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To: Richard Greenhous

SUBMISSIONS TO MINISTERS

We met today to discuss Submissions to Ministers and I agreed to provide you with a short summary on the current situation that you could share with the Executive Board.

Overview

Submissions to Ministers cover a wide range of issues, but it is fair to say that in general we only send a Submission to Ministers where there is a decision that is required to be made by a Minister. There are a few occasions where we will send a Submission to notify Ministers of some significant event or issue in order that they are pre-warned. Typically, in total, there are less than 25 Submissions per year to Defra Ministers.

Routine Business

There are a small number of Submissions to Ministers (no more than 4-6 per year) where the matter in hand could possibly be dealt with by Defra officials (under the *Carltona* principal – see attached Annex). These would be for the appointment of Reference Committees, but consideration of the outcome of the Committee process will still need to go to the Minister. This is because the issues decided by the Minister could eventually end in court action and we would not want this action to fail on a technicality. The change to a senior Defra official making the appointment decision was last considered in 2011/12 but was not taken forward as the savings (on all sides) were not seen as significant.

Significant Decisions

Submissions covering some routine business still require significant decisions, for example approving the Corporate Plan (including the Ministerial Foreword) or Annual Report and Accounts. In all these cases the content of the Submission would have been discussed with Defra officials and it is frustrating to find that when this has been taken into account they often have a 'rethink' of their position once the Submission has been made.

Submissions on policy delivery issues; when only the Minister can make a decision, for example land sales (where low level cases are filtered out before reaching the Minister) or changes to legislation we do all we can to ensure that we have used the latest templates and followed the advice provided on the Defra Intranet.

Possible Improvements

- We need to re-establish ourselves as a trusted brand so that Ministers accept that advice, information and recommendations that come from the FC do not need to be passed back out to Defra officials for secondary advice before a decision is made. This can partly be addressed by ensuring that all FC staff involved in producing Submissions have or refresh their training on Submission writing and keep in touch with current Ministers' preferences and an increased quality control role for Executive Office.
- Defra officials need to understand and appreciate that when they are given the opportunity to comment on draft Submissions their contribution will be taken on board by the FC, but we will not expect them to change their position once the Submission has been made. Some limited recent experience has been somewhat frustrating from both an FC and Defra perspective in that Submissions have been checked with relevant Defra colleagues before Submission to Ministers but in one case comments proved with hind sight to have been too limited and in another internal clearances requested via Defra colleagues appeared to have been provided but in the end proved not to have been.
- Defra officials should not feel obliged to modify a draft Submission when this has no added value, we would only expect interventions where they have substantive comment.
- We could seek to agree the delegation of statutory function in regard to the Appointment of Reference Committees (and Defra may want to have a similar process for the appointment of 'Appointed Person' for FWPS appeals, where Defra make the appointment submission but the administrative work is done by the FC). This would be under the *Carltona* principal. This would require a Defra official of appropriate seniority and experience to make the decision and the FC could seek this decision by with a Submission along the lines of a Submission to Ministers.

Conclusion

We need to continue to improve and meet the changing requirements of Ministers. However, I do not accept that there are any fundamental failings by the FC. The current concerns appear to have arisen from a few minor issues coming together at the same time, for which both Defra and the FC have shared responsibility.

However, this is an opportunity to clarify, for all parties concerned, how the Submissions process should work and this will help cut out unnecessary duplication, actions with no added value and reduce the burden on all concerned.

Richard Barker

Frequently asked questions

Delegation of statutory functions

[What are “statutory functions”?](#)

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[Can officials exercise the statutory powers of the Secretary of State on her behalf?](#)

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What are “statutory functions”?

“Statutory functions” are powers or duties conferred on a person (whether a natural person or a legal person such as a company) by or under legislation. Statutory functions include:

- powers to make orders and regulations (e.g. the power under section 1 of the Animal Health Act 1981 for the Secretary of State to make orders to prevent the spread of disease);
- statutory duties (e.g. the duty imposed on the Secretary of State under section 1 of the Climate Change Act 2008 “to ensure that the net UK carbon account for the year 2050 is at least 80% lower than the 1990 baseline”);
- powers to issue licences or authorisations (e.g. the power given to the Secretary of State under the Veterinary Medicines Regulations 2009 to issue marketing authorisations for veterinary medicines);
- power to prepare and issue guidance (e.g. the power under section 38 of the Marine and Coastal Access Act 2009 for the Secretary of State to issue guidance to the MMO with respect to the exercise of its functions);
- power to issue directions (e.g. power under section 1 of the Forestry Act 1967 for the Secretary of State to issue directions to the Forestry Commissioners about the exercise of their functions).

Who can exercise statutory functions?

The general rule is that a power conferred by legislation can only be exercised by the person on whom it is conferred. So a power conferred on the Secretary of State by Act of Parliament or statutory instrument can only be exercised by the Secretary of State. She cannot delegate (i.e. give away) this power to anyone else.

But this general rule does not prevent junior Ministers from exercising the legislative powers of the Secretary of State, nor does it prevent officials acting in her name under the [Carltona principle](#).

Does the “Secretary of State” include junior Ministers?

Yes. As a matter of general principle, references in legislation to the “Secretary of State” include junior Ministers. So, any statutory power conferred on the “Secretary of State” can be exercised by a junior Minister (i.e. a Minister of State or Parliamentary Under-Secretary).

Can officials exercise the statutory powers of the Secretary of State on her behalf?

Yes – if the official is of sufficient seniority, which will depend on the facts. The courts have recognised that it is not possible for the Secretary of State personally to make every decision that is made in her name. This would cause great administrative inconvenience and would be simply unworkable (for example if the Secretary of State personally had to consider and sign every licence issued by Defra). It is, therefore, accepted that officials may act in the Secretary of State’s name – in effect as her alter ego. This is known as the *Carltona* principle, from the leading case of *Carltona Ltd v Commissioners of Works* [1943] 2 ALL ER 560. It applies equally to decisions taken by officials on behalf of junior Ministers.

Does the Secretary of State need to delegate the exercise of her powers to officials formally?

No. The [Carltona principle](#) allows Defra officials of appropriate seniority and experience to act in the Secretary of State or the Minister’s name without them having to delegate their powers formally. Officials effectively act as the alter ego of the Secretary of State or Minister. The theory is that, legally and constitutionally, the acts of the officials are the acts of the Secretary of State or Minister. This is not a “delegation” of powers in the true sense of the word.

What are the limits of the *Carltona* principle?

There are some limits on the principle that officials can act in the name of the Secretary of State or a Minister.

- A decision may only be taken on behalf of the Secretary of State or junior Minister by an official of appropriate seniority and experience. In *Carltona* itself, the decision to

requisition the company's factory and to redeploy its staff (made in wartime under defence of the realm regulations) was taken by a Grade 5, described as a "high official of the Ministry" and this was upheld by the court. Each case will depend on its facts. Ultimately, the practical test is whether the Minister will be happy to explain to Parliament that this was the sort of decision that could properly be taken by an official acting in the name of the Minister.

- The principle only applies to officials in the department of the relevant Secretary of State or Minister. So it is only the acts of Defra officials that are treated as acts of the Defra Ministers. An official from another Government department could not exercise a power of the Defra Ministers, nor could an employee of any Defra arms length body such as Marine Management Organisation.
- In some cases it is clear from the wording of the statutory provision that the powers must be exercised by the Secretary of State personally (although such provisions are rarely found in Defra legislation).
- By convention some things are almost always done by Ministers rather than officials. This includes making (i.e. signing) subordinate legislation (regulations, orders etc) when made by statutory instrument ("SI"). However, not all subordinate legislation is made by statutory instrument (the Act of Parliament conferring the power to make the subordinate legislation will say whether it has to be made by SI). Subordinate legislation that doesn't have to be made by SI is typically signed by an official of at least Grade 7 level.

Can the Secretary of State appoint an agent to act on her behalf?

Yes. The legal principle outlined above that prevents the Secretary of State from delegating her statutory powers to someone else is primarily a prohibition on the delegation of her *decision-making* powers. The Secretary of State can engage an agent to execute (i.e. carry out) her decisions, once they have been made. The key question is whether the discretion remains in the hands of the Secretary of State or whether some other person purports to exercise it.

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