Written submission from Barnwell Farms directors to the Committee on their independent stage 2 panel mini enquiry.

We have no objection to our response being put on the public record but can you please redact our email addresses.

OPEN CORRESPONDENCE

Dear Members of the DAERA Assembly Committee ,

As the Agriland website reported last Thursday, on the DAERA press release "**Minister to be final decision-maker for NI area-based scheme reviews"** ….. "Currently, the Independent Panel hears the case and makes a recommendation to the department, which makes the final decision without the minister's input. However, the process has come under scrutiny following the Barnwell Farms judicial review – a case in which a favourable decision towards the applicant made by the independent panel was overturned by the department.".

We learnt last week, from Jim Shannon MP, in reading the Supplementary submission from James O'Brien BL and Brian Little to the Committee, and last week's IFJ that "the committee is currently finalising a mini inquiry on the issue." As the Directors of Barnwell Farms we wish to be on the public record now that we deeply appreciate the fact that the Committee has taken the time to undertake your mini inquiry.

We believe now is the right time for us to make a few observations / inputs, as the Chair appropriately recognised that on 11 March 2021 in concluding "*Thanks very much for that, Jim and David. It is always great to hear from the front line . We found it really helpful. Thanks very much for that"*

Hence Robert and I discussed yesterday that we would provide our thoughts (and we believe that for Mr Ian Marshall / JR1:JR2, with whom we have been in correspondence with since last October and blind copying here so he may choose to endorse or write to you separately if he wishes) from the front line of those two farmers effectively forced in to a HIGH COURT Judicial Review process as the only viable appeal route then available to us. Having read and listened to all the evidence and questioning on 28 January , 11 February and 11 March we wish to make three specific points for your Committee consideration as you move towards finalising your report ……..

1. There is no doubt that the mental stress and anxiety associated with the NI area based schemes review process and a Judicial Review is immense. We do however believe that the comments made by Jim Carmichael of NIAPA on 11 March are very relevant. He told the

Committee that "*To have somebody sitting on the panel is all well and good, but it is something that a lot of people take very personally. Having discussed this with professionals that I know , I can say that it is not something that people want to discuss with a panel. It should be viewed by somebody with proper experience or qualifications*" and later concludes "*On the mental health, yes, but I am not sure how you would approach appointing the mental health person because , obviously , if this is the case, then you are going to bring up and select people because they have put in something to do with that. I would perhaps prefer to have somebody look at that and make a recommendation.*"

It seems to us that the mental health issues are as **a consequence of the handling of the case as these processes currently stand.** A final decision will always revolve around the actual evidence but that it would be appropriate, if the Panel or a SAAP decide, that supplementary advice be sought from a mental health professional if deemed necessary as part of any mitigation. In that regard we believe Mr Carmichael's comments above are the correct way forward.

We do, however, wholly accept that DAERA do have some responsibility for mental health issues where the independent panel overturn a Stage 1 Decision and recommend acceptance at Stage 2 of the Farmer Application, only to find DAERA don't accept that recommendation. As you know Mr Shannon MP and the IFJ established there were 50 + such cases since 2015. IFJ – 9 December. We deal with that mental health aspect in a practical suggestion that the Committee should consider and we hope could recommend in its Final report to Minister Poots and the Permanent Secretary.

In the two Judicial Reviews both Mr Marshall and us faced enormous delays, in excess of five years, to obtain justice. There was a lack of interim update and correspondence throughout with a final very blunt letter of rejection at the end of a most exhausting and anxious process. As the IFJ reported in one of their initial articles, on 21 November, alongside Mr Poots answer to Mr William Irwin MLA question in the Assembly , Mr Shannon MP commented on the consequential losses paid to us under the IFJ heading **below inflation ……..**

The family has been supported throughout by Strangford MP Jim Shannon who argues that the ex gratia payment made by DAERA is unacceptable. "*It seems quite wrong that DAERA Permanent Secretary Dr Denis McMahon believes that a below inflation payment of £4077 is an appropriate interest rate. This is equivalent to a £2 single cup of tea per day since May 2015*" he told the Irish Farmers Journal.

Appropriately our Strangford MLA Mr Harry Harvey in his questioning of Dr Foye on 28 January 2021 asked

Mr Harvey: OK. Thank you very much, Chair. This question touches on some case-specific issues, and I appreciate if you are unable to fully answer it. However, in terms of the interest payment to those cases that have previously been the subject of a JR, I am aware that there is no legal requirement for

such a payment and that any award in the past has been ex gratia. There appear to differences in the amount awarded previously. How are such figures arrived at and who makes such a decision?

Mr Foy: Ultimately, the decision on an ex gratia payment is for the departmental accounting officer, the permanent secretary. As you noted, there is no legal requirement for the Department to pay interest on payments that are refunded. In cases where there is some justification for it — I must stress that each case is treated on its own merits — the standard that we have used is the same standard that we apply to any debts that are recoverable from farm businesses to the Department, which is the Bank of England base rate plus 1%. We believe that that is a fair standard. It is a set and transparent standard and one that takes account of prevailing economic circumstances. It is not a fixed rate in a sense; it is the Bank of England base rate plus 1%. That is what we apply in cases where we consider that interest is payable. In our consideration of any ex gratia payment, both its amount and whether it is payable or not, we are guided very much by 'Managing Public Money Northern Ireland', and the Department and the accounting officer are bound by that.

So in effect DAERA use an approximation to the entire HMG borrowing rate. While they can fund delays in farmer payments to them at that or below interest rate , I don't know any banks or courts which use that approach. Once again this is the minimum legally Dr McMahon could do and is wrong Yet as James O'Brien BL and Brian Little pointed out in their five Judicial Reviews where DAERA claim to interpret the law correctly they have lost two in Judgments (Ian Marshall and us) and settled three. The IFJ correctly reported the overall costs too when they wrote that these five JR cases have cost the Taxpayer in excess of £300K in total legal costs, the UFU circa £230K in unrecovered legal costs while we still have some £22K in a legal costs deficit.

What we now suggest the Committee consider recommending that in light of these facts the Permanent Secretary Dr Denis McMahon makes an ex gratia payment equivalent to the usual court 8% interest rate on the value of those JR consequential losses for both Ian Marshall (circa £12K on approx. £40K) and us (circa £16K on £85K). We would ask that, if Mr Marshall supports, 15% / say £4000 of that be paid to the UFU and the remaining 85% / say £25K be provided to the Rural Support charity (NI 105191) and specifically directed to be used by them in support of those farmers involved in mental health issues around direct farmer payments including compliance penalties. We recognise that DAERA already provide support to the Rural Support charity and ask that this sum be transparently additive to their current funding. That, we believe would be a practical and effective way to assist those farmers.

Both Permanent Secretaries Mr Lavery and Dr McMahon received Pre Action Protocol letters in the JR1 and JR2/JR 5 cases and could have stopped the Judicial Reviews , in Ian Marshalls case funded by the UFU at £263K and in our case privately funded by Barnwell Farms or director loans at £85K, so that is an ex gratia payment Dr McMahon could now make recognising the impact on us and our willingness to have other farmers supported.

2. We recognise that we have the best DARD / DAERA Minister in Mr Poots, with real life farming experience and knowledge, since 1998 and we fully endorse the need to change the legislation in 2021 recognised by both Minister Poots and Mr Shannon MP. It is important though that the precise legislation text actually achieves what is required. We thought that this was captured well in last weeks IFJ when it recorded Jim Carmichael's response to Mr Patsy McGlone MLA when he said ""There is a lesser need for a SAAP if we could get the proper grounding for an independent panel at stage 2" responded Carmichael , although both he and Rankin pointed out that it up to the lawmakers (such as MLAs) to come up with appropriate text in legislation."

We expect that you will all, as a committee, consider carefully the proposition / reasoning put forward for the creation of a Supreme Agricultural Appeal Panel (SAAP), in their written and oral evidence given by barrister at law James O'Brien BL and Brian Little as to why, in making the independent panel decision binding, there are additional statutory responsibilities in relation to DAERA officials charged with meeting the law and the use of taxpayer funds to be considered and applied within the legislative changes in 2021.

We understand why Minister Poots in taking the final decision making responsibility for current cases and the immediate future enables both those responsibilities above to be achieved. However we will not always have someone of his capability and farming experience in this Ministerial role. The reinstatement of the ministerial role in the decision making process in meeting those two accountabilities will, in our view and in agreement with O'Brien and Little, necessitate that any future Minister will have an arbitral mechanism should there be a farmer or DAERA challenge to a "binding" Stage 2 independent panel decision. This should be fulfilled by their proposed 5 person £5000 SAAP , chaired by a capable QC. Should the decision of the SAAP be challenged by anyone then that SAAP Chair / QC can be deployed by the incumbent Minister to provide the affidavits and arguments to any High Court Judicial Review.

Of course this SAAP will not only substantially reduce the likelihood of any such legal challenge but the SAAP in the five cases would have cost £25K not in excess of £500k at considerable expense to the Taxpayer, the UFU and relatively speaking us. Given its intellectual composition it can also make the whole decision on the law and agriculture evidence without a JR Judge referring it back to DAERA to make another decision if the Department lose.

3. Finally while we think with the changing processes for Farmer Support funding, probable in the next Assembly mandate, we believe that getting this legislation and dispute resolution processes right for the future is essential in 2021. This is why we have not only appreciated the impact on our individual case from Mr Shannon MP / Minister Poots but appreciated the wider value of it's Judgment to all farmers in future….. back to the Agriland comment above. We hope you will also recommend that the DAERA Consultation will consider collecting the information on historic cases, as proposed by James O.Brien BL and Brian Little supplementary submission to you, as we know all too well the challenges farmers faced in deciding whether to proceed to a Judicial Review or not. We found Brian Little's response

on historical cases experience to Mr Shannon MP and he compelling but not unsurprising in his oral evidence to the committee.

Mr Irwin: On the matter of historical cases, the Assembly was not in operation from 2017 for almost three years. A number of decisions were made during that time, one of which I have sitting on my desk. It is a similar situation, whereby the independent panel ruled in favour of a young farmer but the Department subsequently overruled. Can you see a way forward with that situation?

Mr Little: I will deal with that as a historical case. Some of you may have heard me on the 'Farm Gate' radio programme sandwiched between Jason Foy's evidence to yourselves and the Chair's comment about the mini-inquiry, where I referred to the number of people calling into Mr Shannon's office or into me or wherever. I will summarise that for you, and then deal with the point that Rosemary quite rightly raised the last time. So far, 37 cases have come to Jim or me. There are cases from between 2001 and 2012, cases from 2012 up until 2017, and cases after 2017. I have heard of only six people so far who are prepared to go forward to a panel to have the decision challenged. In my view, we have sufficient evidence to justify that position. The vast majority of people are too scared of the Department or too scared of their wife to raise the issue again and have instead moved on with their life. I can relate to that.

I referred earlier to the business banking scheme back to 2001. Although there is potentially a reservoir of 12 60,000 people involved, there are probably only 300 to 400 people affected. It will therefore not surprise you, I hope, that my provisional view is that, even if you were to let all those people go forward to the supreme panel with a historical case, I doubt whether there would be more than 10 or 12 cases taken. A lot of you may decide, "Well, we don't legally need to do this, and it doesn't really matter".

I can tell you that, for those 10 individuals, which probably includes the young farmer whom you just mentioned, this is something that they get up most days and think about. From a mental health point of view and whatever else, we should try to find a way of allowing those historical cases to be assessed. I have also had a whole lot of people tell me that £1,500 is really too much in order to do it, yet, in the same breath, they tell me that they are owed £70,000 or £80,000. If they know how to make more money out of farming with that return and are confident of their position, that is up to them, but it is insane.

If they are confident in their case and in what they are doing, they should have the confidence to go forward and spend £1,500 to do that. It is not a large amount of money to spend if the claim is greater than £5,000. I will finish by saying that my current assessment is that I very much doubt whether the total value of all that will come forward — we will find out in the next month — will be more than the amount of money that has been wasted on judicial reviews by the Department or by the trade union on trying to support this. It will be less than half a million quid, but it is important to those individuals.

If there are indeed a small number of cases and Minister Poots and yourselves do proceed with an historical scheme then he would be very well placed to authorise their consideration at a SAAP. While the SAAP outcomes may not be complete by the end of the current political mandate and Assembly elections in May 2022 at least Minister Poots and your committee will have achieved this important change for the past, present and future.

We hope these three inputs are useful to you and will merit serious consideration given that frontline experience of a Judicial Review and this DAERA process.

Many thanks and kind regards

Viola and Robert Calvert

Directors of Barnwell Farms