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GENERAL COMMITTEES

Public Bill Committee

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

Second Sitting

Tuesday 29 June 2021

(Afternoon)

CONTENTS

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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

Sir Jonathan Stephens, Former Permanent Secretary at the Northern Ireland Office

Emma Little-Pengelly, Former DUP MP and former Northern Ireland Special Adviser

Mark Durkan, Former SDLP MP and Good Friday Agreement Negotiator

Alex Maskey, Speaker, Northern Ireland Assembly

Lesley Hogg, Clerk , Northern Ireland Assembly

Dr Gareth McGrath, Director of Parliamentary Services, Northern Ireland Assembly

Public Bill Committee

Tuesday 29 June 2021

(Afternoon)

[Sir David Amess *in the Chair*]

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

2 pm

The Committee deliberated in private.

Examination of Witness

Sir Jonathan Stephens gave evidence.

2.2 pm

The Chair: We will now hear from Sir Jonathan Stephens, former permanent secretary at the Northern Ireland Office. Colleagues, we have until 2.30 pm. Sir Jonathan, I described you, but briefly please say something about yourself.

Sir Jonathan Stephens: Certainly. I am Jonathan Stephens. I was permanent secretary of the Northern Ireland Office from 2014 until February 2020, having previously worked in the Northern Ireland Office over a number of years from the mid-1980s.

The Chair: Thank you. Colleagues, it is over to you to start the questioning.

Q33 The Minister of State, Northern Ireland Office (Mr Robin Walker): Sir Jonathan, it is very good to see you again. You were permanent secretary from 2014 to 2020, as we have heard, and that means you were at the heart of the Northern Ireland Office both before and during the period of the collapse of the Executive. In your view, how was the Northern Ireland civil service most hindered by the lack of ministerial accountability when the Executive was not functioning?

Sir Jonathan Stephens: Fundamentally, there were no Ministers available to give direction and take critical decisions. The Northern Ireland civil service was left in a wholly unprecedented situation, which I know from talking to many of them they found intensely challenging and was not at all what they sought. Civil servants are trained to work for and support the Government of the day and Ministers and provide their advice to Ministers, who take decisions that civil servants then implement. Our colleagues in the Northern Ireland civil service were left trying to maintain the machinery of Government and trying to provide public services in the absence of ministerial decisions, and they found that increasingly uncomfortable as time went on.

Q34 Mr Walker: How far do you feel this Bill goes to safeguard Executive stability and provide the civil service with the accountability mechanisms they require? Given some of the discussions we have had to date, both in the case of encouraging the Executive to stay together and to stay in place, but also in the case where you might have a First and Deputy First Minister step down and caretaker Ministers, as they have been described, remaining in place, how far do you feel the Bill creates the clarity needed for them to be able to carry out their role?

Sir Jonathan Stephens: I think it does a number of important things. First, it fills in what you might think of as a number of loopholes in the original design of the Northern Ireland Act 1998, which simply did not contemplate the sort of situation in which we found ourselves in 2016.

Secondly, and perhaps most importantly, it provides time and space for the Executive or for party leaders to resolve fundamental differences, if and when they arise. As you will know, the previous scheme provided only for periods of either seven or 14 days for the formation of the Executive and the appointment of the First Minister and the Deputy First Minister. We went through those early deadlines very quickly indeed in 2016. We were left in the unprecedented situation of having no means of restoring the Executive without fresh legislation at Westminster.

It is important to say that these changes provide a number of mechanisms that will help in the resolution of fundamental differences, if they arise again. They provide greater assurance for continuity of decision making, but, of course, nothing is perfect. I have always thought that if there is absolute determination to bring about the collapse of the institutions, or such a deep and fundamental breakdown in trust between the parties that they cannot be restored, then no amount of clever constitutional provisions will get over such a fundamental breakdown.

Q35 Colum Eastwood (Foyle) (SDLP): It is a pleasure to serve under your chairmanship, Sir David. It is good to see you, Jonathan. I spent many long hours over that three-year period in your company, and thankfully we got there in the end.

Do you think it is fair to say that the New Decade, New Approach agreement was largely imposed by the two Governments at a very opportune moment in the political process? The three largest parties had had a difficult election. We had a nurses' strike and then the two Governments struck, and got Stormont back up and running again. That goes to the heart of your point that if we do not have political parties willing to work the system and work together, no clever constitutional construct can stop them collapsing it. Do you think there is more that we could have done as part of those discussions? I am particularly thinking about the way in which the First Minister and the Deputy First Minister are appointed.

Sir Jonathan Stephens: I would not use the word "imposed" because, at the end of the day, it was the decision of all the main parties in Northern Ireland to re-form the Executive. Yes, it was on the basis of the proposals put forward in New Decade, New Approach, but each party was free to take its own decision on that. From my point of view, when the document was published there was no certainty as to how parties would react and whether it would provide a basis for forming the Executive. We very much hoped so, but there was no certainty.

It reflected extensive discussions, of which a number of people on the Committee will have close memories, over many years, but most recently over the period of months from the calling together of the most recent session of talks, following the tragic murder of Lyra McKee. Again, there was very strong input from the parties. Although the proposals were the proposals from the

Governments, they reflected very considerably the input of the parties. They were our best judgment as to where agreement lay.

On the First and Deputy First Ministers, I am conscious that parties have a number of different views on that. There are a number of parties that think that the original arrangement under the Good Friday agreement for the election of the First and Deputy First Ministers on the basis of cross-community consent should not have been changed after the St Andrews agreement. Other parties who were critical of the St Andrews agreement formed and participated in devolved government on the basis of that.

The Good Friday agreement was now more than 20 years ago. It was designed with one situation and set of scenarios in mind. As ever, the world moves on and change comes. It is coming in Northern Ireland, and there will come a time when it will be right to look at some of the fundamental arrangements within that agreement and consider whether they still best serve the people of Northern Ireland and adequately reflect the current situation in Northern Ireland. However, that would be quite a major task to undertake, with possible renegotiation of key aspects of the agreement. It is not a task that, personally, I think is quite right for now.

Q36 Stephen Farry (North Down) (Alliance): It is a pleasure to serve under your chairmanship, Sir David. A very warm welcome to you, Sir Jonathan. I will largely pick up on your answer to the questions posed by Colum Eastwood. You are one of the very rare officials with long experience of Northern Ireland over several different stints in office, so you have that wider perspective. You indicated that there might be a need to revise the rules around the institutions at some stage. Do you feel there is a danger of the Northern Ireland Office almost operating on a reactive basis after a problem has actually arisen and then trying to patch it up, amend it and move on for a few more years before going back to the next crisis? Is there not an argument for trying to be a little bit more proactive and anticipate where pressure points are likely to emerge, to assess how society is changing and to act accordingly? In that regard, should we look at some of the rules around the election of the First Minister and Deputy First Minister, particularly in the light of the democratic change that we are seeing in society?

Sir Jonathan Stephens: In a sense, I agree with you, Mr Farry. I was indicating earlier that there had been significant change in Northern Ireland. At the time of the Good Friday agreement, the assumption was that there was a Unionist majority community, a substantial nationalist minority community and a relatively small but steady component who did not identify with the others. Since then, the situation has changed. It is more like two substantial minorities with a much larger, more significant and growing number of people who choose not to identify with either.

Over time, I think that will mean that a number of the arrangements need to be looked at again and examined. I am just conscious, having participated in a number of those discussions over the years, that that is not an easy task. It takes up a huge amount of political energy. Yes, there is a lot to be said for anticipating, rather than reacting to, crises, but Governments across the world, not least in Northern Ireland, have a number of crises right now to respond to. I simply suggest that right now does not seem to me to be a good time to undertake that significant and mammoth task, but I would be surprised if at some point in the next 10 years it is not on the agenda.

Q37 Gavin Robinson (Belfast East) (DUP): Good afternoon, Jonathan. I will reflect on the question from the hon. Member for North Down. Of course, the Assembly and Executive Review Committee is the sort of place where you would ordinarily think these discussions at the moment should occur. Going to the NIO and expecting the Government to sort these issues out should be the last resort; it should be something that is foreseen and considered among parties.

I do not know whether you had the opportunity to hear the evidence session this morning. Some questions were raised about the lack of detail in the Bill as to what safeguards are in place if Ministers are in position and there is a difficulty in forming an Executive. You will know that the discussions during the negotiations focused on safeguards for issues that are significant, cross-cutting and controversial, which would ordinarily therefore go to the Executive, but with no Executive sitting, those decisions could not be made. It appears in one sense that there needs to be further detail in the Bill on what the pitfalls might be. One aspect that did not come out in the evidence this morning was the fact that Ministers normally operate after having gone through a process of reaching consensus on a programme for government. Any Minister without an Executive could therefore continue to bring forward decisions on that basis, and perhaps juxtapose that with an inability for Ministers to act and the difficulty that the Northern Ireland civil service found itself in during that three-year hiatus.

Sir Jonathan Stephens: The fundamental position is that the Bill essentially provides for a form of caretaker Administration in the absence of the formation of a full Executive. Without an Executive Committee or an Executive meeting—there cannot be an Executive without a First and Deputy First Minister—as you say, Mr Robinson, decisions cannot be taken on issues that are cross-cutting, significant or controversial. That in itself will be a significant constraint. During the absence of Ministers, cases were brought before the courts arguing that decisions had been reached without the required authority, and the courts policed that quite robustly. No doubt they will police these provisions equally robustly.

Although there might not be an Executive Committee meeting in place, there is likely to be agreement on a programme for government, even if it was of the previous Administration. That will provide an overview, as it were, of the direction of the Government under which a caretaker Administration would be able to continue to operate. I think there are protections in place, but I continue to come back to the point that no system is perfect, and there should be no doubt that the absence of a properly functioning Executive for the periods of time that could be possible under the Bill would itself have serious consequences, but at least we would not be in a situation where there was no direction and no decision making at all.

Q38 Alex Davies-Jones (Pontypridd) (Lab): It is a pleasure to serve under your chairmanship, Sir David. Sir Jonathan, thank you for joining us this afternoon. Given your experience from the negotiations, are you

[Alex Davies-Jones]

concerned that the scope of powers is not clearly defined in the Bill and an Executive could essentially limp on without any broad cross-community support, but still would be able to make significant decisions?

Sir Jonathan Stephens: I think that is where the provisions in the Bill for the Secretary of State to call an election in the event that he judges that there is no longer broad cross-community support are critical. That underpins the whole basis of government in the Good Friday agreement, which is that Government should have broad cross-community support. If one ended up in a situation in which there were Ministers of only one party, that would be very unlikely indeed to command broad cross-community support, and you would expect the Secretary of State to step in. I think there are protections against that.

I have also identified the fact that if there is no Executive Committee meeting, because there is no First or Deputy First Minister, the ability of Ministers to take significant, controversial or cross-cutting decisions is heavily constrained. They cannot take such decisions, and the courts have already demonstrated their readiness to step in if they think that that boundary has been crossed. So this sets up a mechanism in which this is a caretaker Administration keeping the business of government and public services going, but unable to take it in new, strategic directions. So I think there are protections in place.

Q39 Alex Davies-Jones: On that point, Sir Jonathan, the Bill provides for up to 24 weeks for the appointment of new Ministers before the obligation to call an Assembly election is triggered. What assessment do you make of the potential effectiveness of those time provisions?

Sir Jonathan Stephens: I think they are likely to be more effective than the existing provisions, which are seven days or 14 days respectively. As I indicated, where a fundamental disagreement arose, that was almost inadequate time even to get discussions going. Once that deadline was busted, there was nothing to fall back on. Of course, you may encounter a disagreement that is so fundamental that whatever amount of time you provide for it is inadequate, but the negotiations on the Stormont House agreement and the fresh start agreement both lasted roughly 12 to 16 weeks. I think that sort of period of time provides a reasonable window in which to seek to resolve fundamental disagreements, but at the end of the day it depends upon a willingness among the parties to get together to discuss, seek to understand and resolve those differences. More time helps, but it is not the complete answer

Q40 Alex Davies-Jones: Finally, what statutory provisions exist that you are aware of to prevent the misuse of the powers available to caretaker Ministers?

Sir Jonathan Stephens: The fundamental protection is the absence of an Executive if there is not a First Minister or a Deputy First Minister, meaning that significant, controversial, cross-cutting decisions cannot be taken by Ministers, as well as the readiness, as demonstrated already, of the courts to step in and rule that decisions are ultra vires—not valid—if they break that boundary.

The Chair: If there are no other questions from colleagues, let me bring the Minister in again.

Q41 Mr Walker: Thank you very much, Sir David, for your chairmanship. Sir Jonathan, you were permanent secretary at a time when, because of the political situation and the absence of an Executive, serious thought had to be given to the possibility of direct rule. Do you agree that we are in a much better situation to be legislating for a deal, rather than agreeing and implementing policy directly for Northern Ireland, and could you expand for the Committee on some of the risks and challenges that we would have faced had we not been able to get the NDNA deal in place?

Sir Jonathan Stephens: Without the deal in place, although of course at the time we had no awareness that covid was just around the corner, it is absolutely inconceivable that Northern Ireland civil servants without ministerial direction could have responded to the covid crisis. I think it would have driven direct rule inevitably. Much of my career in the Northern Ireland Office has been about trying to find the basis on which devolution can be restored and leaders from within Northern Ireland can take decisions for Northern Ireland. I believe that that is a far better system of government for Northern Ireland, allowing Northern Ireland's unique interests and concerns to be reflected by its own politicians and leaders.

Of course, over many years in the Northern Ireland Office I experienced direct rule, and direct rule Ministers from Westminster made the best of trying to take decisions for Northern Ireland, but I know they felt deeply uncomfortable at times taking decisions for a part of the UK from which they were not elected and where they did not reflect the local community. I do not think that I ever saw a Minister who did not believe that local politicians should be taking decisions for local matters in Northern Ireland.

The concern always was that, once direct rule were reinstituted, if it ever were, it would be enormously difficult and time-consuming to restore agreed institutions again. That would mean that there were real questions about the nature of Northern Ireland, how its society was reflected in its Government, and I think that would also be very bad for Northern Ireland. Although we did not know it at the time, it was incredibly fortunate timing that the agreement was reached just in time before covid hit, and meant that Northern Ireland was trying to respond to that crisis but with its own leaders and politicians, conscious of its own challenges and unique characteristics.

The Chair: Sir Jonathan, were there any final remarks you wanted to make before we finish your evidence session and wish everyone well?

Sir Jonathan Stephens: No, thank you.

The Chair: Thank you for our time; we are very grateful and it will help with our later deliberations. There will now be a 30-second break while we test the sound.

2.26 pm

The Committee deliberated in private.

Examination of witness

Emma Little-Pengelly gave evidence.

2.21 pm

The Chair: Good afternoon, Emma, and welcome. Would you kindly introduce yourself to the Committee?

Emma Little-Pengelly: I am Emma Little-Pengelly. I have recently been a special adviser to the First Minister, but I am a barrister by training. I have been special adviser to various First Ministers since 2007, although I stepped out of that to be a public representative and Member of Parliament for a few years.

The Chair: Colleagues, we have scheduled 45 minutes for this session. Who would like to ask the first question?

Q42 Gavin Robinson: Good afternoon, Emma. Members will know you well from your time here, but those of us from Northern Ireland will know that you have been integrally involved in numerous iterations and negotiations over the years.

You know the Bill before us. Would you mind giving us your reflection on its provisions, the rationale for them as you see them, and whether you feel there are elements that have not been achieved or are worthy of consideration by the Committee?

Emma Little-Pengelly: My experience of the existing provisions comes from a more practical point of view, as well as the theoretical and legal aspects of the Belfast/ Good Friday agreement and the Northern Ireland Act 1998. I had come in initially as a shadow special adviser to help prepare for the restoration of institutions back in 2007. That included working very closely with the drafters office and with machinery of Government elements within the Executive and the Departments in order to look at things such as the ministerial code, how the Executive should operate, and the guidance for Ministers and Departments in relation to what matters needed to come to the Executive. Also, it included issues such as the nomination of Ministers and the First and Deputy First Minister.

Over that period of time, from 2007, obviously we have had a number of significant issues and challenges. Very often they led to periods of negotiation. Much of those negotiations took place within the context of trying to talk about the technical details of the process in which we try to operate in Northern Ireland. It is a very challenging and difficult system to operate. It is a system where, at the very heart, arising from the Belfast/ Good Friday agreement, the key principle is consensus and inclusion. That is a very slow and difficult process for trying to come to decisions.

The key element to remember is that in Northern Ireland we do not have—and have never had for some considerable time since the Belfast agreement—a majoritarian system of government. Therefore, that principle is very much cooked into every part of the process, from the nomination of First and Deputy First Minister and what they can do, singly or acting jointly, to the way the Ministers operate in relation to the Executive. All of that is based on a process of consensus and a process of agreement. That of course means that at times we cannot get agreement, and that has been very, very difficult. Nevertheless, that is the system that we have had. It is the system that we have operated right up until very recently.

In more recent years, there has been a drive to change some of the elements of the Belfast/Good Friday agreement —in particular, around the concept of cross-community voting and consensus, and particularly around the safeguard mechanism of the petition of concern. When you look at the petition of concern, it is important to take a look, carefully, at the Belfast/Good Friday agreement. I listened to the evidence very carefully today. I strongly disagree with what was put across, for example, this morning by Daniel from the Committee on the Administration of Justice, in relation to the original intent of the petition of concern mechanism. I think that the proposal that this was supposed to be a very narrow issue, as opposed to it applying to all key issues, simply does not hold up to scrutiny.

I would ask everybody to take a look back at the Belfast/Good Friday agreement. The petition of concern is set out in the section referred to as Safeguards, and the Safeguards section that refers to the cross-community voting is entirely separate from the safeguard that sets out the ECHR and the equality protections. The cross-community component of that is set out in 5(d), under strand 1, and yet the ECHR and the equality severable obligations are set out in 5(c) of strand 1 of the Belfast agreement. Those are not conditional on each other; they are entirely separate. It was clear from the Belfast agreement and then the Northern Ireland Act 1998 that the cross-community consensus was to apply to all key decisions.

This is not just in terms of the basic reading of the Belfast/Good Friday agreement or the Northern Ireland Act. I think it is important also to look back at the *Hansard* for the passage of the Northern Ireland Bill in 1998 and the comments that were made about that Bill from all parties. I think the key thing here is that those commenting on that in the House of Commons were those who negotiated it. It was the Ulster Unionist party—David Trimble and others—along with the Social Democratic and Labour party representatives. It is very clear from reading the *Hansard* that no issues of concern were raised about the scope of the petition of concern and cross-community vote protections and safeguards as set down in the Safeguards section of the Belfast/Good Friday agreement.

Q43 Gavin Robinson: Thank you for that. To draw on some of the issues that were brought out this morning, there was a suggestion from Professor Tonge, for example, that the petition of concern could benefit from being amended so that you had support across the community designations, so that one community wishing to table a petition of concern would require support from another or the other designation, if I can put it that way. Do you have any reflections on that contribution or suggestion that was made this morning?

Emma Little-Pengelly: When you look back to the operation of the petition of concern—again, I referenced, in terms of the passage of the Northern Ireland Bill, as it then was, in 1998, the fact that no concerns were raised about the scope of those particular provisions. But likewise, when the Northern Ireland Assembly was established under the First Minister and Deputy First Minister leadership of the Ulster Unionist party and the SDLP, no concerns were raised at that time about the petition of concern. It was still difficult. When you look back at the history of the Northern Ireland Assembly and the various crises that we have faced, of course it is difficult, because the ultimate aim of those provisions, and the provisions across the Northern Ireland Act, arising from the agreement, is that they are all based on consensus building.

We have heard some reference about the petition of concern being used as a veto, but in reality it is used in a way that reflects the fact that there is not yet, or no, consensus on particular issues, and those are key issues, so where a petition of concern is used, it is an indication that an issue has been pushed forward without consensus. That is why, when you look at the new provisions proposed in this Bill—the idea, for example, of a 14-day cooling-off period for a petition of concern is, I think, very welcome. Gavin will know as well as I do that—look, the sustainability procedures and processes as part of the New Decade, New Approach negotiations were something that the Democratic Unionist party pushed very, very hard. We pushed because we could see that it does not benefit the people of Northern Ireland to be in a situation of perpetual crisis, particularly if those crises are manufactured by, for example, the tactical resignation of a First or Deputy First Minister. Ultimately, we do need stability, and stability within a very difficult process to operate. I think the 14-day period, now within this proposed Bill, will allow a period for people to get together to try to find a consensus way forward. That may be through amendment if it is legislation, or it may be by some further or different agreement. But at the very heart of this is the idea that because the institutions were set up to be very inclusive, from the very beginning there was a concern that significant minorities should not be forced to be part of either an Executive or Government in Northern Ireland where they were subject to continual majority decision making.

That applied right up until the point at which Unionism was no longer the majority. We have since seen concerted moves to try to remove that safeguard for significant minorities. The concern there is that yes, it is a difficult and frustrating system, but in Northern Ireland ultimately this will only work if you have that maximum consensus. As I understand from those who negotiated the Belfast agreement, and right through to those who negotiated the St Andrews agreement that modified and built on some of those protections, that at the heart of that is the idea that significant minorities should not be excluded, and that consensus decision making is the priority over a quick and simple majority system, which would exclude those people.

Q44 Gavin Robinson: Perhaps just one final question from me, Sir David, if you have a rake of colleagues now hoping to jump in. Questions have been raised around the lack of detail on safeguards for Ministers who find themselves remaining in position where the Executive is not fully functioning. Do you have any concerns about the provisions as drafted in the Bill, or do you feel that the safeguards from the St Andrews agreement around significant, cross-cutting and controversial decisions are sufficient in the circumstances?

Emma Little-Pengelly: I think that Northern Ireland have found themselves in this position on previous occasions, and in fairness, on those occasions all Ministers have respected that an Executive is not in place, and largely abided by and operated under the decisions previously agreed by it. I agree completely with what Sir Jonathan Stephens said on the safeguard of the courts, but as we know, the court process is long; it requires somebody to take a challenge and often ends up in Ministers taking legal challenges against Ministers.

I would have thought, though, that there is an additional safeguard in that Ministers in Northern Ireland are required to operate lawfully—they cannot step outside of that. If a Minister wanted to take a decision that was significant or controversial or cross-cutting, it is very clear from both the jurisprudence and the legal cases on this, and in terms of what was said at the time of the passing of the Northern Ireland (St Andrews Agreement) Act 2006, that a Minister has no power—there is no vires for a Minister to take a decision that ought to have come to the Executive under the terms of the St Andrews Act amendments. Therefore, a Minister could not take a decision on a significant, controversial or cross-cutting matter, unless that had already been agreed by the Executive.

In the situation that you have outlined, Gavin, there would be no way to form an Executive. Without the First Minister and Deputy First Minister, you cannot have an Executive meeting and therefore those decisions cannot be decided on because an individual Minister does not have the power or the vires to do that. Therefore, he would be operating ultra vires. I presume that the permanent secretary or the accounting officer of that Department would advise the Minister of that, and that the Minister could not proceed because that would be unlawful under those circumstances.

Q45 Colum Eastwood: Thanks for your evidence, Emma. You are absolutely right that the Democratic Unionist party pushed very hard for a lot of the provisions around sustainability during the negotiations, and some of us had some concerns about it, but I absolutely agree with you that there have to be some mechanisms for keeping the show on the road. Nobody should be threatening to pull down institutions. Of course, it was Sinn Féin that walked out the last time. Does that go as well for the DUP when it comes to issues like the protocol?

Secondly, you and I will disagree about the purpose of the petition of concern and when it should be used and so on. You have said, now that Unionism is no longer a majority, there are moves to take away safeguards like the petition of concern. What did you think, then, when Arlene Foster suggested removing it as a mechanism altogether during the negotiations?

Emma Little-Pengelly: First, to be fair to the Democratic Unionist party, I should make it clear that I am not here as a spokesperson for the DUP, so I cannot comment on the particular issues of the current situation. What I can say is that the DUP, along with many others, has, over the years since the Belfast/Good Friday agreement, pushed for a better form of government, as you will be aware, very much around trying to put better democracy in that and a better system that is not so slow or difficult to try to get agreement through.

There is a real issue around protections and safeguards. It is notable that the petition of concern is in the safeguard section. It does apply to all key decisions. That is the system that was set up—purposely difficult, I suppose, one might say—to ensure that there was maximum buy-in. What we are rapidly seeing is that people now have a particular policy proposal, they get the majority for it and they want to push that forward, against the will of significant sections of the other community.

People need to get back better to fundamental consensus policy making. Potentially we have lost that over the years. As I said, it is slow but there is a benefit to that.

When you look back to the original point about intent, it is important to point out that equality and human rights are very well protected, cooked in right across the system.

If you look back to the narrative around the Belfast/Good Friday agreement, including the discussions and the debates in the House of Commons on those matters, you will see that the key safeguards lay with the establishment, under the agreement, of the Equality Commission for Northern Ireland and the Human Rights Act, which at any time can give advice or perhaps even take a legal challenge against a Department or the Northern Ireland Assembly—certainly give advice on that.

Importantly, the Northern Ireland Assembly is set up but it does not have competence to deal with matters that would be in contravention of the European convention on human rights or equality legislation. I understand that your evidence will go on next to the Speaker. The Speaker will have a legal team, so it is not even a case of a discretion. The Northern Ireland Assembly, certainly even set down in the agreement and the Northern Ireland Act, emphasised and safeguarded even further in the Human Rights Act 1998, has no power to legislate in a way that is in violation of that. A piece of legislation should never be introduced where there is a decision by the Speaker's legal panel that is in contravention of that.

What we have seen subsequently is that people will have a range of views about whether something is a breach of human rights, which is very different from whether it is legally a breach of human rights. Of course, that is an evolving issue. There are safeguards there already, but I would also point out that the party of which Mr Eastwood is a member did not raise any concerns about the scope of the petition of concern at the time of the passing of the Northern Ireland Act, nor in the first decade of the Northern Ireland Assembly's operation, and the operation of the petition of concern. This is an issue that has emerged over the past number of years, on the briefing from the likes of CAJ and others. There was no indication on the record—*Hansard* or elsewhere—that there was a concern about this.

To go back to the Belfast/Good Friday agreement, the obligations under strand 1 5(d) are completely separate from the obligations under strand 1 5(c). They are severable. Of course, they can be linked through the special process, which has already been outlined to you, but they are separate. It is very clear from both the spirit and the detail of the Belfast/Good Friday agreement that cross-community consensus was to apply to all key decisions.

The Chair: If there are no further questions, I will bring in the Minister again.

Q46 Mr Walker: It is good to see you, Emma. As a former Minister within the Executive, and having worked as a special adviser, could you speak to the need for a ministerial code of conduct, and how you believe that could help to strengthen public confidence in elected representatives? I recognise that, with the changes that the Bill enshrines to the ministerial code of conduct, the Northern Ireland Office is acting as agents on behalf of what was already agreed within the Executive. Can you speak a bit to the process that has been gone through in looking at the ministerial code within the First Minister's and Deputy First Minister's office?

Emma Little-Pengelly: Over the years, there has been some frustration about what some may perceive to be breaches of the ministerial code, and a lack of action against those. I think that the proposed changes are welcome, in that they really try to tighten up some of those provisions in relation to how they apply, but ultimately this comes down to two different issues, and I think this applies to all of the provisions in the Bill. These changes are designed to try to encourage better behaviour. For example, when you look at the move from seven days after a resignation to call an election to the rolling process of six weeks and six weeks, that is obviously something that was pushed for to try to encourage people to get around a table, with a series of deadlines to try to encourage a more structured process, I think to focus minds, and also to allow other people to come in and make their representations very clear to the parties that they want the Northern Ireland Assembly to continue, and about the issues that are important to them, as opposed to—as I have said—a tactical resignation.

However, ultimately, as some of the other witnesses have said, this will work only if there is a willingness for people to agree. We all have our issues that we feel very strongly about, and we will not always find consensus on those issues. Some of the people around the table will have been part of coalition Governments before. Coalition Government is frustrating: you will not always find agreement on the way forward, and therefore those issues cannot be progressed. Ultimately, it is about the willingness of people to compromise—to get together to try to find a solution that appeals to everybody across the community. If we try to get into a space where there are only solutions that appeal to the majority, to the exclusion of a significant minority or to the exclusion of a community in Northern Ireland, we would be in a very difficult space in terms of stability, not only of the institutions but of Northern Ireland. I think those who worked on the Belfast agreement and those who worked on the St Andrews agreement recognised that and saw the value in having those types of safeguards to ensure maximum inclusion, because once we go down the route of—for example—removing the safeguards of petition of concern and consensus decision making and moving towards majority decision making, there is the risk of exclusion, and I do not think that is good for people, certainly not on the key decisions. I think it is all about balance.

Q47 Mr Walker: We have heard evidence from various witnesses and various speeches on Second Reading about the fact that many of these issues and, indeed, some of the issues beyond the scope of this Bill were hard negotiated on all sides. I wonder if you agree with what we have heard in some of the evidence earlier: what they have described as other vetoes, but I think you might describe as some of the balance within the process of working together in the Executive, would not have been signed up to by all the parties in NDNA if it had sought to go further on that front.

Emma Little-Pengelly: Absolutely. When you look back over the 20 years of the operation of these mechanisms, they were there to build trust and confidence in all of the parties across all of the communities to be part of the institutions in Northern Ireland. That is why I highlight the difference between what has happened in more recent elections, where we now have a number of quite significant minorities, and what had happened for

the majority of that period of time, which is that there was a Unionist majority. I think that those who drafted these documents and those, including myself, who have worked on this over the years recognised that this was not a majority Government situation in which Unionists, when they were in the majority, simply got everything they wanted and others got nothing.

That is why there needs to be, I suppose, better reflection about why these provisions are there, and the dangers of simply dismissing them. Rather than people jumping up and down and saying, "We are really angry because you are vetoing what we want", they should sit back and reflect and say, "Look, there is clearly not consensus for this proposal. How do we find a consensus way forward? How do we look at getting a balance within what is happening and try to find a way forward that includes the maximum number of people?" You will never get absolutely everybody on board, and we recognise that, but we have been through really difficult situations before, such as the devolution of policing and justice and trying to work through a programme for government. We have to remember that the parties in Northern Ireland are not just very different constitutionally speaking, but they are very different in that they come from across the political spectrum, from left to right and all things in between. Any coalition Government with parties that are quite diametrically different in political ideologies will always be challenging. That is the challenge that we have; we have got through it in previous years. But we only get through it by getting round a table and finding the consensus way forward, not by majoritarily forcing other people, through the removal of the veto's protections and safeguards.

Q48 Stephen Farry: A very warm welcome to Emma. I will ask a two-part question. The first part is this: would Emma recognise that the effect of a petition of concern, or the veto as such, is that in effect it works for those parties or that part of the community that are perhaps most comfortable with the status quo, and it probably frustrates those parties that have a desire to see change in society?

Perhaps as an example of that, could Emma just reflect on the fact that, to my knowledge, since the Assembly was created in 1999 there has been no instance whatever of it legislating successfully at all in the human rights or equalities sphere? That has never happened and it has always fallen to Westminster to address those issues.

Emma Little-Pengelly: In terms of the provisions, I am not sure that if you look back at how the petition of concern operated from the Belfast/Good Friday agreement onwards—so, from 1998—what you will see would back up your analysis that the petition of concern is used mainly by one particular side of the community.

I say that for this reason. If you look at the bare figures, it does look as if it has been used much more, of course, by the Unionist-designated bloc than by the nationalist-designated bloc. However, that really only changed quite recently, in terms of the Democratic Unionist party obtaining 30 seats, which was the threshold in terms of signing the petition of concern. Prior to that, by default no party had over 30 seats. Therefore, despite the fact that it was not explicit within the petition of concern, the way that the petition of concern practically operated was that you required more than one party to agree with it, and that was including within designations.

I think that what you see, for example within the nationalist designation, is that you do not have and you never had the ability of one party to sign a petition of concern. Therefore, I would suggest that to try to get 30 signatures within that designation on policy issues is much more challenging, because of course you will have significant policy differences between those two parties. However, when the DUP obtained 30 seats or votes in the election, that of course made it much easier to use the petition of concern, and I think that is when some of the issues and concerns arose.

Also, when you look, Dr Farry, at the types of issues for which the petition of concern has been used, you will see that a significant number of those petitions of concern were used, for example, in relation to welfare reform legislation. Again, I think it is important to look at the nature of this issue. For example, it was not the case that the Unionist bloc were not sympathetic to the arguments around welfare reform and that we are not sympathetic to, for example, the proposed welfare mitigations; in fact, I think the opposite is true and that people were very sympathetic. But the concern around that issue lay fundamentally with financial aspects of it.

As we know, with welfare reform happening in Westminster, that had a direct impact in relation to what was happening in Northern Ireland. We were not going to get the hundreds of millions of pounds that would have been required to do the mitigations put forward by a series of amendments by other parties. So, the consideration there in terms of the use of the petition of concern was around this argument: "Look, if this passed in the Assembly, or if these legislative changes are proposed without consensus"—and there was no consensus on those amendments—"there would be a cost to the Northern Ireland Executive of hundreds of millions of pounds of additional money, which would have to be found from the block grant".

Now, if you look back at that time, you had a DUP Finance Minister, so of course they would have been very attuned to what the concerns were then. But that is a decision that is often used to say that this is a misuse of the petition of concern. In fact, if it had not been used, those hundreds of millions of pounds would have had to be found from across other Departments. Of course, it did include human rights and equality issues because it would have meant, for example, top-slicing or taking funding away from the health service at that time, before it had been reformed, when it required even more money, never mind a top-slicing. It would undoubtedly have required other programmes to stop completely, but without any analysis by the Assembly of what the impact of those changes would have been.

In my view, a decision was taken that it was the responsible thing to do to use the petition of concern in that way to prevent the Assembly from voting on something that was going to cost hundreds of millions of pounds across Departments and have a massive impact on the everyday lives of individuals. Of course, as you know, having been a Minister in the Government, these things are all about balance, but they are also about responsibility and trying to assess the best way to do those things by talking them through and by consensus, not by forcing amendments through where there is clearly no consensus behind them, for example.

Q49 The Chair: If there are no other questions, Emma, do you want to make some closing remarks in your evidence before we say goodbye?

Emma Little-Pengelly: The only thing I would want to reflect on, I suppose, is really where these proposals came from. As I have indicated, it was the DUP that pushed very hard for the sustainability aspects of the New Decade, New Approach agreement, and we did that very much because of the experience of the preceding three years, where Northern Ireland was left in a really appalling situation of not only having no local devolved Government, but having no real direct-rule Ministers either, so civil servants were left in the position where they had to try to make decisions with no accountability, no democratic accountability and no guidance.

I do not think the Bill is in any way perfect, but I do think it is progress. The key thing is to try to ensure that there is not that incentive for others to bring the institutions down and cause instability in a tactical way, and to recognise that at times there will be major constitutional issues—we are seeing that at the moment with protocol, for example—and other issues of serious concern that we have had before. In those situations, of course it is absolutely right for people to raise their personal concerns, their party concerns and their community concerns to say, "This is simply not sustainable as a way forward."

I know that that cannot be prevented and should not be prevented, but ultimately, this is a step forward to try to encourage greater stability, which is much needed across Northern Ireland.

The Chair: Thank you for your time today, Emma. I am sure that I speak for everyone when I say that I wish you well.

Colleagues, we are a little early. We were meant to hear from Mark Durkan at quarter past three, but we are trying to make contact with him. We are ready to go, so we will bring things forward. I am beginning to think that this is all to do with the football match, but I could be wrong.

Examination of Witness

Mark Durkan gave evidence.

3.4 pm

The Chair: Welcome, Mark. I think this is a conspiracy to do with the football because we seem to be getting through things very quickly. We have earmarked 45 minutes for your session. Would you explain to everyone who you are and what you do?

Mark Durkan: I am Mark Durkan, and I suppose the reason I may be of interest to these inquiries is that I was one of the people who negotiated the Good Friday agreement. I also served in the institutions and the Executive, as the Finance Minister in the first Executive and then as Deputy First Minister elected by the Assembly in 2001. Then the Assembly was suspended in 2002. I also served from 2001 to 2010 as SDLP leader and as Member of Parliament for Foyle from 2005 to 2017. I was involved in various negotiations, including St Andrews, Leeds Castle, all the various Hillsborough talks and all of the other impasse negotiations that were around difficulties about interpretation and implementation of the Good Friday agreement and some of the subsequent agreements.

The Chair: You are most welcome, Mark, albeit virtually. Our first question today is from Alex Davies-Jones.

Q50 Alex Davies-Jones: Thank you, Sir David, and thank you, Mark, for joining us this afternoon. As you mentioned, so much of the Good Friday agreement, which you helped to negotiate, is still not implemented. How important do you believe that this failure to implement key elements such as a Bill of Rights has been to damaging the sustainability of the peace process?

Mark Durkan: I think it has damaged it hugely. For too long, Governments and others have tried to pretend it is as though the tyre is only flat at the bottom whenever we do not have the rights, provisions and promises of the Good Friday agreement upheld and implemented. It is not just that the Bill of Rights has not been implemented; we have seen regression in recent years because there were absolutely explicit commitments in the Good Friday agreement to the European convention on human rights, of it being accessible in the domestic courts in Northern Ireland and that it could be used specifically to allow the courts to strike down legislation in the Assembly.

Mo Mowlam worked very hard as Secretary of State and the areas of the agreement that she concentrated on most were the areas to do with rights, equal rights, equality and other safeguards. The fact is that she ensured that we had a strong Equality Commission for Northern Ireland and a strong Northern Ireland Human Rights Commission, which would be a way of giving voice and reality to those commitments on rights. The fact is that subsequent Governments adopted a position that said: "Well, we're not really going to move on a Bill of Rights unless there is total agreement among the parties."

The way the Good Friday agreement was written, it charged Westminster with the responsibility to legislate for a Bill of Rights, on top of its commitment to ensure that the European convention on human rights would apply to all public authorities and bodies. We did not get to follow through on that as far as the additional provisions of a Bill of Rights alongside the European convention is concerned, but in the post-Brexit legislation, we have seen holes being drilled into the commitments that are made there to the European convention on human rights.

Now, Ministers of the Crown have powers—it is almost like a form of direct overrule—to supersede decisions and choices at the devolved level in the name, for instance, of protecting the internal market of the UK. Those decisions can completely ignore any concerns around the European convention on human rights and a public body is actually forbidden to cite concerns about the European convention on human rights as to why it would not comply with what a Minister of the Crown has said. We have gone well off-road in what was envisaged in the Good Friday agreement in respect of rights.

One other thing I would say about rights, because this Bill touches on the whole question of petition of concern, is that it was the thinking at the time we negotiated the agreement that the petition of concern was not a petition of veto, it was not even a petition of objection, but that it would be used to trigger a special proofing procedure during which a special Assembly committee would hear specifically from the Equality Commission for Northern Ireland and the Northern Ireland Human Rights Commission. So the petition of concern was very much rights and equality focused.

It was to be there as a proofing procedure to ensure rights were upheld. It was never there to prevent rights being legislated for, which is how it has turned round to be abused.

The Chair: Alex, if I could just interrupt you for a moment. Mark, we can all hear you very well indeed, but our technical team here is not hearing you very well and cannot do anything to turn up the volume. Of course, we are trying to record your evidence for *Hansard* purposes. If you can try and get as close to your microphone, wherever it is, that would be helpful for those trying to record things here.

Q51 Alex Davies-Jones: The Good Friday agreement established a Civic Forum to give communities a voice and a proper consultative say in the democratic process. How important do you believe that was and has it set back progress on the Good Friday agreement that it is not currently in place?

Mark Durkan: I think again that it is a key bit of the architecture that is missing. The Civic Forum was agreed by the parties in the strand 1 negotiations. We recognised that the Assembly was going to have many challenges and difficulties and agreed that it would be useful to supplement the elected representation in the Assembly with a strong Civic Forum. The thinking that some of us had was that maybe a Civic Forum involving a variety of stakeholders and public policy interests would be an outrider on some of the more difficult structural challenges that we would face in Northern Ireland in trying to rebalance our economy and make sure that a rebalanced economy also went along with a better balanced region, and also in tackling issues of a shared future and some of the big structural problems that we needed to change.

The idea was that work could proceed in the Civic Forum in ways that could frame issues for debate and choice that could then be taken up by the Assembly and Executive themselves. The fact is that the Civic Forum, when it was in operation, did start to do some of that work in forward strategic thinking, but unfortunately, while the Assembly was restored some years after it collapsed in 2002 after Stormont-gate, spy-gate—whatever people want to call it—the Civic Forum never was, and that is a loss.

Q52 Alex Davies-Jones: Finally, what key measures do you believe need to be implemented that are currently absent from the Bill?

Mark Durkan: I think we need progress in relation to the Bill of Rights. We need to try to clarify exactly what damage may have been done to the standing of the European convention on human rights and the reliance that citizens can place on it. A very direct promise was made to citizens in Northern Ireland about the European convention on human rights, but several of the Acts on the foot of Brexit have diluted that quite significantly, so I think that needs to be improved. While this Bill makes some improvements to the petition of concern—it weeds out some of the abuses in terms of how quickly or easily people table a petition of concern, so it is more qualified—it does not actually fix the problem with the petition of concern, which goes right back to the original 1998 legislation.

This is not a criticism of Mo Mowlam or of Paul Murphy, who brought that Bill through at the time, but that Bill translated the Good Friday agreement into statute in pretty short order, and the fact is that it did not properly translate what was intended in terms of the petition of concern. As I said earlier, the petition of concern was never to be a petition of veto, or even a petition of objection. It was to be there to trigger a special procedure, which the Assembly would then use and which would also call in the Equality Commission and the Human Rights Commission. It was to be joined-up scrutiny for rights and equality.

Of course, that has not happened and instead we have had the petition of concern being abused as essentially a dead-end veto, played almost as wild, as a joker at times, even against censure motions on Ministers. It was never intended to be so used. Some of the provisions in the Bill weed some of those bad habits out, but they do not correct the basic architectural mistake that the 1998 legislation never properly provided for paragraphs 11, 12 and 13 of strand 1 of the Good Friday agreement to be put into statute.

Q53 Claire Hanna (Belfast South) (SDLP): It is a pleasure to serve under your chairmanship, Sir David. Thanks for your evidence, Mark. You commented briefly on the original intent of the Good Friday agreement versus how it has latterly been used as a way to, I suppose, thwart minority rights rather than protect them. Could you give an assessment of what Daniel Holder this morning called the St Andrews veto, deployed at the Executive, and the extent to which it is being used as a pre-emptive veto that prevents proposals and legislation from even reaching the floor of the Assembly?

Mark Durkan: Thank you for that question, Clare. First of all, there is a problem with what you describe as a pre-emptive veto—in the past, I have used the phrase "predictive veto". That certainly stems from, first, the petition of concern itself, because once parties start to moot the possibility that a proposal or a part of a Bill might be the subject of a petition of concern, that very much helps to stop a lot of the preparation and a lot of the thinking.

Even at the prelegislative stage, issues end up staying inside Government Departments, or on the Executive table even, and not going to the Assembly because people sense that there will be a petition of concern, so we end up with a bit of a stand-off, or gridlock. Issues that should be the subject of clear, concrete proposals often find themselves remaining in hidden contemplation at Departments because people are afraid of triggering the petition of concern process. In that sense, it has ended up being like a predictive veto. The petition of concern was meant to be there so that issues could be properly considered and perused because of their equality and human rights implications. It was not there to stop proposals being tabled in the first place, but it has had that effect.

In terms of what Daniel seems to have said this morning about the St Andrews veto, that refers to the fact that, as part of the St Andrews agreement, an additional point of veto ended up being created explicitly at the Executive, whereby three Ministers could call in any measure—even one being dealt with by another Minister—to the Executive. They could also then subject that to a cross-community voting requirement at the

Executive itself. Again, in this provision, there was no reference to equality, rights or any grounds on which such a veto or call-in power had to be selectively used. It was not there; it was just wide open and free range. At the time of the St Andrews negotiations, I referred to it as a "drive-by veto" that would be used on top of the difficulties that we already had with the petition of concern. Of course, again, this has meant that rather than giving due consideration to legitimate and much-needed proposals—often those that have been directed or requested by the courts—the Executive are not able to do that simply owing to this additional veto, which was created as part of the St Andrews negotiation.

Q54 Claire Hanna: I want to pick up on another change to the Good Friday agreement at St Andrews that is also covered, in part, in the Bill, which is the change from jointly electing First Ministers to the arrangement that we currently have. What was the point in principle of that change? Do you think it has been a factor in the recurring instability that we have seen over the last number of mandates and years?

Mark Durkan: I do not think there was a point in principle in that change as such. The reason why it was an imperative for the DUP to seek that change was because the DUP did not want to be in the voting lobby along with Sinn Féin to elect the First and Deputy First Ministers. The Good Friday agreement very deliberately provided for the joint election of the First and Deputy First Ministers by the Assembly on an open-nomination basis. Any two Members of the Assembly could have been proposed by any Member of the Assembly to be First Minister and Deputy First Minister, or, as we would have preferred to have the wording, joint First Ministers.

The DUP were afraid that if they were going to vote for Ian Paisley, they would have to vote for Ian Paisley and Martin McGuinness together, and they would be in the yes Lobby in the Assembly, possibly on their own. The first move that the DUP and the two Governments made to try to resolve that momentary issue—it would have been the 10 or 15 minutes of a Division—was to say, "Well, we will force all the other parties into the Lobby with you." From December 2004, the whole way up until St Andrews, it was the position of Sinn Féin, the DUP and the two Governments that the agreement was going to be changed so that no other party would get to be nominating Ministers under the d'Hondt rules if they had not also voted for the First and Deputy First Minister. This was an attempt to oblige the SDLP and the UUP to be in the lobbies with the DUP voting for Ian Paisley and Martin McGuinness, as the price of being included in ministerial office.

We as a party were very clear. We had negotiated elective inclusion into the Good Friday agreement. We had negotiated it there for everybody. Nobody had to even support the agreement to be eligible for elective inclusion; nobody had to vote for the First and Deputy First Ministers to be eligible for inclusion. When Seamus Mallon and David Trimble were elected, the DUP voted against and Sinn Féin abstained but they still got appointed Ministers. The plan was to change the rules to force the SDLP and the UUP to vote for them.

Whenever the DUP realised that neither the SDLP nor the UUP would comply with those terms, and therefore they were going to be in the Lobby on their own, they came up with this other device instead, that said, "Well, we will pre-assign, on an exclusive basis, the nomination of First Minister to the biggest party of the biggest designation. We will also privatise the nomination of the Deputy First Minister to the biggest party of the second biggest designation." It was purely to remove that 15 minutes of discomfort for the DUP on one day.

What has happened since then has been that that change has meant that the Assembly elections have been tribalised even more deeply than they would have been, because they have been turned into a first-past-the-post race for First Minister, with the DUP saying, "You have to back us to make sure we are the biggest Unionist party and the biggest party, otherwise you could have a Sinn Féin First Minister." Similarly, Sinn Féin are using it on the other side, saying, "Rub the DUP's nose in it. We can take First Minister off them if everybody piles in behind us." That is not what having proportional representation elections for the Assembly was designed to produce.

It has also meant that the office has had less of an air of jointery around it. Remember, they are nominated separately; they are not nominated or elected jointly. More fundamentally, there has been a weakening of the sense of accountability of the First and Deputy First Ministers. When the First and Deputy First Ministers are not appointed by the Assembly, they may feel less accountable to the Assembly. We have seen that with changes in previous years in relation to levels of Budget scrutiny. We also saw it at other times. For instance, there was a motion by the leader of the SDLP in the Assembly back at the end of 2016 around the renewable heat incentive. It was a motion calling Arlene Foster to account.

Arlene Foster's attitude as First Minister was that she resented being called into the Assembly and she just parroted that she had a mandate from the people of Northern Ireland. She did not have a mandate from the Assembly. Her only mandate was to those who voted for the DUP. The DUP, in that previous Assembly election, got a smaller share of the vote than the Labour party, then in opposition in Great Britain, had done. The idea that this was a mandate from the people of Northern Ireland, not from the Assembly, created some of the tensions and some of what I would say—maybe unfairly—was evidence of arrogance on the part of the holders of that office. It all stemmed back to those St Andrews changes, which essentially privatised those two appointments simply to two parties and gave other parties no say in the appointment of Ministers.

I would contrast that with my own experience. To be elected as First Minister and joint First Minister, David Trimble and I had to have the support of not just members of our own parties but members of other parties. Indeed, some members of other parties had to even stretch to redesignate themselves to so elect us. You were always conscious that you owed your election and your level of accountability to all parties—not just to be obsessed with your own party's mandate.

Q55 Claire Hanna: I do not want to hog all the time, but I want to ask what your assessment is of the Government impact of the potential period of caretaker Ministers. The phrase that has been in my head all day is the former First Minister's phrase "rogues and renegades". I am thinking of the issues around powers and scrutiny. What is your assessment of that?

Mark Durkan: As I understand it, the New Decade, New Approach negotiations involved a push by some parties to say that there was a need to lock in stability or

sustainability, and that the way in which the Executive had fallen after the resignation of Martin McGuinness was something that needed to be corrected or avoided. I am not sure that the scheme provided for in this legislation really does lock in stability. In some cases, it may lock in what might be a pretty untenable situation of a caretaker set of Ministers limping on in office.

In fairness, we have to accept that every time we have tried to solve some of the conundrums that come up with the agreement, we find ourselves coming up against the same basic problem. It is a bit like, "There's a hole in the bucket, dear Liza". Every time we try to solve one procedural or structural problem, we find ourselves coming up against another one, and in many cases we find ourselves coming up against the same basic question: is there really the will and commitment to truly honour and uphold disparate power sharing, both in the joint office of First Minister and in a power-sharing Executive? I am not sure that the proposals adequately answer that.

You can see, I think, that there is planning permission in the proposals for roll-over periods of every six weeks, potentially, where you have caretaker Ministers. No doubt kites will be flown that there are proposals to break through the impasse, and then we will find that that does not work, and there are more recriminations and still more roll-over of caretaker Ministers. How credible that will be, I am not sure. Whether the public will regard that as sustainability in the way that the parties that wanted the changes in NDNA talked about, I am not sure.

Then, of course, there is the issue about what is called representation—that the Secretary of State may step in, notwithstanding provisions elsewhere in the Bill, to call an election because he thinks that there is not sufficient representation among the Ministers who are in office to enjoy cross-community support in the Assembly. I think that was the phrase used in NDNA, but it is not used in this legislation. I assume that that is to address the possibility that one of the First Ministers could resign, other Ministers might resign, and in essence a shell of an Executive would continue, but it does not seem to me that the issue is properly dealt with. It seems to me that we are looking at planning permission for new brinks to be brought to teeter on, which is what happened even with some of the St Andrews changes, and some of the other procedural adjustments that have been made.

There is the question of what powers the Ministers will have. The suggestion is that their powers will be qualified and limited—NDNA said, of course, nothing significant or controversial. The question then arises of how many weeks you can really go on for on that basis, and who is to judge what is controversial. Do you have an Executive Committee that is able to operate? If we are talking about a period of either 24 weeks or even, as the Bill provides for, up to 48 weeks, where you have this kind of zombie Executive, what happens to the North South Ministerial Council? The Good Friday agreement provided very clearly that the Assembly and the North South Ministerial Council are so interdependent and so interlinked that one cannot function without the other. It seems to me that we have come up with a scenario of a period, possibly of up to a year, where you could have an Assembly functioning in some sort of quasi-status form and Ministers in a shell of an Executive, but without a basis for NSMC meetings to take place. That is not the institutional, interdependent, interlinked balance that the Good Friday agreement specified. The Good Friday agreement is explicit on the interdependence of the strand 1 and strand 2 institutions, but NDNA seems to have come up with a way of sustaining strand 1 in a way that could not actually sustain strand 2 at the same time.

Q56 James Sunderland (Bracknell) (Con): Mark, thank you for appearing before the Committee. Politicians generally agree that the Good Friday agreement was a good bit of work. It was successful, it has endured to the present day, and there is lots of confidence in it for the future as well. We know there are some relative threats to it at the moment, not least the Northern Ireland protocol and possibly the forthcoming statute of limitations on legacy—the list goes on. Can you assure the Committee that the Bill does not pose any threat to the Good Friday agreement? If there is a threat, can you explain what it is?

Mark Durkan: In terms of the agreement, the Bill is meant to uphold and follow through on understandings that were reached by five parties and the two Governments in the NDNA, and that was the price of getting devolution restored. I look at the Bill not as something that is going to directly damage the Good Friday agreement. I would say it is something that does not go far enough to restore and repair the Good Friday agreement, to correct its standing. What is missing is the true correction correcting the original architectural flaw in the original 1998 legislation around the petition of concern. What is in the Bill about qualifying the use of the petition of concern is helpful and good, but it does not go far enough to correct the basic architectural flaw about the absence of the special procedure and the focus on equality and human rights, so that is something that could be improved.

Likewise, in terms of the appointment of First Ministers, I would prefer legislation that restored the factory setting of the Good Friday agreement and allowed for the joint election by the Assembly of joint First Ministers. That is going to be particularly important coming up to the next Assembly election when there will be all sorts of speculation about the possible permutations of numerical strengths of different parties. The terms that were fixed at St Andrews say that the biggest party in the biggest designation gets one nomination, and the next nomination goes to the biggest party in the next biggest designation, but they also provide for the fact that if the biggest party is not in the biggest designation, it will get to appoint the First Minister, and then the Deputy First Minister will go to the biggest party in the biggest designation. So, you can see areas where parties will speculate that they might score very highly in the election in terms of seats but end up, because of St Andrews, being disqualified from the exclusive nominating rights that are fixed. It would be much better if the whole Assembly, as elected at the next Assembly election, had the responsibility of jointly electing First and Deputy First Ministers, and if all parties had responsibilities for making the Government work, rather than being able to say, "It's the problem of those two parties," which are preassigned those two nominating positions by the random results of the election. Nobody else can be nominated to anything without the First and Deputy First Ministers being nominated.

The repair work that could be done and the prevention of some pretty serious anomalies or absurdities that could potentially arise after the next election have not been achieved by the Bill. I do not think that we should be precluded from thinking that through further, in order to avoid an impasse after the next election.

Q57 Gavin Robinson: Good afternoon, Mark. I do not agree with all of your evidence, but I certainly enjoy the fact that you have not lost your unique turn of phrase. I have been following very closely. On some of your comments concerning human rights and equality, you will remember the negotiations that led to the deal that was not a deal, which you and I were involved in around Stormont Castle. We had interesting discussions about the petition of concern and so on. Do you still accept that it is impossible for the Assembly to consider a Bill that has not been screened for equality and human rights impacts, and that the Assembly cannot progress or pass a Bill that is in conflict with human rights or equality legislation?

Mark Durkan: I do not fully accept that. The whole point about the petition of concern at the time was to ensure that we had—I used this phrase earlier—joined-up scrutiny and that we would make sure that there could be a connection between the quality of Assembly consideration and the advice or evidence that might come from the Equality Commission, the Human Rights Commission or indeed others.

Remember that the whole promise of the Bill of Rights in the agreement was very much a promise to citizens. That is one of the reasons I lament the absence of a Bill of Rights. When we were negotiating the agreement, our thinking was that the reliance on things like the petition of concern would reduce in circumstances where you had a live Bill of Rights and the good custom and practice of people being able to exercise their own challenges. Parties would not then have to rely on some of these other designation-related devices. It was there for a reason. Yes, the agreement and the legislation are clear about the obligations around rights, including the European convention on human rights. But the logic and strength of that has been watered down by much of the legislation that has happened since Brexit, because the European convention on human rights does not have the same strength of standing in Northern Ireland after some of those bits of legislation as it did.

We are in a bizarre situation whereby a public authority can say to a Northern Ireland Minister, "You cannot ask us to breach the European convention on human rights," and they are within their rights to do so and to challenge any request, demand or pressure by a Minister or Department to so do. But they will not be in a position to so challenge a demand or instruction from a Minister of the Crown under, for instance, the United Kingdom Internal Market Act 2020. Those instructions can apply directly to Departments in Northern Ireland or to other public bodies. What was envisaged in the Good Friday agreement, which Mo Mowlam in particular put so much work into the wording and strength of, is now diminished. I would like to see it restored.

Q58 Gavin Robinson: You know that the European convention on human rights is there in the Belfast agreement, and the Human Rights Act in the UK was passed some months after and came into operation in 2000. As part of that, for any challenge that is brought within Northern Ireland, our courts have to consider the jurisprudence of the European Court of Human Rights in assessing the application of the Human Rights Act. Does that diminish your concerns in any way? Does that give you more reassurance? You mentioned earlier in your evidence that you could not go to court and rely on the convention, but you seemed to not ignore but maybe not reflect on the Human Rights Act and the part of it that specifically requires our courts in Northern Ireland to consider the jurisprudence and case law of the European Court of Human Rights.

Mark Durkan: Yes, and the courts in Northern Ireland are given under the agreement the power to strike down legislation of the Northern Ireland Assembly on the grounds of incompatibility. They do not have the power to strike down legislation from Westminster, for instance. They do not have the power to strike down decisions that might be taken by a Minister of the Crown under something like the United Kingdom Internal Market Act. The decisions of a Minister of the Crown cannot be challenged in the courts. The UK Internal Market Act specifically provided for there being no challenge in the courts of Northern Ireland, or indeed in any other courts, on that basis.

That knocks a pretty big hole in the intended effect of the commitments on the European convention on human rights, which was provided for as part of the Human Rights Act. When negotiating the agreement, one of the reasons we were able to agree that the work on the Bill of Rights was something that would be for the future—for the next few years—was that a bird in the hand was worth two in the bush. The promise of the European convention being available and accessible in the domestic courts in Northern Ireland, on the basis of the Human Rights Act, meant there was a starting point—there was already a starter for 10—as far as rights protections, alongside the institutions, was concerned. But the intent and the expectation was that there would also be some additional rights that would go alongside the European convention and that, together, those rights and the European convention would constitute a Northern Ireland Bill of Rights.

It would have been good to achieve that. I think it would also relieve the temptation that parties sometimes feel to use devices like the petition of concern and other structural blocks in the name of saying they are reserving or protecting rights, when they are actually preventing decisions. The more robust and articulate a Bill of Rights that can be taken to the courts, the better for the decision-making processes.

Q59 Gavin Robinson: This is perhaps slightly outside the scope of the Bill—Sir David, you can strike me down if you wish—but on the issue of a Bill of Rights, as you know, Mark, the agreement provided that the Human Rights Commission would bring forward proposals at the request of the Government, and it did and you reflected that there was not consensus at that time. What it was asked to bring forward was additional rights framed particularly because of the unique circumstances of Northern Ireland. It may fall outside the scope of your remit or interest, but what sort of issues do you think fall within that category of being unique issues to the circumstances of Northern Ireland now, in 2021, today's era?

Mark Durkan: The word in the agreement is not "unique" but "particular". From my memory, that was because one negotiator in particular and one party would have voice-activated apoplexy any time anybody said Northern Ireland was a "unique situation" or "unique". George Mitchell, Ministers of both Governments and all sorts of people found themselves seized with this fierce reaction to the suggestion that we were unique. "Particular" was, apparently, allowed, so that is what is there.

In the wording of the agreement, we did not specify—we did not give lists of examples of the particularities—and that was simply because we did not want to turn that section of the agreement into a sort of sin sheet, whereby we would each record or voice sensibilities about rights breaches or perceived rights breaches that had been endured, either through governmental or non-governmental and other actions.

Obviously, Northern Ireland does have very particular circumstances. At the time we were negotiating the agreement, there was a lot of talk around group rights. For instance, people were talking about that in relation to the parades issues, from two different sides and two different senses of rights. They were partly being talked about there, but we were not writing that specifically into the agreement.

Obviously, there is a statement in the agreement that makes a commitment—a kind of "from here on in", future-looking commitment—around certain rights in Northern Ireland. Some of those touch on some of the issues that maybe are not dealt with in this Bill but are dealt with in other aspects of NDNA.

Q60 Gavin Robinson: Finally, Mark, you reflected on your disappointment with the Civic Forum. I think you know that we are probably in a different space from that, but as part of New Decade, New Approach there was an agreement, outside this Bill, to incorporate civic co-design in policy making and so on. Do you think that that was a useful step forward as part of the overall discussions in New Decade, New Approach, although I recognise that you still want to see the re-establishment of the forum itself?

Mark Durkan: I think you can have both—it does not have to be an either/or. The forum having its own standing is good—it can take on work, particularly long-term work that may need careful framing of options and choices, and scoping out some of the issues and potential problems. We saw the forum as something that could do that, but we do not think it is the only form of civic engagement or input that there should be.

Let us not forget part of the success of a different aspect of the agreement in terms of policing—the Patten plan. We think the role of the independent members of the Policing Board was part of the strength of making that new beginning for policing happen and succeed during some very challenging times in the early days of the Policing Board and some challenging issues, in terms of the Omagh bombing report and the issues around, "I'm retiring; no, I'm not retiring", by the then Chief Constable. The independents had a key role alongside the elected representatives. That is something that we can replicate in other ways. When it comes to prelegislative scrutiny in the Assembly, for instance, there is no reason why members of the public with particular policy insider expertise and credibility in given policy communities should not be there alongside MLAs.

There are different models and options, but there is certainly a big appetite among the public for it to be not just politicians alone who decide those things—or, more often than not, fail to decide them—and then recriminate those who are to blame.

The Chair: If there are no other questions from colleagues, I call the Minister.

Q61 Mr Walker: Thank you, Sir David. It is a pleasure to see you again, Mark, as a much-valued former colleague in the Commons whom I enjoyed engaging with over many years. It is good to see you back.

You have talked about the importance of the Good Friday agreement institutions. I absolutely recognise that. Do you accept that, since the NDNA deal was reached, we have seen the restoration of devolution? We have seen meetings of the British Irish Council and the British-Irish Intergovernmental Conference. We have seen those institutions functioning. It required an agreement, as you say, with the input of both the British and the Irish Governments and all five parties to reach it.

I appreciate there are aspects of the Bill that you and your party might feel ought to be different, and aspects of the St Andrews agreement architecture that you may not like. Do you accept, however, that in order to get the devolved institutions restored and the institutions of the Good Friday agreement itself properly functioning, we needed to get the buy-in of all five parties and therefore reach a deal that was acceptable to all of them?

Mark Durkan: Yes, I do. I said that I recognised that NDNA was an agreement by all the parties and it was the price that had to be paid for getting the institutions restored. I am glad that it is the case, too, as you say, Minister, that it is not just the Assembly and the Executive who have been operating; obviously, this week we had the British-Irish Intergovernmental Conference and other things, and I am very glad of that.

I am at a loss to understand why there was a decade when the British-Irish Intergovernmental Conference did not meet. I think that the two Governments gave a very bad example as the supposed co-guarantors of the agreement. The one bit of the agreement that falls particularly to them was not being honoured. The Governments were not always in the strongest place by appearing to criticise either or both Sinn Féin and the DUP for the failure to restore the Assembly for three years, in circumstances where the two Governments had failed in their responsibilities.

Yes, I recognise the limitations in the NDNA. The problem is that some of those limitations are being translated into statute here. The promise is that this legislation is there to give stability and sustainability, but rather than blocking instability, there is a danger that it locks in a sort of zombie Executive and creates difficulties between parties, as well as creating difficulties in which the Secretary of State can be implicated. I think that the more we get into those sorts of difficulties, the harder things are.

This Bill does not rescue us from the sorts of absurdities that might emerge with possible election results at the next Assembly election. With a bit of speculation as to the different strengths of different parties, you could have very serious difficulties trying to appoint the First Minster and Deputy First Minister, as provided for in the St Andrews agreement, due to the random nature of the electoral results in terms of the number of Assembly seats.

Those seats determine who has the prescribed right to nominate the First Minister and who has the prescribed right to nominate the Deputy First Minister. It becomes a real problem, and that will be a problem that discolours a lot of the election debate. It is going to bring people into all sorts of difficulties due to technical voting, tribalistic voting and all sorts of other things. We should be free of that. We should be trying to correct the St Andrews damage there, and I make no apology for that.

I think that proposed new paragraphs (e), (f) and (l), set out in clause 4(1), provide useful additions to the ministerial code in relation to good community relations and equality of opportunity, and also in relation to public appointments, civil service appointments and the code of conduct for special advisers. Those are useful additions, although I do not know whether there is a particular reason why some of the original terms of the code of conduct are now being omitted. For instance, one requires Ministers at all times to

"ensure all reasonable requests for information from the Assembly, users of services and individual citizens are complied with; and that Departments and their staff conduct their dealings with the public in an open and responsible way".

That seems to have been omitted for the first time, and I do not know why.

Similarly, there are references elsewhere in the original version to users of services, but there is now no reference to users of services in the ministerial code of conduct. Even some of the opening language in the original version has been changed. It had required Ministers

"to observe the highest standards of propriety and regularity involving impartiality, integrity and objectivity in relationship to the stewardship of public funds".

The opening language in the new version is arguably weaker. I am not aware of which parties either argued for or agreed that weakening of language.

Q62 Mr Walker: I must say that most of the evidence we have heard to date—this is certainly true of the submissions I have received from the parties individually—sees this as a strengthening of the ministerial code. It is the case that some aspects of the Spad code and the ministerial code would sit with the Assembly to manage. What we are seeking to do here is correct those bits of the Northern Ireland Act 1998 in relation to the ministerial code, in line with the agreement that was reached by the Executive and signed off by the Office of the First and Deputy First Minister.

Overall, this should be a strengthening of the ministerial code, alongside some of the other mechanisms to enhance the stability of the Executive. This is about trying to support them. I would agree with your evidence and that of the former permanent secretary, but what we all want to see is good will from all parties to keep the Executive fully functioning and to avoid a situation in which these mechanisms are required. It is very important that we see that.

With regard to the possibility of what you called a zombie Executive—the Opposition talked about caretaker Ministers—do you accept, given the experience that we had during the long period of the absence of the Executive, with civil servants really being put in an impossible position, that it is useful during any potential period of interregnum to have a Minister in place who is able to take decisions within their departmental remit, to allow for some accountability within that, on the basis of the programme for government on which they were originally put in place? That would allow for continuity of departmental decisions and give some cover to their civil servants in a future period in which we might be without a First Minister and Deputy First Minister.

Mark Durkan: I take that point, Minister, but you said "some cover". Given that the decisions are not meant to be on matters that are significant or controversial, some cover might be quite limited. Some of the difficulties and frustrations that the civil servants had in the previous period of abeyance could equally apply, but they would have Ministers who are not at full power or status and who may not have the benefit of actually operating inside an actual Executive, in those terms. It will be a pretty limp-along situation. It will be a sort of twilight zone, both politically and administratively.

I know you will say that, with the roll-over periods and things like that, there are options for the Assembly, and that if the position becomes completely unsustainable, in terms of cross-community support, there is the power for the Secretary of State to intervene to call an election. However, I think we need to recognise that we are providing for a series of episodic crises and anomalies that can happen under this legislation. In Northern Ireland, people have a habit of being able to conjure up all sorts of problems and interpretive misapplications of provisions to create particular problems. We have seen that previously in relation to provisions of the agreement or in subsequent legislation. As I say, I do not expect that there could ever be perfection in a Bill like this, because there is a hole in the bucket, dear Liza, and people keep coming up against some of the same problems, no matter how many patches or solutions we come up with.

However, I think we need to recognise that this imperfection means that it probably will not be very long after the next Assembly election until you will be looking at possibly more remedial legislation to deal with the probably untenable situation that might exist around the St Andrews provisions for the appointment of First Ministers. I think it would be better to correct that now. I think it is in all parties' interests that that is corrected, in terms of equalising the title of the offices of First and Deputy First Ministers, and also restoring the joint election by the Assembly, and maybe relying not only on parallel consent but on other measures of cross-community support. I think that would safeguard the atmosphere around the election debate and would safeguard the choices of the public from being pulled into all sorts of tactical voting considerations owing to a pretty tribalistic agenda around the totemic significance, supposedly, of the title of First Minister, which should not be a singular title.

The Chair: Mark, even though I dare say that the Minister wants to continue the questioning, we cannot; you have, in fact, used up the 15 minutes we gained, and we are due to finish hearing your evidence at 4 o'clock. We thank you very much indeed for the time you spent with us this afternoon. I know I speak for everyone when I say that I wish you well.

Mark Durkan: Thank you, Sir David.

The Chair: We will have a two-minute pause.

4 pm

The Committee deliberated in private.

Examination of Witnesses

Alex Maskey, Lesley Hogg and Dr Gareth McGrath gave evidence.

4.2 pm

The Chair: In our last session this afternoon we will hear from Alex Maskey, the Speaker of the Northern Ireland Assembly; Lesley Hogg, the Clerk of the Northern Ireland Assembly; and Dr Gareth McGrath, the director of parliamentary services at the Northern Ireland Assembly. This is just to prove that I can read what is in front of me. I have introduced our three witnesses, but would you expand on your jobs, please?

Alex Maskey: My name is Alex Maskey. I am the Speaker of the Assembly. I was elected to this position in January 2020, when the Assembly was reconstituted on the basis of the NDNA agreement.

Lesley Hogg: I am Lesley Hogg, Clerk and chief executive of the Assembly. I took up post in 2016.

Dr McGrath: I am Gareth McGrath, director of parliamentary services. I took up my post with the Assembly in 2008.

The Chair: Thank you for your time this afternoon. Which colleague would like to ask the first question? I call Mr Stephen Farry.

Q63 Stephen Farry: Thank you, Chair. I welcome my former colleagues from the Northern Ireland Assembly—it is great to see you all again. To facilitate the conversation, I will start with you, Mr Speaker. I am conscious that you have written to MPs setting out some particular concerns about micro-details on how some of the governance aspects of NDNA may impact the day-to-day working of the Assembly. Perhaps it would be useful if you set those out for the Committee.

Alex Maskey: Thanks, Stephen—it is good to talk to you again. You have been missed in the Assembly for a while, let me tell you. Thanks to you, Chair, and to the Committee, for allowing me and my two colleagues Lesley and Gareth to appear today. Obviously, we want to make a number of points on the procedures and potential unintended consequences, given the slight difference between the scenarios that exist within Westminster and what exists and is pertinent to ourselves in the Assembly.

As Speaker and as officials, we have no view on the substance of the NDNA, or indeed the content or intentions of any of the aspects of it, but we are obviously very much aware of the fact that this Assembly was reconstituted on the basis of that particular agreement being reached by the parties and the Governments involved in those discussions at the time. I would have been involved in some of those conversations myself but, as you all know, once I take up the role of Speaker, as is the case for all Speakers, we immediately adopt a position of impartiality and independence and take no opinion on any of these matters. I am dealing with this, and my colleagues are going to deal with this, on an exclusively procedural basis.

We had a number of concerns. They may well be on a little bit of a cautious basis, but we thought that we would draw them to the attention of the NIO in the first instance. That is why we wrote to them, and eventually met them as well, to discuss this matter. A number of the issues of concern that we had were around the procedural and technical aspects of it, as I have said. It is about supporting the day-to-day operation of the Assembly, so our concerns are exclusively about making sure that any changes that occur through the Bill are clear and can be delivered practically.

I will just touch on a couple of the issues that you have referred to, Stephen. For example, the Bill includes triggering a consideration period of 14 days when a petition of concern is presented by 30 Members. As currently drafted, it would appear that this period of 14 days cannot be shortened in any way, which could present a significant issue when a vote on a matter that is the subject of a petition is time-sensitive—for example, a statutory rule, a legislative consent motion or some other types of regulation. In a more malign sense, it could also be used to stymie business: if people want to upset some of those time-sensitive matters, they could put in a petition of concern.

That might seem outlandish or unreasonable, given the way that the petition of concern has been dealt with in the past couple of years, but nevertheless we thought we would draw attention to the fact that this 14-day period might actually lead to an issue. In fact, any shortened period or any number of days set beyond where we are at the minute could lead to some of these unintended consequences, so we just want to draw them to the attention of the Committee, as we did to the NIO.

People also need to understand that the Bill requires that the Assembly Standing Orders provide for the implementation of the new arrangements for the petition of concern, which include a 14-day consideration period. It is not yet clear if or when the Standing Orders required would be agreed by the Assembly, and consequently the existing Standing Orders would continue to apply. We already have an example of this. We had a Bill passed some time ago, and there was not the political agreement within the Assembly on a cross-community basis to put that into the Standing Orders. That was the John McCallister Opposition Bill, so these things can actually happen in reality.

Moving on to the proposal that outgoing Ministers would continue to be in office for an extended period following an election or since an Executive was in place, the only comment to note is that the Standing Orders of the Assembly are clear that Committees are not established after an election until all ministerial offices have been filled. Therefore, if Ministers remain in office, there is the proposal for Ministers to exercise some level of function without the normal accompanying Committee scrutiny.

Finally, I want to comment on the proposal to prohibit the Speaker and Deputy Speakers from signing a petition of concern throughout all of the mandate. In relation to the Speaker, Stephen, you will of course know that this simply puts existing practice into law, but in relation to the three Deputy Speakers, the position is different. As currently drafted, by prohibiting a Deputy Speaker from signing a petition of concern even if they would not be chairing that item in that capacity, there is the potential to deter Members from serving actively as a

Deputy Speaker, and occasionally parties may be reluctant to allow one of their Members to serve as a Deputy Speaker if they cannot sign a petition of concern throughout the mandate.

Intentionally or unintentionally, that could impact on the inclusivity of the team of Deputy Speakers who work with the Speaker, on the basis that if Members cannot sign a petition of concern throughout the whole of the mandate, as I say, some individual Members may have some particular issues of interest on which they would wish to reserve the right to do that. It may put them off, or indeed it may put the parties off, given that we need 30 Members now to sign a petition of concern. No party at the moment can deliver those 30 signatures on its own.

Parties may be a bit reluctant to allow their Members to sign petitions of concern, which could affect the inclusive nature of having Deputy Speakers from across the current main parties. We were just trying to set out to the Committee and the Northern Ireland Office that we want to avoid situations where the Speaker and officials would have to resolve any ambiguity or deficiency in any of these provisions.

We are happy enough to come back in if there are any other issues that we have left out. Maybe I will ask Gareth, in the first instance, if he wants to add anything.

Q64 Stephen Farry: Gareth might be able to elaborate on this. Essentially, Mr Speaker, you are outlining three broad issues. One is the removal of the bar on Deputy Speakers with regard to a petition of concern. The second is the ability to establish Committees if there is a long period after an Assembly election in which Ministers are still in place on a caretaker basis. Perhaps we could ask Gareth to elaborate on the third point, which is around the potential lowering of the 14-day threshold in very limited circumstances. Maybe he could give us an idea of how that could be achieved in primary legislation—there are some enabling issue—and in Standing Orders. There may well be issues around those circumstances are defined.

Dr McGrath: Mr Farry will recall from many discussions of petitions of concern over many years that the devil in these matters is in the detail. It is almost impossible to envisage all the scenarios that could be captured in relation to the 14-day period. As Mr Speaker mentioned, a number of matters would be obvious to us, such as statutory rules, prayers of annulment and legislative consent motions, but there may be a plethora of other statutory motions, as I would call them, in primary legislation throughout the statute book. It is quite difficult to say, "If it isn't 14 days, is it 10 days or seven days? What is it?" From that perspective, some sort of mechanism that could take into account when a statutory deadline will impact on the 14-day period would be helpful. It would be almost impossible for me to get into defining that in more detail.

Q65 Alex Davies-Jones: I thank the witnesses for joining us. Mr Speaker, are you concerned that the limits of the power of Ministers during the caretaker period are not set out?

Alex Maskey: What we would be concerned about is that under our rules, once we have an election, we would appoint the Speaker and Deputy Speakers before anyone else. Then we would appoint Ministers and Committees. First, we need agreement on a cross-community basis in order to elect our Speakers. Secondly, if we were not to have new Ministers, and outgoing Ministers were caretakers, you could have a situation where there would be little scrutiny or accountability of the work that they were doing, albeit that they would still be operating on a caretaker basis. That would be a concern for us.

We would also have an issue on the question of sufficient representation, which we would like better clarified. I do not want to have to navigate undefined or ill-defined conditions, such as "sufficient representation". The NIO is suggesting it would want flexibility in that case, which I can fully understand, but we are drawing attention to the fact that that could give us the issue of trying to navigate something that is not very well defined.

Q66 Alex Davies-Jones: In the Bill, it is not clear how the ministerial code will be enforceable. Do you think that will make it hard for Members of the Legislative Assembly to hold Ministers to account?

Alex Maskey: I would not necessarily say so, to be truthful with you. That is always a work in progress, I suppose. I would not necessarily say that that would create any further difficulties than we already have.

Q67 Alex Davies-Jones: Do you think it would be wiser for the definition of "cross-community confidence" to be outlined in clause 213 in relation to a caretaker Executive?

Alex Maskey: For me, as Speaker and as someone who will remain impartial on this, I am trying to draw out, as are our officials, what areas are not as clear as we might like, but we support the legislation, and we will support what the Assembly decides. At the end of the day, it is not for us to make specific proposals. We are certainly very happy for our officials to continue to liaise with the NIO on some of these matters, but for us, in our role, to put specific proposals probably would not help, and would be inadvisable.

Q68 Claire Hanna: A previous speaker addressed some my questions around the code of conduct. By the way, it is very good to see you all, if only virtually. On the provisions on enforcement of the code of conduct, do you think the Bill needs to specify who should be the arbiter of those provisions?

Alex Maskey: Again, Claire, it would not be for me to put a proposal on the table on that, because as you know, people guard very jealously—I certainly do—the professional requirement to be independent and impartial. While I fully accept and appreciate that our Assembly is predicated and reconstituted on the basis of New Decade, New Approach and all its contents, I want to see them all delivered as a matter of integrity and public confidence-building. By the same token, the substance of each of those provisions is really a matter for all the parties and the Governments to work out, and we will service those diligently.

Q69 Claire Hanna: Lesley or Gareth, would you have any suggestions on that? Should there perhaps be more power, or more definition of the scope of the Northern Ireland Assembly Commissioner for Standards?

Lesley Hogg: Obviously, the ministerial code will now be monitored, and complaints against the ministerial code will be taken up by the Commissioner for Standards,

but I think that is really as far as I would like to comment at this stage. As the Speaker says, we will obviously implement whatever decisions are taken. The code of conduct is embedded in the ministerial code and would therefore come under the remit of the Commissioner for Standards.

Dr McGrath: It has always been the case that the Speaker has no role in the code of conduct for Ministers.

Q70 Claire Hanna: I want to pick up on an issue that has been discussed today by a number of witnesses: the processes that were envisaged originally regarding the use of the petition of concern, but that have not been regularly used, such as this Ad Hoc Committee on Conformity with Equality Requirements. I remember, from my time in the Assembly, a previous committee being in place for the POCs on welfare reform. What has been the thinking around those? There was a difference in opinion on whether they were required or discretionary. What is your analysis?

Again, I suppose this is relatively moot in your term, Alex, because the POC has not been deployed while you have been in post, but what is your understanding of the requirement for those Committees to be established under the current framework?

Alex Maskey: You know that as part of the Good Friday agreement, that framework was agreed, but it was never, if you like, replicated in the Assembly. Speaking as someone involved in the Good Friday agreement, that was one of key areas people were focusing on to make sure we built the new instructions on a proper framework. However, it is a statement of fact that they are not there, not used and not in place at the moment. I spend every other week in the Chamber, busily telling people, "I have no role over that," in terms of the code of conduct, for example.

On what you are requesting, Claire, I would have liked the provisions in the Good Friday agreement to have been faithfully implemented across the board, and that would have applied to these provisions as well. The fact they are not means that I have to deal with what is in place within the framework, the Northern Ireland Act, and our own Standing Orders, and I will faithfully deliver on those.

Q71 Gavin Robinson: Good afternoon to all three of you. Alex, you mentioned that you did not want to engage in suggesting solutions, or do not see that as your role. You highlighted the issue of the 14-day consideration period for a petition of concern. Those are really issues that may arise in extreme circumstances where there is a legislative deadline, or there is some urgency to matters proceeding. From what you say, the frailty in the legislation is that there is no indication that the petition can be rescinded if a resolution is found, say, two, three, four, five or 13 days into that 14-day period. Would that option to withdraw the petition satisfy the concerns that have been raised either through your officials or the Office of the Legislative Counsel?

Alex Maskey: On one level, it could possibly help, because it would remove the issue. If you were to remove it, then you do not need to deal with any consequences. Gareth said earlier that we have identified a number of issues that could be impacted, such as the LCMs, but there are others we may not have detected yet. I suppose it could go some way towards solving it.

Q72 Gavin Robinson: May I ask Lesley or Gareth if those are discussions that you have had with the NIO? Or as Mr Speaker says, are you highlighting the problems as you see them and looking to the NIO to bring solutions?

Lesley Hogg: We have really highlighted the problems; these are political solutions that are you are trying to identify. Many of these have been ongoing for a number of years. We have highlighted that there is an issue. There is no easy solution, but we are happy to continue to work with officials to see if we can come up with anything.

Dr McGrath: Mr Robinson, I would just add that former Speaker Hay wrote in 2009 that the tabling of a petition of concern is a serious and important procedural step that has the effect of raising the bar. From an Assembly perspective, you hope to avoid the law of unintended consequences with all of these. For example, you could imagine that making it easier for Members to withdraw a petition of concern could potentially increase the number tabled. Given that 116 petitions of concern were tabled in the 2011 to 2016 mandate, one in the 2016 to 2021 mandate and none in the last 18 months, the Committee will want to consider the law of unintended consequences.

Q73 Gavin Robinson: Alex, I hope you do not mind, but the hon. Member for Belfast South asked you about the petition of concern and some of the equality and human rights aspects. Leaving aside the petition of concern, if legislation was passing through the Assembly, and somebody raised an issue to do with the declaration that it is compatible with human rights and equality legislation, how would you deal with that, procedurally? If someone raises the concern that the declaration on the face of the Bill is erroneous, do you have a process that you can use, or can the Office of the Legislative Counsel look at it?

Alex Maskey: First of all, as you know, the Speaker has the role of verifying or confirming whether a Bill is competent in the first instance, before it is introduced. Once it is introduced, I would refer that to the Human Rights Commission. The Assembly also has the right, which was exercised recently, to vote to make sure we do refer something; it is a bit of an additional belt-and-braces provision. The Assembly can vote to refer a Bill or a measure to the Human Rights Commission at the outset, so it would always be referred in the first instance to the legal team, who would look at it from a perspective of rights, as well as considering all other matters of competence. Of course, additionally, we then refer it to the Human Rights Commission. The provisions are there, and they are acted on in each and every case.

Q74 Mr Walker: It is good to see you and your team again, Mr Speaker. As Speaker of the Northern Ireland Assembly, you will be better placed than most to appreciate the importance of having the Assembly up and running and legislating again after three years of absence. In your opinion, overall, does the Bill safeguard the institutions in Northern Ireland, and support them in working collectively for the benefit of the people whom they are there to represent?

Alex Maskey: I certainly hope that anything that we do would lead to that outcome. As I said at our meeting, Minister, with the political will, we can resolve most of the matters, if not all of them. Unfortunately, occasionally we have not been able to resolve matters, including, as I

said, when it came to an Opposition Bill passed a number of years ago; it was put forward by John McCallister. There was no cross-community agreement to enact a Standing Order to apply that. That might seem odd or unusual, and it probably is, but the fact of the matter is that we did not get an agreement.

At our meeting and in correspondence, we addressed the fact that the first item of business of an Assembly is electing the Speakers. With the six-week ruling, and the six-week period of delay envisaged in the Bill, theoretically, the Assembly could meet after six weeks, and if it could not be formed at that time or could not fill the offices, then it could close down for the next six weeks, but if we do not get a Speaker in place—if we do not have that agreement—we cannot even move to that point. With political agreement and common sense, you would imagine we could resolve these matters. We have only drawn attention to these matters on a cautionary basis because of our experiences; in the past, we have not even been able to pass a number of important matters on the basis of cross-community support.

Since taking up my post, I have routinely been on record reminding Members that we have a very important job to do, as guardians of the legislature, in holding the Executive to account. However, it is also by way of being our business to secure and try to maintain public confidence in the institutions. If we can do anything to maintain the sustainability of the institutions on the basis of the integrity of NDNA and previous agreements reached, I think we will be doing a good job. Anything that helps us to perform our duties in a way that maintains and builds public confidence, we need to embrace.

Q75 Mr Walker: I wholly agree. Are you not concerned, though, that if we were to try to deal with matters relating to the Standing Orders of the Assembly in Westminster legislation, that would risk overriding some of the provisions made in the Good Friday agreement for Standing Orders to be agreed on a cross-community basis? I appreciate that there have been times when it has not been possible to agree Standing Orders, but is it not better for any changes required to be agreed within the committees of the Assembly, so that it shows that maturity and control over its own processes?

Alex Maskey: That is the conundrum that we have to face. I am absolutely certain that the very best way of conducting our business is by doing it ourselves and by the Assembly performing its duties on a mature basis. Unfortunately, on more than one occasion, that has not been able to happen on the basis that we would have liked, but that is politics. As you know, there are many issues that are quite divisive and polarising in our politics at times. I still would say that I have been very pleased, notwithstanding the very challenging difficulties that we have had to face in the past year and more, that the Assembly, for the most part, has performed its duties well and professionally and the level of debate and so on has been mature enough. There have been one or two breaches of good order and all the rest of that, but I think that, for the most part, the Assembly has come through the difficulties and trials pretty well. We have still a lot of work to do. Yes, I agree with that entirely, and I certainly want to work through the rest of this mandate on the basis that the Assembly parties are fully understanding of the need to build confidence among the general public by doing our work professionally and maturely.

Q76 Mr Walker: On the issue of the Deputy Speakers, the NDNA deal states clearly:

"The Speaker and the three Deputy Speakers shall not sign a Petition."

How do you interpret that? You expressed concern about being able to recruit Deputy Speakers. Can you give the Committee any further evidence as to that? Has that been a challenge? To what extent has the willingness of parties to put forward their Members as a Deputy Speaker been a challenge to date?

Alex Maskey: As I have said, no party at this moment in time can trigger a POC itself, because it does not have the 30 Members. Therefore, parties may be reluctant and there would be some little amount of chit-chat around the corridors—not that I have heard it recently. But when I was in the business of being involved in chit-chat around the corridors as a party activist—I do not operate on that basis now, of course—there would have been people thinking, "God, would you want to lose a Member"—people would describe it in those terms—"by putting them in as a Speaker if they are not able to sign a POC?" You also have some Members who would feel very passionate about particular issues and who might want to support a POC if one were to be deployed at some point in the future.

We are merely drawing attention to the fact that the Deputy Speakers in our Assembly function differently from how the Speakers in Westminster, for example, do, as I understand it. Our Deputy Speakers function as a Deputy Speaker when they are chairing a session; for the rest of the time, they actually operate as party political activists. It is only the Speaker in this case—in the Assembly—who would be prohibited, throughout the entire mandate, from signing any petition of concern; and that is as it should be, of course. I am just drawing that to your attention and that of the Committee today. It is just because we do not want to cause chill factors; we want to make sure we can draw on as wide a range of Members across the Assembly as possible, to make sure we have inclusive arrangements made, from the Speaker through to the Principal Deputy Speaker and the two Deputy Speakers.

Q77 Mr Walker: Thank you. May I turn to Gareth McGrath and the contents of clause 5? The Bill will require petitions of concern to be signed and confirmed by at least 30 MLAs from two or more political parties. Do you agree that this will better ensure that the mechanism is used on a cross-party basis, reflecting concerns across the community?

Dr McGrath: I think that that self-evidently would be the case. It is also the case that uniquely in this mandate, and partially because of the reduction in the number of Members, no political party has the number of signatures required to table a petition of concern, so by definition, at the moment, a party requires the support of either independent Members or Members from another party to do that. It is the practice now—there have been no petitions of concern in the current mandate. I am not saying that the two are related, but I am saying that it is more difficult to see a scenario in future—obviously, without trying to forecast electoral outcomes—in which a party would have the required number of Members.

Q78 Mr Walker: We have heard some evidence today from witnesses that the 14-day consideration period is welcomed in terms of the opportunities it could provide

[Mr Robin Walker]

for people to rethink a petition of concern or find other ways of resolving concern. To come back to the issue of how we ensure that it is not in any way misused, do you think that is something that could be resolved through changes to Standing Orders in the Assembly?

Dr McGrath: To revert to the issue that was originally raised by the Speaker, clearly the intention of the consideration period, as I understand it, is to allow a cooling-off period and room for manoeuvre among the political parties. It may well start off with that intention. However, there would be scenarios in which it could evidently be used to stymie progress on issues for which the petition of concern was not intended.

It is one thing to have the provision in the Act, but trying to implement it in Standing Orders is a different matter. Standing Orders have to be passed on a cross-community basis so there is no guarantee that just because this Bill requires Standing Orders to make provision for that, it will happen. That is a statement of fact on the basis of legislation, as Mr Speaker said previously, that the Assembly has passed requiring Standing Orders to make provision for, and that has not happened. In that situation, the Speaker will be required to rule on whatever is referred to as interim procedures. That will inevitably put the Speaker in a difficult position.

Q79 Mr Walker: I am certainly happy for our officials to follow up with you on this and continue this conversation. It is important that we get the detail of this right. I am very grateful to all three of you for your input.

Q80 The Chair: Are there any other questions from colleagues? If there are no other questions, do our witnesses want to make any final comments?

Alex Maskey: I just want to say thank you on behalf of the Assembly for giving us this opportunity. As I and my colleagues have said, we do not want to be over-cautious, but we feel obliged to draw attention to some of those issues that may lack a bit of clarity. That may help on one level, but if we do not have the political will then that could cause us some difficulties, purely from a procedural implications perspective.

We are not looking to see those situations arise again, but we want to make sure we have drawn some of these issues to your attention, given that we have experienced a number of these in the past and we do not want to have those matters resolved to create another unintended consequence or problem.

Other than that, we wish you well in your deliberations. As a Speaker and as officials, we will professionally and diligently put in place whatever comes our way as a result of the legislation, according to the will of the Assembly. Thank you.

The Chair: On behalf of the Committee, I would like to thank our three witnesses very much indeed for the time they have spent with us. We are very grateful.

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

4.38 pm

Adjourned till Tuesday 6 July at twenty-five minutes past Nine o'clock.

Written evidence reported to the House

NIB01 Centre for the Administration of Justice