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DEPARTMENT OF JUSTICE

76 St. Stephen's Green
Dublin 2



AN ROINN DLÍ AGUS CIRT

72-76 Faiche Stabhna
Baile Átha Cliath 2

Telephone : (01) 602 8202 GTN : 7115-0

Fax : (01) 661 5461

Teileafón : (01) 602 8202 GTN : 7115-0

Facsuimhir : (01) 661 5461

Reference / Tagairt :

Mr Paddy Teahon
Secretary
Department of the Taoiseach
Government Buildings
Upper Merrion Street
Dublin 2

Dear Paddy

*Secretary -
There have been handed to me. Two
copies taken - one for self and
the other for the Section file*

I enclose a Background Note for Information on the Irish Draft Decommissioning Bill, as settled by this Department and the Office of the Attorney General.

hvk

13.9.96.

I also enclose

- the Draft Bill
- the latest version of the corresponding Draft British Bill and
- a Draft Joint Paper which it is anticipated will accompany publication of the Bills within the Talks framework.

Yours sincerely

Tim Dalton
Secretary

13 September 1996

DRAFT DECOMMISSIONING BILL 1996

Background Note for Information

Introduction

1. The Draft Decommissioning Bill, as settled by the Department of Justice and the Attorney General's Office, is attached (Annex 1). A copy of the latest, and it is understood final, version of the corresponding Draft British Bill (Annex 2) and a Draft Joint Paper which it is anticipated would accompany publication of the Bill within the Talks framework (Annex 3) is also attached. The terms of the Draft Joint Paper are largely agreed but the document as a whole has yet to be finalised with the British side.

Background

2. The Government agreed on 12 March that the Minister for Justice should, on a contingency basis, start preparing legislation to deal with a possible amnesty [for paramilitary arms]. Following a presentation on the more significant provisions of the Draft Bill by the Minister for Justice on 11 September, the Government informally decided that the Irish Government delegation to the Northern Ireland Talks could show the draft legislation to the unionist side if this was deemed necessary. The Government also adverted to the possible need to brief the main Opposition parties in the Dail on the contents of the proposed legislation.
3. Work on the draft legislation has been underway in the Department of Justice since March in close consultation with the Attorney General's Office. Intensive consultations have also taken place with the Northern Ireland Office, who will have responsibility for the parallel legislation in Northern Ireland, within the framework of the Dalton-Chilcot Group.
4. The proposed legislation in both jurisdictions reflects these discussions and will permit a co-ordinated approach and the implementation of complementary arrangements. The

draft Bills differ in their approaches in some respects (see paragraphs 9-12 below) but the intention, which is to give effect to all relevant aspects of the International Body's report, is the same. Both Bills are also intended to be consistent with the terms of that report.

Main Features of Draft Bill

5. The approach adopted in the Draft Bill is intended to be consistent with the approach which the Government has adopted on the issue of decommissioning since publication of the International Body's report and equally with the thrust of that report itself, which leaves open for discussion and agreement, in the course of all-party negotiations, issues relating to the modalities of decommissioning.

6. The key provisions in the Draft Bill provide for
 - * the Minister for Justice to make regulations in relation to the means by which arms may be decommissioned in this jurisdiction (section 2);

 - * the establishment of an independent Commission by agreement between the two Governments whose functions and role in relation to decommissioning will be specified in regulations (sections 3 and 4);

 - * an amnesty to the extent of a prohibition on the taking of proceedings in relation to an offence where the act constituting the offence, or an act that is an ingredient of the offence, was a part of the process of decommissioning (section 5);

 - * a prohibition on the forensic examination or testing of arms made available for decommissioning except in limited and specified circumstances and provision that such arms, or information obtained in the course of decommissioning, will not be admissible by or on behalf of the State in proceedings for an offence (section 6).

Outline of main provisions

7. The Draft Bill contains nine sections. The most important provisions are:

Section 2 - regulations in relation to decommissioning

This section contains the key regulation making power under which the Minister for Justice is being empowered to make provision for the decommissioning of arms in this jurisdiction. That power, by virtue of subsection 2(b), includes provision for each of the four methods of decommissioning identified in the International Body's report, viz.

- * the transfer of arms to the Commission or to the designated representatives of either Government, for subsequent destruction;
- * the provision of information to the Commission or to designated representatives of either Government, leading to the discovery and destruction of arms;
- * the depositing of arms for collection and subsequent destruction by the Commission or representatives of either Government;
- * the destruction of arms by those in possession of them.

No option is therefore being excluded at this point, and the regulation making power is drafted with a view to giving effect to any combination of these methods of decommissioning or other methods identified by the parties to the Talks - or a variation of them - that may be agreed.

Sections 3 and 4 - The Commission and regulations in relation to the Commission

Section 3 makes provision for a Commission which it is intended will be established by agreement between the Irish and British Governments. The section provides that the Commission will be independent in the exercise of its functions and shall have the legal capacity of a body corporate. Provision is also made for the Minister to confer privileges and immunities in relation to the Commission by way of order. It will also enable the Commission to be dissolved in due course. Section 4 enables regulations to be made by

the Minister regarding the Commission which may include the functions of the Commission and its role generally in relation to decommissioning as well as such matters as membership, terms and conditions, financing etc.

Section 5 - Prohibition on certain proceedings

This section provides for an amnesty in relation to decommissioned arms to the extent that it prohibits the taking of proceedings in respect of an offence in relation to any particular arms where the act constituting the offence, or an act that is an ingredient of the offence, was a part of the process of decommissioning and was done in pursuance of regulations or arrangements governing the decommissioning process. Provision is also made, if required, for the Minister to specify by regulation offences to which the section applies either generally or by reference to particular methods of decommissioning. Finally the section makes clear that the amnesty does not apply to proceedings for an offence alleged to have been committed after decommissioning by use of decommissioned arms.

Section 6 - Prohibition of certain testing etc. and certain evidence

This section prohibits the forensic examination or testing of arms or related materials made available for decommissioning subject to certain limited exceptions designed to enable the safe handling of decommissioned arms and the authorities to act in the event of decommissioned arms being subsequently misappropriated or misused. It also provides that arms, information obtained in the course, or as a result of decommissioning, and evidence of anything done for the purposes of decommissioning will not be admissible by or on behalf of the State in criminal proceedings. These prohibitions do not consequently exclude the possibility of the use of such evidence by a defendant in criminal proceedings or by an individual in civil proceedings or a private prosecution.

8. It should also be noted that the Draft Bill does not seek to distinguish between paramilitary arms and other arms held illegally on grounds of practicality. It may, however, be possible to distinguish between these in the detailed arrangements which will be made under section 2 of the Bill.

Differences as between Draft Bill and Draft British Bill

9. Differences in the approaches adopted in the Irish and British Bills reflect both different legal requirements in each jurisdiction and policy considerations. Under our law, primary legislation has to contain the policy and principles which are to apply in any subsequent delegated legislation, so as to ensure that there is no excessive delegation of legislative power in contravention of constitutional requirements. Our Bill has been drafted with this requirement in mind. Greater flexibility exists under UK law in this regard and consequently our Bill makes more detailed provision on such matters as regulations in regard to decommissioning and on the proposed Commission.
10. There are also a number of differences that reflect policy considerations and, in the UK case, appear directed in part to parliamentary handling considerations. These include:
- * provision for the "amnesty period" specified in any scheme for decommissioning to end before the first anniversary of the passing of the Act with the possibility for annual extension up to a maximum of five years subject to prior approval by each House of Parliament (clause 2);

Comment: - The British side initially favoured a two-year life (?) for the Act and the present provision represents an advance on that position. Enactment of legislation in both jurisdictions within a specified time-frame in accordance with UUP demands might now, however, involve a danger of creating unrealistic expectations in relation to a likely start to actual decommissioning. Our Draft Bill contains no similar provision and maintains maximum flexibility as to when decommissioning may begin and end.

- * the manner in which the amnesty is defined by reference to a schedule of offences rather than a more general provision on the lines of our Bill (clause 4 and Schedule);

Comment:- This would seem to be intended in part to assuage unionist and conservative backbench opinion but a difficulty with the approach - implicitly acknowledged in the British Bill by the inclusion of a reserve power to add to their schedule - is the

uncertainty that all relevant offences are included at least until such time as the precise modalities of decommissioning have been agreed and worked through. The approach adopted in our Bill consequently represents a more flexible option.

* the manner in which the prohibition on testing is dealt with (clause 6);

Comment:- The British Bill avoids a blanket prohibition on forensic examination or testing relying instead on a prohibition or test for specified purposes. While we have no reason to doubt the comprehensiveness of that prohibition, our approach is more in keeping with the language used in the International Body's report - which is considered to be sufficiently as to meaning - and preferable in circumstances where the forensic science is constantly evolving.

11. There are other differences as between both Bills which reflect different drafting practices and approaches in both jurisdictions but which do not go to substance to any great extent.
12. Attention is also drawn to the fact that the British Draft Bill will have application only to Northern Ireland and will not accordingly apply to Britain although the intention is that the safeguard against prosecution will have UK wide application. This is a possible area of controversy in that there will be no incentive to decommission weapons held in Britain and would appear to run contrary to the policy of encouraging total disarmament of all paramilitary groups. The British side insist that a practical solution to any such problems would be possible.

Draft Bill and Talks Process

13. The Draft Bills have been finalised at this stage because it is believed that deployment of them at an appropriate moment could facilitate progress in the Talks process. The Irish side has taken the view that this would be best done and most appropriate following the establishment of the proposed subcommittee to deal with the decommissioning issue in parallel with the substantive negotiations. The intention would be to publish the Bills in draft form as an aid to the work of the sub-committee and to facilitate its consideration of

other outstanding issues, e.g. the modalities to be employed, role and function of the independent Commission in the decommissioning process etc. Publication in draft form, as opposed to publication and introduction to the Oireachtas and House of Commons in the ordinary way, will also enable consideration to be given to any views of the sub-committee in advance of finalisation and introduction in Parliament by both Governments. It will, of course, be important in that context to avoid any suggestion that the Bills are open to negotiation or subject to veto by the parties. Another important consideration has been the potential impact of the course followed on efforts to secure a restoration of the PIRA cessation. Publication in draft as opposed to final form is seen as preferable in this context as well.

14. There have been recent indications that making the Bill available to the Ulster Unionist Party at this stage would facilitate agreement on the remaining agenda for the Opening Plenary and an early move to substantive negotiations. Discussions to this end are continuing.

Department of Justice

13 September, 1996.