

Human Rights Consortium – Written evidence (NIP0032)

Human Rights Consortium Response to the House of Lords Sub-Committee on the Ireland/Northern Ireland Protocol’s Legislative Scrutiny of the Northern Ireland Protocol Bill

03/11/22

1. The Human Rights Consortium is a human rights charity and coalition of civil society organisations from across Northern Ireland which was established in 2000. Our membership includes 165 member-organisations from a range of community and voluntary grassroots groups, NGOs, and Trade Unions, drawn from all sections of the community and all parts of Northern Ireland. We work together towards the development of a human rights based Northern Ireland.

Overview

2. We in the Human Rights Consortium are gravely concerned about the implications of this Bill for human rights, legal and economic stability, and the rule of law. The Northern Ireland Protocol Bill is directly designed to enable the ripping up of an international agreement, and its continued passage through Parliament undermines the UK’s position in upholding and supporting the rule of law on a global stage.

3. We believe this Bill should be withdrawn and, as is the expressed will of the vast majority of political parties and people in Northern Ireland, issues pertaining to the Protocol should be resolved through negotiation rather than unilateral action¹.

4. We have a number of specific concerns about the Bill which we will explore in more depth below. In summary, we are concerned at the sheer level of delegated powers contained within this Bill, the potential for undermining the human rights provisions of the Ireland/Northern Ireland Protocol, the impact on legal and economic stability in the region, and the potential impact of the removal of ECJ jurisdiction and case law on the Government’s Article 2(1) ‘keeping pace’ commitment.

5. The UK Government’s approach to the Protocol, as we outlined in our previous submission to this Sub-committee², has been severely lacking. The Government has, in prioritising the view of one political party on the Protocol rather than meaningfully involving all parties and communities in these discussions from the offset, lost the trust of many communities in Northern Ireland to act in their best interest³.

¹ [What Do Voters In Northern Ireland Think About The Protocol On Ireland/Northern Ireland?](#)

“A clear majority of respondents (71%) would prefer to see the UK and the EU reaching an agreement on the Protocol’s implementation than the UK take unilateral action.”

² [Human Rights Consortium Evidence Submission: Impact of the Protocol on Ireland/Northern Ireland](#)

³ As above, ref 1: “The UK government is by far the most distrusted (84% distrust including 49% strongly distrust) and least trusted (7% trust) of all actors [on the Protocol].”

6. The UK Government has also raised compliance with the Belfast/Good Friday Agreement, and the issue of 'democratic deficit', quite selectively. There are several current proposals being taken forward that intersect with the devolved powers of the NI Assembly and protections within the Belfast/Good Friday Agreement, yet there are currently no plans afoot to seek the consent of locally elected politicians. The argument that this Bill is intended to 'protect the B/GFA' is disingenuous in a context where they are undermining it in other areas.

7. We believe that the Government has been largely ignoring their commitments under Article 2 of the Protocol. The Dedicated Mechanism Unit, a joint project of the Northern Ireland Human Rights Commission and the Equality Commission for Northern Ireland set up under the to monitor the implementation of Article 2, identified potential breaches in Government legislation which were not addressed during their passage, namely in the Elections Act⁴ and the Nationality and Borders Act⁵.

Economic, political and legal impact of the Bill

8. Businesses and individuals across NI, generally, did not want Brexit, and knew there would be instability and uncertainty as a result of the wide regulatory and political changes that would occur as a result of it. Local businesses were beginning to get used to the new regulatory system, and this Bill represents the rug being pulled out from under them.

9. This Bill could allow for a radical departure from the regulatory framework set up under the Protocol. It would allow for Protocol Articles to be revoked and reinstated as the UK Government finds appropriate, and would only worsen the instability already evident throughout the UK and particularly in NI.

10. Further, it is worth reiterating the original point of the Protocol on Ireland and Northern Ireland: to avoid a border in the island of Ireland, and introduce a framework for the movement of goods North-South and East-West. Any checks, regulatory alignment, and jurisdiction of the ECJ, are purely for the purposes of ensuring that the border in Ireland remained open.

11. The avoidance of a hard border is essential, and we are concerned that any unilateral action on behalf of the UK could leading to a hardening of the border on this island.

12. We do not believe this Bill complies with international law, and the Government's legal basis of the 'doctrine of necessity' does not hold up to basic scrutiny. This doctrine ascertains that a state facing "grave and imminent peril" can cease its compliance with an international obligation.

13. However this "necessity" argument can only hold up if the Government can show it has not "contributed to the situation of necessity"; given the Protocol issues had been clearly identified prior to signing and implementing the agreement, it is hard to fathom how the UK can be viewed not to have

⁴ [Joint ECNI/NIHRC Briefing on the provisions on Voting/Candidacy Rights of EU citizens in Northern Ireland and the Elections Bill](#)

⁵ [Joint NIHRC / ECNI Briefing Paper on the Modern Slavery and Human Trafficking and Electronic Travel Authorisation provisions in the Nationality and Borders Bill](#)

contributed to this situation of so-called 'necessity'. This point has been raised and reiterated during the Lords' Committee stages.

Specific aspects of the Bill

14. Due to the specific remit of the Human Rights Consortium, we are focusing on the rights-based concerns stemming from this Bill.

15. We have concerns both with the ideological underpinning for this Bill and with the myriad of proposals within it. The sheer volume of delegated powers within the Bill is particularly worrying.

16. Clause 22 essentially converts all regulatory powers in the Bill into "Henry VIII" powers, allowing Ministers to make regulations under this Bill which otherwise would have required an Act of Parliament.

17. While the Withdrawal Act contained some comparative powers, these were accompanied with additional Parliamentary scrutiny through a 'sifting' process by Committees in the Commons and Lords. No such safeguards exist within this NI Protocol Bill, and any regulations made under the Bill do not require parliamentary approval to become or remain law unless they amend an Act of Parliament or make retrospective provision.

18. Further, 10 of the 26 clauses of the Bill provide for Ministers to 'make any provision which the Minister considers appropriate in connection with' the Protocol, the Protocol Bill, or the EU-UK Withdrawal Agreement. This 'appropriateness' test has been identified by the Lords Delegated Powers Committee as providing too much scope for Ministers to pass regulations outside of the original intent of the Bill, and generally recommends a test based on the 'necessity' of the delegated legislation, rather than its subjective appropriateness.

19. Clause 15 is where significant concerns lie, and also where the purpose of the Bill is laid out. This clause would give UK Government Ministers the power to unilaterally disapply most Articles within the Protocol, with the exception of Articles 2, 3 and 11 covering individual rights, the Common Travel Area (CTA), and North-South cooperation on areas such as health, respectively. As per Clause 22, these powers would be converted to so-called 'Henry VIII' powers.

20. There are concerns that this Clause could be used to override the democratic consent mechanism contained within Article 18, removing the ability of the Northern Ireland Assembly to vote on the continued application of the Protocol, and further worries that any disapplication of areas of the Protocol by UK Ministers would be carried out without sufficient engagement in NI.

21. Further, the unilateral amendment or disapplication of any Protocol Article could undermine the operation of the Protocol in its entirety, including the important human rights and CTA protections contained within Articles 2 & 3.

22. Another specific provision of the Bill we have concerns about is the removal of ECJ jurisdiction over the Protocol, and the removal of the duty for domestic courts to pay due deference to ECJ rulings on issues relating to the Protocol. This

could have a knock on impact on the Government's Article 2(1) 'keeping pace' commitment, which outlines a series of EU Directives which must be kept pace with in NI law, including through the incorporation of any relevant case law.

23. Combined with the Retained EU Law (REUL) Bill, which would remove the General Principles of EU law from domestic jurisprudence and undermine courts' ability to rely on EU case law⁶, we believe the impact of this Bill will lead to further direct violations of the Article 2 commitments.

24. We also fear that the introduction of a rapidly changing regulatory framework in the UK, both through the Protocol Bill and the REUL Bill, the combined effect of these Bills would be to create a legal and economic environment fraught with instability and confusion. Business groups have repeatedly insisted that, while the Protocol has impacted their work – positively and negatively – in certain areas, stability and legal certainty is top of their agenda⁷.

Article 16

25. The UK Government taking unilateral action on the Protocol will impact the stability of the wider Protocol beyond the specific Articles it intends to amend, putting the rights and protections contained in Article 2 at risk. Retaliatory action from the EU also has the potential to generate instability and cause widespread political uncertainty.

26. Invoking the Article 16 safeguarding mechanism would necessitate first discussing proposals through the dispute resolution mechanisms contained within this Article, bringing issues to the EU-UK Joint Committee to try to find other solutions. The emergency invocation of Article 16 without due regard for these processes would further impact trust in the UK Government to uphold international agreements and reach a reasonable solution to these issues, and would also have a knock-on impact on stability in Northern Ireland.

27. While the proper invocation of Article 16 would not immediately solve everything, and would itself possibly lead to some level of confusion and instability, it would demonstrate willingness on the UK's part to follow the processes and structures it signed up to in order to resolve disputes regarding the implementation of the Protocol.

The EU's response

28. The EU has largely shown good faith through their continued engagement in talks regarding the Protocol despite the upcoming unilateral action from the UK Government and the disruption caused by NI ministers attempting to contravene certain provisions within the Protocol.

⁶ [Retained EU Law Bill – HRC Briefing](#)

⁷ [Retail NI comments on Foreign Secretary Protocol statement](#)

"The local business community needs certainty and stability and not ongoing disputes on the Protocol. The election of NI Assembly Speaker and establishment of the Executive needs to happen immediately."

29. The four non-papers⁸ provided a reasonable and credible starting point for discussions, proposing ways in which disruption to goods movement can be addressed within the existing mechanisms of the Protocol.

30. The EU has also sought to engage the views of local civil society organisations to inform their negotiations with the UK and ensure that the views of civil society and communities in NI are represented in these discussions.⁹

The way forward

30. It should be in the gift and mandate of both parties to protect the Good Friday Agreement, uphold rights and work within the mechanisms of existing international agreements. The UK Government's commitment to wholesale rewriting of certain elements of the Protocol and unilateral action is bringing us further away from a reasonable solution.

31. Any compromise and negotiations should occur through these mechanisms and avoid the current public recriminations or provocation through unilateral action.

3 November 2022

⁸ [Protocol on Ireland/Northern Ireland non-papers](#)

⁹ [Protocol on Ireland and Northern Ireland, Non-Paper, Engagement with Northern Ireland Stakeholders and Authorities](#)