

LITIGATION & DISPUTE RESOLUTION

The Northern Ireland (Executive Formation etc.) Act 2022: *Extended Powers for Departmental Officials in Northern Ireland*

Background

After the assembly elections in May 2022, Caretaker Ministers remained in post to make the day to day decisions until a Stormont Executive could be formed. However, an Executive could not be formed and under Section 16B of the Northern Ireland Act 1998, Ministers could only remain in post for up to 24 weeks following the election after which time they must step down to be replaced by officials. Consequently, Stormont Ministers ceased to hold office on **28 October 2022**, when the deadline for reforming the power-sharing Executive passed without agreement.

In November 2022, Chris Heaton-Harris, the Secretary of State for Northern Ireland, announced that the UK Government would legislate to provide additional powers to senior civil servants in the 9 NI government departments.

Until now, the absence of Stormont Ministers has meant that senior officials were responsible for the operational decisions taken within each department. However, the powers of civil servants were

heavily restricted; they were only able to implement policies previously agreed upon by politicians and their ability to react to changing circumstances was limited. The Secretary of State has now given the parties until April 2023 to form an Executive. In the intervening period he has now taken steps to increase the powers of civil servants in order to protect Northern Ireland's public finances and delivery of public services.

The new legislation will have significant consequences for how decisions are made by Government Departments in the absence of a Minister and will have far reaching public law and administrative consequences for Northern Ireland. Significantly, it will impact on the Court of Appeal's landmark decision in *Buick's Application* [2018], which provide guidance for when decisions made by NI Government Departments require Ministerial approval.



Northern Ireland (Executive Formation etc.) Act 2022

On Wednesday 9 November 2022, in a statement to the House of Commons, the Secretary of State for Northern Ireland announced plans to give officials more powers to support public service delivery. The Northern Ireland (Executive Formation etc.) Act (“the Act”), which follows on from the Northern Ireland (Executive Formation and Exercise of Functions) Act 2018, was subsequently fast-tracked through Parliament and received Royal Assent on 6 December 2022, extending the time period in which to call an election and expanding the powers of officials for a period of 6 months, or until an Executive is formed (whichever is sooner).

Importantly, the exercise of departmental functions section of the Act sets out, amongst other things, that:

“The absence of Northern Ireland Ministers does not prevent a senior officer of a Northern Ireland department from exercising a function of the department ... if the officer is satisfied that it is in the

public interest to exercise the function during that period.

The fact that a matter connected with the exercise of a function by a Northern Ireland department has not been discussed and agreed by the Executive Committee of the Northern Ireland Assembly is not to be treated as preventing the exercise of that function”

The powers and functions outlined in the above sections have been the subject of constitutionally significant judicial reviews in recent years. The powers of government officials to make decisions and the circumstances as to when they can do so has been the subject of litigation in the high profile *Buick* and *Casement Park* cases.

Buick concerned a challenge to a decision made by the Department for Infrastructure’s then Permanent Secretary to grant planning permission for the Arc 21 Incinerator in absence of a Minister. This decision took place during the period of time between January 2017 and January 2020 when there was no functioning Executive in Northern Ireland.

The key issue in *Buick* was whether a department could take a decision in the absence of a Minister. Given the requirement of departmental accountability to the corresponding Minister (as laid out in Article 4 of the Departments (NI) Order 1999) it was found that decisions of Ministers were beyond the competencies of the Permanent Secretary and that the Department did not have the capacity to make decisions on cross-cutting, significant or controversial matters, as approval of the Stormont Executive would be required for such decisions.

This meant that a range of important decisions simply could not be taken by department officials in the absence of a functioning Executive.

The new Act therefore provides additional powers and certainty to officials and clearly sets out that officials can exercise departmental functions without Executive approval. The extent to which senior officials will exercise these new powers remains to be seen given that there remains potential for any decision to be subject to judicial review.

Statutory Guidance

The Act placed an obligation on the Secretary of State to publish guidance on the principles to be taken into account upon the exercise of such functions by a senior officer. The guidance sets out the parameters of how senior officials are to take decisions and places extensive restrictions on the use of their decision making powers.

The draft guidance can be found [HERE](#).

Additional key points:

- The Act extends the period for Executive formation and permits the Secretary of State to take a number of actions, including on MLA pay. The Secretary of State has, on 7 December 2022, announced a cut in MLA's salaries by 27.5%.
- The Secretary of State may set the regional rate for the year ending 31 March 2024.
- The Act also allows for a further six week extension to the period for Executive formation, until 19 January 2023, if needed.
- An Act to make provision to extend the period following the Northern Ireland Assembly election of 5 May 2022.

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