

# Climate change and energy

## Incendiary developments: Northern Ireland's Renewable Heat Incentive, and the collapse of the devolved government



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### At a glance

- A complex heating scandal has recently resulted in the collapse of Northern Ireland's devolved government.
- The heating scheme at issue is the Renewable Heat Incentive, which is intended to stimulate the increased derivation of heat from renewable sources.
- Northern Ireland retains a greater degree of devolved energy competence than the UK's other subnational jurisdictions. An equivalent Renewable Heat Incentive scheme has been rolled out across Great Britain, but officials in the Northern Ireland Executive have used their powers to adjust the scheme's financial mechanisms in a detrimental way.
- The cost to the Northern Irish taxpayer of the consequent design faults is estimated at £490m.
- These flaws came to light in conjunction with allegations of extreme mismanagement, faulty governance and fraud. A variety of allegations and revelations ran to the heart of the devolved administration, and the Northern Irish government presently collapsed under these pressures.

This article considers the development and application of the Renewable Heat Incentive (RHI) scheme in Northern Ireland, and addresses the major scandal that arose as a consequence of the scheme's design and implementation, ultimately resulting in the collapse of the Northern Irish government and significantly threatening the future of devolution in the jurisdiction.

### Devolution and energy in Northern Ireland

Northern Ireland's current devolved arrangements were established in the late 1990s after a long period of Direct Rule from Westminster (largely since 1972, subject to some generally unsuccessful efforts to restore devolution). The Northern Ireland Act 1998 (NIA 1998) established the primary governance architecture, and included the creation of a Northern Ireland Assembly that can legislate on devolved matters, and a Northern Ireland Executive. It is well known that life in Northern Ireland has been subject

over modern times to violent conflict – an era often euphemistically described as 'The Troubles' – and that the jurisdiction is presently undergoing a post-Troubles transition. As such, it is unsurprising to find that Northern Ireland's devolved institutions have rested on shaky social-political foundations since their recent inception. The institutions have been suspended temporarily in 2000,<sup>1</sup> and again over 2002-2007.<sup>2</sup>

As a measure to incentivise the sourcing of heat energy from renewable means, the RHI scheme is an energy-specific matter. The present author, working with Professor Geraint Ellis of Queen's University Belfast, has recently 'mapped' the allocation of low carbon energy-specific powers across the UK's national and devolved jurisdictions.<sup>3</sup> In the case of Northern Ireland, the research outputs show that energy competence is largely devolved to Northern Ireland under the terms of the devolving legislation,<sup>4</sup> but that this understanding must be qualified by energy's cross-cutting nature, which engages with governance in a range of broader competence areas including planning, housing (domestic heat and electricity consumption), etc. Certain nuanced governance features unique to Northern Ireland also impact the practical use of allocated powers, including a Single Electricity Market that operates across the island of Ireland, which is operated by Northern Ireland and the Republic of Ireland.<sup>5</sup>

In other words, while the major devolving legislation ostensibly asserts that energy is a 'devolved' competence, it is the case that the assumption that 'energy is "Fully Devolved"... substantially overlooks the contingent nature of the Devolved Administration's responsibilities and the complex way in which the scope to act, or not act, is underpinned by a broad range of conditions and qualifications.<sup>6</sup> Nonetheless, it is clear that Northern Ireland has a breadth of devolved energy competence that exceeds the powers that have been legislatively devolved to Scotland and Wales.<sup>7</sup> The manner in which constitutional law frames legislatively and executive devolved energy controls forms an essential backdrop to the RHI scandal: it has been alleged that the Northern Irish department holding primary

responsibility for energy governance has misused its capacity for action in this area to absorb, adjust and implement a flawed incentive scheme that has otherwise worked across the rest of the UK without major issue.

### The RHI scheme

The Northern Ireland Executive established the RHI scheme in November 2012. The department with energy responsibility at this time was the Department of Enterprise, Trade and Investment (DETI; the department no longer exists due to governance restructuring). The Minister at the head of that department, Arlene Foster of the Democratic Unionist Party (DUP), oversaw the scheme's development and signed off on it. Foster went on to become First Minister of Northern Ireland, and was in that position when the devolved government recently collapsed.

As noted, the scheme's purpose is to stimulate increased deployment of renewably-sourced heat. Although Northern Ireland is some way off the national pace in the sphere of climate governance,<sup>8</sup> the RHI is part of a progressive effort to work towards a target of 10% heat to be derived from renewable sources by 2020.<sup>9</sup> Its design is intended to provide a financial incentive to install renewable heat systems, and it has been targeted at non-domestic users, including businesses (although a domestic version has been phased in subsequently). While these systems include solar thermal and heat pumps, the systems at the centre of the scandal involve biomass boilers that mostly work by burning wood pellets. The RHI incentivises the use of these boilers by providing users with a large subsidy payment at a flat rate that extends over 20 years.

Much could be said about the scheme's design flaws, but to summarise the essential issues in concise terms for the purposes of this article, the crucial issue is that DETI in effect took the 'national' version of RHI that was to be applied across Great Britain – which has worked fine – and applied it Northern Ireland, but after having used its constitutional space in the sphere of energy to adjust financial aspects of the scheme in a detrimental way. Most particularly, these adjustments mean that the Northern Irish version pays out more in subsidies than the cost of the fuel at issue. Consequently, this incentivises RHI beneficiaries to burn more and more fuel in order to accrue more and more profit. Further, the Northern Irish adjustments dictate that approved applications are to continue to receive these payouts for the duration of a locked-in 20 year period (unlike the Great Britain version, which employs sophisticated tariff controls). As noted, the estimated and unforeseen cost to the Northern Irish taxpayer of the botched scheme is £490m. At present, discussions about how to change the locked-in design in order to mitigate these costs are ongoing; however, any substantial changes made by the Assembly or

Executive will likely raise complex legal problems that potentially include issues concerning the enactment of retrospective legislation, breach of contract, etc.

Problematic aspects of the RHI design can be usefully viewed across a series of periods. The first period concerns the years running from the scheme's inception up to April 2015. Over 2011-2015, £25m was budgeted to cover the scheme, but over 2014–2015 a lack of uptake saw a departmental underspend of £15m. The next period concerns April 2015 to February 2016. Here, from April, RHI applications began to increase dramatically. The BBC has noted that '[s]ome 984 applications were received in just three months – September, October and November 2015 – after officials announced plans to cut the subsidy but before the change took effect.'<sup>10</sup> Thus, '[o]ut of a total of almost 2,000 RHI applications, just under half were made in the space of seven weeks, and it was that flurry of applications which pushed the RHI budget beyond its limits, leaving taxpayers with an unexpected bill.'<sup>11</sup> The next period concerns February 2016 onward. In February 2016, DETI Minister Jonathan Bell of the DUP, who by this time had stepped into Foster's role, announced that he intended to close the scheme to new applications. Bell was presently ejected from the party after giving an in-depth interview to the media on RHI matters (see below).

As noted, the responsible DETI Minister over the period of the RHI's inception, design and early extended implementation was Arlene Foster (DUP leader since December 2015). Departmental changes mean that DETI no longer exists, with primary authority over energy governance now resting with the Department for the Economy. This department is headed by Economy Minister Simon Hamilton, a DUP member and close political ally of Foster's. Foster went on to become First Minister of Northern Ireland, and was in that position as the RHI scandal developed and became public knowledge. Her persistent efforts to deflect responsibility for the scheme and to resist calls from unionist and nationalist parties across the Northern Irish political spectrum to step aside while a substantial independent inquiry into the RHI could be undertaken, or to step down altogether, permitted the narrower crisis around the scheme to culminate in a much broader crisis of governance. This resulted ultimately in the resignation of Northern Ireland's Deputy First Minister Martin McGuinness and the collapse of the entire government.

### Fire and brimstone: the collapse of the devolved administration

An investigation into the RHI scheme commenced in February 2016. It was galvanised by both the irregular spike in applications noted above (over September–November 2015), and by the testimony of a whistleblower, who contacted the Northern Ireland Executive in January 2016 stating that 'an empty farm

shed was being heated for the subsidy and factories which did not need the heat were running large boilers 24 hours a day to earn money.<sup>12</sup> The investigation uncovered evidence of significant fraudulent behaviour. It also emerged that another whistleblower – a woman who runs a heating company – had been pressing DETI for action to be taken in relation to the scheme for some time. She contacted Foster initially in August 2013, and was in touch again with her department in 2014 and 2015, but, she said, '[i]t felt like I was hitting a brick wall.'<sup>13</sup> It also emerged that the Ulster Farmers Union, possessed of specialised knowledge of farmers' investment practices, had met with Stormont officials in July 2015 and 'warned of an imminent spike in demand'; officials did not apply this knowledge in order to avert the uptake either.<sup>14</sup>

On the BBC's Stephen Nolan Show, the DUP's Jonathan Bell gave an in-depth, emotional interview, claiming that he had endeavoured to wind down the scheme prior to the crucial flood of applications, but had been obstructed in doing so by DUP special advisors and Foster. Foster was interviewed separately on the programme, denying any wrongdoing.<sup>15</sup> The BBC summarises that, amongst other things, 'Mr Bell claimed that two senior DUP advisers "were not allowing the scheme to be closed" at the point when costs were spiralling out of control in autumn 2015.'<sup>16</sup> The advisers he identified were Timothy Johnston and Dr Andrew Crawford. Crawford was at that time an aide within DETI. It presently came to light that Crawford's brother was director of a company that was receiving the RHI subsidies. When pressed before Northern Ireland's Public Accounts Committee to name an advisor of Foster's who he believed to be exerting influence over the RHI scheme, senior civil servant Dr Andrew McCormick named Crawford.<sup>17</sup> Bell also claimed that a DUP special adviser to Foster, Stephen Brimstone, had been present at a confrontational meeting with Foster where Bell was trying to secure the closure of the scheme. Brimstone quit his job as adviser to Foster (November 2016), and it emerged in the month following this that he was an RHI claimant (December 2016). Investigative reporting from the *Irish News* further revealed that a business run by his brother, the husband of former DUP councillor Alison Brimstone, was also claiming the subsidies.<sup>18</sup>

Space precludes elaboration of the significant amount of additional alleged conflicts of interest and associated revelations that have recently emerged. These developments united all major unionist, nationalist and other parties across the Northern Irish political spectrum (apart from Foster's own DUP) in calling for Foster to step aside either temporarily or permanently so that a fully independent public inquiry could be conducted. Foster has persistently refused to do so. Under the Northern Irish

constitutional arrangements Foster of the DUP and Martin McGuinness of Sinn Fein had been holding joint office as first minister and deputy first minister respectively.<sup>19</sup> With Foster refusing to move, McGuinness ultimately resigned, collapsing the government and triggering fresh elections.<sup>20</sup> It is now agreed that a public inquiry into the RHI will be undertaken, chaired by retired appeal court Judge Sir Patrick Coghlin.

Voters in Northern Ireland still largely vote along ethno-religious lines, with the two major parties, the DUP and Sinn Fein, absorbing the significant majority of the votes falling within the extremes of loyalism-unionism and republicanism-nationalism respectively. As such, large numbers of votes for these parties are virtually assured, given present voting biases. Nonetheless, in the recent elections triggered by the government's collapse (2 March 2017) the DUP's vote has contracted (and nationalist votes have expanded), with the DUP remaining the largest party by only one Assembly seat over Sinn Fein. At the time of writing, politicians are endeavouring to restore and sustain a renewed devolved government, with Foster and the DUP insisting that Foster must remain in power. The BBC's political editor Mark Devenport has commented that '[w]e have all been burned, some heads must surely roll, but Stormont needs to act swiftly to put out this impossibly expensive fire.'<sup>21</sup> The problem is, given Northern Ireland's complex constitutional arrangements, no heads have rolled.

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## Endnotes

- 1 Northern Ireland Act 2000.
- 2 On the legislative dimensions of the 2006 – 2007 phase where the restoration of devolution was being established, see particularly: Northern Ireland Act 2006; Northern Ireland (St Andrews Agreement) Act 2006, giving effect to the St Andrews Agreement; Northern Ireland (St Andrews Agreement) Act 2007.
- 3 Thomas Muinzer and Geraint Ellis, 'Subnational Governance for the Low Carbon Energy Transition: Mapping the UK's "Energy Constitution"' *Environment and Planning C: Government and Policy* 2 February 2017.
- 4 'Energy' competence is excluded from Schedules 2 and 3 to the NIA 1998, meaning that it is to be construed as a 'transferred' (ie, devolved) competence, in accordance with NIA 1998 s.4.
- 5 See further *Single Electricity Market Operator: SEMO Home*, <http://www.sem-o.com/Pages/default.aspx>.
- 6 Muinzer and Ellis, *supra* n. 3, 9.

- 7 Muinzer and Ellis, 'The UK's "Energy Constitution": Mapping the Powers', in *supra* n.iii, pp.5-11.
- 8 See Thomas Muinzer, 'Warming UP: Northern Ireland's Developing Response to Climate Change in the Context of UK Devolution', *UKELA E-Law* (September/October, 2016) (96): 19-22.
- 9 See further the *UK Renewable Energy Roadmap* (UK: DECC, 2011), 9.
- 10 BBC News Q&A: What is the Renewable Heat Incentive (RHI) Scheme? 13 December 2016; see the sub-heading 'What was the Uptake Like?'
- 11 Enda McClafferty (for BBC News), 'RHI Scandal: Ulster Farmers' Union "Warned of Spike in Applications' 3 January 2017.
- 12 Conor Macauley (for BBC News), 'Renewable Heat Incentive scheme: Whistleblower "Ignored" after Reporting Abuse Claims' 9 November 2016.
- 13 BBC News 'Renewable Heat Incentive scheme: "Five Minutes of Research" uncovered Funding Flaws' 8 December 2016.
- 14 Enda McClafferty (for BBC News), 'RHI Scandal: Ulster Farmers' Union "Warned of Spike in Applications"' 3 January 2017. Quoting documents from the Ulster Farmers' Union website.
- 15 BBC 1 (television), Nolan Show Investigation Broadcast 15 December 2016 at 22:40.
- 16 BBC News 'RHI Scandal: Advisers "Pressurised Jonathan Bell"' 16 December 2016.
- 17 BBC News, 'As it Happened: Stormont's RHI Inquiry' 18 Jan 2017 (see subheading 'I believe Foster's Adviser was exerting RHI Influence').
- 18 'Brother of Stephen Brimstone has also been RHI Claimant', *Irish News* 15 December 2016.
- 19 See NIA 1998, s.16A.
- 20 Where one of the first ministers resigns, the joint nature of the role means that the other shall cease to hold office: NIA 1998 16B(2).
- 21 Mark Devenport (for BBC News), 'We've all been Burned by Heating Scandal' 16 December 2016.