

CIVIL SERVICE (SPECIAL ADVISERS) BILL

EXPLANATORY AND FINANCIAL MEMORANDUM

INTRODUCTION

1. This Explanatory and Financial Memorandum has been prepared by Mr Jim Allister (“the Sponsor”) to assist the reader of the Bill and to help inform debate on it. It does not form part of the Bill and has not been endorsed by the Assembly.
2. The Memorandum needs to be read in conjunction with the Bill. It is not, nor is it meant to be, a comprehensive description of the Bill. So where a clause or part of a clause or schedule does not seem to require an explanation or comment, none is given.

POLICY OBJECTIVES

3. The first objective of the Bill is to provide that no person shall hold the post of special adviser if they have been convicted of a criminal offence for which they received a custodial sentence of five years or more (a “serious criminal conviction”). In exceptional circumstances, a person with such a conviction can be appointed, (or can remain in post if they have an historic conviction), but only if an independent review panel agrees to this. The review panel is to be established by the Department of Finance and Personnel (DFP) where an appointment or proposed appointment is referred to it.
4. The Bill places a statutory duty on DFP to publish a code of conduct and an annual report about the number and cost of special advisers, similar to duties in the Constitutional Reform and Governance Act 2010, passed by the UK Parliament. It also requires the DFP to publish a code for appointment of special advisers.
5. The Bill also amends the Civil Service Commissioners (Northern Ireland) Order 1999 to remove the Presiding Officer of the Northern Ireland Assembly from the list of office-holders who are entitled to appoint a special adviser to the Civil Service.

BACKGROUND

6. Early in the Northern Ireland Assembly's third mandate an issue arose around the appointment of ministerial special advisers, particularly the ability to appoint someone to such a public office who had a serious criminal conviction. The Sponsor raised the matter in a number of ways, including through public statements, media interviews and by tabling Assembly Questions, an Assembly Motion and a Matter of the Day. The relevant Assembly Questions can be viewed on the Northern Ireland Assembly website via the AIMS portal. This can be accessed at <http://aims.niassembly.gov.uk/mlas/search.aspx>

7. In June 2011, in response to the public controversy, the Minister of Finance and Personnel, Sammy Wilson, announced by press release that he would undertake a review of arrangements for the appointment of special advisers. The terms of reference of the review were:

“To review the current arrangements which are applied to the appointment of Ministers’ Special Advisers, taking account in particular of the policies and processes in place governing the appointment of all other civil servants, and to bring forward recommendations for new appointments, as appropriate”.

8. The review report was published in September 2011 and is intended to govern all appointments from that date. It did not, however, recommend the disqualification of current special advisers with a serious criminal conviction but made a series of recommendations aimed at strengthening regulation of the Special Adviser appointments process. The report is available at <http://www.dfpni.gov.uk/review-of-arrangements-for-the-appointment-of-ministers-special-advisers.pdf>

CONSULTATION

9. The Sponsor carried out a six-week consultation on the policies behind the Bill in autumn 2011. A total of 818 responses were received. Of those, 808 supported the proposal that anyone with a serious criminal conviction should be prohibited from holding the post of special adviser. A very small minority of respondents opposed the Bill.

OPTIONS CONSIDERED

10. In developing this legislation, the Sponsor considered the following options:

- Option 1 - that regulation of the process for the appointment of special advisers be based solely on the Department of Finance and Personnel's

review report of September 2011 and the non-statutory *Code of Practice on the Appointment of Special Advisers*. Moreover, to retain the power in the Civil Service Commissioners (Northern Ireland) Order 1999 enabling the Speaker to appoint a special adviser, in addition to the adviser provided by the Assembly Commission.

- Option 2 - to introduce and enact the Civil Service (Special Advisers) Bill to disqualify prospective and existing special advisers with a serious criminal conviction, and to put the duty to lay before the Assembly a code of conduct, code of appointment and annual report on a statutory footing. Moreover, to remove the anomaly of the Speaker still being able to appoint a special adviser by political patronage.

11. The response to the Sponsor's consultation was overwhelmingly in favour of disqualifying existing special advisers with a serious criminal conviction. The DFP review report did not address this issue and was itself subsequently disputed. In addition, the Sponsor was not aware of any proposal to review the legislation granting the Speaker a residual patronage power. Legislation would also provide an opportunity to reflect the provisions in the UK Parliament's Constitutional Reform and Governance Act 2010, creating a duty to publish and lay before Parliament an annual report and code of conduct on special advisers. In addition, it would allow for the code of practice on the appointment of special advisers to be put on a statutory basis. For all of the reasons outlined above, the Sponsor concluded that a Bill was necessary.

OVERVIEW

12. The Bill consists of 13 clauses and 1 Schedule.

COMMENTARY ON CLAUSES

A commentary on the provisions follows below. Comments are not given where the wording is self-explanatory.

Clause 1: Meaning of "special adviser"

Clause 1 defines a special adviser as a person appointed to the Northern Ireland Civil Service to advise the First Minister or deputy First Minister, a Northern Ireland Minister or a junior Minister. The position terminates when the Minister ceases to hold office.

Clause 2: Special advisers: serious criminal convictions

Clause 2 prohibits a person with a serious criminal conviction from being appointed as a special adviser. Special advisers in post with a serious criminal conviction and those

who incur such a conviction while in post will have their appointment terminated by this legislation. In exceptional circumstances, however, a review panel, to be established by DFP, can determine that prospective appointees and existing post-holders with a serious criminal conviction are eligible to become or to remain a special adviser. Subsection (2) provides that, where a Minister proposes to appoint as a special adviser a person who has a serious criminal conviction, that person may refer the appointment to DFP for review. Under subsection (5) an existing post-holder with a serious criminal conviction at the time this legislation comes into operation may make such a referral. A duty is placed on Ministers to inform DFP whether any special adviser appointed by them has a serious criminal conviction.

Clause 3: Determination of eligibility of special advisers by review panel

Under Clause 3, a review panel to be established by DFP can determine that a person referred to them under Clause 2(2) or (5) is eligible to become or to remain a special adviser only if there are exceptional justifying circumstances. In making their determination, the panel must have regard to matters set out in subsection (5) and to the outcome of Civil Service vetting procedures. The matters to be taken into account are: whether contrition has been shown; whether the person has assisted in the investigation and prosecution of persons connected with the offence; and the views of victims or their family.

Clause 4: Appeals against review panel's determinations

Clause 4 provides for a right of appeal to the High Court by anyone who is the subject of a determination by the review panel under Clause 3, on the ground that the determination was not reasonable. The appeal must be brought within 21 days of the determination being made.

Clause 5: Meaning of "serious criminal conviction"

Clause 5 defines "serious criminal conviction" as one for which a sentence of imprisonment of five years or more, or another specified sentence, was imposed.

Clause 6: Annual report

This provision places a duty on DFP to prepare an annual report about special advisers and requires the Minister for Finance and Personnel to lay the report before the Assembly.

Clause 7: Code of conduct

This clause places a duty on DFP to issue a code of conduct for special advisers and requires the Minister for Finance and Personnel to lay the code before the Assembly. This code forms part of the adviser's contract of employment.

Clause 8: Code for appointments

This clause places a duty on DFP to issue a code governing the appointment of special advisers and requires the Minister of Finance and Personnel to lay the code before the Assembly. The code must provide that appointment must be subject to the same vetting procedures as apply when appointing senior civil servants to the Northern Ireland Civil Service.

Clause 9: Advisers to the Presiding Officer

This clause amends the Civil Service Commissioners (Northern Ireland) Order 1999 to remove the Presiding Officer of the Northern Ireland Assembly from the list of office-holders who are entitled to appoint a special adviser to the Civil Service without adhering to the merit principle of appointment on the basis of fair and open competition.

Clause 10: Interpretation

This provision contains definitions of words or terms used in the Bill.

Clause 11: Transitional provisions

This clause gives effect to the provisions of the Schedule.

Clause 12: Commencement

Clauses 1, 2(5), 3, 4, 5, 7, 8, 9, 10, 12 and 13 will come into operation on the day the Act receives Royal Assent. Clause 2(6) will come into force one month after Royal Assent. All other provisions will come into operation two months after Royal Assent.

The Schedule: transitional provisions: termination payments

The schedule makes provision for payment to existing special advisers whose appointment is terminated under the legislation. A special adviser is entitled to a payment of three months' salary or the amount stipulated in their contract, up to a maximum of six months' salary.

FINANCIAL EFFECTS OF THE BILL

13. The Bill has no significant financial implications. Compensation equivalent to up to six months' salary will be paid to any existing special adviser whose appointment is terminated under the legislation. This is similar to what would be paid if the Minister terminated the contract of the special adviser.
14. No significant additional costs will be incurred as a result of the duty on the Department of Finance and Personnel to produce an annual report, code of conduct

and code for appointments of special advisers. The Department has already prepared non-statutory codes on special advisers.

HUMAN RIGHTS ISSUES

15. The provisions of the Civil Service (Special Advisers) Bill have undergone detailed legal examination to ensure their compliance with the European Convention on Human Rights (ECHR). It is not considered that the Bill engages Article 6 of the convention. The Bill sets a qualifying condition for employment as a civil servant; it does not make a determination of an adviser's civil rights. In order to ensure compliance with Article 1 of the First Protocol to the ECHR, on the right to property, compensation is provided for any special adviser whose appointment is terminated under the legislation.
16. During the passage of the Bill new provisions were added allowing a review panel to be established by DFP to determine in exceptional circumstances that a special adviser with a serious criminal conviction should nonetheless be eligible for appointment or to remain in post as a special adviser. This provides a review mechanism of the automatic ineligibility of persons with serious criminal convictions from being special advisers and enables the individual circumstances of each proposed or existing appointee to be taken into account. These changes address issues raised in relation to human rights by expert witnesses who gave evidence to the Finance and Personnel Committee of the Northern Ireland Assembly during the Bill's Committee Stage.
17. The Sponsor is satisfied that the application of a straightforward eligibility criterion to the post of special adviser, with provision for a review to determine eligibility in exceptional circumstances, is human rights compliant.

ADDITIONAL LEGAL CONSIDERATIONS

18. In assessing the legislative competence of the Bill, in accordance with Section 6 of the Northern Ireland Act 1998, careful consideration has been given to the nature and effect of Clause 2(4) of the Bill, which terminates the appointment of any existing special adviser with a serious criminal conviction. Although the provision has a retrospective dimension, in so far as it relates to an appointment that took place in the past, it is clear that its application is wholly prospective. The Bill does not provide that the appointment of a special adviser with a serious criminal conviction was void from the outset, therefore it does not change the legal nature of a past event; it simply enables disqualification to be imposed for the future. The competence of the Bill is therefore unaffected.

LEGISLATIVE COMPETENCE

The Sponsor of the Bill, Mr Jim Allister, had made the following statement under Standing Order 30:

“In my view the Civil Service (Special Advisers) Bill would be within the legislative competence of the Northern Ireland Assembly.”