

Mr Paul McGinn
C/O Teresa Stitt
Departmental Solicitors Office
Victoria Hall
12 May Street
Belfast
BT1 4NL

By Post and Email: Teresa.stitt@finance-ni.gov.uk

29 November 2018

Dear Sir

Re: The Independent Public Inquiry into the Non Domestic Renewable Heat Incentive (RHI) Scheme
Provision of a Section 21 Notice requiring the provision of evidence in the form of a written statement

I am writing to you in my capacity as Solicitor to the Independent Public Inquiry into the Non Domestic Renewable Heat Incentive (RHI) Scheme (known as 'the RHI Inquiry') which has been set up under the Inquiries Act 2005 ('the Act').

I enclose a copy of the RHI Inquiry's Terms of Reference, which are also available on the Inquiry's website at www.rhiinquiry.org. I know, however, that you are likely to be familiar with the work of the Inquiry already.

At the moment, although the Inquiry's oral hearings are largely concluded, the Inquiry is continuing with the process of requiring individuals who have been, or who may have been, involved in the range of matters which come within the Inquiry's Terms of Reference to provide written evidence to the Inquiry Panel.

The Inquiry is aware that you, as a solicitor within the Departmental Solicitor's Office (DSO), were involved in the process of providing advice to the Department of Enterprise, Trade and Investment (DETI) in relation to the RHI Scheme (in particular, during the summer of 2015, which the Inquiry has been considering further recently in the course of its Phase 3-4 oral hearings). In this context, it would be of assistance to the Inquiry to have a statement from you setting out your involvement with the Non Domestic Renewable Heat Incentive Scheme in Northern Ireland ('the Scheme') and, in particular, providing clarification of the legal advice given in or around summer 2015.

In keeping with the approach adopted with all witnesses, the RHI Inquiry is now issuing to you a Statutory Notice (known as a 'Section 21 Notice') pursuant to its powers to compel the provision of evidence in the form of a written statement in relation to the matters falling within its Terms of Reference.

The Section 21 Notice enclosed with this letter requires you to provide evidence to the RHI Inquiry Panel in the form of a written statement addressing the matters identified in the Schedule to the Section 21 Notice. As the text of the Section 21 Notice explains, you are required by law to comply with it.

I should also inform you that the Department for the Economy (formerly DETI) has waived privilege in relation to work carried out, or advice given to it, by DSO in relation to the RHI Scheme. I enclose a copy of the relevant correspondence from the Department, dated 15 May 2017, in this regard. Again, you are likely to be aware of this already; but hopefully it will assuage any concern you might otherwise have had about confidentiality or legal privilege.

The aim of the enclosed Notice is to require you to provide all relevant evidence you have within your knowledge, information or belief which is pertinent to the Inquiry's Terms of Reference. The Schedule to the enclosed Section 21 Notice provides further detail as to the matters which should be covered in the written evidence which is required from you. In the event that there is a category of information in respect of which you have no evidence which you can provide, please state this in your

response. Where you can provide evidence, the more comprehensive your statement is, the less likely it is that the Inquiry will have to revert to you at a later stage for clarification, although in many cases this is likely to be necessary to some degree.

I also refer you to Restriction Order No 2 made by the Chairman of the RHI Inquiry on 22 June 2017, a copy of which is available on the Inquiry's website. This restriction order prohibits you from publishing any documentation received from the RHI Inquiry (save that you may show it to your legal representative) unless you first obtain the consent in writing of the Inquiry Chairman.

In addition to the three restriction orders made by the Chairman of the RHI Inquiry (which you will find published on the Inquiry website) receipt of this correspondence and its enclosures also places you under a duty of confidentiality to the RHI Inquiry in respect of them. You may share the correspondence and the enclosed Notice and documents with your legal representative(s), but neither you nor they may show, communicate the contents of, nor provide this correspondence or the Notice or documents to any other person or organisation without the express permission of the RHI Inquiry. Any breach of this duty of confidentiality is actionable at the suit of the Inquiry Chairman.

If you have any problems gaining access to documentation held by DSO which you require in order to respond to the Section 21 Notice, please contact me as soon as possible and arrangements will be made for you to either have access to the documents or for copies of the documents to be made available to you. Hopefully, the key documents for you to consider will be those enclosed with this correspondence; although you may also have other emails or file notes which are relevant (and I am writing to you separately today with a Notice requiring the production of documents which might be relevant to the issues raised in the enclosed Notice where they will not otherwise have been provided to the Inquiry).

For the avoidance of doubt, the Inquiry Chairman *does* permit you to share the enclosed Notice and discuss its contents with any other member (of former member) of your DSO office or team where you judge that necessary or appropriate to provide a full or accurate answer to the enquiries raised.

You will also find attached to the Section 21 Notice a Guidance Note explaining the nature of a Section 21 Notice and the procedures that the RHI Inquiry has adopted in relation to such a notice. In particular, you are asked to provide your evidence in the form of the template witness statement which is also enclosed with this correspondence.

Given the tight time-frame within which the RHI Inquiry must operate, the Chairman of the Inquiry would be grateful if you would comply with the requirements of the Section 21 Notice as soon as possible and, in any event, by the date set out for compliance in the Notice itself.

Finally, I would be grateful if you could acknowledge receipt of this correspondence and the enclosed notice by email to Patrick.Butler@rhiinquiry.org.

Please do not hesitate to contact me to discuss any matter arising.

Yours faithfully

A handwritten signature in black ink that reads "Patrick Butler". The signature is written in a cursive style with a long horizontal stroke at the end.

Patrick Butler

Solicitor to the RHI Inquiry

02890408928

SCHEDULE
[No 239 of 2018]

Legal Advice provided in June 2015

From information received by the Inquiry it appears that Seamus Hughes of DETI wrote to you on 12 June 2015 requesting legal advice in relation to the possible amendment of the RHI Scheme (see **DSO-05022**). The document at **DSO-05060 to DSO-05063** appears to be your written advices in response to this request, dated 25 June 2015. From evidence received by the Inquiry however, it would appear that Seamus Hughes spoke to you twice by telephone on 17 June 2015, during which you gave him verbal legal advice in relation to the amendment of the RHI Scheme (see document **DFE-349922/3**). As to these circumstances and insofar as you can now recall:

1. Please describe whether, prior to his letter dated 12 June 2015, Seamus Hughes communicated with you (or, to your knowledge or belief, any member of your staff) either orally or in writing, during which he referred to the possible amendment of the RHI Scheme. If so, please provide details (including when, how and with whom he communicated; what possible amendments he referred to; and what advice was given).
2. Following the letter of 12 June 2015, but prior to the telephone conversations on 17 June 2015, did you and Seamus Hughes communicate in any way in relation to the RHI Scheme (for instance, for the purpose of seeking further information or clarification in relation to the request within his letter of 12 June 2015)? If so, please provide details (including when and how these communications took place, what further information or clarification was sought or imparted; and the reasons for same).
3. In relation to your first telephone conversation with Seamus Hughes on 17 June 2015, please address the following matters:
 - a. Who initiated the communication and for what purpose?

- b. Set out, as far as you can recall, what was discussed and what advice was given on this call.
- c. Without prejudice to the generality of the foregoing enquiry, at any point during the conversation did Seamus Hughes raise any of the following issues? If so, please explain the reason, and context in which, they were raised and your response(s). The issues are:
- i. The Scheme's budget, any limitations on it and the ability, or potential ability, to exceed the scheme budget, including the reason(s) why the RHI Scheme was exceeding, or likely to exceed, its budget;
 - ii. Possible solutions or proposals for preventing or mitigating the Scheme exceeding its budget, including what the purpose was of introducing the tiered tariff for medium sized biomass boilers and what other possible amendments could be made to the Scheme and the reasons for any such amendment (or, as the case may be, the reasons against pursuing any such amendment);
 - iii. What inherent, systemic or design problems existed within the RHI Scheme;
 - iv. The issue of returns under the Scheme, including whether the issue of State Aid was raised together with the context and reasons for it being raised; whether the question of over-compensating recipients or providing a rate of return greater than intended by Energy Division was discussed; and whether it was considered that the existing Scheme did, or had the potential to, create a 'perverse incentive' to generate heat;
 - v. The possibility of immediate suspension of the Scheme and, if this was discussed, the context in which such a course of action was

proposed and the reasons why such a course of action was rejected.

- vi. The potential for, or evidence of, fraud or exploitation of the scheme by scheme recipients.
 - d. In respect of this telephone conversation, please indicate whether you made any notes or minutes, or took a 'telephone attendance note' or similar; and, if not, the reasons for not doing so.
4. In relation to your second telephone conversation with Seamus Hughes on 17 June 2015, please address the following matters:
- a. Who initiated the communication and what was the purpose of it (including reasons why the communication took place so soon after the previous telephone conversation)?
 - b. What, if any, further information or issues did Seamus Hughes bring to your attention during this conversation? (If new information was provided please also indicate, to your knowledge or belief, the reason why he had not informed you of such information or issues previously).
 - c. At any point during this conversation did Seamus Hughes raise any of the issues described in Question 3.c. above and, if so, please explain the reason, and context in which, they were raised and your response(s).
 - d. In respect of this telephone conversation, please provide a detailed description of the legal advice given by you to Seamus Hughes.
 - e. In respect of this telephone conversation, please indicate whether you made any notes or minutes, or took a 'telephone attendance note' or similar; and, if not, the reasons for not doing so.

5. Do you take issue with any of the comments within Seamus Hughes' emails to Stuart Wightman regarding the advice you purportedly provided during either of the telephone conversations? If so, please set out your reasons.
6. As to the suggestion that you did not "*favour the suspension route*" (DFE-349922), please provide a description (insofar as you can and seeking to avoid the use of hindsight) as to (i) what you understood the 'suspension route' to be and (ii) why you did not favour it. In the course of your response, please outline whether your advice was to the effect that the 'suspension route' should not be pursued at all or to the effect that, if it was pursued, this should only be after consultation (or to some other effect).
7. Following your conversations with Seamus Hughes on 17 June 2015, but prior to you issuing your written advice on 25 June 2015, were you in contact with any DETI official during which any of the issues described in Question 3.c. above were raised and/or further advice or information was provided or discussed in relation to the RHI Scheme? If so, please provide details (including with whom you were in contact, when, who initiated the contact, and what the purpose and content of it was). Please also address, again, the question of whether any relevant notes or records were made.
8. At any time after you issued your written advice on 25 June 2015 did any person request or otherwise seek your advice in relation to any of the issues described in Question 3.c. above? If so, please provide the like details as are requested above. (For the purpose of this question, please ignore advice given in relation to the ultimate closure/suspension of the Scheme in what the Inquiry refers to as Phase 4 of its work. The enquiry is focused on advice given in summer 2015.)
9. At any point in time between the period May 2015 to November 2015 did you give, or to your knowledge or belief did any of your staff give, advice in relation to any of the issues described in Question 3.c. which is not already comprehensively addressed in your responses to the above enquiries? If so, please provide full details.

10. At any point in time during the period May 2015 to November 2015 did you amend or alter any advice given by either you or a member of your staff in relation to the RHI Scheme? If so, please provide full details.

11. In your dealings with Departmental officials in relation to the RHI Scheme:
 - a. Did you consider that there was any particular approach or solution favoured by them or to which they were pre-disposed? If so, please provide details insofar as you can as to what this approach was and why it appeared to be favoured.

 - b. Did you consider yourself to be under any pressure or influence to give advice as to any particular outcome, to any particular effect or of any particular gravity? Again, if so, please provide details.

General

12. Please set out any further significant evidence you have or of which you are aware, having regard to the Inquiry's Terms of Reference, which has not been addressed either adequately or at all in your previous written or oral evidence.

NOTE:

It is important for the efficiency of the RHI Inquiry that the issues identified above are addressed as fully as possible and by reference, where available, to the dates and locations of specific incidents to which reference is made. The statement should be broken down into paragraphs, which should be numbered sequentially from '1' to the end. The use of appropriate section headings or sub-headings is also encouraged. A template witness statement is provided with this Notice for your assistance and should be used as the format for your response.

INQUIRY INTO THE RENEWABLE HEAT INCENTIVE SCHEME**RHI REF: Notice 239 of 2018****DATE: 17 December 2018**

Witness Statement of: Paul McGinn

I, Paul McGinn, will say as follows: -

Legal Advice provided in June 2015

From information received by the Inquiry it appears that Seamus Hughes of DETI wrote to you on 12 June 2015 requesting legal advice in relation to the possible amendment of the RHI Scheme (see **DSO-05022**). The document at **DSO-05060** to **DSO-05063** appears to be your written advices in response to this request, dated 25 June 2015. From evidence received by the Inquiry however, it would appear that Seamus Hughes spoke to you twice by telephone on 17 June 2015, during which you gave him verbal legal advice in relation to the amendment of the RHI Scheme (see document **DFE-349922/3**). As to these circumstances and insofar as you can now recall:

1. Please describe whether, prior to his letter dated 12 June 2015, Seamus Hughes communicated with you (or, to your knowledge or belief, any member of your staff) either orally or in writing, during which he referred to the possible amendment of the RHI Scheme. If so, please provide details (including when, how and with whom he communicated; what possible amendments he referred to; and what advice was given).

Sometime in May 2015, I was invited to a meeting in Adelaide House at which members of the Energy Division of the Department for Enterprise, Trade and Investment (DETI) now Department for the Economy (DFE) (referred to



hereafter as “the Department”) were present. As far as I can recall senior members of the Finance Division of the Department were also present. To the best of my recollection Energy Division attendees included John Mills, Stuart Wightman and Seamus Hughes, and Finance Division attendees included Eugene Rooney and Trevor Cooper. Unfortunately my recollection of the identities of those present is not as clear as I would have liked and I have not been able to trace any documentation relating to the meeting. So, I cannot be certain either of the date or of the attendees. The purpose of the meeting was to discuss the fact that the RHI budget had been exceeded; there was no discussion as to the classification of the RHI Scheme funding (i.e. DEL or AME) nor was there any discussion of a risk sharing arrangement. At the meeting I was asked about the possibility of suspending the RHI Scheme administratively (i.e. other than through legislative amendments). I did indicate a general scepticism about that possibility simply as a matter of principle but asked that the Department write formally to me to put the question so that I could consider it properly and respond in writing. At that stage I had not had a chance to look at the RHI Scheme in detail but it was a statutory Scheme where the requirements are mandatory. And even if the RHI Scheme had been discretionary in nature, just on general principles of administrative law, it would have been beyond the powers of the Department to simply administratively close it by deciding as a matter of policy to refuse to grant accreditations. I recall that I also referred to the fact that if amendments to the legislation were pursued this would require a number of months, given the fact that the legislation was subject to the draft affirmative resolution procedure before the Assembly. This, I believe, was the genesis of the letter of 12 June. As far as I can recall legislative amendments to the Scheme were not proposed at that meeting to deal with the budgetary issues. I also recall reference to very high use by some operators of small and medium biomass boilers to generate heat and that, accordingly, payment to the owners of those boilers was significantly greater than anticipated. But I cannot recall any other specific points or actions being raised.

2. Following the letter of 12 June 2015, but prior to the telephone conversations on 17 June 2015, did you and Seamus Hughes communicate in any way in



relation to the RHI Scheme (for instance, for the purpose of seeking further information or clarification in relation to the request within his letter of 12 June 2015)? If so, please provide details (including when and how these communications took place, what further information or clarification was sought or imparted; and the reasons for same).

To the best of my recollection I had no substantive dealings with Seamus Hughes in relation to the RHI Scheme in question between the 12th and 17th of June. It is possible that he emailed me or tried to speak to me by telephone to expedite a reply to the request for advice. But I do not recall actually speaking to him. I expand on this below.

3. In relation to your first telephone conversation with Seamus Hughes on 17 June 2015, please address the following matters:
 - a. Who initiated the communication and for what purpose?

I cannot recall with any certainty who initiated the first telephone conversation with Seamus Hughes and it is possible that I did so because I realised that, although I had by then had a chance to consider the Renewable Heat Incentive Scheme (Regulations) Northern Ireland 2012 (the subordinate legislation) and satisfied myself about its mandatory nature, because of pressures of other work, it might be a few more days before I could respond in writing. I understand, however, that on the 17th of June there was a meeting in the Department attended by among others Dr Andrew McCormick, Eugene Rooney, Trevor Cooper, John Mills and Shane Murphy. The most likely sequence of events, therefore, was that because of that meeting Seamus Hughes initiated the contact with me in order to obtain at least verbal advice about the power of the Department to suspend the Scheme administratively. As I explain later I had not by the 17th of June had a chance to consider in detail the relevant powers in the Energy Act 2011 (“the parent legislation”).

- b. Set out, as far as you can recall, what was discussed and what advice was given on this call.



I shared with him my basic analysis of the subordinate legislation, namely that if certain criteria were satisfied there was a duty to accredit an installation and if an installation is accredited then there is a duty to make periodical payments. There were exceptions and qualifications but none of these seemed to me to allow the sort of administrative suspension the Department seemed to have in mind. Nothing else was discussed.

- c. Without prejudice to the generality of the foregoing enquiry, at any point during the conversation did Seamus Hughes raise any of the following issues? If so, please explain the reason, and context in which, they were raised and your response(s). The issues are:
- i. The Scheme's budget, any limitations on it and the ability, or potential ability, to exceed the scheme budget, including the reason(s) why the RHI Scheme was exceeding, or likely to exceed, its budget;
 - ii. Possible solutions or proposals for preventing or mitigating the Scheme exceeding its budget, including what the purpose was of introducing the tiered tariff for medium sized biomass boilers and what other possible amendments could be made to the Scheme and the reasons for any such amendment (or, as the case may be, the reasons against pursuing any such amendment);
 - iii. What inherent, systemic or design problems existed within the RHI Scheme;
 - iv. The issue of returns under the Scheme, including whether the issue of State Aid was raised together with the context and reasons for it being raised; whether the question of over-compensating recipients or providing a rate of return greater than intended by Energy Division was discussed; and whether it



was considered that the existing Scheme did, or had the potential to, create a 'perverse incentive' to generate heat;

- v. The possibility of immediate suspension of the Scheme and, if this was discussed, the context in which such a course of action was proposed and the reasons why such a course of action was rejected.
- vi. The potential for, or evidence of, fraud or exploitation of the scheme by scheme recipients.

i. The general background to the query was, of course, that there was a budgetary shortfall and the advice was intended to assist the Department in understanding the scope of its legal powers to deal with that. I was also aware from my attendance at the May 2015 meeting that, in the view of the Department, higher than expected use of small and medium boilers was resulting in greater payments being made than anticipated, in at least some cases, and that these cases were not de minimis and were significantly contributing to budgetary overruns. But the terms of the letter of 12th June also suggested that there had been more applicants than anticipated and that this was also a major cause of the overruns - hence the desirability of obtaining additional funding. From this it appeared that the Scheme itself was achieving its aim in promoting use of sustainable energy and was considered by the Department worth maintaining in principle. But this is a reflection of my understanding of the position at the time and none of these issues were discussed during the telephone conversation, as far as I can recall.

There was certainly no discussion of the size of the budget itself, its source or how or from whom additional funding could be achieved. Indeed such matters were not so much a question of the legal power of the Department but rather of financial management and control which I would not have regarded as matters for me.

ii. The only policy proposal that I was aware of, at that point, was the administrative suspension of the Scheme as set out in the letter of 12th June. I only became aware of the proposal to introduce the tiering for small and medium biomass boilers when I received instructions from the Department in connection with this proposal on 9th July (DSO 01323). Instructions relating to capping were not received until 21st August (DSO 01340 to DSO 01346). Those instructions at the time appeared to me to confirm that the Department had decided not to proceed with any proposal to suspend the Scheme although there had been no discussion between myself and the Department on this since my written advice of 25th June.

iii. In a sense the discussion (arguably at least) was about an inherent, systemic or design problem with the RHI Scheme because the structure I was outlining left the Department with little if any legal power of control over expenditure. It was a demand led Scheme. But aside from this there was no discussion of such problems or indeed any solutions other than administrative suspension. The legal difficulties with legislative suspension were not raised in this conversation and I will deal with this matter in response to question 4 below.

iv. No issue of State Aid or the rate of return allowed thereunder was discussed. I was, at that stage, completely unaware of State Aid issues in connection with the RHI Scheme. The Department had separate sources of advice on State Aid matters both within it and within DSO.

As far as the perverse incentive to generate heat, again this was not a matter discussed in this telephone conversation which was focussed on the powers of the Department to suspend the Scheme administratively. As I have already indicated, I was aware, in general terms, of a concern that some operators were receiving higher payments than anticipated but this was not a matter that was mentioned in the telephone call.



v. As for the immediate suspension of the Scheme, the timescale was not discussed in this conversation, although my original instructions indicated that the Department was considering introducing a suspension quickly. On this occasion I expressed the view that it could not be done administratively at all and that was really the end of the matter for the purposes of this discussion. But see my comments on the second telephone conversation with Seamus Hughes below.

vi. The potential for, or evidence of, fraud or exploitation of the Scheme was again not a matter discussed on this occasion. As noted earlier, at the meeting in May, I had heard expressed concerns about higher than anticipated use of small and medium biomass boilers and this was a factor in budgetary overruns but no advice was sought from me at this point about whether this amounted to fraud or over-use within the terms of the Scheme.

- d. In respect of this telephone conversation, please indicate whether you made any notes or minutes, or took a 'telephone attendance note' or similar; and, if not, the reasons for not doing so.

I did not make any written record of this telephone conversation as I intended to cover the points discussed in full written advice, which was intended to be the full written record.

4. In relation to your second telephone conversation with Seamus Hughes on 17 June 2015, please address the following matters:
 - a. Who initiated the communication and what was the purpose of it (including reasons why the communication took place so soon after the previous telephone conversation)?

During the first telephone conversation, discussion related to the question of whether the RHI Scheme might be suspended administratively and, as set out above, my advice was that it could not. Seamus Hughes (after having



communicated my views to Stuart Wightman) initiated the second telephone discussion, as a follow up, in order to seek my view on whether the Scheme could be suspended legislatively. This was not a matter discussed in the earlier conversation.

- b. What, if any, further information or issues did Seamus Hughes bring to your attention during this conversation? (If new information was provided please also indicate, to your knowledge or belief, the reason why he had not informed you of such information or issues previously).

As stated above the new issue raised was the question of whether the subordinate legislation could be amended to suspend the operation of the Scheme. I had not been asked for advice on this before because the Department had been exploring the possibility of administrative suspension and now was looking for alternatives. No new information about the Scheme or its operation was brought to my attention.

- c. At any point during this conversation did Seamus Hughes raise any of the issues described in Question 3.c. above and, if so, please explain the reason, and context in which, they were raised and your response(s).

My general understanding of the background to the Department's query remained as set out above in terms of the budgetary shortfall, the structures of the Scheme and the operational problems the Department had identified including the suggestion that there had been higher than anticipated use. But again these issues were not discussed in the telephone conversation as such. This focussed on the issue of the powers in the primary legislation to amend the RHI Scheme and potential legal difficulties in exercising those powers.

- d. In respect of this telephone conversation, please provide a detailed description of the legal advice given by you to Seamus Hughes.



The advice that I gave Seamus Hughes was essentially the same as that set out in my subsequent written advice of 25th June. I did caution him that I had not, at that point, had an opportunity to review the parent legislation but I said that, as a matter of general principle where an Act confers power to do something in subordinate legislation it also enabled that power to be exercised from time to time as circumstances required and different provision to be made. Again in principle this would include the power to stop what the subordinate legislation allowed. The first question was whether there was anything express in language of the primary legislation to indicate a different intention on the part of Parliament. A more difficult issue for the Department was whether the powers granted could be exercised lawfully for the purpose intended or whether the Department's ability to amend the legislation would be constrained in particular by the legitimate expectations of those who were entitled to benefit from the Scheme. Essentially, I said, the matter was likely to come down to a consideration of fairness; balancing the interests of those adversely affected by the suspension against the public interest in suspension. If the suspension was short lived those adverse consequences were likely to be minimal but if the budgetary difficulties could not be resolved and the suspension was indefinite there could be considerable risk. A person may have invested considerable sums in the expectation of a guaranteed return and may have undertaken significant debt for the purpose. However I did add that everything would depend on the circumstances of those aggrieved and a Court's appreciation of what was, and was not, fair was notoriously difficult to predict. But on the whole I felt a better approach than suspension was to amend the subordinate legislation to provide the Department with the discretion as to whether or not to accredit rather than make it a duty (see DFE 349922). This would possibly allow the Department to exercise a greater degree of control than it presently had over accreditation and payments and would allow it to take into account the circumstances of individual applicants and decide whether or not to accredit accordingly. I suggested that any amending legislation might set out criteria to assist the Department in exercising this discretion and would assist in defending individual exercises of that discretion. This possibility was, however, discussed in only very general terms and not in any detail.



- e. In respect of this telephone conversation, please indicate whether you made any notes or minutes, or took a 'telephone attendance note' or similar; and, if not, the reasons for not doing so.

As in the case of the first conversation with Seamus Hughes I did not make any written record of this telephone conversation as I intended to cover the points discussed in full written advice, which was intended to be the full written record. I note, however, that my written advice dated 25 June (DSO-05060) did not record my suggestion that the subordinate legislation could be amended to confer some discretion of the Department as to whether or not to grant accreditation. I can only conclude that I overlooked this issue when it came to drafting the advice and the Department did not revert to me to seek further advice on this possibility.

5. Do you take issue with any of the comments within Seamus Hughes' emails to Stuart Wightman regarding the advice you purportedly provided during either of the telephone conversations? If so, please set out your reasons.

Within the limitations of brief emails which did not intend to be a comprehensive report of the conversations in question I consider the reports of the conversation in the emails from Seamus Hughes to Stuart Wightman to be fair and accurate.

6. As to the suggestion that you did not "*favour the suspension route*" (DFE-349922), please provide a description (insofar as you can and seeking to avoid the use of hindsight) as to (i) what you understood the 'suspension route' to be and (ii) why you did not favour it. In the course of your response, please outline whether your advice was to the effect that the 'suspension route' should not be pursued at all or to the effect that, if it was pursued, this should only be after consultation (or to some other effect).

My understanding of the legislative suspension route was that the RHI Scheme would be effectively closed indefinitely so that after a particular date no further

accreditations would be granted until the suspension was lifted. As a result no-one would, after that date, qualify for new periodical payments under the Scheme and they would assume the full commercial risk of any investment made until the Scheme was re-opened. With the limited instructions that I had, the reason I did not favour this approach was my view that, if the suspension were of significant duration, there was a considerable risk of a successful legal challenge to any amending legislation which would effect such a suspension, particularly on the grounds of breach of legitimate expectation. This risk was particularly acute in the case of individuals who may have invested significant sums in purchasing plant and perhaps borrowed money for the purpose. I cover this in more detail above. It must be understood, however, that I was not advising that the approach should not be followed at all. First of all any decision about changes to the subordinate legislation to address the budgetary issue arising were matters of policy for the Department acting under the direction and control of Ministers. The role of the legal adviser is to ensure that, on receipt of all relevant information from instructing officials, policy officials and Ministers were fully aware of all relevant legal issues so as to take the necessary decisions, including in particular advice on whether there was the power to do something and, if so, what if any were the potential grounds of legal challenge. The law is of course inherently uncertain. Only a Court can authoritatively determine the law. So any view about these matters is simply an opinion and can really only be expressed in terms of risk. It is for the Department to balance the legal advice about the extent and degree of such risks against other considerations in deciding whether or not to proceed.

But secondly, in this particular case, as I told Seamus Hughes in my verbal advice and as I explicitly repeated in my written advice, the underlying issue the Department faced was one of fairness and a proper assessment of the risks depended heavily upon factual circumstances of which my knowledge was limited. In this context I can do no better than to repeat what I said in my written advice, namely that a great deal would depend upon the degree of prejudice suffered by aggrieved parties and:-



"Without knowing more it is impossible to say more than that there is likely to be a significant risk that a change in policy would breach the substantive legitimate expectations of those who had actually invested in installations in expectation of receiving payments."

In addition my letter also made it clear that a great deal would also depend upon how strongly the Department could articulate the public interest case for suspension so as to strike an appropriate balance between the competing interests. Again, as set out in this statement, my knowledge of the strength of this public interest was limited. The advice I was giving was intended to be general in the sense of identifying the principles that a Court would apply if the matter was tested but could not go any further because at that stage there was a limit to how specific this advice could be.

That is why I used the formula "did not favour", which is more or less a direct quote. It was intended to convey my view that there were very serious legal risks with the suspension route and there were perhaps other alternatives that should be considered in preference to this route, to see if they would deliver a suitable response to the budgetary issues, while at the same time mitigating these risks, rather than saying that the risks posed by the suspension route was too high to be acceptable. But I intended the phrase should convey the sense that I was not ruling this approach out. The Inquiry will note that at the end of my written advice I recognised that the suspension route remained a possible option.

This brings me to a further point. In the context of the possibility of introducing a suspension by legislative amendment, I dealt in my advice with the procedural requirements for consultation well as potential substantive rights. This requirement for consultation could not be seen simply as a delay to the suspension. Consultation required the Department to listen with an open mind to representation made by interested parties and be prepared to change its mind in response. So, the Department could not lawfully predetermine its course of action before consultation; any consultation had to be meaningful.



7. Following your conversations with Seamus Hughes on 17 June 2015, but prior to you issuing your written advice on 25 June 2015, were you in contact with any DETI official during which any of the issues described in Question 3.c. above were raised and/or further advice or information was provided or discussed in relation to the RHI Scheme? If so, please provide details (including with whom you were in contact, when, who initiated the contact, and what the purpose and content of it was). Please also address, again, the question of whether any relevant notes or records were made.

I was not in contact with any official of the Department in the period mentioned about the issues described in Question 3.c. above.

8. At any time after you issued your written advice on 25 June 2015 did any person request or otherwise seek your advice in relation to any of the issues described in Question 3.c. above? If so, please provide the like details as are requested above. (For the purpose of this question, please ignore advice given in relation to the ultimate closure/suspension of the Scheme in what the Inquiry refers to as Phase 4 of its work. The enquiry is focused on advice given in summer 2015.)

I was not in contact with any DETI official after 25 June about the issues described in Question 3.c. above, except to the extent that the following matters were relevant.

On 9th July I was asked by the Department to scrutinise an amendment to the subordinate legislation which, among other things, introduced tiering. As already mentioned (in response to question 3.c.ii above) this was the first time I had seen this policy. It was expressed to be for the purpose of *“manag[ing] budgets and improving affordability”* but (with the exception set out below) I was asked for no specific advice on it. The same applied in relation to the Department’s instructions on the introduction of capping on 21st August. My



comments on both were mainly of a technical drafting nature (DSO 01324 to DSO 01330 and DSO 01384 to DSO 01387 and DSO 01408 to DSO 01416).

The exception was when on 30th September 2015, (DSO 01394 to DSO 01402 and DSO 01406), the Department asked about applying the cap on payments retrospectively. I responded on 16th October 2015 (DSO 01408 to DSO 01416) to the effect that such a proposal would need to be consulted upon and there may be difficulty in terms of whether the Department could impose such a retrospective cap but a good deal would turn upon individual circumstances relating to the economics of the investment.

On 24 August the issue of suspension re-emerged in a new and somewhat different context. In an email from the Department (DSO 01359) the issue became not so much one of budget being exceeded but rather one of regularity of expenditure. In order for expenditure to be regularly incurred, it needed DFP approval and now, for the first time, I was informed that this approval had lapsed and needed renewal. The Department asked therefore whether “payments for new applicants beyond 30 September 2016” under the Scheme could be “subject to DFP approval”. I responded by letter, dated 10 September, (DSO 01384 to DSO 01387), saying that I did not think such a proposal would be lawful for the reasons set out there (DSO 01387).

This in turn led to a further request for advice from the Department, dated 30 September, (DSO 01394 to DSO 01402). This related essentially to approvals after the end of September 2016 when the prospective DFP approval, now being sought, would end. The Department was anxious for some mechanism to suspend such approvals if DFP approval for the period after 30th September was not obtained. I responded on 16th October 2015 (DSO 01408) providing a preliminary draft of a power which might be included in the Regulations allowing a halt to new accreditations after 30th September 2016 (see in particular, DSO 01409).

The forgoing represents the extent to which I was asked for and gave advice in relation to the matters mentioned in Question 3.c. above and in particular in



relation to the budget for the RHI Scheme and options to prevent it being exceeded.

9. At any point in time between the period May 2015 to November 2015 did you give, or to your knowledge or belief did any of your staff give, advice in relation to any of the issues described in Question 3.c. which is not already comprehensively addressed in your responses to the above enquiries? If so, please provide full details.

Except as set out above, I was not in contact with any DETI official between the period May 2015 to November 2015 about the issues described in Question 3.c. above.

10. At any point in time during the period May 2015 to November 2015 did you amend or alter any advice given by either you or a member of your staff in relation to the RHI Scheme? If so, please provide full details.

On no occasion did I amend or alter any advice in relation to the RHI Scheme and on no occasion was I asked to.

11. In your dealings with Departmental officials in relation to the RHI Scheme:
- a. Did you consider that there was any particular approach or solution favoured by them or to which they were pre-disposed? If so, please provide details insofar as you can as to what this approach was and why it appeared to be favoured.

When I was asked to give advice in relation to the suspension route my impression (and it was no more than that) was that it was a genuine option under consideration. It was, of course, not then pursued. Whether that was as a result of the legal difficulties I identified, or for other reasons, I do not know. The next proposed change to the RHI Scheme, that I was instructed in



relation to, was set out in the 2015 Amendment Regulations which, among other things, introduced capping and tiering. But this and the other changes to the rules of the Scheme suggested to me that the Department still considered the Scheme a viable and indeed worthwhile initiative and intended, at that stage, to continue with it subject to improvements to correct any difficulties. This was consistent with the suggestion from the Department that any suspension was only intended to be temporary. I am simply not in a position to comment beyond this.

- b. Did you consider yourself to be under any pressure or influence to give advice as to any particular outcome, to any particular effect or of any particular gravity? Again, if so, please provide details.

Both as legal advisor and as a Civil Servant it was my duty to assist the Department to achieve its policy objectives and my advice was intended to provide that assistance, hence my discussion of an alternative to the suspension route. And the Department, by the summer of 2015, clearly regarded a solution to the problems posed by the RHI Scheme was a very high priority. But in giving my advice I always tried to be accurate and objective and at all times my analysis of the legal issues, and the advice that I gave as a result, were my work alone and I was under no pressure to, for example, shape my advice to meet pre-determined Departmental planning or intentions.

General

12. Please set out any further significant evidence you have or of which you are aware, having regard to the Inquiry's Terms of Reference, which has not been addressed either adequately or at all in your previous written or oral evidence.

There is no further such evidence that I am aware of which is not referred to in the written documentation provided by DSO to the Inquiry.



Statement of Truth

I believe that the facts stated in this 17 page witness statement to be true.

Signed: Paul McGinn

Dated: 17/12/18