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NH 93/11

Mr Saunders LOD*
Mr Hammond HO
Mr Innes B
Mr Simpson NI Court Service M*
Mr Spence B ✓
Mr J McConnell PAB B
Mrs R Brown DOENI M
Mr Kirk B

cc Mr Burns
Mr Elliott B
Mr Bell B
Mr Hewitt B
Mr Fergusson B
Mr Rickard B

Mr Hammond
Pl. Represent
Central Sec
M 6/11

* with copy of discussion paper
(Mr Simpson's copy of above by box)

CANDIDATES' DECLARATION

The discussion paper "Elected Representatives and the Democratic Process in Northern Ireland" was published on 12 October. Comments were invited by 30 November. Its main proposal was for a declaration to be taken by candidates in Northern Ireland elections abjuring support for proscribed organisations.

2. It seems likely that Ministers will wish to press ahead with legislation providing for a Candidates' Declaration to be in place in time for the May 1989 local elections. A place in the legislative programme will therefore be required for 1988-89 and a bid will have to be made for that place round about the turn of the year. We shall reduce our chances of that bid being successful if we have not previously obtained policy approval from H Committee. It follows that we will need to submit a paper to H early in December.

3. The timetable is thus extremely tight. It looks as if we shall need to have all but completed the drafting of the H paper before the consultative period ends. It would, I think, therefore be helpful to take stock of the current position at an early meeting and to resolve, so far as possible, the issues which would need to be covered in the H paper. In particular, we need to consider:

- i. the precise terms of the proposed declaration;
- ii. operational details such as the point at which the declaration should be made, the circumstances in which it should be made, the person to whom it should be made etc;
- iii. the method of enforcement of the declaration and in particular whether the criminal or the civil courts should be used;
- iv. extending existing disqualification provisions (see paragraph 10 of the discussion paper).

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4. We may not be able to reach final decisions before the end of the consultative period. But the tenor of comments is already clear and I am in no doubt that we should try to reach a provisional view and proceed on that basis to a draft H paper without waiting for the end of the month. We simply do not have time to take any other approach.

5. A paper will be circulated within the next few days setting out some options in respect of the issues itemised above. I hope that that will enable us all to focus our thinking and I should like to follow that rapidly with a meeting which I should be grateful if you could attend, or at which you could be represented. My secretary will be in touch with your office on Monday in the hope of arranging a meeting at the end of that week - Friday, 13 November looks at present to be the most suitable date.

(Signed DC)

D CHESTERTON
5 November 1987

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Mr Hamilton

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Mr Saunders LOD
Mr Hammond HO
Mr Innes - B
Mr Simpson NI Court Service - M
Mr Spence - B
Mr J McConnell PAB - B
Mrs R Brown DOE(NI) - M

cc Mr Burns - B
Mr Chesterton - B
Mr Elliott - B
Mr Bell - B
Mr Hewitt - B
Mr Kirk
Mr Rickard
Mr Fergusson

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SEC 105/11
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CANDIDATES' DECLARATION

1. Further to Mr Chesterton's minute of 5 November, I attach a copy of a paper which is intended to serve as a basis for discussion at the meeting on Friday.

2. It is probable that aspects of the declaration proposal will need to be reviewed following the bomb attack in Enniskillen on Sunday. The meeting will provide an opportunity to do this in addition to considering the points raised in the paper.

(signed)

D R GREY
Constitutional & Political Division
NORTHERN IRELAND OFFICE
10 November 1987

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CANDIDATES' DECLARATION: POLICY ISSUES

1. The Government's discussion paper "Elected Representatives and the Democratic Process", was published on 12 October. It noted the widespread public concern in Northern Ireland over the role and activities of elected representatives whose attitude to terrorist violence is incompatible with constitutional politics. It went on to examine the options for removing the causes of that concern; and invited views. The central proposal of the discussion paper was that candidates for election as District Councillors and Assembly Members in Northern Ireland should be required to sign a declaration abjuring support for proscribed organisations.

2. Consultation is now proceeding. The Secretary of State for Northern Ireland will, however, probably wish to consult ministerial colleagues about the scheme very shortly after the end of the consultation period. Work therefore needs to proceed, in the interim, on the form of scheme which he might present to his colleagues.

3. This paper aims to set out the main issues to be resolved in devising a workable scheme, and to indicate some provisional conclusions as a basis for discussion. The main issues which it addresses are:

- (i) the nature of the enforcement process, whether civil or criminal;
- (ii) form of the declaration - whether 'wide' (embracing support for violence) or 'narrow' (covering only support for proscribed organisations);
- (iii) whether it is necessary to define in statute the concept of 'breach of the declaration';

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- (iv) the operational details of how the declaration is to be applied;
- (v) whether or not to extend the period of disqualification following a conviction, beyond the existing 5 year period which applies for district councillors.

4. These questions are to an extent inter-related. But it may be convenient to deal with each in turn.

CIVIL V CRIMINAL

Position reached to date

5. The proposal originally put by the Secretary of State to colleagues (his letter of 31 January 1986 to the Lord Chancellor) was that breaches of the declaration should be enforced by a civil process leading to disqualification of the District Councillor or Assembly Member from office. Subsequently, the Secretary of State also consulted colleagues on the LCJ's proposal for a general offence of support for terrorism, which would be linked (in the case of Councillors/ Assembly Members, although the application of the offence would go wider than this) to breach of the declaration. The initial reaction of the Lord Chancellor (his letter of 17 February 1986) was that the civil process had advantages, but going beyond to the creation of an offence of supporting or encouraging terrorism would give rise to difficulties, and the offence would be awkward to draft. The then Attorney-General agreed (20 February), drawing attention to the DPP(NI's) view that great difficulties would arise in defining the prohibited conduct.

6. However, at a subsequent meeting of Ministers (27 February 1986) the view was taken that whilst a wide-reaching criminal offence presented real difficulties, a more narrowly-defined criminal offence of breach of a declaration by a Councillor might be feasible.

7. Accordingly, both options, civil and criminal, were floated in the discussion paper.

8. The Secretary of State also consulted (11 March 1986) the then Attorney-General about a third option, of enforcement by civil proceedings in which the Attorney-General would be ex officio applicant. The Attorney in his reply (17 March 1986) saw serious practical and presentational problems in this approach.

The Options

(a) Civil process, case brought by persons other than the Attorney-General.

9. In this option, new legislation would give a defined category of persons locus standi to bring civil actions in the High Court, seeking a declaration that a named councillor or councillors had breached the terms of his/her candidates' declaration. If the High Court upheld the action, disqualification of the named councillor(s) would follow. It would be for consideration which persons, or categories of persons, should be enabled to bring such an action. The possibilities include:

- (i) councillors of the same district council as the offending councillor;
- (ii) the council of which the offending councillor is a member;
- (iii) any elector of the district (or electoral area?) concerned;
- (iv) any councillor in Northern Ireland;
- (v) any council in Northern Ireland;

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- (vi) any district council (or Assembly) elector in Northern Ireland;

or any combination of the above.

10. It seems unlikely that it would be possible to enable the political parties, or bodies such as the Unionist Councillors' Association, which have no legal personalities, to bring actions. On the face of it, any attempt to do so would have very wide implications (eg, the registration of political parties as bodies corporate) which would be difficult to handle in any Bill.

11. The advantages of a civil procedure on these lines would be:

- (i) the Executive would be distanced from the process of enforcement, preventing allegations that one group of elected representatives (Ministers) or appointed officials (the DPP) was being empowered to remove another group (councillors and Assemblymen) from office;
- (ii) the standard of proof required for a finding of breach of the declaration would be the civil one of 'balance a probability' (although the former Attorney-General had serious doubts as to whether, in practice, the courts would not require a much higher standard of proof);

12. The disadvantages are:

- (i) cost. High Court actions are very expensive to mount, and the substantial numbers of councillors thought to support violence might result in a corresponding flow of cases in the High Court. It seems improbable that civil legal aid (which is

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available on a discretionary basis through the Law Society, and is means-tested) would be available. Actions could be funded by political parties, but in practice it is doubtful that their resources could support any significant number of cases. It would be out of the question for the Government to fund cases brought by private individuals/corporations, whilst at the same time arguing that the public interest was insufficiently engaged to justify provision for cases to be brought by the Attorney-General or DPP;

(ii) exposure of private individuals. The Alliance Party have argued plausibly that to throw the burden of bringing cases of this kind on private individuals is to expose the people concerned to considerably risk. It is arguable, however, that this difficult could be circumvented if actions were brought in the name of the office bearers of a political party, or (conceivably) by a limited company formed for that purpose. This presumes, however, that the categories of persons given locus standi to bring cases would be drawn sufficiently wide to permit this;

(iii) evidence. The RUC could not become involved in the gathering of evidence for civil cases.

(b) Civil process, cases brought by Attorney-General.

13. New legislation would empower the Attorney-General (and perhaps a limited category of others) to bring civil actions in the High Court, seeking a declaration that a named councillor or councillors had breached the terms of his/her candidates' declaration. If the High Court upheld the action, disqualification of the named councillor(s) would follow. The action might be modelled upon that provided for by Section 31 of the Local

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Government Act (NI) 1972, under which the Attorney-General can institute proceedings in the High Court for a declaration that the conduct of a councillor is 'reprehensible' as defined by the Act. (The definition relates to financial malpractice.)

14. The advantages of this option are:

- (i) it avoids the difficulties over costs and the exposure of individuals discussed in relation to the preceding option;
- (ii) it recognises that the Attorney has a role in defending the public interest, and avoids the awkwardness of giving locus standi to a broad category of private individuals to bring cases which engage the public, quite as much as the private, interest;

15. The disadvantages are:

- (i) the Attorney-General might be widely perceived as acting in his capacity as a member of the Government, rather than as an independent guardian of the public interest;
- (ii) as a practical matter, the Attorney would not be able to call upon the assistance of the DPP to bring cases. Although the services of the Crown Solicitor would be available to him, a heavy personal burden would be placed on the Attorney and his small London-based staff by a flow of highly politically sensitive cases;
- (iii) as with the preceding option, the RUC would not be able to involve themselves in evidence-gathering.

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(c) Criminal offence.

16. New legislation would provide for 'breach of declaration' by a councillor to be a criminal offence. It would be for consideration how this offence might be defined. Prosecutions would be brought by the DPP on the basis of evidence provided by the RUC. Conviction would be attended by a fine and/or imprisonment; the offence would be scheduled under the Emergency Provisions Act. Disqualification from office would be an automatic consequence of conviction.

17. The advantages of this option are:

- (i) it avoids the problems of cost and exposure of individuals of the first option;
- (ii) it enables the RUC to become involved in the collection of evidence;
- (iii) cases would be presented by an authority (the DPP) independent of the Executive, and seen to be so;
- (iv) by criminalising breach of the declaration, the proposal will be perceived as 'tougher' than the 'civil' options, and so more acceptable to a certain spectrum of political opinion.

18. The disadvantages are:

- (i) the definition of the offence on a basis which will secure convictions is likely to encounter all the difficulties which have already led the Government to reject proposals for an offence of supporting terrorism;
- (ii) politically, this option comes closest to criminalising opinions, and is thus more liable to attack as an infringement of free speech than the 'civil' options;

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- (iii) the standard of proof required will be the higher one of 'beyond reasonable doubt';
- (iv) linking conviction (for a relatively minor offence) to disqualification from office may be regarded as inconsistent with the current disqualification provisions, which bite only on relatively serious offences (in the case of district councils, on individuals sentenced to imprisonment for three months or more; in the case of the Assembly, only on those serving a sentence of imprisonment of more than one year, and continuing only so long as the imprisonment lasts).

Provisional recommendations

19. None of the three options is without its disadvantages. The course which appears to cause least difficulty of principle is option (b), civil actions brought by the Attorney-General. However, we recognise that the Attorney sees considerable practical difficulties in this approach, and if ways cannot be found to overcome these, then option (a) (civil actions brought by individuals) is recommended.

FORM OF DECLARATION

20. The declaration suggested in the discussion paper is:

"I declare and undertake that if elected, I will neither support nor assist the activities of any organisations proscribed by law in Northern Ireland".

21. This formulation suffers from two major disadvantages:

- (i) it will catch only support and assistance for a specific proscribed organisation; generalised

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references to "support for the armed struggle" are not caught, those to support for "the popular struggle" still less so;

- (ii) it does not cover paramilitary organisations not proscribed, such as the UDA, and is therefore open to political attack on the ground that it is one-sided.

22. Ministers (and some respondents to the discussion paper) have accordingly suggested that some way be found of broadening the declaration so as to embrace support for the use of violence. Possible formulae include:

"I declare and undertake that if elected, I will neither support, assist or engage in (a) the activities of any organisation proscribed by law in Northern Ireland, nor in (b) activities which involve unlawful violence against the Government, its servants or any person in Northern Ireland for political ends." (Suggested by DOE.)

or

"I declare and undertake that, if elected, I will neither support nor assist (a) the activities of any organisation proscribed by law in Northern Ireland, nor (b) [the commission of] acts of terrorism connected with northern Irish affairs." (Based on a formula suggested by Mr Hammond: cf Section 10(5) of the Prevention of Terrorism (Temporary Provisions) Act 1984.)

23. These 'wider' forms of declaration, embracing violence, have their own disadvantages:

- (a) they could be portrayed (and attacked as) an unreasonable limitation of the right of free speech;

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- (b) breach of the terms of the 'wider' wording is, in practice, even less likely to be capable of legal proof.

A further consequence, although not a disadvantage, is that some unionist councillors might be caught.

24. Nonetheless, if the present 'narrow' declaration seems (as it does) unlikely to be effective there is a strong case for a 'wider' formula, if only on presentational grounds. We believe, and provisionally recommend, that the second of the two formulae in para 22 above should be adopted.

BREACH OF DECLARATION

25. It is for consideration whether the legislation should seek to define what constitutes a 'breach of declaration' or leave this entirely to the courts. On the face of it, permitting absolute discretion to the court would invite it to consider the defendant's state of mind, just as much as his actions, in deciding whether or not the declaration had been breached. Whether the courts would attempt to do so, or merely confine themselves to the issue of whether the acts of the defendant constituted a breach, is for further consideration. The alternative course would be to attempt to specify in the legislation forms of behaviour which would give rise to the presumption that a breach of the declaration had taken place. A possible formula might be:

"Using words or behaviour or displaying written material which could give rise to a [reasonable] apprehension that the councillor concerned supported or assisted proscribed organisations, or the commission of acts of terrorism connected with Northern Irish affairs."

26. However, in his letter of 20 February 1986 to the Secretary of State, the then Attorney-General, Lord Havers expressed the view that:

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"The difficulties attached to an offence of behaving in such a manner which arouses reasonable apprehension that the person concerned supports a proscribed organisation are too great".

27. On the face of it, the difficulties of defining beach of the declaration as a civil wrong are just as great as those of defining a criminal offence, to which Lord Havers referred.

28. It is therefore provisionally recommended that the legislation should refer simply to 'breach of the declaration' without seeking to further define that concept (or attempting to specify evidence which the courts should, or should not, take into account).

MECHANICS

29. The discussion paper suggests that the declaration should be made at the stage of candidature rather than following election. Perhaps the simplest way to achieve this would be to have the declaration form part of the candidates written consent to nomination (which might also need to include a warning about the consequences of breaching the declaration). Failure to subscribe to the declaration would then invalidate the nomination.

30. It would probably be difficult to devise a wholly effective safeguard against candidates making verbal reservations or qualifications intended to nullify the terms of signed declaration. But it is not entirely clear why such safeguards should be necessary if there is an effective enforcement procedure. The fact that a candidate had made a verbal disclaimer indicating that he did not accept the terms of the declaration would, presumably, be no defence against a subsequent action for breach of the declaration. (The converse of this is of course that a candidate who signs hypocritically, but, following election, abides by its terms, will remain a councillor still.)

31. It has been suggested that candidates might be required to declaim the declaration before the returning officer at the time of nomination, either instead of, or in addition to, subscribing to it. It is not clear what advantage there would be in such an arrangement (which would, of course, also mean that candidates were required to attend nomination. At present they are not). Indeed, if the declaration was verbal only, witnesses to it might be placed at some personal risk.

32. It has also been suggested that the returning officer should have a discretion not to accept a nomination if he has grounds for believing that the candidate is not sincere in making the declaration (in whatever form). The returning officer's present powers to declare a nomination invalid are extremely limited. They are either:

- (a) that the particulars of the candidate or the persons subscribing the paper are not as required by law; or
- (b) that the paper is not subscribed as required.

To replace these objective grounds with a subjective assessment of intent would undermine the returning officer's acknowledged impartiality and render him (or the Town Clerks who act as Deputy Returning Officers) liable to pressure. Again, given that it is a councillor's conduct after his election, rather than his state of mind at the time of making the declaration, that will give rise to a court proceedings, it is not clear why such a discretion on the part of the returning officer should be necessary.

Provisional recommendations

33. It is proposed to recommend to Ministers:

- (a) that the declaration should be taken at the stage of nomination;

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- (b) that it should be in written form only;
- (c) that it should form part of the candidates consent to nomination; and
- (d) that the returning officer's discretion to declare nominations invalid should remain as it is at present.

EXTENDED DISQUALIFICATION

34. The present disqualification provisions are contained in Section 4 of the Local Government Act (Northern Ireland) 1972. Under subsection 4(1)(d) a person is disqualified from being elected or from being a councillor for a period of 5 years following either:

- (a) a conviction resulting in a sentence of imprisonment of three months or more without the option of a fine; or
- (b) a declaration before the High Court that he has been guilty of reprehensible conduct within the meaning of Section 31 of the Act (failing to disclose a pecuniary interest etc).

Paragraph 10 of the discussion paper leaves open the possibility that this 5-year period might be extended. The paper produced by the Alliance Party suggests that any conviction (other than one for a road traffic offence) should attract disqualification for 5 years and that a conviction for a scheduled offence should result in disqualification for 10 years.

35. The present 5 year disqualification period removes a sitting councillor from the council for the remainder of its term and from the subsequent council (unless a by-election

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occurs). If he is convicted in the last year of a council's life he is also unable to stand for election to the council after that as well. To be sure of having any practical effect, the increase in the period of disqualification would have to be extended by the life of a district council (ie by 4 years), or multiples thereof. However, to go much beyond 9 years would probably conflict with the provisions of the Rehabilitation of Offenders Order 1978, although it is possible for a disqualification to extend beyond the rehabilitation period specified in the Order.

36. Increasing the period of disqualification raises the question of having a differential disqualification period according to the length of sentence imposed, ie a longer sentence would attract a longer period of disqualification. However, this in turn raises the question of what disqualification period should apply in respect of a breach of the declaration (and following a finding of reprehensible conduct).

37. As far as the Alliance party's other suggestion is concerned, It would seem inherently undesirable for the period of disqualification to be determined by the nature of the offence rather than the sentence imposed. Extending disqualification to anyone who had been convicted of any offence would be uncertain in its effects. It would seem preferable to retain a link between the gravity of the offence, as reflected by the sentence imposed, and disqualification. This also avoids the need to consider differential disqualification.

38. Any change in the present disqualification provisions would take Northern Ireland out of step with the rest of the United Kingdom and will high-light the (existing) discrepancy between the disqualification periods for local government and for Parliament (and the Northern Ireland Assembly). (A person who has served a sentence of imprisonment of whatever length is eligible to stand for Parliament immediately he is released.) Extending the present disqualification provisions by 4 years would not disbar any councillors who were elected for the first time in 1985.

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Provisional recommendation

39. Although the advantages of extending the present disqualification period in subsection 4(1)(d) will be largely presentational as far as sitting councillors are concerned, it is provisionally recommended that it should be increased to 9 years. A change to the present provisions for disqualification for election to the Assembly would require an amendment to the Representation of the People acts and is not recommended.

Constitutional & Political Division
NORTHERN IRELAND OFFICE
10 November 1987

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