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**URGENT**

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MR STEPHENS

**THE APPOINTED DAY**

1. You invited me to gather together some thoughts with a view to preparing a plan for the big day, and the run-up. This note is heavily indebted to work by Tom Watson. We are meeting on Friday to discuss the issue. There is much to consider. I should be **grateful therefore if colleagues could consider this urgently**, especially lawyers – sorry.
2. We shall then need to consult Ministers, followed by the Irish, presiding officer and parties.
3. I will work on a more detailed plan, as you suggested. Our discussions on Friday will feed into it. But I hope the key issues are identified here.

**Before the day**

4. We need to make, before the day, the **devolution order** (an Order in Council, subject to affirmative resolution), and a **commencement order** for the Act (by the Secretary of State). Jonathan Margetts has started some work on this, the whips are on notice of our possible timetable the week after next, and I hope we will have a note before the meeting from **Clive Barbour** (who is on leave on Friday) about the details. We might **follow up with the business managers** in writing.
5. We would need to decide nearer the time who in the directorate had most leisure to prepare a **speech** – presumably a fairly short one, if this is a one and a half hour debate. I doubt it is worthwhile starting much in advance.
6. We need a **commencement order to be made for the Departments Order** (which must come into effect before the appointed day) and a **transfer of functions order**. You raise the question whether, if we do not have devolution by 1 April, those orders should be made anyway. They would be a token of our confidence that devolution was coming, and there would be administrative convenience in having the new structures in place at the start of the financial year. On the other hand they are not in the direct rule context necessarily desirable changes. It would be helpful to have **Central Secretariat** views. In



any event they will presumably wish to have the paperwork – submissions etc – in place.

7. If we are moving on a **tight schedule**, the Departments Order commencement and transfer of functions order might need to be made immediately after the running of d'Hondt, the debates and Privy Council for the devolution order taking place the following day, when the Secretary of State would presumably also make the commencement order.
8. Conceivably the **timetable might be even more compressed**, d'Hondt happening in the morning and the debates in the afternoon. In that case, I assume the Departments (Commencement) Order would have been made by 11.59pm the previous day.

#### **What time does the transfer happen?**

9. I have been taking it that the **appointed day order cannot specify a time**: if it prescribes 2 April, that means midnight between 1 and 2 April. Can **HOLAB** please confirm that this is true? It would be rather easier if the devolution order, and the commencement order, could enter force at, say, 10am.
10. If not, there is at least a case to examine for **getting over at midnight such formalities as are necessary**, on the Assembly and international fronts. That is logical. There would then be, in principle, no power vacuum, as there would be if the taking-up of office etc were postponed to a civilised time in the morning. Moreover there may be less likelihood of people trying to disrupt things then (though I have heard dissenting voices). Handovers of power in colonies generally take place at midnight: not an auspicious precedent for some, but it makes good theatre, if that is what is wanted (below).
11. I have made inquiries about the Scots' intentions, but their position is different from ours: though power transfers at midnight, there is nothing for them to do at that point, their Ministers having been sworn in some weeks before. They have their ceremony the following morning (below).

#### **The international agreements**

12. The *British-Irish Agreement* comes into effect (article 4(2)) when each Government has notified the other of the completion of the requirements in 4(1). Arguably 4(1)(c) is not satisfied on our side until the making (or conceivably the coming into force) of the commencement order. But presumably at any time after midnight on the appointed day we are obliged to send the Irish a notification under 4(2). If 4(1) is exhaustive of the requirements for coming into force, we should have had theirs last May, but I am not clear we have. Presumably the exchange could be achieved either through low-level diplomatic channels (helpful to know from **FCO** how); or by the Secretary of State and Mr Andrews, or Prime Minister and Taoiseach, sitting at a table and exchanging pieces of paper; according to choice.



13. I understand the *other agreements* – NSMC, BIC, BIIGC, *implementation bodies* – are stated to come into force on the date the British-Irish Agreement enters into force. So no further action appears to be required (grateful for confirmation).
14. We shall clearly need to prepare draft notifications etc: grateful if **FCO** could reflect on all we need to do here.

### **The Irish constitutional amendments**

15. Immediately on entry into force of the British-Irish Agreement, that is on the exchange of notifications, the Irish are to 'ensure' that the constitutional amendments take effect (article 4(3)). This is done by a declaration under new article 29.7.3 of the Irish Constitution that the State has become bound to give effect to the amendments. We shall need to **discuss with the Irish** who does this, and where. It should presumably be done at midnight: our amendments come into effect then by virtue of the commencement order.

### **Assembly proceedings**

*What the Assembly needs to do on day (or night) one*

16. The following seem candidates:
  - a) *affirm the pledge of office*: as you point out, between midnight and the point at which the nominated ministers take the pledge (if later), and take up office (below), there is a power vacuum, with Departments subject to neither UK Ministers', nor devolved ministers' direction. This may be an argument for a midnight ceremony. But otherwise it may not matter too much in itself: it is unlikely that crises would arise, and if they did, the power to deal with them would presumably still lie with departments: they would want to consult with the new shadow ministers (and perhaps the old ones, but they would presumably want to defer if they could) before acting.

But it is possible to affirm the pledge before the appointed day. We have discussed with Mr Murphy the possibility that, in a benign scenario where all seemed on course for a successful running of d'Hondt, the Secretary of State might amend her standing orders to provide for the substantive rather than the shadow pledge to be taken at that point. This would get the DUP off their difficulty (or others, whoever they were trying to make one for, off theirs).

So far as I can see the affirmation does not need to be done before the Assembly, or in public at all, but I assume that will be the wish.

- b) *taking up office*: how are we to know when someone has taken up office? Would it be sufficient that they make an affirmation to that effect? I should be grateful for **HOLAB** advice. If it is something that



can be achieved passively, and the pledge is already taken, we may not need any special action at midnight to permit an transfer of power.

- c) *(re)making standing orders*. In view of the legal arguments we have heard, I mildly favour (and have invited **HOLAB** to consider) a belt and braces approach. We would make the standing orders now approved by the Assembly (Mr Watson understands we will receive the final version towards the end of the week: they made rather a lot of amendments, mostly at the instance of Mr Robinson, which will need some scrutiny: by **Mr Watson in cooperation with HOLAB and Karolyn Cooper?**) on the basis – which the latest indications are that they accept – that everything has to be in place before devolution and specifically to avoid any risk of disruption (below) leaving the Assembly without a set. But there would also be an understanding that the Assembly will (as we understand was their wish) want to readopt them in its own name at the first opportunity, thereby also curing any deficiency that might arise from the limitations on the Secretary of State's powers.

If we do decide on this course, we shall need to be ready to determine the standing orders, along with any transitional standing order, to take effect from the appointed day; along presumably with an order zapping the old standing orders (which would otherwise carry over) from that point. I should be grateful if **Mr Watson and HOLAB** would, in the light of our meeting, take this on.

- d) I do not see any other necessary business for day one (unless the standing orders, when revealed to us, suggest business that has to be discharged then). But the Assembly might have other views, and once the main business is done, we may not care much what else it does. People may of course want to *make speeches*. That apart, among the possibilities for further business are appointment of a *Commission* (the shadow one does not carry over); appointment of *non-statutory committees* (which may be a simple matter of reappointment en bloc, but could be more complex and controversial, eg over an Office of the FM and DFM committee), determinations about *junior ministers*, assuming we do not have time for that in the shadow phase (but it may be very controversial and time-consuming) and *salaries* (but there is no need for this, because we have received advice that they can decide formally determine them at a later point, with retrospective effect; and they seem resolved to accept the SSRB recommendation anyway).

17. So far as I can tell (**HOLAB** please confirm) no action should be necessary in respect of *statutory committees*, the whole shadow caboodle transferring under paragraph 9 of schedule 14. There must be such a caboodle, because so far as I can see Secretary of State's standing order 23 is mandatory, and therefore must be run by the shadow Assembly after it has run the ministerial d'Hondt process.