

Chapter 38 – The initial submissions to close the scheme

The submission of 31 December 2015 to close the scheme in principle

- 38.1 As outlined in the previous chapter, on 31 December 2015 Mr Mills prepared a submission recommending closure of both the domestic and non-domestic RHI schemes as soon as possible. The purpose of this submission was to secure the Minister’s approval, in principle, to this course of action.
- 38.2 In accordance with practice at that time, the submission had been sent to the Minister’s Private Office on 31 December and then to Mr Cairns, his SpAd, who noted the following queries on the document:
- “Can we 1) consult or inform UFU & industry that this is happening now, 2) set out time scales?”²⁰²²
- 38.3 Minister Bell told the Inquiry that he did not recall seeing the submission with this added note and that he would add his signature to every submission that he received and read. Unusually, the Inquiry has been unable to find any copy of this submission signed by the Minister.²⁰²³ There is, however, an email from Mr Stewart to Mr Mills and Dr McCormick of 12 January 2016 which records that, at a meeting the day before, “the Minister accepted the advice on RHI.”²⁰²⁴
- 38.4 On 8 January 2016 Mr Mills responded to Mr Cairns’ comments by confirming that reasonable notice of the closure of the scheme to new applicants would be provided, but not yet, since the Department did not have the Minister’s policy agreement nor DSO clearance as to how suspension of the scheme might be effected. In addition, there was a need to check whether the Executive was willing to provide funding (to meet the anticipated annual shortfall between the funding provided by HMT for the NI RHI schemes and DETI’s liabilities under those schemes). Mr Mills pointed out that there was no formal statutory requirement to consult on the proposal and that it would not be appropriate in the circumstances.²⁰²⁵
- 38.5 At this point there were a number of changes in personnel at both ministerial and SpAd level: on 12 January 2016 Ms Foster became First Minister of Northern Ireland; she was replaced as DFP Minister by Mervyn Storey, with Dr Crawford continuing as his SpAd. Ms Foster’s SpAds at OFMDFM now included Timothy Johnston, Richard Bullick and Stephen Brimstone.

The submission of 19 January 2016 recommending consultation

- 38.6 Mr Bell continued as DETI Minister, and Mr Cairns as his SpAd, and on 19 January 2016 Mr Mills advanced a further submission to the Minister’s Private Office specifying the following in relation to its urgency: “Desk Immediate: timing to be cleared by 20 January to enable public and Executive consultation to begin.”
- 38.7 The submission suggested that a three-week period of consultation in relation to the proposal to close the RHI schemes was “not considered unreasonable.”²⁰²⁶ Mr Mills’ covering email emphasised the need to launch the consultation on 20 January in order to enable policies to be

2022 IND-25141 to IND-25146

2023 WIT-22635; TRA-12477

2024 IND-05881

2025 DFE-294370

2026 WIT-10662 to WIT-10682

finalised and approved and the legislation progressed before the Assembly rose in March.²⁰²⁷ The submission emphasised that a decision was needed immediately in favour of legislative change to close the scheme “as swiftly as possible” in order to minimise overspending. There was concern that the Assembly was due to rise in mid-March because of the impending election and, if the legislation was not introduced before the last day of sittings, there was a real risk that an opportunity to do so would not arise again until October.²⁰²⁸

- 38.8 On the same day, Dr McCormick emailed Mr Cairns underlining the importance of the timetable set out in the submission.²⁰²⁹ The public consultation proposed was to last for a period of three weeks to give stakeholders advance notice of closure while moving to prevent further overspend as swiftly as possible. The period of consultation was suggested to be reasonable in the circumstances, given that there had been a more substantial consultation in 2013 and this proposed consultation concerned only a single issue.²⁰³⁰ The proposal for the coming into operation of the closure regulations was early to mid-March.²⁰³¹
- 38.9 A draft consultation document was also provided along with the submission, together with an appropriate letter to the Chairman of the ETI Committee and a paper for the Executive Committee.²⁰³² Both the letter to the ETI Committee and the Executive Committee paper highlighted a surge of over 900 applications in the six weeks before passage of the 2015 amendment regulations and a forecast budget deficit of around £75 million, to be recovered from the DEL budget over the next five years, which would increase to £165 million if both the non-domestic and domestic schemes remained open to new applicants.²⁰³³ The submission confirmed that the closure/suspension and the budget position could be considered “significant or controversial and cross-cutting”; hence, in accordance with paragraph 2.4 of the Ministerial Code and the relevant provisions of the Northern Ireland Act 1998, the need to refer the submission to the Executive Committee.²⁰³⁴
- 38.10 As noted above, Dr McCormick sent a follow-up email to Mr Cairns on 19 January reminding him how pressing the matter had become.²⁰³⁵ Mr Cairns forwarded the draft submission and supporting papers to both Dr Crawford and Mr Brimstone, respectively the SpAd to the Finance Minister and a SpAd within OFMDFM.²⁰³⁶
- 38.11 Early in the afternoon of 22 January, Minister Bell cleared that submission, together with a submission relating to closure of the NIRO scheme, before leaving for a business visit to the USA on the following day with Mr Cairns and Dr McCormick.²⁰³⁷ The circumstances of this clearance, and particularly its subsequent withdrawal, were matters of considerable concern to former Minister Bell when he gave his television interview to Stephen Nolan in December 2016. They are dealt with in detail below.

2027 WIT-10662

2028 WIT-10662 to WIT-10664

2029 WIT-10662

2030 WIT-10664

2031 WIT-10665

2032 WIT-10666 to WIT-10682

2033 WIT-10666

2034 WIT-10664

2035 WIT-10662

2036 WIT-21682 to WIT-21708

2037 TRA-12498 to TRA-12499

The withdrawal of Minister Bell’s approval of the submission

38.12 Shortly after Minister Bell had cleared those submissions, Mr Cairns sent the papers relating to both submissions to Mr Johnston, SpAd to the First Minister. Mr Cairns emphasised the urgency of a decision on the submission, consistent with what he had been told about this within DETI, by stating that this was:

“Another one that needs to be out the door today. Again it’s a consultation on closing RHI. Keeping it open before Christmas has caused potentially a £27 million over-spend in this area.”²⁰³⁸

38.13 In his written evidence to the Inquiry Mr Cairns maintained:

“...I believe that on the afternoon of the 22nd January Mr Bell had tried to contact Mr Johnston without success. Mr Bell had urgent constituency business. He instructed me to email Mr Johnston, which I did, if Mr Johnston did not get back to me (or the Minister) by a certain time (I believe 4pm). [sic] The submission was to be cleared. If Mr Johnston got in contact and said the submission should not be cleared I was to hold the submission for further consideration.”²⁰³⁹

38.14 Mr Johnston did in fact respond by email just after 2.00 pm and made clear that there was no chance of clearing the submission on the Friday, since it needed to be discussed with a “wider group”. He explained that he would not be able to get “Arlene and party view until Monday” which would be 25 January.²⁰⁴⁰

38.15 However, Mr Cairns did not see Mr Johnston’s reply until after the 4.00 pm deadline but replied to Mr Johnston:

“No problem. I’ve had a lengthy conversation with Dr Crawford about them. Not sure we have much alternative but to go with officials’ advice - it’s more handling of interested parties that needs to be managed now.”²⁰⁴¹

38.16 As a result of discovering Mr Johnston’s email, Mr Cairns then realised “Goodness we shouldn’t have issued clearance”²⁰⁴² and took steps to ask Minister Bell’s Private Secretary to ‘hold’ the submission, i.e. to treat it as not yet having been approved by the Minister.

38.17 Minister Bell told the Inquiry that he believed that he had cleared the submission and that nobody informed him that it had been held or rescinded.²⁰⁴³ This contention formed part of his concern at a later stage that steps were being taken by Mr Cairns (at the behest of others within his party) without his knowledge or authority.

38.18 However, Mr Cairns did email Mr Johnston’s response to Minister Bell and his Private Secretary at about 4.45 pm, informing the Minister that he had told Mr Kerr to “hold the sub.”²⁰⁴⁴

38.19 Mr Bell maintained in his oral evidence that any communications about departmental business would always have been sent to a Government email account and that he had not received Mr

2038 INQ-15063

2039 WIT-20238

2040 INQ-15084

2041 INQ-15084

2042 TRA-12977

2043 TRA-12911

2044 INQ-60166

Cairns' email informing him that the submission had been 'held' because it had been sent to his private 'Hotmail' account.²⁰⁴⁵

38.20 However, Mr Kerr confirmed that the Hotmail address was, to the best of his knowledge as Mr Bell's Private Secretary, the only address used by the Minister to conduct business by email and that he was instructed by the Minister to use it.²⁰⁴⁶ Similarly, when asked about sending departmental business to Minister Bell, the Permanent Secretary from that time, Dr McCormick, agreed that the Hotmail account was "the only email that I ever used if I was sending things to him."²⁰⁴⁷

38.21 The Inquiry was provided with significant documentary evidence of the use of his Hotmail account by Minister Bell, including correspondence with Mr Kerr and former First Minister Robinson.²⁰⁴⁸

38.22 Mr Cairns also said that he had discussed the matter (that is to say, the rescinding of the approval of the submission of 19 January which Minister Bell had given on 22 January) with Minister Bell the next day during their travels in the USA and that both had expressed annoyance at the unprofessionalism of Mr Johnston who did not seem to prioritise a call from a DUP Minister, especially when Mr Johnston had expressly asked to be consulted. They both felt that what had happened was embarrassing and unprofessional.²⁰⁴⁹ Minister Bell denied in his oral evidence to the Inquiry that such a conversation had taken place, but he was quite unable to suggest any reason why Mr Cairns would have made it up.²⁰⁵⁰

38.23 Meanwhile, Mr Mills updated Mr Stewart and Dr McCormick on the progress of the submission by email, explaining that he had experienced:

"A slightly bizarre afternoon with efforts focused on clearance of the two submissions. The green light was given for both around half four and then rescinded around 20 minutes or so later – so neither sub has issued with serious repercussions for the timetables of both."²⁰⁵¹

38.24 Mr Stewart told the Inquiry that he had never experienced a submission being "uncleared".²⁰⁵² He contacted Mr Cairns after this seeking expedition of clearance and Mr Cairns replied on Monday 25 January confirming that the submissions were "in the hands of DUP party officers and will be dealt with by them", adding that "I have recommended officials' advice but party officers have requested time to deal with them. I have no idea if they will approve or not."²⁰⁵³ Mr Stewart told the Inquiry that he thought that this delay was to enable engagement to take place between Sinn Féin and DUP SpAds in relation to the proposed course of action.²⁰⁵⁴

2045 TRA-12503 to TRA-12507

2046 WIT-25847

2047 TRA-15431

2048 IND-29745

2049 WIT-20238

2050 TRA-12501 to TRA-12503

2051 WIT-11768

2052 TRA-11753

2053 WIT-11769 to WIT-11770

2054 TRA-11757

DUP consideration of the recommended course for closure of the scheme

- 38.25 As noted above, further to his email correspondence with Mr Johnston on 22 January, Mr Cairns told Mr Stewart by email that the submission recommending the course to be adopted to secure closure of the RHI scheme was in the hands of DUP “party officers” and would be dealt with by them. To similar effect, on 25 January at 2.57 am, during their visit to the USA with Minister Bell, Mr Cairns texted Dr McCormick informing him that “RHI and NIRO now in hands of party officers. Minister cleared but DUP party officers on Friday afternoon called papers in.”²⁰⁵⁵
- 38.26 Mr Johnston subsequently took issue with the reference by Mr Cairns to “party officers” and in an email to Dr McCormick on 1 February 2016, he said:
- “For absolute clarity and the avoidance of any doubt, no such discussion took place at any time regarding RHI or any associated matters with the party officers. Therefore, the POs did not recall approval. As a matter of course these types of issues are not brought to the attention of officers.”²⁰⁵⁶
- 38.27 Mr Stewart told the Inquiry that he understood the use of the term ‘party officers’ to refer to other DUP SpAds rather than, for example, the Party Chairman or Secretary.²⁰⁵⁷
- 38.28 In a written corporate statement provided to the Inquiry, Stephen McMurray, then head of the RHI Task Force at DETI, confirmed that Energy Division had been told by DETI Private Office that the submission had been recalled within half an hour of being approved by Minister Bell. The statement continued:
- “The First Minister’s SpAds had intervened and given that this issue had escalated so significantly, and was now explicitly for Executive consideration, that is not surprising. In a fast-developing situation, it was not unreasonable for them to seek to create an opportunity for further consideration.”²⁰⁵⁸
- 38.29 There was undoubtedly some confusion on the part of those in the United States at this point (the DETI Minister, his SpAd and the Permanent Secretary) as to precisely what was happening at home in Northern Ireland in relation to the submission of 19 January. In his evidence Mr Cairns described a “bizarre” teleconference situation, in the course of a visit to Stanford University, in which he, on one side of the quad, was being advised by Mr Johnston that the submission was not to be cleared while, on the other side, Minister Bell was speaking to Mr Stewart who, as is dealt with shortly below, had been informed by the Head of the Civil Service that the First Minister wanted the submission cleared. In a subsequent call from Mr Johnston, Mr Cairns was told that First Minister Foster and senior DUP members were being consulted.²⁰⁵⁹
- 38.30 It is clear from the exchange of relevant emails at that time that the delay in clearing the submission was causing considerable concern amongst officials with regard to the consequences of any associated significant delay in consultation and passing the necessary legislation to close the scheme. For example, on 26 January Dr McCormick emailed Mr Sterling, then Permanent Secretary at DFP to say: “Unthinkable this is delayed any longer.”²⁰⁶⁰

2055 IND-01880

2056 WIT-10686

2057 TRA-11755

2058 WIT-00127

2059 WIT-20238 to WIT-20239

2060 DFE-153056

Findings

204. The Inquiry is satisfied that Mr Bell regularly used his Hotmail account for ministerial business and that it was justifiable for Mr Cairns to believe that the Minister would read his correspondence sent to this email address on 22 January 2016.
205. The Inquiry therefore finds that Minister Bell’s assertion that he had no knowledge of the reasons for holding back the submission on 22 January 2016 to be irreconcilable with the evidence from Mr Cairns (that he forwarded on that day an email to Minister Bell providing information about what had happened and why). The fact that Mr Cairns shared this information with Minister Bell by email on 22 January 2016 makes it unlikely, in the view of the Inquiry, that he would have had any reticence about discussing it with Minister Bell the following day, as he (Cairns) claimed to have done. In the circumstances, the Inquiry accepts Mr Cairns’ evidence that he discussed the ‘holding’ of the submission with Minister Bell on 23 January 2016.
206. It is unfortunate that the process involving consideration of this submission of 19 January by the DETI Minister and by the First Minister or her SpAds was not more structured. A more structured process may have prevented the ‘recall’ of an apparently cleared submission.
207. The Inquiry accepts the evidence that the submission was referred to the First Minister and SpAds and not to other DUP party officials. This action was appropriate, particularly due to the cross-cutting nature of the issues.
208. The collective lack of clear leadership and of structured communication from all senior individuals involved, combined with the drawn out approvals processes, led to unnecessary delay in clearing the submissions. Nevertheless, the Inquiry accepts that the clearance process became much more difficult once it was determined that the matter was ‘cross-cutting’ and therefore required Executive approval.