

## Docbuster

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**From:** Boileau, Sam  
**Sent:** 21 February 2011 16:12  
**To:** 'Hutchinson, Peter'  
**Cc:** 'Clydesdale, Alison'; 'Hutchinson, Peter'; Wood, Charles; Phakey, Rajan; Bowdren, Helen  
**Subject:** DETI / Draft Instructions to Parliamentary Counsel  
**Attachments:** 9003370 v5.doc

Dear Peter and Alison

I attach draft instructions to Parliamentary Counsel in connection with the proposed extension of RHI powers to DETI.

You will see that there are a couple of matters which we have raised by way of footnotes which DETI will wish to consider when reviewing the draft. These will need to be dealt with before the instructions are finalised. We have also included square brackets where there are policy or factual points which we need DETI to confirm.

Please do give me a call if you would like to discuss any aspects of the draft instructions.

Kind regards.

Sam



Instructions to Parliamentary CounselRenewable Heat Incentive**1 Summary**

- 1.1 The Department of Energy and Climate Change (DECC) intends to implement a renewable heat incentive (RHI) in Great Britain (GB). DECC has powers to do this under section 100 of the Energy Act 2008. The Department of Enterprise, Trade and Investment (DETI) has also identified a need for an RHI to be introduced for Northern Ireland. However, DETI does not currently have primary legislative powers to do this.
- 1.2 By these instructions Parliamentary Counsel is instructed to draft provisions to be inserted into the Energy Bill 2011, a bill sponsored by DECC, to enable DETI to introduce an RHI scheme in Northern Ireland (NI). The objective is for DETI to be given powers, equivalent to those currently available to the Secretary of State in GB, to introduce a separate RHI in NI.
- 1.3 Counsel is asked to note that functions which would be conferred on the Secretary of State in GB are commonly conferred on a named department in Northern Ireland, in this case DETI. Accordingly in these instructions reference is made to DETI as the entity to which it is intended to confer powers.
- 1.4 The Energy Bill started in the House of Lords and has finished the Committee stage in the House of Lords. The Bill is waiting for Report stage in the House of Lords (first house). It is intended that these amendments be introduced [at Report stage in the House of Lords] [at Committee stage in the House of Commons] [at Report in the House of Commons].

**2 Policy Background and Objectives***United Kingdom and GB*

- 2.1 Under the Renewable Energy Directive (Directive 2009/28/EC), the United Kingdom is required to introduce measures to ensure that 15% of its overall energy use is obtained from renewable sources by 2020.
- 2.2 The United Kingdom Government has introduced and is introducing a number of steps to help meet the 15% target. These include measures such as the Feed in Tariff and the Renewables Obligation (which both support the price of electricity generated from renewable sources) and the Renewable Transport Fuel Obligation (which obliges fuel suppliers to blend bioliquids into transport fuel). As part of this package of measures, DECC has proposed the introduction of an RHI in GB to encourage households, businesses and communities to use renewable heat.

The purpose of the RHI is to stimulate a market for renewable heat by making support payments to the owners of renewable heat generation systems, proportionate to the amount of measured heat output delivered.

- 2.3 In February 2010 DECC consulted on the introduction of an RHI scheme in GB. It is DECC's intention for the scheme to be introduced in GB during 2011.

### *Northern Ireland*

- 2.4 Energy is a devolved matter under the Northern Ireland Act 1998. DETI is responsible for energy policy in Northern Ireland. Its statutory powers and duties are set out in the Energy (Northern Ireland) Order 2003.
- 2.5 DETI published a Strategic Energy Framework (SEF) in 2010 which sets out its policy and aims for the next ten years in the energy sector. DETI's stated objectives in the SEF are to set the conditions for maximising the contribution of renewable heat in the Northern Ireland energy mix by 2020.
- 2.6 The heating market is significantly different in Northern Ireland to that in GB. Many people in Northern Ireland heat their homes using fossil fuels such as oil (which is delivered by a large number of mainly small suppliers with no central collation of consumption data). DETI is of the view that the reliance on oil, especially in rural areas, provides a significant opportunity for promoting renewable heat technologies as an alternative choice for consumers.
- 2.7 DETI has commissioned research which concluded that Northern Ireland has the potential to obtain 10% of its heat energy from renewable sources by 2020, and recommended the development of an RHI, providing it is economically viable.
- 2.8 DETI has also commissioned an independent economic appraisal of the level of support that could be introduced through an RHI. DETI has not held a formal consultation on the introduction of an RHI, although as discussed above, the concept of an RHI in NI was mentioned in the 2009 SEF consultation which was adopted in September 2010.

### *Policy objective*

- 2.9 DETI's policy objective is to implement in NI an RHI scheme that is similar to the scheme in GB. However the RHI scheme for NI is intended to be separate from the RHI scheme in GB, since it will need to be tailored to suit the NI energy market. In particular, there may need to be different payment levels, and different eligibility requirements. DETI considers that the powers currently available to DECC under section 100 Energy Act 2008 would be appropriate for these purposes if extended or introduced in Northern Ireland. Further details are set out below.

### 3 Detailed instructions

#### *Legal position in GB*

- 3.1 Section 100 of the Energy Act 2008 gives the Secretary of State the power to introduce financial incentives for the generation of heat using renewable sources. The powers granted are broad, and it is intended that the detail of the scheme will be contained in secondary legislation. Section 100 of the Energy Act has application in England and Wales and Scotland only (Section 112). The powers set out in Section 100 do not extend to Northern Ireland.

#### *Legal position in NI*

- 3.2 Renewable heat and energy are not excepted or reserved matters under the Northern Ireland Act 1998 and the Northern Ireland Assembly is therefore free to legislate in respect of it. However, DETI is not currently minded to introduce new primary legislation in the Northern Ireland Assembly for these purposes. If DETI were to pursue the legislation through the Northern Ireland Assembly route, the process could take up to 18 months. There would then be a danger that the provisions would not be enacted in time for Northern Ireland to take advantage of specific funding for the RHI secured from HM treasury for the next financial year.
- 3.3 DETI has considered alternative legislative options for introducing an RHI scheme in NI, such as exercising powers under the miscellaneous provisions in the Energy (Northern Ireland) Order 2003 or under section 2(2) of the European Communities Act 1972. However, for a number of reasons DETI is currently of the view that introducing powers through the current Energy Bill in Westminster would be more appropriate.

#### *Legislative Consent Motion*

- 3.4 Notwithstanding that energy is a devolved matter, therefore, DETI wishes to obtain the necessary powers through an amendment to be introduced to the current Energy Bill 2011. The amendment is intended to extend or introduce (as appropriate) RHI enabling powers to Northern Ireland. [DECC is agreeable to this approach, provided the amendments do not impact on the Bill's passage.] [DETI has accordingly obtained [will obtain] a Legislative Consent Motion to enable the Secretary of State to legislate in this area for Northern Ireland.]

#### *Legislative options*

- 3.5 There would appear to be two potential legislative options in terms of the Energy Bill amendment, as follows:
- (a) the provisions of the Energy Act 2008 could be extended to NI by way of an amendment to that Act; or
  - (b) the powers could be introduced for DETI by a free standing clause in the Energy Bill in equivalent terms to the Energy Act 2008.

- 3.6 Counsel is asked to consider which of these is appropriate and draft the relevant provisions accordingly.

*General scope of the proposed RHI*

- 3.7 In terms of its broad scope and purpose, the RHI in NI is intended to be the same as that proposed for England, Scotland and Wales by DECC, save for one point relating to the definition of biofuels, addressed below.
- 3.8 Accordingly, whilst the underlying regulations will need to differ to cater for issues specific to Northern Ireland, the primary legislation does not need to be different save for one point relating to biofuels, explained below. DETI requires the same powers as those set out in Section 100 and currently being implemented by DECC.
- 3.9 Any local differences in terms of payment levels or eligibility rules can be dealt with by the secondary legislation which will, in any case, be required.

*Power to raise levy*

- 3.10 The Energy Act 2008 provisions include a power to impose a levy on fossil fuel providers with the intention that revenue from the levy could be used to fund the RHI scheme. For the moment, it has been decided as a matter of policy that the RHI across the UK will not be funded, at least at the outset, by way of a levy. Rather it will be funded by way of central funds already secured from HM Treasury. In connection with NI £25m has been secured by way of Annually Managed Expenditure - £2m in the first year, then £4m, £7m and £12m. £850m has been allocated to GB.
- 3.11 Notwithstanding this policy decision, it is the intention to confer on DETI all of the powers currently contained in section 100 of the Energy Act 2008, including the power to raise a levy<sup>1</sup>. There may therefore be a requirement for a ways and means resolution and a money resolution.

*Administrator*

- 3.12 The Energy Act 2008 confers administrative functions on the Gas & Electricity Markets Authority (**Ofgem**) for the purposes of the RHI. For the purposes of the NI scheme, the equivalent administrative functions will need to be conferred on the Northern Ireland Authority for Utility Regulation (**NIAUR**), which is the regulator for all Energy, Electricity, Gas and Water and Sewerage industries in Northern Ireland. (NIAUR was established under the Energy (Northern Ireland) Order 2003 as the Northern Ireland Authority for Energy Regulation to regulate gas and electricity in Northern Ireland. When the Water & Sewerage Services

<sup>1</sup> [Note to DETI: The effect of this will be that DETI will be given a power to make regulations in relation to a matter (the raising of a levy) which would, if dealt with by primary legislation, be an excepted matter. Has this been discussed and agreed as between DETI and DECC?]

(Northern Ireland) Order 2006 (the "Water Order") came into force on 1st April 2007, its name changed to NIAUR.)

- 3.13 In addition, provision will be required to deal with the delegation of functions from NIAUR to Ofgem. In practice, the day to day administration of the NI RHI will be carried out by Ofgem on NIAUR's behalf. For example, it is intended that Ofgem will hold the funds, make payments to eligible parties, and make decisions on eligibility for payments.
- 3.14 Counsel's attention is drawn to the analogous situation under the Renewables Obligation, where NIAUR is given the legislative function of regulator, but there are provisions written into the legislation (Section 121 of the Energy Act 2004) to allow NIAUR and Ofgem to enter into agreements / arrangements to allow Ofgem to perform NIAUR's functions on its behalf.
- 3.15 It is suggested that similar provisions will be appropriate in connection with the RHI<sup>2</sup>.

#### *Definition of Biofuel*

- 3.16 DETI require the flexibility to amend the definition of "biofuel" in the future. In Section 100 of the Energy Act at sub-section 5 paragraph (b) there is the power to modify the definitions of "biogas" or "biomass". The equivalent provisions in this case should be extended to include "biofuel".

#### *Statutory references*

- 3.17 There are certain references in the Energy Act 2008 to GB legislation which DETI suggests will need to be considered and if appropriate amended. These are set out below, along with details of their NI legislative equivalents.

Energy Act Reference	GB Act referred to	Equivalent N.I Order
Section 100 (3) Definition of Biomethane	Gas Act 1986 (c 44) Section 7 (gas transporter licences)	Gas Order 1996 Article 8(1)(a): Licensing of conveyance
Section 100 (4) (h) Sources of energy and technologies (Combined heat and	Electricity Act 1989 (c 29) Section 32M (interpretation of "renewable source").	The Energy (Northern Ireland) Order 2003 Section 55(f) defines renewable

<sup>2</sup> [Note to DETI: It may be necessary to include a paragraph in the instructions dealing with administrative costs and how these will be funded. We understand that funding has been specifically identified for the GB RHI (£850m); and NI schemes (£25m), but we are not aware of what has been proposed in terms of how those funds will be used to pay for administrative costs. We presume that any funding relating to the administration of the NI scheme – even if incurred by Ofgem - would need to come from the allocated £25m. Will there be a need for NIAUR to incur / recover its own administrative costs? Will there be a need for NIAUR to reimburse Ofgem for costs incurred on NIAUR's behalf in administering the NI RHI?]

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**Source Path:** \DETI Draft Instructions to Parliamentary Counsel - Renewable Heat Incentive Powers - comments on final draft.msg