



**Northern Ireland  
Assembly**

**Assembly and Executive Review Committee (AERC)**

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

Dear Steve

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

This is in follow up to correspondence from your Committee dated 30 March 2020 and 1 May 2020 inviting the AERC 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 3, 5, 7 and 12 of the Bill as these are more directly related to its remit. As part of its deliberations, the Committee reviewed the range of evidence already available on the Bill, including: oral evidence from the Bill Sponsor to both the Committee for Finance and The Executive Office Committee; oral evidence from David Stirling, Head of the Civil Service, and the Finance Minister to the Finance Committee; as well as plenary debates on the matter.

In addition to this wider body of evidence, the Bill Sponsor made two written submissions to the AERC, which are included at **Appendix A**, and made a number of points during the Committee's meeting on 24 June 2020, which are set out at **Appendix B**.

In terms of a response to the Finance Committee, at its meeting on 24 June 2020, the AERC decided that it would forward the attached information and the link to the audio recording of the Committee meeting of 24 June 2020 (included at **Appendix C**) to your Committee to inform its forthcoming clause-by-clause consideration of the Bill.

Kind regards

**Mervyn Storey**  
**Chairperson**

**FUNCTIONING OF GOVERNMENT (MISCELLANEOUS PROVISIONS)  
BILL - WRITTEN SUBMISSION FROM THE BILL SPONSOR**

(Received by email on Wednesday 27 May 2020)

I refer to the Committee Secretariat paper of 22 May 2020.

I note and concur with the view that Clauses 3, 5, 7 and 12 are most relevant to AERC.

Naturally, as sponsor of the Bill, I support all its clauses and would hope the AERC will do likewise.

In terms of the pertinent clauses I'd make the following brief comments: -

**Clause 3**

I specifically draw attention to the evidential response of the Civil Service Commissioners for Northern Ireland. The Commission is clear that Clause 3 would have the welcome effect of reducing the number of public appointments which can be filled without fair and open competition. Accordingly, the Commission concludes Clause 3 would be in accordance with the merit principle that they are obliged by statute to maintain.

I, therefore, regard the submission of the Civil Service Commissioners as highly persuasive in evaluating the merit of Clause 3.

**Clause 5**

This clause seeks to address an obvious gap in accountability whereby MLAs can be subject to independent scrutiny for alleged breach of standards, but not ministers. Clause 5, in accordance with a motion passed by the Assembly, without division, in January 2017, would bring ministers within the ambit of the jurisdiction of the Commissioner for Standards.

I am working on an amendment to permit the Commissioner to sift out complaints - against either ministers or MLAs - which are *frivolous or vexatious or otherwise an abuse of the complaints process*.

### **Clause 7**

This clause is motivated by examples of unrecorded encounters from the RHI evidence and is directed at ensuring that a proper record exists of such lobbying. Following discussions with Department of Finance officials I am contemplating an amendment which will more explicitly focus this clause on capturing lobbying, rather than every casual encounter, as its target.

### **Clause 12**

Clause 12 seeks to lay out a path going forward which will keep a focus on providing good and better government. Making the changes outlined elsewhere in the Bill need the follow up of this clause so as to ensure that a momentum is maintained in striving to improve the processes of government. I find it difficult to comprehend why anyone would not share this goal. Improving the functioning of government should not be a one off event, but a continual process.

I draw attention, in particular, to the submission of the Carnegie U.K.Trust which welcomes this provision and concludes, "Reporting to the Northern Ireland Assembly on a biennial basis will improve accountability, transparency and public awareness of these ways of working, and progress made towards improving the societal wellbeing outcomes in the Programme for Government".

### **Next steps:**

I am very happy for the committee to hold evidence sessions, though I'm not convinced much can be added to the relevant and clear submissions already made.

I should advise the committee that I am contemplating bringing an amendment to add a new clause to the Bill which would be relevant to AERC. This would be to strengthen the scrutiny function of the committees. Whereas, at present a committee can ultimately have recourse to Section 44 of the Northern Ireland Act 1998 to

compel the production of documents etc, there is no statutory obligation on departments to up front provide information. I am minded to seek to create such a statutory obligation, believing such would strengthen the scrutiny function and its effectiveness.

Jim Allister

(Received by email on Saturday 6 June 2020)

Further to my response of 27 May 2020, I wish to add the following comments in regard to Clause 5 and how it differs from the approach outlined in 'New Decade, New Approach'.

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>

Jim Allister

(Received by email on Wednesday 10 June 2020

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)

**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

### Extract from Minutes of Proceedings of the AERC meeting on 24 June 2020

Mr Allister spoke briefly to the Bill and made the following points on clauses 3, 5, 7 and 12 specifically:

- Clause 3 – the point of this clause is to repeal the Civil Service Commissioners (Amendment) Order 2016 and ensure that any future exercise of prerogative powers to change the Civil Service Commissioners (Northern Ireland) Order 1999 should come to the Assembly.
- Clause 5 – *New Decade New Approach* aims to appoint a three-member panel to investigate alleged breaches of the Ministerial Code; however, in terms of the Bill, the procedures, infrastructure and mechanisms to investigate already exist in the form of the Assembly Commissioner for Standards. Therefore, it would be a straightforward and simple step to extend the remit of the Commissioner to include complaints against ministers.
- Clause 7 – is currently being redrafted to focus primarily on lobbying and will borrow from the legislation already established in Great Britain. This would require any minister or special adviser lobbied about an issue to report it and ensure it is recorded.
- Clause 12 – would require the First and deputy First Minister to report to the Assembly every two years outlining any issues or proposals in regards to addressing any flaws or inadequacies identified in the functioning of government.

## Appendix C

The audio recording of the Assembly and Executive Review Committee meeting on 24 June 2020 can be accessed [here](#).