

NH 345/11

COVERING
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FR.

Mr Chesterton
Mr Saunders
Mr Hammond
Mrs Brown
Mr Edgar
Mr Elliott
Mr Hamilton
Mr Kirk

cc: Mr Burns
Mr Rickard

1. MR McCubbin - to see

2. MR ~~Scam~~ ^{Mr Stone}
For file

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CANDIDATES' DECLARATION

I attach the minutes of the meeting of 13 November about the proposed declaration. I apologise for the delay in producing these.

Demi Grey

D R GREY
CPL Division
25 November 1987

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MINUTES OF A MEETING ON 13 NOVEMBER 1987 TO DISCUSS THE PROPOSED CANDIDATES' DECLARATION

Present Mr D Chesterton NIO
Mr M Saunders LOD
Mr A H Hammond HO
Mrs R Brown DOE (NI)
Mr F Edgar LCD(NI)
Mr M Elliott NIO
Mr D Kirk NIO
Mr S Rickard NIO
Mr D Grey NIO

Apologies for absence Mr N Hamilton Cent Sec

INTRODUCTION

1. Opening the meeting, Mr Chesterton said that the discussion would probably fall into two parts: the issues in the paper prepared by CPL division; and the general issue of whether or not the policy was still appropriate. It appeared probable that Ministers would wish to proceed with the proposal. Mr Chesterton confirmed that any conclusions reached at the meeting would need to be endorsed by the relevant Belfast divisions of the NIO.

DETAILED POINTS (PAPER CIRCULATED ON 10 NOVEMBER)

2. Terms of the Declaration

2.1 The discussion paper had suggested a very simple form of declaration which had been pared down with time because of the difficulties associated with the wider formulations. However, a number of those who had commented on the proposal had criticized this narrow definition; and Ministers seemed disposed to accept that it was not sufficient for the declaration to focus on proscribed organisations (to the exclusion of other paramilitary organisations which were not proscribed).

2.2 The meeting had before it two possible alternative forms of words, one suggested by DOE(NI) and one based on a suggestion by Mr Hammond. Mrs Brown said that the DOE's formula had been intended as a cock-shy. She would not wish to press for its adoption in preference to the other. Mr Hammond explained that he preferred the extension of the form of words in the discussion paper to refer to "terrorism", which was a statutory formula, rather than "unlawful violence" which might result in arguments about lawful self-defence. It might, however, be necessary to add a rider defining "terrorism" ("that is to say violence for political ends"). He did not believe that the line of argument that the security forces indulged in "violence for political ends" was capable of being sustained. Any extension of the deliberately sparse terms of the declaration suggested in the discussion paper would make enforcement more difficult; but the formula he suggested would be no more

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difficult to enforce than any other and was probably the best that could be achieved. He believed that a declaration in the terms suggested would catch support for terrorism generally rather than support an assistance for a particular act and that it would also catch support for "the armed struggle". But it was difficult to construct a declaration that would prevent a speech which was prefaced with the words "I can well understand why".....".

- 2.3 It was agreed that the aim should be to make the declaration as complete as possible and that the legislation should not attempt to define what might constitute a breach. It was also agreed that there was no need to include a reference to "engaging in" as well as "supporting or assisting" (because engaging in terrorism was already an offence).
- 2.4 The response to the discussion paper from the UUP had suggested that the only certain way to exclude Sinn Fein was to require candidates to repudiate proscribed organisations. Mr Hammond said that "repudiate" would be difficult to define and impossible to enforce and that to attempt to do so would bring the law into disrepute. However, one could not say that it was already covered by the undertaking "not to support or assist". An undertaking not to support any proscribed organisation was by no means the same thing as a statement repudiating all proscribed organisations. Mr Elliott said that the idea of a requirement to repudiate was central to unionist thinking; and it was agreed that the submission to Ministers should explain why it was not possible to incorporate this in the declaration.
- 2.5 It was agreed that the second of the two formulae in paragraph 22 of the CPL paper should be recommended to Ministers subject to the deletion of the words in square brackets, the substitution of "or" for "nor" in line 3, the addition of a rider defining "terrorism" and the inclusion of "either by word or by deed" after "support". It was further agreed that CPL would liaise further with Mr Hammond about this final point, as "word and deed" might not cover all possible forms of expression. However, it was recognized that the Parliamentary draftsman might have his own ideas about an appropriate formula. Mr Hammond pointed out that the words "or undertake" were tautological, but there was no harm in their being retained for presentational purposes.
- 2.6 It was also agreed that the enforcement provision should make clear that a breach could be committed only in a public place (which would exclude an all ticket meeting of a political party), but that this might be anywhere in the world. Mr Saunders expressed some unease at the prospect of creating extra-territorial legislation which might apply to non-nationals. He was not concerned about civil enforcement, but he suggested that the FCO should be consulted if it were proposed to create a criminal offence which foreigners might commit while abroad.

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3. Enforcement: Civil v. Criminal

- 3.1 Mr Saunders said that although he had been unable to discuss the matter with the new Attorney-General he thought it unlikely that his views would differ significantly from those of his predecessor, ie he would probably be averse to the use of criminal sanctions in the event of a breach of the declaration, partly because of the workload involved, but mainly because of the problems of political pressure to bring cases and of criticism for turning cases down. The option of ex officio actions by the Attorney General in the civil courts was even worse because he would then not have the assistance of the DPP and RUC. Mr Saunders wondered whether the use of the relator proceedings arrangements (whereby the Attorney-General lends his name to proceedings being brought where he is satisfied there is a prime facie case that a public wrong has been committed) would provide a way round these difficulties.
- 3.2 Mr Elliott said that there was considerable support for the view that breach of the declaration should be a criminal offence. A declaration which relied on enforcement through the civil courts would be very much less attractive to opinion in Northern Ireland. Mr Kirk pointed out that following publication of the discussion paper Mr Needham had expressed the view that enforcement should be through the civil courts. Most of the comments received in favour of the proposed had favoured using the criminal courts; what were the arguments against this? Mr Hammond replied that at the practical level the wide form of declaration would give use to a number of statements and actions and to arguments about whether or not these constituted a breach of the declaration. It was likely that a sizeable proportion of cases would not succeed (or that the system would collapse under the strain) and that the legislation would be regarded as having been discredited. There was also some force in the view that the object of the exercise was to exclude certain councillors not to create a new criminal offence, particularly one that could be committed only by an elected representative. He felt that Parliament might find it more difficult to accept a declaration which was enforceable in the criminal courts, particularly if it was in the wider form now proposed. Mr Rickard added that opting for the criminal route would remove, or at least significantly weaken, one of the arguments used against proscription, which the discussion paper had come down against.
- 3.3 Mr Kirk said that that the main disadvantages of the civil option appeared to be first, the risk to individuals and second, the cost of an action. The latter might be overcome by having an impecunious councillor, who would be eligible to receive legal aid, bringing the action. As to the former there was the possibility of using the representative procedure, ie a person bringing an action on behalf of himself and others. This would give a measure of protection to the individual, but would reduce the likelihood of legal aid being granted. It was suggested that

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the presentational advantages of the Attorney-General lending his name through relator proceedings might be outweighed by the fact that this did nothing to reduce the risk to the individual whose name would still appear as plaintiff. A further disadvantage was that relator proceedings were specifically excluded from legal aid (Part 2 of the 1st Schedule to the Legal Aid Act 1974.) Mr Hammond suggested that whether or not the Attorney-General decided to lend his name to proceedings his decision would be criticized. There was the further problem that if he were to agree, his name could be associated with a controversial case over which he had no control. In addition, in order for relator proceedings to be possible, the legislation would have to create a cause of action.

3.4 Mr Kirk said that if councils were empowered to bring actions, this would protect the individual. But he accepted that locus standi could not be limited to the council to which the offender belonged and that it would be undesirable for the Assembly to institute proceedings against individual members. Mr Hammond considered that of the options listed in paragraph 9 of the CPL paper (iv), (v) and (vi) went too wide; option (iii) (any elector of the district concerned) was a possibility; but (i) and (ii) (actions by other members of the same council or by the council itself) seemed the best options. It would be extremely difficult to empower other bodies, such as political parties, to bring actions.

3.5 Mr Hammond said that whichever method of enforcement was adopted the grounds would be that the councillor had "contravened the terms of the declaration as set out in statute". This avoided the need to prove that a particular individual had signed the declaration.

4. Mechanics

4.1 Mr Hammond pointed out that although a candidate's consent to nomination for a local government election had to be in a prescribed form of words it did not have to be on an official printed form. The candidate could simply write it out if he so wished. It would therefore not be possible to have a "health-warning" about the penalties for failing to abide by the declaration in the candidate's consent, although this could be included on the forms which were printed by HMSO.

4.2 It had been suggested that the declaration might be declaimed, either in addition to or instead of being signed by candidates. Mr Kirk said that on balance it seemed preferable not to provide those at whom the measure was aimed with an opportunity which could be exploited for publicity purposes. Mrs Brown and Mr Elliott accepted that the item of a "swearing-in ceremony" for candidates was not practical. But they wondered whether including the declaration in the consent to nomination would be seen as a sufficiently public demonstration by unionist opinion. Mr Hammond agreed to consider whether it would be

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possible to have a two part form of consent and require the candidate to sign both parts.

- 4.3 It had also been suggested that council proceedings should be recorded. This of course assumed that a breach of the terms of the declaration would be likely to occur in the Council Chamber. Mr Hammond said that in principle tape recorded evidence would be acceptable, provided that the engineer who made the tape could be called to give evidence. Such evidence might be useful in the event of a dispute about exactly what had been said, whereas the present summary minute of proceedings would not. But the best evidence would be the testimony of one councillor supported by others.
- 4.4 Finally it had been suggested that returning officers should have a discretion not to accept a nomination from "insincere" candidates. There was no support for this proposal. (Mr Hammond pointed out that at present returning officers were empowered to declare a nomination invalid, but they had no discretion in the matter. The reference in paragraph 33 (d) of the CPL paper to an existing "discretion" was therefore incorrect).

5. Penalties

- 5.1 Informal consultations with C1 division of the Home Office had suggested that if contravening the terms of the declaration were to be a criminal offence a level 5 fine (currently £2000) was probably the appropriate penalty.
- 5.2 Mr Hammond asked whether disqualification for serving as a councillor should be an automatic consequence of a conviction/High Court finding. On the one hand it might appear a bit harsh if an outburst in the heat of the moment resulted in disqualification. But it would be impossible to assess the sincerity of subsequent retractions and, on balance, automatic disqualification was probably right. This raised the question of whether convictions for similar offences (eg under ss 24 and 25 of the Emergency Provisions Act) ought not also to attract automatic disqualification on conviction and it was agreed that the submission would consider whether or not a conviction for a scheduled offence should entail automatic disqualification for election to a district council or for serving as a councillor.

6. Extended disqualification

There were no strong views on whether or not the present 5 year period of disqualification for election as a district councillor should be extended. However, it was agreed that the present grounds for disqualification for election to the Assembly should remain unchanged except for the additional disqualification which would result from contravening the terms of the declaration.

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7. Other Matters

It had been suggested that if a Commission for District Councils were to be established, locus to initiate proceedings against councillors there were alleged to have contravened the terms of the declaration might be vested in that body. The meeting concluded that such a body was very unlikely to come into being before the next local general election in May 1989. Doubts were also expressed as to whether this function would be an appropriate one for such a body; and as a minor point there would seem no logical reason why such a body, if established, should be responsible for bring action against members of any future Assembly.

GENERAL DISCUSSION

8.

- 8.1. Mr Kirk said it seemed likely that Ministers would wish to proceed to make legislative provision for a declaration. There appeared to be a measure of support for the proposal, but this was in some cases rather lukewarm. The general unionist view was that it was better than nothing; the Alliance party supported the proposal; the SDLP disliked it; and the (GB) Labour party would probably also oppose it. The Irish Government was known to be unenthusiastic but had so far not commented publicly. These views would need to be reported formally to Ministers in the eventual submission. This submission would also need to rehearse the arguments about the problems of enforcement which had already been heard and to spell out the aims and likely consequences of the measure.
- 8.2 In practical terms, the aim appeared to be the relatively modest - but nevertheless important - one of making life in the Council Chambers more bearable; although it was possible that the short-term effect would be to raise the political temperature by producing a situation where each side tried to bait the other into a statement which would contravene the terms of the declaration. The aim of the declaration was not to remove Sinn Fein. Indeed, Sinn Fein had already indicated that its candidates would probably sign any declaration. This would need to be spelled out and the submission would also have to include an assessment of long-term consequences.
- 8.3 Mr Elliott suggested that on the purely practical level it would be extremely difficult to abandon the proposal. It might well be that the declaration would prove to be ineffective and would serve only to increase support for Sinn Fein in the short-term. But it was important that the Government should be seen to be doing something to enable action to be taken against elected representatives who abused their position in this way. The declaration was only one part of a general strategy and had to be seen as such. Mr Hammond said that the declaration appeared to be largely in political gesture to which the

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Government was perceived as being already committed. It was important that Ministers should be given an assessment of the likely effects of the measure, including the effect of the probable opposition in Parliament to the Bill which Sinn Fein might cite as respectable opposition to the measure. His own view was that if the declaration proved to be ineffective, the long-term effects of this would outweigh the short-term political advantages.

- 8.4 Mrs Brown asked whether, if Sinn Fein candidates signed and abided by the declaration, this would affect Ministerial policy about meeting Sinn Fein councillors. Mr Hammond thought that this was unlikely. Such councillors would still have been elected on a ticket of supporting violence. The justification for the policy would therefore remain unchanged.

CONCLUSION

9. Mr Chesterton thanked those present for attending at short notice. The timetable for the legislation was extremely tight and quite a lot still remained to be done; but the discussion had been very helpful.

CPL Division
24 November 1987

Circulation:-

Those present:-

Mr Burns
Mr Hamilton.

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