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Tasir, carh

Date: 16 July 1998

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To: Belfast
For: Joint secretary

From: HQ
From: David Cooney


17-7-98

Subject: North-South Provisions of the Northern Ireland Bill

Thank you for your fax no. 807 in regard to which you will have already received an initial response from Mr. Gallagher.

We look forward to receiving details of the British Government's further proposals in relation to the North-South elements of the Bill. We see a clear requirement, in terms of both the letter and spirit of the Agreement, for the legislation to endow the Secretary of State, the Assembly, Ministers and Departments with all the powers necessary for the fullest possible implementation of the Strand Two chapter of the Agreement. From a political perspective, this needs to be done openly and without ambiguity. As far as possible, the various provisions should be consolidated in one or more clauses, rather than scattered around the Bill. I attach a note by Mr. Montgomery which represents an initial reaction here to the proposals in the current draft of the Bill. You might find this helpful in your contacts with the British side. We will be forwarding a more comprehensive response to the Bill at large as soon as possible

As regards the basis for the establishment of the North-South Council, we take the British point that the Council is established by international agreement, rather than by legislation, but this does not mean that there is not room in the Bill for an authoritative description of the Council. As of now, it referred to only in passing. We have looked at the precedent of the Decommissioning Commission, which was established by international agreement and given powers under parallel legislation, North and South.

Section 7(1) of the Northern Ireland Arms Decommissioning Act 1997 reads as follows:

"In this section "the Commission" means an independent organisation established by an agreement, made in connection with the affairs of Northern Ireland between Her Majesty's Government in the United Kingdom and the Government of the Republic of Ireland, to facilitate the decommissioning of firearms, ammunition and explosives."

Is there any reason why a similar, if more concise, definition of the North-South Council could not be included in the relevant clause of the Northern Ireland Bill?

Northern Ireland Bill, 15 July 1998: North/South Aspects

The British have failed to take on board any of our proposals in regard to their 6 July draft, and have indeed made a number of problematic changes.

Capacity to take decisions in North/South Council, and to give effect to them

Clause 26 of the 6 July draft, which essentially carried forward the provisions of the 1973 Act allowing Ministers and Departments to consult with or enter into arrangements or agreements with our authorities, and empowering the Assembly to enact the necessary legislation, has, far from being strengthened as we proposed, been removed altogether, apparently in response to DUP complaints.

The British, while promising a fuller account, have suggested that Clause 66 adequately fulfils the same objectives as the deleted Clause. This obliges the First Minister and deputy First Minister to ensure such participation in the NSMC and BIC "as appears to them to be required" by the relevant passages of the Agreement. Participation is defined as including consultation with the other Council member or members, and entering into arrangements and agreements with them in respect of transferred matters.

However

(a) there is a possible difference between the entirely permissive nature of the deleted Clause 26, and Clause 66's reference to "such participation as appears to them to be required": could it be suggested that Ministers have no power to enter into agreements which are not actually required by the Agreement- as none are, other than in respect of the initial Implementation Bodies?

(b) the capacity of the Assembly to enact the necessary implementation legislation following up agreements in the Council is not covered in Clause 66. It could be that this is adequately catered for in Schedule 2, which in listing excepted matters excludes "the exercise of legislative powers so far as required for giving effect to any agreement or arrangement made in pursuance of section 66....." This, however, merely mirrors a provision in the like Schedule to the 1973 Act - which was reinforced by the explicit enabling section in the Act itself.

Even if, from a legal viewpoint, these matters are adequately clarified, the net point remains that, politically, the text of the Bill proper appears weaker in regard to North/South co-operation than that of the 1973 Act. The logical course would be to have two elements in the Bill, one conferring the necessary capacity on Ministers and on the Assembly, the second dealing more narrowly with the powers and obligations of the First and Deputy First Ministers in regard to the Council.

Duty Of Service

The new Clause 66 omits the obligation on Ministers, contained in the 6 July draft, to participate in the Council if so directed by the First Minister/Deputy First Minister. This is a clear step back from the Agreement (Para. 2 of Strand 2 says that "Participation in the Council to be one of the essential responsibilities attaching to relevant posts in the two Administrations." This links back to the Pledge of Office in Strand One ("to discharge in good faith all the duties of office") and thus to removal from office. Certainly, an explicit reference in the Bill would reinforce the importance of participation in the Council as a key Ministerial duty. While the Agreement does envisage the need for alternative arrangements "if a holder of a relevant post will not participate normally", this should be read as a practical safeguard not lessening the obligation on a Minister to participate, or the possible consequences for him of a failure to participate.

Implementation Bodies: Funding

There is a new provision in Clause 68 (formerly 67) allowing the Secretary of State to make grants to the initial batch of Implementation Bodies, which is useful insofar as it presumably means that funding can be provided by the British Government if the Assembly fails to do so. However, as there continues to be no explicit obligation on the Assembly itself to provide funding, it is arguable that this provision could be exploited to allow the Assembly to dodge its political responsibilities.

The Clause also (section 4) permits making an order in relation to accounts and audit, etc. "corresponding" to the provisions in Schedule 8 of the Bill relating to the Human Rights Commission. Those provisions would, if carried through to the Implementation Bodies, make no allowance whatever for the joint nature of the bodies, and the need as we see it to make appropriate arrangements including reporting to the NSMC, joint audit etc. It would seem much

preferable to leave these issues for negotiation, and for the appropriate order then to be made: the Secretary of State's general power "to make consequential or supplementary provisions", as contained in 68.2 (c), would seem to offer adequate scope for this.

Rory Montgomery

16 July 1998