

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

THE NORTHERN IRELAND (INTERIM ARRANGEMENTS) 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 (Interim Arrangements) Bill (**the Bill**). The Bill will be introduced in the House of Commons on 27 April 2023. 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 appointed¹. That period ended on 27 October whereupon the Secretary of State came under a duty to propose a date as soon as practicable for a further election.
3. That period was extended until 8 December 2022 by the Northern Ireland (Executive Formation etc) Act 2022² (**2022 Act**) and then until 19 January 2023 by the Secretary of State exercising powers under that Act to extend the period once by regulations. It has been further extended until 18 January 2024 by the Northern Ireland (Executive Formation and Organ and Tissue Donation) Act 2023³ (**2023 Act**).
4. Following the election in May 2022, 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 on 27 October 2022. Since that time there have therefore been no Ministers in charge of NI departments.
5. 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.
6. The 2022 Act clarified the ability of a senior officer of a Northern Ireland department to exercise the functions of that department - where satisfied it is in the public interest to

¹ 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.

² See the Committee's 19th report of session 2022/23.

³ See the Committee's 26th report of session 2022/23.

do so - in the absence of the Minister in charge of the department, and, in respect of matters that must be referred to the Executive Committee of the Assembly, that Committee⁴. In doing so they must have regard to guidance published by the Secretary of State. Those provisions currently sunset when an Executive is next formed or on 5 June 2023⁵, whichever happens first.

7. This Bill will extend the period mentioned above so that it will now expire when an Executive is next formed.
8. During the same period the Bill will also confer powers on the Secretary of State to direct a Northern Ireland department to provide advice or information or carry out a consultation. Those powers may only be used for the purpose of developing options for raising more public revenue in Northern Ireland or otherwise improving the sustainability of public finances in Northern Ireland.
9. It will also amend the Northern Ireland Act 1998 (**NIA 1998**) such that during *any* period when the Assembly is not functioning, including the current period, certain accounts, reports and other documents that must usually be laid before the Assembly under the Government Resources and Accounts Act (Northern Ireland) 2001 or the Financial Provisions (Northern Ireland) Order 1993 will also have to be laid before the House of Commons.

Purpose and effect of the Bill

Exercise of functions

10. Clause 1 extends the period in s. 3 of the 2022 Act⁶ such that it will now expire when an Executive is next formed.

Advice and information on options for raising public revenue

11. Clause 2 will amend the 2022 Act by inserting new section 5A. New section 5A will confer powers on the Secretary of State to direct a NI department to give the Secretary of State advice or information about such matters as are specified or to carry out such consultation as is specified. The powers may only be used for the purpose of developing options for raising more public revenue in Northern Ireland or otherwise improving the sustainability of public finances in Northern Ireland. They will sunset when an Executive is next formed.
12. NI departments currently have no specific powers to provide such information or advice to the Secretary of State and there is no basis on which the Secretary of State can require it. This means that information sharing between the UK Government and NI departments during period when NI Ministers are not in office is compromised.

⁴ See s. 20 and s. 28A NIA 1998

⁵ Being the expiry of 6 months beginning with the day on which the 2022 Act was passed – see s. 3(2).

⁶ See the department's delegated powers memorandum dated 21 November 2022

13. The Secretary of State will be able to specify when and in what form any information or advice should be provided and may require two or more departments to give joint advice or collate any information.
14. In relation to any consultation that a department is directed to undertake, the Secretary of State will be able to specify who is to be consulted, how the consultation is to be carried out, the content of the consultation and whether the Secretary of State's approval of the content of the consultation is required, and the consultation timetable.
15. New section 5B confirms that departments are not required to provide advice or information that would breach relevant data protection legislation.⁷

Assembly's power to call for witnesses and documents

16. Clause 3 will amend s. 44 of the NIA 1998 restricting the ability of the Assembly to require a person who is or has been a Minister of the Crown or a person who is or has been in Crown employment (including a NI civil servant) to provide evidence or documents in connection with the giving of a direction under s. 5A of the 2022 Act or the exercise of a function in accordance with a direction under s. 5A.

Laying of accounts and other financial reports

17. Clause 4 will amend the NIA 1998 so as to make provision for departmental accounts and Northern Ireland Comptroller and Auditor General reports to be laid in the House of Commons during any period when the Assembly is not sitting because it has been unable to elect a Presiding Officer and deputies. Whilst documents may still be laid in the Assembly during any period when it is not sitting, they are not subject to any scrutiny by the relevant committees. If they are also laid in the House of Commons appropriate scrutiny can more readily take place and the relevant committee can make requests for evidence and information on this basis.

18. In summary, the Bill will:

- a. extend the provisions in the 2022 Act whereby senior officers may exercise the functions of a department in the absence of NI Ministers or an Executive Committee (until an Executive is next formed);
- b. make provision for the Secretary of State to direct a NI department to give the Secretary of State advice or information or carry out a consultation (until an Executive is next formed);
- c. amend s. 44 of the NIA 1998 to restrict the matters in respect of which the Assembly may require Ministers or civil servants to provide evidence or documents where they relate to the giving of a direction to provide advice or information or carry out a consultation, or the exercise of a function in accordance with such a direction; and
- d. amend the NIA 1998 so as to require certain departmental accounting and

⁷ Defined by reference to s. 3(9) of the Data Protection Act 2018

financial documents to be laid before the House of Commons as well as before the Assembly during any period (including the current period) when the Assembly is unable to elect a presiding officer and deputies after an election.

Delegated Powers

19. The Bill contains one delegated power conferred on the Secretary of State to direct a NI department. We do not think this power is legislative in character but nevertheless have included an explanation of it here.

Clause 2: Advice and information on options for raising revenue

Power conferred on: Secretary of State

Power exercised by: direction

Parliamentary Procedure: none

Context and purpose

41. Clause 2 will confer powers on the Secretary of State to direct a NI department to give the Secretary of State such advice or information as is specified in the direction.
42. A direction may be given so as to require two or more departments to give joint advice or supply information jointly. Where information is not within the possession or control of a department, it must take reasonable steps to comply with the direction.
43. There is similar and existing provision under s.67 NIA 1998 for HM Treasury to request information, but this does not extend to the Secretary of State.
44. There is currently no basis upon which the Secretary of State may *require* departments to provide advice or information, although they may of course do so voluntarily so far as existing powers allow. For matters such as considering the budgetary sustainability of NI Departments or what policy choices may be available for revenue raising, efficiencies or savings, the Secretary of State needs to be able to request advice and/or information and for NI departments to be required to comply with it.

Explanation for delegation

45. As noted above, NI departments cannot currently be required to provide the Secretary of State with advice or information on a given policy matter. If the Secretary of State is considering where budget savings may be made or revenue raised, and how those changes could be given effect, then the relevant NI department(s) can be directed to provide advice, information and/or conduct a public consultation on such matters. It may be the case that the Secretary of State wants work to be advanced on a matter in time for an incoming Executive, in which case these powers (together with the power to direct a consultation where relevant) may be used to ensure that policies have been explored and progressed so that an incoming Executive is able to make decisions about them without delay.

Explanation for parliamentary process

46. Any directions given under this provision are not required to be laid in Parliament.
47. This is consistent with s. 67 where similar provision (albeit not by way of a direction) is made. It is also consistent with the manner in which UK and NI departments would normally provide advice and information to their respective Ministers.
48. It is a longstanding principle that departmental officials should be able to provide advice to a Minister to support the formulation or development of policy or the making of certain decisions, without that advice or the fact that it's been requested being subject to immediate disclosure. For example, such information is exempt from disclosure for the purposes of the Freedom of Information Act 2000⁸.
49. If directions were to be laid before Parliament we believe that would potentially be to the detriment of candid advice being given by NI departments to the Secretary of State.
50. There are direction powers where the Secretary of State is required to lay the direction before Parliament and publish it⁹. We think those can be distinguished. The Secretary of State will not here be directing a department to exercise its functions in a particular way (other than in a limited extent in relation to consultations). This is merely a direction to provide advice or information or carry out a consultation. We believe these to be essentially internal matters as between two administrations.
51. For these reasons we believe that it is not necessary or appropriate for directions made under these provisions to be laid in Parliament.

Northern Ireland Office

27 April 2023

⁸ See s. 35 FOIA

⁹ See for example s. 6(4) Identity and Language (Northern Ireland) Act 2022 and SI. 2021/365