

An Chartlann Náisiúnta
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To: Wally Kirwan **Date:** 1 March 2000

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From: Rory Montgomery

Subject: Bodies

COMMENTS:

As promised, a copy of what I gave to Dermot Gallagher.

We are going to organise a meeting with Departments next week - Helena will convey details to Ann.

Rory

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North/South Implementation Bodies: Issues and Options

1. The continuing suspension of the Assembly and Executive inevitably raises questions about the future operation of the other institutions of the Agreement, in particular the Implementation Bodies.

2. If the current political difficulties were to be overcome quickly and the Northern institutions restored, there would obviously be no difficulty. However, we need to consider the possibility that the Executive will remain suspended for a lengthy period.

Legal Situation

3. The Bodies were formally established by the international agreement between the two Governments signed at Dublin on 8 March 1999. For as long as that agreement remains in force unamended, the bodies must continue to operate in accordance with it as best they can. Tim O'Connor has reported that this is the legal advice received by the NIO.

4. The Attorney-General has advised that, while we are barred from actively co-operating in suspension, we are nonetheless entitled to respond, both legislatively and through agreement with the British, to the practical issues created by the British action. His advice indicates that "orderly wind-down" would be one option.

5. As was envisaged in the Good Friday Agreement, the Bodies have a "clear operational remit". Each has practical functions which it can, and indeed is required to, carry out. However, the Bodies are accountable to the North/South Ministerial Council, which has a range of important responsibilities and powers in relation to them, including the appointment of Board members and permanent chief executives; the approval of corporate plans; and setting annual

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budgets.

6. The extent to which the NSMC would be involved in the operation of the Bodies over the coming months varies: while some of the Bodies' day-to-day activities are already clearly defined, the future development of the Trade and Business Body, for example, is heavily dependent on the NSMC's decisions on studies which are to be brought before it by the Body.

7. Formally, the NSMC remains in operation: in practice, it cannot function in the absence of a Northern side. This would over time have increasing implications for the functioning of the Bodies, which are accordingly already to some degree in limbo.

Previous Discussions on Suspension

8. During the negotiations last March on the Implementation Bodies Agreement, the UUP sought an explicit "sunset clause" committing the Governments to wind up the Bodies should the other institutions fall. Under pressure from Sinn Féin, we resisted this and instead agreed to insert in the preamble a quotation from the Good Friday Agreement's Declaration of Support, including the words "It is understood that all of the institutional and constitutional arrangements .....are interlocking and interdependent".

9. Following the publication on 2 July 1999 of the *Way Forward* proposals (which provided for "failsafe" measures in certain circumstances), agreement was reached at official level on the text of a draft agreement between the two Governments which essentially provided for (a) the immediate suspension of the NSMC and the BIC and (b) the assumption by the two Governments of the role of the NSMC in regard to the Bodies, with the Bodies to continue in operation during a period of up to four months during which arrangements

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were to be agreed for the (temporary) transfer of functions back to the parent administrations (save in the case of the Foyle, Carlingford and Irish Lights Commission, which, as the successor to a pre-existing organisation, would remain in being).

10. With the failure of the *Way Forward*, it was not necessary to finalise work on the draft agreement. However, during the Mitchell Review it formed the basis of a paper given to the UUP by the British, with our agreement, outlining what was understood by suspension. Part of the Mitchell package was the proposal that "If default occurs on either devolution or decommissioning the governments undertake to immediately cease the operation of the following institutions: the Assembly, the NSMC, the BIC, the Civic Forum and the implementation bodies." Default was not defined.

11. Just after the Mitchell Review, on 22 November, the Secretary of State said to the House of Commons that "if there is default, either in implementing decommissioning, or indeed for that matter devolution, it is understood that the two Governments, British and Irish, will take the steps necessary to cease immediately the operation of the institutions." On 23 November the Taoiseach said "If there is difficulty either in relation to devolution or decommissioning we are by definition in a very serious situation. In those circumstances, where the Agreement was in significant respects not being implemented, the Governments would have to step in and assume their responsibilities, including through appropriate suspension arrangements."

Issues

12. So far the British have not pursued the future of the Bodies with us. However, David Trimble has privately raised it with us. Robert McCartney has previously shown an interest in the matter and may be expected to exploit it if

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the situation is not clarified.

13. While the existence of "clear operational remits" may make it possible to allow the Bodies to proceed without any remedial action for some time to come, this is likely to become increasingly unsatisfactory in practical terms, given the effective non-functioning of the NSMC. The absence of clarity would also place their Boards and staffs in an invidious position, and could strain relationships between the parent Departments North and South.

14. The two broad medium-term options both involve the formal assignment to the two Governments, by a supplementary international agreement between them, of the powers and duties of the NSMC in respect of the Bodies. This would recognise the realities of the situation and bring the Bodies' legal structures into line. A short piece of legislation would be required in our jurisdiction.

15. However, the question then would be whether the Governments would (a) move on to make arrangements to suspend the Bodies, as originally envisaged or (b) keep them in being indefinitely.

16. Considerations relative to option (a) are:

- it would probably be the preferred option of the British Government, the co-operation of which would be required in any event if the Bodies were to be able to act meaningfully;

- it is undoubtedly what the UUP understood us to be committed to and a failure (as they would present it) to honour our commitment would make relations with them more difficult;

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- not suspending the Bodies might lead to the resignation of unionist board members and could cause difficulties for Northern staff;

- there are indications that loyalist paramilitaries are taking an interest in the issue, and we need to protect the safety of staff;

- the Agreement itself makes the Bodies subordinate to the NSMC, and makes clear that all the institutions are interdependent;

- the intrinsic value of the Bodies themselves, outside the context of North/South partnership, is fairly limited.

17. Factors in favour of option (b) - keeping the Bodies going - are:

- their suspension would be hotly opposed by nationalists and republicans;

- commitments given by us previously related to default: we do not accept that there has been default, nor that suspension is legitimate;

- in these circumstances, the maintenance of the Bodies is a not unreasonable counterweight (including to the irreversible amendment of Articles 2 and 3);

- unscrambling the Bodies and then reassembling them after suspension would be a laborious task;

- the everyday work of the Bodies is sufficiently removed from political considerations to justify its continuation in a low-key fashion.

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17. The judgement to be made between the two options is essentially a political one. It is unlikely that the British Government could be induced to agree to option (b) in its entirety. On the other hand, to set out now on a clear road to suspension would have very negative consequences on the nationalist side. A possible compromise might be for the Governments (i) to let matters sit for a short further period, eg two weeks (ii) then to enter into an agreement assuming the powers of the NSMC and (iii) to allow the Bodies to continue functioning but to keep matters under review, with a view to deciding in two or three months what longer-term course to adopt.

Waterways Body: Transfer of functions

17. A pressing specific issue is the forthcoming transfer of responsibility for all inland waterways to the Waterways Body on 1 April 2000. Close to three hundred staff would be involved. This is specified in the Implementation Bodies Agreement and in the consequent legislation in both jurisdictions, and must by law proceed unless a delay is agreed. The staff involved are understandably expressing concerns. Given the lead-in time involved, a decision should be made over the next two weeks.

Rory Montgomery
21 February 2000

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