



## **Committee on Standards & Privileges**

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Dr Steve Aiken OBE, MLA  
Chairperson of the Committee for Finance  
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06 July 2020

Dear Steve

### **Functioning of Government (Miscellaneous Provisions) Bill**

Further to your correspondence dated 30 March 2020 and 1 May 2020 inviting the Committee on Standards and Privileges to make a written response on the Functioning of Government (Miscellaneous Provisions) Bill in accordance with Standing Order 64A.

The Committee has considered only clauses 5 and 10 of the Bill as these are directly relevant to its remit. As part of its scrutiny, the Committee submitted a range of detailed questions to The Executive Office and separately to the Bill Sponsor (Mr Jim Allister MLA). This included a request to both parties to outline what they see as the pros and cons of the provisions in clauses 5 and 10 of the Bill as compared to the Executive's approach to the respective matters (as provided for in the applicable provisions in

*Annex A of New Decade, New Approach, the related Enforcement of the Ministerial Code of Conduct and in the Guidance for Ministers in the Exercise of their Official Responsibilities).*

Additionally, the Committee raised various queries on technical matters and on the practical implementation of the provisions both in the Bill and in the Executive's approach. The questions posed by the Committee together with the written responses are enclosed in full at **Appendix A** and **Appendix B** respectively. The gist of the written responses is outlined below,

In regards to Clause 5, The Executive Office highlighted a number of points, including: that, in its view, if the remit of the Assembly Commissioner for Standards ('the Commissioner') was to be extended as outlined in the Bill, it should only be done in relation to Section 1 of the Ministerial Code (i.e. the Pledge of Office, Ministerial Code of Conduct and the Seven Principles of Public Life); that, under the Executive's approach, the independence of the panel members will be protected through the use of an independent Secretariat; confirmation that one panel member will be appointed by the Secretariat to lead an investigation but that this is not restrictive and additional panel members can participate if required; and confirmation that a number of issues are still to be determined including, for example, how panel members will be selected and appointed.

The Bill Sponsor pointed to benefits of the approach taken in the Bill including: the statutorily independent position of the Commissioner, whose is appointed via a fair and open recruitment competition; the investigative powers of the Commissioner and their ability to initiate investigations; and the cost effectiveness of extending the existing functions of the Commissioner to cover investigation of complaints against Ministers. In addition, the Bill Sponsor provided an update on potential amendments to Clause 5 including: an intention to table an amendment to address the risk of vexatious or spurious complaints; and the decision not to pursue an amendment to prevent a petition of concern being used in respect of a report from the Committee on Standards and Privileges (due to the applicable provisions in the Northern Ireland Act 1998 being an excepted matter).

In reference to Clause 10, The Executive Office: considered the difference between the Executive's approach and that contained in the Bill to be largely procedural; explained that, as Gifts and Hospitality and private interest are considered to be separate matters, Registers of Gifts and Hospitality will be published separately; and advised that Assembly and departmental registers will be similar but not mutually exclusive. For his part, the Bill Sponsor: concluded that, while there may be some overlap between the Assembly's register of interests and the Ministerial register of interests, this will not lead to confusion; and pointed out that, under Clause 10, the Ministerial register of interests will have a statutory basis which gives it a binding effect, with failure to comply being a breach of the law and therefore a breach of the ministerial code and pledge of office, which could provide the basis for a complaint under Clause 5.

In light of the attached written submissions, the Committee is mindful both that clauses 5 and 10 are subject to amendment and change as the Bill is considered further by the Assembly and that various aspects of the practical outworking of the Executive's approach remain to be determined. Therefore, in terms of a response to the Finance Committee, at its meeting on 1<sup>st</sup> July 2020, the Committee on Standards and Privileges agreed to forward the attached evidence to your Committee to inform its forthcoming clause-by-clause consideration of the Bill.

Kind regards

***Sinéad Ennis***

**Sinéad Ennis**

**Chairperson**



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**28 May 2020**

**Dear Shane**

Thank you for your letter of 7 May 2020 which sought responses to a number of questions from the Committee for Standards and Privileges in relation to the Functioning of Government (Miscellaneous Provisions) Bill.

Responses to the Committee's questions, which have been prepared in consultation with the Department of Finance, are attached at Annex A. Please accept the department's apologies for not meeting your deadline of 22 May.

Yours sincerely

**KERRY LOVELAND - MORRISON**  
**Departmental Assembly Liaison Officer**

## **EXECUTIVE OFFICE RESPONSE TO THE COMMITTEE ON STANDARDS AND PRIVILEGES ON THE FUNCTIONING OF GOVERNMENT (MISCELLANEOUS PROVISIONS) BILL**

- 1. What does the Department see as the pros and cons of the approach to investigating complaints against Ministers provided for in clause 5 of the Bill as compared to the Executive's approach?**
- 2. To what extent could the Executive's approach be adapted to take account of the provisions in clause 5 of the Bill?**
- 3. What, if any, issues has the Department identified in relation to the outworking of the provisions in clause 5 of the Bill?**

### **Response:**

Clause 5 of the Bill proposes a number of amendments to the Assembly Members (Independent Financial Review and Standards) Act (NI) 2011 the effect of which would be to bring matters relating to Ministerial conduct within the remit of the Assembly Commissioner for Standards by, inter alia allowing him or 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.

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 clear locus in relation to section 1 of the Ministerial Code insofar as taking the Pledge of Office before the Speaker is a pre-requisite of Ministerial office; and 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 1998. By extending the remit of the Commissioner to matters relating to the Ministerial Code in its entirety, the Bill would potentially

involve him/her in matters relating to the operation of the Executive Committee, the North South Ministerial Council and the British Irish Council which in themselves would normally be regarded as matters of procedure rather than conduct. Certain obligations of Ministers to the Executive Committee are already set out in (d), (e) and (f) of the Pledge of Office and under the provisions of the Bill would therefore be open to investigation by the Commissioner in relation to adherence. 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.

The Bill is also silent on who and by what means complaints may be referred to the Commissioner and, therefore, it is not possible to draw an exact comparison between the two proposed systems. If the current arrangements set out in Standing Order 69A would continue unchanged the Commissioner may be seen as less readily accessible a route for making a complaint by the public and that, similarly, by limiting complaints to perceived breaches of the Code, may also be seen as a higher test for a complainant than the more open approach proposed in the Executive's model.

- 4) Paragraph 6 of Enforcement of the Ministerial Code of Conduct states that:

‘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.’

In that regard, Assembly research (see paper attached), which considered the comparative position in other jurisdictions, has highlighted concerns raised by the House of Commons Public Administration Select Committee in relation to aspects of the UK Government arrangements whereby the Adviser is appointed by the Prime Minister and is unable to initiate their own investigations.

4. **How can the independence of all the Panel members be ensured under the Executive's approach?**
5. **Will each of the Panel members have statutory independence?**
6. **Will the statutorily independent position of the Assembly Commissioner in investigating complaints against MLAs, as provided for in the Assembly Members (Independent Finance Review and Standards) Act (Northern Ireland) 2011 ('the 2011 Act'), be extended to cover his/her functions in relation to the Panel?**

### **Response**

The Panel members will not have statutory independence is intended that the independence of the Panel members will be protected by the use of an independent Secretariat outside the Executive and the Assembly. The Commissioner's role in investigating Ministers will be discharged as a member of the Panel and not through any statutory power conferred on him by the Assembly members (Independent Financial Review and Standards) Act (NI) 2011. Therefore, an extension of the Commissioner's statutory independence in respect of MLAs to cover any functions in relation to the Panel would not be necessary.

7. **How will the other two panel members be identified and appointed and what criteria will be used in that regard?**
8. **What will be the terms of appointment of the Panel members, including their term of office and accountability arrangements?**
9. **Will the Panel members have the power to initiate their own investigations into the conduct of ministers (e.g. equivalent to the Assembly Commissioner's power in relation to MLAs as provided for in section 17(1)(b) of the 2011 Act)?**

### **Response**

These matters have not yet been determined. It is not envisaged at this time, however, that panel members will initiate their own investigations unless, for example, this is required in the light of further issues arising during the investigation of a complaint already referred to them.

5) Paragraph 7 of Enforcement of the Ministerial Code of Conduct states that:

‘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).’

- 10. Is it therefore intended that individual complaints will be investigated by one of the Panel members rather than by the Panel acting collectively? If so, who will select which Panel member undertakes each given complaint and on what basis will this decision be made?**
- 11. What will be the role of the Assembly Commissioner for Standards in relation to individual complaint cases?**
- 12. Why is it considered necessary to have a panel of investigators, including members from ‘a range of backgrounds’?**

## **Response**

It is expected that most complaints will be capable of investigation by one panel member, but equally no prohibition is envisaged on more than one member being involved where the scope or complexity of the matters under investigation would require it. The selection of panel members for individual cases would be a matter for the Secretariat. The role of the Assembly Commissioner would be a matter for further discussion with him or her. As stated earlier the Commissioner would only investigate Ministerial conduct in his or her capacity as a panel member.



In relation to the need for a panel of investigators, the number of complaints likely to be received against the 10 Ministers in the Executive Committee is at this stage unknown, and access to a number of panel members will enable a number of complaints to be investigated at the same time, and will provide ongoing coverage in relation to holiday and other periods of unavailability. While a variety of backgrounds and experiences is regarded as desirable, in terms of the broad landscape of complaint which is provided by the Ministerial Code/Pledge of Office.

5) With reference to the provisions for the 'Preliminary Examination' outlined at paragraphs 10 – 15 of Enforcement of the Ministerial Code of Conduct:

**13. How will consistency in the assessment of the admissibility of complaints be ensured if the interpretation of the criteria (outlined at paragraph 12) is a matter for the investigating Panel member in each case (as indicated at paragraph 13)?**

#### **Response**

**Is it expected that the information available to a panel member in relation to a complaint will be sufficient to enable them to make an objective assessment of whether a complaint is unfounded, trivial, frivolous or vexatious. These characteristics should be reasonably capable of identification from the history of the issue in question. This problem is unlikely to arise in relation to a matter which has been informally resolved.**

7) Paragraph 18 of Enforcement of the Ministerial Code of Conduct states that:

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

**14. What assurance is there that it will be feasible for all investigations to be completed within fifteen working days and what comparative analysis or benchmarking has been undertaken in this regard?**

## **Response**

This is intended to be an indicative target to promote commitment to swift investigation of a complaint and, in advance of individual investigations, no assurance can be given at this time that this will be feasible for all investigations. A pragmatic approach would be taken in the light of circumstances to any need for an extension to this period. As complaints in other jurisdictions and will differ in terms of their administrative context and methods of investigation, it is not considered that comparative data could be identified which would produce any conclusion on the feasibility or otherwise of the 15 working day target.

8) Paragraph 19 of Enforcement of the Ministerial Code of Conduct states that: '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.'

**15. Will the full investigation report be published or the findings only?**

**16. What, if any, arrangements will be put in place for investigation reports to be laid before and debated in the Assembly?**

## **Response**

These matters are for further consideration and determination

**17. What, if any, amendments will be required to existing legislation or procedures (e.g. the 2011 Act, Assembly Standing Orders) in order to implement the Executive's approach?**

## **Response**

Any amendment needed to the 2011 Act will depend on whether the present Bill is enacted to provide a role for the Commissioner in relation to matters of Ministerial conduct or the Commissioner considers that some statutory adjustment is required to reflect his or her membership of and participation in the panel. Any amendments required to Standing Orders as a consequence of

the introduction of these arrangements are more appropriately for consideration by the Assembly.

### **Clause 10**

A response from The Executive Office to the below questions will assist the Committee on Standards and Privileges in terms of comparing the provisions for a register of ministers' interests in clause 10 of the Bill to the provisions in the Executive's recently published Guidance for Ministers in the Exercise of their Official Responsibilities. This is in the context of the Committee's functions in relation to the Assembly's Code of Conduct and Register of Members' Interests and the potential for overlap between the role of a Minister and an Assembly Member and the respective codes of conduct (and/or guidance on conduct). In particular, the Committee is mindful that the Assembly's Code of Conduct applies to Ministers when they are acting simultaneously as a Member.

**18. What does the Department see as the pros and cons of the approach to providing for the registration of ministers' interests as set out in clause 10 of the Bill as compared to the approach taken by the Executive in the relevant provisions of the Guidance for Ministers in the Exercise of their Official Responsibilities? What, if any, scope exists to align the two approaches?**

### **Response**

The difference between the provisions in Clause 10 of the Bill and the arrangements agreed by the Executive appear to be largely those of procedural detail rather than intent. In Clause 10(1), the Bill envisages the publication by the Department of Finance of a register of interest of Ministers and Special advisers. It is assumed that "maintain" refers to the ongoing revision as required of the registers by the department. "Make available for public inspection" and the means by which this is to be effected are not defined. Arrangements are being made for the publication of a Register of Special Advisers' interests and to the twice yearly publication in respect of those of Ministers, thus providing greater clarity on public access to the information.

In relation to clause 10(2) the Executive has also prepared a schedule of those interests for Special Advisers and Ministers which are registrable and this will be evident on publication of the respective Register of Interests. To that extent, the laying of “a scheme” is a procedural addition.

The effect of clause 10(3) and the Executive’s arrangements are similar, the main difference being the imposition of specific timescales for completion and revision of the registers.

11) With reference to paragraphs 4.3 to 4.5 of the Executive’s Guidance for Ministers in the Exercise of their Official Responsibilities:

**19. How will consistency of approach/advice be maintained across departments if it is for each Permanent Secretary to consider any potential conflicts of interest and decide whether a Minister may retain a relevant interest?**

#### **Response**

All Permanent Secretaries will be guided by the General Principle set out at paragraph 4.1 of the section on Ministers’ Private Interests and use their judgment in assessing the relevance of the interest declared to the exercise. It is recognised, however, that the significance of a particular interest will vary in accordance with the portfolio held by the Minister.

**20. While reference is made to ministers updating the Ministerial Declaration of Interest Framework document ‘as interests emerge and change on an ongoing basis’ what specific timeframe will apply in this regard and on the basis of which an investigating Panel member could determine whether there has been a breach?**

#### **Response**

As indicated above, it is expected that Ministers will complete the Declaration of Interests as soon as possible after taking office. The setting of specific

timescales is an issue which can be explored further and recommendations put to the Executive.

- 21. What form will the published 'statement covering relevant Ministers' interests' take and how accessible will this be to the public? For example, will it be a consolidated statement covering all Ministers and available online?**

**Response**

The precise form has not yet been determined but is likely to follow the format of the Declaration of interest framework. It is intended that this will be a consolidated statement and that it will be published.

- 22. To what extent will the details of gifts and hospitality received by Ministers (as covered under section 8 of the Guidance for Ministers) be included in the published 'statement covering relevant Ministers' interests'?**

**Response**

Gifts and Hospitality and private interest are considered to be separate matters. Registers of Gifts and Hospitality will therefore be published separately.

- 23. How will the purpose of the published 'statement covering relevant Ministers' interests' be distinguishable from that of the Assembly Register of Members' Interests?**
- 24. Where overlap exists, what measures will be taken to avoid confusion and resultant non-compliance in meeting the requirements of the respective codes/guidance? (On a related matter, it is noteworthy that paragraph 8.5 of the Guidance for Ministers states that 'Gifts, hospitality and services provided to Ministers in their capacity as constituency MLAs or members of a political party fall within the rules relating to the Assembly's Register of Members' Interests'. However, the Assembly's registration**

**requirements in relation to ‘Category 3: Gifts, benefits and hospitality’ and ‘Category 4: Visits’ specifically include ‘those received in a ministerial capacity’.)**

### **Response**

The purpose of both registers are similar but it is not considered that the Assembly Register and departmental registers should be mutually exclusive. It is likely therefore that differences will be presentational and also determined by the comparative frequency with which each register is updated and published.

**25. Why is the stated requirement on ministers in relation to the Assembly’s Register of Members’ Interests confined to ‘any direct or indirect pecuniary interests’ (the Assembly’s Register of Members’ Interests covers financial and non-financial interests; and, also by contrast, clause 10 of the Bill refers to ‘financial and other interests’)?**

### **Response**

This wording reflects that relating to the requirement set out in the Pledge of Office: “The Assembly will retain a Register of Interests. Individuals must ensure that any direct or indirect pecuniary interest which members of the public might reasonably think could influence their judgment are listed in the Register of Interests”. The widening of the scope of the Assembly Register to cover other interests is noted.



Northern Ireland  
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**COMMITTEE ON STANDARDS AND PRIVILEGES**

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Jim Allister MLA  
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29 May 2020

Dear Mr Allister

**The Functioning of Government (Miscellaneous Provisions) Bill**

In accordance with Assembly Standing Order 64A, the Committee for Finance has sought the view of the Committee on Standards and Privileges on the clauses of the abovementioned Bill which are applicable to its remit (i.e. clauses 5 and 10).

Arising from its ongoing scrutiny of the provisions in clauses 5 and 10 of the Bill, the Committee on Standards and Privileges has raised a number of queries (**attached**) for your consideration as the Bill Sponsor. In order to ensure that the Committee has sufficient time to consider the issues and respond to the Committee for Finance, I should be grateful for a timely response on the matter by **Noon on Friday 12 June 2020**.

If you require any clarification please do not hesitate to contact me.

Yours sincerely

*Shane McAteer*

**Shane McAteer**  
**Clerk of Standards**

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## Functioning of Government (Miscellaneous Provisions) Bill

### Issues for the Bill Sponsor

#### Clause 5

- 1) What does the Bill Sponsor see as the pros and cons of the approach to investigating complaints against ministers provided for in clause 5 of the Bill as compared to the Executive's approach provided for in Annex A of *New Decade, New Approach* and the related *Enforcement of the Ministerial Code of Conduct* document? What, if any, scope exists to align the two approaches?
- 2) Arising from the provisions in clause 5, what accompanying procedural arrangements will need to be put in place for the Assembly Commissioner for Standards to follow in assessing complaints against ministers and conducting associated investigations (e.g. to cover matters such as admissibility criteria, timeframes, investigation procedures, reporting requirements)?
- 3) With reference to the points raised during the evidence to the Finance Committee on 26 February 2020 in relation to the risk of a high number of spurious and 'petition-type complaints' being raised against ministers, what specific admissibility criteria are envisaged which would help mitigate the risk of overloading the Commissioner for Standards?
- 4) Is it envisaged that general procedures for considering and investigating complaints against ministers will be put in place by the Committee on Standards and Privileges issuing new directions to the Commissioner (e.g. similar to the directions to the Commissioner which the Committee has made under Standing Order 69A(3)(c) and section 24 of the Assembly Members (Independent Finance Review and Standards) Act (Northern Ireland) 2011 ('the 2011 Act'))? If not, where will this responsibility fall?
- 5) Is it the intention that, in exercising the functions provided for in clause 5 of the Bill, the Commissioner will not be able to recommend sanctions where a minister has been found to have breached the Ministerial Code? If so, is a consequential amendment required to section 27(1) of the 2011 Act (which reads '*A report made by the Commissioner under this Part may not include any specific recommendation for the imposition of a sanction on a member of the Assembly but may otherwise make such recommendations as the Commissioner thinks fit.*')?
- 6) What, if any, role is envisaged for the Committee on Standards and Privileges in terms of: considering the Commissioner's reports of investigations into alleged breaches of the Ministerial Code; reporting to the Assembly; and recommending sanctions where applicable? (It is noted that reference was made in oral evidence

to the Finance and Executive Office committees and during the Second Stage debate to a potential amendment to clause 5 to prevent a petition of concern being used in respect of a report from the Committee on Standards and Privileges).

- 7) With reference to subsection (5) of clause 5, will the Executive's recently published *Guidance for Ministers in the Exercise of their Official Responsibilities* (March 2020) and the *Conduct of Executive Business* fall within the definition of "the Ministerial Code" and therefore within the remit of the extended powers of the Assembly Commissioner for Standards provided for in clause 5?
- 8) With reference to the provisions in sections 17(1)(a) and 17(2)(b) of the 2011 Act and Assembly Standing Order 69A(5)(a), is it intended that the Committee on Standards and Privileges will have the equivalent power to refer matters relating to the conduct of ministers to the Commissioner and that there will be a duty on the Commissioner to investigate such referrals? If so, what amendments are required to the 2011 Act and/or Assembly Standing Orders?
- 9) What, if any, other amendments will be required to Assembly Standing Orders for the purpose of implementing the provisions in clause 5 (e.g. Standing Order 69A, 69B)?
- 10) What costs are anticipated, in terms of support under paragraph 3 of Schedule 4 to the 2011 Act, for the purpose of discharging the additional functions imposed on the Commissioner by clause 5 of the Bill?

#### Clause 10

- 11) What does the Bill Sponsor see as the pros and cons of the approach to providing for the registration of ministers' interests as set out in clause 10 of the Bill as compared to the approach taken by the Executive in the relevant provisions of the *Guidance for Ministers in the Exercise of their Official Responsibilities*? What, if any, scope exists to align the two approaches?
- 12) What consideration has been given to the potential for overlap between the role of a Minister and an Assembly Member and the respective codes of conduct (and/or guidance on conduct)? In particular, to what extent do the provisions in clause 10 take account of the existing requirement on Ministers, under both the *Guidance for Ministers in the Exercise of their Official Responsibilities* and the Assembly's Code of Conduct, to register in the Assembly's Register of Members' Interests certain pecuniary/financial interests? (note: when Ministers do this they do so as Members and, more generally, the Assembly's Code of Conduct applies to Ministers when they are acting simultaneously as a Member).

- 13) To what extent will the purpose of the register of ministers' interests, as required under clause 10, be distinguishable from that of the Assembly Register of Members' Interests? Where overlap exists, what measures will be taken to avoid confusion and resultant non-compliance in meeting the requirements of either register?
- 14) What will the requirement in subsection (1) of clause 10 for the register of interests to be made 'available for public inspection' mean in practice? In particular, how accessible will it be to the public (e.g. published in hard copy and/or online, available for inspection by physically visiting the Department)?
- 15) With reference to subsection (3) of clause 10:
- How will the term 'close family members' be defined?
  - What should be the scope of 'registrable interests' (e.g. the Executive's *Guidance for Ministers in the Exercise of their Official Responsibilities* refers to 'spouse, partner or a member of your immediate family (including parents, siblings or children) or close friend...'; and the Assembly *Code of Conduct and The Guide to the Rules relating to the Conduct of Members* refers to 'third party (e.g. partner, child, friend, member of staff or company in which you have a controlling interest)')?
  - What is the basis for the '21 days' timeframe? In that regard and with a view to avoiding confusion, is there merit in aligning this with the '28 days' timeframe which is applied in the Assembly *Code of Conduct and The Guide to the Rules relating to the Conduct of Members*?
  - What, if any, sanctions are envisaged for a failure on the part of a Minister to comply with the requirements of subsection (3) of clause 10?

E-mailed to: [committee.standardsprivileges@niassembly.gov.uk](mailto:committee.standardsprivileges@niassembly.gov.uk)

Ref: JA/KC/Justice/8892-1

Shane McAteer  
Clerk of Committee of Standards and Privileges  
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08 June 2020

Dear Mr McAteer,

**Re: Functioning of Government (Miscellaneous Provisions) Bill**

Further to your letter of 29 May 2020, please find enclosed my response to the questions posed.

I trust you find this of assistance. I might add I am happy to discuss these matters with you or directly with the Committee if such would assist.

Yours sincerely

Jim Allister MLA

Enc

# Functioning of Government (Miscellaneous Provisions) Bill

## Response by Bill sponsor to Committee for Standards & Privileges

### Clause 5

1. Among the more important differences in the two approaches is the enhanced independence which attaches to the Assembly Commissioner for Standards and his office, to which my Bill proposes to give investigative functions in respect of complaints against ministers, as opposed to the non-statutory scheme proposed in New Decade, New Approach (NDNA). Included in these differences are the following:

a) The mode of appointment - the Assembly Commissioner is appointed by fair and open competition (S 19 Assembly Members (Independent Financial Review and Standards) Act (Northern Ireland) 2011 - hereinafter referred to as the 2011 Act'); the NDNA commissioners are appointed by the First Minister and deputy First Minister - the very people who individually will control the outcome in terms of resulting action against most ministers found to be in breach of the ministerial code, in that they are the nominating officers of the parties with the most ministers (between them 9 of the 12 ministers). In cases where the First Minister and/or the deputy First Minister are those complained of, then the situation appears even less satisfactory. This does nothing for public confidence in the probity of any such process. (The Code on public appointments operated by the Commissioner for Public Appointments would not, I believe, even apply to the selection of the NDNA commissioners.)

b) the investigative powers - the Assembly Commissioner has the power to call and compel witnesses and the production of papers and take evidence under oath, with non-cooperation a punishable offence (sections 28, 30 & 31 of 2011 Act); the NDNA Commissioners have no such powers and seems to be limited to asking the Secretary to the Executive for factual information - a linkage and dependence which itself dissipates any perception of independence.

c) the disqualifications which apply to appointment - the Assembly Commissioner, for reasons to sustain public confidence in his/her independence, is prohibited from being a person recently associated with government etc, or a family member of such a person. Sch 3 of the 2011 Act lists 20 such prohibitions. There is no such prohibitions in regards to NDNA commissioners.

d) the viability of the untested NDNA process, as opposed to the proven track record of the Assembly Standards Commissioner route. It is not clear to me how the NDNA commissioners and their operation can be provided without legislation, whereas simple addition to the existing functions of the Assembly Commissioner provide a clear path to better accountability in respect of ministers. I must also question how the Assembly Commissioner could be added ex officio as a NDNA Commissioner given his functions are defined and limited in law (S 17 of 2011 Act). But, if he is suitable as a NDNA Commissioner in concert with others - and indeed under the NDNA scheme could be the sole panel member conducting an investigation- then, patently he is suited to the task anticipated by Clause 5. So, why reinvent the wheel? And, why spend a budget of £120,000 pa on a new panel when the Assembly Commissioner has said he could do the job at minimal extra cost. ("The investigation of such complaints would have many similarities to work already undertaken by the Commissioner. **It would be most unlikely to require any significant increase in resources.** It would have the advantage that when considering a motion to exclude a Minister or junior Minister from office for an alleged breach of that Code the Assembly would have the benefit of a report of an independent investigation into the alleged conduct" - See paragraph 2.3 of the Commissioner's report for 2016-17 which is online here <https://standardscommissionerniassembly.org/wp-content/uploads/2017/04/Commissioner-for-Standards-Annual-Report-2016-2017.pdf> )

2. The template already exists in respect of the procedures for investigation of complaints against MLAs. Adaptations to include complaints against ministers should be straightforward, as the Commissioner for Standards seemed to anticipate above.
3. In order to deal with the threat of vexatious or spurious complaints I am planning an amendment - which will bring relief on the issue to both MLAs and ministers - in the following terms:

**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"'***

This will provide the Commissioner with a filter, with the onus being on the Commissioner to be satisfied the complaint is not frivolous etc.

4. The general purpose of Clause 5 is to enable the Commissioner to initiate an investigation in respect of a minister under section 17(1)(a). Section 24 of the 2011 Act enables the Assembly to give the Commissioner directions regarding general procedures and compliance with standards, codes of conduct and registration of interests with an overriding restriction to prevent directions from interfering with any specific investigation. It would be for the Committee for Standards and Privileges to consider the existing general procedure directions it has provided under Section 24 and in doing so determine for itself whether new directions regarding the general procedures for investigation of complaints against Minister are required which would necessitate an amendment to SO 69A(3)(c).
5. I confirm that I am intending an amendment in the following terms:

**Clause 5, page 3, line 14**

**At end insert:**

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

6. It is for the Committee for Standards and Privileges to consider how Clause 5, including the proposed amendment, will impact on their role as provided for in SO 57, 69A and 69B. However, my own view is that any changes will mirror the situation vis a vis MLAs to now include reports on ministers, subject to competence issues arising from sanctions against ministers largely being dealt with in the Northern Ireland Act 1998 (the 1998 Act) as 'excepted matters', save when acting in their capacity as MLAs. Thus specific sanctions under SO 69B are likely to be limited in regard to ministers to issues relating to their conduct as members. However, by amending section 27 of the 2011 Act the Commissioner would be enabled to make a recommendation in respect of a minister which might inform the option of 30 MLAs bringing a motion to the Assembly under section 30 of the 1998 Act. (As noted at 1(d) above the Commissioner for Standards has said, "The investigation of such complaints .... would have the advantage that when considering a motion to exclude a Minister or junior Minister from office for an alleged breach of that Code the Assembly would have the benefit of a report of an independent investigation into the alleged conduct"). None of this would impede the options of the minister's nominating officer. I do not purport to give advice to the Committee on these issues and believe the Committee might consider seeking its own legal advice.

It is correct that I had hoped to bring an amendment to prevent a petition of concern being used in respect of a report from the Committee for Standards and Privileges. However, I have now concluded there is a competency issue here arising from the Petition of Concern provisions in the 1998 Act being excepted matters.

7. It does not appear to me that the documents 'Guidance for Ministers in the Exercise of their Official Responsibilities' and 'Conduct of Executive Business' fall within the Ministerial Code as defined in Section 28A of the Northern Ireland Act 1998. I will give consideration to whether they need by amendment to be brought within the ambit of Clause 5.
8. While it is for the Committee to take its own legal advice, for reasons alluded to at 6 above I doubt if the Committee could exercise the powers in SO 69B in respect of a Minister, save in regard to his actions as a member. SO 81 is also relevant here.
9. See 2, 4, 6 and 8 above.
10. As referred to at 1(d) above the Commissioner for Standards has said "The investigation of such complaints would have many similarities to work already undertaken by the Commissioner. **It would be most unlikely to require any significant increase in resources.**"

## Clause 10

11. Key to the difference of approach is that Clause 10 puts declarations of interest on a statutory basis, which is likely to command more public confidence than mere guidance on the subject. As Lord Bingham said in *R-v-Ashworth Hospital Authority* [2006] 2 AC, "It is in my view plain that the code does not have the binding effect which a statutory provision or statutory instrument would have." Moreover, a formal and public Register of Interests has more gravitas than a statement of ministerial interests published twice a year. If there is a public Register of Interests for MLAs, why should the more senior and sensitive office of minister have a lesser provision?



12. Naturally because ministers are also MLAs there will be overlap in the respective Registers of Interests, but same is not a reason to exclude ministers from such an obligation. Just as two different codes of conduct operate, so two registers are compatible. Moreover, the same overlap would exist with the non-statutory provisions in 'Guidance for Ministers in the Exercise of their Official Responsibilities'.
13. The differing codes of conduct may shape different obligations and additional entries, but generally I'd expect considerable similarity. It will be noted that Clause 10 requires the departmental scheme drawn up to cover the ministerial register of interests to include such matters as gifts and hospitality, which are likely to be more common with ministers than MLAs. If an entry is duplicated in each register that will not cause confusion.
14. I anticipate the ministerial register, as with the MLAs' register, would be published online, but Clause 10 leaves the publication modalities with the Department of Finance; it is not prescriptive.
15. I'd anticipate 'close family members' to be defined as in Schedule 3 Paragraph 3 of the 2011 Act. Such can be readily referenced by an amendment to Clause 14.

Clause 10 requires the Department of Finance to publish a scheme for Assembly approval prescribing registrable interests. I am content to leave it to the department to define same.

I am content to align the period for registration with that governing MLAs.

Failure to comply would be a breach of the law and therefore a breach of the ministerial code and pledge of office and could provide the basis for a complaint under Clause 5.

**Jim Allister**  
**8 June 2020**

-----Original Message-----

From: J H Allister [mailto:jhallister@hotmail.com]

Sent: 09 June 2020 19:52

To: +Comm Standards & Privileges Public Email

<committee.standardsprivileges@niassembly.gov.uk>

Subject: functioning of Govt (MP) Bill

Shane,

Further to me earlier response, could I also refer to an interesting recommendation by the Standards Committee of the Welsh Assembly In 2018 which is relevant to the debate arising from Clause 5 of my Bill. I refer you to paragraphs 38-44.

Regards.

Jim Allister

[https://www.legco.gov.hk/general/english/library/stay\\_informed\\_parliamentary\\_news/creating\\_the\\_right\\_culture.pdf#page23](https://www.legco.gov.hk/general/english/library/stay_informed_parliamentary_news/creating_the_right_culture.pdf#page23)

# Creating the Right Culture

September 2018



**37.** We understand the need for party structures and would not seek to take away people's opportunity to raise concerns this way, given the different dynamics in parties. We welcome the work done by the Standards Commissioner to standardise these processes to date.<sup>6</sup>

**Recommendation 11.** The Committee recommends that each Party's policy is made available on the Complaints page of the Assembly website, once the processes have been finalised.

## Ministerial Code

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**38.** We are concerned by the potential for confusion around the Ministerial code. The Ministerial code states:

“(viii) Ministers must keep separate their roles as Minister and Assembly Member;”

**39.** We believe that this does appear to create, at the very least, a perception of ambiguity regarding when a Minister is performing their duties as a Minister and when they are acting as an AM. Especially as the two roles may not necessarily be incompatible. If this unclear perception exists for us within the political structure, then it must be significantly greater for those outside the system. We believe that if you have taken the important step to come forward to make a complaint about inappropriate behaviour, then you should not have to face the possibility of being told this was not the correct path and then being signposted to other channels. Complaints need to be dealt with from that initial point of contact.

**40.** The system of separate codes as exists in Wales is comparable with the provisions in the other UK parliaments. However, as a Committee we believe that Wales can take a bold step, to improve provision and increase confidence in the system.

**41.** Complaints against Assembly Members are currently considered by an independent statutory Standards Commissioner. This appointment is made via an open and transparent process. This is a recognised parliamentary system for dealing with Members.

**42.** The Committee would like to see complaints relating to AMs, including Ministers, to be referred to the Independent Standards Commissioner. We would envisage that following the completion of their investigation, the Commissioner would report to the First Minister in a similar way to the reporting process for the

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<sup>6</sup> Standard's Commissioner Annual Report 2017-18 (July 2018)

Committee. As with AMs, we would like to see any reports relating to Ministers made public once the First Minister had reached a conclusion.

**43.** While we agree completely that the First Minister should be able to decide which Ministers remain within the cabinet, we believe that the initial complaint and investigation should be dealt with by the independent Standards Commissioner.

**44.** We recognise that an independent adviser has been appointed in relation to the Ministerial Code, but we believe that public confidence in the system could be improved by utilising the same route and process as Assembly Members. We believe this will be simpler to understand and easier to access for the public.

**Recommendation 12.** The Committee recommends that the First Minister work with the Standards Commissioner to establish a protocol by Summer 2019 whereby all complaints are referred to the office of the Commissioner and that the Commissioner subsequently report to the relevant body.

## Support for the Standards Commissioner

**45.** The office of the Standards Commissioner is much valued and respected in the Assembly and beyond. The independence of this office is vital to ensure confidence in the system, and the Committee received positive feedback from some who had approached the Commissioner on sensitive matters relating to complaints.

**46.** The Committee has also heard evidence that the Standards Commissioner may not be the best avenue for everybody wishing to make a complaint. A number of reasons were suggested for this including;

- uncertainty about whether people wanted to make a “formal” complaint,
- a perception that complaining to the Standards Commissioner was a “nuclear option”, and
- concern about the lack of specialist support available at the Standards Commissioner’s Office for dealing with complaints, such as those based around sexual harassment, which are complex and sensitive matters requiring professional support.

**47.** In light of these reasons, and particularly the Standards Commissioner being considered a nuclear option, the Committee would like to emphasise that the