Northern Ireland Assembly

Committee for Finance

OFFICIAL REPORT (Hansard)

Functioning of Government (Miscellaneous Provisions) Bill: Mr Jim Allister MLA

26 February 2020

NORTHERN IRELAND ASSEMBLY

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Members present for all or part of the proceedings:
Dr Steve Aiken (Chairperson)
Mr Paul Frew (Deputy Chairperson)
Mr Pat Catney
Ms Jemma Dolan
Mr Seán Lynch
Mr Maolíosa McHugh
Mr Matthew O'Toole
Mr Jim Wells

Witnesses:
Mr Jim Allister Member of the Legislative Assembly

The Chairperson (Dr Aiken): Jim, would you care to make an opening statement?

Mr Jim Allister (Member of the Legislative Assembly): Thank you, Mr Chairman. Today, I either enjoy or endure — I am not sure which it will be — a different perspective from this seat at the Committee. I am grateful for the opportunity. I propose, if you think that it would be helpful, to give a brief overview of the Functioning of Government (Miscellaneous Provisions) Bill and then take whatever questions you may have.

The first thing that I want to say is that the catalyst for the Bill was the renewable heat incentive (RHI) inquiry. As I listened and watched, I was, like us all, I am sure, appalled by some of the evidence tumbling forth and struck by a number of the gaps and deficiencies in our governmental process that were exposed. That gave rise to the thought that, if and when the Assembly came back, I would seek to bring forward legislation to address some of those issues, although I am sure that the Bill does not address them all.

One thing that I will say at the outset is that I deliberately drafted the long title of the Bill with a wide perspective so that it lends itself to a wide range of amendment, in anticipation that there may be other things that look different or more significant after Lord Justice Coghlin reports. If there is a Bill already in process in the House — one that lends itself readily to amendment — it becomes a possible vehicle for advancing more expeditiously than otherwise would be the case changes to the law that need to be made.

I view the Bill as having three different areas. Clauses 6 to 11 address specific issues that have tumbled out of RHI: the recording of meetings; the recording of contacts; the presence of civil servants at meetings; the use only of official systems; a register of interests; and the problem of the

unauthorised disclosure of confidential material. Those are all within the ambit of clauses 6 to 11, and I can expand on all or any of those.

The second area of the Bill is what comes before those clauses: various changes to the law as it stands. That relates to clauses 1 to 5. I will take a quick moment to run through them. Clause 1 does a number of things, the first of which is at clause 1(2). You will recall the evidence that, in one party, at least, there was a hierarchy of spads and one particular individual directing spads across different Departments, which seemed not to sit at ease with the idea of a special adviser to a particular Minister et cetera. At clause 1(2), I seek to restrict that facility only to the Executive Office, where there is a multiplicity of spads.

The Chairperson (Dr Aiken): The most recent spads' code has just come out. Do any changes in the spads' code specifically address concerns that you had?

Mr Allister: Yes. Let me take you back. There are things —.

The Chairperson (Dr Aiken): Sorry, I am talking specifically about clause 1, if we are working our way through the Bill.

Mr Allister: Can I answer that in two parts?

The Chairperson (Dr Aiken): Yes.

Mr Allister: Codes of conduct are exactly that: codes of conduct. They are nothing more than that. They are guidance and can be unmade as easily as they were made. They do not, therefore, compare to legislation. That point was rather crisply made in a case in the House of Lords in 2006, when a code of practice brought in by the Health Secretary under the Mental Health Act 1983 was up for discussion and actions taken under it. In that case, Lord Bingham said:

> *"It is in my view plain that the Code does not have the binding effect which a statutory provision or a statutory instrument would have."*

That is a truism, but it needs to be stated: obviously, a code is useful, but it is not as good as a statute.

In respect of clauses 6 to 11 generally, I have been making the point that, whereas a number of those issues have been addressed in whole or in part in the code, the manner of addressing them in a code rather than in statute does not have the same binding authority.

The Chairperson (Dr Aiken): The binding authority is the key.

Mr Allister: Binding authority is what I am after.

I do not think that what is in the code changes what is in clause 1(2). The code says that special advisers owe a duty not just to their Minister but to the whole Executive. That is a different concept from one special adviser being able to dictate and form a hierarchy of special advisers across all or some of the Departments, so I do not think that it conflicts with clause 1(2).

Clause 1(3) introduces a disciplinary process for special advisers. The premise for that is that they are temporary civil servants and are subject to all the benefits and privileges of the Civil Service, but the one thing on which they stand apart is that they are not subject at all to the discipline. The discipline that the code provides for them is in the Minister's bailiwick, which means that the Minister may or may not decide. There is no process outside that.

We had an example of that, you may recall, in the Red Sky controversy, where Mr Brimstone was a special adviser and there was unease about his conduct. Officials in the Department of Finance and Personnel were asked to conduct an investigation, which they did, and they recommended that he should be subject to a disciplinary procedure. The Minister of the day simply quashed that, so Mr Brimstone escaped scot-free, so to speak. If he is a civil servant, that is not right, so I would put spads, as civil servants, subject to the disciplinary process of the Civil Service.

The Chairperson (Dr Aiken): Could I digress slightly? Matthew, in your experience working as a special adviser —.

Mr O'Toole: I was a civil servant, not a special adviser.

The Chairperson (Dr Aiken): Correct.

Mr O'Toole: I am very keen to —.

Mr Allister: He was subject to disciplinary procedures.

Mr O'Toole: I was certainly subject to disciplinary procedures. I was also never a Tory; I am always keen to add that. That is not a dig at Tories. I am sometimes called a "Tory adviser": I was not.

Mr Allister: We have noticed *[Laughter.]*

The Chairperson (Dr Aiken): For the general elucidation of the Committee, were special advisers in Whitehall subject to disciplinary procedures? Can the head of the Civil Service institute disciplinary procedures against special advisers?

Mr O'Toole: I am not and do not claim to be a complete authority on this, Chair. As I understand it, yes, there are disciplinary routes for special advisers, but I do not know the level of codification. I think that there is a grey area as well. It is arguable that someone who might be quite good at giving evidence on that is the current permanent secretary of the Department of Finance. I do not know exactly the level of codification.

The Chairperson (Dr Aiken): I declare an interest because I was involved in an incident when a special adviser to a Minister was hauled in front of the head of the Civil Service to be dealt with in a disciplinary procedure.

Mr O'Toole: There definitely are procedures, but I do not know what statutory basis they have. I am not sure whether they have any statutory basis.

Mr Allister: I was just going through some of the clause 1 provisions.

Clause 1(6) deals with an RHI issue. Members will recall that, after the passing of my first spad Bill, which became the Civil Service (Special Advisers) Act (Northern Ireland) 2013, which removed people with criminal convictions from the role of spad, there was evidence before the RHI inquiry that that had been circumvented to some extent by parties or a party appointing a person who was not a spad — he could not be a spad because of that Act — but, nonetheless, had full access in Stormont Castle to all the materials and facilities that a spad had. The only difference was that he was not paid from the public purse. Therefore I seek, at clause 1(6), to make sure that only spads can perform spad roles and that,

> *"a permanent secretary must ensure that no person other than a duly appointed special adviser is afforded by the department the cooperation, recognition and facilitation due to a special adviser."*

If the public purse is paying for people to perform such a role — I am not against spads at all; they have a role to play — there have to be parameters. It is a privileged position where you get access to the very top papers in the Civil Service. That is what clause 1(6) is about.

Clause 2 is about the number of spads. It is my view that the legal provision for eight spads in the Executive Office is excessive. I observe that, for now, only six have been appointed, but the legal facility exists for eight. I have suggested that that should be reduced to four, and there are two ways of doing that. The eight is made up of three for the First Minister, three for the deputy First Minister and one for each of the junior Ministers. There are two ways of reducing the number. The first is to take away the junior Ministers' appointments altogether and reduce the First Minister and the deputy First Minister to two each or something else. I have chosen the second way, as, drafting-wise, it was the easiest way to do it: reduce the First Minister and the deputy First Minister from three to one, and the junior Ministers' two makes four. There are various mechanisms, and, of course, it is a matter that might be open to debate and amendment as to whether four is the right number. That is the gist of clause 2.

Clause 3 is caused by a specific situation that arose. Those who were Members at the time will recall the consternation when it was discovered that, for the appointment of David Gordon, there had been

an unpublicised amendment to the law on the use of Executive powers. The Civil Service Commissioners (Northern Ireland) Order 1999 was amended overnight — in secret, as it were — by a prerogative order of the First Minister and the deputy First Minister. That is not a healthy situation, so I want to make any such amendment subject to affirmative resolution in the Assembly so that it cannot be done behind closed doors. It has to be open. The public are entitled to know if the law has been changed. That is the simple premise. Therefore, I would repeal the provision that allowed that appointment. I do not think that that appointment has been re-established, but I would repeal it and make sure that any future amendment of that order could not be done by prerogative powers but only by affirmative resolution.

If there is to be a reduction in the number of spads, their various rights dictate that those who are not kept on are entitled to some compensation. Therefore, if you reduce from eight to four or remove the office that David Gordon held, there would have to be a compensation provision. That is in clause 4 and is reflected in more detail in the schedule. I have said that it should not happen until 31 March next year to give ample time and notice to those who are involved. After 31 March, people could be reappointed to whatever post then existed, but it is to compensate those who are removed.

Clause 5 is to bring Ministers under the same roof for complaints procedure as MLAs. MLAs are subject to the Commissioner for Standards, and we have a code of conduct et cetera, but, at this moment, the Commissioner for Standards cannot take a complaint in respect of a Minister; indeed, there is no real satisfactory route for making a complaint against a Minister. The last action of the Assembly, before it collapsed in January 2017, was to pass unopposed a motion calling for the powers of the Commissioner for Standards to extend to Ministers and to bring the ministerial code under his wing so that he could examine whether or not it had been breached. As I say, that was in January 2017. Clause 5 is to give effect to that.

In 'New Decade, New Approach' there is an elaborate process to appoint three extra commissioners to do all sorts of things, but, in my view, that is reinventing the wheel. Why not simply put it in the ambit of the Commissioner for Standards and save the £120,000 set aside for the extra commissioners and put everyone in the same level-playing field?

The other difficulty that I have with the 'New Decade, New Approach' document on that score is that, at the end of the disciplinary process, if there were one in respect of a Minister, whether anything is actually done about it, it is gifted to the First Minister or the deputy First Minister or to the leader of the Minister's party, whoever that may be. That does not seem appropriate, because it says in paragraph 1.9:

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

It is a bit of a mirage, quite honestly. Those are the changes to the law. There are changes to the law that I can talk about in the creation of fresh criminal offences also in clauses 9 and 11.

The third aspect of the Bill, which is, I think, an important aspect, is that I do not want the Bill to be just something that is done in a moment of time. Therefore, 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. I do not think that we should ever be satisfied with the status quo: if things can be improved, improve them. Clause 12 provides a mechanism to create a framework for doing that. That, of itself, is a useful provision.

In the past, I have probably commented adversely on the length of the opening statements of other witnesses. I have probably said more than enough.

Mr Wells: You propose a change in the pay structure.

Mr Allister: I am proposing a cap. The code that has been brought in has changed the pay structure and put it into three bands, and there is an upper cap of £85,000. I did not know that that was coming in the code. I am saying that there should be a relationship, because they are civil servants, between the salary of a spad and a senior grade in the Civil Service. Therefore, I have suggested that it should

be capped at grade 5; indeed, I looked at the issue, and, in 70% of countries, according to a publication in the Library, advisers' salaries are linked to Civil Service salaries. That seems to me to take things into the Civil Service ambit. The new code proposal is an improvement, but I remind the Committee that, when spads first came in, there were two bands. There was an upper band somewhere in the £70,000s, but, overnight, it went to £90,000.

Mr Wells: Ninety-two.

Mr Allister: Yes, £92,000. That was done by the First Minister and the Finance Minister apparently agreeing to do it, and, suddenly, it jumped. That is not a good thing to have in the political arena, so I said, "Link them to the Civil Service grade 5", which is a very senior grade and seemed to me to be appropriate. However, it is like much in the Bill: if the House as a whole thinks that it is the wrong standard, there is a facility to change it. It seems to me to be appropriate.

Mr Wells: Yes. It may be that the Executive or the Department of Finance, to some extent, has pre-empted what you have said, as the new appointees have been appointed at considerably lower salaries. For instance, my understanding is that there were three MLAs — I am sorry; if only they were MLAs — three spads who were getting by on £92,000 under the old system: now there are none.

Mr Allister: There are four getting by on £78,000.

Mr Wells: Yes, but that is a significant drop in what they were getting. I am not saying that that is a pauper's wage, but has the Department of Finance not pre-empted what you are doing? Does that bring the current situation into what you are aiming for, which is a Civil Service grade 5 banding?

Mr Allister: The Minister has taken some action on that in the code. That is good, because it needed to be addressed. My problem with doing it in the code is that, as I said, it can be unmade as quickly as it is made. We have seen how it was unmade when it was in the £70,000s and suddenly shot into the £90,000s. I would prefer to have a statutory cap linked to Civil Service pay, and, within that, the code could set the different bands up to that level.

Mr Wells: Will there be spads who will have their pay cut from their current announced situation when your Bill becomes law?

Mr Allister: I do not think so, because the current grade 5 band extends to in or about the £78,000 that four of them, I think, are being paid at present.

Mr Wells: Right, but would we not, then, need to make provision for compensation for those who may have their salaries reduced?

Mr Allister: That is a detail of the Bill that, at the time, when you see exactly what the grade 5 band now is, might need adjustment. I accept that, but the principle of whether the cap should be set in law rather than in a code is the one that needs to be addressed.

Mr Wells: OK. Your Bill may not save any public money at all, apart from the reduction in the number of spads from six to four.

Mr Allister: From eight to four.

Mr Wells: Well, there are only six appointed.

Mr Allister: Yes, but there is nothing to stop two more being appointed tomorrow; the facility still exists. At the end of the day, a cap will be set somewhere, and it is better set in a non-controversial linkage to Civil Service pay than in a political code that a politician writes and a politician can change.

Mr Wells: Thank you. On the totally different issue of bringing Ministers within the ambit of the Commissioner for Standards, I think that I probably hold the record in the Building for the maximum number of complaints made about an MLA to the Committee on Standards and Privileges — none of which, may I say, was successful.

Mr Allister: None as a Minister, because they could not investigate you.

Mr Wells: No, they could not. Many of the complaints were vexatious, but none was successful. The point is that that was just me as a humble, lowly, obscure Back-Bencher. Surely, if you bring a Minister within that ambit, you will provoke a massive number of vexatious complaints. By their very nature, Ministers have to make value judgements about school closures, hospital upgrading et cetera. Will this not provoke a huge number of complaints coming in on policy issues?

Mr Allister: That is a fair question, but, within the existing arrangements, the standards commissioner has a discretion to decree that something is vexatious and therefore not to be investigated. Why would you not have that facility for a vexatious complaint about a Minister?

Mr Wells: It may not be vexatious, in the sense that it may be about, for instance, a hospital closure, where the local community rises up as one against the decision.

Mr Allister: The complaint would have to be about a breach of the ministerial code. It would have to be rooted in something that the standards commissioner could rule on. You cannot just say, "The Minister did something I don't like". In doing what you did not like, he would have to have breached the ministerial code.

Mr Wells: Inevitably, the complainant will make the accusation that he or she did.

Mr Allister: If the complaint is fatuous, the commissioner can quickly dispose of it.

Mr Wells: What do you see happening to a Minister if there is a ruling that he has breached the code?

Mr Allister: If a Minister breaches the ministerial code, do we think that he should be a Minister?

Mr Wells: You see the ultimate sanction as being the power to —.

Mr Allister: The standards commissioner would recommend a sanction, as with MLAs. There would be a recommendation for sanction. It would not be a decision for the standards commissioner; ultimately, the decision is for the Assembly to take.

Mr Wells: How does that sit with the unique situation here, where Ministers are appointed under d'Hondt by their party? We do not have the Westminster situation, where there is a governing party. We have a totally different structure. How could a commissioner end up dictating to a party that it had to remove the Minister?

Mr Allister: Any party has selection of talent. Therefore, if a Minister is found to be in breach of the ministerial code and the Assembly accepts that the Minister is in breach of the ministerial code and accepts the recommendation that the Minister should therefore not continue as a Minister, why should that person continue as a Minister?

Mr Wells: That leads to the next issue. If the matter is brought to the Assembly, inevitably the party concerned will try to block it with a petition of concern.

Mr Allister: One of the amendments that I already have in mind for my Bill is to prescribe that you cannot use a petition of concern on a clause 5 issue.

Mr Wells: You are flagging that amendment up as likely to come at Second Reading.

Mr Allister: Consideration Stage, yes.

Mr Wells: That is interesting. Thank you.

Mr McHugh: Thank you for the presentation, Mr Allister. The Minister has already published new code of conduct measures, and those have been implemented. Is your Bill not a case of putting the cart before the horse, given that we await the report of the RHI inquiry, which, I expect, will include recommendations that, I am sure, will not be ignored by Ministers?

Mr Allister: There are two or three points there. We are back to the point that I have already made: a code is a code, not statute. If you want to give something real bite, you need to have it in statute.

Among the public, who were affronted by the evidence that they heard during the RHI inquiry, there is a real expectation of significant action being taken to deal with the issues. Simply to put matters into a code is good as far as it goes, but let me remind you that a number of the matters that were exposed as having been breached during the RHI inquiry were in the old code. The old code of conduct required spads to:

"conduct themselves with integrity and honesty."

Paragraph 5 of the old code said that they should not divulge confidential information, yet we had the evidence of a spad flagrantly disclosing to family and friends confidential information. The fact that it was in a code did not deliver the prohibition that we require. If we put it in statute, people can still break the law, but, if they break the law rather than a code, they do something much more significant. That is why, in clause 11, I want to create the specific offence of distributing information, effectively to family and friends, that is confidential. All spads are covered by the Official Secrets Act, but the Official Secrets Act really deals with high-level, national security issues. If you really want to create a deterrent to a repetition of what happened, certainly put it in the code, but you need to have the criminal deterrent of an offence that states that, if you are caught distributing information, there is a penalty. That is really what gives it bite.

I am making a couple of points to you. I am saying that the fact that the old code was infringed demonstrates that a code is not enough. Particularly on that important issue, criminal sanction will be required as a real deterrent. That is why it needs to be in an Act, not just in a code.

Mr McHugh: I notice that you have not commented on the RHI inquiry, but, now that you have raised the point, I will conclude by saying to you that what is being talked about is not the efficiency of the code per se but whether it was enforced. That might be where the problem lay. You imply that the code will only ever be enforced as a result of there being a criminal conviction pending when a person has breached the code. Is it not the case that the Minister's proposals for enforcement arrangements that will give investigative complaints to independent commissioners, including the Commissioner for Standards, go far beyond what you suggest, even while you argue that the difference between legislation and the code is that the code does not carry an enforceable penalty?

Mr Allister: That is the real point: nothing in a code can be more effective than something in legislation. In all walks of life, when people are tempted to do something that they should not do, the temptation is easier to overcome and people tend to think twice if they know that they are breaking the law, or most people do. By putting the offence in law, you give it that elevated imprimatur that makes it clear, in flashing lights, "You do not do this, because, if you do, you are at risk of paying a criminal penalty".

On your point that the RHI report might come along with other things, of course it might. I am sure that it will, but the very point that I made at the beginning was that this Bill, with its wide long title, can be a vehicle for adding multiple amendments to deal with multiple situations. Therefore, any Member — you included — can pick up on something in the RHI report or elsewhere and say, "Why don't we put that in? Lord Justice Coghlin has found that, and you haven't dealt with it, Mr Allister? Can we put it in?" Yes, we can table an amendment to that effect, and, if the House agrees it, it is in. The starting point is that the best way to deal with this is through legislation. It is superior to a code, and this legislation, because of what you can put into it, lends itself to elasticity.

Mr Frew: Jim, in the spirit in which you bring the Bill, I have a lot of sympathy for you. We are in a new age, and that necessitates that we as MLAs have a duty to ensure that people behave appropriately and that there are strict controls on individuals so that there can be no abuse of what is democracy. It is a fragile democracy here, and we have to make sure that we guard and protect it. We are certainly in a new decade, but it remains to be seen whether business will be conducted in a different way. We hope that it is, so I believe that this is part of that process. It is good that we can debate the issues, so I come in a spirit of generosity and sympathy.

Mr Wells: But.

Mr Frew: There is a "but", of course. Jim Wells made a point about the Commissioner for Standards. On at least two occasions, I have been subjected to spurious claims — all nonsense — that went to

the standards commissioner. A complaint is still something that a representative has to deal with, however, and it is still something that the Commissioner for Standards has to test and adjudge. The process can be quick — it is clear that, sometimes, complaints are nonsense and perhaps can be adjudged quickly — but there is still the burden of process. Sometimes, an investigation has to await a third-party investigation, perhaps outside this place, so that process takes a lot longer. As an MLA — an elected representative — you could have this hanging over you. That is the process.

Jim Wells also made the point about a Minister making a tough decision that has had to be made. There can be no excuses for kicking a can down the road, so there will be unpopular decisions made by Ministers. Although you are correct that they might not be breaking the ministerial code, I hazard a guess that there might still be petition-type complaints running into the hundreds made about a Minister who makes a decision. How do you square that? How do you stop the burden of process for the Commissioner for Standards? There could be specialist, vital investigations that he should be taking forward but cannot because he is bogged down in 100 petition-type complaints.

Mr Allister: That is a fair enough point. Maybe the Bill needs an amendment to enhance the powers of the standards commissioner to weed out initial complaints that do not pass muster. Strengthening his powers in that regard might be useful for Ministers and MLAs. It would be perfectly possible to devise an amendment that would give a direction of travel to strengthen that filter. I agree that a filter is necessary, but, in considering whether it is right or wrong to do that, you have to measure it against what we have, and what we have is pretty farcical. You have to measure it against the fact that the clause accords with what the Assembly, three years ago, approved in a motion. All the arguments that were made in the House did not cause a single MLA to call a Division on the motion and vote it down, so the clause comes with the standing of having been considered and approved by the Assembly through the passing of a motion. However, I am very open to the idea that imposing a proper filter would be a bonus in dealing with the threat of vexatious claims.

Mr Frew: Clauses 9 and 11 deal with criminal offences. Following the RHI inquiry and other investigations, I see the rationale behind the clauses. I will take clause 9 first:

> *"It shall be an offence for any minister, civil servant or special adviser when communicating on government business by electronic means to use personal accounts or anything other than departmental systems and email addresses."*

We live busy lives and work long hours. I have two email addresses on my phone. Last week, I searched for an email address, put in the content of the email, hit "Send" and then realised that I had sent it from my personal account. It was not a big thing, but I wanted to communicate with the person through my MLA account so that my staff would pick it up, because they do not have access to my personal email account. Could something like that, done by a Minister, spad or civil servant, be construed to be a criminal offence, leading to a sanction?

Mr Allister: That is why we have clause 9(2).

Mr Frew: Yes.

Mr Allister: Clause 9(2) reads:

> *"It is a defence for a person charged with an offence under subsection (1) to prove that the person had a reasonable excuse for the failure."*

Mr Frew: What is a "reasonable excuse"?

Mr Allister: Let us take the example of Minister or a special adviser who is out and about when something unexpected happens. They have access only to their personal email on their electronic device. They need to do something, and they do it. Clause 9 is not targeted at them; it is targeted at the deliberate avoidance of using official systems in order to hide things, such as we saw in the RHI inquiry. Therefore, the person in the example that I gave would never be prosecuted, because of the "reasonable excuse" defence.

Mr Frew: So a mistake is a reasonable excuse.

Mr Allister: It could be, in those circumstances.

Mr Frew: If an electronic device had two or more email accounts.

Mr Allister: You would have to demonstrate that it was a mistake and not just a convenience.

Mr Frew: How do you demonstrate a mistake?

Mr Allister: At the end of the day, those are all what we call "jury questions". It is for a jury, as it were, to decide. "Do I believe him, or do I not?" is a classic jury question. That is where it would lie, but, yes, it is right. I have been asked why I do not have the reasonable defence provision in clause 11, which deals with unauthorised disclosure. It has been suggested to me that that could be a discouragement to whistle-blowers. I do not think that that is right, but I am more than willing to consider the inclusion of the reasonable defence provision in clause 11 as well.

Mr Frew: I will come on to that, because I am interested in clause 11 as well, but I will stay on clause 9. We know from the RHI inquiry that, when the judge requested information, he requested all information, not just ministerial or official information. All personal data that had any link at all to RHI was requested. Is that not a defence in itself, in the knowledge that, when someone sends an email now, no matter under what guise, for what function or from what machinery, it will be picked up?

Mr Allister: In the circumstances of a statutory RHI-type inquiry, yes. However, I remind you that the inquiry took a long time to unearth some of that information. Some of it was not volunteered until cross-referencing showed that it existed. Only then was it reluctantly handed over. No matter what the law states here, there will be people who get away with breaching it. It is by putting the offence in law that you create the sanction and deter people from doing it. It is better in the law than not.

Mr Frew: Is the tariff correct?

Mr Allister: I toyed with the tariff. It is not the most serious offence in the criminal canon. I picked two years because that gives the option of putting it into the ambit of the Crown Court as opposed to the Magistrates' Court. A summary conviction where the max 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 there. In my first draft, I put the tariff at five years, but then I thought, "This may be a bit high", so I brought it back to two *[Laughter.]* That is the sort of thing that can be teased out at Committee Stage and at other stages, if the Bill gets there.

The Chairperson (Dr Aiken): One of the issues is the use of government information on non-government servers. TRIM and government servers are protected to a degree that individual or private party servers are not. In clause 9, are you also looking to ban official information being passed on to non-government servers?

Mr Allister: I am. I looked at what the new code says to see had it captured it in a better way. It states simply:

"Special Advisers must use official email systems".

Mine is a bit wider than that.

I do not hold myself out as an electronics expert. If the Bill gets beyond Second Stage, I anticipate talking to somebody with particular knowledge of those things in order to make sure that the clause is watertight. The thrust is clear, however: you cannot go around in an official job hiding stuff in private email accounts, on private devices or anything else. You have to use the official, upfront system so that, if anything is ever to be investigated, it is there and we do not have the scenario that we had with the RHI inquiry, where people chased their tail for months trying to unearth emails. In the end, they got them all — well, we think they got them all. If people do an official job and there may be motive for hiding things, we want to build legislation that discourages them from doing so.

Mr Frew: The first line of clause 11 states:

"Without prejudice to the operation of the Official Secrets Acts 1911-1989, it shall be an offence".

I take it that is in there for a reason. Can you explain the reason?

Mr Allister: The reason is that, because spads 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. However, in circumstances in which it was not the right vehicle, this Bill might be the right vehicle. Therefore, without prejudice to the fact that there might be an Official Secrets Act question here, we can go for them on what is, in essence, probably a lesser offence of the unauthorised distribution of sensitive material. That is why the Bill is phrased like that.

Mr Frew: On the Official Secrets Act, I am sure that you are aware of the case of Katharine Gun, a British intelligence specialist who blew the whistle on an NSA request that came over the Atlantic from America; the trial that she went through; and the impact that it had on her life. Surely you cannot help having sympathy for someone such as her, even though she allegedly broke the Official Secrets Act. You have already mentioned this — I probably have sympathy with the argument — but is there a danger that clause 11 may prevent or stop spads who come across something that they view to be harmful, dangerous or reckless to democracy, people or the population from whistle-blowing?

Mr Allister: A journalist raised that issue with me. I have been thinking about it and am conscious of it now, so I think that that is justification for putting the lawful excuse defence into clause 11. Again, at Consideration Stage, I anticipate moving an amendment to that effect, specifically to protect whistle-blowers. I am not entirely certain that it is necessary, but better to be sure than sorry.

Even without this legislation, someone like Ms Gun could be charged under the Official Secrets Act and still go through all that difficulty. This Bill does not ameliorate the situation.

Mr Frew: There may be some gap between what would be classed as Official Secrets Act procedures and what needs to be leaked. That may depend on the information at hand. This is probably just me speaking with my libertarian hat on, but we really want to be allowed to out information on practices that could be harmful to the population. I worry about that clause.

Mr Allister: Do you not think that the reasonable excuse defence could be made?

Mr Frew: Yes. That might tie it up. That might work.

Mr Allister: You have the Official Secrets Act, and you would have this. You also have the catch-all, common law offence of misfeasance in a public office, which is there to catch, in common law terms, what statute law does not catch.

Mr Frew: I question the difference in the tariffs, but we have time to —.

Mr Allister: I thought that unauthorised disclosure was a more serious matter than using an unauthorised device, so I thought that the tariff might take it into the realm of being a serious criminal matter.

Mr Frew: That will do me, Chair. I look forward to scrutinising the Bill clause by clause.

Mr O'Toole: Thank you for giving us evidence on your Bill, Jim. I have a few definitional questions. What is a "meeting" as defined by the Bill? Clause 6 is titled "Records of meetings".

Mr Allister: This is a meeting. When two or more people meet, it has the capacity to be a meeting. It is something attended by a Minister and a third party, obviously. There are some obvious examples. If you sit down with your civil servants or with a business group, you are having a meeting.

Mr O'Toole: If a Minister is at a public reception, for the sake of argument, at a university or of a trade group and is pulled to one side by someone who says, "Minister, I just want to collar you about x policy", and the private secretary is not around or cannot get into the conversation for whatever reason, who is at fault under the Bill?

Mr Allister: I think that that situation is caught by clause 7:

> *"Ministers and special advisers must log and retain records of all meetings they hold with non-departmental personnel about departmental matters".*

If you are in an unplanned situation and are collared about something, that could be, in one view, a meeting. If you have no civil servant or anyone else with you, you simply log it and retain a record.
Mr O'Toole: "Log it", as in give a written note or verbal briefing to your private secretary.

Mr Allister: Yes.

Mr O'Toole: That would include basically any contact at all.

Mr Allister: It might be, "Last night, I met the chairman of Invest NI. He raised with me the need to do x, y and z. Will you look at that?". It might be, "I met somebody who says that we should not proceed with that legislation because it could hurt some sector of industry". That might be a more dubious thing, but it certainly should be recorded.

Mr O'Toole: Does it not strike you as a somewhat onerous legal and statutory requirement for a Minister effectively to log every conversation that he has with anybody who asks him about departmental or governmental business?

Mr Allister: The new code of conduct for special advisers, at paragraph 13, states:

> *"Special Advisers must keep accurate official records, including minutes of relevant meetings, and handle information as openly and transparently as possible".*

Even the new code states that you need to keep a record of whom you meet.

Mr O'Toole: First, the code is not statutory, as you have said, nor does it create a specific obligation that seems to catch almost any interaction that a Minister might have that plausibly covers departmental business. He or she could be in the local coffee shop or supermarket.

Mr Allister: If he is discussing departmental matters that could have a bearing on the shaping of future policy or decision-making, should there not be a record of that?

Mr O'Toole: We were talking about vexatious enquiries earlier. Say that someone who is politically opposed to or has a specific policy disagreement with the Minister in question lives close by and they meet in the supermarket. Person X says, "Minister, I would like to chat to you about something". The Minister says, "Fine, but you will have to go through the Department. Can you email or get in touch with the Department?". Person X subsequently says, "I had a 10-minute conversation in which I asked the Minister to do x, y and z for me, and the Minister agreed", even if the Minister did not.

Mr Allister: You mean the person lies about the Minister?

Mr O'Toole: They lie about it, yes.

Mr Allister: We are all subject to being lied about. How do you legislate for that? In that circumstance, the Minister would be well advised to put in a note, "Mr X approached me, but I refused to discuss issues with him", so that there is a record.

Mr O'Toole: My question is this: in addition to the administrative burden, does it create an incentive for vexatious people who know that there is now a statutory obligation on every Minister to record every interaction he has that could conceivably touch on departmental business?

Mr Allister: I do not think that it is very burdensome, with modern technology, to record a one-sentence reference to a meeting. Could it encourage malevolent contact for the sake of asking, "Has that been recorded?"? Anything could, but it is a question of balance. Is there a mischief here that needs to be addressed? If there is, you address it, with the knowledge that there could be a spin-off of inconvenience. Which is more important: addressing the mischief or avoiding the inconvenience?

Mr O'Toole: Before I go on to the next clause, is there a specific bit of mischief mentioned in the RHI farrago that you are trying to address?

Mr Allister: There was a lot of evidence, and there were suggestions of meetings. There was one, if I recall correctly, where a Finance Minister met Moy Park, but there was no record. There should have been a record of a Minister meeting the Moy Park management.

Mr O'Toole: I certainly agree with the principle, but my concern is about what it might create.

The Chairperson (Dr Aiken): As a matter of record, take care when discussing specifics. The RHI report is due on 13 March, and we do not know the specifics of it.

Mr O'Toole: We can move away from the specifics to the generalities.

The Chairperson (Dr Aiken): We are mentioning specific companies and individuals who may be subject to other action, so it is important that we shape our comments away from that.

Mr Allister: Point taken.

Mr O'Toole: As clause 9 was being discussed, I was going through it and breathing a sigh of relief. Although I was a UK and not a Northern Ireland civil servant, I probably would have done time on the basis of some of the provisions in the Bill. *[Laughter.]* That may or may not be your intention. Maybe that is a sign.

Mr Frew: You could put in a retrospective clause, Jim. *[Laughter.]*

Mr O'Toole: Indeed, yes. Thankfully, you cannot legislate for Whitehall. My point is not that I think that I did anything that breached even the Civil Service code in any way; further to what Paul said, my point is on the use of official systems. If I went into my Hotmail now, I would probably find umpteen emails that I had written covering official business. Is it right to put something as routine as that in the Bill, creating the possibly chilling effect for civil servants that, if they were to use their Hotmail or Gmail once, they would have to construct a "reasonable defence"? Would it be an impediment to ongoing, daily good government for someone to think, "I have to contact the Minister quickly via Hotmail or WhatsApp to tell them to be in a departmental meeting at a certain time, but I cannot just do that knowing that, in an ideal world, I would use my departmental email. I have to think about the fact that I'm doing this with the knowledge that I might have to construct a 'reasonable excuse' defence"?

Mr Allister: We should always remember that there can be no prosecution unless it passes two tests. One is a reasonable prospect of conviction, and the other, which is important here, is that it is in the public interest. I would be very surprised if any prosecutor thought that, because Matthew O'Toole, Minister of Whatever or special adviser of whatever status, used his WhatsApp to tell someone that there was a meeting in half an hour's time, he should be prosecuted. No one would think that that was in the public interest. That would be a vexatious prosecution in itself, so it would not happen. You are back to this question: is there a mischief to be addressed? RHI shows that there is a mischief to be addressed. There was deliberate, conscious deployment of non-departmental systems to keep things off systems. If that is so, do you need that to be a criminal offence? I think that you do, and I do not think that that need is dissipated by thinking up innocent examples where that would be too onerous, because that which is too onerous would not pass the public interest test.

Mr O'Toole: Is there a risk that, in legislating in that way, you incentivise even more malign or mischievous types of contact, such as through phone calls or in-person verbal briefings that are even harder to get at? Is there a risk of incentivising that?

Mr Allister: Do you mean a risk of the hapless Minister being set up by something like that?

Mr O'Toole: Yes.

Mr Allister: Someone rings a Minister on his personal phone to give him information or asks him to do something, and he talks to them on his private home phone line — is that what you mean?

Mr O'Toole: Yes, but not only that. The clear intent of the Bill — one that, I am sure, lots of us agree with — is to disincentivise people who would seek mischievously to avoid FOI and other official channels in order to do things that might not be desirable. Do you, by creating a specific statutory sanction, in a sense incentivise those people to just not put something in an email at all, thereby

driving behaviour that is even harder to regulate, such as people having private conversations and things not going in email at all? Do you see what I mean?

Mr Allister: That, it seems, was one of the problems in RHI. We had spectacular evidence from the head of the Civil Service that it was agreed that notes of certain meetings would not be kept because they would be FOI-able. I want to ensure, through clauses 6 and 7, that notes are kept and that we put an end to that. We should not be discouraged from doing the right thing to address those mischiefs by worrying unduly about whether they are open to exploitation by miscreants who could set a Minister up for a breach that, frankly, would never be prosecuted, because it would not be in the public interest.

Mr O'Toole: You mentioned the media in relation to the offence of unauthorised disclosure. You may have given consideration to this with regard to amendments. It seems to me that the clause would capture many forms of communication with the media, including informal briefings about the thinking of Minister X on issue y, much of which, I happen to think, is the routine business of politics; in fact, it helps the media to do a better job of holding Ministers to account. Many people here will have read Sam McBride's book. They will have admired not only his rigour but that of the people on 'Spotlight' and other journalists in Northern Ireland. Is there a concern that you will end up making their job harder? They are the people who have been, in a sense, the most effective at holding Ministers and the political class here to account.

Mr Allister: I can see the point that you make: in modern government, there is a role for press briefings etc. Yes, maybe a suitably framed amendment — one would have to be careful with it — could exempt authorised briefings. It would be important to ensure that they were authorised.

Mr O'Toole: Authorised by the Minister?

Mr Allister: Yes.

Mr O'Toole: As people will know, there is an example of an adviser in London at present. He is extremely enthusiastic about confidential, sensitive, off-the-record background briefings to media to suit his agenda. We might disagree with what he says or we might agree with it and we might think that it is not a great way to do government, but it seems to me that the clause will make that illegal in statute in Northern Ireland. I have a concern about that.

Mr Allister: You bring up points that make a meeting like this useful. I am more than happy to take that discussion forward with you and other members. I want the Bill to be as good as it can be. I am not the fount of all knowledge on any of these things. Two amendments there might help, given Paul's point and your point: one about the "reasonable excuse" and one, properly crafted, about press briefings.

Mr O'Toole: The specific scenario that I see is where a political journalist, for the sake of argument, is investigating an incompetent or possibly even corrupt Minister. I am obviously talking completely hypothetically. If a journalist is sniffing around that story, the special adviser who works for that Minister might think, "You know what? They're right. I want to be helpful to them. I don't want to be authorised by the Minister in question. I want to give a background nod to the journalist in question that they're on the right lines. I might want to do that via WhatsApp or a phone call".

Mr Allister: They would have the problem of paragraph 12 of the existing code:

> *"Special advisers should not disclose official information".*

Mr O'Toole: Yes, but that is not on a statutory footing.

Mr Allister: No, but it is in the code. You are looking for a halfway house whereby you could break the code but not the law.

Mr O'Toole: No. At the beginning of the meeting, you said that the purpose of the Bill was to put it on a statutory footing and create robust masonry around the whole thing. Clearly, the whole point of moving from codification to a proper statutory basis with criminal sanction is that you create a chilling effect on certain types of behaviour. It may be that the codification contains a degree of flexibility

around certain types of behaviour, for good reason, because making that more strenuous would have, in a sense, a perverse or unwanted effect.

Mr Allister: I understand the line that you take. I will take that matter away and think about it and discuss it with you further. I am certainly not closing the door on any of that.

Mr Frew: One of Matthew's points was on clause 7, which is about making notes. That clause is a really good one. It is essential. Do you have in mind the times when, after Question Time, you rush out and grab a Minister, put your arm around him as you walk to his office and talk to him about a constituency issue? His or her head is already frazzled from Question Time, and he gets to the office, closes the door on you and says, "Thank goodness. He's away". You are walking with a Minister along the corridors of power, if you like, where it all comes from, trying to ingrain your thought process in the mind of the Minister. Is that the type of thing that you are talking about?

Mr Allister: It was not exactly what I was thinking of, but it is probably captured by this. I am thinking of the probably more sinister side of things, where someone with a vested interest persuades a Minister off the record, as it were, that something should be done.

Mr Frew: I agree with you on that one.

Mr Allister: The Minister then does or does not do it, and there is no record whatsoever of the contact. I am trying to create a situation in which that sort of lobbying exercise would have to be referenced. Could that include the MLA? Yes, it could.

Mr Frew: A Minister has just done 45 minutes of Question Time or maybe even a debate. You grab him and you churn out a lot of stuff to him. He listens to about 30% of it, gets into his office and shuts the door.

Mr Allister: My experience of that is that he would say, "Drop me a note about that".

Mr Frew: Yes, but imagine that you say that. Nine months later, there is a debate about a policy that has gone wrong.

Mr Allister: "Do you remember the day I told you, Minister, about that?".

Mr Frew: You say, "Minister, you're a liar. I met you on such-and-such a date".

The Chairperson (Dr Aiken): No Minister would ever be a liar. That is not how things happen in Northern Ireland.

Mr Frew: Do you understand?

The Chairperson (Dr Aiken): I have indulged you quite a lot, deputy Chair.

Mr Allister: I understand the point. If there is something of substance attaching, you would expect there to be a record: "Today, met Paul Frew. We discussed future of SONI".

Mr Frew: Yes, good subject.

Mr Allister: A good subject.

The Chairperson (Dr Aiken): I refer you to our previous conversation.

Mr Allister: I still think it right that that should be recorded.

Mr Catney: Thanks very much, Mr Allister. I have no doubt that a lot of work has gone into this. We are looking at a reduction in the number of special advisers and the impact that that may have on the work of the Executive, given the expertise that they require. Clause 2 would reduce the number of special advisers: I probably agree with the cost-saving aspect, but, from your point of view, is that expertise lost?

Mr Allister: The way I came at this was that I looked at the number of special advisers in this jurisdiction and then looked at the other devolved institutions. When I saw that Wales had the same number for its entire Government as the First Minister and the Deputy First Minister have in their office, I thought, "There's something seriously wrong here. How can the whole Welsh Government survive with eight special advisers and the First Minister and deputy First Minister also need eight?". To me, it seemed that there was too much of a sense of "jobs for the boys" about it, to be frank.

I thought that it would be appropriate to reduce the number. I suggest reducing it from eight to four; there might be other views. If the current appointment of six is a settled view, there is, I think, an acknowledgement from the appointing Ministers themselves that eight is too many. Legislation already sets out the number of special advisers that Ministers can have. If we think that the number is wrong, it is appropriate that we set the alternative in legislation. To me, four seems adequate. If the House thinks that it should be six, so be it. If the House thinks that it should be eight, it will not approve clause 2.

Mr Catney: I have not had time to check this: are the salaries paid in Northern Ireland different from those paid in Wales?

Mr Allister: Yes. Traditionally, ours have been the most expensive. Of course, the figures change as time goes on. The last year for which we have the cost of special advisers in Northern Ireland is 2015-16, when it was just over £2 million. For 2017-18, the cost in Scotland was just over £1 million. For 2018-19, the cost in Wales was just under £1 million. Before the Assembly collapsed, we were already paying for special advisers twice what was being paid in Scotland and Wales.

Mr Catney: We are all committed, I hope, to good governance and transparency in government. There are lessons to learn from RHI, and we all want to do better. There is no doubt that that is one way of doing it. Support for the reduction of the number of spads would go a long way towards doing that. Would that help with transparency? I also want to return to the issue of the use of electronic devices.

Mr Allister: This place has a public perception problem. Given my view of this place, it would be tempting for me to sit back and do nothing.

Mr Catney: I do not want to cut across you, but it is only in the past month that I have taken my seat and been able to ask the questions, and I feel that public perception as well.

Mr Allister: When the public look at the figures and see that special advisers were costing twice what they cost in Scotland and Wales, they come to an uncharitable conclusion about this place. That, in turn, creates an obligation: if we can do something about it, we must do something about it. That is why I am motivated to say, "There are too many special advisers in that office, so let us reduce them". That, I think, is the public expectation.

Special advisers have not had a good press through RHI, and there will not be too many people out on the streets protesting if we reduce their number. However, that is not the test: the test is whether it is right. It is not defensible to have the same number of special advisers in the Office of First Minister and deputy First Minister as there are in the whole of the Welsh Government.

Mr Catney: You have my support on that one. I have to agree with you on that.

The Chairperson (Dr Aiken): I have a quick question on special advisers. Jim, when looking at the issue of special advisers, did you consider averaging the amount of money per special adviser per elected representative across the regional parliaments?

Mr Allister: The short answer is no.

The Chairperson (Dr Aiken): On that basis, the figure would be considerably less than £2 million. Then, it would be up to the Ministers to decide how they averaged it out. You could have 20 special advisers, if you wanted, if you paid them £20 grand each.

Mr Allister: Do you mean capping the budget for special advisers?

The Chairperson (Dr Aiken): Correct. In particular, the pension costs and the rest of it.

Mr Allister: Yes. That is another way.

Chair, I do not at all wish to impede this Committee, but I agreed to appear before the Executive Office Committee on the same subject at 3.30 pm.

The Chairperson (Dr Aiken): We anticipated that we might take a bit longer than that.

Mr Allister: Maybe someone could check.

The Chairperson (Dr Aiken): We have done that.

The Committee Clerk: The Executive Office Committee is running late.

Mr Allister: Good.

The Chairperson (Dr Aiken): You are not getting away that easily *[Laughter.]*

Mr Catney: I want to go back to electronic devices. I know that it has been well covered, but, to use a drinking term, a lot of people "bring their own bottle" — they use their own device. How would that fit in? Matthew mentioned it. A lot of my communication is via WhatsApp, which I like — I do not use it for anything official — and I am looking at the penalties for using such things. They have the harshness of a criminal penalty. I am not asking for the penalty to be trivial, but, if you are at a meeting, as Matthew, Paul and others said, it can be simple just to hit that button. I am greatly concerned about that being a criminal offence.

Mr Allister: Let me repeat: the reason for thinking about a criminal offence at all is the evidence in the RHI inquiry of how, deliberately, private devices were used to circumvent record-keeping. That is a serious issue and, therefore, one that needs to be addressed. Is it over the top to address it in that way? I think that the defence of "reasonable cause" mitigates that very considerably, as does the fact that any prosecution has to be in the public interest. The obvious one-off use of your device for wholly innocent purposes will never be prosecuted, nor should it be. However, you need to have a criminal provision in order to be able to prosecute the ones who deserve to be prosecuted. If you do not have that, they, too, escape. It is the same with any criminal offence. It is a question of balance, but I think it right to criminalise conduct designed to circumvent a proper record, because the person who does it is deliberately trying to conceal something. It is right to have a criminal offence for that.

Mr Catney: OK. Thank you.

The Chairperson (Dr Aiken): I have a final question, Jim, before we let you go. Whom have you consulted so far?

Mr Allister: The first four clauses are a considerable reflection of a Bill that I tabled in 2015. In 2013, I brought through the Civil Service (Special Advisers) Bill, which prevented people with serious criminal convictions from becoming spads; indeed, it created the statutory duty to have codes of conduct and codes of appointment. Before that, there was no such duty. In 2015, I tabled a Bill to reduce the number of spads and do the other things that, in the main, are in clauses 1 to 4. That Bill was defeated at Second Stage. Before I tabled that Bill, I had a consultation exercise on the proposals, and they were fairly strongly supported. I did not repeat that consultation in respect of the first clauses in this Bill.

On clause 5, I took the view that, because the Assembly had already debated and decided on the matter, that was sufficient. On the other clauses, I took the view that the matters had been so widely ventilated in the public arena through RHI that there was no necessity to consult further.

I also make this point: private Members' Bills fall into two categories. You can go to the Bill Office and say, "Here is my idea. I want a Bill on this". When they draft it for you, you are obligated to go through a formal consultative process. If you go to the Bill Office with your Bill already drafted and say, "I want to introduce this", you are not obligated to go through the consultation process. My Bill is in the second

category. I drafted it and took it to the Speaker's Office. All that the Speaker's Office had to do was decide whether it was within the legislative competence of the Assembly etc. Hence, it got here.

The Chairperson (Dr Aiken): OK. Jim, thank you very much for your evidence. Go and enjoy yourself in the Committee for the Executive Office, and then come back here for all the rest of the work that we need to do this afternoon.

Mr Allister: You will not be here by then *[Laughter.]*

The Chairperson (Dr Aiken): Just before you go, Jim, if we require any further information, are you happy to submit it to the Committee?

Mr Allister: Absolutely.