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Mr Abbott

cc: Miss Owens, - M
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B II: THE CURRENT CONSTITUTIONAL FRAMEWORK

I attach for your consideration a draft of the First Day Brief B II on the current constitutional framework. There is a slight overlap between this and Miss Owens' draft brief on the legislative process (circulated under cover of her note of 25 May), but this is largely unavoidable given the relation between the two subjects. (I should be grateful if Miss Owens would give me the reference number for her brief, since this one refers to it.)

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THE CURRENT CONSTITUTIONAL FRAMEWORK

Introduction

1. The central element in the current constitutional framework is Northern Ireland's position within the United Kingdom. Statutory provision exists for the wishes of the Northern Ireland electorate on this fundamental question to be tested at intervals of not less than ten years in a "border poll", and successive Governments have made it clear that those wishes - whether to remain part of the UK or to cease so to be - will be respected. (It would be possible to hold a "border poll" this year (the last one took place in 1973) but since the result could not be in doubt the Secretary of State decided last year that the disadvantages would probably outweigh the benefits.)

2. Within this context, the constitutional arrangements have three main features: the continuing system of direct rule, under which the Secretary of State is responsible for nearly all aspects of government in Northern Ireland; the Assembly, elected last October, which under the terms of the Northern Ireland Act 1982 has both scrutinizing functions and the task of proposing how a devolved administration could be formed; and the local government system.

Direct rule

3. The basic structure of government in the Province is laid down in the Northern Ireland Constitution Act 1973. This Act (under which the 1973-74 Assembly and the short-lived power-sharing Executive were set up) defines three categories of "matters":

- (i) excepted, which are permanently outside the competence of a devolved Assembly (eg taxes, elections, special powers for dealing with terrorism);
- (ii) reserved, which after devolution would also remain the responsibility of Parliament at Westminster, although (unlike excepted matters)

responsibility for them could be transferred to a devolved administration in due course (eg law and order matters, firearms, civil defence);

- (iii) transferred, which are the responsibility of the Northern Ireland departments and are available for devolution to the Assembly (eg public transport, industrial development, agriculture).

4. Following the fall of the Executive in May 1974, the Northern Ireland Act 1974 was passed to make better temporary provision for the government of the Province by direct rule. Under the arrangements set out in the Act - which are still in force, and must be extended annually by Parliament - the Northern Ireland departments exercise their functions in respect of transferred matters subject to the direction and control of the Secretary of State. As an administrative arrangement during direct rule, the Secretary of State has delegated responsibility for the departments to his junior Ministers. However, although as a result these tend to be perceived as the Ministers for Economic Development, Education, etc; in constitutional terms the Secretary of State alone controls and is responsible for all the departments. Apart from certain excepted matters which fall to other UK departments (eg taxes, defence), the government of Northern Ireland since 1974 has therefore rested wholly with the Secretary of State.

5. Although legislation for Northern Ireland may of course be passed by Bill, the shortage of parliamentary time makes separate Bills for Northern Ireland largely impractical. Since the Province, as a result of its history and particular needs, can often benefit from legislation which differs in some respects from that required in the rest of the UK, the 1974 Act provides that during direct rule primary legislation which the Assembly had been competent to enact could be made at Westminster by Order in Council subject to the affirmative procedure. Orders in Council are thus the normal method of legislating for Northern Ireland in all transferred (and some reserved) matters. (There are occasional exceptions: for

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technical reasons some Acts covering transferred matters extend throughout the UK, while some applying to GB provide for an exactly corresponding Order in Council to be made for Northern Ireland by negative resolution.) Although technically subordinate legislation at Westminster, Orders in Council have the full force and effect of primary legislation as the equivalent of, and successors to, Acts of the old Northern Ireland Parliament and measures of the Assembly.

6. The Orders in Council procedure has often been criticized as inadequate for the enactment of complex and sometimes controversial legislation, and as a symptom of the remoteness of direct rule. Once laid, a draft Order in Council is incapable of amendment: it can only be approved or rejected. Over the years a number of improvements have been made to increase the opportunity for consultation - thus, draft Orders are now normally published as "Proposals" some time before they are formally laid, and any acceptable representations from interested parties can be incorporated before the draft reaches Parliament. Following the 1982 Act the new Assembly has an important scrutinizing role in relation to affirmative resolution Orders in Council in the transferred field (see para 10, below).

7. Proposals for draft Orders in Council are sometimes considered at Westminster by the Northern Ireland Committee, which however has no power to take a vote on any issue of substance. (Brief on the legislative process discusses the NI Committee's role further.) Subjects for the Committee are generally agreed between Northern Ireland Members and the Secretary of State. While there is no Select Committee on Northern Ireland, the remit of the existing Select Committees extends to the Province and one recently considered the effectiveness of investment incentives there (Select Committee on Trade and Industry, Seventh Report).

The Assembly

8. In the 1982 White Paper "Northern Ireland: A Framework for Devolution" the Government accepted that direct rule - for all its virtues - was an unsatisfactory long-term arrangement for the Province, and set out proposals to enable the people of Northern Ireland to

resume greater responsibility over their own affairs. The Northern Ireland Act 1982 provided that a new Assembly should have the responsibility of putting forward to the Secretary of State proposals for devolution - either full devolution as in 1974, or partial devolution, ie covering some but not all of the matters within the responsibilities of the Northern Ireland departments. The Act also provided that pending devolution the Assembly would have important scrutinizing, deliberative and consultative functions in the transferred field, and in furtherance of this role required it to establish committees corresponding to the Northern Ireland departments.

9. The 1982 Act does not specify how a devolved Northern Ireland administration should be formed: it is up to the parties in the Assembly to reach agreement on this central question. There are however two (alternative) tests which must be met before the Assembly can submit devolution proposals to the Secretary of State: either such proposals must be supported by 70% of Assembly members or, if they are supported by a majority but less than 70%, the Secretary of State must be satisfied that the substance of the proposals is likely to command widespread acceptance throughout the community. The Secretary of State will lay before Parliament proposals which meet one of these criteria, and these can then be implemented by Order in Council subject to the affirmative procedure. In addition, each House of Parliament must indicate that in its opinion the proposals are likely to command widespread acceptance. Once this approval is given the Assembly will again have the power to legislate by Measure on the matters concerned, and there will again be political Heads of Departments responsible to the Assembly. These would form an Executive under full devolution, and might do so under partial devolution. Under partial devolution the direct rule arrangements - and the Assembly's scrutinizing role - will continue in respect of each non-devolved department. For practical reasons the powers exercised by the Department of Finance and Personnel will only be devolved under full devolution.

10. The Assembly elected last October has yet to put forward any proposals for devolution, but it has exercised its scrutinizing and consultative functions with vigour. These functions are designed

to enable the Assembly, pending devolution, to provide an important addition to the direct rule system - a local forum in which the views of elected representatives can be expressed, formulated and presented to Government. As well as monitoring (through its Committees) how Ministers exercise their departmental responsibilities, the Assembly considers Proposals for affirmative resolution Orders in Council on transferred matters, and the Secretary of State lays its reports on such Proposals before Parliament. In respect of subordinate legislation the Assembly is also, in general, invited to comment on drafts of statutory rules before they are made. (See also on the Assembly briefs C III (political aspects) and ... (involvement in legislative process).)

Local government

11. The Province's local government system comprises 26 district councils elected every four years by proportional representation. (The next election is due in 1985). The councils take decisions on a straight majority basis but have only limited powers (eg cleansing, recreation, markets), since in Northern Ireland most of the functions discharged by regional authorities in Great Britain are the responsibility of Stormont departments. The local councils have a representative role in nominating members to executive agencies (eg the Area Boards) and a consultative role in, eg, planning matters.