



# An Chartlann Náisiúnta National Archives

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## FAX COVER SHEET

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**Comment:** My note on referendum conundrum/referenda conundra

Mr Hane



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### A Referendum on a Northern Ireland Settlement: Some Considerations

(Note: This paper is based on my own, non-expert, analysis, and on preliminary informal discussion with the relevant section of the Department of the Environment. It would seem imperative that authoritative legal advice be sought on some of the issues raised, four of which are summarised at the end of the paper).

#### Ground Rules

1. Paragraph 26 of the Ground Rules states that: "Both Governments respectively reaffirm their intention that the outcome of negotiations will be submitted for public approval by referendums in Ireland - North and South - before being submitted to their respective Parliaments for ratification and the earliest possible implementation."

#### North

2. The situation in regard to the holding of a referendum in Northern Ireland is relatively straightforward. Section 4 of the Entry to Negotiations Act, 1996, provides that "The Secretary of State may from time to time by order direct the holding of a referendum for the purpose of obtaining the views of the people of Northern Ireland on any matter relating to Northern Ireland" and specifies that the necessary statutory instrument, which may inter alia set out the wording of the question to be put, should be approved by Parliament.

3. The British appear to envisage that on the successful conclusion of the negotiations they would frame a general question along the lines "Do you support the agreement reached among the parties and the two Governments at the multi-party negotiations?", put it to the people of Northern Ireland, and, after a "yes" vote, proceed to the enactment of the legislation necessary to implement the various elements of the agreement (including both constitutional and institutional provisions).

#### South

4. On our side, however, matters are more complicated. It is clear that a commitment to propose and support amendment of the Constitution will form part of a settlement. This will require a referendum under Article 46, the proposals for amendment being initiated in Dáil Éireann as a Bill.
5. The question also arises, however, of whether the act of self-determination which the simultaneous polling of North and South is meant to represent would be more complete and politically unchallengeable if the people of the South were also asked explicitly to endorse the settlement as a whole. It could of course be made clear that public approval of changes to the Constitution would be taken as implying support for the overall shape of a settlement package. Technically this would be the simplest way to proceed. There would be one vote, and no chance of any discrepancies between the outturns.
6. On the other hand, there could be a greater political and ideological resonance to the explicit endorsement of the settlement as a whole. It might be - and this is a matter for political judgement - that a proposal to change Articles 2 & 3 would carry more easily if it were presented directly alongside an overall settlement.

7. The problem is that it may not be possible to run the two aspects - overall approval of a package, and change to articles 2 and 3 - together in one question. Other than the plebiscite which endorsed the Constitution itself, there has never been in our jurisdiction a plebiscite or referendum of a declaratory or political character. Nor does the Constitution provide for one - its provisions on referendums apply exclusively to the reference of Bills to the people (art. 27) or to its own amendment (arts. 46 - 47). Art. 46.4 specifically provides that "A Bill concerning a proposal or proposals for the amendment of this Constitution shall not contain any other proposal." The legislation providing for the practical organisation of referendums is likewise confined to these cases.
8. In informal discussion with the Department of the Environment, they tended to the view that, if we wished to ask the public to approve in general terms the nature of a settlement, it would be necessary to have two separate referendums - one on that, and one to amend the Constitution. Two separate Bills would therefore also be required. It was suggested that the provisions of that Bill arranging a declaratory referendum could include the application of the detailed practical provisions of the Referendum Act to the holding of a poll.
9. One intermediate possibility could be to include in our constitutional amendments a general, EU-type declaration that we could ratify a new British-Irish Agreement. However, such a formal Intergovernmental Agreement would probably not include the Strand One and some other internal aspects of a settlement. It would also seem logical and politically prudent (especially in Northern Ireland) that it not be signed before the endorsement of the people had been received: could the Constitution refer to what was simply a draft?
10. If there were a decision to hold two separate ballots, the question of timing and sequencing would arise. In general, taking into account such aspects as the organisation of a campaign and general political momentum it would seem logical and attractive for them to be held on the same day (and simultaneously with that in Northern Ireland). An intellectually attractive, but politically dubious, alternative would be for the two declaratory referendums, North and South, to be held on the same day, with that amending the Constitution held back to maintain a general symmetry with the passage of new British legislation (and with the enactment of other necessary legislation in our jurisdiction) This would also protect us from a situation in which the people had voted to change the Constitution while a Northern referendum had simultaneously failed (or, indeed, vice versa), and against any subsequent disruption of the process at the British end.
11. A final issue is whether there is any other way of safeguarding ourselves against a situation in which the South had voted to amend the Constitution while the Northern referendum was defeated. Would it be possible to write into the constitutional amendments some conditionality - such as that they would only take effect on ratification of a new British-Irish Agreement, or on the entry into operation of new institutions, including a North/South Council? This clearly raises political, legal and technical

questions.

**Issues for Consideration**

12. - Is it possible to combine in one referendum questions on specific amendments to the Constitution and on a general endorsement of a settlement?
- If not, is it politically possible or desirable to present a referendum on the Constitution as a proxy vote on the settlement as a whole?
- If it were decided to hold two polls, what are the legislative and practical issues involved? Should they be on the same day?
- Is it possible to include in a constitutional referendum some safeguard against a Northern vote going the wrong way?

Rory Montgomery  
4 February 1998