



Northern Ireland
Assembly

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Ref: JA/PM/Gen/8989

Jim McManus
Finance Committee Clerk
Room 375, Parliament Buildings,
Ballymiscaw, Stormont,
Belfast, BT4 3XX

10 July 2020

Dear Jim,

Re: Functioning of Government (Miscellaneous Provisions) Bill

Further to the discussion at committee on 8th inst, please find enclosed for distribution to members advance notice of a number of amendments which I am minded to table.

Also, enclosed is my explanation of the amendments.

The purpose of this exercise is to enable members to return to me with any relevant views and comments.

I trust you and members will find this helpful.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'J. Allister', on a light-colored background.

Jim Allister MLA

Explanation of Possible Amendments:

Amendments 1, 6, 8 and 21 are essentially technical and relate to drafting issues. (Amendment 8 arises because the sub-clause it removes is unnecessary in drafting terms.)

Amendments 2 and 3 together address an issue raised as to the need to retain and respect the principle that a minister should be responsible for the conduct of their special adviser.

Amendment 4 is to reverse the removal from the Code of Appointment of any process governing a minister's selection of their SpAd in circumstances where the RHI Report commented adversely on breaches of previous code provisions and the expectation that such provisions should be honoured. Instead the new Code of Appointment removed all such provisions. By this amendment I seek to impose a statutory requirement for adherence to the basic requirements which were in the previous Code.

Amendment 5 is to address a departmental concern so as to put beyond doubt that the change in Clause 1(6) is Spad specific.

Amendment 7 is to change the approach in the Bill on the reduction of Executive Office SpAds. Since junior ministers have not appointed SpAds, I am proposing to repeal the provision from 2007 affording them that facility and in consequence to only reduce the number of SpAds the FM and dFM can appoint to two each, meaning the total number in the Executive Office would be four.

Amendment 9 inserts a protection - for both MLAs and ministers - against vexatious complaints.

Amendment 10 addresses a concern from the Executive Office that the original drafting included more of the Ministerial Code than was necessary. Now it would only encompass the Pledge of Office, the Code of Conduct and the Nolan Principles.

Amendment 11 is a necessary but incidental amendment to add ministers to the ambit of the Standards Commissioner.

Amendment 12 introduces a new clause to put into law a statutory duty on ministers and departments to provide scrutiny committees with requested information. At present no such statutory obligation exists and committees in extremis are forced to resort to section 44 of the NI Act 1998. Amendment 23 is a consequential amendment to provide for the definition of "department".

Amendments 13 -15

I ask members to consider these amendments together as they deal with Clauses 6-8 which themselves are a suite of provisions dealing with meetings involving ministers and/or SpAds. In response to various points made I have redrafted these clauses to hopefully give them greater

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cogency and compatibility. Clause 6 deals with internal meetings, Clause 7 with external, and probably unscheduled meetings where ministers/SpAds are lobbied and Clause 8 with planned meetings with non-departmental personnel.

Amendment 13 reduces the burden of what must be recorded in response to points made by the department.

Amendment 14 changes the focus of Clause 7 to the obligations when ministers and/or SpAds are lobbied, with lobbying defined as in the Transparency of Lobbying, Non-Party Campaigning and Trade Union Administration Act 2014.

Amendment 15 simply adjusts the wording of Clause 8 to make it more compatible with terms used elsewhere in the Bill.

Amendment 16 addresses Clause 9 and, in particular, the criminal offence created thereby. Clause 9 is one of the clauses which has attracted most comment. Particular concerns were raised about the “reasonable excuse” defence. Accordingly, I have revisited this to effectively reverse the burden of proof once a “reasonable excuse” is raised. Now, it would be for the prosecution to prove that the course of behaviour was not reasonable. This is a significant “concession” to try and meet the range of queries raised.

With Clause 9 I am signalling a willingness to consider further change by offering two possible versions of the amendment. The first version, and what Clause 9 presently says, is that the use of non-official devices etc is the offence. The second version, on the other hand, makes the offence the failure to record in official records that which passed on unofficial systems etc.

My preference is the first option, which along with the revised “reasonable excuse” defence, provides a more straightforward approach. However, with the alternative option, I am exploring which option commands the greater consensus in the committee.

Amendments 17 & 19 are to secure alignment with Code of Conduct provision.

Amendment 18 is allied to Amendment 22 and together define the family members relevant to register of interests requirements in Clause 10.

Amendment 20 addresses Clause 11, which also creates a criminal offence and thus has attracted considerable comment. The amendment simplifies the language of subsection (1), bearing in mind NIHRC comments, protects FOI obligations and internal government communications and introduces the reasonable behaviour and public interest defence along the same lines as Amendment 16 in respect of Clause 9. The amendment also reduces the maximum sentence from 5 years to 2 years to keep the tariff more in line with Official Secrets Act standards.

Functioning of Government (Misc Provisions) Bill – Possible Amendments

Amendment 1

Clause 1, Page 1, Line 7

After '(2)' insert '(b)'.

Amendment 2

Clause 1, Page 1, Line 12

Leave out 'involvement or'.

Amendment 3

Clause 1, Page 1, Line 13

Before 'A Minister' insert 'Subject to section 3A'.

Amendment 4

Clause 1, Page 1, Line 14

At end insert-

'(3A) In section 8 (Code for appointments), after subsection (1) insert the words:

“(2) Without prejudice to the generality of subsection (1), the code must provide that the appointing minister must -

- (a) create a job description and person specification for the post,*
- (b) set out the requirements to be met by a successful applicant,*
- (c) achieve a candidate pool from which the minister shall select on sustainable and lawful grounds,*
- (d) complete and the department retain documentation associated with the above processes, including recording the minister's reasons for the selection made.”*

Amendment 5

Clause 1, Page 2, Line 9

At end insert-

'(2) 'by reason of the holding of that post.'

Amendment 6

Clause 1, Page 2, Line 12

Leave out 'him' and insert 'the special adviser'

Amendment 7

Clause 2, Page 2, Line 19

Leave out "one person" and insert "two persons"

insert- **New sub-clause**

(3) The Civil Service Commissioners (Amendment) (Northern Ireland) Order in Council 2007 is repealed.'

Amendment 8

Clause 4, Page 2, Line 33

Leave out from '(3) Appointments' to end of line 34'.

Amendment 9

Clause 5, Page 3, Line 4

At end insert-

'(1A) In Section 17(1)(a) after 'Part' insert- ', provided the Commissioner is satisfied the complaint is not frivolous or vexatious or otherwise an abuse of the complaints process.'

Amendment 10

Clause 5, Page 3, Line 11

Leave out from 'means' to end of line 12 and insert 'means Section 1 of the Ministerial Code as provided for by Section 28A of the Northern Ireland Act 1998.'

Amendment 11

Clause 5, page 3, line 14

At end insert-

(6A) In Section 27(1) after 'Assembly' insert 'or minister'

Amendment 12 – New Clause

After Clause 5 insert- **New Clause**

'Accountability to the Assembly: provision of information

5A (1) *Ministers and their departments must provide to an Assembly committee such information as that committee may reasonably require in order to discharge its functions, being information which—*

- (a) has been requested in writing; and*
- (b) relates to the statutory functions exercisable by the Minister or their department.'*

Amendment 13

Clause 6

Leave out clause 6 and insert -

'Record of Meetings

6. *A civil servant must make and the department must retain an accurate written record of every internal departmental meeting attended by a minister recording, in particular, those present, date and time, topics discussed, and every decision and action point.'*

Amendment 14

Clause 7

Leave out clause 7 and insert –

'Record of Contacts

7 (1) *In the event of a minister or special adviser, other than as provided for in section 8, being lobbied in respect of official business, then, the minister or (as the case may be) special adviser must provide at the earliest opportunity a written record to the department of all such lobbying and the department must retain such records.*

(2) *In this section “being lobbied” means to receive personally a communication, either oral or written, on behalf of the person making the communication or another person or persons, relating to:*

- (a) the development, adoption or modification of any proposal of the government to make or amend primary or subordinate legislation;*
- (b) the development, adoption or modification of any other policy of the government;*
- (c) the making, giving or issuing by the government of, or the taking of any other steps by the government in relation to,—*
 - (i) any contract or other agreement,*
 - (ii) any grant or other financial assistance, or*

- (iii) any licence or other authorisation; or*
- (d) the exercise of any other function of the government.*

(3) It does not matter whether the person to whom the communication is made, or the person making it, or both, are outside the United Kingdom when the communication is made.'

Amendment 15

Clause 8

Leave out clause 8 and insert –

'Presence of Civil Servants

8 *(1) A civil servant, other than a special adviser, must be present and take an accurate written record of every meeting held by a minister or special adviser with non-departmental personnel about official business; except for liaison with the minister's political party.*

(2) The department must retain the record made pursuant to subsection (1).'

Amendment 16

Clause 9

Leave out clause 9 and insert -

'Use of Official Systems

9. - *(1) It shall be an offence for any minister, special adviser or civil servant when communicating on official business by electronic means to use personal accounts or anything other than devices issued by the department, systems used by the department and departmental email addresses.*

(2) In proceedings in respect of a charge against a person ("A") of the offence under subsection (1), it is a defence for A to show that the course of behaviour was reasonable in the particular circumstances or was in the public interest.

(3) A person is taken to have shown the fact mentioned in subsection (2) if—
(a) evidence adduced is enough to raise an issue as to whether the course of behaviour is as described in subsection (2), and
(b) the prosecution does not prove beyond reasonable doubt that the course of behaviour is not as described in subsection (2).

(4) A person guilty of an offence under this section is liable on conviction
(a) on indictment, to imprisonment for a term not exceeding 2 years;
(b) on summary conviction, to imprisonment for a term not exceeding 6 months or a fine not exceeding the statutory maximum or both.'

Or

Clause 9

Leave out clause 9 and insert -

'Use of Official Systems

9. - (1) *A minister, special adviser or civil servant when communicating on official business by electronic means must not use personal accounts or anything other than devices issued by the department, systems used by the department and departmental email addresses.*

(2) *If out of necessity it is not possible to comply with the requirements of subsection (1) the minister or (as the case may be) special adviser or civil servant must within 48 hours, or as soon thereafter as reasonably practicable,*

(a) copy to the departmental system any written material generated during the use of non-departmental devices or systems; and

(b) make an accurate record on the departmental system of any verbal communications relating to departmental matters.

(3) *It shall be an offence for any minister, special adviser or civil servant to fail to comply with the requirements of subsection (2).*

(4) *In proceedings in respect of a charge against a person ("A") of the offence under subsection (2), it is a defence for A to show that the course of behaviour was reasonable in the particular circumstances or was in the public interest.*

(5) *A person is taken to have shown the fact mentioned in subsection (3) if—*

(a) evidence adduced is enough to raise an issue as to whether the course of behaviour is as described in subsection (3), and

(b) the prosecution does not prove beyond reasonable doubt that the course of behaviour is not as described in subsection (3).

(6) *A person guilty of an offence under this section is liable on conviction*

(a) on indictment, to imprisonment for a term not exceeding 2 years;

(b) on summary conviction, to imprisonment for a term not exceeding 6 months or a fine not exceeding the statutory maximum or both.'

Amendment 17

Clause 10, Page 4, Line 10

Leave out '21' and insert '28'

Amendment 18

Clause 10, Page 4, Line 12

Leave out 'close'

Amendment 19

Clause 10, Page 4, Line 13

Leave out '21' and insert '28'

Amendment 20

Clause 11

Leave out clause 11 and insert -

'Offence of unauthorised disclosure

11. (1) Without prejudice to the operation of the Official Secrets Acts 1911-1989 and save in the discharge of a statutory obligation or in the lawful pursuit of official duties, it shall be an offence for any minister, civil servant or special adviser to communicate, directly or indirectly, official information to another for the financial or other improper benefit of any person or third party.

(2) In proceedings in respect of a charge against a person ("A") of the offence under subsection (1), it is a defence for A to show that the course of behaviour was reasonable in the particular circumstances or was in the public interest.

*(3) A person is taken to have shown the fact mentioned in subsection (2) if—
(a) evidence adduced is enough to raise an issue as to whether the course of behaviour is as described in subsection (2), and
(b) the prosecution does not prove beyond reasonable doubt that the course of behaviour is not as described in subsection (2).*

*(4) A person guilty of an offence under this section is liable on conviction
(a) on indictment, to imprisonment for a term not exceeding 2 years;
(b) on summary conviction, to imprisonment for a term not exceeding 6 months or a fine not exceeding the statutory maximum or both.'*

Amendment 21

Clause 12, Page 4, Line 30

Leave out from 'relevant' to 'actions,' and insert 'judgements of the courts relevant to the functioning of government.'

Amendment 22

Clause 14, Page 5, Line 10

At end insert-

'family member' has the same meaning as set out in Schedule 1(3) to the Assembly Members (Independent Financial Review and Standards) Act (Northern Ireland) 2011.

Amendment 23 – consequential to amendment 12

Clause 14, Page 5, Line 10

At end insert-

“department” means a Northern Ireland department as set out in Schedule 1, Departments Act (Northern Ireland) 2016.’