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**Head of the Civil Service**  
Head of the Office of the First Minister & Deputy First Minister  
Secretary to the Executive

3446/01

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**From: Gerry Loughran**  
**25 October 2001**

**cc: For distribution list see below.**

**To: Sir Reg Empey**  
**Mr Mallon**

Pat Donaghy

✓  
30/10

### **EXERCISE OF FIRST MINISTERIAL FUNCTIONS**

1. There has been consideration of the issue of whether, on the re-appointment of Sir Reg as Minister of Enterprise, Trade and Investment, he may exercise the functions of the office of First Minister pending the election to fill the First Ministerial vacancies under the terms of the designation made by Mr Trimble under section 16(5) of the Northern Ireland Act 1998.
2. The Department's legal advice is that the re-appointment of Sir Reg as a Minister restores to him the capacity to exercise the functions of the office of First Minister. The Attorney General's opinion was also obtained through Home Office lawyers, and you will see from the attached advice that the Attorney, while accepting that the contrary proposition is arguable, considers that the better view is that the original designation remains effective, notwithstanding the resignation of Sir Reg as a Minister. On returning to office as a Minister, Sir Reg resumes the capacity to exercise the functions of the office of the First Minister.
3. Given that the combination of circumstances which have lead to this conclusion are not expressly provided for in the Act, there clearly can be no absolute certainty in the matter. This interpretation is, however, consistent with and serves the purpose of the Act; its application would enable the administration

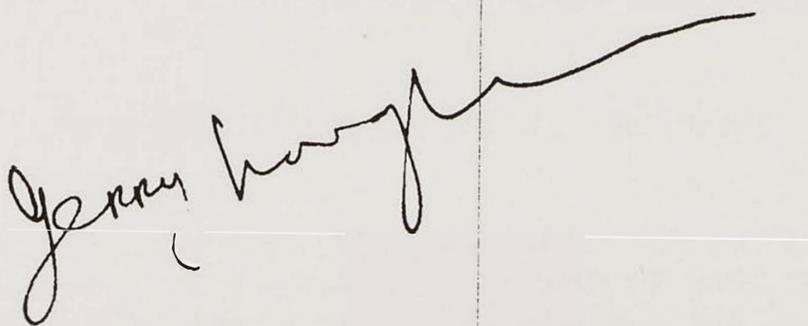
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and the institutions of devolution to operate fully and effectively. The contrary interpretation (that the powers conferred by the designation terminated permanently on the resignation of Sir Reg as a Minister) would not promote the purposes of the Act.

4. Accordingly, I am satisfied that Sir Reg, on reappointment as a Minister, can lawfully and properly exercise the powers conferred by Mr Trimble's designation.
5. We intend also to advise the Speaker of the Attorney's opinion, when we are authorised by him to do so.



**GERRY LOUGHRAN**

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Summary: The Attorney considers that, whilst the majority is correct, the better view is that where a First Minister designates a Minister under section 14(1) then section 14(2) applies. The Minister is designated under section 14(1) and that Minister is then appointed under section 14(2) in original designation of that Minister under section 14(1) unless otherwise provided that it is not otherwise.

1. Thank you for your letter of 10/10/08. That night the Attorney General's advice on the interpretation of section 14(1) of the Northern Ireland Act 1998. I am writing to convey the Attorney's view.
2. The Deputies are not to be your letter and I will not report that here.
3. You ask where a First Minister designates a Minister under section 14(1) then appoints under section 14(2); the Minister is designated under section 14(1) and that Minister is then appointed under section 14(2) in original designation of that Minister under section 14(1) unless otherwise provided that it is not otherwise.
4. The Attorney notes that the Act provides no express answer, in the circumstances that the Act does not provide an express answer, he considers it arguable that at least one person cannot be a Minister.

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**SECTION 16(5) OF THE NORTHERN IRELAND ACT 1998**

**Summary:** the Attorney considers that, whilst the contrary is arguable, the better view is that where: a First Minister designates a Minister under section 16(5); then resigns under section 16(6)(a); the Minister is dismissed under section 18(9)(c); and that Minister is then nominated once more under section 18(10); the original designation of that Minister under section 16(5) remains effective, unless the designation itself expressly or by necessary implication provides that it is not effective.

1. Thank you for your fax of Tuesday evening. You sought the Attorney General's advice on the interpretation of section 16(5) of the Northern Ireland Act 1998. I am writing to convey the Attorney's advice.
2. The facts are set out in your letter and I will not repeat them here.
3. You ask where: a First Minister designates a Minister under section 16(5); then resigns under section 16(6)(a); the Minister is dismissed under section 18(9)(c); and that Minister is then nominated once more under section 18(10); does that Minister's earlier designation under section 16(5) remain effective?
4. The Attorney notes that the Act provides no express answer. In the circumstance that the Act does not provide an express answer, he considers it arguable that as soon as a person ceases to be a Minister,



he is no longer capable of being designated under section 16(5) (because he is not a "Northern Ireland Minister"), and that any existing designation ceases instantly to have effect. There is nothing in the Act to revive any designation which has ceased to have effect, and any designation therefore remains invalid, even in the circumstances described in paragraph 3 above.

5. The Attorney considers the better view, however, to be that a designation may remain effective in the circumstances described in paragraph 3.
6. The starting point is that the express words of the section, given their literal meaning, cover that situation: there is a designation, and at the time of the proposed exercise of functions the designated person satisfies the requirement of being a Northern Ireland Minister. The question which then arises is why the designation should not be effective? Arguments which might be advanced for a designation not being effective in these circumstances are considered below.
7. A first argument relates to the words "a Northern Ireland Minister" in section 16(5): do they exclude someone who is not at some point in time a Northern Ireland Minister? They clearly require a person to be a Northern Ireland Minister at the time he exercises functions under that section. What is unclear is whether they also require that person to be a Northern Ireland Minister at the moment of designation. The Attorney considers the better view to be that they do not, for two reasons. First, it is not necessary so to require in order to give the words "a Northern Ireland Minister" a meaning. Secondly, the apparent purpose of the provision is to allow a delegation of the First Minister's functions, but to ensure that the delegation is to someone who has an appropriate capacity to carry out those functions. Whilst that purpose requires that a person should not exercise functions whilst not a Minister, it is irrelevant to that purpose whether a person is a Minister when designated. It follows that a First Minister could, anticipating his own temporary incapacity (e.g. for medical treatment), designate someone whom he confidently expects to become a Minister before that incapacity arises.
8. A second argument relates to whether a designation would not be effective on the grounds that it was not for a single continuous period. It seems clear that a designation would be valid which was expressly intended to span a series of periods during which the First Minister would be absent or incapacitated: there is nothing in section 16(5) to



prevent this, and it is easy to envisage cases where it would be appropriate.

9. The third argument would be that a designation comes to an end when the person designated ceases to be a Minister. Of course the person could not exercise functions whilst not a Minister, but that does not answer the question of whether he could do so if he became a Minister once again. The statute does not expressly provide that a designation ceases to have effect in these circumstances, nor is there any necessary implication that it shows no absurdity arises if the designation subsists waiting for reactivation, and the apparent purpose of the provision (to ensure delegation only to a Minister) is achieved by preventing a person *exercising* functions whilst not a Minister. For these reasons the Attorney considers the better view to be that a designation does not cease to have effect when the person designated ceases to be a Minister.
10. It follows that the Attorney's view is that the Act does not rule out a designation reviving after a period when the person designated does not, for whatever reason, exercise the power. However, the terms of the individual designation remain important. The Attorney notes that whether a particular designation survives the person designated ceasing to be a Minister depends on the interpretation of the designation itself. A designation could make clear, expressly or by necessary implication, that it did not survive. The Attorney considers that a designation which stated merely that "X is designated under section 16(5)" would survive.

*Yours,  
Jonathan*

Jonathan Robinson