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FROM: TONY McCUSKER
DIRECTOR, OFM/DFM
1 DECEMBER 1999

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NI PERMANENT SECRETARIES
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8/12

DEVOLUTION: INTERIM GUIDANCE

1. My minute of 9 November attached interim guidance for Departments on devolution. This guidance has been updated slightly and now incorporates material on the implementation of Human Rights legislation and some more information on Assembly Questions. It is being re-issued so as to ensure that it is brought to the attention of all relevant staff.
2. You should ensure that this guidance is put into effect immediately on devolution ie tomorrow. Fuller guidance will be made available following approval by the Executive Committee.
3. As with the previous guidance, any queries regarding legislation or Departmental Seals should be directed to Anne O'Boyle, Belfast (5)28424. Queries on any other aspect of the guidance should be directed to Patricia McAuley, Belfast (5)28425.

P McAuley

pp TONY McCUSKER

cc {
 Sex - CCAS Principals
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 Ms Kenny
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DEVOLUTION: INTERIM GUIDANCE FOR DEPARTMENTS

In any contacts with Assembly Members, party officials or party workers, and servants

1. This circular provides interim guidance to Departments on treatment of matters which will remain the responsibility of UK Government Ministers (reserved and excepted matters), access to Ministers in the Assembly (ie dealing with correspondence, requests for meetings, invitations etc), dealing with Assembly business (Questions, adjournment debates etc), legislation, Departmental Seals and access to records by local Ministers and their Special Advisers. Fuller guidance is with the First Minister and Deputy First Minister in draft for consideration, but it will need to be cleared with the other members of the new Executive Committee before it can be released. Once the Executive Committee have endorsed the guidance, it will be issued, on wide circulation, to Departments. In the meantime, Departments should follow the guidance set out in this note in relation to those areas. Guidance is also now included on the implementation of the Human Rights legislation in Northern Ireland.

Treatment of Reserved and Excepted Matters

2. A Memorandum of Understanding has been published (Cm 4444) which sets out the principles to be observed by the devolved administrations and the UK Government in their dealings with each other. The MOU has been agreed by the UK Government, Scottish Ministers and the Cabinet for the National Assembly of Wales. It will be put to the Northern Ireland Executive Committee for endorsement. In the meantime, Departments should observe the general principle that correspondence, Questions, requests for information etc relating to reserved and/or excepted matters (which are set out in Schedules 2 and 3 of the Northern Ireland Act 1998) should be referred to the responsible UK Government Department for response. The correspondent should be informed that this has occurred. In some cases, a reply may need to be issued to the correspondent if, for example, the Minister is asked what representations he/she has made to a UK Government Minister on a particular issue. In this case, the correspondence should be copied, along with the original letter/Question, etc to the relevant UK Government Department via Private Offices.

unless the case is urgent, involves personal information which could not be revealed to

Contacts with Assembly Members/Party Officials

3. In any contacts with Assembly Members, party officials or party workers, civil servants need to bear in mind their constitutional position. The NI Civil Service Code of Ethics states clearly that the constitutional and practical role of the NI Civil Service is to assist the duly constituted government of the day - in our case, the Northern Ireland Executive Committee - in formulating its policies. Thus, in any direct or indirect contacts with Assembly Members who are not NI Ministers, or with party officials or party members, civil servants must avoid either suggesting or commenting on policy options or engaging in debate about the merits of NI Ministerial or Executive Committee policies. They may provide only factual information or factual briefing.

Access to Ministers in the Assembly

(i) Correspondence

4. **All** correspondence to an Assembly Minister, regardless of the correspondent, should be treated as requiring a Ministerial response. The time limit for responses to all correspondence will be 10 days. If a substantive reply is not possible within 15 days, a holding reply should be issued. Existing procedures relating to Ministerial replies should be applied. Correspondence addressed to a Minister but dealing with a matter which is the responsibility of a Next Steps Agency should also be dealt with in this way, as should correspondence relating to an NDPB.

Dealing with Assembly Business

5. Letters addressed to local offices may be dealt with at that level unless the issue raised is a policy one. In this case, the correspondence should be forwarded to the Private Office who will arrange for a Ministerial response.
6. Copies of replies to Assembly Members writing on a constituent's behalf should not be sent to the other constituency Assembly Members or to the constituency MP.
7. If an MEP takes up a case with no EU content, he should be asked to advise the constituent to refer the matter to one of the constituency Assembly Members or MP unless the case is urgent, involves personal information which could not be revealed to

others, or the constituent clearly did not wish to approach his/her Assembly Member(s) or MP. If there are both EU and domestic aspects, the response should note the constituency interest of both Assembly Members and MP. In no circumstances should correspondence be copied to constituency Assembly Members or MP without the constituent's agreement.

(ii) Telephone enquiries

8. These should be dealt with in a similar way to correspondence - if available, the Minister should be asked whether he wishes to speak to the enquirer. If a written response is requested, this should be prepared for the Minister's signature.

(iii) Meetings

9. All requests for meetings should be referred to the Minister with considered advice. Officials should not meet with deputations on particular issues unless authorised to do so by the Minister.

(iv) Issue of Papers

10. All consultative documents, draft legislative proposals and major policy papers should be issued to Assembly Members, MPs, MEPs and political parties. Lists of names and addresses are available in Departments. Further copies may be obtained from Central Secretariat as required.

Dealing with Assembly Business

(i) Questions

11. Departments should deal with Assembly Questions in the same way as Parliamentary Questions. However, in the meantime answers to all Questions relating to Next Steps Agencies and NDPBs should be prepared for the Minister's response. Questions will be posted on the Assembly's Internet site by the Business Office. Departments should therefore ensure that this site is checked each day. Answers should be approved and signed by the Departmental Minister and returned to the relevant Assembly Member and the Business Office by 2pm on the due date in written format – the Speaker has

indicated that electronically submitted Answers will **not** be accepted. Answers should also be copied to PS/First Minister and PS/Deputy First Minister.

(ii) Adjournment Debates

12. The Speaker will decide on topics for the adjournment debate(s), and this/these will be notified to the relevant Department by the [Business Office]. Departments should provide their Minister with a 10 minute speech on each topic with lines to take and accompanying background briefing as necessary. Officials must be available to support the Minister as required.

(iii) Statements

13. Departments should contact Central Secretariat for guidance if their Minister wishes to make such a statement.

(iv) Committees

14. Departments should contact Central Secretariat for guidance when Committees begin work.

Legislation

(i) Primary Legislation

15. From and including the date of devolution the Order in Council procedure under the Northern Ireland Act 1974 will cease. From that date primary legislation, dealing with matters which fall within the legislative competence of the New Northern Ireland Assembly, will be progressed by way of Bills of the Assembly.
16. Guidance on the new procedures is currently being produced and will be put to the Executive Committee for endorsement. In the meantime, if there is any proposed legislation which Departments consider will need urgent attention they should let Central Secretariat know.
17. Departments should also be aware that negative resolution clauses contained in GB Bills (or Acts) enabling Northern Ireland to legislate under the negative resolution

procedures will fall on devolution day. Consequently, any such legislation will have to be dealt with under the new procedures.

18. It is possible that Bills currently before Parliament at Westminster may make reference to a named Northern Ireland Department. If so, Northern Ireland officials should ensure that the GB Department sponsoring the legislation is advised of the revised title of the new or re-named Northern Ireland Department.

(ii) Subordinate legislation

19. Subordinate legislation procedures will also be significantly different under devolution. If subject to affirmative resolution, the legislation will be scheduled for debate in the Assembly before coming into force (i.e. it will have to be formally affirmed by the Assembly). If subject to negative resolution it must be laid before the Assembly and it will take effect from the specified operative date unless "prayed against" or annulled by the Assembly during the statutory period as defined in section 41(2) of the Interpretation Act (NI) 1954.

20. Guidance on subordinate legislative procedures after devolution is being drawn up for consideration and endorsement by the Executive Committee. Departments will be advised of the new procedures as soon as the Executive Committee's endorsement is received; but in the meantime, that is from the date of this minute and until advised otherwise by Central Secretariat, Departments should **not** make or lay statutory rules unless they absolutely have to. If there is an urgent need to make a statutory rule during that period Central Secretariat should be consulted.

21. Staff working on subordinate legislation should also be aware of transitional arrangements in Article 3 of the Northern Ireland (Modification of Enactment - No. 1) Order 1999 which comes into force on devolution. That Article contains a savings provision for subordinate legislation made before the date of devolution but which is capable of being annulled, revoked or not approved either by the Assembly or at Westminster during any part of the statutory period which falls after devolution.

Departmental Seals

22. The new Departmental structures and functions came into effect today. Departments should ensure that any action taken or done on or after today, including documents signed, authenticated and/or sealed, is taken or done under their new or revised Departmental title and authority.
23. Under Article 6 of the Departments (NI) Order 1999, the Department, *"shall have an official seal which shall be officially and judicially noticed. The application of the seal of a Department shall be authenticated by the signature of the Minister or a senior officer of that Department"*.
24. Departments should note that when it is necessary for an official to authenticate a document, he or she should now do so as a "senior officer of the Department of/for". The current practice of signing as "Assistant Secretary ..." therefore ceases.
25. A "senior Officer of a Department" is defined in Article 2(3) of the Departments (Northern Ireland) Order 1999 as:
- " a person who is employed in that Department and is-*
- (a) a member of the Northern Ireland senior civil service; or*
 - (b) a member of the Northern Ireland civil service designated by the department*
- as a senior officer for the purposes of this Order"*.
26. "Authenticated" is an attestation by the Minister or senior officer that it is the official seal which was affixed to the document. For this reason the Minister or senior officer concerned must be personally present when the seal is affixed and must witness this then and there by means of his/her signature and the date. To do otherwise runs the risk of a challenge, in that a court could hold that the seal was not properly affixed and that, consequently, the document concerned was not properly executed.
27. Private Offices of all 11 Departments hold new seals for their respective departments.

Access to records by NI Ministers and Special Advisers

28. The Whitehall convention on access to papers of a previous administration prevents UK Ministers from seeking access to the records of a predecessor of a different political party. There is no statutory provision which would prevent such access. The First Minister and Deputy First Minister have been asked to agree that a similar convention should apply in Northern Ireland in relation to papers created prior to their appointment. This will also need to be cleared with the other members of the new Executive Committee. In the meantime, if a Minister makes a request for a record created prior to his or her appointment, Departments should consult Central Secretariat for advice.

IMPLEMENTATION OF THE HUMAN RIGHTS LEGISLATION IN NORTHERN IRELAND

Introduction

29. **The Human Rights Act 1998** ("the Act") will incorporate the rights and freedoms guaranteed under the European Convention on Human Rights (ECHR) into domestic law. All public authorities in the UK will be required to act compatibly with the ECHR. Judges will have to take account of the ECHR in deciding cases. The courts will have the power to strike down incompatible subordinate legislation.
30. Two key provisions of the Human Rights Act are:
- **Section 3** – which requires primary and subordinate legislation to be read and given effect in a way which is compatible with the Convention rights. In this connection most Orders in Council will be treated as subordinate legislation, along with SRs, and could be quashed or disapplied by a court if found to be incompatible with Convention rights
 - **Section 6** – which imposes a duty on public authorities to act in a manner compatible with Convention rights. This includes public bodies in Northern Ireland.

31. The Act will come fully into force throughout the United Kingdom on 2 October 2000. However, the most significant provisions of the Act are brought into force in Northern Ireland on devolution, as has happened in Scotland and Wales.

32. For the first time, citizens who consider that their Convention rights have been breached will be able to seek redress in the courts in Northern Ireland instead of having to incur the cost and delay of taking a case to the European Court of Human Rights in Strasbourg. It is worth noting that the ECHR confers rights on the citizen, but with corresponding duties on the State. This is positive in nature, not simply about avoiding breaches of rights, but about protecting the citizen from infringement of his/her rights, whether by the State or others.

The Northern Ireland Act 1998 and the Belfast Agreement

33. Human rights and equality issues are central to the Belfast Agreement. The Northern Ireland Act 1998 also contains provisions relating to the Convention rights, and provides that the legislative competence of the Assembly and the executive competence of Northern Ireland Ministers and departments are restricted by the requirement of compatibility with any of the Convention rights. On devolution therefore the Convention rights as set out in the Human Rights Act will apply to the Assembly, to Ministers and their departments, and the provisions of the Human Rights Act as to remedies for breach will apply as if that Act was in force. Thus, Ministers and Northern Ireland departments have no power to do anything which is incompatible with the ECHR or Community law.

34. Two key provisions of the Northern Ireland Act 1998 are:

- **Section 6(2)(c)** which provides that the NI Assembly has no competence to make laws which are incompatible with Convention rights; and
- **Section 24 (1)(a)** which provides that NI Ministers and Departments have no power to make subordinate legislation or to do any act which is incompatible with Convention rights.

35. The Northern Ireland Act 1998 also makes provision for the establishment of the **Northern Ireland Human Rights Commission (NIHRC)**. The NIHRC was formally established on 1 March 1999 with the appointment of Professor Brice Dickson as Chief Commissioner.

Guidance and Training

36. All of this will have a very significant impact on the work of the NI departments and for Ministers in charge of departments, in terms of taking executive action, making decisions, or drawing up proposals for legislation.
37. Copies of Home Office Guidance for Departments on the Human Rights Act have been circulated to all Northern Ireland departments. A Northern Ireland version of the Guide is in preparation.
38. Each Northern Ireland department has nominated an officer at Senior Civil Service level to drive forward the work required in preparation to implement the Act. This group will meet along with representatives of the Office of the Legislative Counsel and Departmental Solicitors to identify specific human rights issues in relation to policy and legislation formulation. Departments are also considering the compliance of existing legislation in relation to the Convention rights.
39. Basic awareness training for senior staff and for the Grades immediately below has already been provided. This is being progressively rolled out to others in the senior civil service and a further 300-400 key staff at Grades 6 and 7 as well as other staff.
40. The next phase will be to provide more specific training for those staff who are directly involved. Exercises are on going with the Departmental Solicitors in identifying high risk legislation and consideration of the most appropriate way to assist and train staff to audit their current legislation for compliance and to proof future legislation at draft stage.

Further Guidance

41. More detailed guidance will be provided to Departments as soon as it has been approved by the Executive Committee. In the meantime, if Departments have any queries regarding legislation or Departmental Seals, these should be addressed to Anne O'Boyle [(5)28424]. Queries on any other aspect of the guidance should be addressed to Patricia McAuley [(5)28425].

OFFICE OF THE FIRST MINISTER AND DEPUTY FIRST MINISTER
1 December 1999