

COMMENTS ON THE INTERIM REPORT OF THE WORKING GROUP ON UNIFICATION REFERENDUMS ON THE ISLAND OF IRELAND

Textual Comments

Executive Summary

2.7 is not strictly accurate. (Think about it. SF did not directly endorse the British guarantee). The participants in the Agreement noted the British Government's undertaking to incorporate in British legislation the constitutional guarantee that etc., while repealing the Government of Ireland Act, 1920, and the Irish Government's redrafting of principally Articles 2 and 3 of the Irish Constitution to remove any territorial claim.

2.8 - Account here is also too abbreviated. Suggested redraft 'The 1998 Agreement also provided for the establishment of the institutions etc.' They were not established till December 1999.

4.9 - I would put more positively: 'The 1998 Agreement provides that unification can only happen with consent both north and south'. It is not just 'our conclusion'; 'it is clear that'. There is no dispute whatever about the point. Suggested redraft: 'To allow a united Ireland to come into being'. Just as the Good Friday Agreement superseded the Anglo-Irish Agreement, so the agreements and perhaps treaty that would lead to a united Ireland would take from the GFA what was required at the time, as the GFA did with the AIA, and reincorporate it. Any political agreement(s) setting up a united Ireland would be of far wider scope than the GFA, and go far beyond the limited indications contained in the GFA.

4.10 - 'Our conclusion is that' is unnecessarily weak. 'It is clear that' means there can be no argument about it, which is the position.

4.11 - Add a final sentence: 'However, the test for the Secretary of State that 'it appears likely to him that a majority of those voting' etc. clearly implies *prima facie* that there is a majority in favour of change (i.e. fairly consistently c.55% plus) rather than that opinion is absolutely evenly divided (50%+1), even should that be the eventual outcome of an actual poll.

11.40 & 12.43 - I strongly agree with the way these paragraphs are formulated.

Interim Report

1.6 - Suggest adding to first sentence something on the lines of 'and later ratified by the people separately but concurrently in both parts of Ireland'.

1.14 - 'a majority' rather than 'the majority', which is often taken to mean the unionist community.

2.4 - 'English Churchmen' reads very oddly - suggested redraft 'descendants of the planters of the seventeenth century - mostly lowland Scots Presbyterian and English settlers (of the Anglican Church of Ireland)'.

2.5 - Qualify 'With some notable exceptions, Irish Protestants ...' This would cover without naming them Grattan, Tone, Emmet, Davis, Parnell, who did a lot to shape Irish nationalism.

2.7 - All reference to unionist resistance to Home Rule is omitted. Suggest 'Ireland's bid for self-determination, to which armed resistance was threatened in Ulster....'

2.9 - on abolition of PR in NI, perhaps explain 'in both cases primarily to prevent divisions on labour lines within the unionist camp'.

2.10 - 'to overturn the Treaty' is more accurate than 'repeal', which implies a parliamentary or negotiated process. Amplify 'the same (civic) rights and status as Commonwealth citizens'.

2.20 - Add: 'However, coming back into government, Fianna Fáil faithfully worked the Anglo-Irish Agreement'.

2.22 - Text completely overlooks the separate Irish back-channel to the leadership of the Republican Movement, which provided one of the main inputs into what eventually became the Downing Street Declaration. It will be recalled that the British/SF talks ended in public acrimony in late November 1993. 'The British Government and the Irish Government had engaged unofficially and separately with the leadership of the Republican Movement, mainly through third parties'. (Note: in talks, mainly with Martin McGuinness between October 1992 and the IRA ceasefire, end-August 1994, the special adviser to the Taoiseach (Reynolds) was not a 'third party'. Fr. Alex Reid was.

2.29 - The following should be added: 'The continued EU membership of both Britain and Ireland, while not stipulated, is taken as a given in the text of the Good Friday Agreement'. Also add word to read NI's 'automatic return to the EU'.

2.77 - Some reference might be made to the process of German unification (as an example of concurrent self-determination, even if

done by two Parliaments rather than by referendums). Another interesting point is that unification did not take place exactly as envisaged in the German Basic Law (1949), but had to some extent to be improvised in terms of constitutional law. There is no mention of the Cyprus referendums of 2004 on the UN proposal for unity, where the two parts voted in opposite ways, opposite also to their respective traditional positions.

3.41 - (line 8) (typo) 'dissuade(d)'.

4.23 -4.24 - Wording on this is unnecessarily tentative. There would have to be a referendum in the Republic. Moreover, Constitutional Issues Ib of the GFA, which speaks of the people exercising their right of self-determination, provides a requirement that could not possibly be fulfilled by legislation alone. In an Irish context, where referendums are regular occurrences, failure to hold a referendum on the most important issue to arise since independence could not be politically defended, even if it were legally or constitutionally possible.

Procedures not previously envisaged may be adopted at the time, where there is agreement in principle on all sides (as in German unification).

5.13 - There is general agreement, certainly in the Republic, particularly after watching the Brexit referendum in the UK, that an informed choice is essential. How to achieve an informed choice may not be at all easy, however, in the absence of all-round engagement on the alternatives. Proposals for a reformed Union may be met with a good deal of scepticism, as promises made on this subject before the Scottish independence referendum were not followed up afterwards, and, if

anything, Brexit may have pushed things in a more rather than less centralized direction.

5.23 - 'Consensual spirit' rather over-idealizes GFA. There was not much consensual about the negotiations or about much of the implementation with frequent stand-offs and suspensions. It was and remains hard-fought ground, with consensus more the exception than the rule.

7.8 - The basic constitutional options remain those in the New Ireland Forum Report, though the unitary state encompasses four sub-choices, with or without devolution, and with or without different executive options as set out in 7.57, sometimes also referred to as the Scottish model (pre-devolution). Eire Nua never took on, as there was never any demand for federal institutions in the other provinces. Ireland is too small a country in terms of population.

7.20 - The Irish Free State renegotiated its financial liabilities under the Treaty in the 1925 Boundary Agreement. Further contribution to servicing the British national debt was written off.

7.32 - The EEC had quite lengthy transition periods for new member States. However, they should not go beyond 5-7 years. Membership started on day 1, but the whole process of joining in terms of practical consequences happened more gradually. As a functioning State, the Republic will not want at any stage to be in limbo, pending reunification.

7.56 - Repartition is ruled out implicitly in GFA, unlike in Sunningdale. Annex A refers to 'Northern Ireland in its entirety'. Shifting the border would be a recipe for violence.

7.66 - While there can only be one capital - and expense would rule out building a new one - capital functions can be shared. For instance, in the absence of devolution or federalism, some parliamentary sessions could take place in Stormont, and as in Bonn post- German reunification some Departments could be based there.

7.69 - While there might formally be a new constitution, it is probably better to build on and adapt perhaps radically the existing one. The 1937 Constitution incorporated many of the features of the 1922 one. There is now a large amount of accumulated jurisprudence which it would be a pity to lose.

8 - *General Comment* - The provision in the GFA for calling a border poll is a good one. The only circumstance in which the SoS should consider exercising the discretionary power is if there is a cross-community vote in the Assembly calling for this to happen, which is not to say that even in those circumstances it should automatically follow. In all other circumstances, the SoS should resist demands for a border poll, unless the condition for a mandatory one is fulfilled, honestly assessed. A border poll held in the absence of that for tactical reasons, as in 1971, should at all costs be avoided.

9 - *General Comment* - There is nothing to prevent the parties and governments agreeing a specific procedure at the time. A former UK Permanent Representative to the EU told an audience during the Kilkenny Festival three years ago that Mrs. Thatcher, then leader of the Conservative Party in opposition, in 1975 advocated a second referendum, in the event that there was a vote to leave the EEC. This would have been for the purpose of putting the terms and conditions of exiting the EEC to the people to confirm that they wanted to proceed

with it. The Republic has on two occasions held two referendums within two years on the EU Nice and Lisbon Treaties, after clarifications in the first case, and a substantive change in the second (each country to keep a Commissioner). It would be quite possible to keep to the GFA in terms of concurrence, by in parallel with a NI border poll holding a referendum to insert a permissive clause in Article 29 of the Constitution, giving the Government the discretion to enter into negotiations on the creation of a new 32-county Irish State. Whatever could be agreed within a specified limit, including unity without an agreement, would be put to the people in both jurisdictions in second referendums.

10.52 - This paragraph makes an important point, that there is no compulsion to hold a border poll at 7 year intervals, unless the condition in the GFA makes it mandatory.

11 - *General Comment* - I agree entirely with the conclusion of this chapter, that the thresholds cannot be altered. Many important referendums have passed by in effect 50% +1 (recent examples - France's Maastricht referendum 1992, Ireland's divorce referendum 1995, and Welsh devolution referendum 1999).

12 - *General Comment* - In my opinion, this chapter is dealing with a non-problem. If two political entities are voting on whether or not to join together, the people entitled to vote on it should be as already determined by the laws governing the franchise in each jurisdiction. In the case of the Republic, its fundamental law is determined exclusively by Irish citizens. Obviously, a new or amended constitution for the whole island would have to provide for British citizens permanently resident in any part of Ireland having the franchise for all purposes,

including constitutional change. (In December 1922, the Irish Free State Constitution came into force, and all women over the age of 21 were given the franchise; many under the age of 30 and without a property qualification did not have it in the General Elections 1918-22, the last of which elected the Third Dáil which in parallel to Westminster voted the Constitution into effect. In other words, they did not have the opportunity of voting for representatives who would broaden the franchise to include them).

13 - *General Comment* - While the wordings of the referendums north and south in 1998 were different, they had the same effect. The negotiations up to the Good Friday Agreement were in this regard equivalent to close consultation between the governments and the parties, and the wording of the referendums contained no unflagged surprises.

14 - *General Comment* - This chapter rather skirts round the issue, as to whether the two governments would campaign actively on opposite sides of the argument. The British government and most of the Westminster parties campaigned vigorously for a 'No' vote in the 2014 Scottish independence referendum.