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CANDIDATES' DECLARATION - PROPOSALS FOR LEGISLATION

Introduction

1. Consultation on the discussion paper "Elected Representatives and the Democratic Process" is not due to end until 30 November. However, if Ministers then decide to proceed with legislation to introduce a non-violence declaration, it will probably be necessary (and certainly very desirable) to obtain H Committee's policy approval for an Elections Bill (also to cover 'I' voters) in early December. This would maximise our chances of obtaining a Bill place when QL Committee considers the legislative programme in January. We need, therefore, to develop firm proposals as a basis for consideration by 'H' Committee. This submission, prepared in consultation with the DOE and Legal Advisers among others, invites Ministers to take note of our provisional recommendations on the line to be taken with 'H' colleagues on certain practical issues relating to a non-violence declaration. Ministers will probably need to consider a draft 'H' paper at the end of next week.

2. Certain views have already emerged clearly from the consultative process. Both the Alliance and the UUP (the latter regarding a declaration as a second-best to proscription) believe that the proposed terms of the declaration do not go far enough. The UUP want council candidates to 'repudiate' proscribed organisations - in order to give Sinn Fein a 'credibility' problem - while the Alliance are concerned that support for non-proscribed organisations with paramilitary links, such as the UDA, would not be caught. The same point has been made by others, including the SDLP, who do not support a declaration. Wide concern has also been expressed that individuals could become terrorist targets, if councillors had to initiate proceedings for alleged breaches of the declaration. The UUP strongly supports the creation of a criminal offence of 'breach of declaration'. The Alliance believe that (civil) proceedings should be initiated only by the Attorney General. There is also some support for changes in the current arrangements for disqualification from council office of those convicted and sentenced to prison for three months or more.

3. This submission deals with these issues and certain other 'operational' aspects of a non-violence declaration.

I TERMS OF DECLARATION

4. The terms of a 'non-violence' declaration suggested in the discussion paper are:

> "I declare and undertake that, if elected, I will neither support nor assist the activities of any organisation proscribed by law in Northern Ireland".

5. Our legal advisers are in little doubt that any form of 'non-violence declaration' will prove very difficult for the courts to enforce. A broader formula may prove, in practice, to be even more difficult to enforce than the existing one. It could also be criticised as an unreasonable limitation of the

right of free speech. A further consequence, although not a disadvantage, is that some unionist councillors might be caught. Nonetheless, the present 'narrow' declaration has been widely criticised and there appears to be a strong case, on political and presentational grounds, for a 'wider' formula.

6. We believe that a formula likely to meet most of the expressed objections would be:

> "I declare and undertake that, if elected, I will neither support nor assist, in word, deed, or by display of written or other material (a) the activities of any organisation proscribed by law in Northern Ireland, or (b) acts of terrorism (that is to say, violence for political ends) connected with the affairs of Northern Ireland".

A declaration along these lines could plausibly be held to catch most of the forms of behaviour which those who have responded to the discussion paper wish to restrain. It has the advantage of following, in its reference to violence, a formula very close to that which already appears in the Prevention of Terrorism Act 1984. It also has the advantage that the declaration is virtually self-contained, ie it answers most (if not all - see para 9) of the questions which a court is likely to pose in deciding whether or not the declaration has been breached. Such a declaration would not, however, seem to catch statements such as "I can well understand why ... in response to British violence ... I do not condemn ..."; but there are likely to be 'ways round' almost any form of declaration.

7. We would not be asking prospective councillors to 'repudiate' violence or proscribed organisations, as the UUP would wish, since there seems little prospect of a court being able to identify a failure to 'repudiate' and to enforce 'repudiation'. Furthermore, it would seem odd, to say the least, to insist that the law-abiding citizens should 'repudiate violence', who have given no indication of supporting it

previously. It seems best, therefore, not to clutter the declaration, already difficult to enforce, with words likely to create unnecessary argument.

8. A further possible disadvantage of the declaration, as proposed, is that the words 'if elected' ensure that the restraints which the declaration imposes 'bite' only from the moment of election; in other words, the declaration would not restrain what was said during the election campaign. To omit these words, however, would depart from the discussion paper's basic concept of a 'declaration as a condition of elected office'. More importantly, it would be almost impossible to enforce the declaration against unsuccessful candidates, who could not be deprived of office, unless criminal sanctions were imposed.

9. While the declaration would be virtually 'self-contained', there are, however, two additional points for which the legislation needs, we believe, to provide:

(a) the words, acts, or display of written or other material would have to take place in a public place. We would define this so as to include Council Chambers (but we are considering the implications for Council sessions held in private). The reason for this limitation is that an attempt to catch private behaviour would be likely to encounter resistance in Parliament, as an unacceptable infringement of personal liberty, whilst producing little in the way of evidence (since Sinn Fein's private meetings by definition are unlikely to produce witnesses prepared to testify);

(b) there would need to be provision for statements or acts by Sinn Fein councillors anywhere (ie including GB, the Republic or the USA) to count as breaches of the declaration. Such a provision seems unlikely to

cause difficulties of a domestic or international nature (although there might be more risk of problems on the latter score if a criminal offence is entailed), but we shall be pursuing the matter with FCO officials.

The terms of the declaration would also of course be subject to the views of the parliamentary draftsman.

II CIVIL V CRIMINAL ENFORCEMENT

10. During the discussions between Ministers in early 1986 about the form of the scheme, differing views were expressed as to whether enforcement should be by the criminal or the civil route. The initial view of the then Lord Chancellor and Attorney General was in favour of enforcement by civil process; and there was opposition to a suggestion by Lord Lowry that we might create a general offence of supporting or assisting proscribed organisations, especially in view of the difficulties which could be expected to arise in defining the prohibited conduct.

11. However, at a subsequent meeting of Ministers (27 February 1986) the view was taken that, whilst a wide-reaching criminal offence presented real difficulties, a more narrowly-defined criminal offence of breach of a declaration by a councillor might be feasible. Accordingly, both options, civil and criminal, were floated in the discussion paper. The Secretary of State also consulted the then Attorney General about a third option, of enforcement by civil proceedings in which the Attorney General would be ex officio applicant. The Attorney in his reply saw serious practical and presentational problems in this approach.

(a) Civil process, case brought by persons other than the Attorney General

12. Under this option, the legislation would give a defined category of persons locus standi to bring civil actions in the High Court, seeking a declaration that a named councillor or councillors had breached the terms of his/her candidates' declaration. If the High Court upheld the action, disqualification of the named councillor(s) would follow. The persons given locus standi under this scheme might be:

(i) councillors of the same district council as the offending councillor;

(ii) the council of which the offending councillor is a member;

(iii) any elector of the district council of which the offending councillor was a member;

(iv) (for the Assembly only) any Assembly member;

(v) (for the Assembly only) any elector of the same Assembly constituency as the offending Assembly member.

13. Political parties, or bodies such as the Association of Unionist District Councillors, which have no legal personalities, could not be empowered to bring actions in their own right, although it would be possible for them to bring 'representative' actions, in which a councillor/elector sues on behalf of a group of people in the same category.

14. As to the costs of civil actions, legal aid would, in principle, be available to individuals on a discretionary basis, through the Law Society and subject to a means test. Alternatively, actions could be funded by the political parties, although the cost could be considerable.

(b) Civil process, cases brought by Attorney General

15. Under this option, the legislation would empower the Attorney General (and perhaps a limited category of others) to bring civil actions in the High Court, seeking a declaration that a named councillor or councillors had breached the terms of his/her candidates' declaration. If the High Court upheld the action, disqualification of the named councillor(s) would follow. The action might be modelled upon that provided for by Section 31 of the Local Government Act (NI) 1972, under which the Attorney General can institute proceedings in the High Court for a declaration that the conduct of a councillor is 'reprehensible' as defined by the Act. (The definition relates to financial malpractice.)

16. This option would avoid the difficulties over cost and exposure of individuals, whilst recognising that the Attorney has a role in defending the public interest. On the other hand, the Attorney might be widely perceived as acting in his capacity as a member of the Government, rather than as an independent guardian of the public interest; and this might involve the Executive more than is desirable. As a practical matter, the Attorney will not be able to call upon the assistance of the DPP to bring cases. Although the services of the Crown Solicitor would be available to him, a heavy personal burden would be placed on the Attorney and his small London-based staff by a flow of highly politically sensitive cases. For these reasons, the previous Attorney-General argued against this option, and it seems likely that his successor would raise similar objections.

(c) Criminal offence

17. The legislation could provide for a 'breach of the declaration' by a councillor to be a criminal offence. Prosecutions could be brought by the DPP on the basis of evidence provided by the RUC. Conviction could be attended by a fine of £2,000 (level 5) and/or imprisonment; and the offence

could be scheduled under the Emergency Provisions Act. Disqualification from office would be an automatic consequence of conviction.

18. The advantages of this option are that it avoids the problems of cost and exposure of individuals of the first option; and, although this may be a more debatable advantage, enables the RUC to become involved in the collection of evidence. Cases would be presented by an authority (the DPP) independent of the Executive (although he might not be perceived as such). By criminalising 'breach of the declaration', the proposal will be perceived as 'tougher' than the 'civil' options. The criminal option is recommended by the UUP among others, and is likely to prove more attractive to unionist opinion in Northern Ireland generally.

19. The disadvantages are that the definition of the offence on a basis which will secure convictions is likely to encounter all the difficulties which have already led the Government to reject proposals for an offence of 'supporting terrorism'. The Attorney- General, the DPP and the RUC would all be involved in matters of great political sensitivity, and criticised for 'failure to take action'. Politically, this option comes closest to criminalising opinions, and is thus more liable to attack as an infringement of free speech than the 'civil' options. It would accordingly be the option most likely to encounter difficulty in Parliament. The standard of proof required would be the higher one of 'beyond reasonable doubt'.

The Choice

20. Clearly, we face a difficult choice in deciding on the means of enforcing a breach of the declaration. There are serious difficulties about criminalising actions by councillors which would not be illegal for non-councillors. The major concern, strongly expressed, of those who favour the Attorney's involvement, whether in a criminal or civil process, is that

individuals bringing actions would run the risk of becoming terrorist targets. (The cost to individuals seems to be a lesser concern.) However, it is difficult to see how such risks can be entirely avoided under any of the three options. Witnesses will in all cases be crucial: someone (most probably, perhaps, a fellow councillor) will need initially to lay information that a declaration has been breached. Action by the Attorney-General will not get round this difficulty. Apart from the practical difficulties which involvement of the Attorney would raise, the Government may find itself highly exposed politically by his involvement. As Mr Needham has suggested in a discussion with Alliance Party representatives, giving the responsibility to the Attorney General could give Sinn Fein a 'propaganda weapon against the British Government'. While the proposed involvement of the Attorney General would help us, politically, in presenting a decision to proceed with the declaration, it might well rebound on us when the declaration became law and the Attorney General faced criticism for failing to take action in particular cases. If we give councils a 'locus standi', as proposed, to bring actions, that should help to a small extent to reduce the exposure of individual councillors (and could help to overcome the problem of costs). It also seems likely that the Attorney General would oppose both the other options (which would impose heavy burdens on him and his staff). Our provisional recommendation, therefore, is that we should, as earlier envisaged by Ministers, propose a civil means of enforcement on the lines discussed above (option (a)).

III OPERATION OF THE DECLARATION

21. The discussion paper suggested that the declaration should be made at the stage of candidature, rather than following election. The simplest way to achieve this would be to have the declaration included on the existing printed form on which most candidates give their consent to nomination. However, the printed form is used as a matter of convenience, not of statutory requirement, and there seems no reason why candidates

should not supply their own form of consent, so long as it meets the statutory requirements as to format and content. It would be most unusual for legislation to specify not merely the format and content of the declaration, but also to require the use of a particular type of printed form. We also believe, for a number of reasons, that subscription to the declaration should be in written form only (not orally). I accordingly recommend that the legislation should require candidates to subscribe to the terms of the declaration in writing, and that a combined 'consent to nomination' and 'declaration' printed form should be made available. The use of this form would not be compulsory, but consent forms supplied by candidates would have to follow the same content and format as the printed version. Failure to subscribe to the terms of the declaration would invalidate the nomination. The Returning Officer's powers to declare nominations invalid would remain as at present.

IV DISQUALIFICATION FROM COUNCIL (OR ASSEMBLY) OFFICE

22. At present, the Local Government Act (NI) 1972 disqualifies a person from being elected or from being a councillor for a period of 5 years following either:

(a) a conviction resulting in a sentence of imprisonment of three months or more without the option of a fine; or

(b) a declaration by the High Court that he/she has been guilty of reprehensible conduct, as defined by the Act (the definition relating to financial malpractice).

New legislation for a candidates' declaration would be expected to add:

(c) a determination by the High Court that he/she had breached his/her candidates' declaration (or been

convicted of a breach of the declaration, if enforcement was by criminal process).

23. Two main questions seem to arise:

(a) should a breach of the declaration entail disqualification for 5 years, or more or less?

(b) should changes to the current disqualification arrangements be pursued?

24. It would seem very difficult to justify a longer period of disqualification for the civil wrong of breaching the declaration, if a criminal conviction leading to 3 months in prison continued to entail disqualification for (only) 5 years. Even if breaching the declaration was made a criminal offence, it would be difficult to justify a longer period of disqualification for an offence that entailed a penalty of £2,000 and no prison sentence. It is possible to contemplate a lesser period of disqualification than 5 years, but it would be unlikely to attract public support. Disqualification for 5 years also has the attraction of consistency with existing arrangements, although it is true that criminal convictions leading to lesser penalties than 3 months' imprisonment do not attract disqualification.

25. The possibility of extending the existing disqualification period was put forward in the discussion paper as one of a number of options, including the declaration, for dealing with the 'Sinn Fein problem'. While the suggestion had emerged from Mr Needham's round of consultations on the subject and was recommended as a measure worth pursuing, Ministers took the view that it could not be a complete 'solution' to the problem and was likely to have little practical effect. To introduce changes to the current disqualification arrangements in addition to the introduction of a declaration would carry a number of potential disadvantages. The declaration would of course be

unique to Northernn Ireland, but the disqualification arrangements would also then be established on a different basis. The change would be regarded by some as an unnecessary additional restriction on individual liberties. Furthermore, the law on disqualification from the Assembly normally keeps in step with that for Parliament; and we would need to consider carefully the implications of changes in this area.

26. No strong arguments have been adduced by the supporters of changes to the current disqualification arrangements. Accordingly, our provisional recommendation is that the civil wrong of breaching the declaration should entail disqualification from council (or Assembly) office, but no other changes should be made to current disqualification provisions.

Summary of Recommendations

27. In summary, our main, but provisional, recommedations are that any scheme to be put to 'H' Committee should include the following elements:

(i) the terms of the declaration would be broadened (as at para. 6) to cover support or assistance for all forms of terrorist violence (paras. 4-8);

(ii) acts constituting a 'breach of the declaration' could be committed in a public place, anywhere (para. 9);

(iii) enforcement of the declaration would be by means of a civil process, with the persons being given locus standi to bring cases to include district councils (paras. 10-20);

(iv) the declaration would need to be subscribed in writing at the nomination stage, but there should be no additional statutory procedures for prospective candidates; and there should be no change in the existing discretion of the returning officer to reject nominations (para. 21);

(v) a judicial finding that the declaration had been breached would lead to disqualification from standing for a district council (or the Assembly) for a period of 5 years, but there should be no other changes to the existing disqualification arrangements (for councils or the Assembly) (paras. 22-27).

Next Steps

28. I invite Ministers to note these provisional recommendations which, subject to any Ministerial comments at this stage, and further work, will be reflected in a draft 'H' paper. As the consultative period is now drawing to a close, we shall very shortly be submitting advice on the responses received to date and the political implications of a decision to proceed with the introduction of a non-violence declaration, or not. We shall also aim to put a draft 'H' paper to Ministers by the middle of next week.

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26 November 1987

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