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HCS/11/74

cc. PS/Ministers B&L - 11
 PS/PUS B&L - 11 .
 Dr Quigley
 Mr Brennan - 11
 Mr Stephens
 Mr Chesterton - 11
 Mr Merifield
 Mr Spence
 Mr Gilliland
 Mr Elliott
 Mr Ehrman - 11 .

PS/Secretary of State B&L - 11

DEALINGS WITH THE ASSEMBLY

1. I was asked at the Secretary of State's morning meeting on 20 November to report on ways of maintaining communications with the Assembly.

Law & Practice

2. It is, I think, important at the outset to distinguish clearly between law and practice. Whether or not we diverge from previous practice in dealing with the Assembly is essentially a matter of policy. The law (in the form of the Northern Ireland Act 1982 and in particular Section 3 of that Act) leaves us more room for manoeuvre than is sometimes supposed. For while
 - (a) it is mandatory for the Assembly to "consider any matter affecting Northern Ireland (whether or not an excepted matter) which is referred to it by the Secretary of State for Northern Ireland"; for the Assembly to "report to the Secretary of State the views expressed in the Assembly on any matter considered by it..... if the Secretary of State so requests; and for the Secretary of State to lay before Parliament any report received by him which relates to "a transferred matter considered by the Assembly under subsection (i)(a)..... or to a matter which has been referred to it..... by the Secretary of State";

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- (b) it is discretionary or permissive for the Assembly to consider any matter affecting Northern Ireland which is not an excepted matter; for the Secretary of State to refer to the Assembly for its consideration proposals for the making of Orders or certain instruments or draft instruments; and for the Assembly to report its views on any matter considered by it in cases where the Secretary of State has not requested a report.
3. Within this legal framework the established practice has been to refer matters on which the Secretary of State wishes to have the Assembly's advice, including in particular proposals for Orders, under cover of a letter from the Secretary of State to the Speaker. This letter has then been read to the Assembly by the Speaker, and there have followed proceedings in the Assembly, typically involving consideration of the relevant business in the first instance by the appropriate departmental committee, the taking by that committee of evidence from Government (through Ministers and/or officials) or other witnesses, a report from the committee to the Assembly, its adoption by the Assembly, and the transmission of the relevant report with its recommendations to the Secretary of State for consideration (often in the context of a deadline for comments required by the Secretary of State when requesting a report from the Assembly in the first place). Reports are laid before Parliament where required by sub-section (iv) of Section 3 of the Act, and the recommendations made are considered within Government. The cycle is completed by a further letter from the Secretary of State to the Speaker, conveying his reactions to the Assembly recommendations and normally setting out in detail the acceptance or reasons for rejection of each specific recommendation.

Repercussions of the Anglo-Irish Agreement

4. Although we face a developing situation, which may change again at any time, the main features of the present state of affairs seem to me to be as follows
- (a) The Speaker, Mr Kilfedder, is anxious to keep bridges up even if this involves a degree of "fudging". But he is likely to resign the Speakership if he has to resign his seat at Westminster and be prepared to fight a by-election. There

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is every indication that here he will follow the general line adopted by other unionists.

- (b) The unionists are exhibiting some schizophrenia about the immediate future role of the Assembly. They appreciate its usefulness to them as a base and a platform from which to mount their anti-agreement campaign, but they do not intend to deal directly with the Secretary of State or Ministers. Some of them at least understand that it will be difficult to justify keeping the Assembly going if it falls out of its scrutiny role; and the divisions within unionism about the importance of the Assembly in the scheme of things continue to be apparent.
- (c) There are at least two interesting developments at the level of the Assembly's committee work. It seems likely that committees will continue to conduct business in relation to matters taken up at their own initiative (eg, they took evidence last week, and following the Agreement, from DANI witnesses on the subject of Forestry). On the other hand, they are unlikely to pick up and carry forward new issues referred to them by the Secretary of State, or even to continue with business referred to them by the Secretary of State before the Agreement. Dr Jack of DANI has reported to me an interesting and significant conversation with Dr Paisley on Thursday, 21 November. Dr Paisley stressed that, while he had no intention of meeting Ministers or giving them advice he wished to continue to have the co-operation of officials in enabling the Assembly to carry on its scrutiny functions. He said that, following the meeting of the Business Committee to be held on 22 November, a series of resolutions which he hoped would clarify the position would be put to the Assembly in the present week.
- (d) There is also evidence that the unionists will try to use Assembly machinery to draw out detail of the Anglo-Irish arrangements and presumably to seek to embarrass Government by pressing for evidence from officials on delicate aspects of the Agreement. I attach as Annex A a minute from Mr Spence which sets out a series of questions being tabled by the DFP Committee.

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Future Programme of Business

5. After a hiatus during the week which followed the Agreement, the Assembly has picked up a pattern of business. Annex B (the Progress Report made by Mr Sullivan on 22 November) shows what is envisaged in the Assembly by way of its immediate business and future handling. Annex C sets out the matters which, in the ordinary way, would have been coming forward from Government for referral to the Assembly.

Issues for Decision

6. It appears to me that there are three important issues, or sets of issues, requiring early decision.
 - (a) Do we, or do we not, want to find a means to keep the scrutiny process going as normally as possible? The hard line on this would be to say that, if the Assembly is not prepared to deal with, or offer advice to, the Secretary of State it should not be permitted, and even less facilitated, to deal with officials who are after all speaking and acting only in his name. But if we take this line, and apply it even to business which the Assembly is prepared to consider (because it relates to matters taken up originally by the Assembly on its own initiative) the Assembly will soon become solely a propaganda platform for the unionist parties. It is unlikely that the Alliance Party will want to be associated with this, and an early decision to wind up the Assembly could become inevitable and even desirable. The softer line is to argue that, in the midst of all of this sound and fury, there is an element of political games playing. Many unionists (though not all) are very reluctant to lose the Assembly. Nor should we ourselves lightly cast away the only foundation (however shaky) upon which future devolution might in the short term be built. We should therefore be prepared not merely to allow officials to continue to attend as witnesses, but to modify the previous practice in dealing with the Assembly (while keeping within the law) so as to make

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informal if not formal advice after scrutiny possible. This might be done by not referring (say) a proposal for an Order to the Assembly at all, but simply publishing it and inviting comments at large. In such circumstances the Assembly might well be willing to pick the matter up off the table, decide of its own volition to examine the issues, go through the usual committee evidence process (examining official witnesses, but not Ministers), and produce a report which might be endorsed by the Assembly but not thereafter formally transmitted to the Secretary of State. Such a "fudge" has obvious imperfections. Officials would have to make it absolutely clear that they were speaking not for some detached departmental entity but for the Secretary of State. We would not have reports which could be laid before Parliament. But substantially the scrutiny process might continue, and I would myself favour this approach if the Assembly parties are themselves willing to go along with it.

- (b) How do we react to Assembly Attempts to probe the Agreement itself?
Here, one could argue that there has been too much mystification and misrepresentation about the Agreement already, and that every attempt should henceforth be made to set matters straight. On the other hand I would have considerable reservations (and so would Dr Quigley with whom I have discussed the matter) about exposing officials to questioning on such issues as those set out in Annex A. We have, I think, two lines of defence on this. The first line would be to say that these are not DFP matters at all but NIO matters and not areas proper for consideration within the DFP or any other Departmental committee. This, however, would have two disadvantages. I am not sure that the argument could convincingly be made in relation to (say) question 8 on the list given in Annex A. Secondly, the inferences behind some of the questions are nonsensical and mischievous, and if left unchallenged may do harm. The alternative would be to answer such questions carefully in writing, but to decline to allow officials to be called to give evidence, on the grounds that the framework here is essentially political, and therefore a proper matter to be dealt with by Ministers, who would be willing to appear. This alternative strategy is itself not without risk, because if a session

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between a Minister and an Assembly Committee on ground such as this actually took place it would no doubt be a difficult and acrimonious exchange. But the risk of a committee accepting a Minister as a witness in current circumstances must be pretty slight, and on balance I would favour this line of approach.

- (c) Do we actually attempt to boost the Assembly? It is in the spirit of the Prime Minister's wish to find some means to reassure unionists that the Assembly should not merely be maintained, but actually built up as a channel through which the majority has a potential for access to Ministers at least as good as that available to the minority through the Inter-Governmental Conference. Here the crucial point is that, under Section 3(i)(b) of the 1982 Act the Secretary of State may refer to the Assembly any matter affecting Northern Ireland (whether or not an excepted matter), and as I read it this means that there is no impediment in law against giving the Assembly a more generous role in relation to (say) security than that so far conceded to them as a matter of policy and practice.

Recommendations

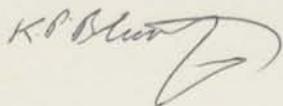
7. I therefore recommend that
- (a) we should do all we can to keep the scrutiny role alive, even if this means avoiding formal references which are bound to be met with a rebuff;
 - (b) we should answer in writing DFP Committee questions about the Agreement, but make it clear that any oral evidence would have to be taken from Ministers; and

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- (c) we should explore urgently the potential for more generous use of the powers of reference under Section 3(i)(b) - which could, of course, be exercised in practice if and when the Assembly is again willing to accept references from the Secretary of State.
8. I hope there will be an opportunity to discuss these and other relevant issues (eg further handling of the report of the Assembly's Devolution Committee) further at a meeting of Mr Brennan's Political Development Group (PDG) on 28 November.



K P BLOOMFIELD
25 November 1985

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ANNEX A

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BUSINESS
POL 312

RBS/11/38



cc. Mr Gilliland
Mr Merifield
Mr Chesterton
Mr M Elliott

J. PS/Mr Bloomfield

ANGLO-IRISH AGREEMENT

You will be interested to know that the DFP Assembly Committee has directed the following questions to DFP:-

1. Who is going to be involved in staffing Anglo-Irish Secretariat?
2. What Departments of the Civil Service are they coming from?
3. Where is the Secretariat going to be located?
4. Are Irish Republic Civil Servants going to be seconded to NICS?
5. What will be the incidence of charge of costs arising from the Secretariat - in terms of accommodation, travel and expenses?
6. The Committee formally request to be furnished with a copy of the Secretary of State's communication to NICS.
7. In the event that NICS officials are involved in any way with the Secretariat are they being required or will they be required to sign any sort of undertaking
8. What if any role has DFP in Anglo-Irish negotiations on the implementation of the Agreement?
9. What, if any, provision has been or will be made in NI allocations for costs arising from implementation of Agreement?

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10. May the Committee have sight of contracts of employment of Civil Servants called upon to serve in the Secretariat?

A response by 2 December is requested. Officials are being invited to give oral evidence.

The Committee is releasing its request to the Press.



R B SPENCE

22 November 1985

/JH?