

From the Minister of Finance

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Your reference:
Our reference: *GM 1158 2020*
Date: *27th April 2020*

Dear Steve,

FUNCTIONING OF GOVERNMENT (MISC. PROV.) BILL

Thank you for your invitation to the Department of Finance, and to the Head of the Civil Service and the Permanent Secretaries of other departments, to submit written evidence on the Functioning of Government (Misc. Prov.) Bill. I am able to provide some general comments, and a clause-by-clause response (attached as an Annex).

This Bill comes after the work completed by the Executive in reviewing and revising the *Ministerial Code of Conduct*, the *Code of Conduct for Special Advisers*, the *NICS Code of Ethics*, and associated documents, much of which was progressed as part of the political talks process prior to the formation of the Executive. This submission therefore reflects a position taken by the Executive collectively in recent months.

These documents have all now been published, save the revised NICS Code of Ethics which is subject to consultation with the civil service unions. I attach a copy of the current draft, for information, but intend to provide the final version shortly.

In general, the Bill seeks to put into primary legislation matters that are being addressed through Codes of Conduct and Guidance. Having rules on the standards of behaviour for Ministers and civil servants including special advisers is critical, and it is very important that those rules are observed and enforced. But it is also important that those rules are amenable to interpretation and the application of judgement, and that the rules can be developed and enhanced as circumstances require. Putting these standards of behaviour into primary legislation would rule out the kind of responsiveness and judgement that is required to make rules effective in fast-moving and complex environments.

The problems of legislating in this area are magnified where the Bill proposes to create new criminal offences. The use of non-official electronic systems and the unauthorised disclosure of official information is something the Executive takes seriously and this is now covered in the Ministerial and Special Advisor Codes of Conduct. The Executive believes these matters can best be addressed administratively in accordance with these. Peter May has written to you separately on the issue of potential criminal proceedings.

I would also raise concerns about the drafting of the Bill, which contains a number of undefined terms, and problems of consistency and accuracy, and would support the work of the Committee in examining where the drafting risks unintended consequences.

Is mise le meas,

A handwritten signature in black ink that reads "Conor Murphy." The signature is written in a cursive, flowing style.

**CONOR MURPHY MLA
MINISTER OF FINANCE**

Functioning of Government (Miscellaneous Provisions) Bill

Clause	Effect	Comment
1(2)	Limits the current power of special advisers to manage other special advisers, so that only TEO special advisers have this power.	At present, only FM and dFM special advisers can form groups with an internal hierarchy, since all other special advisers are sole appointments, directly responsible to the minister who appoints them.
1(3)	<p>Makes special advisers subject to NICS disciplinary processes and procedures, without involvement or interference of ministers.</p> <p>Makes ministers responsible for the management and conduct of their special advisers, including their adherence to the code of conduct</p>	<p>The revised Special Advisor and Ministerial Codes of Conduct make clear that Ministers are responsible and accountable for the conduct and discipline of their special advisers.</p> <p>The application of NICS disciplinary processes to special advisers is set out at paragraph 39 of the Annex to the <i>Letter of Appointment</i>.</p> <p>As temporary civil servants, NICS disciplinary processes may be applied to special advisers, but may need to be modified to take account of the special status of special advisers. In particular, the disciplinary processes assume a civil service line manager and a chain of line management, which special advisers will not have.</p> <p>There are some problems with the drafting of clause 1(3). Following its current drafting, the two provisions are incompatible. The Minister would be able to delegate some tasks within the disciplinary processes to a civil servant, but any decision to discipline can only be taken by the Minister, as the individual responsible for the management of the special adviser. The Minister must, therefore, be involved for the procedures to be effected.</p>

1(4)	Renders ineffective any appointment of a special adviser that does not adhere to the statutory Code for Appointment	An appointment that does not meet the provisions of the Code would not be lawful.
1(5)	Prevents any special adviser being paid more than the highest rate for a Grade 5 civil servant	<p>This provision is broadly in line with what has already been achieved without legislation.</p> <p>The new arrangements for special adviser pay set a maximum of £85,000. The Grade 5 maximum is currently £80,847. No special adviser is currently paid more than the Grade 5 maximum.</p> <p>Under the new arrangements, the Department of Finance will take decisions on pay, rather than pay being set in agreement with Ministers. In practice, pay is set by officials and does not involve the Minister of Finance. The annual pay bill and salaries of special advisers will be published pro-actively with individual salaries for those in PB2 and PB3 published.</p>
1(6)	<p>Seeks to ensure that only a properly constituted special adviser can fulfil the functions of a special adviser.</p> <p>Seeks to prevent any special adviser being answerable to anyone other than their minister (or in the case of a TEO special adviser, another TEO special adviser)</p>	<p>This is already inherent in the Code of Conduct and contract of employment; anything else would be unlawful.</p> <p>There are some problems with the drafting of the first part of this clause.</p> <p>The functions of a special adviser are set out in the <i>Code of Conduct for Special Advisers</i>. Many (but not all) of these functions can be fulfilled by any civil servant. Likewise the 'cooperation, recognition and facilitation due to a special adviser' derives from their status as a civil servants, and is also, therefore, due to other civil servants.</p> <p>As drafted, the clause appears to place a requirement upon the Minister to prevent any other civil servant from fulfilling core functions. Likewise, as drafted, this provision would appear to oblige the permanent secretary to ensure that no other civil servant</p>

		received the cooperation, recognition and facilitation that was their due as civil servants.
2	Limits FM and dFM to one special adviser each	Reducing to one each does not recognise the seniority or weight of the role.
3	Removes the power of FMdFM to make any further special appointment Requires an affirmative resolution order to make any further change the Civil Service Commissioners (NI) Order in future	No appointments have been made under this provision by this administration. This provision is kept under review.
4	Creates a break in the appointment of all special advisers currently in post, so that the new provisions apply from 31 March 2021	This is a practical measure to bring these new provisions into play before the next election.
5	Extends the remit of the Assembly Commissioner for Standards to include the actions of MLAs in their role as Ministers, and breaches of the Ministerial Code	The ACS has a particular role that ought not, in general, to be confused with the function of enforcing ministerial standards. The two Codes are quite different, given the different roles. The independent investigation function that has been agreed by the Executive provides for the involvement of the ACS as an <i>ex officio</i> member of the Ministerial Standards Panel, to be called upon when required.
6	Requires civil servants to keep accurate written records of ministerial meetings, including attendees, date and time, topics discussed, every ministerial indication of intent, and every decision and action point	The requirement upon civil servants to keep accurate official records, including minutes of ministerial meetings is contained in the revised NICS <i>Code of Ethics</i> . The Code does not set out the degree of detail contained in this clause, which appears to be unnecessarily specific.

7	Requires ministers and special adviser to record all meetings with non-departmental personnel about departmental matters, except for party political meetings.	<p>The <i>Guidance for Ministers</i> sets out that Ministers must 'ensure that records of ... meetings are maintained'.</p> <p>Special Advisers are obliged to abide by the <i>NICS Code of Ethics</i> which includes the requirement upon civil servants to keep accurate official records, including minutes of ministerial meetings.</p>
8	Requires a civil servant to attend and retain a record of every meeting of a minister or special adviser with non-departmental personal about departmental matters, except for party political meetings.	<p>The revised <i>NICS Code of Ethics</i> requires civil servants to 'keep accurate official records, including minutes of ministerial meetings'.</p> <p>There are a number of points on which the drafting of clauses 6, 7 and 8 is not clear.</p> <p>Some clarity would be needed to set out the distinction is between a meeting on 'departmental matters' and 'in departmental service'; also, some distinction may be needed between 'the Civil Service' and individual civil servants; it is not clear what ought to constitute a 'meeting'; it is not clear what distinguishes 'making and keeping a written record' from 'logging and retaining a record' or 'taking a contemporaneous note'.</p> <p>It is not clear why a Minister is obliged to log and retain a record of a meeting at which a civil servant must have been in attendance and obliged to make and keep a record; and it is not clear whether the civil servant required in attendance at a meeting can be the special adviser, since the special adviser is a civil servant. (This distinction between a civil servant and a special adviser is made throughout the Bill).</p>
9	<p>Makes it a criminal offence to use anything other than departmental systems and email accounts when communicating on government business.</p> <p>Allows a defence of 'reasonable excuse'.</p>	<p>The <i>Guidance for Ministers</i> states:</p> <p><i>Ministers must use official email systems for all communications relating to official business. Exceptionally, where this is not possible, the Minister must copy any message to their official email account. Information generated in the course of government</i></p>

	Creates a maximum penalty of two years' imprisonment	<p><i>business must be handled in accordance with the requirements of the law ... regardless of how it is communicated.'</i></p> <p>The Code of Conduct for Special Advisers states:</p> <p><i>Special Advisers must use official email systems for communications relating to official business. Exceptionally, where this is not possible, the Special Adviser must copy any message to their official email account. Information generated in the course of government business must be handled in accordance with the requirements of the law (including the Freedom of Information Act (Fol), GDPR and Public Records Act), regardless of how it is communicated.</i></p> <p>The NICS has a Use of Electronic Communication policy which recommends that private email addresses are not used for business purposes and highlights that information held in non-work personal email accounts may be subject to the FOI.</p> <p>The creation of criminal offences does not form part of the current policy.</p> <p>There are some problems with the drafting of clause 9.</p> <p>This provision refers to 'government business'. It is not clear how extensive this definition may be, or what the consequences of such a broad definition might be. Also, there is no definition of 'departmental systems'. No electronic communication is likely to take place on wholly departmentally-controlled or departmentally-owned systems. This clause could have the effect of criminalising all electronic communication by Ministers and civil servants.</p>
10	Requires the creation and publication of a register of interests for ministers and special advisers.	<p>The <i>Guidance for Ministers</i> sets out:</p> <p><i>Upon assuming office, Ministers will complete the Ministerial Declaration of Interest Framework document (Annex) and make a full declaration of all interests which might be thought to give rise to</i></p>

		<p><i>a conflict. ... a statement covering relevant Ministers' interests will be published twice yearly.</i></p> <p>The <i>Code of Conduct for Special Advisers</i> sets out:</p> <p><i>Special advisers must, at all times, ensure that no conflict arises, or could be perceived to arise, between their public duties and their private interests, financial or otherwise, and comply with NICS rules and departmental procedures concerning conflicts of interest. The Declaration of Interest form attached should be completed by Special Advisers upon appointment.</i></p> <p>Special advisers' relevant interests will be published.</p>
11	<p>Makes it a criminal offence for a minister, special adviser or civil servant to pass confidential or commercially sensitive information for the benefit of anyone else.</p> <p>Creates a maximum penalty of five years' imprisonment</p>	<p>The Ministerial Code of Conduct states that:</p> <p><i>A Minister must at all times ... adhere to the rules regarding the management of official information. This includes rules on disclosure.</i></p> <p>The Guidance for Ministers states:</p> <p><i>Ministers have a personal responsibility to safeguard the integrity and confidentiality of official papers, including Executive papers. Failure to maintain good security can cause damage to the interests and reputation of the Executive Committee and Northern Ireland departments, and may prejudice the effective conduct of official business.</i></p> <p>The Code of conduct for Special Advisers states:</p> <p><i>Special advisers should not disclose official information which has been communicated in confidence on official business or received in confidence from others. The preparation or dissemination of inappropriate material or personal attacks has no part to play in the job of being a special adviser as it has no part to play in the conduct of public life. Any special adviser found to be disseminating</i></p>

		<p><i>inappropriate material will be subject to a disciplinary process that may include dismissal.</i></p> <p>The NICS Code of Ethics states that civil servants (including special advisers) <i>must not disclose official information without authority.</i></p> <p>There are problems with the drafting of this clause,</p> <p>The provision refers to documents that are 'confidential'. There is no longer any 'Confidential' classification. Without a formal definition, the ordinary meaning of the word confidential would apply, and arguably all 'Official' classified information may be considered confidential to some degree. The clause as drafted may have the effect of criminalising the communication of any official information, even between departments, ministers and civil servants about issues that might be of benefit to anyone, including members of the public. It would thereby render all internal collaboration and communication on the business of government potentially criminal.</p> <p>Even if the definition of 'confidential' is narrowed, it is not clear how this provision is meant to interact with the Freedom of Information Act.</p>
12	<p>Requires the FMdFM to publish a biennial report on the functioning of government, following consultation with the Civil Service Commissioners, the Public Services Ombudsman, the Audit Office and the Commissioner for Public Appointments.</p> <p>Requires FMdFM to bring forward proposals to improve the functioning of government.</p>	<p>The bodies listed already all publish annual reports, which will as necessary make recommendations for improving the functioning of government.</p>

NORTHERN IRELAND CIVIL SERVICE CODE OF ETHICS

The Civil Service

1. The Civil Service is an integral and key part of government in Northern Ireland. Its role is to support Ministers and the Executive as a whole in developing and implementing their policies, and in delivering public services.
2. Individual civil servants are accountable to their Department's Minister, who in turn is accountable to the Assembly.
3. Civil servants, as holders of public office, are expected to uphold the seven principles of public life.

Civil Service Values

4. As a civil servant, you are appointed on merit on the basis of fair and open competition. You are expected to carry out your role with dedication and a commitment to the Civil Service and its core values: integrity, honesty, objectivity and impartiality. In this Code:
 - "integrity" is putting the obligations of public service above your own personal interests;
 - 'honesty' is being truthful and open;
 - 'objectivity' is basing your advice and decisions on rigorous analysis of the evidence; and
 - 'Impartiality' is acting solely according to the merits of the case and serving equally well Ministers of different political persuasions.
5. These core values support good government and ensure the achievement of the highest possible standards in all that the Civil Service does. This in turn helps the Civil Service to gain and retain the respect of Ministers, the Executive, the Assembly, the public and its customers.
6. This Code sets out the standards of behaviour expected of you and other civil servants. These are based on the core values set out in paragraph 4.
7. Individual departments may also have their own separate mission and values statements based on the core values, including the standards of behaviour expected of you when you deal with your colleagues and others.

Standards of Behaviour

Integrity

NICS Code of Ethics - February 2020 – changes highlighted

8. You must:

- fulfil your duties and obligations responsibly;
- always act in a way that is professional **and collaborative** and that deserves and retains the confidence of all those with whom you have dealings;
- make sure public money and other resources are used properly and efficiently
- deal with the public and their affairs fairly, efficiently, promptly, effectively and sensitively, to the best of your ability;
- **keep accurate official records, including minutes of ministerial meetings**, and handle information as openly **and transparently** as possible within the legal framework; and,
- comply with the law and uphold the administration of justice.

9. You must not:

- misuse your official position, for example by using information acquired in the course of the your official duties to further your private interests or those of others;
- accept gifts or hospitality or receive other benefits from anyone which might reasonably be seen to compromise your personal judgment or integrity; or
- disclose official information without authority. This duty continues to apply after you leave the Civil Service.

Honesty

10. You must:

- set out the facts and relevant issues truthfully, and correct any errors as soon as possible; and
- use resources only for the authorized public purposes for which they are provided.

11. You must not:

- deceive or knowingly mislead Ministers, the Assembly, or others; or
- be influenced by improper pressures from others or the prospect of personal gain.

Objectivity

12. You must:

- provide information and advice, including advice to Ministers, on the basis of the evidence, and accurately present the options and facts;
- take decisions on the merits of the case; and
- take due account of expert and professional advice.

13. You must not:

- ignore inconvenient facts or relevant considerations when providing advice or making decisions; or
- frustrate the implementation of policies once decisions are taken by declining to take, or abstaining from, action which flows from those decisions.

Impartiality

14. You must:

- carry out your responsibilities in a way that is fair, just and equitable and reflects the Civil Service commitment to equality, diversity **and inclusion, including** the obligations of your department or agency under Section 75 of the Northern Ireland Act 1998.

15. You must not:

- act in a way that unjustifiably favours or discriminates against particular individuals or interests; **or**
- **harass, bully or engage in any other inappropriate or discriminatory behaviour, or tolerate such behaviour in others.**¹

Political Impartiality

16. You must:

- serve Ministers, whatever their political persuasion, to the best of your ability in a way which maintains political impartiality and is in line with the requirements of this Code, no matter what your own political beliefs are;
- act in a way which deserves and retains the confidence of Ministers, while at the same time ensuring that you will be able to establish the same relationship with those whom you may be required to serve in the future; and
- comply with any restrictions that have been laid down on your political activities.

17. You must not:

- act in a way that is determined by party political considerations, or use official resources for party political purposes; or
- allow your personal political views to determine any advice you give or your actions.

Rights and Responsibilities

¹ The Code does not cover areas outside the core values of the Civil Service, such as personnel management grievances. Such matters should be pursued through the normal channels within Departments

NICS Code of Ethics - February 2020 – changes highlighted

18. Your department or agency has a duty to make you aware of this Code and its values.

19. If you believe that you are being required to act in a way which conflicts with this Code, your department or agency must consider your concern, and make sure that you are not penalised for raising it.

20. If you have such a concern, **including if your concern is about a Minister or a special advisor**, you should start by talking to your line manager or someone else in your line management chain. If for any reason you would find this difficult, you should raise the matter with your department's **speak-up champion**.

21. If you become aware of actions by others which you believe conflict with this Code you should report this to your line manager or someone else in your line management chain; alternatively you may wish to seek advice from your **speak-up champion**.

22. Any concerns can be raised at any time directly with your Permanent Secretary.

23. You should report evidence of criminal or unlawful activity to the police or other appropriate authorities.

24. **Separate arrangements apply for people who are not civil servants wishing to raise matters of concern.² You as a civil servant have a responsibility to take seriously any concern raised with you and ensure that it is properly addressed.**

25. If you have raised a matter covered in paragraphs 19 to 21, in accordance with the relevant procedures, and do not receive what you consider to be a reasonable response from your department or agency, you may report the matter to the Civil Service Commissioners for Northern Ireland. The Commissioners will also consider taking a complaint **directly regarding the actions of civil servants, including special advisers, under the Civil Service Code. The Commissioners will ordinarily expect that internal departmental procedures are exhausted before considering a case. There is a time limit for raising a matter with the Commissioners.** Their address is:

Office of the Civil Service Commissioners for Northern Ireland
Room 105
Stormont House
Stormont Estate
Belfast
BT4 3SH
Tel. 028 90523577
Email: info@nicsscommissioners.org

² [Reference to the Speak Up Guidance – to be confirmed]

NICS Code of Ethics - February 2020 – changes highlighted

26. If the matter cannot be resolved using the procedures set out above, and you feel you cannot carry out the instructions you have been given, you will have to resign from the Civil Service.

27. This Code is part of the contractual relationship between you and your employer. It sets out the high standards of behaviour expected of you which follow from your position in public and national life as a civil servant. You can take pride in living up to these values.

Department of Finance
XXXXX, 2020

DRAFT