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OIFIG AN ARD-AIGHNE
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Our Ref: SR 1/98, B3540

11th February 2000

Mr Bertie Ahern,
Taoiseach,
Government Buildings,
Dublin 2.

**RE: Suspension of the British Irish Agreement**

Dear Taoiseach,

I have been asked by the Attorney General to forward a short briefing paper on the question of whether the Government can take steps to suspend the operation of certain aspects of the British Irish Agreement having regard to the fact that the United Kingdom proposes to commence the Northern Ireland Bill 2000, this evening.

Yours sincerely,

Caitlín Ní Fhlaitheartaigh
Legal Assistant

cc: Dr Martin Mansergh, Special Advisor to the Taoiseach.

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**BRIEFING PAPER - SUSPENSION OF BRITISH-IRISH AGREEMENT**

**FILE REF: B3540**

1. 
   - The British Irish Agreement (BIA) is a binding international agreement.
   - Its term do not provide for suspension.
   - On the contrary, the terms of the Multi-Party Agreement (MPA) provide that in the event of a difficulty there should be a review.
   - The Attorney General is of the view that such a review should take place without suspension.

2. 
   - There is no forum internationally in which the Irish Government can have its view on suspension upheld.
   - In British constitutional theory Parliament is sovereign. The law such as the one passed in Westminster yesterday sweeps away the right of any person in the UK to argue that the suspension is unlawful.
   - The Attorney General is of the view that no legal remedy is available to the Irish Government to avoid or reverse the decision made by the United Kingdom Government.

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3.
- Article 29 of the Constitution was amended by the people to permit this State to be bound by the BIA. The changes to Articles 2 and 3 were only permissible if the Irish State did become bound.
- The fact that the State was authorised to become bound and did so creates a constitutional dimension to the present difficulties.
- In those circumstances the Attorney General advises that there is at least an arguable case that the Irish Government could not be seen to encourage or collude in a fundamental variation of the BIA.

4.
- A different scenario arises if the BIA is unilaterally abrogated by the British.
- If the institutional underpinnings of the cross-border implementation bodies has been rendered temporarily or permanently inoperative then Irish Government will have to reflect on the situation.
- Undoubtedly there will be a need to make remedial legislative arrangements regardless of whether the suspension is lawful in terms of the Agreement or not.
- Although there is question mark over whether the State could have varied the BIA in advance, there is no question mark over our capacity within

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constitutional law to respond by legislation to at a *d facto* situation brought about by the United Kingdom Government.

5.
- In fact, on a contingency basis, the legislation has been substantially drafted in this Office.
- The Attorney General wishes to append for information an advanced of the draft Bill. It is premised on the implementation bodies being maintained in order to enable an orderly wind down.
- It would be of doubtful wisdom to reveal the existence of the draft at this point but you may be assured that arrangements are in hand to fully respond to the new situation.
- Further negotiations with the UK may be necessary to ensure that any legislative response is appropriate.
- If a wind down is to take place, an agreement on an orderly wind down would be desirable.
- The Attorney General recognises that co-operation on a wind down is politically fraught.
- There is fine line between pragmatism and being co-operative. The State should not be seen to actively co-operate in the abrogation of the Agreement but, once the Agreement has been abrogated, then we have to take a pragmatic view.

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6. • The Attorney General has obtained the advice of senior counsel expert in constitutional law which suggests that the Irish State is not at liberty to actively co-operate on a suspension project. However the same advice acknowledged that the State would be at liberty to respond legislatively in a remedial way[1].

• The Attorney General is not advising that we would lose a case in court. However there is a strong possibility that the State would be prohibited from proceeding with the suspension.

• There is a significant likelihood that the Courts might interfere in any attempt to co-operate with the United Kingdom in the suspension.

• It is on the basis of this risk that the Attorney General advises against co-operating with the United Kingdom on the suspension of aspects of the BIA.

(as distinct from simply taking necessary remedial measures)

7. • The Attorney General was talking to David Lavery (Secretary to Mr Trimble) yesterday and emphasised to him that the North South implementation bodies are not necessarily casualties of suspension. If we regard the United Kingdom as being in breach, we may have a basis for

[1] That legal advice argued that the State was not entitled to agree a fundamental change to the BIA without a referendum. The Attorney General personally does not go that far and believes that some of the case law regarding the EU relied upon by Counsel in arising at that view is not directly applicable to the present scenario on suspension because such a change does not affect adversely the rights of citizens of the Republic guaranteed by the Constitution.

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arguing that there should not be a morbidity clause on the implementation bodies.

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**Michael McDowell, S.C.,**
**ATTORNEY GENERAL**

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