

## Chapter 40 – The submission to close the scheme without consultation and the changes made to it

### Decision to proceed with closure as quickly as possible

- 40.1 As noted in the previous chapter, on 3 February Mr Brennan of DFP returned the draft Urgent Procedure letter from the DETI Minister to OFMDFM to Dr McCormick at DETI with a series of proposed amendments which were suggested by DFP. These included the removal of the reference to public consultation on the proposal to close the NI RHI schemes.<sup>2109</sup> From that date, this appears to have been adopted as the joint position of DFP and DETI.
- 40.2 On the same date, 3 February 2016, Mr Cairns emailed Mr Stewart enquiring in the following terms:
- “Can someone urgently contact the Assembly authorities to see if an emergency procedure can be put in place to bypass the whole process – a suspension of standing orders or something like that to enable this to be stopped asap.”<sup>2110</sup>
- 40.3 Although this suggestion was not able to be pursued – by reason of the need for further regulations and the requirements of the enabling legislation as to how these must be made – it gives some indication of the urgency which was now being felt and, therefore, the expedition which was now being sought.
- 40.4 Also on the same date Mr Stewart appears to have received a telephone call, presumably from Mr Cairns, confirming that OFMDFM agreed to proceeding without consultation and without the conventional consideration of the draft regulations by the Assembly Committee.<sup>2111</sup> Mr Stewart therefore prepared another draft submission, revised by Mr Wightman, to be sent to Minister Bell seeking immediate clearance for a letter to be sent on the following day to OFMDFM to approve an urgent decision on closure of the NI RHI scheme.<sup>2112</sup>

### Changes to the draft submission of 3 February 2016

- 40.5 The draft submission recorded that the DETI Minister had previously agreed to close the scheme to new applicants, subject to public consultation. Paragraph 4 referred to proceeding without consideration and approval by the ETI Committee, and accepted that such a decision was “likely to attract strong criticism from the Committee”. It recorded that to meet existing RHI commitments around £95 million would have to be found from resource DEL budget for the next five years and that if both RHI schemes remained open the deficit would increase to £185 million.<sup>2113</sup>
- 40.6 At paragraph 5 the submission stated as follows:
- “Assuming prompt Executive approval the shortest feasible timescale would involve consideration by the Business Committee next Tuesday (9 February), with a proposal to schedule the debate for Monday 15 February. The scheme would close on 16 February (with less than 2 weeks public notice).”<sup>2114</sup>

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2109 WIT-11825 to WIT-11830

2110 WIT-11831

2111 TRA-11794

2112 WIT-11833 to WIT-11845

2113 WIT-11836

2114 WIT-11836

The Inquiry notes that a number of significant amendments were made before the documents were finalised.

40.7 Paragraph 1 of the original draft dealt with the background to the scheme and recorded the earlier decision to close it subject to public consultation. It then contained the following sentence:

“However, following discussion with DFP and OFMDFM, you have agreed to proceed with legislation to close the schemes without public consultation.”<sup>2115</sup>

40.8 The reference to OFMDFM was subsequently removed and ultimately replaced by the following reference to consultation with other Ministers:

“You have consulted the Finance Minister on these issues and he concurs with your concerns and desire to minimise the exposure of the NI Block DEL.”<sup>2116</sup>

40.9 Paragraph 4, which dealt with proceeding without prior consideration and approval of the ETI Committee, was amended to remove the words:

“Informal advice from OFMDFM officials is that this is feasible, but highly unusual.”<sup>2117</sup>

40.10 It appears that those amendments to the original draft, which had also included a request to remove any reference to the Finance Minister, were made by Mr Cairns without the knowledge of Minister Bell.<sup>2118</sup> Mr Cairns did, however, copy the draft with suggested changes tracked to Dr Crawford, Mr Bullick and Mr Johnston on 4 February.<sup>2119</sup> Shortly afterwards, on the same day, he forwarded the amended draft to Mr Stewart.<sup>2120</sup> Mr Cairns wrote:

“The Minister made the decision to dispense with notice and consultation and no advice from other ministers or departments played a part in that decision.”<sup>2121</sup>

40.11 However, Mr Stewart was aware that there had been consultation with the Finance Minister, and he had been present at a meeting of OFMDFM SpAds on 28 January.<sup>2122</sup> He persuaded Mr Cairns to reinstate the reference to the Finance Minister (quoted earlier) as being required in order to demonstrate compliance with paragraph 2.14 of the Ministerial Code, which requires that when a decision is to be made by the Executive using the Urgent Procedure the responsible Minister must set out in writing, so far as practicable, the views of any other Ministers with a relevant interest (which would require, in this case, engagement with the DFP Minister to ascertain his view).<sup>2123</sup>

40.12 Mr Stewart assumed that the amendments proposed by Mr Cairns had been approved by Minister Bell and, for his part, Mr Cairns gave evidence that he believed his draft with tracked changes would have gone to Minister Bell’s Private Office from which it would have been referred to the Minister.<sup>2124</sup> In the course of his oral evidence to the Inquiry, Mr Cairns accepted

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2115 WIT-11836

2116 WIT-11864

2117 WIT-11836; WIT-11864

2118 TRA-12944 to TRA-12946

2119 DFE-293206

2120 WIT-11850 to WIT-11861

2121 WIT-11850

2122 WIT-27548

2123 WIT-27548; TRA-11808

2124 WIT-11548; TRA-12945

that the assertion that the Minister had made the decision without consulting other Ministers or Departments was “simply untrue”.<sup>2125</sup>

- 40.13 Mr Stewart, in giving oral evidence about this exchange, agreed that he had told Mr Cairns that the proposed amendment was “just wrong”.<sup>2126</sup> Mr Cairns had said that he was not denying that contacts had taken place but that they had not played any part in the Minister’s change of view.<sup>2127</sup> His attention was drawn to his written evidence, in which he had accepted that he had not been asked by anyone else to make the changes and explained that:

“The prevailing view within the DUP was to defend the First Minister/Party Leader as much as possible in this matter, notwithstanding that it was believed within the party that she had done nothing wrong as regards setting up the Scheme, as she had acted on the advice of officials. This makes political sense and as a political adviser appointed by the party I endeavoured to do that.”<sup>2128</sup>

- 40.14 Mr Cairns told the Inquiry that an election was coming up and the amendments would give the First Minister the full gamut of options depending on whether the proposed course of action with the RHI scheme turned out to be popular or unpopular.<sup>2129</sup> He rejected the suggestion made by Dr McCormick that it was part of a strategy to make Minister Bell solely responsible for closing the scheme and asserted that, on the contrary, it gave him credit for doing so.<sup>2130</sup>

- 40.15 When the final submission, without the changes tracked, was sent to Mr Cairns by Mr Kerr of the Minister’s Private Office, Mr Cairns replied by email:

“Have the Minister read it, I have cleared it and he should and then I await the voice on high to tell me when it can be issued.”<sup>2131</sup>

- 40.16 Mr Cairns told the Inquiry that the “voice on high” was a reference to Mr Johnston, a SpAd of the First Minister.<sup>2132</sup> His email to Mr Johnston and Mr Bullick read:

“Please see attached latest RHI paper. I have taken out references to other departments and have agreed a line on consultation.”<sup>2133</sup>

### “Whistle-blower” allegations

- 40.17 On the evening of 15 December 2016 former Minister Bell’s interview by the BBC journalist Stephen Nolan, was broadcast on television, in the course of which he stated that:

“The Deputy Permanent Secretary of my department, Chris Stewart, asked for something that was highly unusual and only done once in five years that I sat in the Executive, he asked to meet the minister, as he is entitled to do, to whistle-blow on a one to one basis.”<sup>2134</sup>

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2125 TRA-12944  
2126 TRA-11801  
2127 TRA-11802  
2128 WIT-20073  
2129 TRA-12945 to TRA-12946  
2130 TRA-12946  
2131 DFE-293218  
2132 TRA-12950  
2133 IND-28845  
2134 DFE-228969

40.18 Minister Bell then proceeded to describe how he had been told by Mr Stewart that, without his knowledge, his SpAd Mr Cairns had been asked by other SpAds to remove references to the First Minister and DFP from the submission seeking Executive approval to close the scheme by Urgent Procedure. Minister Bell told Mr Nolan that he had subsequently spoken to the Permanent Secretary who verified this account and was prepared to put it formally on record for an inquiry.<sup>2135</sup>

40.19 Subsequent to the broadcast of Mr Nolan’s interview with Minister Bell, Mr Stewart forwarded an explanatory submission to the then DfE Minister, Mr Hamilton, on 18 December 2016.<sup>2136</sup> That submission was seen and agreed by Dr McCormick as a true record of events as far as he was concerned.<sup>2137</sup> The submission contained the following paragraphs:

“6. On 3 February, DETI officials were told that the decision agreed by both sides in OFMDFM was the most urgent available option, which would leave out consultation on the proposals and also the conventional consideration of draft regulations by the Assembly Committee.

7. On 3 February 2016, I put a submission to Minister Bell, via his political advisor, Mr Cairns. The subject matter of the submission was the seeking of Executive approval to the proposed closure of the RHI schemes, by means of the ‘urgent procedure’, i.e. to take forward formally the approach that we knew had been agreed.

8. Paragraph 1 of the submission notes that the Minister had previously agreed to close the schemes to new applicants, subject to the outcome of public consultation. The original draft goes on to say that: ‘however, **further to discussion with DFP and OFMdFM** (emphasis added by Mr Stewart), you have decided to proceed... without public consultation.’

9. In the final version of the submission, as presented to Minister Bell, the corresponding sentence in paragraph 1 read ‘**following further consideration** (emphasis added by Mr Stewart) you have decided to proceed...without public consultation.’

10. The revision of the draft was requested by Timothy Cairns. I challenged the request on the grounds that there had indeed been a consultation with OFMdFM. However, Mr Cairns continued to press for the change to be made, and I agreed. I assumed that the request had been made at the behest of Minister Bell, or at least with his knowledge. The submission was finalised and issued on that basis and the Urgent Procedure paper issued to the FM and dFM on 5 February. Paragraph 16 of that paper confirms that the recommendation was to proceed without consultation or a Committee stage.

11. The submission as finalised was wholly factual: the omission of the reference to the engagement with OFMdFM in no way altered the actions to be taken. ...

12. Some days later (almost certainly 10 February), I attended a meeting with Minister Bell, initially only with Ian McCrea MLA (the Minister’s Assembly Private

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2135 DFE-228970

2136 WIT-12168 to WIT-12172

2137 WIT-12165 to WIT-12166; WIT-12170

Secretary) present. I did not seek a meeting with the Minister as a whistleblower. The Minister asked why the submission of 4 February made no reference to discussion with OFMDFM. I explained that in finalising the submission I had accepted some changes requested by Mr Cairns. The Minister indicated that he had not had prior knowledge of this, and expressed concern that it had been done without his knowledge. I explained that I had assumed that he was aware of, or had requested the change.

13. Mr Cairns and the Permanent Secretary (Andrew McCormick) joined the meeting. Minister Bell asked Mr Cairns for an explanation of what had happened. After a brief exchange, Dr McCormick and I were asked to leave the meeting, to allow for a private discussion between the Minister and Mr Cairns.

14. Shortly thereafter, the Minister left to attend another matter, and there was further discussion involving me, Dr McCormick and Mr Cairns. Mr Cairns expressed the view that I had misrepresented the position to the Minister. Through discussion (which was initially heated, but which ended amicably) agreement was reached that this was not the case. The Minister later returned and advised that he had dealt with the matter to his satisfaction elsewhere, and that it was closed.”<sup>2138</sup>

40.20 In the course of giving oral evidence to the Inquiry, Mr Stewart confirmed the account provided in this contemporaneous submission.<sup>2139</sup> Mr Stewart continued:

“The decision was likely to be a matter of some controversy and sensitivity. For whatever reason, a conclusion appears to have been drawn that it was desirable to have Minister Bell being seen as the person solely responsible for taking that decision.”<sup>2140</sup>

40.21 In his oral evidence to the Inquiry, Mr Stewart also said that his assumption was that Minister Bell had requested the change.<sup>2141</sup> Furthermore, in his written evidence he rejected Minister Bell’s assertion that he had approached the Minister as a ‘whistle-blower’ on 10 February 2016 and said that their exchange had taken place during a standard Issues Meeting when he was asked why he had made the change. He then realised that Minister Bell had not been aware of the change and was obviously angry. When Mr Cairns arrived, it seems that he, Mr Cairns, told the Minister that he had been lied to by Mr Stewart, an allegation that Mr Cairns then withdrew.<sup>2142</sup>

40.22 Mr Stewart described the amendment as “purely presentational”, but he also agreed that it effectively removed any reference to the involvement of the OFMDFM SpAds.<sup>2143</sup>

40.23 This amendment of the draft was the only potential basis seen by the Inquiry for the “cleanse the record” allegation made by Minister Bell during his interview at the end of 2016 with Mr Nolan of the BBC.<sup>2144</sup>

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2138 WIT-12169 to WIT-12170

2139 TRA-11802

2140 TRA-11803

2141 TRA-11807

2142 WIT-27549 to WIT-27550

2143 TRA-11803; TRA-11813

2144 DFE-228977

40.24 From this episode, Dr McCormick drew a clear inference that the DUP SpAds “were focussed on where responsibility and blame would lie as well as on the substance of the actions needed.” He thought that, with hindsight and reconstruction, the motive had been to seek to build a narrative that the full responsibility for the scheme lay with Minister Bell.<sup>2145</sup>

### Minister Bell’s deteriorating relationships

40.25 Whatever the position may have been as to the motivation of Mr Cairns in making the alterations to the text of the draft submission of 3 February 2016 in order to remove reference to any involvement on the part of OFMDFM, or the motivation of any others aware of these changes being proposed or made, it is clear from evidence which the Inquiry has seen that from February/ March 2016 Minister Bell’s relationship with senior DUP members, including First Minister Foster, seriously deteriorated.

40.26 An email exchange on 8 March 2016 culminated in Mr Johnston requesting Minister Bell to “Come down and have a meeting and stop sending emails as if you never had a conversation with any of us in your life. Hardly very gracious jb. Let’s get sensible.”<sup>2146</sup> In a further email exchange commencing at 22.37 on 25 March 2016 and directed to First Minister Foster, Nigel Dodds MP and Party Chairman Lord Morrow, Minister Bell stated “It is no secret that I have been extremely hurt by the manner in which I have been treated which has made it very difficult for me to do my job” and he then set out a long list of complaints, which included an allegation of keeping the RHI scheme open contrary to his public decision (discussed in further detail later in this Report) and removal of the reference to OFMDFM from the submission, which is discussed above.

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2145 TRA-16624

2146 IND-29554 to IND-29557

## Findings

- 215.** The Inquiry does not consider the “whistle-blower” description given by Minister Bell to Mr Nolan of Minister Bell’s conversation with Mr Stewart about changes to the closure submission to be an appropriate description of the nature of the disclosure made by Mr Stewart.
- 216.** The closure submission abandoned the need for public consultation and reduced the time for closure. This represented a significant alteration to the course Minister Bell had previously approved. Although all reference to the fact that OFMDFM officials had been consulted was removed from the submission, the Inquiry finds that this amendment in itself did not result in any incorrect factual statement or any change to the substance of the submission as a whole.
- 217.** The Inquiry agrees with Mr Stewart that the amendments proposed by Mr Cairns of his own volition were designed to distance any other DUP Ministers from a decision that was bound to prove unpopular, even though the Urgent Procedure required the support of OFMDFM in any event.

