Final version. Mr Canavan approved the draft unamended. LSJ.

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Date: 5 November, 1998

Anne
NI bill file for Dr

9/11.

IMMEDIATE

cc PS/Secretary of State (B&L)
PS/PUS (B&L)
PS/Mr Semple
Mr Jeffrey
Mr Stephens
Mr Beeton
Mr Brooker
Mr Canavan
Mr Hill
Miss Wooldridge
Mr Keown
Mr McIlroy
Mr Webb
Ms Pearson

PS/MR MURPHY (B&L)

MC JMO 762: BAIRBRE DE BRUN ON THE NORTHERN IRELAND BILL

1. Immediately following her meeting with Mr Murphy on 14 October, Ms de Brún wrote in with the further comments on the Bill (her letter of 16 October); and has since written a chaser (2 November). She is anxious in particular for early sight of amendments to the Bill.

2. This is to offer a reply. I am grateful to colleagues for contributions, which make up the bulk of the attached draft. It aims to be very full, by way of showing Sinn Féin that we have taken them seriously. It draws where relevant on that recently submitted to the Minister to send to Mr Mallon.

3. It is cast to be sent today, Thursday, before we put amendments down, signed by the Private Office on the Minister's behalf, if it is possible to obtain his agreement from Brussels. We would then arrange for you to send on to Ms de Brún the amendments when tabled tomorrow.

A J Whysall

Draft letter for signature by **Mr Murphy**

Ms Bairbre de Brún
Sinn Féin
51-53 Falls Rd
BELFAST

Thank you for your letters of 16 October and 2 November about the Northern Ireland Bill.

Let me say first that we have aimed to take the fullest account of the views of all parties at every stage, as we have gone about giving the Agreement its legal reflection in the Bill. In particular we have been grateful for the thorough expositions of your own views, in your papers and in our meetings. I am sorry there has not been time for more consultation still, which I know you and others would have welcomed – but we are aiming to move forward with all proper speed, so as to permit the Agreement to be up and running as soon as possible, as I think you will agree is right. I hope you will see a good many echoes of your points in the Bill as it stands at present, and more in the amendments we are bringing forward, of which I will see you have a copy as soon as possible.

Turning to the particular issues you raise, let me first deal with the **North-South Ministerial Council**. We had a discussion of this at our meeting on 14 October, when we showed you some draft amendments, and you presented ones you had prepared. We have been reflecting on those amendments, and you should see our refined proposals shortly. On your specific points in your 16 October letter, and considering first rights of representation, Strand Two states that the Northern Ireland Administration is to be represented in the NSMC by the First and deputy First Minister and by any relevant Ministers. The Bill places a clear duty on the First and deputy First Minister to make such nominations as to ensure that this representation is achieved. This means that relevant Northern Ireland Ministers will participate in meetings of the NSMC when matters for which they are responsible are included on

the agenda. To put the matter beyond doubt, we will be proposing at Report amendments to delete 'appears to them to be' from clause 50(1)(a) and (b).

If Ministers do not participate normally in the NSMC, the Bill makes it clear that they are neglecting a Ministerial responsibility and are in breach of their Pledge of Office. As with any breach, it will be for the Assembly to decide what action is appropriate.

On interim measures where a Minister fails to participate normally in the Council, we will be putting forward an amendment at Report to make explicit the previously implied power of the First and Deputy First Minister to make alternative nominations of Ministers to attend the NSMC and BIC. To enable the delegation to enter into any agreements or arrangements within the area of responsibility of the absent Minister, subsection (4) of clause 50 already provides that a Minister may authorise another Minister to act on his or her behalf. Furthermore, we intend to permit junior Ministers, where appointed, to participate and to be so authorised.

On frequency and notice of meetings, and attendance at them, the Bill makes it clear that the work of the NSMC will involve meetings between Ministers from the Northern Ireland administration and their counterparts in the Irish Government. The exact frequency of such meetings will be for the respective administrations to agree although the Agreement states that the NSMC should meet in plenary twice a year and in sectoral format on a regular and frequent basis. The requirement for notice of meetings to be given to the Assembly in advance, together with a report afterwards, will help to ensure proper openness and transparency in the NSMC's work. This represents an important element of accountability to the Assembly, as required under the Agreement. It does not mean that the Ministers need a prior mandate from the Assembly. Ministers will be free to operate within their defined authority and in accordance with decisions of the Executive Committee and Assembly.

Moving on to **human rights**, I believe the Bill's provisions amount already to a transformation in human rights protection in Northern Ireland, and in our report amendments we will try to improve them further. The questions you raise about initiating litigation and powers of investigation are among the most contentious that have been raised in consultation, however. On the question of bringing proceedings

first, under the Bill the Commission will enjoy the same rights as any legal person to initiate proceedings in its own name, notwithstanding that it can also (under Clause 66) support cases brought by individuals. The *only* restriction on the ability of the Commission to initiate proceedings in its own name is in Clause 67. In common with the policy which the Government has adopted in the Human Rights Bill, Clause 67 restricts the bringing of proceedings in respect of Convention rights to a "victim", as defined in the Convention itself. The only exception provided is in Clause 67(2) for the Attorney General, the Attorney General for Northern Ireland or the Lord Advocate. This exception is required because the law officers may need to bring devolution proceedings on questions of legislative competence.

The Commission could bring proceedings in its own name, for example, by initiating legal proceedings to argue that an Act was unlawful, because it was incompatible with Community law or because it discriminated on the ground of religious belief or political opinion, providing the case involved some aspect of human rights. Equally, the Commission could initiate proceedings in its own name to prevent a Minister or Northern Ireland Department acting in a way which was incompatible with community law or which discriminated on the grounds of religious belief or political opinion, contrary to Clause 22, again providing some aspect of human rights were involved. Nor is there anything to prevent the Commission initiating proceedings in its own name under Clause 72 of the Bill.

These are just examples. It is particularly relevant that the Bill, in Clause 65(11)(b), defines human rights in a very wide fashion. Although I expect most proceedings to be brought in support of specific individuals, the Commission will, under the Bill as it stands, be able to bring its own legal proceedings in appropriate cases. This conforms with the requirements of the Agreement.

Strong arguments have been advanced by you and others for the Commission to be able to compel, in the course of its investigations, the attendance of witnesses and the production of documents. Let me repeat the reassurances my colleague, Gareth Williams, gave in Committee stage in the Lords. The Government has no intention that the Commission should be a toothless body, just the reverse. But the Agreement

is silent on whether the Commission should have available to it formal powers of compulsion. Of course, the Bill fills in a great deal of detail on which the Agreement is silent, but in all significant areas we have sought consensus among the Northern Ireland parties on the approach we have taken. In the extensive consultations we have had with the parties to the Agreement on this very issue, we were unable to achieve the "sufficient consensus" which was the prerequisite for the Agreement itself. Some parties to the Agreement believed that the Bill as it stands faithfully reflects the Agreement in full and it would be wrong now to reopen the negotiations on this issue. So, although we are sympathetic to the arguments for an extension of the Commission's powers in this way, we decided it would be wrong to proceed in this Bill while there did not exist a sufficient consensus among the Northern Ireland parties on the issue.

Individuals will, of course, be able under the Human Rights Act to enforce their rights under the Convention through the courts. The courts will have access to the full range of their usual powers to compel witnesses and the production of documents in the course of any such human rights case. So an individual bringing a case under the Human Rights Act - and, under this Bill, he or she may well have the support of the Commission in doing so - will be able to ask the courts to procure the necessary information, whether by compulsion of witnesses or production of documents, for the case.

As Lord Williams explained, the Government will fully co-operate with any investigation undertaken by the Commission. We shall provide it with any information and documents necessary for such an investigation, subject only to adequate arrangements to protect information where confidentiality is necessary to safeguard national security, public safety and public order.

In any circumstances where the Commission considers that it is being frustrated in obtaining the necessary information it needs to do its job, we expect the Commission to say so and to draw the attention of Parliament and the Assembly to any such failure to co-operate. One option then available, either to the Assembly or to either House of

Parliament, is to take up the investigation and use its own powers to compel witnesses and the production of documents to obtain the necessary information.

We also made clear that the Government has not closed its mind on this issue. We therefore brought forward amendments at Committee stage in the Lords to require the Commission, no later than two years after its establishment, to review the adequacy of its powers. If, on the basis of its experience, the Commission reports that it has been frustrated in the tasks set it under the Agreement because of the absence of powers of compulsion, then that would offer a powerful case for legislation to deal with that. Moreover, if there was broad consensus among the Assembly that the Commission should have such powers, then the Government would look sympathetically at legislation to provide them.

On some of the points you raise about the **equality** provisions in your 2 November letter, I think there is a certain amount of misunderstanding about. The Agreement gave to the Assembly full authority over those matters which were the responsibility of Northern Ireland Departments (paragraph 3 of the Strand One section). The law on fair employment, sex discrimination, race relations and disability have been the responsibility for many years of the Department of Economic Development and the Department of Health and Social Services: they must, therefore, under the Agreement be within the Assembly's domain. But any amendment of these laws will be subject to all the safeguards set out in the Bill, including the petition of concern procedure. Furthermore, the Assembly with have to act in conformity with UK international obligations, the ECHR and EU law. I think you would agree that the anti-discrimination legislation cannot be frozen for all time - indeed we hope that the Assembly will legislate along with Westminster on the extension of disability discrimination law.

On your point about the application to new public authorities of the statutory duty on public authorities to prepare equality schemes, I am pleased to be able to tell you that we are bringing forward an amendment which will impose a requirement on new authorities, within six months of coming into existence, to prepare equality schemes.

On the question of a power to exempt authorities from preparing schemes, I believe some such power is justifiable for sound administrative reasons. The definition of public authority which will be included in an amendment at Report Stage embraces a very wide range of bodies. I believe it is right for the Commission to have the ability to exempt individual public authorities where their nature of their duty, or their very limited operation in Northern Ireland, would mean that the preparation of an equality scheme would be a disproportionate burden. For instance, the definition includes every sub-committee of a district council. Rather than have each sub-committee prepare an equality scheme, it would be more rational to permit the district council's equality scheme to cover the work of all its Committees. The power of exemption could achieve this.

On the question of decision-making, you will be pleased to hear that we propose amendments to include extended provisions on consultation in relation to impact assessments and to taking account of such consultation in decision making.

You also pick up my remarks at our meeting about Kevin McNamara's proposed new clauses 4 and 5. I can confirm that clauses to be discussed at Report Stage in the Lords should reflect the main points of those two new clauses.

You also raised concerns about **national security certificates**. The Tribunal we propose is in direct response to the ECHR ruling this summer in the *Tinnelly* and *McElduff* cases where the UK was found to be in breach of article 6 of the Convention. Unless we ensure ECHR-compliance by providing such a right of appeal, the certification powers in the Bill are deficient. We do not think it is right to remove those powers, because we are convinced of the need to protect from disclosure sensitive intelligence information in the interests of safeguarding national security. Without the certification powers, the Government might have to rely on Public Interest Immunity applications in the original proceedings. We believe that establishing this Tribunal is the preferable approach as it will allow the national security arguments to be aired and reviewed by this independent judicial process, separate from the original proceedings which gave rise to the certificate.

We are very much aware of the need to balance the rights and interests of an appellant against the national security considerations. The amendments debated at the Lords Committee stage on 26 October were designed precisely with that aim in mind and in ensuring ECHR compliance. I fully accept that the Government's amendments set up procedures which differ from those usual in judicial proceedings, but we believe that these arrangements are essential if we are to strike the balance we aim to achieve.

I should stress that the judgement in the Tinnelly and McElduff cases did not require the Government to provide that an individual should have disclosure of the information which led to the decision not to grant him employment. Under the Government's amendments the appellant will not have a right to that information because to allow disclosure would be prejudicial to national security, public safety or public order. Instead, the new Tribunal provides a dedicated forum in which the information can be tested as part of its independent review of the act in question. The amendments also require the Tribunal to consider not only whether the act was undertaken for the reasons stated in the certificate, but also whether the act in question was a proportionate response. This is a major step forward from the current position whereby a certificate is conclusive evidence of the reasons for the act in question and where no right of appeal exists against a certificate.

The appellant's interest have been taken fully into account in devising these procedures, within the constraints which safeguarding national security imposes. The special advocate procedures ensures that the appellant's interests are represented by a suitably qualified person while protecting intelligence information from disclosure. Again, I fully accept that this is an unusual arrangement but it is not unprecedented. These provisions are modelled directly on the Special Immigration Appeals Commission established last year to hear immigration appeals where national security is an issue. That Commission was also established in the light of an ECHR-ruling in the *Chahal* case. In the *Tinnelly* and *McElduff* judgement, the Court noted that it had been possible in other contexts to modify judicial procedures to safeguard national security concerns about the nature and sources of intelligence information while according the appellant a substantial degree of procedural justice. The Government's

proposals were again developed with that in mind and we see the special advocate provisions as being central to these provisions.

Finally, I should make clear that we intend to bring the certification powers in fair employment, race and gender legislation within the Tribunal's remit in due course.

As I say, we are striking a balance here. I am not sure I could persuade you it is exactly the right balance – but I do ask you to accept that we have tried to safeguard individual rights to the fullest extent possible, and that we believe the arrangements we propose are fully in accordance with the European Convention.

I turn now to your concerns about the **Irish language**, and **symbols and emblems**. We have been over some of this ground before, and I appreciate the strength of your feeling, but I emphasise again that we believe we are doing full justice to the Agreement. We have always made clear that the Bill only made provision where it was legally necessary: there are many areas of the Agreement that do not seem to us to require legislative action. I think that is largely true in this case. We did have a specific commitment to legislate on Irish medium education, and we moved ahead of the Bill to carry that into law in an Education Order. The other provisions of paragraph 4 of the Economic, Social and Cultural issues part of the Agreement can be carried forward by administrative means or through the UK's adherence to the international obligation of the Council of Europe Charter for Regional or Minority Languages.

The paragraph on symbols and emblems seems to us to involve issues to be addressed by all participants to the Agreement in the context of their collaboration in the new institutions.

I move to **junior ministers** and a **Department of the Centre.** On junior ministers, there was a widespread feeling that it should be possible to appoint them, and we felt obliged to respond to that. But there was no consensus about how they should be appointed, and, in accordance with our usual approach, we did not feel able impose one view or another. We therefore put forward a permissive provision, now clause 17 of the Bill. How junior ministers are appointed, as well as how many there are to be

and the functions they are to discharge, are all matters for future discussion in the Assembly.

The provision we have in mind for a Department of the Centre is similarly permissive: the question whether to establish such a department will have to be discussed by the parties in the Assembly.

As I say, I wish we had had greater opportunities to discuss these issues face to face, but we need above all to maintain progress on making a reality of all aspects of the Agreement. Although I know we have had to disappoint you in some areas, for lack of consensus among other parties, I hope you will feel we made a real effort to respond to your views.

NORTHERN IRELAND OFFICE.
CONSTITUTIONAL BILL TEAM.

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URGENT FAX MESSAGE.

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No. of pages (including header): 11

Message: MC JM01762: Bairbre de Brun on the NI Bill

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Paul Murphy MP
Minister of State
NIO
Castle Buildings
Stormont

16 October 1998

A chara

We refer you to the points made at our meeting with you on 12 October in relation to our letters of 17 September and 2 October which we enclose again.

We would stress in particular our views with regard to the following, all of which we feel should be reflected in the Bill.

1. North/South Ministerial Council
   - There should be an automatic right to be on the NSMC arising from membership of the Executive.
   - The sanction against ministers who default with regard to the required participation on the NSMC should be clearly stipulated in the legislation.
   - There is a need for interim measures to ensure that the work continues while the minister is in breach of the duty of service as contained in the Pledge of Office.
   - As we pointed out in our 2 October letter:
     - The work of the NSMC should include ministers meeting their counterpart or counterparts in the Irish government on a regular and frequent basis.
     - We are concerned that the advance notice required for meetings of the NSMC, as outlined in the Bill, is such as could be used to demand prior mandate to a degree not contained in the Agreement.

2. National Security Certificates
   - The proposals you are making are unsatisfactory and would not, in our view, comply with the European Court ruling.

3. Junior Ministers
   - The posts of junior ministers should be allocated to parties on the basis of the d'Hondt system.

4. Irish Language
   - The NI Bill should make clear provision for the Irish language. (see letter 17 September)

5. Symbols and Emblems
   - The NI Bill should contain provision for addressing the issue of symbols and emblems. (see letter 17 September)

At our meeting with you on 12 October, you indicated that you are in the process of formulating amendments to deal with new clauses 4 & 5, as considered in Committee in the House of Commons, and a Department of the "Centre". We would like to see the text of these or other further amendments as soon as possible.

Is mise le meas

B de Brún

Bairbre de Brún