



Constitution Committee

Corrected oral evidence: The governance of the union: co-operation, consultation and legislative consent

Wednesday 13 March 2024

10.15 am

Watch the meeting

Members present: Baroness Drake (The Chair); Lord Beith; Lord Burnett of Maldon; Lord Foulkes of Cumnock; Baroness Goldie; Lord Keen of Elie; Lord Strathclyde; Lord Thomas of Gresford.

Evidence Session No. 3

Heard in Public

Questions 37 - 49

Witnesses

[I](#): Dr Lisa Claire Whitten, Research Fellow, School of History, Anthropology, Philosophy and Politics, Queen's University Belfast; Professor Derek Birrell, Professor of Social Policy, University of Ulster.

Examination of witnesses

Dr Lisa Claire Whitten and Professor Derek Birrell.

Q37 **The Chair:** Good morning, everyone, and particularly to our visitors who are giving evidence today. This morning, the Constitution Committee is taking evidence from Dr Lisa Claire Whitten, research fellow at the School of History, Anthropology, Philosophy and Politics at Queen's University Belfast, and Professor Derek Birrell, professor of social policy at the University of Ulster, on the committee's inquiry, "The governance of the union: co-operation, consultation and legislative consent".

Dr Whitten and Professor Birrell, can I welcome you both this morning? We are really delighted that you could join us, and thank you for that. We have a series of questions that we would like to put to you. I hope you have had some indication of the area that we want to cover. Before I move into the questions, are there any opening comments that either of you would wish to make?

Dr Lisa Claire Whitten: I may make some general comments at the beginning, but I am happy to go straight in.

Q38 **The Chair:** Let me open with a question on the new intergovernmental relations structures that were introduced in January 2022. I am conscious that the Executive and Assembly have not been functioning for most of the period that they have been in, but we are trying to seek your views as to what contribution the new intergovernmental structures could make to successfully promoting joint working between the UK Government and the Northern Ireland Executive. How could they be enhanced so that they are more likely to promote joint working?

Dr Lisa Claire Whitten: Thank you very much to the committee for the invitation to be here speaking with you. Overall, I would say yes, or at least that the new structures are unlikely to hinder or disincentivise joint working between the Northern Ireland Executive and the UK Government, but it is also hard to say anything very definitive at this point.

As you acknowledged, only a handful of meetings set up under the new three-tier system have been attended by elected Northern Ireland representatives, due to the Executive's collapse in February 2022 and the two-year hiatus in fully functioning devolution that followed. Most meetings of interministerial groups—the third tier—have instead been attended by Northern Ireland executive officials, who have been there in an observatory or listening capacity. With the return of Stormont, we are now at a moment of opportunity to see the efficacy or otherwise of full Northern Ireland participation in these IGR structures.

That also means that a direct answer to that question of what these mean for the Northern Ireland system is always going to be a little speculative. That said, it is possible to make a couple of more general observations about the new intergovernmental structure from the perspective of Northern Ireland and its particularities that may be relevant for any discussion in terms of how they work in the overall

broader picture of the UK political context and constitutional arrangements. I will state these briefly, because they may come through in later remarks.

The fact of Northern Ireland's system of a mandatory power-sharing devolution makes the development and articulation of a single Northern Ireland position on any given issue, at any given meeting, more difficult. In the context of the intergovernmental relations structures, internal differences between Northern Ireland Executive Ministers may constrain the ability of Northern Ireland as a whole to benefit comparatively from the new potential for better cross-jurisdictional working between the different parts of the UK.

It is an obvious point, but the Northern Ireland institutions' propensity to collapse and be absent for prolonged periods is detrimental to any endeavour to promote joint working between Northern Ireland and other parts of the UK through that IGR system. That begs the question about the sufficiency or otherwise of what you could term a plan B arrangement for Northern Ireland participation during periods of collapse and the extent to which the absence of Northern Ireland's elected representatives could or should delay progress in the overall system, or certain decisions within it.

There are also the realities of north-south relations on the island of Ireland and the shared geography that Northern Ireland has with another international state. Many of the areas of policy for which there are dedicated interministerial groups in the new IGR system are also areas where there is established north-south co-operation on the island of Ireland. At least from what I understand, there are no mechanisms to consider, recognise or potentially accommodate the possible relevance of north-south co-operation to discussions happening in the context of the IGR structures.

Of course, these structures are domestic, and north-south co-operation is not, so having the two operate separately is appropriate, but, at the same time, having no apparent context for recognising the potential interactivity of those two spheres or arenas of policy-making—the domestic and the north-south—seems perhaps a weakness of the system from a Northern Ireland perspective.

A final point is on Northern Ireland's obligations under the Windsor Framework, or protocol (as was); it is the case that, post Brexit, Northern Ireland has additional requirements for policy-making, again in areas that are covered by dedicated interministerial groups in the new IGR system, due to its obligations under the Windsor Framework to stay aligned to specified EU laws, primarily concerning trade in goods but also regarding electricity and energy markets and individual rights.

Again, while the IGR structures are perhaps not the appropriate forum for full consideration of the implementation of the Windsor Framework for Northern Ireland (there is dedicated architecture for that) nonetheless the apparent lack of connection or ability to acknowledge the potential

interactivity of those requirements arising for Northern Ireland under the Windsor Framework, and the ability of Northern Ireland Ministers to opt in to or out of initiatives in the intergovernmental relations structures, seems to be an omission in the new architecture.

The Chair: When we come on to the common framework, we might want to particularly use that as an example of agreeing how the common frameworks, because they are slightly awaiting Northern Ireland executive approval, sit alongside the Windsor Framework. Let us reserve that for then. Professor Birrell, did you want to add something?

Professor Derek Birrell: I may not have a lot to add as background. Thanks again for the invitation. As you may guess, I am now a professor emeritus, but my area is social and public policy, and I am still doing some work.

On the background, the performance of the new three-tier system without Northern Ireland has been fairly patchy. One of the major disappointments has perhaps been the fact that tier 1—the council—which involves senior Ministers and the Prime Minister has met only once, in 2022, and not since then. One of the objectives of the system was to increase respect for the devolved Administrations and systems.

I should also say that the fact that Northern Ireland did not participate, apart from the Civil Service observers, has drawn little attention in Northern Ireland. It is not on the main list of what was seen as the deficits of the collapse of the Assembly, but that is not to say that it cannot be important, and it has been.

One of the other general background points is that there has been a great deal of intergovernmental co-operation on which this can build. There is sometimes a distinction between intergovernmental relations and intergovernmental activity, and there is a great deal of activity that is not structured. There have been other elements of intergovernmental co-operation that have become quite important. One is the quadrilateral finance meetings, which have taken place very regularly. The new system is building on that, and it does show the importance of building on what already exists.

The other general background point is the extent to which all four Administrations involved have shown some preference for bilateral relations. Dealing with a problem tends to be done in a bilateral way—say, Scotland-UK—and it is not really the primary concern to wait until a structured meeting, so the legacy of bilateral meetings is quite important. Therefore, the new system has to show that it can deliver.

Just to end on perhaps a promising note, it was last Wednesday that the First Minister and Deputy First Minister attended a group meeting with Scottish and Welsh representatives on EU-UK relationships. That can be seen as a promising beginning.

The Chair: Developing that point, when the new intergovernmental

structures were agreed, all the devolved Administrations and the UK Government committed to the principle of “promoting collaboration and the avoidance of disagreements”. To what extent is the spirit of that commitment captured in the *Safeguarding the Union* Command Paper? Has that carried through?

Professor Derek Birrell: That is quite a good question, because there are quite a range of issues that have made co-operation more difficult, because of current events relating to Brexit and other issues. *Safeguarding the Union* does raise some other issues. I must say that, as a Command Paper, it is a rather strange document and is written in rather peculiar ways. In a sense, it is very much a political negotiation.

It has at least one bizarre aspect, which is that it is a document between the UK Government and a single political party, although that party was and is in government in Northern Ireland. There is some question about whether it is itself an example of intergovernmental relations. In a sense, it is not.

In terms of whether the *Safeguarding the Union* document promotes intergovernmental relations, in a sense it does because it means that the Northern Ireland reps will return to the intergovernmental bodies. That has already started. There are already several examples, which we will go through in a moment, in the first month.

It is also the case that some new examples of intergovernmental relations have been set up, particularly the monitoring committee, which is really a bilateral one between the UK and Northern Ireland on the workings of the Windsor Framework.

The proposal for an east-west council is seen as a follow-up to the Irish dimension, which is clearly written into the Good Friday agreement. It is not totally clear what the East-West council will do, or even who will populate it. It is seen as Ministers, but also other people, particularly business representatives and even academics, so in what sense it is an intergovernmental body is not clear. It seems that Scotland and Wales will be represented, but its function is very much attached to promoting business.

There is another similar intergovernmental body, InterTrade UK, which will be separate. The Northern Ireland Minister of State was speaking in the House of Commons last week and proceeded to call it the east-west business council, which might suggest that the two might even be merged. That may not be the case at all, but business is the focus of both.

As a final point, one of the slight problems for good intergovernmental relations is the legacy of the negotiations between the Government and the DUP, in that it might lead people to think that the best approach is a bilateral one by the devolved Government to the UK Government, rather than working through quadrilateral statutory bodies. Those are some first impressions on the *Safeguarding the Union* impact.

Dr Lisa Claire Whitten: I do not have much more to add. I would have said similar to Professor Birrell's remarks around the parameters being quite different inasmuch as this is an agreement between the UK Government and one single political party, which is not conventional. At the same time, the creation of those new bodies that have been mentioned—the east-west council and InterTrade UK in particular—seems to be in line with the spirit, if you will, of collaboration and seeking to facilitate better working relationships across the UK.

There is also something to be said about the lack of connection between the existing and new IGR system, and between these new bodies set up under the *Safeguarding the Union* Command Paper auspices, as well as those bodies and initiatives established in relation to the withdrawal agreement architecture, which were further developed in the context of the Windsor Framework package of measures.

As Professor Birrell has also highlighted, the personnel involved across these bodies differ somewhat. Some are ministerial and some are official. From a Northern Ireland perspective, in particular, there is stakeholder engagement to be facilitated through the Windsor Framework arrangements. These new bodies seem to be combining everyone across the board, and yet there does not seem to be a developed sense of how these will link together and how communication is to be facilitated between them.

When you look at the policy substance of what they are likely to be engaging with and the issues that they are likely to be discussing, there is quite a considerable overlap. It may be an area for potential development to better think through how all of these mechanisms, which are all still relatively new will or ought to work together.

Q39 **Baroness Goldie:** Good morning, Dr Whitten and Professor Birrell. I am going to bring in a slightly lighter touch to all of this and take us back to some first principles. I was very struck, Dr Whitten, by the paper that you prepared in 2022 for the Institute for Government. It is important that we make clear that, at the Westminster end, we understand that there is not some template that all the devolved legislatures neatly fit in to. I just wanted to clarify if I understand the position correctly in relation to Northern Ireland, which is that, effectively, the constitution now for Northern Ireland is a combination of the Belfast agreement and the 1998 Northern Ireland Act. Have I understood that correctly?

Dr Lisa Claire Whitten: Yes, in terms of the constitutional laws that apply to Northern Ireland. Within the broader UK constitutional arrangement, Northern Ireland has a dedicated arrangement that is quite unique inasmuch as it has an international law basis in the 1998 agreement, and the Northern Ireland Act which has been judicially recognised, particularly in the case of *Robinson*, I believe, in 2006, but it was reiterated in some of the Brexit case law, to serve, in effect, as a constitution for Northern Ireland, which is to be interpreted and applied in the context of the provisions and principles of the 1998 agreement.

In that sense, although, of course, it is within the UK and we have an uncodified constitution across the state, Northern Ireland is the part of the UK that comes closest to having a level of codification of its constitution, in the Northern Ireland Act in particular. At least that would be my analysis on it.

Baroness Goldie: That is helpful. Just to be absolutely clear, the case to which you referred is from 2002, but that is just a detail. Given that the Assembly reconvened only very recently—and, of course, it is extremely difficult for either of you to give an opinion on how relationships are working—can I invite you to look at what we do know, which is that, for nearly 25 years, both the Scottish and Welsh legislatures have been operating? From your observation of how that set of relationships has progressed with Westminster, do you have any thoughts about that that you would wish to share with us, or are there lessons to be learned as you look ahead in Northern Ireland to the reconvened Assembly getting back to serious parliamentary work?

Professor Derek Birrell: The Scotland experience has been quite patchy. At times, some of the intergovernmental processes have collapsed. You will probably all be aware of the history of the Joint Ministerial Committee and its near collapse. It was then restored after 2007, and some of the functions were changed. It sprang into action a little bit again over Brexit, but that experience for Scotland and Wales was disappointing.

The SNP was quite enthusiastic, at least at first, about the Joint Ministerial Committee. They have all joined the British-Irish Council, which was first seen as some pure Northern Ireland-related invention but became quite popular with the other countries that were involved. They all continued it after Northern Ireland withdrew from the British-Irish Council until this month. They have found some of the intergovernmental work useful.

I know that there are some Scottish academics who regard intergovernmental structures as having no great value. When a Scottish Minister or the Scottish First Minister wants something, they will go directly to the Ministers in London and, to some extent, it is the same in Wales. This is quite a big topic. Intergovernmental relations in Scotland have hit a brick wall at the moment, certainly from the Scottish Government's point of view, over the use of Section 35 to overrule devolved power over the gender recognition issue.

Wales has taken a slightly more low-key attitude to intergovernmental relations. There was an early trend that they objected strongly to interventions by the Welsh Secretary of State, which caused problems. In more recent years, Mark Drakeford has developed quite a good relationship with Secretaries of State, but that is very much at the senior level.

When you start to look at the lower levels involving Scotland and Wales, there is a great deal of interdepartmental co-operation that continues all

the time. Northern Ireland is slightly different, in that it has a separate Civil Service, which has not always encouraged that kind of co-operation. I hope that those were a few relevant points.

Dr Lisa Claire Whitten: I would briefly add two points. One is based on my reading of communiqués that are released after meetings of interministerial groups, inasmuch as they are published. Primarily, it seems to be quite a transparent arrangement, so there have been publications where meetings have taken place.

One can then go and read correspondence that is released, on occasion, from the Welsh government perspective in particular, but also sometimes from the Scottish Government about the same meeting. You can see some discrepancies between what is being said and outlined in the overall communiqué, and then the perspective of the individual devolved Administrations. Of course, we can expect this to some degree given the different starting points and priorities.

From doing that cross-reading, it does seem that there has, at times, been some frustration from the Welsh and Scottish side at perhaps a lack of substantive discussions within the meetings, and early on—this is specific to some IMGs; I would have to go back and look up the occasions on which this has taken place—about the speed of the meetings being organised and perhaps a lack of communication in advance.

However, on the more positive side, as you go through the communiqués, it seems that has changed. There may have been a bedding down of the system and arrangements, such that there is more advanced notice of meetings. The rotating chair system has started to take effect and seems to be working quite well.

Looking forward to Northern Ireland participation, it seems that it may be joining at a point when the new mechanisms have started to be quite effective, inasmuch as the structure seems to be working better than it was from initial teething challenges.

Overall, we are still at the early stage of working out how policy development and policy divergence operates in the post-Brexit context in relation to devolution and the UK-wide arrangements. We can look at things around retained EU law, now assimilated law, the progress towards new trade agreements, and the arrangements for the border target operating model. The slow evolution of legislation and policy across all of the different territories is still at an early stage of seeing how much divergence arises, and how much, therefore, the interministerial groups and the new IGR system have to hold agreements to disagree, as well as agreements to go in the same direction in particular policy areas.

Northern Ireland, because of its complexities and particularities, may bring an added dimension of potential multi-layered policy-making in the UK after Brexit. Across the board, there is a degree to which we are still to see how this has effect in terms of policy substance.

Q40 **The Chair:** Just finishing off this question, the intergovernmental relations structures have a dispute resolution process. Has the Northern Ireland Executive ever used that process? Do they have any dispute going through? There has been some speculation that there is one going through the Treasury, but is there, to your knowledge, one going through?

Dr Lisa Claire Whitten: To my knowledge, no.

Professor Derek Birrell: No, not as far as I know. There are examples of them taking some complaints to the JMC about capital funding and so on, but not recently. I am not sure that there are any examples yet of a complaint from Scotland, Wales or England that has escalated through the three tiers. I do not think that there has been an example of that either.

The Chair: Dr Whitten, on your reading of those dispute resolution processes, could that process be meaningfully used in Northern Ireland, or do the complexities inhibit that?

Professor Derek Birrell: The obvious area to look at seems to be finance. There is, of course, a special second-tier body that will look at finance and might well build up as a route for complaints about financial issues. From the recent example of Northern Ireland, the inclination will always be to head to the Treasury, the Secretary of State or the Prime Minister.

What is in existence already, although it does not seem totally clear as to how it fits into the new IGR, is the Treasury statement of funding of the devolved Administrations. This is something that is updated regularly. The last one is from 2020, and it has a clear dispute procedure written into it. It led to quite a major dispute, when, if you recall, the Conservative Party and DUP agreed a Confidence and Supply Agreement, and quite an extra sum of money was delivered to the DUP for, basically, support in the House of Commons. The Scottish and Welsh Administrations lodged a complaint that it breached the principles of the statement of funding.

It turned out that the only problem was that the final arbiter was the Treasury, which eventually rejected the complaint, but that remains as a procedure that will have to be built into the working of the IRG, about which has primacy.

If I could just make one other point about dispute resolution: the other option that is open and has been used by various bodies in Northern Ireland is to use the courts and judicial review in the context of disputes. This is not so much about finance, but there have been several major decisions by the Northern Ireland courts and by the UK Supreme Court affecting views on Brexit. The courts are another option for dispute resolution. The IGR system has to find a place where it can prosper.

The Chair: I want to move on, but do you have any final comments on that, Dr Whitten?

Dr Lisa Claire Whitten: I do not have more to say. It is true to say that it was reported that the Northern Ireland Executive had initiated a dispute procedure in autumn 2022—I think it was September—and that came through in answers to questions in the Welsh Assembly. In February 2022, the institutions collapsed and I have not heard anything further from that point, so it perhaps was not progressed.

The Chair: It is not a working example that we can look at. Okay. Thanks very much. Could we look at the issue of intergovernmental relations structures on a statutory basis? Lord Strathclyde, do you want to start?

Q41 **Lord Strathclyde:** Part of the nub of this inquiry is to look at the relationship between the UK Government and the devolved entities, and how to improve how that works for the long term. Is there a case for putting those relationship structures on a statutory basis? We are trying to make sure that attitudes and behaviours change in as co-operative a way as possible, but it would be interesting to hear your views.

Dr Lisa Claire Whitten: A case can certainly be made to put it on a statutory footing. It is not my place to advocate strongly for or against. I would just make a couple of related points to highlight that, from a Northern Ireland perspective, should any such initiative be taken forward, the form of any resultant statutory underpinning would need to make provisions regarding what to do in the event of the collapse of the Northern Ireland Executive, and the extent to which that would or would not impact on the functioning of the whole IGR system, and/or if alternative provisions would be made for Northern Ireland representation via senior officials or Northern Ireland Office Ministers.

A statutory footing puts the whole thing into somewhat of a more rigid arrangement, and so it would have to have some level of flexibility or carve-out to recognise the instability of power-sharing that can be a reality for Northern Ireland.

For more general reasons, but also not completely detached from that first point, any statutory underpinning of IGR in the UK system would be best aimed at a high-level arrangement, focusing perhaps on legislative requirements for the frequency of meetings, and perhaps a duty on Ministers to participate, and to do so in good faith, rather than seeking to make very detailed operational provisions and mechanisms in law.

In any scenario and in any case, even in other states and jurisdictions internationally, intergovernmental relations work well when there is trust between parties and when there is good faith and means for effective communication. Although institutional structures and a legal framework can facilitate that, it cannot make it happen. The softer relational side of IGR is going to be determinative of the health or otherwise of the system. Those would be my thoughts on it.

Professor Derek Birrell: I do not have very much to add to that. I would agree with Dr Whitten about the problems of forcing the

intergovernmental relations structures into a formal or rigid structure. Ultimately, in the case of any dispute about the statutory basis, it would be for the courts and not for Parliament to resolve, and it might lead to an increase in that.

There is one possible example of it. The all-Ireland intergovernmental relationships, the North/South Ministerial Council and so on are on a statutory footing of course. What happened just before the collapse of the Executive was that DUP Ministers withdrew from the North/South Ministerial Council and a court case was taken against them, when the courts ruled that the Ministers had acted unlawfully. That might have been followed up—in what direction, no one is sure—except that the whole system collapsed, so the case was not continued. The case was adjourned several times, with the judge asking the politicians for some agreement on that, so that is possibly an example that might happen.

Q42 Lord Beith: Dr Whitten, is it realistic to expect Northern Ireland's renewed participation through its Executive and its Assembly to shape in some way the governance structures and the practices by which the union functions, or is it more realistic simply to see Northern Ireland, because of all the other arrangements that you have described—intergovernmental, cross-border and so forth—as so distinctive that it does not really shape the devolution arrangements for other parts of the United Kingdom but is tacked on to it?

Dr Lisa Claire Whitten: That is an excellent question. It is perhaps not realistic to expect a very direct role for Northern Ireland in terms of shaping the direction of the IGR systems and structures as a whole, partly due to the challenge in many contexts of articulating a strong, unified Northern Ireland position on some of the substantive policy areas. That is not to say that that is not possible, but the power-sharing arrangement does make it more challenging.

It is worth highlighting those additional complexities and particularities of Northern Ireland that it faces. The participation of Northern Ireland Ministers potentially brings some of those to the table in the context of interministerial groups and the council, et cetera. It may be that the presence of Northern Ireland Ministers shapes and perhaps expands the discussion in these settings to consider dimensions and factors that have not previously been directly addressed.

You could, for example, envision the interministerial group for environment, food and rural affairs having to consider how decisions taken there and what is being considered in that context play out in view of the obligations of Northern Ireland under the Windsor Framework and, therefore, what is happening at the EU level in areas of policy. There is quite a strong overlap in terms of some of the regulations that still apply in Northern Ireland, as well as the geographic reality of shared rivers, air and land on the island of Ireland with a state that is making different policy choices.

Also, in the context of, for example, the interministerial group for net zero, energy and climate change, to what extent is the fact that there is a single electricity market in Northern Ireland and Ireland relevant to those discussions, and the fact that it is still linked, to a degree, to what is happening in the EU context? I could go on about the interministerial group for security, justice and immigration, and cross-border policing and judicial co-operation on the island of Ireland, which is always going to have to have a particular profile or consideration.

Lord Beith: Will they not be more likely to need bilateral consideration?

Dr Lisa Claire Whitten: Yes.

Lord Beith: They do not affect Scotland or Wales in the same way.

Dr Lisa Claire Whitten: No, not in the same direct way, but, in terms of Northern Ireland, which will have a bilateral arrangement or set-up, either north-south or directly with the UK Government for that purpose, Ministers are participating within the interministerial group, so it will add another dimension or diversity, if you will, even if that does not necessitate alignment across the board, if Northern Ireland is an exception in that context.

It is still fair to say that it will perhaps broaden the conversation and, in some areas, perhaps it is worth noting, particularly on things such as the environment, agriculture, rural affairs and net zero, et cetera, the Scottish Government's position regarding alignment with EU law, and at least the policy intention to aim for that. If you have Northern Ireland Ministers and representatives in the room who are obliged to align with EU standards, the Scottish Government are then perhaps forced to consider that in a different way, or it brings it into the conversation in a new way.

It is all hard to determine, but the requirement for Northern Ireland's particular arrangements and idiosyncrasies to be more infused in the system may play some role in shaping and expanding conversations that are properly domestic to have to consider the interactivity with neighbouring states.

Lord Beith: One immediate example is common frameworks. Do you anticipate that these will be put on a formal footing instead of simply operating informally, now that the Executive and the Assembly are in place?

Dr Lisa Claire Whitten: I would optimistically say yes, on the basis that previously the UK Government cited the lack of a Northern Ireland Executive as a major reason for not putting them all on a formal basis.

Professor Derek Birrell: There will be allowances made for it. It is possible to expand the outlook or coverage at meetings of the IGR groups, particularly what are called the portfolio groups, which several relevant Ministers can be invited to attend. Northern Ireland joining might widen the agenda or the approach, and that can be catered for by the

attendance, which, of course, gives a greater body of work to do, which may help the IGR.

Northern Ireland departments and Ministers will take part freely, as far as I can see, in all of the IGR meetings. There was an example last year when the portfolio group on the economy was looking at the Windsor Framework, and there was, of course, no Northern Ireland representative in attendance.

There will always be the attraction of a bilateral approach to certain issues. One good example in Scotland is the group on social security, because Scotland has moved to independently adopt social security measures but does keep in touch with the Department for Work and Pensions and the relevant Ministers through a working group. That is a topic that again shows the attraction of bilateral negotiations. Perhaps we are coming on to common frameworks later.

Lord Beith: This is the point at which common frameworks are under consideration, so if you want to add anything else about them, please do.

Professor Derek Birrell: The guidance on common frameworks is very much that they pave the way for the operation of the internal market, but they must take account, first of all, of the devolved states and the position of the devolved Administrations, as well as the special Brexit arrangement for Northern Ireland—for the protocol and the Windsor Framework.

Civil servants have been working to deal with the provisional frameworks, because they, of course, do not require the Northern Ireland Ministers. You might think that bringing in the Northern Ireland Ministers will bring, to some extent, differences in Northern Ireland with them, and that certainly cannot be ruled out, making it more difficult for the frameworks or for exclusions.

Perhaps one way of leaving that is that there has been relatively little political attention by Ministers or the Assembly to common frameworks, and not much understanding relating to the details of the workings of the internal market.

Q43 **The Chair:** Dr Whitten, on one precise point, there are 28 common frameworks operating on a provisional basis, which cannot be signed off until the Northern Ireland Executive agree. In certain areas under the Windsor Framework, Northern Ireland has adherence to EU laws. Can that be dealt with quite easily within ratifying the common frameworks, or is that going to be a more substantive issue?

Dr Lisa Claire Whitten: As I understand it, part of the intention of the common frameworks is to facilitate differentiation in a managed way. We can look at those 28 common frameworks and read them across the EU law that continues to apply in Northern Ireland. There are overlaps. This is from memory but, from doing some analysis previously, about 19 of the 28 interact directly with areas where Northern Ireland is still subject to EU law. A different but not entirely distinct 19 also overlap with areas

of established north-south co-operation. I could send on details of what these are in substance.

There is going to have to be consideration of both of those dimensions in the Northern Ireland context and its participation within the common frameworks. In contrast to, for example, the more rigid arrangements of the United Kingdom Internal Market Act, I understand that the common frameworks are intended to facilitate differences between the devolved and different constituent parts of the UK. It does not necessarily mean that divergence will hinder their operation. It may just be that differentiated arrangements for Northern Ireland are part of the *modus operandi* going forward.

The Chair: Can we move on? I am conscious that we have quite a few questions. I want to move on to the UK territorial department versus the functional department. Lord Foulkes?

Q44 **Lord Foulkes of Cumnock:** Welcome, Dr Whitten and Professor Birrell. As Baroness Goldie said, while the Assembly has not been operating, the Northern Ireland Office has had a much greater role and is much larger than the Scotland Office and the Wales Office. Is this going to change substantially once the Assembly gets under way? Will the role of the Northern Ireland Office change? Is there still an important role for that territorial department?

Dr Lisa Claire Whitten: It is above my pay grade to say definitively, but I do not think that we are likely to see a reduction in the size of the Northern Ireland Office. It has a distinct role, particularly given the history of devolution here. Its staccato progress and periods of suspension and prolonged hiatus in operation mean that the Northern Ireland Office plays quite a powerful and significant role as the effective administrator of a territory in terms of policy and provision, albeit we are not and have not been in an era of direct rule, formally understood, for quite a while.

There is a dimension of the Northern Ireland Office's role that is distinct across the three territorial offices, not only because it has that stand-in position to have to make sometimes difficult decisions in the context of an absent Executive, but also due to the way in which the Northern Ireland Office plays an almost diplomatic function in terms of bilateral relations with Ireland that pertain to matters in Northern Ireland.

We often see arrangements between the Northern Ireland Secretary and the Tánaiste or the Taoiseach, with them standing side by side when they are brokering talks or making arrangements even around the common travel area and those sorts of things, albeit there is also the higher-level Prime Minister-to-Taoiseach arrangement. The Northern Ireland Office still has requirements around the legacy of the conflict and an ongoing gatekeeper position in terms of security status and operations here in Northern Ireland, and paramilitarism, et cetera.

There are a number of reasons, in addition to the very recent collapse of the Executive and Assembly, to suggest that it will continue to have a larger role and some additional features vis-à-vis the other territorial offices.

Lord Foulkes of Cumnock: That is a very helpful answer, Dr Whitten, especially for your pay grade, as you said. What about Professor Birrell, who gets paid a bit more, no doubt?

Professor Derek Birrell: I might have a slightly different view of the Northern Ireland Office, because my view probably goes over quite a long period of time. The Northern Ireland Office is very small. It has about 154 civil servants in Belfast and London. Their functions are specified in the Northern Ireland Act 1998, and are fairly limited, historically, to supporting the political arrangements and the Good Friday agreement, distributing the block grant itself, although not the details of it, certain other financial and economic aspects, and being responsible for reserve functions that have, in the case of the Northern Ireland Office, mainly been security matters and certain other areas of human rights and Civil Service Commissioners and so on. It has really had a fairly restricted role.

Secretaries of State have always played an important political role, but not so much the office itself. I used to use a question to try to illustrate that by asking people whether they could name the Permanent Secretary in the Northern Ireland Office, and it was very rare, throughout the last 50 years or so, for anyone to be able to name them, which was very different from Scotland and Wales.

The position is rather different at the moment, and that is because of the major role of the Secretary of State in the negotiations with the DUP. The other aspect of the Northern Ireland Office is to represent Northern Ireland in the Cabinet. If you look at all the Cabinet sub-committees, the Secretary of State is represented only on four, and so, again, the role is somewhat limited.

The Secretary of State traditionally also gets a higher profile, because weekly questioning of the Northern Ireland Secretary of State takes place immediately before Prime Minister's Questions. That tends to get some publicity for the Northern Ireland Office.

You also have to look at some other aspects. A number of other UK departments also function in Northern Ireland and, therefore, Northern Ireland Ministers can more easily, now and in the future, relate directly either to Whitehall in London or to Whitehall representatives in Northern Ireland.

Of course, the Cabinet Office still plays quite an important role as well relating to Northern Ireland. It is quite a complex picture and it is not really the case, to a large extent, that the Northern Ireland Office has played a key role. It does take its place more in some of the IRG bodies,

particularly the British-Irish Council and the British-Irish Intergovernmental Conference, which is another important Irish body.

Lord Foulkes of Cumnock: You have confused me a bit there, Professor Birrell, because Scotland and Wales have Question Time immediately before Prime Minister's Questions as well, and UK departments operate in Scotland and Wales just as they do in Northern Ireland.

Professor Derek Birrell: The point that I was making is that, in the past, very few Whitehall departments operated in Northern Ireland. The number of Northern Ireland civil servants is something like 25,000 or 27,000. The number of UK home civil servants—what used to be called the imperial civil servants—in Northern Ireland is under 1,000 or so. There are not large numbers of them. In the last year or so, the number has increased, with offices opening in Northern Ireland such as the Department for Levelling Up and so on. That was just the point I was making. It is fairly different from Scotland and Wales.

Lord Foulkes of Cumnock: You said that there were a couple of hundred in Belfast and a couple of hundred in London. That is bigger than the Wales Office and the Scotland Office together, and each of Scotland and Wales is bigger than Northern Ireland in population terms.

Professor Derek Birrell: The number—200—is small compared with 27,000 Northern Ireland civil servants. The reason why it had those numbers to begin with is because it was responsible, as it still is, for elements of security policy. It is also the case that the Northern Ireland devolved responsibilities were larger than in Scotland or Wales, so the size and role of the Northern Ireland Office was somewhat limited.

Dr Lisa Claire Whitten: I would reiterate that the Northern Ireland Office is large for a territorial office. In moments when we have no Executive and it is running, as has been pointed out, a constituent territory of the UK with nearly 2 million people, it is really quite small, so it has a paradoxical position in that regard.

Professor Derek Birrell: I do not want to sound too critical, but the Northern Ireland Office has not been running Northern Ireland during the absence. It is the Northern Ireland Civil Service and the very large Northern Ireland quango state that have been running Northern Ireland. Of course, that does not apply to the key negotiations. One of the main roles of the territorial office is to safeguard the devolved arrangements. It is not quite the case that, over the last two years, the Northern Ireland Office has been running Northern Ireland.

Dr Lisa Claire Whitten: I agree. That was poorly phrased. Under the legislation, the Northern Ireland Secretary has ultimate responsibility for decisions being taken by senior civil servants under the Northern Ireland (Executive Formation and Exercise of Functions) Act. You are absolutely right. We do not have a direct-rule system and the NIO is not fully responsible, but it is fair to say there is some level of paradox on occasion.

Q45 Lord Thomas of Gresford: Historically, to what extent have the Northern Ireland Executive been consulted prior to legislation being introduced in the UK Parliament that alters their executive competence? What impact has this had on the executive competence of Northern Ireland Ministers?

Professor Derek Birrell: The system of legislative consent Motions has applied fully in Northern Ireland, and in Scotland and Wales. Unlike Scotland and Wales, it has not been put on a statutory basis. Northern Ireland used legislative consent Motions much in the same way as in Scotland and Wales, and there were often practical reasons about saving time and so on that led to their use.

Just before the collapse in 2022, the Northern Ireland Assembly Committee on Procedures issued a report on legislative consent Motions and their treatment in Northern Ireland. Although it largely followed the patterns in Scotland and Wales, there were quite a lot of criticisms of the procedure in Northern Ireland. Ministers were often not given detailed information about the legislative consent Motion, or the reason for it. They found it difficult to draw up memoranda to present to the Assembly. In a few cases, the legislation passed through the House of Commons without any consent being given. This was not really acknowledged, but it made a number of recommendations about how to improve legislative consent Motions, and those may be implemented.

It has not always been so popular with some of the politicians. Sinn Féin and the SDLP, apart from practical advantages, are not too keen on these powers being exercised at all by the House of Commons using legislative consent Motions.

Lord Thomas of Gresford: There was a lack of consultation. Did the Northern Ireland Assembly, before it collapsed, have a committee to discuss legislative consent proposals?

Professor Derek Birrell: No, there was no special committee. It just went to an appropriate Minister and the related committee. As you are indicating, that report put a great deal of emphasis on the, at times, absence of communication and exchange of information. It rejected more critical outcomes, such as, if consent was withheld, the original Bill in the House of Commons should be altered to acknowledge that. Of course, legislative consent Motions have become much more controversial because of Brexit. Like Scotland and Wales, Northern Ireland refused to give its consent to the original Brexit legislation.

Lord Thomas of Gresford: If there was no committee to discuss the suggestion of legislative consent, how did a request by the UK Government to grant legislative consent proceed? What was the procedure?

Professor Derek Birrell: Maybe I did not explain it properly. The Northern Ireland Minister would draw up a memorandum, which would be presented to the Assembly, but it could be discussed by the appropriate

committee; for example, the committee dealing with health and social care. It just went to the appropriate Minister and appropriate committee—there was not a special committee—but it was not always the case that there was time to do that. There was some question about only a few days' notice being given in the communication from the House of Commons that the legislative consent-related Bill was passed through the Commons.

Lord Thomas of Gresford: In effect, it was seen by the UK Government as a pure formality to notify the Government of Northern Ireland without consultation.

Professor Derek Birrell: Yes, that is correct. It was highly unusual for a legislative consent Motion to be refused, but, comparatively speaking, the numbers in Northern Ireland were much the same as in Scotland and Wales.

Lord Thomas of Gresford: Dr Whitten, has respect for the Sewel convention eroded or strengthened in recent years? If so, what has been the cause of such a development?

Dr Lisa Claire Whitten: It has probably been eroded just based on practice, particularly around significant Brexit-related legislation being rejected, particularly in Scotland and Wales, but, on occasion, across the three territories, and going ahead none the less.

I would also underline one of the facilitative or reflective factors, which is the position of the Supreme Court in the first Miller case in 2017, which emphasised the political nature of the Sewel convention and lack of ability for the courts to uphold it in any way.

Lord Thomas of Gresford: It held that it was non-judicial, did it not?

Dr Lisa Claire Whitten: Yes, exactly. Regardless of whether or not you view that as just a confirmation of the existing position, or otherwise, what happened thereafter in terms of the politics of consent across the different parts of the UK would suggest that trust in the convention to operate as a holding mechanism has diminished in recent years, just on the basis of practice.

Lord Thomas of Gresford: When the Assembly was not sitting at all, what were the consequences of it being unable to consent?

Dr Lisa Claire Whitten: On one level, there were not a lot of consequences, in that the legislation went ahead. On another level and a more democratic position, it is really not an ideal scenario to have such significant legislative and constitutional provisions being made without Northern Ireland being able to exercise a view. Even if there would not have been one single view, to have that lack of consideration is just problematic.

I would also make a tangential and technical point. Because of the arrangements that have been agreed for Northern Ireland under the

Windsor Framework and its continued access to the EU single market for goods that comes with the requirement to stay aligned in certain areas of EU law, you can look at the provisions in Section 26 of the Northern Ireland Act, where the Secretary of State for Northern Ireland is required to make sure that any action being proposed by a Northern Ireland department or Minister is compatible with international obligations.

That is a provision that is standard and has been there for a long time, but it is also true to say that, in the post-Brexit era, the extent of UK international obligations that are Northern Ireland-specific and have implications for devolved policy-making has expanded significantly, because, under the Windsor Framework, there is the requirement for Northern Ireland, on the basis of an international law commitment, to stay aligned with aspects of EU law.

When we are thinking about competence and the devolved versus central government arrangement within Northern Ireland, that has shifted in practice in some ways, albeit mitigating measures have also subsequently been taken to help facilitate Northern Ireland participation in some of what that looks like in terms of what the EU is doing, and also within the UK system around the Stormont brake and that sort of thing.

Lord Thomas of Gresford: You previously referred to the architecture of the Windsor Framework, which is, essentially, an agreement between the UK Government and the EU. It has its Joint Ministerial Council, Joint Consultative Working Group and subgroups that have been organised. When we are talking about intergovernmental relations, to what extent are the UK Government and those bodies influenced by what is happening in Northern Ireland? I say that because Baroness Foster, in a debate in this House, said that, under the previous arrangements, although she and her deputy had a seat on the Joint Ministerial Council, they were really ciphers and had no particular part to play in representing Northern Ireland. Will that now improve?

Dr Lisa Claire Whitten: I cannot speak directly for what is now going on in joint committee meetings, but it is very clear from the Windsor Framework arrangements in particular, and measures taken there. You mentioned the establishing of new subgroups to the Joint Consultative Working Group, which is a third tier of the pre-existing architecture to the Windsor Framework being established. There are also two new ways in which the specialised committee will meet, which is the second tier. There is a body on goods and also on VAT and excise provisions.

Through those mechanisms and also new commitments, particularly on the part of the European Commission, to ensure that Northern Ireland stakeholders are adequately briefed around what is going on in relation to EU law that affects Northern Ireland, that change, while not directly requiring the UK Government to bring Northern Ireland voices in, means that it is more likely that Northern Ireland consultation will have to be substantive.

Lord Thomas of Gresford: Should the voice of Northern Ireland be

strengthened in the Windsor Framework arrangements?

Dr Lisa Claire Whitten: A considerable effort has been made to strengthen the voice of Northern Ireland in the arrangements, and we are still in the early days of seeing whether that is realised in terms of impact for Northern Ireland and policy.

Lord Thomas of Gresford: Professor Birrell, there is just one other matter that I want to ask you about, which is the devolution guidance notes that set out the mechanisms whereby those proposing the need for legislative consent should go through these mechanisms. Do they need to be updated?

Professor Derek Birrell: That is one of the recommendations in the Committee on Procedures report. It had eight in all. One of them was to clarify some of the points in the guidance, particularly about information and communication timelines. That is one thing that it emphasised, which may not be in the devolution guidance notes.

One perhaps slightly different point to add is that it does seem a considerable break, because, in any year, they would probably be dealing with up to 20 legislative consent Motions, yet Northern Ireland has gone for two years with this gap. You might argue that a lot of them were technical and that delays did not matter so much, but one reason for the lack of attention was that there was a turn of attention away from legislative consent Motions by some of the parties in Stormont, to the UK Government legislating directly on devolved matters. Some of these issues attracted a great deal of controversy in Northern Ireland. They had to do with abortion legislation and with the Irish language, where they were legislating on what are largely devolved matters, and it was different from the legislative consent Motions, although, to some extent, there was a connection.

Lord Thomas of Gresford: When the legislation is imposed, it adds to the feeling of a democratic deficit in Northern Ireland, does it not?

Professor Derek Birrell: Yes. That was clear. You can present some more technical legal arguments. In the case of abortion, there was some conflict about health matters, which are devolved, and human rights matters, which are not. In the past, abortion was normally regarded as a devolved issue and is now a devolved issue in Scotland. That was the reason for the controversy. The term "democratic deficit" was used quite extensively in arguments about that.

Q46 **Baroness Goldie:** Dr Whitten, this is specifically for you. Following on from what you were saying about the non-sitting period of the Assembly, I just wondered whether that has led to a potential surge in legislation that will require more Sewel Motions.

Dr Lisa Claire Whitten: Just to understand, do you mean a surge in legislation coming from Westminster?

Baroness Goldie: Given that the Assembly was not sitting, is there now

a pressure, for the reasons that Professor Birrell was talking about, to get domestic legislation attended to? Do you anticipate that there is going to be quite a lot of legislation from Westminster requiring Sewel consents?

Dr Lisa Claire Whitten: I would say two things. First, the task list ahead of Northern Ireland institutions in general is unenviable. There is a very big backlog of policy decisions to be made specifically in the devolution context, but also around considering the implications of Bills and Acts that have come through during the period of the lack of fully functioning devolution.

There are some specific issues that have been raised around that. I was looking earlier this week at the interaction of Article 2 of the Windsor Framework, which makes some provisions around individual rights, and some challenges and cases that have been brought by rights bodies in Northern Ireland vis-à-vis recent Acts that have gone through in Westminster. There was a ruling on the legacy Act, as well as challenges around the migration Act, where questions have been raised. That is one dimension of that catching up with changes that have been made in the Westminster context from a Northern Ireland perspective.

It is also true to say that Acts have become law without Northern Ireland being present and, therefore, without consent. There is no retroactive mechanism for the Assembly to give or withhold consent, but, at the same time, there will be a requirement for the Assembly to grapple with the implications of those new laws.

Another example that comes to mind in that regard is changes around migration law and the raising of the thresholds for individuals and spouses to be able to come to the UK and get a visa, as I understand it, to over £30,000. While that is having an impact throughout the UK, there is, from the Northern Ireland perspective, an additional requirement to consider the impact on competitiveness of Northern Ireland businesses and employers, who are now facing a challenge in terms of trying to recruit employees when they are having to pay at least £10,000 more than employers that may operate just a couple of miles south of the land border.

Having to work out what that means for different sectors is just one example of the ways in which, absent consent and absent any scrutiny or consideration at early stages of a Bill or Act that has been brought in Westminster because of a lack of functioning devolution, it adds to that long task list of having to catch up with the new landscape. That is before you mention any of the Windsor Framework-specific EU laws and developments coming forward from outside the UK for Northern Ireland to consider and manage, so there is quite a lot to do.

The Chair: Dr Whitten, going back to a piece of evidence that you gave earlier, you referred to the new bodies that have now been created and the lack of clarity as to the connection between these bodies and the legislature. You have the new bodies, the legislature and the Executive. You said that it was unclear in terms of how that could impact on the

operation of the Sewel convention. Can you give us two or three examples of where that lack of clarity could impact the Sewel convention? I presume that it is who has responsibility for what. Perhaps you would like to elaborate on that.

Dr Lisa Claire Whitten: Perhaps I did say the Sewel convention. I would understand the lack of clarity to be more around the interaction between bodies set up for the purposes of IGR, bodies set up under the withdrawal agreement arrangement, bodies set up under *Safeguarding the Union*, and existing bodies, some of which have a statutory footing, which have been established under the 1998 agreement, and how all of those work together for Northern Ireland, rather than those being directly linked to the operation of Sewel.

It is the case that, with participation in all those forums and having to consider the complexity of what that looks like, and the relative effectiveness of any decision to give or withhold consent to an Act coming forward, how that links up or does not link up or has been considered in the context of any of these different bodies is just an unanswered question.

At least from the way that you can read all of the provisions, it does not seem that there has been networked thinking in how one or other element of this overall architecture of governance for Northern Ireland going forward is to fit in with the existing requirements of devolution, of the Sewel convention, of the operation of Assembly scrutiny, or of ministerial responsibilities. I apologise for the point being perhaps more generally than is useful, but there is a complexity that does not seem to have been fully thought through.

The Chair: Would it be reasonable to say that, if you are looking for informed consent or informed engagement on a piece of UK legislation, that is complicated by not knowing how these different bodies interact?

Dr Lisa Claire Whitten: Yes, exactly. A more specific point to make is that, at least as I understand the dispute mechanism laid down in the intergovernmental relations architecture, there is a requirement for the raising of any dispute to have been sufficiently considered across the appropriate fora, and so there is a bit of an open question as to what that means for any policy area that cross-sects some of the different dimensions that are at play in the Northern Ireland context.

Q47 **Lord Keen of Elie:** Good morning. I want to pursue certain points with regard to the Sewel convention and the difficulty that it has created in the context of consent, for example. Just to try to put that into context, we are all familiar with the concept of the sovereignty of the UK Parliament, but we are also familiar with the fact that political reality is a practical check upon the legal theory of sovereignty.

A well-worn example of that is the Statute of Westminster 1931, where the UK Parliament said that it would not legislate for the Dominions, and yet, just a few years later, the Judicial Committee of the House of Lords

received a submission that the UK Parliament could, notwithstanding that Act, proceed to legislate for the Dominions, which got a rather dusty response from the then Lord Chancellor, Lord Sankey, who said that that might be legal theory, but that it is had no relation to political reality.

The same might be said of more recent constitutional provisions. Section 1 of the Scotland Act 2016 says that the Scottish Parliament and Scottish Government are permanent parts of the UK constitutional arrangement. Indeed, Section 1 of the Northern Ireland Act 1998 sets out the constitutional position of Northern Ireland within the United Kingdom.

Against that background, I wanted to canvass with you the proposition that the way forward here might be to abolish the Sewel convention altogether and replace it with a provision in the devolved legislation that said that the UK Parliament will not legislate in devolved areas, except with the express consent of the devolved legislatures.

There might be one proviso for Northern Ireland to allow for the collapse of the Northern Ireland Executive, but I pause and ask you to consider whether that might be a way through the thicket of Sewel and all of the consent mechanisms that we repeatedly revisit.

Dr Lisa Claire Whitten: Without wanting to take a strong position either way, it would solve some of the challenges that we see. If I may join you in the historical points—and I might get the dates wrong off the top of my head—Lord Sewel, after whom the convention is named, when speaking in 1998, was referring to the practices that existed between 1920 and 1972 in relation to the first iteration of devolved institutions in Northern Ireland. The doctrine of UK parliamentary sovereignty held even throughout that period, but, in practice, the Northern Ireland Stormont institutions exercised a considerable amount of autonomy compared to that which is practiced in the devolution arrangement today.

There was one instance in the 1920s, where the UK Government withheld Royal Assent to a Bill proposed around electoral reforms, due to concerns around the position of the Catholic nationalist minority in Northern Ireland. Ultimately, the then unionist NI Government threatened to resign and the central UK Government acquiesced. Thereafter, no other attempts were made on the part of the central UK Government to challenge what was being done in the Northern Ireland government set-up.

Why that is perhaps relevant is just to highlight the very different political landscape that existed at that time, which is the birthplace of the Sewel convention of today and the theory that a political convention would be sufficient to allow for routine differentiation in respect of the presence and existence of the devolved Governments, and to allow some mitigation of the legal doctrine regarding parliamentary sovereignty, but that is not where we are.

The 1920-1972 political arrangement in terms of the distinctiveness of Northern Ireland, and its distance—and it seemed then that the Irish Sea was perhaps even wider—is not where we are now, instead, today, more

of the policy choices that are made in the different parts of the UK have more potential influence and interactivity with other parts, and devolution is much more established as a political reality.

I would just make the point by saying that the Sewel convention, as it is and as it stands, is perhaps no longer the best reflection of the political realities of our territorial constitution. On that basis, a stronger alternative arrangement or some form of set-up could be created, whereby it is a requirement to seek and achieve consent, perhaps with a small number of carve-outs. There would, of course, have to be a specific Northern Ireland arrangement that allows for collapses of the institutions and also one that considers the very particular set-up under Section 1 of the 1998 Act that you cited.

Lord Keen of Elie: Professor Birrell, might the abolition of the Sewel convention lead to a more stable devolved settlement within the United Kingdom?

Professor Derek Birrell: The argument for the Sewel convention, at least originally and maybe until fairly recently, was that it was more a matter of convenience. It saved legislative procedures. There was no great controversy about it. They were often technical matters.

One of the arguments or problems with the Sewel convention was the lack of exchange of information, timeliness and consideration, and so on. One of the other main criticisms was around what happens if there is no consent. Of course, that has happened more frequently only recently, because there appears to be no procedure in the House of Commons for dealing with no consent, other than it perhaps being recorded in a note; there is no pathway for dealing with no consent. Either the law goes through without consent and that is it, or the House of Commons reverts to primary legislation, but that would not be popular and takes up so much time.

It is rather difficult to get out of. As the court originally decided, the problem is that it is a convention, and conventions have been very useful in making the system work. Therefore, there is no great argument for saying that the new institutions should adapt to that, but the problem arises when it is no longer a convention but a controversial political issue. The question then is how you deal with that. Do you scrap it and just go back to everything that follows the normal procedure of primary legislation or more use of statutory instruments and so on?

One solution might be to exclude from legislative consent Motions issues that have some constitutional importance. It is not always easy to determine what is of constitutional significance, but that would be one possible way of disallowing legislative consent Motions that deal with what may seem constitutional issues, although that may lead to legal challenges.

Lord Keen of Elie: Would one way forward be to retain the Sewel convention but to introduce into the devolved legislation an obligation

very similar to that of the EU, requiring sincere co-operation from all of the legislatures when dealing with these matters?

Professor Derek Birrell: Yes, that would help and could be incorporated into the guidance notes. The problem remains on a highly political issue, which, for example, led to the devolved institutions not giving consent to the UK Internal Market Act. Would that undertaking then overrule their deeply held opposition at the time to the UK Internal Market Act?

Lord Keen of Elie: That is perhaps the most obvious example of where Westminster has legislated in devolved areas without the consent of any of the devolved legislatures. Dr Whitten, what would your reaction be to the suggestion of an obligation of sincere co-operation, which, in turn, of course, has led to endless litigation in the European Court of Justice? Is there any benefit to be had from such an obligation being imposed on all four legislatures?

Dr Lisa Claire Whitten: For what it is worth, it could be an appropriate development without requiring a fundamental reworking of the constitutional arrangements that we have. It may not be a useful parallel, but it is perhaps worth noting that, as Professor Birrell perhaps already mentioned, under the Northern Ireland Ministerial Code, which is on a statutory footing, there is an effective duty on the part of Northern Ireland Executive Ministers to co-operate or at least participate in meetings of the strand 2 and strand 3 bodies—the North/South Ministerial Council and the British-Irish Council.

That came to the fore in a case brought against a DUP boycott of north-south meetings, and so it can lead to these things being tested in the courts. That was the first instance of that, and it could be a step towards greater recognition and solidifying the requirement to consider the intergovernmental dimension of decisions without requiring a fundamental constitutional shift.

Q48 **Lord Burnett of Maldon:** As we know, the Sewel convention applies only to primary legislation, not delegated legislation. I wondered what your view was about the impact of that on Northern Ireland in what are two linked but separate situations. The first is using delegated legislation in areas of devolved competence, with or without discussion first. The second is the use of Henry VIII powers to amend Acts of the devolved legislature. It is quite a wide area, and it might help if you were to indicate the extent to which this has been an issue in Northern Ireland, and then, in respect of each of the two types of delegated legislation, the impact that it has been having.

Dr Lisa Claire Whitten: From a Northern Ireland perspective, in terms of the use of delegated legislation in areas of devolved competence, it is problematic from a democratic point of view. On occasion, it is also justifiable, given the periods of no functioning. We have seen, for what it is worth, in the last number of years, statutory instruments coming forward that are making provisions in areas of devolved legislation in Northern Ireland, but which give effect to, as I was mentioning earlier,

changes in EU law that are now an obligation for the UK to ensure that Northern Ireland is staying aligned with. There is a small number of those, but it is a new category of use of delegated legislation in the context of devolution.

When the devolved institutions are up and running, it is more problematic for delegated legislation to be in use in devolved competence, but it is not something that at least I am familiar with. There have been many examples of that when we have an Assembly and Executive up and operating.

On the Henry VIII powers to alter Acts of the devolved legislatures, I would highlight one example. There are several, but one that is particularly prominent is around the implementation of Brexit-related changes and measures for Northern Ireland to change the Northern Ireland Act 1998. As we were discussing earlier, if there is a category of laws in the UK that ought to be constitutional laws, it is very clearly one of them, and yet there has been delegated legislation passed to give effect to changes; for example, introducing making provision for the democratic consent mechanism votes to be held every four or eight years in the Northern Ireland Assembly around the continuation or otherwise of aspects of the Windsor Framework provisions.

You can make a practical case for making that change and putting it through in delegated legislation, because of the controversial nature of the situation, but, at the same time, that is introducing changes in the Northern Ireland setting that are recurring and that are potentially very significant for its relationship on the island of Ireland and its position in the UK internal market. I believe that I am right in saying that the specific statutory instrument was considered for less than eight minutes at a delegated legislation committee in Westminster, which, from a democratic point of view, is not ideal.

Lord Burnett of Maldon: Professor Birrell, is there anything that you wish to add on this particular topic?

Professor Derek Birrell: I do not have much to add to what Dr Whitten has been explaining. The traditional argument about adopting more user-friendly powers is to put some conditions on it, whereby there should be a pre-legislative stage and that it perhaps should be time-limited, or limited in certain ways, but perhaps seeing it more as an emergency measure.

The issue of using delegated legislation has come up in a slightly different IGR context recently, which is with the UK Internal Market Act. The devolved Administrations—in this case, Scotland and Wales—have been looking for exclusions from that Act to protect devolved powers. In fact, because of the general problem of Scotland and Wales and the UK Internal Market Act, a new Office for the Internal Market has been set up, which can be seen as a form of IGR, because Scotland and Wales have what is called political representation on it.

Northern Ireland has been excluded from that, and there appear to be rather different attitudes to the UK Internal Market Act; it is thought that it just means unfettered access across the UK for goods, but, of course, it does not mean that, because it can allow divergence. There are potentially so many of these interacting areas—around 150—that delegated legislation may be a way of dealing quickly with that.

Lord Burnett of Maldon: Should there be a more consultative or deliberative process built around the use of delegated legislation in these areas?

Professor Derek Birrell: As Dr Whitten was explaining, in terms of parliamentary procedure, not a great deal of time is devoted to delegated legislation. The question of time would put more onus on the committee system in the devolved institutions. Therefore, it may be better not to go in that direction. Northern Ireland has, just in the last few weeks, started a new committee dealing with post-EU matters. It did not have such a committee before. There is no committee on delegated legislation at the moment.

Dr Lisa Claire Whitten: It is perhaps a subtopic in the world of delegated legislation to note that changes made under the Retained EU Law (Revocation and Reform) Act mean that Ministers, at least as I understand it, can make changes in now-assimilated law, without a requirement to report or communicate what changes they are making.

That is perhaps important in the context of intergovernmental relations and also the operation of the common frameworks, because, when you read those documents, part of the initial assumption and assessment as to where common frameworks were or were not required, and the nature of those frameworks, relied on, at the time, the presence of retained EU law as a shared foundation for the legislation in the given area.

That is not to suggest that there is a terminal shift, but the implementation of the changes in the Retained EU Law (Revocation and Reform) Act allows for greater fluidity in the policies through the use of delegated legislation, which is one of the least transparent or least scrutinised means of making law in the UK.

Q49 **The Chair:** Just finishing on that point, post the Windsor Framework and the restoration of the Assembly and the Executive, has it produced processes, procedures or opportunities for greater scrutiny by the Northern Ireland Assembly of the Executive or the Executive Office? Has that been one of the outputs?

Dr Lisa Claire Whitten: Yes and no. As Professor Birrell has mentioned, there has been the establishment of a new committee—the Democratic Scrutiny Committee—to look specifically at changes arising under relevant EU law that are to apply in Northern Ireland. That is linked specifically to the Stormont brake.

If you look at the substance of conversations happening in Assembly committees as they restart their work, there is a very clear effort and

requirement to look at the policy impacts of the new landscape that Northern Ireland now has and its positionality as the touching point between the UK internal market and the EU single market, and so there is a way in which that scenario seems to be forcing more of an emphasis on the policy implications of lawmaking and decisions being taken across the board.

I do not mean to make a political point, but, if you look at the history of Northern Ireland, our political culture has been better at politics than it has been at policy. The external change and the new post-Brexit position is catalysing somewhat of what you might call a normalisation in terms of rebalancing the remit of the legislature and the Executive towards more substantive policy decisions. In the same breath, one should also say however that the complexity of the situation is a real challenge in terms of managing that and having the capacity to do so. The requirements are quite considerable.

Professor Derek Birrell: The history of the work of select committees in the Northern Ireland Assembly is not very good in terms of the number and quality of reports, and you have to perhaps look in other directions. It does mean, for example, that, with all of the current select committees plus the extra one resuming, the Northern Ireland Affairs Committee at Westminster, following a convention, will no longer be able to examine devolved matters, although it has been doing that quite extensively over the last two years.

Because of the consensus on getting the Northern Ireland Assembly back to work, the work of select committees may be taken up with more vigour. I expect that the work of the north-south bodies and of the British-Irish Council will attract more effort from Northern Ireland Assembly Members and, therefore, we hope that, with that knowledge and expertise in these and new issues, and IGR in general, will improve.

The Chair: You will be relieved to hear that we have come to the end of our questions. I thank you for joining us and sitting through that interrogation on all of those questions. It is much appreciated. You have given us lines of thought to think about, so thank you very much indeed.