

EXPLANATORY NOTES

Functioning of Government (Miscellaneous Provisions) Act (Northern Ireland) 2021

Chapter 3

£6.90

FUNCTIONING OF GOVERNMENT (MISCELLANEOUS PROVISIONS) ACT (NORTHERN IRELAND) 2021 (c 3)

EXPLANATORY NOTES

INTRODUCTION

1. These Explanatory Notes relate to the Functioning of Government (Miscellaneous Provisions) Act (Northern Ireland) 2021 (c 3) which received Royal Assent on 22 March 2021. They have been prepared by Mr Jim Allister in order to assist the reader of the Act. They do not form part of the Act and have not been endorsed by the Assembly.

2. The Notes need to be read in conjunction with the Act. They are not, and are not meant to be, a comprehensive description of the Act. So, where a section or part of a section or Schedule does not seem to require an explanation or comment, none is given.

BACKGROUND AND POLICY OBJECTIVES

3. Controversy about the number, cost and disciplinary regime applicable to special advisers caused the Member to investigate the arrangements within the devolved institutions elsewhere in the United Kingdom. This comparison revealed that whereas there are 16 special advisers in Northern Ireland there are only 7, plus two part-time, in Wales and 14 in Scotland. The last full year for which figures are available (2015/16) shows Northern Ireland's special advisers cost £2,027,835.05, whereas in Scotland the cost in 2017/18 was £1,045,486 and the pay bill cost in Wales in 2018/19 was £814,069 (plus £119,636 in net severance payments). It is also notable that in Scotland half of the special advisers are employed on the lowest pay band.

4. In the question of discipline, the Committee for Social Development investigation into "the Redsky affair" highlighted that though an independent fact-finding investigation by DFP recommended the minister's special adviser should be subject to disciplinary investigation, his minister was able to intervene and abort any such course of action. Thus raising for the Member the adequacy of the current arrangements.

5. The unpublicised exercise of prerogative powers in 2016 by the First Minister and deputy First Minister to amend the Civil Service Commissioners (Northern Ireland) Order 1999, so as to permit the arbitrary appointment of a handpicked 'spin doctor', provoked controversy and unease which the Member proposes to address in this Bill by requiring any amendment to this legislation to be subject to the affirmative resolution process of the Assembly.

6. The very last motion passed (without division) by the Assembly before its collapse in January 2017 endorsed expanding the role of the Standards Commissioner to include alleged breaches of the Ministerial Code.

7. The evidence to the RHI Inquiry exposed a number of matters directly relevant to the positions and conduct of special advisers and the functioning of government, including:

a) appointments of special advisers in breach of the code for appointments;
b) a failure to accept ministerial responsibility for special advisers;
c) lack of record keeping within the civil service in regard to ministerial decisions;
d) evidence of attempted deliberate circumvention, on the part of one party of the arrangements governing the control of special advisers following the passing of the Civil Service (Special Advisers) Act (Northern Ireland) 2013;
e) use of non-governmental email systems;
f) unwarranted passing of information to third parties; and
g) the direction of special advisers across departments under a hierarchy of special advisers.

8. Additionally, the absence of a publicly available register of interests for Ministers and special advisers appears as a gap in accountability, as does any requirement to keep the functioning of government under review.

9. Though the document 'New Decade, New Approach' anticipates measures to address some of the above matters, none of it would be on a statutory basis and, therefore, lacks binding assurance. Accordingly, the Member proposes to address these issues in this Bill.

10. The Act has fifteen objectives:

a) to render ineffective any appointment of a special adviser which does not comply with the provisions of the code for appointments;
b) to provide that special advisers are subject to the processes and procedures of the disciplinary code operative in the Northern Ireland Civil Service;
c) to make it plain that an appointing minister is accountable and responsible for his special adviser;
d) to restrict the remuneration of special advisers so that it cannot be greater than that applicable within the Senior Civil Service Pay Structure to Assistant Secretary (Grade 5);
e) to impose a statutory duty on a departmental minister and Permanent Secretary to ensure no person exercises the functions or enjoys the privileges of a special adviser other than the duly appointed person;
f) to reduce the number of special advisers within the Executive Office from 8 to 6 by removing the right of Junior ministers to appoint special advisers.
g) to prevent the exercise of prerogative powers to perfect amendment of the Civil Service Commissioners (Northern Ireland) Order 1999;
h) to extend the powers of the Commissioner for Standards to include investigation of and report on complaints against ministers;
i) to ensure the activities and meetings of ministers and special advisers are adequately recorded and retained within the Civil Service;
j) to provide for the keeping of records when ministers or special advisers are lobbied.
k) to provide for a register of interests in respect of ministers and special advisers;

l) to provide for a statutory duty on departments to provide requested information to Assembly committees;
m) to make provisions relating to Assembly scrutiny of the Executive's in-year monitoring process;
n) to make it a specific criminal offence for a minister or special adviser to communicate confidential government information to a third party while including a reasonable behaviour defence; and
o) to require the First Minister and deputy First Minister to report biennially on the functioning of government and act to improve same.

OVERVIEW

11. The Act consists of sixteen clauses.

COMMENTARY ON CLAUSES

12. A commentary on the provisions follows below. Comments are not given where the wording is self-explanatory.

Section 1: Amendment of the Civil Service (Special Advisers) Act (Northern Ireland) 2013

This section requires the Code of Conduct, established under the 2013 Act, to restrict the management of special advisers by other special advisers to within the Executive Office and to provide that special advisers are subject to the processes and procedures of the disciplinary code operative in the Northern Ireland Civil Service and makes clear there can be no ministerial interference. Ministerial responsibility for special advisers is clearly established by this clause and a statutory duty imposed on the departmental minister and permanent secretary to ensure only the duly appointed special adviser can exercise the functions and privileges of that office. This clause also requires the Code for Appointments, provided for in the 2013 Act, to prescribe that special advisers must not be remunerated above the rate applicable to Grade 5 civil servants and that any appointment made in breach of the code is of no effect.

Section 2: Repeal of the Civil Service Commissioners (Amendment) Order in Council 2007

This section removes the right of Junior ministers to appoint special advisers with the resulting effect of reducing the number of special advisers in The Executive Office from 8 to 6.

Section 3: Repeal of the Civil Service Commissioners (Amendment) Order (Northern Ireland) 2016

This section repeals the Civil Service Commissioners (Amendment) Order (Northern Ireland) 2016 and prevents further amendment of the Civil Service Commissioners (Northern Ireland) Order 1999 other than by Act of the Assembly.

Section 4: Special Advisers in the Executive Office

This section provides for compensation for any special adviser losing their job in consequence of the reduction in the number of special advisers in the Executive Office, as per the Schedule.

Section 5: Amendment of the Assembly Members (Independent Review and Financial Standards) Act (Northern Ireland) 2011.

This section extends the powers of the Commissioner for Standards to investigate and report on complaints against ministers.

Section 6: Records of meetings

This section requires a civil service note to be kept of all ministerial meetings.

Section 7: Presence of civil servants

This section requires notes to be made and kept by the Civil Service of all ministerial and special adviser meetings with persons from outside the department.

Section 8: Record of being lobbied

This section requires instances of lobbying of ministers and special advisers to be logged. The clause includes a detailed definition of what is meant by "being lobbied" and includes exemptions in respect of Assembly proceedings and meetings with the minister's political party.

Section 9: Register of Interests

This section requires a publicly available register of interests in respect of ministers and special advisers.

Section 10: Offence of unauthorised disclosure

This section makes it a specific criminal offence for a minister or special adviser to communicate confidential government information to a third party, though with a reasonable behaviour or public interest defence

Section 11: Accountability to the Assembly: provision of information

This section imposes a statutory duty on departments to provide requested information to Assembly committees.

Section 12: Biennial report

This section establishes a process whereby the First Minister and deputy First Minister shall report on a biennial basis on the functioning of government and initiate improvements.

Section 13: Assembly scrutiny of the Executive's in-year monitoring rounds

This section provides for Assembly scrutiny of the Executive's in-year monitoring rounds.

Section 14: Commencement

This section provides that section 1(3) comes into effect six months after the Act receives Royal Assent and the rest of the Act upon Royal Assent.

Section 15: Interpretation

This section defines the terms "special adviser" and "minister".

Section 16: Short Title

This section cites the new law as the Functioning of Government (Miscellaneous Provisions) Act (Northern Ireland) 2021.

13. Hansard Reports

First Stage	3 February 2020
Second Stage	16 March 2020
Committee Stage Report	11 November 2020
Consideration Stage	24 November 2020
Further Consideration Stage	19 January 2021
Final Stage	2 February 2021
Royal Assent	22 March 2021

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