

**THE INDEPENDENT PUBLIC INQUIRY
INTO THE NON DOMESTIC RENEWABLE HEAT INCENTIVE (RHI) SCHEME
(known as the 'RHI Inquiry')**

Procedural Protocol

to be followed by the RHI Inquiry

Introduction

[1] The Independent Public Inquiry into the Non Domestic Renewable Heat Incentive (RHI) Scheme (known as 'the RHI Inquiry' but referred to in this protocol simply as 'the Inquiry') has been set up by the Minister for the Department of Finance ('the Minister'). The Inquiry's Terms of Reference have been deposited in the Library of the Northern Ireland Assembly. A copy of the Terms of Reference can also be found on the Inquiry's website.

[2] The Inquiry will focus upon the origin, implementation and subsequent development of the non-domestic renewable heat incentive scheme ('the Scheme') introduced by the provisions of the Renewable Heat Incentive Scheme Regulations (Northern Ireland) 2012 [SR 2012 No. 396] ('the Regulations').

[3] The Inquiry has been established and derives its formal powers from the provisions of the Inquiries Act 2005 (c. 12) ('the 2005 Act'). Section 17 of the 2005 Act provides as follows:

"Subject to any provision of this Act or of rules under section 41, the procedure and conduct of an inquiry are to be such as the chairman of the inquiry may direct."

Unlike the position in which a United Kingdom Minister is responsible for an inquiry, to date, no rules have been promulgated in accordance with section 41 of the 2005 Act in Northern Ireland which apply to inquiries for which a Minister of the Northern Ireland Executive is responsible.

[4] By virtue of section 17(3) of the 2005 Act, the chairman of the Inquiry ('the Chair') is bound to act with fairness and with regard to the need to avoid any unnecessary costs (whether to public funds or to witnesses or others) in making decisions as to the procedure or conduct of the Inquiry. In the course of its duty to act with impartiality, fairness and justice the RHI Inquiry proposes to have regard to the principles and procedures set out in the provisions of the rules applicable in the rest of the United Kingdom, namely The Inquiry Rules 2006 [SI 2006 No. 1838] ('the 2006 Rules') and The Inquiries (Scotland) Rules 2007 [SI 2007 No. 560] ('the Scottish Rules').

[5] This Procedural Protocol ('the Procedural Protocol') is subject to and must be read in conjunction with the 2005 Act together with guidance drawn from the 2006 Rules. It is intended to provide general information and guidance as to how the RHI Inquiry will carry out its work. It is not intended to cover every eventuality that may arise.

[6] The scope of the RHI Inquiry is confined to and contained within the Terms of Reference.

[7] The Inquiry acknowledges the need to work expeditiously and to complete its report within a reasonable timeframe consistent with the Inquiry's obligation to conduct a full and scrupulous investigation.

[8] Subject to any determination made by the Chair, the Inquiry intends that its report shall include the full public disclosure of all documentation and evidence relating to this matter. The Chair may impose restrictions upon the publication of any evidence or documents given, produced or provided to the Inquiry in accordance with section 19 of the 2005 Act. Further information in respect of the Inquiry's approach to disclosure is contained in the Inquiry's Disclosure Protocol. Upon completion of the Inquiry the Chair will arrange publication of the report as soon as practicable.

Evidence gathering

[9] Section 21 of the 2005 Act provides the Chair with various powers to serve a notice requiring a person to:

- (i) attend to give evidence;
- (ii) produce any document or documents in his custody or under his control that relate to a matter in question at the Inquiry;
- (iii) produce any other thing in his custody or under his control for inspection, examination or testing by, or on behalf of, the Inquiry Panel; or
- (iv) provide evidence to the Inquiry in the form of a written statement.

By virtue of section 43(1) of the 2005 Act, "document" in this context includes information recorded in any form including, for instance, correspondence, notes, emails, memoranda and text communications.

[10] In cases where evidence by way of written statement is required the Inquiry will seek to draw the attention of the person concerned to the Terms of Reference and to any specific issues which appear to be of particular relevance to him or her.

However this will be without prejudice to the ability of any such person to provide any information or evidence which he or she feels would be of assistance to the Inquiry; and to the expectation of the Inquiry that those who are able to assist it will be candid in so doing. The process of obtaining evidence by written statement may require further supplementary directions for clarification or to respond to matters subsequently raised as the Inquiry progresses.

[11] In broad terms the evidence which the Inquiry expects to obtain will fall into one or more of the following categories:

- (a) Documents provided to the Inquiry in compliance with a section 21 notice by any individual or organisation the Inquiry believes may be able to assist its work; or submitted upon a voluntary basis. The originals of all documents relevant to the work of the Inquiry must be preserved for production to, and inspection by, the Inquiry should the Inquiry so require. If the Inquiry wishes to inspect any original document or documents, the holder of the document or documents will be contacted by the Inquiry legal team and requested to produce the document or documents at a time and place specified by the Inquiry legal team.

Those who have been served with a section 21 notice have an ongoing obligation with regard to the disclosure of documents which continues throughout the inquiry process. If any additional documents, not yet disclosed to the Inquiry, relating to any of the issues being investigated or examined by the Inquiry are or come into your possession, custody or power, you must ensure that copies of those documents are sent to the Inquiry forthwith.

Inspection of any document or documents or things may be sought by the Inquiry either on its own initiative or at the request of an interested party.

- (b) Evidence that the Inquiry obtains through its own researches and from whatever sources it considers necessary or appropriate in the circumstances. This will normally be documentary material, although the Inquiry may also appoint expert assessors or expert witnesses to provide the Inquiry with opinions, advice and assistance and/or with relevant information not otherwise available to it.
- (c) Witness statements provided to the Inquiry's legal team by any individual the Inquiry believes may be able to assist its work.
- (d) Oral evidence given by witnesses at the public hearings that the Inquiry directs in due course.

- (e) Written statements which the Chair directs to be read at public hearings or directs to be placed in the Inquiry records, in either event without the maker of the statement being called to give evidence.

[12] The Inquiry Panel will have regard to rules 9 and 10 of the 2006 Rules in relation to the collection of written statements and the giving of oral evidence. However, insofar as rule 9(1) and (2) of the 2006 Rules have been drafted in mandatory terms, it is noted that the equivalent Scottish rule (rule 8) is permissive. In the absence of any specific Northern Ireland rules, and bearing in mind the need for expedition, it is generally proposed to proceed directly by use of the section 21 notice procedures under the 2005 Act for the purpose of obtaining documentary and oral evidence.

Provision of documents

[13] During the course of its work the Inquiry will send relevant material it has gathered to those it considers should see it in order to assist the Inquiry with its work. Any material received from the Inquiry places the recipient under an obligation of confidence to the Inquiry. The received material may not be published to anyone, or in any form, nor used for any purpose other than that for which it has been provided by the Inquiry, without the Inquiry's prior written consent. Attention is drawn to the restriction orders made by the Inquiry Chair in this regard, which are available on the Inquiry's website.

Core participants

[14] The Chair will have regard to rule 5 of the 2006 Rules in determining whether or not to exercise his power to designate a person or organisation as a core participant at any time during the course of the Inquiry.

[15] The general approach adopted by the Inquiry is to designate as core participants only those organisations which appear to the Inquiry to have been generally involved across, or to have some knowledge of, all of the matters to be investigated by the Inquiry in accordance with the Terms of Reference throughout the currency of the Scheme.

[16] Applications to be designated as a core participant must be made in writing to the Solicitor to the Inquiry and must clearly specify the grounds upon which such designation is sought. The Chair will give careful consideration to all such applications and, if the Chair considers that further information is required before he can make a decision, he may require the applicant to provide such further information as he considers necessary. Further, if he considers it to be necessary, the Chair may require an applicant to appear before him to make an oral application for core participant status.

[17] In advance of public hearings the Inquiry will endeavour to transmit to any core participant and/or, if one has been designated, any designated legal representative of such a core participant, the Inquiry's evidence bundles (which may be in electronic format). Further evidence may be supplied by the Inquiry from time to time.

[18] Wherever possible the Inquiry will try to provide the Inquiry's evidence bundles to a core participant prior to the Inquiry's public hearings. Thereafter the Inquiry will endeavour to provide any such additional document or documents as far in advance as possible of any public hearing at which that document or documents will be considered by the Inquiry; but there may be occasions when this will not be possible if documents become available, or their relevance only becomes apparent, at short notice or at a later stage.

[19] Core participants will be entitled to apply to the Chair for appropriate legal representation.

[20] Core participants shall be entitled to formally appear at any public hearings but only on the day or days when the Chair considers that matters directly relevant to that core participant or those core participants are likely to be at issue before the Inquiry. Unless matters directly relevant to a particular core participant are being considered at a public hearing, that core participant and/or its legal representative will not be permitted to take part in that public hearing without the written permission of the Chair.

[21] Core participants and/or their designated legal representative may apply to the Chair for permission to ask questions of a witness but only in the circumstances set out in the 'Procedure at public hearings' section below.

[22] Core participants may seek permission from the Chair to make an opening and/or a closing statement to the Inquiry. In the event that such permission is granted the Chair may require a core participant or its designated legal adviser to provide a written copy of any such statement at a time reasonably in advance of the day fixed for oral delivery.

Enhanced participatory rights

[23] As part of the Inquiry's flexible approach to procedures (an approach which is being adopted so as to ensure fairness to all those with whom the RHI Inquiry interacts, in a manner consistent with the Chairman's overriding duty to further the Inquiry Terms of Reference in a fair, efficient and cost-effective manner) the Inquiry may also provide enhanced participatory rights to some individuals or organisations.

[24] These rights are additional to those granted to every witness before the Inquiry but will generally not be as extensive as those granted to core participants.

They are entirely in the discretion of the Chairman but are likely to be granted to those individuals or organisations before the Inquiry whose contribution to the matters within its field of investigation, at least at some point or points in time, was significant; and where it is possible, depending upon the view that the Inquiry Panel may take of the totality of the evidence when the Inquiry's investigation is complete, that the individual or organisation may face criticism from the Inquiry because of some involvement they had with the RHI Scheme.

[25] Enhanced participatory rights may be different for different individuals or organisations, and there is not a prescriptive list of rights to which anyone may be entitled. By way of example only, the enhanced participatory rights may include the right of access to certain documentation gathered by the Inquiry during its investigation, such as the witness statements of others, and/or to have a designated legal representative attend with the witness during the giving of their evidence to the Inquiry or at times when the Chair considers evidence is being given by others which is relevant to the individual or organisation with enhanced participatory rights. Consideration will also be given to providing individuals or organisations with enhanced participatory rights the right to provide a written closing submission or, exceptionally, an oral closing submission, although any determination in respect of such a right is likely to be made only towards the end of the Inquiry hearings.

[26] The Inquiry will itself confer on individuals or organisations such enhanced participatory rights as it considers necessary. However, an individual or organisation may also apply for these rights. Applications for enhanced participatory rights must be made in writing to the Solicitor to the Inquiry and must clearly specify the enhanced participatory rights sought, and the grounds for so doing. The Chair will give careful consideration to all such applications and, if the Chair considers that further information is required before he can make a decision, he may require the applicant to provide such further information as he considers necessary. Further, if he considers it to be necessary, the Chair may require an applicant to appear before him to make an oral application for enhanced participatory rights.

Legal representation

[27] The Chair will exercise the power to hear and determine applications for legal representation in appropriate circumstances. In exercising such a power the Chair will have regard, *inter alia*, to the provisions of rules 6 to 8 of the 2006 Rules and to the need to avoid unnecessary public expense. Further detail in relation to this issue is contained within the Inquiry's Costs Protocol.

Costs and expenses

[28] All applications for costs and expenses shall be considered by the Chair in accordance with the provisions of section 40 of the 2005 Act. In so doing the Chair will have regard to the provisions of rules 20 to 34 of the 2006 Rules. All

applications for costs and expenses must be made in writing to the Solicitor to the Inquiry and clearly set out the reasons why funding is being sought together with an estimate of the work required.

[29] An oral hearing may be required in respect of any application but applications for costs and expenses may be granted without a hearing. If an application is to be refused, in whole or in part, without a hearing, the reasons for so doing will be communicated to the applicant and the applicant will be entitled within 7 days of being notified of the decision, to seek an oral hearing before the Chair at which the application may be renewed.

[30] No costs or expenses shall be paid by the Inquiry unless pre-authorisation has been provided by the Inquiry in respect of those costs and expenses.

[31] Further specific information about how the Inquiry will deal with the issue of costs and expenses can be found in the Inquiry's Costs Protocol.

Preliminary hearings

[32] Prior to any public hearings being held by the Inquiry, the Chair or Panel will hold such preliminary hearings as may be necessary or considered appropriate to deal with any relevant applications or procedural or other matters.

Public hearings

[33] The Inquiry intends to hold its hearings in public wherever possible. These will be conducted by the Chair or Panel and will normally take place at the Senate Chamber, Parliament Buildings, Stormont, although preliminary hearings may take place elsewhere as necessary. The dates, locations and times of all hearings will be posted on the Inquiry website and notified to participants and any relevant witnesses.

[34] Arrangements have been made for members of the public to view the Inquiry's proceedings, either by attending the Senate Chamber in person or watching online through the Inquiry's website. A transcript of the public proceedings of the Inquiry will also be placed on the Inquiry website as soon as possible after the completion of the day's public hearing.

[35] Generally, documents that form part of the evidence before the Inquiry will be subsequently published on the Inquiry website.

Procedure at Public Hearings

[36] Set out below are some of the main procedures that the Inquiry expects to adopt at the public hearings:

- (a) All witnesses will be called and examined by Counsel to the Inquiry;
- (b) All witnesses will give evidence orally and on oath or by affirmation, unless the Chair directs that a written statement by a witness may be received in evidence without the witness having to attend to give evidence in person;
- (c) If a witness is unable to attend due to illness or infirmity or for any other good reason, or it is inconvenient for the witness to attend (such as by reason of their living outside Northern Ireland) then the Inquiry will consider whether the witness should give evidence by way of live video link or any other means which the Chair considers reasonable;
- (d) Subject to paragraph (f) below, only Counsel to the Inquiry and the Inquiry Panel will be allowed to ask questions of a witness giving evidence to the Inquiry;
- (e) If any relevant witness, or participant, or, if they have one, their recognised legal representative, wishes any question to be put to a witness giving evidence to the Inquiry, each proposed question or suggested line of questioning must be submitted to Counsel to the Inquiry by email not less than seven working days before the first day upon which that witness is due to give evidence. It is within the discretion of Counsel to the Inquiry as to whether and, if so, to what extent any such suggested questions, or lines of questioning, are put to the witness.
- (f) The recognised legal representative of such a witness or participant may apply to the Chair for permission to ask questions of a witness in accordance with the Chair's directions, but only where the Chair is satisfied that the issue has not already been adequately covered in questioning by Counsel to the Inquiry. It is expected that such applications are likely to be rare and exceptional and any such application will require to be properly grounded.

Warning letters

[37] The Chair may at any time cause a warning letter to be sent to any person who has been or may be the subject of criticism in the Inquiry proceedings or about whom criticism may be inferred from evidence that is being given during the Inquiry proceedings or who may be subject to criticism in the report.

[38] If the Inquiry intends to make any explicit or significant criticism of any person in the report of the Inquiry, it may send that person a warning letter setting out:

- (i) the nature and, as appropriate, the content or gist of the criticism or proposed criticism;
- (ii) a statement or, as appropriate, a summary of the facts that the Chair considers substantiates the criticism or proposed criticism; and
- (iii) the evidence or, as appropriate, a summary of the evidence which supports those facts.

[39] The Chair will give the person concerned a reasonable opportunity to respond to the contents of the warning letter. The recipient of such a letter must respond to it within the time set out in the letter. If the recipient believes that further time will be required than the limit set out in the warning letter, an application for an extension should be made to the Chair within five days of receipt of the warning letter. Any such application should detail the extension sought and the reasons why it is required.

[40] The contents of a warning letter are to be treated as subject to an obligation of confidence owed:

- (a) separately by each member of the Panel to the recipient of the letter;
- (b) by the recipient of the letter to the Chair; and
- (c) by any personal legal representative of the recipient of the letter to the chairman.

[41] The obligation of confidence may be waived in writing at any time by the Chair or, as the case may be, by the recipient of the warning letter.

[42] Any obligation of confidence owed by the Inquiry in respect of warning letters, or otherwise, shall end upon publication of the Inquiry report.

The approach of the Inquiry

[43] The Inquiry is inquisitorial and not adversarial in nature and it is specifically prevented from ruling on or making a determination of any person's civil or criminal liability by virtue of section 2 of the Inquiries Act 2005. However, the Inquiry Panel will not be inhibited in the discharge of its functions by any likelihood of liability being inferred from facts that it determines or recommendations that it makes.

[44] Specifically, in the course of its consideration of the conduct of public officials and organisations, the Inquiry will have regard to the seven Nolan Principles established by the Committee on Standards in Public Life in 1994.

Generally

[45] The Inquiry retains the right to suspend, alter or modify the procedure set out in this Protocol at any time as the circumstances may require.