

PIVOTAL
B R I E F I N G

7 FEBRUARY 2023

WHO IS GOVERNING NORTHERN IRELAND?

PIVOTAL - THE INDEPENDENT
PUBLIC POLICY THINK TANK FOR
NORTHERN IRELAND

INTRODUCTION

Northern Ireland has not had an Executive for over a year. The First Minister resigned on 3 February 2022, leaving Departments with caretaker ministers but no Executive. On 28 October, these caretaker ministers ceased to be in post. This Briefing looks at who is now taking decisions in Northern Ireland, and considers the implications for government and local public services.

Caretaker ministers were unable to take forward any new policies or legislation. A main casualty of this was the failure to agree a Budget for 2022-23 (although noting that there was not political agreement on the draft Budget that had been put out for consultation). No Speaker was elected after the May election, meaning no Assembly or Committees, apart from a few special sittings.

Since 28 October, decision-making in Northern Ireland has fallen to either the Secretary of State or to civil servants who possess fewer powers than the caretaker ministers. This is similar to the three year period between 2017 and 2020, but in a much more challenging context. There is no agreed Budget or Programme for Government for civil servants to follow. Severe pressures on public services, particularly health, are combined with growing strain on departmental budgets. All this is happening in the midst of a cost-of-living crisis that is deeply affecting many households and businesses.

There is an ongoing legal requirement for the Secretary of State to call a new Assembly election, to take place by 13 April. However, the current approach seems to give time and space for a resolution in the Protocol talks, which might enable the establishment of the Assembly and Executive elected in May 2022.

This Briefing looks at who can make decisions at present and explores what decisions have been made in recent months. It concludes with some suggestions on ways to proceed. As an independent think tank, Pivotal does not take a view on the politics of the current situation, but instead is concerned about the implications for public services and effective government here.

WHO CAN TAKE DECISIONS NOW?

The powers of the Northern Ireland Assembly and Executive are devolved from the UK Parliament, and as confirmed in the [Memorandum of Understanding](#) in 2013: “The United Kingdom Parliament retains authority to legislate on any issue, whether devolved or not.” Normally, Westminster does not legislate on devolved matters (the Sewel Convention), but there is no alternative legislature in the absence of a functioning Assembly and Executive, and some actions can only be taken forward by legislation. However, unless some specific legislative provision exists, the Secretary of State does not have the power to direct executive functions devolved to the Northern Ireland Departments, and hence he cannot address the many day-to-day decisions that are part of the business of government.

The Secretary of State has taken decisions on specific major issues

In the absence of a Northern Ireland Executive, Assembly and ministers, the UK Government has said it will take the steps necessary “to maintain the delivery of public services, protect the interests of the people of Northern Ireland and protect public finances” and that it “will keep under review the need for any additional necessary Northern Ireland legislation that may need to be brought before Parliament” (see [Guidance on decision-making for Northern Ireland Departments](#), paras 3 and 4).

DECISION-MAKING IS LIMITED AND NOW FALLS TO EITHER THE SECRETARY OF STATE OR CIVIL SERVANTS

The [Northern Ireland \(Executive Formation etc\) Act 2022](#) (EF Act) enabled the Secretary of State to postpone the requirement to call a new Assembly election for 12 weeks, to extend the powers of civil servants, to reduce MLA pay, to set the regional rate for 2023-24 if needed, and to make some public appointments.

In his [Written Ministerial Statement](#) on 24 November, the Secretary of State set out Budget allocations for Departments for 2022-23, and he has subsequently introduced the [legislation](#) needed to put this Budget into effect. He strongly criticised Executive ministers’ failure to stay within annual funding allocations and the absence of public sector reform over many years.

The Budget divided the available funding between Northern Ireland’s Departments, but left civil servants to determine spending within each Department. Huge concerns have been raised about the Budget’s implications for public services, particularly in education, justice and health.

Civil servants were given limited extra powers to take decisions in the public interest

Following the collapse of the Executive in 2017, the legal basis for day-to-day executive decision-making by civil servants was tested in the courts. In the [Buick judgement](#) of 2018, the High Court and Court of Appeal ruled that civil servants do not have authority to take decisions that would normally go to the minister. This led to [legislation](#) at Westminster in 2018 to clarify the scope and limits of civil servants' decision-making powers, but this was [repealed](#) in 2022.

On 21 November 2022, the Secretary of State introduced the [EF Act](#) which repeated the approach taken in the legislation in 2018. The EF Act said that the absence of 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”, for a period of six months. This gives civil servants legal authority to take some necessary decisions during this time.

CIVIL SERVANTS CAN MAKE SOME DECISIONS, BUT SHOULD NOT MAKE CHOICES THAT WOULD NORMALLY BE MADE BY A MINISTER

The [Guidance](#) accompanying the EF Act provides principles to guide decision-making, the first of which is that “some decisions should not be taken by civil servants without the direction of elected ministers.” Its other principles are: keep within spending limits; act where necessary to avoid detrimental consequences; maintain the policy direction previously set by ministers; and maintain the sustainable, effective and efficient delivery of public services.

A monthly summary report of decisions using the above guidance is to be provided by Northern Ireland Departments to the Secretary of State. This will give information about where civil servants have taken decisions, and also where they have not made a decision because it needs to be taken by a minister instead. The first of these reports is due to be published soon.

WHAT DECISIONS ARE BEING MADE?

Examples of actions and decisions taken since 28 October are set out below.

Northern Ireland Office

The Secretary of State has acted to set a Budget for Northern Ireland Departments for 2022-23. This was taken forward in the [Northern Ireland Budget Bill](#) which also enables spending by Northern Ireland Departments to continue after the start of 2023-24.

The Secretary of State has said that he will set a Budget for 2023-24 if the Executive is not restored in time. He said his aim would be to put Northern Ireland's finances on a sustainable long-term footing, including considering wide-ranging options for revenue raising and reviewing all spending (see [Written Ministerial Statement](#)). Options include the introduction of water charges and/or higher regional rates to ensure a balanced budget.

The [EF Act](#) enables the Secretary of State to:

- Extend NICS powers to make decisions in the absence of ministers (as set out above)
- Set the regional rate for 2023-24, if necessary
- Cut MLAs' pay
- Make some public appointments

THE SECRETARY OF STATE HAS SAID HE WILL SET A BUDGET FOR 2023-24 IF AN EXECUTIVE IS NOT RESTORED

Northern Ireland Departments

The normal business of government has continued across all departments, through the day-to-day management of public services, publication of research and statistics, consultations and guidance, and recruitment to some board positions.

On more major decisions, a [statement by The Executive Office](#) in December emphasised the limitations on civil servants' actions, highlighting the Buick judgement's ruling that civil servants should not make decisions that would normally be taken by the minister. In a [media interview](#) in late November, the Head of the Civil Service said that significant decisions would be considered on a case-by-case

basis, seeking legal advice where needed about civil servants' powers. She emphasised that it was in the public interest for politicians to make major decisions, not civil servants.

One area where civil servants have been left with no option but to make significant decisions is in implementing the Budget set for each department by the Secretary of State. Officials have made choices about how funding will be divided within each department. This has involved very difficult decisions given the extremely tight settlements, particularly given the funding available for [education](#) and [justice](#).

Many other decisions and actions made by civil servants since 28 October are a continuation of previous policies, but at least some of them would have been taken by ministers had they been in post. Examples include:

- Department for the Economy: [statement about independent review of Invest NI](#)
- Department of Education: [funding for Engage III to support learning following lockdowns](#)
- Department of Education: [proposals for expansion and closure of particular schools](#)
- Department of Finance: [published public sector pay policy](#) and [made pay offer to Northern Ireland Civil Service](#)
- Department of Finance: [draft outcome of business rates re-evaluation](#)
- Department of Health: [public messaging](#) and [media interviews](#) about pressures on Emergency Departments and GP access, and the need for reform in health and social care

Civil servants are also spending time preparing for the return of ministers so that good groundwork has been done for future decision-making. This includes developing options for a multi-year budget and Programme for Government, as well as looking at longer term 'missions' to address some of Northern Ireland's biggest policy challenges.

AT LEAST SOME OF THE DECISIONS
TAKEN BY CIVIL SERVANTS WOULD
HAVE BEEN TAKEN BY MINISTERS
HAD THEY BEEN IN POST

MLAs and political leaders

MLAs have continued to take forward issues on behalf of constituents, including writing to Permanent Secretaries and the Secretary of State in the absence of ministers. MLAs have continued engagement on different issues, including through All Party Groups.

Political leaders have written individually or jointly to the Secretary of State and/or Permanent Secretaries urging action on particular issues, for example [organ donation legislation](#) and [financial support for local councils](#).

What decisions are not being made?

While some policy choices have moved forward at the direction of civil servants, many have not. These include decisions about the long-overdue reconfiguration of health services, signing off action plans to deliver the commitments in the new Climate Change Act, agreeing the childcare strategy promised in New Decade, New Approach, and publishing an anti-poverty strategy.

A [long list of stalled decisions](#) was published in the Belfast Telegraph on 31 January, including stabilisation of oncology services and breast assessment services, approval of an environment strategy, peatland strategy and green growth plan, sign language legislation, options for re-opening the independent living fund, changes to procurement policy, funding for victims' payments, agreement of a refugee integration strategy, and a wide range of regulations, consultations and public appointments.

Comparing what civil servants have been able to do with decisions that have not been taken makes clear both the extent of Northern Ireland's current policy inertia and the impact it will have across a wide range of areas which affect people's day-to-day lives. This will only get worse as time goes on.

THE LIMITS ON WHAT CIVIL
SERVANTS CAN DECIDE MEAN THAT
MANY IMPORTANT ISSUES ARE NOT
BEING PROGRESSED

CONSEQUENCES FOR GOVERNMENT IN NI

The absence of proper government means continuing deterioration in public services

Most decisions that are new, significant, cross-cutting or controversial are not being made. As time goes on, this lack of decision-making becomes increasingly problematic and risks further deterioration in public services, most obviously in the health system, but also, for example, in education, infrastructure, planning and justice. The absence of a previously agreed Budget and Programme for Government means that civil servants have a limited work-plan to follow. These impacts are made worse by the legacy of no government between 2017 and 2020 and the Covid period that followed, resulting in an ever-accumulating amount of overdue decisions and legislation.

Decision-making is piecemeal, restricted and uncertain

In the absence of an Executive and ministers, it is not clear who - if anyone - is responsible for making significant decisions. There is no legislative basis for many significant decisions to be taken by anyone at the present time. The [Guidance](#) under the [EF Act](#) limits what civil servants can decide, and the Secretary of State has said that he is leaving decision-making for the return of locally elected representatives. Civil servants can use their increased powers to act in the public interest but remain constrained by not being able to take decisions that would normally go to a minister. This leaves them approaching issues with caution, wary of over-reaching their remit and alert to the risk of legal challenge.

THERE IS NO LEGISLATIVE BASIS FOR MANY SIGNIFICANT DECISIONS TO BE TAKEN BY ANYONE AT THE PRESENT TIME

There is a tension between the different parts of the guidance for civil servants

The first principle in the [Guidance on decision-making](#) is that major decisions should be left for ministers (e.g. a new policy, programme or scheme, including major public expenditure commitments). However, particularly in the current tight budgetary context, it is inevitable that civil servants will be faced with decisions that would normally be taken by ministers, for example deciding how to split their funding allocation between the different responsibilities of their department, making pay offers, or deciding on the future of a service that is no longer sustainable. There is an inherent tension in this guidance, with civil servants often being pulled in two directions at once.

The budgetary position is dire, compounding the need for effective and accountable decision-making

The 2022-23 Budget is an extremely tight settlement for all Departments. Professional bodies and other representative groups in [education](#), [health](#), [policing](#) and the third sector have voiced their extreme concerns about how this will impact on the delivery of services. The pressures on the budget this year have been partly addressed by bringing forward £330 million from next year, making next year's budget even more challenging. A former Head of the Civil Service has estimated [next year's funding pressures](#) to be around £1 billion. The budgetary position at present makes this period without government much more challenging than 2017 to 2020.

Multi-year budgets and longer-term strategic planning are urgently needed

Multi-year budgets and longer-term planning are long overdue. Public services and organisations receiving public funding need the stability of a longer-term budget in order to plan for investment and reform. However, Northern Ireland has not had a multi-year budget since 2011-15. The current situation offers short-term funding fixes at best. Little or no progress is being made on important longer-term priorities like climate change, tackling poverty, childcare and regional inequality.

MULTI-YEAR BUDGETS ARE
ESSENTIAL TO GIVE THE STABILITY
NEEDED FOR PLANNING,
INVESTMENT AND REFORM

There is an absence of democratic accountability, with civil servants given responsibility far beyond their job role

Decision-making in a democracy should be the responsibility of those elected, who are then held to account by the public at the ballot box. At present, Northern Ireland has a situation where a few decisions are being taken by the UK Government, and others are being taken by Northern Ireland civil servants without any democratic accountability. This is unavoidable at present if public services are going to continue to function. Civil servants have to make decisions in order to manage spending within their budgets, but this gives them responsibility far beyond their usual role of providing advice to assist elected ministers in making decisions.

There is little transparency and scrutiny in decision-making

The Assembly and its Committees normally provide an opportunity for MLAs to question ministers and civil servants and hold them to account. At present these are completely absent. Without ministers

in post, some MLAs are writing to Permanent Secretaries or the Secretary of State about particular issues, but there are no formal accountability or reporting mechanisms. Some civil servants have provided public statements and media interviews, which has helped get more information into the public domain. These public-facing roles are however not familiar to civil servants.

Political leadership and representation are missing on issues affecting Northern Ireland

Without an Executive or ministers, there is a lack of political leadership on issues affecting Northern Ireland in discussions at Westminster and beyond. This has been seen in the absence of a collective voice on issues like the delivery of the £600 energy support payment (which was delayed but has now been paid in most cases) and the replacement for EU funding schemes.

Public support for devolution could fall further if the institutions continue not to function

Since devolution in 1999, the Assembly and Executive have not been functioning for more than 40% of the time, including for four of the last six years. This failure to provide government risks undermining the credibility of the institutions themselves and the public's support for them. Deloitte's recent '[State of the State](#)' report found the Northern Ireland Executive was the least trusted of the four UK administrations.

MOVING FORWARD

Pivotal offers the following suggestions on ways to proceed:

- ▶ All concerned should focus their efforts on the urgent restoration of the Assembly and Executive. While this would not solve all Northern Ireland's problems, it would enable decisions to be made in a way that is timely, planned and democratically accountable. To that end, the UK and Irish governments and the local political parties should continue to prioritise the return of devolution.
- ▶ The recent signs of progress in the UK/EU Protocol talks are very welcome. All involved should recognise the importance of successful resolution, given the growing negative impact of the absence of the Assembly and Executive on public services in Northern Ireland.
- ▶ Greater attention needs to be given to providing effective government in Northern Ireland. There has not been an Executive and Assembly for more than four of the last six years, meaning limited and piecemeal decision-making in the midst of a multitude of immediate and longer term challenges. Without effective government, public services deteriorate and people bear the cost of this in their day-to-day lives.
- ▶ If the period without an Executive and Assembly continues, the UK Government should consider how to ensure that important decisions can be taken to prevent the further deterioration of public services here. While legislating in Westminster would be against the principle of devolution, it could ensure the improved delivery of essential services.
- ▶ The Budget setting process for 2023-24 should recognise the enormous pressures facing public services here, with a detailed analysis of prioritisation between different funding programmes and potential revenue sources.
- ▶ Northern Ireland urgently needs multi-year budgets to address its immediate and longer term problems. Repeated single-year budgets do not allow the much-needed planning, investment and reform in public services.
- ▶ Permanent Secretaries should look for opportunities to provide more information about their Departments' activities in the absence of ministers, for example through progress reports, oral briefings or media interviews. This would help increase understanding about the current position on important policy areas, as well as providing some opportunities for scrutiny and accountability.
- ▶ In the absence of an Executive and Assembly, those outside government in civic society, business and academia must re-double their efforts to raise issues, develop ideas, press for change and work collaboratively to promote good decision-making.