



Northern Ireland  
Assembly

## Research and Information Service Research Paper

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Paper 69/12

27 April 2012

NIAR 246-12

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# Consultation: legal requirements and good practice

This Briefing Paper is a follow-up to RaISe Bill Paper 59/12 *The Superannuation Bill*.<sup>1</sup> Members of the Committee for Finance and Personnel requested additional research. The Paper concerns the duties that the Bill would place on the Department of Finance and Personnel to consult with trades unions, and to report the outcome of the consultation to the Assembly.

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<sup>1</sup> RaISe (2012) 'The Superannuation Bill' available online at:  
[http://www.niassembly.gov.uk/Documents/RaISe/Publications/2012/finance\\_personnel/5912.pdf](http://www.niassembly.gov.uk/Documents/RaISe/Publications/2012/finance_personnel/5912.pdf) (accessed 20 April 2012)

## Executive Summary

The research presented in this Paper highlights a number of issues that the Committee may wish to consider.

Firstly, whether the requirement in the *Superannuation Bill* for consultation fits with the meaning of consultation. Consultation is defined as a process of dialogue and an exchange of views. It is not merely the provision of information. In addition, the research suggests that there is a degree of tension between the concept of consultation in the Bill and with the concept of negotiation.

The research also highlights good practice in relation to consultation. This good practice indicates a minimum period for consultation. Taken together with the legal definition of proper consultation, it is suggested that there is scope for the Bill's provisions to be strengthened in this regard.

This view is also supported by other statutory provisions. Some examples require what might be considered to be a more thorough reporting of the consultation process than currently provided for in the Bill.

## Contents

Executive Summary .....	2
Introduction .....	4
1. What is consultation? .....	5
1.1. Statutory definitions .....	5
1.2. Case Law .....	8
2. What is the difference between consultation and negotiation?.....	10
2.1. A Trade Union view .....	10
2.2. Business theory .....	11
2.3. Examples from consultation agreements .....	11
2.4. Implications for the <i>Superannuation Bill</i> .....	12
3. Good practice on consultation .....	13
3.1. UK Government guidance .....	13
3.2. NI Executive guidance .....	14
3.3. Implications for the <i>Superannuation Bill</i> .....	14
4. Statutory duties to report on the outcome of consultation .....	15
4.1. The Autism Act (Northern Ireland) 2011.....	15
4.2. The Health and Social Care Act 2008.....	15
4.3. The Health Act 1999 .....	16
4.4. The Public Services Reform (Scotland) Act 2010 .....	16
4.5. The Legislative and Regulatory Reform Act 2006 .....	17
4.6. Implications for the <i>Superannuation Bill</i> .....	18
5. Overall conclusions and issues for consideration .....	19

## Introduction

The *Superannuation Bill* passed second stage in the Assembly on 26 March 2012. During an initial research briefing to the Committee for Finance and Personnel (CFP) on 27 March, the Research and Information Service was asked to provide follow-up research. In particular, this related to the duties the Bill will impose on the Department of Finance and Personnel (DFP) to consult with trades unions and to report the outcome of the consultation to the Assembly.

To further assist CFP's scrutiny of the Bill, this Paper provides detail on:

- Legal definitions of consultation (section 1);
- The difference between consultation and negotiation (section 2);
- Good practice in relation to consultation (section 3);
- Other instances of legislation which places a duty on a body to consult and report to the legislature (section 4); and,
- Overall conclusions and key issues for the Committee's consideration (section 5).

This information is provided to MLAs in support of their Assembly duties and is not intended to address the specific circumstances of any particular individual. It should not be relied upon as professional legal advice or as a substitute for it.

# 1. What is consultation?

This section addresses the concept of consultation and provides clarity on what this term actually means. Sample statutory definitions are provided so that CFP can consider whether the provision in the Bill as drafted is satisfactory.

*Black's Law Dictionary* (9<sup>th</sup> edition) defines 'consultation' as "the act of seeking the advice or opinion of someone."

The Labour Relations Agency has stated that:

*The purpose of consultation is to give everyone involved an early opportunity to share the problem and discuss options. It can encourage better co-operation between managers and employees, reduce uncertainty, and lead to better decision making.*<sup>2</sup>

## 1.1. Statutory definitions

### The Information and Consultation of Employees Regulations

A specific statutory definition can be found in *The Information and Consultation of Employees Regulations (Northern Ireland) 2005* (SR 2005 no.47) ("the ICE Regulations"):

*"consultation" means the exchange of views and establishment of a dialogue between –*

*(a) information and consultation representatives and the employer; or*

*(b) in the case of a negotiated agreement [...] the employer and the employees;*

The ICE Regulations give employees in organisations over a certain size the right to be informed and consulted about matters affecting their employment.<sup>3</sup> The duty to consult under these Regulations applies to 'undertakings'. The Regulations transpose into Northern Ireland the EC Directive 2002/14/EC *establishing a general framework for informing and consulting employees in the European Community*<sup>4</sup>. The Directive defines an undertaking as "a public or private undertaking carrying out an economic activity, whether or not operating for gain".

The Cabinet Office's *Code of practice on informing and consulting employees in the civil service* states that:

<sup>2</sup> Labour Relations Agency (2007) 'Advice on handling redundancy' available online at:

[http://www.lra.org.uk/index/agency\\_publications-2/advice\\_and\\_guidance\\_on\\_employment\\_matters-3/advisory\\_guides2/advice\\_on\\_handling\\_redundancy-2.htm](http://www.lra.org.uk/index/agency_publications-2/advice_and_guidance_on_employment_matters-3/advisory_guides2/advice_on_handling_redundancy-2.htm) (accessed 24 April 2012) (see pages 10-11)

<sup>3</sup> IDS Employment Law Brief 780 (2005) 'Collective redundancy consultation' (see page 15)

<sup>4</sup> <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2002:080:0029:0033:EN:PDF>

*The main activities of traditional central government departments concern the exercise of public authority (i.e. legislation, administration and policy development). As there is very little case law in this area, it is difficult to be clear on the number of government bodies which would be undertakings, although it is expected that there will be very few, if any.<sup>5</sup>*

However, the Cabinet Office Code also said that:

*The Government fully supports the principle that employees should be informed and consulted about the important issues affecting them regardless of whether they are working in what is legally defined as an undertaking.<sup>6</sup>*

From the UK Government's perspective at least, whilst government departments may not technically be caught by the requirements of the ICE Regulations, the civil service should be an exemplar of good practice. The Code:

*...is intended to apply the general principles of the Regulations to central government departments and agencies which are not undertakings within the scope of the legislation. Departments should also encourage the adoption of the general principles as set out in this Code of Practice by their non-departmental public bodies.<sup>7</sup>*

The Department for Employment and Learning (DEL) is responsible for employment law in Northern Ireland. Its own guidance on the ICE Regulations takes a similar view to the Cabinet Office. It states that an undertaking:

*...may also include [...] Government bodies (both central and local), again if they carry out an economic activity. Ultimately it is a matter for the courts to decide (in the first instance, the Industrial Court) on a case-by-case basis, whether an organisation is carrying out an economic activity.<sup>8</sup>*

The ICE Regulation's definition therefore may or not legally apply to NICS departments depending on how the courts might choose to interpret the law. But, either way, they suggest that consultation is a two-way process of **discussion and dialogue**, rather than simply the provision of information. Members may wish to keep this in mind when considering the statement made by a union official in evidence to the Committee:

<sup>5</sup> Cabinet Office 'Code of practice on informing and consulting employees in the civil service' available online at: [http://resources.civilservice.gov.uk/wp-content/uploads/2011/09/ec\\_info\\_consultation\\_tcm6-2411.doc](http://resources.civilservice.gov.uk/wp-content/uploads/2011/09/ec_info_consultation_tcm6-2411.doc) (accessed 20 April 2012) (see paragraph 5)

<sup>6</sup> Cabinet Office 'Code of practice on informing and consulting employees in the civil service' available online at: [http://resources.civilservice.gov.uk/wp-content/uploads/2011/09/ec\\_info\\_consultation\\_tcm6-2411.doc](http://resources.civilservice.gov.uk/wp-content/uploads/2011/09/ec_info_consultation_tcm6-2411.doc) (accessed 20 April 2012) (see paragraph 3)

<sup>7</sup> Cabinet Office 'Code of practice on informing and consulting employees in the civil service' available online at: [http://resources.civilservice.gov.uk/wp-content/uploads/2011/09/ec\\_info\\_consultation\\_tcm6-2411.doc](http://resources.civilservice.gov.uk/wp-content/uploads/2011/09/ec_info_consultation_tcm6-2411.doc) (accessed 20 April 2012) (see paragraph 3)

<sup>8</sup> DEL (2008) 'Information and communication in the workplace – a guide' available online at: [http://www.delni.gov.uk/information\\_and\\_consultation\\_april30\\_2008.pdf](http://www.delni.gov.uk/information_and_consultation_april30_2008.pdf) (accessed 20 April 2012) (see page 7)

*We have not had negotiations. We have only had information-provision sessions on what the Minister was thinking and where the court cases were at in GB, and we were told that the intention was probably to proceed down that route at some stage.*<sup>9</sup>

At the same time, it should be noted that currently the discussion has related to the *Superannuation Bill* and not specifically to the proposed changes to the Northern Ireland Civil Service Compensation Scheme (the NICSC Scheme). This means that there may be further engagement between DFP and the unions following the passage of the Bill.

The ICE Regulations seem relevant to the *Superannuation Bill* because they are based on the principle that employees should be informed and consulted about issues that affect their employment. More specific provisions relating to redundancy proposals are contained in other legislation presented below.

### **The Employment Rights (Northern Ireland) Order 1996**

The *Employment Rights (Northern Ireland) Order 1996* imposes a statutory duty on employers to consult with employee representatives when they are proposing to make 20 or more redundancies.

Article 216(2) provides for a minimum period of consultation:

*The consultation shall begin in good time and in any event—*

*(a) where the employer is proposing to dismiss 100 or more employees as mentioned in paragraph (1), at least 90 days; and*

*(b) otherwise, at least 30 days;*

*before the first of the dismissals takes effect.*<sup>10</sup>

Article 216(4) prescribes the form of the consultation:

*The consultation shall include consultation about ways of—*

*(a) avoiding the dismissals;*

*(b) reducing the numbers of employees to be dismissed; and*

*(c) mitigating the consequences of the dismissals;*

*and shall be undertaken by the employer with a view to reaching agreement with the appropriate representatives.*<sup>11</sup>

<sup>9</sup> Official Report, 27 March 2012, available online at: [http://www.niassembly.gov.uk/Documents/Official-Reports/Finance\\_Personnel/Superannuation%20Bill%20Trade%20Union%20Briefing.pdf](http://www.niassembly.gov.uk/Documents/Official-Reports/Finance_Personnel/Superannuation%20Bill%20Trade%20Union%20Briefing.pdf) (accessed 17 April 2012) (see page 4)

<sup>10</sup> <http://www.legislation.gov.uk/nisi/1996/1919/article/216>

The *Superannuation Bill* relates to the consultation process for determining the NICSC Scheme that would apply in a redundancy situation. **It does not relate to a redundancy programme in itself.** Despite this, Members may wish to consider the consultation requirements of the *Employment Rights (Northern Ireland) Order 1996* in relation to Clause 2 of the Bill, which imposes the consultation duty on DFP.

In particular, CFP may wish to consider if there is a case for specifying a minimum period for the consultation (please refer to the examples of other statutory consultation provisions presented in Section 4 below). The purpose of providing a minimum period may be to ensure that there is sufficient time allowed for a meaningful process.

### Other statutory provisions

There is a wide range of further employment-related legislation that includes some form of duty to consult, including (although this is not an exhaustive list):

- the Transnational Information and Consultation of Employees Regulations 1999;
- the European Cooperative Societies (Involvement of Employees) Regulations 2006;
- the Companies (Cross Border Mergers) Regulations 2007;
- the European Public Limited-Liability Company (Employee Involvement) (Northern Ireland) Regulations 2009;
- the Transfer of Undertakings (Protection of Employees) Regulations 2006; and,
- the Service Provision Change (Protection of Employees) Regulations (Northern Ireland) 2006.

Officials in DEL have advised the author that they are not aware of any legislation within the DEL remit which includes a duty on NICS departments to consult with employee representatives and to report the outcome to the Assembly.<sup>12</sup> There are, however, some examples from other policy remits (such as Health) which are presented in Section 4 of this paper.

## 1.2. Case Law

Case law in the field of employment is complex. For example, there is case law which determines whether employees are considered to be employed at the same establishment. This is important because the duty to consult in a redundancy situation under the *Employment Rights (Northern Ireland) Order 1996* is only triggered when all employees are in the same establishment. The question of whether a number of sites or divisions in a company are one establishment or more has frequently arisen.<sup>13</sup>

<sup>1111</sup> <http://www.legislation.gov.uk/nisi/1996/1919/article/216>

<sup>12</sup> Personal communication from DEL official

<sup>13</sup> IDS Employment Law Brief 780 (2005) 'Collective redundancy consultation' (see page14)

This Paper does not seek to give a comprehensive explanation of all potentially relevant employment case law. Instead, a particular judgement which contains important principles in relation to consultation is highlighted below.

### The Weatherup Judgement

A judgement by Weatherup J, handed down on 11 September 2007, addresses the issue of proper consultation process: “it is common ground that, whether or not consultation of interested parties and the public is a legal requirement, if it is embarked upon **it must be carried out properly.**” [emphasis added]<sup>14</sup> In his judgement, Weatherup J cited another judgement,<sup>[2]</sup> in which the four requirements of consultation were stated:

*To be proper, consultation must be undertaken at a time when proposals are still at a formative stage; it must include sufficient reasons for particular proposals to allow those consulted to give intelligent consideration and an intelligent response; adequate time must be given for this purpose; and the product of consultation must be conscientiously taken into account when the ultimate decision is taken.*

In the light of these requirements, the consultation duty the *Superannuation Bill* will place on DFP is discussed further in Section 5 of this Paper.

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<sup>14</sup> [2007] NIQB 66 QUEEN'S BENCH DIVISION

<sup>[2]</sup> Ex p Coughlan [2000] 3 All ER 850, [2001] QB 213, para 108

## 2. What is the difference between consultation and negotiation?

The Cabinet Office's guidance on the ICE Regulations makes it clear that there is a difference between the concepts:

*While consultation is different from negotiation or collective bargaining, it is important that any new consultation or communications procedures are compatible with, and complementary to, existing collective bargaining processes.<sup>15</sup>*

The question, then, is **how** does consultation differ? CFP raised this during its evidence session with the unions. This section looks at some sources which provide further clarity on the distinction between the two concepts.

*Black's Law Dictionary* (9<sup>th</sup> edition) defines 'negotiation' as "a consensual bargaining process in which the parties attempt to reach agreement on a disputed or potentially disputed matter."

Members should note that the trades unions have also been asked to provide their perspective on the distinction. To supplement that evidence, the following information is presented to allow CFP's to place the trades unions' response into a wider context.

### 2.1. A Trade Union view

A document on the union *Unison's* website notes that it is important to understand the difference between negotiation and consultation:

***Negotiation commits both parties to reaching agreement, whereas consultation is merely a commitment to exchange views.***

*While consultation gives unions fewer automatic rights it can still be very valuable in ensuring that the views of the union and its members are progressed. Skilful negotiators are often very successful in converting consultation into negotiation.*

***Some employers confuse consultation with the conveying of information. It is much more than this.***

*Most agreements and supporting legislation require employers to undertake 'meaningful' consultation.<sup>16</sup> [emphasis added]*

<sup>15</sup> Cabinet Office 'Code of practice on informing and consulting employees in the civil service' available online at: [http://resources.civilservice.gov.uk/wp-content/uploads/2011/09/ec\\_info\\_consultation\\_tcm6-2411.doc](http://resources.civilservice.gov.uk/wp-content/uploads/2011/09/ec_info_consultation_tcm6-2411.doc) (accessed 20 April 2012) (see paragraph 8)

<sup>16</sup> Unison Activist Zone 'Working with the employer' available online at: [http://www.unison.org.uk/activists/sh5\\_employer.asp](http://www.unison.org.uk/activists/sh5_employer.asp) (accessed 23 April 2012)

## 2.2. Business theory

The 'Times 100 Teaching business studies by example' internet resource has the following to say:

*Negotiation involves discussion to make agreements where the parties involved have some difference of interest or simply negotiation of how a task or project will be carried out. Consultation involves talking to interested parties both to explain developments and issues and **in order to canvas their views and ideas that they can contribute.***

*Typically negotiation involves a greater level of democracy in decision making than consultation. In a negotiation there may be considerable uncertainty about what the outcome will be. In contrast **managers who consult their employees may already have decided the core of what they intend to do from the outset.**<sup>17</sup> [emphasis added]*

## 2.3. Examples from consultation agreements

Down District Council's Local Joint Consultative Committee's document gives a useful description of the distinction between the two concepts:<sup>18</sup>

### 4.0) Communication Vs Consultation

4.1 Communication is the provision and exchange of information between management and employees. Current, formal, methods use to support employee communication are:-

- Core Brief
- Team Meetings
- Job Chats
- Intranet
- Down Time
- Employee Communication and Consultation (ECC for non-Trade Union members)

Consultation is a process by which management and employees, or their representatives, jointly examine and discuss issues of mutual concern, through seeking acceptable solutions to problems through a genuine exchange of views and information. Consultation involves management actively meeting with employees and/or their representatives, and taking account of views before making a decision.

### 5.0) Consultation Vs Negotiation

5.1 Consultation is distinctly different from negotiation, for example over pay or changes to terms and conditions, where both the employer and the Trade Unions take responsibility for fulfilling the bargain. This is not the same as consultation and is not addressed within this policy. With consultation the responsibility for decision making remains with management. Negotiation is carried out via an alternative mechanism therefore by definition this is a consultation forum-

A further example is provided in the University of York's *Employee Relations Structure*:

<sup>17</sup> <http://businesscasestudies.co.uk/business-theory/people/communication-negotiation-and-consultation.html> (accessed 23 April 2012)

<sup>18</sup> [http://www.downdc.gov.uk/Online-Documents/HR---LJCC-Agreement-\(12-08\).aspx](http://www.downdc.gov.uk/Online-Documents/HR---LJCC-Agreement-(12-08).aspx) (accessed 23 April 2012) (see page 2)

### *Negotiation*

*Collective bargaining is the process by which the University of York and the recognised Trade Unions seek to reach agreement through negotiation on issues such as pay and terms and conditions of employment. **It is distinct from consultation where the responsibility for decision making remains with management.***

### *Consultation*

*Consultation is the process by which management and employees or their representatives jointly examine and discuss issues of mutual concern. It involves managers actively seeking and then taking account of the views of employees, either directly or through their representatives, before making a decision. **Meaningful consultation depends on those being consulted having adequate information and time to consider it.** It is important to remember that merely providing information does not constitute consultation.*

### *Communication*

*Communication is concerned with the interchange of information, instructions and ideas. Communication in this context enables the University of York to function efficiently and is either carried out directly (through face to face meetings and team briefings) or indirectly (through e-mails and newsletters).<sup>19</sup>[emphasis added]*

## 2.4. Implications for the *Superannuation Bill*

The examples presented in this section build on the statutory definitions presented in Section 1. Consultation must be **more than just information provision**: there must also be dialogue and the canvassing of views with the possibility that these views may influence the design of the policy. However, consultation is **not** negotiation: the consulting body retains the decision-making responsibility, whereas in a negotiation the decision must to some degree be made collectively.

The *Superannuation Bill* provides for consultation to occur, and for DFP to report on whether agreement had been reached with the consultees. But given the definitions of consultation above, a question arises as to whether agreement is likely to be reached. Agreement is a word perhaps more commonly associated with negotiation than consultation, because the former requires consensus and the latter does not.

**Issue for consideration: is the drafting of the Bill sufficiently clear? Does the requirement to consult sit comfortably with the aim of reaching agreement?**

<sup>19</sup> <http://www.york.ac.uk/univ/unions/aut/20080520-ER-DraftStructure-V14.1-SMG-PR.pdf> (accessed 23 April 2012) (see page 2)

### 3. Good practice on consultation

There are some differences between the process of public consultation and consultation with employees in relation to specific employment matters. Nevertheless, it may be argued that a number of the principles of good practice in relation to public consultation are generally applicable. This section includes detail on those principles as set out in UK Government and Northern Ireland Executive guidance.

Members may wish to consider whether consultation on proposed changes to the NICSC Scheme can be conducted in accordance with these principles under the terms of the *Superannuation Bill*.

#### 3.1. UK Government guidance

In 2008, the Department for Business, Enterprise and Regulatory Reform (now replaced by the Department for Business Innovation and Skills) published the Government's *Code of Practice on Consultation*. This set out seven consultation criteria:

**Criterion 1 When to consult**

*Formal consultation should take place at a stage when there is scope to influence the policy outcome.*

**Criterion 2 Duration of consultation exercises**

*Consultations should normally last for at least 12 weeks with consideration given to longer timescales where feasible and sensible.*

**Criterion 3 Clarity of scope and impact**

*Consultation documents should be clear about the consultation process, what is being proposed, the scope to influence and the expected costs and benefits of the proposals.*

**Criterion 4 Accessibility of consultation exercises**

*Consultation exercises should be designed to be accessible to, and clearly targeted at, those people the exercise is intended to reach.*

**Criterion 5 The burden of consultation**

*Keeping the burden of consultation to a minimum is essential if consultations are to be effective and if consultees' buy-in to the process is to be obtained.*

**Criterion 6 Responsiveness of consultation exercises**

*Consultation responses should be analysed carefully and clear feedback should be provided to participants following the consultation.*

**Criterion 7 Capacity to consult**

*Officials running consultations should seek guidance in how to run an effective consultation exercise and share what they have learned from the experience.*

In the context of the *Superannuation Bill*, it is possibly Criterion 1 that is most significant. The question that has been raised by the Committee is whether – in the

context of parity – there is genuinely scope for the consultees (in this case the trades unions) to influence the policy.

### 3.2. NI Executive guidance

The Office of the First and deputy First Minister's (OFMDFM) *Practical Guide to Policy Making in Northern Ireland* contains a short section on consultation. Among other things, it emphasises the need for consultation to be proper. This echoes the Weatherup judgement cited above:

*Proceeding with no, or token consultation, may appear to save time in the short term, especially in a context of limited resources, but it can result in problems later.<sup>20</sup>*

Like the UK Government's Code, the guidance also sets 12 weeks as the standard period for consultation. It states that the minimum period for a formal consultation process is eight weeks.

### 3.3. Implications for the *Superannuation Bill*

The UK Government and OFMDFM guidance both emphasise the need for a reasonable period for consultation. Also, that the timing of the consultation should be appropriate – in terms of the development of the policy being consulted upon.

The *Superannuation Bill* does not specify when the consultation on a revised NICSC Scheme should take place, nor for how long (except that DFP must lay its report on the consultation before a revised scheme 'comes into operation'). One may reasonably assume, then, that the periods specified in the policy guidance would apply.

The UK Government's Code requires responsiveness to the consultation process. The *Superannuation Bill* requires consultation to be undertaken 'with a view to reaching agreement'. It may be argued that this phrase at least implies that the consultation must be meaningful.

**Issue for consideration: does the absence of a specified timeframe for consultation create a risk that the consultation may not be conducted properly?**

<sup>20</sup> OFMDFM (2003) 'A Practical Guide to Policy making in Northern Ireland' available online at: <http://www.ofmdfmi.gov.uk/policylink-a-practical-guide-to-policy-making.htm> (accessed 19 April 2012) (see page 44)

## 4. Statutory duties to report on the outcome of consultation

Clause 2 of the *Superannuation Bill* provides for consultation with trades unions. Specifically, it creates a duty on DFP to “consult with a view to reaching agreement” on proposed changes to the NICSC Scheme. This is different from the current provision (in the *Superannuation Order 1972*) which also requires consultation. But the present *Superannuation Bill* removes the current requirement for those consulted to agree.

On the basis of the distinction between consultation and negotiation defined in Section 2, the current provisions have a much greater feel of negotiation. The requirement for agreement puts DFP in the position of collectively bargaining. The proposed duty is likely to be less onerous, and one where DFP retains the decision-making role.

Clause 2 also requires DFP to lay a report before the Assembly outlining the consultation process and whether or not agreement was reached.

This section provides some other examples of statutory provisions that require a report to be laid before the legislature in relation to consultation. Only one Northern Ireland example was found in the course of this research (see 4.1, below). Consequently, some – more relevant - examples from other jurisdictions are included.

### 4.1. The Autism Act (Northern Ireland) 2011

This Act requires the Department of Health, Social Services and Public Safety (DHSSPS) to prepare an autism strategy. Before doing so, it must consult other departments.

Section 2(9) of the Act also requires DHSSPS to report on the implementation of the strategy. Section 2(10) requires that the report to be laid before the Assembly.<sup>21</sup>

This duty, it will be noted, differs significantly from that imposed on DFP by the *Superannuation Bill*. The report is on implementation of the strategy, not on the consultation process.

### 4.2. The Health and Social Care Act 2008

Section 124(1) of this Act of the UK Parliament empowers the Secretary of State for Health (or in Wales, the Welsh Assembly Government) to:

*...make provision modifying the regulation of social care workers, so far as appears to the appropriate Minister to be necessary or expedient for the purpose of securing or improving their regulation or the services which they provide or to which they contribute.*<sup>22</sup>

<sup>21</sup> <http://www.legislation.gov.uk/nia/2011/27/section/2>

<sup>22</sup> <http://www.legislation.gov.uk/ukpga/2008/14/section/124>

Before doing so, the Secretary of State must first publish a draft of the regulations and consult with relevant persons affected. Paragraph 9(2) of Schedule 9 to the Act provides that **no sooner than three months** after the laying of the draft regulations, a modified or unmodified set of regulations may be laid. It also provides that “a report about the consultation” must be laid before Parliament.

Unlike the *Public Services Reform (Scotland) Act 2010* (see below), this Act does not prescribe the **form** of the consultation report.

#### 4.3. The Health Act 1999

As with the *Health and Social Care Act 2008*, this Act empowers the Secretary of State (or in Scotland, the Scottish Ministers) to regulate health care and associated professions. It also requires an order to be laid in draft and consulted upon.<sup>23</sup>

Also, like the *Health and Social Care Act 2008*, this Act provides for a minimum of three months between the publication of the draft order and the laying of a modified or unmodified order before Parliament. Again, it requires a report on consultation to be laid before Parliament. The form of the report is not prescribed.

#### 4.4. The Public Services Reform (Scotland) Act 2010

Section 14 of this Act gives the Scottish Government the power to:

*...by order make any provision which they consider would improve the exercise of public functions, having regard to— .*

*(a)efficiency;*

*(b)effectiveness; and*

*(c)economy.*<sup>24</sup>

Section 17 of the Act gives additional powers to:

*...by order make any provision which they consider would remove or reduce any burden, or the overall burdens, resulting directly or indirectly for any person from any legislation.*<sup>25</sup>

Before exercising these powers, the Scottish Government is required to consult with relevant bodies affected, to lay a draft order, and to lay an accompanying explanatory document before the Scottish Parliament.

Under section 25 (5), the explanatory document must detail:

<sup>23</sup> <http://www.legislation.gov.uk/ukpga/1999/8/schedule/3>

<sup>24</sup> <http://www.legislation.gov.uk/asp/2010/8/section/14>

<sup>25</sup> <http://www.legislation.gov.uk/asp/2010/8/section/17>

- (a) any consultation undertaken under subsection (4);*
- (b) any representations received as a result of the consultation;*
- (c) the changes (if any) made to the proposals mentioned in subsection (4) as a result of those representations.<sup>26</sup>*

Section 26 of the Act makes further provision in relation to consultation. Section 26(2) (c) requires the Scottish Ministers to “have regard to any representations about the proposed draft order that are made to them within 60 days” of the draft order being laid.

This last provision has the effect of ensuring a minimum period for the consultation process.

#### 4.5. The Legislative and Regulatory Reform Act 2006

The *Legislative and Regulatory Reform Act 2006* of the UK Parliament introduced similar powers to the *Public Services Reform (Scotland) Act 2010* to:

*...by order under this section make any provision which he considers would serve the purpose in subsection (2).*

*(2) That purpose is removing or reducing any burden, or the overall burdens, resulting directly or indirectly for any person from any legislation. .*

*(3) In this section “burden” means any of the following— .*

- (a) a financial cost;*
- (b) an administrative inconvenience; (c) an obstacle to efficiency, productivity or profitability; or*
- (d) a sanction, criminal or otherwise, which affects the carrying on of any lawful activity.<sup>27</sup>*

Before exercising this power, ministers must consult. When a modified, or unmodified, order is laid before Parliament following consultation, it must be accompanied by an explanatory document. This must:

*give details of—*

- (i) any consultation undertaken under section 13;*
- (ii) any representations received as a result of the consultation;*
- (iii) the changes (if any) made as a result of those representations.<sup>28</sup>*

<sup>26</sup> <http://www.legislation.gov.uk/asp/2010/8/section/25>

<sup>27</sup> <http://www.legislation.gov.uk/ukpga/2006/51/part/1>

<sup>28</sup> <http://www.legislation.gov.uk/ukpga/2006/51/section/14>

Although these provisions appear similar to the *Public Services Reform (Scotland) Act 2010*, they are unlike that Act in that there is not a statutory minimum period for the consultation.

#### 4.6. Implications for the *Superannuation Bill*

There are two differing elements that emerge from the statutory duties outline above:

- Specification of a minimum period for the consultation; and,
- Prescription of the form or content of the consultation report that must be laid before the legislature.

The issue of providing a minimum time period for consultation was raised in section 3. The second element – the form of the consultation report – may also be worthy of consideration.

Clause 2(3) of the Bill provides that DFP must provide information about:

*(a) the consultation that took place for the purposes of Article 3(2), so far as relating to the provision,*

*(b) the steps taken in connection with that consultation with a view to reaching agreement in relation to the provision with the persons consulted, and*

*(c) whether such agreement has been reached.*

This appears to be a potentially less robust requirement than the duty in, for example, the *Legislative and Regulatory Reform Act 2006*. This requires the report also to include details of any changes made to the provisions as a result of the consultation.

**Issue for consideration: is the Committee content with the proposed reporting duty or should it be strengthened?**

## 5. Overall conclusions and issues for consideration

The legal judgement presented in section 1.2 set out four requirements for proper consultation. These are considered in this concluding section in the light of the other findings of the research, and the key issues that arise are set out.

### Consultation to be undertaken when proposals are at a formative stage

The *Superannuation Bill* does not specify **when** consultation is to be carried out. It does however specify that DFP must report to the Assembly on the outcome of the consultation **before** changes to the NICSC Scheme come into effect.

It was noted in RalSe Bill Paper 59/12 that the Executive has opted to pursue a policy of parity with GB in relation to compensation payments to civil servants in the event of redundancy. The question is, then, when are the proposals at a formative stage? If the Executive is introducing new terms in line with strict parity, then it might be possible to argue that the proposals are **already developed** in GB before they reach Northern Ireland.

On the other hand, the *Superannuation Bill* needs to be written in a way that allows flexibility for the Executive to depart from parity if it chooses. In that circumstance, the policy proposals would presumably be at a formative stage when first issued by DFP.

**Issue for consideration: should the Bill specify that the consultation must take place at a time when proposals in GB are still at a formative stage?**

### Consultation to include sufficient reasoning to allow for an informed response

The proposed duty on DFP to report on the consultation process to the Assembly would allow MLAs (and committees) to interrogate the quality of that process. But, because there is no Assembly control over the legislative instrument that underpins the NICSC Scheme,<sup>29</sup> the question may be asked, what could the Assembly do about it if it were not content with the process?

**Issue for consideration: is there any value in creating a duty to report on the consultation to the Assembly in the absence of Assembly control over any amended NICSC Scheme?**

### Consultation must allow adequate time

The *Superannuation Bill* does not specify a minimum time period for consultation. The minimum periods specified in statutes presented in Section 4 of this Paper are either '60 days' or 'three months'. OFMDFM's guidance suggests a standard of 12 weeks for consultations.

<sup>29</sup> See section 2.2 of RalSe (2012) 'The Superannuation Bill' available online at: [http://www.niassembly.gov.uk/Documents/RalSe/Publications/2012/finance\\_personnel/5912.pdf](http://www.niassembly.gov.uk/Documents/RalSe/Publications/2012/finance_personnel/5912.pdf) (accessed 20 April 2012)

**Issue for consideration: does the absence of a specified timeframe for consultation create a risk that the consultation may not be conducted properly?**

### **The products of consultation must be taken into account**

The policy of parity was discussed briefly above. If, in future, the Executive continues to follow parity, there may be a question of whether the response to a consultation in those circumstances is capable of being taken into account by DFP?

One possibility may be that the consultation process could persuade DFP to recommend departing from parity in response to specific local circumstances. Again, it should be noted that the *Superannuation Bill* needs to be written in a way that allows flexibility for the Executive to depart from parity if it chooses. But does the concept of parity necessarily undermine the value of consultation?

**Issue for consideration: is the Committee content that consultation under the *Superannuation Bill* may be taken into account by DFP? In the context of parity, could such consultation influence the outcome?**

In summary, Members may wish to consider these issues, and also that raised in section 2.4 (the meaning of 'consultation'), as part of their deliberations on the Bill.