



Northern Ireland
Assembly

Committee for Finance

OFFICIAL REPORT (Hansard)

Functioning of Government
(Miscellaneous Provisions) Bill:
Research and Information Service

8 July 2020

NORTHERN IRELAND ASSEMBLY

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Members present for all or part of the proceedings:

Dr Steve Aiken (Chairperson)
Mr Paul Frew (Deputy Chairperson)
Mr Jim Allister
Mr Pat Catney
Ms Jemma Dolan
Mr Seán Lynch
Mr Maolíosa McHugh
Mr Matthew O'Toole
Mr Jim Wells

Witnesses:

Mr Tim Moore Research and Information Service

The Chairperson (Dr Aiken): Come on in, Tim. Tim, would you like to make your presentation, please?

Mr Tim Moore (Research and Information Service): I will indeed, Chair. Thank you.

The Chairperson (Dr Aiken): You are a fairly regular attendee, and we are really glad to see you again.

Mr Moore: Thank you, Chair. Members have the paper that was prepared in the context of the consideration of the Functioning of Government (Miscellaneous Provisions) Bill, and it was a follow-on to the evidence session with the ex-Commissioner for Public Appointments, Ms Huston. There were questions that the Committee wished to address. The paper covers three broad issues. I will go through the paper and cover the three issues and try and fill in some of the gaps that may be in the paper and then take any questions that remain. The paper first looks at Northern Ireland and the role of the Commissioner for Public Appointments, then it looks at Scotland and the Commissioner for Ethical Standards in Public Life, who includes within their remit the regulation of public appointments, and finally it addresses the International Ombudsman Association's standards in relation to the operation of ombudsmen and, in particular, the independence of ombudsman bodies.

Just to run quickly through the paper, the second section deals with the Commissioner for Public Appointments in Northern Ireland. That role was established in 1995 under the Public Appointments (Northern Ireland) Order 1995. It has been amended over time to make changes to do with the devolution of powers and government structures. None of those have been particularly significant, but

what may be of interest to members is the nature of the Order. It is a prerogative Order, and it is subject to very little, if any, Assembly scrutiny. It can be changed by, at the moment, the First Minister and the deputy First Minister, using their powers under the Northern Ireland Act 1998. The changes that have been made to the Order were simply to address who would appoint the commissioner, and that is now the First Minister and the deputy First Minister. Previously it would have been the Secretary of State.

The functions of the commissioner are set out in the 1995 Order, and they have not changed over time. You can see them on page 2. Broadly, the commissioner is there to regulate, monitor and report on how Ministers make appointments to public bodies, and they do that through issuing a code of practice, conducting audits, requiring summary information, and conducting inquiries into policies and practice. Essentially, the list of functions that is set out there is the Order; there is not much more to it. It is quite brief in its outline, and I think that that is the point that Ms Huston may have made: that there are certainly gaps there.

Complaints is one of the issues that is not specifically referenced in the functions, but it is addressed in the code of conduct. You will see that:

"The Commissioner may ... investigate a complaint".

That is presumably an interpretation of an inquiry into a specific appointment, but, again, that may be one of the grey areas that Ms Huston was pointing out. The commissioner can investigate complaints that are made directly to her and then, as I said, the commissioner may take action. It is not exactly clear what that action is, but it appears that the action that the commissioner takes is to make recommendations to the Department. Beyond that, it is difficult to see where the enforcement lies. Presumably, a decision by the commissioner to make a recommendation, should an issue go to judicial review, would bear on one side of the argument, but, again, that is not dealt with in the functions or in the code. The code simply says that she can take action, and that is where it stops.

The real detail of the operation of the commissioner is set out, in terms of the relationship with the Executive Office, in the memorandum of understanding and financial memorandum. That was drawn up in 2015 after consultation between the commissioner and the Department. It is much more detailed than the Order. It runs to approximately 20 or 30 pages, and it sets out, in great detail, how the Department will manage the relationship in terms of finances. I will go on to that in a minute. The relationship between the commissioner and the Department, as set out in the memorandum of understanding, is one of arm's length. I will get to the ombudsman standards later, but it is almost a subjective question of whether that is sufficient independence when measured against other bodies. However, that is the relationship between the Department and the commissioner.

The memorandum of understanding then goes on to explain a bit more about the relationship, and particularly the responsibilities of the First Minister and the deputy First Minister. We can see that the First Minister and deputy First Minister approve the policy and remit within which the commissioner will operate; they keep the Assembly informed as to the commissioner's performance; the commissioner carries out her duties in line with the Order; the First Minister and deputy First Minister can, by prerogative Order, change that originating legislation; and the Department provides the resources to the commissioner. So she sits within the departmental boundary. That is quite a close relationship in terms of financing. Again, that is dealt with in detail in the financial memorandum. I will not go through that, but I know that the Committee was interested in the commissioner's scope for engaging external advice and expenditure, and the financial memorandum is quite tight, I think. For consultancy advice, there is a £5,000 limit within which the commissioner can act, and, if it is a single tender exercise — I think that is the old terminology; the Committee is perhaps more familiar with the new terminology than I am — that has to be accompanied by a business case to the Department. Again, there is quite a tight control on the financing in the commissioner's office. The staff support to the commissioner is civil servants from the Executive Office, and she has three staff at the moment.

That is a quick run-through of the commissioner here and her role. I will move on to the position in Scotland. In Scotland, there is no single commissioner for public appointments. The role has been encompassed within the Commissioner for Ethical Standards in Public Life. Ms Huston left her post as commissioner in 2011, and she was concerned that there might have been some changes in the functions of the commissioner or the regulation of public appointments, so I will explain a little bit about that. It is probably easiest to explain the areas that are covered by what is now the Commissioner for Ethical Standards in Public Life in terms of investigating complaints. The commissioner can investigate complaints against Members of the Scottish Parliament, local councillors and members of boards and, more recently, has been regulating the lobbying of Members in the Scottish Parliament. The last area

that falls within the remit is the regulation of public appointments in Scotland. There has been an amalgamation of those roles over time. In 2011, a number of roles were brought together, and in 2013 they were brought closer together, really for reasons of accountability, efficiency and value for money. There is now one commissioner carrying out a range of functions. The functions remain as they were in the originating legislation, which is detailed in the table on page 5.

One of the features of the Commissioner for Ethical Standards is its remit in relation to public appointments, but those functions date back to the original legislation. Nothing has really changed with regard to those features. They are not new to the Commissioner for Ethical Standards; they applied to the old public appointments commissioner. The Ethical Standards Commissioner is appointed by the Parliamentary Corporation, which is equivalent to our Assembly Commission. One of the things that are not mentioned with regard to the commissioner here is removal. There is provision in the Scottish legislation for removal of the Commissioner for Ethical Standards. A two-thirds majority in the Parliament is required to remove her from her post.

There is a statutory provision that the commissioner will be independent from a range of people, including the Scottish Government, the Scottish Parliament and the corporate body itself. The financing and staffing of the commissioner is carried out by the Scottish Parliament corporate body. The commissioner is the accountable officer, so there is a greater degree of independence with regard to our commissioner and the Executive Office. The Commissioner for Ethical Standards has the power to appoint staff, to contract advisers and to seek assistance within their budget.

Very briefly, the functions in relation to public appointments are much the same as those of the commissioner here. However, a Committee member raised the issue of complaints and the halting of exercises that are under way. I have highlighted on page 8 that the commissioner can take action in instances in which there has been a material, serious breach of the code. That action will be to inform the Minister of their view and, as I have said on page 8, if the position has not been filled, the commissioner can ask that that be put on hold through Parliament. Serious breaches of the code must be reported to Parliament.

That is a brief overview of the remit of the Commissioner for Ethical Standards. To put that into some sort of context, in her annual report, the Scottish commissioner noted:

"Devoting limited resources to the production of thematic reviews, governance research and recommendations for improvement is only valuable if acted upon by relevant stakeholders, which generally has not been the situation of late."

It is one thing to look at the legislation and powers, but it appears from the commissioner's annual report that there is room for improvement in how it is working out in practice.

The final section of the paper looks at the standards of the International Ombudsman Association. It is a membership organisation that exists to promote good practice among ombudspersons. I have set out its four ethical principles, but the one that will be of most interest to members is the independence of the office. The standards of practice that flow from the ethical standards are set out at the bottom of page 9. The first two are probably the two that are most relevant:

"The Ombudsman Office and the Ombudsman are independent from other organizational entities."

Again, as I mentioned before, that is a question of degree. An arm's-length body certainly is, to some degree, independent, but there are probably greater degrees of independence. How far that independence should extend is really a policy decision.

The other point is:

"The Ombudsman holds no other position within the organization".

The Commissioner for Ethical Standards and Public Life in Scotland, for example, is prohibited from holding a range of posts, such as councillor or Member of the Scottish Parliament, so there are legislative provisions there. As I say, our Order is very brief, and those are the gaps that are not dealt with in the Order. I will leave it there and take any questions, Chair.

The Chairperson (Dr Aiken): OK. Thanks very much.

Mr Allister: First, I was not here at the start, so I will declare an interest as the sponsor of the Bill that gave rise to this discussion.

Under the present arrangements, the only control is the prerogative control under section 23(3) of the Northern Ireland Act 1998. Is that correct?

Mr Moore: Yes. To amend the Order?

Mr Allister: Yes, and that power lies exclusively outside the Assembly and exclusively with the First Minister and deputy First Minister.

Mr Moore: I must stress that I am not a lawyer, but, yes, that is my understanding.

Mr Allister: Clause 3 of my Bill would bring any changes to those Orders within the ambit of the Assembly, by requiring affirmative resolution of any changes to the original Orders. Is that correct?

Mr Moore: Yes, that is my understanding.

Mr Allister: However, even with that, you still have an office that you could not describe as an arm's-length body, could you?

Mr Moore: It is described as an arm's-length body.

Mr Allister: In terms of its independence —.

Mr Moore: It is arm's-length in the sense that the functions are independent.

Mr Allister: Does it have its own budget?

Mr Moore: Once that is agreed by the Executive Office.

Mr Allister: Whatever the Executive Office gives it.

Mr Moore: Yes.

Mr Allister: Does it employ its own staff?

Mr Moore: No.

Mr Allister: Certain Executive Office staff or other Civil Service staff are seconded to it. When you apply that to the international standards of independence, you see that it falls down on the first requirement of being "independent from other organizational entities", namely the Executive Office. Is that correct?

Mr Moore: I think that I mentioned that there is a spectrum of independence, and this falls at one part of that. You can certainly move either side of where it lies.

Mr Allister: Among the public appointments that the Public Appointments Commissioner is expected to oversee are those by the First Minister and deputy First Minister.

Mr Moore: That is correct.

Mr Allister: Indeed, of all the Departments, maybe more public appointments come from there than anywhere else.

Mr Moore: I am not sure of the exact numbers.

Mr Allister: The fifth international standard of independence is:

"The Ombudsman has authority to select Ombudsman Office staff and manage Ombudsman Office budget and operations".

It does not exactly match up to that, does it?

Mr Moore: No. As I say, the staff are seconded from the Executive Office.

Mr Allister: When you apply the international standards, you see that we have a prevailing situation that is falling fairly far short. Is that fair?

Mr Moore: I would not like to comment on whether it was far short.

Mr Allister: Falling short.

Mr Moore: The Member and any other Committee members may form an opinion on that. As I say, there is no objective standard.

Mr Allister: Thank you.

The Chairperson (Dr Aiken): Ladies and gentlemen, are there any further questions? Tim, thank you very much for your detailed work.