EXECUTIVE SUMMARY

- The legal basis for the 2019 Legislation is questionable;
- The detrimental impact upon counter-climate change was immediate\(^1\);
- The lawfulness of the Department’s action in bringing forward the 2017 Regulations is a matter before the Court of Appeal. 2019 legislation will be Judicially Reviewed in October;
- The DfE Consultation process was fatally flawed and will be subject to challenge;
- The decisions made post consultation are unreasonable and there appear to be manifest errors in assessing the consultation responses and other data;
- “Irrespective” as an operative word in the 2019 legislation created retrospective application of the allocated 1,314 hrs. There is a presumption in British Law against retrospective legislation. This clause created a “cash-flow shock.”
- Competitive disadvantage compared with producers of all kinds operating in GB, was immediate. >80% of poultry meat consumed in GB is produced in GB. GB based producers enjoy a commercial advantage of ~£18,000 per shed over their NI-based counter-parts. Agri-foods was a vibrant part of the NI economy. Moy Park injected >£200m/pa into the economy. In May, 2019, Moy Park reduced production by 18%.
- The Irish Renewable Heat Scheme launched on 4 Jun 19. Comparative disadvantage to producers (of all types) in Ireland, now exists.
- Property rights attach to renewable energy rebate tariffs in renewable energy schemes. Bill Sneyd has given testimony on his experiences as CEO of Home Sun\(^2\) and was the lead litigant in the Breyer Group v DECC case in protecting his firm’s rights\(^3\) - most especially, Article 1, Protocol 1 of the Human Rights Act.
- Lord Mackay commented upon participants’ rights. The Parliamentary Joint Committee on compliance with Human Rights legislation should now engage.
- 12% (of what value/s) is an appropriate rate-of-return?
- NI tariffs should be based upon a compliant GB Scheme. To avert collapse – Scheme ownership must pass – emergency legislation is required ASAP if this environmental and economic disaster is to be averted. The Barnett consequential would not come into play if NI participants were absorbed into a GB RHI Scheme.

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1. An additional 1,915,200,000 litres of LPG will now be burned.
WRITTEN EVIDENCE TO THE SELECT COMMITTEE

DETAIL

Introduction. The Committee has been exposed to a great deal of (often conflicting) information – much of it out-with the Terms of Reference. This submission serves to address matters that have emerged during the period of the Inquiry – most especially the indicators and warnings of a wholesale reversion to the use of fossil fuels. Specific responses to the terms of reference are provided – along with supporting evidence.

The RHI (NI) programme was one of several initiatives designed to counter climate change.

If it transpires that the Department's management of the Scheme was both an administrative canard and that changes forced through have resulted in wholesale reversion to fossil fuel use, the programme will have failed.

Those senior officials responsible for the most recent events are identifiable: they should be held to account.

QUESTIONABLE LEGAL PROCESS

We say that the legal process leading to the 2019 Act is questionable. The Association has been granted leave for Judicial Review of the legislation. That Review was scheduled for 17 & 21 June 2019. Counsel for the Secretary of State and the Department advised the Court that the Respondent should be in a position to serve the replying affidavit on 19 Jun 19. Counsel further advised the Court that Departmental staff have been busy and have attended before the Select Committee. The dog ate our homework.

The Judicial Review is now scheduled for 1-3 October. For affected businesses, this (unnecessary) postponement adds uncertainty to the immediate impact of "cash-flow shock" arising from the use of the operative word "regardless" in the legislation – a clause which created a retrospective start-date for the allocated 1,314 hours based not on the operational date of the legislation but, on some other arbitrary (administratively convenient) factor.

The presumption in British Law against retrospective law, has been offended. See paragraph 13 of our submission dated 28 April 2019.

Compensation is a matter for the Courts: legal advice received by the Committee is that the hardship proposal is not viable. A permanent, 15-year solution is required.

COUNTER CLIMATE CHANGE

Equipment. The purpose of this ambitious renewable energy scheme was to contribute to climate change alleviation. The rebate tariff is insufficient to sustain the use of the technology. The Committee has received evidence from Alan Hegan and others regarding the reintroduction of Liquid Petroleum Gas (an environmentally damaging fossil fuel) as the fuel for the heating system of choice – "Winter Warm" blown air direct heat systems. The unit cost of these vented and flued systems is ~£5,000. As a direct to air system, they are several orders of magnitude less complex than biomass-fuelled hot-water systems. The gas supplier provides the storage tank and connection at no cost. Rather than assume that the capital cost of an oil boiler at £10,000 is discounted from gross cost (or, is added in Ireland), the actual counterfactual replacement cost is £5,000. The core proposition is that if the assumed alternative (counterfactual) is incorrect or impractical, then, the whole financial
calculation is polluted and worthless. It is this issue that explains the wide disparity between the DfE calculation and those of the competent authorities in GB and Ireland.

Reversion. Evidence from Moy Park was that LPG fuelled many back-up systems. Many of these were naked-flame. The flued, vented, direct-heat systems do not create in-house humidity problems. Moy Park assess that about 600 of their 800 producers will, within weeks if the situation is not arrested, revert to using LPG.

Pollution. In recent days, an innovative coal importer has sent communication to registered biomass users. Coal fines, pulverised coal and small diameter pellets are available at $110/tonne, ex Belfast Docks. Coal is not a permitted fuel in RHI but, Scheme participants can declare use of a prohibited fuel and forego payment of rebate. Pulverised coal is 60% cheaper than biomass and has a greater calorific value. Cost of production (assuming 86% efficiency) when using coal drops to £0.02 per kWh/t.

Pulverised or particulate coal is 1000 times more polluting than biomass.

“We have been in conversations this week with one of our coal importer customers, I have had to explain that our rising prices for next season are due to rising production costs. They have expressed an interest in using us a case study for the installation of a coal fired (multi-fuel) boiler system which would utilise screenings from their coal imports and processing. Initial figures look very promising – apparently these boilers are very popular throughout Europe, boilers are reliable, cost effective and can quite easily be integrated with our existing systems. This is not the way that we want to proceed, but the cost of heat is substantially lower than our current biomass systems.”

1,915,200,000 litres LPG - Unnecessary Consumption. Reversion to fossil fuel is likely to result in the consumption of 1,915,200,000 litres of Liquid Petroleum Gas. This staggering volume is the product of 2,128 boilers, each generating 350,000Kwh/t per annum using 60,000 litres of LPG for the balance of the 20 years of the Scheme. Some might state that this size of fleet is implausible, and that attrition would have occurred. DfE advanced the proposition that no attrition of the 2,128-boiler fleet will occur over the balance of the 20-year period, when they calculated the “worst case” overspend.

IRREGULAR PROCESS

Legislation. It is established principle that property rights are afforded to participants in renewable energy schemes. Bill Sneyd’s evidence is clear in this matter. Government interventions risk collapsing capital critical schemes. Further, paragraphs 13 & 14 of our submission dated 28 April 2019 have hyperlinks to case law in this matter. Click here to refresh understanding of the circumstances.

Human Rights Act. Article 1, Protocol 1 of the Act is described in outline in the article accessed by clicking here. This issue should be carefully reviewed.

RIGHTS UNAFFECTED - HOUSE OF LORDS DEBATE 19 MAR 19

Lord Mackay of Clashfern (Con)

Share

“My Lords, this is undoubtedly an extremely complicated situation, but I think the principle is that when a member of the public makes an investment in a government scheme, that member of the public is entitled to trust the terms on which the scheme was launched. Therefore, there can be no doubt that those who invested in the
scheme, relying on the Government’s statement of what was involved, are entitled to be protected by the 
Government from any failure on their part to meet the terms on which the scheme was set up. That rule applies to 
the United Kingdom Government, but also to the Governments of the devolved Administrations. That is the basic 
principle which cannot be set aside by any legislation that we may pass here, although the ultimate terms of the 
performance obligation are a matter that we cannot determine here, for various reasons that have been given. 
The principle seems to me absolutely clear and sound.”

**Rights Unaffected.** Further, at the end of the debate, the following question was asked and answered. It is interpreted as relating to rights under the Human Rights Act, specifically 
Article 1, Protocol 1 (see above):

*Lord Mackay of Clashfern*

“I should like to be absolutely certain that there is nothing in the Bill that damages any legal right that 
people had in Northern Ireland as a result of dependence on the action of the Northern Irish 
Government taken on behalf of that Government by authorised officials or Ministers. Because that is 
the fundamental matter: if that is not affected by the Bill, the way in which matters should be brought 
forward to encourage that is perfectly reasonable as a way forward. The fundamental point is that the 
legal rights of those who may have been damaged by their contract with the Northern Irish 
Government, through Minister or official, would not be touched.”

*Lord Duncan of Springbank*

“My noble and learned friend makes a useful point. I can happily confirm that this will not affect the 
legal rights or standing of any of those who have been affected by the scheme thus far.”

**DfE CONSULTATION EXERCISE**

**Flawed Consultation – Leading to Compromised Legislation.** We say that the 
Department’s consultation process and the subsequent selection of a course of action by the 
Permanent Secretary was fatally flawed in the following ways and that it was:

a. Procedurally defective,

b. Demonstrated a clear deficiency of reasoning,

c. Contained factual inaccuracy,

d. That there was a series of manifest errors in assessing the facts,

e. That these, and the rapid process of legislative drafting amount to a misuse of 
power.

**Flaws.** As an example, of the 8 + 1 options advanced in the DfE Consultation Document, at 
outset, DfE stated that only options 1, 4 & 6 were, by their calculation, compliant with EU 
State Aid rules. At Paragraph 6.10:
“If the Department is unable to put in place a replacement tariff structure from 1 April 2019, there would be no legislative payment mechanism for small and medium biomass boilers that were accredited before 18 November 2015. Without statutory powers to continue operating the Scheme, payments to over 1,700 installations in this group would cease.”

Understanding. It is our understanding that it was both possible and practical for SofS NI to present in legislation, an RPI adjusted tariff effective 1 April 2019. We said so in our consultation response. We also provided to the Department, detailed expert witness evidence challenging their assertions, and accountancy processes as Expert Economic Assessment and Expert Forensic Accountancy analysis of rate of return available to three broad case study businesses.

DfE Conclusions. We say that the Department demonstrated a clear deficiency of reasoning compounded by a series of manifest errors in assessing the facts, in that the Consultation resulted in:

- Selection of an Option not proposed during the Consultation process;

- Arbitrarily reduced inflationary index linking from RPI to CPI – with “rounding” set a one decimal point, unless CPI rises to above 10%, any review of the £0.017 and £0.012 tariffs will never result in increase;

- Extinguished the possibility that neither of the two Combined Heat & Power plants would ever be built (see estimate of RHI cost over run in Optimal Report). By being silent on the matter, the 2019 legislation extinguished all support to Combined Heat & Power initiatives. In GB, these enjoy support. One of these plants was linked to the expansion of indigenous wood pellet production: that market has now collapsed,

GROUND FOR STATING THAT CONSULTATION WAS FATALLY FLAWED

- Timeliness. The Consultation process was initiated and authorised by the (then) Permanent Secretary, DfE. The Buick challenge determined that decisions normally reserved to Ministers could not be taken by Civil Servants.

- Deficiency. Proper process required that DfE should act transparently, and should have provided sufficient reasons to allow intelligent consideration & intelligent response. By rendering critical aspects opaque, DfE fatally compromised its position.

- Conscientious Consideration. That the responses rendered warranted appropriate and conscientious consideration. In drawing the conclusions stated, DfE demonstrated a clear deficiency in this respect.

- Unreasonable. That in their actions, the Department has acted unreasonably. So unreasonable that no authority could reasonably have come to it.

- Omission & Material Mis-statement. The Department is guilty of omission and mis-statement, when stating that there was no “claw-back” the impact of “averaging” payment had this exact effect. The DfE witness who spoke to the issue of correct accounting formula for RoR, IRR, mIRR and AIRR may have
misspoken. Analysis of some of the dissimilar formulas can be accessed by clicking here. It is our contention that they are NOT the same. He stated otherwise.

**Retrospective Legislation.** “Irrespective” as an operative word in the 2019 legislation created retrospective application of the allocated 1,314 hrs. There is a presumption in British Law against retrospective legislation. This clause created a “cash-flow shock.” Scheme participants with medium to high energy use and an accreditation date between June and October face the prospect that the “allocation” of 1,314 hours for Financial year 2019/20 will have been expended BEFORE the 2019 legislation came into effect. These parties will receive the first payment after completion of Qtr 3/FY 2019/20, six weeks after submitting their meter reading. Payment will therefore be made in Feb 20. No other payment will be made. There is a presumption in British law against retrospective legislation.

**Disadvantage 1.** Competitive disadvantage vice producers of all kinds operating in GB, was immediate. >80% of poultry meat consumed in GB is produced in GB. GB based producers enjoy a commercial advantage of ~£18,000 per shed over their NI-based counter-parts. Agri-foods was a vibrant part of the NI economy. Previously, Moy Park injected >£200m/pa into the economy. In May 2019, Moy Park reduced production by 18%. This reduction in production will not only reduce the £200m injection but, will reduce the turn-over of each independent poultry producer. This will, in turn, reduce the heat requirement across this sector by 18%. DfE expenditure on RHI may be assumed to shrink by at least this percentage.

**Disadvantage 2.** From 4 Jun 19, the Irish Renewable Heat Scheme was launched. This created an immediate comparative disadvantage for sectors where production is distributed across the island. The immediate competitors for the mushroom consortium in S Tyrone is the mushroom consortium in Co. Monaghan.

**CONSEQUENCE**

**Remedy.** The Committee has been apprised of the consequences for DECC of a near identical set of circumstances. Debate in the Upper House confirmed that rights of Scheme participants are immutable. This impacts upon each of the legal proceedings that are in train. The Committee has received testimony from Bill Sneyd. Mr Sneyd was CEO of Home Sun\(^4\) and was the lead litigant in the Breyer Group v DECC case in protecting his firm’s rights\(^5\) - most especially, Article 1, Protocol 1 of the Human Rights Act. Remedy for the consequential losses incurred by installers was given through a confidential settlement between DECC and the Breyer Group.

**OVERSIGHT**

**Statutory Construct.** It is not for this lay person to make comment on legislative process. Lord Mackay commented upon participants’ rights. The Parliamentary Joint Committee on compliance with Human Rights legislation should now engage.

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\(^4\) [https://rhani.org/uk-human-rights-blog-small-solar-court-of-appeal-confirms-that-changes-were-unlawful](https://rhani.org/uk-human-rights-blog-small-solar-court-of-appeal-confirms-that-changes-were-unlawful)

DEFINITIONS

At the core of these matters are a series of simple calculations. At the core of the matter are (a) the proper and reasonable calculation of costs allowable under standard EU policies for the promotion of renewable energy and (b) establishing a competent authority with mature and developed policies fit-for-purpose for the balance of the 20-year period.

SCHEME COLLAPSE BUT NOT (REGRETABLELY) NO TERMINATION

It is our assessment of that the 2019 legislation collapsed RHI (NI). Regrettably, it did not terminate the Scheme. To have done so would have crystallised the legal position for the

ALTERNATIVES

Response. Alternative arrangements are proposed within the framework of the Committee’s Terms of Reference and the 6 questions.

Transfer of Authority. The authority of the Department for the Economy is irretrievably compromised. An already damaged Department sponsored an inadequate consultation and botched analysis and construction of a revised programme plan for the balance of their programme. All credibility of the Department has evaporated. The Department’s accounts are currently qualified – a consequence of their failure to understand the governance arrangements of their own financial regulations. The time has come for a competent Whitehall Department to take charge. This is a time-critical issue as fuel selection is at a tipping point across many sectors. Taking RHI back to the “centre” would also address the budgetary mess DfE has created.

SUMMARY

• What was the rationale for the new tariff structure introduced by the bill?
  o We stand by the comments above. We say that the process was irrational.

• How will these new tariffs affect the businesses they apply to?
  o The impact will be ruinous.
  o The 2019 tariffs create immediate competitive disadvantage – most especially for the agri-food sector.
  o The 2019 tariffs now represent a comparative disadvantage for businesses whose competitors are base in Ireland.
  o See the direct comments attached.

• What other options could be considered for payments to stay line with the 12% approved by state aid?
  o The business case/s for the GB RHI and the Irish Renewable Heat Schemes are known to be compliant with EU State Aid.
  o Closure of RHI (NI) – with appropriate Court directed relief -followed by admission to the extant GB Scheme is but one alternative.
  o The Scheme duration could have been reduced.

• How do these tariffs compare with those available in Great Britain?
See attached annexes which compare both energy demand of 350,000 kWh (the mean usage) and 400,000 hours – a typical poultry shed requirement.

**If these changes had not been introduced by 31 March, what would be the consequences?**

- In correspondence with the Permanent Secretary, Mr Lavery was not prepared to lift the veil from the issue as to why and what the impediment was to the RPI adjusted continuation of the 2017 Regulations. The lawfulness of the 2017 Regulations is to be tested before the Court of Appeal. A Review, mention has been made by the Court of the Solar Panel judgement and the absence of mention of quantum in that case. The Court offered parties the option of the matter being returned to the judge of first instance to conduct a “rebalancing exercise” now that the 2016/17 cost overrun is now known.

**How far does the voluntary buy-out scheme mitigate the potential impact of the new tariffs?**

- This proposal is limited in duration and in value. By construct, it excludes those who are worst affected.
- The statutory construct for the Voluntary Buy-Out is predicated upon there being no functioning Assembly. In any case, DfE advise that fewer than 200 of the 2,128 participants would qualify for any payment in return for the surrender of their "rights" for the next 15 years. This cohort (using the unique RICARDO/DfE formula) had a very low rate of return on their investment. The meagre payments militate against this proposition.
- There is no legislative construct for a hardship scheme,
- Hardship is ill-defined. Participants would not face hardship has not DfE constructed a situation which would collapse the Scheme and the businesses dependent upon it.
- Legal advice is that hardship payments would breach EU SA rules.
- Hardship is a sticking plaster: it cannot address the long-term competitive and comparative disadvantage which will last (GB) for 20 years and (IRL) for 15 years.
- Other parties in litigation against DfE are poised to serve writs for compensation - which, we understand, is unaffected by EU SA rules.

**ADDITIONAL POINTS**

- After 7 years of operation of the Scheme and following 2 years of pressure from RHANI, DfE has now agreed to run compliance workshops to inform participants of "best practice" and of their expectation at audit. This is akin to describing the purpose and detail of an MoT test, 2 years after the tests commenced.

- The DfE Consultation paper dismissed the introduction of GB-like tariffs as the formula used (uniquely) in NI, would result in a rate of return that was in excess of that acceptable under EU SA rules.

- Any tariff lower than the lowest GB tariff must trigger an EU investigation of all GB RHI Schemes.
• The expert witness testimony from forensic accountants on the rate of return on 3 case studies (including a negative rate of return) - albeit on the 2017 tariffs - (400% more generous) has been made available to the Committee.

Yours sincerely,

Andrew Trimble