



## BRIEFING PAPER

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# Northern Ireland (Executive Formation) Bill 2017-19

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# 1. Summary

The [\*Northern Ireland \(Executive Formation\) Bill 2017-19\*](#) was introduced to the House of Commons on 4 July 2019. The text of the Bill and [Explanatory Notes](#) are available on the [Bill pages](#) on the Parliamentary website.

At Business Questions on 4 July, the Leader of the House, Mel Stride MP, announced that the Government's intention is for all the House of Commons stages of the Bill to be taken on Monday 8 July. However, the Business of the House motion tabled by the Government for Monday does not propose to do this. Instead the second reading debate would take place on Monday 8 July, with all subsequent Commons stages being scheduled for a further sitting day.

This short Bill amends Section 1 of the *Northern Ireland (Executive Formation and Exercise of Functions) Act 2018* to extend the period provided in the *Northern Ireland Act 1998* for Northern Ireland Ministers to be appointed following the Assembly election held on 2 March 2017 to 21 October 2019. It also imposes a duty on the Secretary of State to report on progress towards the formation of an Executive in Northern Ireland.

## 2. Background

### 2.1 Collapse of the Assembly and Executive

There has been no fully-functioning [Northern Ireland Assembly](#) or [Executive](#) since 9 January 2017, when the then Deputy First Minister, Martin McGuinness, resigned, which under Northern Ireland's power-sharing arrangements also resulted in the First Minister, Arlene Foster, 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.

The Commons Library Briefing Paper, [Northern Ireland \(Executive Formation and Exercise of Functions\) Bill 2017-19](#), gives further background on events in Northern Ireland until October 2018.

### 2.2 The 2018 Act

The [Northern Ireland \(Executive Formation and Exercise of Functions\) Act 2018](#) ("2018 Act") was passed on 1 November 2018 to facilitate an extended legal period for the formation of an Executive in Northern Ireland. The Act:

- extended the period during which Ministers could be appointed following the election of the Assembly on 2 March 2017 ("the period for Executive formation") so as to expire on 26 March 2019; and
- clarified that Northern Ireland Departments were not prevented from exercising their functions in the absence of Northern Ireland Ministers during the period for Executive formation, so long as they are satisfied that it is in the public interest to do so and they have regard to [guidance published by the Secretary of State](#).<sup>1</sup>

#### Legal duty to call an election

By law, the Secretary of State for Northern Ireland is required to propose a date for another Assembly election if Northern Ireland Ministers – including the First Minister and Deputy First Minister – are not appointed within a 14-day period after the first meeting of the Assembly following an election.

The exact terms of how this is done have, however, changed over time.

Section 16(1) of the [Northern Ireland Act 1998](#) stated that:

Each Assembly shall, within a period of six weeks beginning with its first meeting, elect from among its members the First Minister and the deputy First Minister.

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<sup>1</sup> The Northern Ireland Civil Service is operationally separate from the Home Civil Service in Great Britain.

While s16(8) stated that where:

the offices of the First Minister and the deputy First Minister become vacant at any time an election shall be held under this section to fill the vacancies within a period of six weeks beginning with that time.

Section 32(3) added that if:

the period mentioned in section 16(1) or (8) ends without a First Minister and a deputy First Minister having been elected, the Secretary of State shall propose a date for the poll for the election of the next Assembly.

A plain reading of this provision might suggest the Secretary of State must in fact designate a date shortly after that period expires. However, a literal reading of that obligation was rejected by the Appellate Committee of the House of Lords in a case decided in 2002, when the Assembly was suspended. It concluded that Parliament did not impose a temporal limitation on the Secretary of State either proposing or holding an election in such circumstances.<sup>2</sup>

The [Northern Ireland \(St Andrews Agreement\) Act 2006](#) substituted s16(1) of the 1998 Act with s16A(3), which stated that:

Within a period of seven days beginning with the first meeting of the Assembly—(a)the offices of First Minister and deputy First Minister shall be filled [...]

The [Northern Ireland \(Stormont Agreement and Implementation Plan\) Act 2016](#) subsequently extended that period to 14 days.

Following the failure to agree Ministerial appointments after the extraordinary Assembly election of March 2017, the UK Parliament passed the [Northern Ireland \(Ministerial Appointments and Regional Rates\) Act 2017](#). This extended the period for filling Ministerial offices after that election to 108 days. The period following future elections was to remain at 14 days.

Such extensions have usually been intended to avoid another Assembly election while inter-party talks concerning the restoration of devolved institutions were ongoing. But after the latter extension (under the 2017 Act) passed on 29 June 2017, successive Secretaries of State did not fulfil their legal duty to call an election, something acknowledged by both James Brokenshire and Karen Bradley.<sup>3</sup>

Section 1(1) of the [Northern Ireland \(Executive Formation and Exercise of Functions\) Act 2018](#), therefore, further extended the time under s16A of the 1998 Act (as amended) to stipulate that Ministers ought to be appointed:

...within the period beginning with the first meeting of the Assembly and ending with 26 March 2019.

It also enabled the Secretary of State to extend that period by regulations, on one occasion only, for up to five months. On 20 March

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<sup>2</sup> [Robinson v Secretary of State for Northern Ireland and Others \[2002\] UKHL 32 \[15\]](#)

<sup>3</sup> [Oral evidence: Work of the Secretary of State for Northern Ireland, 2017-19, HC 498](#), 31 January 2018.

2019 the Secretary of State exercised that power and the period for Executive formation was extended so as to expire on 25 August 2019.<sup>4</sup>

Given the ongoing talks and that approaching deadline, the Explanatory Notes for the *Northern Ireland (Executive Formation) Bill 2017-19* set out the intention to extend that period again so as to expire on 21 October 2019:

Extending the period for forming an Executive means that if agreement is reached to form an Executive after 25 August 2019, Ministers can be appointed right away without the need for further legislation.<sup>5</sup>

## 2.3 Events since October 2018

On 18 April 2019, the journalist Lyra McKee was shot during unrest in Derry/Londonderry. She was standing close to a police vehicle. The New IRA, a dissident republican group, admitted responsibility for the killing.<sup>6</sup>

McKee's funeral was attended by the leaders of Northern Ireland's main political parties and there was a standing ovation in response to comments by Catholic priest Father Martin Magill as to why it had taken the death of a 29-year-old woman to bring them together.<sup>7</sup>

In a joint statement, Theresa May and Irish Taoiseach Leo Varadkar said the display of unity seen at the funeral:

gave expression to the clear will and determination of all of the people of these islands to reject violence and to support peace and a better future for everyone in Northern Ireland.

They continued:

We also heard the unmistakable message to all political leaders that people across Northern Ireland want to see a new momentum for political progress. We agree that what is now needed is actions and not just words from all of us who are in positions of leadership [...]

The aim of these talks is quickly to re-establish to full operation the democratic institutions of the Belfast/Good Friday Agreement – the NI executive, assembly and North-South ministerial council – so that they can effectively serve all of the people for the future.<sup>8</sup>

The talks between the UK Government, the Irish Government and the five Northern Ireland political parties, in accordance with the three-stranded approach set out in the [Belfast/Good Friday Agreement](#), commenced on 7 May 2019.

Five working groups discussed key issues central to making progress. These are:

- a programme for government;

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<sup>4</sup> [Northern Ireland \(Extension of Period for Executive Formation\) Regulations 2019](#)

<sup>5</sup> [Northern Ireland \(Executive Formation\) Bill Explanatory Notes](#), p5.

<sup>6</sup> See BBC News online, ["Lyra McKee: 'New IRA' admits killing of journalist"](#), 23 April 2019.

<sup>7</sup> See ITV News online, ["Priest receives standing ovation by challenging politicians at funeral of Lyra McKee"](#), 24 April 2019.

<sup>8</sup> See Politico.EU website, ["May, Varadkar agree to restart Northern Ireland power-sharing talks"](#), 26 April 2019.

- transparency, accountability and the operation of the Executive;
- reform of the Petition of Concern;
- rights, language and identity issues; and
- improving the sustainability, stability and operation of the Belfast/Good Friday Agreement institutions as a whole.<sup>9</sup>

As of 4 July 2019, the talks had not reached a conclusion.

### **Box 1: Chronology of deadlines for the appointment of Northern Ireland Ministers**

**9 January 2017:** Martin McGuinness resigns as Deputy First Minister of Northern Ireland.

**2 March 2017:** an extraordinary Northern Ireland Assembly election is held.

**27 March 2017:** deadline for the appointment of Ministers to form an Executive under the *Northern Ireland Act 1998* (as amended).

**29 June 2017:** new deadline for the appointment of Ministers following extension by the *Northern Ireland (Ministerial Appointments and Regional Rates) Act 2017*.

**26 March 2019:** deadline under the *Northern Ireland (Executive Formation and Exercise of Functions) Act 2018* for the appointment of Ministers.

**25 August 2019:** new deadline for the appointment of Ministers following a five-month extension made by regulation under the 2018 Act.

**21 October 2019:** proposed deadline for the appointment of Ministers in the *Northern Ireland (Executive Formation) Bill 2017-19*.

**13 January 2020:** new deadline if extended by regulation under the same Bill.

## 2.4 Decisions by civil servants

[Section 22](#) of the *Northern Ireland Act 1998* made clear that statutory functions can be conferred on Northern Ireland Departments by name as well as on Northern Ireland Ministers. While functions conferred directly on Ministers have not been exercised since March 2017, Section 4(1) of the [Departments \(Northern Ireland\) Order 1999](#) requires that the “functions of a department shall at all times be exercised subject to the direction and control of the Minister”.

Northern Ireland Departments had interpreted this obligation as applying only when Ministers were in post, and thus had continued to take decisions following the collapse of the Executive in January 2017. In September 2017, for example, the Northern Ireland [Department for Infrastructure](#) granted planning permission for the Arc 21 waste disposal incinerator at Mallusk.

<sup>9</sup> [HC Deb 4 Jun 2019 c68](#)



On 14 May 2018, Mrs Justice Keegan, sitting in the High Court in Belfast, ruled that Peter May, the department's permanent secretary, had acted unlawfully in so doing:

I do not consider that Parliament can have intended that such decision making would continue in Northern Ireland in the absence of ministers without the protection of democratic accountability.

Mrs Justice Keegan added that the case advanced by the Department for Infrastructure "would mean civil servants in Northern Ireland could effectively take major policy decisions such as this one for an indefinite period".<sup>10</sup> This became known as the "Buick case".

As noted in **Section 2.2**, the *Northern Ireland (Executive Formation and Exercise of Functions) Act 2018* was intended to clarify that Northern Ireland Departments were not prevented from exercising their functions in the absence of Northern Ireland Ministers during the legal period for Executive formation, provided they were satisfied it was in the public interest.

According to the Explanatory Notes for the *Northern Ireland (Executive Formation) Bill 2017-19*, it:

has the effect that section 3 of the 2018 Act continues to apply and Northern Ireland departments may continue to exercise their functions in accordance with that section.<sup>11</sup>

## 2.5 Developments since the 2018 Act

Prior to passage of the *Northern Ireland (Executive Formation and Exercise of Functions) Act 2018*, the [Attorney General for Northern Ireland](#) (AGNI), John Larkin, sought clarity from the [Supreme Court of the United Kingdom](#) (UKSC) regarding the powers of civil servants in a number of areas.

These included whether the [Ministerial Code](#) applied to Northern Ireland Departments without Ministers, and whether the absence of a [Programme for Government](#) restricted civil service action.<sup>12</sup>

After Larkin made his referral to the UKSC, a Northern Ireland High Court case examining the validity of a civil service decision to proceed with a proposed electricity interconnector between Northern Ireland and the Republic of Ireland was postponed. The UKSC rejected the AGNI's referral. In a unanimous judgement, Lord Kerr said the interconnector case would provide an opportunity for greater legal clarity and should therefore proceed:

In general, it is desirable that legal questions be determined against the background of a clear factual matrix, rather than as theoretical or academic issues of law. The opportunity for discussion and determination of the legal questions raised in the AGNI's reference exists. Litigation concerning the validity of a

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<sup>10</sup> *R (Buick) v Department of Infrastructure* [2018] NIOB 43

<sup>11</sup> [Northern Ireland \(Executive Formation\) Bill Explanatory Notes](#), p5. This, like the Executive formation date, was time limited in the 2018 Act.

<sup>12</sup> See Richard Johnstone, "[Northern Ireland Civil Service powers to face further court challenge](#)", Civil Service World website, 15 January 2019.



proposed electricity interconnector between Northern Ireland and Ireland potentially raises most, if not all, of the issues adumbrated in the current reference.<sup>13</sup>

At an Engagement Event at Holy Cross College in Strabane on 28 January 2019, the [Northern Ireland Affairs Committee](#) heard views on education funding in the absence of a fully-functioning Assembly and Executive. One attendee said legislation “was brought in so that civil servants could make decisions, but it hasn’t worked”. Another said:

We don’t want civil servants making decisions anyway. Diversifying from our institutions is wrong. We want our elected representatives to fight for what we want.<sup>14</sup>

Giving oral evidence to the Northern Ireland Affairs Committee in March 2019, Derek Baker, permanent secretary at the Northern Ireland [Department of Education](#), said he had:

taken the view that, in the absence of a Minister, I should continue to take decisions on [school] development proposals. I have taken legal advice. We also have the comfort of the legislation that the Secretary of State enacted last year, the *Northern Ireland (Executive Formation and Exercise of Functions) Act 2018*. I welcome that. I am always open to judicial review, of course, so nothing is absolutely safe.<sup>15</sup>

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<sup>13</sup> [Reference by the Attorney General for Northern Ireland of devolution issues to the Supreme Court pursuant to Paragraph 34 of Schedule 10 to the Northern Ireland Act 1998 \(No 2\) \(Northern Ireland\)](#) [2019] UKSC 1

<sup>14</sup> [Written evidence from the Education Funding in Northern Ireland Engagement Event](#), 28 January 2019.

<sup>15</sup> [Oral evidence: Funding priorities in the 2018-19 budget: Education, HC 1497](#), 13 March 2019.

## 3. The Bill

According to the Explanatory Notes, the need for the *Northern Ireland (Executive Formation) Bill 2017-19* arises from the “continued absence of a Northern Ireland Executive”. After 25 August, the:

Secretary of State for Northern Ireland will be under a legal duty to set a date for an Assembly election and Northern Ireland departments would revert to the restrictions applied to decision making by civil servants following the ‘Buick’ Court of Appeal judgement.<sup>16</sup>

In the absence of devolved institutions, the Government intends to ask Parliament to expedite the parliamentary progress of this Bill, with all Commons stages taking place on Monday 8 July 2019.

In their report, [Fast-track Legislation: Constitutional Implications and Safeguards](#), the Lords Select Committee on the Constitution recommended that the Government should provide more information as to why a piece of legislation should be fast-tracked.<sup>17</sup> The Explanatory Notes state that:

Time and space were required to give the talks the best possible prospect of success – this extension provides additional time for the parties to come together and provides continuity of decision making while decisions on next steps are taken by the Government.<sup>18</sup>

### 3.1 Commentary on provisions of Bill

**Clause 1** amends section 1(1) of the 2018 Act in order to extend the period for Executive formation beyond 25 August 2019. It enables Northern Ireland Ministers to be appointed without the need for further legislation at any point until 21 October 2021.<sup>19</sup>

**Clause 2** substitutes a new section 2 in the 2018 Act, so as to confer power on the Secretary of State to further extend the period for forming an Executive by regulations until 13 January 2020.<sup>20</sup> As the Explanatory Notes state, this means that:

if Ministers have not been appointed, but the Secretary of State is of the view that further time is needed to enable this, she may extend the period without further primary legislation.<sup>21</sup>

2(2) states that the Secretary of State may only exercise this power on or before 21 October 2019 and may only extend the period so as to expire

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<sup>16</sup> [Northern Ireland \(Executive Formation\) Bill Explanatory Notes](#), p6.

<sup>17</sup> See Lords Constitution Committee, [15<sup>th</sup> report of session 2008/09, HL paper 116-I](#), para 186.

<sup>18</sup> [Northern Ireland \(Executive Formation\) Bill Explanatory Notes](#), p6.

<sup>19</sup> At which point the extension period will expire, unless further extended by regulation.

<sup>20</sup> This is similar to Section 2 of the 2018 Act, which contained the regulation-making power enabling the Secretary of State to extend the period of Executive formation from 26 March 2019 for a period of up to five months.

<sup>21</sup> [Northern Ireland \(Executive Formation\) Bill Explanatory Notes](#), p8.

on 13 January 2020.<sup>22</sup> This means no further extension will be necessary without primary legislation.

**Clause 3**(1) will require the Secretary of State to report on or before 21 October 2019 on the progress that has been made towards forming an Executive in Northern Ireland. 3(2) says she must publish that report and lay it before Parliament. The Explanatory Notes state that this reporting requirement is “a one-off”.<sup>23</sup>

**Clause 4** sets out the territorial extent of the Bill. 4(1) says the Bill would extend to England and Wales, Scotland and Northern Ireland (but apply to Northern Ireland only). 4(2) states that the Act will come into force on the day on which it is passed. 4(3) gives the short title.

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<sup>22</sup> The regulations under Clause 2 of the Bill will be subject to the affirmative procedure in Parliament, which means they may be made without the prior approval of Parliament. They must however be approved by Parliament within 28 days of having been made, and if they are not will cease to have effect.

<sup>23</sup> [Northern Ireland \(Executive Formation\) Bill Explanatory Notes](#), p7.

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