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16 April 1991

Dear Mr Sutton

NORTHERN IRELAND: LEGISLATIVE PROCEDURES

1. You will be aware that after a year of preliminary discussions the four main Northern Ireland political parties and the Irish Government have agreed to participate in formal political talks in relation to Northern Ireland. These are likely to start at the end of this month and run for ten weeks.

2. They will address relations between the United Kingdom and the Republic and between the two parts of Ireland but the meat of the discussion will be a consideration of possible future arrangements for the government of Northern Ireland.

3. Our starting point will be to encourage the parties to reach agreement on a basis for full legislative and executive devolution, as envisaged in the Northern Ireland Constitution Act 1973. This would relieve Parliament of the need to consider all Northern Ireland legislation in the 'transferred' field. There is, however, a possibility that this will be too much for them to swallow.

4. There may be some who would prefer to have a continuing role for Westminster in the consideration of Northern Ireland legislation, as a kind of safeguard against any possible abuse of power by a local administration. Others will argue for

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administrative devolution anyway, arguing that Northern Ireland legislation should be the responsibility of the Westminster Parliament. It remains quite possible that we will not be able to achieve any agreement on a basis for devolution, in which case the pressure for some reform of the 'temporary' arrangements for handling Northern Ireland legislation at Westminster (which have been renewed on an annual basis since 1974) will increase.

5. It would be helpful as we enter the talks to have some idea of the range of options for handling Northern Ireland legislation which colleagues would find acceptable and which we might therefore be able to deploy if the course of the negotiations made that desirable.

6. I attach two papers (Annexes A and B) which describe, respectively, the current legislative procedures for Northern Ireland and some possible options for changing them.

7. For convenience, the specific proposals described in Annex B are:

i. more debates on Northern Ireland business in prime time;

ii. more adjournment debates on Northern Ireland matters;

iii. revive the Northern Ireland Committee. (We have recently sought to remind Northern Ireland MPs of its existence and offered to seek to arrange debates if they would find it helpful, eg in relation to the Proposal for a Draft Electricity (NI) Order due to be published shortly);

iv. amend Standing Orders to provide for the automatic referral of at least a category of Proposals for draft orders to the Northern Ireland Committee;

v. amend Standing Orders to enable the Northern Ireland Committee to propose and vote on advisory amendments;

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vi. arrange debates on the floor of the House on preliminary amendable motions, enabling the House to express views on the terms of a particular Proposal;

vii. arrange such debates in relation to actual Draft Orders;

viii. devise a new Committee procedure for handling Northern Ireland legislation;

ix. amend the Northern Ireland Act 1974 to enable more Parliamentary scrutiny of Northern Ireland subordinate legislation;

x. consider increasing the number of GB Bills containing a 'negative resolution' Clause enabling corresponding legislation to be made for Northern Ireland by Order in Council subject to the negative resolution procedure;

xi. enact more Northern Ireland legislation in the 'transferred' field by Westminster Bill (the only examples in recent years are the Fair Employment (NI) Acts of 1976 and 1989);

xii. tack more Northern Ireland legislation on to relevant GB Bills;

xiii. (in the event of agreement on a measure of legislative devolution) amend the NI Constitution Act to require that Measures of the Assembly be subject to the approval of both Houses of Parliament;

or

xiv. give any NI Assembly a direct role in debating and

amending NI legislation before it is considered in detail at Westminster (where a committee procedure equal to that canvassed at viii above might be appropriate).

8. With an eye to the likely convening of the talks I should be particularly interested in having your views on items viii and xiii above.

9. I am sending copies of this correspondence to Mr J Dilling, Ms J Bailey and Ms R Mulligan at the Cabinet Office, Mr T McDonald at the Scottish Office, Mr G Thomas at the Welsh Office and Mr M Demorais (Parliamentary Clerk) at the Department of the Environment and to Mr MacLean and Mr Walters in the Whips Offices.

10. These proposals may need to be the subject of Ministerial exchanges in due course but in the meantime I would be grateful to have your initial responses by 24 April.

Yours sincerely
Peter Dunbar

pp D J R HILL
Constitutional and Political Division

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ANNEX A

LATIVE PROCEDURES FOR NORTHERN IRELAND

Vehicles for Primary Legislation

1. Selecting the vehicle for a particular piece of Primary NI legislation depends largely on which of the three main categories of "matters" prescribed by the Northern Ireland Constitution Act 1973 it falls into. These are:

a. "excepted" matters. These are either matters of national importance (eg Parliament, the Crown, international relations and defence), or matters which were intended never to fall under the control of a future devolved Northern Ireland Assembly (eg special powers and other provisions for dealing with terrorism or subversion; elections; appointment of judges and the DPP);

b. 'reserved" matters. This actually comprises two categories, although the Constitution Act does not ostensibly distinguish between them. Some "reserved" matters are never intended to be devolved, but were put in the "reserved" category partly because it might be convenient on occasions to allow an Assembly to legislate about them, and partly because there was political pressure in 1973 to keep the "excepted" matters to a minimum. This category includes international trade, navigation, civil aviation, broadcasting, and nuclear installations. The second category is of matters which are available to be devolved to a future Northern Ireland Assembly "once a durable and stable system of government is established in Northern Ireland". It includes the criminal law, the maintenance of public order, and the "establishment, organisation and control" of the RUC;

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c. "transferred" matters are all matters not listed as "excepted" or "reserved". Virtually all the legislation proposed by the NI Departments will fall into this category.

2. There are basically two vehicles for primary legislation in Northern Ireland: Westminster Bills or Orders-in-Council made under the Northern Ireland Act 1974. If Parliament wanted to, it could pass all primary legislation for Northern Ireland, whatever category of matter it fell into, by Westminster Bill - either in Bills dealing solely with Northern Ireland matters; or by incorporating provisions for Northern Ireland in a relevant "GB" Bill. The practical and political objections to this are described in more detailed in Annex B below. A major factor is that a full programme of legislation by Bill for Northern Ireland would place an impossible burden on Parliament. This was the main justification used in 1972 and 1974 for enabling the Government to enact primary legislation for Northern Ireland by means of Orders-in-Council.

3. In practice, the choice of legislative vehicle is determined as follows:

a. "excepted" matters must be dealt with by Bill;

b. "transferred" matters are nearly always dealt with by Orders-in-Council. The main exception has been the Fair Employment Acts 1976 and 1989 where the Government decided that although the subject - employment legislation - was a "transferred" matter, the importance of the issue - discrimination - and its complexity justified proceeding by Bill;

c. "reserved" matters can be dealt with by Bill or Order-in-Council. The rule of thumb which is applied is to amend past Northern Ireland statutes by Order-in-Council and past GB statutes by Bill. This is because the divide between those "reserved" matters which are potentially available for devolution and those which are not almost always coincides with the divide between NI statutes (Acts of the Parliament of NI, Measures of the Assembly and Orders-in-Council under the 1974 Act) and GB Acts.

Procedures

4. There are four possible procedures which can be followed when seeking to legislate by Order-in-Council: two are taken directly from the 1974 Act and two are subsequent elaborations upon it:

a. "shortened procedure. This is in fact the original 1974 procedure. A draft of the legislation is laid before Parliament. It cannot be amended. It must be approved by both Houses of Parliament and is then made by Her Majesty in Council. It has now largely been superseded by the so-call "normal" procedure but is still used regularly for Appropriation and routine Financial Orders and occasionally for relatively urgent but (usually) uncontroversial Orders;

b. "urgent" procedure. Also provided for in the 1974 Act, this procedure allows an Order to be made by Her Majesty in Council without prior Parliamentary approval. The Order must subsequently be approved within 40 sitting days by both Houses or it lapses. This procedure has only been used for temporary "emergency" legislation with a strictly limited life - e.g. Orders dealing with remand in absence during POA strikes;

c. "normal" procedure. For Parliamentary purposes this is the same as the "shortened" procedure described above but, in the interests of making NI legislation more responsive to local needs, it has been the practice sine 1976 to engage in a public consultation exercise before Draft Orders are laid before Parliament. Consultation takes place on the basis of a Proposal for a Draft Order which is published together with an Explanatory Memorandum and widely circulated. The consultation period (normally six weeks) is often extended in the case of lengthy or controversial legislation. [The introduction of "Proposals" also made possible more debates in the Northern Ireland Committee (comprising all NI MPs and up to 25 others), though the Committee cannot directly amend Proposals. Under the Northern Ireland Act 1982, the Assembly was also, pending devolution, given a statutory role in scrutinising proposals and passing comments to the Secretary of State.] At the conclusion of the consultation period Ministers review any comments which have been made and (almost invariably) amend the draft legislation before it is laid before Parliament as a Draft Order, subject to affirmative resolution in both Houses. Debates in the Commons are normally limited to $1\frac{1}{2}$ hours, although longer debates can occasionally be arranged;

d. "negative resolution" procedure. Where NI requires the same substantive provisions as those incorporated in a GB Bill, a Clause can be inserted in that Bill to enable an Order-in-Council to be made under the 1974 Act but subject to "negative resolution", rather than "affirmative resolution". There is no consultation period (on the basis that the issues can all be debated during the passage of the GB Bill). The Order is made by her Majesty in Council and then laid before Parliament. It can be "prayed against" within 40 sitting days and (if time can be found) debated. Such an Order must "correspond" with

the parent provision which means that it can be freely adapted to fit Northern Ireland's different statute book and institutional arrangements, so long as the substance of what it does is the same.

Subordinate Legislation

5. There are two main categories of subordinate legislation:

i. Statutory instruments apart from Orders in Council under the NI Act 1974. These are subordinate legislation made under UK Statutes. They comprise the renewal orders for the Northern Ireland Act 1974 and for the Emergency Provisions Acts 1978 and 1987 (both subject to affirmative resolution) as well as some other powers: eg section 38 of the Constitution Act contains power to legislate by affirmative Order for elections and boundaries for local authorities;

ii. subordinate legislation made under NI Statutes. This category of subordinate legislation, collectively known as Statutory Rules and Orders (SROs) is subject to special procedures. The enabling legislation is still drafted in terms of Assembly, not Parliamentary, procedure. This is then "stepped down" by the 1974 Act. Thus an SRO which would, under devolution, be subject to affirmative procedure in the Assembly, is subject to negative procedure at Westminster; one subject to negative procedure in the Assembly is subject to no procedure at Westminster. There are, very roughly, about 100 of the former and 3 to 400 of the latter each year.

ANNEX B

POSSIBLE CHANGES TO NORTHERN IRELAND LEGISLATIVE PROCEDURES

1. The current arrangements for dealing with legislation for Northern Ireland, are described in Annex A attached with these papers.

2. There has been regular criticism (mainly from Unionists) of those procedures on the basis that once a Draft Order has been laid before Parliament it cannot be amended. Debates on Draft Orders are often short, late and poorly attended. The fundamental criticism is that all decisions about NI legislation, including its details, are effectively made by NIO Ministers who have no democratic base in Northern Ireland.

3. The Government's response to such criticism has been that

(i) considerable efforts have been made to provide opportunities for local elected representatives and others to express views on proposed legislation before it is laid in draft at Westminster (eg publication of Proposals and the statutory role of the Assembly pending devolution); and the Northern Ireland Committee is available to debate Proposals, on request (though in practice the NI MPs have not sought debates and the Committee has therefore not met since 1985);

(ii) the present system enables us to "preserve the integrity of the NI statute book" which makes it possible to contemplate a smooth transfer of legislative and executive powers to a devolved administration, which in turn would resolve all the perceived problems surrounding the present procedures.

4. Criticism continues, however, and has probably been increasing over recent months, with the SDLP joining in (and also Lord Prys-Davies, although Mr McNamara is extremely suspicious of any

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changes which might be integrationist and reduce pressure for [illegible]tion). Suitable action in this area could have a positive impact, particularly on the UUP and 'non-political' Unionists, and thus possibly encourage political movement in the right circumstances. In the absence of devolution or of a functioning Assembly (or similar body perhaps) with scrutinising powers, such action would help to counter a major criticism of direct rule. However, the possibility of making minor "concessions" in the past (eg experiments with amendable motions) has not been followed up in the absence of any quid pro quo from Unionists.

5. There are a number of ways in which existing legislative procedures might be adjusted to give greater opportunities for local elected representatives to debate and possibly amend legislation for Northern Ireland. They fall into three broad categories:

(a) improving existing procedures for consultation and debate;
(b) changing Parliamentary procedures, possibly to the extent of enabling NI legislation to be directly amended during the Parliamentary process; and
(c) taking more legislation for NI by Westminster Bill.

6. In practice it is difficult to identify further significant improvements in the current arrangements for consultation about NI legislation, and no such improvements would meet the fundamental criticism that NI legislation could not be directly amended. The main possibilities are to offer more NI debates in prime time (if we can plan sufficiently far in advance) and perhaps more adjournment debates on NI matters (subject in both cases to the availability of Parliamentary time and the needs of the business managers); or to revive the Northern Ireland Committee. The latter Committee can, on the initiative of MPs, debate the principle and content of Proposals (but not amend them) or, indeed, any matter relating exclusively to Northern Ireland. In practice there is no current pressure for such debates and the Committee has not met since 1985. The Government could take the initiative in proposing debates or, if the business

managers agreed and the Opposition were content, secure an amendment to Standing Orders to provide for the automatic referral of (some or all) Proposals to the Committee.

7. As regards changes in Parliamentary procedures, movement might be possible in four areas:

(a) secure an amendment to Standing Orders which would allow Northern Ireland Committee members to propose and vote on advisory amendments. This would enable the Committee to express its opinion on the detail of the proposed legislation, but final decisions would still be taken by NIO Ministers in preparing the Draft Order;

(b) arrange debates on the floor of the House on preliminary amendable motions, e.g. welcoming the terms of a Proposal. MPs could table and debate amendments which would permit the expression of Parliamentary views on proposed NI legislation whilst it could still be amended. The disadvantages of this approach are the small number of divisions which could be permitted (one is the probable limit) and the difficulty which the Secretary of State would face in securing Parliamentary time for such debates. A more radical version of this approach would be to arrange such debates in relation to Draft Orders and thus enable Parliament to express a view on the actual legislative provisions, though this would make the process of making amendments more complicated;

(c) devise new Committee procedures for handling NI primary legislation. The aim might be to enable amendments to be tabled, debated and voted on, whether the legislation was in the form of a Draft Order or a Westminster Bill. In either case, proceedings on the floor of the House would be kept (or cut) to a minimum. Any such procedures could obviously have wider implications for the conduct of Government business and handling legislation. There could

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be practical difficulties in establishing a Committee which included all (or a sufficiently large and representative selection of) the NI MPs, gave the other Opposition parties a reasonable representation and preserved a Government majority (which might not always be easy). Even if the consideration of NI Bills were substantially remitted to a Committee (or a Committee was established with power to amend Draft Orders), this would still place a substantial extra burden on Parliamentary time in the sense that it would absorb the time of many MPs for substantial periods. The Scottish Grand Committee might provide a model though the composition of an equivalent Northern Ireland Committee would need to be on a different basis. Ideally any new legislative procedure based on the existance of such a Committee would not require a very substantial increase in the amount of time devoted to Northern Ireland business on the floor of the House. Equally, any new procedures should enable the MPs to propose, debate and vote on detailed amendments, if not on the floor of the House then in something akin to a Standing Committee;

(d) amend the 1974 Act to provide more opportunities for Parliamentary scrutiny of subordinate legislation, e.g. by making all Statutory Rules and Orders (most of which are at present subject to no procedure at Westminster) subject to negative resolution. However, the effort required to achieve this change would probably be disproportionate: it is a relatively minor move in an area which gets little criticism; it would require a Bill; and it would impose a substantial burden on the Joint Committee on Statutory Instruments.

8. Using Bills to deal with NI legislation could be achieved by seeking separate NI Bills on significant "transferred" matters or by actively seeking to tack NI legislation on to relevant GB Bills. A

third option in this category would be to seek to increase the area of legislation dealt with by "negative resolution" Orders-in-Council which "correspond" to GB legislation. There is probably little scope for more of the latter, a move which would also be perceived as highly integrationary and abandoning the advantages of being able to tailor NI legislation to the particular circumstances of NI. Either of the last two options would result in NI legislation being considered in the context of GB legislation, which would probably reduce the impact which NI MPs could have and therefore paradoxically reduce the local influence on the provisions of local legislation. All three options would in theory enable us to preserve the integrity of the NI statute book, but in practice the second would result in considerable pressure on the Secretary of State to simplify the legislation and agree to "UK-wide" legislation. This would result in powers being "vested" in the relevant Secretary of State, rather than the relevant NI Department which would reduce the range of matters available for devolution or at least make it difficult to arrange a smooth transfer of power and responsibilities in the event of devolution: it would be necessary to legislate in order to reconstitute the NI statute book; and to persuade "GB" Departments to surrender powers and, possibly, staff and resources.

9. Whichever of these options for legislating by Bill was selected, the Secretary of State would need to secure the approval of relevant colleagues. He would probably find it difficult to secure Cabinet approval for further NI Bills on "transferred" matters, certainly not for more than one year; and, in relation to the 3 or 4 GB Bills a year which might be suitable for extension to NI, Departmental Ministers would probably be reluctant to complicate them by adding parts on related NI matters.

Partial legislative devolution

10. Most of these suggestions might apply in the event of a failure to agree to any measure of legislative devolution, and to the handling of the remaining Orders-in-Council on 'reserved' matters

which would continue to be the responsibility of Westminster even in the event of legislative devolution. There remains the possibility that the parties will agree on 'partial' legislative devolution, with some of the local politicians insistent that Westminster should continue to play some role.

11. There are a number of possible models here. Much would depend on whether any local administration was willing to take responsibility for proposing and introducing legislation, or whether the whole legislative process and associated policy responsibilities were left with the UK Government. There are probably a range of possibilities in between but the key distinction is likely to lie between:

a. a system in which the Northern Ireland legislation in the transferred field is dealt with by the Northern Ireland Assembly but then referred to Westminster for some kind of superior authorisation. Such Measures might require the approval of both Houses of Parliament (as Draft Orders do at present). They might be introduced by the Government, though the views of the Assembly and of Northern Ireland political and public opinion more generally would be represented by the Northern Ireland MPs and peers. There could be a case for enabling Parliament to amend the legislation but it may be better simply to leave it with a veto power, leaving the local administration to ensure that the legislation was likely to be acceptable before putting it forward or to withdraw and amend it for re-submission, if necessary;

b. a system in which Northern Ireland legislation in the transferred field continues to be the responsibility of the UK Government but in which the Assembly would play a significant role. It might at the very least retain a statutory role in commenting on Proposals for Northern Ireland legislation but it may be possible to devise a system in which the Assembly were given the power to

debate and directly amend Northern Ireland legislation in the transferred field, perhaps after it had formally been laid before Parliament. There would then need to be a further procedure at Westminster to enable the Government, and other parties, to propose amendments. In this case one might need to look at some variation of the proposals canvassed in paragraph 7c above.