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Functioning of Government (Miscellaneous Provisions) Bill

RaISe

The briefing should not be relied upon as legal or professional advice (or as a substitute for these) and a suitably qualified professional should be consulted if specific advice or information is required.

1. Introduction

This paper has been prepared to inform consideration of the *Functioning of Government (Miscellaneous Provisions) Bill*, a Private Member's Bill that completed its second stage on 16 March.

The Bill has 15 clauses and one Schedule and addresses a range of policy objectives, primarily in relation to the conduct of special advisers and ministers.

This paper makes comparisons, where appropriate, with arrangements in other legislatures in the UK and Ireland. It draws on two other recent RaISe papers: *Special Advisers: Appointment and Conduct* (February 2020) and *Investigations into alleged breaches of ministerial codes* (March 2020).

The paper is divided into the following sections:

Section 1 is a brief introduction.

Section 2 provides background and context to the key issues contained in the Bill.

Section 3 examines clause 1 – the amendment of the Civil Service (Special Advisers) Act (Northern Ireland) 2013. It focuses on those parts of the clause seeking to regulate the conduct and remuneration of special advisers.

Section 4 looks at the proposed amendment of the Civil Service Commissioners (Northern Ireland) Order 1999 which seeks to limit the number of special advisers in the Executive Office.

Section 5 provides commentary on clause 5 which would expand the role of the standards commissioner to include complaints about ministerial conduct.

Section 6 comments on some of the administrative and operational clauses in the Bill.

2. Context

The Bills sponsor, Mr. Jim Allister MLA, had previously introduced the Civil Service (Special Advisers) (Amendment) Bill in 2015. The 2015 Bill contained some of the same policy objectives as his current Bill but fell at its second stage.¹

The issue of special advisers and transparency in government featured prominently throughout the inquiry into the Renewable Heat Incentive (RHI) scheme and the *New Decade, New Approach* document.

The *New Decade, New Approach* document was published in January 2020² and formed the basis for the restoration of the devolved institutions. It contained a number of provisions aimed at increasing transparency in the workings of the Executive, including new arrangements for investigating breaches of the Ministerial Code and making ministers more accountable for the actions of their special advisers.

The report of the RHI Inquiry published in March 2020³ raised concerns over the role and behaviour of some special advisers and ministers.

These issues are discussed further at the appropriate sections in the paper where they align with the clauses of the Bill.

¹ Civil Service (Special Advisers) (Amendment) Bill 2015: <http://www.niassembly.gov.uk/assembly-business/legislation/2011-2016-mandate/current-non-executive-bill-proposals/civil-service-special-advisers-amendment-bill/>

² *New Decade, New Approach* available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/856998/2020-01-08_a_new_decade_a_new_approach.pdf

³ Report of the RHI Inquiry available at: <https://www.rhiinquiry.org/report-independent-public-inquiry-non-domestic-renewable-heat-incentive-rhi-scheme>

Special advisers

The Department of Finance issued a number of documents relating to the conduct of special advisers following the restoration of devolved government in January 2020. These reflected commitments made in *New Decade, New Approach* and included, among other things, an updated Code of Conduct for Special Advisers and a Letter of Appointment for Special Advisers.⁴

The Code of Conduct for Special Advisers is issued under section 7 of the Special Advisers Act 2013.⁵ The updated Code of Conduct 2020⁶ includes additional guidelines around transparency and record keeping in comparison to the prior Code of Conduct (2013)⁷. This brings the Code of Conduct 2020 closer to the codes which relate to the governments of the UK, Scotland and Wales.⁸

The appointment of Special Advisers to the UK Government, Scottish Executive and Welsh Assembly Government is guided by Part 1 Section 15 of the Constitutional Reform and Governance Act 2010⁹ and the respective Ministerial Codes.¹⁰ As in Northern Ireland, Special Advisers are appointed as temporary civil servants.¹¹

There are also codes of conduct for special advisers in England, Wales and Scotland.

⁴ <https://www.finance-ni.gov.uk/publications/special-adviser-appointments>

⁵ Civil Service (Special Advisers) Act (Northern Ireland) 2013.

⁶ Department of Finance – Code of Conduct for Special Advisers (2020).

⁷ Department of Finance and Personnel – Code of Conduct for Special Advisers (2013).

⁸ Code of Conduct for Special Advisers UK. Available from:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/832599/201612_Code_of_Conduct_for_Special_Advisers.pdf .

Code of Conduct for Special Advisers Wales. Available from: <https://www.cynulliad.cymru/laid%20documents/gen-ld10974/gen-ld10974-e.pdf> .

Code of Conduct for Special Advisers Scotland. Available from:

<https://www.gov.scot/binaries/content/documents/govscot/publications/agreement/2017/04/special-advisers-code-of-conduct-and-model-contract/documents/code-conduct-special-advisers-pdf/code-conduct-special-advisers-pdf/govscot%3Adocument/Code%2Bof%2Bconduct%2Bfor%2Bspecial%2Badvisers.pdf>

⁹ Constitutional Reform and Governance Act 2010. Available from: <http://www.legislation.gov.uk/ukpga/2010/25/contents> (Accessed 31st January 2020)

¹⁰ UK Cabinet Office Ministerial Code 2019. Available from:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/826920/August-2019-MINISTERIAL-CODE-FINAL-FORMATTED-2.pdf

Scottish Government Ministerial Code 2018 edition. Available from:

<https://www.gov.scot/binaries/content/documents/govscot/publications/advice-and-guidance/2018/02/scottish-ministerial-code-2018-edition/documents/00531094-pdf/00531094-pdf/govscot%3Adocument/00531094.pdf>

Welsh Government Ministerial Code 2019. Available from: <https://gov.wales/sites/default/files/publications/2019-11/ministerial-code-november-2019.pdf>

¹¹ UK Code of Conduct for Special Advisers 2016. Available from:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/832599/201612_Code_of_Conduct_for_Special_Advisers.pdf

Scotland Code of Conduct for Special Advisers 2017. Available from:

<https://www.gov.scot/binaries/content/documents/govscot/publications/agreement/2017/04/special-advisers-code-of-conduct-and-model-contract/documents/code-conduct-special-advisers-pdf/code-conduct-special-advisers-pdf/govscot%3Adocument/Code%2Bof%2Bconduct%2Bfor%2Bspecial%2Badvisers.pdf>

Wales Code of Conduct for Special Advisers 2016. Available from: <https://www.cynulliad.cymru/laid%20documents/gen-ld10974/gen-ld10974-e.pdf>

Ministers

Ministers are bound by the respective Ministerial Codes in the UK legislatures. The main issue around these codes has been the extent to which they are enforceable and how alleged breaches can be investigated in a transparent manner.

Republic of Ireland

The system in the Republic of Ireland is different to that in the UK legislatures. The Standards in Public Office Commission oversees various pieces of legislation that govern the conduct of elected representatives and public officials. Under this regime, Ministers (including the Taoiseach and Tánaiste) are classed as ‘Office Holders’ along with:

- The Attorney General, if they are a member of the Oireachtas;
- Chairman and deputy chairman of the Dáil and Seanad; and
- Oireachtas committee chairpersons.

The Standards in Public Office Act 2001 requires:

the drawing up of codes of conduct for office holders, other members of the Houses and for the public service. These codes of conduct are published by the Standards Commission and indicate standards of conduct and integrity for the persons to whom they relate in the performance of their functions and connected matters. The codes will be admissible in any proceedings before a court or other tribunal or a Committee on Members' Interests of either House of the Oireachtas or the Standards Commission.¹²

The 1997 Act also provides for the appointment of special advisers and this is discussed later in this paper.

3. Clause 1 – amendment of the Civil Service (Special Advisers) Act (Northern Ireland) 2013

Hierarchy of special advisers

1.—(1) The Civil Service (Special Advisers) Act (Northern Ireland) 2013 is amended as follows:

(2) In section 7 (Code of Conduct), amend subsection 3 to read “Within the Executive Office the code may permit a special adviser to exercise any power under subsection (2) in relation to another special adviser in that office.”

¹² <https://www.sipo.ie/documents/english/Code-of-Conduct-for-Office-Holders-.pdf>

Subsection 3 of section 7 of the 2013 Act currently states:

(3) The code may permit a special adviser to exercise any power within subsection (2)(b) in relation to another special adviser.

The amendment proposed by the FoG Bill would essentially limit any perceived hierarchy of special advisers to within the Executive Office and preclude management by one special adviser over special advisers in other ministerial departments. Subsection 2(b) provides that special advisers must not “exercise any power in relation to the management of any part of the Northern Ireland Civil Service”.¹³

Relevant comparisons

Section 7 of the Code of Conduct for Special Advisers in relation to the UK Government states (among other things) that:

But special advisers must not:

vii. exercise any power in relation to the management of any part of the Civil Service (except in relation to another special adviser);¹⁴

Similar provision is contained in the code of the Scottish Government and that of the Welsh Government. This appears to allow for management responsibilities relating to another special adviser to be granted to special advisers.

It has been reported that there have been recent attempts to centralise responsibility for the delegation of special advisers in Westminster. For example, an article on the Civil Service World website reported that:

...a number of special advisers were moved to work for new ministers in this month's government reshuffle, breaking the personal link between the minister and adviser, [along with] moves to merge the special adviser teams between No.10 and the Treasury. This integration drive led to the resignation of chancellor Sajid Jaivid, who said that "no self respecting minister" could serve under the terms. He was replaced by Rishi Sunak.¹⁵

This would appear to go against the traditional model, in which ministers in the UK Government select their special advisers, albeit they require ultimate approval by the Prime Minister.

¹³ <http://www.legislation.gov.uk/nia/2013/8/section/7>

¹⁴ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/147830/special-advisers-code-of-conduct.pdf

¹⁵ <https://www.civilserviceworld.com/articles/news/no10-accused-using-special-advisers-circumvent-civil-service-recruitment-rules-job>

Special advisers and the Northern Ireland Civil Service Disciplinary Code

(3) In section 7 (Code of Conduct), after subsection (3) insert ~~□~~—

“(3A) Without prejudice to the generality of subsection (1), the code must provide that special advisers are subject to the processes and procedures of the disciplinary code operative in the Northern Ireland Civil Service and that there can be no ministerial involvement or interference.

(3B) A minister who appoints a special adviser is responsible for their management, conduct and adherence to the code of conduct.”

New Decade, New Approach contained a commitment that “The Executive will, as a matter of urgency, produce strengthened drafts of the relevant codes to be implemented immediately”.

One of these commitments was for “Ministers to be responsible for the management, conduct and discipline of their special advisers (to also be included in the Special Adviser Code of Conduct).”

This commitment is addressed in the updated Code of Conduct for Special Advisers published on 20 January 2020 by the Department of Finance.

Paragraph 9 of the Code states:

9. Breaches of this Code of Conduct, the NICS Code of Ethics and the Standards of Conduct in the NICS Staff Handbook shall be treated as disciplinary matters.

Paragraph 10 further states:

10. The responsibility for the management and conduct of special advisers, including discipline, rests with the Minister who made the appointment. It is also the appointing Minister’s responsibility to ensure that their special adviser(s) adhere to this Code of Conduct.

The Department of Finance also published a Letter of Appointment to be issued to special advisers, which confirms the terms of appointment. With regard to conduct, the letter states that special advisers are required to act in accordance with the NICS Code of Ethics, except for the principles of objectivity and impartiality, the NICS Handbook Standards of Conduct, except for the rules on political activities, and the Code of Conduct (2020). The letter says:

Disciplinary matters are dealt with in accordance with procedures, which are set out in HR Policy 6.03 Discipline. The management, conduct and discipline of Special Advisers is, however, the responsibility of the appointing Minister,

and disciplinary powers are exercised by the Minister subject to any express statutory intervention such as those contemplated by the Civil Service (Special Advisers) Act (Northern Ireland) 2013.

Relevant comparisons

The UK Government Code of Conduct for Special Advisers specifies that responsibility for matters relating to conduct and discipline rest with the appointing minister. However, it also makes clear that the Prime Minister can terminate the employment of a special adviser by withdrawing his consent to an appointment. Paragraph 4 of the Code says:

4. The responsibility for the management and conduct of special advisers, including discipline, rests with the Minister who made the appointment. It is, of course, also open to the Prime Minister to terminate employment by withdrawing his consent to an individual appointment.

Paragraph 9 of the Scottish Government Code states:

The responsibility for the management and conduct of special advisers, including discipline, rests with the First Minister. It is also the First Minister's responsibility to ensure that their special adviser(s) adhere to this Code of Conduct. It is, of course, also open to the First Minister to terminate employment by withdrawing consent to an individual appointment at any time.¹⁶

Almost identical wording appears in paragraph 9 of the Welsh Code.

The role of the appointing minister, Prime Minister and First Ministers are therefore central to the discipline of special advisers elsewhere in the UK.

Number and remuneration of special advisers

(5) After subsection (3)(b), insert —

“(c) must not be remunerated above the rate within the Senior Civil Service Pay Structure applicable to Assistant Secretary (Grade 5)”.

On 20 January 2020, the Department of Finance published the document *Remuneration of Special Advisers* which stipulated that special advisers would be paid within one of three pay bands:

1. up to £54,999

¹⁶ Scottish Ministerial Code

2. £55,000 – 69,999

3. £70,000 – 85,000

It went on to say that “An individual’s salary will be determined by officials in the Department of Finance, on consideration of a CV. Salaries in paybands 2 and 3 will normally start on the payband minimum.”¹⁷

There are now 14 special advisers across the Executive. Six special advisers are on payband 1, four are on payband 2 and four on are payband 3.

Section 6 of the Special Advisers Act 2013 stipulates that a report on the number and cost of Special Advisers should be laid before the Northern Ireland Assembly at the end of each financial year.

Relevant comparisons

Part 1 Section 16 of the Constitutional Reform and Governance Act 2010 stipulates that the UK, Scottish and Welsh governments should prepare annual reports for their respective parliaments, with information on numbers and costs of Special Advisers.

In terms of determining salary, the Scottish Code of Conduct for Special Advisers says:

*All special advisers (paid or unpaid) will be appointed by the First Minister under the terms and conditions set out in the Model Contract for Special Advisers and the Code of Conduct for Special Advisers. Salaries for special advisers are determined either by a Special Advisers Remuneration Committee or by any alternative mechanism that may be put in place following discussion and agreement with the First Minister.*¹⁸

Tables 1, 2 and 3 provides information on the number of special advisers remunerated at each pay band.

UK Government

Table 1: Special adviser pay bands UK Government

| Pay bands ¹⁹ | Number of special advisers |
|--------------------------|----------------------------|
| PB1 - £40,500 - £60,500 | 1 |
| PB2 - £57,000 - £78,000 | 59 |
| PB3 - £73,000 - £102,000 | 33 |
| PB4 - £96,000 - £145,000 | 9 |

¹⁷ <https://www.finance-ni.gov.uk/sites/default/files/publications/dfp/REMUNERATION%20OF%20SPECIAL%20ADVISERS%20-%20FINAL%20-%202020%20JANUARY%202020.pdf>

¹⁸ Scottish Ministerial Code

¹⁹ According to the latest Annual Report on Special Advisers there were nine special advisers at pay band 4 (eight of whom were listed under the Prime Minister); 33 were at pay band 3; 59 were at pay band 2 and eight were at pay band 1.

Eight of the nine special advisers listed at pay band 4 were listed under the Prime Minister.

Scottish Government

In response to a parliamentary question²⁰ asked on 19th December 2019, the following information was provided on special advisers.

Table 2: Special adviser pay bands Scottish Government

| Pay bands | Number of special advisers |
|----------------------------------|----------------------------|
| PB1 - 39,445 – 52,904 | 2 |
| PB2 - 52,905 – 65,016 | 6 |
| PB3 - 65,017 – 86,964 | 5 |
| PB3 (premium) - 86,965 - 100,942 | - |
| PB4 - 86,965 - 104,462 | 1 |

Welsh Government

A Written Statement by the First Minister in July 2019 provided the latest data on pay bands. There were three pay bands within which special advisers were remunerated.

Table 3: Special adviser pay bands Welsh Government

| Pay bands | Number of special advisers ²¹ |
|-------------------------|--|
| PB1 - up to £52,999 | 3 ²² |
| PB2 - £53,000 - £69,999 | 9 ²³ |
| PB3 - £70,000 - £94,999 | 4 ²⁴ |

3. Clause 2 - Amendment of the Civil Service Commissioners (Northern Ireland) Order 1999

Number of special advisers in the Executive Office

Amendment of the Civil Service Commissioners (Northern Ireland) Order 1999

²⁰<https://www.parliament.scot/parliamentarybusiness/28877.aspx?SearchType=Simple&Keyword=special%20advisers&ExactPhrase=True&DateChoice=4&SortBy=DateSubmitted&ResultsPerPage=10>

²¹ This included one special adviser who moved from pay band 2 to pay band 3. In addition, one PB3 was part-time and another PB3 was part-time temporary. The statement included five PB2s who had left their posts in December 2018 and one PB2 who moved to PB3. Two of the PB1s were part-time and one was part-time temporary.

²² Two of the PB1s were part-time and one was part-time temporary.

²³ The statement included five PB2s who had left their posts in December 2018 and one PB2 who moved to PB3.

²⁴ This included one special adviser who moved from pay band 2 to pay band 3. In addition, one PB3 was part-time and another PB3 was part-time temporary.

2.—(1) The Civil Service Commissioners (Northern Ireland) Order 1999 is amended as follows.

(2) In Article 3 (Selection on merit), in paragraph (4) for the words “up to three persons” substitute “one person”.

Paragraph 4 of section 3 of the 1999 Order allows the First Minister and deputy First Minister to appoint up to three special advisers each. The two junior ministers in the Executive Office are also allowed to appoint one special adviser each, meaning there could be a maximum of eight special advisers within the Executive Office. Clause 2(2) of the FoG Bill would limit the First and deputy First Minister to one special adviser each.

During evidence to the Finance Committee, the Bill sponsor, Mr. Jim Allister, recognised that there were two ways of achieving his aim of reducing the number of special advisers in the Executive Office. The alternative to that stated in Clause 2 would have been to take away the right of the junior ministers to appoint special advisers. Although either option would have achieved the same outcome, Mr. Allister felt that his approach was more straightforward in terms of drafting.

Relevant comparisons

The UK Government Ministerial Code provides that, with the exception of the Prime Minister, Cabinet Ministers may each appoint up to two special advisers. The Prime Minister may also authorise the appointment of special advisers for Ministers who regularly attend Cabinet. In Scotland and Wales the First Ministers are responsible for the appointment of special advisers. There is no provision for individual ministers to select their own special advisers. For example, the Scottish Ministerial Code states:

Under the terms of the Constitutional Reform and Governance Act 2010, the First Minister is responsible for all special adviser appointments. If the First Minister ceases to hold office, the appointments of all special advisers appointed by him or her also end. The First Minister is responsible for deciding on the distribution of all special adviser posts within the Scottish Government, whether in support of individual Ministers or as a collective resource.

In the Republic of Ireland, a minister or minister of state may request approval from the government for the appointment of a Special Adviser in accordance with Section 11 of the Public Service Management Act 1997.²⁵ Special Advisers are temporary civil

²⁵ Section 11 Public Service Management Act, 1997. Available from:
<http://www.irishstatutebook.ie/eli/1997/act/27/section/11/enacted/en/html#sec11>

servants²⁶ but are exempt from being appointed by Civil Service Commissioners following a competitive procedure.²⁷ If the proposed individual comes from outside the civil service, the appointment further requires approval by the Taoiseach.²⁸

In regard to number of Special Adviser appointments, the Public Service Management Act 1997 states²⁹:

11.—(1) The Government may, by order, on the request of a Minister of the Government having charge of a Department... appoint Special Advisers to the Minister or to a Minister of State who is assigned to that Department or to a Scheduled Office...:

Provided that the number of Special Advisers shall not—

(a) in the case of a Minister (other than the Taoiseach or the Tánaiste or the leader of a political party registered in the Register of Political Parties), be greater than 2,

(b) in the case of a Minister of State who regularly attends meetings of the Government, be greater than 2, and

(c) in the case of any other Minister of State, be greater than one.

Table 4 sets out the number of special advisers in the UK Government and devolved administrations since 2013-14. The figures include special advisers in post for all or part of the financial year and therefore may not reflect the number of special advisers in post at any one time. This will also explain any variations with the tables earlier in the paper.

Table 4: Number of special advisers in the UK Government and devolved administrations since 2013-14

| | 2013-14 | 2014-15 | 2015-16 | 2016-17 | 2017-18 | 2018-19 |
|------------------|---------|---------|---------|---------|--------------------|---------------------|
| Northern Ireland | 21 | 25 | 27 | - | - | - |
| UK | 103 | 92 | 89 | 88 | 99.2 ³⁰ | 108.4 ³¹ |

²⁶ Instructions to Personnel Officers - Ministerial Appointments for the 32nd Dáil: Appendices 8 - Model Contract of Employment for the post of Special Adviser. Available from:

<https://www.gov.ie/pdf/?file=https://assets.gov.ie/7915/4e02a0251f144e20b34c4042e7e7aa62.pdf#page=1>

²⁷ Section 19 Ethics in Public Office Act, 1995. Available from:

<http://www.irishstatutebook.ie/eli/1995/act/22/enacted/en/print#sec19>

²⁸ Instructions to Personnel Officers - Ministerial Appointments for the 32nd Dáil. Available from:

<https://www.gov.ie/pdf/?file=https://assets.gov.ie/7915/4e02a0251f144e20b34c4042e7e7aa62.pdf#page=1>

²⁹ Section 11 Public Service Management Act, 1997. Available from:

<http://www.irishstatutebook.ie/eli/1997/act/27/section/11/enacted/en/html#sec11>

³⁰ Full-time equivalent

³¹ Full-time equivalent

| | | | | | | |
|----------------------------|---------|----|---------|----|----|----|
| | | | | | | |
| Wales | 9 | 10 | No data | 13 | 10 | 15 |
| Scotland | 14 | 14 | 12 | 13 | 14 | 14 |
| Republic of Ireland | No data | | | | | 59 |

5. Role of the Commssioner for Standards

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

5.—(1) The Assembly Members (Independent Financial Review and Standards) Act (Northern Ireland) 2011 is amended as follows.

(2) In Section 17(1)(b) after “Code of Conduct” insert “or the Ministerial Code, or both.”

(3) At the end of Section 17(1)(d) insert “including ministers”.

(4) In Section 17(2)(a) after “Code of Conduct” insert “or the Ministerial Code, or both”.

(5) in Section 17(3) insert the words

“the Ministerial Code” means the Ministerial Code as defined by Section 28A of the Northern Ireland Act 1998

(6) in Section 17(3) for the purposes of defining “relevant time” after “Code of Conduct” insert “or the Ministerial Code, or both”.

Clause 5 seeks to bring investigation of breaches of the Ministerial Code within the remit of the Assembly’s Commissioner for Standards. This issue has been raised before. In January 2017 Steven Agnew, a Green Party MLA, tabled a motion calling for the Executive to introduce legislation to allow the Commissioner for Standards to

investigate breaches of the Ministerial Code. The question was put and agreed but no subsequent action was taken to address the substance of the motion.³²

Reflecting on this motion, the then Commissioner for Standards commented on the possibility of such complaints coming within his remit:

*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.*³³

Section 28A(1) of the Northern Ireland Act 1998 provides that “Without prejudice to the operation of section 24, a Minister or junior Minister shall act in accordance with the provisions of the Ministerial Code.” However, whilst there is therefore a statutory obligation to abide by the provisions of the Code, there is also a lack of a clearly process defined for investigating alleged breaches of the Code.

New Decade, New Approach states that a panel of three Commissioners for Ministerial Standards will be appointed to investigate complaints that a Minister has breached the Ministerial Code of Conduct, Guidance to Ministers on the Exercise of their Functions or Conduct of Executive Business. This will be in addition to the Assembly’s Commissioner for Standards.

The three Commissioners will be appointed by the First Minister and deputy First Minister and *New Decade, New Approach* explains that:

When the Commissioners investigate a complaint, they will publish the findings of their investigation. Their findings will include whether or not the Minister has been found to have breached the terms of the Code or Guidance, and the relative seriousness of the breach. The findings will not include any recommendation regarding sanctions. This will ultimately be a matter for the relevant Party/Assembly process.

It goes on to say:

The published report of the Commissioners may provide the grounds upon which others may initiate their own sanctions, including those under s.30 of

³² Official Record of the Northern Ireland Assembly, 24 January 2017:

<http://aims.niassembly.gov.uk/officialreport/report.aspx?&eveDate=2017/01/24&docID=288332#2655161>

³³ Annual Report of the Commissioner for Standards: <https://standardscommissionerniassembly.org/wp-content/uploads/2017/04/Commissioner-for-Standards-Annual-Report-2016-2017.pdf>

the NI Act 1998 by which the Assembly can suspend a Minister on the passing of a motion of no confidence supported by 30 MLAs or moved by the First Minister and deputy First Minister acting jointly. The published report may also be taken into consideration by the nominating officer of the Minister's party.³⁴

If Clause 5 of the Bill was enacted, then this would presumably negate the need for the panel of commissioners.

Relevant comparisons

There is no provision in the other legislatures for the standards commissioner to investigate breaches of their respective ministerial codes. The final arbiter on decisions relating to ministerial conduct rest with the Prime Minister or First Minister in Wales or Scotland.

There are mechanisms for the Prime Minister or a First Minister to seek an investigation into alleged ministerial misconduct. All three codes refer to an independent adviser or, in the case of Scotland, a panel of advisers, who may be asked by the Prime Minister or First Minister to undertake an investigation.

However, the perceived lack of independence of these advisers and their inability to act on their own initiative has come in for criticism.

For example, in Westminster the post is not statutory and is not subject to open recruitment. In 2012 the Public Administration Select Committee questioned the method of appointment and in a pre-appointment hearing raised concerns over whether the latest appointee, Sir Alex Allan, was the best choice for the role, given his long career as a civil servant.

The Committee also questioned the powers of the Independent Adviser, specifically the inability to initiate his or her own inquiries:

That is exactly how other regulators work, and it is how our own Parliamentary Commissioner for Standards operates. He would command little public confidence if he could not instigate his own investigations. The Committee on Standards in Public Life has recommended the same thing for the Prime Minister's adviser on ministerial interests, on more than one occasion. The mystery is why these recommendations have not been implemented, and why the previous Labour Government did not accept them. The Opposition are now proposing this motion precisely because their Government refused to implement them.³⁵

The status and effectiveness of the Independent Adviser was the subject of a Westminster Hall debate in November 2016, where it was the subject of some criticism.

³⁴ *New Decade, New Approach*, January 2020

³⁵ House of Commons Library, *The Ministerial Code and the Independent Adviser on Ministerial Interests*, January 2018

Replying for the Government, the Assistant Whip reiterated that the appointment and dismissal of Ministers remained a matter for the Prime Minister.

Recommendation of the Standards of Conduct Committee in the National Assembly for Wales

In its September 2018 report, *Creating the Right Culture*, the Standards of Conduct Committee in the National Assembly for Wales highlighted what it saw as problems with the Ministerial Code, specifically with regard to making complaints:

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.

The Committee recognised that this system was similar to that operating elsewhere in the UK but suggested that “as a Committee we believe that Wales can take a bold step, to improve provision and increase confidence in the system.”³⁶ It went on to say that:

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 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

³⁶ National Assembly for Wales Standards of Conduct Committee, *Creating the Right Culture*, September 2018.

Members. We believe this will be simpler to understand and easier to access for the public.³⁷

The Committee recommended 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.”

This recommendation was not taken forward. In its response to the Committee’s report, the Welsh Government rejected a potential role for the Assembly’s Standards Commissioner, arguing that this would cause the type of confusion that the Committee was seeking to avoid:

3. There is a comment in paragraph 38 of the report that the requirement under the Ministerial Code which states: Ministers must keep separate their roles as Minister and Assembly Member, is potentially confusing. This is a fundamental clause of the code and the primary purpose of 1.1(viii) of the Ministerial Code is to ensure that a Minister avoids the potential for an actual or perceived conflict of interest if they are asked to make a decision, within their portfolio, which impacts directly on their own constituency. It is also designed to ensure Ministers do not use Welsh Government facilities and resources for constituency or party political activities outside of the parameters set out in paragraphs 4.1 to 4.4 of the code. The rationale for the Committee’s conclusion that there is potential for confusion regarding Assembly Member and Ministerial roles is not evident. To involve the Standards Commissioner, appointed by and accountable to the Assembly, to investigate complaints about the behaviour of Ministers, when clearly operating as Minister rather than Assembly Member, could in itself create the sort of ambiguity of accountability the Committee’s report seeks to avoid. The separation of the Executive from the Legislature in 2006 ended the corporate body status and involving an Assembly appointee in such matters could create confusion in the minds of the public about where responsibility for Ministerial conduct lies.

4. However, where a Minister was clearly acting in their capacity as Assembly Member when the alleged misconduct occurred, the First Minister would, under those circumstances, consider it appropriate for the Standards Commissioner to handle the matter rather than it be dealt with under the Ministerial Code.

6. The report rightly refers to the facility the First Minister has to refer any matter regarding Ministerial behaviour to an Independent Adviser to investigate. Having only been asked to investigate and advise on one case, which was undertaken diligently and objectively by a former Director of Public Prosecutions to the Irish Government, the Committee’s view that public confidence would be improved if the Standards Commissioner undertook that role, is not one that is shared by the First Minister.³⁸

³⁷ As above.

³⁸ Written Response by the Welsh Government to the report of the Standards of Conduct Committee entitled *Creating the Right Culture*, November 2018

6. Administrative and operational clauses

Clauses 6, 7 and 8 are taken together as they are related to issues of transparency and record keeping.

Records of meetings

6. The Civil Service will make and keep an accurate written record of every meeting attended by a minister in departmental service, recording, in particular, those present, date and time, topics discussed, each ministerial indication of intent and every decision and action point.

Records of contacts

7. Ministers and special advisers must log and retain records of all meetings they hold with non-departmental personnel about departmental matters; except for liaison with the minister's political party.

Presence of civil servants

8. A civil servant must be present and take a contemporaneous note at every meeting held by a minister or special adviser with non-departmental personnel about departmental matters; except for liaison with the minister's political party.

Paragraph 4 of Part 2 of the *New Decade, New Approach* document states that the political parties agreed to an “ambitious package of measures to strengthen transparency and governance arrangements in the Assembly and Executive in line with international best practice”.³⁹

Annex A further states that “The Executive will, as a matter of urgency, produce strengthened drafts of the relevant codes to be implemented immediately.” This would include requirements to:

- Make clear the need for the recording of ministerial meetings (to also be included in the Civil Service Code), the attendance of officials at ministerial meetings, and the prompt declaration to the Department of any substantive

³⁹ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/856998/2020-01-08_a_new_decade_a_new_approach.pdf

discussions with external organisations relating to departmental business at which no officials were present.

- Publish details of meetings with external organisations (and also gifts and hospitality received).

These measures are reflected in the new ministerial code of conduct published on 16 March 2020:

7.5 Ministers must ensure that an appropriate official is in attendance at all meetings concerning departmental or Executive business, and that records of all such meetings are maintained.

7.6 It is recognised that third parties and other relevant stakeholders may initiate discussions with a Minister in relation to departmental or Executive business, in unscheduled and/or less formal contexts. If a Minister meets an external organisation or individual and finds themselves discussing official business without an official present any significant content should be passed back to their Private Secretary as soon as possible after the event.

7.7 When holding meetings with Ministers and/or officials from foreign governments, or where official business is likely to be discussed, Ministers should always ensure that an official is present and that a record of the discussion is maintained.

7.8 Details of Ministers' meetings with external organisations/individuals will be published by Departments on a quarterly basis. Exceptionally there may be a need to consider cases where publication at certain times may engage commercial sensitivities, or where another relevant Freedom of Information exemption or ERI exception applies. Where such information is withheld, the rationale for doing so will be recorded and the details published as and when the matter covered by the exemption/exception is no longer relevant.⁴⁰

⁴⁰ <https://www.finance-ni.gov.uk/sites/default/files/publications/dfp/Guidance%20for%20Ministers%20-%20Final%20as%20agreed%20at%20Executive%20-%20March%202020.pdf>

Relevant comparisons

Table 5 compares the proposals in the FoG Bill with existing provisions in the other Ministerial Codes in the UK. The Codes of the UK Government and Scottish Governments require a private secretary or official to be present for all discussions relating to Government business. In circumstances where a private secretary or official cannot be present, any significant content should be reported back.

Table 5: Requirement to maintain records of meetings - comparisons

| Proposal in FoG Bill | UK Government Ministerial Code | Scottish Government Ministerial Code | Welsh Government Ministerial Code |
|---|---|---|--|
| <p>6. The Civil Service will make and keep an accurate written record of every meeting attended by a minister in departmental service, recording, in particular, those present, date and time, topics discussed, each ministerial indication of intent and every decision and action point.</p> | <p>8.14 Ministers meet many people and organisations and consider a wide range of views as part of the formulation of Government policy. Meetings on official business should normally be arranged through Ministers’ departments. A private secretary or official should be present for all discussions relating to Government business. If a Minister meets an external organisation or individual and finds themselves discussing official business without an official present – for example at a social occasion or on holiday – any significant content should be passed back to the department as soon as possible after the event. Departments will publish quarterly, details of Ministers’ external meetings...</p> | <p>4.22 Ministers meet many people and organisations and consider a wide range of views as part of the formulation of Government policy. Meetings on official business should normally be arranged through Private Offices. A private secretary or official should be present for all discussions relating to Government business. Private Offices should arrange for the basic facts of formal meetings between Ministers and outside interest groups to be recorded, setting out the reasons for the meeting, the names of those attending and the interests represented. A monthly list of engagements carried out by all Ministers is published three months in arrears.</p> <p>4.23 If Ministers meet external organisations or individuals and find themselves discussing official business without an official present – for example at a party conference, social occasion or on holiday – any significant content (such as substantive issues relating to Government decisions or contracts) should be passed back to their Private Offices as soon as possible after the event, who should arrange for the basic facts of</p> | <p>3.6 Ministers meet many people and organisations and consider a wide range of views as part of the formulation of Government policy. The basic facts of formal meetings between Ministers and outside interest groups should be recorded, setting out the reasons for the meeting, and the names of those attending and the interests represented. Ministers should not meet formally with professional public affairs organisations (lobbyists) seeking to influence the views or decisions of Government.</p> |

such meetings to be recorded in accordance with paragraph 4.22 above.

The Cabinet Office publishes details of Ministers' meetings with external organisations. Figure 1 is an illustration of the information published.

Figure 1: excerpt from *Cabinet Office ministerial meetings, October to December 2019*⁴¹

| Minister | Date | Name of organisation or individual | Purpose of meeting |
|--------------|------------|--|---|
| Michael Gove | 02/10/2019 | Action Homeless | To discuss homelessness |
| Michael Gove | 08/10/2019 | Bill and Melinda Gates Foundation | To discuss development and charitable organisations |
| Michael Gove | 08/10/2019 | British Chamber of Commerce | To discuss Business and Brexit readiness |
| Michael Gove | 09/10/2019 | ExonnMobil, United Kingdom Petroleum Association | To discuss Oil and Gas sector and Brexit |

The Welsh Government publishes similar information in Excel format, although it does not provide the purpose of the meeting.

⁴¹ *Cabinet Office ministerial meetings, October to December 2019*, published March 2020

Using official systems to communicate

Use of official systems

- 9.—(1) It shall be an offence for any minister, civil servant or special adviser when communicating on government business by electronic means to use personal accounts or anything other than departmental systems and email addresses.
- (2) It is a defence for a person charged with an offence under subsection (1) to prove that the person had a reasonable excuse for the failure.
- (3) A person guilty of an offence under this section is liable on conviction
- (a) on indictment, to imprisonment for a term not exceeding 2 years;
 - (b) on summary conviction, to imprisonment for a term not exceeding 6 months or a fine not exceeding the statutory maximum or both.

The issue of the use of official and non-official email accounts featured during the course of the RHI Inquiry. The revised ministerial code published on 16 March states that:

7.3 Ministers must use official email systems for all communications relating to official business. Exceptionally, where this is not possible, the Minister must copy any message to their official email account. Information generated in the course of government business must be handled in accordance with the requirements of the law (including the Freedom of Information Act 2000 (Fol), the Environmental Information Regulations 2004 (EIR), GDPR and Public Records Act (NI) 1923), regardless of how it is communicated.⁴²

The Code of Conduct for Special Advisers published in February 2020 states:

Special Advisers must use official email systems for communications relating to official business. Exceptionally, where this is not possible, the Special Adviser must copy any message to their official email account. Information generated in the course of government business must be handled in accordance with the requirements of the law (including the Freedom of

⁴² <https://www.finance-ni.gov.uk/sites/default/files/publications/dfp/Guidance%20for%20Ministers%20-%20Final%20as%20agreed%20at%20Executive%20-%20March%202020.pdf>

Information Act (Fol), GDPR and Public Records Act), regardless of how it is communicated.⁴³

Where the FoG Bill goes further is making it a criminal offence for a minister, special adviser or civil servant for failure to adhere to the requirement to use official systems, although there is an allowance for a reasonable excuse as a defence.

Relevant comparisons

In 2013 the Cabinet Office published *Guidance to Departments on the Use of Private Email*, which addressed the use of non-government email for government business.

The guidance says:

Civil servants and Ministers are generally provided with access to Government email systems. Other forms of electronic communication may be used in the course of conducting Government business. Departments' security policies will apply when generating and communicating information. The originator or recipient of a communication should consider whether the information contained in it is substantive discussions or decisions generated in the course of conducting Government business and, if so, take steps to ensure the relevant information is accessible (e.g. by copying it to a government email address).

The guidance goes on to say that it may be helpful to bear in mind the following:

- a. Who are the originator and recipients of the information? This will not necessarily be determinative but if, for example, the sender and recipients are civil servants then this might suggest that the email amounts to Government business.*
- b. In what capacity were the originator or recipients acting? For example, Ministers can act in several different capacities – as members of the Government, as constituency MPs, and as members of a political party.*
- c. What function was the information being provided for? For example, was it to inform a substantive policy discussion or a particular decision and if so, what was the nature of that discussion or decision? Was the information being generated directly to inform or influence the development or implementation of departmental policy or the operation of the department? Should the information form part of the public record? An exchange which mentions a department's policy area (e.g. commenting, expressing views, or discussing wider political ramifications) does not necessarily amount to Government's official business. However, if it was intended that the*

⁴³ Code of Conduct for Special Advisers, Northern Ireland: <https://www.finance-ni.gov.uk/sites/default/files/publications/dfp/CODE%20OF%20CONDUCT%20FOR%20SPECIAL%20ADVISERS%20-%20FINAL%20-%20-%20-%20JANUARY%202020.pdf>

department would use or act on the information in the course of conducting its business that may well point to the information being Government information.

The use of private email accounts to conduct government business is an issue that has arisen in different countries in recent years.

In 2019 Scottish First Minister Nicola Sturgeon was involved in controversy when it emerged that she was using a non-government email account to conduct government business.⁴⁴

Former Welsh First Minister Carwyn Jones faced criticism in 2018 when he admitted to using his personal email account to conduct government business since 2009.⁴⁵

In 2017 six ministers in the Republic of Ireland admitted to using non-government email accounts to send information about government business.⁴⁶

In all of the cases, there did not appear to be agreement on to what extent any rules had been breached.

Interests of Ministers and special advisers

Register of interests

10.—(1) Within 3 months of this Act coming into effect the Department of Finance must establish, maintain and make available for public inspection a register of interests in respect of ministers and special advisers for the purpose of recording all such interests as are prescribed in a scheme defining the categories of financial and other interests that are registrable, including gifts and hospitality.

(2) The Minister of Finance must lay the scheme and any revisions thereof before the Assembly as soon as possible after compilation.

(3) All ministers and special advisers must —

(a) within 21 days of taking up their post inform the Permanent Secretary of the Department of Finance of their registrable interests, including those of their spouse, partner or close family members; and

(b) within 21 days of any change to those registrable interests, inform the Permanent Secretary of that change.

Relevant comparisons

⁴⁴ Article in the Scotsman newspaper: <https://www.scotsman.com/news/politics/scottish-independence/nicola-sturgeon-urged-come-clean-over-claims-she-used-private-email-government-business-1405179>

⁴⁵ Article in Wales Online: <https://www.walesonline.co.uk/news/politics/questions-over-carwyn-jones-use-14227468>

⁴⁶ Article in the journal.ie: <https://www.thejournal.ie/ministers-using-personal-emails-3228531-Feb2017/>

In the Republic of Ireland, special advisers whose remuneration exceeds the prescribed amount must prepare and furnish a statement of their own registerable interests which could reasonably be seen as interfering or being incompatible with their official duties, to be submitted to the minister/minister of state and the Oireachtas.⁴⁷ In total, the minister/minister of state should submit the following documents before the Houses of the Oireachtas not later than 60 days after the person's appointment to Special Adviser:⁴⁸

1. A copy of the contract, or a statement in writing of the terms and conditions, under which the person acts or acted as a special adviser,
2. A copy of any statement under subsection (3) (a) (i) of the interests of the person furnished to the office holder,
3. A statement as to whether the person is a relative of the office holder, and
4. If subsection (3) applies to the person, a statement of the qualifications of the person relevant to his or her functions as a special adviser.

Special Advisers should also prepare a statement of interests of their spouse/civil partner, children, or children of their spouse/civil partner, which could reasonably be seen as interfering with their official duties. This, alongside the statement of own interests, should be submitted to their appointing minister/minister of state and the Standards in Public Office Commission on an annual basis.⁴⁹

Ministers, as office holders, are "required to furnish a statement of registrable interests to the Standards Commission by the following 31 January."⁵⁰

Other jurisdictions

The research did not find any specific reference to registers of interests for special advisers in the UK, Scottish or Welsh Governments. In Scotland, the Lobbying (Scotland) Act 2016 requires lobbyists to register the names of persons lobbied. This includes Scottish Government Ministers and special advisers.⁵¹

In relation to the UK Government, gifts and hospitality received by both ministers and special advisers are published on the gov.uk website.

For registering interests, ministers must:

7.3 On appointment to each new office, Ministers must provide their Permanent Secretary with a full list in writing of all interests which might be thought to give rise to a conflict. The list should also cover interests of the

⁴⁷ As cited above.

⁴⁸ Section 19 Ethics in Public Office Act, 1995.

⁴⁹ As above.

⁵⁰ Standards in Public Office Act, Code of Conduct for Office Holders: <https://www.sipo.ie/documents/english/Code-of-Conduct-for-Office-Holders-.pdf>

⁵¹ Lobbying (Scotland) Act 2016: <http://www.legislation.gov.uk/asp/2016/16/contents>

Minister's spouse or partner and close family which might be thought to give rise to a conflict.

7.4 Where appropriate, the Minister will meet the Permanent Secretary and the independent adviser on Ministers' interests to agree action on the handling of interests. Ministers must record in writing what action has been taken, and provide the Permanent Secretary and the independent adviser on Ministers' interests with a copy of that record.

7.5 The personal information which Ministers disclose to those who advise them is treated in confidence. However, a statement covering relevant Ministers' interests will be published twice yearly.⁵²

The Welsh Ministerial Code contains similar wording, except that it commits to publishing a list of relevant ministers' interests annually.⁵³

The Scottish Ministerial Code does not commit to publishing a list of ministers' interests.

Offence of unauthorised disclosure

11.—(1) Without prejudice to the operation of the Official Secrets Acts 1911-1989, it shall be an offence for any Minister, special adviser or civil servant to communicate, directly or indirectly, confidential and/or commercially sensitive information to any natural person or legal entity for the financial or other potential benefit of any natural person, legal entity, minister, special adviser or civil servant.

(2) A person guilty of an offence under this section is liable on conviction

(a) on indictment, to imprisonment for a term not exceeding 5 years;

(b) on summary conviction, to imprisonment for a term not exceeding 6 months or a fine not exceeding the statutory maximum or both.

Clause 11 introduces a new criminal offence for the disclosure of certain information for the purposes of financial or other benefit.

The Letter of Appointment for special advisers reminds special advisers of the need for confidentiality:

⁵² UK Government Ministerial Code:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/826920/August-2019-MINISTERIAL-CODE-FINAL-FORMATTED-2.pdf

⁵³ Register of Ministerial interests, Welsh Government: <https://gov.wales/sites/default/files/publications/2018-10/ministerial-interests.pdf>

34. As a civil servant, high standards of confidentiality must be observed. You are required to exercise care in the use of official information acquired in the course of official duties and not to disclose, without the authorisation of your Appointing Authority, information which is held in confidence. The rules governing the confidentiality and use of official information are set out in HR policy 6.01 Standards of Conduct.

35. You are also subject to the Official Secrets Acts.⁵⁴

Relevant comparisons

Special advisers in England, Scotland and Wales are also bound by the Official Secrets Act, although this would be unlikely to relate to the intention behind Clause 11 of the FoG Bill, a point which the Bill's sponsor noted during the second stage debate.

The model contracts for special advisers serving in the UK, Scottish and Welsh Governments makes clear the requirement for confidentiality. For example the Welsh model contract says:

15a. You are a servant of the Crown and you owe duties of confidentiality and loyal service to the Crown. You are required to exercise care in the use of information acquired in the course of your official duties and to protect information which is held in confidence. An account of the constitutional position and the rules governing confidentiality and the use of official information is set out in the Welsh Government Terms & Conditions of Service Code. You are also subject to the Official Secrets Act 1989.⁵⁵

⁵⁴ Letter of Appointment for Special Advisers, Northern Ireland: <https://www.finance-ni.gov.uk/sites/default/files/publications/dfp/LETTER%20OF%20APPOINTMENT%20TO%20BE%20ISSUED%20TO%20SPECIAL%20ADVISER%20-%20FINAL%20-%202020%20JANUARY%202020.pdf>

⁵⁵ Model Contract for Special Advisers, UK Government: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/832908/20190919_-_gov.uk_version_-_FINAL_VERSION_Special_Adviser_Model_Contract.pdf