

Written evidence submitted by Professor Katy Hayward¹ (TTC 10)

Summary

Post-Brexit Northern Ireland is in a highly complex legal, constitutional and governance environment. It now follows UK legislation (in reserved matters), retained EU legislation (through the Protocol on Ireland/Northern Ireland), amended EU legislation (including through UK Government Ministers' regulations), and NI (devolved) legislation. Amid this complexity, it is of paramount importance that procedures in Westminster ensure that the NI Assembly is informed of amendments to legislation that affect its competence and that there is sufficient means and time given for such legislation to be scrutinised effectively, including by the legislature for the affected region.

1. Northern Ireland is in a unique position in the UK, primarily because of the 1998 Good Friday (Belfast) Agreement. This is of consequence for the territorial constitution of the UK as a whole.

- i. The 'three strands' of the 1998 Agreement are 'interlocking and interdependent'. The success of power-sharing within Northern Ireland, for instance, is connected to that of North-South cooperation and, indeed, British-Irish relations.
- ii. Policy-making and legislation in Northern Ireland (NI) has to be made in recognition of the potential knock-on effects for North-South and British-Irish cooperation. This has been significantly complicated by withdrawal from the EU and by the Protocol on Ireland/Northern Ireland.
- iii. The 1998 Agreement affects the scope of legislation that can be passed by UK Government Ministers under the EU Withdrawal Act (2018).
 - Section 10 of the EU Withdrawal Act 2018 states: 'Nothing in section 8, 9 or 23(1) or (6) of this Act authorises regulations which—(a) diminish any form of North-South cooperation provided for by the Belfast Agreement (as defined by section 98 of the Northern Ireland Act 1998).'
 - To give an indication of the potential reach here, North-South cooperation provided for by the 1998 Agreement covers such a wide range of policy areas as includes Agriculture (inc animal and plant health), Education (e.g. teacher qualifications), Environment, Transport, and Waterways.

- iv. The mandatory coalition of the NI Executive means that it is often difficult to find consensus in the Executive, particularly on those matters which relate to North-South and British-Irish matters.
- Experience with the coronavirus pandemic has illustrated that the more divergence there is between policies in the Republic of Ireland and Great Britain, the more difficult it is to find an agreed approach from the NI Executive.

2. Weakness and flaws in the process by which consent is given from Northern Ireland to the UK Parliament have been exposed in the past year. There are now major UK Acts, with a direct impact on NI devolved powers, which the NI Assembly has either not given its consent to or has not been formally informed about.

- i. The NI Assembly has not given its consent to major pieces of UK legislation that fundamentally affect the territorial constitution of the UK and the governance of NI.
- The NI Assembly was not fully operational from January 2017-January 2020, and so its consent was not given to the EU Withdrawal Act (2020).
 - The NI Assembly did not give its consent to the EU Withdrawal Agreement Act (2020). The Executive Office laid a motion on the European Union (Withdrawal Agreement) Bill and it was resolved after a debate on 20 January 2020 that showed unanimity: *That the Assembly notes the request from the Secretary of State for Exiting the European Union for the consent of the Assembly for the provisions of the European Union (Withdrawal Agreement) Bill which affect its competence; and affirms that the Assembly does not agree to give its consent.*²
- ii. Furthermore, contrary to Standing Order 42A, there was no memorandum on legislative consent or nor a memorandum for a Legislative Consent Motion (LCM) laid by any NI Minister before the NI Assembly on the following bills:
- UK Internal Market Bill
 - Trade (Disclosure of Information) Bill
 - The European Union (Future Relationship) Bill³
 - The Trade Bill (which had its first reading in Parliament in March 2020)
- iii. Consequently, the NI Assembly has not been formally informed by a NI Minister about certain acts of UK Parliament legislation that affect its devolved competence, nor has its consent been sought.

- iv. The UK Parliament was not formally informed about this breach of NI Standing Orders.
- v. This marks a particular challenge for the Sewell Convention, by which the UK Government will not normally make regulations that could be made by the Devolved Administrations (DAs) without the agreement of the DAs.

3. The use of secondary legislation to manage potential legislative deficiencies in the UK's withdrawal from the EU has compounded the problems regarding scrutiny and consent from the NI Assembly.

- i. The EU Withdrawal Act (2018) and EU Withdrawal Agreement Act (2020) grant powers to UK Government (UKG) Ministers to make regulations in devolved areas of competence by way of statutory instrument (SI), where those powers intersect with EU law. This in order to ensure that the statute books across the UK continued to function properly after the end of the transition period.
- ii. It is for the UK Parliament to scrutinise the powers or exercise of functions by UKG ministers, not the NI Assembly, even where these powers affect the legislative or executive competence of the DAs.
- iii. However, where such SIs are deemed to be necessary, the UK Minister is to inform the NI Minister. It is then for the relevant Minister to decide whether or not they wish to give consent. Where an NI Minister agrees that such an SI should apply to NI, legislation on devolved matters is then made without the opportunity for the Assembly to carry out its usual scrutiny
- iv. The NI Assembly has no formalised procedure for scrutiny of Statutory Instruments (SIs) as it only requires LCMs in respect of Bills.
- v. In further contrast to the Senedd and Scottish Parliament, there was no amendment to the Standing Orders of the NI Assembly to enhance the process for scrutiny of regulations made under the 2018 Act, where UK Ministers lay before the UK Parliament regulations in areas within the legislative competence or executive competence of the DAs.
- vi. The scale and speed of the passing of secondary legislation in the last few months of the transition period also caused difficulties for the NI Assembly.

- In August 2020, the First Minister and deputy First Minister informed the Assembly that some 114 potential SIs had been identified that were to be made by UKG Ministers on matters devolved to NI arising from EU exit.
- vii. In order to have some minimal scrutiny in NI, relevant departmental committees attempted to consider in each case whether the proposed approach was necessary and whether a SI was the correct instrument for this.
- viii. Some committees were frustrated in this task of scrutiny by a lack of information and the limited time to consider it, making it impossible to fully explore and understand the potential impacts and implications to this NI.⁴
- ix. The difficulty of scrutiny was compounded by the legal uncertainties around the UK Internal Market Bill, the Withdrawal Agreement and the future UK-EU relationship.

4. Some things can be done differently by the House of Commons in order to address some of the deficiencies in scrutiny and consent from the NI Assembly.

- i. *Westminster should allow sufficient time for scrutiny by devolved legislatures and committees.*
 - The timescale for scrutiny and consent where the UK Parliament is legislating in areas of devolved competence is determined by the timetable in Westminster.
 - Some very important bills affecting devolved competence, and large amounts of SIs, have been processed at great speed according to the will of the UK Government, as in the EU (Future Relationship) Bill.
 - Currently, the Assembly's Standing Orders only allow a committee 15 working days to consider and report on an LCM, and committees have often found this to be insufficient time.
 - In some instances, when there is a great rush for the bill to complete its passage through Parliament to process it in Westminster (as in the Trade (Disclosure of Information) Bill and the EU (Future Relationship) Bills) there is not enough time for the relevant committee to even have 15 working days to consider the matter.
 - In these instances, the Assembly then needs to decide whether or not to give its consent to an LCM without the benefit of the relevant committee having carried out its scrutiny and reporting its views to the Assembly. In other instances, where a bill proceeds very slowly, it seems unnecessary that an NI Assembly committee would only have 15 working days to consider the matter.

ii. *There should be less reliance on the actions of NI and UK Government ministers in the consent process.*

- When the Assembly debates an LCM, the outcome of the debate is communicated by the Assembly to Parliament. However, this relies on the NI Minister having laid the LCM which, doesn't always happen.
- Where a NI Minister fails to lay a memorandum before the NI Assembly either requesting an LCM or explaining why consent of the NIA is not being sought, this creates a gap in procedure, record-keeping and scrutiny
- The consent process at the moment relies on the relevant UKG Minister informing the Parliament as to whether consent has been given or even if the Assembly has been informed.
- In the absence of these procedures being followed, it seems that there is currently no impediment to the law being passed.

iii. *It would be a significant improvement if there was more formal and detailed direct legislature-to-legislature communication on UK bills affecting devolved competence*

- Standing Orders in the House of Commons should set out a process by which Parliament can be notified that consent from any of the DAs has not been given an opportunity for subsequent amendments to be considered.

5. The Protocol on Ireland/Northern Ireland in the Withdrawal Agreement has transformed the conditions for governance in Northern Ireland, including vis-à-vis Westminster.

- i. The Protocol sets out some 325 pieces of EU legislation that are applicable in Northern Ireland, approximately half of which fall within, or partially within, the devolved powers in Northern Ireland. When these are amended or updated by the EU, the NI statute book will have to be adjusted accordingly
- ii. The UK authorities are responsible for implementing and applying the provisions of EU law that will be applied to Northern Ireland by the Protocol (Art 12.2).
- iii. Sections 21 and 22 of the 2020 EU Withdrawal Agreement Act state that a UK Minister or a devolved authority (including a Northern Ireland Executive Minister), 'either acting alone or jointly', may make regulations to give effect to the Protocol.
- iv. The House of Lords EU Committee Report on the Protocol (June 2020) called on the "Government to set out the process by which it will consult and notify the Northern

Ireland Executive and other devolved authorities on its proposed approach to making domestic regulations required under the Protocol.”⁵ The Government has so far failed to answer this clearly.

- The Government has instead stated that it is “working closely with the Executive”, that there is “regular engagement at official level and Ministerial level where appropriate”, that there will be no Joint Committee decision on Northern Ireland “without sufficient consultation with the Northern Ireland Executive” and that it will “provide as much information in Explanatory Memoranda (EMs) as feasible”.⁶
- v. In correspondence of 6 January 2021 to the Committee for the Executive Office, Michael Gove said in respect of the Withdrawal Agreement that, “Much of the legislation that will apply to Northern Ireland falls under the exclusive competence of its institutions, and it is *important that oversight of devolved policy responsibilities continues to rest primarily with the Assembly.*”⁷ However, the Process as to how this happens is still unclear.
- vi. Also unclear is the matter of what will happen if NI Ministers are unwilling or unable to make regulations necessary to implement the Protocol or if the Assembly chooses either to annul or not to approve any such regulations that are made.
- vii. As things stand, there is much potential for inter-parliamentary tension, and confusion over competence, between Westminster and the NI Assembly regarding the Protocol.

¹ Professor of Political Sociology, Queen’s University Belfast. This evidence is being submitted in a personal capacity and to supplement the oral evidence given on 3 March 2021.

² NI Assembly debate on the European Union (Withdrawal Agreement) Bill, 20 January 2020. <http://aims.niassembly.gov.uk/officialreport/report.aspx?&eveDate=2020-1-20&docID=291366> (accessed 8 March 2021).

³ On 30 December 2020, the First and Deputy First Minister moved a motion, *That this Assembly takes note of the trade and cooperation agreement between the United Kingdom and the European Union.* However, no NI Minister laid a memorandum before the Assembly and there was no Executive position on the LCM and none was brought to the Assembly. The Assembly subsequently resolved the amendment moved by the SDLP, which included the statement that calls ‘for this Assembly to decline legislative consent to the British Government to impose the European Union (Future Relationship) Bill, their inferior trade deal and their Brexit against the will of the people of Northern Ireland. The Speaker said it was his ‘intention to convey the results of today’s sitting to the relevant authorities’ (<http://aims.niassembly.gov.uk/officialreport/report.aspx?&eveDate=2020/12/30&docID=320953>) (accessed 6 March 2021).

⁴ See, for example, the record of the Committee on Agriculture, Environment and Rural Affairs on those amended regulations it was being asked to note; ‘The Committee wishes it to be clearly understood that due to a lack of information on [...] and the limited time that it has had to consider it, it has been unable to fully explore and understand the potential impacts and implications to this

jurisdiction'; see <http://www.niassembly.gov.uk/globalassets/documents/committees/2017-2022/agriculture-environment-and-rural-affairs/minutes-of-proceedings/2020---2021/mops-8-october-2020.pdf> (accessed 6 March 2021).

⁵ House of Lords European Union Committee, The Protocol on Ireland/Northern Ireland, Ninth Report of Session 2019-21, 1 June 2020, HL Paper 66; https://publications.parliament.uk/pa/ld5801/ldselect/lducom/66/6614.htm#_idTextAnchor140 (accessed 6 March 2021).

⁶ Government response to the Committee's report on the Protocol on Ireland/Northern Ireland, 4 September 2020; <https://committees.parliament.uk/publications/2362/documents/23310/default/> (accessed 6 March 2021).

⁷ <http://www.niassembly.gov.uk/globalassets/documents/committees/2017-2022/executive-office/brexit-scrutiny/other-correspondence/20210106-michael-gove-mp-response---future-relationship-with-the-eu2.pdf> (accessed 8 March 2021).