

FROM THE OFFICE OF THE MINISTER

Carál Ní Chuilín MLA
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Dear Carál

Thank you for your letter of 17 December 2021 about the ongoing inquiry being undertaken by the Assembly Committee on Procedures into the current procedures and support for Private Members' Bills offered by the Assembly.

I think that a review of the nature and scope of Private Member's Bills (PMBs) is absolutely necessary. I know you had asked for responses to that letter by 7 January 2022, however, this response takes into account recent experience of the stages, including Consideration Stage, of a PMB relevant to the Department of Education. I refer to the Integrated Education PMB introduced by Kellie Armstrong MLA.

I consider that some processes for appropriate checks prior to any PMB being introduced must be established. If we are serious in our intent to protect the statute book and only provide for good legislation then there are improvements to the current process which should be made.

These are as follows:

- i. As I understand it, the requirement for consultation is currently only to inform a Bill sponsor's policy intent. Consultation should be recent – within 6 months of a Bill's introduction seems reasonable - and should relate to a draft of the Bill alongside a plain English explanation of what each provision intends to achieve – more than the Explanatory and Financial Memorandum. Consideration should be given to providing support to a Member to ensure that questions are fully objective and that analysis is free from bias. Any consultation to inform a Bill sponsor's policy intent can still be conducted but no PMB should be able to be introduced without specific, recent consultation on an actual draft (including

the plain English explanation) of it. The consultation, analyses, report and anonymised data should be made available before the PMB is introduced, in the interests of openness and transparency.

- ii. The relevant department should be offered sight of a draft PMB and the opportunity to provide a policy analysis for the Speaker's consideration. If the Bill Sponsor has not sought advice from the relevant department, then the Speaker should seek this input in order to inform the decision on the introduction of the PMB. Time should also be provided for legal advice to be sought as part of this process. The risk of not building in such a step is that PMBs are introduced which have significant impact across a Department's existing policies with potentially far-reaching consequences, and that the Department and the Minister are unsighted. This includes the potential – as with the Integrated Education PMB – to place significant pressure on a finite Departmental budget.
- iii. All potential costs should be adequately outlined in the draft Explanatory and Financial Memorandum and the relevant department provided with an opportunity to assess and provide a view on these – to the Bill sponsor and the Speaker – in advance of the Speaker's decision on the introduction of the PMB. Time invested at the beginning of the process will greatly improve the quality of any PMB coming forward and will increase the understanding of all parties.
- iv. If a PMB is far-reaching and with significant potential costs it should be able to be deemed outside scope of what a PMB should cover and not be introduced. Given that PMBs do not come with guaranteed funding, and that we as elected representatives have a duty to protect the public purse, this step should be a requirement prior to introduction by way of safeguarding value for money considerations.
- v. I would also recommend that a legal analysis is provided by the Assembly's Legal Service prior to a Bill being approved for introduction. A more detailed, legal analysis should also be provided to the relevant Committee at the start of the Committee Stage. Moreover, as amendments are voted through, a legal analysis of the impact and interaction within a Bill and with any existing law should be provided e.g. following Consideration Stage and Further Consideration Stage. This is to ensure that a clear understanding can be provided for MLA's who – in the main – will not have a legal background. The described policy intent behind a clause or clauses in a PMB is not necessarily reflective of the actual impact such provisions will have in practice.
- vi. Again, our focus should be to protect the statute book and the public purse whilst supporting MLA's to bring forward legislation that will actually achieve what they set out to do.

- vii. If any of these pieces of information – in particular legal advice – indicate that a PMB exceeds the stated scope of the change it intends to effect, then it should not pass the test for introduction. Currently the test only seems to relate to legislative competence, which is extremely narrow.
- viii. Once a PMB is introduced then a clear, simple guide to the process should be circulated as a matter of course to each MLA. Such a guide exists in general terms, but it is not my experience that it has been provided as a matter of course. It would also be worth considering providing specific guidance and training relating to PMBs. MLA's need to understand that a vote at second stage debate counts in terms of what can be brought forward at Consideration Stage. MLA's need to understand what can and cannot be brought forward at Further Consideration Stage once voted through at Consideration Stage. It should not be assumed that all MLAs have a detailed knowledge and understanding of the stages of the legislative process and the implications of their voting. Making law is too serious a duty to leave any aspect unclear.
- ix. The Committee Stage should be able to adapt to reflect the complexities of the PMB it is scrutinising. As well as the legal analysis requirement set out at paragraph (v) which must in my view be provided at the start of the stage, the relevant department should have ample opportunity to advise the Committee on issues that arise during its scrutiny. There should be a minimum amount of time provided for Committee members to scrutinise legal advice before being asked to complete their clause by clause analysis/ decision making. Committee members should also be afforded sufficient time to review the Committee report in draft before it is finalised. Ensuring that the report reflects the range of stakeholder views and member's positions fully, particularly where a PMB is complex, is an important part of the scrutiny process.
- x. Consideration should be given to providing more time between the deadlines for tabling amendments and the Consideration/ Further Consideration Stage debate where the number of amendments exceeds a certain level e.g. 40 or where the ratio of clauses to amendments in a PMB is more than a certain level e.g. 1. In relation to the Integrated Education PMB, there were 15 clauses and 71 amendments were tabled. The grouped and marshalled lists were published on the Thursday evening with four groupings. The Consideration Stage debate began on the Monday. The workload involved in preparing for this debate was onerous, within very short timescales, and the debate itself carried on over the course of 3 sitting days. The process should allow sufficient flexibility when the number of amendments clearly indicate that a complex matter is being brought forward by a PMB – although if my points at (iv) and (vii) applied this ought to mean such complex matters are not brought forward as PMBs.
- xi. A Minister should not have to seek Executive approval to instruct the Office of the Legislative Counsel (OLC) to draft amendments to a PMB. Given that approval can be heavily caveated to disagree with the Ministerial policy intent,

it seems logical – and in the interests of managing OLC’s workload – to separate the two aspects. Executive approval for a Minister to instruct OLC should only be considered if the Bill’s contents are cross cutting.

- xii. Separate to that a Minister can still provide the policy intent behind the proposed instructions; provide a copy of the draft instructions; and, discuss these at an Executive meeting if colleagues require. However, in relation to the Integrated Education PMB, despite my originally seeking FM/dFM approval to instruct OLC on 24 November 2021, this approval was only given on 21 December 2021. The impact of this was that OLC professionals worked throughout weekends, late nights and over their Christmas holidays to meet the deadline for tabling amendments. I consider this unacceptable. The process must, in my view, build in sufficient time to balance OLCs workload. I trust that OLC views will be gathered as part of this Inquiry.

I think all these measures, taken together, will provide a better outcome for legislation in Northern Ireland and for those professionals drafting this legislation. I trust that the recommendations outlined in this letter will be given due consideration and look forward to an improved process, delivering effective PMBs and legal clarity.

Regards



MICHELLE McILVEEN MLA
Minister of Education

Committee on Procedures Inquiry into Private Members' Bills (PMBs)

Terms of Reference

- To examine whether the system of support currently in place for PMBs is fair, appropriate and a good use of public resources;
- To compare and contrast any variations and limitations of the right to table PMBs in other legislatures;
- To review whether the current arrangements are equitable or whether they could be improved by requiring a consistent level of involvement of the Bill Office as well as public consultation prior to the PMB being submitted;
- To consider whether committees, if they so choose, should be able to include the sponsor of a PMB as an ex-officio member of that committee during the appropriate stages of the passage of the PMB in order to allow the sponsor to ask questions of witnesses and thus provide necessary clarity to the committee;
- To outline whether there are any issues arising from the nature of the special circumstances of the Assembly which need to be taken into account, and, based on the above to consider whether provision should be made in Standing Orders to clarify:
 - Whether there should be scheduled/dedicated plenary days for PMB business
 - Whether there should be mechanisms by which a proposal must pass a simple majority or other measure of support before being provided with resources to be developed further
 - Whether there could be arrangements to allow Members to legislate as a group and for all their names to be attached to it
 - How Assembly plenary time might be maximised and prioritised towards the end of the mandate, when the level of PMBs and Executive legislation are likely to create significant pressures on Assembly business.

Extract from Bill Office written submission to the Committee on Procedures Inquiry

In summary, there are three broad stages within the supported PMB process: –

Initial Proposal and Development:

This is where the Member liaises with the Unit about an idea for a PMB and begins the process of discussion, engagement and refinement. This involves taking early advice from RAISE and ALS on the policy context in which the bill would operate and ensuring a bill can be drafted within the legislative competence of the Assembly. It also involves engagement with the Minister of the relevant department with responsibility to ensure there is no duplication of efforts. Engagement with the Human Rights Commission and Equality Commission is built in. This step is to ensure value for money in avoiding unnecessary duplication of work; to design bills which are within the remit of the Assembly and to ensure that proposals reflect best practice and are informed by the wider policy context.

Consultation and Final Proposal:

The Unit will assist the Member in the preparation of an eight-week consultation to test opinion and establish public support for the policy proposals. This step informs the policy development process by creating scope for the Member to become aware of any alternative approaches which might be considered. This informs subsequent debate within the Assembly and is a key milestone as the Member prepares their Final Proposal for the Speaker. The Final Proposal document is where the Member reflects on the policy development process and demonstrates their compliance with the guidance on developing a PMB. The submission goes to Speaker to authorise access to the panel of drafters. –

Drafting and Introduction:

This is where the Unit instructs specialist drafters and works with the Member to craft a piece of legislation to give Page 6 of 7 effect to their policy objectives. This expertise adds value by drawing the Member's attention to different means of achieving their objectives. It is at this stage where the legislative mechanisms to promote the policy goals becomes clear and potential unintended consequences can be resolved. This builds the knowledge of the Member around the practicalities of their proposal as they aim to persuade the Assembly of its merits.