E.R.

CONFIDENTIAL

HCS/5/90

cc. PS/Ministers (B&L)
PS/PUS (B&L)
NI Perm Secs
Mr Brennan
Mr Stephens
Mr Max Reid
Mr Ferneyhough
Mr Buxton
Mr Carvill
Mr Gavin Hewitt
Mr Gilliland
Mr Hammond
Mr Merifield
Miss Elliott
Mr Coulson
Mr Lyon
Mr Pearson
Mr Reeve
Mr Bickham
Mr Carlisle
Mr Crozier

PS/Secretary of State (B&L)

COMMUNITY GROUPS

1. We have now received, and carefully considered, legal advice in respect of the grant applications which have been made by the Conway Community Group and the proposed termination of the agreement with the Conway Street Women's Self Help Group. The former has been seen and endorsed by the Law Officers.

Legal advice

2. The Counsels' Opinions are at Annex A (Conway Street) and Annex B (Conway Women). They confirm that there is a sufficient basis for refusing grant in respect of the Conway Community Group, in that:

(a) Counsel believes that the Secretary of State (and the grant-aiding Department) would be entitled, in principle, to refuse the payment of a statutory grant, even if the normal conditions for the payment of that grant were established, if he were satisfied that to pay it would assist or promote, either directly or indirectly, the aims of an unlawful organisation (paragraph 6 of Annex A). It is not necessary, for this

CONFIDENTIAL

criterion to be complied with, that the Secretary of State should be satisfied that the grant would actually be used for the purpose of an illegal organisation (although if that were the case the grounds for withholding the grant would be even stronger). It is sufficient, in Counsel's view, if the payment of the grant would enhance the standing of an unlawful organisation.

(b) The strongest basis for the refusal would be if it could be justified on grounds of national security but even if that were not the case there would be sufficient grounds of public policy to justify the refusal.

(c) Public policy could also be invoked as a justification for refusal if it were based on a reasonable belief that the grant would be used, directly or indirectly, to promote unlawful or paramilitary activities even though the organisation in question was not proscribed, although Counsel warn that, in such a case, it might be more difficult to persuade the courts that the facts were such as to provide such a reasonable belief.

(d) Even if it were impossible for the Secretary of State to reveal the full facts which have led him to his decision, it should be possible to persuade courts to proceed on the basis that those facts exist provided that reasons are given in an affidavit (which could be in general terms) why the precise facts could not be revealed, for example, because national security was involved or the information on which the decision was based came from sensitive sources. I should, however, mention the qualification inserted by Crown Counsel in paragraph 7(iv) that the Northern Ireland courts might be less ready to take on trust an assertion of this kind than would an English court.

(e) Provided that the decision to refuse grant could be justified on the above criteria, no question of discrimination contrary to section 19 of the Northern Ireland Constitution Act 1973 should arise.

In respect of the Conway Women's Group Counsel's advice is that we are entitled to exercise our right to withdraw from the contract at three months' notice provided that we do so on reasonable grounds. The main Opinion confirms that the considerations which we have in mind should constitute

reasonable grounds.

Communication with the groups

3. The next step is therefore to communicate our decisions to the groups in question. In doing so we need to have regard to:

   (a) Counsel's advice that the refusal letter should preferably indicate the grounds for the refusal.

   (b) The need to ensure that the reasons given are fully consistent with the arguments that we may need to deploy subsequently in public or court defence of our decision.

   (c) The precedent that will be created for future cases, not all of which may be on all fours with the present cases (eg they may not involve a proscribed organisation).

4. The Secretary of State will note the references in Counsel's Opinion to considerations of "national security". We do not think that it would be appropriate to invoke "national security" as such, as we can operate on "public interest" grounds. Counsel's Opinion confirms that "national security" is not a necessary factor, since furthering the aims of an illegal organisation gives sufficient grounds for a refusal.

5. We also need to be careful not to create dangers for the staff who are directly dealing with the applications in question. Many of these staff are involved in frequent contacts with and make regular visits to those difficult areas in which such groups are based. If the impression were created that those staff were themselves involved in or had initiated the security consideration which led to the refusal their personal security could be put in jeopardy. I feel on balance that the most acceptable way of avoiding this would be for the Secretary of State to make a statement of his general policy prior to the issue of any refusal letter. Departments could then refer to this statement by way of explanation of their refusal of particular cases.

6. Another reason for considering a public statement at the outset is that some general explanation of policy will certainly be sought after the first decisions

become public, and we could find ourselves having to respond on an ad hoc basis rather than in the more carefully drafted terms of a considered statement. But there are also dangers entailed in the higher profile which such a statement involves, whether it is made before or after the first decisions. The more firmly and clearly we set out our position the harder it will be to make any modifications which experience may suggest to be desirable. Unionist politicians will no doubt welcome the statement at least insofar as it applies (as it will in the first instance) to republican groups. But they will press us to say why we have rejected some groups while still accepting others which in their view are no better. In many respects we are entering uncharted waters : we do not know exactly how many similar groups may be identified when we investigate further, but in practice most are likely to be less "black and white" cases than the two Conway groups. Since we will not be able to stand over refusals without a very clear security assessment it is inevitable that many groups will have to be given the benefit of any doubt that may exist. In this context it could be embarrassing to be committed to a hard-line policy if in practice it is seldom implemented. We might only provide fuel for Unionist politicians to argue that any group with Sinn Fein members should be debarred from receiving grant, and thus accentuate the controversy over proscription. And such a statement could also re-open (to our disadvantage) more important issues of paramilitary finance such as the black taxi operation, construction industry fraud, and drinking clubs. We have made or will be making progress on all of these fronts, but we cannot pretend to have solved all the problems that could well be highlighted.

7. If, despite these disadvantages, the Secretary of State feels that such a statement should be made, then the most appropriate vehicle for it might be an arranged written PQ. Annex C is a draft of the sort of statement we would suggest. Annex D shows the sort of Departmental letter which might issue following that statement. The drafts are tentative as we want to have them specifically cleared by Counsel, and we will be guided by Counsel as to the factors to be stressed and the way in which they should be expressed at this stage. In the case of the Conway Community Group, DED would write to LEDU in similar terms, as it is LEDU and not the Department which actually makes the payment, but the terms of the Department's letter would be made known to the group by LEDU. If however the Secretary of State feels that it would be better to avoid such a general statement then we would have to give

consideration to other ways of avoiding the security complications referred to at para 5 above.

Lines of defence

8. When these decisions become public we can expect support in some political quarters but also considerable criticism of our action as being discriminatory towards self-help groups which are simply seeking to alleviate social disadvantage. In response to Press and Parliamentary queries we will seek to avoid being drawn significantly beyond the initial statements. But there is also the possibility of formal legal challenge, and we have considered with our legal advisers what challenges might be posed and how we would respond to them.

9. Perhaps the most likely challenge would be to seek a judicial review of the administrative decision. The purpose of judicial review is to look at the way in which the decision to refuse grant was arrived at, and to establish that all the relevant factors (and no irrelevant factors) were taken into consideration. The Court would not seek to substitute its decision for that of the Department, but if it found a defect in the Department's consideration of the case it could set aside the decision and require the Department to consider the application afresh. Counsel's Opinion indicates that the Courts could be expected to accept an affidavit stating that the Crown had good reason to believe that grant would further the aims of an illegal organisation and that there are also good reasons why the grounds for that belief cannot be made public. This is the fundamental premise on which our legal defence rests, and Counsel's Opinion is reassuring in stating that it would be an acceptable defence. It should be noted that this defence may be more difficult to sustain if a non-proscribed organisation were in question (eg the UDA). We propose to be guided by Counsel in this regard, but it should be noted that this is largely untested territory in the Northern Ireland courts and that - as Counsel notes in the manuscript addition of para 7 (iv) of Annex A -the Northern Ireland courts may be less ready to accept such statements than might be the English courts. If necessary an appeal on the issue of non-disclosure could probably be made from the High Court to the Court of Appeal, and even to the House of Lords.

10. The possibility of a successful appeal under Section 19 of the Northern Ireland Constitution Act 1973 is not considered by Counsel to be an obstacle in the

present case (see para 8 of Annex A).

11. Finally there remains the possibility of an investigation by the Parliamentary Commissioner for Administration. We do not feel that we could be vulnerable to a finding of maladministration. Under the terms of the Act we would have no right to refuse the Commissioner access to any relevant document, whether of a security nature or otherwise. However there is power to prohibit the disclosure of any particular information in any form by the Commissioner on security grounds, and this should be an adequate safeguard.

Conclusion

12. The Secretary of State is invited:

(a) to note the terms of Counsel's advice (para 2 above);

(b) to say whether he would wish to make a public statement of general policy in advance of the issue of refusal letters (paras 5 to 7 above);

(c) to agree (subject to Counsel's comments) the text of the draft statement at Annex C and the draft letter at Annex D;

(d) to note the possible legal challenges to these decisions and the proposed lines of defence (paras 8 to 10 above).

(e) to note the possibility of a PCA investigation (para 11 above).

K.P. Bloomfield

K P BLOOMFIELD

24 May 1985

/JH

ANNEX A

CONWAY STREET WOMEN'S SELF HELP GROUP

OPINION

1. Action for Community Employment is part of an extra-statutory scheme. Monies are voted by Parliament but the payments are not made under any express statutory power.

2. According to the leaflet, each proposal is considered on its own merits and the work undertaken must come within the broad criterion of being of benefit to the community at large.

3. When Agreement No 2253 was made between the Department of Economic Development and Conway Mill Women Self Help Group I assume that the Secretary of State was satisfied that the proposal was of benefit to the community at large. Since that time, he has had reason to change his view.

4. The extent to which the Crown has power to bind itself by contractual obligations is not clearly defined. In Rederiaktiebolaget Amphitrite -v- The King /1921/ 3 KB 500, Rowlatt J held that the Government could not be bound by an arrangement whereby it purported to give an assurance as to what its executive action would be in the future in relation to a particular ship in the event of her coming to this country with a particular kind of cargo. He described it as "merely an expression of intention to act in a particular way in a certain event." In Robertson -v- Minister of Pensions /1949/ 1 KB 227 Denning J (as he then was) said at page 231 "In my opinion the defence of executive necessity is of limited scope. It only avails the Crown where there is an implied term to that effect or that is the true meaning of the contract. It certainly has no application in this case. The War Office letter is clear and explicit and I can see no room for implying a term that the Crown is to be at liberty to revoke the decision at its pleasure

and without cause."

5. In Agreement No 2253 Clause 3.3 (A) provides "Except in the circumstances described at 3.1, this agreement shall remain in force until terminated by one party giving the other three months' notice in writing to that effect". In my opinion it can be argued that for its part the Department has reserved an express power to revoke the decision to pay the grant.

6. Although I have been unable to find any authority on the point, I consider that the decision under Clause 3.3 (A) to terminate should be exercised on reasonable grounds. If this were not so, then judicial review of executive decisions could be avoided. A Department might decide to pay a grant and then withdraw the payment after three months under the terms of the contract. If the Applicant made a fresh application, the same course could be followed. If I am wrong in my view, then the Court could not examine the reason for the termination of the grant under the terms of the agreement.

7. As I stated at the outset, this scheme is extra-statutory. As the Department is acting without statutory power, then it could be argued that it is not subject to judicial review. The position in law is far from clear. For example, certiorari has been held to operate in the case of the Criminal Injuries Compensation Board which was created to administer a non-statutory scheme for compensating victims of crimes of violence by ex gratia payments out of funds authorised by Parliament. The Immigration Rules made by the Home Secretary under the Immigration Act 1971 have been held by the House of Lords to have "no statutory force" - see R -v- Home Secretary ex p Zamir /1980/ AC 930. The Courts have several times quashed immigration decisions for misconstruction or misapplication of the Rules though they have not said if they were treating the Rules as having statutory force or enforcing non-statutory rules. If a decision is attacked, then I would seek to argue that it should not be reviewed as being non-statutory. Unfortunately,

in the present state of the law, I can go no further than to say that it is a possible line of defence.

8. My advice is that the agreement can be terminated under Clause 3.3 (A). If the decision to terminate is made on reasonable grounds, a challenge in the Courts could be defended. If the agreement is terminated without such grounds, then it remains open to be argued that an extra-statutory decision cannot be challenged.

W A Campbell

.....
W A CAMPBELL

Royal Courts of Justice
BELFAST

14 May 1985

CONFIDENTIAL

ANNEX B

Was (as amended in manuscript - see para (4)(iv)) approved by both W.A.C. + J.G.McC. and is to be treated as their definitive Joint Opinion.

KJ. 30/4

Re: Conway Community Group

OPINION

(1) We are asked to advise on the question whether or not Government Departments in Northern Ireland may withhold, on the ground of connection with paramilitary organisations, the payment of statutory grants to community groups which in all respects have satisfied the requirements subject to which grant is payable.

(2) A power to pay grant is conferred on the Department of the Environment for Northern Ireland by s.1 of the Social Need (Grants) Act (NI) 1970. Grant may also be paid by the Local Enterprise Development Unit under the terms of its Memorandum. The LEDU is largely controlled and funded by the Department of Economic Development for Northern Ireland.

(3) The Conway Community Group has made applications for grant which are at present before both DOE and LEDU for consideration.

(4) It is believed (and anyway for the purpose of this Opinion assumed) that Conway fulfils all conditions of eligibility for the grants for which it has applied. It is also believed (and it is enough for the purpose of this Opinion that the belief is resonably held) that Conway has connections with the Provisional IRA, not necessarily in the sense that any grant paid to it would be likely to be applied directly to unlawful purposes but in the sense that the payment of grant would enhance the standing and influence of Conway and so, at least indirectly, go to swell the influence of the PIRA. Nor is the possibility of direct application of grant funds to unlawful purposes ruled out.

CONFIDENTIAL

(5) We are instructed that in cases other than Conway the information available to Departments may well fall short of what would be necessary to prove a paramilitary connection or even to establish a genuine belief in such a connection. It is thus the more important to take the stand of refusing grant in this case if that may be done with good prospects of successfully resisting any consequent legal challenge.

(6) General Principles

(i) It is clear that the statutory and corporate arrangements for the payment of grant by DOE or LEDU (which would be acting under directions given by DED) involve discretionary powers. Two propositions apply as a matter of law to those powers:-

(a) they must be exercised only for the purposes for which they are conferred (Padfield v Minister Agriculture [1968] AC 997);

(b) the fact that a candidate for grant fulfils all stated necessary conditions does not give rise to an obligation to pay grant to that candidate: "may" does not become "shall". But refusal in such a case prima facie would call for some justification.

(ii) Refusal may be justified, no doubt, by widely varying contingencies. Funds may be limited, so that some fully qualified candidates are sent away empty-handed; or a supervening Government policy may indicate refusal. In a case like

the present, we are of the clear view that refusal would be justifiable if it were done for reasons of national security. But there is no reason to suppose that that would be the only supervening consideration of policy which could amount to justification. In our Opinion, were the appropriate Departments to believe that a particular candidate had connections with, and directly or indirectly proposed to assist, an unlawful organisation, refusal could be justified on grounds of public policy notwithstanding that it might be impossible to assert any danger to national security, and notwithstanding that the candidate itself was in no sense an unlawfully constituted organisation. A fortiori if it were an unlawful organisation.

(iii) These considerations merely exemplify the application of the well-known administrative law canons set out in Wednesbury [1948] 1 KB 223 and Padfield (see above); and in particular as regards national security, see CCSU v Minister for the Civil Service [1984] 3 AER 935. But this says nothing about the evidence which would have to be presented to the Court in response to a legal challenge; and to this we now turn.

(7) Evidence

(i) A refusal based on grounds for which the Department had no evidence would in principle be liable to be quashed in judicial review proceedings on Wednesbury grounds. But it does not follow from this that in every case the Department must make its evidence public as the price of the judicial review's being dismissed.

(ii) If a challenge to a refusal is brought, it will no doubt be necessary to go on affidavit to set out the grounds of the refusal (and this may - and preferably should - already have been done in the refusing letter). The grounds may be, for example, that the Secretary of State has reason to believe that an award of grant may promote or assist the aims and objects of an illegal organisation. If the Department can give the 'chapter and verse' which would lie behind such an assertion, so much the better; but if (as is no doubt the likelier position), it cannot, save with unacceptable consequences, do so, then in our Opinion it would be appropriate to state on affidavit the reason why it cannot: here again, the reason may be that national security would or might be imperilled. We would expect the Court to accept the assertion of such a reason without more. The reason might be that the information in question has come from a source which might not be available in the future if its identity were disclosed. Again, we would expect the Court to accept the assertion of such a fact, especially if it were supported by evidence (couched, necessarily, in most general terms) that the source in question had in the past been proved to be a reliable provider of important information. In either of these cases, we would expect the Court to proceed on the footing that the Crown had the grounds asserted, without requiring proof of them. In any other class of case it would presumably be possible to give the underlying evidence.

(iii) In the absence of any statutory appeal route, the only procedurally proper means of challenging a refusal would be by application

for judicial review. Evidence in such proceedings is normally given on affidavit. We should, however, refer to the fact that the Court has power to order cross-examination; and it would by wrong to exclude the possibility that such an order might be made. Nevertheless, such a course remains wholly exceptional in the English judicial review jurisdiction although orders have occasionally in recent years been made. Since the purpose of cross-examination could (presumably) only be to test the strength of the Department's case vis-a-vis the assertion, for instance, of a paramilitary connection, any application to cross-examine ought to fail if we are right in our view that the Court would accept a statement of the reasons for a refusal to disclose the evidence supporting such an assertion if they were grounded in national security or the public policy need to protect sources of sensitive information.

(iv) We should perhaps add a warning that the courts in Northern Ireland would appear to be somewhat readier to scrutinise documentary material for themselves in the context of public interest arguments.

(8) The Northern Ireland Constitution Act 1973, s.19

This provision proscribes discrimination "in the discharge of functions relating to Northern Ireland against any person or class of persons on the ground of religious belief or political opinion". Clearly a refusal of grant to a candidate on the grounds only that it had sympathy or connections with any political party - including, of course, Sinn Fein - would be unlawful. But this consideration in no way limits, as a matter of law, what we have said in paragraph (6)(ii): refund of grant will be justified on the strength of a reasonable belief that its payment will promote or assist the purposes of an unlawful organisation. That said, there may well be instances when it will be difficult (notwithstanding what we have said about evidence in paragraph (7) to make out

such a case in practice. Clearly, if all that is known about a particular candidate is that it has connection with Sinn Fein because (for example) some of its officers are members of that party, that will not be enough.

(9) Conclusion

Our answer to the general question posed in paragraph (1) is in the affirmative, as explained (in particular) in paragraph (6)(ii). It would seem wholly appropriate to refuse grant to Conway, and we are optimistic as to the prospects of success in resisting any consequent challenge to such a refusal.

JOHN G McK. LAWS
29.iv 1985

CONWAY

Add at the end of para. 6(ii) of the Opinion: -

But the entitlement to refuse is not, in our Opinion, anyway limited to cases where an unlawful organisation is involved (either as the candidate for grant or as a body with which the candidate has connections): the entitlement springs from the proposition that the Crown may lawfully decide whether to exercise or decline to exercise a discretionary power according to the policy of the Government, provided that it does not fetter its discretion and that the policy in question is not itself unlawful. Thus a refusal on the grounds that the candidate, not being itself an unlawful organisation, is engaged in unlawful activities or activities which are intrinsically contrary to the public interest (such as paramilitary activities) would in our view in principle be justified (although in the event of a legal challenge it might be more difficult in this class of case to persuade the Court of the necessary facts or of a reasonable belief in the necessary facts).

John G McK Laws

and for Anthony Campbell Q.C.

7.v.1985.

CONFIDENTIAL

ANNEX C

DRAFT QUESTION

To ask the Secretary of State for Northern Ireland whether he has in mind any new steps to ensure that Government financial support for community activities is not used to foster the aims and objectives of paramilitary interests.

DRAFT REPLY

Yes sir. It is the government's policy to encourage voluntary and community based activity which has the genuine aim of improving social, environmental or economic conditions in areas of need, and various grant-aid schemes exist for such purposes. However I am satisfied, from information available to me, that there are some cases in which particular community groups, or persons prominent in the direction or management of such a group, have sufficiently close links with paramilitary organisations as to give rise to a grave risk that to give support to that group would have the effect of improving the standing and furthering the aims of a paramilitary organisation, whether directly or indirectly. I do not consider that any such use of government funds would be in the public interest, and I will therefore be directing Departments that proposals for financial assistance from these groups should be rejected as contrary to the public interest.

CONFIDENTIAL

ANNEX D

DRAFT LETTER DED TO CONWAY WOMEN'S GROUP

I refer to the agreement [dated] which provides for grants of [ ] to be paid in respect of [ ] and which includes provision for termination at three months' notice on either side.

You may be aware that the Secretary of State has recently indicated in Parliament that he believes that in some instances there are connections between community groups and paramilitary organisations, and that in such circumstances he believes that it would not be in the public interest for grants to be paid. I enclose a copy of the Secretary of State's statement.

I am directed to inform you that the Secretary of State has decided that it is not in the public interest that grant should continue to be paid under the agreement of [ ] In accordance with [Clause] of the agreement the Department therefore gives notice that the agreement is hereby terminated with effect from [ ].

/JH