

Chapter 39 – Continuing discussions on scheme closure

Rising concern at the delay in closure

39.1 On 26 January 2016 Mr Brennan emailed Dr Crawford and Mr Sterling within DFP expressing concern at the continuing rising costs of the scheme stating:

“Andrew – in the discussions with the Minister recently on the Chief Secretary letter, we discussed the lack of action by DETI on RHI. You mentioned that you would take forward the issue at a political level.”²⁰⁶¹

39.2 Mr Brennan pointed out that DETI’s decision to recommend going out to consultation would only delay closure and generate further cost increases.²⁰⁶² Dr Crawford told the Inquiry that he believed that this was a request for him to engage other SpAds and, while he was happy to discuss the financial implications with Mr Brennan, his emailed response clearly stated that: “The DETI Minister is responsible for the policy decisions on both of these matters.”²⁰⁶³ Mr Sterling, in turn, emailed Mr Stewart urging him to do “all that is possible to close the existing scheme as a matter of extreme urgency...”.²⁰⁶⁴

39.3 That same evening Dr McCormick stated that he had received a clear message from Mr Cairns and Minister Bell that the matter was now one for the First Minister and the Head of the Civil Service. This was consistent with the fact that the 19 January submission to Minister Bell had been referred to Mr Johnston for consideration by him and others, including the First Minister. Dr McCormick’s impression, he said, was that their focus was on seeking a better outcome from HMT and his information was that there would not be a decision until the following Tuesday (2 February 2016).²⁰⁶⁵

39.4 However, on the following day, 27 January 2016, Sir Malcom McKibbin, then Head of the Civil Service, wrote to Dr McCormick expressing his extreme concern over the escalating costs of the scheme and the potential impact on the 2016-17 budget as well as on subsequent budgets.²⁰⁶⁶ Sir Malcolm also referred to the ongoing engagement between DETI and DFP and noted that DETI was looking at options to close the scheme as soon as possible. He continued:

“Given the seriousness of the situation, I would ask you to let me know what actions *you* are going to take to expedite this matter so that ***I can keep the First Minister and deputy First Minister informed....I have spoken to the First Minister who has made it quite clear that it is the responsibility of DETI to mitigate costs and to urgently cease accruing further liabilities from this scheme for the NI Block in 2016/2017 and beyond.***”²⁰⁶⁷ (the Inquiry’s emphasis)

39.5 The Inquiry has considerable difficulty in reconciling this email with any suggestion (if indeed this is to be inferred) that the First Minister’s SpAds had not familiarised her with the draft

2061 DOF-42048

2062 WIT-30831

2063 TRA-13227 to TRA-13228; WIT-30831

2064 DFE-153053

2065 DOF-42045

2066 DFE-10394 to DFE-10396

2067 DFE-10394 to DFE-10395

submission to Minister Bell which had been cleared by him but recalled as a result of one of those SpAds (Mr Johnston) on Friday 22 January.

- 39.6 Dr McCormick replied to Sir Malcolm on 27 January pointing out that Minister Bell had approved the proposals for urgent action to close the scheme, but that approval had been recalled by “Party Officers”. He explained that DETI required ministerial authority in order to bear down on the cost pressure, implicitly emphasising that this authority had not been provided in light of the fact that the DETI Minister and his SpAd were awaiting further input from Mr Johnston.²⁰⁶⁸
- 39.7 The Inquiry notes that this elicited the following message sent from Mr Bullick’s iPhone to Mr Johnston: “This is quite a dangerous email to be in the system!”.²⁰⁶⁹ When asked about this by the Inquiry during 2018 Mr Bullick stated that he had no specific recollection of the matter. However, he agreed it was possible that he was referring to Dr McCormick’s email and he further stated that he did recall “being concerned about the reference around this time to party officer involvement not least because it was untrue.”²⁰⁷⁰ During his oral evidence on the issue Mr Johnston stated that it was his understanding, at the time, that it was the reference to “Party Officers” which was considered to be dangerous “because it wasn’t actually factually the case”²⁰⁷¹
- 39.8 On 27 January Sir Malcolm met with Mr Sterling and Mr Brennan and he was advised that the unfunded spend for the scheme in 2016-17 could be as high as £33 million, although there was still uncertainty about that figure.²⁰⁷² On the same day Sir Malcolm met the deputy First Minister, Martin McGuinness, to brief him with regard to the RHI scheme.
- 39.9 In the course of that briefing, he dealt with the purpose of the scheme, the sudden spike in the autumn of 2015, the increasing costs and the approximate scale of the impact on the DEL budget in-year and in future years, the difficulties associated with quick closure and the view of the First Minister that, while DETI was primarily responsible for securing closure, it was now also an Executive issue. The deputy First Minister was most concerned about the impact upon the DEL budget and undertook to discuss the matter further with his SpAds.²⁰⁷³
- 39.10 Later on 27 January Sir Malcolm wrote to Dr McCormick again expressing extreme concern about the escalating costs and the potential impact on the DEL budget. On this occasion, he enclosed an anonymous letter from a constituent, which had been handed to him by First Minister Foster on 26 January, claiming that the non-domestic RHI scheme was being “seriously abused” by many businesses.
- 39.11 The allegations by the author of the anonymous letter included that the scheme was not being properly monitored and that it was being used by many people who had not previously required heating. Large factories which were said not to have had previous heating were alleged to have had installed three biomass boilers which they intended to run all year round. A local farmer with no need for heat was said to be intending to install biomass boilers in order to heat an empty shed over the next 20 years.²⁰⁷⁴ These allegations of widespread abuse, although at

2068 DFE-10397

2069 IND-28911

2070 WIT-75153

2071 TRA-14793

2072 WIT-64139

2073 WIT-64872

2074 TEO-00014 to TEO-00016

that point untested, would likely have added to the concern that the decision which had been taken to close the scheme should now be expedited.

- 39.12 Dr McCormick replied to Sir Malcolm on 28 January with some initial comments, indicating that Minister Bell would confirm approval of the DETI submission to close the scheme as soon as possible and that they were seeking to reduce the time required for the procedures.²⁰⁷⁵

Discussions between SpAds to seek to expedite closure

- 39.13 On the same date, 28 January, there was a meeting called at short notice at Stormont Castle between DUP and Sinn Féin SpAds, which (unusually) Mr Stewart was invited to attend. While Mr Stewart was unable to recall the identities of all attendees, he told the Inquiry that there had been a clear shared view that closure was urgently required without public consultation.²⁰⁷⁶ He felt that there was consensus that the extent of the financial crisis justified the decision not to proceed with consultation and to close as soon as possible.
- 39.14 Mr Stewart gave evidence to the Inquiry that he was quite satisfied that there was no desire on behalf of the DUP advisers to delay closure and, if anything, Sinn Féin advisers were even more keen to adopt that course of action.²⁰⁷⁷ Mr Stewart noted that officials would not normally attend such political meetings and suggested that his invitation might have been issued in the absence of Mr Cairns, who was still in the United States at this point.²⁰⁷⁸

The submission of 29 January 2016 still recommending consultation

- 39.15 Discussions continued between Departments, with concerns expressed by both the First Minister and the Finance Minister, and on 29 January Mr Mills advanced a further draft submission to Minister Bell recording those concerns; seeking to balance the risk of increasing financial loss with that of potential legal challenge if there was no consultation in relation to the proposal to close the scheme; and advising that the use of the Urgent Procedure was necessary to secure Executive approval for Tuesday 2 February.²⁰⁷⁹ The Urgent Procedure is a process set out in the Ministerial Code by which, where Executive discussion and approval of a matter is required (by reason of its significant, controversial or cross-cutting nature) but the urgency is such that this cannot await full discussion at the next Executive meeting, such approval can be given by means of agreement between the First Minister and deputy First Minister.
- 39.16 The submission set out three options: firstly, dispensing with consultation and substituting an announcement of scheme closure at the end of February, which carried a significant risk of legal challenge; secondly, holding a consultation contemporaneously with securing ETI Committee agreement, which would see closure by 7 March but would also be vulnerable to legal challenge on the basis of the consultation not being genuine; thirdly, a reduced period of two weeks' consultation about closure of the scheme before enacting legislation – which was the recommended option.²⁰⁸⁰ This recommendation seems designed to try to expedite the process to some degree (including making up for time thought to have been lost by the withholding of clearance of the submission of 19 January) but without abandoning consultation

2075 TEO-00019

2076 WIT-27547 to WIT-27548

2077 TRA-11775

2078 TRA-11783 to TRA-11784

2079 DFE-153094 to DFE-153105

2080 DFE-153095

on scheme closure altogether, in light of concerns that this would lead to a successful challenge to the decision to close the scheme by way of judicial review.

- 39.17 In dealing with presentational issues, the submission also advised that consultation seemed better than announcement alone.²⁰⁸¹ In practice option 3, which was the option that would take the most time, seems to have been the same as the recommendation contained in the draft of 19 January, save for the reduction of the consultation period by one week.²⁰⁸²
- 39.18 Having obtained the agreement of the Minister to option 3, later on the same date Mr Mills forwarded a further submission to Minister Bell requesting his consent for a draft letter seeking the views of the Finance Minister in order to comply with paragraphs 2.4 and 2.14 of the Ministerial Code, which require “the views of any other Ministers with a relevant interest” to be consulted.²⁰⁸³

DFP input to the proposed course and amendment of the draft Urgent Procedure letter

- 39.19 A draft of the letter of request to be sent by Minister Bell to the First and deputy First Ministers to effect closure of the RHI scheme by way of the Urgent Procedure was sent by DETI to DFP for comment on 1 February 2016 in order to comply with the DETI Minister’s obligation under the Ministerial Code to consult the DFP Minister, since DFP clearly had a relevant interest in the financial implications of the continuation of the scheme.²⁰⁸⁴
- 39.20 On 3 February Mr Brennan returned the paper to Dr McCormick at DETI with a series of proposed amendments including removal of the reference to public consultation.²⁰⁸⁵ This appears to have been the formal means by which the preference between DUP and Sinn Féin SpAds for closure without consultation was introduced into the decision-making process.
- 39.21 On 3 February 2016 Mr Stewart sent a submission to Minister Bell marked “Desk Immediate” in order to enable a letter to be sent to OFMDFM invoking the Urgent Procedure to close the NI RHI scheme. Annexed to the submission was a draft letter from Minister Bell to OFMDFM confirming that he had consulted the Finance Minister and had secured agreement to dispense with consultation.²⁰⁸⁶
- 39.22 The reference to public consultation was not the only thing which had been removed from the draft letter of request. On 1 February Mr Brennan had emailed the DFP Private Office and Mr Sterling saying “...we have significant concerns about this DETI draft. We will get tracked changes back to you in next hour or so.”²⁰⁸⁷ That draft with tracked changes then appears to have been discussed by Minister Storey, Mr Brennan and Dr Crawford.²⁰⁸⁸ As a consequence, it was proposed that the reference to the role played by the poultry industry in causing or contributing to the surge in RHI applications during 2015 contained in paragraph 5 of the draft should be removed.²⁰⁸⁹

2081 DFE-153096

2082 DFE-424268 to DFE-424287

2083 DFE-153090; DFE-153106 to DFE-153114

2084 DOF-02296; DFE-125280 to DFE-125284

2085 WIT-11825 to WIT-11830

2086 WIT-11863 to WIT-11873

2087 DOF-02296

2088 DOF-02300

2089 WIT-43252; DOF-02300 to DOF-02304

- 39.23 Dr Crawford accepted that he had been responsible for asking for its removal, explaining that it was his belief, and remained his belief, that the use of biomass for heating in other industries was contributory to the spike and overspend and not just the poultry industry.²⁰⁹⁰ He said that he was concerned that singling out Moy Park and the poultry industry was unfair.²⁰⁹¹ When further questioned by the Inquiry he accepted that use of biomass by the poultry industry was responsible for the most significant increase in numbers of applications and that by removing the words the First Minister and deputy First Minister were being deprived of accurate information.²⁰⁹²
- 39.24 Dr Crawford stated that withholding information had not crossed his mind and that, looking at it now, he probably should not have removed the reference, but that he was concerned about the implications “in terms of what narrative was being created.”²⁰⁹³ He informed the Inquiry that it was not uncommon for SpAds to make changes to the papers of other Departments in certain circumstances (for instance where the SpAd’s own Department had a legitimate interest in the subject matter).²⁰⁹⁴
- 39.25 The fact is that Dr Crawford had been, on his own admission, “one of the key people”²⁰⁹⁵ in DETI with whom Moy Park had dealt over seven years and also, by January 2016, an individual with three family members operating, between them, 11 biomass boilers that were accredited on the NI non-domestic RHI scheme. In this particular regard, Dr Crawford said to the Inquiry that, in or around October/November 2015, he verbally informed David Sterling and Mike Brennan in DFP that he had family members on the RHI scheme and asked whether he needed to put it in writing. Dr Crawford said to the Inquiry that he was told, by the then DFP Permanent Secretary David Sterling, that he did not have to do so.²⁰⁹⁶ Mr Sterling was asked about this in his own evidence to the Inquiry and he indicated he had no recollection of such a conversation, and it was something he considered he would have remembered had it occurred.²⁰⁹⁷ It is the case that at the time of these events there was no established mechanism specifically for the reporting by SpAds of potential conflicts of this nature. However, as this Report will later consider in the chapter dealing specifically with the role of SpAds, and as is clear from the main terms and conditions of their employment,²⁰⁹⁸ they were at all material times subject to Section 6.01 of the Employee Relations part of the NICS Handbook.²⁰⁹⁹ In his evidence to the Inquiry regarding SpAds²¹⁰⁰ Sir Malcolm McKibbin specifically referred to the obligations laid down in paragraph 2.1.g of Section 6.01, which provided as follows:

“g. you must not misuse your official position, or information acquired in the course of your official duties, to further your private interests or those of others. Conflicts of interest may arise from financial interests and more broadly from official dealings with, or decisions in respect of, individuals who share private interests (for

2090 WIT-21900; TRA-13238

2091 TRA-13239 to TRA-13240

2092 TRA-13240 to TRA-13241

2093 TRA-13242

2094 TRA-13244

2095 TRA-13263

2096 TRA-13219 to TRA-13222

2097 WIT-05187 to WIT-05188; TRA-16503

2098 DOF-00567 to DOF-00575 and in particular DOF-00572 to DOF-00573

2099 DOF-00021 to DOF-00108

2100 WIT-64012

example, freemasonry, membership of societies, clubs or other organisations and family). Where a conflict of interest arises, you must declare the interest to your Establishment/Personnel Division so that a decision can be made on the best way to proceed.”²¹⁰¹

- 39.26 Returning to what happened to the draft letter from the DETI Minister to OFMDFM on which the DFP Minister had been asked to comment, the amended draft was forwarded by DFP to DETI, where Dr McCormick referred it to Mr Stewart.²¹⁰² On 2 February Mr Stewart replied that he could see no difficulty with most of the suggested changes, adding “However, I do not see any reason to remove wording from para 5 (which is factually correct)...”.²¹⁰³ The reference to the poultry industry and Moy Park was then reinstated²¹⁰⁴ but removed again from the final document²¹⁰⁵ on the same day at the direction of Mr Sterling. Mr Sterling told the Inquiry that he “didn’t think it was worth having a major set-to with Dr Crawford about it” and his approach was “If he (Dr Crawford) wants it removed then let it go.”²¹⁰⁶ Mr Sterling conceded that he had not sought to discuss with Dr Crawford why he wanted the sentence to be removed and, at the time, he did not consider it to be significant in the context of a particularly intense period.²¹⁰⁷
- 39.27 Also, on 2 February an email exchange took place between Dr McCormick, Mr Stewart, Mr Wightman and Mr Mills which confirmed the continuing lack of understanding amongst officials about the original funding for the non-domestic RHI scheme.²¹⁰⁸ The only correspondence discussed was Mr Parker’s email of 15 April 2011 to Ms Clydesdale.

2101 DOF-00026

2102 WIT-11816

2103 WIT-11816

2104 DOF-36771 to DOF-36775

2105 DOF-36776 to DOF-36780

2106 TRA-16538

2107 TRA-16538 to TRA-16539

2108 DFE-225579 to DFE-225580

Findings

209. The Inquiry acknowledges that there was a difficult balance to be struck between expedition and the risk of legal challenge when deciding whether to dispense with consultation.
210. In the circumstances the Inquiry accepts that it was appropriate for OFMDFM SpAds and DFP to seek to dispense with consultation in order to expedite scheme closure.
211. Dr Crawford sought to remove an accurate statement of explanatory fact concerning the poultry industry's contributory role in the autumn of 2015 to the surge in non-domestic RHI applications from the draft "Urgent Procedure" document sent to DFP on 1 February 2016.
212. It appears that, in 2015 and 2016, there may have been no well-understood formal mechanism, other than informing the Establishment/Personnel Division (about which there was no specific training or instruction), for the declaration of conflicts of interest by SpAds. Nevertheless, Dr Crawford should have ensured, at the time when he was asked to engage in matters relating to problems with the RHI scheme in his role as DFP SpAd, that he had formally reported to the DFP Permanent Secretary, in writing, the fact he had family members with boilers on the RHI scheme and that he had close links to the poultry industry.
213. There should have been, at the time of these events, a clear formal procedure in operation within Departments for the periodic recording of interests and the declaration of conflicts of interest as and when they arose.
214. In view of the conflict of interest that Dr Crawford had, which had not been formally declared, he should not have been involved in advising on DETI's Urgent Procedure document relating to RHI. He also should not have caused the removal of relevant information from the Urgent Procedure document relating to the fact of the poultry industry's significant contribution to the overspend on the RHI scheme.

