CAJ
Committee on the Administration of Justice

Promoting Justice / Protecting Rights

Written Evidence to the Northern Ireland Affairs Committee inquiry into 'The effectiveness of the institutions of the Belfast/Good Friday Agreement": political vetoes or objective safeguards?

January 2023

1. The Committee on the Administration of Justice (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. We welcome the opportunity to submit evidence to the Committee on its inquiry into 'The effectiveness of the institutions of the Belfast/Good Friday Agreement.' (B/GFA). The inquiry includes consideration of the extent to which the Strand 1 B/GFA institutions (the NI Executive and Assembly) have delivered cross-community, effective and stable government in Northern Ireland; together with seeking proposals and commentary on mechanisms for reform.[1]
3. CAJ has regularly given oral and written evidence to the Committee, most recently in relation to its inquiry into paramilitarism[2] and its work on legacy legislation.[3] In 2021 CAJ also gave oral and written evidence to the public bill committee scrutinising the Northern Ireland (Ministers, Elections and Petitions of Concern) Bill.[4] Our evidence focused on the clause of the then bill relating to the 'Petition of Concern' mechanism, raising many of the same issues as in the present submission.
4. In summary:
   - We would caution against any focus of reform limited to ensuring the institutions and ministers are in place, given the broader questions of dysfunctionality within the Stormont institutions which also require redress.
   - We contend that the effectiveness and stability of the current structures could be improved by returning to safeguards based on objective legal rights standards, as was intended by the B/GFA, rather than the present system of political vetoes that have largely ground normal governance to a halt.

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[1] The Terms of Reference of the Inquiry are set out in the call for evidence: https://committees.parliament.uk/call-for-evidence/2956/

[2] Paramilitarism inquiry: Oral Evidence 23 November 2022: https://committees.parliament.uk/oralevidence/11926/html/ Written Evidence: 18 May 2022 https://committees.parliament.uk/writtenevidence/108540/html/

[3] Legacy legislation – most recently 15June 2022 https://committees.parliament.uk/oralevidence/10402/html/

[4] Oral Evidence, 29 June 2021 https://hansard.parliament.uk/commons/2021-06-29/debates/1c997260-df96-4b77-9759-141c628af7d6/NorthernIreland(MinistersElectionsAndPetitionsOfConcern)Bill(FirstSitting) Written Evidence published 30 June 2021 https://bills.parliament.uk/bills/2858/publications

- It is notable that the majority of parties sought further reforms to the 'Petition of Concern' mechanism at the time of *New Decade New Approach*, but that only limited reform proceeded. We suggest further consideration of reforms to the Petition of Concern mechanism that would involve the NI Human Rights Commission taking on an adjudicatory role over the validity of Petitions.
- The incorporation of the European Convention on Human Rights (ECHR) into Northern Ireland law through the Human Rights Act 1998 is a core safeguard within the B/GFA, also expressly linked to the Petition of Concern.
- The Bill of Rights for Northern Ireland was also a core B/GFA safeguard over the exercise of Executive and Legislative power, also essential to the functioning of the Petition of Concern. Its lack of implementation has contributed to the instability of the institutions.
- There are serious problems with the subjective political veto introduced by the St Andrews Agreement whereby departmental Ministers are unable to take many decisions that are either 'significant' or 'controversial' that are outside an agreed Programme for Government. Instead, such decisions must be considered by the full NI Executive, with any three ministers being able to require an Executive vote to also have a unionist/nationalist majority.
- The increased use of this veto in the most recent mandate has in effect displaced the Petition of Concern as the veto of choice. There also has been no Programme for Government adopted in any recent mandate meaning Ministers are required to defer to the Executive for a range of 'significant' or 'controversial' decisions, grinding effective governance to a halt.
- We advocate therefore for this veto – which was not provided for in the B/GFA- to be repealed. The NI Bill of Rights would provide a much more effective safeguard against Ministerial 'solo runs' that risk interfering with the rights of others.
- We also urge consideration of reforms to the process whereby either the First or deputy First Minister can permanently veto any Ministerial request for an item to be placed on the agenda of the NI Executive.

5. Our central issue is to improve the effectiveness of the Strand 1 institutions through a return to the intention of the B/GFA of safeguards linked to objective rights and equality requirements, rather than the present circumstance of subjective political vetoes vested in larger parties that can turn the original intention on its head. This will be further detailed in commentary below on the Petition of Concern, St Andrews Veto and Executive agenda veto in turn.

The Petition of Concern

6. Under the B/GFA Executive and Legislative authority was to be "subject to safeguards to protect the rights and interests of all sides of the community".[5] The Petition of Concern (PoC) was a central safeguard to this end linked to conformity with 'equality requirements' and a Special Procedure Committee (*Ad Hoc Committee*

[5] B.GFA, strand 1 paragraph 1.

on Conformity with Equality Requirements) to scrutinise the compliance of a measure with, in particular, the ECHR and the Northern Ireland Bill of Rights.

7. In practice, however, these provisions were not properly put into place and use of the PoC to block equality and rights initiatives (turning the intention of the B/GFA on its head), and for party political purposes, brought the mechanism into disrepute.

8. Each PoC was supposed to trigger the specialised Assembly Committee (*Ad Hoc Committee on Conformity with Equality Requirements)* to consider if the legislation etc., the PoC was tabled against actually infringed the ECHR/Bill of Rights NI. Instead, the PoC was not set up in this manner. Rather a structure was embedded that allowed any 30 MLAs to use it as a political veto by calling for a 'cross community vote' without any objective criteria.

9. Under paragraph 13 of Strand One of the B/GFA, 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.[6] However, to date, the Special Procedure Committee has never been convened as a result of a Petition of Concern.

10. The misuse of the PoC led to its reform becoming a key part of the NDNA negotiations. Reform was progressed through the Northern Ireland (Ministers, Elections and Petitions of Concern) Act 2022.[7] This included one party no longer being able to table a PoC on its own and misconduct sanctions against Ministers and MLAs being outside the scope of PoCs. NDNA also provided that reasons must be stated when tabling a PoC.[8] NIO Ministers argued these reforms would return the PoC to its intended purpose under the B/GFA and prevent one party from blocking business.[9]

11. NDNA did record that "Most parties supported wider reform of the Petition of Concern."[10] Broader reform could have brought much greater objectivity to the PoC by empowering the NI Human Rights Commission to have an adjudicatory role as to whether a PoC was valid (in the sense of whether the legislation etc., it was tabled against actually infringed the ECHR or other equality/human rights standards). In the

[6] "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." Paragraph 11 provides a broader permissive provision regarding this special procedure whereby the Assembly may appoint the Special Committee at any point to examine and report as to "whether a measure or proposal for legislation is in conformity with equality requirements, including the ECHR/Bill of Rights." It is paragraph 13 that makes this a mandatory provision when a PoC is tabled – unless there is a cross-community vote to the contrary.

[7] https://www.legislation.gov.uk/ukpga/2022/2/section/6/enacted

[8] NDNA Annex B, paragraph 2.2.1. This is not presently reflected in the provisions for Petition of Concern in the Standing Orders of the Assembly. http://www.niassembly.gov.uk/assembly-business/standing-orders/standing-orders-14-march-2022/#a60 (28. Petition of Concern)

[9] The Secretary of State for Northern Ireland stated at Second Reading "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 Agreemen*t—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*…" 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

[10] NDNA, part 2, paragraph 11.

absence of such provision a PoC can still be tabled and even though those tabling it may be advised by the Human Rights Commission that it is not at all valid, they can use it as a blocking veto regardless.

12. The attention, controversy, and reform of the PoC means it fell out of use for most of the 2020-2022 Assembly mandate. Ultimately a PoC was only tabled once by the DUP and TUV to try and block the Integrated Education bill. This fell as they collectively only had 29 MLAs.[11]

NI Bill of Rights and ECHR

13. 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 as provided for by the B/GFA.

14. The Northern Ireland Bill of Rights is entirely separate to Dominic Raab's (UK) Bill of Rights Bill, the purpose of which is to diminish incorporation of the ECHR in domestic law across the UK. In Northern Ireland this would breach the B/GFA and diminish the only objective and effective rights-based safeguard in place in Northern Ireland.[12]

15. The NI Bill of Rights was to provide a practical and enforceable baseline for well-established rights, many of which have long already been committed to by the UK as a State Party to both the B/GFA and to treaties within the UN and Council of Europe human rights systems. The role of the Bill of Rights is to be a core safeguard over the exercise of Executive and legislative power.

16. It is notable that the NI Bill of Rights could have prevented many of the issues that de- stabilised power sharing and contributed to its collapse in 2017. These issues include legislation and policy that would not have been lawful with the Bill of Rights in place. They also include the diversion of Executive business into repeated attempts to enact rights-based provisions (many blocked from previous agreements) that would already have been in place (or already required as a matter of domestic law) had the Bill of Rights been enacted.[13]

17. In 2016 a UN treaty-body assessing UK compliance with its international obligations expressed regret that the "bill of rights for Northern Ireland has not yet been adopted, as provided by the Belfast (Good Friday) Agreement" and urged the UK "to take all necessary measures to expedite the adoption of a bill of rights for Northern Ireland."[14]

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[11] https://www.belfasttelegraph.co.uk/news/northern-ireland/assembly-passes-integrated-education-bill-after-uup-refuses-to-back-petition-of-concern-41428674.html

[12] The CAJ response to the consultation on reform of the Human Rights Act can be accessed here: https://caj.org.uk/publications/submissions-and-briefings/caj-responds-to-human-rights-act-consultation/

[13] For further elaboration see Written Evidence to the Northern Ireland Assembly Ad Hoc Committee on the Bill of Rights Daniel Holder, Deputy Director of the Committee on the Administration of Justice and Patricia McKeown, Regional Secretary of UNISON , Co-Conveners of the Equality Coalition, http://www.niassembly.gov.uk/assembly-business/committees/2017-2022/ad-hoc-committee-on-a-bill-of-rights/written-briefings/daniel-holder-and-patricia-mckeown/

[14] E/C.12/GBR/CO/6 Concluding Observations on the UK, 2016, Paras 9-10. https://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=4slQ6QSmlBEDzFEovLCuW3XRinAE8KCBFoqOHNz%2FvuCC%2BTxEKAI18bzE0UtfQhJkxxOSGuoMUxHGypYLjNFkwxnMR6GmqogLJF8BzscMe9zpGfTXBkZ4pEaigi44xqiL

18. In 2020 NDNA included a commitment to progress the NI Bill of Rights through a dedicated Ad Hoc Committee on a Bill of Rights in the NI Assembly.[15] A recent report by the Council of Europe Commissioner for Human Rights Dunja Mijatović, records that in June 2021:

> …the Ad Hoc Committee agreed it supported the creation of a Bill of Rights for Northern Ireland, but it made any further decisions contingent on the advice from a panel of experts, which would have to be created for this purpose. This panel was not established due to political disagreement. The Committee delivered a report in February 2022, but could not make a decision on what approach a Bill of Rights for Northern Ireland should take in view of the afore-mentioned issues."[16]

19. Whilst all parties bar the DUP supported the creation of the Bill of Rights, the Commissioner notes that whilst the B/GFA provides "that a Bill of Rights for Northern Ireland must be legislated for by the UK Parliament" the UK government had declined to introduce legislation until there is political consensus at Stormont. It should be noted that such a veto over the NI Bill of Rights was not provided for in the B/GFA and the introduction of such a pre-condition has long prevented progress on the NI Bill of Rights.

The 'St Andrews Veto' and Executive Agenda veto

20. In the first year from NDNA whilst no Petitions of Concern were tabled, the same issues that prompted its reform instead 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.

21. The 'St Andrews Veto' continued to be used regularly since NDNA. This veto relates to the changes made to the structures under the B/GFA further to the 2006 St Andrews Agreement. This augmented the role of the NI Executive to require most ministerial decisions to additionally obtain the support of the full Executive if they were 'controversial' or 'significant' and outside of the Programme for Government. Further changes under the St Andrews Agreement meant that three ministers could require an Executive vote to be taken on a 'cross community' basis (in which 'Other' Ministers have no vote).[17]

22. 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.

[15] https://www.gov.uk/government/news/deal-to-see-restored-government-in-northern-ireland-tomorrow
[16] https://www.coe.int/en/web/commissioner/-/united-kingdom-commissioner-warns-against-regression-on-human-rights-calls-for-concrete-steps-to-protect-children-s-rights-and-to-tackle-human-rights-issues-in-northern-ireland
[17] For further information see: https://caj.org.uk/2020/11/18/stormonts-vetoes-in-the-context-of-a-pandemic-an-equality-coalition-briefing-note/

- 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.[18]

23. We understand that on all the above occasions DUP Ministers invoked the use of the procedure. Information released about the brief mandate of 2016-2017 illustrates that the 'St Andrews veto' was used once – to block a Consultation on (same sex) Equal Marriage. Under the 2011-2016 Mandate the veto was used six times.[19] This included its deployment 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.[20]
24. The increased use of the 'St Andrews Veto' in the first year of the 2020-22 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. There was some reform to this veto following NDNA, mostly focusing on removing its scope from planning decisions.[21]
25. The actual exercise of the 'St Andrews Veto' will constitute the tip of the iceberg as its existence prevents Ministers from taking forward measures they consider are likely to be vetoed. The veto means such decisions cannot be taken at all during periods of 'caretaker ministers' (as was the case following the election in 2022) as no Executive exists to take the decision. During this time one MLA argued that even a Stormont Department launching a consultation (in this case relating to the minimum age of criminal responsibility) should have required Executive consultation.[22]
26. The scope of application of the St Andrews veto is much greater when no Programme for Government is in place. It is notable that there has not been a Programme for Government with the present and past two mandates. This is despite a draft having been published in NDNA during the last mandate.
27. The St Andrews Veto has therefore had broad subjective application as a political veto. We would urge this veto is repealed. The NI Bill of Rights, along with the ECHR,

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[18] FOI request 18 November 2020, CAJ to The Executive Office TEO ref 2020–102, response 3 March 2021.
[19] FOI request 8 March 2021, CAJ to The Executive Office TEO ref 2021–013, response 26 May 2021.
[20] 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 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.
[21] https://www.legislation.gov.uk/nia/2020/4/section/1/enacted
[22] AQW 3991/22-27 Mr Jim Allister MLA http://aims.niassembly.gov.uk/questions/printquestionsummary.aspx?docid=382857

would provide a more effective and objective safeguard against the contention individual Ministers could engage in 'solo runs' that infringe the rights of others.

28. A second mechanism that has now been regularly misused concerns the framework for placing items 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. This gives, in practice, either Minister a veto. [23]

29. Reforms in a *Fresh Start* to prevent the repeated 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.[24] Notwithstanding the general role of the First and deputy First Ministers in shaping an Executive agenda it is clear there has been abuse of this mechanism to prevent discussion and thwart progress on a range of issues, including matters which constitute legal obligations.[25] We would therefore urge consideration of a safeguard to prevent *repeated* blockage of items from the Executive's agenda in this way.

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[23] https://www.northernireland.gov.uk/topics/your-executive/ministerial-code
[24] A Fresh Start, paragraph 62. https://www.gov.uk/government/news/a-fresh-start-for-northern-ireland
[25] For examples see CAJ Written Evidence Northern Ireland (Ministers, Elections and Petitions of Concern) Bill Committee, paragraph 20 https://bills.parliament.uk/bills/2858/publications