

CLOSING SUBMISSION ON BEHALF OF TIMOTHY JOHNSTON

Introduction

1. Timothy Johnston became a Special Adviser to Rev. Dr. Ian Paisley in May 2007. He was then Special Adviser to Peter Robinson for 8 years before becoming Special Adviser to First Minister Foster in January 2016. He was therefore a Special Adviser in OFMdFM during the lifetime of the RHI Scheme. There is no suggestion that he had any involvement in Phases 1 and 2 of the Inquiry's work.
2. Mr Johnston gave evidence to the Inquiry on days 96 and 99 - 28 September 2018 and 4 October 2018.
3. This submission seeks to address the key points directed at Mr Johnston, particularly where there is a conflict of evidence with other witnesses, or where an issue may benefit from being drawn out of the evidence of Mr Johnston himself or others. It does not seek to rehearse the evidence.

General

Special Advisers - hierarchy.

1. The Inquiry is examining the role of Special Advisers within government. One aspect that has been of particular interest is whether at the relevant time there was a 'hierarchy of Spads' with Timothy Johnston being regarded by some as 'Top Spad'.
2. As summarised by Mr Lunny during Mr Johnston's evidence session, there was a number of reasons why Mr Johnston may be viewed as more senior (**TRA 14197**):
 - (i) Timothy Johnston along with Mr Bullick had more experience than other Special Advisers;
 - (ii) The OFMdFM Spads were proxies for the most powerful person in the party i.e. the First Minister and Party leader who was responsible for appointing and removing Ministers and therefore, indirectly, the Special Advisers to those Ministers;
 - (iii) Mr Johnston and Mr Bullick had more influence than others and were capable of influencing the First Minister and Party leader;
3. The evidence of the various Special Adviser and Ministerial witnesses has differed in nuance on this point. However, it is submitted that the difference in nuance often lies in the distinction between a *formal* hierarchy and an *informal* one, as highlighted by Mr Lunny (**TRA 14199**).

4. Mr Johnston's position is that there was no formal hierarchy but he had achieved seniority by virtue of his longevity in his role as Special Adviser to the First Minister i.e. from his appointment to the role by Dr Paisley in 2007 until the collapse of the Executive in early 2017 (**TRA 14199-14201**). This meant that on purely political matters (i.e. not on specific issues where he would have had little or no expertise) his view would have been given more weight than that of other Advisers (**TRA 14202**).
5. Mr O Muilleoir, as the only Sinn Fein Minister to give evidence to the Inquiry, was also asked about the 'hierarchy' of Special Advisers. He said that Aidan McAteer, as Special Adviser to the First Minister, would have been "*seen as having a more weighty [sic] and more authority than any of the other special advisers*" (**TRA 16248**).
6. It is submitted that the role of Special Advisers in providing advice, liaising with colleagues, and negotiating with others, on the basis of the authority of their Minister, is not dissimilar to lawyers acting on the basis of the authority of their client. In a formal negotiation, for example, a lawyer will be assumed to be speaking with the authority of their client, and this will also be made explicit at various points when clarity requires it. However, there will also be situations in which a lawyer speaks his own mind or discusses issues in circumstances where it is obvious he has not taken instructions from his client and is not speaking on a client's behalf. In those circumstances, the views of a lawyer with more experience in a particular area would be given more weight by his colleagues than someone of little experience.

Appointment of Special Advisers

7. Special Advisers are a necessary part of Government. Their role is primarily to advise and assist Ministers in the exercise of their role. The Inquiry has examined the various codes governing the appointment and remit of Special Advisers, particularly in light of their peculiar status as temporary civil servants. This includes the model contract (**DOF 601**) and terms and conditions (**DOF 607 et seq for 2013 version**); the Northern Ireland Civil Service handbook; and the code of conduct for Special Advisers (**DOF 617**).
8. In his evidence Timothy Johnston accepted that the fact that the party leader was involved in the selection of Special Advisers, could lead to a perception that the 'real power' lies elsewhere in the party rather than with their appointing officer i.e. the Minister whom they serve, and that in future there would be a need to revise practices within the Executive or change the legislation in order to ensure transparency and compliance with the relevant codes (**TRA 14125**).

9. However, it is not the case that during the relevant period Special Advisers were simply foisted upon Ministers. For example, John Robinson gave evidence that, following the general election in 2016, he was contacted by Timothy Johnston to let him know that he would probably soon be hearing from Simon Hamilton as he was considering John for the role of Special Adviser (**TRA 13789**). But, crucially, Simon Hamilton is clear in his recent statement that the choice of Special Adviser was his to take and that he had discussed the matter with Timothy Johnston only insofar as it was necessary because at that time Mr Robinson was working for the party as Director of Communications. Mr Johnston therefore undertook to discuss the matter with the party leadership as it would leave a gap in party operations (**WIT 21049**). It is submitted it was therefore not the case that Mr Johnston was directing or selecting the choice of Special Adviser for Mr Hamilton, nor was Mr Hamilton deviating from the legislative code for appointment. He has been clear in his most recent statement to the Inquiry that he considered a pool of candidates and made his selection accordingly.
10. Similarly, Arlene Foster gave evidence that she was involved in the process of appointing her Special Adviser, Andrew Crawford (**TRA 13603-4**).
11. Nevertheless, there was perhaps more central involvement in the selection of Special Advisers than envisaged by the legislation and codes governing their appointment. Peter Robinson has provided evidence explaining that the “*drift*” away from the protocols within the DUP arose to prevent a repeat of a situation whereby a Special Adviser appointed by his Minister did not work with the party (**WIT 156021**).
12. There has also been evidence given to the Inquiry demonstrating that the DUP was not the only party that deviated from the spirit and letter of the code governing Special Advisers. The Inquiry has heard that the effect of the changes to the legislation in 2013 brought about a scenario where people who were prevented from being Special Advisers because of criminal records, acted in effect as *de facto* Special Advisers, leaving them outside the system of accountability for Special Advisers (**TRA 14128-9**). This was accepted by Mr O Muilleoir in his oral evidence (**TRA 16250**).
13. Further, the Senior Civil Service was aware of the deviation from the rules, and assisted in what the Chair has termed the “*camouflage*” of the process (**TRA 14114**).

Phase 3 - events in Summer 2015

Relationship between Jonathan Bell and Timothy Cairns and the reconciliation meeting

14. Timothy Johnston was involved in reconciling Jonathan Bell with his Special Adviser Timothy Cairns following their disagreement on 10 June 2015 in London. He was contacted by Timothy Cairns on 10 June 2015 when Mr Cairns believed Mr Bell had dismissed him. Following conversation with then First Minister Peter Robinson (**TRA 14157**), Mr Johnston advised Mr Bell in a phone call that: *"I've spoken to Peter. There's clearly been a big issue here. Don't do anything until you get back to Northern Ireland and we have had a chance to chat"* (**TRA 14159**).
15. Thereafter, Mr Robinson and Mr Johnston became involved in a 'reconciliation process' with Mr Bell and Mr Cairns. This process was informal. Mr Johnston is clear that Mr Robinson's involvement was necessary given that it was only Mr Robinson's authority that would have been respected and accepted by Mr Bell.
16. Mr Cairns alleges Mr Johnston effectively told him that if he did not come to a joint meeting with Mr Bell on 26 June 2015 that there would be no job for him. This is disputed by Mr Johnston. His position is that at the time he would have believed it unlikely that Mr Cairns could remain in a Special Adviser role if the matter could not be resolved (there being no indication that Mr Bell would be removed as Minister and little likelihood of a reshuffling of other Special Advisers to accommodate Mr Cairns - **TRA 14174**) but that a party position was likely to be found, albeit this wasn't expressly explored (**TRA 14176**). Mr Johnston also disputes Mr Cairns' evidence that he was told Jonathan Bell would apologise to him. Mr Johnston says he could have given no such guarantee (**TRA 14172**).
17. There is disagreement about whether or not Mr Robinson was present for all or part of the meeting on 26 June 2015. While it was Mr Johnston's belief that Peter Robinson was present for the whole of the meeting, he accepted in his oral evidence that, the meeting having taken place on a Friday, it is possible Mr Robinson left during the meeting to deal with Democratic Unionist business (**TRA 14178**). However, Mr Johnston is clear that he was acting with the authority and at the request of the First Minister (**TRA 14163**), in his role as Spad, and would not therefore have been overreaching his position in dealing with the matter even if Mr Robinson had not been present for the entire meeting.
18. Mr Johnston's view immediately following the 26 June 2015 meeting was that there had been agreement reached between the two men to move forward and continue working together. The text message the following day from Timothy Cairns expressing dissatisfaction (**IND 31977**) was therefore both disappointing and surprising to him (**TRA 14181**).

19. Overall, Timothy Johnston accepts that the process to reconcile the relationship between Jonathan Bell and Timothy Cairns, could have been handled differently. He made the following points:

- (i) he was involved by virtue of Mr Cairns having rung him on 10 July 2015 and thereafter Mr Robinson having asked him to speak to Mr Bell **(TRA 14157-9)**;
- (ii) he was acting with the authority and at the request of Mr Robinson in dealing with the matter **(TRA 14163)**, and not therefore because he had adopted a managerial role in respect of Mr Cairns;
- (iii) Mr Robinson, the party leader, may have had meetings or discussions about the situation in which Mr Johnston was not directly involved **(TRA 14160)**;
- (iv) It was his recollection that Mr Robinson had been present for the entirety of the 26 June 2015 meeting but that given that others recollect differently it is possible that Mr Robinson was only present for part of the meeting **(TRA 14178)**;
- (v) He did not tell Timothy Cairns that Mr Bell would apologise **(TRA 14172)**;
- (vi) He did not threaten Timothy Cairns that there would be no job for him if he did not attend the 26 June 2015 meeting and reconcile with Mr Bell **(TRA 14174)**;
- (vii) Mr Johnston believed the meeting of 26 June 2015 had been successful and was therefore surprised and disappointed when Timothy Cairns contacted him by text message the following day **(TRA 14161)**;
- (viii) There was no minute or note of the meetings taken because the process was viewed as informal. Mr Johnston accepts this was a mistake that he would not make a second time **(TRA 14167)**.
- (ix) When the two men began working together again, Mr Johnston did not have the sense that dysfunction in the working relationship was manifest **(TRA 14191)**;
- (x) With the benefit of hindsight, professional HR input, including the involvement of Dr McCormick as Permanent Secretary of the relevant Department, would have been useful, recognising that a Special Adviser is a temporary civil servant. However, at the time, the culture was not such that this was likely to have occurred i.e. Special Advisers would not have considered anyone other than their Minister or the First Minister to be their

line manager and the Permanent Secretary would not have been keen to get involved (TRA 14194).

Alleged involvement of Timothy Johnston in delaying the introduction of tiering

20. Mr Johnston is clear that the first time he became aware of the RHI Scheme was in Autumn 2015 - prior to that the matter would have fallen within a category of issues that were beyond his comfort zone and in which he had no knowledge or interest and was not engaged during the Summer of 2015 (TRA 14226-7).
21. It was only following the murder of Mr McGuigan and the introduction of the policy of in/out Ministers that Mr Johnston became aware that there was DETI business for which Mr Bell needed to be in office (TRA 14227).
22. This can be distinguished from the NIRO of which Mr Johnston *was* aware (at a high level) because of the ending of the coalition government, and the fact that it was an issue that the First Minister had an interest in. As such Mr Johnston received emails about the NIRO Scheme in June 2015 (TRA 14226).
23. Given Mr Johnston's lack of knowledge and interest in the RHI Scheme, he is adamant that Timothy Cairns' recollection that he instructed him to liaise with Andrew Crawford about NIRO and RHI is mistaken. Mr Johnston recalls Mr Bell and Mr Cairns being encouraged to liaise with Dr Crawford generally, but not in relation to these specific topics. Indeed, Mr Johnston's evidence was that the to-ing and fro-ing in July 2015 was "*sensible*" (TRA 14241) albeit not a 'process' that Mr Cairns had been instructed or directed to engage in by Timothy Johnston.
24. Furthermore, Timothy Cairns claims Mr Johnston told him that "*tariff controls would not be introduced*" albeit he also gave evidence that he thought Mr Johnston would not have been aware of the detail of the Scheme. However, in oral evidence Mr Cairns admitted that his recollection was frail on this aspect stating that: "*he would not go to the sword on it*".
25. It is submitted that in the context where Mr Johnston is absolutely firm in his belief that he was not aware of RHI until later in the year and had absolutely no knowledge or interest in it, and Mr Cairns' recollection is weak, the former's evidence should be preferred.
26. Indeed, Mr Cairns speculated that because the issues of NIRO and RHI would have been much more significant to him than to Mr Johnston, it would be understandable if Mr Johnston did not recollect them being discussed at the meeting. However, as the Chairman pointed out, if

the issues were not uppermost in Mr Johnston's mind, it begs the question how he would have had the wherewithal or knowledge to make the specific point about tariff controls at that stage (TRA 14238).

27. Mr Johnston has no recollection of a conversation with Dr Crawford in which Dr Crawford mentioned helping Mr Cairns with the RHI submission, but does not challenge Dr Crawford's evidence that there may have been such a conversation. He also has no recollection of receiving or opening the 16th July email from Dr Crawford enclosing the submission (TRA 14247 - 8 and TRA 14716).
28. Mr Johnston accepted that not reading the submission represented a missed opportunity on his part in that if he had read it he was likely to have asked questions around it and had some input capable of producing a different outcome (TRA 14719 and 14723-5).
29. In December 2016, on the day before the Nolan Show, Timothy Cairns gave evidence that he rang Richard Bullick and was put on speaker in the room where Timothy Johnston and Mrs Foster were also present. Mr Cairns claims that when he suggested that Mr Johnston was involved in trying to delay the introduction of cost controls in the Summer of 2015, Mr Johnston became uncomfortable and closed the conversation down quickly. Timothy Johnston disputes this. He says that when Mr Cairns suggested that Mr Johnston had directed him to speak to Dr Crawford about RHI, he quickly and sharply corrected Mr Cairns stating he had directed him to speak to Dr Crawford about DETI issues generally (TRA 14819-20).

The 17 August 2015 email

30. It is apparent from an email received from Timothy Cairns shortly before Mr Johnston was due to give evidence, that he had sent Mr Johnston an email on 17 August 2015 about the NIRO Scheme that also contained a line about the RHI Scheme. Mr Johnston is clear that by this time in August 2015 he still had no knowledge about the RHI Scheme or the proposed changes, albeit he can not rule out that it was mentioned to him (TRA 14756). As such, he believes that Timothy Cairns was assuming a level of knowledge that Mr Johnston did not have, perhaps as a result of Mr Cairns' discussions with Dr Crawford during the Summer of 2015 that Mr Cairns (erroneously) believed were part of a 'process' directed by Mr Johnston (TRA 14751).
31. However, Mr Johnston is absolutely clear that there was never any suggestion that cost controls should not be introduced or should be delayed (TRA 14756).

Phase 4 - closure of the Scheme to new applicants

32. Mr Johnston received the submission for closure of the RHI Scheme to new applicants from Timothy Cairns on Friday 22 January 2016. He replied that afternoon to the effect that he would not be able to get a view from the First Minister and other DUP Ministers until the following week when the Ministers were back at Stormont (Friday being the day Ministers spent away from Stormont on constituency business) (**TRA 14784**). It is submitted, contrary to the view of Mr Bell that this was Mr Johnston overruling him or withdrawing his Ministerial decision (**TRA 12504-7**), that this was appropriate given the fact this matter was at this stage cross-cutting but OFMdfM had not yet been involved.

Conclusion

33. In relation to the central charge against Timothy Johnston that he was involved in delaying the introduction of tiered tariffs, the Inquiry must consider and weigh the evidence of Timothy Cairns, Andrew Crawford, and Timothy Johnston. It is significant that Dr Crawford does not consider that Timothy Johnston was the instigator or collaborator in formulating a party policy to push back cost controls. This is despite the fact that it was Dr Crawford who would have been the primary conduit for that message, and who did engage with Timothy Cairns in Summer 2015. It is submitted that Dr Crawford would have reason to deflect attention away from himself and onto Mr Johnston if Mr Johnston had been involved in the manner alleged by Mr Cairns. It is therefore significant that Dr Crawford has not done so.

34. Indeed, it is also significant that Dr Crawford recommended that Timothy Cairns proceed with the introduction of cost controls in his email of 31 July 2015, and thereafter Mr Cairns is clear that by in or around 12 August 2015, he and Dr Crawford were at common cause that the proposal should proceed in line with the date set out in the 8 July submission i.e. October 2015. This runs contrary to the idea that there was a direction or instruction to delay the introduction of tariff controls.

35. By contrast, Timothy Cairns has reason to allege that Timothy Johnston was involved, whether by virtue of a mistaken belief as to what he was told by Mr Johnston at the 26 June 2015 meeting, (and thereafter because he assumed Dr Crawford was reporting back to Mr Johnston), or otherwise in order to give himself cover for the delay in bringing the matter to the Minister.

36. Timothy Johnston is clear that he had no reason to seek cost controls to be pushed back, and did not have the requisite interest or knowledge to make the statement at the 26 June 2015 meeting that tariff controls would not be introduced. He is therefore of the view that Mr Cairns

was assuming more knowledge on his part when the 17 August 2015 email was sent to him.

37. It is respectfully submitted that the Inquiry should place more weight on the evidence of Mr Johnston that he was not involved in any attempt to push back the introduction of tariff controls.

Julie Ellison BL

27 November 2018