

CONSTITUTION, EUROPE, EXTERNAL AFFAIRS AND CULTURE COMMITTEE

23rd Meeting, 2022, Session 6

27 October 2022

Northern Ireland Protocol Bill (UK Parliament legislation)

1. The [Northern Ireland Protocol Bill](#) was introduced by the UK Government on 13 June 2022. The Bill was considered by a Committee of the Whole House and was not amended in the House of Commons. It is currently at the Committee stage in the House of Lords.
2. [Chapter 9B of the Standing Orders](#) sets out the rules and procedures for UK Parliament Bills making provision requiring the Scottish Parliament's consent. The Northern Ireland Protocol Bill falls under Rule 9B.1.1 of the Standing Orders as a 'relevant Bill' as it makes provision applying to Scotland for purposes within the legislative competence of the Parliament; makes provision which alters the legislative competence of the Scottish Parliament; and makes provision which alters the executive competence of the Scottish Ministers.
3. On 19 August 2022, the Scottish Government lodged a [legislative consent memorandum](#) (LCM) which states that it does not intend to lodge a legislative consent motion in connection with the Bill and recommends that the Parliament *not* give its consent to the Bill. On 29 June 2022, the Parliament agreed [motion S6M-05235](#) which called on the UK Government to "*withdraw the Northern Ireland Protocol Bill and restart negotiations with the EU*".
4. On 21 September, under Rule 9B.3.5 of the Standing Orders, the Parliamentary Bureau referred the LCM to the Constitution, Europe, External Affairs and Culture Committee ('the Committee') to consider and report on the LCM. The [Delegated Powers and Law Reform Committee](#) also considered the LCM at its meeting on 4 October.
5. At its meeting on 6 October 2022, the Committee agreed to focus its scrutiny of the LCM on the issues raised in its recent report on '[The Impact of Brexit on Devolution](#)'. The Committee agreed to focus in particular on the concerns identified in its report in relation to the operation of the Sewel Convention and the post-EU step change in the use of delegated powers both by UK Ministers and devolved Ministers.

6. At this meeting, the Committee will take evidence from—

- Professor Catherine Barnard, Deputy Director, UK in a Changing Europe; Professor of European and Employment Law, University of Cambridge (online)
- Dr Ruth Fox, Director, Hansard Society (online)
- Sir Jonathan Jones KC, Senior Consultant, Linklaters (online)
- Dr Oliver Garner, Research Fellow, Bingham Centre for the Rule of Law (online)

The Committee's adviser, Professor Katy Hayward, UK in a Changing Europe Senior Fellow, Queen's University Belfast, will also attend the meeting virtually.

And then from—

- Angus Robertson MSP, Cabinet Secretary for the Constitution, External Affairs and Culture
- Frank Strang, Deputy Director, European Relations, Scottish Government
- Chris Nicholson, Solicitor, Scottish Government
- Tom Holm, EU Negotiation Strategy Adviser, Scottish Government

7. The following papers are attached—

- **Annexe A:** Briefing from SPICe, Professor Katy Hayward, and Dr Christopher McCorkindale (Committee advisers).
- **Annexe B:** Letter from the Convener of the Delegated Powers and Law Reform Committee to the Secretary of State for Foreign, Commonwealth and Development Affairs on its consideration of the LCM.
- **Annexe C:** A copy of the legislative consent memorandum LCM(S6)24 for the Northern Ireland Protocol Bill.
- **Annexe D:** Written submission from Sir Jonathan Jones KC.
- **Annexe E:** A copy of a paper prepared for the House of Lords Sub-Committee on the Protocol on Ireland/Northern Ireland by Professor Alan Boyle, Emeritus Professor of Public International Law, University of Edinburgh, who was unable to attend this meeting.

**CEEAC Committee Clerks
October 2022**

Constitution, Europe, External Affairs and Culture Committee

23rd Meeting, 2022 (Session 6), Thursday 27 October 2022

Northern Ireland Protocol Bill

The UK Government introduced the [Northern Ireland Protocol Bill](#) (“the Bill”) on 13 June 2022. [SPICe has published a joint blog with Professor Katy Hayward](#) which considers the main provisions of the Bill.

The Scottish Government lodged a [legislative consent memorandum](#) (LCM) on 19 August 2022. The LCM recommends that the Parliament not give its consent to the Bill. The LCM also states that the Scottish Government does not intend to lodge a legislative consent motion in connection with the Bill.

On 29 June 2022, the Parliament agreed [motion S6M-05235](#) which called on the UK to “*withdraw the Northern Ireland Protocol Bill and restart negotiations with the EU*”.

At its meeting on 6 October 2022 the Committee agreed to focus its scrutiny of the LCM on the issues raised in its recent report on [‘The Impact of Brexit on Devolution’](#). The Committee agreed to focus in particular on the concerns identified in its report in relation to the operation of the Sewel Convention and the post-EU step change in the use of delegated powers both by UK Ministers and devolved Ministers.

As such, this paper focuses on the delegated powers within the Bill rather than the questions already debated and agreed by the Parliament. This paper provides information to support the Committee’s consideration of the Scottish Government’s LCM. The paper provides:

1. An overview of the Bill.
2. Consideration of delegated powers provided in the Bill.
3. Commentary from academics and interest groups as well as UK Parliament Committees on the delegated powers.
4. Discussion of devolution issues, including how the Bill has been received in Northern Ireland and how the Bill relates to some of the issues raised in the Committee’s latest report [‘The Impact of Brexit on Devolution’](#) published on 22 September 2022.

1. Bill overview

What is the Northern Ireland Protocol Bill?

The Bill provides the basis to amend the operation of the Protocol. The [Explanatory Notes](#) to the Bill set out the UK Government's position:

“the Government’s assessment is that the ongoing practical issues, as well as challenges to political stability in Northern Ireland, linked to the Northern Ireland Protocol, demonstrate that it is not meeting its original objectives. Without change, those issues pose significant challenges to the functioning of the Belfast (Good Friday) Agreement and the institutions it establishes, as well as to broader social and economic conditions in Northern Ireland. The Government’s assessment is that, while the preference is to find joint solutions, action is necessary to respond to the urgent and serious context in Northern Ireland and cannot await such an agreement.”

On publication of the Bill, the UK Government published a statement on its [legal position on the Bill](#).

If enacted the Bill will do two key things:

- disapply elements of the Protocol. The Explanatory Notes state: “the Bill ends the effect of – i.e. disapplies – specific areas of the Northern Ireland Protocol in domestic law”.
- allow UK Ministers to disapply further elements of the Protocol and relevant parts of the Withdrawal Agreement in domestic law.

The Bill disapplies the Protocol, and/or provides UK Ministers with the power to disapply it, in the following five areas:

1. The movement of goods
2. The regulation of goods
3. Subsidy control
4. The governance of the Protocol
5. VAT and excise

Powers for UK Ministers

The Bill provides UK Government Ministers with wide-reaching powers. These powers can generally be used to make “any provision which the Minister considers appropriate in connection with” the relevant part of the Protocol.

These are “Henry VIII” powers as Ministers can exercise them to amend primary legislation.

Regulations made under these powers will be subject to the negative procedure at the UK Parliament unless they amend primary legislation or are retrospective, in which cases the affirmative procedure will apply. Regulations can also be made by the “made affirmative” procedure in cases of urgency.

Further discussion on the powers given to UK Government Ministers can be found in the ‘Delegated powers’ section of this briefing.

Scottish Government LCM

The Scottish Government’s LCM recommends that the Parliament not give consent to the Bill for three reasons. The LCM (paragraph 36) states:

“The Scottish Government believes that the Parliament should not give consent to the Bill, for three reasons – its potential illegality; the impact it is already having on Scottish interests; and its potential future impact, in the event of further escalation in the UK Government’s associated dispute with the EU.”

The LCM also notes concern around the delegated powers given to UK Ministers:

“In addition to the concerns that the Bill undermines an international agreement, the Bill is also concerning for the breadth of powers that it confers on the UK Government. The Bill will enable UK Ministers to create broad swathes of “new law” to replace the provisions of the Protocol which are dis-applied. Cambridge University Professor of European Law Catherine Barnard has criticised these measures as, ‘eye wateringly broad’.” [Paragraph 27]

2. Delegated powers

Overview of delegated powers

The UK Government has published a [Delegated Powers Memorandum](#) to accompany the Bill.

The Bill does not give any powers to the Scottish Ministers. It does, however:

- give regulation-making powers to UK Ministers that are exercisable within the legislative competence of the Scottish Parliament; and
- enable UK Ministers to sub-delegate these powers to (among others) the Scottish Ministers.

The Bill does not require UK Ministers to obtain or seek the consent of the devolved authorities before exercising the powers in devolved areas, and there is no political commitment in the accompanying documents that the UK Government will do so.

Every power in the Bill can be used to make retrospective provision.

More detail on specific powers and approaches to delegated powers is provided below.

Henry VIII powers

Every power in the Bill is a so-called “Henry VIII” power, as provided in clause 22(1). This term is used for powers which enable secondary legislation to repeal or amend primary legislation. The usual constitutional principle is that primary legislation, passed by parliament, should be repealed or amended only by other primary legislation passed by parliament, not by secondary legislation made by the executive. Key to this principle is that where the executive wants to amend or repeal primary legislation which has been put in place by Parliament, it should do a way of a bill, which will receive full parliamentary scrutiny, and which Parliament has the opportunity to amend. Secondary legislation receives a far lower level of scrutiny and Parliament cannot amend it, only approve or reject it as a whole. In this Bill, the Henry VIII powers are particularly strong: all the regulation-making powers in the Bill enable Ministers to make any provision that could be made by an Act of the UK Parliament.

Sub-delegation to Scottish Ministers

Every regulation-making power in the Bill can be sub-delegated by UK Ministers to the Scottish Ministers, Welsh Ministers and/or a Northern Ireland department. UK Ministers can do this by making regulations under clause 22(6).

A blanket ability to sub-delegate is an unusual approach to how powers are to be allocated between the UK and devolved administrations.

UK Ministers can choose whether to sub-delegate, their choice is not subject to any conditions, and they can exercise the choice separately for each relevant power. For each power they can choose:

- (1) not to sub-delegate the power at all;
- (2) to sub-delegate the power so that it is no longer exercisable by UK Ministers and is instead exercisable solely by the devolved administration;
- (3) to sub-delegate the power so that it is exercisable jointly by UK Ministers and the devolved administration, which would normally involve the regulations being laid in both the UK Parliament and the devolved legislature; or
- (4) to sub-delegate the power so that it is exercisable concurrently by UK Ministers and the devolved legislature, which would normally mean that the power is available to both UK Ministers and the devolved administration and can be exercised separately by either of them.

UK Ministers can also choose to what extent they sub-delegate each relevant power. They could choose to sub-delegate a power only within certain limits.

The Delegated Powers Memorandum says that the justification for taking this power is:

“The division of responsibilities in implementing the new arrangements replacing excluded elements of the Northern Ireland Protocol will depend on

policy decisions yet to be taken, including as a result of consultations with stakeholders.

Where a matter would normally fall within the legislative competence of the devolved administrations and the passage of devolved primary legislation would not be appropriate, or timely it may be appropriate to create a new devolved delegated power by exercise of this power.”
(paragraphs 153 and 154)

The key scrutiny challenge with the approach taken to sub-delegation is that:

- As powers are not conferred on the Scottish Ministers on the face of the Bill the Scottish Parliament has no opportunity to scrutinise whether or how the powers will in fact be sub-delegated, despite this being a delegation of power that is within the Scottish Parliament’s competence.
- The parliamentary procedure which would apply to the exercise of sub-delegated powers by the Scottish Ministers is not specified in the Bill. The Bill provides instead that the regulations making the sub-delegation may set down the scrutiny procedure that will apply to sub-delegated regulations.

[The DPLRC Committee wrote to](#) The Rt Hon James Cleverly MP, Secretary of State for Foreign, Commonwealth and Development Affairs [after its consideration of the Bill at its meeting on 4 October 2022](#). The letter notes [the delegated powers within the Bill](#), and the “unusual level of attention” they have received. It asks why the sub-delegation model was chosen rather than the conventional approach of the Bill itself directly conferring the delegated powers; and asks why the scrutiny procedure for sub-delegated powers is not set out in the face of the Bill. A response is awaited.

Power to make provision that is incompatible with the Protocol

Clause 22(2)(b) of the Bill says:

“Regulations under this Act may, in particular—

- (a) make provision notwithstanding that it is not compatible with the Northern Ireland Protocol or any other part of the EU withdrawal agreement...”

This gives explicit authority to UK Ministers, and to Scottish Ministers if power is sub-delegated to them, to make regulations that would be incompatible with the Protocol.

[Reporting on the Bill](#), the House of Lords Delegated Powers and Regulatory Reform Committee said:

“The legality of the matter in international law is ultimately a matter for the courts. But even assuming that the Government are proposing to act lawfully, the matter is highly controversial and should (if at all) be for Parliament in primary legislation rather than for Ministers in secondary legislation.”

The [Law Society of Scotland Second Reading Briefing](#) on the Bill also comments on the matter, stating:

“As a matter of principle regulations should not be deployed to depart from the terms of an international agreement.”

Powers for UK Ministers within devolved competence

Many of the powers are capable of being exercised within devolved competence but are conferred only on UK Ministers. Scottish Ministers would be able to exercise them only in the event that UK Ministers choose to sub-delegate. UK Ministers are not required to obtain the devolved authorities’ consent before making regulations in devolved areas. UK Ministers are not required to consult the devolved authorities before making such regulations. The regulations would be laid in the UK Parliament only, giving no opportunity for scrutiny within the devolved legislatures.

The DPLRC raised this with the UK Government in its recent letter, asking for a specific explanation in relation to each relevant power in the Bill as to why it was considered appropriate for the power to be conferred in this way.

UK Government justification for delegated powers

The UK Government’s [Delegated Powers Memorandum](#) published on the Bill’s introduction in the House of Commons states the purpose of the Bill as *“to provide Ministers with the power to make changes to the operation of the Northern Ireland Protocol in domestic law which protect the Belfast (Good Friday) Agreement and to safeguard peace and stability in Northern Ireland.”*

The memorandum notes that the UK Government *“has not taken the decision to seek powers lightly but considers them appropriate given the grave and imminent situation in Northern Ireland and the need to ensure the Government can act quickly and flexibly as appropriate to restore the balance of the institutions under the Belfast (Good Friday) Agreement.”*

Specifically on the delegated powers within the Bill the memorandum states *“that some of the delegated powers provided for in this Bill are necessarily broad”*. The memorandum notes that *“concerns previously raised by Parliament regarding the appropriate degree of scrutiny on the exercise of delegated powers, particularly where they may amend an Act of Parliament or make retrospective provision, have been carefully considered”*. As such, *“where the powers in the Bill may be exercised so as to amend an Act of Parliament or to make retrospective provision, regulations may not be made unless they are first approved by each House of Parliament”*¹.

Regulations not amending primary legislation are subject to the negative procedure and Ministers are able to use the made affirmative in cases of urgency.²

¹ Only the Commons in the case of provisions relating to custom matters or tax.

² The Scottish Parliament’s Delegated Powers and Law Reform Committee conducted an inquiry on the use of the “made affirmative” procedure during the coronavirus pandemic and published its [report](#) on 10 February 2022

However, “primary legislation” in this Bill means only Acts of the UK Parliament. Primary legislation made by the Scottish Parliament and of the other devolved legislatures can be amended by regulations subject to the negative procedure. In its recent letter to the UK Government, the DPLRC asked why this is considered appropriate.

A [Senedd research paper](#) also highlights that the Bill provides “*that domestic legislation could be suspended or repealed by UK Ministers, which would include Welsh legislation.*” **This would equally be the case for Scottish legislation.**

It is also noted that many of the delegated powers can be exercised to make whatever provision the UK Minister “considers appropriate”. The UK Government notes that the power are subject to a “*test of appropriateness (i.e. the powers can be exercised to make choices between different appropriate policies)*” although it “*acknowledges previous views of the [House of Lords’ Delegated Powers and Regulatory Reform] Committee that powers should be restricted by a test of necessity.*”

The rationale for the appropriateness test approach is “*that the majority of powers taken by the Bill are deliberately drafted, and constrained, by reference to the policy area within the Northern Ireland Protocol which they are seeking to deliver differently*” thus “*the Government considers that the powers taken by this Bill are suitably constrained by their function, while ensuring the Government is able to fulfil its duties to the people of Northern Ireland.*”

3. Commentary on delegated powers

The delegated powers contained in the Bill have drawn attention from a range of external organisations and academics.

The [Hansard Society](#) published an [analysis of the delegated powers in the Bill](#) in June 2022. The sole interest of the analysis was said to be improving the drafting of delegated powers, it noted that the Hansard Society “*make no comment on the Bill’s legal or policy merits. None of our suggestions about ways in which the drafting of delegated powers could be improved would prevent the implementation of the Bill’s intended policy.*”

The analysis notes that the Bill is a skeleton or framework Bill and that “*the real operation of the Bill and the implementation of its policy objectives will be entirely at the discretion of Ministers once the Bill receives Royal Assent.*” Although the Bill disapplies certain elements of the Protocol in domestic law, it does not set out what will replace the arrangements.

In relation to the Henry VIII powers in the Bill, the Hansard Society explains that:

“*Clause 22(1) states that regulations made under powers in the Bill can make any provision that can be made by an Act of Parliament. This clause in effect enables all regulation-making powers contained in the NIP Bill to function as ‘Henry VIII powers’ – that is, powers that enable Ministers to amend, repeal, or otherwise alter the effect*

of Acts of Parliament by regulations. This includes the ability to amend the NIP Bill itself after it receives Royal Assent and becomes an Act. By virtue of Clause 22(1), Ministers will also be able to make retrospective provision and further delegate legislative powers to Ministers and others ('legislative sub-delegation')."

The Hansard Society also stated that *"Many of the powers sought in this Bill are very broad."* Noting that although *"The Government has provided, and will no doubt continue to provide, assurances on how they will be exercised"*... *"powers should be assessed on the basis not merely of how the Government says that it proposes to exercise them, but on their actual scope and how they are capable of being used by the present or any future Government."*

In an [article for The House](#) (15 June 2022), former Head of the UK Government Legal Department Sir Jonathan Jones QC described the Bill as *"one of the most extraordinary pieces of legislation I have ever seen"* adding that it is *"notable for the number and breadth of the powers it confers on ministers."* Mr Jones continued to highlight two clauses in particular, stating:

"Clause 22 provides that any of these powers can be used to amend primary legislation – including the bill itself – thus creating a whole family of "Henry VIII" powers.

"Perhaps most extraordinary of all, Clause 18 provides that a minister may "engage in conduct in relation to any matter dealt with in [the Protocol]" if the minister "considers it appropriate to do so" in connection with any of the purposes of the Bill: what might be described as a "do whatever you like" power. If Brexit was about "taking back control", this bill makes it clear that the control is to be exercised by the government, not by Parliament."

Writing about the Bill for [UK in a Changing Europe](#), [Professor Catherine Barnard](#) stated:

"Having switched off aspects of the NIP, the Bill goes on to provide eye wateringly broad powers to the Executive. Ministers will be able to come up with new regulations on, for instance, the movement of goods between Great Britain and Northern Ireland."

Professor Barnard continued:

"And Ministers, in many cases, gain these powers when they consider it 'appropriate'. And they can use them – with certain exceptions – to alter primary legislation. In other words, these are so-called Henry VIII powers. In so doing, they are subject to the negative resolution procedure. Parliament can vote against the regulations, but it doesn't have to vote in favour for them to be adopted."

Professor Barnard also drew attention to clause 19 of the Bill, remarking that it *"empowers a Minister to take measures as s/he considers appropriate to implement any new agreement reached with the EU to replace the NI Protocol."*

Professor Barnard concludes that:

“Whitehall prevails over Westminster. This is perhaps the most worrying aspect of the NIPB. It is part of a broader and consistent pattern of Government Ministers asking Parliament to give them ever more powers to use as they see fit.”

Chair of the Faculty of Law at the University of Cambridge and Professor in public law, [Mark Elliott noted in his comments on the Bill on Twitter](#) that:

“There are also broad delegated powers enabling Ministers to make new domestic law in place of excluded provision of the Protocol.”

Continuing on his blog ‘Public Law for everyone’ Professor Elliott states that:

“The Bill goes on to give Ministers powers to make new domestic law, including in place of excluded provisions of the Protocol (clauses 5, 6 and 9), and allows Ministers to extend the definition of ‘excluded provisions’ (clause 15). The latter power can be used whenever a Minister considers that it is necessary to exclude additional parts of the Protocol for any of several ‘permitted purposes’, including ‘safeguarding social or economic stability in Northern Ireland’, ‘ensuring the effective flow of trade between Northern Ireland and another part of the United Kingdom’, ‘safeguarding the territorial or constitutional integrity of the United Kingdom’ and ‘lessening, eliminating or avoiding difference between tax or customs duties in Northern Ireland and Great Britain’.”

The [Bingham Centre for the Rule of Law explained in its report on the Northern Ireland Protocol Bill](#) that:

“Under clause 22 the regulation making powers of a Minister under this Bill are the same as the powers of Parliament to make an Act of Parliament. That is to say, that Ministers can do anything by way of regulations that Parliament can do by way of an Act, including amending any Act of Parliament. This is generally referred to as a Henry VIII clause.”

A further report from the Bingham Centre for the Rule of Law, titled [‘A Rule of Law Analysis’](#) was published ahead of the Bill’s Committee Stage. The analysis highlighted “excessively wide ministerial powers” as a problem with the Bill, saying:

“The Northern Ireland Protocol Bill continues the trend in Brexit-related legislation of creating wide powers for Ministers, including “Henry VIII” clauses that allow primary legislation to be modified through delegated legislation.”

The analysis continued:

“Ministerial powers in this Bill to make regulations are numerous, extensive and subject to very low hurdles before those powers may be exercised.”

The analysis explains the scope of the powers with reference to clause 22:

“Every single regulation making power is a Henry VIII power. Clause 22(1) makes the scope of these powers clear.”

“Regulations under this Act may make any provision that could be made by an Act of Parliament (including provision modifying this Act).”

This provision grants to the minister the full power of Parliament to legislate. Although Henry VIII powers are becoming ubiquitous, it still ought to be the case that only Parliament should be able to make Acts of Parliament, not ministers.”

House of Commons Scrutiny – Committee of the Whole House

The Bill was considered on an expedited timetable in the Commons. During [second reading on Monday 27 June](#), a number of MPs raised the issue of the delegated powers within the Bill.

David Lammy MP (Labour) said the Bill would “gift Ministers unaccountable powers” [Column 54]:

“This Bill not only contravenes international law but affords the Government extraordinary powers and denies proper respect to the role of this House. Fifteen of the 26 clauses confer powers on Ministers...Ministers may use these powers whenever they feel it appropriate. Clause 22 allows them to amend Acts of Parliament, and clause 15 gifts them the power to disapply other parts of the protocol, potentially including the article on democratic consent in Northern Ireland. Ministers could use secondary legislation to change not just primary law but an international treaty.” [Hansard, Column 53]

Simon Hoare MP (Conservative) also spoke against such broad delegated powers, saying:

“These Henry VIII clauses really will not stick. Seventeen of the clauses give unspecified powers to Ministers. Was taking back control about this Parliament handing powers to the Executive to use for unspecified purposes? Even worse, one clause tells us that powers will be used to change powers that might have been changed in the Bill if those changes are subsequently thought to have been wrong or ill-advised.” [Column 57]

Richard Thomson MP (SNP) argued against “the horrors of the empowerment of Ministers that the Bill represents—the Henry VIII powers.” [Column 61]

Former Prime Minister Teresa May MP noted “the extraordinarily sweeping powers that the Bill would give to Ministers”. [Column 63]

Claire Hanna MP (SDLP) also raised the Henry VIII powers, saying:

“We are told that the Bill is about a democratic deficit. That is being protested against by removing the entirety of Government from the people of Northern Ireland, and it will apparently be solved by handing over Henry VIII powers that allow the Government to ride roughshod over everybody in Northern Ireland.” [Column 76]

Sir Robert Neill MP (Conservative) noted the “*exceedingly wide Henry VIII powers*” and suggested the House should “*require the Government, when they wish to disapply an element of the protocol, to come to the House and seek its endorsement, having presented that evidence to it.*”

Raising particular concerns with clause 18, Sir Robert continued:

“Similarly, I do not see why clause 18, with such wide powers to do virtually anything, is acceptable—that should come back to the House” [Column 103]

The issue was raised again during Committee stage although no amendments were agreed³ and at Third Reading. Stephen Kinnock MP (Labour) stating on Wednesday 20th July during [Third Reading](#) that:

“these Henry VIII powers are strengthening the hand of Government and weakening the hand of Parliament”. [Column 1001]

House of Lords Delegated Powers and Regulatory Reform Committee

The House of Lords Delegated Powers and Regulatory Reform Committee (DPRRC) published its conclusions on the Northern Ireland Protocol Bill in its [seventh report of Session 2021-22](#) on 7 July 2022.

The DPRRC stated that:

“The Northern Ireland Protocol Bill is a skeleton bill that confers on Ministers a licence to legislate in the widest possible terms. The Bill unilaterally departs from the Northern Ireland Protocol and enables Ministers to depart from the Protocol even further. The Bill represents as stark a transfer of power from Parliament to the Executive as we have seen throughout the Brexit process. The Bill is unprecedented in its cavalier treatment of Parliament, the EU and the Government’s international obligations.”

DPRRC highlighted general concerns with the Bill as well as some specific clauses. General concerns included:

- Henry VIII power – *“not only is the Bill a skeleton bill but clause 22(1) also entails that every power in the Bill (all 19) is what might be called a super Henry VIII power. Ordinary Henry VIII powers allow Ministers to amend Acts of Parliament. In some contexts Henry VIII powers allow Ministers to make minor and consequential amendments to a narrow and technical area of law. That is not the case here. Every power in the Bill allows Ministers to make any provision that could be made by an Act of Parliament, including modifying by regulations the Bill once it has been enacted.”*
- Government justification for powers – *“the Government have failed to explain and justify why the Bill contains so many open-ended powers. In such a highly*

³ [Scottish Government LCM](#)

controversial area, one might have expected powers to be focussed or constrained, for example by requirements:

- *to undertake pre-legislative scrutiny or consultation,*
 - *to satisfy stringent criteria,*
 - *to meet pre-conditions,*
 - *for the exercise of powers to be time-limited.”*
-
- Open-ended nature of powers - *“Most of the key powers in the Bill are open-ended, allowing Ministers to do what they regard as “appropriate”, for example clauses 5(1), 6(1), 9(1), 12(3), 13(4), 17(1), 18(1) and 19(1). Only clause 15(1) uses a test based on necessity rather than appropriateness.”*
 - Parliamentary procedure – *“The Government’s starting point for the applicable parliamentary procedure is unsatisfactory. Every power, however important, is subject only to the negative procedure save where it is used to amend or repeal primary legislation or to make retrospective provision.”*
 - Challenge to powers being exercised for “technical and detailed” matters – *“the Memorandum frequently refers to powers being exercised to make “technical and detailed” provision that is best suited to regulations. Powers unilaterally to depart from a major international agreement in such a controversial area of law, and in such a controversial way, cannot be characterised as merely involving technical and detailed matters. They involve matters of the highest public interest, involving questions of law, politics, diplomacy and integrity.”*
 - Skeleton legislation – *“this is a clear example of legislation preceding policy formulation rather than policy formulation preceding legislation. The Bill contains a swathe of delegated powers enabling Ministers to do what they like when they like. Meanwhile Parliament is given the frustrating task of debating a series of exorbitant delegated powers that are mere triggers for future Ministerial action, with very little detail from Ministers and with no illustrative regulations to facilitate such debate.”*

DPRRC’s conclusion on the Bill was that it “failed in so many ways to accord with the principles of parliamentary democracy”. The DPRRC report also highlighted its previous report [Democracy Denied the urgent need to rebalance power between Parliament and the Executive](#).

DPRRC notes that the Government in its response to the *Democracy Denied?* report stated that:

“We commit to strengthen the Guide to Making Legislation to ensure that it reflects the DPRRC’s updated guidance on delegated powers”.

The DPRRC report concludes that the *“Bill shows so little, if any, evidence of the effectiveness of that commitment.”*

4. Devolution issues

Reception of Bill in Northern Ireland, by Committee adviser Professor Katy Hayward

A core objective of the Protocol on Ireland/Northern Ireland itself (Article 1.iii) is to protect the 1998 Agreement “in all its dimensions”. This is mirrored in the stated purpose of the Northern Ireland Protocol Bill to, as the then Foreign Secretary [Liz Truss asserted](#), “*uphold the Belfast (Good Friday) Agreement and support political stability in Northern Ireland.*”

The concerns that the Protocol is – contrary to UK and EU [claims](#) and intentions at the time of its agreement in 2019 – undermining the 1998 Agreement predominantly come from the political community of unionism in Northern Ireland (NI). In sum, this centres on NI’s differentiated place in the UK internal market and the likelihood of this growing over time.

This is reflected in the [Democratic Unionist Party’s policy position](#) to “*Remove the NI Protocol*”:

“The Protocol must be replaced by arrangements that restore our place within the UK internal market. Any new arrangements must be able to command the support of Unionists as well as Nationalists.”

It has repeatedly said that it will judge any new arrangements against 7 tests. These broadly cover no border or no checks on goods moving within the UK, no new regulatory barriers between NI and the rest of the UK “unless agreed by the NI Executive and Assembly”, giving NI people “say in the laws that govern them”, and preserving the “letter and spirit” of the principle of majority consent.

The resignation of the DUP First Minister in February 2022 and then the party’s refusal to nominate either a Speaker or deputy First Minister following the May elections was intended to be [leverage](#) towards such ‘new arrangements’. The Democratic Unionist Party [welcomed](#) the announcement of the NI Protocol Bill in June whilst noting that “*the bill doesn’t do anything in itself*”. Indeed, the DUP is very aware that this is a skeleton bill. Hence such [statements](#) as, “*alongside regulations that will need to be brought forward, the content of the bill can remove the protocol’s long shadow from Northern Ireland.*” This caution has been reflected in the fact that, although DUP MPs strongly supported the Bill in the House of Commons debates, they chose not to make any gesture towards restoring the devolved institutions even as the Bill progressed to the House of Lords. They have urged the UK Government to resist amendments to the Bill.

The position of the DUP is different from that of the other main parties. The Ulster Unionist Party has always championed a negotiated rather than unilateral route to addressing the concerns it has over the Protocol. It thus [welcomed](#) the Bill as a means to open up the UK-EU talks rather than as a solution in and of itself. The other main parties in Northern Ireland are vehemently opposed to the Bill. 52 of the 90 MLAs in the Assembly (from Sinn Féin, the SDLP and Alliance) wrote an [open letter](#) to the Prime Minister on the day the legislation was announced, objecting to

unilateral action on the part of the Government and stating their wish to see an agreed outcome to the difficulties on the Protocol. They say: *“We will resolutely oppose this reckless Bill and continue to promote post-Brexit solutions on the basis of trust and honesty”*.

The progress of the NI Protocol Bill is particularly significant in Northern Ireland because of the [Ministers, Elections and Petitions of Concern Act](#) (February 2022). This means that, unless the Executive is formed by 28th October, a new election has to be called within 12 weeks. Although the UK Government [describes](#) the political situation in Northern Ireland as needing to be addressed “urgently”, the restoration of the Assembly and power-sharing remains in the gift of the DUP.

Outside the political sphere, Northern Ireland’s economic position is also heavily dependent on what happens with the NI Protocol Bill. Few businesses in Northern Ireland have explicitly welcomed the Bill. Some have made it [clear](#) that: *“Unilateral action is not at our request, and in these times, the parties have a responsibility to reach an agreement with a sense of urgency.”*

A number of [business organisations](#) in NI have been vocal in expressing concerns about the Bill. These have centred on the EU’s assertion that Northern Ireland would lose access to the EU’s single market were the Bill to come into force. The common position is that an agreed UK-EU solution is [preferable](#) because it is likely to bring more certainty and stability in the longer term. That said, they do not underestimate the technical difficulty in finding agreed solutions.

“Impact of Brexit on Devolution” report

On 22 September 2022 the Committee published its report – the [Impact of Brexit on Devolution](#). A number of issues considered by the Committee in preparing that report are relevant to the consideration of the Northern Ireland Protocol Bill LCM.

Powers for UK Ministers to act in devolved areas

In its report the Committee stated that:

“The Committee’s view is that the extent of UK Ministers’ new delegated powers in devolved areas amounts to a significant constitutional change. We have considerable concerns that this has happened and is continuing to happen on an ad hoc and iterative basis without any overarching consideration of the impact on how devolution works.”

The Bill gives UK Ministers sweeping powers. These powers may be exercised in areas of devolved competence within the responsibility of the Scottish Parliament. If UK Ministers exercise such powers, there is a clear scrutiny challenge for the Scottish Parliament.

As outlined above, UK Ministers may also sub-delegate these powers, if they wish, including to Scottish Ministers. UK Ministers could sub-delegate a power only to a certain extent, for example for certain purposes or under conditions.

The effect of not delegating powers to Scottish Ministers on the face of the Bill is that the Scottish Parliament has no say over whether, how or to what extent powers are sub-delegated even where they are within devolved competence.⁴

View of Committee adviser Dr Chris McCorkindale

As the committee noted in its Impact of Brexit report, 2016 marked a step change from the pre-Brexit position that – outside of the exception for UK Ministers, with the agreement of devolved counterparts, to implement EU law obligations in devolved areas – UK Ministers would rarely take powers exercisable in devolved areas. Since 2016 there has been a marked increase in the number of powers taken by UK Ministers to act in devolved areas both in areas formerly governed by EU law but also more recently in areas that were not previously within the scope of EU law. The Northern Ireland Protocol Bill includes a number of very broad powers for UK Ministers to act in devolved areas, buttressed by Henry VIII powers to suspend or repeal Acts of the Scottish Parliament, and enables UK Ministers to sub-delegate those powers to Scottish Ministers. This presents a significant challenge for the Scottish Parliament in the exercise of its legislative and scrutiny functions. First, because the number and scope of these powers undermine a fundamental principle of the UK constitution – the executive and legislative autonomy of the Scottish Government and Scottish Parliament in the devolved sphere.⁵ Second, because UK Ministers are accountable to the UK Parliament for the exercise of those powers, undermining the Scottish Parliament’s scrutiny function in devolved areas.

On the power of UK Ministers to sub-delegate powers to devolved counterparts:

This is an usual approach to the delegation of law-making powers in the devolved sphere: one would normally expect to find both the delegation of powers, and the level of scrutiny to be applied to the exercise of those powers, on the face of the Bill. The Scottish Parliament should be alert to the existence and exercise of this power of sub-delegation, for a number of constitutionally significant reasons. First, because there is no requirement that UK Ministers consult with the Scottish Government or the Scottish Parliament before sub-delegating powers to Scottish Ministers under the Bill. Second, because unlike other delegated powers contained in the Bill there is no provision for the level of scrutiny to be applied to the exercise of sub-delegated powers (merely a commitment to make any sub-delegated power subject to ‘appropriate’ procedures before the Scottish Parliament). Third, because with the content, purpose and regulation of sub-delegated powers left for another day, these devolution powers are the most ‘skeletal’ of this framework Bill’s provisions. As the DPRRC has said, general assertions of the need for flexibility or futureproofing (such as the UK Government’s justifications for the sub-delegation powers) are insufficient justifications for ‘skeleton’ bills. Given their inhibiting effect on parliamentary scrutiny, the DPRRC has said that exceptional justification is needed - none is provided here. Fourth, because the scope of the sub-delegation powers includes the potential to confer constitutionally problematic powers such as powers to amend, suspend or

⁴ Neither the UK nor Scottish Parliament has a say over the parliamentary procedure which would apply to the exercise of sub-delegated powers by Scottish Ministers, this would be determined by UK Ministers.

⁵ [The Constitution in Review: Third Report from the United Kingdom Constitution Monitoring Group](#) (for period 1 January – 31 July 2022) by the Constitution Society

repeal Acts of the Scottish Parliament (so-called Henry VIII powers), powers to make regulations with retrospective application or powers to make regulations that are incompatible with the NI Protocol itself (i.e. that enable Scottish Ministers to act incompatibly with the UK's international obligations). The Scotland Act 1998 empowers the Secretary of State to order the Scottish Government to refrain from taking actions that are incompatible with the UK's international obligations or, conversely, to direct the Scottish Government to take action to give effect to the UK's international obligations. However, there are no meaningful safeguards in the Scotland Act where the UK Government intends for the Scottish Government to act incompatibly with international obligations or to enable the Scottish Government to do so. In such circumstances the Scottish Parliament must be alert in the exercise of its scrutiny functions to the possibility that Scottish Ministers might be empowered to act in such a way.

Sewel and consent

The Committee agreed in its report that:

“the Sewel Convention is under strain following Brexit and notes the view of some of our witnesses that without reform, “there is a risk of the convention, and the legislative consent process that puts Sewel into practice, collapsing altogether.”

The Committee heard from a number of witnesses concerns *“about the extent to which leaving the EU and its aftermath has exposed the limitations of the facilitative function of the Convention⁶”*. That is to say how well the intergovernmental process to facilitate the Convention operates. The report noted that both the Scottish Government and Welsh Government have *“raised concerns in recent Legislative Consent Memorandums about the lack of meaningful engagement prior to the introduction of UK Bills.⁷”*

The Committee's recent report on the impact of Brexit on devolution noted that the Scottish Government indicated in the [LCM on the Northern Ireland Protocol Bill](#) that it was not involved in the preparation of the Bill and “was provided with a copy of it only two hours before it was introduced.”

The report also noted that the Welsh Government had raised concerns over lack of engagement on the Bill, with the Welsh Government stating that this *“plainly breaches the principles in the Intergovernmental Relations Review that sets out how the UK and devolved governments should work with each other.”⁸*

The Committee's view was that:

“there is a need for a much wider public debate about where power lies within the devolution settlement following the UK's departure from the EU. In particular...this needs to address the extent of regulatory autonomy within the UK internal market. Any reform of the Convention needs to flow from the outcome of this discussion which also needs to be inter-parliamentary.”

⁶ [The Impact of Brexit on Devolution | Scottish Parliament](#)

⁷ [The Impact of Brexit on Devolution | Scottish Parliament](#)

⁸ [Welsh Government Written Statement](#): The Northern Ireland Protocol Bill 28 June 2022

There is no consent requirement within the Bill, meaning that UK Ministers could exercise powers without the consent of the Scottish Ministers or Scottish Parliament. Similarly, there is no consultation requirement that UK Ministers consult with Scottish Ministers or the Scottish Parliament before exercising those powers.

In Dr Chris McCorkindale's view this presents a second, two-fold, challenge to the Scottish Parliament's legislative and scrutiny functions. On the one hand, the greater the number and scope of powers taken by UK Ministers in devolved areas - in this Bill and elsewhere⁹ - the greater the opportunity for the UK Government to by-pass the legislative consent procedure altogether, by choosing to act through delegated rather than primary law-making powers. On the other hand, and as the Committee noted in its Impact of Brexit report, with no legal requirement or political commitment on the part of UK Ministers to seek consent from Scottish Ministers for the exercise of powers in devolved areas, there is no consent decision by the Scottish Government upon which the scrutiny function of the Scottish Parliament can bite. With no oversight role of its own, the Scottish Parliament is increasingly reliant upon effective scrutiny in the UK Parliament to regulate the exercise of very broad powers in devolved areas. Even if UK Parliament oversight of such powers was exemplary, and analysis suggests that the picture is mixed,¹⁰ this severance of the executive power to act in devolved areas from accountability from scrutiny by the devolved legislatures would remain constitutionally problematic.

Dr McCorkindale notes that the underlying issue is one noted by the Committee in its report – the balance of power in the post-Brexit constitution. Unlike Scottish legislation that encroaches upon reserved matters, and that is therefore vulnerable to judicial strike down, the regulation of UK legislation that encroaches upon devolved areas is political in nature. Given the political and constitutional differences that exist between the UK Government and its devolved counterparts (individually and collectively) we are now pushing at the limits of a form of regulation that relies so heavily on the good will of, and shared understandings with, the centre in lieu of mutually agreed processes and the neutral arbitration of disagreement between the centre and the devolved administrations.

Alignment with the EU

The Committee's report considered issues around alignment with the EU and the Scottish Government's policy commitment to align where possible with EU law.

The Committee in particular noted:

“that there are substantive differences between the views of the UK Government and the Scottish and Welsh Governments regarding future alignment/divergence with EU law.”

The Committee concluded that this difference of views

⁹ [The Impact of Brexit on Devolution | Scottish Parliament](#)

¹⁰ [Plus ça change? Brexit and the flaws of the delegated legislation system](#), Public Law Project, October 2020

“raises a number of fundamental constitutional questions for the Committee and the Parliament

- to what extent can the UK potentially accommodate four different regulatory environments within a cohesive internal market and while complying with international agreements;*
- whether the existing institutional mechanisms are sufficient to resolve differences between the four governments within the UK where there are fundamental disagreements regarding alignment with EU law and while respecting the devolution settlement;*
- how devolution needs to evolve to address these fundamental questions.”*

Similarly the report noted that

“dynamic alignment between NI and the EU is enormously complex and challenging especially for NI businesses in terms of awareness of the rules that apply in NI, for production and for sale of goods.”

In the view of the Committee’s adviser, Professor Katy Hayward, a particularly complex consequence of the NI Protocol Bill would be the introduction of a dual regulatory regime for Northern Ireland. The Bill would see the removal of customs and regulatory barriers for those businesses in the rest of the UK who wish to trade into Northern Ireland. Because NI already enjoys free access to the GB market, the primary benefit of the dual regulatory regime to it would be to enable NI businesses to avoid being a competitive disadvantage to GB businesses.

However, there are longer term implications for the operation of devolved competence. The [UK in a Changing Europe’s report](#) on the Bill noted the complexity of the future regulatory regime in the UK Internal Market were the NI Protocol Bill in force:

“if the EU standard is one, what is the second standard in the dual regulatory regime? Is it UK-wide or NI-decided, as per devolved competence? ...This raises new questions about whether Stormont would be willing to legislate to non-EU standards to prevent NI businesses from being undercut by non-EU products”.

In this way, the Committee’s adviser Professor Katy Hayward observed:

“The NI Protocol Bill bears a resemblance to the UKIM Act in purporting to respect devolved competence whilst fundamentally altering the environment in which devolved legislatures produce regulations and compounding the asymmetry within the UK internal market to the benefit of the largest part of the UK.”

Sarah McKay (senior researcher, SPICe), Professor Katy Hayward and Professor Christopher McCorkindale (Committee advisers)
13 October 2022



The Scottish Parliament
Pàrlamaid na h-Alba

CEEAC/S6/22/23/1
Annexe B

Delegated Powers and Law Reform Committee

The Rt Hon James Cleverly MP
Secretary of State for Foreign,
Commonwealth and Development Affairs
By email

T1.01
Chamber Office
EDINBURGH
EH99 1SP
Direct Tel: 0131-348-5212
(RNID Typetalk calls welcome)
(Central) Textphone: 0131-348-5415
DPLR.Committee@parliament.scot

12 October 2022

Northern Ireland Protocol Bill

Dear Secretary of State,

I am writing in relation to the Scottish Parliament Delegated Powers and Law Reform Committee's consideration at its meeting on 4 October of the [Legislative Consent Memorandum](#) ("the LCM") for the [Northern Ireland Protocol Bill](#).

Rule [6.11.1\(b\) and \(c\)](#) of the Scottish Parliament's Standing Orders provide that the remit of the Committee includes considering and reporting on proposed powers to make subordinate legislation in particular bills or other proposed legislation as well as general questions relating to powers to make subordinate legislation. The Committee and its predecessor Committee have considered powers exercisable within devolved competence that are conferred on UK Ministers in various Bills over the course of sessions 5 and 6.

As you will know, all 26 clauses of the Bill extend to and apply in Scotland, and throughout the UK. The UK Government is seeking the Scottish Parliament's legislative consent for 13 of the clauses.¹¹ The Scottish Government considers that a further 7 of the clauses require legislative consent.¹²

Although the Scottish Parliament passed a motion¹³ on 29 June 2022 calling on the UK Government to withdraw the Bill, this Committee is required to consider the

¹¹ Paragraphs 152 and 153 and the table in Annex A of the second version of the UK Government's Explanatory Notes: [Explanatory Notes](#) as brought to the House of Lords on 21 July 2022

¹² Specified in the LCM, paragraph 33

¹³ [motion S6M-05235](#)

relevant powers in the Bill and may report on these to the lead committee, which in this case is the Constitution, Europe, External Affairs and Culture Committee.

Overview of the delegated powers in the Bill

The Committee noted that the Bill does not confer any powers on the Scottish Ministers. It does, however:

- confer regulation-making powers on UK Ministers that are exercisable within the legislative competence of the Scottish Parliament; and
- confer power on UK Ministers to sub-delegate these powers to (among others) the Scottish Ministers (clause 22(6)).

There is no requirement in the Bill that UK Ministers obtain or seek the consent of the Scottish Parliament or Scottish Government before exercising the powers within devolved competence.

The Committee noted that the House of Lords Delegated Powers and Regulatory Reform Committee (“DPRRC”) produced a report on the Bill on 7 July 2022, stating it was reporting while the Bill was still in the House of Commons because the Bill is “of exceptional constitutional significance”. As you will be aware, the DPRRC report is highly critical of the delegated powers in the Bill, summarising its conclusions as follows:

“The Northern Ireland Protocol Bill is a skeleton bill that confers on Ministers a licence to legislate in the widest possible terms. The Bill unilaterally departs from the Northern Ireland Protocol and enables Ministers to depart from the Protocol even further. The Bill represents as stark a transfer of power from Parliament to the Executive as we have seen throughout the Brexit process. The Bill is unprecedented in its cavalier treatment of Parliament...”

The Scottish Government states in the LCM that “the Bill is also concerning for the breadth of powers that it confers on the UK Government”.

The delegated powers in this Bill have attracted an unusual level of attention from academic and other external commentators. We are aware that the extent of the delegated powers was also raised by MPs from various parties when the Bill was debated in the House of Commons.

Delegated Powers and Law Reform Committee consideration

While the Committee considered each relevant power individually, it agreed to write to you, as the Minister responsible for the Bill, with questions on the following points which are applicable to all (or many) of the relevant powers. These are:

- sub-delegation to the Scottish Ministers;
- powers for UK Ministers within devolved competence; and

- parliamentary procedure.

I will cover each in turn.

Sub-delegation to the Scottish Ministers

All of the regulation-making powers in the Bill can be sub-delegated by UK Ministers to a devolved authority, meaning the Scottish Ministers, Welsh Ministers or a Northern Ireland department. This can be done by regulations made by UK Ministers under clause 22(6).

The Committee noted that a blanket sub-delegation provision is a novel approach to how powers are to be allocated between the UK and devolved governments. It has not seen this before in other post-EU bills.

The Bill imposes no conditions or requirements on whether or how the UK Ministers can sub-delegate, they have a free choice. It is open to them to choose not to sub-delegate any of the powers.

The powers can be sub-delegated “to any extent”. UK Ministers could therefore sub-delegate a power only for certain purposes, or under conditions.

One result of choosing not to confer powers on the Scottish Ministers on the face of the Bill is that the Scottish Parliament has no opportunity to scrutinise whether or how the powers will in fact be sub-delegated, despite this being a delegation of power that is within the Scottish Parliament’s competence. The Committee has considered the justification given in paragraph 154 of the DPM.

The Committee would be grateful for an explanation as to:

- 1. why the sub-delegation model was chosen rather than the conventional approach of the Bill directly conferring the delegated powers upon the Scottish Ministers (or concurrently upon UK and Scottish Ministers) to the extent that they are exercisable within devolved competence;**
- 2. why is it not considered appropriate to set out on the face of the Bill the scrutiny procedure that will apply to sub-delegated regulations made by the Scottish Ministers, given that the chosen approach means that the Scottish Parliament has no say in how these powers, which are within its competence, are to be scrutinised; and**
- 3. why does the approach to the delegation of powers to Scottish Ministers depart from that taken in, for example, the EU (Withdrawal) Act 2018 and the Trade (Australia and New Zealand) Bill, each of which makes clear that the powers they confer do not include power to make provision outwith devolved competence? Is the intention that any regulations making the sub-delegation would contain this restriction?**

Powers for UK Ministers within devolved competence

As highlighted above, there is no requirement in the Bill on UK Ministers to obtain the consent of the Scottish Parliament or Scottish Ministers before exercising the powers in the Bill within devolved competence. There also does not appear to be any political commitment in the accompanying documents that UK Ministers will seek such consent. In the absence of a consent requirement, the Scottish Parliament has no ability to scrutinise the decision to legislate on matters that are within its competence.

The Committee's previous position in relation to powers in UK bills conferred on UK Ministers in devolved areas has been as follows:

- a. The Scottish Parliament should have the opportunity to effectively scrutinise the exercise of all legislative powers within devolved competence.
- b. Where such powers are exercised by the Secretary of State in devolved areas, there is no formal means by which the Scottish Parliament can scrutinise such regulations or be notified that they had been laid before the UK Parliament.
- c. Powers conferred on the Secretary of State should be subject to a requirement for the Scottish Ministers' consent when exercised within devolved competence.
- d. As a minimum, powers when exercised by the Secretary of State in devolved areas should be subject to the process set out in the [SI Protocol 2](#) where the power is within the scope of that protocol.

The [Committee wrote to the UK Government on 12 July 2022](#) regarding the scrutiny of delegated powers in UK Parliament bills conferred on UK Ministers in devolved areas and the application or otherwise of SI Protocol 2. The Secretary of State for Levelling Up, Housing and Communities [responded](#) on 14 August indicating that the *"UK Government takes into account a variety of factors when seeking delegated powers in devolved areas."* The Secretary of State also indicated that *"[w]hether or not to include statutory consent requirements is considered on a case-by-case basis as each policy area has a different legislative context."*

The Committee would therefore be grateful for a specific explanation in relation to each relevant power in the Bill as to:

4. **why the UK Government considers it appropriate, in the particular policy context of this Bill, that the power has been conferred so that it is exercisable independently by a Minister of the Crown in relation to devolved matters;**
5. **Why the UK Government considers it appropriate, in the particular policy context of this Bill, that when the power is exercised independently by a**

Minister of the Crown in relation to devolved matters, there is no requirement to obtain the consent of the Scottish Ministers; and

- 6. whether the UK Government intends to amend the Bill either to ensure the power is conferred solely on the Scottish Ministers in relation to devolved matters, or to require the Minister of the Crown, when exercising the power in relation to devolved matters, to obtain the consent of the Scottish Ministers?**

Parliamentary procedure

The Committee noted that the parliamentary procedure¹⁴ chosen for each of the relevant powers in the bill is uniform:

- draft affirmative procedure where amending an Act of the UK Parliament;
- draft affirmative procedure where making retrospective provision;
- otherwise subject to the negative procedure; and
- made affirmative procedure is available where in the Minister's opinion it is necessary by reason of urgency.

The requirement for the affirmative procedure for regulations that amend or repeal primary legislation applies only to Acts of the UK Parliament. Accordingly, Acts of the Scottish Parliament can be amended or repealed by regulations which are subject only to the negative procedure at Westminster. These instruments will not be laid nor subject to any procedure at Holyrood.

The Committee would be grateful for an explanation as to:

- 7. why it is considered appropriate that provision amending or repealing an Act of the UK Parliament necessitates the affirmative procedure, but provision amending or repealing an Act of the Scottish Parliament does not?**

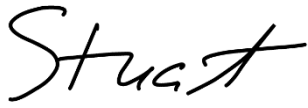
I would be grateful if you were able to provide a response to these questions by **Tuesday 25 October 2022**.

I look forward to hearing from you.

I am copying this letter to the Rt Hon Alister Jack MP, Secretary of State for Scotland; Angus Robertson MSP, Cabinet Secretary for the Constitution, External Affairs and Culture; as well as the Convener of the Constitution, Europe, External Affairs and Culture Committee.

¹⁴ Clause 23 of the Bill

Yours sincerely

A handwritten signature in black ink that reads "Stuart". The letters are cursive and fluid, with a prominent 'S' at the beginning and a long, sweeping tail on the 't'.

Stuart McMillan MSP
Convener of the Delegated Powers and Law Reform Committee

Legislative Consent Memorandum

Northern Ireland Protocol Bill

Introduction

1. The Northern Ireland Protocol Bill (“the Bill”) was introduced to the House of Commons on 13 June 2022. It passed its Second Reading on 27 June 2022. No amendments were accepted during the Committee stages, which took place as a Committee of the whole House on 14, 19, and 20 July 2022, and the Bill passed its Third Reading on 20 July 2022. The Bill unilaterally disapplies, or affords the UK powers to disapply, parts of the legislation that implement the Northern Ireland Protocol (“the Protocol”) in the UK. The Bill extends to England and Wales, Scotland and Northern Ireland.

2. This Memorandum has been lodged by Angus Robertson, Cabinet Secretary for the Constitution, Europe, and External Affairs under Rule 9B.3.1 (a) of the Parliament’s Standing Orders. The Bill can be found on the UK Government’s website.¹

3. This Memorandum relates to the Bill as introduced.

4. The EU, multiple individual member states, and several of their international partners have reacted with consternation to the introduction of the Bill, with many EU leaders - and legal commentators - maintaining that it constitutes a breach of international law.² The EU Commission has re-activated the infringement procedure it originally launched against the UK Government in March 2021 for breaches of the Protocol. The EU Commission has taken this proceeding to its second stage by issuing a Reasoned Opinion.

¹ [Northern Ireland Protocol Bill - GOV.UK \(www.gov.uk\)](https://www.gov.uk)

² See for example: Maroš Šefčovič, European Commission Vice President - 15 June - <https://inews.co.uk/news/politics/eu-illegal-changes-to-northern-ireland-protocol-launches-legal-action-against-uk-1687722> “Let there be no doubt: there is no legal, nor political justification whatsoever for unilaterally changing an international agreement. Opening the door to unilaterally changing an international agreement is a breach of international law as well. Let’s call a spade a spade: this is illegal.”

Simon Coveney, Ireland’s Foreign Minister - 13 June -

<https://www.irishexaminer.com/news/politics/arid-40894568.html> “We are forced because of UK action to respond to what we certainly see as a breach of international law. If you are legislating to set aside elements of an international treaty, which is international law, well, then you’re breaking international law.”

Jonathan Jones QC, ex-head of Govt Legal Dept- 13 June

<https://twitter.com/SirJJQC/status/1536417826034130945> “The government’s legal statement, relying on the doctrine of necessity, is surely hopeless.”

Mark Elliott, Professor of Public Law, University of Cambridge - 13 June - [The Northern Ireland Protocol Bill – Constitutional Law Matters](#) “By announcing its intention to enact this legislation, and by accompanying it with a ‘legal justification’ that engenders ridicule, the Government has once again signalled its willingness to play fast and loose with the rule of law.”

5. The EU Commission has also launched six new infringement proceedings against UK Government for failing to:

- carry out obligations under the EU's sanitary and phyto-sanitary (SPS) rules, in particular not carrying out the necessary controls, and failing to ensure adequate staffing and infrastructure, at Border Control Posts in Northern Ireland;
- provide the EU with certain trade statistics data in respect of Northern Ireland, as required under the Protocol. This is monthly aggregated data on certain GB-NI flows;
- comply with the applicable customs requirements, supervision requirements and risk controls on the movement of goods from Northern Ireland to Great Britain;
- notify the transposition of EU legislation laying down general EU rules on excise duties, which will become applicable from 13 February 2023;
- notify the transposition of EU rules on excise duties on alcohol and alcoholic beverages, which facilitate access for small and artisan producers to lower excise duty rates, among other provisions; and
- implement EU rules on Value Added Tax (VAT) for e-commerce, namely the Import One-Stop Shop (IOSS).

6. The UK Government maintains that it would prefer a negotiated solution to the political and economic challenges it argues have arisen as a result of implementing the Protocol in its current form. However, the UK Government is currently refusing to return to negotiations unless and until the EU Commission seeks a new mandate that would enable it to change the text of the Protocol itself. The EU Commission instead has argued that alterations can be made to the current text that would resolve many of the practical difficulties encountered to date, tabling proposals to that effect in October 2021 that it argues the UK Government has failed to fully consider.

7. A total impasse therefore remains a real possibility. Both sides are making preparations for this situation, with possible scenarios ranging from further legal proceedings to the imposition of tariffs, or even suspension of the UK/EU Trade and Cooperation Agreement ("the TCA").

8. The Scottish Government is extremely concerned about the potential damage such a dispute could do to Scotland's vital interests, both in terms of trade and through exclusion from prestigious funding and cooperation opportunities such as the EU Horizon Programme.

9. The Scottish Government therefore lodged a motion in the Scottish Parliament on 27 June 2022 calling on the UK Government to withdraw the Bill, and to resume meaningful negotiations with the EU in order to resolve issues arising from the implementation of the Protocol. It also called on the UK Government to recognise the vital interests of Scotland in matters surrounding the Protocol, and to engage meaningfully and immediately with the Scottish Government to ensure that devolved interests and concerns are properly represented and fully respected in the UK's dealings with the EU over this issue. The Parliament agreed the motion without the need for a division.

10. The Scottish Government believes that the Scottish Parliament should similarly not consent to this Bill. The Scottish Government cannot support a Bill that may well be found to break international law and could lead to a trade dispute that would be very harmful to Scotland, at a time when the country is facing a cost of living crisis and the risk of recession.

11. The Scottish Government does not therefore intend to lodge a legislative consent motion in relation to the Bill. In line with Rule 9B.3.3(d) of Standing Orders, the Scottish Government's reasons for not including a draft motion are set out in paragraphs 36 to 42 below.

Background

The Withdrawal Agreement and the Protocol

12. The Protocol is an integral part of the Withdrawal Agreement agreed between the UK and the EU ("the Withdrawal Agreement").³ The purpose of the Protocol is to avoid a hard border on the island of Ireland and protect the peace process. It does so by providing that certain parts of EU law which relate to the Single Market for goods continue to apply in Northern Ireland.

13. Under the terms of the Protocol, Northern Ireland is formally outside the EU, but is in effect part of the EU Single Market for goods. This enables goods to move freely over the Irish border with no checks or controls required. Instead, the Protocol establishes a requirement for checks and controls on goods moving between Great Britain and Northern Ireland.

14. The Withdrawal Agreement, including the Protocol, was negotiated and agreed by the UK Government and the EU in late 2019. Prime Minister Boris Johnson called the Agreement's January 2020 ratification a 'fantastic moment' which would enable the UK to 'move forward as one country.'

15. The Withdrawal Agreement, including the Protocol, became a binding international treaty between the UK and the EU on 31 January 2020. The UK and the EU then entered into a transition period that ended on 31 December 2020 (known as "IP completion day") during which the UK continued to apply EU rules and standards. On IP completion day, the transition period ended and the Withdrawal Agreement, including the Protocol, came into effect.

³ The Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community is available at <https://www.legislation.gov.uk/eu/withdrawal-agreement/contents/adopted>. Article 182 of the Withdrawal Agreement provides, "The Protocol on Ireland / Northern Ireland, the Protocol relating to the Sovereign Base Areas in Cyprus, the Protocol on Gibraltar, and Annexes I to IX shall form an integral part of this Agreement."

The Protocol in the UK's domestic law

16. While the Withdrawal Agreement, including the Protocol, was being agreed, the UK Government introduced legislation to implement it. The Protocol is given effect in the UK's domestic law by the European Union (Withdrawal) Act 2018 ("the EUWA"), as amended by the European Union (Withdrawal Agreement) Act 2020. Section 7A of the EUWA gives direct effect to the Withdrawal Agreement, including the NI Protocol, as required by Article 4 of the Withdrawal Agreement.

17. Accordingly, section 7A of the EUWA applies to, "*(a) all such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the withdrawal agreement, and (b) all such remedies and procedures from time to time provided for by or under the withdrawal agreement.*" Section 7A(2) provides that those rights, powers (etc.) are to be, "*(a) recognised and available in domestic law, and (b) enforced, allowed and followed accordingly.*" It is complemented by section 7C, which obliges UK courts to interpret the law so as to be compatible with the Withdrawal Agreement.

18. In other words, the Protocol has force in UK law by virtue of sections 7A and 7C of the EUWA.

Further negotiations on the Protocol ("grace periods")

19. Following IP completion day, concerns were raised by Northern Ireland's Unionist community, and by the UK Government, about elements of the Protocol. These included customs checks; plant and animal health (known as sanitary and phyto-sanitary, or SPS) controls; VAT and subsidy rules; and governance, including the role of the Court of Justice of the European Union (the "CJEU").

20. In an attempt to ease these concerns, "grace periods" were negotiated between the UK and EU that temporarily set back the full implementation of the Protocol in the UK. However, in March 2021 the UK unilaterally extended the grace periods for a second time. The EU raised proceedings in terms of a breach of Article 167 of the Withdrawal Agreement (good faith) and substantive provisions of the Protocol itself, including Article 5.

21. These proceedings were paused to enable the parties to reach a negotiated solution. The EU's view is that practical difficulties arising from implementation of the Protocol can be addressed within the existing framework. In October 2021 the EU presented a package of proposals for achieving this - including simplified customs arrangements, simplified SPS certification requirements, and an 80% reduction in SPS checks on goods moving from Great Britain to be consumed in Northern Ireland.

22. Despite this offer, further discussions and a change in negotiators, formal EU-UK negotiations failed to achieve significant progress between October 2021 and February 2022. The UK originally indicated that it would seek to invoke Article 16 of the Protocol, which would have allowed it to take (targeted) unilateral safeguarding measures on the basis, it said, of the social difficulties it was having in

Northern Ireland, in particular the Unionist community and the Irish Sea Border that is now considered to be in place between Northern Ireland and Great Britain.

23. However, on 17 May 2022 Foreign Secretary Liz Truss announced the UK Government's intention to legislate to make changes to the Protocol unilaterally. On 13 June 2022 the Northern Ireland Protocol Bill was introduced in Parliament, with the stated purpose, "to fix parts of the Northern Ireland Protocol, to restore stability and protect the Belfast (Good Friday) Agreement." The UK Government has released its legal position, which justifies the Bill on the grounds of "necessity."⁴

24. The UK Government did not involve the Scottish Government in the preparation of the Bill, and the Scottish Government was provided with a copy of it only two hours before it was introduced.

Overview of the Bill

25. The Bill was introduced in the House of Commons on 13 June 2022. The Bill provides that many parts of the Protocol are to be treated as 'excluded provision' with no effect in domestic law, and that sections 7A and 7C of the EUWA do not apply in respect of them. The Bill confers powers on UK Ministers to make "new law" to replace the parts of the Protocol that are to cease to have effect in domestic law.

26. The parts of the Protocol that are to be 'excluded' include provisions dealing with the movement of goods, including customs duties, between Great Britain and Northern Ireland (clause 4), and subsidy control (or 'state aid') rules (clause 12). The Bill also treats as 'excluded provision' any parts of the Protocol or the Withdrawal Agreement that confer jurisdiction on the CJEU in relation to the Protocol, or related provisions of the Withdrawal Agreement.

27. In addition to the concerns that the Bill undermines an international agreement, the Bill is also concerning for the breadth of powers that it confers on the UK Government. The Bill will enable UK Ministers to create broad swathes of "new law" to replace the provisions of the Protocol which are dis-applied. Cambridge University Professor of European Law Catherine Barnard has criticised these measures as, 'eye wateringly broad.'⁵

Requirement for legislative consent

28. The Bill is a relevant Bill within Rule 9B.1.1 of the Standing Orders as it makes provision applying to Scotland for purposes within the legislative competence of the Parliament; it makes provision which alters the legislative competence of the Scottish Parliament; and it makes provision which alters the

⁴ <https://www.gov.uk/government/publications/northern-ireland-protocol-bill-uk-government-legal-position/northern-ireland-protocol-bill-uk-government-legal-position#:~:text=The%20Government%27s%20assessment%20that%20the%20situation%20in%20Northern%20Ireland%20constitutes,or%20to%20diversion%20of%20trade.>

⁵ [The Northern Ireland Protocol Bill and its constitutional implications - UK in a changing Europe \(ukandeu.ac.uk\)](#)

executive competence of the Scottish Ministers.

29. Firstly, the Bill alters the legislative competence of the Scottish Parliament by its modification of sections 7A and 7C of the EUWA. When the European Union (Withdrawal Agreement) Act 2020 was enacted, it inserted sections 7A and 7C into the EUWA. The EUWA is a protected enactment under Schedule 4 of the Scotland Act 1998. The addition of sections 7A and 7C to the EUWA triggered an LCM on the basis that it altered the legislative competence of the Scottish Parliament by narrowing it.⁶

30. The effect of this Bill is to provide that certain parts of the Protocol and Withdrawal Agreement are “excluded provision”. The Bill provides for the cessation of the effect of sections 7A and 7C in respect of excluded provision. Where an excluded provision touches on matters that are within the legislative competence of the Scottish Parliament, this constitutes a corresponding change to the Scottish Parliament’s legislative competence.

31. Secondly, the Protocol has the effect of conferring certain functions on the Scottish Ministers. The disapplication of these functions by the Bill constitutes a change to the executive competence of the Scottish Ministers. The Bill also enables the Scottish Ministers to incur preparatory expenditure, which is a change to the Scottish Ministers’ executive competence.

32. Finally, the Bill contains a number of provisions that confer delegated powers on UK Ministers which are exercisable in devolved areas. The Scottish Parliament could delegate these powers itself in devolved areas, and so these provisions are within the Scottish Parliament’s legislative competence to that extent.

33. For these reasons, the Scottish Government considers that the following clauses of the Bill require legislative consent from the Scottish Parliament:

- a. Clause 2 (Limitation of general implementation of the Northern Ireland Protocol)
- b. Clause 3 (Other limitations in interpretation of law)
- c. Clause 4 (Movement of goods (including customs): excluded Protocol provisions)
- d. Clause 5 (Movement of goods: new law about matters other than customs)
- e. Clause 8 (Regulation of goods: excluded Protocol provision)
- f. Clause 9 (Regulation of goods: new law)
- g. Clause 10 (Meaning of “regulation of goods”)
- h. Clause 11 (Regulation of goods: supplementary provision)
- i. Clause 13 (Implementation, application, supervision and enforcement of the Protocol)
- j. Clause 14 (Provision of the Protocol etc applying to other exclusions)
- k. Clause 15 (Changes to, and exceptions from, excluded provision)
- l. Clause 16 (Additional excluded provision: new law)
- m. Clause 17 (Value added tax, excise duties and other taxes: new law)

⁶ [European Union \(Withdrawal Agreement\) Bill - Parliamentary Business : Scottish Parliament](#)

- n. Clause 18 (Other Ministerial powers)
- o. Clause 19 (New agreements amending or replacing the Northern Ireland Protocol)
- p. Clause 20 (The role of the European Court in proceedings)
- q. Clause 21 (Preparatory expenditure)
- r. Clause 22 (Regulations)
- s. Clause 23 (Making regulations under this Act: general provisions)
- t. Clause 25 (Interpretation)

34. A full discussion of each clause, and the associated requirement for an LCM, is available at Annex A.

35. In a 13 June letter to the Cabinet Secretary for Constitution, External Affairs and Culture, the Foreign Secretary stated that, “the Bill includes powers and provisions which are capable of being exercised or applied in a manner which relate to devolved matters and or are capable of altering the legislative competence and or executive functions of the Scottish Parliament and Government.” The Foreign Secretary has sought the legislative consent of the Scottish Parliament for the Bill. The Explanatory Notes that have been published alongside the Bill set out a table showing the provisions which the UK Government consider to engage the legislative consent process of the Scottish Parliament.⁷ There are a number of clauses which the Scottish Government consider to require the legislative consent of the Scottish Parliament, but which the UK Government do not.⁸ These clauses are included in this Legislative Consent Memorandum as the Scottish Government considers them to be relevant provisions under Rule 9B of the Scottish Parliament’s Standing Orders.

Scottish Government view

36. The Scottish Government believes that the Parliament should not give consent to the Bill, for three reasons – its potential illegality; the impact it is already having on Scottish interests; and its potential future impact, in the event of further escalation in the UK Government’s associated dispute with the EU.

Legality

37. The Bill has been the subject of considerable public and academic legal debate. The Bill modifies the effect of the Protocol in domestic law. This will make the UK’s domestic law incompatible with its international obligations under the Protocol.

38. The UK Government has published an extract of its legal position on the Bill, which justifies this incompatibility on the grounds of necessity.⁹ Questions of legality

⁷ The Explanatory Notes are available at: <https://bills.parliament.uk/bills/3182/publications>

⁸ These are: Clause 8 (Regulation of goods: excluded Protocol provision), Clause 10 (Meaning of “regulation of goods”), Clause 11 (Regulation of goods: supplementary provision), Clause 17 (Value added tax, excise duties and other taxes: new law), Clause 18 (Other Ministerial powers), Clause 23 (Making regulations under this Act: general provisions), Clause 25 (Interpretation)

⁹ [Northern Ireland Protocol Bill: UK government legal position - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/614441/Northern_Ireland_Protocol_Bill_UK_government_legal_position_-_GOV.UK.pdf)

are ultimately for the Courts (domestic or international). However, multiple EU Leaders and legal commentators have already robustly challenged the UK Government's legal position. For example, on 15 June 2022 European Commission Vice President Maroš Šefčovič stated that, "there is no legal, nor political justification whatsoever for unilaterally changing an international agreement... Let's call a spade a spade: this is illegal." Jonathan Jones QC, former Head of the UK Government's Legal Department, has called the legal position "hopeless", whilst Mark Elliott, Professor of Public Law at the University of Cambridge, has noted that the UK Government's legal justification, "engenders ridicule."

39. Several prominent UK parliamentarians have voiced similar views, including the former Prime Minister Theresa May, who noted during a debate on the Bill in the House of Commons on 27 June 2022 that, "if the necessity argument is to hold, this Bill must be the only way to achieve the Government's desires, yet the Government's legal position paper itself accepts that there are other ways... Article 16 is referred to in the legal position paper, but when I read that I thought it was referred to in a way that seemed to try to say that the existence of article 16 somehow justifies the introduction of this Bill. Article 16 does not justify this Bill; the very existence of article 16 negates the legal justification for the Bill."

40. The Scottish Government cannot recommend providing legislative consent for a Bill that reneges on a legally binding international treaty that the UK Government signed less than two years ago, and which poses so great a risk of breaking international law.

Current impact on Scottish interests

41. The impasse caused by the tabling of the Bill has already had a direct impact on Scottish interests, in the form of ongoing uncertainty for business and border control in Scotland. It has also had a much wider impact, insofar as it has brought all substantive progress towards resolving outstanding issues within the TCA to a halt. Scotland has significant interests at stake in a range of TCA areas including: association to the EU's prestigious 95.5 billion euro research and development programme, Horizon; agrifood exports; fisheries; and justice cooperation. The Protocol dispute is a serious obstacle to constructive engagement at every level.

Potential future impact on Scottish interests, in the event of further escalation

42. If the dispute between the UK Government and the EU that the Bill has provoked continues to escalate, the impact on Scottish interests could be deeply damaging. The full extent of that impact will depend on the exact nature of UK action, and the EU's reaction. The EU has already re-instituted infringement action against the UK, which had been paused, and has also started new proceedings (summarised at paragraph 5 above). Possibilities for further escalation include, for example:

- trade measures – the impact of EU tariffs on Scottish goods exports could be severe; analysis indicates that Scottish food and drink and fishing exports

- could be particularly exposed;
- EU withdrawal of data protection ‘adequacy’ – serious disruptions to UK-EU data flows and major costs for Scottish businesses would be likely; and
 - EU withdrawal of financial services ‘equivalence’ – the impact of losing market access for Scotland’s financial services sector could be significant.

Draft legislative consent motion

43. Under Rule 9B.3.3(d) of the Parliament’s Standing Orders, if a member of the Scottish Government does not propose to include a draft motion in the Memorandum, the Memorandum must explain why not. Paragraphs 36 to 42 set out the Scottish Government’s reasons for not including a draft motion in this Memorandum for the purposes of that rule.

44. The Scottish Government notes that the Parliament approved a motion on 29 June 2022 that expressly condemned the Bill and called on the UK Government to withdraw it.

Scottish Government
August 2022

Annex A

Northern Ireland Protocol Bill: requirement for legislative consent

Clause 2 (Limitation of general implementation of the Northern Ireland Protocol)

1. Clause 2 of the Bill is the main substantive provision which sets out how the Bill will alter the effect of the Protocol in domestic law. Clause 2(1) provides that section 7A of the EUWA does not apply to any part of the Protocol which is 'excluded provision'. The term "excluded provision" is defined by clause 25(1) to be any part of the Protocol or other part of the Withdrawal Agreement "*so far as it is excluded provision by virtue of this Act*". Subsequent clauses in the Bill set out which parts of the Protocol and the Withdrawal Agreement are excluded provision.

2. The legal mechanism by which clause 2 alters the effect of the Protocol is by modifying section 7A of the EUWA. There are two modifications in this clause. The first, in clause 2(1), is a non-textual modification which changes the effect of section 7A without amending it. It does so by providing that section 7A(2) does not apply to "rights, powers, liabilities, obligations and restrictions" which are created or arise under excluded provision. In other words, those parts of the Protocol cease to have direct effect. Clause 2(2) clarifies this by explicitly stating that those rights, powers etc. are not to be recognised in domestic law or enforced, allowed or followed. In other words, the parts of the Protocol and Withdrawal Agreement which are designated as excluded provision by this Bill will no longer have any legal force in the UK.

3. The second modification which clause 2 makes to section 7A of the EUWA is a textual amendment which signposts the provisions of this Act in section 7A itself.

4. This clause modifies the legislative competence of the Scottish Parliament by limiting the effect of section 7A of the EUWA. It modifies the executive competence of the Scottish Ministers to the extent that it removes the basis in domestic law for functions which are exercisable in accordance with the Protocol.

Clause 3 (Other limitations in interpretation of Law)

5. Clause 3 qualifies section 7C of the EUWA. Section 7C places an obligation on the Courts to interpret "relevant separation agreement law" in accordance with the Withdrawal Agreement. Clause 3 modifies this requirement by dis-applying section 7C "*so far as it would require any question as to the validity, meaning or effect of any relevant separation agreement law (including this Act and any regulations made under it) to be decided in a way which is incompatible with (a) any provision made by or under this Act, or (b) any conduct under section 18(1)*".

6. The term "relevant separation agreement law" is defined by section 7C(3) of

the EUWA to include anything which has direct effect by virtue of section 7A. It therefore includes the Protocol and the EU law annexed to it.

7. Clause 3 modifies the legislative competence of the Scottish Parliament and the executive competence of the Scottish Ministers by limiting the effect of section 7C of the EUWA.

Clause 4 (Movement of goods (including customs): excluded Protocol provisions)

8. Clause 4(1) establishes that the first and second subparagraphs of Article 5(1), and Article 5(2) of the Protocol are excluded provision thus dis-applying them. The specified paragraphs of Article 5(1) provide for customs duties to be paid on goods moving between Great Britain and Northern Ireland where those goods are “*at risk of being subsequently moved into the Union*”. Article 5(2) sets out the test which will be applied when deciding whether a good is at risk of being subsequently moved into the Union.

9. Clause 4(2) provides that Article 5(3), Article 5(4) and Annex 2 of the Protocol are excluded provision to the extent that they apply to “qualifying movements” of goods. Articles 5(3) and 5(4) apply a defined body of EU law to goods entering Northern Ireland. The effect of clause 4(2) is to dis-apply that body of law to goods entering Northern Ireland where they do so as part of a “qualifying movement”. Clause 4(4) to (6) define what is meant by a qualifying movement and confers powers on the UK Government to alter that definition.

10. Clause 4 modifies the legal effect of section 7A of the EUWA and so it is outwith the Scottish Parliament’s legislative competence.

11. Clause 4(2) provides for the movement of goods between Great Britain and Northern Ireland. Import and export control is reserved by Head C5 of Schedule 5 of the Scotland Act 1998 subject to the following exception:

“Exceptions

Prohibition and regulation of movement into and out of Scotland of:

(a) food, animals, animal products, plants and plant products for the purposes of protecting human, animal or plant health, animal welfare or the environment or observing or implementing obligations under the Common Agricultural Policy, and

(b) animal feeding stuffs, fertilisers and pesticides [F33(including anything treated as if it were a pesticide by virtue of section 16(16) of the Food and Environment Protection Act 1985)] for the purposes of protecting human, animal or plant health or the environment”.

12. This means that while the Scottish Parliament couldn’t itself enact clause 4 as it would be modification of section 7A of the EUWA, it nevertheless relates to

matters which are within devolved competence.

13. Clause 4 alters the legislative competence of the Scottish Parliament and the executive competence of the Scottish Ministers.

Clause 5 (Movement of goods: new law about matters other than customs)

14. Clause 5 confers a power on UK Ministers to make provision in connection with “*any provision of the Northern Ireland Protocol to which section 4 [clause 4] relates*”. Clause 5(2) provides that this power cannot be used to make provision about customs matters (as this is provided for by clause 6) and clause 5(3) provides a non-exhaustive list of matters which ministers may regulate for. This list includes provision of checks, controls and administrative procedures.

15. The power conferred on UK Ministers by clause 5 could be used to regulate the movement between Great Britain and Northern Ireland (for example by creating checks) of the products specified in the Head C5 exception in Schedule 5 of the Scotland Act 1998. Prior to the enactment of this Bill, it would not be within the legislative competence of the Scottish Parliament to do so as it would modify section 7A of the EUWA. However, when clause 4 of the Bill comes into force, section 7A will cease to apply to “qualifying movements” of goods (as defined in clause 4). Therefore, due to the modifications that clause 4 makes to section 7A of the EUWA, clause 5 would be within the legislative competence of the Scottish Parliament.

Clause 8 (Regulation of goods: excluded Protocol provision)

16. Clause 8 provides that Article 5(4) and Annex 2 of the Protocol are excluded provision so far as they would prevent clause 7 from having effect. Clause 7 allows the option to choose between a UK and an EU regulatory route and so, in effect, this clause dis-applies the Protocol (and EU law referred to in it) where a person chooses a UK regulatory route.

17. Clause 8 limits the effect of section 7A of the EUWA and so modifies the legislative competence of the Scottish Parliament and the executive competence of the Scottish Ministers.

Clause 9 (Regulation of goods: new law)

18. Clause 9(1) confers powers on UK Ministers to make regulations about “*regulation of goods which the Minister considers appropriate in connection with the Northern Ireland Protocol*”. Clause 9(2) provides that the powers may be used to make regulatory routes available under clause 7 or modify clauses 7 and 8. This is a non-exhaustive list of the provisions that regulations made under this power can contain.

19. The power in clause 9 applies to “the regulation of goods”. That term is

defined in clause 10 by reference to a wide list of actions taken on the supply chain from production, to putting on the market, to use and import of goods. The power is not limited to the regulation of goods in Northern Ireland, but rather to the regulation of goods in connection with the Protocol. The Explanatory Notes for this clause indicate that the power could be used to adjust regulatory regimes so that there is clarity for the dual routes set out in clause 7. The power could therefore be used to modify the rules which regulate goods in Scotland (provided it is for the purposes of the Protocol). As such this clause would be within the legislative competence of the Scottish Parliament to the extent that it may be exercised in Scotland.

Clause 10 (Meaning of “regulation of goods”)

20. This clause defines “regulation of goods” for the purposes of the Bill, including clause 9. As clause 9 is within the legislative competence of the Scottish Parliament, this clause is as well.

Clause 11 (Regulation of goods: supplementary provision)

21. Clause 11 confers a power on UK Ministers to make regulations about the application of clause 7. This clause is within the legislative competence of the Scottish Parliament.

Clause 14 (Provision of the Protocol etc. applying to other exclusions)

22. Clause 14 extends the excluded provisions to include parts of the Withdrawal Agreement and Protocol which relate to provisions which are excluded elsewhere in the Bill. Clause 14(4) confers a power on UK Ministers which could be exercised in a way which modifies the legislative competence of the Scottish Parliament and the executive competence of the Scottish Ministers.

Clause 13 (Implementation, application, supervision and enforcement of the Protocol)

23. Clause 13 alters the jurisdiction of the Court of Justice of the European Union (the “CJEU”) in the UK under the Withdrawal Agreement and Protocol. It confers on UK Ministers a power to make additional provision. This clause modifies section 7A of the EUWA and so it modifies the legislative competence of the Scottish Parliament.

Clause 15 (Changes to, and exceptions from, excluded provision)

24. Clause 15 confers a power on UK Ministers to provide for other parts of the Withdrawal Agreement or Protocol to become excluded provisions in certain circumstances. This clause modifies section 7A of the EUWA and so is outwith the legislative competence of the Scottish Parliament.

25. The power in clause 15 enables UK Ministers to broaden (or otherwise amend) the scope of excluded provisions for a number of “permitted purposes” which are set out in clause 15(1). These include animal, plant or human welfare and health, the environment and other purposes which fall within devolved matters. This power could be exercised in a way which changes the legislative competence of the Scottish Parliament and the executive competence of the Scottish Ministers.

Clause 16 (Additional excluded provision: new law)

26. Clause 16 confers a power on UK Ministers to make regulations which “the Minister considers appropriate in connection with additional excluded provision” (parts of the Withdrawal Agreement or Protocol which are excluded by regulations made under clause 15). This power could be exercised in an area which is within the legislative competence of the Scottish Parliament.

Clause 17 (Value added tax, excise duties and other taxes: new law)

27. Clause 17 confers a power on the Treasury to make regulations about VAT and other taxes in connection with the Protocol. Fiscal policy, including taxation is reserved subject to a number of exceptions by Head A1 of Schedule 5 of the Scotland Act 1998. The exceptions relate to “devolved taxes” which are set out in Part 4A of the Scotland Act 1998, and local taxes to fund local authority expenditure. Clause 17(2) provides that the power may be used to “lessen, eliminate or avoid difference between ... (c) any other tax in Northern Ireland and Great Britain (including difference in the incidence of tax)”. This power could therefore be exercised to change the level of devolved taxes and local taxes in Scotland and so is within the legislative competence of the Scottish Parliament.

Clause 18 (Other Ministerial powers)

28. Clause 18 confers a power on UK Ministers to engage in “conduct” in relation to any matter dealt with in the Protocol. The Explanatory Notes accompanying the Bill explain that this could include issuing guidance. This power could be exercised in devolved areas, for example in relation to animal or plant health checks between Northern Ireland and Scotland, and so is within the legislative competence of the Scottish Parliament.

Clause 19 (New agreements amending or replacing the Northern Ireland Protocol)

29. Clause 19 confers a power on UK Ministers to implement a relevant agreement. Clause 19(2) defines a relevant agreement as an agreement between the UK and the EU which modifies, supplements or replaces the Protocol.

30. Foreign affairs is reserved by paragraph 7 of Part 1 of Schedule 5 of the Scotland Act 1998. However, the implementation of international agreements is

excluded and so devolved. As such, this provision would be within the legislative competence of the Scottish Parliament insofar as the implementation of a “relevant agreement” would touch upon devolved matters.

Clause 20 (The role of the European Court in proceedings)

31. Clause 20 applies to court proceedings which relate to the Protocol, the Withdrawal Agreement or related domestic law. Clause 20(2) provides that the domestic courts are not bound by the principles of the CJEU when making determinations. It also provides that the domestic courts cannot refer matters to the CJEU. Clause 20(3) and (4) confers a further power in this regard on UK Ministers.

32. Article 13(2) of the Protocol provides that “*the provisions of this Protocol referring to Union law or to concepts or provisions thereof shall in their implementation and application be interpreted in conformity with the relevant case law of the Court of Justice of the European Union.*” This is given effect by section 7A of the EUWA. Consequentially, clause 20 is a modification of the EUWA and so is a modification of the legislative competence of the Scottish Parliament and the executive competence of the Scottish Ministers.

Clause 21 (Preparatory expenditure)

33. Clause 21 enables Ministers of the Crown, government departments and devolved authorities to incur expenditure for purposes which relate to the Bill. A devolved authority includes the Scottish Ministers. This clause would be within the legislative competence of the Scottish Parliament so far as it confers authority on the Scottish Ministers. It also alters the executive competence of the Scottish Ministers by conferring a function on them.

Clause 22 (Regulations)

34. This clause makes provision about the regulation making powers conferred under the Bill. A number of these powers can be exercised within devolved competence and so this clause is within the legislative competence of the Scottish Parliament.

Clause 23 (Making regulations under this Act: general provisions)

35. This clause makes further provision about regulations under the Bill. For the reasons set out for clause 22 above this clause is within the legislative competence of the Scottish Parliament.

Clause 25 (Interpretation)

36. This clause sets out the defined terms which are used in the Bill. The definitions include terms which are used in clauses of the Bill which are subject to legislative consent.

This Legislative Consent Memorandum relates to the Northern Ireland Protocol Bill (UK legislation) and was lodged with the Scottish Parliament on 19 August 2022

Northern Ireland Protocol Bill – Legislative Consent Memorandum

© Parliamentary copyright. Scottish Parliamentary Corporate Body

Information on the Scottish Parliament's copyright policy can be found on the website - www.parliament.scot

Produced and published in Scotland by the Scottish Parliamentary Corporate Body.

All documents are available on the Scottish Parliament website at: www.parliament.scot/documents

NORTHERN IRELAND PROTOCOL BILL

NOTE FOR THE CONSTITUTION, EUROPE, EXTERNAL AFFAIRS AND CULTURE COMMITTEE OF THE SCOTTISH PARLIAMENT

SIR JONATHAN JONES KC (Hon)

1. This note is not intended to be a comprehensive analysis of the Northern Ireland Protocol Bill. Rather it is intended to highlight some specific issues which may be of concern or interest to the Committee. I made some general comments on the Bill in an [article](#) in *The House* magazine when the Bill was published in June 2022.

2. I do not comment here in detail on the international law implications of the Bill. It is clear that Bill will override, or empower Ministers to override, large areas of the Protocol. Most commentators (including me) consider that this would inevitably involve a breach by the United Kingdom of its international law obligations under the EU Withdrawal Agreement, including the NI Protocol. In my view, the justification given by the UK government in its [statement of legal position](#), relying on the doctrine of necessity, is entirely unpersuasive. Indeed, the assertion that the Protocol represents a “grave and imminent threat” to the UK’s essential interests has been exposed as ever more hollow as the months have passed since the government published that statement in June, without it apparently taking any other action to tackle the supposed “threat”.

3. For a good survey of the international law aspects of the Bill, I commend (if the Committee is not already aware of it) this [article](#) by Billy Melo Araujo of Queen’s University, Belfast.

4. The other main aspect of concern is the breadth of the powers conferred by the Bill. By way of a non-exhaustive summary:

- Clauses 4 to 6 empower a Minister to make regulations changing the rules and definitions applying to customs and movement of goods currently covered by the Protocol.
- Clause 9 (tellingly headed “*Regulation of goods: new law*”) empowers a Minister to make “any provision about regulation of goods which the Minister considers appropriate in connection with [the Protocol]”.
- Clauses 10 and 11 further empower a Minister to make regulations changing definitions or making other provisions about the movement or regulation of goods.
- Clause 12(3) allows a Minister to make regulations in connection with any provision of the Protocol relating to subsidy control.
- Clause 13(3) and (4) give power to make regulations in connection with any provision of the Protocol relating to the implementation, application, supervision and enforcement of the Protocol, including the role of the Court of Justice of the European Union (CJEU).

- Clause 14(4) gives power to make regulations in connection with any aspects of the Protocol or the Withdrawal Agreement which are ancillary to provisions of the Protocol excluded by the Bill.
- Clause 15 confers a particularly wide power to exclude or modify the application of any other provision of the Protocol, apart from those set out in clause 15(3).
- Further to that, clause 16 empowers a Minister to make any provision which the Minister considers appropriate in connection with “additional excluded provision” – i.e. any provision of the Protocol excluded by regulations under clause 15.
- Clause 17 enables the Treasury to make regulations about VAT, excise duty or any other tax which they consider appropriate in connection with the Protocol. This includes power to impose or vary the incidence of any tax.
- Clause 18 is a particularly wide and unusual power for a Minister to “engage in conduct in relation to any matter dealt with in [the Protocol]” if the Minister “considers it appropriate to do so in connection with one or more purposes of [the Bill]”.
- Clause 19 enables a Minister by regulations to make provision for the purposes of any agreement entered into between the UK and the EU that modifies, supplements or replaces the Protocol.
- Clause 20(3) and (4) empower a Minister to make regulations in connection with clause 20(2), which provides that in any proceedings related to the Protocol, a court or tribunal is not bound by any principles or decisions of the CJEU made after the coming into force of that clause, and cannot refer any matter to the CJEU (subject, presumably, to any regulations made under clause 20(4)).

5. It is notable that the test for the exercise of many of these powers is that the Minister considers a given provision to be “*appropriate* in connection with” various provisions of the Bill or of the Protocol. It is difficult to imagine a much wider formulation. The government rejected attempts to substitute a test of necessity as being too strict. However the test of necessity does apply to the power in clause 15.

6. Clause 22 makes general provision about the regulation-making powers conferred by the Bill. It provides that such regulations may (among other things):

- Make any provision that could be made by an Act of Parliament – including amendment of any other Act, including the Bill itself (what has been described as a “super Henry VIII power”).
- Make provision that is incompatible with the Protocol or any other part of the EU Withdrawal Agreement.
- Suspend or repeal, or make alternative provision to, domestic law so far as it gives effect to the Protocol or any other part of the Withdrawal Agreement.

7. Aside from such specific exclusions as clause 22(3) (which provides that regulations under the Bill may not be used to create new border checks or

infrastructure), there are no limitations on the use of powers under the Bill to (for example) create criminal offences or make retrospective provision.

8. Clauses 23 and 24 make provision about the procedure for making regulations under the Bill. In summary, the default position is that regulations are subject only to the negative scrutiny procedure unless they amend an Act or Parliament or contain retrospective provision, in which case they are subject either to the “draft affirmative procedure” or (if, the Minister declares this to be necessary by reason of urgency) the “made affirmative procedure”.

9. In summary:

- The Bill makes wholesale provision for unilaterally overriding much of the NI Protocol and related aspects of the EU Withdrawal Agreement.
- This will undoubtedly put the UK in breach of its international law obligations.
- The Bill confers extremely wide powers on Ministers to make whatever provisions, and take other actions, they consider “appropriate in connection” with the Protocol. These amount to powers to rewrite the law, and create new law, including the amendment of the Bill itself and any other Act of Parliament. In most cases the Bill sets no policy or other parameters around the exercise of the powers: it will simply be up to Ministers to decide what is “appropriate”.
- Parliamentary scrutiny of the exercise of those powers will inevitably be limited, in most cases to the negative procedure, which normally does not involve even a debate.

Jonathan Jones
18 October 2022

A copy of a paper prepared for the House of Lords Sub-Committee on the Protocol on Ireland/Northern Ireland by Professor Alan Boyle, Emeritus Professor of Public International Law, University of Edinburgh

A does the bill terminate the protocol /No . there is no right of unilateral termination and the protocol will remain in force indefinitely for all future governments or until the UK and EU can agree to terminate. The bill itself does not change that position. And there is nothing in it that will violate international law. to suggest that it contravenes the rule of law is just rhetoric.

B. the key point is that Derogations are permitted under art 16 if necessary to rectify serious disruption of trade, or societal or environmental difficulties. The govt's case is that limited derogations are now necessary to protect power sharing under the Belfast Agreement. Are they necessary? Yes if there is no other way to restore power sharing, but that does mean the government will have to show that other options have been tried and failed. They have tried negotiation with the EU but unsuccessfully. It would help if the DUP indicates its intention to go back into government when the bill is passed. And for as long as the derogations remain in place.. Protecting the Belfast Agreement is among the express purposes of the Protocol –see the preamble. The derogations from articles 5, 10, 12 and 13 are focused on trade, state aid, the ECJ, and the application of eu law. They do not amount to a repudiation of the whole protocol The bill expressly precludes any possibility of a hard border.it preserves all the provisions on cross border cooperation. on my reading of Art 16 the proposed derogations set out in the bill on are justifiable within its terms and would survive any arbitral challenge by the EU. In any event Articles 5 – 10 will terminate in 2024 unless extended for 4 years by a majority vote of the NI Assembly and approved by the public consultation process set out in the UK's declaration. . Power sharing is by far the best guarantee of peace and progress in NI. Why would any responsible government put that at risk? Negotiation with the EU has not succeeded. There is no legal obstacle to invoking Article 16 now except the ex-Foreign Secretary's opposition, which makes no legal sense. She ddid not need to rely on the

defence of necessity under article 25 of the ILC's state responsibility articles. Indeed it is mad to do so; it amounts to admitting that the bill breaks international law , which if I am correct it does not. But the notification and consultation requirements set out in annex 7 must first be followed or we will be acting unlawfully. article 16 is not unique; it builds on existing precedents. compare ECHR and WTO agreements which allow derogation in times of emergency or necessity, one weak point in the Article 16 argument is that it may be harder to show that derogations related to the ECJ or EU law are necessary in order to bring the DUP back into power sharing. A more plausible conclusion here might be that these provisions are in there in order to satisfy the Brexit wing of the tory party. that would not satisfy the test of necessity in article 16, and might for that reason be thought to show bad faith, , but the derogations on customs tariffs and state aid should be easy to justify. In the end it might come down to asking the DUP what their minimum terms are

To summarise, if the government can show that the proposed derogations are the only way to restore power sharing, and do not defeat the objective of protecting the EU's internal market, and and are not simply disguised restrictions on trade, or they will be acting lawfully, and the EU will then have no right to respond with trade sanctions or denial of access to scientific research programmes, but if the govt relies instead on necessity as a defence in nternational law their position may well be difficult to sustain. Necessity is not a viable defence if the problems were foreseeable or if there are other solutions. The existence of article 16 shows that problems were indeed foreseen and provided for. So Its either article 16 or lose.

D. Disputes and the ECJ

ECJ jurisdiction is excluded as follows

Art 13.1 Any provision of the Northern Ireland Protocol, or of any other part of the EU withdrawal agreement, is excluded provision so far as it

confers jurisdiction on the European Court in relation to—

3.(a) the Northern Ireland Protocol, or

4.(b) related provision of the EU withdrawal agreement,

(whether the jurisdiction relates to excluded provision or any other matter).

Withdrawal agreement arts 171-180 provide for arbitration of disputes

The TCA provides; in Part 6

“ an effective and efficient mechanism for avoiding and settling disputes between the Parties concerning the interpretation and application of this Agreement and supplementing agreements, with a view to reaching, where possible, a mutually agreed solution.” Basically it also envisages arbitration not ECJ for disputes , including protocol disputes. It accepts that WTO disputes go to WTO

Difficult then to see why Bill section 14 appears to exclude arbitration; Impossible to justify. Why is it there?