Northern Ireland Assembly

Committee for Finance

# OFFICIAL REPORT (Hansard)

## Functioning of Government (Miscellaneous Provisions) Bill: Northern Ireland Human Rights Commission

27 May 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 Jim Allister
Mr Pat Catney
Ms Jemma Dolan
Mr Seán Lynch
Mr Maolíosa McHugh
Mr Matthew O'Toole
Mr Jim Wells

**Witnesses:**

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|---|---|
| Mr Les Allamby | Northern Ireland Human Rights Commission |
| Dr David Russell | Northern Ireland Human Rights Commission |

**The Chairperson (Dr Aiken):** I remind members that this session is being recorded by Hansard. Les — if you do not mind me calling you Les — I would be delighted if you would make an opening statement.

**Mr Les Allamby (Northern Ireland Human Rights Commission):** Chair, thank you for the invitation. I will make some brief opening remarks. First, the commission welcomes the Bill's purpose of increasing the accountability and transparency of the role of special advisers in particular, though it clearly extends beyond special advisers. At the outset, 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.

The commission does not have a particular view on the merits or otherwise of the individual clauses that do not give rise to human rights considerations, save in the respects that I want to cover briefly. The first is that the Bill creates two separate criminal offences. Clause 9 is the:

> *"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."*

I acknowledge that there is a defence of "a reasonable excuse" for failure to do so, but this 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 conviction on a summary basis. The second is clause 11, which states:

> *"Without prejudice to ... the Official Secrets Acts ... it shall be an offence for any Minister, special adviser or civil servant to communicate, directly or indirectly, confidential and/or commercially sensitive information to any natural person or legal entity for the financial or other potential benefit of any natural person, legal entity, minister, special adviser or civil servant."*

If successfully prosecuted, that person will face up to five years' imprisonment on indictment and up to six months or a fine on summary conviction. The reason why I have read out the offence, which I know that the Committee will be very familiar with, is because it is so widely drawn that it appears to cover everything from, at one end of the spectrum, speaking to a journalist and inadvertently or otherwise letting something slip, for example, through to, at the other end of the spectrum, effectively, corrupt insider trading for personal gain.

There are three issues in human rights terms. The first is that creating such a criminal offence must be proportionate, both in terms of the offences themselves and in terms of the breadth of the offence. The Human Rights Council, for example, 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".*

In a similar vein, the international covenant on civil and political rights (ICCPR), in a general comment, says something very similar:

> *"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",*

including the right to liberty. Therefore, proportionality is one of our concerns.

Secondly, in practical terms, if the leaking of any information by a civil servant, a special political adviser or a Minister could lead to criminal prosecution, you immediately entangle any disciplinary proceedings with the sceptre of criminal action. The possibility of criminal action, in the commission's view, may bring the disciplinary process into article 6 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.

The third concern that we have is that there is the question of article 10 of the convention: the right to "Freedom of expression". It is not an absolute right. Any curbs must be prescribed in law, and Jim Allister's Bill clearly does that. It must be necessary in a democratic society, which is obviously a matter of debate, and it can be in certain circumstances. That includes the prevention of the disclosure of information that has been received in confidence, protecting the reputation and rights of others. Again, my concern here speaks to the breadth of the clause, but it also does not provide protections for whistle-blowers. I have no doubt that it may be used as a defence, if there was ever a prosecution. My concern, and the concern of the commission, is that it is likely to inhibit whistle-blowing by, for example, a civil servant. The Public Interest Disclosure Act 1998 ensures that everyone who is dismissed for whistle-blowing can be considered unfairly dismissed. It seems to us that it is one thing to risk your job by whistle-blowing; it is quite another to risk your liberty.

I will stop at that point. I am happy to take any questions.

**Mr Allister:** Thank you very much. I will make one general point and then deal with some *[Inaudible.]* Of course, any Assembly legislation is human rights-proofed by virtue of the fact that it cannot get to Royal Assent unless the Attorney General filters it through as human rights compliant. Is that right?

**Mr Allamby:** Yes, under the Northern Ireland Act 1998.

**Mr Allister:** I will come to clause 11 in a moment. I think that you have made some important points.

Your written submission states your preference that clause 9 be articulated in codes. Will you agree with me that the experience of codes, which did require confidentiality, probity and honesty, was, in relation to RHI, a very disappointing one? They proved to be inadequate, to put it as neutrally as I can. Hence, do you not think that, against that background of the failure of codes, there could be an advantage in having the clarity and emphatic nature of legislation?

**Mr Allamby:** I would separate whether it is necessary to create criminal offences in the Bill from what I see as a separate issue, which is whether to place some of the accountability issues into a statutory framework as opposed to a code of conduct. You will not find me looking to disagree with you that given the history of this, given that we attempted to do it by way of codes of conduct in the past and given that we know from the RHI inquiry that it has palpably failed in the past, there seems to be a compelling argument to say that putting it into a statutory framework does not create any undue human rights issues, in my view. That is a matter of judgement. I can see perfectly strong, valid arguments for doing that, given where we are.

On the other hand, creating criminal offences as opposed to statutory discipline, or placing the disciplinary procedures on a much stronger statutory framework, moves you into different territory. It moves you into the issue of proportionality. Clause 11, in particular, is problematic. If you are to create criminal offences, they must be proportionate. There is a set of issues that relates to public interest disclosure, but there is also a debate to be had about the role of special political advisers: on the one hand, what has happened in the past and the latitude that has been taken, if you like, with regard to special political advisers; on the other hand, neutering special political advisers to the extent that they cannot be the political antennae of a Minister.

**Mr Allister:** I understand. I want to come specifically to clause 11 in a moment. On the issue of clause 9 and whether codes are adequate to deal with the abuse of the use of private emails etc, we have had evidence from various quarters in written and oral form. Amongst the written evidence received was some from Sam McBride, who wrote the book 'Burned', which, I suspect, you might have read.

**Mr Allamby:** I have.

**Mr Allister:** He might be thought of as something of an authority on these matters. In written evidence, Sam McBride said:

> *"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 practices up to the level of corruption.*
>
> *If it is recognised that using private phones and email addresses, thus hiding things from the official record, is dangerous, then there needs to be some tough sanction for those who do so."*

Do you agree with that?

**Mr Allamby:** Yes, in part. It is nuanced, but the difficulty that the commission has with clause 9 is, I think, that, while there is the defence of a reasonable excuse, it is still widely drawn. You characterised, for example, almost a wanton abuse of the use of non-departmental phones, emails etc for a malign purpose. Depending on what that malign purpose is, there might be circumstances where it would be reasonable to look at an offence. However, with regard to how that clause is drawn currently, it seems to suggest that any use is potentially a criminal offence, regardless of whether that is inadvertent or for a relatively innocent purpose.

I understand that, often, the purpose of criminal legislation is twofold: a deterrent effect and, of course, a prosecutorial effect. The deterrent effect should be a deterrence against clear, deliberate abuse rather than a kind of wider blanket to stifle ordinary activity.

**Mr Allister:** Surely, the antidote to that is the "reasonable excuse" defence, which means that, if someone can demonstrate that what they did was reasonable, there is no risk of conviction. Is that not the safety net?

**Mr Allamby:** As a deterrent — this may be what it is designed to do — someone may say, "I will never use anything other than departmental communication". However, if somebody rings you on your own phone or emails you in some other way for a purpose that is not malign but which, potentially, creates an offence, the question for us is whether that is proportionate to —.

**Mr Allister:** In taking evidence and discussing this, my thinking is refining, and I am minded to have an amendment to deal with that situation by simply putting in a responsibility to record, within the official systems, the fact that such an event took place. Do you follow me?

**Mr Allamby:** Yes.

**Mr Allister:** In clause 11, likewise —.

**The Chairperson (Dr Aiken):** Sorry, just for clarification, does your organisation tolerate any movement of official documentation or official emails outside the official communications network?

**Mr Allamby:** I would probably need to look to David to see whether we have a policy in place.

**The Chairperson (Dr Aiken):** I expect that you would have a policy, would you not?

**Dr David Russell (Northern Ireland Human Rights Commission):** All official documentation goes via the commission's emails.

**Mr Allister:** What is the reason for that?

**Mr Allamby:** To protect information that may be confidential and which would not be appropriate to go into the public domain.

**Mr Allister:** Do you acknowledge that that was not what was happening in some Departments?

**Mr Allamby:** It is clear from the RHI inquiry that, absolutely, that was not happening.

**Mr Allister:** If you leave it to codes, it becomes just a disciplinary matter. In the new code of conduct for special advisers, where is the article 6 compliance in the process when it simply says that the Minister shall have responsibility for discipline?

**Mr Allamby:** One of the issues is that the Bill is aimed at more than special political advisers.

**Mr Allister:** Yes.

**Mr Allamby:** It is aimed at the Civil Service, as well as Ministers. The question for the Committee is whether that should that be dealt with by way of a proper and effective disciplinary process, and how to do that, including whether you can put some statutory framework around it or whether you should create criminal offences. In human rights terms, you can create criminal offences, but they must be proportionate. The question is whether the Bill, as drafted, creates proportionate criminal offences.

**Mr Allister:** I get that, but I was asking you a different question. We know that the new code says that you shall not use unofficial devices etc, but if that is breached, it becomes a matter of discipline. However, where, in that process — there is no process — is article 6 met?

**Mr Allamby:** In my view, article 6 protections would not be covered as simply a disciplinary offence, whereby the ultimate sanction is, let us assume, that you could lose your job as a result.

**Mr Allister:** Yes.

**Mr Allamby:** It is covered in this letter, but my analysis is that such breaches probably do not fall under article 6 — the right to a fair trial — based on case law as I understand it. It probably would move into article 6 protection if the issue is not just that you may face a disciplinary outcome but that you may also face criminal sanction and imprisonment —.

**Mr Allister:** You could lose your job.

**Mr Allamby:** You could lose your job.

**Mr Allister:** Let us look at what the new code says. It says:

> *"The responsibility for the management and conduct of special advisers, including discipline, rests with the Minister who made the appointment."*

End of. There is no process for how the discipline is organised and nothing that shows compatibility with article 6. Have you, as a commission, drawn the Minister and the Department's attention to that obvious flaw in their code that if they are going to indulge in discipline, it needs to be article 6 compliant if it could involve the loss of employment?

**Mr Allamby:** I am not sure that it does fall under article 6 if the issue is simply a disciplinary process where you could lose your job, although there is an argument there. However, you could, for example, place statutory duties on a Minister, or put some additional bulwark to this in a statutory framework, and that would not create a human rights problem, in my view. Therefore, having a statutory framework for dealing with this does not create an impediment, from the Human Rights Commission's perspective, to doing so. The issue for us is that if the Assembly is minded to put a statutory framework around some of the requirements of a special political adviser and a civil servant etc, provided that they are proportionate in human rights terms, it can do so. However, if you are going to create criminal offences, you really are looking at issues of proportionality.

**Mr Allister:** I understand that. My point is that if it stays in the code — the code as drafted — and, therefore, simply goes to the ministerial discipline of a spad, that spad has no human rights protections in the code, as drafted.

**Dr Russell:** I do not know whether it helps to ask, but on the due process for a disciplinary action, one assumes that special advisers can appeal in the same way as any other employee. That might be a question for the Labour Relations Agency (LRA) or an employment appeals tribunal, for a discipline that amounted to unfair dismissal, presumably as for any other employee.

**Mr Allister:** Ultimately.

**Dr Russell:** It would be the process by which you would mount an appeal.

**Mr Allister:** You would expect, before you get to that stage, some human rights compliance.

**Dr Russell:** You would, and that is fair enough.

**Mr Allister:** The point that I am making is that the code is absent of human rights compliance for the spad who is disciplined by his Minister. I would have thought that you would be drawing that to the attention of the —.

**Dr Russell:** Assuming that you are correct that there is no process —.

**Mr Allister:** There is none. You can take it for this purpose. Clause 11, and I appreciate I am hogging the time.

**The Chairperson (Dr Aiken):** Just one second, Jim. Just go back, Les, to what you said about there being a compelling argument that this could be put into a legislative framework. That is not the issue that you have; the issue is proportionality.

**Mr Allamby:** Yes. Whether you put in a statutory framework or otherwise does not have a set of human rights issues. If you decide to do it by an adequate and effective code of conduct, it could be perfectly human rights complaint. If you decided instead — bearing in mind what happened here — to place it in a firmer set of statutory safeguards, that would, in our view, be equally human rights compliant. There is no compelling argument that says, "Human rights determines that it must be in a code of conduct, as opposed to being a creature of statute".

**The Chairperson (Dr Aiken):** The issue that you have is with proportionality, particularly the role of criminal offences.

**Mr Allister:** Chair, can you indulge me for one moment? I take your points on clause 11 about the whistle-blower. So, I am minded to move an amendment to make provision for that, probably in tandem with introducing the reasonable excuse defence, part of it being that the disclosure was made in the public interest. If it had the reasonable excuse defence and the provision that it was made in the public interest, would that meet your points?

**Mr Allamby:** I think that it would. Our other recommendation concerns the word "benefit". We would add the word "improper" to benefit.

**Mr Allister:** Yes, I am open to that.

**Mr Allamby:** Again, to be clear, the commission is not saying that you cannot have a criminal offence for seeking an improper benefit by your behaviour. I talked earlier about the spectrum of the continuum. If somebody used their knowledge and breached a confidence for insider trading in order to benefit themselves commercially etc, would that be reasonable grounds for creating a criminal offence? I think that, very arguably, it would. You would have to severely focus clause 11, quite forensically, to make sure that it is proportionate. You have suggested some ways. Without looking at the exact rewording of it, it will not be possible to make a definitive approach, but I think that you would be on safer ground.

**Mr Allister:** That is the territory that we are in. I accept that entirely.

**Mr Allamby:** There is a policy argument about creating criminal offences at all. You may decide that, in policy terms, it is not a good thing to do. However, if you have a narrowly focused clause that may be human rights compliant, it really depends on what the clause says, and then there is the wider debate about whether it is a good thing to do it.

**Mr Allister:** The Assembly has approved the principles of the Bill; we are now trying to make sure that we get it right. Thank you very much.

**Mr Wells:** Some of what you say sounds remarkably familiar. Have you had any contact with the Executive or any Executive parties about the Bill?

**Mr Allamby:** No.

**Mr Wells:** None at all?

**Mr Allamby:** None at all.

**Mr Wells:** No letters, emails, phone calls?

**Mr Allamby:** Not that I am aware of. I do not think that we have had any discussions.

**Mr Wells:** There is no pressure being put on you to take a certain view on this?

**Mr Allamby:** No, and if there were, the commission is resolutely independent and would resist it. However, we have not had pressure from any of the five main parties or from any the other political parties.

**Mr Allister:** Or from me. *[Laughter.]*

**The Chairperson (Dr Aiken):** Through the Chair. Behave.

**Mr Allamby:** I have already attempted to unnerve Jim by agreeing with him on a number of occasions.

**Mr Wells:** You have seen the evidence given by Mr Murphy, the Minister. It is almost uncanny how much unison there is between you and him on the proportionality issue.

**Mr Allamby:** At the risk of destroying a conspiracy theory, the evidence that I have read has been up to 6 May, which was the David Sterling evidence. I have not had an opportunity to read the evidence that came from Sue Gray and Conor Murphy. I know that they were due to give evidence, but I have not had a chance to read it. I could not find it on the website this morning.

**The Chairperson (Dr Aiken):** It is not up yet.

**Mr Wells:** I was almost going to say that you have not even had a friendly chat at a cocktail party, but, of course, that has not been possible over the past three months. You, like the Minister and Mr Sterling, talked remarkably similarly about the importance of proportionality. Do you accept that the misbehaviour of spads in the RHI brought the Executive and the Government down for three years? Do you accept that?

**Mr Allamby:** I do not think that it is for the commission to make a judgement on that. We know the facts. We know the basis on which that all happened. I can offer an opinion on it, but my opinion has no more weight than anybody else's.

**Mr Wells:** You are the chief executive of one of the most powerful bodies in Northern Ireland, so, yes, it is important.

**Mr Allamby:** I will not defend what happened around RHI, and you would not expect me to. We had an inquiry. It reached its conclusions. I am not sure that my view of that, other than, as I said at the outset, given the backdrop to this, I entirely understand why a Bill like Jim Allister's is being put forward.

**Mr Wells:** That is progress. Are you aware of the controversy around the National Asset Management Agency (NAMA) and Red Sky, which were previous issues where the conduct of special advisers was drawn into question?

**Mr Allamby:** Yes. I am not sure *[Inaudible.]* It seems to me that things have gone wrong in the past. They need to be remedied.

**Mr Wells:** Correct.

**Mr Allamby:** The question of how you remedy them, whether by way of statute or code, is not, per se, a human rights issue. What I am saying — I think it is probably helpful to Jim Allister's Bill — is that there is not a human rights imperative that says that it must be one as opposed to the other. That is a matter of judgement, including the judgement of the Assembly, ultimately, presumably, and I am saying that there is not a human rights reason that drives you down one road as opposed to another.

**The Chairperson (Dr Aiken):** We do not want to lead the witness, Jim.

**Mr Wells:** We do.

**The Chairperson (Dr Aiken):** No, we do not; I am not going to allow that. It comes back to the fact that we, in Northern Ireland, are in a unique situation. If codes had been followed, we would not have been in the situation that we were in. You say that there is a compelling argument to put it into a legislative framework, but the issue relates to proportionality and whether there would be a criminal element and criminal penalties. That puts it into a framework. I am not trying to put words into your mouth, but it is a key point.

**Mr Allamby:** It is. It is a matter of judgement for the Assembly, ultimately. If a code of conduct is being used to deal with this, for instance, is it sufficiently strong and effective to command the confidence of the Assembly or, I suspect, more widely, the public? The stronger and more effective a code of conduct is, the more likely that is to happen. Against that is the question of whether it would command the confidence of the Assembly and the wider public if it were put into a stronger form of statute.

Generally speaking, it is unusual for such areas to be dealt with by way of statutory safeguards, but the question is this: has what happened in Northern Ireland generated such concern publicly and politically that it should be dealt with in this way? It is not being done this way in other parts of the United Kingdom and elsewhere.

**Mr Wells:** Would a reasonable person who has seen what happened with Red Sky, RHI and NAMA, and who has read carefully the recommendations of Lord Justice Coghlin, come down on the side of the argument that the past code of conduct failed wretchedly, miserably and totally and, therefore, say that we need to move on to something that is on a statutory basis? Is that reasonable?

**Mr Allamby:** In the past five or six days, we have had a debate about what a reasonable person would do. I am not sure that that — *[Interruption.]*

**The Chairperson (Dr Aiken):** For the record, he is not and he was not.

**Mr Allamby:** I understand the backdrop that has brought us to where we are today. Ultimately, it is a judgement for the Assembly.

**Mr Wells:** What is your judgement?

**The Chairperson (Dr Aiken):** I think that has pushed the witness.

**Mr Allamby:** The commission does not take a position on this.

**Mr Wells:** You have. I will tell you what is going to happen. Almost all MLAs, bar those from one party, are totally sold on the Bill and think it is an excellent idea, but they will be ruthlessly whipped by their parties to burn the Bill at the Third Reading. That is what will happen. Your words will be seized upon as the reason why that should happen, because you are not prepared to say that we need this Bill to happen.

**Mr Allamby:** I think that I have gone significantly further. It is a matter of judgement. I am the head of the Human Rights Commission, and our response to the Bill has been confined to the human rights issues. You are right in saying that I have gone a bit further than that by recognising the backdrop to the situation, so I am not using human rights as a shield from saying anything publicly about it. What I have said is as far as I am prepared to go.

I do not think that the Bill will fail or succeed on the basis of the human rights issues, other than the aspects that I have raised about proportionality, the criminal offences and the wisdom of criminal offences as a whole. I have no desire to hole the Bill below the waterline on human rights grounds, other than on the issues that we have raised.

**Mr Wells:** Let us be reasonable about it. Your words will be quoted on the Floor of the Assembly, and they will be quoted by those who want to kill this Bill.

On balance, your view on whether there should be a statutory code, with, of course, legal backing and potential imprisonment: is it a 50:50 judgement or are you 70:30 or 80:20? How do you come down on this? You say that it is a balanced argument. Where does the balance lie?

**Mr Allamby:** Jim, you are doing your job, but you are trying to ask the same question under another guise, frankly.

**Mr Wells:** Yes, I am.

**The Chairperson (Dr Aiken):** He is, and, at that point, I will stop it. The reason why I gave Jim this latitude, Les, is that we all know you quite well, and you will speak your mind. Thank you very much indeed.

**Mr McHugh:** Tá fáilte romhat anseo inniu. You are very welcome here today. I can totally appreciate how you have compared it to a code of practice, as opposed to it being statutory legislation and the implications of that. One comment that I probably disagree with you on, if you do not mind me saying, is where you said that the code failed in the past. The code is only but a code. It did not fail; people failed it. Those who failed it did so as the result of a culture that we saw in a party. As a result of that, we have found ourselves in the position that we are in today in addressing this Bill.

The whole issue of proportionality is very important in every respect, including in the work that is carried out by spads in the first instance and the amount of flexibility that exists for them in every way,

particularly in their dealings with the Minister. I can see so many difficulties in the Bill that straight away would nearly leave a person in a straitjacket, in a sense, in the way in which it would limit them. In particular, when we look at RHI and how it was that they danced on the head of a pin concerning the Minister taking responsibility for the spad in the first instance. I think that that issue has now been addressed in the new code of practice that has been recommended.

Coming to my question, I am sure that you have looked at that new code of practice, too. The issue of ministerial responsibility is addressed in that code of practice, and that, in itself, implies a control on spads and so on. Do you compare and contrast that? As opposed to the code failing, it was the culture that failed. If the culture itself is addressed, will the proposed, newly strengthened code be adequate? When you say that it is possible to design statutory legislation, you could design statutory legislation for anything. We have to ask ourselves which of these will lend itself to better government, particularly now in addressing the way that spads are handled.

**Mr Allamby:** It is clear that there has been a significant change to the approach. A code of conduct could be adequate and sufficient in human rights terms to deal with this. The question is a matter of judgement of whether, given the context now, given what has been placed in a code of conduct, that is deemed to be sufficient. As I said earlier, there is not something in human rights terms that says that you have to have a code of conduct, but, if the Assembly were to decide to go down the code of conduct route, it could well be perfectly human rights compliant, and there is no human rights reason for not going down that road.

The question is more of a question of judgement. This is not a situation where the Human Rights Commission kicks the ball into touch either way, because of a human rights consideration, and, before you know it, there is no choice but to have a code of conduct because the Human Rights Commission has said that the only way to deal with this effectively is a code of conduct. Neither is there a situation where the only way to deal with this is a statutory safeguard. Bear in mind that what is drafted in a code of conduct or a statutory piece of legislation could be perfectly human rights compliant in the way of dealing with this.

I am not a great sitter on the fence but, in this, there is not an imperative that says it must be one over the other. It really is a matter of judgement.

**Mr McHugh:** Let me follow on from that. I do not think that you are sitting on the fence at all, but stating the reality. The reality of the situation is that you could design statutory legislation that conforms to human rights in every respect, as might a code of practice. It is not an either/or situation in terms of human rights. It is an either/or situation in terms of what serves government best, and, in serving government best, hopefully, it serves the interests of the people.

**Dr Russell:** It has been said over and over, but our major concern is not whether this is statutory or a code of conduct. The issue is the proportionality of criminal offences. Putting a disciplinary process into either of those two is one thing. The question for the Assembly and the Committee is — this is the issue that we have a concern with — going beyond that, to create a specific set of criminal offences, is that necessary and proportionate? One of the questions to be asked is: what does it do that the existing criminal framework does not already provide? In the example that Jim gave earlier, about things that might constitute up to the level of fraud, fraud is already a criminal offence. So, is it necessary to add a new criminal law into an area? Is it wise, as Les said, when, on the one hand, you have a disciplinary process for people who amount to employees, versus the criminal framework that is being proposed, to mix those two up? That is where the human rights issues lie.

**Mr McHugh:** I emphasise the same point. We all know that the death penalty is not a deterrent for murder and, in making it a criminal offence, any penalty you impose is not going to deter that behaviour if that culture exists. That is why I make the point that, if that culture exists, people will find ways of circumventing codes and legislation, irrespective of what way they are presented. That is the main issue that probably has to be addressed within a party.

**Mr Allamby:** Depending on what is in a statute, the reality is that not adhering to a statute, generally speaking, has greater ramifications than not adhering to a code of conduct. That is a general rule. 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. The policy questions about having criminal offences are how widely they are drawn and the level of sentence. It is fair to say that human rights law around sentencing and proportionality has been focused much more on the whole-life-term arrangements, not

on this kind of arrangement. However, it probably still brings these kinds of arrangements into the arena of proportionality, sentencing and human rights.

You could make an article 3 argument about inhuman and degrading treatment if you had a very severe sentence for what looked like a relatively minor crime, but that is quite a high threshold to get over, in terms of article 3. It has to amount to inhuman and degrading treatment. The proportionality is about the level of sentence etc, but, as I have said, this is not a matter of, "It must be one as opposed to another", for human rights reasons.

**Mr Frew:** I suppose one culture of that is the previous experience that we had with Sinn Féin bypassing the previous spad Bill that Jim proposed in the House.

Can I keep you on clause 11 and your concerns about proportionality? You suggest that, for example, the inclusion of the word "improper" preceding "benefit", in line 20 of the Bill, could add much to it with regard to proportionality, and not having it so free-for-all. That is probably a good word to use in that regard, but who defines "improper"?

**Mr Allamby:** That would be a matter, initially, for the prosecutorial authorities and, ultimately, the judicial authorities. If you created a criminal offence and the question was about improper benefit, you would have an investigation. When you moved to prosecution, the prosecuting authorities would have to look at the circumstances and decide whether it met the threshold for prosecution. If it did, it would be for a judge to decide, on hearing a case, whether that threshold was met in terms of the law. That is the process that you have to go through.

**Mr Frew:** When Jim gave evidence to the Committee on the penalties in clauses 9 and 11, he said, I think, that he thought that the clause 11 offence was of greater stature than the clause 9 offence. You are worried about the sweeping nature of clause 11, the proportionality of the tariff and the conviction itself. Is there a way to resolve your fear? Could you detail certain activities that would be offences and give them separate tariffs — a tariff scale, if you like?

**Mr Allamby:** I am sure that Jim would not like the Human Rights Commission to redraft his Bill. That would be a fairly unusual and, I am almost tempted to say, unholy alliance. *[Laughter.]* I will be serious. At the moment, this clause is drawn extremely widely. Let us put aside commercially sensitive information for a second and talk about confidential information. If, for example, a special political adviser has a conversation with Sam McBride in order to give the Minister's view and, two or three days later, that appears in a newspaper, has that special adviser committed a criminal offence? Is that something that you would normally expect special political advisers to do? In my reading of clause 11 as drafted, that appears to be a potential criminal offence. That is in a very different space from individuals with commercially sensitive information telling somebody, "Buy shares in this because I have information that suggests that doing so will be to your advantage. I am going to get everybody else I know to do the same", the intention being to gain for some corrupt purpose. Currently, both seem to be caught within this clause.

What is the role of a special political adviser? We can debate that, but it seems to me that part of that role is to be the political antennae of a Minister. Should a special political adviser have a conversation with a journalist in order to get across a Minister's view on something the day before it happens? Under this clause, that looks to be a potential offence, and, to me, that does not seem proportionate.

**The Chairperson (Dr Aiken):** We understand that to be part of normal political discourse — the back and forth with the media. The real concern that we have is insider trading: information that has gone to, let us say, some in the agri-business community to the exclusion of other elements of the agri-business community. That is what happened, and that is my understanding of why we need, probably, to have that intent in the legislation. I think that you already used the words "deterrent impact". There is a discrete case for special advisers and politicians in the media, which is normal political discourse, but that is completely different from special advisers, politicians and businesses being given financial and pecuniary advantage.

**Mr Allamby:** Yes.

**The Chairperson (Dr Aiken):** If the proportionality element was dealt with in a way that split those, would that remove part of your concern?

**Mr Allamby:** You would have to look at the drafting. I am talking about it being properly focused on what I think are reasonable offences. Take your example of somebody who, on no basis other than for their own or their acolytes' pecuniary or personal gain, was leaking commercially sensitive information or, to make it even clearer, being paid for advance information.

**Mr Wells:** That has happened.

**Mr Allamby:** I am saying that, in those kinds of circumstances, that may well be proportionate. However, all that I am saying is that the commission's view is that, in how it is drafted currently, it is not proportionate; it is too widely drawn.

**The Chairperson (Dr Aiken):** Your concern is its breadth rather than the implications of specific offences.

**Dr Russell:** There are two issues with this clause. One is the intended target, as Les and Jim addressed earlier. In our view, that is too broad at the moment. There are concerns about whistle-blowing, and the suggestion is that the clause might be amended to narrow its scope in that regard.

The second is the nature of the activity that is trying to be captured to constitute a criminal offence. It is not clear that that, too, is not extremely broadly drawn at the minute. Two questions need to be addressed in order to determine whether it is proportionate. First, can you create a list that narrows the scope to provide legal certainty as to what sort of activity is trying to be captured by the clause? That leads on to this second question: is it necessary to do that? In other words, are the activities in question not already criminal offences?

**Mr Frew:** We want to capture a statutory list of past activity that there has been no real way to investigate because it happened under a cloak of codes, requiring a Minister to step in and say a, b or c. Is there not a danger that there could be criminal activity ongoing that cannot come to the surface or to the attention of the relevant enforcement body or the police?

**Mr Allamby:** One of the lessons of RHI is that, eventually, this did all come into the public domain. Its coming into the public domain was partly through whistle-blowing, but it was much more than that. David is right: 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?

**Mr Frew:** Your written evidence refers to article 10 compliance and having a defence if there is a strong public interest to disclose. I get that. People have to be able to think independently, act independently and have a conscience, no matter what their role. However, who judges the strength of public interest? You mentioned that earlier. We have had six days of debate on a lot of nonsense, when the media should be concentrating on the draconian legislation and the effect that it is having on the nation. Who defines and judges what is of public interest?

**Mr Allamby:** We already have public interest disclosure legislation for whistle-blowing. In Northern Ireland, ultimately, unfair dismissal is a matter for industrial tribunals. If you have other public interest defences, it becomes a matter for the courts, ultimately, and judges to decide. That is, of course, on a case-by-case basis.

It is worth saying that, for example, in the Official Secrets Act, as I understand it, there is no public interest disclosure. There are issues around legislation where the public interest disclosure does not apply. Public interest disclosure is generally about the ability to keep your job if you whistle-blow. Here, you are moving into different territory, which is a matter that the Bill will have to deal with. The public interest disclosure defence would be about potentially keeping you out of prison as opposed to *[Inaudible]* your job. That is a very different set of concerns.

I move back to what I said before about the deterrent effect. If I see something that should not be happening, and I ask myself, "Should I go on public record because I know that this is wrong, but, if I do, I may have to go to prison for it?", that is a bigger concern. It is still a very significant concern for a civil servant to think, "If I go on the record here, this may impact on my career, including whether I am

still in a job". That is pretty tough, but it is very different from, "I could face imprisonment". So, there are issues around public interest disclosure, even putting in public interest disclosure. It is not just about the impact — that gives you a defence — it is whether it deters you from speaking out in the first place. That is where you move into the policy judgements that you have to make on whether a criminal offence, even with a public interest disclosure defence, is wise. It is not a matter for the Human Rights Commission to say yes or no to that, but it is important that it be placed on the record that those are the kind of considerations that, ultimately, the Assembly will have to make.

**Dr Russell:** What might be instructive to the Committee is that, when we were looking at the background to this issue, the old Official Secrets Act was revised in order to narrow down scope.

**The Chairperson (Dr Aiken):** I could be wrong, but it was the Ponting defence, was it not, at the time of the Belgrano?

**Dr Russell:** It was narrowed down partly because of the issue of freedom of expression and disclosure so that public servants would not be captured in the legislation and would feel more free to act in the public interest. That is part of the reason. To the extent that there is legislation that attaches to criminal offences for public servants and their activities, the legislative trajectory by Parliament on this issue has been to narrow down in order to allow people to more freely exercise their rights.

**Mr Allamby:** I think that that is right, except in the case of official secrets, where public interest disclosure is not a defence, as I understand it. That takes you back to Clive Ponting and the response.

**The Chairperson (Dr Aiken):** I want to get this right in my head. Surely, there is a distinct difference between public interest disclosure and the current list of rules and regulations on whistle-blowing. We seem to be coming at this from two different approaches. You are talking about the protection of people who would like to whistle-blow but will not do so because they think that they will be prosecuted.

I will paraphrase what I suppose to be our view: the problem is that, in the past, because there was no deterrent value, there was no approach to try to stop bad behaviour. One of the reasons why we are in this position is that codes, rules and all sorts of things have been blatantly ignored, and, to use the words of the head of the Civil Service here in Northern Ireland, "We are in a unique situation". That is why we are considering whether we need to bring legislation into the process as well. Surely, in many respects, the Ponting defence is still there and would still apply

**Mr Allamby:** Moving outside of the Official Secrets Act for a second, yes, it does, but there is still the question of whether, if it is potentially a criminal offence to disclose confidential information, that will inhibit people in doing so, as opposed to, "I know that I may put my job at risk if I do this, although I still have the public interest disclosure defence to fall back on". The stakes are higher. That is the reality of having a criminal offence. Do those higher stakes mean that someone might be more circumspect about blowing the whistle?

**Mr O'Toole:** Thank you for being patient with the various questions. I realise that you have been dealing with quite broad principles. I have a couple of very brief questions. Part of your website entitled "What we do" details "Our core activities". Under that, in addition to UN principles, it mentions the Nolan principles. I think that that is Sir Christopher Nolan.

**Mr Wells:** Not Stephen Nolan.

**Mr O'Toole:** No, a different type of Nolan, who, unfortunately, governs public life in this country a little bit more than some people might like. When you refer to the Nolan principles, is it about how you do your work? You do not have any statutory or normative function to uphold Nolan principles.

**Mr Allamby:** No. We adhere to the Nolan principles on openness etc. My commissioner colleagues, the staff and I are expected to adhere to the seven principles of public life that are the Nolan principles. In public appointment terms, the commissioners and I adhere to the seven principles. There are other organisations that deal with the question of how people behave in public life. However, that is not a primary purpose of the Human Rights Commission.

**Mr O'Toole:** One of your other roles, in a sense, is placing Northern Ireland in the context of international human rights practice, with the UN declaration, the ECHR and so on. You mentioned the

homework that you did in preparing a response to this. Are you aware of other jurisdictions putting this kind of statutory underpinning into practice? Did you compare and contrast when you were doing the human rights comparator?

**Mr Allamby:** No, at the risk of saying that the dog ate my homework. I do not profess to be an expert on jurisdictions elsewhere, but I am not aware of many other places where a statutory set of safeguards has been put in place. Certainly, in the rest of the UK, and, as I understand it, the rest of these islands, there is not, but are there examples of somewhere where it has been done? I could not put my hand on my heart and say that I know for certain that there is not. I am not aware of them, but I do not profess to be an expert.

**The Chairperson (Dr Aiken):** There are some fairly stringent rules in the EU, particularly if you are working as a special adviser in the EU and any of those processes. They are subject to stringent rules and regulations, and I think that there is some legislative framework for that as well.

**Mr Allamby:** There is certainly something in the EU Charter of Fundamental Rights, in article 49, I think, but I cannot recall exactly. However, that only applies in the use of EU law. There are some provisions about, for example, protection of confidentiality.

**The Chairperson (Dr Aiken):** There was a body of casework quite recently about breaches of that and about whistle-blowing, was there not?

**Mr Allamby:** There might well have been, but I am not familiar with it. I would be skating on thin ice, frankly, if I were to attempt to talk about something that I am not fully conversant with.

**The Chairperson (Dr Aiken):** Thank you very much indeed. If we have any written questions, would you mind if we forwarded them to you?

**Mr Allamby:** Not at all.

**The Chairperson (Dr Aiken):** Thank you very much for your time.