

THE RENEWABLE HEAT INCENTIVE INQUIRY

**CLOSING WRITTEN SUBMISSIONS
ON BEHALF OF
THE DEPARTMENT OF FINANCE**

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Glossary

In this submission the following abbreviations shall mean:

AFMD	Accountability and Financial Management Division
AME	Annually Managed Expenditure
C&AG	Comptroller and Auditor General in the Northern Ireland Audit Office
CBG	Consolidated Budgeting Guidance
CED	Central Expenditure Division
CPD	Central Procurement Division
CST	Chief Secretary to the Treasury
DECC	Department of Energy & Climate Change
DEL	Northern Ireland Executive's Departmental Expenditure Limit
DETI	Department of Enterprise, Trade & Investment
DfE	Department for the Economy
DFP	Department of Finance & Personnel
DoF	Department of Finance
DoH	Department of Health
DOJ	Department of Justice
EAB	Economic Appraisal Branch
HMT	Her Majesty's Treasury

IMS	Information Management System
MPMNI	Managing Public Money in Northern Ireland
NIAO	Northern Ireland Audit Office
NI Block	Northern Ireland Block Grant from HMT
NIGEAE	Northern Ireland Guide to Expenditure, Appraisal and Evaluation
OBC	Outline Business Case
PSD	Public Spending Directorate
RBM	Resource Budgeting Management database system that holds the financial data for the Northern Ireland Executive
RHI schemes	Non-domestic RHI scheme and Domestic RHI scheme
Settlement Letters	CST letters to the Northern Ireland Executive recording the spending review settlement for specified financial years
SFP	HMT Statement of Funding Policy
SOC	Strategic Outline Case
SPD	Strategic Policy Division
Supply	Supply Division
VFM	Value for Money

1. Introduction

1. The Renewable Heat Incentive Inquiry is tasked to investigate, inquire into and report on the Non-Domestic Renewable Heat Incentive scheme (“the RHI scheme”), including its design, governance, implementation and operation, and efforts to control the costs of that scheme, from its conception in 2011 to the conclusion of the Inquiry.
2. The Inquiry has been hearing oral evidence for almost a year, and has in addition received evidence by way of written statements from a large number of witnesses.
3. The Department of Finance (DoF), formerly the Department of Finance and Personnel (DFP), hereafter referred to as the Department, has provided the following corporate statements to the Inquiry (excluding annexes):
 - 1) DoF Corporate Statement dated 02/06/17 - WIT 30011-30171
 - 2) DoF Corporate Statement dated 20/09/17 - WIT 34692-34707
 - 3) DoF Corporate Statement dated 22/03/18 - WIT 34708-34716
 - 4) DoF Corporate Statement dated 21/07/17 - WIT 35006-35010
 - 5) DoF Corporate Statement dated 07/09/17 - WIT 35021-35091
 - 6) DoF Corporate Statement dated 09/02/18 - WIT36294-36312
 - 7) DoF Corporate Statement dated 30/05/18 - WIT 34717-34730
 - 8) DoF Corporate Statement dated 19/06/18 - WIT 37001-37319
 - 9) DoF Corporate Statement dated 25/06/18 - WIT 37389-37393
 - 10) DoF Corporate Statement dated 06/10/18 - WIT 37413-37419

11) DoF Corporate Statement dated 30/11/18 – WIT 37420-37422

4. In addition, the Inquiry has sought and obtained written witness statements from a large number of employees or former employees of the Department of Finance.
5. The Department does not seek to repeat the detailed contents of its corporate statements, but it is hoped that the information contained within those statements and the statements made by Departmental officials and witnesses, as well as the work which it has undertaken to locate and produce over 73,000 pages of documents, has assisted the Inquiry in fulfilling its terms of reference.
6. The Department welcomes the opportunity to comment in writing on the evidence before the Inquiry. As the Inquiry is continuing to receive evidence, the Department asks the Inquiry to note that these submissions do not refer to evidence that the Inquiry has received and given to the Department after 30th November 2011. In order to meet the Inquiry deadline for these submissions, and to continue to fulfil requests for information and address Section 21 Notices, it has not been possible to fully consider all recent material. Should it be necessary to address anything received after that date, the Department respectfully wishes to have an opportunity to address same, either in oral submissions or in a manner approved by the Inquiry.
7. In preparing this submission, the Department has sought to remain focussed on the remit of the Inquiry as it applies to DoF and its predecessor department, DFP. Any reference to the Department herein is intended to cover either DoF or DFP, unless otherwise made clear.

8. The Department recognises that the Inquiry is looking only at the RHI scheme, but respectfully reminds the Inquiry that this was one scheme in a large number of schemes operated by Energy Division in the Department of Enterprise, Trade and Investment (DETI), now the Department for the Economy (DfE), which was in itself an extremely busy policy department. (The Inquiry will be aware from the evidence of the long hours worked by Civil Servants to deliver for the public). The Department reminds the Inquiry that the Northern Ireland Civil Service at the time was experiencing considerable cost pressures and this was targeted in an overall reduction of staffing, known as the Voluntary Exit Scheme, and a moratorium on new staff being employed. Similar considerations of workload, staffing and resources apply to the working of this Department, however the Department does not seek to suggest that it is in any way inadequately resourced.

9. The Department respectfully submits that context, and the wider picture, as regards what occurred in respect of the RHI scheme is extremely important. Thus, while the Inquiry is tasked only with looking at one scheme, albeit one which had enormous repercussions for the Government and governance of Northern Ireland, it would be wrong not to consider what else was happening across the two Core Participant Northern Irish departments, throughout the relevant periods under consideration.

10. The Department refers to the consideration of Dr Andrew McCormick to “systems failure”:¹

¹ Paragraph 16 of his statement to the Inquiry dated 22nd August 2018, at **WIT 26228**

- a. “systems failure” is and should be seen as **more serious** than a failing by one or more individual; and
- b. in such cases, errors or failings by individuals need to be considered on their merits in a fair and objective process, but, frequently, no individual act or omission explains the bad outcome, and where that is the case, it is unfair and inappropriate to blame or hold to account individuals who have only contributed to the problem;”

It respectfully suggests that no one person is responsible for the problems that arose in respect of the RHI scheme, rather systems failed. The systems in place either did not operate as intended, or were inadequate to meet the needs of a complex scheme such as the RHI.

- 11. The Department will, in the following submission, set out those areas where systems failures arose within the Department and, where it is appropriate to comment, more widely within the NICS.

2. Funding

Introduction

12. One of the central themes of the work of the Inquiry has been the source and classification of the funding for the RHI scheme and the extent to which any confusion as to the nature of the funding affected the design of the Scheme and the delay in introducing measures to control costs.
13. It is a fundamental principle of public finance that every pound of public money is of equal value whether, Annually Managed Expenditure (AME) or funding subject to a Departmental Expenditure Limit (DEL) and in that sense, treatment of the RHI budget should not have differed, regardless of the funding source.
14. This chapter will examine the formal HMT guidance that existed on funding at the time and the information that was made available to DETI by the Department both generally, and specifically in relation to RHI funding. It is apparent from the evidence that DETI was aware of the precise nature of the RHI funding position from the outset. The Department accepts, however, that it should have sought greater clarity on RHI funding issues at that time and passed this on in writing to DETI.

HMT Classification of Funding

15. The Consolidated Budgeting Guidance (CBG) is the authoritative guidance for all government departments on the budgeting framework for expenditure control, whilst the Statement of Funding Policy (SFP) sets out how the UK devolved regions are funded.
16. The classic DEL and AME definitions were described in the 2010/11 CBG² in the following way;

“1.33 All programmes are in DEL unless the chief secretary has determined that they should be in AME. The Chief Secretary may agree to put programmes in AME if -:

They are demand-led or exceptionally volatile in a way that could not be controlled by the department and where the programmes are so large that departments could not be expected to absorb the volatility in their DELs;

or

For other reasons they are not suitable for inclusion in firm three year plans set out in the spending review.³

17. Thus, DEL budgets were by their nature “expenditure limits”, whilst AME budgets were “managed” but not limited. HMT in its witness statement pithily describes AME as “*money spent in areas outside of budgetary control – this is all spending that is not controlled by a Government Department...*”⁴ On the basis of the CBG definitions, therefore, RHI funding was a contradiction in terms, being funding in an area outside of budgetary control yet at the same time subject to an expenditure limit.

² INQ 51727-51868

³ The 2010/11 CBG replicates exactly the 07/08 CBG in this regard.

⁴ Witness Statement of JC Gray at WIT 180025

18. With the greater controls introduced by the coalition government in 2010, new restrictions were introduced. As was succinctly stated by Dame Una O'Brien on Day 9:

"...prior to 2010, that volatility and unpredictability was managed by the Treasury within the public spending envelope as a whole, but due to the pressure of austerity and the need to bring the deficit down, the attempt was really to push as much management of that volatility and unpredictability back into departments".⁵

19. The 2011/12 Guidance⁶ reflected this new emphasis on greater controls on AME spending following the Spending Review Framework of June 2010⁷. Whilst still annually managed, the intensity of the management required was substantially increased. In particular, the 2011/12 CBG stated;

"Where actions/inaction of a department increases AME, they are assumed to fund the increases in AME by reductions in their DEL budgets."⁸ (underlining added)

20. This potential DEL impact was referred to by Counsel to the Inquiry as an "*ex-post facto* clawback".⁹

21. Similarly, the 2015 SFP referred to what is known as the 'parity principle'¹⁰ whereby if Devolved Administrations wish to offer more generous terms for an AME programme they would be expected to make up the difference from their DEL budgets.

⁵ TRA01057 – line 16-18

⁶ DOF 60033-DOF 60157

⁷ INQ 53134

⁸ DOF 60039

⁹ TRA 01052

¹⁰ See INQ 50074 §§3.1-3.4

22. Information on these new controls on AME budgets introduced in 2010 were in turn passed on by the Department to the individual Northern Ireland Departments.¹¹
23. It should be noted that in the 11/12 CBG, a DEL consequence to an AME overspend was not *automatic*, it was an assumption.
24. Whilst the CBG and the SFP undoubtedly tightened up the management of AME management and raised the distinct possibility of DEL consequences in certain circumstances, no specific guidance is to be found in either of these documents on the RHI funding model of AME subject to a DEL type expenditure limit, perhaps because the RHI was seen, in relative terms, as a small scheme. Whilst there was reference in the 2015 STP to breach of DEL limits¹², there was no similar reference to breach of AME limits.
25. Paul Doyle, the Deputy Director of the Devolved Countries Team in HMT had written to the Department on 26 April 2011 about the new approach to control and monitoring of AME in the latest edition of the CBG.¹³ It was explicitly stated in this letter that the new approach “does not set a firm cap on AME spending” and no specific mention was made of RHI, notwithstanding that the Jon Parker email had been sent some 11 days earlier.
26. The Department disseminated the message on the increased AME restrictions to all of the NICS departments by a letter of 6 June 2011 from Peter Jakobsen (CED) to each of the Finance Directors. They were advised of,

¹¹ See **WIT 37023** (Peter Jakobsen Memo to Finance Directors 6 June 2011) Underlining present in the original version; See also **WIT 37051-37088** 2011-12 In Year Monitoring Guidance, (see in particular paragraph 7.6 at **WIT 37081** for DEL Consequence).

¹² See 2015 SFP at **INQ 50081**

¹³ Letter - P Doyle HMT to R Pengelly DFP - **WIT 37031**.

“...HM Treasury’s intention to monitor AME spend this year in the same way as DEL is currently monitored starting from the June return.

In practice this means that your AME plans as provided in the opening monitoring confirmation print are upper limits and any forecast which exceeds this level will now require HMT approval.
(original underlining)

...

Where a departmental return forecasts spend in excess of its plans, a full explanation of the increase must be provided to CED who in turn will approach HMT for approval to the increase.”¹⁴

27. A similar warning was circulated to all Departments in January 2012 where it was said;

“HM Treasury in this financial year has changed the way in which AME expenditure is managed. The main change is the need to seek approval from the Chief Secretary to the Treasury to any increase in funding requirements compared to the opening budget position. HM Treasury still recognise that many areas of AME expenditure are volatile and beyond the direct control of the Executive. However, this additional control highlights the ongoing importance of rigorous monitoring and management of our AME expenditure.”¹⁵

28. This message was also the subject of training given to finance staff by CED in 2012. The accompanying slides have been appended to the witness statement of Agnes Lennon.¹⁶

¹⁴ at WIT 37023

¹⁵ WIT 37014 and DOF 60540. Whilst it was indicated that AME plans were now upper limits, there remained the possibility that where those limits were exceeded, HMT approval could still be obtained for the increased funding, depending on the circumstances.

¹⁶ Narrative at WIT 44638, slides at WIT 44655-60.

29. Thus, the warning of greater control and monitoring of AME spending was fully conveyed by the Department to all the other NI Departments. Whilst the RHI Scheme may not have fitted neatly into the CBG, DETI would have been aware nonetheless, independently of the John Parker email and the specific advice from Supply, that AME forecasts in monitoring confirmation prints were considered to be upper limits and where AME budgets were exceeded, then explanations would be required and DEL consequences could be anticipated.

The Settlement Letters

30. The now well known that the 20 October 2010 Settlement letter from the Chief Secretary to the Treasury¹⁷ made reference to AME funding, which in itself was unusual. Agnes Lennon in Central Expenditure Division, commented in her evidence;

*“At that time, Settlement Letters primarily focused on DEL issues and control totals and, in relation to AME, normally just confirmed the latest total AME forecast. For those reasons to have a paragraph on a specific AME allocation in respect of a particular programme (a NI Renewable Heat Incentive Scheme) was a little unusual.”*¹⁸

31. As stated above, this ‘unusual’ feature was what prompted Mrs Lennon to seek clarification on the matter from HMT. The equivalent Great Britain Settlement Letter explicitly stated that;

¹⁷ at DOF 02333-02342

¹⁸ At WIT 44662

“spending through the RHI will be budgeted through AME, but a condition of the treatment is that DECC will need to contribute towards any overspend above the Spending Review forecast...”¹⁹

32. By contrast, the Northern Ireland 2013 Spending Round letter for the financial year 2015/16²⁰ made no reference to RHI funding whatsoever. HMT evidence indicates that it “assumed” that AME cover would continue to be proportionate to the budget assigned to DECC²¹ but this assumption was not communicated, either formally or informally to the Department. A different approach was taken by HMT in the 2013 DECC settlement letter, which explicitly stated;

*“spending... will continue to be treated as AME. This is on condition that where spending exceeds the cap of £430m in 2015/16 because of higher than expected levels of deployment, DECC will bear a proportion of all spend above this limit”.*²²

33. Counsel to the Inquiry had suggested that there may have been *no* funding for 2015/16 “because we’d missed out on in the 2013 spending review.”²³ This analysis is not accepted by the Department. The 2013 Spending Round letter explicitly stated: “The Northern Executive’s Annually Managed Expenditure (AME) budget for 2015/16 remains in line with the Office of Budget Responsibility forecast provided by you for Budget 2013”. RHI forecasts beyond March 2015 had been approved by HMT as set out in the Department’s corporate statement written by Joanne McBurney of CED.²⁴ Having received HMT approval, there was no reason to assume that the RHI AME budget would have been excluded. At the very least, the funding tails for the 2011-15 period would have formed part of the

¹⁹ See HMT Statement at **WIT 180050**

²⁰ **DOF 59020**

²¹ Statement of JC Gray at **WIT 180027**

²² See HMT Statement – **WIT 180051**

²³ During evidence of Davina McCay, Mr Aiken BL –**TRA 05528** at line 21

²⁴ See paragraphs 15-16 – **WIT 37004**

AME budget. Thus, for this single year, the RHI AME budget was subject only to the standard CBG controls.

34. Nonetheless, the Department acknowledges that it should have queried with HMT at the time whether this had been an omission on its part. Instead the Department made the assumption that as a funding profile for 2015-16 had been included in AME forecasts which had been approved by HMT, the fact that HMT had not notified it of a cap implied that funding would be provided without any limit being applied. While this was ultimately borne out by HMT providing full funding for 2015-16, the Department acknowledges that clarification should have been sought from HMT instead of relying upon that assumption.
35. It is clear, however, from the letter from Minister Foster to Minister Barker on 16 December 2013²⁵ which refers previous allocations being based on a share of the GB budget and to assuming 'similar arrangements' being considered for 2015-16 that DETI officials were aware that funding was to be limited in the same way as it had been previously. This was confirmed in the response from Minister Barker. Had the issues in the Barker-Foster correspondence been pursued with the Northern Ireland Minister for Finance, as indicated in the letter, through formal processes, this would undoubtedly have prompted the Department to raise the issue of a cap with HMT.
36. In the Northern Ireland Settlement Letter of 13 January 2016²⁶ HMT *did* provide express clarification on the RHI budget. On this occasion the letter specifically referred to AME cover based on a population-proportionate share of the budget for RHI in Great Britain subject to the rider that "*any spending on*

²⁵ WIT 02470

²⁶ Beginning at DOF 42001

RHI above this level will need to be funded from the Executive's DEL budgets or other sources of income".

37. In light of all of the above, it is perhaps unsurprising that at the stocktake meeting in Belfast on 8 December 2015, the Department made the case to Jon Donaghy (HMT Devolved Spending Team) that *"the funding arrangements were not clearly or consistently communicated throughout the last SR period"* and that the notification of the 2015 Spending Review cap *"represents a significant change"*.²⁷
38. The December meeting was part of a wider stocktake at which RHI issues were discussed²⁸ and at a time when in the words of the Department's then Permanent Secretary, David Sterling, Northern Ireland's *"stock was low"* with HMT in the post 'Fresh Start' context.²⁹ As stated in the Department's Corporate Witness statement of 6 October 2018³⁰ the engagement with HMT was *"relatively informal"* and no definitive advice was given by HMT. HMT did not unequivocally confirm at the meeting itself what the position was with regard to RHI AME funding; instead it issued oral, informal, interim advice. Thus, even at this late stage, there remained a degree of ambiguity on the part of HMT. The final position was then communicated by way of a telephone call to Mike Brennan on 18 December 2015.³¹ HMT agreed not to claw back any of the monies for 2015/16 but required any overspend in the future to be borne by the Northern Ireland DEL grant. Jon Donaghy, in Devolved Spending, was reported by Mike Brennan as having tried to get the Energy Desk in HMT to review its position, but Mike Brennan expressed the view that HMT *"will never move from a position signed off by the CST"*.³² There was *"a clear CST*

²⁷ See email from Michelle Scott to Jon Donaghy (HMT) of 11 Dec 2015 **DOF 04704-04707**. This refers to the 2015/16-2019/20 budget.

²⁸ Details of the meeting are given at DoF No 7 - **WIT 37417**

²⁹ See email D Sterling to A McCormick - 28 Jan 2016 - **WIT 11781**

³⁰ **WIT 37413**

³¹ **DOF 04683**

³² See email from M Brennan to D Sterling - 26 Jan 2016 - **DOF 42044**

line” in the 2016 settlement letter³³, but in the earlier 2013 letter it was entirely absent.

39. Ultimately, the size of the budget allocation for RHI was a matter in which the Northern Ireland Departments just did not have a say. Thus, when Pamela Galloway of CED queried with HMT the RHI budget for 2015/2016 and thereafter, she was told by Keith Jarrett that it was “subject to discussions with DECC”³⁴, as had been the case when the scheme was initially devised. In those circumstances it was all the more important that HMT would explicitly provide the fullest possible information to the Department as to the precise nature of the funding arrangements, their duration, bearing in mind the complexity of the funding tails, and of the risk to the NI block grant.

“Capped” AME

40. The AME in RHI, which was subject to a cap or upper limit, was different from other forms of AME funding, even after the new restrictions introduced by the updated CBG in 2011. Unlike AME of any other kind, the cap was completely rigid and did not permit the flexibility required by the higher degree of volatility and unpredictability. It differed from DEL in that Departments were *not* free to spend any surplus AME budget elsewhere in the department, return it to the “Centre” or carry it forward to the next year. In a sense it could be seen as the worst of both worlds. DFE has expressed the same view; in its first corporate statement it has said, “it is evident that Scheme expenditure does not fit neatly into either of the broad categories³⁵”, ie DEL or AME.

³³ **DOF 42003**

³⁴ See **DOF-04642** – series of emails passing between P Galloway & K Jarrett – Oct/Nov 2015

³⁵ At **WIT 00046** at §85

41. At this remove, it is difficult to see why HMT provided funding for the scheme in AME in the first place. It would have been simpler, and more appropriate to provide the funding as a DEL budget.
42. The HMT evidence shows that this novel funding model was developed in Great Britain following a process of discussion and negotiation between Treasury officials and DECC with the specific agreement that HMT would not take on the risk of overspend. Jean-Christophe Gray of HMT has said that Treasury required that “strong cost controls” were in place for the GB Scheme to incentivise robust budget management.³⁶
43. HMT has confirmed that the only written communication of this new funding model³⁷ to the Northern Ireland departments, other than the 2010 Settlement Letter, was by way of the Jon Parker email of April 2011, which was sent directly to DETI and copied to Mike Brennan in the Department and Mark Parkinson in the HMT Devolved Spending Team.³⁸ HMT has acknowledged in evidence that the position it adopted in December 2015 in the conversation between HMT and the Department’s then Budget Director, Mike Brennan, was based on “*the arrangements set out in the Statement of Funding Policy, the 2010 Settlement letter and the 2011 email from Jon Parker*”³⁹.
44. The second HMT witness statement⁴⁰ has an annex containing an analysis by HMT of the DECC business case for AME treatment of the RHI budget. The conclusions of that analysis, set out in bullet points, form the stringent conditions that Treasury considered should be imposed on DECC’s AME

³⁶ At **WIT 180026**

³⁷ As stated above, the 2010 CST letter, did not provide a firm indication that the figures provided were a rigid upper limit rather than an indicative profile.

³⁸ Jon Parker did not work in the Devolved Administrations Team; he was an official in HMT Energy Division.

³⁹ See HMT statement – **WIT 180029** final paragraph.

⁴⁰ **WIT 180047**

funding.⁴¹ Regrettably, these conclusions dating from 2009 were not seen by this Department or DETI until they were disclosed to the Inquiry in 2017.

“Treat it as DEL”

45. It is clear from the evidence that DETI was fully aware of the RHI funding position from the outset, both from the Jon Parker email of 15 April 2011⁴² which was sent directly to Alison Clydesdale in DETI and from the specific advice given on the funding model by Stuart Stevenson of Supply. Agnes Lennon, then the Grade 7 responsible for AME exercises in CED has written of her regular, probably daily, contact with the NI Spending Team in HMT.⁴³ She has given written evidence of how she contacted HMT in October or November 2010 following the Settlement Letter due to the unusual nature of the funding and obtained clarification of the fact that the funding was capped. She recalls passing on this advice to Supply.

46. “Treat it as DEL” was the advice given by Stuart Stevenson (Supply officer from 5 November 2007 to 31 March 2014) to Bernie Brankin in DETI Finance Division in May 2011. This advice was a sound rule of thumb. DETI Finance was experienced in managing DEL budgets. Fiona Hepper, when referring to the email exchanges between Jon Parker, Alison Clydesdale, Bernie Brankin and Stuart Stevenson, confirmed her first witness statement that *“the significance of these statements was clearly recognised and understood by DETI officials”*⁴⁴. Had DETI, as the spending department, adhered to that advice and ensured that the scheme had adequate spending control levers at the outset, it is unlikely that the scheme would ever have gone over budget. From the outset, it should have been plain to DETI, who were steeped in the policy

⁴¹ At WIT 180075

⁴² DFE 62074

⁴³ See WIT 44632 paragraph 7. Her contact was mostly with Keith Jarrett, but also two grade 5s, Mark Parkinson and Jon Donaghy.

⁴⁴ See witness statement of Fiona Hepper – WIT 15121 para 306

of the Scheme and alert to its potential pitfalls etc⁴⁵, that there was a requirement to ensure that cost controls were in place.

47. In his witness statement of 22 August 2018, Andrew McCormick has said, "*in light of all I know now..... DETI really should have retained the understanding of the particular constraints on the RHI budget from its inception (and hence we should have had cost controls in place from the outset). I no longer think that it is fair on HM Treasury to imply that they (or DFP) had been slow to communicate a decision.*"⁴⁶ The Department acknowledges that it ought to have *formally* communicated the funding restrictions to DETI, but it is plain that the warning was received and understood. DETI, as the spending department, ought to have taken steps at an early stage to ensure that the necessary budgetary controls were in place.

Conclusion

48. The Department wholly acknowledges that where uncertainty existed as to funding, it ought to have sought formal written clarification from HMT at the outset. It is likely that informal oral communications with HMT took place in late 2010, and it is clear that Stuart Stevenson passed on the useful, pithy advice to DETI Finance that the funding should be treated as DEL. Nonetheless, more could have and should have been done to ensure that this novel mode of funding, was recorded in writing and underscored by way of *formal* communication to DETI, whether by way of a letter or a memorandum of understanding as suggested by David Sterling in evidence.
49. In the same way, when DETI sought clarification in 2015 of the HMT position the Department acknowledges that clarity as to the budget position should have been obtained as soon as possible from HMT, even if it would not have

⁴⁵ In particular, DETI had also been given detailed advice and warnings by OFGEM in the email of 4 November 2011 – See **WIT 00065** and also **WIT 15122**, paragraph 309 statement of Fiona Hepper

⁴⁶ See **WIT 26239** at §53

been possible to seek additional funding in the absence of evidence as to Value for Money.

50. It was put by the Chairman to the Inquiry to Ms Morelli in evidence, *“Would you have expected Treasury to give you a little more? One or two clues maybe?”* to which Ms Morelli replied, *“It would’ve been very, very helpful”*.⁴⁷ Had the background information and communications with DECC on the rationale for choosing this particular type of AME funding for RHI been explained to the Department at the outset, and had the 2013 NI Settlement Letter contained the warning that was explicitly provided in the equivalent letter to DECC (and to this Department in the 2016 Settlement Letter), then the uncertainty as to the true funding position may have been resolved at a much earlier stage.

⁴⁷ See **TRA 11373** lines 13-16

3. The Role of Public Spending Directorate

Introduction

51. As has been made clear in the Department's corporate statements, Supply Division (Supply) lies within the Public Spending Directorate (PSD). The role of a supply officer covers three main areas: financial and public expenditure exercises; private office business, and advice to departments.⁴⁸

52. In carrying out this latter function, the supply officer liaises with the Finance Divisions of other Departments. A supply officer would rarely have contact with policy officials, the general exception being when attending casework committees, at the invitation of that Department, or, exceptionally when there

⁴⁸ WIT 43421/23 (Relevant Extract from Stuart Stevenson Statement) and WIT 43021/24 (Relevant Extract from Michele Scott Statement)

is a particular business need to meet, as - in the case of RHI - proved to be the case in 2015.⁴⁹

53. In 2011, the relationship between a supply officer and a departmental Finance Division, whilst always professional, was generally one characterised by both formal written communication and “informal verbal communication⁵⁰” and always based on trust. This manner of working evolved as a natural consequence of the volume, complexity and (on occasion) urgency of work. As has been previously stated, Stuart Stevenson,⁵¹ the Grade 7 supply officer with responsibility for DETI until April 2014, has indicated to the Inquiry that he was in daily contact⁵² with DETI Finance Division. While it would simply not be possible to record all such daily communications, the Department recognises that its⁵³ lack of records of key conversations has proved to be problematic in respect of the RHI scheme.

Events 2010 - 2014

54. The first engagement Supply had with DETI in relation to the RHI scheme was upon the receipt of the Chief Secretary to the Treasury’s Settlement letter in October 2010, when DETI was advised by Supply to feed into AME lines on RHI⁵⁴ after a Departmental engagement with HMT⁵⁵.

⁴⁹ Meeting of 30th September 2015 attended by DFP, DETI Finance and Energy policy officials. See **TRA 15038**, line 20-22. Mrs Morelli stated that this was “the first time I’d met the policy side” – **TRA 15043**

⁵⁰ **TRA 02729**, line 1

⁵¹ Evidence given on Day 21 – 8/1/18 at **TRA 02722 -02786**

⁵² **TRA 02728** and **TRA 02729**

⁵³ **WIT 44021** – per Sylvia Sands “communication takes place day to day. Also **TRA 01691** line 23-24 and **TRA 01692**, lines 1-5 evidence of Bernie Brankin describing relationship as “informal”, “good” and not “documented in many cases”.

⁵⁴ See **DFE 195322** (16 December 2010) and also **WIT 44661**, paragraph 2 (Agnes Lennon Second Statement)

⁵⁵ **WIT 44022** para 14(c) and (d) of Sylvia Sands’s statement.

55. The Jon Parker email⁵⁶ into which Mike Brennan was copied by Jon Parker in April 2011 was forwarded to both Supply and CED by him.
56. Much time has been spent by the Inquiry in considering this email and the message it contained. The email related primarily to the arrangement that DECC had with HMT. At this point in time DETI had not committed to an RHI scheme similar to that in GB. The Parker email was not definitive, in terms of what Treasury might do in relation to Northern Ireland. As Joanne McBurney (CED) stated in oral evidence⁵⁷ the email had no firm standing as it did not come from the NI devolved spending team in HMT.
57. The Department nonetheless concedes that on receipt of the email, PSD ought to have sought clarity in writing from HMT, and then provided advice to DETI.⁵⁸
58. When the email came into Supply, it appears on the basis of all the evidence that Stuart Stevenson is likely to have spoken to Agnes Lennon in CED before speaking to Bernie Brankin in DETI Finance Division⁵⁹.
59. Following receipt of the Jon Parker email, while Mrs Lennon now has no recollection of speaking to Supply, she is clear that that should not be taken to mean that she did not do so.⁶⁰ She is clear what she would have said was “to strongly register a complaint that DETI had initiated communication with HMT rather than with the Department, as well as repeating the stark message, communicated initially following receipt of the 2010 Settlement Letter, that

⁵⁶ **DOF-02347**

⁵⁷ **TRA 03298** – line 9 to 15

⁵⁸ **TRA 03298** lines 21-25

⁵⁹ **TRA 02779-02780** -evidence of Stuart Stevenson Day 21, 8/1/18 and WIT 44662, paragraph 3

⁶⁰ **WIT 44665** – paragraph 13, supplementary witness statement of Agnes Lennon dated 16th March 2018

the RHI AME allocation must not be overspent as it would impact on the DEL".⁶¹

60. The Department submits that this evidence is supported by the advice which was given by Stuart Stevenson to Bernie Brankin, as recorded in her email to Alison Clydesdale, dated 3 May 2011, as having received from the Department - to treat the funding for RHI "as DEL"⁶².

61. The Department submits that the advice recorded by Mrs Brankin as having been given by Supply was sound advice in the context of a finite pot of money - even if it was classified as AME.

62. The Department regrets that the message is not referenced within any of the records that the Department holds or has been able to reconstitute.

63. As part of its engagement with departments, Supply considers business cases submitted by departments to determine whether a proposed spending decision has the potential to deliver a value for money outcome, based on an assessment of costs, benefits and risk.⁶³ Supply "relies on assurances from departments that they have completed a business case with all the available information in the most transparent and frank way"⁶⁴. The Department could not and should not be expected to duplicate work already carried out in preparation for the business case. The reliance upon what is stated in a business case is a fundamental component of the system of approvals.

⁶¹ WIT 44665 para 13

⁶² DOF 06373

⁶³ Department's corporate statements at WIT 03026 and WIT 34719

⁶⁴ Evidence of Emer Morelli - Day 79, 26/6/18 at TRA 11429 - lines 6-8

64. On average Supply assesses between £3 - 5 billion worth of business cases annually⁶⁵ and the grant of approval is essentially permission to proceed with a proposed spend, if a department determines to proceed with that proposal⁶⁶.
65. In evaluating business cases Supply is primarily concerned with value for money considerations, the question of whether or not a scheme is affordable is a matter for the individual department⁶⁷. Given the large volume of business cases, their worth and the fact that there is a 15 working day response to proposals,⁶⁸ it is not possible for Supply to be fully over every element of a policy outlined in a business case.
66. In the assessment of whether a scheme offers value for money, Supply regularly engages the assistance of economists from the Economic Appraisal Branch (EAB) of the Strategic Policy Division of the Department (SPD). Consideration of business cases is frequently a collaborative process, with team members discussing cases.
67. In respect of RHI, Supply approved DETI expenditure for the appointment of experts, recognising that DETI did not have the specialist knowledge within Energy Division to carry out the necessary work preparatory to advising its Minister as to how to utilise the Treasury money allocated to RHI.⁶⁹

⁶⁵ TRA 11368- Emer Morelli – lines 13-14

⁶⁶ TRA 11368 – Emer Morelli- lines 15 to 18

⁶⁷ Department's corporate statement WIT 34719-20 at paragraph 9 and 10 and TRA 11368 (line 16) to TRA 11369 (line 3)

⁶⁸ WIT 34719

⁶⁹ 1. DOF-60873 - Approval granted on 3 July 2009 for the appointment of consultants AECOM/Poyry to assist in the development of a renewable heat strategy for Northern Ireland. 2. DOF-41479-85 - approval granted on 22 March 2011 for the engagement of Consultants to Undertake Renewable Heat Incentive Economic Appraisal. 3. DOF-60874-5 –approval granted for the appointment of Energy Legal Advisers on 22 March 2011. 4. DOF-02403-4 - approval granted to the OFGEM feasibility study and associated £98,000 costs on 9 September 2011.

68. In November 2011, DETI submitted a Strategic Outline Case to Supply (SOC).⁷⁰ This was considered by Sylvia Sands, (the then Deputy Principal in Supply), and by Stuart Mc Allister, (then Assistant Economist (Staff Officer) in EAB)⁷¹. It was approved on 3rd January 2012⁷².
69. Prior to January 2014, the Department was not routinely invited to attend casework committees of DETI⁷³. From that point onwards, however, invitations to Supply were routinely issued from DETI, to attend casework committees of DETI, at which cases requiring Departmental approval were being considered⁷⁴. In oral evidence, Stuart Stevenson indicated that Supply was invited by DETI prior to 2014 on an ad hoc basis, citing an example of - inter alia - attending a casework committee discussing the “Gas-to-the-West” project in 2012⁷⁵. Supply was not, however, invited to attend the casework committee discussing the Outline Business Case (OBC) for the non-domestic RHI Scheme held on 9th March 2012, although it was invited to attend other casework committees around this time in relation to Invest NI projects.
70. The OBC⁷⁶ for the RHI Scheme, including the pro forma completed by DETI,⁷⁷ was sent to Supply on 22nd March 2012.
71. Although records no longer exist to say by whom it was considered, it is the Department’s case that the supply officer who considered the business case was Stuart Stevenson, for the reasons outlined below.

⁷⁰ **DOF 02405-02414**

⁷¹ **WIT 41526** Stuart McAllister

⁷² **DOF 02428**

⁷³ **WIT-03322** (DFE Corporate Witness Statement)

⁷⁴ DETI corporate statement at **WIT 003322** paragraphs 3 - 9

⁷⁵ **TRA 02737** line 12

⁷⁶ **DOF 02442-03235** (including annexes)

⁷⁷ **DOF 03236-38**

72. Following receipt of the OBC in Supply, it was passed to Rachel McAfee,(EAB) the following day, for consideration. EAB comments of 26th April 2012⁷⁸ were sent to Ronnie McAteer (Supply) and copied to Sylvia Sands and Noel McNally (EAB). Nothing should be read into or construed from the fact that Stuart Stevenson was not copied into this email, as this was not intentional, nor in any way significant.⁷⁹
73. Inquiry Counsel, Mr Aiken, appeared to suggest that there was no evidence of supply officer input into the approval of the RHI scheme business case. Stuart Stevenson explained that the consideration in Supply was a “team effort”⁸⁰, he further explained that while not recalling the exact exchange with Ms McAfee from EAB, the fact that her comments were put into the approval letter was an indication of the agreement between Supply and EAB.⁸¹ Nonetheless, the decision as to what goes into an approval letter is “very much an issue for supply”.⁸²
74. As Stuart Stevenson made clear in an exchange with Dame Una O’Brien on Day 23⁸³, in accordance with the standard practice in Supply at that time, because Sylvia Sands had looked at the SOC for the RHI scheme, he looked at the OBC in order to provide a fresh set of eyes. Further, the fact that the approval letter was signed by Ronnie McAteer, who was skilled at interpreting Mr Stevenson’s handwriting, supported this conclusion.
75. In 2012, un-minuted meetings were held with the then Grade 5 Head of Supply, Jack Layberry, at which supply officers and economists were present to discuss merits and difficulties of business cases in order to remove errors⁸⁴.

⁷⁸ **DOF 03235**

⁷⁹ **WIT42057** Rachel McAfee

⁸⁰ **TRA 03079** line23

⁸¹ **TRA 03081** line 9

⁸² **TRA 03081** line 13

⁸³ The exchange with Dame Una at **TRA 03083- 21** to **TRA 03087** line 136 at line 11. See in particular **TRA 03085** line 20 to line 18 on **TRA 03086**

⁸⁴ **TRA 03082**, see also Sylvia Sands’ witness statement **WIT-44019**, paragraph 6

76. The Department concedes that, despite the fact that the OBC was scrutinised by both the Grade 7 supply officer and the EAB economist, and is likely to have been the subject of discussion within the team, the errors in the OBC presented by DETI were not identified by the Department. In particular, the fact that Energy Division undervalued the net present cost of the RHI scheme for which approval was sought was not appreciated.
77. Had this defect been identified, Supply would have asked DETI to withdraw the business case and re-submit with the correct net present cost for further consideration.
78. The need to turn around business case approvals at pace, means that the Department has to be able to trust that the information it is given is complete, in that it contains all relevant information for and against a proposal, and that such information is correct.
79. Where an external expert has been engaged to advise a spending department, this Department submits that it is entitled to place substantial weight on that advice.
80. It is a matter of some regret that until 2018 no formal pro forma or other internal document existed that recorded the reasons for approvals and/or the reasoning behind the imposition of conditions, except for the approval letter.
81. On 25th January 2018, a new protocol introduced a single document recording the decisions taken by Supply when considering requests for spending approval. It records who was assigned to consider the business case; why that person was selected; what decisions were taken and the reasons for those

decisions.⁸⁵ This triage document can be found annexed to the second statement of Michelle Scott, dated 23rd May 2018.⁸⁶

82. Supply officers do not approve every business case submitted to it by a spending department. Where, however, Supply determine that approval should be granted, the key control available is making the approval subject to conditions, whether budgetary conditions or timescales.⁸⁷

83. In the approval letter⁸⁸ for the non-domestic RHI Scheme, as well as the two bespoke conditions: 1) limiting the time for which approval was granted, to reflect the period for which funding had been provided by HMT, i.e. until 31st March 2015; and 2) a requirement that arrangements be put in place to monitor, assess and if necessary change the scheme, with the first review to start in 2014, there were a number of standard conditions of approval, as required by the Northern Ireland Guide to Expenditure Appraisal and Evaluation (NIGEAE).

84. It is submitted that the conditions imposed by Supply were appropriate for the proposed scheme, and, had DETI complied with these conditions, the difficulties inherent in the RHI scheme could have been identified and remedied at an earlier stage.

85. It is, nonetheless, conceded that the Department ought to have realised that the RHI scheme was not “standard” as described on the pro forma⁸⁹, and to have appreciated that it was a novel, volatile scheme. It would certainly have been helpful for DETI to have described it in this way on the pro forma.

⁸⁵ Michelle Scott’s second statement at paragraph 4 – **WIT 44566**

⁸⁶ **WIT 44574**

⁸⁷ **WIT 43427** – Stuart Stevenson -para 18

⁸⁸ **DOF 03253**

⁸⁹ **DOF 03236**

86. The Department recognises that incentive schemes are susceptible to fraud, and will continue to work with departments to help manage this risk. It has recently issued guidance by way of a Dear Accounting Officer Letter (DAO) entitled “Fraud proofing Guidance”⁹⁰.
87. Given that that the amount of funding provided by HMT was limited, coupled with the tail payment, the Department ought to have imposed as a condition that the RHI Scheme included a mechanism for budgetary control – this is all the more so as the business case identified the risk of a higher than expected uptake leading to overspends.⁹¹
88. It was also open to Supply to impose a condition that the Scheme be project managed, whether through Gateway or in some other form. The Department is of the view, however, that it is generally for a department to manage its schemes in line with best practice and its own governance arrangements. Accordingly, the Department would not routinely make this a bespoke condition.
89. The OBC did indicate that there was to be an element of project management by way of a “joint project team” between DETI and OFGEM⁹². The Department considers that had the scheme been project managed this might have ensured that the scheme was properly monitored and reviewed as was stated would happen in paragraphs 10.4⁹³ and 13.33⁹⁴ of the OBC. It also would, perhaps have allowed for a better flow of information between DETI and OFGEM.
90. The Department accepts that the imposition of bespoke conditions merits greater consideration generally. The Department has commenced a review of

⁹⁰ 4/2018 <https://www.finance-ni.gov.uk/sites/default/files/publications/dfp/daodof0418.pdf>

⁹¹ **DOF 02523** – paragraph 10.10 of the OBC

⁹² **DOF 02524** paragraph 10.18 “in order to mitigate this risk, the Department will establish a joint project team with OFGEM as the scheme is implemented”

⁹³ **DOF 02521** (second 10.4)

⁹⁴ **DOF 02543**

the expenditure approval and business case appraisal process, the issue of bespoke conditions will be considered as part of that review.

Domestic Business Case

91. The Domestic Scheme business case was submitted to the Department on 15 August 2014⁹⁵. The Department was not invited to attend the Casework committee in DETI that considered the scheme, prior to it being sent to the Department.
92. The Supply team that considered the non-domestic RHI Scheme business case in 2012 was not the same Supply team that considered the Domestic Scheme business case in August 2014.⁹⁶
93. The Department recognises that the movement of civil servants, inter and intra, departments is a theme of some concern for the Inquiry and these submissions will address elsewhere⁹⁷ the discrete matter of handovers. Unfortunately, the fact is that the knowledge about the non-domestic RHI Scheme, its funding and the conditions imposed was not retained in Supply in a way that was readily accessible. As it was not then a live business case, knowledge of the RHI scheme was not transferred to the incoming supply officers, either by way of a handover, written or oral.⁹⁸
94. Further, at that time, there was no requirement to record in the Department the fact that approval of the non-domestic scheme was time limited, and there was no requirement to send reminders to Departments that approvals

⁹⁵ **DOF 100001**

⁹⁶ **WIT 34728**, paragraph 37 (DoF Corporate Statement)

⁹⁷ See pages 70-71 post

⁹⁸ **WIT 34728**, paragraph 38

required renewal. That responsibility did, and ultimately still does, remain with the spending departments. The Department has nonetheless adapted its Information Management System (IMS) so that bespoke conditions may be recorded and monitored. This will allow the Department to issue reminders/prompts to the spending Departments, if necessary. The Department nevertheless reiterates that primary responsibility for meeting Departmental approvals rests with the Accounting Officer of the respective department.

95. As a result, when the “new” Supply team came to consider the domestic business case, it was viewed as a standalone scheme. It was not considered to be contentious. The Department fully accepts however that the funding for the two schemes, ought to have been linked and considered in the round.⁹⁹

96. The position today is different to that which pertained in 2014. The Department now uses the IMS database to record unusual schemes.¹⁰⁰ This has been achieved by adding additional capacity to the existing IMS database to allow increased narrative to be recorded thereby providing further detail on the database. As stated above, Supply has now developed a pro forma which is completed by Supply on receipt of a spending proposal from a spending department¹⁰¹. In addition, the Department has updated the pro forma which a spending department is required to complete when submitting a spending proposal to Supply Division. A copy of the new pro forma is annexed hereto. As can be seen at point 19, departments are now required to identify linked schemes or earlier approvals.

97. In the domestic scheme business case there was no reference to the non-domestic RHI Scheme having received time limited approval. It would have been helpful if DETI had flagged the nature of this time limited approval as

⁹⁹ Evidence of Emer Morelli **TRA 11365** and **TRA 11378** lines 2 and 3

¹⁰⁰ Evidence of Emer Morelli -**TRA 11383**, line 22

¹⁰¹ See **WIT 44566** (paragraph 4) and **WIT 44574** (DoF Supply Spending Proposal Triage) (Michelle Scott Second Statement)

part of the business case. That said, the Department has conceded that Supply missed the opportunity to consider and familiarise itself with the nature of and any terms and conditions which attached to that approval. Had the approval of the Non-Domestic RHI scheme been checked then the Department could have asked for an update on progress on the non-domestic review, (scheduled to start in 2014) which may have, in turn, alerted DETI to the need to seek reapproval of the non-domestic scheme.

98. Further, Supply failed to identify the inconsistencies and inaccuracies in the information provided by DETI in the business case.¹⁰²
99. The domestic business case was passed to EAB on 18th August, and the Economist, raised a number of pertinent queries on 1st September.¹⁰³ In addition to these queries it is clear that discussion took place between Supply and DETI.¹⁰⁴ As a consequence of that those queries and that discussion, DETI provided Supply with the Barker-Foster correspondence of December 2013/ January 2014, an email from Stuart Wightman and the Jon Parker email¹⁰⁵. In the context of considering the stand-alone Domestic Scheme business case, Supply failed to join up the dots and realise the linkage in the two schemes. Rather, Supply relied on the information as presented as evidence that the RHI policy remained in place and that funding would continue to be provided. Supply did not challenge the formal correspondence between two Departments but rather took assurance from the information provided therein.
100. In particular, the EAB Economist asked about funding for the scheme, and whether CED had agreed [with HMT] “that any Barnett (sic) consequential of GB RHI will be allocated to DETI.”¹⁰⁶

¹⁰² WIT 34722, paragraph 19 Emer Morelli’s evidence at TRA 11418- 19

¹⁰³ DOF 100210

¹⁰⁴ See DOF 100214 and TRA 11394 line 22

¹⁰⁵ DOF 100214-100230

¹⁰⁶ DOF 100210

101. This query was not followed up by Supply. In not contacting CED, and by extension HMT, an opportunity to clarify the position as set out in the Barker-Foster correspondence of December 2013/ January 2014 was missed.

102. In respect of the Barker-Foster correspondence¹⁰⁷, (although received in September 2014 as part of the domestic business case consideration as indicated at paragraph 99 above), the Department submits that had this correspondence been shared with the Finance Minister, as was apparently intended when it was received in November/December 2013¹⁰⁸, this would have been viewed by those in the Department most appropriately and suitably placed to comment. Had that been the case, adhering to this formal channel of communication could have helped bring clarity to the funding position within both Departments at an earlier stage.¹⁰⁹

103. Approval in respect of the domestic scheme was granted on 15th September 2014.¹¹⁰ Had the linkage between the two Schemes been properly appreciated and understood then it is likely that approval would have been limited to 31st March 2015, or conditional on the review of the non-domestic scheme being completed.¹¹¹

Irregular Spend

104. During the evidence of Ms Morelli on 9 October 2018, Dr MacLean expressed surprise that “*there wasn't much more stamping of feet and escalation*” when the Department became aware that DETI was in irregular spend. In the

¹⁰⁷ **DOF 100216-100226**

¹⁰⁸ **DOF 100217**

¹⁰⁹ **TRA 11401 (line 4) – TRA 11409**

¹¹⁰ **DOF 100249**

¹¹¹ **TRA 11444**

Civil Service, both in Northern Ireland and Whitehall, irregularity is an extremely serious matter which should create a sense of urgency¹¹², and this was undoubtedly understood by all of the civil servants dealing with the matter in both Departments. Ms Morelli explained in evidence that where an irregular spend occurs MPMNI sets out the criteria which can be considered should a spending department seek an opportunity to retrospectively get back into regular spend. That is precisely what occurred with the RHI scheme over the summer of 2015, at which time the primary focus of the Department was on trying to ascertain whether in fact the Scheme remained value for money. Detailed consideration of the concept of irregularity and how it operated in the RHI context is set out in the Department's Corporate Statement of 6 October 2018 authored by Emer Morelli.¹¹³

105. Managing Public Money describes the concept of regularity and propriety as "powerful", as it delivers public sector values in the round.¹¹⁴ In the case of the RHI Scheme, the controls brought about by irregular spend worked as they should have done. The irregular spend was detected, though perhaps somewhat later than it should have been.¹¹⁵ Thereafter, intense focus was brought to bear on all aspects of the RHI scheme. Had approval not lapsed when it did, and had DETI not gone into irregular spend, then the payments under the scheme may well have continued unabated for a considerable amount of time. When the addendum business case was finally produced in October 2015, the Department acted with the necessary rapidity to approve the prospective case, which although sub-optimal, was better than

¹¹² In his evidence to the Inquiry on 10 Oct 2018 Dr McCormick said of DETI "...the wider corporate view was and should have been that dealing with the irregularity was a matter of great urgency".

TRA 15230 Line 8. Trevor Cooper described it in evidence as "a real no-no" – **TRA 15784** line 19

¹¹³ **WIT 37413**

¹¹⁴ See **DOF 59260** MPMNI 2.2 "Regularity, Propriety and Value for Money" at §2.2.2.

¹¹⁵ The Department has acknowledged in evidence and in this submission, that although this is solely the responsibility of the Accounting Officer under MPMNI, a system should be put in place to remind spending departments when approvals are due to lapse. The C&AG in his witness statement has expressed the view that this responsibility lay with DETI Finance & Energy Divisions and not the Department (see **WIT 115016** §26)

the status quo. Similarly, retrospective approval was refused on 21 November 2015, at which time expenditure became irregular. Thereafter, the Comptroller & Auditor General became involved, leading to the NIAO report of June 2016.

106. The principal catalyst for all of these events was the discovery of the irregular spend under the MPMNI rules. Whilst there were many procedures that were not as good as they should have been in the history of RHI, this was one process that did serve its purpose.

Summer 2015

107. Due to the lack of records as to the funding restriction for the non-domestic scheme in 2012, the absence of any procedural requirement to flag the need for renewal for the non-domestic scheme or to re-visit the approvals and funding for the non-domestic scheme as part of the consideration of the domestic scheme meant that in the summer of 2015, Supply did not understand the funding of the RHI scheme, its funding model, what the problems were or how they came about. As HMT had not notified the Department of a cap on AME funding in 2015/16 this was not flagged as an issue.

108. When the Department was provided with the Jon Parker email of April 2011 in May 2015¹¹⁶, this was not regarded as pertaining to the 2015/16 financial year and beyond as it only applied up to 2014/15. The Department accepts that the position regarding the funding for 2015/16 ought then to have been clarified by engagement with Treasury. During the Summer of 2015, the Department was trying to understand the Scheme including what the plans

¹¹⁶ **DOF 03298-03308** exchange between Jeff Partridge DETI finance and Sarah Benton in Supply that is referred to Mark Millican in CED and on to Pamela Galloway. **DOF 03298** email of 15/6/15 from CED to Mark Millican

were for the future of the Scheme. The Department accepts that this led to delays in clarifying the funding of the Scheme with HMT.

109. The Department recognises that improved communication between Supply and CED may have led to earlier communication with HMT, however it is likely that the Department would still have sought the same information from DETI to inform that engagement with HMT.

110. The Department is looking at ways to strengthen communication across its divisions. A new protocol for engagement between divisions is currently being developed for PSD staff. This will introduce formal stocktake meetings between the three divisions of PSD, (CED, Supply and AFMD), and ensure that all divisions are aware of key issues across teams.

111. The Department accepts that its actions and omissions the summer of 2015 led to some delay in resolving matters with the RHI scheme. It submits, however, that actions by others also contributed to delay.

112. Following the letter from Trevor Cooper to Supply on 1st July 2015,¹¹⁷ the Department understood that a business case seeking both retrospective and prospective approvals would be with the Department as a matter of urgency¹¹⁸. It is now known that the activity of the Special Advisers that summer led to a delay in the business case being signed off by the DETI Minister. This meant that despite assurances given to the Department by DETI the business case did not arrive until October 2015.

¹¹⁷ DFE 147438

¹¹⁸ TRA 15008 –Emer Morelli’s evidence Day 101- 9/10/2018 and TRA 15015

113. By the time the addendum business case did arrive in October 2015, (over 4 months after 3 June 2015 meeting¹¹⁹ with Michelle Scott when the funding issue was first raised with Supply), DETI had already started to implement the recommendation contained in the submission to the Minister of 8th July 2015, prior to obtaining approval¹²⁰. The Department was therefore presented with only one option, to approve the proposal of tiering. This was effectively the only option available to the Department to seek to ensure that some control was placed on the RHI scheme.¹²¹

114. Due to the legislative timetable, the Department had very little time in which to consider the addendum business case. For this reason, the Department determined, it is submitted, appropriately, to concentrate on the prospective element of the business case.

115. Although a draft addendum business case¹²² was provided in advance of the casework committee¹²³, the final addendum business case was received in the Department only on 27th October 2015.¹²⁴ Prospective approval was granted within two days, on 29th October 2015¹²⁵. It is submitted that, based on the information that was available to the Department, approving the business case for tiering was undoubtedly the right decision to take. To do otherwise would have made the situation worse, not better.

116. It is apparent that, Supply, in the summer of 2015, did look closely at the original business case and the domestic business case¹²⁶ and was in close contact with DETI in endeavouring to understand the workings of the RHI scheme. Nonetheless, while Supply was proactive in reviewing the business

¹¹⁹ **WIT 43036**

¹²⁰ Something that was unusual – **TRA 15048** and **WIT 34698** (DoF Corporate Witness Statement)

¹²¹ **TRA 15017, 15032** and **15061**

¹²² **DFE 151799** – 13th October 2015

¹²³ Which took place on 21st October 2015

¹²⁴ **DOF 04546**

¹²⁵ **TRA 04624**

¹²⁶ **DOF 03310** – Tabular analysis carried by Michelle Scott and Angela Millar

cases, it is accepted that it ought to have been more expeditious in seeking clarity on the funding arrangements with HMT.

117. Further, the Department should have asked to see the review of the scheme that DETI claimed, in Trevor Cooper's letter to Michelle Scott¹²⁷, had been carried out in 2013 in July and sought written confirmation that a review had in fact been carried out.

118. In Summer 2015, Supply understood that DETI was advising that it was seeking extra money for a scheme that had 'taken off'¹²⁸. Supply's priority across the period was the irregular spend and the lack of a business case from DETI which demonstrated value for money. It is accepted that similar priority ought to have been afforded to obtaining clarity in relation to the funding of the scheme.¹²⁹

119. Following the "unusual" "one item urgent"¹³⁰ meeting of 30th September attended by the Department, DETI Finance and Energy Division officials, the Department ought to have expressed concerns in writing to DETI. It was only at this point, after that meeting, that Supply contacted CED, who in turn contacted Treasury¹³¹ seeking clarity regarding RHI funding. It is accepted that clarification should have been sought from HMT at an earlier point.

120. It is now clear that in the summer of 2015 both Departments had a lack of understanding as to the nature of the RHI funding and the key issues to be prioritised in respect of the RHI scheme. The Department recognises it could, and should, have brought all the main players together at a much earlier date to arrive at a shared understanding of what was the overall knowledge.

¹²⁷ DFE 147438

¹²⁸ WIT 02629- email from John Mills to Dr McCormick 27/1/16

¹²⁹ Emer Morelli - TRA 11479 and TRA 11490

¹³⁰ DoF second witness statement dated 20th September 2017 - WIT 34698

¹³¹ DOF 04633-34. See also DOF 03330

Post summer 2015

121. In its consideration of the addendum business case in October 2015 the Department relied too much on assurances provided by DETI.¹³² Within five weeks of granting prospective approval it was apparent that those assurances and assumptions in the addendum business case were not supported by the actual performance of the scheme¹³³.
122. The Department relied on DETI's advice that the RHI scheme could only be amended through legislative change underpinned by consultation, and that any proposed change to the then proposed Regulations would take additional time and lead to further delay in cost controls. The Department accepted DETI's assurances that the business case setting out the proposed way forward would be submitted to the Department in Summer 2015 and was not aware that the legislative changes had already been notified by DETI to the Assembly ETI Committee in advance of this Department's approval.
123. The Department also relied on assurances from DETI that the new tariff arrangements would be subject to a review, and that this would be completed as soon as possible, but no later than December 2015.
124. Retrospective approval was refused on 21st December 2015¹³⁴. The Department contends that this was a wholly appropriate decision. It was a decision for head of Supply to make and did not require to be brought to the attention of the Minister of Finance. The Department agrees with David Sterling's assessment that the issue was communicated to the Finance Minister

¹³² **DOF 04546-04577**

¹³³ **DFE 152857** – Trevor Cooper's letter of 7th December 2015

¹³⁴ **DOF 04726** Emer Morelli's letter to Trevor Cooper.

once it had the potential to become cross-cutting in terms of financial impact on the wider NI DEL position¹³⁵.

125. In 2016 the then Finance Minister advised that he would approve the business case to address the deficiencies in the RHI Scheme. At this stage the issue was cross-cutting in nature and required both DETI and the Department's approval.

Conclusion

126. The Department accepts that in its consideration of the RHI schemes, both non-domestic and domestic it failed to recognise the complexities inherent therein. The Department concedes that it accepted the information provided by DETI in response to queries raised, without in some cases further challenge, and relied too heavily on the information, (some of which was inaccurate) provided in the business cases. In so doing the Department missed opportunities to identify steps to rectify the errors in the schemes at the earliest possible date.

127. The Department however says that the issue identified in June 2015 was one that was outwith approvals and in need of additional funding. The complex nature of the case and potential financial impact of the extant scheme was only fully realised once DETI had provided the addendum business case and subsequent monitoring information as to uptake. If DETI had provided the Department with all the information available to them at the earliest opportunity a lot of the delay could have been avoided and a different outcome achieved. Rather, the Department found itself at the end of the decision-making process and had little opportunity to influence the outcome.

¹³⁵ WIT 37415 paragraph 12. TRA 16485 -8

128. Steps have been taken to improve processes in Supply to try to ensure that there can be no repetition of what occurred in respect of RHI. This includes the formal triage process referred to by Mrs Morelli¹³⁶, whereby the Grade 7 supply officer must complete a robust checklist that shows the reasoning behind assignment to a particular officer grade in supply, and setting out the reasons behind the grant or refusal of approval.
129. The expenditure approval process and associated appraisal process is also being reviewed with the ultimate aim of ensuring that high risk projects are identified at the earliest possible stage and that the correct expertise is engaged at the most appropriate stage of the business case development process.
130. In general, however, it is submitted that the Challenge function of Supply is adequate. This was confirmed to the Inquiry by the interim Head of Civil Service, David Sterling on the last day of oral hearings¹³⁷. The failings in respect of RHI are not reflective of the work of the Supply division generally. It is submitted that in considering upwards of 3 -5 billion pounds' worth of business cases submitted annually by departments, the Department does provide a sufficient challenge to ensure that work undertaken by departments provides value for money to the public.

¹³⁶ TRA 11420

¹³⁷ TRA 16509-10 - Day 111

4. Communication

Introduction

131. Sir Malcolm McKibbin, the former Head of the Civil Service, has given evidence to the Inquiry that within the Northern Ireland Departments, this Department was perceived to occupy a position at the top of the hierarchy on the basis that it “looks after the money” for the Northern Ireland Assembly.¹³⁸
132. The Inquiry will be aware that the Department communicates with individual departments through its Supply Division and with HMT through its CED. As the Department held responsibility for public finances it was and is of fundamental importance that communications are clearly and accurately disseminated to other departments and that accurate information flows back from those departments on all public spending issues.
133. The Inquiry is familiar with the long-established protocol that communication from spending departments to HMT must take place through the Department.¹³⁹ Whilst this may at times appear cumbersome, it has the advantage of ensuring that there can be no misunderstanding or mixed messages on issues of funding.
134. The lines of communication between the Department and DETI formed a central theme in the evidence given to the Inquiry. In this section, the Department will provide an analysis and contextualisation of inter-

¹³⁸ TRA 16775 6 line 25

¹³⁹ See email of 2 November 2010 from S Stevenson to T Cooper- WIT 18575 “... the important protocol arrangements whereby DFP should lead on any discussions with HMT in relation to funding. Please ensure that this point is raised with key individuals in DETI...”

departmental communication in relation to the RHI scheme, the extent to which things went wrong, how and why this occurred, and the lessons that have been learned as a result of what has been disclosed during the Inquiry.

135. In particular the section will examine;

- The 2011-15 budget & the Jon Parker email;
- Whether and to what extent “the Parker message” was “lost”;
- The Barker-Foster correspondence;
- The flow of information between Departments in summer/autumn 2015;
- The utility of the protocol of conducting communication with HMT via the Department.

136. The prevailing culture of relative informality which characterised contact between the Department and DETI was partly due to the volume of communication, as has been previously stated (paragraph 53 above¹⁴⁰) This engendered and promoted a collaborative, ‘open and honest’ approach¹⁴¹ between the two Departments.

137. Whilst there may have been some advantages to this approach, the work of the Inquiry has revealed a number of examples of situations in which communication was far from satisfactory, and in particular with regard to the issue of budget. Although messages may have been accurately communicated orally, they were not always confirmed in writing. Fundamental pieces of information were inadequately communicated by both Departments, or in

¹⁴⁰ Oral evidence of S Stevenson, TRA 02728 line 21 *et seq*

¹⁴¹ *Ibid* at TRA 02730-31

some cases, not at all. The sometimes piecemeal nature of record keeping resulted in key pieces of information being lost or misinterpreted.

138. In particular, the evidence has established that there was an ongoing failure on the part of DETI to disclose key pieces of information to the Department either in time or, in some cases, not at all.

139. For its part, the Department has acknowledged in its written evidence that there is substantial room for improvement in the area of inter-departmental communication. Many new measures have already been put in place to formalise and strengthen inter-departmental communication. Some of these are set out earlier in this submission and in the concluding paragraphs below.

2011-15 Budget

140. From the standpoint of the present, the RHI budgetary position appears deceptively simple. The Department's submissions in the Funding section addresses why this was not entirely true. It is undoubtedly the case, however, that in 2011 it was widely known in both Departments that the RHI AME funding was finite, subject to conditions and, as many witnesses have now said, highly unusual.

141. In the years which followed, Inquiry counsel has referred to the Departments as "*losing the Parker message*"; a reference to the email sent by Jon Parker of HMT Energy Branch to Alison Clydesdale in DETI on 11 April 2011. The evidence before the Inquiry demonstrates that the message was perhaps not entirely lost in DETI.

142. Agnes Lennon, the Grade 7 in CED in 2011¹⁴², has written in her evidence to the Inquiry that back in 2010 she discussed the 2010 Chief Secretary to the Treasury Settlement Letter with Keith Jarrett (Deputy Principal, HMT Devolved Countries Team) and would have been referred to the Energy Team, probably Jon Parker. As with most of the communications with HMT, this was by telephone. She recalls discussing this with the then DETI Supply Officer, Stuart Stevenson and his DP, Sylvia Sands. The Department has no note or record of her conversations with either Jon Parker or Stuart Stevenson.

143. Whilst Stuart Stevenson and Sylvia Sands do not recall the conversation with Mrs Lennon¹⁴³, it is undoubtedly the case that by April 2011 DETI was fully aware of the peculiarity of the RHI budget. The Department acknowledges that there was a degree of informality to discussions within the Department and that they were not formally recorded in a system such as TRIM; subsequent events have amply demonstrated that they ought to have been, in order to ensure that information remained accessible to future staff.

144. On 3 May 2011, Bernie Brankin emailed Alison Clydesdale in DETI Energy Division, conveying the Department's message from Stuart Stevenson regarding RHI AME.¹⁴⁴ She stated that it was non-standard AME and that the RHI budget "*is being treated the same as DEL allocations*", a message which, in her words, was "good advice"¹⁴⁵. She reinforced the need to put in place controls to prevent over/underspending when drawing up proposals which were to be copied to the DETI Finance Division. Ms Brankin explained to the Inquiry that she also had a face to face meeting with Ms Clydesdale before she sent out the email as she "saw this as significant, and I saw it as significant that the person I was sending this to fully understood it".¹⁴⁶ This email was copied

¹⁴² In post from 2007 - 2015 - responsible for AME exercises

¹⁴³ Which may not be surprising, given the lapse in time and volume of work that was transacted by Supply Division

¹⁴⁴ WIT 12771/2

¹⁴⁵ at TRA 01693 line 8

¹⁴⁶ See TRA 01694 line 15 *et seq*

to Trevor Cooper, Fiona Hepper and Peter Hutchinson. Jeff Partridge, the Deputy Principal working under Bernie Brankin was also well aware of this warning in 2011.¹⁴⁷

145. There is no doubt therefore that the unequivocal “handle with care” warning from the Department was firmly implanted in both DETI Finance and Energy Divisions in 2011.¹⁴⁸

146. The Inquiry will also recall that the following month, in June 2011, Peter Hutchinson sought further clarification on funding from Akhil Patel in DECC Finance.¹⁴⁹ The advice given was that overspends in one year would have to be funded from savings in subsequent years and any remaining overspend would have to come from DEL. Mr Patel said,

“However, if we do not manage to find these savings we would have to fund the residual overspend from DEL. Clearly, this represents a large financial risk on the department...”.

147. As Dr. MacLean pointed out in conversation with DETI witnesses¹⁵⁰, in reality it would be well-nigh impossible to recover overspends from future years, unless there was a substantial increase in the budget ceiling, as there was a statutory requirement to honour commitments once they were made.

148. In a pattern that has become familiar to the Inquiry, the Hutchinson-Patel correspondence was not shared with the Department, nor was the Department asked for its views on the content of what Mr Patel said.

¹⁴⁷ Confirmed in witness statement of J Partridge **WIT-18230** §20(e)

¹⁴⁸ Whilst there was a wholesale change of staff in Energy Division and in DoF Supply, DETI finance officials remained in post in 2015.

¹⁴⁹ **WIT 00856-7**

¹⁵⁰ Eg: during the evidence of Peter Hutchinson 5/12/18 – **TRA 01584**

149. On day 110, David Sterling, the then Permanent Secretary of DETI, stated that he was very clear in his recollection that going back to his time in DETI¹⁵¹ that he knew that *“whilst this was an unusual funding arrangement and that it was AME but nonetheless it was capped and that exceeding this cap would have consequences for our DEL”*¹⁵².

150. It is abundantly clear, therefore, that the funding restrictions were received and understood in DETI from the outset. The Department nonetheless, acknowledges that DETI ought to have been formally informed of these restrictions in writing.

151. When the DETI consultation document for Phase 2 of the RHI Inquiry was issued in summer 2013¹⁵³, the section entitled “Cost Control” stated at paragraph 4.14;

The RHI budget is different in nature to the NIRO in that there is a finite budget for new installations and these budget limits cannot be breached.

152. This reference to finite budgets that cannot be breached suggests that in the summer of 2013, the “Parker message” was still well understood in DETI. Indeed, the DETI corporate statement of 26 October 2018, acknowledges that in fact Energy Branch used this wording again in March 2015 *“to populate draft policy templates”*¹⁵⁴. Despite this, the statement goes on to say that notwithstanding the use of this wording, DETI officials *“did not understand the true nature of the funding profile”*.

¹⁵¹ David Sterling moved from DETI to the Department on 1st July 2014

¹⁵² See **TRA 16489** – Lines 13-16

¹⁵³ See **DFE 97319-97359**

¹⁵⁴ See DETI Corporate Statement no 12 – **WIT 03573** §§39-41

Losing the “Parker Message”

153. In December 2013, some 6 months after the 2013 consultation document had been issued, the Grade 7 in Energy Division, Joanne McCutcheon, having seen confirmation of the GB RHI budget for 2015/16¹⁵⁵, asked Jeff Partridge, a DP in DETI Finance Division, to check the Northern Ireland position with the Department.¹⁵⁶

154. Mr Partridge replied, copying in his line manager, Bernie Brankin, and Linda Donaldson, a staff officer, stating that;

“DFP have advised that AME budgets are formulated using the information provided in AME forecasting exercises, and there is no separate bidding process. Therefore, for RHI the current profile is £6.3m 2014/15, £9.5 m 2015/16, £13.5 2016/17, £18.5m 17/18, £24.5 2018/19 and £31. 2019/20.”

155. The Inquiry will be aware from the written and oral evidence, that the Department has been unable to discover who provided this information to Mr Partridge.¹⁵⁷ Mr Partridge had written in his statement that the advice was given in a phone call, but he cannot remember the identity of the person to whom he spoke.¹⁵⁸ It may well be that Mr Partridge sought the information in the telephone call without specifically mentioning RHI funding. There is no evidence that the letter containing the GB RHI 2015/16 budget, which sparked the inquiry, was ever sent to the Department.

¹⁵⁵ Ms McCutcheon became aware of the DECC 15/16 budget from being asked to draft a reply to the correspondence from letter of 29 November 2013 from Minister Barker to Minister Foster– see footnote below

¹⁵⁶ At **DFE 268206-7**

¹⁵⁷ See DoF Corporate Statement **WIT 37011** at paragraphs 38-44

¹⁵⁸ **WIT 18269**

156. The information relayed by Mr Partridge was factually correct in the context of normal AME budgets, but this was not “standard” AME. The Inquiry has seen that Mr Partridge and Mrs Brankin were well aware of this fact back in 2011. The confusion appears to have extended to the Finance Division as well. How and why that awareness was lost in DETI not a matter for this Department to address.¹⁵⁹

157. In an email of 8 January 2014 to Jeff Partridge, Trevor Cooper observed that “*the comments on 15/16 funding in GB’s reply appear contradictory*”¹⁶⁰. Jeff Partridge was emphatic in reply to Trevor Cooper that;

“in relation to AME RHI budgets, I actually checked this out with DFP last month ... and it was confirmed that AME forecasting exercises are used to formulate the Northern Ireland AME budgets”.

158. It is significant that Mr Partridge’s reply refers to AME budgets in the general sense and not to RHI AME in particular. It may well be therefore that Mr Partridge asked a very general question about AME funding over the phone and got a general answer. There was a rather different outcome in May 2015 when Jeff Partridge emailed Sarah Benton in Supply (having initially discussed the subject with her). On that occasion he forwarded the Jon Parker email and then set out his query. Sarah Benton, in turn, then contacted Mark Millican in CED who contacted his superior, Pamela Galloway.¹⁶¹

159. Confusion as to the budgetary position contaminated the understanding of the entire domestic business case for both Departments in 2014, where the spending profile figures for the planned Domestic Scheme case as presented

¹⁵⁹ The DETI corporate statement of 26 October 2018 has conceded that “Energy staff did not understand the true nature of the funding profile as described in the HM Treasury email” WIT 03573 at §41

¹⁶⁰ DFE 144229

¹⁶¹ DOF 03298- DOF 03308

by DETI, also included the spending profiles for the Non-Domestic Scheme over the same period. The Department did not challenge this spending profile for the Domestic Scheme, and in doing so missed an opportunity to seek further details on the Non-Domestic Scheme. Supply's focus at that time was on the stand-alone Domestic Scheme business case and its consideration was in line with the established process in Supply at that time, that is to consider each business case on its own merits. The affordability of schemes falls to the respective department to consider once this Department's approval is in place and a department may proceed or not proceed with a scheme within its own affordability constraints. The Department accepts that it failed to notice and query the spending profiles provided in the Domestic Business case, which resulted in a missed opportunity to review the Non Domestic case approval.

160. For its part, the Department, as stated above, acknowledges DETI should have been informed in writing of restrictions around RHI funding, and the restriction should have been prominently recorded in the Department, making it un-missable for those who were dealing with it. An inter-departmental memorandum like that suggested by David Sterling would have avoided this confusion. In the words of Emer Morelli in her evidence to the Inquiry on 9 October, *"DoF's central repository of knowledge was not there"*.¹⁶²

Return of the "Parker Message"

161. The Jon Parker email emerged again in DETI when, on 12 March 2015 Seamus Hughes, the Deputy Principal in Energy Division, emailed Jon Parker in HMT (copying in Stuart Wightman) hoping to "seek clarity over the budget" and to arrange a teleconference.¹⁶³ Jon Parker was no longer in post and Mr Hughes was referred to Sam Smyth-Murray, who dealt with the GB RHI in

¹⁶² TRA14985 – Line 4

¹⁶³ See WIT 02707

HMT. Mr Hughes emailed Mr Smyth-Murray on 20 March 2015.¹⁶⁴ Mr Smyth-Murray's brief reply, having spoken to the HMT Devolution Team, was that "you need to speak to the DFP NI in the first instance". It is unclear whether HMT took this stance simply for reasons of communication protocol. Having been asked the question, it would have been helpful if HMT had contacted the Department to advise that the query had been raised, this may have saved a lot of time and effort.

162. Once again, neither DETI nor HMT copied the Department into this series of emails, nor were they drawn to the Department's attention. Indeed, when DETI Finance officials came to discuss the matter with the Department only 3 months later in June 2015, they made no reference to the fact that they had already been in touch with HMT and that they had been explicitly instructed by HMT to speak to the Department. This was highly relevant information that, inexplicably, was withheld. As a result, events took on a frustrating circularity.

163. Having drawn a blank with HMT in March 2015, Stuart Wightman of Energy Division by email of 26 March 2015 instructed Sandra Thompson of DETI Co-Ordination Branch to seek clarification from Jeff Partridge in Finance Division.

164. Mr Wightman's instructions to Ms Thompson stated,

"we made contact with HMT for advice but have been directed to DFP. We are seeking some clarification around the future NI RHI budget..... Urgent clarification on the above matters from DETI Finance Branch and DFP would be appreciated so we can factor in

¹⁶⁴ WIT 02706

tariff reductions if necessary as part of our Phase 2 Non-domestic RHI changes.”¹⁶⁵

165. Sandra Thompson duly forwarded to Jeff Partridge Mr Wightman’s above email, as well as Energy Division’s previous attempts to seek clarification from HMT (as set out at paragraph 30 above) and also the Jon Parker email, with a covering note stating,

“I appreciate that we basically secure our budget via AME profiling but it would be helpful if we could establish some parameters as non-domestic commitments made now/ in the next couple of years will have implications for the next 20 years”¹⁶⁶

166. On 7 May 2015, seeking a response from the Department, Stuart Wightman forwarded Sandra Thompson’s 26 March email on to Trevor Cooper. That email stated, *“we await confirmation from DFP that NI has received 3% of DECC’s RHI budget (£12.9) for 15/16”¹⁶⁷* (underlining added). Mr Wightman appeared to be of the belief that the Department had been contacted; this was not the case. The Department had not received any request for clarification of the budget in May 2015, whether from Energy or Finance Divisions.

167. For the reasons set out in his witness statement¹⁶⁸, Mr Partridge did not respond to Sandra Thompson until some 7 weeks later on 19 May 2015¹⁶⁹ at which point Finance Division had also received Energy Division’s contribution to the June monitoring input, this perhaps serving as a prompt for the reply. On this occasion, rather than repeat what had been stated in his email of 8

¹⁶⁵ WIT 17662

¹⁶⁶ See WIT 17661

¹⁶⁷ WIT 17392

¹⁶⁸ WIT 18235

¹⁶⁹ WIT 17660

January 2014 (see paragraph 157 above), Mr Partridge reverted back to the orthodox Parker message on RHI AME, writing,

“it is likely from previous correspondence that Energy Division had with DECC that a cap of 2.98% of the DECC RHI Scheme will apply to NI RHI, and that the total amount available for 2015-16 will therefore be in the region of £12.8m. The email from Jon Parker in April 2011 specified that RHI was not being treated as standard AME and overspending would have consequences for DETI resource budgets”.

168. The email exchange that ensued culminated in Mrs Brankin’s stark warning; *“Please stop entering into commitments immediately to ensure that monthly cumulative expenditure does not increase”*¹⁷⁰. Given these warnings from Finance Division and the requests from Energy Division for clarification (or perhaps more accurately, for more money¹⁷¹) it is not clear why the Department was not approached much earlier for clarification or assistance.

169. DETI Finance Branch finally made contact with the Department on 29 May 2015¹⁷² by way of an email from Jeff Partridge to Sarah Benton, a Staff Officer in Supply Division¹⁷³. Rather than raise the broad queries about funding of the RHI scheme, his two emails to Ms Benton instead had a very narrow focus; *“We have underspending in standard AME in 2014-15. Can we offset the RHI overspend with Standard AME underspend?”* (DETI was seeking to offset overspends against Invest NI AME underspends.) Ms Benton sought advice from Mark Millican in CED who passed it up to Pamela Galloway. Ms Galloway responded promptly on 2 June 2015.

¹⁷⁰ **WIT 17659**

¹⁷¹ See email from S Wightman to J Partridge on 19 May 2015 at **WIT 17660**- *“We should surely be making the case for more RHI AME money from HMT/DECC rather than curtailing the scheme”*

¹⁷² **DOF 03298-03308**

¹⁷³ Reporting to Angela Millar (DP) who in turn reported to Michelle Scott (G7)

170. The advice passed back from CED to Supply was;

*“the short answer is that spend should be reported against correct lines if correctly incurred and if that means that against plans that shows an overspend then so be it – an explanation should be provided”.*¹⁷⁴

171. CED went on to note that the Scheme was “below the 2010 profile” and that AME profile was forecast against all years going forward. Ms Galloway queried whether DETI had consulted with the Department or HMT.

172. Had DETI made frank disclosure of events to date, had it sent the Department the email chains with HMT and DECC, had it asked the specific questions that had been put by Energy Division to HMT and to DETI Finance about the nature of the funding, about possible tariff reductions and concerns about the 20 year implications as to spending, then the outcome could have been significantly different. It did not inform the Department that applications for the 14/15 year were more than 3 times the total for the previous 18 months and that based on DETI’s current profile, established by way of population-based share¹⁷⁵, they would run out of money in mid-September.¹⁷⁶ Instead, the focus on a narrow, technical issue means that another opportunity to address funding at a relatively early stage was wasted. Instead, the query sent to the Department focused on a narrow, technical issue means that another opportunity to address funding at a relatively early stage was wasted.

The Barker - Foster Correspondence

¹⁷⁴ See **DOF 03298**

¹⁷⁵ Which DETI had clearly anticipated by reason of the Barker/ Foster correspondence

¹⁷⁶ See Sandra Thompson email of 30 April 2015 referred to at footnote 27 above.

173. The Inquiry will be familiar with the exchange of letters between the DECC & DETI ministers referred to as the Barker-Foster correspondence. Among other things, these letters provided a clear reminder between the two policy departments that RHI AME funding was constrained to a population-based share.

174. Minister Barker's letter of 29 November 2013 to Minister Foster in DETI set out DECC's work on degression as a budget management tool.¹⁷⁷ Minister Foster's reply of 16 December noted that a budget of £430m had been obtained for the GB RHI in 2015/16 and she assumed that a pro-rata share would be obtained for Northern Ireland.¹⁷⁸ The DETI Minister did not copy the Finance Minister into this reply. Minister Barker replied on the budget issue on 7 January 2014 stating that;

"The Standard arrangement is that the population based Barnett formula is applied to all departmental settlements in Spending Reviews in the normal manner with full details of the formula set out in the Statement of Funding Policy. Funding for the Northern Ireland RHI Scheme for 2015/16 would therefore be derived from the £430m 2015/16 figure agreed for the GB scheme but not paid directly from that.

I understand that your department should have received RHI funding directly from HMT in the 2015/16 Spending Round"¹⁷⁹.

175. The Barker-Foster correspondence was only provided to the Department in September 2014 in response to queries from Michael Houston,

¹⁷⁷ DOF 100218

¹⁷⁸ DOF 100217

¹⁷⁹ DOF 100226

an economist in Economic Appraisal branch, during the domestic business case evaluation ¹⁸⁰; they should have been provided as part of a routine practice of basic public administration¹⁸¹. The letters did not have the formal standing of a Spending Round or Settlement Letter and it is not incumbent on departments to share all policy documents. The Department submits however, that in this case it ought to have been perfectly apparent that as these letters related to key funding issues, copies should have been provided to the Department at the outset.

Non-disclosure of Information in 2015

176. Throughout summer and autumn 2015, and beyond, a pattern of behaviour on the part of DETI officials persisted in which pieces of information of various kinds were withheld from the Department or only partly disclosed. This included matters such as prior engagement with DECC & HMT as referred to above, the emails to and from Sarah Redwood in DECC, the existence of allegations from a whistle-blower, value for money concerns and the possibility of fraudulent abuse of the scheme, the new draft Regulations and the Rudd/ Bell correspondence. Matters such as these were only partly disclosed or not disclosed at all.

177. The Department's corporate witness statements have set out the Department's concern that DETI did not keep it adequately informed of events the summer and autumn of 2015¹⁸². Some of the key issues are briefly set out below. Whether this was due to a misplaced sense of defensiveness or

¹⁸⁰ **DOF 100210 -DOF 100226**

¹⁸¹ See observation from Dame U O'Brien on 26.06.18 – **TRA 01403** Line 23 "But this is very basic public administration. ... failure to copy a letter, failure of Private Office to pick up that you've made a commitment to write"

¹⁸² See in particular DoF Corporate Statement No 2 at **WIT 34696**

conversely due to some lack of authority on the part of the Department¹⁸³ or for some other reason is ultimately a matter for the Inquiry to determine.

The Sarah Redwood Emails

178. At what is referred to as the “stand alone” meeting on 12 June 2015 between Michelle Scott and Angela Millar of Supply and Trevor Cooper and Bernie Brankin of DETI Finance, Michelle Scott had tasked DETI to “clarify the agreement between themselves and DECC on the AME available”. This was followed by a written request from Michelle Scott on 29 June 2015¹⁸⁴ requesting “more information on the original agreement between DECC and DETI”.

179. Strangely, DETI did not provide a reply saying that there had been no such original agreement. Instead, a week later on 7 July 2015 John Mills in DETI wrote to Sarah Redwood in DECC seeking clarification on the NI RHI budget and how DECC’s budget was secured from HMT.¹⁸⁵ The wording of the email demonstrated an accurate understanding of the peculiarities of the RHI budget. It was stated, *inter alia*, that;

- DETI’s forecast spend for 2015/16 was well above the figure “... derived from applying the Barnett formula (2.98%) to DETI’s RHI AME allocation”
- “...for 2015/16, 2.98% of DECC’s £430m allocation translates into an NI allocation of £12.8m;”

¹⁸³ A question posed by Dame U O’Brien to Emer Morelli in evidence on 10 October “Do you think the DFP carries the authority that it needs to ensure that the taxpayer’s money is well looked after in Northern Ireland?” TRA 15142-3 lines 22-25/ 1-5

¹⁸⁴ See WIT 18767

¹⁸⁵ WIT 03411. Also, at DFE 147449 - DFE 147450

- “We would prefer future NI RHI AME allocations to be determined by actual scheme demand/ performance as would normally be the case with AME funding and not based on DECC’s allocation”.

180. The email exposes firstly, the knowledge within Energy Division that this was not normal AME and secondly, DETI’s objective at that time, which was to obtain more money from Treasury for the scheme. The knowledge held by Finance Division of the true budgetary position is also plain from Bernie Brankin’s email of 1 July 2015 to Trevor Cooper¹⁸⁶ (commenting on Stuart Wightman’s draft letter to Sarah Redwood) in which she astutely observed that on the basis of the Jon Parker email, DETI was going round in circles, saying;

“I don’t know that any answers to this email on how GB RHI funding is secured from a DECC perspective will help us very much but it is a starting point.... The email from 2011 confirms that DECC’s allocation is not standard, there is a limit on DECC’s annual budget and compensating savings are required in future years for overspends with a likely contribution of 5% from the Resource DEL budget”.

181. This knowledge and these observations were not passed on to Supply and instead the fruitless process of seeking “clarification” from DECC continued. Notwithstanding the Department’s requests for the information, Ms Redwood’s email reply, which was received by DETI on 5 August 2015¹⁸⁷, was not forwarded on to the Department that summer, or indeed at any time prior to its submission to the Inquiry.¹⁸⁸ It is worth noting that, according to the reply, DECC’s own understanding of its funding position was that the

¹⁸⁶ DFE 278387

¹⁸⁷ DFE 147589 -147590 It was received by Laura McCoy, PS to John Mills on 5/8/15 and forwarded to him and copied to Seamus Hughes and Stuart Wightman. John Mills forwards it to Trevor Cooper the same day.

¹⁸⁸ It is accepted however that at least some of its content was discussed with Michelle Scott and Angela Millar when they met DETI officials on 12th August 2015.

budget position was not set in stone and suggested that there was room for manoeuvre with HMT. It stated that;

- “DECC *negotiates* an AME budget as part of the spending review” (emphasis added).
- “DECC’s RHI AME allocation is not revised in-year unless there is a risk of overspend. This would be tackled in the supplementary estimate to HMT”
- “... DECC’s AME RHI spend is effectively unlimited – we agree an overall budget and there are penalties for overspending”.

182. The commitments given by DETI in its letter of 1 July 2015 required a formal response. No such response was ever given. The first DETI Corporate witness statement states that;

“at the meeting on 28 May 2015, Andrew McCormick’s contact in DECC referred him to his contact in DECC with responsibility for renewable heat, but it became clear before long that seeking additional budget cover from DECC was a blind alley because in fact the position taken by DECC and HM Treasury was that this was a devolved funding issue which could only be addressed between DFP and HM Treasury”.¹⁸⁹

183. That being so, it is difficult to understand why DETI allowed both Departments to go back down that blind alley over the critical summer period.

184. The Department, for its part, recognises that it could have been much more proactive in pressing DETI for information, in obtaining written confirmation from DETI on each of the steps it had taken and on the options

¹⁸⁹ See WIT 00112 at para 290.

that were open to it rather than simply “believe that DETI would do what they set out to do”¹⁹⁰.

Scheme Performance / VFM Concerns

185. The reality of how the RHI scheme had been performing was not fully disclosed to the Department; indeed, it had been given assurances by DETI during the addendum business case that the prospective business case was on a ‘worst case scenario, saturated market’ basis.

186. The Department was assured in the 27 October business case that “the scheme provided *continuing* value for money”. This was not the full picture. DETI was aware over the course of the summer 2015 that there were higher than expected returns giving rise to value for money concerns. The Inquiry is familiar with the analysis of John Mills in his email 11 August 2015¹⁹¹ in response to a query from Andrew Crawford, the implication of which was that anything beyond the 1314 peak hours taken from DECC could not be defended on VFM terms. (He also made a passing reference to the heating of empty sheds). The Inquiry has seen that DETI had been aware of the risk of over-compensation for some time. None of these value for money concerns were ever articulated to the Department; in fact, the opposite was the case. It would have been infinitely preferable to set out the unvarnished facts; that the rates of return were well outside what was envisaged at the outset, that value for money was questionable and that there was every likelihood of a spike in applications.

187. The Department was not made aware at any stage of the fact that DETI had information about the possibility of fraudulent claims nor was it informed

¹⁹⁰ See evidence of E Morelli –TRA 15031 line 8

¹⁹¹ See DFE 293161

by DETI of any the issues raised by Janette O’Hagan in her “whistleblowing” complaints, the last of which had occurred as recently as 12 March 2015¹⁹². These were all matters of critical importance that two government departments, working for a common purpose, ought to have shared openly.

188. It was only following the approval of the prospective business case, and on the eve of the critical meeting between the Department and HMT, that the Department was informed by DETI in a letter from Trevor Cooper of 7 December 2015 that the annual cost of the Scheme had then risen to £44 million rather than the £30 million.¹⁹³ This was in a context where HMT had advised that DETI should only provide the cost of new installations up to March 2016 in its future forecast positions. In October 2016 DETI had forecast an AME requirement of £30m in 2016-17 as part of the OBR exercise.

Introduction of the 2015 Regulations

189. In September 2015, the Department was entirely unaware of the fact that the 2015 Regulations had been drafted and that DETI had had gone so far as to write an SL1 to the ETI Committee on 8 September 2015. Emer Morelli in evidence described legislation as “frozen policy” and observed that “before you freeze the policy you get it right”¹⁹⁴ yet DETI had taken the “very odd”¹⁹⁵ and “very unusual”¹⁹⁶ decision to move ahead into the public domain with the legislation before obtaining the necessary approval. The Department was verbally informed of this fact at the specially convened meeting on 30 September.

¹⁹² Email of 12.03.15 - J O’Hagan to S Hughes & S Wightman- **DFE 04532**

¹⁹³ At **DFE 152857**

¹⁹⁴ **TRA 15032** – 9 October

¹⁹⁵ In the words of E Morelli – **TRA 15031** line 24

¹⁹⁶ As above at **TRA 15032** line 18

190. The meeting of 30 September 2015 is dealt with in more detail in a separate chapter on the role of Public Spending Division. For present purposes, it should be noted that Mrs Morelli has given evidence that she came away from the meeting feeling “unsettled” as “surprise after surprise”¹⁹⁷ had emerged. These concerns were described in some detail in Ms Morelli’s oral evidence on 10 October 2018 and in the first and second corporate statements of the Department.

191. The Department’s prospective approval of the ‘addendum business case’ in October 2015 was given on the basis that the forecast AME requirement from 2016/17 onwards would be £30 million per annum, but approval could only be given until March 2016 due to uncertainty as to future funding. As stated in the 6th Department’s corporate witness statement¹⁹⁸, it is now known that in fact DETI officials at that stage had grave doubts as to whether they could ever comply with such a requirement; for the Department this was another ‘unknown unknown’.¹⁹⁹ The day after the grant of retrospective approval there was an exchange of emails between John Mills, Trevor Cooper and Eugene Rooney²⁰⁰ in which Mr Mills, referring to closure of the Scheme wrote “it is very unlikely that this could be done before March 2016”. Trevor Cooper confirmed to Eugene Rooney that a potential 6 month lead in time to close the scheme “would not be apparent from the business case”.

192. The emergence of ‘surprise after surprise’²⁰¹ from DETI confirmed the Department’s concerns both then and now that DETI was being less than transparent about what had been taking place. For whatever reason, there was a lack of open, purposeful engagement not just in June, but even as late as the meeting of 30 September 2015. This was not in the best interests of decision

¹⁹⁷ See **TRA 15043** line 1& line 7

¹⁹⁸ See DoF corporate statement No 6 – E Morelli – **WIT 37416** - §§14-15

¹⁹⁹ See **DFE 149883**- email from T Cooper to E Rooney- 30 Oct 2015

²⁰⁰ See **DFE 149883**

²⁰¹ Per E Morelli; see footnote 204 *supra*

making within the Civil Service or indeed in the best interests of the public. It was incumbent on all departments to work collaboratively.

The Rudd/ Bell Correspondence

193. As with the previous Barker-Foster correspondence, the Department was not made aware in late November 2015 of correspondence between the subsequent DECC minister, Amber Rudd, and the DETI Minister, Jonathan Bell, advising DETI of changes to the DECC scheme following the spending review.²⁰²

Communication with other Departments- Desertcreat

194. In his opening statement, senior counsel to the Inquiry drew attention to a number of “red flag” moments in which government departments had the opportunity to appreciate the true nature of the returns available under the RHI scheme, the principal one being the “whistleblowing” communications from Janette O’Hagan. The Department was not made aware of Ms O’Hagan’s communications until late January 2016. It did however have some awareness of the second “red flag” moment drawn to the Inquiry’s attention, this being the marketing of the Scheme by Sheridan & Hood, a heating firm.²⁰³

195. The Inquiry will be aware that Sheridan & Hood wrote to the Department of Justice about the intended new police college in Desertcreat on 27 November 2012²⁰⁴, just after the scheme had been launched, proposing to

²⁰² See DoF corporate statement No 6-WIT 37417 - §19

²⁰³ The detailed evidence of this Department on the Desertcreat issue is contained in the witness statement of Hugh Widdis of 9 February 2018, beginning at WIT 36294

²⁰⁴ WIT 30892

run the heating system with a series of 99kW biomass boilers rather than the megawatt boiler on the plans. With the benefit of the RHI payments on the highest tariff, Mr Hood ventured that the Department could actually make a profit on heating over 20 years.

196. The letter had been copied to the Departmental Private Office and was seen by the then Finance Minister, Sammy Wilson. It was passed to the acting Grade 7 Supply Officer for Department of Justice (DOJ), who was “not sure that it was for Supply to comment on the specific engineering of heating systems” and considered that it was more a matter for Central Procurement Division (CPD).

197. Supply was split into two teams at that time; there is no evidence that it was discussed with the then DETI supply officer, Stuart Stevenson, who only became aware of it when the Department corporate statement was being compiled in 2017.

198. CPD, having no involvement in the Desertcreat project, passed it on to the Health Estates Investment Group, which dealt with procurement in the Department of Health (DoH).²⁰⁵

199. In her oral evidence Emer Morelli had referred in another context to the Department’s “central repository of knowledge”²⁰⁶. The Department receives vast amounts of information from many sources, all of which must be weighed and sifted. In order to do so, it is imperative that the right information gets to the right people. This is a demanding task.

²⁰⁵ As the project related to the proposed police and fire college for Northern Ireland it fell within the ambit of Health Estates Investment Group sitting within the Department of Health.

²⁰⁶ **TRA 14985**

200. The Department has acknowledged that the information regarding the Desertcreat project contained a “red flag” and that this was missed. Although not directly relevant to the Department, properly analysed, it contained highly relevant information on the issues of whether the RHI scheme was indeed value for money and whether it was open to abuse. Looking at it now, it seems obvious that it ought to have been drawn to the attention of both DETI Energy Division and the DETI supply officer, Stuart Stevenson. That was not apparent to the officials dealing with it at the time, who may have considered the calculations to be based on some clever wheeze that was too good to be true or outside of the spirit of the scheme (which seems to be the view that was taken by procurement officials connected with the scheme), and for that reason it was not pursued. Those departmental officers who did see it would have known little or nothing about the RHI scheme, which was still very much in its infancy. The Department is mindful of the need to promote a culture of working more collaboratively both within the Department and also with other government departments and public sector organisations in order to minimise the risk of this type of slip occurring in the future.

Conclusion

201. The Department recognises that that the standard of inter-departmental communication was a major contributory factor to the problems that arose with the RHI Scheme. In particular, it is recognised that because of the highly unusual nature of the funding, it was imperative that there should have been explicit, formal communication from the Department to DETI setting out exactly the nature of the funding arrangements. This may well have avoided much of the confusion as to budget that arose in 2015.

202. As stated above, Ms Morelli has conceded on behalf of the Department that “DoF’s central repository of evidence was not there”.²⁰⁷ Since the events giving rise to the RHI Inquiry have taken place there has been substantial reflection on this issues and changes of substance have been put in place. By way of example;

- The stocktake meetings of summer 2015 were not fully minuted and the only documentary evidence available to the Inquiry were the brief notes taken by individuals at the meeting.²⁰⁸ Stocktake meetings with spending departments are now *routinely* minuted;
- Inter-departmental meetings must be minuted;
- Telephone calls with other departments or with HMT must be documented by way of a note to file.

203. In its central role, the Department receives and handles substantial quantities of information which must be weighed and sifted. These changes should enable the Department to function much more as effectively the “central repository” of financial information referred to by Ms Morelli. As was observed by Dame Una O’Brien during Ms Morelli’s evidence on 26 June 2018;

*“I think what we’re really talking about is just old-fashioned public administration, really, aren’t we? Just record keeping, linking things. The sort of fundamental basics of what normal public administration should be.”*²⁰⁹

²⁰⁷ See TRA 14985 Line 4

²⁰⁸ See evidence of Sarah Benton on existing practice of minuting stocktake meetings at WIT 23619-20

²⁰⁹ See TRA-11384

The Department's Information Management System, which is in the process of further improvement, now allows for the inclusion and flagging of additional information in order to record linkages between discrete pieces of information.

204. The evidence presented to the Inquiry has amply demonstrated that, for whatever reason, the withholding of important information from the Department created real problems of substance, not just of form. It led to wholly avoidable delays in addressing the problems with RHI in 2015 and beyond. Some have suggested there has been a culture of unwillingness to disclose information to the Department to avoid the risk of blame or sanction. Conversely, Dame Una O'Brien has questioned whether the Department does have the "necessary Authority" to ensure that there is full adherence to its protocols.²¹⁰ The Department considers that there is a fundamental necessity that each of the departments renew their awareness of their respective roles and adhere to them, while at the same time recognising the central role exercised by the Department.

205. In all matters regarding finance, the Northern Ireland departments, as public bodies, have a shared purpose and ought to work hand in hand. The Inquiry panel has observed on numerous occasions that departments appeared to operate in silos rather than collaboratively. Aspects of these practices could also be seen between Divisions within departments. The Department is committed to addressing these issues not just by strengthening the protocols for communication and record keeping but also by ensuring that officers understand the reasons why these protocols and procedures are needed in the first place.

²¹⁰ TRA 15142, line 20

4. Records and Handover

206. The issue of record keeping, including the minuting of meetings is one that is under active consideration by the civil service as a whole and the Department does not consider it appropriate to comment more widely than what is said below.

207. The Department recognises the value of an appropriate handover when officials change within Departments. Written handover notes were and are a suitable means of ensuring that key information is not lost when officials transfer. It is conceded that written handover notes were not provided by Sylvia Sands to Angela Millar or by Stuart Stevenson to Michelle Scott²¹¹.

208. Handover notes are now used in PSD on any change of staff. Unfortunately, handover notes cannot provide a full assessment of all the business cases that have been assessed by a previous team and have been given approvals. What goes into a handover note involves a judgement exercise, and it is possible that the importance of key information may still get lost.²¹²

209. Accordingly, it is submitted that handover notes cannot and should not be the only source of information for incoming staff. Records of approvals, the reasons therefor, linkage to other business cases and unusual funding streams need to be maintained in such a way as is accessible to all staff. This is particularly so where time-limited approval is granted.

210. Supply Division is now recording bespoke conditions of approval including time limited approvals²¹³ on its IMS database, and CED has formally recorded the restrictions on RHI funding on the reconciliations routinely used by those responsible for managing its central RBM database. The functionality of the IMS continues to be actively considered in the Department with a view to improving record keeping. Since October 2014, Supply is no longer split and the fact that there is one singular Supply team makes it easier to ensure consistency of approach with regard to record keeping.

²¹¹ Evidence of Emer Morelli – Day 79 – **TRA 11383**

²¹² This clearly occurred with the handover note prepared by Peter Hutchinson when he was leaving DETI.

²¹³ Emer Morelli – Day 79 **TRA 11383**

211. The recording of key information necessitates a recognition of what is likely to be important, and as with handover notes this involves an exercise of judgement. It is however recognised that better use of emails to follow up what has been decided at meetings, and memos of telephone conversations and appropriate recording of same would be beneficial.
212. While it is largely a matter for the Civil Service as a whole, the Department submits that the evidence seen by the Inquiry has shown that the absence of proper records can lead to confusion and misunderstanding.
213. The Department respectfully agrees with Dame Una O'Brien that there needs to be a return to "the fundamental basics of what normal public administration should be."²¹⁴ The maintenance of proper records is a key element of this.

²¹⁴ **TRA 11384**

5. The Role of Departmental Solicitor's Office

214. The Departmental Solicitor's Office (DSO) is a business area which sits within the Department of Finance for resourcing and governance purposes, but provides impartial legal advice and services to all the Departments.

215. In respect of DSO's involvement in the RHI Scheme, the Department refers to the witness statement provided by Claire Archbold and Nicola Wheeler²¹⁵ and the oral evidence of Nicola Wheeler²¹⁶.

216. As is made clear in the evidence provided to the Inquiry, the core function of the Advisory Divisions in DSO is to provide legal advice on such matters of public law as a Northern Ireland Department may require, as well as assisting with the development and preparation of primary legislation and secondary legislation. Whilst, in most cases, NI Departments use the legal services of DSO as their first port of call it is open to them to engage external legal advisors where DSO does not have the particular expertise to undertake specialist work. The RHI scheme was one such example.

217. The Inquiry has received evidence as to how, following a procurement exercise²¹⁷, Arthur Cox Solicitors were appointed by DETI as specialist legal advisors in connection with energy matters. DETI then commissioned Arthur Cox to draft the Northern Ireland Renewable Heat Incentive Regulations in June 2011²¹⁸.

²¹⁵ WIT 28613 (First Witness Statement) and 29201 (Second Witness Statement)

²¹⁶ TRA 02790 - 02862 Day 22 -9/1/2018

²¹⁷ WIT 28213 (Witness Statement from Alan Bisset)

²¹⁸ WIT 01004 (DETI's First of Five Work Requests to Arthur Cox) (Work Request 2 DFE 16448) (Work Request 3 DFE 17393) (Work Request 4 DFE 20401) AND (Work Request 5 DFE 20438)

218. The evidence has shown that here was extensive interaction between DETI and Arthur Cox. This consisted of “an initial briefing meeting”²¹⁹; various email communications²²⁰; a telephone conference call on 6 March 2012²²¹, a meeting on 18 September 2012²²², various telephone calls and the sharing of pivotal information, specifically the OFGEM Memorandum dated 4 November 2011²²³. By contrast, the Departmental Solicitor’s Office was not privy to any of the abovementioned interactions. None of the legal advice from Arthur Cox or OFGEM’s lawyers, or their representations were shared with DSO²²⁴. In fact, the only interaction DSO had with DETI was a formal written response to each of its discrete legal requests²²⁵.

219. The Department notes the Work Request 3 Form, sent by DETI to Arthur Cox, dated 7 March 2012, which specifically states: - “*Comments raised by DSO and OFGEM should also be considered and if appropriate reflected in the final draft legislation*”²²⁶. The Department notes also the email exchanges of 21-24 September 2012 between DETI and OFGEM, where DETI’s “legal team” was identified as “Alan Bisset” and “David Trethowan”²²⁷, both of Arthur Cox. DSO was not included in this email exchange. The Department submits that it is apparent that with the engagement of specialist energy legal advisers, the role of DSO in relation to the RHI Scheme Regulations was considered to be marginal.

²¹⁹ WIT 28212, in May 2011, (Witness Statement from Alan Bisset)

²²⁰ DFE 20037

²²¹ WIT 28226 (paragraph 13.a.v)

²²² WIT 28229 Para 15. A (DFE 19544)

²²³ WIT 17146 (Witness Statement from Alan Bisset)

²²⁴ TRA 02822 (line 8 to 11)

²²⁵ WIT 01885 (Response from N. Wheeler dated 3 October 2011); DSO 01051/53 (Response from N. Wheeler dated 15/17 May 2012) ; DSO 00742/778 (Response from N. Wheeler dated 5 October 2012); DSO 00781 (Response from N. Wheeler dated 9 October 2012); and DSO 04596/7 (Response from N. Wheeler dated 11 October 2012)

²²⁶ DFE 17303

²²⁷ DFE 20036/38 email exchange between Peter Hutchinson and Keith Avis

220. No specific instructions were provided to DSO by DETI. Thus, its role could reasonably have been considered to be what Counsel to the Inquiry referred to as “*the general... or maybe the fundamental DSO role which was checking the vires of regulations, checking for drafting defects and checking that Northern Ireland drafting conventions were adhered to*”.²²⁸

221. As a result, in relation to the draft RHI Regulations, Ms Wheeler was at all times acting on the basis of very limited information and for a limited purpose. She was not privy to the information shared by DETI with Arthur Cox, (see above). Ms Wheeler’s role was confined to responding to specific requests for legal advice, checking that the Regulations complied with the Northern Ireland drafting conventions, that Northern Ireland legislative references were correct and considering whether there were any *vires* issues.²²⁹ At the outset, she made it very clear in her written response to DETI of 3 October 2011²³⁰, that she could not comment on the technical nature of the Regulations given that she had no expertise in that regard.²³¹ She also made it clear, during oral evidence, that she considered the Regulations from the point of the Examiner of Statutory Rules rather than from a financial or budgetary perspective.²³²

222. Whilst it is accepted that Ms Wheeler did not identify either the technical flaws with the draft regulations²³³ or the absence of cost controls, this must be set in the context of her generalist role, the information that she had been given and the job that she had been asked to perform. There was no background information, nor were there any specific instructions from DETI on these specific issues, nor were there any interactions of the kind which took place

²²⁸ See **TRA 02806** line 25 – D Lunny BL

²²⁹ **TRA 02814** (Nicola Wheeler Evidence)

²³⁰ See letter from N Wheeler to P Hutchinson 3 Oct 2011 – **DFE-17174**

²³¹ **TRA 02815** (line 11-17)

²³² **TRA 02823** (line 12) to **TRA 02824** (line 1 to 9)

²³³ **TRA 02819** (line 10 to 12)

between DETI and Arthur Cox and which might have prompted that line of inquiry.

223. Given the limited and discrete nature of her role, Ms Wheeler was not privy to the policy papers or instructions on the technical flaws or absence of cost controls in the scheme. The Department submits that these were not matters which a generalist lawyer would readily identify, but fell to be raised with and addressed by other parties, particularly those in receipt of all pertinent information.

224. Ms Wheeler has candidly expressed that it is a matter of personal regret to her that she did not, when considering the draft RHI Regulations in October 2012, identify that DECC had introduced a set of amendment Regulations on 30 July 2012, which provided for an interim suspension mechanism²³⁴. Whilst Ms Wheeler's candour is to be welcomed and commended, the evidence demonstrates that this was information about which DETI was aware and yet did not disclose to DSO, perhaps on the basis that it was content with the expert advice it was receiving on the subject from Arthur Cox. The 2012 interim cost control mechanism had been the subject of specific negotiation and consultation between DETI, Arthur Cox and OFGEM²³⁵. DSO was notably absent from these negotiations and no advice was ever sought from it in that regard.

225. Further, it is submitted that the advices given by Ms Wheeler to Peter Hutchinson regarding the regulations on 17th May 2012²³⁶, with regard to the removal of reference to "the authority" and Regulations 53 and 54 was sound advice. It is regrettable that when it came to advising on the draft Administrative Arrangements Agreement (AAA) between DETI and OFGEM

²³⁴ TRA 02844 (line 4)

²³⁵ DFE 19544, WIT 28230/31 paragraph 16.e.i - iii (Alan Bisset's Witness Statement)

²³⁶ DSO 01049

in September 2012,²³⁷ Ms Wheeler did not recall her earlier advice, so as to ensure that the detailed information in those regulations was incorporated into the AAA. Nonetheless, it is submitted however, that the one wide-ranging provision²³⁸ ought to have been sufficient to ensure co-operation between two government bodies.

226. In the circumstances, it is submitted that the role played by the DSO in the RHI Scheme was not a significant one, nor ultimately was it causative of any of the problems in the Scheme. Had DETI instructed DSO to provide it with advice on a wider canvas, then expectations would have been different, but the evidence amply demonstrates that this did not occur.

227. These submissions have not addressed the role played by Mr Paul McGinn in the Departmental solicitors' Office in relation to advices that he gave to DETI, as, at the time of drafting, Mr McGinn has only just received Section 21 Notices requiring him to provide documentation and a witness statement. Mr McGinn is now retired and is currently out of the jurisdiction. The Department therefore reserves its position in respect of any comments it may wish to make to the Inquiry regarding his involvement in the RHI scheme until such time as Mr McGinn is able to comply with those Notices.

²³⁷ DSO 04596- 04597

²³⁸ WIT 28706

7. Conclusions

228. The Inquiry was set up to “*investigate, inquire into and report on the Non-Domestic Renewable Heat Incentive Scheme*”. One of its stated purposes in the terms of reference was “*to restore public confidence in the working of government*”.

229. Quite a number of Departmental officials have now given evidence to the Inquiry, both orally and in written form.

230. In the course of its evidence and in these submissions, the Department has acknowledged that mistakes were made, and that too frequently, protocols and procedures have been shown to be have been inadequate. In a significant number of areas improvements have been made on the basis of what has been learned as a result of the focus which has been brought about by this Inquiry.

231. It is submitted, however, that no evidence has emerged of any Departmental official acting in any manner which may have constituted a breach of ethics or standards in public life. On the contrary, the evidence demonstrates that its officials worked diligently, conscientiously and often outside of the confines of conditioned hours in order to perform challenging, complex roles.

232. There has been no evidence that any Departmental official improperly promoted the scheme; attempted to delay the introduction of cost controls or suspension of the scheme; improperly disclosed information or had any conflict of interest.

233. The view has been expressed by some, whether in the Inquiry or in the media, that as RHI funding was AME civil servants or others may have taken

a more liberal approach to monetary controls; what senior counsel to the Inquiry in his opening described as “*something like free money from London*”²³⁹. The evidence has emphatically demonstrated that no such attitude ever existed in the Department. On the contrary, Departmental officials applied the same value for money standard to the RHI spend as it would have done to any DEL public expenditure. The Department takes seriously its role in helping the Executive and public servants to safeguard public funds and spend them in accordance with the principles set out in *Managing Public Money Northern Ireland*; in the spirit of and to the letter of the law, in the public interest, to high ethical standards, and achieving value for money.

234. These submissions have focused extensively on the failures of communication and recording of information, internally in the Department, with other NICS departments and with HMT. The Inquiry has seen that that the Department receives large quantities of information; some of it of fundamental significance, some of it routine. It is accepted that regular, sometimes informal, working relationships gave rise to a degree of complacency and a failure to keep proper records.

235. Thus, the restrictions that were placed on the RHI funding which was known in 2010 ought properly to have been the subject of a formal letter to DETI at the time. That letter ought to have been retained by the Department in its own records.

236. The Department, has vast expertise of the complex system of recording, analysing and reporting the Northern Ireland finances. It has now strengthened its procedures to ensure that funding restrictions are clearly noted on documentation used by those responsible for managing the central RBM database.

²³⁹ See TRA 00012 – line 4.

237. These submissions have highlighted how there have been substantial changes in Supply's approach to recording the rationale for approval of business cases and bespoke conditions attached thereto, if any.
238. The Department acknowledges in particular that in summer 2015, PSD ought to have moved much more quickly to engage with HMT in order to gain a proper understanding of the true nature of the budget position.
239. Whilst there was undoubtedly much room for improvement, as indeed there will always be, the Department's role in the RHI scheme was in other respects a constructive one. The conditions imposed by the Department in the 2012 business case were sensible, focused and time limited, as was appropriate for what was a finite budget. Had there been adherence to these conditions, it is likely that the events of 2015 would not have come to pass. The sanction of DETI being in an irregular spend, and the prospect of the involvement of the NIAO marked a turning point in the unfolding RHI story. The protocol in place for dealing with irregular spend ensured that RHI issues finally received the full attention of senior officials.
240. The Department shares responsibility for the confusion in summer 2015. The Department's understanding of the position that summer was, however, clouded by a failure on the part of others to provide all of the relevant and necessary information. Departmental officials were prepared to, and did, work collaboratively and conscientiously in order to progress matters. Their overriding concern during this period was to ensure that the funds being spent on the RHI scheme were value for money. They were not prepared to seek any additional monies from any source without first being satisfied of this requirement. That insistence was right and proper. The Inquiry has seen how the addendum business case for the introduction of cost controls, having been

awaited for several months, was approved in just two days due to the overriding interest of protecting public funds.

241. The Inquiry has heard from David Sterling²⁴⁰ and from Kieran Donnelly²⁴¹, the Comptroller and Auditor General, about the way ahead and the need for changes in culture and leadership across the Civil Service. The Department endorses those views, and respectfully suggests that Ms Morelli²⁴² is correct, that greater training is needed all levels within the civil service about the reasons that underlie the necessity for adherence to procedures, as well as knowledge of the procedures themselves.

242. Finally, the Department wishes to acknowledge the hard work, dedication and patience of the Inquiry panel, counsel and staff. Its close, forensic examination of working practices and procedures in the Northern Ireland Civil Service has not always been a comfortable experience for officials, but it has necessarily provoked reflection and change within the Department. The Department recognises that the Inquiry has sought to be fair to all those from whom it has heard. No doubt the Inquiry will wish to continue to exercise fairness to witnesses in the way it has done to date, by affording them and us the opportunity to comment on any explicit or significant criticism before publication of its report. The Department remains ready to assist the Inquiry in its task and looks forward to the report of the Inquiry in due course.

²⁴⁰ TRA 16587 line 12 -13: "we know we need to change culture and introduce other organisational changes as well" and TRA 16588 line 11 –"I think changing culture is very much about leadership"

²⁴¹ Mr Donnelly at TRA 16128 line 1-3: "unless there's a step change in the behaviours, the culture and the leadership, we're not going to make nearly enough progress".

²⁴² TRA 15141 line 3 to TRA 15143 line 19

Annex

DoF Supply Division

Business Case Proforma

1. Name of Department:

2. Name of Agency (if applicable):

3. Name of NDPB (if applicable):

4. Project Title:

5. Is this Case a Resubmission?

Yes: <input type="checkbox"/>	No: <input type="checkbox"/>
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6. Departmental Contact Details:

Job Title:

Branch:

7. Type of Business Case:

Capital: <input type="checkbox"/>	IT: <input type="checkbox"/>	Consultancy: <input type="checkbox"/>	Policy: <input type="checkbox"/>	Pay Remit: <input type="checkbox"/>	Other: <input type="checkbox"/>
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For Pay Remits go to Question 12b

8. Is the Business Case:

Standard <input type="checkbox"/>	Novel <input type="checkbox"/>	Contentious <input type="checkbox"/>	Setting a Precedent <input type="checkbox"/>
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9. If standard, which delegated limit has been triggered:

10. Is this a PPP or PFI Project?

Yes: <input type="checkbox"/>	No: <input type="checkbox"/>
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11. For all cases, is this the:

SOC: <input type="checkbox"/>	OBC: <input type="checkbox"/>	FBC: <input type="checkbox"/>
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12. Costs Outlined in Business Case:

Capital Cost

Resource Cost

12b. Pay Remits Only:

Actual
Increase for
staff in Post

£

13. Estimated Project Start Date:

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14. Estimated Project Completion Date:

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**15. Post Project Evaluation (PPE or PPR)
Due Date:**

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**16. Please state the job title
and
/or name of body
responsible
for completing the
evaluation:**

Job Title:

Branch:

**17. Has Business Case been reviewed by
departmental economists**

Yes <input type="checkbox"/>	No <input type="checkbox"/>

**18. Has Business Case been approved
by the Minister?**

Yes <input type="checkbox"/>	No <input type="checkbox"/>	N/A

19. Is the case linked to similar cases or earlier approvals?

Yes <input type="checkbox"/>	No <input type="checkbox"/>	N/A <input type="checkbox"/>
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If yes please give details

20. Accounting Officer Declaration

I am content with the regularity and propriety of this business case and that it represents value for money for the Department.

Signed:

On behalf of the Departmental Accounting Officer

Date: