

PIVOTAL
B R I E F I N G

17 OCTOBER 2022

GOVERNING
WITHOUT
MINISTERS -
NORTHERN
IRELAND AFTER
28 OCTOBER

PIVOTAL - THE INDEPENDENT
PUBLIC POLICY THINK TANK FOR
NORTHERN IRELAND

INTRODUCTION

For over eight months, Northern Ireland has had ‘caretaker’ ministers but no proper government. After the 28 October deadline for forming an Executive, these ministers will no longer be in post and the law as it stands requires an election to be called.

Disagreements about the Northern Ireland Protocol sit behind the failure to form an Executive following May’s election. These disagreements are not the subject of this paper, which instead considers the implications of there being no Executive or ministers, possibly for a prolonged period.

The [Northern Ireland \(Ministers, Elections and Petitions of Concern\) Act 2022](#) (MEPOC) provided a period of 24 weeks from the first Assembly sitting (in this case, 13 May) for an Executive to be formed, during which time previous ministers stayed in post as caretakers. This period ends on 28 October.

In the absence of a First Minister and deputy First Minister, these caretaker ministers have run their departments in line with previous policies. They are unable to do anything that is new, significant, cross-cutting or controversial which would require Executive agreement (see Pivotal’s previous Briefing [Governing Northern Ireland without an Executive](#)). This means, for example, no Budget or programme for government has been agreed - two fundamental elements of any normal government’s plans.

After 28 October, the MEPOC 2022 Act says that the Secretary of State must call an election to take place within 12 weeks (in practice between 8 December and 19 January). Ministers will no longer be in post, leaving only civil servants to take decisions. However, under the current law their powers will be limited and unclear, even more than during the previous three-year period without ministers (March 2017 to January 2020).

This is all happening amidst the escalating cost of living and severe pressures on public services - including lengthy health waiting lists, overwhelmed Emergency Departments and squeezed school budgets - alongside longer-term challenges like the need for health service reform, infrastructure investment and action on climate change.

This briefing paper provides information about how government is working in Northern Ireland and how that will change in the coming weeks. As an independent think tank, Pivotal takes no position on the politics of the situation. The paper ends with ideas for how best to proceed.

WHAT CHANGES AFTER 28 OCTOBER?

Until 28 October, caretaker ministers can lead their departments but with a restricted remit

In the absence of an Executive to collectively sign off any new or significant decisions, ministers must only act in line with previous policies. Examples of ministers' actions in recent months include plans to help reduce health waiting lists, summer holiday food grants for low-income families, working with the UK Government on energy support schemes and a mental health strategy delivery plan. There has been active lobbying of the UK Treasury about the inadequacy of the Northern Ireland block grant in the face of growing financial pressures.

After 28 October, civil servants will be in charge but with limited and unclear powers

If no Executive is formed by 28 October, caretaker ministers will cease to hold office, leaving civil servants in charge. Civil servants' powers to make decisions in these circumstances were left in question by a successful challenge to a major planning decision about an incinerator, taken in 2017 in the absence of ministers. In 2018 [the High Court and the Court of Appeal](#) ruled that officials did not have authority to take decisions that would normally go to the minister. Later that year civil servants' powers were increased by new legislation in Westminster through the [Northern Ireland \(Executive Formation and Exercise of Functions\) Act 2018](#) (EFEF), but these provisions were repealed in MEPOC 2022.

Legislation says the Secretary of State must call a new Assembly election

The MEPOC 2022 Act is clear that the Secretary of State must call an election to take place within twelve weeks, if an Executive is not formed by 28 October. However, between March 2017 and January 2020, the UK Government repeatedly used legislation to postpone any requirement for an election. While the wording in MEPOC 2022 is strong about the obligation to call an election, this could still be postponed by further legislation. Many commentators on Northern Ireland politics would question how realistic it is to expect another election to help resolve the current political impasse. Any new legislation could also extend the period that caretaker ministers remain in post beyond 28 October although, since their appointment derives from the previous Assembly mandate, their legitimacy might increasingly be questioned.

No Budget or programme for government

Meanwhile, Northern Ireland still does not have a Budget for 2022-23 or a programme for government, [since both must be agreed by an Executive](#). Departments are receiving funding for this year via emergency arrangements which allow the Department of Finance Permanent Secretary to allocate up to 95% of the previous year's budget to each department ([see Section 59 of Northern Ireland Act 1998](#)). There are currently [huge pressures on departmental budgets](#), in large part due to rising pay and energy costs. There are growing calls for greater support to help households with the [rising cost of living](#).

Passing legislation in the UK Parliament

When there was no Executive or ministers between 2017 and 2020, the UK Government stepped in to bring forward essential legislation, for example passing budgets, setting property rates and making some public appointments. However, Westminster was reluctant to intervene on devolved matters, so this only happened on unavoidable issues.

Civil servants are continuing to prepare for proper government

Since February, civil servants have been supporting ministers in their caretaker roles and preparing for an incoming Executive. A draft programme for government is being developed and a number of working groups are being held with political parties. This internal planning work can continue after 28 October.

MLAs are engaging with constituents and stakeholder organisations but without the normal Assembly procedures in place

MLAs remain in post until a new election is called. They have continued to take forward issues on behalf of constituents, but without regular Assembly sittings and Committee meetings at which to pursue matters with ministers. MLAs have submitted [over 4,500 written Assembly questions](#) to ministers since the May election. MLAs continue to meet with business and third sector groups on relevant issues and some all-party groups have been formed.

Pressures on households and businesses are enormous and people are looking for leadership and support from an Executive

There is growing concern about the multitude of issues affecting people's day-to-day lives. Most obvious of these is the cost-of-living crisis, as households face unprecedented energy and food prices and increasing housing costs. Multiple groups have highlighted the huge financial pressures facing households and businesses this winter. In this context, there have been repeated calls for the return of the Executive from businesses, the third sector and other professional bodies, to make decisions and provide leadership in Northern Ireland.

CONSEQUENCES FOR GOVERNMENT IN NORTHERN IRELAND

Decision-making will be very limited after 28 October

After 28 October, civil servants should be able to act in line with previously agreed policies, but bigger decisions that would have gone to the Executive, needed ministerial approval or required Assembly legislation will not be possible. Examples of what could not be done include setting a Budget, re-allocating funding in-year, developing new funding schemes, adjusting the regional rate, agreeing new cross-cutting strategies or making major changes to how public services are delivered.

In 2018, during the previous Executive collapse, [new legislation](#) allowed civil servants to take decisions that were in the public interest - but these powers were repealed in [MEPOC 2022](#). The UK Government will likely need to act to legislate for some unavoidable decisions, as it did during 2017-20.

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There is a lack of clarity about what civil servants will be able to do

There is no clear legislation or guidance saying what decisions civil servants can take in the absence of ministers. The expectation is that officials should run departments in line with previous policies. This creates an immediate problem since Northern Ireland does not have an agreed programme for government or Budget, so there is no obvious road map to follow.

Moreover, judging what is defined as acting in line with previous policies is not straightforward. [Previous research by the Institute for Government](#) found that the approach taken by civil servants during 2017-20 varied according to the nature of their department's work, the amount of ministerial involvement previously, the level of policy direction in place, and even in some cases the risk appetite

of senior officials. The [successful legal challenge](#) to the incinerator planning decision in 2018 resulted in increased uncertainty about civil service powers, since the judgement said that civil servants should not take any decisions that would, in normal circumstances, be taken by the minister.

The absence of an agreed Budget for 2022-23 is unsustainable

More than six months into the financial year, Northern Ireland still has no Budget for 2022-23. Departments are being funded via emergency arrangements linked to last year's budgets, but this will become insufficient as the end of the year approaches. Re-allocation of unspent funds to higher priorities in-year would normally provide some flexibility, but this cannot be agreed without an Executive. [Around £300 million of additional funding](#) allocated to Northern Ireland by the UK Government cannot be accessed because there is no Executive to agree how it should be spent. Without an Executive, it is inevitable that the UK Government will have to step in with legislation to set a Budget for 2022-23, as happened in 2017, 2018 and 2019.

Ministers are reporting [additional pressures on their departments' budgets totalling £960 million](#), so there is a very high risk of overspending. There are particular concerns about [how public sector pay awards will be funded](#). While it would be naïve to suggest that a restored Executive would be able to resolve all the current budgetary pressures, it would at least ensure that those who were politically accountable were making decisions based on recent evidence, using all available funding.

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Legislation to give more powers to civil servants is possible but might not be desirable

Westminster could legislate to give the Northern Ireland Civil Service increased powers in the absence of ministers, [as happened in 2018](#). While this would help to progress important issues, it would put decisions in the hands of unelected officials without any democratic accountability. Controversial decisions could be challenged legally, as happened in 2018. It might also indirectly serve to prolong the period without an Executive, since decisions would not be delayed by the absence of politicians.

Without an Assembly or ministers, there will be a lack of transparency, scrutiny and accountability

Under normal arrangements, MLAs can scrutinise the work of Ministers and civil servants in the Assembly chamber or through Committees. While this has not been possible in recent months, MLAs have still been able to use limited other routes to question and raise issues with ministers, but this will stop if an election is called. This leaves a serious lack of transparency, scrutiny and accountability in government, including to the public.

Northern Ireland will not be properly represented in wider discussions

Without an Assembly, Executive or ministers, Northern Ireland will be without political leadership or representation. In the context of soaring energy costs, rising interest rates, forecasts of recession, Brexit and other global challenges – and with the new UK Prime Minister pursuing a new economic approach - many will want a strong voice representing the interests of people in Northern Ireland.

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Momentum is being lost on important issues where progress is needed

Lack of proper government means longer-term issues are neglected. Health service reform should be at the top of the list, with efforts to tackle waiting lists only scratching the surface, when fundamental reconfiguration of services is needed. Important steps forward were taken on climate change in the last mandate, but now require action plans. Outstanding commitments from New Decade, New Approach remain unfulfilled, like an anti-poverty strategy, a childcare strategy and infrastructure investment.

MOVING FORWARD

Below Pivotal offers some suggestions on how best to proceed:

- ▶ Northern Ireland needs proper government. The changes after 28 October will mean even less ability to make decisions than was possible with caretaker ministers. Urgent restoration of the Executive and Assembly should be a priority, not least to ensure that households, businesses and public services are supported as effectively as possible through this period of squeezed budgets, escalating costs and uncertainty.
- ▶ A resolution to the outstanding issues about the Northern Ireland Protocol is clearly essential. The impact on ordinary lives of the absence of government in Northern Ireland should be acknowledged by all involved. The recent resumption of negotiations is therefore very welcome.
- ▶ A Budget needs to be agreed for this financial year as soon as possible, to provide departments with greater clarity for the remainder of the year. All funding allocated to Northern Ireland this year needs to be accessible. In the absence of an Executive, Budget legislation will need to be brought forward by the UK Government.
- ▶ If the Secretary of State decides to postpone the requirement to hold an election, the ‘least bad’ option may be retaining caretaker ministers in post, to provide some leadership and accountability. This would be preferable to leaving civil servants in charge.
- ▶ If there is a period without an Executive and ministers, consideration should be given to legislation in Westminster that would allow civil servants to make more decisions. This would mean some important issues could be progressed. However, any new powers for civil servants must be carefully balanced with the need for democratic accountability.
- ▶ Whether or not they are given increased powers, guidance is needed about what civil servants can and cannot do in the absence of an Assembly, Executive and ministers. This will be important to provide clarity for decision makers and for those outside government.
- ▶ Steps should be taken to provide some transparency and scrutiny in the absence of an Executive, Assembly and ministers - for example oral or written briefings by civil servants, regular progress reports and ways for the public to raise questions and issues in the absence of MLAs.
- ▶ In the absence of an Assembly or Executive, those outside politics – the public, civil society and business – should continue to raise issues, develop policy ideas, press for change and work collaboratively to promote good decision-making.