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-6 MAY 1992
GREAT BRITAIN

308/92

FROM: D A L COOKE
TALKS PLANNING UNIT
5 MAY 1992

cc: PS/PUS (L&B) - B
PS/Mr Fell - B
Mr Ledlie - B
Mr Alston - B
Mr Bell - B
Mr Chesterton - B
Mr Steele - B
Mr Watkins - B
Mr Wood - B
Mr Allsop - B
Mr Dodds - B
Mr D A Hill - B
Mr D J R Hill - B
Mr Maccabe - B
Mr Petch - B
Mr Percival - B
Mr Brooker - B
Ms Lodge - B
Mr Bentley, HOLAB - B
Mr Archer, FCO, RID - B
Mr Hallett, FCO, RID - B
HM Chancery, Dublin - B
Mr Sibson, Cabinet Office - B

MR THOMAS - B

TALKS STEERING GROUP
POLITICAL TALKS: POSSIBLE SOLUTION

As you know, a small group within your area of command has been meeting to discuss an outline paper which might seek to give Ministers a brief snapshot of the sort of outcome which HMG might be looking for from the Talks. As far as possible these outcomes would be inside - or failing that as close as possible to - the possible zones of convergence between the Talks participants as to what they might ultimately be prepared to sign up to. You asked that the latest draft of this paper should be circulated to the TSG for discussion with a view to its subsequently being put to NIO Ministers as a briefing paper.

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2 I attach the paper, together with a draft covering submission which explains more fully the nature of the paper and which sets out the health warnings which ought to accompany a paper of this sort.

(SIGNED)

D A L COOKE
TALKS PLANNING UNIT
5 MAY 1992
OAB EXT 6587

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DRAFT

FROM: D A L COOKE
TALKS PLANNING UNIT
MAY 1992

cc: PS/Mr Hanley (L&B) - B
PS/PUS (L&B) - B
PS/Mr Fell - B
Mr Thomas - B
Mr Ledlie - B
Mr Alston - B
Mr Bell - B
Mr Steele - B
Mr Watkins - B
Mr Wood - B
Mr Dodds - B
Mr D A Hill - B
Mr D J R Hill - B
Mr Maccabe - B
Mr Petch - B
Mr Bentley, HOLAB
Mr Archer, FCO, RID - B
Mr Hallett, FCO, RID - B
HM Chancery, Dublin - B
Mr Sibson, Cab Office (BY HAND)

PS/SECRETARY OF STATE (L&B) - B

POLITICAL TALKS: POSSIBLE SOLUTION

I attach a briefing paper for Ministers entitled "Political Talks: Possible Solution".

Nature of the paper

2. In view of its title, it is as well to be clear about the limited nature of this paper. Ministers have already had a set of negotiating position papers for the Talks, examining a range of issues such as devolved institutions, finance, devolution and the European Community, security, the constitutional position, and possible future North/South and East/West institutions. The attached paper does not seek to go beyond those position papers, and is not a substitute for them. Rather, it aims, starting from the likely positions of the Talks participants as set out in those papers, and the conclusions which each of the papers reaches on possible outcomes which might emerge from the Talks, to set out as

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briefly and clearly as possible an overall package of the possible ingredients which we might expect to find in a comprehensive accommodation. It deliberately avoids including any possible outcomes which are likely to be so far away from the possible zones of convergence between the Talks participants as to make it unrealistic to expect to see them forming part of an overall agreed package.

3. Another significant caveat is the fact that the paper offers a single snapshot of a possible end package, and does not itself attempt to display the numerous possible trade-offs between the different strands which the parties are likely to be seeking in the course of the Talks. For the sake of brevity and clarity, the paper ignores the reality that what we are actually dealing with is a set of variables for each of which a range of possible outcomes could be envisaged, each depending on what has been settled in other parts of the Talks. The paper looks ahead to the end point of the Talks, without working through various deals and compromises which may be necessary to get to it.

Trade-offs

4. Some of these possible trade-offs are nevertheless predictable in broad outline. They include:

- the extent of power and influence for representatives of the minority community in new institutions in Northern Ireland in relation to the degree of influence exercised by the Irish Government in relation to Northern Ireland matters
- the breadth of the scope of any successor to the Anglo-Irish Agreement in relation to continuing consultation rights for the Irish Government in respect of non-transferred Northern Ireland matters

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- the extent of transfer of power to local representatives in Northern Ireland as against the degree of formal protection for human rights and/or other political safeguards for the minority
- the share of executive responsibilities exercised by representatives of the minority in Northern Ireland in relation to the level of structural or legal constraints on the ability of the new local administration or executive to exercise its powers
- the degree of power/influence of new North/South institutions in the transferred field in relation to the extent of involvement of minority representatives in any new Northern Ireland administration or executive
- the extent of the responsibilities of any new Northern Ireland administration or executive in relation to the likely stability and durability of new Northern Ireland political institutions and the extent of agreement within them as to how further transferred powers should be exercised
- the extent of reform of arrangements at Westminster for scrutiny of non-transferred Northern Ireland matters in relation to the ability of members of a local Assembly and executive to have an input on those matters, including through any successor to the Intergovernmental Conferences
- the ending of any role for the Intergovernmental Conference in respect of North/South co-operation in transferred matters in return for sufficiently strong new North/South institutional structures

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This is not an exhaustive list. Virtually any possible element of a proposed solution is in theory capable of being traded off against a range of other possible outcomes.

Sticking points

5. Nevertheless, recognition of the kaleidoscopic nature of the possibilities does not mean that it is a hopeless task to look ahead to a possible determinate outcome. We know that each of the Talks participants has sticking points beyond which it would not be prepared to go. For instance, the Unionists will want to see movement on Articles 2 and 3, something which they could present as a replacement of rather than mere modification to the Anglo-Irish Agreement, no erosion of sovereignty through any North/South institutions, and political arrangements in Northern Ireland which stop well short of enforced power-sharing. The SDLP will not be prepared to contemplate unfettered majority rule in Northern Ireland, loss of the most significant gains of the Agreement, or a solution which does not adequately tackle the totality of the relevant relationships. They will also want to see adequate reflection of the EC framework in any overall solution. The Irish Government's position will be similar. They are likely to attach particular importance to having new North/South institutions with real influence, which are capable of further evolution, and which do not place any ultimate obstacle in the way of unification by consent. Without this they are unlikely to move on Articles 2 and 3.

6. Moreover, what we know of the parties' likely positions as set out in the position papers gets us beyond these sticking points and into some clear areas of convergence. There is already convergence, for instance, on protection of human rights and the need for a local administration to have a significant input into (but, implicitly, not control of) security matters. A consensus in favour of legislative as well as administrative devolution

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seems to be emerging. There is also at least a latent consensus on the present status of NI, and on the majority consent principle. And the Talks are now beginning to block in areas of agreement on the sort of principles which ought to underpin new political arrangements in NI. Beyond that, it is possible to extrapolate further to the points at which the known positions of the parties on various specific topics might be reconciled.

7. There are also constraints on HMG's position which mean that, notwithstanding our facilitating role, we are not necessarily neutral on every point. We cannot, for instance, set aside the responsibilities of the UK's EC membership. In addition, there may be an HMG view on how a particular outcome would match up to underlying principles for new arrangements which we would regard as important, such as the tests of stability, durability and capacity to command widespread support. The position papers take account of HMG's own interests for each of the topics with which they deal.

Purpose of the paper

8. The attached paper accordingly attempts as far as possible to take account of the sticking points, to anticipate where the balance might be struck in the various possible trade-offs, and to take account of HMG's own interests, without displaying all the possible variants in an inordinately complicated way. As the Talks progress it should be possible to refine the presentation of the possible solution in the attached paper in a way which reflects more accurately the emerging positions of the participants.

9. This is clearly not a paper which one would seek to table in the Talks in its present form, and probably not in any recognisably similar form until towards the end. HMG has said repeatedly that it does not have a single blueprint for the

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10. The preparation of the paper is not intended to be inconsistent with that. But it may be useful to Ministers to have at a reasonably early stage some indication of the overall shape of a possible accommodation in order to help them in giving direction to the Talks. The paper may, as we go along, also suggest areas which we will need to concentrate on in setting the pace and showing the way where that seems desirable.

The paper: two major issues

10. This submission does not attempt a commentary on the paper. Ministers may find it more convenient to have a discussion. But the treatment of two major issues in the paper calls for some explanation here.

11. First, on almost any analysis one of the crunch issues in the Talks will be how any new NI Executive (or Administration) is formed and in particular what role in it is accorded to minority community representatives (or, in the absence of such a role, what safeguards there are for the interests of the minority community). This is the one point on which the paper does not sketch a determinate outcome. Instead, four models (among many further possibilities) are set out in Annexes A-D. Annex A is a model which the UUP have outlined in the past. Annex B would be more likely to appeal to the SDLP. Annex C is something of a cross between Annexes B and C. Annex D similarly attempts to reach a consensus position, but from a different starting point. When the time is right, a possible tactical approach would be to table papers based on Annexes A and B, while keeping C and D in reserve in the hope that one or other of these could eventually be produced with the aim of getting a deal. Much will depend at the time on whether consensus is crystalising around other elements (and if so of what sort).

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Secondly, Parts II and III of the paper (North/South and East/West matters respectively) necessarily get into territory where it is particularly difficult to see the way through at this stage. A fuller list of possible outcomes is set out in the position paper on North/South and East/West Institutions. This latter paper (but not the attached paper) alludes to the possibility that HMG might have a role in any new institutionalised co-operation and consultation between the NI Administration and ROI Ministers in the transferred sphere. By not mentioning this possibility the attached paper implicitly assumes that it would be preferable to leave the NI Administration to stand on its own feet in dealing with the Irish over transferred matters, but that, to the extent that HMG needed some leverage here, it would be adequately supplied by HMG's roles in relation to (i) securing compliance with international obligations, (ii) liaison with the NI Administration over finance, and (iii) securing compatibility of action as between the transferred and non-transferred areas. But we may need to revisit the whole question of whether there should be tripartite N/S institutions, bearing in mind that we are proposing that representatives of the NI Administration should have some attendance rights at the successor to the IGC (ie in the East/West area), and that one of the Talks participants, the Alliance, has proposed tri-partite institutions as a possible outcome of Strands 2 and 3.

Conclusion

13. Ministers may find it helpful when a convenient opportunity arises to discuss with officials the elements sketched out in the paper. For the present, we ask them to do no more than note it and agree that its contents should be reviewed and refined as the Talks process continues.

D A L COOKE
TALKS PLANNING UNIT
MAY 1992
OAB EXT 6587

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POLITICAL TALKS: POSSIBLE SOLUTION

I: NEW INSTITUTIONS IN NI

- A single, unicameral province-wide legislature (Assembly) of about 85* members elected for four year terms by PR(STV), with ability to make its own standing orders, subject to the constitutional legislation.
- Transfer to Assembly of similar range of subjects as in 1973 (broadly agriculture, commerce, education, employment, industrial development, energy, environmental matters, transport, housing, health, social services), with scope for further transfers if Assembly proved stable, durable, and able to agree on how to exercise such powers. Secretary of State to remain accountable to Westminster for non-transferred matters.
- Assembly may legislate freely on transferred matters⁺; may legislate on reserved matters only with the Secretary of State's consent and Parliamentary approval; and may legislate on reserved and excepted matters where ancillary, and with Secretary of State's consent.
- Westminster Parliament to retain residual right to legislate on all Northern Ireland matters. By convention this should happen only exceptionally.
- Arrangements for consultation between local administration and HMG over financial matters, external aspects of transferred matters (including EC aspects), and non-transferred matters (including Anglo-Irish aspects).

* number needs to be a multiple of 17

+ subject to formal approval of Queen in Council.

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- Assembly to have departmental committees and general advisory committee(s) to provide local input on non-transferred matters (including security).
- Formation of, and limitations on, Executive* on one of the attached models.
- Local administration free to allocate its share of resources (whether secured by Secretary of State as part of the NI Block or separately), subject to EC obligations, and restrictions on certain transfers (eg from social security to other areas). Local administration free to vary the regional rate and to legislate to vary the rating system.
- Means needed for Executive to be required to comply with international obligations; for possibly discriminatory Assembly Measures or Instruments to be referred to an arbiter such as the Judicial Committee of the Privy Council; and for the Secretary of State to enforce action in the non-transferred field where there is any conflict with action in the transferred field.
- No incorporation of ECHR or entrenchment of Bill of Rights, but scope for further entrenchment of specific rights which the Assembly could not amend. Part III of 1973 Act (prevention of religious and political discrimination) to be retained, and possibly augmented.
- New arrangements at Westminster for NI-related legislation and scrutiny. NI Select Committee to be established if Parliament wishes.

* here and subsequently "Executive" includes possibility of a committee system with legislative and executive powers

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Unchanged level of NI representation at Westminster and Strasbourg. No disqualification of NI MPs and MEPs from being members of Assembly with full voting rights.

- Local administration responsible for implementing EC obligations in the transferred field, and (via HMG) for pursuing NI interests on transferred matters with the Community through UKREP and UK representatives in the Council of Ministers. Reserve powers for the Secretary of State to ensure compliance with EC obligations.
- Local administration able to set up NI office in Brussels which would supplement but not replace UKREP's activities. Maximum possible NI representation on Committee of Regions.
- Local administration free to co-operate on EC matters with Republic, provided that the UK's role as the Member State representing NI is not compromised.

II: NORTH/SOUTH MATTERS

- Territorial claim in Articles 2 and 3 of Irish Constitution to be replaced by aspiration to unification by consent.
- Institutionalised co-operation and consultation between NI Ministers (or Committee Chairmen) and ROI Ministers, with UK Government not present, on transferred matters with cross-border or all-Ireland aspects.
- To be serviced by joint Commission (with NI officials answerable to responsible NI Ministers or Committee Chairmen and ROI officials answerable to responsible ROI Ministers).

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No initial sub-delegation to Commission of joint executive powers in transferred field, but scope for this if voted by both Irish Parliament and NI Assembly (70% vote required). Commission might also have power to undertake or commission joint studies.

- Alternatively some further sub-delegation of joint executive powers to ad hoc bodies may be possible, if voted.

III: EAST/WEST MATTERS

- New British/Irish Agreement catering for totality of relationships between GB, NI and ROI.
- New Agreement would confer reciprocal consultation rights on UK and ROI Governments in respect of non-transferred matters [whether relating directly to Northern Ireland or not].
- Intergovernmental Conference under Agreement could consider transferred matters only where ancillary to non-transferred matters or where the Secretary of State's responsibilities were relevant. [Such responsibilities would include that to make a report to Parliament on a matter which required Westminster intervention (because deadlocked in the Assembly) even though the subject as a whole remained a transferred matter.]
- Subject to this, IGC would cater either for the totality of relationships, or for all aspects minus bi-lateral East/West matters (including strategic planning on a "both islands" basis) which would fall to a re-activated Anglo-Irish Intergovernmental Council and/or to bi-lateral contracts.

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- NI Ministers (or Committee Chairmen) to have right to attend certain IGC sessions in order to be consulted and debriefed by UK and ROI Ministers. (Would not preclude sessions between UK and ROI Ministers only.)
- Article 1 of present Agreement to be replicated in all three elements, but also to recognize explicitly present status of NI as part of UK.
- Similar provision as in present Agreement on security co-operation, confidence issues, extradition and extra-territorial prosecution.
- IFI to become the joint responsibility (while retaining its independence) of the Irish Government and the NI administration.
- Inter-parliamentary arrangements not to include powers to legislate or powers of compulsion, but to be a matter for the Westminster, Dublin and Belfast representative bodies.

IV: OTHER

- Relevant aspects of overall package to be validated by referenda in NI and ROI.

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MODEL ILEGISLATIVE AND EXECUTIVE COMMITTEE SYSTEM

- Government through system of Departmental Committees (plus Finance, General Purposes and External Affairs Committee(s), which would provide an input on non-transferred matters and discuss relevant transferred matters with ROI Ministers), with chairmanships, deputy chairmanships and memberships allocated in proportion to party strengths in Assembly.
- Either allocations to be in accordance with formula (eg a "successive exclusions" formula) prioritising party nominations in accordance with party strengths, or outcome of allocations to require weighted majority (70% or more) approval of Assembly. Appointments to be formally made by Speaker of Assembly.
- Committee chairmen to act as Heads of Departments, with powers to take day-to-day administrative decisions, make Departmental appointments and decide policy.
- [- Alternatively. Executive decisions could be divided according to agreed criteria between those vested in Chairmen alone, those requiring retrospective approval by Committee and those requiring prior approval by Committee.]
- Departmental Estimates, policies and actions to be subject to scrutiny by relevant Committee, which would have power to compel attendance, call for papers etc. But only Chairmen would have access to Departments fully equivalent to that which would otherwise be enjoyed by Ministers.

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Legislation to be subject to procedures prescribed by the Assembly. But all such legislation would require majority approval (70% for financial measure or one with constitutional implications) of both relevant Committee and of full Assembly, except that a 30% vote of the relevant Committee would suffice to require all stages to be taken on the floor of the Assembly.

- For any Measure or subordinate instrument twice referred to the full Assembly for approval and twice rejected by it, a 30% majority of the full Assembly could refer it for approval to Westminster.
- Finance Committee (including all Chairmen of Departmental Committees) would have duties of negotiating with the Secretary of State for the share of the NI block to be allocated to transferred matters; making proposals to the Assembly for the subsequent allocation of that share; and proposing comprehensive estimates (with the approval of the relevant Departmental Committees) to the full Assembly.
- Committee Chairmen would have to answer Assembly Questions. [Assembly could debate minutes of each Committee.]

Variants

- Committee memberships allocated proportionately according to party strengths, but not proportionately between Committees.
- Instead, each Committee Chairman has a right to nominate members of his party to up to half of the seats on his Committee.

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- Could be combined with abolition of right of Committee minority to refer legislation to full Assembly.
- It would also be possible to have no rule allowing disputed legislation to be referred to Westminster, but instead to rely on Westminster's residual right to legislate on transferred matters.

Assessment against criteria

- Workable? Potentially, but various practical difficulties to be solved.
- Stable and durable? Could be.
- Widely acceptable? Potentially.
- Fair role for both sides of the community? Yes.
- Power for Sectional interest disproportion to electoral strength? No, although it could be argued that safeguards amounted to this.
- Executive externally generated? No.
- Scope for alternations of power? Not in full sense.
- Neutral as to communal identity? Yes.

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MODEL II

EXECUTIVE MEMBERSHIP PROPORTIONATE TO PARTY STRENGTHS

- Party representation in the Executive to be proportionate to party strengths in the Assembly (with no representation for parties commanding fewer than 5% of seats in Assembly).
- Allocation of portfolios within Executive to be in accordance with formula prioritising party nominations in accordance with party strengths. Any further appointments in response to resignations, deaths etc must maintain representation of party strengths. Or allocation of portfolios to be negotiated between the eligible parties and approved by [the Speaker] [the leader of the largest party].
- Executive, when formed, would need to command investiture vote of 70% of Assembly, and to command subsequent confidence votes on the same weighted majority.
- Legislation to be subject to procedures to be prescribed by the Assembly. Measures dealing with financial matters or raising constitutional matters to require 70% approval at all stages.
- [Executive may refer any Measure or other instrument which it has twice proposed and which the Assembly has twice rejected to Westminster.]
- Departmental Committees to have scrutinising role with concomitant powers, but no power to introduce legislation

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or amend or reject estimates. Representation on Committees in accordance with party strengths.

- Executive's decisions to be made on the basis of the Chairman's [Prime Minister's] sense of the view of the Executive.
- Chairman of Executive [Prime Minister] to be [leader of largest party] [elected by Executive from among its number].

Assessment against criteria?

- Workable? In principle, but difficult in practice.
- Stable and durable? Could be, but unlikely.
- Widely acceptable? Arguable: might be opposed by majority community.
- Fair role for both sides of community? Yes.
- Disproportionate power for sectional interests? No.
- Executive externally generated? No.
- Scope for alternations of power? No.
- Neutral as to communal identity? Yes.

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MODEL III

LEGISLATIVE AND EXECUTIVE COMMITTEE SYSTEM (HYBRID)

As in Model I except that

- all legislation (other than Private Members' legislation) would require the approval before introduction of a unitary Finance, General Purposes and External Affairs Committee (FGPEAC)
- the FGPEAC's composition would be the Chairmen of the Departmental Committees.
- the FGPEAC would not need the approval of the relevant Departmental Committee for the component parts of the estimates, and would have power to decide what budget proposals to make to the Assembly
- FGPEAC decisions would be made on the basis of the Chairman's sense of the view of the Committee

Assessment against criteria

As for Model I.

EXECUTIVE WITH WEIGHTED MAJORITY RULE (OR MITIGATED SIMPLE MAJORITY)

- Following an election the leader of the largest single party would be invited by the Speaker to form an administration (the Executive). If the Executive so formed secured weighted majority (70%) approval in the Assembly it would assume power. It would govern on conventional Westminster lines while it could, on a vote of confidence, secure the weighted majority.
- If it became clear that no party or group of parties could form an Executive capable of securing the requisite weighted majority (or if an Executive, formed after successfully securing that weighted majority, subsequently lost it on a vote of confidence), an Executive could be formed by that party or parties able to secure a simple majority.
- Those who did not vote for the Executive (on its most recent vote of confidence) would compromise the Opposition (that is, those abstaining would be members of the Opposition). If the Executive secured the requisite weighted majority the Opposition would have no special powers.
- It would be open to the Executive to submit itself, at any time, to a vote of confidence by the Assembly. If it survived but by a majority different from that on the earlier occasion the powers and identity of the Opposition would reflect the new voting pattern.
- If, but only if, the Executive were formed without securing

the requisite weighted majority, a Council would be formed from among those in the Assembly. The Council would be formed as follows: first the Executive would be able to nominate four* members; second the Opposition would vote to elect that number of its members equivalent to 15%* of its own size. (Thus if the Executive was supported by 51% of the Assembly, and the Opposition accordingly comprised 49 people, the Council would compromise eleven members, four nominated by the Executive and seven - being 15% of 49 - being elected by the Opposition. If the Executive was supported by 60%, the Council would comprise ten, with four nominated by the Executive, and six elected by the Opposition; at 65% support, the Council would be nine with four nominated by the Executive and five elected by the Opposition.) These figures are of course illustrative.* The Council would elect its own Chairman (not being a member of the Executive) who, in addition to his own vote, would enjoy a casting vote.

- The Council would consider measures to be submitted to the Assembly. There would however be a bypass procedure to enable the Assembly to consider and approve measures supported by at least 70% of its members.
- On considering measures, the Council would be empowered, on a simple majority vote, to:
 - (i) Approve the measure for submission to the Assembly;
 - (ii) propose rejection of the measure;

* figures based for simplicity on assumption of an Assembly with 100 seats. Figure would need to be 17.5% for an 85 seat Assembly.

(iii) propose amendments to the measure;

(iv) refer the proposed measure to the Westminster Parliament;

(v) perhaps to introduce other procedural hurdles - such as reference to a scrutinising committee of the Assembly - with further capacity for delay.

- If the Council proposed amendments the Assembly could pass the measure in the amended form without resubmitting it to the Council. The Executive could resubmit the measure to the Council at any time with or without further amendment. If the Assembly amended the measure it would need to be resubmitted to the Council. Failing that, the measure could be passed after 12 months delay by a simple majority in the Assembly. The Assembly could, at any time, override the Council's delays or amendments if it approved the measure by 70% majority.

- Members of the Opposition could also initiate legislation (and there might be some procedure whereby they could secure drafting assistance). Such legislation too would have to pass the Council. Such legislation would need to secure a simple majority in the Assembly, which would be unlikely unless a deal had been done with the Executive. The Opposition's lever would be the Council's right to refer measures to the Westminster Parliament which, in the case of measures initiated by Opposition members, might be exercisable - by the Council - provided at least 20% of Assembly members, voting in the Assembly, approved a motion to this effect.

Variant

- Council of the Assembly could be permanent and could consist of Chairmen and Deputy Chairmen of Departmental scrutinising committees (who would have been assigned on a proportional basis)
- Voting strength in the Council could vary according to the level of support the Executive received in regular confidence motions: between 50 and 54.9%, representatives of parties which did not support the Executive to have two votes each; between 55 and 59.9%, such representatives to have 1.75 votes each; between 60 and 64.9%, 1.5 votes each; between 65 and 69.9%, 1.25 votes each; 70% or over, one vote each
- Council to have power to approve all legislation and the Executive's public expenditure proposals by a simple majority; and power on a 45% vote to defer legislation by referring it back to the Assembly for further consideration or to require it to be considered by the Westminster Parliament in an affirmative resolution procedure.

Assessment against criteria

- Workable? Yes, although its novelty could cause problems.
- Stable and durable? Potentially, although unclear.
- Widely acceptable. Unclear.
- Fair role for both sides of community? Arguably yes.
- Disproportionate power for sectional interest. Arguably no.

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Executive externally generated. No.

- Scope for alternation of power? Yes in principle.

- Neutral as to communal identity? Yes.

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