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P. Teahon

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Subj: Briefing on Northern Ireland Bill

1. Bill Jeffrey, Jonathan Stephens and Alan Whysall called to the Secretariat this afternoon to give us a copy of the draft Northern Ireland Bill and to brief us on its contents.

General

2. They stressed that the draft provided is very much "work in progress", that many amendments to it are likely before the Bill is tabled next week and that there will be a further raft of Government amendments as the Bill proceeds through Parliament (as various technical deficiencies come to light). The reason for this is that they have had to compress into a very tight timescale the work on a 78-clause Bill which would ordinarily require several months' preparation.
3. They also made clear that they are open to drafting suggestions which we may wish to make (though, as with the NI Sentences Bill, they could not give guarantees that our suggestions would be accepted).
4. A precise date for tabling of the Bill remains to be agreed with the business managers. A business statement by the Leader of the House tomorrow will announce the timetable, which is likely to involve tabling around next Thursday, with Second Reading following about ten days later (a one-day debate), the committee stage lasting three or four days (on the floor of the House) and the report stage a further day.

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Ministers are aiming to complete all Commons stages by the end of July, to send the Bill to the Lords for the "spill-over" period in October and to complete the passage of the Bill before the end of the present session (i.e., by the beginning of November).

5. While the Lords will as always be unpredictable, the general view is that this Bill should be less controversial than the NI Sentences Bill and that completion within this timescale should be possible.
6. The SDLP and the UUP were briefed this morning on the Bill (together). The British plan to brief Sinn Féin at 9am tomorrow and the other parties later this week. (It is possible, they added with a smile, that logistics may make it difficult to arrange meetings with the DUP and the UKUP until the last moment prior to tabling). The Conservatives and Liberal Democrats will also be briefed later this week.
7. I understand that a copy of the Bill has already reached you via the SDLP. The following are the key points to emerge from an initial run through the Bill this afternoon with Jeffrey and his two colleagues (with section designations and page references as in the copy you have).

Preliminary (p.1)

- Para 1(1) and (2), which deals with the status of Northern Ireland, reproduces the precise terms of the Agreement;
- Para 3(1) is the trigger for the devolution order. This will be laid before Parliament if it appears to the Secretary of State that "sufficient progress has been made in implementing the Belfast Agreement". The British feel that this formulation (which would cover action in relation to the North/South Ministerial Council, implementation bodies etc.) should provide sufficient protection from our point of view;
- Para 4(1) reproduces the distinction made in the 1973 Act between excepted matters, reserved matters and transferred matters. Definitions are contained in Schedules 2-3 to the Bill (though there has been some updating of the 1973 terms);

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Para 4(5) reproduces the "cross-community support" procedures as in the Agreement (though the words "present and" are omitted).

Legislative power (p.3)

Throughout the Bill, the British have used the terms "Measure" and "proposed Measure" (from the 1973 Act) to describe an Assembly Act and Bill respectively. Both the SDLP and the UUP objected this morning to this, preferring Act and Bill. The British told us that they will probably agree to this;

Para 6(2) indicates matters which would be ultra vires in terms of the Assembly's legislative competence. It would be for the courts to decide whether the Assembly has strayed outside its competence with any particular law;

Paras 8-11 cover scrutiny by Ministers and the Presiding Officer. The latter is given a role on the lines of a provision in the Scotland Bill; to prevent abuses, his rulings could be overturned by a majority of the Assembly. The ultimate adjudication in this area lies with the Judicial Committee of the Privy Council;

The use of "shall" in para 11 reflects a basic view of what would be a reasonable approach in this area; the use of "may" in some parts is intended to reflect the conditional language used on these points in the Agreement;

Para 12 provides for the Secretary of State to submit Assembly Bills for Royal Assent. While the Presiding Officer will have this role in Scotland, it was felt that, as the Secretary of State in any event has to give consent in respect of certain Bills, it would be simpler for her to be tasked with submitting all Bills for Royal Assent. (Comment: Bill Jeffrey speculated that Trimble might have difficulty with this).

Executive authorities (p.7)

Para 16 provides that, if the First Minister or his Deputy ceases to hold office, the other must stand for re-election. A point on which the British are reflecting, and on which an amendment to this section is likely, is how to ensure continuity in such circumstances (for example, the individual still in office might be given temporary powers and an election set for an early date);

Para 17 sets out the D'Hondt procedure. The British consider that some reference may be needed here to the number of Ministers and nature of their offices being subject to the Assembly's approval. We argued against this, pointing out that the DUP would exploit any such provision mercilessly. Jeffrey felt that the mandate given to Trimble and Mallon last week implied a reporting relationship of some kind to the Assembly on these matters. He noted our reservations, however, and indicated that they would only pursue this point if they came under pressure from the parties in relation to it;

The provision in para 17(2) for the Secretary of State to provide for a number of Ministers greater than the Agreement's ceiling of ten is explained with reference to the need for flexibility. If Trimble and Mallon were to decide that a larger number would be desirable, it would be helpful if the Act did not have to be renegotiated in order to achieve this;

No provision has been made in the Bill as yet for junior Ministers. The British say that, if Trimble and Mallon decide on these, a brief enabling provision would be required, though the detail of how appointments would be made could be left to the standing orders;

We discussed para 19 at some length (removal from office). We sought an explanation for the sweeping reference to "any other reason" as an additional basis for exclusion. The response was that it is necessary to provide for circumstances which might precipitate exclusion beyond those indicated in the Agreement (e.g. involvement by a Minister in financial or sexual misdemeanours). A Minister could not be excluded, however, without a cross-community vote and this would require a motion on the basis set out in

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para 19(5);

We observed that the latter would allow "at least 30" members to move such a motion and that it should not be too difficult, accordingly, for the DUP and their allies to use this provision for vexatious or time-wasting purposes (including repetitive use in order to block serious business). The British agreed to reflect on this point with a view to preventing such abuses;

As regards para 19(2), the SDLP and UUP commented to them this morning that, while an individual might commit misdemeanours, this risk hardly exists in relation to a party and therefore there are no grounds for using a phrase such as "for any other reason" in this paragraph. Jeffrey agreed to adjust the para in some way (we suggested deletion of this phrase);

A crucial section of the Bill from our perspective is paras 19(6) and 19(7) - the application of the "Balmoral criteria".

The basic approach here is that the Secretary of State may form an opinion that the Assembly should consider a resolution in relation to the exclusion of a Minister or members of a particular party; that she would take four factors into account in forming this opinion (the factors rendered precisely as in the NI Sentences Bill); and that she would convey that opinion to the Assembly.

Jeffrey emphasised that, as in the Sentences Bill, none of the factors would be a precondition. Should Unionists demand that the Assembly be given the lead role in this respect, the response would be that the opinion could not be formed without the benefit of confidential information which is available only to the Secretary of State.

The Bill will also place no obligation on the Secretary of State to explain her reasoning (though she might choose to do so briefly in an accompanying statement) or to attend the Assembly in this connection;

Para 20 was firmly resisted by the SDLP and the UUP this morning. This provides for the Secretary of State, in the event of paralysis in the Assembly, to transfer the functions of the First Minister and Deputy First Minister

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temporarily to members of the House of Commons. (They have in mind the likes of Tony Worthington being brought back for this purpose). While the SDLP and UUP are unhappy at the idea of planning for failure in this way, the British fear the consequences of a sudden collapse and feel some provision must be made for it;

We suggested that the very specificity of the "plan B" (with its implication of MPS waiting on permanent stand-by) is unhelpful and that a more generalised reference to the Secretary of State resuming control in the event of a collapse would be better. Jeffrey agreed to reflect on this. He noted the possibility of having the First Minister and the Deputy First Minister report the collapse to the Secretary of State and invite the latter to resume control;

Para 21(7) presumes that the restructuring of NI Departments will have taken place before powers are transferred (i.e., the provision here for establishing "new NI Departments" relates to future developments beyond those anticipated over the coming months);

In para 24, the Secretary of State's role in establishing compatibility with international obligations is modelled on the Scotland Act;

The provisions covering the Executive's involvement in the Strand Two arrangements are fairly terse and are contained in para 26.

The NI Assembly (p.14)

The four-year term for the Assembly reflects the Scottish arrangement and also District Council terms in Northern Ireland. The first terms will run until May 2003;

The Northern Ireland Assembly Commission referred to in para 37 is the equivalent of the House of Commons Commission (chaired by the Speaker and involving a number of MPS) and will have a purely "housekeeping" role (buildings, catering etc.);

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In para 14 (compellability of persons and documents), the British intend to ensure that actions taken during the years of direct rule will not be covered.

Financial provisions (p.23)

(These have still to be finalised).

Human Rights and Equal Opportunities (p.25)

In para 52(3), we suggested that the Agreement's explicit reference to community balance on the Human Rights Commission is insufficiently reflected in the provision that the Secretary of State "shall have regard to the desirability of the Commission's membership being representative of the community in Northern Ireland". The SDLP and UUP also criticised this today and said they would propose an amended version;

Jeffrey suggested a rewording to us to the effect that the Secretary of State "shall ensure that, so far as is practicable, the Commission's membership shall be representative of the community". We suggested that the word "balance" could usefully be added, to which Stephens replied that the Parliamentary drafters would probably object. We suggested that the matter be revisited at the human rights meeting scheduled for London tomorrow;

A provision has been included for the Commission to appoint representatives to the envisaged Joint Committee (para 53.6). We explored whether the Bill could announce in a more positive fashion that such a Committee is indeed envisaged. The British objections to this were that the language of the Agreement is tentative on this point, that the agreement of the two Commissions is required and that the fact that ours does not yet exist presents a difficulty. They were advised that there was no strict need to have a provision of this kind in the Bill (as the undertaking in the Agreement stands on its own) but they felt that it might be useful. We strongly supported this but suggested that the drafting might be improved;

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In response to representations from SACHR and others, the British are pondering a possible provision for the Commission to conduct inquiries and to compel witnesses and the production of documents. They are conscious, however, that to go down this road could turn the Commission into a quasi-judicial body. As there is no reference to this aspect in the Agreement, unhelpful controversy could arise as the Bill goes through Parliament and there could also be nervousness in Whitehall about the knock-on implications for a future Human Rights Commission in the UK;

Para 56(1), which provides for an Equality Commission, has been drafted in the absence of Ministerial decisions on this point. These decisions are expected over the next few days. It is likely that the basic model of a single Commission will be retained. However, Ministers will want to ensure that the concerns of the current sectoral agencies are addressed in some way and proposals for this are being considered. The SDLP signalled concerns on this subject today and a meeting is being arranged with the Secretary of State and Tony Worthington;

Para 58(1) implements the statutory duty on public authorities in relation to the PAFT guidelines.

Miscellaneous and General (p.30)

Para 65 provides for the Civic Forum;

Para 66 deals with participation in the North/South Ministerial Council, the BIC and the British-Irish Intergovernmental Conference. (The basic enabling provisions for these institutions, of course, appear in the international Agreement between the two Governments). We queried the linkage made between these three issues, suggesting that the Agreement's vaguer reference to the Executive being "involved" in the BIIGC should not be equated with the mandatory participation in the North/South Ministerial Council. The British disagreed;

We queried the phrase "which he thinks" in para 67, suggesting that this

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introduces an unhelpful note of uncertainty. The British agreed (blaming this on the Parliamentary drafters);

A point which particularly exercised David Trimble today was the issue of Orders in Council (para 71). It is envisaged that the Assembly will be able to legislate on reserved matters with the Secretary of State's consent (with a view to preparing them for the eventual transfer of such matters to them). However, the British have no means of ensuring that the Assembly would deal seriously with such matters now, it is necessary to provide for Orders in Council which would ensure that e.g. criminal justice matters are kept up to date. The Order in Council procedure is favoured as the time available for NI Bills at Westminster in future will be very limited. Trimble is, predictably, demanding that the Bill procedure be used.