cc PB

The Rt Hon John Morris QC MP

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The Rt Hon Dr Marjorie Mowlam
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BELFAST

2 October 1997

Dear Mo,

**NORTHERN IRELAND EMERGENCY LEGISLATION:**
**THE SCHEDULED OFFENCES - CERTIFYING IN v CERTIFYING OUT**

Thank you for your letter of 28 July, putting forward your proposals for a system of certifying in, giving the decision-making power to the judges, who would apply a test set out in legislation. I have also seen the letter to you from the Lord Chief Justice for Northern Ireland. I was glad to have the opportunity to discuss the proposals with you, and also with Derry Irvine and the Lord Chief Justice. I know that you are minded now not to proceed with your proposals, but I am putting my views in writing, for the record.

The change you propose is only to the procedure for deciding mode of trial. As I understand it, you are not seeking to achieve any significant decrease in the number of cases tried by the Diplock Courts and you have not suggested that I or my predecessors have refused to certify out in cases which in your view should have been tried by a jury. Consequently, I am not sure what the benefit would be in changing a system which has worked well and to which no particular criticism attaches. Although we have a manifesto commitment to guarantee human rights in Northern Ireland, I am not aware of any commitment on this specific issue. My view is that the practical problems which would flow from the change outweigh any potential benefit from making a change which might be described as merely cosmetic. The underlying objection of those whom we are trying to appease is to the fact of Diplock Courts and not the procedure for determining mode of trial. I have, however, given consideration to three alternative proposals which you may like to consider, in particular the possibility of removing certain offences from the Schedule which we discussed, and I set these out towards the end of this letter.

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However, it may be helpful if I briefly recap on why the current legislation takes the form it does. Scheduled offences are subject to special procedural arrangements, the most significant of which is the Diplock Court - trial without a jury. The reasons for introducing Diplock Courts are well-rehearsed: a belief that in the special circumstances of Northern Ireland fair trial by a jury could not be guaranteed in all cases because of the risks of bias by jurors, and intimidation of juries on behalf of the defendant. For similar reasons, bail decisions in scheduled offences are taken by a high court judge rather than the local magistrate.

The current process of certifying out permits me to restore to an accused person the right to be tried by jury. It reflects the view that the right to jury trial is of such importance that it should be taken away only by Parliament, and not on an ad hoc basis by the executive or the judiciary. Whilst I am content to reduce the severity of the law in individual cases, I have argued before that it would be invidious for a Minister to have the power to remove that right in individual cases. I can therefore understand the judiciary's reluctance to exercise such a power, the reasons for which are set out cogently in the Lord Chief Justice's letter.

I turn now to your specific proposal. There are some practical disadvantages to it. As you say, I only need to address certification in about half the scheduled offences, as the other half are not capable of being certified out but must be tried by a Diplock Court. Under your new proposal, patently terrorist offences such as those under the Prevention of Terrorism legislation, which do not cross my desk, would need to be the subject of a court application if they were to be removed from a jury. This would generate unnecessary applications to court in a potentially substantial number of cases. I would recommend that the offences in the schedule which by their very definition must be committed in connection with or in pursuance of terrorism (ie which meet your proposed test) should be tried by a Diplock Court automatically and should not require certifying in.

In the first 6 months of this year, my predecessor and I refused to issue a certificate in respect of 113 offences. These numbers mean that there may be as many as 4 court hearings each week, in addition to those required in respect of any scheduled offences which at present I cannot certify out (and which I mention in the previous paragraph). I take my decision on refusal in private in a relatively short period of time. However, a court hearing would require substantial court time (for the greater analysis which I agree judges would need to bring to bear), legal representation for both sides, legal aid and in most instances witnesses. The resource implications of this would be considerable - but could be reduced a little if you agreed that offences which

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I cannot certify out remain automatically the province of the Diplock Courts.

I am sceptical as to your suggestion that it would be possible to have a decision on certifying in before the special arrangements which apply to scheduled offences are required. To ensure that the proper cases are tried without a jury, it would still be necessary for the DPP's office to consider carefully every offence charged by the police which had the potential to be a scheduled offence, to ensure that an application for certifying in was made where appropriate.

A serious practical consequence of your proposal is that sensitive intelligence material may be less well protected. In approximately half of the applications where I refuse certificates, I rely on information provided by the police which has been founded on intelligence gathered, for example on paramilitary connections - although I do not see that material myself. (The cases in which I do not rely on intelligence information are where the sectarian nature of the offence is evident from the circumstances.) On the test you propose, that sensitive material is likely to be decisive of the point in issue, and you will want to consider carefully whether it is desirable for its circulation to be increased. Should the judge see it, or just be informed of the police belief based on it? I expect the RUC would advise very strongly against its disclosure to the accused, because that might compromise informants or surveillance operations. They would also be concerned, I expect, about dissemination to the Court Service, legal advisers, etc.

If sensitive material were to be relied on, one option would be for the hearings to be in the absence of the defence and without notice to them. But then, in the very cases where a case is likely to certified in, the advantage of transparency would be lost. Another option would be for the judge to make his decision purely on submissions of Counsel, for example that the police believe the accused to be a member of PIRA, but then the advantage of involving the judiciary would be lost, because there would be no opportunity for forensic analysis of the underlying basis for that belief. Nor, I suspect, would the judiciary wish to take such an important decision without hearing evidence. If the judges were to examine the underlying basis, in most cases the police information would not be admissible as evidence under the current rules, so new rules would be needed. There is also a danger that the hearing would become a full trial, for whether or not the offence was committed in pursuance of terrorism is likely to be at the heart of the full trial of alleged terrorist offences too.

Currently, the prosecution usually seek an order from a judge that intelligence material is not subsequently disclosed to the defence as unused material under

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the usual rules of disclosure, because of its sensitivity. It is true therefore that a judge will see it even under the current arrangements, so their argument that they may be tainted by extensive exposure to intelligence material is not a robust one, although such hearings will become less common once the new Criminal Procedure and Investigations Act is in force.

You have suggested that the test may be written simply: for example "[the judge] will certify an offence as a scheduled offence if he is satisfied in the particular case that it was committed in connection with or in pursuance of terrorism". I have two comments on the test. The first is that if the judges are to be convinced that their role is to be a judicial one of applying a statutory test, it will need to be extremely tightly drafted, in more detail than you suggest. The second is that it does not represent the test which I currently apply and I am not sure whether that was your intention or not. Nor do I understand how you reach the view that the number of offences being dealt with by the Diplock Courts might fall as a result of your proposed change.

The legislation does not constrain me in the exercise of my discretion to certify out, but the test which I and my predecessors have consistently used is that we have singled out for jury trial the cases which are "not connected with the emergency". Although the Parliamentary debates have often described the test by reference to terrorist offences, it is not only terrorist offences which are connected with the emergency. Although we will not consider whether in a particular case an accused will or will not receive a fair trial if tried by jury, we do take into account the difficulties generally with jury trial in Northern Ireland. The test is sufficiently flexible that we have refused to certify out offences which have a terrorist connection, but also those which have a sectarian element or arise from public order disturbances such as those connected with the marches. In difficult, or borderline cases, we have generally taken the view that if we are not satisfied that the events are not connected with the emergency, then we will refuse to issue a certificate. The test is not statutory, and we could operate a different test without needing to change the legislation. As a matter of policy, for example, in difficult cases we could choose to operate a presumption of jury trial.

The options which I have been considering are as follows. The first one, which would go some way to meeting your proposal would be if I restricted myself to certifying out those cases which are not connected to or committed in pursuance of terrorism. This would mean that some offences which have a sectarian connection could be left to juries. It would be something of an experiment as there is no particular reason to believe that the circumstances which gave rise to the creation of a Diplock Courts (the potential for

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intimidation of jurors and bias of jurors) no longer pertain. But you may consider that now is the right time to conduct such an experiment.

The second option, which we discussed and which you said you will consider further, is the one put forward by the Lord Chief Justice. He suggests that the number of scheduled offences may be reduced. Offences such as offences against the person which are regularly certified out because they are committed in a domestic context (assault, actual bodily harm and grievous bodily harm) could be removed from the Schedule altogether. The power to add or remove offences from the Schedule is exercisable by Order in Council relatively quickly, so if tension escalates, the offences could be reinstated. Admittedly there would be a risk that such an offence could be committed in a terrorist or sectarian context on occasions and if it were charged alone on a charge sheet it would be heard by a jury. (On a joint charge sheet with scheduled offences it would be heard by a Diplock Court in any event.) I have discussed this proposal with the Lord Chief Justice and consider it worthy of further consideration.

The third option, also put forward by the Lord Chief Justice, is for there to be a mix of certifying in and certifying out, operated by me. I am not particularly persuaded of the merit of this option which would require complicated legislation. You are, in any event, already aware of my objections to the Attorney General certifying in.

My conclusion is that the current system works well and I am not aware of any groundswell of opinion criticising the mechanism by which certifiable offences reach the Diplock Court. If there is an imperative to do something, I suggest that you consider further whether any offences against the person might be removed from the schedule. Such a change could be presented as a liberalisation - a gradual step towards normalisation. It could be understood by the community in Northern Ireland more easily than a change to the procedure for deciding mode of trial, which in effect is likely to be perceived as largely cosmetic.

I am copying this letter to the recipients of yours.

*JOHN MORRIS*