Northern Ireland Assembly

Committee for Finance

OFFICIAL REPORT (Hansard)

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

9 September 2020

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

Witnesses:
Mr Allister MLA - North Antrim

The Deputy Chairperson (Mr Frew): I invite Jim to make an opening statement.

Mr Jim Allister (Northern Ireland Assembly): Thank you very much. Since the Bill was launched, I have been listening carefully to the various points that have been made, primarily those made at the oral evidence sessions and in the written evidence submitted. It has been a useful exercise for me in seeking to fine-tune and improve the Bill. That is why I have given you sight of a variety of amendments flowing from that process that I am minded to table. Without going through them all, I will highlight just two or three points.

Amendment Nos 13 to 15 are important, in that they recast clauses 6 to 8, which are about record-keeping, bringing, I think, greater clarity and cohesion to those clauses. Amendment No 14 introduces regulation for lobbying. That amendment is based very much on the 2014 Act on the subject in Great Britain, which has worked fairly well. It introduces formal requirements in respect of Ministers and special advisers being lobbied. Generally, clauses 6 to 8 now hang better together than they did.

Clauses 7 and 9 deal with two aspects of criminal offences in the Bill — sorry, it is clauses 9 and 11 that deal with criminal offences. My mistake. Those two clauses have probably drawn the most attention. I have taken significant steps in view of some of the comments made. The Committee will recall that, initially, I had a defence of simply "reasonable excuse". I have taken that and radically reversed the burden of proof so that the prosecution must now disprove reasonable excuse once that is raised. That happens in some other legislation, but it makes things quite different from what was originally anticipated.

I have reduced the maximum tariff in clause 11 from five years to two to take account of the fact that it is more reflective of the type of tariff that would be available in, for example, the Official Secrets Act, although that is a different subject. Amendment No 20 simplifies clause 11, and that very much takes account of the points that were raised by some contributors about protecting freedom of information

(FOI) rights and a point Matthew O'Toole raised about not wanting to put any cloud of criminality over a special adviser doing his job in briefing the media. All that is taken care of.

For the Committee's consideration, I have provided, in the light of the discussion that we had, two options in respect of clause 9. Members will be aware that clause 9, as originally drafted, made it an offence for a Minister, civil servant or special adviser, when they were on official business, to use personal accounts or anything other than departmental systems. What I have offered in the second version of an amendment to that is something primarily flowing from what you, Deputy Chair, said. Instead of the use of such non-official processes, the offence should be the failure to record back into the official system that which had been emanating from non-official usage. Therefore, that failure to record would become the criminal offence to create the deterrent of someone trying to hide something. If they were to try to hide something and were caught, the offence would be that they never put it on the official system. That, of course, was one of the issues in RHI: things were hidden away on private devices. That is the choice on the amendments touching on clause 9. Do I keep it as the offence being the actual use of non-official devices, or do I make the offence the failure to record back into the official system something that has emerged from the use of non-official devices? In respect of both, the option is to sustain the reversal and the burden of proof, in respect of reasonable excuse.

Amendment No 12 is a new clause. It is motivated by my consideration as a member of Committees. We are in a situation where, when we ask for something from a Department and do not get it, the only step that we can take is the ultimate, extreme step of section 44 of the Northern Ireland Act 1998, which requires a very convoluted process. I was somewhat surprised, when I looked at it, to discover that, in this jurisdiction, there is no statutory duty on a Department to provide information. A new clause, in amendment No 12, would say:

> *"Ministers and their departments must provide to an Assembly committee such information as that committee may reasonably require in order to discharge its functions, being information which—*
> *(a) has been requested in writing; and*
> *(b) relates to the statutory functions exercisable by the Minister or their department."*

It is to create that statutory obligation, in the expectation that that would dissipate any need to have recourse to section 44. It should create a freer flow in that regard without having to go to the extremity of section 44.

That is just a quick overview. At the beginning of July, I gave the Clerk copies of the amendments and my explanation for them, and I believe that that was circulated to all members. I hope that members have had the opportunity to digest what was there. I seek to deal with any questions.

The Deputy Chairperson (Mr Frew): Thank you, Jim, for your succinct and concise presentation. I will bring in Seán.

Mr Lynch: Are you saying that the new clause in amendment No 12 will do away with section 44?

Mr Allister: No.

Mr Lynch: What will be the relationship between both?

Mr Allister: Each is free-standing. Section 44 is the ultimate step when a Committee gets into conflict with a Department and is not getting what it wants. It can effectively take judicial steps — High Court steps — to compel. To discourage getting to that point, because it is a very time-consuming process where you have to take advices on all sorts of things, I thought that it would be useful to introduce a statutory duty on Ministers and Departments to produce documents when asked. Strangely, that duty does not exist at this time, and I think that it should exist. The new clause in amendment No 12 would be to encourage that process. It is not taking away section 44, but it would probably mean that recourse to it would be less and less necessary. Each is different but is free-standing in its operation.

Mr Lynch: Which one would have primacy? I have another question, Chair. In relation to clause 11 and whistle-blowers, you include "in the public interest". That opens the argument about who that relates to and how public interest is determined. On my first point, does amendment No 12 or section 44 have primacy?

Mr Allister: It is not a competition for primacy. They each have their place. Amendment No 12 would create a statutory duty on a Department to supply information, and section 44 comes into play only if they fail in that; section 44 is the final step. The idea of amendment No 12 is to encourage Departments to be as forthcoming as they can without forcing anyone to go to section 44. It would aid smooth running, more than anything else, but it is free-standing.

Amendment No 20 — clause 11 — would insert:

> *"Without prejudice to the operation of the Official Secrets Acts 1911-1989 and save in the discharge of a statutory obligation"* —

that is probably FOI —

> *"or in the lawful pursuit of official duties,"* —

which is the spad briefing the press as part of his duties —

> *"it shall be an offence for any minister, civil servant or special adviser to communicate, directly or indirectly, official information to another for the financial or other improper benefit of any person or third party."*

The use of "improper" comes from the submission of the Human Rights Commission. The amendment goes on:

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

That could cover the whistle-blower, and, in my mind, that is what it is directed at. If something bad is going on in a Department and nobody is prepared to put their head above the parapet and expose it, but a whistle-blower comes along and does what, it says in clause 11(1), they should not do — give out information — it would be a defence for them to say, "It was very much in the public interest that I acted as a whistle-blower". To my mind, that is what "public interest" would cover in that regard. If they then raise that, it is for the prosecution to disprove that it was in the public interest, because that is a reasonable excuse.

I hope that that answers the question, but that is what I have in mind with the public interest. It could be wider than that.

Mr Lynch: Yes, it probably raises other issues.

Mr Wells: Mr Allister, thank you for giving the Committee the courtesy of tabling the amendments such a long time ago. I wish that the movers of other legislation would follow your lead, as it has given us plenty of time to consider them.

I want to go into the mechanics. Say that a spad is in the Maldives, for instance, with his Minister. He cannot use the equipment that was provided by the Department, so he is forced to use his personal mobile to communicate with his private office. What are the mechanics of him transferring that back into the official system? What would he or she do?

Mr Allister: He or she can use their private facilities out of necessity — that is the phrase in the amendment — if, out of necessity, it is not possible to comply. Within 48 hours or as soon practicable thereafter, they must copy into the departmental system any material generated during the use of the non-departmental equipment and make an accurate record on the departmental system of any verbal communications relating to the Department. The mechanics of that might be that they send an email to the private office, saying, "Please enter this on the departmental system. I wish to record this information", or they might, when they are back, do it themselves. The mischief that this is directed at is to ensure that things are not done behind backs, off official systems, never to be seen. The onus is then on the person who steps outside to use the non-official systems to make sure that the information generated there comes onto the official system, so that, when Joe Public makes an FOI application or a Member asks a question and the official system is searched, the information is there.

Mr Wells: Would he or she be required to make it clear that that was information that was logged as being, perhaps, from a personal mobile phone? Would they have to point out the fact that it was not possible at the time, or would it just go into the system as if it had been done properly?

Mr Allister: The onus is on him to get it onto the official system. By way of explanation, you would probably expect them to say, "This is information that came from my private system", but the offence, as drafted, is the failure to put it onto the official system. How they do that is not specified, because there might be different processes in different Departments and processes might change over time. It might be that a linked-in document could simply be transferred automatically. The offence is the failure to get it onto the official system.

Mr Wells: I remember being caught in Tanzania for 10 days. I simply could not get back to the office. I was in areas where there was no internet or anything like that. All I could use was my mobile phone. Would it be reasonable at the end of the 10 days, after returning to the UK, to log that material?

Mr Allister: Yes, because it says:

> *"within 48 hours or as soon thereafter as reasonably practicable".*

You may be stuck in the jungle somewhere and unable get back for 10 days, but, when you get back, the obligation on you is to get the information on the system.

Mr Wells: My second question is on the requirement on Departments to give up evidence and material. Does that sit easily with the overall nature of the Bill? I am reminded of the famous Henry VIII shipping Bill, which ran to 500 pages and, at the end, said, "I hereby divorce Anne Boleyn", and stuck in something that really was not relevant to the main purpose of the Bill.

Mr Allister: That it is very relevant, because even the title of the Bill is the "Functioning of Government", and the long title states that it will do various things and:

> *"make additional provision for the functioning of government in Northern Ireland and connected purposes."*

That clearly covers the functioning of Committees via Departments, and this is to step up the enforceability of a Committee's expectation of being provided by a Department with the information that it seeks. That is totally germane to the purposes of the Bill.

Mr Wells: The main thrust of the Bill is to bring maverick spads under control, on the basis of the experience of the RHI.

Mr Allister: It is not just that; there are things in the Bill that do more than that. Any amendment has to fit within the long title, and the Bill Office has not suggested to me that that would not fit into the long title. I think that it touches on the functioning of government, because it touches on the relationship between Departments and Committees, and Committees are a key part of the scrutiny infrastructure.

Mr Wells: For future reference, we must make the title of a Bill as vague and all-encompassing as possible.

Mr Allister: You must make your long title as all-encompassing as possible.

Mr Wells: So you can bring anything underneath that umbrella.

Mr Allister: If it fits within the long title.

Mr Wells: Interesting. You learn something every day.

Mr Catney: Thanks very much, Mr Allister. A lot of work has gone into the Bill. You could not have had too many days off with all the reading that you have had to do on it.

To start with, I have a small question on clause 4. Do you think that, with COVID-19, the date of 31 March 2021 is still adequate to have your Bill as proposed? As the Bill's sponsor, does 31 March give you adequate time for the amendments as they are coming in?

Mr Allister: I think that it does. Obviously, I chose that date when I first introduced the Bill, and, yes, COVID-19 has delayed things. If and when the Bill gets to Further Consideration Stage and a view is collectively taken that it is getting too tight to 31 March, it would need a simple amendment at Further Consideration Stage to advance that. A view has been expressed — I cannot remember where it came from, but it may have been the Executive Office — that it would be better to coincide that with the end of the mandate, and there is a certain logic to that. However, if things are ready before that, I did not see the need to add an extra year. Who knows? The mandate could be even be extended.

We are talking, if everything here goes through, about the Executive Office adjusting its number of spads and codes of conduct being adjusted in respect of various additions. None of that is excessively protracted, so, even if the Bill got Royal Assent before Christmas, a full three months thereafter is adequate time. However, if the House were to think otherwise, I would not die in a ditch over it.

Mr Catney: With reference to clause 5, how concerned are you about the use of the petition of concern in the passage of the Bill?

Mr Allister: The petition of concern can be used on any Bill after Second Stage. I think that there was material in 'New Decade, New Approach' that was discouraging of that, but it could be used. That would require, of course, the components to be met, namely 30 Members.

Mr Catney: Have you thought of other ways to try to prevent it being used?

Mr Allister: One of the things that I wanted to do in the Bill was to amend clause 5 in relation to reports from the Standards and Privileges Committee so that they could not be subjected to the petition of concern. That was to take the partisanship out of it whereby one of the bigger parties can block the findings of a report in order to protect one of their own, despite the overwhelming nature of the evidence found by the standards commissioner. In my discussions with Legal Services, they were adamant that the petition of concern aspect is a matter reserved in the 1998 Act that the Assembly cannot change. It would take an amendment to the 1998 Act to change that, so I had to reduce my ambitions in that direction. Therefore, there is no inhibition on the petition of concern in the Bill, although, I think, 'New Decade, New Approach' promised that there would be some changes, but they must come in legislation at Westminster.

Mr Catney: Will clause 5 make it easier for Committees to get information? I know that you stated that at the start, but are you confident that it will help us to get information?

Mr Allister: It gives the Committee another string to its bow. If you can point to a statutory provision that says, "We're entitled to this", it is bound to make the Department more dilatory about refusing it to you.

Mr Catney: OK. Going forward to clause 9, given that evidence of a criminal offence is required, how do you integrate the criminal offence with internal disciplinary procedures?

Mr Allister: Generally, when there is a criminal investigation, internal procedures tend to be parked to allow the criminal proceedings to come to a conclusion, so that would be the interface on that. It was suggested by some that it is enough to put all that sort of stuff into codes. My response to that has always been, "Yes, but those things were in the codes, and RHI demonstrated just how useless that was". Really, the choice for every MLA, post RHI, is this: do we want the changes that are made to be binding or not? If we want them to be binding, they have to be in legislation, because, as I have quoted several times, Lord Bingham has made it clear that a code is just a code; it is not legislation.

Mr Catney: Given all your experience at the Bar, looking at the legislation, are those offences clearly defined?

Mr Allister: I believe so. The clause 9 offence, depending on which version you look at — I am interested in getting a feel from the Committee on the two versions — is either the initial use of a non-official system or the failure, having used an unofficial system, to put it on to the official system. Either

of those is, I think, pretty clear. It would help me to get some feedback from the Committee on which is, in its view, preferable.

Mr McHugh: Go raibh maith agat as do ráiteas, a Shéamuis. Jim, thank you for your statement. On your last point about what is binding, there are more recent experiences of that, given what happened at Westminster yesterday. That shows us how binding legislation can be ignored, depending entirely on the culture. I have always felt that inherent in the RHI inquiry was the fact that the culture had to be addressed more than the codes of practice.

Notwithstanding all that, I want to move on to an area that seems to give rise to more questions than others in the Bill: clause 11. Your amendment changes the wording so that it now states:

> *"save in the discharge of a statutory obligation or in the lawful pursuit of official duties, it shall be an offence".*

I have some concerns about that. Sam McBride, amongst others, raised the potential issue of Ministers or spads who are briefing journalists on government business being in breach of legislation and facing criminal prosecution. How does the new wording prevent that?

Mr Allister: I have already alluded to that. It says:

> *"Without prejudice to the operation of the Official Secrets Acts ... and save in the discharge of a statutory obligation"*

— I think that that is FOI, where you have to give information —

> *"or in the lawful pursuit of official duties".*

If it is part of the official duties of a spad to brief a policy proposal to the media on behalf of his Minister, that is done in pursuit of official duties. Therefore, that would not be an offence. That takes care of the Sam McBride point. That is why the wording has been changed to put that in. It still catches the unauthorised disclosure of official information for improper purposes, but it would not catch the briefings that Sam McBride referred to, because that would be a lawful pursuit of official duties. That point is taken care of.

Mr McHugh: Well, currently, it is not included in the terms of a statutory obligation or in the official duties of a spad to include speaking to members of the media.

Mr Allister: Well, that could be changed very swiftly in the terms and conditions and in the codes. It is not for me to write the codes.

Mr McHugh: But do you accept that it is not included at present?

Mr Allister: Well, I do not know if that is true, but I would have thought that the custom and practice is that special advisers can and do brief the media. If it needs amplification in the codes of conduct, then, no doubt, that can be done.

Mr McHugh: I am sure that you will agree that the media, in themselves, are another essential element of democracy in every respect and that they should be in a position to question and avail themselves of the services of a spad in the proper scrutiny of government policy and the like. So, if it is not included, that is a danger in itself.

Mr Allister: If it is not included, then you need to ask the question, "Why is it not included?".

Mr McHugh: Yes, I think so. Let us move on, then, to talk about when an offence has been committed. In your amendment, you have reduced the penalty for conviction from five years to two years. In its evidence, the Human Rights Commission stressed the importance of proportionality. The proposed amendment does not address the problems of proportionality.

Mr Allister: Well, I think —.

Mr McHugh: I am sorry — it is the clear view of the Human Rights Commission that creating a specific set of criminal offences is neither necessary nor proportionate. Clearly, I am of the opinion that the view of the Human Rights Commission should hold some weight in the debate. I remember very clearly the evidence that it presented to this Committee. Their experts are tasked with ensuring that our laws and regulations are compliant with international human rights standards, and I think that that should be taken on board here as well.

Mr Allister: The Human Rights Commission is not the legislator for Northern Ireland. The legislator for Northern Ireland is the Northern Ireland Assembly. We are grateful for the views that are expressed by the Human Rights Commission, but it is for us, as MLAs and legislators, to determine the legislation. I took account of the points that were made, and that is reflected in the reduction in the maximum tariff. Some people made the point that it should only be summary offences and that there should not be anything above the summary. The reason for making it a hybrid offence — that is to say, an offence that can be tried either in the Magistrates' Court or in the Crown Court — is that, if you make it only a Magistrates' Court offence, the accused does not have the right to a jury trial. By making it a hybrid offence, you convey a right on the accused to say, "No, I want to opt for this to go to the Crown Court. I want to be tried by 12 of my peers". So, there is a protection for the individual accused in keeping it a hybrid offence, which would not be there if you made it only a summary offence.

Mr McHugh: I am sure that you remember that, in their evidence, the Human Rights Commission representative said that one can achieve the objectives using either of the two methods and that it is dependent entirely on whether one decides on legislation or a code of practice. This has arisen out of the RHI inquiry in particular. The RHI inquiry has not included any recommendations to the Executive that it should be anything other than a code of practice. The Minister came forward initially with a code of practice. Should we not await the further outcome of that and the RHI inquiry?

Mr Allister: I do not understand why people would want to postpone bringing certainty to these matters. I remind you that the RHI inquiry had quite a lot to say about the failure of the old codes. The old codes did require integrity, honesty and non-disclosure of information. Paragraph 24 of schedule 1 to the old code established high standards of confidentiality. Did it work? No. RHI proves abundantly that having something in the codes was of no effect. With that experience of the failure of codes, the choice now is this: do we put our faith in something that has already failed, or do we put our faith in something binding like legislation? I really do not see why anyone who has nothing to fear from a prohibition on breaching confidentiality would balk at it being in legislation. I have already made the point that the choice for MLAs is this: do we want the changes proved necessary by RHI to be binding or not? If we want them to be binding, we need to put them in legislation. Codes are a failed vehicle; that has been demonstrated beyond belief. If there are people in Stormont who think that we can rectify all this by simply rewriting the codes, they are in a bubble. The public, having been scandalised by what happened in RHI, expect and need better than codes. The "better than codes" is legislation.

Mr McHugh: Whilst I totally respect your opinion, I have to say that I totally disagree with it. It was not the code per se that was the problem. I keep making the point that it was the culture. If that culture prevails, we are still faced with a very serious problem, irrespective of whether it is codes or legislation. That is what has to change. I do not think that having convictions or jail terms for what might be seen as breaches of a code or legislation per se will, in itself, drive any real change in the Assembly or anywhere else.

Mr Allister: It is a matter of judgement. My judgement, given our experience, is that the culture that you referred to will be more influenced and changed by the deterrence of legislation than by the repetition of limp codes. The choice is this: do you want the change to be binding, or do you want it to be transitory so that it can be trashed again as it was in the past? I do not understand why anyone, if they genuinely want to improve the culture of operation, would balk at legislation setting it out very plain and very straight, so that, if anybody breaches it, it is not a matter of a slap on the wrist under a code, which would probably not even happen because the disciplinarian is the very person who appointed the person in the first place. Whether they want that or the deterrent of legislation is the choice that the Assembly has to make.

The Deputy Chairperson (Mr Frew): OK. Thank you very much. Jemma, do you want to come in?

Ms Dolan: I am OK at this point.

The Deputy Chairperson (Mr Frew): OK. Thank you.

Jim, I am not disrespecting any of the clauses in your Bill, but I will take you to a lesser point in one of your clauses: clause 12 on biennial reporting. We have received evidence from both the Department of Finance and the Executive Office to suggest that the provisions in clause 12 duplicate what happens in annual reports and accounts. If this was to become law, what would stop the Departments from adding a paragraph onto the annual reports and accounts? Would that be acceptable to you, or should there be a standalone report?

Mr Allister: It is not an either/or situation. Each individual body, from time to time, makes annual reports that contain recommendations. The purpose of clause 12 is to make sure that those reports do not gather dust and that an overview is taken every two years on what has been recommended that we need to act on. Something might already have been acted on. If so, good, but, if it has not been acted on, or a judicial review has thrown up a point that needs to be addressed, the idea of the Executive and the Assembly focusing on those issues every two years can only be a good one. Otherwise, as we all know, reports tend to gather dust. With the best of intentions, we might say, "We will do that", but we never get round to it. If we have a compulsion that every two years we will have a biennial report on things that can be done, that have been recommended or arise from judicial reviews and that could improve the function of government, that keeps a focus on it. That is all that clause 12 does. It is important, but I do not see why there would be any resistance to that.

The Deputy Chairperson (Mr Frew): Can I read something into the record in order to get an explanation? The last line of the first paragraph of clause 12:

> *"having considered any relevant judgements of the courts on governmental administration and actions".*

By that, do you mean any court judgement on governance, or do you mean specifically the offences created in this Bill?

Mr Allister: I mean any comments, most likely to come from a judicial review, pertaining to the functioning of government. In draft amendment 21, I want to make it more explicit by saying:

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

The Deputy Chairperson (Mr Frew): Yes.

Mr Allister: So draft amendment No 21 perhaps tidies up that ambiguity. Such judgements are, in my experience, most likely to be judicial review judgements, but they would not of necessity be so. Let us say that there was a prosecution under sections 9 or 11, and a judge made the comment, "I don't understand why that's as it is", or "That could be better". That is something that you might want to take account of. Judicial reviews, by their very nature, challenging processes, and so it is most likely to be judicial review judgements that criticise the functioning and processes of government.

The Deputy Chairperson (Mr Frew): I do not think you do violence to clause 12(b) in your amendment. It says:

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

What do you mean by "other means"? I take it that by "statutory provision" you mean law.

Mr Allister: Yes, a statutory provision can be an Act of Parliament or secondary legislation.

The Deputy Chairperson (Mr Frew): Does "other means" refer to codes?

Mr Allister: It might be a code change, it might be simply a ministerial declaration of how we are going to do things or it could be anything within the ambit — a policy declaration, for example. It could be all of those things.

The Deputy Chairperson (Mr Frew): The new clause is about giving a statutory footing to the provision of information that goes to a Committee. I like that idea. Using section 44 is too unwieldy, cumbersome and slow, because you are having to threaten that in order to get something, whereas if

it was on a statutory footing that there was an expectation, and in effect, it was the law that the Committee would receive anything that we requested in writing. I do not understand why there is such a gap. You either have a scrutiny Committee or you do not, and if you want to have a scrutiny Committee doing its job well, you need to give it sufficient power. What does the wording of new clause 5A look like in comparison with section 44 of the Northern Ireland Act 1998? Is it couched in the same terminology? You talked about —.

Mr Allister: It is in different terminology, because they are serving two different purposes, I suppose. Let me get you the exact terminology of section 44. It is very much the sanction provision. This is taking a moment to open. It is the power to call witnesses and, as it were, to subpoena documents. That is still a power that you would have, but I think that the need to have recourse to it would be less likely if there was a statutory obligation to supply the documents in the first place.

The Deputy Chairperson (Mr Frew): I agree with you on that point, in a personal capacity, but what is the point of having a statutory obligation with no sanction? What I am getting to is, do we need to add an offence or a sanction to your Bill, in new clause 5A, to compel —.

Mr Allister: No.

The Deputy Chairperson (Mr Frew): I agree with you and I think we need it, but if Ministers, permanent secretaries and officials behave badly and obstruct information flow, what will having it in law do without a sanction to compel?

Mr Allister: On the sanction, if my new clause 5A does not work, then you go to clause 44 of the 1998 Act. Clause 44 is the one with the sanctions.

The Deputy Chairperson (Mr Frew): Yes.

Mr Allister: There is a linkage in that sense. If 5A does not work, then 44 is your last resort where there is sanction — not criminal sanction, but there is the sanction of contempt.

The Deputy Chairperson (Mr Frew): Would having that clause in a separate or new legislation strengthen your case at court in respect of 44?

Mr Allister: Very much so. You are going, then, to compel the production of something that has been refused to you in the face of a statutory provision that, prima facie, should be provided. It very much strengthens the path to 44.

The Deputy Chairperson (Mr Frew): On one of your big ones, clause 9, you asked for a steer.

Mr Allister: Yes.

The Deputy Chairperson (Mr Frew): My personal opinion is that I like the idea of your second option with regard to the use of official systems, in that the offence would be the non-declaration of the use of official systems. I like that because — I have talked before in this room about it — quite often you would mistakenly use a wrong account. You could guard against that by having a completely separate system — a separate laptop and a separate phone — for your Department business, and all of that would guard against it. Ultimately, you could make a mistake like that that would mean that you have created an offence or conducted something unlawfully. It is wrong to have used a private account or something else, but the offence is actually when you do not declare that. If it was completely innocent and you have declared it, nothing is wrong at that point and you have not broken the law, so to speak. It is nearly giving you a second chance to declare it: you have done the first action, which is using an unofficial system or device or a personal email account, and then you have declared it. I am much more comfortable with that.

I note that you have added to your amendments, for both offences, the aspect of public interest. That is also important. Imagine that you are a whistle-blower and you have information that something is going on in the Department that is seriously bad that you needed to get out in the public interest, you would use a private account to get that information out. You need the public interest in both offences, because you could have a public interest offence in one, but, the fact that you used an unofficial email address means that you could fall foul of the other offence.

Mr Allister: I have become persuaded of all that, and that started with your initial observations on it some months ago. It was then supplemented by what some other people think. I think that the public interest is now a very important component of this.

I am reasonably relaxed about whether this is the first or second version of clause 9. I understand the logic that you propound, which is that the real offending and the real concealment is the non-transfer. If that is without prejudice to people's general views on the Bill and it is the consensus view of the Committee, I am happy to table the second amendment. A steer on that would be helpful.

The Deputy Chairperson (Mr Frew): I am not sure of that, because other members have not declared. Maybe, although not necessarily today —.

Mr Catney: On that point, Chair.

The Deputy Chairperson (Mr Frew): Yes, go ahead.

Mr Catney: I was hoping that we could maybe set that aside and have a special one-off session to come to an understanding and an agreement on it. My reasons for that — I will not dwell on this today — are that, if that was not accepted and agreed to, the functioning of the Government, which was updated following —. Sorry, if you can just bear with me —. The papers say:

> *"Members may wish to question the Bill sponsor further on this point in order to determine specific differences between what is proposed under clause 12 and what is already in place."*

It is not much; it is just a few questions about what we already have in place.

Mr Allister: Is that clause 12?

Mr Catney: Yes. Sorry; I wanted to go to clause 11. If the Committee were to decide not to support clause 11, what changes would you, the Bill sponsor, recommend to the current codes, guidance and disciplinary procedures to ensure that those who disclose information without the authority to do so are consistently held accountable? They are interlinked; that is the point that I am trying to make, Chair.

Mr Allister: I think that that point has been made about clauses 9 and 11.

Mr Catney: Yes.

Mr Allister: My answer to that is that I have declared that codes do not cut the mustard.

Mr Catney: Yes, and I am in agreement with you.

Mr Allister: My view is that it requires legislation. Therefore, if we do not want to bite the bullet and go for legislation, I do not think that we serve any purpose by tinkering with codes.

Mr Catney: That is OK. As I stated, I am in agreement with you, but I would like —.

Mr Allister: On that point, Chair, is there a view on whether option A or option B for clause 9 is better, without prejudice to what people generally think about the Bill?

The Deputy Chairperson (Mr Frew): My personal view is B, but members can make up their own mind if they have not come to a conclusion. If we can get that to the Bill sponsor as quickly as possible, it will be helpful. We will get to a point in the Committee where we are going through this informally clause by clause.

Mr Catney: Can we do that sooner rather than later, Chair?

The Deputy Chairperson (Mr Frew): Yes.

Mr Catney: I am quite happy, and I am fairly close to it now, but there are a few technical points that I wanted to look at, if that is all right.

The Deputy Chairperson (Mr Frew): Yes, sure. I think that we should do that sooner rather than later.

Mr Catney: We could look at it with the sponsor as well.

Mr Allister: Yes.

The Deputy Chairperson (Mr Frew): First of all, unofficially, we will have to go through it clause by clause and give an account on it, so probably the sooner that gets nailed down the better.

One further question, Jim, and then I am finished. Pat raised a point about the timing for the changes to spad numbers: by 31 March 2021. I take it that that date is simply due to a new financial year starting.

Mr Allister: Yes.

The Deputy Chairperson (Mr Frew): You can understand how changing that date to any other date in the year could be problematic. Ultimately, an election can come at any time too. There is a reasonable assumption that a spad will be in place and there are no guarantees after the next election. In a new mandate, while you are right about the timing of when an Assembly will fall and another takes its place, that could be before 31 March. However, there seems to be more of a natural cut-off with a mandate, but I understand that that is at the end of the financial year as well. I agree with Pat that the timing could be getting close to the knuckle for people to make life-changing decisions about their job.

Mr Allister: The view I experienced was that you maybe do not have to be definitive about that until you get to Further Consideration Stage.

The Deputy Chairperson (Mr Frew): OK. Do Members have any further questions, or are you content to leave it at that for now?

Mr Allister: Thank you.

The Deputy Chairperson (Mr Frew): Thank you very much, Jim.