Northern Ireland Assembly

Assembly and Executive Review Committee

Stakeholder 'Call for Evidence' Paper on Review of D'Hondt; Community Designation and Provisions for Opposition

Contents

Provisions for Opposition

1) Whether the accountability and effectiveness of the Northern Ireland Assembly and Executive could be improved through the introduction of provisions to formally recognise Opposition, while retaining the principles of power-sharing and inclusivity.

   In particular, whether:

a) Opposition Parties/Non-Executive Parties should be allocated appropriate financial resources to assist in their Assembly duties;

b) Arrangements for allocating Chairs and Deputy Chairs of Assembly Committees should be changed to take account of a formal Opposition;

c) Opposition Parties/Non-Executive Parties should be guaranteed additional time to raise and debate non-Executive business in the Assembly — including priority speaking rights in response to Ministerial Statements and in Question Time.

Section 1

Stakeholder Details

Stakeholder Name	Telephone Number
Professor Rick Welford	02890 973652

Stakeholder Address	Stakeholder Type (Include one or more X)			
	Registered Political Party		Local Government	
	Academic	x	Government	
	Legislature		Non-Government	
	Other (Please Specify)/ Member of the Public			

Please provide some background information on your role as a stakeholder

(This box will expand as you type)

Professor of Politics at QUB, Co-Convenor of the NI Devolution Monitoring Project 1999-2009 and currently Director of Legislative Studies and Practice at Queen's. I submitted written and oral evidence to the Committee in the earlier stages of this inquiry.

Guidelines for Completion of Submissions

The Committee would ask that stakeholders submit electronic responses using this pro forma.

Stakeholders should be aware that their written evidence will be discussed by the Committee in public session and included in the Committee's published Report.

Stakeholders should also be aware that if they decide to publish their submissions, the publication would not be covered by Assembly privilege in relation to the law of defamation.

Section 2

Introduction

Powers

2.1. The Assembly and Executive Review Committee is a Standing Committee established in accordance with Section 29A and 29B of the Northern Ireland Act 1998 ("the 1998 Act") and Standing Order 59 which, amongst other powers, provide for the Committee to:

I. 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

II. consider such other matters relating to the functioning of the Assembly or the Executive as may be referred to it by the Assembly.

Assembly and Executive Review Committee's Next Priority for Review

2.2. The Committee agreed the **Terms of Reference** of this next Review of Parts III and IV of the Northern Ireland Act as follows:

The Assembly and Executive Review Committee will review d'Hondt, community designation, and the provisions for Opposition Parties/Non-Executive Parties in the Northern Ireland Assembly to assist them in holding the Executive to account, guaranteeing safeguards and protections to ensure that the institutions operate on an inclusive and power-sharing basis. The Review will not only address each area separately but examine the interrelationship between the three areas in the context of any proposed changes.

Phase 1 – Review Evidence Gathering

The Review will take evidence on **d'Hondt** in relation to:

1) Whether there should be changes in the legislative provision and use of d'Hondt in the Northern Ireland Assembly in the allocation of Ministerial offices and/or Committee Chairpersons and Deputy Chairpersons.

The Review will take evidence on **community designation** in relation to:

1) Whether there should be changes in the legislative provision and use of community designation in the Northern Ireland Assembly.

The Review will take evidence on **provisions for Opposition** in relation to:

1) Whether the accountability and effectiveness of the Northern Ireland Assembly and Executive could be improved through the introduction of provisions to formally recognise Opposition, while retaining the principles of power-sharing and inclusivity.

In particular, the Committee will take evidence on whether:

a) Opposition Parties/Non-Executive Parties should be allocated appropriate financial resources to assist in their Assembly duties;

b) Arrangements for allocating Chairs and Deputy Chairs of Assembly Committees should be changed to take account of a formal Opposition; and

c) Opposition Parties/Non-Executive Parties should be guaranteed additional time to raise and debate non-Executive business in the Assembly — including priority speaking rights in response to Ministerial Statements and in Question Time.

Phase 2 – Consideration and Report

The Committee will consider all evidence received in relation to d'Hondt, community designation, and provisions for Opposition and report and make recommendations to the Assembly on these matters by early June 2013.

Matters Outside the Scope of the Review

2.3. The Committee has agreed that the following issue is outside of the scope of the Review:

- Alternative electoral systems/models; for example, additional member system or alternative vote.

Section 3

BACKGROUND

This section provides some background information on the issues being considered by the Committee as part of this Review.

3.1. The following sections provide information relating to:

- D'Hondt;
- Community designation; and
- Provisions for Opposition in the Northern Ireland Assembly and related factors.

3.2. The Northern Ireland Assembly can bring about some changes to how the Assembly operates. For example, some changes might require amendments to the Standing Orders of the Assembly and it is for the Assembly to agree any such changes on a cross-community basis. However, it can only legislate on matters that have been transferred to the Assembly by the UK Parliament, or with the consent of the Secretary of State for Northern Ireland in relation to reserved matters or excepted matters that are ancillary to other provisions dealing with reserved or transferred matters. In other areas, the UK Parliament has the power to introduce legislative change — that is, excepted matters.

3.3. In August 2012, the then Secretary of State for Northern Ireland launched a consultation entitled, *'**Consultation on measures to improve the operation of the Northern Ireland Assembly**'*, one of the key areas of which was *"**Government and Opposition**"*. The consultation highlighted that the Northern Ireland Executive currently operates as a five-party coalition, as this has been important in ensuring that all parts of the community are adequately represented in government. The Secretary of State pointed out that the present structure of government is derived from the 1998 Act, which recognised that inclusive power-sharing is essential in Northern Ireland.

3.4. The Secretary of State's consultation paper went on to say that there are obvious flaws in a system where there is no effective alternative government and highlights that the UK Government has regularly expressed a wish at some stage to see a move to a more normal system that allows for inclusive government but also opposition in the Assembly. The consultation paper stressed that moves to a recognised opposition must be consistent with the principles of inclusivity and power-sharing that are central to the 1998 Act.

3.5. The consultation closed on 23 October 2012. On 11th February 2013, the Secretary of State published the consultation responses, along with draft legislation to make provision on the following issues: donations and loans for political purposes; dual mandates; electoral registration and administration; appointment and tenure of the NI Justice Minister. The 'Publication of Draft Legislation Northern Ireland (Miscellaneous Provisions)' (Cm 8563) is available online (http://www.nio.gov.uk/getattachment/Publications/Publication-of-Draft-Legislation/27250-Cm-8563-v4.pdf.aspx).

3.6. The introduction to the draft legislation refers to "Government and Opposition" and states:

> "While the Government would welcome moves towards a system of government and opposition, we remain clear that such changes could only come about with the agreement of parties in the Assembly. In addition, such moves must be consistent with the principles of inclusivity and of power-sharing that are central to the Belfast Agreement. We do not believe that there is sufficient consensus for statutory change at present which is why the draft Bill includes no provision on this issue.
>
> However, the consultation document also drew attention to the possibility of procedural change within the Assembly aimed at providing for a more effective opposition. The Government notes that the Assembly and Executive Review Committee is examining these questions, amongst other institutional issues. The Assembly Research and Information Service produced a Briefing Paper entitled 'Opposition, Community Designation and d'Hondt' in November 2012. Procedural developments are of course matters for the Assembly itself and not for the Government to seek to impose."

3.7. The Secretary of State has asked the Northern Ireland Affairs Committee to undertake scrutiny of the draft legislation, and that Committee will issue a call for evidence very shortly. The Secretary of State is seeking to introduce this Bill in the Third Session of Parliament.

3.8. The following sections provide an overview of the issues that the Committee has identified as key to this Review. For further detail, please refer to the Assembly Research and Information Service paper *'Opposition, Community Designation and d'Hondt'*.

D'HONDT

3.9. Political Parties are entitled to seats in the Northern Ireland Executive based on their level of representation in the Northern Ireland Assembly. The process used to allocate Ministerial offices, and thereby fill seats in the Executive, is called the d'Hondt mechanism and is outlined in section 18 of the Northern Ireland Act 1998 (the 1998 Act). Through the use of d'Hondt, membership of the Executive is automatically determined based on electoral strength, rather than negotiations between Parties following an election. This particular application of d'Hondt appears unique to Northern Ireland.

3.10. However, there is nothing that requires Parties to take a seat in the Executive — they can refuse and the seat will be offered to the next eligible Party. In effect, there is no legislative barrier to Parties not taking their allocated seat following an election or withdrawing from the Executive if they wish. The question then arises as to what extent will those Parties be afforded the traditional role and resources allocated to Opposition Parties.

3.11. The position of Chairpersons and Deputy Chairpersons of Committees in the Northern Ireland Assembly are also allocated using the d'Hondt formula. This is provided for under Assembly Standing Orders, as required under section 29 of the 1998 Act. Again, should an eligible Party choose not to take the position to which it is entitled, the position will be offered to the next eligible party.

3.12. Amendments to section 18 and/or section 29 of the 1998 Act could only be made by legislation passed by the UK Parliament. The Assembly, does, however, have the power to amend the Standing Orders dealing with d'Hondt provided that they remain consistent with the requirements of the 1998 Act.

3.13. The Assembly Research paper *'Opposition, Community Designation and D'Hondt'* refers briefly to the Sainte-Laguë allocation mechanism. This is another divisor method that has been found to produce more advantageous results for small parties, both in terms of allocations (the number of seats) and in terms of sequencing, so that smaller parties can get a higher "pick" in the allocation of Ministerial portfolios or Committee Chairs.

COMMUNITY DESIGNATION

3.14. The 1998 Act and Assembly Standing Orders make provision for Members of the Assembly to designate themselves as "Nationalist", "Unionist" or "Other" at the first meeting of the Assembly after an election.

3.15. The 1998 Act details a number of key decisions in the Assembly for which cross community support is required. To obtain this cross community support under the 1998 Act, there must either be the support of a majority of the members voting, including a majority of the designated Nationalists and designated Unionists voting or the support of 60 per cent of the members voting including 40 per cent of the designated Nationalists voting and 40 per cent of the designated Unionists voting. Votes for which cross-community support is required are detailed in the Assembly Research and Information Service paper *'Opposition, Community Designation and D'Hondt'*, (p. 17).

3.16. One of the instances in which cross-community support is required is in the event of a Petition of Concern. If 30 or more Members petition the Assembly expressing their concern about a matter that is to be voted on by the Assembly, the vote on that matter requires cross-community support.

3.17. A system of community designation is also used in Belgium, where there is an "alarm bell" procedure, used when one of the language groups believes that the provisions of a Bill are likely to be seriously detrimental to relations between the two language communities. Although the procedure is similar to that operating in the Northern Ireland Assembly, the threshold appears to be set higher and applies only to legislation, rather than ordinary motions (see the Assembly Research and Information Service paper '*Opposition, Community Designation and D'Hondt*', p. 19).

3.18. A range of provisions governing the operation of the Assembly would be affected by changes to the political designation mechanism. One key area that could be affected by any changes to political designation is the appointment of the First Minister and

deputy First Minister. Under current legislative provisions the largest Party of both the largest and second largest political designations are given the opportunity to appoint the First Minister and deputy First Minister respectively.

PROVISIONS FOR OPPOSITION

3.19. In the traditional Westminster model, the Party with the most non-government members in Parliament becomes the Official Opposition and its leader becomes the Leader of the Opposition. In broad terms, the role of the Opposition, as its name suggests, is to oppose the Government and form an "alternative government" if the existing government loses the confidence of the House. This is the model most often cited when highlighting the perceived lack of an Opposition within the Assembly. However, the Scottish Parliament and National Assembly for Wales more commonly refer to non-Executive or non-Government Parties, and there is no recognition of an Official Opposition in those legislatures, although there is proportionate provision for non-Government Parties in relation to parliamentary time and funding to carry out their functions.

3.20. The Assembly and Executive Review Committee has agreed that any consideration of the recognition of an Opposition in the Northern Ireland Assembly must recognise the consociational framework and the principles of inclusivity and power-sharing that underpin the workings of the Assembly and the Executive.

3.21. The Northern Ireland Act 1998, which sets out how the Assembly and Executive would operate, makes no reference to an Opposition.

3.22. Under the 1998 Act, Parties that have not reached a certain threshold in terms of elected Members do not have the opportunity to select a Ministerial office under the d'Hondt system. It is arguable that the Parties not currently in the Executive are an "Opposition". Furthermore, as highlighted earlier, there is nothing that requires Parties to take a Ministerial office and, thereby, a seat in the Executive — they can refuse and the seat will be offered to the next eligible Party. In effect, there is no legislative barrier to Parties withdrawing from the Executive if they wish.

Factors related to Provisions for Opposition:

3.23. It is usual practice that non-Executive or non-Government Parties are granted certain rights within a legislature to assist them in holding the Government/Executive to account. If there were agreement to formally recognise an Opposition within the Assembly, some or all of the following would need to be taken into account:

Financial Assistance

3.24. In most jurisdictions, Political Parties with non-Executive or non-Government roles are usually allocated additional financial resources to assist in their Parliamentary/Assembly duties. All Political Parties represented in the Northern Ireland Assembly already receive funding under the Financial Assistance to Political Parties (FAPP) scheme, irrespective of whether they have a seat in the Executive. In the context of a move to formally recognise Opposition, consideration may need to be

given by the Assembly Commission to reviewing the scheme to ensure that non-Executive Parties are appropriately funded.

3.25. Should the Assembly wish to provide allowances or additional salaries to individual Members of the Assembly in key positions in an Opposition, this may not require legislation, as the Independent Financial Review Panel (IFRP), which was set up following the passing of the Assembly Members (Independent Financial Review and Standards) Act (Northern Ireland) 2011, could issue a Determination providing for this. This would be entirely a matter for IFRP.

3.26. The specific financial arrangements in place for the Opposition or non-Executive Parties in the House of Commons, the Scottish Parliament, the National Assembly for Wales and Dáil Éireann are outlined in the Assembly Research and Information Service paper *'Opposition, Community Designation and D'Hondt'*, p. 6-9.

Committee Chairpersons

3.27. It has been suggested that the Committee structure in the Northern Ireland Assembly performs an important scrutiny role that is perhaps lacking in more traditional Government-Opposition models. The Chairpersons and Deputy Chairpersons of Committees in the Northern Ireland Assembly are currently selected by Parties via the d'Hondt method, as is the case in the Scottish Parliament for convenors (Chairs). In the House of Commons, the Government is allocated the majority of Chairs. Nevertheless, in the context of a move to formally recognise Opposition in the Northern Ireland Assembly, there is an argument that the Opposition Parties/Non-Executive Parties should be offered the Chair or Deputy Chair of more Committees, rather than the allocation of these Chairs continuing to be made on a proportional basis.

3.28. The 1998 Act prevents Statutory or Departmental Committees being Chaired or Deputy Chaired by Ministers or junior Ministers. Furthermore, arrangements for the allocation of Chairpersons and Deputy Chairpersons for these Committees provide that Parties shall "prefer" to select other Committees than those for which the Party holds Ministerial Office.

3.29. The arrangements in place in relation to the composition of Committees in the House of Commons, the Scottish Parliament, the National Assembly for Wales and Dáil Éireann are outlined in the Research paper *'Opposition, Community Designation and D'Hondt'*, p. 9-10.

Parliamentary/Assembly Time

3.30. A key consideration with respect to the formal recognition of Opposition would be the guarantee of time to raise and debate non-Executive business — including priority speaking rights in response to Ministerial Statements and in Question Time. The House of Commons, Scottish Parliament and National Assembly for Wales guarantee time for non-Government business (see Research paper *'Opposition, Community Designation and D'Hondt'*, p. 10-13).

3.31. In the Northern Ireland Assembly, Standing Order 17(5) states:

> "The Speaker shall determine the order of speaking and the number of speakers in any debate having due regard to the balance of opinion on the matter, the party strengths in the Assembly and the number of members who have indicated a desire to speak."

Standing Order 17(4) places a responsibility on the Business Committee to consult with the Speaker on these arrangements. These are the requirements that apply to the Assembly as it is currently constituted.

3.32. The speaking list agreed by the Business Committee in 2006 provides for the five largest parties to be called, in order, for the first 'round' of speakers. Subsequent rounds are based on party strength – identified by applying the d'Hondt formula to current party strengths. It should be noted that the threshold for inclusion in the first round of speakers was agreed as "parties with two or more members".

3.33. The Business Committee reconsidered this arrangement in September 2011 in the context of a request to allow the single member parties and the, then, single independent Member more opportunity to speak. It was agreed that the current arrangements did not need to be reviewed.

3.34. The Speaker uses the speaking list only for calling Members to speak in debates and for questions following Ministerial Statements. While not all Members may be called to speak in debates on private Members' motions in the time available, there is no similar constraint on debates on legislation. All who wish to do so may speak. It is rare for Members on the list not to be reached for questions to Ministerial Statements.

3.35. The following items of business operate outside the speaking list arrangements – Matters of the Day; Question Time; and Urgent Oral Questions. For these items, Members are required to rise in their places to indicate to the Speaker that they wish to be called. In using his discretion to call Members from among those standing, the Speaker will consider issues of cross-party balance, any relevant constituency interests, and giving priority to Committee Chairpersons. It should be noted that the selection of questions for oral answer during Question Time is done by random computer selection.

3.36. A Committee Chair may be given priority in the order of speaking if the relevant Minister is making a Statement or if legislation relating to that Committee is being debated. Regarding Ministerial Statements, while the speaking list order applies in broad terms, priority is given to those who have been present for the entire Statement. Members who have only been present for part of the Statement will be called last, which may result in a departure from the order in which parties are normally called.

3.37. Business in the Northern Ireland Assembly is currently already allocated on a proportional basis. A debate cycle rota is in place, calculated by applying the d'Hondt formula to current party voting strengths on the Business Committee. The Business Committee agrees the number of slots available for private Members' business after Executive and Committee business has been scheduled each week. Parties next due

to have motions scheduled, as per the debate cycle rota, put forward their chosen motion(s) to fill the slots agreed as available. The Business Committee agrees scheduling (e.g. running order) and timing issues in relation to the motions put forward.

3.38. The Business Committee reviews and agrees the order of all the business scheduled. Up to 10 additional slots are reserved in each Assembly session for cross-party motions, or for motions tabled by Parties/Members not represented on the Business Committee. In the latter case, the co-operation of a member of the Business Committee would have to be sought to put forward the motion. Use of these 'other' slots could be proposed at any time, but would be subject to the specific agreement of the Business Committee. The same arrangement, with a separate rota, is in place for the selection of topics for Adjournment debates.

Other Measures to Strengthen Accountability

3.39. In addition to the provision of resources for Opposition Parties/Non-Executive Parties, which may, in itself, strengthen accountability within the institutions of Government, the Assembly and Executive Review Committee has raised the issue of what other specific measures could strengthen accountability within the institutions.

3.40. For example, the Assembly Research paper *Opposition, Community Designation and D'Hondt'* highlights the fact that Westminster, Dáil Éireann, the Scottish Parliament and the Welsh Assembly all provide for a vote of no confidence in the current Government. In Scotland, if such a motion is passed, all Members of the Executive must resign. This does not automatically result in a general election, but will do so if a new First Minister is not nominated within 28 days. There is no provision in the Northern Ireland Assembly for a vote of no confidence in the Executive.

3.41. As well as provision for a vote of no confidence in the Government, the Belgian Parliament has an instrument called an interpellation, which is a question for explanation from an MP and aimed at a Government Minister. The Minister's response is followed by a vote, which can either be on a motion of no confidence in the Government or, more probably, on a "simple motion" agreeing that normal activities be continued. The latter is an implicit vote of confidence. This mechanism can be used in plenary sessions of the Parliament or, more commonly, in the parliamentary commissions. It is used for serious and important matters, mainly by the Opposition.

Further Information

3.42. Stakeholders will wish to refer to a detailed Research and Information Service (RaISe) paper, produced for the Committee in respect of this Review. The Research Briefing paper, titled *'Opposition, Community Designation and D'Hondt',* can be accessed on the Assembly and Executive Review Committee's webpage: http://www.niassembly.gov.uk/Assembly-Business/Committees/Assembly-and-Executive-Review/Research-Papers-2012/

Section 4

Issues (as set out in Phase 1 of the Committee's Review) and Questions to consider

D'HONDT

(1) Whether there should be changes in the legislative provision and use of d'Hondt in the Northern Ireland Assembly in the allocation of Ministerial offices and/or Committee Chairpersons and Deputy Chairpersons.

In your view, should the d'Hondt mechanism be retained to allocate Ministerial positions? If you think it should be retained, please outline why. If you think it should be replaced, what do you think should replace it?

In your view, should the d'Hondt mechanism be retained to allocate Committee Chairpersonships and Deputy Chairpersonships? If you think it should be retained, please outline why. If you think it should be replaced, what do you think should replace it?

Please include a suggested time frame for any of your suggested changes and offer supporting evidence for your views.

D'Hondt is one means of realizing the proportionality principle embodied in the NI Act 1998/GFA and is utterly consistent with the consociational thinking that underpins the institutional design of the Strand One Institutions.

Re Ministerial Positions: The application of the d'Hondt mechanism—its automaticity—in relation to Executive formation carries an (arguable) advantage, namely it precludes any requirement for coalition bargaining in the sense that an eligible party/parties have the right to opt-in to the Executive if it/they so choose: equally, of course, they can choose to opt-out and surrender their Executive role(s), an option that no party has thus far exercised. That does not mean that bargaining/negotiation is wholly excluded: the exact choice of Executive Departments in both 2007 and 2011 was (unlike in 1999) the outcome of informal discussions (and a 'dry-run') among the eligible parties, albeit that the rank ordering of party choice(s) was governed by the d'Hondt formula. The experiences of 2007 and 2011 demonstrated a certain maturing of inter-party relationships, thereby realizing the spirit (and the letter) of both accommodation and of inclusion that informs the wider consociational design.

On the other hand, it can be argued that d'Hondt's apparent advantage—dispensing with need for inter-party bargaining over inclusion in the Executive—entails the postponement of, inter alia, discussions and negotiations designed to agree the programme for government: that is, they occur in the wake of the relevant election but after the formation of the Executive. In that respect, one might argue that there is something of a disconnect between electors' preferences and the outcome of PfG negotiations, since the latter are conducted behind closed doors and can take some time to conclude which, in turn, can delay the Executive's legislative programme with consequent effects on the Assembly's business/timetable. In the

best of all possible worlds—or, perhaps as an exercise in 'wishful thinking'—such negotiations could occur in a pre-election period enabling parties, or some, to appeal to the electorate on the basis of a shared platform, thereby ameliorating the apparent 'disconnect' *vis a vis* the electorate. They could, however, occur in the post-election context, enabling parties to agree a PfG prior to the formal act of nominating the Executive. Neither process seems likely to appeal to the eligible parties. Thus, perhaps what matters as much as the precise formula for allocating the number of Executive seats to the relevant parties is the character of informal, accommodatory politics that animated the distribution of Ministerial portfolios in 2007 and 2011.

Against that more recent background and given the commitment to proportionality, the Committee might contemplate a different formula, namely St Lague, as mentioned in the Research Paper cited at 3.42 above or, indeed, in my earlier evidence to the Committee. As I explained on that occasion, and as noted in the Research Paper, St Lague lends some numerical advantage to smaller parties (by increasing the divisor more rapidly than d'Hondt). Whether d'Hondt, St Lague or, indeed, another proportional method of Executive seat allocation is preferred, all meet the tests of proportionality and inclusion, though with somewhat different effects, both in terms of sequential process and thereby of outcomes. However, whatever the method, it would be triggered in a post-election context which, if past patterns are repeated—i.e. all eligible parties opt-in to the Executive—would be likely to entail delay in agreeing the PfG and consequentially the legislative timetable.

Should there be at some point a reduction in both the total number of MLAs and of Executive Departments (that is, after 2015), the parties might then be persuaded to change the proportional allocation formula to one that carries more potential for smaller parties in order to sustain the inclusivity principle that underpins the process of Executive formation, pending electoral outcomes of course. Parties may judge that any change should be deferred until 2019/20 or, on the other hand, be implemented in 2015/16 especially if there was to be an agreed reduction in the number of Executive Departments prior to the next Assembly election. It seems to me that the earlier this is accomplished the better: it would, among other things, assure the electorate that the Assembly and the Executive are motivated to embark on reform and in a manner that defends inclusiveness and proportionality – and, further, that will represent some marginal savings in the costs of administering the Strand One institutions, which would undoubtedly chime with the (austere) times.

There are then, two issues to be contemplated by the parties: the retention of both inclusiveness and proportionality and the timing of any agreed change in the method of Executive formation: each is influenced, if not governed, by possible related reforms, notably the number of future Departments. If there was to be no change, either in the number of MLAs or of Departments, then the attraction of maintaining d'Hondt is likely to be compelling for the parties: it might be styled as 'the inertia of established practice/commitments'. My own judgement is that change is more likely should there be a reduction in both the total number of MLAs and of Departments: in those circumstances, such a change—to St Lague for instance—may be required in order to afford the realization of the principles of proportionality and inclusiveness.

Re Committee Chairs/Deputy Chairs: Here, I would follow the same line of thinking: that is, a change in the allocation formula should be influenced (but not determined) by a reduction in both the number of MLAs and of Departments. For the sake of consistency, such a change, to

say St Lague for Executive formation, should also be adopted for the allocation of chairs and deputy chairs.

Of course, should a party or parties decide not to exercise its/their option of entering the Executive but instead take on an Opposition role (all other things being equal – see below), there may be a case for applying a different formula or process to the task of allocating chairs/deputy chairs, or of giving such parties some sort of preference before a formula was applied. I'm not persuaded by this proposition. In such circumstances, notably where there was a reduction in the number of Departments and, consequentially, of statutory committees, there would be considerable latitude for such a party/parties to exercise its choices, latitude that is reinforced by the norm/procedure whereby a chair/deputy chair is not drawn from the same party as that of the relevant Minister: this practice widens the range of strategic choices for an Opposition party/parties.

In summary, my guess is that any change in the allocation formula is likely to be triggered by decisions relating to the total number of MLAs and the re-configuration of the Executive. The responses by the Executive parties to the NIO's consultation published on 11 February 2013 indicated a disposition to reduce the number of MLAs, the SDLP excepted. SF, which did not furnish a written response to the consultation exercise, has however stated (in the AERC Report NIA 52/11-15, 12 June 2012) that it wants 'an as inclusive Assembly as possible', and will 'consider all options that reflect the inclusiveness and equality envisaged by the GFA'. St Lague would accomplish those objectives, whether adopted in the current context or one altered by a reduction in the number of MLAs and Departments.

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.

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.

PROVISIONS FOR OPPOSITION

(1) Whether the accountability and effectiveness of the Northern Ireland Assembly and Executive could be improved through the introduction of provisions to formally recognise Opposition, while retaining the principles of power-sharing and inclusivity.

Do you agree or disagree that the accountability and effectiveness of the Northern Ireland Assembly and Executive could be improved through the introduction of provisions to formally recognise Opposition, while retaining the principles of power-sharing and inclusivity? If you agree, what model of Opposition do you feel would be most appropriate for the Northern Ireland Assembly?

What other changes do you consider would strengthen the accountability and effectiveness of the institutions of Government in Northern Ireland?

Please include a suggested time frame and outline the process for any changes and offer supporting evidence for your views.

In respect of Executive inclusiveness, as Members will be aware the Additional Initial Standing Orders (1999) provided that the Executive must include at least three Unionist and three Nationalist Ministers, an expression of the power-sharing principle entrenched in the 1998 Agreement, realized by means of community designation. Abandoning the Standing Order would seem to raise the prospect of an exclusive rather than an inclusive Executive, i.e. one that was not based on inter-communal power-sharing. Yet, it could be redrawn in line with the proposed requirement to achieve cross-community support by way of a weighted majority. In addition, the application of either d'Hondt or St Lague to the process of Executive formation is in itself a guarantor of bi-communalism through the power-seeking motives of the parties. Key, though, would be provision for a weighted majority vote endorsing the nominees for the Executive—whether in a single Executive slate vote or one for the nominees for FM & dFM and another for the remaining nominees: each would meet the over-arching need for cross-community support for the Executive.

Participation in the Executive is already voluntary, provided it meets the current test applied by the above standing order: eligible parties may, conversely, choose to decline the seat(s) to which they are entitled. However, that choice is constrained by the lack of resources, both procedural and financial: there are, in short, no tangible incentives enabling a party or parties to choose to adopt a formal Opposition role.

Invariably, in contemplating a formal Opposition one is drawn to the Westminster model, a model predicated on a majoritarian political system, with single-member constituencies and a 'first-past-the-post' electoral system: such a model is not consistent with the consociational design of the NI Act 1998 and related legislation.

To date, Executive parties have, arguably, enjoyed the best of both possible political worlds: able to perform both a governing and an oppositional role, without jeopardizing their participation in the Executive. Such a 'habit' is appealing and difficult to break and has, for the most part, been effectively managed since 2007. Moreover, like Scotland and Wales, there is

no formal provision for an Opposition in NI, although in the former two cases, as the Research Paper by Messrs McCaffrey and Moore points out, there is provision for non-Government parties re supply days and related matters.

The, at first sight, nearest comparator to the NI model is Switzerland – it too is an oppositionless consociation, but the corrective in that case is provision for direct democracy, i.e. referendums. One party there did, in 2007, opt for Opposition, but it was a short-lived phenomenon and within a year it rejoined the Federal Council. Proposals to create an Opposition have been mooted in Switzerland but without success: the Swiss model, one of concordance, collegiality and direct democracy is distinctively different from NI (it is also federal and bicameral, of course).

The case of South Africa is identified in the Research Paper however, despite the formal provision for Opposition, as a dominant party system (ANC) it has evolved into what some critics term 'hidden majoritarianism'. In Belgium, also cited in the Research Paper, there is a highly fractured party system within which the process of government formation is protracted to the point where some believe its continuance as a state is questionable. Both Belgium and South Africa do make provision in the form of resources for non-governing parties, as is the case in both Wales and Scotland, albeit that in the latter cases they are not termed as 'the Opposition' as such. Nevertheless, they do supply guides to the type of resources that may be made available and which enable the non-governing parties to perform their parliamentary roles – including, their self-presentation as alternative governments-in-waiting.

In NI, the weight of party opinion is disposed to making provision for an Opposition, as opposed to parties performing an oppositional role, not least via the committee system. It is the case (as per O'Leary and McGarry among others) that the statutory committees in the NIA supply a mechanism for 'rigorous accountability', but they are not a surrogate for Opposition. Their key role in general is to subject government to effective scrutiny, whether in a Westminster or Westminster-like setting or other parliamentary contexts. (And it is worth noting the recent changes wrought to the select committees in the House of Commons in terms of their chairmanships and memberships. Most chairs are directly elected by the whole House and members via open elections within party blocks, thereby adding to their legitimacy: such roles are no longer in the gift of the Whips.)

Such scrutiny can/must be conducted in democratic parliaments, whether or not there is provision for a formal (if not 'loyal') Opposition. One expectation of party chairs/members (certainly at Westminster) is that they leave their 'party baggage' outside the committee room: this is a behavioural norm rather than a structural matter: partisanship can transcend even the most elegantly designed committee system. The question then is, what could a formal Opposition provide that a scrutiny committee system cannot? To which the readiest response is an alternative Government.

UK and other constitutional purists argue that without Opposition there is no democracy: in the words of Sir Ivor Jennings, 'in truth opposition is an essential part of democratic government'—he was referring to the institutionalization of Opposition in the House of Commons, defined in statute in 1937 (in Canada, the role was defined in 1905)—whilst Lawrence Lowell, the American constitutional expert, described the institutionalization of opposition 'as the greatest contribution of the nineteenth century to the art of government'.

The key word in this connection is 'institutionalization'. Executive parties can and do adopt an oppositional role in the current Assembly, i.e. ride two horses simultaneously. In addition, opposition by Executive parties (to policy proposals, for instance) can be effected at the Executive table if three Ministers call for a cross-community vote at an Executive meeting. That is to say, NI is not 'oppositionless': and statutory committees can, especially where they are unanimous, express opposition to policy and legislative proposals as a result of performing their scrutiny role.

However, calls for an official Opposition suggest that current practice(s) is/are deemed insufficient by some. If provision was to be made for Opposition then on what basis? In the current context, a party or parties can decline a seat or seats in the Executive and self-designate itself/themselves as an opposition (of sorts), but without access to the resources available to parties in other legislatures. I think the issue of resources, be they financial, supply days, committee places, speaking rights, can draw on practices elsewhere, not least Scotland and Wales, each of which provides a guide on how to facilitate non-governing parties. However, in each of those cases there are viable and electable 'governments-in-waiting', whereas the premium placed on inclusiveness in NI creates a potentially different order of problem.

I certainly would not endorse the idea that the principle of inclusiveness be abandoned: i.e., as is currently the case, parties that are, on the basis of seat strength, eligible for a seat or seats around the Executive table, should retain that eligibility: it would be for it/them to decide whether or not to participate in the Executive. Should that mean that an Opposition should comprise only that party/those parties otherwise eligible for an Executive place but which opt not to enter the Executive or, indeed, leave an Executive of which it was/they were formerly a constituent part? (And having withdrawn, voluntarily, from the Executive would not be permitted to rejoin it at a later date.) In a sense, there is a threshold issue lurking here: should there be a minimum number of MLAs (from one or more parties) below which they would be denied the formal Opposition role? Defining such a critical mass would, I think, be a necessary and perhaps tricky issue to be resolved.

So, in terms of the composition of an Opposition: should it, in part, be a matter of status: i.e., whether or not a party is sufficiently strong in terms of the number of seats it holds to otherwise be included in the Executive? Or should it be based on a numerical baseline? Would the role of Opposition be confined to one party or a coalition of smaller parties – or, indeed, both, in some sort of rank order? Unlike the design of the Executive, I am not persuaded that the Opposition should be necessarily coalitional, albeit that it could be a strength of any such provision and it would enable some perhaps greater choice in allocating the roles of 'shadow' ministers between/among the relevant parties.

For now, I will leave these questions hanging in the air. Certainly, provision for an Opposition would enhance Executive accountability and in theory at least enable a party or coalition of parties to develop an alternative programme for government in order to widen its electoral base. Electoral dynamics would, potentially, change in such circumstances.

One final point: if there is to be provision for an Official Opposition which, among other things, acts as a potential partner in government rather than *the* alternative government, then consideration needs to be given to creating the procedural opportunity for a censure motion, i.e. a vote of no confidence. Perhaps this could be afforded by way of an amended PoC

procedure.

Re other accountability measures.

There are two related matters that may be considered: (a) Place the Liaison Group on a statutory footing, tasked to produce an annual report and a legacy report at the conclusion of a mandate, so as to both record the work of the statutory committees and identify those operational/procedural/resource matters it considers need to be addressed so as to ensure that scrutiny is conducted efficiently and effectively: it could in that regard be regarded as an agent of change both for the current Assembly and, via a legacy report, future Assemblies; (b) Empower it to cross-question the First and deputy First Ministers at least annually on policy/programme co-ordination, for which it has strategic responsibility. The remit would need to be carefully calibrated so as not to impinge on the roles of the OFMdFM Committee.

If the above changes, i.e. provision for an Opposition and a new status and role for the Liaison Group were to be implemented, it would be feasible to introduce them in the next mandate beginning in either 2015 or 2016. Perhaps the time necessary to effect such changes would in itself enhance the argument for extending the current mandate by 12 months.

PROVISIONS FOR OPPOSITION

a) In particular, please comment on whether Opposition Parties/Non-Executive Parties should be allocated appropriate financial resources to assist in their Assembly duties.

What is your view on appropriate financial assistance being provided to Opposition Parties/Non-Executive Parties?

How might this financial assistance be structured to support Opposition Parties/Non-Executive Parties with varying numbers of Members?

Please offer supporting evidence for your views.

Re additional financial assistance: this would be justifiable and in all likelihood, relatively inexpensive, especially were there to be a reduction in both the total number of MLAs and of Executive departments. The method for calculating the amounts (both salary top-up + office expenses/allowances) for the 'Leader of the Opposition' would need to reflect the status of the role and be related to party strength, i.e. an amount for each seat held. This is clearly a matter for the ISRP, which may draw on the models developed in the Scottish Parliament and the NAW as guides to its recommendations. Lower amounts (salary top-up and expenses/allowances) could be made available to other Opposition spokespersons, on a scale commensurate with the scope and remit of the respective Departments (the ISRP has already indicated that it is minded to examine the allowances available to Ministers in accordance with the complexity and range of Ministerial responsibilities: the same exercise would need to conducted in respect of Opposition spokespersons). The reach of financial assistance to an Opposition party would be governed by the seat-strength of non-Executive parties, the baseline point mentioned earlier.

PROVISIONS FOR OPPOSITION

b) In particular, please comment on whether arrangements for allocating Chairs and Deputy Chairs of Assembly Committees should be changed to take account of a formal Opposition.

What is your view on changing arrangements for allocating Chairs and Deputy Chairs of Assembly Committees to take account of a formal Opposition?

If additional Chairs and Deputy Chairs were allocated to Opposition Parties/Non-Executive Parties, should this be done on a proportional basis on the number of Members of Opposition Parties/Non-Executive Parties; i.e. larger Opposition Parties/Non-Executive Parties receiving more Chairs/Deputy Chairs?

Please offer supporting evidence for your views.

I am disposed to retain the proportional allocation of Chairs/Deputy Chairs via either d'Hondt or St Lague. I think that supplying other resources, including 'supply days', priority at question time, enables the Assembly to dispense with the earmarking of Chairs/Deputy Chairs for Non-Executive parties. In the best of all possible worlds, Committees should generally be nests of consensus: the value placed on consensus could be reduced where, for instance, shadow ministers occupied a chair/deputy chair role. However, blocking them from such roles would be problematic, not least because it would offend the principle of equality. What matters is how chairs/deputy chairs interpret their roles: being a chair and an opposition spokesperson could create role strain and impair intra-committee relations.

PROVISIONS FOR OPPOSITION

c) In particular, please comment on whether Opposition Parties/Non-Executive Parties should be guaranteed additional time to raise and debate non-Executive business in the Assembly — including priority speaking rights in response to Ministerial Statements and in Question Time.

Do the current arrangements provide adequate time and speaking rights for Opposition Parties/Non-Executive Parties to raise and debate non-Executive business and questions Ministers? If so, please outline why. If not, please outline how you think arrangements could be restructured.

Please offer supporting evidence for your views.

As mentioned in passing earlier, I do think that an Opposition party/parties should have time available when it determines plenary business, i.e. 'supply days', whether full or half-days. Given that 16 half-days are available in the Scottish Parliament (as outlined in the McCaffrey/Moore Research Paper) for non-Executive parties and that the NIA has fewer members, 10-12 half-days seems appropriate.

I also support the proposition that the Leader of the Opposition (or Opposition spokespersons as appropriate) should have priority at Ministerial QT and in response to Ministerial statements. Equally, if a second smaller party meets the threshold of what constitutes an Opposition party (i.e. in terms of the minimum number of seats it holds), then its leader should be accorded second order priority, both at QT and in respect of Ministerial Statements.

Supply days and priority speaking rights are the norm for official Oppositions and afford opportunities for the relevant parties to both scrutinize and criticize Government policy and legislation, thereby offering an alternative to voters and the wider public.

Section 5

Additional Information

Please provide any additional information which you believe will be of assistance to the Committee during the course of the Review.

(This box will expand as you type)

Section 6

Contact Details

All responses should be sent by email please to:

The Committee Clerk
Assembly and Executive Review Committee
Room 375
Parliament Buildings
Ballymiscaw
Belfast
BT4 3XX

Tel: 028 90521787 or
028 90521928

To arrive no later than 27th March 2013

Email: committee.assembly&executivereview@niassembly.gov.uk

Thank you for your submission