# Committee for Finance and Personnel

# Report on the Legislative Consent Motion

# Enterprise Bill

# (Public sector employment: restrictions on exit payments)

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**NIA 278/11-16**

# Contents


| | |
|---|---|
| **List of Abbreviations and Acronyms** | Page 3 |
| **Committee Membership & Powers** | Page 4 |
| **Background** | Page 5 |
| **Committee Consideration** | Page 6 |
| **Recommendation on the LCM** | Page 11 |
| Appendix 1 | Page 12 |

**List of Abbreviations and Acronyms**

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| DFP | Department of Finance and Personnel |
| HM | Her Majesty's |
| LCM | Legislative Consent Motion |
| MBE | Member of the British Empire |
| MP | Member of Parliament |
| NILGA | Northern Ireland Local Government Association |
| FMDFM | First Minister and deputy First Minister |
| RPA | Review of Public Administration |
| TUPE | Transfer of Undertakings (Protection of Employment ) Regulations 2006 |
| TUS | Trade Union Side |
| VES | Voluntary Exit Scheme |

## Committee Remit, Powers and Membership

### Powers

The Committee for Finance and Personnel is a Statutory Departmental Committee established in accordance with paragraphs 8 and 9 of the Belfast Agreement, Section 29 of the Northern Ireland Act 1998 and under Assembly Standing Order 48. The Committee has a scrutiny, policy development and consultation role with respect to the Department of Finance and Personnel and has a role in the initiation of legislation.
The Committee has the power to;

- consider and advise on Departmental budgets and annual plans in the context of the overall budget allocation;
- approve relevant secondary legislation and take the Committee Stage of primary legislation;
- call for persons and papers;
- initiate inquiries and make reports; and
- consider and advise on matters brought to the Committee by the Minister of Finance and Personnel.

### Membership

The Committee has eleven members, including a Chairperson and Deputy Chairperson, with a quorum of five members. The membership of the Committee during the current mandate has been as follows:
Mr Daithí McKay (Chairperson)[1]
Mr Dominic Bradley (Deputy Chairperson)
Mrs Judith Cochrane
Mr Leslie Cree MBE
Ms Michaela Boyle[2]
Mr Gordon Lyons[3]
Mr John McCallister[4] [5]
Mr Ian McCrea[6] [7]
Mr Maírtín Ó Muilleoir[8] [9]
Mr Gary Middleton[10] [11]
Mr Jim Wells [12][13]

[1] Mr Daithí McKay replaced Mr Conor Murphy MP with effect from 2 July 2012
[2] Ms Michaela Boyle replaced Ms Megan Fearon with effect from 2 December 2013
[3] Mr Gordon Lyons replaced Mr Adrian McQuillan with effect from 5 October 2015
[4] Mr Roy Beggs replaced Mr Ross Hussey with effect from 23 April 2012
[5] Mr John McCallister replaced Mr Roy Beggs with effect from 15 October 2012
[6] Mr Ian McCrea replaced Mr David McIlveen with effect from 16 September 2013
[7] Mr David McIlveen replaced Mr David Hilditch with effect from 1 October 2012
[8] Mr Raymond McCartney replaced Mr Mitchel McLaughlin with effect from 6 October 2014
[9] Mr Maírtín Ó Muilleoir replaced Mr Raymond McCartney with effect from 10 November 2014
[10] Mr Gary Middleton replaced Mrs Emma Pengelly with effect from 9 November 2015
[11] Mrs Emma Pengelly replaced Mr Paul Girvan with effect from 5 October 2015
[12] Mr Jim Wells replaced Mr Peter Weir with effect from 18 May 2015
[13] Mr Peter Weir replaced Mr William Humphrey with effect from 1 October 2012

**Background**

1. The Enterprise Bill[14] was introduced to the House of Lords on 16 September 2015. As explained in the Draft Legislative Consent Motion (LCM) laid in the Northern Ireland Assembly Business Office by the Department of Finance and Personnel (DFP):

   > *'The Bill deals with a number of government initiatives intended to support the growth of enterprise in the United Kingdom. The Bill also contains measures to restrict public sector exit payments. Under these measures the total value of exit payments that an individual, who exits public sector employment on terms of redundancy or early exit may receive, would be capped at £95,000'*[15].

2. On 16 September 2015, the Committee for Finance and Personnel ('the Committee') received correspondence from DFP to advise that HM Treasury had consulted on these proposals from 31 July 2015 until 27 August 2015. This consultation sought views on the proposed scope, level and design of the cap. Full details on this consultation can be found here. It was noted that these proposals could have implications for the public sector in Northern Ireland; although public service pension and compensation arrangements are devolved, the conventional approach here is to provide broadly comparable pension and compensation arrangements to those operated for the equivalent public service employments in Great Britain.

3. On 20 October 2015, DFP advised that HM Treasury's preferred position was for a single United Kingdom-wide legislative approach to implement this policy and that this could be achieved by means of an amendment inserting the relevant clauses into the Enterprise Bill. This amendment would need to be laid in advance of the House of Lords reporting stage for the Enterprise Bill, which was expected to occur in late November/early December 2015.

4. DFP further advised that the Minister of Finance and Personnel had indicated agreement in principle to pursue this approach, subject to the necessary consents. Such an approach would necessitate a LCM being agreed in the Assembly. The Minister of Finance and Personnel wrote to the First and deputy First Minister

[14] http://services.parliament.uk/bills/2015-16/enterprise.html

[15] http://www.niassembly.gov.uk/globalassets/documents/finance/legislative-consent-motions/4-legislative-consent-memorandum.pdf

(FMDFM) to request agreement for a decision under the urgent procedure provided for in paragraph 2.14 of the Ministerial Code[16].

5. On 22 October 2015 the Committee was informed that agreement had been confirmed by FMDFM to the extension to Northern Ireland of provisions in the Enterprise Bill to cap public sector exit payments and to seek agreement of the Assembly to this by means of a LCM. The Memorandum accompanying the LCM in respect of the Bill was subsequently laid in the Assembly on that day.

**Committee Consideration**

6. Given the circumstances outlined above, coupled with the tight timeframe allowed in Assembly Standing Orders for Committee consideration of LCMs, there has been very limited opportunity for the Committee to engage with DFP and other stakeholders in order to scrutinise the policy proposals and implications of the LCM. Nonetheless, the Committee sought an urgent briefing from DFP officials on 4 November 2015[17] and, in line with its previous approach when scrutinising LCMs, written briefings were invited from other relevant stakeholders, including the Collective Consultation Working Group/Trade Unions. In terms of the latter, at its meeting on 4 November, the Committee considered the stakeholder submissions received and, in noting the level of discontent with the proposals, members agreed to hold an additional meeting on 12 November 2015 to take oral evidence from a panel of Trade Union Side (TUS) representatives.[18] The Committee also agreed to inform the relevant Assembly statutory committees about the LCM, given the cross-cutting interest, and to invite the Equality Commission to make a written submission in terms of any possible equality considerations arising from the proposed provisions.

7. During the briefing from DFP officials on 4 November, members were advised of the policy rationale and reasons for using the approach of a LCM, the scope of the cap and the waiver as well as the extent of consultation.[19] The Committee raised a range of issues with the departmental officials, including:

[16] http://www.niassembly.gov.uk/globalassets/documents/finance/legislative-consent-motions/redacted-3.pdf

[17] Official Report Committee for Finance and Personnel 4 November 2015

[18] http://www.niassembly.gov.uk/assembly-business/committees/finance-and-personnel/legislative-consent-motions/enterprise-bill-public-sector-employment-restriction-on-exit-payments/

[19] http://www.niassembly.gov.uk/globalassets/documents/finance/legislative-consent-motions/151104_publicsectorexitpaymentslcmdfp.pdf

- the concerns raised in relation to the use of the LCM facility, as opposed to an Assembly Bill, for effecting a complex and controversial policy change of this nature;
- the need for clarification on how the regulation-making power for DFP will be used;
- the limited nature of the HM Treasury consultation;
- the justification for the Westminster Bill including exemptions in respect of a range of publicly funded bodies, including broadcasters, Royal Bank of Scotland and the Bank of England;
- the concerns raised in relation to the robustness of the Equality screening carried out by DFP;
- how the cap might impact on the current Voluntary Exit Scheme (VES) being administered by the Northern Ireland Executive and potentially skew any cuts towards the more junior grades in the public sector here;
- the potential for lower-paid public servants to be affected by the cap (e.g. an example had been cited of the potential for a female employee aged 55 with 35 years' service earning £27,000 to breach the cap);
- the extent to which the proposals were vulnerable to legal challenge and whether the Department had received legal advice as an assurance in that regard;
- whether an assurance could be given that the changes arising from the LCM would not impact on the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) protections; and
- whether the Department would be mirroring actions of HM Treasury to ensure that firefighters who are unable to maintain operational fitness beyond the age of 55 are not affected by the LCM.

8. During the session on 4 November, the departmental officials responded to a number of the aforementioned issues. On the issue of the use of a LCM, they stated that the decision was largely a political one, given the time required to make primary legislation in Northern Ireland and the public money which would have been paid in the interim period. In response to the queries regarding how the regulation-making power would be used and the implications for the VES, the departmental officials indicated that, under the Regulations, the Department could grant certain flexibilities and waivers in relation to the cap where the need was proven on the basis of evidence. In terms of the impact of the cap on lower paid workers, when pressed by Committee members as to whether the waiver provision could be applied in such circumstances, the departmental officials indicated that that could be considered.

9. The departmental officials also indicated that they were confident of the legal position surrounding the proposals and they confirmed that DFP would be following the approach of HM Treasury in respect of firefighters who are unable to maintain operational fitness beyond the age of 55 not being affected by the LCM.[20]

10. Arising from the DFP session on 4 November, the Committee agreed to commission an urgent written response from the Department to various issues discussed during the session and on the concerns raised in submissions to the Committee from key stakeholders. The Department responded to the Committee on 11 November 2015 and this was considered by the Committee on 12 November 2014.

11. In its follow-up written response to the specific queries raised, DFP gave some examples of the types of payments that would be within the scope of exemption from the cap. It was also highlighted that the cap does not affect any pension which an individual has already accrued and paid for by member contributions – rather, it is a cap on any additional funding paid for by the employer as part of an exit package. The Department also gave further information in relation to the waiver process to 'relax' the restriction – for example, when there is clear evidence of a justified business need to disapply the cap in order to achieve a required restructuring outcome, such as the Review of Public Administration (RPA). Also in terms of the waiver, it was noted that the regulations could delegate the power to relax the restriction to individual departments or employing authorities, and that guidance would be issued by DFP in this regard, and employers will be required to maintain records of any such waiver being invoked. The Department also confirmed that the Regulations would specify that the cap would not apply to an exit payment where an exit payee has an entitlement to that exit payment as a result of protection conferred by TUPE Regulations. In addition, the Department addressed some of the issues which had been raised in the stakeholder submissions to the Committee; the detail of this can be found here.

12. On 12 November 2015[21] the Committee received evidence from TUS representatives who set out a range of concerns with the proposals, including:

    - criticism of the consultation undertaken by HM Treasury which, in the view of TUS, did not apply the Wolf-Gunning principles, as well as criticism of the limited opportunity for discussion and consultation locally due to the time pressure exerted by the use of a LCM;

[20] Official Report Committee for Finance and Personnel 4 November 2015
[21] http://www.niassembly.gov.uk/assembly-business/committees/finance-and-personnel/meetings/12-november-2015/

- the absence of a full Equality Impact Assessment in light of the perceived impact of the proposals on long-serving employees;
- the list of bodies excluded from the Westminster legislation, including banks, financial institutions and broadcasting corporations in which the UK Government has ownership or significant shareholdings;
- the adverse impact which the application of the cap would have on public servants other than those in the Northern Ireland Civil Service in terms of further VES tranches beyond 1 April 2016 (when the cap comes into effect);
- related to the above, the potential for differential treatment between the Civil Service and other parts of the public sector when the cap is applied after 1 April 2015 and before the further VES tranches are completed;
- the proposals leading to inconsistent application of the cap on local government workers, particularly lower-paid workers, who may already have agreed severance entitlements as a result of the on-going implementation of the RPA;
- that use of the waiver could result in potential cases of direct or indirect discrimination in relation to Section 75 groups, as a result of one department or Minister deciding to apply or not apply a wavier in certain cases but not in others;
- future changes indicated by the UK Government in relation to the calculation of compensation terms and employer-funded early retirement in circumstances of redundancy; and
- a legal tension in respect of TUPE Regulations and the existing contractual rights of public servants as well as the previously mentioned severance arrangements in relation to the RPA.

13. Using illustrative examples, the TUS representatives outlined the wide range of public servants in diverse roles who would be potentially impacted by the cap, including in the health and education sectors. It was emphasised that the cap could have an impact upon long-serving public servants more than high earners and that there is an absence of detail in terms of the guidance and controls to be put in place by DFP. Also on this point, members noted an example, quoted in correspondence from the Education Committee, of an Education Authority employee on a moderate wage who could be detrimentally impacted when the cap is applied.

14. In response to questions from Committee members as to the projected savings from the proposals, the TUS representatives pointed to an absence of detailed information on the costs to the public purse of any decisions regarding non-implementation of the cap locally. Members further noted the TUS assertion that the Scottish Government has indicated that it is not minded to apply the cap in relation to public sector exit payments. It was argued that, instead, the Scottish Government

has been able to manage regular restructuring through voluntary exits and maintaining a 'no-compulsory-redundancy guarantee' currently in existence with no associated freeze on recruitment or temporary promotions.

15. Members also noted the TUS assertion that it would initiate potential legal challenges to the cap, should the need arise. In this regard, the example was cited of those public servants within 10 years of their normal retirement age at 1 April 2012 who were protected in the case of the recent pension reforms. TUS argued that the cap may 'fly in the face of these protections'[22] as there was no indication that this group will be excluded from the provisions. It was also pointed out that, in terms of high earners, a cap of just under £150K already exists within the Civil Service compensation scheme, which was set in 2010.

16. At the Committee meeting on 12 November 2015, members also considered additional issues raised in correspondence from the Equality Commission and the Northern Ireland Local Government Association (NILGA). In this regard, members agreed to request an urgent response from DFP to all of the unaddressed issues in relation to the proposals, including the points raised by the Equality Commission regarding the need for the Department to provide evidence in support of its decision not to undertake a full Equality Impact Assessment.

17. While, due to the time constraints involved, the Committee was able to undertake only a cursory consideration of the proposed LCM, it has nonetheless identified a range of substantive issues requiring careful consideration by DFP and the wider Executive. These include, for example, the need for: a closer examination of the equality impacts of the cap; assurances around the risk of the changes leading to future legal challenges to the Executive; and a detailed cost-benefit analysis of implementing the cap as compared to non-implementation in Northern Ireland.

18. The Committee has made previous recommendations in relation to LCMs[23] and their use in the Northern Ireland Assembly, particularly in terms of the need for earlier engagement between DFP and Whitehall and between DFP and the Committee. Similarly, in this instance, the Committee has endeavoured to gather evidence on the proposed LCM, as much as practicable, and report to the Assembly within the time constraints set out in standing order 42A (7) – i.e. 15 working days from the date of referral. However, this timeframe is far from ideal, especially given the complexity

[22] http://www.niassembly.gov.uk/assembly-business/committees/finance-and-personnel/meetings/12-november-2015/

[23] http://www.niassembly.gov.uk/assembly-business/committees/finance-and-personnel/reports/report-on-the--legislative-consent-motion-marriage-same-sex-couples-bill-/

and controversy surrounding this particular LCM and that various issues remain to be addressed by the Department. As such, the Committee believes that the potential for the LCM should have been indicated at an earlier stage, which would have facilitated a more thoroughgoing evidence gathering and scrutiny exercise.

**Recommendation on the LCM**

19. Given that clarification and assurance is required from DFP on a number of the aforementioned issues identified, **the Committee for Finance and Personnel reserves its position in relation to the Minister of Finance and Personnel seeking the Assembly's agreement '*"That this Assembly endorses the principle of the extension to Northern Ireland of provisions dealing with public sector exit payments contained in the Enterprise Bill.".***

**Appendix 1**

All the information referred to above and considered by the Committee in respect of its deliberations on the LCM can be found at**:**

http://www.niassembly.gov.uk/assembly-business/committees/finance-and-personnel/legislative-consent-motions/enterprise-bill-public-sector-employment-restriction-on-exit-payments/