Northern Ireland Assembly

Committee for Finance

Report on the Functioning of Government (Miscellaneous Provisions) Bill

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Report: NIA 55/17-22 Committee for Finance

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Powers and Membership

Powers

The Committee for Finance is a statutory departmental committee established in accordance with paragraphs 8 and 9 of Strand One of the Belfast Agreement and under Assembly Standing Order No 48. The Committee has a scrutiny, policy development and consultation role with respect to the Department of Finance and has a role in the initiation of legislation. The Committee has 9 members including a Chairperson and Deputy Chairperson, and a quorum of 5.

The Committee has power to:

- consider and advise on Departmental budgets and Annual Plans in the context of the overall budget allocation;
- approve relevant secondary legislation and take the Committee Stage of relevant primary legislation;
- call for persons and papers;
- initiate enquiries and make reports; and
- consider and advise on matters brought to the Committee by the Minister of Finance.

Membership

The Committee has 9 members, including a Chairperson and Deputy Chairperson, and a quorum of five members. The membership of the Committee is as follows

Dr Steve Aiken OBE (Chairperson)
Mr Paul Frew (Deputy Chairperson)
Mr Jim Allister
Mr Pat Catney
Ms Jemma Dolan
Mr Philip McGuigan[1]
Mr Maolíosa McHugh
Mr Matthew O'Toole
Mr Jim Wells

[1] Mr Philip McGuigan replaced Mr Seán Lynch with effect from 5 October 2020

List of Abbreviations and Acronyms used in this Report

AERC	Assembly & Executive Review Committee
CSP	Committee on Standards & Privileges
dFM	The deputy First Minister
DoF	Department of Finance
DoJ	Department of Justice
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EIR	Environmental Information Regulations
FM	The First Minister
FOI	Freedom of Information Act
GB	Great Britain
GDPR	General Data Protection Regulation
HOCS	Head of the Civil Service
ICCPR	International Covenant on Civil and Political Rights
ICO	Information Commissioner's Office
NDNA	New Decade New Approach
NICS	Northern Ireland Civil Service
NIHRC	Northern Ireland Human Rights Commission
OCPANI	Commissioner for Public Appointments for Northern Ireland
OFMdFM	Office of the First and deputy First Minister
RaISe	Research and Information Service
RHI	Renewable Heat Incentive
SpAd	Special Advisor
SPRD	Strategic Policy & Reform Division
TEO	The Executive Office
The Assembly	The Northern Ireland Assembly
The Bill	The Functioning of Government (Miscellaneous Provisions) Bill
The Commissioners	The Civil Service Commissioners
The Committee	The Committee for Finance

The Department	The Department of Finance
The Executive	The Northern Ireland Executive
The Minister	The Minister of Finance
UN	United Nations

Executive Summary

Purpose

1. This Report details the Committee for Finance's consideration of the Functioning of Government (Miscellaneous Provisions) Bill.

2. The purpose of the Functioning of Government (Miscellaneous Provisions) Bill is to amend sections 7 and 8 of the Civil Service (Special Advisers) Act (Northern Ireland 2013 and Article 3 of the Civil Service Commissioners (Northern Ireland) Order 1999 in relation to special advisers in the Northern Ireland Civil Service, repeal the Civil Service Commissioners (Amendment) Order (Northern Ireland) 2016, amend section 17 of the Assembly Members (Independent Financial Review and Standards) Act (Northern Ireland) 2011 and to make additional provision for the functioning of government in Northern Ireland and connected purposes.

Principles of the Bill

3. The main principles of the Bill are:

- To restrict the management of special advisers by other special advisers and to subject special advisers to the processes and procedures of the disciplinary code of the Northern Ireland Civil Service and that Ministers and Permanent Secretaries are responsible to ensure the special advisers exercise the functions and privileges only of that office.

- To limit the remuneration of special advisers, reduce the number of special advisers within The Executive Office and provide compensation for any special adviser losing their job as a consequence of this reduction.

- To repeal the Civil Service Commissioners (Amendment) Order (Northern Ireland) 2016 and prevent further amendment of the Civil Service Commissioners (Northern Ireland) Order 1999 other than by deployment of the affirmative resolution process in the Assembly and to extend the powers of the Commissioner for Standards to investigate complaints against ministers.

- To develop a process for recording all meetings attended by ministers, special advisers and non-departmental personnel and to place a requirement on ministers and special advisors to register any interests which will be publicly available.

- To make it a criminal offence for a minister, civil servant or special adviser, when communicating on government business by electronic means, to use anything other than departmental systems and for a minister or special adviser to communicate confidential government information to a third party.

- To establish a procedure whereby the First Minister and deputy First Minister shall report on the functioning of government and initiate improvements.

4. The Committee published a call for evidence inviting responses from interested organisations and individuals, as well as from the Department of Finance and the Northern Ireland Civil Service as part of its deliberations on the Bill. The Committee took oral evidence between 26 February and 9 September 2020. Stakeholders within government did not demonstrate clear support for the Bill, however, evidence from other stakeholders indicated broad support for the Bill elsewhere, although there were concerns raised over a number of provisions.

Committee Consideration of Key Issues

5. The Committee had concerns in relation to the appropriate number of special advisers for The Executive Office; compensation for special advisers who had lost their jobs as a consequence of the Bill; potential for vexatious or fatuous complaints against ministers or special advisers; the definition of what is regarded as a meeting; the impact on informal briefings with the media that may hold ministers to account; and the appropriateness and duration of tariffs under Clause 9 and Clause 11.

6. The Committee considered that key issues relating to the Bill were as follows:

- Whether or not there is a need for legislation or whether codes are sufficient or preferable.

- The removal of sections of the Code of Appointment for Special Advisers relating to the process for appointing special advisers.

- The appropriate number of special advisers in The Executive Office and the most appropriate means to achieve this.
- Ensuring accountability to the Assembly and the public in use of Prerogative Order powers to appointment specialised experts.
- Putting in place an open and transparent complaints procedure in respect of ministers to ensure full accountability to the public.
- The need for appropriate records to be kept of meetings and interactions where ministers and/or special advisers are involved.
- The need for all communication relating to official business to be recorded on official systems.
- The need to prevent the improper sharing of confidential government information with third parties.
- Whether or not provision for criminal offences is appropriate in respect of the use of official systems or in respect of unauthorised disclosure of official information.
- Issues relating to the independence of the Commissioner for public appointments.

7. There was broad welcome from the majority of the Committee that the Bill sponsor responded to the many concerns raised in the evidence by tabling significant amendments. These provide a better basis for the Bill going forward and allowed broader support for the Bill at Committee.

Introduction

8. The Functioning of Government (Miscellaneous Provisions) Bill was introduced to the Northern Ireland Assembly on 3 February 2020 and, following its second reading on 16 March 2020, was referred to the Committee for Finance for Committee Stage.

9. At its meeting on 26 February 2020, the Committee received a preliminary briefing from the Bill sponsor, Mr Jim Allister MLA on the key principles contained within the Bill.

10. The Committee sought and received approval of the Northern Ireland Assembly in Plenary Session on 5 May 2020 to extend its consideration and scrutiny of the Bill to 2 December 2020.

11. The Bill contains 15 clauses and 1 schedule.

12. The Committee published a call for evidence from 27 March 2020 to 24 April 2020.

13. In total substantive written submissions were received from 22 organisations and individuals.

14. One item of correspondence was received which was sent to the Bill sponsor from the Department of Justice (DoJ) following the Committee's deliberations and its formal clause-by-clause scrutiny of the Bill. The correspondence addresses concerns, expressed previously by DoJ and outlined in the body of this report, in relation to Clause 9 and Clause 11 as originally drafted. The Correspondence states that, in the view of DoJ, the revised criminal sanctions in the proposed amendments to Clause 9 and Clause 11 are now consistent and proportionate. This correspondence was noted by the Committee on 4th November 2020.

15. In response to the written evidence received, the Committee invited a range of witnesses to provide oral evidence including:

- The Head of the Northern Ireland Civil Service;
- The Minister of Finance and the Permanent Secretary of the Department of Finance;
- The Bill sponsor, Mr Jim Allister MLA;
- Ms Felicity Huston, Huston & Co Tax Consultants & Accountants;

- Mr Sam McBride;
- Representatives from the Office of the Northern Ireland Commissioner for Human Rights;
- Officials from Strategic Policy & Reform Division, DoF.

Summary of the Bill as Presented at the Committee Stage

Clause 1 Amendment of the Civil Service (Special Advisers) Act (Northern Ireland) 2013

16. Clause 1 requires the Code of Conduct, established under the 2013 Act, to restrict the management of special advisers by other special advisers to within The Executive Office and to provide that special advisers are subject to the processes and procedures of the disciplinary code operative in the Northern Ireland Civil Service and makes clear there can be no ministerial interference. Ministerial responsibility for special advisers is clearly established by this clause and a statutory duty imposed on the departmental minister and permanent secretary to ensure only the duly appointed special adviser can exercise the functions and privileges of that office. This clause also requires the Code for Appointments, provided for in the 2013 Act, to prescribe that special advisers must not be remunerated above the rate applicable to Grade 5 civil servants and that any appointment made in breach of the code is of no effect.

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

17. Clause 2 amends the 1999 Order to reduce the number of special advisers within The Executive Office from 8 to 4.

Clause 3 Repeal of the Civil Service Commissioners (Amendment) Order (Northern Ireland) 2016

18. Clause 3 repeals the Civil Service Commissioners (Amendment) Order (Northern Ireland) 2016 and prevents further amendment of the Civil Service Commissioners (Northern Ireland) Order 1999 other than by deployment of the affirmative resolution process in the Assembly.

Clause 4 Special Advisers in The Executive Office

19. Clause 4 provides compensation for any special adviser losing their job as a consequence of a reduction in the number of special advisers in The Executive Office, as per the Schedule.

Clause 5 Amendment of the Assembly Members (Independent Financial Review and Standards) Act (Northern Ireland) 2011

20. Clause 5 extends the powers of the Commissioner for Standards to investigate complaints against ministers.

Clause 6 Records of Meetings

21. Clause 6 requires a civil service note to be kept of all ministerial meetings.

Clause 7 Records of Contacts

22. Clause 7 requires all ministerial and special adviser meetings outside the department to be logged.

Clause 8 Presence of Civil Servants

23. Clause 8 requires ministerial and special adviser meetings with non-departmental personnel to be attended by a civil servant and a note taken.

Clause 9 Use of Official Systems

24. Clause 9 makes it a criminal offence for a minister, civil servant or special adviser, when communicating on government business by electronic means, to use anything other than departmental systems and email addresses.

Clause 10 Register of Interests

25. Clause 10 requires a publicly available register of interests in respect of ministers and special advisers.

Clause 11 Offence of Unauthorised Disclosure

26. Clause 11 makes it a specific criminal offence for a minister or special adviser to communicate confidential government information to a third party.

Clause 12 Biennial Report

27. Clause 12 establishes a process whereby the First Minister and deputy First Minister shall report every two years on the functioning of government and initiate improvements.

Clause 13 Commencement

28. Clause 13 deals with commencement of the Bill

Clause 14 Interpretation

29. Clause 14 defines a number of terms used in the Act.

Clause 15 Short Title

30. Clause 15 deals with the title of the Bill.

Schedule: Transitional Provisions: Termination Payments

31. The Schedule makes transitional provisions in respect of section 4.

Summary of Consideration

Consideration of the Need for Legislation as opposed to Codes

32. A number of clauses in the Bill and associated evidence refer to a range of codes which apply to ministers, civil servants and/or special advisers. There was a considerable amount of evidence and discussion in the Committee about the need for legislation or whether codes were sufficient or preferable. As this general discussion covered a large number of clauses in the Bill, this section has been included to help provide context and to help reduce repetition within the remainder of the report.

33. In its written evidence the Department of Finance expressed the view that, the Bill seeks to put into primary legislation matters that are being addressed through codes of conduct and guidance. The Department stated that it considered it critical to have rules on the standards of behaviour for ministers and civil servants but further stated that, in its view,

> *"it is important that those rules are amenable to interpretation and the application of judgement, and that the rules can be developed and enhanced as circumstances require."*

34. The Department's view was that putting standards of behaviour into primary legislation would rule out the type of *"responsiveness and judgement"* that is required to make rules effective in a fast-moving and complex environment. The Department went on to state that,

> *"The problems of legislating in this area are magnified where the Bill proposes to create new criminal offences."*

35. In oral evidence the Head of the Civil Service (HOCS) informed the Committee that Executive was seeking to address any issues through a new Code of Conduct for Special Advisers, Guidance for Ministers and a new NICS Code of Ethics (currently in draft form). He said that,

> *"The First Minister and the deputy First Minister recognise that the credibility of the codes and guidance depends on their implementation. The endorsement by the parties of the New Decade, New Approach agreement should be viewed alongside the strengthened codes and the new guidance as evidence of their commitment in that regard. The new enforcement arrangements will also be crucial."*

36. HOCS acknowledged that the RHI Inquiry report had identified a number of issues that both he and ministers are keen to ensure do not occur again. He stressed that there is a strong desire among ministers to ensure that there is adherence to the highest standards of behaviour and accountability in future.

37. When questioned further on whether legislation precludes the need for codes, HOCS acknowledged that they are compatible and can exist together.

38. When asked about comparisons with other jurisdictions, HOCS stated that it is challenging working in a coalition such as exists in Northern Ireland. He said that it requires unique levels of cooperation but, given the fact that there are five parties with different ideological and political views on a range of issues, he had been impressed by the way that people have been prepared to set those views aside to deal with the major issues.

39. When asked about revisions to codes following the RHI inquiry, HOCS informed the Committee that, in agreeing the codes and guidance, ministers were clear that it is not something that they had done as a one-off. He said that ministers recognise that an advantage of guidance is that it can be amended quickly and will need to be amended in light of behavioural changes and contextual changes over time. He emphasised that there is a clear desire to make sure that guidance remains very much alive and relevant to the particular circumstances faced. He added that, in his experience, if relationships are not good, it does not particularly matter whether there is legislation or guidance; it would be a struggle to have a healthy, well-functioning administration.

40. HOCS was questioned on a concern that, in the past, there had been a failure because normal processes for codes and guidance were not followed. He was asked if, as Head of the Civil Service, he could outline how Northern Ireland could, in future, avoid problems such as RHI by only using codes and guidance without legislative process. HOCS responded that, within the framework that the guidance is designed to provide, there are mechanisms to ensure accountability, including sanctions for ministers, special advisers and civil servants.

41. In his oral evidence the Minister of Finance stated, that, as a result of the RHI Inquiry the Executive intends to review the codes and make changes. He added that revising rules made in legislation would be much harder and slower.

42. When questioned about the preference for codes, the Minister advised the Committee that amending a code that was dependent on changes to legislation would mean that there would be a delay as it would involve consultation and, ultimately, the passage of legislation.

43. When asked if the ability to change codes easily meant that the Executive could interpret codes in whatever way they see fit, the Minister responded that it was not a matter of how they interpret the codes, but that codes need to change to reflect changing circumstances.

44. The Minister stated that the RHI Inquiry did not recommend legislation and that legislation is not supported by the five parties in the Executive. He said that, had the RHI Inquiry suggested that legislation was needed, it would have been considered. His view was that legislation is, at best, premature. He informed the Committee that the new arrangements should be put into practice once completed and should be tested before further changes are made. The Minister said that he had supporting guidance from the Department of Finance, which does not believe that legislation is necessary.

45. The Minister was asked if he agreed that, when codes of conduct are continuously being misinterpreted or not used, and there is continuous misconduct, it is not good enough to keep strengthening a code of conduct that is going to be ignored anyway. He responded that,

> *"All of the institutional arrangements have a set of rules and regulations, as do all democratic institutions. If somebody wants to try to thwart them and misbehave, you look to codes to protect the institutions and democracy in that regard, but you cannot stop the behaviour of individuals. What you can do is hold them to account for that behaviour."*

46. When it was suggested to the Minister that the people of Northern Ireland need a degree of certainty that things will not go back to the way it was before, the Minister responded that, having rules in legislation may not have altered the fact that individuals behaved disreputably. He said that, where a complaint is made about the conduct of a Minister or about things that are going on in a Minister's office, the process 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.

47. The Bill sponsor was asked to respond to the Minister's position. In his written response to Committee questions the Bill sponsor acknowledged that codes are easier to change than legislation, adding,

> *"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."*

48. When asked to comment on the relative strength of the set of enforcement codes and the robustness of the process for dealing with complaints about the conduct of a minister, the Bill sponsor stated that under NDNA the process would lack independence. He added that,

> *"…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."*

49. The Minister was asked if the circumstances here, where there is a joint working and mandatory coalition, mean that there is not the built-in accountability mechanism of a single head of government who is responsible of the electorate. He responded that it is, arguably, stronger here than one that relies on the political judgement of a head of Government who may be in a wholly different set of political circumstances that influence the exercise of that judgement. Whilst here, there is much more access to a set of commissioners who will investigate. He said that a decision by the First Minister and deputy First Minister is not, therefore, required. He added that the outworking of it will be in how people demonstrate how they do business over the coming period. The Permanent Secretary added that the Commissioners' findings will be published, meaning that transparency is, in her view "huge".

50. When asked about the ability of civil servants to raise concerns about the behaviour of a minister or special adviser, the Permanent Secretary informed the Committee that the Civil Service code had been strengthened. She stated that, unlike anywhere else, if a civil servant has a concern about the behaviour of a minister or a special adviser, they can raise that concern with anybody in the Civil Service. She said that there is also the enforcement panel of external commissioners, and a civil servant can also go there.

51. In oral evidence the Chief Commissioner of the Northern Ireland Human Rights Commission stated that the Northern Ireland Human Rights

Commission welcomes the purpose of the Bill of increasing accountability and transparency. He commented,

> *"… there is no human rights impediment to placing safeguards on a statutory footing per se as opposed to creating arrangements within, for example, a code of conduct. Given the backdrop to the Bill, I accept that there are substantial arguments in favour of doing so within a statutory framework. I recognise that the Bill goes further than the recommendations of the Renewable Heat Incentive (RHI) inquiry and, again, in principle, there are no human rights constraints to doing so."*

52. NIHRC representatives were questioned on whether there could be an advantage in having the clarity and emphatic nature of legislation rather than relying on codes. The Chief Commissioner responded that he would separate the issue of whether it is necessary to create a criminal offence from the issue of whether to place some of the accountability issues into a statutory framework as opposed to a code of conduct. He said that, following the RHI Inquiry, there seems to be a compelling argument to say that putting it into a statutory framework does not create any undue human rights issues. He said that, on the other hand, creating criminal offences as opposed to statutory disciplinary procedures on a much stronger statutory framework is very different as it brings in the issue of proportionality. He said that it was a matter of judgement whether codes or legislation were preferable.

53. The view of the Bill sponsor, as stated in his written response to Committee questions was that a statutory duty at best creates a civil remedy which, he stated, may be enforced through judicial review proceedings, which would be expensive. His view was that a criminal offence creates a "real deterrent".

54. NIHRC representatives were asked about a possible flaw in the new Code of Conduct for Special Advisers in that it may not comply with Article 6 of the European Convention on Human Rights (ECHR) (which provides for the right to a fair trial). The Chief Commissioner was unsure that if would fall under Article 6 if the issue is simply a disciplinary process where somebody could lose their job. He said that it would probably move to Article 6 protection if the issue is that somebody may face criminal sanction and imprisonment. He continued that statutory duties could be placed on ministers in a statutory framework and that would not create a human rights problem. His view was that, having a statutory framework does not create an impediment from the NIHRC perspective. He said that either a code of conduct or legislation would

be equally human rights compliant. He added that the issue for NIHRC is that, if the Assembly is minded to put a statutory framework around some of the requirements for a special adviser and a civil servant, it can do so, provided that they are proportionate in human rights terms but if criminal offences are being created, the issue of proportionality must be considered. He added that the question becomes, how strong and what sanctions are contained in a code of conduct, as opposed to what sanctions you might contain within a statute. It was suggested that the human rights issues lie in having a criminal framework alongside a disciplinary process for employees.

55. When questioned further during the meeting he stated that there is a policy argument in relation to the creation of criminal offences. He said that, if there is a narrowly focused clause that may be human rights compliant, there is a wider debate about whether it is a good thing to do. The Chief Commissioner's view was that the Bill would not fail or succeed on the basis of the human rights issues, other than the aspects in relation to proportionality and the wisdom of introducing criminal offences as a whole.

56. During oral evidence author and journalist, Mr Sam McBride considered it clear and accepted that there is a problem that needs to be addressed. He said that the issue was how to address the problem and whether the Bill is the correct and proportionate way to address it. He said that the alternative was codes. He added,

> *"One of the key tests of the new regime, whether it is the Bill or the code that succeeds, is public confidence. We know that public confidence is important, because this place was down for three years and very few of the public were marching in the streets to get it back. Therefore, there is a significant vested interest for everyone in this room, and for anybody who cares about this place, in getting this right so that the public believes that people who behave badly can be held to account in the system — without the entire system having to be toppled to deal with those people, as was seen to be necessary by some people the last time."*

57. When asked if he thought that this legislation would capture extra-official involvement in decision-making he said that it could happen only when there were secretive channels of communication and that secrecy is critical in this context. He said that, if those previously involved in structures to circumvent the law, knew that it was being seen by civil servants, journalists or the Committee, it would not have been done.

58. During oral evidence Former Commissioner for Public Appointments, Ms Felicity Huston was asked about evidence of culture change and the need for legislation. Her view was that it was a real issue that things got so bad that the Assembly has to be seen to be doing something. She said that, after a few years, things could be rolled back somewhat but, at this stage, her view was that legislation is the only hope.

59. An official from DoF, Strategic Policy & Reform Division (SPRD) expressed the view during oral evidence that having rules and standards for ministers, special advisers and civil servants is an important issue, adding that enforcement is also important. He went on to say, the Departments view is that codes sufficiently address the issues and that legislation is not necessary, adding that the codes will be re-examined in the light of RHI Inquiry recommendations.

60. When questioned by members, the official accepted the need for change stating that, following NDNA, which indicated that the codes should be put in place as a matter of urgency, all new codes and their supporting documents have been agreed by the Executive and published, with the exception of the Code of Ethics document which is in draft form.

61. Officials highlighted the effect of the legislation whereby having to consider a defence, may be a deterrent to someone coming forward, whereas a code allows for the interpretation of what the rules and the breaches might be.

62. In oral evidence, when asked if it would not be preferable to await the outcomes of consideration of the RHI Inquiry report, the Bill sponsor stated that he did not understand why anyone would wish to postpone bringing certainty to these matters. He said that the RHI Inquiry proves that codes have no effect.

63. It was put to the Bill sponsor that the problem is with the culture that pervades and that there is a very serious problem with that irrespective of whether provisions are within codes or legislation. He responded that the culture will be more influenced and changed by the deterrence of legislation than, what he referred to as, “limp codes”. He made the point that he had no confidence that any sanctions would be imposed under codes because, currently, the person who is responsible for discipline (the relevant minister) is the person who appointed the special adviser.

64. During its consideration of evidence and in its deliberations on the Bill, members considered in detail whether there is a need to legislate in his area or whether it codes and guidance were sufficient to address any

issues and to ensure that appropriate custom and practice is followed. The Committee did not come to consensus on the matter. Sinn Féin members on the Committee outlined the view of the Party that they would not be supporting the Bill as, in their view, legislation is not required and codes are sufficient to achieve the desired objectives. A number of other members expressed the view that, as codes and guidance had not been adhered to in the past, there was now a need to legislate in this area to ensure that similar issues do not arise in the future. Some members also challenged the Minister's assertion that the Bill is not supported by the five parties in the Executive.

Clause 1 Amendment of the Civil Service (Special Advisers) Act (Northern Ireland) 2013

65. Clause 1 makes a number of amendments to the Civil Service (Special Advisers) Act 2013 as follows:

- Clause 1(2) – Hierarchy of Special Advisers;
- Clause 1(3) – Special Advisers and the NICS disciplinary process;
- Clause 1(4) – Makes ineffective an appointment of a Special Adviser that does not adhere to the statutory Code of Appointment;
- Clause 1(5) – Remuneration of Special Advisers; and
- Clause 1(6) – Ensures that only a properly constituted Special Adviser can fulfil those functions, and makes Special Advisers answerable to their minister.

66. The Committee noted the advice from the Northern Ireland Human Rights Commission on the European Convention on Human Rights (ECHR) in its written evidence that,

> *"…there is considerable discretion in the international human rights law on the specific form that disciplinary procedures should take and Clause 1 appears to be compliant with the due process guarantees in Article 6 ECHR."*

67. The Committee's consideration of, and views on, the above provisions contained in Clause 1 are outlined below.

Clause 1(2) – Hierarchy of Special Advisers

68. Clause 1(2) restricts the facility to have a hierarchy of special advisers to the Executive Office.

69. RaISe Research Paper, NIAR 88-20 confirms that the proposed provision would limit any perceived hierarchy of special advisers to within The Executive Office and preclude management by one special adviser over special advisers in other departments.

70. In written evidence considered by the Committee at its meeting on 6 May 2020, DoF stated that, at present, only FM and dFM special advisers can form groups with an internal hierarchy since all other special advisers are sole appointments directly responsible to the minister who appoints them. During questioning HOCS confirmed that the question of a *"rank structure"* of special advisers had not been raised with him as a problem. It is the view of The Executive Office was that the scope for the exercise of such authority is significantly limited by the provision in Clause 2 which has the effect of reducing the total number of special advisers to be appointed by the First Minister and deputy First Minister from three each to one. The Executive Office, therefore, considers it likely that the authority permitted could only be exercised in relation to special advisers appointed by the junior ministers if such appointments were made.

71. In its written response to a follow-up question from the Committee asking what is currently in place to prevent parties from acting informally outside of the structure where only FM and dFM special advisers can form groups with an internal hierarchy, DoF responded,

> *"In terms of their role within government, individual SpAds are accountable to the Minister who appointed them. Within the offices of the First Minister and deputy First Minister it would be possible for the Ministers to delegate aspects of their management role in respect of their special advisers to one special adviser, thus creating an internal hierarchy. In other Ministers' offices, there is only one special adviser, so there is no capacity for the Minister to delegate his or her management responsibility to anyone else."*
>
> *There are no impediments to individual special advisers working within informal groups and networks, and this is provided for in the Code of Conduct for Special Advisers (paragraph 4)."*

72. In his written response to Committee questions the Bill sponsor stated that Clause 1(2) expressly restricts any hierarchy of special advisers to The Executive Office. He stated that this is in response to RHI Inquiry

evidence of special advisers within other departments being controlled externally from The Executive Office or further afield. He stated that the RHI Inquiry amply demonstrated why such control was unhealthy and inappropriate.

73. The Bill sponsor is proposing one amendment to Clause 1(2) which is technical in nature.

74. During its deliberations the Committee considered the view that the need for the provision has arisen because, in the past, there was a hierarchy of special advisers with one particular individual directing special advisers across different departments, which, it was suggested, seemed not to sit at ease with the idea of a special adviser being accountable to a particular minister.

75. The Committee noted that provisions in the Bill would still permit a hierarchy of special advisers in the Executive Office, which was not considered inappropriate. Members also explored the practicalities of legislating in this area, where a special adviser may have a role in guiding and advising another special adviser without, necessarily, giving instruction. It was accepted that provision of advice and guidance could readily be differentiated from provision of instruction or direction.

Clause 1(3) – Special Advisers and the NICS disciplinary process

76. Clause 1(3) makes special advisers subject to the processes and procedures of the disciplinary code of the NICS.

77. In oral evidence, the Bill sponsor explained that the premise for introducing a disciplinary process for special advisers is that they are temporary civil servants and are subject to all the benefits and privileges of the Civil Service, but that they differ in that they are not subject to discipline. He said that the code provides for the minister to decide whether or not to discipline a special adviser and there is no process outside that.

78. Expanding on the disciplinary process for special advisers during oral evidence, HOCS stated that it is now made clear that special advisers are accountable and responsible to their Minister. He emphasised that special advisers are required to adhere to the Civil Service Code of Conduct. If there is any breach of that, it would be the responsibility of the Minister to ensure that there is accountability for any such breach.

79. During the same evidence session, a DoF official from SPRD informed the Committee that the standards expected of civil servants in all areas apply to special advisers with the exception of the impartiality and objectivity requirements. He also said that it is part of the letter of appointment and the NICS Code of Conduct that special advisers sign to the effect that they have read and understood the Code.

80. In oral evidence the Minister of Finance stated that he had move quickly to implement the new codes for special advisers following restoration of the institutions the previous January. He said that the revised codes make clear that ministers are responsible and accountable for the management, conduct and discipline of their special advisers. RaISe Research Paper NIAR 88-20 confirms that the NDNA agreement contains a commitment that the Executive would produce strengthened drafts of the relevant codes as a matter of urgency.

81. When asked to explain the problem with having the code strengthened by providing a legislative basis, the Minister said that the code very firmly places the responsibility for special advisers on the person who appointed them to their post. That person is accountable and responsible for their discipline. He said the idea of legislation takes that accountability and responsibility away from that person and makes it a police and judicial matter.

82. When asked what would stop a minister stepping in and preventing any disciplinary action being taken against their special adviser, he responded that doing so would probably put that minister in breach of the Ministerial Code of Conduct. He informed the Committee that this is one of the issues that is addressed by the revised code of conduct for Ministers whereby they are 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 of the Ministerial Code.

83. When asked to respond to this position, the Bill sponsor expressed the view this does not resolve the problem because a minister chooses the special adviser who is a civil servant but is not subject to civil service discipline.

84. Witnesses were questioned further on the process for dealing with the breach of the code. The Permanent Secretary explained that, as civil servants, if special advisers breach the special advisers' code, complaints can be made against them to the Civil Service

Commissioners. She said that the enforcement commission would publish its findings within three weeks.

85. When questioned about the system of having the Minister who handpicked the special adviser without a selection process being responsible for their discipline, the Minister responded that, under the Ministerial code, that Minister can be subject to complaint and investigation for lack of action.

86. When asked about the impact of not acting, the Minister stated that a minister would have to defend their inactivity in relation to the special adviser. A minister would be subject to investigation under such circumstances and would have to account for why no action was merited.

87. The Permanent Secretary was asked how the process for a special adviser compared with that for a permanent civil servant, who would be subject to the full weight of the disciplinary process if they stepped out of line. The Permanent Secretary responded that, for a special adviser, a Civil Service investigation would be undertaken up to the point at which the Civil Service could not take a decision on it. The Civil Service would then tell the Minister what it thinks should happen.

88. In response to written questions from the Committee, DoF raised issues with the drafting of the Clause in relation to the involvement of ministers in the process and procedures of the disciplinary code. The Department pointed out that, as ministers are the line managers of special advisers, they are responsible for their conduct and discipline. DoF went on to state that there will be a key role for the NICS acting impartially and objectively.

89. In response to a written question asking if it would be considered appropriate or acceptable for a process to remain in place where a minister could ignore sanctions recommended by officials where a special adviser has contravened the Code of Conduct, the Department responded that there is provision for a minister to be challenged where the disciplinary process had not been applied and any failure to fulfil their responsibility may be referred to the Ministerial Standards Panel.

90. When asked to comment on the Department's response, the Bill sponsor referred to a previous case where a minister ignored recommendations from a DFP investigation. He indicated his view that this is a deficiency in the process which requires the introduction of the provision at Clause 1(3).

91. When asked, during oral evidence, about the sanctions that are in place the official from DoF, SPRD informed the committee that most of the sanctions relate to the fact that complying with the special adviser code and the Civil Service Code of Ethics is part of a special adviser's contract. The official stated that, where a minister did not impose the appropriate sanction, that the minister could be removed from office but that would have to be done through cross-community vote in the Assembly.

92. In its written evidence, NIHRC stated that the current mechanism creates a clear link whereby ministers are directly accountable for the actions of their special advisers. The response went on to state that the provision at Clause 1(3),

> *"…would create a clear avenue of independent accountability over the behaviour of Special Advisers and ensure that it is decoupled from the Minister. This provides for more impartial and structured disciplinary proceedings, but could have the inadvertent effect that a Minister is no longer directly responsible for any action or inaction of their Special Adviser."*

93. In oral evidence Mr Sam McBride was asked if the Code for Special Advisers, which gives the exclusive disciplinary power to the Minister, aided transparency. He responded that it helps transparency in that a report is published, which he considers a small step. He said that the hope seems to be that the Minister feels compelled by public opinion to act. His view was that it does not move it forward that much if there is no sanction or no change to who the decision-maker is. He felt that an independent decision-maker for disciplinary matters would be different. The witness was of the view that, as it currently stands, based on the Minister's evidence, if a Minister decides that nothing is going to happen to a special adviser, nothing can be done.

94. The Committee noted that, since the introduction of the Bill, the Code of Appointment for Special Advisers had been considerably revised to remove many of the provisions from the previous Code of Appointment.

95. The revised Code, which is just over one page in length states, at paragraph 8,

> *"Reflecting the personal nature of the special adviser appointment, this Code sets out the formal requirements for the appointment from the point at which the Minister advises the Department of the name of the person they have chosen to be their special adviser."*

96. The Code contains little information on any formal requirements.

97. In contrast to the revised Code, in a written response to a Committee question a former Commissioner for Public Appointments, stated that the fundamentals a Code of Appointments must include are:

- A Minster must record the skills and experience he needs in his special adviser and why.
- A record must be kept of why a particular individual was appointed as special adviser including how the minister assessed that the successful candidate had the necessary skills and experiences and ultimately why that individual was appointed.
- Any special adviser appointment should be announced publicly and the records as above used as a basis for the Press Notice.
- Such records should be available under FoI.
- If these records are not kept, then the appointment is null.

98. In response to Committee questions the Bill sponsor stated that the removal of a selection process from the Code of Appointment was not anticipated by the RHI Inquiry report and, as such, there is no process with which to comply.

99. During its deliberations the Committee considered the inclusion in the Bill of the term, *"ministerial involvement"* in relation to the disciplinary code and the Department's view that this was not compatible with the position that a minister is responsible for the conduct and discipline of their special adviser. It was accepted that the nature of this relationship would require ministerial involvement but that ministerial *"interference",* as referenced in the Bill would not be acceptable. The Committee considered two amendments brought by the Bill sponsor which, he informed the Committee, together address the need to retain and respect the principle that a minister should be responsible for the conduct of their special adviser.

100. The view was expressed that, as those provisions were contained in the previous code, it is not appropriate to remove them. The Committee also noted criticism from the Chair of the RHI Inquiry that the previous code had been ignored.

101. The Committee considered a further amendment from the Bill sponsor which would make provision to reverse the removal of a process

governing ministers' selection of their special advisers which was contained in the previous Code of Appointment for Special Advisers.

Clause 1(4) – Makes ineffective an appointment of a Special Adviser that does not adhere to the statutory Code of Appointment

102. Clause 1(4) makes ineffective an appointment of a special adviser that does not adhere to the statutory Code of Appointment.

103. The view of the Department was that an appointment that does not meet the provision of the Code for Appointment for Special Advisers would not be lawful. When asked to clarify the specific provisions in the Code of Appointment relating to this statement and how this meets the provisions in Clause 1(4) the Department responded 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 is subject to the terms of the Code, therefore, an appointment that is not subject to the terms of the Code would be unlawful.

104. In his written response to Committee questions the Bill sponsor expressed the view that the revised Code of Appointment for Special Advisers means there is no process with which to comply and, therefore, renders Clause 1(4) largely nugatory. He stated that he is seeking to make it a statutory requirement to have a due process of selection. This would be achieved through the amendment to Clause 1(3) above.

105. During its deliberations the Committee considered the need to keep a job description for a special adviser as broad as possible to assist in appointing the most appropriate candidate. Having considered the matter, members were satisfied that the provisions under Clause 1(4) or as proposed under the amendment to Clause 1(3) do not prescribe what should be in the job description.

106. Members considered the need for an appropriate human resources' process in order to provide assurances for candidates, for special advisers who have been appointed and for ministers. Views were expressed that an appropriate process such as that proposed by the Bill would provide a degree of protection and bring the process more into line with NICS processes and procedures and the NICS Code of Conduct.

Clause 1(5) – Remuneration of Special Advisers

107. Clause 1(5) seeks to ensure that no special adviser is paid above the rate within the senior civil service pay structure applicable to NICS Assistant Secretary (Grade 5). In his written response to a Committee question the Bill sponsor stated that, because the matter has been the subject of controversy, he considers it appropriate to set a Civil Service-linked cap in the level of special adviser pay, rather than in codes which ministers can readily change.

108. RaISe Research Paper NIA 88-20 states that, on 20 January 2020, DoF published the pay bands for special advisers which stipulate that special advisers will be paid within one of three pay bands as follows:

Pay Band	Salary Range
1	Up to £54,999
2	£55,000 - £69,999
3	£70,000 - £85,000

109. The pay band of each special adviser is determined by officials in DoF on consideration of a CV. Salaries in pay bands 2 and 3 normally start on the pay band minimum.

110. The NICS Grade 5 pay scale maximum is £80,847 at the time of writing. In its written response to Committee questions DoF did not confirm whether any special advisers were currently paid above this level. When asked to outline in detail, any objections to aligning special adviser pay to NICS pay scales the Department responded that special advisers have a distinct role within the NICS and, like other distinct groups within the NICS, they have a separate pay scale. The Department did not, however, refer to the fact that all pay scales are linked to the same percentage increases.

111. The RaISe paper contains details of special adviser numbers, and pay bands in Northern Ireland and comparisons with other jurisdictions. There are currently 14 special advisers in Northern Ireland. Six are on pay band 1, four are on pay band 2, and four are on pay band 3.

112. During oral evidence the official from DoF, SPRD conceded that there is nothing in the Code of Appointment to prevent a Minister from appointing somebody with no qualifications, special skills or expertise as a special adviser but added that he could not foresee a scenario in which ministers would want to do that.

113. The Committee's deliberations focused on ensuring that salaries are adequate to attract an appropriate pool of suitably qualified and experienced candidates. Members considered the temporary nature of the role and issues relating to attracting candidates from secure permanent employment to special adviser roles which are dependent on how long the associated minister would remain in post.

114. Members considered the nature of the special adviser role as a political appointment and the fact that it differs from other technical roles which could be appointed through other means. The example was considered that an appointment could be made under the Civil Service Commissioners (Northern Ireland) Order 1999 which allows the First Minister and deputy First Minister to make appointments through Prerogative Order. It was acknowledged that Clause 3 proposes to amend the Order to provide for such appointments being subject to Assembly approval. It was acknowledged that the legislation is not seeking to change the nature of the special adviser role.

115. The Committee further considered the current arrangements where, unlike other civil servants, the salaries of special advisers are not subject to any formal procedures and can be easily raised.

Clause 1(6) – Ensures that only a properly constituted Special Adviser can fulfil those functions, and makes Special Advisers answerable to their minister

116. Clause 1(6) ensures that only a properly constituted special adviser can fulfil those functions and makes special advisers answerable to their minister.

117. The Bill sponsor informed the Committee during oral evidence that Clause 1(6) deals with an RHI issue. He reminded members that, after the passing of his first special adviser Bill, which became the Civil Service (Special Advisers) Act (Northern Ireland) 2013, which removed people with criminal convictions from the role of special adviser, there was evidence before the RHI Inquiry that the provision had, in his view, been circumvented to some extent by parties or a party appointing a person who was not a special adviser and could not be because of that Act but, nonetheless, had full access in Stormont Castle to all the materials and facilities that a special adviser had. He informed the

Committee that the only difference was that the person was not paid from the public purse.

118. The view of the Department is that the provision in Clause 1(6) is already inherent in the Code of Conduct for Special Advisers and the contract of employment and that anything else would be unlawful.

119. In its written response to a Committee question the Department explained that the Code of Conduct and the Letter of Appointment set out that the role and responsibilities of a special adviser is a person appointed to a position in the NICS under Article 3(2)(b) of the Civil Service Commissioners (NI) Order 1999 and that they do not apply to anyone else.

120. HOCS was asked during oral evidence for his view on seeking to avoid anyone circumventing the requirements of the law, as provided for in Clause 1(6). He said that he had not detected a hierarchy and went on to inform the Committee that the only people who have access to Stormont Castle are people who are authorised to be there. He said that he is not aware of anybody who is not a civil servant, special adviser or a minister having access.

121. In its written response to the call for evidence Innocent Victims United supported the provisions in Clause 1(6) to prevent what it called 'obvious malpractice', stating,

> *"Innocent victims and survivors of terrorism find it very traumatic to see ex-terrorists in positions of power as elected representatives, with their history of convictions or involvement in sustained terrorist campaigns that directly resulted in the murder of these innocent victims' loved ones or which caused the life changing injuries they have to live with."*

122. In its written evidence, the Department referred to, what it considered, problems with the drafting of the first part of the Clause where it appears to place a requirement upon the Minister to prevent any other civil servant from fulfilling core functions. In addition, the Department's view was that this provision would appear to oblige the Permanent Secretary to ensure that no other civil servant received the cooperation, recognition and facilitation that was due as civil servants. In response, the Bill sponsor intends to bring forward an amendment at Consideration Stage to address this concern.

123. During its deliberations the Committee considered the view that this subsection brings transparency and accountability to the role of special

adviser. The Committee discussed the view that there have only ever been official special advisers. The issue was raised that, if this is the case the Clause will have no effect and should, therefore, be welcomed.

124. The Committee considered a proposed amendment to Clause 1(6) from the Bill sponsor to address the DoF concern that there is a need ensure that Clause 1(6) relates solely to special advisers.

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

125. The purpose of Clause 2 is to reduce the number of special advisers in the Executive Office from eight to four.

126. In oral evidence the Bill sponsor highlighted that, under existing provisions, the First Minister, deputy First Minister and junior Ministers may collectively appoint up to 8 special advisers. The Bill sponsor considers this to be excessive. His view was that reducing to one the number of special advisers that the First Minister and deputy First Ministers can each appoint was the easiest way to achieve the objective of reducing the total number of special advisers in The Executive Office to four. When questioned by members, the Bill sponsor agreed that it would be open to debate and amendment as to whether four is the right number.

127. When asked, during oral evidence, for his views on the current provision for eight special advisers in The Executive Office, HOCS commented that there is a wide range of issues to be dealt with, therefore, he does not have a particular issue with that. When pressed for his views on having provision for eight special advisers, HOCS emphasised that the First Minister and deputy First Minister have chosen not to exercise that right at present.

128. In its written evidence considered by the Committee on 6 May 2020, the Department of Finance stated that reducing the number of special advisers that both the First and deputy First Minister can appoint *'does not recognise the seniority or weight of the role'*. In response to this point, and in order to gain a clearer understanding, the Committee wrote to the Department requesting that it set out in detail the seniority and weight of the roles of special advisers within The Executive Office.

129. In its written response of 17 June 2020 the Department highlighted that special advisers appointed by the First Minister and deputy First Minister have *'a wider range of responsibilities than those appointed by other Ministers'*. The response continued to highlight that these include:

- Supporting the First and deputy First Minister in discharging their joint responsibilities and in joint decision making;
- Advising and supporting the First and deputy First Minister in relation to the functions of The Executive Office; and
- Consultation with other special advisers in support of collective decision making by the Executive Committee and to the First and deputy First Minister in their role as joint chairpersons.

130. A similar view was provided to the Committee for The Executive Office by TEO. TEO's response also highlights that the proposal,

> *"…does not take account of the distinct characteristics of the Northern Ireland Executive and the joint roles of the First Minister and deputy First Minister."*

131. From the evidence received from both TEO and DoF, it is unclear how the role of a special adviser within The Executive Office differs significantly to that of a special adviser in any other department.

132. In follow-up correspondence, the Committee wrote to the Bill sponsor to obtain his views on the points raised. In his written response the Bill sponsor stated,

> *"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."*

133. The Bill sponsor went on to state that the need for, what he referred to as a *"surplus of SpAds"* is mitigated because of the constitutional all-party coalition in Northern Ireland and the absence of an official opposition.

134. In addition, the Bill sponsor highlighted that, following consideration, it is now his intention to amend The Civil Service Commissioners (Northern Ireland) Order 1999 to abolish the existing provisions available for a junior minister to appoint a special adviser and to reduce the number

that may be individually appointed by the First Minister and deputy First Minister from three to two.

135. In response to the Committee's invitation to provide written evidence on the Bill, the Institute for Government observed that, whilst The Executive Office cannot reasonably be compared with 10 Downing Street or the Cabinet Office, it was the Institute's view that, having a larger number of special advisers was not necessarily something that should be perceived negatively. It stated that, more fundamentally, the question should be how to ensure that a larger team has a *'proper understanding of their minister's view and priorities'.* The view of the Institute was that more advisers are helpful for a multi-party government as more communication between ministers and their teams is necessary. In his written response to Committee questions the Bill sponsor expressed the view that this contention is not sustainable and, even if it were, four special advisers should be adequate to meet the needs of The Executive Office.

136. The Bill sponsor is proposing an amendment to Clause 2 which would change the approach in the Bill to the reduction of special advisers in The Executive Office. He explained that this would mean the total number in the Executive Office would remain at the originally proposed number of four but by alternative means.

137. During deliberations there was broad agreement within the Committee that the number of special advisers should be reduced. There was no consensus, however, on the most appropriate means to reduce the number of special advisers, whether through legislation or other means, or on the appropriate number of special advisers that there should be in the Executive Office.

138. Members considered the Bill sponsor's proposed amendment to repeal the Civil Service Commissioners (Amendment) (Northern Ireland) Order in Council 2007 which would remove the provision for junior ministers to appoint special advisers. This amendment would have the effect of reducing the maximum number of special advisers in the Executive Office to six. A number of members expressed support for this amendment.

139. Although all members expressed the view that the appropriate number of special advisers in the Executive Office should be less than eight, there was no consensus on what the appropriate number should be. A concern was raised that, if the number is reduced in legislation, this

would remove any flexibility to increase the number of special advisers when four may not be sufficient in all circumstances. The point was made that such flexibility exists under current provisions relating to the powers of the First Minister and deputy First Minister to appoint additional staff through Prerogative Order. The only change the Bill would make to this provision under Clause 3, would be to introduce a requirement to seek the consent of the Assembly to do so through the Affirmative Resolution procedure.

Clause 3 Repeal of the Civil Service Commissioners (Amendment) Order (Northern Ireland) 2016

140. Clause 3 requires appointments being made under Civil Service Commissioners (NI) Order 1999 to be made under the affirmative resolution procedure in the Assembly.

141. During the oral evidence on 26 February 2020 the Bill sponsor explained that the Order makes provision for the First Minister and deputy First Minister to appoint a person to provide specialised support. He informed the Committee that this provision had arisen as a result of the use of a Prerogative Order of the First Minister and the deputy First Minister in the appointment of an Executive Press Secretary. He believes the provision should be repealed and that any future amendment of that Order should only be done through affirmative resolution in the Assembly. In his written response to Committee questions the Bill sponsor stated that he believes the affirmative resolution procedure to be the most appropriate rather than either negative resolution procedure or confirmatory resolution procedure so that it cannot be done *"behind closed doors".*

142. In the written evidence considered on 6 May 2020, the DoF stated that no appointments have been made under this provision by this administration and the provision is kept under review. This positon was reiterated by the Head of the Civil Service (HoCS) HOCS during his oral evidence on 6 May 2020. In its written response to Committee questions DoF conceded that the only way to prevent appointments being made in this way in the future would be through legislation.

143. In its written response to Committee questions the Department outlined that constitutionally it would represent significant change to the traditional authority of the Executive arm of government in the management of the Civil Service. This view was supported in the written

evidence from TEO, which was considered by the Committee on 27 May 2020.

144. In his written response to Committee questions the Bill sponsor stated,

> *"Moving away from the exercise of prerogative powers was indeed a significant, but welcome, constitutional development in the 17th century. It is 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!"*

145. In oral evidence, when asked why a department would want to disbar the approval of the Assembly as provided for under Clause 3, the PSRD official responded that the clause would remove the power of FM and dFM to engage any specialised, expert support that they might need in some form of emergency or other situation. The official was unable to provide an example of the type of situation to which he was referring.

146. Officials conceded that, because only one person could be appointed through this route at any one time there was a risk that, by appointing only one expert, this would limit the scope of the expertise, especially considering that experts can vary on any subject matter.

147. When asked if the consultancy route would be appropriate for such an appointment the official conceded that it was a route by which temporary specialist appointments can be made for different periods of time. He said that consultancy was a common process that happens often and is monitored to ensure that consultants are not being used for something that could be done internally.

148. Officials also conceded that FM and dFM could appoint a special adviser to recruit the particular expertise they need and that that person would have to comply with the Code of Conduct for Special Advisers.

149. The official informed the Committee that, as part of the Department's wider thinking about Civil Service reform it is thinking about how the Civil Services Commissioners work and the role that they play. He said that there were fewer exemptions to the merit principle available here than to Civil Service Commissioners in Britain. He said that the wider issues need to be considered in getting the required expertise.

150. A broad level of support was expressed for Clause 3 during the Committee's deliberations on the Bill. It was considered one of the less contentious aspects of the legislation. Views were expressed that introducing the Affirmative Resolution procedure, as proposed, would be in the public interest, would introduce checks and would increase transparency by making the public aware of appointments being proposed.

Clause 4 Special Advisers in The Executive Office

151. Clause 4 provides for compensation for any special adviser losing their job in consequence of the reduction in the number of special advisers in the Executive Office from 31 March 2021.

152. In its written evidence DoF described this as a practical measure to bring the new provisions into play before the next election.

153. In its written evidence considered by the Committee on 27 May 2020, TEO stated that it considers the date of 31 March 2021 arbitrary and not consistent with the need for the First Minister and deputy First Minister to have a sustained level of support across the mandate to ensure the delivery of Executive commitments. When asked what scope exists for amending the Clause to enable the current level of provision until the end of the current mandate, the Bill sponsor replied, in his written response to Committee questions that such amendment is feasible, but he considered the proposed date adequate to give time for adjustment.

154. The Bill sponsor is proposing one amendment to Clause 4 which he considers essentially technical and relates to drafting issues. He explained to the Committee that the sub-section that the amendment removes is unnecessary in drafting terms.

155. During oral evidence the Bill sponsor was asked if the date of 31 March 2021 would give adequate time, especially for people making life-changing decisions about their job. He responded that, in his view, it does but, once the Bill reaches Further Consideration Stage, if the view is that the date is too tight it would merely be a matter of introducing a simple amendment at that time. He accepted that there may be logic in the view that it would be preferable for the date to coincide with the end of the mandate but went on to point out that the mandate could be extended.

156. During its deliberations there was broad agreement within the Committee that the provisions in Clause 4 represent a sensible approach should the number of special advisers in the Executive Office be reduced during the current mandate. Some consideration was given to keeping the date under review.

Clause 5 Amendment of the Assembly Members (Independent Financial Review and Standards) Act (Northern Ireland) 2011

157. The purpose of Clause 5 is to extend the powers of the Commissioner for Standards to investigate complaints against ministers.

158. During oral evidence the Bill sponsor explained that currently, the Commissioner for Standards cannot take a complaint in respect of a minister and that there is no satisfactory route for making such a complaint. He highlighted that Clause 5 will give effect to a motion which passed, unopposed, in the Assembly in January 2017. This motion called for the powers of the Commissioner for Standards to extend to ministers and for the Ministerial Code to be brought under the remit of the Commissioner.

159. The Bill sponsor highlighted that the NDNA agreement contains, what he referred to as, *"an elaborate process, to appoint three additional commissioners to carry out a number of duties."* In his view, this was "reinventing the wheel". He said that, by putting these duties under the ambit of the Commissioner for Standards £120,000 could be saved.

160. The Bill sponsor raised a further issue with the NDNA agreement in that, following the disciplinary process, any sanctions imposed would be decided by FM, dFM or the leader of the minister's party. He did not consider this appropriate because, Paragraph 1.9 of the NDNA agreement it states,

> *"The findings will not include any recommendation regarding sanctions. This will ultimately be a matter for the relevant Party/Assembly process."*

161. Concern was expressed in the Committee that this provision could lead to large numbers of vexatious or fatuous complaints relating to ministerial decisions on policy issues which may be considered unpopular. The Bill sponsor subsequently informed the Committee on Standards & Privileges (CSP) and the Assembly & Executive Review Committee (AERC) that he was working on an amendment to permit the

Commissioner to sift out complaints, against either ministers or MLAs, which are *"frivolous or vexatious or otherwise"* (Amendment 9)

162. The Bill sponsor informed the Committee that he is considering bringing an amendment to the Bill at Consideration Stage to the effect that a petition of concern may not be used on an issue relating to Clause 5. In his oral evidence considered by the Committee on Standards & Privileges the Bill sponsor stated that he had decided not to pursue such an amendment due to the applicable provisions in the Northern Ireland Act 1998 being an excepted matter. He also brought the matter to the attention of the Committee for Finance during oral evidence.

163. Further details on both the January 2017 motion and the proposals contained in NDNA are include in RaISe Research Paper NIA 88-20. This paper also considers relevant comparisons with other jurisdictions.

164. At the Committee meeting on 6 May 2020, during oral evidence, the Head of the Civil Service explained that FM and dFM's view is that it is more appropriate to address standards of behaviour for ministers through codes of conduct and guidance. He stated that such arrangements are similar to those in neighbouring and equivalent jurisdictions across the world. He also noted that the RHI Inquiry panel recommended that the required changes be made by amending the codes and guidance rather than by legislating. He said that the view of FM and dFM was that the disadvantage of legislating in this area is that discretion is needed. He stated that their view is that,

> *"Standards must be open to interpretation, recognising that there is a difference between deliberate wrongdoing and carelessness or accidental breaches."*

165. HOCS informed the Committee that the Ministerial Code of Conduct is a statutory code which, he said, carries the kind of authority that the Bill seeks to provide. His view was that the Code of Conduct,

> *"is drafted in high-level terms, setting out principles, and that is why it needs to be expanded on in guidance. The advantage of that guidance is that it can be updated or revised simply and quickly."*

166. The view of the Department was that the Commissioner for Standards has a specific role that should not be confused with the function of enforcing ministerial standards. The response stated that the two codes are different, given the different roles. At the time of the motion to the Assembly, the then Commissioner for Standards seemed to adopt an opposing view (see RaISe Research Paper NIA 88-20). He commented,

"The investigation of such complaints would have many similarities to work already undertaken by the Commissioner. It would be most unlikely to require any significant increase in resources. It would have the advantage that when considering a motion to exclude a minister or junior minister from office for an alleged breach of that Code the Assembly would have the benefit of a report of an independent investigation into the alleged conduct."

167. During oral evidence SPRD officials explained that the proposed enforcement process that has been agreed by the Executive includes provision for a panel of three, one of whom is, in an ex officio role, the Assembly Commissioner for Standards. It was considered important that the Commissioner for Standards is part of the panel because it is likely that there could be breaches of standards that would also constitute breaches in relation to a minister's role as an MLA. He said that the proposed panel would be a multiple-person panel, to allow different areas of expertise or knowledge among the individuals appointed. It will be for the panel to determine the person who is most capable of investigating the matter.

168. The official also informed the Committee that the method of appointment has not been settled, however, he conceded that he was not aware of any plans to set it in legislation.

169. The Committee considered written evidence from the Committee on Standards & Privileges. CSP had taken oral evidence from the Bill sponsor who had pointed to benefits of the approach taken in the Bill including: the statutorily independent position of the Commissioner, whose is appointed via a fair and open recruitment competition; the investigative powers of the Commissioner and their ability to initiate investigations; and the cost effectiveness of extending the existing functions of the Commissioner to cover investigation of complaints against Ministers. In addition, the Bill Sponsor provided an update on potential amendments to Clause 5 including: an intention to table an amendment to address the risk of vexatious or spurious complaints; and the decision not to pursue an amendment to prevent a petition of concern being used in respect of a report from the Committee on Standards and Privileges (due to the applicable provisions in the Northern Ireland Act 1998 being an excepted matter).

170. CSP also highlighted a number of concerns expressed by The Executive Office which were also included in the written response from the Committee for The Executive Office. The Executive Office expressed the view that, if the remit of the Commissioner for Standards was to be

extended as outlined in the Bill, it should only be extended in relation to section 1 of the Ministerial Code (the Pledge of Office, Ministerial Code of Conduct and the Seven Principles of Public Life). The Executive Office explained that the Assembly has a locus in relation to section 1 insofar as it has a statutory role in resolving that a Minister has breached the Pledge of Office (including non-compliance with the Ministerial Code of Conduct) and in imposing the sanctions available to it under the Northern Ireland Act. 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. The response states that certain obligations of ministers to the Executive Committee are already set out in (d), (e) and (f) of the Pledge of Office and would therefore be open to investigation by the Commissioner. In his written response to Committee questions the Bill sponsor stated that this is addressed by a proposed amendment to the Bill.

171. In its evidence to the Committee for The Executive Office, TEO raised a concern about the wording of Clause 5. It stated that, as worded, the Clause allows the Commissioner to give advice on any matter of general principle relating to standards of conduct of members of the Assembly including ministers. TEO explained that the Commissioner may already consider matters relating to ministers when acting in their capacity as MLAs. It recommended alternative wording to provide greater clarity that the provision is intended to cover *"conduct of members of the Assembly and of ministers"*.

172. In his written response to Committee questions the Bill sponsor directed the Committee to a proposed amendment which addresses this issue.

173. TEO also informed the Committee for The Executive Office that,

> *"arising from the New Decade New Approach Deal, the Executive Committee has already agreed arrangements for the enforcement of Ministerial Standards through the formation of a Panel on Ministerial Standards. A process to identify and appoint members of the Panel will take place later this year."*

174. In his written evidence to AERC the Bill sponsor clarified, in considerable detail, the differences between the provisions in Clause 5 and the approach outlined in NDNA. His evidence states that the enhanced independence of the Commissioner for Standards is one of the more important differences in the two approaches compared to the

proposed NDNA approach, which is a non-statutory scheme. His response outlines the following key differences in detail:

- The mode of appointment;
- The investigative powers;
- The disqualifications which apply to appointment;
- The viability of the untested NDNA process, as opposed to the proven track record of the Assembly Standards Commissioner route.

175. The AERC response includes an extract of the minutes of its meeting of 24 June 2020, which states, in relation to Clause 5,

> *"…the procedures, infrastructure and mechanisms to investigate already exist in the form of the assembly Commissioner for Standards. Therefore, it would be a straightforward and simple step to extend the remit of the Commissioner to include complaints against ministers."*

176. The Bill sponsor is proposing three amendments to Clause 5. He informed the Committee that the first two would: provide protection for both MLAs and ministers, against vexatious complaints and provide for Clause 5 only encompassing the Pledge of Office, the Code of Conduct for Special Advisers and the Nolan Principles, thus addressing a concern from TEO that the original drafting included more of the Ministerial Code than was necessary. He stated that the third is a is a necessary but incidental amendment to add ministers to the ambit of the Commissioner for Standards.

177. During the Committee's deliberations there was discussion on the differences between the provisions in the Bill and the provisions agreed in NDNA. Members considered the powers of the Commissioner for Standards to compel witnesses and documents under the provisions in Clause 5 which do not exist under the proposed approach in NDNA.

178. It was noted that the Clause would bring ministers under the same complaints procedures as other MLAs and thus ensure that both ministers and other MLAs, being investigated for similar alleged breaches, would be subject to the same complaints procedures.

179. The Committee also noted that, to date, there has been no action on bringing forward the NDNA proposals. Views were expressed that this

lack of clarity on the delivery of NDNA provisions increases the urgency for this legislation and allows NDNA to be implemented in a way that is seen as open and transparent.

180. A number of members expressed support for the Bill sponsor's proposed amendment to Clause 5 to provide protection to ministers and other MLAs against vexatious complaints.

Clause 6 Records of Meetings

181. Clause 6 requires a civil service note to be kept of all ministerial meetings

182. During oral evidence the Committee questioned the Bill sponsor to establish a definition of 'a meeting' in order to give clarity to the scope of the provisions of the Clause. In response, the Bill sponsor highlighted that, in his view, when two or more persons come together then this has the capacity to be a meeting and, therefore, the requirements under Clause 6 would apply.

183. The Bill sponsor went further and explained that, in such circumstances, where a minister encounters a member of the public informally and departmental matters are discussed which could have a bearing on the shaping of future policy or decision-making, this would be considered a meeting and would, therefore, place a duty on the minister to produce a written record.

184. The Committee also sought the views of the Department of Finance on the requirements as set out under this Clause. The Department highlighted that, in light of the revised NICS Code of Ethics, which places a duty upon civil servants to keep accurate official records, the Department considers that the Clause *"appears to be unnecessarily specific."*

185. The Committee sought further detail in order to understand how the Code of Ethics has been revised to address the issue of maintaining accurate records and, based upon Department's assertion that the clause is unnecessarily specific, what level of specificity it considered to be appropriate. In its written response to Committee questions the Department stated only that it does not consider it appropriate to legislate in this area.

186. In follow-up correspondence the Committee sought a response to these points with the Bill sponsor. In his written response the Bill sponsor outlined a proposed amendment that he intends to bring forward in order to provide what he referred to as, *"a more coherent and joined up approach"*, however, he did not accept that the argument for codes as opposed to legislation could be justified, particularly in light of what he considered, *"excesses exposed through the RHI Inquiry."*

187. The Bill sponsor is proposing one amendment to Clause 6, however, in his explanation to the Committee he asked members to consider amendments to clauses 6 to 8 together as the clauses are a suite of provisions dealing with meetings involving ministers and/or special advisers.

188. He informed the Committee that the proposed amendment to Clause 6 reduces the burden of what must be recorded and that it is proposed in response to points made by the Department of Finance.

189. In oral evidence the Bill sponsor stated that the amendments are important because they recast Clauses 6 to 8 and bring greater clarity and cohesion to them.

190. In its deliberations the Committee noted that there is a large amount of normal, innocent, practical civil service business that may have fallen within the provisions of the Bill as drafted and would have created difficulties for civil servants in their legitimate roles. It was observed that such issues would be addressed, and the risks minimised, by the Bill sponsor's proposed amendment.

Clause 7 Records of Contacts

191. Clause 7 requires all ministerial and special adviser meetings outside the department to be logged.

192. During oral evidence the Bill sponsor highlighted that the Clause was drafted to deal with, what he considered, the "*sinister side of things, where someone with a vested interest persuades the Minister off the record.*" He also recounted the evidence arising in the course of the RHI Inquiry by HOCS, who had acknowledged that notes of some meetings would not be kept because they would be discoverable under the Freedom of Information Act.

193. Members explored the potential for vexatious and inaccurate claims from people who were opposed to a minister. In response the Bill sponsor acknowledged that this could occur, but considered that it is a question of balance between the need to address any mischief and avoiding any inconvenience to a minister from having to record such an encounter.

194. The Minister reiterated a point during oral evidence that was contained within the Department's initial response to the Bill, which highlighted that the Guidance for Ministers sets out that records of meetings are to be maintained, and special advisers are obliged to adhere to the NICS Code of Ethics, which includes the requirement to keep accurate records.

195. The Committee sought the Department's view on the robustness of the revised Ministerial Code of Conduct and Code of Ethics in dealing with the issues that gave rise to the provision in Clause 7. In its written response to Committee questions the Department highlighted that the consequences for a minister failing to fulfil these requirements arise from his or her breach of the Ministerial Code of Conduct and therefore of the Pledge of Office. The Department went on to state that special advisers are bound by the NICS Code of Ethics and are subject to the same consequences of any breach of that Code.

196. In his written response to Committee questions the Bill sponsor highlighted a proposed amendment to provide more clarity on the provisions in the Clause. He explained that the amendment changes the focus of Clause 7 to the obligations when ministers and/or special advisers are lobbied. He stated that lobbying is defined as in the Transparency of Lobbying, Non-Party Campaigning and Trade Union Administration Act 2014.

197. During oral evidence the Bill sponsor explained that the amendment introduces a formal requirement in respect of ministers and special advisers being lobbied. He stated that it provides for regulation for lobbying and added that the amendment is based on the above 2014 Act in Great Britain which, he believes, has worked well.

198. The Committee noted during its deliberations that the Bill sponsor has proposed in the Notice of Amendments, that it is his intention to oppose the question that Clause 7 stand part of the Bill. The Committee considered Clause 7 in conjunction with a proposed Bill sponsor amendment to Clause 8 and an amendment to introduce a new Clause 8A. In light of the Bill sponsor's intention to introduce these

amendments (considered in more detail in the following sections) there were no objections expressed in the Committee to the proposal that Clause 7 should not stand part of the Bill.

Clause 8 Presence of Civil Servants

199. Clause 8 requires ministerial and special adviser meetings with non-departmental personnel to be attended by a civil servant and a note taken.

200. In its written evidence considered by the Committee on 6 May 2020, DoF expressed the view that, in relation to the provisions in Clauses 6, 7 and 8, clarity is necessary to set out the distinction between 'departmental matters' and in 'departmental service' and for matters referencing the 'Civil Service' and 'individual civil servants' because, in its view, it was unclear what ought to constitute a meeting.

201. In a written response to further Committee questions the Department reiterated the provision under the Code of Ethics that civil servants and special advisers (as temporary civil servants) are subject to the same consequences of any breach of the Code.

202. The Department also highlighted that section 7 of the Ministerial Code of Conduct places a requirement that an appropriate official attends all meetings concerning departmental or Executive business and that records of all such meetings are maintained.

203. In addition, the Code also requires that, in the event of a civil servant not being present, any significant content should be passed to the Minister's Private Secretary as soon as possible. The Department highlighted that,

> *"A Minister failing to fulfil these requirements may be referred to the Ministerial Standards Panel."*

204. In his written response to Committee questions the Bill sponsor directed the Committee to a proposed amendment to change the wording to make Clause 8 more compatible with terms used elsewhere in the Bill.

205. The Committee considered Clause 8 during its deliberations in conjunction with Clause 7 and Clause 8A. The Committee considered the view that the legal requirement that the Clause would place on civil servants to be present at meetings was a sensible approach. The Bill

sponsor's proposed amendment was noted, and no specific objections were raised in respect of the Clause or the proposed amendment.

Clause 8A Record of being lobbied

206. Clause 8A requires a written record to the department in the event of a minister or special adviser being lobbied in respect of official business. The Clause is a proposed amendment by the Bill sponsor in conjunction with an amendment to Clause 8 and a proposal that Clause 7 should not stand part of the Bill. The Committee considered Clause 8A only during its deliberations and received no formal evidence in relation to the proposal.

207. Issues considered by the Committee included:

- Clause 8A places a legal obligation and statutory duty on ministers and special advisers to maintain a record of having been lobbied;
- The proposed definition of lobbying;
- The possibility of ambiguity about whether or not lobbying had occurred;
- The possibility of vexatious complaints from people who may claim they had lobbied a minister or special adviser; and
- Whether or not there is a need to include the provision in legislation as it is already included in the appropriate codes.

Clause 9 Use of Official Systems

208. Clause 9, as drafted, makes it a criminal offence for a minister, civil servant or special adviser, when communicating on government business by electronic means, to use anything other than departmental systems and email addresses.

209. During oral evidence the Bill sponsor informed the Committee that, in bringing Clause 9 the intention is to have official records to discourage people from hiding information in the event that actions may be investigated.

210. The Bill sponsor was questioned about the proposed requirement to always use departmental systems and email addresses and the potential for this requirement to impede good government. It was put to the Bill sponsor that officials, acting in the interests of the Minister and Department outside of these parameters, would have to do so in the knowledge that they would have to construct a 'reasonable excuse' defence. The Bill sponsor's view was that there can be no prosecution unless there was both a reasonable prospect of conviction and the case passed the public interest test.

211. In relation to the tariff, the Bill sponsor informed the Committee that he had picked two years because that gives the option of putting a case into the ambit of the Crown Court as opposed to the Magistrates' Court. A summary conviction where the maximum is six months would be for something relatively modest. If the offence were a bit more serious, it should go to the Crown Court on indictment. Two years is the bottom level experienced in the Crown Court.

212. During questioning from members, the Bill sponsor indicated that he would be willing to consider an amendment to Clause 9 in relation to the construction of a reasonable excuse where unavailability of official systems may impede good government.

213. Written evidence from the Department of Finance quotes the Guidance for Ministers which states,

> *"Ministers must use official email systems for all communications relating to official business. Exceptionally, where this is not possible, the Minister must copy any message to their official email account. Information generated in the course of government business must be handled in accordance with the requirements of the law […] regardless of how it is communicated."*

214. The evidence also quotes the Code of Conduct for Special Advisers which states,

> *'Special Advisers must use official email systems for communications relating to official business. Exceptionally, where this is not possible, the Special Adviser must copy any message to their official email account. Information generated in the course of government business must be handled in accordance with the requirements of the law (including the Freedom of Information Act (FoI), GDPR and Public Records Act), regardless of how it is communicated.'*

215. The Committee asked the Department to provide details of the checks and balances that are in place to ensure that messages are copied to

official email accounts where use of official systems is not possible. In its written response to Committee questions the Department stated,

> *"Civil Servants, including departmental Private Offices, will respond to any concerns that private email accounts are being used. The Minister is responsible for the special adviser's compliance with the Code of Conduct."*

216. The response also stated that the Minister of Finance is satisfied that the current sanctions would be applied fairly, openly and consistently in all cases. In his written response to a Committee question on the matter, the Bill sponsor expressed the view that it is more important that the public is satisfied in this regard.

217. The original written evidence also pointed out that the NICS has a Use of Electronic Communication Policy which recommends that private email addresses are not used for business purposes and highlights that information held in non-work personal email accounts may be subject to FoI legislation.

218. In its written response to Committee questions the Department referred to its Guide to Physical, Document and IT Security which sets out the requirements for proper handling of official information.

219. In oral evidence HOCS was asked if he thought there is a need for either codes or legislation to ensure that civil servants do not use personal equipment which would allow them to do something underhand or unscrupulous. He responded that there are already strong guidelines in the NICS about the use of official devices and systems. He said that it is made very clear in the NICS handbook that breaching those guidelines can be misconduct or gross misconduct, which could result in a civil servant losing his/her job. He considered this a very strong sanction.

220. HOCS went on to say that, in relation to ministers, it is in the guidance to the Ministerial Code that the use of official systems needs to be properly managed.

221. The Minister and the Permanent Secretary were questioned on the matter during oral evidence. The view of the Minister was that the creation of a criminal offence in respect of breaches of the code would be inconsistent with the standard practice in both the public and private sectors, where workplace codes of conduct are a matter for employers, rather than a criminal offence. His view was that the creation of a criminal offence would undermine the democratic principle that ministers are responsible and accountable for the conduct of their special

advisers, as that responsibility would be transferred to the police and the judiciary. When asked to comment on this position, the Bill sponsor stated in his written response to Committee questions that he viewed these as separate issues. He stated,

> *"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."*

222. The Minister informed the Committee that the Executive intends to review the codes in the light of the RHI inquiry report and to make changes where the RHI inquiry has recommended improvements. He said that it would be a primary role of the Executive subcommittee adding that, revising rules made in legislation would be much harder and slower. In his written response to Committee questions the Bill sponsor agreed that it would be slower but stated that the Minister's desire for flexibility, *"holds its own dangers"*. He responded that the Minister had set out, in his letter of 27 April, that his ambition is for rules that are, *"amenable to interpretation and the application of judgement…"* He indicated that he was alarmed by this, stating that, *"forgetting the public dismay over RHI so soon is a foolhardy course."*

223. In written evidence the Northern Ireland Human Rights Commission (NIHRC) informed the Committee that, under the principle of subsidiarity, the European Court of Human Rights (ECtHR) does not usually take a view on the length of the prison sentence or whether the type of penalty is suited to any given offence. Its evidence stated that, where a penalty is *"clearly disproportionate"*, it may fall foul of Article 3 ECHR (which provides that no one shall be subjected to torture or to inhuman or degrading treatment or punishment), but added that this is a high threshold and *"it will only be on rare and unique occasions that this test will be met."*

224. NIHRC representatives stated during oral evidence that, without the criminal offences, there is a strong argument to say that the Article 6 guarantees do not apply but added that there is a need to be mindful of how disciplinary proceedings will manage if they are intertwined with potential criminal offences.

225. NIHRC went on to state that the United Nations (UN) International Covenant on Civil and Political Rights (ICCPR) protects the right to liberty and security of the person in Article 9 adding that it is recognised that the right is not absolute and that arbitrariness must be broadly interpreted to include *"inappropriateness, injustice, lack of predictability*

and due process of law, as well as elements of reasonableness, necessity and proportionality". It added that this does not mean that penalties imposed by criminal offences will fall foul of human rights law.

226. NIHRC stated that the ECtHR has made it clear that a professional working in an area where a high degree of caution is common can be required to take special care in assessing the risks that such activity entails. It advised that international human rights law requires that the law is not applied arbitrarily, which includes an assessment of reasonableness, necessity and proportionality.

227. The evidence from NIHRC stated that the creation of this offence goes further than the recommendations from the RHI inquiry which suggests that *"expectations and rules for SpAds when handling and emailing official information"* and *"guidance about use of personal email addresses and personal mobiles for official business"* should be addressed in a revised Special Adviser Code of Conduct.

228. Journalist and author, Mr Sam McBride stated in written evidence,

> *"I believe that central to the flaws of the Stormont system which enabled disasters such as RHI was secrecy. By allowing spads to keep their work off the government system (at least in part to evade FoI), there was no accountability and an inherent danger of dark practises [sic] up to the level of corruption."*

229. He stated that there needs to be tough sanctions for those who hid things from the official record. He suggested a new clause to encourage special advisers not to conduct work on private electronic devices or accounts by permitting civil servants to search those devices or accounts if they do so.

230. NIHRC representatives were asked if they agreed with the views of Mr McBride that, because the system had no accountability and had potential for corruption there needs to be tough sanctions for those who hide information from the official record. The Chief Commissioner informed the Committee that he agreed in part, but that it is nuanced. He said that the difficulty with Clause 9 is that, while there is the defence of reasonable excuse, the Clause is still widely drawn. His view was that there might be circumstances where it would be reasonable to look at an offence but, he said, the Clause seems to suggest that any use is potentially a criminal offence, regardless of whether that is inadvertent or for a relatively innocent purpose. He said that any deterrent effect should be against clear, deliberate abuse rather than a wider blanket to

stifle ordinary activity. He added, that the question for the Committee is, whether that should be dealt with by a disciplinary process with possibly a statutory framework around it or whether you create criminal offences. He added,

> *"The question is whether the Bill, as drafted, creates proportionate criminal offences."*

231. Commenting on the reasonable excuse defence, The Chief Commissioner stated that such an offence can result in a term of imprisonment of up to two years on conviction by way of indictment and six months or a fine, or both, on summary conviction.

232. In conclusion, in its written evidence, the NIHRC recommended that consideration is given to including the provisions in Clause 9 as,

> *"a specific disciplinary offence which falls short of criminal liability within Ministerial, Civil Service and Special Adviser codes of practice."*

233. In the Bill Sponsor's written response to Committee questions he informed the Committee that, during RHI, codes requiring integrity and confidentiality counted for nothing. They did not prevent bad behaviour or result in discipline.

234. Mr McBride stated during oral evidence that he was not convinced that the revised Code of Conduct for Special Advisers addresses the issue. He suggested that, although the Permanent Secretary informed the Committee that the revised Code is much easier to understand, he did not consider ease of understanding to have been the issue. His view was that lack of understanding was not the problem and that, during the implementation of RHI, special advisers knew their actions were wrong, which is why they hid it and used private emails and systems.

235. In his written response to Committee questions the Bill sponsor expressed the view in relation to a new clause, as proposed by Mr McBride, that there could be considerable human rights issues in relation to such a clause. He stated that his proposed amendment to Clause 9 may address the issue in part as it creates a duty on the user of private accounts to copy relevant information to the official system. He also acknowledged that under current legislation, if there was evidence that a criminal offence had been committed by government information being kept off the official record through the use of private accounts, that information could be accessed through the granting of a search warrant.

236. Mr McBride was asked for his views on whether outlawing the use of personal accounts would push communications into even more offline places and cause further problems. He agreed that, potentially, it could do, but that if you thought that there was a robust sanction you might think twice about it. He said that, if a personal account had been used because there was no other option, by providing a retrospective period to rectify any issues, the problem could be resolved. He felt that this would also cover a situation where a personal account had been used in error. He said that there was also the 'reasonable excuse' and 'public interest' tests where no harm had been caused and nobody had benefited.

237. When questioned further on Clause 9, Mr McBride stated that the culture was so widespread that civil servants, up to and including permanent secretaries, were forwarding confidential government information to their private email accounts so that they could read them on bigger screens. He continued that, in technical terms, these were dismissal offences of gross misconduct but that nobody was ever sacked as a result. He considered this a contradiction between what, on paper, is a tough sanction, and the sanction not being enforced. He said that the emails were also problematic in that they could be hacked.

238. In its written response to the call for evidence the Department of Justice stated that it could only offer comment on the offences and penalties provisions as currently presented in the Bill. DoJ considered these problematic because, in its view they were: too broadly drawn; not properly defined; and potentially criminalise legitimate working arrangements. It provided the example of the remote working arrangements many civil servants were operating under during the coronavirus pandemic.

239. In relation to the use of electronic communications for business purposes, DoJ informed the Committee that it does not consider a criminal sanction is warranted and it considers the maximum penalty of up to two-years' imprisonment when convicted on indictment is excessive. DoJ stated that,

> *"At most, if the Committee is satisfied that an offence and penalty should remain a part of any Bill going forward, the Department would consider a maximum penalty commensurate with a summary only conviction to be proportionate."*

240. The Bill sponsor responded to DoJ in a letter dated 29 April 2020, stating,

> *"In regard to your comments on Clause 9, at paragraphs 4 and 5 of your letter, you totally ignore the provision within that clause of the "reasonable excuse" defence which would patently cover situations such as those arising in the exigencies of the current Covid-19 crisis. I will consider if that aspect needs to be further amplified and also your point on proportionality of sentence."*

241. In its reply to the Bill sponsor, dated 18 May 2020, DoJ informed him that it would be happy to consider any revisions to Clause 9 and Clause 11, particularly in relation to the proportionality of the proposed sentences.

242. The Bill sponsor confirmed, in his written response to Committee questions that he would be bringing forward an amendment to address the issue of remote working. The proposed amendment also further amplifies the "reasonable excuse" defence. It does not, however, address the DoJ concerns in relation to the proportionality of sentence the amendment provides for imprisonment on indictment for a term of up to two years.

243. The view of the Committee for Justice as outlined in its written response, was that, if the Committee for Finance and, subsequently, the Assembly, were to decide that the offences and penalties provided for in Clause 9 should remain,

> *"…the offences should be clearly defined and unambiguous in their intent and the penalties should be proportionate and fit within the overall sentencing framework of criminal law in Northern Ireland."*

244. On the issue of the use of official and non-official email accounts, RaISe Research Paper NIA 88-20 draws attention to the revised Ministerial Code of Conduct which states:

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

245. The research paper also quotes the Code of Conduct for Special Advisers which states:

> *"Special Advisers must use official email systems for communications relating to official business. Exceptionally, where this is not possible, the Special Adviser must copy any message to*

their official email account. Information generated in the course of government business must be handled in accordance with the requirements of the law (including the Freedom of Information Act (FoI), GDPR and Public Records Act), regardless of how it is communicated."

246. The paper considers relevant comparisons with other jurisdictions along with issues that have arisen in those jurisdictions in relation to the use of private email accounts. It states that, in all cases, there did not appear to be agreement on the extent to which any rules had been breached.

247. The original written evidence from DoF drew attention to what it considered to be problems with the drafting of the Clause. It states that the provision refers to 'government business' but does not make clear how extensive this definition may be, or what the consequences of such a broad definition might be. The Department also pointed out that there is no definition of 'departmental systems'. It added that no electronic communication is likely to take place on wholly departmentally-controlled or departmentally owned systems. The DoF view was that Clause 9 could have the effect of criminalising all electronic communication by Ministers and civil servants.

248. The Bill sponsor informed members that, as originally drafted, Clause 9 made it an offence for a Minister, civil servant or special adviser, when they were on official business, to use personal accounts or anything other than departmental systems. He explained that he is proposing an amendment which, instead of the use of non-official processes, the offence would be the failure to record the use of non-official systems and processes back into the official system. He said,

"that failure to record would become the criminal offence to create the deterrent of someone trying to hide something. If they were to try to hide something and were caught, the offence would be that they never put it on the official system. That, of course, was one of the issues in RHI: things were hidden away on private devices."

249. When questioned by members the Bill sponsor provided more detail, stating that the amendment provides for communication to be recorded on official systems within 48 hours or *"as soon as practicable thereafter"*. He said that the provision is directed at ensuring that things are not done secretively and off the official record. He said that it puts the onus on the person who steps outside the official system to make sure that the information comes onto the official system so that when, for example, there is a request under Freedom of Information or an MLA asks a question the information requested is available on the official record.

250. In relation to both Clause 9 and Clause 11 the Bill sponsor informed the Committee during oral evidence that his proposed amendments radically reverse the burden of proof so that the prosecution must now disprove reasonable excuse once that is raised.

251. The Bill sponsor was asked how criminal offences would integrate with internal disciplinary procedures. He responded that internal procedures are usually suspended to allow criminal proceedings to conclude.

252. The Committee focused on two specific areas during its deliberations. Firstly, members discussed the Bill sponsor's proposed amendment to the Bill and, secondly, the matter of criminal offences relating to the Clause were considered.

253. Members generally welcomed the proposed amendment in that it would change the focus of the Clause from the use of non-official systems per se to the failure to record the use of non-official systems within a reasonable time period.

254. There was discussion within the Committee on the issue of the need for criminal offences. Concern was expressed both about the principle of including a criminal offence in the Clause and in relation to the two-year maximum tariff. Members discussed the value of having a hybrid offence as provided for under the Clause. Consideration was also given to the need to accept the offer from the Department of Justice to consider any revisions to the Clause in relation to the proportionality of the proposed sentences.

Clause 10 Register of Interests

255. The purpose of Clause 10 is to require a publicly available register of interests in respect of ministers and special advisers.

256. The Department of Finance quoted both the Guidance for Ministers and the Code of Conduct for Special Advisers. The Guidance for Ministers states,

> *"Upon assuming office, Ministers will complete the Ministerial Declaration of Interest Framework document (Annex) and make a full declaration of all interests which might be thought to give rise to a conflict. … a statement covering relevant Ministers' interests will be published twice yearly."*

257. The Code of Conduct for Special Advisers states,

'Special advisers must, at all times, ensure that no conflict arises, or could be perceived to arise, between their public duties and their private interests, financial or otherwise, and comply with NICS rules and departmental procedures concerning conflicts of interest. The Declaration of Interest form attached should be completed by Special Advisers upon appointment.'

258. The Department also informed the Committee that special advisers' relevant interests will be published.

259. When asked to clarify if these provisions fully comply with the provision in the Bill to require the creation and publication of a register of interests for special advisers and for ministers, the Department stated in its written response to Committee questions that there is no substantive difference in either case between the requirements in the Bill and the existing requirements. The Bill sponsor's view, in his response to Committee questions considered on 9th September, was that the difference lies in the fact that the Bill creates a statutory obligation. He added that the provisions in Clause 10 would add certainty and year-round access to up to date information.

260. On 3 July 2020, the Department of Finance published and laid in the Assembly its first Special Advisers Report 1 April 2019 – 31 March 2020. It stated that, while the DoF usually publishes an annual report containing the number and costs of special advisers, for the first time the report would be expanded to include greater details about salaries and relevant interests, adding that this information will become a regular part of this publication.

261. The written response from the Committee on Standards & Privileges stated that The Executive Office considers the difference between the Executive's approach and that contained in the Bill to be largely procedural. In his evidence to CSP, the Bill sponsor stated that, under Clause 10, the Ministerial register of interests will have a statutory basis which gives it a binding effect, with failure to comply being a breach of the law and therefore a breach of the ministerial code and pledge of office, which could provide the basis for a complaint under Clause 5.

262. RaISe Research Paper NIA 88-20 provides relevant comparisons to the requirements in other jurisdictions regarding registration of interests for ministers and special advisers.

263. The Bill sponsor is proposing three amendments to Clause 10. In his explanation, he informed the Committee that two of the amendments

would secure alignment with the Code of Conduct provision and the remaining amendment, together with an amendment allied to Clause 14, defines the family members relevant to register of interest requirements.

264. In its deliberations the Committee noted that the Bill sponsor is proposing amendments to Clause 10 to bring it into line with the codes to which they relate. The Committee also noted the further proposed amendment to define family members.

Clause 11 Offence of Unauthorised Disclosure

265. Clause 11 makes it a criminal offence for a minister or special adviser to communicate confidential government information to a third party.

266. During oral evidence from the Bill sponsor some members expressed concerns regarding the potential for Clause 11 to capture many forms of communication with the media, including informal briefings which help the media to hold ministers to account. The Bill sponsor agreed that such briefings could be facilitated through an amendment to the Bill which would exempt authorised briefings.

267. When questioned on why Clause 11 contained a reference to the Official Secrets Act 1989, the Bill sponsor informed the Committee that, because special advisers are subject to the Official Secrets Act, there might be a case in which it would be the correct vehicle to use, therefore, that power should be available. He said that, in circumstances in which it was not the right vehicle, this Bill might be the right vehicle. He went on to say that,

> *"the reference is included without prejudice to the fact that there might be an Official Secrets Act question there, a minister or a special adviser could be investigated under a lesser offence of the unauthorised distribution of sensitive material."*

268. In written evidence considered by the Committee on 6 May 2020, the Department of Finance quoted the Ministerial Code of Conduct which states,

> *"A Minister must at all times … adhere to the rules regarding the management of official information. This includes rules on disclosure."*

269. The written evidence also quoted the Guidance for Ministers which states,

> *"Ministers have a personal responsibility to safeguard the integrity and confidentiality of official papers, including Executive papers. Failure to maintain good security can cause damage to the interests and reputation of the Executive Committee and Northern Ireland departments, and may prejudice the effective conduct of official business."*

270. The written evidence went on to quote the Code of Conduct for Special Advisers where it states,

> *"Special advisers should not disclose official information which has been communicated in confidence on official business or received in confidence from others. The preparation or dissemination of inappropriate material or personal attacks has no part to play in the job of being a special adviser as it has no part to play in the conduct of public life. Any special adviser found to be disseminating inappropriate material will be subject to a disciplinary process that may include dismissal."*

271. The response also referred to the NICS Code of Ethics which states that civil servants (including special advisers) must not disclose official information without authority.

272. In its written response to Committee questions DoF stated that unauthorised disclosure of official information is a disciplinary matter which can lead to dismissal and/or criminal proceedings. The response provided assurances that any unauthorised disclosure that is uncovered would be investigated and, where appropriate, brought to the relevant minister's attention.

273. HOCS referred to the new codes and guidance during his oral evidence. He said that the First Minister and deputy First Minister recognise that the credibility of the codes and guidance depends on how they are implemented. He went on to say that the parties' endorsement of the NDNA agreement along with the strengthened codes and new guidance should be viewed as evidence of the commitment of the First Minister and deputy First Minister. He considered the new enforcement arrangements to be crucial, stating,

> *"Those arrangements have been set out by the Executive and will be put into practice as soon as possible, and they will ensure that all complaints are considered and, where relevant, investigated by an independent panel member."*

274. The Minister's view during oral evidence in relation to the creation of criminal offences in respect of breaches of workplace codes and the

Executive's intention to review the codes in light of the RHI inquiry are considered above under Clause 9. They apply equally to Clause 11.

275. In the same evidence session, the Permanent Secretary was asked if the Metropolitan Police would have investigated if a minister's special adviser in the Cabinet Office had leaked a classified document which was subsequently used for business or economic advantage. She responded that the threshold for referring something to the police is very high and you would have to look at the individual circumstances.

276. In its written evidence NIHRC stated that Clause 11 creates a direct interference with the right to freedom of expression in Article 10 ECHR. It went on to state,

> *"The right to freedom of expression in Article 10(1) ECHR provides that "everyone has the right to freedom of expression". Any constraint on freedom of expression must be a proportionate interference with the right and must be based on the principle of non-discrimination. Such limitations must be no more than is "necessary in a democratic society", be prescribed by law and meet one of the legitimate aims in Article 10(2) ECHR, including "the interests of national security" and "for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence".*
>
> *The ECtHR has confirmed that Article 10 ECHR applies within the workplace. While civil servants in a democratic society have a particular duty to assist the government in discharging its functions, this does not preclude someone from the protection of Article 10 ECHR if they divulge or publish information, even secret information, if there is a strong public interest in disclosure.*
>
> *The right to freedom of expression is also recognised in Article 19 UN ICCPR..."*

277. NIHRC stated that particular care should be taken to ensure that Clause 11 avoids inadvertently capturing someone, such as a whistle-blower who would otherwise come within the scope of the Public Interest Disclosure (Northern Ireland) Order 1998.

278. Its response stated that the offence provided for in Clause 11 is more far-reaching than the RHI Inquiry recommendation, which states that *"SpAds' duty of confidentiality, cross-referencing to their employment terms under the Civil Service code"*, is addressed in the Special Adviser Code of Conduct.

279. In oral evidence to the Committee on 27 May 2020 the Chief Commissioner said that NIHRC had three concerns in relation to human rights. These were:

- Creating such a criminal offence must be proportionate.
- The potential to entangle disciplinary proceedings with criminal action.
- Concerns in relation to the right to *"freedom of expression*".

280. On the issue of proportionality, the Chief Commissioner said that a criminal offence must be proportionate both in terms of the offences themselves and breadth of the offence. He quoted the Human Rights Council, which has suggested that a criminal offence,

> *""must demonstrate its necessity and only take such measures as are proportionate to the pursuance of legitimate aims in order to ensure continuous and effective protection of convention rights."*

281. He went on to quote the ICCPR where it states,

> *""States must demonstrate their necessity and only take such measures as are proportionate to the pursuance of legitimate aims in order to ensure continuous and effective protection of Covenant rights."*

282. He informed the Committee that the Covenant rights includes the right to liberty.

283. When questioned in relation to concerns regarding proportionality, the Chief Commissioner responded that, Clause 11, in particular is problematic because criminal offences must be proportionate. He said that there is a set of issues relating to public interest disclosure. When asked if an amendment to introduce a reasonable excuse defence and the provision that a disclosure was made in the public interest would meet requirements, the Chief Commissioner said that he thought that it would. When asked who defines and judges what is of public interest, the Chief Commissioner responded that it becomes a matter for the courts, ultimately, and judges. He said that public interest disclosure is generally about the ability to keep your job if you whistle-blow but Clause 11 moves it to potentially staying out of prison as opposed to losing your job, which is a very different set of concerns. He said,

> *"there is a policy judgement question about whether you want to create criminal offences. The commission's position is that, as a*

human rights issue, you can create these offences. Whether it is wise to do so is not a matter for us, but it is a judgement that has to be made. I am not a great fan of creating criminal offences unless there is a compelling reason to do so. That is a matter of judgement; it is not a matter of human rights per se. The question of human rights is this: if you create a criminal offence, is it proportionate?"

284. The Chief Commissioner was concerned that the Clause is widely drawn. He said that something that you would normally expect a political adviser to do, such as providing the Minister's view to a journalist, appears to be considered a criminal offence under Clause 11 as drafted and does not seem proportionate.

285. On NIHRC's second concern, the Chief Commissioner said that in practical terms, if the leaking of information could lead to criminal prosecution under Clause 11, the disciplinary proceedings immediately becomes entangled with the threat of criminal action. He went on to say that,

"The possibility of criminal action, in the commission's view, may bring the disciplinary process into Article 6 [ECHR] and the right to a fair trial. That would no doubt come with arguments about halting any disciplinary proceedings until it is clear whether there will be a criminal investigation and/or a prosecution at its conclusion. Therefore, I think that, without the criminal offences, there is a strong argument to say that the Article 6 guarantees do not apply. We will need to be mindful of how disciplinary proceedings will manage if they are intertwined with potential criminal offences."

286. In his written response to Committee questions the Bill sponsor stated his view that the normal procedure is disciplinary proceedings must await the outcome of criminal proceedings. He did not, therefore, consider 'intertwining' to be an issue.

287. In relation to "freedom of expression", the NIHRC concern related to Article 10 of ECHR. He said that this is not an absolute right but that any curbs must be prescribed in law. He said that the Bill clearly meets this requirement. He went on to say that such curbs must be necessary in a democratic society, which he considered a matter of debate. He also raised the issue that protections are not provided for whistle-blowers and is likely to inhibit whistle-blowing by a civil servant. The Chief Commissioner informed the Committee that the Public Interest Disclosure Act 1998 ensures that everyone who is dismissed for whistle-blowing can be considered unfairly dismissed. He said,

"It seems to us that it is one thing to risk your job by whistle-blowing; it is quite another to risk your liberty."

288. In conclusion, in its written evidence, the NIHRC recommends that,

"the creation of a criminal offence in Clause 11 should be more focused and specifically drawn to address the particular harm it is seeking to remedy, for example by the inclusion of the word "improper" preceding "benefit" at line 20 and includes appropriate safeguards in line with international human rights standards including whistle blowing."

289. In his oral evidence to the Committee on the same date, Mr Sam McBride also raised the issue of possibly penalising whistle-blowers who are acting in the public interest. He posed the question of whether it could be distinguished between somebody who is whistle-blowing and somebody who is passing confidential government documents to others without authority to do so. He said that he believed that these could be distinguished because the Bill provides for a "reasonable excuse" defence. He agreed with the NIHRC view that there needs to be further clarity to distinguish between whistle-blowing and passing confidential information so as to provide assurances to those who believe they are acting in the public interest.

290. Mr McBride also questioned whether the Bill covered the area where a special adviser may be legitimately briefing the media or communicating with a party press officer who briefs the media. He said that these are things that currently happen. He questioned if this needs to be spelt out in the Bill but believed that, if it was an issue it could be resolved.

291. When questioned further on his views on a possible amendment to Clause 11 to introduce provisions for a reasonable excuse and for acting in the public interest, Mr McBride responded that,

"explicitly including a reference to the legislation not applying to whistle-blowing in the public interest would build in a safeguard for any potential unintended consequences."

292. In oral evidence from the former Commissioner for Public Appointments, Ms Huston was asked for her views on proportionality and whistle-blowing. She responded that whistle-blowing is a problem because the issue is the fear that someone releases information because they feel that it needs to go into the public domain for good reason, and then the legislation catches them. She said that, in her experience of how things operate, civil servants will still be very nervous whatever the legislation

says and however much protection is put in formally on whistle-blowing. She said that for that reason she would not want to do anything that would put people off having an opportunity to go out to the public domain. She considered it unfortunate that we seem to live in a political culture where legislation like this needs to be drafted.

293. In its written response to the Committee's call for evidence the Department of Justice noted that that section 5 of the Official Secrets Act 1989 already makes it an offence for the unlawful disclosure of protected information (regardless of motivation) with a penalty of a maximum sentence of two years' imprisonment upon conviction on indictment, or six months' imprisonment or a fine not exceeding £5,000, or both, on summary conviction.

294. DoJ stated that it does not consider the clause adds anything to the overall framework of criminal law in Northern Ireland and does not consider the offence to be necessary.

295. In his written response to Committee questions the Bill sponsor stated that,

> *"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."*

296. The DoJ response went on to state that, given the penalty associated with the Official Secrets Act, it has assessed the maximum penalty of up to five years' imprisonment to be disproportionate. In correspondence to DoJ, dated 29 April 2020, the Bill sponsor conceded that there may be merit in this point.

297. In the same correspondence, the Bill sponsor stated that, in his view, DoJ's reference to Section 5 of the Official Secrets Act was misplaced because Section 5 is restricted in its application to the disclosure of information dealing with matters of security and intelligence, defence, international relations and the disclosure of a specific type of information resulting in the commission of other crimes. In his view, the suggestion by DoJ that the Clause is unnecessary, was erroneous and likely to mislead. In its response to the Bill sponsor, dated 18 May 2020, DoJ recognised that Section 5 must be read in conjunction with the preceding sections which deal with the matters outlined in the Bill sponsor's correspondence. The response went on to state,

"At the time of the Department's initial consideration of your Bill, because the 'for financial or other potential benefit' aspect of Clause 11 is not defined, it was not clear whether you intended the clause to capture financial benefit secured through criminal activity such as fraud, theft, or, in extreme cases, blackmail or extortion, that might be perpetrated upon the disclosure or receipt of information.

Were that to have been the case, Section 4 of the 1989 Act would be engaged and the offence of unlawful disclosure under Section 5 would be triggered and the offence in your Clause 11 may not be needed. I appreciate that this could have been made clearer in my original letter to the Committee for Finance but trust that this clarification sets out the Department's thinking.

However, upon receipt of your letter, it is now apparent that you do not intend to capture financial benefit as a result of other crimes as part of your clause. For the avoidance of any further doubt, this may be something that you might wish to consider making explicitly clear moving forward."

298. The response went on to state that DoJ would be happy to consider any revisions to clauses 9 and 11 as a result of the Committee's ongoing scrutiny of the Bill, particularly in relation to the proportionality of the proposed sentences.

299. The view of the Committee for Justice as outlined in its written response, was that, if the Committee for Finance and, subsequently, the Assembly, were to decide that the offences and penalties provided for in Clause 11 should remain,

"…the offences should be clearly defined and unambiguous in their intent and the penalties should be proportionate and fit within the overall sentencing framework of criminal law in Northern Ireland."

300. In its original written evidence, the Department also pointed out its view that the Clause, as drafted, may have the effect of criminalising the communication of any official information, even between departments, ministers and civil servants about issues that might be of benefit to anyone, including members of the public. The Department's view was that Clause 11 would thereby render all internal collaboration and communication on the business of government potentially criminal.

301. In its original response, DoF also identified, what it considered to be, drafting problems in relation to the use of the term 'confidential'. It stated that the provision refers to documents that are confidential. The response highlighted that there is no longer a 'Confidential' classification

in the NICS. It stated that, without a formal definition, the ordinary meaning of the word confidential would apply, and arguably all 'Official' classified information may be considered confidential to some degree. When asked for clarification on this point, the Department stated, in its written response to Committee questions,

> *"The Bill contains no definition of 'confidential', and that term may be interpreted widely to include any material that is not published or intended for publication. The clause is broadly drafted, and it could lead to the situation where only published material could be communicated with anyone else, even within government, about anything which might be of benefit to anyone else, which would include most public-sector activity.*
>
> *It is also important to note that the draft clause also makes no allowance for departments to communicate commercially sensitive information with contractors, as appropriate."*

302. DoF view was that, even if the definition of 'confidential' is narrowed, it is not clear how the provision is intended to interact with the Freedom of Information Act. When asked how this provision is meant to interact with the FoI Act, the Department stated in its response to Committee questions,

> *"The Freedom of Information Act enables a member of the public to request information currently held by public bodies. As above, without a definition, any material that is not already published or intended for publication might be considered confidential. It would, therefore, be a criminal act under this provision for the Department to disclose information that the FOIA requires to be disclosed."*

303. In his written response to Committee questions the Bill sponsor provided assurances that his proposed amendment to Clause 11 would address any issues of concern regarding: confidentiality; the proportionality of the sentence; whistle-blowing; the right to freedom of expression; and the need for legal certainty on the types of activity covered by the Bill.

304. The Bill sponsor is proposing one amendment to Clause 11 which would replace Clause 11 in its entirety. His explanation to the Committee states,

> *"The amendment simplifies the language of subsection (1), bearing in mind NIHRC comments, protects FOI obligations and internal government communications and introduces the reasonable behaviour and public interest defence […]. The amendment also reduces the maximum sentence from 5 years to 2 years to keep the tariff more in line with Official Secrets Act standards."*

305. In relation to both Clause 9 and Clause 11 the Bill sponsor informed the Committee during oral evidence that his proposed amendments radically reverse the burden of proof so that the prosecution must now disprove "reasonable excuse" once that is raised.

306. In relation to Clause 11 the Bill sponsor explained that the proposed amendment would reduce the maximum tariff from five years to two years to take account of the fact that it is more reflective of the type of tariff that would be available in other legislation. He said that the amendment simplifies Clause 11 and protects freedom of information (FoI) rights and media briefings by special advisers.

307. It was put to the Bill sponsor that the proposed amendment does not address the issue of proportionality as advised by the Human Rights Commission. The Bill sponsor responded that he took account of the points raised by the Human Rights Commission and that this is reflected in the reduction in the maximum tariff. He added that, on the point of whether it should be summary only offences, he has included proposed a hybrid offence in order to provide a right on the accused to opt for trial in the Crown Court by a jury. Under summary only offences trial would be in a Magistrates' Court without the right to a jury trial.

308. The Bill sponsor also outlined that the inclusion of the term *"improper"* in relation to Clause 11 would cover disclosure of information by a person acting as a whistle-blower. He informed the Committee that it would be a defence for someone to say that they were acting in the public interest.

309. During its deliberations the Committee considered the issue of the need for criminal offences and the extent of the tariff proposed in both the Clause as drafted and the Clause as amended. There was discussion within the Committee and concern was expressed about the principle of including a criminal offence in the Clause. There was also discussion in relation to the two-year maximum tariff proposed by the Bill sponsor's amendment and also on whether it would be preferable to return to the proposed five-year maximum tariff proposed in the Clause as drafted.

310. A number of members indicated support for the aspect of the proposed amendment designed to address the issue of legitimate press briefings by special advisers and the provision of information under FoI requirements.

Clause 12 Biennial Report

311. The purpose of Clause 12 is to establish a process whereby the First Minister and deputy First Minister shall report every two years on the functioning of government and initiate improvements.

312. In his oral evidence the Bill sponsor described Clause 12 as an important aspect as the Bill, stating,

> *"Clause 12 imposes a rolling obligation on the First Minister and the deputy First Minister to keep under review the functioning of the Government. For example, in any year, there will be judicial reviews that will find fault with how government has done things and there will be reports from commissioners that will find fault. Therefore, I suggest in Clause 12 that, every two years, the First Minister and the deputy First Minister should lay a report before the Assembly on the functioning of government and bring any proposals there are to improve it."*

313. The views of DoF and TEO were that this provision would duplicate the annual reports and accounts already produced. TEO was of the view that weakness in the functioning of government would be highlighted and addressed through these reports and remedial action initiated in a shorter timeframe rather than biennially.

314. In his written response to Committee questions the Bill sponsor expressed the view that,

> *"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."*

315. In its written evidence the Carnegie UK Trust welcomed the provision in Clause 12. The Trust stated that it believes,

> *"that all Northern Ireland Executive Ministers should demonstrate personal leadership in ensuring the delivery of the outcomes-based approach in the Programme for Government. A cultural shift is required to work in a way that embodies co-production and a diffusion of leadership, and this will only be achieved through clarity on the different legitimacies of different groups, such as elected politicians; Ministers; special advisers; and civil servants. The ways of working should be clearly linked to improving long-term societal wellbeing outcomes, and these groups should learn from Northern Ireland's Community Planning Partnerships in implementing this approach. Reporting to the Northern Ireland Assembly on a biennial basis will improve accountability, transparency and public awareness of these ways of working, and the progress made towards improving the societal wellbeing outcomes in the Programme for Government."*

316. The Bill sponsor is proposing one amendment to Clause 12. He informed the Committee that the amendment is technical in nature.

317. During oral evidence the Bill sponsor responded to the view of DoF and TEO that the provisions in Clause 12 duplicate what happens in annual reports and accounts. He was asked what would prevent departments, under Clause 12, from adding a paragraph into the annual report and whether that would be acceptable. He responded that he did not consider it an 'either/or' situation. He said that it is about ensuring that reports do not gather dust and that an overview is taken every two years on what has been recommended that the Executive and the Assembly needs to act on. He used the example of a judicial review raising an issue that needs to be addressed.

318. The Bill sponsor was asked what was meant by the term in the proposed amendment where it states,

> *"judgements of the courts relevant to the functioning of government."*

319. He explained that judicial reviews are, by their nature, challenging processes and that is most likely to be judicial review judgements that criticise government but that it could cover any area where areas for improvement in the functioning of government had been identified.

320. The Bill sponsor was questioned in relation to the requirement in Clause 12(b) to,

> *"bring forward by statutory provision or other means, as appropriate, proposals to improve the functioning of government."*

321. He informed the Committee that a statutory provision could be primary or secondary legislation and that other means may include, for example, a change in a code or a ministerial declaration.

322. During its deliberations the Committee noted that the provisions in Clause 12 are designed to ensure that a stocktake is undertaken every two years and that appropriate action is taken to address any issues identified.

Clause 13 Commencement

323. Clause 13 sets the date on which the provisions will come into operation.

324. No issues were raised during Committee deliberations in relation to this Clause.

Clause 14 Interpretation

325. Clause 14 defines terms used elsewhere in the Bill.

326. The Bill sponsor originally proposed two amendments to Clause 14. One amendment is aligned to an amendment to Clause 10 and together they define the family members relevant to register of interests' requirements in Clause 10. A further amendment is consequential to the amendment to introduce new Clause 11A and provides a definition for the word "department" as set out in the Schedule to the Bill. The Bill sponsor subsequently proposed a third amendment to the Clause to define the term "Executive Committee".

327. No issues were raised during Committee deliberations in relation to this Clause as drafted or in relation to the Bill sponsor's proposed amendments.

Clause 15 Short Title

328. No issues were raised during Committee deliberations in relation to this Clause.

Schedule: Transitional Provisions: Termination Payments

329. Clause 14 sets transitional provisions for termination payments in respect of special advisers who lose their job as provided for at Clause 4

330. No issues were raised during Committee deliberations in relation to the Schedule.

Clause 11A Accountability to the Assembly: provision of information

331. Clause 11A is an amendment proposed by the Bill sponsor which would require ministers and departments to provide an Assembly committee with all information that it may reasonably require in order to discharge its functions.

332. On 9 September 2020, the Committee considered written correspondence from the Bill sponsor to AERC advising that Committee that he was contemplating bringing an amendment to add a new clause to the Bill which would be relevant to AERC. He informed AERC that the amendment would strengthen the scrutiny function of committees. He informed AERC that, although a committee can ultimately have recourse to Section 44 of the Northern Ireland Act 1998, to compel the production of witnesses and documents, there is currently no statutory obligation to provide information 'up front'.

333. At the same meeting the Committee considered a list of proposed amendments from the Bill sponsor which included an amendment to introduce Clause 11A. The Bill sponsor informed the Committee that the amendment introduces a new clause to put into law a statutory duty on ministers and departments to provide scrutiny committees with requested information. He stated that, at present, no statutory obligation exists and committees are forced to resort to section 44 of the Northern Ireland Act 1998.

334. In oral evidence to the Committee on the same date, the Bill sponsor explained that Clause 11A is motivated by his consideration as a member of committees. He was of the view that invoking section 44 is a complex and very time-consuming process. In bringing the amendment he wanted to discourage having to get to the point of invoking section 44 which, he said, was a convoluted process but was the only step a committee can take. He was of the view that Clause 11A would reduce the need to have recourse to section 44. He acknowledged that section 44 and Clause 11A serve two different purposes and, although each has its place, under the provisions in Clause 11A, section 44 would be a final step.

335. When questioned about the absence of any sanction under Clause 11A the Bill sponsor expressed the view that, if the Clause does not produce the desired result, then section 44 is invoked where the sanction of contempt could be applied. When questioned further, he added that failure to provide information under Clause 11A would strengthen the case in court because the court case would seek to compel the production of something that had been refused in the face of a statutory provision requiring its production.

336. During its deliberations the Committee noted the view that the provisions in Clause 11A would provide committees with enhanced authority to seek information from departments without having to use section 44 of

the Northern Ireland Act 1998, and the intention of the Clause to strengthen the overall scrutiny function of committees.

337. There was some discussion on the possible need for the Committee to take evidence on Clause 11A but a decision was not made to do so.

Committee Consideration of Other Issues

Independence of the Commissioner for Public Appointments

338. Following the receipt of oral evidence from the former Commissioner for Public Appointments, Ms Felicity Huston the Committee considered bringing forward an amendment to the Bill to enhance the independence of the Office of the Commissioner for Public Appointments.

339. In written evidence Ms Huston posed the question, *"why should a Code be mandatory?"* She stated that as Commissioner, she had extensive experience of the problems of working within an area of guidance rather than law. She informed the Committee that the Commissioner for Public Appointments in Northern Ireland is appointed under Section 23(3) of the Northern Ireland Order 1998, which runs to three pages and one schedule. Her view was that the Order is vague and provides very few powers and that it does not clearly lay out what the independent nature of the post means in practice. The written evidence continued,

> *"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."

340. In her oral evidence to the Committee, Ms Huston set out the role of the Commissioner for Public Appointments as follows:

"The Commissioner sets the standards, writes the code of practice for appointments and sets standards that are to be used for all relevant public appointments, which, as I said in my paper, can be complicated. The commissioner then oversees implementation, provides advice to Ministers and civil servants on how it is to be implemented, deals with complaints where the code has not been followed and audits competitions, which means that the commissioner looks at competitions to see if they comply with the code. […] When I was Commissioner, I was responsible for the allocation to panels of Commissioner's assessors who would try to ensure that the code was being applied."

341. The witness was asked to elaborate on how the office of the Commissioner for Public Appointments could be improved. She responded that she was not on top of the current detailed structure but that things do not seem to have changed much since she was Commissioner. She added that the Commissioner prior to the current Commissioner had, *"resigned in despair at what was going on."* Ms Huston confirmed that the Office was established through a prerogative order rather than legislation and continued,

"It just says that there should be a Commissioner and you can do these things. What it does not say is that the Commissioner must have control of his or her own budget; I was not a budget holder at all. The Commissioner could not appoint their own staff. It is that sort of thing; those basics. My staff were civil servants who were seconded to me not by my choosing. I would never criticise any of the staff that I had, but that is not the point. Previous to my taking the job, it had been done by the Commissioner for GB. She was also part-time Commissioner here, and she did not even have an office.

When I set up, my office was put in Castle Buildings, which people who wished to come and see me found very disconcerting and confusing. They saw this independent person, who was supposed to be a regulator, sitting right in the middle of the structures of government. When I raised this with civil servants, they could not understand it, because it was their workplace; "Why would you not be happy? You have a nice office. It should be all right". Again, they could not understand why I was not happy about not having my own staff.

One of the few roles that were clearly laid out for the Commissioner was to audit appointments. Due to circumstances that I will not bore the Committee with, we ended up without an auditor. We are not talking about a financial auditor; this was a process auditor. The Civil Service, which was OFMdFM, just refused to help me find a new one and wanted to impose somebody on me etc. Eventually, the Comptroller and Auditor General (C&AG) at the time lent me a member of his staff because I did not have an auditor. I was not allowed to have the person whom I wanted; I was prevented from doing that by the Civil Service. I got somebody from a department that everybody recognises is entirely independent etc. Thankfully, at the time, John Dowdall was the C&AG, and he recognised the difficulties that I was having. He had to lend me a member of staff. The Commissioner for Public Appointments should not have to borrow a member of staff from the C&AG to be able to fulfil one of her very few clearly laid out statutory duties, but lacking financial independence and lacking the ability to appoint staff caused tremendous difficulties. You will want the current Commissioner to tell you how things are these days, but you cannot have a regulator who cannot appoint her own staff."

342. Ms Huston confirmed that the people being appointed through the Commissioner were board members of multiple quangos (between 70 and 80). She compared the role with that of the Scottish Commissioner who wrote their own legislation to establish the Office; had authority to appoint their own staff; had a budget; and had the authority to halt a competition for a public appointment if she believed that things were not being done correctly in compliance with the Code. The Scottish Commissioner had a duty to present a report to the Scottish Parliament. The Commissioner also had a right to present a report to the Scottish Parliament if it was believed that a Minister had contravened the Code and that the issue had not been resolved.

343. The witness went on to reference the International Ombudsman Association which has a set of standards to recognise and measure the independence of an ombudsman, a regulator or somebody who deals

with complaints. She said that there is a series of tests, all of which her office failed when she was Commissioner for Public Appointments. She said that she was constantly told that things were outside her remit but that nobody could clarify what the remit was, and she was not allowed to take independent legal advice nor was she allowed to use the Government Legal Service to see what her position was on certain things. She agreed that, when someone can tighten the budget string on your office you have to question the level of independence.

344. Assembly Research and Information Services (RaISe) Research Paper on the Regulation of Appointments was considered by the Committee at its meeting on 2 July, the Committee along with an oral presentation from RaISe. RaISe officials attending informed the Committee,

"…what may be of interest to members is the nature of the Order. It is a prerogative Order, and it is subject to very little, if any, Assembly scrutiny. It can be changed by, at the moment, the First Minister and the deputy First Minister, using their powers under the Northern Ireland Act 1998. The changes that have been made to the Order were simply to address who would appoint the Commissioner, and that is now the First Minister and the deputy First Minister. Previously it would have been the Secretary of State.

The functions of the commissioner are set out in the 1995 Order, and they have not changed over time. You can see them on page 2. Broadly, the Commissioner is there to regulate, monitor and report on how ministers make appointments to public bodies, and they do that through issuing a code of practice, conducting audits, requiring summary information, and conducting inquiries into policies and practice. Essentially, the list of functions that is set out there is the Order; there is not much more to it. It is quite brief in its outline, and I think that that is the point that Ms Huston may have made: that there are certainly gaps there.

Complaints is one of the issues that is not specifically referenced in the functions, but it is addressed in the code of conduct. You will see that:

"The Commissioner may ... investigate a complaint".

That is presumably an interpretation of an inquiry into a specific appointment, but, again, that may be one of the grey areas that Ms Huston was pointing out. The Commissioner can investigate complaints that are made directly to her and then, as I said, the Commissioner may take action. It is not exactly clear what that action is, but it appears that the action that the Commissioner takes is to make recommendations to the Department. Beyond that, it is

difficult to see where the enforcement lies. Presumably, a decision by the Commissioner to make a recommendation, should an issue go to judicial review, would bear on one side of the argument, but, again, that is not dealt with in the functions or in the Code. The Code simply says that she can take action, and that is where it stops.

The real detail of the operation of the Commissioner is set out, in terms of the relationship with the Executive Office, in the memorandum of understanding and financial memorandum. That was drawn up in 2015 after consultation between the Commissioner and the Department. It is much more detailed than the Order. It runs to approximately 20 or 30 pages, and it sets out, in great detail, how the Department will manage the relationship in terms of finances. I will go on to that in a minute. The relationship between the Commissioner and the Department, as set out in the memorandum of understanding, is one of arm's length. I will get to the ombudsman standards later, but it is almost a subjective question of whether that is sufficient independence when measured against other bodies. However, that is the relationship between the Department and the Commissioner.

The memorandum of understanding then goes on to explain a bit more about the relationship, and particularly the responsibilities of the First Minister and the deputy First Minister. We can see that the First Minister and deputy First Minister approve the policy and remit within which the commissioner will operate; they keep the Assembly informed as to the Commissioner's performance; the Commissioner carries out her duties in line with the Order; the First Minister and deputy First Minister can, by prerogative Order, change that originating legislation; and the Department provides the resources to the Commissioner. So she sits within the departmental boundary. That is quite a close relationship in terms of financing. Again, that is dealt with in detail in the financial memorandum. I will not go through that, but I know that the Committee was interested in the Commissioner's scope for engaging external advice and expenditure, and the financial memorandum is quite tight, I think. For consultancy advice, there is a £5,000 limit within which the Commissioner can act, and, if it is a single tender exercise — I think that is the old terminology; the Committee is perhaps more familiar with the new terminology than I am — that has to be accompanied by a business case to the Department. Again, there is quite a tight control on the financing in the Commissioner's Office. The staff support to the Commissioner is civil servants from the Executive Office, and she has three staff at the moment."

345. The researcher went on to brief the Committee on the standards of the International Ombudsman Association.

"It is a membership organisation that exists to promote good practice among ombudspersons. I have set out its four ethical principles, but the one that will be of most interest to members is the independence of the Office. The standards of practice that flow from the ethical standards are set out at the bottom of page 9. The first two are probably the two that are most relevant:

> *"The Ombudsman Office and the Ombudsman are independent from other organizational entities."*

Again, as I mentioned before, that is a question of degree. An arm's-length body certainly is, to some degree, independent, but there are probably greater degrees of independence. How far that independence should extend is really a policy decision.

The other point is:

> *"The Ombudsman holds no other position within the organization".*

The Commissioner for Ethical Standards and Public Life in Scotland, for example, is prohibited from holding a range of posts, such as councillor or Member of the Scottish Parliament, so there are legislative provisions there. As I say, our Order is very brief, and those are the gaps that are not dealt with in the Order.

346. The Bill sponsor was asked to respond to the issues raised by Ms Huston. He stated in his written response to Committee questions,

> *"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.*

347. At its meeting on 8 July, the Committee for Finance agreed to recommend in this report that the First Minister and deputy First Minister make legislative provisions to bring the Office of the Commissioner for Public Appointments to international standards.

Recommendation

That the First Minister and deputy First Minister make legislative provisions to bring the Office of the Commissioner for Public Appointments to international standards.

Clause by Clause Scrutiny of the Bill

Clause 1 Amendment of the Civil Service (Special Advisers) Act (Northern Ireland) 2013

348. The Committee considered amendments to Clause 1 proposed by the Bill sponsor.

Clause 1, Page 1, Line 7

After '(2)' insert '(b)'

Clause 1, Page 1, Line 12

Leave out 'involvement or'

Clause 1, Page 1, Line 13

Before 'A minister' insert 'Subject to section 3A'

Clause 1, Page 1, Line 14

At end insert '(3A) In section 8 (Code for appointments), after subsection (1) insert the words:

"(2) Without prejudice to the generality of subsection (1), the code must provide that the appointing minister must –

(a) create a job description and person specification for the post,

(b) set out the requirements to be met by a successful applicant,

(c) achieve a candidate pool from which the minister shall select on sustainable and lawful grounds, and

(d) complete and the department retain documentation associated with the above processes, including recording the minister's reasons for the selection made.""

Clause 1, Page 2, Line 9

After 'adviser' insert 'by reason of the holding of that post'

Clause 1, Page 2, Line 12

Leave out 'him' and insert 'the special adviser'

349. The Committee agreed that it is content with the amendments to Clause 1 proposed by the Bill sponsor.

350. Question put: that the Committee is content with Clause 1, subject to the amendments proposed by the Bill sponsor.

The Committee divided Ayes 6; Noes 3; Abstentions 0

Ayes	Noes	Abstentions
Dr Steve Aiken	Jemma Dolan	
Paul Frew	Philip McGuigan	
Jim Allister	Maolíosa McHugh	
Pat Catney		
Matthew O'Toole		
Jim Wells		

351. Question put and agreed that the Committee is content with Clause 1, subject to the amendments proposed by the Bill Sponsor.

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

352. The Committee considered amendments to Clause 2 proposed by the Bill sponsor.

***Clause 2**, Page 2, Line 18*

Leave out subsection (2) and insert '(2) In Article 3 (Selection on merit), in paragraph (4) for the words "three persons" substitute "two persons".'

***Clause 2**, Page 2, Line 19*

At end insert '(3) The Civil Service Commissioners (Amendment) (Northern Ireland) Order in Council 2007 is repealed.'

353. The Committee agreed that it is content with the amendments to Clause 2 proposed by the Bill sponsor.

354. Question put: that the Committee is content with Clause 2, subject to the amendments proposed by the Bill sponsor.

The Committee divided Ayes 4; Noes 3; Abstentions 2

Ayes	Noes	Abstentions
Dr Steve Aiken	Jemma Dolan	Pat Catney
Paul Frew	Philip McGuigan	Matthew O'Toole
Jim Allister	Maolíosa McHugh	
Jim Wells		

355. Question put and agreed that the Committee is content with Clause 2, subject to the amendments proposed by the Bill Sponsor.

Clause 3 Repeal of the Civil Service Commissioners (Amendment) Order (Northern Ireland) 2016

356. Question put: that the Committee is content with Clause 3 as drafted.

The Committee divided Ayes 6; Noes 3; Abstentions 0

Ayes	Noes	Abstentions
Dr Steve Aiken	Jemma Dolan	
Paul Frew	Philip McGuigan	
Jim Allister	Maolíosa McHugh	
Pat Catney		
Matthew O'Toole		
Jim Wells		

357. Question put and agreed that the Committee is content with Clause 3 as drafted.

Clause 4 Special Advisers in The Executive Office

358. The Committee considered an amendment to Clause 4 proposed by the Bill sponsor.

***Clause 4**, Page 2, Line 33*

Leave out subsection (3)

359. The Committee agreed that it is content with the amendment to Clause 4 proposed by the Bill sponsor.

360. Question put: that the Committee is content with Clause 4, subject to the amendment proposed by the Bill sponsor.

The Committee divided Ayes 4; Noes 3; Abstentions 2

Ayes	Noes	Abstentions
Dr Steve Aiken	Jemma Dolan	Pat Catney
Paul Frew	Philip McGuigan	Matthew O'Toole
Jim Allister	Maolíosa McHugh	
Jim Wells		

361. Question put and agreed that the Committee is content with Clause 4, subject to the amendment proposed by the Bill Sponsor.

Clause 5 Amendment of the Assembly Members (Independent Financial Review and Standards) Act (Northern Ireland) 2011

362. The Committee considered amendments to Clause 5 proposed by the Bill sponsor.

***Clause 5**, Page 3, Line 4*

At end insert '(1A) In Section 17(1)(a) after "Part" insert- ", provided the Commissioner is satisfied the complaint is not frivolous or vexatious or otherwise an abuse of the complaints process.'"

***Clause 5**, Page 3, Line 11*

Leave out from 'means' to end of line 12 and insert 'means Section 1 of the Ministerial Code as provided for by Section 28A of the Northern Ireland Act 1998.'

***Clause 5**, Page 3, Line 14*

At end insert '(6A) In Section 27(1) after "Assembly" insert "or minister".'

363. The Committee agreed that it is content with the amendments to Clause 5 proposed by the Bill sponsor.

364. Question put: that the Committee is content with Clause 5, subject to the amendments proposed by the Bill sponsor.

The Committee divided Ayes 6; Noes 3; Abstentions 0

Ayes	Noes	Abstentions
Dr Steve Aiken	Jemma Dolan	
Paul Frew	Philip McGuigan	
Jim Allister	Maolíosa McHugh	
Pat Catney		
Matthew O'Toole		
Jim Wells		

365. Question put and agreed that the Committee is content with Clause 5, subject to the amendments proposed by the Bill Sponsor.

Clause 6 Records of Meetings

366. The Committee considered an amendment to Clause 6 proposed by the Bill sponsor.

*Leave out **clause 6** and insert*

'Record of meetings 6. A civil servant, other than a special adviser, must make and the department must retain an accurate written record of every internal departmental meeting attended by a minister recording, in particular, those present, date and time, topics discussed, and every decision and action point.'

367. The Committee agreed that it is content with the amendment to Clause 6 proposed by the Bill sponsor.

368. Question put: that the Committee is content with Clause 6, subject to the amendment proposed by the Bill sponsor.

The Committee divided Ayes 4; Noes 3; Abstentions 2

Ayes	Noes	Abstentions
Dr Steve Aiken	Jemma Dolan	Pat Catney
Paul Frew	Philip McGuigan	Matthew O'Toole
Jim Allister	Maolíosa McHugh	
Jim Wells		

369. Question put and agreed that the Committee is content with Clause 6, subject to the amendment proposed by the Bill Sponsor.

Clause 7 Records of Contacts

370. Question put: that the Committee is content with Clause 7 as drafted.

The Committee divided Ayes 6; Noes 3; Abstentions 0

Ayes	Noes	Abstentions
Dr Steve Aiken	Jemma Dolan	
Paul Frew	Philip McGuigan	
Jim Allister	Maolíosa McHugh	
Pat Catney		
Matthew O'Toole		
Jim Wells		

371. Question put and agreed that the Committee is content with Clause 7 as drafted.

Clause 8 Presence of Civil Servants

372. The Committee considered an amendment to Clause 8 proposed by the Bill sponsor.

Leave out ***clause 8*** *and insert*

'Presence of civil servants

8.–(1) A civil servant, other than a special adviser, must be present and take an accurate written record of every meeting held by a minister or special adviser with non-departmental personnel about official business; except for liaison with the minister's political party.

(2) The department must retain the record made pursuant to subsection (1).'

373. The Committee agreed that it is content with the amendment to Clause 1 proposed by the Bill sponsor.

374. Question put: that the Committee is content with Clause 8, subject to the amendment proposed by the Bill sponsor.

The Committee divided Ayes 6; Noes 3; Abstentions 0

Ayes	Noes	Abstentions
Dr Steve Aiken	Jemma Dolan	
Paul Frew	Philip McGuigan	
Jim Allister	Maolíosa McHugh	
Pat Catney		
Matthew O'Toole		
Jim Wells		

375. Question put and agreed that the Committee is content with Clause 8, subject to the amendments proposed by the Bill Sponsor.

Clause 8A Record of Being Lobbied

376. The Committee considered an amendment by the Bill sponsor to introduce a new clause 8A.

After clause 8 insert

'Record of being lobbied

***8A**.–(1) In the event of a minister or special adviser, other than as provided for in section 8, being lobbied, then, the minister or (as the case may be) special adviser must provide at the earliest opportunity a written*

record to their department of all such lobbying and the department must retain such records.

(2) In this section "being lobbied" means to receive personally a communication, either oral or written, on behalf of the person making the communication or another person or persons, relating to:

(a) the development, adoption or modification of any proposal of the department to make or amend primary or subordinate legislation;

(b) the development, adoption or modification of any other policy of the department;

(c) the making, giving or issuing by the department of, or the taking of any other steps by the department in relation to,—

(i) any contract or other agreement,

(ii) any grant or other financial assistance, or

(iii) any licence or other authorisation; or (d) the exercise of any other function of the department.

(3) For the purposes of subsection (2), it does not matter whether the communication occurs in or outwith the United Kingdom.

(4) Nothing in this section shall apply to a communication— (a) made in proceedings of the Northern Ireland Assembly or the Executive Committee, or (b) arising in the course of liaison with the minister's political party.'

377. Question put: that the Committee is content to note Clause 8A.

The Committee divided Ayes 6; Noes 3; Abstentions 0

Ayes	Noes	Abstentions
Dr Steve Aiken	Jemma Dolan	
Paul Frew	Philip McGuigan	
Jim Allister	Maolíosa McHugh	
Pat Catney		

Matthew O'Toole

Jim Wells

378. Question put and agreed that the Committee is content to note Clause 8A.

Clause 9 Use of Official Systems

379. The Committee considered an amendment to Clause 9 proposed by the Bill sponsor.

Leave out clause 9 and insert

'Use of official systems

9.– (1) A minister, special adviser or civil servant when communicating on official business by electronic means must not use personal accounts or anything other than devices issued by the department, systems used by the department and departmental email addresses.

(2) If out of necessity it is not possible to comply with the requirements of subsection (1) the minister or (as the case may be) special adviser or civil servant must within 48 hours, or as soon thereafter as reasonably practicable,

(a) copy to the departmental system any written material generated during the use of non-departmental devices or systems; and

(b) make an accurate record on the departmental system of any verbal communications relating to departmental matters.

(3) It shall be an offence for any minister, special adviser or civil servant to fail to comply with the requirements of subsection (2).

(4) In proceedings in respect of a charge against a person ("A") of the offence under subsection (3), it is a defence for A to show that the course of behaviour was reasonable in the particular circumstances or was in the public interest.

(5) A person is taken to have shown the fact mentioned in subsection (4) if–

(a) evidence adduced is enough to raise an issue as to whether the course of behaviour is as described in subsection (4), and

(b) the prosecution does not prove beyond reasonable doubt that the course of behaviour is not as described in subsection (4).

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

(a) on indictment, to imprisonment for a term not exceeding 2 years;

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

380. The Committee agreed that it is content with the amendment to Clause 9 proposed by the Bill sponsor.

381. Question put: that the Committee is content with Clause 9, subject to the amendment proposed by the Bill sponsor.

The Committee divided Ayes 4; Noes 5; Abstentions 0

Ayes	Noes	Abstentions
Dr Steve Aiken	Pat Catney	
Paul Frew	Jemma Dolan	
Jim Allister	Philip McGuigan	
Jim Wells	Maolíosa McHugh	
	Matthew O'Toole	

382. Question put and agreed that the Committee is not content with Clause 9 subject to the amendment proposed by the Bill sponsor.

383. Question put: that the Committee is content with Clause 9 as drafted.

The Committee divided Ayes 3; Noes 5; Abstentions 1

Ayes	Noes	Abstentions
Dr Steve Aiken	Pat Catney	Paul Frew
Jim Allister	Jemma Dolan	
Jim Wells	Philip McGuigan	
	Maolíosa McHugh	
	Matthew O'Toole	

384. Question put and agreed that the Committee is not content with Clause 9 as drafted.

Clause 10 Register of Interests

385. The Committee considered amendments to Clause 10 proposed by the Bill sponsor.

Clause 10, Page 4, Line 10

Leave out '21' and insert '28'

Clause 10, Page 4, Line 12

Leave out 'close'

Clause 10, Page 4, Line 13

Leave out '21' and insert '28'

386. The Committee agreed that it is content with the amendments to Clause 10 proposed by the Bill sponsor.

387. Question put: that the Committee is content with Clause 10, subject to the amendments proposed by the Bill sponsor.

The Committee divided Ayes 6; Noes 3; Abstentions 0

Ayes	Noes	Abstentions
Dr Steve Aiken	Jemma Dolan	
Paul Frew	Philip McGuigan	
Jim Allister	Maolíosa McHugh	
Pat Catney		

Matthew O'Toole

Jim Wells

388. Question put and agreed that the Committee is content with Clause 10, subject to the amendments proposed by the Bill Sponsor.

Clause 11 Offence of Unauthorised Disclosure

389. The Committee considered an amendment to Clause 11 proposed by the Bill sponsor.

Leave out clause 11 and insert

'Offence of unauthorised disclosure

11.– (1) Without prejudice to the operation of the Official Secrets Acts 1911-1989 and save in the discharge of a statutory obligation or in the lawful pursuit of official duties, it shall be an offence for any minister, civil servant or special adviser to communicate, directly or indirectly, official information to another for the financial or other improper benefit of any person or third party.

(2) In proceedings in respect of a charge against a person ("A") of the offence under subsection (1), it is a defence for A to show that the course of behaviour was reasonable in the particular circumstances or was in the public interest.

(3) A person is taken to have shown the fact mentioned in subsection (2) if–

(a) evidence adduced is enough to raise an issue as to whether the course of behaviour is as described in subsection (2), and

(b) the prosecution does not prove beyond reasonable doubt that the course of behaviour is not as described in subsection (2).

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

(a) on indictment, to imprisonment for a term not exceeding 2 years;

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

390. Question put: that the Committee is content with the amendment to Clause 11 proposed by the Bill sponsor.

The Committee divided Ayes 4; Noes 5; Abstentions 0

Ayes	Noes	Abstentions
Dr Steve Aiken	Pat Catney	
Paul Frew	Jemma Dolan	
Jim Allister	Philip McGuigan	
Jim Wells	Maolíosa McHugh	
	Matthew O'Toole	

391. Question put and agreed that the Committee is not content with the amendment to Clause 11 proposed by the Bill sponsor.

392. Question put: that the Committee is content with Clause 11 as drafted.

The Committee divided Ayes 2; Noes 5; Abstentions 2

Ayes	Noes	Abstentions
Jim Allister	Pat Catney	Dr Steve Aiken
Jim Wells	Jemma Dolan	Paul Frew
	Philip McGuigan	
	Maolíosa McHugh	
	Matthew O'Toole	

393. Question put and agreed that the Committee is not content with Clause 11 as drafted.

Clause 12 Biennial Report

394. The Committee considered an amendment to Clause 12 proposed by the Bill sponsor.

Clause 12, Page 4, Line 30

Leave out from 'relevant' to 'actions' on line 31 and insert 'judgements of the courts relevant to the functioning of government,'

395. The Committee agreed that it is content with the amendment to Clause 10 proposed by the Bill sponsor.

396. Question put: that the Committee is content with Clause 12, subject to the amendment proposed by the Bill sponsor.

The Committee divided Ayes 6; Noes 3; Abstentions 0

Ayes	Noes	Abstentions
Dr Steve Aiken	Jemma Dolan	
Paul Frew	Philip McGuigan	
Jim Allister	Maolíosa McHugh	
Pat Catney		
Matthew O'Toole		
Jim Wells		

397. Question put and agreed that the Committee is content with Clause 12 as drafted.

Clause 13 Commencement

398. Question put: that the Committee is content with Clause 13 as drafted.

The Committee divided Ayes 6; Noes 3; Abstentions 0

Ayes	Noes	Abstentions
Dr Steve Aiken	Jemma Dolan	
Paul Frew	Philip McGuigan	
Jim Allister	Maolíosa McHugh	
Pat Catney		
Matthew O'Toole		
Jim Wells		

399. Question put and agreed that the Committee is content with Clause 13 as drafted.

Clause 14 Interpretation

400. The Committee considered amendments to Clause 14 proposed by the Bill sponsor.

Clause 14, Page 5, Line 10

At end insert

'"family member" has the same meaning as set out in Schedule 1(3) to the Assembly Members (Independent Financial Review and Standards) Act (Northern Ireland) 2011.'

Clause 14, Page 5, Line 10

At end insert

'"department" means a Northern Ireland department as set out in Schedule 1, Departments Act (Northern Ireland) 2016.'

Clause 14, Page 5, Line 10

At end insert

'"The Executive Committee" means the Executive Committee as established by section 20 of the Northern Ireland Act 1998.'

401. The Committee agreed that it is content with the amendments to Clause 14 proposed by the Bill sponsor.

402. Question put: that the Committee is content with Clause 14, subject to the amendments proposed by the Bill sponsor.

The Committee divided Ayes 6; Noes 3; Abstentions 0

Ayes	Noes	Abstentions
Dr Steve Aiken	Jemma Dolan	
Paul Frew	Philip McGuigan	
Jim Allister	Maolíosa McHugh	

Pat Catney

Matthew O'Toole

Jim Wells

403. Question put and agreed that the Committee is content with Clause 14, subject to the amendments proposed by the Bill Sponsor.

Clause 15 Short Title

404. Question put: that the Committee is content with Clause 15 as drafted.

The Committee divided Ayes 6; Noes 3; Abstentions 0

Ayes	Noes	Abstentions
Dr Steve Aiken	Jemma Dolan	
Paul Frew	Philip McGuigan	
Jim Allister	Maolíosa McHugh	
Pat Catney		
Matthew O'Toole		
Jim Wells		

405. Question put and agreed that the Committee is content with Clause 15 as drafted.

Schedule: Transitional Provisions: Termination Payments

Question put: that the Committee is content with Clause 3 as drafted.

The Committee divided Ayes 6; Noes 3; Abstentions 0

Ayes	Noes	Abstentions
Dr Steve Aiken	Jemma Dolan	
Paul Frew	Philip McGuigan	
Jim Allister	Maolíosa McHugh	
Pat Catney		
Matthew O'Toole		

Jim Wells

406. Question put and agreed that the Committee is content with Clause 3 as drafted.

Long Title

407. Question put: that the Committee is content with the Long Title as drafted.

The Committee divided Ayes 6; Noes 3; Abstentions 0

Ayes	Noes	Abstentions
Dr Steve Aiken	Jemma Dolan	
Paul Frew	Philip McGuigan	
Jim Allister	Maolíosa McHugh	
Pat Catney		
Matthew O'Toole		
Jim Wells		

408. Question put and agreed that the Committee is content with Clause 15 as drafted.

Clause 11A Accountability to the Assembly: Provision of Information

409. The Committee considered an amendment by the Bill sponsor to introduce a new clause 11A.

After clause 11 insert

'Accountability to the Assembly: provision of information

***11A**.—(1) Ministers and their departments must provide to an Assembly committee such information as that committee may reasonably require in order to discharge its functions, being information which—*

(a) has been requested in writing; and

(b) relates to the statutory functions exercisable by the minister or their department.'

410. Question put: that the Committee is content to note Clause 11A.

The Committee divided Ayes 6; Noes 3; Abstentions 0

Ayes	Noes	Abstentions
Dr Steve Aiken	Jemma Dolan	
Paul Frew	Philip McGuigan	
Jim Allister	Maolíosa McHugh	
Pat Catney		
Matthew O'Toole		
Jim Wells		

411. Question put and agreed that the Committee is content to note Clause 11A.

Links to Appendices

Printable version of Report

Memoranda and Papers from the Department for Finance

Memoranda and Papers from Others

Minutes of Proceedings

Minutes of Evidence

Written submissions

Research Papers

Other Documents relating to the report

This Report can be made available in a range of formats including large print, Braille etc. For more information, please contact:

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