Background

Commissioner for Public Appointments NI from 2005-2011. Responsible for writing and publishing the Code of Practice for Public Appointments, and oversight of its application. Also providing advice across all government depts. to staff and ministers about the Code and its implementation.

Commissioner for the House of Lords Appointments Commission from 2000—to 2008 – appointed by the Prime Minster. Commission tasked with setting up and administering process for appointment of Independent Peers to the House of Lords. Also vetting political peerages for probity – thereby unearthing the 'cash for peerages' scandal.

Chaired the appointment process for Independent Parliamentary Standards Authority – established in the wake of the MPs expenses scandal.

I have also served as an independent panel member for selection of Queen's Counsel both in Northern Ireland and Great Britain.

In my 'day job' I am a tax consultant and accountant – running my own practice for 25+ years.

With reference to

(**4) In section 8 (Code for appointments), after subsection (2) insert the words "and any failure to adhere to the code shall render the appointment of no effect."**

I would comment as follows:

Codes operated within the civil service are inherently difficult documents – particularly when they fall into the hands of civil servants. What seems to a taxpayer's eye a simple task becomes extremely complex when looked at by those in receipt of said taxpayer's money.

E.g. The Code of Practice for Public Appointments is to be applied to all relevant public appointments. This seems straight forward until further investigation is required to establish if an appointment is *technically* a public appointment and if the Code therefore applies.

A public appointment for the purpose of the Code is a public appointment if it appears on the relevant schedule attached to the current Order relevant to the Commissioner for Public Appointments NI. Some other appointments are public appointments for the purposes of the Code if their founding legislation says so. The appointment is made by a Minister. However not all Ministerial appointments to public bodies are public appointments.

Once it has been established whether a code is *applicable* the content of the code then becomes the key matter

The problem with legal adherence to a code is that it is only as good as the wording in that code.

As we have seen with the publication of the Code of Appointment for Special advisors published January 2020, if a code is basically silent on procedures then it can be very easy to comply with.

This Code - published to the surprise of many **before** Sir Patrick's report and recommendations – omits any process or procedure for the actual selection of Special advisors. It has dispensed with any pretence at *selection* as would be understood by those commonly applying for a job. No Minister needs to explain what skills, experience etc were either required for the post or how he or she established whether the selected SPAD had those skills etc.

The previous Code ran to 33 pages. This one has 2 pages and covers the processes required to be enacted by the Civil Service once a Ministerial choice has been made.

We have learned from evidence at the RHI Enquiry that the previous Code was not complied with because Minsters did not follow it. However, the requirements under paras 12-14 for civil servants to have written records of the process etc kept and presented to the relevant Permanent Sectary appear also to have been ignored. If they had been kept, I am sure they would have been provided to the enquiry as evidence that some sort of selection procedure was followed.

As the new January 2020 Code stands there can be no cause for complaint or lack of compliance because there is no process about which to complain.

A Code for Appointment would normally set out a basic appointment process – to help departments ensure they comply with the merit principle in appointments, provide good practice on appointment processes and also to tackle some of the recurring problems that have arisen in reviewing appointments. The previous Code – published 2016 - does basically follow these expectations.

The issue therefore facing the Committee and ultimately the Assembly is what the *Code Governing the Appointment of SPADS* should actually seek to do and then how much should be set out in the Code.

Does the Assembly want an actual process laid out which must be complied with under legislation?

Or does it prefer the appointment to be of such a personal nature between Minster and potential Spad that it is left to the two of them. – as para 8 of the new code refers?

If the latter, then the legislation should work.

If the former, then more detail is required. An appointments process as understood by most job seekers would include:

- Criteria for selection -which encompass the skills and experience required to do what in this case is a very demanding but also highly paid job.
- An opportunity for candidates to demonstrate how they fulfil the criteria – normally a written application form
- Some form of objective assessment process to gauge the candidate(s)' fitness against the criteria.
- Records of the above and why the successful candidate was selected.

I have not attempted to draft any potential detailed legislation required for a more prescriptive code – being neither a lawyer nor having access to the relevant legislative counsel

Why should a Code be mandatory?

As Commissioner of Public Appointments I had extensive experience of the problems of working within an area of *guidance* rather than law.

The Commissioner for Public Appointments in NI is appointed under Section 23 (3) of the Northern Ireland Order 1998. The relevant Order runs to three pages + a schedule. It is vague and provides very few powers nor does it clearly lay out what the *independent* nature of the post means in practice.

When in post the Office of the Information Commissioner was established- with the accompanying legislation. I was very struck by the contrasting attitude of the then Head of NICS to that Office – with its clearly laid out legislation, powers etc and his attitude to my post. The ICO is on a different scale but both organisations were established to amongst other things improve the public's trust in government. The ICO was demonstrably independent of government because its legislation ensured this. By contrast the OCPANI failed the tests for independence established by the International Ombudsman's Association. I wrote and commented repeatedly on these problems. I drew it to the then OFMDFM departmental committee's attention in my quarterly risk report I was required to submit. For whatever policy reason the problem was ignored. If the legalisation had clearly and in detail laid out the independence of the office, it would have been treated as such.

The Code of Practice for Public Appointments for NI was advisory. It could be set aside if a Minister decided they did not want to follow it. There might be a flurry in the media – depending on the current news cycle- but there was no sanction. I would contrast this with the situation in Scotland. Legally the Scottish Commissioner could at that time halt competitions which were not in compliance with her code and lay a report before the Scottish Parliament if a Minster had not complied with her Code.

Ministers set aside the Code of Practice in Northern Ireland – either knowingly or because of advice - and unlike in Scotland there was no recourse.

If the content of a Code and compliance with said Code is not nailed down in legalisation it will be both avoided and evaded - depending on circumstances.

As you will see from my biographical details, I am a tax consultant with over 30 years' experience in the field. Many years ago I worked as an HM Inspector of Taxes dealing with tax fraud. Having worked both sides of the desk I am only too aware that legislation must be drafted to prevent actions as well as enable them.

Ends