

The Welsh Government's Legislative Consent Memorandum on the Northern Ireland Protocol Bill

November 2022



1. Background

The UK Government's Northern Ireland Protocol Bill

1. The Northern Ireland Protocol Bill¹ (the Bill) was introduced into the House of Commons on 13 June 2022. It is sponsored by the Foreign, Commonwealth and Development Office.

2. The long title to the Bill states that it is a Bill to:

"Make provision about the effect in domestic law of the Protocol on Ireland/Northern Ireland in the EU withdrawal agreement, about other domestic law in subject areas dealt with by the Protocol and for connected purposes."

3. The Bill's Explanatory Notes include an overview of the policy background:

"The terms of the UK's departure from the EU were agreed and set out in the Withdrawal Agreement. This included the Northern Ireland Protocol setting out unique arrangements for Northern Ireland. ...

The Northern Ireland Protocol was intended to meet several overall policy objectives: to safeguard the Belfast (Good Friday) Agreement in all dimensions; to avoid a hard border on the island of Ireland; to protect Northern Ireland's place in the United Kingdom and its internal market; and to safeguard the EU's Single Market. Its operation has continued to support trade between Northern Ireland and Ireland as intended. However, its requirements – for full EU customs, sanitary and phytosanitary and other controls, as well as for Northern Ireland to apply EU rules in a variety of areas concerning goods, have led to a significant degree of disruption and burdens in practice.

In recognition of these concerns, the Government has taken steps to avoid further disruption. These include the extension of several easements in March 2021 and the application of "standstill" arrangements in September 2021, which have continued to operate the initial set of grace periods and easements in the period since. ...

¹ Northern Ireland Protocol Bill, as introduced (HL Bill 12)

The Government has also looked to work with the EU to find joint solutions to the underlying challenges posed by the Northern Ireland Protocol and propose ways forward to operate the Northern Ireland Protocol sustainably. These discussions have proceeded since January 2021. ...

In parallel there have been ongoing political developments in Northern Ireland linked to the Northern Ireland Protocol. ...

Taken together, the Government's assessment is that the ongoing practical issues, as well as challenges to political stability in Northern Ireland, linked to the Northern Ireland Protocol, demonstrate that it is not meeting its original objectives. ...

... As a result, the Foreign Secretary set out to the House of Commons on 17 May 2022 that primary legislation would be brought forward to address the operation of the Northern Ireland Protocol and revise its arrangements in order to fulfil its objectives."²

4. The Bill's Explanatory Notes also include an overview of the Bill's purpose:

"The purpose of the Bill is to provide Ministers with the power to make changes to the operation of the Northern Ireland Protocol in domestic law which protect the Belfast (Good Friday) Agreement and to safeguard peace and stability in Northern Ireland.

The Bill makes certain provisions of the Northern Ireland Protocol "excluded provision". Where provision is excluded, clause 2 provides that section 7A(2) of the European Union (Withdrawal) Act 2018 no longer applies to it, and the provision will not be applicable in domestic law ...

The Bill specifies which elements of the Northern Ireland Protocol are "excluded provision", particularly in relation to the movement of goods; the regulation of goods in Northern Ireland so far as necessary to allow goods in Northern Ireland to meet either UK or EU rules based on the choice of producers; subsidy control; and the governance arrangements under the Northern Ireland Protocol."³

² Northern Ireland Protocol Bill, [Explanatory Notes](#), July 2022, paragraphs 4-10

³ Northern Ireland Protocol Bill, [Explanatory Notes](#), July 2022, paragraphs 11-13

5. The Explanatory Notes also provide a summary of the delegated powers contained within the Bill:

"Where provisions of the Bill create "excluded provision" they are accompanied by a delegated power to make appropriate new provision in domestic law. Powers are also provided in relation to VAT and excise.

The Bill also provides powers to reflect in domestic law the disapplication of additional elements of the Northern Ireland Protocol and to make new law as appropriate in connection with this. Finally, the Bill provides a power to implement a new agreement with the EU concerning the Northern Ireland Protocol, if one is reached."⁴

6. The Bill completed its passage through the House of Commons on 20 July 2022. The Bill entered committee stage in the House of Lords on 25 October 2022.

The Welsh Government's Legislative Consent Memorandum

7. Standing Orders 29.1 and 29.2 provide that a legislative consent memorandum is required when a relevant UK Bill makes provision in relation to Wales for any purpose within the legislative competence of the Senedd or which modifies the Senedd's legislative competence.

8. On 29 September 2022, Vaughan Gething MS, Minister for Economy (the Minister), laid before the Senedd a Legislative Consent Memorandum (the Memorandum) in respect of the Bill.⁵

9. The Business Committee agreed that the Legislation, Justice and Constitution Committee, the Culture, Communications, Welsh Language, Sport, and International Relations Committee and the Economy, Trade, and Rural Affairs Committee, should report on the Memorandum by 7 November 2022.⁶

⁴ Northern Ireland Protocol Bill, Explanatory Notes, July 2022, paragraphs 13–14

⁵ Welsh Government, [Legislative Consent Memorandum, Northern Ireland Protocol Bill](#), September 2022

⁶ Business Committee, [Timetable for consideration: Legislative Consent Memorandum on the Northern Ireland Protocol Bill](#), October 2022

Provisions for which the Senedd's consent it required

10. Annex 1 of the Memorandum sets out the Welsh Government's assessment of why all clauses except for clause 1 (Overview) of the Bill require the Senedd's consent. It categorises these clauses into the following three groups:

- under Standing Order 29.1(i) for clauses within the legislative competence of the Senedd: clauses 5, 9, 10, 16, 17, 19, 21–23, 25 and 26;
- under Standing Order 29.1(ii) for clauses which modify the legislative competence of the Senedd: clauses 2–4 and 13–15; and
- provisions which have regard to devolved matters given the impact on economic development and/or implementation of international agreements, for which the consent of the Senedd consent is required by virtue of section 107(6) of the *Government of Wales Act 2006* (the 2006 Act): clauses 6–8, 11, 12, 18, 20 and 24.

11. According to the Bill's Explanatory Notes, the UK Government believes that only the following clauses of the Bill require the Senedd's consent: clauses 2–5, 9, 13–16, 19, 21 and 22.⁷

The Welsh Government's position

12. The Minister sets out the Welsh Government's position on the Bill within the Memorandum and a Written Statement issued on 29 September 2022. Within the Written Statement, the Minister notes that proceeding with the Bill "would risk a further escalation of measures by the European Union and, potentially, a trade war" which "is not in the best interests of the businesses and people of Wales who depend on trade with the EU."⁸

13. Paragraphs 21 and 22 of the Memorandum set out why the Welsh Government recommends the Senedd should withhold consent:

"The Welsh Government was not involved in the development of this Bill and does not agree with the rationale for making these provisions. We have repeatedly requested that the UK Government returns to negotiations with the EU to seek an agreed solution to the issues arising from the Protocol.

⁷ Northern Ireland Protocol Bill, Explanatory Notes, July 2022, Annex A – Territorial extent and application in the United Kingdom

⁸ Welsh Government, [Written Statement: The Northern Ireland Protocol Bill](#), 29 September 2022

Many of the regulation making powers drafted in the Bill are so broad that they lack any real clarity of purpose. This makes it impossible to ascertain both how the powers would be exercised and the potential implications and effect that the related provisions will have for Wales and our devolution settlement. In addition, clause 22(6) confers a power on a Minister of the Crown to make regulations that give Devolved Governments any of the regulation making powers conferred by the Bill. This means that 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. There are no restrictions on the powers that could be conferred on the Welsh Ministers (for example to ensure alignment with devolved areas)."

14. The Minister states at paragraph 23 of the Memorandum:

"... the Welsh Government considers that the consent of the Senedd is required for the whole Bill (save for clause 1), on the basis that all remaining provisions of the Bill have regard to the non-reserved area of the implementation of international agreements and/or economic development. As such, the above reasons for recommending that consent is withheld apply across the Bill as a whole, and not only to those provisions within the scope of SO 29."

15. At paragraphs 24–29 of the Memorandum, the Minister outlines the Welsh Government's further concerns about the Bill "regarding its potential, if enacted and implemented, to result in a breach of international law", and concludes that the Welsh Government is "unwilling to recommend consent to a Bill that has the potential to breach international law on an unjustifiable basis." The Minister also states that recommending consent for the Bill could call into question the Welsh Ministers' adherence to the Ministerial Code.

2. Committee consideration

16. We considered the Memorandum at our meeting on 17 October 2022, and agreed our report on 24 October 2022.⁹

Our view

General observations

17. We acknowledge that the Minister wrote to the Llywydd on 27 June 2022 to explain that, given “the complete absence of meaningful engagement by the UK Government” and the complexity of issues raised in the Bill, the Memorandum would be laid outside of the two-week deadline provided in Standing Order 29.2(i).¹⁰

18. We are disappointed to learn of the lack of engagement by the UK Government ahead of the Bill's introduction. We see this as yet another example of the UK Government's poor engagement with the Welsh Government in relation to legislation which affect areas of devolved competence.¹¹ We have raised these concerns with the UK Government.¹²

19. Nonetheless, we note that by the time the Memorandum was laid on 29 September 2022, over 15 weeks had elapsed since the Bill's introduction. This inordinate delay has severely limited Senedd committees' ability to undertake meaningful scrutiny of the Bill. This is particularly regrettable when considering the Bill's potential constitutional implications.

Conclusion 1. While we recognise the difficult position in which the Welsh Government has found itself due to the lack of engagement with the UK Government, we nevertheless believe that the Welsh Government should have acted sooner in laying a Legislative Consent Memorandum in respect of the Bill to allow for sufficient scrutiny by Senedd committees.

⁹ [Legislation, Justice and Constitution Committee, 17 October 2022](#) and [Legislation, Justice and Constitution Committee, 24 October 2022](#)

¹⁰ Welsh Government, [Letter from the Minister for Economy to the Llywydd](#), 27 June 2022

¹¹ See our report on the [Welsh Government's Legislative Consent Memorandum on the Infrastructure Bank Bill](#), October 2022; [Letter from the Minister for Climate Change to the Llywydd on the Genetic Technologies \(Precision Breeding\) Bill](#), 27 June 2022, [Letter from the Minister for Climate Change to the Llywydd on the Levelling-up and Regeneration Bill](#), 24 May 2022

¹² LJC Committee, [Letter to the Secretary of State for Levelling Up, Housing and Communities and Minister for Intergovernmental Relations](#), 4 November 2022

Clauses which fall within a purpose within the legislative competence of the Senedd

20. We note there are areas of disagreement between the Welsh Government and the UK Government as to which clauses of the Bill require the Senedd's consent.

21. We note the Welsh Government's assessment that clauses 5, 9, 10, 16, 17, 19, 21–23, 25 and 26 in the Memorandum fall within a purpose within the legislative competence of the Senedd, as described in Standing Order 29.1(i).

Conclusion 2. We agree with the Welsh Government's assessment that clauses 5, 9, 10, 16, 17, 19, 21–23, 25 and 26 listed in the Memorandum fall within a purpose within the legislative competence of the Senedd, as described in Standing Order 29.1(i).

22. The Memorandum states that, while provisions within clauses 6, 7, 8, 11, 12, 18, 20 and 24 do not fall within the legislative competence of the Senedd, by taking account of section 107(6) of the 2006 Act, they have regard to devolved matters. The Memorandum explains that these devolved matters include economic development and/or implementation of international agreements, and possibly others. For this reason, the Welsh Government believes the Senedd's consent is required for these clauses.¹³

23. We believe that clauses 6, 7, 11, 18 and 24 fall within a purpose within the legislative competence of the Senedd under Standing Order 29.1(i). It is for this reason we believe these clauses require the Senedd's consent. While we agree that clauses 8 and 20 require the Senedd's consent, we arrive at this view for a different reason (see paragraph 25). We do not believe that clause 12 requires the Senedd's consent (see paragraphs 26–27).

Conclusion 3. In addition to the clauses listed at Conclusion 2, we believe that clauses 6, 7, 11, 18 and 24 of the Bill also fall within a purpose within the legislative competence of the Senedd, as described in Standing Order 29.1(i).

¹³ Memorandum, paragraphs 51–67

Clauses which modify the legislative competence of the Senedd

24. We note the Welsh Government's assessment within the Memorandum that clauses 2–4 and 13–15 of the Bill modify the Senedd's legislative competence.¹⁴

Conclusion 4. We agree with the Welsh Government's assessment that clauses 2–4 and 13–15 listed in the Memorandum modify the legislative competence of the Senedd, as described in Standing Order 29.1(ii).

25. The Memorandum states that clauses 8 and 20 require the Senedd's consent as they relate to devolved matters, by taking account of section 107(6) of the 2006 Act.¹⁵ While we agree that these clauses require the Senedd's consent, we disagree with the Welsh Government's reasoning. We believe these clauses modify the Senedd's legislative competence, for the following reasons:

- clause 8 limits the effect of section 7A of the *European Union (Withdrawal) Act 2018* (the EU Withdrawal Act);
- clause 20 amends certain provisions given effect under section 7A of the EU Withdrawal Act (particularly Article 13(2) of the Northern Ireland Protocol).

Conclusion 5. We believe that clauses 8 and 20 modify the legislative competence of the Senedd, as described in Standing Order 29.1(ii).

Clause 12, which we deem does not require the Senedd's consent

26. The Memorandum states that clause 12 "brings Northern Ireland under the UK's new subsidy control regime", and that the Senedd's consent is required as it has regard to the devolved matter of economic development.¹⁶

27. As the Memorandum states, distortive or harmful subsidies (i.e. subsidy control) is a reserved matter under section C18 of Schedule 7A to the 2006 Act.¹⁷ We believe that the provision contained within clause 12 therefore falls outside of the 'purpose test' in Standing Order 29(i) and, as such, we do not agree with the Welsh Government that consent is required.

¹⁴ Memorandum, paragraphs 33-50

¹⁵ Memorandum, paragraphs 54-56; 62-64

¹⁶ Memorandum, paragraphs 57-59

¹⁷ Memorandum, paragraph 58

The Bill's potential to breach international law

28. We note that, in its legal position, the UK Government envisages the non-performance of international obligations. It considers that it has "no other way of safeguarding the essential interests at stake than through the adoption of the legislative solution that is being proposed."¹⁸

29. We note that the European Commission considers the introduction of the Bill to constitute a breach of international law,¹⁹ and that "violating international agreements is not acceptable".²⁰

30. We also note the range of the views of some legal commentators, many of whom consider a breach of international law to occur if the Bill becomes law.²¹

31. The Counsel General has told us that the Bill's potential to result in a breach of international law creates a "particular constitutional problem" for the Senedd, because:

"... we will be asked to give consent to the legislation, and whether we can actually consent to something that effectively legitimises unlawfulness ... that's certainly something that I've been applying my mind to at the moment."²²

32. We note that the Memorandum states that the Welsh Government has concerns regarding the Bill's potential, "if enacted and implemented", to result in a breach of international law.²³ We note that the Minister has previously expressed this as a matter of "grave concern".²⁴

Conclusion 6. In line with our responsibility for monitoring the implementation of non-trade international agreements in the sixth Senedd, we believe that adherence to international agreements is of paramount importance.

¹⁸ UK Government policy paper, [Northern Ireland Protocol Bill: UK government legal position](#), 13 June 2022

¹⁹ European Commission, [Remarks by Vice-President Maroš Šefčovič at the press conference on the Protocol of Ireland / Northern Ireland](#), 15 June 2022

²⁰ European Commission, [Commission launches infringement proceedings against the UK for breaking international law and provides further details on possible solutions to facilitate the movement of goods between Great Britain and Northern Ireland](#), 15 June 2022

²¹ University of Cambridge, [Law in Focus: 'Does the Northern Ireland Protocol Bill breach international law?' – Mark Elliott](#), 17 June 2022

²² LJC Committee, [20 June 2022, Record of Proceedings \[145\]](#)

²³ Memorandum, paragraph 24

²⁴ Welsh Government, [Written Statement: The Northern Ireland Protocol Bill \(NIP Bill\)](#), 28 June 2022

The doctrine of necessity

33. We note that, in its legal position, the UK Government describes how the doctrine of necessity “provides a clear basis in international law to justify the non-performance of international obligations under certain exceptional and limited conditions.”²⁵

34. However, we note that within the Memorandum, the Minister highlights that the doctrine of necessity “is a very controversial way of escaping international obligations, and as such is interpreted extremely restrictively by the courts.”²⁶

35. The Minister also highlights that “notable legal scholars” have commented that the UK Government’s defence of necessity for its breaching of international obligations is “weak”.²⁷

36. We note that the Minister concludes that, as “ultimately” it would be a matter for the Court of Justice of the European Union to determine whether the requirements for the defence of necessity are justified if infringement proceedings are initiated by the EU, “the Welsh Government is unwilling to recommend consent to a Bill that has the potential to breach international law on an unjustifiable basis”.²⁸

37. Whilst we accept the situation which the Bill seeks to resolve is serious, we note the views of the Minister and legal commentators that the successful invocation of the doctrine of necessity is rare and we share their concerns regarding the UK Government’s position.

38. The Committee agrees with the Counsel General that that this potential breach creates a constitutional problem for the Senedd in that it asks it to “consent to something that effectively legitimises unlawfulness”.

Conclusion 7. A decision by the Senedd to consent to the Bill could contribute to a breach of international law and would mean the Senedd acting incompatibly with international obligations, which would be in contrast to the spirit of the devolution settlement. A majority of the Committee agrees with the Minister that the Senedd should withhold its consent to the Bill; not all members of the Committee are of the view that consent should be refused.

39. This Committee does not normally make a recommendation as to whether the Senedd should give its consent to provisions within UK Bills. However, due to the profound constitutional

²⁵ UK Government policy paper, [Northern Ireland Protocol Bill: UK government legal position](#), 13 June 2022

²⁶ Memorandum, paragraph 25

²⁷ Memorandum, paragraph 26

²⁸ Memorandum, paragraphs 27-29

implications of the Bill, it is right to do so in this instance, as the Committee's predecessor did in respect of the United Kingdom Internal Market Bill.²⁹

The devolution settlement and international obligations

40. We note that sections 81 and 82 the 2006 Act contain mechanisms which ensure that the actions of the Welsh Ministers remain compatible with international obligations. In particular, section 82 allows the Secretary of State to direct Welsh Ministers not to take any action that would be considered to be incompatible with any international obligation.

41. However, as drafted, clause 22(2)(a) of the Bill would expressly authorise UK Ministers of the Crown or the Welsh Ministers (if delegated to them) to legislate even if doing so would be incompatible with the Northern Ireland Protocol or any other part of the UK-EU Withdrawal Agreement (the Withdrawal Agreement).

42. We therefore highlight that, on the presumption that section 82 of the 2006 Act was predicated on ensuring that Welsh Ministers comply with international obligations, the Bill may give rise to an unforeseen situation.

43. We have previously expressed concerns³⁰ at a decision made by the Minister for Rural Affairs and North Wales, and Trefnydd to consent to the UK Government making regulations which "raised questions" of compatibility with World Trade Organisation rules and the UK-EU Trade and Cooperation Agreement (although the Minister was "satisfied" that the risks of doing so did not fall to the Welsh Ministers).³¹ In response to those concerns, the Minister justified her decision to consent as the regulations were "necessary", temporary in nature and proportionate.³²

44. We therefore draw to the Senedd's attention that, while the Memorandum states that the Welsh Government is unwilling to recommend consent to a Bill that has the potential to breach international law on an "unjustifiable" basis, there have been instances when the Welsh Government is of the view that breaches of international law may be justifiable.

²⁹ LJC Committee (Fifth Senedd), [The Welsh Government's Legislative Consent Memorandum on the United Kingdom Internal Market Bill](#), November 2020, paragraph 111

³⁰ LJC Committee, [Letter to the Minister for Rural Affairs and North Wales, and Trefnydd](#), 21 January 2022

³¹ Welsh Government, [Letter from the Minister for Rural Affairs and North Wales, and Trefnydd](#), 20 December 2021

³² Welsh Government, [Letter from the Minister for Rural Affairs and North Wales, and Trefnydd](#), 3 February 2022

The Welsh Government's Ministerial Code

45. We note that the Memorandum highlights the following passage of the Welsh Government's Ministerial Code as relevant to its conclusion that it is unwilling to recommend consent to a Bill has the potential to breach international law:

"The ministerial code should be read against the background of the overarching duty on ministers to comply with the law, including international law and treaty obligations, and to protect the integrity of public life."³³

46. The Memorandum goes to state that:

"Consequently, recommending consent to this Bill could call into question Ministers' adherence to the Code, particularly with regard to how the Welsh Ministers could exercise any regulation making powers (if conferred upon them) under the Bill in compliance with international obligations."³⁴

47. We share the Welsh Government's concerns that recommending consent to the Bill could call into question the Welsh Ministers' adherence to the Ministerial Code.

The Bill's effect on UK-EU obligations

48. We are concerned that, in addition to limiting the effect of the Northern Ireland Protocol, the Withdrawal Agreement and other separation agreement law,³⁵ the Bill also empowers Ministers to make future changes to their effects and to unilaterally replace their arrangements with new arrangements.

49. We are concerned that the Bill may call into question the UK's compliance with other unrelated provisions of the Withdrawal Agreement, and could jeopardise cooperation under the Trade and Cooperation Agreement. For example:

- Article 4 of the Withdrawal Agreement requires the UK to maintain the same effects of the agreement in domestic legislation as the EU and its Member States;

³³ Memorandum, paragraph 29

³⁴ Memorandum, paragraph 20

³⁵ Relevant separation agreement law is defined by [section 7C\(3\) of the EU Withdrawal Act](#) (as inserted by the EU (Withdrawal Agreement) Act 2020).

- Article 5 places a duty on the UK and EU to assist each other with tasks “in full mutual respect and good faith” and they must also refrain from doing anything which could jeopardise the agreement’s objectives.³⁶

50. We are also concerned that the Bill makes a number of changes to the role of the Court of Justice of the European Union in relation to the Northern Ireland Protocol, which curtails the options available to domestic courts and tribunals, and could lead to uncertainty.

51. Finally, it is unclear to us why the UK Government has chosen to introduce the Bill when the Withdrawal Agreement’s own mechanisms have not been fully explored, including Article 16 of the Northern Ireland Protocol which allows the UK and EU to take temporary safeguarding measures if the Protocol leads to certain difficulties or to trade diversions.³⁷

Conclusion 8. In line with our responsibility for monitoring UK-EU governance in the sixth Senedd, we are concerned at the Bill’s likely negative impact on UK-EU relations.

Regulation-making powers within the Bill

52. We note that the House of Lords Delegated Powers and Regulatory Reform (DPRR) Committee published reports on the Bill on 7 July 2022³⁸ and 7 October 2022.³⁹ Within its July report, it provided the following assessment:

“The Northern Ireland Protocol Bill is a skeleton bill that confers on Ministers a licence to legislate in the widest possible terms. The Bill unilaterally departs from the Northern Ireland Protocol and enables Ministers to depart from the Protocol even further. The Bill represents as stark a transfer of power from Parliament to the Executive as we have seen throughout the Brexit process. The Bill is unprecedented in its cavalier treatment of Parliament, the EU and the Government’s international obligations.”⁴⁰

53. We note that the DPRR Committee highlighted that clause 22(1) of the Bill also provides that every power in the Bill are “super Henry VIII” powers – powers which allow “Ministers to

³⁶ UK Government, [Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community](#), 19 October 2019

³⁷ UK Government, [Protocol on Ireland/Northern Ireland](#)

³⁸ House of Lords, [7th Report of the Delegated Powers and Regulatory Reform Committee](#), 7 July 2022

³⁹ House of Lords, [12th Report of the Delegated Powers and Regulatory Reform Committee](#), 7 October 2022

⁴⁰ House of Lords, 7th Report of the Delegated Powers and Regulatory Reform Committee, 7 July 2022, paragraph 4

make any provision that could be made by an Act of Parliament, including modifying by regulations the Bill once it has been enacted."⁴¹

54. The DPPR Committee also provided the following contrast between the powers contained within the Bill and those within the EU Withdrawal Act:

"... We were highly critical of the width of section 8 [of the then European Union (Withdrawal) Act Bill]. But section 8 did at least contain important restrictions, including a two-year sunset clause and a ban on doing any of the following:

- *imposing or increasing taxation or fees,*
- *creating law that is retrospective,*
- *creating serious criminal offences,*
- *establishing a public authority,*
- *amending the Human Rights Act 1998 and certain other legislation.*

*This Bill places no such restrictions on Ministers when making regulations under the Bill. Ministers can do all of the above and much more—indeed, anything that can be done by an Act of Parliament."*⁴²

55. We agree with the DPPR Committee's assessment that the delegated powers in this Bill are extremely wide and could be used to make any changes to this Bill in the future, and to do so retrospectively.

56. We note that the Memorandum states that clause 22(6) of the Bill:

"... confers a power on a Minister of the Crown to make regulations that give Devolved Governments any of the regulation making powers conferred by the Bill. This means that 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. There

⁴¹ Ibid., paragraph 7

⁴² Ibid., paragraphs 8-9

*are no restrictions on the powers that could be conferred on the Welsh Ministers (for example to ensure alignment with devolved areas)."*⁴³

57. We also note that, in justifying the taking of the power under clause 22(6), the Bill's accompanying delegated powers memorandum states:

*"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."*⁴⁴

58. Furthermore, we note that the Hansard Society states in relation to clause 22(6):

"The approach that has been taken in the NIP Bill is to confer on UK Ministers the power to make regulations that can further delegate legislative powers to devolved administrations. This is in effect 'legislative sub-delegation' and the power that would be exercised by the devolved administration would be a 'sub-delegated power' to make 'tertiary legislation'.

*... powers that permit 'legislative sub-delegation' that are drafted without provision for scrutiny of the exercise of 'sub-delegated powers' break the important link between those empowered to make law and their accountability to Parliament."*⁴⁵

59. We are concerned at the fact that the Bill does not provide the Welsh Ministers with a consenting role if UK Ministers decide to exercise any delegated powers exclusively. Such is the extent of the powers within the Bill, we are concerned that UK Ministers could, should they wish, act in areas of devolved competence, including to suspend or repeal Senedd legislation.

60. We are also concerned at the fact that the Bill gives no guaranteed role for the Senedd to scrutinise any future regulations unless a UK Minister decides to allow such scrutiny.

61. Furthermore, we are concerned that the Bill enables the future creation of new delegated powers for the Welsh Ministers by UK Ministers, who would also determine the relevant Senedd procedures.

⁴³ Memorandum, paragraph 22b

⁴⁴ Northern Ireland Protocol Bill, Memorandum from the Foreign, Commonwealth and Development Office to the Delegated Powers and Regulatory Reform Committee, paragraphs 153-154

⁴⁵ Hansard Society, The Northern Ireland Protocol Bill: Delegated Powers, 24 June 2022, page 13

Conclusion 9. We are concerned that the extremely wide delegated powers in the Bill would allow UK Ministers to effectively make any changes it wishes to the Bill in the future (including retrospectively, if it so wishes) without any role or involvement for the Senedd or the Welsh Ministers.

Conclusion 10. Our concerns in relation to the wide delegated powers in the Bill remain the same regardless of whether those powers are to be exercised by UK Ministers or subsequently, in the future by the Welsh Ministers.

Conclusion 11. A further concern to us is that it is not yet known which new delegated powers for the Welsh Ministers may be created as a consequence of the Bill, or which procedures may be applied to those powers, and that UK Ministers will make those decisions.