

TRANSFERRED, RESERVED AND EXCEPTED MATTERSIntroduction

1. At the political Conference the UDUP and Alliance both said that the subjects to be transferred to a new NI authority should be at least as wide-ranging as those transferred under the NI Constitution Act 1973. (Cmnd 7763 had already indicated that the Government was prepared to transfer all the 1973 powers if acceptable arrangements could be made). The approach to the division of powers into transferrable and non-transferrable has in the past been dictated by historical and general political considerations rather than by close attention to the practicalities of the matter. In both 1920 and 1973 executive and legislative power were envisaged as going hand in hand. The Acts concentrated on defining the transfer of legislative power; and in each case the transferred matters were all those which were not specifically reserved (or excepted). Both Acts provided for NI Departments to act as agents for UK Departments (and vice versa); ie an NI Department could carry out what would normally be the function of a UK Department (and vice versa). However these agency arrangements have not assumed great importance. Perhaps the most significant example is work carried out by DANI on behalf of MAFF.

New Factors

2. Since 1973 there have been a number of developments which call into question the assumption that a new division of responsibilities should automatically follow the earlier precedents;

- (a) The limited scope of the devolution proposals for Scotland, which would have excluded agriculture, energy, labour relations, social security and major industrial employment and development powers. In contrast to NI, the Scottish authorities were only to have competence for the specific matters remitted to them. The Scottish proposals also introduced the concept of executive only responsibility, with legislation a matter for Westminster - eg development agencies;

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- (b) The/growth in the subvention to NI from central funds. In 1973/74 it was £313 million (equivalent to 37 % of total NI public expenditure). In 1979/80 it was £918 million (42% of the total);
 - (c) The relative economic decline of the UK, and the world economic outlook, bringing with them greatly increased competition for investment within the United Kingdom, together with the need for nationally-controlled financial and economic disciplines;
 - (d) The need for a coherent strategy, and tactics, in the UK's relationship with the EEC and the reconciliation of that need with local interests in NI, particularly where traditionally transferred matters (agriculture, commerce, environment) are concerned;
 - (e) The problem of the emergence of "new" subjects if the non-specific transfer precedent is observed. Examples of highly political new subjects emerging since 1973 are prices and incomes policy and consumer protection;
 - (f) The establishment of social security as a truly national scheme, although separately administered and legislated for in NI. Social security benefits amounted to 27% of NI's total public expenditure in 1979/80, and were paid out by DHSS(NI) in the strictest parity with DHSS(GB). It is sensible to consider social security as a transferred matter in future?
 - (g) The effect of unforeseeable developments which make a transferred matter too difficult for an NI administration to tackle - eg the oil price explosion, recession, and resultant increase in cost of electricity in NI;

- (h) Finally, since NI has been without a locally elected body since 1974, there is a feeling that any new institutions should respond to the realities of the present, rather than historical precedent, and that no purpose is served by including among transferred matters some in which little if any independence of action is practicable.

The Historical Background

3. The Government of Ireland Act 1920 set up Home Rule Parliaments for both the North and South of Ireland, and each Parliament received the same transferred powers to "make laws for the peace, order and good Government" of their respective territories. The Act clearly envisaged the subsequent re-union of Ireland with the consent of the two Parliaments. Had the draftsman of the 1920 Act known that in 1980 a British Government would be seeking to maintain and strengthen the union between GB and NI then he would undoubtedly have recommended a different constitution. A full-blooded form of devolution as in 1920 and 1973 is not compatible with either the logic of day to day circumstances, or the indefinite maintenance of the union. Thus Enoch Powell is as usual exactly on target in attacking the whole concept of devolution - any devolution - to NI, since it does tend to undermine the concept of the union. But clearly the British Government of 1920 wished to keep the option of reunification alive, and in broadly following the earlier scheme in 1973 the last Conservative administration was also careful not to close the door on re-unification.

4. It follows that a lesser transfer of powers in future will be interpreted in NI as having an integratory effect when compared with the benchmarks of 1920 and 1973, and this will be particularly unwelcome to the SDLP. Ironically it will also disappoint the mainstream of Unionist politicians (Paisley, Craig, West) who in contrast to Mr Powell believe that the Unionists' best protection is their own Parliament wielding the fullest possible range of powers.

The 1973 Arrangements

5. In legislative terms the 1973 arrangements gave the NI authorities complete freedom in relation to all the transferred matters. But in practice this freedom was immediately limited by political and above all

financial constraints. The 1973 White Paper said (paras 88-89) that it would be necessary to divide expenditure on transferred matters into two broad categories. For services in the first category (cash social services, assistance to industry and employment, agriculture and fisheries) limitations on local freedom of decision were "inevitable", for a variety of reasons:

"In the case of the cash social services, such as family allowances, unemployment and sickness benefit and pensions, it is difficult to envisage anything other than exact parity with Great Britain. In the case of assistance to industry and employment, consultation with the UK Government will be necessary to ensure that regard is paid to the general industrial and fiscal policies of the UK Government and to the problems of the Development Areas in Great Britain. Moreover, the UK Government cannot abrogate responsibility for the application in NI of regional policies which will be the subject of negotiation with the European Economic Community in their application to the UK as a whole. Somewhat similar considerations apply also in the case of policies for agriculture and fisheries."

6. Thus it was clearly envisaged in 1973 that the NI authorities would have to operate within guidelines set by the UK Government in respect of over 40% of the total expenditure on transferred matters.

7. The second category would have consisted of all other services (education, health and personal social services, housing, roads, the nationalised fuel industries and local environmental services) and the NI authorities would have had "a high degree of freedom and discretion to determine relative priorities, to reallocate funds from one programme to another, and to pursue distinctive policies different from those obtaining in Great Britain."

8. The 1974 Executive did not last long enough to provide experience of how these financial arrangements, with their considerable impact on many transferred matters, would have operated. But there seems to have been

no lack of confidence that the 1973 arrangements (ie the Act and the financial categories) would have resulted in a scheme satisfactory to the Executive, the Assembly, HMG and Parliament.

Consequences of a departure from 1973

9. It is no coincidence that the second category (with the exception of the nationalised fuel industries) also represents the range of matters which would have been devolved to Scotland. This suggests that it may be hard to construct a logical case for particularising one of the Category I services (eg social security benefits) for retention by Westminster next time, but no others, such as agriculture and fisheries. If all the Category I services were retained for legislation at Westminster, together with the energy industries from Category II, the NI Assembly would lose practically half its functions (measured in cash terms). Westminster and Whitehall would have to take on a considerable additional load, even if agency arrangements were made for day to day operations to be carried out by the NI Departments. Both opponents and proponents of devolution would criticise the setting up of a subordinate Parliament in NI if a large slice of the legislative burden remained at Westminster. A major argument for setting up an Assembly in NI is that it should encourage the development of responsible politics about those matters within the competence of the Assembly. It is hard to see how this aim could be served by limiting the range of matters, particularly since the Stormont Parliament has tended to have too little rather than too much to occupy it in the past.

10. Between 1974 and the end of 1979 131 Orders in Council under the 1974 Act have been made at Westminster by successive Governments who have maintained that although such a method of primary legislation is unsatisfactory it is nonetheless essential to preserve these areas of competence for a future NI Assembly, and in order to allow both the statutory and administrative machinery to be smoothly switched over to the control of new elected representatives. Any radical departure from what has been the bi-partisan policy, as well as the expectation and desire of all the NI parties, will be embarrassing to say the least. And even a limited change may expose the Government's flanks. Apart from the view that Parliament might take, the Secretary of State's colleagues in charge of other Departments might take some convincing that the act of devolution

to new authorities in NI should be the occasion, for the first time since 1920, to ask them to assume certain responsibilities in NI.

11. There would be no insurmountable practical obstacles in the way of transferring functions currently undertaken by NI Departments to UK Departments of State, but the undertaking would be by no means simple and could conceivably be complex in certain areas. The size and possibly the structure of the NICS would be affected. Departmental statutory responsibilities and powers would have to be reallocated by means of amending legislation, which would certainly complicate the transition to a new constitution. The problems of reorganisation are not themselves of sufficient relative significance to counterbalance the *other* arguments in favour of a revision of traditional responsibilities, but when added to the likely political reaction they at least present a case for asking whether it would not be better largely to follow tradition and allow a future NI administration to retain its historic range of powers even if the reality is that decisions in a large area of them are taken by central government.