

# DÁIL ÉIREANN

---

## AN COMHCHOISTE UM

---

### FEIDHMIÚ CHOMHAONTÚ AOINE AN CHÉASTA

### JOINT COMMITTEE ON THE IMPLEMENTATION OF THE GOOD FRIDAY AGREEMENT

---

*Déardaoín, 29 Meán Fómhair 2022*

*Thursday, 29 September 2022*

---

Tháinig an Comhchoiste le chéile ag 1.30 p.m.

The Joint Committee met at 1.30 p.m.

---

Comhaltaí a bhí i láthair / Members present:

Teachtaí Dála / Deputies	Seanadóirí / Senators
Jennifer Carroll MacNeill,	Frances Black,
Rose Conway-Walsh,	Niall Blaney,
James Lawless.	Emer Currie,
	John McGahon,
	Niall Ó Donnghaile.

Teachta / Deputy Fergus O'Dowd sa Chathaoir / in the Chair.

## **Architects of the Good Friday Agreement (Resumed): Mr. Mark Durkan**

**Chairman:** With the agreement of the members we will go into private session for a moment. Is that agreed? Agreed.

*The joint committee went into private session at 1.34 p.m. and resumed in public session at 1.37 p.m.*

**Chairman:** We will commence in public session when the technicians have set up the cameras. Today we are resuming our meetings in our study Architects of the Good Friday Agreement project. We will be meeting with a range of people who were involved in negotiations, both politicians and officials. On behalf of the committee I welcome Mr. Mark Durkan to this meeting. I thank him for attending. Mr. Durkan was a key member of the SDLP negotiating team in the run up to the Good Friday Agreement in 1998, Deputy First Minister from 2001 to 2002 and Leader of the SDLP from 2001 to 2010.

Before we begin I will explain some limitations in regard to parliamentary privilege and the practice of the Houses. The evidence of witnesses physically present in the committee room or who give evidence from within the parliamentary precincts is protected pursuant to constitutional statute by absolute privilege. However witnesses and participants who give evidence from a location outside the parliamentary precincts are asked to note that they may not benefit from the same level of immunity following the proceedings as a witness giving evidence from within the parliamentary precincts does and may consider it appropriate to take legal advice on this matter.

Witnesses are also asked to note that only evidence connected with the subject matter of these proceedings is to be given and are asked to respect the directions given by the Chair and the parliamentary practice to the effect that, where possible, they should not criticise or make charges against any person or entity by name or in such a way as to make him, her or it identifiable or otherwise engage in speech that might be regarded as damaging to that person's or entity's good name.

Members are reminded of our normal parliamentary practice that they should not comment on, criticise or make charges against any person outside the Houses or an official either by name or in such a way as to make him, her or it identifiable.

Mr. Durkan will be familiar with such parliamentary procedures. I now call on Mr. Durkan to make his opening statement.

**Mr. Mark Durkan:** I thank the Chair and the committee for the opportunity to share some reflections as we approach the 25th anniversary of the Agreement.

That Agreement was not only the result of concentrated negotiations in the weeks and months leading up to 10 April 1998. Its achievement rested on layers of understanding built up in disparate phases including the New Ireland Forum, the Anglo-Irish Agreement, the Hume-Adams dialogue, the Brooke-Mayhew talks and the Forum for Peace and Reconciliation. Some collective ambiguity was a necessary part of the coinage for the process in 1998 but this was supposed to be supplemented by a growing collective certainty which should have stemmed from the implementation of its provisions and faithful adherence to its precepts. The suboptimal experience of subsequent vagaries should not be allowed to invalidate the broad balanced architecture of the agreement or the unique integrity of its resounding democratic endorsement

by the people of Ireland, North and South.

The agreement secured a framework for the three sets of relationships and a platform of guaranteed rights. Its three strands have seen varied episodes of performance; sometimes with evident good purpose, sometimes with recalcitrance and, for too long, confounded by the discoloration from Brexit. Its rights promises have been serially neglected or frustrated, deliberately eroded in this Commons mandate and threatened with eradication if the European Convention on Human Rights, ECHR, is further relegated or even repudiated.

We have to be honest about such divergences and deficits in implementing the agreement. These also include the gross misapplication of the agreement's clear intent on petitions of concern, the St. Andrews Agreement mistaken departure from the joint nomination and election by the Assembly of joint First Ministers, the abandonment of the Civic Forum in the North, which also aborted the complementary North-South civic consultation arrangements that had been agreed by the North-South Ministerial Council, NSMC, in June 2002, the underdevelopment of strand 2 and the underuse of strand 3.

There is no point in pretending that tyres are only flat at the bottom, but neither should we despair as though the wheels have come off. The agreement has review provisions. Such necessary facilities for respective strands or in overall terms should not be ignored as we celebrate and contemplate the 25th anniversary. A spirit of renewal review would allow us to be honest about shortcomings in the agreement's outworkings and Brexit's disruptive fallout, while showing positive purpose about its under-tapped enabling potential. The bandwidth of strands 2 and 3 allow for creative lateral thinking that could answer some of the problems created by the fact and form of Brexit. Why deny such relevant exploration as we celebrate what we achieved in 1998 but have not fully advanced since? Such constructive institutional explorations can take place at the same time as due consideration of how we can reflect the agreement's key precepts around constitutional status and consent in terms that respect the equal legitimacy of two aspirations, as affirmed by the agreement.

Democratic pro-agreement Ireland needs to engage in careful deliberation and respectful discourse on a basis that sees responsible curation of the spirit and letter of Article 3 of the Constitution as so finely worded in the agreement. There is a real need to illuminate the serious issues that need to be factored sensitively so we might have healthy debate with honest differences about honest preferences as posited in the agreement, with its overarching commitments to reconciliation and rapprochement. Such necessary, thoughtful and helpful light will not come from deferring duly deliberative discourse or from seeking dubious determinations from the current British Government.

Unpreparedness in the name of respect or reconciliation is not really a responsible approach. The value of preparedness, that is, advance thinking, collective anticipation, building layers of understanding and showing responsibility, all in the spirit of respect and with the clear aim of reconciliation, is an important lesson from the long journey that John Hume piloted to the Good Friday Agreement.

**Chairman:** I thank Mr. Durkan. I will call our different groups in the order we agreed, namely, Fianna Fáil, Fine Gael, Sinn Féin, the SDLP, the Alliance Party, the Green Party, Sinn Féin, the Labour Party, Independents and Aontú.

**Senator Niall Blaney:** I welcome Mr. Durkan. It is great to see him again. There is no element of his opening remarks one could disagree with. We could do another report on the in-

tricacies of matters between ourselves and the British Government and what has not happened in relation to the agreement. As a committee we have a job to do on the implementation of the agreement. The idea of bringing in people like Mr. Durkan, namely, those who were at the helm in the lead-up to the agreement and were involved in bringing it together as we approach the 25th anniversary is to get an insight into the difficulties behind the scenes that existed in bringing this together. It is about getting to the bottom of that and having an appreciation of what was necessary to get to that very historic occasion where all on this island came together as one. That was a historic event we had thought would never be possible.

Mr. Durkan rightly ended his speech in the spirit of John Hume and the amount of work he did on this. What was the reason behind somebody like David Trimble sticking his neck out the way he did when he unexpectedly signed up to the Good Friday Agreement at the last minute? What are the moments that stick out in Mr. Durkan's mind as being significant during that process in the weeks beforehand and during those days of negotiations?

**Mr. Mark Durkan:** I thank the Senator for his welcome and the question. It is a salient one. I am not sure what exactly made David Trimble decide, in the sense that most talks participants spent their casual conversational time asking each other how we read David Trimble and did we think he was going to be up for an agreement or not. That was because sometimes in the talks he would disappear. He would leave on a Monday and disappear to Westminster for a few days. We would be negotiating with the Ulster Unionist Party team and we found each time the line-up changed the line changed. That made it difficult and it would change again whenever David Trimble came back, so there were big doubts. Officials and people in all the different parties would have been talking and asking that question. John Hume had a glass-half-full approach in that he felt the fact David Trimble had split from other unionist parties to allow George Mitchell into the chair at the start of the talks, the fact he had agreed renegotiated ground rules in circumstances where other unionist parties were opposing them and more saliently the fact that he pivoted on a nuance to stay inside the talks when Sinn Féin was admitted in the summer and autumn of 1997. John read into that that if David Trimble really wanted an excuse to abscond from the talks and possible agreement he would have used any of those opportunities to do so. A point I recall from that time was David Trimble, in a meeting with John Hume, believed himself to be assured the SDLP's negotiating position and our likely proposals were not going to be altered by the fact of Sinn Féin being at the table as well and I think he sought similar assurances from the Irish Government. In that sense, David Trimble kind of pre-assured himself he was not going to be facing a pan-nationalist front. That makes one of the remarks by Baron Dean Godson, who gave a eulogy for David Trimble at his funeral, wrong when he talked about David Trimble having confounded a pan-nationalist front. He certainly seemed to try to assure himself that was not what he was facing.

When it came to the substance of negotiations, everybody knows David Trimble had serious issues in the last week with what was in the strand 2 text. That was called the "Mitchell text" but George Mitchell was making it clear to everybody that it was not his text and he had not drawn it up. He was a wee bit critical of the two Governments for the fact there were no square brackets and no italics in the text. With strand 1, where we had been negotiating and talking in circles for many months, it was only very late in the negotiations that David Trimble accepted the idea that there could be ministers in the North and it was later still that he accepted the idea that those ministers could sit collectively in an executive. To my mind, the point on which that really turned was whenever we shared with him the idea of the joint office of first ministers. I had a list of roles and responsibilities or functions that the joint First Ministers might do. That was because at that stage, only two weeks out from the agreement, the Ulster Unionist position

was still to be opposed to an executive. Even if people with executive authority in the North were possibly going to be called ministers, they did not want them in an executive. We were saying that someone would have to manage issues between Departments and manage and co-ordinate budget oversight etc. We had a list of roles and functions and David Trimble looked at Seamus Mallon and me and said that this was all written in the language of functions and roles, I would prefer to see it written in the language of power. When we asked him what he meant by the language of power, the only example he gave was patronage. I can remember Seamus and I taking that and going back to John with it, saying that we saw definitely that the Ulster Unionist position had moved with all of the issues that it was refusing to contemplate in strand 1. Obviously that did not conclude the negotiations because different things were factored in there. One of the reasons David Trimble and the UUP had argued against ministers, and particularly our proposals that ministers would be appointed by d'Hondt, was they said that if they have personal executive authority, they go off and do their own thing. We heard a lot of talk about rogue ministers, solo runs and all that sort of stuff. It is precisely because of those sorts of concerns coming up on the unionist side that some of the checks and balances are actually in the agreement. Things like the petition of concern and all the rest were there as much to protect unionists against this bogey fear they had about rogue ministers, solo runs and all the rest of it. The balance of checks and inclusive arrangements became enough for David Trimble to decide that institutionally he could go with things in strand 1. Obviously, that, in turn, was only finally negotiated after the issues in strand 2 had been sorted. There were a couple of days of serious sweating with the Ulster Unionists and Alliance demanding significant change in the strand 2 text and the Irish Government having to water down the language and whittle down the list there. That obviously worried us in the SDLP and I know it worried Sinn Féin because, particularly, it looked as though at that stage the Ulster Unionists were trying to negotiate that strand 1 would happen and then when we got the assembly that we would then negotiate the details of strand 2. There were tensions and difficulties there and things that had to be finely balanced.

**Senator Niall Blaney:** Taking it all in context, what are the lessons from the whole process? We have lots of talk and articles these days about census results, constitutional change and so on. What are the take-away lessons for us? If we have an election in the UK at some point and there is a change of government and the environment happened to be right, what would we need to do? What are the lessons from the Good Friday Agreement? How do we close that gap with unionism if we ever have that opportunity again, keeping in mind the current status as a result of the Good Friday Agreement?

**Mr. Mark Durkan:** There is a lesson in the process that gave us the agreement. The inclusive nature of the process was important. Having been involved in different talks processes, including the Brooke-Mayhew talks I found the more inclusive, bigger table for the Good Friday Agreement better in the sense that in a tighter situation, parties are very defensive about their own idiom or they are very careful about accepting language from other parties or whatever. In the more open process, it was easier; language was able to be seasoned not least by people like the Women's Coalition; people were able to bring in a different perspective or maybe couch things in somewhat less political and what sounded like more academic terms. That was able to neutralise the debate and open up discussion away from fixed positions. That was important. Then there was the role of the two Governments working together. Remember, the work that the two Governments were doing in those talks was, as I said, based on other layers of understanding that had been built up over the years. A lot of the language in the agreement was not actually new to 1998. A lot of the language in the agreement is actually derived from the Downing Street Declaration for instance, or from the frameworks document which in turn was influenced by things such as the Brooke-Mayhew talks and things that had been discussed there.



It was building on those layers of understanding which, unfortunately, seem to be completely forgotten on the British Government side. At times, I think that we have gone through an unlearning process since the agreement and the people who have most gone through the unlearning process, to my mind, is the British Government and particularly this British Government which might, in the context of Brexit, pay a lot of lip service to the Good Friday Agreement. Collectively we have not done enough to ensure due adherence to the agreement. I mentioned that the agreement provides for review which we have never really used as constructively as it might be. I know people are sometimes fearful of reviews. They say that if you do a review it will create a run on the agreement but the fact is that I do not think we could do any more damage to the agreement by a review now than, say, by some of the changes that were made at St. Andrews which we are currently paying a price for now because the changes at St. Andrews allowed a party to veto the formation of an executive which was never the case before.

We need to get back to that inclusive spirit when we are facing problems. We also need to remember that we would not have reached the Good Friday Agreement if we had simply talked past each other and ignored where people were saying they had genuine problems or issues. We had to address those issues. We only got an agreement by mutual adjustment. Mutual engagement on its own does not bring about an agreement. It takes mutual adjustment where people are able to vary some of the language either of their proposals or their objections to reach more accommodation. That seems to me to be missing at the minute in the context of all the stand-offs that there are around the protocol and everything else. We need to remember the value of the institutions themselves. The institutions were meant, themselves, to help solve problems and be a way of us facing and tackling problems together. That should be true of the protocol itself. I am not one of those who says to the DUP it should just go into the Executive because the issues of the protocol are clearly between the UK and the EU. I believe that an executive would have good agency in putting forward ideas for improving the workings of the protocol. Both the UK Government and the EU would find it hard to ignore proposals that were agreed by the executive. I do not think that it is impossible to envisage that there could be such proposals; after all, we did have the joint letter from Martin McGuinness and Arlene Foster in August 2016. Just before Theresa May called the election in 2017 the all-party talks that were then taking place included discussions on tackling some of the Brexit issues. Obviously then there were issues like the backstop in the air and all the rest of it. The fact is that you could actually see positive prospects for parties working together, including through their different departmental responsibilities in government, to tackle some of these problems. We just need to learn the lessons of what has worked in the past and what was pointing to a way of working and recover some of that. Also in that context, I would mention paragraph 17 of strand 2 provides that North-South Ministerial Council, NSMC, can discuss EU matters and that arrangements would be made to ensure that the views of the NSMC could be represented at relevant EU meetings. That should not be ignored in this context because the Brexiteers tell us that not one letter of the agreement has been changed by Brexit, so that paragraph still stands. We should look at how we can use that to answer many of the complaints about a democratic deficit with the protocol. The NSMC would be a channel for ministers in the North to put forward their views on relevant EU matters. That helps to address some of the problem with the democratic deficit. Let us value what we agreed, appreciate what it took to agree it and maybe acknowledge that we have not been attentive enough in implementing it.

**Senator Emer Currie:** Mr. Durkan's submission eloquently screams sense. It is lovely to read. He talked about rights promises. I want to ask him about the legacy Bill, which is an attack on rights. The Irish Government is, of course, completely opposed to the legacy Bill. We had a cross-community group of victims here yesterday. The Minister for Foreign Affairs,

Deputy Coveney, met them and reiterated how the Bill is not acceptable. It is important for politicians to continue to build momentum with victims and to support them. The Bill is by perpetrators, for perpetrators. How did we get here? How did we get from the Stormont House Agreement to this? In Mr. Durkan's experience, does the DNA of this Bill lie in the Hain legislation and those who crafted it?

**Mr. Mark Durkan:** I thank Senator Currie. I mentioned the rights provisions of the agreement in the opening statement. They simply have not been fulfilled on so many counts. I will not rehearse them all here. Even when we had a Labour government, it was dilutory about the question of a bill of rights. It introduced a false precondition that is not in the agreement that there would have to be all-party consensus before there could be legislation on a bill of rights. The agreement was written to state that the bill of rights would be legislated for in the Westminster Parliament because we knew we could not get all-party agreement on the bill of rights in the Assembly or Executive. It was outsourced to the Northern Ireland Human Rights Commission to draw up proposals for what might be in a bill of rights, but there was a guarantee that the UK Government would legislate for a bill of rights, as the nearest thing one could get to entrenchment in those circumstances.

Various arguments were given whenever different parties and groups sought movement on the bill of rights. Former secretaries of state made statements to indicate that nothing would really be added by a bill of rights that is not already covered in the EU charter on social and economic rights, or by the European Convention on Human Rights. We know the EU charter no longer applies to the North. We are looking at a situation where the ECHR applies less and less. Various legislation has already ousted the ECHR as something people can use in the courts of Northern Ireland, such as the United Kingdom Internal Market Act.

The legacy issue is one of the areas in which the agreement itself is deficient. I recall raising with Mo Mowlam on the night in question that the words had very little to do with victims or legacy. She told me not to worry as the Women's Coalition had already contacted her about that, and she agreed. I still do not think the words that were added were enough. I can understand why people were diffident about putting in too much about legacy issues. They were afraid that if we got into text that rehearsed things that happened in the past, it could become quite difficult. The UK Government had previously appointed Kenneth Bloomfield to produce a report on legacy victims. People used the point that they did not want to pre-empt that in some way or tilt at its independence. Not all parties were necessarily happy with the prospect of what Kenneth Bloomfield might produce. That created a situation where the agreement was more silent on legacy issues and victims than it should have been. That is a point I have made whenever I have engaged with others from the DUP, Sinn Féin, trade unions and other groups. When talking with people involved in the Colombian peace process, one point that I always made to them was to learn the lesson from our process that they need to address legacy issues up-front and face up and not to think they would take care of themselves or could be avoided afterwards.

I am glad that the Government and Opposition here are explicit in their opposition to the UK Government's Bill. It basically vanquishes any prospect of serious rights to truth or justice for victims. Nobody is necessarily trying to pretend that there would ever be a possibility of a huge number of prosecutions in unresolved cases, but the justice standard is the standard at which these matters need to be approached. Most victims' groups are realistic about what the real prospect for truth translating into prosecution is, but they want to know that truth will be pursued and yielded. They know that the approach of the British Government is to turn off that search for truth by pretending that it will somehow emancipate or invite all sorts of releases of

truth from people who have, until now, hidden things and are determined to continue to hide things for their own reasons. It has been criticised as being an amnesty and it is an amnesty in that sense.

Senator Currie mentioned the Hain legislation in 2005. It, too, was for an amnesty. It provided that anybody could go to a tribunal in secret and get a certificate that provided immunity to prosecution. That certificate could be given an added seal of secrecy by the Secretary of State, so that the only people who might go to jail for any events of the past would be family members or media who might speculate that somebody got a certificate relating to a particular incident or crime. It seems crazy that victims or survivors could end up being jailed and that journalists seeking truth could end up being prosecuted as a result of the Hain legislation, while perpetrators would not be prosecuted. Perpetrators did not have to come forward themselves. Anybody could do it on their behalf.

I remember challenging that legislation with a raft of amendments to try to expose just how pernicious it was and to challenge how one would prevent a situation where certificates would be issued in circumstances where people had not sought those certificates or were not admitting any involvement in those offences. It was an amnesty that was agreed in 2005. Thankfully, that Bill was withdrawn after enough victims' groups persuaded Sinn Féin to withdraw its support for the Bill, which it had supported on its introduction even though it clearly provided for an amnesty for anybody who wanted one. That included loyalists, security forces and anybody accused on the republican side too.

**Senator Emer Currie:** Does Mr. Durkan think the DNA of what we are looking at now is connected to that legislation?

**Mr. Mark Durkan:** I think parts of it are revived. The difference is that people were to go to a notional tribunal to claim this immunity. The 2005 legislation in itself did not overtly say there would be no more prosecutions. It did not provide a cut-off date or anything else but it would have made pursuit of prosecutions futile because people would have had these certificates issued by the tribunal. It was giving a veneer of process and accountability. I would not say that this Bill is exactly the same as what was proposed then. It is different but the fact is that in effect, it means an amnesty. It means the same thing to victims. That is why victims were so unanimous in eventually opposing the Bill in 2005. In 2005, it took a lot of victims some time to wake up to what the Bill was because of the media. It was called the Northern Ireland (Offences) Bill, but the media kept dubbing it the "on the runs Bill", so people thought that it was just a Bill to deal with the anomalies that were there around "on the runs" and people who found their status questionable in terms of what might happen to them when they return to a given jurisdiction. However, the Northern Ireland (Offences) Bill was far more sweeping that. Unfortunately, we have come back to amnesty again. While we can and must criticise the British Government for that, this also comes back to the fact that the parties and the political process collectively have failed to agree a proper way forward and a legacy at different times. Different parties have different reasons for trying to avoid different proposals or to resile from different proposals on legacy. That has yielded a situation where a British Government has been able to do what it is doing and say that everything else that has been tried or that has been suggested has been turned down, and saying that this is all that we can do. We should criticise the British Government but we need to reflect on our own possible agency in this as well.

**Deputy Jennifer Carroll MacNeill:** I thank Mr. Durkan for joining. Although it is difficult within the confines of the agreement at the time, I want to better understand the mindset on the difference between achieving an agreement and knowing that you are achieving an agreement



essentially on constitutional and political structures and having a sense that things were being left over, as it were, for example, legacy or the path towards mutual respect and reconciliation. To what extent at the time were people aware of that or thinking about that? Has Mr. Durkan been surprised or disappointed in terms of the operation of the agreement and how things have actually played since?

**Mr. Mark Durkan:** I thank the Deputy for that question. As she says, when we negotiated the agreement, we knew that we were working on institutional frameworks and constitutional precepts to take account of the fact that there were two very different aspirations. We wanted to make sure that those differences did not prevent agreed institutions from being established in the North, North-South and east-west. We also knew that we could not write into the terms of all those institutions all the protections that people might feel that they needed, which is why so many of the rights provisions of the agreement appear separately from strand one, strand two or strand three. There is therefore some read-across in strand one to some of the rights provisions but the rights provisions are there separately and distinctly. In some cases, that was because some of the Ulster Unionists' negotiating team had a particular bugbear when it came to questions of rights and we knew that we were not going to get the rights language agreed in strand one itself. It was going to have to be in separate sections.

It would be remiss not to point out that one of the people who had such a big hand in the rights provisions - and there are two sections of the agreement that are headed rights, equality and safeguards - was Mo Mowlam. Mo stayed out of the weeds of the institutional negotiations; she did not want to get involved on the detail about executives, ministers and assembly committees and all the rest of it. She was happy to leave that to Paul Murphy. However, what Mo did concentrate on was making sure that whatever institutions were agreed, there would be strong rights provisions and that those rights provisions would also extend to citizens having the right, using the ECHR to go to court and even overturn Assembly legislation. We wrote it into the agreement. Here we were negotiating to create an assembly but we were actually giving citizens the right to go into the courts and overturn Assembly legislation if it was deemed to be incompatible with the European Convention on Human Rights. Those provisions are there, as I said earlier, the dimmer switch has been applied to them really ever since the agreement. Now it faces real difficulties.

From someone in the SDLP negotiating team, what I recall is that John Hume's two lenses for looking at everything was through rights and relationships. The institutional arrangements were meant to be arrangements that could foster better relationships, both within the North and North-South, while also upholding rights. That was the idea. We may have presumed that getting the physics of the institutions right meant that the chemistry would happen by itself, but it has not and did not. However, it has done at times. The chemistry within the institutions even at times of difficulty has worked better. It would be wrong to say that the whole thing has been a disappointment or that things have gone wrong. It is just that something as good as the Good Friday Agreement, and as overwhelmingly endorsed as the Good Friday Agreement, needs better care, attention and respect, as far as adherence is concerned. There is this idea that we can let different parts of agreement go.

It is not just parties that let parts of the agreement go. Look how long the two Governments let the British-Irish Intergovernmental Conference go without meeting. Why? There is no point in them calling themselves co-guarantors of the agreement if they are setting a pretty bad standard. This was not meeting at times when there were not the difficulties between the British and Irish Governments that there are now. It tended to be neglected. It kind of frightens

the unionist horses. Unionists do not like the British-Irish Intergovernmental Conference that much but that was not a good reason for not discharging the commitment and the agreement to meet every year to deal with non-devolved matters. The text of the agreement says that relevant Ministers from the Executive can be invited to those meetings. That is the way of assuring people that there is nothing wrong or that nothing untoward is going on. I would like to correct what I just said there now, I have said that the text of the agreement says that Ministers could come in. If we actually read the text of the British-Irish Intergovernmental Conference section of the agreement, paragraph seven does not actually use the term “Northern Ireland Ministers”, because at the stage that it was written, there still was not agreement on Northern Ireland Ministers. Instead, the clunky language refers to those with executive authority representing the Northern Ireland administration. That was one of the clunky bits of language that was not caught in the final draft of the agreement.

**Deputy Jennifer Carroll MacNeill:** A typo.

**Mr. Mark Durkan:** It is a hangover from the fact that we had not agreed on Ministers. We got that squared. We got the Ministers squared in strand one, and obviously the language of strand two was squared with that, but it was not ironed out in that paragraph, which is why that clunky language appears, but it is what it means now; it refers to Ministers. We can all ask ourselves why we have let different bits go. Is it for the sake of not stirring things up or of not creating problems? We should just be doing it as due diligence. When you have something like the Good Friday Agreement, the institutions should be the process after that. The process should be the institutions. By and large, that is not what happened. We got into a situation whereby the two Governments created a sense that the process was different from the institutions and that the institutions were neither here nor there at times. We had that with the Mandelson suspension originally and all those things. That became a creeping attitude. That has created a moral hazard that has put us into the circle that we got into from 2017 to 2020 and that we are in again now.

**Chairman:** We will now move on to Sinn Féin.

**Deputy Rose Conway-Walsh:** I thank the Cathaoirleach. I will be sharing my time with Senator Ó Donnghaile. It is good to see Mr. Durkan here today. I listened with interest to what he has to say. I want to thank him for his contribution to the Good Friday Agreement, because I think we sometimes forget how much it has achieved and how far we have come in a quarter of a century. As we are the Committee on the Implementation of the Good Friday Agreement, we focus a lot on what has not been implemented as well. These discussions are useful on that basis to look at how we may move those things forward.

Also, we need to be mindful of how much things have changed in the whole landscape, the political landscape and the landscape in the North, most recently on foot of the census. There is no longer a unionist majority, and Michelle O'Neill is the First Minister designate. All those things have changed. The other day I listened with interest to Mr. Durkan on “Talkback” discuss the referendum and preparedness for it. I think he referred to that in his statement in the context of the necessity to plan and to prepare for where we are at the moment. Mr. Durkan will have heard this from the whole island and the diaspora, but there is an appetite for people looking to the future and the constitutional future of the island.

Therefore, we and many other politicians and civic society have been calling on the Irish Government to set up a citizens’ assembly on Irish unity as an appropriate citizen-led initiative to discuss the constitutional future of the island. I note that in Mr. Durkan’s contribution, he

talked about an open process of bringing in different perspectives and getting people away from fixed positions, and I completely agree with him. I saw that, as late as Monday night, Donegal County Council passed a motion - it was a Sinn Féin motion but it passed with the support of Fianna Fáil and Fine Gael - on writing to the Taoiseach to establish a citizens' assembly, so I think there is a real appetite for that.

I think Senator Black is present on Teams. She will probably talk about Ireland's Future's Together We Can event on Saturday. That is really significant. I think all the political parties are involved in that, as well as all the different organisations and the diaspora. There will also be speakers from the unionist tradition there. The big ask from the event is that the Irish Government plan for the future and establish an all-island citizens' assembly.

As this would be one of the most fundamental changes in our country since partition, how important does Mr. Durkan think it is to provide such a forum for people to contribute their views, to discuss what a new and united Ireland would look like and to have an informed discussion, whether about health, education or any of the other issues that may be in people's minds, about what things may look like in the future?

**Mr. Mark Durkan:** I thank the Deputy for those points and questions. As I said in my statement, I think there is a really strong case for proper deliberative moves to curate Article 3 of the Constitution. Article 3.1 states "It is the firm will of the Irish nation, in harmony and friendship, to unite all the people who share the territory of the island of Ireland, in all the diversity of their identities and traditions, recognising that a united Ireland shall be brought about only by peaceful means with the consent of a majority of the people, democratically expressed, in both jurisdictions in the island." I think the Irish Government could, for instance, move to revive the Forum for Peace and Reconciliation or something like it. It may not need to meet in as big a format or on a public, weekly basis, but there certainly should be deliberative, well-framed, inter-party discussions. I believe that something like that would be a helpful preliminary to the establishment of a citizens' assembly or anything else. I think a citizens' assembly, when it is convened, will want to know if there is at least some established wavelength of thinking across political parties and the various parties likely to form governments here, in the North or whatever. Like the Forum for Peace and Reconciliation, I think such an exercise can be open to all parties, North and South. Not all parties may attend, but the terms of reference should not of themselves prevent any party attending because, after all, the language of the terms of Article 3 was accepted and agreed in the talks by unionist negotiators. Part of the balance for accepting the institutions in strand 2 was that there was also acceptance of the terms of the constitutional change in Articles 2 and 3. I know some unionists who will say that, as far as they are concerned, the people of Ireland can be united even under existing arrangements. I have some unionists friends who say the people of Ireland united to vote for the agreement North and South so it does not have to mean a unitary state for the people to be united. People can have different views as to what they hope Article 3 would lead to in respect of uniting the people.

Article 3 was also carefully worded in expressing the firm will of the Irish nation. It was deliberately framed not to create a direct obligation on the State to be seen to be prosecuting or pushing for unity. That was to balance the provisions that were there on the UK Government side about accepting that it is the right of the Irish people to self-determination without external impediment. Just in the same way the British Government was saying it would have no agenda standing in the way of unity, the balance was that the Irish Government could not be seen to be saying that the State and every Irish Government had to be pushing for unity because, if that nuance was not there, unionists would say Article 3 was not really changing in the Good Friday

## Agreement.

Therefore, for all sorts of reasons there are live discussions about constitutional change, the prospect for constitutional change, what the necessary processes would be and just what are all the logical and logistical issues we would have to go through to even bring about a healthy, respectful debate. The fact is that, in respect of the provisions in the agreement, and while there is some necessary collective ambiguity, or there was collective ambiguity at the time, around some of the precise terms on providing for a possible poll on the constitutional status of the North, that was not inserted into the agreement as a dead letter. I wonder at times when I hear some people say that yes, the provision is there, but no, we should not do it because it would somehow subvert reconciliation or jeopardise the agreement if those things are even talked about. It is framed such that there are two equally legitimate aspirations, so people cannot be told that one of those aspirations dare not speak its name or that they dare not try to frame an agenda or express that aspiration in any positive way. In the long journey to the Good Friday Agreement, it took all sorts of deliberative stages for people to get our heads around language and concepts and to be able to arrive at language that could be more shared and more commonly understood. It will be the same when it comes to the questions of constitutional status. I do not think we should spend our time at the moment being fixated on asking the current British Government what the criteria would be for calling a poll. I am glad we are not stuck with the Brandon Lewis test or the Brandon Lewis doctrine as to what the criteria would be because they would probably be criteria that Deputy Conway-Walsh and I would object to and have issue with. I do not think, therefore, that we should be asking the British Government to lay down *ex cathedra* grounds on which a poll might be called.

We also have to be wise to the fact that the terms in the agreement that oblige a Secretary of State to call a poll may not be the only conditions on which a poll could be called. A proof of that is that the first political leader to call for a constitutional status poll after the Good Friday Agreement was actually David Trimble. In the spring of 2002 he advocated having a poll to coincide with the then scheduled Assembly elections for May 2003. At that time he made the point that the obligation on the Secretary of State is conditional and circumstantial but it is not a general restriction that would prevent a poll being called and agreed on other grounds and other bases. Similarly, I recall a speech given by Peter Robinson in Queen's University Belfast a few years ago in which he stated that unionists should possibly agree to a poll, that it should not be on the same basis as in the agreement but on a different basis and that, therefore, the seven-year itch would not be triggered, as it were, and it would be generational. We already have evidence of people thinking beyond the choice that a British Secretary of State is obliged to take under the terms of the agreement. It is healthy that the rest of us are thinking about those possibilities. How can we create the prospect of having a debate where those who want to remain in the United Kingdom and those who want a united Ireland can put forward their proposals positively along with a clear prospectus for that? We know from the whole Brexit nonsense that one does not want campaigns that are not evidence based, nor a situation where people vote for outcomes for which there is not a clear prospectus and people are free to write and argue their own version of things after that, with all the destructive effects. There is a duty for us to try to frame that debate. That is why I deliberately referred to curating Article 3.

In taking steps to ensure due diligence in deliberations, we should start with parties, extend it to citizens' assemblies and commission expert input. I say citizens' assemblies because I do not expect it will be a one-off exercise. A series of assemblies will be needed to focus on different issues. Parties would then have to regroup and retune based on what comes back from those expert groups and citizens' assemblies. It is a longer process and it needs to start now. There is

no virtue in not preparing or planning.

Some people have said we cannot talk about these things until reconciliation has taken place. What is going to be the test for sufficient reconciliation before we can have this debate? In addition, we should not suggest that those who want constitutional change are not as committed to reconciliation as those who do not want constitutional change, or that they do not see constitutional change as being the space in which reconciliation can be best fostered.

**Deputy Rose Conway-Walsh:** Sorry. I have taken up most of Senator Ó Donnghaile's time.

**Senator Niall Ó Donnghaile:** Do not worry about that.

**Deputy Rose Conway-Walsh:** I thank Mr. Durkan for his contribution; it was very interesting.

**Mr. Mark Durkan:** It was my fault.

**Senator Niall Ó Donnghaile:** It was a bit of both, to be fair. There is shared responsibility on that. Mr. Durkan is welcome back. I know he was a long-standing and engaged member of this committee and he is familiar with its work. I thank him for his presentation. I apologise for missing his contribution as I was in the Seanad Chamber, but I read his submission.

There are a couple of issues I wish to raise and I will be as brief as I can. I agree with most of what Mr. Durkan said about the failure to implement a number of aspects of the agreement. This failure lies primarily but not exclusively with the British Government. Given where we are in the context of the work of this committee, it is important that we name failures on the part of the Irish Government. I will go through my thinking behind that and seek Mr. Durkan's analysis given where he is coming from.

On the provision in the Good Friday Agreement on the right to identify and be accepted as Irish, British, or both, some people think in the context of the agreement that Articles 2 and 3 were done away with as opposed to replaced. While Mr. Durkan has referred to Article 3 a number of times, and it is an important article, I want to talk a wee bit about Article 2, the right of everyone born on the island to be part of the Irish nation.

In the context of the provision in the Good Friday Agreement on the right to identify and be accepted as Irish and Article 2 of the Constitution on the right to be part of the Irish nation, there have been systematic issues and failures and, in a way, erosions over the past 25 years on the part of this State. There has been a failure to give speaking rights to MPs in the Dáil, which was spoken about for a long time. There was the recent failure by the Opposition to allow MPs and MLAs sit on special Oireachtas committees, such as this, that would look at specific issues such as autism, which are dealt with under the agreement and other agreements as all-Ireland healthcare issues. I refer to the whole campaign around voting rights and all of that. Is there a need for the Irish Government to engage in some self-reflection on giving effect to Article 2 as well Article 3 and how it should best go about doing that in the context of the Good Friday Agreement?

A former Secretary of State in the North spoke online last week about how the UK Government's strategy on the union needed a radical shift. Does that chime with rigorous impartiality? What does Mr. Durkan think about the British Government's undertakings? While I appreciate this was someone reflecting and providing their own opinion, does it chime with the responsi-



bility to be rigorously impartial on this issue, or does that responsibility only come into effect if and when a referendum is announced?

**Chairman:** Before Mr. Durkan answers these questions, I have to work out the issue of time slots. I want Mr. Durkan to have the opportunity to answer those questions - we all do - but I want to make sure I am being fair to everybody. The SDLP slot is next. I do not think Alliance Party members can make it today, nor can Green Party members, as far as I am aware. Following this reply, the speaking time will rotate to Sinn Féin's second slot, if that is okay. That is fair as everyone would have a second opportunity. On your marks again, Mark.

**Mr. Mark Durkan:** The rigorous impartiality obligation is meant to be constant and absolute. It is not conditional on a particular time. The only condition that changes it is a change of sovereignty, which would mean the duty of rigorous impartiality would be on a different government. That should be in force anyway. The obligation of rigorous impartiality in and of itself does not prevent a political party in a government from having a view. We must carefully distinguish between the outright machinery of government and the state and free political expression that is open to everybody. For instance, a future British Labour minister should not be precluded from indicating that he or she is comfortable with a united Ireland. Do unto others as you would have them do unto you. Other people should not be precluded on a party basis, if they belong to a conservative and unionist party, from expressing a particular preference.

I refer to the point raised about looking at things in the context of the British Government. When looking at the British political landscape, it is clear that we will probably see all sorts of people coming up with new visions for the union in the coming years. There could be a new shared union. Just as people may get confused about a new Ireland or shared island and get upset or worried about such terms, the fact is that such things will be canvassed in the context of the politics of Great Britain with respect to Scotland and the rest of it. We should not be apologising for allowing such language to circulate and build up in common understanding in Ireland. We should go ahead with that.

On the point about the Irish Government and speaking rights, that could be a fair enough proposal. In the past, in the context of a united Ireland, I have proposed that one of the ways of accommodating people's continuing British identity and affinity with Britain would be to allow some Northern Ireland representation to continue in a reformed second chamber in Westminster. I have never advocated that it should be in the primary chamber. I would not want a situation in a united Ireland where people felt they could abstain from the Irish national Parliament and take speaking rights in the British national Parliament. I want a united Ireland to be one in which unionists realise the benefits of taking up their full entitlement in an Irish national Parliament, while still giving them the right of access to a second chamber or whatever in Westminster. You can take a long, rounded view on some of these things, which would mean the choices around speaking rights or whatever mean less. In the Good Friday Agreement, people agreed that Westminster would be the Parliament to legislate for certain things, including the bill of rights, the agreement itself and all the rest. That would terminate in the event of a vote for a united Ireland but I do not think it should end the relationship some people would still want to have with the British body politic. That is one of the challenges we have to recognise in our conversations around possible constitutional status, how it would be calibrated, what it would mean and what accommodating a British identity is. Accommodating a British identity has to mean more than just allowing people to have passports. It will have to run much deeper than that for people, in the same way that many of us value when the North has representation in the Seanad. We would just like that on a more structured, regular and deliberate basis.

**Senator Niall Ó Donnghaile:** I agree. That aspect of the Good Friday Agreement has to prevail in any post-unity scenario, that is, respecting people's right to identify, be accepted and give expression to that identity and that national identity, whatever it might be. In the same way that it has to be more than giving people of a British tradition passports, surely in the context of the Good Friday Agreement provision and Article 2, it also has to be more than just giving people like Mr. Durkan and I passports and sin é - that is it. That is not really being part of the Irish nation as such. While I agree that we need to have those more nuanced conversations and get into the entrails of what it would mean post a unification outcome, we also have to look at it in the context of the here and now. This is more the technical side of things but I know Mr. Durkan is into the technical side. According to the GFA provision, people have the right to identify and be accepted as Irish. Then there is Article 2 of the Constitution, which says people have a right to be part of the Irish nation. How do we give greater effect to that than just giving people a passport so they can go and travel? That is very important and I am not diminishing the important symbolism of that. None of us derives our Irishness from the Good Friday Agreement or Article 2 of the Constitution. It goes much deeper than that. There has to be an expectation there, in the same way we would expect the British Government to implement the aspects around the bill of rights and everything else. Surely there has to be an onus on the Irish Government to lean into giving effect, in a greater way, to what it has said, particularly in the context of increasing numbers of people from the unionist tradition wanting to avail of a passport. Many more of them are also considering issues of representation and engagement. I hope I am wording that right. I know it is a bit-----

**Chairman:** I am sorry to interrupt but I just want to be fair to everybody else.

**Senator Niall Ó Donnghaile:** Apologies.

**Chairman:** There is nobody as interested as I am in this conversation but I have the SDLP waiting-----

**Senator Niall Ó Donnghaile:** Tá brón orm.

**Chairman:** -----and we are six minutes into penalty time for Sinn Féin. I see a Sinn Féin member looking very cross on the screen there.

**Senator Niall Ó Donnghaile:** I actually have to go. If Mr. Durkan wants to come back to the question while I am away, I will read back his answers.

**Chairman:** I have to try to run this properly. I ask Mr. Durkan to wait to give the rest of his answers. Ms Hanna indicated she is tied up so we will continue with seven minutes left for Sinn Féin and that will be its second round, if everybody else is happy with that. Then we have to go back to Fianna Fáil and Fine Gael and so on.

**Senator Niall Ó Donnghaile:** I apologise to Mr. Durkan but I have to go.

**Chairman:** I understand that.

**Senator Niall Ó Donnghaile:** If he wants to touch on those questions I will read the report back.

**Chairman:** I call Mr. Chris Hazzard.

**Mr. Chris Hazzard:** I thank Mr. Durkan for his contribution. It has been very enlightening. We have had some discussions around the review of the Good Friday Agreement, where we

would like to go to and the dangers, opportunities and challenges of that. One of those areas is North-South institutions. For reasons Mr. Durkan might touch upon, the areas to be included in North-South arrangements were decided in 1998. Where do we stand today? We have to look at the biodiversity and nature crisis. Is there scope to expand North-South institutions to look at that? How do we make those institutions and functions more resilient? They were one of the first things to go when there were troubled waters at Stormont. As Mr. Durkan has alluded to already, the only function of the Good Friday Agreement that is currently working is the British-Irish Intergovernmental Conference, which is due to meet shortly. How would we make the North-South institutions more robust in the time ahead, if we had that ability?

**Mr. Mark Durkan:** The North-South provisions agreed in 1998 ended up being necessarily limited because of reactions to the text at the time. People were on the defensive because they had objected to what had been envisaged in the framework document in 1995 and that, perhaps, shopsoiled some of the ideas for North-South arrangements. While what was agreed in 1998 and regarding which implementation bodies and areas of co-operation would be legislated for, to happen on day one alongside devolution, they were all open to further development. That could be development of their own remits, their remits being complemented by other areas of co-operation being agreed or by other implementation bodies and so on. We have not really had that since unionist parties have taken a “keep it low, keep it slow” approach as far as North-South engagement is concerned.

When we negotiated the agreement, as well as the civic forum in the North, it was cast that there could be a North-South consultative forum as well. The idea of that was to try to ensure that positive ideas for North-South co-operation, policy co-ordination and deepening or widening areas of co-operation would come not necessarily as party political demands but as very credible sectoral ambitions and initiatives. The test unionists in particular have is whether something is a real issue and if it will be of mutual benefit and collective interest. That test would almost be proven by who was coming forward with many of these ideas and proposals as they would be coming from the sectors themselves. Unfortunately we do not have that. I hope that in any renewal or review of the agreement, we could get back to those sorts of intents because not everything has to come from political parties or through political processes. We see examples of that in a lot of the debate around the protocol and some of the options for moving there.

There was also meant to be a North-South parliamentary forum. The engagement between the Assembly and these Houses is done in a very stilted way and it could be done much more organically. In any renewal or review, rather than us just getting fixated on the feng shui of changing a bit of the furniture in the NSMC, we should look to that dimension as well because positive ideas and engagement can come from that. A more intentional North-South parliamentary forum could provide the space for the sort of engagement Senator Ó Donnghaile was talking about earlier, with MLAs, Senators and Deputies being able to sit down and talk about different issues or how to advance policies. We need to come into this with lateral thinking. We should also recognise that even on a vexed issue like the protocol, Article 14(b) of the protocol actually states that the North-South Ministerial Council and-or the implementation bodies could put forward proposals to the specialised committee. InterTradeIreland’s remit could easily be repointed so that, if the EU and UK Government are discussing a trusted trader scheme, there could be a role for it in overseeing and vouching for that scheme. In terms of co-operation on agriculture and animal health, the food safety advisory body’s bandwidth could be widened to deal with some of the issues that obtain post protocol, post Brexit or whatever the case may be. We just have to come at this situation creatively. We do not want to jeopardise what we agreed

in 1998, but we should not be so defensive as to not build it up. As has been mentioned, we are more than 24 years on and there are different policy issues pressing, some of which entail international obligations and standards. We should be looking to how North-South and east-west arrangements can address some of those difficulties.

**Chairman:** I must speak in the Dáil shortly and will ask Senator Blaney to take the Chair. Before I do, I thank Mr. Durkan for sharing his considerable professional knowledge and for the openness of his ideas. “Radical” might not be the right word to use, but what he is discussing are tangible steps that do not threaten anyone and that allow for communication, growth and an understanding and appreciation of what everyone on all sides is thinking. If it is appropriate of me to say, I would welcome Mr. Durkan putting some of his tangible and constructive ideas down on paper for us, if he has not already done so. I would be more than happy for our committee to use them to articulate that voice. An issue for us is that this committee always hears the nationalist voice but never hears the unionist voice because unionists will not participate. That presents a difficulty. If we can take practical steps such as those that Mr. Durkan mentioned and point out new ways of communicating without threatening unionists’ Britishness, it will be key, as will recognising that they have the same right as we do - I am a nationalist - to hold the opposite view. We must engage. I could say that it is like the tyres are flat on the Good Friday Agreement, but it has actually run out of breath and the race is over at this stage. Everyone is losing out. There are no North-South bodies, our east-west relations have never been worse and there is no Government in the North. We are at a bad place. I would welcome anything that could change that in a constructive way, such as the ideas that Mr. Durkan has proposed.

I apologise, but I must go to speak on the budget. I ask Senator Blaney to take over.

*Senator Niall Blaney took the Chair.*

**Acting Chairperson (Senator Niall Blaney):** We are moving on to the Fianna Fáil slot. I will take seven minutes and give Deputy Lawless the last eight.

Mr. Durkan referenced Mr. John Hume and relations. From my perspective, the Irish Government is leading in this area through the work and research being done by the shared island unit. What is Mr. Durkan’s opinion on that? It is investigating 62 relevant aspects. One of the greatest arguments around constitutional change on this island, particularly from the Southern perspective, is about whether the Southern Government could afford it if we had unity tomorrow. Could we get over hiccups like the disparities in healthcare and education? The idea behind the shared island unit is to say once and for all what those disparities are. That information will be vital in any future talks on how this island moves forward.

Through its work at community level, the shared island unit is currently the only vehicle that is getting the opportunity to go into unionist communities. That is vital. What is Mr. Durkan’s opinion on this? From my perspective, the unit’s approach is non-confrontational. Are there lessons to be learned from this? We might all have the same aspirations, but we sometimes talk about them too much before people are even at the table.

**Mr. Mark Durkan:** The shared island unit is a positive development. As with other areas, some of the unionist parties have taken issue with it. I can understand that in one sense because the phrase “shared island” was one of the phrases that we discussed during the negotiation of the Good Friday Agreement in terms of what the name of the North-South arrangement would be. They said “No” to “Council of Ireland”, “No” to “Irish Council of Ministers”, “No” to

“Shared Island Council”, etc. Some of them may be going back to that.

It is not just the unit that is important, but also the fund. The shared island fund has been able to cut through the drag factors that have kept back many worthy projects that people have agreed and endorsed down the years. I am referring to projects that appeared in all sorts of planning documents but never happened. The shared island fund has been a positive addition. A number of years ago, I made the observation that the trick we missed with the Good Friday Agreement in setting up strand two - the ministerial council, defined areas of co-operation and implementation bodies, as if implementation bodies were going to be the highest form of North-South life - was in not creating an all-Ireland version of the European Structural Fund. Unionists do not like structures and bodies, but they do not mind funds. Who does? This could be built into any review and we could draw lessons from the positive experience of the shared island fund and, at a lesser and sometimes more localised level, the experience of the peace and reconciliation fund. The Department of Foreign Affairs’s peace and reconciliation fund has very good cross-community reach in the North for the precise reasons that the Acting Chairperson has mentioned. That helps to build assurance and acceptance by everyone of the relevance and benevolent interest of the Irish Government. The shared island fund helps to enable activities. I am conscious that, when the Taoiseach established the shared island unit, he stated that it would not be in the business of dealing with the unity debate. As such, we must be careful about creating difficulties in that regard. I can see why people want to keep those strands carefully delineated, but there are positive lessons to take from the shared island fund.

It would be good if, in a future review of the NSMC, we could agree longer term funding arrangements or structures, for example, a mini-version of the EU’s funds. At the final plenary session of the NSMC before the institutions were suspended in 2002, we agreed that capital investment and infrastructure plans North and South could come to it for joint consideration. That is something that Mr. David Trimble agreed to and signed off on as a possible development of the NSMC’s agenda. He was interested in North-South projects like the Ulster Canal, which would have benefited from such funding. It goes back to what I said earlier. We need to recapture some of what we were trying to do before, but also learn from some of the good ideas that have developed since.

**Acting Chairman (Senator Niall Blaney):** I call Deputy Lawless, who is online.

**Deputy James Lawless:** I thank Mr. Durkan for being with us today.

**Mr. Mark Durkan:** I thank the Deputy.

**Deputy James Lawless:** I have two questions. I listened with great interest to the witness talking through Article 3. I always keep a copy of the blue book on my desk. I had a quick flick through it as Mr. Durkan was talking through it. It was interesting to hear his explanation of the thought process behind the text that was chosen, what went into that and how he saw it manifesting in due course. One thing that caught my eye when I went to look at it again was that Article 3.2 refers to what we sometimes discuss as “the North-South institutions” or the executive bodies that have cross-Border reach. That is the constitutional framework for those to give effect to their powers. I will put two questions to Mr. Durkan and then he can come back with the others. Does he think we have realised the potential of those institutions? I know there are some, which tend to be in less contentious areas, such as Waterways Ireland and on the amenities, leisure and tourism side. Can we go a lot further with that? Are there other things we could and should be doing, or attempting to do or supporting, on this committee and elsewhere? What sort of vision did Mr. Durkan have in mind at that time? Casting his mind back, how can



we realise the potential of that further?

The second question is slightly different. I also asked other witnesses during this series of engagements with architects of the Agreement. We have seen a lot of discussion in recent times that, following the Assembly elections, when members are elected and take up their seats, they are asked to designate. I think it is a simple nationalist-unionist designation, but there is an increasing number of “other” members being elected and identifying as that. Is it time to move on from a simplistic orange or green choice and look at a rainbow or different strands and move slightly away from that sort of demarcation? Is it hindering things at this stage, even though it was important at the outset?

**Mr. Mark Durkan:** On the Deputy’s observations about Articles 2 and 3 as changed by the Good Friday Agreement, I want to make sure that I do not fail to mention how much care the then Taoiseach, Attorney General and advisors such as Mr. Martin Mansergh and the whole Irish Government team took with the language around both articles. It was so judicious and nuanced. Genius went into that wording. I recall John Hume making the point at the time that some of it could perhaps appear on a passport. I garnered from Bertie Ahern’s response that that idea had occurred to him or was already afoot. Of course, the wording in Article 2 is now part of the artwork on Irish passports. I know new artwork commissioned; I hope the language of Article 2 remains in there and maybe some of the language of Article 3 as well. I understand that the Irish Government at the time felt that if they put Article 3 into the artwork of the passport, that it might be misunderstood or misconstrued in some way. It was a point of sensitivity that Article 2 featured on it. I do think there is more we should be doing.

In terms of the potential of North-South institutions, we agreed limited areas in 1998. There were negotiations after the Agreement and we got agreement in December 1998 on what the first areas of co-operation would be and the first implementation bodies. Those were more limited than we wanted them to be. For instance, we wanted the body that was set up as trade and business development to be trade, business development and inward investment. The unionists did not want inward investment to be included. As it happened, the veto on it came from the Tánaiste in Dublin at the time, Ms Mary Harney. She did not want inward investment in there. The Industrial Development Authority Ireland, IDA, did not seem to have as many issues with this as the Industrial Development Board, IDB, did in the North. We should be looking at those again. Let us remember that the original terms included that the Commissioners of Irish Lights was meant to be in with the Foyle-Carlingford Commission. That could not happen. That was meant to be replaced; it never was. We need to be looking at all of these things for the reasons the Deputy and others, including Senator Ó Donnghaile, have said.

I have to confess that I am the person who wrote that paragraph about designation. It was written because the position in the talks was that parties wanted to have similar protections in the institutions coming out of the talks as were in the ground rules of the talks themselves. One of the ground rules in the talks was the rule of sufficient consensus. We borrowed this idea from all of the lessons the different parties and governments had learnt from the South African process. The sufficient consensus rules said that a proposition would stand if it was supported by parties who were supported by a majority of the people, including majorities of unionists and nationalists, respectively. When that protection was agreed in the talks, including by the DUP and the UK Unionist Party, when they were still in the talks, parties felt that it would be odd not to have such a safeguard in the institutions coming out of those talks. As an example of examining how it would work, it could have been done on a party basis, but the feeling was it would have to be done it on an individual MLA basis to allow for different parties that might emerge

in the future and to allow for independents, etc., so it would be done by MLA. That is why it was written in those terms. I said long ago and it was part of what I got into trouble for calling the “ugly scaffolding” of the Agreement. I recall at the time, when we negotiated the Agreement, we said that some of these provisions would, we hoped, be biodegradable and that as the environment changed, they could dissolve and our reliance on them would change. Part of the thinking also was that a robust and articulate bill of rights, as we hoped would emerge under the Agreement, would itself be a significant safeguard and would mean that a lot of these checks and balances would not have to play out as vetoes inside the institutional decision-making.

However, it does need to change. There are different ways this can be done. Obviously, not all parties will agree to a change. In the current context, unionist parties would say that any attempt to move away from this is an attempt to weaken the position of unionists, at a point where this might become a more significant protection for them, and that we are trying to remove and dissolve it in light of all the arguments around the protocol, etc. There are ways of doing things, for instance, reverting to the idea that the Assembly has to jointly elect First Ministers, rather than parties being given the exclusive private right to nominate respective posts. That joint election should no longer rest exclusively on parallel consent, which is the 50% + 50% + 50% rule, but it could be done by the other qualified weighted majority or by a two-thirds majority, which would mean it would not then depend on designation. In the current situation, it would mean, for example, that one party would not be able to prevent the formation of the Executive, just by refusing to exercise its exclusive right to nominate a deputy First Minister. That is a way of reducing the impact of designation, even if we cannot entirely remove it from the provisions. I do not think you would get cross-party agreement to completely remove it, but you could severely reduce its impact and create other alternatives in that respect, given that there are more people designated as “other”, etc.

**Deputy James Lawless:** Could Mr. Durkan run through parallel consent? I understand the 50% rule, that is, 50% + 1%, but 50% + 50% + 50%, as I think he said, could he explain that formula?

**Mr. Mark Durkan:** The phrase “parallel consent” was invented by Dennis Haughey of the SDLP negotiating team. It was essentially to describe what the rule was for sufficient consensus in the talks. It meant that it had to be supported by 50% by parties with the support of more than 50% of people, including more than 50% of nationalists and more than 50% of unionists. That was called parallel consent. The joint election of First Ministers was the only part in the agreement where parallel consent was an absolute requirement and that was disposed of at St. Andrew’s at the behest of the DUP which now quotes parallel consent as though it is key thing for everything in the Good Friday Agreement. Parallel consent was only named for the one decision, which was the joint election. We should go back to joint election but it should not rest on parallel consent alone.

**Acting Chairman (Senator Niall Blaney):** Sinn Féin’s second slot has started. Six minutes were taken and seven minutes are outstanding. A number of their representatives are online. Does Deputy Conway-Walsh wish to take the time now?

**Deputy Rose Conway-Walsh:** I will put it to those participating online.

**Acting Chairman (Senator Niall Blaney):** Does Mr. Brady, Ms Gildernew or Mr. Hazzard wish to use the slot?

**Ms Michelle Gildernew:** Did Mr. Hazzard receive an answer to his question? Does he or

Mr. Brady wish to contribute?

**Mr. Chris Hazzard:** I received an answer.

**Acting Chairman (Senator Niall Blaney):** Will Mr. Durkan reply to Senator Ó Donnghaile's question if he has a note of it?

**Mr. Mark Durkan:** Senator Ó Donnghaile raised a number of questions about Article 2 and how to give it full meaning. The Irish Government has tried to honour Article 2 in a significant way, including by ensuring it appears on passports. While I agree with Senator Ó Donnghaile that identity is not only expressed in the right to carry a passport, it is good it is in the artwork of the current passport and I hope that will not be lost in the move to commission new artwork for the passport.

As regards moving North-South discussions forward, we need to respect the fact that some of the architecture was set out in 1998. We want to develop that as far as we can. In so far as that is stymied, we can use alternative ways to assist in some of the issues, for example, as the Senator mentioned, the shared island unit. If some issues are being stilted and stunted in the context of the North-South Ministerial Council arrangements that does not rule out other airspace being opened up in a creative, positive, pragmatic and non-threatening way, but that is not a substitute for being able to hold a mature, adult conversation about the prospect and possibility of constitutional change.

In respect of constitutional change, democratic, pro-agreement Ireland needs to have a discussion to clarify what the criteria might be for calling a poll, or the question to be asked, rather than waiting for a British secretary of state to set his or her criteria. In the same way as democratic Ireland thought ahead, through the New Ireland Forum and the Forum for Peace and Reconciliation, even when unionists were refusing to engage and participate. Democratic Ireland thought about the type of political arrangements which might be agreed in negotiations and proposals that could be borne by both unionists and nationalists. We had to be realistic about what was likely to be agreed in negotiations and could be passed in a referendum North and South, as Mr. John Hume always recommended.

If we were able to have that sort of constructive dialogue in the past there is no reason not to do the same around constitutional change. It meant we were ready in negotiations with unionists with suggestions they could agree to and unionist voters were able to vote for. It can be done in a constructive way, especially if it is done in terms of curating Article 3. That means a renewed or revived forum for peace and reconciliation that considers how we can develop the thinking and share new thinking around Article 3 and that is equally open to those who support Northern Ireland remaining part of the United Kingdom as it is to those who support a united Ireland. It would not only consider a united Ireland. Those who want to talk about and plan for a united Ireland could do so. Those who have a different view could express theirs also. Those are terms in which Article 3 is written.

We need to examine this in a manner that is seen to be without prejudice or presumption and of course without the predicament of calling a referendum or a referendum being called upon us with no plan. Other people may have their reasons for moving towards a referendum. Mr. David Trimble did in 2002, hoping it would be held in 2003. We know why he did it, but a unionist leader or leaders could calculate that they want to hold a poll.

I do not use the term "Border poll", but rather constitutional change. I know I will not win

a battle of political correctness on that issue, but the reason I do not use the term “Border poll” is that those of us who want a united Ireland need to remember we need to address many more issues than just antipathy to the Border. We must also respect the views of people who will vote to remain part of the United Kingdom and who will not *per se* be voting for the Border. I have unionist friends who say they would be quite happy to have a borderless Ireland and want it to be even more borderless than it is at present. Their vote for the union is not a vote for a Border in any shape or form. Therefore it is helpful to alter the language.

We should also be clear that the referendum should not be a vote for or against a united Ireland. The vote should be a choice between the two equally legitimate aspirations, United Kingdom or united Ireland, because then it is up to both sides to come up with a positive prospectus and give positive assurances about what the outcome will mean if their side of the debate wins. If the question is unity - yes or no - in addition to typecasting unionists into a no-vote again, there is also the danger of making it easy to build up confusion and fears on a “if you do not know, vote no” basis. That could apply in the South as well as the North.

**Acting Chairman (Senator Niall Blaney):** We will move on to the Fine Gael slot. Senator McGahon has 15 minutes.

**Senator John McGahon:** That is the benefit of coming slightly later. I have met Mr. Durkan previously. It is good to see him again.

One of the useful things about the debate here is we have the opportunity to ask architects of the Good Friday Agreement about the past but also about their views of events today. Mr. Durkan has been an MP for more than 12 years. He knows Westminster inside out. He knows it intrinsically. The Irish Government has made many comments in the media in recent weeks that the new premiership of Ms Liz Truss offers the opportunity for a reset of Irish and British relations and that reset is important. With Mr. Durkan’s experience of both Irish politics and being in Westminster, does he think that reset is likely or feasible?

**Mr. Mark Durkan:** I thank the Senator. I know why people said responsibly and reasonably that an opportunity for a reset exists. Recent events mean that opportunity is somewhat polluted, in circumstances where you have a British Government in disarray and distracted. However, the Irish Government and the Irish national democratic interest will have to be the adult in the room in trying to stabilise matters and move forward. We saw that with Brexit. Only the Irish Government planned and commissioned impact appraisals about what would flow from a vote to leave. Whatever the British Government said at the time, it was not doing any of that work. Whitehall was vetoed from doing it whereas the Departments in Dublin had desks stacked with papers they hoped could be disposed of on 24 June 2016. Unfortunately, that was not the case. In the aftermath of the Brexit vote, the Irish Government, and parties in this House and more widely on the island, through things like the all-Island civic dialogue, paid due attention to the broad interests of the island, including the operation of the Good Friday Agreement with regard to the island economy and other dimensions. The Irish Government will have to be the pace leader when it comes to these things and that applies in the context of the review when it comes to the anniversary of the agreement next year, which I would like to approach in a spirit of renewal and review. I know some people have concerns that if you do that, you are creating a run on the agreement, but it has already been sliced and diced in many different ways and subject to false interpretation. We should come at it constructively and fairly. There are things at the institutional level, which can be looked at and which do not preclude a healthy and reasonable conversation about constitutional change and how that could be managed in the background. There are other issues around reconciliation and legacy that also need

to be faced up to. Irish Governments of all hues have been more responsible in relation to those issues than British Governments.

**Senator John McGahon:** That is an interesting point about the concept of review and renew. Over the last couple of months, when we have been speaking to people, there have been two very clear views on the Good Friday Agreement. Some people argue that it should be left alone, as it was in 1998, and that an agreement is an agreement which cannot be altered and changed. Others have suggested that it should be opened up to discussion again. Am I right to say Mr. Durkan's view is that within two years, we should renew and review it and tinker with it, or should we leave it alone? Where does Mr. Durkan stand on that?

**Mr. Mark Durkan:** We should respect the validity of the broad architecture of the agreement. However, 25 years on, the fixtures, fittings and furniture that come with it certainly need to be looked at again and used. The agreement should not be looked on as a precious ornament, which is not to be touched. It is a tool kit to be used and developed, not least in the context of many of the issues and questions Brexit throws up. In terms of protecting the island economy and meeting the issues and difficulties that exist with the protocol, using the machinery of the agreement could be an answer, by using, repointing and repurposing some of the existing North-South implementation bodies. We have a trade and business development body called InterTradeIreland. While it was set up specifically with a remit to look at small and medium enterprises and to make sure they took full advantage of the market space not only in the island economy North and South, but also in wider markets, we need to look at that remit again not just in the context of the island and EU markets, but also the UK market. Both the UK Government and the EU in their respective proposals about express lanes or red and green channels talk about a trusted trader scheme. Can an existing North-South body be repointed to possibly oversee that? It is in the protocol that proposals are invited to the EU-UK specialised committee from the North-South Ministerial Council, or some of the implementation bodies. There is an invitation to use creative and lateral thinking but currently nobody seems to be taking that up. We do not have a North-South Ministerial Council because we do not have an Executive but that is where the argument should be made to those holding back from forming an Executive to say they could challenge other parties in the North to agree proposals from the Executive to the joint committee and the specialised committee. They could also challenge other parties in the North and the Irish Government to agree positive ideas for improving the workings of the protocol or easing the frictions around it by using those provisions in the protocol for the North-South Ministerial Council or implementation bodies. We need to take and use the agreement and its machinery. It is not treasure to be kept in a glass case.

**Senator John McGahon:** That is a great way to describe it. It is not a golden thing on a hill that we should observe and leave it at that. It is a tool kit that we can use to move forward in the modern era. That is very astute.

Mr. Durkan mentioned the Executive. There was an election in May but five or six months later, there is still no functioning Executive. While we know the reasons behind that, it must be incredibly disheartening for the average person on the street of any town in Northern Ireland that having voted in an election, there is still not a functioning Executive. In Mr. Durkan's view, and let us be blunt about it, is the DUP withholding from this Executive to try to push a second election in which it may do better? Does he think an Executive will be formed before the deadline in October or does he think the North is looking to a second election?

**Mr. Mark Durkan:** A wise person said that prophecy is the most gratuitous form of error, so I need to be careful. I am not sure the DUP is holding out for a second election or if DUP



councillors, who face council elections next year, think they would be helped by an Assembly election in the current context. I think they might feel the public mood would not be very good. Some of them might think that even should they claw back an extra seat or two, they will not out poll Sinn Féin. Even if they got an equal number of seats, Sinn Féin would still have the right to be named First Minister. There is no difference between First and deputy First Minister, but this difference has taken on a lot of false significance, which then becomes real. I am not sure that a second election, in particular in these circumstances, would ease its problems. Maybe some of them thought that against a backdrop of Liz Truss coming in and doing the protocol Bill that an election would help if they could make the Bill part of that. I think the events of the last week have completely changed that scenario, if that was in some of their heads. My view had been that if Liz Truss and Kwasi Kwarteng had not done what they did with this mini-budget, we would see a bit of choreography whereby Liz Truss might let it be known that she had appointed all her ministers in every department in London on the basis that they would be ready to use the powers that come to ministers of the Crown under the Northern Ireland protocol Bill, that Jeffrey Donaldson and the DUP would claim that as significant assurance, and that they would probably have a few meetings with ministers to say they are ready to run and to use these powers and that they can go in on that basis, but if they are let down, the same as David Trimble, they will have the right to withdraw. That would have included telling the House of Lords that if it interfered with the Bill, the DUP would pull out. The House of Lords would be told that if it is bothered about this Bill, it is in danger of bringing down the institutions in Northern Ireland again. They would use it as leverage. They would claim victory but use it as leverage in that way. That scenario has probably been changed by events of the past few days. Liz Truss's standing probably would not work for that choreography in the way it might have done.

**Senator John McGahon:** On the subject of Liz Truss, when Mr. Durkan looks at the ministers she appointed to the Northern Ireland Office, they come from a very clear political slant when it comes to Brexit. They come from the European Research Group, ERG, which is a particular home within the Conservative Party. Would Mr. Durkan be worried about their political outlooks when it comes to Northern Ireland based on where they come from politically?

**Mr. Mark Durkan:** Yes, I would, and it goes back to Senator Ó Donnghaile's earlier point around rigorous impartiality. It becomes harder to see how those ministers are going to show rigorous impartiality given the sensitivities of some of these issues. As Brexit champions, they were singularly insensitive to any of the considerations around the Good Friday Agreement. That would be an issue. I think it is wider than that in the sense that the ministers appointed to the Northern Ireland Office, NIO, do not have many levers at their disposal. Chris Heaton-Harris might be given more of a role in EU-UK negotiations than was the case for previous Secretaries of State. I do not know but there is some speculation about that. The real issue is going to be when one looks at all of the ministers she has appointed. In a way it is similar to what Boris Johnson announced when he first took over from Theresa May that every minister was appointed on the grounds that they had promised to deliver Brexit in absolute terms. I would imagine Liz Truss would probably say that, similarly, she appointed all the ministers of the Crown in all of the various departments. Remember the protocol Bill means that a minister in any department in London can have the power to change the law and change the legislation to supply part of the protocol partially or totally, then reapply it in bits, reinterpret it, and even rewrite legislation.

In the UK Parliament everybody calls these Henry VIII powers. Out of mischief, I would actually call them James II powers because it is giving overweening powers to the Crown and completely negating the powers of Parliament. The Democratic Unionist Party, DUP, and oth-

ers would claim that the glorious revolution and the Williamite cause was all about challenging that overweening power of the Crown and establishing rights of Parliament. In supporting the protocol Bill, they have changed sides on the Williamite revolution.

**Senator John McGahon:** As a lover of history, I love that analogy. I have a minute left, so I will be brief. Does Mr. Durkan think we that we will see a united Ireland in our lifetimes?

**Mr. Mark Durkan:** I am not an actuary so I do not know for how long everyone in this room will live. Yes, or I certainly think that we have to plan responsibly and carefully for it so that all of the issues that need to be appraised are properly addressed. I do not think that will be a short exercise. It will involve layers of inter-party discussion, layers of public engagement and different channels of expert consideration feeding back into public debate and back into inter-party discussions. Most of the ideas that are in the Good Friday Agreement did not begin in the negotiations on the Good Friday Agreement. Most of them were there based on and written into layers of understanding or if not written in at least discussed when we were having various talks between parties. That includes the Brooke-Mayhew talks and the Hume-Adams talks. It goes back to the New Ireland Forum, it includes the Forum for Peace and Reconciliation and all sorts of Anglo-Irish negotiations that went on between officials. We need to do that work now. We cannot leave it until somebody decides that the criteria have been met to call a poll and then people are not ready to put forward a clear, coherent proposition in a credible way. We also need to design that conversation so that it is actually about reconciliation.

One of the fulfilments of reconciliation under the agreement would be if we could have a safe, healthy debate on the choice of constitutional status for the North where people were not worried that the fact of having a referendum was jeopardising the agreement and people were assured that in either outcome the promises in terms of rights and protections that the agreement affords would still stand. We need to do that, so I do not buy the argument that it somehow upsets or distracts from the reconciliation agenda to discuss the question of constitutional change. We need to look at how we can have a healthy debate with honest differences over honest preferences where each side is going to have to take its chance.

**Senator John McGahon:** Yes.

**Mr. Mark Durkan:** We have to know that if we have such a referendum, and if the North is still in the United Kingdom, that nobody is then going to have the right to say that that vote against a united Ireland was also a vote to do away with different parts of the Good Friday Agreement, or to say we could do without this or do without that. Similarly, people need to be assured that if the vote is for a united Ireland, the agreements, promises and protections are not in any way dissolved by that. The shape and form of a united Ireland has to give real life to those protections as well.

**Senator John McGahon:** That was excellent. Mr. Durkan has held elected office both as an MLA and an MP for the last 20 years and has been at the forefront of Northern Irish politics. I think that insight shows how important these discussions we are having with the architects of the Good Friday Agreement are. I thank Mr. Durkan for coming today.

**Mr. Mark Durkan:** I thank Senator McGahon.

**Acting Chairman (Senator Niall Blaney):** I thank Senator McGahon for doing my job for me and bringing the meeting to its conclusion.

**Senator John McGahon:** I could chair next.

**Acting Chairman (Senator Niall Blaney):** I thank Mr. Durkan for coming all the way down and for being here in person today and contributing to this debate. It is one that I personally find very intriguing because I think we have to learn from the past before we can move forward. We have to have an understanding of why those who took major steps and put their neck out did so and of the spirit in which they did so. We have to give leadership to the political leaders of tomorrow who will hopefully take this island forward in the footsteps of the Good Friday Agreement architects and in a manner in which all in the economy can move forward and cater for all the people across all counties to make sure everybody has equal opportunities and equal rights. Again, I thank Mr. Durkan for coming here today.

We will go into private session.

The joint committee went into private session at 3.36 p.m. and adjourned at 3.50 p.m. until 1.30 p.m. on Thursday, 6 October 2022.