

(2 March 1998)

RELATIONSHIP BETWEEN NEW DEMOCRATICALLY-ELECTED INSTITUTIONS IN
NORTHERN IRELAND AND THE WESTMINSTER PARLIAMENT

A Discussion Paper by the British Government

1. This paper was requested by the Strand 1 participants at a meeting on 23 February, in order to assist their consideration of the case for legislative devolution. It provides an initial analysis of the issues and possible options.

The current position

2. Under "direct rule", in the absence of a local legislature, all legislation applying in Northern Ireland is made with the authority of the Westminster Parliament:

"excepted" matters are likely always to remain the responsibility of the national Parliament. They include defence, foreign affairs, taxation etc. Excepted matters are usually legislated for by Bill.

"reserved" matters embrace some matters which are unlikely ever to be devolved and others which could potentially be devolved. They include the criminal law, policing, firearms and public order issues. The rule of thumb which is applied is to amend past GB statutes by Bill and past Northern Ireland statutes (Acts of the Parliament of Northern Ireland, Measures of the Assembly and Orders in Council under the Northern Ireland Act 1974) by Order in Council;

"transferred" matters comprise all matters not listed as excepted or reserved. They include virtually all the matters within the responsibility of the Northern Ireland Departments. Such matters are normally legislated upon by Order in Council, although the Government may decide to legislate by Bill where the subject, eg Fair Employment is contentious and/or complicated. Additionally, where practicable, Northern Ireland provisions can be incorporated in relevant "GB" or "England and Wales" Bills.

3. Orders in Council have been used to pass primary legislation for Northern Ireland since 1974 because the Westminster Parliament does not have the time or resources to legislate for Northern Ireland by ordinary Bill procedure. Under the 1974 Act primary legislation for Northern Ireland in the transferred field is normally made by securing affirmative support in both Houses

of Parliament for a draft Order laid by the Secretary of State, usually following widespread consultation in Northern Ireland.

4. On those occasions when there is a requirement for both parity and simultaneous implementation of legislative provision with England and Wales (ie changes in social security benefits or national insurance contributions) provision for Northern Ireland has been made by means of the negative resolution procedure. This is when the appropriate clause is placed in a GB bill allowing Northern Ireland to "mirror" the GB provisions but adapted to the different administrative structures that exist there.

5. By a "stepping down" process, secondary legislation which is made by a Northern Ireland institution would normally be subject to affirmative resolution procedure is made at Westminster subject to "negative" resolution procedure, ie it is normally passed without debate at Westminster; and such secondary legislation which would normally be subject to negative resolution procedure is not subject to any formal procedure at Westminster, although the report of the Examiner of Statutory Rules is often considered by the Northern Ireland Grand Committee.

6. The Northern Ireland Grand Committee, established in 1975, can consider "any matter relating exclusively to Northern Ireland". It comprises all the sitting Northern Ireland MPs and up to 25 others as nominated by the committee of Selection. Businesses is referred to it on a Government motion. It may hear statements, table questions for Oral Answer, hold adjournment debates and debate specific issues, including Proposals for Draft Orders. It may also take certain stages of Northern Ireland Bills, although there is no scope for it to debate and make detailed amendments. It may meet in Northern Ireland, although it has not yet done so.

7. The Northern Ireland Affairs Select Committee is a scrutiny committee of the House of Commons which normally includes 4 Northern Ireland MPs and can enquire into any matter within the responsibility of the Secretary of State for Northern Ireland.

8. Additionally, the Secretary of State for Northern Ireland can be held to account through Parliamentary Questions, statements, private notice questions, adjournment debates etc.

The arrangements for Scotland

9. The plans for devolution in Scotland involve the creation of a Scottish Parliament, with the competence to enact primary and subordinate legislation for all matters which are not expressly reserved by the Bill and a Scottish Executive which will be accountable to the Parliament for the functions laid on them

including all Ministerial functions relating to devolved matters and to other matters in the reserved areas which have been executively devolved to Scottish Ministers. There will be no override powers except where necessary to ensure the UK's compliance with international obligations or in certain limited respects where legislation about Scottish private law which applies to reserved matters is believed by the UK Secretary of State to have an adverse effect on the operation of legislation applying to reserved matters. [There are provisions for resolving disputes over the vires of legislation and executive actions by reference to the Judicial Committee of the Privy Council]. Acts of the Scottish Parliament will require Royal Assent by Her Majesty before they take effect. Following devolution the role of the Secretary of State for Scotland will change significantly; the holder of the post will be responsible for liaison between the UK Government and the Scottish Executive and for representing Scottish interests in reserved matters. *

The arrangements for Wales

10. So far as Wales is concerned, primary legislation will continue to be made at Westminster. The national Assembly for Wales inherits the present executive power of the Secretary of State (including his order making powers) and it is anticipated that as new order making powers are created in statute, responsibility for these in respect of Wales will be the responsibility of the Welsh Assembly.

11. Strand 1 participants will need to decide whether a Northern Ireland Assembly should have

primary legislative powers in respect of all transferred matters,

primary legislative powers in respect of some transferred matters, leaving legislation and policy responsibility for the remainder with Westminster, or

no primary legislative powers.

12. If the Northern Ireland Assembly were to have primary legislative powers in respect of some or all transferred matters, there would be no requirement for any procedure at Westminster, other than formal approval by Her Majesty in Council. Obviously, arrangements would need to be made to ensure that the UK's international obligations, including in respect of the EU, were properly fulfilled, and that the legislation did not breach the ECHR or any Northern Ireland "Bill of Rights". (It is worth noting that under the devolution plans for Scotland and Wales it will be ultra-vires for the Scottish Parliament or the Welsh Assembly to act in a way that is inconsistent with EU law or the ECHR). Strand 1 participants would need to agree procedures for

handling legislation, especially on contentious matters, in ways which protected their fundamental political interests. *

13. Where the Northern Ireland Assembly had primary legislative powers, it would be free to legislate according to its own judgement of the needs of the people of Northern Ireland and in ways which reflected the specific administrative and other features of Northern Ireland life.

14. In respect of transferred matters where the Northern Ireland Assembly did not have primary legislative powers, it would need to implement the policies reflected in legislation passed at Westminster, whether that was introduced by the Secretary of State for Northern Ireland or by the relevant "GB" or "England and Wales" Secretary of State. #

15. In some areas it might be appropriate for the England and Wales legislation to be extended in its entirety to Northern Ireland but such opportunities are likely to be limited because of certain areas where Northern Ireland has its own, separate arrangements eg education, juvenile and some criminal law. Otherwise it would be possible to tailor legislation made at Westminster to the particular needs of Northern Ireland in a number of ways:

i. adaptations could be incorporated in a GB or England and Wales Bill to tailor the legislation to the circumstances of Northern Ireland and apply it there as well. This would require intensive consultation between the relevant Northern Ireland Department and "GB" Department, usually at very short notice and under great pressure. The result is normally very poor from a drafting point of view and thus inaccessible to many users; the pressure would be on the Northern Ireland Departments simply to go along with whatever was proposed for Great Britain; and in practice there might be a steady transfer of responsibilities from Northern Ireland institutions to "GB" or "England and Wales" institutions. ~~In any event the Northern Ireland Departments' policy priorities would be completely subordinated to whatever Bills happened to secure a place in the GB legislative programme;~~

ii. a GB or England and Wales Bill could provide for "corresponding" legislation to be made by secondary legislation, thus enabling the Assembly to mirror the provisions of the "parent" legislation in ways which took account of the different legislative history, administrative arrangements and needs of the situation in Northern Ireland;

iii. there could be a continuation of something like the Order in Council procedure, but with the Assembly given an opportunity to make detailed recommendations to the Secretary of State on the terms of a Proposal for a Draft Order. This would probably require Departments to be split up with policy/legislative staff

working for the Secretary of State and administrative/executive staff for the new Institutions;

iv. some new procedure might be devised which would allow primary legislation in the transferred field to be taken at Westminster by a truncated procedure, perhaps involving the Northern Ireland Grand Committee and a dedicated Northern Ireland Standing Committee. That would entail most of the disadvantages of option (iii) with probably less opportunity for the Assembly to influence the detail of the legislation. It would still create considerable additional pressures on Parliamentary time which might not be sustainable. No obvious solution to these difficulties presents itself as current Parliamentary procedures stand. If Strand I participants wish, the possibility of new procedures could be investigated with the House authorities. *

The Role of the House Authorities

16. The role and remit of the Northern Ireland Affairs Select Committee and the Northern Ireland Grand committee (like their Scottish and Welsh counterparts) will need to be reviewed after devolution. For example Select Committees, by tradition, normally look at all the responsibilities of a specific Secretary of State. After devolution the responsibilities of the three regional Secretary of States may be adjusted. Likewise, Grand Committees look at a wide range of regional matters some of which will be devolved to the local institutions. *

Law Reform Commission

17. There is at present a Law Reform Commission which examines the civil law within Northern Ireland. the role and future of this Commission would need to be reviewed to reflect any changes in legislative responsibility for Northern Ireland. #

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