Questions for the Bill Sponsor for Written Response to the Committee for Finance

Codes v Legislation

1. In his evidence, the Minister of Finance stated that revising rules made in legislation, as the Bill proposes, would be much harder and slower. He also said that this is something that happens frequently. To what extent do you agree with these statements and to what extent do you consider it important to have rules that can be easily revised?

Answer:

Of course, codes are easier to change than legislation, but, isn't that the point. We've already seen the ease with which the minister - in face of criticism of defiance of the Codes at the RHI Inquiry - stripped out all and any selective criteria from the Code of Appointment. Hence, now, my suggested Amendment 4 to restore the basic components of due process to the selection of a Spad.

The framework established in the Civil Service (Special Advisers) Act (NI) 2013 is that the legislation stipulates basic requirements for a Code but the minister can add thereto as is appropriate and change the non-core components going forward.

The basic choice between codes and legislation is crystallised by the comment of Lord said in the Ashworth case "It is in my view plain that the code does not have the binding effect which a statutory provision or statutory instrument would have."... So the real question for every MLA do you want changes in response to RHI scandal to be binding, or not? That is the defining issue.

As Mr Sterling agreed at the Committee on 6 May 2020 ..."yes, Legislation gives you stronger protections".

2. The Minister of Finance informed the Committee that there is a much stronger set of enforcement codes and practices in Northern Ireland than exist elsewhere. He added that the current process for dealing with complaints about the conduct of a Minister are is much more robust than that which pertains in other jurisdictions, where there is a very strong political filter before a complaint is accepted and brought forward. To what extent do you consider these statements valid and where do you see the main gaps?

Answer:

An inescapable lesson of RHI was that codes counted for very little and did not impede the excesses exposed. Hence, the need to step up to legislation. In regard to dealing with complaints against ministers, the process to date has been virtually non-existent and even under NDNA would lack independence. Whereas, moving the function to the Commissioner for Standards would bestow it on someone independently appointed by open competition, who would have power to compel witnesses and production of papers, take evidence on oath and in consequence produce a more credible report and process.

3. Considering the NIHRC view that that statutory duties could be placed on ministers in a statutory framework and that would not create a human rights problem, is there merit in considering this rather than in introducing criminal offences under Clause 9 and Clause 11?

Answer:

I do not accept there is a human rights problem, nor do I think the NIHRC made out such. Nonetheless, I have refined Clauses 9 and 11 to address any perceived problems. A statutory duty at best creates a civil remedy, which might be enforced through expensive judicial review proceedings, whereas a criminal offence creates a real deterrent.

Clause 1(2)

4. The Department of Finance states that, at present, only FM and dFM special advisers can form groups with an internal hierarchy, as all other ministers' offices have only one special adviser and, therefore, no capacity to delegate management responsibility. Do you consider this accurate and, if not, why not? If accurate, in what way would this be inappropriate?

Answer:

Clause 1(2) expressly restricts any hierarchy of SpAds to the Executive Office in response to the RHI evidence of SpAds within other departments being controlled externally from the Executive Office, or further afield! The RHI Inquiry amply demonstrated why such control was unhealthy and inappropriate.

Clause 1(3)

5. How do you respond to the Department's assertion that, as temporary civil servants, NICS disciplinary process may be applied to special advisers but may need to be modified to take account of their special status?

Answer:

If Clause 1(3) passes then it is a matter for NICS to make such modifications to their disciplinary process as are necessary to ensure it meets any peculiarities relevant to SpAds.

6. The NICS disciplinary process includes involvement of line managers. Who would replace a minister as the line manager of the special adviser given that the minister would be prevented from becoming involved in the disciplinary process under the provisions in the Bill?

Answer:

See proposed Amendments 2 and 3 which somewhat address this issue. It would be a matter for the Head of the Civil Service to make any internal adjustments. The department's Permanent Secretary could be given a role.

7. How do you respond to the Department of Finance assertion that the current sanctions would be applied fairly, openly and consistently in all case as all ministers have agreed the current codes and guidance and there will be a key role for the NICS acting impartially and objectively?

Answer:

From the Stephen Brimstone episode it is clear a minister can act as a protector of the Spad. The nexus is too strong to allow public confidence in a process in which the minister is so inextricably involved. Hence, the logic of treating SpAds like the civil servants they are in terms of disciplinary processes.

8. The view of the Department of Finance is that any failure by a minister to fulfil the responsibility to apply the disciplinary process or act upon the conclusions of the disciplinary process may be referred to the Ministerial Standards Panel. DoF goes on to state that a breach of the Ministerial Code of Conduct may be considered a breach of the Pledge of Office which would be subject to the existing sanctions of the Assembly. Please outline what, in your view, the deficiencies are in this process, which require the introductions of the provisions in Clause 1(3).

Answer:

See Answer 7 above. Additionally, the major advantage in Clause 1(3) is that it removes both the possibility and the public perception of any ministerial meddling. Despite what some in the Stormont bubble might think, this is a much needed confidence-building measure.

9. Who would replace other participants in the line management chain during the disciplinary process?

Answer:

This is a matter for the NICS to prescribe in its disciplinary procedures, but a role for the permanent secretary might be appropriate.

10. How do you respond to the NICS assertion that, although a minister would be able to delegate some tasks within the disciplinary processes to a civil servant, any decision to discipline can only be taken by the minister as the individual responsible for the management of the special adviser?

Answer:

Clause 1(3), as proposed to be amended, leaves some flexibility for ministerial involvement, which allows alignment with the minister being responsible for their Spad.

11. How do you respond to the NIHRC assertion that Clause 1 could have the inadvertent effect that a minister is no longer directly responsible for any action or inaction of their special adviser?

Answer:

See Answer 10 above.

12. How do you respond to the Minister's statement that making breaches of the code a criminal offence, "would undermine the democratic principle that ministers are responsible and accountable for the conduct of their special advisers"?

Answer:

Criminal liability is an individual, not vicarious, matter. It is not breaches of codes that would carry a criminal sanction, but breaches of legislation, as specified in Clauses 9 and 11. If a minister or Spad choose to break the law then criminal liability should follow.

13. In response to follow-up questions the Department outlined that, depending on the nature of a breach by special advisers of their Code of Conduct, a range of sanctions is available to ministers, up to and including dismissal. Excluding offences committed under Clause 9 and Clause 11, are you satisfied that, if they were properly applied, the range of sanctions is appropriate?

Answer:

The range of sanctions is not my issue, rather the modalities of discipline. As civil servants SpAds should be subject to the NICS discipline processes.

14. How do you respond to the Minister of Finance's statement that the Bill applies to one code in a suite of three codes and overlaps with the Civil Service code because the persons being legislated for are temporary civil servants?

Answer:

I think this is a non issue. As a civil servant a Spad in addition to the Spad Code of Conduct will also be subject to such other codes as apply to civil servants, with the effect of Clause 1(3) being to bring coherence to any disciplinary process.

15. The Minister of Finance's view was that the revised Ministerial Code of Conduct makes a minister responsible and accountable for the behaviour of their special advisers and, if they do not take action in response to a breach in the special advisers' code they can be reported and investigated for a breach in the Ministerial Code. Do you consider this insufficient and, if so, why?

Answer:

Yes. Neither presentationally nor practically does it resolve the problem - minister handpicks Spad, who acts as civil servant but is immune from civil service discipline and instead can only be held to account by the one who chose him/her in the first place. One also has to ask how many ministers ever have been held accountable for a breach of the ministerial code? Moreover, any 'punishment' of minister lies with the one who chose him/her - which in the case of First Minister or deputy First Minister is themselves respectively! It would be as farcical as it appears.

Clause 1(4)

16. In what way do changes to the Code of Appointment of Special Advisers impact on the provisions in this clause?

Answer:

The new Code of Appointment means there is no process with which to comply and, therefore, renders Clause 1(4) largely nugatory. The audacious removal of a selection process from the Code of Appointment was not anticipated when the Bill was drafted, nor, given his comments, was it anticipated by Coghlin LJ. By proposed amendment 4 I am seeking to make it a statutory requirement to have a due process of selection and, therefore, Clause 1(4) would have relevance and bite.

17. In oral evidence to the Committee on 24th June 2020 officials stated that the new Code of Appointment is simpler and "reflects the reality of what happens when appointing SPADs". What are your views on a Code that is amended in order to comply with an existing process rather than changing the process in order to comply with the Code?

Answer:

***I think it is an appalling commentary that in reality there is no "new approach" when it comes to responding to the shocking evidence to the RHI Inquiry of how the previous code on appointments was systematically and deliberately breached. The Executive response was to strip out any requirements so that the excoriated behaviour is no longer a breach*!**

18. The DoF view is that this provision is unnecessary because an appointment that does not meet the provisions of the Code would not be lawful. In response to a written question from the Committee DoF states that Section 8(2) of the Civil Service (Special Advisers) Act (NI) 2013 sets out that where a Minister proposes to appoint a special adviser, such an appointment shall be subject to the terms of the code and that an appointment that is not subject to the terms of the Code would, therefore, be unlawful. How do you respond to this?

Answer:

Section 8(2) of the 2013 Act anticipated there would be substance within the Code of Appointment, but as referred to above the substance has been removed. Hence the necessity for my proposed amendment 4. Clause 1(4) as drafted was to underscore the consequences, exposed in the RHI Inquiry, of ignoring the content of the Code. It regains purpose by the insertion of proposed amendment 4.

Clause 1(5)

19. DoF states that the Code of Conduct, which has been strengthened, and contract of employment already include provision for only a properly constituted special adviser being able to fulfil the functions of a special adviser. How do you respond to the DoF assertion that this provision is broadly in line with what has already been achieved without legislation?

Answer:

Clause 1(5) is about setting a cap on Spad pay at the Civil Service Grade 5 level. It is not about non-SpAds fulfilling Spad roles. On the subject of Spad pay I see no conflict between the contracts and codes specifying appropriate bands - within the context of Clause 1(5) setting an upper limit. I believe the linkage in legislation to a senior Civil Service grade is a sound protection against suspicion of ministers uplifting salaries for their hand-chosen few.

20. The RaISe research paper NIA 88-20 outlines the pay bands of special advisers in other jurisdictions. There are a number of special advisers in England, Scotland and Wales who are paid more than those in Northern Ireland. Why, therefore, is it considered necessary to include this provision?

Answer:

The level of Spad pay in Northern Ireland has been the subject of considerable controversy. Hence the wisdom of setting a civil service linked cap in legislation. While, particularly in the sovereign government, there are several SpAds paid very high salaries, across the devolved regions NI's SpAds in the previous term were well above average and all but one, if I recall, was on the highest band. This was unsustainable and rightly drew public opprobrium which is best assuaged by setting an upper limit in legislation, rather than in codes which ministers can readily change.

Clause 1(6)

21. How do you respond to the DoF assertion that this is already inherent in the Code of Conduct and contract of employment and anything else would be unlawful?

Answer:

The need for Clause 1(6) needs to be judged against not promises, or assurances but the reality of what happened through the appointment of a 'super Spad' by Sinn Fein in order to circumvent the provisions of the 2013 Act. (See RHI Report Vol 3 54.32-54.34) What happened hitherto was incompatible with at least the spirit of the Code, but it still happened and was acquiesced in by the Head of the Civil Service. Clause 1(6) will impose a statutory duty on permanent secretaries to ensure such is not repeated.

22. In response to follow-up questions from the Committee the Department outlined that, as set out in the Code of Conduct and Letter of Appointment of a special adviser, a person appointed to a

position in the NICS under Article 3(2)(b) of the Civil Service Commissioners (NI) Order 1999 do not apply to anyone else. The response also stated that there are now explicit requirements on ministers to ensure that official resources are not used for party political purposes and to comply with the rules regarding the management of official information. To what extent does this meet the provisions under Clause 1(6) and, what gaps, do you believe, remain?

Answer:

The RHI Inquiry showed that various provisions in codes were systematically breached. Thus, as an adequate control mechanism codes alone have demonstrably failed and assurances that things will now be different lack the certainty of legislation. Why would anyone determined to do the right thing fear legislation?

Clause 2

23. How do you respond to the assertion in written evidence from TEO that this provision does not 'take account of the distinct characteristics of the Northern Ireland Executive and the joint roles of the First and deputy First Minister, including the operation of a multi-party involuntary coalition'?

Answer:

This argument for the status quo of 8 SpAds in the Executive Office does not even stand up to current practice. Even during much of the coronavirus crisis the Executive office has operated with 5 SpAds (2 for FM and 3 for dFM). My proposed reduction to 4 is commensurate.

In proposed amendment 7 I am suggesting an adjustment to abolish the currently unused option for separate SpAds for the junior ministers and, accordingly, an increase from my original draft to 2 each for the FM and dFM.

If anything, an all-party coalition mitigates against the need for a surplus of SpAds, because there is no Opposition!

24. The response from the Institute for Government refers to the benefits of a larger team of advisers stating that, "the experience of the 2010-15 Conservative-Liberal Democrat government suggests that more advisers are particularly helpful for a multi-party government, as more communication between ministers and their teams is necessary."

a. To what extent to you consider this assessment to be fair?

b. Given that you have stated in evidence to the Committee, that it would be open to debate and amendment to determine the appropriate number, would you be open to having more research conducted in this area prior to any legislation being passed to reduce the number of special advisers in The Executive Office?

Answer:

a. I do not find this contention sustainable and even if it were, affording the Executive Office 4 SpAds should be adequate.

b. I see no need for further research. A political judgement is required as to the correct number. I think it is 4, but, of course, I cannot prevent the Assembly from taking a different view and adjusting the number at Consideration stage.

Clause 3

25. Clause 3(2) refers to approval, "by resolution of the Assembly." What consideration have you given to which resolution procedure would be most appropriate in this case (negative, affirmative or confirmatory)?

Answer:

I believe the affirmative resolution procedure to be most appropriate.

26. How do you respond to The Executive Office and DoF view that the provision would prevent FM and dFM engaging specialised support in an emergency situation where the normal procedures for appointments could be insufficiently responsive to the urgency of a matter?

Answer:

We've experienced an emergency situation, through COVID-19, with no need for such additional specialist advice. An emergency situation suggests a transitory need, not a permanent appointment. Such assistance, if required, can be adequately met through recourse to consultants.

27. In response to a written question from the Committee, the Department responded:

"Clause 3 subjects the prerogative power of the FM and dFM in relation to the NICS and the Commissioner for Public Appointments for Northern Ireland under section 23(3) of the Northern Ireland Act 1998 in its entirety to Assembly approval and therefore constitutionally represents a significant change to the traditional authority of the executive arm of government in the management of the civil service."

How do you respond to this statement?

Answer:

Moving away from the exercise of prerogative powers was indeed a significant, but welcome, constitutional development in the 17th century. It is the clinging to such in the 21st century that is significant. Moreover, loosening the executive arm of government's control of the supposedly independent civil service is not a bad thing. But, fundamentally here the issue is whether the legislative assembly thinks it appropriate that laws should be made in secret and behind its back!

Clause 4

28. TEO response to the Committee for TEO states that it considers the date of 1 April 2021 arbitrary and not consistent with the need for FM and dFM to have a sustained level of support across the mandate to ensure the delivery of Executive commitments. What scope exists for amending the Clause to enable the current level of provision until the end of the current mandate?

Answer:

Such amendment is feasible but 1 April 2021 seemed to me to give adequate time for adjustment.

Clause 5

29. TEO response to the Committee for TEO states that TEO considers that if the Assembly was minded to extend the remit of the Commissioner, this should only be in relation to adherence to the Pledge of Office, Ministerial Code of Conduct and the Seven Principles of Public Life. How do you respond to this?

Answer:

I am amenable to this. Hence, my proposed amendment 10.

30. Clause 5 (2) amends the Act to widen the functions of the Commissioner to include Ministers however, evidence from The Executive Office to the Committee for The Executive Office states that this could be problematic because 'By extending the remit of the Commissioner to the Ministerial Code in its entirety it would potentially involve him/her in functional matters relating to the operation of the Executive Committee, the North South Ministerial Council and the British Irish Council which in themselves would not normally be regarded as matters of conduct.' Do you consider this assessment accurate and, if so, what scope is there to amend the Clause in order to focus the scope of the Commissioner's powers on specific aspects of the Ministerial code?

Answer:

See Answer 29 above.

31. TEO highlighted that the proposed amendment to the wording of Clause 17(1)(d) of the Assembly Members etc Act 2011 is imprecise and suggest that this needs to be amended. The response goes on to state that the Commissioner for Standards may already consider matters relating to Ministers when acting in their capacity as MLAs so alternative wording would be needed to provide greater clarity that this is intended to cover conduct of members of the Assembly and of Ministers. Taking into this view account, do you accept that this Clause needs to be refined?

Answer:

See proposed amendment 11.

32. How to you respond to the statement made by an official in oral evidence to the Committee at its meeting on 24th June 2020 that:

“for maintaining standards among MLAs and solely reading that role across to make it apply to maintaining standards among Ministers could lead to some areas where that was inappropriate. However, we felt that it was appropriate that he or she — whoever is appointed to the role — should be a part of the panel, because it is likely that there could be breaches of standards that would also be breaches in respect of the fact that the Minister is also an MLA. The proposed panel is a multiple-person panel, and that is to allow different areas of expertise or knowledge among the individuals who will be appointed. They can then use that to carry out investigations into breaches or complaints and determine the person who is best capable of investigating the matter.

What merit do you see in the Department’s position that the person appointed to conduct an investigation would be independent otherwise the investigation has no credibility; and that an enforcement mechanism here means that the panel has a greater capacity to bring things into the open than is the case in Scotland?

Answer:

Whatever advance lies in the NDNA proposal it still does not compare to an independent Standards Commission, appointed through open competition, with those with close past connections to government excluded and when appointed possessed of powers to compel witnesses and papers and take evidence on oath. The irony of the NDNA proposal is that the Standards Commissioner would be an ex officio member of the panel, but when operating as a panel member to investigate a minister would have none of the powers he possesses when investigating a MLA! Parity of esteem seems appropriate.

In my view, therefore, it is preferable to align the process for ministers and MLAs, which is something the Assembly approved in a motion in January 2017 and which the then Commissioner endorsed.

Clause 6

34. Evidence received from the Department of Finance states that the revised code of ethics requires that civil servants to keep accurate official records including ministerial meetings. In your oral evidence to the Committee on 26th February you expressed the view you that it is necessary to record meetings that occur even on an informal basis.

Answer:

See Answer 38.

Clause 7

a. How do you believe this could be achieved in practical terms?

b. Given that there is no means of verifying the accuracy or completeness of many informal meetings, is there a risk that this may become merely a ‘tick-box’ exercise?

Answer:

See Answer 38.

35. Evidence from the Department of Finance highlights that provisions within the Guidance for Ministers already places a duty upon ministers to ensure that records of meetings are maintained and that Special Advisors are also required to comply with the same requirement under the NICS Code of Ethics.

Answer:

See Answer 38.

Clause 8

a. Given the overlap with Clause 6, should it not be the case that a civil servant has responsibility for ensuring that records of meetings are maintained?

b. Does this clause prevent an MLA who is also a minister from meeting with a constituent or any other group or individual in a party capacity, where the topic under consideration falls within that MLA's remit as minister?

Answer:

See Answer 38.

36. Given the overlap between this and Clause 6, is there scope to amend the Bill to amalgamate the two clauses?

Answer:

See Answer 38.

37. The evidence from the Department of Finance highlights that in order to comply with the clause as drafted, greater clarity is required in order to set out who would be responsible for producing the accurate record of the meeting.

a. Do you accept this assessment?

b. How could the Bill be amended to set out specifically, who is responsible for

maintain the when there is a combination of personnel in attendance?

Answer:

See Answer 38.

38. In response to a written question from the Committee DoF states that ministers are bound by the Ministerial Code of Conduct to adhere to the rules regarding the management of official information and that the Guidance also sets out what to do if it is not possible for an official to be in

attendance (content to be passed to their Private Secretary as soon as possible after the event). DoF considers this sufficiently robust to prevent ministers and special advisers from failing to record meetings with non-departmental personnel about departmental matters. Why in your view do these arrangements need to be changed?

Answer:

I propose to provide a cumulative answer to Qs 34-38 in light of the fact that my recasting of Clauses 6-8 in proposed amendments 13-15 addresses some of the points raised. If there are fresh points arising from the new drafts, then, I am happy to address same.

Overall, I believe the fresh drafting provides a more coherent and joined up approach which is preferable to the various codes referred to by the department precisely because it sets these matters in legislation, which codes can amplify but not defy. The excesses exposed through the RHI Inquiry require us to travel the sure road of legislation rather than the failed path of codes.

Clause 9

39. How do you respond to the NIHRC recommendation that consideration is given to including this as a specific disciplinary offence which falls short of a criminal liability within ministerial, civil service and special adviser codes of practice?

Answer:

What happened **in RHI is the answer - codes requiring integrity, confidentiality etc counted for nothing, either in preventing behaviour or resulting in discipline.**

40. How do you respond to the Department of Justice view that the offences, as presented, could potentially criminalise legitimate working arrangements, such as remote working?

Answer:

The redrafts in proposed amendment 16 address this issue.

41. How do you respond to the Minister of Finance view that this provision would undermine the democratic principle that ministers are responsible and accountable for the conduct of their special advisers?

Answer:

I view these as separate issues. Clause 9 is about the individual liability of a minister, Spad or civil servant. It is not about vicarious liability. All would be equally subject to the law.

42. How do you respond to the Minister of Finance view that revising rules made in legislation would be much harder and slower than through codes?

Answer:

Of course, but then the minister's desire for 'flexibility' holds its own dangers! The minister's ambition, as set out in his letter of 27 April 2020, for rules that are "amenable to interpretation and the application of judgement...", alarms me. Forgetting the public dismay over RHI so soon is a foolhardy course.

43. In response to a written question from the Committee, the Department outlined that Guidance for Ministers and the Code of Conduct for Special Advisers requires ministers and special advisers to use official systems for all communications and that, exceptionally, where this is not possible, to copy any message to their official email account. To what extent are is the Bill attempting to introduce similar provisions but with a legislative basis?

Answer:

Whereas such is central to the alternative draft in amendment 16, there is nothing to stop guidance and codes stipulating this requirement independent of legislation. There is no mutual exclusivity here.

44. How do you respond to the response from the Department to a written question from the Committee that, the Minister is satisfied that the current sanctions would be applied fairly, openly and consistently in all cases?

Answer:

Frankly, the more important question **is whether the public are so satisfied. Past experience of ministerial oversight of SpAds is not encouraging!**

45. Sam McBride made a proposal that there should be a new clause making a provision for civil servants to check a special adviser's private emails. If, Clause 9 were to pass, and there was evidence that a criminal offence had been committed by government information being being kept off the official record through the use of private accounts, would the same result be achieved through a request for a search warrant?

Answer:

Yes, by and large.

Clause 10

46. How do you respond to the Department of Finance evidence to the effect that ministers and special advisers are already required to complete declarations of interests and the assertion that there is no substantive difference between the requirements in the Bill and the existing requirements upon ministers (introduced in January 2020 and special advisers?

Answer:

The difference lies in the fact that my Bill creates a statutory obligation, whereas a code or guidance requirement can be changed as quickly as it is made. Thus, durability and seriousness of intent is the issue.

47. Does the Special Advisers Annual Report, published on 3rd July 2020 meet objective that Clause 10 is trying to achieve in respect of Special Advisers?

Answer:

No, because there is no statutory obligation to include same in the annual report.

48. What would the provisions in Clause 10 add to what is already in place?

Answer:

Certainty and year round access to up to date information.

Clause 11

49. The response from the Department of Finance quotes the Ministerial Code of Conduct, the Guidance for Ministers and the Code of Conduct for Special Advisers and also refers to the NICS Code of Ethics as meeting the requirements to prevent disclosure of official information. To what extent are is the Bill attempting to introduce similar provisions but with a legislative basis?

Answer:

I remind the reader that the old Code also required confidentiality (Sch 1 para 24), but in RHI it proved not to provide protection. It is the failure of Codes that has brought us to this point. The Bill not only creates a statutory duty but also the deterrent of possible prosecution.

50. The Department takes issue with the use of the word 'confidential' as there is no longer any such classification and states that Clause 11 as drafted may have the effect of criminalising the communication of any official information. It states that, even if the definition is narrowed, it is not clear how this provision would interact with the FoI Act in that it would be a criminal act under this provision for the Department to disclose information that the Act requires to be disclosed. What are your views on this?

Answer:

These points are addressed in proposed amendment 20.

51. How do you respond to the Department of Justice view that the clause is unnecessary as it does not add anything to the overall framework of criminal law in Northern Ireland?

Answer:

The Department of Justice fell into error in misjudging the relevance of the Official Secrets Acts, as effectively acknowledged in its follow up communication. Clause 11 addresses issues not captured by section 5 of the Official Secrets Acts.

52. The Department of Justice assessed the maximum penalty of up to five years' imprisonment upon conviction as disproportionate. The NIHRC and Ms Felicity Huston also questioned the proportionality of the penalty. What consideration have you given to amending the clause in light of this evidence?

Answer:

Proposed amendment 20 addresses this issue by reducing the 5 years maximum to 2 years upon conviction on indictment.

53. The NIHRC, Sam McBride, and Felicity Huston had concerns relating to whistle-blowing and disclosure of information in the public interest. What consideration have you given to amending the clause in light of this evidence?

Answer:

Proposed amendment 20 addresses this issue.

54. In response to concerns expressed in relation to the potential for Clause 11 to criminalise confidential press briefing you had indicated that you may be open to an amendment which would exempt authorised briefings. Is this still the case, and is it your intention to bring such an amendment?

Answer:

Proposed amendment 20 addresses this issue ("the lawful pursuit of official duties").

55. How do you respond to NIHRC concerns that Clause 11 creates a direct interference with the right to freedom of expression in Article 10 ECHR?

Answer:

I'm not sure the NIHRC expressed itself quite so emphatically, but anyhow proposed amendment 20 should address this issue.

56. Do you agree with the NIHRC recommendation that the word 'improper' should precede 'benefit' at line 20?

Answer:

This has been provided for in proposed amendment 20.

57. The NIHRC refers to the clause as being 'widely drawn'. The Department of Finance refers to it as being 'broadly drafted'. How do you respond to these concerns?

Answer:

Proposed amendment 20 addresses this issue.

58. What is your view on the Minister's assertion that the introduction of a criminal offence would be inconsistent with the standard practice in the public and private sectors where workplace codes of conduct are a civil issue for employers, not a criminal issue for the judiciary?

Answer:

Clause 11 is not addressing mere breach of a code of practice but a free standing criminal act of deliberate leaking of official information "for the financial or other improper benefit of any person or third party." Such rightly falls within the domain of the criminal law. Thus the minister's assertion is misplaced. However, such misconduct could properly give rise to both civil and criminal issues.

59. The NIHRC had concerns in relation to how disciplinary proceedings will be managed if they are intertwined with potential criminal offences?

Answer:

The normal procedure is that disciplinary proceedings await the outcome of criminal proceedings. Thus, there is no intertwining.

60. How do you respond to the following questions posed by the NIHRC during oral evidence:

a. Can a list be created that narrows the scope of Clause 11 to provide legal certainty as to the sort of activity the clause is trying to capture?

b. Is that necessary or are the activities in question already criminal offences?

Answer:

a. The scope of Clause 11 has been refined in proposed amendment 20.

b. Although there was leaking of official information for third party gain during RHI, the PSNI has confirmed to me there are no police investigations into same, suggesting there is a gap in the criminal law.

Clause 12

61. Both the Department of Finance and The Executive Office have stated that the bodies listed already publish annual reports. The TEO response goes on to state that it would be expected that weaknesses in the functioning of government would be highlighted and addressed through these

reports and that remedial action would be initiated within a shorter timeframe than biennially. If passed, what would the provisions in Clause 12 introduce that is an improvement on the current arrangements?

Answer:

The purpose of Clause 12 is to prevent reports gathering dust and to create a rolling programme of review and improvement of the functioning of government - a biennial stocktake. I do not understand governmental resistance to such and find no merit in it.

Potential New Clause (Sam McBride)

62. What is your view on the suggestion by Sam McBride regarding the introduction of a new clause that would permit civil servants to inspect the private email accounts of special advisers where they had used those accounts to conduct government business?

Answer:

I anticipate there could be considerable human rights issues here but would be content if the committee wishes to explore and pursue such an amendment. Proposed amendment 16 in its second version would create a duty on the user of private accounts to copy relevant entries to the official system, which might in part address the issue.

Potential New Clause (Felicity Huston)

63. During her oral evidence to the Committee Ms Felicity Huston outlined a range of issues relating to the lack of independence of the role of the Commissioner for Public Appointments. In your view, does the independence of the role need to be enhanced, and if so, would and amendment to this Bill be the most appropriate means of doing so?

Answer:

I do very strongly believe this issue needs to be addressed so that the office meets international standards, but, as agreed by the committee on 8 July 2020, I am content for this to be recommended in the committee's report in circumstances where Clause 3 would require any such proposals by the First Minister and deputy First Minister to come before the Assembly.

Jim Allister

15 July 2020