

PRIME MINISTER

cc Mr Mount

National Training Commission

Sir Robert Armstrong has completed the first phase of his work and has produced a draft of a paper for Ministers. At this stage he is not asking for policy decisions from you but merely for authority to widen the circle of Ministers and officials who can be consulted. This would still be on a need-to-know basis.

His aim is to produce a new version of the paper, taking account of the comments of this wider group, in time for a meeting of Ministers when you return from CHOGM.

The two main policy choices will be the size of the resources to be transferred to the NTC and the reporting arrangements. I imagine that on the former you will want to have the largest transfer that can be achieved within the constraints of existing legislation and the need to maintain the co-operation of local authorities. On this there remains legitimate doubt which Sir Robert's group should investigate further.

On the reporting line for Ministers you expressed the view in your minute to Sir Keith Joseph that:-

"By NTC, I meant an organisation developed out of the MSC, and reporting principally to the Secretary of State for Employment as the MSC does now."

It is therefore somewhat surprising to find option A in para. 17 still alive. You need to consider whether the paper which comes to Ministers contains this option. If it does there is a danger that your meeting will be dominated by this issue rather than how to implement the kind of NTC you have in mind.

/I feel

I feel there is a defect in the paper. The responsibilities of the NTC are described only in terms of the amount of money to be transferred to it, not in terms of the courses it would be able to finance. In deciding how much to transfer, Ministers ought to know how much wider is the scope of the NTC's activities (ie whether it would be confined to courses such as construction and engineering or whether it should also finance courses in the services sector). Ministers also ought to know what would be left to be financed by the colleges in the usual way with the larger and smaller options.

I agree  
mt

Agree:-

- i) Sir Robert's procedural proposals?
- ii) That the paper which is circulated to the wider group should delete the option in 17a?
- iii) That the paper should set out the implications for the scope of NTC's work of the larger and smaller financing options?

Yes

It is fully contradictory to para 1.

Yes mt.

AS

I will have difficulty with the tempered ministers.  
mt.

18 November 1983

Thank you for  
summarising this paper so  
marvellously for me.



10 DOWNING STREET

21 November, 1983

*From the Private Secretary*MR. HATFIELD  
CABINET OFFICENATIONAL TRAINING COMMISSION

The Prime Minister has seen Sir Robert Armstrong's minute of 18 November and the draft paper attached to it. She is content that the circle of departments involved in this work should now be widened, on the understanding that knowledge of the proposals is kept very restricted.

On the substance of the paper she had two comments. First she takes the view that the option in paragraph 17a is inconsistent with the remit as set out in her personal minute to Sir Keith Joseph of 8 November. This stated that

"By NTC I meant an organisation developed out of the MSC, and reporting principally to the Secretary of State for Employment as the MSC does now".

She therefore does not wish the option of a NTC reporting formally to the Secretary of State for Education and Science to be pursued further.

Secondly, she has noted that the options for the scope of the NTC are discussed solely in terms of the resources to be transferred. She feels that the paper needs to cover the extent to which the larger or smaller transfer affects the range of courses which the NTC is able to finance. Ministers will also want to know what would be left to be financed by the colleges in the usual way with the larger and smaller options.

I am sending a copy of this minute to Barnaby Shaw (Department of Employment), Elizabeth Hodgkinson (Department of Education and Science) and David Vere (Manpower Services Commission).

(Andrew Turnbull)

21 November, 1983

cc Mr Mount

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Ref. A083/3304

PRIME MINISTER

Summing up your meeting on 1 November, you said that there was a strong case for the establishment of a National Training Commission to administer funds at present made available to local education authorities to finance work-related training in the Non-Advanced Further Education (NAFE) sector. You said that more work was needed to refine the proposal; to determine the extent of the resources to be transferred; to clarify the reporting arrangements; and to establish how much could be achieved within existing legislation.

- 2. I attach a paper, which I have prepared in consultation with the Permanent Secretaries to the Departments of Education and Science and Employment.
3. The paper shows that it should be possible without legislation to introduce a workable scheme under which a certain amount of the money now channelled into work-related training in the NAFE sector via the block grant to local authorities would be channelled via the Manpower Services Commission (MSC), for whom this would be a sizeable increase in the amount they spend on training courses provided by the local education authorities in institutions of non-advanced further education. Such a scheme could come into effect from 1 April 1985. Legal opinion will have to be sought, however, on how far it would be possible to go in terms of the amount of resources transferred from the block grant to the MSC without exposing the Government to the risk of challenge on the grounds that local education authorities would no longer be able to meet their obligations under the Education Act 1944 to provide full and part-time education for those under the school leaving age.
4. Subject to the legal advice on this point, there are two main questions for Ministers to consider:
- (1) The amount of resources to be transferred.
  - (2) The nature of the Secretary of State for Education and Science's involvement in the development of and decisions on the Manpower Services Commission's plans



for expenditure in the Non-Advanced Further Education sector and their implementation.

5. On the question of the amount of resources to be transferred, apart from the legal question, there is a political decision, which will fall to be determined by reference mainly to two considerations: how large a transfer local authorities would take, and how large a transfer the MSC would need for effectiveness. The Department of Education and Science believe that £100 million, achieved over a period of years, is about the limit on what local authorities would take; the Department of Employment believe that about £200 million, achieved over a relatively short time, is about the least which would enable the MSC to be effective.

No. -

Yes

6. On the question of responsibility, the choice is between an arrangement which would make the MSC statutorily responsible to the Secretary of State for Education and Science for its work-related training programmes in the NAFE sector, and responsible to the Secretary of State for Employment on the rest of its work, and an arrangement which leaves the MSC statutorily responsible for all its work to the Secretary of State for Employment but gives the education services a significant consultative role in the planning and implementation of MSC activities in the NAFE sector. The end-result might not be greatly different in either case, in terms of effects upon courses; the first option would be more cumbersome, in that the MSC would become formally responsible to two Secretaries of State (four if you count the territorial Secretaries of State as separate education Ministers), but it would recognise the Secretary of State for Education's formal responsibility for the oversight of further education and might help to reassure the local authorities. *This has been the trouble*

*No -  
this was clear from the outset  
There is no point in going ahead at all if it is responsible to who else is responsible to do it  
It is better to have done it who is responsible to do it  
No point in going ahead at all if it is responsible to who else is responsible to do it  
It is better to have done it who is responsible to do it*

7. These proposals have so far been discussed only with the Departments of Education and Science and Employment, and in them only with their Secretaries of State and with a very few senior officials. Other Departments would be directly affected, and it would be essential to consult them before official decisions are taken. Departments concerned are the Treasury, the Department of the Environment, the Scottish Office, the Welsh Office and the Law Officers (the Attorney General and the Lord Advocate).



8. Time is running short if a White Paper is to be produced in January. I am concerned that you will not be able to discuss this before you leave for New Delhi on 21 November, and that we shall lose valuable time if no further progress can be made until you return. I should like, therefore, to suggest that we should embark without further delay upon consultations with senior officials in the Departments concerned. I would write to the Permanent Secretaries concerned to say that a meeting of Ministers under your chairmanship had concluded that there was a strong case for a transfer of resources from the block grant to local authorities to the MSC, to enable the MSC to commission and direct work-related training courses in the NAFE sector; that I had been instructed to prepare proposals which would achieve this result without legislation; that I was circulating the attached paper which had been prepared in fulfilment of that instruction; that you had instructed me to consult the Permanent Secretaries of the other Departments affected with the view to producing a revised and refined version of the paper which could be discussed at a meeting of all the Ministers directly concerned after your return from New Delhi. In my absence the consultations would be convened by Mr Le Cheminant and Mr Gregson. I would emphasise that in the meantime no decisions had been taken; and that knowledge that proposals of this kind were being considered was being kept on an extremely restricted basis, and that they should involve nobody other than their Secretaries of State (the Chancellor of the Exchequer and the Chief Secretary in the case of the Treasury), the Attorney General and the Lord Advocate, and one or two senior officials each as necessary for the purpose of considering the proposals.

9. I should be grateful if you could let me know whether you are content that I should proceed accordingly.

18 November 1983

*AP*  
Approved by  
ROBERT ARMSTRONG  
and signed in his absence

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## RESPONSIBILITY FOR WORK-RELATED TRAINING IN THE FURTHER EDUCATION SECTOR

Note by the Secretary of the Cabinet

Ministers decided at their meeting on 1 November that there was a strong case for converting the Manpower Services Commission (MSC) into a National Training Commission with new responsibilities for the direct funding of some work-related Non-Advanced Further Education (NAFE). The essential feature of the proposal would be the transfer to the MSC of some part of the Government block grant to local authorities currently intended for the NAFE sector and distributed through the Rate Support Grant (RSG) mechanism.

2. This paper looks at how far the proposal can be developed within existing legislation, how large the transfer of resources might be in such circumstances and the other arrangements, including Ministerial reporting arrangements, that would be necessary. The paper is written in terms of England and of the responsibilities of the Secretaries of State for Education and Science and for Employment. But it assumes that the MSC's new role would extend to Scotland and Wales, and that similar arrangements would be made to cover the interests of the territorial Secretaries of State.

### SCOPE WITHIN EXISTING LEGISLATION

3. It would not be possible to change the title of the MSC without legislation. But the Commission already has the necessary power to fund work-related education under its general duty "to make such arrangements as it considers appropriate for the purpose of assisting persons to select, train for, and retain employment" (section 2 of the Employment and Training Act 1973), and it already spends around £90 million a year in the NAFE sector.

4. The MSC's statutory ten members include only one formally appointed to represent education interests and there is no way of adding to the Commission's membership without legislation. But the Secretary of State for Education and Science appoints members, and he could make it clear in future to the local authority associations (and perhaps to the Confederation of British Industry and the Trades Union Congress as well) that he would want them to reflect the value of educational experience in nominating people for membership. No new appointments are due until 1 January 1986, but the existing local authority representatives are past or present Chairmen of the Education Committees of their Associations.

5. There is scope under existing legislation to set up new advisory machinery at national and local level to help both Ministers and the MSC in the discharge of their responsibilities. Changes could also be made, without legislation, in the numbers and composition of the MSC's existing 54 Area Manpower Boards whose remit covers some employment as well as training aspects of the MSC's work.



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6. As far as resources are concerned, there is no legal bar to reducing the Exchequer contribution towards the cost of NAFE through RSG and giving the equivalent resources to the MSC to spend on courses provided by both local authorities and the private sector. What would happen in practice would be that the money spent by the MSC in Further Education (FE) colleges would reduce the net cost of NAFE to local education authorities, and thus reduce their "relevant expenditure" (see paragraph 10).

7. There could however be a legal problem at the level of the individual authority where grant loss might be much greater in amount than the payments received from the MSC. It is possible that a decrease in general rate fund income so caused, taken together with Government measures to contain local authority expenditure such as grant holdback and rate capping, could make an individual authority unable to fulfil its statutory responsibilities under the 1944 Education Act and so call in question the Secretary of State for Education and Science's duty to ensure that it so fulfils them. This would of course depend on the severity of the holdback penalties and the level at which the rates were capped. The greater the transfer from RSG to the MSC the greater the risk of this kind of legal challenge. The Law Officers' opinion will be needed on whether there is a risk of challenge here and on the chances of a successful challenge.

8. If Ministers wanted to allow the MSC to concentrate its efforts on training and on work-related NAFE, the Secretary of State for Employment could take back the employment service, relying on his reserve powers in the Employment and Training Act. A copy of the Law Officers' advice is annexed. This agrees that the powers may be used in this way, but notes that this would go to the limit of what can be legally justified. In my judgment, whatever the strict legal position, it will be politically more difficult to proceed without legislation if Ministers significantly alter the role of MSC by taking away a major existing function at the same time as adding a new one. I would not therefore recommend the removal of the employment service work at this stage. If however Ministers wanted simply to emphasise the MSC's new responsibilities it would be possible, if it were felt this would be helpful presentationally, to group the training side of the Commission's work under a new non-statutory title such as "National Training Agency".

9. The MSC could thus become a National Training Commission in all but formal title without any new legislation. But there may be some risk of legal challenge and of Parliamentary criticism. In practice that risk obviously grows in proportion to the opposition (both initial and continuing) which the proposals attract. Both this, and indeed the amount of support for them, depend on the scale of reduction in RSG and on the arrangements made to make the proposals work.

## RESOURCES

10. The NAFE sector currently costs some £1,200 million a year of which about £800 million is devoted to provision that is in some sense work-related. This is part of relevant expenditure on

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all services in England of about £22 billion in 1983-84. About half of this sum is met from the rates or from income from charges and the other half from the Exchequer, principally through block grant. None of the block grant is hypothecated to particular activities or even services; but with this important qualification it may be said that of the £800 million about £325 million is met by central Government through block grant. Another £325 million is funded from the rates; the MSC itself already provides about £90 million as a customer for courses; and the balance comes from fees from individuals, employers, industrial training boards etc.

11. The distribution of block grant depends on rate resources as well as on spending needs. The proportion of total expenditure met from block grant therefore ranges from zero in the Inner London Education Authority (because of its high rate resources and high spending in relation to need) to over 60 per cent in some other education authorities with low resources and spending. It follows that a transfer from block grant to MSC funding would have a widely differing impact. Indeed since the mechanism for the transfer under present legislation could only be a reduction in the total of block grant paid to all local authorities, some of the loss of grant would fall on those without any education responsibilities (eg district councils in shire counties) who would gain nothing in return from the MSC.

12. The essential point about the RSG element is that, although the £325 million is notionally allocated to work-related NAFE and present expenditure by Local Education Authorities (LEAs) on NAFE is in fact very close to the agreed plans, the Government has no power to force local authorities to spend any particular sum on NAFE or to control the type of courses on which it may be spent. A reduction in RSG and an equivalent increase in MSC funds would enable employers, industry and Government through the MSC directly to influence NAFE provision and to buy in NAFE courses in the private as well as public sectors. But, by the same token, it would make it more difficult for local authorities to manage their resources coherently, because a much larger proportion would be dependent on the decisions of an external purchaser. If for example £200 million of the current RSG provision were available to the MSC, some 30 per cent of the NAFE budget would be outside LEAs' control, compared with the present 12½ per cent or so, represented by current MSC and fee funding. These are of course only averages. In practice there would be wide variations from college to college and from area to area depending on the type of NAFE provision the MSC wanted in particular areas, their assessment of colleges' ability to make this provision to the standards they require, the existing capacity of FE colleges, and the availability of other capacity in the private sector.

13. There seem to be two options for transfer of resources. One is the transfer of the major part of the RSG provision; the other the transfer of a smaller amount ie well below 50 per cent. In either case the earliest the transfer could take place would be 1 April 1985 (the main outlines of the 1984-85 RSG settlement already having been announced, including the total of grant) and it would be possible to phase the RSG reduction and consequential

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increase in the MSC's grant over a period of years. The Department of Employment believe that the MSC need at least an extra £200 million a year if the change is to have the initial impact needed and to provide enough leverage to bring about the necessary changes. They think that a transfer of this order needs both to be reached quickly and to be in evident prospect from the outset. The Department of Education and Science (DES) point out that some areas of FE are well regarded by and responsive to industry. They think that a figure of £100 million a year, reached over time, would not be disruptive and could possibly be presented in such a way as to avoid confrontation with local authorities.

14. The main arguments that need to be considered in deciding between the two options seem to be:

i. The larger the transfer, the greater the impact in political and presentational terms and on the present FE system. It is believed that a substantial transfer would attract strong support from employers. If local authorities co-operate, it could have the major beneficial impact required, and the same is true if there is only initial hostility. On the other hand, a major transfer could provoke so much opposition and so much disruption to local authority plans that there would be no co-operation, and problems in delivery, if local authorities preferred to maintain opposition rather than accept the funds.

ii. A significant change in the funding arrangements for one part of the local authority education sector could lead local authorities to raid other parts of their budget, or to increase the rates to make good the deficits which may be inevitable until FE provision adapts itself to MSC requirements. This possibility - which must always arise on any attempt to modify the boundaries between central and local government responsibilities - could have undesirable implications for other Government policies, and could also lead to higher public expenditure, (to the extent that this was not prevented by rate capping legislation and authorities' reluctance to incur financial penalties).

15. Neither option would escape opposition from local authorities, because both involve the transfer to control by a quango of substantial sums previously controlled by local elected bodies. Both options therefore run the risk - which must be weighed against the advantages of change - of worsening the Government's general relations with local government, and could also put at risk policy initiatives on the wider education front, particularly in the schools, which depend on the co-operation of LEAs. In both cases not only the actual working arrangements devised for the MSC in its new role and for the transfer of resources, but also the way in which the decisions are presented will be critical.

## WORKING ARRANGEMENTS: INVOLVEMENT OF EDUCATION INTERESTS

16. A key factor will be the way in which the MSC is able and is seen to be able to respond sensitively to the problems of the LEAs as managers and providers of the major part of work-related

education. This means that arrangements will be needed to involve both the Secretary of State for Education and Science and the LEAs in the decisions taken by the MSC and by the Secretary of State for Employment as the sponsoring Minister. The part played by the Secretary of State for Education and Science, in particular the extent to which he is seen to influence decisions and represent education interests at national level, may be looked at particularly critically.

17. The Secretary of State for Education and Science will continue to have overall statutory responsibility for the FE sector. Thus his relations with the LEAs will bear upon all courses run by FE colleges whether or not for the MSC. So will those of Her Majesty's Inspectorate whose basic role will be unaltered. There are then two options for his specific relationship with the MSC:

*No - inconsistent with para 1.*

*This is clearly contradictory to para 1 and would be no part of an N.T.C.*

a. The MSC could formally report to the Secretary of State for Education and Science and be subject to direction from him on their work-related education programmes, while continuing to report to the Secretary of State for Employment on their training programmes and general policies. This option would give the Secretary of State for Education and Science direct control over MSC decisions on NAPE, and would prevent a split developing between more general and vocational education. But it would complicate reporting lines, and also perpetuate the split between work-related education and training which the development of the MSC as a national training agency is partly designed to end.

b. The MSC could continue to report to the Secretary of State for Employment on their NAPE as all other activities but the Secretary of State for Education and Science would be closely involved in the development of decisions on the MSC's plans for expenditure in the NAPE sector and their implementation. It would be agreed that he would be consulted about any significant departure from plans during the year. This option would give more emphasis to the work-related training aspect of the proposals and would avoid complicating lines of accountability and management.

18. Whichever option is adopted, it would be important not to tip the balance too far against the key employer interests. The detailed arrangements for involving the DES and LEAs would need further work by the two Departments in consultation with the MSC, but the broad outline might be as follows.

19. At national level, the Secretary of State for Education and Science and his officials would be involved each year, as the Secretaries of State for Scotland and for Wales are now, and as the Secretary of State for Trade and Industry might be in future, in the consideration of the MSC's Corporate Plan, including the detailed work lying behind it. In practice this would involve consultation at the formative stage as well as at the stage of the formal submission of the Plan. There might also be, on the

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model of the existing Youth Training Board, a new non-statutory body to advise the MSC on its expanded NAFE activities. The board could be chaired by the Chairman of the MSC and its membership might include representatives of customers and suppliers of NAFE as well as DES, Department of Trade and Industry and Department of Employment assessors.

20. At local level there would need to be close and continuing contact and consultation between MSC officials and LEAs. This would be the main mechanism for the planning of courses in FE colleges and assessment of MSC requirements within national plans. It might be useful for this purpose to strengthen the MSC's area offices by the employment of staff on secondment from the education service.

21. These day-to-day working arrangements would need to be supported by new formal planning and consultation arrangements at local level. These might be based on the MSC's existing Area Manpower Boards whose membership, number and geographical coverage would need to be reviewed. The boards could be strengthened to give improved representation for LEA and professional education interests. They would be able to consider detailed plans for local NAFE provision in accordance with the guidelines set out in the MSC's Corporate Plan, and they would provide the main feedback to the centre on the local implications of MSC plans and priorities for work-related education. An effective dialogue with MSC staff would be essential.

22. These arrangements could require some additional manpower in the MSC. The Department of Employment suggest a figure of around 150 at a rough estimate. It would be for consideration whether this extra manpower would be found by reductions elsewhere in the Department of Employment group or whether there would have to be an addition to Department of Employment manpower totals.

## PRESENTATION AND TIMING

23. Local authorities' reactions will no doubt be considerably affected by the amount of resources transferred. But for the Government, whatever its decision about the amount, the main requirement would be to present the proposal not as an attack on local authority competence but as a move to link work-related education programmes, which would still largely be provided by local authorities, even more closely to the needs of local industry and employers. Local authorities will not for the most part be losing resources; they will simply be getting them by another route. But to underline the point it seems desirable to announce the new arrangements in the context of a wider presentation of the MSC's training work. A White Paper could be produced for publication in January which would bring together a number of announcements on other fronts, for example the future of the Youth Training Scheme and of adult training.

24. Timing is critical. If the additional funds are to be given to the MSC in time to have a significant impact on FE course provision for the academic year beginning September 1985, detailed

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discussions with LEAs need to start early in 1984. The Government must in any event be ready to discuss the implications of the change in funding arrangements by May next year when negotiations begin on the 1985-86 RSG settlement.

## DECISIONS REQUIRED

25. If Ministers wish to proceed with a scheme for transferring NAFE resources from RSG to the MSC which does not need legislation, they need to decide now:

i. The amount of resources to be given to the MSC (paragraphs 10-15). The choice is somewhere between a figure of around £100 million a year built up over time, which the DES regard as the most the local authorities will take, and a figure of around £200 million a year built up rather more quickly, which is what the Department of Employment think is needed to be effective. The judgment is for Ministers and depends essentially, subject to advice from the Law Officers on the risk of legal challenge to a substantial transfer, on an assessment of the reaction of local authorities to the size of the transfer, the leverage which a given size of transfer will provide, and the ability of the MSC to distribute the money successfully.

ii. Whether the MSC should concentrate all its energies on training and work-related education, or should also continue to run the employment service (paragraph 8). There are conflicting considerations here. One is the ability of the MSC to cope with a complex of tasks. On this basis the larger the transfer of responsibility for funding NAFE, the stronger the case for returning employment-related work to the Department of Employment. On the other hand, the return of the employment work would itself be controversial with the trade unions and employers. It would also be disruptive. Perhaps the decisive argument in favour of leaving the employment service with the MSC is that the addition of work-related training in NAFE to the responsibilities of the MSC without legislation would be less likely to attract legal challenge or Parliamentary criticism if it were presented simply as an extension of the MSC's existing role in the training area, with no change in its other responsibilities.

iii. The Ministerial reporting arrangements (paragraphs 16-18). The alternatives are to give the Secretary of State for Education and Science formal responsibility for the MSC's activities in this area, or to leave reporting lines unchanged but closely involve the Secretary of State for Education and Science in the approval of the MSC's plans for its NAFE activities.

iv. The general arrangements for involving education interests (paragraph 4 and paragraphs 18-21). These include the changes which might be made to the composition of the Commission's own membership after January 1986 when vacancies arise, and the detailed arrangements for consultation at both national and local level.

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v. The nature and timing of any announcement (paragraphs 23 and 24). The suggestion is an announcement in January by means of a White Paper about the MSC's general training and work-related educational role. This would present the proposed change in funding arrangements as having a major beneficial effect on the content and direction of work-related education but relatively little effect on its provenance, ie the LEAs.

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## Opinion of the Solicitor General

I am asked to advise the Department of Employment as to whether or not certain functions presently laid to the Manpower Services Commission can lawfully be transferred to the Secretary of State under the power contained in Section 3(4) of the Employment and Training Act 1973 without the need for further legislation.

2. I am of the opinion that they can.

3. The functions concerned fall into two groups:

(a) Certain of the functions that may be exercised by the Commission under Section 2(1) of the 1973 Act "for the purpose of assisting persons to select, train for, obtain and retain employment suitable for their ages and capacities and to obtain suitable employees ..."

(b) Certain functions exercised by the Commission under Section 2(2)(a) of the Act as agent for the Minister.

4. So far as the functions exercised under Section 2(1) are concerned, Section 3(4) of the Act provides that if the Secretary of State considers that any action for the purposes of Section 2(1) should be taken in pursuance of the Act otherwise than by the Commission, or otherwise than by the Commission alone, he may after consulting the Commission about the matter make arrangements for the action to be taken by himself.

5. Although this discretionary power is fairly widely drawn it is subject to review by the Courts at the instance of a person having a sufficient interest and must be exercised in accordance with the express words of the Statute. This means no more than that the procedural requirements laid down by the Act must be strictly adhered to, and I assume that there will be no difficulty in complying with these conditions. But quite apart from the question of procedure a Court will be concerned with the manner in which the discretion is exercised. In this context I consider that the Court would enquire as to whether or not the Secretary of State had kept



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within the bounds of the Act and had acted reasonably, for a proper purpose and in good faith. Strictly speaking, each of these considerations forms a separate ground for legal challenge, but in this particular case I think that they all come down to the same question - is the proposed exercise of the power a proper use of the discretion conferred upon the Secretary of State by Section 3(4) of the Act?

6. I would agree with the assessment made by those instructing me that the manner in which the discretion is to be used "goes to the very limit of, but not beyond, what can be legally justified". I think it particularly important that the MSC is not to be deprived entirely of its functions in relation to at least some of the purposes contemplated by Section 2(1) of the Act. It is also significant that the proposals do not affect the rights of individuals. In order to minimise the risk of legal challenge it is important to be able to show that the power is not in reality being used to repeal the whole of Section 2(1) so far as the Commission is concerned. In the light of what I am told I think this condition is satisfied, and accordingly I consider that a Court would be unlikely to interfere with the exercise of the discretion in the manner proposed.

7. I have also considered the proposal from the point of view of legal policy. The power under Section 3(4) appears, from the background material with which I have been supplied, to have been designed as one for use in last resort, where for example the Commission had failed to provide an adequate service, or had failed to obey directions to improve it. I note that Section 3(2) confers power on the Secretary of State to give directions to the Commission modifying its functions, including depriving it of some of its functions, and that there is nothing on the face of the Act constituting a legal impediment to a substantial transfer of functions by use of the Section 3(4) power. Nevertheless, the proposed use of the power in preference to separate legislation will attract sensible criticism: it falls short of what is ideally desirable as legal policy, particularly in respect of the

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consequential transfers of property, rights and liabilities. However, in my opinion the margin by which it falls short of what is ideally desirable as legal policy is not so wide as to render the proposed use of the power improper.

8. So far as the second group of functions [ie those exercised by the Commission under Section 2(2)(a) of the Act] is concerned, I see no particular difficulty in effecting the necessary transfer although it will be necessary, of course, to examine the exact terms of the agreements made between the Commission and the Secretary of State under that Section.

9. I do not think that the Ministers of the Crown Act 1975 applies to the transfer of functions between the Commissioners and the Secretary of State. It is intended to deal with transfers between one Ministry and another.

10. This advice applies to England and Wales and not to Scotland.

Law Officers' Department

28 October 1983