PARLIAMENTARY DEBATES

HOUSE OF COMMONS
OFFICIAL REPORT
GENERAL COMMITTEES

Public Bill Committee

NORTHERN IRELAND (MINISTERS, ELECTIONS AND PETITIONS OF CONCERN) BILL

First Sitting

Tuesday 29 June 2021

(Morning)

CONTENTS

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not later than

Saturday 3 July 2021

The Committee consisted of the following Members:

Chairs: Sir David Amess, †Graham Stringer

† Anderson, Stuart *(Wolverhampton South West)* (Con)
† Benton, Scott *(Blackpool South)* (Con)
† Brereton, Jack *(Stoke-on-Trent South)* (Con)
† Butler, Rob *(Aylesbury)* (Con)
† Davies-Jones, Alex *(Pontypridd)* (Lab)
† Dines, Miss Sarah *(Derbyshire Dales)* (Con)
† Eastwood, Colum *(Foyle)* (SDLP)
† Farry, Stephen *(North Down)* (Alliance)
Haigh, Louise *(Sheffield, Heeley)* (Lab)
† Hanna, Claire *(Belfast South)* (SDLP)
† Mann, Scott *(Lord Commissioner of Her Majesty's Treasury)*
† Marson, Julie *(Hertford and Stortford)* (Con)
† Moore, Robbie *(Keighley)* (Con)
† Owatemi, Taiwo *(Coventry North West)* (Lab)
† Robinson, Gavin *(Belfast East)* (DUP)
† Sunderland, James *(Bracknell)* (Con)
† Walker, Mr Robin *(Minister of State, Northern Ireland Office)*

Jo Dodd, Sarah Ioannou, *Committee Clerks*

† **attended the Committee**

Witnesses

Daniel Holder, Deputy Director, Committee on the Administration of Justice

Professor Jonathan Tonge, Professor of Politics, University of Liverpool

Lilah Howson-Smith, former special adviser to Julian Smith at the Northern Ireland Office

Public Bill Committee

Tuesday 29 June 2021

(Morning)

[Graham Stringer *in the Chair*]

Northern Ireland (Ministers, Elections and Petitions of Concern) Bill

9.25 am

The Chair: Before we begin, I have a few preliminary announcements. Hon. Members will understand the need to respect social distancing guidance, in line with the House of Commons Commission decision. Face coverings should be worn in Committee unless Members are speaking or medically exempt. *Hansard* colleagues would be grateful if Members emailed their speaking notes to hansardnotes@parliament.uk. Please switch electronic devices to silent mode. I remind Members—sometimes people forget—that tea and coffee are not allowed during sittings.

Today we will first consider the programme motion on the amendment paper, then a motion to enable the reporting of written evidence for publication and then a motion to allow us to deliberate in private about our questions before the oral evidence session. In view of the time available, I hope that we can deal with those matters formally, without debate.

Ordered,

That—

1. the Committee shall (in addition to its first meeting at 9.25 am on Tuesday 29 June) meet—

(a) at 2.00 pm on Tuesday 29 June;

(b) at 9.25 am and 2.00 pm on Tuesday 6 July;

(c) at 11.30 am and 2.00 pm on Thursday 8 July;

2. the Committee shall hear oral evidence in accordance with the following Table:

Date	*Time*	*Witness*
Tuesday 29 June	Until no later than 10.30 am	The Committee on the Administration of Justice; Professor Jonathan Tonge, University of Liverpool
Tuesday 29 June	Until no later than 11.25 am	Lilah Howson-Smith
Tuesday 29 June	Until no later than 2.30 pm	Sir Jonathan Stephens
Tuesday 29 June	Until no later than 3.15 pm	Emma Little-Pengelly
Tuesday 29 June	Until no later than 4.00 pm	Mark Durkan
Tuesday 29 June	Until no later than 4.45 pm	Alex Maskey, Speaker of the Northern Ireland Assembly; Lesley Hogg, Clerk of the Northern Ireland Assembly; Dr Gareth McGrath, Director of Parliamentary Services, Northern Ireland Assembly

3. the proceedings shall (so far as not previously concluded) be brought to a conclusion at 5.00 pm on Thursday 8 July.—*(Mr Robin Walker.)*

Resolved,

That, subject to the discretion of the Chair, any written evidence received by the Committee shall be reported to the House for publication.—*(Mr Robin Walker.)*

The Chair: Copies of written evidence that the Committee receives will be made available in the Committee Room and circulated to Members by email.

Resolved,

That, at this and any subsequent meeting at which oral evidence is to be heard, the Committee shall sit in private until the witnesses are admitted.—*(Mr Robin Walker.)*

9.27 am

The Committee deliberated in private.

Examination of Witnesses

Daniel Holder and Professor Jonathan Tonge gave evidence.

9.28 am

The Chair: We are now sitting in public again and the proceedings are being broadcast. Before we start to hear from the witnesses, do any Members wish to declare any interests in connection with the Bill? No. We will now hear oral evidence from Daniel Holder of the Committee on the Administration of Justice, and from Professor Jonathan Tonge of the University of Liverpool. Before calling the first Member to ask questions, I remind all Members that questions should be limited to matters within the scope of the Bill and that we must stick to the timings in the programme motion to which the Committee has agreed. For this session, we have until 10.30 am. May I ask the witnesses to introduce themselves, starting with Daniel Holder?

Daniel Holder: Good morning. I am Daniel Holder, the Deputy Director of the Committee on the Administration of Justice, a Belfast-based human rights organisation.

Professor Tonge: Good morning, and thank you to the Committee for the invitation to be here. I am Professor Jon Tonge, Professor of British and Irish Politics at the University of Liverpool and author of various books on politics in Northern Ireland.

The Chair: Thank you very much. Minister, would you like to ask the first question?

Q1 The Minister of State, Northern Ireland Office (Mr Robin Walker): Thank you. It is a pleasure to serve under your Chairmanship, Mr Stringer. This is a question for Daniel Holder. In the briefing note that your organisation prepared for the Second Reading of this Bill, you welcomed the fact that,

"the current bill will provide a level of legislative reform intended to return the Petition of Concern to its intended GFA purpose."

Could you tell the Committee about the limitations with the current mechanism and how provisions within this Bill will return the petition of concern to its intended purpose, in your view?

Daniel Holder: If we look back at the intended purpose of the petition of concern, it was very much linked to a level of scrutiny of what would be objective rights and quality standards. Every time a petition of concern is tabled, unless there is a cross-community vote to the contrary, it was to be referred to a special committee, the Ad Hoc Committee on Conformity with Equality Requirements. This serves a similar function to the Joint Committee on Human Rights at Westminster in actually scrutinising provisions of a contested piece of legislation that has been referred to a petition of concern against standards that include the ECHR, but also the Northern Ireland Bill of Rights. There is obviously a significant gap there, as the Northern Ireland Bill of Rights has not been put into place.

One of the problems, however, is that a committee has never been established as a result of a petition of concern. Instead, what has essentially happened is that the original intention of the petition of concern has been turned on its head somewhat. At times, it has actually been used not just for party-political purposes but to block equality of rights initiatives rather than as an equality of rights-based tool. Therefore, we do welcome the reform that is within both the New Decade, New Approach agreement and the Bill.

However, my recommendations to the Committee have identified one weakness, which is that essentially what is in the Bill will replicate what is in the current primary legislation regarding the establishment of the Ad Hoc Committee on Conformity with Equality Requirements. Unfortunately, to date that has not proved sufficient to ensure that standing orders are drafted in a way that ensures that the ad hoc committee is convened every time a petition of concern is tabled, as the Belfast agreement originally intended. That is one area I wanted to draw to the attention of the Committee, so that it can deal with that codification in the primary legislation to ensure that the commitment in the NDNA agreement to return to the original purpose of the Good Friday agreement is met.

Q2 Mr Walker: Thank you. With regard to that second area, NDNA also committed to setting up a committee within the Assembly to look at the Bill of Rights and take that work forward. Are you following the work of that committee, and do you have any views as to how that is progressing?

Daniel Holder: Yes, we have given evidence twice to that committee—once in the capacity of the CAJ and secondly as co-conveners of the Equality Coalition, which is a network of equality and rights non-Governmental organisations that we co-run with UNISON. It has been extremely important that that committee is established, and it is progressing its work. We keep coming back to our evidence that really the Bill of Rights was supposed to be a safeguard to prevent the type of abuse of power, rights deficits and discriminatory decision making that characterised not only the old Stormont Parliament but patterns and practices that re-emerged and were instrumental in the collapse of the institutions in 2017.

So it is in some senses to us not surprising that safeguards that were envisaged within the agreement that have not been put into place have led to a situation whereby Stormont becomes unworkable and dysfunctional. I think it is only if these safeguards over the exercise of both Executive and legislative powers are properly put into place that the institutions should begin to function as they were originally intended to.

Q3 Mr Walker: You recommended that MPs examine changes to address the St Andrews veto. Can you explain what that is and how often it has been used?

Daniel Holder: It is the case that since NDNA not a single petition of concern has been tabled. Its use has become, it appears now at least, politically untenable. There is a significant risk that the problems that were associated with the petition of concern will simply be displaced and picked up by the use of other veto-type mechanisms.

So there are two vetoes: one is the St Andrews veto, which is whereby any significant or controversial decision that a Minister has taken must be referred to the full Executive unless it is already within an agreed programme for government, but, of course, despite the draft being in NDNA, we do not have an agreed programme, so at the moment it means practically any decision.

We have managed to obtain under freedom of information the amount of times this veto was used in the first 11 months of the current mandate. It was used six times. On each occasion it was invoked by DUP Ministers. On the first three occasions it was used to block provision for early medical abortion services and engagement with women's reproductive rights. On two other occasions, which were quite public, it was used, again by DUP Ministers to block proposals from the Health Minister for public health measures to contain the pandemic. On a final occasion it was used to block an SDLP proposal seeking an Executive position on the extension of the Brexit timeframe. Those six occasions are the same number of occasions that that particular veto was exercised during the entirety of the 2007 to 2011 mandate, so there is a significant risk of displacement now.

The second veto that we have noticed has been readily used is a provision in the ministerial code whereby the First and Deputy First Ministers both must agree on agenda items for the Executive, which in practice gives either a veto. Although we do not have a full list of the occasions it has been used—that has been withheld from the freedom of information requests that we submitted—we certainly know that it has been used. For example—as referenced in a UK Government report to the Council of Europe—it was used to block a timeframe for adopting the Irish and Ulster Scots strategies, despite them being legal requirements. It was used to block the draft budget from being on the agenda for, I think, around a month and a half of the Executive. Most recently, this month, the communities Minister has stated that particular veto was used 17 times to prevent legislation to close loopholes in welfare legislation being tabled for the Executive.

The Justice Minister has also referenced occasions where perhaps one of the two vetoes, we do not know strictly which one, was used to block for a period of time the Justice Bill being introduced into the Assembly that dealt with issues around gender-based violence. Indeed, the Health Minister has publicly stated that the gender veto was used to prevent, until this week, I think, legislation being taken forward on opt-out for organ donations. So, there is a real issue whereby we could deal with the petition of concern but be left with

the same problem simply being displaced on to other veto mechanisms that are well outside what was originally intended by the Belfast Agreement, which was that such mechanisms would be safeguards scrutinised against rights and equalities standards, which would bring a degree of objectivity as to their use into decision making.

Q4 Mr Walker: Given the equivalence that you see between the petition of concern mechanism and these other mechanisms in the Executive, why do you think that those reforms were not included as part of the NDNA deals? Obviously, that was something that all parties had a say in and the Irish and British Governments worked together on. Why do you think that equivalence was not delivered as part of that deal itself?

Daniel Holder: Of course, we were not in the room during the negotiations. It is possible that those who most used those vetoes perhaps resisted reforms to them. We don't know that. But I think another factor in this is that these types of vetoes have not had the public profile that the petition of concern has had. When a petition of concern is tabled, at least it is done in full public sight on the Floor of the Assembly, whereas with the St Andrews veto and indeed the Executive agenda veto it is done within what is usually the secret world of Cabinet confidentiality of the Executive, although I think the frustrations as to the use of these particular vetoes have spilled over in the last year, which is why a lot more information about them is in the public domain.

Also, while Ministers have the St Andrews veto, the concepts of significant and controversial are deeply subjective, of course these are ministerial decisions that are still subject to judicial review. They have to be compatible with convention rights. If the Bill of Rights was in place, they would need to be compatible with the provisions of the Bill of Rights. For example, the veto over public health measures to contain the pandemic and the context in which it was exercised, we consider would probably have been unlawful if the Bill of Rights had been in place with the right to the highest sustainable standard of health integrated within it.

There have been other occasions whereby in judicial proceedings the use of these vetoes have been drawn out, but quite often they occur in secret, so a lot less is known about them.

Q5 Mr Walker: Thank you. Professor Tonge, in your analysis of the 2017 and 2019 elections, you identified the restoration of the Assembly and its institutions as one of the key issues facing Northern Ireland at both elections. How important do you perceive it to be for the state of politics in Northern Ireland that the Executive and the Assembly have been restored and that the Assembly is again able to legislate for Northern Ireland?

Professor Tonge: I think it is hugely important, because in successive surveys that we have done—I have directed the last four Economic and Social Research Council Northern Ireland election surveys—every time we have asked the question, "What is your preferred mode of governance?", direct rule has never come above 15% as a preferred option. Devolved power sharing is overwhelmingly a preferred option that comes back from each of those surveys—never larger, it should be said, than in 2019, which might be seen as remarkable given the hiatus in devolution from January 2017 until just after the election in December 2019. So the public have never lost faith with devolved power sharing. They have continued to support it.

Moreover, there were substantial majorities, both in the main communities and among those who say they are neither Unionist nor nationalist, in favour of the principles of devolved power sharing, including that key decisions should be taken by concurrent majorities among Unionist and nationalist representatives. So I think you would also conclude from the 2019 election that part of the reason that DUP and Sinn Féin lost support was that they were being blamed for the absence of devolution.

When we asked, "What is the most important issue at this election?", restoration of the Assembly was listed fourth. There were others that were higher—Brexit and the crisis in the health service pre-covid, which of course was a derivative of the absence of devolution—but restoration of the Assembly came fourth in terms of the importance of issues, and was above that among those who said they were neither Unionist nor nationalist. So clearly it is of seismic importance to keep the devolved power sharing show on the road, and that is why I endorse the vast bulk, but not everything, of what is in this Bill.

Q6 Mr Walker: In terms of what you have seen since then with the restoration of power sharing—obviously, the pandemic has meant that we have been living through extraordinary times; I think it is unimaginable what it would have been like to try and deal with it without the Executive in place—have you done any further research on the perceptions of the public of the period of government that we have seen?

Professor Tonge: No, because I run the general election surveys in Northern Ireland, but the Northern Ireland life and times survey has subsequently shown continuing support for devolved power sharing. That is an annual survey run by Queen's University and the University of Ulster, and it again showed substantial support for devolved power sharing. That survey work is limited in the sense that it does not ask what we should do about reforms of power sharing. We have just heard about petitions of concern. I would endorse a lot of what Daniel said in respect of that.

The explanatory notes to the Bill talk about the petition of concern mechanism having departed from its intended purpose,

"which was to ensure that all sections of the community are protected".

I agree, but I think petitions of concern are the least important aspect of the vetoes that often frustrate the public in Northern Ireland. I am not saying that they are museum pieces, but I think petitions of concern were a product of their time. They were a big feature of the Assembly from 2011 to 2016, with 115 petitions of concern tabled, albeit across only 14 Bills. The petitions of concern in which the DUP was involved were solo runs in the vast bulk of cases—82 out of 86 petitions of concern that the DUP signed.

However, given the reduction in size of the Assembly from 108 to 90 Members in 2016-17, and given the fact that I do not think it is conceivable that any party will get to 30 Assembly seats in the near future, the legislation before us is to some extent closing the stable door after

the horse has bolted. To be honest, much as I welcome what is in the Bill in terms of the 14-day consideration before a petition of concern is tabled and the fact that there has to be two or more parties, petitions of concern are less of an issue than the forms of veto that frustrate the public, as Daniel emphasised in his evidence.

One other point I would like to make about petitions of concern is that if they are not about just a single section of the community but are about protecting all the community, is there not a case for a petition of concern to have to be signed by two parties that are not from the same section of community? Why does it not have to be signed by two parties from different sections of the community—nationalists and others, or Unionists and others, or Unionists and nationalists? That would really turn petitions of concern from communal protection into what they were intended for, which was to protect all sections of the community. That does not appear in the Bill.

Q7 Mr Walker: The Bill does not do anything to stop that. It requires 30 Members from more than one party, so in theory could you not have various different parties getting together to put those forward, given the way the Bill is drafted?

Professor Tonge: That is true, but there is nothing to prohibit, for example, the DUP and UUP, or on the other side Sinn Féin and the SDLP, combining to table a petition of concern, which keeps that sense of communal politics. You might think that is perfectly legitimate—that, frankly, you have to have communal protection—but the Good Friday agreement and the explanatory notes to the Bill state that petitions of concern are

"to ensure that all sections of the community are protected".

You would still be permitting communal protection, and perhaps specifically communal protection, by allowing two parties from the same side—I use those terms advisedly, obviously—to table a petition of concern.

Mr Walker: Sure, but I would take it as all sections of the community including those communities, but not exclusive to those communities, therefore allowing any two parties to come together, or indeed Members from some parties and none. That addresses that point. I see where you are coming from. I think you have already answered my supplementary questions in the extra information you provided on petitions of concern, so I am happy to hand over to the Opposition.

The Chair: Thank you, Minister. Before I move on to the official Opposition, I remind members of the Committee of the point I made before we started—that tea and coffee cannot be consumed during Committee hearings.

Q8 Alex Davies-Jones (Pontypridd) (Lab): It is a pleasure to serve under your chairship, Mr Stringer. Mr Holder, I will come to you first, as the representative of the Committee on the Administration of Justice. The CAJ has done work in the past on the importance of the undelivered Good Friday agreement commitments and the role that, had they been implemented, they would have played in the stability of the Executive over two decades. Would you outline your thinking and your research on that?

Daniel Holder: Thank you very much. We have engaged both as CAJ and as part of the Equality Coalition, which represents a broad section of groups from across the sector. In 2013 we published a report called "Mapping the Rollback?" about the unimplemented commitments of the peace agreement, 15 years on from the Belfast agreement. It examined and produced a matrix of what had not been implemented and the problems that had caused in terms of a return to some of the patterns and practices—for example gerrymandering within housing—that had beset the previous, pre-troubles Stormont institutions.

We also produced in 2018, as a part of a coalition, what we call the "Manifesto for a Rights Based Return to Power Sharing," which looked at the restoration of power sharing but in a manner that power sharing would not simply be restored only to collapse for exactly the same reasons that led to its implosion in 2017. That was largely beyond the renewable heat incentive issue; it was issues around rights deficits, sectarianism in decision making and a lack of safeguards to qualify Executive power in the way that the agreement originally intended.

This year, 23 years on from the agreement, we did a significant stocktake on the back of the "New Decade, New Approach" report. We again mapped the level of non-implementation of commitments in a matrix and pushed on a call to end this endless cycle where we have renegotiation and fresh agreements, then bodies reneging on the commitments and the agreements, and we end up going back into an almost endless cycle of renegotiation. We looked specifically at some of the decisions that had been instrumental in bringing down power sharing and how they could have been prevented, for example if the Bill of Rights had been in place.

Q9 Alex Davies-Jones: You mentioned the Bill of Rights, which is a reserved measure for Westminster. Why is it so important for the stability of the Assembly and the integrity of the Good Friday agreement?

Daniel Holder: I think the best way of answering that is to give a couple of examples. In 2017, when the Assembly collapsed, one of the straws that broke the camel's back was what was called the líofa decision, from the Irish word for fluency. This was a decision made by the then Minister for Communities, who is currently the First Minister, to cut quite a small Irish language bursary scheme—I think it was around £50,000—that enabled children from lower-income families to attend the summer gaeltacht schemes. That caused a huge outcry; the decision was widely seen as sectarian and it was one of the issues referenced in the Deputy First Minister's resignation letter.

All we have to do is look back. In the same way that Ministers are very unlikely to breach the European convention on human rights because they know that would be unlawful, had the Bill of Rights been in place that decision would have been easily challengeable as unlawful. I am thinking about a Bill of Rights as in the advice of the Equality and Human Rights Commission that was delivered in 2008. A Bill of Rights that reflected that advice would have had a provision that outlawed discrimination, for example, on the basis of language. Given the background, such a Bill of Rights would have prevented such a decision from happening.

That was not the only Irish language decision that destabilised power sharing. There was a decision, again primarily by a number of Democratic Unionist party departments—the biggest impact was certainly from the Department of Education—to tear up a long-standing trilingualism policy that was in keeping with the United Kingdom's human rights commitments under the European charter for regional or minority languages. That is the Council of Europe treaty that was signed as a result of the Belfast agreement, with specific provisions for the Irish language and the Ulster variant of Scots. The Bill of Rights would have made that enforceable in Northern Ireland, so decisions by DUP Ministers in, say, the Department of Education or the Department of Agriculture, to scrap those policies and introduce English-only policies would not have been compatible with the UK's international human rights commitments and would have been directly enforceable through a Bill of Rights, so that would not have happened.

Equally, many discussions have sapped energy out of the Executive discussion, because we have an endless cycle of very basic things that are present elsewhere in the UK being blocked. An example would be single equality legislation. There are big gaps in the equality law framework in legislation to prevent age discrimination against children, for instance, or provisions around harassment in the workplace on the basis of sexual orientation. These types of things have been endlessly argued about and endlessly vetoed, yet they would have had to already be in place by virtue of the Bill of Rights. It would have taken contentious issues off the table and enshrined them in what would essentially be equivalent in other countries to a constitutional framework, or the equivalent to what the Human Rights Act provides for convention rights. We think that would have provided a much more solid basis for power sharing, where a lot of these misuses of power could not have taken place.

Q10 Alex Davies-Jones: Thank you. This is my final question to you. NDNA is just the latest agreement that is easier to achieve than it is to implement. Should Ministers be accountable for implementing the agreements that act as the scaffolding for the peace process?

Daniel Holder: Yes, we need mechanisms that ensure implementation, whether they are legal mechanisms, dispute-resolution mechanisms and so on. As the two exercises that we conducted show, both in 2013 and more recently, we end up in the endless cycle where agreements are made, significant provisions are reneged on and not implemented, and we have to return to another negotiation, usually to water down what was originally agreed in a previous negotiation. It is incredibly frustrating and makes the institutions unworkable and dysfunctional.

Q11 Alex Davies-Jones: Thank you, Mr Holder. Professor Tonge, I will come to you next. The briefing accompanying the Bill says that Ministers in the caretaker Executive would be operating within well-defined limits, but those limits are not outlined. Is that a concern? Are there examples of how those limits could be better identified?

Professor Tonge: Yes, I think that is a serious concern. New Decade, New Approach refers to "caretaker Ministers" but that term does not appear in the explanatory notes to the Bill. During the debate on Second Reading, the only definition of powers afforded to caretaker Ministers were those

> "set out in the ministerial code and in accordance with the requirement for an Executive Committee to consider any decisions that are significant, controversial and cross-cutting."—[*Official Report*, 22 June 2021; Vol. 697, c. 821.]

That is an Executive Committee, please note. That definition begs far more questions than it answers. First, what ministerial decision is insignificant? That is an obvious question to ask. Secondly, the formation of the Executive Committee is a moot point. It is far from clear in the Bill whether there would simply be a collection of individual Ministers, remnants from the previous Assembly and Executive, left in place for up to 24 weeks after the election, but d'Hondt is not run to re-establish those Ministers post-election. Obviously, the composition of the Executive Committee may change substantially if there is a change in party fortunes at that election.

Let us assume that the pre-election Ministers are left in place for up to 24 weeks. First, there is a democratic element: is that correct, given that the electorate might have spoken in a different way? More substantively, in terms of powers, is the question you asked: which ministerial decisions will they be able to take that are significant, controversial or cross-cutting? Will they be able to take decisions with financial implications in a caretaker capacity? I would seek clarification of those points from the Minister, because I am far from clear. The right hon. Member for East Antrim used the phrase "lame duck Ministers" during that 24-week period. It would be interesting to see what specific powers they will be able to use during that period of up to 24 weeks.

Q12 Alex Davies-Jones: The purdah restrictions for local government operate under the Local Government Act 1986. They prevent the local authority from publishing

> "any material which, in whole or in part, appears to be designed to affect public support for a political party."

The rules governing purdah in the UK Government are outlined in the Cabinet manual, and civil servants inform their permanent secretaries if any requests by Ministers raise issues. Do you think that the Bill will provide civil servants with enough legal scope to push back on Ministers making inappropriate requests during a caretaker Administration?

Professor Tonge: Yes, I am comfortable about the Bill's provisions in that respect. Actually, I think the most comprehensive part of the Bill is the updating of the ministerial code. It makes clear the need for the separation of party political from ministerial matters. In that respect, I am quite sanguine about the Bill doing exactly what you suggest.

Q13 Alex Davies-Jones: Do you think that the Bill should set out how the code of conduct should be enforced?

Professor Tonge: Therein lies a much bigger area: how the code of conduct will actually be enforced, what will happen and whether we will simply see the traditional divide on party lines over its implementation.

There is one phrase in the code of conduct that slightly alarms me:

> "Ministers must…operate in a way conducive to promoting good community relations".

No further definition is offered. What would constitute promoting bad or offensive community relations, as distinct from good community relations? To give one

example, would a Minister who criticised Irish language provision while still implementing it be in breach of the code of conduct? Similarly, if a nationalist Minister praised aspects of a paramilitary campaign of the past, would that be seen as non-conducive to good community relations, and would sanctions against that Minister be available? It is far from clear, partly because it is ultimately a matter for the Assembly and the Executive to decide how to impose sanctions.

I think that what is contained in the Bill is very laudable in updating the ministerial code, but the devil will be in the detail of implementation. Whether implementation is actually possible in terms of sanction against a Minister who is seen to be in breach of the ministerial code—I think that that is where the difficulty will lie. I am not convinced that Westminster can necessarily resolve that difficulty.

Q14 Alex Davies-Jones: Under the current wording,

"the Secretary of State may"—

only "may", rather than "must"—

"issue a certificate"

outlining the date for a poll, even if the conditions for cross-community representation are not met. Do you think that that is a mistake? Is there a risk of undermining the principles of the Good Friday agreement if an Executive drawn from one community is able to limp on at the behest of the Secretary of State?

Professor Tonge: I think that there has been a lot of limping on in the Assembly and Executive over the years, and there has been an arbitrariness about when a poll should be called. We have had, in effect, two pieces of emergency legislation by previous Secretaries of State to prevent an election from being called and to update the rules because an election was due.

In a broader sense, I welcome the fact that the current time periods of either seven days or 14 days are being extended to either 24 weeks or 48 weeks, to keep the show on the road. You simply cannot afford another collapse. I understand the principles behind the Bill, so I do not think that we need to be too formulaic about giving the Secretary of State some discretion in that respect. The main purpose of the Bill is clear here: to allow greater cooling-off periods before another election is called. If that means giving the Secretary of State greater flexibility, so be it.

Q15 Alex Davies-Jones: A final question, Professor Tonge. At the moment, the First Minister and the Deputy First Minister must be drawn from the two traditions: Unionist and nationalist. Do you believe that this integral feature of the Good Friday agreement is at risk of becoming outdated if a party representing neither achieves sufficient support? What do you think could be done to remedy that?

Professor Tonge: I think it is outdated. It may soon look very outdated, depending on the performance of Alliance in the Assembly election that has to take place by 5 May next year.

The communal designations more broadly are period pieces; they were of their time, and they were necessary in their time. Is the Assembly ready for the complete abolition of communal designations? It would be a bold step, but it would probably be laudable. You could still build in protections. The obvious way forward, if you get rid of communal designations, is to have qualified majority voting, where, for example, any controversial measure would have to be passed by 70% of the Assembly as an entirety. There is something horribly reductionist in requiring parties in the "centre ground" to designate as "Other"; I know that Alliance refuses to use the term "Other", as reductionist, and use that term as a "community first" label.

Have the communal designations served their purpose? Yes, over time, but I think there is now a clear case for a fundamental review of Assembly rules to see whether it is still necessary to have those Unionist and nationalist designations. Particularly if you got to the position after the next Assembly election in which you had a First Minister from the largest party and the largest designation who may be nationalist, but for example, Alliance was to be the second largest party, but because it was not from the next largest designation it was not able to provide a Deputy First Minister, the case—which is already mounting—for a reappraisal of the rules would become quite overwhelming.

You can make the case against that by saying, "If you look at the recent Assembly elections, you've got 85% of voters still voting for Unionist or nationalist parties", or certainly in excess of 80%. However, if you look at the electorate as a whole, when we have done the last four Northern Ireland election surveys, the largest single category of elector now—as distinct from voter—is a person saying they are neither Unionist nor nationalist. The life and times survey from two different universities shows exactly the same. That is the largest single category: bigger than the Unionist category, bigger than the nationalist category. The Assembly rules as they are are in denial of that.

You might say, "Well, the percentage of actual voters who are still Unionist or nationalist is still high", but in terms of the electorate as a whole, there is a case for reform of the rules, and the fact that you have those communal designations is a deterrent to people voting in Northern Ireland who say they are neither Unionist nor nationalist. When we ask non-voters the question, "Why didn't you vote in the last election?", those communal rules come across loud and clear as one of the most significant deterrents to people participating in the electoral system, so in terms of the health of the body politic, I think there is a growing case for getting rid of the communal designations. Whether Unionist or nationalist politicians would concur with that is a very moot point.

Alex Davies-Jones: Thank you, witnesses; thank you, Chair. No more questions from me.

The Chair: Thank you. James Sunderland, and could you state which of the witnesses your question is to, or whether it is to both of them?

Q16 James Sunderland (Bracknell) (Con): Thank you, Mr Stringer; it is a great pleasure to serve under you as Chair. My question is to both witnesses in turn: would you comment on the extent to which the petition of concern has been used as a veto? Is this perception or reality?

Professor Tonge: I am happy to go first. It clearly was used as a veto between 2011 and 2016. It was often used as a solo run: the DUP, because of its very considerable Assembly strength during that period, was in a position

to veto not particularly the social and moral issues with which the veto is often associated—although they did use the veto for that—but welfare reform legislation. That was the most common form of veto; that was where the veto card was played the most. Some 115 petitions of concern were tabled, 86 from Unionist parties and another 29 from Sinn Féin and the SDLP, across just 14 Bills. When you think that during that period, something like 70 Bills were passed by the Assembly between 2011 and 2016, it was very much only a minority of Bills for which the veto card, if you want to call the petition of concern that, was used. Petitions of concern were tabled for only a relatively small percentage of Bills, but it was used quite extensively during that period.

Of course, as soon as the Assembly size was reduced from 108 to 90 and no party could get up to 30 seats, the petition of concern faded considerably in significance. The six-monthly reports that now have to be produced on petitions of concern show clearly that it is simply not a veto that can realistically be used these days by any single party anywhere.

Daniel Holder: I suppose all I can add to that is just to concur that, yes, the petition of concern was essentially used as a political veto, rather than—as alluded to earlier—a mechanism whereby a particular measure or piece of legislation would be scrutinised against rights and the European convention on human rights.

The only other point to add is that, of course, the actual use of the petition of concern and, indeed, the other vetoes, while they have not been used in large numbers, really is the tip of the iceberg as to the broader impact they actually have, particularly not just with the petition of concern but with the St Andrews and agenda vetoes. You will have a situation where Ministers simply will not progress particular initiatives or measures because they know that they are likely to be vetoed. What is in plain sight is perhaps the tip of the iceberg of a much broader problem in the way that what were supposed to be safeguards have been flipped on their head and are not used for their original, intended purpose.

Q17 James Sunderland: May I ask both witnesses to confirm the extent to which they believe that the Bill will achieve the aim of making communities and parties work more closely together without necessarily resorting to the use of the petition of concern as a veto?

Professor Tonge: Clearly, the Bill is laudable in how it deals will petitions of concern. It makes it much more difficult for parties, in one sense, to use petitions of concern, notwithstanding the fact that none of them has the Assembly strength to go solo in respect of petitions of concern. The message that comes from the Bill is quite clear: petitions of concern should be used only as a last resort and used to the benefit and for the protection of the entire community, not just communal interests. I return to the point that I made earlier: I would like to see petitions of concern confined to cross-community tabling, or at least having to go beyond your community, so it would have to be a POC from nationalists and others, or from Unionists and others, for example.

There is stuff in the Bill that is eminently sensible: the 14-day consideration stage before its deployment; the fact that the Speaker, or three Deputy Speakers, cannot be involved in tabling a petition of concern; the fact that a Minister would be in breach of the code of conduct if he or she supported a petition of concern, given that it went against Executive policy, so it encourages a sense of collective Executive responsibility—they cannot then go and grandstand on behalf of their party, which is a good thing—and the fact that a POC cannot be used at the second stage of a Bill, which is simply a discussion of general principles in the Assembly. All those things contained in the Bill are very laudable

Daniel Holder: From our perspective, the Bill represents significant progress in relation to the petition of concern. I reiterate the gap that I mentioned earlier, however: it does not appear to deal with codifying in primary legislation and ensuring that the Standing Orders will follow the procedure that was intended under the agreement for the special procedure committee being set up. Also, there is the broader risk that the problems associated with the petition of concern will simply be displaced elsewhere into, for example, the St Andrews veto.

Just to pick up on the caretaker Administration when the First Ministers are not in place, again, there is a significant risk of a legal lacuna and that Ministers will not be able to take any decisions that are significant, which, as Professor Tonge has said, could be practically anything, or indeed any decisions that are controversial, which is anything that anyone wants to make politically contentious. That could be particularly problematic where Ministers have to take steps to deal with legal obligations or human rights obligations, for example, but will be unable to do so, as those decisions would have to be deferred to the full Executive committee that essentially does not exist.

A further problem we have identified is that there are certain duties that were core elements of the peace agreement, such as the adoption, further to the legislation passed at St Andrews, of an anti-poverty strategy on the basis of objective need to deal with the patterns of deprivation that, in the past and present, have quite often fuelled conflict. That particular decision, and the strategies legislated for at the time of St Andrews to progress both the Irish language and Ulster Scots, are legal obligations on the full Northern Ireland Executive. Again, those obligations would go into limbo in the caretaker period where you have no Executive able to adopt them.

We welcome the provisions in the Bill that would strengthen the ministerial code. We would concur with Professor Tonge's concerns, however, about the ambiguity in the term, "good community relations", which is open to interpretation. In particular, it has been used in the past as a veto on, for example, new housing developments, on the grounds that the other community to that which has hitherto been dominant in that area may live in the house, and that is therefore not conducive to good community relations, which offends against the right to housing that should have been in place under the various peace agreements.

On the ministerial code and enforcement, it is worth noting that the private Member's Bill of Jim Allister MLA, led to provisions whereby the Assembly standards commissioner now can deal with breaches of the ministerial code. I should declare an interest, in the sense that my organisation, along with another one, has already issued one such complaint that is under investigation, so it would not be appropriate to go into the details.

We have identified a potential ambiguity that may be of relevance to the Committee to the extent that the new provisions on enforceability just concern the code of conduct, not whether they also cover the pledge of office and broader provisions of the ministerial code. Our view certainly is, given the reference to the broader ministerial code in the code of conduct itself, that there should be a degree of enforceability of broader provisions. Others may take a different view, and that is possibly something worth exploring further.

James Sunderland: Thank you.

Q18 Gavin Robinson (Belfast East) (DUP): Good morning. Mr Holder, will you reflect on your repetition that these provisions will bring us back to what was intended on the petition of concern? You have tried to contextualise what you believe was intended, but may I ask you to provide us with your authority for what the Belfast agreement says on the intended purpose of the petition of concern?

Daniel Holder: Certainly. We have done a number of papers on this, which we have fed into the negotiations that led to the re-establishment of it. In summary, we think that what is in the Belfast agreement as the petition of concern was set up as a safeguard to ensure that all sections of the community are protected and can participate in the institutions. That was linked expressly to conformity with equality requirements, specifically, as I have said a number of times, the ECHR and the Northern Ireland Bill of Rights. The provision for cross-community voting was also linked to that.

The Good Friday agreement provides for a special procedure committee, which would be a committee with full powers. It would be established to examine and report on whether a measure or proposal was in conformity with equality requirements, including the ECHR and the Bill of Rights. That committee must be convened when a petition of concern is tabled, unless there is a cross-community vote to the contrary.

In our view, it is very clear that that was the original intention of the Belfast agreement. I do not think that the custom and practice of it not operating properly through this time is sufficient to suggest that that should be viewed differently. Essentially, the original intention of the agreement has been departed from. It is now, but was not supposed to be, essentially, a subjective political veto; it was supposed to be tied to more objective criteria.

We always go back to the fact that—plus sometimes the difference of views—you cannot just make up human rights, ECHR rights or the rights in the Bill of Rights. They would largely reflect the existing human rights commitments of the UK, albeit not in an enforceable format without the Bill of Rights. Therefore, you bring in a level of objectivity, with the same function that the Joint Committee on Human Rights would have, in that the special procedure committee may seek advice from the Human Rights and the Equality Commissions that were established under the Belfast agreement as to whether a measure or particular piece of legislation offends those standards.

Of course, there is a weakness, that a party or parties could just ignore the expert advice and the determination as to whether a particular measure breaches those equality standards and vote to the contrary anyway. However, the original intention was very much to make that linkage. It is expressly on the face of the agreement.

Q19 Gavin Robinson: Although expressly on the face of the agreement, it states that a special agreement may be established, but there is no requirement—it was not mandated to be so. Do you accept that?

Daniel Holder: If you read paragraph 13 of strand 1 of the Good Friday agreement it says that, when a petition of concern is tabled,

"the Assembly shall vote to determine whether a measure may proceed without reference to this special procedure. If this fails to achieve support on a cross-community basis...the special procedure shall be followed."

The agreement expressly says that the special procedure committee must be established each time a petition of concern is tabled, unless there is a cross-community vote to the contrary.

Q20 Gavin Robinson: But, of course, we all know in Northern Ireland the good phrase, "cherry picking", and you cannot outline the provisions of paragraph 13 without considering those of paragraph 11, which start:

"The Assembly may appoint a special Committee".

Is that correct?

Daniel Holder: I am fortunate to have the relevant paragraphs in front of me; yes, but—

Gavin Robinson: You can take my word for it, Mr Holder. I will move on.

Daniel Holder: No, I do have the relevant paragraph in front of me but, Mr Robinson, that is referring to other occasions when the Assembly may establish this particular committee. For example, the special committee on equality requirements can be established for another reason. There is one example of its ever being established, for the Welfare Reform Bill. That was on the basis of a petition of concern, from a referral from the Bill Committee dealing with welfare reform. The Assembly can establish this Committee for other reasons, and you are right to point to that being permissive. However, it is not permissive when a petition of concern is tabled; it is mandatory, unless there is a cross-community vote to the contrary.

The Chair: I have two Members indicating that they wish to ask questions, and there are nine minutes left, so I will move on.

Gavin Robinson: Do you mind, Mr Stringer, if I ask one question of Professor Tonge?

The Chair: If there is time at the end, but I want to see if we can get everybody in.

Q21 Stephen Farry (North Down) (Alliance): Good morning, and it is a pleasure to serve under your chairmanship, Mr Stringer. As a strong advocate for reform of petitions of concern, I slightly wanted to play devil's advocate in this scrutiny process on the Bill. Do both witnesses feel that the measures are in some ways too cumbersome, given the potential 16-day window in some circumstances between a petition being tabled and an actual vote? How will that work, particularly in things such as the Committee stage of a piece of legislation? Will that become a straitjacket for the Assembly? Are there alternative ways in which the same outcomes around petitions of concern could be achieved, rather than what is in the Bill? Is there a risk of parties somehow gaming the system by doing multiple petitions of concern on more or less the same item, time after time, which further delays reforms going through?

Professor Tonge: Briefly on that, the obvious solution to your last point would be to restrict the number of times any particular party can table a petition of concern. As I say, I do not think they will be key players anyway throughout the life of the next Assembly, or any Assemblies thereafter, because they have had their day. The obvious solution is simply to limit the number of times a POC can be played. There has been talk of limiting petitions of concern to certain types of legislation—I do not think that is a runner because it would very hard to define. However, why not only allow a party one or two opportunities to table a petition of concern during the lifetime of an Assembly? That would be a logical solution, so that only in extremis could any party play the veto card.

Daniel Holder: I think the risk of gaming the system is there, given what we have heard to date, and it would be helpful if that was constrained to an extent. At the same time, the time available will be helpful to allow the special procedure committee to sit and scrutinise a measure at that stage. Yes, certainly we would encourage a discussion on the broader reform of the provisions, including the designation provisions that have become a very crude instrument. Although they are termed as cross-community voting, they are of course not linked to any indicator of community background as such, but to Unionist or nationalist traditional political affiliation.

Stephen Farry: And the petitioners have the option of simply reconfirming—

The Chair: Sorry, Mr Farry. We are really running out of time. I am going to move to Colum Eastwood, so that every Member who has indicated that they wish to ask a question will have had the opportunity to do so.

Q22 Colum Eastwood (Foyle) (SDLP): Thank you, Mr Stringer. I thank the two witnesses. It is always difficult to pinpoint exactly why or how the Assembly collapsed on any of the times that it did. It is arguable, though, that a factor was the lack of progress and the inability of the Executive or Assembly to get things done because of the three vetoes that particularly Daniel has outlined, whether it is a petition of concern, the St Andrews veto, as you call it—it is well named—or the veto in terms of what goes on the Executive agenda.

We have another storm brewing around Irish language legislation, because whilst the Government here have said that they will introduce the legislation, that legislation is quite clear that some of its provisions will need to be implemented by the First Minister and the Deputy First Minister jointly. Do you see this as another potential crisis point in the process for the Executive and the Assembly, given the fact that it has already been touted as a potential bargaining chip to deal with some other issues?

Professor Tonge: Yes, I do see that as a problem, because the Ulster Scots/Ulster British commissioner and the Irish language commissioner have to be joint Office of the First Minister and Deputy First Minister appointments. One obvious stalling tactic would be disagreement, potentially from opponents of either, but more obviously from opponents of Irish language provision, to the appointment of an Irish language commissioner. An objection to the appointment of an Irish language commissioner could arise.

At the moment, there is not provision for the Secretary of State to intervene to make those appointments. I have already written that I can see a scenario in which legislation has to be passed again, assuming that the provisions of New Decade, New Approach on Irish language are formally accepted. I suspect that if the Secretary of State has to legislate for this come the autumn, the legislation would have to be amended to include the appointments, if necessary, of those two commissioners. Otherwise, there will be another Assembly impasse down the track.

Daniel Holder: My short answer is also yes, but it goes well beyond the issue of the appointment of the two commissioners. The Irish language commissioner, as envisaged by NDNA, draws on the Welsh model of a commissioner who produces language standards that are then, in the Welsh model, binding on public authorities. In the NDNA model, public authorities have to pay due regard to them, which is a weaker formulation. However, the language standards produced by the commissioner are subject to approval by the First Minister and the Deputy First Minister. Therefore, you again have the ongoing risk that they will simply be vetoed and not put into place, which will bring us straight back to the problem that we are trying to get past.

Certainly one particular area of focus could be looking at alternatives, such as whether the commissioner can approve their own standards, or whether they could be referred to Foras na Gaeilge, the body set up under the North South Ministerial Council language body under the agreement, to instead approve and formally incorporate those standards. Otherwise, yes, we could end up having commissioners appointed, including the Ulster Scots commissioner, who is set up in a different format.

Unfortunately, sometimes provisions for Ulster Scots are designed more around being a counterweight to Irish rather than thinking through what is actually needed to safeguard and preserve Ulster Scots linguistically. That in itself is a problem. That particular commissioner—rightly, because it would not be the right model—will not produce language standards. So, that concern over veto would not necessarily apply to that commissioner once appointed, but certainly in terms of the Irish language commissioner there is potential for, essentially, ministerial interference in the daily work of the commissioner, unless the legislation is amended.

The Chair: Thank you. We have a matter of seconds left of the time allocated. So, may I take this opportunity, on behalf of the Committee, to thank the witnesses for the very valuable contributions that you have made?

Examination of Witness

Lilah Howson-Smith gave evidence.

10.30 am

Q23 The Chair: We will now hear oral evidence from Lilah Howson-Smith, a former special adviser at the Northern Ireland Office. For this session, we have until 11.25 am.

Could you introduce yourself, please?

Lilah Howson-Smith: Hi. Good morning. My name is Lilah Howson-Smith. I was a special adviser in the Northern Ireland Office under Julian Smith, when he was Northern Ireland Secretary.

The Chair: I will go to the Minister to ask the first questions.

Q24 Mr Walker: Thank you, Mr Stringer, and it is good to see you again, Lilah. You were working as a special adviser to the Secretary of State for Northern Ireland during the period when the Executive was not functioning, from 2019 to 2020. Can you give us your views on the real-life impact that that situation had on Northern Ireland's citizens, and the importance of putting in place some mechanisms to make sure that it does not happen again?

Lilah Howson-Smith: Sure. I think that the most obvious impact was on public services delivery. You obviously had a situation where the civil service could authorise certain decisions, up to quite a low threshold, and authorise certain amounts of spending, but you basically had a situation where no new policy or structures could be pursued.

The way in which that impacted public services was basically most explicitly on the health service, with incredibly long waiting lists, but the impact also extended into education. We visited a number of schools, both at primary and secondary level, where there was just a sense of overall stasis. I think there was also a kind of frustration more widely about infrastructure issues, even extending to Belfast City Council, who we spoke to; they talked about issues around sewage that just had not been dealt with, because of the absence of Ministers.

So, I think it affected all aspects of life. It was very much the first thing that came up in all our meetings with civil society, business and border organisations throughout our time in Northern Ireland, before power sharing was restored.

Q25 Mr Walker: On Second Reading, Julian Smith stated that the Bill provides for a number of important and practical measures. What do you think are the practical benefits of this legislation?

Lilah Howson-Smith: Particularly with regard to the measures around elections and the sustainability measures, as they were characterised in the original agreement, I think they give the Executive and Ministers space and time to resolve various issues around power sharing, in advance of any need to bring forward an election.

As it is, at the current moment in time there is very little capacity for Ministers to work through even quite basic issues, in terms of policy programmes, in advance of an obligation falling on the Secretary of State to bring forward an election. So, I think the intention was specifically to give greater space and time for them to resolve those policy issues and personnel issues, to build some relationships in advance of an immediate decision by the Secretary of State to hold an election.

I also think that the measures around the petition of concern were specifically about building greater trust between the parties, in terms of the mechanics of policy making, as some of the other witnesses have spoken about. There was obviously a sense in which the petition of concern had been used as a veto or blocking measure by particular parties. While the new measures are maybe not as extensive as some of the parties wanted during the negotiations, the intention clearly is that the petition of concern once again becomes a measure of last resort, restored to its original purpose as it was conceived in the Good Friday agreement, rather than being a kind of blocking mechanism on moral or social issues, or even party political issues, such as welfare.

Q26 Mr Walker: You just referred to the negotiations; obviously, they were pretty intense and, as you say, some of the parties pushed for things that they did not necessarily get. Was the issue of the border executive vetoes and other issues discussed in those negotiations? Did you have a clear view as to whether it would be acceptable to the parties to change that?

Lilah Howson-Smith: Of the measures introduced as part of the Bill, the petition of concern measures were the most discussed in the talks. I do not think they were necessarily controversial, but there was a disagreement or divergence of views between the parties on how far they wanted to go on that. It was not necessarily about any single party having a strong view on how they conceived the petition of concern being used in future, but there was a broader acknowledgment that the petition of concern had been used too much in the past, there was a need to reduce its use and therefore a need to signal that as part of the agreement.

Where the agreement landed and where the Bill is representative of that agreement is roughly where there was the most agreement between the parties, in that it could not be used on Second Reading votes and on standards motions, and that there is now a 14-day cooling-off period. That was all about basically making parties and individual MLAs consider whether it was an appropriate use of the petition of concern and whether it was the best way to do policy making, in terms of building credibility and trust between the parties.

Q27 Mr Walker: The Government have been criticised by the Opposition for treating Northern Ireland as an afterthought. Would you agree with that claim? Does it reflect your experience in Government?

Lilah Howson-Smith: Not at all. Definitely Julian and I worked alongside all the officials in the Northern Ireland Office—worked extremely hard to restore the institutions. I frequently reflect that, in the absence of an Executive, the covid pandemic and the public health crisis that has happened since is unthinkable. It is really difficult to think how the civil service in Northern Ireland would have been able to handle that with the limited powers it had at that time. That is not a reflection on their abilities, but the absence of ministerial decision making would have made it unthinkable. The fact that those institutions were restored in advance of the covid pandemic represents the fact that the Government took that extremely seriously, and that went right up to the Prime Minister.

Q28 Mr Walker: Finally, as I want to give Members the opportunity to ask questions, you previously worked in the Chief Whip's Office before coming to the Northern Ireland Office. What do you think are the benefits to introducing this legislation on non-emergency timings? Can you recall when we last had non-emergency legislation for Northern Ireland?

Lilah Howson-Smith: It is exactly the point that you make in your question. We have had to rush bits of Northern Ireland-related legislation through, in part

because of the absence of power sharing. You have the Executive formation legislation, which was always done on an incredibly tight timescale. I think rightly, some of the Northern Ireland parties objected to that, on the basis that perhaps there was not adequate scrutiny. More recent bits of legislation around victims' payments and abortion, which we were involved in implementing, were also incredible difficult to implement because there was not broad consensus or buy-in from the other parties through a longer-term legislative process.

There is definitely an advantage to taking this bit of legislation through in slightly slower time, so that we can have discussions like this where we are able to discuss where things are missing or not clear, or can be clarified through implementation.

Q29 Alex Davies-Jones: Lilah, from your experience of the negotiations, was it envisaged that there would be ambiguity on what constituted sufficient cross-community representation in a caretaker Executive?

Lilah Howson-Smith: I understand that perhaps there is not total clarity about what that means. I think the point was that it was supposed to be agreed by the Executive once the legislation was taken forward by Westminster. The fact that the legislation is being taken forward by Westminster reflects the fact that amendments have to be made to the Northern Ireland Act 1998 and that this part falls within a reserved area, rather than the fact that there will not be an active process, I assume, with the Executive to discuss what this means in reality. I think there was tacit or implicit agreement between all the parties that there would clearly need to be clarity around that, and that there would be checks and balances on the fact that Ministers obviously would not be able to take decisions in a caretaker capacity that went beyond the normal remit of perhaps the types of decision that might be taken during a purdah period.

Q30 Alex Davies-Jones: Are you concerned that the scope of powers is not clearly defined, allowing for an Executive, for example, to limp on without broad cross-community support but still be able to make significant decisions?

Howson-Smith: The intention was never that they would be able to make—yes, it depends how you define significant decisions, but the intention was always that there would be sufficient checks either within the Executive or by the Secretary of State that would mean that there was not the kind of significant decisions that would have broader implications for the cross-community nature of those decisions. I am concerned that you have characterised it as limping on. I take your point, but the reality is that it was supposed to just provide that bit of additional flexibility to the Ministers and in forming the Executive, where those decisions have been difficult to make or have not happened because the time periods are so short and perhaps it was not in everyone's political interest to form an Executive within that short period of time. So yes, obviously, there is a flip side to that, but clearly there is also opportunity to avoid the type of situation that we fell into in 2017, where an Executive just is not formed for a long period of time because there is an election and then there has to be a series of talks processes to get the Executive and the Assembly back up and running.

Q31 Alex Davies-Jones: Is there anything, from your experience, that did not make the cut in NDNA that you think would have been valuable in terms of the sustainability of the Executive?

Howson-Smith: In terms of the petition of concern, I do have some worries that perhaps we did not necessarily go far enough in ensuring that, for example, petitions of concern are not tabled on Bills that are allowing the Northern Ireland Executive to take border legislation that is compliant with human rights. For example, petitions of concern were previously used—or were likely to be used—on issues around abortion and that was a concern for me, that perhaps those measures did not give adequate protection. On that specific issue, Westminster is taking forward legislation and we are now in a process of implementation. However, there were some suggestions about potentially having more oversight from human rights bodies in that petition of concern process. I do not think that that necessarily would have been a bad thing. I think that would be quite valuable, given the previous types of things the petition of concern has been used for. However, I hopefully think that the changes that are in there will make parties and MLAs think twice about using petitions of concern in that way again.

Q32 Alex Davies-Jones: Finally, as I also want to give other Members the opportunity to ask questions, what statutory provisions currently exist to prevent the misuse of powers available to caretaker Ministers?

Howson-Smith: As far as I understand it, there are no statutory limitations.

The Chair: If there are no further questions from Members, I thank the witness for that interesting and valuable contribution.

Ordered, That further consideration be now adjourned. —(*Scott Mann.*)

10.44 am

Adjourned till this day at Two o'clock.