

INSTITUTIONAL ARRANGEMENTS: ISSUES FOR CONSIDERATION

Paper by the Secretariat

1. This paper sets out some questions that need to be addressed in considering Strand One institutional arrangements, in the context of a broader settlement, together with a selection of (purely illustrative) options for dealing with them. It should be read in the light of papers in other strands. The Government, as Chair of Strand One, offers them so as to promote constructive discussion, rather than advocating them in its own right.
2. The questions and options revolve around the second paragraph of the Governments' Propositions on Heads of Agreement:

Democratically elected institutions in Northern Ireland, to include a Northern Ireland Assembly, elected by a system of proportional representation, exercising devolved executive and legislative responsibility over at least the responsibilities of the six Northern Ireland Departments; and with provisions to ensure that all sections of the community can participate and work together successfully in the operation of these institutions and that all sections of the community are protected.

3. There is much material available with which to illustrate the way questions relating to internal institutions have been approached before, in Northern Ireland and elsewhere. We thought it would be helpful to participants to include some references to this, though not wishing to add too much to the bulk of paper.

Overarching questions

4. Two general points that are relevant to any democratically elected institutions in Northern Ireland may be worth an initial discussion, though they will need to be considered chiefly during discussion under many of the detailed heads that follow, and might be looked at again in the round when that work is completed.

A. Ensuring all sections of the community can participate and that their interests are protected

5. *What provisions are necessary to ensure that, in the words of the Propositions document, all sections of the community can participate and work together successfully in the operation of [democratically-elected] institutions and that all sections of the community are protected?*
6. This issue goes to the heart of any proposals for a settlement. The 1973 devolution scheme in Northern Ireland sought to ensure the safeguarding of communities' interests through the requirement that executive appointments – and by extension, the arrangements generally – could command wide acceptance. The scheme put forward in *Framework for Accountable Government* in 1995, on the basis of a substantial measure of agreement in the 1992 talks, relied on an elaborate system of checks and balances, involving weighted majorities for contentious legislation and other important matters and provision for minimum threshold votes.
7. Other factors apart, a balance has to be struck between properly protecting the interests of all parts of the community, and an essential minimum of workability.

B. Relationships with other institutions

8. *What is needed to permit relations with other institutions?*

9. Any institutions will need to be capable of engaging in relations with other institutions and mechanisms, including the Westminster Parliament (a relationship that under the rules lies with this strand), and other institutions falling to Strands Two and Three.

Detailed aspects of a scheme

10. The following questions can only profitably be addressed in relation to a particular institution, and the discussion below - which of course is not intended to limit the scope of contributions at the meeting - centres on an Assembly, though the question of other institutions arises in section H.

C. Election by a system of proportional representation

11. *What sort of electoral system should be adopted?*
12. Among factors to be considered are the need to ensure fair representation for all sections of the community, and all parts of Northern Ireland. The system should be comprehensible to voters; it may be desirable to discourage a large proliferation of parties.
13. Many permutations of proportional systems are possible. The Single Transferable Vote system is well known in Northern Ireland, from local government and European elections, as well as those in 1973 and 1982 to the Assembly (in which it was based on Parliamentary constituencies). The additional member system used in Scottish and Welsh schemes might be of interest: in Northern Ireland, such a scheme might operate on the 18 parliamentary constituencies, and a single regional list. (In the short term, it may be inevitable that an electoral system is based either on the parliamentary constituencies, or Northern Ireland as a whole; any other division would probably require a Boundary Commission or similar institution, whose proceedings would be lengthy).

D. Nature, size and duration

14. *Should an Assembly have one chamber, or two? How large should the chamber(s) be? Elected for what period?*
15. Factors to be considered are the need to ensure fair representation for all sections of the community, and all parts of Northern Ireland; bringing the widest range of useful expertise and experience to bear on questions of Government; and giving confidence to all sections of the community that their interests are protected. But structures should not be so large or complex as to be unwieldy, and there must be some regard to economy.
16. As for lifespan, over-frequent elections would be disruptive (and a question would arise about who had a right to call them); but if an Assembly is in deadlock an election might be the best way of breaking it.
17. The 1973 Assembly was unicameral, originally had 78 members and was elected for a 4 year term, with a power for the Secretary of State to call an election ahead of that if appointments likely to be widely accepted could not be made. The Frameworks proposals were for a single chamber of about 90 members, elected for a fixed 4 or 5 year term. The Scottish Parliament is intended to be a single chamber of 129 members, the Welsh Assembly of 60 members, both with a fixed 4 year term.

E. Procedures

18. *How should the Assembly operate?*
19. Procedures will need to ensure that the discharge of executive functions is overseen, and that legislation is enacted, in such a way that the main sections of the community

are involved and feel their interests protected. The procedures will also need to be workable, and not readily prone to deadlock; with arrangements to ensure some consistency of approach and coordination across the range of executive activities. The detail of these arrangements will require close technical discussion at a later point.

20. In the 1973 system, committees (reflecting the membership profile of the Assembly) had an important role in scrutiny of departments. Heads of Departments were chairmen of committees of the Assembly covering their Departments' fields, and the committees, whose membership reflected the balance of parties in the Assembly, were charged with advising and assisting them in the formulation of policy. But the chief guarantee to different sections of the community was the requirement that appointments were likely to be widely accepted throughout the community, and the system depended on a continuing ability to make such appointments. The Executive provided direction and coordination.
21. Under the 1995 proposals, committees featured very prominently; as did the system of checks and balances. Coordination was to be achieved through a General Purposes committee; a directly elected three-person Panel, acting by consensus, with consultative, monitoring, referral and representational functions was also an important part of the scheme.
22. There may be a role in future arrangements, in relation to executive appointments (below) as well as key legislation and other important issues, for a requirement that propositions would require not only a majority of votes but also that of parties representing at least 50% of each main part of the community (an idea now familiar from the sufficient consensus rule in the talks). These arrangements would need careful thought (how are parties – including cross-community ones – designated for these purposes; who expresses the view of the party if members vote different way etc); but may be simpler and more robust in operation than the 1995 mechanisms.

F. Range of legislative powers

23. *What range of legislative powers and executive functions should be taken by the Assembly and those answerable to it – that at present covered by the Northern Ireland departments, or wider?*
24. The six departments (Agriculture, Economic Development, Education, Environment, Health and Social Services and Finance and Personnel) cover a wide range of economic and social functions, and a few of the 'home affairs' type (together known as 'transferred matters'). There is a large volume of separate Northern Ireland legislation in these fields, and generally a wide scope for local flexibility (though in some cases legislative provision at least is constrained by EU obligations or a policy of parity with Great Britain. More information will be provided).
25. Many 'excepted' or 'reserved' matters may be unsuitable of their nature for transfer: so with international relations, macroeconomic questions, or measures against terrorism. There may be some scope for transfer of responsibilities in respect of 'reserved' matters, such as the criminal law (except in respect of terrorism), or, as the terrorist threat declines, of policing. There may be consultative arrangements for devolved institutions in other fields.
26. The 1973 institutions had responsibility for transferred matters; the 1995 scheme would have covered 'at least' those matters. The Scottish Parliament would have responsibility for most – not all – as well as responsibility for policing, criminal law and the administration of justice. The Welsh Assembly's responsibilities would cover economic and social matters (it will take responsibility for executive functions and secondary

legislation – generally order-making powers at present exercised by the Secretary of State; but will not have powers of primary legislation).

G. Allocation of executive power

27. *How should appointments to executive responsibilities be made, ensuring participation from the main sections of the community?*
28. One issue to be considered is whether there should be a system giving all major parties a share of executive appointments, embodying as broad a range of views as possible; or whether a narrower grouping would be desirable, as permitting greater cohesion in approach and the possibility of democratic alternation. Another question is the precise role of committees in controlling the exercise of executive functions.
29. The 1973 scheme involved the Secretary of State making appointments meeting the wide acceptability criterion (above). In the 1995 scheme, a list of Chairmen and Deputy Chairmen of committees broadly reflecting party strengths would be appointed by weighted majority on the unanimous recommendation of the Panel. The Welsh Assembly would be able to delegate powers to Assembly committees themselves.
30. Other arrangements can be envisaged for appointments to executive posts. They might be wholly contained within the Assembly. There could for example be appointments by an *automatic formula*, such that all parties of a certain size would have some executive responsibility, broadly proportionate to their vote. Or there might be a system involving *election within the Assembly* to executive posts. Alternatively, there might be a system of *appointment subject to acceptability in the Assembly, tested by the sufficient consensus* criterion (the system would probably proceed essentially by agreement among party leaders, even if an outside figure were involved in appointment).

H. Ensuring collective responsibility: further 'tiers' (elected or otherwise)

31. *What if any further entities are required to complement the Assembly, and the individuals (or bodies) charged with executive functions, to give direction and ensure coordination, and by way of giving reassurance about participation and protection of interests across the community?*
32. Some mechanisms are clearly necessary in Northern Ireland in both these senses; there is a balance to be struck between achieving that, and not overloading the system with intricate and time-consuming procedures.
33. The 1973 scheme had its Executive, whose existence on a widely-acceptable basis was the guarantee of cross-community participation etc., and the fact of whose collective responsibility would ensure some cohesion and coordination. The 1995 scheme envisaged a General Purposes Committee with coordination functions; and the Panel, acting by unanimity, taking the lead in executive appointments, with powers over legislation, finance and other appointments.

I. Financial provisions

34. Financial arrangements, including arrangements for setting the level of public expenditure and sources of funding, would need careful consideration. The Scottish and Welsh models, outlined in the paper already circulated, clearly now merit consideration.

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STRAND ONE (PAPER 2) 2 FEBRUARY 1998**FUNCTIONS OF THE NORTHERN IRELAND DEPARTMENTS AND THE
NORTHERN IRELAND OFFICE - PAPER BY THE BRITISH GOVERNMENT**

1. This paper responds to the request made at the meeting of Strand One on 19 January for an account of the functions of the six Northern Ireland Departments and of the Northern Ireland Office.

The constitutional categories

2. The division of functions reflects categories established under the Northern Ireland Constitution Act 1973:
 - (a) *excepted matters* were set out in Schedule 2. Most of them were ones that of their nature fall to the central authorities: the Crown, Parliament, defence and international relations, etc. They also included elections: special powers relating to terrorism; appointment of judges etc and taxes. The Assembly set up by the Act generally could not legislate about these at all, and the Northern Ireland Departments have no functions in the field. Some of them fall to the Northern Ireland Office, and others to other Whitehall Departments.
 - (b) *reserved matters* were originally set out in Schedule 3 to the Constitution Act. They include matters such as the administration of justice, police and public order, the criminal law, international trade, post, telecommunications, broadcasting etc. It was intended in 1973 that some of these might move to the transferred category later. Other matters have been assimilated to this category since, for example banks, building societies, aspects of pensions, human fertilisation and embryology, the National Lottery. The 1973 Assembly could legislate for these matters only with the Secretary of State's consent and subject to Parliamentary veto. Again, executive functions in the field fall either to the Northern Ireland Office or Whitehall Departments, not to the Northern Ireland Departments.
 - (c) *transferred matters* are all that are not excepted or reserved: they are not formally listed anywhere. They are largely in the economic and social fields, though a few were functions the old Ministry of Home Affairs, like licensing, betting and gaming or the fire service. The 1973 Assembly could legislate freely on these, and executive functions lie largely with the Northern Ireland Departments (a few fall to Whitehall Departments).
3. Under direct rule, legislation may be made by Order in Council in the reserved and transferred fields, and the Northern Ireland Departments discharge their functions subject to the direction and control of the Secretary of State, exercised through her junior Ministers.

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The functions of the Northern Ireland Departments

4. The main functions of the six Departments are set out in the Appendix. Often the bulk of the administrative work in these areas is discharged by public bodies outside the department concerned, or by agencies within its aegis.

Scope for local flexibility

5. The Government has been asked to indicate those functions of the Northern Ireland Departments where scope for local flexibility might be constrained, for example by EU obligations, a policy of parity with the rest of the United Kingdom or a requirement to follow national policy. The Appendix also summarises the position.

The Northern Ireland Office and other Whitehall Departments

6. The Northern Ireland Office's main functions are in the following areas. Again, some are discharged through agencies, and some by organisations operationally independent of the Northern Ireland Office:
 - political development in Northern Ireland;
 - elections;
 - public order;
 - police;
 - prevention, detection and prosecution of crime;
 - criminal law and procedure (in relation both to terrorist and ordinary crime);
 - treatment of offenders, including prisons;
 - compensation for victims of crime.

7. Other Whitehall Departments discharge functions in Northern Ireland. The Northern Ireland Court Service, which answers to the Lord Chancellor, for example deals with court administration. The Commissioners of Customs and Excise and the Inland Revenue operate here. The Department of Trade and Industry is in charge of regulation of various financial services. Some Departments' responsibilities - such as those of the Department of Media, Culture and Sports for broadcasting or HM Treasury for coinage - are of their nature UK-wide.

Further information

8. The Government would be very happy to provide further information, and/or arrange oral presentations on the work of Departments if participants would find this helpful.

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