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Clare Adamson MSP  
The Scottish Parliament  
Edinburgh  
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31 January 2023

Dear Clare,

Thank you for inviting the Foreign Secretary to respond to the report you have published on the Northern Ireland Protocol Bill (the Bill). He has asked me to respond on his behalf, and to thank you and the Committee for your diligent scrutiny of this important piece of legislation.

I know you have also written to the Secretary of State for Levelling Up, Housing and Communities regarding the wider questions raised in the report about the effect of Brexit on devolution, and so I will confine my response here to the specific points made in the report about the Bill. I hope you will by now have seen my response to the Delegated Powers and Law Reform Committee (DPLRC) which addressed many of the same issues.

The UK Government's preference is, and always has been, a negotiated solution to the problems the operation of the Northern Ireland Protocol (the Protocol) is causing and the Committee will be aware that we are currently engaging in constructive dialogue with the European Union to that end. However, if an agreement cannot be reached, the Bill is the only means that the UK Government has to safeguard the essential interests at stake.

The Bill provides Ministers with the ability to amend the operation of the Protocol in the domestic law of the UK, including where provision of the Protocol does not have effect in the UK. Under the devolution settlements, the UK Government is responsible for international relations, and the Scottish Parliament could not make provision relating to or dealing with the Protocol in the way that the Bill does. However, given the scope of the matters covered by the Protocol the Bill has implications for the competence of the Scottish Government and Parliament, and the Bill includes powers that may also be used to make provision in areas of the Scottish Parliament's legislative competence.

Your report expresses concern about the scope of the delegated powers, and argues they need to be viewed in the wider context of the scope of delegated powers in other Bills related to the UK leaving the EU. I note that you have also written to the Secretary of State for Levelling Up in his capacity as Minister for Intergovernmental Relations, and I submit that he is best placed to respond on these points.

The powers in the Bill are necessary and proportionate, reflecting the urgency and gravity of the situation that we face in Northern Ireland. They provide for flexibility and a range of possible solutions as the situation in Northern Ireland evolves. Given the state of necessity created by the problems with the Protocol, it is essential that we are able to act appropriately, and the breadth of powers is necessary for us to do so. The Bill contains clear restrictions on their use, which must be in connection with a) the Protocol or provision of it which no longer has effect, and b) the specific purposes as set out in the relevant clauses.

The majority of powers provided by the Bill are deliberately drafted, and constrained, by reference to the policy area within the Protocol which they are seeking to deliver differently. For these reasons, the UK Government considers that the powers taken by this Bill are suitably constrained by their function, while ensuring that we are able to fulfil our duties to the people of Northern Ireland.

We will of course consult and work closely with the Scottish Government and the other devolved governments as we make the changes necessary to deliver the new regime.

You asked why the Bill enables UK Ministers to sub-delegate powers to (among others) the Scottish Ministers rather than simply delegating these powers through the Bill. As I said in my response to the DPLRC, the majority of the powers in the Bill either allow for provision to be made exclusively in areas that are not devolved, or a mixture of areas that are devolved and not devolved. The ability to sub-delegate the powers was chosen to ensure that elements of powers can be granted to the Scottish Ministers, and to other devolved ministers, in devolved areas, as appropriate for the specific circumstances of each policy area as it develops.

Your report pointed to concerns that have been raised by the approach taken in the Bill to Scottish Ministers' ability to make provision outside of areas of devolved competence. Like the powers that the Bill provides to UK Government ministers, any power sub-delegated to Scottish Ministers would be restricted to provision that could be made in connection with the provision of the Protocol which is excluded. The Government would expect any sub-delegation to be confined to the specific, and necessarily more narrow, area in which it is deemed appropriate that the Scottish Ministers should be able to make relevant provision in devolved areas.

The reasons for allowing provision to be made to amend Acts of Parliament, make retrospective provision and to make provision which is incompatible with the Protocol have been set out in a number of publications relating to the Bill and to Parliament. If a power is to be sub-delegated to the Scottish Ministers, an assessment will be made at that point as to whether that power should be sub-delegated to the same or any lesser extent.

The report also argued that there is a lack of detail in the Bill regarding the level of scrutiny to be applied to the exercise of sub-delegated powers. As I said in my response to the DPLRC, I can confirm that when UK Ministers are sub-delegating to the Scottish Ministers, we intend to consult the Scottish Ministers to ordinarily determine the Scottish Parliamentary procedure that should apply for such regulations. Whilst I cannot speak for Scottish Ministers in such cases, one would anticipate that they would approach this in consultation with the Scottish Parliament.

The scope of a particular power is clearly a relevant consideration in the exercise of determining the appropriate level of scrutiny which should apply to it. That is why any exercise of the powers by UK government ministers to make provision that is retrospective or which amends an Act of Parliament is subject to the draft affirmative procedure. Similar considerations are likely to be involved if and when any power is sub-delegated.

Finally, the report highlighted concerns about the level of engagement with the Scottish Government concerning the Bill. I can assure the Committee that officials and Ministers have engaged their counterparts in the Scottish Government throughout this process, and continue to do so. FCDO Ministers have discussed the Bill on numerous occasions with Scottish Ministers, including through the Interministerial Group on UK-EU Relations. More recently, on 16 November the Foreign Secretary met with the Cabinet Secretary for the Constitution, External Affairs and Culture, Angus Robertson MSP, and they exchanged views on the way forward on the Protocol. FCDO officials have also engaged regularly with Scottish Government counterparts and continue to make themselves available for in-depth discussions on the Bill.

Yours ever,

A handwritten signature in blue ink, appearing to read 'Leo Docherty', with a large flourish at the end.

**Leo Docherty MP**  
**Minister for Europe**