

FUNCTIONING OF GOVERNMENT (MISCELLANEOUS PROVISIONS) BILL

EXPLANATORY AND FINANCIAL MEMORANDUM

INTRODUCTION

1. This Explanatory and Financial Memorandum has been prepared by Mr Jim Allister (“the Member”) in order 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, and is not meant to be, a comprehensive description of the Bill. So, where a clause or part of a clause does not seem to require an explanation or comment, none is given.

POLICY OBJECTIVES

3. The Bill has fifteen objectives:
 - a) provide for the termination of any appointment of a special adviser which does not comply with the provisions of the code for appointments;
 - b) to provide that special advisers are subject to the processes and procedures of the disciplinary code operative in the Northern Ireland Civil Service;
 - c) to make it plain that an appointing minister is accountable and responsible for his special adviser;
 - d) to restrict the remuneration of special advisers so that it cannot be greater than that applicable within the Senior Civil Service Pay Structure to Assistant Secretary (Grade 5);
 - e) to impose a statutory duty on a departmental minister and Permanent Secretary to ensure no person exercises the functions or enjoys the privileges of a special adviser other than the duly appointed person;
 - f) to reduce the number of special advisers within the Executive Office from 8 to 6 by removing the right of Junior Ministers to appoint special advisers;

- g) to prevent the amendment of the Civil Service Commissioners (Northern Ireland) Order 1999 by the exercise of prerogative powers;
- h) to extend the powers of the Commissioner for Standards to include investigation of and reports on complaints against Ministers;
- i) to ensure the activities and meetings of Ministers and special advisers are adequately recorded and retained within the Northern Ireland Civil Service;
- j) to provide for the keeping of records when Ministers or special advisers are lobbied;
- k) to provide for a register of interests in respect of Ministers and special advisers;
- l) to provide for a statutory duty on departments to provide requested information to Assembly committees;
- m) to make provisions relating to Assembly scrutiny of the Executive's in-year monitoring process;
- n) to make it a specific criminal offence for a minister or special adviser to communicate confidential government information to a third party while including a reasonable behaviour defence; and
- o) to require the First Minister and deputy First Minister to report biennially on the functioning of government and act to improve same.

BACKGROUND

4. Controversy about the number, cost and disciplinary regime applicable to special advisers caused the Member to investigate the arrangements within the devolved institutions elsewhere in the United Kingdom. This comparison revealed that whereas there are 16 special advisers in Northern Ireland there are only 7, plus two part-time, in Wales and 14 in Scotland. The last full year for which figures are available (2015/16) shows Northern Ireland's special advisers cost £2,027,835.05, whereas in Scotland the cost in 2017/18 was £1,045,486* and the pay bill cost in Wales in 2018/19 was £814,069 (plus £119,636 in net severance payments). It is also notable that in Scotland half of the special advisers are employed on the lowest pay band.
5. On the question of discipline the Committee for Social Development investigation into "the Redsky affair" highlighted that though an independent fact-finding investigation by DFP recommended the minister's special adviser should be subject to disciplinary investigation, his minister was able to intervene and abort any such

course of action. Thus raising for the Member the adequacy of the current arrangements.

6. The unpublicised exercise of prerogative powers in 2016 by the First Minister and deputy First Minister to amend the Civil Service Commissioners (Northern Ireland) Order 1999, so as to permit the arbitrary appointment of a handpicked 'spin doctor', provoked controversy and unease which the Member proposes to address in this Bill by requiring any amendment to this legislation to be subject to the affirmative resolution process of the Assembly.
7. The very last motion passed (without division) by the Assembly before its collapse in January 2017 endorsed expanding the role of the Standards Commissioner to include alleged breaches of the Ministerial Code.
8. The evidence to the RHI Inquiry exposed a number of matters directly relevant to the positions and conduct of special advisers and the functioning of government, including:
 - a) appointments of special advisers in breach of the code for appointments;
 - b) a failure to accept ministerial responsibility for special advisers;
 - c) lack of record keeping within the civil service in regard to ministerial decisions;
 - d) evidence of attempted deliberate circumvention, on the part of one party, of the arrangements governing the control of special advisers following the passing of the Civil Service (Special Advisers) Act (Northern Ireland) 2013;
 - e) use of non-governmental email systems;
 - f) unwarranted passing of information to third parties; and
 - g) the direction of special advisers across departments under a hierarchy of special advisers.
9. Additionally, the absence of a publicly available register of interests for Ministers and special advisers appears as a gap in accountability, as does any requirement to keep the functioning of government under review.
10. Though the document 'New Decade, New Approach' anticipates measures to address some of the above matters, none of it would be on a statutory basis and, therefore, lacks binding assurance. Accordingly, the Member proposes to address these issues in this Bill.

CONSULTATION

11. The Member has previously conducted a positive consultation exercise in respect of the proposal to reduce the number of special advisers and their maximum salary and to make special advisers subject to the disciplinary code of the Northern Ireland Civil Service, before he introduced the Civil Service (Special Advisers) (Amendment) Bill in 2015. (Bill 61/11-16).
12. The additional matters addressed in the Bill in the main have been extensively ventilated and publicised through the evidence given to the RHI Public Inquiry, which itself has generated a public expectation of reform.
13. Accordingly, the Member took the view that a further consultation exercise was unnecessary.

OPTIONS CONSIDERED

14. In developing this legislation, the Member considered the following options:

Option 1: do nothing.

Option 2: to introduce and enact the Functioning of Government (Miscellaneous Provisions) Bill to amend sections 7 and 8 of the Civil Service (Special Advisers) Act (Northern Ireland) 2013, repeal the Civil Service Commissioners (Amendment) (Northern Ireland) Order in Council 2007, repeal the Civil Service Commissioners (Amendment) Order (Northern Ireland) 2016, amend sections 17 and 27 of the Assembly Members (Independent Financial Review and Standards) Act (Northern Ireland) 2011 and to make additional provision for the functioning of government in Northern Ireland and connected purposes to deliver the fifteen objectives outlined at paragraph 3.

15. The failure of government to address these issues in the past, the unacceptability of the status quo and the public expectation for reform has caused the Member to conclude that a Bill is necessary.

OVERVIEW

16. The Bill consists of sixteen clauses.

COMMENTARY ON CLAUSES

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

Clause 1: Amendment of the Civil Service (Special Advisers) Act (Northern Ireland) 2013

Clause 1 requires the Code of Conduct, established under the 2013 Act, to restrict the management of special advisers by other special advisers to within the Executive Office and to provide that special advisers are subject to the processes and procedures of the disciplinary code operative in the Northern Ireland Civil Service and makes clear there can be no substantive ministerial interference. Ministerial responsibility for special advisers is clearly established by this clause and a statutory duty imposed on the departmental minister and permanent secretary to ensure only the duly appointed special adviser can exercise the functions and privileges of that office. This clause also requires the Code for Appointments, provided for in the 2013 Act, to prescribe that special advisers must not be remunerated above a level higher than the highest level under the published pay scale for Grade 5 civil servants and that any appointment made in breach of the code may be terminated.

Clause 2: Repeal of the Civil Service Commissioners (Amendment) (Northern Ireland) Order in Council 2007

Clause 2 repeals the Civil Service Commissioners (Amendment) (Northern Ireland) Order in Council 2007 so as to remove the right of Junior Ministers to appoint special advisers with the resulting effect of reducing the number of special advisers in The Executive Office from 8 to 6.

Clause 3: Repeal of the Civil Service Commissioners (Amendment) Order (Northern Ireland) 2016

Clause 3 repeals the Civil Service Commissioners (Amendment) Order (Northern Ireland) 2016 and prevents further amendment of the Civil Service Commissioners (Northern Ireland) Order 1999 other than by deployment of the affirmative resolution process in the Assembly.

Clause 4: Special Advisers in the Executive Office

Clause 4 provides for compensation for any special adviser losing their job in consequence of the reduction in the number of special advisers in the Executive Office, as per the Schedule.

Clause 5: Amendment of the Assembly Members (Independent Financial Review and Standards) Act (Northern Ireland) 2011

Clause 5 extends the powers of the Commissioner for Standards to investigate and report on complaints against Ministers.

Clause 6: Records of meetings

Clause 6 requires a note to be kept by the Northern Ireland Civil Service of all relevant ministerial meetings.

Clause 7: Presence of civil servants

Clause 7 requires notes to be made and kept by the Northern Ireland Civil Service of ministerial and special adviser meetings with persons from outside of the department, though with stipulated exemptions.

Clause 8: Record of being lobbied

Clause 8 requires instances of lobbying of Ministers and special advisers to be logged. The clause includes a detailed definition of what is meant by “being lobbied” and includes exemptions in respect of Assembly proceedings and meetings with the Minister’s political party.

Clause 9: Register of interests

Clause 9 requires a publicly available register of interests in respect of Ministers and special advisers.

Clause 10: Offence of unauthorised disclosure

Clause 10 makes a specific criminal offence for a Minister or special adviser to communicate confidential government information to a third party, though with a reasonable behaviour or public interest defence.

Clause 11: Accountability to the Assembly: provision of information

Clause 11 imposes a statutory duty on departments to provide requested information to Assembly committees.

Clause 12: Biennial report

Clause 12 establishes a process whereby the First Minister and deputy First Minister shall report every two years on the functioning of government and initiate improvements.

Clause 13: Assembly scrutiny of the Executive's in-year monitoring process

Clause 13 provides for Assembly scrutiny of the Executive's in-year monitoring rounds.

COST IMPLICATIONS OF THE BILL

17. The Bill would save resources by reducing the cost of special advisers; otherwise the Bill has no significant financial implications.

HUMAN RIGHTS ISSUES

18. The Member is satisfied that the Bill is human rights compliant.

LEGISLATIVE COMPETENCE

19. At introduction, the sponsor of the Bill, Mr Jim Allister, had made the following statement under Standing Order 30:

"In my view the Functioning of Government (Miscellaneous Provisions) Bill would be within the legislative competence of the Northern Ireland Assembly."

* Question S5W-17596