

MINISTERIAL CODE : LEGAL ADVICE

1. This note comments on the response of Mr Robinson to the draft Ministerial Code, in which he questions both the status of the Code, and the role of the FM and DFM within it.
2. Strand One of the Good Friday Agreement makes provision for the duties and functions of the FM and DFM, and the Executive Committee. Paragraph 18 provides that:

The duties of the FM and DFM will include, inter alia, dealing with and co-ordinating the work of the Executive Committee and the response of the Northern Ireland administration to external relationships.

3. The underlined words should be noted; the Agreement does not contain the entirety of the functions of the FM and DFM, and there has of course subsequently been conferred on them the function of joint charge of the OFMDFM, the functions of which (by Article 9 of the Departments (Transfer and Assignment of Functions) Order (NI) 1999) include:-

- ♦ the co-ordination of policy
- ♦ supporting the Executive Committee
- ♦ the legislative programme
- ♦ standards in public life.

4. Paragraph 19 of Strand One provides that the FM and DFM shall convene and preside over the Executive Committee, and the Committee, by paragraph 19:-

..... will provide a forum for the discussion of, and agreement on, issues which cut across the responsibilities of two or more Ministers, for prioritising executive and legislative proposals and for recommending a common position where necessary (eg in dealing with external relationships).

5. Paragraph 20 provides that the Executive Committee will seek to agree a programme of government, which is subject to approval by the Assembly, after scrutiny in Assembly Committees, on a cross-community basis.
6. By section 20 of the Northern Ireland Act 1998 these provisions of the Agreement are in part given legislative force; subsection (2) provides that the FM and DFM shall be Chairmen of the Executive Committee, and by subsection (3) the Committee shall have the functions set out in paragraphs 19 and 20 of Strand One.
7. Before taking up office Ministers are required by section 18(8) to affirm the terms of the pledge of office, which is annexed to Strand One. The pledge requires compliance with the Ministerial Code of Conduct which is also annexed to Strand One.
8. The Ministerial Code is drafted principally as the outworking of relevant provisions of the Northern Ireland Act, of the pledge of office and code of conduct, of the co-ordinating role of the FM and DFM and of the Executive Committee's functions as set out in the Agreement. As such its provisions are clearly within the ambit of what can properly be agreed by the members of the Executive Committee. This seems to be acknowledged in Mr Robinson's letter of 21 December (first page, last paragraph).
9. There are however elements of the Ministerial Code which have no linkage with the provisions of the Agreement and the Northern Ireland Act. I think Mr Robinson would contend that the Executive Committee has no authority to agree to a Code which goes beyond the functions of the Committee and the

FM and DFM as set out in the Agreement and the Act, and that any exercise of additional functions which the Executive Committee has purported to confer is without statutory authority and ultra vires.

10. Such a strict interpretation misconstrues the effect of the Good Friday Agreement. It is a document of legal effect, both domestically and internationally. But it is framed in the language of negotiation, and is not capable of construction in the strict terms of legislation. Section 20 of the Northern Ireland Act provides that the Executive Committee shall have the functions set out in paragraph 19 of the Agreement. But it does not limit the Executive Committee to those functions. To do that the drafting would have been different: something like "The functions of the Committee shall be those set out in paragraph 19". That would have imposed limits which are not contained in the Agreement and the Act. So there is nothing to prevent the Executive Committee, in pursuance of a coherent approach to the conduct of its business, to make agreements beyond what is immediately within the contemplation of Strand One, so long as there is no incompatibility with any provision of the Agreement, the Act, or any other legislation or legal obligation.
11. In reality very little of the draft Ministerial Code goes beyond the Agreement's provisions. Section 9 (Ministers' Visits) is one area for which it is hard to find any connection with those provisions. But some other paragraphs have an ambivalent status, being capable of application in circumstances which may or may not relate to the Agreement's provisions on the roles of the FM and DFM and the Executive Committee.
12. Mr Robinson's focus on paragraph 4.4 of the draft Code provides a good example. This paragraph envisages that all statements to the Assembly must be cleared in advance with the FM and DFM, and the Executive Information Service. There is a clear relationship with the co-ordinating role of the FM and DFM and the role of the Executive Committee on cross-cutting issues and the prioritisation of executive and legislative proposals, or need for a

common position. But statements to the Assembly could be made by Ministers in circumstances which have no relevance to the roles of the FM and DFM, where there are no such issues.

13. The Executive Committee can properly and competently agree a procedure which applies to both circumstances; it is not confined to agreement on working practices which are within the ambit of a strict interpretation of the language of the Agreement. However the consequences of non-compliance in the two circumstances could be different.
14. Paragraph (f) of the pledge of office requires Ministers "to support, and act in accordance with, all decisions of the Executive Committee and Assembly". If the Executive Committee agrees the Ministerial Code, then any breach of its provisions in circumstances relevant to the role of the FM and DFM and the Committee, as conferred by the Agreement, would be a failure to support or act in accordance with a decision of the Committee in breach of the pledge of office. That breach could attract the application of section 30(1) of the Northern Ireland Act and its exclusion from office provisions.
15. However, neither the Executive Committee nor the Assembly is competent to extend the scope of the pledge of office beyond that which is contemplated by the Agreement. The pledge of office at paragraph (f) relates to matters within the competence of the Committee and Assembly as set out in the Agreement. That is not to say that working practices going beyond the provisions of the Agreement on the role of the Executive Committee cannot be properly agreed, but a breach of those extra - Agreement provisions is not a pledge of office issue. The resolution of any problem so arising would be entirely political.

Summary

16. ♦ Agreement of a Ministerial Code by the Executive Committee which includes matters beyond those outlined in the Agreement is not ultra vires and unlawful.
- ♦ Non-compliance with an Executive Committee decision relevant to the Ministerial Code, which is within the competence of the role conferred on it by the Good Friday Agreement is a breach of paragraph (f) of the pledge of office.
- ♦ Non-compliance with a decision outside the competence conferred on the Committee by the Agreement is not a breach of the pledge of office, and has no legal consequences as between the Executive Committee, or the Assembly, and the defaulting Minister.

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