



**Northern Ireland
Assembly**

Committee for Finance

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5 June 2020

Dear Felicity

Functioning of Government (Miscellaneous Provisions) Bill

Thank you for attending the meeting of the Committee for Finance on 3 June 2020 to give oral evidence on the above Bill, and thank you for agreeing to answer in writing any further questions the Committee may have.

Having considered both your written and oral evidence, there are a number of questions remaining, answers to which would be helpful in informing the Committee's deliberations. I have listed these as an Appendix. I should be grateful for a response to these by 25th June.

Following your evidence, the Committee commissioned the Assembly Research and Information Service to conduct research to examine the functions of the Commissioner for Public Appointments in Northern Ireland which will include detail on the governance arrangements. I will forward the research to you once it has been considered by the Committee. Having considered the research, it would be helpful to the Committee to receive any suggestions you may have that may contribute to an amendment to the Bill

relating to improving the independence of the Commissioner for Public Appointments.

We will forward the Hansard of the meeting to you once published. In the meantime, the video link to yesterday's committee meeting is here:

<https://www.youtube.com/watch?v=6SrcD6NgBXg>

I look forward to receiving your response to the questions at the Appendix and will be in touch again once the Committee has considered the Research Paper. Please feel free to contact me if you would like to discuss any aspect of this request.

Yours Sincerely,

Jim McManus
Clerk
Committee for Finance

Appendix

1. What could be included in an amendment to Clause 1(4) to ensure that the code for appointments is robust and must be compiled with under the legislation?
2. Your written evidence refers to the current code for appointment in comparison to the previous code which goes into considerable detail on the need to comply with employment legislation - paragraph 4 of the previous code lists the relevant legislation.
 - 2a. How can it be demonstrated that the process used to appoint current special advisers complied with employment legislation or, alternatively, how can it be demonstrated that the process used to appoint did not comply?
 - 2b. What grounds might there be for challenging the appointment of special advisers under employment legislation under the new code?
 - 2c. What grounds would there have been for challenging the appointment of current special advisers if the previous code applied?
3. The previous code set out the framework for selection and appointment along a procedure for selection (para. 5-6). The revised (para. 8) states, *“Reflecting the personal nature of the special adviser appointment, this Code sets out the formal requirements for the appointment from the point at which the Minister advises the Department of the name of the person they have chosen to be their special adviser.”* There is no reference to any formal requirements for the appointment.
 - 3a. Does the revised code set out the formal requirements as stated?
 - 3b. Did the previous code for appointments appropriately set out the formal requirements for the appointment?
4. Your written evidence states: *“If the content of the Code and compliance with said Code is not nailed down in legalisation it will be both avoided and evaded – depending on circumstances.”*
 - 4a. Is this Bill the only/best way to make the code mandatory?

- 4b Is the code not already mandatory under the Civil Service Commissioners (Northern Ireland) Order 1999 as amended and section 8 of the Civil Service (Special Advisers) Act (Northern Ireland) 2013?
5. Throughout their oral evidence to the Committee, the Minister of Finance and the Permanent Secretary referred to the process here being stronger and much more robust than in other jurisdictions.
- 5a. What is your views on the strength of the codes relating to the Bill?
- 5b. Can the required strength and robustness be achieved through codes rather than through legislation?
6. In oral evidence, the Minister of Finance and the Permanent Secretary referred to the flexible nature of codes which enabled them to be updated as required whereas revising rules made in legislation would be much harder and slower.
- 6a. Is there a need for flexibility in the Bill?
- 6b. What appropriate degree of flexibility would be provided through this Bill?

FAO Mr J McManus

Clerk to The Committee For Finance

In response to questions from the Committee for Finance

Thank you for the further questions from the Committee. As I am not an expert in employment legislation and relevant case law there are one or two of the questions which I feel it would be inappropriate to answer. Particularly questions 2a-2c. Perhaps the President of the Industrial Tribunals and Fair Employment Tribunals would be able to help. As a public servant she has great expertise in the area.

1 The Committee and ultimately the Assembly must decide how prescriptive it wishes firstly the law and then the Codes of Practice re SPADs to be. This is to some extent a philosophical issue—dependent on how much the Assembly feels that law must itemise what can and can't be done – or whether it should be an enabling instrument setting out principles which can then be translated into instructions in the relevant Code. IF the Committee wants to use the law to ensure an open transparent process then I would propose some wording is inserted that states the Code of Appointment must follow basic selection principles and maintain records of the selection process – see below

The fundamentals that the Code of Appointments must include are;

- *A Minister must record the skills and experience he needs in his SPAD and why.*
- *A record must be kept of why a particular individual was appointed as SPAD including how the minister assessed that the successful candidate had the necessary skills and experiences and ultimately why that individual was appointed.*
- *Any SPAD appointment should be announced publicly and the records as above used as a basis for the Press Notice.*
- *Such records should be available under FOI*
- *If these records are not kept then the appointment is null.*

I leave it to those who are familiar with drafting to legislation to amend to the appropriate language.

3a 'Formal requirements' in the Code of January 2020 I would see as referring to some administrative procedures that the NICS must carry out .

3b Much of the previous Code takes the form of paperwork more appropriate to an HR handbook. It does however elaborate on some of the fundamental processes of selection – as would be recognised by most people – including person specifications, selection from a pool of candidates and records kept of how the choice was made and why.

4a My experience has been that if a Code is not mandatory it will be worked around. I cannot think of any other method other than legislation to compel adherence. Ideally we would be able to rely on a culture of compliance and transparency to ensure a Code is complied with. There is little evidence of this in the recent history of governance in NI. So we must use the law. The next question for the committee is what is the sanction for non-compliance? If failure to comply with a Code incurs no more than some uncomfortable headlines for a few days, then non-compliance can become commonplace. A clear sanction will be needed – e.g. that an appointment is null and void if

it hasn't been carried out under the Code and seen to be done under that Code. Transparency is critical to improve confidence levels in those of us who pay the salaries of SPADs. Whether non-compliance with the appointments code should be tied to the Ministerial Code is open for debate. What would that achieve?. The general public see no evidence that non-compliance with the current Ministerial Code in any matter has actually affected any political careers in Northern Ireland.

4b The Code itself is mandatory – but not I think the content of the Code. I believe this is why the Code of Appointments January 2020 can be said to comply with the legislation but in no way satisfies the concerns of the tax paying public as to how individuals were selected for such well-paid powerful positions.

5a-b Please see my comments above regarding the tensions which occur when non-compliance with a Code does not bring with it any form of sanction. The structures are so different in the other three nations of the UK and the National Government to our own that it is close to impossible to compare the impact of non-compliance on Ministers there with here.

6a-b Codes of practice are more nimble tools of governance because as the Minister and his Permanent Secretary have pointed out, they do not require the passage of legislation. However, they are only as good as their content and the level of compelled compliance. See my response above regarding sanctions. My suggested solution to provide flexibility within the Bill is for the legislation to lay out the principles required in the Code as the bare minimum that could be expected by the voters – as per my para 1 and then a Code based round those principles should be produced. It should not be padded out with HR paperwork. It should however include guidance on the fundamental principles with clear instructions on what processes the legislation does require e.g record keeping.

Felicity Huston

24th June 2020