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PS/SECRETARY OF STATE (B&L) -E

FAILSAFE BILL

Summary

1. *Decisions required:* on the note attached (A) setting out key elements of the Bill to give effect to the 'failsafe' clause, which would be used as a basis for consultation with the parties

also on the attached note of 'clarifications' (B) for Mr Trimble sought by No 10.
2. *Timescale: immediate.*
3. *Recommendation:* agree main note in first instance as a basis for discussion with the Irish, then to No 10 later this afternoon;

agree clarification note (subject to implications of any Irish comments on main note), to go to No 10.

Outline of the Bill

4. The note attached (A) sets out the way we envisage that a Bill would give effect to the 'failsafe' clause in the Prime Ministers' announcement of Friday. Parliamentary counsel, whom we met on Sunday, is drafting on the basis of it.
5. Subject to Ministers' views, and discussion with the Irish, the note could be used as a basis of discussion with the parties.
6. For reference, the clause reads:

5. A "failsafe" clause: the Governments undertake that, in accordance with the review provisions of the Agreement, if commitments under the Agreement are not met, either in relation to decommissioning or to devolution, they will automatically, and with immediate effect, suspend the operation of the institutions set up by the Agreement.

In relation to decommissioning, this action will be taken on receipt of a report at any time that the commitments now being entered into or steps which are subsequently laid down by the Commission, are not

fulfilled, in accordance with the Good Friday Agreement. The British Government will legislate to this effect.

7. The key features of the scheme we propose:

A. the Secretary of State would be **bound** to act:

- i) if she received a report from the **Decommissioning Commission** that a **party or organisation** had **failed to honour commitments** in respect of decommissioning, or **steps laid down by the Commission** in respect of it; or
- ii) if she had **any other reason** to believe an **Assembly party** had **not honoured commitments** in respect of **decommissioning or devolution**.

Issues. This formulation covers failure to observe decommissioning steps by **any party or organisation**, whether or not in, or associated with a party in, the Assembly. But (see below) the Assembly can resolve not to suspend, if for example a group outside the political process is in default.

We have not mentioned consulting the **Irish**, which might rile the UUP, but of course we would do so before reaching any decision.

B. The Secretary of State would first **notify the Assembly of her intention to make a suspension order**. It would then have x days in which it might resolve by cross-community support that **suspension was not appropriate** – which might follow action to **exclude** a relevant party from holding ministerial office [we are considering x – five days might be appropriate].

Issues. This should be **welcome to unionists**: the Assembly will have a chance to act so as to remove the justification for suspension. This is not in the proposals, which say that suspension should be ‘automatic’ and ‘with immediate effect’. But we could justify it as being faithful to the Agreement, which envisages exclusion as the remedy in cases like this.

In the case of **loyalists**, exclusion would have no *practical* effect (unless the PUP got a junior minister post). But the Northern Ireland Act allows parties to be excluded from *holding office in the future*, so there would be a theoretical sanction. The only way of going further would be to exclude defaulters from the **Assembly**, but that has never featured in the Agreement or Northern Ireland Act.

C. Failing action, she would **make the suspension Order** (subject to negative resolution: Parliament may not be sitting, and suspension is supposed to be ‘automatic’, so affirmative resolution seems excessive).

- D. Under the order, the aim is the **status quo ante**: Ministers will **cease to hold office**, and the Secretary of State will control the executive; the **Assembly will not meet**, and there will be **power to legislate by Order in Council** (and we will take control of **Assembly salaries**); the **NSMC, BIC and BIIGC** will not meet; the **implementation bodies** would be to some degree suspended, though functions inherited from other bodies might go on under the Secretary of State's control; there would be a **review**.

Issues. The absence of a link with **prisoner releases** will be denounced.

There are great practical difficulties with suspending **implementation bodies**. We are working on what is possible. The Irish will no doubt have views (and on suspension of the BIIGC, without restoration of the Anglo-Irish Agreement).

The **Human Rights Commission** and **Equality Commission** would not be suspended: Unionists might argue they were included by the terms of the proposals, but they discharge important statutory functions. Neither will the **constitutional changes** be reversed (including the nationalist concession on consent, which may be a response to UUP criticism).

- E. The Secretary of State could **bring back the devolved institutions**, by affirmative resolution order, following a successful review. If there were any exclusions, d'Hondt would be re-run. Otherwise Ministers (including the FM and DFM) would take their old places automatically.

Next steps

8. Further advice follows. There will need to be consultation with the parties. The attached note of 'clarifications' (B) for Mr Trimble has been requested by No 10. But it is obviously subject to the Irish comments on our other note.
9. Counsel will draft the Bill as soon as possible – we should have the key clauses tomorrow, if not today. But there is a good deal of intricate detail to it, and if it went wrong, the consequences could be very serious for the process. So it is worth taking time to check. We are aiming for parliamentary passage next week, in advance of the appointed day order.

A J Whysall

cc PS/Mr Murphy (B&L) -e
PS/Lord Dubs (B&L)
PS/PUS (B&L) -e
PS/Mr Semple -e
Mr Gray -e
Mr Jeffrey -e
Mr Watkins -e
Mr Bell -e
Mrs Evans, HOLAB -e
Mr Kelly -e
Mr McCusker -e
Mr Stephens -e
Mr Brooker -e
Mr Crawford -e
Mr Heaton, HOLAB
Mr Maccabe -e
Mr Keown -e
Mr Margetts
Mr Barbour -e
Mr Sawers, No 10
Ms Milligan, DAD, FCO
Mr Saunders, PCO

THE WAY FORWARD:

OUTLINE OF A BILL TO PROVIDE A FAILSAFE MECHANISM

1. This note summarises in non-legal terms the approach followed in the Bill now being drafted to provide the 'failsafe clause' outlined in the proposals of the Prime Minister and Taoiseach of 2 July 1999.

Criteria for suspension

2. The Secretary of State would be under a duty to act if:
 - A. the Decommissioning Commission produced a report that indicated that a party or organisation had failed to honour commitments in respect of decommissioning or fulfil steps laid down by the Commission bearing on that party or organisation; or
 - B. she had any other reason to believe that a party in the Assembly had not met its commitments in respect of devolution or decommissioning.
3. In those cases she would notify the Assembly of her intention to make a suspension order.
4. Unless within x days of receiving the notification, the Assembly passed with cross-community support a resolution to the effect that suspension was not appropriate (which might follow a resolution to exclude a relevant party from holding ministerial office, currently or in the future, under section 30 of the Northern Ireland Act 1998), the Secretary of State would make the order, which would be subject to negative resolution in Parliament.
5. At the same time, she would take steps to establish a review.

Effect of suspension

6. Under the suspension order:

- A. **Ministers** in the devolved administration would cease for the time being to hold their posts, and the Northern Ireland administration would come under the control of the Secretary of State, as under direct rule;
- B. the **Assembly**, its committees, etc, would not meet, and there would be powers of legislation by Order in Council, also as under direct rule;
- C. the **NSMC, BIC and BIIGC** would be suspended (the Bill would itself suspend powers for Northern Ireland representation in these institutions; an international agreement would be needed to complete the suspension process);
- D. subject to considerations of practicality, the operation of the **implementation bodies** might be suspended (essential pre-existing statutory functions passing in Northern Ireland under the aegis of the Secretary of State).

Power to end suspension and restore devolved government

- 7. The Secretary of State would have a power following a successful review to resume devolution by Order subject to affirmative resolution in Parliament (unless during recess, when it would be subject to later approval). The Assembly would meet again, the legislative powers by Order in Council would fall away, and Northern Ireland Ministers would take over executive functions (subject to any exclusion resolution, which would be followed by a running of d'Hondt); the NSMC, BIC and BIIGC could meet again, and the implementation bodies would function normally.

CLARIFICATION OF THE FAILSAFE PROPOSALS FOR DEPLOYMENT WITH MR TRIMBLE

The 'trigger' for suspension: automatic action on an adverse finding by the Decommissioning Commission

Any adverse report by the Decommissioning Commission about a party or organisation will trigger action: the Secretary of State will be under a duty to act.

We cannot confine this only to parties in the Executive: it must be seen to cover loyalist failures too.

We have to cover, under the terms of the proposals, other failures to honour commitments in respect of decommissioning or devolution – a reference we had to include in the interests of balance. Those on devolution are likely to relate chiefly to failures in the pledge of office. We will spell out in more detail the (limited) nature of the circumstances in which we see it coming into play.

The Assembly gets a chance to act

The Bill will give the Assembly a brief interval to act, by excluding the parties in default. If that happens, or if it thinks the breach does not justify suspension, it can pass a resolution by cross-community support to prevent suspension. That is the first-line sanction, and is obviously preferable.

Suspension: the status quo ante

Suspension will as far as we possibly can restore the position now: ministers cease to hold office for the time being, the Assembly does not meet, the North-South and East-West institutions are effectively suspended, and we would revert to direct rule powers, as now. There would be a review.

Resumption

There would be powers to resume devolved government after a successful review. If there were an exclusion, d'Hondt would be re-run, but we envisage no re-election of the First Minister and Deputy First Minister. Subject to that, Ministers would take up their posts, the institutions would resume, and the direct rule powers would fall away.