

HOUSE OF LORDS

Select Committee on the Constitution

---

6th Report of Session 2022–23

# Northern Ireland Protocol Bill

---

Ordered to be printed 19 October 2022 and published 20 October 2022

---

Published by the Authority of the House of Lords

HL Paper 78



### *Select Committee on the Constitution*

The Constitution Committee is appointed by the House of Lords in each session “to examine the constitutional implications of public bills coming before the House and to keep under review the operation of the constitution and constitutional aspects of devolution.”

#### Membership

The Members of the Constitution Committee are:

<a href="#"><u>Baroness Drake (Chair)</u></a>	<a href="#"><u>Lord Hope of Craighead</u></a>	<a href="#"><u>Lord Sherbourne of Didsbury</u></a>
<a href="#"><u>Lord Falconer of Thoroton</u></a>	<a href="#"><u>Lord Howard of Lympne</u></a>	<a href="#"><u>Baroness Suttie</u></a>
<a href="#"><u>Lord Faulks</u></a>	<a href="#"><u>Lord Howarth of Newport</u></a>	<a href="#"><u>Lord Thomas of Gresford</u></a>
<a href="#"><u>Baroness Fookes</u></a>	<a href="#"><u>Lord Howell of Guildford</u></a>	
<a href="#"><u>Lord Hennessy of Nympsfield</u></a>	<a href="#"><u>Lord Robertson of Port Ellen</u></a>	

### *Declarations of interests*

A full list of Members’ interests can be found in the Register of Lords’ Interests: <https://members.parliament.uk/members/lords/interests/register-of-lords-interests/>

### *Publications*

All publications of the committee are available at:

<https://committees.parliament.uk/committee/172/constitution-committee/>

### *Parliament Live*

Live coverage of debates and public sessions of the Committee’s meetings are available at:

<http://www.parliamentlive.tv>

### *Further information*

Further information about the House of Lords and its committees, including guidance to witnesses, details of current inquiries and forthcoming meetings is available at: <http://www.parliament.uk/business/lords>

### *Committee staff*

The current staff of the committee are John Turner (Clerk), Rachel Borrell (Policy Analyst) and Jackie Lam (Committee Operations Officer). Professor Stephen Tierney and Professor Alison Young are the legal advisers to the Committee.

### *Contact details*

All correspondence should be addressed to the Constitution Committee, Committee Office, House of Lords, London SW1A 0PW. Telephone 020 7219 5960. Email: [constitution@parliament.uk](mailto:constitution@parliament.uk)

### *Twitter*

You can follow the Committee on Twitter: [@HLConstitution](https://twitter.com/HLConstitution).

# Northern Ireland Protocol Bill

## Introduction

1. The Northern Ireland Protocol Bill was introduced in the House of Commons on 13 June 2022 and brought to the House of Lords on 21 July 2022. Second reading took place on 11 October 2022 and committee stage is scheduled to begin on 25 October 2022.
2. The Bill is of constitutional significance. Its main purpose is to ensure certain aspects of the Northern Ireland Protocol<sup>1</sup> no longer have legal effect in domestic law. It empowers ministers to designate further provisions of the Northern Ireland Protocol as no longer having legal effect in domestic law. The Bill also empowers ministers to make new law in connection with the Northern Ireland Protocol, including to implement any new protocol agreed with the European Union.
3. The Committee has noted in the past the importance of ensuring that legislation receives sufficient scrutiny by Parliament. **We are conscious that the Government wants to make progress with the Bill in the context of its negotiations on the Northern Ireland Protocol. We also note the relevance of the Protocol to the formation of a Northern Ireland Executive ahead of the statutory deadline for doing so of 28 October 2022. Nonetheless, this Bill’s constitutional significance means it requires sufficient time for detailed parliamentary scrutiny.**

## International law

### *The Bill’s compliance with international law*

4. The Bill seeks to disapply parts of the Northern Ireland Protocol, and has similar objectives to Part 5 of the United Kingdom Internal Market Bill in 2020. Clauses 44, 45 and 47 of the earlier Bill would have allowed the UK to act contrary to its international obligations under the Protocol and were acknowledged by the Government to breach international law in a “specific and limited way.”<sup>2</sup> They, along with the rest of Part 5 of the Bill, were removed by the House of Lords and subsequently dropped by the Government. The Government argues that the current Bill’s disapplication of parts of the Protocol is legally justified by the doctrine of necessity.<sup>3</sup>
5. Two arguments have been made as to why the Northern Ireland Protocol Bill in itself, separately to the exercise of the powers it contains, breaches international law. Both refer to the way in which the Bill breaches, or will breach if enacted, the Withdrawal Agreement between the UK and the European Union.
6. The first argument is that the introduction of the Bill in itself breaches international law by violating article 5 of the Withdrawal Agreement. Article 5

---

1 In this report, as in the Bill, we refer to the Protocol on Ireland/Northern Ireland as “the Northern Ireland Protocol”.

2 HC Deb, 8 September 2020, [col 509](#)

3 Foreign, Commonwealth & Development Office, *Northern Ireland Protocol Bill: UK government legal position*, 13 June 2022: <https://www.gov.uk/government/publications/northern-ireland-protocol-bill-uk-government-legal-position/northern-ireland-protocol-bill-uk-government-legal-position> [accessed 19 October 2022]

requires that the EU and the UK “shall, in full mutual respect and good faith, assist each other” in implementing the Withdrawal Agreement and “shall refrain from any measures which could jeopardise the attainment of the objectives of this Agreement.”<sup>4</sup> It is argued that, by introducing the Bill, the Government has acted in a manner that could jeopardise the attainment of the objectives of the Northern Ireland Protocol and has failed to show mutual respect and good faith.<sup>5</sup>

7. The second argument is that, if enacted, the Bill will breach international law as the UK will no longer comply with the majority of its obligations under the Northern Ireland Protocol. Article 26 of the Vienna Convention on the Law of Treaties stipulates: “[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith.”<sup>6</sup> Article 27 sets out: “[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty”.<sup>7</sup> The Northern Ireland Protocol Bill, if enacted, cannot of itself therefore, be used as a justification for any breach of the Northern Ireland Protocol in international law. We can identify no other articles of the Vienna Convention that would justify the non-performance of the UK’s obligations under the Protocol.
8. The Government’s legal position attempts to justify this breach of international law through the doctrine of necessity—a principle of customary international law.<sup>8</sup> The doctrine, as stated in article 25 of the ‘Articles on Responsibility of States for Internationally Wrongful Acts’<sup>9</sup>, is:

“(1) Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act:

(a) is the only way for the State to safeguard an essential interest against a grave and imminent peril; and

(b) does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.

(2) In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if:

(a) the international obligation in question excludes the possibility of invoking necessity; or

---

4 Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, [article 5](#)

5 ‘Northern Ireland protocol explainer: why the UK government’s plan to change it violates international law’, *The Conversation* (14 June 2022): <https://theconversation.com/northern-ireland-protocol-explainer-why-the-uk-governments-plan-to-change-it-violates-international-law-184985> [accessed 19 October 2022]

6 United Nations, *Vienna Convention on the Law of Treaties*, article 26: [https://legal.un.org/ilc/texts/instruments/english/conventions/1\\_1\\_1969.pdf](https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf) [accessed 19 October 2022]

7 *Ibid.*, article 27

8 Foreign, Commonwealth and Development Office, *Northern Ireland Protocol Bill: UK government legal position* (13 June 2022): <https://www.gov.uk/government/publications/northern-ireland-protocol-bill-uk-government-legal-position/northern-ireland-protocol-bill-uk-government-legal-position> [accessed 19 October 2022]

9 The ‘Articles on Responsibility of States for Internationally Wrongful Acts’ were adopted by the International Law Commission. Article 25 is considered the clearest statement of the provisions of the doctrine of necessity.

(b) the State has contributed to the situation of necessity.”<sup>10</sup>

9. The International Law Commission’s commentary on article 25 stresses that the doctrine of necessity is construed narrowly and is applicable only in exceptional circumstances. The measures that may be taken are limited to those that are strictly necessary to safeguard an essential interest against a grave and imminent peril.<sup>11</sup>
10. The Government argues that the condition of necessity is met given the need to maintain stable social and political conditions in Northern Ireland and to protect the Good Friday Agreement. The Government also argues that the Bill is necessary to preserve the fostering of social and economic ties between Northern Ireland and the rest of the UK. In particular, the Government notes that the Protocol is a barrier to forming an executive in Northern Ireland. The Government argues that these circumstances give rise to a genuinely exceptional situation that can be expected to last from the medium to long term.<sup>12</sup>
11. It is difficult to conclude that the circumstances cited by the Government have created “grave and imminent peril”. The Government’s argument that the application of the Protocol places the provisions of the Good Friday Agreement in peril is difficult to sustain given that the preamble to the Protocol affirms the need to protect the Good Friday Agreement and article 2 requires the United Kingdom to “continue to facilitate the related work of the institutions and bodies” established by the Good Friday Agreement to protect the rights of individuals.<sup>13</sup>
12. It is also difficult to argue that the Northern Ireland Protocol Bill is the “only way” for the UK to protect its interests in the circumstances. Article 16 of the Northern Ireland Protocol allows the UK Government, after following notification and consultation procedures, unilaterally to take “appropriate safeguard measures” in response to “serious economic, societal or environmental difficulties” or trade diversion.<sup>14</sup> The article 16 procedure has not been initiated.
13. Finally, the provisions of the Northern Ireland Protocol Bill appear to go beyond those strictly necessary to remedy the peril that the Government cites as justification for the Bill. For example, clause 13 removes the Court of Justice of the European Union’s (CJEU) oversight role in determining disputes over the application of the Withdrawal Agreement, including the Northern Ireland Protocol. The Government has not explained why this provision is necessary to remedy the perils it considers to have arisen from the application of the Northern Ireland Protocol.

---

10 International Law Commission, *Articles on Responsibility of States for Internationally Wrongful Acts*, article 25: [https://legal.un.org/ilc/texts/instruments/english/draft\\_articles/9\\_6\\_2001.pdf](https://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf) [accessed 19 October 2022]

11 International Law Commission, *Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*, 2001: [https://legal.un.org/ilc/texts/instruments/english/commentaries/9\\_6\\_2001.pdf](https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf) [accessed 19 October 2022]

12 Foreign, Commonwealth and Development Office, *Northern Ireland Protocol Bill: UK government legal position* (13 June 2022): <https://www.gov.uk/government/publications/northern-ireland-protocol-bill-uk-government-legal-position/northern-ireland-protocol-bill-uk-government-legal-position> [accessed 19 October 2022]

13 Northern Ireland Protocol, [article 2](#)

14 *Ibid.*, [article 16](#)

14. **This Committee’s role is to examine the constitutional implications of public bills coming before the House. In this case, the lawfulness of the Bill in international law is a key constitutional issue. The House has been asked to pass a Bill the enactment of which, in its current form, would in our view clearly breach the UK’s international obligations and we offer our views to assist the House’s deliberations.**
15. **We do not accept the Government’s reliance on the doctrine of necessity as justification for introducing legislation that disappplies its obligations under international law. The doctrine of necessity is narrowly construed and applicable only in exceptional circumstances, which have not been satisfied in this case.**
16. The principle of parliamentary sovereignty means that, as a matter of domestic law, it is possible for the UK Parliament to enact legislation which breaches the UK’s international law obligations. However, to do so would place the state in breach of its obligations on the international plane and undermine the rule of law. In our report on the United Kingdom Internal Market Bill we stated:
- “The rule of law requires a state to comply with its obligations in international law as in domestic law. The introduction and enactment of legislation that results in the UK violating its obligations under international law is therefore cause for serious constitutional concern ... Any breach of international law threatens to undermine the rule of law and international confidence in future treaty commitments made by the UK Government.”<sup>15</sup>
17. The Ministerial Code requires ministers to “comply with the law”, including international law.<sup>16</sup> If the introduction of the Bill itself constitutes a breach of the UK’s international obligations then it is arguable that ministers promoting the Bill have contravened the Code by doing so.
18. **Legislation which puts the UK in breach of international law undermines the rule of law and trust in the UK in fulfilling future treaty commitments. The Government’s reliance on the doctrine of necessity does not justify introducing this Bill. This raises the question of whether ministers might be thought to have contravened their obligation under the Ministerial Code to comply with the law, including international law.**

*The Government’s assessment of legal risk*

19. In our current inquiry on the role of the Lord Chancellor and the Law Officers we have heard evidence on how the Government assesses legal risk. Former Advocate General for Scotland, Lord Keen of Elie KC, told us that it was acceptable for the Government to pursue a policy if the Law Officers

---

15 Constitution Committee, *United Kingdom Internal Market Bill* (17th report, Session 2019–21, HL Paper 151), para 137

16 Cabinet Office, *Ministerial Code*, May 2022: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1079310/Ministerial\\_Code.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1079310/Ministerial_Code.pdf) [accessed 19 October 2022]. See Constitution Committee, *United Kingdom Internal Market Bill* (17th report, Session 2019–21, HL Paper 151), paras 198–207 for further discussion of the status of the Code and the duty to comply with international law.

could present a “respectable” legal argument for its lawfulness—a test that he observed set a fairly low threshold.<sup>17</sup>

20. This is reflected in the Attorney General’s guidance to Government lawyers on providing legal advice, which states:

“Only if no respectable legal argument can be put to a court should [a proposed course of action] be advised as being unlawful. This will be rare.”<sup>18</sup>

21. **We draw the attention of the House to the guidance on Government legal advice. In this case, reliance on the doctrine of necessity is not a “respectable” legal argument.**

*Regulation-making powers*

22. Clause 15(2) enables a Minister of the Crown, by regulations, to “provide for any provision of the Northern Ireland Protocol or any related provision of the EU withdrawal agreement” to be added to the list of excluded provisions and, therefore, no longer to have effect in domestic law.<sup>19</sup> This enables ministers to disapply any obligations under the Northern Ireland Protocol. A minister may make a regulation for this purpose only if it is “necessary to do so” for a range of “permitted purposes”, listed in clause 15(1).<sup>20</sup> Clause 23(4) establishes the negative resolution procedure as the default for making regulations under the Bill.<sup>21</sup>

23. The Delegated Powers and Regulatory Reform Committee concluded:

“A power conferred by Parliament allowing Ministers to make delegated legislation that disapplies international law—or that puts in place provision that is inconsistent with international law—does not sit easily alongside a duty under the Ministerial Code to comply with the law, including international law.”<sup>22</sup>

24. **As stated above, it undermines the rule of law for the UK Government to invite Parliament to pass legislation in breach of the UK’s international obligations. Enabling ministers to do this through secondary legislation, particularly via the negative resolution procedure, is even less constitutionally acceptable.**

25. **We agree with the Delegated Powers and Regulatory Reform Committee that the exercise of a regulation-making power, such as that in clause 15(2), which empowers the minister to use delegated legislation to disapply international law, risks placing ministers in breach of their obligation under the Ministerial Code to comply with the law, including international law.**

---

17 Oral evidence taken before the Constitution Committee on 27 April 2022, [Q 50](#)

18 Attorney General’s Office, *Attorney General’s Guidance on Legal Risk* (2 August 2022), para 2: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1095957/Attorney\\_General\\_s\\_Guidance\\_on\\_Legal\\_Risk.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1095957/Attorney_General_s_Guidance_on_Legal_Risk.pdf) [accessed 19 October 2022]

19 [Northern Ireland Protocol Bill](#), clause 15(2)

20 *Ibid.*, clause 15(1)

21 *Ibid.*, clause 23(4)

22 Delegated Powers and Regulatory Reform Committee, *Northern Ireland Protocol Bill, Clear Air (Human Rights) Bill [HL]: Sponsor Response* (7th report, Session 2022–23, HL Paper 40), para 18

## Delegated legislation

### *Skeleton legislation*

26. The Bill can be considered skeleton legislation. It would replace provisions in the Northern Ireland Protocol with regulations, in some cases without providing clear guidance in legislation on the content of those regulations.
27. The Delegated Powers and Regulatory Reform Committee drew attention to several clauses that, in its view, contain “an inappropriate delegation of power, which should be removed from the Bill”<sup>23</sup> or, in the case of clause 17(1), contain “an inappropriately wide delegation of power which should be narrowed ... or removed from the Bill”.<sup>24</sup> **We endorse the Delegated Powers and Regulatory Reform Committee’s recommendations on clauses 4(3), 4(5), 5(1), 6, 12(3), 13(4), 14(4) and 17(1).**
28. As also noted by the Delegated Powers and Regulatory Reform Committee, clause 9 is particularly problematic. It empowers a Minister of the Crown by regulations to “make any provision about regulation of goods which the Minister considers appropriate in connection with the Northern Ireland Protocol”.<sup>25</sup> The clause provides no further guidance on the purposes for which this power may be used, save to empower the minister to make further provision for the dual routes of regulation established in clause 7.<sup>26</sup>
29. **In examining clause 9, the Delegated Powers and Regulatory Reform Committee concluded: “[I]nvestigation has preceded policy development rather than vice versa”.<sup>27</sup> We agree and recommend that clause 9 be removed from the Bill.**

### *Henry VIII clauses*

30. Clause 22(1) (considered below) is a general Henry VIII clause allowing regulations made under the Bill to make any provision that could be made by an Act of Parliament. In this section we explore its relationship with clause 15.
31. Clause 15(2) empowers ministers to add to the list of provisions of the Northern Ireland Protocol which no longer have effect in domestic law. This includes a power partially or wholly to exclude provisions of the Northern Ireland Protocol; to increase or reduce the extent to which any provision excluded by the Bill continues to be an excluded provision; or to cease the exclusion of a provision.<sup>28</sup>
32. A minister may use the power under clause 15(2) if he or she “considers that it is necessary” to achieve a list of permitted purposes. For example, ministers may use this power for the purposes of “safeguarding social or

---

23 These include clauses 4(3), 4(5), 5(1), 6, 12(3), 13(4) and 14(4). Delegated Powers and Regulatory Reform Committee, *Northern Ireland Protocol Bill, Clear Air (Human Rights) Bill [HL]: Sponsor Response*, paras 26, 30, 35, 39, 46, 50 and 55

24 Delegated Powers and Regulatory Reform Committee, *Northern Ireland Protocol Bill, Clear Air (Human Rights) Bill [HL]: Sponsor Response*, para 65

25 *Northern Ireland Protocol Bill*, clause 9

26 Clause 7 provides for traders to choose between compliance with UK regulatory requirements, EU regulatory requirements or both, with regard to Northern Ireland. *Northern Ireland Protocol Bill*, clause 7

27 Delegated Powers and Regulatory Reform Committee, *Northern Ireland Protocol Bill, Clear Air (Human Rights) Bill [HL]: Sponsor Response*, para 42

28 *Northern Ireland Protocol Bill*, clause 15(2)



economic stability in Northern Ireland”. Regulations may also be used to safeguard: the effective flow of trade between Northern Ireland and another part of the UK, the territorial integrity of the UK, the Belfast Agreement, animal, plant or human welfare or health, biosecurity or the environment.<sup>29</sup>

33. Limits on this broad power are in clause 15(3), which prevents ministers disapplying three provisions of the Northern Ireland Protocol, on: the “rights of individuals”; the “common travel area”; and “other areas of North–South co-operation”.<sup>30</sup>
34. **We concur with the Delegated Powers Regulatory Reform Committee’s conclusion<sup>31</sup> that the delegation of power in clause 15 is inappropriate and should be removed from the Bill.**
35. As noted above, clause 22(1) provides that all the powers granted to ministers under the Bill may be used to make any provision that may be made by an Act of Parliament.<sup>32</sup> Regulations amending an Act of Parliament are subject to the draft affirmative procedure.<sup>33</sup> However, the made affirmative procedure may be used if the minister makes a declaration that “by reason of urgency, it is necessary to make it without it being subject to the draft affirmative procedure”.<sup>34</sup>
36. The Delegated Powers and Regulatory Reform Committee described this clause as a “super Henry VIII” power.<sup>35</sup> It noted that unlike “ordinary” Henry VIII powers, which allow ministers to make minor or technical amendments to Acts of Parliament, this Henry VIII clause extends to every power in the Bill, allowing ministers to make any provision that could be made by an Act of Parliament. There is no restriction on this power to prevent ministers from creating new offences or introducing taxes—which we, and the Delegated Powers and Regulatory Reform Committee, have previously considered to be constitutionally inappropriate.<sup>36</sup>
37. **Clause 22(1) extends to every power in the Bill. It is an exceptionally broad Henry VIII power. While we accept that Henry VIII powers are sometimes appropriate for making minor and technical amendments to Acts of Parliament, in clause 22(1) there is nothing to prevent ministers from introducing constitutionally inappropriate measures such as creating new offences or introducing taxes. We recommend the House considers how best to limit its effect to making minor and technical amendments.**

---

29 [Northern Ireland Protocol Bill](#), clause 15(1)

30 *Ibid.*, clause 15(3)

31 Delegated Powers and Regulatory Reform Committee, [Northern Ireland Protocol Bill, Clear Air \(Human Rights\) Bill \[HL\]: Sponsor Response](#), para 61

32 [Northern Ireland Protocol Bill](#), clause 22(1)

33 *Ibid.*, clause 23(5)(a)

34 *Ibid.*, clause 23(5)(b)

35 Delegated Powers and Regulatory Reform Committee, [Northern Ireland Protocol Bill, Clear Air \(Human Rights\) Bill \[HL\]: Sponsor Response](#), para 7

36 Constitution Committee, [The Legislative Process: The Delegation of Powers](#) (16th Report, Session 2017–19, HL Paper 225), para 50 and Delegated Powers and Regulatory Reform Committee, [European Union \(Withdrawal\) Bill](#) (3rd report, Session 2017–19, HL Paper 22), para 91

*“Appropriateness” as a test*

38. The Bill provides a wide range of powers to make delegated legislation when a minister, the Treasury or His Majesty’s Revenue and Customs considers it to be “appropriate”.<sup>37</sup>
39. Clause 18(1) empowers a Minister of the Crown to “engage in conduct in relation to any matter dealt with in the Northern Ireland Protocol (where that conduct is not otherwise authorised by this Act) if the Minister of the Crown considers it appropriate to do so in connection with one or more of the purposes of this Act.”<sup>38</sup> The Delegated Powers and Regulatory Reform Committee criticised this clause for its use of “appropriate”<sup>39</sup> and because of the vaguely worded ability of Ministers to “engage in conduct” in relation to any matter dealt with in the Northern Ireland Protocol.<sup>40</sup>
40. We have previously concluded:
- “the power of Ministers to do what they consider ‘appropriate’ is subjective and inappropriately wide.”<sup>41</sup>
41. **We agree with the Delegated Powers and Regulatory Reform Committee that clause 18(1) is an inappropriate delegation of power and should be removed from the Bill. We have recommended that certain other powers featuring the “appropriateness” test be removed from the Bill: the House may wish to consider whether those that remain in the Bill should be more closely circumscribed.**

**Devolution**

42. The Explanatory Notes recognise that the Bill contains provisions that cover devolved matters and the Government has sought legislative consent from the Scottish and Welsh parliaments. The Government has stated its intention to seek consent from the Northern Ireland Assembly when possible.<sup>42</sup>
43. On 27 June 2022 the Scottish Parliament agreed a motion lodged by the Scottish Government which called on the UK Government to withdraw the Bill given serious concerns that it would breach international law and might give rise to retaliatory action from the European Union.<sup>43</sup> In its legislative consent memorandum the Scottish Government concluded that the Scottish Parliament should not consent to the Northern Ireland Protocol Bill and

---

37 This wording is in clause 5(1); clause 6(1); clause 9(1); clause 9(2); clause 12(3); clause 13(4); clause 14(4); clause 16(1); clause 17(1); clause 17(2); clause 19(1); clause 20(3); and clause 22(4).

38 [Northern Ireland Protocol Bill](#), clause 18(1)

39 Delegated Powers and Regulatory Reform Committee, *Northern Ireland Protocol Bill, Clear Air (Human Rights) Bill [HL]: Sponsor Response*, para 13

40 *Ibid.*, paras 68–69

41 Constitution Committee, *The European Union (Withdrawal) Bill* (9th report, Session 2017–19, HL Paper 69), para 167

42 [Explanatory Notes to the Northern Ireland Protocol Bill](#), para 24

43 The Scottish Parliament, *Northern Ireland Protocol Bill* (27 June 2022): <https://www.parliament.scot/chamber-and-committees/votes-and-motions/S6M-05235> [accessed 19 October 2022]

chose not to lodge a consent motion before the Scottish Parliament.<sup>44</sup> Consent has therefore not been formally denied by the Parliament, but nonetheless has not been given.

44. The Welsh Government laid a legislative consent memorandum before the Senedd Cymru on 29 September 2022 in which it concluded that “it is unable to recommend to the Senedd that it gives its consent to the Bill as currently drafted”.<sup>45</sup> The Welsh Government preferred the UK Government to return to negotiations with the EU and was concerned about the potential for the Bill, if enacted, to result in a breach of international law.<sup>46</sup> It also found clause 22(6)(b)<sup>47</sup> problematic because:

“Ministers of the Crown may decide not only what powers in the Bill may be exercised by the Welsh Ministers (or another Devolved Government), but also the extent to which those powers may be exercised, whether and how they will be shared with the UK Government or other Devolved Governments and what the scrutiny process would be”.<sup>48</sup>

45. This modification of the powers of the devolved ministers would occur through delegated legislation and therefore would not be subject to the Sewel convention.
46. In our recent report *Respect and Co-operation: Building a Stronger Union for the 21st Century* we recognised that the Sewel convention was “an essential part of achieving, and maintaining, mutual respect between the UK Government and devolved administrations”. We noted that Brexit had placed the Sewel convention under strain, with a resulting reduction in trust between the UK Government and the devolved administrations<sup>49</sup> and suggested mechanisms for improving parliamentary scrutiny of the consent process including the provision by the Government of enhanced information on the engagement that has taken place with the devolved administrations.<sup>50</sup> On the general importance of the convention, we concluded:

“For the Sewel convention to operate well, constructive relationships and good faith are required between the UK Government and the devolved administrations. The Sewel convention is undermined both if the Government refuses to seek, or chooses to act without, consent, and

---

44 Scottish Government, Legislative Consent Memorandum: Northern Ireland Protocol Bill (19 August 2022), para 10: <https://www.parliament.scot/-/media/files/legislation/bills/lcms/northern-ireland-protocol-bill/legislative-consent-memorandum.pdf> [accessed 19 October 2022]. Other recent examples of the Scottish Government declining to lodge a motion are the Professional Qualifications Bill: <https://www.parliament.scot/-/media/files/legislation/bills/lcms/professional-qualifications-bill/supplementarysplcms063b.pdf> [accessed 19 October 2022] and Advanced Research and Invention Agency Bill: <https://www.parliament.scot/-/media/files/legislation/bills/lcms/advanced-research-and-invention-agency-bill/splcms066.pdf> [accessed 19 October 2022]

45 Welsh Government, Legislative Consent Memorandum: Northern Ireland Protocol Bill (29 September 2022), para 22: <https://senedd.wales/media/ehfhoqmi/lcm-ld15360-e.pdf> [accessed 19 October 2022]

46 *Ibid.*, para 29

47 Clause 22(6)(b) provides that a Minister of the Crown may, by regulations, “provide for scrutiny of regulations that are to be made, or have been made, by a devolved authority”, which includes Welsh ministers.

48 Welsh Government, Legislative Consent Memorandum: Northern Ireland Protocol Bill (29 September 2022), para 22(b): <https://senedd.wales/media/ehfhoqmi/lcm-ld15360-e.pdf> [accessed 19 October 2022]

49 Constitution Committee, *Respect and Co-operation: Building a Stronger Union for the 21st Century* (10th report, Session 2021–22, HL Paper 142), paras 99 and 122

50 *Ibid.*, para 138

if devolved administrations recommend the refusal of consent to their legislatures, for purely political purposes.

Where the UK Parliament legislates in devolved areas without consent it should demonstrate that the particular circumstances require it to do so. In any event, the UK Government should always demonstrate that it has taken all reasonable steps to secure consent. Other than in exceptional circumstances, the UK Government ought not to seek to legislate in devolved areas without consent.”<sup>51</sup>

47. **The need for consent from the devolved legislatures is important given the delicate nature of the Northern Ireland Protocol, particularly in light of the current political situation in Northern Ireland. We are concerned that enacting the Northern Ireland Protocol Bill without legislative consent will exacerbate tensions and ill will within the Union.**
48. *In light of the above, the Government should provide further details of the engagement that has taken place with the devolved administrations and the steps taken to resolve tensions.*

#### Scrutiny of international agreements

49. Clause 19 provides that a Minister of the Crown “may, by regulations, make such provision as the Minister considers appropriate to implement any relevant agreement or otherwise for the purposes of dealing with matters arising out of, or related to, any relevant agreement”. A “relevant agreement” means “an agreement made between the United Kingdom and the EU that modifies, supplements or replaces the whole or any part of the Northern Ireland Protocol”.<sup>52</sup>
50. An agreement of such constitutional significance as a new Northern Ireland Protocol should be implemented through an Act of Parliament. In addition, the use of regulations to implement a newly negotiated international agreement has the consequence that the Sewel convention would not apply and the UK Government would not have to seek the consent of the devolved legislatures.
51. **We endorse the recommendation of the Delegated Powers and Regulatory Reform Committee that the delegated power in clause 19 is inappropriate and the clause should be removed from the Bill.**

---

51 *Ibid.*, paras 123 and 124

52 Northern Ireland Protocol Bill, [clause 19](#)

## APPENDIX 1: LIST OF MEMBERS AND DECLARATIONS OF INTEREST

---

### Members

Baroness Drake (Chair)  
 Lord Falconer of Thoroton  
 Lord Faulks  
 Baroness Fookes  
 Lord Hennessy of Nympsfield  
 Lord Hope of Craighead  
 Lord Howard of Lympne  
 Lord Howarth of Newport  
 Lord Howell of Guildford  
 Lord Robertson of Port Ellen  
 Lord Sherbourne of Didsbury  
 Baroness Suttie  
 Lord Thomas of Gresford

### Declarations of interest

Baroness Drake (Chair)  
*No interests declared*  
 Lord Falconer of Thoroton  
*No interests declared*  
 Lord Faulks  
*No interests declared*  
 Baroness Fookes  
*No interests declared*  
 Lord Hennessy of Nympsfield  
*No interests declared*  
 Lord Hope of Craighead  
*No interests declared*  
 Lord Howard of Lympne  
*No interests declared*  
 Lord Howarth of Newport  
*No interests declared*  
 Lord Howell of Guildford  
*No interests declared*  
 Lord Robertson of Port Ellen  
*No interests declared*  
 Lord Sherbourne of Didsbury  
*No interests declared*  
 Baroness Suttie  
*Liberal Democrat spokesperson on Northern Ireland*  
 Lord Thomas of Gresford  
*No interests declared*

A full list of members' interests can be found in the Register of Lords' Interests: <https://members.parliament.uk/members/lords/interests/register-of-lords-interests>

Professor Stephen Tierney, University of Edinburgh, and Professor Alison Young, University of Cambridge, acted as legal advisers to the Committee. They declared no relevant interests.