

cc: Mr McCusker
Mrs Brown
Mrs Flanagan

TO: MR SEMPLE

DATE: 27 JANUARY 2000

FROM: D McCARTNEY
DEPARTMENTAL SOLICITOR'S OFFICE

MINISTERIAL OFFICE AND DISTRICT COUNCIL MEMBERSHIP

1. I was asked at the Executive Committee meeting for a note on the issues which might arise from:-
 - (i) delay in taking a decision in principle on retention of district council membership;
 - (ii) delay in the implementation of a decision in principle that such membership should not be retained; and
 - (iii) the retention of district council membership by some Ministers, notwithstanding a policy and practice to the contrary.
2. Because of the inter-action of central and local government functions continued membership of district councils is more likely than not to put Ministers in situations where their interests conflict, or would appear to conflict. There must also be potential for the actions of a district council of which a Minister was a member to be an embarrassment to a Ministerial colleague, with scope for compromising the work of the Executive Committee on cross-cutting issues. For reasons of probity, and the need of the Executive Committee to secure the confidence of the public, the paper before the Executive Committee on 25 January on Ministerial Conflicts of Interest suggested that it would be inappropriate for Ministers to retain their membership of district councils.
3. It is for the Executive Committee to judge the impact on public confidence if a decision in principle against retention of district council membership is not made, or, if made, its implementation is delayed. While such membership is retained Ministers are likely to have to decide, to varying degrees, how to deal with awkward situations as they arise. A decision to avoid a collective decision, or to delay its implementation, is not of itself unlawful; aside from the loss of public confidence, which might flow from that avoidance or delay the unlawfulness (if any) is in the manner in which issues in which conflicts of interest arise have been handled by an individual Minister, and subjected to an adverse judgment of the court.

4. The peril of leaving the decision of retention of membership of district councils to individual Ministers, or of delaying the implementation of a collective decision is that issues start to accrue, to which Ministers respond in various ways, with varying degrees of success. In the short term this is more likely to cause problems of a political and public confidence nature, rather than result in issues for the court, but the latter cannot be ruled out. Critical press comment could encourage complainants to pursue their grievances by judicial review or other appropriate litigation. And the longer either a collective decision, or its implementation, is delayed the greater the peril of application of those Pledge of Office issues to which the Executive Committee paper referred (paragraph 9).
5. Section 11.3 of the draft Ministerial Code proposes that a Minister should, on taking up office, normally give up any other public appointment. This envisages that there may arise some circumstances, exceptional and justifiable, in which a Minister may retain another public office, including that of district council membership. What those exceptional and justifiable reasons might be would depend on the circumstances relevant to the particular case. Even if the Ministerial Code was framed in absolute terms, purporting to have no element of discretion, I think the First Minister and the deputy First Minister and Executive Committee, if asked to agree a dispensation, would be obliged to give it proper consideration, and to decide whether there were reasonable and sustainable grounds why the policy of non-retention should not be applied in the particular case.
6. What those grounds might be would vary from case to case, but certainly they could include issues of timing; for instance, the appointment of a Minister with district council membership might reasonably retain that membership if an election for the Assembly was soon to be held. The essence of this is that, if section 11.3 of the Code is adopted (with or without the word "normally"), application for retention must properly be considered, and membership retained only for sound and valid reasons. I would suggest that, for all those Ministers with district council membership, retention until resolution of the present political uncertainties is sustainable.

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