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FAOI RÚN DAINGEAN

UIMHIR THAGARTHA

ROINN AN TAOISIGH

S.29238T

17 Aibreán, 1998

Please associate this memorandum/aide memoire
with the Agenda for Monday's Government meeting.

FRANK MURRAY

Ard-Rúnaí an Rialtais

Roinn an Taoisigh

Memorandum for Government

Approval of the Nineteenth Amendment of the Constitution Bill, 1998

Decision Sought

1. The Taoiseach seeks:
 - (a) the approval of the Government for the text of the attached Nineteenth Amendment of the Constitution Bill, 1998; and
 - (b) authority to present the Bill to Dáil Éireann and to circulate it to Deputies.

Background

2. The Bill and the constitutional referendum that would follow its enactment are, essentially, the mechanisms to authorise the State to give effect to the two Agreements reached in Belfast on Good Friday, 10 April, 1998, in regard to a settlement of the conflict in and about Northern Ireland. These Agreements are
 - (1) the Agreement reached in the Multi-Party Negotiations, which was supported by all the participants in the multi-party negotiations, including the Irish and British Governments, when it was considered at the final session of the negotiations in Belfast on 10 April, 1998; and
 - (2) the British-Irish Agreement, done in Belfast, also on 10 April, 1998 and signed by the Taoiseach, on behalf of the Irish Government and by Prime Minister Blair on behalf of the UK Government.

The latter Agreement is the international agreement which, when it enters into force, will place legal obligations on the two Governments to support, and where appropriate, to implement the provisions of the Multi-Party Agreement, which itself is annexed to the British-Irish

Agreement. The Taoiseach signed the latter Agreement and voted in favour of the Multi-Party Agreement on the basis of the authority given to him by the Government decision of 7 April, 1998 (S29238T). Both Agreements are being circulated with this Memorandum.

Mechanism involved in Proposed Constitutional Amendment

3. The Bill proposes to amend Article 29 of the Constitution by adding an additional section to the existing text of the Article. The additional section contains the following three elements:-
 - (a) a statement that the State may consent to be bound by the British-Irish Agreement;
 - (b) consequential provisions to allow institutions established under the Agreement (the North-South Ministerial Council and implementing bodies implementing on an all-island and cross-border basis policies agreed in that Council) to function, notwithstanding existing provisions of the Constitution which confer similar functions and powers on existing organs of State; and
 - (c) the insertion of a mechanism whereby new Articles 2 and 3 of the Constitution can be substituted for the existing Articles 2 and 3, and a new section 8 (about the extra-territorial jurisdiction of the State) added to Article 29 of the Constitution, if and when certain stated circumstances mature, viz the coming into force of the British-Irish Agreement.

4. To deal first with 3(c), if the Bill is enacted as drafted, the people will be asked to agree to a conditional amendment to Articles 2 and 3, which will have effect if the rest of the British-Irish Agreement comes into force but not otherwise. Thus, if the result of the parallel referendum in Northern Ireland were to be negative or if, despite a positive vote, blocking tactics were to delay the establishment of the North-South implementation bodies, the British Irish Agreement would not come into force and, as a consequence, neither would the new versions of Articles 2 and 3 nor the proposed new section of Article 29. Thus, the State cannot and will not be exposed to any risk that the Government delivers on its part of the bargain, in terms of constitutional change, while other parties to the Good Friday agreements fail to deliver on their commitments.

5. The Bill proposes to amend Articles 29 by adding a new section 7. The element dealing with Articles 2 and 3 is dealt with in sub-section 3° of this section. Subsection 3° provides that if the Government declares that the State has become obliged pursuant to the British-Irish Agreement, to give effect to the amendments to Articles 2 and 3 and the insertion of a new section 8 in Article 29, those amendments will thereupon have effect. The text of the proposed new Articles 2 and 3 is then set out.
6. The State's obligation will arise, pursuant to Article 4(3) of the Agreement¹, immediately on entry into force of the Agreement. [Entry into force is governed by Article 4(2) of the Agreement²]. At this point, the Government will be obliged to make the declaration referred to in the proposed new Article 29.7.3°. Because of Article 29.3 of the Constitution, that "Ireland accepts the generally recognised principles of international law as its rule of conduct in its relations with other States", Ireland will be bound to make the necessary declaration. One of the generally recognised principles of international law is that treaties must be obeyed. Accordingly, this subsection does not leave any discretion to the Government, once the necessary requirements have been fulfilled. The purpose of the subsection is simply to provide a mechanism whereby the necessary amendment can be made at the appropriate time. The alternative to providing a mechanism of this sort would either have been to make the amendments to Articles 2 and 3 of the Constitution straight away, taking it on trust that the other elements of the British-Irish Agreement would be put in place, or alternatively to have had a second referendum in order to do this. Neither of these options would have been appropriate.
7. This procedure for the automatic insertion of an amendment into the Constitution if certain conditions are met is novel. It is expressed to be "notwithstanding Article 46" of the Constitution, because otherwise it would have been necessary to hold a second referendum under the

¹ Article 4(3) provides:

"Immediately on entry into force of this Agreement, the Irish Government shall ensure that the amendments to the Constitution of Ireland set out in Annex B to the section entitled "Constitutional Issues" of the Multi-Party Agreement take effect."

² Article 4(2) provides:

"Each Government shall notify the other in writing of the completion, so far as it is concerned, of the requirements for entry into force of this Agreement. This Agreement shall enter into force on the date of the receipt of the later of the two notifications."

provisions of that Article. In effect, what the people are being asked to do is approve a conditional amendment to the Constitution which will have effect only if certain conditions are met. However, these conditions are clear and ascertained and the amendment to Articles 2 and 3 will take place virtually automatically once the other elements of the British-Irish Agreement are in place.

8. Subsection 4^o of the proposed section 7 of Article 29 has been inserted because, once the amendments to Articles 2 and 3 take place, it would be undesirable for the new Articles 2 and 3 to appear in more than one place in the Constitution (i.e. in Article 29 as well as Articles 2 and 3). Accordingly, it is envisaged that once the amendments are made to Articles 2 and 3, subsection 3^o of the new Article 29.7 need no longer appear in the text of the Constitution. There is precedent for this in Articles 51 and 52 of the existing Constitution under which the "Transitory Provisions" of the Constitution are omitted from the published texts.
9. Subsection 5^o of the proposed section 7 contains a mechanism whereby if the British-Irish Agreement does not enter into force and the amendments to Articles 2 and 3 of the Constitution are therefore not made, the whole amendment will itself cease to have effect after 12 months and will not be effective after that date. However, this period of 12 months can be extended by ordinary legislation.

Substance of Proposed Constitutional Amendment

10. Turning from the mechanism to the substance of the proposed new Articles 2 and 3, the proposed new Article 2 contains three elements:-
 - (a) statement that is the entitlement and birthright of every person born in the island of Ireland to be part of the Irish nation.
 - (b) statement that this is also the entitlement of persons otherwise qualified in accordance with law to be citizens of Ireland.
 - (c) statement that the nation cherishes its affinity with people of Irish ancestry living abroad.
11. The first of these elements is legally the most significant. Effectively, it substitutes a statement about national territory with a statement defining

the Nation in terms of people - but people related to a specific territory, viz the island of Ireland. It places on a constitutional basis the rights of every person born in the island of Ireland to Irish nationality and hence citizenship. For this purpose no distinction is made between the State and Northern Ireland. Furthermore, because this amendment to the Constitution is approved of in an Agreement between the two sovereign States, there is international recognition of Ireland's assertion of the right of persons born anywhere in Ireland to be regarded as Irish citizens. A further consequence is that, by reference to the provisions of various international agreements on diplomatic protection of citizens, the State will be legally entitled, without any risk of challenge from the UK, to give diplomatic and consular protection to Irish citizens born in Northern Ireland where such persons wish to have such protection.

12. At present, the basis for the right to Irish citizenship of persons born in Northern Ireland is statutory only, being based on the Irish Nationality and Citizenship Act, 1956. While it can be argued that this Act is constitutionally underpinned by the existing Article 2, it would be difficult to sustain an argument that Article 2 requires what is contained in the 1956 Act. It has even been argued by some commentators that the statutory provision in relation to the right to Irish citizenship of persons born in Northern Ireland contained in the existing statute is an exercise of extra-territorial jurisdiction contrary to the provisions of existing Article 3 of the Constitution. Effectively, therefore, both in international and domestic law, the substitution of the new proposed Article 2 for the existing text would establish a much sounder basis for the right of persons born in Northern Ireland to membership of the Irish nation and Irish citizenship than does the existing provision.
13. The proposed new Article
 - (1) meets the concerns of nationalists in Northern Ireland to be regarded as, and constitutionally recognised to be, part of the Irish nation, defined by reference to the specific territory of Ireland and to be Irish citizens;
 - (2) maintains the traditional historic concept of the Irish nation as seen by nationalists, i.e. as inclusive and open to all born in Ireland, of whatever tradition, who wish to embrace and belong to it, as exemplified to Wolfe Tone's wish to substitute the

common name of Irishman for the denominations of Catholic, Protestant and Dissenter;

- (3) avoids including into the nation those in Ireland who resist such inclusion; and
- (4) includes a new statement that the nation cherishes its affinity with people of Irish ancestry living abroad, which will be greatly welcomed by the 70 million people worldwide who share cultural identity and heritage with the nation.

14. The proposed new Article 3 contains the following elements:-

- (a) a statement that it is the firm will of the Irish nation, in harmony and friendship, to unite all the people who share the territory of the island of Ireland,
- (b) a recognition of the diversity of the identities and traditions of the people who share the island,
- (c) a recognition that a united Ireland shall be brought about only by peaceful means with the consent of a majority of the people, democratically expressed, in both jurisdictions in the island,
- (d) a recognition that until Irish unity comes about, the area of jurisdiction of the State is the same as that which existed prior to 1937.

15. The fourth of these elements is the same as under the existing Constitution, whereas the others are new. The wording of the fourth element has been changed to reflect the recommendation of the 1967 Committee on the Constitution chaired by Sean Lemass, although the substance of that element has not changed. In addition the reference to extra-territorial jurisdiction is to be moved to Article 29, since it is not a provision which has any particular reference to Northern Ireland.

16. The new elements in the proposed new Article 3.1 do two things:

- (a) they recognise that the unification of Ireland can come about only with the consent of a majority of the people in both jurisdictions.

The status of Northern Ireland within the United Kingdom can continue while a majority of its population wish this to happen;

(b) at the same time, however, the Article establishes a mechanism whereby the reunification of Ireland can in fact come about, without the interference of any person outside the island of Ireland. This is a vital new element in the process, particularly when taken with changes in British constitutional legislation, with the new British-Irish Agreement and with elements of the Multi-Party Agreement accepted by the political parties in Northern Ireland that support the union with Great Britain.

17. The proposed new Article 3 thus represents a considerable improvement, as regards legal effect, over the existing Articles 2 and 3, in relation to the "reunification of the national territory" which is spoken about in existing Article 3. The current text of Article 2 defines the national territory, but then proceeds to take the practical effect out of that definition by stating that, pending its reunification, the area of jurisdiction of the State is the 26 Counties. The claim survives merely as a claim of legal right. The existing constitutional provision is silent on the mechanism for the reunification of the national territory. However, Article 29.1 proclaims Ireland's devotion to the ideal of peace and friendly co-operation amongst nations, and by Article 29.2 "Ireland affirms its adherence to the principle of the pacific settlement of international disputes by international arbitration or judicial determination". When Article 29 is read in conjunction with Article 3 of the Constitution, it becomes clear that under the existing constitutional scheme, the reintegration of the national territory could only come about as a result of a peaceful settlement with the United Kingdom, either with the United Kingdom's agreement or pursuant to a determination by an international judicial or arbitration mechanism that Ireland's claim to jurisdiction over the whole island was well-founded. In practice, although this has not been generally understood, under the existing constitutional provisions, taken in conjunction with international law, the United Kingdom has a veto over the reintegration of the national territory.
18. In this respect, the proposed new Article 3, taken in conjunction with the other aspects of the Good Friday Agreements cited in paragraph 16(b), marks a change of immense significance, in that it establishes a legal mechanism for the reunification of Ireland. That mechanism is the

consent of a majority of people, democratically expressed, in both parts of the island and thus reflects the agreed approach to self-determination and consent, set out in the Downing Street Declaration of 15 December, 1993. The implication of the acceptance of this proposed provision of the constitution by the British Government, as well as by Northern Ireland parties supporting the Union, the Ulster Unionist Party and the two Loyalist parties and the Alliance Party, is the recognition, not only of the separate existence of Northern Ireland for as long as a majority of its people wish it to continue, but also of the right of Northern Ireland to become part of a United Ireland if a majority of the people of Northern Ireland so declare. The achievement of a United Ireland is made entirely conditional on decisions made by people on the island of Ireland, and it would no longer, for example, be possible as a legal proposition for a majority of the electorate in the United Kingdom or for a majority of the United Kingdom Parliament to block a United Ireland if a majority of the people of Northern Ireland wanted it. This is an important change in the existing situation and as a matter of law the British Government will now be bound by a solemn treaty obligation, as well as by its own legislation, once the agreed changes in that are made, to give effect to the wishes of the people of Northern Ireland should they decide in the future that they wish to become part of a united Ireland.

19. It is proposed to insert a new second section into Article 3. This will enable the creation of institutions with executive powers and functions that are shared between the two jurisdictions in the island of Ireland and will enable them to exercise powers and functions in respect of all or any part of the island. There is a complementarity between this provision and the new provision which is proposed to be Article 29.7.2°. The focus in the proposed new Article 3.2 is to enable the exercise of executive power in the island as whole, notwithstanding the limiting provisions in proposed Article 3.1 on the exercise of jurisdiction outside the area of the State, whereas the proposal in Article 29.7.2° has as its focus permitting all-Ireland institutions to operate in the South notwithstanding the existing constitutional provisions conferring legislative, executive and judicial powers exclusively on the organs of government established under the Constitution.
20. The proposed new Article 3.2, in conjunction with Article 29.7.2°, will for the first time permit the exercise of governmental functions by all-Ireland bodies - something which is not envisaged under the existing

Article 3, which contemplates no all-Ireland arrangements short of eventual unification.

21. The proposed Article 29.7.2° does not go as far as the corresponding constitutional provisions in relation to EU Institutions, which effectively protected any laws enacted, acts done or measures adopted necessitated by membership of the European Communities from any constitutional questioning whatsoever. In case of the British-Irish Agreement, all that is proposed is that provisions of the Constitution which confer a function on a particular organ of government cannot be used to prevent the institutions established under the Agreement from functioning. It has to be borne in mind that the North-South Ministerial Council and its related implementation bodies will operate in both parts of the island, and people in the South will have to accept that these bodies will be exercising functions which heretofore would have been reserved to institutions established under the Constitution. In particular, an enabling mechanism is provided to ensure that if any dispute resolution mechanism is set up in relation to any of these bodies, that mechanism may function notwithstanding the exclusive jurisdiction of the courts. It may be considered appropriate for some of the implementation bodies to ensure that there are appropriate arbitration mechanisms to resolve disputes without reference to the courts of the two jurisdictions in all circumstances. It would be undesirable to have a situation where courts on either sides of the border might arrive at different conclusions in relation to a matter which was in dispute, and in relation to certain type of dispute it might be appropriate to provide that an arbitration body should apply the rules which were common to the two jurisdictions. Whether this mechanism will in fact have to be used will depend on the detailed provisions in relation to particular implementation bodies, which remain to be worked out.
22. It is proposed to insert a provision as Article 29.8 permitting the State to exercise extra-territorial jurisdiction in accordance with the generally recognised principles of international law. This is effectively a relocation of the existing provision, which relates to extra-territorial jurisdiction generally rather than to any specifically Northern Ireland problem, from Article 3 (where it is inevitably mixed up with the question of Northern Ireland) to Articles 29, where it more properly belongs. It appears at present in Article 3 as an exception to the limitation of the jurisdiction of the State to the area of the Twenty Six Counties. The opportunity is being taken to make it clear that the

exercise of extra-territorial jurisdiction must be in accordance with the generally recognised principles of international law, and provided that the jurisdiction is exercised in such a manner, it will not matter whether or not the extra-territorial jurisdiction is one which could have been asserted prior to 1937 or not. The law in relation to extra-territorial jurisdiction has developed in recent years, and an example of the circumstances in which states now claim extra-territorial jurisdiction is the recent legislation making sex tourism outside the State a criminal offence. It would be undesirable if there was any question mark over the State's right to legislate with extra-territorial affect where this is in accordance with the principles of international law and the opportunity is being taken to deal with this problem in the general re-write of Articles 2 and 3. Again, this proposal is in line with the recommendations of the 1967 Lemass Committee Report.

23. The Agreements have been negotiated as a package and reflecting this, the constitutional amendment is to be put to the people as a package. While undoubtedly some aspects of the Agreements will appeal more to some than others, an a la carte approach is not possible. The proposal is, therefore to be put as a single amendment which will either be passed or rejected as a whole. It would be inappropriate and politically problematic to hold separate votes on the different elements of the deal. The Attorney-General has advised that the proposed approach is correct legally. While the ultimate effect of the proposed amendment would be to amend three Articles of the Constitution, there is sufficient commonality between the elements of the amendment as to make it fully appropriate to have them contained and put to the people within a single proposal for amendment.

Relationship of Proposal in Bill to Government's Programme and Previous Government Commitments

24. The proposals for constitutional change in the Bill reflect and would implement the relevant section of the Government's programme, An Action Programme for the Millennium:

- "Northern Ireland
.....The Government's negotiating position will be based on the Downing Street Declaration, the Framework Document, the Mitchell Principles and the draft Report of the Forum for Peace and Reconciliation....."

- "Building confidence on all sides, based on mutual acceptance of the principle of consent....."
25. The proposals are also in line with the commitment given in paragraph 7 of the Joint Declaration of 15 December, 1993 (Downing Street Declaration), the text of which was approved by the Government on 14 December, 1993 (S27725):
- "(The Taoiseach) confirms that, in the event of an overall settlement, the Irish Government will, as part of a balanced constitutional accommodation, put forward and support proposals for change in the Irish Constitution which would fully reflect the principle of consent in Northern Ireland".
26. The proposals in the Bill are also in line with the relevant sections of the Joint Framework Document, A New Framework for Agreement, of 22 February, 1995 the text of which was approved by the Government on 21 February, 1995 (S28169G), particularly paragraph 21:
- "As part of an agreement confirming the foregoing understanding between the two Governments on constitutional issues, the Irish Government will introduce and support proposals for change in the Irish Constitution to implement the commitments in the Joint Declaration. These changes in the Irish Constitution will fully reflect the principle of consent in Northern Ireland and demonstrably be such that no territorial claim of right to jurisdiction over Northern Ireland contrary to the will of a majority of its people is asserted, while maintaining the existing birthright of everyone born in either jurisdiction in Ireland to be part, as of right, of the Irish nation."
27. The proposals in the Bill are also in line with the relevant sections of the Final Document of the Drafting Committee of the Forum for Peace and Reconciliation, issued on 2 February, 1996, to which both parties now in Government were parties.
28. The Taoiseach is satisfied that the requirement of balanced constitutional change has been fully met by the changes to British constitutional legislation that have been agreed as part of the Multi-Party Agreement. These changes:

- (1) involve agreement by the British Government to insert, for the first time, in British legislation, an obligation on the British Government to lay proposals before Parliament to give effect to a wish expressed by the majority of the people of Northern Ireland that the latter should cease to be part of the UK and form part of a united Ireland. This positive expression of the principle of consent will be added to the existing purely negative statement of the principle in Section 1 of the Northern Ireland Constitution Act, 1973. The British commitment is given, in addition, the force of an international obligation by the terms of Article 2 of the British-Irish Agreement;
- (2) involve agreement by the British Government expressly and in full to repeal the Government of Ireland Act, 1920 - 'the Partition Act';
- (3) indicate obliquely that the new British constitutional legislation will override the Act of Union, 1800 - "this Act shall have effect notwithstanding any other previous enactment"; and
- (4) in a significant advance on the current legislative position, commit the British Government to exercise the power to hold a border poll if at any time it appears likely that a majority of those voting would express a wish that Northern Ireland should form part of a united Ireland; and reduce the minimum interval between such polls from 10 to 7 years.

These changes are of considerable significance in the context of the rapid evolution of the demographic balance that has taken place in Northern Ireland and may well continue.

Taoiseach's Conclusions

29. The Taoiseach considers that the overall settlement achieved is a very good one and, in that connection, wishes to emphasise the very significant breakthrough made in regard to North-South bodies. It is his conviction that the operation of these bodies over time, in conjunction with underlying forces for economic and social integration in Ireland, will be more effective in promoting the coming together of all the people of Ireland and thus the achievement of national unity than the existing forms of Articles 2 and 3 proved to be. In this conviction, he is at one

with former Taoiseach and President de Valera, when he said on 20 November, 1957:

"His conclusion grew stronger with the years - that the proper way to try to solve it was to endeavour to have as close relations as possible with the people of the Six Counties and get them to combine with us on matters of common concern."

30. Accordingly, the Taoiseach considers that all the requirements set out by successive Governments for the promotion of constitutional change along the lines now proposed have been fulfilled. He therefore commends the Bill to the Government.

Impact on Women

31. The proposal in this Memorandum is gender neutral.

Financial and Staffing Implications

32. There may be some additional costs arising from the establishment of the North-South Ministerial Council. There could also be some additional costs - e.g. severance - in connection with the establishment of North-South implementing bodies but in the longer term there will be savings in terms of economies of scale and elimination of duplication. There may be some small staffing implications in regard to the secretariats which are to be established but it has not yet been possible to establish these. In any event, it is clear that these will be relatively small, particularly by comparison with the savings - e.g. on security - that will flow from consolidation of a stable peace on the island of Ireland.

**AN BILLE UM AN NAOÚ LEASÚ DÉAG AR AN
mBUNREACTH, 1998**

**NINETEENTH AMENDMENT OF THE CONSTITUTION
BILL, 1998**

EXPLANATORY MEMORANDUM

Purpose and Background

1. The Nineteenth Amendment of the Constitution Bill, 1998, is necessary in order to give effect to the Agreement between the Government of Ireland and the Government of the United Kingdom of Great Britain and Northern Ireland done at Belfast on 10 April, 1998.
2. The Agreement commits the two Governments to implementing the provisions of the Multi-Party Agreement which was reached in Belfast on the same date and which is annexed to the British-Irish Agreement. In particular, the following institutions are to be established in accordance with the provisions of both Agreements:-
 - a North/South Ministerial Council,
 - implementation bodies implementing on an all-island and cross-border basis policies agreed by that Council,
 - a British/Irish Council, and
 - a British/Irish Intergovernmental Conference.

The British-Irish Agreement also contains in Article 1 the shared understanding of the two Governments on constitutional issues in relation to Northern Ireland.

3. The British-Irish Agreement will not enter into force until
 - (i) the necessary legislation is enacted in order to establish the institutions at 2 above,
 - (ii) British legislation has been enacted for the purpose of implementing certain constitutional-type changes (including the repeal of the Government of Ireland Act, 1920), and
 - (iii) the amendments to the Constitution which are now proposed to be put before the people have been approved by referendum.
4. On entry into force, the British-Irish Agreement will replace the Anglo-Irish Agreement, 1985, and the existing Anglo-Irish Intergovernmental Conference will cease to exist.
5. Once the Agreement enters into force, the Irish Government is obliged immediately to ensure that the Constitutional amendments now proposed have effect.
6. The amendment is in the form of an additional section to Article 29 of the Constitution (Section 7). The section contains the following elements:-
 - (a) a statement that the State may consent to be bound by the Agreement.
 - (b) consequential provisions to enable the institutions established under the Agreement to function.
 - (c) the insertion of a mechanism whereby new Articles 2 and 3 of the Constitution can be substituted for the existing Articles 2 and 3 and a new Section 8 inserted into Article 29. These amendments will have effect only when the British/Irish Agreement comes into force.

The provisions of the proposed amendment in detail

Section 7.1°

7. Subsection 1° of Section 7 is a straightforward statement that the State may consent to be bound by the Agreement. The Agreement will not

have binding force until it enters into effect and this will happen only when all of the elements of the Agreement already referred to are in place, including the establishment of the institutions referred to at 2(a).

Section 7.2°

8. Subsection 2° is an enabling Section to allow institutions established under the Agreement to function notwithstanding existing provisions of the Constitution which confer similar functions and powers on existing organs of State. In particular an enabling mechanism is provided to ensure that if any dispute resolution mechanism is set up in relation to any of these institutions, that mechanism may function notwithstanding the exclusive jurisdiction of the courts.

Section 7.3°

9. Subsection 3° provides that if the Government declares that the State has become obliged, pursuant to the Agreement, to give effect to the amendments to Articles 2 and 3 of the Constitution and the insertion of a new section 8 in Article 29, those amendments will thereupon have effect. The text of these proposed new provisions is set out.
10. The State's obligation will arise, pursuant to Article 4(3) of the Agreement¹, immediately on entry into force of the Agreement. [Entry into force is governed by Article 4(2) of the Agreement²]. At this point, the Government will be obliged to make the declaration referred to in the proposed new Article 29.7.3°. Because of Article 29.3 of the Constitution, that "Ireland accepts the generally recognised principles of international law as its rule of conduct in its relations with other States", Ireland will be bound to make the necessary declaration. One of the generally recognised principles of international law is that treaties must be obeyed. Accordingly, this subsection does not leave any discretion to the Government, once the necessary requirements have been fulfilled.

¹ Article 4(3) provides:

"Immediately on entry into force of this Agreement, the Irish Government shall ensure that the amendments to the Constitution of Ireland set out in Annex B to the section entitled "Constitutional Issues" of the Multi-Party Agreement take effect."

² Article 4(2) provides:

"Each Government shall notify the other in writing of the completion, so far as it is concerned, of the requirements for entry into force of this Agreement. This Agreement shall enter into force on the date of the receipt of the later of the two notifications."

The purpose of the subsection is simply to provide a mechanism whereby the necessary amendment can be made at the appropriate time.

11. The procedure for the insertion of the amendment into the Constitution is expressed to be "notwithstanding Article 46" of the Constitution, because otherwise it would have been necessary to hold a second referendum under the provisions of that Article. In effect, what the people are being asked to do is to approve a conditional amendment to the Constitution which will have effect only if certain conditions are met. These conditions are those which must also be met before the British-Irish Agreement comes into force as set out at paragraph 3 above. The amendment to Articles 2 and 3, if approved in the referendum, will take effect once the other requirements of the British-Irish Agreement are in place and immediately after the Agreement has entered into force.

Section 7.4°

12. Subsection 4° has been inserted because, once the amendments to Articles 2 and 3 take place, it would be undesirable for the new Articles 2 and 3 to appear in more than one place in the Constitution (i.e. in Article 29 as well as Articles 2 and 3). Accordingly, it is envisaged that once the amendments are made to Articles 2 and 3, subsection 3° of the new Article 29.7 need no longer appear in the text of the Constitution. There is precedent for this in Articles 51 and 52 of the existing Constitution under which the "Transitory Provisions" of the Constitution are omitted from the published texts.

Section 7.5°

13. Subsection 5° contains a mechanism whereby if the British/Irish Agreement does not enter into force and the amendments to Articles 2 and 3 of the Constitution are therefore not made, the whole amendment will itself cease to have effect after 12 months and will not be effective after that date. However, this period of 12 months can be extended by ordinary legislation.

Substance of proposed new Articles 2, 3 and 29.8

Article 2

14. Proposed new Article 2 contains three elements:-
- (a) a statement that it is the entitlement and birthright of every person born in the island of Ireland to be part of the Irish nation.
 - (b) a statement that this is also the entitlement of persons otherwise qualified in accordance with law to be citizens of Ireland.
 - (c) a statement that the nation cherishes its affinity with people of Irish ancestry living abroad.
15. The first of these elements effectively substitutes a statement about national territory with a statement defining the Nation in terms of people. It places on a constitutional basis the rights of every person born in the island of Ireland to Irish nationality and hence citizenship. For this purpose no distinction is made between the State and Northern Ireland. Furthermore, because this amendment to the Constitution is approved of in an Agreement between the two sovereign States, there is international recognition of Ireland's assertion of the right of persons born anywhere in Ireland to be regarded as Irish citizens. At present the basis for the right to Irish citizenship of persons born in Northern Ireland is statutory only, being based on the Irish Nationality and Citizenship Act, 1956.

Article 3

16. Proposed new Article 3 contains the following elements:-
- (a) a statement that it is the firm will of the Irish nation, in harmony and friendship, to unite all the people who share the territory of the island of Ireland.
 - (b) a recognition of the diversity of the identities and traditions of the people who share the island.
 - (c) a recognition that a united Ireland shall be brought about only by peaceful means with the consent of a majority of the people, democratically expressed, in both the jurisdictions in the island.

- (d) a recognition that until Irish unity comes about, the area of jurisdiction of the State is the same as that which existed prior to 1937.
17. The fourth of these elements is the same as under the existing Constitution, whereas the others are new. The wording of the fourth element has been changed to reflect the recommendations of the 1967 Committee on the Constitution chaired by former Taoiseach, Sean Lemass, although the substance of that element has not changed. In addition the reference to extra-territorial jurisdiction is to be moved to Article 29 since it is not a provision which has any particular reference to Northern Ireland.
18. The new elements in the proposed new Article 3.1 do two things:
- (a) they recognise that the unification of Ireland can come about only with the consent of a majority of the people in both the jurisdictions. The status of Northern Ireland within the United Kingdom can continue while a majority of its population wish this to happen.
 - (b) at the same time, however, the Article establishes a mechanism whereby the reunification of Ireland can in fact come about. That mechanism is the consent of a majority of people, democratically expressed, in both parts of the island.
19. It is proposed to insert a new second section into Article 3. This will enable the creation of institutions with executive powers and functions that are shared between those jurisdictions and will enable them to exercise powers and functions in respect of all or any part of the island. There is a complementarity between this provision and the new provision which is proposed to be Article 29.7.2°. The focus in the proposed new Article 3.2 is to enable the exercise of executive power in the island as a whole, notwithstanding the limiting provisions in proposed Article 3.1 on the exercise of jurisdiction outside the area of the State, whereas the proposal in Article 29.7.2° has as its focus permitting all-Ireland institutions to operate in the South notwithstanding the existing constitutional provisions conferring legislative, executive and judicial powers exclusively on the organs of Government established under the Constitution.

20. The proposed new Article 3.2, in conjunction with Article 29.7.2°, will for the first time permit the exercise of functions by all-Ireland bodies.
21. Finally, it is proposed to insert a provision as Article 29.8 permitting the State to exercise extra-territorial jurisdiction in accordance with the generally recognised principles of international law. This is effectively a relocation of the existing provision, which relates to extra-territorial jurisdiction generally rather than to any specifically Northern Ireland problem, from Article 3 to Article 29, where it more properly belongs. It appears at present in Article 3 as an exception to the limitation of the jurisdiction of the State to the area of the Twenty Six Counties. The opportunity is being taken to make it clear that the exercise of this jurisdiction must be in accordance with the generally recognised principles of international law, and provided that the jurisdiction is exercised in such a manner, it will not matter whether or not the extra-territorial jurisdiction is one which could have been asserted prior to 1937 or not. The law in relation to extra-territorial jurisdiction has developed in recent years. It would be undesirable if there was any question mark over the State's right to legislate with extra-territorial effect where this is in accordance with the principles of international law and the opportunity is being taken to deal with this problem in the general re-write of Articles 2 and 3. Again, this proposal is in line with recommendations of the 1967 All-Party Committee Report.

Roinn an Taoisigh

Aibrean, 1998