

FUNCTIONING OF GOVERNMENT (MISCELLANEOUS PROVISIONS) BILL

BILL TIMETABLE

Subject	[Target] Date
Bill introduced to the Assembly	3 February 2020
Second Stage debate on principles of the Bill	16 March 2020
Referred to the Committee for Finance for Committee Stage	17 March 2020
Request written evidence from The Executive Office	22 April 2020
Consider and agree timetable for consideration of the Bill	13 May 2020
Consider written evidence received from The Executive Office to identify whether any further information is required	20 May 2020
Oral evidence session: TEO officials	10 June 2020
Oral evidence session: [IF REQUIRED]	10/17 June 2020
Oral evidence session: Bill Sponsor	17 June 2020
Consider Committee position on Bill	24 June 2020
Agree Committee position on Bill	1 July 2020
Clerk to submit Committee response to Committee for Finance - a response was requested by 1 June but the Committee for Finance was advised that an extension was needed	3 July 2020
Committee for Finance Committee Stage ends (as extended)	2 December 2020

EVIDENCE TO THE COMMITTEE FOR THE EXECUTIVE OFFICE ON THE FUNCTIONING OF GOVERNMENT (MISCELLANEOUS PROVISIONS) BILL

1. The Functioning of Government (Miscellaneous Provisions) Bill contains a range of provisions including in respect of special advisers and record keeping which, if enacted, would apply equally to the Executive Office (TEO) as to all departments and which the department would be required to implement without specific derogations. This evidence therefore deals with those provisions which apply only to TEO or where they would place a particular duty or obligation on it.

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

2. **Clause 1 (2)** amends section 7(3) of the Civil Service (Special Advisers Act) NI 2013 to remove the ability of a special adviser to exercise the powers listed in subsection (2) of that Act in relation to another special adviser. However, it replaces this with a provision for the Code of Conduct for Special Advisers to permit a special adviser within the Executive Office to exercise such powers.
3. It would be for the First Minister and deputy First Minister to determine whether any such authority should be conferred on a special adviser in relation to another or others. It should be noted, however, that the scope for the exercise of such authority is significantly limited by the provision in clause 2 of the Bill which has the effect of reducing the total number of special advisers to be appointed by the First Minister and deputy First Minister from three each to one. It is likely therefore that the authority permitted could only be exercised in relation to special advisers appointed by the Junior Ministers if such appointments were made.

Amendment of the Civil Service Commissioners (NI) Order 1999

4. **Clause 2** contains a provision to reduce the total number of special advisers which the First Minister and deputy First Minister can appoint from three each to one under the above Order.

5. The Order currently permits the First Minister and deputy First Minister to appoint up to three special advisers each, and the Junior Ministers one each. At this time no appointments have been made by the Junior Ministers. The First Minister and deputy First Minister can therefore vary the number of appointments they make in accordance with business need.

6. The proposal in the Bill to limit the number of special advisers in TEO represents an unusual intervention in the operation of Ministerial authority with their department based on a purely numerical rather than political or organisational comparison with other administrations. Further amending legislation to vary this number in the event that the limit imposed proved inadequate for providing support to the First Minister and deputy First Minister across the range of their functions. It is noted from the Explanatory material and the debate on the second reading that this proposal has been made following a strictly numerical comparison with the number of special advisers in other administrations, particularly Wales, but does not evidently take account of the distinct characteristics of the Northern Ireland Executive and the joint roles of the First Minister and deputy First Minister, including the operation of a multi-party involuntary coalition. However, from the information available to us, the number of special advisers in Northern Ireland does not vary much from that in other devolved administrations and reflects the spread of governmental responsibilities in each. Scotland has a First Minister, eleven Cabinet Secretaries and 14 special advisers; Wales has a First Minister, eight Ministers and 10 special advisers; Northern Ireland has a First Minister and deputy First Minister, eight Ministers and 14 special advisers.

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

7. Clause 3 prevents the exercise by FM and dFM of the prerogative and executive powers of HM The Queen under section 23(3) of the Northern Ireland Act 1998 in relation to the Northern Ireland Civil Service and the Commissioner for Public Appointments for Northern Ireland, other than with the approval of the Assembly

to a draft Order. While it is assumed that the main purpose of this provision is related to the appointment discussed below, this subjects the prerogative power of the FM and dFM in these areas in their entirety to Assembly approval and is therefore a significant constitutional measure.

8. The clause also repeals the Civil Service Commissioners (Amendment) Order (Northern Ireland) 2016 which was made under section 23(3) and which allowed the FM and dFM to appoint a person to provide specialised support outside the requirement for selection on merit on the basis of fair and open competition. The first appointment made under this Order terminated on the election to the Assembly held on 2 March 2017. The First Minister and deputy First Minister have not made any further appointments under this Order. The effect of the provision would therefore be to prevent the First Minister and deputy First Minister engaging specialised support in an emergency situation where the normal procedures for appointments could be insufficiently responsive to the urgency of the matter.

Special Advisers in the Executive Office

9. Clause 4(1) provides that any special adviser in post in the Executive Office shall cease to hold office on 31 March 2021. The Executive Office notes this provision which would reduce the number of special advisers in the Executive Office from six at 31 March 2021 to two with effect from 1 April 2021. As such it considers the date arbitrary and not consistent with the need for the First Minister and deputy First Minister to have a sustained level of support across the mandate to ensure the delivery of Executive commitments.
10. Clause 4 (2) provides that any person in post who was appointed under the Civil Service Commissioners (Amendment) Order (Northern Ireland) 2016 will cease to hold office.
11. No appointments have been made under this Order since 2016; under the terms of Order any person so appointed would cease to hold office on the day of the 2022 election to the Northern Ireland Assembly.

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

12. Clause 5 contains a number of amendments to this Act, the effect of which would be to bring matters relating to Ministerial conduct within the remit of the Assembly Commissioner for Standards, by allowing him/her to initiate an investigation into a breach of the Ministerial Code; and to give advice on any matter of general principle relating to the standards of conduct of members of the Assembly including Ministers.

13. The Executive Office considers these amendments as potentially problematic:
 - (i) The Ministerial Code has three sections: Section 1: The Pledge of Office and Ministerial Code of Conduct and the Seven Principles of Public Life; Section 2: the Executive Committee; and Section 3: the North - South Ministerial Council and the British-Irish Council. The Assembly has a locus in relation to section 1 insofar as it has a statutory role in resolving that a Minister has breached the Pledge of Office (including non-compliance with the Ministerial Code of Conduct) and in imposing the sanctions available to it under the Northern Ireland Act. By extending the remit of the Commissioner to the Ministerial Code in its entirety it would potentially involve him/her in functional matters relating to the operation of the Executive Committee, the North South Ministerial Council and the British Irish Council which in themselves would not normally be regarded as matters of conduct. Certain obligations of Ministers to the Executive Committee are already set out in (d), (e) and (f) of the Pledge of Office and would therefore be open to investigation by the Commissioner. The Executive Office therefore considers that if the Assembly was minded to extend the remit of the Commissioner, this should only be in relation to adherence to the Pledge of Office, Ministerial Code of Conduct and the Seven Principles of Public Life.

- (ii) The proposed amendment to the wording of Clause 17(1)(d) of the Assembly Members etc Act 2011 is also imprecise. This allows the Commissioner to give advice on any matter of general principle relating to standards of conduct of members of the Assembly **including Ministers**. The Commissioner may already consider matters relating to Ministers when acting in their capacity as MLAs so alternative wording would be needed to provide greater clarity that this is intended to cover “conduct of members of the Assembly and of Ministers”.

- (iii) In addition, arising from the New Decade New Approach Deal, the Executive Committee has already agreed arrangements for the enforcement of Ministerial Standards through the formation of a Panel on Ministerial Standards (see attached). A process to identify and appoint members of the Panel will take place later this year.

Biennial Report

- 14. **Clause 12** requires the First Minister and deputy First Minister to lay a biennial report on the functioning of Government in the Assembly and to bring forward by statutory or other means proposals to improve the functioning of government.

- 15. The list of organisations which the FM and dFM are required to consult would suggest that this report would focus on the effectiveness of government in complying with its financial, administrative, personnel, and public appointments obligations and, in particular, any lapses in compliance requiring change or reform to procedures and practice.

- 16. Departments already produce annual reports and accounts, as do the organisations listed, and it would be expected that weaknesses in the functioning of government would be highlighted and addressed through these and that remedial action would be initiated within a shorter timeframe rather than biennially.

Enforcement of the Ministerial Code of Conduct

Basis for accountability

1. Ministers are bound by the Ministerial Code of Conduct (section 1.5 of the Ministerial Code) by virtue of line (g) of the Pledge of Office.
2. The Ministerial Code of Conduct is contained within the Ministerial Code which in turn is supplemented and expanded within the *Guidance to Ministers on the Exercise of their Official Duties* and the *Conduct of Executive Business*. The *Guidance to Ministers*, in particular, sets out the practical outworking of the principles contained in the Ministerial Code of Conduct.

Complaints

3. Anyone may make a complaint regarding alleged breaches of the Ministerial Code, the Guidance for Ministers, or Conduct of Executive Business ('ministerial standards documents').
4. Complaints will only be considered if the complainant provides their name, contact details and sufficient details of the alleged breach to be able to give it full consideration.
5. Complaints that a Minister has breached ministerial standards documents will be referred to the Panel for Ministerial Standards.

Panel for Ministerial Standards

6. The Panel shall comprise three members, one of whom will be the Assembly Commissioner for Standards (*ex officio*) with the others to be appointed by the First Minister and deputy First Minister acting jointly.
7. The function of the Panel will be to investigate and make findings in respect of alleged breaches of ministerial standards documents. Members of the Panel will comprise a range of backgrounds to enable a Panel member to be selected to reflect the nature of the allegation. Panel members will be part time (working on a call off basis).
8. Panel members will have no powers to reprimand or sanction Ministers. They will, however, be expected to comment on the relative seriousness of any breach.
9. The Panel will be supported by a small Secretariat (who will not be from the NICS or the Assembly).

Preliminary Examination

10. The Panel member undertaking the investigation will conduct a preliminary examination to establish facts in order to determine whether the complaint should be investigated.

11. The Panel member may ask for factual advice from the Secretary to the Executive to inform their decision as to whether to investigate a complaint.

12. In light of the preliminary examination, the Panel member may conclude that a complaint is

- unfounded;
- trivial;
- frivolous, vexatious, or made in bad faith, or
- has been resolved informally.

13. It will be for the Panel member to determine how these criteria are to be interpreted.

14. If he/she plans to investigate further, the decision and details of the complaint will be published. The preliminary examination will be completed within seven working days of the complaint being received by the Panel members.

15. The Panel will publish the number of complaints received in a period, and the number investigated.

Investigation

16. Ministers, civil servants, including special advisers, Arm's-Length bodies and Assembly staff will be required to co-operate fully with any investigation.

17. Ministers being investigated will be informed of the decision to investigate, and will be kept informed of the progress of the investigation.

18. The investigation will be completed within fifteen working days of the complaint being received.

Findings

19. On completion of the investigation, the investigating Panel member, will

- a. report the findings of their investigation to the Minister; and
- b. publish their findings.

20. Their findings will include whether or not the Minister has been found to have breached the terms of the ministerial standards documents. The report may make a judgement as to the relative seriousness of the breach.

21. The report will not include any recommendation regarding sanctions, but the published report may provide the grounds upon which others may initiate their own sanctions, including those under s.30 of the NI Act 1998 by which the Assembly can suspend a Minister on the passing of a motion of no confidence supported by 30 MLAs or moved by the First Minister and deputy First Minister acting jointly.

22. The published report should be taken into consideration by the nominating officer of the Minister's party, who would be expected to comment publicly on any action taken.