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23 June 1997 **No of pages including this one: 2**

To: ~~HQ~~ **From: Belfast**
For: **C O ~~Floinn~~** **From: K Dowling**

Subj: Proposal to amend QC's Declaration

Further to the Joint Secretary's SF 589 of 17 June, the British side have provided us with the following response (drafted by Murray Power) to our request for information on the procedure for the appointment of Queen's Counsel:

1. The appointment of Queen's Counsel is a Crown function, carried out extra-statutorily under the Royal Prerogative.

2. In Northern Ireland the functions of the Crown are carried out by the Secretary of State, who inherited them from the former office of Governor of Northern Ireland when the latter was abolished in 1973. (In England and Wales they are carried out by the Queen, advised by the Lord Chancellor).

3. In appointing Queen's Counsel, and in relation to the associated procedures, the Secretary of State is advised by the Lord Chief Justice of Northern Ireland through the Clerk of the Crown.

4. Prior to October 1995, newly-appointed Queen's Counsel were required to take an Oath of Allegiance in the following terms:

"I, [A.B.] do swear by Almighty God that I will be faithful and bear true allegiance to Her Majesty Queen Elizabeth the Second, her Heirs and Successors, according to law", and also to make the following Declaration:

"I, [A.B.] do declare that well and truly I will serve the Queen as one of Her Counsel learned in the Law and truly counsel the Queen in Her matters, when I shall be called upon to do so, and duly and truly minister the Queen's matters, and sue the Queen's process after the courts of the Law, and after my cunning, I will duly in convenient time speed such matters as I may lawfully do which any person shall have to do in the

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Law against the Queen. And in all other respects I will be attendant to the Queen's matters when I be called thereto".

The requirement to take the Oath of Allegiance had no parallel in England and Wales.

5. In October 1995, following a review of the legal basis of the procedures it was decided to remove the requirement to take the Oath of Allegiance, it having been found to be in conflict with restrictions on the use of the Oath contained in the Promissory Oaths Act 1861, and to shorten and simplify the form of the Declaration in line with changes made in England and Wales in the 1970s. The form of Declaration used since then is:

"I, [A.B.] do sincerely promise and declare that I will well and truly serve Her Majesty Queen Elizabeth the Second and all whom I may lawfully be called upon to serve in the office of one of Her Majesty's Counsel learned in the law according to the best of my skill and understanding".

6. In December 1996, the General Council of the Bar of Northern Ireland established a committee to consider all aspects of the present system of appointment. Views were sought from all members of the Bar and judiciary. The committee has now completed its work and produced a report recommending various changes to the current arrangements. One is the removal of the words "Her Majesty Queen Elizabeth the Second and" from the Declaration leaving it is a promise to serve all whom the QC may be lawfully be called upon to serve, without particular reference to the Crown.

7. The Report has been sent to the Lord Chief Justice. It would be for him to advise the Secretary of State on any changes that he considers desirable in the light of the arguments advanced therein. No such advice has yet been received.

We will keep you advised of developments.

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QC's Declaration

1. On 27 October 1995, a barrister, Mr. Philip Magee, won a case taken in the Belfast High Court to remove the requirement to take an Oath of Allegiance and the Northern Ireland form of a Declaration by those becoming Queen's Counsel at the Northern Bar (relevant texts attached). Mr. Magee had objected to the Oath (which was not a requirement in the rest of the UK) on the grounds that he "did not feel it to be consistent with my nationality, my nationalist political opinions or my disagreement with the formally anti-Catholic position which the British monarch must take on coronation". The respondent in the action was the Secretary of State for Northern Ireland, who signs the warrant of appointment of a Queen's Counsel.

Position of the Lord Chief Justice for Northern Ireland

2. In March 1996 however, the then Lord Chief Justice Sir Brian Hutton wrote to then Secretary of State for Northern Ireland asking him to include in any future warrants of appointment a requirement to take the English form of the Declaration (copy attached) in respect of a number of nominations to the Bar which were due to be made shortly thereafter.

3. The then LCJ contended that the appointment of Queen's Counsel is an exercise of the Royal Prerogative; that the position of QC is in the nature of an office under the Crown; that this implies a particular duty of service to the sovereign; and that it is thus an ancillary part of the exercise of the Royal Prerogative to require a Declaration to this effect.

Response by the British Side

4. In response, the Criminal Justice Division of the NIO advised the Secretary of State at the time that compliance with the LCJ's request would place him in a very difficult position and proposed that conscientious objectors to the wording in question might be given the option of making the Declaration in a different form. Instead, on foot of his own legal research, Secretary of State Mayhew formed an opinion which supported retaining the wording of the Declaration in its English form. Legal opinion from Crown Counsel was sought to support this argument and this did not elicit any fundamental objections from that quarter.

Irish position

5. On 30 May 1996, the matter was raised with the British authorities in a delegation meeting held in the Secretariat. It was conveyed that we hoped to see a fair and transparent QC appointment procedure which was compatible with the concept of parity of esteem. It was our view that rendering the English form of the Declaration a requirement in the warrant of appointment of a QC was incompatible with this concept and should be dispensed with, or at least made optional.

6. In early June 1996, it was reported via the Secretariat that the Secretary of State had replied to the LCJ's letter of March 1996. In his response, Secretary Mayhew expressed no difficulties with the proposition that the appointment of QCs is a Crown function under the Royal Prerogative and concluded that the making of a declaration of office is a firmly established part of the appointment procedure for QCs in both England & Wales and Northern Ireland. No reason was seen to exist to discontinue the practice in Northern Ireland or to depart from the form of words agreed in Autumn 1995 and which was communicated to the Chairman of the Bar Council by the Clerk of Crown by letter on 26

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October 1995. This was taken to imply that the requirement to make the English form of the Declaration would remain in place.

7. The Secretary of State also concluded that the requirement to make the declaration should not be specified in the warrant of appointment for two reasons; it is sufficiently well established as a matter of common law to be enforceable without being mentioned in their Letters Patent, and thus by implication, in the Secretary's warrant; and, since no change in the status of the Declaration was intended, it would not be appropriate, and might be regarded as provocative, to insert a reference to it in the warrant for the first time at that juncture.

8. It was further stated that in taking these decisions, Secretary Mayhew had been mindful of and shared the LCJ's concern's that nothing should be done which might be perceived as weakening the position of the Crown in the Northern Ireland legal system, either in the title "Queen's Counsel" or in the broader context of the Queen's Courts. These conclusions were subsequently welcomed by the then LCJ.

9. In June 1996, Mr. Magee reported to this Division that the successful applicants for silk would soon to be notified of their appointment as QCS by the LCJ (in the event, the appointments were announced on 5 September 1996). None of those who had signed supporting affidavits in his 1995 challenge to the QC's Oath and (NI form) Declaration were among the fourteen and among those excluded were Alban Maginess and Martin Rogers, both of whom had made clear in advance that they would not make the English form of the Declaration. For reasons perhaps internal to the Northern Ireland Bar (personal rivalries etc.), Mr. Magee stated that he did not intend to pursue the matter further by way of judicial review.

10. In a subsequent meeting between Mr. Ó Floinn and Mr. Eugene Grant, Chairman of the Northern Ireland Bar Council, the latter expressed disappointment at Philip Magee's tactics in the wake of his High Court success in October 1995. It was felt that by seeking to pressurise Mr. Grant and the Bar Council on the issue, Mr. Magee had effectively allowed the LCJ "off the hook". Mr. Grant also gave notice that a working group had been established within the Bar Council, representative of both traditions, on the question of future QC appointments. It was to consider both the Declaration and the transparency in the appointment procedure and Mr. Grant hoped that its report could be used to move towards making the Declaration optional in due course.

Recommendation by the Bar Council

11. In the event, the report in question was submitted to the current Lord Chief Justice, Sir Robert Carswell, on 6 June. Welcomed publicly by both Philip Magee and Eugene Grant, it contained, inter alia, a recommendation that the requirement to take the English declaration should be dropped and replaced by a declaration which contains no direct reference to the English monarch (copy of text attached). The report is now under consideration by the LCJ and while he might be expected to take the traditional line in support of retaining the reference to the Queen in the relevant declaration, the Secretariat reports that it is considered unlikely that he will find it easy to demonstrate that the authority in this matter rests with him.

Security Section, Anglo-Irish Division, 18 June 1997

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