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## Delegated Powers and Law Reform Committee

# Legislative Consent Memorandum: delegated powers relevant to Scotland in the UK Northern Ireland Protocol Bill



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# Delegated Powers and Law Reform Committee

To consider and report on the following (and any additional matter added under Rule 6.1.5A)—

(a) any—

(i) subordinate legislation laid before the Parliament or requiring the consent of the Parliament under section 9 of the Public Bodies Act 2011;

(ii) [deleted]

(iii) pension or grants motion as described in Rule 8.11A.1; and, in particular, to determine whether the attention of the Parliament should be drawn to any of the matters mentioned in Rule 10.3.1;

(b) proposed powers to make subordinate legislation in particular Bills or other proposed legislation;

(c) general questions relating to powers to make subordinate legislation;

(d) whether any proposed delegated powers in particular Bills or other legislation should be expressed as a power to make subordinate legislation;

(e) any failure to lay an instrument in accordance with section 28(2), 30(2) or 31 of the 2010 Act;

(f) proposed changes to the procedure to which subordinate legislation laid before the Parliament is subject;

(g) any Scottish Law Commission Bill as defined in Rule 9.17A.1;

(h) any draft proposal for a Scottish Law Commission Bill as defined in that Rule; and

(i) any Consolidation Bill as defined in Rule 9.18.1 referred to it in accordance with Rule 9.18.3.



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# Committee Membership



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**Stuart McMillan**  
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Scottish Conservative  
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**Oliver Mundell**  
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Scottish Labour

# Introduction

1. At its meetings on 4 October and 1 November 2022 the Delegated Powers and Law Reform Committee considered the delegated powers that are exercisable within devolved competence in the [Northern Ireland Protocol Bill](#) (“the Bill”).
2. The Committee considered the delegated powers in the Bill under its wider remit, in [Rule 6.11.1\(b\) and \(c\)](#) of Standing Orders, which includes considering and reporting on proposed powers to make subordinate legislation in particular bills or other proposed legislation; and general questions relating to powers to make subordinate legislation.
3. The lead Committee for consideration of the LCM is the Constitution, Europe, External Affairs and Culture Committee (“CEEAC Committee”), to which this Committee directs its report.
4. The Bill is a UK Government Bill, introduced in the House of Commons 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 now in the House of Lords, where committee stage began on 25 October 2022. As the Bill is still progressing through the UK Parliament it is still subject to amendment. The Committee may therefore need to consider a supplementary LCM in due course.
5. The Committee's consideration of the Bill and resulting recommendations are set out below.
6. Oliver Mundell MSP dissented from the report.

## Background to the Bill

7. The stated purpose of the Bill is to make provision about the effect in domestic law of the Protocol on Ireland/Northern Ireland (the “Protocol”). The Protocol is part of the [Withdrawal Agreement](#) agreed between the UK and the EU in October 2019.<sup>i</sup> The UK Government gives the following overview of the Bill in its [Explanatory Notes](#):

” The Bill will provide the basis to amend the operation of the Protocol on Ireland/Northern Ireland (“the Northern Ireland Protocol”) included in the UK-EU Withdrawal Agreement (“Withdrawal Agreement”) in the domestic law of the UK. It will disapply elements of the Northern Ireland Protocol, and provide delegated powers to Ministers to make new law in connection with the Northern Ireland Protocol (including where provision ceases to have effect in the UK). Additionally, the Bill will provide delegated powers for Ministers to provide that other provisions of the Northern Ireland Protocol should cease to have effect in the UK, as well as to implement any agreement with the European Union (“EU”) regarding the Northern Ireland Protocol.<sup>ii</sup>

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<sup>i</sup> The Protocol begins on page 292 of the Withdrawal Agreement

<sup>ii</sup> Explanatory Notes paragraph 2

8. The key provisions of the Bill do the following:
- Disapply certain provisions of the Protocol and Withdrawal Agreement which are specified in the Bill; and
  - Give UK Ministers power to disapply other provisions of the Protocol and Withdrawal Agreement (by making regulations to that effect).
9. The Bill also enables businesses in Northern Ireland to choose whether to comply with EU law or UK law for certain products; it excludes the role of the EU Court of Justice in Protocol-related court proceedings; and gives UK Ministers other powers in connection with the Protocol.

## Legislative consent memorandum

10. 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.<sup>iii</sup> The Scottish Government considers that a further 7 of the clauses require legislative consent.<sup>iv</sup>
11. The Scottish Government lodged a [Legislative Consent Memorandum](#) ("LCM") for the Bill on 19 August 2022. Before that, the Parliament passed a motion on 29 June 2022 calling on the UK Government to withdrawal the Bill.<sup>v</sup> The LCM indicates that the Scottish Government does not intend to lodge a legislative consent motion in relation to the Bill and recommends that the Parliament should not give its consent.

## Delegated powers - overview

12. 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)). This is a new development.
13. There is no requirement in the Bill that UK Ministers obtain or seek the consent of the Scottish Parliament or Scottish Government before exercising any of the powers in the Bill in devolved areas.
14. The UK Government has published a [Delegated Powers Memorandum](#) ("DPM"),

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<sup>iii</sup> See 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

<sup>iv</sup> Specified in the LCM, paragraph 33

<sup>v</sup> [Official Report 29 June 2022](#), column 117

which sets out its justification for taking each of the powers in the Bill.

15. The Committee has had the benefit of considering the [report](#) on the Bill by the House of Lords Delegated Powers and Regulatory Reform Committee (“DPRRC”), published on 7 July 2022.<sup>vi</sup> Such a report is not often available at the point that this Committee considers a bill, but the DPRRC stated that in this case it was reporting while the Bill was still in the House of Commons because the Bill is “of exceptional constitutional significance”. 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...<sup>vii</sup>

16. 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”.
17. The nature and extent of the delegated powers has been a significant issue in the debate in the House of Commons<sup>viii</sup> and similarly at second reading in the House of Lords.<sup>ix</sup>
18. The Committee notes that the delegated powers in this Bill have also attracted an unusual level of attention from academic and other external commentators.<sup>x</sup>

## Questions asked of the UK Government

19. The Committee [wrote](#) to the Minister responsible for the Bill, the Secretary of State for Foreign, Commonwealth and Development Affairs, on 12 October 2022 asking questions about the delegated powers in the Bill that are exercisable within devolved competence. A response is awaited.
20. The Committee limited its questions to the devolution aspects because the DPRRC, in its report, had already raised a number of issues in which this Committee has an interest about the powers more generally. The UK Government’s response to the DPRRC’s report is also not yet available.

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vi [DPRRC 7<sup>th</sup> Report of Session 2021-22](#). On 7 October 2022 the DPRRC also published an [extract](#) from its report ahead of committee stage in the House of Lords.

vii Paragraph 4

viii [Hansard, Second Reading](#), 27 June 2002; and [Hansard, Third Reading](#), 20 June 2002

ix [Hansard, Second Reading, House of Lords](#), 11 October 2022

x For example, [Prof. Catherine Barnard](#) said the Bill provides “eye wateringly broad powers to the Executive”; [Jonathan Jones QC](#), former Permanent Secretary of the UK Government Legal Department said “The bill is notable for the number and breadth of the powers it confers on ministers... creating a whole family of “Henry VIII” powers.”

21. The Committee is nevertheless reporting now, before the responses are available, so that its recommendations are available for the CEEAC Committee to consider before it produces its own report, the timing of which is driven by the Bill's timetable at Westminster.
22. The Committee will publish the Secretary of State's response when it is received.

## Committee consideration

23. The Committee's consideration of the relevant delegated powers in the Bill is set out below in two parts. Part 1 makes recommendations which are applicable to all (or many) of the relevant powers. Part 2 makes recommendations that relate to individual relevant powers.
24. Oliver Mundell MSP dissented from the recommendations made by the committee.

## Part 1: Recommendations applicable to all relevant regulation-making powers

### Sub-delegation to the Scottish Ministers

25. All of the regulation-making powers in the Bill which are conferred on a Minister of the Crown can be sub-delegated by UK Ministers to a devolved authority, meaning the Scottish Ministers, Welsh Ministers or a Northern Ireland department.<sup>xi</sup> This can be done by regulations made by UK Ministers under clause 22(6). Every regulation-making power in the Bill which could be exercised within devolved competence is therefore of interest to the Scottish Parliament.
26. The Scottish Parliament's consideration of the LCM is its only opportunity to have a say in relation to the potential conferral of these powers on Scottish Ministers, because the actual conferral of the powers would be done by secondary legislation laid only in the UK Parliament.
27. A blanket sub-delegation provision is a novel approach to how powers are to be allocated between the UK and devolved governments. The Committee has not seen this before, even in other post-EU bills.
28. Under the sub-delegation provision, UK Ministers have the following options in relation to each relevant power:
  - not to sub-delegate the power at all;
  - to sub-delegate the power so that it is no longer exercisable by UK Ministers and is instead exercisable solely by the devolved administration;
  - 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
  - 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.

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<sup>xi</sup> Clause 24 provides that only the Treasury can exercise power to make provision that relates to tax, and only the Treasury or HMRC can exercise a relevant power to make provision that relates to customs matters.

29. The Bill imposes no conditions or requirements on whether or how the UK Ministers can sub-delegate, they have a free choice.
30. The powers can be sub-delegated “to any extent”. UK Ministers could therefore sub-delegate a power only for certain purposes, or under conditions.
31. The justification given in the DPM for taking a blanket power to sub-delegate is that:

” 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.<sup>xii</sup>

32. In its letter to the UK Government, the Committee asked for further explanation of why the sub-delegation model was chosen over the conventional approach of directly conferring powers on Scottish Ministers on the face of the Bill. The Committee noted that the conventional approach was taken in the corresponding powers for devolved authorities in the European Union (Withdrawal) Act 2018 (including those in relation to the Protocol) and more recently in the Trade (Australia and New Zealand) Bill.

**33. In the absence of further explanation, the Committee considers it inappropriate that the Bill gives UK Ministers the choice whether to sub-delegate to Scottish Ministers the powers in the Bill that are exercisable within devolved competence.**

**34. The Committee is concerned that the Scottish Parliament will have 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 legislative competence.**

**35. The Committee considers that these powers should be conferred, on the face of the Bill, on Scottish Ministers. This is necessary (i) to enable the Scottish Parliament to consider in its scrutiny of the LCM whether it is content with the way in which powers within its competence are being delegated; and (ii) to ensure the Scottish Parliament’s role in scrutinising the use of those powers.<sup>xiii</sup>**

36. The regulation-making powers in the Bill can be used to make provision which is not within devolved competence, and yet all of the powers in the Bill can be sub-delegated to Scottish Ministers. The Committee has asked the UK Government whether it intends that the regulations making the sub-delegation will provide that sub-delegated powers cannot be used by Scottish Ministers to make provision outwith devolved competence. A restriction to this effect is usually contained in the

xii DPM paragraphs 153 and 154

xiii **Oliver Mundell MSP dissented from the recommendations in these paragraphs.**

primary legislation conferring the power.<sup>xiv</sup>

37. “Jointly” and “concurrently” are not defined in the Bill, and would again presumably be defined in the regulations which sub-delegate the power.
38. 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 Committee has asked the UK Government why it is not considered appropriate to set out the procedure on the face of the Bill, given that the chosen approach means that the Scottish Parliament has no say in how these powers, which are a delegation of matters within its competence, are to be scrutinised.

39. **In the absence of further explanation, the Committee considers that the parliamentary procedure for making sub-delegated regulations should be set out on the face of the Bill.**<sup>xv</sup>

## Power to make provision that is incompatible with the Protocol

40. Clause 22(2)(b) provides:

” 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

41. This provision specifically authorises UK Ministers, and Scottish Ministers if the power is sub-delegated to them, to use the powers in the Bill to make provision that would be, on the face of it, in breach of an international agreement.
42. Unusually, the UK Government has published its [legal position](#), setting out why it considers that the Bill would not breach international law. There is a body of academic commentary taking the opposite view.<sup>xvi</sup>
43. This Committee’s remit is limited to scrutiny of the delegated powers themselves

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<sup>xiv</sup> For example the corresponding power for devolved authorities to make provision in connection with the Protocol in EUWA, Schedule 2, Part 1C, paragraph 11N and 11P; and more recently in the Trade (Australia and New Zealand) Bill, Schedule 1, Part 1, paragraphs 1 and 5.

<sup>xv</sup> **Oliver Mundell MSP dissented from the recommendation in this paragraph.**

<sup>xvi</sup> For example: [An Analysis of the UK Government's Defence of the Northern Ireland Protocol Bill under International Law](#) by Billy Melo Araujo, 16 September 2022, due to be published in the Northern Ireland Legal Quarterly; [Northern Ireland Protocol Bill: A Rule of Law Analysis of its Compliance with International Law](#) by Dr Ronan Cormacain writing for the Bingham Centre for the Rule of Law, 17 June 2022; and Sir Jonathan Jones KC writing on politicshome.com, [The Northern Ireland Protocol Bill is one of the most extraordinary pieces of legislation I have ever seen](#)

and it has not considered whether their exercise would in fact be compatible with international law.

44. The Committee notes that the Scotland Act 1998 contains specific safeguards to prevent Scottish Ministers making regulations that would be incompatible with international obligations: under section 58, where a UK Minister believes that subordinate legislation which the Scottish Ministers propose to make would be incompatible with any international obligations, the UK Minister can, by order, direct that such regulations shall not be made.<sup>xvii</sup>

45. **Without taking a view on whether the exercise of the powers would in fact be compatible with international obligations, the Committee considers that the Scottish Ministers should not be given power to make provision that, on the face of it, would be in breach of an international agreement.**<sup>xviii</sup>

## Powers for UK Ministers within devolved competence

46. Many of the powers in the Bill are capable of being exercised within devolved competence but are exercisable only by UK Ministers.<sup>xix</sup> There is no concurrent power for Scottish Ministers. There is no requirement for the consent of the Scottish Ministers before UK Ministers exercise these powers within devolved competence. The regulations would be laid in the UK Parliament only, giving no opportunity for scrutiny by the Scottish Parliament.
47. The Committee considers it unclear why these powers are not being made available to the Scottish Ministers to the extent that they are exercisable within devolved competence. In contrast, in the EU (Withdrawal Agreement) Act 2020, powers to deal with matters arising out of, or related to, the Protocol were conferred concurrently on the devolved administrations.<sup>xx</sup> Implementing international obligations is expressly a devolved matter.<sup>xxi</sup>
48. As noted above, there is no requirement in the Bill that UK Ministers obtain the consent of the 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/obtain the consent of the devolved authorities when exercising the delegated powers within devolved competence. [SI Protocol 2](#) will not operate effectively in relation to these powers because of the absence of a consent requirement.

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<sup>xvii</sup> Under the same section, a UK Minister can also direct the Scottish Ministers to make subordinate legislation which is required for the purpose of giving effect to international obligations.

<sup>xviii</sup> **Oliver Mundell MSP dissented from the recommendation in this paragraph.**

<sup>xix</sup> Unless UK Ministers choose to sub-delegate them.

<sup>xx</sup> EU (Withdrawal Agreement) Act 2020 section 22, inserting paragraph 11M into Schedule 2 (“Corresponding powers involving devolved authorities”), Part 1C of EUWA.

<sup>xxi</sup> Scotland Act 1998, Schedule 5, Part 1, paragraph 7(2)

49. 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.” He 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.”
50. The Committee drew this correspondence to the attention of the Minister responsible for the present Bill in its letter of 12 October, and asked for specific, detailed explanation in relation to each relevant power in the Bill, as to:
- 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;
  - 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
  - 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.

51. **In the absence of further explanation, the Committee takes the same position in relation to the powers in this Bill as it has in relation to other bills conferring powers on UK Ministers in devolved areas, being:**
- The Scottish Parliament should have the opportunity to effectively scrutinise the exercise of all legislative powers within devolved competence.**
  - 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.**
  - Powers conferred on the Secretary of State should be subject to a requirement for the Scottish Ministers’ consent when exercised within devolved competence.**
  - 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.<sup>xxii</sup>**

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xxii Oliver Mundell MSP dissented from the recommendation in these paragraphs.

## “Henry VIII powers”

52. Clause 22(1) turns every regulation-making power in the Bill into a “Henry VIII” power by providing that “[r]egulations under this Act may make any provision that could be made by an Act of Parliament (including provision modifying this Act)”. This is highly unusual.
53. The DPRRC explains the position as follows:
- ” 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.
54. The DPRRC notes that even the “deficiency-correcting” power in section 8 of the EU (Withdrawal) Act 2018 (“EUWA”), which was strongly criticised by the DPRRC for its width, was subject to some important restrictions, including a two-year sunset clause and a ban on using the power to make certain kinds of provision (such as increasing taxation, making retrospective provision or amending the Human Rights Act 1998).<sup>xxiii</sup>

55. **The Committee shares the DPRRC’s concerns that every power in the Bill is a “Henry VIII” power and moreover is capable of making any provision that could be made by an Act of Parliament.**
56. **The Committee considers that the blanket availability of “super Henry VIII” powers in the Bill, exercisable by UK Ministers within devolved competence and capable of sub-delegation to Scottish Ministers, is not an appropriate delegation of power.**<sup>xxiv</sup>

## Retrospective provision

57. Every regulation-making power in the Bill can be used to make retrospective provision. This is again highly unusual. Retrospective powers are contrary to the general rule that changing the law after the event is unfair and should be avoided unless necessary.
58. The justification in the DPM<sup>xxv</sup> suggests that the UK Government considers that retrospective provision is acceptable as long as it is subject to the affirmative procedure.

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<sup>xxiii</sup> DPRRC report paragraphs 7-9

<sup>xxiv</sup> **Oliver Mundell MSP dissented from the recommendations in these paragraphs.**

<sup>xxv</sup> Paragraphs 16-24

59. **The Committee considers that the Bill should differentiate between powers which, of necessity, require to be retrospective and those which do not.**
60. **The Committee considers that requiring retrospective provision to be subject to the affirmative procedure is not a substitute for careful consideration in advance of which powers may require to be exercised retrospectively.<sup>xxvi</sup>**

## Parliamentary procedure

61. The parliamentary procedure<sup>xxvii</sup> chosen for each of the relevant powers in the bill is uniform:
- draft affirmative procedure where amending an Act of the UK Parliament (but not an Act of the Scottish 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.
62. The requirement for the affirmative procedure for regulations that amend or revoke 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.
63. If powers are sub-delegated to the Scottish Ministers, Scottish subordinate legislation under the Bill, laid at Holyrood, could also be used to amend Acts of the Scottish Parliament, but the procedure that would apply is unknown (it would be determined by future regulations).
64. The Committee has asked the UK Government why it is considered appropriate that provision amending an Act of the UK Parliament necessitates the affirmative procedure, but provision amending an Act of the Scottish Parliament does not.

65. **In the absence of further explanation, the Committee considers that provision amending an Act of the Scottish Parliament should be subject to the draft affirmative procedure.<sup>xxviii</sup>**
66. **In relation to the availability of the "made affirmative" procedure in this Bill, the Committee draws attention to the recommendations in the Committee's**

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<sup>xxvi</sup> Oliver Mundell MSP dissented from the recommendations in these paragraphs.

<sup>xxvii</sup> Clause 23 of the Bill

<sup>xxviii</sup> Oliver Mundell MSP dissented from the recommendation in this paragraph.

[report](#) of 10 February 2022 of its inquiry into the use of the made affirmative procedure during the Coronavirus pandemic.<sup>xxix</sup>

## Part 2: Individual relevant powers

67. Part 1 of this report makes recommendations which apply to the powers in the Bill generally. Part 2 considers individually the most significant powers in the Bill which may be exercisable within devolved competence.
68. All the powers below are regulation-making powers except for clause 18, which is a power to engage in conduct.
69. All the regulation-making powers are:
- conferred on a Minister of the Crown;
  - capable of being sub-delegated to the Scottish Ministers;
  - exercisable by regulations; and
  - subject to the following parliamentary procedure: draft affirmative procedure where amending an Act of Parliament or making retrospective provision; otherwise subject to the negative procedure; “made affirmative” procedure where in the Minister’s opinion it is necessary by reason of urgency.

### Regulation-making powers

#### **Clause 4(3) – Power to make provision for the exclusion in clause 4(2) to apply only to prescribed descriptions of qualifying movements of UK or non-EU destined goods**

70. In the Protocol, the UK and EU agreed that EU customs law and other trade-related law would continue to apply in relation to Northern Ireland, to facilitate Northern Ireland remaining in the EU single market for goods. The EU law in question is specified in article 5(2) and (4) and in Annex 2 of the Protocol. Clause 4(2) “undoes” this, meaning that these provisions of the Protocol will no longer have effect as a matter of law in the UK. Accordingly, EU customs and trade law would no longer apply in relation to Northern Ireland. This applies to “qualifying movements” of goods, which includes: movement of goods into Northern Ireland from anywhere other than the EU; movement of Northern Irish goods to anywhere other than the EU; and also movement of goods within the UK.
71. The DPM states that this clause, along with clauses 5 and 6, enable UK Ministers to change to a regime with different channels and requirements for goods entering Northern Ireland, depending on whether the goods are staying Northern Ireland or destined for the EU. The DPM suggests, as an example, that regulations could

establish a “green channel” for goods which will be staying in Northern Ireland and a “red channel” (to which EU customs and regulatory requirements would apply) for goods destined for the EU.

72. The power in clause 4(3) enables UK Ministers to provide that instead of the default disapplication under clause 4(2), EU law would only be disapplied in relation to particular descriptions of “qualifying movements” of goods which are destined for Northern Ireland or the EU. Examples of such particular descriptions are given

within the power as: the purpose for which the goods are being moved; the manner in which they are moved; the person moving them; where the goods are moving from/to or will remain; the nature of the goods.

73. The devolved aspects of import and export control are set out in the exceptions to Head C5 of Schedule 5, Part II, of the Scotland Act 1998.
74. As regards the appropriateness of delegating the power, two justifications are given in the DPM. First, to ensure that UK Ministers “have the flexibility to provide for the exclusion in clause 4(2) to apply only to certain descriptions of qualifying movements. For example, this would allow a Minister to provide that non-commercial movements of goods... or non-commercial pets, is a movement to which the exclusion should apply.” The second justification is that the rules on movement of goods and sanitary and phyto-sanitary checks require a significant level of technical and administrative detail which is most appropriately provided in secondary legislation.
75. The DPRRC reported that “This is a power to determine by regulations the extent to which international law requirements under the Protocol (for EU customs legislation and EU law to apply) are disapplied. It is not a matter of technical, administrative or operational detail. It involves fundamental questions of international law. Even assuming that the Government are free to act in this way in international law, if provisions of the Protocol are to be excluded from applying to movements of certain goods it should be clear on the face of the Bill what sorts of movements this exclusion applies to rather than being a matter for Ministerial regulations.” The DPRRC regarded this clause as containing an inappropriate delegation of power, which should be removed from the Bill.

#### **Clause 4(5) – power to make provision for the definition of “UK or non-EU destined” goods**

76. The term “UK or non-EU destined” goods is not defined in the Bill. This power enables UK Ministers to define it. In effect, this power can be used to determine which goods the Protocol does and does not apply to. The DPM suggests that this power could be used to provide that certain goods are eligible for the “green channel” if they meet certain conditions, for example, that they are declared under a “trusted trader” scheme.
77. For devolved purposes, the definition is relevant to clause 4 (which provisions of the Protocol are disapplied regarding the movement of goods) and clause 5 (the power to make new law about the movement of goods (other than customs) in place of the disapplied Protocol provisions).
78. The justifications given in the DPM for taking the power are: the need for flexibility for Ministers to determine which types of goods will continue to be subject to

controls (reference is made to a potential “trusted trader” scheme); and that the rules require a level of technical and administrative detail that is more appropriate for secondary legislation.

79. The DPRRC considers that clause 4(5) is open to the same criticisms as clause 4(3) given the similar justifications, concluding that clause 4(5) contains an inappropriate delegation of power and should also be removed from the Bill.

**Clause 5(1) – power to make provision which the Minister considers appropriate in connection with the provisions of the Northern Ireland Protocol to which clause 4 relates.**

80. This power allows a Minister of the Crown to make “new law” in relation to the movement of goods. This does not cover customs, which are dealt with in clause 6. This power would enable UK Ministers to make new provision in place of the Protocol provisions which are disapplied by clause 4.

81. The power is:

” A Minister of the Crown may, by regulations, make any provision which the Minister considers appropriate in connection with any provision of the Northern Ireland Protocol to which section 4 relates.

82. The Bill contains a non-exclusive list of examples of how the power may, in particular, be exercised. The examples include: provision about checks, controls and administrative processes, including restricting the movement of UK or non-EU goods into the EU.

83. The Bill contains no limits on how this power can be exercised.

84. The UK Government’s justification for taking this power is: the need for flexibility to make provision to replace the Protocol rules; “much of the precise detail of the regime will be properly subject to consultation with stakeholders”; it is anticipated that the rules and processes will need to be adapted in the future; and (as above) that this requires technical etc. detail which appropriate for secondary legislation.

85. The DPRRC reported in relation to this power:

” These reasons are unconvincing. Once again, flexibility operates at the expense of meaningful constraints. Ministers are said to need flexibility, but the reality is that policy has not yet been formulated. A delegated power is said to enable the precise detail to be subject to consultation. But the Government could have formulated their policy, consulted on it, refined it (if necessary) and then brought forward legislation with the details filled in. This would have facilitated meaningful parliamentary debate. Instead the Government have produced a skeleton bill replete with wide powers to be exercised at some future date of the Government’s choosing. The Bill says practically nothing on what will replace those parts of the Northern Ireland Protocol from which Ministers are given the power to depart.

**Clause 9(1) – power to make provision about the regulation of goods in connection with the Northern Ireland Protocol**

86. Similar to clause 5, which gives power to make new law about the *movement* of

goods, clause 9 allows UK Ministers to make new law about the *regulation of goods*. Clause 9(1) says:

” A Minister of the Crown may, by regulations, make any provision about regulation of goods which the Minister of the Crown considers appropriate in connection with the Northern Ireland Protocol

87. This expressly includes power to make provision modifying the UK regulatory route or the EU regulatory route, and power to amend clauses 7 and 8<sup>xxx</sup> (clause 9(2)).
88. The “regulation of goods” is defined in clause 10, in wide terms. The LCM notes that 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, and that it could be used to modify the rules which regulate goods in Scotland, provided that that was done for the purposes of the Protocol.<sup>xxxi</sup>
89. An example of how the power could be used is given in subsection (2) (to make provision in connection with a “UK regulatory route”), but this does not limit how the power can be used.
90. The DPRRC reported as follows:

” The [DPM] justifies the power in clause 9(1) on the ground that it is not possible on the face of the Bill to set out all the different requirements that are engaged under the regulatory routes; nor is it said to be possible to set out the exact options and regulatory routes for each type of good regulated under the dual regulatory regime in Northern Ireland. This would need to reflect consultation with business and to be capable of changing over time to reflect how UK and EU regulatory regimes evolve.

This is the frankest admission by the Government that policy is so embryonic that it has not yet been consulted on. And yet Parliament is being presented with a major Bill on the subject. Legislation has preceded policy development rather than vice versa. Nor is it remotely credible to say that it is not possible for these matters to be put on the face of the Bill. Why should the Bill say so little, with so much left to regulations? Primary and secondary legislation are both legislation; they are both capable of containing detailed rights and obligations justiciable in law. The Government have included very little detail in the Bill and are leaving the bulk of its implementation for Ministers at a time of their own convenience, including the power to amend what will become sections 7 and 8. It is clearly possible that so much need not be left to regulations.

**Clause 13(4) – power to make provision which the Minister considers appropriate in connection with any provision of the Northern Ireland Protocol to which clause 13 relates.**

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<sup>xxx</sup> Clauses 7 provides that certain goods which were subject to the Protocol can instead comply with either the UK or the EU regulatory route (this applies, for example, to manufactured goods, medicines and agri-food products); clause 8 disapplies any provision of the Protocol insofar as it prevents this from having effect.

<sup>xxxi</sup> LCM paragraph 19

91. This power allows UK Ministers to:
- ” make any provision which the Minister considers appropriate in connection with any provision of the Northern Ireland Protocol to which this section relates.
92. This means provision in the Protocol conferring jurisdiction on the EU Court of Justice (“CJEU”) in relation to the Protocol, whether the jurisdiction relates to excluded provision or any other matter. It also means provision in the Protocol on the presence and powers of EU representatives and the practical working arrangements relating to the exercise of the rights of EU representatives.<sup>xxxii</sup> This clause disapplies these aspects of the Protocol.
93. The power enables the making of any provision in connection with the Protocol articles which this clause excludes, and could therefore include any provision within devolved competence “in connection with”, for example, the removal of the jurisdiction of the CJEU.
94. The DPRRC considers this clause to be an inappropriate delegation of power, for reasons including that the details of the regime which will replace the current jurisdiction of the CJEU are not yet known, and that the UK Parliament is being expected to “rubber stamp all the regulation-making arrangements” while having no knowledge of the UK Government’s plans in this regard.

**Clause 14(4) – power to make provision which the Minister considers appropriate in connection with the provisions of the Northern Ireland Protocol and other parts of the Withdrawal Agreement to which clause 14 relates**

95. Clause 14(1) makes any Protocol provision “excluded” provision if it applies in relation to any other “excluded” provision. There is a non-exclusive list in clause 14(2) of “excluded” provision to which this applies. The power in clause 14(3) allows regulations to be made in connection with any of these additional excluded provisions.
96. The DPM states that the justification for taking the power is similar to that for many of the other powers, that ““excluded provision” provides the basis for, but does not itself prescribe, the full new domestic regime. The DPM says “[t]he full details of the new regime will reflect discussions with stakeholders.”<sup>xxxiii</sup>
97. The DPRRC considers that this means, “In other words, what is to replace the Protocol has not yet been determined because the underlying policy has not been formulated.” The DPRRC considers this an inappropriate delegation of power.

**Clause 15(2) – power to provide for any provision of the Northern Ireland Protocol to become: “excluded provision” wholly or to any other extent; to any greater extent; to any lesser extent; or to cease to be “excluded provision”**

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<sup>xxxii</sup> This relates to article 12 of the Protocol. Under article 12(1), UK authorities take responsibility for implementing and applying in relation to Northern Ireland the provisions of EU law which it is agreed in the Protocol will continue to apply. This clause of the disapplies article 12(2) and (3), which give EU representatives the right to be present and to be given information in relation to the exercise by the UK of this responsibility.

<sup>xxxiii</sup> DPM paragraph 100

98. Clause 15(2) permits Ministers to change which provisions of the Protocol are “excluded” by the Bill, and to what extent.<sup>xxxiv</sup> The power can only be exercised where the Minister considers that it is necessary to do so for one or more of eight specified permitted purposes. The permitted purposes are:

- (a) safeguarding social or economic stability in Northern Ireland;
- (b) ensuring the effective flow of trade between NI and the rest of the UK, or between part of the UK and abroad;
- (c) safeguarding the territorial or constitutional integrity of the United Kingdom;
- (d) safeguarding the functioning of the Belfast Agreement;
- (e) safeguarding animal, plant or human welfare or health;
- (f) safeguarding biosecurity or the environment;
- (g) safeguarding the integrity of the EU single market;
- (h) lessening, eliminating or avoiding difference between tax or customs duties in Northern Ireland and Great Britain;
- (i) securing compliance with, or giving effect to, any international obligation or agreement to which the United Kingdom is a party (whenever the United Kingdom becomes a party to it), except for the Withdrawal Agreement and Northern Ireland Protocol.

99. This is another highly unusual provision, and one of which the DPRRC was particularly critical. The DPRRC’s assessment of this power begins:

” Clause 15 contains a power of the sort we rarely see—a power that in essence allows Ministers to rip up and rewrite an Act of Parliament.

100. The DPRRC describes this power as “the most arresting power in the Bill because it allows Ministers, by subordinate legislation, to re-write the Bill making whatever changes they think necessary with respect to how the Protocol applies in Northern Ireland.”

101. The DPRRC considers that “it seems wholly inappropriate for this to be done by means of subordinate legislation, particularly where that legislation is capable in certain circumstances of only requiring the negative procedure.”

#### **Clause 17(1) – power to make provision about:**

- **value added tax (including imposing or varying the incidence of the tax),**
- **any excise duty (including imposing or varying the incidence of any excise duty), or**

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<sup>xxxiv</sup> The power can be used to provide for any provision of the Protocol or related provision of the Withdrawal Agreement: (a) to become excluded provision wholly or to any other extent, (b) to be excluded provision to any greater extent, (c) to be excluded provision to any lesser extent, (d) to cease to be excluded provision.

- **any other tax in Northern Ireland and Great Britain (including difference in the incidence of the tax)**

**which they consider appropriate in connection with the Northern Ireland Protocol (including any exclusion).**

102. This power allows a Minister of the Crown to adjust the operation of the relevant aspect of the dual regulatory regime as it applies to a particular class of goods.<sup>xxxv</sup> The DPM states that this has the practical effect of being able to turn the dual regime on or off for specific types of goods; and that this could be used to make any bespoke adaptations as may be required for a particular class of goods, to apply the approach to part or all of a category of goods or to some or all of the required regulatory route.
103. The UK Government considers that an LCM is not required for clause 17; the Scottish Government considers that it is required because it covers the devolved taxes<sup>xxxvi</sup> and local taxes to fund local authority expenditure which are exceptions from the general reservation of taxes in paragraph A1 of Schedule 5 of the Scotland Act 1998. The Committee notes that the power is broad: it permits “any provision” to be made about “any other tax” which Ministers consider appropriate in connection with the Protocol. Subsection (2) permits the power to be used, in particular, to “make any provision which the Treasury considers appropriate to lessen, eliminate or avoid difference between... any other tax in Northern Ireland and Great Britain (including difference in the incidence of the tax).”
104. The DPRRC considers that this power is an inappropriately wide delegation power, and that either the scope of the power should be narrowed by being limited to the stated intention of using it to lessen, eliminate or avoid differences in VAT, excise and other taxes between Northern Ireland and Great Britain; or should be removed from the Bill.<sup>xxxvii</sup>

**Clause 19(1) – power to make such provision as the Minister considers appropriate— (a) to implement any relevant agreement, or (b) otherwise for the purposes of dealing with matters arising out of, or related to, any relevant agreement.**

105. This power enables UK Ministers to implement, by secondary legislation, any future agreement made between the UK and EU which replaces, modifies or supplements the whole or any part of the Protocol.
106. The implementation of devolved aspects of international agreements is a devolved matter.<sup>xxxviii</sup>
107. The current Protocol, and the Withdrawal Agreement of which it is part, was implemented by an Act of the UK Parliament (the EU (Withdrawal Agreement) Act

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<sup>xxxv</sup> The requirement that only the Treasury can exercise certain powers in the Bill in relation to tax does not apply to the power in clause 17 (clause 24(1) and (11)).

<sup>xxxvi</sup> In Part 4A of the Scotland Act 1998, added by the Scotland Act 2012

<sup>xxxvii</sup> DPRRC report, paragraphs 62-65

<sup>xxxviii</sup> Scotland Act 1998, Schedule 5, paragraph 7(2): “sub-paragraph (1) [the general foreign affairs reservation] does not reserve- (a) observing and implementing international obligations...”

2020). The present power would enable a future agreement to be implemented purely by subordinate legislation, without the level of parliamentary scrutiny that would be given to a Bill. As this Committee noted in its report on the LCM for the Professional Qualifications Bill<sup>xxxix</sup>, the standard procedure is that international agreements are implemented in domestic law by primary, not secondary legislation.

108. The justification in the DPM<sup>xi</sup> for taking this power is that the provisions cannot be included on the face of the Bill because a future agreement has not yet been reached, and if it were reached, it may not be expedient to pass an entirely new piece of primary legislation to implement those remedies given the urgency of resolution. The DPM notes that this power does not affect the UK Parliament's ratification process in the Constitutional Reform and Governance Act 2010 ("CRAGA"). The Committee considers that the CRAGA requirements serve a different purpose, of giving the UK Parliament the opportunity to resolve that the international agreement as a whole should not be ratified. The Committee notes that in exceptional cases, the CRAGA procedure can be disapplied entirely, as happened with the UK-EU Trade and Cooperation Agreement in late 2020.
109. The Committee agrees with the DPRRC's assessment<sup>xli</sup> that, given the significance and controversial nature of the subject matter, it is arguably inappropriate that the implementation of any future agreement should be through subordinate legislation subject only to the negative procedure (when not containing retrospective or Henry VIII provision).

110. **To the extent to which they are capable of being exercised within devolved competence, the Committee shares the DPRRC's view that the regulation-making powers in clauses 4(3), 4(5), 9(1), 13(4), 14(4), 15(2), 17(1) and 19(1) are an inappropriate delegation of power.<sup>xlii</sup>**

## Power to engage in conduct

### Clause 18(1) – power to engage in conduct

#### Power conferred on: A Minister of the Crown

#### Power exercisable by: Conduct

#### Parliamentary procedure: As above

111. This clause provides that:

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<sup>xxxix</sup> DPLRC 7<sup>th</sup> Report, 2021, paragraph 60

<sup>xi</sup> DPM paragraphs 141-142

<sup>xli</sup> DPRRC report, paragraph 72

<sup>xlii</sup> **Oliver Mundell MSP dissented from the recommendation in this paragraph.**

” A Minister of the Crown may 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.

112. This is not a regulation-making power.
113. The relevance of this power for this Committee’s interest is that (as the Explanatory Notes indicate) it could be used, among other things, to issue guidance and (as the DPRRC report notes) there is nothing in the clause to prevent it “creating legally binding rules of general application”. The Committee’s remit includes considering whether any proposed delegated powers (exercisable within devolved competence) should be expressed as a power to make subordinate legislation.<sup>xliii</sup> This power cannot be sub-delegated to Scottish Ministers under clause 22(6), because it applies only to regulation-making powers, and therefore the Committee’s general recommendation in relation to sub-delegation does not apply to this power.
114. The UK Government considers that an LCM is not required for clause 18; the Scottish Government considers that it is required. The LCM notes that this power could be exercised in devolved areas, for example in relation to animal or plant health checks between Northern Ireland and Scotland.

**115. The Committee notes that the power to engage in conduct could potentially be used by UK Ministers to issue binding guidance within devolved competence which would not be subject to any parliamentary scrutiny, neither at Westminster nor Holyrood. The Committee considers that a power of such vague nature which is capable of being exercised within devolved competence is not appropriate for delegation regardless of to whom it is delegated.<sup>xliv</sup>**

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<sup>xliii</sup> Scottish Parliament Standing Orders, Rule 6.11.1(d)

<sup>xliv</sup> **Oliver Mundell MSP dissented from the recommendation in this paragraph.**

