

Written evidence submitted Dr Clare Rice, Research Assistant, Newcastle University (NDE0006)

Details

Dr Clare Rice is a Research Assistant at Newcastle University, working on the ESRC-funded project 'Performing Identities: Post-Brexit Northern Ireland and the reshaping of 21st-Century Governance (ES/S006214/1)'. She is interested in how structures of governance interact with citizen experiences and, in the context of Brexit, has engaged in work examining the interaction between multi-level governance structures in Northern Ireland and identity. She also works in the field of legislative studies, with a main expertise and a working knowledge of the Northern Ireland Assembly.

She authored a briefing paper on the 'New Decade, New Approach' deal in January 2020, focusing on the areas of the agreement pertaining to matters of governance and identity. The briefing complements some of the areas covered in this submission, and is available [here](#).

This submission is made in a personal capacity and does not represent the views of the ESRC or of Newcastle University.

This evidence focuses on responding to two of the Committee's questions:

- the potential effect of the New Decade, New Approach agreement on the future sustainability of devolved institutions in Northern Ireland; and
- whether the deal excludes other measures that might improve good governance in Northern Ireland.

Future Sustainability of Northern Ireland's Devolved Institutions

[1] The points raised in this section interlink with those covered in the remainder of this paper and are expanded upon in more depth there, hence the brevity of analysis conducted at this initial point.

[2] Sustainability of the institutions was a key feature of the 'New Decade, New Approach' (NDNA) agreement. It is evident from the document that the 3-year institutional hiatus from 2017 underpinned the desire for procedures to be established to try and ensure that this would not be able to happen again.

[3] Some of the changes outlined are aimed at creating opportunities for stronger (working) relationships to form between elected representatives, as seen, for example, through the establishment of a Party Leaders' Forum. In a power-sharing arrangement that is reliant on parties working together, this is a positive step as it facilitates interaction and conversation that may not be possible to happen otherwise, either for practical or political reasons.

- [4] In a system designed on the premise of deeply entrenched division and which necessitates formal demarcation along group lines – unionism and nationalism in the Northern Irish case – inter and intra-group distance between party leaders is not novel. While parties formally work together throughout the devolved institutions, a breakdown in communication on an individual level between the leaderships of these entities is where the potential lies for the functioning of the institutions to come into jeopardy. This is something that, in part, contributed to the resignation of the deputy First Minister in 2017.
- [5] With regard to provisions for the formation of official Opposition in the Northern Ireland Assembly, it is a welcome step to seek an independent review of how these can be enhanced. It is important that it will be possible for any additional resources that might be required to support this can, as intended, be provided.
- [6] In terms of enhancing institutional sustainability, Committees are obliged to continue to function as usual while Ministers continue in their posts under their scrutiny, until such a time as political difficulties are resolved or the Secretary of State for Northern Ireland is obliged to call an election. As Ministers in any such instance are also obliged to remain in post in a caretaker capacity, this is a positive step to ensure accountability of their actions is maintained should such a situation occur.
- [7] The provisions also include an extension in the number of days that can lapse before an election has to be called by the Secretary of State for Northern Ireland to 24 weeks. This is likely a reflection of the previous shorter time frame having created additional challenges in 2017. The 2017 Assembly election created further divisions between the parties, divisions then compounded by the 2017 General Election. With more time in the future should a similar scenario emerge, ensuring the divisive pressures that come with an election for the political parties are not as imminent a possibility might create more space for resolutions to be found without having to resort to an election.
- [8] As with any political arrangement, there is always the potential that the institutions can stop functioning despite protective measures being in place to prevent it. The NDNA agreement does not provide a panacea in this regard, but it does strengthen the framework in place to mitigate the impact of this should something similar happen again. Something to note, however, is that this is time limited. While the amount of time provided for covers a post-election continuation of political difficulties and is considerable in duration – the shorter of either up to 24 weeks after an election or up to 48 weeks from the point the Executive stops functioning – it is worth reiterating that the most recent period of difficulty far exceeded these limits, as has also been the case in previous instances. The NDNA agreement is not clear on what would happen should this timeframe be exceeded.

[9] The role of the Secretary of State for Northern Ireland is key in determining the consequences when relationships between the political parties break down. The recent Northern Irish experience is testament to the importance of a Secretary of State in these instances, not just in terms of their presence, but their experience, proactivity and knowledge of the specificities of the Northern Irish context. This varied greatly across those individuals that occupied the post in Northern Ireland during the three years prior to the NDNA deal being reached. While timing is an important consideration with any agreement, the role of the Secretary of State cannot be underestimated in aiding such situations.

[10] Put simply, the sustainability of the devolved institutions in Northern Ireland is as dependent on those actors involved in them as it is on the Secretary of State. The expectations placed on the Secretary of State currently are heavily limited and procedural, and while there are practical and sensible reasons for that, perhaps revisiting the minimum expectations of what any individual in this role should be required to do at times of political strife in Northern Ireland is one way in which the sustainability provisions outlined in the NDNA deal can be supported going forward.

Good Governance in Northern Ireland: Excluded Measures

[11] The NDNA agreement recognises that there was a breakdown in trust between the public and the institutions on Page 11, which alludes to each cog in the institutional machines needing to play a part in 'rebuilding the trust of citizens.'

[12] It is evident that the fallout from the Independent Public Inquiry into the Non-domestic Renewable Heat Incentive (RHI) Scheme was instrumental in the construction of plans to try and rebuild trust in the institutions, with the March 2020 report recommendations adding some further substance to provisions outlined in the NDNA agreement. This includes, for instance:

- measures to increase Ministerial accountability (recommending an update of the Ministerial Code of Conduct);
- responsibility for Special Advisers (SpAds) and heightening of their accountability;
- improvements in record and minute keeping; and
- the creation of a new Fiscal Council dedicated to examining the Executive's finances and spending proposals.

[13] There was also a commitment made in the NDNA agreement to respond quickly to any recommendations that would come from the RHI report when published, through the creation of a sub-committee to address this specifically. This report was published on 13th March 2020, and as of yet, the sub-committee promised has not yet been established. However, this has happened against the backdrop of the novel coronavirus spreading, which, in Northern Ireland as much as elsewhere globally, has reshaped the priorities for governing bodies. It is only once a sense of normalcy returns

that any failure to follow through on this commitment can become questionable. That said, there was ample time ahead of the release of the RHI report to put a committee in place, and this is an opportunity that was not availed of.

- [14] The commitment of a sub-committee dedicated to the quick enactment of recommendations from the RHI report was also a positive inclusion in that it ensured there would not have to be a conversation (likely played out in public) about what to do with regard to the report after its publication, and after the institutions had been re-established. This was a sensible move, both with hindsight given the current unprecedented public health situation that MLAs have to contend, and in terms of addressing a potentially destabilising challenge in advance.
- [15] Northern Ireland Audit Office (NIAO) has been tasked with oversight of the implementation of the RHI Inquiry's recommendations, however, it is not clear what the working relationship between NIAO and the Executive sub-committee on RHI will be. This is something that will need to be established.
- [16] The establishment of a new Independent Fiscal Council is an important inclusion in the NDNA agreement. From what can be ascertained in the NDNA deal (and the 2015 'A Fresh Start' agreement), it would appear this body is intended to be complementary to the Public Accounts Committee (PAC) through undertaking *ex ante* scrutiny of public spending. It is not evident at this point how these two bodies might work together in practice, what role NIAO would have in this, if any, nor is it clear who will populate it. The premise of having a Fiscal Council is one which, in theory, should assist with good governance in Northern Ireland, but the detail of how this would work in reality is scant. This, in turn, leaves it open to the potential of partial, poor or no implementation.
- [17] Any such Fiscal Council needs to be knitted together very carefully with the existing financial oversight architecture already in place in Northern Ireland if it is to be effective.
- [18] In essence, the challenge is that the potential remains, perhaps in a heightened capacity at present, for lip-service to be paid to the idea of increasing transparency within the institutions. With specific reference to the RHI report, practical and moral lessons arising from this bear the potential to become lost once political normality returns. The NDNA deal goes some way in mitigating the potential for this, but ambiguities remain when the longer-term picture is considered. From an institutional sustainability perspective, this could become problematic further down the line.

Petition of Concern [Annex B]

- [19] The Petition of Concern (PoC) is a mechanism within the institution of the Northern Ireland Assembly that effectively provides a veto power. Its intended purpose is that it should be used to ensure that neither designated group (i.e. Unionists or Nationalists) would be able to pursue a course of

action that would have a potentially detrimental impact on the other community. 30 signatures are required for a PoC to be raised, however, prior to 2017, the mechanism was increasingly [used](#) in instances where no discernible link could be found to suggest that an adverse impact on one community would arise. The NDNA document shows a recognition of this, and an intent is stated on Page 12 that the PoC should be returned to its original use.

- [20] The proposed reforms stated in the NDNA agreement aim to do this. The measures include that it cannot be used where a Member's conduct is under question in the Assembly, that it can only be used after a bill has completed the Second Stage of the legislative process, and that the 30 signatures required to trigger its use must come from across at least 2 of the political parties. If successful in meeting these requirements, a 14-day 'period of consideration' commences, after which if the signatories confirm their remaining support for the PoC's use, a cross-community vote is held.
- [21] The PoC was a point of contention for the political parties during the talks ahead of reaching the NDNA agreement. The amendments agreed fall short of the reforms that were being called for in some quarters, which included increasing the number of signatures required. Nonetheless, steps to mitigate the potential for its abuse within the Northern Ireland Assembly must be welcomed.
- [22] Scope does remain for further reform of the PoC. For example, in 2014 the Assembly and Executive Review Committee (AERC) examined this and suggested that having the Presiding Officer and a committee determine the permissibility of the PoC's use could be one way to prevent it being used against its purpose. But the basis upon which any such decisions could be taken has not been established.
- [23] There are also examples of how the veto mechanism is designed elsewhere that Northern Ireland could draw inspiration from. For instance: in Bosnia, the courts determine the permissibility of a veto use; in Macedonia, a specific list has been established of instances where the veto's use is permitted; and in Belgium, an 'alarm-bell' procedure is in place, requiring the votes of three-quarters of representatives from one linguistic group and a final decision from the Council of Ministers. These approaches are not necessarily advocated herein, but these examples illustrate that there is room for the PoC to be reformed further and in ways that could further enhance governance in Northern Ireland.
- [24] Mitigating the potential for (party) political interest to dictate the use of the PoC is key to the mechanism's contribution to good governance in Northern Ireland. Timing is of the essence with any changes to the core elements of the consociational model, so it should be noted that just because the NDNA deal did not go as far as it *could* have with regard to PoC reform, it does not mean to say that this equates to a rejection of further changes occurring in the future. What constitutes an appropriate time for this to happen will depend on the political expediency or detriment that comes from the current

version of it in practice, the wider political context (for example, a shift in the proportional sizes of the Unionist and Nationalist groupings in the Assembly), and the nature of the issues being dealt with.

[25] It will only be when a deeply contentious issue comes to the fore that the robustness of the measures outlined in the NDNA deal with regard to the PoC will become clear.

Rights, Language and Identity [Annex E]

[26] One of the ‘red line’ issues going into the talks was the provision of formal rights for Irish language speakers in Northern Ireland. The 2018 attempt at a deal [fell](#) when the DUP was unable to sell the tripartite language provision suggested within the [draft](#) deal to its base. Irish language activists, Conradh na Gaeilge, were given [access](#) to the Secretary of State for Northern Ireland during the most recent talks to outline what was being sought, highlighting the importance that rights, language and identity matters held in the success or demise of the talks process.

[27] While nothing wholly surprising emerged from the framework agreed in the NDNA deal, one point of ambiguity that arises in this regard is the use of the term ‘Ulster British’ in conjunction with ‘Ulster Scots’. Where exactly the distinction lies between the two is not clear, and the term ‘Ulster British’ itself is not a commonly used one. With ambiguity around the terminology, it is unclear how the traditions and interests of those that identify as such can be recognised and accommodated, to paraphrase language used within this area of the agreement. But there is no certainty within NDNA as to what is meant by this.

[28] In practical and in parity of esteem terms, it is not evident if those that reached the NDNA agreement view Ulster British as a synonymous phrase with Ulster Scots, or if it has been included as a way of reflecting diversity within Northern Ireland. It could also be used as a means of constructive ambiguity that opens the potential for non-Irish language provisions to gain more support than might otherwise have been the case, by expanding beyond Ulster Scots in terminology and so becoming applicable to citizens that may feel this is a better reflection of their identity.

[29] In any eventuality, the uncertainty about what is meant by Ulster British raises a question as to how a commissioner tasked with advancing the interests of this group would identify targets to work towards and how their effectiveness in their role could be gauged. Such ambiguity, while somewhat beneficial in allowing a new commissioner to shape the role when the post is filled, could present problems further down the line.

Bill of Rights

[30] From a governance perspective, the NDNA deal also considers the question of a Bill of Rights for Northern Ireland. Such a bill has been recommended by the Northern Ireland Human Rights Commission ([NIHRC](#)). The purpose of such a bill would be to consolidate the currently fragmented

equality framework that exists in Northern Ireland, in contrast to the rest of the UK where a single [Equality Act](#) is in place.

[31] In the context of Brexit, there is an added impetus to strengthen the equality law framework in Northern Ireland. The NDNA agreement outlined that an Ad-Hoc Assembly Committee should be created to look into this, taking account of the 'particular circumstances' of Northern Ireland in doing so. This Committee was established in February 2020, with a commitment being made that a report will be delivered to the Northern Ireland Assembly by 28 February 2022. However, a Forward Work Programme remains to be established, and a number of pertinent questions remain as to how it will operate going forward.

[32] It is outlined in Paragraph 5.27 of the agreement that this committee will be supported and assisted by:

'a Panel of five experts appointed jointly by the First Minister and deputy First Minister.'

While this seems a positive step towards a Bill of Rights being given fulsome consideration within the Northern Ireland Assembly, the proposal gives rise to a number of pertinent questions. Of particular concern is that there is no procedure outlined for how the individuals that will sit on the expert panel will be selected. While we know who will appoint the members, we do not know the criteria that will be applied to this process or what will constitute an 'expert' in the area.

[33] From this, there stems another question on the panel's membership and if there will be an expectation that members will speak specifically and only for different communities. If it is the case the members will be neutral arbiters in their positions, then it must be asked where the distinction arises between what this panel will do and the NIHRC's mandate regarding a Bill of Rights under the 1998 settlement. The NDNA deal does not offer clarity on this.

[34] If the aim of the panel is, in effect, to do work that the NIHRC can or is already doing, then it must be asked why a duplication of work is being advocated. Fracturing expertise on human rights and identity in Northern Ireland could, ultimately, have the impact of expertise becoming lost as voices from different sources clamour to be heard. Five experts might also be insufficient to capture the breadth of knowledge needed across civil, political, economic and social rights.

[35] In very practical terms, it has also not been established in NDNA if this panel will comprise of paid posts (in which case, the NDNA financial support required will need to be revisited), or how long a term of membership would last. These are factors also that need to be taken account of in determining the appropriateness of the panel's size.

Brexit

- [36] What is perhaps surprising about the NDNA deal, given the wider political context within which it was drafted, is the limited reference that is made to Brexit within it. While there are points which implicitly pertain to Brexit-related matters (such as Paragraphs 8-12 under the UK Government commitments to Northern Ireland where there is reference made to Northern Ireland being supported in its 'future relationship with the European Union'), Brexit itself does not feature as heavily as might be expected.
- [37] In some ways the secondary role that Brexit played in these negotiations and in the final iteration of the NDNA agreement can be viewed positively. In theory, building a strong basis for power-sharing should make it possible for the elected representatives to navigate the challenges that the UK's exit from the European Union will present. Further, Brexit itself was not the reason the institutions ceased to function in 2017.
- [38] At the time the NDNA agreement was reached, the most significant Brexit-driven factor spurring a restoration of power sharing was (and remains) the united dissatisfaction amongst Northern Ireland's parties with the Brexit deal reached. But if power sharing does collapse again, the UK's NDNA commitment to the Northern Ireland Executive having a place on UK delegations before the Specialised Committee on the Withdrawal Agreement's Ireland/Northern Ireland Protocol and the Joint Committee where Northern Ireland is at issue (the Brexit deal's key dispute settlement architecture) goes with it. So, there is also a clear Brexit-related incentive to ensure the institutions remain operational.
- [39] The relative lack of reference to Brexit and its implications for Northern Ireland is nonetheless concerning. Exiting the EU presents one of the most fundamental constitutional changes for the UK as a whole, and for Northern Ireland in particular, since the establishment of the devolved institutions post-1998. This raises a question as to how pragmatically the deal has been approached in this regard given the challenges Brexit bears the potential to give rise to. While these cannot be predicted, and while it is undoubtable that to have focused on Brexit would have been to overlook the core obstacles to restoring the institutions, it is difficult not to wonder about the extent to which the steps taken will be enough to ensure the working relationship between the parties in the Executive can remain intact.

Funding

- [40] It appears that discussions on funding within the negotiations were not conducted in depth between the Northern Ireland parties and the UK Government. The broad political consensus is that the £2 billion announced to support the restored institutions is insufficient. The devolved institutions in Northern Ireland will not receive this amount as an [additional](#) support to fulfil NDNA commitments – £1 billion of this stems from 'Barnett-based investment' while the remaining amount is conditional and intended for specific purposes.

- [41] The implication of this is that elements of the NDNA deal simply will not be affordable for the Executive to implement in the short-to-medium term, especially in light of the additional pressures of the coronavirus pandemic. The likely elements within the NDNA deal to suffer as a consequence will be those around identity and language, as has been seen with previous agreements reached.
- [42] Aside from the obvious consequence of not being able to fulfil the commitments made in NDNA, financial limitations mean that funding will need to be prioritised. How this prioritisation happens will itself present challenges within the institutions and will inevitably mean that difficult conversations will have to be had around how the available money should be used. It is one thing for this to be done in the context of an international health emergency, but it is another to have to do this with regard to aspects of an agreement reached that now forms the basis of what is to be expected in terms of basic features of governance in Northern Ireland. The latter does not fall under the remit of 'normal' bargaining for additional financial resources within an Executive – these are commitments made mainly along community-based lines.
- [43] Having gone through the hard process of producing the NDNA agreement, the next stage could prove to be where the real difficulties set in if adequate financial support is not provided. It is not yet clear if the relationship between the parties has been sufficiently restored to be able to cope with confronting this challenge, or if it could shake the very foundations of this to the point where another institutional crisis becomes inevitable. In a worst-case scenario, the easier option could be to renege on some of the commitments made, or to postpone their implementation. This would be a worrying step given the importance and significance of the agreement for underpinning governance in Northern Ireland.

Concluding Remarks

- [44] Overall, the NDNA agreement represents a relatively pragmatic and positive agreement from the perspective of sustainability and governance. But, there are gaps and points of ambiguity throughout the agreement, and it is evident that there is genuine potential for these areas to present real challenges for Northern Ireland's politicians going forward. The difficulty with this is that the agreement speaks to such core issues for all the parties, and Sinn Féin and the DUP in particular, that challenges that arise along any of these lines bear the potential to completely destabilise the institutions once more. The easiest way to avoid this in light of insufficient funding for bringing all commitments made to reality is to either not do everything that was promised or to postpone their enactment indefinitely. Neither of these are good options.
- [45] To undermine public trust in the institutions at a stage where rebuilding it is essential could bear long-term, potentially destabilising consequences for the institutions. Good governance is integral to building this trust, and trust (public-political and between parties) is a key element in sustaining the

institutions. It is important that where clarity is needed in some of the plans outlined in the NDNA deal, this is provided. But it is also important, for the reasons outlined, that the commitments made in it are kept.

1 April 2020