Northern Ireland Assembly

Committee for Finance

OFFICIAL REPORT (Hansard)

Functioning of Government (Miscellaneous Provisions) Bill

30 September 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:
Ms Claire McCanny NIA Bill Office

The Chairperson (Dr Aiken): OK. We did clause 1, so we will look at clause 2, which deals with an amendment to the Civil Service Commissioners (Northern Ireland) Order 1999. Clause 2 sets the number of special advisers in the Executive Office. The current number is six, with provision for eight. The Bill's sponsor is proposing to limit the number to four. Are there any comments?

Mr Frew: In the vacuum of the silence I will nip in to say that I am not 100% sure. It is all about a numbers game on this one, and it would be easily amended, even on the Floor of the Assembly, for that matter, with regard to what number any particular Member thinks is sufficient. I am in agreement with Jim that eight is too many. I have an issue with the junior Minister spad and whether there is a necessity for such a post, but whether I agree with limiting the Executive Office to four is a completely different question. If you set a ceiling on how many spads it can have, it does not necessarily have to use them all. That is where I am at on this clause.

The Chairperson (Dr Aiken): Seán?

Mr Lynch: We believe that six in TEO is the appropriate number.

The Chairperson (Dr Aiken): Six in TEO?

Mr Lynch: Yes.

The Chairperson (Dr Aiken): Matthew?

Mr O'Toole: Thanks, Chair. Sorry, I do not know if anyone else — if I have jumped in. I suppose I remain unconvinced. There is clearly a general concern, which this Bill addresses, and many concerns

that I and my party would clearly share about the conduct of special advisers. I remain to be convinced that limiting the number in this way via legislation addresses the concerns that specifically arose from the renewable heat incentive (RHI) scandal. I remain unconvinced about limiting in legislation. Seán has just said that six is an appropriate number. I do not know whether it is. There is a sort of "smell test" here, and by implication, if there is a smell test about whether something is appropriate or inappropriate, it is difficult to have it in primary legislation and you then get —. I remain to be convinced about whether this is a problem that can be solved in primary legislation.

The Chairperson (Dr Aiken): Jim, do you want to come in on clause 2?

Mr Jim Allister (Northern Ireland Assembly): Apologies for being late. I will just say a word about the format of clause 2. Its ambition is to reduce the number in the Executive Office from eight to four. The mechanism, in the original drafting of clause 2, was anticipating that the junior Ministers would continue to have one each and the First Minister and the deputy First Minister three each. Therefore, the mechanism was simply to reduce the First Minister and deputy First Minster to one each, giving a total of four. But since the junior Ministers have not appointed — a signal to me that they are not required — which of course takes you back to the pre-2007 situation, I thought it was more appropriate therefore to remove the capacity to have the junior Ministers to appoint spads, and to adjust the number that the senior Ministers could appoint to two each, still giving four. The reason for four is that it seemed to me that eight was so out of kilter — that you had eight in a single Department, at a point when there were only eight in the entire Welsh Government. It seemed to me totally out of kilter. Four seems to me right, though obviously there might be other views.

On Matthew's point about whether legislation is the place to do it, if you do not do it in legislation you cannot do it otherwise. That is the only way that you can restrict the numbers. If in principle it is right to restrict the numbers, the only means is through legislation. Is four right or not? Is four a response to RHI? Four is not going to change the culture of how things are done, but there are other things in the Bill that do that. The question in clause 2 is whether it is necessary, right and appropriate to reduce from eight, and, if so, is four the right number? I think it is, because eight is just unconscionable. In fact, since we came back, there have been only six. In fact, I think there are only five at present. The DUP had a resignation, and I do not think they replaced that young lady. So, through the biggest crisis that the Government are likely to face, the First Minister's office has coped with two and has not moved to appoint others, but they could bring it up to four. That gives a total of five. If the First Minister can manage with two, I do not see why the deputy First Minister cannot manage with two.

The Chairperson (Dr Aiken): The question is this: should we be putting a limit on the number of special advisers? The intent of the Bill is to put a limit, yes. The next question is what that limit should be and whether we should be taking a view on setting that now or waiting until it is goes to be debated. Seán mentioned six, and we have talked about between four and eight. If it is going to be debated on the Floor anyhow, it would give us a starting point for an opportunity, if members are content to take that view.

Mr O'Toole: Chair, will you summarise the view again?

The Chairperson (Dr Aiken): The intent of the Bill is to limit the number of advisers, because the number is excessive. Four might be seen as too few, and eight as too many. We are looking to limit the number. If we go for six, which Seán suggested, it can be debated when it comes to the Floor. The difference in Northern Ireland is the bit where we need to put some form of legislative limit on the number of special advisers.

Mr O'Toole: Am I summarising it correctly? There seems to be broad agreement in the Committee that there be a mechanism for either limiting the number of special advisers or creating an assurance that there is some form of check on special advisers. There may be a degree of consensus on that, but there is not agreement on whether it should be in primary legislation. There is another separate question — a slightly theological one — about eight versus four. Bluntly, I have worked in this stuff in a different jurisdiction and context. If it is about the conduct of the special advisers, I genuinely do not see —. I would rather that there were eight special advisers in the Executive Office behaving well than two who are either incompetent or misbehaving. I am still uncertain as whether the number needs to be in primary legislation, albeit I agree that there is a concern abroad about the lack of control over the volume of them and the lack of clarity about it.

Mr Catney: I have made some notes. I have written down that there is a lot of blowback on this from the Department. My personal feeling is that four is plenty. We have already heard that we are

operating through the pandemic with five. I have the feeling that, if they can operate through the worst times that we have had here — .We have already had eight. Was there eight during RHI?

Mr Allister: Yes.

Mr Catney: It did not work. We are here to look at the Bill. We will talk it over. I heard what my colleague said about the number between four and six. However, we have agreed that we have to reduce it, and I have a liking for four.

Mr Lynch: While we believe that six is appropriate, I agree with Matthew that a specific number should not be in legislation.

Mr Allister: But then how do you control it, if it is not in legislation?

The Chairperson (Dr Aiken): Just a general question out there for discussion amongst yourselves. The other Ministers have one spad each. The Executive are only supposed to be there for a coordinating function, as well as some of the roles that are specific to the Executive Office. Specifically, it is a coordinating function, and the role of special advisers to the First Minster and deputy First Minister is to advise the First Minister and deputy First Minister, but also to act with a degree of coordination. If you have eight special advisers, you are, in essence, man-marking every other Department. Instinctively, that feels wrong. I do not think that it is good government. Limiting it sends out a message that, "Your function is the coordination and support of the First Minister and deputy First Minister, rather than to provide oversight to every other Department". That is one of the problems that there has been in the past. On clause 1, we talked about the hierarchy of spads and trying to stop one spad being in charge of the other ones, particularly where a party has two or three spads in different Departments reporting to one in TEO. If I am correct, the intent of the Bill is to make sure that we do not get that, which is what happened with RHI.

Mr Catney: We have to look at savings. We have to look at the cost of this. No one seems to have mentioned the cost. If you take four from four, this runs into millions. It is about the costing as well. I do not think we can just pick a figure out. They would have to show what work is being done in order for them to have four. I do not what work the Executive Office has to do that needs four special advisers to deliver. They would have to make a case for that. At the minute, I have to agree with the Bill's sponsor. Four seems quite a lot, bearing in mind that every other Minister has one.

The Chairperson (Dr Aiken): It is not that we have to make the decision, but what we say —.

Mr Catney: We have to make a recommendation.

The Chairperson (Dr Aiken): We have to consider it and take a view on it. If you are content, I think that we have taken a view on clause 2.

Mr Allister: If there is a general agreement that it should certainly not be more than six, then support for the amendment that removes the 2007 Order, which was the one that gave the junior Ministers spads, would accomplish that. Then the question on the other amendment is whether or not it should be four or six. Those who support four can vote for that amendment, and those who do not can vote against it.

Mr Frew: We could probably get a consensus here as to what use a spad is for a junior Minister. We could probably go even further and talk about junior Ministers themselves. We could probably form a consensus that we do not think that a junior Minister should have a spad and that it should be a collective. I agree with your point that there is no way that a spad in the Executive Office should have rank over, or be regarded as having more expertise than, an educational spad or an economic spad. That is just peculiar. Of course, that relates to clause 1, which we have already talked about. We are probably there. Is eight excessive? It probably is. Matthew is toying with the fundamental question with regard to whether we need to legislate for it. My position is probably that we do. My fundamental issue is whether four is enough. Should we legislate for only four? How would that affect and tie the hands of a Department which we all wish to do well? That is where I am.

Mr O'Toole: May I raise a suggestion and test it with the Bill sponsor? This is a genuinely open-minded question. Is there an amendment that you could make, something that you could insert, that introduces a degree of flexibility but still requires, in legislation, the Executive Office to justify the

number? I know that there is a separate biennial report provision later in the Bill. Say, for the sake of argument, in a situation like when the institutions re-established themselves in January, the two parties running the Executive Office or the First Minster and deputy First Minister decide that, in order to deliver on the Programme for Government, they require four special advisers each. Rather than, at the moment, just appointing those four special advisers, they would have to make a report to the Assembly. There has to be a debate on a motion laid by the Executive Office to approve a number. There is a risk there that you get into time-wasting. You would not want people debating the merits of individual appointments on the Floor of the Assembly, because that could get dicey. It would probably lead to people not wanting to become spads because they would not want to have their CV debated in the Northern Ireland Assembly, which is understandable. Do you see what I am getting at? That is just a suggestion for discussion. Is there a way of having a bit more flexibility?

Mr Allister: I am going to tie that to clause 3. The Civil Service Commissioners (Northern Ireland) Order 1999 was made under prerogative powers, as was the Civil Service Commissioners (Amendment) (Northern Ireland) Order in Council 2007, which gave junior Ministers a spad. I am not abolishing prerogative powers in clause 3, but I am subjecting them to a vote of the Assembly. So if the Assembly, for example, reduced the number of spads in the Executive Office to four by amending the 1999 Order, which was a prerogative Order, it would be perfectly possible for the First Minister and the deputy First Minister — they would have the numbers to do it — to subsequently bring a prerogative order for the approval of the Assembly to, in fact, appoint 10 spads.

The Chairperson (Dr Aiken): But they would have to come and explain why to the Assembly.

Mr Allister: Yes, they would have to come to the Assembly. I think that ties it across.

The Chairperson (Dr Aiken): So, clause 3 covers it, Matthew. Are you content?

Mr O'Toole: OK. We are not making a final decision on our view on it. I am glad that we have had the discussion now, and it can be reflected in our deliberations that a concern was raised about flexibility.

The Chairperson (Dr Aiken): OK. So we have taken a view on clause 2.

The Committee Clerk: Before we move on, Chair, I am thinking about how that will be framed when it comes to formal clause-by-clause consideration.

The Chairperson (Dr Aiken): We have taken a view on clause 2. A view of the Committee, rather than the Committee's collective view — Maolíosa has already made clear what he thinks about the Bill, so it cannot be the combined view of the Committee — is that, by statute, there should be a limitation on the number of special advisers. However, the question of the number is what we are looking at now. At the moment, as you are proposing four, that will be subject to a debate on the clause in the House.

Mr O'Toole: I am not sure that there is complete consensus that there is definitely a need to do it in legislation. The way I would frame it is that there is a consensus on the need to limit the number of spads, but we need to have a discussion about whether and how legislation is the best means of achieving it. I remain open-minded about that; I am not ruling it in or out at this stage.

The Chairperson (Dr Aiken): When you have been here a couple more years you probably will.

Mr O'Toole: No doubt. I am sure, once I cross paths with one of these —.

Mr Frew: We probably do need to legislate for it. The problem that I have is the number. Is four the right number?

The Chairperson (Dr Aiken): We can reflect that, because we have taken that view.

We will now move on to clause 3. I think we have covered —.

Mr Allister: I just want to reiterate that the genesis of this was the bizarre appointment of David Gordon. How that was done was unknown to anyone until it emerged that it had been done —

The Chairperson (Dr Aiken): By royal prerogative.

Mr Allister: — by royal prerogative by Peter Robinson and Martin McGuinness. That legislation was made without the Assembly knowing that it was made. The point of clause 3 is to do two things: to say that, if you are doing that again, you must bring it to the Assembly for affirmative resolution, with no behind-the-scenes manoeuvring; and, secondly, that the specific legislation that was brought in to appoint David Gordon should be repealed. That is a non-issue because that post has fallen vacant, but, technically, it could still be filled. That the essence of clause 3.

The Chairperson (Dr Aiken): Comments?

Mr Frew: I get everything that Jim says. Bringing it to the Assembly makes it much more accountable.

Mr Catney: Does that prevent TEO appointing commissioners directly? That is sensible.

Mr Allister: Yes.

Mr Catney: It has plenty of other avenues.

Mr Allister: Yes. It has the numbers to do it in the Assembly if it wants to. It is about transparency.

The Chairperson (Dr Aiken): The other thing about it is, looking at RHI and the other pieces as well, that it gives protection to the First Minister and deputy First Minister or the people doing it. They are bringing in somebody who has to go through an affirmation process in front of the Assembly. We have checks and balances for that. That is in the spirit of it.

Are we content to move to the next clause?

Mr O'Toole: My only comment is that it is one of the less-contentious bits of the legislation. There are, clearly, questions around the way in which Mr Gordon was appointed, but I retain a degree of doubt about whether it was the crime of the century. As is the case with lots of these things, there is a question that we need to keep in mind. I am sympathetic to lots in the Bill, but there is an unresolved question from our earlier deliberations, and it will continue to be unresolved for me: there are democratic norms, such as good journalism and proper scrutiny, but it is our job, as Back-Bench MLAs, as all of us are, albeit that most of us are in Executive parties, to keep some of that stuff under check. In general, it is a less-contentious clause, and there is a degree of sense in it; not that there is not in others.

The Chairperson (Dr Aiken): There is also the question of what would have been deemed to be in the public interest. Taking the example of Mr Gordon, at the time, who was, one day, a senior producer with the BBC and 'The Nolan Show' — he was very much the poacher, or gamekeeper, depending on which way you want to look at it — and, within 48 hours, he was the Government press officer, for want of better terminology. One of the issues is public scrutiny and accountability. I do not think that there was an issue of him being appointed; it was the process and the fact that nobody was aware of it. If we are serious — we must be serious — about dealing with the output from RHI and the issue of government openness and accountability, that is a process that we should encourage. The Assembly being aware of what is happening is quite important.

We move on to clause 4, which concerns special advisers in the Executive Office.

Mr Allister: Clause 4 arises only if clauses 2 and 3 stand. Clause 4 is to make sure that anyone displaced as a spad is compensated, as is their right. Clause 4 is dependent on clauses 2 and 3.

The only potentially controversial issue in clause 4, I would have thought, is the date line. I was seeking to put that in as 31 March. I think that I said before to the Committee that I would like to keep that under review to see whether that is still a viable timescale if or when the Bill passes. I was minded to revisit that at Further Consideration Stage. There is an argument, and it is one that I am sympathetic to, that the closer you get to the end of the mandate, you should just leave it to the end of the mandate. That might well be appropriate. Has a specific date been set for the end of the mandate?

Mr O'Toole: I do not know whether someone could clarify this point of information. Do special advisers remain in office during a purdah period before elections here, or do they have to resign?

Mr Allister: No, they remain in office so long as their Minister is in office. Ministers remain in office until they are replaced.

The Chairperson (Dr Aiken): Therefore, even after the election, they stay in office until they are reappointed. Is that correct?

Mr Allister: I think that they stay in office during the election —

The Chairperson (Dr Aiken): Yes.

Mr Allister: — as I understand it. I think that, at the point of the election, they probably lose their position.

Mr O'Toole: The way that it works in Westminster is, basically, that they remain in post unless they are working on an election. In reality, that means that the vast majority of them have to resign because they will be expected to work on the Labour or Conservative campaign.

The Chairperson (Dr Aiken): Yes, but that has not been the process here. They have actually remained, along with the Minister. It is not like a purdah process where, by that point, it is normally accepted that they would have stepped down to go and do political work. Here, they remain in post.

Mr Allister: I think so.

Mr O'Toole: Presumably, they are, as they should be, barred from election campaigning.

Mr Allister: Yes. If they want to do that, they have to resign.

The Chairperson (Dr Aiken): On the principle that there should be suitable compensation, are we agreed?

Members indicated assent.

The Chairperson (Dr Aiken): We have a view on clause 4. We will move on to clause 5.

Mr Allister: Clause 5 addresses what I have always thought to be a gap in our accountability, namely that Assembly Members have oversight by the Commissioner for Standards, but it is much more opaque — let us put it like that — in respect of Ministers in their role as Ministers. Back in January 2017, the Assembly passed a resolution saying that Ministers should be brought under the umbrella of the standards commissioner. That is what clause 5 seeks to do.

One of the amendments adds a protection, both for Ministers and MLAs, against vexatious complaints. The commissioner would investigate only if he were satisfied — and the onus is on him to be satisfied — that the complaint is not frivolous, vexatious or an abuse of the complaints process.

The Chairperson (Dr Aiken): My view is that that is one of the critical elements of the Bill. I will take views from round the room.

Ms Dolan: Was there not a provision in 'New Decade, New Approach' (NDNA) about the complaints procedures against Ministers and for a panel of three commissioners? I do not really know whether this is relevant.

Mr Allister: There is. It is suggested in NDNA that the Executive Office would appoint a panel, which would then arbitrate on any complaints against Ministers. The obvious differences are that the Commissioner for Standards is independently recruited; it is an open competition; and he has powers to compel witnesses and documents. The three panel members that have been suggested — nothing has happened about that as far as I know —

The Chairperson (Dr Aiken): No, it has not.

Mr Allister: — would simply be hand-picked and would not have powers to compel witnesses and documents, but rather, would rely on information that is supplied to them by the head of the Civil Service. Indeed, you would have the anomaly that the Commissioner for Standards could be one of

the three, but if he were investigating a Minister, he would have fewer powers than if he were investigating a lowly MLA. That is why it does not seem to me to add up very well.

Mr Frew: This is one that I have sympathy with, and I also commend Jim for the amendment with regard to the vexatious claims or complaints process. I think that that is helpful, because you would not want to burden either the office of standards or a Minister with aggrieved MLAs or a person who does not agree with a policy decision that a Minister has taken.

However, we had a bizarre situation only recently, in which MLAs were being investigated by the standards commissioner for attending the funeral of Bobby Storey, yet standing stand by side and shoulder to shoulder with them were Ministers, who are not being investigated by the standards commissioner. I think that that is a really bizarre place to be because, ultimately, for a Minister to be a Minister, they have to be an MLA. Whilst they are a Minister, they still are MLAs, and they are still out there in the court of public opinion, where they are treated the same as us lowly MLAs who are not part of the Executive, and we never see or hear or are provided with any confidential Executive information. We may well be in Executive parties, but we have no connection to the Executive whatsoever. Our job is to scrutinise the Executive. I think that this is a useful clause, and I commend the amendment.

Mr Catney: As has already been stated, clause 5 brings Ministers under the same complaints procedures as MLAs, and I do not have any issue with that at all.

Mr O'Toole: I do not want to force the Bill's sponsor into giving a further evidence session, but I want to ask a couple of questions that are not just for Jim but for discussion so that we understand exactly where we are with this. In a sense, this clause is explicitly saying that the NDNA provisions are insufficient because they are not in statute. Can someone remind me where exactly we are in delivering on that? What is the latest statement in the delivery of a commissioner for ministerial standards?

The Chairperson (Dr Aiken): To say the least, there is not a lot of information on that. Indeed, it is one of the questions that I will be raising at the party leaders' forum this week because I have had no update of where it is supposed to be. Of course, one of the things that are probably wrapped in this as well is that there was an emphasis that the new head of the Northern Ireland Civil Service would be leading on a lot of these things, and we do not have a new head of the Northern Ireland Civil Service, unexpectedly. The Committee will discuss that later, when we discuss some other areas of work.

It has stalled, but, in a way, the clause allows us to achieve what is in NDNA and in a way that is seen as open and transparent. The fundamental difference in the NDNA approach is the question of what the independence of the process is. Bear in mind that we have agreed to the new Commissioner of Standards and to their role and responsibility.

I quite like the idea about protections for Ministers and MLAs against vexatious complaints. That sets an understanding of where we should go on this, and this meets the requirement of NDNA. In fact, this will probably go through faster than whatever will eventually emerge some time next year, potentially. We have no real oversight with it, and I will probably take as an action, Clerk, talking to the Chair of the Committee for the Executive Office about where we are on the issue. Again, we were supposed to be briefed at the six-month point, and we have not heard anything, so we should do that. Jemma, this meets the requirement of NDNA.

Mr O'Toole: On how our report will look, it is clear that there needs to be better enforcement of the ministerial code. There have been other prima facie breaches of the ministerial code in the last few months, including on Brexit-related issues, so I agree that we need to do something on this.

One way of framing our consideration might be that, since Jim first put this in draft legislation, it might be argued that the urgency or the need for it has been underlined because we have not seen clarity on the delivery of the NDNA provisions. Perhaps, in our report, it would be helpful to underline that, if the argument from the Department and the Civil Service generally was that this stuff works better when it is in code, that might have been a more robust and convincing argument had they delivered that sooner. So, there is an argument to be made there, and that is a core part of the Executive's response, but in order for that to be a robust response, you need to see the colour of their money.

The Chairperson (Dr Aiken): I accept that as a view, but speaking as an MLA rather than as Chair, I do not think that having it in the code works — bearing in mind also that when we had the permanent secretary here, she made it quite clear that it was normal custom and practice. Well, normal custom

and practice has not worked. That is the fundamental difference. If normal custom and practice had worked, we would not have been in the position we were in.

If we are serious about delivering on NDNA, it needs to have sufficient teeth to be able to do the role that we want it to through NDNA and the transformation. It cannot be in the code; it has to be in legislation.

Mr Frew: I agree with that point. If we, as MLAs, wait for the Executive, first of all, the cogs turn very slowly at the best of times. In fact, they usually stop, and then there is a lot of effort to get them cranked up slowly again. Remember our role. We are Members of the Legislative Assembly. We are legislators. We now have a vehicle to legislate, so why would we not take that opportunity?

The Chairperson (Dr Aiken): Are we content?

Members indicated assent.

The Chairperson (Dr Aiken): Clause 6 relates to records of meetings. Do we have any dissention on records of meetings?

Mr Frew: Other than to say that, one of the amendments that Jim brought became quite —. No, I think it is on clause 7.

The Chairperson (Dr Aiken): I did not think it was clause 6.

Mr Allister: The only amendment to clause 6 is to reduce the ambit a bit, so that you do not have to record as much as in the original draft. I took out "ministerial indication of intent". I was persuaded that that was a bit over the top.

Mr Frew: I commend the amendment.

The Chairperson (Dr Aiken): OK. Are we content with clause 6?

Mr Catney: I am happy enough.

Mr O'Toole: I am glad that the amendment has been proposed. I speak as a former civil servant, and, as we discussed, whatever the merits or otherwise, we have to be absolutely clear on, "This is what this is intended to capture". There is a huge amount of normal, completely innocent, practical Civil Service business, and it would be a bad thing if this legislation were to go through and we make it difficult for civil servants to do their jobs ordinarily. I recognise that the amendment is designed to minimise that risk.

The Chairperson (Dr Aiken): Clause 7 relates to records of contacts.

Mr Allister: I am minded to remove clause 7 so that I can bring in what is presently labelled clause 8 and clause 8A. If I can just explain; what I want to do is cover a situation where a Minister has a scheduled meeting with some outside body or other, and I want, in my new clause 8, to make sure that a civil servant keeps an accurate record of all that. The only exemption is when the Minister is meeting with his party. I do not think that that is our business.

In 8A, I want to deal with the situation where a Minister or special adviser is lobbied, maybe out at a dinner or whatever, and his ear is bent about an aspect of Government policy. I want to require that a note is fed back and kept of that. One of the issues out of the RHI inquiry, for example, was that meetings occurred with Moy Park, of which no records were kept, and other such matters.

I want to create a situation where, if a Minister is lobbied, that has to be recorded. The definition of lobbying is one that I stole from the 2014 GB Act. It is precisely the same terminology. That is what that is about.

The Chairperson (Dr Aiken): The proposal is that we take out clause 7 but go with clause 8 and clause 8A.

Mr Allister: Yes.

Mr O'Toole: What would the effect of taking out clause 7 be on reducing or clarifying the burden?

Mr Allister: Clause 7 was too woolly. The new clause 8 will, in due course, probably become 7 when it is recast. The new clause 8 (1) is pretty crisp:

> *"A civil servant, other than a special adviser, must be present and take an accurate written record of every meeting held by a minister or special adviser with non-departmental personnel about official business;"*

The Chairperson (Dr Aiken): The intent should be that if a Minister is, in his duties as a Minister, meeting anybody, it should, in some form, be recorded.

Mr Allister: Yes.

The Chairperson (Dr Aiken): I think that that is standard practice everywhere else.

Mr O'Toole: If it is in code. Just to test that hypothetical scenario, a Minister is shopping in Tesco and someone he knows — a local property developer or headmaster — takes him aside, and says, "Minister, I just want to have a quick word with you." — this is a constituent who he has known for many years and worked with because it is a local business or community person — "I just want to collar you for a second about this issue", and then they lobby. That is lobbying. That is a lobbying moment.

Mr Allister: Yes.

Mr O'Toole: We live in a small community, and the Minister in that scenario, showing normal courtesy, might politely nod along and say, "Yes, listen, I'll get someone in the Department to get back to you", and he forgets. If that becomes criminal in some way, how does a Minister defend himself in that situation? In creating a criminal penalty there, do you risk creating a situation in which it is very difficult for a politician, who is honest but a bit absent-minded or busy, to defend himself?

Mr Allister: There is no criminal offence in clauses 8 or 8A. It is just an obligation of the law that you shall, if you have been lobbied, put a record of it into the Department. It is not expecting an elaborate record, but you might expect, "Met the managing director of Moy Park. He told me that we radically needed to change a certain aspect of policy because it was hurting his industry". That is the sort of thing that I would see being captured. If the Minister says, "Right, come in and see me" and then there is a formal meeting, there will be a proper note of that meeting, under new clause 8.

Mr O'Toole: I take the point that you are not creating a criminal offence, but people will say that you are criminal in the sense that you are in breach of the law, if you could be deemed to be in breach of the law, albeit there is no specific offence with a tariff attached to it. To test a hypothesis in which said headmaster, GP or whoever — it does not have to be a business person; we know that the organisation that you named was heavily involved in lobbying during the RHI process, not all of it to the public good by the looks of things — or a person in the community who wants to lobby a Minister, they could surreptitiously record that conversation. They could then use that recording against the Minister in question. If the Minister does not go back to the Department immediately and organise that meeting — if they are innocently absent-minded — there is then the Joe or Jane Bloggs who lobbied the Minister in Tesco, at a school parent-teacher evening or at a sports event, and said, "Look, I lobbied this person, and they were in breach". As an unintended consequence, that would worry me. What would be the defence to that? It is not a criminal offence.

Mr Allister: It is important that it is not a criminal offence. It is a legal obligation and a statutory duty that is put on someone. It is refined by the definition of what "being lobbied" means:

> *"the development, adoption or modification of any proposal of the government to make or amend ... legislation ... the modification of any other policy [in relation to] contracts ... financial assistance ... licences ... or the exercise of any other function of the government."*

It has to be something specific whereby you could say, "Right, I have just been lobbied about that. Having been lobbied, I need to make sure that there is a note of that in the Department, because I do not want to be in the situation of another RHI where a person says that they told me such-and-such. It is a protection for me to keep *[Inaudible]* to the Department". We are not looking for a four-page essay but at saying to your private secretary, "Would you take a note that, on Saturday past, I was lobbied about X?".

The Chairperson (Dr Aiken): In the existing ministerial code and in the Nolan principles, in which objectivity, accountability and openness are referenced, there is a burden on the Minister, if that happened, to report it. One problem is that that has not happened. Matthew, unlike the system that you and I are aware of, when you were with various Ministers and an approach had been made to them, even if they attended a dinner, somebody would have sat down and made a note that they were at a dinner at which the following people were present. They will not necessarily record what was said — they probably will not — but they could say that there was a record of a meeting, which is what this is about. The fact that it was already in the existing code and that it did not happen underlies the reason that it has to go into statute.

Mr O'Toole: That is in their capacity as a Minister, Chair. If a Minister is at a dinner and the private secretary is there, they are there because they are speaking at the Lions Club in Ballywherever, and the private secretary is there to join them. I still have concerns about the potential for a huge amount of utterly innocent behaviour. I put this thought to the Bill sponsor, recognising that there is merit in the intent behind it. We have very particular structural political challenges here, some of which came out through RHI. We have a unique set of institutions to reflect a unique society. We are also a very small society. Most Northern Ireland constituencies are rural, and people often know one another very well. People see their MLA in the pub, the church, the chapel, the Orange hall, the GAA club or the supermarket. That presents a particular challenge for the most honest politicians of any hue, because they will be collared and lobbied in the course of their daily life in a way that probably is not the case elsewhere. Politicians here are not absentee constituency MPs, like Winston Churchill was in Dundee, who go back once a year. People live in the communities that they represent. From that perspective, we have to be careful. That is my concern.

Mr Catney: It is proposed that clause 8A will replace clause 7, which I want to come on to. Clause 8 puts a legal requirement on civil servants to be present at meetings, and that seems very sensible to me. In simple terms, without going into all the detail or trying to stretch it out as much as possible, that is sensible.

Clause 8A is an amendment to introduce a requirement that a:

> *"minister or ... special adviser must provide ... a written record to the department of all such lobbying and the department must retain such records."*

That is important for accountability. It is important for me as an MLA and for all of us as legislators to step up to the plate and do the job that we were elected to do. There has been no evidence on this. I cannot see any, bar maybe what comes out through RHI. This seems very clear to me.

Ms Dolan: That is already in the code, so I do not see the need for it. I agree with Matthew — that might not happen very often — and he raises a valid point. That is all I want to say on that.

Mr Frew: I think that Jim's amendment has maybe further clouded our judgement rather than simplifying things. The simple fact is that the old clauses 7 and 8 that are currently in the Bill, which Jim thought were "woolly", were more clear-cut. The danger in all this is the collaring, because "Records of contacts", which is in the old clause 7, states:

> *"and retain records of all meetings".*

I do not think that any of us could perceive walking down an aisle in Tesco and bumping into a teacher as being a "meeting". Nonetheless, it is still lobbying in the same way as it would be if a Minister leaves the Chamber after Question Time and, while walking to their office on the second floor, some idiot of an MLA comes up to talk about the biggest bonkers idea that he has in his head. The Minister is expected to record that as having been lobbied for. Again, I worry about making it too detailed, because an opposition MLA or a member of the public who is not sympathetic to a Minister or their policies may well try to use it as some sort of weapon.

As I read this, I see a wee intricacy. The new clause 8 talks about it still being:

> *"except for liaison with the minister's political party."*

I understand why that has to be in, but it is not in the new clause 8A. Is that an omission? If it is important for clause 8 to have that exception, should it not also be in clause 8A? I do not know the answer to that. I am just throwing it out there out loud, which is sometimes dangerous.

Mr Allister: There might actually be something in that latter point; maybe it should be. I think that it was in my original.

Mr Frew: Yes, it was. The old clauses 7 and 8 state the exception in both cases.

Mr Allister: OK. Let me think about that. I might withdraw the one that is there and re-substitute it. It is probably a fair enough point to add that to it. I now remember why; I did think about that. I was thinking that, if somebody wants to be Machiavellian, they will make sure that they do it in a party meeting rather than in the open, but maybe you cannot legislate against that.

On the point about the scope of the lobbying, I remind you that that is precisely the 2014 GB provision about lobbying. I do not think that it has been hugely problematic in GB, and I think that it is a protection for Ministers. You spoke about some malcontent raising the issue of lobbying a Minister and their not doing anything about it. Would it not be a good idea for a Minister to get into the habit — I am sure that he always carries a notebook — of reminding himself and as a protection for himself that he must report, "On Monday morning, I was lobbied about x, y and z"?

Mr Catney: It can happen to an MLA. If we are walking down the street and somebody stops us to try to lobby us, we ask them to contact the office, where we all have caseworkers. It is only when you have that contact. That is the same thing that I would expect from a Minister: "Contact my office".

Mr O'Toole: I should declare an interest. I am a former civil servant, and I worked as a consultant lobbyist for a brief period after I left the Civil Service and before I became an MLA. The 2014 Act refers to the meaning of consultant lobbying. Could clarity be added to the Bill that would address that here? I do not know whether I am looking at the same legislation. I am looking at the Transparency of Lobbying, Non-Party Campaigning and Trade Union Administration Act 2014, which states:

> *"For the purposes of [Part 1], a person carries on the business of consultant lobbying".*

Mr Allister: Yes. The 2014 Act creates duties about registering consultant lobbyists and states, therefore, who has to be registered. I am extracting from it what it means to be lobbied.

There is a problem with restricting it to consultant lobbyists. If Moy Park — I keep using that example — does the lobbying through its managing director, it does not count, but if it does it through its PR consultant, it does.

Mr O'Toole: Yes, but could you not draw a definition so that it is if a person has a clear material business interest in that which is being lobbied on? I understand that you will get into something else, but you could then draw a distinction between the primary-school headmaster who is lobbying about playing fields provision and the Moy Park chief executive or any other business. Could there be a clarification about people who are lobbying? That then gets you into issues. With that definition of lobbying, you would at least make it clear that it is about people making a profit — I almost said People Before Profit — and lobbying to advance a business interest as opposed to anything else.

Mr Allister: The lobbying definition is that you are trying to change the law, to get a licence or to change policy. It is not about just talking to them in generalities; it is about trying to induce some change. Does that not speak to an interest?

Mr O'Toole: It does, although I suppose my question — I do not know the answer to it and I realise that it is not a question that we will be able to answer in the next few minutes — is this: is there a way of differentiating a primary-school principal — I keep using that example as if they are the font of all decency, but it could arguably be a religious minister, a charity person or a charity campaigner? You

could then get into difficult territory about whether they have an interest, but it would allow you to distinguish between Moy Park, the developer or whoever else.

Mr Allister: I suppose that it is about how you make that distinction.

Mr O'Toole: I agree.

The Chairperson (Dr Aiken): There has been sufficient discussion — I am looking at the Bill's sponsor — about potentially retaining clause.

Mr Allister: No. Clause 7 is being replaced by new clause 8. Clause 7 was targeted at organised meetings, the meetings that they hold.

The Chairperson (Dr Aiken): Taking the temperature of the room, I do not think that we can say that we have a combined view on this.

Mr Catney: It is proposed that clause 7 will be replaced by clause 8A. That seems clear enough. I have a clear view on it, but I do not know about everyone else.

Mr Allister: I will think more about Paul's point. I cannot think of a good reason not to include a meeting with a political party. I do not have an answer to Matthew's point, and maybe there is no answer.

Mr O'Toole: That is usually the case.

Mr Allister: I will think a little more about it.

Ms Dolan: I raised this last week and, again, this is nothing personal against Jim, but this is turning into another evidence session. We are doing clause-by-clause scrutiny of the Domestic Abuse and Family Proceedings Bill in the Justice Committee, which is fair enough. Paul knows about all the discussions that we have had. On numerous occasions, members here have said, "I will ask the Bill's sponsor", but the Bill's sponsor is not here to be asked about the Bill; we are here to do the clauses. I am sorry, but it does not sit right with me; it is a conflict of interest. Again, it is nothing against Jim, but I have been thinking about it all week and today it has been more evident than ever, especially when Jim said that he would take on board Paul's point and fine-tune something that Matthew had raised. That is not what clause-by-clause scrutiny is. I just want to put that out there again. I will leave it up to you to decide.

Ms Claire McCanny (Northern Ireland Assembly Bill Office): Just to clarify, we are not doing clause-by-clause scrutiny today; we are doing Committee deliberations. With a departmental Bill, sometimes the departmental Bill team sits in and provides clarification just to assist the Committee in reaching a view. Today is not a clause-by-clause session, and the Committee has a right to reach a view on the length of time that you are discussing things, but today is very much the deliberation phase. At the clause-by-clause stage, each person will have a vote in their capacity as a member of the Committee.

Ms Dolan: Will Jim's vote count in that?

Ms McCanny: Yes, Jim will be there as a member of the Committee. It just so happens that a member of the Committee is the sponsor of the Bill.

Mr Wells: Which Jim? Clever Jim or thick Jim? *[Laughter.]* Is it me or him?

Ms Dolan: Jim Allister.

Mr Wells: Clever Jim. OK.

The Chairperson (Dr Aiken): Has the Committee considered clauses 7, 8 and 8A? I think that we have.
Members indicated assent.

The Chairperson (Dr Aiken): We will move on to clause 9, "Use of official systems".

Mr Frew: Again, I am grateful to Jim for the amendment on this. I have always had a massive issue about somebody making a mistake. Someone could have a device with a number of email accounts on it and, by pure accident, hit the wrong button. Typing out an email in haste and hitting the wrong button should not in itself be the crime; the crime should be the non-registration of the incident and non-rectification of it. Registering it could be done in many ways: a note could be made of it by an official or it could be forwarded to the correct account, which, in itself, would create the public record that would be obtainable, thereby ensuring accountability and transparency, which is key. The clause is worthy and has a lot of merit. The shifting of the crime is to be welcomed.

Mr Catney: The clause proposes to create a criminal offence; is that right?

Mr Allister: Yes.

Mr Catney: The sanctions are a bit heavy. The Bill's sponsor has spoken about an amendment to it, but have we written to the Department of Justice on that amendment and, if so, received anything back?

The Chairperson (Dr Aiken): No.

Mr Catney: Do we need to?

Mr Allister: Obviously, I do not feel that we to, but it is a matter for the Committee. I made the point last week, I think, that, at the moment, it is a hybrid offence: that is to say that it can be tried in either the Magistrates' Court or the Crown Court. If it were simply a summary offence, the person accused would have no right to a jury trial because the penalty is only six months. By making it a hybrid offence, you do two things: you afford the Public Prosecution Service (PPS) the choice of bringing it in the petty sessions or in the Crown Court; and the accused person has the right, if it is being brought in the petty sessions, to elect for trial by jury. I do not think that, if you are going to afford the right to trial by jury, the Crown Court penalty can be less than two years. I cannot think of any — I will not say that there is not — criminal offence in the Crown Court for which the penalty is less than two years. The maximum in the petty sessions is, of course, 12 months, although here it is six months.

Mr Lynch: Like many of the clauses, that is already in the codes. It brings about the problem of creating a criminal offence. The issue of proportionality was raised. I think that it is over the top and is not needed.

Mr O'Toole: It is going in the right direction, in the sense that the tariff has come down. While open to discussing lots of aspects of the Bill, I remain very concerned about the principle of that being a criminal offence, not just because, as I sit here, I could probably bring up evidence from my Hotmail account of my having been in breach of that hypothetical law on countless cases in my career.

Mr Wells: Resign, resign.

Mr O'Toole: I already did, Jim, to deal with that. *[Laughter.]* I am glad that I did. I have two points. Fundamentally, I am very cautious about making this a criminal offence per se. Also, there is a question that we as a Committee should consider and reflect on, and it is that, if part of what we want to do is to ensure that we have good people in government, in the Civil Service, in ministerial office and in special adviser posts, we need to think about the potential chilling effect that that would have for people. I understand that, when we discussed this, the Bill sponsor said that there would be defences, and there would obviously be a test whereby the public prosecutor would say, "Well, is this really worth it?". Clearly, you would have to pass many hurdles, but, still and all, it is creating a criminal offence. It theoretically being a criminal offence for someone to use their Hotmail on a busy ministerial visit gives me pause. I am very nervous about that.

The Chairperson (Dr Aiken): On the use of official systems, going back to RHI, one of the issues was that a lot of emails were being run on an unofficial server, where a lot of government work was being done.

Mr O'Toole: I do not think that it was an unofficial server. It was that they were using private email.

The Chairperson (Dr Aiken): No, the information had to be recovered from a separate server. It had to be recovered from the DUP's server. A lot of the information had been kept on its server. Let us transpose it to a slightly different situation, and we should maybe ask this question. For a civil servant to use classified government information — it does not matter what the classification is — and private accounts on a non-government-secure system and not to account for that would be a significant offence under the Civil Service code of conduct. We are talking about special advisers, who are technically civil servants, and we are talking about Ministers who deal with official, sensitive government information. We are not talking about inadvertently sending something from a Hotmail account. One of the biggest problems — I was very struck by this when we had the evidence from the head of the Civil Service — was that they did not seem to have any concern about the fact that there seemed to be unofficial communication systems. It is as though they had never even heard of Hillary Clinton.

Mr O'Toole: Chair, with respect, that is wrong. You have said that we are not talking about people using private accounts: we are talking about that.

The Chairperson (Dr Aiken): Yes, sure.

Mr O'Toole: Clause 9(1) states:

> *"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".*

Mr Allister: No, that is the amendment.

Mr O'Toole: Indeed. OK, fair enough, but there is still a criminal offence that exists.

Mr Allister: The criminal offence is failing to put it on to the official system. The criminal offence is not the misuse of your private account; it is failing to record on the official system that which emerged there. That is now the criminal offence. I listened very carefully to the points that were made, and that is why the amendment that redrafts clause 9 states:

> *"If out of necessity it is not possible to comply with the requirements of subsection (1) the minister or (as the case may be) special adviser or civil servant must within 48 hours, or as soon thereafter as reasonably practicable,*
>
> *(a) copy to the departmental system any written material generated during the use of nondepartmental devices or systems; and*
> *(b) make an accurate record on the departmental system of any verbal communications relating to departmental matters."*

That, of course, is to deal with the mischief that, in RHI, private systems were being used to hide things. Now, the criminal offence is not the use of the private system but the failure to transfer the information from the private to the official.

Mr O'Toole: May I ask one further question? This is to the room, but the Bill sponsor will probably know more. What is the normal practice for sentencing guidelines? If the Bill were to pass with this clause included, how and when would sentencing guidelines be produced?

Mr Allister: Generally, sentencing guidelines are produced by the Office of the Lord Chief Justice. They would not be produced for as minor an offence as this. You would not see sentencing guidelines for much where the penalty is under 10 years. I do not think that we will get sentencing guidelines.

Mr O'Toole: OK.

Mr Frew: Chair, this is very important: it is a very positive, major shift from Jim's published Bill. This amendment does great things, and I accept it because I did not want anybody to be penalised for mistakenly hitting a button with their thumb. If you value transparency and accountability, if you recognise that there are parties in our Executive that are quite authoritarian in nature —

Mr O'Toole: Speak for yourself.

Mr Frew: — and if you see the Civil Service as not being fit for purpose and recognise the major failures therein, you will see that something like this is the right thing to do and the right direction to take. To me, it is totally acceptable to have a tariff. I get Jim's issue about having flexibility to make it a hybrid offence, given that there might be a case that has real public interest. That is why it is essential to keep it a hybrid. If you keep it a hybrid, I do not think you have a choice with the tariff. Remember that we set only "not exceeding" tariffs. It is very rare that we do the opposite, and there is a fundamental question about whether we should. I am OK with that. Remember: it is a term not exceeding two years. If it injects the flexibility of a hybrid case, it is a good thing.

The Chairperson (Dr Aiken): Of course, taking the Committee's view, it is about the deterrent value of the process.

Mr Allister: As I have said before, as with any good criminal offence on the statute book, if it does not have to be used, it is working.

The Chairperson (Dr Aiken): We will move on to clause 10, "Register of interests".

Mr Allister: That is simply to equalise for Ministers and special advisers the burden of making an entry in the register of interests. It is relatively uncontroversial. I have adjusted it to bring it in line with the codes — from 21 to 28 days — so that they marry. The only other change that I propose is to define family members in the manner in which they are already defined in other legislation.

The Chairperson (Dr Aiken): So, it is tidying up. Are members happy to take that view and content to move on?

Members indicated assent.

Mr Allister: Clause 11 is the other criminal offence, "Offence of unauthorised disclosure". Again, it has been adjusted to bring in the defence of reasonable cause and to, essentially, reverse the onus so that the prosecution has to prove beyond reasonable doubt that the course of behaviour was not reasonable. The penalty has been reduced from the originally anticipated five-year maximum to two years but retains the hybrid facility. It is about sharing, to the advantage of others, official information.

The amendment takes care of the points raised by Matthew and others about the spad who, as part of his duties, has to brief the press. If something is done in the lawful pursuit of official duties, it could not be an offence, and, for example, if it is something done on the foot of statute, such as providing information in a freedom of information (FOI) matter, it could not be an offence. It is to catch only the person who is abusing their position and enriching themselves or others, or attempting to, through the sharing of information that they should not be sharing, where there is no reasonable excuse for doing so.

The Chairperson (Dr Aiken): I have one question on this, and it comes down to the tariff. I noted the comments from the DOJ and others about the size of the tariff. I was also struck by the Serious Fraud Office's (SFO) rules on insider trading, which is essentially, what this is. I understand reducing the penalty. However, bearing in mind that we might be talking about something that gives somebody a considerable financial advantage, I believe that this is as bad as insider trading and should be looked at in a similar way. I hear the views about reducing the tariff, but bearing in mind the preparatory information that was passed on, what else we saw in the RHI inquiry and the considerable amounts of money potentially involved, I have a concern. Are we taking a view that we are happy with the lower tariff, or do we want to go back to what it was?

Mr Frew: On that specific question, I think that, when we look at other tariffs for this type of crime, it seems sensible that Jim has reduced it from five years to two years The critical line in all of this, and Jim had a similar line in the original Bill, is:

> *"official information to another for the financial or other improper benefit of any person or third party."*

That is the amended clause, but he had something similar in the original. To me, that is the key line. I think that that is a criminal offence, and should be. Having regard to all the other things that a spad, official of Minister has to do in the course of their duties, I welcome the clarification and the

amendment to reduce the tariff for that crime. Of course, sometimes there has to be a defence, too, with regard to what is in the public interest and what should be in the public sphere. Therefore, some protection for whistle-blowing must also be applied.

Mr Allister: It is in there.

Mr O'Toole: Notwithstanding our previous conversation, I retain, for some of the same reasons as before, a fair degree of concern about creating a criminal offence, in general, in relation to this. Notwithstanding that, Chair, in relation to your mentioning the SFO and insider dealing, is there a particular tariff that, you think, should be equalised?

The Chairperson (Dr Aiken): No, not if this was just confidential information or information that had been shredded. However, one of the issues that we have in Northern Ireland relates particularly to RHI, where there were clear examples of people being given inside financial information. Some people were given a significant financial opportunity that enabled them to grow and develop their business while other businesses were specifically excluded. In some respects, this is not just a question of preparatory information being released. To me, bearing in mind why we have to bring in legislation, there is something more significant. What we saw was not just an example of bad behaviour; it was behaviour that will have made a really significant difference to companies' profits and badly financially disadvantaged some people. Look at the definition of insider trading relating to the flow of information from companies and at how that is dealt with by the Serious Fraud Office or in the City of London. I have a concern that this is a more serious element.

Mr O'Toole: To be honest, we are venturing into making quite vague statements. Insider dealing relates to price. I am looking at the relevant statute, which refers to "price-affected securities". The world of publicly traded entities is heavily regulated: there are clear definitions of what represents price-sensitive information; and clear definitions of what should be disclosed to the markets. Entire industries in the City of London and in New York are devoted to this. It might be a bit of a fool's errand for us to try to lead the world in creating criminal offences for this kind of thing, albeit that clear concerns arise out of RHI.

The Chairperson (Dr Aiken): This is not just a question of RHI. Consider the issues with the National Asset Management Agency (NAMA) and Red Sky: you could run off a whole catalogue of issues, specifically within Northern Ireland, that went beyond the mere passing on of information.

Mr O'Toole: I completely agree with that. However, we need to be careful about using the term "insider dealing", because specific legal issues apply to that.

The Chairperson (Dr Aiken): My background and experience are not in law.

Mr Allister: I want to make one comment. There is a general public expectation, I would have thought, which comes from how far people were scandalised by RHI, that the Assembly will be seen to do something that can be pointed to as a serious reaction to it. A deterrent must be created so that a spad will not think it appropriate to distribute to family members advantageous information about when something is to close. Making that a criminal offence would be in line with what the public expect us to be doing after RHI. These are modest steps, but they are a deterrent. They mark the communal disapproval and the Assembly's disapproval of what has gone on in the past.

Mr O'Toole: I am not disputing that; I agree with it. My question is this: as we scrutinise this clause, what exactly is the effect that we are trying to have? Personally, I disapprove of and worry about the criminalisation aspect of clauses 9 and 11, but the mitigations in clause 11 concerns me more. The Chair mentioned Red Sky and NAMA, and there is clearly a culture that people want to see addressed. If the culture can be addressed with legislation, good, because there are real concerns. I am still concerned about the principle of criminalisation in clauses 9 and 11. However, the problem that clause 11 is getting at is one that needs to be got at somehow, and we need to be clear in doing that.

I have other specific questions, but I am not sure whether we have time to discuss them now. I am not sure whether this next issue has been addressed. Clause 11, for example, states:

> *"directly or indirectly, confidential and/or commercially sensitive information ... for the financial or other potential benefit".*

Is there a risk that, if we say, "other potential benefit", there will be a huge swathe of *[Inaudible.]*?

Mr Allister: In light of the evidence from the Human Rights Commission, that was changed to "financial or other improper benefit".

Mr O'Toole: That has changed. OK.

Mr Allister: That has been done. The point that I want to make about that is this: it turns out that, in RHI, giving information to others was not a criminal offence: the police have confirmed to me that there are no investigations into the distribution of information. So, the question for the Assembly is this: should that have been a criminal offence? I think that it should have been. A spad, a civil servant or anyone else who did that should have been liable to be pursued. The Official Secrets Act does not help; it is more about national security. Therefore, there seems to me to be a gap, which people were able to exploit in RHI, and I think that we should close it.

The Chairperson (Dr Aiken): We have seen enough precedent in NAMA, Red Sky and who knows what else to show that there needs to be that degree of penalty. Are we content to take a view on that and move on to the last clause?

Members indicated assent.

The Chairperson (Dr Aiken): We will move on to clause 12.

Mr Allister: As I explained before, clause 12 is just to make sure that this is not a moment-in-time inspection and that we keep under review all the things that we could do better. Therefore, as court judgments come up and public bodies report, we will have a stocktake every two years to make sure that everything has been tidied up that needs to be tidied up.

The Chairperson (Dr Aiken): Are there any comments? OK. Thank you very much indeed.

The Committee Clerk: Chair, do we need to do the remaining clauses? Further down is clause 11A on accountability.

The Chairperson (Dr Aiken): Clause 11A is "Accountability to the Assembly: provision of information".

Mr Allister: That is about making sure that Committees have enhanced authority to seek information from Departments without having to go through the rigmarole of section 44 of the Northern Ireland Act.

The Chairperson (Dr Aiken): I cannot think of any member of the Committee who will object to that.

Mr Frew: It is sensible, given what we have been through since we came back six months ago. The Department has been atrocious with regard to accountability and transparency, so I think that that is a key element.

The Chairperson (Dr Aiken): Claire, just to keep myself right, do we have to do clauses 13, 14 and 15?

Ms McCanny: Yes.

The Chairperson (Dr Aiken): Are there any comments on clause 13?

Mr Allister: It is the commencement date. Again, I might want to revisit that when we see at what point on the calendar Further Consideration Stage is.

Mr Catney: I want to go back to clause 11, which links to clause 11A. Is it worth getting more evidence — this question is for the Bill sponsor — from the Department of Justice on that new amendment, which relates to accountability to the Assembly re provision of information?
Mr Allister: I do not think so. I think that the Committee is capable of making its own decision.

Mr O'Toole: Apologies, again, but have we had much written evidence specifically on clause 11A? Does that amend the Northern Ireland Act?

Mr Allister: No, I do not think so.

Mr Catney: It is intended to strengthen the scrutiny function of the Committee. It is a new clause. That is why I am linking it back to clause 11. I have to ask the question on clause 11 to link it to clause 11A. There was an issue. Is there room for a bit more evidence?

The Chairperson (Dr Aiken): Speaking as the Chair, I do not think that we need to see any more evidence that insufficient information is provided. I have spoken to other Committee Chairs, as you will have spoken to members of other Committees, and the flow of information is, to say the least, not acceptable. I do not think that we need to receive evidence to realise that that is what is happening.

Mr Catney: OK.

Mr Frew: I back you up 100%. The question was this: should we ask the Department of Justice? I am not sure that the Department of Justice is qualified on clause 11. Even if it is, are you taking the Department's view or the Minister's view? If you are taking the Minster's view, is it a personal view or is it the view of the Executive? The head of the Civil Service told us in this very room that the Executive do not support the Bill. I happen to know, having spoken to individual Executive members, that that is not the case. You have to ask yourself this question: when is the evidence that you are given by a Department credible?

The Chairperson (Dr Aiken): I want to move this on. Bear in mind that we do not have a head of the Civil Service any more. I do not think that we need to get any extra evidence on clause 11A, Pat. I hate to say that it is self-evident, but it is.

Mr O'Toole: My question is less about evidence as in, "Yes, this is a great idea", or, "No, it is a terrible idea". This is where we suffer from a dearth of academics or think tanks. Is there anyone in academia who is an expert on the functioning, or lack of functioning, of the Northern Ireland Assembly and its Committees and who might want to give us contextualising information? I say that not to hold up scrutiny but just so that we are fulsome in doing this. I am happy to take it as a task and to go away and think about it.

The Chairperson (Dr Aiken): I love people who volunteer. Well done, Matthew.

Mr O'Toole: My point is that not all evidence is a partisan yes or no. Some of the evidence is technical explanation and scrutiny that we are not always qualified to do. Do you see what I mean?

The Chairperson (Dr Aiken): I understand that, Matthew, but the question is this: do we, as Committee members and Assembly Members, feel that we are getting the necessary information? We do not need outside academic interest to explain to us that we are not getting the flow of information that we need.

Mr Catney: There has been a lot of evidence against clause 11, mostly to do with the length of the term. What I am trying to say is that it might be worth getting some evidence on clause 11A. I am not sure how that all fits in with it. I hear you say that it is self-evident.

Mr Frew: Chair, we are at the point where we are going to consult turkeys on how they feel about Christmas. There is no way that the Civil Service will want clause 11A or clause 11.

The Chairperson (Dr Aiken): Or the Bill.

Mr Frew: Or the Bill. That is not a justification not to have it.

Mr O'Toole: Sorry, I want to be absolutely clear on this. You are right, Paul; I am not saying that they would. They are not consultees whom you would ask, "Do you like this thing that will create more of a burden and enable Assembly Committees to get more information from you?". They will not like it. I was a civil servant. You do not want anything that will add further burden to your job, whether it is

controversial or not. The only point that I was making is this: is it incumbent on us to ask for further technical evidence on the effect of this? I do not say that in order to delay scrutiny. I am asking whether it is worth us taking that as an action — I am happy to do it, or it could be someone in the Clerk's team — and spending literally half an hour finding out whether there is an academic at Queen's who could write us a couple of pages on this.

The Chairperson (Dr Aiken): Sorry, Matthew. I am consulting the Clerk.

Mr Allister: Matthew asked about the 1998 Act. Claire, when that amendment was drafted, the Bill Office obviously believed that it was within the competence of the Assembly to make that change. We can be assured that this is within the competence of the Assembly and that Legal Services agree with that — yes?

Ms McCanny: I have not sought a formal opinion. Admissibility criteria do not include legislative competence. They will take a view on that. I remind members that the Committee has been charged only to take a view on the Bill as introduced.

The Chairperson (Dr Aiken): Matthew, is your proposal that you see whether there is further information on clause 11A that you can bring along to the Committee?

Mr O'Toole: Is the proposal that, otherwise, we take a vote today?

The Chairperson (Dr Aiken): We are not taking a vote; we are taking a view.

Mr O'Toole: We are taking a view. If it would delay our taking a view on the Bill as a whole, I do not think that I need to do that.

The Chairperson (Dr Aiken): Therefore, we will take a view on clause 11(a) but make a note that, if any further information comes forward, we will look at it.

Mr O'Toole: I will go away and see whether anybody wants to give more detailed thoughts on that.

The Chairperson (Dr Aiken): We got past clause 13. We are at clause 14.

Mr Allister: This is "Interpretation".

The Chairperson (Dr Aiken): Yes.

Mr Allister: Clause 15 is the short title.

The Chairperson (Dr Aiken): Are we happy with clause 15?

Members indicated assent.

The Chairperson (Dr Aiken): Claire, are you happy that we have taken a view?

Ms McCanny: Yes.

The Chairperson (Dr Aiken): Excellent. Thank you very much indeed, and thank you, Committee.

The Committee Clerk: There is the schedule, Chair.

Mr Allister: The schedule deals with transitional provisions for payments should anyone be laid off because of this. It is pretty standard.

The Chairperson (Dr Aiken): Are we content?

Members indicated assent.