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HCS/7/85

cc. PS/SOS - B
 PS/Ministers L&B
 PS/PUS L&B
 NI Perm Secs
 Mr Brennan
 Mr Stephens
 Mr Erskine
 Mr Reid
 Mr Hammond
 Mr Buxton
 Mr Carvill
 Mr Chesterton
 Mr Gilliland
 Mr Ferneyhough
 Mr Merifield
 Miss Elliott
 Mr Lyon
 Mr Reeve
 Mr Bickham
 Mr Wood

PS/Secretary of State - L

SINN FEIN - POSITION ON APPOINTED AND ELECTED BODIES

1. I have been considering in detail with an ad hoc group of colleagues a range of issues arising out of the Sinn Fein representation on district councils, and the subsequent nominations of Sinn Fein councillors to Area Boards.
2. The attached paper discusses essentially the following questions:
 - a. Since it is clear that the present law leaves us with no alternative but to appoint Sinn Fein members to Area Boards if the nominating District Councils persist in nominating them, should we change the law so that Ministers will in future have a discretion? Here we examine, but reject as unsatisfactory, the possibility of taking power to reject any specific nomination, or to require Councils to give us a more extended list of nominees. We conclude that the only foolproof change would be to move all the way from District Council nomination to simple Ministerial power to appoint (following such consultations or soundings as Ministers wished to take). But we saw this as a fundamental and potentially extremely controversial change in the structure of the Boards.

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- b. Since there are various provisions in existing law which provide for disqualification from elected or appointed positions, should we extend those provisions so as to catch more of the people whose behaviour is reprehensible? The disqualifying provisions could certainly be made tougher in a number of ways, but there is a risk of making "hard cases" and a certainty that many of the most objectionable people will at any time be clever enough to keep themselves just outside the ambit of disqualifying offences.
- c. Would it be useful to require for certain elected positions and/or offices a mandatory declaration dissociating the individual from violence? We rehearse the difficulties of deciding upon appropriate and effective wording, coming to the conclusion that it is association with a proscribed organisation rather than with "violence" (which can be so variously interpreted) which should be the target. We argue that it would be wrong to impose such a new requirement on people already elected or appointed, and we discuss the legislative and other implications of covering particular types of office. We consider whether any power to require a declaration needs to be associated with a power to remove for breach of the declaration, but identify formidable difficulties in operating such a power.
- d. Would there be advantages in providing in law for some proportionality, so that local majority in district councils cannot entirely exclude substantial minorities from participation through council committee chairmanships, nominations to statutory boards etc? It is worth noting here that, unless coupled with some effective action to "screen out" Sinn Fein, the introduction of proportionality could amongst other things assure Sinn Fein councillors in particular areas of a share of local power. There are real practical difficulties. At council committee level, it is very much a matter for each council to decide what committee structure it wishes to have. And provision for proportionality on (say) Area Boards would mean a radical revision of the structure of those boards.

3. These questions were examined within the established policy context. Sinn Fein is not a proscribed organisation, and although that issue has been re-examined from

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time to time it has up to now been concluded that proscription would have more disadvantages than advantages.

4. This is not to say that the distinction which the law in that respect makes between Sinn Fein and the IRA is paralleled by an equally clear distinction in policy and methods. The Armalite and the ballot box are not the alternative instruments of distinct though sympathetic groups, but rather part of the armoury of a single organisation which changes its posture to reflect its opportunities. A scan of the intelligence information available on the Sinn Fein district councillors will readily illustrate that unpleasant reality. The hope that, if offered an opportunity to take a political course, the Republican movement would turn increasingly in that direction is far from realisation (although it can be argued that the determination of the Adams leadership to exploit political opportunities may have had some effect from time to time on the intensity and methods of the violence, if not on the ultimate readiness to resort to it).
5. But the avoidance of proscription has not been motivated solely by a hope to encourage alternatives to violence. It has reflected also the reality that, even if Sinn Fein were to be proscribed, it would remain in being underground, acting through surrogates and associates. Since the organisation is not proscribed, it is in a position to present candidates for election and these are entitled both to stand and if elected to sit unless some impediment is placed in their way to prevent them. Both the Secretary of State and the Prime Minister have, since the district council elections, robustly defended the decision to allow people who wanted to vote for Sinn Fein councillors to do so.
6. We therefore faced a dilemma in dealing with these issues. Having decided not to embrace proscription, were we to seek to achieve similar results by other methods? Having made a considered decision to allow Sinn Fein members to reach the district councils, are we to deprive those elected councillors of any of the rights and opportunities which would normally attach to office as a councillor?
7. We took into account that so far any de-stabilising effect resulting from the election of Sinn Fein councillors has been attributable less to their behaviour than to the reaction of others to their presence. This is not to say that their behaviour

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has been impeccable. Mr Kerr of Omagh in particular has come very close in some of his statements to an open endorsement of violence. But if we want (as presumably we do) to cope with the influence of Sinn Fein in the long-term and strategic sense rather than the short-term and tactical sense, it has to be asked if it would be wise for government to contemplate any action which might drive SDLP into sympathetic alliance with them and/or actually increase their support amongst the Nationalist population at large.

8. Those of us who considered the matter were unable to reach unanimous conclusions on the idea of a non-violence declaration. On the one hand, there were arguments that we would be building a very powerful and elaborate engine to crack a rather small nut; that action on these lines would actually assist Sinn Fein in presenting themselves as unfairly discriminated against by "the system"; that the real issue here was whether or not Sinn Fein should be a proscribed organisation; and that provision for a declaration would be "toothless", unless accompanied by a power to remove, which in itself would be bound to drag the Secretary of State into very difficult and controversial discretionary areas. On the other hand, there were arguments that it places Ministers in a most invidious position if they have to tolerate the appointment of Sinn Fein members to public bodies; that it is also unacceptable to be unable to remove a member even if his behaviour in relation to endorsing violence is widely considered by the general public to be disgraceful; and that government may in any event be driven to take action at some stage by public outrage about specific words or deeds.
9. The Secretary of State will no doubt wish to discuss on the basis of these papers.

K P Bloomfield

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30 July 1985

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SINN FEIN: POSITION ON ELECTED AND APPOINTED BODIES

Purpose of this Submission

1. At the Secretary of State's meeting on this subject on 11 June, I was asked to pursue two matters:-
 - a. an examination of options for future legislation which might give Ministers discretion over appointments to Boards and public bodies, while ensuring that they did not fall foul of Section 19 of the 1973 Constitution Act;
 - b. consideration of the possibility of legislating for a "non-violence" declaration on the part of all members of public bodies and elected representatives.

At his Belfast morning meeting on 18 June the Secretary of State authorised me to pursue also a further and related matter:-

- c. consideration of introducing a requirement for "proportionality" when Councils fill their own offices or make nominations to other bodies.
2. This submission examines the options for action under these headings. It has been prepared after discussions in which NIO, the Departments of Environment, Health & Social Services and Education, Central Secretariat, the Head of Legal Services (NI) and the First Legislative Draftsman have all been involved. Advice has also been sought on appropriate matters from the Home Office Legal Adviser.

Discretionary Power of Appointment

3. Our consideration of this matter begins with the legal advice that Departments have no discretion to reject District Council nominations to Health & Education Boards if those Councils persist in them and offer no choice. While the formal power of appointment rests with the Department concerned, in practice it has in the end to appoint those duly nominated by the Council. In a similar category are the Fire Authority (where DOE is obliged to appoint four councillors nominated by the Belfast City Council) and the Housing Executive (where the Northern Ireland Housing Council nominates three councillors to the Board). Given the political composition of the Belfast City Council and of the Northern Ireland Housing Council, there is no present danger of Sinn Fein nominations to the Fire Authority or to NIHE.
4. It should be noted that the law provides in a number of cases for Councils themselves to make appointments directly to public bodies, as distinct from nominations to departments. Examples are the Trustees of the Ulster Folk and Transport Museum and of the Ulster Museum, the Court and Council of the University of Ulster, and the Northern Ireland Housing Council (which, as has already been noted, itself nominates three members for appointment to the Board of the NIHE, and consists of one councillor appointed by each of the District Councils).
5. Finally, there are a number of bodies (including the Sports Council, Drainage Council and Tourist Board) where departments appoint people to represent local government interests after consultation with local government (previously usually through ALANI but nowadays - with ALANI largely devalued as a representative body through its own unrepresentative behaviour - with individual Councils).
6. We have concentrated our consideration upon those cases in which a department (in

effect the Secretary of State) is seen to appoint, but must under the existing law in practice accept nominations, up to the number to which they are entitled, upon which District Councils insist. It is not, happily, the case that Councils invariably decline to offer a choice. For example, this year following the local government elections 11 out of the 26 Councils offered DHSS a choice in nominating to Health Boards. This happened on both sides of the political divide, although more consistently where there was a strong SDLP presence. Belfast, on the other hand, with 5 places to fill, simply nominated 5 DUP/OUP Councillors.

7. There are at least three theoretical ways in which the law might be changed so that Ministers would not in future be obliged to make an appointment repugnant to them. These are:

- a. to give Ministers an expressed power to reject a specific nomination and to ask the nominating Council in such a case for an alternative nomination;
- b. to require Councils to offer more nominations than there are places to be filled by nominees of that Council (say, twice as many nominations as there are places); or
- c. to abandon the representative principle which up to now has been recognised in the constitution of Area Boards.

8. Either (a) or (b) above would give Ministers a discretion:- (a) to reject a nomination and seek another, and (b) to make a choice between proffered alternatives. There would, of course, be little point in pursuing the possibility of legislating for a discretion if Ministers could not safely exercise it so as to exclude Sinn Fein Councillors. The thrust of legal opinion is that, while a consistent use of a discretion against people who are merely members of Sinn Fein could be said to conflict with

the spirit, and possibly also with the letter, of Section 19 of the Constitution Act, we could offer a credible defence to allegations of discrimination against Sinn Fein Councillors, who had sought election on a programme associating them with violence. It would be that association, rather than their political opinions, which would be the justification for their exclusion. There is, however, a complication here. This is that, although the Education & Libraries (NI) Order 1972 provides for the appointment of persons nominated by each District Council "from amongst members of that Council", the Health & Personal Social Services (NI) Order 1972 provides for the appointment of "at least one person nominated by each of the District Councils in the area" but does not require that such a person shall be a member of the Council. In practice District Councils have so far used their nominating powers in favour of Council members.

9. A discretion to reject a nominee, or to choose between proffered alternatives, could then probably be used with reasonable confidence to exclude Sinn Fein Councillors. But the process of exercising discretion to that end could be messy and protracted. To take a hypothetical case, under scheme (a), the rejection of an initial Sinn Fein nominee could be followed by the serial nomination of a further number of Sinn Fein Councillors. Under scheme (b), Fermanagh District Council could offer nominations representing twice the number of places available to that Council on the Education Board without exceeding the total Sinn Fein strength on the Council.
10. It follows that the only relatively "clean" way to secure the exclusion objective would be to regard "local government" simply as another "interest" entitled, after consultation, to representation on Area Boards. Government would then proceed as it currently does in relation (for example) to the representation on the Education Boards of the transferors of schools and the trustees of maintained schools. The statutory procedure here requires the Minister to undertake such consultation as may seem to him practicable and expedient, but allows him to appoint those who appear to him to

represent the interests in question. (DENI point out, however, that this obligation to consult is in practice discharged by asking the relevant transferors or trustees to suggest more than one name for each vacancy; thus arriving by practice if not by statute at the position described in paragraph 7b above). Any such amendment of the law would, however, represent a fundamental change in the constitution of Boards, and one which might well be vehemently opposed by District Councils generally. It is not at all clear that, as the price for excluding Sinn Fein influence elsewhere, Councils in parts of the Province where such influence is not a real problem would be willing to sever the direct representative link between themselves and these Boards. The representative principle, as reflected in the current constitution of Boards, sits uncomfortably alongside a concept of ultimate Ministerial discretion. Our conclusion is that there is no sensible half-way house between the present pattern and a radical reconstruction of the Boards breaking the direct tie between the Boards and individual District Councils and looking to some other way of providing a democratic element within the Board structure. The present pattern is not ideal. District Council members tend to be advocates of the special interests of the District rather than people willing to tackle the problems of the broader area in a collective way. The obligation to have all Districts represented leads to cumbersome Boards, which on the Health side are not an ideal instrument to cope with the heightened emphasis on management. But with all their shortcomings, the Boards reflect in their structure the outcome of complex and difficult negotiations with all the "interests" at the time they were being planned. In the case of Education Boards in particular, it has to be remembered that their predecessors were Local Education Authorities firmly fixed in the local government context. The dilution of local government involvement to a minority position in Boards was only accepted because a clear link between the Boards and the new District Councils was to be created.

The Concept of Disqualification

11. It is important to note that a range of provisions in the existing law disqualify certain defined categories of people from standing for/serving on various bodies. For example:-
 - 11.1 In relation to Health Boards, paragraph 5(2)(c) of Schedule 1 to the Health & Personal Social Services (NI) Order 1972 requires a Board to declare a member's place to be vacant if he is convicted of "an indictable offence"
 - 11.2 In relation to Education Boards, paragraph 6(1)(c)(i) of Schedule 2 to the Education & Libraries (NI) Order 1972 provides that a person be disqualified from being a member of a board or a sub-committee thereof if (inter alia) he has, within the 5 years immediately preceeding the day of his appointment or at any time thereafter, been convicted by a court in Northern Ireland or elsewhere in the British Isles of any offence and ordered to be imprisoned for a period of not less than 3 months without the option of a fine
 - 11.3 In relation to District Councils, section 4 of the Local Government Act (NI) 1972 provides that a person "shall be disqualified for being elected or being a Councillor" if (inter alia) he has within the 5 years immediately preceeding the day of his election or at any time subsequent to that day been convicted by any court [and there follows wording similar to that used in the Education & Libraries Order]
12. The concept of disqualification could be used in a number of ways to "tighten the

screw" against politicians who associate themselves with violence. For example,

12.1 the period of 5 years which features in the Education and Libraries Order and the Local Government Act could be extended to (say) 10 years, or to take in anyone convicted for certain offences and/or receiving certain minimum sentences during the present phase of political violence (say since 1969 or 1972)

12.2 one could seek to specify for purposes of disqualification certain types of offence for which conviction would bring disqualification regardless of sentence (and here the logic of the situation would be to disqualify on conviction for a "scheduled" (ie terrorist-type) offence)

12.3 one could provide for the disqualification of any person remaining "unrehabilitated" under the terms of the Rehabilitation of Offenders (NI) Order 1978. Under this Order certain classes of offender can never be "rehabilitated", eg anyone receiving a prison sentence of over $2\frac{1}{2}$ years. For lesser offenders - generally speaking, only those receiving prison sentences, not fines - there is a sliding scale of the period of rehabilitation; for instance, for a prison sentence of between 6 months and 30 months, the period is 10 years

12.4 one could provide that, for the purposes of disqualification, a suspended sentence shall have the same effect as a sentence actually brought into operation (cf the SEAWRIGHT case)

12.5 one could as discussed below disqualify people who declined to make a given form of declaration.

In any extension of disqualification provisions there is the risk of attacking (as with mandatory sentences) unanticipated targets. Moreover, some of the behaviour by

Sinn Fein members which is most resented by the wider public is just on the right side of the existing law. Mr Buxton's submission of 17 June 1985 on "Sinn Fein and Incitement" recalled the conclusion of a Working Party on Further Measures to Curb Terrorism convened after the Harrods bombing, that

"while in theory if not in practice there is a gap in the law which could be plugged, there is a great danger that in doing so we could arouse expectations that something could actually be done to stop the offending but unspecified comments, and we should thus be criticised, perhaps quite quickly, for failing to tackle the root of the problem." Referring to some recent statements by Sinn Fein councillors in support of the IRA, Mr Buxton concluded that "if we were to legislate against such statements the Sinn Feiners would not have the smallest problem in making their point without falling foul of the new law." (See also Mr Prior's letter of 19 July 1984 to the Attorney-General). The earlier studies do not encourage much optimism that skilful and devious people would not be able to conduct themselves just within the law as it stands. A major revision of the disqualification provisions could therefore continue to miss some of the most objectionable statements and behaviour.

"Non-Violence" Declaration

13. In this section we consider whether useful ends would be served by requiring in law from those serving or to be elected or appointed to democratic or other public bodies a form of declaration, oath or affirmation renouncing the use of force as a means to secure political ends.
14. It may be useful to refer briefly at the outset to forms of declarations, oaths or affirmations used now or in the past in Northern Ireland. The Promissory Oaths Act 1868 made provision for the holders of various scheduled offices in England and in

Ireland to take an Oath of Allegiance [to the reigning Monarch and her heirs and successors, according to law] and an official Oath [to "well and truly serve" the reigning Monarch in the specific office]. The Oath of Allegiance is taken by Members of Parliament, and under section 18(2) of the Government of Ireland Act 1920 Members of the former Northern Ireland Senate and House of Commons were required to take the Oath in the same form as that taken by Members of the UK House of Commons. A similar approach was evident in the Local Government Act (Northern Ireland) 1972 which by virtue of section 7 and Part I of Schedule 1 required that no person elected to the office of councillor should act in the office until he had made a declaration in the following terms:-

"I..... having been chosen Councillor for the District of..... hereby declare that I take the said office upon myself and will truly and faithfully fulfil the duties thereof according to the best of my judgement and ability and that I will render true and faithful allegiance and service to Her Majesty Queen Elizabeth II Her heirs and successors according to law and to Her Government of Northern Ireland"

15. After direct rule was introduced much careful thought was given to the impact of oaths and declarations on attempts to develop a wider consensus. A new policy was announced in "Northern Ireland Constitutional Proposals" (Cmnd 5259 of March 1973), which stated that the forthcoming Constitutional Bill for Northern Ireland would provide

" that, in the exercise of powers devolved upon it, the Assembly may not impose upon any member of an appointed body, or upon any person paid out of public funds in Northern Ireland, as a condition of his appointment, service or employment, any requirement to make any form of oath or declaration save when such oath or declaration is required in comparable circumstances in the rest of the United Kingdom"

In the meantime, action would be taken to amend existing legislation - in particular to remove in time for the forthcoming local government elections the requirement for a statutory declaration of allegiance to be made by a Councillor on acceptance of office.

16. Thereafter, the Oaths and Declarations (Repeals) (Northern Ireland) Order 1973 removed the requirement for certain previously-required oaths and declarations and in particular terminated the declaration required of a councillor with the words "judgement and ability" so as to remove the declaration of allegiance. Section 21 of the Northern Ireland Constitution Act 1973 made it unlawful for a wide range of authorities and bodies (the Assembly, and bodies subject to the activities of the PCA and Commissioner for Complaints) to require an oath, undertaking or declaration as a condition of appointment or of acting as a member unless already required or to be required by law (that is by Act of Parliament, Assembly Measure or (in current terms) Order-in-Council).
17. Schedule 4 of the Northern Ireland Constitution Act 1973 required a person being appointed to the Northern Ireland Executive or administration (ie, the office-holders under the power-sharing system) to swear [or affirm]:-

"that I will uphold the laws of Northern Ireland and conscientiously
fulfil as [] my duties under the Northern Ireland Constitution
Act 1973 in the interests of Northern Ireland and its people"

All the SDLP, Unionists and Alliance office-holders were in conscience prepared to swear (save in the case of Mr Devlin, who affirmed) this oath.

18. In present circumstances, the first question to be considered is whether it would be possible to devise a form of words to which Sinn Fein representatives would in

practice be unwilling to subscribe. It cannot be said, on the basis of experience, that members of Sinn Fein have notably delicate consciences, and they have increasingly been disposed to place pragmatic opportunism before ideology (in, for example, seeking remedial action from that very system of courts which they seek to discredit and subvert). If there is to be a declaration, then it would need to be in a relatively simple and robust form. We considered first of all a form of declaration rejecting "the use of violence for political ends". Given the high rhetorical temperature of much Northern Ireland political dialogue one could not be too sure upon whom such a declaration would bite. Moreover, any such wording could be a basis for a familiar kind of logic-chopping. Sinn Fein members would, perhaps, be willing to make such a declaration declaring afterwards that in doing so they had made a distinction between "violence" (which they would construe as the unjust use of force by the "occupying forces") and "the just and understandable use of force to secure justice and freedom from oppression", which could not properly be described as violence. If our real target is Sinn Fein, and the argument for trying to hit it is that it supports the methods and objectives of a proscribed organisation, the IRA, then a declaration in something like the following form could be more apt:-

"I declare that I will uphold the laws of Northern Ireland, and that I do not and will not support the methods or assist the activities of any organisation proscribed by law."

19. In paragraphs 20 to 26 which follow, we therefore discuss the following related issues:-

- a. If Ministers decide in principle to pursue the idea of a declaration, to what elected and/or appointed offices should it be applied?
- b. would it be a practical proposition to make such a declaration a requirement for

the continuation in office, beyond an appointed day, of those already serving at the time of its introduction?

- c. Do we need some form of "belt and braces" removal provision to deal with office-holders who, having made a declaration, fail in practice to honour it (or who, because they were already serving, were not required to make it in the first place)?
- d. On what legislative basis could such declarations be required, and in particular to what extent would any such requirement involve legislation by Bill rather than by Order in Council?

Range of Appointments subject to a Declaration

- 20. There are two important distinctions to be made here; first, as between positions to which people are elected (MEP, Member of Parliament, Assembly Member, Member of a District Council) and those to which they are appointed by Departments/Ministers; and second, between membership of elected bodies and offices arising out of membership (eg the distinction between membership of the Northern Ireland Assembly as such and office as the political head of a Department in any administration based on the Assembly).
- 21. Although Parliament could, in theory, legislate by Bill to import a declaration into the electoral process for the European Assembly, it would no doubt be highly controversial to do so, and likely to be counter-productive in Community terms to appear to be constraining in any way the ability of Northern Ireland electors to

decide who is to represent them in the European Assembly. Again, as far as the UK Parliament itself is concerned, it would be controversial to attach conditions to candiditure which do not exist in contests for other constituencies; and the concession of distinctive arrangements for Northern Ireland might well lead to growing pressures from some quarters for the adoption of STV as the basis of Parliamentary elections in Northern Ireland.

22. In practice, then, we believe that a declaration could be contemplated only for elections to District Councils and the Northern Ireland Assembly, for appointment to offices in a devolved Northern Ireland administration (by way of an extension of the oath/affirmation which the Constitution Act already requires of office-holders) and for appointment to public bodies by Departments or Ministers.

Continuing or Future Service

23. If a declaration is decided to be worthwhile, it would clearly bite upon all appointments made after its effective date. But should we go further, and seek to require individuals who by then will already have been appointed (eg, to Education or Health Boards) to make a declaration as a condition of remaining in office? When we considered this, it seemed to us inconceivable to impose a new condition upon those who had been put into place under the existing rules. We would be certain to face the criticism of "changing the rules in the middle of the game".

"Belt and Braces": The Power to Remove

24. At present we are virtually powerless to secure the removal from office of a person whose conduct in that office is widely regarded as reprehensible - not in the limited area of corrupt practice defined by the Local Government Act but in a wider sense. This impotence was amply demonstrated in the case of Mr Seawright's membership of

an Education Board. If a non-violence declaration were in future to be required as a condition of holding certain offices, further public outrage could be caused by office-holders cynically prepared to make the declaration but thereafter to act and/or speak in ways quite incompatible with it. It is not at all difficult to envisage future situations in which the behaviour and utterances of a Sinn Fein (or ultra-Loyalist) member could give rise to outrage and uproar. To take a hypothetical case, a school bus driver, an employee of the Education Area Board, and a part-time UDR man, is assassinated at the wheel of his bus. A Sinn Fein member of the Board volunteers to make, or is pressed to make, a comment. It is in the terms that any man who puts on "the uniform of the occupying forces" has it coming to him. It is to be doubted if public opinion would sympathise with an inability to take any action in the aftermath of such an episode.

25. We have already discussed, in paragraph 12 above, the possibility of extending the scope of existing disqualifications. But this would, at best, provide an incomplete answer. It is likely that the ingenuity of Sinn Fein members in particular will continue to out-run the ability of the legislator to re-define or extend offences, and that certain offensive remarks supportive of violence will nevertheless remain outside the reach of the criminal law. We considered whether, this being the case, the Secretary of State might be given a wide discretionary power to remove from named offices

"any person who acts or speaks in such a way as to cause the Secretary of State to conclude that he is in breach of the statutory declaration required by []"

The difficulty here would, of course, be that the Secretary of State would be drawn into the area of subjective judgement. Whereas disqualification or removal on the grounds of conviction for a specified offence and/or for a specified minimum sentence is based upon the objective facts of such conviction or sentence, and whereas at the outset agreement or refusal to make a declaration required by law can

readily be factually determined, a power of removal for breach of such a declaration could be exercised only through the exercise of judgement. Particular words or deeds would become politically contentious, and the pressures upon the Secretary of State to exercise or withhold a power to remove could be intense. We therefore considered an alternative in that the judgement should be made, either finally or in the first instance, by an authority other than the Secretary of State. This would not, in our view, be a suitable role for the Parliamentary Commissioner for Administration, and although the Attorney-General may institute proceedings in the High Court for a declaration that a Councillor has been guilty of "reprehensible conduct", which would have the effect of disqualifying that person, this is in relation to specific behaviour in terms of the use of corrupt influence for personal gain. We concluded that a power to remove for breach of a statutory declaration could be an embarrassment and that, if such a declaration were to be introduced, it would be better to expose any who subscribed to it and subsequently acted or spoke against its spirit to criticism for blatant hypocrisy than to hazard what could too easily be presented as a politically motivated power of removal. These difficulties could of course, be overridden to the extent that particular appointments were to be re-defined as held expressly at the Secretary of State's pleasure. But this would be inappropriate for positions secured by election, or for appointments made to secure representation of democratically-elected bodies.

Legislative Basis

26. I attach as an Annex to this paper a minute dated 25 June 1985 from Mr T R Erskine, First Legislative Draftsman, covering the legislative implications of possible action. It will be seen from this that the legislative position is complex, in that electoral matters are "excepted", as are matters for which provision is made in the Constitution Act. Requiring a declaration as a condition of running for election means entering the electoral arena; requiring a declaration as a condition of serving

as a councillor or a member of an Area Board does not. Any further provision in relation to the Assembly or a Northern Ireland administration based upon it would need most careful consideration, and could well involve a parliamentary Bill.

Proportionality

27. It was put to the Secretary of State at a recent meeting with SDLP Party Leaders that the existing local government law was being manipulated by a number of Unionist-controlled Councils to devolve almost all of their work to committees from which Sinn Fein were excluded. Their concern was not so much about the exclusion of Sinn Fein per se as about the development of a tactic which might be used at some future date to exclude the SDLP from vital Council business. SDLP members pushed strongly for amendments to the Local Government Act (Northern Ireland) 1972 to counter the potential for such unreasonable use of the law.
28. The recent judgement in the matter of an application by Brendan Curran and Brian McCann (Sinn Fein) for judicial review in the Craigavon Borough Council case has to a large extent removed the SDLP concern. Mr Justice Hutton considered "that the purported exclusion of the applicants from the work and activities of the Council by forming a Special Committee, from which the applicants are excluded, to deal (subject to a small number of specified exceptions) with all the matters normally dealt with by the Council offends against the clearly established principle that a power given for one purpose cannot be exercised for a different purpose and that such a purported exercise is ultra vires and unlawful".
29. This judgement may of course be appealed, but the more likely course is that the parallel tactics being employed by Cookstown Council will now also be challenged in the courts and the prospect of other councils following suit may recede.

Nevertheless, the present local government law needs to be examined in the sense that it is based on "simple majority" rule (paragraph 7 of Schedule 7 to the Local Government Act (NI) 1972). Thus a dominant party may still effectively exclude minority group Councillors from meaningful participation in the decision making process and certainly from real power. Northern Ireland is of course by no means unique in this respect.

30. The arguments for and against proportionality have, therefore, been considered to see whether it might be possible to make some provision for assuring any political party which wins substantial representation in a particular council of a 'share of the spoils', as represented by Council offices - chairmanship, deputy chairmanship or committee chairmanship - or nominations from that Council unto other bodies.
31. To impose the principle of proportionality would certainly require a change in legislation. On the question of Council chairmanship and vice-chairmanship it seems correct in principle that the party or parties commanding a majority should be able to determine how these positions are to be held (that is, either to keep these positions for themselves or allow them to rotate as an act of policy). This could be regarded as a reasonable recognition of the majoritarian principle. The question of Council nominations would require different legislative change and this possibility is explored later.
32. The potential problem areas in following the principle of proportionality on Council committees have been identified as follows:-
 - i. it would represent an obvious departure from parity with equivalent GB legislation. This would have to be defended at the Assembly and Westminster stages of amending legislation and is bound to be heavily criticised by Unionist groupings. The fact that such amending legislation would preclude in future the

sort of inter-party pacts which have occurred in Castlereagh and North Down (where respectively the DUP and Alliance parties have been deprived not only of committee offices but positions on committees, despite holding a large share of Council seats) is unlikely to placate general Unionist feeling in the matter.

- ii. any such change in legislation so soon after the local government election, imposing new procedures mid-term, would be seen as the "rules of the game" being changed after the game had started. The vires of doing so is certain to be challenged by those opposed to such a move.
- iii. it is unlikely to secure any greater say by the minority party concerned (of whatever political line) if its members are continually out-voted or ignored on committee.
- iv. the greatest obstacle would be the presentational aspect. It would be an almost impossible task for the Government to attempt to justify legislation of this nature without such a move being seen by Unionists as both a sop to the SDLP and pronounced Government acceptance of Sinn Fein as a legitimate political party.

33. On balance it is our view that it would be wrong to contemplate introducing legislation of such nature at this stage. The position can be reassessed in the light of how Councils operate during their current term and further thought given to the 'proportionality' principle in advance of the next elections. Devices used in other jurisdictions (eg as in the German electoral list system where a certain minimum percentage of votes is required before any seats are allocated) can be looked at in detail and their application in the Northern Ireland context examined. Another aspect which might be considered is an amendment of the existing practice of 'simple majority' which applies in local government in Northern Ireland. It might be a

possibility to require Council and Council committee decisions to operate on a two-thirds majority basis on certain matters (for example, before standing orders can be suspended, in determining the relevance of particular motions etc). With certain Councils this would not make one iota of difference to voting patterns and decisions because of the weighted majority on one side or the other but at the end of the day there are limits to how far the majoritarian ideal can be ignored to accommodate or placate a minority presence.

34. The position regarding proportionality in Council nominations to public bodies includes different considerations. There is no mention in the Local Government Act (NI) 1972 of a Council's position regarding such nominations. Rather, this is dictated by whatever piece of legislation established the public body in question. Such legislation is not consistent across the board but in most cases District Council representation on public bodies is, in the final analysis, dependent on Departmental or Ministerial approval. The exceptions occur where the legislation is specific about District Council representation, eg Education and Library Boards, Health and Social Services Boards, NI Fire Authority, Board of Trustees of Ulster Museum, NI Housing Council etc. In no case does the legislation governing these appointments specify that there should be an element of proportionality in such nominations. To provide such a requirement would mean an amendment to each piece of legislation concerned. It would need to be considered in the context of decisions about the other matters discussed in this paper, since proportionality without parallel action to exclude Sinn Fein would have the perverse effect of assuring Sinn Fein of a share of the available offices.

K.P. Blum

30 July 1985