

Northern Ireland Audit Office (NIAO) report: Planning in Northern Ireland (supplementary submission)

1. Following the Public Accounts Committee (PAC) hearing on 10 February 2022 into *planning in Northern Ireland*, there are many issues that could be raised with the evidence given by the Department for Infrastructure on the state of the planning system. However, ahead of the next evidence session scheduled for the 17 February 2022 to examine planning at local government level, this supplementary submission to my previous evidence tabled on 7 February 2022 concentrates on the subject of *raising concerns* about planning, an important topic that was rightly raised by Members.

History of whistleblowing in planning

2. In 2010, the PAC was critical of DOE Planning's "*...long term underperformance...and the weaknesses in measures to prevent and detect impropriety*".¹ Specifically, Members concluded "*...that no other part of the public sector was more open to the possibility of conflicts of interest, collusion and impropriety.*"²
3. In 2010, Members had the foresight to recognise the vital role the general public can play in raising public interest concerns and the importance that such concerns are robustly investigated. As a result, the PAC strongly recommended that a specific external whistleblowing policy be developed and promoted for planning. This complimented the provisions of the *Public Interest Disclosure (Northern Ireland) Order 1998* which provides protections to public servants who raise concerns on a wide range of issues that were likely to harm public services and the public interest. These include:

¹ Northern Ireland Audit Office (2013) DOE Planning: Review of Counter Fraud Arrangements. Published by CDS 104040, p3.

² Ibid.

- a) *That a criminal offence has been committed, is being committed or is likely to be committed,*
- b) *that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,*
- c) *that a miscarriage of justice has occurred, is occurring or is likely to occur,*
- d) *that the health or safety of any individual has been, is being or is likely to be endangered,*
- e) *that the environment has been, is being or is likely to be damaged, or*
- f) *that information tending to show any matter falling within any one of the preceding sub-paragraphs has been, is being or is likely to be deliberately concealed.*³

4. It is these types of potential disclosures that still form the basis for many modern-day Northern Ireland public sector whistleblowing policies.

5. Between 2010 and 2013, DOE Planning published its external whistleblowing policy and rolled out a series of counter-fraud measures across all Divisional Planning Offices. This included tailored fraud awareness training for all DOE Planning Staff.

6. In 2013, the Northern Ireland Audit Office (NIAO) issued an up-date report on *DOE Planning: Review of Counter Fraud Arrangements*. It reported how, despite evidence of a growing counter fraud culture within DOE Planning, *“less than half of staff would be confident in using the whistleblowing arrangements to report wrongdoing.*⁴ This may well be explained because, for internal whistleblowers, *“speaking out against power structures...has a cost...and can be a powerful disincentive”.*⁵

³ The Public Interest Disclosure (Northern Ireland) Order 1998, Section 3; amending Part V of the 1996 Order.

⁴ Refer to footnote 1, p5.

⁵ Brown, B. (2017) *Braving the Wilderness: The quest for true belonging and the courage to stand above*. London, Ebury Publishing, p151.

7. Moreover, it has long been recognised that in planning there will be many employees who struggle with the type of ethical dilemmas highlighted by Marcuse, where loyalty to, or fear of their institution, conflicts with personal “*moral integrity*”.⁶ These dilemmas become an issue of public concern when:

*“...a planner employed by a public agency believes that his agency is not acting in the best interest of the public and yet feels constrained from dissenting by virtue of employment by the city and obligation of loyalty that arises from it.”*⁷

8. Hirschman puts this persisting problem down to predominantly economic factors.⁸ In other words, employees concerned with wrongdoing are more inclined to remain silent because of their financial dependence on their employer. More recent, Kenny recognises that internal whistleblowers remain few and that “...*most employees still fail to report observed wrongdoing.*”⁹
9. A persisting reluctance of employees to raise concerns heightens the importance of the PAC’s foresight in encouraging members of the public to come forward as external whistleblowers over a decade ago. Indeed, the actions of one member of the public who raised the alarm about the Renewable Heat Incentive (RHI) scandal were highly commended by the authors of the Public Inquiry report.¹⁰ Yet, these selfless actions of that external whistleblower were not matched by the reactions of government organisations charged with maintaining high standards of probity in public service.¹¹

⁶ Marcuse, P. (1976) Professional Ethics and Beyond: Values in Planning. *Journal of the American Institute of Planners*. 42(3), p269.

⁷ Ibid.

⁸ Hirschman, A. O. (1970) Exit, Voice and Loyalty: Responses to decline in firms, organisations and states. (Vol.25) Cambridge, Harvard University Press.

⁹ Kenny, K. (2019) *Whistleblowing: Towards a new Theory*. Massachusetts, Harvard University Press, p16.

¹⁰ Coghlin, P., O’Brien, U. and MacLean, K. (2020) *The Report of the Independent Public Inquiry into the Non-domestic Renewable Heat Incentive (RHI) Scheme*. United Kingdom, Digital Print Service of the Northern Ireland Department of Finance.

¹¹ McBride, S. (2019) *BURNED: THE INSIDE STOREY OF THE CASH-FOR-ASH SCANDAL AND NORTHERN IRELAND’S SECTRETIVE NEW ELITE*. Newbridge, Merrion Press.

10. External whistleblowers are all too aware that they are not afforded protection under the *Public Interest Disclosure (Northern Ireland) Order 1998* (as all Departmental external whistleblowing policies make clear). However, because the law makes no legislative provision to protect external whistleblowers, is not justification for a public body to dismiss the concept or value of external whistleblowing.
11. To do so relegates citizens' public interest concerns to the status of private complaints and, in my experience, has ensured they are not subject to the same rigorous investigative standards required when internal whistleblowing concerns are raised within local government. This is despite the 2013 NIAO report having stressed the importance of ensuring that "*...robust counter fraud procedures are in place prior to the transfer of planning functions to district councils.*"¹²
12. At the evidence hearing of 10 February 2022, the Department for Infrastructure sought to provide Members with some assurance of the robustness of its whistleblowing procedures (at least in theory). However, there was no examination of how the development of a counter fraud / raising concerns / anti-bribery culture was transferred to local government along with the transfer of the majority of planning functions.
13. There is nothing to indicate that the risks to planning have lessened with the introduction of Local Government Reform (LGR) in April 2015. However, there is qualitative evidence to suggest that the external whistleblowing safeguards introduced back in 2010, have been diminished and dismissed post-LGR, leaving the planning system open to "*...considerable risks...*"¹³ such as those identified in the NIAO report.
14. Without effective examination of the concerns being raised with NIAO by the public about planning,¹⁴ there is less likelihood of detection of wrongdoing or

¹² Refer to Footnote 1, p11.

¹³ Northern Ireland Audit Office (2022) Planning in Northern Ireland. CDS 265237, para.3.19.

¹⁴ Ibid., Executive Summary, p14.

creating deterrents for those intent on engaging in irregular and improper practices and conducts that bring the planning system into disrepute. The value of the case study approach (referred to at paragraph 33 of my initial submission) can be key in establishing the veracity of concerns raised by the public, where subsequent acknowledgement and accountability become the basis for delivery and implementation for sound whistleblowing policy. Presently, the public are being failed in that regard.

15. What follows is my own experience of seeking to raise public interest concerns about serious matters of irregularity and impropriety and the failure of the internal and external scrutiny structures to properly investigate actual evidence of irregular and improper practices and conducts within planning. Whilst necessarily brief for the purpose of this submission, the concerns raised are backed by detailed analysis of the facts of the case.

External whistleblowing and Derry City and Strabane District Council

16. Following an unsuccessful legal challenge of a planning permission granted by DCSDC in 2018, there was (and remains) clear, objectively verifiable evidence that false and misleading testimony corrupted a High Court judgement that gave rise to a miscarriage of justice. Concern over a miscarriage of justice is a recognised aspect of the *Public Interest Disclosure (Northern Ireland) Order 1998*,¹⁵ as set out in paragraph 3 above. There should be no argument that such external whistleblowing concerns need to be robustly investigated in the public interest if the integrity and credibility of Northern Ireland's planning (and judicial) system is to be safeguarded.

17. In line with the categories set out in DCSDC's whistleblowing policy, as drawn from the *Public Interest Disclosure (Northern Ireland) Order 1998*, concerns were formally raised by me as an external whistleblower between December 2018 and

¹⁵ Refer to footnote 3.

February 2019. These evidence-based concerns were presented to a public body that claims to be “...committed to the highest possible standards of openness, probity and accountability”,¹⁶ in the expectation that a robust investigation would ensue.

18. DCSDC declined to deal with the matter as an external whistleblowing case, instead dealing with it under the council’s ordinary internal complaints procedures. Unhappy with the standard to which the complaint was investigated and suspicious of the motives behind why such serious public interest concerns were being dealt with under the normal complaints procedure, the matter was again raised with senior management in the public interest.

19. A meeting took place with DCSDC senior management on 27 February 2019, where a detailed evidence pack of the wrongdoing was presented and forensically particularised before senior officials. These officials could have been in no doubt as to the veracity of concerns being raised and the objectively verifiable evidence supporting them. However, despite a written request beforehand, and a verbal request to do so during the meeting, the senior officials in attendance refused to make an official record of the meeting.

20. Members will be aware of the serious criticisms directed at public servants in the RHI inquiry report for not keeping records. In the circumstances, it is difficult not to conclude that not keeping an official record of the meeting of 27 February 2019 was to ensure that the evidence of impropriety presented to senior officials and, importantly, their understanding of the veracity of the concerns before them, remained in “perishable verbal form”¹⁷ within DCSDC.

21. Before the meeting of 27 February 2019, the importance of keeping official records would not have been lost on senior officials. This is because, ten months earlier,

¹⁶ Derry City and Strabane District Council (2020) *Counter Fraud, Raising Concerns and Anti-Bribery Policy*, p18. Reviewed July 2020.

¹⁷ Proctor, R. (2008) Agnotology: A Missing Term to Describe the Cultural Production of Ignorance (and its Study); (Chapter 1) in Proctor, N. and Schiebinger, L. *Agnotology: the Making and Unmaking of Ignorance*. California, Stanford University Press.

DCSDC had received a warning from the then Ombudsman, Marie Anderson, about the unacceptability of not keeping contemporaneous records and how their absence in her case “...has impeded my investigation...”¹⁸

22. That such a recent warning was blithely ignored lends credence to a “key message” contained in the joint publication by Northern Ireland’s oversight bodies that: “incomplete records can lead to suspicions of wrongdoing or a sense that a body has something to hide.”¹⁹ Certainly, from the perspective of a trained and experienced investigator of whistleblowing concerns, this would be seen as a potential indicator of impropriety on the part of the public body that warranted further scrutiny. However, this was missed due to the inadequate approach DCSDC extended to external whistleblowers at the time.

23. Senior officials were at pains to point out that they would not be carrying out an investigation, but a review of what they deemed to be a Stage 2 complaint under the councils standard complaints procedures.²⁰ After months of delay, in June 2019 DCSDC decided to refer the matter to a barrister specialising in planning and environmental law. His task was to undertake a desktop review of the findings of the investigation undertaken by DCSDC as part of its Stage 2 internal complaints process.

24. The desktop review was completed in August 2019.²¹ It recommended not to uphold my “complaint”, notwithstanding my insistence that I was not making a complaint but raising an external whistleblowing concern that required robust investigation, beyond that of a desktop review. For the avoidance of doubt, in my

¹⁸ Northern Ireland Public Services Ombudsman (2018) *Investigation Report 17101: investigation of a complaint against Derry City and Strabane District Council*. Belfast, NIPSO, para.74.

¹⁹ Northern Ireland Public Services Ombudsman, Northern Ireland Audit Office and the Information Commissioner’s Office (2020) *Records Matter: A view from regulation and oversight bodies on the importance of good record keeping*. Northern Ireland, Department of Finance, p9.

²⁰ My contemporaneous note of the unrecorded meeting with DCSDC on 27 February 2019.

²¹ Derry City and Strabane District Council (2019) *DESKTOP REVIEW OF A STAGE 3 COMPLAINT AND RECOMMENDATION TO THE CHIEF EXECUTIVE DERRY CITY AND STRABANE DISTRICT COUNCIL*, dated 28 August 2019.

experience of directing and conducting whistleblowing investigations on behalf of the former Department of the Environment between 2006 and 2013, a desktop review is wholly inappropriate when matters of irregularity and impropriety are raised by citizens about the conduct of public business.

25. A key finding of the desktop review was that there is no such concept as external whistleblowing and that any references made about the public in DCSDC's whistleblowing policy that might allow a member of the public to claim to be a whistleblower, should be removed.
26. This retrograde recommendation to expunge reference to the public from DCSDC's whistleblowing policy was made in ignorance of the 2010 PAC concerns about the potential for conflicts of interest, collusion and impropriety within planning. It was made in ignorance of the importance the PAC attached to the vital role the public play in raising concerns in planning. It was made in ignorance of the fact that external whistleblowing had become enshrined in the whistleblowing policy of DOE Planning (and all Northern Ireland central government departments). This, in itself, is an indicator of the inadequacy of both (i) the standard of review undertaken into the serious concerns raised and, (ii) DCSDC's relegation of any member of the public raising matters of irregularity and impropriety to a complainant, to be dealt with under its standard complaints procedures.
27. Another key finding was that those members of the public presenting the whistleblowing concerns at the meeting, including myself, had failed to particularise the serious claims of irregularity and impropriety against this public authority. This is simply wrong. The evidence was meticulously and methodically particularised at the meeting with senior officials. It was the fact that officials refused to keep a record of the meeting which deprived the reviewer of DCSDC's understanding of the evidence before it.
28. Astonishingly, the external reviewer reached his conclusion without conducting interviews with either myself, other professionals who provided corroborating evidence, or DCSDC staff, including those senior officials who attended the

meeting where the external whistleblowing concerns were forensically particularised.

29. There was no criticism in the review of the failure of senior officials to make a record of the evidence that was presented to them; something the most basis of reviews should have recognised as unacceptable practice. Fundamentally, there was no attempt made to elicit from the senior officials who attended the meeting what they understood of the veracity of those evidence-based concerns that went without official documentation due to their decision not to keep a record. I consider this to be a clear failure on the part of the reviewer to be alert to potential indicators of impropriety; an essential skill for any investigator of whistleblowing concerns.

30. There was no effort to establish the facts of the concerns raised, a basic tenet of conducting a whistleblowing investigation (of which I have directed a number on behalf of DOE Planning when employed as its head of the Compliance Improvement and Review Team between 2006-2013). The failure to establish the facts behind the external whistleblowing concerns raised, is a fundamental and serious malfunction of (good) public administration and a further indicator of the inadequacy of the desktop review approach preferred by DCSDC.

31. The fact that public money was spent on commissioning an external review when in-house expertise (and responsibility) was readily available and capable of understanding the *factual or forensic truth*²² behind the external whistleblowing concerns is yet another indicator of potential irregularity than went unexamined.

The wrong type of expert

32. Cohen forcefully argues that when injustice is countered by irrefutable evidence that something happened, or is undeniably the case, the strategy of public

²² **Factual or forensic truth** – truth that is obvious to all (even those seeking to deny it) because it can be objectively verified by evidence. Cohen, S. (2001) *STATES OF DENIAL: Knowing about Atrocities and Suffering*. Cambridge, Polity, p227.

institutions seeking to evade accountability switches from silence or denial to more sophisticated tactics.²³ Particularly so, when the authority is internally aware of the injustice it has presided over – an “*open secret*”²⁴ – but consciously seeks a way of not acknowledging its wrongdoing to evade accountability.

33. In such a scenario, McGoey recognises how external experts can be unwittingly exploited by an organisation in its attempt to absolve corporate and individual liability for the wrongdoing that is to be denied. She alerts readers to how organisations, through the guise of vigilance or independence, set out to find the wrong type of expert to ensure uncomfortable truths are suppressed, whilst simultaneously enabling senior officials to “...*remain convincingly ignorant of effects [the truth] widely visible to others.*”²⁵
34. This gives rise to the tension as to why senior officials (one an experienced civil engineer), required a remotely conducted review to be carried out by a QC – the wrong type of expert – who failed to carry out the simple exercise of establishing the facts around basic planning and civil engineering matters? This gives rise to the concern that the commissioning of a QC was to avoid, and to justify avoiding, an investigation into the *factual or forensic truth* of the whistleblowing concerns already known by DCSDC officials to be true.
35. In other words, I am satisfied that the senior officials who attended the meeting of 27 February 2019, could not have remained ignorant of the factual truth of the external whistleblowing concerns raised. This is because these facts are objectively verifiable and were rigorously particularised to them, at the time. It

²³ Cohen, S. (2001) *STATES OF DENIAL: Knowing about Atrocities and Suffering*. Cambridge, Polity, p103.

²⁴ An *open secret* requires those within an organisation to deliberately and collectively agree not to publicly acknowledge wrong-doing or corrupt practices that they are personally aware of, even though they know this constitutes unethical, unacceptable, unjust and sometimes, criminal practice. Zerubavel, E. (2006) *The Elephant in the Room: Silence and Denial in Everyday Life*. Oxford, University Press, p2-3. See also *open secret* – Cohen, S. (2001) *STATES OF DENIAL: Knowing about Atrocities and Suffering*. Cambridge, Polity, p6 and p79; see also *open secret* - Bok, S. (1989) *SECRETS: On the Ethics of Concealment and Revelation* (2nd edition) New York, Vintage Books, p216.

²⁵ McGoey, L. (2019) *The UNKNOWERS: How Strategic Ignorance Rules the World*. London, Zed Books Ltd., p275.

cannot be ruled out that the aversion to keeping an official record of their understanding of the veracity of the evidence before them has hindered investigation.

Raising Concerns

36. It may be coincidence, but having kept the Local Government Auditor regularly updated about this case from 11 January 2019, the NIAO issued *Raising concerns* in June 2020. This publication makes clear that citizens' concerns about impropriety within a public body must be treated in the same robust manner as an internal whistleblowing concern. The fact of the matter is that the concerns presented to DCSDC were not robustly investigated in the manner a whistleblowing concern is required to be.
37. As a result, the opportunity has been missed to restore public confidence and trust in a failing planning system. Worse, such failure risks emboldening and embedding irregularity and impropriety in the culture of the planning system and discourages the public from raise concerns if they believe they will not be properly investigated.
38. What is not a coincidence is the subsequent intervention of elected representatives of DCSDC to reverse the approach their senior officials were embarking upon to dismiss the concept and role of external whistleblowers. In July 2020, former DCSDC Councillor McCann tabled a motion, seconded by Councillor McCloskey, regarding "*the Northern Ireland Audit Office Public Sector Guidance on Raising Concerns.*"²⁶ The motion called on DCSDC to ensure that when members of the public raise concerns about the improper conduct of public

²⁶ Derry City and Strabane District Council (2020) Open Minutes of the Monthly Meeting of the Derry City and Strabane District Council held remotely on Thursday 23 July 2020. Motion C247/20, p46. URL: <http://meetings.derrycityandstrabanedistrict.com/documents/g1596/Printed%20minutes%20Thursday%2023-Jul-2020%2016.00%20Derry%20City%20and%20Strabane%20District%20Council.pdf?T=1> [Accessed: 13 February 2022].

business, that these are treated and investigated in line with the NIAO's *Raising Concerns*.

39. It was resolved by a unanimous vote that:

*“Council should set out the procedures currently in place for investigating matters of concern raised by citizens about how council business is conducted and should **ensure that meetings with citizens raising concerns are recorded**, thus to reassure members of the public that their concerns will be taken seriously and investigated in line with the requirements of the NIAO”* [emphasis added].

40. Senior public officials should not have needed reminding of their public duty to keep official records when serious matters of irregularity and impropriety are presented to them. This motion was a clear rebuke for their unwillingness to keep an official record on such a serious matter and their attempts to dismiss the notion of external whistleblowing. It also recognised how a failure on the part of DCSDC to properly investigate such concerns will irreparably undermine public confidence and trust in the council, as it has in this case, if citizens believed their concerns are not being taken seriously.

41. Unfortunately, it is an indisputable fact that this council's aversion to record keeping is not a one-off when it comes to concerns raised by me about irregular and improper practices and conducts. Between October 2016 and February 2019, four meetings took place with various senior DCSDC officials. At these meetings, issues of lack of professional competence and potential malpractice were raised. In some cases evidence was handed over. Despite the seriousness of the issues raised, all meetings went undocumented. Therefore, it is reasonable to conclude that, in my experience, senior officials in this council operated an unwritten and sustained policy of “oral government”²⁷ in respect of serious concerns I have raised about irregular practices and conducts in planning.

²⁷ Denham, E. Information Commissioner (2018) *Trust, Transparency and Just-in-Time FOI: Sustainable Governance and Openness in the Digital Age*. Annual Jenkinson Lecture (delivered 22 March 2018), University College, London. URL: <https://ico.org.uk/about-the-ico/news-and-events/news-and-blogs/2018/03/trust->

42. More recent, the Ombudsman, Margaret Kelly, has again raised her concerns over this council's aversion to record keeping, concluding:

*"I would remind the Council that a lack of openness can undermine trust, particularly in matters relating to planning and to the environment where openness is key to the integrity of the process."*²⁸

This is but one of three recent Ombudsman reports following complaints raised by me, for which DCSDC has been required to issue apologies. As the other two reports remain unpublished, I am unable to divulge the content of those findings against DCSDC.

43. Given this council's persisting aversion to record keeping, there remains the justifiable *"...suspicion of wrongdoing or the sense that a body has something to hide"*²⁹ and how not official keeping records seldom favours the public, but works to the advantage of a public authority by hindering proper investigation.³⁰

44. If such an aversion to official record keeping and the inadequate approach to external whistleblowing displayed by DCSDC is permitted to become normalised due to inadequate scrutiny of external whistleblowing concerns on irregularity and impropriety, then planning in Northern Ireland seems destined to remain in the perilous state of decline it currently displays.

45. In respect of the external whistleblowing case raised in this submission, it had been hoped that the evidence-based presentation (that went wilfully unrecorded by senior officials of DCSDC) could have been given to NIAO officials under *Raising Concerns*. Unfortunately, this has never been possible due to the pandemic. However, I remain in no doubt that it would take little investigation to establish

[transparency-and-just-in-time-foi-sustainable-governance-and-openness-in-the-digital-age/](#) [Accessed: 16 February 2022].

²⁸ Northern Ireland Public Services Ombudsman (2021) *Investigation Report 21017: Investigation of a complaint against Derry City and Strabane District Council*. Belfast, NIPSO. Published February, 2021, para.39.

²⁹ Refer to footnote 19.

³⁰ Refer to footnote 18.

the veracity of the evidence of impropriety presented to senior officials of DCSDC, and why they have remained silent, but not ignorant, of the miscarriage of justice this council has presided over.

46. Not robustly addressing such concerns sends the wrong message to the public and undermines the effectiveness of the NIAO's *Raising Concerns*, going forward. It will further discourage citizens from acting upon what the PAC set out to achieve in 2010; namely, strengthening probity in planning through external whistleblowing.

47. I am happy and available to provide the PAC and NIAO with the more detailed analysis which irrefutably points to the irregular and improper conduct which I believe this public authority has engaged in in order to conceal the miscarriage of justice it has presided over.

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16 February 2022.