the absence of Northern Ireland Ministers. It gives civil servants within Northern Ireland departments general powers for the administration of Northern Ireland, introducing a public interest test for the exercise of these powers, subject to guidance from the Secretary of State.<sup>2</sup> Following an amendment to the Bill in the House of Commons, that guidance must specify how Northern Ireland departments exercise their functions in relation to incompatibilities between legislation applied in Northern Ireland and human rights obligations.<sup>3</sup>

## Administrative functions, Northern Ireland departments and the public interest

4. The Bill provides a ‘senior officer’ of a Northern Ireland department<sup>4</sup> with general discretionary powers, to be exercised in the public interest: “The absence of Northern Ireland Ministers does not prevent a senior officer of a Northern Ireland department from exercising a function of the department during the period for forming an Executive if the officer is satisfied that it is in the public interest to exercise the function during that period.”<sup>5</sup> Clause 3 further provides that the Secretary of State must publish guidance about

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1 [Northern Ireland \(Ministerial Appointments and Regional Rates\) Act 2017](#)

2 ‘Guidance on decision-making for Northern Ireland Departments during the temporary period for Northern Ireland Executive formation’, Draft published alongside the Bill, 18 October 2018: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/749653/Secretary\\_of\\_State\\_guidance\\_to\\_NI\\_Departments\\_on\\_decision\\_making\\_during\\_the\\_temporary\\_period\\_for\\_Executive\\_formation\\_-\\_Draft\\_to\\_be\\_published\\_18\\_October.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/749653/Secretary_of_State_guidance_to_NI_Departments_on_decision_making_during_the_temporary_period_for_Executive_formation_-_Draft_to_be_published_18_October.pdf) [accessed 26 October 2018]

3 [Northern Ireland \(Executive Formation and Exercise of Functions\) Bill](#), clause 4 [HL Bill 137 (2017–19)]

4 Defined by The Departments (Northern Ireland) Order 1999 ([NISI 1999/283](#)), Article 2(3), per the Bill, clause 3(10)

5 [Northern Ireland \(Executive Formation and Exercise of Functions\) Bill](#), clause 3

the exercise of these functions and that senior officers of Northern Ireland departments must have regard to that guidance.

5. The Government has published draft Guidance, which includes an explanation for the powers: “while efforts to restore the Executive continue, Northern Ireland departments will need to take decisions and exercise functions in order to uphold good governance and protect the public interest.”<sup>6</sup> The draft Guidance sets out the principles to which Northern Ireland departments must have regard when taking decisions on matters which, ordinarily, would have been presented to Ministers to decide or agree. These principles will operate alongside the Northern Ireland Civil Service Code of Ethics.<sup>7</sup>
6. The draft Guidance seeks to draw a distinction between policy and administration, declaring that “major policy decisions, such as the initiation of a new policy, programme or scheme, including new major public expenditure commitments, or a major change of an existing policy, programme or scheme, should normally be left for Ministers to decide or agree.”<sup>8</sup> It is with this qualification in mind that departments should then consider “whether there is a public interest in taking a decision rather than deferring a decision during the period for Executive formation.”<sup>9</sup>
7. The draft Guidance also sets out the principles that should be taken into account in deciding whether there is a public interest in taking a decision in the absence of Ministers. It is apparent from these principles that there is no possibility of a clear distinction between purely administrative decisions on the one hand and policy decisions on the other. For example, the principle that “the priorities and commitments of the former Executive and Minister(s) should be followed unless there is an exceptional circumstance ... which lead senior officials to conclude that it is no longer in the public interest to do so”<sup>10</sup> is an attempt to circumscribe this power within the realm of administration, however other principles appear to empower officials to further a range of broad policy objectives.<sup>11</sup>
8. The draft Guidance in other ways seeks to balance the need for administrative discretion with attempts to control the exercise of this discretion. Officials are guided towards holding discussions across departments where more than one is affected by a decision. They are also guided to keep deferred decisions under review, and to do preparatory work until the time when Ministers can take decisions.<sup>12</sup> The draft Guidance also makes reference to any other statutory requirements which may impact upon decisions in the public interest, and reminds officials of public engagement, reporting and record keeping duties. It also restates the chain of accountability within departments, confirming the ultimate responsibility of Permanent Secretaries and the

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6 ‘Guidance on decision-making for Northern Ireland Departments during the temporary period for Northern Ireland Executive formation’, Draft published alongside the Bill, 18 October 2018, para 4

7 Civil Service Commissioners for Northern Ireland, ‘NCIS Code of Ethics’: <http://www.nicscommissioners.org/code-of-ethics.htm> [accessed 26 October 2018]

8 ‘Guidance on decision-making for Northern Ireland Departments during the temporary period for Northern Ireland Executive formation’, Draft published alongside the Bill, 18 October 2018, para 7

9 *Ibid.*, para 8.

10 *Ibid.*, para 9(b). See also a similar guideline in para 9(a).

11 See for example the 12 broadly framed outcomes, published in the 2018–19 Outcomes Delivery Plan, cited in the draft Guidance, para 9(c).

12 ‘Guidance on decision-making for Northern Ireland Departments during the temporary period for Northern Ireland Executive formation’, Draft published alongside the Bill, 18 October 2018, para 10

functions of the Comptroller and Auditor General for Northern Ireland and the Northern Ireland Audit Office.

9. These are all important qualifications and safeguards, but it is nevertheless clear that clause 3 together with the draft Guidance vests unelected officials with potentially very wide policy-related discretion. There is also a serious concern in relation to accountability. Northern Ireland officials have no direct line of accountability to UK ministers which means that there will consequently be no line of accountability for decisions made by Northern Ireland officials to either the suspended Stormont Assembly or to Parliament (albeit that the Guidance makes provision for an audit trail of decisions taken, which can be made available to incoming Ministers when an Executive is appointed).
10. It is also unclear whether in exercising these powers the decisions taken by civil servants will be open to judicial review in the same way as those by devolved Ministers and what status the courts will accord to the Guidance given to officials. It would be dangerous and highly constitutionally questionable to treat civil servants as Ministers, even for a limited time and for limited purposes, but if they are not to be so treated, it is not clear how the courts are to interpret their role. The Guidance could be seen as directing civil servants, but it is also possible that the powers exercised by civil servants could be interpreted more broadly, with the guidance document being treated as little more than advisory. If the latter is the case, the discretion of officials will be all the greater, and an undesirable constitutional precedent set.

### Retrospective effect of clause 3

11. Clause 3 will have retrospective effect, largely in an effort to prevent legal challenges from interfering with administrative action. Clause 3(4) provides: “The absence of Northern Ireland Ministers is not to be treated as having prevented any senior officer of a Northern Ireland from exercising functions of the during the period beginning with 2 March 2017 [the date of the most recent Northern Ireland Assembly election] and ending when this Act is passed.” This is reinforced by a further provision, to the effect that the exercise of functions under the clause is not to be treated as prevented by a lack of discussion or agreement by the Executive Committee of the Northern Ireland Assembly.<sup>13</sup>
12. This measure, and indeed clause 3 more broadly, is in part a response to the *Buick*<sup>14</sup> case. Here the Court of Appeal in Northern Ireland found that while Northern Ireland departments as well as Ministers can exercise statutory functions, the powers of the former are more limited in nature and do not extend to matters that would normally be referred to the Executive Committee of the Northern Ireland Assembly for discussion and agreement (were Ministers in post). It seems to flow from this that departmental civil servants are also not empowered to approve matters which would ordinarily be referred to Ministers for approval.
13. One qualification is that the retrospective effect of clause 3 does not apply to “proceedings begun, but not finally decided, before this Act is passed”<sup>15</sup> which involve a challenge to the validity of the exercise of a particular

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13 [Northern Ireland \(Executive Formation and Exercise of Functions\) Bill](#), clause 3(5)

14 *Application by Colin Buick for judicial review* [2018] NICA 26

15 [Northern Ireland \(Executive Formation and Exercise of Functions\) Bill](#), clause 3(6)(a)

function, where the applications of clause 3(4) and 3(5) would affect the outcome of the proceedings.

14. It is irregular to give such a measure retrospective effect, however we accept that in the interests of good administration it would not be helpful if Northern Ireland departments faced repeated judicial review actions in respect of decisions taken by civil servants since March 2017 which would have been lawful if taken by Ministers.<sup>16</sup>

### Appointment functions

15. The Bill seeks to address the problem whereby appointment functions conferred on Northern Ireland Ministers cannot be exercised while the Executive is suspended. Clause 5 provides Ministers of the Crown with temporary appointment functions. During the period while there is no Executive, “an appointment function of a Northern Ireland Minister in relation to a specified office may be exercised by the relevant Minister of the Crown”.<sup>17</sup> Clause 5(2) contains a table which sets out which UK minister may perform which appointment functions. For example, the Lord Chancellor may appoint Members of the Northern Ireland Judicial Appointments Commission; the Secretary of State may appoint the Police Ombudsman for Northern Ireland etc. The appointment power is cast widely, to include for example the function of determining terms of appointment office and of suspending or removing persons from office.<sup>18</sup>
16. The provision contains a Henry VIII clause. The Secretary of State may by regulations add entries to the table.<sup>19</sup> Although before exercising such an appointment function the relevant Minister of the Crown must consult a relevant Northern Ireland department, the measure nonetheless permits the Secretary of State to insert—by way of secondary powers—additional offices over which ministers will have appointment powers. The Secretary of State is given a further Henry VIII power in that she may by regulations, subject to affirmative procedure, amend the definition of “appointment function”.<sup>20</sup>
17. The Delegated Powers and Regulatory Reform Committee (DPRRC) were “not convinced” by the Government’s justification for the use of the negative procedure for the power to add new offices to the list in clause 5(2) and concluded that it should be subject to the affirmative resolution procedure.<sup>21</sup> The DPRRC observed that there were “no limits on the circumstances in which an office may be included in the list” and “the exercise of appointment functions in relation to some Northern Ireland offices is likely to be politically sensitive; and this also suggests a high level of scrutiny is appropriate.”<sup>22</sup>
18. The public appointments included in the Bill are important ones for the operation of the justice system in Northern Ireland and the Bill would allow other significant positions to be added to the list. The Government has accepted the Delegated Powers and Regulatory Reform Committee’s

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16 Ordinarily of course civil servants are protected by the ‘Carltona principle’, whereby the acts of officials are deemed in law to be synonymous with the actions of the responsible minister. *Carltona Ltd v Commissioners of Works* [1943] 2 All ER 560 (CA)

17 [Northern Ireland \(Executive Formation and Exercise of Functions\) Bill](#), clause 5(1)

18 *Ibid.*, clause 8(1)

19 *Ibid.*, clause 5(3)

20 *Ibid.*, clause 8(3)–(4)

21 Delegated Powers and Regulatory Reform Committee, *Thirty-Sixth Report* (Session 2017–19, HL Paper 204), paras 7–8

22 *Ibid.*

recommendation and amended the Bill in the House of Commons such that the affirmative procedure applies to this power.

19. Clause 6 concerns duties of consultation and approval in relation to appointment functions which cannot apply while there is no Executive and the Assembly is suspended. It provides that any duty imposed on a Minister of the Crown to consult, or obtain the approval of, a Northern Ireland Minister or the Executive Committee of the Northern Ireland Assembly before exercising an appointment function has effect, during the period while there is no Executive, as a duty to consult a relevant Northern Ireland department.
20. This offers further powers to Northern Ireland civil servants, who will now be able to approve or disapprove of decisions to be taken by a Minister of the Crown, subject to the Guidance. This provision is problematic, as either it could lead to civil servants exercising a policy-influencing role, or it could result in acquiescence by civil servants in relation to UK ministerial decisions with which they do not consider it constitutionally appropriate for themselves to be involved.

### Constitutional issues

21. The Bill raises a number of important constitutional questions. The breadth of the powers afforded to ministers and civil servants, the lack of clear lines of accountability, and retrospective effect of the clause 3 provision are irregular and concerning. It is regrettable the current political circumstances in Northern Ireland mean that functions, which ought to be exercised by the devolved Executive and Assembly are being transferred, albeit temporarily, to Northern Ireland civil servants. The political vacuum has resulted in officials having powers beyond the constitutional norm, without any kind of meaningful, democratic accountability or oversight. That a bill with such characteristics is being fast-tracked through its legislative stages in Parliament is undesirable.<sup>23</sup>
22. However, all of these concerns must be set in the current political context of Northern Ireland. The suspension of the devolved institutions is having a significant impact upon the provision of services and, without a Northern Ireland Executive in place, we accept that the Government is compelled in the absence of any attractive alternatives to legislate to address them. While the provisions in the Bill will result in a significant democratic deficit in the province, this is a consequence of the present political situation.
23. **We question whether the speed at which the Government wishes to pass this Bill is necessary. Power-sharing has been suspended in Northern Ireland for well over 18 months and there have been few recent signs that a resolution to the impasse is likely. Moreover, the judgment in the *Buick* case was delivered in early July. We understand the Government's desire to allow the negotiations to continue for as long as possible to avoid this legislation, however more time (even with a fast-track timetable) could have been made available for parliamentary scrutiny of this Bill.**

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23 In line with our previous recommendation on fast-track bills, the Government has set out its justification for expediting its progress in the explanatory notes. [Explanatory Notes to the Northern Ireland \(Executive Formation and Exercise of Functions\) Bill](#) [HL Bill 137(Session 2017–19)-EN], paras 15–29. See also, House of Lords Constitution Committee, [Fast-track Legislation: Constitutional Implications and Safeguards](#) (15th Report, Session 2008–09, HL Paper 116), para 186

24. **The situation in Northern Ireland is an unusual one and we recognise that the Government has sought to frame a proportionate response in acutely difficult circumstances. We accept, reluctantly, that an exceptional response is justified to protect the people of Northern Ireland from a potentially significant damaging impact on the provision of services. We emphasise that in any other circumstances provisions such as these which challenge established constitutional principles would not be acceptable and that no part of this Bill—nor the fast-track procedure by which it is being taken through both Houses—should be taken as a precedent for future legislation.**