

**COMMITTEE FOR THE EXECUTIVE OFFICE
RESPONSE: FUNCTIONING OF GOVERNMENT (MISCELLANEOUS
PROVISIONS) BILL**

INTRODUCTION

1. The Private Members' Bill: Functioning of Government (Miscellaneous Provisions) Bill was introduced to the Assembly on 3 February 2020, by Mr Jim Allister, MLA. It passed Second Stage on 16 March 2020, and was referred to the Committee for Finance for Committee Stage.
2. The Bill contains provisions that are of 'concern' to a number of committees including the Committee for the Executive Office. The Committee therefore considered the general principles of the Bill prior to Second Stage and relevant clauses of the Bill once it had been referred to the Committee for Finance for Committee Stage.
3. This response to the Committee for Finance details the Committee's consideration of the general principles of the Bill and includes, or provides links to, the oral and written evidence it received. The response was agreed at the Committee for the Executive Office meeting on 1 July 2020.

COMMITTEE CONSIDERATION OF THE GENERAL PRINCIPLES OF THE BILL

4. At its meeting on 26 February 2020, the Committee for the Executive Office received oral evidence from Mr Jim Allister, the Bill Sponsor, on the general principles of the Functioning of Government (Miscellaneous Provisions) Bill. A Hansard of the evidence session can be found at:
<http://data.niassembly.gov.uk/HansardXml/committee-21484.pdf>.
5. Following the oral evidence session, the Chairperson sought Members' views on the position the Committee should take during the Second Stage debate on the Bill.
6. **Having considered the general principles of the Bill, there was unanimous agreement within the Committee that the status quo was not an option. The Committee agreed with the principle of change and felt**

very strongly that action needed to be taken, not just to restore public confidence, but also to improve the functioning of government.

However, in terms of the right vehicle or vehicles to do that, there was some disagreement. Similarly, there was some disagreement around the timing of the Bill and the lack of consultation on the provisions contained therein.

7. In relation to the timing of the Bill's introduction and the vehicle(s) for introducing change, Members questioned why the Bill was introduced in advance of the publication of the Renewable Heat Incentive (RHI) Inquiry Report and the publication of the new Ministerial Codes. Some Members felt that the content of these documents would help inform the need and scope for legislation and, in some cases, suggest or implement measures that would go beyond the provisions in the Bill.
8. The lack of consultation on the Bill's provisions was raised during the evidence session. In response, the Bill Sponsor advised the Committee that he had already carried out a consultation on various issues around special advisers in the course of drafting a Bill that he introduced in 2015, and some of those provisions are contained in this Bill. He also told Members that he drew on the well-publicised issues arising from the evidence given to the RHI Inquiry to inform his drafting.
9. Following a lengthy discussion, the Committee could not reach consensus on whether the Committee should form a view, at that juncture, on the general principles of the Bill.
10. **Subsequent to a [division](#), the Committee agreed to consider the general principles of the Bill following the publication of the Renewable Heat Incentive Inquiry Report. Unfortunately, the Committee was not afforded that opportunity because the Bill had its Second Stage on the next working day following publication of the Report.**

COMMITTEE CONSIDERATION OF THE CLAUSES OF THE BILL

11. At its meeting on 22 April 2020, the Committee requested written evidence from the Executive Office on the relevant clauses of the Bill. A copy of the evidence is attached at **Annex A**.
12. The Functioning of Government (Miscellaneous Provisions) Bill contains provisions in respect of special advisers and record keeping which, if enacted, would apply equally to the Executive Office as to all departments, and which the Executive Office would be required to implement without specific derogations.
13. In light of this, and to avoid duplication of the work being carried out by other 'concerned' committees, the Committee for the Executive Office agreed at its meeting on [20 May 2020](#), to focus its scrutiny on those provisions which apply **only** to the Executive Office **or** where they would place on it a particular duty or obligation: **Clause 1(2); Clause 2; Clause 3; Clause 4(1) and (2); Clause 5; and, Clause 12**.
14. To assist further scrutiny of the Bill, the Committee received oral evidence from senior Executive Office officials on [10 June 2020](#) and from the Bill Sponsor on [17 June 2020](#).
15. Following the oral evidence session with Executive Office officials on 10 June 2020, the Committee requested further information/clarification from the Executive Office. A copy of the response is attached at **Annex B**.
16. The Committee also considered [oral](#) and [written](#) evidence received by the Committee for Finance.

CONCLUSION

17. At its meeting on 24 June 2020, the Committee for the Executive Office agreed not to come to a view on the relevant clauses of the Bill. The Committee agreed to provide the Committee for Finance with a summary of its consideration of the general principles of the Bill, prior to Second Stage, and details of the written and oral evidence it received.

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 wording of Clause 17(d) 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.



Committee for the Executive Office

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23 April 2020

Dear Kerry

FUNCTIONING OF GOVERNMENT (MISCELLANEOUS PROVISIONS) BILL

At its meeting on 22 April 2020, the Committee for the Executive Office considered correspondence from the Committee for Finance requesting its views on the Functioning of Government (Miscellaneous Provisions) Bill, and advising that Mr David Sterling, Head of the Civil Service, has been invited to give oral evidence to the Committee for Finance on same.

As you are aware, the Bill is of concern to a number of committees, and although the Bill was referred to the Committee for Finance for Committee Stage, the Committee for the Executive Office is expected to consider those provisions which relate to The Executive Office and report its findings to the Committee for Finance.

It is my understanding that the Committee for Finance will focus on those elements of the Bill that relate to Special Advisers and Civil Servants. To avoid duplication, the Committee for the Executive Office will therefore focus on those elements that relate

to Executive Ministers and Special Advisers in the Executive Office, although it is appreciated that there is some overlap.

In this context, the Committee agreed to request written evidence from the Executive Office on the clauses of the Bill that relate to Executive Ministers and Special Advisers in the Executive Office.

Once received, the Committee will consider whether an oral evidence session should be scheduled. If an oral evidence session needs to be scheduled, it is likely to be scheduled for either 3 or 10 June 2020. I should be grateful if you would let me know **as soon as possible** the preferred date.

I would appreciate written evidence by **noon on Thursday 14 May 2020**.

Yours sincerely

Marie Austin
Clerk to the Committee for the Executive Office

**FUNCTIONING OF GOVERNMENT (MISCELLANEOUS PROVISIONS) BILL:
EXECUTIVE OFFICE COMMITTEE: FURTHER QUESTIONS****Clause 2: Could Civil Servants perform the role of a special adviser?**

Special Advisers are temporary civil servants appointed by Ministers under Article 3 of the Civil Service Commissioners (Northern Ireland) Order 1999 as amended. They are required to comply with the NICS Code of Ethics but are exempt from the general requirements that civil servants should be appointed on merit through fair and open competition, and that they should behave with political impartiality and objectivity in order to retain the confidence of future administrations. Civil servants are not exempt from these requirements and therefore could not perform the role of special adviser.

Clause 4(1) and (2): It is proposed that the number of special advisers are reduced mid-mandate –what impact would this have?

The Bill proposes that the number of special advisers appointed by the First Minister and deputy First Minister should be reduced from three each to one each with effect from 1 April 2021. As advised in the evidence previously submitted to the Committee this would have a significant impact on the continuity of support for Ministers and the delivery of their business and policy objectives over the remaining year of the mandate.

Clause 5: What specific difficulties could you foresee if the Assembly Commissioner for Standards became involved in functional matters?

The Assembly has a statutory role in relation to resolving that a Minister has not observed the terms of the Pledge of Office, including compliance with the Ministerial Code of Conduct. As advised in previous evidence, it is the view of the Executive Office that any expansion of the role of the Assembly Commissioner for Standards should for the purposes of consistency relate only to the Pledge of Office and Ministerial Code of Conduct, and not the Ministerial Code in its entirety, as proposed by the Bill. It is not immediately apparent how the Commissioner could investigate breaches of the Ministerial Code as they relate to the collective operation of the Executive Committee. In addition, the performance of administrative functions do not necessarily give rise to issues relating to issues of conduct or standards and the inclusion of such issues within the remit of the Commissioner would detract from his or her key role in upholding standards, and could overlap with the role of the Assembly Ombudsman

Is there a way in which the provisions in Clause 5 could work alongside the Ministerial Standards Panel already agreed by the Executive (NDNA)?

Under Assembly Standing Orders referrals to the Commissioner may be made by the Committee on Standards and Privileges or the Clerk to the Assembly. It is therefore in theory possible to envisage the separate operation of the arrangements under Clause 5 solely for the purposes of the Assembly's own consideration of matters relating to Ministerial conduct. In addition the arrangements for the Enforcement of the Ministerial Code of Conduct envisage in paragraph 21 circumstances where a report of the Panel for Ministerial Standards could be used to initiate further action in relation to the statutory sanctions available to the Assembly in respect of Ministerial

observance of the Pledge of Office. These matters would require consultation with the Assembly Commissioner for Standards to ensure complementarity..

Will the Ministerial Standards Panel Members be independent?

It is intended that they will operate independently.

Will the Ministerial Standards Panel have greater or lesser powers than those proposed for the Assembly Commissioner for Standards under Clause 5?

The Ministerial Standards Panel will have no statutory powers. Clause 5 proposes to confer a power on the Assembly Commissioner for Standards to initiate an investigation where he/she believes that a breach of the Ministerial Code may have occurred. The Ministerial Standards Panel will therefore not have the power to initiate an investigation nor give advice on any matter of general principle relating to the standards of conduct of Ministers.



Committee for the Executive Office

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12 June 2020

Dear Kerry

FUNCTIONING OF GOVERNMENT (MISCELLANEOUS PROVISIONS) BILL

At its meeting on 10 June 2020, the Committee for the Executive Office received a briefing from departmental officials on relevant clauses of the Functioning of Government (Miscellaneous Provisions) Bill. Following the briefing, the Committee agreed to forward the following questions to officials:

Clause 2

- Could Civil Servants perform the role of a special adviser?

Clause 4(1) and (2)

- It is proposed that the number of special advisers are reduced mid-mandate – what impact would this have?

Clause 5

- What specific difficulties could you foresee if the Assembly Commissioner for Standards became involved in functional matters?
- Is there a way in which the provisions in Clause 5 could work alongside the Ministerial Standards Panel already agreed by the Executive (NDNA)?
- Will the Ministerial Standards Panel Members be independent?
- Will the Ministerial Standards Panel have greater or lesser powers than those proposed for the Assembly Commissioner for Standards under Clause 5?

The Committee is due to consider its position on the relevant clauses of the Bill at its meeting on 24 June 2020, therefore I should be grateful for a response in time for consideration at that meeting.

Yours sincerely

Marie Austin
Clerk to the Committee for the Executive Office