Assembly and Executive Review Committee

Review of Petitions of Concern

Together with the Minutes of Proceedings of the Committee Relating to the Report, Minutes of Evidence, Written Submissions and Research Papers

Ordered by the Assembly and Executive Review Committee
to be printed 25 March 2014
Report: NIA 166/11-15 (Assembly and Executive Review Committee)

REPORT EMBARGOED UNTIL COMMENCEMENT OF THE DEBATE IN PLENARY

Powers and Membership

Powers

The Assembly and Executive Review Committee is a Standing Committee established in accordance with Section 29A and 29B of the Northern Ireland Act 1998 and Standing Order 59 which states:

"(1) There shall be a standing committee of the Assembly to be known as the Assembly and Executive Review Committee.

(2) The committee may -

(a) exercise the power in section 44(1) of the Northern Ireland Act 1998;

(b) report from time to time to the Assembly and the Executive Committee.

(3) The committee shall consider -

(a) such matters relating to the operation of the provisions of Parts 3 and 4 of the Northern Ireland Act 1998 as enable it to make the report referred to in section 29A(3) of that Act; and

(b) such other matters relating to the functioning of the Assembly or the Executive Committee as may be referred to it by the Assembly."

Membership

The Committee has eleven members including a Chairperson and Deputy Chairperson with a quorum of five. The membership of the Committee is as follows:

- Stephen Moutray (Chairperson)
- Pat Sheehan (Deputy Chairperson)
- Alex Attwood[1]
- Roy Beggs
- Paula Bradley[2]
- Gregory Campbell
- Paul Givan
- Trevor Lunn[3]
- Raymond McCartney
- Seán Rogers [4] [5] [6]
- Caitríona Ruane [7] [8]

1 With effect from 4 September 2013 Mr Conall McDevitt resigned as a Member; with effect from 7 October 2013 Mr Alex Attwood replaced Mr Conall McDevitt

2 With effect from 3 February 2014 Ms Paula Bradley replaced Mr Simon Hamilton

3 With effect from 1 October 2013 Mr Trevor Lunn replaced Mr Stewart Dickson

4 With effect from 26 September 2011 Mrs Sandra Overend replaced Mr Mike Nesbitt

5 With effect from 23 April 2011 Mr John McCallister replaced Mrs Sandra Overend

6 With effect from 04 March 2013 Mr Seán Rogers filled the vacancy created by the departure of Mr John McCallister from the Committee

7 With effect from 12 September 2011 Mr Pat Doherty replaced Mr Paul Maskey

8 With effect from 10 September 2012 Ms Caitríona Ruane filled the vacancy created by the resignation of Mr Pat Doherty from the Assembly

Table of Contents

Appendices

Executive Summary

1. The Assembly and Executive Review Committee is a Standing Committee of the Northern Ireland Assembly that was established to:

   - make a report to the Secretary of State, the Assembly and the Executive Committee, by no later than 1 May 2015, on the operation of Parts III and IV of the Northern Ireland Act 1998; and
   - consider such other matters relating to the functioning of the Assembly or the Executive as may be referred to it by the Assembly.

2. On 14th January 2014, the Committee agreed the Terms of Reference for its Review of Petitions of Concern.

3. The Committee considered relevant sections of the evidence received from its previous *Review of D'Hondt, Community, Designation and Provisions for Opposition*, as part of this directly addressed the Review of Petitions of Concern. One of the conclusions in the Committee's Report on this Review stated that '*further detailed work on Petitions of Concern needs to be carried out'*. The Committee also commissioned and considered three Assembly Research Papers that informed Members' discussions and views on the issues arising from this Review.

4. As set out in the Terms of Reference, the Review considered evidence on **Petitions of Concern** in relation to:

   - provisions for voting on an Ad Hoc Committee on Conformity with Equality Requirements prior to the vote on a Petition of Concern.
   - the possibility of restricting the use of Petitions of Concern to certain key areas, and mechanisms that might facilitate this.
   - whether the current threshold of 30 signatures required for a Petition of Concern should be adjusted.
   - whether the Petitions of Concern mechanism should be replaced with an alternative mechanism, such as a weighted-majority vote.

The Committee concluded that:

5. **While there was support among some Parties on the Committee for the use of the alternative mechanism of a weighted-majority vote for matters subject to a Petition of Concern, there was no consensus on this issue. Therefore, in this context, the Committee reaffirmed the following conclusion from its previous Report: "…there was no consensus for replacement of community designation [and Petitions of Concern] by, for example, a weighted-majority vote in the Assembly of 65%."**

6. **Although there was some support among the Parties represented on the Committee for restricting the use of Petitions of Concern to key areas, there was no consensus among the Committee on how that would operate.**

7. **The Committee agreed that, should the number of MLAs in the Assembly be reduced, there should be a proportional change in the number of MLA signatures required to trigger a Petition of Concern.**

8. **While there was some support among the Committee for taking a vote on the establishment of an ACER only when a Petition of Concern relates to legislation, there was no consensus on this issue.**

9. **Even though there was some support for the establishment of a Standing Committee on Equality and Human Rights Conformity to replace the Ad Hoc Committee mechanism referred to in Standing Orders 35 and 60, there was no consensus on this issue.**

10. **It is important to highlight that although the Committee did not achieve consensus for most of its conclusions on this complex subject, the Report sets out in some detail the options considered together with the individual Party positions on specific options. The Committee therefore sees that this Report provides valuable information for the Assembly to reach a way forward on this matter.**

Introduction

Background to the Review

11. In September 2013, the Committee agreed that its next area of work would be a Review of Petitions of Concern. The Committee then spent some time considering the scope of the Review and key issues related to the Review – in particular, the issue of Ad Hoc Committees on Conformity with Equality requirements and Petitions of Concern.

12. In January 2014, the Committee agreed the **Terms of Reference** for its Review of Petitions of Concern. The terms of reference and the Committee's approach to the Review are set out in the next section of this Report.

13. The Committee had raised the issue of Petitions of Concern in the course of its '***Review of D'Hondt, Community Designation and Provisions for Opposition***', which was published on 18th June 2013. In the *'Community Designation'* section of the 'Call for Evidence' paper for that Review, which was issued on 12th February 2013, the Committee asked:

Do you believe that there should be changes to the "rules" governing Petitions of Concern? If so, what changes do you propose?

There were 22 responses to this 'Call for Evidence', and respondents included Political Parties, academics and others. Relevant extracts from these responses can be found at Appendix 5.

14. There was a wide range of opinions expressed regarding the Petitions of Concern mechanism and a number of responses on specific issues are highlighted in the *'Committee Consideration'* section of this Report. Professor Cochrane, from the University of Kent, stated that the *"Petitions of Concern provide some much needed room for manoeuvre in my view and should be retained in their current form."* In contrast, the **TUV** response to the 'Call for Evidence' described the mechanism as *"a perverse instrument which is open to abuse."*

15. Several of the stakeholder responses referred to how the Petition of Concern mechanism was used. The **UUP** observed that the Petition of Concern mechanism was *"being used on an increasingly frequent basis"*, and that statement was echoed by the Centre for Opposition Studies, which suggested that the Petition of Concern *"seems now to be a feature of regular Assembly politics, rather than a signal of exceptional concern."* However, Professors McCrudden and O'Leary et al argued that *"the procedure has been used relatively sparingly."* Nevertheless, they also observed that *"the Petition of Concern has occasionally been abused to block decisions which have nothing to do with community-specific vital nationalist or unionist interests."* This concern was echoed by Professor Cochrane, who highlighted *"the continuing danger that Petitions of Concern are being over-used for the purpose of obstructing the business of government"*.

16. Professor Galligan stated that *"There is some disagreement as to the extent to which the practice of employing Petitions of Concern has conformed to the underpinning intention of the provision."* The **UUP** response also referred to *"the original intent of providing this mechanism"*, and the Centre for Opposition Studies suggested that *"The invoking of community designations on a regular basis in this way reinforces sectarian divisions, and seems to go beyond the intended purpose of the mechanism."*

17. During the *'Review of D'Hondt, Community Designation and Provisions for Opposition'*, the Committee also received correspondence from the Committee on Procedures dated 22nd April 2013 (see Appendix 5), which highlighted an important issue relating to Petitions of Concern. This information referred to the issue of whether a "*measure*" against which a Petition of Concern is tabled *"can proceed or should be referred to an Ad Hoc Committee on Conformity with Equality Requirements (ACER) every time there is a Petition of Concern."*

18. Given the complexities involved and the range of issues raised in the 'Call for Evidence' responses and in the information from the Committee on Procedures, the Committee agreed the following conclusion in its Report on the '*Review of D'Hondt, Community Designation and Provisions for Opposition'* (see Appendix 5):

Following the evidence that was presented to the Committee regarding Petitions of Concern, the Committee concluded that further detailed work in relation to Petitions of Concern needs to be carried out.

19. The issue of Petitions of Concern also arose during the House of Commons consideration of the **Northern Ireland (Miscellaneous Provisions) Bill 2013**. During the Report Stage of the Northern Ireland (Miscellaneous Provisions) Bill 2013 in the House of Commons on 18th November 2013, Mr Mark Durkan, MP, proposed an amendment (see Appendix 5) that would:

"… amend the Northern Ireland Act 1998 to reflect the terms and intent of paragraphs 11, 12 and 13 of strand 1 of the Belfast Agreement. It would qualify the exercise of veto powers, via petitions of concern in the Assembly, through the consideration of possible equality or human rights implications."

20. During the debate, Mr Durkan stated:

"The new clause and amendments are intended to return the position to what was intended in the Good Friday, or Belfast, agreement of 1998. New clause 2 seeks to reflect properly what was in paragraphs 11, 12 and 13 of the strand 1 paper, which provide for a petition of concern in respect of a measure or a proposal in the Assembly. Those paragraphs make clear that the petition of concern was not meant to be used as an open veto to be played like a joker at any time."

21. A further amendment (see Appendix 5) was proposed by the **DUP**, which would:

"… apply to Northern Ireland, the clarification provided in the Equality Act 2010 to restrict the good relation duty being cited against fulfilling equality obligations based on objective need."

22. During the debate, Mr Nigel Dodds MP stated:

"I understand that the Assembly and Executive Review Committee is dealing with this matter, among others, and I believe that that is the right and proper place for the issue to be decided on. It is for the parties in the Northern Ireland Assembly to agree or disagree to such matters relating to petitions of concern. I understand that 40% of the petitions of concern tabled in the Northern Ireland Assembly have been tabled by the nationalist parties, so this is not a question of one party tabling petitions in a way that abuses the process. This has happened right across the board."

23. It was acknowledged during the debate that the Assembly and Executive Review Committee was undertaking a review of Petitions of Concern, so the proposed new clause was withdrawn, as Members expressed a hope that the issue would be resolved through the Assembly (see Hansard report of debate: http://www.publications.parliament.uk/pa/cm201314/cmhansrd/cm131118/debtext/131118-0003.htm#13111834000098)

The Committee's Approach to the Review

24. In September 2013, the Committee agreed that its next Review would look at Petitions of Concern, as one of the conclusions in its June 2013 Report on its '*Review of D'Hondt, Community Designation and Provisions for Opposition'* stated:

Following the evidence that was presented to the Committee regarding Petitions of Concern, the Committee concluded that further detailed work in relation to Petitions of Concern needs to be carried out.

25. At its 24th September 2013 meeting, the Committee heard evidence from the Assembly Research and Information Service and Assembly Legal Service. Following these briefings, the Committee discussed its initial approach to the Review and agreed to draft a specific 'Options Paper' (Appendix 3) to be sent to the Leaders of the Parties represented on the Committee to directly inform its Review of Petitions of Concern. The Options Paper related specifically to the issue of voting on the establishment of an Ad Hoc Committee on Conformity with Equality Requirements (ACER) prior to a vote on a Petition of Concern.

26. The Options Paper was issued to the Leaders of the Parties represented on the Committee on 22nd October 2013, and the Committee considered and discussed the Party responses (Appendix 4) at its November and December 2013 meetings.

27. The Committee considered whether it wished to focus its Review specifically on the issue of Ad Hoc Committees and Petitions of Concern, or whether it wished to conduct a wider Review of Petitions of Concern. At its 10th December 2013 meeting, the Committee agreed to have a wider review of Petitions of Concern, and the Terms of Reference for this Review were agreed at the 14th January 2014 Committee meeting.

28. The **Terms of Reference for the Review** are as follows:

The Assembly and Executive Review Committee will review Petitions of Concern, taking into account how the Petition of Concern has been used to date and the fact that the mechanism was designed as part of the safeguards to ensure that all sections of the community are protected and can participate and work together successfully in the operation of these institutions. The Committee will:

1. *Examine provisions for an Ad Hoc Committee on Conformity with Equality Requirements in relation to Petitions of Concern, including alternative procedures, e.g. the Westminster Joint Committee on Human Rights.*

2. *Examine the possibility of restricting the use of Petitions of Concern to certain key areas, and consider mechanisms that might facilitate this.*

3. *Consider whether the current threshold of 30 signatures required for a Petition of Concern should be adjusted.*

4. *Consider whether the Petitions of Concern mechanism should be replaced with an alternative mechanism, such as a weighted-majority vote.*

29. Rather than issuing a fresh 'Call for Evidence' for this Review, the Committee agreed that it would consider relevant sections of the submissions to its *Review of D'Hondt, Community Designation and Provisions for Opposition* to inform this Review of Petitions of Concern (see Appendix 5 – *'Call for Evidence - Extracts of Relevant Responses'*), as the 'Call for Evidence' paper for that Review specifically addressed the issue of Petitions of Concern (see paragraph 13 above).

30. Similarly, the Committee agreed to consider relevant sections of the Hansard reports of the oral evidence sessions taken during the *Review of D'Hondt, Community Designation and Provisions for Opposition* to inform the Review of Petitions of Concern, as some of the evidence directly referred to this issue (see Appendix 2).

31. The following oral evidence sessions were held as part of the *Review of D'Hondt, Community Designation and Provisions for Opposition*: Professor Rick Wilford, Queen's University Belfast on 26th February 2013, Professor Christopher McCrudden, University of Oxford and Professor Brendan O'Leary, University of Pennsylvania on 5th March 2013, Professor Derek Birrell, University of Ulster on 19th March 2013, Professor Yvonne Galligan, Queen's University Belfast on 23rd April 2013 and Dr Robin Wilson and Ms Eileen Cairnduff from Platform for Change on 7th May 2013. The Minutes of Evidence (Hansards) for these oral evidence sessions are at Appendix 2.

32. All Minutes of Proceedings relevant to the Committee's Review are included at Appendix 1.

33. As part of the Committee consideration, at the Committee meeting of 24th September, the Assembly Research and Information Service (RaISe) presented a briefing paper, '*Additional information on Petitions of Concern'* which provided information on Petitions of Concern, which had previously been presented to the Committee on 7th May 2013 (including an extract from an earlier briefing), as part of its *Review of D'Hondt, Community Designation and Provisions for Opposition*. This Research Briefing Paper included various analyses of Petitions of Concern submitted since the establishment of the Assembly in 1998, with Table 3 giving the subject and date of each petition, whether it was brought by a Nationalist or Unionist and the Party or Parties who signed the petition. Further Research briefings were provided to the Committee on 14th January 2014 and 11th February 2014, providing information on conformity with human rights and equality issues. The Research Briefing Papers listed below are set out in full in Appendix 6 (and can also be found at: http://www.niassembly.gov.uk/assembly-business/research-and-information-service-raise/research-publications/publications-2012/).

- *Opposition, community designation and D'Hondt – Extract (4 December 2012)*
- *Additional information on Petitions of Concern (2 May 2013)*
- *Standing Committees that examine conformity with human rights and equality issues in legislatures in the UK and Ireland (9 January 2014)*
- *Human Rights and Equality Proofing of Public Bills (10 February 2014)*

34. The *'Committee Consideration'* section of this Report — immediately below — is structured into four subsections that specifically address in turn the four key issues set out in the Terms of Reference of this Review. Similarly, the *'Committee Analysis and Conclusions'* section is divided into these four subsections, with four specific Committee Papers on each issue drawn up to assist in the Committee's deliberations. The four papers include options for draft conclusions of this Review, which were considered by the Committee at its 11th, 25th February and 11th March 2014 meetings — the papers can be found at Appendix 5.

Committee Consideration

Key Points from the stakeholder submissions to the 'Call for Evidence' paper for the *Review of D'Hondt, Community Designation and Provisions for Opposition*, the Party Responses to the Committee's Options Paper on Ad Hoc Committees and Committee Deliberations

35. The following section of this Report highlights key points relevant to this Review in the responses to the 'Call for Evidence' paper for the Committee's previous *Review of D'Hondt, Community Designation and Provisions for Opposition*, the Party Responses to the Committee's Options Paper on Ad Hoc Committees and the position of the Political Parties represented on the Committee on the four key issues set out in the Terms of Reference to this Review.

36. Relevant extracts from the responses to the previous Review can be found at Appendix 5. Full copies of the Party Responses to the Committee's Options Paper on Ad Hoc Committees and Petition of Concern can be found at Appendix 4, with Appendix 3 providing a full copy of the Options Paper.

37. The specific question asked of stakeholders by the Committee in the 'Call for Evidence' paper for the *Review of D'Hondt, Community Designation and Provisions for Opposition* in relation to Petitions of Concern was:

- *Do you believe that there should be changes to the "rules" governing Petitions of Concern? If so, what changes do you propose?*

38. The **Terms of Reference** for the Review of Petition of Concern identified four key issues for consideration:

1. Provisions for an Ad Hoc Committee on Conformity with Equality Requirements in relation to Petitions of Concern;
2. Restricting the use of Petitions of Concern to certain key areas;
3. Adjusting the threshold of signatures required for a Petition of Concern;
4. Replacing the Petition of Concern with an alternative mechanism.

This section is therefore structured into four sub-sections, which specifically address in turn the four key issues of the Terms of Reference of this Review.

Provisions for an Ad Hoc Committee on Conformity with Equality Requirements in Relation to Petitions of Concern

39. This issue was addressed at the initial stage of this Review through the Options Paper that was sent to the Leaders of the Political Parties represented on the Committee on 22nd October 2013. The Committee's objective in issuing this Options Paper to the Parties represented on the Assembly and Executive Review Committee was to identify their specific views on policy in this discrete area and hence directly inform the Committee's Review. The Options Paper related specifically to the issue of voting on the establishment of an Ad Hoc Committee on Conformity with Equality Requirements (ACER) prior to a vote on a Petition of Concern.

40. As highlighted by the Committee on Procedures the Options Paper stated:

> *"…there appear to be ambiguities with regard to the requirements in respect of ACERs. Both the Belfast Agreement (paragraphs 11 and 13) and the Northern Ireland Act 1998 (section 42(3)) appear to require the Assembly to vote on whether a measure can proceed or should be referred to an ACER every time there is a Petition of Concern. …*

The Options Paper also went on to state:

> *There is a particular issue with regard to an aspect of the procedure required by Section 42(3) of the Northern Ireland Act 1998, which appears to be ambiguous. Paragraph 13 of Strand One of the Belfast Agreement requires the Assembly to vote on whether the measure may proceed without being referred to an Ad Hoc Committee on Conformity with Equality Requirements.*
>
> *The current Standing Order 60(1) appears to have interpreted the word "measure" as a reference to a Bill/proposal for legislation as it uses the word "Bill" instead of measure when describing the matters which can be examined by the Ad Hoc Committee. The word "measure" is not defined in the Belfast Agreement or the Northern Ireland Act 1998 and consequently the meaning of the word is unclear but it could also be interpreted less restrictively as referring to a general proposal which the Assembly is considering.*
>
> *The effect of interpreting the word "measure" as a reference to a legislative proposal is that the Assembly can only refer a matter to an Ad Hoc Committee on Conformity with Equality Requirements when the Petition of Concern relates to a legislative proposal. As stated above, this appears to be the current position under Standing Order 60. If, however, the word "measure" is interpreted as a reference to a proposal which the Assembly is considering, the Assembly would need to vote every time there is a Petition of Concern, regardless of the subject matter, on whether to refer the matter to an Ad Hoc Committee on Conformity with Equality Requirements."*

41. The **Options Paper** sets out possible broad options as follows:

***Option A**: Amend the 1998 Act to reflect current Assembly practice*

The Committee could agree a recommendation to the Assembly that the Northern Ireland Act 1998 should be amended to reflect current practice with regard to Petitions of Concern, whereby a vote on whether to establish an Ad Hoc Committee on conformity with equality requirements is not required in advance of a vote on a Petition of Concern.

This would require amendments to the NI Act 1998 to be made at Westminster and will require the Assembly to amend its Standing Orders.

***Option B**: Vote on Ad Hoc Committee (ACER) to be taken when Petition of Concern is tabled in relation to legislation*

Three sub-options are available to the Assembly in relation to the definition of legislation in this instance:

***Sub-option 1**: Relates to primary legislation only; OR*

***Sub-option 2**: Relates to primary and secondary legislation and Legislative Consent Motions; OR*

***Sub-option 3**: Relates to primary and secondary legislation and Legislative Consent Motions, as well as draft Bills and proposals for legislation.*

It is possible that this may require amendments to the NI Act 1998 to be made at Westminster and will require the Assembly to amend its Standing Orders.

***Option C**: Vote on Ad Hoc Committee (ACER) to be taken every time a Petition of Concern is tabled*

This will require the Assembly to amend its Standing Orders and it is possible that this may require amendments to the NI Act 1998 to be made at Westminster.

42. Party responses to this Options Paper were received in November 2013. The individual Party responses are included in Appendix 4. Included in Appendix 5 is a paper entitled *'Petitions of Concern: Spectrum of Responses from Parties re: ACERs'*. This paper summarises the individual Party positions and also shows where they are situated in relation to each other. It was circulated at the 26th November 2013 Committee meeting, and some subsequent meetings.

43. In considering this issue, the Committee requested and considered information on the number of Petitions of Concern submitted since the establishment of the Assembly in 1998 (see Appendix 5), looking specifically at how many related to legislation and how many related to other types of Assembly business.

44. The Committee also requested information on the financial costs associated with the establishment of an ACER. At the 10th December 2013 meeting, the Committee considered a paper detailing the generic costs associated with the establishment of an Ad Hoc Committee (see Appendix 5). The costs are estimated for eight weeks, based on a Committee meeting for six weeks, plus one week either side for preparation for Committee/Report finalisation, printing and Plenary debate. It was highlighted by a Member that these costs are not necessarily additional costs for the Assembly, as it will depend on the staffing situation at the time as to whether there is existing capacity or whether additional staff would be required.

45. In its response to the Committee's Options Paper on Ad Hoc Committees and Petitions of Concern, the **Alliance Party** states:

> *"…we would prefer that legislation which is subject to a petition of concern be required to have a vote on an Ad Hoc Committee take place."*

46. The **DUP** response states:

> *"In relation to the specific issue relating to the Ad Hoc Committee on Conformity with Equality Requirements (ACER), we believe that the current practice of the Assembly is the most appropriate option."*

However, it went on to say:

> *"There is a credible argument that so long as Standing Orders provide a route – not necessarily a requirement that there must be a vote on every occasion – then the terms of Section 42 (3) have been satisfied. This could be done by indicating on the petition of concern that it was being tabled pursuant to Standing Order 60."*

The **DUP** later clarified its proposal regarding Standing Order 60 as follows: there could be two types of Petition of Concern; one that reflects current practice and another that allows for a vote on whether to establish an ACER, which would be blocked only by a No vote achieving parallel consent. In this context, the **DUP** also favours limiting votes on the establishment of an ACER to Petitions of Concern on legislation.

47. The **SDLP** response refers to the intention of the Good Friday Agreement provisions, stating:

> *"The scope of a petition of concern was not to be restricted to primary or other legislation. … the SDLP also believes the intention of the Agreement in relation to the process around a petition of concern, with reference to the ad hoc committee, in relation to all measures should be honoured."*

48. The **Sinn Féin** response states:

> *"Sinn Féin proposes that an Ad Hoc Committee on conformity be established automatically and as a prerequisite to a Petition of Concern being tabled in regard to Assembly Legislation."*

This would mean that for every Petition of Concern tabled in regard to legislation, a vote should be taken on whether to establish an ACER, and this would be blocked only by a No vote achieving parallel consent.

A **Sinn Féin** representative later stated, at the 10th December 2013 Committee meeting, that they "… *are happy to discuss other options, particularly Option C"* [i.e. a vote on ACER to be taken before every Petition of Concern].

49. The **UUP** response states:

> *"The Ulster Unionist Party's preferred option at this stage is Option A which is to amend the Northern Ireland Act 1998 to reflect current Assembly practice with regard to Petitions of Concern, whereby a vote on whether to establish an Ad Hoc Committee on conformity with equality requirements is not routinely taken in advance of a vote on a Petition of Concern."*

Restricting the Use of Petitions of Concern to Certain Key Areas

50. This issue was addressed in responses to the 'Call for Evidence' for the Committee's previous *Review of D'Hondt, Community Designation and Provisions for Opposition* and during Committee discussions. Although some Parties expressed concern about the frequency with which the Petition of Concern mechanism is being used, the question of whether or how the mechanism could be restricted raised several issues.

51. At the 14th January 2014 Committee meeting, a **Sinn Féin** representative stated:

> *"We certainly believe that the issue of restricting the use of Petitions of Concern should be considered; there is no doubt that the Committee should discuss that."*

52. The **UUP** response to the 'Call for Evidence' states:

> *"The Petition of Concern mechanism is being used on an increasingly frequent basis and we would welcome a review of the occasions it has been used and the reasons why, with particular reference to the original intent of providing this mechanism."*

53. The **Alliance Party** response to the 'Call for Evidence' states:

> *"Alliance would welcome a method of defining those issues on which a Petition of Concern can be used and as a way of ensuring this mechanism is not open to misuse."*

54. However, the **SDLP** response to the Committee's Options Paper states:

> *"The scope of a petition of concern was not to be restricted to primary or other legislation. This was the limited interpretation, put on it by bureaucrats. The proper interpretation was that the review referred to in the Agreement included primary and secondary legislation, draft Bills and policies…"*

55. The **DUP** document, '*Making Stormont Work Better*' proposed that:

> *"…the Assembly should establish a convention whereby Petitions of Concern are not used in relation to votes of confidence."*

56. At the Committee meeting of 14th January 2014, a **DUP** representative indicated support for the opinion expressed by **Professor Cochrane** from the University of Kent, who argued:

> *"I have no particular view in relation to revising the list of matters set out in the 1998 Act requiring a cross-community vote, other than to say that this should be allowed to evolve in line with other changes that are taking place and that will continue to do so."*

Professor Cochrane also stated:

"On an associated point, I would not favour any great changes to the current rules governing Petitions of Concern, as these provide a slightly more mobile and neat means that allows parties the security of knowing that they have access to a mechanism (subject to sufficient support) that allows them to designate something as a key issue, without having to come up with an exhaustive list in advance."

57. The **Green Party** response to the 'Call for Evidence' states:

"In the event that a weighted majority is not adopted, the Green Party believes that there ought to be changes to the rules governing petitions of concern to ensure that the use of petition of concern is restricted to key cross community decisions."

58. During the Committee's previous Review of *'D'Hondt, Community Designation and Provisions for Opposition'*, the Committee meeting of 19th March 2013, **Professor Birrell** from the University of Ulster stated:

"Originally, I think that petitions of concern were intended to deal mainly with constitutional and procedural matters.

Any restrictions on content, for example, only primary legislation or only Executive supported petitions, would be difficult to implement."

59. **Professor Galligan** from Queen's University Belfast suggested in her response to the 'Call for Evidence':

"There is merit in designing a mechanism, either through Standing Orders or by means of a determination of the Speaker (on advice), whereby the use of Petitions of Concern is more regulated and the content conforms to an agreed understanding of what constitutes a 'key decision'."

During the Committee meeting of 23rd April 2014, Professor Galligan stated:

"…the use of petitions of concern seems to have extended beyond the key community-specific interest that it was intended to address. Therefore, there is scope for a number of initiatives on that, some of which could be undertaken independently of other reforms. One could be to clarify the circumstances in which a petition of concern could be invoked, possibly confining it to legislation only. Another would be to introduce a qualified majority for non-legislative matters on which a petition of concern is lodged. A third, more radical departure would be to require a qualified majority for all issues that are related to community designation and cross-community voting. That would remove the parallel-consent requirement for key decisions."

60. **Professors McCrudden and O'Leary et al** stated in their response to the 'Call for Evidence':

"…the Petition of Concern has occasionally been abused to block decisions which have nothing to do with community-specific vital nationalist or unionist interests. Regarding this possibility, we would encourage the Assembly to consider ways in which it might give its Presiding Officer in conjunction with a suitably composed committee of the Assembly means to inhibit what we might call pseudo-petitions of concern."

During the Committee meeting of 5th March 2013, **Professor O'Leary** repeated this suggestion, stating:

"…we saw no reason why the Assembly could not set up an informal committee under the presiding officer to establish some kind of protocols in which party elders or senior party members might meet to try to inhibit misuse of the petition of concern. It would be up to them to devise their own proposals."

61. In his response to the 'Call for Evidence' paper **Professor Wilford** from Queen's University Belfast stated:

> *"However, the case for its [Petition of Concern's] retention rests on the opportunity it supplies for a belt and braces safeguard to parties on issues not routinely subject to the key decision tests as set out in the NI Act 1998: and it would, admittedly, be an exhaustive and probably futile task to attempt to extend the list of 'key decisions' subject to such a vote."*

During the Committee meeting of 26th February 2013, Professor Wilford reiterated this point:

> *"You cannot simply list all the issues that should be designated as key decisions. I think that the list would probably be too long and, in a sense, the petition of concern procedure is an economic way of designating an issue as a key decision. It is about certainty and reducing uncertainty. If parties have that device available to them, they can ensure that they will have a safeguard if anything is likely to cause conflict or disruption among parties."*

62. In its response to the 'Call for Evidence', the **Centre for Opposition Studies** stated:

> *"…it would, admittedly, be an exhaustive and probably futile task to attempt to extend the list of 'key decisions' subject to such a [cross-community] vote."*

Adjusting the Threshold of Signatures Required for A Petition of Concern

63. This issue was addressed in responses to the 'Call for Evidence' for the Committee's previous Review. Paragraph 131(a) of the Committee Report on *'D'Hondt, Community Designation and Provisions for Opposition'* suggested that there was some Party support for a change to the threshold of signatures required for Petitions of Concern in the event of the number of MLAs being reduced:

> *"All Parties represented on the Committee recognised that, should the number of MLAs in the Assembly be reduced, this would present an opportunity to consider changing the proportional number of MLA signatures required for a Petition of Concern"*

64. During the 14th January 2014 Committee meeting, a **DUP** representative stated:

> *"…if the current status quo in this place remains, there is not much point in talking about changing this, but if the structures change, if the number of MLAs change or the protocols change, that is when this would come into play and we would then look at that."*

65. The **SDLP** response to the Options Paper regarding Ad Hoc Committees, which was received in November 2013, stated:

> *"The SDLP does not believe that the voting threshold surrounding petitions of concern should be adjusted."*

66. During the 14th January 2014 Committee meeting, a **Sinn Féin** representative referred to evidence given by Professors McCrudden and O'Leary in March 2013:

> *"…Christopher McCrudden and Brendan O'Leary … made the point that if there was an agreement around the protocols of when it is appropriate to use a Petition of Concern, that then informs the discussion about how many MLAs are required. …So, we would need to agree the protocols first, if we are going to change our approach to Petitions of Concern, before we talk about thresholds."*

67. Given that the **Alliance Party** advocates a replacement of the Petition of Concern mechanism, it did not make a suggestion regarding the threshold. The **UUP** did not make a specific comment on the threshold in its submission; however, at the 11th February 2014 Committee meeting, the **UUP** representative said that his Party would prefer "*increasing the proportion of those [*MLAs*] required for a Petition of Concern"*.

68. Various academics suggested adjusting the threshold of signatures required for a Petition of Concern. At the Committee meeting on 23rd April 2013, **Professor Yvonne Galligan** stated:

> *"… I suggest that 30 signatures is too low a threshold, irrespective of whether three parties could each achieve 30 signatures.*
>
> *There has to be an agreement that an issue, whatever it may be, is a genuine issue of concern that reflects a general concern within the Assembly. That requires more than just 30 Members to indicate a concern. Maybe it could be through two parties. However, maybe instead of it being party related, it could be Member related: the threshold could be moved up to whatever 55% or 60% of the membership of the Assembly is, so that there is some way of moving a petition of concern and not using it as a blocking mechanism, as has been said."*

69. In his response to the 'Call for Evidence' paper, **Professor Rick Wilford** suggested:

> *"If it is to be changed, there may be a case for increasing the threshold (to 35% of members, n38) in part to reflect the proposal to displace designation in favour of a qualified weighted majority."*

At the 26th February 2013 Committee meeting, Professor Wilford acknowledged that he suggested a threshold of 35% simply to reflect the proposal to move to a weighted majority of 65%. He also reflected on some of the issues that might arise from adjusting the threshold:

> *"If one moves to weighted majority voting on key decisions, we should maybe increase the number of Members who are required to trigger a petition of concern. That would offset the possibility of that device being used vexatiously. You could build in a threshold that would frustrate that. However, you might then think that, if you pitch it too high, the opposition parties will be frustrated because they simply do not have access to that device. … Maybe it is 30, or maybe you should bump it up a bit. Lowering it would be an even more radical proposition, but the likelihood is that you would run into misuse of the device."*

Replacing the Petition of Concern with an Alternative Mechanism

70. This issue arose in the Committee's *Review of D'Hondt, Community Designation and Provisions for Opposition*, specifically in relation to the issue of community designation. One of the conclusions in that Report states:

> *"The Committee concluded that there was no consensus for replacement of community designation by, for example, a weighted-majority vote in the Assembly of 65%."*

71. Several of the responses to this 'Call for Evidence' suggested that the requirement for community designation should be ended. Almost all of those who suggested an end to community designation proposed a weighted majority voting system as a replacement.

72. In its response to the 'Call for Evidence' paper, the **Alliance Party** stated:

> *"Alliance does not support the retention of community designation.*
>
> *The current system institutionalises sectarian division within the Assembly and leads to the inequality of votes between elected MLAs. … Alliance would prefer the introduction of an Assembly voting system for cross-community matters based on a weighted majority. The*

introduction of a system of weighted majority voting ensures cross-community support while avoiding these difficulties."

73. In its paper, '*Making Stormont Work Better*', which was submitted in response to the 'Call for Evidence', the **DUP** stated:

"… in the long-term, the best means of governing Northern Ireland would involve a voluntary coalition Executive and weighted majority voting of around 65% in the Assembly, resulting in an end to community designation."

74. The **UUP** response to the 'Call for Evidence' paper stated:

"The Ulster Unionist Party position is that the Assembly should be seeking to move away from community designation and towards weighted majority voting to reflect the normalisation of politics here."

75. Several other Assembly Parties called for an end to community designation. The **TUV** described Petitions of Concern as:

"…a perverse instrument which is open to abuse."

76. The **Green Party** response to the 'Call for Evidence' proposed:

"… decisions should require a weighted majority of Assembly members which would be set at an appropriate level (e.g. 66%) as to require the support of MLAs from both unionist and nationalist communities."

77. **Mr J McCallister and Mr Basil McCrea** (then Independent Members, now **NI21**), made a similar argument in their response to the 'Call for Evidence' paper:

"The Petition of Concern mechanism has outlived its usefulness and has also been consistently misused in a manner undermining progress towards a mature parliamentary culture. The proposed requirement of a weighted majority vote is a mechanism which would secure minorities while also not impeding the emergence of a robust parliamentary culture."

78. Support for the retention of community designation came from **Sinn Féin** and the **SDLP**, as well as some academics. The **SDLP** response to the 'Call for Evidence' stated:

"The SDLP supports the retention of community designation and the right of parties to their d'Hondt entitlement under powersharing arrangements if a party chooses to claim that entitlement."

79. This response was echoed in **Sinn Féin**'s response to the 'Call for Evidence':

"Sinn Féin support the continued use of community designation for the purposes of measuring cross-community support in Assembly votes."

80. Several of the academics who responded to the 'Call for Evidence' considered at what level the qualified majority would be set. **Professors McCrudden and O'Leary et al** argued:

"… a relatively lower threshold is a relatively less reliable means for blocking decisions that lack de facto cross-community consent. … On the other hand, a relatively higher qualified majority threshold risks giving a single party the power to block any motion or Bill it chooses, regardless of the subject matter."

81. **Professor Rick Wilford**'s response to the 'Call for Evidence' stated:

> *"… a move to qualified majority voting – at say 65% of members present and voting – would in itself be an assurance that no key decision could be taken in the face of significant opposition: on that basis, there may be an arguable case for abandoning the PoC procedure."*

At the 26th February 2013 Committee meeting, Professor Wilford delved further into this issue:

> *"I think that the weighted majority could achieve what petitions of concern are designed to serve, but the problem there is that, if you pitch it too high, particularly if you are going to go for formal provision of an Opposition, you might deny that opportunity to smaller parties in the Assembly. …if you move to a system of weighted majority on what are currently defined as key decisions, unless there were to be a massive seismic shift in voting patterns in Northern Ireland, that 65% is a safe figure to ensure that no issue could be progressed in the face of significant opposition from one or other party block in the Assembly."*

82. **Platform for Change** proposed an alternative approach:

> *"A more effective mechanism for minority protection would be, as already mentioned, the enactment of a Northern Ireland Bill of Rights, which would replace the 'petition of concern'.*
>
> *Alternative or additional protection could be provided by a requirement for a super-majority vote in the assembly. This, however, should be confined to issues of strategic significance, so that the procedure could not be abused in an opportunistic manner as indicated."*

83. The **Labour Party in NI** also suggested a super-majority system:

> *"Major parliamentary decisions could simply require a super majority of 75% in order to be passed."*

84. The Assembly Research Papers commissioned by the Committee under this Review are available in full at Appendix 6 of this Report.

Committee Analysis and Conclusions

Replacing the Petition of Concern with an Alternative Mechanism

85. During deliberations, the Committee decided that it would be logical to consider first the question of whether to replace the Petition of Concern with an alternative mechanism, as this would determine how the other issues would be considered.

86. At the 28th January 2014 Committee meeting, the **Alliance Party** representative raised the point that a majority of Parties in the Assembly, as well as academics who had responded to the 'Call for Evidence' for the Committee's previous Review, supported a change to a weighted-majority vote. However, at the 11th February 2014 Committee meeting, Members discussed the issue further and found that there was no consensus among the Committee Members present on this issue.

87. The Committee specifically considered a paper (see Appendix 5) that set out two options for a Committee conclusion on this issue as follows:

Option a) Although there was support among some Parties on the Committee for the use of the alternative mechanism of a weighted-majority vote for all matters subject to a Petition of Concern, there was no consensus on this issue. Therefore, in this context, the Committee reaffirmed its conclusion from its previous Report, that: "… there was no consensus for replacement of community designation by, for example, a weighted-majority vote in the Assembly of 65%."

OR

Option b) The Committee agreed to replace the Petition of Concern cross-community vote with the alternative mechanism of a weighted-majority vote in some circumstances; for example, regarding *'Restricting the use of Petitions of Concern to Key Areas'* and *'Petitions of Concern and Establishment of Ad Hoc Committees'*.

88. A **DUP** representative said *"either there is agreement about potential replacement, or we go for the first option, which is de facto the current position".* A **Sinn Féin** representative said *"It is clear that there is still no consensus on that, so option a) is the obvious choice".* A **SDLP** representative stated, *"Our position hasn't changed in terms of Petitions of Concern, and we would choose Option a)."* However, the **Alliance Party** representative stated, *"Our position hasn't changed either; we would like to see an end to these things."*

89. At the 25th February 2014 Committee meeting, it was proposed that a vote should be taken on the principle of whether the Petition of Concern should remain or be dispensed with. The rationale for the Committee dividing was that, if it were clearly established that the Committee did not agree to dispense with the mechanism, Parties could give their views on the subsequent issues in this context.

90. The Committee, by majority, voted against the following question:

The Assembly dispenses with the use of the Petition of Concern and acknowledges that consideration must be given to alternative mechanisms that would ensure cross-community support and protection for the rights of minorities.

91. On the basis of this vote, the Committee agreed the following conclusion:

While there was support among some Parties on the Committee for the use of the alternative mechanism of a weighted-majority vote for matters subject to a Petition of

Concern, there was no consensus on this issue. Therefore, in this context, the Committee reaffirmed the following conclusion from its previous Report: "…there was no consensus for replacement of community designation [and Petitions of Concern] by, for example, a weighted-majority vote in the Assembly of 65%."

Restricting the Use of Petitions of Concern to Certain Key Areas

92. In relation to restricting the use of Petitions of Concern to key areas, several of the Parties represented on the Committee (**DUP**, **Sinn Féin**, **UUP** and the **Alliance Party**) suggested that there was value in considering some restriction on the areas where a Petition of Concern can be used.

93. At the 11th February 2014 Committee meeting, the **Alliance Party** representative stated, *"as far as Petitions of Concern and Private Members' Motion are concerned, it does not really matter … but it is really very serious that legislation can be blocked in this way, and that is why I would like to see weighted-majority."* He went on to say, *"…frequently there has been a majority* [of the House] *in favour of a motion that has been blocked by a Petition of Concern."* A **DUP** representative stated, *"I think it would be better if you could move away from that* [Petitions of Concern on Private Members' Motions]*".*

94. At the 25th February 2014 meeting, the Committee considered a paper (see Appendix 5) that set out the following options for draft conclusions of this Review:

Option a) Although there was some support among the Parties represented on the Committee for restricting the use of Petitions of Concern to key areas, there was no consensus among the Committee on how that would operate.

OR

Option b) The Committee agreed that Petitions of Concern should be used in relation to legislation only.

i. "Legislation" refers to primary legislation only.

OR

ii. "Legislation" refers to primary legislation, Legislative Consent Motions, secondary legislation and all proposals for legislation – including Private Members'Bills and Committee Bills.

OR

Option c) The Committee agreed that Petitions of Concern should not be used in relation to Private Members' Motions.

95. The **Alliance Party** representative stated *"you might get agreement around Option a)".* The **SDLP** representative also selected Option a), stating, *"I don't want to see the Petition of Concern being restricted."* A **Sinn Féin** representative agreed that *"Option a) is the one that most people can agree on",* but also stated, "*We could go for Option a), although Option b)(ii) expands on Option a), so we would be happy with that. But we would also be happy with Option c)".* A **DUP** representative stated *"Option a) is the more realistic option".* However, the **UUP** representative wished to express his *"frustration that Option a) is the one being agreed by the Committee"*, as he had hoped that the Committee could agree on one of the other options that it had discussed and, if not, Parties represented on the Committee should record their specific views on each option. The **UUP** representative restated his Party's position that *"… Petitions of Concern have been excessively used… beyond that which was originally intended; therefore we would be supportive of trying to reduce the number of occasions on which they are used."* A **Sinn Féin** representative responded to the **UUP** frustration by saying, *"…in a sense, our* [AERC's] *role is to lay out the options; it is not necessarily to arrive at consensus …".*

96. The Committee agreed the following conclusion:

Although there was some support among the Parties represented on the Committee for restricting the use of Petitions of Concern to key areas, there was no consensus among the Committee on how that would operate.

Adjusting the Threshold of Signatures Required for A Petition of Concern

97. At the 11th February 2014 Committee meeting, there was some consensus among Members present regarding the threshold of signatures required for a Petition of Concern. Representatives from the **DUP** and **Sinn Féin** both expressed a preference for the option proposing that in the event of a change in the number of MLAs in the Assembly, the threshold for signatures would be adjusted accordingly. However, the representative from the **UUP** indicated a preference for *"… increasing the proportion of those* [MLA signatures] *required for a Petition of Concern …"*.

98. The Committee reaffirmed its statement in its previous Report on *'D'Hondt, Community Designation and Provisions for Opposition'* with regard to:

> *"a possible proportional increase in the number of MLA signatures (relative to the size of the Assembly) which can trigger a Petition of Concern. All Parties represented on the Committee recognised that, should the number of MLAs in the Assembly be reduced, this would present an opportunity to consider changing the proportional number of MLA signatures required for a Petition of Concern."*

99. At the 25th February 2014 meeting, the Committee considered a paper (see Appendix 5) that set out the following options for Committee draft conclusions:

Option a) The Committee agreed that, should the number of MLAs in the Assembly be reduced, there should be a proportional change in the number of MLA signatures required to trigger a Petition of Concern.

OR

Option b) The Committee agreed that there should be an increase in the number of MLA signatures required to trigger a Petition of Concern.

100. Representatives from the **DUP**, **Sinn Féin** and the **SDLP** selected **Option a)**.

101. The **Alliance Party** representative stated that his Party *"would like to remove the Petition of Concern mechanism altogether",* but *"if it were a fait accompli that Petitions of Concern were going to remain in place"*, he stated that he *"could support both **Option a)** and **Option b)**".*

102. The Committee agreed the following conclusion:

The Committee agreed that, should the number of MLAs in the Assembly be reduced, there should be a proportional change in the number of MLA signatures required to trigger a Petition of Concern.

103. The **UUP** representative added, *"We would* [also] *wish to have a proportional increase to lessen the likelihood of the abuse of the Petition of Concern."*

Provisions for an Ad Hoc Committee on Conformity with Equality Requirements (ACER) in Relation to Petitions of Concern

104. In relation to the issue of establishing an Ad Hoc Committee on conformity with equality requirements (ACER), the responses from the **Alliance Party** and **Sinn Féin** to the Committee's Options Paper on this subject both indicated a preference for a vote on the

establishment of an ACER only when a Petition of Concern relates to legislation. The **UUP** response indicated a preference for the current practice in the Assembly, whereby a vote on the establishment of an ACER is not routinely taken in the event of a Petition of Concern. The **DUP** response suggested a mechanism whereby the Members tabling a Petition of Concern could indicate whether or not they wished for a vote to be taken on the establishment of an ACER. The full Party responses to the Options Paper are available at Appendix 4 of this Report, and the paper *'Spectrum of Responses from Parties re. ACERs'* can be found at Appendix 5.

105. At the 25th February 2014 meeting, the Committee considered a paper (see Appendix 5) that set out the following **options regarding the establishment of ACERs for Committee draft conclusions**:

Option a) The Committee concluded that a vote should be taken on the establishment of an ACER only when a Petition of Concern relates to legislation.

i. "Legislation" refers to primary legislation only.

OR

ii. "Legislation" refers to primary legislation, legislative consent motions, secondary legislation and all proposals for legislation – including Private Members' Bills and Committee Bills.

OR

Option b) Although there was some support among the Committee for taking a vote on the establishment of an ACER only when a Petition of Concern relates to legislation, there was no consensus on this issue.

OR

Option c) The Committee concluded that a vote should be taken on the establishment of an ACER each time a Petition of Concern is tabled.

106. The **Alliance Party** and the **UUP** stated a preference for **Option a).** The **UUP** representative clarified that his preference for **Option a)** was on the basis that it would *"reduce the use of Petitions of Concern and their abuse".* The **SDLP**, **Sinn Féin** and the **DUP** stated a preference for **Option b).** Given that Option b) reflects the fact that there was greater support among the Committee for taking a vote on the establishment of an ACER only when a Petition of Concern relates to legislation, the Committee agreed the following conclusion:

While there was some support among the Committee for taking a vote on the establishment of an ACER only when a Petition of Concern relates to legislation, there was no consensus on this issue.

107. During the Committee meeting on 11th January 2014, the **Alliance Party** and **Sinn Féin** expressed interest in the possibility of creating an **Assembly Standing Committee on Equality and Human Rights Conformity**, rather than an Ad Hoc Committee each time the Assembly votes on the establishment of an ACER. The Committee received a Research briefing at this meeting on the subject of *'Standing Committees that examine the conformity with human rights and equality issues in legislatures in the UK and Ireland'* (see Appendix 6). The Research Paper highlighted the merit of the specialised Westminster Joint Committee on Human Rights, although its role is not replicated in the Committees of the Scottish Parliament, the National Assembly for Wales and Dáil Éireann.

108. At the 11th February 2014 Committee meeting, the **Alliance Party** representative reaffirmed his support for the establishment of a Standing Committee on Equality and Human Rights Conformity. However, a **SDLP** representative reaffirmed his Party's support for the ACER mechanism.

109. At the 11th February 2014 meeting, the Committee received a further Research briefing on human rights and equality entitled *'Human Rights and Equality Proofing of Public Bills'* (see Appendix 6). This briefing informed the Committee of the procedures by which legislation made by the Northern Ireland Assembly is scrutinised on human rights and equality grounds.

110. At the 25th February meeting, the Committee considered the second part of a paper (see Appendix 5) that set out the following options for a draft Committee conclusion:

Option a) The Committee agreed that the Assembly should establish a Standing Committee on Equality and Human Rights to replace the Ad Hoc Committee mechanism referred to in Standing Orders 35 and 60.

OR

Option b) Although there was some support for the establishment of a Standing Committee on Equality and Human Rights Committee to replace the Ad Hoc Committee mechanism referred to in Standing Orders 35 and 60, there was no consensus on this issue.

111. The **Alliance Party** representative stated that he would prefer **Option a)**, whereas **all other Parties** represented on the Committee stated a preference for **Option b)**. Therefore, the Committee agreed the following conclusion:

Even though there was some support for the establishment of a Standing Committee on Equality and Human Rights Conformity to replace the Ad Hoc Committee mechanism referred to in Standing Orders 35 and 60, there was no consensus on this issue.

Conclusions

The Committee agreed the following conclusions:

112. **While there was support among some Parties on the Committee for the use of the alternative mechanism of a weighted-majority vote for matters subject to a Petition of Concern, there was no consensus on this issue. Therefore, in this context, the Committee reaffirmed the following conclusion from its previous Report: "…there was no consensus for replacement of community designation [and Petitions of Concern] by, for example, a weighted-majority vote in the Assembly of 65%."**

113. **Although there was some support among the Parties represented on the Committee for restricting the use of Petitions of Concern to key areas, there was no consensus among the Committee on how that would operate.**

114. **The Committee agreed that, should the number of MLAs in the Assembly be reduced, there should be a proportional change in the number of MLA signatures required to trigger a Petition of Concern.**

115. **While there was some support among the Committee for taking a vote on the establishment of an ACER only when a Petition of Concern relates to legislation, there was no consensus on this issue.**

116. **Even though there was some support for the establishment of a Standing Committee on Equality and Human Rights Conformity to replace the Ad Hoc Committee mechanism referred to in Standing Orders 35 and 60, there was no consensus on this issue.**

117. **It is important to highlight that although the Committee did not achieve consensus for most of its conclusions on this complex subject, the Report sets out in some detail the options considered together with the individual Party positions on specific options. The Committee therefore sees that this Report provides valuable information for the Assembly to reach a way forward on this matter.**

Northern Ireland Assembly

Appendix 1

Minutes of Proceedings (Extracts)

Appendix 1 – Minutes of Proceedings

1. Extracts of Agreed Minutes 2 July 2013
2. Extracts of Agreed Minutes 10 September 2013
3. Extracts of Agreed Minutes 24 September 2013
4. Extracts of Agreed Minutes 8 October 2013
5. Extracts of Agreed Minutes 22 October 2013
6. Extracts of Agreed Minutes 12 November 2013
7. Extracts of Agreed Minutes 26 November 2013
8. Extracts of Agreed Minutes 10 December 2013
9. Extracts of Agreed Minutes 14 January 2014
10. Extracts of Agreed Minutes 28 January 2014
11. Extracts of Agreed Minutes 11 February 2014
12. Extracts of Agreed Minutes 25 February 2014
13. Extracts of Agreed Minutes 11 March 2014
14. Extracts of Agreed Minutes 25 March 2014

Tuesday 2 July 2013
Room 21, Parliament Buildings, Ballymiscaw, Stormont

Present: Mr Pat Sheehan (Deputy Chairperson)
Mr Roy Beggs
Mr Gregory Campbell
Mr Stewart Dickson
Mr Paul Givan
Mr Simon Hamilton
Mr Raymond McCartney
Mr Conall McDevitt
Mr Seán Rogers
Ms Caitríona Ruane

Apologies: Mr Stephen Moutray

In Attendance: Mr John Simmons (Assembly Clerk)
Ms Ursula McCanny (Assistant Assembly Clerk)
Mr Jonathan Watson (Clerical Supervisor)
Mr Joseph Westland (Clerical Supervisor)

4. Topic of Committee's Next Review

The Deputy Chairperson reminded Members that the Chairperson wrote to the Party Leaders and Independent Members of the Assembly on 21 May 2013 regarding their priorities for the Committee's next review and sought responses by 13 June 2013.

The Deputy Chairperson advised the Committee that they had the option of moving into closed session for this discussion.

Agreed: To move into closed session.

10.35am The Committee moved into closed session.

The Committee discussed the responses received regarding the topic of the Committee's next review.

10.42am Ms Caitríona Ruane joined the meeting.

10.55am Mr Raymond McCartney left the meeting.

10.57am Mr Roy Beggs left the meeting.

10.58am Mr Paul Givan joined the meeting.

Agreed: The Committee agreed that secretariat staff should compile information on the topics discussed and present the information at the Committee's next meeting.

[EXTRACT]

Tuesday 10 September 2013
Room 21, Parliament Buildings, Ballymiscaw, Stormont

Present: Mr Stephen Moutray (Chairperson)
Mr Roy Beggs
Mr Gregory Campbell
Mr Stewart Dickson
Mr Raymond McCartney
Mr Seán Rogers
Ms Caitríona Ruane
Mr Pat Sheehan

Apologies: None.

In Attendance: Mr John Simmons (Assembly Clerk)
Ms Ursula McCanny (Assistant Assembly Clerk)
Mr Joseph Westland (Clerical Supervisor)
Mr Raymond McCaffrey (Research Officer)
Mr Michael Potter (Research Officer)

4. Topic of Committee's Next Review

The Chairperson advised Members that the purpose of this agenda item was to continue the Committee's discussion on the topic of its next review.

The Chairperson referred Members to Assembly Research Briefing Papers entitled 'The Civic Forum' and 'Women in the Northern Ireland Assembly' and invited Research Officers from Assembly Research and Information Service to join the meeting.

10:34am The Assembly Research Officers joined the meeting.

An Assembly Research Officer briefed the Committee on the Research Paper entitled 'The Civic Forum'.

10:40am Mr Gregory Campbell joined the meeting.

10:45am Mr Raymond McCartney left the meeting.

The briefing was followed by a question and answer session.

An Assembly Research Officer briefed the Committee on the Research Paper entitled 'Women in the Northern Ireland Assembly'.

10:53am Mr Stewart Dickson left the meeting.

The briefing was followed by a question and answer session.

The Chairperson thanked the Assembly Research Officers for their briefings and for attending the meeting.

11:03am The Assembly Research Officers left the meeting.

The Chairperson advised the Committee that they had the option of moving into closed session to continue this discussion.

Agreed: To move into closed session.

11:03am The Committee moved into closed session.

The Committee discussed topics for the Committee's next review.

11:08am Ms Caitríona Ruane left the meeting.

Agreed: The Committee agreed that secretariat would provide further information on the subject of Petitions of Concern as its immediate review topic for the autumn 2013 session.

[EXTRACT]

Tuesday 24 September 2013
Room 21, Parliament Buildings, Ballymiscaw, Stormont

Present: Mr Stephen Moutray (Chairperson)
Mr Roy Beggs
Mr Gregory Campbell
Mr Stewart Dickson
Mr Paul Givan
Mr Raymond McCartney
Mr Seán Rogers
Ms Caitríona Ruane
Mr Pat Sheehan

Apologies: None.

In Attendance: Mr John Simmons (Assembly Clerk)
Ms Ursula McCanny (Assistant Assembly Clerk)
Mr Joseph Westland (Clerical Supervisor)
Mr Raymond McCaffrey (Research Officer)
Mrs Kiera McDonald (Legal Adviser)

5. Topic of Committee's Next Review

The Chairperson reminded Members that, at the meeting on 10th September 2013, the Committee agreed that the topic of its next Review would be Petitions of Concern.

The Chairperson invited a Research Officer from Assembly Research and Information Service to join the meeting, to brief the Committee on research papers that were first presented to it during its previous Review.

10:40am The Assembly Research Officer joined the meeting.

An Assembly Research Officer briefed the Committee on the Research Paper entitled 'Additional information on Petitions of Concern' and an extract from the paper 'Opposition, community designation and D'Hondt'.

10:44am Mr Stewart Dickson and Mr Gregory Campbell joined the meeting.

The briefing was followed by a question and answer session.

The Chairperson advised Members that, as the Committee was to receive a briefing from Assembly Legal Service on an issue relevant to the current Review, it would be appropriate for the Committee to go into closed session for the duration of the briefing and any subsequent discussion.

Agreed: To move into closed session.

10:47am The Committee moved into closed session.

The Chairperson welcomed an Assembly Legal Adviser and invited her to join the meeting.

10:47am The Assembly Legal Adviser joined the meeting

11:03am Mr Roy Beggs joined the meeting.

The Assembly Legal Adviser briefed the Committee on legal advice that was first presented to the Committee in May 2013.

The briefing was followed by a question and answer session.

The Chairperson thanked the Assembly Legal Adviser.

The Chairperson advised the Committee that they had the option of remaining in closed session to continue this discussion.

Agreed: To remain in closed session.

The Committee discussed key issues relating to Petitions of Concern.

11:06am Mr Raymond McCartney left the meeting.

11:09am Mr Stewart Dickson left the meeting.

Agreed: The Committee agreed that the secretariat would provide draft Terms of Reference for the Review at its next meeting.

[EXTRACT]

Tuesday 8 October 2013
Room 21, Parliament Buildings, Ballymiscaw, Stormont

Present: Mr Stephen Moutray (Chairperson)
Mr Alex Attwood
Mr Roy Beggs
Mr Gregory Campbell
Mr Paul Givan
Mr Trevor Lunn
Mr Raymond McCartney
Ms Caitríona Ruane
Mr Pat Sheehan

Apologies: None.

In Attendance: Mr John Simmons (Assembly Clerk)
Ms Ursula McCanny (Assistant Assembly Clerk)
Mr Joseph Westland (Clerical Supervisor)

10:37am The meeting opened in public session.

4. Review of Petitions of Concern

The Chairperson reminded Members that it was proposed at the 24th September meeting that the discussion on this topic be held in closed session, given that it is likely to refer to the legal advice presented to the Committee at the 24th September meeting.

Agreed: To move into closed session.

10:40am The Committee moved into closed session.

The Committee discussed key issues relating to the Review, including a proposed approach to the Review and draft Terms of Reference.

10:45am Mr Alex Attwood joined the meeting.

Agreed: The Committee agreed that the secretariat would draft an Options Paper for the Review for consideration at its next meeting.

[EXTRACT]

Tuesday 22 October 2013
Room 21, Parliament Buildings, Ballymiscaw, Stormont

Present: Mr Pat Sheehan (Deputy Chairperson)
Mr Roy Beggs
Mr Gregory Campbell
Mr Raymond McCartney
Ms Caitríona Ruane

Apologies: Mr Alex Attwood
Mr Paul Givan
Mr Trevor Lunn
Mr Stephen Moutray
Mr Seán Rogers

In Attendance: Mr John Simmons (Assembly Clerk)
Ms Ursula McCanny (Assistant Assembly Clerk)
Mr Joseph Westland (Clerical Supervisor)

10:44am The meeting opened in public session.

2. Review of Petitions of Concern

The Deputy Chairperson moved to Agenda item 4 to allow for discussion, as the Committee was not quorate.

The Deputy Chairperson reminded Members that it was agreed at previous meetings that the discussion on this topic be held in closed session, given that it is likely to refer to the legal advice presented to the Committee at the 24th September meeting.

Agreed: To move into closed session.

10:45am The Committee moved into closed session.

The Committee discussed the draft Options Paper.

10:54am Ms Caitríona Ruane joined the meeting.

10:56am The Committee moved into open session.

5. Review of Petitions of Concern

Agreed: To move into closed session.

10:57am The Committee moved into closed session.

Agreed: The Committee agreed to issue the Options Paper to the Leaders of the Parties represented on the Committee.

[EXTRACT]

Tuesday 12 November 2013
Room 21, Parliament Buildings, Ballymiscaw, Stormont

Present: Mr Pat Sheehan (Deputy Chairperson)
Mr Roy Beggs
Mr Paul Givan
Mr Trevor Lunn
Mr Raymond McCartney

Apologies: Mr Gregory Campbell
Mr Stephen Moutray

In Attendance: Mr John Simmons (Assembly Clerk)
Ms Ursula McCanny (Assistant Assembly Clerk)
Mr Joseph Westland (Clerical Supervisor)
Ms Noreen Hayward (Clerical Officer)

10:40am The meeting opened in public session.

4. Review of Petitions of Concern

The Deputy Chairperson reminded Members that it was agreed at previous meetings that the discussion on this topic be held in closed session, given that it is likely to refer to the legal advice presented to the Committee at the 24th September meeting.

Agreed: To move into closed session.

10:42am The Committee moved into closed session.

The Committee discussed the Party responses to the Options Paper.

Agreed: The Committee agreed that the Committee Secretariat should liaise with Assembly Legal Service on the implications of the proposals, for discussion at its next meeting.

[EXTRACT]

Tuesday 26 November 2013
Room 21, Parliament Buildings, Ballymiscaw, Stormont

Present: Mr Pat Sheehan (Deputy Chairperson)
Mr Roy Beggs
Mr Gregory Campbell
Mr Paul Givan
Mr Raymond McCartney
Mr Stephen Moutray
Ms Caitríona Ruane

Apologies: Mr Alex Attwood
Mr Seán Rogers

In Attendance: Mr John Simmons (Assembly Clerk)
Ms Ursula McCanny (Assistant Assembly Clerk)
Mr Joseph Westland (Clerical Supervisor)

11:05am The meeting opened in public session.

4. Review of Petitions of Concern

The Deputy Chairperson reminded Members that it was agreed at previous meetings that the discussion on this topic be held in closed session, given that it is likely to refer to the legal advice presented to the Committee at the 24th September meeting.

Agreed: To move into closed session.

11:07am The Committee moved into closed session.

11:07am Ms Caitríona Ruane left the meeting.

11:17am Mr Stephen Moutray joined the meeting.

11:24am Mr Stephen Moutray left the meeting.

The Committee discussed the Party responses to the Options Paper and the Terms of Reference of the Review.

Agreed: The Committee agreed that it is important that a representative of all Parties attends the Committee's next meeting, to allow for a full discussion of the issues and agreement of the Terms of Reference for the Review.

[EXTRACT]

Tuesday 10 December 2013
Room 21, Parliament Buildings, Ballymiscaw, Stormont

Present: Mr Stephen Moutray (Chairperson)
Mr Roy Beggs
Mr Gregory Campbell
Mr Paul Givan
Mr Trevor Lunn
Mr Seán Rogers
Ms Caitríona Ruane
Mr Pat Sheehan

Apologies: Mr Alex Attwood

In Attendance: Mr John Simmons (Assembly Clerk)
Ms Ursula McCanny (Assistant Assembly Clerk)
Mr Joseph Westland (Clerical Supervisor)

10:36am The meeting opened in public session.

4. Review of Petitions of Concern

The Chairperson reminded Members that it was agreed at previous meetings that the discussion on this topic be held in closed session, given that it is likely to refer to the legal advice presented to the Committee at the 24th September 2013 meeting.

Agreed: To move into closed session.

10:37am The Committee moved into closed session.

10:38am Mr Paul Givan joined the meeting.

10:40am Mr Pat Sheehan joined the meeting.

The Committee discussed the Party responses to the Options Paper and the draft Terms of Reference of the Review.

Agreed: The Committee agreed that the Secretariat should draft an updated Terms of Reference for the Review, incorporating the points raised by Members, to be considered and agreed at the Committee's next meeting.

[EXTRACT]

Tuesday 14 January 2014
Room 21, Parliament Buildings, Ballymiscaw, Stormont

Present: Mr Stephen Moutray (Chairperson)
Mr Gregory Campbell
Mr Paul Givan
Mr Raymond McCartney
Mr Seán Rogers
Ms Caitríona Ruane
Mr Pat Sheehan

Apologies: Mr Alex Attwood
Mr Roy Beggs

In Attendance: Mr John Simmons (Assembly Clerk)
Ms Ursula McCanny (Assistant Assembly Clerk)
Mr Joseph Westland (Clerical Supervisor)
Mr Raymond McCaffrey (Research Officer)

10.40am The meeting opened in public session.

4. Review of Petitions of Concern

The Chairperson advised Members that the purpose of this agenda item was to continue the Committee's discussion on the Review of Petitions of Concern.

The Chairperson referred Members to the Assembly Research Briefing Paper *'Standing Committees that examine conformity with human rights and equality issues in legislatures in the UK and Ireland'* and invited the Research Officer from Assembly Research and Information Service to join the meeting.

10.41am The Assembly Research Officer joined the meeting.

The Assembly Research Officer briefed the Committee on the Research Paper.

The briefing was followed by a question and answer session.

The Chairperson thanked the Assembly Research Officer for his briefing and for attending the meeting.

10.51am The Assembly Research Officer left the meeting.

Agreed: The Committee agreed to request further research on the processes that currently exist in the Northern Ireland Assembly and Northern Ireland Executive for proofing Bills in respect of conformity with human rights and equality requirements.

The Chairperson advised the Committee that they had the option of moving into closed session for part of the discussion on the draft Terms of Reference for the Review of Petitions of Concern.

Agreed: To move into closed session.

10.52am The Committee moved into closed session.

The Committee discussed the redrafted Terms of Reference.

10.57am The Committee moved into open session.

Agreed: The Committee agreed that, given that there was no indication of dissent from the Members present and that issues raised in the 10th December 2013 Committee meeting had been addressed in the redrafted Terms of Reference, it was content with the following Terms of Reference for the Review of Petitions of Concern:

The Assembly and Executive Review Committee will review Petitions of Concern, taking into account how the Petition of Concern has been used to date and the fact that the mechanism was designed as part of the safeguards to ensure that all sections of the community are protected and can participate and work together successfully in the operation of these institutions. The Committee will:

1. Examine provisions for an Ad Hoc Committee on Conformity with Equality Requirements in relation to Petitions of Concern, including alternative procedures, e.g. the Westminster Joint Committee on Human Rights.

2. Examine the possibility of restricting the use of Petitions of Concern to certain key areas, and consider mechanisms that might facilitate this.

3. Consider whether the current threshold of 30 signatures required for a Petition of Concern should be adjusted.

4. Consider whether the Petitions of Concern mechanism should be replaced with an alternative mechanism, such as a weighted-majority vote.

The Chairperson advised the Members that they had the option of returning to closed session to continue the discussion on the Review of Petitions of Concern.

Agreed: To move into closed session.

10.58am The Committee moved into closed session.

11.03am Ms Caitríona Ruane joined the meeting.

The Committee discussed three papers on different elements of its Review of Petitions of Concern, as set out in the agreed Terms of Reference.

Agreed: The Committee agreed that the Secretariat should draft updated papers for further discussion at its next meeting.

[EXTRACT]

Tuesday 28 January 2014, Room 21, Parliament Buildings, Ballymiscaw, Stormont

Present: Mr Roy Beggs
Mr Paul Givan
Mr Trevor Lunn
Mr Raymond McCartney
Ms Caitríona Ruane

Apologies: Mr Alex Attwood
Mr Gregory Campbell
Mr Stephen Moutray
Mr Seán Rogers
Mr Pat Sheehan

In Attendance: Mr John Simmons (Assembly Clerk)
Ms Ursula McCanny (Assistant Assembly Clerk)
Mr Jim Nulty (Clerical Supervisor)
Mr Joseph Westland (Clerical Supervisor)

10.36am The meeting opened in public session.

5. Review of Petitions of Concern

The Acting Chairperson advised Members that the purpose of this agenda item was to continue the Committee's discussion on the Review of Petitions of Concern.

The Acting Chairperson referred Members to the agreed Terms of Reference in the meeting folder. He advised Members that a draft press statement had been tabled, which would be used to address any queries regarding the Review.

Agreed: The Committee agreed that it was content with the press statement as drafted.

The Chairperson advised the Committee that they had the option of moving into closed session for the discussion on the Review of Petitions of Concern.

Agreed: To move into closed session.

10.39am The Committee moved into closed session.

The Committee discussed four papers on different elements of its Review of Petitions of Concern, as set out in the agreed Terms of Reference.

Agreed: The Committee agreed that the Secretariat should draft updated papers for further discussion at its next meeting.

[EXTRACT]

Tuesday 11 February 2014, Room 21, Parliament Buildings, Ballymiscaw, Stormont

Present: Mr Stephen Moutray (Chairperson)
Mr Roy Beggs
Ms Paula Bradley
Mr Gregory Campbell
Mr Paul Givan
Mr Trevor Lunn
Mr Raymond McCartney
Mr Seán Rogers
Ms Caitríona Ruane
Mr Pat Sheehan

Apologies: None

In Attendance: Mr John Simmons (Assembly Clerk)
Ms Ursula McCanny (Assistant Assembly Clerk)
Mr Jim Nulty (Clerical Supervisor)
Mr Tim Moore (Senior Research Officer)

10.35am The meeting opened in public session.

4. Review of Petitions of Concern

The Chairperson advised Members that the purpose of this agenda item was to continue the Committee's discussion on the Review of Petitions of Concern.

The Chairperson referred Members to the Assembly Research Briefing Paper 'Human Rights and Equality Proofing of Public Bills' and invited the Senior Research Officer from Assembly Research and Information Service to join the meeting.

10.37am The Assembly Senior Research Officer joined the meeting.

The Assembly Senior Research Officer briefed the Committee on the Research Paper.

The briefing was followed by a question and answer session.

10.44am Mr Paul Givan left the meeting.

The Chairperson thanked the Assembly Senior Research Officer for his briefing and for attending the meeting.

10.59am The Assembly Senior Research Officer left the meeting.

The Chairperson advised the Committee that they had the option of moving into closed session for the discussion on the Review of Petitions of Concern.

Agreed: To move into closed session.

11.00am The Committee moved into closed session.

The Committee discussed four papers on the different elements of its Review of Petitions of Concern, as set out in the agreed Terms of Reference.

11.06am Mr Raymond McCartney joined the meeting.

11.14am Ms Paula Bradley left the meeting.

11.14am Mr Roy Beggs joined the meeting.

11.15am Ms Caitríona Ruane and Mr Seán Rogers left the meeting.

Agreed: The Committee agreed that the Secretariat should draft revised papers for further discussion at its next meeting.

[EXTRACT]

Tuesday 25 February 2014, Room 21, Parliament Buildings, Ballymiscaw, Stormont

Present: Mr Stephen Moutray (Chairperson)
Mr Roy Beggs
Ms Paula Bradley
Mr Gregory Campbell
Mr Paul Givan
Mr Trevor Lunn
Mr Raymond McCartney
Mr Seán Rogers
Ms Caitríona Ruane
Mr Pat Sheehan

Apologies: None.

In Attendance: Mr John Simmons (Assembly Clerk)
Ms Ursula McCanny (Assistant Assembly Clerk)
Mr Jim Nulty (Clerical Supervisor)

10.30am The meeting opened in public session.

4. Review of Petitions of Concern

The Chairperson advised Members that the purpose of this agenda item was to continue the Committee's discussion on the Review of Petitions of Concern.

The Chairperson advised the Committee that they had the option of moving into closed session for the discussion on the Review of Petitions of Concern.

Agreed: To move into closed session.

10.32am The Committee moved into closed session.

10.33am Mr Roy Beggs joined the meeting.

The Committee discussed four papers on the different elements of its Review of Petitions of Concern, as set out in the agreed Terms of Reference.

10.44am Ms Caitríona Ruane left the meeting.

10.49am Mr Raymond McCartney joined the meeting.

A Member proposed that the Committee vote on the following question:

The Assembly dispenses with the use of the Petition of Concern and acknowledges that consideration must be given to alternative mechanisms that would ensure cross-community support and protection for the rights of minorities.

The Committee voted

Ayes: Two Members

Noes: Six Members

Abstentions: One Member

Agreed: The Committee agreed draft conclusions for the Report on the Review.

Agreed: The Committee agreed that the Secretariat should draft an initial Report, based on the discussions at today's meeting, for consideration at its next meeting.

[EXTRACT]

Tuesday 11 March 2014
Room 21, Parliament Buildings, Ballymiscaw, Stormont

Present: Mr Pat Sheehan (Deputy Chairperson)
Mr Roy Beggs
Ms Paula Bradley
Mr Gregory Campbell
Mr Stephen Moutray
Mr Raymond McCartney
Ms Caitríona Ruane

Apologies: Mr Alex Attwood
Mr Paul Givan
Mr Trevor Lunn
Mr Seán Rogers

In Attendance: Mr John Simmons (Assembly Clerk)
Ms Ursula McCanny (Assistant Assembly Clerk)
Mr Jim Nulty (Clerical Supervisor)

10:36am The meeting opened in public session.

4. Review of Petitions of Concern

The Deputy Chairperson reminded Members that there is an upcoming seminar in the Knowledge Exchange Seminar Series (KESS) that is relevant to AERC in that it will address Petitions of Concern and Women in Politics. It will take place on Thursday, 20th March 2014 and the Committee was asked if a Member could provide the opening remarks at this seminar.

Agreed: The Committee agreed a Member to provide the opening remarks.

The Deputy Chairperson advised Members that the purpose of this agenda item was for the Committee to consider the initial draft Report on the Review of Petitions of Concern.

The Deputy Chairperson advised the Committee that they had the option of moving into closed session for the discussion on the draft Report.

Agreed: To move into closed session.

10:39am The Committee moved into closed session.

10:40am Mr Stephen Moutray left the meeting.

The Committee discussed the draft Report and agreed some amendments to the text.

Agreed: The Committee agreed that any further proposed changes to the draft Report should be sent to Committee secretariat no later than 19th March 2014, for inclusion in the Committee folder for the 25th March meeting.

Agreed: The Committee agreed that the Secretariat should present a final version of the Report for agreement at its next meeting, on 25th March 2014.

10:55am Mr Gregory Campbell left the meeting.

10:56am The Committee moved into open session.

10:57am The Deputy Chairperson adjourned the meeting.

Mr Pat Sheehan, Deputy Chairperson

Assembly and Executive Review Committee

[EXTRACT]

Tuesday 25 March 2014
Room 21, Parliament Buildings, Ballymiscaw, Stormont

Present: Mr Stephen Moutray (Chairperson)
Mr Roy Beggs
Ms Paula Bradley
Mr Gregory Campbell
Mr Paul Givan
Mr Trevor Lunn
Mr Raymond McCartney
Ms Caitríona Ruane
Mr Pat Sheehan

Apologies: Mr. Alex Attwood

In Attendance: Mr John Simmons (Assembly Clerk)
Ms Kate McCullough (Assistant Assembly Clerk)
Mr Jim Nulty (Clerical Supervisor)

10:31am The meeting opened am in public session.

4. Review of Petitions of Concern: Committee Final Consideration of the Report on Petitions of Concern

The Chairperson advised Members that the purpose of this agenda item was to continue the Committee's discussion on finalising its Review of Petitions of Concern and there was the option of moving into closed session for this.

Agreed: To move into closed session.

10:34am The Committee moved into closed session.

The Committee considered its final draft Report on the Review of Petitions of Concern.

5. Review of Petitions of Concern: Committee Agreement of Report on Petitions of Concern

10:49am The Committee moved into open session.

The Chairperson advised the Committee that the purpose of this session was to allow the Committee to agree the final draft of the Review of Petitions of Concern and the draft motion for Assembly Plenary debate on the Report.

Agreed: That the covering pages and the 'Executive Summary' section stand part of the Report.

Agreed: That the 'Introduction and Committee's Approach to the Review' section stands part of the Report.

Agreed: That the 'Committee Consideration' section stands part of the Report.

Agreed: That the 'Committee Analysis and Conclusions' section stands part of the Report.

Agreed: The Appendix 1 of the Report, the Extracts of the Minutes of Proceedings relating to the Review, stands part of the Report.

Agreed: The Appendix 2 of the Report, the Minutes of Evidence (Hansards) relating to the Review, stands part of the Report.

Agreed: The Appendix 3 of the Report, the Options Paper on Petitions of Concern Ad Hoc Committee on Conformity with Equality Requirements stands part of the Report.

Agreed: The Appendix 4 of the Report, Options Paper: Party Responses stands part of the Report.

Agreed: The Appendix 5 of the Report, Correspondence and other papers relating to the Review stands part of the Report.

Agreed: The Appendix 6 of the Report, Assembly Research Papers stands part of the Report.

Agreed: That the Committee Secretariat make any changes to typographical erros and the format of the Report as and where necessary, as these have no effect on the substance of the Report and are purely for formatting and accuracy of text purposes.

Agreed: That the first edition of today's Hansard record of the Review be included in the Report.

Agreed: That the Committee Secretariat forwards an embargoed, electronic version of the Report as soon as it becomes available – with an appropriate covering letter from the Chairperson – to the Secretary of State, First Minister and deputy First Minister and Leaders of the Parties of the Assembly.

Agreed: The wording of the motion for debate for the Report in Assembly Plenary with a request for 7th April 2014 (subject to agreement by the Business Committee).

Agreed: To order the Report of the Review of Petitions of Concern to be printed and that the Report be embargoed until the debate commences in Assembly Plenary.

Agreed: That the number of printed copies of the Report be kept to a minimum in the interest of efficiency.

Agreed: That two embargoed manuscript copies of the Report be laid with the Business Office by close Wednesday 26th March 2014.

11:15am The Chairperson adjourned the meeting.

Mr Stephen Moutray, Chairperson

Assembly and Executive Review Committee

[EXTRACT]

Appendix 2

Minutes of Evidence

Minutes of Evidence

1. 26 February 2013: Review of D'Hondt, Community Designation and Provision for Opposition: Briefing from Professor Rick Wilford.

2. 5 March 2013: Review of D'Hondt, Community Designation and Provision for Opposition: Briefing from Professor Christopher McCrudden and Professor Brendan O'Leary.

3. 19 March 2013: Review of D'Hondt, Community Designation and Provision for Oppostiion: briefing from Professor Derek Birrell.

4. 23 April 2013: Review of D'Hondt, Community Designation and Provision for Opposition: Briefing from Professor Yvonne Galligan.

5. 7 May 2013: Review of d'Hondt, Community Designation and Provision of Opposition: Platform for Change Briefing.

6. 24 September 2013: Petitions of Concern. Briefing from Northern Ireland Assembly Research and Information Service on 'Additional Information on Petitions of Concern' and 'Standing Orders 35 and 60 of the NI Assembly'.

7. 14 January 2014: Petitions of Concern. Briefing from Northern Ireland Assembly Research and Information Service on 'Standing Committees that examine conformity with human rights and equality issues in legislatures in the UK and Ireland'.

8. 11 February 2014: Review of D'Hondt, Community Designation and Provision for Opposition. Briefing from Northern Ireland Assembly Research and Information Service on 'Human Rights and Equality Proofing of Public Bills.'

9. 25 March 2014: Committee agreement of Report on Petitions of Concern.

26 February 2013

Members present for all or part of the proceedings:

Mr Stephen Moutray (Chairperson)
Mr Pat Sheehan (Deputy Chairperson)
Mr Roy Beggs
Mr Gregory Campbell
Mr Stewart Dickson
Mr Paul Givan
Mr Simon Hamilton
Mr John McCallister
Mr Raymond McCartney
Mr Conall McDevitt
Ms Caitríona Ruane

Witnesses:

Professor Rick Wilford — *Queen's University Belfast*

1. **The Chairperson**: Today's evidence session is the first in a series. Professor Rick Wilford, who is the director of legislative studies and practice at Queen's University Belfast, will present to us this morning. Professor Wilford, you are very welcome again. You are no stranger to this Committee. It is good to have you back.

2. **Professor Rick Wilford (Queen's University Belfast)**: Good morning. Thanks for inviting me back. You will see that I have produced the template and the summary paper. I will rattle through the summary paper with you to give you the heads up on where I am coming from on the agenda that you have got. I followed the order of the template, so I will start with d'Hondt, which, as you know, is one method of copper-fastening proportionality. It also has the purpose of ensuring inclusivity or inclusiveness in the Executive. It meets the tests of proportionality and inclusiveness, but there are alternative methods of doing the same thing, one of which is Sainte-Laguë, which I mentioned when I appeared before you some time last year.

3. The actual formula, whether it is d'Hondt or some other method, does matter because, technically, they are rather different. Sainte-Laguë uses a larger divisor 1, 3, 5, 7, 9 and that has the effect of advantaging smaller parties in the process of seat allocation around the Executive table. However, it seems to me that what matters as much as the actual formula, although they have differential effects, is the way in which the process of allocating seats around the Executive table is conducted. One thing that was evident in 2007 and 2011 but was not true of 1999 was the informal politics that went on. So, I think that it is a mix of informal politics and discussions among parties about who might get what, as well as the formula itself, which is quite mechanistic in its application.

4. I have floated the idea that you might want to consider changing the formula to Sainte-Laguë precisely because, if there is to be a reduction in the number of Departments and MLAs, the Committee and the Assembly may want to give consideration to ensuring, as far as possible, that the principle of inclusiveness is defended. If there is to be a reduction in the total number of Members in the Assembly, that could be a disadvantage for smaller parties, and there could be a compensating factor by altering the formula for allocation of seats around the Executive table and seats to chair and deputy chair the Committees. Any change is likely to be contingent on those reductions; that is to say, in the number of Ministers and the number of seats.

5. I will turn now to community designation. As I pointed out in the template paper, this has nothing to do with a sense of existential doubt. It is a means of ensuring that cross-community consent applies to key decisions, and, as you know, key decisions are listed in the Northern Ireland Act 1998. My only view on that is that it may be a way of entrenching difference within the

Assembly and that there may be a case for moving towards a weighted majority provision instead of the test of power of consent or weighted majority as they currently exist. I am sympathetic to the argument that designation copper-fastens or underwrites difference, and some would argue that it entrenches sectarian thinking in the Assembly.

6. If you move to a weighted majority, provided it is pitched at a sufficiently high level, you can secure the end that community designation currently provides. It could be done another way, and that might, at least, loosen the perception that the Assembly is simply an assemblage of distinctively different communities. So, I would suggest that maybe 65% or two thirds of those present in voting take the place of community designation and the two tests that are currently applied.

7. The petition of concern has become an increasingly popular method. It offers a belt-and-braces approach for parties and a safeguard against some sort of majoritarian approach in the Assembly. I think that the weighted majority could achieve what petitions of concern are designed to serve, but the problem there is that, if you pitch it too high, particularly if you are going to go for formal provision of an Opposition, you might deny that opportunity to smaller parties in the Assembly.

8. I would like to see the Assembly move towards a weighted majority system, but I can understand fully why parties might want to retain a petition of concern. You cannot simply list all the issues that should be designated as key decisions. I think that the list would probably be too long and, in a sense, the petition of concern procedure is an economic way of designating an issue as a key decision.

9. It is about certainty and reducing uncertainty. If parties have that device available to them, they can ensure that they will have a safeguard if anything is likely to cause conflict or disruption among parties. I understand the reasoning behind that, but I think that the weighted majority system should, in itself, provide a sufficient assurance that no particular issue could be railroaded through the Assembly. So, whether you want a belt-and-braces approach or are simply prepared to go with the weighted majority approach is a matter for you. I think that the latter would help in suggesting that Northern Ireland politics is beginning to normalise as a consequence of dropping the petition of concern procedure. It would mean that you would operate on the basis of a politics of recognition rather than very sharply defined politics of identity, which is what the petition of concern procedure actually affords.

10. I will turn now to opposition. I know that some people will argue that the Committees perform an oppositional role. If they do, it is opposition with a lower-case “o”, but they are not a surrogate for a formal Opposition, with a capital “O”. Any self-respecting liberal democratic parliament would have provision for a formal Opposition and enable Committees to perform an oppositional role if they so choose. That is to say that they are not alternatives. The one advantage that a formal Opposition has is that, in theory at least, it can present itself as an alternative Government-in-waiting, ready to take over if the electorate decides to throw out the rascals who are currently in office.

11. Formal Opposition is complementary to a rigorous Committee system. In the Northern Ireland context, trying to present itself as an alternative Government in waiting is going to be difficult, not least because such an alternative would have to be based on a coalitional basis anyway. So, if there is to be an Opposition, one of the things that the Committee and the Assembly will have to grapple with is what entitles a party to select an oppositional role. If formal Opposition was enabled, I think that some sort of threshold or baseline would need to be established in order for a party to designate itself or to claim the role of being an opposition party. Currently, to become entitled

to seats on a Committee or speaking rights, a minimum of three members form some sort of grouping or party in the Assembly. You might want to think about that in relation to what formally would constitute an Opposition. Should it simply be a party that otherwise is eligible for a seat around the Executive table, and/or should there be some kind of baseline figure? That is something that you need to think about.

12. The issue here is how you institutionalise opposition, and that includes not only what constitutes, or what numeric criterion you would need form an Opposition, but things like speaking rights in the Chamber, for example, to respond to a ministerial statement, a Committee report or whatever it might be. You need to think about the full ramifications of institutionalising opposition. If you will the end — the provision of a formal Opposition — then you have to will the means to enable the formal Opposition to conduct itself properly. That would include, for example, the opportunity to move a censure motion in the Chamber, as is common to opposition parties in other parliamentary democracies.

13. I made two small points in relation to other accountability measures. One is to put the liaison group on a statutory footing, which is something that I have argued before, and, secondly, to enable it to cross-question the First Minister and deputy First Minister, at least annually, on policy co-ordination and legislative co-ordination to focus on the strategic role of the Office of the First Minister and deputy First Minister (OFMDFM).

14. You need to fund an Opposition, if there is going to be one, and that is a matter for the independent financial review panel. If an Opposition were to be provided, I do not think that special measures should be adopted to afford the opposition parties some sort of priority. Either the d'Hondt or the Sainte-Laguë mechanisms will afford that opportunity. I do not think that they should be given any special preference, particularly if speaking rights were to be accorded to opposition leaders or an opposition leader. You have to have supply days to enable the Opposition to do its role properly. There is a guide in the Scottish model where they have 16 half-days during the parliamentary year when they can structure the business of the day in the Scottish Parliament, and, on a scale-back basis, if there were to be a formal Opposition, something in the order of 10 or 12 half-days during an Assembly term would be appropriate.

15. If you are going to recommend that there should be provision for a formal Opposition, certain things follow in train once that strategic decision is taken. You need to fund an Opposition, and you need to give it the resources to enable it to conduct the role as a formal Opposition in the Chamber, and that means supply days, speaking rights and financial resources.

16. I think that I will stop there.

17. **The Chairperson**: Thank you, Professor Wilford. I will open the meeting up to questions. I will allow Conall McDevitt in first, as I am aware that he will leave us shortly.

18. **Mr McDevitt**: Thank you, Chair. I apologise, Rick, for having to leave early. As always, thank you for your thoughts. The area that I am most interested in exploring is community designation and weighted majority. I want to tease out the idea that you could keep community designation but begin to introduce weighted majority for particular types of decisions on, for example, another thing that you have introduced, the concept of censure. What are your thoughts on the next phase being that we would maintain community designation but that we would explore weighted majority decisions in certain aspects, and, in particular, how appropriate to the question of censure would the application of a weighted majority be?

19. **Professor Wilford**: In a sense, of course, you have both now —

20. **Mr McDevitt**: To some extent.

21. **Professor Wilford**: Yes. Certainly for key decisions. I am only suggesting that this would apply to key decisions. I do not think that you need to bother too much about extending the scope of the key decisions, except and in so far as that we should be back to where we were in 1999-2002, where the First Minister and deputy First Minister were subject to an endorsement, and that was a key decision. There are different ways of doing that, either on a joint ticket or for the whole ministerial slate, which was recommended in the comprehensive agreement of 2004.

22. You have it now. The issue here is that, if we were to have a weighted majority, where do you pitch the level? Obviously, the level matters, because it has to be sufficiently high to enable the Assembly to demonstrate that it does have cross-community support, but it must not be too high to frustrate opposition parties seeking to designate a particular issue as a key decision. As you know, most decisions on the Floor of the Chamber are taken on a simple majority vote. For the relatively few that are subject to the key decision procedure, a petition of concern is there to so designate a matter if a party or parties deem that to be the case.

23. One option that has been floated is that, instead of each member having to designate as one thing or another, you designate a whole party as belonging to one designation or another, and I suspect that Brendan O'Leary will mention it when he appears before you next week. Therefore, instead of everyone having to sign in as a unionist or a nationalist or other, you simply have the parties designating all their members in a block. One of the problems that I have —

24. **Mr McDevitt**: Sorry, what practical difference would that make?

25. **Professor Wilford**: None, in effect. Although the perception might be that that cements even further the perception of the place as being more deeply embedded in a concept of either/or politics. Whereas, if you move to a simple — I say simple but it is not simple — majority voting system, it enables the perception that maybe Northern Ireland is moving on a bit and that one does not need the Linus's blanket of designation, whether as an individual or as a party block. As I said in my paper, this is not about existential doubt: everybody knows where they are coming from, and people know where they are coming from. One of the problems that I have with designation is the fact that it can conceal differences on policy issues within a party. The working assumption would be that everybody within a particular party block agrees on everything, but that is not necessarily the case. Parties, in themselves, are coalitions of interest, and members will disagree. It allows some flexibility, but it is a perceptual thing as much as anything. As I said earlier, it is about recognition rather than a hard and fast concern with identity. I do not think that anybody has issues with their identity; it is more, perhaps, shifting towards recognition and respect for difference.

26. If you designate, whether individually or in a block, you do not really have to think about it again. Whereas, if you move to a weighted majority system, some Members might think — perish the thought — that, on certain issues, they do not agree with their party leadership. Of course, that raises the whole issue of relationships between Members and Whips.

27. **The Chairperson**: Can I ask you about the petition of concern? You said that there may be a case for increasing the threshold or abandoning it altogether. Do you feel that a compromise could be reached, whereby a petition of concern could be used but its use could be restricted? Do you have any mechanism for that?

28. **Professor Wilford**: You have to grapple with the purpose of a petition of concern. What is it there for? It is there as a kind of belt-and-braces device, so that, if a party is particularly concerned about the implications of a proposal, whatever that may be — whether it is

legislative, policy or procedural — it has the assurance, provided it has the numbers, that it can lodge a petition and thereby oblige the taking of a cross-community vote. My view is that if you move to a weighted majority, and you pitch it at a sufficiently high level, which is guaranteed to secure cross-community consent in the Chamber, you probably do not need the device. However, that is, I think, a matter of confidence within and among the parties. They need to have that backstop just in case something occurs that they find difficult to accept. Petitions of concern can be used constructively, but they can also be used obstructively. It is really a matter of judgement about the basis upon which, and the purposes for which, the petition is presented.

29. **Mr Hamilton**: Thanks for your presentation, Rick. I just wanted to delve a little deeper into your points about the provision for an Opposition and the threshold, which, I think, is interesting.

30. When we, as a Committee, discussed this before opening up the evidence session, the issue of small parties forming an Opposition came to the fore. In some respects, it could be the case that if you facilitate or institutionalise an Opposition, some individual — I am not thinking of anybody in particular; current events are just happening — could have a perverse incentive to set themselves up as a party in this institution in order to get the benefits of funding, speaking rights, and so forth. Is that where you are coming from? I can see how you could have a problem there.

31. I am supportive of the idea of facilitating an Opposition. However, I think that it would be a little preposterous if, as well as having large parties in the Executive by whatever arrangement — whether it is a weighted majority, d'Hondt or whatever you use, because we are still going to have those big parties in Government — you might have two or three individuals in a group who style themselves as an Opposition to get speaking rights. If we were to reconstruct what we do in the Assembly Chamber following on from any changes to provide for an Opposition, that might enable them to ask questions of the First Minister or deputy First Minister or another smaller party in the Executive that does not hold that Department, so it starts to become a little preposterous. Is that where you are coming from?

32. **Professor Wilford**: Exactly, Simon. I think that you have encapsulated one of the anxieties that I have. If you provide for a formal Opposition, I do not anticipate or envisage that enabling any and all non-Executive parties to constitute the Opposition. I think that, rather like the fact that you need three Members to form a group in order to get speaking rights, Committee places in the Assembly, and so on, you have to set a minimum. This is a very tricky question. This is not a scientific issue. It is a matter of dark political arts rather than hard science.

33. **Mr McDevitt**: Do not encourage him.

34. **Professor Wilford**: No.

35. **Mr Hamilton**: Now I am salivating.

36. **Professor Wilford**: Go back to the first Assembly when three anti-agreement unionists were elected as independent unionists and came together as, I think, the united Assembly unionist group or something: there were three of them, so that could arguably be a precedent. You set the benchmark, as it were.

37. Given the premium on coalition formation for the Executive, I do not think that the Assembly should impede the possibility of non-Executive parties forming some kind of Opposition coalition in the Chamber, but the onus is on them to agree. I think that, provided they meet a threshold — I would suggest three, but it could be higher, because what one would not want is an archipelago of single-Member opposition groups — the onus would then be on them to seek agreement to form a coalition or Opposition in the Chamber, if they were so minded. In a sense, one could argue that that rather reflects the formation of the Executive in and of themselves. It is a voluntary act to go into the Executive. Equally, it would be

a voluntary act to form an Opposition. I do, however, think that you would need to set a threshold.

38. **Mr Hamilton**: You have not said anything about timing and the moment at which you choose to do that. After an election, in the current system, if parties are over a certain threshold, they can choose to join the Executive. You can, in the current system, depart at any time you want. This point has come up in our discussion: would you be in favour of setting a rigid time in which you make that decision to avoid a cynical departure from an Executive that are maybe taking unpopular decisions prior to an election, for example? Do you fix it at a certain point, such as immediately after the election, so that you choose to join or not to join or do you allow it to be flexible?

39. **Professor Wilford**: I think that you have eight working days after the election to construct the Executive. The negotiations that would happen in the post-election context would probably provide sufficient time for parties to make a decision. However, I do not think that should be the only point at which a party makes a decision about whether to go into Opposition. It could take the decision within that sort of time frame and say that there is not enough for it to agree on; therefore, it could go into Opposition. If, during the lifetime of an Executive and an Assembly, a party that had gone into the Executive decides later to leave because of its opposition to whatever it may be, it should be able to do so. However, having left, it cannot go back in. So, that has to be a once-and-for-all decision. I would not say that, if you make the decision to join the Executive within the eight-day time frame, you have to stay in. There are different points at which a party could elect to take an oppositional role. I would not limit it to that initial period.

40. **Mr Dickson**: Thank you. This has all been very helpful. I want to ask about the whole area around opposition, a motion of censure and the interrelationship between those and petitions of concern. When is a motion of censure a petition of concern and when is a petition of concern a motion of censure?

41. **Professor Wilford**: During the chequered history of the Assembly, we have not debated a motion of censure because, of course, there is no provision for it.

42. **Mr Dickson**: Exactly.

43. **Professor Wilford**: Let me complicate the picture even further. There is one possible option, which is to go for what is called a constructive vote of no confidence, which is that you only move a vote of censure when you have an alternative Government-in-waiting and ready to take over. That is the German model.

44. A vote of censure would have to meet, clearly, a test and should meet the weighted majority. The difficulty with that is that it almost looks as if it is simply going through the motions, because one would expect the Executive members, unless some are disaffected, to vote against the motion of censure. This is the thing about willing the end and willing the means. If you are to will the end of a formal Opposition, you have to will the means, and one of the means is the ability to seek to move a motion of censure. That is the point. It may be just for the optics, but it is a procedural device that should be available if you are to move to the provision for a formal Opposition.

45. **Mr Dickson**: Should the will not also include the ability to complete that motion of censure and bring the institution down?

46. **Professor Wilford**: It could, yes. I would have thought that, before such a motion would trigger that, if inter-party relations were sufficiently sour that that were to be the outcome, you would probably not require a motion of censure.

47. **Mr Dickson**: I am more interested in the relationship between that and the petition of concern. I am concerned about what I see as the cynical use of the petition of concern for political reasons rather than for reasons of

genuine concern and in the way in which the petition of concern is meant to be used. Therefore, should some other mechanism, whether it is a motion of censure or something like that, not put down a very strong marker as to why people are opposed to something?

48. **Professor Wilford**: There is provision, and there has been from the start, for the moving of a motion of no confidence in a Minister. In the first mandate, it was attempted in relation to both Martin McGuinness and David Trimble. On each occasion, it fell short of the required number. There was an attempt to move a motion of no confidence, which would have triggered a cross-community vote in the Chamber. That can happen now.

49. The issue of the petition of concern procedure is one that I mention in the paper. If one moves to weighted majority voting on key decisions, we should maybe increase the number of Members who are required to trigger a petition of concern. That would offset the possibility of that device being used vexatiously. You could build in a threshold that would frustrate that. However, you might then think that, if you pitch it too high, the opposition parties will be frustrated because they simply do not have access to that device. What they could do is move a motion of no confidence, a censure, in the Chamber, and it would then be up to Members to vote. It is as simple as that. It may not be successful, but, if that device were made available, it would at least give them the opportunity to use it. However, again, you would have to set some kind of threshold where that should be met. Maybe it is 30, or maybe you should bump it up a bit. Lowering it would be an even more radical proposition, but the likelihood is that you would run into misuse of the device.

50. **Mr McCartney**: Thank you very much for your presentation. I missed the beginning, but I have read your paper.

51. I want ask you for your views on systems that are designed in a particular way. The Good Friday Agreement was designed in a particular way. There can be a tendency to look at the building blocks and to try to reform those building blocks without looking at how each impacts on the other. The discussion on opposition has to happen alongside one on a petition of concern. In essence, if you were in Opposition and had the strength to bring a petition of concern, you could literally vote down everything in the Assembly. We should not try to separate all these things. We should not look at reform and having a formal Opposition without looking at the petition of concern. Likewise, we should not look at the size of the Assembly without looking at its impact on the representation thresholds. I would like your view on that.

52. **Professor Wilford**: I absolutely agree. This has to be done in a holistic way. I do not think that I have suggested anything that offends the principles of inclusivity or proportionality. They are cornerstones of the design that we have. I do not think that anything that I am suggesting erodes those cornerstones. However, I completely agree with you that, if you are going to move in this direction, you have to do it in a 360 degrees way. It must not be a case of picking on this particular area or that particular area without giving due regard to what the knock-on effects might be.

53. I am all for joined-up thinking. One of things that I find frustrating about the inquiry that you are all engaged in is that, whatever recommendations you may or may not agree, the efficiency review panel will ultimately have to look at those recommendations and buy into them. The risk is that the Committee might agree on something that the panel may not. Ultimately, it has the executive authority to make the decisions. However, if this process is to be at all meaningful, that panel and this Committee should really be working in a joined-up way to try to come to some agreement on what the reforms ought to be, if you believe that reforms are necessary.

54. It should not be regarded as an à la carte menu; it should be regarded as a much more integrated, holistic process. That has to be the primary motive here. It means that you have to address the potential implications of whatever the reform package may turn out to be.

55. The Select Committee on Northern Ireland Affairs was here yesterday and today. The draft Bill is very limited in its scope. I understand that the Secretary of State is minded that, if there is inter-party or all-party agreement on a reform package, the Bill will be amended. It is only at its pre-legislative scrutiny stage, but the clock is ticking.

56. I wonder whether, because of the complexities, and so on and so forth, members might be minded to say, "Well, what we have works up to a point. We do not really need to contemplate too significant a set of changes, and, therefore, we will rumble along." What I suggest, and what other witnesses will perhaps suggest, is that you have an opportunity to create a more effective and perhaps a more efficient system of joined-up scrutiny and to make the Assembly more like a parliamentary democracy than it already is by, for example, having provision for a formal Opposition. However, that does not mean that I am fixed on the Westminster or Dáil model of opposition.

57. The experience of consociations such as Northern Ireland is that it is extremely difficult to provide for a formal Opposition. Switzerland has tried and failed. It is probably the nearest parallel that we have in the way in which Executives are formed, and so on. It is, if you like, a democracy without a capital "O" opposition. That does not mean that there is no small "o" opposition or no oppositional politics. It functions, but the saving grace of the Swiss example is the provision for direct democracy, which we do not have. They initiate a system of referendums, and so on. We do not have that. There is not that kind of opportunity for our population to become involved in strategic decision-making.

58. You are focused, on the one hand, on having provisions that meet the tests of inclusivity and proportionality and, on the other hand, looking to see the extent to which you can make the Assembly more parliamentary, if you like, in the way in which it functions. That may mean providing for a formal Opposition. From what I read, the disposition of the parties is that there is a weight in favour of providing for a formal Opposition. If you make that basic decision, you have to think about what resources you should provide for those parties given that there is a threshold, as Simon said, and a point below which a party cannot legitimately describe or designate itself as the formal Opposition.

59. If you will that end, you have to will the means. It is about whether one operates as one does now. A lot of people are content, up to a point, with the oppositional role discharged by the Statutory Committees, in particular. However, the Committees are not an alternative to a formal Opposition. Look at the models in the South or over the water at Westminster: they have both. It is about the nitty-gritty procedural stuff. How do we provide for it in a way that does not offend the basic principles that underpin the agreement? That is the issue.

60. **Mr Sheehan**: Thanks for your presentation, Professor Wilford. I was wondering about the different formulae for guaranteeing proportionality in representation. You mentioned the Sainte-Laguë formula. Have you done any maths on that? If we were to change to the Sainte-Laguë formula tomorrow morning, what would be the practical changes?

61. **Professor Wilford**: No, I have not. I should have; shouldn't I? There are two versions of the Sainte-Laguë formula. One is the straightforward version, which is the divisor that goes up in the order of 1, 3, 5, 7, 9. With d'Hondt, the order is 1, 2, 3, 4. With d'Hondt, it is arithmetical. With Sainte-Laguë, it increases at a faster rate. The advantage of that is that it assists smaller parties because the bigger

parties get hit earlier in the allocation process.

62. There is also a modified version of Sainte-Laguë where, in fact, the first divisor is 1·4. So the divisor increases from the start. I cannot do it in my head; I will, or maybe you could get the Committee Clerk or somebody from the research office to do it. I do not think that it would have a material effect.

63. Where it would make a difference, I think, is if the total number of MLAs was reduced. Let us assume we had an eight-Department Executive plus OFMDFM: if you took out those Ministers and the junior Ministers, you would be left with about 60-odd Members to discharge all the roles. If you were to reduce the number to 90, 80 or whatever at some point in the future, that would give the smaller parties something of an assurance that they would get a look-in when it came to ministerial allocation. The risk with smaller numbers being elected is that the smaller parties really do get marginalised. However, they do have to take their chances in the elections. I do not think that one should be too altruistic in relation to smaller parties. If you were prioritising inclusivity, you might be minded to move to a Sainte-Laguë formula, because that is more likely than d'Hondt to ensure the inclusiveness of smaller parties. I think that that is the issue for you.

64. **Mr Sheehan**: On the issue of community designation, you say:

"a change would supply a signal that NI is capable of moving from ascribed labels which may conceal as much as they reveal."

65. You said that it would be a change in perception as much as anything else. Are you talking about the international perception of there being a divided community here? If that were the case, would it not, in actual fact, be better to have a model that shows the outside world that, even where there are divided communities, it is possible to develop a model that is capable of giving governance to wherever it is?

66. **Professor Wilford**: I suppose that what you are saying in a nutshell is, "If it ain't broke, don't fix it", because it is currently working. It is working, I suppose, imperfectly, but then all parliamentary systems work imperfectly, and I do not think that perfect should be the enemy of good. If you remove community designation, I do not think that that will change perceptions locally, nationally or internationally of the divided nature of Northern Ireland society at all.

67. The fact that one would, as an alternative, provide for weighted majority voting on key decisions, in itself, reflects that communal divisions persist on some matters. I think that you are right in the sense that you implied that it is as much a presentational issue as it is a substantive one.

68. The rider I added there about labels concealing as much as they disclose is that — I made this point earlier — you will have differences of opinion amongst Members in parties. To date, it has been very rare for Members of one party or another to rebel when it comes to Divisions. That is a rare occurrence. When you have one all-encompassing label, what you are doing, in effect, is challenging people even more to signal that they might not agree with the leadership, because so much emphasis is placed on the cohesion of the party block.

69. Back-Bench dissent is a norm of parliamentary practice and parliamentary life at Westminster. Here, Back-Bench dissent just does not exist. All I am suggesting is that, if you move to a weighted majority system, that might give people a little bit more leeway to say, "Actually, I don't agree with my party on this issue. I don't need the label. I am not concerned about my identity, because that is a given". It is a philosophical point, perhaps. Instead of being so focused or preoccupied with identity politics, one should be more concerned with the politics of recognition and respecting people's differences. Other than to provide a voting safeguard through the petition of concern device, for example, you do not

need the label for the people outwith the Assembly, whether they are an international audience or whatever, to know that we are a divided society. The point that I am making is that it may be whimsical; nevertheless, if one moved away from this assuming necessity of a communal label, that might be regarded as some kind of progression here, which does not diminish the scale of the problems that there are over division in Northern Ireland.

70. **Mr Beggs**: Thanks for your presentation. It has been very useful. I will pick up on two issues. First, a petition of concern may be brought by 30 out of 108 MLAs, which is about 27% or 28%. There are, I think, nine non-aligned Members. In reality, 30% of the Assembly have to sign a petition of concern. It strikes me that this device is being exercised in an unhealthy number of debates. There is another vote today, and a petition of concern has been tabled. I am curious as to how you came across the figure of 35%. Why 35%?

71. **Professor Wilford**: That was lazy thinking on my part because of the suggestion that we were going to move away from that device and choose a weighted majority of 65% or two thirds, as some people suggested. The figure was more or less plucked out of the air when I was writing this paper. It was to ensure that it could not be used in a vexatious way. The frequency with which the petition of concern device has been used has increased across a range of measures, whether they are procedural, legislative or policy. It is a way of limiting recourse to that device because you could have a weighted majority system instead. I just took 65 from 100 and ended up with 35. It was as simplistic as that.

72. **Mr Beggs**: There are positives and negatives of going to 65%. In theory, some legislation could go through on 55% and not be seen as being community sensitive. It is just that people accept the vote at 55%, and it goes through and allows change in governance to occur. Yet, there is a need to give protection for other areas that could be perceived as being adverse to one community or the other. Could you perceive a situation where some petitions of concern would still be required, and, having exercised that petition of concern, the issue would be voted on with the 65%? Would that be a way of limiting the blockage in the Assembly to legislation, yet showing community sensitivity on certain key issues?

73. **Professor Wilford**: Yes, it could. There are certain key decisions that ordinarily trigger the requirement for cross-community voting. The petition provides an additional safeguard. You are right that most decisions are taken on a simple majority basis, but if you move to a system of weighted majority on what are currently defined as key decisions, unless there were to be a massive seismic shift in voting patterns in Northern Ireland, that 65% is a safe figure to ensure that no issue could be progressed in the face of significant opposition from one or other party block in the Assembly. The alternative would be to ramp up the petition of concern device and begin to add to the list of what constitutes key decisions. For example, in the first Assembly, the Programme for Government was subject to a cross-community vote. That was then subsumed into the vote on the Budget, so that discrete, separate vote was then dispensed with. The only change that I would make in respect of what is subject to a key decision is the vote for First Minister and deputy First Minister. I would like to see that reintroduced either as a discrete vote or on an Executive slate vote subject to the 65% test.

74. **The Chairperson**: Thank you. No one else has indicated that they wish to speak. Therefore, I will just thank you for coming up and presenting to the Committee today.

75. **Professor Wilford**: Thank you very much.

5 March 2013

Members present for all or part of the proceedings:

Mr Stephen Moutray (Chairperson)
Mr Pat Sheehan (Deputy Chairperson)
Mr Roy Beggs
Mr Stewart Dickson
Mr Paul Givan
Mr Simon Hamilton
Mr Raymond McCartney
Mr Conall McDevitt
Ms Caitríona Ruane

Witnesses:

Professor Christopher McCrudden	*Queen's University Belfast*
Professor Brendan O'Leary	*University of Pennsylvania*

76. **The Chairperson**: I welcome Professors McCrudden and O'Leary. Thank you for your memorandum and attendance today. I ask you to begin your submission.

77. **Professor Brendan O'Leary (University of Pennsylvania)**: Thank you very much. It is an honour to supply evidence to you. Professor McCrudden and I will highlight the key elements of the memorandum that we submitted, and I will add some further reflections on the simulations that I sent yesterday. Professor McCrudden will speak to legal issues in a moment.

78. Let me highlight five components of our arguments. First, we defend the d'Hondt system. We say that it has worked well, facilitates speedy Executive formation, and achieves difference-blind inclusivity and power sharing across all political parties that have a significant mandate. This way, Northern Ireland avoids the types of crises in Executive formation that occur in Belgium, Iraq, Israel and Italy. The d'Hondt system is not unique to Northern Ireland, but it is especially suited to a deeply divided place that seeks to accomplish jointness and proportionality in the Executive. We note that it was explained to the public in the 1998 referendum, endorsed in both jurisdictions in Ireland.

79. Secondly, in our supplementary evidence, we show that the use of an alternative method to d'Hondt namely, Sainte-Laguë, which is typically kinder to smaller parties does not offer a significant prospect of enhanced representation in the Executive for the others, especially if that was to be combined with possible reductions in the size of the Northern Ireland Assembly. At best, Sainte-Laguë would marginally enhance the likelihood that others obtain the last Ministry out of a 10-member Executive or get a single higher pick among Executive portfolios. In our view, the use of Saint-Laguë would not significantly compensate small parties for their loss of seats in an Assembly reduced by 36 Members or, indeed, one reduced by 18.

80. Thirdly, regarding an opposition, we argue that the existing arrangements are better than they might appear, even to those schooled in the orthodoxies of the Westminster model. We think that it is politically inappropriate to prefer the Government and opposition model for Northern Ireland. We note that membership of the Executive is voluntary. Parties are free to go into opposition. The chairing and deputy chairing of Committees by MLAs from competitor parties holds Ministers to scrutiny much more effectively than in the Westminster model. The relatively high number of MLAs who are not in the Executive is beneficial for enhancing scrutiny. It is certainly better than what would follow from reducing their numbers. We commend enhancing MLAs' policy and administrative scrutiny capabilities through increasing resources available for expert assistance, which is also good for building party capacity. We are not persuaded of the merits of increasing

the likelihood of votes of no confidence in the Executive as a whole, and we note existing provisions for admonishing particular Ministers. The suggestions for change, we believe, flow from the suppositions of the Westminster model, which simply do not meet the needs of Northern Ireland.

81. Fourthly, regarding designation, we welcome the improvements made at St Andrews regarding the mode of election of the First Minister and deputy First Minister. We also carefully note in our memorandum the difficulty in creating difference-blind qualified majority rules for legislation in the Assembly. A 60% difference-blind rule might encourage a majority opposed by all designated nationalists, and it might encourage a future majority opposed by all designated unionists. By contrast, a 65% or 66% rule would enhance the likelihood that one party — not a designated group — would enjoy a veto over all legislation, despite having significantly less support than a majority in the Assembly. Any higher threshold for a qualified majority rule would likely create the pathologies associated with moves towards unanimity. For those reasons, we think that the existing rules on designation are appropriate as mutual confidence-building arrangements. We accept that the others are less pivotal than nationalists and unionists under the existing rules, but we observe just as emphatically that, under any plausible alternative arrangements, they would be disproportionately pivotal, which would be neither obviously democratic nor necessarily better for conflict regulation.

82. Lastly, regarding Assembly size and consequences of reductions in the number of MLAs, in supplementary evidence, I have simulated two reductions in Assembly size. In scenario 1, the Assembly is reduced by 18 MLAs, and, in scenario 2, by 36 Members. The first scenario results in the proportion of nationalist MLAs increasing and the proportion of unionist MLAs decreasing. Others, by contrast, would increase their share of the Assembly very slightly, but not increase their numbers. The second scenario would result in the proportion of both nationalist and unionist MLAs increasing, while the proportion of others would decrease. We also observe that any significant reduction in the size of the Assembly — for example, by 36 Members — would enhance the likelihood that the Alliance Party would not win a place in the Executive, whether the Executive were large — 10 members — or small — six members. We also observe that a smaller Executive of six makes the likelihood of parity in the number of nationalist and unionist Ministers far more probable. It would almost certainly remove the presence of others on the Executive.

83. There is a straightforward tension between reducing the size of the Assembly and the desire to maintain proportionality, which a shift from d'Hondt to Sainte-Laguë would barely modify. Reducing the size of the Assembly, given current party strengths and voter preferences, is also likely to increase the share of nationalists in the Assembly, which may encourage unionists to prefer the status quo. Many desirable properties of the existing system, namely reasonable opportunities for small parties, proportionality and having a significant number of MLAs who are not in the Executive, are all enhanced by keeping the existing Assembly at its existing size. Ours is, therefore, a conservative argument. There is much wisdom in the present arrangements, which flow from much learning and many compromises. Beware of changing without very good cause a system that is working well. Especially beware of the unintended consequences of what might appear to be minor reforms. Northern Ireland has fought and negotiated its way to a functioning set of institutions. We think that it should stick with them unless there are decisive objections to them, cross-community consent to those objections and cross-community consent on what would work better.

84. **Professor Christopher McCrudden (Queen's University Belfast)**: Thank you

for the invitation. We did not include in our original submission any discussion of the equality or human rights implications of the current or possible future arrangements. We noted, however, that the Northern Ireland Affairs Select Committee, in its recent call for evidence, asked specifically whether there are any equality and human rights considerations that should be brought to its attention. It might be useful to this Committee if I briefly touched on those issues. I am happy to clarify further the points that I am about to make if necessary. For obvious reasons, this part of our evidence is in my name only. The general conclusion — before I explain why I reached this conclusion — is that the likelihood of equality law or human rights law being the grounds for any successful challenge to the current arrangements is so negligible that the Committee would be justified in dismissing it.

85. I will concentrate on the implications, particularly of the European Convention on Human Rights, for the current arrangements. There are two issues that we should distinguish. The first is whether the mere requirement of parties to register as unionist, nationalist or other is itself a breach of human rights requirements under article 8 of the convention, which protects the right for private life, or article 9, which protects freedom of religion. I am aware that a question was asked in the Assembly, some time ago, about the effect of recent European Court of Human Rights case law on monitoring in the fair employment context, which might be thought to raise somewhat equivalent issues. In my view, the relevant case law of the European Court of Human Rights poses no threat to the requirement on parties to choose a designation in the Assembly. The cases in which the European Court of Human Rights objected to requirements to disclose affiliations and identities all involved the forced disclosure of religious or ethnic identities, and it is by no means clear that the court would regard unionist, nationalist or other as ethnic classifications, let alone religious classifications, although there is some possibility that it might. Even if the European Court of Human Rights were to view designations as ethnic classifications, the other elements of those cases come into play. All the relevant cases in which claims have been successful on those grounds have involved individuals, but the designation requirements for the Assembly relate to parties, not individuals. Party designations in the Assembly are chosen, based on self-identification, rather than imposed. There can be no objection on the procedural fairness of the process of designation. There are strong prudential justifications for the system, as we have just heard and as we have set out in more detail in our memorandum. It would, in short, be a dramatic departure from precedent were the court to regard the Assembly designation requirements as by themselves contrary to the convention, and my professional judgement is that it would not.

86. The second major issue is whether the other practices that the Committee is considering would amount to a breach of article 3 of protocol 1 taken alone or in combination with article 14. Article 3 of protocol 1 protects the right to fair elections, and article 14 prohibits discrimination. As regards the arrangements for the appointment of the Executive, the legal position is straightforward. Article 3 of protocol 1 does not apply to the formation of an Executive, only to the right to vote for and to be elected to the Assembly. Article 14 also does not apply because it is not a stand-alone prohibition of discrimination; it would have to engage some other right. Article 3 of protocol 1 seems to be the only possible candidate, and we have seen that it does not apply. So there appears to be no legal basis for challenging the formation of the Executive under human rights law in this respect. In any event, the system of proportional and sequential allocation of ministerial portfolios is difference-blind. It does not, on its face, allocate on the basis of religion or ethnicity, and nor does it, of

course, exclude the others from gaining ministerial portfolios.

87. As regards the election of the First Minister and deputy First Minister, you will be aware that the 1998 agreement specified that those posts would be held only by a designated unionist and a designated nationalist. The subsequent rule agreed at St Andrews in 2006 changed that system. As you well know, the post of First Minister is now awarded to the largest designation in the Assembly, whether nationalist, unionist or other, and the deputy First Minister post is awarded to the second-largest designation in the Assembly, whether unionist, nationalist or other. Therefore, the method now adopted after St Andrews is difference-blind, meaning that there is no prohibition on others being elected as First Minister or deputy First Minister.

88. As regards the arrangements requiring unionist and nationalist agreement on any important decision in the Assembly by providing for qualified majority rules, we have already accepted that they have the effect of rendering the legislative votes of those self-designating as others less likely to be pivotal. Does that amount to a breach of article 1 of protocol 1, on the ground that the vote cast by a voter for a candidate of a party that will register as "others" is of less value than that of a voter voting for a unionist or nationalist candidate? The answer to that question is more complicated, because it is clear that article 1 of protocol 1 does apply and, therefore, that article 14, prohibiting discrimination, would apply as well, unlike in the context of the selection of the Executive or the First and deputy First Ministers.

89. It is also more complicated legally, because of the decision of the European Court of Human Rights in the Sejdi and Finci v Bosnia case, in which aspects of the constitutional arrangements agreed at Dayton to settle the civil war in Bosnia were successfully challenged. The decision of the court was that constitutional prohibitions on others — that is, non-constituent peoples; think nationalist and unionist — from being able to stand for the upper house of the federal parliament were contrary to the convention insofar as they prevented a self-identified Jew and Roma, who did not wish to self-identify as one of the constituent peoples, from standing.

90. The Northern Ireland arrangements would, nevertheless, survive any challenge on those grounds under the convention, in my view. The main reason, again, is that the rules on designation are not based on ethnicity or religion. They refer to national identification. Given that no suspect classification, such as ethnicity or religion, is used, requiring heightened scrutiny by the court, the default rule applies — that is, that electoral systems, the right to vote and the right to be elected are all matters within national competence and expertise, to which the court generally gives a very wide margin of appreciation. It is also relevant that the Dayton agreement was never subject to democratic approval, unlike the Belfast/ Good Friday Agreement.

91. In conclusion, whatever the merits or demerits of the existing arrangements on political, prudential or ethical grounds, there is no good reason under equality or human rights law to depart from those arrangements.

92. **The Chairperson**: Thank you very much. I want to open it up to questions from members. First of all, in relation to the opposition within the Assembly, you have been pretty clear in saying that you see no clear need for enhancing resources, whether in money, time or positions, for exclusively opposition parties. Will you expand on why?

93. **Professor O'Leary**: Our basic philosophy is that the system established by the Belfast/Good Friday Agreement has as its core the principle of proportionality. As far as our understanding goes, it is our empirical appraisal that small parties get proportional access to all sorts of resources in the Assembly, including questioning time, and so on. We think that that is the appropriate rule. We also think that, unlike the

Westminster system, opposition parties and/or small parties get a more significant role to play in scrutiny, so we found it difficult to find a special case for enhanced opposition support.

94. We also noted that the distinctive characteristic of the dual leadership — having a First Minister and a deputy First Minister — made it almost conceptually impossible to think of an appropriate set of opposition figures. Would there be a first leader of the opposition and a deputy first leader of the opposition? How could they be constituted? Those were the factors that led us to be sceptical about any special need for fresh support for opposition. It is possible that the Committee and/or the Assembly might wish to review matters if a much higher proportion of parties, on a stable basis, went into opposition, but I do not think that that is the situation currently faced.

95. **Mr McDevitt**: Thank you, gentlemen. My party, certainly, agrees with the basic proposition that the d'Hondt process should remain at the heart of the institutions. I just want to explore Professor O'Leary's last remark. Surely, it would be prudent for this Committee to put in place arrangements should the circumstances arise in which one or two substantial parties were to choose not to take advantage of their d'Hondt entitlement and, therefore, following an election, opt out of their entitlement to the Executive without prejudice, possibly, to their entitlement to Committee seats or other roles and responsibilities in the Assembly. If they were to do so, is there not an argument that Standing Orders, the operational modus of the Assembly, would have to shift a little bit to acknowledge that there were now substantial blocks, not so much Government opposition, but non-Government?

96. **Professor O'Leary**: Perhaps. However, I think that it is also important to observe the point that you raised, namely that one of the special features of the Northern Ireland arrangements is that you can decide not to participate in the Executive and yet, remarkably, receive your entitlement either to chairing or deputy chairing Committees, for which there is no analogue in the Westminster model of democracy. It seems to me that, for that reason, opposition parties get a very reasonable share of resources and opportunities under the existing system. Personally, I see no special need to review the possibility for greater resources for the opposition if the circumstances that you envisage were to materialise. However, it is not for me to decide that matter.

97. **Mr McDevitt**: Perhaps, Chair, I could continue on that issue. Members will all have their own opinion, but I do not think that the Committee is fixated on the Westminster model. I think that we accept that, whatever we are talking about, it is unlikely to be the Westminster model. Therefore, from my point of view, it is about preserving the integrity of d'Hondt — as you say, still being entitled to exercise your proportional rights with regard to scrutiny mechanisms — but envisaging a situation in which, for whatever reason, as long as the principle of power sharing is maintained round the Executive table, parties may just opt out. Have you had the opportunity to look in any detail at the practical expression of scrutiny in plenary? Have you had the opportunity to analyse what happens, for example, at Question Time? How do you feel about what happens, for example, at the First Minister and deputy First Minister's Question Time, when the overwhelming number of questions are posed by their party colleagues and are, often, co-ordinated between the two parties?

98. **Professor O'Leary**: We report the findings of a systematic appraisal of Question Time by Professor Conley at the University of Florida. His findings are genuinely interesting. It is true that roughly one third of questions that go to the First Minister and deputy First Minister are related to constituency matters. However, he shows, very significantly, that both the Ulster Unionist Party and the SDLP engage in extensive scrutiny of the Executive

through Question Time and do so more than the other parties. He also shows the remarkable phenomenon that each party tends to specialise in a certain area of public policy, so it may well be that people from the same party, as in the Westminster system, are soft on their own members of the Executive. Nevertheless, other parties do generate lots of serious scrutiny of Ministers.

99. In response to your general query, let us go to the heart of the agreement on this question, which is the notion of proportionality. If, in the scenario that you are talking about, the SDLP and the Ulster Unionist Party were to withdraw from the Executive, they would automatically have a higher proportion of opposition time and resources. So, I assume that, under your existing Standing Orders — though I beg to be corrected — they would automatically be entitled to an increased share of access to Question Time and other resources. Personally, if that were not the case, I would be in favour of such a transformation.

100. **Professor McCrudden**: I want to make two very brief points in response to Mr McDevitt. The first is that we should not lose sight of the recommendation that, in general, we would like more facilities to be provided to MLAs in order to enable them to be more effective in questioning and scrutiny. It is not that we are, in any way, hesitant or uneasy about scrutiny: we are very much in favour of it. However, we are not convinced about its being directed to a particular group, as it were, rather than to the generality of MLAs.

101. The second point comes back to the broader question that you began with. I think that there is an important point of principle at stake here. The supposition, not behind your question but behind some arguments as to why you should move to an opposition model, is based on the notion that, in some way, the opposition model is the normal model. There has been quite a lot of talk about normalisation. It is precisely that that we want to resist. Steps towards the opposition model seem to suggest that the normalised model would be one of Government and opposition, as in the Westminster model. However much moving towards that in small steps may not have been the original intention, we are worried that it gives the impression that the Westminster model is the normalised model, which we suggest is not appropriate in these circumstances.

102. **Mr Hamilton**: Thanks for your presentation. I want to follow on from the point that Conall has elaborated on: your evolving position on the resourcing of opposition parties. As you say in your paper, Professor O'Leary, every party that is entitled to a place in the Executive has the right not to take up that position. Let us use the SDLP as an example. You do not mind me using the SDLP as an example, do you? As it stands, if the SDLP were to withdraw from the Executive today, it would not get any more time in the Chamber. Questions are allocated on an individual Member ballot basis. It would be freakish if it were to happen, but it is conceivable that, for every Question Time in an Assembly term, no SDLP Member could be drawn to ask a question. They may get called for supplementary questions. However, it is conceivable that they would not be called for a question. That is unlikely to happen. However, if it did, the SDLP would not get any additional time or monetary resources to employ people to scrutinise. It is possible, too, that its Members may not chair any scrutiny Committee for the critical Ministries. There are no additional resources. Even though parties have the right to pull out, that does not afford them any additional rights or status to scrutinise. That is the point.

103. We have a few parties that would style themselves as an opposition, but you are talking about one- and two-Member parties. We had a discussion last week about thresholds and whether you could really consider a party that had two Members to be an appropriate opposition. However, if a party like the SDLP withdrew, with 14 Members, it would get to a certain level. It would

not, by any means, be dominant in the Assembly, but it would be significant enough. That was the point you made: if you had a sizeable and more stable opposition, that would be sufficient to resource. Your position in the paper was not an argument for resources, but are you saying that, in certain circumstances, if certain parties were to do it and do it on an ongoing basis, resources — time and monetary resources — would be appropriate?

104. **Professor O'Leary**: We want to be cautious in our answer. The first thing I would say is to repeat the point that Professor McCrudden made that we are generally in favour of enhancing resources to all MLAs to enhance their policy, scrutiny, administrative and monitoring capabilities. We would want that to apply to the parties in the Executive as well as to those parties in opposition. We make the point in the paper that the system now built in Northern Ireland actually provides for better opportunities for those not in the Executive compared to the Westminster model. So, it would be generous for the Assembly to decide to resource such opposition parties further. Of course, if it was minded to do so, that is its prerogative. However, our point is simply to observe that nothing under the principle of proportionality requires the Assembly to do more than it is doing at present.

105. **Mr Hamilton**: I am almost arguing against my party's position. A party that pulls out but does not get any additional resources is, therefore, not able to probe my party and the other parties that remain in the Executive. That is not a bad position to be in.

106. **Mr McDevitt**: It is all right from inside it at the moment, as you keep reminding us.

107. **Mr Hamilton**: It is entirely tactical.

108. The question is about whether it is fair. If our parties decided not to take their Executive positions, is it "normal", to use that phrase, that they should not be getting a little bit more? It is not about money to do whatever they want with; it is more about time resources and the ability to scrutinise in Committee and plenary.

109. **Professor McCrudden**: One of the points that we need to come back to is the centrality of proportionality in this context. You get the resources that, to put it crudely, voters want you to get: the resources are proportionate to your electoral support. Were one to take a party into "opposition" and that "opposition" role proved popular, the general rule of politics is that that party will get more votes, more support, more MLAs and will be able, on a basis of proportionality, to carry out even more successful monitoring in calling the Executive to account. The principle of proportionality is central to the mechanism. I think that I speak for both of us when I say that breaching the principle of proportionality by giving some groups of MLAs more resources than apply to the run of the mill would be a worrying trend.

110. **Mr Hamilton**: I do not disagree with you about the principle of proportionality as it relates to democratic representation or positions in the Executive. However, I am not entirely sure whether it was ever envisaged that it would go down as far as pounds, shillings and pence. We had an interesting discussion last week about thresholds, and there is a ridiculousness about a party of two people getting lots of money, time and resources that the electorate did not afford them via the ballot box. It creates a perverse incentive for people to create such an establishment. There is a difference once you get beyond a certain threshold, although I am not stating a position on what I think that should be. However, it is interesting that in an earlier discussion, we said that if there was a sizeable party over a sustained period, it might perhaps be worth looking at.

111. **Professor McCrudden**: I should say that we both read Rick Wilford's evidence to the Committee and the discussions surrounding it. I should also say that we were not convinced by it.

112. **Mr McCartney**: Thank you for your presentation. Your paper was very good; it opened up some of the points that I want to raise today. There has been commentary on the need for an opposition, although there has been rather less narrative about why people suddenly feel the need for an opposition now when there was not so much discussion about it in the past. I do not want to reduce the argument to a sentence or two, but I am forced to. You touched on people believing that other models are normal and, almost by extension, that equals better. However, from reading your paper, I infer that if a number of MLAs or parties decided to go into opposition, they would find themselves in a better position than what is described as the "normal" opposition that exists in, say, Westminster. Is that a fair reflection of your position?

113. **Professor O'Leary**: It is fair in respect of proportional access to time and leadership positions in Committees. As you know, the official Opposition at Westminster gets special resources that enable it to fund a great many special assistants who work on behalf of members of the shadow Cabinet. There are resource opportunities that the official Opposition gets in a Westminster-style system.

114. Thank you for your generous comments on our paper. One of the things that we want to emphasise in the series of submissions is that there are parliamentary models other than the Westminster one, including the European Parliament model, in which the principle of proportionality is applied more or less all the way through. That is another form of normality to which the Northern Ireland Assembly might want to refer.

115. **Mr McCartney**: At present, if parties decide to go into opposition by choice, which is your contention, they would have Chairs and Deputy Chairs of Committees, which is not the case in Westminster.

116. **Professor O'Leary**: Correct.

117. **Mr McCartney**: Therefore, in many ways, they would put themselves in a more advanced position. Resources make a difference, and I will not minimise that. However, opposition should come about through opposing policy or by suggesting a different way of doing things rather than having more resources to do it. If you have the position and the platform, you may find yourself in a better position than some of the well-resourced opposition spokespersons that you find in other models.

118. **Professor O'Leary**: You have interpreted us correctly.

119. **Mr McCartney**: It even relates to using d'Hondt in the first instance. You contend that d'Hondt was employed because it favoured the larger parties, whereas Sainte-Laguë might have been better proportionally.

120. **Professor O'Leary**: There is a law of political science that you will find rather peculiar. However, it is simple to state, and I will not elaborate on it at any great length. Each definition of proportionality is proportional in its own way. The d'Hondt system is one way of accomplishing proportionality that operates to the benefit of larger parties, whereas Sainte-Laguë or Webster generally operates to the benefit of smaller parties. There is modified Sainte-Laguë, which operates to the benefit of medium-sized parties.

121. There is a whole family of proportionality systems, each of which accomplishes a slightly different objective. We do not want to take the view that one system of proportionality is always better than others. However, there were considered reasons for choosing d'Hondt. It has worked effectively. We note through our simulations that the application of Sainte-Laguë would not make a significant difference to the others, although, before we carried out the simulations, we thought that it might. However, the others stand to lose most from a reduction in the size of the Assembly. If you are concerned to protect the interests of the smaller parties, the best way to do that is to

keep the Assembly at roughly its current size.

122. **Mr McCartney**: There was a debate in the Assembly yesterday on the Miscellaneous Provisions Bill that the Secretary of State is taking forward. The new model for selecting the First Minister and the deputy First Minister was described yesterday as a "corruption". However, your paper states that it is an enhancement, a better reflection and, indeed, opens up the possibility that you do not have to be a unionist or nationalist by designation to fill either post.

123. **Professor O'Leary**: Right. There are several features of the new system that are helpful compared to the old one. First, they are much closer to the d'Hondt principle. Secondly, as we have said, the others have a full opportunity to get either the first ministership or the deputy first ministership. Thirdly, each group gets to choose its own leader. There is no obligation on them to vote for the other party's nomination for leader, which is a much tougher call than endorsing your own leader.

124. **Mr McCartney**: No one has provided the narrative. We all have our own political viewpoint on why opposition has become a hot subject in recent times. However, nothing that I read here indicates that, as regards delivering good governance or best practice, the idea of a traditional "opposition" model is better than what is already on offer for parties that want to go into opposition.

125. **Professor McCrudden**: I must distinguish between a formal role for the opposition, as is being sketched out now and as Professor Wilford sketched out to some extent last week, and effective scrutiny by a group of MLAs. Professor O'Leary and I are deeply committed to effective scrutiny. Anything that would increase that scrutiny would be good, provided that it does not undermine the basic structure of the operation of the Executive and the Assembly.

126. We have no reason to believe that there are not very effective ways of enhancing a scrutiny and monitoring role for MLAs without having to create a formal opposition role. Confusion sometimes enters the public debate about Opposition with a capital "O" and opposition with a lower-case "o". Opposition with a lower-case "o" is entirely consistent with what we are arguing. Indeed, we strongly support it. Opposition with a capital "O" is a different game.

127. **Mr McCartney**: One of the headlines of this is that the opposition provides an alternative government. Therefore a party's leaving the Executive voluntarily could provide the electorate with an alternative way of the Executive's doing business. It is not as if you need a formal structure to provide the alternative.

128. **Professor O'Leary**: A party could offer itself as a better party for the electorate to consider. However, in the context of the proportional representation system and multi-party government, it is implausible that a single party that goes into opposition could truly represent itself as an alternative government. It could represent itself in future as willing to bargain on different items that it would insist on having in a Programme of Government. However, that is quite a different picture from the classical Westminster model in which the Opposition hopes to accomplish a full scale parliamentary majority at some future election. That is not the kind of world in which we are living here.

129. **Mr McCartney**: I will be party political here. There may be a formal Opposition at Leinster House, but some people might say that the true opposition is a different party. The alternative to the politics of the government may not necessarily be the designated opposition. That can be possible in a multi-party system as well.

130. **Professor McCrudden**: This is not what you are doing, but there is a danger in picking and choosing bits of another system and assuming that they will have the same effects when transferred to your system. We suggest considerable

caution in that regard. The system is an organic whole and operates in a particular way. We are against change for the sake of change, but we are not against change if it will lead to a more effective operation of the system. However, we are concerned about how far it would undermine this system.

131. **Mr McCartney**: In our party's presentation to the Select Committee, we made the point that, as this system is made up of a number of blocks, it is possible that you could have an opposition of 30 MLAs that, through use of the petition of concern, could block all the work of the Executive. You cannot just tinker without looking at all the blocks that might make our system of government more —

132. **Professor McCrudden**: As far as we are aware, part of the discussions are set in the context of possible reductions in the size of the Assembly and the Executive. I do not know how far those discussions have progressed. However, if one of the concerns for the opposition model is that you want to be seen to support small parties, I come back to the point that Professor O'Leary made earlier: the best possible way to support small parties in the existing system is by not reducing the size of the Assembly.

133. **Professor O'Leary**: Or the size of the Executive.

134. **Ms Ruane**: Go raibh maith agaibh. Tá fáilte romhaibh. You are very welcome. I am sorry that I was late for the initial part of the presentation. Like Raymond, I have read your papers and have listened to what you said, and it is very interesting. Our party wants inclusivity, diversity, fair play and power-sharing arrangements, including the scrutiny role that you are talking about, so the Human Rights Commission and the Equality Commission are a very important part of the arrangements. It is interesting that you say that reducing the size of the Assembly could diminish inclusivity. In my constituency of South Down, the majority of voters are nationalist, yet you have representatives from most of the parties. That is good. I like to see that, particularly given the times that we are living in now. This has been a very interesting discussion.

135. I want to focus on gender in Stormont and in our institutions, as we do not have good percentages of women. Have you given any thought to that?

136. You mentioned the scrutiny role. We are a young institution, and I agree that we need to increase our capabilities. Do you have a view on the Politics Plus programme that was launched last week here and the work of the Assembly trust on that?

137. **Professor O'Leary**: Thank you for your comments. International practice on gender is very interesting in this respect; it seems to have no concerns whatsoever about quotas for females. By contrast, ethnic and religious quotas tend to generate much more debate and controversy. It is not clear philosophically why that should be the case; nevertheless, it suggests that it is open to the Assembly to consider obliging parties to have quotas of female candidates if it chooses. That is the fastest route to increasing female representation in the Assembly. It is a little bit more difficult to do that under the single transferable vote than under list proportional representation. It would be bad to move to a world in which, in particular constituencies, there are only female candidates. I do not think that that would be a desirable model. Short of that, however, it is up to parties, by and large, to reform themselves to increase female representation. I will leave Chris to answer the other parts of the question. He may wish to disagree with me on the other matter because we did not have a prior consensus on the question of gender.

138. **Professor McCrudden**: I am afraid that I will pass on the second question because I do not know enough about it.

139. As you will know, increasing the participation of women is an issue that is close to my heart. However, there is a lack of good empirical information on how the system works in the context

of women. Over the past two years, I have been supervising a thesis by a graduate student of mine who has been working precisely on the question of how to increase the representation of women in electoral systems, and he has many interesting conclusions that I am happy to share with you. I am sure that he would as well. One conclusion is the difficulty of knowing precisely how best to change a specific electoral system in a particular context to increase representation. Assuming that we want to increase representation, which I suspect we both do, the question is how to do that in a particular context. However, I am not aware of any empirical research in Northern Ireland on why the system results in a disproportionate number of women not being elected. Therefore, the starting point is — I am an academic so I would say this — much more attention to the current electoral system in Northern Ireland and how best it might be changed. Therefore, assuming that there is an agreement on the result, I would want to know a great deal more about the mechanics of how this particular system works. I just do not have the information at my fingertips. In other words, I cannot say at the moment which particular bits of the system need to be changed to have the most effective results. Professor O'Leary mentioned the quota systems that have been introduced: some have been very successful; some have not. Mostly, that relates to local conditions and local systems. That is the best that I can do, I am afraid, Ms Ruane.

140. **Ms Ruane**: It is Caitríona. I would be very interested to see your student's thesis. I am a delegate from our party to the Convention on the Constitution, and Stewart is a delegate from his party. There was a very interesting weekend that focused just on women in politics. If your student does not have it, I suggest that he take a look at it. It was very good, and many excellent academics provided very interesting information. All the statistics and research show that you need to get a critical mass of women in to change a culture. Moreover, they show the importance of getting women into winnable seats. The key thing is that party managers understand the importance of change. In the South, a law is being brought in that a party will be penalised financially if at least 30% of its candidates in local elections are not women. We argue that it should have gone further, but it will have an impact. Would you like to comment on that?

141. **Professor McCrudden**: It is precisely that second aspect of the question that I was indirectly hinting at. For example, under the system that operates in France, a financial penalty is attached. The empirical information on how that works is very mixed, so I do not think to use the cliché that there is a magic bullet here. It is by no means clear that simply introducing a financial penalty will automatically be successful. So far as I know, and being entirely dependent on my graduate students supplying me with the information, the effect in France has been that, at certain times, parties have just accepted the financial penalty. Therefore, it has had no effect other than a relatively marginal penalty being imposed that parties are willing to accept. A very context-specific argument needs to be made. I would not assume that if it works in the South, it will automatically work in the North. Each system needs to devise its own particular arrangements. That said, your first point on internal arrangements in parties to sensitise must be correct.

142. **The Chairperson**: Conall, you wanted to come in on the same point.

143. **Mr McDevitt**: It is a slightly different point, Chair. It is on your observations on petitions of concern. I am happy to leave it to the end if other colleagues want to come in on that point.

144. **The Chairperson**: Paul Givan had indicated.

145. **Mr McDevitt**: I am happy to wait until after Mr Givan.

146. **Mr Givan**: Thank you very much for the presentation. You make a very strong defence of the arrangements that were established under the Belfast

Agreement. We did not support that agreement, so we are not as precious about the institutions.

147. **Professor McCrudden**: And St Andrews.

148. **Mr Givan**: Yes. When we are looking at issues such as proportionality, from our perspective, things are on the table to make changes. Our boundaries are tied to Westminster, so if you are predicating your argument on there being 108 MLAs, our destiny is not in our own hands. Had the changes been made, we would have been facing a reduction of 12 MLAs.

149. **Professor O'Leary**: Eighteen, surely.

150. **Mr Givan**: No; we were to lose 12 MLAs. We were to lose two constituencies. It was to drop to 16 constituencies, so we would have had a reduction of 12 MLAs.

151. **Professor O'Leary**: That was under the proposals to make each constituency the same size.

152. **Mr Givan**: Yes; it was going to be kept as six Members in each constituency, but we would have been electing from 16 constituencies. If that had happened, and it may well come back on the table in a future Westminster term, what implications would that have for your arguments?

153. **Professor O'Leary**: I would not run simulations on constituencies that do not exist. That is why the simulations that you have presuppose the maintenance of the existing 18. I thought that that was a reasonable short-term assumption, given the fallout at Westminster between the two coalition parties in government about reviews of parliamentary boundaries.

154. If you reduced the number of constituencies in Northern Ireland and kept six members per constituency, the effect on proportionality and the small parties would be less than what would happen if you reduced the number of people returned from each constituency. Keeping the principle of six people per constituency is very important. There is logic in the relationship between the multi-member district in Northern Ireland and the Westminster constituency. However, it may be for the Assembly to consider whether it would want to make — in its own interests and in the interests of long-term proportionality or a stable size of the Assembly — proposals to Westminster about fixing its own organisational and constituency arrangements for long-term stability. I do not anticipate another huge growth in the population of Great Britain, vis-à-vis Northern Ireland, that might have adverse consequences for the number of constituencies in Northern Ireland, but it is something that the Assembly could consider.

155. To summarise, reducing the number of constituencies by one or two, if you keep the number of people returned per constituency the same, is much less consequential for proportionality and for small parties than a model where you would reduce the number of people returned per district.

156. **Mr McDevitt**: Thank you, Chair, for another bite at the cherry. I want to pick up on the observations that you both made in your submission about the petition of concern. You said:

"We have observed that the Petition of Concern has occasionally been abused to block decisions which have nothing to do with community-specific vital nationalist or unionist interests."

157. You suggest how we might preserve the integrity of a petition but prevent it being blocked. Can you elaborate on that?

158. **Professor O'Leary**: Our philosophy is that you, as representatives of Northern Ireland in the Assembly and as representatives in a partnership system, should, as much as possible, resolve any disputes that you have among yourselves among yourselves rather than using outside bodies. We were most reluctant to see judicial review petitions and most reluctant to see the two Governments acting in some way as arbitrators over whether something was a genuine petition of concern. However, we saw no reason why the Assembly could not set up an informal committee under the presiding officer to establish

some kind of protocols in which party elders or senior party members might meet to try to inhibit misuse of the petition of concern. It would be up to them to devise their own proposals. We did not presume to sketch quite what form those would take, but we thought it best for the Assembly to come up with an internal mechanism for handling those questions. I am thinking out loud here, but it could be, for example, that when the presiding officer is elected, together with his or her deputies, they would give guidance as to how they would treat petitions of concern.

159. **Mr McDevitt**: I presume for that to be a workable model, whether it was the Speaker and Deputy Speakers, just as a collective, given that they are probably representative of the Assembly having a function, that we would all accept that petitions of concern are just petitions of concern and that they are not blocking mechanisms for selfish party or political interest, and that we would see them solely as an opportunity to address a communal inequality that may arise.

160. **Professor O'Leary**: It would be a way for the Assembly to try to make sure that the petition of concern served its original function.

161. **The Chairperson**: Thank you for taking time out of your schedule to present to us today.

162. **Professor O'Leary**: Our pleasure; thank you.

163. **Professor McCrudden**: Thank you.

19 March 2013

Members present for all or part of the proceedings:

Mr Stephen Moutray (Chairperson)
Mr Pat Sheehan (Deputy Chairperson)
Mr Roy Beggs
Mr Simon Hamilton
Mr Raymond McCartney
Mr Conall McDevitt
Ms Caitríona Ruane

Witnesses:

Professor Derek Birrell	*University of Ulster*

164. **The Chairperson**: We are about to hear a presentation from Professor Derek Birrell, professor of social administration and social policy at the University of Ulster. Professor Birrell, you are very welcome. We are low on numbers but we are delighted to have you. Please start your presentation, and afterwards there will be questions.

165. **Mr Hamilton**: We are low on numbers but high on quality.

166. **The Chairperson**: Absolutely.

167. **Professor Derek Birrell (University of Ulster)**: I should start by explaining that I work mostly in the areas of social policy, public administration and governance, rather than pure politics, so I do not spend my time trying to work out mathematically the outcome of the d'Hondt formula, and so on. I am not a pure political scientist.

168. I will try to focus on issues that maybe have not been drawn to the Committee's attention or that tend not to be much discussed in relation to d'Hondt, an Opposition, and so on. I will skip some of the other issues on which the Committee has probably received quite substantial comment.

169. I will start with d'Hondt, Ministers, ministerial office and Committee Chairs. Two main issues draw attention in the role of d'Hondt in underpinning power-sharing arrangements and the 1998 agreement. The d'Hondt system has been operating in Northern Ireland in the context of government Departments, following very much a Whitehall model of the principle of ministerial Departments, coterminosity in functions between departmental functions and the Minister, a single Minister — for the most part — in charge of each Department, and quite a large number of Departments, which, at present, allows five parties to hold ministerial office.

170. Of course, there are alternatives to that. You do not have to have that coterminosity. The first point arising from that is this: if you went down to six or seven Departments, would that create problems for running d'Hondt and allocating Ministers? The answer is not necessarily, in that you do not have to be restricted to six or seven Ministers. That happens only if you are tied very closely to the ministerial Department model because you could have 12 Ministers, for example, with two in each Department. They could be from the same party or from different parties as part of the power-sharing Executive, or you could have discrete areas for a senior Minister and junior Minister, which is the type of system that operates in Wales. Scotland has really abolished Departments and instead has 30-odd directorates, so it can be fairly flexible in ministerial allocations. Therefore, you can decouple d'Hondt from the idea of a ministerial Department.

171. The second point is about d'Hondt and Committee Chairs. That, again, can be allowed to operate in different contexts. In Scotland, d'Hondt is used for Committees. The main idea is proportionality. Of course, if you link that to the idea of opposition, normally an official Opposition chairs some Committees in most parliamentary systems. I am looking mainly at

Scotland and Wales because of devolution and also because I do some work there. In Scotland at present, the SNP Government have only nine Chairs of Committees, and the opposition parties have five. In Wales, of the 10 main Committee Chairs, five are held by the governing party and five by the opposition parties, although it is quite normal for the governing party to hold both the Chair and the Deputy Chair. I will come back to that.

172. The last point is that the possible exception to d'Hondt — it depends, but it may have to be an exception — is the Public Accounts Committee, the Public Audit Committee, or whatever it is called, because, normally, in all systems, it is opposition parties that hold the Chair and Deputy Chair positions on the Public Accounts Committee. That is a parliamentary convention that is quite strongly established.

173. I will move quickly through community designation and the criticisms of it, which are quite well rehearsed. Are there any alternatives? There are quite complex alternatives that might not be very popular, including official recognition of the "Other" category and MLAs being able to change designation fairly quickly, which could be complex or difficult. The requirement for a weighted majority in place of community designation might result in much the same outcomes. Cross-community support on the basis of party rather than individual MLAs could be looked at, but, of course, that would place a lot of restrictions on parties and individual Members. Community designation could be altered or amended, but it would probably be quite difficult to get agreement on that or to get a workable system without abolishing it in favour of some weighted majority.

174. Matters for cross-community vote raises the issue of petitions of concern. Originally, I think that petitions of concern were intended to deal mainly with constitutional and procedural matters. They have been interpreted more widely, but, of course, it is quite difficult to place a strict limiting definition on when they should be used. There are options to require a higher a proportion of MLAs, but the petition of concern has become somewhat embedded as part of the system of checks and balances in the devolved system here.

175. I will move on to provisions for opposition. Of course, when we think of parliamentary opposition, everyone tends to think of the Westminster model, which is the one that dominates in Britain and Ireland. That has been very closely related to the two-party system, although, at present, that is an issue. It is tied to the notion that there is a Government in waiting, that there are two parties that alternate in office and do not really rely on other parties. There is not really much prospect of coalitions and negotiations about coalitions, except at present, of course, in the UK Government context.

176. What about opposition under devolution? That would give greater status to non-Government parties, might enhance scrutiny and furthers the idea of every MLA — or almost all MLAs — participating in the parliamentary process. It may lead to the opposition becoming an alternative Government. However, the devolved institutions in Scotland and Wales have operated with opposition parties, but not in opposition, because there is no official Opposition in Scotland or Wales. All parties — defined as having more than two or three Members — that are not in Government can be considered opposition parties. In Scotland and Wales, they organise themselves into shadow Cabinets, or shadow Executives. There are 12 in the Labour shadow Cabinet in Scotland, 13 in the Conservative shadow Cabinet, and 11 Welsh Conservatives form a shadow Executive. However, they are not a structured official Opposition. The two main opposition parties in Scotland do not necessarily co-operate with each other; they may do so, but not necessarily. Those Assemblies make arrangements for individual, usually single, opposition Members. Something

else that is perhaps slightly different in Scotland and Wales is that they have a strong participative ethos, which was in some of the original thinking about devolution. Very recently, the SNP Executive discussed the Scottish Budget with the opposition parties; that is normal.

177. Finally, there is a slight complication in that you can have a situation in which there is not a formal coalition, but, as is the case with the Governments in Scotland and Wales, there is a voting arrangement with opposition parties. That has happened with the Green Party in Wales. At significant times, it has said that it would support the Welsh Government, but it regards itself as an opposition party. So you can have somewhat flexible arrangements.

178. In Northern Ireland, you would probably have to have smaller parties opting out of an all-party Government. Would the two main parties — the two largest parties — be happy with that? Would they prefer an all-party Government? Can you give any incentives to the smaller opposition parties? It might be a financial incentive, or, in practice, it might be a more significant role; it depends.

179. One other significant factor that maybe does not receive so much attention is what difference having official Opposition parties would make to the governing parties, because, in a sense, it would have to make a difference to them as well. A kind of Government-and-Opposition model would have to operate, and, of course, that presents some difficulty for the Executive in Northern Ireland, where there is not the principle of collective responsibility. That is not written into how it works.

180. There is the issue of different levels of opposition. Do you have opposition among the governing parties, as you can have at the moment, and a second level of opposition between the governing parties and the opposition parties, which is a type of two-tier opposition?

181. Given the time, I will skip over the issue of financial arrangements. I think that the evidence on that will be produced before the Committee.

182. I move now to the issue of Committees and opposition, which I mentioned briefly at the beginning. Committees are elected on a proportional basis, and if you had official Opposition parties, it probably would not make a great deal of difference. I note the current distribution of Statutory Committee Chairs among the five parties. It is highly unlikely that an Opposition at Stormont would be entitled to more than three or four Committee Chairs, so it would not make a huge difference. However, it would raise one or two issues. Would it be acceptable for a Chair and a Deputy Chair to come from the same political party? That happens in Scotland and Wales, for example. On the other hand, it could be a positive move to end the original concept of Assembly Committees as, in a sense, an opposition to the Minister, because it is not really the tradition for Back-Bench Committees to be seen as a place of special opposition influence. They are normally a place of Back-Bench influence; or even agreed Back-Bench influence. That is a slight difference that might come about if you had an Opposition. Is there a problem with an opposition party leader being Chair of a Committee? Not really; that happens in Scotland and Wales. The governing party or parties have a majority on the Committee anyway. The exception may be the Public Accounts Committee because, in a sense, it would have to have an opposition Chair and Deputy Chair. That is a strongly established convention.

183. I will skip over the rights that an Opposition may have in respect of questions and speaking time. Those are probably quite well recorded. That just leaves me with additional information and conclusions. Can you develop in Northern Ireland a sort of Government versus Opposition culture? You probably need parties of a significant size to form

an Opposition. A few small parties would not really suffice.

184. There is then a choice for the opposition parties: would they willingly opt out of holding one ministerial office, or even two, and instead choose to be an official Opposition? That has been discussed quite a bit. How appealing would that be to the two largest parties? They may accept losing the Chair of the Public Accounts Committee. Would they be seen as moving into closer co-operation with each other as a corporate Government entity facing an Opposition?

185. Even with official Opposition parties, the Assembly may still be operating on the basis of double opposition because Ministers and parties in the Executive are free to publicly oppose each other. How would that be affected if you had an official Opposition? That is a quick run through some of the points that are in my paper.

186. **The Chairperson**: Thank you for that, Professor Birrell. On d'Hondt, your paper refers to:

"Greater commitment to achieving collective views within Executive and joined up government".

187. Have you any thoughts as to how we would ensure that greater commitment?

188. **Professor Birrell**: Greater commitment is probably widely encouraged by several factors. The alternative is that, on some occasions, there will obviously be impasses or slowness in decision-making in the Executive. Collective responsibility is not written into the Northern Ireland system at all, but it is written into the Scottish and Welsh legislation. If you do not have the principle of Executive responsibility, you have to have some kind of voluntary movement towards largely having Executive responsibility. An official Opposition might encourage that, but it is rather difficult in the Northern Ireland context to see that opposition at the moment. It might happen in the future as a kind of shadow Government in waiting along the lines of the Westminster model.

189. You are asking me how you might encourage greater commitment to Executive decision-making. Except on some very divisive political issues or where there are strong ideological views, you would hope that increased policymaking capacity and increased news, opinions, data and information from different sources, including research networks, communities, lobbying groups and research bodies, might make the best way forward clearer. There are some issues such as those.

190. It is going slightly off the point, but I mentioned to Conall bodies such as the Education and Skills Authority in the context of modern public administration. If you look at all the writings and even the calculations about efficiency and savings, I am not sure that you would see that coming up as a modernising idea. You might get consensus more often if the policy advice were stronger and better. I say that not to denigrate Northern Ireland in particular, but it has been a big problem in Scotland and Wales, where quite a lot of attention has been paid to the issue.

191. **Mr McDevitt**: I am sorry, Derek, I was caught up with business in the House. I want to ask about cross-community support and where you see the line being best drawn in proving and establishing it. I want to ask you about it on two levels, the first of which is whether you have any views beyond what you said in your paper about weighted majority voting. If so, what are those views?

192. Secondly, I noticed that you made an observation about changing the threshold for a petition of concern. Could you talk us through where you see that opportunity? Do you see any pitfalls in possibly going to 50%, as you said?

193. **Professor Birrell**: I was looking at various alternatives. That comes up as an alternative. However, not many parliamentary or government systems opt for weighted majorities, and, generally, coalition Governments are formed by negotiation and agreements that are sometimes fairly informal and

highly formalised. The weighted majority comes into play almost if you cannot think of a better way of building checks and balances. Back in 1998-99, the Northern Ireland Act and the agreement were quite clever in producing a structure of checks and balances without going for weighted majority. There has been some experience of it in Belgium, I think, but you find very few examples of it. I think that it leads to maybe trying to count up the number of individual MLAs all the time, so it makes life more difficult for parties. The 60% weighted majority would be a broad brushstroke.

194. The designated community principle in Northern Ireland is also fairly unusual. I know that you could find one or two examples of it, but it is unusual. I go to quite a lot of conferences in Scotland, Wales and England about devolution, and so on. In recent years, I have noticed that people always ask, "As long as you have community designation, does that not show that the whole system is a kind of failure?" I think that, in the future, it will probably have to be addressed. I am not necessarily a major advocate of weighted majorities. It has to be weighed against other systems of checks and balances. You get involved in whether it should be 50%, 60% or 70%, whether it should be different for different issues or different kinds of legislation, and whether there should be votes of confidence.

195. **Mr Sheehan**: I apologise for missing the first part of your presentation, Professor Birrell; I was in the Chamber. I am interested in the financial incentives for an official Opposition. It seems that an official Opposition could operate adequately without any financial incentive. Will you elaborate on why there should be some incentive?

196. **Professor Birrell**: The first thing that people might argue is that there are some extra costs, because the opposition parties do not normally have access to civil servants. They cannot be advised by civil servants, and they might not have access to information and data, and so on. They need some money to make foreign trips, whereas Ministers can just head off. So, there are some practical things to consider. Those extra costs are there to make up for some of the benefits and advantages that they do not get. So, that is certainly one strong argument.

197. The more difficult area is whether they are being given a bit of a financial incentive. Those in London may say, "We know that you are not in power, and we know that you cannot decide anything, but you have a role to play. Ministers get high salaries and junior Ministers get salaries, so we are going to encourage the Opposition." Shadow Ministers are not given a salary, but they can be assisted in a certain way. So, you can argue about the amounts that are involved. In Northern Ireland, that issue crops up because potential opposition parties may be faced with a choice of losing a ministerial position. However, if only one Minister is involved, the financial calculation is not great.

198. It is just a backing up to the status. You could argue that, instead of more financial incentives, they just get the status incentives. That means that if a Minister appears on television, the opposition person must come on as well, which increases their profile. You see it at Westminster. When Parliament opens and the MPs all troop in for that, at present, the leader of the Opposition walks alongside the Prime Minister leading the procession; it is not the Prime Minister and the Deputy Prime Minister. So, that is the status issue.

199. It is a mixture of those things. It is normally not a bribe, as it were, but, in Northern Ireland, there is a slight notion that perhaps you would need a bribe.

200. **Mr Beggs**: Thanks for your presentation.

201. I would like to go back to petitions of concern. There has been a spate of them recently. Interestingly, even those designated "Other" have joined with particular designated groups to get the 30-Member threshold. However, as indicated, that leads to the potential for stalemate. There is now a sense that

the petition of concern is being misused by both sections. How did you come across the figure of a 50% requirement for a petition of concern? Is that not almost doing away with the petition of concern? If you have 50% agreeing to an issue, you clearly have a majority. To change the current threshold, increase it and avoid the stalemate, you will need buy-in from all sides.

202. **Professor Birrell**: I take your point. I think that that might refer more to the discussion that took place when the system was originally mooted back in the 1990s, when it was seen as a constitutional issue. Therefore, if you were heading for a major quasi-constitutional change, you really needed more than 50% — my paper says just 50% — or a significant number. Of course, as you say, it has worked out that it can be used for all kinds of policies if the party presenting it feels strongly. Obviously, it will be an issue if it is widely used. There are a number of impasses already in the system, or at least there are checks that lead to impasses. Some people argue that that is the whole point of it and that it is about making it more difficult to operate without a consensus or to force people into some sort of consensus. However, it leads to impasses, delays and, maybe, the lowest-common-denominator approach where you can get a level of agreement.

203. As long as you have petitions of concern, one option would be to have some kind of figure. However, that would be quite a radical change. The other option is to go back to the original idea and to define more closely what is meant by a petition of concern. I am sorry; that does not fully answer your question, but I take your point that 50% might not be appropriate.

204. **Mr Beggs**: In the other places that you referred to where protection is built in, are there any other examples of the idea of a blocking section? I think that the figure of 27% or 28% at present could block legislation. Are there such blockages anywhere? There are advantages for having it, as it protects the community, but the stalemate means that there are also disadvantages.

205. **Professor Birrell**: I am not really certain. There are the obvious consociational countries, as they are called — I think that Switzerland, Holland and Belgium are the major ones. If they have it, I think that it would certainly be restricted to constitutional-type issues. In the Swiss system of government, I think that 75% of the cantons have to vote in favour of any constitutional change, as they define it.

206. As far as I know, I do not think that there is an example of a petition of concern. It would certainly be worth checking, although that kind of comparative government is not something that I operate with. Nevertheless, it would be interesting to find out. However, from my knowledge at the minute, I do not think that there is such an example.

207. **Mr Beggs**: It would be a useful for the Committee to look over the range of motions to which petitions of concern have been tabled so that we can get a reflection on what has happened in the past.

208. **Professor Birrell**: I think that there have been about 12 or 14 so far, although you might move to the situation of having half a dozen a year.

209. **The Chairperson**: The Committee Clerk has indicated that that information is in the research paper.

210. **Mr Hamilton**: I did not want to talk about petitions of concern, and I know that you were not nailed down on the specifics of the Swiss example. However, in that system, if in every instance, 75% of cantons have to vote for it, a petition of concern would be a much more attractive proposition. It happens only on a handful of votes. One that recently grabbed attention was legislation. However, in most cases, it has been deployed for motions that are debated in the Chamber, which are of no particular weight other than as an indicator of a general view.

211. You said in your presentation that you see that moving to a traditional Government versus Opposition system is unlikely in Northern Ireland. You said that it would be necessary for a party of a significant size to become an opposition party and to not be represented at the Executive. The size of an official Opposition and whether strictures should be placed on its size has come up in a couple of evidence sessions. Are you making that comment on the basis that, unless a party in opposition is of a certain size, its ability to be effective in opposition is difficult? I would agree with that point. For example, you would not have the numbers to shadow, in the traditional sense, and to enable you to say that there are 10 Ministers, so we must supply 10 opposition spokespeople. Are you coming at it purely on that basis?

212. A point that has come out in other discussions that we have had is that there is almost a slightly ludicrous position. If we facilitate an official Opposition, and a party of a couple of Members, as is the case with some parties in the Assembly, is the next biggest party outside the Executive, it would become the official Opposition. It would not be entitled to be in the Executive anyway. You could then have two people as the official Opposition. Have you considered that, as well as the obvious, straightforward point that the bigger you are, the more effective you are going to be?

213. **Professor Birrell**: That is true. The grouping would need to be a certain size to be effective at all. In Scotland and Wales, it is two or three; you can go down to quite low numbers and be recognised as an official Opposition party. They cannot operate terribly effectively, but they are given a certain status. For example, a place might be found for them as Deputy Chair of one of the 20-odd Committees. So, some slight recognition is given to them. The Conservatives in Scotland cannot really function as an Opposition, because they are too small in number. So, at the end of the day, it is a matter of size.

214. The importance of a couple of Members is a slightly different issue. One or two single Members representing a small party or some cause can still become very significant, depending on which way they vote on certain issues, and so on. They might have a degree of opposition power, as it were. However, where the formal structures of participation are concerned, it would be very difficult to operate. Obviously, the question is: where do you draw the line? Suppose you have a couple of parties, each with four or five Members. Does that just about make it viable?

215. **Mr Hamilton**: Rick Wilford discussed that. It was a point that provoked my interest because it is something that I have thought about. We have a few one-person parties in the Assembly, and they are recognised as a party. I think that that is on the basis of how they run.

216. **Mr McDevitt**: They stood on a party ticket.

217. **Mr Hamilton**: You run as a party. Even though only one person gets in, you are still recognised in the confines of the Assembly as being a party. For a variety of reasons, we have then had a proliferation of single-Member parties. Rick made the point that, really, there is almost a perverse incentive. You get additional speaking time and additional resources. There is, therefore, an incentive for some people to become an opposition party, even though they are a single Member. Rick favoured a level of about three Members, although I may be quoting him incorrectly.

218. **Professor Birrell**: I think that, rather strangely, it is three Members in Wales and two in Scotland. It is built into legislation in Scotland and Wales, in that they do not talk about a party; they talk about a political group. So, if you have two or three individuals, they can then go and form themselves into a group, even though they might be from different small parties.

219. **Mr Hamilton**: It is one of those technical issues. If we proceed down this line, it is one of those little things that we

would have to think about, rather than saying that, yes, we will have an official Opposition, and then finding out that that is one person.

220. **The Chairperson**: There are no other questions. Thank you, Professor Birrell, for attending today.

23 April 2013

Members present for all or part of the proceedings:

Mr Pat Sheehan (Deputy Chairperson)
Mr Roy Beggs
Mr Gregory Campbell
Mr Stewart Dickson
Mr Paul Givan
Mr Simon Hamilton
Mr Sean Rogers
Ms Caitríona Ruane

Witnesses:

Professor Yvonne Galligan	*Queen's University Belfast*

221. **The Deputy Chairperson**: I welcome Professor Yvonne Galligan to the meeting. Thank you for coming and for sending us your written presentation. If you are ready to go ahead with your presentation, feel free to do so.

222. **Professor Yvonne Galligan (Queen's University Belfast)**: Thank you very much, Chairperson. I will make a short presentation that broadly summarises and pulls together some of the ideas that I presented in my submission. Thank you for the opportunity to appear before the Committee to discuss aspects of the operation of Parts III and IV of the Northern Ireland Act 1998. I would like to suggest that, on the matters in question, it is timely to consider their operation as part of a regular cycle of reflection and assessment of the workings of the institutions. I imagine that finding agreement and building consensus might take a little bit longer.

223. The issues are treated separately, but they have reciprocal impacts. I would like to broadly suggest that the principles of inclusivity and power-sharing that underpin the Northern Ireland Act 1998 should be kept in mind as discussions on reform are undertaken, and interpreted to include gender diversity, as well as other forms of diversity. My presentation will address those matters, as did my submission.

224. I turn first to d'Hondt. As I stated at greater length in my written submission, d'Hondt has served Northern Ireland's politics well. It has been accepted as a fair and transparent means of distributing Executive and Assembly Committee leadership positions. In my view, there are three conditions that make d'Hondt work well in the Northern Ireland setting: transparency, inclusiveness and proportionality. This enables the politics of negotiation on substantive post distribution to take place in a context of certainty regarding the numerical distribution of positions among the parties. However, given the need to accommodate five parties in the power-sharing Executive, d'Hondt works best with a minimum threshold of 10 positions, which is sufficient for all significant parties to be represented while conforming to the principles of inclusivity and power-sharing.

225. The consequences of a reduction in the number of Executive posts or Committee Chair and Deputy Chair positions would need to be carefully considered, not only in light of the politics of inclusion, but in respect of the operation of d'Hondt and its role in preserving the consociational arrangements. If a formal opposition were to emerge, d'Hondt could still act as a mechanism for the allocation of Executive positions as it does at present, leaving the Executive-forming parties to negotiate on the substantive policy areas and a Programme for Government. It could also be retained for the allocation of Committee Chair and Deputy Chair positions, again in the interests of inclusive politics. Often, a Government will seek to control the majority of Committee leadership positions. That happens elsewhere, but, in a Northern Ireland context, conserving a meaningful voice and presence for non-Executive party representatives

would be an important part of continued confidence building in the political arrangements.

226. A related aspect of inclusion and power-sharing is that of gender, facilitated by d'Hondt. As my submission indicates, women have less of a share of power in the institutions than men. Over half of the number of men who were elected in 2011 hold leadership positions in the Executive or Assembly, compared with 40% of the number of women who were elected.

227. In the context of a reduced-in-size Assembly and Executive, women are likely to lose out on power-sharing. That could potentially be exacerbated further if the plans to reduce each constituency representation by one are carried out. If one examines the last seat filled in each constituency in the 2011 election, one will see that women are in a more marginal position than men. On the last count, 13 men and five women were returned, which is 15% of men and 25% of women who were elected in 2011. DUP and SDLP women would be particularly vulnerable to seat loss if the pattern of 2011 were repeated. Three of the five DUP Members and two of the three SDLP Members who were elected on the last count were women. Therefore, the point that I am making is that d'Hondt interacts with other dimensions in addition to party representation. In the interests of inclusivity, representative democracy and power-sharing, gender balance in the political institutions matters.

228. I turn now to community designation. The mechanism for supporting consociational decision-making is coming under the spotlight once more. Views are divided on whether it accommodates competing identities or perpetuates ethnic divisions. It has certainly irked those representatives who do not wish to indicate a community designation and those who argue that they represent both major communities and others. At the same time, community designation has provided an element of certainty in the political process that, with other measures, has allowed politics to establish legislative routines and practices. Changing community designation in respect of the 12 voting areas that are listed in the Northern Ireland Act 1998 is a sensitive matter. It is about trust in the institutions and politics to deliver a fair outcome that commands broad cross-community consensus. The effects of any change to those principles of inclusivity on power-sharing need to be considered in that regard.

229. Community designation interacts with cross-community voting. That is evident in the operation of petitions of concern. The intent of petitions of concern was to alert the Assembly to upcoming decisions that could have a bearing on significant community-specific interests. However, the use of petitions of concern seems to have extended beyond the key community-specific interest that it was intended to address. Therefore, there is scope for a number of initiatives on that, some of which could be undertaken independently of other reforms. One could be to clarify the circumstances in which a petition of concern could be invoked, possibly confining it to legislation only. Another would be to introduce a qualified majority for non-legislative matters on which a petition of concern is lodged. A third, more radical departure would be to require a qualified majority for all issues that are related to community designation and cross-community voting. That would remove the parallel-consent requirement for key decisions. That point has been raised in the briefing paper that accompanies this evidence hearing. I lay those points before you without necessarily coming to a view on one side or the other. I offer them as issues for discussion and exploration. Obviously, a political decision is required on which of them, if any, would be considered possible to pursue.

230. Finally, I turn to the matter of opposition. I present a case in my submission for enhancing current opposition opportunities because I believe that there is scope to extend the role of Committees as they stand at present. I

believe that there is benefit to be gained from relaxing the discipline of the Whips in order to facilitate wider discussion in Committees and wider purview of Committees. There is also something to be said for not having every MLA on a Committee as of right. Again, those issues are open to discussion.

231. There are consequences to the introduction of a more "conventional" form of opposition. One of those is that the Executive may need to begin to consider operating under the rubric of collective Cabinet responsibility, at least in some areas. Indeed, in that regard, the discussion on opposition allows space for a discussion on how the Executive Government are functioning. What about policy-sharing, policy continuity, joined-up government, and thematic policy initiatives? These are areas that would enable an opposition to function more effectively if some semblance of collective government were in place and if there was a longer-term plan to which the Executive could be held accountable.

232. If an opposition were instituted, there would need to be rules for what exactly constituted an opposition. How much speaking time would the opposition or opposition parties be allowed? Who would represent the opposition group or groups? Would there be a leader of an opposition or would all leaders of opposition groups have rights of their own? Would that person or persons have additional speaking rights and the right to question the First Minister and deputy First Minister? That is all part of the nitty-gritty of developing the framework for oppositional politics to take place. If that is the decision, it may not be easy to move to that model immediately, but, in the absence of that happening, there is merit in Committees flexing their muscles more and taking on inquiries of a more cross-cutting or far-reaching nature than they currently do. That would require additional research assistance. Indeed, enhancing the research capacity allocated to individual MLAs would contribute to MLA scrutiny and development.

233. One aspect in considering the emergence of an opposition is the leadership of Assembly Committees. Customarily, in Westminster-type systems, those positions are in the gift of the Government. I suggest, as I did earlier, that the d'Hondt system could continue to be used for allocation of Committee roles of Chairperson and Deputy Chairperson, with all recognised opposition groups having an opportunity to be involved in leading scrutiny of the Executive. With that, I conclude my formal presentation to you. I am very happy to discuss any matters arising.

234. **The Deputy Chairperson**: Thanks very much for that, Professor Galligan. I will start off by asking a general question. I noticed that when you referred to conventional opposition in your submission, you had the word conventional in inverted commas. I mention that because the argument has been advanced that, to have a normal democracy, to go through the normal processes of holding government to account, scrutinising legislation, and so forth, there is a need for a formal opposition. Others will argue that, given the institutions that we have here, there is no need for that because there is a high level of scrutiny and holding the Executive to account. The difficulty is that many people use Westminster and the system there as their reference point. Would you like to comment on that general issue of the formal opposition and whether that is a prerequisite for normal democracy, whatever "normal" means?

235. **Professor Galligan**: That is a very interesting question, Chairperson. It goes to the heart of the matter, which is how we construct our democracy here, and to what extent is it normal or not. I think that looking at the Westminster Government/Opposition relationship to some extent constrains our opportunities for thinking about what opposition means and what holding the Government to account means. Clearly, a normal arrangement — in the sense of a Westminster-style system — is largely based on a two-party system; certainly

a system of two dominant parties. Obviously, there are other parties in the mix, but two parties are dominant in that system. It is very easy to accept that as the model. As the briefing paper points out, there are many forms of opposition and every one of them is appropriate for that particular circumstance. In my view, our facility for holding the Government to account already has much potential. We should be looking at how that power is utilised, developed, and exploited, if we feel that there are some constraints on our holding the Government to account. That is my view. There is a lot of scope for developing the existing institutions with democratic procedures and practices that are also "normal".

236. **Mr Beggs**: You seem to be arguing for continuing with big government and that, should there be a reduction in the number of Departments and Ministers, you would want to see additional junior Ministers appointed for the purposes of inclusivity. However, as junior Ministers are appointed by a principal Minister, that practice would not necessarily widen inclusivity. Why do you argue that it would? I do not understand that.

237. **Professor Galligan**: If there is to be a change in the number of Departments, it would involve more than just changing that number and keeping everything else as it is. There has to be a lot of consideration. If we are going to change the size and number of our Executive Departments, we must think very carefully about how we make government work. There is no point in, let us say, cutting out two or three Departments and merging them with others without a rationale as to how those rearrangements will deliver better government. It may be that more than one Minister will be needed to deliver that better government in those particular spheres. I do not necessarily say that the current method of appointing junior Ministers should be continued. Junior ministries should perhaps be distributed in a similar way to the senior ministries.

238. **Mr Beggs**: I will move on. Petitions of concern have been abused; most people recognise that. However, the abusers have been the DUP and Sinn Féin, which also have the power to stop any change to the mechanism of petitions of concern. What would encourage those parties to relinquish some of that power, which they seem to relish?

239. **Mr Hamilton**: It is hard to abuse the system when you cannot get enough signatures.

240. **Mr Givan**: You established it in the agreement.

241. **Professor Galligan**: I think that petitions of concern are meant to be warning bells and signals.

242. **Mr Beggs**: They are just blockages. They block legislation and motions.

243. **Professor Galligan**: Yes; that is exactly what has happened. That is why I suggest that, instead of a petition of concern being triggered by 30 signatures, the test or the threshold should be much higher than that. A petition of concern should require, for example, a qualified majority of the Members of the Assembly. That would mean that it would require more than any individual party alone — either the DUP or Sinn Féin — to lodge a petition of concern. That is what I am getting at, moving forward.

244. **Ms Ruane**: Go raibh maith agat, a Chathaoirligh. Tá fáilte romhaibh. You are very welcome. I want to make two points. I will start with the petition of concern. Lest you leave with something that is not factual, I think there was a bit of misrepresentation by previous contributors. First of all, Sinn Féin cannot complete a petition of concern on its own; we have 29 MLAs. Secondly, as part of the negotiations, we negotiated petitions of concern in relation to an equality mechanism. A petition of concern is a warning bell in relation to equality.

245. If you look at where Sinn Féin has used them, you will see that it was to protect equality; for example, the Ad Hoc Committee on welfare reform. If you look at where other parties used them —

indeed, Roy's party has used them along with the DUP — it was to block areas of equality. In fact, I think that the DUP used a petition of concern to stop Jim Wells from having to apologise when he should have had to apologise.

246. **Mr Givan**: The National Crime Agency —

247. **Ms Ruane**: Sorry, I did not interrupt you, Paul.

248. **Mr Givan**: I did not speak.

249. **Ms Ruane**: He uses a good example with the National Crime Agency. That was in relation to the protection of rights in respect of fingerprints and retention of data, which goes against international courts and legislation.

250. You spoke about a qualified majority. In relation to petitions of concern, what is your view on maybe two parties having to initiate a petition of concern instead of requiring 30 signatures, so that it is not just one party? I think that the DUP has used a petition of concern seven or eight times on its own. Do you think that is a good mechanism for democracy and equality?

251. **Professor Galligan**: My point, without getting into any of the party politics of this, is that irrespective of what party is able to initiate a petition of concern under the current rules on its own, and one never knows what the electoral arithmetic will throw up at any point in time, I suggest that 30 signatures is too low a threshold, irrespective of whether three parties could each achieve 30 signatures.

252. There has to be an agreement that an issue, whatever it may be, is a genuine issue of concern that reflects a general concern within the Assembly. That requires more than just 30 Members to indicate a concern. Maybe it could be through two parties. However, maybe instead of it being party related, it could be Member related: the threshold could be moved up to whatever 55% or 60% of the membership of the Assembly is, so that there is some way of moving a petition of concern and not using it as a blocking mechanism, as has been said.

253. **Ms Ruane**: I will move to my second area. I wanted to compliment you on your focus on gender diversity. That is particularly interesting, given that we have 21 women Members. When we look across the Benches, there are very few women. Although I welcome the percentage of 40% of women in the Executive, that figure is so high only because Sinn Féin picked three women out of its five Ministers. There is only one other woman in the Executive. We need to improve on that 40%.

254. In relation to MLAs, I note — I have not seen this before — how women would lose out if we cut the number of constituencies and the number of Members who represent constituencies. Like Pat — I think it was Pat who said it — I am not a great fan of the first-past-the-post system. It is fundamentally anti-democratic, and we should not be blindly following England or anywhere else. The Scottish system is interesting. We were over there recently. They have regional representation, looking at policy, and also individual MSPs representing constituencies, so they are focusing on constituencies and another layer is focusing on policy. I think that there is something interesting there.

255. There is also an opportunity to increase gender representation. I am regularly the only woman on a Committee. That is the case for women from other parties, and I know that that is a factor for them. I think that that then often leads to gender-biased representation on various Committees. So, I welcome that you are here and that you focused on gender. Could you give us some advice on how we not only maintain but increase the number of women in the Assembly?

256. **Professor Galligan**: Increasing the number of women in the Assembly is a challenging agenda. I think that, unlike many other countries in the world, there is a mechanism at your disposal that most parties have decided that they do not want to look at. That mechanism is the Sex Discrimination (Election Candidates) Act 2002, which enables parties to introduce their own supportive measures for gender-balanced

representation. I think that political parties could use that tool much more to support women's representation.

257. It occurred to me only after I had presented my submission to you some weeks ago to do a piece of research on looking at who filled the last seat at the previous election That is because, obviously, the last seat is always the marginal seat, if there is one. From the figures, it was very clear that, in some instances, women who ran in 2011 were in a more vulnerable position and in a greater position of vulnerability than men. I think that that is quite disturbing. So, it is about bringing more women in as candidates and positioning them to run in winnable constituencies. That is the key. It is not enough to bring in more women to run as candidates; they need to run in winnable constituencies. Again, I think that there is a lot of room for further development there, so we will have to see how it goes.

258. Northern Ireland lags way behind the other devolved Parliaments and Assemblies. Over 40% of Members in the Welsh Assembly and over one third of Members in the Scottish Parliament are women. That happened because, when both Parliaments were established, they embedded the principle of equality of opportunity. In our circumstances, although we also embedded the principle of equality of opportunity, that relates to different fault lines and divisions in our society. I think that now is an appropriate time to extend that to gender and gender balance in Parliament.

259. **Mr Rogers**: You are very welcome. I have a little question to ask about petitions of concern, which seem to exercise a lot of people around the table. Do you not believe that a qualified majority would undermine the whole purpose of a petition of concern and, in particular, squeeze smaller parties? That is my first question.

260. **Professor Galligan**: Do you mean that it would undermine that it is meant to express a community's key interests?

261. **Mr Rogers**: Yes.

262. **Professor Galligan**: I do not think that we would be discussing this if petitions of concern had not been used differently from the way in which they were intended to be used. That is why I raised the issue of a qualified majority. The threshold of that qualified majority is open for question. I only suggested a figure, but it does not have to be that; it could be 55%. The point is that petitions of concern are a way of supporting the trust in and confidence that politics is representative, which is sort of what you are saying to me. I think that when that role leaks away, petitions of concern have to be brought back to their initial purpose and function. It seems to be that the point that can trigger a petition of concern is causing the problem. It is on that moment that one must focus. What are the trigger mechanisms that alert that alarm bell? If 30 is too low, perhaps we should be raising it to prevent the alarm bell from being raised too often and unnecessarily. However, we also want to set it at a point that allows for a genuine expression of interest. So, I think that it is a matter of finding the formula that brings it back to what it was.

263. **Mr Rogers**: My second point is about opposition. You said that, in a Northern Ireland context, conserving a meaningful voice and presence for non-Executive parties is very important. What sort of a mechanism do you see for that? You mentioned additional time and so on for non-Executive parties. Can you elaborate on that?

264. **Professor Galligan**: If there is a scenario where there is a clear-cut opposition and parties choose not to take their seats in the Executive and go into opposition, I think that it would become quite important that those parties be recognised in their capacity to hold the Government to account and that they be recognised in their own voices in doing so. So, if one, two or three parties decide not to take up their seats, they would not be a collective one-voice opposition; there would be an opportunity for each of them to bring

their perspective and diverse view to the table to hold the Executive to account. They would not be one block.

265. That leads me to say that there is also a role for people from very small parties. They could join together or align with other parties to have speaking rights as such, or they could form an independent block in their own right as an independent grouping of MLAs wishing to hold the Executive to account. So, I envisage a more inclusive and more diversified opposition than a one-voice opposition.

266. **Mr Dickson**: Thank you for your presentation. I want to follow through on two areas: community designation; and opposition. I appreciate that you indicated that community designation has served the process well to this point in time, but you use a word that irks me. That word is "irked". It is not due to being irked that I do not choose to designate myself as unionist or nationalist; it is a matter of political belief and philosophy that I do not wish to be defined by a sectarian title. Rather, I wish to represent everyone in the community. There needs to be recognition of that. I feel undervalued, and, indeed, my vote is undervalued, for as long as that remains. Is there an understanding of that? How will we work our way through that?

267. **Professor Galligan**: I appreciate your point. I was mindful that there are clearly tensions for people and representatives — individuals are representatives of different voices in the community — and it is clear that this space for diverse voices is restricted because of the community designation. It is a point at which, if there is ever going to be "normal" politics, the normality of the politics has to include all voices. Therefore, community designation needs careful thinking through. For example, people say that "other" is a community designation, but, in fact, it is not really a designation at all.

268. **Mr Dickson**: No, it is not, and it undervalues a group of people in the Assembly. If I wish to share my voice with unionists or nationalists on a particular subject, I am free to do that, and I can effectively add my voice to theirs. However, they are in a more difficult position if they wish to add their voice to mine. Their voice counts more than mine. It is an area on which we are clearly going to have to do a lot more work, and I would welcome more information on it as we progress through this.

269. Turn to opposition, there is a feeling or perception that there is no opposition in the Assembly, that opposition was poorly thought out in the Assembly or that it is ill catered for in this organisation. Having looked last week at, for example, the Scottish Parliament, I can see that it is quite clear that we actually have clear lines, roles and rules for people in the organisation and that we are not that different from the Scottish Parliament, which has opposition. There may be a few tweaks that we could do with matters such as speaking time, for example. However, I am interested to know how you see opposition being developed. Does opposition just simply mean those parties that are either too small to be in the Executive or that choose not to be in the Executive? That is also a free choice; a party may choose not to be in the Executive. It may be that, at some stage in the future, a significant number of people may choose not to be in the Executive. One party or another may decide to take that line. Your view is that d'Hondt serves everybody well, so how would it serve in those circumstances? Would it allow the largest non-Executive party more time than the next smallest party and so on, going right down to the single Member?

270. **Professor Galligan**: Opposition is an issue that needs careful attention. Having looked at the Assembly, I think that there is a lot of opposition in the Assembly as it is and that there is a lot of scope for opposition in the Assembly. As I said, there is room to extend and to take the power that opposition allows for Committees to be more proactive —

271. **Mr Dickson**: Even in this model?

272. **Professor Galligan**: Even in this model. That is my view.

273. This relates to an earlier point that I made, but I think that, at the moment, we should welcome that we have got so far with our consensual politics, with the politics of the Assembly and with the consociation of power-sharing politics. Even though the agreement is 15 years old, the Assembly is in fact not much more than six years old — you could maybe push it to seven — in its regular and continued working. So, in a way, we have only one full parliamentary term, if you like, under our belt. This is our second parliamentary term, and it has its own uncertainties, such as length of time and all the rest.

274. I think that we can sometimes be a little too hard on ourselves. We can say, "Things are not working, so we have to fix them really quickly." In fact, maybe they are not working, but maybe we do not need to fix them really quickly; maybe we need to fix them slowly and carefully in an organic manner rather than in a knee-jerk manner. The Scottish Parliament has been going for 15 years, so it has double the amount of experience and is bedding in. As we all know from our own experience of politics and other areas, it just takes a little bit of time for dust to settle and for processes to bed in. However, that does not mean that we should not be reflecting on how those processes are working. We should absolutely be doing that. That is where we should be with the opposition issue.

275. **Mr Campbell**: My apologies for being late. The issue that you raised about gender and the last seat had not occurred to me. Surely you do not think that the greater preponderance of females that is likely to win final seats is down to their gender. Is it not the case that the lesser number of female candidates that stood previously is only now being reflected in voters becoming more used to giving higher preferences to more women rather than women being regarded as the final candidate or the second, third or fourth choice?

276. **Professor Galligan**: I think that that is an important point about how the electoral system interacts with candidate gender, who the voters choose and how that works through the system. Interestingly, at the previous election, we found that voters were more inclined to give women than men their first vote across all parties except the DUP.

277. So, even though there are fewer women than men running as candidates, when you average it all out, you will see that voters were as likely to give their first vote to a woman as to a man but, in fact, went further and were more likely to give their first vote to a woman. That is the first point.

278. **Mr Campbell**: I presume that that is the case where, across the board, voters can select a male or a female. If they do not have a female candidate, obviously they cannot vote for a woman. I take it that that analysis took account of that and that you had to discount areas where there were all-male candidates.

279. **Professor Galligan**: Yes. That tells us that the Northern Ireland electorate is not necessarily going to discriminate against women candidates. That is an important point.

280. Coming to your second point, when one looks at the counts and at who was in the race for the final seat, one sees that, across all 18 constituencies, it is obvious that more men than women were in the race for the last seat. However, when you take that as a proportion of the number of men and women who were elected, it looks as though women are in the more vulnerable position. My point is that if you take the last seat away, you will consequently have proportionately fewer women than proportionately fewer men returned.

281. **Mr Campbell**: I understand that. Can we ascertain why that should be the case? Why should female candidates be at proportionately greater risk? I accept that they are, because you looked at the figures and found that to be the case. However, why is that? Why is it that, on

the fifth seat, a female is more likely than a male to be at risk?

282. **Mr Hamilton**: May I butt in? I will propose a theory for why that is the case. You noted that, for the DUP, three of our five female Members were vulnerable at the last seat. Each of those three was a first-time candidate.

283. **Mr Campbell**: That is my point.

284. **Mr Hamilton**: Yes, and the other two topped the poll in their constituencies. I know that very well, because I trailed in miserably behind one of them. So, I am living proof that our voters far prefer women candidates. Three of them were first-time candidates, and one was brand new in politics and had never run for anything in her life. So, they did not have the benefit of incumbency, which is widely acknowledged everywhere in political science as being of some benefit to those who are running. There is other evidence to back that up. Those three people were all brand new candidates running for Assembly constituencies. In two cases, they were councillors, but that is only a tiny area of their entire constituency.

285. **Mr Campbell**: That is what I was alluding to.

286. **Mr Hamilton**: Sorry, I jumped in ahead of you.

287. **Mr Campbell**: Is it not the case that, slow and evolutionary as it might be, the issue that you correctly raise is more likely to be resolved when we see more female candidates on the ballot paper over two or three electoral cycles? As more women become more predominant in more places in the electoral world, more voters will place them higher on the ballot paper and they will be less likely to be the last candidate. Is that not likely to be the case?

288. **Professor Galligan**: I definitely agree with your point that, the more women who run, the more likely it is that women will be elected. That is very true, and I support that argument for a long term.

289. I have also observed that incumbency clearly matters, as you said. Whether somebody is a first-time candidate or not in the new political experience also very much matters, as does the level of support that a party attracts. Not all the women that I was looking at were first-time candidates. One of the vulnerable women was a long-time candidate for another party. Therefore, incumbency does not always protect or help women, nor does the fact that they were first-time candidates. So, party support also fits into this equation, and we need to consider that.

290. **Ms Ruane**: I have two brief supplementary questions to ask. It is very interesting to see how everyone gets so exercised when we talk about proactive measures for women. It is great that we are having this debate; I think that it is really important. Anyone who is involved in politics knows that it is about party support and how you divvy up party votes in a constituency. So, if a party wants to get women elected, it can, and if it does not take measures to do that, there will be very few women elected. It is as simple as that. You can add incumbency, etc, but there will be loads of men who are not incumbents and are still well up there. So, rather than starting to pick holes, I think that we would be better accepting that we have a problem, that we have a lack of women and that we need more.

291. I would be the first to say that Sinn Féin needs more women, yet we have the highest number of women in the Assembly. However, that is not good enough for me or, indeed, for the men in our party. That is because it should not just be women fighting for gender equality; men should do that as well. Thankfully, the men in our party are doing that.

292. I forgot to ask about this previously, but latitude is the other point that I wanted to raise. I think that others in the room might be interested in that. I speak as the only female Whip, which is also interesting, but I know that Stewart is a Whip for his party. You mentioned

more latitude in Committees. Can you elaborate a little bit on that?

293. **Professor Galligan**: I was thinking that a Committee — the Health Committee, for example — might feel that an issue that it wished to tackle fell within its broad remit or policy area. That issue need not necessarily always shadow an Executive matter, but it is obviously a societal problem of some kind or another. That Committee would investigate it as a Statutory Committee in its own right. It would explore and develop it and come up with a view or recommendations and a position on that policy issue.

294. That might also mean that that Committee would have to work with another Committee, because many of our societal problems are multidimensional. For example, somebody who is in poverty is not just poor financially; they are poor in many other ways and need support in other ways. So, Committees could instigate tackling those kinds of cross-cutting issues off their own bat — and why not?

295. **Ms Ruane**: Thank you. I am sorry that it was so hard to hear because of the two gentlemen talking. I think that we need to be respectful to our guests.

296. **The Deputy Chairperson**: Thanks very much for coming along, Professor Galligan. Thanks for your written submission and for your patience in answering all the questions.

297. **Professor Galligan**: You are very welcome. Thank you very much for the discussion. I very much enjoyed it. I wish you well in your work.

7 May 2013

Members present for all or part of the proceedings:

Mr Pat Sheehan (Deputy Chairperson)
Mr Roy Beggs
Mr Gregory Campbell
Mr Paul Givan
Mr Simon Hamilton
Mr Raymond McCartney
Mr Conall McDevitt
Mr Sean Rogers
Ms Caitríona Ruane

Witnesses:

Ms Eileen Cairnduff	*Platform for Change*
Dr Robin Wilson	

298. **The Deputy Chairperson**: I welcome Dr Robin Wilson and Ms Eileen Cairnduff. Thank you for your submission and your attendance. I ask you now to give us an oral briefing.

299. **Dr Robin Wilson (Platform for Change)**: Thanks very much, Deputy Chair and members, for having us. Eileen and I are conscious of time and of the imminence of the statement at 10.30 am. I propose to give a five-minute presentation and then either of us will field questions.

300. I stress that we are asking you to consider the submission in conjunction with that of the previous year on the number of Departments and the size of the Assembly, and to see what we present to you today as a coherent overall package of proposals on the three issues that you have asked to be addressed.

301. What we are really saying across this submission is that the argument about the kind of governance structures that we have here has been bedevilled, over the years, by a polarisation between people who fundamentally believe that the Westminster model is the model and who consider that the winner-takes-all political culture at Westminster is what we should aspire to, and those on the other side who have rejected that model in favour of an insistence on having, essentially, a communal veto against majority rule.

302. What we try to say in this paper is that there is a middle way. That does not make us the voice of the Alliance Party. The middle way says that we should think of the wider European context as the model. In that wider context, the norm is not a winner-takes-all culture but shifting coalitions of different parties as elections succeed one another. In Northern Ireland, we should try to reach a point as soon as possible where we have a more flexible system of power sharing, which retains the equality of citizenship at its heart but, nevertheless, allows us to be more normal in that European sense.

303. What we suggest on the issue of d'Hondt is that the way through that argument, which, again, polarises between people who want a voluntary coalition and those who say we should keep it as it is, is to have a mandatory, agreed coalition, which would be formed after each election. It would not need to be an all-inclusive grand coalition. Parties could choose to be part of that coalition or not part of it, depending on their ability to agree on a programme. Such a Government should operate with collective responsibility in support of that programme, as did, of course, the 1974 power-sharing Government. They should operate in a joined-up way, which the d'Hondt arrangements do not encourage. That would send out a very strong signal to society in Northern Ireland that we have a purposeful Government, committed to reconciliation. In that light — and Eileen may want to come back to this later — we think that the arrangements for communal designation are totally inappropriate in a democratic society, because a democratic society has to be based on the idea that voting counts

and makes a difference. You do not simply have a view on an issue that derives from your religious background but you listen to the arguments and change your view as you may. In that context, communal designation has proved to be a straitjacket that has prevented the emergence of more normal politics in Northern Ireland, and it has sent the wrong signal on reconciliation to wider society.

304. We suggest that it is possible to provide various minority protections, and we offer three possible ways to do that: through a super-majority requirement to form a Government; a Northern Ireland bill of rights; or through a requirement that a Government be formed on a 50:50 basis. Those can easily replace communal designation as a safeguard to militate against majority rule.

305. Finally, in that context, it seems logical to have an opposition consisting of those parties that elect to be non-governing parties after an election, and which can, therefore, hold the Executive to account. That is, as we point out, allied to the reconstitution of the Civic Forum, which is a statutory duty that is not being implemented, with a view, if one is in one of those opposition parties, to being able to present the case as to why one should be in government after the next election.

306. I have just skated over the surface, but it is probably best to leave it at that and take comments and questions.

307. **The Deputy Chairperson**: Thank you very much for that, Robin. Will you elaborate on what you mean by a numerical super-majority requirement, and comment on the need for a cross-community requirement for Government formation for a period of time?

308. **Dr R Wilson**: The current position is, obviously, that we have communal designation and the sense is that the cross-community support requirements provide you with a safeguard against winner-takes-all type of behaviour. We do not want winner-takes-all type of behaviour. However, there are other ways that would keep the baby of power sharing and equality without the bath water of entrenching sectarianism, as with the current arrangements.

309. We suggest that, after an Assembly election, there would be negotiations among the parties on a potential Programme for Government. Whichever parties decided to coalesce behind that programme would then have to be able to command a sufficient majority in the Assembly to go into government together and implement that programme. What the precise figure for that should be is a matter of legitimate debate. I think that around the 65% level would be reasonable but that is something that people can argue back and forth about.

310. **The Deputy Chairperson**: Sorry, can I just stop you? Are you saying that it would not require a majority within each community bloc, as such, but just a majority of, as you say, maybe 65%?

311. **Dr R Wilson**: It would require a super-majority in the Assembly of some figure that would be agreed, say 65%, for the sake of argument. There would not be communal designation.

312. **The Deputy Chairperson**: On a practical issue, could you imagine the formation of any Government in those circumstances that would include Sinn Féin?

313. **Dr R Wilson**: Yes. Any party could be in government and any party could decide not to be in government. There is no reason why, for example, you could not have a Government, for the sake of argument, that included Sinn Féin, the SDLP, the Alliance Party and — I am not quite sure what is happening to the Ulster Unionist Party. I am sorry to intrude on private grief but whatever there is there. The DUP might say that it does not want to be a part of that and will campaign for a different Government in the future.

314. The beauty of having a number, once you get away from communal designation, is that anybody can be in and anybody can be out. Obviously, however, you could not

have a situation where you simply had one community dominating the Executive to a degree that would frighten anybody on the other side.

315. **Ms Eileen Cairnduff (Platform for Change)**: Surely, Sinn Féin has sufficient numbers in the Assembly now that the 65% number should not frighten it. Surely, you should not think that you will be put out at this stage of the game. I hope that we have reached a more mature stage in our government that things such as these can be considered.

316. **Dr R Wilson**: If I was a Sinn Féin member, I would agree with what Eamonn McCann said at the beginning of the Assembly, which was that Sinn Féin should go into Opposition and provide a left-wing opposition to the Government. That would be my position.

317. **The Deputy Chairperson**: I am not surprised that Eamonn would take that position. It sounds to me an awful lot like self-regulation of the Assembly. We know from experience in not just the political field but other fields that self-regulation often does not work.

318. **Mr McDevitt**: I declare an interest as someone who was involved with Platform for Change when it was being established.

319. You suggest that we set aside designation, and one of the models that you proposed was that there would be some way to do what you called a 50:50 Government. How would you know that it was a 50:50 Government if you did not have designation?

320. **Dr R Wilson**: That, we are suggesting, is not a particularly desirable fallback. It is, essentially, the Belgian model in the sense that the Government in Belgium has to consist of 50% Walloons and 50% Flemings. It is not a very good model because government in Belgium does not work. Leaving that aside, the comparison, Conall, would be with the fair employment monitoring system. I do not mind saying on a fair employment form that I am perceived as a member of the Protestant community. I am an atheist, but I know what I am doing when I say that. What I resent is anybody who says, "You are a Protestant, ergo you are also a unionist, loyalist or a member of the so-called PUL community", which I detest with a passion.

321. I have no problem at all about having to ensure that a Government would be 50:50 in the sense of people from Catholic and Protestant backgrounds, and any others could then be thrown in. What I have a big problem with is the idea that our political choices are programmed by birth and we would then have to have a Government of, say, 50% unionist and 50% nationalist, without anybody like me on the secular left of politics getting a look-in.

322. **Ms Cairnduff**: On a personal level, that is the main issue that I am strongly against. I am a Catholic unionist, I suppose, which is a new phrase that is being mentioned quite a lot. I would hate anybody to think that, because I am a Catholic, I am, ergo, a nationalist. I am actually English by birth but that does not mean very much these days.

323. **Mr Hamilton**: We will not hold that against you.

324. **Ms Cairnduff**: Exactly, do not. I am also in a mixed marriage. The messages that all this gives to the wider community is what leads us into problems with flags and national anthems at football matches.

325. **Mr McDevitt**: I will play devil's advocate. That is the scenario that would arise if you applied the fair employment test to government here. As it is today, with the test and designation, religion has nothing to do with it.

326. **Ms Cairnduff**: What about the others?

327. **Mr McDevitt**: What I am saying is that religion has nothing to do with it. Therefore, it is not an accident of birth thing.

328. **Ms Cairnduff**: Surely it is implicit.

329. **Mr McDevitt**: No, it is not at all implicit.

330. **Dr R Wilson**: I am a social scientist, Conall. I know of no correlation in social

sciences that is anything like as close between how people designate in the Assembly and their religion. There was only one person in the Assembly whose designation I could not have predicted from their religious background, and that was John Gorman, who was a Catholic and in the Ulster Unionist Party. Every other single person who has designated since 1999 did so in a way that you could have predicted from their —

331. **Mr McDevitt**: That is not true. Billy Leonard, as far as I remember, was a Sinn Féin candidate.

332. **Dr R Wilson**: I beg your pardon, yes.

333. **Mr McDevitt**: I think you would probably find one or two other examples. It is the exception.

334. I am just trying to work it through. If you were to move away from mandatory designation, which I think probably everyone would see as a desirable outcome in the long term, there are phases that would allow you to move through that. If you were to move to 50:50, even if it were a voluntary designatory model, you would be reduced to religion, as you rightly point out. Of course, that would be extremely regressive because it assumes that it is just religion that defines your politics.

335. **Dr R Wilson**: No, because what you would be saying, as with the fair employment case, is that it does not say anything about your actual religion but just the background from which you come. That is just a safeguard, as we say. We do not think that it is the best one. We would much rather it was a super-majority and/or a bill of rights requirement, and you could have those as belt and braces if you wished. However, that is the example if it came to it and there was no other way that it could be done. Just to balance it out: I am an Irish citizen.

336. **Ms Cairnduff**: With fair employment, obviously it is always done in secret. If you fill in anything, it is usually put in a separate envelope, so we would expect that to be similarly done here.

337. **Mr McDevitt**: Eileen, let us apply the test to that. I do not mean to hog the session. This is a representative Parliament, so, if you vote for someone and their political platform in good faith and then there is the criterion that, let us say, the Government will be made up of half and half and you did not know that individual's religion, there would be a democratic issue on their criterion for being in government and the basis on which you would vote for them. So, you could not do it in secret. It is just not possible. You would be withholding from the electorate a vital piece of information that would then be relied upon to establish the composition of a Government.

338. **Ms Cairnduff**: I suppose so.

339. **Mr McDevitt**: One of the things that we are trying to do is think our way through an organic and evolutionary process, and one of the debates that has emerged in Committee is the idea of moving from the d'Hondt all-in, effectively, model to what I suppose the Committee is calling the d'Hondt opt-out model, where, after an election, parties would come together. They would know their potential entitlement according to the d'Hondt formula, and it may be a question of negotiating a Programme for Government, with those who cannot sign up to it leaving to form an opposition. This would be in the interim, obviously, to your idea, but how would you feel about that as a next step?

340. **Dr R Wilson**: In some ways, Conall, on any reasonable reading of the Belfast Agreement, you see that the Programme for Government was meant to be the gel that would hold the Executive together. Unfortunately, it did not end up playing that role. I would have no problem if d'Hondt were to fade into the background as the emphasis on coming together around the Programme for Government took over. If people were to feel that that was a more secure way of doing it and were fearful that, if there was no foundation, things could roll back, that would be fine.

341. **Mr Beggs**: You mentioned that it was thought that the Programme for Government would be the gel that would hold the various offices together with a united purpose. Do you agree that agreeing a Programme for Government a year after going into office is very bad practice, is illogical in most political norms that exist throughout the world and is not helpful? Do you agree that if it were agreed before office was taken, it would be beneficial for the community and everyone and would bring cohesiveness to that Government?

342. Secondly, in my opinion, there has been a lot of abuse of key votes from certain political parties on both sides. Have you any suggestion for how to alter the current regulation to bring about what was originally intended?

343. **Dr R Wilson**: Roy, thanks for both your points. On the first, in the wider European model that we are talking about, it is not unusual for it to take weeks or months to form a Government while the parties that will eventually form it decide to agree on a programme. You cannot really agree in advance of the election, because you do not know what the election will show up. Part of what we are trying to say is that it is important that ordinary electors think that how they will vote makes a difference to what the final pattern turns to be. Nevertheless, I agree with the thrust of what you are saying, which is that there should be a link to a Government being formed and a programme being developed by that Government. The ordinary electors' point of view is that they elect people to do things, and, if there is not a connection between the Programme for Government and the formation of a Government, it disconnects people from the political process.

344. It would be much more purposeful if we could have, as Scotland does, a quite developed Programme for Government, with the Government committed to set of very clear policy goals. That would give politicians here the ability to say that this is something very different from what would have been done if we had direct rule. I am afraid that most people here would not say that that much has been done that is that different, because the Programme for Government has not been strong enough.

345. With regard to your second point about key votes, yes, they have been abused because different parties at different times have come at it in a partisan way. The idea was that it was meant to protect minorities; not the parties. We state in our proposal that that is one of a number of reasons why a Northern Ireland bill of rights that is based on some basic minority rights and protections should find its role and come back to the fore, because you could then get rid of those mechanisms for key votes that, like you say, are open to abuse.

346. **Mr Beggs**: Do we need a bill of rights to do that? Surely that could be agreed in the Assembly at present by just simply changing the regulations around key votes.

347. **Dr R Wilson**: It does not need to be agreed, but it would certainly be my view, given the divided nature of Northern Ireland, that the value of incorporating the two minority rights conventions from the Council of Europe, which we refer to in the submission, would be very strong. It would be seen as a signal that their rights were being protected, and it would be seen as Northern Ireland being in full compliance with the requirements on a European level.

348. **The Deputy Chairperson**: Are there any other questions? No?

349. Thank you very much for coming in. It has been short —

350. **Dr R Wilson**: We were conscious that it was a rush.

351. **Ms Cairnduff**: Thanks very much for giving us your time.

352. **The Deputy Chairperson**: The day after a bank holiday is always hectic. Apologies for that.

353. **Dr R Wilson**: Thank you very much for your time. We will obviously be available if you need to discuss any of those things further.

24 September 2013

Members present for all or part of the proceedings:

Mr Stephen Moutray (Chairperson)
Mr Pat Sheehan (Deputy Chairperson)
Mr Gregory Campbell
Mr Stewart Dickson
Mr Paul Givan
Mr Raymond McCartney
Mr Sean Rogers
Ms Caitríona Ruane

Witnesses:

Mr Ray McCaffrey	*Northern Ireland Assembly Research and Information Service*

354. **The Chairperson**: I ask Ray McCaffrey, who is a research officer, to come to the table. You are very welcome, Ray. Go ahead when you are ready.

355. **Mr Ray McCaffrey (Northern Ireland Assembly Research and Information Service)**: Thank you, Chair.

356. Members have several papers on petitions of concern. Given that you will shortly hear legal advice, I will speak briefly to the paper, which contains additional information and includes section 4 of a paper that was submitted to the Committee as part of its previous review.

357. As of March 2013, 56 petitions of concern had been submitted since the Assembly was established in 1998. Since March, and the completion of the previous paper, a further five have been submitted. Three related to the Planning Bill; one to marriage equality at the constitutional convention in the Republic of Ireland; and one to a motion calling for an inquiry into alleged political interference at the Housing Executive. So, in total, there have now been 61 petitions of concern: 34 unionist, 25 nationalist and two joint.

358. From the table in the paper, you will see that there is no real set pattern to their use. Certainly, since the Assembly was first established, their use has increased, but that is, of course, thrown out somewhat by the long period of suspension. Even in the 2010-11 session, for example, the 17 unionist petitions of concern can largely be accounted for by the Caravans Bill and Justice Bill. So, even where it looks as though there are a lot, they centre on a couple of pieces of legislation.

359. Section 4 is an extract from our larger paper, 'Opposition, community designation and d'Hondt'. It provides some background to the concept of community designation in the Assembly. It also sets out the legislative basis of community designation and the process under Standing Orders for designating as "Nationalist", "Unionist" or "Other". Section 42 of the Northern Ireland Act 1998 states that any vote on a petition of concern must be on a cross-community basis. Standing Order 28 states that, if 30 Members sign a petition of concern, the vote on that matter will be delayed until at least one day after the petition was submitted.

360. As Members are aware, there is disagreement on the principle of community designation, and the arguments for and against were advanced in the evidence sessions for the Committee's previous inquiry. Critics suggest that it is a method of entrenching sectarianism by dividing the Assembly into clearly defined groups. Others argue that it simply addresses the reality of political parties working in a divided legislature. Another argument is that it means that the votes of those designated "Other" do not count. That was refuted in one evidence session, when it was argued that it would be more accurate to say that the votes of nationalists and unionists are worth more than the votes of those who designate as "Other". It was suggested that community designation could be replaced with a weighted majority voting system with a sufficiently

high threshold. That would still ensure that no decision could be taken against significant opposition in one of the two communities. It was argued that petitions of concern could be limited to certain key votes in the Assembly. That could be a method of curtailing their use, if it was felt that they were being employed too often, as some have suggested.

361. Finally, the paper provides another example of the type of community designation that exists elsewhere. This one is in the Belgian Parliament and has been described as an alarm bell procedure, whereby a motion signed by at least three quarters of one of the language groups in the Parliament, the French-speaking or the Dutch-speaking group, could state that the provisions of a particular Bill could be seriously detrimental to community relations. That means that the Bill is referred back to the Cabinet, which has to consider it and refer it back to the Parliament within 30 days.

362. That was just a brief recap of some of the issues around petitions of concern and community designation.

363. **The Chairperson**: Thanks for that, Ray.

364. According to the table, a joint petition of concern about the Civic Forum was brought by nationalists and unionists. Will you give us the background to that?

365. **Mr McCaffrey**: I do not have the background to hand, Chair, but I am happy to go away and confirm that for the Committee.

366. **The Chairperson**: I was just wondering about that one and the petition of concern about the election of the First and deputy First Ministers. Those two stand out.

367. **Mr McCaffrey**: I think that the one about the election of the First and deputy First Ministers was, perhaps, submitted by the Ulster Unionists and the SDLP. I will double-check the one about the Civic Forum.

368. **The Chairperson**: No members wish to ask questions. Thank you, Ray.

14 January 2014

Members present for all or part of the proceedings:

Mr Stephen Moutray (Chairperson)
Mr Pat Sheehan (Deputy Chairperson)
Mr Gregory Campbell
Mr Paul Givan
Mr Raymond McCartney
Mr Seán Rogers

Witnesses:

Mr Ray McCaffrey	*Northern Ireland Assembly Research and Information Service*

369. **The Chairperson**: Further to the discussion at the meeting on 10 December 2013, a research briefing paper on Standing Committees that examine conformity with human rights and equality issues in legislatures in the UK and Ireland has been prepared for the Committee. I invite the research officer to brief the Committee on the paper. I advise Members that Hansard will report the presentation and any subsequent discussion. I welcome Ray McCaffrey, who will present the paper. Go ahead when you are ready, Ray.

370. **Mr Ray McCaffrey (Northern Ireland Assembly Research and Information Service)**: Thank you, Chair. The Research and Information Service was asked to look at the remit and role of any Standing Committees in legislatures in the UK and Ireland in examining conformity with human rights and equality issues.

371. The starting point is the House of Commons and House of Lords Joint Committee on Human Rights at Westminster. It has a broad role in the context of the UK's obligations under the European Convention on Human Rights (ECHR) and the incorporation of that convention under the Human Rights Act 1998. I will give members an overview of the work of the Joint Committee.

372. In a 2005 report, the Joint Committee reflected on its work to date. It stated that it was an important part of the constitutional compromise struck between parliamentary sovereignty and human rights in the 1998 Human Rights Act. That Act was crafted in such a way as to preserve parliamentary sovereignty at Westminster in the field of human rights. So, unlike its US counterpart, for example, the UK Supreme Court cannot strike down primary legislation that is incompatible with convention rights. Instead, it makes a declaration of incompatibility, essentially leaving it up to Parliament and the Government to remedy the situation; and that is where the Joint Committee comes in. Part of its role is to report on remedial orders that can be introduced to rectify any incompatibility. It is essentially a fast-track method for removing incompatibilities with convention rights.

373. This forms only part of the Joint Committee's broader remit. For example, it has chosen to review each Bill brought before the House. It can undertake inquiries into areas of public policy; for example, establishing a human rights committee in Great Britain. Neither should the work of the Joint Committee be viewed in isolation. Before legislation reaches that stage, detailed guidance exists for those drafting and introducing legislation to ensure that it complies, as far as possible, with the Government's responsibilities under the convention. If a Minister is not able to provide that personal assurance, he or she must state, nevertheless, that the Government wish the House to proceed with the Bill. That is an overview of the Westminster situation.

374. Unlike the UK Parliament, legislation passed by the Northern Ireland Assembly, the Scottish Parliament and the National Assembly for Wales must be compatible with the UK's obligations under the convention. Obviously, there

are no directly comparable Committees in the devolved institutions to the Joint Committee, as there does not necessarily need to be. Neither, it appears, is there a directly comparable Committee in the Houses of the Oireachtas.

375. At this point, it is worth mentioning that, in its 2008 advice to the Secretary of State on a bill of rights for Northern Ireland, the Northern Ireland Human Rights Commission (NIHRC) recommended that an Assembly Committee should be established similar to the Joint Committee at Westminster. Just to reiterate, that advice was to be seen in the context of a bill of rights having been established here. The NIHRC envisaged that the Committee's functions would include pre-legislative scrutiny of legislation for compliance with the bill of rights; conducting consultations; publishing reports; and drawing up departmental guidance to government for compliance with the bill of rights in respect of statements of compatibility.

376. The Justice Committee in Scotland is mandated to scrutinise human rights issues, but it has come in for criticism for having failed to adequately address such issues. The Equal Opportunities Committee in Scotland has a remit to consider matters of discrimination relative to sex or marital status, race, disability, age, sexual orientation, language, social origin or other personal attribute. The National Assembly for Wales has the Communities, Equality and Local Government Committee, which has the remit to examine legislation and hold the Welsh Government to account by scrutinising expenditure, administration and policy matters encompassing Wales's culture, languages, communities and heritage, including sport and the arts; local government in Wales, including all housing matters; and equality of opportunity for all. In the Oireachtas, the Committee on Justice, Defence and Equality and the Joint Committee on Foreign Affairs and Trade cover equality and human rights issues between them. From 2007 to 2011, there was a subcommittee on human rights, but it took a wider view of the issue, including international human rights. Again, it does not appear to have been concerned with looking at the minutiae of legislation, as this Committee is discussing. So, there are Committees that look at human rights issues and equality. However, those issues really have to be seen in the broader remit of the Committees. There is not really a Committee as such relating to the one that you would find at Westminster.

377. Looking beyond that, and one thing that the paper touched on, monitoring and compliance with human rights extends beyond Committees of legislatures and the various human rights and equality commissions, making for a more complex framework within which the issues need to be placed, certainly in the context of Northern Ireland. For example, human rights and equality form a significant part of the Belfast Agreement and the Northern Ireland Act 1998. In addition, of the seven different mechanisms for ensuring that legislation made by the Assembly falls within its competence, four relate specifically to human rights. For example, the Attorney General can initiate court proceedings challenging the legislation's compatibility with convention rights. The Secretary of State for Northern Ireland can refuse to submit a Bill for Royal Assent if he or she thinks it is incompatible with international human rights obligations. The NIHRC has the power to advise the Assembly that a Bill is incompatible with human rights. Finally, the compatibility of legislation with human rights can be challenged during court proceedings.

378. Essentially, that is a brief overview of the position. What may be required is a wider look at how the issues are addressed in the devolved institutions and the Oireachtas. As I said, this extends beyond looking just specifically at Committees in the legislatures. It is a more complex framework that is perhaps worthy of more detailed discussion, but hopefully this is a useful overview for members.

379. **The Chairperson**: Thank you, Ray. Are there any questions?

380. **Mr Givan**: Thank you very much, Ray. This is a very useful piece of work for us. I was struck by the comment that we have been looking at whether we should potentially have a human rights Committee to look at legislation once that is triggered by petitions of concern or motions. In all your research, you have not found a parallel-type process that has been used at Westminster or the Dáil.

381. **Mr McCaffrey**: No, but I suppose you could make the point that the petitions of concern mechanism is not found in the other legislatures either. So, there perhaps is not the trigger that would send legislation to such a Committee. In Westminster, the Joint Committee carries out that function around incompatibility with European Convention rights. However, you will not find a directly comparable mechanism to petitions of concern. We would always caution against drawing parallels with other institutions, especially the House of Commons, given its much wider remit.

382. **Mr Givan**: You made the point that we have the Attorney General and the Secretary of State. There are all those checks and balances if we decide to do something that is contrary to human rights. Westminster does not have that. If that Parliament decides to pass legislation, it is sovereign.

383. **Mr McCaffrey**: Again, that is the difference. When you compare Westminster to the devolved institutions you should proceed with caution because the doctrine of parliamentary sovereignty applies. If it wishes to do so, it can pass legislation that is incompatible with convention rights, and that is where the work of the Joint Committee comes in. The Supreme Court in the UK cannot strike legislation down, but it can declare that it is incompatible. Essentially, it bats the ball back to Parliament and the Government and tells them that they need to sort it out.

384. **Mr McCartney**: My point is similar. As far as the four steps are concerned, the court challenge can only come after the Bill has been passed. Is that correct?

385. **Mr McCaffrey**: Yes.

386. **Mr McCartney**: OK. Thank you.

387. **The Chairperson**: There are no other questions. Thanks very much.

388. The research paper usefully highlights that there are human rights and equality obligations for Ministers in relation to public Bills. There are also processes in the Assembly for proofing Bills in respect of human rights and equality. I propose that we ask the Research and Information Service to prepare a further paper or papers on that to inform the Committee's scrutiny of the issue of petitions of concern and an ad hoc Committee on conformity with equality requirements. Are members content that we do that?

Members indicated assent.

389. **The Chairperson**: As members will recall, draft terms of reference for the review of petitions of concern were discussed at the Committee's meeting of 10 December. Further to that discussion, revised draft terms of reference are included in members' packs. Do members wish to go into closed session to consider them?

Members indicated assent.

The meeting continued in closed session.

On resuming —

390. **The Chairperson**: We are now in open session. The text of the draft terms of reference is as follows:

"The Assembly and Executive Review Committee will review Petitions of Concern, taking into account how the Petition of Concern has been used to date and the fact that the mechanism was designed as part of the safeguards to ensure that all sections of the community are protected and can participate and work together successfully in the operation of these institutions. The Committee will:

1. *Examine provisions for an Ad Hoc Committee on Conformity with Equality Requirements in relation to Petitions of Concern, including alternative procedures, e.g. the Westminster Joint Committee on Human Rights.*

2. *Examine the possibility of restricting the use of Petitions of Concern to certain key areas, and consider mechanisms that might facilitate this.*

3. *Consider whether the current threshold of 30 signatures required for a Petition of Concern should be adjusted.*

4. *Consider whether the Petitions of Concern mechanism should be replaced with an alternative mechanism, such as a weighted-majority vote."*

391. Are members agreed?

Members indicated assent.

11 February 2014

Members present for all or part of the proceedings:

Mr Stephen Moutray (Chairperson)
Mr Pat Sheehan (Deputy Chairperson)
Ms Paula Bradley
Mr Gregory Campbell
Mr Paul Givan
Mr Trevor Lunn
Mr Seán Rogers
Ms Caitríona Ruane

Witnesses:

Mr Tim Moore — *Research and Information Service, Northern Ireland Assembly*

392. **The Chairperson**: I welcome Tim Moore, who is a senior research officer. Tim, whenever you are ready, you can go ahead.

393. **Mr Tim Moore (Research and Information Service, Northern Ireland Assembly)**: Thank you, Chair. The Committee asked the Research and Information Service (RaISe) to identify the human rights and equality proofing mechanisms for legislation or public Bills going through the Assembly. I should point out at the start that this is a paper from the Research and Information Service; it is not a paper from Legal Services. Nothing in it constitutes legal advice. So, if the Committee requires legal advice, Legal Services will be more than happy to provide it.

394. The Committee previously had a briefing from one of my RaISe colleagues that looked at the operation of human rights committees in other legislatures. The point was made that the Oireachtas and Westminster can both legislate in ways that are incompatible with the European Convention on Human Rights. That is not the case for the Assembly, so that is the starting point of our paper. We look at the Assembly's legislative competence, because that undermines the human rights and equality proofing that goes on with public Bills.

395. Section 6 of the Northern Ireland Act 1998 establishes that the Assembly cannot legislate in ways that are outside its legislative competence. The relevance of that to considerations of equality and human rights is that section 6 states that an Act of the Assembly will be outside its competence if:

"it is incompatible with any of the Convention rights"

or if:

"it discriminates against any person or class of person on the ground of religious belief or political opinion".

396. Those are two fundamental grounds by which anything that the Assembly legislates on that is incompatible with them could be struck down in a court.

397. There is a reference to incompatibility with EU law, which brings up one of the difficulties. We were asked to look at equality-proofing processes in the context of equality and human rights requirements. When you look at the provisions, you see that it is difficult to separate them out. The discrimination element of section 6 would overlap with some of the human rights elements in section 6(2)(c), and EU law is a primary source of anti-discrimination law, which would also overlap with section 6(2)(c). So, it is difficult to separate equality processes and human rights processes, as they overlap in their competence. They also intermingle in the Assembly's Standing Orders, where you will find reference to human rights and equality. Those matters emerge later in the paper.

398. Another point about the paper that I should make at the outset is that we have not sought to identify every way in which you could challenge legislation made by the Assembly on human rights and equality. There may be innovative

ways in which lawyers could question some of the legislation. We have looked for the primary mechanisms set out in legislation and in Standing Orders to ensure equality and human rights proofing of the legislation.

399. The remainder of the paper looks at the process, from pre-legislative scrutiny through to Royal Assent. Probably the best way to go through the paper is to look at the table, which is at appendix 1. The process of equality and human rights proofing of Assembly legislation starts at the pre-legislative stage, which is the policy development stage in the Departments. Members will be well aware that section 75 places duties on Departments to take account of equality. The Human Rights Act 1998 places responsibilities on Departments, which, for the purposes of the Act, are public authorities. As such, they cannot act in a way that is incompatible with the convention.

400. At the outset, the Department will be working within a framework that is designed to ensure equality and human rights proofing of any policy that will eventually become a Bill and be introduced into the Assembly. Once the Department has worked up the policy into a draft Bill, there are opportunities for the Assembly to use Standing Orders 34 and 35, which are the special mechanisms for addressing human rights and equality issues. They have not been used at that stage. I will touch on them later, because they can be used throughout the legislative process.

401. Setting those aside, the Minister in charge of a Bill must, before he introduces it in the Assembly, make a statement saying that the Bill is compatible with convention rights. The explanatory memorandum that accompanies the Bill usually contains that statement. It also usually contains statements on human rights issues and section 75 statutory duties. It is interesting that it is not a requirement in the Assembly's Standing Orders to include those statements, but they are generally included. In fact, of the 11 Executive Bills that are in front of the Assembly at the moment, all have statements on human rights issues and on the statutory equality duties.

402. The point that could be made about the explanatory memoranda is the extent to which the statements in them are meaningful. It has been suggested with regard to human rights statements that, if you have a statement in which the Minister says that the Bill is compatible with convention rights, the additional statement on human rights issues should say something different. Essentially, it should address the issues that have emerged in the policy development process and the development of the Bill that relate to human rights. The Minister would not have introduced the Bill if he had thought that it was incompatible, but there still might be issues that are of concern to the Assembly. The argument has been made that it might provide for a better Second Stage debate if you had more information on those issues.

403. To be fair to the Departments, of the 11 Bills that we have in front of the Assembly, two address human rights issues and look at the right to possession. I am not sure of the exact wording, but they refer to the rightful use of your possessions, which is article 1 of protocol 1. There are issues around those that were identified in the Reservoirs Bill and the Public Service Pensions Bill. So, there is some discussion in the explanatory memoranda, but one of the arguments could be that that discussion could be fuller. Where the section 75 duties are concerned, the statements tend to be little more than saying that section 75 has been adhered to. There is no real discussion of what the section 75 issues were. The Welfare Reform Bill directs you to the equality impact assessment statement but does not address those in the explanatory memoranda. That is the pre-legislative phase.

404. The Bill will go to the Speaker, as members will know. The Speaker then has seven days to assess whether, in his opinion, the Bill is within the

Assembly's legislative competence. That engages the elements of compatibility with the convention and discrimination, which we mentioned. If the Speaker decides that the Bill is within the Assembly's legislative competence, it has a First Stage. Following that, it will be sent to the Human Rights Commission for its opinion. There is no obligation on the commission to come back with an opinion, but, when it has an opinion, it tends to use the Committee Stage to bring it to the Assembly.

405. Standing Orders 34 and 35 are the special mechanisms. I mentioned that they could be used in the pre-legislative phase, but they can be used in the other phases of legislation through the Assembly. Standing Order 34 allows any Member to table a motion to seek advice from the Human Rights Commission on compatibility with human rights. Standing Order 35 allows the establishment of an Ad Hoc Committee on Conformity with Equality Requirements, which is one of the areas that this Committee has been looking at.

406. Standing Order 34 was used once, and that was for the Welfare Reform Bill. The motion did not pass, so the Bill was not referred to the Human Rights Commission for advice. Standing Order 35 was used once, which led to the establishment of the Ad Hoc Committee on Conformity with Equality Requirements, again on the Welfare Reform Bill. Those were the only times that the Assembly has used the special Standing Orders that are provided for human rights and equality issues.

407. Outside those special procedures, the Committee Stage is when Committees engage in equality and human rights issues. It is standard practice to take evidence from statutory bodies, such as the Equality Commission, the Human Rights Commission and the Children's Commissioner. The paper contains examples of when that has happened. The Committee Stage provides that mechanism, but, as I said, the two other Standing Orders allow for special provisions.

408. One feature of the Assembly is that a Committee cannot amend legislation; it can only make recommendations for amendments, so amendments have to be made at further stages. Amendments can be made at Consideration Stage and Further Consideration Stage. These amendments can work in two ways for human rights and equality issues. They can introduce human rights or equality concerns or resolve human rights and equality concerns that have been addressed in earlier proceedings.

409. Amendments are not checked for competence. The Department will look at them, and there is a responsibility on anyone tabling an amendment. However, there is no requirement for an amendment to be competent, as I understand it. If the Committee needs advice on that, I am sure that Legal Services would be happy to provide it. As the Bill progresses to Final Stage, the Speaker has to make a statement or introduction and has to address the Bill, and the Minister will have to make a statement, but, at Final Stage, there is no final statement from the Speaker or final consideration or decision on the Bill. Once the Bill has been passed and is at its Final Stage, the legislation provides an opportunity for the Attorney General to examine it for competence issues. Those will address human rights compliance with the convention, as well as equality.

410. Where the Attorney General feels that there is a competence issue, he will make a reference to the Supreme Court to have it examined. That happened once with the Damages (Asbestos-related Conditions) Bill, and the Attorney General eventually withdrew the reference. Again, it was to the rights of possession under article 1 of protocol 1. Similar legislation went through the Scottish Parliament. There was a reference from the Scottish Parliament, and, on the back of that being considered, the Attorney General withdrew his reference. So, we have had a reference, but we have never had a decision on the Attorney General

for Northern Ireland's reference to the Supreme Court.

411. The Advocate General, who is the UK Attorney General, can also make such a reference but has not done so. In what is referred to as Reconsideration Stage, Assembly Standing Orders provide for situations where the Supreme Court makes a decision. It allows the Assembly to revisit the Bill so that it does not lose it, and it allows the Assembly to make amendments to make it compatible with the court decision. Again, that has not happened, because we have never had a case go to the Supreme Court.

412. The final stage in the legislative process is Royal Assent. The Secretary of State can decide not to send the Bill for Royal Assent, because, among other things, he feels that it does not meet the UK's international obligations. It could well be argued that those obligations include references to international treaties, such as the UN Convention on the Rights of the Child and the UN Convention on the Rights of Persons with Disabilities. At that stage, the Secretary of State could introduce human rights and equality issues into the consideration of the legislative process.

413. That is a run-through of the equality and human rights proofing of Bills as they go through the legislative process. The paper makes the point that none of this is a guarantee that a Bill that is coming through the Assembly and achieving Royal Assent is actually compliant or does not have human rights or equality issues. For that reason, the courts can hear cases that challenge our legislation, and, in an extreme case, the legislation can be struck down because it is incompatible.

414. **One of the questions that arise is this**: are the human rights and equality checks sufficient, or is there a gap? I am not the person to answer that question, but the Procedures Committee looked at this in 2002. It came to the conclusion that the lack of use of the special provision in Standing Orders 34 and 35 would lead you to believe that the mechanisms were sufficient and that, if they were not, you would have had much more use of them. I am in no position to judge whether that is the right conclusion to draw. There are probably other conclusions, but that was the only time that the legislative process and equality proofing has been considered, and that was the conclusion drawn in 2002. With that, I end the briefing, and I am happy to take questions.

415. **The Chairperson**: OK, Tim. Thank you very much for that. Are there any questions?

416. **Ms Ruane**: How many Bills were referred to the Human Rights Commission in the North?

417. **Mr Moore**: All Bills are sent to the Human Rights Commission as soon as possible after introduction. There is no requirement on the Human Rights Commission to respond.

418. **Ms Ruane**: Does it generally respond at Committee Stage?

419. **Mr Moore**: It generally responds at Committee Stage, because that is the first stage in the process that it can.

420. **Ms Ruane**: Has it responded formally?

421. **Mr Moore**: It has responded formally at Committee Stage.

422. **Ms Ruane**: I have one comment to make. This is very clear, and I appreciate the work that you have done. However, I just think that we should use "he/she" and not "Chairman/Chairperson". I know that you use it in one instance, but in some of the others it is just "Chairman" and "he" and "Secretary of State" and "he", especially given that we are talking about equality and human rights.

423. **Mr Moore**: Absolutely, I take your point.

424. **Mr Campbell**: The appendix in particular is very useful. Sometimes we get briefing papers that you have to go through four or five times to find out what exactly is being said, but that is not the case with this one. It appears to crystallise the current position. I just want to check

that I have got this right. The paper quite usefully crystallises down the various stages, and I think that I am 99% sure, but I want to be 100% sure.

425. I will go through briefly the stages that you outlined. At the pre-legislative stage, an impact statement on human rights and equality is included, and the Minister in charge must publish a written statement to the effect that the Bill will be within the legislative competence. At the next stage, it is scrutinised by the Assembly legal office, and the Speaker decides whether it is within the legislative competence. The Speaker then sends a copy to the Human Rights Commission. There is then the lack of use that you referred to of Standing Orders 34 and 35, where any member can table a motion that the Human Rights Commission should be asked to advise. A member of the Executive Committee or a Chairman of the relevant Committee may table a motion to refer a Bill to an Ad Hoc Committee. I want to make sure that I am 100% clear on this multiplicity of sieves, if you like. At Committee Stage, the Human Rights Commission again may be asked to give a written submission. Then, under Standing Order 39, prior to the Final Stage, the Speaker considers the Bill again in accordance with section 10 of the Northern Ireland Act 1998. At that point, the Attorney General and the Advocate General may, within four weeks, refer it to the Supreme Court for a decision. After that, if the Secretary of State considers that the Bill contains a provision that is incompatible, he or she may decide not to submit it for Royal Assent, and then, at Reconsideration Stage, the Supreme Court may decide. Have I got that series of sieves right?

426. **Mr Moore**: The only point that I would make about that series of sieves is that the Speaker does not make a final assessment of competence, but, yes, that is the process.

427. **Mr Campbell**: Do you mean the one about him passing it on?

428. **Mr Moore**: At the Final Stage, the Speaker will address a number of issues, but he does not address the competence of the Bill as detailed in section 6.

429. **Mr Campbell**: However, that series of sieves that —

430. **Mr Moore**: Absolutely.

431. **Mr Campbell**: That is fair enough.

432. **Ms Ruane**: With your indulgence, may I ask one more question? Your paper refers to the fact that the Human Rights Commission:

"raised the notion of establishing a human rights committee".

433. You could make all sorts of interpretations of whether Standing Orders 34 and 35 were used. When they were used, the Assembly was only up and running, it was very early stages, and there were probably not that many Bills going through. What are the pros and cons of the notion of the establishment of a human rights Committee? Was any work ever done on that?

434. **Mr Moore**: I am not aware of the arguments that were put around 2002. There may have been the feeling that, although you had the OFMDFM Committee, which has a clear cross-cutting remit on human rights, you did not have a Committee with that focus. The same could be said about a European Committee. You needed one with that focus. My colleague, Ray, presented a paper that looked at human rights committees and at how they operate to see whether there is scope for a remit that would add to this process. However, that is not a decision for the Research and Information Service to make. One of the benefits, I suppose, would be the expertise that you build up in a Committee. In the human rights Committee at Westminster, you have a group of members who are very focused solely on human rights issues, as it is a complicated area. So, that would be one of the arguments for it.

435. **Ms Ruane**: Trevor raised that point the previous time.

436. **The Chairperson**: Thank you, Tim.

25 March 2014

Members present for all or part of the proceedings:

Mr Stephen Moutray (Chairperson)
Mr Pat Sheehan (Deputy Chairperson)
Mr Roy Beggs
Ms Paula Bradley
Mr Gregory Campbell
Mr Paul Givan
Mr Trevor Lunn
Mr Raymond McCartney
Ms Caitríona Ruane

437. **The Chairperson**: The aim of the session is to allow the Committee to consider the final draft of the report on the Committee's review. I propose that we consider the final draft text section by section.

438. Are members content with the executive summary section of the report?

Members indicated assent.

439. **The Chairperson**: Are members content with the introduction and the "The Committee's Approach to the Review" section?

Members indicated assent.

440. **The Chairperson**: Are members content with the "Committee Consideration" section?

Members indicated assent.

441. **The Chairperson**: Are members content with the "Committee Analysis and Conclusions" section of the report?

Members indicated assent.

442. **The Chairperson**: Are members content with appendix 1 to the report: the extract of Minutes of Proceedings relating to the review?

Members indicated assent.

443. **The Chairperson**: Are members content with appendix 2: the Minutes of Evidence — the Hansards — relating to the review?

Members indicated assent.

444. **The Chairperson**: Are members content with appendix 3 to the report: "Options Paper on Petitions of Concern: Ad Hoc Committee on Conformity with Equality Requirements"?

Members indicated assent.

445. **The Chairperson**: Are members content with appendix 4 to the report: "Party Responses"?

Members indicated assent.

446. **The Chairperson**: Are members content with appendix 5 to the report: "Correspondence and Other Papers Relating to the Review"?

Members indicated assent.

447. **The Chairperson**: Are members content with appendix 6 to the report: "Assembly Research Papers"?

Members indicated assent.

448. **The Chairperson**: Thank you. The final version of the report will be proof-read a final time before the report is ordered to print. Are members content that the Committee secretariat make any changes to typing errors or the format of the report, where necessary? These will have no effect on the substance of the report and are purely for formatting.

Members indicated assent.

449. **The Chairperson**: The extract of the Minutes of Proceedings and the Minutes of Evidence — the Hansard report — from today's meeting will have to be included in the report: are members content that I, as Chairperson, approve the extract from the Minutes of Proceedings from today's meeting for inclusion in the report?

Members indicated assent.

450. **The Chairperson**: Are members therefore content that the first edition of today's Hansard report of the review

will be included in the report, as there is insufficient time for members to review the transcript before publication?

Members indicated assent.

451. **The Chairperson**: Are members content that the Committee secretariat forward an embargoed electronic version of the report with an appropriate covering letter from me, as Chairperson, to the Secretary of State, the First Minister, the deputy First Minister and leaders of the parties in the Assembly?

Members indicated assent.

452. **Mr Beggs**: Can members have an embargoed electronic version as well?

453. **The Chairperson**: OK.

454. We now move to consideration of the draft motion for a debate on the report in the Assembly plenary that was tabled earlier in the meeting. Are members content with the wording of the draft motion for debate in the Assembly plenary and that the Committee request 7 April for the debate?

Members indicated assent.

455. **The Chairperson**: Finally, are members content that the Committee should order its report on the review of petitions of concern to be printed following today's meeting and that hard copies be kept to a minimum in the interests of efficiency?

Members indicated assent.

456. **Mr Beggs**: I take it that there is an electronic pack at the back and we are not producing loads of appendices needlessly.

457. **The Committee Clerk**: The proposal is that the 11 members of the Committee are given the very thin hard copy with a CD at the back, so that they can see the report, if that is what members are content to get. It is the thin version of the report, rather than the thicker version.

458. **The Chairperson**: Thank you. Are members content that a note be put in the Business Office today signalling that two embargoed manuscript copies of the report will be laid in the Business Office by close tomorrow? I advise members that the report should be returned by the printer and distributed to all MLAs by 2 or 3 April. The report will, of course, be embargoed until the commencement of the plenary debate. Are members agreed?

Members indicated assent.

459. **The Chairperson**: Thank you.

Northern Ireland Assembly

Appendix 3

Options Paper on Petitions of Concern: Ad Hoc Committee on Conformity with Equality Requirements

Options Paper on Petitions of Concern: Ad Hoc Committee on Conformity with Equality Requirements

1. Options Paper sent to Party Leaders on 22nd October 2013.

Options Paper sent to Party Leaders on 22nd October 2013

Northern Ireland Assembly

Assembly and Executive Review Committee

Review of Petitions of Concern:

Ad Hoc Committee on Conformity with Equality Requirements (ACERs)

Options Paper

Date of Issue: 22 October 2013

Deadline for Responses: Wednesday 6 November 2013

Contact Details for Queries

Committee Clerk: John Simmons
02890 5 21787
john.simmons@niassembly.gov.uk

Assistant Committee Clerk: Ursula McCanny
02890 5 21928
ursula.mccanny@niassembly.gov.uk

Contents

Research Papers

Northern Ireland Assembly Research and Information Service Briefing Papers:

- Standing Orders 35 and 60 of the Northern Ireland Assembly (February 2013) – Annex B
- Additional Information on Petitions of Concern (May 2013) http://tinyurl.com/qeeswlt
- Opposition, community designation and D'Hondt (December 2012) (ref. section 4 – Community designation) http://tinyurl.com/pmtzzz2

Background and Context

Review of D'Hondt, Community Designation and Provisions For Opposition

1. In February 2013, the Assembly and Executive Review Committee commenced a *'Review of D'Hondt, Community Designation and Provisions for Opposition'*, with its Report published on 18th June 2013 and debated in the Assembly on 2nd July 2013.

   Included within the Committee's *'Call for Evidence'* paper (issued mid-February 2013, with a closing date of late March 2013) on the Community Designation area of this Review, the Committee asked *"Do you believe that there should be changes to the 'rules' governing Petitions of Concern? If so, what changes do you propose?"*

Party Responses in relation to Petitions of Concern

2. The **Alliance Party** stated that it *"would welcome a method of defining those issues on which a Petition of Concern can be used and as a way of ensuring this mechanism is not open to misuse."* The **DUP** proposed that *"Where a cross-community vote is required by legislation or triggered by a Petition of Concern, a proposal would require the support of 65% of Assembly Members present and voting to pass."* The **Green Party** stated that *"In the event that a weighted majority is not adopted, the Green Party believes that there ought to be changes to the rules governing petitions of concern to ensure that the use of petition of concern is restricted to key cross community decisions."* The **SDLP** and **Sinn Féin** supported the continued use/retention of community designation. The **TUV** stated *"TUV is opposed to Petitions of Concern. We believe that they are a perverse instrument which is open to abuse."* The **UUP** stated *"The Petition of Concern mechanism is being used on an increasingly frequent basis and we would welcome a review of the occasions it has been used and the reasons why, with particular reference to the original intent of providing this mechanism."* **NI21** argued *"The Petition of Concern mechanism has outlived its usefulness and has also been consistently misused in a manner undermining progress towards a mature parliamentary culture. The proposed requirement of a weighted majority vote is a mechanism which would secure minorities while also not impeding the emergence of a robust parliamentary culture."*

Committee on Procedures

3. In late April 2013, the Committee on Procedures wrote to AERC regarding a particular issue relevant to the Review and suggested that it would be appropriate to address this in the Review. The issue related to Assembly Standing Order 60 and Petitions of Concern, and the establishment of Ad Hoc Committee on Conformity with Equality Requirements (ACERs). Correspondence from the Committee on Procedures referred to important information that has come to the Committee on Procedures' attention and detailed:

   > *"…until 19 November 2012, SO 60 had never been used, and was invoked for the first time in respect of the Welfare Reform Bill on that date. In this lone example, the establishment of the Ad-Hoc Committee on Conformity with Equality Requirements (ACER) was as a result of a motion from the Committee on the Welfare Reform, not as a result of the POC on the motion.*
   >
   > *… However, the Committee noted that both the Belfast Agreement and the Northern Ireland Act 1998 (the 1998 Act), appear to require the Assembly to vote on whether a measure can proceed or should be referred to an ACER every time there is a petition of concern.*
   >
   > *…very little information exists to explain or clarify this genesis and no corporate memory has survived in respect of this issue. It is most likely that the purpose of the segregation [of Standing Orders] was to ensure the principle was applied in all the circumstances where it might arise i.e. voting (SO 28), legislative process (SO35) and committee matters (SO 60). While this would have been well intentioned, the Committee on Procedures considered, as part of its deliberations, the informal view that there may now be an argument for revisiting the drafting to provide a composite SO which gives clarity to application of the underlying policy."*

Report Analysis and Conclusions

4. The Report's *'Committee Analysis'* section recorded that the Committee discussed two areas in relation to Petitions of Concern – the second of which relates directly to the issue of Petitions of Concern and Ad Hoc Committees:

> *A possible proportional increase in the number of MLA signatures (relative to the size of the Assembly) which can trigger a Petition of Concern. All Parties represented on the Committee recognised that, should the number of MLAs in the Assembly be reduced, this would present an opportunity to consider changing the proportional number of MLA signatures required for a Petition of Concern.*
>
> *The possibility of amending Standing Orders to introduce a clear requirement that all Petitions of Concern relating to Assembly primary legislation (and Legislative Consent Motions) would result in an Ad-hoc Committee on Equality Requirements being established — in advance of consideration of the Petition of Concern in plenary — to advise on the equality and human rights associated with the issue being petitioned. Under this system the creation of an Ad-hoc Committee could only be prevented if there is agreement in plenary on a cross-community basis that it is not required.*

5. One of the conclusions in the Report stated:

> *"…there was no consensus for replacement of community designation by, for example, a weighted-majority vote in the Assembly of 65%."*

In relation to Petitions of Concern, the Report concluded:

> *"Following the evidence that was presented to the Committee regarding Petitions of Concern, the Committee concluded that further detailed work in relation to Petitions of Concern needs to be carried out."*

Current AERC Review: Petitions of Concern

6. The Committee decided on 10th September 2013 that its next review would be to specifically address the subject of Petitions of Concern. Following Committee discussions on this on 24th September and 8th October 2013, the Committee decided on 22nd October 2013 that it was important to immediately address the issue of voting on the establishment of ACERs prior to a vote on a Petition of Concern, and agreed that this Options Paper be issued to the Parties represented on AERC to identify their specific views on policy in this discrete area. AERC in the light of responses received on this issue would then discuss and decide the scope of and approach to its Review of Petitions of Concern.

7. It is important to understand and reflect on the legislative provisions in relation to Petitions of Concern and ACERs, including the relevant provisions in the Belfast Agreement and current Assembly Standing Orders. These are set out in Annex A. Also, the Committee considered it important to highlight at this point that Petitions of Concern have operated as an **important safeguard to ensure the protection of all sections of the community**, and that **political responsibility** should also be a consideration in respect of how they are used.

Issues for Consideration

8. As highlighted by the Committee on Procedures, there appear to be ambiguities with regard to the requirements in respect of ACERs. Both the Belfast Agreement (paragraphs 11 and 13) and the Northern Ireland Act 1998 (section 42(3)) appear to require the Assembly to vote on whether a measure can proceed or should be referred to an ACER every time there is a Petition of Concern.

If this is the case, the procedure required within the Assembly is set out below:

(i) When there is a petition of concern, the Assembly shall vote on a cross-community basis to determine whether **the measure** may proceed without being referred to an Ad Hoc Committee on Conformity with Equality Requirements. The measure will only proceed if there is parallel consent.

(ii) If parallel consent is not achieved, **the measure** will not proceed and the Assembly may appoint an Ad Hoc Committee on Conformity with Equality Requirements.

(iii) The Ad Hoc Committee on Conformity with Equality Requirements will examine and report on whether the measure or proposal for legislation is in conformity with equality requirements including the ECHR/Bill of Rights. It has the power to call people and papers to assist in its consideration of the matter. It will produce a report which will be considered by the Assembly.

(iv) Once the Assembly has considered the report of the Ad Hoc Committee on Conformity with Equality Requirements it will then vote on the matter on a cross-community consent basis.

9. There is a particular issue with regard to an aspect of the procedure required by Section 42(3) of the Northern Ireland Act 1998, which appears to be ambiguous. Paragraph 13 of Strand One of the Belfast Agreement requires the Assembly to vote on whether the **measure** may proceed without being referred to an Ad Hoc Committee on Conformity with Equality Requirements.

The current Standing Order 60(1) appears to have interpreted the word "measure" as a reference to a Bill/proposal for legislation as it uses the word "Bill" instead of measure when describing the matters which can be examined by the Ad Hoc Committee. The word "measure" is not defined in the Belfast Agreement or the Northern Ireland Act 1998 and consequently the meaning of the word is unclear but it could also be interpreted less restrictively as referring to a general proposal which the Assembly is considering.

10. The effect of interpreting the word "measure" as a reference to a legislative proposal is that the Assembly can only refer a matter to an Ad Hoc Committee on Conformity with Equality Requirements when the Petition of Concern relates to a legislative proposal. As stated above, this appears to be the current position under Standing Order 60. If, however, the word "measure" is interpreted as a reference to a proposal which the Assembly is considering, the Assembly would need to vote every time there is a Petition of Concern, regardless of the subject matter, on whether to refer the matter to an Ad Hoc Committee on Conformity with Equality Requirements.

Options

11. **This section lists possible broad options that the Committee could consider in its Review of Petitions of Concern**

Option A: Amend 1998 Act to reflect current Assembly practice

The Committee could agree a recommendation to the Assembly that the Northern Ireland Act 1998 should be amended to reflect current practice with regard to Petitions of Concern, whereby a vote on whether to establish an Ad Hoc Committee on conformity with equality requirements is **not** required in advance of a vote on a Petition of Concern.

This would require amendments to the NI Act 1998 to be made at Westminster and will require the Assembly to amend its Standing Orders.

Option B: Vote on Ad Hoc Committee (ACER) to be taken when Petition of Concern is tabled in relation to legislation

Three **sub-options** are available to the Assembly in relation to the definition of legislation in this instance:

Sub-option 1: Relates to primary legislation only; **OR**

Sub-option 2: Relates to primary and secondary legislation and Legislative Consent Motions; **OR**

Sub-option 3: Relates to primary and secondary legislation and Legislative Consent Motions, as well as draft Bills and proposals for legislation.

It is possible that this may require amendments to the NI Act 1998 to be made at Westminster and will require the Assembly to amend its Standing Orders.

Option C: Vote on Ad Hoc Committee (ACER) to be taken every time a Petition of Concern is tabled

This will require the Assembly to amend its Standing Orders and it is possible that this may require amendments to the NI Act 1998 to be made at Westminster.

Guidelines for Completion of Responses

The Committee would ask that Parties submit electronic responses using the enclosed pro-forma.

The pro-forma seeks the views of Parties on three broad options set out in paragraph 11 of this paper.

Parties may wish to refer to the Northern Ireland Assembly Research and Information Service Briefing Papers that the AERC received in relation to Petitions of Concern and specifically in relation to the issue of Petitions of Concern and Ad Hoc Committees on Conformity with Equality Requirements (Annex B).

Parties are advised that the information contained in this Options Paper or the Research Briefing Papers should not be relied upon as legal advice, or as a substitute for it.

Parties should be aware that their written evidence will be discussed by the Committee in public session and made public by the Committee by publication of its Report or other means.

Parties should also be aware that if they decide to publish their responses, the publication would not be covered by Assembly privilege in relation to the law of defamation.

Northern Ireland Assembly

Assembly and Executive Review Committee

Review of Petitions of Concern:

Ad Hoc Committee on Conformity with Equality Requirements (ACERs)

Proforma For Responses

Deadline for responses: 6 November 2013

Responses should be made to the Committee Clerk as follows:
committee.assembly&executivereview@niassembly.gov.uk

OR

Room 241, Parliament Buildings, Stormont Estate, Ballymiscaw Belfast BT4 3XX

Party

Submitted by

Contact Details:

Broad Options

This section lists possible broad options that the Committee could consider in its Review of Petitions of Concern

OPTION A: Amend the Northern Ireland Act 1998 Act to reflect current Assembly practice

The Committee could agree a recommendation to the Committee that the Northern Ireland Act 1998 should be amended to reflect current practice with regard to Petitions of Concern, whereby a vote on whether to establish an Ad Hoc Committee on conformity with equality requirements is **not** taken in advance of a vote on a Petition of Concern.

This would require amendments to the NI Act 1998 to be made at Westminster and will require the Assembly to amend its Standing Orders.

OPTION B: Vote on Ad Hoc Committee (ACER) to be taken when Petition of Concern is tabled in relation to legislation

Three **sub-options** are available to the Assembly in relation to the definition of legislation in this instance:

Sub-option 1: Relates to primary legislation only; **OR**

Sub-option 2: Relates to primary and secondary legislation and Legislative Consent Motions; **OR**

Sub-option 3: Relates to primary and secondary legislation and Legislative Consent Motions, as well as draft Bills and proposals for legislation.

It is possible that this may require amendments to the NI Act 1998 to be made at Westminster and will require the Assembly to amend its Standing Orders.

OPTION C: Vote on Ad Hoc Committee (ACER) to be taken every time a Petition of Concern is tabled

This will require the Assembly to amend its Standing Orders and it is possible that this may require amendments to the NI Act 1998 to be made at Westminster.

Please set out your preferred option and unacceptable options using the box below.

(This box will expand as you type)

Further Options under OPTION B.

Please complete this section if you have indicated that your preferred option is B.

Option B

Vote on Ad Hoc Committee to be taken when Petition of Concern is tabled in relation to legislation

Sub Options under OPTION B

Sub Option 1: Relates to primary legislation only; **OR**

Sub Option 2: Relates to primary and secondary legislation and Legislative Consent Motions; **OR**

Sub Option 3: Relates to primary and secondary legislation and Legislative Consent Motions, as well as draft Bills and proposals for legislation.

Please set out your preferred sub option and unacceptable sub options using the box below.

(This box will expand as you type)

Thank you for your response

Deadline for Responses is Wednesday 6 November 2013

Responses should be made to the Committee Clerk as follows:
committee.assembly&executivereview@niassembly.gov.uk

OR

Room 241, Parliament Buildings, Stormont Estate, Ballymiscaw Belfast BT4 3XX

ANNEX A: Statutory Obligations, Belfast Agreement and Assembly Standing Orders

(The areas highlighted in bold relate directly to the issue of Petitions of Concern and ACERs.)

12. The Northern Ireland Act1998 contains three statutory obligations in relation to Petitions of Concern and these are set out in **Section 42 of that Act** —

Section 42 provides:

(1) If 30 members petition the Assembly expressing their concern about a matter which is to be voted on by the Assembly, the vote on that matter shall require cross-community support.

(2) ***Standing Orders shall make provision with respect to the procedure to be followed in petitioning the Assembly under this section, including provision with respect to the period of notice required.***

(3) ***Standing Orders shall provide that the matter to which a petition under this section relates may be referred, in accordance with paragraphs 11 and 13 of Strand One of the Belfast Agreement to the committee established under Section 13 (3)(a).***

13. It is the requirement in relation to Petitions of Concern at Section 42(3) of the 1998 Act that has resulted in the terms of **Standing Order 60**. Standing Order 60 is set out below:

60. Ad Hoc Committee on Conformity with Equality Requirements

(1) The Assembly may establish an ad hoc committee to examine and report on whether a Bill or proposal for legislation is in conformity with equality requirements (including rights under the European Convention on Human Rights or any Northern Ireland Bill of Rights).

(2) The committee may exercise the power in section 44(1) of the Northern Ireland Act 1998.

(3) The Assembly shall consider all reports of the committee and determine the matter in accordance with the procedures on cross-community support within the meaning of section 4(5) of the Northern Ireland Act 1998.

(4) ***Where there is a Petition of Concern the Assembly shall vote to determine whether the measure or proposal for legislation may proceed without reference to the above procedure. If this fails to achieve support on a parallel consent basis the procedure as at (1)-(3) above shall be followed.***

14. **Section 42(3) of the Northern Ireland Act 1998**

Section 42(3) requires the Assembly to make provision in Standing Orders so that the subject matter of a petition of concern may be referred:

(i) in accordance with Paragraphs 11 and 13 of Strand One of the Belfast Agreement,

(ii) to the committee established under Section 13(3)(a) of the 1998 Act.

15. **Paragraphs 11 and 13 of Strand One of the Belfast Agreement are set out below**:

11. The Assembly may appoint a special Committee to examine and report on whether a measure or proposal for legislation is in conformity with equality requirements, including the ECHR/Bill of Rights. The Committee shall have the power to call people and papers to assist in its consideration of the matter. The Assembly shall then consider the report of the Committee and can determine the matter in accordance with the cross-community consent procedure.

13. ***When there is a petition of concern as in 5(d) above, the Assembly shall vote to determine whether the measure may proceed without reference to this special procedure. If this fails to achieve support on a cross-community basis, as in 5(d)(i) above, the special procedure shall be followed.***

16. **Section 13(3)(a) of the 1998 Act** provides:

Standing Orders shall include provision for establishing such a committee as is mentioned in paragraph 11of Strand One of the Belfast Agreement.

17. **Standing Order 35** provides, inter alia, for an ACER to be established by the Assembly pursuant to a Notice of a motion given by any Member of the Executive Committee, or by the Chairperson of a Statutory Committee calling for the referral of a Bill, draft Bill or proposal for legislation to an ACER:

SO 35. Public Bills: Equality Issues

(1) For the purpose of obtaining advice as to whether a Bill, draft Bill or proposal for legislation is compatible with equality requirements (including rights under the European Convention on Human Rights) the Assembly may proceed on a motion made in pursuance of paragraph (2).

(2) Notice may be given by -

(a) any member of the Executive Committee, or

(b) the chairperson of the appropriate statutory committee (or another member of that statutory committee acting on the chairperson's behalf), of a motion "That the …… Bill (or draft Bill or proposal for legislation) be referred to an Ad Hoc Committee on Conformity with Equality Requirements"……

The provisions detailed in Standing Order 35 are drawn from paragraph 12 of Strand One of the Belfast Agreement and the requirement in Section 13(3)(b) of the Northern Ireland Act 1998. **It is important to note that Standing Order 35 does not relate to Petitions of Concern and any amendments made to Standing Order 60 are unlikely to necessitate significant changes to Standing Order 35.**

ANNEX B: Research Briefing Paper 'Standing Orders 35 and 60 of the Northern Ireland Assembly'

See Appendix 6: Research Paper.

Northern Ireland Assembly

Appendix 4

Options Paper on Ad Hoc Committees: Party Responses

Options Paper on Ad Hoc Committees: Party Responses

1. Alliance Party Response
2. Democratic Unionist Party (DUP) Response
3. Sinn Féin Response
4. Social Democratic Labour Party (SDLP) Response
5. Ulster Unionist Party (UUP) Response

Alliance Party Response

Northern Ireland Assembly

Assembly and Executive Review Committee

Review of Petitions of Concern:

Ad Hoc Committee on Conformity with Equality Requirements (ACERs)

Proforma For Responses

Deadline for responses: 6 November 2013

Responses should be made to the Committee Clerk as follows:
committee.assembly&executivereview@niassembly.gov.uk

OR

Room 241, Parliament Buildings, Stormont Estate, Ballymiscaw Belfast BT4 3XX

Party **Alliance Party of Northern Ireland**

Room 220, Parliament Buildings, BT4 3XX.

Submitted by

Contact Details:

Broad Options

This section lists possible broad options that the Committee could consider in its Review of Petitions of Concern

OPTION A: Amend the Northern Ireland Act 1998 Act to reflect current Assembly practice

The Committee could agree a recommendation to the Committee that the Northern Ireland Act 1998 should be amended to reflect current practice with regard to Petitions of Concern, whereby a vote on whether to establish an Ad Hoc Committee on conformity with equality requirements is **not** taken in advance of a vote on a Petition of Concern.

This would require amendments to the NI Act 1998 to be made at Westminster and will require the Assembly to amend its Standing Orders.

OPTION B: Vote on Ad Hoc Committee (ACER) to be taken when Petition of Concern is tabled in relation to legislation

Three **sub-options** are available to the Assembly in relation to the definition of legislation in this instance:

Sub-option 1: Relates to primary legislation only; **OR**

Sub-option 2: Relates to primary and secondary legislation and Legislative Consent Motions; **OR**

Sub-option 3: Relates to primary and secondary legislation and Legislative Consent Motions, as well as draft Bills and proposals for legislation.

It is possible that this may require amendments to the NI Act 1998 to be made at Westminster and will require the Assembly to amend its Standing Orders.

OPTION C: Vote on Ad Hoc Committee (ACER) to be taken every time a Petition of Concern is tabled

This will require the Assembly to amend its Standing Orders and it is possible that this may require amendments to the NI Act 1998 to be made at Westminster.

Please set out your preferred option and unacceptable options using the box below.

We prefer option B.

Alliance continues to maintain that the petitions of concern system should see more radical overhaul and replacement with a weighted 65% majority.

However, we would prefer that legislation which is subject to a petition of concern be required to have a vote on an Ad Hoc Committee take place.

Further Options under OPTION B.

Please complete this section if you have indicated that your preferred option is B.

Option B

Vote on Ad Hoc Committee to be taken when Petition of Concern is tabled in relation to legislation

Sub Options under OPTION B

Sub Option 1: Relates to primary legislation only; **OR**

Sub Option 2: Relates to primary and secondary legislation and Legislative Consent Motions; **OR**

Sub Option 3: Relates to primary and secondary legislation and Legislative Consent Motions, as well as draft Bills and proposals for legislation.

Please set out your preferred sub option and unacceptable sub options using the box below.

We would prefer that this applies to sub-option2 and any elements which do not fall into sub option 2 but fall into sub option three which also have some form of legal effect.

[EXTRACT]

Democratic Unionist Party (DUP) Response

At a general level we believe that reform of the rules governing petitions of concern should be considered as part of a wider review of the Assembly.

In relation to the specific issue relating to the Ad Hoc Committee on Conformity with Equality Requirements (ACER), we believe that the current practice of the Assembly is the most appropriate option.

In law, there is no requirement that petitions of concern can only be used in relation to 'equality' issues, nor is there anything in the Belfast Agreement which would operate – or seek to operate - as such a limitation.

The practice has also been that petitions of concern have been used for a variety of reasons and on a variety of issues by parties across the chamber. Arguably, few have specifically related to equality issues as such.

To require a formal vote when a petition of concern is tabled in relation to legislation would appear to be administratively burdensome and unnecessary.

Whether or not, in light of the provisions of the Northern Ireland Act 1998, there is a need to specifically amend the legislation is also open to debate. There is a credible argument that so long as Standing Orders provide a route – not necessarily a requirement that there must be a vote on every occasion – then the terms of Section 42 (3) have been satisfied. This could be done by indicating on the petition of concern that it was being tabled pursuant to Standing Order 60.

The terms of Standing Order 60 are slightly more problematic though it may be possible to interpret 60(4) as limited to the context of Standing Order 60. However a minor amendment making this point explicitly could resolve any ambiguity.

Sinn Féin Response

Northern Ireland Assembly

Assembly and Executive Review Committee

Review of Petitions of Concern:

Ad Hoc Committee on Conformity with Equality Requirements (ACERs)

Proforma For Responses

Deadline for responses: 6 November 2013

Responses should be made to the Committee Clerk as follows:
committee.assembly&executivereview@niassembly.gov.uk

OR

Room 241, Parliament Buildings, Stormont Estate, Ballymiscaw Belfast BT4 3XX

Party **Sinn Féin**

Sinn Féin Assembly Administration, R262,

Parliament Buildings, Stormont.

Submitted by

Contact Details:

Broad Options

This section lists possible broad options that the Committee could consider in its Review of Petitions of Concern

OPTION A: Amend the Northern Ireland Act 1998 Act to reflect current Assembly practice

The Committee could agree a recommendation to the Committee that the Northern Ireland Act 1998 should be amended to reflect current practice with regard to Petitions of Concern, whereby a vote on whether to establish an Ad Hoc Committee on conformity with equality requirements is **not** taken in advance of a vote on a Petition of Concern.

This would require amendments to the NI Act 1998 to be made at Westminster and will require the Assembly to amend its Standing Orders.

OPTION B: Vote on Ad Hoc Committee (ACER) to be taken when Petition of Concern is tabled in relation to legislation

Three **sub-options** are available to the Assembly in relation to the definition of legislation in this instance:

Sub-option 1: Relates to primary legislation only; **OR**

Sub-option 2: Relates to primary and secondary legislation and Legislative Consent Motions; **OR**

Sub-option 3: Relates to primary and secondary legislation and Legislative Consent Motions, as well as draft Bills and proposals for legislation.

It is possible that this may require amendments to the NI Act 1998 to be made at Westminster and will require the Assembly to amend its Standing Orders.

OPTION C: Vote on Ad Hoc Committee (ACER) to be taken every time a Petition of Concern is tabled

This will require the Assembly to amend its Standing Orders and it is possible that this may require amendments to the NI Act 1998 to be made at Westminster.

Please set out your preferred option and unacceptable options using the box below.

Sinn Féin support the continued use of the Petition of Concern as a safeguard to ensure that all sections of the community can participate and work together successfully in the operation of these institutions and that all sections of the community are protected. Sinn Féin proposes that an Ad Hoc Committee on conformity be established automatically and as a prerequisite to a Petition of Concern being tabled in regard to Assembly Legislation.

Further Options under OPTION B.

Please complete this section if you have indicated that your preferred option is B.

Option B

Vote on Ad Hoc Committee to be taken when Petition of Concern is tabled in relation to legislation

Sub Options under OPTION B

Sub Option 1: Relates to primary legislation only; **OR**

Sub Option 2: Relates to primary and secondary legislation and Legislative Consent Motions; **OR**

Sub Option 3: Relates to primary and secondary legislation and Legislative Consent Motions, as well as draft Bills and proposals for legislation.

Please set out your preferred sub option and unacceptable sub options using the box below.

[EXTRACT]

Social Democratic Labour Party (SDLP) Response

Dear Clerk,

1. The intention of the Good Friday Agreement provisions in relation to a petition of concern was to create a process to mitigate the abuse of power on a measure, where there may be equality and human rights consequences.

2. The scope of a petition of concern was not to be restricted to primary or other legislation. This was the limited interpretation, put on it by bureaucrats. The proper interpretation was that the review referred to in the Agreement included primary and secondary legislation, draft Bills and policies (for example, a Minister taking a budgetary decision around recess that carried significant consequences.)

3. The power to deploy a petition of concern should fall to a Minister, the Executive Committee, the Chair of a committee/the Committee. However, the position intended by the agreement is not properly reflected in Standing Orders.

4. The purpose of an ad-hoc committee was to assess the equality and human rights implications of a measure, in which regard taking evidence for the Human Rights Commission, Equality Commission and others was anticipated.

5. The SDLP does not believe that the voting threshold surrounding petition of concerns should be adjusted. However the SDLP also believes the intention of the Agreement in relation to the process around a petition of concern, with reference to the ad hoc committee, in relation to all measures should be honoured.

Ulster Unionist Party Response

The Ulster Unionist Party's preferred option at this stage is Option A which is to amend the Northern Ireland Act 1998 to reflect current Assembly practice with regard to Petitions of Concern, whereby a vote on whether to establish an Ad Hoc Committee on conformity with equality requirements is not routinely taken in advance of a vote on a Petition of Concern.

Importantly, this does not negate the need for a wider review of Petitions of Concern which should be undertaken by the Assembly and Executive Review Committee.

We would restate our position that the Petition of Concern is a useful tool for the protection of communities but has unfortunately been increasingly abused by the current dominant Parties. We believe that we must look towards reducing the potential for misuse.

We recognise the urgency of clarifying this particular aspect of Petitions of Concern but also urge that a wider review of the use of Petition of Concerns is concluded as soon as possible.

Northern Ireland Assembly

Appendix 5

Correspondence and Other Papers relating to this Review

Correspondence and Other Papers relating to this Review

1. Memo from the Clerk to the AER Committee, dated April 2013, detailing papers received from the Committee on Procedures in relation to Standing Order 60 and the establishment of Ad Hoc Committees and Petitions of Concern.

2. Memo from the Clerk to the Committee on Procedures providing a background to the Committee on Procedures deliberations.

3. Relevant extracts from the 'Committee Analysis and Conclusions' section of the Committee's *'Review of D'Hondt, Community Designation and Provisions for Opposition'*.

4. Northern Ireland (Miscellaneous Provisions) Bill 2013 – Proposed Amendments.

5. Relevant extracts from *'Call for Evidence'* responses to the Committee's *'Review of D'Hondt, Community Designation and Provisions for Opposition'*.

6. Ad Hoc Committees and Petitions of Concern – Options for Committee consideration and Party responses to the Options Paper regarding ACERs.

7. Spectrum of Responses from Parties regarding ACERs.

8. Replacing the Petition of Concern with an Alternative Mechanism – Options for Committee consideration and background information.

9. Restricting the use of Petitions of Concern to Key Areas – Options for Committee consideration and background information.

10. Adjusting the threshold of signatures required for a Petitions of Concern – Options for Committee consideration and background information.

11. Generic financial costs associated with an Ad Hoc Committee.

12. Petitions of Concern submitted since the establishment of the Assembly in 1998 – Highlighting Petitions of Concern on Legislation.

1. Memo regarding Petitions of Concern - April 2013

Clerk of AERC Committee to Members – April 2013

Northern Ireland Assembly

Assembly and Executive Review Committee
Room 375
Parliament Buildings

Tel: +44 (0)28 9052 1787
john.simmons@niassembly.gov.uk
Fax: +44 (0)28 9052 1083

To: Mr Stephen Moutray
Mr Pat Sheehan
Members of the Assembly and Executive Review Committee

From: John Simmons
Clerk to the Assembly and Executive Review Committee

Date: April 2013

Subject: Committee on Procedures memo

Review of d'Hondt, Community Designation and Provisions for Opposition

Petitions of Concern: Standing Order 60 and Establishment of Ad Hoc Committees

1. Please see attached memo from the Clerk to the Committee on Procedures regarding the above.

2. The Committee on Procedures have recently identified an important issue in relation to SO 60, relating directly back to the Good Friday Agreement (GFA) and the Northern Ireland Act 1998, which "appears to require the Assembly to vote on whether a measure can proceed or should be referred to an Ad Hoc Committee on Conformity with Equality Requirements (ACER) every time there is a Petition of Concern." Members may recall the lone example of an ACER being established in November 2012 as a result of the Committee for Social Development motion regarding the Welfare Reform Bill.

3. The Committee for Procedures have provided:

   - **A Background Paper** on the genesis of this correspondence **(Appendix 1)**
   - **An Assembly Research paper** on 'Standing Orders 35 and 60 for the Northern Ireland Assembly' dated 19 Feb 2013 **(Appendix 2)**; and
   - **An Assembly Graduate Student Report** by Trasa Canavan dated 5 December 2012 **(Appendix 3)**.

4. These papers provide a background to Standing Order 60 including the issue of ambiguity of Standing Order 60 and related Standing Orders, and the view that there is a need to revisit the drafting of these Standing Orders to provide a composite Standing Order, which gives clarity to the applications of the underlying policy intent.

5. The Committee on Procedures recognised that the Assembly and Executive Review Committee's (AERC) current Review included under its review of community designation the 'rules' governing Petitions of Concerns, and agreed to take no action at this point in time – but agreed to advise AERC of this important information as a response to its Call for Evidence.

6. On this basis that this issue raises the **policy intent** and questions the **practice to date** by the Northern Ireland Assembly regarding Petitions of Concerns and the setting up of an Ad-hoc Committee on Conformity with Equality Requirements, I discussed the memo with the Chairperson and Deputy Chairperson of the Committee and they agreed that the issue is relevant to the Committee's current work and it would be appropriate to consider this as part of the AERC's current Review. **I have drafted a response memo to the Clerk to the Committee on Procedures** to that effect, and this is **attached below** for the Committee's consideration and approval at tomorrow's AERC Meeting.

7. Finally, Members will note that the Committee on Procedures received Assembly **legal advice** on the issue, but this is subject to legal privilege of that Committee and cannot be passed to AERC. Members will therefore wish to consider seeking legal advice on this matter, which could be provided to the Committee at its next meeting of 7 May 2013 – together with an oral briefing and an opportunity for Members to raise questions.

8. Any queries on this memo please ring me (ext. 21787) or the Assistant Clerk, Ursula McCanny (ext. 21928).

Thank you

John Simmons

Committee Clerk

2. Memo from Committee on Procedures to AERC - April 2013

Internal Memo

From: Alison Ross
Clerk to Committee on Procedures

Date: 22 April 2013

To: John Simmons
Clerk to the Assembly and Executive Review Committee

Petitions of Concern: Standing Order 60 and Establishment of Ad-Hoc Committees

1. At its meeting of 19 March 2013, the Committee on Procedures, while considering legal advice provided in respect of the above matter, noted that the Assembly and Executive Review Committee (AERC) had recently issued a call for evidence to stakeholders. This, it noted, was issued as part of the AERC's inquiry into "Review of D'Hondt; Community Designation and Provisions for Opposition".

2. The item of particular interest to the Committee on Procedures discussion was listed at paragraph 3.16 of the call for evidence document, where the AERC asks stakeholders, *"Do you believe that there should be changes to the "rules" governing Petitions of Concern? If so, what changes do you propose?"*

3. Given that the AERC inquiry was already underway, the Committee on Procedures recognised its primacy, and agreed to take no action at this point, but agreed rather to instruct the Clerk to contact the Clerk of the AERC with a view to advising the AERC of the important information that had come to Committee on Procedures attention. The Committee was concerned to note that the AERC call for evidence officially closed on 27 March, and directed the Clerk to determine, given the importance of the information, whether it could still be submitted for consideration.

4. I thought it may be helpful to provide you with some background on the genesis of this issue in the Committee of Procedures together with some of the basic information included in general briefings to it. For clarity this is included separately, as **Appendix 1** to this memo.

5. While the Committee received full legal advice on the topic, AERC colleagues will be aware of the well established protocol that such advice is subject to legal privilege and therefore cannot be detailed as part of this memo or shared with third parties.

6. However, no such restriction exists for sharing research papers, and a copy of such a paper has been included as **Appendix 2** of this memo. For information, this paper was shared with colleagues from legal services and was taken into account when the legal advice was prepared.

7. The Committee on Procedures meets again at 13h00 on 23 April 2013, and would be grateful for at least an initial indication of whether the AERC will include this issue in its inquiry for its meeting on this date. To facilitate this I am of course happy to discuss any or all aspects of this memo further in person, if that would be helpful.

Clerk of Committee on Procedures to AERC Committee Clerk – 22 April 2013

Alison Ross

Documents Included:
Appendix 1 – Background to the Committee on Procedures deliberations
Appendix 2 - Research Paper (attached separately)
Appendix 3 - Graduate Student Themed Report – (not attached)

Appendix 1

Background to the Genesis of this Correspondence

1. At its meeting on 27 November 2012, a question in relation to the genesis and application of Standing Order (SO) 60 was raised by a Member of the Committee on Procedures.

2. Up to that point, 38 Petitions of Concern (POC) had been tabled during the life of the current Assembly (see table 1, below for details). However, up until 19 November 2012, SO 60 had never been used, and was invoked for the first time in respect of the Welfare Reform Bill on that date[1]. In this lone example, the establishment of the Ad-Hoc Committee on Conformity with Equality Requirements (ACER) was as a result of a motion from the Committee on the Welfare Reform, not as a result of the POC on the motion.

Table 1. Summary of Petitions of Concern Tabled

Party	1998 - 2002	2007 - 2011	2011 - Dec 2012	Total
Total	7	22	9	38

3. Members subsequently requested legal advice and received briefing papers in respect of this issue, largely because of an apparent disparity between established practice and possible interpretation of SO 60(4) in terms of POCs.

4. Clear, common, well understood practice is that POCs trigger a cross community vote on specific motions, amendments or legislative proposals; but do not, however, generate a question to establish an ACER. However, the Committee noted that both the Belfast Agreement and the Northern Ireland Act 1998 (the 1998 Act), appear to require the Assembly to vote on whether a measure can proceed or should be referred to an ACER every time there is a petition of concern.

5. In terms of the genesis, the Assembly's SOs relating to the establishment of ACERs, these arise from interpretation of Paragraphs 11 to 13 of the Belfast Agreement (the Agreement) and Section 42(3) of the Northern Ireland Act 1998 (the Act). The Act itself, of course, ranks above the Agreement and Standing Orders in the legislative hierarchy.

6. Even in the earliest versions of Assembly SOs available[2] the result of this interpretive process was the development of three distinct SOs, namely SO28, SO35 and SO60 (previously numbered as SO55).

7. Beyond this, very little information exists to explain or clarify this genesis and no corporate memory has survived in respect of this issue. It is most likely that the purpose of the segregation was to ensure the principle was applied in all the circumstances where it might arise i.e. voting (SO 28), legislative process (SO35) and committee matters (SO 60). While this would have been well intentioned, the Committee on Procedures considered, as part of its deliberations, the informal view that there may now be an argument for revisiting the drafting to provide a composite SO which gives clarity to application of the underlying policy.

1 Official Report (Hansard) – Tuesday 20 November 2012 (Volume 79,No 6)

2 Northern Ireland Assembly Standing Orders 2001

3. Petitions of Concern - 2013 Report Analysis and Conclusion Extracts

Petitions of Concern:

Relevant Extracts from the 'Committee Analysis and Conclusions' Section of the 'Review of D'hondt, Community Designation and Provisions For Opposition'

Community Designation and Petitions of Concern

130. There is no consensus within the Committee, particularly in the short-term and medium term, for replacement of **community designation** by, for example, a weighted majority vote in the Assembly of 65%.

131. However, the Committee discussed two areas where there appears to be some Party support for changes to **Petitions of Concern** with regard to:

a) A possible proportional increase in the number of MLA signatures (relative to the size of the Assembly) which can trigger a Petition of Concern. All Parties represented on the Committee recognised that, should the number of MLAs in the Assembly be reduced, this would present an opportunity to consider changing the proportional number of MLA signatures required for a Petition of Concern;

b) The possibility of amending Standing Orders to introduce a clear requirement that all Petitions of Concern relating to Assembly primary legislation (and Legislative Consent Motions) would result in an Ad-hoc Committee on Equality Requirements being established — in advance of consideration of the Petition of Concern in plenary — to advise on the equality and human rights associated with the issue being petitioned. Under this system the creation of an Ad-hoc Committee could only be prevented if there is agreement in plenary on a cross-community basis that it is not required. While Party representatives did not address this particular area directly, the **UUP** representative said during the 4th June meeting that Petitions of Concern have been *"used and abused"* and that *"it would be healthy if there was a mechanism to limit that occurrence". He went on to say, "We ought to look at how we can produce better governance and better arrangements, such as have been suggested."*

Conclusions

139. **The Committee concluded that there was no consensus for replacement of community designation by, for example, a weighted-majority vote in the Assembly of 65%**.

140. **Following the evidence that was presented to the Committee regarding Petitions of Concern, the Committee concluded that further detailed work in relation to Petitions of Concern needs to be carried out**.

4. Proposed Amendments to NI Bill 2013

Northern Ireland (Miscellaneous Provisions) Bill 2013 – Proposed Amendments

SDLP Amendment:

Petitions of concern

'(1) In section 42 of the Northern Ireland Act 1998 (Petitions of concern), omit subsection (3) and insert—

"(3) When a petition of concern is lodged against a measure, proposal or a decision by a Minister, Department or the Executive ("the matter"), the Assembly shall appoint a special committee to examine and report on whether the matter is in conformity with equality and human rights requirements, including the European Convention on Human Rights and any Bill of Rights for Northern Ireland.

(4) Consistent with paragraphs 11, 12 and 13 (Strand 1) of the Belfast Agreement, a committee as provided for under subsection (3) may also be appointed at the request of the Executive Committee, a Northern Ireland Minister or relevant Assembly Committee.

(5) A committee appointed under this section—

(a) shall have the powers to call people and papers to assist in its consideration; and

(b) shall take evidence from the Equality Commission and the Human Rights Commission.

(6) The Assembly shall consider the report of any committee appointed under this section and determine the matter in accordance with the requirements for cross-community support.

(7) Standing Orders shall provide for—

(a) decisions on the size, timescale and terms of reference for such a committee; and

(b) procedure(s) to allow for subsection (8).

(8) In relation to any specific petition of concern or request under subsection (4), the Assembly may decide, with cross-community support, that the procedure in subsections (3) and (5) shall not apply.".'.

This Clause would amend the Northern Ireland Act 1998 to reflect the terms and intent of paragraphs 11, 12 and 13 of strand 1 of the Belfast Agreement. It would qualify the exercise of veto powers, via petitions of concern in the Assembly, through the consideration of possible equality or human rights implications.

DUP Amendment

Amendment 3, page 6, line 37 [Clause 6], at end add—

7B The alteration of the number of members of the Assembly required to express their concern about a matter which is to be voted on by the Assembly, such concern requiring that the vote on that matter shall require cross-community support. This paragraph does not include the alteration of that number to a number exceeding 30.”.’.

Amendment 4, page 16, line 3 [Clause 22], at end insert—

‘(1) After subsection (2) of the section 75 (Statutory duty on public authorities) of that Act insert—

(2A) A public authority shall not interpret its obligations under subsection (2) in a way that is incompatible with measures taken on the basis of objective need.”

(1B) In subsection (5) of section 75 of that Act insert ““good relations” shall be interpreted in line with international obligations and, in particular, with regard to—

(a) tackling prejudice, and

(b) promoting understanding.”.’.

This amendment would apply to Northern Ireland, the clarification provided in the Equality Act 2010 to restrict the good relation duty being cited against fulfilling equality obligations based on objective need.

5. Petitions of Concern - Call for Evidence from 2013 Review. Extracts of Relevant Responses

Petitions of Concern:

Relevant Extracts from 'Call for Evidence' Responses for the 'Review of D'hondt, Community Designation And Provisions For Opposition*'

* All are responses to the 'Call for Evidence' Paper, unless otherwise stated.

* Text in bold simply highlights key references to Petitions of Concern.

Community Designation

(1) Whether there should be changes in the legislative provision and use of community designation in the Northern Ireland Assembly.

Do you believe that community designation as it currently operates should be retained? If yes, why?

If you believe that changes should be made, what changes do you propose? In particular:

- **Do you believe that there should be changes to the "rules" governing Petitions of Concern? If so, what changes do you propose?**
- Do you believe that there should be changes to the list of matters set out in the 1998 Act that are designated as requiring a cross-community vote? If so, what changes do you propose?

Please specify how you think your suggested changes should be applied, including a time frame where relevant, and offer supporting evidence for your views.

Political Parties of the NI Assembly

The Alliance Party

Alliance does not support the retention of community designation.

The current system institutionalises sectarian division within the Assembly and leads to the inequality of votes of between elected MLAs. Other problems with this system are the inability to adjust to changing demographics and political circumstances as well as the ability of minorities to hold the process to ransom.

Alliance would prefer the introduction of an Assembly voting system for cross-community matters based on a weighted majority. The introduction of a system of weighted majority voting ensures cross-community support while avoiding these difficulties.

Alliance would welcome a method of defining those issues on which a Petition of Concern can be used and as a way of ensuring this mechanism is not open to misuse.

DUP (extracts from 'Making Stormont Work Better')

Resignation of Ministers [Removal of Minister]

Provision already exists for the removal of Ministers within the Northern Ireland Act. However, in effect, this provision is significantly limited by the requirement that any vote of the Assembly to remove a Minister requires a cross-community majority as defined by the Act. In practice it therefore is not possible for the Assembly to remove a Minister from either

of the two largest Parties in circumstances where the Minister continues to command the support of his Party's Nominating Officer. This is a severe limitation on the application of the relevant provision. As an alternative in the short-term, consideration should be given to a non-binding motion of no confidence in a Minister which, while lacking formal legal effect, could have considerable political effect and, for which, there would be no automatic requirement for a cross-community vote. Indeed, **the Assembly should establish a convention whereby Petitions of Concern are not used in relation to votes of confidence**. Following the passing of a vote of no confidence in a Minister it would be a matter for the individual or the Party's Nominating Officer to determine the future of that Minister. It would be a matter for the public as to whether the vote of no confidence was legitimate or a party-political stunt or whether the failure of a Minister to resign or be dismissed by their Nominating Officer was an improper failure to recognise the authority of the Assembly.

Voting Arrangements

Where a cross-community vote is required by legislation or triggered by a Petition of Concern, a proposal would require the support of 65% of Assembly Members present and voting to pass. The 65% threshold means that a proposal would need to have widespread support across the community but would not permit a small minority to block decision-making. It would also permit various combinations of parties to pass a particular proposal with no single party holding a veto. It would also allow differing coalitions to pass proposals on different issues without any single group holding the Assembly to ransom. This arrangement would also encourage greater co-operation and compromise in the Assembly to obtain sufficient support for proposals to pass. In the Executive analogous voting arrangements would also be introduced to require the support of parties representing 65% of Assembly Member voting in favour to pass.

… in the long-term, the best means of governing Northern Ireland would involve a voluntary coalition Executive and weighted majority voting of around 65% in the Assembly, resulting in an end to community designation."

The Green Party

The Green Party is opposed to community designation in the NI Assembly as we believe that it entrenches sectarianism in the institutions. We propose that decisions should require a weighted majority of Assembly members which would be set at an appropriate level (e.g. 66%) as to require the support of MLAs from both unionist and nationalist communities.

In the event that a weighted majority is not adopted, the Green Party believes that there ought to be changes to the rules governing petitions of concern to ensure that the use of petition of concern is restricted to key cross community decisions.

SDLP

The SDLP supports the retention of community designation and the right of parties to their d'Hondt entitlement under powersharing arrangements if a party chooses to claim that entitlement.

Sinn Féin

Sinn Féin support the continued use of community designation for the purposes of measuring cross-community support in Assembly votes.

TUV

TUV is opposed to community designation as we believe that it institutionalises sectarianism. We believe that it should be scraped and that all MLAs – including those who choose not to define themselves as "Unionist" or "Nationalist" – should have equal voting power in the Assembly.

TUV is opposed to Petitions of Concern. We believe that they are a perverse instrument which is open to abuse. A graphic illustration of this was when one was used to block an amendment to the Justice Bill which would have prevented abortions being carried out outside of the National Health Service. This was an amendment which had wide support across the community in Northern Ireland and yet the amendment was not made, in spite of it receiving the backing of a majority of MLAs, a significant number of Nationalists joining with Unionist MLAs in supporting it.

UKIP

Community designation should only be applied in the broadest possible terms – unionist, nationalist and other – so that any voluntary coalition should be cross-community – that is the coalition should include one nationalist party if the other party is unionist. Other parties may be included in a multi-party coalition though an all-party mandatory coalition should be abandoned.

UUP

The Ulster Unionist Party position is that the Assembly should be seeking to move away from community designation and towards weighted majority voting to reflect the normalisation of politics here.

The Petition of Concern mechanism is being used on an increasingly frequent basis and we would welcome a review of the occasions it has been used and the reasons why, with particular reference to the original intent of providing this mechanism.

NI21

No, community designation as currently operated should not be retained. While community designation was a necessary aspect of the Agreement, contributing to cross-community confidence in and support for the devolved institutions, its continued retention is preventing progress towards normalised politics in Northern Ireland.

Community designation should be abolished, replaced by a weighted majority vote on the matters presently designated as requiring a cross-community vote.

The Petition of Concern mechanism has outlived its usefulness and has also been consistently misused in a manner undermining progress towards a mature parliamentary culture. The proposed requirement of a weighted majority vote is a mechanism which would secure minorities while also not impeding the emergence of a robust parliamentary culture.

The existing list of matters should be required to be subject to a weighted majority vote. This would provide appropriate protection against any majority in the Assembly abusing its position.

Academics and Other Stakeholders

Professor Birrell, University of Ulster

1. The criticism has been well rehearsed that community designation institutionalised a ‘two communities’ model and encouraged parties to prioritise ‘community’ interests. This can result in policy impasses or ‘lowest common denominator’ agreements.

2. However, community designation is part of the system of checks and balances and may be seen as still essential by most political parties to give them the security and confidence to participate in the devolved system of government.

   Alternatives would possibly not receive widespread acceptance.

   (i) These include official inclusion of the ‘other’ category

(ii) Right of MLAs to change individual designation in relation to subject of vote

(iii) Requirement of weighted majority (for example, 60%) in place of community designation, which in practice may have similar outcome but is not so focused on community division

3. A further alternative is that the principle of cross-community support on the basis of MLAs is replaced by cross community party support, that is, a simple majority but with the support of at least a party from each community designation. A political group (party) in the Assembly must have at least two or three MLAs to be designated.

4. Matters for cross community vote.

This list is restricted to certain 'constitutional and procedural matters' and to certain 'financial matters'. This would suggest the intention was that its use would not be common and not related to major output of Assembly which is in areas of social policy.

5. **This interpretation has become misleading due to provision for petitions of concern, signed by 30 members and leading to a vote requiring cross-community support**.

This in effect opens up every vote to a cross-community vote which can lead to further impasses and dominance of communal approaches.

Suggestions for less availability of petitions of concern would relate to requirement for support by a higher proportion of MLAs (50%). Any restriction on content, for example, only primary legislation or only Executive supported petitions, would be difficult to implement.

Professor Cochrane, University of Kent

I have no particular view in relation to revising the list of matters set out in the 1998 Act requiring a cross-community vote, other than to say that this should be allowed to evolve in line with other changes that are taking place and that will continue to do so.

On an associated point, **I would not favour any great changes to the current rules governing Petitions of Concern, as these provide a slightly more mobile and neat means that allows parties the security of knowing that they have access to a mechanism (subject to sufficient support) that allows them to designate something as a key issue, without having to come up with an exhaustive list in advance. It also, for once, allows the parties to take a minimalist rather than a maximalist approach as too often making political agreements is like making your last will and testament –you start with the absolutely worst scenario and work backwards. So the Petitions of Concern provide some much needed room for manoeuvre in my view and should be retained in their current form**.

Of course there is the continuing danger than Petitions of Concern are being over-used for the purpose of obstructing the business of government rather than constructing a more effective and light-touch system where this mechanism would only be deployed *in extremis*.

The problem here, as ever, lies not with the specific mechanism but in the way it can be used as an obstructive technique to engage in identity-based politics within the system. But again this is part of a wider political malaise in NI that goes far beyond the issue of whether petitions of concern should remain in their present form or not.

Professor Galligan, Queen's University Belfast

Petitions of Concern provide a mechanism for 30 MLAs to express their concern about a matter before the Assembly, and subject it to cross-community consent requirements. The intention behind Petitions of Concern was to alert the Assembly to upcoming decisions that had a bearing on significant community-specific interests. Given the role of community designation and cross-community voting in determining the outcome of key decisions, the question then arises as to the nature of Petitions of Concern – in other words, **how key are**

the issues that invoke a Petition of Concern? There is some disagreement as to the extent to which the practice of employing Petitions of Concern has conformed to the underpinning intention of the provision. There is merit in designing a mechanism, either through Standing Orders or by means of a determination of the Speaker (on advice), whereby the use of Petitions of Concern is more regulated and the content conforms to an agreed understanding of what constitutes a 'key decision'. This is one aspect of the functioning of the Assembly where reform could enhance public confidence in the legislature, as it would be seen to prevent use of the Petition of Concern mechanism for ethno-national advantage.

Professor Christopher McCrudden, University of Oxford; Professor John McGarry, Queen's University Canada; Professor Brendan O'Leary, University of Pennsylvania; Dr Alex Schwartz, Queen's University Canada

The question of how "designation" is used for "key" decisions or for decisions subjected to the Petition of Concern procedure is somewhat more complicated. The underlying rationale for these qualified majority-voting rules is to protect the interests of the two historically largest and most antagonistic communities in Northern Ireland by allowing each group of their representatives to veto important proposed decisions when they do not attract a significant degree of cross-community agreement. In keeping with this rationale, the rules make it impossible for the votes of any single party, regardless of how many seats they hold, to be both necessary and sufficient in attaining a winning coalition of votes.

These special decision rules are frequently said to be unfair to those who designate as "others." That is because the rules make the votes of Others less decisive (more strictly, less likely to be pivotal) than the votes of designated nationalists and unionists (McGarry and O'Leary 2004; and see Schwartz: 2011 for a treatment that applies "power indices" developed in the political science of voting). Whenever cross-community decision-making rules apply, the votes of "others" are only potentially decisive regarding the majority threshold or qualified majority thresholds, while, by contrast, the votes of nationalists and unionists are potentially decisive for both the majority or qualified majority thresholds as well as for one of the intra-nationalist or intra-unionist thresholds.

We observe first that it would not be a good solution to this question to give the "others" a parallel role as a designated community in cross-community consent procedures, because that would, at least at present, dramatically give undue weight to their voting power in the Assembly compared with their support among the electorate, and because they have not sought such a measure. We also observe that on current electoral trends, without any cross-community consent procedures, and with an Assembly run on simple majority rules, "the others" would likely be disproportionally "pivotal" in the Assembly in the decade ahead, in the same way that small parties in Germany or Israel have frequently punched above their electoral weight in executive and legislative decision-making. We also observe, third, that there is no compelling evidence that these rules have so far functioned as disincentives for voters contemplating support for the "others." Support for the latter category has increased slightly in net terms in the fifteen years since the 1998 Agreement, whereas it had fallen in the fifteen years before the Agreement (any argument that possible growth in support for the "others" has been held back by the rules would in our view rest on highly speculative counterfactuals).

Some have suggested (and some of us have at various junctures been open to the idea) that the existing cross-community and weighted majority decision rules could be replaced by a truly "difference-blind" qualified majority decision rule, i.e. one that makes no use of community designation. Any such revised decision rule would have to be consistent with the rationale of blocking decisions that lack a significant amount of nationalist and unionist support, and should itself attract their respective support with roughly equal intensity. But, several difficult questions then arise.

The first is to choose the number at which the qualified majority rule would be fixed. On the one hand, a relatively lower threshold is a relatively less reliable means for blocking decisions that lack de facto cross-community consent. For example, given the current composition of the Assembly, a 60% threshold would not be a very secure guarantee for nationalists. The total number of nationalist MLAs is 43, i.e. about 39.8% of the Assembly. Thus, a decision which attracted no nationalist support whatsoever could still pass the Assembly under a qualified majority threshold of 60%. Allowing such a possibility is not, we suggest, why nationalists voted overwhelmingly and enthusiastically for the 1998 Agreement. On the other hand, a relatively higher qualified majority threshold risks giving a single party the power to block any motion or Bill it chooses, regardless of the subject matter. Under a 65% threshold, assuming the current composition of the Assembly, the DUP (which currently has 38 seats, or 35.1% of the MLAs) would be necessary to any possible winning coalition for legislative resolutions or enactments. In other words, the DUP would have a guaranteed veto (a party veto, not a designated community veto) even though its support falls well short of a majority of the voters. And because the DUP would also have more than 30 seats, the party could unilaterally activate this veto by organizing a Petition of Concern. Meanwhile, the voting power of the second largest party, currently Sinn Féin with 29 seats, could be effectively nullified if all the remaining parties were to vote against its preferences en bloc. Moreover, because the second largest party is also (and is often likely to be) the largest of the two nationalist parties, a winning coalition that excluded that party would have fewer than fifty per cent support among the nationalist bloc. This possibility runs counter to the Agreement's principle of inclusivity.

It would also significantly alter the bargaining power of the parties in the Assembly. Under the existing rules, both the votes of the DUP and Sinn Féin (who each currently have more than 50% of the seats from their respective community designations) are necessary (but not sufficient) for any possible winning coalition, whenever the cross-community consent rules apply. The current provisions, therefore, give these leading designation parties relatively equal veto bargaining power (i.e. "parity"). We also think that requiring a difference-blind qualified majority rule beyond two thirds of the Assembly's members would generate pathologies of its own (seen in other political systems when legislative consent requirements go past two thirds to approach unanimity).

We therefore caution strongly against any precipitate change to the rules which have so far served Northern Ireland and its generally-successful peace agreement very well. We note in passing that there is something rather misleading in the language of "difference-blind" rules. In a place as highly politicized as Northern Ireland, intelligent politicians, parties and communities are more than capable of knowing whether they are likely to stand to lose or gain under various "difference-blind" rules. In short, the situation is not one in which the parties are blind to their likely future strengths and weaknesses under the new rules. For that reason we are inclined to doubt that there is likely to be cross-community consent to change the cross-community consent rules, as would be required by the mandate of the 1998 Agreement, and by its legislative enactment. We cannot identify an equilibrium-qualified majority decision-making rule likely to be agreed by a majority among nationalists, unionists and others respectively. The existing rules protect most the communities that have been most in conflict, and the conflict-regulating effects which they have produced also serve to protect the "others" who want to advance a different politics. For these reasons, we regard the cross-community rules as fully within the margin of appreciation that should be allowed to democratic power-sharing polities (especially because in this case the others are fully protected in the franchise, access to office, their ability to expand their support, in their civil and human rights, and because we know that it can be formally mathematically proven that no voting rule or decision-rule can meet all the desirable properties that democrats would want such rules to have (Arrow: 1963 (1951)).

Lastly, we observe that **although the Petition of Concern procedure can be used to subject any decision of the Assembly to these cross-community consent requirements, the procedure has been used relatively sparingly**. On the last count (by Schwartz in January

2012), the procedure had only been used 22 times. We have observed that **the Petition of Concern has occasionally been abused to block decisions which have nothing to do with community-specific vital nationalist or unionist interests. Regarding this possibility, we would encourage the Assembly to consider ways in which it might give its Presiding Officer in conjunction with a suitably composed committee of the Assembly means to inhibit what we might call pseudo-petitions of concern. We would not welcome any provision for judicial review of the Petition of Concern procedure**, because we think that it is vital, so far as possible, for the consociational partners to make decisions about their joint fate jointly, without calling in outside agencies, such as courts or the two sovereign governments, to resolve matters that the Agreement establishes as being within the jurisdiction of the consociational partners themselves. **Should provision for judicial review of a Petition of Concern be considered important by the Assembly, which we recommend against, then we think it would be important for any such provision to be clearly set within and constrained by the language and ethos of the 1998 Agreement**.

Professor Wilford, Queen's University Belfast

The provision for community designation has nothing to do with existential doubt among/ within the parties, but rather is a device designed to test cross-community support for policy, legislation and other matters, including procedural matters. In that sense it is a rather blunt tool and can be deployed to block certain proposals or measures via the Petition of Concern procedure. Critics, myself included, have argued elsewhere that it has the effect of entrenching communal identities, what others would less kindly term sectarian thinking/ action, and of according greater significance to the votes cast by self-designated Unionists and Nationalists as compared with 'Others' on key issues – which it does.

Clearly, NI remains a divided society and safeguards are required to ensure that measures do command cross-community support, but this does not necessitate community designation. Instead, a weighted majority could be adopted to resolve 'key' decisions, set at a level (say 65%) that assures, in effect, that cross-community support has been achieved and which would ensure that no key decision could be taken in the face of significant opposition. Moreover, it would, as referenced in the Research Paper, represent a (mostly symbolic signal) of the dismantling of a communal divide: the proposal that parties, rather than individuals, designate as Unionist, Nationalist or Other, would only consolidate collective communal identity.

Re key decisions requiring cross-community support: one addition, namely the process of nominating & electing FM & dFM. This was the status quo ante in the first mandate when the incumbents were jointly elected by means of a cross-community vote. (In addition, Messrs Trimble and initially Mallon and subsequently Durkan, appeared together at QT and took alternate questions, another symbol of the 'jointedness' of the Office). I appreciate that the change effected at St Andrews dispensed with the requirement for a ratifying/legitimising cross-community vote within the Assembly for the nominees but, as devolution has bedded-down, I think there may well be a case for resurrecting the procedure, thereby adding it to the list of 'key decisions': i.e. it would require a weighted vote that realizes the principle of cross-community consent. Agreement by the two leading parties from their respective communities to run their nominees on a joint ticket, together with the dropping of the designation requirement, would send the signal that the political process was normalizing, albeit that it would provide for identity politics in an implicit rather than an explicit, manner.

As an alternative, one might refer to the Anglo-Irish 'Comprehensive Agreement' (2004) which included a recommendation for a cross-community vote for the entire Executive on a single 'Executive slate'. In Switzerland (another oppositionless consociation, but one with extensive provision for the exercise of direct democracy) each nominee to the seven-member Federal Council requires endorsement by a secret ballot of both chambers of the Federal Assembly in a combined vote. The nominees are themselves nominated by the parties by means of the 'magic formula', an inter-party agreement (it has no statutory basis) designed to realize a power-sharing administration. Details aside, the key issue here is ratification/election by

the legislature a process that, unlike the Swiss model, should be transparent: applied to NI it would demonstrate publicly the legitimacy of the whole Executive, including the FM and dFM. I.e., rather than having a separate vote for the latter pairing, there would be one weighted vote for the full Executive.

Each of the above alternatives, if effected, should be in place following the next Assembly election.

Re Petitions of Concern: 30 is not a 'magic' number, nor one cast in stone. Clearly, lodging a PoC has become a noteworthy feature of the parliamentary process at the Assembly, signalling that it meets the perceived needs of the parties. Put another way: provide the tool and it will be used, including as a blocking device. If it is to be changed, there may be a case for increasing the threshold (to 35% of members, n38) in part to reflect the proposal to displace designation in favour of a qualified weighted majority. On the other hand, a move to qualified majority voting – at say 65% of members present and voting – would in itself be an assurance that no key decision could be taken in the face of significant opposition: on that basis, there may be an arguable case for abandoning the PoC procedure.

However, the case for its retention rests on the opportunity it supplies for a belt and braces safeguard to parties on issues not routinely subject to the key decision tests as set out in the NI Act 1998: and it would, admittedly, be an exhaustive and probably futile task to attempt to extend the list of 'key decisions' subject to such a vote. Its provision, like the Belgian procedures cited in the Research Paper', supplies a safeguard against majoritarianism and its retention, I suspect, would be sought by the parties, not least because it realizes the mutual veto principle entrenched in the NI Act 1998. Perhaps the key issue is whether the 30 signatures currently required to trigger a petition is the appropriate threshold.

The actual number does matter: and it may matter more should the Assembly decide that provision for an official Opposition be made. A party or parties that chose to form a formal Opposition could be disadvantaged if the threshold was set too high. Yet, if procedures were adopted on the floor, including 'supply days', such a party/parties would enjoy opportunities to subject the Executive, either in whole or part, to structured scrutiny – even censure – which would compensate for any insufficiency of numbers to reach the PoC threshold.

Labour Party in NI

1. The current system of decision-making in the Assembly makes territorial politics the bedrock of political decision-making by requiring MLAs to designate as unionist, nationalist or 'other' (i.e. to be defined either by national allegiance or by lack of it; if MLAs refuse to designate then they are automatically classified as 'other'). Major Assembly decisions must be endorsed on a cross-community basis i.e. with a majority from both unionists and nationalists, thus reducing the incentive for MLAs to designate as 'other' as a matter of principle.

2. By forcing members to designate on the basis of community attachment, and making non-alignment a somewhat second-class designation, the Assembly's structures actively encourage division at every level. In short, whilst these systems remain in place it is difficult to envisage NI ever abandoning territorial politics in favour of a more left-right ideological remit.

3. **The Labour Party in Northern Ireland fundamentally disagrees with the community designation system as it encourages, rather than discourages, community division. We desire a full and proper review to facilitate any needed change, as is elaborated upon in the Additional Information section. Nevertheless, below are several options for reform**;

    i. Major parliamentary decisions could simply require a super majority of 75% in order to be passed. This means that both communities will retain an embargo on the passage

of important bills whilst also allowing those who designate as 'other' a say on the matter.

ii, All legislation could simply require a basic majority but be subject to review by equality proofing. Equality proofing could additionally involve community groups and citizens' initiatives in its process, meaning that all legislation passed would be acceptable to local communities whilst also allowing a greater citizenry role in the process.

iii. On a slightly different tact, the power to legislate could reside within committees, similar to statutory committees presently installed within Stormont. Within this system d'Hondt would be retained for allocation purposes and committees of roughly 8-12 MLAs would involve themselves in policy and legislation on specific policy briefs, such as Health. Unanimous consent would probably be the best option for legislating within this system as it would force committee members to work together and for them to create a programme for legislating. These Committees could also double-up as executive review committees.

Centre for Opposition Studies

Community designation is a factor that continues to highlight the stark divisions of Northern Ireland's politics, and as such can be seen as a barrier to the development of more traditional forms of representative politics in the Assembly. Certainly, it is difficult to see how politics in Northern Ireland can be 'normalised' until the primacy of such designations is reduced.

The need to ensure cross-community support for certain measures is a key feature of the 1998 Act, and designation provides a clear (albeit rather blunt) instrument for achieving this result. However, an alternative system such as qualified majority voting, which would allow for the removal of formal designations, is clearly more desirable in the longer term.

Nevertheless, the key issue is the way in which designation is currently used, and this is highlighted by the role of Petitions of Concern. As, essentially, a constitutional safeguard, their use should be somewhat exceptional, and restricted to the most important issues. Evidence (including that in Appendix 2 of the Assembly briefing paper) suggests their use has become less infrequent than would be expected for such a mechanism, and seems now to be a feature of regular Assembly politics, rather than a signal of exceptional concern.

The invoking of community designations on a regular basis in this way reinforces sectarian divisions, and seems to go beyond the intended purpose of the mechanism. It would seem appropriate to look at restricting their use by raising the number of petitioners required, or adopting specific criteria which a petition should meet to be accepted by the Speaker.

Platform for Change

Communal designation should be abolished in the assembly because it perpetuates the sectarian divide as the axis of political argument in Northern Ireland. Its most obvious comparator is Bosnia-Herzegovina, where the associated mutual-veto arrangements have left government perennially deadlocked. Indeed, an insidious effect of communal designation is that it gives 'ethnic' political parties an incentive to maintain an ethnically divided society to sustain their vote banks and to campaign at election times on the basis of communal assertion rather than on how they will promote the public interest and the common good. It also has an insidious effect on the public, corroding any sense of the fellow citizenship on which democracy depends.

The idea was never entertained in the prolonged public and political debates leading up to the 1974 power-sharing executive and since 1998 it has often had perverse effects: rather than preventing sectarian majoritarianism, as supposed, it has provided a basis—via the exercise, or potential exercise, of the 'cross-community support' test—for individual parties to veto proposals to which they object. This was exacerbated by the provision in the St Andrews

agreement for the test to be imported into government itself, arising from and consolidating the impasse over academic selection.

A more effective mechanism for minority protection would be, as already mentioned, the enactment of a Northern Ireland Bill of Rights, which would replace the 'petition of concern'. This has been stymied by the failure to agree on the communalist notion of 'parity of esteem'. In fact, all minority rights conventions, notably the Council of Europe Framework Convention for the Protection of National Minorities and the Charter for Regional or Minority Languages, which could readily be incorporated into a Bill of Rights justiciable through the Northern Ireland courts, recognise the individual as the subject of all human rights, including when they deem themselves to be 'persons belonging to' minority communities—a recognition of the risk of unwittingly entrenching stereotyped communal conceptions of the Self and Other.

Alternative or additional protection could be provided by a requirement for a super-majority vote in the assembly. This, however, should be confined to issues of strategic significance, so that the procedure could not be abused in an opportunistic manner as indicated. It should therefore be restricted to the appointment of an executive after an election and the agreement of the Programme for Government, which—as in fact stipulated in the Belfast agreement—should once more be subject to annual iteration.

The timescale for these changes would be similar to that identified in the preceding section, requiring again Westminster legislation. To ensure the delay over a Bill of Rights is finally brought to an end, it should simply incorporate the two conventions referred to above—which are otherwise non-justiciable—thereby providing a suite of protections allied to the incorporation of the European Convention of Human Rights in 1998.

6. Options for Committee consideration Paper: Ad Hoc Committees and Petitions of Concern

Petitions of Concern and Establishment of Ad Hoc Committees (ACERs)

The responses from the **Alliance Party** and **Sinn Féin** to the **Committee's Options Paper** (*see Appendix 3*) on this subject both indicated a preference for a vote on the establishment of an ACER only when a Petition of Concern relates to legislation. The **UUP** response indicated a preference for the current practice in the Assembly, whereby a vote on the establishment of an ACER is not routinely taken in the event of a Petition of Concern. The **DUP** response suggested a mechanism whereby the Members tabling a Petition of Concern could indicate whether or not they wished for a vote to be taken on the establishment of an ACER. The full Party responses to the Committee's Options Paper are set out in Appendix 4 of this Report, and are reproduced again below for immediate reference purposes along with a '*Spectrum of Responses*' diagram.

The **Alliance Party** and **Sinn Féin** also consider that there is merit in creating an Assembly Standing Committee on Equality and Human Rights Conformity, rather than an Ad Hoc Committee each time the Assembly votes on the establishment of an ACER. At the 11th February 2014 Committee meeting, the **Alliance Party** representative reaffirmed his support for the establishment of a Standing Committee on Equality and Human Rights. The **SDLP** provided an update on its stance supporting the ACER mechanism, and this is now included (and highlighted for Members' reference) in the background notes below.

The Members of Committee present at the Committee's meeting of 11 February agreed to consider the options within their respective Parties and come back to the options at the Committee meeting of 25 February.

Draft Conclusions: Options for Committee consideration. Sub-options to how 'legislation' might be defined have been included

Vote on ACER

Option a) The Committee concluded that a vote should be taken on the establishment of an ACER only when a Petition of Concern relates to legislation.

i. "Legislation" refers to primary legislation only.

OR

ii. "Legislation" refers to primary legislation, legislative consent motions, secondary legislation and all proposals for legislation – including Private Members' Bills and Committee Bills.

OR

Option b) While there was some support among the Committee for taking a vote on the establishment of an ACER only when a Petition of Concern relates to legislation, there was no consensus on this issue.

OR

Option c) The Committee concluded that a vote should be taken on the establishment of an ACER each time a Petition of Concern is tabled.

The representatives from [ ] stated that they were unable to support this conclusion.

Standing Committee

Option a) The Committee agreed that the Assembly should establish a Standing Committee on Equality and Human Rights to replace the Ad Hoc Committee mechanism referred to in Standing Orders 35 and 60.

OR

Option b) Even though there was some support for the establishment of a Standing Committee on Equality and Human Rights Committee to replace the Ad Hoc Committee mechanism referred to in Standing Orders 35 and 60, there was no consensus on this issue.

The representatives from [ ] stated that they were unable to support this conclusion.

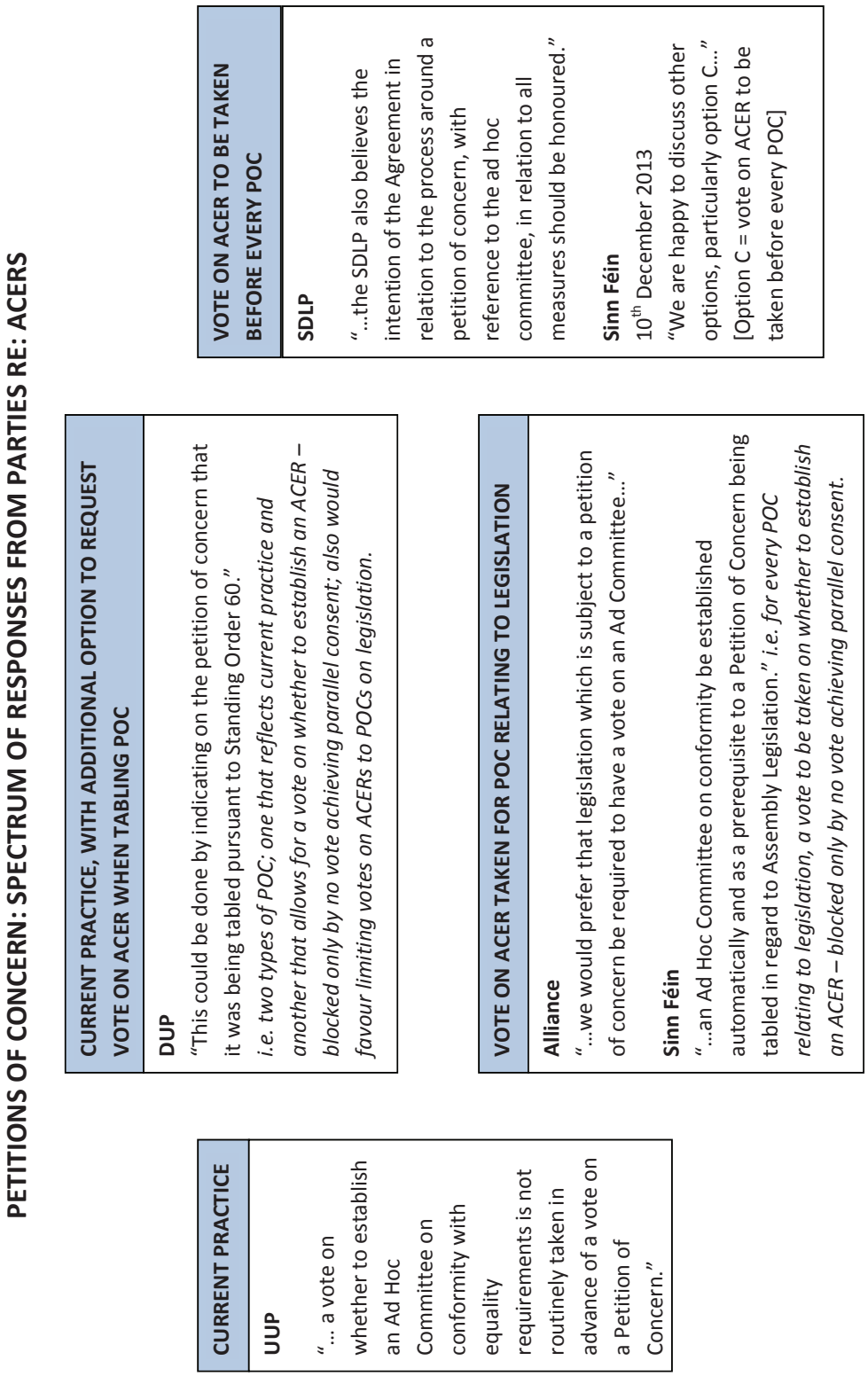
Party Responses Regarding Ad Hoc Committee on Conformity With Equality Requirements

Party responses to Options Paper, unless otherwise indicated

Alliance Party	We prefer option B. Alliance continues to maintain that the petitions of concern system should see more radical overhaul and replacement with a weighted 65% majority. However, we would prefer that **legislation which is subject to a petition of concern be required to have a vote on an Ad Hoc Committee take place**. We would prefer that this applies to sub-option2 and any elements which do not fall into sub option 2 but fall into sub option three which also have some form of legal effect. **Committee meeting, 10th December 2013** I have said before that the advice we got in Westminster, when we spoke to the Chair of their Ad Hoc Committee, was that Stormont should consider setting up a standing Ad Hoc Committee to deal with these issues, as they have in Westminster. …it seems like overkill to set up an Ad Hoc Committee every time they have a decision to make.
DUP	At a general level we believe that reform of the rules governing petitions of concern should be considered as part of a wider review of the Assembly. **In relation to the specific issue relating to the Ad Hoc Committee on Conformity with Equality Requirements (ACER), we believe that the current practice of the Assembly is the most appropriate option.** In law, there is no requirement that petitions of concern can only be used in relation to 'equality' issues, nor is there anything in the Belfast Agreement which would operate – or seek to operate - as such a limitation. The practice has also been that petitions of concern have been used for a variety of reasons and on a variety of issues by parties across the chamber. Arguably, few have specifically related to equality issues as such. To require a formal vote when a petition of concern is tabled in relation to legislation would appear to be administratively burdensome and unnecessary. Whether or not, in light of the provisions of the Northern Ireland Act 1998, there is a need to specifically amend the legislation is also open to debate. **There is a credible argument that so long as Standing Orders provide a route – not necessarily a requirement that there must be a vote on every occasion – then the terms of Section 42 (3) have been satisfied. This could be done by indicating on the petition of concern that it was being tabled pursuant to Standing Order 60.** The terms of Standing Order 60 are slightly more problematic though it may be possible to interpret 60(4) as limited to the context of Standing Order 60. However a minor amendment making this point explicitly could resolve any ambiguity.

SDLP	1. The intention of the Good Friday Agreement provisions in relation to a petition of concern was to create a process to mitigate the abuse of power on a measure, where there may be equality and human rights consequences. 2. **The scope of a petition of concern was not to be restricted to primary or other legislation.** This was the limited interpretation, put on it by bureaucrats. The proper interpretation was that the review referred to in the Agreement included primary and secondary legislation, draft Bills and policies (for example, a Minister taking a budgetary decision around recess that carried significant consequences.) 3. The power to deploy a petition of concern should fall to a Minister, the Executive Committee, the Chair of a Committee/the Committee. However, the position intended by the Agreement is not properly reflected in Standing Orders. 4. The purpose of an ad-hoc committee was to assess the equality and human rights implications of a measure, in which regard taking evidence for the Human Rights Commission, Equality Commission and others was anticipated. 5. **The SDLP does not believe that the voting threshold surrounding petition of concerns should be adjusted.** However **the SDLP also believes the intention of the Agreement in relation to the process around a petition of concern, with reference to the ad hoc committee, in relation to all measures should be honoured.** **SDLP paper to Committee, 11th February 2014** The Petition of Concern facility was put into the agreement to safeguard communal sensitivities and specifically to protect equality and human rights considerations. It was not proposed or envisaged as a tool to protect any Minister from due accountability – not least when there are issues on probity in public finances or propriety of ministerial conduct. It was meant to trigger a process whereby equality and human rights concerns could be assessed and addressed, by a specially appointed Committee of the Assembly taking evidence and reporting on those very issues.
Sinn Féin	Sinn Féin support the continued use of the Petition of Concern as a safeguard to ensure that all sections of the community can participate and work together successfully in the operation of these institutions and that all sections of the community are protected. **Sinn Féin proposes that an Ad Hoc Committee on conformity be established automatically and as a prerequisite to a Petition of Concern being tabled in regard to Assembly Legislation.** **Committee meeting, 10th December 2013** Our position has not really changed from our submission. We are happy to discuss other options, particularly option C; we have no difficulty with that. [Option C = vote on ACER to be taken before every POC] I would be in favour of that [standing Ad Hoc Committee] …Rather than setting up an Ad Hoc Committee every time you have a Petition of Concern, you have a Standing Committee.
UUP	**The Ulster Unionist Party's preferred option at this stage is Option A which is to amend the Northern Ireland Act 1998 to reflect current Assembly practice with regard to Petitions of Concern, whereby a vote on whether to establish an Ad Hoc Committee on conformity with equality requirements is not routinely taken in advance of a vote on a Petition of Concern.** Importantly, this does not negate the need for a wider review of Petitions of Concern which should be undertaken by the Assembly and Executive Review Committee. We would restate our position that the Petition of Concern is a useful tool for the protection of communities but has unfortunately been increasingly abused by the current dominant Parties. We believe that we must look towards reducing the potential for misuse. We recognise the urgency of clarifying this particular aspect of Petitions of Concern but also urge that a wider review of the use of Petition of Concerns is concluded as soon as possible.

7. Petitions of Concern - Spectrum of Responses



8. Options Paper: Alternative mechanism for Petitions of Concern

Replacing the Petition of Concern with an Alternative Mechanism

In the context of replacing the Petition of Concern with an alternative mechanism, at the 28th January 2014 Committee meeting a Member raised the point that a majority of Parties in the Assembly, as well as academics who had responded to the 'Call for Evidence' for the Committee's previous Review, supported a change to a weighted-majority vote — as opposed to a cross-community vote — on **all** matters subject to a Petition of Concern.

However, there was no consensus among the Committee on this; therefore, the Committee in this context reaffirmed the following conclusion from the Committee's previous Report on *'D'Hondt, Community Designation and Provisions for Opposition'*:

Draft Conclusion – Options for Committee consideration

Option a) While there was support among some Parties on the Committee for the use of the alternative mechanism of a weighted-majority vote for all matters subject to a Petition of Concern, there was no consensus on this issue. Therefore, in this context, the Committee reaffirmed its conclusion from its previous Report, that: "…there was no consensus for replacement of community designation by, for example, a weighted-majority vote in the Assembly of 65%."

OR

Option b) The Committee agreed to replace the Petition of Concern cross-community vote with the alternative mechanism of a weighted-majority vote in some circumstances; for example, regarding *'Restricting the use of Petitions of Concern to Key Areas'* and *'Petitions of Concern and Establishment of Ad Hoc Committees'*.

The representatives from [ ] stated that they were unable to support this conclusion.

Background Points

Comments below drawn from responses to the 'Call for Evidence' paper for the *'Review of d'Hondt, Community Designation and Provisions for Opposition'* unless otherwise indicated:

Political Parties of the NI Assembly
The Alliance Party Alliance does not support the retention of community designation. The current system institutionalises sectarian division within the Assembly and leads to the inequality of votes of between elected MLAs. Other problems with this system are the inability to adjust to changing demographics and political circumstances as well as the ability of minorities to hold the process to ransom. Alliance would prefer the introduction of an Assembly voting system for cross-community matters based on a weighted majority. The introduction of a system of weighted majority voting ensures cross-community support while avoiding these difficulties. **Response to Options Paper, November 2013** Alliance continues to maintain that the petitions of concern system should see more radical overhaul and replacement with a weighted 65% majority.

DUP (extracts from 'Making Stormont Work Better')

VOTING ARRANGEMENTS

Where a cross-community vote is required by legislation or triggered by a Petition of Concern, a proposal would require the support of 65% of Assembly Members present and voting to pass. The 65% threshold means that a proposal would need to have widespread support across the community but would not permit a small minority to block decision-making. It would also permit various combinations of parties to pass a particular proposal with no single party holding a veto. It would also allow differing coalitions to pass proposals on different issues without any single group holding the Assembly to ransom. This arrangement would also encourage greater co-operation and compromise in the Assembly to obtain sufficient support for proposals to pass. In the Executive analogous voting arrangements would also be introduced to require the support of parties representing 65% of Assembly Member voting in favour to pass.

… in the long-term, the best means of governing Northern Ireland would involve a voluntary coalition Executive and weighted majority voting of around 65% in the Assembly, resulting in an end to community designation."

The Green Party

The Green Party is opposed to community designation in the NI Assembly as we believe that it entrenches sectarianism in the institutions. We propose that decisions should require a weighted majority of Assembly members which would be set at an appropriate level (e.g. 66%) as to require the support of MLAs from both unionist and nationalist communities.

SDLP

The SDLP supports the retention of community designation and the right of parties to their d'Hondt entitlement under powersharing arrangements if a party chooses to claim that entitlement.

Sinn Féin

Sinn Féin support the continued use of community designation for the purposes of measuring cross-community support in Assembly votes.

TUV

TUV is opposed to community designation as we believe that it institutionalises sectarianism. We believe that it should be scraped and that all MLAs – including those who choose not to define themselves as "Unionist" or "Nationalist" – should have equal voting power in the Assembly.

TUV is opposed to Petitions of Concern. We believe that they are a perverse instrument which is open to abuse.

UKIP

Community designation should only be applied in the broadest possible terms – unionist, nationalist and other – so that any voluntary coalition should be cross-community – that is the coalition should include one nationalist party if the other party is unionist. Other parties may be included in a multi-party coalition though an all-party mandatory coalition should be abandoned.

UUP

The Ulster Unionist Party position is that the Assembly should be seeking to move away from community designation and towards weighted majority voting to reflect the normalisation of politics here.

Mr J McCallister and Mr Basil McCrea (then Independent Members)

…community designation as currently operated should not be retained. While community designation was a necessary aspect of the Agreement, contributing to cross-community confidence in and support for the devolved institutions, its continued retention is preventing progress towards normalised politics in Northern Ireland.

Community designation should be abolished, replaced by a weighted majority vote on the matters presently designated as requiring a cross-community vote.

The Petition of Concern mechanism has outlived its usefulness and has also been consistently misused in a manner undermining progress towards a mature parliamentary culture. The proposed requirement of a weighted majority vote is a mechanism which would secure minorities while also not impeding the emergence of a robust parliamentary culture.

The existing list of matters should be required to be subject to a weighted majority vote. This would provide appropriate protection against any majority in the Assembly abusing its position.

Academics and Other Stakeholders:

Professor Birrell, University of Ulster

1. The criticism has been well rehearsed that community designation institutionalised a 'two communities' model and encouraged parties to prioritise 'community' interests. This can result in policy impasses or 'lowest common denominator' agreements.

   However, community designation is part of the system of checks and balances and may be seen as still essential by most political parties to give them the security and confidence to participate in the devolved system of government.

2. Alternatives would possibly not receive widespread acceptance.

   These include official inclusion of the 'other' category

   Right of MLAs to change individual designation in relation to subject of vote

   Requirement of weighted majority (for example, 60%) in place of community designation, which in practice may have similar outcome but is not so focused on community division

3. A further alternative is that the principle of cross-community support on the basis of MLAs is replaced by cross community party support, that is, a simple majority but with the support of at least a party from each community designation. A political group (party) in the Assembly must have at least two or three MLAs to be designated.

Professor Galligan, Queen's University Belfast

Extract from Hansard report of 23/04/13:

…the use of petitions of concern seems to have extended beyond the key community-specific interest that it was intended to address. Therefore, there is scope for a number of initiatives on that, some of which could be undertaken independently of other reforms. One could be to clarify the circumstances in which a petition of concern could be invoked, possibly confining it to legislation only. Another would be to introduce a qualified majority for non-legislative matters on which a petition of concern is lodged. A third, more radical departure would be to require a qualified majority for all issues that are related to community designation and cross-community voting. That would remove the parallel-consent requirement for key decisions.

Professor Christopher McCrudden, University of Oxford; Professor John McGarry, Queen's University Canada; Professor Brendan O'Leary, University of Pennsylvania; Dr Alex Schwartz, Queen's University Canada

Some have suggested (and some of us have at various junctures been open to the idea) that the existing cross-community and weighted majority decision rules could be replaced by a truly "difference-blind" qualified majority decision rule, i.e. one that makes no use of community designation. Any such revised decision rule would have to be consistent with the rationale of blocking decisions that lack a significant amount of nationalist and unionist support, and should itself attract their respective support with roughly equal intensity. But, several difficult questions then arise.

The first is to choose the number at which the qualified majority rule would be fixed. On the one hand, a relatively lower threshold is a relatively less reliable means for blocking decisions that lack de facto cross-community consent. … On the other hand, a relatively higher qualified majority threshold risks giving a single party the power to block any motion or Bill it chooses, regardless of the subject matter.

Professor Wilford, Queen's University Belfast

… a weighted majority could be adopted to resolve 'key' decisions, set at a level (say 65%) that assures, in effect, that cross-community support has been achieved and which would ensure that no key decision could be taken in the face of significant opposition.

… a move to qualified majority voting – at say 65% of members present and voting – would in itself be an assurance that no key decision could be taken in the face of significant opposition: on that basis, there may be an arguable case for abandoning the PoC procedure.

Extract from Hansard report of 26/02/13:

The petition of concern has become an increasingly popular method. It offers a belt-and-braces approach for parties and a safeguard against some sort of majoritarian approach in the Assembly. I think that the weighted majority could achieve what petitions of concern are designed to serve, but the problem there is that, if you pitch it too high, particularly if you are going to go for formal provision of an Opposition, you might deny that opportunity to smaller parties in the Assembly.

There is one possible option, which is to go for what is called a constructive vote of no confidence, which is that you only move a vote of censure when you have an alternative Government-in-waiting and ready to take over.

Petitions of concern can be used constructively, but they can also be used obstructively. It is

really a matter of judgement about the basis upon which, and the purposes for which, the petition is presented.

…if you move to a system of weighted majority on what are currently defined as key decisions, unless there were to be a massive seismic shift in voting patterns in Northern Ireland, that 65% is a safe figure to ensure that no issue could be progressed in the face of significant opposition from one or other party block in the Assembly. The alternative would be to ramp up the petition of concern device and begin to add to the list of what constitutes key decisions. For example, in the first Assembly, the Programme for Government was subject to a cross-community vote. That was then subsumed into the vote on the Budget, so that discrete, separate vote was then dispensed with. The only change that I would make in respect of what is subject to a key decision is the vote for First Minister and deputy First Minister.

Labour Party in NI

The Labour Party in Northern Ireland fundamentally disagrees with the community designation system as it encourages, rather than discourages, community division. …

Major parliamentary decisions could simply require a super majority of 75% in order to be passed.

Platform for Change

Communal designation should be abolished in the assembly because it perpetuates the sectarian divide as the axis of political argument in Northern Ireland.

A more effective mechanism for minority protection would be, as already mentioned, the enactment of a Northern Ireland Bill of Rights, which would replace the 'petition of concern'.

Alternative or additional protection could be provided by a requirement for a super-majority vote in the assembly. This, however, should be confined to issues of strategic significance, so that the procedure could not be abused in an opportunistic manner as indicated. It should therefore be restricted to the appointment of an executive after an election and the agreement of the Programme for Government, which—as in fact stipulated in the Belfast agreement—should once more be subject to annual iteration.

9. Options Paper: Restricting use of Petitions of Concern

Restricting the use of Petitions of Concern to Key Areas

Several of the Parties represented on the Committee (including **Sinn Féin**, **UUP** and the **Alliance Party**) suggested that there was value in considering some restriction on the areas where a Petition of Concern can be used.

At the 11th February 2014 Committee meeting, the Committee discussed **Option b)**, and how "legislation" might be defined. Based on this discussion, sub-options have been included under **Option b).**

It was also agreed at that meeting that **Option c),** should be amended to read Private Members' "motions" rather than "business", as the latter could encompass Private Members' Bills. During the Committee discussion, the **Alliance Party** representative stated, *"as far as Petitions of Concern and Private Members' Motion are concerned, it does not really matter … but it is really very serious that legislation can be blocked in this way, and that is why I would like to see weighted-majority."* He went on to say, *"…frequently there has been a majority (of the House) in favour of a motion that has been blocked by a Petition of Concern."* A **DUP** representative stated, "*I think it would be better if you could move away from that* [Petitions of Concern on Private Members' Motions]".

Members of the Committee present agreed to consider the options within their respective Parties and come back to the options at the Committee's meeting of 25 February.

Draft Conclusion: Options for Committee consideration

Option a) Although there was some support among the Parties represented on the Committee for restricting the use of Petitions of Concern to key areas, there was no consensus among the Committee on how that would operate.

OR

Option b) The Committee agreed that Petitions of Concern should be used in relation to legislation only.

i. "Legislation" refers to primary legislation only.

OR

ii. Legislation" refers to primary legislation, Legislative Consent Motions, secondary legislation and all proposals for legislation – including Private Members'Bills and Committee Bills.

OR

Option c) The Committee agreed that Petitions of Concern should not be used in relation to Private Members' Motions.

The representatives from [ ] stated that they were unable to support this conclusion.

Background Points

- This may require amendment to the 1998 Act;
- Difficult to create exhaustive list;
- Difficult to specify criteria, and raises question of who would make judgement?
- Advocated by various academics – e.g Professor McCrudden, Professor O'Leary and Professor Galligan

Comments below drawn from responses to the 'Call for Evidence' paper for the *'Review of d'Hondt, Community Designation and Provisions for Opposition'* unless otherwise indicated:

Political Parties of the NI Assembly
The Alliance Party Alliance would welcome a method of defining those issues on which a Petition of Concern can be used and as a way of ensuring this mechanism is not open to misuse.
DUP **Committee meeting 14th January 2014** "… this is an evolutionary process as opposed to a revolutionary one … we are more likely to get a relaxed consensus as matters evolve rather than trying to make a dramatic change …" **Extracts from 'Making Stormont Work Better'**
RESIGNATION OF MINISTERS [Removal of Minister] Provision already exists for the removal of Ministers within the Northern Ireland Act. However, in effect, this provision is significantly limited by the requirement that any vote of the Assembly to remove a Minister requires a cross-community majority as defined by the Act. In practice it therefore is not possible for the Assembly to remove a Minister from either of the two largest Parties in circumstances where the Minister continues to command the support of his Party's Nominating Officer. This is a severe limitation on the application of the relevant provision. As an alternative in the short-term, consideration should be given to a non-binding motion of no confidence in a Minister which, while lacking formal legal effect, could have considerable political effect and, for which, there would be no automatic requirement for a cross-community vote. Indeed, the Assembly should establish a convention whereby Petitions of Concern are not used in relation to votes of confidence. Following the passing of a vote of no confidence in a Minister it would be a matter for the individual or the Party's Nominating Officer to determine the future of that Minister. It would be a matter for the public as to whether the vote of no confidence was legitimate or a party-political stunt or whether the failure of a Minister to resign or be dismissed by their Nominating Officer was an improper failure to recognise the authority of the Assembly.
The Green Party In the event that a weighted majority is not adopted, the Green Party believes that there ought to be changes to the rules governing petitions of concern to ensure that the use of petition of concern is restricted to key cross community decisions.
SDLP *No specific comment on this matter.*
Sinn Féin **Committee meeting 14th January 2014** We certainly believe that the issue of restricting the use of Petitions of Concern should be considered; there is no doubt that the Committee should discuss that.

Political Parties of the NI Assembly

UUP

The Petition of Concern mechanism is being used on an increasingly frequent basis and we would welcome a review of the occasions it has been used and the reasons why, with particular reference to the original intent of providing this mechanism.

Academics and Other Stakeholders

Professor Birrell, University of Ulster

Matters for cross community vote.

This list is restricted to certain 'constitutional and procedural matters' and to certain 'financial matters'. This would suggest the intention was that its use would not be common and not related to major output of Assembly which is in areas of social policy.

Extract from Hansard report of 19/03/13:

Professor Birrell: Matters for cross-community vote raises the issue of petitions of concern. Originally, I think that petitions of concern were intended to deal mainly with constitutional and procedural matters.

Any restrictions on content, for example, only primary legislation or only Executive supported petitions, would be difficult to implement.

Professor Cochrane, University of Kent

I have no particular view in relation to revising the list of matters set out in the 1998 Act requiring a cross-community vote, other than to say that this should be allowed to evolve in line with other changes that are taking place and that will continue to do so.

On an associated point, I would not favour any great changes to the current rules governing Petitions of Concern, as these provide a slightly more mobile and neat means that allows parties the security of knowing that they have access to a mechanism (subject to sufficient support) that allows them to designate something as a key issue, without having to come up with an exhaustive list in advance. It also, for once, allows the parties to take a minimalist rather than a maximalist approach as too often making political agreements is like making your last will and testament –you start with the absolutely worst scenario and work backwards. So the Petitions of Concern provide some much needed room for manoeuvre in my view and should be retained in their current form.

Of course there is the continuing danger that Petitions of Concern are being over-used for the purpose of obstructing the business of government rather than constructing a more effective and light-touch system where this mechanism would only be deployed *in extremis*.

The problem here, as ever, lies not with the specific mechanism but in the way it can be used as an obstructive technique to engage in identity-based politics within the system. But again this is part of a wider political malaise in NI that goes far beyond the issue of whether petitions of concern should remain in their present form or not.

Academics and Other Stakeholders

Professor Galligan, Queen's University Belfast

There is some disagreement as to the extent to which the practice of employing Petitions of Concern has conformed to the underpinning intention of the provision. There is merit in designing a mechanism, either through Standing Orders or by means of a determination of the Speaker (on advice), whereby the use of Petitions of Concern is more regulated and the content conforms to an agreed understanding of what constitutes a 'key decision'. This is one aspect of the functioning of the Assembly where reform could enhance public confidence in the legislature, as it would be seen to prevent use of the Petition of Concern mechanism for ethno-national advantage.

Extract from Hansard report of 23/04/13:

Professor Galligan:…the use of petitions of concern seems to have extended beyond the key community-specific interest that it was intended to address. Therefore, there is scope for a number of initiatives on that, some of which could be undertaken independently of other reforms. One could be to clarify the circumstances in which a petition of concern could be invoked, possibly confining it to legislation only. Another would be to introduce a qualified majority for non-legislative matters on which a petition of concern is lodged. A third, more radical departure would be to require a qualified majority for all issues that are related to community designation and cross-community voting. That would remove the parallel-consent requirement for key decisions.

Professor Christopher McCrudden, University of Oxford; Professor John McGarry, Queen's University Canada; Professor Brendan O'Leary, University of Pennsylvania; Dr Alex Schwartz, Queen's University Canada

…the Petition of Concern has occasionally been abused to block decisions which have nothing to do with community-specific vital nationalist or unionist interests. Regarding this possibility, we would encourage the Assembly to consider ways in which it might give its Presiding Officer in conjunction with a suitably composed committee of the Assembly means to inhibit what we might call pseudo-petitions of concern.

Extract from Hansard report of 05/03/13:

Professor O'Leary:…we saw no reason why the Assembly could not set up an informal committee under the presiding officer to establish some kind of protocols in which party elders or senior party members might meet to try to inhibit misuse of the petition of concern. It would be up to them to devise their own proposals. We did not presume to sketch quite what form those would take, but we thought it best for the Assembly to come up with an internal mechanism for handling those questions. I am thinking out loud here, but it could be, for example, that when the presiding officer is elected, together with his or her deputies, they would give guidance as to how they would treat petitions of concern.

Academics and Other Stakeholders

Professor Wilford, Queen's University Belfast

Re key decisions requiring cross-community support: one addition, namely the process of nominating & electing FM & dFM. This was the *status quo ante* in the first mandate… I appreciate that the change effected at St Andrews dispensed with the requirement for a ratifying/legitimising cross-community vote within the Assembly for the nominees but, as devolution has bedded-down, I think there may well be a case for resurrecting the procedure, thereby adding it to the list of 'key decisions': i.e. it would require a weighted vote that realizes the principle of cross-community consent.

However, the case for its retention rests on the opportunity it supplies for a belt and braces safeguard to parties on issues not routinely subject to the key decision tests as set out in the NI Act 1998: and it would, admittedly, be an exhaustive and probably futile task to attempt to extend the list of 'key decisions' subject to such a vote.

Extract from Hansard report of 26/02/13:

I would like to see the Assembly move towards a weighted majority system, but I can understand fully why parties might want to retain a petition of concern. You cannot simply list all the issues that should be designated as key decisions. I think that the list would probably be too long and, in a sense, the petition of concern procedure is an economic way of designating an issue as a key decision. It is about certainty and reducing uncertainty. If parties have that device available to them, they can ensure that they will have a safeguard if anything is likely to cause conflict or disruption among parties. I understand the reasoning behind that, but I think that the weighted majority system should, in itself, provide a sufficient assurance that no particular issue could be railroaded through the Assembly.

…if you move to a system of weighted majority on what are currently defined as key decisions, unless there were to be a massive seismic shift in voting patterns in Northern Ireland, that 65% is a safe figure to ensure that no issue could be progressed in the face of significant opposition from one or other party block in the Assembly. The alternative would be to ramp up the petition of concern device and begin to add to the list of what constitutes key decisions. For example, in the first Assembly, the Programme for Government was subject to a cross-community vote. That was then subsumed into the vote on the Budget, so that discrete, separate vote was then dispensed with. The only change that I would make in respect of what is subject to a key decision is the vote for First Minister and deputy First Minister.

Centre for Opposition Studies

The invoking of community designations on a regular basis in this way reinforces sectarian divisions, and seems to go beyond the intended purpose of the mechanism. It would seem appropriate to look at restricting their use by raising the number of petitioners required, or adopting specific criteria which a petition should meet to be accepted by the Speaker.

Platform for Change

Alternative or additional protection could be provided by a requirement for a super-majority vote in the assembly. This, however, should be confined to issues of strategic significance, so that the procedure could not be abused in an opportunistic manner as indicated. It should therefore be restricted to the appointment of an executive after an election and the agreement of the Programme for Government, which—as in fact stipulated in the Belfast agreement—should once more be subject to annual iteration.

10. Options Paper: Adjusting Threshold for Petitions of Concern

Adjusting the threshold of signatures required for a Petition of Concern

The Committee reaffirmed its statement in its previous Report on *'D'Hondt, Community Designation and Provisions for Opposition'* with regard to:

> *"a possible proportional increase in the number of MLA signatures (relative to the size of the Assembly) which can trigger a Petition of Concern. All Parties represented on the Committee recognised that, should the number of MLAs in the Assembly be reduced, this would present an opportunity to consider changing the proportional number of MLA signatures required for a Petition of Concern"*

At the 11th February 2014 Committee meeting, there was some consensus among Members present regarding the threshold of signatures required for a Petition of Concern. Representatives from the **DUP** and **Sinn Féin** both expressed a preference for **Option a)**, which proposes that, in the event of a change in the number of MLAs in the Assembly, the threshold for signatures would be adjusted accordingly. However, the representative from the **UUP** indicated a preference for *"… increasing the proportion of those required for a Petition of Concern …"*. The wording of **Option b)** has been amended to more clearly reflect the distinction between the two options.

Draft Conclusion – Options for Committee consideration

Option a) The Committee agreed that, should the number of MLAs in the Assembly be reduced, there should be a proportional change in the number of MLA signatures required to trigger a Petition of Concern.

OR

Option b) The Committee agreed that there should be an increase in the number of MLA signatures required to trigger a Petition of Concern.

The representatives from [ ] stated that they were unable to support this conclusion.

Background Points

This would require amendment to the 1998 Act.

Comments below drawn from responses to the 'Call for Evidence' paper for the *'Review of D'Hondt, Community Designation and Provisions for Opposition'* unless otherwise indicated:

Political Parties of the NI Assembly
The Alliance Party *No specific comment on this matter.*
DUP **Committee meeting 14th January 2014** "…if the current status quo in this place remains, there is not much point in talking about changing this, but if the structures change, if the number of MLAs change or the protocols change, that is when this would come into play and we would then look at that."

Political Parties of the NI Assembly

SDLP

Response to Options Paper, November 2013

"The SDLP does not believe that the voting threshold surrounding petitions of concern should be adjusted."

Sinn Féin

Committee meeting 14th January 2014

"…Christopher McCrudden and Brendan O'Leary, they made the point that if there was an agreement around the protocols of when it is appropriate to use a Petition of Concern, that then informs the discussion about how many MLAs are required. They made the point that if the Speaker and Deputy Speakers came together at the start of a mandate and agreed, for example, that Petitions of Concern should only be used in relation to legislation rather than a Private Member's Motion, that change in protocol would have an impact on the threshold of signatures needed for a Petition of Concern. So, we would need to agree the protocols first, if we are going to change our approach to Petitions of Concern, before we talk about thresholds."

"…you would be looking for party agreement on whether that was the right thing to do. Rather than leaving it up to the Speaker, you would nearly be giving that direction, but the direction would have to come from all the Parties. This Committee might come up with a recommendation as to how we can go forward regarding Petitions of Concern, because I think there would be broad agreement that, at times, they have been used in a way that they

might not have been designed to; I think we all accept that. So it is a matter of trying to whittle down how we use it appropriately in the future."

UUP

No specific comment on this matter.

Academics and Other Stakeholders

Professor Birrell, University of Ulster

Extract from Hansard report of 19/03/13:

…This interpretation has become misleading due to provision for petitions of concern, signed by 30 members and leading to a vote requiring cross-community support.

This in effect opens up every vote to a cross-community vote which can lead to further impasses and dominance of communal approaches.

Suggestions for less availability of petitions of concern would relate to requirement for support by a higher proportion of MLAs (50%). Any restriction on content, for example, only primary legislation or only Executive supported petitions, would be difficult to implement.

As long as you have petitions of concern, one option would be to have some kind of figure. However, that would be quite a radical change. The other option is to go back to the original idea and to define more closely what is meant by a petition of concern. I am sorry; that does not fully answer your question, but I take your point that 50% might not be appropriate.

Academics and Other Stakeholders

Professor Galligan, Queen's University Belfast

Extract from Hansard report of 23/04/13:

…instead of a petition of concern being triggered by 30 signatures, the test or the threshold should be much higher than that. A petition of concern should require, for example, a qualified majority of the Members of the Assembly. That would mean that it would require more than any individual party alone — either the DUP or Sinn Féin — to lodge a petition of concern.

… I suggest that 30 signatures is too low a threshold, irrespective of whether three parties could each achieve 30 signatures.

There has to be an agreement that an issue, whatever it may be, is a genuine issue of concern that reflects a general concern within the Assembly. That requires more than just 30 Members to indicate a concern. Maybe it could be through two parties. However, maybe instead of it being party related, it could be Member related: the threshold could be moved up to whatever 55% or 60% of the membership of the Assembly is, so that there is some way of moving a petition of concern and not using it as a blocking mechanism, as has been said.

It seems to be that the point that can trigger a petition of concern is causing the problem. … What are the trigger mechanisms that alert that alarm bell? If 30 is too low, perhaps we should be raising it to prevent the alarm bell from being raised too often and unnecessarily. However, we also want to set it at a point that allows for a genuine expression of interest. So, I think that it is a matter of finding the formula that brings it back to what it was.

Professor Wilford, Queen's University Belfast

Extract from submission:

Re Petitions of Concern: 30 is not a 'magic' number, nor one cast in stone. … If it is to be changed, there *may* be a case for increasing the threshold (to 35% of members, n38) in part to reflect the proposal to displace designation in favour of a qualified weighted majority.

Extract from Hansard report of 26/02/13:

Professor Wilford: If one moves to weighted majority voting on key decisions, we should maybe increase the number of Members who are required to trigger a petition of concern. That would offset the possibility of that device being used vexatiously. You could build in a threshold that would frustrate that. However, you might then think that, if you pitch it too high, the opposition parties will be frustrated because they simply do not have access to that device. … Maybe it is 30, or maybe you should bump it up a bit. Lowering it would be an even more radical proposition, but the likelihood is that you would run into misuse of the device.

[Threshold of 35%] was lazy thinking on my part because of the suggestion that we were going to move away from that device and choose a weighted majority of 65% or two thirds, as some people suggested. The figure was more or less plucked out of the air when I was writing this paper. It was to ensure that it could not be used in a vexatious way. The frequency with which the petition of concern device has been used has increased across a range of measures, whether they are procedural, legislative or policy. It is a way of limiting recourse to that device because you could have a weighted majority system instead. I just took 65 from 100 and ended up with 35. It was as simplistic as that.

…if you move to a system of weighted majority on what are currently defined as key decisions, unless there were to be a massive seismic shift in voting patterns in Northern Ireland, that 65% is a safe figure to ensure that no issue could be progressed in the face of significant opposition from one or other party block in the Assembly. The alternative would be to ramp up the petition of concern device and begin to add to the list of what constitutes key decisions. For example, in the first Assembly, the Programme for Government was subject to a cross-community vote. That was then subsumed into the vote on the Budget, so that discrete, separate vote was then dispensed with. The only change that I would make in respect of what is subject to a key decision is the vote for First Minister and deputy First Minister.

11. Generic Financial costs associated with Ad Hoc Committees

Generic Financial Costs Associated With An Ad Hoc Committee

Staffing* 1 x AG4, 1 x AG6, 1 x AG7	£25,000
Travel Based on travel within UK, no overnight stay, up to 4 MLAs, 1 Secretariat staff Airfares, car parking, public transport, subsistence	£1,000
Refreshments Based on 2 meetings per week (one lunchtime meeting) over six weeks	£500
Printing of Report Based on 91 CD versions and 4 full copies of two-volume report.	£1,500
Total	**£28,000**

Please note:

Costs are estimates, based on a Committee meeting and reporting within the period of 30 working days (i.e. over six calendar weeks).

*Staffing costs are estimated for eight weeks, based on a Committee meeting for six weeks, plus one week either side for preparation for Committee/Report finalisation, printing and Plenary debate.

Staffing costs may vary depending on staffing situation at the time – e.g. whether appropriate staff are available to be transferred from other Committee Secretariats/whether temporary promotions are required. Staffing costs will also vary according to whether recess falls during the life of an Ad Hoc Committee.

12. Details of Petitions of Concern submitted since 1998

Paper Detailing Petitions Of Concern Submitted Since Establishment of Assembly In 1998 Highlighting Petitions Of Concern On Legislation

Mandate 2011-2015, Total POC (to November 2013): 23, Legislation: 7 (2 Bills)

	Petition	Brought by Nationalists or Unionists?	Signatories to Petition	Date considered in Plenary	Type of Business
Party representation following election: DUP: 38 SF: 29 UUP: 16 SDLP: 14 Alliance: 8 Green: 1 TUV: 1 Independent: 1	Transfer of Broadcasting Powers	Unionist	DUP	26/11/2013	PMB
	Transfer of Broadcasting Powers – Amendment 1	Unionist	DUP	26/11/2013	PMB (Private Members' Business)
	Call for an Inquiry into Allegations of Wrongful Political Interference in the Northern Ireland Housing Executive, Potential Breaches of the Ministerial Code of Conduct and Misleading the Assembly and the Committee for Social Development	Unionist	DUP	08/07/2013	PMB
	Consideration Stage: Planning Bill (NIA 17/11-15) - Amendment 21	Unionist	DUP	25/06/2013	ECB (Executive Committee Business)
	Consideration Stage: Planning Bill (NIA 17/11-15) - Amendment 23	Unionist	DUP	25/06/2013	ECB
	Consideration Stage: Planning Bill (NIA 17/11-15) - Amendment 24	Unionist	DUP	25/06/2013	ECB
	Marriage Equality at the Constitutional Convention	Unionist	DUP	29/04/2013	PMB
	FCS - Criminal Justice Bill (NIA 10/11-15) - Amendment 1	Nationalist and Other	Sinn Fein/ Alliance/ Green	12/03/2013	ECB
	Establishment of an Ad Hoc Committee	Unionist	DUP	26/02/2013	PMB

	Petition	Brought by Nationalists or Unionists?	Signatories to Petition	Date considered in Plenary	Type of Business
	CS - Criminal Justice Bill - Amendment 26	Nationalist	Sinn Féin/ SDLP	25/02/2013	ECB
	CS - Criminal Justice Bill - Amendment 24	Nationalist	Sinn Féin/ SDLP	25/02/2013	ECB
	CS - Criminal Justice Bill - Amendment 21	Nationalist	Sinn Féin/ SDLP	25/02/2013	ECB
	National Crime Agency	Nationalist	Sinn Féin/ SDLP	04/02/2013	PMB
	Commitment to Inclusivity, Mutual Respect, Peace and Democracy - Amendment 1	Nationalist	Sinn Féin/ SDLP	21/01/2013	PMB
	Report on complaints against Mr Jim Wells MLA	Unionist	DUP	19/11/2012	CB (Committee Business)
	Ad Hoc Committee on Conformity with Equality Requirements - Welfare Reform Bill	Nationalist	Sinn Féin/ SDLP	19/11/2012	CB
	Ad Hoc Committee on Conformity with Equality Requirements - Welfare Reform Bill - Amendment 1	Nationalist	Sinn Féin/ SDLP	19/11/2012	CB
	Marriage Equality (Revised Wording)	Unionist	DUP	01/10/2012	PMB
	Retention and Release of Information from Police Officers	Unionist	DUP	29/11/2011	PMB
	Murder of Pat Finucane - Amendment 1	Unionist	Sinn Féin/ SDLP	08/11/2011	PMB
	Murder of Pat Finucane	Unionist	DUP/UUP	08/11/2011	PMB
	A5 Dual Carriageway Project - Amendment 1	Nationalist	Sinn Féin/ SDLP	07/06/2011	PMB
	A5 Dual Carriageway Project	Unionist	DUP	07/06/2011	PMB

Mandate 2007-2011, Total POC: 33, Legislation: 18 (6 Bills)

	Petition	Brought by Nationalists or Unionists?	Signatories to Petition	Date considered in Plenary	Type of Business
Party representation following election: DUP: 36 SF: 28 UUP: 18 SDLP: 16 Alliance: 7 Green: 1 PUP: 1 Independent: 1	Planning Bill - Amendment 2	Unionist	DUP	21/03/2011	ECB
	Final Stage - Local Government (Disqualification) Bill	Unionist	DUP	09/03/2011	PMB
	Planning Bill - Amendment 102	Unionist	DUP	08/03/2011	ECB
	Planning Bill - Amendment 20	Unionist	DUP	08/03/2011	ECB
	Justice Bill - Amendment 11	Unionist	DUP/UUP	07/03/2011	ECB
	Justice Bill - Amendment 10	Unionist	DUP/UUP	07/03/2011	ECB
	Justice Bill - Amendment 9	Unionist	DUP/UUP	07/03/2011	ECB
	Justice Bill - Amendment 8	Unionist	DUP/UUP	07/03/2011	ECB
	Justice Bill - Amendment 6	Unionist	DUP/UUP	07/03/2011	ECB
	Justice Bill - Amendment 5	Unionist	DUP/UUP	07/03/2011	ECB
	Armed Forces and Veterans Bill - Clauses 2 through to 8 and the Long Title	Nationalist	Sinn Féin/ SDLP	15/02/2011	PMB
	Armed Forces and Veterans Bill - Clause 1	Nationalist	Sinn Féin/ SDLP	15/02/2011	PMB
	Caravans Bill - Amendment 15	Unionist	DUP	25/01/2011	PMB
	Caravans Bill - Amendment 14 New Clause	Unionist	DUP	25/01/2011	PMB
	Caravans Bill - Amendment 13	Unionist	DUP	25/01/2011	PMB
	Caravans Bill - Amendment 12	Unionist	DUP	25/01/2011	PMB
	Second Stage - Victims and Survivors (Disqualification) Bill	Nationalist	Sinn Féin/ SDLP	14/12/2010	PMB

	Petition	Brought by Nationalists or Unionists?	Signatories to Petition	Date considered in Plenary	Type of Business
	Final Stage - Local Government (Disqualification) Bill	Unionist	DUP	07/12/2010	Assembly Business (b/c not moved)
	Irish Language Strategy	Unionist	DUP/UUP	08/11/2010	PMB
	Proposed Rose Energy Incinerator at Glenavy	Unionist	DUP	27/09/2010	PMB
	Safe Passage to Gaza for the MV Rachel Corrie	Unionist	DUP	07/06/2010	PMB
	40th Anniversary of Disbanding of B-Specials and Formation of UDR	Nationalist	Sinn Féin/ SDLP	24/05/2010	PMB
	Northern Ireland Human Rights Commission	Nationalist	Sinn Féin/ SDLP	03/11/2009	PMB
	'Act on CO2' Advertising Campaign	Unionist	DUP	30/03/2009	PMB
	Dual Mandates	Unionist	DUP	10/03/2009	PMB
	North-South Ministerial Council	Nationalist	Sinn Féin/ SDLP	09/02/2009	PMB
	Civic Forum	Nationalist and Unionist	Sinn Féin/ SDLP/PUP	03/02/2009	PMB
	Irish Medium Primary School	Nationalist	Sinn Féin/ SDLP	24/06/2008	PMB
	Irish Medium Schools in Dungannon / South Tyrone	Nationalist	Sinn Féin/ SDLP	13/05/2008	PMB
	Forkhill Military Site	Nationalist	Sinn Féin/ SDLP	07/04/2008	PMB
	FIFA Eligibility Proposal	Nationalist	Sinn Féin/ SDLP	11/12/2007	PMB
	Irish-Medium Club Bank	Nationalist	Sinn Féin/ SDLP	13/11/2007	PMB
	Irish Language	Nationalist	Sinn Féin/ SDLP	09/10/2007	PMB

Assembly suspended October 2002-May 2007

Mandate 1998-2003, Total POC: 7, Legislation: 1 (1 Bill)

	Petition	Brought by Nationalists or Unionists?	Signatories to Petition	Date considered in Plenary	Type of Business
Party representation following election: UUP: 28 SDLP: 24 DUP: 20 Sinn Féin: 18 Alliance: 6 UKUP: 5 PUP: 2 Northern Ireland Women's Coalition: 2 Independent: 3	Strategic Investment and Regeneration of Sites Bill	Unionist	N/A (Assembly suspended from this date)	14/10/2002	
	Election of First Minister and Deputy First Minister	Unionist/ Nationalist/ Other	UUP/SDLP/ Alliance	05/11/2001	
	Motion to amend Standing Orders	Unionist	DUP/UKUP	05/11/2001	
	Northern Ireland Human Rights Commission	Nationalist and Other	SDLP/ Sinn Féin/ Alliance	25/09/2001	
	No Confidence in Minister of Education	Nationalist	SDLP/Sinn Féin	08/05/2001	
	Display of Easter Lilies in Parliament Buildings	Nationalist and Other	SDLP/ Sinn Féin/ Alliance/ NIWC	10/04/2001	
	Union Flag	Nationalist and Other	SDLP/ Sinn Féin/ Alliance	6/06/2000	

Appendix 6

Research Papers

Assembly Research Papers and Information Service Papers

1. An extract from the Research paper titled, 'Opposition, Community Designation and D'Hondt' – 4th December 2012

2. Research briefing paper on 'Standing Orders 35 and 60 of the Northern Ireland Assembly' – 19th February 2013

3. Research briefing paper on 'Additional information on Petitions of Concern' – 2nd May 2013

4. Research briefing paper on 'Standing Committees that examine conformity with human rights and equality issues in legislatures in the UK and Ireland' – 9 January 2014

5. Research briefing paper on 'Human Rights and Equality Proofing of Public Bills' – 10 February 2014

Research and Information Service
Briefing Paper

Paper 000/00 4 December 2012 NIAR 899-12

Ray McCaffrey & Tim Moore

Opposition, community designation and D'Hondt

Extract

4 Community designation

The Northern Ireland Act 1998 and Assembly Standing Orders make provision for Members to designate themselves as 'Nationalist', 'Unionist' or 'Other' at the first meeting of the Assembly after an election.

Section 5(A) of the Northern Ireland Act 1998 states:

> [(5A) Standing orders of the Assembly shall provide that a member of the Assembly designated in accordance with the standing orders as a Nationalist, as a Unionist or as Other may change his designation only if—
>
> (a) (being a member of a political party) he becomes a member of a different political party or he ceases to be a member of any political party;
>
> (b) (not being a member of any political party) he becomes a member of a political party.
>
> "designated Nationalist" means a member designated as a Nationalist in accordance with standing orders of the Assembly and "designated Unionist" shall be construed accordingly.

Standing Order 3 details the procedure to be followed in designating as Nationalist, Unionist or Other:

- (7) After signing the Roll a member may enter in the Roll a designation of identity, being "Nationalist", "Unionist" or "Other". A member who does not register a designation of identity shall be deemed to be designated "Other" for the purposes of these Standing Orders and the Northern Ireland Act 1998.
- (8) A member may change his or her designation of identity only if -
- (a) (being a member of a political party) he or she becomes a member of a different political party or he or she ceases to be a member of any political party;
- (b) (not being a member of any political party) he or she becomes a member of a political party.
- Any such change takes effect immediately after notification in writing is submitted to the Speaker.
- (9) The Clerk shall draw up a list of the party affiliations of the members. Each member shall have the opportunity to confirm or correct his or her affiliation as stated in that list[1].

There is disagreement on the principle behind the use of community designation in the Assembly. Critics have argued that:

> *…the designation system (acts) to "entrench communalist politics"[2]. According to critics, consociationalists promote group vetoes, because they assume that Northern Ireland will remain "forever divided, requiring skilful and continual management, rather than becoming a united, (though) diverse community with common interests and shared goals"[3]. Specifically, the system is seen as according more weight to nationalist and unionist votes than those members who do not wish to be 'pigeonholed' in communal terms, thereby providing a deterrent for cross-community parties and politics to emerge[4].*

However:

> *…advocates of consociationalism argue that they are merely legislating for what is already there and that any successful accommodation of competing ethno-nationalisms in Northern Ireland has to begin by accepting the saliency and relative historical fixity of ethno-national identities…Accordingly, consociationalists are apt to portray their clique as "pragmatists who, in accepting existing divisions within ethnically divided societies, strive to regulate them through complex constitutional engineering"[5].*

The 1998 Act sets out how community designation provides for a test of cross-community support for key decisions within the Assembly

> 4(5)In this Act—
>
> "the Assembly" means the New Northern Ireland Assembly, which after the appointed day shall be known as the Northern Ireland Assembly;
>
> "cross-community support", in relation to a vote on any matter, means—
>
> (a) the support of a majority of the members voting, a majority of the designated Nationalists voting and a majority of the designated Unionists voting; or
>
> (b) the support of 60 per cent of the members voting, 40 per cent of the designated Nationalists voting and 40 per cent of the designated Unionists voting;

1 Standing Orders of the Northern Ireland Assembly October 2012

2 Wilson and Wilford quoted in Nagle and Clancy 2010

3 Farry quoted in Nagle and Clancy 2010

4 Nagle, John; Clancy, Mary-Alice C.. 2010., Shared Society or Benign Apartheid?: Understanding Peace-Building in Divided Societies. [online]. Palgrave Macmillan

5 Kerr quoted in Nagle and Clancy

The relationship between the PR voting system and community designation and the consequences of their use have been explained in a theoretical way as follows:

The principle of parity and the principle of proportionality imply roughly the same outcome for representation, or for decision-making power, only when the relevant peoples have roughly the same number of valid voters. Imagine that two key peoples in a polity are roughly balanced in size: people A comprises 47 per cent of the electorate; and people B comprises 43 percent; others (neither As nor Bs) comprise 10 per cent. Imagine further that all voters in each category vote for just one party of their ethnic category under a system of pure proportional representation (PR). In this example, achieving both proportionality, according to equality among individual voters, and parity between the peoples A and B, seems to be not too difficult.

In this case, the use of PR to elect legislators, and of a PR system to determine the executive, can be combined with a concurrent majority decision-making rule among the two peoples, A and B, over key matters.

Such concurrent majority decision-making can be achieved explicitly through corporate naming (or 'designation') of the peoples, such as: 'A majority of those deputies who represent people A and a majority of those deputies who represent people B as well as a majority in the parliament shall agree before legislation is passed regulating any aspect of policing or internal security.'

Such a rule, however, has consequences for the voting power of 'the others' (neither As nor Bs) who may not be pivotal—that is, capable of being decisive in the outcome of a vote[6].

Addressing these consequences in the operation of the Assembly some commentators have argued that:

In effect, there are two orders of Assembly members: in relation to key decisions there are those whose votes always "count" and those whose votes never do so. Not only is this patently undemocratic, in the particular case of the Alliance Party it is also richly ironic. Since its inception, it has been bi-confessional and committed to the promotion of positive cross-community relations and yet it is a casualty of this anomalous and wholly unnecessary procedure which could easily be surrendered in favour of weighted majority voting on key issues[7].

However, others contend that these concerns are overstated:

In fact, the votes of others always count – they count towards the majority (or supermajority) threshold. Similarly, (it has also been argued) that "in practice the parallel consent rule implies that once a majority is secured within the assembly, the 'others' no longer count; at such a point, all that matters is whether or not there is a majority within both communities". Again, this is a very misleading way of characterising the cross-community consent procedures. It is true that once a majority is secured in a cross-community vote, the votes of others no longer count. But it is equally true that under a simple-majority decision the votes of others do not count once a majority is otherwise secured.

Perhaps what critics…really mean to say is that the votes of designated unionists and nationalists are more decisive than the votes of designated others.

This much is suggested by the Alliance Party in its 2001 submissions to the Review of the Northern Ireland Assembly. As the Alliance Party points out, the cross-community consent procedures effectively count the votes of designated unionists and designated nationalists twice – first with respect to the overall threshold in the Assembly, and again with respect to the community designation thresholds.

6 C. McCrudden & B. O'Leary, 'Courts and Consociations', Oxford University Press, (forthcoming), pp14-15

7 Rick Wilford 'Northern Ireland: The Politics of Constraint', Parliamentary Affairs vol 63 p137

So, in so far as the votes of others may be necessary to meet the majority or supermajority thresholds, their votes are not, strictly speaking, irrelevant. However, on a cross-community vote, the votes of designated unionists and nationalists are more likely than the votes of others to have a determinative effect on the outcome. This line of argument, at least, suggests a more precise way of formulating the problem[8].

A number of votes which cross-community support are specifically set out in the Northern Ireland Act 1998:

- changes to the schedule of reserved, transferred or excepted matters (Section 4(3))
- determination of the number of Ministers and their portfolios (Section 17(5))
- changes to the Ministerial Code (Section 28A(4))
- exclusion of Ministers from Office and exclusion of parties from holding Ministerial Office (Section 30)
- election of Presiding Officer (Section 39(7)) (also Principal Deputy Speaker and Deputy Speakers under Standing Orders)
- making, amending or repealing Standing Orders (Section 41(2))
- Petitions of Concern (Section 42)
- resolutions about reduction in remuneration (Section 47A(9))
- resolutions about reduction in financial assistance (Section 51A(8))
- censure resolutions (Section 51D(5))
- financial Acts of the Assembly (Section 63(3))
- draft budgets (Section 64)[9]

Regarding petitions of concern Section 42 (1) of the 1998 Act states that:

(1) If 30 members petition the Assembly expressing their concern about a matter which is to be voted on by the Assembly, the vote on that matter shall require cross-community support[10].

Standing Order 28[11] of the Assembly details the procedures to be followed in respect of Petitions of Concern:

> **28. Petition of Concern**
>
> (1) A Petition of Concern in respect of any matter shall be in the form of a notice signed by at least 30 members presented to the Speaker. No vote may be held on a matter which is the subject of a Petition of Concern until at least one day after the Petition of Concern has been presented.
>
> (2) Other than in exceptional circumstances, a Petition of Concern shall be submitted at least one hour before the vote is due to occur. Where no notice of the vote was signalled or such other conditions apply that delay the presentation of a Petition of Concern the Speaker shall determine whether the Petition is time-barred or not.

To date in the 2011-2015 mandate, nine Petitions of Concern have been tabled (six Unionist and three Nationalist). In the 2007-2011 mandate, 33 Petitions of Concern were tabled (20 Unionist and 13 Nationalist). Appendix 2 provides the title and date considered in plenary of all Petitions since 2007. It also signifies the political designation of those Members bringing the petition.

8 Alex Schwartz 'How unfair is cross-community consent? Voting power in the Northern Ireland Assembly'

9 Northern Ireland Act 1998 as amended

10 Section 42 of the Northern Ireland Act 1998 as amended

11 Standing Orders of the Northern Ireland Assembly:
http://www.niassembly.gov.uk/assembly-business/standing-orders/

Since 2007, the DUP have had the required numbers to present Petitions of Concern without the need to seek the support of other parties or Independents[12]. Currently, Sinn Féin requires the support of one other Member outside its party if it wishes to present a Petition of Concern. Table 1 shows the relative strength of each Assembly party in relation to cross-community support.

Table 1: Party strength in relation to cross-community support

Party	No. of Members	Designation	Percentage of total Members	Percentage of voting block (Nationalist or Unionist)
Alliance	8	Other	7.4	-
DUP	38	Unionist	35.2	67.9
Green	1	Other	0.9	-
Sinn Féin	29	Nationalist	26.9	67.4
SDLP	14	Nationalist	13.0	32.6
TUV	1	Unionist	0.9	1.8
UUP	15	Unionist	13.9	26.8
Independents	2	Unionist	1.9	3.6

Research from 2003 raised the prospect of replacing community designation with a weighted majority voting system:

In terms of changing parliamentary voting procedures, it would be a constructive step forward if the parallel consent mechanism for key decisions was removed and replaced with qualified majority voting, with a sufficiently high threshold (e.g., three-fifths or two-thirds of assembly members present and voting). This would still ensure that no decision could be taken against significant opposition in one of the two communities. It would also mean that the principle of designation could be removed - a small but significant symbolic step towards breaking down sectarian divisions in the Assembly[13].

The use of community designation is not unique to the Northern Ireland Assembly, Belgium provides another example, like Northern Ireland, of consociational democracy in which:

proportional representation, executive power-sharing and grand coalitions, minority vetoes are key elements…At the national level in Belgium, in response to Francophones' fear that they might be outvoted and dominated politically by the Flemish majority, Belgium has put in place a variety of institutional mechanisms that prevent Flemish domination through majority rule[14].

As part of the consociational arrangement, the Belgian Parliament is divided into a French-speaking group and Dutch-speaking group:

For critical political decision-making in the Belgian government, the elected members of each of the two houses of the legislature were divided into a French-language and a Dutch-language group…When the parliamentary language groups had a role to play, the constitution required a concurrent majority of votes in each language group of each house, but that concurrent majority was further qualified. The total of the affirmative votes cast in the two language groups was required to amount to at least two-thirds of the votes cast. In addition,

12 The DUP obtained 30 seats following the 2003 Assembly election but the Assembly did not meet.

13 http://cain.ulst.ac.uk/ethnopolitics/wolff03.pdf

14 Robert Mnookin & Alain Verbeke 'Persistent nonviolent conflict with no reconciliation: the Flemish and Walloons in Belgium' 2009 (available at www.law.duke.edu/journals/lcp)

there was an "alarm bell" procedure, which to be triggered, required a motion signed by at least three-quarters of the members of one of the language groups to be moved, stating that the provisions of a specified bill were likely to be seriously detrimental to relations between the two language communities. Upon the alarm bell being rung, parliamentary proceedings were suspended and the motion was referred to the Cabinet, which was required to give a reasoned opinion on it within thirty days and to request the parliamentary chamber concerned to vote either on this opinion or on the Bill. These provisions were designed primarily to protect the speakers of the country's minority language, i.e. French. The Cabinet was required to have as many French-speaking as Dutch-speaking Ministers[15].

The provisions relating to language designation are given effect in the Rules of the Belgian Parliament[16]. The procedure therefore bears similarities to that operating in the Northern Ireland Assembly, but the threshold appears to be set higher and applies only to legislation, rather than ordinary motions. There is nothing similar to a petition of concern which in certain circumstances may in effect allow a single party a veto on any issue.

15 C. McCrudden & B. O'Leary, 'Courts and Consociations', Oxford University Press, (forthcoming), p.50

16 http://www.dekamer.be/kvvcr/pdf_sections/publications/reglement/reglementE.pdf

Appendix 2 – Petitions of Concern

	Petition	Brought by Nationalists or Unionists?	Signatories to Petition	Date considered in Plenary
Mandate 2011-2015				
Party representation following election: DUP: 38 SF: 29 UUP: 16 SDLP: 14 Alliance: 8 Green: 1 TUV: 1 Independent: 1	FCS - Criminal Justice Bill (NIA 10/11-15) - Amendment 1	Nationalist and Other	Sinn Fein/ Alliance/ Green	12/03/2013
	Establishment of an Ad Hoc Committee	Unionist	DUP	26/02/2013
	CS - Criminal Justice Bill - Amendment 26	Nationalist	Sinn Féin/ SDLP	25/02/2013
	CS - Criminal Justice Bill - Amendment 24	Nationalist	Sinn Féin/ SDLP	25/02/2013
	CS - Criminal Justice Bill - Amendment 21	Nationalist	Sinn Féin/ SDLP	25/02/2013
	National Crime Agency	Nationalist	Sinn Féin/ SDLP	01/02/13
	Commitment to Inclusivity, Mutual Respect, Peace and Democracy - Amendment 1	Nationalist	Sinn Féin/ SDLP	21/01/2013
	Report on complaints against Mr Jim Wells MLA	Unionist	DUP	19/11/2012
	Ad Hoc Committee on Conformity with Equality Requirements - Welfare Reform Bill	Nationalist	Sinn Féin/ SDLP	19/11/2012
	Ad Hoc Committee on Conformity with Equality Requirements - Welfare Reform Bill - Amendment 1	Nationalist	Sinn Féin/ SDLP	19/11/2012
	Marriage Equality (Revised Wording)	Unionist	DUP	01/10/2012
	Retention and Release of Information from Police Officers	Unionist	DUP	29/11/2011
	Murder of Pat Finucane - Amendment 1	Unionist	DUP/UUP	08/11/2011
	Murder of Pat Finucane	Unionist	DUP/UUP	08/11/2011
	A5 Dual Carriageway Project - Amendment 1	Nationalist	Sinn Féin/ SDLP	07/06/2011
	A5 Dual Carriageway Project	Unionist	DUP	07/06/2011

	Petition	Brought by Nationalists or Unionists?	Signatories to Petition	Date considered in Plenary
Mandate 2007-2011				
Party representation following election: DUP: 36 SF: 28 UUP: 18 SDLP: 16 Alliance: 7 Green: 1 PUP: 1 Independent: 1	Planning Bill - Amendment 2	Unionist	DUP	21/03/2011
	Final Stage - Local Government (Disqualification) Bill	Unionist	DUP	09/03/2011
	Planning Bill - Amendment 102	Unionist	DUP	08/03/2011
	Planning Bill - Amendment 20	Unionist	DUP	08/03/2011
	Justice Bill - Amendment 11	Unionist	DUP/UUP	07/03/2011
	Justice Bill - Amendment 10	Unionist	DUP/UUP	07/03/2011
	Justice Bill - Amendment 9	Unionist	DUP/UUP	07/03/2011
	Justice Bill - Amendment 8	Unionist	DUP/UUP	07/03/2011
	Justice Bill - Amendment 6	Unionist	DUP/UUP	07/03/2011
	Justice Bill - Amendment 5	Unionist	DUP/UUP	07/03/2011
	Armed Forces and Veterans Bill - Clauses 2 through to 8 and the Long Title	Nationalist	Sinn Féin/ SDLP	15/02/2011
	Armed Forces and Veterans Bill - Clause 1	Nationalist	Sinn Féin/ SDLP	15/02/2011
	Caravans Bill - Amendment 15	Unionist	DUP	25/01/2011
	Caravans Bill - Amendment 14 New Clause	Unionist	DUP	25/01/2011
	Caravans Bill - Amendment 13	Unionist	DUP	25/01/2011
	Caravans Bill - Amendment 12	Unionist	DUP	25/01/2011
	Second Stage - Victims and Survivors (Disqualification) Bill	Nationalist	Sinn Féin/ SDLP	14/12/2010
	Final Stage - Local Government (Disqualification) Bill	Unionist	DUP	07/12/2010
	Irish Language Strategy	Unionist	DUP/UUP	08/11/2010
	Proposed Rose Energy Incinerator at Glenavy	Unionist	DUP	27/09/2010
	Safe Passage to Gaza for the MV Rachel Corrie	Unionist	DUP	07/06/2010
	40th Anniversary of Disbanding of B-Specials and Formation of UDR	Nationalist	Sinn Féin/ SDLP	24/05/2010
	Northern Ireland Human Rights Commission	Nationalist	Sinn Féin/ SDLP	03/11/2009
	'Act on CO2' Advertising Campaign	Unionist	DUP	30/03/2009
	Dual Mandates	Unionist	DUP	10/03/2009

	Petition	Brought by Nationalists or Unionists?	Signatories to Petition	Date considered in Plenary
	North-South Ministerial Council	Nationalist	Sinn Féin/ SDLP	09/02/2009
	Civic Forum	Nationalist and Unionist	Sinn Féin/ SDLP/PUP	03/02/2009
	Irish Medium Primary School	Nationalist	Sinn Féin/ SDLP	24/06/2008
	Irish Medium Schools in Dungannon / South Tyrone	Nationalist	Sinn Féin/ SDLP	13/05/2008
	Forkhill Military Site	Nationalist	Sinn Féin/ SDLP	07/04/2008
	FIFA Eligibility Proposal	Nationalist	Sinn Féin/ SDLP	11/12/2007
	Irish-Medium Club Bank	Nationalist	Sinn Féin/ SDLP	13/11/2007
	Irish Language	Nationalist	Sinn Féin/ SDLP	09/10/2007

Assembly suspended October 2002-May 2007

	Petition	Brought by Nationalists or Unionists?	Signatories to Petition	Date considered in Plenary
Mandate 1998-2003				
Party representation following election: UUP: 28 SDLP: 24 DUP: 20 Sinn Féin: 18 Alliance: 6 UKUP: 5 PUP: 2 Northern Ireland Women's Coalition: 2 Independent: 3	Strategic Investment and Regeneration of Sites Bill	Unionist	N/A (Assembly suspended from this date)	14/10/2002
	Election of First Minister and Deputy First Minister	Unionist/ Nationalist/ Other	UUP/SDLP/ Alliance	05/11/2001
	Motion to amend Standing Orders	Unionist	DUP/UKUP	05/11/2001
	Northern Ireland Human Rights Commission	Nationalist and Other	SDLP/Sinn Féin/Alliance	25/09/2001
	No Confidence in Minister of Education	Nationalist	SDLP/Sinn Féin	08/05/2001
	Display of Easter Lilies in Parliament Buildings	Nationalist and Other	SDLP/ Sinn Féin/ Alliance/ NIWC	10/04/2001
	Union Flag	Nationalist and Other	SDLP/Sinn Féin/Alliance	6/06/2000

Research and Information Service
Briefing Paper

Paper 000/00 19 February 2013 NIAR 947-12

Standing Orders 35 and 60 of the Northern Ireland Assembly

The information contained in this briefing note should not be relied upon as legal or professional advice, or as a substitute for it.

1 Introduction

This briefing paper has been prepared for the Committee on Procedures following its meeting on 27 November 2012. At that meeting, Members had agreed to commission research on the background to Standing Order 60 of the Northern Ireland Assembly1.

2 Background

The Welfare Reform Bill

To date, there has been only one Committee established under Standing Order 60. On 20 November 2012 the Speaker announced that he had received a valid petition of concern in relation to the Welfare Reform Bill. This triggered SO 60(4) whereby a vote was taken to decide if the Bill could proceed without the need to refer to it to the Ad Hoc Committee. This was a potentially confusing scenario which the Speaker himself recognised:

The vote must be passed with parallel consent. I know that these are complex issues, and I know that when we bring a petition of concern here what it normally does. In fact, the petition

1 Standing Orders as amended 16 October 2012: http://www.niassembly.gov.uk/assembly-business/standing-orders/

of concern being presented actually does the opposite, so it is trying to be as clear as possible to the House and Members2.

In the event, parallel consent was not achieved and the Bill was therefore referred to the Ad Hoc Committee.

3 Standing Orders 35 and 60

It is useful to consider the text of the Belfast (Good Friday) Agreement in relation to the current relevant Standing Orders of the Assembly. Furthermore, Standing Order 60 should be considered in conjunction with Standing Order 35, in particular 35(2). In addition, the function performed by Petitions of Concern (SO28) is important to understanding the impact of these Standing Orders. The relevant sections of the Agreement and the text of SOs 28, 60 along with the relevant sections of 35 are reproduced below (the full text of SO 35 is reproduced in Appendix 1):

Figure 1: Extract from the Belfast (Good Friday) Agreement and relevant Standing Orders

Belfast (Good Friday) Agreement	Current Standing Orders
5. There will be safeguards to ensure that all sections of the community can participate and work together successfully in the operation of these institutions and that all sections of the community are protected, including: (d) arrangements to ensure key decisions are taken on a cross-community basis; (i) either parallel consent, i.e. a majority of those members present and voting, including a majority of the unionist and nationalist designations present and voting; (ii) or a weighted majority (60%) of members present and voting, including at least 40% of each of the nationalist and unionist designations present and voting. Key decisions requiring cross-community support will be designated in advance, including election of the Chair of the Assembly, the First Minister and Deputy First Minister, standing orders and budget allocations. In other cases such decisions could be triggered by a petition of concern brought by a significant minority of Assembly members (30/108).	Standing Order 28 (1) A Petition of Concern in respect of any matter shall be in the form of a notice signed by at least 30 members presented to the Speaker. No vote may be held on a matter which is the subject of a Petition of Concern until at least one day after the Petition of Concern has been presented. (2) Other than in exceptional circumstances, a Petition of Concern shall be submitted at least one hour before the vote is due to occur. Where no notice of the vote was signalled or such other conditions apply that delay the presentation of a Petition of Concern the Speaker shall determine whether the Petition is time-barred or not.

2 Official Report, 11 November 2012: http://www.niassembly.gov.uk/Assembly-Business/Official-Report/Reports-12-13/20-November-2012/#2

Belfast (Good Friday) Agreement	Current Standing Orders
12. The above special procedure (this refers to Paragraph 11) shall be followed when requested by the Executive Committee, or by the relevant Departmental Committee, voting on a cross-community basis.	Standing Orders 35(1) and (2) 35. Public Bills: Equality Issues (1) For the purpose of obtaining advice as to whether a Bill, draft Bill or proposal for legislation is compatible with equality requirements (including rights under the European Convention on Human Rights) the Assembly may proceed on a motion made in pursuance of paragraph (2) (2) Notice may be given by – (a) any member of the Executive Committee, or (b) the chairperson of the appropriate statutory committee (or another member of that statutory committee acting on the chairperson's behalf), of a motion "That the….Bill (or draft Bill or proposal for legislation) be referred to an Ad Hoc Committee on Conformity with Equality Requirements".
11. The Assembly may appoint a special Committee to examine and report on whether a measure or proposal for legislation is in conformity with equality requirements, including the ECHR/Bill of Rights. The Committee shall have the power to call people and papers to assist in its consideration of the matter. The Assembly shall then consider the report of the Committee and can determine the matter in accordance with the cross-community consent procedure. 13. When there is a petition of concern as in 5(d) above (this refers to paragraph 5d of the Agreement), the Assembly shall vote to determine whether the measure may proceed without reference to this special procedure. If this fails to achieve support on a cross-community basis, as in 5(d)(i) above, the special procedure shall be followed.	Standing Order 60 60. Ad Hoc Committee on Conformity with Equality Requirements (1) The Assembly may establish an ad hoc committee to examine and report on whether a Bill or proposal for legislation is in conformity with equality requirements (including rights under the European Convention on Human Rights or any Northern Ireland Bill of Rights). (2) The committee may exercise the power in section 44(1) of the Northern Ireland Act 1998. (3) The Assembly shall consider all reports of the committee and determine the matter in accordance with the procedures on cross-community support within the meaning of section 4(5) of the Northern Ireland Act 1998. (4) Where there is a Petition of Concern the Assembly shall vote to determine whether the measure or proposal for legislation may proceed without reference to the above procedure. If this fails to achieve support on a parallel consent basis the procedure as at (1) – (3) above shall be followed.

Furthermore, Section 13 of the Northern Ireland Act 1998 contains the following provision:

(3) Standing orders—

(a) shall include provision for establishing such a committee as is mentioned in paragraph 11 of Strand One of the Belfast Agreement;

(b) may include provision for the details of a Bill to be considered by the committee in such circumstances as may be specified in the orders3.

Parts of paragraphs **11 and 13** of the Agreement have been translated into what is now SO 60(1), (3) and (4), albeit some of the wording has changed.

3 Northern Ireland Act 1998, section 13 (LexisNexis)

Paragraph **12** has been translated into the current SO 35(2). However, the words "voting on a cross-community basis" have been omitted. Instead, SO 35(2) refers to any member of the Executive Committee or the chairperson of the appropriate statutory committee being able to give notice that a Bill, draft Bill or proposal be referred to an Ad Hoc Committee. Furthermore, there is no provision in Standing Orders for statutory (departmental) committees to vote on a cross-community basis.

The Executive Committee may however vote on a cross-community basis:

In accordance with Section 28A(8) it is the duty of the Chairmen of the Executive Committee to seek to secure that decisions of the Executive Committee are reached by consensus wherever possible: if consensus cannot be reached, a vote may be taken, and if any 3 members of the Executive Committee require the vote on a particular matter which is to be voted on by the Executive Committee to require cross community support, any vote on that matter in the Executive Committee shall require cross community support in the Executive Committee. "Cross community support" shall have the same meaning as set out in Section 4(5) of the Act. A quorum of 7 members will be required for any vote. The requirement for cross-community support must be requested prior to a vote actually commencing4.

Tracing the evolution of the relevant Standing Orders

The Initial Standing Orders of the New Northern Ireland Assembly were notified to the Presiding Officer by the Secretary of State for Northern Ireland in accordance with paragraph 10(1) of the Schedule to the Northern Ireland (Elections) Act 1998.

Paragraph 15 of the Initial Standing Orders stated that the Assembly should establish Committees to assist in the consideration of matters referred to it. The Standing Orders Committee was established on this basis.

The Committee's 'Progress Report' (26 October 1998) included a "compendium of agreed Standing Orders for consideration of the Assembly". The Committee remitted certain Standing Orders because of:

- Uncertainty about the content of the Northern Ireland Bill (later the 1998 Act) which it is understood about to undergo heavy amendment and which will not become law until late November
- Because further discussion and work is required before decisions can be taken

At its meeting of 7 October 1998 the minutes of the Committee recorded the following entry: 'Conformity with Equality Requirements – consideration deferred until Bill becomes law'.

A fourth report of the Committee (8 March 1999) contains SO 53: 'Conformity with Equality Requirements – Special Committee on'. At this stage, the SO contained two additional paragraphs. The full SO as drafted at the time is reproduced below:

4 Northern Ireland Ministerial Code: http://www.northernireland.gov.uk/pc1952_ni_exec_min_code.pdf

Figure 2: Standing Order 53, March 1999

Standing Order 53 Conformity with Equality Requirements – Special Committee on

53. (1) The Assembly may establish an ad hoc committee to examine and report on whether a Bill or proposal for legislation is in conformity with equality requirements (including rights under the European Convention on Human Rights or any Northern Ireland Bill of Rights).

(2) The committee may exercise the power in section 44(1) of the Northern Ireland Act 1998.

(3) The Assembly shall consider all reports of the committee and determine the matter in accordance with the procedures on cross-community support within the meaning of section 4(5) of the Northern Ireland Act 1998.

(4) Where there is a Petition of Concern the Assembly shall vote to determine whether the measure or proposal for legislation may proceed without reference to the above procedure. If this fails to achieve support on a parallel consent basis the procedure as at (1) – (3) above shall be followed.

(5) A Petition of Concern in respect of any matter shall be in the form of a notice signed by at least 30 members presented to the Speaker. No vote may be held on a matter which is the subject of a Petition of Concern until at least one day after the Petition of Concern has been presented. (this is now SO 28)

(6) The Committee shall be constituted so that each party with a membership in the Assembly of 16 or more shall be entitled to 2 seats and each other party to 1 seat.

The same report also contains SO 32 – Public Bills: Equality Issues (now SO 35). The only significant wording change that appears to have taken place compared to the existing SO is the removal of "compatible with human rights" which has been replaced with "compatible with equality requirements".

These Standing Orders do not appear to have been a contentious subject in meetings of the Committee on Standing Orders, although this research has not had the benefit of verbatim transcripts from the meetings.

Debate in Plenary, 8 March 19991	**Mr Dodds**: …Amendment No 24, in Mr Robinson's name, relates to a petition of concern. The Standing Orders Committee had included this Standing Order, but it is in the wrong place. If Members look at Standing Order 53(5) as drafted in the compendium of Standing Orders, they will find that the Standing Order has been placed there. Members agreed that there should be a Standing Order in relation to a petition of concern. I think it was Mr Farren of the SDLP who said that he wanted to come back to this issue. Members looked at this Standing Order and agreed the text of it, but it has somehow ended up in 53(5), which deals with equality. However, it is a much more general Standing Order. Therefore what Mr Robinson is proposing, quite rightly, is to take it out of the equality section and put it into the voting section where it belongs. As far as the other matters are concerned, this is a repeat of what is in the Act. I heard what Mr McFarland has said, and this is clearly a matter which the Assembly can decide. It is something that might be more sensible to have complete, in that sense, when we are dealing with voting. But it is a matter for the Assembly to decide. These are important provisions, and the section on voting will mark a major improvement in the way that work is carried out in the Assembly. **Mr Farren**: The point relating to the petition of concern is to some extent well-made. Does it not follow that there is no need for the petition of concern in the equality section, in which it now appears, because it is couched in the general terms which are required for its general application to our proceedings? If this amendment were adopted, would this Standing Order be repeated unnecessarily? **Mr Dodds**: When we come to those amendments we can look at that. **Mr Durkan**: Mr Robinson has proposed an amendment which would remove the duplicated reference. **Mr Dodds**: I am grateful to the Member for that. The Initial Presiding Officer: Mr Robinson referred to amendments 83, 25, 23 and 50, but I do not think that he referred to No 24. I am not sure whether he was to speak to that amendment at this point. **Mr P Robinson**: Amendment 24 is one where we do not have a choice. Section 42 of the Northern Ireland Act 1998 says (1) "If 30 members petition the Assembly expressing their concern about a matter which is to be voted on by the Assembly, the vote on that matter shall require cross-community support. (2) Standing orders shall make provision with respect to the procedure to be followed in petitioning the Assembly under this section, including provision with respect to the period of notice required." This is one of the instances where there was a requirement in the legislation which had not been met by the report from the Committee on Standing Orders. Mr Dodds indicated that we had taken from section 53(5). However, subsection (5) relates to paragraph 1 of the proposed new Standing Order under amendment No 24. We have had to add paragraph (2) to comply with the legislation. That fulfils the period-of-notice requirement…

Debate in Plenary, 9 March 19992	**Mr. Durkan**: (Standing Order 53) purports to carry out paragraphs 11 to 13 of Strand One of the agreement, which in many ways was a special procedure to provide what might be termed "an equality reading" or "an equality hearing" and for the possible appointment of a committee, almost on an ad hoc basis. We were influential in having that aspect included in the agreement, and it was not intended as the basis for a permanent Standing Committee of this nature. Depending on the issue which might be referred to that procedure - and it might be a gender-equality issue, a race-equality issue or a communal-equality issue - and the policy area involved, such as health, employment or social services, parties might want to appoint different people to be on that committee to test and probe the issue concerned.

The decision to redesignate the Committee on Conformity with Equality Requirements as ad hoc, instead of Standing, resulted in some debate. This was resolved on 14 December 1999 in Plenary but was opposed by Sinn Féin on the grounds that it reduced the status of the Committee5.

Commentary on the relevant Standing Orders

There appears to be little direct commentary and/or research on the Standing Orders in question. However, a book6 published soon after the establishment of the Assembly provided a detailed analysis on the Agreement, Northern Ireland Act and Standing Orders. The relevant sections are reproduced below:

Figure 3: Commentary on relevant Standing Orders

The drafting (of paragraphs 11, 12 and 13 of the Agreement) shows signs of having been rushed; the word 'procedure' is confusingly used in two different ways. The three paragraphs concern equality of opportunity, not human rights – which are dealt with in the NIA 1998 under legislative competence and stages of bills (plus standing orders108). Section 13(3)(a) – part of stages of bills – states that standing orders shall include provision for establishing a committee under paragraph 11. They may include provision for a bill to be considered by the committee (but this seems not to be mandatory).
'The above special procedure' is strange wording, not least since consent procedure occurs in paragraph 11. It can only be a reference to the special committee on conformity with equality requirements (leading possibly to a determination by the assembly on a cross-community basis). Special procedure is not a reference to cross-community support. 'shall be followed when requested by the Executive Committee,' has now been written into SO 33(2). SO 32(2) goes further and states 'any member of the Executive Committee'. There is a conflict here, which is not resolvable by looking at section 13(3)(a) of the NIA1998. The United Kingdom and Irish governments are bound in international law to follow paragraph 12. The assembly has its standing orders, and, under section 41(1) of the NIA 1998, 'the proceedings of the Assembly shall be regulated by standing orders'. 'or by the relevant Departmental Committee,' is a reference to the statutory committees provided for in section 29 of the NIA 1998. However, the term departmental committee has been used above in paragraph 10. There is another conflict. Paragraph 12 refers to the committee requesting the special procedure (that is, appointment of a special committee). But SO 33(2) refers to the chairman of the committee. Again, the United Kingdom and Irish governments are bound by paragraph 12; the assembly must follow standing orders. 'voting on a cross-community basis.' This cannot mean that the executive committee, or statutory committee, votes on a cross-community basis. This is inconsistent with paragraph 5(d). And with section 4(3) of the NIA 1998. Only the assembly can so vote. The phrase is superfluous.

5 Official Report, 14 December 1999

6 Austen Morgan The Belfast Agreement: a practical legal analysis, The Belfast Press 2000

Research and Information Service
Briefing Paper

Paper 000/00 2 May 2013 NIAR 303-13

Ray McCaffrey

Additional information on Petitions of Concern

1 Introduction

This briefing provides further information on Petitions of Concern. The Assembly and Executive Review Committee requested this information at its meeting on 23 April 2013. The information is presented in a series of tables.

2 Petitions of Concern

The following table shows the numbers of Petitions of Concern by session and by community designation. Two Petitions submitted have been joint Unionist/Nationalist.

Table 1: Petitions of Concern submitted by community designation from 1998 to 2013

Session	Unionist	Nationalist	Joint Unionist/Nationalist
1998-99	0	0	0
1999-00	0	1	0
2000-01	0	2	0
2001-02	1	1	1 (Election of First Minister and Deputy First Minister)
2002-03	1	0	0

Session	Unionist	Nationalist	Joint Unionist/Nationalist
2003-04	Suspension October 2002 – May 2007[1]		
2004-05			
2005-06			
2006-07			
2007-08	0	6	0
2008-09	2	1	1 (Civic Forum)
2009-10	1	2	0
2010-11	17	3	0
2011-12	4	1	0
2012-13[2]	3	8	0
Total	**29**	**25**	**2**

1 At times during the period of suspension the Assembly operated in 'shadow' form in preparation for a return to devolved government.

2 Up to and including 30 April 2013

There is a fairly even split between Petitions submitted in respect of motions and legislation. However, it should be noted that almost half of petitions submitted against legislation relate to the Caravans Bill and the Justice Bill where Petitions have been submitted in respect of various amendments to these Bills.

Figure 1: Breakdown of Petitions of Concern by type

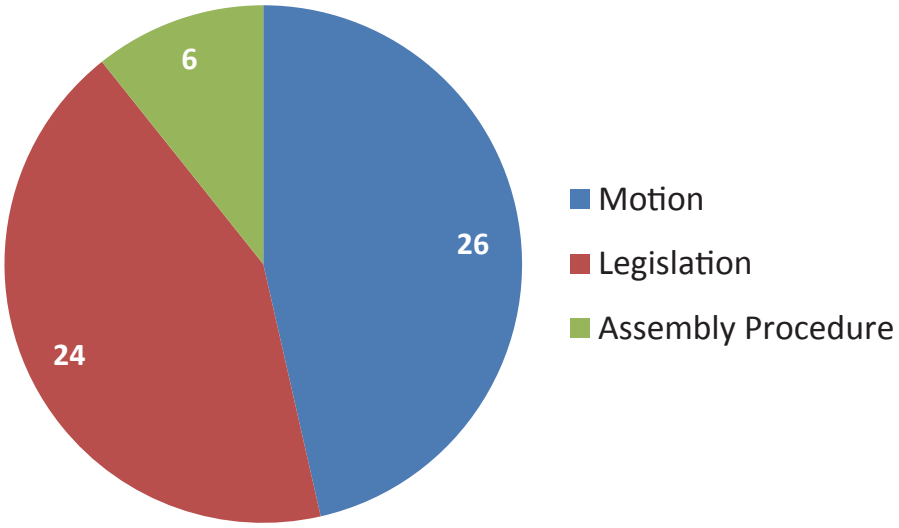


Table 2 places the number of Petitions in the context of the number of plenary sessions held in a session. Commentary is also provided in relation to periods of suspension.

Table 2: Petitions of Concern by session and mandate including number of plenaries by session and mandate and comments on periods of suspension

Number of plenaries by session and mandate		**Petitions of concern by session and mandate**
2011-15 mandate up to and including 30 April 2013	*Plenaries*	*Petitions of Concern*
2011-12	81	5
2012-13	67	11
Total	148	16
2007-11 mandate	*Plenaries*	*Petitions of Concern*
2006-07	18	0
2007-08	70	6
2008-09	69	4
2009-10	79	3
2010-11	52	20
Total	*288*	*33*
Hain and Transitional Assembly	*Plenaries*	*Petitions of Concern*
Hain Assembly	3	0
Transitional Assembly	16	0
Total	**19**	**0**
Comments Northern Ireland Assembly suspended: 14 October 2002 to 8 May 2007. Following the passing of the Northern Ireland Act 2006 the Secretary of State created a non-legislative fixed-term Assembly, whose membership consisted of the 108 members elected in the November 2003 election. This met for the first time on 15 May 2006, its remit was to make preparations for the restoration of devolved government to Northern Ireland and for a fully restored Assembly. Its discussions informed the next round of talks called by the British and Irish Governments, held at St Andrews in October 2006. The St Andrews Agreement of 13 October 2006 led to the establishment of the Transitional Assembly. The Northern Ireland (St. Andrews Agreement) Act 2006 set out a timetable to restore devolution in Northern Ireland.		
1998-2003	**Plenaries**	**Petitions of Concern**
1998-99	15	0
1999-00	21	1
2000-01	61	3
2001-02	63	3
2002-03	12	0
Total	*172*	*7*
Overall Total	**627**	**56**

Number of plenaries by session and mandate	Petitions of concern by session and mandate
Comments The Northern Ireland Assembly was elected on 25 June 1998 under the terms of the Northern Ireland (Elections) Act 1998 and met for the first time on 1 July 1998. The Assembly met in 'Shadow' form until legislative powers were transferred from 2 December 1999. Assembly suspended: 11 February to 30 May 2000. 24-hour technical suspension: 10 August 2001. 24-hour technical suspension: 22 September 2001.	

Table 3 provides more detailed information including:

- Subject of Petition
- Whether Petition brought by Unionists or Nationalists
- Signatories by party
- Date considered in plenary

Table 3: Details of Petitions of Concern submitted since establishment of Assembly in 1998

	Petition	Brought by Nationalists or Unionists?	Signatories to Petition	Date considered in Plenary
Mandate 2011-2015				
Party representation following election: DUP: 38 SF: 29 UUP: 16 SDLP: 14 Alliance: 8 Green: 1 TUV: 1 Independent: 1	FCS - Criminal Justice Bill (NIA 10/11-15) - Amendment 1	Nationalist and Other	Sinn Fein/ Alliance/ Green	12/03/2013
	Establishment of an Ad Hoc Committee	Unionist	DUP	26/02/2013
	CS - Criminal Justice Bill - Amendment 26	Nationalist	Sinn Féin/ SDLP	25/02/2013
	CS - Criminal Justice Bill - Amendment 24	Nationalist	Sinn Féin/ SDLP	25/02/2013
	CS - Criminal Justice Bill - Amendment 21	Nationalist	Sinn Féin/ SDLP	25/02/2013
	National Crime Agency	Nationalist	Sinn Féin/ SDLP	01/02/13
	Commitment to Inclusivity, Mutual Respect, Peace and Democracy - Amendment 1	Nationalist	Sinn Féin/ SDLP	21/01/2013
	Report on complaints against Mr Jim Wells MLA	Unionist	DUP	19/11/2012
	Ad Hoc Committee on Conformity with Equality Requirements - Welfare Reform Bill	Nationalist	Sinn Féin/ SDLP	19/11/2012
	Ad Hoc Committee on Conformity with Equality Requirements - Welfare Reform Bill - Amendment 1	Nationalist	Sinn Féin/ SDLP	19/11/2012

	Petition	Brought by Nationalists or Unionists?	Signatories to Petition	Date considered in Plenary
	Marriage Equality (Revised Wording)	Unionist	DUP	01/10/2012
	Retention and Release of Information from Police Officers	Unionist	DUP	29/11/2011
	Murder of Pat Finucane - Amendment 1	Unionist	Sinn Féin/ SDLP	08/11/2011
	Murder of Pat Finucane	Unionist	DUP/UUP	08/11/2011
	A5 Dual Carriageway Project - Amendment 1	Nationalist	Sinn Féin/ SDLP	07/06/2011
	A5 Dual Carriageway Project	Unionist	DUP	07/06/2011

	Petition	Brought by Nationalists or Unionists?	Signatories to Petition	Date considered in Plenary
Mandate 2007-2011				
Party representation following election: DUP: 36 SF: 28 UUP: 18 SDLP: 16 Alliance: 7 Green: 1 PUP: 1 Independent: 1	Planning Bill - Amendment 2	Unionist	DUP	21/03/2011
	Final Stage - Local Government (Disqualification) Bill	Unionist	DUP	09/03/2011
	Planning Bill - Amendment 102	Unionist	DUP	08/03/2011
	Planning Bill - Amendment 20	Unionist	DUP	08/03/2011
	Justice Bill - Amendment 11	Unionist	DUP/UUP	07/03/2011
	Justice Bill - Amendment 10	Unionist	DUP/UUP	07/03/2011
	Justice Bill - Amendment 9	Unionist	DUP/UUP	07/03/2011
	Justice Bill - Amendment 8	Unionist	DUP/UUP	07/03/2011
	Justice Bill - Amendment 6	Unionist	DUP/UUP	07/03/2011
	Justice Bill - Amendment 5	Unionist	DUP/UUP	07/03/2011
	Armed Forces and Veterans Bill - Clauses 2 through to 8 and the Long Title	Nationalist	Sinn Féin/ SDLP	15/02/2011
	Armed Forces and Veterans Bill - Clause 1	Nationalist	Sinn Féin/ SDLP	15/02/2011
	Caravans Bill - Amendment 15	Unionist	DUP	25/01/2011
	Caravans Bill - Amendment 14 New Clause	Unionist	DUP	25/01/2011
	Caravans Bill - Amendment 13	Unionist	DUP	25/01/2011
	Caravans Bill - Amendment 12	Unionist	DUP	25/01/2011
	Second Stage - Victims and Survivors (Disqualification) Bill	Nationalist	Sinn Féin/ SDLP	14/12/2010
	Final Stage - Local Government (Disqualification) Bill	Unionist	DUP	07/12/2010

	Petition	Brought by Nationalists or Unionists?	Signatories to Petition	Date considered in Plenary
	Irish Language Strategy	Unionist	DUP/UUP	08/11/2010
	Proposed Rose Energy Incinerator at Glenavy	Unionist	DUP	27/09/2010
	Safe Passage to Gaza for the MV Rachel Corrie	Unionist	DUP	07/06/2010
	40th Anniversary of Disbanding of B-Specials and Formation of UDR	Nationalist	Sinn Féin/ SDLP	24/05/2010
	Northern Ireland Human Rights Commission	Nationalist	Sinn Féin/ SDLP	03/11/2009
	'Act on CO2' Advertising Campaign	Unionist	DUP	30/03/2009
	Dual Mandates	Unionist	DUP	10/03/2009
	North-South Ministerial Council	Nationalist	Sinn Féin/ SDLP	09/02/2009
	Civic Forum	Nationalist and Unionist	Sinn Féin/ SDLP/PUP	03/02/2009
	Irish Medium Primary School	Nationalist	Sinn Féin/ SDLP	24/06/2008
	Irish Medium Schools in Dungannon / South Tyrone	Nationalist	Sinn Féin/ SDLP	13/05/2008
	Forkhill Military Site	Nationalist	Sinn Féin/ SDLP	07/04/2008
	FIFA Eligibility Proposal	Nationalist	Sinn Féin/ SDLP	11/12/2007
	Irish-Medium Club Bank	Nationalist	Sinn Féin/ SDLP	13/11/2007
	Irish Language	Nationalist	Sinn Féin/ SDLP	09/10/2007

Assembly suspended October 2002-May 2007

	Petition	Brought by Nationalists or Unionists?	Signatories to Petition	Date considered in Plenary
Mandate 1998-2003				
Party representation following election: UUP: 28 SDLP: 24 DUP: 20 Sinn Féin: 18 Alliance: 6 UKUP: 5 PUP: 2 Northern Ireland Women's Coalition: 2 Independent: 3	Strategic Investment and Regeneration of Sites Bill	Unionist	N/A (Assembly suspended from this date)	14/10/2002
	Election of First Minister and Deputy First Minister	Unionist/ Nationalist/ Other	UUP/SDLP/ Alliance	05/11/2001
	Motion to amend Standing Orders	Unionist	DUP/UKUP	05/11/2001
	Northern Ireland Human Rights Commission	Nationalist and Other	SDLP/Sinn Féin/Alliance	25/09/2001
	No Confidence in Minister of Education	Nationalist	SDLP/Sinn Féin	08/05/2001
	Display of Easter Lilies in Parliament Buildings	Nationalist and Other	SDLP/ Sinn Féin/ Alliance/ NIWC	10/04/2001
	Union Flag	Nationalist and Other	SDLP/Sinn Féin/Alliance	6/06/2000

Research and Information Service
Briefing Paper

Paper 000/00 9 January 2014 NIAR 942-12

Ray McCaffrey & Fiona O'Connell

Standing Committees that examine conformity with human rights and equality issues in legislatures in the UK and Ireland

1 Introduction

This briefing paper has been prepared following a request from the Assembly & Executive Review Committee. The Committee asked for information, where it exists, on the following:

- The remit and role of any Standing Committees in the UK and Ireland examining conformity with human rights and equality issues
- The membership of these Committees
- The main processes of these Committees, and in particular any common processes such as examining detailed human rights memoranda and/or equality impact assessments accompanying Government Bills.

2 The wider human rights framework

Legislation passed by the Northern Ireland Assembly, Scottish Parliament and National Assembly for Wales must be compatible with the European Convention on Human Rights (ECHR)[1]. The UK Parliament, as a sovereign Parliament, can pass legislation that is incompatible with the ECHR. The Supreme Court of the UK (unlike its US counterpart) cannot strike down an Act of Parliament, but can issue a declaration of incompatibility. It is then up to Parliament to decide what action it wishes to take and this is discussed below in relation to the Joint Committee.

Therefore, there are no directly comparable committees in any other legislature in the UK or the Republic of Ireland with a remit similar to the joint committee at Westminster. Neither, it would appear, is there provision elsewhere for the establishment of an Ad Hoc Committee on Conformity with Equality Requirements as provided for within the Northern Ireland Assembly. Furthermore, monitoring and compliance with human rights extends beyond legislative committees to human rights and equality commissions, making for a more complex framework. For example, in both Northern Ireland and the Republic of Ireland, the respective Human Rights Commissions can examine legislation for compliance with human rights issues and report to the legislatures their recommendations.

Specifically in the context of Northern Ireland, human rights and equality form a significant part of the Belfast Agreement and the subsequent Northern Ireland Act 1998. Indeed, the Agreement "envisaged that there would be a joint committee of representatives of the two Human Rights Commissions, North and South, as a forum for consideration of human rights issues in the island of Ireland. The joint committee will consider, among other matters, the possibility of establishing a charter, open to signature by all democratic political parties, reflecting and endorsing agreed measures for the protection of the fundamental rights of everyone living in the island of Ireland"[2].

In addition, of the seven different mechanisms for ensuring that legislation made by the Northern Ireland Assembly falls within its competence, "four relate specifically to human rights":

1) the Attorney General can…initiate court proceedings challenging the legislation's compatibility with 'Convention rights', i.e. those rights listed in the European Convention on Human Rights which were made part of domestic law throughout the UK by the Human Rights Act 1998.

2) the Secretary of State for Northern Ireland can refuse to submit a Bill for Royal Assent if he or she thinks it is incompatible with international human rights obligations.

3) the Northern Ireland Human Rights Commission has power to advise the Assembly that a Bill is incompatible with human rights

4) the compatibility of legislation with human rights can be challenged during court proceedings or by way of parallel court proceedings[3].

Therefore, while there are committees within the Scottish Parliament, National Assembly for Wales and the Oireachtas that to varying degrees examine issues around human rights and equality (and these are listed below), these are generally part of a broader remit with which a committee has been tasked.

1 See the relevant Acts establishing these institutions.

2 Belfast Agreement http://cain.ulst.ac.uk/events/peace/docs/agreement.pdf

3 Brice Dickson, Law in Northern Ireland, 2nd edition, Hart Publishing, 2013

3 Examples of committees

House of Commons and House of Lords Joint Committee on Human Rights

Historical context of the Committee

In its reflections on its work from 2001-05 the Committee commented on its establishment:

General consensus on the desirability of a parliamentary committee on human rights was achieved at an early stage in the debate over the incorporation of the ECHR into UK law through the Human Rights Act. It seems to us that this was primarily because a parliamentary committee was seen as an important part of the constitutional compromise that was struck between parliamentary sovereignty and human rights in the terms of the Act. As is well known, the Act was crafted in such a way as to preserve ultimate parliamentary sovereignty in the field of human rights. The UK courts may not strike down incompatible primary legislation. Instead, assuming they cannot construe legislation is such a way as to make it compatible with the Convention rights, they may make a declaration of incompatibility, leaving it up to Parliament and the Government to decide how the situation should be remedied. This constitutional compromise leaves Parliament with a crucial responsibility for the protection of human rights. The establishment of a specialised committee within Parliament, reflecting that responsibility, was therefore seen as a natural development[4].

House of Commons and House of Lords Joint Committee on Human Rights
Dr Hywel Francis MP (Chair), Labour
Mr Robert Buckland MP, Conservative
Mr Rheman Chishti MP, Conservative
Rt Hon Simon Hughes MP, Liberal Democrats
Mr Virendra Sharma MP, Labour
Sir Richard Shepherd MP, Conservative
Baroness Berridge, Conservative
Lord Faulks, Conservative
Baroness Kennedy of The Shaws, Labour
Lord Lester of Herne Hill, Liberal Democrats
Baroness Lister of Burtersett, Labour
Baroness O'Loan, Crossbench

The Joint Committee on Human Rights' formal remit is to consider:

(a) matters relating to human rights in the United Kingdom (but excluding consideration of individual cases);

(b) proposals for remedial orders, draft remedial orders and remedial orders made under the Human Rights Act 1998; and

(c) in respect of draft remedial orders and remedial orders, whether the special attention of the House should be drawn to them on any of the grounds specified in HC Standing Order No. 151 (Statutory Instruments (Joint Committee))[5]

4 Joint Committee On Human Rights - Nineteenth Report: http://www.publications.parliament.uk/pa/jt200405/jtselect/jtrights/112/11202.htm

5 http://www.parliament.uk/business/committees/committees-a-z/joint-select/human-rights-committee/

Work of the Committee

The Joint Committee on Human Rights was first appointed in January 2001.The Committee has a maximum of six members from each House and the quorum is two Members from each House. It has the power to appoint specialist advisers and to adjourn from place to place. This power originally extended only to within the UK and to institutions of the Council of Europe outside the UK no more than four times in any calendar year. This was subsequently changed to a general power to adjourn from place to place in January 2002[6].

Erskine May has summarised the work of the Committee:

The Committee has chosen to examine each bill introduced into either House and to report on whether any of a bill's provisions could raise questions around compatibility with 'Convention rights', within the meaning of the Human Rights Act 1998. It also considers questions of compatibility with international human rights instruments to which the UK is a signatory, and draws the attention of each House to any concerns it has in regular reports. On occasion, items of subordinate legislation which are primary legislation within the meaning of the 1998 Act (for example commencement orders and statutory instruments that repeal primary legislation) are also considered by the Committee. In undertaking this legislative scrutiny, the Committee is assisted by a permanent legal adviser, who is an officer of both Houses.

Within the very broad terms of its orders of reference, the Committee has also undertaken inquiries similar to those of other select committees of either House on general matters of public policy. It has reported, for example, on the case for establishing a human rights commission in Great Britain and a UK bill of rights, and on the United Kingdom's compliance with judgments of the European Court of Human Rights and the international human rights obligations. In this respect it is of a very different nature from other joint committees established permanently, which have very narrow Terms of reference, or the ad hoc committees which report only on the specific matter referred to them by the two Houses[7].

The Committee's work on remedial orders

A remedial order is a form of subordinate legislation which has the power to amend or repeal primary legislation for purposes and in circumstances specified in the Human Rights Act 1998: "It is a fast-track method of removing incompatibilities with Convention rights which emerge in the course of litigation in courts in the United Kingdom or at the European Court of Human Rights at Strasbourg…"[8].

The role of the Committee is to report and recommend, within a 60-day timeframe, on whether a draft order remedying the incompatibility should be approved by each House.

Compatibility with European Convention on Human Rights – Government Bills

The work of the Joint Committee should not be viewed in isolation – detailed guidance exists for those drafting and introducing legislation to ensure that it complies, in so far as possible, with the Government's responsibilities under the ECHR:

Section 19 of the Human Rights Act 1998 requires that, for every government bill, the minister in charge in each House make a statement that in her or his view the bill's provisions are compatible with the Convention rights.

Departmental legal advisers will take the lead in providing the formal advice required to justify such statements, seeking assistance from legal advisers in the Ministry of Justice Human Rights Division and, ultimately, the law officers as necessary[9].

6 Erskine May, Parliamentary Practice, 24th edition, Lexis-Nexis, 2011, p917

7 Erskine May, Parliamentary Practice, 24th edition, Lexis-Nexis, 2011 pp917-918

8 As above p691

9 The guidance is detailed. The full version can be found in chapter 11 of the following document: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/210917/Guide_to_Making_Legislation_July_2013.pdf

The devolved institutions and the Oireachtas

The Scottish Parliament, National Assembly for Wales and Dail Eireann do have committees that address equality issues and these are outlined briefly below:

Scottish Parliament

Equal Opportunities Committee
Margaret McCulloch (Convenor), Labour
Marco Biagi, SNP
Alex Johnstone, Conservative
John Finnie, Independent
Siobhan McMahon, Labour
Christian Allard, SNP
John Mason, SNP

The Justice Committee of the Scottish Parliament is mandated to scrutinise Human Rights issues, but it was criticised in a 2012 report from Glasgow University for having failed to adequately address such issues since its establishment:

A review of the official papers and reports of the Justice Committee for the period under review reveals a reductive and sceptical pattern of attitude towards human rights that comports with the CPGHR's assessment. Although the applicable human rights regimes, such as the European Convention on Human Rights (ECHR), have their own normative and institutional frameworks, the committee employs neither such frameworks nor the vocabulary of human rights in dealing with issues of indisputable human rights character. In the few occasions the Committee made reference to these normative and institutional frameworks, it was in negative terms, alluding to the confining constraints posed by the Convention in the administration of criminal justice[10].

The report called for the establishment of a separate Human Rights Committee within the Scottish Parliament.

The Equal Opportunities Committee has a remit to consider matters of discrimination relative to sex or marital status, race, disability, age, sexual orientation, language, social origin or other personal attributes, including beliefs or opinions on, for example, religion or politics[11]. The work of the Committee encompasses a broad range of business. A list of the current business includes:

- Marriage and Civil Partnership (Scotland) Bill
- Draft budget scrutiny 2014-15
- Equality and Human Rights Commission
- Women and Work

Within its inquiries and published reports the Committee addresses issues of equality and human rights. For example, in its report on the Marriage and Civil Partnership (Scotland) Bill, the Committee highlights the human rights issues raised by various stakeholders who gave evidence to the Committee. The report itself, however, does not take a position on the overall human rights implications of the Bill.

10 University of Glasgow, Scottish Parliament Committees' Perspective on Human Rights, April 2012 http://www.gla.ac.uk/media/media_241147_en.pdf

11 Scottish Parliament: http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/29807.aspx

National Assembly for Wales

Constitutional and Legislative Affairs Committee	Communities, Equality and Local Government Committee
Dave Melding (Chair), Conservative	Christine Chapman (Chair), Labour
Suzy Davies, Conservative	Leighton Andrews, Labour
Julie James, Labour	Peter Black, Liberal Democrats
Eluned Parrott, Liberal Democrats	Jocelyn Davies, Plaid Cymru
Simon Thomas, Plaid Cymru	Janet Finch-Saunders, Conservative
	Mike Hedges, Labour
	Mark Isherwood, Conservative
	Gwyn R Price, Labour
	Jenny Rathbone, Labour
	Rhodri Glyn Thomas, Plaid Cymru

The remit of the Constitutional and Legislative Affairs Committee is to carry out the functions of the responsible committee set out in Standing Order 21 of the National Assembly for Wales and to consider any other constitutional or governmental matter within or relating to the competence of the Assembly or Welsh Ministers.

As part of this, the Committee considers the political and legal importance and technical aspects of all statutory instruments or draft statutory instruments made by the Welsh Ministers and reports on whether the Assembly should pay special attention to the instruments on a range of grounds set out in Standing Order 21.

The Committee also considers and reports on the appropriateness of provisions in Assembly Bills and UK Parliament Bills that grant powers to make subordinate legislation to the Welsh Ministers, the First Minister or the Counsel General[12].

The Communities, Equality and Local Government Committee has a remit to examine legislation and hold the Welsh Government to account by scrutinising expenditure, administration and policy matters encompassing: Wales's culture; languages communities and heritage, including sport and the arts; local government in Wales, including all housing matters; and equality of opportunity for all[13].

The Committee published a report in August 2013, The future of equality and human rights in Wales, which looked at the following issues:

- how well the specific public sector equality duties are functioning in Wales;
- the future of the Equality and Human Rights Commission in Wales;
- the link between poverty and equality, and the socio-economic duty; and
- accountability for equality and human rights legislation in Wales[14].

The report made a series of recommendations in relation to the above issues that were broadly accepted by the Welsh Government. One of these recommendations was that "The Welsh Government should seek further powers in the field of equality and human

12 Constitutional and Legislative Affairs Committee, Report on the Further and Higher Education (Governance and Information) (Wales) Bill: http://tinyurl.com/nmr4knt

13 National Assembly for Wales, Communities, Equality and Local Government Committee: http://www.senedd.assemblywales.org/mgCommitteeDetails.aspx?ID=226

14 Communities, Equality and Local Government Committee: The future of equality and human rights in Wales, August 2013 http://tinyurl.com/p5zy6yw

rights to build on the Equality Act 2010 and the Human Rights Act 1998". The committee acknowledged that the Assembly could do more to scrutinise equality issues[15].

Oireachtas

Defence, Justice and Equality Committee
TDs
David Stanton, Fine Gael
Niall Collins, Fianna Fáil
Marcella Corcoran Kennedy, Fine Gael
Alan Farrell, Fine Gael
Anne Ferris, Labour
Seán Kenny, Labour
Pádraig Mac Lochlainn, Sinn Féin
Finian McGrath, Independent
John Paul Phelan, Fine Gael
Senators
Ivana Bacik, Labour
Martin Conway, Fine Gael
Tony Mulcahy, Fine Gael
Rónán Mullen, Independent
Denis O'Donovan, Fianna Fáil
Katherine Zappone, Independent

The Defence, Justice and Equality Committee 'has been a forum for Oireachtas members from all parties and none to have a meaningful input into key legislation and policy areas which have real significance. It plays a major role in helping to shape opinion and policy in the fields of justice, security, the rule of law, equality, defence and immigration to ensure that Irish society is safe, secure, just, open-minded and impartial'[16].

In addition, the Committee on Foreign Affairs and Trade lists as one of its roles "the protection and promotion of human rights" and selected as a key priority for 2013:

The protection and promotion of human rights, including (i) the completion of a report on human rights and democracy clauses in international agreements to which the European Union is a party, and (ii) the Government's objectives for its term of membership of the UN Human Rights Council[17]

A sub-committee on Human Rights was established from 2007-11 with a remit to "consider such aspects of international human rights, including the role of the United Nations in this field, as the sub-Committee may select or as may be referred to it by the Joint Committee on Foreign Affairs"[18].

15 As above

16 Role of the Committee on Justice, Defence and Equality: http://www.oireachtas.ie/parliament/oireachtasbusiness/committees_list/jde-committee/role/

17 2013 Work programme of the Committee on Foreign Affairs and Trade http://www.oireachtas.ie/parliament/media/committees/foreignaffairs/JCFAT-Work-Programme-2013-V.5.doc

18 Sub-Committee on Human Rights, Order of Reference: http://tinyurl.com/jvpzfzm

Research and Information Service
Briefing Paper

Paper 000/00 10 February 2014 NIAR 050-13

Tim Moore, Michael Potter and Jane Campbell

Human Rights and Equality Proofing of Public Bills

Nothing in this paper constitutes legal advice or should be used as a substitute for such advice.

1 Introduction

This paper outlines the procedures by which legislation made by the Northern Ireland Assembly is scrutinised on human rights and equality grounds. The paper is written in the context of the Assembly and Executive Review Committee's (A&ERC) Review of Petitions of Concern.

The Committee has previously requested and been presented with information on the existence and operation of committees that examine conformity with human rights and equality issues in other legislatures in the UK and Ireland.[1]

2 Equality and Human Rights Scrutiny and the Legislative Process for Public Bills

The Northern Ireland Assembly is a creature of statute, it's operation being provided for in the Northern Ireland Act 1998[2] (the NIA 1998). The Standing Orders of the Northern Ireland

1 Assembly and Executive Review Committee (14 January 2014) OFFICIAL REPORT (Hansard)Petitions of Concern: Briefing from Northern Ireland Assembly Research and Information Service http://www.niassembly.gov.uk/assembly-business/official-report/committee-minutes-of-evidence/session-2013-2014/january-2014/petitions-of-concern-briefing-from-northern-ireland-assembly-research-and-information-service/

2 Northern Ireland Act 1998: http://www.legislation.gov.uk/ukpga/1998/47/contents.

Assembly[3] detail the procedures which regulate the way the Northern Ireland Assembly carries out its business.

Fundamentally, the Northern Ireland Assembly may only make provisions within legislative competence. Pursuant to Section 10 (1) of the NIA 1998 Standing Orders shall ensure that a Bill is not introduced in the Assembly if the Speaker decides that any provision of it would not be within the legislative competence of the Assembly. Section 6 (1) of the NIA 1998 states that a provision of an Act is not law if it is outside the legislative competence of the Assembly and Section 6 (2) sets out the circumstances in which provisions will fall outside legislative competence:

6 Legislative competence.

(1) A provision of an Act is not law if it is outside the legislative competence of the Assembly.

(2) A provision is outside that competence if any of the following paragraphs apply—

(a) it would form part of the law of a country or territory other than Northern Ireland, or confer or remove functions exercisable otherwise than in or as regards Northern Ireland;

(b) it deals with an excepted matter and is not ancillary to other provisions (whether in the Act or previously enacted) dealing with reserved or transferred matters;

(c) it is incompatible with any of the Convention rights[4];

(d) it is incompatible with EU law[5];

(e) it discriminates against any person or class of person on the ground of religious belief or political opinion;

(f) it modifies an enactment in breach of section 7.

Given the provisions in Section 6 (2) (c) (d) and (e), it is clear that equality and human rights considerations underpin the consideration of legislative competence of the Assembly. Significant overlap, however, exists between these areas.[6] This, together with the intermingling of references to equality and human rights in the Assembly's Standing Orders, means that it is not feasible to present individual processes for equality and human rights proofing of Public Bills.[7]

Whilst this paper focuses on those mechanisms which directly refer to human rights, equality or legislative competence, it should be borne in mind that a range of more general powers, duties and responsibilities may also encompass equality and human rights dimensions. References to the Secretary of State's powers in relation to ensuring compliance with the UK's international obligations, for example, might be considered to include compliance with international human rights instruments such as the Convention on the Rights of the Child. By way of further example, The Ministerial Code which sets out the rules and procedures for the exercise of the duties and responsibilities of Ministers and junior Ministers of the Northern Ireland Assembly contains a Pledge of Office which Ministers are required to affirm requires them, amongst other things, to 'serve all the people of Northern Ireland equally, and to act

3 Standing Orders of the Northern Ireland Assembly: http://www.niassembly.gov.uk/Documents/Standing-Orders/Standing-Orders-121113.pdf.

4 This refers to the European Convention on Human Rights: http://www.echr.coe.int/Documents/Convention_ENG.pdf.

5 This refers to legislation in the European Union, which includes a range of Directives relating to equality. See Research and Information Service Research Paper 75/11 Equality and Human Rights Legislation in Northern Ireland: A Review, August 2011: http://www.niassembly.gov.uk/Documents/RaISe/Publications/2011/OFMdFM/7511.pdf.

6 And both of which potential overlap compatibility with EU law

7 SO 34 for example refers to 'human rights (including rights under the European Convention on Human Rights)' whilst SO 35 refers to 'equality requirements (including rights under the European Convention on Human Rights)'

in accordance with the general obligations on government to promote equality and prevent discrimination'.[8]

Pre-Legislative Scrutiny

A number of legal provisions seek to ensure that consideration of human rights and equality issues is integral to the policy and pre-legislative development phase of any Bill.

Under Section 75 of the NIA 1998, Northern Ireland Departments are required, in carrying out their functions, to have due regard to the need to promote equality of opportunity on nine grounds:

- between persons of different religious belief, political opinion, racial group, age, marital status or sexual orientation, between men and women generally,
- between persons with a disability and persons without and
- between persons with dependents and persons without.

In fulfilling this duty, departments are required to carry out equality proofing of all policy (including legislation). This is achieved through 'screening' and 'equality impact assessments' (EQIA) processes. The Equality Commission's revised guide to the Statutory Duties[9] for Public authorities specifies that *the Section 75 statutory duties apply to the development of legislative proposals and state that '[m]emoranda to the Northern Ireland Assembly Committees should confirm that the legislative proposal has been subjected to the requirements of the Section 75 statutory duties'.*

As the Human Rights Act 1998 (the HRA 1998) places a duty on Public authorities not to undertake actions in contravention of the European Convention on Human Rights,[10] a Minister is implicitly bound to human rights compliance when introducing legislation.

Furthermore, pursuant to Section 24 of the NIA 1998 a Minister or Northern Ireland Department has no power to make, confirm or approve any subordinate legislation, or to do any act, so far as the legislation or act is incompatible with Convention rights or Community law.

The Assembly's Statutory Committees may consider equality and human rights issues as part of any pre-legislative scrutiny and, in addition, Assembly Standing Orders provide specific mechanisms for the purposes of obtaining advice on human rights and equality issues on a *draft Bill or proposal for legislation, once it has been published for Public consultation.*[11] These mechanisms can also be invoked after the introduction of a Bill and so are discussed in more detail later in this paper.

Passage of Public Legislation

The introduction of a Bill in the Assembly is accompanied by a number of procedural requirements which address the legislative competence of the Bill, which as has been stated encompasses human rights and equality considerations.

A Minister in charge of a Bill is required, on or before its introduction, to make a statement to the effect that in his or her view the Bill is within the legislative competence of the Assembly.[12]

In the case of a Private Member's Bill, the Member in charge of the Bill is likewise required, when submitting the text of the Bill to the Speaker, to also submit a statement in writing to

8 http://www.northernireland.gov.uk/index/your-executive/ministerial-code.htm

9 Equality Commission for Northern Ireland Section 75 of the Northern Ireland Act 1998 A Guide for Public Authorities April 2010

10 Human Rights Act 1998, Section 6: http://www.legislation.gov.uk/ukpga/1998/42/crossheading/public-authorities.

11 See Standing Orders 34 and 35

12 Section 9 (1) of the NIA 1998

the effect that in his or her view the Bill would be within the legislative competence of the Assembly.

A Minister or Member who proposes to introduce a Bill is required to submit the full text of it to the Speaker not fewer than seven days (excluding Saturdays and Sundays) before the date proposed for the introduction of the Bill in the Assembly.

Standing Order 41 states that Public Bills on introduction shall be accompanied by an explanatory and financial memorandum detailing as appropriate:-

(a) the nature of the issue the Bill is intended to address;

(b) the consultative process undertaken;

(c) the main options considered;

(d) the option selected and why;

(e) the cost implications of the proposal/s.[13]

It has been observed that whilst there is no requirement to include human rights statements in explanatory memoranda accompanying Bills, they do tend to contain statements on human rights compliance, albeit that these statements tend to very brief and contain only minimal analysis.[14] The same observation would seem to be true of the statements on Equality Impacts/Section 75 duties which accompany explanatory memoranda.

Criticisms of the extent to which explanatory notes address compatiblity with Convention rights have been made in the Westminster context. Section 19 of the HRA 1998 requires that, for every UK government Bill, the Minister in charge in each House of Parliament must make a statement that, in his or her view, the Bill's provisions are compatible with the Convention rights. Alternatively, if he or she is not able to provide that personal assurance, he or she must state that, nevertheless, the Government wishes the House to proceed with the Bill. Recent guidance for UK Government Departments states that explanatory notes should record not only the fact that a Section 19 statement has been made and what it was, but also give further detail of the most significant Convention issues thought to arise on the Bill, together with the Minister's conclusions on compatibility.

> The explanatory notes must also give further details of the most significant human rights issues thought to arise from the Bill, as the Government has made a commitment to this effect…This assessment of the impact of the Bill's provisions on the Convention rights should be as detailed as possible setting out any relevant case law and presenting the Government's reasons for concluding that the provisions in the Bill are Convention compatible.[15]

The guidance cites the explanatory notes to the Criminal Justice and Immigration Bill, which received Royal Assent in May 2008 as an illustration of a '[c]omprehensive approach to human rights analysis that has been noted with approval by the Joint Committee on Human Rights'.

In the Assembly, having received the full text of the Bill, the Speaker is required to ensure that a Bill is not introduced if he decides that any provision of it would not be within the legislative competence of the Assembly.[16] As soon as reasonably practicable after introduction of

13 Standing Orders as amended 16 October 2012, 41, available at: http://www.niassembly.gov.uk/globalassets/Documents/Standing-Orders/Standing-Orders-121113.pdf

14 Colin Caughey and David Russell (forthcoming), 'Devolution and Human Rights in the Northern Ireland Assembly' in Hayley Hooper, Murray Hunt and Paul Yowell (eds.), Parliaments and Human Rights, Oxford: Hart Publishing.

15 Cabinet Office (July 2013) Guide to Making Legislation https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/210917/Guide_to_Making_Legislation_July_2013.pdf

16 Section 10 (1) NIA 1998 and Standing Order 30 (3)

Bill in the Assembly, the Speaker must send a copy to the Northern Ireland Human Rights Commission (NIHRC).[17]

The NIHRC takes the following action on receipt of a Bill from the Speaker:[18]

- Considered on receipt from the Speaker
- Examined, as appropriate and where resources permit, according to domestic and international obligations, hard and soft law, and international and domestic jurisprudence
- Advice drafted and endorsement by the Commission
- Engagement with the Assembly, usually at Committee Stage

Once a Bill has been agreed by the Assembly at Second Stage, it is referred to the appropriate statutory committee and this stage of the legislative process affords an opportunity for detailed scrutiny of the provisions contained within a Bill, including consideration of equality and human rights issues. This consideration frequently involves engagement between a statutory committee and the relevant statutory equality bodies.

Human rights compliance, whilst a cross-cutting responsibility across all government departments, is ultimately the responsibility of the Office of the First Minister and deputy First Minister (OFMdFM) and therefore falls within the scrutiny remit of the Committee for OFMdFM. All statutory committees, however, will consider equality and human rights issues as part of the detailed consideration undertaken at Committee Stage.

The Assembly Committee for Finance and Personnel, for example, has requested and received written and oral briefing from the NIHRC on its views regarding the compatibility of the Damages (Asbestos-related Conditions) Bill with the European Convention on Human Rights (ECHR).[19]

The NIHRC has also recently attended the Justice Committee in line with its duty to advise the Committee whether in its view a Bill is compatible with human rights. The Bill in question was the Human Trafficking Bill.[20] Similarly, the Equality Commission is regularly asked by Assembly Committees to comment in relation to equality issues arising in draft legislation and at the Committee Stage of the legislative process. A recent example relates to the examination of the Superannuation Bill by the Committee for Finance and Personnel.[21]

In its most recent annual report, the Equality Commission states that it has 'sought to inform the work of government' by providing evidence to Assembly Committees on a number of pieces of proposed legislation:[22] The Welfare Reform Bill; the Superannuation Bill; the Civil Service (Special Advisers) Bill. The Children's Commissioner has also recently provided advice to the Assembly's Justice Committee on potential children's rights issues arising from DNA/ fingerprint retention clauses in the Criminal Justice Bill.[23]

---

17 Standing Order 30 (6)

18 Information from the Northern Ireland Human Rights Commission 22 January 2014.

19 http://archive.niassembly.gov.uk/finance/2007mandate/damages_bill/NIHRC.pdf

20 Official Report: Evidence to the Committee for Justice 16 January 2014 - Human Trafficking and Exploitation (Further Provisions and Support for Victims) Bill: Northern Ireland Human Rights Commission: http://www.niassembly.gov.uk/assembly-business/official-report/committee-minutes-of-evidence/session-2013-2014/january-2014/human-trafficking-and-exploitation-further-provisions-and-support-for-victims-bill-northern-ireland-human-rights-commission/.

21 Official Report: Evidence to the Committee for Finance and Personnel 9 May 2012 - Superannuation Bill: Equality Commission for Northern Ireland: http://www.niassembly.gov.uk/assembly-business/official-report/committee-minutes-of-evidence/session-2011-2012/may-2012/superannuation-bill-equality-commission-for-northern-ireland/.

22 Equality Commission for Northern Ireland (2013), Equality Commission for Northern Ireland Annual Report and Accounts for the year ended 31 March 2013, Belfast: ECNI, p.14: http://www.equalityni.org/archive/pdf/AnnualReport2013.pdf.

23 Official Report: Evidence to the Committee for Justice - Criminal Justice Bill: DNA/Fingerprint Retention Clauses-NICCY Briefing: http://www.niassembly.gov.uk/assembly-business/official-report/committee-minutes-of-evidence/session-2012-2013/october-2012/criminal-justice-bill-dnafingerprint-retention-clauses-niccy-briefing/.

In addition to the detailed investigation by a committee described above, the Assembly's Standing Orders (34 and 35) provide additional mechanisms through which advice on equality and human rights issues can be sought.

Under the heading 'Public Bills: Equality Issues', Standing Order 34 allows for debate on a motion that the Assembly to refer a Bill to the NIHRC for advice. The first and to date only time that such a motion has been debated took place in October 2012. The motion, which was proposed by Fra McCann MLA and opposed by the Minister for Social Development, was defeated.[24]

Under the heading 'Public Bills: Human Rights Issues', Standing Order 35 enables either the Chair of a statutory committee (or a member of the committee acting on his or her behalf) or any Minister to propose a motion to establish an Ad Hoc Committee on Conformity with Equality Requirements. This Ad Hoc Committee may then function similarly to a statutory committee, examining and reporting on the Bill, or focus solely on conformity with the requirements for equality and observance of human rights.[25]

This provision has been used once when, on the 19 November 2012, the Assembly debated the following Committee Motion tabled by the Chair of the Social Development Committee, Alex Maskey MLA.

> **Ad Hoc Committee on Conformity with Equality Requirements - Welfare Reform Bill**
>
> That, in accordance with Standing Order 35(10)(a) and (b)(i), the Welfare Reform Bill be referred to an Ad Hoc Committee on Conformity with Equality Requirements; and that the Ad Hoc Committee shall consider and report only whether the provisions of the Bill are in conformity with the requirements for equality and observance of human rights.

At the outset of the debate, the Speaker informed Members that a valid petition of concern had been presented and, as required by Standing Order 28, no votes could be held on the motion until the following day. The Speaker went on to explain that:

> [b]ecause there is a petition of concern to the motion, Standing Order 60(4) now applies. That means that the Question that will be put tomorrow on the motion will automatically become one by which I will ask the House to agree that the Welfare Reform Bill may proceed without reference to an Ad Hoc Committee on conformity and equality requirements. The Question must be passed with parallel consent.[26]

On the 20 November 2012, the postponed vote on the motion to refer the Welfare Reform Bill to an Ad Hoc Committee on Conformity with Equality Requirements was the first item of business. The Speaker again explained that:

> [A]s there is a valid petition of concern, Standing Order 60(4) applies, and the Question will not, therefore, be put on the Committee for Social Development's original motion. Instead, the Question becomes that the Welfare Reform Bill may proceed without reference to an Ad Hoc Committee on Conformity with Equality Requirements.
>
> The vote must be passed with parallel consent. I know that these are complex issues, and I know that when we bring a petition of concern here what it normally does. In fact, the petition of concern being presented actually does the opposite, so it is trying to be as clear as possible to the House and Members.

---

24 Official Report: Evidence to the Committee for Justice - Criminal Justice Bill: DNA/Fingerprint Retention Clauses-NICCY Briefing: http://www.niassembly.gov.uk/assembly-business/official-report/committee-minutes-of-evidence/session-2012-2013/october-2012/criminal-justice-bill-dnafingerprint-retention-clauses-niccy-briefing/.

25 This process is shown at Appendix 2.

26 Official Report (Hansard) Session: 2012/2013 Date: Monday, 19 November 2012 http://www.niassembly.gov.uk/Assembly-Business/Official-Report/Reports-12-13/19-November-2012/#5

On a vote, the motion failed to achieve parallel consent and, as the House had therefore rejected the proposal that the Bill may proceed without being referred to an Ad Hoc Committee, the Bill was referred to such a committee. The next item of business established the Ad Hoc Committee.

The Ad Hoc Committee[27] was established to consider only, and to report only, on whether the provisions of the Welfare Reform Bill were in conformity with the requirements for equality and observance of human rights. The Committee for Social Development suspended its scrutiny of the Bill for the period during which the Ad Hoc Committee undertook its consideration of the Bill.

The Final Report of the Ad Hoc Committee was debated in Plenary on 29 January 2013. In the report the committee noted that it had taken oral evidence and accepted written submissions from a number of representative bodies, including the Equality Commission and the NIHRC. The report also noted, however, that whilst the Committee invited the Equality Unit of OFMdFM to present or give evidence, no official response was received to this request. The Chairperson and Deputy Chairperson of the Ad Hoc Committee did though met with the Chairperson of the House of Lords and House of Commons Joint Committee on Human Rights to gain an insight into the approach used by that Committee in its scrutiny of Westminster legislation

In the only such review to have been undertaken to date, in 2001-2002 the Committee on Procedures reviewed the legislative process in the Assembly. During the inquiry, the NIHRC raised the notion of establishing a human rights committee in the Assembly, noting that certain human rights mechanisms during the legislative process had not been used. The Committee on Procedures concluded that a recommendation for a human rights committee went beyond the remit of its inquiry but also stated that:[28]

> As part of its examination of the existing procedures the Committee reviewed the provisions of Standing Orders 32, 33 and 55 which gave Members the opportunity of requesting formal advice from the NIHRC and of invoking the Ad Hoc Committee on Conformity with Equality Requirements. The Committee concluded that the primary reason for these procedures not having been invoked was that the extent of the human rights proofing of legislation was considered to be sufficiently robust.

Whilst the Committee Stage in the legislative process for Public Bills requires Committees to undertake a detailed investigation of a Bill and report to the Assembly, no amendments to the Bill can be made at this stage. Amendments can, however, be made at 'Consideration Stage' and 'Further Consideration Stage'. Amendments may address human rights and equality concerns raised, for example, during the Committee stage. Amendments may also, however, themselves introduce further equality or human rights concerns. There appears, however, to be no specific legal obligation on a Minister or other sponsor of a Bill to give a view on compatibility other than on or before its introduction. Nor is there a specific legal obligation on the Speaker to make a statement on the legislative competence of a Bill before final stage, though he is required under Section 10 (2) of the NIA 1998 to consider certain issues related to reserved and excepted matters before final stage in deciding whether a Bill should be referred to the Secretary of State.

Pre-Enactment Review

When a Bill has been passed by the Assembly, the Attorney General for Northern Ireland or the Advocate General for Northern Ireland may within four weeks of its passing, as specified

27 http://www.niassembly.gov.uk/assembly-business/committees/2011-2016/ad-hoc-committee-on-conformity-with-equality-requirements-welfare-reform-bill/reports/report-on-whether-the-provisions-of-the-welfare-reform-bill-are-in-conformity-with-the-requirements-for-equality-and-observance-of-human-rights/

28 Committee on Procedures (2002), Review of the Legislative Process in the Northern Ireland Assembly, Paragraph 4.21: http://archive.niassembly.gov.uk/procedures/reports/report1-01r.htm#5.

in Section 11 of the NIA 1998, refer the question of whether a provision of a Bill would be within the legislative competence of the Assembly to the Supreme Court for decision.

In April 2011, The Attorney General for Northern Ireland referred the Damages (Asbestos-related Conditions) Bill to the UK Supreme Court, asking it to decide whether two of the Bill's clauses were within the legislative competence of the Assembly. In May 2011, however, he withdrew this reference stating that:

> I have always been of the view that if the Scottish litigation before the Supreme Court was able to provide a definitive answer to the retrospective provisions classifying Pleural Plaques as actionable damage then there was no need for separate Northern Ireland proceedings.
>
> …As there is a considerable overlap between the issues in the Northern Ireland Reference and the Scottish Appeal, I have reflected on whether in the light of the early listing of the Scottish Appeal I ought to continue with the Reference. I have come to the conclusion that if I withdraw the Reference and intervene by way of written submissions in the Scottish Appeal, relevant matters for this jurisdiction can still be properly ventilated before the Supreme Court but with a very significant reduction in the associated costs for Northern Ireland.[29]

The Scottish litigation being referred by the Attorney General in his statement was an appeal from AXA General Insurance Limited to the Supreme Court challenging the lawfulness of the Damages (Asbestos-related Conditions) (Scotland) Act 2009 on a number of bases. One of these was that the legislation was incompatible with Article 1 of Protocol 1 (which relates to peaceful enjoyment of possessions) of the ECHR and therefore outside the legislative competence of the Scottish Parliament under the Scotland Act 1998. On this issue, the Supreme Court held that the applicants were entitled to bring proceedings under the Convention, as the effect of the Damages (Asbestos-related Conditions) (Scotland) Act 2009 was that they would be victims for the purposes of article 34 and that the amount of money they would be required to pay should be considered a possession for the purposes of Article 1 of Protocol 1. The Court also held, however, that A1P1 was not violated, as there was a legitimate aim for the interference with property, and the interference was proportionate.[30]

Under Section 14 of the NIA 1998, the Secretary of State is required when certain circumstances obtain to refrain from submitting a Bill for Royal Assent. These circumstances include when the Attorney General for Northern Ireland or the Advocate General for Northern Ireland are entitled to make a reference in relation to a provision of the Bill under Section 11 of the NIA 1998 or any such reference has been made but has not been decided or otherwise disposed of by the Supreme Court. In addition, where the Supreme Court has decided that a provision of a Bill would not be within the legislative competence of the Assembly, the Secretary of State may not submit the Bill for Royal Assent.

Under Section 14 (5) of the NIA 1998 the Secretary of State may decide not to submit a Bill for Royal Assent if he considers that it contains a provision which is incompatible with, amongst other things, international obligations. As has been noted earlier in this paper, these it might be argued include the UK's obligation in relation to compliance with a range of international human rights instruments.

The Assembly's procedures for Public Bills provide an opportunity to amend a Bill where the Supreme Court decides that a provision of the Bill is not within the legislative competence of the Assembly. At this 'Reconsideration Stage' Members consider only the amendments

29 Attorney General for Northern Ireland (Press Release 27/5/2011)'Damages (Asbestos-Related Conditions) Bill Reference Withdrawn' http://www.attorneygeneralni.gov.uk/index/latest-news/news-archive/news-archive-2011/pleural_plaques_2.htm (accessed 5/2/2014)

30 Supreme Court (12 October 2011 Press Summary) AXA General Insurance Limited and others (Appellants) v The Lord Advocate and others (Respondents) [2011] UKSC 46 On appeal from the Court of Session: [2011] CSIH 31 http://supremecourt.uk/decided-cases/docs/UKSC_2011_0108_PressSummary.pdf (accessed 5/2/2014)

proposed to be made to the Bill and, if amendments are agreed to, a vote is taken on whether to approve the Bill as amended.

3. Post Enactment

Whilst the information above describes a complex system of human rights and equality proofing, it is also true that:

> [s]tructural checks are not absolute safeguards. Parliamentary scrutiny can fail. Statements by Ministers and Presiding Officers may be important practical safeguards to the work of the devolved Assemblies…but they do not guarantee *intra vires* legislation. And of course, not only can political moods change, but the questions which vex government lawyers during the legislative process, may differ from those which excite post-enactment litigation by individual litigants.[31]

Ultimately, if the safeguards on equality and human rights grounds fail, enacted legislation can be pursued through the courts and the Supreme Court has jurisdiction to hear and determine questions relating to the powers and functions of the Northern Ireland Executive and the Assembly.

31 Graham Gee (2005), 'Devolution and the Courts' in Robert Hazell and Richard Rawlings (eds.), Devolution, Law Making and the Constitution, Exeter: Imprint Academic, p.256.

Appendix 1

Stages of a Bill at which Human Rights Standards are Considered

Stage	Action
1. Pre-legislative	Sponsoring Department includes an Impact Statement on Human Rights and Equality in the Explanatory and Financial Memorandum to the Bill. Policy issues contained in the draft Bill are scrutinised by the relevant Assembly Committee during the pre-legislative consultation between Committee and Department. Minister in charge of a Bill must publish a written statement to the effect that in his/her view the Bill would be within the legislative competence of the Assembly **(Section 9 of the Northern Ireland Act 1998).**
2. Introduction and First Stage	**Standing Order 30 (1)** Copy of Bill received by Speaker prior to Introduction and scrutinised by Assembly Legal Office in respect of legislative competence including compatibility with, inter alia, Convention rights (required by **Section 6 of the Northern Ireland Act 1998**) **Standing Order 30 (3)** No Bill may be introduced in the Assembly if the Speaker decides that any provision is not within the legislative competence of the Assembly **(Section 10 (1) of the Northern Ireland Act 1998).** Speaker sends copy of every Bill to the Northern Ireland Human Rights Commission as soon as practicable after its introduction **(Section 13 (4) of the Northern Ireland Act 1998 and. Standing Order 30 (6))** **Standing Order 34 (2)** A Member, at any time after a Bill has been introduced (or in the case of a draft Bill or proposal for legislation, after Publication for Public consultation), may table a motion that the NIHRC be asked to advise whether the Bill is compatible with human rights **Standing Order 35 (2)** A member of the Executive Committee or the Chairman of the relevant Statutory Committee (or member of that Committee acting on his behalf) may table a motion to refer a Bill, draft Bill or proposal for legislation to an Ad Hoc Committee on Conformity with Equality Requirements. This Committee will report on whether the Bill is in conformity with Equality requirements, including rights under the European Convention on Human Rights.
3. Committee Stage	**Standing Order 33** Detailed clause-by-clause examination of the Bill. Concerns expressed by Members at Second Stage are addressed. Human Rights Commission may be asked to give a written submission for comment on the Bill's provisions, or be called to give oral evidence. **Standing Order 35 (2)** The Chairperson of the appropriate Statutory Committee (or another Committee member acting on his behalf) may propose that the Bill be transferred to an Ad Hoc Committee on Conformity with Equality Requirements. The Ad Hoc Committee reports within 30 days of the referral, or at a time agreed by the Assembly **(Standing Order 35 (5))** and has the power to call for people and papers to assist in its consideration **(Standing Order 60 (2)).**

Stage	Action
4. Consideration / Further Consideration Stages	**Standing Orders 36 (4) and 37 (5)** At the end of both the Consideration Stage and the Further Consideration Stage, a Bill stands referred to the Speaker.
5. Final Stage	**Standing Order 39 (2)** Prior to Final Stage each Bill is considered by the Speaker in accordance with **Section 10 of the Northern Ireland Act 1998**
	When a Bill has been passed by the Assembly, the Attorney General for Northern Ireland or the Advocate General for Northern Ireland may within four weeks of its passing, as specified in Section 11 of the NIA 1998, refer the question of whether a provision of a Bill would be within the legislative competence of the Assembly to the Supreme Court for decision.
6. Royal Assent	**Under Section 14 (5) of the Northern Ireland Act 1998** the Secretary of State may decide not to submit a Bill for Royal Assent if he considers that it contains a provision which is incompatible with international obligations.
7. Reconsideration	**Standing Order 40 (1)** A Bill will be set down for reconsideration if Supreme Court decides that any provision of the Bill is not within the legislative competence of the Assembly.

Table adapted from table contained in: SESSION 2001/2002 FIRST REPORT - Review of the Legislative Process in the Northern Ireland Assembly Ordered by The Committee on Procedures *to be printed 16 January 2002 Report 01/01R (to the Northern Ireland Assembly from The Committee on Procedures)*

http://archive.niassembly.gov.uk/procedures/reports/report1-01r.htm#5

Published by Authority of the Northern Ireland Assembly,
Belfast: The Stationery Office

and available from:

Online
www.tsoshop.co.uk

Mail, Telephone, Fax & E-mail
TSO
PO Box 29, Norwich, NR3 1GN
Telephone orders/General enquiries: 0870 600 5522
Fax orders: 0870 600 5533
E-mail: customer.services@tso.co.uk
Textphone 0870 240 3701

TSO@Blackwell and other Accredited Agents

£21.00

Printed in Northern Ireland by The Stationery Office Limited