

INQUIRY INTO THE RENEWABLE HEAT INCENTIVE SCHEME

Supplementary Statement on Issues arising from the Opening Statements

DATE: 24 November 2017

Witness Statement of: Stephen McMurray

I, Stephen McMurray, will say as follows:

1. This supplementary Witness Statement by the Department for the Economy (DfE) seeks to assist the Inquiry by clarifying or expanding on a number of points arising from the Opening Statements made on 10 November 2017. This is also informed by the Opening Statements made by Counsel for the Inquiry.

DFE OPENING STATEMENT**Communication between Ministers, SpAds and Officials**

2. In the Opening Statement by Counsel for the Department, we said:

The Department does not always know fully what the Minister, his SpAd and, indeed, the wider political party know in relation — or knew in relation — to the workings of the RHI scheme. It is therefore important not to conflate what the politicians understood about RHI and what the Department understood.

3. The Chairman asked about the apparently anomalous position of knowledge not being shared between Ministers, SpAds and officials. The Department's position is based on the foundational points that:
 - a. officials are accountable to Ministers and work at all times under their direction and control, and
 - b. Ministers are accountable within the political domain – where there are clear and well established conventions that guide their relationships with

the Assembly, the Executive, their constituencies and their party colleagues.

4. On this basis, the practical reality is that:
 - a. officials have a clear responsibility to share relevant information on current issues with the Minister (often through the SpAd), either formally in submissions or notes for information or through conversations, messages, phone calls, etc.; and
 - b. there are many aspects of communication and information gathering where it is neither necessary nor conventional for Ministers or SpAds to share their knowledge and communications with officials. Ministers have a clear prerogative to consider policy options or other political judgements without any obligation to share all their communications with officials. Obviously, if Ministers or SpAds have information that is relevant to the tasks that they are expecting officials to fulfil on their behalf it would be reasonable to have expected that such information would be shared. In this case it would be expected that Ministers and SpAds would have shared any information that was relevant to the effective operation and management of the RHI Scheme, within the parameters set by the Assembly and by HM Treasury, and having proper regard for the need to secure value for money and the prevention of fraud and abuse,

Intercommunication between Departments

5. At the conclusion of the Opening Statement made by Counsel for DfE, the Chairman asked about the intercommunication between departments. This question specifically referred to the apparent lack of communication between departments, in the context of information, which was contained in correspondence to the Department of Justice (DoJ) in 2012 relating to the Desertcreat project, and CAFRE and DARD's apparent continued promotion of the RHI Scheme in 2015, at a point after DETI had begun to act to address the emerging problems with the Scheme.

6. In this context it should be noted that there is no systematic arrangement for the transmission of information received by one department in Northern Ireland about issues affecting the business of another department. The normal expectation is simply that where an individual becomes aware of something that may be of importance (or of interest) to another department, they should pass that on to the relevant officials.
7. More formally, where a cross-cutting issue is raised in a correspondence case (especially for Ministerial or Permanent Secretary cases), it is conventional to make a request to the other relevant Department for 'part input'. This is often coordinated through departmental Private Offices or negotiated between the two relevant businesses areas directly. Part input requests provide the opportunity for the responding department to reflect the view of the other department with a shared responsibility or interest in the topic matter. It also ensures that departments are appraised of, and have some control over, communications by other areas of Government touching on areas within their purview. However, this arrangement does not and could not ensure that all information, which one department is made aware of, and which could be relevant to another department finds its way to the right place. It is trite to state that of key importance to the sharing of information between departments is a realisation by the recipient of the information that it should be shared.
8. In addition, there are many interdepartmental meetings at a range of levels across the Civil Service, but these are almost all focused on specific agendas, topics or functions. Only the weekly meetings at Permanent Secretary level have an agenda item that provides an open opportunity for the sharing of information on any topic (the "Tour de Table") but, by the nature of the time available for those meetings, only a small number of items can be raised. It would not have been realistic to expect that intelligence such as the letter from Sheridan and Hood to the Justice Minister to have been shared in that context.
9. In any case, it may well not have occurred to the DoJ officials to raise the issue with DETI, in the circumstances wherein the Sheridan and Hood correspondence in relation to the Desertcreat project revealed no evidence of fraud or inappropriate gaming of the RHI Scheme. The comment on the letter from DoJ

officials was that the proposal from Sheridan and Hood was an attempt to 'circumvent the intent of the scheme'. The statement from Nick Perry, Department of Justice (WIT-91011 and WIT-91080) confirms that officials associated with the project did not consider that the Sheridan and Hood proposal would have been eligible for RHI support and consequently did not consider it necessary to approach departments not directly involved in the project to make them aware of the correspondence.

Role of Special Advisers

10. At the conclusion of the Opening Statement made by Counsel for DfE, Dame Una O'Brien asked whether the description in the DfE Opening Statement of the working arrangements in respect of SpAds were specific to DETI or if the description applied generally across NI departments.

11. The Department's assessment is that the position as described is reasonably typical of the position across NI departments.

Conspiracy of Silence

12. On the issue of the fact that many there were many individuals, working in the renewables industry, who were aware of the flaws in the Scheme, but did not tell DETI, the following additional points may be helpful:

- a. as drawn out in the Inquiry's Opening Statements, the flaw in the Scheme, namely that the untiered small-medium biomass tariff was higher than the cost of the fuel, was recognised quickly by some firms (for example, Sheridan and Hood and Neil Elliott);
- b. the Department has not been able to find any evidence that either of the following were ever drawn to the attention of DETI officials:
 - i. the letter of 27 November 2012 from Sheridan and Hood to the Minister for Justice (WIT-91018), or the reply sent by Colin McCrossan on 10 January 2013 (WIT-91057 et seq), confirming that the Desertcreat project team had understood that the proposal from Sheridan and Hood "...could have been

interpreted as a deliberate attempt to circumvent the intent of the RHI...." (WIT-91058); or

- ii. the presentation by Gaynor Hartnell on 20 June 2013 (noting especially OFG-67322, 67331 and 67333)
- c. Janette O'Hagan's third e-mail to Arlene Foster (dated 3 September 2013) followed an e-mail from Wayne Cullen of BSH Holdings referring to the way the Scheme was being exploited (WIT-264967)
- d. documents provided by the Inquiry in the Companies bundle show clear evidence that several poultry farmers were maximising the financial benefit available from the Scheme (see Paragraph 16 below);
- e. in advising on the poultry business model to inform DETI's work on the tariff reduction in July 2015, CAFRE's paper was apparently influenced by some of these same poultry farmers (WIT-195365);
- f. Documentation produced for the 2013-14 CAFRE Practical on-farm Renewable Energy seminar referred to a payback period of less than 3 years for a biomass boiler (WIT-86253) when the 12% rate of return for the scheme implied that payback should take 7-8 years; and
- g. it is clear from Andrew Crawford's e-mail of 31 July 2015 to Timothy Cairns (WIT-11117) that he was aware that *"it pays producers to heat houses when their houses are empty as the rates are attractive and some use boilers for more than 6000 hrs. per annum."*

13. In the Opening Statement, Counsel for the Department said that Janette O'Hagan was the only person who had drawn the problem with the Scheme to the attention of Departmental officials. Subsequent to the openings on 10 November 2017, the letter at COM-06480 and DFE-107130 to DFE-107132 from Solmatix to Energy Division has come to the Department's attention. The correspondence from Solmatix refers to their appreciation that *"...unscrupulous beneficiaries are not only taking advantage of RHI support, but in many cases, notably within the poultry sector, appear to be actively exploiting it."*

14. The Department has not yet been able to examine all the documentation provided by the Inquiry, and hence it is important to acknowledge that the material may include further evidence of knowledge of the flaws in the Scheme and, possibly, other occasions when the flaws may have been highlighted to officials.
15. The Department's view is that some of the missed opportunities to inform officials were simply accidental. However, it is also very clear that it would have been disadvantageous for any of those benefitting from the gaming and exploitation (or in some cases abuse) of the Scheme to have alerted the Department and hence there is justification for the phrase "conspiracy of silence". The Department also acknowledges that it missed many opportunities to identify and to correct the flaw in the Scheme at a much earlier date.
16. The Department has considered further evidence provided by the Inquiry relating to information and interactions with industry. As well as adding to the Department's understanding of events, some aspects of this new evidence have added to the concerns that there was a 'conspiracy of silence'. Indeed some of the evidence appears to go beyond even that description. The Department intends to provide a separate supplementary statement dealing with this issue as soon as it can.

DOF OPENING STATEMENT

17. DfE does not take issue with most of the content of the Opening Statement by Counsel for the Department of Finance (DoF) and indeed a number of the points made have been acknowledged as failings on DETI's part in the DfE Corporate Witness Statements.
18. Counsel for DoF said the following (page 27 lines 5-7 of the transcript):

"But the Department of Finance wishes to emphasise that how the RHI was funded is, to some extent, irrelevant. Both AME and DEL spending are ultimately funded by the UK taxpayer and one type of funding is not more important than the other."

19. On this point (which is of course self-evidently true), it is very important to point out that if the RHI budget had been both:

- a. "standard AME" in the sense that as a demand led budget, HMT would meet the full cost of uptake of the Scheme; and
- b. good value for money, with full and proper alignment between the policy objectives and the uptake of the incentive, and protected by all proportionate controls to prevent abuse and gaming;

then action to maximise uptake and expenditure would have been correct and rational, in that that would secure a better share of resources for Northern Ireland and contribute positively to a wider strategic objectives at UK and NI levels in relation to maximising renewable heat production. By way of comparison, DFP/DoF has never had any difficulty with the need to align other demand led programmes such as social security benefit expenditure, which is "standard AME" with the level of demand in Northern Ireland.

20. Regrettably, it appears that at least some in DETI in the summer and autumn of 2015 believed the points at 19 (a) and (b) above to be true, and may have represented point (a) as being true to the SpAds¹, and this contributed to the confusion over what to do about the Scheme in that period. Hence, the Department would suggest that the position was not as simple as the Opening by Counsel for DoF would suggest: DETI's attitude to the RHI Scheme reflected the misconception around the two points above, and would have been reasonable had both points been correct. Of course, DfE accepts that it is clear that neither were ever correct: a fact that should have been known to DETI at the time.

AME Funding for 2015-16 Financial Year

21. DoF commented on the issue of RHI funding for the 2015-16 financial year (page 34 of the transcript). DfE accepts that DFP had not seen the Ministerial correspondence culminating in the DECC letter of 7 January 2014 (DFE-152874).

¹ See comment above at paragraph 12 (g) which show that there is independent evidence that the SpAds knew that point (b) was not true.

It is not clear precisely how DECC and HM Treasury followed up the point made in that letter, that the Northern Ireland Executive (this being the natural meaning of "your Department" in the context of the DECC Minister's letter) would be notified by HM Treasury of its population-based share of the £430m available for RHI in 2015-16 (DoF's Counsel refers to 2014-15 at line 17 of page 34, but from the context we assume that should have been 2015-16). Any such notification from HM Treasury would normally have been to DFP.

22. Northern Ireland's population-based share of £430 m is £12.8 m (DOF-03311), and hence, had the rules set by HM Treasury at the outset of the Scheme (as set out in the key correspondence of 2011) been applied in 2015-16, that would have been the ceiling on spending for the Scheme in Northern Ireland.
23. Joanne McCutcheon had enquired about the position (in her e-mail of 10 December 2013 to Jeff Partridge at WIT 18730), and Jeff Partridge's reply of 11 December 2013 (also at WIT-18730) refers to a profile including £9.5 million for 2015-16. Jeff Partridge's e-mail of 10 January 2014 (also at WIT-18730) goes on to say that this profile had been confirmed by DFP as part of the AME forecasting exercise. – DoF may be able to confirm whether or not HM Treasury was involved in that process. The confirmation print showing the AME allocations for, inter alia, the RHI Scheme is located at (WIT-18733).
24. Energy Division identified the emerging budget problem in the spring of 2015, and there was some confusion around the handling of the budget. The relevant point for the context of this Statement is that in an e-mail of 19 May 2015 (WIT-02722), Jeff Partridge refers to "... *the allocated AME budget of ... £10.5M Resource*". DfE has not yet found the full chain of evidence to show how the amount changed from £9.5m in January 2014 to £10.5m in May 2015, or any explanation as to why the amount was not the population-based consequential of £430m (£12.8m).
25. DoF has explained in its corporate Witness Statement of 2 June 2017 (WIT-30140) that HM Treasury had accepted DETI's RHI AME forecast for 2015-16 because no limit had been set in advance. Michael Brennan makes the same point in his personal Witness Statement of 20 September 2017 (WIT-43219).

The confirmation from HM Treasury that it had accepted the revised forecast was not received until the late autumn of 2015.

26. This seems to be at odds with the approach described in the DECC Minister's letter of 7 January 2014 (DFE-152874) which shows that DECC did have an allocation for RHI in 2015-16, and the emails from Jeff Partridge quoted at paragraphs 23 and 24 above, which suggest that DETI had a defined expectation as to an amount that would be available for the Scheme in 2015-16 (and indeed the years following). Hence DfE would suggest that the position was perhaps not as clear as suggested in the Witness Statements quoted above (paragraph 25), or in the Opening by Counsel for DoF though we recognise that there may be further information on this that is not to hand at the time of writing.

27. The Department notes that the Witness Statement from HM Treasury says:

"No formal communication was issued to the NIE in relation to RHI budgets in the single year covered by the 2013 Spending Round (2015-16), but it was assumed that AME cover would continue to be proportionate to the budget assigned to DECC to operate the GB scheme. In January 2014, then-DECC Minister Greg Barker wrote to then-DETI Minister Arlene Foster, confirming that funding for the NIE for 2015/16 would continue to be a population share of the GB RHI scheme."

This suggests that the position should have been reasonably clear and that an allocation of £12.8 m would have been available as a planning figure for 2015-16 from early in 2014 (though, of course, as well as seeking confirmation of the allocation, DETI also should have sought a fresh approval for the expenditure).

28. In any case, the Department acknowledges unreservedly that:

- a. it should have sought renewal of the approval from DFP before 31 March 2015; and
- b. it should have treated Northern Ireland's population-based share of the amount specified in the DECC Minister's letter of 7 January 2014, or any lower amount set implicitly or explicitly by DFP, as the limit on

expenditure in 2015-16 in line with the previous clear statements on the nature of the budget available for the RHI.

29. On this same point, the Department has noted the point raised at paragraph 281 of the first DfE Corporate Witness Statement, namely that DETI was told by DFP that an additional AME allocation had been approved, has been addressed in a number of Witness Statements. Bernie Brankin has asserted at paragraph 79 (c) of her Witness Statement (WIT-24041) that she was told by Michelle Scott that the additional AME of £11.3m had been approved². She had reported this in her e-mail of 24 August 2015 (WIT-02741³) which was her response to a question from Andrew McCormick as to whether “...HMT has accepted the amended forecast and consciously given us the extra?” (e-mail also in WIT- 02741). In contrast to this, Michelle Scott (WIT-43051) avers that she does not remember any such conversation.
30. The importance of this point is that at the time, there was confusion within DETI as to the implications of the budget overspend on RHI in 2015-16. At that time Energy Division believed that the consequences of the “non-standard” treatment of the AME would be limited to a DEL penalty of 5% of any overspend, and had represented that view to, among others, Trevor Cooper (see his Witness Statement at paragraph 33 (c), WIT-18545). Finance Directorate had advised that urgent clarification was needed (as in Bernie Brankin’s e-mail at WIT-02741) but this was not acted on promptly by DETI (the draft e-mail provided by Bernie Brankin on 24 August 2015 was not issued until 5 October 2015).
31. The Department now accepts that there really should not have been a great need for new clarification of the position, given that the original documentation from 2011, all of which was available to both Finance Directorate and Energy Division, was available and had come to officials’ attention. Nevertheless, there was confusion, and the actions taken by DETI and DFP did not resolve it. Within DETI, it was only in February 2016 that reliance on the “5%” point was exposed

² This was clearly understood as additional to a pre-existing allocation (the £10.5m referred to at paragraph 24 above) as it was clear that the total projected expenditure on the non-domestic RHI Scheme at that stage of 2015-16 was £21.8m.

³ Not WIT-02471 as in Michelle Scott’s Witness Statement (WIT-43051)

as a misconception (see paragraph 281 of the DfE Corporate Witness Statement **WIT-00109**, and paragraph 2.74-2.77 of Andrew McCormick's personal Witness Statement **WIT-10529**).

32. Counsel for DoF addressed the question of whether DFP might have engaged more quickly with HM Treasury in 2015 about the funding of the RHI (see section from page 33, line 23 of the transcript). This appears to be a response to evidence from former DETI officials: for example, Trevor Cooper's assertion in his Witness Statement (paragraph 35 **WIT-18547**), that the first contact with HM Treasury appears to have not taken place until 9 October 2015. DoF's position is that before it could engage with HM Treasury, DFP needed to know:

- a. what the additional funding would be used for;
- b. why the funding forecast had increased;
- c. whether the forecast was accurate;
- d. whether there had been any additional funding made available by DECC for the scheme; and
- e. whether the scheme itself represented value for money.

33. DfE would wish to suggest that, while these points are clearly orthodox and essential considerations in relation to an expenditure approval, this approach leaves out of account a number of aspects of the context. DETI's initial engagement was not to seek formal approval of the excess expenditure it had committed without approval, but simply to secure clarification of the way the arrangements for the RHI budget should operate (see for example, Trevor Cooper's e-mail of 17 June 2015 to Michelle Scott at **WIT-18766**).

34. DfE accepts that it would have been quite reasonable for DFP to have responded to that enquiry by referring back to the 2011 e-mails and to have advised that there was nothing to debate. The Department accepts that DETI should have known that the expenditure was to have been treated as specifically limited to the allocations provided by HM Treasury, and indeed DETI should not even have needed to raise these queries with DFP.

35. If it is accepted that there was a degree of confusion, at least within DETI, around this point, it would have been very helpful if DFP had either:

- a. responded with clarification based on the 2011 e-mails as above; or
- b. approached HM Treasury to seek (or reaffirm) clarification of the rules that applied.

36. However, as a matter of fact, neither of these things happened, and the one definite (or apparently definite) development was the allocation of £11.3m of additional provision for the RHI in summer 2015 – which appeared to be **directly contrary** to the expectations created by the 2011 e-mails, and which contributed to the confusion within DETI at the time.

37. To be clear, DfE accepts that it has to accept full responsibility for the initial development of the confusion about the budgetary treatment in the summer and autumn of 2015. But there were ways in which DFP might have helped dispel the confusion (as at paragraph 35 above).

Delay in Closing⁴ the Scheme

38. Counsel for DoF stated that DFP urged DETI to close the Scheme (see page 37, line 3 of the transcript).

39. DfE acknowledges that there were discussions from December 2015 onwards around closure of the Scheme. However, DfE is not aware of any 'urging' from DFP to close the Scheme before David Sterling's e-mail of 26 January 2016 to Chris Stewart (WIT-30829) and the letter from DoF Supply Division to Trevor Cooper of the same date (WIT-30827 and WIT-30828) which post-dated DETI's submissions of 31 December 2015 and 19 January 2016 recommending suspension of the Scheme⁵.

⁴ Strictly speaking, this should refer to suspension, which was the actual action taken in February 2016 as distinct from formal closure.

⁵ The reply from Andrew McCormick of 26 January 2016 at 18.10 was written in the period between the intervention of the OFMdFM SpAds to overrule Jonathan Bell's approval of the submission of 19 January 2016 and the clarification of the next steps.

OFGEM OPENING STATEMENT

40. The Department has previously commented (WIT-03039 to WIT-03234) on the Ofgem Corporate Witness Statement. We are still considering the further Witness Statements and the bundle of evidence from Ofgem, and will provide a further Witness Statement in due course on points arising from the documents and the Opening Statement by Counsel for Ofgem.

Statement of Truth

I believe that the facts stated in this witness statement are true.

Signed: Stephen McMurray

Dated: 27th Nov. 2017