

Chapter 28 – Developing the revised RHI policy and the 8 July 2015 submission

The nature of ministerial submissions

- 28.1 During the course of this Report the Inquiry has referred to submissions which officials provided to Ministers about the subject matter which the Inquiry has investigated. Ministerial submissions are clearly important documents as they contain the basis for Ministers' decisions.
- 28.2 During the course of the Inquiry's investigation it was evident that submissions often went through many drafts before the final version was submitted to the Minister. The important submission of 8 July 2015 is one such example. The Inquiry recognises that this is an entirely normal process within organisations.
- 28.3 It may be that some draft versions arise as a result of someone saving their work on the TRIM electronic system used by DETI, without the draft necessarily being circulated for the comment of others. In other instances, drafts of a submission (to the point that the draft had reached) are circulated amongst colleagues for comment.
- 28.4 It was often possible for the Inquiry to trace the development of documents like submissions, and indeed other documents (such as business cases) which were stored in the TRIM document management system, through the Department making available to the Inquiry the TRIM document records (or metadata) relating to a particular record. This was the case with the submission of 8 July 2015, the development of which will be examined shortly.

Policy work leading up to the 8 July 2015 submission

- 28.5 As discussed earlier, by mid-May 2015, during the work on the wider 18-point RHI Phase 2 policy response, Mr Wightman and Mr Hughes had already begun building tiering into their RHI proposals. Following the DETI Finance instruction of 20 May 2015, to stop entering financial commitments on the NI RHI scheme, work on the wider 18-point Phase 2 policy document stopped and the focus moved to a much narrower policy as attempts were made to address the perceived problems.
- 28.6 The Inquiry has already noted that it was on 29 May 2015 that emerging problems over RHI featured in a DETI Senior Management Team meeting. This led, amongst other things, to RHI-specific meetings among DETI officials on 3 and 17 June, to RHI being raised at the DETI ministerial Issues Meeting on 8 June, and to DETI Finance having an RHI-specific meeting with DFP Supply on 12 June 2015.
- 28.7 During this period officials in DETI's Energy Efficiency Branch worked on the development of four key documents: a draft RHI submission for the Minister; a draft consultation paper on cost control (which was subsequently abandoned when DETI decided not to consult further); a much narrower draft DETI policy response to the 2013 RHI consultation; and an early draft of an RHI Business Case Addendum. Ultimately, it was not until 8 July 2015 that the Minister was sent the submission with a suggested final RHI policy document and other related material.¹⁶¹⁶

- 28.8 Work on drafting that submission had begun on 29 May. On that date Mr Hughes began drafting both the submission¹⁶¹⁷ and the revised response to the 2013 public consultation, which was to reduce radically the number of topics covered by the earlier draft consultation response from 18 to two, namely tariffs for combined heat and power installations ('CHP') and cost control measures.¹⁶¹⁸
- 28.9 By the time the public consultation response was finalised towards the end of August 2015 there had been some 15 draft versions of it.¹⁶¹⁹ At the point when the draft public consultation response was provided to the Minister with the 8 July 2015 submission,¹⁶²⁰ it was in its ninth draft version¹⁶²¹ and then stated that work was ongoing to develop a system of tariff degression suitable for the NI RHI scheme and that, in the interim, a tiered tariff would be introduced for biomass heating systems from 1 October 2015.¹⁶²² The first 1,314 hours (or equivalent in kWh) of use would attract the standard tariff, which would then reduce to 1.5p/kWh thereafter. The higher tier was intended to cover the capital cost and the lower tier the ongoing running costs.¹⁶²³ DETI also intended to extend the existing medium biomass tariff to installations above 99kW in size up to and including 199kW from October 2015.¹⁶²⁴
- 28.10 On 11 June 2015 Mr Wightman provided DETI Finance colleagues with what he described as a "discussion/briefing paper" to assist with an RHI meeting DETI Finance was having the following day with DFP Supply.¹⁶²⁵ The document was entitled "Renewable Heat Incentive – Business Case Addendum", though it was a very different document from the subsequently developed 'Business Case Addendum for the NI Renewable Heat Incentive' that DETI would eventually submit to DFP in October 2015. As noted earlier, this 11 June 2015 briefing document from Mr Wightman had led the DETI Finance Director, Mr Cooper, to comment to a senior colleague on 12 June 2015 that it demonstrated "a fair bit of naivety around the issues" and that the RHI scheme may be "overcompensating".¹⁶²⁶

The draft 15 June 2015 submission proposing to consult over tiering

- 28.11 On 15 June 2015 Mr Wightman circulated to colleagues a draft of a proposed submission for Minister Bell. This was entitled "Phase 2 Deferral, consultation on cost control proposals and engagement with [then DECC Secretary of State] Amber Rudd MP on NI RHI budgets."¹⁶²⁷ The eventual submission to the Minister on the 8 July 2015 submission advocated a very different approach from that proposed in this June 2015 document.
- 28.12 The 15 June draft submission outlined the recent pressures on the non-domestic RHI budget said to have been driven largely by the move in the poultry sector away from LPG heating systems to biomass heating systems for broiler houses, and the consequent need to ensure DECC/HMT approval of the revised AME forecast for 2015-16 (which was, at that point, said

1617 DFE-119513 to DFE-119516; DFE-119509 to DFE-119512; DFE 424438 to DFE-424442

1618 DFE-119539

1619 DFE-119539 to DFE-119633; DFE-424232 to DFE-424241

1620 DFE-120439 to DFE-120457

1621 DFE-119581 to DFE-119587; DFE-120439 to DFE-120457

1622 DFE-119586; DFE-120439 to DFE-120445

1623 DFE-119586; DFE-120439 to DFE-120445

1624 DFE-120454 to DFE-120455

1625 DFE-146558 to DFE-146564

1626 DFE-146565

1627 DFE-146592 to DFE-146598

to be twice the previous 2015-16 forecast).¹⁶²⁸ Also enclosed was a draft letter to the DECC Secretary of State highlighting the need to move away from the Barnett formula and seeking additional AME funding.¹⁶²⁹ The draft suggested that the first step in getting HMT to agree additional AME funding was to get DECC to agree to that course.

- 28.13 The 15 June draft also proposed the introduction, in October 2015, of tiering for biomass after the peak 1,314 hours, together with future proposed fixed value reductions¹⁶³⁰ of tariff in 2016 and 2017.¹⁶³¹ Paragraph 8 of the draft submission at this stage stated that because of the “financial implications of the non-domestic RHI’s success it is proposed to consult on cost control proposals to manage the available budget both now and in the future.”¹⁶³²
- 28.14 The draft went on to explain that, aside from the introduction of a new CHP tariff, the rest of the Phase 2 proposals (consulted on by DETI in 2013) would be deferred until 2016, pending clarity on future RHI budgets and an assessment of the effectiveness of the cost control measures to be introduced.
- 28.15 Following the RHI meeting of DETI officials on 17 June 2015 a different intended course emerged, which would ultimately come to be reflected in the documents that formed part of the submission sent to the Minister on 8 July 2015. The first draft of what was to become the 8 July 2015 submission was saved into the TRIM system at lunchtime on 6 July 2015.¹⁶³³

The development of the 8 July 2015 submission

- 28.16 The development of this submission saw the previously proposed periodic tariff reductions removed to leave tiering as the sole proposed cost control. There was now to be no consultation on the tiering proposal, even though tiering had not been part of the 2013 Phase 2 consultation (which had instead contained the budget protecting trigger mechanism applicable to both non-domestic and domestic schemes).
- 28.17 Importantly, under the “Financial Implications” summary on the first page of the first draft of the 8 July submission, it said “Forecast RHI expenditure in 2015-16 is £23m – almost twice current AME allocation of £11.6m.”¹⁶³⁴
- 28.18 However, by the time the submission was filed with the Minister’s Private Office at 18.23 on 8 July 2015¹⁶³⁵ the “Financial Implications” summary on the front page had been altered to state simply, “We are currently seeking extra funding as forecast scheme expenditure is [sic] exceeds previous funding allocations.”
- 28.19 Another stark statement, about the doubling of previous forecasts, was found in the 6 July draft of paragraph 6 of the submission¹⁶³⁶ which also explained that if additional funding could not be secured, then “the funding shortfall will have to be met by DETI and taken from other investment programmes.”¹⁶³⁷

1628 DFE-146595

1629 DFE-146597 to DFE-146598

1630 See section 7.1 of the report and the discussion about the cost control template.

1631 DFE-146595

1632 DFE-146595

1633 WIT-03390; WIT-03392

1634 WIT-03401

1635 DFE-120439 to DFE-120457. When the submission was lodged with the Minister’s Private Office it was on its 8th version; see WIT-03392 and WIT-03464 to WIT-03469

1636 WIT-03403

1637 WIT-03403

- 28.20 In the final version filed with the Minister two days later, paragraph 6, whilst acknowledging that forecast expenditure exceeded previous funding allocations, no longer made plain that the extent of the required additional funding was essentially 100%, and the warning of the potential consequences of the shortfall having to be met by DETI from its other programmes was removed entirely.¹⁶³⁸
- 28.21 As appears in the findings below, in the Inquiry’s view the stark and clear message of the extent of the RHI funding problem and its potential consequences, as articulated in the 6 July draft of what became the 8 July 2015 submission, should not have been altered so as to deprive the Minister of the opportunity of reading the submission and consequently knowing, or being reminded, that there was a potential £13 million shortfall in funding in that year alone that may have to be met from some other part of the DETI budget.
- 28.22 The DETI Finance Director, Mr Cooper, initially provided a written statement to the Inquiry that, on one reading, suggested that the clear language of the initial draft of the submission referred to above was that of DETI Finance, and that it had been removed by others “at the eleventh hour”.¹⁶³⁹ However, Mr Cooper later accepted in his oral evidence to the Inquiry that he, and other more senior colleagues, had been copied into the email exchanges on 7 July 2015 relating to the changes,¹⁶⁴⁰ and that he should have replied raising his concerns.¹⁶⁴¹
- 28.23 For his part, Mr Mills accepted that he had directed Mr Wightman to make the above changes to the submission¹⁶⁴² They were made on the evening of 7 July 2015.¹⁶⁴³ Mr Mills was on leave at the time and travelling in a taxi into central London from an airport.¹⁶⁴⁴ In oral evidence, Mr Mills explained that he had advised the amendments because of the uncertainty about the precise amount of the expenditure and the specific nature of the funding, referring to “caution not to mention specific figures.”¹⁶⁴⁵
- 28.24 With the benefit of hindsight, he agreed that the amendments made the submission much less explicit and reduced the sense of urgency.¹⁶⁴⁶ Looking back, he accepted that the submission should have referred to a risk to the DEL budget, but he added that the risk had been removed in July¹⁶⁴⁷ by the additional HMT funding that was made available (albeit that he would not have been aware of this on 7 July 2015).¹⁶⁴⁸ He had been working from a Blackberry without seeing the whole document and never thought that the changes would have the significance which later emerged.¹⁶⁴⁹
- 28.25 The fact that changes were being made at the request of Mr Mills was pointed out by Mr Wightman on the evening of 7 July 2015 to the two grade 3 civil servants in DETI, Mr Stewart

1638 DFE-120454

1639 WIT-18545

1640 TRA-15953 to TRA-15959

1641 TRA-15956

1642 TRA-11069; TRA-10790 DFE-278452

1643 DFE-278452

1644 TRA-11069 to TRA-11070

1645 TRA-11070

1646 TRA-11071

1647 DETI had sought additional 2015/2016 AME funding for RHI (approximately £11.3 million) through the June 2015 monitoring round in line with its then 2015-16 forecast RHI expenditure. DFP indicated to DETI on 9 July 2015 that the additional funding was available to match its new RHI forecast for 2015/16 (£23.179 million); DFE-176363 to DFE-176365 and DFE Spreadsheet DFE-179394. This was confirmed by DETI on 10 July 2015; see, again, the references above. DFP then provided a confirmation print confirming the allocation on or about 20 July 2015; see WIT-43755; DFE 176378 to DFE-176379; WIT-37016; DFE-279008; DFE-147605 to DFE-147607; and DFE-462956.

1648 TRA-11074

1649 TRA-11073 to TRA-11074

and Mr Rooney, and grade 5 Mr Cooper, with an indication to those individuals that they would be able to view the tracked changes on the draft submission stored in TRIM.

28.26 Mr Stewart subsequently replied, later the same evening, confirming he was content with the changes, save for an issue unrelated to the above.¹⁶⁵⁰ He did not take issue with the changes Mr Mills had instructed, and which altered the nature of the message being communicated about the extent of the financial problem, and its potential consequences. The other individuals raised no issue with the above changes either.

28.27 In addition to what was removed, in paragraph 4 of the version of the submission that was submitted to the Minister's Private Office, it positively stated that: "RHI funding is provided from the Treasury via Annually Managed Expenditure (AME) **so does not impact directly on NI Departmental budgets.**" (the Inquiry's emphasis). Dr McCormick, then Permanent Secretary at DETI, informed the Inquiry that he regarded this statement as "incorrect and misleading" for the Minister because his officials did have the 2011 Parker email, which spoke of DEL consequences for RHI overspends.¹⁶⁵¹

28.28 The references in this submission, and other DETI documents, to RHI AME funding having no impact on the Northern Ireland block grant or DEL departmental budgets were simply incorrect and were contrary to the then available evidence. For instance, aside from having knowledge of the 2011 HMT Parker email itself, Mr Wightman was copied in to an email from DETI Finance's Mr Partridge of 19 May 2015 which pointed out that:

"The email from Jon Parker (HMT) in April 2011 specified that RHI was not treated as standard AME, and overspending would have consequences for Resource DEL budgets."¹⁶⁵²

Mr Partridge's 19 May 2015 email formed part of a chain of emails into which more senior colleagues to Mr Wightman were copied into on 20 May 2015.¹⁶⁵³

28.29 Mr Cairns, the DETI SpAd in July 2015, was asked during his oral evidence about the omissions from the final draft of the 8 July submission, and their potential effect on the course of events. Prior to the Inquiry he had not seen the earlier draft in which they had been included. He doubted if it would have interfered with the process adopted by officials or Mr Bell going on holiday, but accepted that it was clearly significant information which would have affected his conversations with Dr Crawford. He agreed that the passages, had they been included, might have altered his inclination to enquire as to the latest date at which the changes to the scheme could be made.¹⁶⁵⁴

28.30 The primary thrust of the submission was to emphasise the need for Phase 2 cost control measures – "Given these budget pressures, we need to urgently implement cost control measures to manage future RHI expenditure."¹⁶⁵⁵ However, despite being reviewed by senior officials including Mr Cooper, the submission did not refer to the risk of overcompensation, a topic Mr Cooper had earlier raised in an email sent to Mr Murphy on 12 June.¹⁶⁵⁶

1650 WIT-03456

1651 TRA-15225

1652 DFE-277174

1653 DFE-277173 to DFE-277174

1654 TRA-12762

1655 DFE-120454

1656 DFE-146565

- 28.31 The submission confirmed that changes to the scheme would require legislation.¹⁶⁵⁷ The submission recommended the extension of the capacity band and the tiered biomass tariff, ostensibly on the basis that such a change could be legislatively introduced by 1 October whereas the other options would require more work and might take more than six months to implement.¹⁶⁵⁸
- 28.32 With regard to the need for legal changes, Mr Hughes had telephoned Mr McGinn at DSO for further advice on the Department’s legal powers to manage and amend the scheme.¹⁶⁵⁹ Mr McGinn provided written legal advice on 25 June in the course of which he noted that the 2012 NI RHI regulations were drafted in mandatory rather than discretionary terms and that amending the legislation to introduce a power to suspend the scheme would constitute a clear change of policy. In such circumstances, legal issues of substantive and/or procedural legitimate expectation would arise in favour of a right of any affected person, at the very least, to be consulted.¹⁶⁶⁰
- 28.33 In the version of the submission sent to the Minister, in its paragraph 7, it also drew attention to the failure to secure DFP approval in March 2015 and confirmed that the Department was urgently working to rectify that situation.¹⁶⁶¹
- 28.34 The submission, marked “Urgent”, was forwarded to the DETI Private Office for clearance by the SpAd and Minister Bell by Mr Wightman at 6.23pm on 8 July 2015.¹⁶⁶² Included along with the submission was the draft final policy document on the proposals, a draft SL1 letter to the ETI Committee and ‘Lines to Take’ in response to any objections.¹⁶⁶³
- 28.35 The lodged submission was copied to, amongst others, the then Permanent Secretary Dr McCormick, his deputies Mr Stewart and Mr Rooney, as well as to other officials Mr Cooper, Mr Mills, Mr Hughes and Mr Alan Smith. Mr Smith had been employed as an economist by Energy Division to carry out a dedicated policy advisory role on energy projects. Mr Smith would subsequently also assist Mr Wightman with the development of what became the October 2015 RHI Business Case Addendum.
- 28.36 The 8 July submission focused on the introduction of tiering as a means, which ultimately did not prove to be effective, of controlling the overall scheme budget. That was clearly linked to seeking to secure DFP approval for the scheme going forward, such approval having lapsed. However, it seems clear that the further issues of potential overcompensation of scheme participants, possible breach of State Aid approval due to such over-compensation and/or lack of adequate review of the scheme, discovery of the perverse incentive and appreciation of the possible disastrous consequences of significant overspend for DEL budgets were not probed and investigated with the rigour or determination that they might have been.
- 28.37 In short, no effective process was undertaken to stand back and examine all the circumstances of the NI RHI scheme and examine forensically and critically exactly why and how the presenting problems had developed. The 8 July submission focused on what was considered to be an expeditious way of addressing the problem, but this was really treating the symptom rather

1657 DFE-120454

1658 DFE-120455

1659 WIT-14184; DFE-349922

1660 DFE-149496 to DFE-149499

1661 DFE-120452 to DFE-120457

1662 DFE-120439 to DFE-120457; DFE-278429 to DFE-278449

1663 DFE-120439 to DFE-120457

than undertaking a full diagnosis. As appears in the findings below, the Inquiry believes that there was a significant lack of effective leadership within DETI in the early weeks of June 2015 (described earlier in this Report) when the process which led to the preparation and drafting of the 8 July submission was set in train.

- 28.38 In its representations to the Inquiry in relation to the Inquiry’s draft findings, DfE indicated that, in light of the evidence which has been presented in the course of the Inquiry, it now has a much more detailed and comprehensive understanding of what was happening before, during and after the summer of 2015. However, DfE has stated that it remains of the view that, without the benefit of hindsight:

“It was reasonable for the leadership of DETI to rely on the knowledge of those who were responsible for the day-to-day operation, and the monitoring, of the Scheme and to expect that they would: (a) have a good grasp of the fundamental tenets of the Scheme, including knowledge of the foundation documents; and (b) be alert to, and pass on any knowledge of, risks of overcompensation.”

- 28.39 The Inquiry accepts that in June and July 2015 the ability to identify the full extent of the developing crisis was inevitably hampered because there was information of which the leadership of DETI was not aware. The Inquiry nonetheless considers that greater steps ought to have been taken to probe the reasons why matters had developed as they had, what the underlying issues with the NI RHI scheme were or may have been, and what steps were necessary to address them. By early June 2015, there were significant budgetary problems, there was a lack of clarity about the funding position and financial approval for the scheme had lapsed. These were sufficiently serious matters that the senior civil service leadership of DETI ought to have taken further steps to investigate more deeply. Indeed, they ought not to have placed significant further reliance on those junior officials directly responsible for the scheme which was now presenting with these issues without ensuring that some further, more independent, enquiry was undertaken. The Department’s continued justification of its reliance on those who were directly responsible for the scheme at the time serves to underline, rather than assuage, the Inquiry’s concerns in this regard.

- 28.40 In his representations to the Inquiry Dr McCormick, albeit maintaining that it was reasonable for him to place his trust in and to rely on the advice of the officials who were responsible for the day-to-day running of the scheme and to expect that those officials were fully up to speed with the detail of the scheme and any possible difficulties – a view which the Inquiry cannot fully support – nonetheless has accepted that he “could have taken a step back from the serious failings that had emerged by June 2015 and undertaken a more fundamental review” and has indicated that he “regrets not seeing and taking that opportunity.”

Findings

155. An initial draft submission about introducing cost controls commenced in late May 2015 but there is no clear or acceptable explanation as to why it did not commence earlier or why it took until 8 July 2015 for a submission to be finalised and lodged with the DETI Minister’s Private Office.
156. In the context of the uncertainty about the RHI budget, the expiry of DFP approval, potential overcompensation and the increase in applications, the bureaucratic, protocol-bound and apparently circular communication between DETI, DFP, HMT and DECC caused unjustifiable delay.
157. The warnings in the initial draft of what became the 8 July 2015 submission with regard to the extent of the increase of forecast expenditure and potential impact upon DEL budgets were removed as a consequence of changes instructed by Mr Mills during a telephone conversation between Mr Wightman and Mr Mills on 7 July.¹⁶⁶⁴ This was one example of what the Inquiry believes may have been a more general inclination on the part of the officials responsible for the NI RHI scheme to emphasise positive aspects of the scheme and downplay any potential risks or adverse outcomes.
158. The stark and clear message of the extent of the RHI funding problem and its potential consequences, as articulated in the initial draft of what became the 8 July 2015 submission, should not have been altered so as to deprive the Minister (or any other subsequent reader) of the opportunity of reading the submission and consequently knowing, or being reminded, that there was a potential £13 million shortfall in funding for the year 2015-16 that may have to be met from some other part of the DETI budget.
159. If an appropriate system of project management had been instituted at the start of the NI RHI scheme it should have been possible to clarify the significant issues in 2015 with a degree of expedition.
160. The Inquiry believes that there was a significant lack of effective leadership within DETI in the early weeks of June 2015. Dr McCormick agreed that May/June 2015 would have been a ‘classic’ moment to conduct a Gateway process and that such a process should also have been carried out in 2011 prior to taking on the NI RHI scheme.¹⁶⁶⁵ This was a lost opportunity for a moment to “stand back and examine all the circumstances of the scheme” along Gateway lines. An independent individual/committee could have easily been provided with relevant documentation and information relating to the implementation and administration of the GB and NI RHI schemes for review including, for example, the unusual nature of the RHI AME funding with the potential to impact upon the DEL budget, the fact that concerns had been raised about the scheme such as those from Ms O’Hagan, the need for and the relevance of the absence of tiering, the requirement for budget controls etc.

1664 TRA-11069 to TRA-11070

1665 TRA-12044; TRA-12097 to TRA-12098