**DELEGATED POWERS AND REGULATORY REFORM COMMITTEE**

**NORTHERN IRELAND (STORMONT AGREEMENT AND IMPLEMENTATION PLAN) BILL 2016**

**Memorandum by the Northern Ireland Office**

**Introduction**

1. This Memorandum has been prepared by the Northern Ireland Office to assist in the examination of delegated powers in the Northern Ireland (Stormont Agreement and Implementation Plan) Bill 2016. It outlines the provisions in the Bill which confer powers to make delegated legislation, and explains why these powers have been taken and the nature of, and reason for, the procedure selected for exercising those powers.
2. The purpose of the Bill is to make provision in relation to a number of the measures in A Fresh Start: the Stormont House Agreement and Implementation Plan (“the Fresh Start Agreement”) dated 17 November 2015[[1]](#footnote-1):
	1. financial responsibility - the UK Government agreed to legislate, with Northern Ireland Assembly consent, to ensure that the Assembly cannot consider spending plans which exceed the Block Grant allocated by HM Treasury or the Northern Ireland Executive’s borrowing limits, where planned spending relies on those funding sources;
	2. measures aimed at dealing with continuing paramilitary activity:
		1. changes to the Ministerial pledge of office to include additional commitments relating to ending paramilitary activity and introduction of a corresponding undertaking for Members of the Legislative Assembly;
		2. the creation of an independent, international body, by agreement between the UK Government and Irish Government, to report on progress towards ending paramilitary activity in Northern Ireland;

c. an extension to the time available to agree a Programme for Government and allocate Ministerial positions in the Northern Ireland Executive from 7 days to 14 days after the Assembly first meets following an election.

**Clause 2(5): Exercise of functions – duty on Secretary of State to issue guidance to the Commission about information:**

*Power conferred on: Secretary of State*

*Power exercisable by: Guidance*

*Parliamentary Procedure: None*

**Introduction**

1. Clause 2(5) requires the Secretary of State to issue guidance to the Independent Reporting Commission (“the Commission”) about the exercise of the Commission’s functions in relation to certain types of information.

**Effect of the provision**

1. Clause 2(5) imposes a duty on the Secretary of State to issue guidance to the Commission about the exercise of the Commission’s functions in relation to information, the disclosure of which might (a) prejudice the national security interests of the United Kingdom or Ireland, or (b) put at risk the life or safety of any person. The Commission must have regard to the guidance when exercising its functions. The Secretary of State may amend or replace the guidance and must publish the current guidance.

**Justification of the Delegation**

1. Clause 2(3) prohibits the Commission, when exercising its functions, from doing anything which might (a) prejudice the national security interests of the United Kingdom or Ireland, (b) put at risk the life or safety of any person, (c) have a prejudicial effect on the prevention, investigation or detection of crime, or (d) have a prejudicial effect on any actual or prospective legal proceedings. Due to the particular risk posed by (a) and (b), it is considered that the Secretary of State should be required to issue the Commission with further guidance, in order to assist it in identifying such information and fulfilling its statutory duties. The guidance is likely to include guidance about the handling and use of, and access to, such information. The Secretary of State will need the flexibility to ensure that the guidance is, and remains, appropriate in light of experience and setting out the detail on the face of the Bill would be very difficult and would unduly burden the Bill. Further, the guidance will relate to the general duty at clause 2(3)(a) and (b) which Parliament will have approved. In addition, in relation to some existing policing and justice bodies, provision in respect of the holding of information has been made using Memorandums of Understanding or service level agreements.

**Justification of the level of Parliamentary Scrutiny**

1. The guidance will provide a framework for the handling of information related to the general duties at clause 2(3)(a) and (b). Existing provisions in relation to holding information have been the subject of Memorandums of Understanding and service level agreements; this guidance is statutory guidance and its subject matter is referred to on the face of the Bill. There is also a requirement for the guidance to be published. For those reasons it is considered appropriate for this not to be subject to a Parliamentary approval process. A copy of the guidance will be placed in the library of each House on publication.

**Clause 3(3): Legal privileges etc - power to confer further privileges etc on the Commission, members and staff of the Commission and members of their families:**

*Power conferred on: Secretary of State*

*Power exercisable by: Regulations made by statutory instrument*

*Parliamentary Procedure: Negative resolution*

**Introduction**

1. Clause 3(1) and (2) confer immunity from suit and legal process, and inviolability of archives and premises, on the Commission. Clause 3(3) allows the Secretary of State to make regulations, subject to the negative resolution procedure, conferring certain further privileges and immunities on the Commission, and on Commissioners and staff of the Commission, and members of their families who form part of their households.

**Effect of the provision**

1. Clause 3(3)(a) enables the Secretary of State to make regulations conferring on the Commission any of the immunities and privileges set out at Part 1 of Schedule 1 to the International Organisations Act 1968 (“the 1968 Act”) which are not already conferred by clause 3(1) and (2).
2. Clause 3(3)(b) enables the Secretary of State to make regulations conferring any of the privileges and immunities set out in Parts 2, 3 and 5 of Schedule 1 to the 1968 Act on Commissioners and staff of the Commission, and members of their families who form part of their households. Both clause 3(3)(a) and (b) include a discretion for the Secretary of State to modify these privileges and immunities.
3. Clause 3(3)(c) enables the Secretary of State to make provision in the regulations relating to the waiver of these privileges and immunities.
4. As a result of clause 10(4), any regulations made under clause 3(3) may make different provision for different purposes or cases; incidental, supplementary or consequential provision; and transitional or transitory provision or savings.

**Justification of the Delegation**

1. The key immunities conferred on the Commission by clause 3(1) and (2) are fundamental to the operation of the Commission and will not change throughout the Commission’s lifespan.  By contrast, the Secretary of State will need the flexibility to decide whether, including to what extent, any of the other immunities and privileges set out in Part 1 of Schedule 1 to the 1968 Act might need to be conferred on the Commission (clause 3(3)(a)). The Secretary of State will also need the flexibility to decide whether, including to what extent, it is appropriate to confer any of the privileges and immunities in Parts 2, 3 and 5 of the 1968 Act on Commissioners, staff and their households (clause 3(3)(b)), on a case by case basis, as well as deciding provisions relating to the waiver of those immunities on a case by case basis (clause 3(3)(c)).

1. It is recognised that the powers to confer privileges and immunities at clause 3(3)(a) to (c) are important ones, but the essential decisions will be taken by Parliament in passing the primary legislation, including the key immunities for the Commission at clause 3(1) and (2). Further, the parameters of the powers in clause 3(3)(a) to (c) to grant further immunities and privileges to the Commission, and to grant immunities and privileges to members of the Commission, staff and their families, are clearly delineated by reference to the 1968 Act.
2. A similar approach to the delegation of the power on the Secretary of State to confer such privileges and immunities on the Commission, Commissioners, their staff and families was taken in relation to the Independent Commission for the Location of Victims’ Remains (see section 2(1)(b) and (c) of the Northern Ireland (Location of Victims’ Remains) Act 1999), and the Independent Monitoring Commission (see section 1(2)(b) and (c) of the Northern Ireland (Monitoring Commission etc.) Act 2003.

**Justification of the level of Parliamentary Scrutiny**

1. The parameters of the delegation are clearly described in clause 3(3), and the nature and scope of the immunities and privileges in question are well established in the 1968 Act and by precedent. The powers in clause 3(3) follow the approach to levels of parliamentary scrutiny taken in section 7(2)(b) and (c) of the Northern Ireland Arms Decommissioning Act 1997, section 1(2)(c) of the Northern Ireland (Monitoring Commission etc.) Act 2003, and section 2(1)(b) and (c) of the Northern Ireland (Location of Victims' Remains) Act 1999. The negative resolution procedure applies to orders made under these provisions (section 7(3)(b), section 1(4)(b), and section 2(2)(b) respectively).
2. It is expected that regulations made under clause 3(3) will make provision similar to that contained in the orders made under those provisions (the Northern Ireland (Monitoring Commission etc.) Act 2003 (Immunities and Privileges) Order 2003 (S.I. 2003/3126), the Northern Ireland Arms Decommissioning Act 1997 (Immunities and Privileges) Order 1997 (S.I. 1997/2231) and the Northern Ireland (Location of Victims’ Remains) Act 1999 (Immunities and Privileges) Order 1999 (S.I. 1999/1437)).
3. On that basis it is considered that the negative resolution procedure provides an appropriate level of Parliamentary scrutiny.

**Clause 4(2): Interpretation and supplementary provision – power to make provision for giving full effect to the agreement relating to paramilitary activity:**

*Power conferred on: Secretary of State*

*Power exercisable by: Regulations made by statutory instrument*

*Parliamentary Procedure: Affirmative resolution*

**Introduction**

1. The Commission will be established by an international agreement between the Government of the United Kingdom and the Government of Ireland, referred to in the Bill as the “agreement relating to paramilitary activity”. Clause 4(2) confers power on the Secretary of State to make regulations containing provision for giving full effect to that agreement.

**Effect of the provision**

1. Clause 4(2) enables the Secretary of State to make regulations, subject to the affirmative resolution procedure, containing such provision as the Secretary of State considers appropriate for giving full effect to the agreement relating to paramilitary activity which will establish the Commission. Clause 4(3) provides that such regulations may amend, repeal or revoke an enactment or confer functions on the Secretary of State or any other person. As a result of clause 10(4), any regulations made under clause 4(2) may make different provision for different purposes or cases; incidental, supplementary or consequential provision; and transitional or transitory provision or savings.

**Justification of the Delegation**

1. The key provisions about the Commission are set out on the face of the Bill, including reference to its functions and objective (clause 1(1) and 2(1)), conferral of immunity from suit and legal process and inviolability of its archives and premises (clause 3(1) and (2)), as well as its statutory duties not to do anything which might put at risk the life or safety of any person (clause 2(3)), for example. But it may be appropriate to make further provision, in addition to that on the face of the Bill, to give full domestic effect to the agreement relating to paramilitary activity, both before the start of the Commission’s work and to react to any further circumstances that may only become apparent once the Commission has started its work. Examples might include provision about accounts and audit and provision about decision making and quorum. It may prove necessary to amend legislation, including primary legislation, or to confer functions on the Secretary of State or other persons. The scope of the power in clause 4(2) will be determined by the terms of the agreement relating to paramilitary activity as the power can only be used to make provision considered appropriate to give full effect to that agreement.   Although the agreement between the UK Government and the Irish Government is not available at the date of this memorandum, the terms of the agreement would be available to Parliament before or at the same time as asking Parliament to approve any regulations to be made under this power and the agreement will be subject to Parliamentary scrutiny under the Constitutional Reform and Governance Act 2010.

**Justification of the level of Parliamentary Scrutiny**

1. It is considered that the appropriate level of Parliamentary scrutiny for the power in clause 4(2) is that offered by the affirmative resolution procedure, which will allow Parliament the opportunity to give its prior approval to further provision about the Commission that may be appropriate (in addition to the key provisions included in the primary legislation) to give full effect to the agreement relating to paramilitary activity.

**Clause 5(1): Conclusion of the Commission’s work – power to authorise or require the destruction of relevant information when the Commission’s functions cease:**

*Power conferred on: Secretary of State*

*Power exercisable by: Regulations made by statutory instrument*

*Parliamentary Procedure: Affirmative resolution*

**Introduction**

1. Clause 5(1) allows the Secretary of State to make regulations, subject to the affirmative resolution procedure, to provide for the winding up of the Commission.

**Effect of the provision**

1. Clause 5(1) enables the Secretary of State to make regulations to make provision for winding up the Commission when it ceases to operate. As the Commission is established via an international agreement with the Irish Government, before making any such regulations, clause 5(2) requires the Secretary of State to consult the Minister of Justice and Equality in the Government of Ireland (or such other Minister as the Secretary of State considers appropriate). Clause 5(2) also requires the Secretary of State to consult the First Minister and deputy First Minister and any other person the Secretary of State considers appropriate. Clause 5(3) gives particular examples of what such regulations may contain: the repeal of any substantive provision in the Bill about the Commission with the exception of that in clause 3 (legal privileges etc); amending or revoking any other enactment; conferring functions on the Secretary of State or any other person; provision about the destruction of information or records held by the Commission. The latter would, for example, allow the regulations to contain provision requiring the Commission, or another person on behalf of the Commission, to destroy information and records relating to the Commission’s functions under paragraph 5.1 of Section A of the Fresh Start Agreement. As a result of clause 10(4), any regulations made under clause 4(2) may make different provision for different purposes or cases; incidental, supplementary or consequential provision; and transitional or transitory provision or savings.

**Justification of the Delegation**

1. In the Fresh Start Agreement it is envisaged that the reports of the Commission will inform the Programme for Government of the Northern Ireland Executive through to 2021. It is intended that the agreement between the UK Government and the Irish Government establishing the Commission will not specify a particular end date but will allow for the agreement relating to paramilitary activity to end by mutual agreement. If it were agreed that the Commission should cease to exist, it is important that the Secretary of State has power to make provision for winding it up. It is considered that prescribing a definitive date in primary legislation for the repeal of the clauses in the Bill concerning the Commission would pre-empt any such mutual agreement and that prescribing the date for repeal should be delegated to secondary legislation to allow that decision to be made in full cognisance of the circumstances at the time. As well as the possibility of provision to make sure that any requirement to destroy relevant information can be fulfilled once the Commission has ceased its functions, it is also important for the Secretary of State to maintain flexibility as to which parts of the provisions of the Bill in relation to the Commission should be repealed (although the provisions of clause 3 will stay in force after the Commission has been wound up).

**Justification of the level of Parliamentary Scrutiny**

1. In the light of the important work of the Commission and the degree of public interest in its operation, it is considered that the affirmative resolution procedure is appropriate in relation to scrutinising decisions in relation to the winding up of the Commission.

**Clause 8 and Schedule 2: Undertaking by members of the Assembly and Transitional Provision:**

*Power conferred on: (1) The Northern Ireland Assembly, and (2) the Outgoing Speaker or Acting Speaker of the Northern Ireland Assembly*

*Power exercisable by: (1) Resolution of the Northern Ireland Assembly, and (2) no procedure*

*Parliamentary Procedure: No procedure*

**Introduction**

1. Clause 8 creates a new section 40A in the Northern Ireland Act 1998, which establishes a new undertaking to be taken by Members of the Legislative Assembly (“MLAs”) as a condition of their participation in proceedings of the Assembly and their having any of the other rights and privileges enjoyed by members of the Assembly who have taken their seats. Subsection (2) of clause 40A states that the procedure for giving the undertaking shall be set out in Assembly standing orders.
2. However there is insufficient time for the Assembly to set out this new process in its standing orders in time for the 2016 election. Making transitional provision through this Bill, in consultation with the Executive and Assembly, is therefore a practical solution to ensure that a workable process is in place for MLAs elected at the 2016 election to take the new undertaking. Paragraph 2(2) of Schedule 2 states that the transitional procedure for MLAs taking the new undertaking will be determined by the person who under the Assembly’s standing orders, takes the chair at the first meeting of the new Assembly.

**Effect of the provision**

1. Section 41(1) of the Northern Ireland Act 1998 sets out that the Assembly has the power to regulate its proceedings by standing orders. Subsection (2) of clause 40A clarifies that this power applies in relation to the procedure for taking the MLA undertaking.
2. The effect of paragraph 2(2) of Schedule 2, when read in conjunction with Assembly standing order 3 (which sets out the procedure for the first meeting of a new Assembly), is that either the outgoing Speaker of the Assembly or the acting Speaker (the oldest member present at the first meeting of the Assembly) should the outgoing Speaker be unable to act, will have responsibility for deciding the transitional procedure.
3. The transitional procedure and authority under paragraph 2(2) of Schedule 2 relate to the 2016 election only. Thereafter the provisions of subsection (2) of the new clause 40A will have effect, and the Assembly will determine the process through a change in standing orders.

**Justification of the Delegation**

1. Subsection (2) of clause 40A is not a new delegation of power – the Assembly already has the power under section 41(1) of the Northern Ireland Act 1998 to regulate its proceedings by standing orders. It is appropriate and desirable for the Assembly to set its own process in this instance, rather than this being provided in legislation. The scope of delegation is in any case narrow.
2. The conferral of power to the outgoing Speaker (or acting Speaker) alone at paragraph 2(2) of Schedule 2 is required as a practical measure to ensure that a workable process is in place in time for MLAs elected at the 2016 election. For the same reasons as outlined above, it is desirable to delegate this power to the outgoing or acting Speaker as a representative of the Assembly so that the Assembly can (so far as possible) manage its own procedures. As a safeguard, sub-paragraphs (3), (4) and (5) of paragraph 2 of Schedule 2 set out specific requirements for the transitional procedure to be implemented.

**Justification of the level of Parliamentary Scrutiny**

1. The standing orders of the Northern Ireland Assembly are not subject to Parliamentary procedure. Similarly, it would not be necessary or appropriate for the transitional process set by the outgoing or acting Speaker to be subject to Parliamentary scrutiny.

**Clause 11(3) : Commencement**

*Power conferred on: Secretary of State*

*Power exercisable by: Regulations made by statutory instrument*

*Parliamentary Procedure: No procedure*

**Introduction**

1. Clause 10(3) allows the Secretary of State to make regulations to commence the provisions in the Bill that will not already commence on Royal Assent.

**Effect of the provision**

1. Clause 10(3) enables the Secretary of State to commence the provisions of the Bill that do not commence on Royal Assent by way of commencement regulations. Clause 10(4) allows for provisions to be commenced on different days for different purposes.

**Justification of the Delegation**

1. Clauses 6 to 8, the Schedule, and clause 10 of the Bill will commence on Royal Assent. The power to commence the other provisions of the Bill by way of commencement regulations therefore attaches to the provisions in relation to the Commission and the provision in relation to financial responsibility. The flexibility in timing provided will enable the Secretary of State to commence the provisions in relation the Commission at the appropriate time to enable the Commission to be established and start its work. It will also enable the provision in relation to financial responsibility to be commenced at the most appropriate time.

**Justification of the level of Parliamentary Scrutiny**

1. It is usual for commencement regulations to be subject to no Parliamentary procedure. The expectation is that primary legislation that has been debated by Parliament will be brought into force by the Government at the most convenient time.
1. <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/479116/A_Fresh_Start_-_The_Stormont_Agreement_and_Implementation_Plan_-_Final_Version_20_Nov_2015_for_PDF.pdf> [↑](#footnote-ref-1)