

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

IDENTITY AND LANGUAGE (NORTHERN IRELAND) BILL

Introduction

1. This memorandum has been prepared for the Delegated Powers and Regulatory Reform Committee to assist with its scrutiny of the Identity and Language (Northern Ireland) Bill (**the Bill**). The Bill will be introduced in the House of Lords on 25 May 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.

Purpose and effect of the Bill

2. The Bill gives effect to commitments by the main Northern Ireland parties in respect of rights, language and identity in the New Decade, New Approach deal (**NDNA**). The NDNA deal was the basis on which all the main parties in Northern Ireland agreed to re-enter power sharing arrangements and restore the institutions in January 2020.
3. Draft legislation giving effect to these commitments was also agreed between the parties and published alongside NDNA. These are transferred matters within the Assembly's competence. Exceptionally, however, the UK Government has undertaken to introduce legislation in Westminster making provision for them. They are included, so far as legislatively possible, in the form in which they were published as draft Assembly legislation in January 2020.
4. In addition to the provisions described above and in relation to them, the Bill also confers certain powers on the Secretary of State to act concurrently and/or direct that action is taken.
5. Part 1 of the Bill:
 - i. establishes a new **Office of Identity and Cultural Expression (the Office)**; requires specified public authorities in Northern Ireland to have due regard to certain principles concerning national and cultural identity when exercising their functions and, confers certain functions on the Office to promote awareness of the principles and monitor compliance with them;
 - ii. provides for the official recognition of the Irish language; establishes an **Irish Language Commissioner**; requires specified public authorities in Northern Ireland to have due regard to "best practice standards" developed by the Commissioner subject to the approval of the First and deputy First Minister acting jointly; and provides for the enforcement of that duty;
 - iii. establishes a **Commissioner for the enhancement and development of the language, arts and literature associated with the Ulster Scots and Ulster British tradition** whose main aim is to enhance and develop the language, arts and literature associated with Ulster Scots and Ulster British traditions in Northern Ireland; confers functions on that Commissioner to promote awareness of Ulster Scots services provided by specified public authorities and to provide advice and guidance to such authorities; and requires the Department of Education in Northern Ireland to encourage and facilitate the use and understanding of Ulster Scots in the education system.

6. Part 2 of the Bill confers powers on the Secretary of State to exercise concurrently any of the functions of Northern Ireland Ministers or departments in implementing the provisions of the Bill. It also confers a power of direction on the Secretary of State, enabling them to direct Ministers, departments or one of the newly created bodies to take action (or not to take action) so as to implement the provisions of the Bill.

Delegated Powers

7. The Bill contains four delegated powers that have legislative effect. Three are in the same form. They enable the First Minister and the deputy First Minister acting jointly to provide in regulations which public authorities are subject to the requirements mentioned above. The fourth is the commencement power, conferred on the Secretary of State.
8. Both Parts 1 and 2 also contain direction powers conferred on the First Minister and the deputy First Minister and the Secretary of State respectively, but these are not considered to be legislative in character. They are covered in this memorandum however for the sake of completeness.

Clause 1: inserts s. 78F(3) – (5) in the Northern Ireland Act 1998: (meaning of “public authority”)

Clause 2: inserts s. 78P in the Northern Ireland Act 1998: (meaning of “public authority”)

Clause 3: inserts s. 78T in the Northern Ireland Act 1998: (meaning of “public authority”)

Power conferred on: First Minister and deputy First Minister acting jointly

Power exercised by: Regulations

Parliamentary Procedure: draft affirmative procedure in the Northern Ireland Assembly

Context and Purpose

9. The Bill inserts three new Parts in the Northern Ireland Act 1998 (NIA).¹ Part 7A establishes the Office, Part 7B establishes the Irish Language Commissioner and makes provision in respect of Irish language and Part 7C establishes the Commissioner for the enhancement and development of the language, arts and literature associated with the Ulster Scots and Ulster British tradition and makes provision in respect of the Ulster Scots and Ulster British tradition. Parts 7A and 7B confer new functions on public authorities and Part 7C requires the Commissioner under that Part to provide advice and guidance to public authorities. Public authority is defined for the purposes of each Part.
10. A public authority is defined in all Parts by reference to Schedule 3 to the Public Services Ombudsman Act (Northern Ireland) 2016 (the 2016 Act).² That Act makes provision for the investigation of complaints of maladministration by members of the public to the Northern Ireland Public Services Ombudsman. Complaints may be made in respect of any of the public authorities listed in Schedule 3 to the Act. That list may similarly be amended by order made by the Executive Office³ subject to the draft affirmative procedure in the Assembly. Any amendments made would also flow into the meaning of public authority in this Bill.

¹ 1998 c. 47

² 2016 c. 4

³ Which exercises its functions subject to the direction and control of the First Minister and the deputy First Minister.

11. New sections 78F, 78P and 78T enable the First Minister and the deputy First Minister by regulations to provide that a body or authority listed in Schedule 3 to the 2016 Act is not a public authority for the purposes of Part 7A, 7B or 7C (as the case may be) or that one not listed, is. They may also add or remove a body in relation only to particular functions of that authority or for a particular purpose.
12. The power may only be exercised so far as it would be within the Assembly's competence to make equivalent provision in an Act of the Assembly. This means that if an Assembly Act could not make provision for the authority in question being subject to the provisions of the Bill without the Secretary of State's consent, adding that authority by regulations will not be *intra vires* this power.⁴
13. It should be noted that, whilst the Secretary of State has concurrent powers with the First Minister and deputy First Minister under this Bill, the Secretary of State may not exercise this power to make regulations.⁵

Explanation for delegation

14. It is not uncommon for legislation intended to capture a comprehensive list of public authorities delivering public services in Northern Ireland to do so by reference to the 2016 Act.⁶ This Bill uses the same device. However, it may be the case that the First Minister and deputy First Minister are of the view that not all the public authorities listed should be subject to the duties in Part 7A, Part 7B or Part 7C (as the case may be) or similarly public authorities not subject to one of them should be. Alternatively, that an authority listed (or not listed) should only be subject to some of the requirements of each Part or only in respect of some of its functions.
15. Language and identity remain particularly sensitive matters in Northern Ireland and there therefore needs to be some flexibility for the Executive to determine which authorities, or which functions of an authority, should be subject to these provisions.
16. The functions of the Office, the Irish Language Commissioner and the Commissioner for the enhancement and development of the language, arts and literature associated with the Ulster Scots and Ulster British tradition are different to those of the Public Services Ombudsman⁷ and the duties placed on public authorities are placed in a very particular context. These provisions will enable the First Minister and deputy First Minister (in discussion with the Executive Committee as appropriate) to tailor the application of those requirements to public authorities as they consider appropriate.
17. It may also be the case, for example, that a body is added to the list in Schedule 3 to the 2016 Act but that it is not intended that these requirements will apply to that body. These powers will enable the First Minister and deputy First Minister to make the appropriate provision in respect of that body.

⁴ The Secretary of State's consent is required where an Assembly Act deals with an excepted matter which is ancillary to other provisions (in the Bill or previously enacted) dealing with reserved or transferred matters, or where the Act deals with reserved matters – see s. 8 Northern Ireland Act 1998.

⁵ See clause 6(1) and (5)

⁶ See for example the Commissioner for Children and Young People (Northern Ireland) Order 2003 (S.I. 2003/439); the Commissioner for Older People Act (Northern Ireland) 2011 (S.I. 2011/1); sections 75, 76 and 77 of the Northern Ireland Act 1998.

⁷ Whose purpose is to investigate alleged maladministration.

18. Other Northern Ireland legislation which defines public authorities by reference to Schedule 3 to the 2016 Act also allows that application to be amended by secondary legislation.⁸

Explanation for Parliamentary process

19. The regulations will be subject to the draft affirmative procedure in the Northern Ireland Assembly. We believe that this is the appropriate level of scrutiny for regulations which may bring authorities within, or remove them from, the application of one of the new Parts and the regulation of the Office, the Irish Language Commissioner or the Commissioner for the enhancement and development of the language, arts and literature associated with the Ulster Scots and Ulster British tradition.

Clause 9: commencement of Parts 1 and 2

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: none

Context and Purpose

20. The substantive provisions of the Bill come into force by commencement regulations made by the Secretary of State. Provisions may come into force at different times and a particular provision may be brought into force at different times for different purposes.

Explanation for delegation

21. Provision for the Bill to be commenced by regulations will enable the Secretary of State to determine the appropriate point at which provisions should or need to be brought into force. Some provisions may be brought in earlier than others, for example, to enable the bodies to be established and guidance to be produced. Others may come into force later so as to enable public authorities to make the appropriate preparations in advance of being subject to the duties under the Bill.

Explanation for Parliamentary process

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

Clause 1: inserts s. 78H in the Northern Ireland Act 1998: (functions of the Office)

Clause 2: inserts s. 78K in the Northern Ireland Act 1998 (functions of the Irish Language Commissioner)

⁸ See Article 4 of the 2003 Order mentioned above.

Clause 3: inserts s. 78R in the Northern Ireland Act 1998 (functions of the Commissioner for the enhancement and development of the language, arts and literature associated with the Ulster Scots and Ulster British tradition)

Power conferred on: First Minister and deputy First Minister acting jointly

Power exercised by: direction

Parliamentary Procedure: none

Context and Purpose

23. We do not think this power is legislative in character but have included an explanation of it for the sake of completeness.
24. The First Minister and deputy First Minister may direct the Office, the Irish Language Commissioner or the Commissioner for the enhancement and development of the language, arts and literature associated with the Ulster Scots and Ulster British tradition in relation to the exercise of their respective functions. There is no scope, therefore, for the First Minister and deputy First Minister to go beyond the provision that is made in the Bill itself in respect of the powers the Office or a Commissioner may exercise or the duties that the Office or a Commissioner must discharge. Their directions will concern only how those functions should be carried out.
25. For example, the First and deputy First Minister may decide to direct the Irish Language Commissioner to undertake activities with a view to encouraging compliance by public authorities with the requirement to have due regard to the best practice standards.

Explanation for delegation

26. As mentioned above, identity and language issues are particularly contentious and sensitive in Northern Ireland. It would not be acceptable at either a political or public level in Northern Ireland for the Office or the Commissioners to operate without some Executive oversight. As such, a provision enabling the First and deputy First Minister to direct the Office and the Commissioners in the exercise of their functions was included to assuage these concerns.

Explanation for Parliamentary process

27. As this direction is not of a legislative character, we do not believe any Assembly process is necessary. The Executive Office and the First Minister and deputy First Minister are of course subject to Assembly scrutiny in the usual ways, and it will be open to the Assembly to amend the legislation to include an Assembly procedure if it determines that is appropriate.

Clause 6: powers of direction

Power conferred on: Secretary of State

Power exercised by: direction

Parliamentary Procedure: the direction must be laid before Parliament after being given

Context and Purpose

28. We do not think this power is legislative in character but, as above, have included an explanation of it for the sake of completeness.

29. Part 2 of the Bill confers powers on the Secretary of State to direct a Northern Ireland Minister, a Northern Ireland department, the Office, the Irish Language Commissioner or the Commissioner for the enhancement and development of the language, arts and literature associated with the Ulster Scots and Ulster British tradition. The Secretary of State may direct these authorities to do (or not do) anything that an authority can do under the Bill or can otherwise do. But the Secretary of State can only direct an authority to do something it can otherwise do if it's considered appropriate for the purpose of ensuring the effective operation of the Office or either of the two Commissioners, or in relation to the Secretary of State's own exercise of functions under the Bill.
30. The Secretary of State is only able to give a direction, therefore, in respect of the exercise of functions set out in the Bill or which are otherwise necessary for the purposes of the Bill.
31. The purpose of the power is to ensure that action is taken to implement the provisions of the Bill. If, for example, the Executive Office is not making grants available to the Irish Language Commissioner such that they are unable to exercise their functions, the Secretary of State may direct the Executive Office to do so. Similarly, if the First Minister and the deputy First Minister have failed to appoint a director of the Office, the Secretary of State may direct them to do so (or exercise the powers to do so themselves).

Explanation for delegation

32. These powers have been included in recognition of the fact that, even with the legislation in place, the First Minister and deputy First Minister might fail to agree on its implementation, for example by failing to appoint a director of the Office or Commissioners, or agree adequate support for their operational running. Under the devolution settlement, functions are conferred on the First Minister and deputy First Minister jointly thus requiring them to reach agreement. In relation to progressing this legislation, this has been challenging to date, hence the Government's decision to introduce this Bill in Parliament. In such a scenario, the Secretary of State wishes to have the power to intervene to ensure that the legislation can be implemented as necessary.

Explanation for Parliamentary process

33. When the Secretary of State gives a direction under this clause, they must lay a copy of it before Parliament and publish it. In giving directions (or exercising concurrent powers), the Secretary of State is exercising executive authority in relation to transferred matters. Recognising the significance of this, the NIO believes that this should be capable of being scrutinised by Parliament. Requiring the Secretary of State to lay any direction given will enable Parliamentarians to raise any matters with the Secretary of State about this in Parliament as appropriate.
34. Similar direction powers conferred on the Secretary of State in relation to abortion⁹ must also be laid before Parliament and it was considered appropriate, not least for reasons of consistency, to require that here too.

Northern Ireland Office

25 May 2022

⁹ S.I. 2021/365