

NATIONAL ARCHIVES

IRELAND



Reference Code:	2005/151/691
Title:	Copy letter from Walter Kirwan, Principal Officer, Department of the Taoiseach to Sean Donlon, Assistant Secretary, Department of Foreign Affairs, enclosing notes on power-sharing.
Creation Date(s):	20 August 1975
Level of description:	Item
Extent and medium:	14 pages
Creator(s):	Department of the Taoiseach
Access Conditions:	Open
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20th August 1975

Seán Donlon Esq.
Assistant Secretary
Department of Foreign Affairs

Dear Seán

I enclose some notes on power sharing which I have prepared on a personal basis, in response to the SDLP request for suggestions in this area.

They may stray, especially in the earlier paragraphs, a bit outside the bounds of technical advice. I would emphasise, therefore, that I am fully conscious that the SDLP are in a far better position than I to judge whether by holding firm in negotiations, supported by the joint and several declarations of the Irish and British Governments, they can bring the UUUC to agree to a form of power sharing, such as proportional Government which would clearly, in the eyes of SDLP supporters, meet the party's stated essential conditions. Equally, it is only they who can judge whether they can depart at all from a form of power sharing with Ministers in a Cabinet (in this connection, I note Ivan Cooper's remarks, reported in today's Irish Times, which echo an even more unequivocal statement by Denis Haughey at the press conference launching the party's manifesto for the Convention elections). My approach has been based on my personal view that

- (1) they are unlikely to get agreement giving them Ministerial posts;
- (2) it may be possible to
 - (a) get agreement and
 - (b) sell a more complex system, starting from the opening positions of both sides. However, insofar as the notes do stray outside the area of technical advice, I will leave it to your own discretion as to whether you will let the SDLP have a copy of them or, alternatively, mention orally to them whatever elements in the notes you consider may be useful to them.

obviously The notes were done largely by reference to experience of the administrative set-up here in the Republic. For lack of time, I was unable to research the corresponding Northern set-up as well as I would have liked. I should mention that in ~~existing~~ powers and functions of Government I omitted functions ~~objectively~~ irrelevant to the Northern Ireland context, such as the conclusion of international treaties.

As mentioned on the phone, I am now turning my attention to some notes on financial aspects of a devolved Northern Ireland administration and I hope to have these ready in a day or two.

Yours sincerely

Walter P. Kimmer

SOME NOTES ON POWER SHARING

1. These notes deal with the question of achieving a balance in the distribution and use of devolved governmental power in Northern Ireland which will meet the aspirations of the people of Northern Ireland of both communities as assessed and represented by the parties represented in the Convention and thus provide the basis for an agreement on a form of devolved Government which "is likely to command the most widespread acceptance throughout the community there." They assume that such an agreement is only likely to be attained, at this time, in the context of the United Kingdom Parliament and Government retaining ultimate or paramount governmental power, through either the area remaining a part of the United Kingdom or assuming an association status similar to that of the Isle of Man and the Channel Islands. They also assume that any agreed settlement could not involve any recognition of any share of sovereignty over Northern Ireland on the part of the Republic.
2. Having regard to the history of Northern Ireland and to the consequential mutual distrust and fears of the two communities, the Convention and the parties represented in it must give careful attention to what powers should be devolved to any regional organs of government and what powers should be retained by the Westminster government, either until certain conditions were judged to be fulfilled, or indefinitely. Examples of areas requiring consideration in this respect would be the criminal law and the administration of justice, elections and the franchise and the distribution of functions between Ministers. This aspect of the Convention's task is not considered here. However, it is recognised that it may help towards a settlement if the SDLP agrees that most or all legislative and executive powers in the field of security should be devolved and the notes refer to the distribution and use of executive powers in this area.
3. A major question for consideration is the extent of the fiscal and economic powers to be invested in any regional organs for the government in Northern Ireland. In particular, the question arises as to whether, and to what extent, such organs should have powers to impose taxation, other than rates. It has been assumed for the purpose of these notes that the United Kingdom Government would not be prepared to give substantial financial assistance to an entity with significant, independent powers to impose taxation and that, as a consequence of this, parties represented in the Convention will not seek other than very limited fiscal powers. As the imposition of taxation could be expected to be an area which would raise considerable difficulties, in relation to the distribution of power, this assumption simplifies the search for an acceptable balance of power.
4. Governmental power is usually regarded as having legislative, executive and judicial dimensions. As it is clear that the crux of any agreement on Government for Northern Ireland is the distribution and use of executive power, these notes concentrate on that dimension.

5. The notes are designed to assist in bridging the gap that exists between the present positions of the SDLP and the UUUC in relation to the distribution and use of executive power. The approach used proceeds from an assumption that there will be considerable difficulty in bridging the gap existing in relation to this key area. Current SDLP thinking seems to be that while the UUUC are entering negotiations on a platform which excludes the participation in the (Cabinet-style) Government of Republicans or anti-partitionists, their apparently strong desire to reach a settlement will lead them to concede a non-imposed system of administration which will meet the SDLP position on sharing of executive power, in a way that will be clear to all the world, in return for SDLP support for the Northern Ireland institutions of Government and for agreed security arrangements, and for action by the Government and people of the South which will give fully adequate assurances in relation to the constitutional position of the North within the United Kingdom. If this thinking is shown to be valid and the UUUC conceded, say, a form of proportional Cabinet-style Government, much of the content of the notes that follow would then be of no or greatly reduced relevance to the crux of the problem. This would equally be true if the SDLP were to accept the Loyalist's reported intended offer of committees whose powers would be limited to examining and making (presumably non-binding) recommendations on draft legislation.

6. However, it is hard to see the SDLP being able to accept committees whose powers would be purely legislative and advisory. Their manifesto for the Convention elections is not stringently confining. The most explicit statement in it on concrete forms of Government is as follows:-

"We regard (power sharing in Government and the institutionalised recognition of the Irish dimension) as the first essential steps in ensuring that we have a system of government to which all the people of Northern Ireland will give their loyalty".

Nevertheless, they could scarcely accept, let alone sell, a system which gave the loyalists all the executive power.

7. The UUUC manifesto for the Convention elections also avoided language which would commit the parties in a very restricted way. It says:-

"We believe that the traditional British democratic parliamentary system is essentially the right one.

The leader of the party with a majority in the House would be entrusted to form a Government. If no party has such a majority then the leader who can secure a majority through a freely negotiated coalition would be entrusted with the task".

Further on, having referred to the opportunities for minority groups which would be afforded by their proposals for back-bench committees, it says:-

"but we do not believe that such opportunities can in any way be allowed to exceed or distort the mandate given by an electoral majority".

However, having regard to reliable reports on the current attitude of Mr. Craig and on Loyalist back-benck feeling, to the many statements committing the UUUC against joining with the SDLP in any Cabinet-syle Government and to the Loyalists' consciousness of the fate that befell Mr. Faulkner and those colleagues of his who participated in the Whitelaw talks leading to the establishment of the former Executive and who were judged to have departed from their mandate, it seems most unlikely that the UUUC would agree to anything in the nature of a proportional Government, whatever was offered as a quid pro quo.

8. The notes would probably also be irrelevant if either or both sides adhered to a position which the other side could not accept i.e. if the SDLP adhered to, say, imposed power sharing in a Cabinet-type Government or to a similar Government elected proportionately by the legislature or if the UUUC refused to move beyond their proposals for committees without executive powers.
9. The notes therefore deal with a situation in which both sides regard some movement from their opening positions on executive power as preferable to the alternative developments which could flow from a failure of the Convention. The approach used has been to examine the various forms and uses of executive powers exercised in a normal Cabinet-type system by the Government acting as a collective authority, and by individual Ministers - while recognising that Governments, in such systems, are collectively responsible for the Departments of State administered by their individual members. The aim has been to seek ways to distribute and to have shared more widely the powers that would normally be concentrated in a Cabinet and also to circumscribe the powers of such a Cabinet more closely than has been done as yet in the United Kingdom. It is thus assumed that a necessary feature of an agreement which would be accepted by the SDLP is the existence of a Cabinet, in some form.
10. As a necessary balance to this, it seems desirable that the opposition parties should be able, through committees, suitably structured and endowed with sufficient power, or in some other way, to block implementation of the Cabinet's intentions in at least some areas. Reports of the intended UUUC proposals (the actual proposals are not to hand at the time of writing) suggested that the Loyalists were prepared to permit the Chairmanships of a majority of the envisaged committees to be held by members of the opposition parties. The reports have not indicated whether membership of each Committee would be proportional to party strength in an assembly or legislature. However, there have been references to the Chairmen of the Committees having a casting vote. This

would imply equal membership of Committees on the part of the Government and opposition parties. It seems likely that the UUJC would only contemplate such an arrangement so long as the powers of Committees were purely advisory with powers of decision resting ultimately with the Cabinet.

11. Where the Committees were to have executive and blocking powers, the Loyalists could be expected to press for membership in proportion to party strengths in the Legislature. However, if all committees had this kind of membership they would not, even if chaired by members of opposition parties, assist in the necessary diffusion of executive power. A possible way out of this difficulty would be that the aggregate membership of the committees, taken together, should be proportional to the balance of the parties in the legislature (as in Section 25 (5) of the Northern Ireland Constitution Act, 1973) but that the internal balance of individual committees could vary in such a way that the opposition parties would control a minority of committees. This would give them the kind of bargaining power inherent in the composition of the former Executive. They might have equal representation with the Government parties on committees on finance and security (see below). This would, of course, imply that opposition representatives might constitute a small minority of the remaining committees. However, this might not be a great drawback in areas such as agriculture and health and social services, (having regard to the powerful influences of EEC and British decisions, respectively, in these two areas). Clearly, the arithmetic of this idea would need to be worked out in detail. It could be part of the agreement that the opposition parties would also chair the committees they controlled and that the legislature would elect a panel of chairmen of committees by proportional representation. There might be provision for rotation of the chair in the finance and security committees. An arrangement of this sort might give the opposition parties less chairmanships than they might get under the reported UUJC proposals. However, it would give them greater leverage.

12. It would be necessary to decide how much of such an arrangement should be enshrined in law and how much left to non-statutory agreement and convention. It might be possible to leave it largely on this basis if the legislation establishing any new institutions included a modified form of the provision in section 2 of the Northern Ireland Constitution Act, 1973, which made devolution of power to the former Executive conditional on it appearing to the Secretary of State that an Executive could be formed which "having regard to the support it commands in the Assembly and to the electorate on which that support is based, is likely to be widely accepted throughout the Community". The modification would substitute an appropriate formula for "the support it commands in the Assembly" but would make initial and continued devolution still dependent on acceptance by both communities. If the opposition parties

were able, as a last resort, to pull the rug out from under the whole devolution arrangement, they would have a powerful lever to prevent the Loyalists from subverting non-statutory conventions. Leaving such agreements in non-statutory form would permit of flexibility and leave scope for evolution in the arrangements.

Another method of giving the opposition parties real bargaining power in relation to the responsibilities of committees would be to have the membership of all committees proportional to party strength in the legislature but to provide that either for all matters within committees' ambits or for certain, designated classes of matters, the committee would have to act by weighted majority - say two-thirds of its members. However, this type of arrangement would cast the minority representatives in a negative role and seems less satisfactory than the kind of system previously discussed. Devices such as weighted majorities or provision that certain measures of a Northern Ireland legislature would be subject to affirmative resolution in Westminster or could be "prayed against" there are probably best reserved for safeguarding minority rights and positions in a relatively limited number of key areas. The former Greek Cypriot-Turkish Cypriot administration of Cyprus was paralysed by safeguards for the Turks which covered too much of the area of Government.

If finance and security were largely to be controlled by committees with equal Government and opposition representation, it might be helpful in obtaining UUJC acceptance, if the absence of separate Ministers in charge of these two vital functions was not highlighted too much. This might be done by not giving any members of the Cabinet titles as Ministers of this or that. In practice, particular Cabinet members would have to deal with the business of one or more Departments but this need not be formally recognised. Where, for practical purposes, a Cabinet member had to perform formal Ministerial-type functions in the area of finance, this might be done by the Head of the Cabinet.

The following represents an attempt to list the executive powers and functions normally exercised by Ministers personally or by Cabinet Governments acting as collective authorities. The list may not be exhaustive and some headings (e.g. making of Orders or Regulations) may not hint sufficiently at the great variety of matters which is encompassed, in practice, under the headings.

1. Approval of terms of draft legislation
and permission to introduce into legislature.
2. Promotion of legislation in legislature.
3. Making of Orders and Regulations, in
-exercise of powers conferred by Statute.

4. Settlement of estimates of expenditure of individual Departments.
5. Settlement of estimates of revenue and expenditure of central Government, as a whole.
6. Presentation of these estimates to the legislature.
7. Determination of the annual budget, including taxation to be imposed.
8. Promotion of annual budget in the legislature.
9. Sanctioning of significant proposal for expenditure.
10. Exercise of powers of Ministerial discretion conferred by legislation, for example, in relation to grants, pensions, licences, social benefits etc.
11. Decisions on appeals under powers conferred by Statute.
12. Innovative action, not necessarily involving legislation, for example, settlement and launching of economic programmes, housing programmes, fuel conservation programmes.
13. Personal decisions and directions about rates of progress under Departmental programmes, rates of expenditure, administrative practices, etc., etc.,
14. Explanation of Government policy through public speeches, articles, broadcasts etc.
15. Exercise of moral suasion, for example, in relation to national pay negotiations, strikes, policies of building societies, banks and insurance companies.
16. Personal participation in pay negotiations in public sector when there is need for high-level intervention.
17. Approval of pay and allied awards under arbitration machinery and otherwise.
18. Personal promotion work in areas of industrial development, trade, tourism.
19. Foreign representation (in Northern Ireland situation this might be largely vis-a-vis Westminster Government).
20. Replies in legislature to Parliamentary questions, Adjournment Debate and Motions.
21. Supervision of local government and such similar bodies as harbour authorities and boards of fishery conservators. (this may be done, in practice, through some of methods or powers already listed e.g. making of orders, issue of personal directions, decisions on appeals).
22. Appointments of civil service heads of Departments.

23. Formal appointments of civil servants in Departments, discipline of civil servants and other personnel functions.
24. Appointments to statutory boards and other bodies (other than local authorities) exercising delegated powers.
25. Approval of forms of annual accounts, of auditors, of remuneration of Chief Executives of statutory boards and allied bodies and of proposals to seek legislative authority to increase capital of such bodies.
26. General supervision of policy of statutory boards and similar bodies (as in the case of local authorities, this is done in practice through various methods already listed including personal directions and moral suasion).
27. Appointments to advisory councils and commissions and establishment of such bodies on a non-statutory basis.
28. Appointments to the public service in the public interest, i.e. other than through normal open competition procedures.
29. Laying of reports of Government Departments, Commissioners, Statutory Boards etc. before the legislature.
30. Appointments of Army Chiefs or recommendations on such appointments.
31. Appointments of senior police officers.
32. Appointments of law officers such as Director of Public Prosecutions, county solicitors.
33. Appointments of or recommendations on the appointments of judges.
34. Acquisition, holding and disposal of land.
35. Borrowing, including issues of securities.
36. Issue of guarantees in respect of borrowing.
37. Establishment of corporate bodies under general legislation permitting this and abolition of such bodies and transfer of their functions (in practice, these acts would usually require making of Orders).

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6. The following are some general methods by which the concentration of these powers and functions within the Cabinet could be avoided and their exercise circumscribed:

- (a) giving committees of the legislature, structured so as to give the opposition parties real blocking and bargaining power, a share in the exercise of some of the powers and functions;

- *33. Proclamation of emergency and invocation ~~or~~ activation of emergency powers.

- (b) delegation of full responsibility for the execution of settled policy and the detailed management of executive functions normally legally assigned to Ministers in the Westminster model of Government, to executive units of Departments, headed by Directors. Such units would be on the lines recommended by the Devlin Group for introduction in the Republic. The Housing Executive would represent a close parallel in Northern Ireland experience. An essential concomitant of such delegation would be the establishment of adequate procedures and institutions for appeal against decisions taken by such executive units or their officials;
- (c) enactment of a Bill of Rights;
- (d) establishment of a number of regional authorities, some of which could be expected to be controlled by the opposition parties, the authorities to be invested with significant powers.

Method (d) is not considered further here. It clearly has considerable dangers. Method (c) seems to be favoured by almost all parties and groups in Northern Ireland and has been widely discussed. It is therefore not elaborated on here.

7. The following are tentative suggestions as to how methods (a) and (b) might be applied in relation to each of the 38 forms of executive power or function set out above:-

1. It is understood that the UUUC already envisage that the committees they envisage would play a role when legislation was being drafted. The main work on legislation at that stage would fall to the civil servants in the Department concerned and the Minister dealing with its affairs but the relevant committee could be fully consulted. If the committee was subsequently to examine the legislation in detail and if it were ^{laid down} as would seem desirable that legislation must pass the relevant committee (which would be controlled, in some cases, by the opposition parties) there would seem to be little advantage in having the committees supersede or share with the Cabinet in approving the actual terms of Bills before introduction. Provision could be made that Bills would be referred immediately to committees without any Second Stage or Reading debates.
2. It could be the job of a Minister to put the arguments for legislation before the relevant committee and later, if reported out of the committee before the full legislature. Consideration might be given to giving civil servants and others permission to speak in the committees. The ability to do this would be one of the advantages of a committee system.
3. In many cases, it is provided that orders and regulations must be laid before the legislature which may annul them by negative resolution within a specified period; alternatively, drafts of the orders or regulations must be approved by the legislature before they are made at all. In other cases, Ministers may make regulations without these restrictions.

In a new system in Northern Ireland, it could be provided that the relevant committee would be consulted when orders or regulations were being drafted and that the chairman of the committee could require, if he thought it necessary, that the finalised draft would be submitted to his committee, in accordance with a procedure whereby the order or regulations would have to be approved by the committee. It would scarcely be desirable that all final drafts should go to committees for approval as many might deal with purely routine or non-contentious matters. The chairman's power to mandatorily require referral would be a sufficient safeguard.

4. This could be done, initially, by Ministers and civil servants in each Department but in consultation with the Committee covering the Department's activities which would have power to refer the proposed estimates back, with suggestions for amendments. It could be laid down that the estimates would have to be finally approved by the relevant committees, in every case.

This could be a matter for a finance committee with membership as already tentatively suggested. The Government parties' representatives on this committee could be members of the Cabinet. It might be necessary to provide for a mechanism to resolve deadlock, possibly through the arbitration of the Secretary of State.

6. This is a purely formal function and could be left to the Chief Minister.
7. This could also be a matter for the finance committee. As it is unlikely that the devolved administration would have any but the most limited powers to impose taxes or to vary United Kingdom rates of taxation, bases of tax, allowances or reliefs, the function would be largely fulfilled by function No. 5.
8. The leading role here could perhaps be left to the Chief Minister.
9. This power is normally exercised by or in the name of a Treasury or Finance Minister in relation to central government expenditure and by a range of Ministers, including Ministers of Housing, Development, the Environment and Education, in relation to expenditure by local authorities. In relation to central government spending, the compromise form of administration outlined in these notes would experience difficulty in diffusing the power which is inherent in this function without interfering unduly with the speedy and efficient despatch of public business. However, the committee's veto in the settlement of estimates would give them a strong weapon in this area. While the cost of proposals for expenditure is not always a good guide to the significance of decisions on them, one way to balance the desiderata might be a system of tiered delegation on the following lines.
 - Executive units of Departments (including statutory boards) would have specified authority to spend monies in pursuance of settled policy;
 - senior civil servants in the Department of Finance would have authority to sanction expenditure on new departures up to certain limits;
 - the Chief Executive would have authority to sanction up to a further higher limit of expenditure, without the approval of the relevant committee;
 - beyond this limit, approval of the committees would be necessary.

It would be necessary to have arrangements for forward projections of the cost of public services, including suggested new projects or services as well as control of commitments to spend in future. Programme budgeting, to measure results against

inputs and to ensure the best allocation of resources, might also be applied. In supervising these elements of financial control, the finance committee could play a powerful role.

0. The exercise of these discretionary powers, in the implementation of settled policy, might best be delegated to the executive units, referred to at (b) of paragraph 16 above and within these units to specified grades of officials, related to some appropriate criteria, of the importance of individual decisions. This delegation would have to be matched, as already described, by adequate procedures and institutions for appeals by aggrieved citizens. It would be for consideration whether existing arrangements of this kind in Northern Ireland would suffice. Delegation in this way would leave Ministers and members of committees free to concentrate on policy formulation and general management functions.
11. It would probably be preferable if this form of power was exercised by institutions independent of Ministers and committees.
12. The members of the Cabinet would probably be in the best position to take a leading role here. However, private members and committees could be given opportunities to put forward ideas, in committee and through motions in the legislature. If it were thought desirable, provision could be made that motions passed would have some binding effect on Ministers and Departments.
13. Members of the Cabinet would be in the best position to exercise power in this way but the committees could also exercise a lot of influence through their part co-operative, part adversary relationship with Ministers, with the scope for bargaining involved in this.
14. This need not be the monopoly of anyone since so many would have a hand in the formulation of policy. In practice, all concerned might be happy to leave it largely to Ministers.
15. This could be a prerogative of Ministers but a convention might be evolved whereby, in appropriate cases, they would be accompanied by the chairman of the relevant committees at meetings with sectional interests.
16. What is said in relation to 15 could also apply here, with the additional point that the leading opposition member of the finance committee might, by convention, also attend in these cases.
17. This could be reserved to the finance committee.
18. This might be primarily a function of Ministers,

Although obviously a number of parliamentarians could be included in promotional missions abroad, as appropriate.

19. This might be largely for Ministers, although here too there could be a convention that committee chairmen would be invited to participate, if they wished. In financial dealings with the Westminster Government, balanced representation might be drawn from the finance committee.
20. These would be for Cabinet members.
21. What is said above about function No. 13 applies here also.
22. These might be by ad hoc boards comprised of the appropriate Minister, the appropriate committee chairman and another member of the controlling side of the relevant committee where this is the opposition. Where the Government parties controlled the Committee the third member of the board might be drawn from the opposition side of the committee.
23. These might best be fully delegated away from political figures, with provision for grievance machinery.
24. Similar arrangements to those suggested above for function No. 22 would suit but it might be preferable to have a larger board, with the same balance of interests.
25. These might be for Ministers, subject to mandatory consultation of the finance committee.
26. This would be exercised by the appropriate Ministers and committees, subject to evolving conventions about matters proper to each and matters which should be the subject of consultation.
27. Both Ministers and committees could have and exercise these powers.
28. Such appointments may be made to secure, at short notice, the services of persons with particular kinds of expertise, for compassionate reasons, or for other exceptional reasons. Safeguards are needed against abuse. Such appointments could be made jointly by the Chief Minister and the senior opposition committee chairman.
29. This is a largely formal function and could be left to Ministers.

This might arise in relation to appointments in any separate Northern Ireland security force, in addition to the police. Assuming that security powers were devolved, these appointments might be reserved to the security committee of the legislature, the chair of which could rotate every six months between the evenly balanced Government and opposition party members.

31. These appointments could be made in the same way.
32. Independent selection procedures, involving members of the judiciary, the legal professions and the independent selection Commissions for the central and local government services, would be necessary here.
33. In the time available for completing these notes, it was not possible to establish the existing procedures in Northern Ireland and no suggestion is made on this matter. It would obviously require considered treatment.
34. These powers could vest with Ministers, subject to the role of committees in relation to the making of orders.
- & 36. These powers could lie with the finance committee.
37. This would be covered by the committees' general supervisory role and their role in relation to making of orders.
38. A decision on this might be for the security committee in the first instance but it would clearly be necessary to have safeguards, perhaps involving a weighted majority in the legislature. The degree to which a Bill of Rights could be suspended would also arise. Decisions by a security committee, in which UPNI and Alliance members would help to make up the opposition parties' representation, might pose difficulties for the SDLP. If any scheme along the lines of the other suggestions above commanded acceptance, this matter would require further consideration.
18. It would be for the parties involved to judge whether a system based on the suggestions above would represent a balance of executive power that could be accepted and recommended to their supporters. It is worth stressing from the point of view of the SDLP that the strong bargaining power it would give them in relation to primary and subsidiary legislation and to finance would place them in a strong position to exercise influence on all significant areas of executive power.