

From: Tom Watsor  
Constitution  
29 October

Circulation

~~Mr Millen~~  
~~Mr Rea~~  
Mrs Hetherington

cc Mr Jeffrey  
Mr Stephens  
Mr McCusker  
Mr Brooker  
Mr Maccabe  
Mr Osborne, HOLAB

as O'Boyle  
LD 2/11  
C. 2/11  
sm  
y 3/11

Mr Crawford

### ELECTION OF FM/DFM: PROCEDURAL OPTIONS

You and I, along with Mr Stephens, had a brief discussion on Wednesday concerning the various procedural options now in circulation with regard to the election of the FM/DFM and how each might impact on attempts to secure a successful outcome under the "parallel consent" mechanism.

2. Before moving into these it may be worth recalling that two further aspects still remain to be firmly nailed down before we reach the position that a fresh joint election is the only realistic way forward, short of some deal between Trimble and Mallon which presently looks improbable. I have given them brief coverage below.

#### Did Mallon resign?

3. We know that the First Minister does not share our view that the only way of resolving the present DFM vacancy, created by the resignation of Seamus Mallon, is to hold a fresh joint election. For clear political reasons he wants to avoid this, though he may also want to adopt this position to flush out what remains in our locker. Whatever the motive, David Lavery's advice to Trimble is that Mallon's resignation was

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never accepted by the Presiding Officer or the Assembly and is therefore invalid, or that if it is valid, some sort of procedure should be found for the Assembly to accept a withdrawal and confirm Trimble and Mallon in office.

4. Either option relies heavily on Mallon agreeing to play along. Ultimately it will come down to Mallon being persuaded that, politically, this is the best course to avoid a fresh election. All the signals from Mallon suggest that he will maintain his view that he has resigned, and will want a further election. He has said publicly that a new election is required.

5. Our legal advice is at odds with Lavery's view. HOLAB (Richard Heaton) has advised that the lack of a formal procedure (ie the Assembly's acceptance of his resignation) is unlikely to render Mallon's resignation as invalid when it took place at a plenary meeting in front of a large media presence, and when the Secretary of State has acted on the resignation. Further, if pressed, Mallon could put his resignation in writing to the Presiding Officer now, making Lavery's argument even more difficult.

6. There is also the issue raised by Mr Stephens, on which HOLAB advice is awaited, as to whether, given actions taken by the previous Secretary of State, we could defend at judicial review a change in the Standing Orders which would allow the Assembly to confirm that the outcome of the original election remains in effect.

By-election for DFM

7. Secondly, Trimble may still hold to the view that if a withdrawal of resignation is out of the question, the next best option might be to hold a by-election for the post of DFM - leaving Trimble in place.

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8. Even if Mallon were to accept this, under some sort of procedure which could be established using revised Standing Orders, our legal advice is quite clear in that there is difficulty with paragraph 2 of Schedule 14 to the Northern Ireland Act. Post devolution this carries across "any election of the First Minister and Deputy First Minister held before the appointed day". It suggests that any election will be a joint election - as provided for in the Agreement. Put another way, a by election could take place in the shadow phase with the transitional provision set to one side. However this would not carry through after devolution and a fresh joint election would then be required. For the reasons already outlined in your submission of 22 October, this would be best avoided.

#### Procedural Options

9. In terms of a joint election under the "parallel consent" procedure there are four other procedural options worth highlighting in looking towards securing a successful outcome.

#### Option 1: Do nothing. Leave Standing Orders as they are.

10. Under this option the Standing Orders would remain as presently determined with the emphasis switching to Trimble and Mallon agreeing some sort of deal. Once this was out in the open there may be scope for persuading Unionists like Peter Weir and other waverers, or some anti-Agreement Members, not to vote against the joint candidature when the election was held.

11. There is no over interference by the Secretary of State in this so there is no risk of any legal challenges. Neither are there issues concerning the present and future status of the Standing Orders or

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change of designation - unless the deal which is brokered impacts on one or all of these aspects.

12. An option worth pursuing.

Option 2: Amending Standing Orders to change basis of parallel consent

13. This is an Alliance proposal. It avoids changing designation - which suits them. Alliance argue that an election could be approved by a majority of unionist and other members present and voting and by a majority of nationalists and other members present and voting. This would permit "others" to be treated as counting votes on one side or the other. Facilitating this would require a change to the Initial Standing Orders (most likely SO 12).

14. The problems are obvious. The Agreement in paragraph 15 is quite clear on what basis the FM/DFM election will take place. The legal advice is that if we were to amend interim Standing Orders under the NI (Elections) Act 1998 (the underlying basis of which is to give effect to the GFA) to depart from the Agreement, this would run a real risk of a successful challenge in a judicial review. Furthermore it leaves a question mark over the status of the FM/DFM following an election which had been conducted in a different manner in the shadow period to that proposed under Section 16(3) of the NI Act.

15. On this assessment, the option carries too many risks.

Option 3: Counting votes on Nationalist/Unionist without changing designation

16. One of our proposals. It envisages treating "Others" as either Unionist or Nationalist votes for the FM/DFM election only, without

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members changing designation but having given notice to the Presiding Officer that they would wish him to do this. The effect would be to allow "Other" votes to count in the FM/DFM election whereas otherwise they would not. A member currently designated as "other" would retain their designation. In practice such a proposal would mean amending Standing Order 14.

17. The legal advice is that changing Standing Orders to enable "Other" to be counted for the purposes of one election without changing designation is considered vulnerable to challenge and could render the position of those elected vulnerable post devolution.

18. On this assessment, the option carries too many risks.

Option 4: Changing designation at short notice and changing back

19. Another one from our side. This option would permit a facility whereby members could, at short notice, change their designation of identity for a period and then change it back before devolution bites. It would require an amendment to initial Standing Order 3(3) and while on the face of it, such a facility seems bizarre, the legal advice is that it is less likely to run the risk of a successful legal challenge. A challenge against the Secretary of State would also be difficult to mount given the very wide power to make Standing Orders under the NI (Elections) Act. In this scenario the Secretary of State might point to a revision of SO 3 (3) as offering this facility following discussions with the parties. The final decision to change designation would rest with the parties.

20. The one problem which may stymie this option is the effect the Assembly's main Standing Orders might have on any fresh redesignations prior to devolution. Standing Order 3(8) permits a change of designation once in the lifetime of the Assembly and only after 30 days written

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notice is given to the Presiding Officer. When the main Standing Orders are determined by the Secretary of State, then those members who had changed their designation, under our revised interim standing orders, may be unable to change it again.

21. Your minute to Mr Osborne of today's date explores a possible way around this. We know that the Assembly itself, (or Standing Order Committee), would not want to make any amendment to this provision. The whole issue of change of designation was extremely contentious during the Committee's development of the Assembly's Standing Orders. Re-opening the subject would meet with strong resistance and would probably lead to the amendment being removed at the first opportunity.

22. Although it may not in the end be attractive to the Alliance or NIWC, particularly if they realise the possible effect of Assembly Standing Order 3 (8), the facility is worth providing and carries little risk so long as legal advice (awaited) does not rule against.

Conclusion

23. We await legal advice on option [4], but if it were regarded as a runner, or the legal view were that the Assembly's Standing Orders could only take effect from the date they were determined by the Secretary of State, Option 1 (do nothing) or Option 4 (providing a facility for members to change designation at short notice and change back) may be the best available.

**Tom Watson**

T Watson  
Constitutional & Political Division  
Castle Buildings Ext 22944

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