



**Northern Ireland
Assembly**

**ASSEMBLY AND EXECUTIVE
REVIEW COMMITTEE**

**OFFICIAL REPORT
(Hansard)**

**Consideration of the Size of the Assembly
and Review of Sections 16A to 16C of the
Northern Ireland Act 1998**

9 November 2010

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**Consideration of the Size of the Assembly and Review of
Sections 16A to 16C of the Northern Ireland Act 1998**

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Members present for all or part of the proceedings:

Mr Jimmy Spratt (Chairperson)
Mr Jonathan Bell
Mr Fred Cobain
Mr Tom Elliott
Mr Simon Hamilton
Mr Raymond McCartney
Mr Conall McDevitt
Mr John O'Dowd
Mr Declan O'Loan

Also in attendance:

Mr Alan McFarland

Witnesses:

Mr Jonathan McMillen) Northern Ireland Assembly Legal Services

The Chairperson (Mr Spratt):

We will start with Jonathan McMillen's presentation. I ask you to take us through the paper, Jonathan, and I assume that you are happy to answer Committee members' questions thereafter.

Mr Jonathan McMillen (Northern Ireland Assembly Legal Services):

The Committee Clerk asked me to go over issues that the Committee raised at its previous meeting about the various assurances given by the Secretary of State on the Parliamentary Voting System and Constituencies Bill. The first was whether the Government were bound by a commitment in a letter, in the sense that they were legally advised to give effect to any recommendation by the Committee in its report to the Assembly on the size of the Assembly. I do not think that a letter could be made into a legally binding commitment. That would involve the Secretary of State committing himself to introducing a Bill in Parliament, which, for a variety of reasons connected to the Bill of Rights Act 1689, is not possible. The courts cannot compel a Member of Parliament to do something in the precincts of Parliament. That is, effectively, dealt with in paragraphs 1 to 6 of my advice. In my reading of the situation, no legal obligation is created by that letter.

There are a couple of interesting arguments based around the Belfast/Good Friday Agreement. I dealt with those at paragraph 7, and it would mainly be an issue if the Committee were minded to recommend that the size of the Assembly remain at 108 seats. Again, that would be more something that could reinforce a political argument than ground an effective legal argument. It is a political rather than a legal question. However, it would cause some political embarrassment if the Government were to go back on an undertaking. That deals with the main issue as to whether the Secretary of State is bound by his commitment.

The Committee Clerk also asked me to consider three additional issues. The first was a mechanism that might be adopted if the Committee were minded to recommend the retention of 108 seats. What would happen — *[Interruption.]*

The Chairperson:

OK, members, can we have only one meeting here? We are listening to someone at the table. We should let him finish first and then have our conversations.

Mr McMillen:

Quite an interesting provision is made for Wales in the Parliamentary Voting System and

Constituencies Bill. The provision basically fixes the size of the National Assembly for Wales to an earlier enactment. It seemed to me that it would be possible for something similar to be done for the Northern Ireland Assembly, and I have dealt with that at paragraph 10.

Paragraph 11 is about cross-community support and paragraph 12 concerns the form of the recommendation. I do not think that there is a requirement for cross-community support. Obviously, any Member with sufficient support could table a petition of concern on any motion to do with the matter, and cross-community support would be required were that done, but I do not think that it would be required generally. On the form of the recommendation, I think that a letter from the Secretary of State to the Speaker would be the obvious way of doing it, but again that is something to leave with the Speaker. That really concludes my presentation.

The Chairperson:

Thank you very much, Jonathan. Do members have any questions on that legal advice?

Mr Bell:

You say that cross-community support would be required if a petition of concern were presented, is that correct?

Mr McMillen:

If a petition of concern were presented, the effect would be that any motion would require cross-community support.

Mr Bell:

If a petition of concern were not presented and the amending legislation were to fall, would we automatically revert to the Westminster model of 15 constituencies by six seats?

Mr McMillen:

If no recommendation is made by the Assembly, the likelihood is that the Assembly will revert to having 90 Members from 2013. The Assembly is obliged to make decisions, in effect, by resolution. That is simply the law. If a petition of concern is tabled, the Assembly must make a decision by cross-community vote. If it does not achieve cross-community support, the motion

will not pass. Accordingly, I do not think that it could then be said then that the Assembly had made a recommendation to the Secretary of State.

Mr Bell:

Would new legislation to go to 15 constituencies by six seats not then be needed?

Mr McMillen:

The default effect on Northern Ireland of the Parliamentary Voting System and Constituencies Bill, which is to have its Second Reading in the House of Lords next week, will be a reduction to six Members for 15 constituencies. That will happen unless the Bill is amended in the Lords or there is a later amending enactment.

Mr McDevitt:

I would like your advice on a couple of technical questions about paragraph 10. If the Assembly wanted the number of Members to remain at 108, as I read things, we could advise the British Government that the number of constituencies will still be reduced in accordance with the electoral formula. We could advise the British Government to continue to allow us to elect 108 from a reduced number of constituencies.

Mr McMillen:

No. The effect would be to decouple —

Mr McDevitt:

OK. It would have a decoupling effect. That was to be my second question. Therefore, in effect, it would be classed as decoupling.

The Chairperson:

Jonathan, thank you very much indeed for your advice, which will be referred to in the future.

If members have considered the summary, perhaps we can start with that, keeping in mind that there are two separate issues with which to deal: the number of MLAs and sections 16A to 16C of the Northern Ireland Act 1998, as amended by the Northern Ireland (St Andrews Agreement)

Act 2006. I am open to discussions. I thank the Committee staff for making up the briefing document, which is very handy. Rather than have to go through individual papers, the briefing paper makes things easier to deal with. Members, it is over to you.

We shall take bids.

Mr O'Dowd:

I thought this was a staring competition.

Our position is as it says on the tin. The legal advice is fine and good, and it is always useful to have, but we are politicians and politicians who make political decisions. Until the political circumstances improve, and until we can prove that we can sustain the rationale behind the Good Friday Agreement with fewer MLAs, we will not move to that position. At present, we are of the view that the structures of the Good Friday Agreement are there for a reason. One of those structures is representation to the Assembly, and that currently entails six MLAs in each constituency. We want to await the outcome of discussions on the Bill at Westminster, and we will deal with the political realities that that produces. As I said, the structures that we have are there for a reason, and, although we certainly cannot ignore costs, the cost of reducing representation and the number of minority voices in the Assembly would be huge.

Mr Hamilton:

Our party position — that we desire a reduction in the number of Assembly Members — has been clear for many years. I can put forward a plethora of reasons for that, not least costs in comparison with other devolved Administrations in the United Kingdom. John is right to the extent that we have to await the reality that emerges from the process at Westminster.

However, I will point out a couple of things. First, there seems to be a willingness and openness at least to discuss a reduction on the part of all but one party, or individual, that has submitted a paper to the Committee. That brings me to my second point, which is that there is an acceptance of the reality that there is a downward pressure being applied. My party may not particularly like the reduction in the number of Westminster constituencies, but if that goes through, it will bring about, as we have heard again today, the default position of a reduction in

the number of Assembly Members. Frankly, everyone needs to get real about the fact that there is that downward pressure. Although a reduction may not be achieved in the way in which my party or I want it to be or what we perceive as the best way, the reality of that downward pressure has to be accepted. Whether we like it or not, it is coming.

Mr McDevitt:

I will probably echo much of what has been said. There are inevitable consequences from the legislation, if it is to complete its passage through Westminster, as we believe that it will. We are open-minded, as we reflected in our paper, about a discussion on some readjustment in the size of the Assembly.

To be frank and honest about it, for the sake of argument, if the Westminster Bill were to go through as is, and it were simply to be accepted by the Assembly, that would give us 15 constituencies, each with six seats, which would equal a 90-seat Assembly. I am interested in getting views about whether a 15-by-six or an 18-by-five model would be in the best interests of our region and whether coterminosity or decoupling would be better. It is unfortunate that we are unable to take this conversation to a serious level until we learn the outcome of the Westminster conversation.

Mr Elliott:

Our position, as set out in the paper, is that we support the reduction in the number of Assembly Members, but that needs to be taken in the context of the overall reform of Westminster that is under way. We need to ensure that everything falls into place. We cannot do one in isolation from the other.

We would like to see a similar review of all non-departmental government bodies as well. We would also like to see changes made to the Northern Ireland (St Andrews Agreement) Act 2006.

The Chairperson:

Do members have any other views? OK. There is consensus around the table that we need to await the outcome at Westminster. As Jonathan McMillen indicated, the Bill's Second Reading in the House of Lords will take place on 15 November. The Bill's Committee Stage, Report

Stage and Third Reading will follow. The Committee Clerk has said that that will take us right through to some time in February.

The Committee Clerk:

The anticipated date is 7 February 2011. It is anticipated that the Bill's passage through the House of Lords will take from December until early February.

The Chairperson:

Those are the stages that the Bill has to pass through in the House of Lords, so we have quite a bit of time between now and then. From what has been said around the table, it seems to me that we want to await the outcome of that. Members have indicated that they are happy to discuss numbers. Again, we need to bear in mind that we have to submit a report to the Assembly by 1 March. Is it that date?

The Committee Clerk:

No. In his letter to the Speaker, the Secretary of State indicated that he would like a response on the size of the Assembly early in the new mandate.

The Chairperson:

Early in the new mandate, but we have —

The Committee Clerk:

The Committee has to respond on sections 16A to 16C by 1 February 2011.

The Chairperson:

We need to come back to that issue and discuss it. Is there any merit in having a discussion about sections 16A to 16C today?

Mr Hamilton:

Our position is clear: there is a divergence between the St Andrews Agreement and the Northern Ireland (St Andrews Agreement) Act 2006. My party does not support the change that was made in the 2006 Act. As we have said, we suggest its removal.

The Chairperson:

The point that I am trying to make is that we have to report to the Assembly by 1 February, so we need to bear in mind that we must deal with that issue. Obviously, there is not a big appetite to deal with it today.

Mr Hamilton:

I suspect not.

Mr O'Loan:

Our position on the issue is straightforward and is set out in the paper. We did not welcome the change made in the 2006 Act. We do not support it. We would like to see a reversion to what was enacted after the Good Friday Agreement.

The Chairperson:

That is all very well. I understand the positions of parties, but we still have to, one way or another, get some sort of an agreement around the table or else go back to the Assembly and say that there is no agreement. We have to do that by 1 February next year.

Last week, we discussed issues around the timing of putting together a report. I imagine that it will not be a very big report. It will be nothing like what we did on policing and justice, but it certainly requires some work and some time for the Committee Clerk's office to deal with it.

We are not going to make any further progress today. Perhaps parties need to go off and have a discussion about the other piece of work that we need to do on sections 16A to 16C, while bearing in mind the report. The question is whether we come back next week or revert to having fortnightly meetings.

As I said, we know the positions of the parties. What has happened today is that all the parties have restated their position around the table. That is where we are at. People are willing to discuss the issue, but we really have not moved much further forward.

Mr O’Loan:

What is the duty on us to report?

The Chairperson:

We have to report on sections 16A to 16C. We are duty-bound to do that under the Northern Ireland (St Andrews Agreement) Act 2006.

The Committee Clerk:

Section 11 of the Northern Ireland (St Andrews Agreement) Act 2006 inserted section 29B into the Northern Ireland Act 1998. Section 29B refers to the review of the operation of sections 16A to 16C. It states:

- “(1) Standing orders shall require the committee established by virtue of section 29A to consider —
- (a) the operation of sections 16A to 16C; and
 - (b) in particular, whether to recommend that the Secretary of State should make an order amending this Act and any other enactment so far as may be necessary to secure that they have effect, as from the date of the election of the 2011 Assembly, as if the executive selection amendments had not been made.”

It also states:

- “(2) If, by no later than 1 February 2011 —
- (a) the committee established by virtue of section 29A of the 1998 Act makes the recommendation set out in section 29B(1)(b) of that Act, and
 - (b) the committee’s recommendation is approved by the Northern Ireland Assembly with cross-community support”.

That is the key part. That issue does require cross-community support. The Secretary of State will, by Order, make a statutory instrument to invoke those changes.

Mr McFarland:

It may be useful for the Committee to know whether there is any discussion to be had on the subject. My sense from the submissions is that Sinn Féin is not interested in discussing another way. It would be useful to know from John whether there is any discussion to be had, in which case it is worth continuing, or whether Sinn Féin’s position is that there is no discussion to be had on the issue, in which case there is little point in dragging it out, and we could do the report next week.

Mr O'Dowd:

If the topic of discussion is how to avoid having a nationalist or republican First Minister, there will not be a discussion on it, because we are not going down that route.

I am interested in Declan's comments. Is the SDLP stating that it wants removal of all of sections 16A to 16C from the St Andrews Agreement Act? That is a strange position. Surely the SDLP would not disagree with the mechanism that allows for a nationalist or republican First Minister.

Mr McDevitt:

The Good Friday Agreement allows for a nationalist or republican First Minister.

Mr O'Dowd:

Is this not an improved position?

Mr McDevitt:

The issue is how the First Minister is elected. It is not whether the people speak; it is about how to elect a First Minister. If the people speak, the people speak, right? The Good Friday Agreement makes absolute provision for a nationalist First Minister. There is nothing in the Northern Ireland Act 1998 that will prevent the election of a nationalist First Minister.

Mr O'Dowd:

It is interesting to hear that position.

Mr McDevitt:

If you think about it logically, John, that is the logical answer.

The Chairperson:

Perhaps parties need to have another discussion on the fringes. The Committee is not the place for that discussion. I am quite happy to allow everyone to have a fair say as long as it is done through the Chair.

My sense from this morning's discussion is that I do not think that we are going to progress much further. The Committee Clerk's office will provide a ready reckoner of what we need to do in order to complete the work that we must put before the Assembly by 1 February 2011. That will help us to understand the timescales within which we have to agree. Perhaps we could simply take a paper to the Assembly that says that there is no agreement in Committee. We would still have to do that, however. My sense is that we must still produce something and that it will have to be presented to the Assembly. Bearing in mind the Christmas recess, that does not leave a lot of time between now and when we might have to report. If members are happy, we will ask the Committee Clerk's office to give us an idea of the time that it would take to produce a report, publish it and do all the necessary bits and pieces. In the meantime, members could see whether there is any movement on having that discussion, bearing in mind that it will probably be February 2011 before we know exactly the outcome of the Westminster legislation. We do not have a time problem with that issue. The time problem relates to our review of sections 16A to 16C.

The next question, on which members must make a decision, is whether the Committee returns to holding fortnightly meetings. There is no point in our coming back next week with the same positions. During that two-week period, there would be an opportunity for parties to discuss what they might want to do regarding the report that must go to the Assembly. Then, members can come back to the Committee and have meaningful discussion to try to get us to some sort of position on paper. It may well be that we cannot reach agreement. However, we need to do that. By that time — perhaps when the Committee Clerk has produced the paper — it could be circulated to members to give them an idea of the timescale within which we must work, showing the recess period, and so on. That could be provided to Alan and shared with other parties that have also made a submission. That would be worthwhile. If members agree, parties that are not at the table and will not have an elected member coming along can put any thoughts that they have in writing. We would be happy to receive that from them. Do members agree?

Members indicated assent.

The Chairperson:

Are members happy to meet two weeks from today?

Members indicated assent.

The Chairperson:

I have just one other issue. Members have before them a research paper on the Parliamentary Voting System and Constituencies Bill and its impact on constituencies. Stratagem has asked for a copy of that research paper, which was submitted today. I propose that any papers before the Committee in full session are confidential and should remain so until such time as we agree to their publication. Is that agreed?

Members indicated assent.