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9 November 2015

Dear Claire

Assembly and Executive Reform (Assembly Opposition) Bill – Politics Plus Session

Thank you for your letter of 26 October and the request for clarification on the issues raised by Mr Daniel Greenberg at the Politics Plus facilitated session on 20 October. I would like to thank Mr Greenberg for taking the time to give evidence to the Committee on my Bill and for Politics Plus for facilitating the session.

I have enclosed a written response paper to the issues the Committee highlighted concerning the session of 20 October. In my opinion Mr Greenberg raised three substantive issues concerning the Bill which I have dealt with primarily; subsequently going through the specific issues I consider to remain outstanding.

Yours sincerely

John McCallister

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Assembly and Executive Reform (Assembly Opposition) Bill

Politics Plus Session with Daniel Greenberg for Assembly and Executive Review Committee

Response Mr John McCallister MLA

9 November 2015

1. In my opinion Mr Greenberg raised three substantive issues concerning the Bill which I have dealt with primarily in this paper; subsequently going through the specific issues I consider to remain outstanding.

Standing Orders

2. Throughout the paper provided, Mr Greenberg makes reference to the Bill failing to recognise that there is nothing to prevent Standing Orders from being nugatory, as in his opinion, the Bill cannot legally dictate the content of Standing Orders. Mr Greenberg subsequently, however, states that *'the Bill is bound to rely on the political will to form an Opposition throughout Standing Orders, and would therefore gain all the available traction by a single duty for Standing Orders to make provision for an Opposition – a general duty which would match provision in the 1998 Act – and leave all the detail to be determined by the Standing Orders in accordance with illustrative lists of what "may" provide to be set out in the Bill along the current lines: that avoids the dangers of inadvertent omission, and still presents a single enforceable duty'*.
3. In referencing the 1998 Act I am unsure as to Mr Greenberg's final position on this issue. There are clear examples throughout the 1998 Act of relatively detailed instruction being given with regards to what is included in Standing Orders. The 1998 Act provides a clear precedent for a relatively detailed legal/statutory framework for what should be included in Standing Orders by those tasked with agreeing them in the Northern Ireland Assembly.
4. I would draw the Committee's attention to Part 1 of the Northern Ireland Act, where alone, there are six paragraphs where the Act states that 'Standing Orders Shall include' or 'Standing Orders shall provide for' (5A, 13 (1), 13 (2), 13 (3), 13 (4), 13 (5) and 13 (6)). I would further draw the Committee's attention to Section 29 in Part 3 of the Act, which deals with Statutory Committees. The Act provides quite detailed instruction as to what Standing Orders should include, in this instance using the language 'Standing orders shall make provision for'. I am content that a precedent has been set in the Northern Ireland Act for a legislative/statutory frame, to be placed upon those tasked with constructing Standing Orders in the Northern Ireland Assembly.
5. I would like to remind the Committee that throughout the drafting of the Bill I received legal advice with regards the wording of the clauses which deal with Standing Orders and I was

advised that using the wording 'Standing Orders must' is competent. There appears to be no legal difference between 'standing orders shall make provision for' and 'Standing Orders must make provision for'. Which is the approach in my Bill and one of the approaches in the Northern Ireland Act, however, the Committee may wish to take its own legal advice on this issue.

6. The issues Mr Greenberg raises with regards the consequences of Standing Orders not meeting the requirements set out in legislation are therefore commensurate issues for the Northern Ireland Act. I am content that a relevant person with locus could bring a decision of the Northern Ireland Assembly, with regards Standing Orders, to judicial review if they considered the writing of Standing Orders to be perversely or irrationally beyond the intent of the statutory framework as laid out in the Bill. The Committee may wish to seek its own legal advice on this issue.
7. In addition, the Northern Ireland Assembly is a creature of statute, in that it differs from Westminster, which is based, to an extent, on both convention and the law. The Northern Ireland Assembly is founded upon and grounded in the Northern Ireland Act, the suggestion being that it is much more judiciable than Westminster.
8. The issue of complete non-compliance with the aspects of the Bill, which relate to Standing Orders was also raised on a number of occasions in the Committee's paper and this is a reasonable point. If no Standing Orders were to be introduced it would be difficult to force the Northern Ireland Assembly to do so. I would point out to the Committee that the Northern Ireland Act would have faced similar problems. Any other Act which gives a power to a Minister or an NDPB, such as the power to introduce Regulations, would face a similar problem. If this Bill passes it will do so with the majority support of MLAs in this House, which places a significant political onus and public expectation for the Standing Orders to be amended in line with the Bill and an Opposition created. I think it would be extremely difficult for parties which voted for the Bill to subsequently refuse to introduce the Standing Orders.
9. I am, however, looking at the potential of introducing a reporting mechanism within the Bill, which may, for example, require the AERC Committee to update the House, at regular intervals, on the progress that is being made with regards the amendment of Standing Orders in line with the statutory framework provided for in the Bill. I would point out that such a reporting mechanism would likely have no legal ability to force the Assembly to introduce Standing Orders, but would provide an additional political/public accountability mechanism for the Bill.
10. I would also take the opportunity to remind the Committee that the Bill has been deemed competent by the Speaker, and as per normal procedure, he will have received extensive legal advice on the Bill from his legal team.

11. There is also a strong political argument as to why I have approached the Bill in this way (and it may be why the authors of the Northern Ireland Act took a similar approach). My approach to the Bill has attempted to keep within the premise of broad political consensus – the basis of the Belfast/Good Friday Agreement - and inclusivity, whilst allowing for a certain amount of flexibility with regards the drafting of Standing Orders.
12. As I understand Mr Greenberg’s points in the paragraph quoted from the report (above) he is conceding that this Bill is designed to ensure maximum political consensus whilst creating the means to ensure decisions happen and agreements are kept.
13. Despite parties in the Assembly having the power to change Standing Orders and create an Opposition, to date this has not happened. I believe the benefit of having clear procedures for an Opposition on the face of the Bill, with a degree of flexibility to add in necessary elements such as timings etc., will give all political parties comfort as to what is actually being agreed and voted upon and what the clear direction of travel is with regards the required content of Standing Orders. Mr Greenberg’s suggestive approach of a general duty accompanied by an illustrative list of what Standing Orders “may” include, in my opinion uses the same legal logic as my approach, however, would not give the degree of certainty to political parties which I think is necessary and which is delivered in sections of the Northern Ireland Act. In my opinion the Bill strikes a good balance between providing a certainty through a relatively clear statutory framework, whilst allowing flexibility to allow Standing Orders to iron out any technical or timing issues.
14. As others have also pointed out, creating an Opposition by changing Standing Orders alone leaves the future existence of the Opposition in the hands of the largest parties in this or any future Assembly – I agree that this is an unsatisfactory way to carryout this reform.

Ministerial Report

15. Mr Greenberg suggests an alternative approach, namely a Ministerial Report, whereby, Ministers (FM and dFM) could be required to produce a report setting out how and whom an Opposition could be formed by and could further reflect on the type of constitutional changes which are laid out in the Bill. Mr Greenberg goes on to suggest that the Ministers could be required to lay the report before the Assembly and where the Ministerial Report has identified changes that can be achieved through Standing Orders, the Ministers must bring forward a motion before the Assembly to bring forward these changes. Mr Greenberg suggests that the Report is an enforceable mechanism as you can sue the Minister. He suggests it brings the control back to the Assembly.
16. I have a number of issues with this approach. Firstly Mr Greenberg’s rationale for proposing such an approach is because he initially deemed the Standing Orders approach within the Bill to be invalid. However, as I argue above, the competency of the Bill and the precedent of the Northern Ireland Act, strongly suggests that this position is not sound and therefore, the categorical need for an alternative approach is removed.

17. I am opposed to the Ministerial Report proposal for two other reasons. Whilst I recognise that in the UK and the Republic of Ireland, we have what can be considered 'weak' separation of powers - by comparison to more presidential systems such as the United States – I think it wrong that the formation of an Opposition is the gift of the Executive arm of Government. We should not forget that the role of the Legislative arm of Government is to pass laws and hold the Executive to account.
18. I would again point out to the Committee that the Northern Ireland Assembly is much more a creature of statute than Westminster and therefore the necessity to place the responsibility with a Minister to aide judiciability is lessened.
19. My last objection to this proposal is its practicality. Members may acknowledge that recent history has demonstrated that if such a responsibility were placed upon OFMDFM, under the current system, there is a degree of probability that no agreement would be reached between the main political parties and no report produced. Again this goes back to the point made above; the benefits of the Bill and the approach pursued is that we publically place the terms and conditions for an Opposition on the face of the Bill and ask parties to vote on them, which gives all parties comfort as to what has been agreed and a legislative framework to has been created.

Competency of Clause 13

20. Mr Greenberg raises an interesting and extremely important issue with regards Clause 13 and the subsequent Schedule. This is an issue that I have given much consideration to when developing the policy objectives of the Bill. It is for this reason that I have consulted with the UK and Irish Governments on my approach. On 21 September 2015 the Speaker of the Northern Ireland Assembly wrote to me outlining that he was content that the Bill be introduced to the Assembly on 22 September. The Bill followed due process to get to this point and was, to my understanding, subject to analysis by legal advisors to the Speaker. Whilst I do not have access to the Speaker's legal advice, the Bill could not have been introduced to the Assembly and debated if it was not competent. In general I am content that the Speaker has deemed the Bill within legal competence.
21. I note that Clause 13 clearly stipulates that an Assembly and Executive Reform Motion passed by the Assembly would **request** that the Secretary of State bring forward legislation which is beyond the legislative competence of the Assembly.
22. I would draw Members' attention to a letter I received from the Secretary of State of Northern Ireland on 15 December 2014, which was in response to a request from me for an opinion on our approach to the Bill. The Secretary of State stated and I quote "*In principle, the Government supports your suggested legislative approach in the Assembly. However, as some of your proposals involve changes to the architecture of the Belfast Agreement, the UK Government can only give effect to those where it can be demonstrated that such changes command the broad support of the parties in the Assembly*".

23. With regards to the possibility of legal challenge, I think that all Acts are potentially open to legal challenge, however, I trust in the advice given to the Speaker of the Northern Ireland Assembly and the acceptance of the UK Government to the general approach. The Committee, however, may wish to seek its own legal advice. I further note that if the Bill was passed and a subsequent Bill was passed by the UK Government, based on the content of the Schedule, this UK Act would be inviolable.
24. I will now seek to address some of the more specific questions raised in the Committee's paper.

Clause 2

25. The Committee asked '*what would happen if the qualifying party or technical group did not come forward, but there was another group who still wishes to form an opposition?*' The additional speaking rights and benefits can only be conferred on either qualifying parties or a technical group. If another group does not meet the threshold of a technical group, or cannot reach agreement to be a technical group, the additional rights will not be conferred upon them.
26. The Committee paper also asks '*whether the Bill provides for one qualifying party and one technical group forming the Opposition?*' As it currently stands the Bill does not provide for one qualifying party and one technical group to form the Opposition. I would, like to look at this aspect of the Bill as I believe allowing for a qualifying party and a technical group to be conferred rights to be the correct approach. However, I would seek to ensure that if a qualifying party and a technical group were to form the Opposition, the qualifying party – regardless of its size in comparison to the technical group – would have primacy to the Leader of the Opposition and associated rights. This would require potential changes to Clause 6 of the Bill and I am seeking clarification on this and the potential implications for changes in this area.

Clause 3

27. The Committee raised a number of questions in relation to Clause 3 primarily related to its purpose. The Northern Ireland Act gives significant store to the timing at which d'Hondt is run and the Executive is formed, dissolved or when Ministers resign. This is arguably for the political reasons of proportionality and inclusivity. Clause 3 seeks to ensure that an Opposition is formed within the current timings of the Executive formation set out in the Northern Ireland Act. Clause 3 ensures that an Opposition can only be formed when the Executive is being formed, removing a fear that political parties will potentially use the rights to an Opposition to either leave the Government prior to an election for electoral advantage or form an Opposition, and access additional rights, prior to an election.

Clause 4

28. The Committee asks '*whether Clause 4(a) means members of political parties who are also Members of the Assembly?*' This is a valid point and my policy intention has always been that

members of political party would have to be members of the Northern Ireland Assembly in relation to membership of the Opposition and I will seek to amend the Bill accordingly.

29. The Committee further asks whether the term 'in a political party' could be open to interpretation. I would draw the Committee's attention to 4 (5A) of the Northern Ireland Act, which deals with the issue of designation. This paragraph in the Northern Ireland Act makes specific reference to membership of a political party in a similar manner to my Bill and I therefore consider that the issues raised by Mr Greenberg would be commensurate issues with the Northern Ireland Act – I am therefore content that my approach to this aspect of the Bill is sound.
30. The Committee asks for an '*explanation for the disparity between Clause 3(2) and Clause 4 (2)*'. In my opinion there is no disparity between these clauses. 3(2) is a legal mechanism to form an Opposition and confer additional rights upon qualifying parties or a technical group. Clause 4(2) ensures that once those rights have been conferred, those who do not qualify for the additional rights can, however, be considered part of the Opposition, in that they are not in the Government of Northern Ireland and their role should effectively be to hold the Executive to account and or support it when they agree with its policies. The Committee should consider that the Bill does not dictate the Opposition needs to act as a mirror image of the Executive or as a homogenous group.

Clause 5

31. The purpose of Clause 5 is to ensure that when there is no Government, the Opposition and the rights conferred upon the Opposition no longer exist, as logically there is no Government to hold to account. If Standing Orders did not make provision for the dissolution of the Opposition, we could be in the unlikely situation of the Government ceasing to exist and the additional rights remaining upon non-Government parties in a still functioning Assembly prior to an election or during a potential process to reconstitute the Northern Ireland Executive.

Clause 6

32. The Committee asks '*why there is no provision for time limits for the nomination of Leader and deputy Leader?*' This is a valid question, however, I consider this to be the type of issue that could be dealt with within the drafting of Standing Orders - without deviating from the clear purpose of Clause 6. However, I am also content to explore placing time limits on the face of the Bill to remove any doubt. I do not foresee any major implications for the Assembly in the event of a delay in the nominations of the Leader and deputy Leader of the Opposition.
33. The Committee also questioned whether it is the intention of the Bill to create a statutory duty rather than the right to nominate the Leader and deputy Leader of the Opposition. It was my intention to create a right and not a duty, however, I am seeking clarity on this issue from the drafter of the Bill. I do, however, think it would be an extremely odd set of circumstances where a political party either chooses not to enter the Executive or did not qualify, under the proposals in the Bill, and did not subsequently choose to take up its additional rights with regards the Leader and deputy leader of the Opposition.

34. The Committee raised the issue of whether Clause 6(5) provides sufficient flexibility in the event that the number of seats held by a party making up the Opposition changed during the term of the Assembly. The Committee will be aware that under the current d'Hondt system within the Executive, if the number of seats a political party holds decreases within a given mandate, the d'Hondt calculation does not change with regards Executive Ministers. This is linked to the timings issue raised above, concerning the formation of the Executive. It is my intention that if the number of seats of a political party in Opposition changed within a mandate, their Opposition rights would remain. This is some of the purpose behind Clause 6, however, I am consulting with the drafter to clarify whether Clause 6 definitively covers this eventuality.
35. There is a more pressing issue with regards any potential changes within a technical group. A technical group by definition is less homogenous than a political party and therefore is more likely to be susceptible to change. I do not think a technical group should retain its Opposition rights if its numbers were to fall below the threshold of 5 per cent, as this would encourage technical groups of complete convenience. I am examining how to deal with this issue going forward.

Clause 7

36. The Committee raised a number of questions with regards flexibility within the Bill to either allow the Leader or deputy Leader of the Opposition to forgo their rights to the first topical question to the First Ministers and what would happen if they were unable to attend question time. I do not think there is anything within the Bill that disallows Standing Orders to be drafted in such a way as to allow for such flexibilities, without distorting the intention of the Clause.

Clause 8

37. The Committee requested an elaboration on enhanced speaking rights. It is my intention to bring the following amendments forward. (Please note the amendment is currently in draft form).

New clause 7A

After clause 7, insert new clause –

Speaking rights in the Assembly

7A Standing Orders must make provision that speaking rights in the Assembly are allocated on the basis of party strength.

Clause 8, page 3, line 39,

At end insert –

'(2A) After the formation of an Executive and an Opposition, enhanced speaking rights for the Opposition shall be calculated as rights enhanced by 20% at the expense of Government speaking rights.'

38. The purpose of these proposed amendments is to ensure, firstly, that Standing Orders stipulate that speaking rights in the Assembly are conferred via d'Hondt, creating a legal framework around the current convention of the Business Committee. The second amendment would increase the Opposition's speaking rights by d'Hondt plus 20%, with the additional time being removed from Government parties to ensure that additional time and resources are not required by the NI Assembly to complete its business. The Committee will note that if a technical group consists of six members, d'Hondt plus 20% will not be a hugely significant increase in speaking time and in my opinion is proportionate for the task of holding the Executive arm of Government to account.

Clause 10

39. The Committee sought clarification on the intention of Clause 10. Clause 10 seeks to ensure that if the Opposition is not strong enough to gain access to the Business committee, under the current convention of d'Hondt that provision is made to ensure the Opposition has representation on it. Therefore ensuring that the Business Committee is not populated entirely by Executive parties.

Clause 12

40. I am seeking clarification from the drafter on the use of the term officer of the Opposition as compared to officer of the Assembly, however, I believe the intention of the Clause is clear.

Clause 20

41. The intention of Clause 20 is to rename the Office of the First and deputy First Minister the Office of the First Ministers, in recognition of the equal nature of their offices. Clause 20 (2) ensures that Government documents that refer to the OFMDFM, should be considered to refer to the Office of the First Ministers.

42. I see no potential difficulties in renaming the office, the Office of the First Ministers and the Secretary of State refusing to rename the First and deputy First Minister the First Ministers. I note it has been suggested that the OFMDFM's name change to that of the Executive Office and no problems have been foreseen in this proposal and the current titles of the First and deputy First Minister.

Schedule 1 and 2

43. The Committee asked for clarification on the extent the Assembly and Executive Reform motion may depart from the precise provisions set out in the Schedule. The intention of wording the Schedule in this way is to allow for a degree of flexibility between the Bill and the motion, as is the proposed approach between the Bill and Standing Orders. However, the Schedule will provide the clear intention and will of the Assembly and the motion should not perversely or irrationally deviate from the motion. For examples, a change may be

thought necessary, upon consultation with the Northern Ireland Office to ensure it fully understands and can implement the intention of the motion.