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To: Dorothy Angus

cc Mrs Flanagan

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From: Denis McCartney

CODE OF ETHICS

Rosalie Flanagan asked me to send you copies of the attached papers; the answer to the big issue could have a considerable bearing on any revision to the Code of Ethics.

Denis McCartney

DENIS McCARTNEY

Introduction

1. This paper considers:

- the applicability of the concept of collective responsibility to the members of the Executive Committee;
- the challenges which have been, or which might be, made to it,
- the scope for enforcement of collective responsibility.

Meaning of Collective Responsibility

2. In Westminster, the convention of collective responsibility means that decisions of the Cabinet are binding on all members of the government. Whatever the internal dissensions, those members are required by the convention to support Cabinet decisions, must not make disclosures which would dispel the appearance of Cabinet unanimity, and, on the passing of a vote of no confidence, must resign, regardless of individual culpability in the particular issue.
3. The collective responsibility of Whitehall Ministers does not preclude their individual ministerial responsibility. Ministers are legally and politically responsible for their personal acts and the conduct of their departments. And

decisions made in Cabinet are also normally articulated by and as those of the Minister with the relevant executive authority.

Functions of the Cabinet

4. The Cabinet functions at the level of collective responsibility; its business principally relates to major policy or public interest issues, together with (echoes of paragraph 19 of Strand One of the Belfast Agreement) issues on which there is unresolved dispute between departments (extracts from the Code of Conduct and Guidance on Procedures for Ministers are attached in Annex 1).
5. Cabinet government, and the conventions and procedures which support it, is sustained by political consensus and, ultimately, the capacity of the Prime Minister to dismiss recalcitrant Ministers. The Cabinet, its functions, and the Prime Minister's powers, are not established or governed by statute. In Scotland, the Scotland Act 1998 provides that there shall be a Scottish Executive, whose members shall be the First Minister, such Ministers as the First Minister may appoint, and the Lord Advocate and Solicitor General for Scotland. But no express functions are conferred by the Scotland Act on the Scottish Executive.
6. The Scottish Executive has decided to operate on the basis of collective responsibility (see Annex 2 - extracts from The Scottish Executive: A Guide to Collective Decision Making). Collective responsibility is underpinned by

section 47 of the Scotland Act, which provides that a Minister may be removed from office by the First Minister (without requirement of Parliamentary approval, as there is for the appointment by the First Minister), and by the provision which requires Ministers to resign if the Parliament resolves that the Scottish Executive no longer enjoys the confidence of the Parliament.

The Position in Northern Ireland

7. It is arguable that collective responsibility is imposed on the members of the Executive Committee by the Northern Ireland Act 1998, rather than, in Westminster, by historic convention and patronage, or, in Edinburgh, by Ministerial consensus and the statutory powers of individual and collective dismissal.
8. Section 20 of the Northern Ireland Act provides that the Executive Committee shall have the functions set out in paragraphs 19 and 20 of Strand One of the Belfast Agreement. Paragraphs 19 and 20 are set out in full in Annex 3. That part of paragraph 19 which provides that "The Executive Committee will provide a forum for the discussion of, and agreement on, issues which cut across the responsibilities of two or more Ministers" has an obvious relationship to paragraph 3 of the Code of Conduct and Guidance on Procedures for Ministers (Annex 1), and the reference to "Questions on which there is an unresolved argument between Departments".

9. Paragraph 20 of Strand One, supported by section 20 of the Northern Ireland Act, confers on the Executive Committee the function of seeking to agree each year a programme for government, which is subject to approval by the Assembly, after scrutiny in Assembly Committees, on a cross-cutting basis. The formulation of the programme of government and issues relating to its application by Ministers in their individual decision making, are, in the language of the Whitehall Code of Conduct, clearly matters which “significantly engaged the collective responsibility of the Executive Committee, because they raise major issues of policy or because they are of critical importance to the public”.
10. Before taking up office a Minister is required to affirm the pledge of office. That pledge, comprised in Strand One, is embodied in the Northern Ireland Act (Schedule 4), and contains provision that the Minister will participate with colleagues in the preparation of the programme for government, and will operate within the framework of that programme when agreed within the Executive Committee and endorsed by the Assembly. The pledge of office further requires a Minister to support, and act in accordance with, all decisions of the Executive Committee and Assembly.
11. Accordingly, it seems reasonably clear that the concept of collective responsibility is imposed on the Executive Committee by section 20 of the Northern Ireland Act, conferring on the Committee the functions set out in paragraphs 19 and 20, and the pledge of office, with its provisions on the programme of government and the obligation to support, and act in accordance with, all decisions of the Executive Committee and Assembly.

Consequences of a breach of collective responsibility

12. The Ministerial Code, while not expressly embracing the concept, supports the application of the collective responsibility of its members in its provisions on the relationship between Ministers and the Executive Committee.
13. In Westminster and Edinburgh a recalcitrant Minister may be dismissed from office by the Prime Minister or the First Minister. By convention in Westminster, by statutory provision in Edinburgh, the government collectively resigns if it loses the confidence of Parliament.
14. In Northern Ireland collective responsibility does not have the same implications. The Assembly does not have the ultimate sanction of securing the dismissal of the Government on a vote of no confidence. Under section 30 of the Northern Ireland Act the power of dismissal of an individual Minister for a breach of any of the terms of the pledge of office lies with the Assembly on a cross-community vote, and not with the First Minister and Deputy First Minister. So there is no readily applicable sanction by which enforcement of compliance with Executive Committee decisions can be secured.
15. Exclusion of a Minister by resolution of the Assembly, even if obtainable, would not necessarily secure adherence to the collective responsibility of the Executive Committee, if, as with the DUP, the breach of collective responsibility arose as a result of the Minister's adherence to party policy.

The replacement Minister under the nominating processes of section 17 would come from the same party, and would join the Executive Committee with the same disruptive political agenda. However, section 20 (2) enables the Assembly to exclude members of a particular political party which does not enjoy the confidence of the Assembly because it is not committed to such of its members as are or who might become Ministers observing the other (that is, other than the commitment to non-violence) terms of the pledge of office from holding office as Ministers or junior Ministers for a period of twelve months from the date of the resolution.

16. So collective responsibility is secured through the Assembly, but not, ultimately, in terms of collectivity; the members of the Executive Committee are not held to be collectively responsible, as the Westminster and Edinburgh governments can be by their respective Parliaments, for the actions of one of their members. The focus of the Assembly, under the Northern Ireland Act, is on individual Ministers, or on the particular political party of which the Ministers, or potential Ministers, are members, rather than the government in its entirety.
17. It is because of these constraints on securing observance of collective responsibility within the Executive Committee that the opinion of Senior Crown Counsel has been sought on the question of whether a failure by a Minister to discharge his or her Ministerial responsibilities in accordance with a decision of the Executive Committee could be successfully challenged in the courts.

18. In Westminster and Edinburgh collective responsibility is a matter of consensus and convention. In Northern Ireland, to the extent that the concept applies, it is supported by the statutory provisions relating to the functions of the Executive Committee and the pledge of office. It is therefore arguable that a breach of collective responsibility is a matter on which the courts could properly intervene, on the basis that the sanction for breach is not solely a matter for political resolution, but also a matter of compliance with the will of Parliament, expressed through the statutory requirements of the Northern Ireland Act. The opinion of Senior Crown Counsel is awaited.