

Written Evidence to the follow-up inquiry of the House of Lords Sub-Committee on the Protocol on Ireland/Northern Ireland

June 2022

1. CAJ is an independent human rights organisation with cross community membership in Northern Ireland and beyond. It was established in 1981 and lobbies and campaigns on a broad range of human rights issues. CAJ seeks to secure the highest standards in the administration of justice in Northern Ireland by ensuring that the Government complies with its obligations in international human rights law.
2. CAJ was the NGO partner in the BrexitLawNI project with the law schools of Queen's and Ulster Universities considering the constitutional, legal, human rights and equality aspects of Brexit and has continued with a range of interventions since, including an immigration impacts specific project. We gave evidence to their Lordships' introductory inquiry, mainly relating to the Article 2 protections of human rights¹, and we welcome the opportunity to provide written evidence to the Sub-Committee for its follow-up inquiry.²
3. CAJ takes no position on the constitutional position of Northern Ireland, that is, whether it remains as a part of the UK or leaves and joins a united Ireland. However, we have long supported the implementation of the rights and equality provisions of the Belfast/Good Friday Agreement (GFA) as essential safeguards over the exercise of power. It is important to emphasise that the 1998 Agreement, which was agreed by referenda, North and South, includes a binding bilateral treaty³ as well as a multiparty agreement and forms the constitutional and legal framework for Northern Ireland. It also has to be recognised that the Agreement has brought over two decades of relative peace which is the necessary condition for the creation of a human rights-based society.

Government-proposed legislation to unilaterally modify the Protocol

4. The Government has announced that it will bring forward legislation and take powers to unilaterally modify the Protocol.⁴ The Foreign Secretary has stated that the bill would make a number of changes to the checks required on goods moving between Great Britain and Northern Ireland, remove regulatory barriers on goods

¹ Committee on the Administration of Justice (CAJ) – Written evidence (H00018)<https://committees.parliament.uk/writtenevidence/36874/html/>
<https://committees.parliament.uk/work/6568/followup-inquiry-on-the-impact-of-the-protocol-on-irelandnorthern-ireland/>

² Follow-up inquiry on the impact of the Protocol on Ireland/Northern Ireland

³ British Irish Agreement (UK Treaty Series no. 50 Cm 4705)

⁴ HC Official Report, Northern Ireland Protocol, Volume 714: debated on Tuesday 17 May 2022
<https://hansard.parliament.uk/Commons/2022-05-17/debates/E62B3F06-DF87-4F5D-867F-222439FD6FFE/NorthernIrelandProtocol>

produced in Britain and sold in Northern Ireland and give powers to determine the tax and spend policies for all of the UK.⁵

5. The European Union (EU) has said that it would "need to respond with all measures at its disposal" if the UK went ahead with the legislation and commentators have raised the spectre of a trade war between the EU and the UK.⁶ The Protocol is part of an international treaty between the UK and the EU, and a unilateral change would constitute a breach of its provisions. The passage of enabling legislation and, almost certainly actual unilateral change to Protocol provisions, would disrupt negotiations and lead to the breakdown of existing trade arrangements. It is important, therefore, to examine the human rights implications of the various scenarios.
6. The Foreign Secretary Ms Truss also stated the intention was "to protect the Belfast Good Friday Agreement in all its dimensions."⁷ It is worth recalling that the Government itself devised and agreed the Protocol as the mechanism to protect the Good Friday Agreement in all its dimensions but is now entertaining a counter argument that the Protocol itself conflicts with the Agreement. We do not think this position is credible and our broad concern relates to the destabilising effect on the peace and political process that taking such a misleading position is having.

The Protocol does not breach the Good Friday Agreement (GFA)

7. The argument that the Protocol undermines or breaches the GFA comes from two main sources – the DUP, as the main unionist party, and the UK Government itself. The DUP focuses on the Protocol as a threat to the Union and therefore to the "constitutional guarantee" that the Union will remain while a majority in NI support it, which is itself now contained in the GFA and implementing legislation.⁸ Its policy document on the Protocol says:

"The Northern Ireland Protocol has created a border in the Irish Sea.

"The Protocol represents an existential threat to the future of Northern Ireland's place within the Union.

"The longer the Protocol remains, the more it will harm the Union itself.

"The checks on the Irish Sea border are the symptom of the underlying problem, namely, that Northern Ireland is subject to a different set of laws imposed upon us by a foreign entity without any say or vote by any elected representative of the people of Northern Ireland."⁹

8. The seventh and final "test" for the acceptability of any replacement to the Protocol expresses a particular view of the issue of "consent:"

⁵ <https://www.bbc.co.uk/news/uk-politics-61475899>

⁶ <https://www.bbc.co.uk/news/uk-politics-61475899>

⁷ <https://hansard.parliament.uk/Commons/2022-05-17/debates/E62B3F06-DF87-4F5D-867F-222439FD6FFE/NorthernIrelandProtocol>

⁸ <https://www.gov.uk/government/publications/the-belfast-agreement> Constitutional Issues and Northern Ireland Act 1998 Section 1 <https://www.legislation.gov.uk/ukpga/1998/47/section/1>

⁹ <https://mydup.com/policies/remove-ni-protocol>

“Preserve the letter and spirit of Northern Ireland’s constitutional guarantee requiring the consent of a majority of the people of Northern Ireland for any diminution in its status as part of the United Kingdom.”¹⁰

9. The UK Government’s position was expressed by Foreign Secretary, Liz Truss, in a statement to the House of Commons on 17th May.¹¹ She referred to the need for cross-community consent in the following terms:

“... the Northern Ireland Executive has not been fully functioning since early February. This is because the Northern Ireland protocol does not have the support necessary in one part of the community in Northern Ireland.”

10. The Foreign Secretary went on to argue that difficulties with regulatory checks and trade between GB and NI have upset the “balance” of the GFA:

“These practical problems have contributed to the sense that the east-west relationship has been undermined. Without resolving these and other issues, we will not be able to re-establish the Executive and preserve the hard-won progress sustained by the Belfast/Good Friday agreement. We need to restore the balance in the agreement.”¹²

11. There are therefore two basic arguments here, albeit expressed in different language: first, that divergence and a “border” between GB and NI undermines the Union and hence the constitutional guarantee of the Agreement and second, that any agreement on post-Brexit arrangements on this island requires the consent of unionists. The DUP also argues that the divergence between NI and GB has been “imposed by a foreign entity.”

12. To deal first with this “democratic deficit” argument,¹³ the “imposition” in question is by a treaty agreed between the UK and the EU. It is a basic part of the British Constitution that treaty-making is reserved to the UK Government and is out-with devolved competency. However, there are two ways in which the Protocol maintains the operational validity of EU law in Northern Ireland, first, by listing the laws and regulations that need to remain in operation in relation to trade by virtue of Article 3-10¹⁴ and second, through guaranteeing no diminution of the rights and equality provisions of the GFA some of which are protected through EU laws and regulations listed in Annex 1. What regulatory mechanisms are necessary to protect NI’s position in both the EU Single Market and the UK Internal Market may be a matter of legitimate debate. It is, however, a bit of a stretch to argue that maintaining EU law in so far as it upholds the human rights and equality guarantees of the GFA is itself contrary to the Agreement.

13. The DUP has, of course, changed its view on the question of checks at an “Irish sea border.” In March 2020, Sir Jeffrey Donaldson argued that “Customs checks doesn’t

¹⁰ Ibid.

¹¹ <https://hansard.parliament.uk/Commons/2022-05-17/debates/E62B3F06-DF87-4F5D-867F-222439FD6FFE/NorthernIrelandProtocol>

¹² Ibid.

¹³ <https://mydup.com/policies/remove-ni-protocol>

¹⁴ Ireland/Northern Ireland Protocol Annexes 2-5

mean that you change the constitutional status of a part of the United Kingdom.”¹⁵ That underlines that the extent to which the new situation of limited checks on goods at NI ports and airports “undermines the Union” is perhaps as much a matter of perception and interpretation as of fact.

14. Regardless, neither the GFA nor previous arrangements for Northern Ireland have provided for a unitary UK approach. There is and has been significant regulatory divergence across a vast range of policy areas between NI and GB through the existence of Northern Ireland as an entity. The former unionist Government that ran the previous Stormont Parliament until 1972 (prior to UK membership of the EEC then EU) diverged from Great Britain in a broad range of policy areas to the extent of requiring work permits from persons resident in GB to work in NI.¹⁶ During the UK suspension of the Common Travel Area – which lasted well beyond the second world war until 1952, passport checks were in place between NI and GB. More recently (pre-Brexit) livestock checks have also been conducted on such routes. Northern Ireland has remained in the UK throughout. The GFA is not proscriptive about what form the UK should take, save in that it does not provide for a unitary system, devolving a range of powers to the power sharing institutions, and hence providing for regulatory divergence in a range of areas.
15. The actual impact of the Protocol on trade and economic links is contested.¹⁷ This is not to say economic relations have not been altered, but the development that caused disruption of the previous economic relations was Brexit. The Protocol was seen as the necessary means of accommodating NI’s unique geographical, political and economic situation in the new circumstances, particularly to prevent the widespread disruption both economically and to everyday life that a ‘hard border’ on the island would have entailed. In legal and constitutional terms, there can be no doubt that NI remains firmly in the UK – as the scope of this proposed legislation itself demonstrates.
16. Human rights organisations have long pointed to problems of ‘equality and rights’ borders in the Irish sea, in reference to deficits between rights protections in a range of areas. This has included issues recently progressed via Westminster relating to women’s reproductive rights and the minority language rights of the Irish speaking community. While all of these areas are usually transferred matters to the power-sharing institutions, they come within the ambit of Westminster under the terms of the GFA as they engage treaty-based obligations the UK is obliged to implement. Paragraph 33 of Strand 1 of the GFA which sets out the role of Westminster, provides that the UK Parliament will: “legislate as necessary to ensure the United Kingdom’s international obligations are met in respect of Northern Ireland.” It would be remiss not to point out that it is inconsistent with this provision of the GFA for Government to now expressly legislate in a manner incompatible with UK treaty based obligations. This issue also has a bearing on the extent to which there should be legislative consent from the devolved institutions.

¹⁵ <https://twitter.com/bbcspotlightni/status/1234980955825176576>

¹⁶ Safeguarding of Employment Act (NI) (1947). The system also regulated employment from the Republic and was only removed in the context of subsequent EEC membership.

¹⁷ See, for example, BBC Brexit Fact-Checker <https://www.bbc.co.uk/news/61468750>

17. The second main argument, made by the DUP and the Foreign Secretary above, is that any agreement on post-Brexit arrangements on this island requires the consent of unionists as well as nationalists.¹⁸ This is not the case. The principle of “consent” within the Agreement, as set out in Article 1 of the British-Irish Agreement, refers specifically to the provisions determining whether by a simple majority Northern Ireland continues in the Union with Great Britain or joins a sovereign united Ireland. This interpretation has been confirmed by the High Court and Appeal Court in Northern Ireland in the *Allister* case.¹⁹ If, however, the interpretation by the litigants was correct, clearly Brexit would also have required such consent from the people of Northern Ireland, who instead voted to remain in the EU.
18. A further “consent” provision under the Agreement, is in relation to cross community voting and the related ‘Petition of Concern’ mechanism relating to legislation and other matters within the competence of the Northern Ireland Assembly. The Petition of Concern was developed in the context of avoiding a repetition of the past dominance of the main unionist party. Under the Agreement (Strand One), it was provided for as a safeguard to ensure all sections of the community are protected and can participate in the devolved institutions. It was designed to ensure conformity with equality requirements and specifically the European Convention on Human Rights (ECHR) and the proposed Northern Ireland Bill of Rights. The Petition was to trigger the establishment of a Special Procedure Committee with powers to “examine and report” as to whether a “measure or proposal” is in conformity with equality requirements including the ECHR/Bill of Rights. The provision was then linked to cross-community voting (either as parallel consent or weighted majority).
19. The failure to implement the Petition of Concern as the Agreement envisaged, especially the failure to convene the Special Procedure Committee, and its consequent use as a political veto, was one of the factors that has led to continuing instability in the institutions. The misuse of the Petition of Concern became a significant focus of the New Decade New Approach reforms, and its use has largely become politically untenable. Further instability has been created in the most recent mandate by the use of other mechanisms as a political veto, in a way not anticipated by the GFA, to an extent that has threatened the functioning of the institutions.²⁰
20. In relation to legislation and measures of the Assembly the above mechanisms on the Petition of Concern and cross community voting apply to matters within the legislative competence of the Assembly. Both Brexit and by extension the Protocol did engage devolved powers. The triggering of Brexit was not an international obligation and the legislative consent of the Assembly should have been sought.

¹⁸ See paras 8 and 9 above.

¹⁹ <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKewiNz-Hxsoz4AhUWSMAKHYZJDwcQFnoECAMQAQ&url=https%3A%2F%2Fwww.judiciaryni.uk%2Fsites%2Fjudiciary%2Ffiles%2Fdecisions%2FSummary%2520of%2520judgment%2520-%2520In%2520re%2520Jim%2520Allister%2520and%2520others%2520%2528EU%2520Exit%2529%2520-%2520CA%2520-%25201403222.pdf&usg=AOvVaw1pbxIPsqxQeVwLurr6HEX1>

²⁰ For further information see Written Evidence from CAJ to the [Northern Ireland \(Ministers, Elections and Petitions of Concern\) Bill](#)

Government did not do this. However, the Protocol, once incorporated into a treaty, does engage international obligations and so the legislation to give it effect in domestic law was passed by the UK Parliament.

21. The UK Government appears to be now proposing a precedent not contained in the GFA whereby a new veto is vested in unionist and (in theory) nationalist parties over international obligations entered into by the UK in a treaty. There was no cross-community nor simple majority consent for any form of Brexit; this approach is therefore selective and based apparently on political expediency.
22. The Protocol itself, of course, contains a novel “consent” mechanism. In Article 18 of the Protocol itself and in the attached Unilateral Declaration by the UK, provision is made for a vote in the Assembly after 4 years of operation on an affirmative motion to continue the operation of Articles 5 to 10.²¹ In accordance with paragraph 3(b) of the UK declaration the Assembly is deemed to have consented to the continuation of the Protocol on the basis of a simple majority of MLAs present and voting. In this instance a further vote will be held in four years’ time. If the simple majority vote does not have cross-community support, then the UK is to commission an independent review on the Protocol over the two years following the vote and make recommendations on new arrangements it believes could command cross community support.
23. Government now appears to be abandoning this approach shortly after an Assembly election – leaving it open to charges of trying to change the rules on the back of the results of that election where a majority of MLAs supported the Protocol. It bears emphasis that the failure to comply with Agreements entered into, the misrepresentation of the GFA and attempts to move the goal posts is having a profoundly destabilising effect on the political process and trust in Northern Ireland.

The Protocol is necessary to protect the Good Friday Agreement

24. The Protocol was designed specifically to avoid a hard border on the island of Ireland. The Preamble states: “RECALLING the commitment of the United Kingdom to protect North-South cooperation and its guarantee of avoiding a hard border, including any physical infrastructure or related checks and controls...” The only mechanism that has been found to avoid a hard border as a consequence of the particularly “hard” Brexit which was chosen is the Protocol.
25. A hard border would have been, and still could be, disastrous. The border during the troubles, with its cratered roads, destroyed bridges, watchtowers on every hill and lengthy checks on travellers, marked both the symbol and the reality of conflict. The normalisation provisions in the implementation agreements of the GFA committed to the dismantlement of border infrastructure. Today, there are 200 approved border crossings - notably more than the 137 crossings on the EU’s eastern frontier – there are an estimated 110 million annual person movements across the border in total and there are up to 30,000 border workers (living in one jurisdiction and

²¹ [Declaration by Her Majesty’s Government of the United Kingdom of Great Britain and Northern Ireland concerning the operation of the ‘Democratic consent in Northern Ireland’ provision of the Protocol on Ireland/Northern Ireland.](#)

working in the other).²² The free movement of vehicles and people across an invisible frontier, marks the symbol and reality of peace. Restoration of any kind of controls on the land border would be highly disruptive to everyday life, economic life and north south cooperation.

26. The Protocol, expressed in UK-EU treaty and domestic legislation, was explicitly designed to avoid that result. More than half of the paragraphs of the explanatory preamble deal with matters such as avoiding a hard border (as above), stressing the importance of North-South cooperation, the all-island character of the peace process and the importance of maintaining the integrity of the Good Friday Agreement. It therefore creates a special regulatory regime for Northern Ireland which allows it to be part both of the EU Single Market and the UK customs area. It also provides for no diminution in the human rights and equality provisions of the Agreement and for the continued application in the North of key EU equality laws and directives.
27. In contrast, the regulation of trade required by the Protocol takes place in selected ports and airports and is invisible to most travellers; there is no disruption to daily life and no threat to the economy. Indeed, wide sectors of industry are starting to appreciate the opportunity in being part of both the EU and the UK economies.²³ It is incumbent upon anyone who wishes to abolish or radically change the Protocol to put forward a viable alternative. We are not aware of any such proposition.

The Protocol protects human rights

28. Article 2 (1) reads:

“The United Kingdom shall ensure that no diminution of rights, safeguards or equality of opportunity, as set out in that part of the 1998 Agreement entitled Rights, Safeguards and Equality of Opportunity results from its withdrawal from the Union, including in the area of protection against discrimination, as enshrined in the provisions of Union law listed in Annex 1 to this Protocol, and shall implement this paragraph through dedicated mechanisms.”

29. This is a valuable commitment and the Human Rights and Equality Commissions involved in the “dedicated mechanisms” have started their work. In our previous evidence to the Committee, we drew attention to a number of issues that we believed engaged Article 2 and we have continued to work with the Commissions in relation to them. The Commissions have confirmed conflict with the Protocol has arisen in relation to UK legislation to establish requirements for Electronic Travel Authorisation (ETA), insofar as it relates to the land border; and the removal of the vote in local elections from (non-Irish) EU citizens present after the transition period. We have been disappointed at a regressive interpretation of the scope of Article 2 by

²² NI Affairs Committee Report The land border between Northern Ireland and Ireland paras 5 – 8 <https://old.parliament.uk/business/committees/committees-a-z/commons-select/northern-ireland-affairs-committee/publications/?type=&session=29&sort=false&inquiry=3512>

²³ See, for example, views of the Director of the CBI: <https://www.bbc.co.uk/news/uk-northern-ireland-61585660>

Government on these issues, which is at odds with the positions of the dedicated mechanisms and authoritative academic analysis.²⁴

Unilateral amendment of the Protocol would breach international law

30. The UK is bound by international law to implement the Protocol in good faith and in its entirety.²⁵ The status of the Protocol in domestic law is highly complex, relating at least to the European Union Withdrawal Acts 2018 and 2020 and the Northern Ireland Act 1998. However, while the sovereignty of Parliament means that any legislation can be amended on the domestic front, the international obligation remains.
31. A willingness to breach international law on the part of the Government reduces trust in the good faith of political leaders and undermines faith in the rule of law. Human rights, which are one of the mainstays of the peace process and form the infrastructure of the GFA, depend on state adhering to the international rule of law. Unfortunately, this current government has shown itself willing to ignore or undermine its international obligations. The proposal for a “British Bill of Rights” weakens the impact of European Court of Human Rights jurisprudence, thus materially weakening the GFA commitment to full incorporation of the ECHR. The Covert Human Intelligence Sources (Criminal Conduct) Act 2021 allows the intelligence and security agencies, as well as other authorities, to authorise criminal conduct by agents without any limit. It reverses the reforms of the NI peace process by bypassing the independent role of the prosecution service in relation to criminal offences committed by informants, instead rendering such crimes “lawful for all purposes.” Successive UK Governments have also shown a lack of respect for the European Court of Human Rights in refusing to implement its judgments relating to the legacy of the conflict in Northern Ireland since 2001. The now published Northern Ireland Troubles (Legacy and Reconciliation) (NITLR) Bill is in clear breach of the investigative obligations under the ECHR, offers near-unconditional immunity to perpetrators and cuts off any access to processes of law. In this context, breaking international law in relation to the Protocol will further reduce faith in the Government’s bona fides.
32. In conclusion, CAJ believes that the Protocol is no threat to the Good Friday Agreement, to the contrary protects it and is a necessary response to Brexit in the particular circumstances of Northern Ireland. The proposal to unilaterally modify an international treaty breaches international law and further undermines confidence in the rule of law.

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²⁴ The Law and Practice of the Ireland-Northern Ireland Protocol. Ed Christopher McCrudden. Cambridge University Press. Available from:

<https://www.cambridge.org/core/product/477EADD294944829F5B6CC71D928DF8D>

²⁵ Vienna Convention on the Law of Treaties (VCLT), Article 26