

Written Evidence to the HC Public Bill Committee on the Northern Ireland (Ministers, Elections and Petitions of Concern) Bill

The Petition of Concern and Stormont's other safeguards and vetoes

June 2021

1. CAJ is an independent human rights organisation with cross community membership in Northern Ireland and beyond. It was established in 1981 and lobbies and campaigns on a broad range of human rights issues. CAJ seeks to secure the highest standards in the administration of justice in Northern Ireland by ensuring that the Government complies with its obligations in international human rights law.
2. CAJ is also the co-convenor, alongside UNISON, of the Equality Coalition, a network of over 100 NGOs and trade unions that aims to promote and advance equality in Northern Ireland.
3. This written evidence is produced in response to the call from the public bill committee of the 23 June 2021 and mostly focuses on clause 5 of the bill concerning the 'Petition of Concern' mechanism.
4. During the Second Reading debate on the bill the Secretary of State for Northern Ireland, echoing the commitments in New Decade New Approach (NDNA), set out the purpose of clause 5 as follows:

Clause 5 reforms the Petition of Concern mechanism to reduce its use and to return it to its intended purpose as set out under the Belfast/Good Friday Agreement—a safeguard to ensure that all sections of the community can participate and work together successfully in the operation of the Northern Ireland institutions and are protected when the Assembly legislates, and to prevent one party from blocking measures or business...ⁱ

5. This evidence reflects on the proposed reforms to the Petition of Concern. It also highlights the risk that without further redress other mechanisms will simply continue to be used as 'vetoes' in the alternative to the Petition of Concern. We explore possible redress through a broader return to the intention of the Belfast/Good Friday Agreement (the 1998 Agreement), that such mechanisms be safeguards linked to objective rights and equality requirements, rather than allowing them to operate as mere political vetoes. We also touch on related issues in relation to the implications for 'caretaker' Ministers' functions during periods where the First and deputy First Ministers are not in office.

The Petition of Concern

6. Under the 1998 Agreement Executive and Legislative authority was to be "subject to safeguards to protect the rights and interests of all sides of the community".ⁱⁱ The Petition of Concern was a central safeguard to this end linked to conformity with 'equality requirements' and a Special Procedure Committee (*Ad Hoc Committee on Conformity with Equality Requirements*), to scrutinise the compliance of a measure with, in particular, the European Convention on Human Rights (ECHR) and the Northern Ireland Bill of Rights.

7. In practice however these provisions were not properly put into place and use of the Petition of Concern to block equality and rights initiatives (turning the intention of the 1998 Agreement on its head), and for party political purposes, brought the mechanism into disrepute. We welcome therefore the commitments in NDNA to be taken forward in the present bill.
8. The most glaring gap in the way the Petition of Concern has operated to date is that the Special Procedure Committee (*Ad Hoc Committee on Conformity with Equality Requirements*) has never been convened as a result of a Petition of Concern. NDNA rightly reaffirms continued provision for this Special Procedure Committee.
9. Under paragraph 13 of Strand One of the 1998 Agreement the establishment of the Special Procedure Committee is mandatory when a Petition of Concern is tabled, unless there is a cross-community vote to the contrary.ⁱⁱⁱ
10. However, the present wording of the primary legislation has been insufficient to secure reflection of this provision in the Assembly Standing Orders in a manner which would ensure this process is followed in practice. The relevant section of the present primary legislation provides that Standing Orders must set out when the matter relevant to a Petition of Concern 'may' be referred to the Committee. The present bill in amending this section would restate this same formulation.^{iv} It is possible that the provision could be strengthened to make it more mandatory or preferably to expressly codify the procedure on the face of the primary legislation to ensure that the Committee is convened as per the original intention of the 1998 Agreement. This itself would fit in with the 'consideration period' on a Petition of Concern that would be introduced by the present bill.
11. The Petition of Concern will not be able to fully operate as intended until the NI Bill of Rights is also progressed through Westminster legislation. Further to NDNA we welcome the renewed focus on the Bill of Rights through the Ad Hoc Assembly Committee. Once this is concluded the Bill of Rights, in accordance with the 1998 Agreement, is a matter to be progressed through Westminster legislation.

Beyond the Petition of Concern: the 'St Andrews Veto' and Executive Agenda veto

12. It is notable that no Petitions of Concern were tabled in the year since NDNA.^v However, the problems that prompted the need for its reform have not dissipated. Rather they have manifested themselves through the use of alternative veto mechanisms that can similarly allow one larger party to make the functioning of the Stormont Executive unworkable and dysfunctional.
13. By contrast to the Petition of Concern what we will call the 'St Andrews Veto' has continued to be used regularly since NDNA. This veto relates to the changes made to the structures under the 1998 Agreement further to the 2006 St Andrews Agreement. This augmented the role of the NI Executive to require most ministerial decisions to additionally require the support of the full Executive if they were 'controversial' or 'significant'. Further changes meant that three ministers could require an Executive vote to be taken on a 'cross community' basis (in which 'Other' Ministers have no vote).^{vi}
14. A CAJ Freedom of Information request in November 2020 revealed that post-NDNA cross community votes had been invoked under this mechanism on six occasions:

- In three votes in April 2020 the veto was used to in relation to “*Options for Introducing a Limited Early Medical Abortion Service for Women in Northern Ireland during the COVID-19 Emergency Period*” blocking provision despite a legal obligation to provide abortion services.
 - In November 2020 the veto was used twice, on the 10th & 11th November to block measures brought forward by the UUP Health Minister relating to Covid 19 restrictions and other interventions to deal with the pandemic.
 - On the 1st June 2020 the veto was used to block an SDLP request to make representations on extending the Brexit transition period.^{vii}
15. We understand that on all the above occasions DUP Ministers invoked the use of the procedure. We do not presently have figures for use of the St Andrews Veto since November 2020. Information released about the mandate of 2016-2017 illustrates that the ‘St Andrews veto’ was used once – to block a Consultation on (same sex) Equal Marriage.
16. Under the 2011-2016 Mandate the veto was used six times.^{viii} This included to block Policy Proposals for an Irish language bill, and to block Irish language and Ulster Scots Strategies, despite the adoption of such strategies being a legal obligation, with a consequent decision by the High Court that the Executive had acted unlawfully.^{ix}
17. The increased use of the ‘St Andrews Veto’ at the beginning of the current mandate (the same number of times as during the whole 2011-2016 mandate) could ultimately be indicative of a ‘displacement’ towards using this veto rather than the Petition of Concern. The actual exercise of the ‘St Andrews Veto’ will constitute the tip of the iceberg as its existence will prevent Ministers from taking forward measures they consider are likely to be vetoed.
18. There was some reform of the ‘St Andrews veto’ after NDNA, with planning decisions removed from its scope, and limitations on its use in ‘cross cutting decisions.’ Its use however remains intact on matters any party deems ‘significant’ or ‘controversial’ that is outside the Programme for Government (PfG).^x Notably despite a draft PfG having been published in NDNA, no PfG has been adopted in the current mandate.
19. A second mechanism that has now been regularly misused concerns the framework providing for items to be placed on the agenda of the NI Executive. Under paragraph 2.11 of the NI Ministerial Code the inclusion of ministerial proposals on the agenda for the NI Executive must be agreed by both the First and deputy First Minister giving, in practice, either a veto.^{xi} Reforms in a *Fresh Start* to seek to prevent the blocking of items from inclusion on the Executive’s agenda were taken forward in a non-binding manner and are not reflected in the binding Ministerial Code.^{xii}
20. Under the current mandate this veto has been used to prevent any discussion and progress on a range of issues. To give some examples:
- A recent UK submission to a Council of Europe treaty body states that Ministerial submissions to take forward the Irish and Ulster Scots strategies had been blocked from inclusion on the Executive’s agenda;^{xiii}
 - According to a statement from the Finance Minister the draft budget was tabled on the 10th December 2020 but was blocked from inclusion on the agenda from this and every other meeting until its belated approval on the 18 January 2021;^{xiv}

- In this month (June 2021) the Communities Minister Deirdre Hargey MLA stated that amendments required to close loopholes in welfare legislation that are pushing people further into poverty had been blocked 17 times by the DUP from inclusion on the Executive agenda.^{xv}
- The same concern was also raised by the Health Minister Robin Swann MLA who expressed frustration that laws for opt-out organ donation were being blocked by the DUP from the NI Executive agenda. At the same time the Justice Minister Naomi Long MLA stated that legislation designed to tackle up skirting and strengthen protections for victims of sexual abuse had also been blocked at the Executive by the DUP.^{xvi} Only after high profile public intervention were the measures given passage, the latter in reduced form.

21. Whilst there may be many more examples the Executive Office has declined to disclose information on use of this veto.^{xvii}
22. This mechanism, coupled with the expanded remit of the NI Executive under the St Andrews veto, can therefore be used by a larger party to entirely derail the work of the NI Executive.
23. We would therefore urge the Committee to give consideration to measures that could also mitigate against the risk that the problems that have emerged with the Petition of Concern are displaced elsewhere.

Further consideration and impact of a period of ‘caretaker ministers’

24. Clearly one option, that has been the preference of the Equality Coalition, would be for repeal of the ‘St Andrews veto’, which was not envisaged by the 1998 Agreement and conflicts with its intentions. A more limited option would be to restrict the use of the ‘St Andrews veto’ either by introducing objective criteria or by limiting the range of matters it can be applied to. The present legislation already excludes matters relating to quasi-judicial justice decisions and (after recent amendment) planning decisions, as well usually matters within the Programme for Government (should one be agreed).^{xviii} Additional matters in this category could include where a Ministerial proposal is in pursuance of legal or human rights obligations.
25. The ongoing issue of items being blocked from inclusion of the agenda of the Executive meeting could also be addressed through changes to the Ministerial Code.
26. During the Second Reading debate a number of members raised issues regarding the extent to which Ministers could be essentially rendered ‘lame ducks’ during a ‘caretaker period’ when there are no First ministers, and hence no Executive Committee. The member for East Antrim (Sammy Wilson) in particular posed the question “*Do we have 24 weeks in which Ministers have no power other than to administer issues and therefore are not able to deal with serious issues that come up?*”^{xix} The continued application of the ‘St Andrews veto’ would unfortunately facilitate such a scenario. Ministers would be precluded from taking decisions that could be deemed ‘significant’ or ‘controversial’ and require approval of an Executive that is not sitting. This could include a decision that is required by a legal or human rights obligation, creating a lacuna. Should the Executive not have agreed a Programme for Government before a ‘caretaker’ situation arises almost all Ministerial decisions could be considered ‘significant’ or ‘controversial’.

27. A further gap this creates, unless the functions of the Executive are otherwise assumed elsewhere, relates to matters, including legal obligations, that are the responsibility of the full Executive Committee. An example is the duty on the Executive to adopt an anti-poverty strategy on the basis of objective need under s28E of the Northern Ireland Act 1998, as well as the aforementioned strategies for Irish and Ulster Scots under s28D of the same Act. Work on the anti-poverty strategy has been progressed and a blueprint produced by the Department of Communities along with a timeframe for consultation and adoption of the strategy by the end of the calendar year.^{xx} However, unless alternative provision is made it will not be possible for the anti-poverty strategy to be adopted in a ‘caretaker’ period, derailing a crucial area of work.
28. Finally, it would be remiss not to reference the further focus that is likely to emerge on the operation of the above ‘vetoes’ if there is a sufficient change in the composition of the Assembly at a future election. This in particular would relate to the growth of MLAs designated as ‘others’ and the consequent operation of the above mechanisms and broader provisions which the Committee may wish to ensure are ‘future proofed’ at this juncture.

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ⁱ HC Vol 697, Tuesday 22 June 2021, column 779. Emphasis added.

[https://hansard.parliament.uk/commons/2021-06-22/debates/9632BA9D-95C7-4D01-8560-164A3D46D007/NorthernIreland\(MinistersElectionsAndPetitionsOfConcern\)Bill](https://hansard.parliament.uk/commons/2021-06-22/debates/9632BA9D-95C7-4D01-8560-164A3D46D007/NorthernIreland(MinistersElectionsAndPetitionsOfConcern)Bill)

ⁱⁱ 1998 Agreement, strand 1 paragraph 1.

ⁱⁱⁱ “13. When there is a petition of concern as in 5(d) above, the Assembly shall vote to determine whether the measure may proceed without reference to this special procedure. If this fails to achieve support on a cross-community basis, as in 5(d)(i) above, the special procedure shall be followed.”

^{iv} The present provision in s42(3) of the NI Act provides “(3) *Standing orders shall provide that the matter to which a petition under this section relates **may** be referred, in accordance with paragraphs 11 and 13 of Strand One of the Belfast Agreement, to the committee established under section 13(3)(a).*” The amended provision, further to the present bill as introduced, would read “(as new subsection 6(b)) that Standing Orders must - *provide that the matter to which a petition under this section relates **may** be referred, in accordance with paragraphs 11 and 13 of Strand One of the Belfast Agreement, to the committee established under section 13(3)(a).*”

^v The Second Report on the Use of the Petition of Concern Mechanism in the Northern Ireland Assembly, CP 362, January 2021. <https://www.gov.uk/government/publications/the-second-report-on-the-use-of-the-petition-of-concern-mechanism-in-the-northern-ireland-assembly>

^{vi} For further information see: <https://caj.org.uk/2020/11/18/stormonts-vetoes-in-the-context-of-a-pandemic-an-equality-coalition-briefing-note/>

^{vii} FOI request from CAJ to The Executive Office TEO ref / 2020 – 102 request of 18 November 2020, response 3 March 2021.

^{viii} FOI request from CAJ to The Executive Office TEO ref / 2021 – 013 request of 8 March 2021, response 26 May 2021.

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- ix S28D of the Northern Ireland Act 1998 (as amended) places duties on the NI Executive to adopt Irish and Ulster Scots strategies respectively. <https://www.legislation.gov.uk/ukpga/1998/47/section/28D> In *Conradh Na Gaeilge's Application* the NI Executive was found to have acted unlawfully for its failure to adopt such a strategy for the Irish language [2017] NIQB 27 <https://www.judiciaryni.uk/judicial-decisions/2017-niqb-27> Other uses of the veto in this period included in votes on public service pensions; the crime and courts bill; and an unspecified procedural issue.
- x <https://www.legislation.gov.uk/nia/2020/4/section/1/enacted>
- xi <https://www.northernireland.gov.uk/topics/your-executive/ministerial-code>
- xii A Fresh Start, paragraph 62. <https://www.gov.uk/government/news/a-fresh-start-for-northern-ireland>
- xiii [MIN-LANG \(2021\) IRIA 1, paragraph 176.](#)
- xiv [Ministerial Statement Public Expenditure: Draft Budget 2021-22, NI Assembly](#), 18th January 2021.
- xv <https://www.irishnews.com/news/northernirelandnews/2021/06/18/news/dup-accused-of-consciously-delaying-vital-legislation-to-close-welfare-loopholes-pushing-people-further-into-poverty--2359101/>
- xvi <https://www.bbc.co.uk/news/uk-northern-ireland-57600590> In relation to the latter example it is not clear which particular mechanism was used to delay introduction of the bill.
- xvii FOI request from CAJ to The Executive Office TEO ref / 2021 – 023 request of 30 March 2021, response 11 May 2021.
- xviii <https://www.legislation.gov.uk/ukpga/1998/47/section/20>
- xix HC Vol 697, Tuesday 22 June 2021, column 791. [https://hansard.parliament.uk/commons/2021-06-22/debates/9632BA9D-95C7-4D01-8560-164A3D46D007/NorthernIreland\(MinistersElectionsAndPetitionsOfConcern\)Bill](https://hansard.parliament.uk/commons/2021-06-22/debates/9632BA9D-95C7-4D01-8560-164A3D46D007/NorthernIreland(MinistersElectionsAndPetitionsOfConcern)Bill)
- xx <https://www.communities-ni.gov.uk/articles/social-inclusion-strategies>