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ASSOCIATE DIRECTOR POLICING AND SECURITY
7 APRIL 1997

DESK IMMEDIATE

- cc: PS/PUS (B & L) - B
- PS/Sir David Fell - B
- Mr Steele - B
- Mr Ray - B
- Mr Brooker - B
- Mr Beeton - B
- Mrs Brown - B
- Mr Hill - B
- Mr Smyth - B
- Mr Webb - B
- Mr Clarke - B
- Mr Strain - B
- Mrs Evans (HOLAB) - B

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W. H. C. A. L. E. Y
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- MR THOMAS - B
- MR GRAY (OLC)
- MR BELL - B
- MR STEPHENS - B
- MR WATKINS - B
- MR PERRY - B
- MRS COLLINS - B
- MR MACCABE - B
- MR PRIESTLY - B

PARADES: OPTIONS FOR THE WAY AHEAD

This minute attaches a comprehensive paper prepared by Mr Webb on the options for future action on the North Report, as the basis for discussion at the meeting scheduled for 1000 hrs on Tuesday 8 April in the Stormont House Conference Room.

2. We of course have the responsibility not only to set out the options for incoming Ministers, but also to recommend which they should adopt. The attached paper lists four options -

- i. full implementation of North (ie implement extra "community relationship" criterion and give adjudicatory powers to Commission);

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- ii. "do nothing" (ie no enhancement of criteria or Commission's current mediation/education remit);
- iii. an advisory Commission (ie Commission given extra, non-statutory, role of advising police on its view of the applicability of the existing criterion of "serious disruption to life of community", with discretion to take a broad overview rather than focus on a single parade);
- iv. Commission with more limited decision-making role (ie the Commission would be empowered to determine conditions relating to, eg, numbers and behaviour, but not re-routing, which would stay with the police on the existing criteria.)

3. Of these, the "do nothing" option has some points in its favour, but could give a dangerous impression of vacillation and might be particularly difficult politically if a Labour Government, with its stated sympathy for a proactive approach, were elected. The limited decision-making option, in giving the Commission some real, if restricted, powers, might be seen as having presentational attractions. However, it might also turn out to be the worst of both worlds: nationalists would see that decision-making stayed with the police, while Orangemen might continue to be provoked by rulings from an "unaccountable" body. There could also be scope for friction between the Commission and the RUC (if, for example, the former imposed conditions on a parade - eg no bands - which the police judged might increase the risk of public disorder). And since this approach would be a significant departure from both the current arrangements and the North recommendations, Ministers might find some difficulty in justifying it on the merits. (The pure South African model (aka the Goldstone variation) is not an option in the context of Northern Ireland, since it would be seen as a clear victory for the Marching Orders.)

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4. The real choice appears to lie between full implementation and an advisory Commission. It is the latter which we propose to recommend to Ministers. Building on the analysis in Mr Webb's paper, this minute seeks to explain why.

The case against full implementation

5. The Parades Commission has been established and is making a good start. It has significant resources to fund mediation activity and is energetically developing a work programme and a wide range of contacts. But it is clearly going to take some time for it to develop standing and trust in the community, and the moral authority which this would bring. Unionists have predictably criticised its membership as partisan - and those criticisms would greatly increase if the body were to be given real powers at this very early stage, before it has had the opportunity to establish itself as an independent presence on the scene. To give the Commission adjudicatory powers now runs a severe risk of destroying rather than enhancing its credibility.

6. The Marching Orders (like the UUP) are opposed as a matter of principle to North's proposed new "community relationships" criterion and its corollary of giving the Commission the adjudicatory responsibility for disputed parades, arguing that the right to march is fundamental, that parades are a legitimate expression of cultural and religious identity, are not designed to offend, and should be guaranteed by the police in the face of what they see as factitious republican-inspired opposition. This view is held firmly at all levels of the Marching Orders. But, importantly, the practical approach of the Orders to parades is far from monolithic. Many were shocked by the physical and political damage caused by last summer's events. A largely moderate leadership is therefore seeking at a number of levels to stimulate local accommodations, in the face of severe opposition from more extreme elements such as Joel Patton's Spirit of Drumcree and the new Loyalist Solidarity group (and, in the background, some elements of the paramilitaries, particularly the LVF). In the circumstances, to

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proceed to give the Commission an adjudicatory role, in the face of representations from the responsible Orange leadership, would be seen as a severe rebuff to Saulters and his colleagues would alienate many in the middle ground of Orangeism, and would strengthen the hand of the harder line factions in spurning accommodation and challenging any adverse rulings by the Commission.

7. On the nationalist side, many see the handling of the parades issue as a touchstone and look for positive action from Government. Both the SDLP and the Irish Government have called for urgent implementation of North in full. But there is also a strong pragmatic desire to avoid confrontation and a re-run of Drumcree. Much nationalist opinion might therefore accept an outcome falling short of full implementation if they believed that this would optimise the chances of a relatively peaceful summer.

8. Sinn Fein continue to be anxious to exploit forthcoming parades, which have "win/win" potential for them in generating confrontation between the RUC and either residents' groups - with consequent nationalist and international reaction and publicity adverse to the police - or Orangemen and unionists, which directly meets the key Sinn Fein objective of setting unionists against the state. Exploiting parades could well become even more important to republicans if there is a "halt" in IRA terrorism - the Sinn Fein move into parades of course developed during the last ceasefire. At the same time, the movement is concerned to avoid being isolated and exposed as manipulative and intransigent, and would tend to accept (and claim credit for) local accommodations which it could not frustrate.

9. Sinn Fein's effort to increase the number of controversial parades would be facilitated by the implementation of the full North recommendations. At the moment, their strategy requires the capacity to field articulate spokesmen for residents' associations who are able to sound plausible while frustrating local accommodation (but who often have a republican background which is prone to discovery), and to produce the numbers to mount physical

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challenges on the streets in order to engage the public order criteria. Both these elements run the risk of illuminating Sinn Fein/IRA involvement (an aspect to which the media are now sensitive), and it could in particular be more difficult for Sinn Fein to persuade constitutional nationalists to participate in physical action following the ending of the ceasefire. However the North recommendations, under which a representation from one MP, or 20 signatories countersigned by two Councillors, would be enough to bring a march into the Commission's ambit, could clearly be exploited by Sinn Fein to increase the number of "contentious parades" while more easily covering their tracks. This would put the onus on the Commission to seek a local "accommodation" for many hitherto non-disputed parades; the Marching Orders would be most unlikely to offer any concessions, and Sinn Fein would seek to manipulate those residents' associations under their influence (a number, of course, are not - eg Dunloy) to maintain a hard line. The greater the number of parades which Sinn Fein could put into play, the greater the likelihood that the Commission would feel obliged to re-route some at least. This would be the nightmare scenario for the Orange Order, and would be likely in practice to lead to much wider confrontation on the streets, and greater rather than less division.

10. Such a scenario would also significantly threaten the ability of the police to uphold Commission determinations. Security force resources to maintain order this summer are finite, and PBRs are the upper limit of force which can be used. Operational success for the security forces will therefore depend crucially on concentrating resources, retaining mobility, and outmassing those likely to cause disorder. An adjudicatory Commission which led to more contested parades, and a correspondingly greater likelihood of widespread unionist counter-action, would inevitably bring a much greater danger of the security forces having to spread their resources too thin and losing the initiative, with the risk of Drumcree 96 (or worse), and the authority of the state again being overborne by force of numbers, coming closer.

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11. The Chief Constable has recently indicated in private that he very strongly opposes the extension of the powers of the Commission, and believes that such a move in the circumstances of the coming summer would be "disastrous" because of the likely public order implications of the reaction from loyalists and the Marching Orders. (In public the RUC position is less firmly stated, in deference to the views expressed by the last Chief Constable.) Moreover, the substantial mediation currently going on at local level (in much of which the RUC are closely involved) would probably lose any chance of success if the ultimate power was taken from the police and given to the Commission.

12. The practical arguments therefore point strongly against an incoming Secretary of State seeking to implement the full North package for the summer. Such a move would all too probably lead to more rather than less confrontation, and destroy the Commission's credibility before it has had the chance to make a real contribution and develop its presence to a point at which it might be sensible to augment its powers on the basis of wider support and recognition of its authority.

13. There may well be a strong political argument in the same direction - if there are prospects of Sinn Fein coming into the Talks, with the turbulence this would cause in the majority community, might not the imposition of an adjudicatory commission be the final straw for the unionist camel? Should not the emphasis rather be on finding unionist-friendly measures which would keep them at the table?

14. The parliamentary aspects also need to be considered. It might well be seen as perverse to give the Commission adjudicatory powers this summer after the point at which they might be able to operate effectively in respect of the 6 July Drumcree parade. In practice, therefore, the Commission would need the new powers scarcely later than mid-June. This would require a Bill to be taken through at breakneck speed, with all normal Parliamentary conventions neglected or telescoped. This can of course be done (as

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the Entry to Negotiations Bill showed) but **only** with the active support of the Opposition. That seems unlikely if there were to be a Labour Government and a Conservative Opposition. The alternative - the unilateral abrogation of the normal procedures by a Government with a significant majority - would theoretically be feasible, but would of course excite intense Unionist opposition and make the Commission the subject of intense controversy. (A clear degree of **bipartisan support** between the major parties for the expansion of the Commission's powers is clearly desirable to give an adjudicatory Commission the best chance of success.)

The case for an advisory Commission

15. The "advisory Commission" option (which is the one favoured by the RUC) has positive as well as negative virtues. It is worth recalling the central North analysis: that the current statutory criteria have been applied in such a way that public order considerations predominate, with the result that inadequate (or no) account is taken of the impact of contentious parades on relationships within the community (paras 12.89 - 90). This leads to the recommendation for an additional criterion relating to the wider impact of parades on such relationships, and for an independent body to take over the task of making determinations based on the enlarged criteria.

16. But, as the Report acknowledges (para 12.90), it is arguable that the current criterion of "serious disruption to the life of the community" would permit wider community relations factors to be taken into account. The deficiency has arisen because the police have chosen to rely on the two other criteria (serious public disorder/damage to property) which are more clearly public order-based. But if the Commission were to advise the RUC on its view of the potential of a parade or parades to cause "serious disruption . . .," that would arguably enable the wider community aspects to be taken more satisfactorily into account, while maintaining the existing criteria and keeping the decision-making power in police hands. The RUC must be entitled to consult or

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ceive views from whomever they like as a preliminary to reaching a decision under Article 4, and the fact that the Commission's advice would be explicitly linked to one of the statutory criteria should help to counter any "Wednesbury"-type argument that, by attending to the Commission, the RUC took irrelevant factors into account. (Legal Advisers would, of course, need to be fully consulted on the details of the Commission's new role.)

17. It is worth recording three further aspects of an "advisory" Commission. First, the Commission's advice to the police should probably be **published**. This would enhance its profile and credibility, and would create a useful institutional incentive for it and the police to seek to reach a common position, to avoid being seen to diverge in public. (The RUC would of course need the opportunity to discuss the issues privately with the Commission before advice was finalised.) Second, a valuable recommendation in North (para 12.101) is that the Commission should be able to take a **broad overview** of the number and nature of parades in a particular area over an extended timescale, rather than focussing on individual parades one at a time. This should be translated to the advisory function. Third, the Commission should be able to advise on parades at its **own discretion**, rather than being invited to do so by the RUC.

18. This option would not (at least initially) be presented as a permanent solution. The public justification for it might run as follows (with suitable adaptation depending on which party was in power):

- i. the consultation exercise has shown that the proposals for an additional criterion and a decision-making Commission remain highly controversial and divisive;
- ii. the Commission has now been established and is pursuing its education and mediation remit with energy and independence. While it will clearly take

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time for it to achieve widespread acceptance and understanding of its role, the Government believes that it is in a position to take on with advantage a further development to its role this summer;

- iii. in all the circumstances, the Government does not judge that implementation of the new criterion and the full adjudicatory powers for the Commission could be achieved in a way which would improve the chances of a peaceful marching season this year. [A Labour Secretary of State could clearly put some weight on criticising the initial decision not to implement the full package, pointing to the resultant problems of time and Westminster procedures. The decision could also be made public in the context of other purposive decisions being announced around the same time.]
- iv. but even if the adjudicatory power remains with the police, the Commission can from its special perspective make a real contribution in **advising**, on its own initiative and with the advice being published, on the community aspects of proposed marches, as reflected in the existing criterion of "serious disruption to the life of the community". This would address the major shortcoming which North perceived in the current arrangements;
- v. the Government will review in the autumn what further steps may be necessary.

Conclusion

19. We therefore propose that incoming Ministers should be recommended to adopt the "advisory Commission" option - and that Dr Mowlam might be briefed **before** the Election not to over-commit a potential Labour Government to full implementation (particularly in the light of the Chief Constable's views). But, given the

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possibility that an incoming Labour Government might nonetheless decide to go for early full implementation, we shall continue work on a possible Bill to maintain that option.

[signed] SJL

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PARADES REVIEW: OPTIONS PAPER

What the Report recommends

1. The most significant of the 43 recommendations in the Report of the Independent Review of Parades and Marches (the North Report) was the establishment of an independent Parades Commission with decision making powers.
2. Not only does the Report recommend transferring the responsibility for decisions from the police to an independent body, it also proposes a new statutory criterion, over and above the existing public order considerations. To set out what this new criterion of considering the "wider impact of the parade on relationships within the community" might mean, the Report recommends producing guidelines to cover:
 - physical location and route, in particular, areas in town and city centres and parades travelling along arterial routes;
 - impact on the local community, including frequency of parades, disruption to trade, traffic and everyday life;
 - the purpose of the parade, for example whether it is commemorative, a Sunday church parade or a band parade; and
 - features particular to that parade, including whether it is traditional, numbers parading and past behaviour.
3. To make the Commission's decisions stick, the Report recommended that a new offence should be created to penalise contravention of a legal determination of the Parades Commission, and that past breaches by marchers or protesters be taken into account in making decisions.
4. The Commission announced on 27 March is already fulfilling the education and mediation roles proposed in the Report. The Report's

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recommendation that the Commission should have decision making powers and that the statutory criteria should be expanded were however put out to public consultation.

5. The eight week consultation period is now over, and has produced few surprises. There have been rather fewer submissions than expected (about 90), and these have put forward predictable arguments. Submissions expressing support for pushing ahead with implementation do not generally seem motivated by great enthusiasm for the recommendations themselves, but by the hope that vigorous action could head off a repeat of last year's events at Drumcree. Submissions from those supporting the marching orders are unanimous in rejecting the Report.

Policy Objectives

6. The decision on which strategy to recommend will depend largely on our objectives. These might be to identify:

- an approach which retains the confidence of the law-abiding community in the maintenance of public order
- a compromise between the aspirations of both communities, perhaps falling short of both sides' hopes, but meeting some of the concerns of both, and thus demonstrating HMG's commitment to even-handed treatment and 'parity of esteem'
- an outcome which seeks to minimise the prospects of serious disorder, reducing the incentives and opportunity for extremists to exploit this issue
- a firm basis on which to determine contentious parades, governed by transparent and consistent criteria.

7. Ideally, we would like to identify an approach capable of achieving all three. This may not however be possible.

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CHR implications

8. Article 11 of the ECHR protects the right to march. Following advice from Counsel, we have now concluded that the ECHR might not prove as great a hurdle as we had originally thought. On balance, Counsel felt we could defend legislation implementing North by citing a pressing social need to preserve order and improve community relations, and that the Court would be reluctant to challenge head on something regarded as a high political priority.

9. We can however expect challenges once any decision is taken to impose restrictions under the new criterion. HMG will then need to defend these decisions, although they are taken by an independent body. The main grounds of attack are likely to be whether the measures are proportionate, ie whether the additional criterion is itself necessary, how serious a restriction of freedom of assembly any individual decision of the commission constitutes, and whether the impact on relationships within the community could equally have been avoided by lesser restrictions.

Strategies

10. We have identified four potential strategies for taking this issue forward.

- full implementation of the North Report
- 'do nothing' option: sticking as closely as possible to existing arrangements with the modifications already announced
- an advisory body
- a decision making body with more limited scope

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Full implementation of the Report

11. Pressing on with implementation of the Report would demonstrate the Government's commitment to act to ensure last year's events were not repeated. It is probably what is expected of Government by both the Nationalist community, and many in the middle ground, and national and international opinion.

12. The Report seeks to build structures which will provide a disincentive to violence, which respect the right to march while requiring that it be exercised with respect for the rights of others, and thus meets some of the concerns of both communities, while seeking a transparent and principled approach to contested parades to replace the current reliance on public order, with all the perverse incentives that brings. If it achieved all this, it would meet all three of the objectives we have identified.

13. There are however serious problems with implementing the report in full. These fall into three main categories; objections in principle, problems of workability, and the likely political reaction to a decision to press ahead.

14. Assuming the recommended new criterion will lead to restrictions being placed on more parades than would have happened under the old public order/disruption criteria, the Report's recommendations represent a dramatic break with precedent in this country and indeed the rest of the world. No society is quite like Northern Ireland, but there are many divided societies where parades are a potential source of tension. Suggestions about curbing potentially offensive parades have been considered in this country ever since the 1930s and in plenty of other countries too. Up to now, Governments have always taken the view that this would lead to an unacceptable restriction on traditional freedoms, as well as requiring the authorities to make difficult and controversial judgements on the motivations of marchers and the reasonableness of otherwise of the offence objectors claim to suffer.

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15. The thinking underlying the proposed new guidelines in the North Report seem to go beyond the idea that rights come with responsibilities, by making the very existence of the rights dependent on their being exercised in a way the authorities consider responsible. The North Report then recommends appointing an unelected body to decide on how these fundamental rights can be exercised. This is a radical new approach, and it is hard to see any fundamental reason of principle why a concession made to residents in Northern Ireland should not equally be extended to other citizens of the UK. Certainly if the North Report is implemented, the pressure to extend its principles to GB will mount.

16. The main problem with the workability of the North Report's recommendations, and in particular the core recommendation of a new criterion is that there is less to them than meets the eye. Taken literally, it is hard to see how any decision could be informed by assessing the impact of a parade on relationships within the community. On a divisive issue widely seen as a zero sum game, any decision is going to upset one side of the community and please the other in equal measure, and thus poison relationships to a similar degree.

17. The Report attempts to set out what it means, with a series of factors to be taken into consideration in proposed new guidelines. But it is difficult to glean from them the underlying logic behind the new criterion. Some parts of the Report seem to hint at the desirability of seeking residents' consent. But the only possible reference to this in the guidelines is the opaque remark under the section 'Impact on the Community' that 'Under this heading also the impact of the parade on local residents directly affected by it would be considered'.

18. Some parts of the guidelines seem to suggest the proportionality of the disruption caused should be taken into account. Examples are the power to take into account the number of marchers and the frequency of marches. On the other hand, the

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presumption in favour of marches in town centres and on arterial routes would actually increase the level of disruption.

19. Probably the main thought underlying the guidelines is the object of avoiding unnecessary offence. This links in with the Code of Conduct, and in particular the system of rewards and penalties for those who in the Commission's view play a constructive or otherwise role in searching for a local accommodation.

20. Having shied away from the idea of testing offence by some form of requiring local consent (although the Report still gives local objectors the power to refer cases to the Commission if they can get 20 signatures and two district councillors' support), the Report appears to be recommending sweeping powers for the Commission to decide on whether the proposed parade could reasonably give rise to offence. This is the only explanation for features of the guidelines such as the power to take into account the purpose of parade, the preference for traditional over new parades and for church over band parades.

21. The question is how are these guidelines to be put into practice? The draft guidelines are a list of factors with little indication of their relative importance. Left as it stands, the Report would therefore allow an unelected body a free rein to interpret the new criterion as it sees fit, with no possibility of appeal except at the instance of the Secretary of State or the Chief Constable. The commission would merely have to satisfy a judicial review that it had taken the factors set out in the guidelines into consideration. The lack of appellate rights for those whose right to march has been restricted may or may not be legally defensible under the ECHR. Whether it is politically tenable is another matter.

22. We are therefore faced with two highly unattractive alternatives. The first would be to implement more or less as the Report suggests, with guidelines issued in the first instance by the Secretary of State, but subsequently developed and owned by the Commission. Parliament would be asked to approve the new criterion,

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Perhaps with sight of the first draft of the guidelines, but the guidelines which are essential to interpret the legislation would be subject to change later by an unelected and unaccountable Commission. Implementation along these lines would cast intense scrutiny on the membership and qualifications of the Commission. Some complaints have already been made about lack of balance, and once the Commission obtained real powers like this, these complaints would grow considerably louder.

23. The alternative would be to make clear straight away what the guidelines mean, and how they are to be interpreted. This would mean that before the legislation is submitted to scrutiny we would need to revamp completely the draft guidelines to make them transparent. This means draft rules of thumb about what sorts of parades should be allowed to go where. This is bound to be arbitrary. Moreover, it will bring to an earlier end such honeymoon period as the Report is currently enjoying. Once it was clear from the guidelines say that Dunloy was out but Garvaghy Road was in, both sides would have fresh grievances, and a fresh target to aim at through political pressure, through the courts, and by street protests.

24. The North Report is acutely aware of the problem that public order criteria create an incentive to disorder. The way it seeks to combat this is by creating a new offence of defying the Commission's ruling, and by allowing the Commission to take into account past behaviour in determining on future marches. Our preliminary conclusion is that the first offence will prove extremely difficult to draft. There is of course already an offence of seeking to disrupt a legal parade, but despite this tactic being followed dozens of times last year alone, there have been [no] prosecutions.

25. As for building new incentives to behave into the system, the Report recognises that if these are to work, they need to apply even-handedly both to marchers and protesters. But there are severe practical difficulties with this from the start. Allowing the commission to take into account the past behaviour of marchers and protesters and in particular their adherence to the Code of Conduct

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is only possible if counter-demonstrations need to be notified in the same way as marches, which the Report recommends is not necessary. The code of conduct includes references to 'organisers' 'stewards' etc which do not make sense if protestors gather in spontaneous or allegedly spontaneous counter-demonstrations.

26. Taking account of the past behaviour of marchers appears straightforward enough - if they misbehave, future marches can be banned or re-routed. But taking account of misbehaviour by protesters is trickier. Logically, it should mean that if attempts are made to break up a parade one year, more parades will be forced down the next year as a punishment. It is questionable whether this is practicable. But if the penalties only bite one way, they will be seen as clearly unbalanced, and will produce an incentive to counter-demonstrators to seek to provoke marchers, as they themselves have nothing to lose. Moreover, without some stronger disincentive on those seeking to use violence to oppose parades, the North Report's recommendations will simply replicate the incentive to threaten violence against parades contained in the current legislation, while adding a whole raft of further criteria by which parades can be challenged.

27. Counsel's opinion suggests we can get away with the legislation on ECHR grounds, but that there are nonetheless a number of ways in which challenges could be launched. While decisions on parades will be made by an independent body, HMG will still be responsible for defending them in Strasbourg. This suggests fairly strong guidelines on how the Commission should exercise its powers, with all the disadvantages outlined above. We might also need to monitor fairly closely what sort of decisions the Commission is making to protect us from any cases which look certain to cause us difficulties. We can be absolutely certain that decisions to restrict marches under the new criterion would be challenged immediately by the marching orders. Unfortunately, given the pace of business in Strasbourg, it could be many years before the case law was clarified, with all the uncertainty this entails. Alternatively, if we incorporate into UK

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legislation, rapid access to the courts could enable a whole complicated chain of litigation in the middle of the marching season.

28. These problems with implementing the report are significant. They pale into insignificance, however, compared with the likely public response to a decision to implement in full. Our broad assessment of the reaction so far is that there is implacable opposition from the Unionist camp, support from the middle ground for doing something, without any clear enthusiasm for the recommendations of the Report as they stand. On the Nationalist side too, there is a feeling that something needs to be done to avoid a repeat of Drumcree. There seems to be a certain amount of agnosticism on the Nationalist side about the Report, and judgement is likely to be reserved until it is clear whether implementation would lead in practice to 'reduced quantity and improved quality' of parades which seems to be their general aim.

29. A decision to implement the report is likely therefore to be greeted with fury on one side and scepticism on the other. On the ground, the marching orders have made it clear they will not co-operate with a decision making body, and extremist factions in the orders and among the residents appear to be looking for a show down. The Unionist parties demonstrated in their fierce opposition even to the minor changes in the Public Order (Amendment) Order their determination to oppose legislation root and branch. The position in Parliament will obviously depend on who wins and the size of the majority. A decision to implement North in full would however put the bipartisan approach under immense strain from conservative backbenchers (and possibly some Scottish Labour MPs too?). The Chief Constable has also made clear he is totally opposed to a decision making body along the lines set out in the Report.

The 'do nothing' option

30. This would reflect a judgement that the existing criteria provide a flexible and robust framework for tackling controversial parades. They recognise the reality that the police need the power

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to impose conditions in circumstances in which it would not be possible to take a parade through without the threat of loss of life. This strategy would keep Northern Ireland legislation in line with that in Great Britain, and indeed the rest of the world.

31. While existing structures failed to deal with Drumcree in 1996, it is questionable whether alternative structures would have made any difference in circumstances where both sides are perfectly prepared to resort to violence to get their way. In addition, changes already announced, for example the proposed powers to confiscate alcohol and to extend the period of notice, as well as the establishment of a Commission with education and mediation roles are incremental but possibly significant improvements over last year.

32. The police will also have learned the operational lessons of Drumcree, while the strong reaction to last year's unrest might lead to a lessened appetite for confrontation this time. Ironically, the resumption of PIRA violence in Northern Ireland introduces both an added element of threat but also the potential for a split in the front against parades, with constitutional nationalists possibly less prepared to take to the streets alongside active terrorists.

33. On the other hand, the cumulative experience of Drumcree in 1995 and 1996 demonstrate that the weakness of the current legislation has been recognised.

34. Notwithstanding the Nationalist belief that the number of parades has been steadily increasing in recent years, in fact in all the key flashpoint areas, there has been a steady ratcheting down through re-routing and police negotiation with march organisers. Preserving the right to march while curbing the number of times it is exercised has helped avert, or perhaps rather postpone, serious violence over the past ten years. With the number of parades down to one a year on the Lower Ormeau and Garvaghy Roads, agreements are imaginable on the number of marchers, their behaviour etc, but there is no longer any middle ground between marching and not marching.

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35. The breakdown of the 1987 framework during the events of 1995 and 1996 has given rise to much discussion. There is no doubt that the issue of parades is one which arouses passions in Northern Ireland. But there is more to it than that. The threat of violence from opponents and the Orangemen's demarche at Drumcree in 1996 were rational strategies given the incentives present in the legislative framework and the authorities' use of it. If violence is rewarded, not surprisingly violence is the outcome. The scale of the disorder before the decision to escort the march down the road revealed the Orangemen's ability and preparedness to use tactics of brinkmanship, but their behaviour was different only in scale not in principle from protesters' threat to bring guns into the Garvaghy Road. This difference in scale itself merely reflected the higher threshold of violence needed to induce the police to reverse their earlier decision compared with the level of threat necessary to achieve a re-routing order in the first place.

36. These insights now having been gained, it is perhaps unrealistic to hope to return to the pre 1995 position when marches could be handled in a low key manner by the police. All the evidence suggests plans are already in place to exploit the situation ruthlessly, and there seems to reason to assume the number or the determination of the extremists have diminished over the past year - rather the opposite. This suggests that while there may be a short term backlash of revulsion over Drumcree and associated pressure for compromise, there is a strong danger that the status quo means a gradual drift to steadily increasing tension over parades.

An advisory body?

37. If it is decided that implementing the Report in full is not practical, there may still be scope for a body with advisory responsibility. This body would allow the decision-making responsibility to remain with the police, who are in the best position to judge the situation on the ground. The body would however be able to advise the police on those criteria which they are not perhaps in the best position to judge.

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38. One possible criterion might be the North Report's recommended "impact on relationships within the community". This criterion does however have serious practical difficulties, as outlined above, and combining these with a Commission without decision making powers would compound the difficulties already identified in making its recommendations stick.

39. An alternative would be for the advisory body to advise the police at the Commission's initiative or at the police's request on the existing criterion of "disruption", which has never yet been used. The North Report pointed out that this criterion went beyond strict public order considerations already, and could go some way to addressing some of resident's complaints. The power was introduced in line with the changes in GB legislation, where the 1986 Act introduced a new criterion in order to tackle the problem of marches and demonstrations intentionally designed to cause massive disruption, particularly in London. The police in both GB and Northern Ireland have never used this power, however.

40. An advisory Commission would combine this advisory power with its existing mediation and conciliation roles, and could crucially follow up the Report's recommendations that parades need to be looked at in the round, not just individually. Its recommendations might for example recommend reasonable numbers of parades in given locations, perhaps seeking to broker deals between separate flash points.

41. The police would continue to make decisions on a parade by parade basis on the existing criteria, but this approach will help address some of the residents' grievances. Of course, the definition of disruption will be controversial, and share some of the difficulties of defining the Report's recommended new criterions. But 'disruption' is in itself a rather tauter concept, and a combination of guidelines and clarification through testing in the courts would soon set the parameters within which the Commission and the police should operate.

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42. There are several major advantages to this approach. It avoids the difficulties of full implementation, while amounting to a real recognition of residents' concerns, and providing a mechanism to take them into account. At the same time, the advisory nature of the body will make it less objectionable to Unionists. In addition, we could combine this approach with an undertaking to review the situation after the end of this marching season, to see if the establishment of a commission with education and mediation roles showed signs in itself contributing towards breaking the deadlock on this issue.

43. The main difficulties with the approach include the perception that the Government is effectively binning another of its reports, and around the workability of the disruption criterion. For example, many residents believe the security force measures eg on the Ormeau Rd in 1996 demonstrated how much disruption parades caused them, while marchers reply that these measures were nothing to do with the march as such, and would not be necessary if there were no threat of violence from protestors. This approach arguably also maintains the disadvantages of the "do nothing option", in that the structural incentive to cause trouble remains. The expanded role for the Commission might help facilitate local agreement, but the prospect of a further review at the end of the marching season could reduce the credibility of the new structures and provide an incentive to ensure the new system does not work in the hope that one side or the other can get a better deal after the new review.

A decision making Commission with limited scope

44. An alternative basis for proceeding would be to give the Commission a decision making role, but restricting it to conditions to be imposed on the parades, eg numbers, behaviour etc, leaving the powers to reroute or ban the parade to be used on the same grounds as currently set out in legislation. The Commission would seek the views of the march organisers and residents and then set binding conditions designed to avoid offence and causing fear to local residents. This would be an improvement on current arrangements,

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where the police have these powers, but are supposed to exercise them on public order grounds, without taking into account concerns of a strictly community relations nature.

45. The Commission's rulings could be given real force, by amending the current definitions of the Public Order Order offences of provocative behaviour, and behaviour designed to arouse fear or hatred. Convictions are currently very difficult to achieve, but the legislation could be amended to provide that the deliberate breach of a Commission ruling was prima facie evidence of wrongdoing, in much the same way that the Highway Code is used for determining road traffic offences.

46. This approach would do nothing in itself to combat the problem of perverse incentives in the current legislation. But on the other hand, the sight of a commission taking on board the concerns of residents and coming to a judgement may create a rift between those opposed to parades which behave badly, and those who want no opposition parades in their area under any circumstances. Similarly, hard line marchers determined to ignore the commission's ruling could be outflanked if those prepared to go along with them see their right to march entrenched in return. The new decision making body would put both sides on the spot, and force people to make a choice between seeking an accommodation and holding out for everything, thus making it harder to disguise intransigence than it has been hitherto. As such, it might exert moral and political pressure towards compromise.

47. The danger, of course, is that the approach might mean the worst of both worlds. The marching orders would be confronted with a decision making body, which they have undertaken to oppose, and Nationalists would see the Commission as consolidating the marching orders' right to march in their areas.

48. A much more radical version of this approach could be devised which put the treatment of all marches on an equal footing. This might draw on the lessons of the Goldstone Report in South Africa.

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49. This Report, whose recommendations were subsequently incorporated into South African legislation and the new constitution, was commissioned against the background of intercommunal violence worse than anything experienced in Ireland since 1798. In 1990 and 1991 alone 125 members of the police were killed in unrest-related incidents, 263 people died as a result of police action and 4,395 died as a result of actions by others. Many of these resulted from contentious parades which degenerated into violence and bloodshed.

50. While recognising the need for prior negotiations between organisers, the police and local politicians, which it made compulsory, the Report was unequivocal on the treatment of contested marches and demonstrations

"to allow hostile parties to prevent a demonstration by threatening violence is to give them the very freedom to foreclose a fundamental democratic right which the state must deny itself ... We do not believe there is any distinction to be drawn in this regard in terms of whether the demonstrators intend to provoke their opponents by their peaceful demonstration. This is too difficult a matter to determine, and too easy a conclusion to manipulate; it should make no difference. Nor should it make a difference that demonstrators want to march through a 'hostile' area. Speaking to those hostile to them is part of the democratic rights of citizens."

51. An alternative strategy in Northern Ireland could be based on a strong reaffirmation of the right to march for both sides. South African legislation could be echoed in giving the police the duty to protect this right unless the threat of violence is such that '[they] would not be able to contain this threat'. In practice, this means that the police would be expected to take legal marches through unless faced with a direct threat to life. This means of course that the police would be obliged to take marches through, not merely orange marches, but Nationalist ones in town centres or even in Unionist areas.

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52. This approach would provide a genuinely even handed treatment of parades from both sides of the community, for the first time in Northern Ireland. In the long term it has the potential to provide the stability and consistency which are lacking at the moment. If combined with a commission with powers to impose conditions on marchers' behaviour, a modified South African model of this type could address the genuine fears of residents and work towards defusing marches as a regular source of tension, while taking a strong stand on the protection of fundamental civil rights.

53. The difficulties of implementing this in the short term are however considerable. In particular, to be credible, the commitment to allow all marches would need to be seen to be honoured. There would probably be a major increase in the number of contested parades, with both sides testing the new approach's limits. Violence will probably follow, possibly worse than last year, particular as Sinn Fein will undoubtedly attempt to march in loyalist areas in order either to provoke trouble or demonstrate the one sidedness of the new approach by forcing a rerouting under public order grounds. Many nationalists and all republicans would see the outcome as a defeat, while Unionists would be outraged at the prospect of Nationalist or still worse Republican marches enjoying the same treatment as orange marches.

54. Following on from the threat of increased violence, the police may well object to an approach which fettered their discretion and exposed them to a greater threat of civil disorder at the same time as a renewed terrorist campaign (on the other hand, removing their discretion also saves them from being forced to make impossible choices, and be blamed whatever decision they reach).

Conclusions

55. In deciding on our strategy, we need to recognise the disastrous combination of factors which have served to make the marching season such an intractable problem in recent years. Marches have, of course, always had the potential for tension. But as we

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have seen, the situation has been worsened by a structural incentive within the current legislation towards violence, and a perception that it works in practice.

56. In addition, at a time of more than normal uncertainty about the political process, the marching issue has proved a touchstone for many - a proxy battle the outcome of which provides an insight into the relative strengths of the two communities.

57. This battle has been entered into with all the more enthusiasm because of the perception that HMG lacks both political will and a clear vision of what it is looking for. This lack of credibility strengthens the arguments of those in both communities who believe that a vacuum exists, and that pressure alone will achieve results from Government.

58. On both sides, extremist groups have emerged who seek confrontation for their own ends. Extremists within the marching orders believe they are facing an enemy bent on their total destruction, but which has chosen tactically to withdraw from frontal assault and concentrate instead on rubbing out a vital symbol of Protestant identity and self-confidence. They believe their enemy has grown steadily stronger over the years on a diet of compromise and appeasement. Not yet strong enough to dominate the Unionist political establishment, these see their enemy's new tactic as providing them an opportunity to make a stand on the parades issue, success in which would provide the strongest case for a wider change towards a more uncompromising Unionist political strategy.

59. On the other side, Sinn Fein have identified the parades issue as a sure-fire vote winner. Building on long standing resentments, they have structured the residents groups in such a way as to make it difficult for the marching orders to talk to them, and have thus furthered their claims that marches are designed to emphasise the Nationalist community's second-class status. If decisions on individual parades go against the local residents, the resulting tension and sense of grievance helps radicalise the community behind

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Sinn Fein. If outright victories are won, or even if the marching orders are compelled to talk and make real or apparent concessions, this provides a potent demonstration of Sinn Fein's strength, and contributes towards the longer term objective of becoming the recognised source of real authority in catholic communities throughout the Province.

60. What is clear from both these groups is that accommodation is against their interests. Nothing less than total victory will do - and there is no incentive to give up the struggle when heightened tensions over the marching issue, far from being a problem, serve the ends of the extremists at both ends of the spectrum.

61. Of course, the experiences of Drumcree last year may have shocked the wider community, leading to pressure for conciliation. But the issues will continue to polarise, and existence of these extremist factions with their own agenda should make us wary of assuming that goodwill will prevail, since many will be determined to ensure it does not. Any new structures will need to be robust in recognition of this fact.

62. Those with malign intent will be able to exploit the fact that any new structures are bound to start life suffering from a lack of credibility, given the Government's perceived unwillingness to grasp this nettle over a period of time. A new administration might enjoy some benefit of the doubt here. But even here, if significant changes are made to the current arrangements, a question mark will remain over the level of political will behind them. If credibility is not rapidly established, there is a danger of an open season, with both sides seeing how far the government is prepared to defend its new arrangements, or how much movement can be extorted by political pressure or street protest.

63. For new structures to assert themselves, the decision making process needs to be transparent, consistent and robust in the face of opposition. Marches are not seen in isolation by most people in Northern Ireland, and whatever steps Government takes are likely to

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be viewed with mistrust. Both sides believe past undertakings have been reneged on. Both regard the marching issue as a microcosm of the wider political process, and see evidence of behind the scenes machinations, even in decisions taken by the police on relatively objective grounds like public order. This suspicion will be magnified if the Government's recommended approach is itself opaque, or if decisions resulting lack transparency or consistency.

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