

HOUSE OF LORDS

Delegated Powers and Regulatory Reform
Committee

7th Report of Session 2022–23

**Northern Ireland
Protocol Bill**

**Clean Air (Human Rights)
Bill [HL]: Sponsor Response**

Ordered to be printed 6 July 2022 and published 7 July 2022

Published by the Authority of the House of Lords

The Delegated Powers and Regulatory Reform Committee

The Committee is appointed by the House of Lords each session and has the following terms of reference:

- (i) To report whether the provisions of any bill inappropriately delegate legislative power, or whether they subject the exercise of legislative power to an inappropriate degree of parliamentary scrutiny;
- (ii) To report on documents and draft orders laid before Parliament under or by virtue of:
 - (a) sections 14 and 18 of the Legislative and Regulatory Reform Act 2006,
 - (b) section 7(2) or section 19 of the Localism Act 2011, or
 - (c) section 5E(2) of the Fire and Rescue Services Act 2004;

and to perform, in respect of such draft orders, and in respect of subordinate provisions orders made or proposed to be made under the Regulatory Reform Act 2001, the functions performed in respect of other instruments and draft instruments by the Joint Committee on Statutory Instruments; and

- (iii) To report on documents and draft orders laid before Parliament under or by virtue of:
 - (a) section 85 of the Northern Ireland Act 1998,
 - (b) section 17 of the Local Government Act 1999,
 - (c) section 9 of the Local Government Act 2000,
 - (d) section 98 of the Local Government Act 2003, or
 - (e) section 102 of the Local Transport Act 2008.

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Historical Note

In February 1992, the Select Committee on the Committee work of the House, under the chairmanship of Earl Jellicoe, noted that "in recent years there has been considerable disquiet over the problem of wide and sometimes ill-defined order-making powers which give Ministers unlimited discretion" (Session 1991–92, HL Paper 35-I, paragraph 133). The Committee recommended the establishment of a delegated powers scrutiny committee which would, it suggested, "be well suited to the revising function of the House". As a result, the Select Committee on the Scrutiny of Delegated Powers was appointed experimentally in the following session. It was established as a sessional committee from the beginning of Session 1994–95. The Committee also has responsibility for scrutinising legislative reform orders under the Legislative and Regulatory Reform Act 2006 and certain instruments made under other Acts specified in the Committee's terms of reference.

Seventh Report

NORTHERN IRELAND PROTOCOL BILL

1. The Northern Ireland Protocol Bill was introduced in the House of Commons on 13 June 2022 and is currently at committee stage in that House. Normally we report on a Bill in sufficient time to allow Members of the House of Lords to consider it before the Bill's committee stage in the House of Lords. This Bill, however, is of exceptional constitutional significance and so, in line with our practice, we are reporting on it while it is still in the House of Commons. (In due course, we will also report on the Bill in the form in which it comes to the House of Lords.) We hope that Members of the House of Commons will find it of assistance during their scrutiny of this important Bill.
2. A delegated powers memorandum (“the Memorandum”) has been provided by the Foreign, Commonwealth and Development Office.¹ Given the exceptional significance of this Bill, it is especially disappointing that the Memorandum falls short of the standards Parliament is entitled to expect and which we set out in our recently revised Guidance to Departments.²
3. According to the Memorandum, the purpose of this 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 Protocol is, however, the most contentious component of the EU withdrawal agreement and the legislative mechanism by which the Government propose to give to effect to the Bill's purpose is wholly contrary to the principles of parliamentary democracy (namely, parliamentary sovereignty, the rule of law and the accountability of the Executive to Parliament) which lie at the heart of our recent report *Democracy Denied? The urgent need to rebalance power between Parliament and the Executive*.³
4. **The Northern Ireland Protocol Bill is a skeleton bill⁴ 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.**
5. This report is in two parts. Part 1 lists our general concerns about the Bill, of which there are 11. Part 2 identifies specific clauses in the Bill. We conclude that clauses 4(3), 4(5), 5(1), 6, 9, 12(3), 13(4), 14(4), 15(2), 17(1), 18(1) and 19 all contain inappropriate delegations of power and should be removed from the Bill.

1 Foreign, Commonwealth and Development Office, *Delegated Powers Memorandum*, 13 June 2022.

2 DPRRC, *Guidance for Departments on the role and requirements of the Committee*, November 2021.

3 DPRRC, *Democracy Denied? The urgent need to rebalance power between Parliament and the Executive*, [12th Report](#), Session 2021–22 (HL Paper 106).

4 A bill which contains so many significant delegated powers that its operation essentially depends on regulations made under it.

Part 1: General concerns

6. First, the Bill is a skeleton Bill the operation of which will essentially depend on regulations to be made in due course by Ministers. The whole Bill can be read without discerning what the Government wish to do with any of the powers it contains.
7. Second, not only is the Bill a skeleton bill but clause 22(1) also entails that 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.
8. It is instructive to compare the width of the powers in this Bill with one of the most important powers in existing Brexit legislation: section 8 of the European Union (Withdrawal) Act 2018, allowing Ministers to deal with deficiencies in EU law by regulations. We were highly critical of the width of section 8. 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.
9. 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.
10. Third, the Bill disapplies specific areas of the Protocol in UK domestic law and gives Ministers delegated powers to disapply further areas of the Protocol in UK domestic law and to make new law related to the Protocol. Clause 22(2) is explicit that Ministers can disregard the UK’s international obligations:

“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;
 - (b) suspend or repeal, or make alternative provision to, domestic law so far as it gives effect to the Northern Ireland Protocol or any other part of the EU withdrawal agreement”.
11. On 13 June 2022, the Government published a paper justifying their actions as a matter of international law. The legality of the matter in international law is ultimately a matter for the courts. But even assuming that the Government are proposing to act lawfully, the matter is highly controversial and should (if at all) be for Parliament in primary legislation rather than for Ministers

in secondary legislation. Ministers have the widest powers to do what they like, when they like, disregarding the Protocol and any other part of the EU withdrawal agreement. Regulations have far less scrutiny than the scrutiny afforded to primary legislation.

12. Fourth, the Government have failed to explain and justify why the Bill contains so many open-ended powers. In such a highly controversial area, one might have expected powers to be focussed or constrained, for example by requirements:
 - to undertake pre-legislative scrutiny or consultation,
 - to satisfy stringent criteria,
 - to meet pre-conditions,
 - for the exercise of powers to be time-limited.
13. Far from it. Most of the key powers in the Bill are open-ended, allowing Ministers to do what they regard as “appropriate”, for example clauses 5(1), 6(1), 9(1), 12(3), 13(4), 17(1), 18(1) and 19(1). Only clause 15(1) uses a test based on necessity rather than appropriateness.
14. Fifth, the Memorandum provides only cursory justification for the delegated powers in the Bill. There is an almost complete absence of examples of provision that could be made and a total absence of indicative regulations. This is regrettable in such an important Bill.
15. Sixth, the Government’s starting point for the applicable parliamentary procedure is unsatisfactory. Every power, however important, is subject only to the negative procedure save where it is used to amend or repeal primary legislation or to make retrospective provision.
 - The Memorandum does not explain why it is right to limit the affirmative procedure to such limited cases. While we normally expect the affirmative procedure to apply to Henry VIII powers and to provisions having retrospective effect, it is not only such powers that merit affirmative procedure scrutiny.
 - No attempt is made in the Memorandum to justify the procedure that applies to each power by reference to its significance in policy terms. Instead, the same formulaic reasons recur throughout the Memorandum.
 - Although all the regulations can make any provision that could be made by Act of Parliament, if the powers are exercised in a way that does not amend primary legislation or is not retrospective, only the negative procedure applies.
16. Seventh, the Memorandum frequently refers to powers being exercised to make “technical and detailed” provision that is best suited to regulations. Powers unilaterally to depart from a major international agreement in such a controversial area of law, and in such a controversial way, cannot be characterised as merely involving technical and detailed matters. They involve matters of the highest public interest, involving questions of law, politics, diplomacy and integrity.

17. Eighth, in allowing Ministers to act inconsistently with the UK's international legal obligations, the Bill represents a serious challenge to the Government's commitment to the rule of law.
18. Ninth, Ministers have an overarching duty under the Ministerial Code to comply with the law. A power conferred by Parliament allowing Ministers to make delegated legislation that disapplies international law—or that puts in place provision that is inconsistent with international law—does not sit easily alongside a duty under the Ministerial Code to comply with the law, including international law.
19. Tenth, the EU withdrawal agreement and the Northern Ireland Protocol involve binding promises freely entered into by the Government and the EU. Article 5 (good faith) of the EU withdrawal agreement states:

“The Union and the United Kingdom shall, in full mutual respect and good faith, assist each other in carrying out tasks which flow from this Agreement. They shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising from this Agreement and shall refrain from any measures which could jeopardise the attainment of the objectives of this Agreement.”

Article 5 of the EU withdrawal agreement contains an express promise by the Government to fulfil their legal obligations under the agreement. This Bill constitutes a repudiation of the Government's legal obligations in circumstances where they think it appropriate to do so.

20. Finally, this is a clear example of legislation preceding policy formulation rather than policy formulation preceding legislation. The Bill contains a swathe of delegated powers enabling Ministers to do what they like when they like. Meanwhile Parliament is given the frustrating task of debating a series of exorbitant delegated powers that are mere triggers for future Ministerial action, with very little detail from Ministers and with no illustrative regulations to facilitate such debate.

Part 2: Specific provisions

Clause 4(3): movement of goods

21. Clause 4(1) and (2) involves an admitted breach of the Government's obligations under Article 5 of the Protocol in relation to UK and non-EU destined goods moving between Great Britain and Northern Ireland. Clause 4(3) allows Ministers to provide for the exclusion from EU customs legislation and EU law to apply only to prescribed descriptions of qualifying movements of UK or non-EU destined goods.
22. The Memorandum offers two justifications for this power.
 - First, it gives the Government flexibility to cover the movement of only certain types of goods, and to adapt rules and processes in light of future developments.
 - Second, technical, administrative or operational detail is most appropriately provided in secondary legislation.
23. The first reason (flexibility) operates at the expense of meaningful constraints and scrutiny, precisely because the power is so open-ended. The

Memorandum openly acknowledges that the power allows for “significantly revised arrangements” for goods moving and remaining within the United Kingdom in place of the Government’s agreed obligations under the Protocol.

24. The second reason (technical detail is more suitable for secondary legislation) downplays the significance of the provision that could be made under the power in clause 4(3). 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.
25. 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.
26. **We regard clause 4(3) as containing an inappropriate delegation of power, which should be removed from the Bill.**

Clause 4(5)

27. Clause 4(2) makes Article 5(3) and (4) and Annex 2 to the Protocol “excluded provision” so far as it relates to “qualifying movements of UK or non-EU destined goods”. In other words, it switches off in domestic law these provisions of the Protocol. Clause 4(5) gives Ministers power to make provision about the meaning of “UK or non-EU destined”. This power is intended to ensure that Ministers have the flexibility to allow the exclusion in clause 4(2) to apply only to certain types of goods.
28. Given that the justification for taking the power in clause 4(5) is in similar terms to that for clause 4(3) it is open to the same criticisms.
29. The power in clause 4(5) for Ministers to define what is meant by “UK or non-EU destined goods” will have the effect of determining to which goods the exclusion from Article 5(3) and (4) of the Protocol applies. This is fundamental to defining the scope of the clause 4 exclusion. It cannot reasonably be described as technical, administrative or operational detail.
30. **We regard clause 4(5) as containing an inappropriate delegation of power, which should be removed from the Bill.**

Clause 5(1)

31. Clause 5(1) gives Ministers power to make any provision which they consider appropriate in connection with any provision of the Northern Ireland Protocol to which clause 4 relates (except customs matters, which are governed by clause 6). It allows Ministers to create new law on matters covered by clause 4 (movement of goods) to replace the Protocol requirements.
32. According to the Memorandum (paragraphs 44-46):
 - this ensures that Ministers have the flexibility to provide for alternative regimes in relation to areas covered by the Northern Ireland Protocol which are “excluded provision”;

- a regulation-making power is required because the precise detail of the regime will require consultation with those affected;
 - this ensures that Ministers have the flexibility to adapt rules and processes in light of future developments;
 - technical, administrative or operational detail is most appropriately provided in secondary legislation.
33. 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.
34. Clause 4 breaks the Government's obligations under Article 5 of the Protocol. Clause 5 gives Ministers a power to fill the gaps left by the disapplication of provisions of the Protocol, and to make any provision Ministers see fit in relation to a wide range of regulatory activity.
35. Given the significance and the breadth of the power, and the insufficiency of the Memorandum's justification, **we regard clause 5(1) as containing an inappropriate delegation of power, which should be removed from the Bill.**

Clause 6

36. Clause 6(1) confers powers on the Treasury and HMRC to make provisions about customs matters where they consider it appropriate in connection with the Northern Ireland Protocol. Once again, "appropriate" is the key word and no restrictions are placed on the Government's powers. They can do what they want, when they want, regardless of their international obligations under the Protocol.
37. According to the Memorandum (paragraphs 51-53):
- The power is intended to ensure that the Treasury and HMRC have the flexibility to provide for alternative regimes, for example to deliver the new 'trusted trader' regime.
 - It is not possible to make such provisions on the face of the Bill because it is necessary for the UK to have the ability to implement future UK customs policy in response to changing requirements.
 - Technical, administrative or operational detail is most appropriately provided in secondary legislation.
38. These reasons are unconvincing.
- The power to make provision about "customs matters" (defined widely in clause 25(1), adding to the open-endedness of the power) certainly

gives Ministers maximum flexibility but at the expense of meaningful constraints and scrutiny. The Government's policy is not formulated in any detail, which is why they have given themselves the maximum in the way of delegated powers. They can formulate their policy when it suits them and at a time when this Bill may have been long enacted and no longer a focus of Parliamentary attention.

- The Government go too far in saying that it is not possible (as opposed to desirable or convenient) for the Bill to contain detailed provision on its face because future UK customs policy may need to change in response to changing requirements. The policy underlying any Act of Parliament may need to be changed to cope with new circumstances. As with any other Act that requires amendment, there is nothing to stop the Government introducing a new Bill in due course once they have formulated their policy. Instead they have chosen to publish a premature skeleton bill.
- As for the argument that secondary legislation is anticipated largely to consist of technical, administrative or operational detail, once again it downplays the significance of the provision that could be made in regulations. Clause 6 contains a power to determine the extent to which legal requirements in relation to customs diverge from international law requirements under the Protocol. This is not a matter of technical, administrative or operational detail. Nor is there anything on the face of the Bill that would confine changes to the realm of the technical, administrative or operational.

39. **We regard clause 6 as containing an inappropriate delegation of power, which should be removed from the Bill.**

Clause 9

40. Clause 7 establishes a default dual regulatory regime for manufactured goods, medicines and agri-food, among other types of goods. Businesses have a choice as to which regulatory route to follow: UK, EU or both where this is possible, when supplying goods in Northern Ireland. Clause 9(1) contains a wide power for Ministers to make any provision about the regulation of goods which they consider appropriate in connection with the Northern Ireland Protocol. This includes a power for Ministers to amend clauses 7 and 8 once enacted.
41. The Memorandum 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.
42. 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.

43. **We regard clause 9 as containing an inappropriate delegation of power, which should be removed from the Bill.**

Clause 12(3)

44. Clause 12(1) of the Bill excludes Article 10 and Annexes 5 and 6 of the Northern Ireland Protocol, that is to say, the EU state aid rules relating to goods and wholesale electricity trade between Northern Ireland and the EU. Clause 12(3) allows Ministers to make regulations concerning the exclusion of Article 10 of the Northern Ireland Protocol. The Government's justification is that the power allows them to take account of any possible future developments in this policy area.
45. This is an inadequate justification because it does not explain why this should be done in regulations rather than by amending the Bill once enacted. Nothing is said about the sort of provision that could be made beyond the fact that it must be appropriate. Although the Memorandum notes that the effect of disapplying EU state aid law would mean the UK subsidy control regime applies, clause 12(3) read with clause 22(1) allows regulations to re-write the position for Northern Ireland.
46. Clause 12 unilaterally removes an important pillar of the Protocol and replaces it by an open-ended power for Ministers (rather than Parliament) to fill in the gap. **We regard clause 12(3) as containing an inappropriate delegation of power, which should be removed from the Bill.**

Clause 13(4)

47. Clause 13(1) states that any provision of the Northern Ireland Protocol or EU withdrawal agreement is excluded provision so far as it confers jurisdiction on the Court of Justice of the European Union (CJEU) in relation to the Protocol or related provision of the EU withdrawal agreement. This is so whether the CJEU jurisdiction relates to excluded provisions or any other matter. It is not at all clear why the doctrine of necessity (relied upon by the Government to depart from the Northern Ireland Protocol) requires ousting the jurisdiction of the CJEU.
48. Clause 13(4) allows Ministers to make such regulations as they consider appropriate in connection with any provision of the Northern Ireland Protocol to which clause 13 relates. We are told that the full details of the new regime will reflect further discussions as to the appropriate arrangements in this area. Parliament has no knowledge of the Government's plans but is meanwhile expected to rubber stamp all the regulation-making arrangements.
49. Given that clause 13 ousts the jurisdiction of the CJEU, it is surprising how little the Memorandum has to say about the broad and vaguely worded power in clause 13(4). Meanwhile Ministers can do anything that they regard as appropriate.
50. **We regard clause 13(4) as containing an inappropriate delegation of power, which should be removed from the Bill.**

Clause 14(4)

51. Clause 14(1) states that any provision of the Northern Ireland Protocol or any other part of the EU withdrawal agreement is excluded provision so far as it applies in relation to any other excluded provision (whether of the Northern Ireland Protocol or any other part of the EU withdrawal agreement). Clause 14(4) allows Ministers to make provision which they consider appropriate in connection with any provision of the Protocol and other parts of the EU withdrawal agreement to which clause 14 relates.
52. The Memorandum states that the power in clause 14(4) is taken in recognition of the fact that making provisions of the Protocol “excluded provision” provides the basis for, but does not itself prescribe, the full new domestic regime. The full details of the new regime will reflect discussions with stakeholders. In other words, what is to replace the Protocol has not yet been determined because the underlying policy has not been formulated.
53. The Memorandum adds that the power in clause 14(4) accounts for the fact that the provisions of clause 14 will entail further steps to ensure legal certainty for courts and tribunals, if that is necessary beyond the provisions included on the face of the Bill and to adapt to changing circumstances.
54. It is not at all clear what this is intended to mean, not least because the Memorandum has so little to say about this broadly worded power. Nothing is said about the sort of provision that could be made under it.
55. **We regard clause 14(4) as containing an inappropriate delegation of power, which should be removed from the Bill.**

Clause 15(2)

56. 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. Central to the Bill is the notion of “excluded provision”, meaning parts of the Northern Ireland Protocol that have been “switched off” in domestic law, in breach of the UK’s obligations under the EU withdrawal agreement.
57. The Bill already contains many provisions that unilaterally depart (or allow Ministers in regulations to depart) from the UK’s international obligations under the Northern Ireland Protocol and the EU withdrawal agreement. These provisions concerning excluded provisions are supplemented by the extraordinary power in clause 15(2), allowing Ministers—if they consider it necessary to do so—to provide that any provision of the Northern Ireland Protocol or any related provision of the EU withdrawal agreement:
 - can become excluded provision, wholly or to any other extent;
 - can be excluded provision to a greater or lesser extent than it currently is;
 - can cease to be excluded provision.
58. According to the Memorandum the power is necessary because the scope of what is “excluded provision” may need to change after the Bill’s enactment should any aspect otherwise put at risk the sustainable operation of the Northern Ireland Protocol. But surely the presumption should be that if an Act of Parliament is not working as intended (particularly something of such political significance as the Northern Ireland Protocol) Parliament

should revisit the matter and enact changes, rather than leave the matter to Ministers to deal with in regulations. If those regulations do not amend primary legislation or make retrospective provision, they will only be subject to the negative procedure.

59. The clause has been criticised as conferring power to rip up any aspect of the Northern Ireland Protocol that the Government regard as causing political or economic instability in Northern Ireland. Nor is the Minister obliged to lay before Parliament, when laying regulations under clause 15, a statement setting out the permitted purpose for which the regulations are being made and the reasons why the Minister considers it necessary to make the regulations.
60. Clause 15 contains 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. Clause 15(1) limits the purposes for which changes can be made. Even so, the nine permitted purposes in clause 15(1) represent a very broad set of circumstances in which the powers can be exercised. Given the significance of the powers, particularly in the context of the UK's duty to comply with its international obligations, 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.
61. **We regard clause 15(2) as containing an inappropriate delegation of power, which should be removed from the Bill.**

Clause 17(1)

62. Clause 17(1) allows the Treasury by regulations to make provision about VAT, excise duty, or other taxes which they consider appropriate in connection with the Northern Ireland Protocol.
63. The Government's justification for the power (Memorandum, paragraph 135) is that it is "not possible" to make such provisions on the face of the Bill because it is "necessary" for the UK to have the ability to respond to future changes and implement future UK VAT, excise and tax policy. The Memorandum does not explain why it is not possible to say more on the face of the Bill and for so much to be left to regulations. Once again the presumption should be that, if an Act of Parliament is not working as intended, Parliament should revisit the matter rather than leave the matter for Ministers to deal with in regulations.
64. The Memorandum says that the Treasury intends to exercise this power to make provision which the Treasury considers appropriate to lessen, eliminate or avoid differences in VAT, excise and other taxes between Northern Ireland and Great Britain. However, there appears to be nothing to prevent the power being used for other and much wider purposes. If the powers are only intended to be used to lessen, eliminate or avoid differences in VAT, excise and other taxes between Northern Ireland and Great Britain, surely that limitation should be built in to the scope of the power.
65. **We regard clause 17(1) as containing an inappropriately wide delegation of power, which should be narrowed in the way we have suggested or removed from the Bill.**

Clause 18(1)

66. Clause 18(1) contains a strange, widely drafted power allowing Ministers to “engage in conduct” in relation to any matter dealt with in the Northern Ireland Protocol (where that conduct is not otherwise authorised by the Bill) if they consider it appropriate to do so in connection with one or more of the purposes of the Bill. Despite its being highly unusual and its breadth, the exercise of the power in clause 18 will have no parliamentary oversight since it is subject to no parliamentary procedure.
67. The Memorandum does not mention clause 18. Its absence from the Memorandum implies that the Government do not regard clause 18 as containing a delegation of legislative power (that is, a power to make law of general application). The Explanatory Notes to clause 18 define “conduct” as “sub-legislative activity, such as producing guidance”. This is vague. It must mean something more than just guidance, otherwise it would have been expressly confined to guidance. But it is unclear how much further it goes than guidance. There is no definition of “conduct” in the Bill itself. And there is nothing on the face of clause 18 that would prevent it from creating legally binding rules of general application.
68. Our *Democracy Denied?* report heavily criticised “disguised legislation”—instruments that are legislative in effect but often not subject to parliamentary oversight. Examples include guidance, determinations, arrangements, codes of practice and public notices. Clause 18 appears to allow all these things to be done, without any parliamentary procedure and in a way that is binding on the general public.
69. What is required is a convincing explanation from the Government as to what conduct is covered by clause 18 and that it cannot include legally binding obligations. **Meanwhile we regard clause 18(1) as containing an inappropriate delegation of power, which should be removed from the Bill.**

Clause 19

70. Clause 19 enables Ministers to implement a “relevant agreement” (or deal with matters arising from or related to such an agreement) defined as any agreement made between the United Kingdom and the EU which modifies, supplements or replaces the whole or any part of the Northern Ireland Protocol.
71. The Memorandum states that the power is in the Bill to reflect the Government’s preference for a negotiated solution with the EU. The matter cannot, the Government say, be included on the face of the Bill because such an agreement with the EU has not yet been reached. If such an agreement were to remedy the issues currently faced in Northern Ireland, it might not be expedient to pass an entirely new piece of primary legislation to implement those remedies given the urgency of resolution.
72. These arguments are not convincing. Parliament can act very quickly to pass primary legislation. Given the significance and controversial nature of the subject matter, it is arguably inappropriate to provide for the implementation of the agreement through subordinate legislation subject only to the negative procedure (when not containing retrospective or Henry VIII provision).

Neither does the power contain the sorts of constraints found in section 8 of the European Union (Withdrawal) Act 2018 (see paragraph 8 above).

73. **We regard clause 19 as containing an inappropriate delegation of power, which should be removed from the Bill.**

Conclusion

74. We acknowledge the complexity of the issues related to this Bill. We are nonetheless at a loss to understand why the Government have introduced a Bill which has failed in so many ways to accord with the principles of parliamentary democracy and with other recommendations contained in our *Democracy Denied?* report such as the need for an alignment of policy development and bill drafting and the avoidance of “disguised legislation”. In their response to *Democracy Denied?*, the Government said: “We commit to strengthen the Guide to Making Legislation⁵ to ensure that it reflects the DPRRC’s updated guidance on delegated powers”.⁶ The Houses may wish to press the Minister on why this Bill shows so little, if any, evidence of the effectiveness of that commitment.

CLEAN AIR (HUMAN RIGHTS) BILL [HL]: SPONSOR RESPONSE

75. We considered this private member’s Bill in our 4th Report of this Session.⁷ The sponsor of the Bill, Baroness Jones of Moulsecoomb, has written to the Committee in response. The response is printed at Appendix 1.

5 The Cabinet Office guide for departments.

6 Lord President of the Council and Leader of the House of Commons, *Government response to Democracy Denied? The urgent need to rebalance power between Parliament and the Executive* (24 January 2022): <https://committees.parliament.uk/publications/8672/documents/88067/default/>, p 12.

7 *4th Report*, Session 2022–23 (HL Paper 23).

APPENDIX 1: CLEAN AIR (HUMAN RIGHTS) BILL [HL]: SPONSOR RESPONSE

Letter from Baroness Jones of Moulsecoomb, Sponsor of the Clean Air (Human Rights) Bill [HL], to the Rt Hon. the Lord McLoughlin CH, Chair of the Delegated Powers and Regulatory Reform Committee

I would like to thank the Committee for taking the time to make their very helpful comments and suggestions on the Bill. I am keen to work with the Committee and anyone else to make this the best Bill that it can possibly be, with the intention that it should go on to pass all of its Commons stages and become law. In light of that, I wanted to offer the below suggestions to address the Committee's points and would appreciate your feedback.

Modified duty on the Secretary of State

Amend clauses 2(5), 2(6), 2(11) and 3(10) such that advice from the Environment Agency ("EA"), the Committee on Climate Change ("CCC") and the Citizen's Commission for Clean Air ("CCCA"), and guidance and good practice statements from the World Health Organization ("WHO"), the International Organization for Standardization ("ISO") and the United Nations Economic Commission for Europe ("UNECE") must be taken into account by the Secretary of State.

After taking the advice, guidance or good practice into account, the Secretary of State must proceed to lay a draft statutory instrument before Parliament in accordance with the affirmative procedure. If the order made is different from the advice of the EA, the CCC, the CCCA, or the guidance or good practice statements of the WHO, ISO and UNECE, the Secretary of State must publish a statement setting out the reasons for that decision.

Amend clause 2(7) such that the Secretary of State must take into account any additional pollutants and lower limit values and, if they are not listed or lowered in accordance with advice or guidance, the Secretary of State must publish a statement setting out the reasons for that decision.

Delete clauses 2(14) and 3(12) relating as they do to the negative procedure.

Power to add pollutants on the advice of the CCC

Amend clause 2(11) to allow the Secretary of State to follow the advice of the CCC to add pollutants to Schedule 4, in addition to lowering pollutant limits.

Power to add pollutants or lower limit levels

Add a power to clause 2 for the Secretary of State to amend schedules 1 to 4 without advice in order to follow or implement guidance of the WHO or the Intergovernmental Panel on Climate Change ("IPCC"). Any such amendments must be made by laying a draft statutory instrument before Parliament in accordance with the affirmative procedure.

Replacement of ISO with WHO

Delete references to the ISO from clauses 2(2)(c) and 2(6).

Amend clause 3(3)(b) and (c) to replace references to the ISO with the WHO.

4 July 2022

APPENDIX 2: MEMBERS' INTERESTS

Committee Members' registered interests may be examined in the online Register of Lords' Interests at <https://www.parliament.uk/hregister>. The Register may also be inspected in the Parliamentary Archives.

For the business taken at the meeting on 6 July 2022, Members declared no interests.

Attendance

The meeting was attended by Baroness Browning, Lord Cunningham of Felling, Lord Janvrin, Lord Haselhurst, Lord Hendy, Lord McLoughlin, Baroness Meacher, Lord Rooker and Lord Tope.