

Equality Commission

FOR NORTHERN IRELAND

Legislative Scrutiny and the Dedicated Mechanism for monitoring Article 2 of the Ireland/Northern Ireland Protocol

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This report was commissioned by the Equality Commission for Northern Ireland (ECNI) further to its role, with the NI Human Rights Commission, as the dedicated mechanism under Article 2(1) of the Protocol.

It was written by Paul Evans, Alexander Horne and Tasneem Ghazi. The views in this report are those of the authors and do not necessarily represent those of the ECNI.

Responsibility for any statements, errors or omissions in this report rests with the authors.

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Executive Summary

The Ireland/Northern Ireland Protocol

The Protocol on Ireland/Northern Ireland forms an integral part of the UK's Withdrawal Agreement with the European Union. Article 2 of the Protocol, headed "Rights of individuals", deals with the UK's undertakings to ensure "no diminution of rights, safeguards and equality of opportunity", as set out in Section 6 of the 1998 Belfast/Good Friday Agreement (the 1998 Agreement), including with respect to six EU Directives which are listed in Annex 1 to the Protocol.

The Dedicated Mechanism

Article 2(1) of the Protocol provides that the commitments will be implemented by the establishment of 'dedicated mechanisms'. Paragraph 2 of Article 2 states:

"The United Kingdom shall continue to facilitate the related work of the institutions and bodies set up pursuant to the 1998 Agreement, including the Northern Ireland Human Rights Commission, the Equality Commission for Northern Ireland and the Joint Committee of representatives of the Human Rights Commissions of Northern Ireland and Ireland, in upholding human rights and equality standards."

Section 23 of the European Union (Withdrawal Agreement) Act 2020 provided for the detailed implementation of Article 2(1) of the Protocol via Schedule 3. Amendments to the Northern Ireland Act 1998 are provided for in Schedule 3 of the 2020 Act: these give new functions

to the Northern Ireland Human Rights Commission and the Equality Commission, so that they take on the role of what has become the Dedicated Mechanism.

This report is designed to analyse current structures and identify recommendations for reform of UK Parliament and NI Assembly mechanisms and processes so as to ensure that there can be effective scrutiny of the UK Government's compliance with its commitment under Article 2(1) of the Protocol, particularly with regard to the Dedicated Mechanism's relationships with various scrutiny committees in Westminster and Stormont.



The obligations under the Protocol

The obligations under Article 2 of the Protocol are unique. They engage with both domestic legislation made at Westminster and in the Northern Ireland Assembly and incoming EU law. The requirement for non-diminution does not generally evolve – the requirement to keep pace with some EU changes evolves depending on actions of the EU.

The report identifies three strands of legislation that the dedicated mechanism will need to monitor as part of its duties under sections 74A to 74E of the Northern Ireland Act 1998. These are:

- **UK and Northern Ireland primary legislation;**
- **UK and Northern Ireland secondary (or delegated) legislation; and**
- **EU legislation.**

In all these flow in five streams: UK Bills, NI Bills, UK Statutory Instruments, NI Statutory Rules and EU draft legislation. The volume of material is very large. The Dedicated Mechanism will need to take a selective approach to its monitoring duties.

The high-level requirements for the policing of the “no diminution” obligation under the Protocol are relatively straightforward. All domestic legislation falls within its ambit, including primary or secondary legislation, whether specific to Northern Ireland or applying to the UK as a whole.

The scrutiny of the “keeping pace” requirement presents a less clear-cut task.

Lines of accountability

Many bodies may be responsible for these different strands and streams, and there is no clear line of responsibility for the co-ordinating this work within Westminster or the Northern Ireland Assembly.

Given the current lack of certainty about the volume of work involved, the government’s reluctance to engage on the precise mechanisms for post-Brexit scrutiny, and the fact that the potential workstreams come in such diffuse strands, it seems unlikely that a single new committee could be established in either Westminster or Stormont to undertake this work. We do not believe this is an ambition worth pursuing. There will, however, need to be some way of co-ordinating the work of the several different committees which may be engaged.

The Dedicated Mechanism will therefore need to perform the co-ordinating function to inform both the UK Parliament and the Northern Ireland Assembly of any initiatives or proposals of concern. In order to do this, it will need to take primary responsibility for the underlying work, bringing particular issues to the attention of the relevant select committees and coming to arrangements to ensure that any such work that is produced is then taken into account as part of those committees’ day-to-day workstreams.

The Dedicated Mechanism will have to develop strong contacts with a number of committees in Westminster and Stormont. Given the specialist knowledge that will be required to conduct this type of scrutiny, it will clearly require access to adequate resources as well as clear information sharing protocols with the UK Government, Northern Ireland Executive and, potentially, the European Commission.

Information exchange

Memorandums of understanding will have to be agreed with relevant parliamentary committees in both Westminster and Stormont to ensure that the information traffic is two-way. The Dedicated Mechanism should be able to rely on these committees to draw its attention to potential areas of concern noted during their routine, staff-level scrutiny, as well as to ensure that issues raised by the Dedicated Mechanism are taken into account and that parliamentarians are alerted to any significant issues.

However, we expect that scrutiny of compliance with Article 2 of the Protocol by committees of Parliament is likely to be selective rather than comprehensive. Thus, any new obligations will need to have regard to the fact that the time and attention of elected and appointed Members of all three chambers is a scarce commodity.

The UK Government has expressed and reinforced its commitment to observing the obligations put in place by Article 2 of the Protocol. It should provide explanatory memoranda for any measures which it believes will engage the terms of Article 2(1), whether

they be UK or EU proposals. The detailed information sharing provisions contained in Article 15 of the Protocol present a clear opportunity for relevant issues to be identified. Any such issues should be brought to the attention of the Dedicated Mechanism at the earliest opportunity, to enable it to report to committees in Stormont and Westminster.

The committees at Westminster

As regards the “no diminution” requirement and scrutiny of primary legislation at Westminster, we recommend that the Dedicated Mechanism work principally through the select committees that feed into this process indirectly: the Joint Committee on Human Rights and the Lords Sub-Committee on the Ireland/Northern Ireland Protocol. Other committees may sometimes be fruitfully included.

In respect of the “no diminution” requirement and scrutiny of secondary legislation at Westminster, the Dedicated Mechanism’s principal interlocutor will be the Joint Committee on Statutory Instruments. Other committees may sometimes be appropriate channels of influence – in particular, the Lords’ Secondary Legislation Scrutiny Committee.

With regard to the “keeping pace” requirement, the main focus of the Dedicated Mechanism at Westminster should be on the Commons European Scrutiny Committee and the Lords European Affairs Committee and its Sub-Committee on the Protocol.

We do not recommend any changes to standing orders or committee structures at Westminster. Given the breadth of

types of legislation requiring scrutiny for Article 2 compliance, it would be disproportionate and inefficient to try and design a committee structure around them.

The Dedicated Mechanism should liaise with the relevant parliamentary committees to ensure that the Explanatory Memoranda and other associated material provided by the Government on proposed legislation make specific reference to the obligations under Article 2 of the Protocol, where this is relevant. This will be especially important in respect of the freestanding human rights memoranda provided to the Joint Committee on Human Rights and the Explanatory Memoranda provided to the Commons European Scrutiny Committee and the House of Lords European Affairs Committee.

The committees of the Assembly

The situation in the Northern Ireland Assembly differs in a number of respects.

So far as primary legislation is concerned, there are a significant number of safeguards against a breach of the Article 2 obligations already present both in the Northern Ireland Act 1998 (as amended) and in the standing orders of the Assembly. Most relevant are those provisions designed to guard against the Assembly legislating outwith its legislative competence. Section 6(2)(ca) of the 1998 Act, as amended by Schedule 3 to the European Union (Withdrawal Agreement) Act 2020, makes it clear that legislation created by the Assembly in contradiction to the Article 2 obligations would be outside its competence.

Nonetheless, the Dedicated Mechanism has a duty to alert the Assembly to any potential breach of this statutory prohibition. Accordingly, we recommend that Standing Order 30(6) of the Assembly should be amended to require the Speaker to transmit a copy of every bill presented to the Equality Commission for Northern Ireland in addition to the Northern Ireland Human Rights Commission. We also recommend that either Standing Order 34 and 35 are amended and consolidated to include reference to the Article 2(1) obligations, or that a new standing order is created to allow for a motion to refer any proposed legislation to the Dedicated Mechanism for analysis and opinion. Standing Order 60 should also be amended consequentially.



We further recommend that the list of topics to be covered in the Explanatory and Financial Memoranda accompanying bills introduced into the Assembly are expanded to include a requirement to explain what consideration has been given to Article 2 matters in the drafting of the proposed legislation.

We also recommend that the Dedicated Mechanism seeks agreement with Northern Ireland Departments to include the Dedicated Mechanism when considering any such proposed provisions during the pre-legislative stage.

Secondary legislation in the Assembly

Section 24(1)(aa) of the Northern Ireland Act 1998 places a similar interdiction on Northern Ireland Ministers in relation to the making of secondary legislation. The test set out in sub-paragraph (6)(f) of Standing Order 43 of the Assembly for the examination of Statutory Rules requires the Examiner of Statutory Rules to advise the committees with which they work as to whether any proposed Statutory Rule is *intra vires*. In the light of section 24(1)(aa) of the 1998 Act, the committees charged with examining Rules should interpret this to mean that a provision in conflict with Article 2(1) of the Protocol was *ultra vires* and report accordingly. We therefore recommend that the Dedicated Mechanism and the Examiner of Statutory Rules should have a protocol or memorandum of understanding in place to ensure dialogue between them on Article 2 issues during the examination of Statutory Rules.

In Westminster there is scope for a number of committees to take a proactive rather than purely reactive interest in the operation of the Protocol. In the Northern Ireland Assembly, we have identified only one relevant scrutiny committee which might currently seek to oversee scrutiny of this topic more broadly (rather than in the context of a specific legislative proposal). This is the Committee for the Executive Office. While there may well be a question as to whether the Committee is equipped with sufficient specialist support or sufficient time (given its many responsibilities) or the political will to shoulder this burden, continued dialogue between the Dedicated Mechanism and the Committee for the Executive Office will be essential.

Principal conclusions and recommendations

The following is a summary of our main conclusions and recommendations:

1. This report highlights the atypical nature of obligations under Article 2 of the Protocol. It engages with five different streams of legislation: primary and secondary legislation created in Westminster and Stormont and incoming EU law;
2. Although the requirements for policing “no diminution” and “keeping pace” seem straightforward, the sheer volume and complexity of legislation have made the task insurmountable for any one committee to undertake. Several existing committees in Westminster and Stormont have some claim to a stake in this task.

The overlap between different committees creates another challenge: the need to ensure that nothing slips through the cracks;

3. We do not consider that it is desirable or feasible for any one committee to undertake this task singlehandedly;
 4. The Dedicated Mechanism has a vital function: first, in assuming primary responsibility for the underlying work; and second, in co-ordinating between the UK Parliament and the Northern Ireland Assembly on several levels. This includes coming to arrangements that suit the relevant committees (having regard to their other workstreams) and notifying either body of any relevant initiatives or proposals;
 5. The Dedicated Mechanism requires strong contacts with the relevant Committees in Westminster and the Assembly, adequate resources and clear information sharing protocols between the involved parties. A strong system of communication can be ensured through Memorandums of Understanding between the relevant parliamentary committees which are discussed in separate sections of this report. The Dedicated Mechanism should be able to rely on committees to draw its attention to issues of concern which arise during their scrutiny work. In turn, the Dedicated Mechanism needs to be sufficiently resourced to be able to alert those committees to matters of concern and to be assured that its warnings will be taken seriously;
 6. We expect these committees to undertake selective rather than comprehensive scrutiny. The Dedicated Mechanism can help ensure the focus of committees is directed where it most matters;
 7. For the Dedicated Mechanism to fulfil its role, it must be given adequate information surrounding the compatibility of any new legislation or proposals with Article 2 of the Protocol. We believe that the UK Government should provide adequate, or better detailed, explanatory memoranda for any measures likely to engage Article 2(1) of the Protocol. The committees, in their turn, should ensure that this information is available to civil society organisations at as early a stage as possible to enable them to engage fully and fruitfully in the scrutiny process – and engagement that the committees are already well practised at encouraging;
 8. To support our general recommendations on scrutiny arrangements in Northern Ireland, we propose five procedural reforms. These reforms will allow various institutions in Stormont to assume political responsibility for the enforcement of the Protocol. Specifically:
 9. All the organisations which comprise the Dedicated Mechanism must be provided with the necessary information to provide timely advice on the conformity of any proposed legislation with the requirements of Article 2. Standing Order 30(6) should be amended to create such requirements.
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10. A new process is needed so that any reports offering advice on the conformity of proposed legislation with the requirements of Article 2 by the Dedicated Mechanism are considered by the Executive and Assembly. Either Standing Order 34 or 35 should be amended to ensure this.
11. The explanatory memoranda accompanying legislation in Northern Ireland must address equality and human rights issues, and specifically, the obligation to ensure the “non-diminution” of rights under the Protocol. Standing Order 41 should be amended to add this requirement to the existing list of tests.
12. Standing Order 60, relating to Ad Hoc Committees on Conformity with Equality Requirements, should be amended to include in paragraph (1) a reference to conformity with Article 2(1) obligations.
13. A memorandum of understanding between the Dedicated Mechanism and the Examiner of Statutory Rules should be created to ensure dialogue on Article 2 issues (and when the changes to the rules are being made).
14. We also recommend that the Assembly considers whether it would be expedient for it to establish a specialist committee focused on human rights and equality. Were it to do so, such a committee could take on the co-ordinating role in relation to Article 2 scrutiny which may otherwise not be readily allocated within the Assembly’s current committee structure;
15. We anticipate that the Dedicated Mechanism will still need to occasionally engage with the broader context in which Article 2 is operating. It will be useful for the Dedicated Mechanism to maintain close contact with the Northern Ireland Affairs Committee in the House of Commons; this committee has a specific interest in the wider political context; and
16. To deliver on its task, the Dedicated Mechanism will need additional resources, which it has already been promised. It will need to work with staff of committees of Parliament and the Assembly to ensure that there is no unnecessary duplication of tasks. The additional resources it has acquired will need to be sustained for as long as its task persists.

Overall task

The role of the Dedicated Mechanism is to advise and warn before legislation is made and to enforce if necessary after it has been made. Good legislative scrutiny will minimise the need for enforcement action by ensuring that so far as possible laws that are made are in conformity with Article 2 obligations. But the aim of scrutiny is to reduce the risk of conflict with the obligations of Article 2; it cannot guarantee that a breach will never occur. Scrutiny should be proportionate to the aim of reducing the risk of a breach to the minimum achievable level.

Introduction

This report has been commissioned by the Equality Commission for Northern Ireland. The purpose of the report is to make proposals for an effective (and politically achievable) mechanism for ensuring that the procedures of the two Houses of Parliament and the Northern Ireland Assembly enable those bodies to legislate with a high degree of confidence and that there is no risk of any breach of the UK Government's obligations under Article 2(1) of the Ireland/Northern Ireland Protocol to the Agreement between the UK and the EU on the terms of their legal relationship following the UK's withdrawal from the European Union.

Article 2(1) of the Protocol requires the UK to ensure that there is "no diminution of rights, safeguards or equality of opportunity, as set out in that part of the [Good Friday or Belfast Agreement 1998] entitled Rights, Safeguards and Equality of Opportunity."

The UK Parliament has passed legislation to provide for the existing human rights and equality bodies - namely the Equality Commission for Northern Ireland (ECNI) and the Northern Ireland Human Rights Commission (NIHRC) to form part of a Dedicated Mechanism envisaged in Article 2(1) of the Protocol. That Mechanism will oversee the status of the rights, safeguards and equality of opportunity protections covered by

Article 2(1).¹ The two Commissions may work together with the Irish Human Rights and Equality Commission on rights and equalities issues falling within the scope of the commitment under Article 2 that have an island of Ireland dimension.² Responsibilities will include dedicated monitoring, advising, reporting and enforcement activities.

The onus for compliance lies primarily with the UK Government and (where appropriate) the Northern Ireland Executive. The recommendations in this report are not directed at ensuring compliance mechanisms within those governments, but rather with enabling the legislatures to check that compliance has been respected in any legislation which they are required to approve, be this primary or secondary legislation. Ultimately decisions on compliance will be a matter for the courts if a challenge arises: mechanisms for scrutiny can in general only be preventative rather than remedial.

The report will consider both the need to examine new legislation emerging from the EU and its implications for domestic legislation to "keep pace", at least in Northern Ireland, with certain rights and safeguards enjoyed by EU citizens. This will be additional to the requirement to examine proposed domestic legislation for any conflict within the terms of Article 2(1).

The analysis of various scrutiny models in this report is based on qualitative analysis in the academic and parliamentary literature. These studies

1 European Union (Withdrawal Agreement) Act 2020, Sch 3 and UK Government, '[Protocol on Ireland/Northern Ireland: Article 2](#)' (7 August 2020), para 17.

2 UK Government, '[Protocol on Ireland/Northern Ireland: Article 2](#)' (7 August 2020), para 19.

are informed by the extensive hands-on experience of the authors who operated many of these systems. Additionally, the authors have conducted confidential interviews with parliamentarians and parliamentary officials of the relevant committees in Westminster and the Northern Ireland Assembly.

The report provides a critical evaluation of practices and methods in several scrutiny models and proposes ways in which the Dedicated Mechanism can most effectively discharge its duty to ensure compliance with Article 2(1) of the Protocol. These proposals include optional elements, some of which we judge to be more politically achievable than others. These proposals also take into account the limitations of different types of parliamentary scrutiny, and the context and reception of the Northern Ireland Protocol.

In reaching its conclusions, the report will describe and analyse the existing models of scrutiny in the two Houses of Parliament which have relevance to legislative scrutiny, pre-legislative scrutiny and quasi-legislative scrutiny, drawing in particular on the work of the Joint Committee on Human Rights, the committees of both Houses dealing with different categories of delegated legislation, methods formerly and currently used for scrutinising EU legislative proposals, and the newly established mechanism for the scrutiny of international agreements. In addition, it will consider the existing scrutiny models in the Northern Ireland Assembly.

Finally, it will assess the mechanisms established by the Withdrawal Agreement itself, including the Joint

Committee, the relevant specialised committee and the Joint Consultative Working Group.

While we do not make any specific recommendations in respect of stakeholder engagement, it is expected that, in circumstances where high quality scrutiny takes place, the provision of information to the Dedicated Mechanism, the UK Parliament and the Northern Ireland Assembly will ensure that issues relating to the compliance with Article 2 of the Protocol will have increased visibility. This should allow NGOs and other bodies with an interest in these matters to engage effectively with each body in the same way as they would with other types of legislative scrutiny. The key will be for the relevant committees to ensure timely information is available to these civil society stakeholders.

The authors would like to thank those individuals who spoke to us about the operation of the current scrutiny systems in the Westminster Parliament and the Northern Ireland Assembly. This report could not have been compiled without their invaluable assistance.

*London and Crickhowell
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Chapter 1: The Protocol and its purpose



Introduction:

The Withdrawal Agreement with the European Union

The Protocol on Ireland/Northern Ireland forms an integral part of the UK's Withdrawal Agreement with the European Union. Following the failure of the Theresa May administration to gain parliamentary consent to the deal that she negotiated with the EU, a revised Withdrawal Agreement was negotiated by the Johnson Government. The Ireland/Northern Ireland Protocol contained in the revised Withdrawal Agreement was one of its more contentious provisions and was significantly re-drafted following the formation of the Johnson Government at Westminster, after the Prime Minister held direct, bilateral, talks with the then Taoiseach, Leo Varadkar, in October 2019.

The revised Agreement, and the accompanying Political Declaration setting out the framework for future UK-EU relations, was first presented to the UK Parliament on 19 October 2019. In the light of continued parliamentary deadlock, an election was agreed via the Early Parliamentary General Election Act 2019. The election was held on 12 December 2019 and resulted in the Conservative Party receiving a significant majority of 80 seats. The revised Withdrawal Agreement was revived following the General Election. It was implemented in UK domestic law by the European Union (Withdrawal Agreement) Act 2020 and subsequently ratified by the UK and the EU.

While much of the interest in the Protocol has focused on the trade

related provisions, it is a much wider ranging document which seeks to ensure respect for the “essential state functions and territorial integrity of the United Kingdom”; recognition that any change to the status of Northern Ireland can “only be made with the consent of a majority of its peoples”; and reference to the “unique circumstances on the island of Ireland”. It covers a variety of issues including rights and the Common Travel Area.

Article 15 of the Protocol establishes a Joint Consultative Working Group composed of representatives of the EU and the United Kingdom, which is designed to “serve as a forum for the exchange of information and mutual consultation.”³ The Article contains specific information, sharing obligations to ensure that the EU provides the UK with timely information about acts within the scope the Protocol (including EU acts that amend or replace the acts listed in the Annexes to the Protocol).⁴

Article 2 of the Protocol: Rights of individuals

The inclusion of Article 2 of the Protocol stems from the December 2017 UK-EU Joint Report.⁵ In that document, the UK committed “to ensuring that no diminution of rights is caused by its departure from the European Union, including in the area of protection

³ Article 15(1) of the Protocol.

⁴ Article 15(3) of the Protocol.

⁵ Joint report on progress during phase 1 of negotiations under Article 50 TEU on the UK's orderly withdrawal from the EU, December 2017.



against forms of discrimination enshrined in EU law”. The UK also committed to “facilitating the related work of the institutions and bodies, established by the Belfast/Good Friday Agreement 1998, in upholding human rights and equality standards”.

Accordingly, paragraph (1) of Article 2 of the Protocol, headed “Rights of individuals”, deals with the UK’s undertakings to ensure “no diminution of rights, safeguards and equality of opportunity”, as set out in Section 6 of the 1998 Belfast/Good Friday Agreement, including with respect to six EU Directives listed in Annex 1 to the Protocol.⁶

The UK also undertakes to “continue to facilitate” the work of the bodies created by the 1998 Agreement “in upholding human rights and equality standards”. These include the Northern Ireland Human Rights Commission, the Equality Commission for Northern Ireland as well as the Joint Committee of representatives of the Human Rights Commissions of Northern Ireland and Ireland.

The text of Article 2 is identical to the parallel provision in the version which had previously been agreed by the May administration in November 2018. While many of the trade related provisions⁷ were made the subject of a new “consent mechanism” (under Article 18 of the Protocol), under which the Northern Ireland Assembly could withdraw its consent to those provisions, Article 2 would remain in force even in circumstances where the Assembly voted to discontinue the trade aspects of the Protocol in or after 2024.

This additional protection for rights, safeguards and equality of opportunity enjoyed by citizens of Northern Ireland was welcomed by the House of Lords European Union Committee in its report on the Revised Withdrawal Agreement and Political Declaration.⁸

6 These are: Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services; Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation; Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin; Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation; Directive 2010/41/EU of the European Parliament and of the Council of 7 July 2010 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Council Directive 86/613/EEC; and Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security.

7 Articles 5-10 of the Protocol.

8 House of Lords European Union Committee, *Brexit: the revised Withdrawal Agreement and Political Declaration*, (1st Report, 2019-21) HL 4, para 125.

The Commitments in Practice: no diminution and keeping pace

On 7 August 2020, the UK Government published a detailed document relating to the provisions of Article 2 which it called an “Explainer”.⁹ It set out the Government’s views on a number of important issues, including: what the commitment to “no diminution of rights, safeguards and equality of opportunity” means; who is covered by the commitment; which rights are in scope and what will amount to a breach; how the UK Government is implementing the commitment; and what remedies will be available should a breach occur. Notably, the Government made clear that “[o]ur international obligations under the Withdrawal Agreement became UK domestic law when Parliament passed the EU (Withdrawal Agreement) Act 2020 in January 2020.”¹⁰

The Explainer sets out the twin obligations which exist under Article 2(1). The first is that the UK Government must “ensure that the protections currently in place in Northern Ireland for the rights, safeguards and equality of opportunity provisions set out in the relevant chapter of the Agreement are not diminished as a result of the UK leaving the EU.”

However, the Explainer acknowledges that the commitment to no-diminution of rights has “a future-facing element.” In practice, this means that:

“Any relevant new protections implemented in domestic law in Northern Ireland between now and the end of the transition period will also fall within the scope of the ‘no diminution’ commitment. In addition, in the event that certain provisions of EU law setting out minimum standards of protection from discrimination - those listed in Annex 1 to the Protocol - are updated or replaced by the EU, relevant domestic law in Northern Ireland will be amended, as necessary, to reflect any substantive enhancements to those protections.”¹¹

This future facing commitment applies only to the Directives set out in Annex 1 to the Protocol and not to other existing EU Directives that provide rights for equality, or future EU equality related Directives that may be introduced (save to the extent that they might result in changes to the Directives included in Annex 1).

The Explainer also sets out the scope of the rights which are protected under Article 2(1) to the Protocol and acknowledges that these go further than the provisions set out in Annex 1. They include rights which have been implemented in ‘retained EU law’ - via the EU (Withdrawal) Act 2018 - or rights contained in domestic law in Northern Ireland. These include, but are not limited to, the Victims’ Directive, the Parental Leave Directive and the

⁹ UK Government, [‘Protocol on Ireland/Northern Ireland: Article 2’](#) (7 August 2020).

¹⁰ Ibid.

¹¹ Ibid.

Pregnant Workers' Directive, as well as specific measures aimed at protecting the rights of persons with disabilities. They cover certain EU underlying rights and principles incorporated into our domestic legal regime by the EU (Withdrawal) Act 2018.¹² Accordingly, the Explainer states that, while the 2018 Act did not preserve the EU Charter of Fundamental Rights, as a result of these provisions:

"[W]here the rights and principles underpinning the Charter exist elsewhere in directly applicable EU law, or EU law which has been implemented in domestic law, or retained EU case law, that law will continue to be operational. In addition, the Act requires our domestic courts to interpret retained EU law that has not been modified in accordance with the general principles of EU law as those principles existed immediately before the end of the transition period."¹³

In a recent exchange of correspondence between the European Scrutiny Committee of the House of Commons and the Northern Ireland Office, the Committee asked about the continuing status of the Explainer and whether it still represented the government's position on the scope of the Article 2 commitment. The Minister responded that:

"The explainer sets out the Government's position on the scope of Article 2(1) commitment."¹⁴

The Dedicated Mechanism

The commitment set out above will be implemented by the establishment of a 'dedicated mechanism' provided for by Article 2(1) of the Protocol. Paragraph 2 of Article 2 states:

"The United Kingdom shall continue to facilitate the related work of the institutions and bodies set up pursuant to the 1998 Agreement, including the Northern Ireland Human Rights Commission, the Equality Commission for Northern Ireland and the Joint Committee of representatives of the Human Rights Commissions of Northern Ireland and Ireland, in upholding human rights and equality standards."

This is viewed by the UK Government as a "framework for ensuring compliance with the commitment, comprising dedicated monitoring, advising, reporting and enforcement activities".

The Explainer indicated that the Government had designated the existing human rights and equality bodies – namely the Equality Commission for Northern Ireland (ECNI) and the Northern Ireland Human Rights Commission (NIHRC) to "oversee the status of the rights, safeguards and equality of opportunity protections covered by the relevant chapter of the Agreement".¹⁵

¹² See, for example, the European Union (Withdrawal) Act 2018, section 5(4) and 5(5) and Schedule 1.

¹³ UK Government, 'Protocol on Ireland/Northern Ireland: Article 2' (7 August 2020).

¹⁴ Correspondence from the Northern Ireland Office 15072021 - European Scrutiny Committee (cabinetoffice.gov.uk).

¹⁵ UK Government, 'Protocol on Ireland/Northern Ireland: Article 2' (7 August 2020).

The Explainer highlights the fact that the rights contained in Article 2(1) will be protected by the UK's domestic courts, rather than the Court of Justice of the European Union. It states that:

“We do not envisage any circumstances whatsoever in which any UK Government or Parliament would contemplate any regression in the rights set out in that chapter, but the commitment nonetheless provides a legally binding safeguard. It means that, in the extremely unlikely event that such a diminution occurs, the UK Government will be legally obliged to ensure that holders of the relevant rights are able to bring challenges before the domestic courts.”¹⁶

In evidence to the Northern Ireland Assembly Committee for the Executive Office, in April 2021, representatives from the bodies which make up the Dedicated Mechanism clarified that work on identifying the scope of the commitments had commenced and that they were aware that mechanisms would need to be put in place to track legislative developments.

Geraldine McGahey OBE, the Chief Commissioner of the ECNI, observed that:

“We have progressed important legal work to examine the scope of the Article 2 commitment to ensure that there is greater clarity and certainty as to what Article 2 means. That has included work to clarify the range of rights protected under Article 2 and the domestic legislation underpinning the EU law that falls within its scope. We have commenced the tracking and monitoring of legislative developments at domestic and EU level in order to ascertain whether they have any potential impact on the Article 2 commitment. We have also been working to ensure that effective mechanisms are in place by which the dedicated mechanism will be kept informed of actual and planned EU legislative developments that are relevant to the Article 2 commitment.”¹⁷

¹⁶ Ibid.

¹⁷ [Oral evidence published by the Committee for the Executive, 14 April 2021.](#)



Implementation in Domestic Law

Section 23 of the European Union (Withdrawal Agreement) Act 2020 provides for the detailed implementation of Article 2(1) of the Protocol via Schedule 3. Notably, amendments to the Northern Ireland Act 1998 are provided for in Schedule 3 of the 2020 Act: these give new functions to the Northern Ireland Human Rights Commission and the Equality Commission to take on the role of the dedicated mechanism referred to in Article 2(1) of the Protocol.

Schedule 3 to the 2020 Act also introduces a restriction on the legislative competence of the Northern Ireland Assembly and the powers of Northern Ireland Ministers and departments, preventing them from acting in a way which is incompatible with Article 2(1) of the Protocol.

The specific new functions set out in Schedule 3 include powers to:

- monitor the implementation of Article 2(1) of the Protocol on Ireland/Northern Ireland in the EU Withdrawal Agreement;
- report to the Secretary of State and the Executive Office in Northern Ireland on the implementation of Article 2(1);
- advise the Secretary of State and the Executive Committee of the Assembly of legislative and other measures which ought to be taken to implement Article 2(1);

- advise the Assembly (or a committee of the Assembly) whether a Bill is compatible with Article 2(1); and
- promote understanding and awareness of the importance of Article 2(1).

The Schedule also provides for powers that the Commissions may:

- Bring judicial proceedings in relation to an alleged breach of Article 2(1);
- Intervene in legal proceedings in relation to an alleged breach of Article 2(1); and
- Support individuals in relation to an alleged breach of Article 2(1).¹⁸

¹⁸ For more details, see: [Northern Ireland Research and Information Service, Rights, Safeguards and Equality of Opportunity in the Ireland/Northern Ireland Protocol: The Dedicated Mechanism](#), 30 October 2020.



In addition, paragraph 20 of the Explainer confirms that:

“... the Government ... will provide each Commission with additional resources, commensurate with the needs they have identified, for their expanded functions as part of the dedicated mechanism.”

The operation of the Protocol has become increasingly controversial in the period since the UK left the EU on 31 January of this year. Those controversies have mainly related to the Articles dealing with trade. In its White Paper on proposals for changes to the Protocol, published on 21 July, the Government stated:

“... the provisions that ensure there is no diminution of human rights in Northern Ireland as a result of the UK’s withdrawal from the European Union are not controversial”.¹⁹

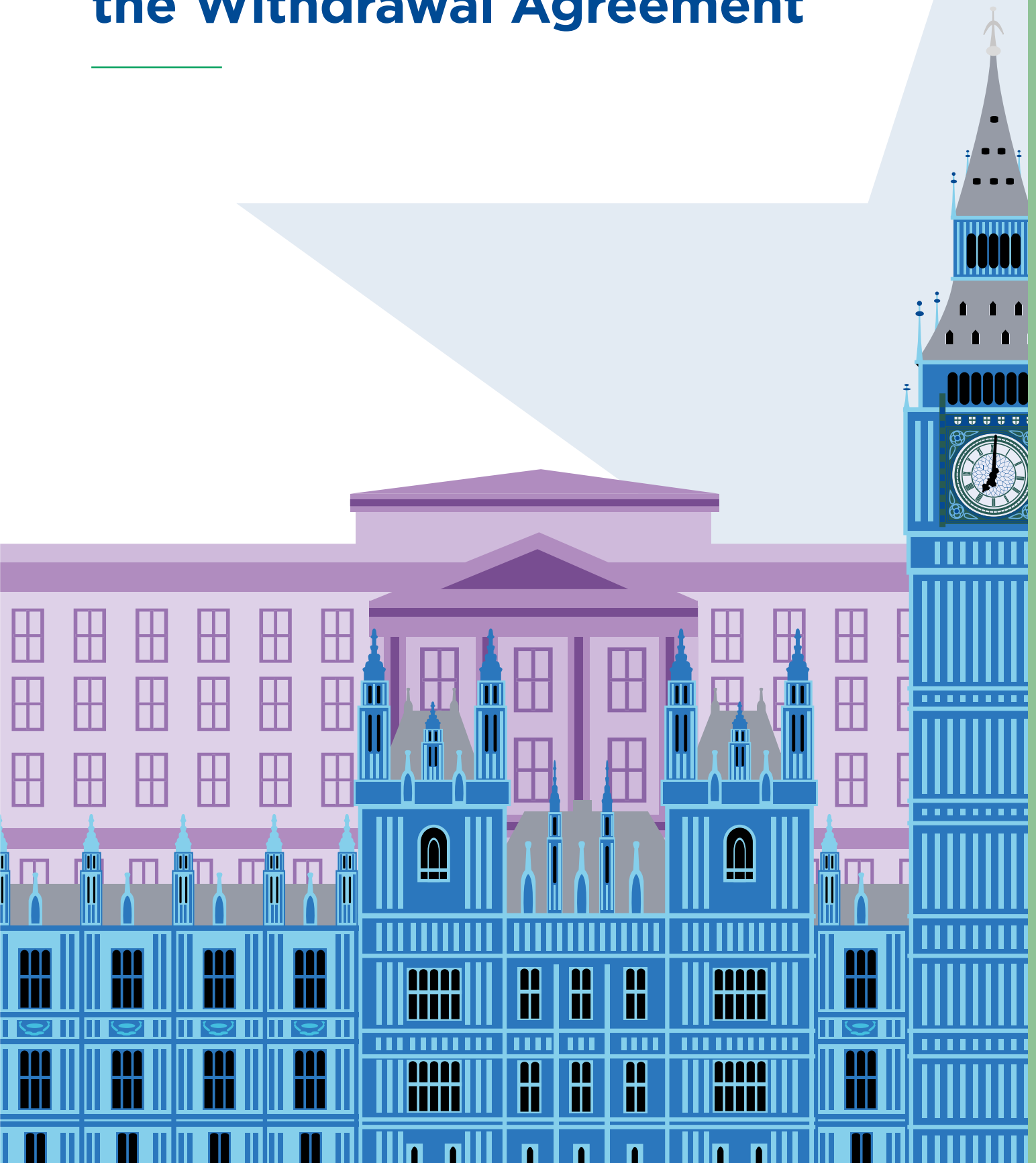
The remainder of this report seeks to place the duties of the Dedicated Mechanism in the broader context of scrutiny mechanisms at Westminster and Stormont, and to identify ways in which the Dedicated Mechanism could be integrated into those processes in the most efficient and effective way. In doing so, we remain conscious throughout that, compliance with Article 2 is as much to do with political will as with legal obligations, and that the time and attention of elected and appointed Members of all three chambers involved is a scarce commodity.

We also note that the Dedicated Mechanism should not be the only active agent scrutinising legislation which may touch on the Article 2 obligations. As with all proposals for legislation, civil society organisations and other stakeholders should be encouraged to engage in the process. The role of the Dedicated Mechanism will be to identify issues, provide early warnings and encourage the scrutiny mechanisms of Parliament and the Assembly to engage with those stakeholders – something that they already actively do.



¹⁹ *Northern Ireland Protocol: the way forward*, CP 502, presented to Parliament on 21 July 2021 by the Secretary of State for Northern Ireland, para 37.

Chapter 2: Governance of the Withdrawal Agreement



Bodies established under the Withdrawal Agreement

The Joint Committee

The main governance body established by the Withdrawal Agreement is the Joint Committee.²⁰ It is responsible for the implementation and the application of the Withdrawal Agreement. Annex VIII to the Agreement provides that the Joint Committee will be co-chaired by a member of the European Commission and a representative of the UK Government at ministerial level, but that this role can also be filled by “high level officials designated to act as their alternatives”.²¹

Article 164 of the Withdrawal Agreement provides that the Joint Committee will meet at the request of the UK or the EU, and in any event at least once a year. Its meeting schedule will be adopted by mutual consent. The Joint Committee’s decisions and recommendations are made by mutual consent and are binding on the EU and the UK. Article 166(2) makes plain that such decisions will have “the same legal effect as this Agreement”.

The Specialised Committee on the Protocol on Ireland/Northern Ireland

The Joint Committee will also oversee certain specialised committees. Of particular relevance to this report is the Specialised Committee on the Protocol on Ireland/Northern Ireland. This Specialised Committee, working at official level, will:

- facilitate the implementation and application of the Protocol;
- liaise with the institutions created by the 1998 Belfast/Good Friday Agreement dealing with North/South cooperation;
- consider any matter of relevance to Article 2 of this Protocol brought to its attention by the Northern Ireland Human Rights Commission, the Equality Commission for Northern Ireland, and the Joint Committee of representatives of the Human Rights Commissions of Northern Ireland and Ireland;
- discuss any matters raised by the parties to the Agreement that “gives rise to a difficulty”; and
- make recommendations to the Joint Committee regarding the functioning of the Protocol.²²

²⁰ Withdrawal Agreement (19 October 2019), Article 164.

²¹ Section 34 of the European Union (Withdrawal Agreement) Act 2020 constrains this power on the UK side, insisting that the functions of the United Kingdom’s co-chair of the Joint Committee, under Annex VIII of the Withdrawal Agreement are to be exercised personally by a Minister of the Crown (and, accordingly, only a Minister of the Crown may be designated as a replacement under Rule 1(3)).

²² Article 14 of the Protocol.



The (then) Secretary of State for the European Union, Rt Hon Stephen Barclay MP, told the House of Lords European Union Committee the Specialised Committee will “sit under” the Joint Committee, will “consider issues” arising under the Protocol and report them to the Joint Committee. Barclay confirmed that it will be “attended by UK and EU representatives and it will be for each side to decide the composition of their delegation”.²³

The Commission will represent the EU in the Joint Committee. However, Ireland may request that the Commission be accompanied by a representative of Ireland in the meetings of the Specialised Committee on issues related to the implementation of the Protocol on Ireland/Northern Ireland.²⁴

The Joint Consultative Working Group

As mentioned in the introduction to this report, in addition to the Joint Committee and the Specialised Committee, the Protocol establishes a Joint Consultative Working Group (JCWG) made up of EU and UK officials which will serve as a forum for the exchange of information and mutual consultation.²⁵ Article 15(5) of the Protocol makes clear that this JCWG will normally meet at least once a month. While it has no power to take binding

decisions (other than adopt its own rules of procedure),²⁶ it does make detailed provision for information sharing.

The Article provides that:

“15(3). Within the working group:

(a) the Union and the United Kingdom shall, in a timely manner, exchange information about planned, ongoing and final relevant implementation measures in relation to the Union acts listed in the Annexes to this Protocol;

(b) the Union shall inform the United Kingdom about planned Union acts within the scope of this Protocol, including Union acts that amend or replace the Union acts listed in the Annexes to this Protocol;

(c) the Union shall provide to the United Kingdom all information the Union considers relevant to allow the United Kingdom to fully comply with its obligations under the Protocol; and

(d) the United Kingdom shall provide to the Union all information that Member States are required to provide to one another or to the institutions, bodies, offices or agencies of the Union pursuant to the Union acts listed in the Annexes to this Protocol.”

23 [House of Lords - Brexit: the revised Withdrawal Agreement and Political Declaration - European Union Committee \(parliament.uk\)](https://www.parliament.uk), para 179.

24 European Union Committee, ‘[Beyond Brexit: how to win friends and influence people](#)’ (35th Report, 2017-19) HL 322, para 21.

25 [Committee reports on UK-EU Joint Consultative Working Group, and VAT in Northern Ireland - Committees - UK Parliament](#).

26 Indeed, it has been described as “an obscure and idiosyncratic bureaucratic body, but at the moment it is Northern Ireland’s best hope of having some means of informing (if not shaping) the EU-level decisions that it will have to abide by.” See [The UK-EU Joint Consultative Working Group: What it is and what it could be - Queen’s Policy Engagement \(qub.ac.uk\)](#).

Then Presidents Donald Tusk (European Council) and Jean-Claude Juncker (European Commission) confirmed that the Withdrawal Agreement and Protocol “do not prevent the United Kingdom from facilitating, as part of its delegation, the participation of Northern Ireland Executive representatives in the Joint Committee, the Committee on issues related to the implementation of the Protocol on Ireland/Northern Ireland, or the Joint Consultative Working Group, in matters pertaining directly to Northern Ireland”, and the UK Government has confirmed its intention to facilitate this.²⁷

The Parliamentary Partnership Assembly

Article INST.5 of the Trade and Co-operation Agreement states that the European Parliament and the UK Parliament:

“... may establish a Parliamentary Partnership Assembly consisting of Members of the European Parliament and of Members of the Parliament of the United Kingdom, as a forum to exchange views on the partnership”.

The remit of the Parliamentary Partnership Assembly (PPA) and its composition is yet to be determined. In its final report, the Lords European Union Committee considered the possible role and composition of the PPA.²⁸ In particular, it pondered whether the PPA might develop a scrutiny

role. The Committee also examined the question of whether and how the devolved legislatures might participate in the work of the PPA. The Chairs of the relevant committees of the Northern Ireland Assembly, the Scottish Parliament and the Senedd have all raised this question in correspondence with the Chair of the EU Committee in February 2021.²⁹

For the time being, the composition and role of the PPA remains unresolved, although we understand that work on it is being conducted informally, but the Dedicated Mechanism should maintain a watching brief on its development in case, in the longer term it could be useful as either an information gathering or a scrutiny forum for actions of the EU Commission in relation to Article 2.

Analysis

Of the three bodies established by the Withdrawal Agreement and under the Protocol, it is the JCWG which offers the greatest opportunities to safeguard the effective implementation of the commitments under Article 2 of the Protocol. However, the lack of transparency so far surrounding the operations of the JCWG is a cause for concern. We hope that the UK Government can be persuaded to make its workings more open to scrutiny and more collaborative with committees both at Westminster and in the Assembly.

²⁷ Ibid, para 22. The European Scrutiny Committee have reported that: ‘In correspondence with the Committee, the Chancellor of the Duchy of Lancaster, Michael Gove MP confirms that officials from the Northern Ireland Executive will be invited to participate on the JCWG and argues that it provides a formal opportunity for the UK to influence EU law’. See: [Committee reports on UK-EU Joint Consultative Working Group, and VAT in Northern Ireland - Committees - UK Parliament](#).

²⁸ House of Lords European Union Committee, ‘[Beyond Brexit: the institutional framework](#)’, (21st Report, 2019-2021) HL Paper 246, paras 76-80.

²⁹ [Welsh Senedd](#), [Scottish Parliament](#), [Northern Ireland Assembly](#).

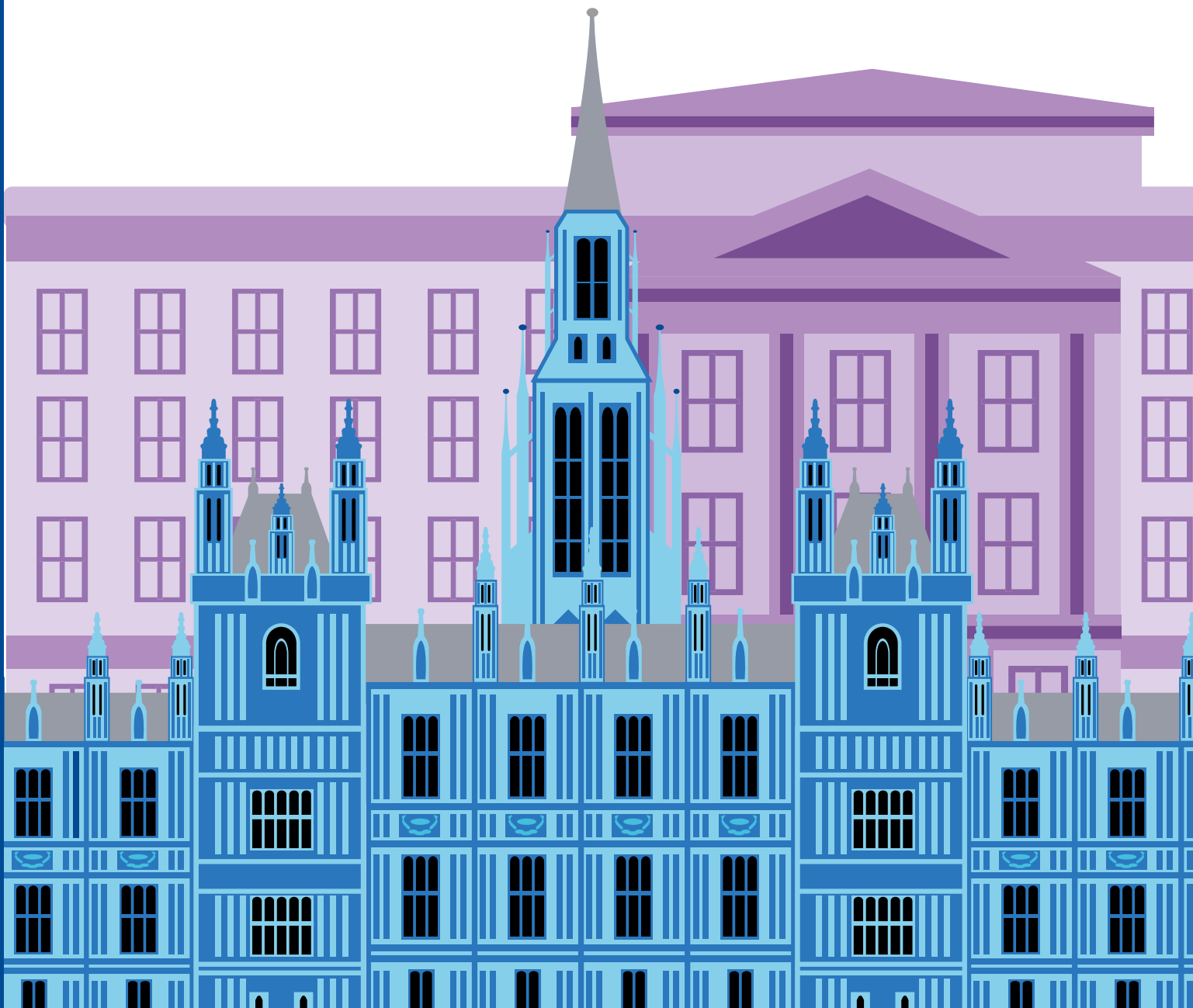
The provisions establishing the JCWG provide for the exchange of information and should ensure that the EU will alert the UK in advance of any proposals to amend legislation that would impact on the workings of Article 2 (including amendment to any of the Directives contained in Annex 1). This is clearly provided for in Article 15(3) and, if an information-sharing protocol could be agreed, it could act as an early warning mechanism for the Dedicated Mechanism, alerting it to any relevant legislative change at an early stage, so that it could prepare reports for relevant Committees in both the Westminster Parliament and the Northern Ireland Assembly. We recommend that the Dedicated Mechanism seeks a formal information-sharing agreement with the JCWG along these lines.

In addition to discussing with the UK Government how any such information could be communicated to the Dedicated Mechanism, it would be wise for the Dedicated Mechanism to liaise with the European Union Delegation to the United Kingdom to seek to facilitate the provision of relevant information before matters reach the agenda of the various committees and working groups enumerated above. This should help to provide early warning of upcoming issues. We recommend that the Dedicated Mechanism establish regular meetings with representatives from the Delegation of the European Union to the UK, to discuss any issues of concern on a less formal basis.

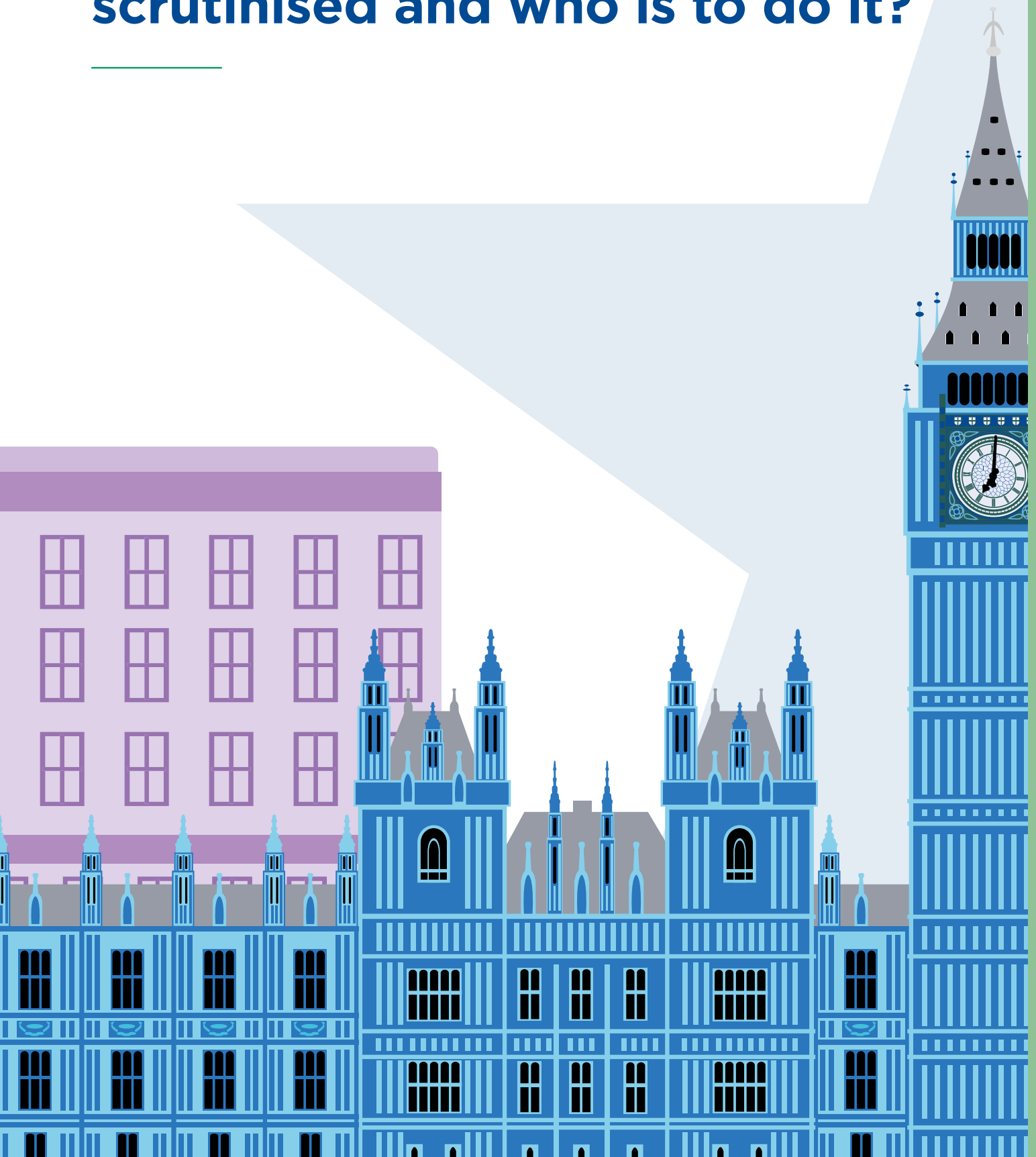


The Specialised Committee, and eventually the Joint Committee itself, appear to offer more limited opportunities for interaction. However, given the obligation on the Specialised Committee to liaise and discuss matters which give rise to difficulties, where a measure was taken forward which appeared to conflict with the commitments made under Article 2, there would

appear to be an opportunity for this to be flagged by the Specialised Committee. We recommend that the Dedicated Mechanism negotiate with the secretariat of the Joint/Specialised Committee to establish a suitable channel for developing such communications.



Chapter 3: What is to be scrutinised and who is to do it?



Introduction

This report seeks to analyse current scrutiny structures and processes in the UK Parliament and Northern Ireland Assembly and to identify recommendations for reform of mechanisms and processes with the aim of ensuring that there is effective scrutiny of the UK Government's compliance with its commitment under Article 2(1) of the Protocol.

Domestic legislation

Two principal channels of domestic legislation require scrutiny:

- **Primary legislation**, which is made through Acts of Parliament and Acts of the Northern Ireland Assembly;
- **Secondary legislation (or delegated legislation)**, which is made through UK statutory instruments or Statutory Rules of Northern Ireland under powers granted to Ministers in primary legislation.

The procedures for scrutiny of primary legislation are elaborate, involving both committees and the plenary. At Westminster, these procedures are repeated in both Houses.

The procedures relating to secondary legislation are more straightforward, and do not always involve explicit approval by the legislatures. The scrutiny mechanism for secondary legislation are mainly committee-based and of a highly technical, rather than political, nature. Only a fraction of secondary legislation is subject to scrutiny in plenary.

What needs to be scrutinised?

As set out above, there are two principal streams of legislation which the Dedicated Mechanism will be required to scrutinise to fulfil its functions under sections 78A to 78E of the Northern Ireland Act 1998 (as amended by Schedule 3 to the European Union (Withdrawal Agreement) Act 2020).

The first of these is legislation made by either the UK Parliament which applies to Northern Ireland or legislation made by the Northern Ireland Assembly.³⁰ Within the terms of the Protocol, such legislation must be checked to ensure it does not diminish the protected rights of those in Northern Ireland. In theory, this encompasses all the legislation being made by either legislature. That is a huge amount of material. It is also important to note that this stream is sub-divided into two separate channels. Both legislatures use both primary and secondary legislation, both of which types need to be checked for compliance. However, there are some models for rights-based legislative scrutiny in existence which we describe below.

The second stream of legislation which requires monitoring is that which is made by the legislative bodies of the European Union. Scrutiny is necessary to ascertain whether there are developments relating to the defined Directives which would require legislation (either UK-wide or NI-specific) to keep pace with the protected rights. Again, this is substantial, but given the circumscription of the scope of Article 2 to the six Directives currently in force listed in Annex 1 to the Protocol,³¹

³⁰ Under sections 6(2)(ca) and 24(1)(aa) of the Northern Ireland Act 1998 (inserted by Schedule 3 to the European Union (Withdrawal Agreement) Act 2020) any legislation which breached Article 2 would be outside the competence of the Assembly or Ministers of the NI Executive to make – in other words it would be *ultra vires*. We deal with this point in more detail below. Parliament cannot directly fetter its own legislative competence in this way, and can decide to make legislation which conflicts with the Article 2 obligations – though it is to be expected that it would not deliberately choose to do so.

³¹ See n6 above.

there is some greater focus provided. However, as the recent questions raised by the draft Pay Transparency Directive demonstrate, that does not necessarily tell the whole story. We discuss these issues in chapter 6.

European Union Legislation

The legislative process of the European Union is highly complex and alters according to the treaty base of the legislative proposal.

- Proposals for legislation and other actions can be made by the European Commission.
- Under the *ordinary legislative procedure*, these proposals must be agreed by both the Council (more formally the Council of the EU) and the European Parliament.
- Where the Parliament rejects or amends a proposal initially agreed by the Council there is a process of conciliation designed to achieve agreement.
- Under the *special legislative procedure*, a proposal can be agreed either through the consultation procedure (where the Council is required only to consult the Parliament but is not bound to take account of its opinions) or under the consent procedure (where the Parliament in effect has a right of veto).
- Decisions of the Council are made either by unanimity or under the system of qualified majority voting (QMV), in which the member states have voting powers roughly in proportion to their populations and in which minimum thresholds of numbers of member states

combined with percentages of the Union's population which they represent are defined for the purposes of a necessary super-majority or a blocking minority.

- A limited amount of relatively routine implementing legislation can be made directly by the Commission, subject to oversight by the Council and European Parliament.

Further, there is the question of the impact of fresh EU legislation on retained EU law. Taken together, these factors again make the stream of potential EU legislation requiring monitoring quite full. Until the UK's withdrawal from the Union, Westminster had a highly developed system of scrutiny covering EU legislative proposals. A significant residue of these systems remains in place after exit. Both the previous and present systems are described in chapter 6, and we examine how they might be deployed to support the Dedicated Mechanism in its task.

In the next chapters we describe and analyse the existing models of scrutiny in the two Houses of Parliament which have relevance to legislative scrutiny, pre-legislative scrutiny and quasi-legislative scrutiny. We draw, in particular, on the work of the Joint Committee on Human Rights, the committees of both Houses dealing with different categories of delegated legislation, methods formerly and currently used for scrutinising EU legislative proposals, and the newly established mechanism for the scrutiny of international agreements and, indeed, the Protocol itself.

Additionally and importantly, especially in the case of delegated legislation, the most efficient point of influence is “upstream”, when the legislation is being prepared by the government legislative drafters. In the case of EU legislation, however, this upstream influence has greatly abated, if not entirely evaporated, since the UK left the Union. However, this is not a major problem in the context of the present exercise since scrutiny by the Dedicated Mechanism is not expected to influence new EU legislation directly, but only to ensure that where necessary domestic legislation takes account of the requirement under Article 2 of the Protocol to “keep pace”.

The Dedicated Mechanism will need to scrutinise five types of legislation to fulfil its duties under the Protocol: UK primary legislation made by Parliament; Northern Ireland primary legislation made by the Assembly; UK secondary legislation; Northern Ireland secondary legislation; and European Union legislation. Each of these streams requires the Dedicated Mechanism to exercise influence at different points. There will not be a one-size-fits-all solution.

What is parliamentary scrutiny for?

Scrutiny can be defined as an activity involving the examination and occasional challenge of legislation, institutional actions, policies, expenditure or administration. Parliamentary scrutiny of government arises in a variety of forms. Scrutiny mechanisms enable Parliament to hold the government to account,

but they can also provide a forum for stakeholders to engage with the legislative process. Both Houses of Parliament perform scrutiny through a mixture of mechanisms: the formal processes of legislative scrutiny in committees and in the plenary, through non-legislative debate, through questions and, increasingly, through committees of inquiry which, while often more focused on policy, may also engage in pre-, peri- and post-legislative scrutiny of various kinds.³² The fused nature of the relationship between the legislature and the executive in the United Kingdom can be argued to strengthen the UK Parliament’s ability to scrutinise executive decisions and actions. However, by the same token, scrutiny must generally operate through persuasion and influence rather than the threat of government defeat, and this colours its nature. This fact must be taken into account when designing ways for the Dedicated Mechanism to work with Westminster. Proportional representation and consociationalism, as built into the Assembly system, will shape scrutiny in slightly different ways there.

The House of Commons (and in a different way, the Lords) is an outlier in both international and domestic terms in having separate policy scrutiny and legislative scrutiny committee systems. Consequently, the amount of external influence that can be brought to bear on the Commons’ public bill committees and the Lords’ system of committees of the whole House is limited. Partly in response to this phenomenon, both Houses have developed systems of

³² Hannah White, ‘Parliamentary Scrutiny of Government’ The Institute for Government (2015) pp. 2-4 accessible at [Parliamentary Scrutiny of Government | The Institute for Government](#).

what are commonly but confusingly known as “scrutiny committees”. These are broadly, by their terms of reference or on their own initiative, committed to examining various proposals for legislation, both primary, secondary and arising from treaty obligations, against certain clearly defined tests.

The scrutiny of legislation is ‘fundamental to the work of Parliament’ first, because parliamentary approval gives legislation their legitimacy (as Acts and Regulations ‘impinge upon citizens in all dimensions of their life’) and second, because parliamentary scrutiny can be detailed and, through its committee work, parliament can draw on expertise from a variety of stakeholders to seek to uphold the quality of legislation.³³ This element of transparent engagement in the process by outside bodies is the primary model we shall draw on for considering the role of the Dedicated Mechanism in scrutinising compliance with obligations under Article 2.

This report, therefore, focuses on parliamentary scrutiny in select committees. This type of scrutiny is vital to promote accountability. In practice, committee scrutiny is also the primary mechanism through which Parliament may ensure that legal obligations, like those under Article 2(1) of the Northern Ireland Protocol are met, and that related legislation is well-promulgated. As the former leader of the House of Commons, the late Robin Cook, famously argued, ‘good scrutiny makes for good government’.³⁴ And, we might add, for government that complies with its obligations under domestic and international law.

Different models and summary of commitments

The following table shows the organisation of committees of the two Houses of Parliament for dealing with different types of legislation or quasi-legislation, such as treaties or EU legislation with continuing implications for the UK.

³³ ‘Parliament and the Legislative Process’, The House of Lords Select Committee (14th Report, 2003-2004) HL 1731-1 pp.8-9.

³⁴ Quoted in n(1), White, ‘Parliamentary Scrutiny of Government’.



Type of legislation	Commons committees	Lords committees
Primary (Bills)	<ul style="list-style-type: none"> Public Bill Committees Committees of the whole House Joint Committee on Human Rights Occasionally select Committees 	<ul style="list-style-type: none"> Committees of the whole House Grand Committees Joint Committee on Human Rights Delegated Powers and Regulatory Reform Committee Constitution Committee
Primary (draft Bills)	<ul style="list-style-type: none"> Commons select Committee Joint Committee 	<ul style="list-style-type: none"> Joint Committee
Secondary (Delegated)	<ul style="list-style-type: none"> Joint Committee on Statutory Instruments Ad hoc Delegated Legislation Committees European Statutory Instruments Committee Regulatory Reform Committee Joint Committee on Human Rights 	<ul style="list-style-type: none"> Joint Committee on Statutory Instruments Secondary Legislation Scrutiny Committee Delegated Powers and Regulatory Reform Committee Joint Committee on Human Rights
International obligations	<ul style="list-style-type: none"> European Scrutiny Committee 	<ul style="list-style-type: none"> European Affairs Committee Sub-Committee on the Ireland/Northern Ireland Protocol International Agreements Committee

What is already clear from the analysis above is that the Dedicated Mechanism will not be able to exercise its influence over the legislatures through only one channel in each chamber. Scrutiny of primary, secondary and European legislation each have different points of influence where they are amenable to intervention.

The three streams and five strands and their scrutiny

In our consideration of the appropriate points of influence for the Dedicated Mechanism, we are therefore looking at three principal streams of legislation.

They are:

- With respect to the “no diminution” of rights obligation principally;
 - > Primary legislation made by Parliament and the Assembly
 - > Secondary legislation made by Ministers of the UK Government or the Northern Ireland Assembly and subject to scrutiny and/or approval by the two Houses of Parliament or the Assembly
- With respect to the “keeping pace” obligation principally;
 - > Legislation made by the European Union.

The stages of scrutiny of primary legislation in the Commons and Lords undertaken in the plenary committees of the whole House or legislative committees of both Houses are passed over fairly briefly for the purposes of this report. While these stages may well permit challenge by opposition parties or individual backbenchers to legislative proposals which may touch on the ambit of Article 2 of the Protocol, they are of only limited use as access points for the Dedicated Mechanism to exert influence. We therefore focus principally on select committee scrutiny of primary legislation at Westminster. The system at Stormont has significant differences, described below.

Select committees could be described as the investigative or “fact finding” branch of the two Houses. They do not debate or (by and large) decide – they deliberate (in private), conduct inquiries, collect evidence and make reports. With certain very limited exceptions they do not undertake the committee stage of bills, though a number of them examine bills under their own motion. They are generally small, with most falling into a range between nine and fourteen members. There is also a sub-category of select committees known as “joint committees”, which draw their membership from both Houses.

In relation to Westminster, therefore, this report primarily examines scrutiny methods undertaken by: (1) the Joint Committee on Human Rights; (2) the

two main committees scrutinising delegated legislation, the Joint Committee on Statutory Instruments and the Secondary Legislation Scrutiny Committee; (3) the European Scrutiny Committee, the House of Lords European Affairs Committee and the Sub-Committee on the Protocol on Ireland/Northern Ireland (specifically, the methods, formerly and currently used for scrutinising EU legislative proposals); and finally (4) the House of Lords International Agreements Committee. It is these committees which provide the best range of models for the kind of scrutiny with which the Dedicated Mechanism needs to tie in.³⁵

Despite the existence of other instructive models of select committee scrutiny, this report focuses on the practices of this handful of committees for good reasons. The committees listed above and analysed in the next chapters either have a specified thematic remit, fulfil a statutory requirement for scrutiny, or perform sifting on either technical or merits-based criteria. Each model will be analysed for how their various practices would be useful to the bespoke scrutiny mechanism established to ensure compliance with Article 2(1) of the Protocol.

³⁵ We have not included the Commons Northern Ireland Affairs Committee in this list as it has no formal or self-imposed legislative scrutiny role. It is, however, likely to pick up on political issues touching on the working of the Protocol, which might include Article 2 questions should they become controversial.



Broad distinctions between the Assembly and Westminster

A significant difference exists between the scrutiny procedures of Westminster and the Northern Ireland Assembly. In both Houses of Parliament there is a definite (though with exceptions) divide between policy scrutiny and legislative scrutiny. The committee system of the Assembly does not draw such a sharp dividing line. We will therefore also need to consider carefully what part the two principal “policy scrutiny” committees at Westminster – the Commons’ Northern Ireland Affairs Committee and the Lords’ Sub-committee on the Ireland/Northern Ireland Protocol – might play in the broader scrutiny of Article 2 obligations and what the role of the Dedicated Mechanism in working with these committees might be. It is likely to be a relationship based on understandings rather than codified in standing orders.

Selective or comprehensive scrutiny?

The Westminster committees analysed in this report can be broadly categorised as undertaking selective or comprehensive scrutiny. Comprehensive scrutiny can be defined as being where a committee is charged with examining every item in a class of documents (for example all European Union “documents” or all statutory instruments) presented to Parliament. In these circumstances, the staff (and sometimes the Chair) of a committee can sometimes operate a ‘sift’ of all qualifying documents, discarding those

of seemingly trivial import or purely technical in character and drawing only those of some significance to the full attention of a committee.

The committee, in turn, determines whether the proposals identified merit further attention from the two Houses in the process of making the law. These committees report their findings on specific proposals with an explanation of their concerns where these have been identified and “pass” those that have raised no concerns. Generally, it is then for the government or for either House to determine what to do with these findings.

Some of these so-called “scrutiny” committees have distinctively tightly-drawn terms of reference in their standing orders. The Joint Committee on Statutory Instruments is the clearest example. Its standing order sets out eight very specific criteria against which it has to assess the measures that come before it, though there is a permissive codicil to these that allows it to consider other relevant matters with the exception of “policy”.³⁶ A similar approach has been taken by the House of Lords International Agreements Committee, which set out five criteria it would use to determine whether to draw an international agreement to the special attention of the House of Lords.³⁷

The European Scrutiny Committee of the House of Commons offered a slightly different model when it was working within the terms of the so-

³⁶ Standing Order No. 158(8) of the House of Commons and No. 74(2) of the House of Lords.

³⁷ House of Lords International Agreements Sub-Committee, *Treaty Scrutiny: Working Practices*, 11th Report of Session 2019-21, HL Paper 97, para 36.

called “Scrutiny Reserve Resolution” while the UK was a member of the EU. It was required to examine every document falling under the definition of a “European Document” against the much broader test of whether it raised questions of “legal or political importance”, and to report its opinion to the House giving reasons. It did so in a weekly report, which would contain the exchanges it had had with Ministers, and which would also list those EU proposals which it considered needed no further consideration by the House. These were described as having been “released” from scrutiny. A small fraction of the documents considered would eventually be recommended for debate either in the specially designed European Committees,³⁸ or in plenary. Occasionally, the Committee would engage in broader policy-style inquiries not directly related to a specific document.

“Comprehensive scrutiny” can therefore combine both technical scrutiny against more or less clearly defined criteria and more “merits-cased” scrutiny which strays into the underlying policy behind the documents or instruments assigned for scrutiny.

“Selective scrutiny” is where committees choose what to scrutinise within the field of their terms of reference and are under no obligation to consider every document, instrument, bill or whatever that would fall within that remit. Examples of such scrutiny include the former Lords EU

Committee³⁹, the Lords Constitution Committee and the Lords Secondary Legislation Scrutiny Committee. The extent to which the filter is applied at staff, chair or committee level will vary. But the shared characteristic is that the triage system is applied with a greater or lesser degree of ruthlessness to ensure the committees’ attention is directed to matters of pressing legal, constitutional or political importance.

The Joint Committee on Human Rights provides an interesting example of a committee which combines both selective and comprehensive scrutiny. Its terms of reference give it a general remit to consider “matters relating to human rights in the United Kingdom”.⁴⁰ It has used this permission to undertake extensive scrutiny of primary legislation, but its approach to that task has veered from being comprehensive to selective over time. Its approach to this self-imposed task is described in more detail in chapter 4 of this report. But the standing order also mandates the committee to consider a specialised form of delegated legislation made under section 10 of the Human Rights Act 1998: known as “Remedial Orders”. How it is to approach this task and the tests it is to apply in its scrutiny are set out in some detail in the standing order, and it is obliged to consider and report on every remedial order laid before Parliament. In doing so, however, it is free to examine “merits” as well as compliance with the specified criteria set out in its standing order.

³⁸ See Standing Order No. 119 of the House of Commons.

³⁹ Although the Chair of the Lords EU Committee would examine every EU document (and a short report was issued by him after the sift), the vast majority of documents were discarded and not sent to the Select Committee or sub-committees.

⁴⁰ Standing Order No. 152B of the House of Commons and mirroring resolutions of appointment of the House of Lords.

Analysis

Our conversations with members and staff of relevant committees in Westminster indicate that there is a readiness to recognise the importance of the UK’s obligations under Article 2. But there is also a sense that committees will not want to make this scrutiny a central aspect of their work and an onerous procedural burden.

Committee scrutiny of primary and secondary legislation at Westminster includes selective or comprehensive models, mandatory or permissive terms of reference and testing against specified criteria with broader consideration of “merits” or the policy lying behind the bill, instrument or other document.

Successful scrutiny relies to a large extent on what has been described as the concept of “anticipated reaction”.⁴¹ In other words, the knowledge that effective scrutiny will be applied keeps government on its toes and honest, because it will not want to be found to have been careless or reckless in its drafting of proposed legislation, and it will seek to avoid creating unnecessary friction in the legislature by consultation and co-operation when possible. There is no evidence that any legislative authority intends wilfully to disregard the obligations of Article 2 of the Protocol, and this provides a firm basis for the Dedicated Mechanism to perform its duties effectively but proportionately.

We anticipate that scrutiny of compliance with Article 2 of the Protocol by committees of Parliament is likely to be selective rather than comprehensive and may tend to the technical (staff focused work) rather than a politically focused and merits-based approach. In delivering on its duties under the Northern Ireland Act 1998, the Dedicated Mechanism will need to ensure that it can give focus to some form of selective scrutiny. Our recommendations below flow from these assumptions.

⁴¹ See, for example, Meg Russell and Daniel Gover, *Legislation at Westminster: Parliamentary Actors and Influence in the Making of British Law*, OUP, 2017, *passim*.



Chapter 4: Scrutiny of primary legislation



Introduction

In this chapter we describe the various mechanisms at Westminster and Stormont for scrutiny of primary legislation.

Primary legislative scrutiny at Westminster

Government bills are introduced into either House of Parliament. In the House of introduction, they are given a purely formal first reading and published.

The next stage is second reading in the plenary, where questions of principle are debated, and the House makes a decision as to whether the bill will proceed to its further stages. Once a bill has been given a second reading in the Commons a “programme motion” is invariably moved, timetabling its subsequent stages. The Lords do not timetable bills.

In the Commons, the majority of bills will be committed to a Public Bill Committee (PBC) for their committee stage. PBCs are not “expert” committees – they are appointed afresh for each bill and their membership is largely determined by the party whips. The Minister in charge of the bill and their official opposition opposite number are put on the committees by default, and occupy the lion’s share of debating time.

When the Commons is the House of introduction, PBCs generally spend their first few sittings taking oral evidence on the bill in public. Although the evidence itself is published, PBCs (unlike select committees) do not produce any report on their conclusions arising from the evidence. For the remaining sittings the PBC goes through the bill debating any amendments proposed and agreeing (or disagreeing) each clause or schedule.

In a minority of cases a bill will be committed to a Committee of the whole House (CWH) for this stage, which will then take place on the floor of the House and will usually be much shorter. There is no evidence taking.

In the Lords, the committee stage is taken in either Grand Committee (in which all peers can participate) or Committee of the whole House. There is no evidence taking process, but the Lords often spend more time on a bill than the Commons. By convention, although amendments are moved to facilitate debate, at this stage they are not pushed to a vote (and cannot be voted on in Grand Committee).

In both Houses, the committee stage is generally followed by the report stage in plenary, when further amendments and proposed new clauses may be debated.⁴² In the Commons, this stage rarely lasts more than a single sitting. In the Lords more time may be taken, and it is at this stage that amendments, whether from Ministers or from others, are made. At this stage, Ministers often bring forward amendments to meet concessions and undertakings they have given in committee.

In both Houses, the report stage is followed by the third reading debate. In the Commons this is very brief, usually taken at the same sitting as the report stage, and, in practical terms, no amendments of substance can be made. In the Lords this stage must usually be taken at a separate sitting, and amendments are occasionally made. The Lords have an additional debatable motion to “pass” the bill.

Once a bill has been agreed in the House of introduction, it is sent to the other House where it must pass again through all the stages described above.

⁴² There is no report stage in the Commons for a bill which was considered in CWH and not amended.

If the second House makes amendments to the bill it received from the House of introduction, there is a process for achieving agreement between the two Houses. This can be an important stage for particularly critical amendments to be thrashed out. The Lords are often willing to challenge the Commons over rights-based provisions.

Any influence over provisions touching on the UK's obligations under Article 2 can only be indirect during these stages in either House, and will largely rely on direct contact with Ministers, opposition spokespersons and backbenchers.

Because of this relatively oblique way in which outside bodies can influence the passage of primary legislation, we primarily consider in this report the scrutiny of primary legislation by select committees at Westminster which may be relevant to the work of the Dedicated Mechanism. This largely takes place in parallel to the stages described above, and there are no formal mechanisms for it to feed directly into those debates. However, this committee scrutiny does have influence, especially in the Lords. It is likely to be through these committees that the Dedicated Mechanism can most effectively intervene.

Primary legislative scrutiny in the Northern Ireland Assembly

Whilst the primary legislative process in the Northern Ireland Assembly is based on the Westminster pattern, it has some key distinctions of both terminology and substance. Some of the significant ones are:

- Bills pass through “stages” rather than “readings”;
- At introduction, the Speaker is required to determine whether the bill falls within the legislative competence of the Assembly (sections 6 and 10 of the Northern Ireland Act 1998);
- After approval in principle at the second stage, bills are generally referred to one of the Assembly's existing statutory committees rather than an ad hoc committee;
- The committees do not make amendments directly, but make a report on the bill to the plenary in which they may recommend changes (including drafted amendments), as well as including more discursive analysis;
- There are two further consideration stages in plenary, as opposed to the single “report stage” in Westminster; the first of these is more akin to the Committee of the whole House proceedings in Westminster;
- After the second or further consideration stage, the bill is referred to the Speaker for a second consideration of whether it falls within the legislative competence of

the Assembly (sections 6 and 10 of the Northern Ireland Act 1998); and

- After it has been passed, a bill is referred to both the UK Attorney General and the Attorney General for Northern Ireland to determine whether they consider it should be referred to the Supreme Court for a ruling on legislative competence. If the Court makes a finding of incompetence, the bill can be referred back to the Assembly for amendment to deal with the problem.

In this context, it is important to note that the European Union (Withdrawal Agreement) Act 2020 inserted a new paragraph in subsection 6(2) of the Northern Ireland Act 1998 which adds a criterion for a bill falling outside the legislative competence of the Assembly if “... it is incompatible with Article 2(1) of the Protocol on Ireland/ Northern Ireland in the EU withdrawal agreement (rights of individuals)”.⁴³

The standing orders of the Assembly also include two important provisions relating to the passage of bills which have no parallel at Westminster:

- Standing Order 34 provides for a motion to be moved at any stage after the introduction of a bill or the publication of a draft bill to refer a bill to the Northern Ireland Human Rights Commission for consideration of its compatibility with Convention rights or other human rights standards; and
- Standing Order 35 includes a similar provision for a motion of a similar kind relating to equalities

issues (including equality aspects of Convention rights). However, in this case the right to move the motion is reserved to Ministers and the Chairs of the statutory committees within the purview of which the bill falls. If the motion is agreed, the bill is referred to an Ad Hoc Committee on Conformity with Equality Requirements for report.

It is not clear, however, whether the remit of the Ad Hoc Committee would definitively extend to considering conformity with the Article 2 obligations. We consider that it would be for this to be made clear and we address this issue in our recommendations. We recommend Standing Order 60, relating to Ad Hoc Committees on Conformity with Equality Requirements, be amended to include in paragraph (1) a reference to conformity with Article 2(1) obligations.

The rationale for the distinction between the mechanisms of Standing Orders 34 and 35 is not self-evident. It appears that there would be good grounds for enabling a reference to the ECNI, especially since it forms part of the Dedicated Mechanism. And it is also unclear at first sight why the opportunity to move a motion for reference on equality issues is more restricted than that for human rights issues. There would appear to be a good case for rationalisation of these procedures in the context of the Article 2 obligations.

In comparison with Westminster, procedures for scrutiny of primary legislation by the Assembly provide a number of entry points for the

⁴³ European Union (Withdrawal Agreement) Act 2020, Schedule 3, paragraph 2.

Dedicated Mechanism to intervene on Article 2 issues. We consider below whether Standing Orders 34 and 35 could be amended to reflect the role of the Dedicated Mechanism more directly.

There are other aspects of procedures in the Assembly which are relevant to the task of the Dedicated Mechanism.

The scope of section 19 of the Human Rights Act (see the discussion of the role of the Joint Committee on Human Rights) does not extend to bills introduced into the Assembly. There is therefore no obligation on Ministers to make any statement, either on the face of a bill or in any accompanying explanatory material, as to whether in their opinion the bill conforms with Convention rights, let alone obligations under Article 2.

Perhaps in place of section 19 statements, Standing Order 30(6) of the Assembly provides that:

“The Speaker shall, as soon as is reasonably practicable after the introduction of a Bill, send a copy of it to the Northern Ireland Human Rights Commission.”

Again, the exclusion of the Equality Commission from this requirement appears obsolete in the context of Article 2.

However, we also note that there is no committee of the Assembly which has a remit clearly suggesting that it could take on a co-ordinating role in relation to equality and rights elements of proposed legislation. The most obvious candidate would be the Committee on the Executive Office. The Committee is

a Statutory Departmental Committee established in accordance with paragraphs 8 and 9 of Strand One of the Belfast/Good Friday Agreement and under Assembly Standing Order No 48.

This Committee has taken the lead in Brexit-related scrutiny and has a scrutiny role in relation to cross-cutting issues arising from the UK’s exit from the EU. It also has a scrutiny, policy development and consultation role with respect to the Executive Office and has a role in the initiation of legislation as well as the usual array of powers to consider and advise on Departmental budgets and Annual Plans, approve relevant secondary legislation and take the committee stage of relevant primary legislation. It may also consider and advise on matters brought to the Committee by the First Minister and deputy First Minister. This remit suggests that the Committee has scope to address Article 2 issues more broadly, but it is not obviously equipped with either the specialist support or sufficient time (given its many responsibilities) to shoulder this burden. We make some recommendations aimed at addressing this gap in our conclusions.

We also note that in the *New Decade New Approach* (NDNA) framework it is proposed that a Petition of Concern could trigger a 14-day period of consideration, including on any reports on whether a measure or proposal for legislation is in conformity with equality requirements, including the ECHR/Bill of Rights and any advice following on from Assembly Standing Order 30(6) and 85(4).⁴⁴ However, there is no specific reference to the Petition of Concern

44 UK Government, Irish Government, (2020), [New Decade New Approach](#), at 2.2.7., Annex B.

mechanism including a consideration of whether a measure is in conformity with of the Article 2 commitment. Clause 5 of the Northern Ireland (Ministers, Elections and Petitions of Concern) Bill (currently awaiting its report stage in the House of Commons) requires changes to standing orders to be drafted in keeping with paragraph 2.2.7 of Annex B of Part 2 of New Decade New Approach. This would provide an opportunity for the Dedicated Mechanism to press for a specific reference to Article 2(1) to be included if it saw fit to do so.

Legislative scrutiny by the Joint Committee on Human Rights

The Joint Committee on Human Rights (JCHR) was the first permanent joint committee of both Houses of Parliament to be established with terms of reference as wide as a typical departmental select committee. It can, therefore, largely determine its own agenda. The Committee also has the usual powers of a select committee to travel and meet away from Westminster, to appoint specialist advisers and to meet on days when neither House is sitting. The JCHR was first established in January 2001, following the coming into effect of the Human Rights Act 1998 on 2 October 2000. Its terms of reference can be divided into two distinct parts.

The first is a duty imposed on it by each House to examine “Remedial Orders” made under the Human Rights Act. The Act makes provision for Ministers to make a form of secondary legislation to amend UK domestic law (including primary legislation) to

address a conflict with Convention rights. The trigger for the exercise of this power is a declaration by a court in the UK that some statutory provision is incompatible with the provisions of the Human Rights Act. A Minister may also exercise the power in response to a decision of the European Court of Human Rights in Strasbourg.

The other element of the Committee’s remit is to “consider matters relating to human rights in the United Kingdom (but excluding consideration of individual cases)”. This allows the Committee to determine its own agenda and, importantly for the purposes of this report, means that its work cuts across the activities of all government departments.

The Committee, therefore, undertakes inquiries more typical of the approach of policy-based select committees but within the field of human rights, choosing topics for inquiry, taking evidence on them and publishing reports. The Committee also looks at non-legislative government action in response to judgments of the UK courts and the European Court of Human Rights where breaches of human rights have been found.

However, the Committee has taken a distinctive approach to one particular aspect of its remit. It seeks to examine every government bill introduced into Parliament, with special attention as to whether their provisions engage the “Convention rights” as defined in the Human Rights Act 1998 or the rights embodied in other international human rights instruments to which the UK is a signatory (of which there are many).

Where it finds that there are questions about whether provisions of a bill comply with those rights, it engages in a dialogue (usually in writing) with the responsible Minister about whether changes might be made to ensure compliance. In its regular legislative scrutiny progress reports it draws the attention of each House to those provisions in bills about which it has questions and doubts. In this way, its work also has aspects of the technical scrutiny approach of committees like the Joint Committee on Statutory Instruments described below.

In this element of its work, the Committee can be seen to be scrutinising the evidence that underpins the statement that the sponsoring Minister is required by section 19 of the Human Rights Act to append to every government bill. That section states:

“A Minister of the Crown in charge of a Bill in either House of Parliament must, before Second Reading of the Bill

(a) make a statement to the effect that in his view the provisions of the Bill are compatible with the Convention rights (“a statement of compatibility”); or

(b) make a statement to the effect that although he is unable to make a statement of compatibility the government nevertheless wishes the House to proceed with the Bill.”

As the JCHR’s legislative scrutiny developed in the early years of its existence, it negotiated with the

government for the routine inclusion in the Explanatory Notes that accompany every government bill on its introduction of a specific separate section on compatibility of its provisions with Convention rights. While these notes are of widely differing levels of detail and quality, they, at least, provide a starting point for the Committee’s legal advisers to see where the government considers the Convention rights may be engaged.

Horne and Conway note that since 2010, in addition to Explanatory Notes routinely supplied with Bills, the Government has also begun to publish regular free-standing human rights memoranda in circumstances where a department believes that a Bill raises significant human rights questions. **This highlights the need that committees with a technical scrutiny function have for detailed information from Government.**⁴⁵

Much of the initial work scrutinising a bill is undertaken by legal counsel who are allocated on a permanent basis to the Committee’s staff team. Currently, the Committee has a Counsel at the equivalent of the civil service SCS1 grade and two Deputy Counsel at the equivalent of civil service grade 6.

We believe the JCHR’s wide remit would allow it to examine whether proposed legislative actions by the UK Government would be in breach of Article 2 of the Protocol without any amendment to its current terms of reference.

⁴⁵ Horne, A. and Conway, M. ‘Parliament and Human Rights’ in A. Horne and G Drewry (eds), *Parliament and the Law*, 2nd edition (Oxford: Hart, 2018).

Other select committee scrutiny of primary legislation

While the JCHR is the leading exponent of rights-based legislative scrutiny, there are other select committees which examine bills during their passage from a variety of perspectives.

The Lords **Delegated Powers and Regulatory Reform** Committee (DPRRC) examines the use of delegated powers in every bill. It reports on cases where it considers the proposed delegation to Ministers (or other bodies) to be inappropriate or insufficiently safeguarded. This is likely to be relevant to the Article 2 obligations in only very occasional circumstances. Should the Dedicated Mechanism identify any such issue, it would have a ready audience in the DPRRC.

The Lords **Constitution Committee** examines all bills for their constitutional implications, as well as considering broader constitutional questions. On matters relating directly to Northern Ireland and the Protocol it is likely to defer to the Sub-Committee on the Ireland/Northern Ireland Protocol (described in the next chapter). However, were any bill to propose a diminution of rights and safeguards UK-wide, the Constitution Committee would be very alert to that, and the implications for Article 2 obligations might well arise. The focus of the Committee would, however, be on the UK dimension and the implications for Article 2 would be likely to be a contingent issue. Most issues concerning rights in bills would anyway be more likely to be considered to be within the purview of the JCHR.

In its first report on its approach to its remit, the **Lords Sub-Committee on the Ireland/Northern Ireland Protocol** noted that in addition to scrutinising incoming EU legislation, the Sub-Committee would also focus on the implications of some domestic UK legislation for Northern Ireland. It stated that:

“Scrutiny of the implications of domestic UK legislation for Northern Ireland in the context of the Protocol is [...] another key task for the Sub-Committee. We intend to consider the implications of relevant domestic legislation for Northern Ireland at the time of a Government bill receiving Second Reading in the House of Lords, thus complementing the Constitution Committee’s work in scrutinising the constitutional implications of Government legislation.”⁴⁶

In the Commons, select committees rarely undertake peri-legislative scrutiny. In relation to Article 2 issues, the two committees most likely to be engaged would be the Northern Ireland Affairs Committee (NIAC) and the Women and Equalities Committee (WEC). We discuss the role of the NIAC in more detail below. The WEC is only likely to be relevant where a legislative proposal has the potential to diminish equality protections UK-wide, and again it would be for the Dedicated Mechanism to be alert to any such proposal and engage with the WEC appropriately.

⁴⁶ European Affairs Committee, ‘Report from the Sub-Committee on the Protocol on Ireland/Northern Ireland: Introductory report’, (2nd Report, 2021-22) HL 55, para 9.

Pre-legislative scrutiny

Less frequently than advocates of reform of the legislative process at Westminster would like, the government publishes a proposal for legislation in draft, for consultation before its formal introduction. Draft bills are generally referred either to one of the departmental select committees of the Commons or to an ad hoc joint committee of the two Houses set up for the purpose of examining a specific draft bill. The decision on which route to adopt is generally taken through informal negotiations between the interested parties.

Given their relative rarity, there seems to be no reason for the Dedicated Mechanism to establish any codified arrangements for how it might contribute to an inquiry into a draft bill. The opportunity will present itself naturally. A relatively small resource would be required for the examination of any draft bill to check for Article 2 issues.

Private Members' Bills

There are many dozens of Private Members' Bills (PMBs) presented in the two Houses of Parliament in any session. Section 19 of the Human Rights Act does not apply to them, and for the majority, no Explanatory Notes are published. The attrition rate is, however, very high. It would be a disproportionate application of scarce resources for the Dedicated Mechanism to seek to scrutinise every bill presented for conformity with Article 2 obligations. Whatever scrutiny

is applied should only happen after a bill has obtained a second reading in the House of Commons (including bills brought from the House of Lords). Such scrutiny could be safely undertaken in a "light touch" way. If problems relating to Article 2 are identified at that stage, negotiations with the Member in charge of the bill would need to be undertaken.

Bills introduced into the Assembly by private Members are subject to the same safeguards relating to rights and equalities as any other bill introduced. With the amendments we recommend elsewhere, we consider that these are sufficient to enable the Dedicated Mechanism to discharge its scrutiny obligations.

Private Bills

Private bills, granting powers to some legal personality in contradiction to or in excess of the general law, are brought forward by "promoters" rather than by the government or Members of either House of Parliament or of the Assembly.

The two Houses of Parliament have requirements in their standing orders relating to private business for the promoters of a private bill to make a statement similar to the section 19 statement described above.⁴⁷ These statements must also be validated by a Minister.

The Assembly has a requirement for the Speaker to transmit a private bill to the Northern Ireland Human Rights Commission for an opinion on its compatibility with the Convention rights;⁴⁸ and a parallel provision under

⁴⁷ House of Lords Private Business Standing Order 33(3); House of Commons Private Business Standing Order 38(3).

⁴⁸ Standing Order 85(4).

Standing Order 34 (described above) for a motion to be made for a private bill to be referred to the Commission for advice on its compatibility.⁴⁹

It seems highly unlikely that a private bill promoted in Parliament would touch on the rights protected by Article 2 in Northern Ireland. There is no obvious need to make any further provision in this respect.

There also seems little likelihood of a private bill promoted in the Assembly touching on Article 2 obligations, since any Act arising from it would, by definition, not be part of the general law. If a particular individual or class of individuals believed their protection under Article 2 was threatened, they could petition against the bill. But if Standing Orders 34 and 35 of the Assembly relating to public bills were to be amended to reflect the obligations under Article 2 of the Protocol, it would be sensible to align Standing Order 97 relating to private bills at the same time.

Analysis and recommendations

The primary legislative procedure at Westminster is only indirectly accessible to the Dedicated Mechanism. It will need to exercise its scrutiny function principally, at the upstream end of the preparation of public bills - in other words, with Ministers and departments preparing legislation.

Once a government bill is published, its scrutiny will be best exercised through the select committees of the two Houses which examine bills in a more technical way. Given that Article 2 issues clearly fall within its remit to

consider matters relating to human rights in the UK, we identify the Joint Committee on Human Rights as the most obvious channel of influence, but on occasions other committees will be appropriate. In particular, the stated commitment of the Lords Subcommittee on the Ireland/Northern Ireland Protocol to examine domestic UK legislation for implications for the Protocol may prove especially relevant for Article 2 issues.

No changes to the standing orders or committee structures of either House of Parliament are required.

In the Assembly, there are already provisions in the standing orders for the Northern Ireland Human Rights Commission to be engaged in the legislative process in an advisory capacity. In the light of the obligations

⁴⁹ Standing Order 97.



under Article 2, we recommend amendment of the relevant standing orders to take account of the role of the Dedicated Mechanism.

The following changes to the standing orders of the Assembly should be made.

Standing Order 30(6) should be amended to require the Speaker to transmit a copy of every bill presented to the Equality Commission for Northern Ireland in addition to the Northern Ireland Human Rights Commission.

Either Standing Orders 34 or 35 should be amended and consolidated to include reference to the Article 2(1) obligations. Alternatively, a new standing order should be made as follows:

“(1) For the purpose of obtaining advice as to whether a Bill, draft Bill or proposal for legislation is compatible with the United Kingdom’s obligations under Article 2(1) of the Ireland/Northern Ireland Protocol to the January 2020 Withdrawal Agreement between the UK and the European Union the Assembly may proceed on a motion made in pursuance of paragraph (2);

(2) Notice may be given by any member of a motion “That the Bill (or draft Bill or proposal for legislation) be referred to the bodies defined in sections 78A and 78B of the Northern Ireland Act 1998 for an opinion as to whether the provisions

of the proposed legislation are compatible with the United Kingdom’s obligations under Article 2(1) of the Protocol”;

(3) In the case of a draft Bill or proposal for legislation, notice of such a motion may be given at any time after the draft Bill or proposal for legislation is published for public consultation;

(4) In the case of a Bill, notice of such a motion may be given at any time after the Bill’s introduction;

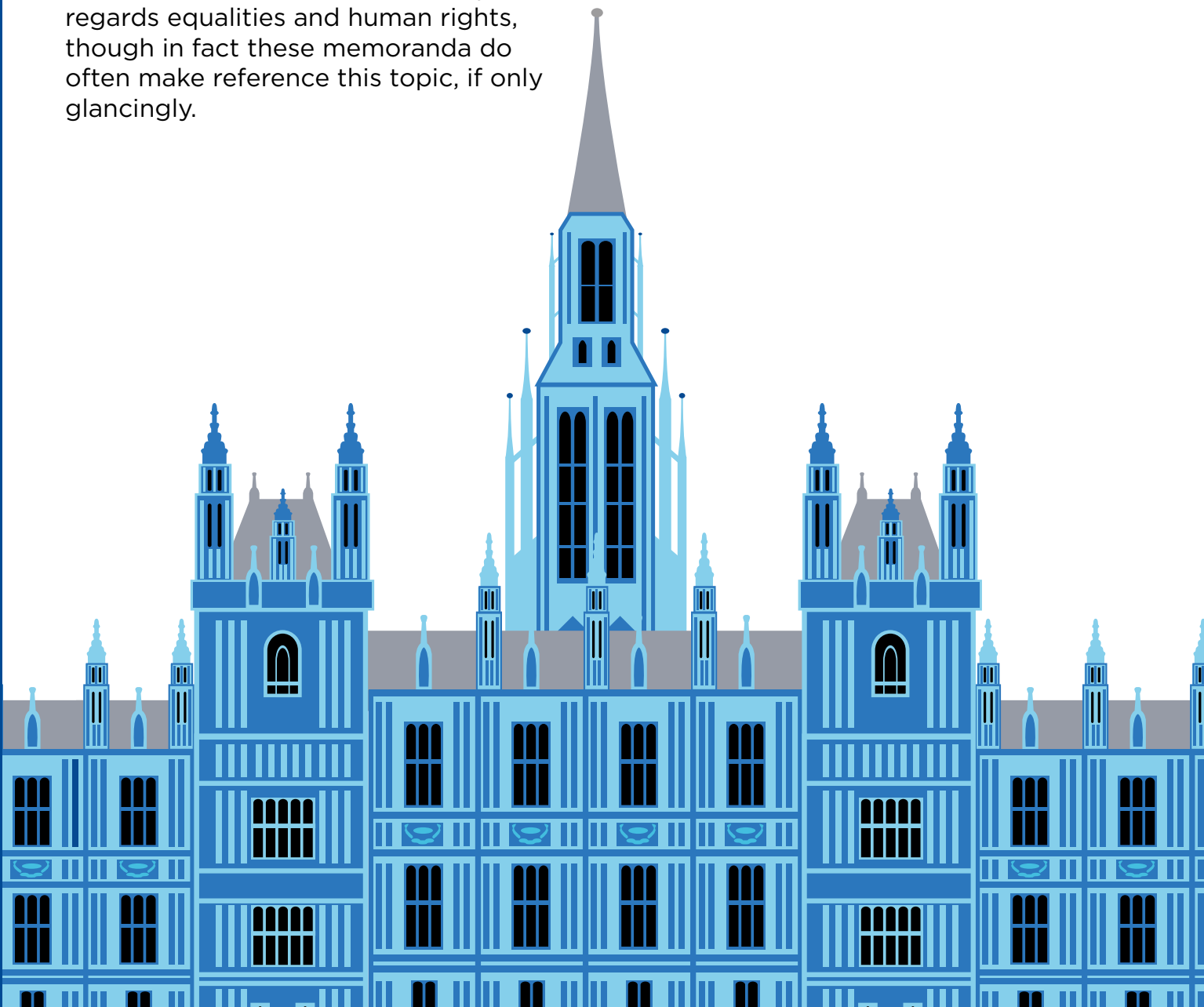
(5) On a motion being made under paragraph (2) a brief explanatory statement may be made by the member who proposes the motion and by a member who opposes it, and the Speaker shall then put the question without further debate; and

(6) Any advice tendered to the Assembly by the bodies appointed under sections 78A and 78B of the Northern Ireland Act 1998 in response to a request made in pursuance of paragraph (2) shall be circulated to all members of the Assembly and published in a manner determined by the Speaker.”

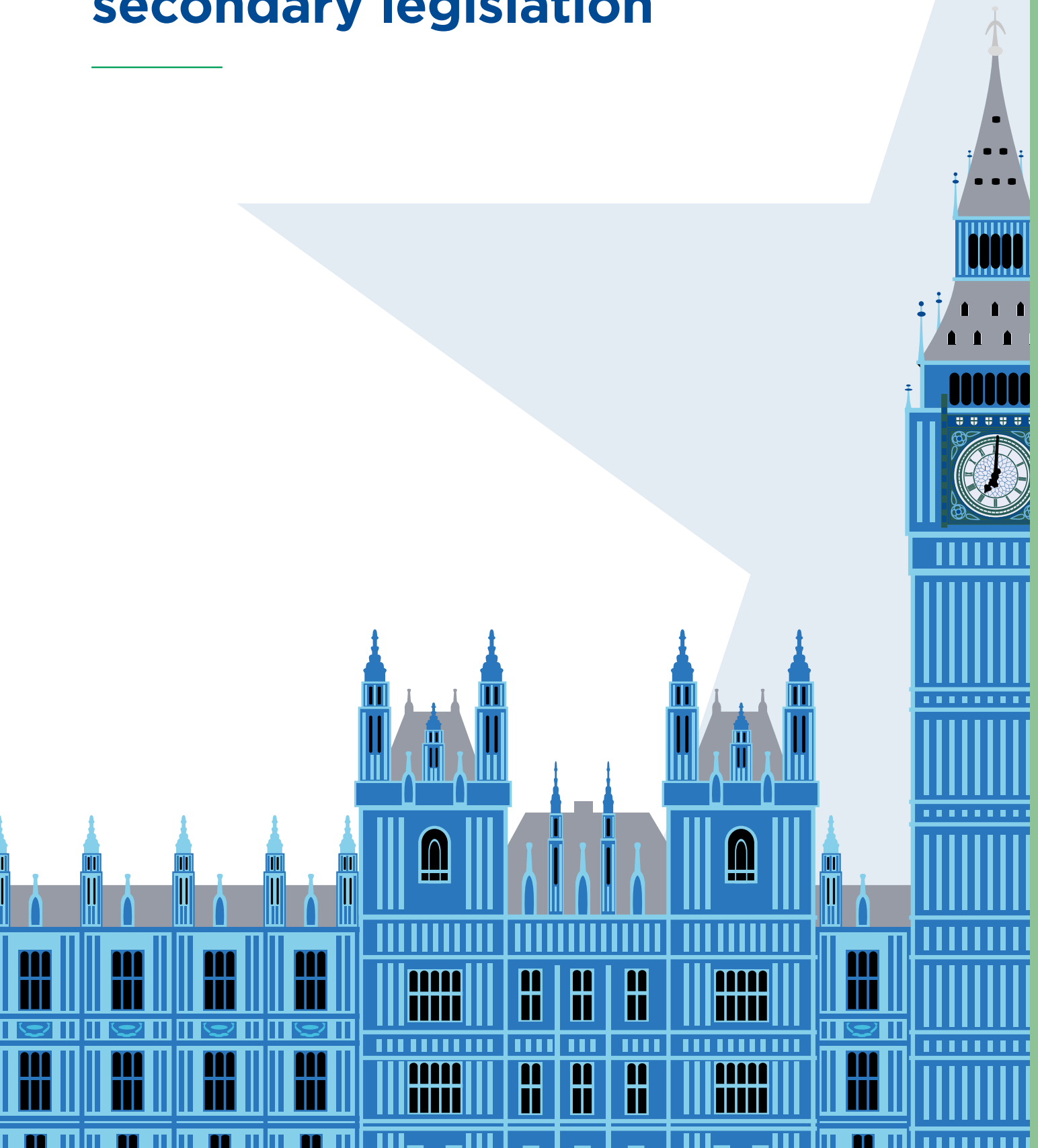
Standing Order 60 is to an extent consequential on Standing Orders 34 and 35. If the changes made above were implemented **Standing Order 60, relating to Ad Hoc Committees on Conformity with Equality Requirements should be amended to include in paragraph (1) a reference to conformity with Article 2(1) obligations** (and its title might be accordingly amended).

It has long been noted that there is an apparent lacuna in the list of topics to be covered in the Explanatory and Financial Memoranda accompanying bills introduced into the Assembly as regards equalities and human rights, though in fact these memoranda do often make reference this topic, if only glancingly.

It would be desirable for there to be added to the existing list in Standing Order 41 a test of “whether the bill has been proofed for conformity with the Convention rights and the UK’s obligations under Article 2(1) of the Ireland/Northern Ireland Protocol, and whether any concerns were identified and mitigating measures proposed”.



Chapter 5: Scrutiny of secondary legislation



Introduction

In this chapter we consider the systems of scrutiny for secondary (otherwise known as delegated) legislation in Westminster and Stormont. As noted above, secondary legislation forms the bulk, in terms of volume, of legislation that is made. There has been a tendency in recent years for UK Acts of Parliament to give increasingly wide powers to Ministers to make legislation through this route. The various Acts related to the UK's withdrawal from the EU were particularly noted for their wide-ranging use of delegated powers.

The term “delegated” indicates that this legislation is made under powers delegated by Parliament to others – usually, but not exclusively, Ministers. (Local authorities are probably the second largest class of delegated lawmakers). That power is delegated by specific provisions in Acts which define the scope of the laws, which may be made or altered under the authority that Parliament has delegated. Nowadays, most Acts of Parliament include provisions giving powers to Ministers to make delegated legislation. The decision in each case by Parliament to delegate its legislative authority in this way enables further law to be made by executive action, without the need for the full panoply of primary legislative processes. As described below, when delegating these powers, Parliament imposes varying degrees of parliamentary control over the process.

In the past, a delegated power was almost always confined to altering or expanding on the law contained in its parent statute (or another law specified in the delegation). However, a relatively new departure has been the widespread introduction of delegated powers which enable Ministers to alter primary legislation in accordance with certain

criteria or principles, rather than by the specification of chapter and verse. Legislative reform orders and remedial orders are the principal examples of these kind of powers, but to them may be added the powers granted under the 2011 Public Bodies Act to merge or abolish certain “quangos” and under the 2011 Localism Act to transfer certain functions of local authorities to other providers. Until a few years ago, the most far-reaching example was probably the provisions of Part 2 of the Civil Contingencies Act 2004 for making emergency regulations, but more recently, the powers granted under the EU (Withdrawal) Act 2017, the Coronavirus Act 2020 and other Acts have rivalled these in scope, much to the disquiet of certain commentators, including committees of Parliament.

The number of pages of delegated legislation made each year has been around three to five times the number of pages of primary legislation enacted, and there can be more than 3,000 individual items of delegated legislation made in a year (compared with forty or fifty Acts of Parliament). **Scrutiny of delegated legislation for compatibility with Article 2 obligations represents a formidable challenge for the Dedicated Mechanism.**

There is no distinction in statutory force between primary and delegated legislation, except in one important respect: a Minister or other maker is open to challenge in the courts that delegated legislation that he or she has made falls outside the scope of the discretion afforded to the Minister in the parent Act (that the Minister has acted *ultra vires*). Such legislation can be quashed by the domestic courts. A further distinction between primary and delegated legislation is that while any legislation may be challenged in

the courts under the Human Rights Act 1998 on the grounds that it is incompatible with the fundamental rights and freedoms guaranteed in the European Convention on Human Rights, in the case of delegated legislation, if a court finds that it is incompatible with the Convention rights, it may quash it, whereas with primary legislation the court may only make a “declaration of incompatibility” (see chapter 3) and cannot set the law aside.

Scrutiny of delegated legislation at Westminster

The making of statutory instruments (the most common form of secondary legislation) is subject to different degrees of parliamentary control, depending on the terms of the parent Act, which delegates the power. In broadly ascending order of rigour, these can provide for instruments which:

- have only to be formally signed-off by a Minister and published (“made”) to come into effect;
- have effect on being made but which have to be laid before Parliament afterwards;
- have effect by ministerial decision but which have to be laid before Parliament after being made, and which are subject to the provision in their parent Act that if either House resolves within forty sitting days that the instrument should be annulled they cease to be of effect (the negative resolution procedure);
- are required under the terms of their parent Act to be laid before Parliament in draft and to be approved by each House before being made and brought into effect (the affirmative resolution procedure);

- a small category of instruments which are laid before Parliament when made rather than in draft, but which cease to be of effect if not approved by one or both Houses within a period specified in the parent Act; and
- a relatively new class of so-called “super-affirmative” instruments which, except in certain cases of urgency, have to be preceded by drafts of the orders which, during a statutory period, are subject to various forms of consultation and parliamentary procedure which allow for amendments to be proposed by parliamentary committees or others. Ministers may choose to incorporate in the draft order presented for final parliamentary approval changes resulting from the consultation on the proposal or they may choose to ignore them. A more recent development is for such draft orders to be subject to variable levels of scrutiny procedure, the decision about which is determined by committees of Parliament rather than Ministers.

It is the general rule that Parliament cannot propose amendments to delegated legislation made or proposed to be made by Ministers. In the case of each instrument it can only approve, disapprove or annul it as a whole. There is a qualified exception to this principle in the cases of draft legislative Reform Orders and Remedial Orders (both of which are potentially relevant to Article 2 obligations), as well as in some other examples of the super-affirmative procedure, where committees of the House and

others can suggest amendments to proposals for delegated legislation. However, even in these cases, the decision whether to incorporate such suggestions in the final form of the legislation is for Ministers.

All items of delegated legislation which are subject to proceedings in both Houses of Parliament are examined by the Joint Committee on Statutory Instruments (see below). Only a small proportion of the delegated legislation made is debated or otherwise considered in any detail by either House. That which is closely considered is usually either debated in the Commons by a delegated legislation committee or in a Lords Grand Committee, or on the floor of that House if subject to the affirmative procedure, or examined by a select committee.

Where the formal approval of delegated legislation by the House is required by the parent Act, the decision in the Commons on the floor of the House most often takes place without debate, as that debate has been held in a committee. Where the parent Act provides for the possibility of a resolution of the House to annul an instrument, any debate on an instrument in respect of which such a motion has been tabled is also likely to take place in the Commons (if at all) in a committee rather than on the floor of the House.⁵⁰

Scrutiny of delegated legislation in the Northern Ireland Assembly

Scrutiny of delegated legislation in the Assembly, while having some broad similarities to Westminster procedures, is also distinctive:

- There is an opportunity for committees to consider proposals for statutory rules before the instrument is laid before the Assembly (the so-called “SL1 Letter” procedure);
- Instruments are considered by the appropriate statutory committee, rather than a dedicated committee or committees. This may include “merits-based” scrutiny (that is to say, policy aspects of the proposal);⁵¹
- An officer of the Assembly, the Examiner of Statutory Rules, is empowered by standing orders to assist committees in their scrutiny of instruments, and committees delegate the technical aspects of scrutiny to the Examiner. The remit of the Examiner is broadly similar to the tests applied by the Joint Committee on Statutory Instruments at Westminster;⁵² and
- The procedures for approval of instruments set out in their parent Acts are again broadly similar to those applying in the UK context: no procedure; negative procedure; affirmative procedure; draft affirmative procedure (generally called at Westminster the “super-affirmative” procedure); and confirmatory procedure (generally called at Westminster the “made affirmative” procedure).

⁵⁰ The main standing orders relevant to the treatment by the House of delegated legislation are Nos. 16, 17, 18, 98, 114, 115, 118, 141, 151, 152B, 158 and 159.

⁵¹ Standing Order 43 of the Assembly.

⁵² Paragraph 6 of Standing Order 43. The tests include the examination of *vires*, but it is not clear that contravention of Article 2 of the Protocol would be regarded as *ultra vires* in this context. We consider this point in greater detail below.

Again, in comparison with Westminster, scrutiny of delegated legislation by the Northern Ireland Assembly contains more apparent entry points for the Dedicated Mechanism to intervene on Article 2 issues. However, by the same token, it requires the Dedicated Mechanism to be alert to a wider range of committees than is the case with the Commons and the Lords. We consider the implication of these conditions further below.

The Joint Committee on Statutory Instruments

The Joint Committee on Statutory Instruments (JCSI) is the primary mechanism employed by the Lords and Commons to undertake the technical scrutiny of secondary legislation.⁵³ In contrast to other committees such as the Secondary Legislation Scrutiny Committee, the Regulatory Reform Committee or the JCHR, the JCSI does not consider the merits of an instrument or any issues of policy (directly). Instead, its terms of reference task it with scrutinising how an instrument is made and whether it conforms with specified basic legislative standards.⁵⁴

The JCSI scrutinises every Statutory Instrument (SI) or draft SI that is laid before Parliament.⁵⁵ (It also scrutinises every general – that is as distinct from local SI, regardless of whether it is laid before Parliament.⁵⁶) The Committee may decide to draw an SI to the attention of both Houses on specified grounds, which it will do in its regular weekly reports.

The JCSI may report an instrument on various grounds, including that: (1) it imposes a charge in the nature of a tax for which a financial resolution of the Commons would normally be required; (2) it purports to oust of judicial jurisdiction; (3) it is of retrospective effect; (4) there was an unreasonable delay in it being made available to Parliament; (5) there is doubt as to whether the instrument was created within the scope of enabling powers (in other words as to whether it is ‘intra vires’); (6) it includes the unusual or unexpected use of an enabling power; (7) it requires elucidation (in other words that its meaning is unclear); and (8) the drafting is defective.

Whilst these grounds are relatively broad, they can be summarised as seeking to uphold basic legislative standards. They also ensure that secondary legislation is accessible, free of defects, not retrospective, and lawfully created (intra vires). Reporting grounds like ‘defective drafting’ can include simple mistakes like circular drafting, or a lack of precision, but also include issues like unclear scope, or creating an obligation without a sanction, both of which would hinder how effective an instrument is.

The JCSI plays a key role in the scrutiny of delegated legislation. Its reports are formally addressed to both Houses of Parliament and may inform next stage scrutiny of instruments in

53 ‘The Statutory Instruments Practice Guide’ (5th edition, 2017) pp.140-142.

54 See the ‘Terms of Reference’ as set out in the House of Commons Standing Order No. 151 and House of Lords Standing Order No.73.

55 Ibid.

56 However, certain SIs lay outside the JCSI’s remit, including for instance, local SIs, Welsh SIs, Church Measures, Remedial Orders and Draft Regulatory Reform Orders (in other words, types of instruments made under enabling subject to bespoke scrutiny arrangements, like strengthened scrutiny).

either House,⁵⁷ and more specifically: (1) debate on affirmative statutory instruments (which normally require positive approval before taking effect); and (2) whether either House decides to annul negative SIs.⁵⁸ But reports are also aimed at government departments and are supposed to set certain standards to ensure that legislation is clear, functional and accessible.

The JCSI plays a role ‘behind the scenes’ in encouraging government departments to continue to uphold good legislative standards when drafting instruments.⁵⁹ Prior to reporting an instrument, the JCSI is required to engage with a government department on certain SIs. In this respect, the JCSI may require any Department to submit a memorandum or send an in-person witness explaining an SI under scrutiny.⁶⁰ The JCSI may report on any memorandum or evidence submitted. Thus, departments are given a chance to explain an SI or withdraw an SI and replace it before the JCSI reports on it.

Although the JCSI does not perform the kind of policy scrutiny that commonly occurs in select committees, its work is valuable in upholding certain standards when secondary legislation is created. Ultimately, these standards can affect whether an SI is effective in meeting its policy aims, and whether an instrument meets basic rule of law (and legislative practice) requirements.

Looking at government responses to 144 instruments across the session 2017-2019, the JCSI highlighted that around half of the time the government acknowledged the error and undertook to make a correction, in another 10% an error was partially acknowledged, and in another 17% the error was elucidated.⁶¹

In the context of this report, it is clear that the JCSI could have a role to play in upholding the UK’s obligations under Article 2 of the Protocol. We examine how this might work in practice in our recommendations.

The European Statutory Instruments Committee

The European Statutory Instruments Committee (ESIC) in the House of Commons was originally established to consider proposed negative procedure instruments which Ministers proposed to make under the European Union (Withdrawal) Act 2018 (most of these were concerned with importing EU law into domestic law).⁶² More recently, in March 2021, ESIC was also tasked with sifting proposed negatives under the EU Future Relationship Act 2020. Like the JCSI, ESIC performs a kind of technical scrutiny, though its role is more limited. It can only propose changing the procedure to which an instrument is subject from the negative to the affirmative.

⁵⁷ Standing Order No. 73 of the House of Lords forbids a motion to approve an SI subject to affirmative procedure from being moved until the JCSI has reported on it; there is no equivalent provision in the standing orders of the House of Commons, nor indeed an equivalent practice.

⁵⁸ House of Commons Standing Order No. 151, House of Lords Standing Order No.73. It should be noted that while motions to annul instruments are very rarely taken on the floor of the House of Commons, and never agreed, the Lords often prefers to express more conditional disapproval through “non-fatal” motions relating to SIs which do not have statutory effect under the Statutory Instruments Act 1946. Debates on such motions could certainly be relevant to the work of the Dedicated Mechanism.

⁵⁹ Caird, J.S. and Patterson, E., ‘Brexit, Delegated Powers and Delegated Legislation: A Rule of Law Analysis of Parliamentary Scrutiny’ (Bingham Centre for the Rule of Law, April 2020) pp. 9-10.

⁶⁰ Ibid.

⁶¹ Joint Committee on Statutory Instruments, ‘[Transparency and Accountability in Subordinate Legislation](#)’ (First Special Report, 2017-2019) HL 151, HC 1158.

⁶² [House of Commons, European Statutory Instruments Committee.](#)

After a proposed negative procedure instrument is laid, the ESIC has ten days during which to determine whether an instrument ought to be “upgraded” to the affirmative procedure.⁶³ If the ESIC proposes that an instrument is reassigned to the affirmative procedure, the relevant Minister then must decide whether to adopt this recommendation, and if they refuse, they must provide a written statement explaining their decision. The ESIC’s recommendations are normally published in a report immediately after it has met, and instruments that are scrutinised by the ESIC undergo all the other standards scrutiny procedures regardless of whether they are upgraded (including scrutiny by the JCSI and SLSC).

The ESIC’s recommendations, like those of most select committees, are advisory not binding. Its work may however occasionally be relevant to secondary legislation relating to Article 2 of the Protocol.

Other select committees dealing with delegated legislation

As noted in the preceding chapter, the **JCHR** is required to consider all Remedial Orders made under the Human Rights Act. On occasions, these may well be relevant to Article 2 obligations. As such, orders are generally subject to a version of the super-affirmative procedure, and they may be amended if the Committee so recommends. This reinforces the need for the Dedicated Mechanism to keep open clear lines of communication with the JCHR.

The **Regulatory Reform Committee** in the Commons and the **Delegated Powers and Regulatory Reform Committee** in the Lords consider Legislative Reform Orders made under the Legislative and Regulatory Reform Act 2006. The power to make orders under this Act has been used fairly sparingly, and the committees are not kept busy with this work. It is possible, though probably unlikely, that orders made under the Act might touch on the Article 2 obligations. Orders under the Act are subject to another variety of the “super-affirmative” procedure, and can therefore be amended in accordance with recommendations made by the committees, so there should be ample opportunity for the Dedicated Mechanism to intervene should it appear necessary to do so.

The Lords’ **Secondary Legislation Scrutiny Committee** (SLSC) considers the policy effects of statutory instruments and other types of secondary legislation subject to parliamentary procedure. It conducts, in the jargon of procedural science, “merits-based” scrutiny. However, were a UK statutory instrument identified as touching on Article 2 issues, it might well be that the SLSC would defer to the Sub-Committee on the Ireland/Northern Ireland Protocol to take any inquiries forward. The Dedicated Mechanism needs to be alert to the role of the SLSC and consider whether it should communicate any concerns it has to that Committee where they arise.

63 Ibid.

Analysis and recommendations

Given the sheer volume of material, scrutiny of secondary legislation for compliance with Article 2 obligations is probably a more challenging task than scrutiny of primary legislation. The Dedicated Mechanism could not sensibly attempt comprehensive coverage of all secondary legislation made, or proposed to be made, by Ministers of the UK Government or Northern Ireland Executive.

The task may be made manageable by the existence of elaborate and comprehensive scrutiny systems at both Westminster and Stormont. At the most emphatic level (and possibly only to be considered as a long-term ambition), the terms of reference of the JCSI at Westminster and (more perhaps in the shorter term) those of the Examiner of Statutory Rules in the Assembly could be enlarged to include a specific test against Article 2 criteria. More quickly, it should be possible for the Dedicated Mechanism to negotiate, with the team working for the JCSI and the Examiner, a protocol by which it would be alerted promptly to any SI or SR (whether made or on draft) that seemed to have potential to impact on the Article 2 obligations. The Dedicated Mechanism could then provide an opinion to the JCSI or to the Examiner which they would take into account when reporting on matters of concern.

However, as described above, the vast majority of statutory instruments are subject to the negative (annulment) procedure and become law without any further parliamentary consideration beyond scrutiny by the

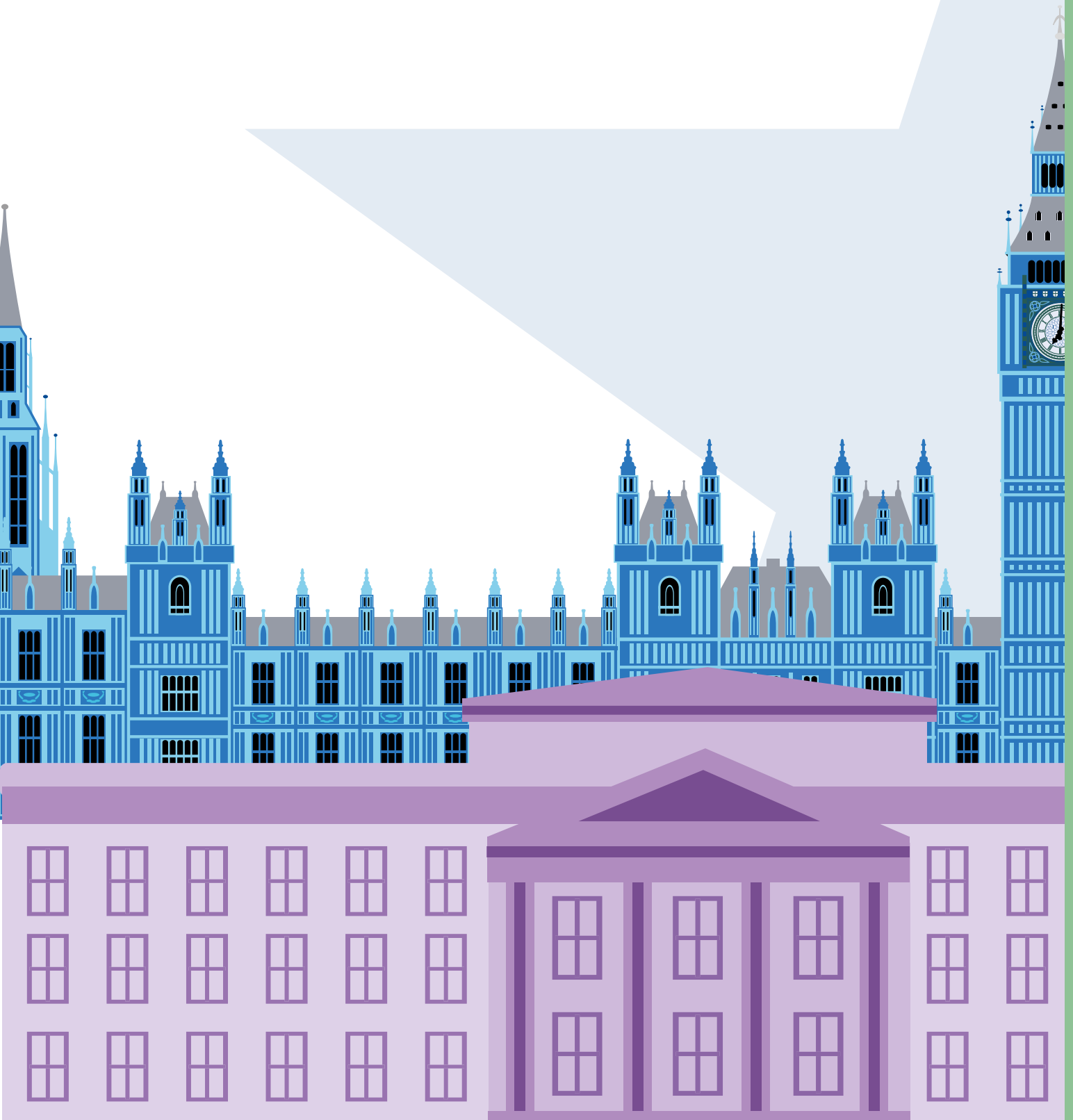
JCSI (and sometimes the SLSC). If the JCSI were to consider that any SI which on the face of it appeared to run counter to Article 2 guarantees was ultra vires, and reported it as such, the expectation would be that the government would withdraw and replace it. If it did not, it would be highly vulnerable to defeat if a judicial review were sought.

In the procedures of the Assembly relating to secondary legislation, the elaborate system of checks relating to rights and competence at different stages that apply during the preparation and passage of primary legislation are not so developed in the making of Statutory Rules. The test set out in subparagraph (6)(f) of Standing Order 43 of the Assembly for the examination of Statutory Rules does, however, include the test of whether the proposed Rule is intra vires. We consider that, in the light of sections 6(2)(ca) and 24(1)(aa) of the Northern Ireland Act, the committees charged with examining Rules would interpret this to mean that a provision in conflict with Article 2(1) of the Protocol was ultra vires and report accordingly.

In the light of these considerations, **we recommend that the Dedicated Mechanism and the Examiner of Statutory Rules should have a protocol or memorandum of understanding in place to ensure dialogue between them on Article 2 issues arising during the examination of Statutory Rules.**

It would be likely to be sensible if this dialogue were to commence at the earliest stage – the lodging of the SL-1 letter.

Chapter 6: Scrutiny of European legislation and international agreements



Introduction

As noted in chapter 1 of this report, one of the streams of legislation which will be relevant to the Dedicated Mechanism is new EU legislation which, either (a) specifically relates to the Directives listed in Annex 1 to the Protocol, or, (b) has a relevant impact on the operation of the rights protected under Article 2 to the Protocol.

Both Houses of Parliament have had in place committees to scrutinise draft EU legislation since 1974.⁶⁴ Each House took its own approach to scrutiny and the two mechanisms were operated very differently. However, both systems worked on the basis of the same information: first, the receipt of EU documents; and second, the receipt of Explanatory Memoranda (EMs) from the UK Government. These EMs set out the content of any proposed legislation, any previous scrutiny history, its financial and policy implications, a statement about any human rights concerns, an impact assessment, a note on its legal base, and (where appropriate) details on the consultation which had taken place.

It was only on the basis of this information that the committees were able to operate what was known as the ‘scrutiny reserve’, which was broadly designed to preclude the Government from assenting to an EU document in Council until it had been cleared from scrutiny.⁶⁵

The former legal adviser to the Lords European Union Committee, Paul Hardy, noted that the reports establishing the scrutiny committees

in each House rightly anticipated the “importance of receiving timely information from the Government on an EU proposal” and indicated that under the procedures operating before Brexit, the Government was required to deposit, in each House, EU policy and legislative proposals within two working days of their arrival at the Foreign and Commonwealth Office.⁶⁶

Within 10 days of the deposit of an EU document, the responsible government department was required to submit an EM on it, signed by a Minister. This triggered the start of the scrutiny process in each House. In 2016, Hardy estimated that approximately 1,000 EU documents were deposited each year.⁶⁷

The European Scrutiny Committee

The functions of the European Scrutiny Committee (ESC) are set out in Standing Order No. 143.⁶⁸ It provides that the ESC is required to examine European Documents and:

“(a) to report its opinion on the legal and political importance of each such document and, where it considers appropriate, to report also on the reasons for its opinion and on any matters of principle, policy or law which may be affected;

(b) to make recommendations for the further consideration of any such document pursuant to Standing Order No. 119 (European Committees); and

(c) to consider any issue arising upon any such document or group of documents, or related matters.”

64 For details of the systems which operated until the end of the transition period, see: e.g. Hardy, P. ‘European Scrutiny’, in A. Horne and A. Le Sueur, *Parliament: Legislation and Accountability* (Hart Publishing: 2016), p.89.

65 There were, of course, exceptions which permitted the Government to override the scrutiny reserve.

66 Hardy, P. ‘European Scrutiny’, in A. Horne and A. Le Sueur, *Parliament: Legislation and Accountability* (Oxford: Hart, 2016), p93-94.

67 Ibid.

68 [Standing Order No. 143](#)

The ESC consists of 16 MPs. It was supported by a very substantial staff by select committee standards, including Counsel and Deputy Counsel and around half-a-dozen highly qualified legal and policy analysts. It had (and in theory, still has) the power to recommend documents for debate, either in a European Committee⁶⁹ or on the floor of the House.

Hardy noted that of the 1,000 or so documents that the ESC considered each year, it found about half to be of political or legal significance, and reported on them substantively. Of these, Hardy suggested that about 40 documents each year be debated in European Committee and only a handful for debate on the floor of the House.⁷⁰

These figures indicate the scale of the task of monitoring potential EU legislation for possible implications for Article 2 obligations.

It would be disproportionate for the Dedicated Mechanism to undertake scrutiny at the level of intensity and comprehensive scope practised by the ESC during the UK's membership of the EU. It will need to rely on both on the remaining European advisory capacities of the Commons and Lords and on civil society organisations concerned with equality and rights issues.

The European scrutiny system of the Commons (in contrast to the Lords) remains largely unreformed and continues in a somewhat makeshift way. The ESC states on its website:

Following the end of the post-Brexit transition period on 31 December 2020, the European Scrutiny Committee will continue to monitor the legal and/or political importance of new EU legislation and policy and assess their potential implications for the UK. It may also scrutinise the implementation of the Withdrawal Agreement, the Protocol on Northern Ireland and the UK/EU Trade & Cooperation Agreement.⁷¹

However, only “deposited” (that is to say, placed before Parliament by UK Ministers) European Documents are now strictly within the scope of the ESC’s scrutiny, and not all Documents relating to proposed legislation emanating from the Commission will necessarily be “deposited”. This problem is illustrated by a recent exchange of letters (published on the Committee’s website) between the Chair of the ESC and the Minister of State for Northern Ireland about the proposed Pay Transparency Directive.⁷² In his [letter](#), the Chair notes:

69 See Standing Order No. 119 which provides, inter alia, that there “are three general committees, called European Committees, to which shall stand referred for consideration on motion, unless the House otherwise orders, such European Union documents as defined in Standing Order No. 143.” Each European Committee shall consist of thirteen Members nominated by the Committee of Selection in respect of any European Union document which stands referred to it.

70 Hardy, P. ‘European Scrutiny’, in A. Horne and A. Le Sueur, *Parliament: Legislation and Accountability* (Hart Publishing: 2016), p.97.

71 [European Scrutiny Committee - Summary - Committees - UK Parliament](#)

72 Proposal for a Directive to strengthen the application of the principle of equal pay for equal work or work of equal value between men and women through pay transparency and enforcement mechanisms; COM(21) 93.

“The European Scrutiny has considered a recent European Commission proposal for a Directive ... The Government has not deposited the proposed Directive for scrutiny so we do not have the benefit of an Explanatory Memorandum setting out the Government’s position on the proposal.”

In his [response](#), the Minister of State does not make any commitment to looking beyond the narrow remit of the Protocol for evidence of any need for the UK to “keep pace”:

“The Government remains committed to ensuring that matters of pay transparency are dealt with, however we do not believe that there is any requirement to go further than the requirements to assess this already included in the protocol.”

The Minister’s letter tends to place the full onus on the EU Commission to identify Article 2 issues in proposals for legislation, saying:

“We are continuing to work within the JCWG to establish the mechanisms for information exchange. NIO have worked with colleagues in JCWG and the NI Executive Office to establish information exchange and have recently written to the Northern Ireland Human Rights Commission (NIHRC) and Equality Commission for Northern Ireland (ECNI) on this in their role as the dedicated mechanism.”

In response to the ESC’s specific question about what steps is the Government taking to monitor developments in EU equality laws which may be relevant to the Article 2(1) commitment and to what extent it can influence their content, the Minister states:

“As set out in Article 15(3)(b), the EU shall inform the UK about planned EU legislation within the scope of the Protocol.”

The Dedicated Mechanism will need to enter into further discussions with the ESC and the UK Government to seek to ensure that legislation identified as affecting Article 2 obligations is singled out for deposit. Nonetheless, for the time being, the ESC may well be one of the main channels of intelligence about, and the principal instrument of scrutiny of, issues relating to the Article 2 obligations. **The resources previously dedicated to the ESC’s scrutiny work have been regrouped in a European Unit, and it will be important for the Dedicated Mechanism to build strong relations with that team of officials.**



The House of Lords European Union Committee

Until April 2021, the House of Lords had a significant responsibility for the scrutiny of European Union documents. Prior to the Brexit vote, the Lords European Union Committee comprised a Select Committee and six sub-committees.⁷³ As such, a total of 73 Members of the House of Lords were responsible for scrutinising EU legislation and they were assisted by a staff of 24 (including two legal advisers).⁷⁴

Prior to Brexit, the terms of reference were as follows:

“(1) To consider European Union documents deposited in the House by a Minister, and other matters relating to the European Union;

The expression “European Union document” includes in particular:

- (a) a document submitted by an institution of the European Union to another institution and put by either into the public domain;
- (b) a draft legislative act or a proposal for amendment of such an act; and
- (c) a draft decision relating to the Common Foreign and Security Policy of the European Union under Title V of the Treaty on European Union;

The Committee may waive the requirement to deposit a document, or class of documents, by agreement with the European

Scrutiny Committee of the House of Commons;

(2) To assist the House in relation to the procedure for the submission of Reasoned Opinions under Article 5 of the Treaty on European Union and the Protocol on the application of the principles of subsidiarity and proportionality; and

(3) To represent the House as appropriate in interparliamentary co-operation within the European Union.”

The Lords EU Committee received the same information as the ESC. However, while the ESC would consider all the documents that were deposited by the Government, the EU Committee operated a sift. Essentially, the legal advisers would assess each document and send it to the Chair of the Select Committee, alongside a recommendation as to whether it should be cleared, sifted for information, or examined by the Select Committee or one of the sub-committees.

The Chair would then consider this advice and finalise the sift – sending about 30% of the most important documents for examination. Whereas the system in the Commons was designed for breadth, the Lords system was designed for more detailed and expert scrutiny. The size of the Lords committee system and the fact that each of the sub-committees had a specialised area of interest meant that it was easier to take external evidence and

⁷³ In 2016, these considered issues relating to Finance Affairs, the Internal Market, External Affairs, Energy and Environment, Justice and Home Affairs. Initially, there had been a seventh sub-committee which considered social policy and consumer protection.

⁷⁴ During the transition period, the Committee was scaled back to comprise the Select Committee and four sub-committees (Energy and Environment; Goods; Service; and Justice and Security), as well as a new International Agreements Sub-Committee which did not have an EU focus.

deal with a larger group of stakeholders. Moreover, the Peers themselves would often bring knowledge and expertise.

Both of these systems had advantages and disadvantages. However, Hardy's conclusion remains worth noting, that "a reality of the scrutiny systems of both Houses is that, on issues where the Government and the committees have opposing views, those of the committee can, ultimately, be ignored."⁷⁵ In spite of the scrutiny reserve system, neither committee had any real veto power.

EU Scrutiny in the Lords post-Brexit

The system for scrutinising European Union documents continued broadly as described above during the transition period. However, with the 'hook' of the scrutiny reserve having fallen away, the scrutiny process became somewhat toothless, as there was no ministerial accountability for the outcomes. The Lords EU Committee noted that during the transition period it had "agreed with the Cabinet Office a streamlined process for scrutiny of EU laws, one that was proportionate to the UK's status as a former Member State still subject to EU law."⁷⁶ Importantly, the Government continued to provide EMs and measures were still examined by both the Commons and the Lords.⁷⁷

However, things changed following the agreement of the Trade and Co-operation Agreement with the European Union and at the end of the transition period. On 20 April 2021, the House

of Lords stated that the House of Lords Select Committee and its sub-committees would be replaced with a much more streamlined committee structure featuring only a single European Affairs Committee and a Sub-Committee on the Protocol on Ireland/Northern Ireland.⁷⁸

The new Lords committee has been appointed with the following terms of reference:

"The Committee is appointed to:

1. Consider matters relating to the United Kingdom's relationship with the European Union and the European Economic Area, including;
 - a) The implementation of any agreements between the United Kingdom and the European Union, including the operation of the governance structures established under those agreements;
 - b) Any negotiations and further agreements between the United Kingdom and the European Union; and
 - c) The operation of the Protocol on Ireland/Northern Ireland;
2. Consider European Union documents deposited in the House by a minister; and
3. Support the House as appropriate in interparliamentary cooperation with the European Parliament and the Member States of the European Union.

75 Hardy, P. 'European Scrutiny', in A. Horne and A. Le Sueur, *Parliament: Legislation and Accountability* (Hart Publishing: 2016) p.112.

76 European Union Committee, '[Beyond Brexit: the institutional framework](#)', (21st Report, 2019-2021) HL 246, para 13.

77 By the end of the transition period, far fewer documents were sifted for examination by the Lords EU Select Committee – possibly because the interaction with Government over new legislation was hindered significantly following the end of the scrutiny reserve.

78 [New European Affairs Committee and Sub-Committee on the Protocol on Ireland/Northern Ireland established - Committees - UK Parliament.](#)

In spite of the continued reference to new EU documents and legislation by the two committees, the precise process for scrutinising European documents post-Brexit had not been formalised at the time of writing.

Following a number of confidential interviews, it is understood that a new process of some kind is likely to be formalised between the committees and the Government. While the Government appears to be willing to provide EMs on some documents which would have an impact on the single market related aspects of the Ireland/NI Protocol, it is far from clear – as noted in relation to the ESC – whether it has committed to do the same in respect of proposals which would impact on Article 2 of the Protocol. **It is clearly essential that this information is provided to Committees in both the Commons and the Lords for effective scrutiny to take place.**

The Sub-Committee on the Ireland/Northern Ireland Protocol

The Protocol on Ireland/Northern Ireland Sub-Committee will have the primary responsibility for scrutinising relevant legislative proposals from the EU in the House of Lords. The Sub-Committee was appointed in April 2021, to consider all matters related to the Protocol, including scrutinising EU legislation applying to Northern Ireland under the Protocol, the Protocol's overall socio-economic and political impact on Northern Ireland, and to engage in interparliamentary dialogue, notably with the Northern Ireland Assembly. The Sub-Committee

launched an introductory inquiry into the operation of the Protocol in April 2021 and produced its first introductory report on the Protocol on 29 July 2021.⁷⁹

In its first report, the Sub-Committee indicated that it had “begun its scrutiny on the basis of Explanatory Memoranda received from and exchanges of correspondence with UK Government Ministers, focusing in particular on:

- The Government's consultation with the Northern Ireland Executive;
- The impact of EU legislation upon the movement of goods between Great Britain and Northern Ireland, and Northern Ireland's participation in the UK internal market;
- The practical impact of regulatory divergence between Northern Ireland and Great Britain;
- The requirements in domestic legislation to implement new EU rules in Northern Ireland;
- Consultation and engagement with businesses and other stakeholders in Northern Ireland; and
- Impact and cost assessments of EU legislation for Northern Ireland.”⁸⁰

In conducting its scrutiny of EU legislation, the Sub-Committee will have access to the same information as the ESC in the Commons. However, it has indicated that it will continue to operate

⁷⁹ European Affairs Committee, 'Report from the Sub-Committee on the Protocol on Ireland/Northern Ireland: Introductory report' (2nd Report, 2021-22) HL 55.

⁸⁰ European Affairs Committee, 'Report from the Sub-Committee on the Protocol on Ireland/Northern Ireland: Introductory report', (2nd Report, 2021-22) HL 55, para 7.

a sift, in tandem with the House of Lords European Relations Committee.⁸¹ This will be conducted by the Chairs of the European Affairs Committee and the Protocol Sub-Committee, with the assistance of a legal adviser. Unlike the ESC, the Sub-Committee will only examine proposals which are considered significant, or raise legal or political concerns. It will continue to conduct the majority of its scrutiny by way of correspondence with Ministers, which is published on its website on a regular basis.⁸²

Analysis

While the House of Lords has scaled back the resources it devotes to the scrutiny of EU legislation, it will still be a key interlocutor for the Dedicated Mechanism. It is particularly important as it has established a dedicated Sub-Committee for the Protocol on Ireland/Northern Ireland, which will scrutinise EU legislation applying to Northern Ireland under the Protocol. As such, it may prove a useful source of intelligence about Commission proposals, and it may well develop greater expertise in these areas than the Commons European Scrutiny Committee, given its particular focus.

Scrutiny of international agreements in the House of Lords

The new system of scrutinising international agreements, or treaties, in the House of Lords was first established as a new function of the European Union Select Committee. Until 2019, the only systematic scrutiny of treaties

was conducted by the House of Lords Secondary Legislation Scrutiny Committee (SLSC), which began to scrutinise treaties in the 2014-15 Parliamentary session. This approach became unsustainable during the Brexit process, since the SLSC was faced with a tsunami of Brexit related statutory instruments.

Accordingly, between 2019 and January 2021, the EU Committee agreed to scrutinise all 'Brexit-related' treaties. It produced reports on every Brexit related agreement which the government laid under the Constitutional Reform and Governance Act 2010. Many of these sought to replicate, or 'roll over' trade agreements the EU had with third countries.

In March 2020, as part of the restructuring of the EU Committee, the House of Lords Procedure Committee recommended that this work should be conducted by a new committee. Initially, from March 2020, this was set up as a sub-committee of the European Union Committee.⁸³

In January 2021, following the end of the transition period, the sub-committee was transformed into a full committee of the House of Lords: the International Agreements Committee. The Committee is obliged, under its terms of reference, to consider all treaties that are laid before Parliament under the terms of the Constitutional Reform and Governance Act 2010 (CRAG 2010). By April 2021, in its two

⁸¹ [New items of scrutiny - Committees - UK Parliament.](#)

⁸² [Correspondence with Ministers - Committees - UK Parliament.](#)

⁸³ Horne, A. and Gracia D. '[Treaty scrutiny - A brave new frontier for Parliament](#)', *UK Constitutional Law Association* (18 March 2020).

guises, the Committee had published 16 reports considering 34 treaties.⁸⁴

While the Committee reports on every agreement laid before Parliament, the level of detail in any report depends on whether it intends to draw an agreement to the special attention of the House. In its report 'Treaty Scrutiny: Working Practices', the Committee set out the specific criteria it would use in deciding whether to draw a new treaty to the special attention of the House. These are:

- (a) that it is politically or legally important, or gives rise to issues of public policy that the House may wish to debate prior to ratification;
- (b) in the case of any agreement that is intended to 'roll over' an agreement by which the UK was previously bound, as an EU Member State, that it differs significantly from the precursor agreement, or that it is inappropriate, in view of changed circumstances since the precursor agreement was concluded by the EU;
- (c) that it contains major defects, that may hinder the achievement of key policy objectives;
- (d) that the explanatory material laid in support provides insufficient information on the agreement's policy objective and on how it will be implemented; and
- (e) that further consultation would be appropriate, including with the devolved administrations.⁸⁵

The use of criteria of this type can be helpful as it highlights to government, in advance, the types of issues which are likely to be important when scrutinising an agreement.

In addition to the establishment of scrutiny criteria, the establishment of a standalone committee led to a particular focus on other working practices⁸⁶ including information exchange with Government. Unlike some other types of scrutiny, the obligation on the government to provide information to Parliament on treaties is set out in statute: section 24 of CRAG 2010. This requires the Government to provide an explanatory memorandum (EM) with each treaty laid before Parliament. These EMs are important as they are often the only information that the government puts into the public domain about a treaty.

The EMs provide the context, explaining what the new treaty is meant to achieve, what legislation (if any) will be needed to implement it, when it will take effect, the financial implications and the territorial application of the agreement. Following concerns expressed by the various Lords Committees which scrutinised these agreements post-2019, the Government agreed to provide more detailed information, including on the consultation that has taken place (particularly with the devolved administrations), the way in which new treaties interact with any related international agreements and whether a treaty has any significant human rights

84 Horne, A. 'Treaty scrutiny in the House of Lords' *UK in a changing Europe* (ukandeu.ac.uk), (15 April 2021).

85 House of Lords International Agreements Sub-Committee, 'Treaty Scrutiny: Working Practices' (11th Report 2019-21) HL Paper 97, para 36.

86 Ibid.

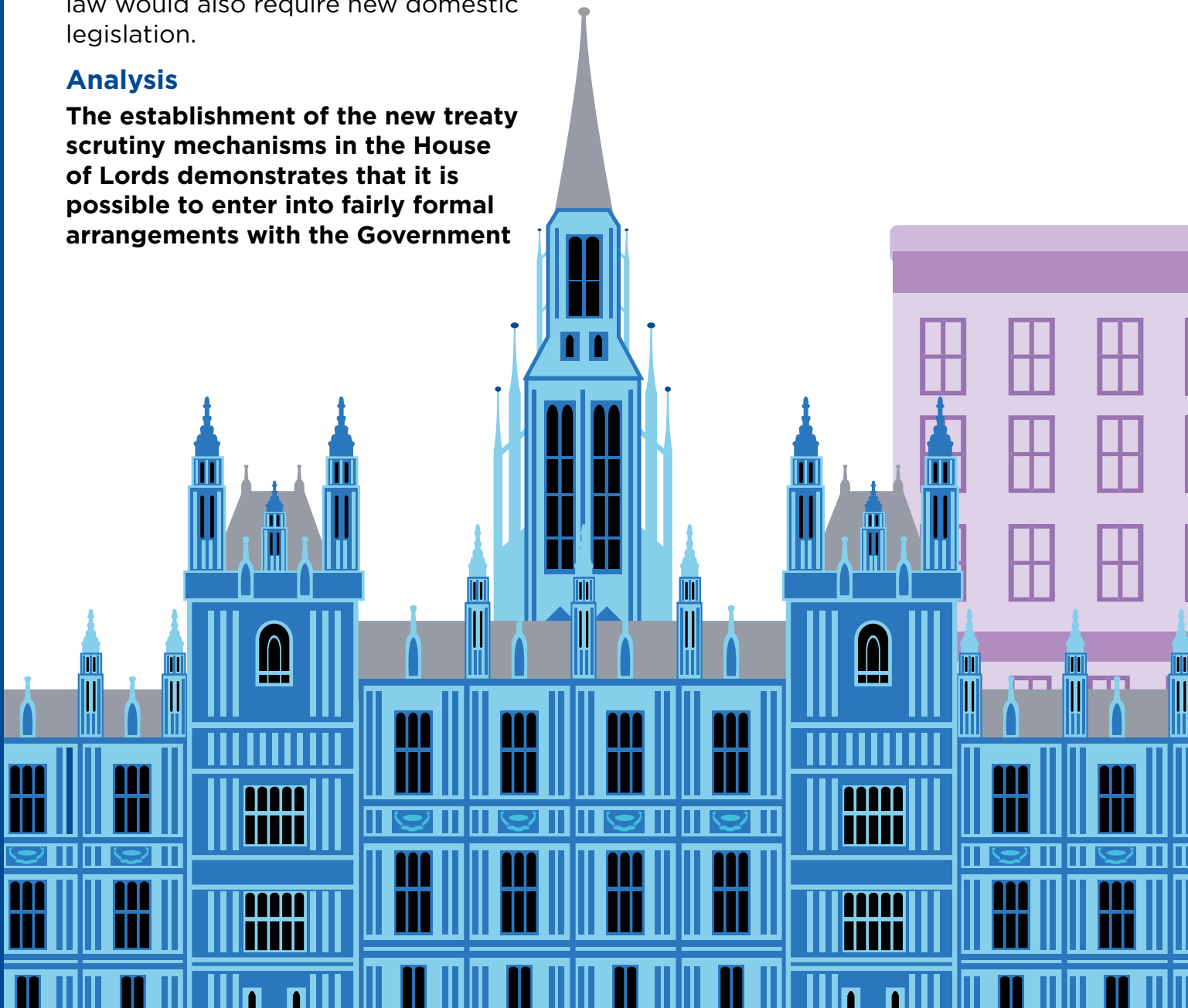
implications which should be drawn to the attention of the Joint Committee on Human Rights.

It is unlikely that the Dedicated Mechanism will need to establish distinct relations with the International Agreements Commission. While new treaties could have an impact on Article 2, the European Affairs Committee will continue to take responsibility for new agreements with the European Union (which would seem the most relevant), while the JCHR will monitor agreements which touch on human rights obligations. Any new agreements which would require significant changes in the law would also require new domestic legislation.

Analysis

The establishment of the new treaty scrutiny mechanisms in the House of Lords demonstrates that it is possible to enter into fairly formal arrangements with the Government

on new scrutiny mechanisms in reasonably short order. It also highlights the importance of the materials that are provided by the government. Many of the reports by the new International Agreements Committee focus on the need for information to be provided in a timely fashion, and for transparency and adequate consultation. This will be important for any new systems established to ensure compliance with the obligations set out under Article 2 of the Protocol.



Conclusion



The type of scrutiny mechanism required

The obligations under Article 2 of the Protocol are unique. They engage with both domestic legislation (made at Westminster and in the Northern Ireland Assembly) and with incoming EU law.

The high-level requirements for the policing of the “no diminution” obligation under the Protocol are relatively straightforward, but the scale of the task is forbidding. All domestic legislation, whether primary or secondary and whether specific to Northern Ireland or applying to the UK as a whole, falls within its ambit.

The scrutiny of the “keeping pace” commitment has less clear-cut boundaries, and some of the challenges it will present have already begun to manifest. It entails keeping track, not only of EU legislation amending or replacing the six directives listed in Annex 1 to the Protocol, but the wider canvas of EU legislation which may indirectly affect the rights of residents in Northern Ireland.

In these circumstances, it is evident that there will be no one-size-fits-all solution. A number of committees in Westminster and Stormont may feel that they have both a locus and a duty to scrutinise new arrangements and report on developments. The Dedicated Mechanism must be ready to engage where its voice and its expertise can add the most value. It must be flexible and adaptable in its approach to supporting effective legislative scrutiny.

Since many bodies may be responsible, and there is no clear line of responsibility for the work, there is a need to ensure that the nothing falls between the gaps.

There is currently a lack of information of the volume of work involved. Combined with the Government’s reluctance to engage on the precise mechanisms for post-Brexit scrutiny, and the fact that the potential workstreams come in such diffuse strands, it seems unlikely that a single new committee could be established in either Westminster or in the Assembly to undertake this work. We do not believe this is an ambition worth pursuing. There are, at Westminster, a number of committees within the remit of which this matter will have some salience, which should ensure that it receives sufficient political attention. However, it will be essential that the Northern Ireland Assembly finds a way to take clear political responsibility for the operation of the Protocol and the implications for its procedures.

In the Northern Ireland Assembly we have identified only one relevant scrutiny committee which might currently seek to consider this topic more broadly than in the context of a specific legislative proposal – the Committee for the Executive Office. Helpfully, the Committee has already taken an interest in issues relating to Article 2 of the Protocol, holding a number of evidence sessions with the ECNI, the NIHRC and the Irish Human Rights and Equality Commission.⁸⁷

⁸⁷ [committee-25919.pdf \(niassembly.gov.uk\)](#)

However, the remit of the Committee for the Executive Office is very wide and it is not established solely as a legislative scrutiny committee.⁸⁸ While we have some concerns that the Committee's remit may be too broad to conduct regular scrutiny of the sort that would be required under Article 2 of the Protocol, it is also clear that, at least in the short term, in order to engage consistently with parliamentarians in the Northern Ireland Assembly, continued dialogue with the Committee for the Executive Office will prove essential.

For the present, the most obvious engagement by the Dedicated Mechanism and other equality and rights stakeholders with the Northern Ireland Assembly will continue to come through dialogue with the Committee for the Executive Office.

In the longer term, **we recommend that the Northern Ireland Assembly consider whether it would be expedient to follow the Westminster and Scottish Parliaments in establishing a specialist committee which focuses on human rights and equality.**⁸⁹ If such a committee were established, this would appear to be the natural home for legislative scrutiny of this type.

In this context, we note the continuing work of the Assembly's Ad Hoc Committee on a Bill of Rights [for Northern Ireland]. It has indicated that it

is expecting to report in October. **While the Ad Hoc Committee's focus has been on the contents of a Bill itself, debate on this issue may provide an opportunity for the Assembly to consider whether a permanent committee, along the lines of the JCHR at Westminster, might be an appropriate means of helping to mainstream rights in the legislative and policy development processes of the Assembly.** The Ad Hoc Committee's consultations have included consideration of the implications of Article 2(1) of the Protocol.

It seems clear that the Dedicated Mechanism must shoulder the co-ordinating function to inform both the UK Parliament and the Northern Ireland Assembly of any initiatives or proposals of concern. In order to do this, it will need to take primary responsibility for the underlying work, bringing particular issues to the attention of the relevant select committees and coming to arrangements that any such work that is produced is then taken into account as part of those committees' day-to-day workstreams. It may also wish to promote this new work to its stakeholders, ensuring the continued visibility of the obligations under Article 2 of the Protocol.

To undertake this task, the Dedicated Mechanism will have to develop strong contacts with the many committees in Westminster and in the Assembly which will have a stake in legislative

⁸⁸ Moreover, it was notable that many of the issues that Committee Members picked up in the April 2021 evidence session were of wider interest and fell outside the scope of Article 2 to the Protocol.

⁸⁹ Whereas the UK Parliament has two committees which do this work: the Joint Committee on Human Rights (which conducts most legislative scrutiny) and the Women and Equalities Committee in the Commons which tends to conduct cross-cutting thematic inquiries, the Scottish Parliament has established a single Equalities and Human Rights Committee which considers and reports on matters relating to equal opportunities, human rights and the elimination of discrimination on the grounds of nine protected characteristics.

scrutiny. Given the specialist knowledge that will be required to conduct this type of scrutiny, it will clearly require access to adequate resources (which should include specialist lawyers and policy analysts) as well as clear information sharing protocols with the UK Government, Northern Ireland Executive and, potentially, the European Commission. We consider that the additional resources would be best located within the Dedicated Mechanism rather than with the Assembly. Certainly, they do not need to be duplicated.

Memorandums of understanding will have to be agreed with relevant parliamentary committees in both Westminster and Stormont that ensure that the information traffic is two-way. The Dedicated Mechanism should be able to rely on these committees to draw the attention of the Dedicated Mechanism to potential areas of concern noted during their routine, staff-level scrutiny, as well as to ensure that issues raised by the Dedicated Mechanism are taken into account and that parliamentarians are alerted to any significant issues.

However, we expect that scrutiny of compliance with Article 2 of the Protocol by committees of Parliament is likely to be selective rather than comprehensive. Thus, any new obligations will need to have regard to

the fact that the time and attention of elected and appointed Members of all three chambers is a scarce commodity.

The need for adequate information from the Government

The key to ensuring that the commitments made under Article 2 of the Protocol are adequately addressed will be to ensure that the Dedicated Mechanism is provided with sufficient information at an early stage.

Many of the Westminster committees which conduct legislative scrutiny have had detailed exchanges with the Government about creating requirements to provide adequate explanatory material to accompany legislative proposals. These are usually provided by way of an explanatory memoranda, signed by a Minister. There are recent examples of such exchanges from the Joint Committee on Human Rights;⁹⁰ the House of Lords European Union Committee;⁹¹ and the House of Lords International Agreements Committee⁹² amongst others. Sometimes these requirements are contained in legislation.⁹³

The precise contents of these documents varies depending on the type of scrutiny that is being undertaken and the regularity of deposit. In each case identified above the committee concerned set out fairly detailed requirements, including, for

90 See: e.g. Horne, A. and Conway, M. 'Parliament and Human Rights' in Horne, A. and Drewry, G. (eds), *Parliament and the Law*, 2nd edition (Hart Publishing: 2018), pp.240-41; Joint Committee on Human Rights, 'Human Rights Protections in International Agreements', (17th Report, 2017-19) HC 1833, HL Paper 310, paras 49-52 and 62-67.

91 House of Lords European Union Committee, *Scrutiny of International Agreements: Lessons Learned*, 42nd Report of Session 2017-19, HL Paper 387, paras 50-51 and 56-57. House of Lords European Union Committee, *Beyond Brexit: how to win friends and influence people*, 35th Report of Session 2017-19, HL Paper 322, paras 109-110 and 114-115.

92 House of Lords International Agreements Sub-Committee, *Treaty Scrutiny: Working Practices*, 11th Report of Session 2019-21, HL Paper 97, paras 68-72.

93 See for example the requirement for the provision of Explanatory Memoranda at s24 of the Constitutional Reform and Governance Act 2010. It might be argued that the requirement at s19 of the Human Rights Act 1998, for a Minister to provide a statement of compatibility on the human rights compatibility was a direct forebearer of the current approach to provide detailed human rights memoranda on Bills with significant human rights implications.

example, mandatory headings. Some committees also use the sufficiency of the explanatory material provided by the Government as part of their checklist criteria when scrutinising legislation or international agreements.

In part, this is designed to ensure that adequate material is provided so that the committee can carry out its scrutiny role. However, the requirement to provide this material also acts as a checklist for the relevant Government department, to ensure that issues are not overlooked by officials.

The Dedicated Mechanism must therefore work to encourage a generous approach within the UK Government and the Northern Ireland Executive towards provision of information on legislative proposals (whether domestic or from the EU) which appear to have implications for the Article 2 obligations. It must also help the relevant Committees at Westminster and Stormont refine and articulate their expectations about the information with which they are provided in order to do their scrutiny work both effectively and efficiently.

By taking a lead on ensuring the best possible (but proportionate) provision of information in this way, the Dedicated Mechanism can facilitate the engagement of civil society stakeholders in the task of upholding the Article 2 obligations. Such bodies are essential components in leveraging and multiplying the relatively small resources upon which Members and committees must rely in their scrutiny work. But without information they cannot perform this role in a timely and effective manner.

The Dedicated Mechanism should liaise with each of the relevant parliamentary committees identified in this report to ensure that the Explanatory Memoranda and other associated material provided by the Government on proposed legislation make specific reference to the obligations under Article 2 of the Protocol, where this is relevant. **A clear expectation must be established that the UK government and the Northern Ireland Executive will provide explanatory memoranda for any measures which it believes will engage the terms of Article 2(1), whether they be UK, Northern Ireland or EU proposals.** This will be especially important in respect of the freestanding human rights memoranda provided to the Joint Committee on Human Rights and the Explanatory Memoranda provided to the European Scrutiny Committee and the House of Lords European Affairs Committee/NI Protocol Sub-Committee.



The detailed information sharing provisions contained in Article 15 of the Protocol present one clear opportunity for relevant issues to be identified. This could act as an early warning system for the Dedicated Mechanism. To enable it to work effectively with committees in the Assembly and at Westminster, the Government has a responsibility to ensure any such issues are brought to the attention of the legislatures at the earliest opportunity, and the Dedicated Mechanism, in its turn, needs to establish channels of communication with the relevant EU and EU/UK bodies to maximise its access to early intelligence on anticipated legislation.

It will be equally, if not more, important to ensure that the ECNI and the NIHRC are provided with the information that they need with respect to the legislative processes of the Northern Ireland Executive and Assembly. It would be desirable to design new procedures to ensure that any reports from the Dedicated Mechanism are taken into account by the Executive and the Assembly.

Taken together, sections 6(2)(ca), 9(1), 10(1), 11 and 14(2), (3) and (5) and 24(1)(aa) of the Northern Ireland Act on the face of it provide a powerful check on legislation being enacted by the Assembly which is in contravention of Article 2(1). These provisions, together with the inherent tendency of governments to anticipate and avoid unnecessary conflict with the legislature, should ensure that the Dedicated Mechanism's role in preventing inadvertent breaches of Article 2(1) through legislation agreed by the Assembly, or made by Northern

Ireland Ministers under delegated powers, is prophylactic, in collaboration with the drafters of laws. If it succeeds in its task of influencing proposed legislation at this upstream stage, its role further down the line at the parliamentary scrutiny stage will be far more straightforward and, potentially, less burdensome both to the Dedicated Mechanism and to the elected Members of the Assembly.

Non-legislative scrutiny

This report, as requested, has dealt with the scrutiny of legislation at Westminster and Stormont to seek to ensure its conformity with Article 2 obligations. An important additional dimension of the work of the Dedicated Mechanism will be to engage, from time to time, in debate over the broader context in which Article 2 is operating, as part of the continuing unique status of Northern Ireland under the Withdrawal Agreement.



The Commons Northern Ireland Affairs Committee (NIAC) is unlikely to become engaged in detailed legislative scrutiny – there are sufficient other vehicles more obviously equipped for that task. But, along with the Lords Sub-Committee on the Protocol, it is the forum at Westminster where the broader examination of the impact of the Protocol is likely to take place. The Dedicated Mechanism should naturally continue to maintain close contact with the NIAC, and would be wise to report regularly (at least annually) to it and the Protocol Sub-Committee of the Lords on successes and failures in the implementation of Article 2, and on any difficulties that may arise in terms of overall government policy on the operation of Article 2. To the extent that anybody in the Commons “owns” overall responsibility for the Protocol, it is the NIAC.

The Commons Women and Equalities Committee clearly also has a stake in issues that may touch, if only indirectly, upon the Article 2 obligations. Like the Northern Ireland Affairs Committee, it is not primarily focused on legislative scrutiny. The Dedicated Mechanism should, however, be prepared to engage with the Women and Equalities Committee where broad issues of policy at UK level engage Article 2 issues.

In general, however, our conversations with key individuals at Westminster indicate that there is a strong commitment to allowing Northern Ireland to manage such issues as far as possible at devolved level. This reinforces our view that the Assembly should look to identify a single institutional focus amongst its

committees with overall responsibility for matters relating to rights and equality. This could be either the existing Committee for the Executive Office or a new self-standing Committee.

Effort and resources

The UK Government has restated its commitment to compliance with Article 2(1) of the Protocol. There is an assumption of good will on its part on which the Dedicated Mechanism, with its new statutory duties, can build. In Northern Ireland, with its statute-based legislature, there are many additional safeguards around the making of laws which provide it with opportunities to advise and warn.

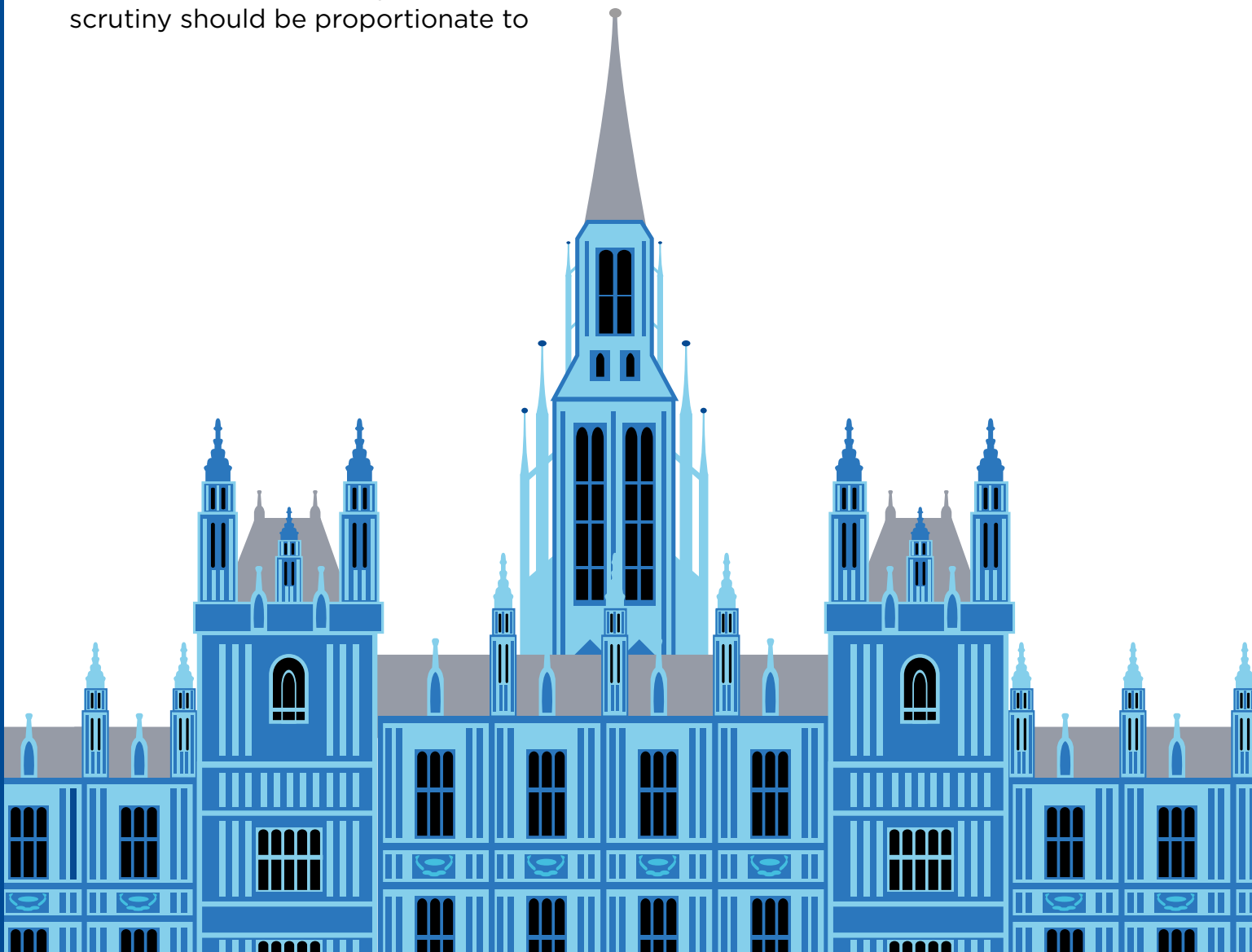
The UK Government has promised the bodies which form the Dedicated Mechanism the resources necessary to the task. Some expansion of resources has already occurred in response to this undertaking, but it is important that this is continued and sustained and reviewed in the light of experience. If a comprehensive approach to legislative scrutiny across all the streams we have identified were taken, this would require a significant staff resource.

We believe the work could be done with a lighter touch and more efficiently if the Dedicated Mechanism can support a proportionate and selective approach by the relevant committees of the legislatures involved to scrutiny of the Article 2 obligations.

Though we have sought to encourage collaboration and information sharing it will, of course, be essential that the Dedicated Mechanism is able to maintain its independence, and is sufficiently resourced to do so. The more effective the Dedicated Mechanism can be at identifying potential areas of concern, the lesser will be the burden on already busy committees in the Assembly, the House of Commons and the House of Lords.

The purpose of parliamentary scrutiny is to ensure that good law is being made which, amongst other things, is in conformity with the UK's international obligations. But procedural safeguards can never be 100% fool proof, and scrutiny should be proportionate to

the risk perceived. In the final analysis, it will be for the courts to determine whether any law that does get made is in conformity with Article 2 obligations. The aim of scrutiny is to reduce the risk of a finding of a breach to the minimum achievable level. The Dedicated Mechanism will be most effective if it adopts a collaborative approach to the pursuit of that goal.



Appendix 1: Literature Review on Parliamentary Scrutiny of Legislation in Westminster and the Assembly



This literature review begins by explaining attempts to strengthen parliamentary scrutiny, through the codification of scrutiny standards. It then explains how three different kinds of scrutiny take place in Westminster: parliamentary scrutiny of international agreements, human rights and secondary legislation. These models are each useful to Article 2(1) of the Northern Ireland Protocol, as the protocol is ultimately a treaty that is concerned with rights issues, and engages four different streams of primary and secondary legislation. It does not cover the very wide range of literature on the primary legislative process at Westminster generally in any detail. Much of this in recent decades has focused on such innovations as the use of pre-legislative scrutiny, advocated by the House of Commons Modernisation Committee in 1997⁹⁴ and post-legislative scrutiny.⁹⁵ In practice, both have been used relatively sparingly (since a peak in publication of draft bills in the early 2000s) and analyses of their actual impact on the content of Acts of Parliament are accordingly scattered.⁹⁶

The most recent comprehensive survey of the legislative process at Westminster is by Meg Russell and Daniel Gover.⁹⁷ This emphasises,

amongst other findings, the importance of the informal processes around the formal procedures, and the impact on the drafting of legislation by the government of the anticipated reactions of Members of both Houses of Parliament. Another more selective survey is contained in the first part of a collection of essays edited by Alexander Horne and Andrew Le Sueur.⁹⁸ The importance of informal processes has been reiterated by Emma Crewe in her ethnographic studies of Westminster.⁹⁹ In his contribution to Horne and Le Sueur, Sir Stephen Laws makes the oft-repeated assertion that in practice it is the government that is legislating, not Parliament. Although this claim is challenged by the analysis of Russell and Gover amongst others, it contains an important truth that must inform any prescription for better scrutiny – much of the work needs to be done before a bill is published.

Part 1: Standards for Legislative Scrutiny

The UK Parliament defines scrutiny as “any activity that involves examining and potentially challenging the expenditure, administration and policies of the government of the day”.¹⁰⁰ Scrutiny can take various forms, including that of a legislative

94 Hansard Society, ‘Making the Law, the report of the Hansard Society Commission on the Legislative Process’ (1993); Select Committee on Modernisation of the House of Commons, ‘The legislative process’ (23 July 1997) HC 190; House of Commons Library ‘Pre-legislative Scrutiny under the 2015 and 2017 Conservative Governments’ Briefing Paper 07757 (November 2018).

95 Constitution Committee, ‘The Legislative Process: The Passage of Bills Through Parliament’ (14th Report, 2003-2004) HL 1731-1; The Law Commission ‘Post-Legislative Scrutiny’ Cmnd 6945 (2006); Office of the Leader of the House of Commons, ‘Post-legislative scrutiny – The Government’s Approach’ Cm 7320 (March 2008).

96 Smookler, J. ‘Making a difference? The effectiveness of pre-legislative scrutiny’ (2006) 59 (3) *Parliamentary Affairs* pp. 522-53.

97 Russell, M. and Gover, D. *Legislation at Westminster, Parliamentary Actors and Influence in the Making of British Law* (Oxford University Press: 2017).

98 Horne, A. and Le Sueur, A.(eds), *Parliament: Legislation and Accountability*, (Hart Publishing: 2016).

99 Crewe, E. *The House of Commons: An Anthropology of MPs at Work* (Bloomsbury 2015); Crewe, E. *Lords of Parliament: Manners, Rituals and Politics* (Manchester University Press: 2005).

100 Hannah White, ‘[Parliamentary Scrutiny of Government](#)’ (The Institute for Government).

nature.¹⁰¹ Legislative scrutiny combines Parliament's two central roles: first, keeping governments in check (scrutinising executive activity); and second, passing legislation. Over time, the constitutional principle of executive accountability to Parliament – which is an extension of parliamentary scrutiny – has even become ingrained in the case law.¹⁰²

Against the present context of the growing administrative state and rising delegation of rule-making powers to executive bodies, several academics and think tanks have made the case for codifying standards for legislative scrutiny. Some academics who favour codifying standards for 'good' legislative scrutiny argue that these could minimise the impact of harmful partisan practises on the legislative process. Dawn Oliver and David Feldman argue that standards must be 'politically neutral' to be effective, and that these standards ought to be of a general 'constitutional' nature.¹⁰³

Oliver argues that some harmful practices in parliamentary scrutiny of bills are owed to the overly partisan nature of scrutiny. This, she argues, reinforce the case for impartial standards, prioritising the quality of legislation over political interest.¹⁰⁴ There is also a myth that all parliamentary scrutiny is detailed when in fact much is limited by the reality of parliamentary timetabling.¹⁰⁵ The

fact that time limits are controlled by the government constrains the extent to which MPs can chase individual issues (beyond those approved by party whips). Another constraint that arises from the partisan nature of the legislative process is whipping that applies to MPs' behaviour on Public Bill Committees. This can hinder them from making independent judgments about the propriety of legislation.

By contrast, those who object to codifying legislative standards argue that a culture of parliamentary resistance explains how bills have been scrutinised and amended in a meaningful way. This line of argument is opposed to the idea that there should be codes of standards for parliamentary scrutiny. Instead, it is argued that scrutiny ought to be guided by the natural flow of the political debate. Opponents of codifying legislative standards also argue that any application of scrutiny standards would be based on political influences, unsupported by parliamentary consensus, would be 'unfit for purpose'. In addition, there is the claim that if a code were drafted entirely neutrally, this it would be 'too bland to enhance scrutiny'.¹⁰⁶

These arguments have not deterred attempts to codify standards for legislative scrutiny. In 2004, Robert Hazell argued that the Delegated Powers and Regulatory Reform

¹⁰¹ Ibid.

¹⁰² *R (Miller) v The Prime Minister; Advocate General for Scotland v Cherry* [2019] UKSC 41 at [46].

¹⁰³ Oliver, D. '[Legislative Standards](#)' (The Statute Law Society 2015).

¹⁰⁴ Ibid.

¹⁰⁵ Ibid.

¹⁰⁶ Oliver, D., Hazell, R. and Caird, J. S. '[The Constitutional Standards of the House of Lords Select Committee on the Constitution](#)' (January 2014) pp.6-10.

Committee, the Constitution Committee and the Joint Committee for Human Rights had, through upholding their own set committee aims when scrutinising bills, bolstered legal and constitutional values and placed legislation on a more transparent footing.¹⁰⁷ Hazell argued that the consistent efforts of these committees have ensured that consecutive governments give more justifications for departures from standard constitutional practices when seeking particularly broad powers. In 2006, Dawn Oliver drew on various international models of legislative scrutiny to derive practices and principles that might bolster parliamentary oversight in Westminster. In 2010, the Hansard Society published *Making Better Law*, a report which strongly favoured legislative standards as a means for better scrutiny.¹⁰⁸ Likewise, the Better Government Initiative proposed using 11 principles to ensure good legislation in Westminster.¹⁰⁹

As Oliver argues, if general legislative standards are to be codified for most committees to use, any such standards must be normative, rather than descriptive. Using normative legislative standards would prevent legislative standards from being subjective and impractical. A useful starting point is the comprehensive study of legislative standards undertaken by Dawn Oliver, Robert Hazell and Jack Simson Caird: ‘The Constitutional Standards of the

House of Lords Select Committee on the Constitution’¹¹⁰ (now in its third edition). This report draws on the work undertaken by the House of Lords Constitution Committee from 2001 to 2015 and derives a conclusive set of standards that have been used over time by the Committee to uphold a variety of norms, ranging from the protection of human rights to constraints upon broad delegated powers and retrospective legislation. This Report is also significant in proving the existence of ‘legisprudence’:¹¹¹ the idea that parliamentary committees can undertake similar interpretative tasks to those normally associated with the courts.

As an early commentary on the Joint Committee on Human Rights’ innovative approach to legislative scrutiny concluded, three factors provide wider lessons for legislative scrutiny. First, was its grounding in a clear set of agreed principles, however widely contested. Second, was its ability to combine detailed technical scrutiny with a wide-ranging view of the context in which the law was being proposed. Third, was its ability to provide both Houses of Parliament with timely and well-informed advice during the actual passage of legislation.¹¹² These lessons might be usefully applied to thinking about how to deal with issues relating to Article 2 of the Protocol in primary legislation.

¹⁰⁷ Ibid.

¹⁰⁸ Fox, R. and Korris, M. *Making Better Law: Reform of the legislative process from policy to Act* (Hansard Society, 2010).

¹⁰⁹ *Better Government Initiative*, ‘[Reforming Parliament and the Executive](#)’ (2010).

¹¹⁰ Oliver, D., Hazell, R. and Caird, J. S. ‘[The Constitutional Standards of the House of Lords Select Committee on the Constitution](#)’ (3rd Edition, 2017).

¹¹¹ Ibid.

¹¹² Evans, P. ‘The Human Rights Act and Westminster’s legislative process’ in *Parliament, Politics and Law Making: Issues and developments in the legislative process*, (Hansard Society, 2004).

Part 2: Parliamentary Scrutiny of International Agreements

The creation and amendment of treaties has been described as ‘an executive power par excellence’.¹¹³ Unlike domestic affairs of state, foreign affairs and relations have traditionally been a matter of executive competence. This is especially the case in the United Kingdom where governments negotiate, sign and ratify treaties under the Royal Prerogative.

Summary of Treaty-making 2021

1. There is no obligation on the Government to tell Parliament that it is negotiating a new international agreement. The only proviso to this is in respect of new trade agreements, where the Government has committed to publishing its negotiating objectives and the process of negotiation may be preceded by a consultation.
2. By ratifying a finalised treaty following a successful negotiation process, the State agrees to be bound by a Treaty and accepts its obligations under this Treaty.
3. The Government undertakes to make any necessary changes to domestic legislation prior to ratifying an agreement.
4. The Government must lay the treaty before Parliament for 21 days. The treaty text is accompanied by an Explanatory Memorandum.

5. During the following 21 days, the treaty cannot be ratified. In that time, the Lords International Agreements Committee will report on the treaty.
6. Parliament expresses approval for proceeding to ratification if no motions against ratification are passed. In other words, if Parliament sees fit to block the treaty, it must pass a resolution against ratification. Although Parliament does not have an official ‘veto’ power, the House of Commons may seek to block ratification by passing several motions triggering a delay (21 days, repeatedly).
7. If no such Commons resolutions are passed, the Government may ratify the Treaty. After ratification, the State is officially bound. A specified time after ratification, the Treaty enters into force.

In recent years, there have been changes to Parliament’s role in scrutinising treaties. This section briefly outlines these changes, alongside some challenges to parliamentary scrutiny of international agreements.

The current regime for ratifying treaties is largely determined by the Constitutional Reform and Governance Act 2010 (‘CRAG’), though this Act did not establish any formal mechanism for parliamentary scrutiny. Until 2019, the only committee undertaking scrutiny was the Secondary Legislation Scrutiny

¹¹³ Lang, A. ‘Parliament’s Role in Ratifying Treaties’ House of Commons Briefing Paper No.5855 (17 February 2017). Source of table above.



Committee.¹¹⁴ Between the 2014-2015 legislative session and 2019, the SLSC considered 69 treaties, reported on 18 of them, and drew none to the attention of the House.¹¹⁵ Yet, as early as 2017, it became apparent that the SLSC would not be able to maintain this role, not least because it would face an ‘overwhelming tsunami’ of retained EU law after Brexit.¹¹⁶ Accordingly, in 2019, the Lords European Union Committee began scrutinising ‘all Brexit-related treaties’, and has since then, produced more than 20 reports looking at least 50 agreements.¹¹⁷

In April 2020, following recommendations by the Constitution Committee and the Lords European Union Committee, the House of Lords established an International Agreements Committee, to scrutinise ‘all treaties that are laid before Parliament under CRAG’.¹¹⁸ This committee is the first formal mechanism established in particular for scrutinising international treaties. But it is faced with various challenges stemming from the fact that CRAG’s framework is itself ‘poorly designed to facilitate parliamentary scrutiny’.¹¹⁹ As the Lords EU Committee argues, 21 sitting days is ‘too short to allow for proper consultation or engagement by committees’; the brevity of this period inhibits the committee’s ability to perform effective

scrutiny.¹²⁰ The Constitution Committee has argued that different treaties may require varying levels of scrutiny and a sifting mechanism could be useful in identifying this, and drawing specific agreements to the attention of the House.¹²¹

The academic literature has reiterated Parliament’s limited role in scrutinising treaties. As early as 1872, Walter Bagehot acknowledged that although ‘treaties are quite as important as most laws ... the Government which negotiates a treaty can hardly be said to be accountable to anyone’.¹²² Bagehot also argued that ‘we should have a real discussion’ before treaties are made and that Parliament ought to have a more comprehensive role, including being able to give assent beforehand.

However, little has been done to strengthen Parliament’s role in creating and ratifying treaties. The Ponsonby Rule, introduced in 1924, was a government undertaking to notify Parliament of treaties before ratification, but Parliament was not given a veto power.¹²³ The Rule was codified under the CRAG, which placed certain procedural requirements on government, though as Alexander Horne argues, these burdens can ‘hardly be described as onerous’.¹²⁴ The requirement to lay the treaty before Parliament for a specified period

114 Horne, A. ‘[Parliamentary Scrutiny of Treaties: An Insider’s Reflections](#)’ (March 2021).

115 Furthermore, the SLSC only began this role in the parliamentary session 2014-2015.

116 Horne, A. and Gracia D. ‘[Treaty scrutiny – A brave new frontier for Parliament](#)’, *UK Constitutional Law Association* (March 2020).

117 *Ibid.*

118 [International Agreements Committee](#).

119 Horne and Gracia, UKCLA 2020.

120 European Union Committee, ‘Scrutiny of international agreements: lessons learned’ ([42nd Report](#), 2017-2019) HL 387.

121 Constitution Committee, ‘Parliamentary Scrutiny of Treaties’ ([20th Report](#), 2017-19) HL 345.

122 Quoted in Horne, ‘An Insider’s Reflections’ (March 2021).

123 Horne and Gracia, UKCLA 2020.

124 Horne, ‘An Insider’s Reflections’ (March 2021).

before ratification does not mean that Parliament can direct the government not to ratify. Even if the Treaty is not supported by a majority of the House of Commons, the most that can be done is delay ratification indefinitely.¹²⁵ This power has never been tested in practice and can be sidestepped in ‘undefined exceptional cases.’¹²⁶ Section 32 of the European Union (Withdrawal Agreement) Act 2020 simply waived the procedural requirements of the CRAG for the purposes of the Agreement. Arabella Lang has argued that the CRAG did nothing to help Parliament scrutinise treaties more effectively.¹²⁷

The case for more comprehensive parliamentary scrutiny of treaties rests on the fact that ‘treaties increasingly have a direct effect on daily life in the UK’.¹²⁸ In the aftermath of Brexit, the Financial Times pointed out that Britain might have to renegotiate ‘at least 759 treaties’.¹²⁹ The present government has already committed to (and indeed begun) negotiating an array of important agreements, with ramifications for jobs, the rights of citizens abroad and the sale and supply of goods to the UK. New agreements also have an impact on Parliament’s capacity to legislate, as they require legislation to comply with obligations under international law (such as Article 2(1) of the Ireland/Northern Ireland Protocol).

Part 3: Parliamentary Scrutiny of Human Rights

Despite the UK’s historical protection of fundamental rights in the common law (judge made law), the protection of human rights was strengthened through ratification of the European Convention of Human Rights in 1951. Yet this came to be seen as an insufficient form of legal protection; those who wished to challenge public authorities for breaching of convention rights had to undergo a lengthy and potentially costly legal process in the European Commission (later Court) of Human Rights.¹³⁰ Parliamentary scrutiny of the Convention was delegated to an interparliamentary assembly – the Parliamentary Assembly of the Council of Europe, which met infrequently in Strasbourg.

The New Labour government moved to incorporate the Convention into domestic law in the Human Rights Act 1998.¹³¹ This was argued to have created a ‘new constitutional settlement’.¹³² UK public authorities became liable domestic law for breaching convention rights. When introducing legislation, ministers were obliged to offer an opinion to Parliament on whether proposed legislation infringed Convention Rights (section 19 HRA). The HRA enshrined Convention rights in domestic legislation and gave the courts and ministers powers and duties to ensure the protection of convention rights.

125 See box summarising ratification process.

126 Horne, ‘An Insider’s Reflections’ (March 2021).

127 Ibid.

128 Ibid.

129 Ibid.

130 Wadham, J., Mountfield, H., Prochaska, E., and Desai, R. *Blackstone’s Guide to the Human Rights Act* (Oxford University Press: 2017) pp.8-13.

131 Ibid.

132 Ibid.

Sections 3 and 4 of the HRA gave the UK courts two important powers of enforcement. Section 3 gave the courts powers to ‘read down’ legislation, to insofar as possible give effect to convention rights.¹³³ These powers would be complemented by section 4, where the courts acquired powers in extremis to make declarations of incompatibility where domestic law was in clear breach of Convention rights. However, the powers granted to UK courts under section 4 must be differentiated from judicial ‘strike-down’ powers that exist in other jurisdictions. Under the HRA, section 4 duties would trigger an important process of three-fold ‘democratic dialogue’, where Parliament, not the courts, would ultimately have the last say. This dialogue is triggered ‘when a court, in reviewing legislative and executive actions, scrutinises the justifications for laws’,¹³⁴ The final word, however, remains with Parliament, preserving its sovereignty.

Remedial Orders

Remedial Orders (ROs) are a type of secondary legislation created by the HRA. Following a declaration of incompatibility by the courts, the purpose of ROs is to allow governments to amend Acts ‘to remove the incompatibility’. There are two versions of the procedure for creating ROs, those that are laid in draft first, or those that are made and come into force immediately.¹³⁵

After a minister presents (‘lays’) a proposal for a draft remedial order,

it must be considered by Parliament within 60 days. During this time, the Joint Committee on Human Rights scrutinises the proposal. After this period, the minister can lay a Draft Order again, but he or she must report any changes to this proposal, and any representations made. Another 60-day period follows the laying of the draft Remedial Order, during which the Joint Committee must again report on whether the draft order should in its opinion be approved.

Under the urgent version of this procedure, a minister can lay a Remedial Order that has already entered into force (‘made’ orders). After an RO has been laid (and made), there is a similar 60-day period for representations to be made to ministers and for the JCHR to report on the RO. The result of these representations can be a replacement remedial order. Under the urgent procedure, either the original RO or the replacement RO must receive parliamentary approval within 120 days of the original order being made. If this does not occur, the original RO ceases in effect.

The Joint Committee for Human Rights

The primary mechanism for scrutinising legislation for its compatibility with human rights, and for the protection of rights more generally, is the Joint Committee for Human Rights (‘JCHR’). Standing Order No. 152B of the House of Commons stipulates that the JCHR’s primary role is to consider: (1) matters relating to human rights in the United Kingdom (excluding individual cases);

¹³³ Wadham, Mountfield et al, see copy of Act (included in text).

¹³⁴ Hickman T. *Public Law After the Human Rights Act* (Hart Publishing: 2010) pp.22-23.

¹³⁵ Joint Committee on Human Rights, ‘The Making of Remedial Orders’ ([Seventh report of Session 2001-02](#)) HL 58, CH 473.

and (2) proposals for remedial orders, draft remedial orders and remedial orders made under Section 10 and laid under Schedule 2 to the Human Rights Act 1998.¹³⁶

This remit has been construed by the JCHR to permit it to scrutinise all Government Bills for their compatibility with human rights, including the rights under the ECHR protected in UK law by the Human Rights Act 1998, common law fundamental rights and liberties, and the human rights contained in other international obligations of the UK.¹³⁷ The JCHR also scrutinises the Government's responses to judgments concerning human rights, and the UK's non-legislative compliance with its human rights obligations contained in a range of international treaties. It conducts thematic inquiries, where it chooses its own subjects of inquiry and seeks evidence 'from a wide range of groups and individuals with relevant experience and interest'.¹³⁸

The Academic Literature

The substantial academic literature surrounding the HRA often focuses, broadly, on the jurisprudence of the Strasbourg court and how this has been incorporated domestically, or on the process of 'constitutional dialogue' that occurs between domestic courts,

Parliament, and the Executive over Convention rights.¹³⁹ From a more critical perspective, the literature engages with politicians' perceptions of 'human rights' as standards that are imposed on Parliament and government by outside actors with little democratic legitimacy. The academic debate also discusses proposals for a 'British Bill of Rights' that have been pitched as an alternative to the HRA. In this context, there is also substantial sub-literature on the long-running saga of the failure so far to produce a Bill of Rights for Northern Ireland under the terms of the Belfast/Good Friday agreement and on the extent to which the HRA may have superseded this obligation.

Critics of the HRA highlight problematic judgements by domestic and Strasbourg courts alike and have argued that the HRA has led to an undue expansion in the power of domestic courts.¹⁴⁰ Proponents of repealing the HRA also express concern over human rights law placing undue constraints on Parliamentary sovereignty, and argue that the HRA has been 'abused' by various categories of claimants.¹⁴¹ Conversely, proponents of the HRA highlight the fact that the public remains ill-informed about the necessity of existing human rights protections, not least because the press frequently

¹³⁶ Standing Orders of the House of Commons (Public Business), Standing Order no 152B.

¹³⁷ Horne, A. and Conway, M. 'Parliament and Human Rights' in *Parliament and the Law* (Hart Publishing: 2018).

¹³⁸ Ibid.

¹³⁹ See for instance, Young, A. 'Is dialogue working under the Human Rights Act 1998?' *Public Law* [2011]; Hickman, T. 'Constitutional Dialogue, constitutional theory and the Human Rights Act 1998' [2005] *Public Law*; and King, J. 'Dialogue, Finality and Legality' in Dixon, R., Sigalet, J. and Webber, G. (eds), *Constitutional Dialogue: Democracy, Rights, Institutions* (Cambridge University Press: 2018)

¹⁴⁰ Horne, A., Dawson, J., Miller, V., Caird, J.S., 'A British Bill of Rights', House of Commons Briefing Paper No. 7193 (May 2015); See also, for example; R Ekins and Gee, G. *50 Problematic Cases* (2016) Judicial Power Project; Ekins, R. and Gee, G. 'Evidence Submission to the Joint Committee on Human Rights 20 years of the Human Rights Act' (Judicial Power Project 2018).

¹⁴¹ Ibid.

publish misleading negative stories about contentious human rights cases.¹⁴²

How effectively Parliament engages with the HRA and the impact of the JCHR's work, given that it is primary mechanism undertaking scrutiny of human rights, receives comparatively less attention.

After the JCHR raises objections to the government concerning a bill, or the scrutiny of an RO, the relevant government department (or minister) engages in a dialogue with the Committee.¹⁴³ Ministers provide additional reasoning, elucidation, and justification. This can be seen as part of what Philip Norton and Lucinda Maer have referred to as 'a culture of justification'.¹⁴⁴ Over time, it is argued, this developing culture in parliamentary scrutiny has increasingly (though slowly) deterred successive governments from introducing non-compliant legislation in the first place. As Alexander Horne and Megan Conway have argued, the JCHR's engagement with rights issues through inquiries coupled with its more specific work on ensuring bills are compliant with rights legislation allows the Committee to act as an agent of political constitutionalism.¹⁴⁵ Thus, the JCHR provides 'democratic legitimacy to the human rights discourse' that would otherwise occur mostly outside of Westminster (amongst NGOs and stakeholders).

142 Ibid.

143 Horne and Conway, 'Parliament and Human Rights' pp.262-264.

144 Ibid.

145 Ibid.

146 Russell, M. and Benton, M. 'Selective influence: The Policy impact of house of Commons Select Committees' (UCL Constitution Unit, June 2011) p 8.

147 Horne and Conway, 'Parliament and Human Rights' p 262.

148 Ibid. p.263.

149 Ibid.

However, as Horne and Conway observe, there are factors which hinder the JCHR's effectiveness. One is a common challenge outlined by a Constitution Unit Report on the impact of select committees¹⁴⁶ – the 'failure by some in government to take committees sufficiently seriously' – this problem lies largely outside the Committee's control.¹⁴⁷

The JCHR does not routinely scrutinise secondary legislation (other than ROs)¹⁴⁸. Whilst the Committee's lack of resources for this task are worth acknowledging, the JCHR's 'silence does not mean there is not an issue'.¹⁴⁹ The omission of secondary legislation generally hinders how effectively it scrutinises human rights. In light of the increasing volume and importance of policies that are implement through statutory instruments (like those



concerning Brexit preparation which clearly affect fundamental rights), it has been argued that there is a strong case for expanding the Committee's remit and resources to directly address the broader scrutiny of delegated legislation and Convention rights.

Horne and Conway discuss various areas for improvement of the JCHR's scrutiny work. Their recommendations include duties to follow up on recommendations in reports, specifically those that do not necessarily concern amendments to bills, alongside more general, systematic follow ups to thematic inquiries. The Committee they argue could also make more of an attempt to link its thematic work to its advice on amendments to legislation. Finally, the Committee would benefit from better resourcing; this could even allow the committee to address the neglected issue of rights concerns in secondary legislation.¹⁵⁰ There are several lessons here which may be applied to the task set for the Dedicated Mechanism.

Part 4: Parliamentary Scrutiny of Secondary Legislation

Delegated or secondary legislation is a type of law created by the executive or an administrative body following the parliamentary conferral of rule-making powers in an enabling Act.¹⁵¹ Since secondary legislation does not receive the same level of parliamentary

scrutiny as primary legislation, it is seen as a convenient vehicle for fleshing out policy details or ensuring compliance between domestic law and external (international) legal regimes (alongside many other purposes). On average, 3,000-5,000 Statutory Instruments, the most common form of secondary legislation, are created per year at the UK level.¹⁵²

Secondary legislation is useful to governments because of the scarcity of parliamentary time and the need for speed and flexibility in policymaking.¹⁵³ The expanding remit of the administrative state, alongside pressing political issues (Brexit and the pandemic being very salient examples) have heightened the appeal of secondary legislation to successive governments. Over the last twenty-five years, there has been a once unthinkable rise in ministerial use of secondary legislation to enact new policies – with the tacit consent of most parliamentarians.¹⁵⁴

Whilst it is common for secondary legislation to be used as supplementary to an Act, using regulations to implement entirely new policies has caused extended controversy.¹⁵⁵ Over the last three decades, this changing scope of secondary legislation has been facilitated by practices like the use of skeleton bills, and the inclusion of more Henry VIII powers.

150 Ibid. pp.262-265.

151 Loft, P. 'Acts and Statutory Instruments: The volume of UK legislation 1950 to 2019' *House of Commons Library*, Commons Briefing papers CBP-7438 2019.

152 Ibid.

153 King, J. 'The Province of Delegated Legislation' in Fisher, L., King, J. and Young, A. (eds), *The Foundations and Future of Public Law: Essays in Honour of Paul Craig* (Oxford 2020 University Press) p. 155, 161, 169. The justifications for using delegated legislation, as articulated by Cecil Carr in the 1920s remain the same today.

154 Ibid.

155 Evans, P., and Sharpe, J. 'Finding Time Legislative Procedure since May' in Evans, P. (ed), *Essays on the History of Parliamentary Procedure: In Honour of Thomas Erskine May* (Hart Publishing 2017) pp. 240-246.

Skeleton Bills are bills that contain many delegated powers, with little to insufficient details about what these powers will be used for; they represent a substantial conferral of power to the executive so that a minister or local authority can create swathes of policy on their own authority alone.¹⁵⁶ Henry VIII powers are a type of enabling (rule-making) power that authorise re-writing or amending primary legislation by secondary legislation, either for a specific purpose, or for broad reasons or under defined circumstances. These provisions are sometimes characterised as despotic since they allow a rule-making authority to trespass the legislative authority of Parliament.¹⁵⁷ Academics and lawyers have argued that these provisions should only be used when necessary, for instance when ensuring compliance with constitutionally significant legislation, like the Human Rights Act 1998, or with international law.¹⁵⁸

Parliamentary Scrutiny

The scope and propriety of secondary legislation is scrutinised at two stages: when an enabling (rulemaking) power is drafted in a bill, and after a minister or delegated authority, activates the enabling power by creating a statutory instrument/regulations.¹⁵⁹ These are various mechanisms at both stages in Westminster that ensure the

more detailed scrutiny of delegated legislation. These mechanisms have not developed in a systematic manner (though one major attempt at systematization was made with the Statutory Instruments Act 1946 – and remains in force and unamended) and are often perceived to be insufficient.

Standard procedure

Whilst the framework for parliamentary procedures for scrutinising secondary legislation are codified by sections 4-6 of the Statutory Instruments Act 1946, the enabling power in each parent Act determines the level of scrutiny an instrument receives – or in other words, which scrutiny procedure it undergoes.¹⁶⁰ Most SIs undergo a variation of either the affirmative or the negative procedure.¹⁶¹

The affirmative procedure requires the active consent of both Houses before an instrument can become law. Affirmative instruments are normally reported on by the Joint Committee on Statutory Instruments before they are laid before Parliament.¹⁶² Under the negative procedure, an instrument becomes law within a specified period unless either House agrees to annul it.¹⁶³

Scrutiny by parliamentary committees of one or both Houses occurs at various stages.

¹⁵⁶ Ibid.

¹⁵⁷ Young, A. and Barber, N. 'The Rise of Prospective Henry VIII clauses and their implications for Sovereignty' [2003] *Public Law*.

¹⁵⁸ Ibid.

¹⁵⁹ Evans and Sharpe, 'Finding Time Legislative Procedure since May' pp.241-244.

¹⁶⁰ Statutory Instruments Act 1946.

¹⁶¹ '[Statutory Instruments Practice Guide](#)' The National Archives (November 2017) pp. 18-22; see also '[Secondary Legislation: how is it scrutinised?](#)' The Institute for Government.

¹⁶² House of Lords Standing Order No. 72.

¹⁶³ Ibid. Variations on both procedures exist, this affects when an instrument becomes law. For instance, the difference between the laid and made affirmative procedure.

The Delegated Powers and Regulatory Reform Committee

In the first instance - when an enabling power is drafted - the Delegated Powers and Regulatory Reform Committee in the House of Lords ('DPRRC') reports on the scope of an enabling power. The DPRRC's primary aim is to examine whether 'the provisions of any bill inappropriately delegate legislative power, or whether they subject the exercise of delegated power to an inappropriate level of parliamentary scrutiny'.¹⁶⁴ A study conducted by the Bingham Centre observes that, through two decades of work, the Committee has built up a set of precedents that can be used to define what is 'inappropriate'.¹⁶⁵ It is generally agreed that the work of the DPRRC is effective in limiting the scope of enabling powers. After sampling 12 randomly picked Bills in a specific session, Russell and Gover and observed that 80-85% of the DPRRC's suggested amendments recommended are accepted by the Government.¹⁶⁶

At the second stage, after an instrument is drafted or laid before either House, both broad and technical scrutiny is conducted by other committees. Instruments are considered by the Joint (bicameral) Committee on Statutory Instruments, the Secondary Legislation Scrutiny Committee in the Lords, and debated either on the floor of each House or in the Lords grand committee or an ad hoc Delegated Legislation Committee in the Commons.¹⁶⁷

The Secondary Legislation Scrutiny Committee

The Secondary Legislation Scrutiny Committee (SLSC), formerly known as the Merits of Statutory Instruments Committee, is the main committee that considers instruments on their merits. The SLSC considers whether an instrument is 'politically or legally important'; gives rise to policy issues that may be of interest to the House; whether an instrument is inappropriate considering its enabling powers or changes to existing law; and finally, whether an instrument does not adequately meet its policy objectives.

The SLSC's reporting grounds are broad and directly engage with each instrument's purpose. Whilst the Committee's scrutiny work often raises important matters of policy application, it is constrained by the fact that it has no formal power to make the government comply with its recommendations. This Committee (like the JCSI and DPRRC) suffers from resource constraints, not least because it is expected to scrutinise every instrument - and this often happens, 'once the horse has bolted'.¹⁶⁸

The Joint Committee for Statutory Instruments

Standing Order Number 151 of the House of Commons (and House of Lords Standing Order Number 73) clarifies the 'technical scrutiny' remit

¹⁶⁴ [Delegated Powers and Regulatory Reform Committee](#).

¹⁶⁵ Caird, J.S., and Patterson, E. 'Brexit, Delegated Powers and Delegated Legislation: A Rule of Law Analysis of Parliamentary Scrutiny' (Bingham Centre, April 2020).

¹⁶⁶ Gover and Russell, pp.219-220.

¹⁶⁷ Evans and Sharpe (2017) p.242, 244.

¹⁶⁸ Fox and Blackwell, pp.207-208.

of the Joint Committee on Statutory Instruments (JCSI). But the JCSI's remit is broader than it may initially seem. The Committee scrutinises every SI or draft SI laid before each House by Act for (amongst other issues): doubtful vires, unusual or unexpected use of powers, retrospection without express authority, unjustifiable delay and even defective drafting. Daniel Greenberg, Counsel for Domestic Legislation in the House of Commons, describes the JCSI as 'the most important technical scrutiny committee'.¹⁶⁹

Whilst the JCSI's main purpose is scrutinising 'technical matters', in practice the committee engages with broader issues like an instrument's legality or whether it engages with an unusual exercise of a certain of power. So even though JCSI's technical remit distinguishes its work from the scrutiny conducted by other permanent parliamentary committees, it engages with questions of propriety relating to how certain powers are drafted and used.

Amendment, Dissent and Debate

With the limited exception of instruments subject to super-affirmative procedure, secondary legislation cannot be amended by Parliament. When an instrument is laid before the House, Parliament can only accept or reject an

instrument. And rejection remains rare. The negative procedure dictates that each House a motion 'praying against' an instrument within forty days, but this power is used sparingly.¹⁷⁰ Since 1946, the Lords have only declined to approve instruments on five occasions and annulled on one.¹⁷¹ When the Lords last exercised their veto power against the Tax Credits regulations in 2015, a political backlash followed when George Osborne described the event as a constitutional crisis though for Meg Russell it was '... neither constitutional nor a crisis'.¹⁷² The Strathclyde Review was established to investigate curtailing the Lords' role in scrutiny of delegated. Whilst Strathclyde Review recommended removing the Lords unilateral veto,¹⁷³ it was roundly criticised by a number of committees of both Houses¹⁷⁴ and did not lead to legislation.

It is frequently argued that owing to the lack of any amendment process, and the binary nature of the approval or disapproval procedures, poorly drafted regulations are often swallowed whole by Parliament and become law.¹⁷⁵ In addition, since the agenda of the House of Commons is controlled by the government, the opportunity to debate a negative procedure SI, even if objections have been raised, is under

¹⁶⁹ Greenberg, D. 'Implications for Brexit legislation: technical scrutiny of statutory instruments' (Legal Insights, Thomson Reuters August 2018).

¹⁷⁰ In the 2013-2014 session, 882 negative SIs were laid yet MPs tabled no more than 10 prayer (debate) motions, representing merely 1.13% of the total regulations tabled. (Loft 2019).

¹⁷¹ Fox and Blackwell (2014) pp.186-187.

¹⁷² Evidence to SLSC 2016, q. 1-16; 17-38.

¹⁷³ 'Secondary legislation and the primacy of the House of Commons', Cm 9177.

¹⁷⁴ Constitution Committee, 'The Legislative Process: Delegated Legislation' (2017-19) HL 225; Delegated Powers and Regulatory Reform Committee, 'Response to the Strathclyde Review' (32nd Report, 2015-2016) HL P119; Secondary Legislation Scrutiny Committee, 'Response to the Strathclyde Review: Effective scrutiny of secondary legislation', HL 128; Public Administration and Constitutional Affairs Committee, 'The Strathclyde Review: Statutory Instruments and the power of the House of Lords', (8th Report, 2015-16) HC 752.

¹⁷⁵ Fox and Blackwell (2014) p.186-187, 220.

its control.¹⁷⁶ Where debate occurs, it usually takes place in the Commons in an ad hoc committee rather than one of the specialised select committees. By contrast to the work of the JSCI, SLSC and DPRRC, scrutiny by ad hoc delegated legislation committees is largely perceived by commentators as fruitless.¹⁷⁷

Strengthened Scrutiny

An additional procedure exists for the ‘strengthened scrutiny’ of some instruments. This is commonly known as the super-affirmative procedure. There are 11 different variations of strengthened scrutiny procedures.¹⁷⁸ These procedures apply, almost exclusively, to instruments or orders created through very broad enabling powers, like ‘Henry VIII’ powers.¹⁷⁹

The development of a variety of strengthened scrutiny procedures is largely the result of parliamentary bargaining and pushback against different governments, which, regardless of political colour, have sought particularly wide (and occasionally sweeping) rule-making powers. One variation of strengthened scrutiny gives both Houses the opportunity to scrutinise proposals for delegated legislation and to recommend amendments before a Minister presents

an instrument in its final form.¹⁸⁰ This encourages a measure of parliamentary dialogue. Strengthened scrutiny procedures are a form of ‘checks and balances’ which strike a bargain between widened executive powers and increased scrutiny.¹⁸¹

Most measures in strengthened scrutiny procedures have either a parliamentary or a procedural dimension, or involve a form of consultation in Parliament or with external actors. Measures with a purely parliamentary dimension include giving certain powers to a parliamentary committee to determine the level of scrutiny or powers to veto an order/instrument.¹⁸² Measures of a more procedural nature include requiring supporting documents to be laid alongside an instrument or requiring certain instruments to be laid first as a proposal which can be amended. These measures encourage a form of dialogue over the substance of an instrument and seek to ensure that the responsible Minister must justify how and why certain delegated powers are used.¹⁸³ Finally, measures involving mandatory or discretionary consultations before an instrument is drafted ensure a degree of policy or merits-based scrutiny pre-legislative scrutiny and civil society engagement.

176 Ibid., pp.60-61.

177 Ibid., 89-90.

178 The variations of strengthened scrutiny are contained in: the Northern Ireland Act 1998 (section 85), the Human Rights Act 1998 (Schedule 2), the Local Government Act 1999 (section 17), the Local Government Act 2000 (section 9), the Local Government Act 2003 (section 98), the Fire and Rescue Services Act 2004 (section 5E) (as amended by the Localism Act 2011), the Legislative and Regulatory Reform Act 2006 (sections 12 to 19), the Local Transport Act 2008 (section 102), the Public Bodies Act 2011 (section 11), and finally, the Localism Act 2011 (sections 7 and 19).

179 See earlier section on trends in delegated legislation for a definition of scrutiny procedures.

180 Erskine May, ‘Parliamentary Practice’, [para 31.14](#).

181 Delegated Powers and Regulatory Reform Committee, ‘Special Report: Strengthened Scrutiny Procedures for Delegated Powers’ (3rd Report, 2012-2013) HL 19, pp.3-7.

182 Ibid., pp.7-9.

183 Ibid., pp.9-12.

Fewer instruments subject to these strengthened scrutiny procedures have been made than was anticipated at the outset of their invention. As the Delegated Powers and Regulatory Reform Committee has argued, this may be because of the increased complexity in these procedures deters Ministers – in fact primary legislation may appear to be the less scrutinised avenue of legislative action.¹⁸⁴

Strengthened scrutiny procedures are also time consuming; when in practice, expediency and rapid response remain two of the most valuable advantages of relying on delegated legislation.

Proposals for reforming the scrutiny of secondary legislation

Although secondary legislation has been a matter of constitutional concern since at least the Donoughmore Committee's Report on Ministerial powers in 1932, the literature on parliamentary scrutiny of regulations has only really expanded over the last few decades.¹⁸⁵ In line with the disjointed nature of parliamentary controls, there are few if any historical studies on how scrutiny has developed or its consistent impact. The most comprehensive studies so far have been conducted by the Hansard Society and Edward Page.¹⁸⁶

The academic consensus on parliamentary scrutiny of delegated legislation is that whilst the system seems functional, it is inadequate to cope with current trends in the use

of secondary legislation. Mechanisms of parliamentary dissent and debate are rarely used and can be ineffective. Although scrutiny by committees can be a meaningful way to hold Ministers to account, recommendations are almost always advisory, not binding. As a result, governments can and do ignore recommendations without fear of sanctions.¹⁸⁷

As the Hansard Society argues, the functional scrutiny mechanisms that do exist have a more cursory role and focus on technical scrutiny.¹⁸⁸ According to this analysis there is a need for more substantive engagement with the content of policy being implemented by delegated legislation. More recently, Public Law Project has undertaken its SIFT project looking at the scrutiny of regulations in preparation for Brexit (focusing on the European Union (Withdrawal) Act 2018 and the European Union (withdrawal Agreement) Act 2020).¹⁸⁹

Jeff King and Paul Craig observe that the inadequate parliamentary scrutiny of secondary legislation has led to an increasing number of challenges in the courts.¹⁹⁰ Unlike Acts of Parliament, secondary legislation can be struck down for being ultra vires (outside the scope of the discretion accorded by Parliament). Whilst ex post scrutiny is not a replacement for inadequate parliamentary scrutiny, to some limited extent the threat of judicial review can lead to some changes in the way

¹⁸⁴ Ibid., pp.2-3.

¹⁸⁵ King (2020).

¹⁸⁶ Ibid. King reviews the academic literature on delegated legislation thus far.

¹⁸⁷ Fox and Blackwell, pp.94-95.

¹⁸⁸ Ibid.

¹⁸⁹ Elaborated on in [King](#) (2020).

¹⁹⁰ Ibid.

instruments are drafted.¹⁹¹

The Hansard Society have argued that a wholesale inquiry on the scale of the Donoughmore Committee is the only viable way to address the inadequate scrutiny of delegated legislation.¹⁹²

Focusing on the insufficient scrutiny of regulations pursuant to the European Union (Withdrawal) Act 2020, Public Law Project has proposed introducing a sifting mechanism for more regulations, greater use of the Lords' unilateral veto and the inclusion of an amendment process for most regulations that implement new policy.¹⁹³ The Lords Constitution Committee has proposed drafting strict standards to distinguish between the use of delegated and primary legislation.¹⁹⁴ But reform is slow in coming. Although the Lords has taken a leading role in enhancing the scrutiny of delegated powers, the system in the Commons remains almost entirely unreformed. Perhaps, as Onora O'Neill suggests, this is because secondary legislation 'intimidates and bores in equal measure'.¹⁹⁵

Part 5: The Scrutiny Framework in the Northern Ireland Assembly

This part begins by outlining the Northern Ireland Assembly's areas of legislative competence ('NIA'), before turning to its framework and capacity for scrutinising legislation for human rights implications. This part also

addresses the academic literature, which tends to focus on committee scrutiny in the Assembly, or its scrutiny capabilities more generally.

The Northern Ireland Assembly's Legislative Competence

The NI Assembly is a 'creature of statute' - its role is derived from the Northern Ireland Act 1998.¹⁹⁶ The Assembly's day-to-day running is regulated by certain procedures set out by the Standing Orders of the Northern Ireland Assembly.

Like other devolved administrations, the NI Assembly legislates and scrutinises matters within its competence. Section 10(1) of the NI Act 1998 confirms this and creates a duty for Standing Orders to prevent a Bill from being introduced if it is deemed to fall outside of the Assembly's competence. Likewise, section 6(1) invalidates a provision of an Act if it is an 'excepted matter' and lies outside the Assembly's competence.

The Assembly's legislative competence is set out by section 6(2) of the Northern Ireland Act 1998. Four categories of exempted competence are relevant to fundamental rights as stipulated the Northern Ireland Protocol. These are legislation incompatible with Convention rights; legislation incompatible with Article 2(1) itself; and directly discriminatory

¹⁹¹ Ibid.

¹⁹² Fox and Blackwell, pp.219-224.

¹⁹³ Sinclair, A., Tomlinson, J. '[Plus Ça Change? Brexit and the Flaws of the Delegated Legislation System](#)' *Public Law Project* (2020).

¹⁹⁴ Constitution Committee, *The Legislative Process: The Delegation of Powers* (2017-19) p.225.

¹⁹⁵ Quoted in Brazier, A., Kalitowski, S., and Rosenblatt, G. *Law in the Making: Influence and Change in the Legislative Process* (Hansard Society, 2008), p.196.

¹⁹⁶ Northern Ireland Research and Information Service, 'Human Rights and Equality Proofing of Public Bills' (10 February 2014).

legislation.¹⁹⁷ The NIA does not normally scrutinise ‘excepted’ matters; these are Westminster’s responsibility.

However, there are two types of excepted matters: those that are directly (and exclusively) Westminster’s responsibility, like national security, currency, or honours¹⁹⁸; and those that may be transferred to the NI Assembly, like consumer protection, telecommunications or broadcasting.¹⁹⁹ For instance, in 2010, and following the passage of legislation, the Assembly established a new Department of Justice. Thereafter, prisons, policing and the criminal law were transferred to the Assembly’s competence.

Scrutinising Legislation for Human Rights Issues

Various legal provisions ensure the consideration of human rights issues at the pre-legislative development stage of all bills.²⁰⁰ Section 6 of the Human Rights Act 1998 obliges public authorities not to act in a manner that trespasses on convention rights. Section 24 of the NI Act 1998 prevents a minister from Northern Ireland from approving any subordinate legislation incompatible with Convention rights.

Before a bill is introduced to the Assembly, it must comply with procedural requirements that encompass human rights considerations.²⁰¹ If it is a Public Bill,

the Minister in charge must submit a statement of opinion confirming that the Bill lies within the Assembly’s competence, which, as explained above, rules out any legislative incompatibility with Convention Rights. In the case of a Private Bill, the Speaker is required to submit the same type of statement confirming the NIA’s legislative competence.

Standing Order 41 of the Assembly requires a Public Bill to be accompanied by explanatory memorandum, detailing the nature of the bill and other issues. So far, no requirement exists to include human rights-related statements in explanatory memoranda accompanying bills, though such statements are normally included.²⁰² Typically, these statements have been very short, and contain little to any analysis. Similar explanatory notes made in Westminster were also criticised for failing to address a bill’s compatibility with Convention Rights in any depth. To remedy this issue, the UK Government published guidance concerning the level of detail Departments should engage with when explanatory notes address significant Convention related issues.²⁰³

197 Legislation that discriminates against any person or class on religious grounds or political opinion.

198 Listed in schedule 2 of the Northern Ireland Act 1998.

199 Listed in schedule 3 of the Northern Ireland Act 1998.

200 [Standing Orders of the Northern Ireland Assembly](#).

201 Ibid.

202 Ibid.

203 Cabinet Office, [‘Guide to Making Legislation’](#) (July 2013).



After a Bill is introduced to the Assembly, the Speaker must ensure that all its provisions lie within competence. At this stage, and as soon as reasonably practicable, the Speaker must send a copy of the Bill to the Northern Ireland Human Rights Commission ('NIHRC').²⁰⁴ To support the work of the Assembly, the NIHRC typically examines the bill, where appropriate, 'according to domestic and international obligations, hard and soft law, and international and domestic jurisprudence'. The Commission may choose to advise the Assembly on a bill, though any engagement with the NIHRC's findings normally occurs at the Committee stage.

At the Committee Stage, Public Bills are considered by the relevant committee, who must report back to the Assembly with their detailed findings.²⁰⁵ Under Standing Order 33, there is an opportunity for committees to take oral and written evidence. For example, the Human Rights Commission may be requested to give evidence on a bill at this stage.

At this stage, procedure can be used by members to scrutinise a bill's implications on Convention rights. Under Standing Order 34(2), a Member may table a motion asking that the NIHRC be asked to advise on a bill's compatibility with Convention Rights. Standing Order 35(2) empowers a Member of the Executive Committee, or alternatively a Chairman of a statutory committee (relevant to the bill) to table a motion referring a bill, draft bill or

proposal to an ad hoc committee on Conformity with Equality Requirements. This committee would consider whether a bill is conforming with equality requirements (including those specified by the Convention). Any ad hoc committee convened must report within 30 days or a time agreed by the Assembly.

Amendments cannot, however, be made until the 'Consideration Stage'.²⁰⁶ There is no requirement for a Minister in Northern Ireland, or a bill's sponsor, to express their views on the bill and potential human rights issues.

At the Consideration stage, and Further Consideration stage, a bill is referred to the Speaker who considers the legislation, in accordance with section 10 of the Northern Ireland Act 1998 (and before it reaches the Final Stage). After a Bill is agreed by the Assembly, the Attorney General of Northern Ireland and Lord Advocate may refer a bill to the Supreme Court if there are significant doubts about its legislative competence (and on occasion, its compatibility with Convention rights, or other rights obligations created through international treaties). Under Standing Order 40(1), a bill is 'set down for reconsideration' if the Supreme Court holds a provision to be outside the Assembly's legislative competence.

The final safeguard is immediately before a Bill receives Royal Assent: the Secretary of State for Northern Ireland retains the discretion not to submit a bill for Royal Assent if he or she considers

²⁰⁴ Northern Ireland Research and Information Service '[Human Rights and Equality Proofing of Public Bills](#)'.

²⁰⁵ Ibid. p.5.

²⁰⁶ Ibid., pp.6-8. See also pp.12-13.

any provisions to be incompatible with international (and namely rights-related) obligations.²⁰⁷

The Academic Literature

Although several academic studies exist on the Northern Ireland Assembly, the majority analyse its work in general terms or in relation to the very specific political situation.²⁰⁸ There are also some useful studies on the Assembly's committee work in the context of consociationalism.

Michael Cole analyses non-legislative committee scrutiny in the NIA in light of commentaries on the weakness of power-sharing, and consociational arrangements.²⁰⁹ The literature documents how consociationalism hinders the development of two factors that are necessary to an efficient committee: the capacity for cross-party agreement and the power-influence of the legislation. Drawing on the empirical data, Cole highlights the negative impact of a 'sectarian chasm' on scrutiny.

Rick Wilford evaluates whether attempts at institutional reform of the NI Executive Assembly confirm consociationalism's ability to facilitate the politics of accommodation.²¹⁰ Wilford describes the 'narrow limits' of institutional reform, arguing that whilst the review of the NIA committee

system is commendable, there are still fundamental flaws.

The academic literature on the Northern Ireland Assembly and its scrutiny of human-rights is modest. One study, by David Russell and Colin Caughey, discusses controls on political power in devolution and human rights in Northern Ireland in relation to devolution and issues of competence.²¹¹ They address the relationship between Acts of the Northern Ireland legislation and the HRA,²¹² in addition to how treaties made by the UK Government affect the actions of the Northern Ireland Assembly. Russell and Caughey analyse how Assembly Standing Orders may be used to enhance the human rights implications of a bill²¹³ with reference to the Ad Hoc Committee's report on the Welfare Reform Bill. Whilst this ad hoc committee was established pursuant to Standing Order 35, its report did not highlight any considerations which might suspend further proceedings on the bill.

A couple of studies have been conducted surrounding the scrutiny of rights and equality in Northern Ireland in the context of Brexit. Murray and Rice have argued that the scrutiny of Article 2 (1) of the Protocol, relating to the 'non-diminution of rights' has been 'marginalised' amidst trade-

207 Ibid.

208 See for example, Haughey, S., 'Worth Restoring? Taking Stock of the Northern Ireland Assembly' *The Political Quarterly* (2019) 90(4).

209 Cole, M. '[Committee scrutiny within a consociational context: A Northern Ireland case study](#)' (2015) 93 *Public Administration* 1.

210 Wilford, R. 'Two Cheers for Consociational Democracy? Reforming the Northern Ireland Assembly and Executive' *Parliamentary Affairs* (2015) 68 pp.757-774.

211 Russell, D. and Caughey, C., 'Devolution, Human Rights and Northern Ireland Assembly' in Hooper, H., Hunt, H., and Yowell, P. (eds) *Parliament and Human Rights* (Hart Publishing: 2014) pp.223-238.

212 Ibid. Acts of the NIA are considered subordinate legislation for the purposes of the HRA, as explained by Russell.

213 Ibid., p.236.

related discussions.²¹⁴ Although only a very modest quantity of commentary about Article 2(1) exists, that which goes beyond simple explanation usually takes the form of written evidence to parliamentary committees in Westminster.²¹⁵

Nevertheless, academic commentaries do not address how scrutinising compliance with Article 2(1) of the Northern Ireland Protocol would be achieved; the literature on this is sparse, if existent.²¹⁶

Comparing Scrutiny in Stormont & Westminster and the Literature

This analysis demonstrates three things concerning the Northern Ireland Assembly's capacity for scrutinising legislation for human rights issues, and the wider academic literature on the Assembly's scrutiny capabilities.

First, the Northern Ireland Assembly does not have the same type of specialist legislative scrutiny as Westminster. Whilst a framework for ensuring legislation is compliant with Convention rights exists, it is largely determined by legislative procedure, and requires the presence of sufficient political will and interest into the implications of a specific provision. However, there is no default committee that conducts specialist scrutiny for rights-related issues in the same way that the Joint Committee on Human Rights operates in Westminster.

Conducting type of scrutiny on rights-related grounds requires a great deal of committee-based resources. The academic literature suggests that the NIA does not seem to have the necessary resources for this type of scrutiny; this point is also reinforced by the outcome of various attempts to improve legislative scrutiny through Ad hoc committees.

The absence of long-standing specialist committees like the Joint Committee on Human Rights, EU Committees, and the Constitution Committee have had a negative impact on the range of academic literature available. The existing commentary is limited as accounts are often based on quantifying the impact or influences of existing committees (and there are comparatively few models). Although, it is worth acknowledging that specialist scrutiny touches upon 'excepted matters' or issues of shared competence between Westminster and Stormont, so the establishment of these committees are more difficult.

In summary, the existing literature on the NIA tends to evaluate its work in general terms or address challenging domestic circumstances. Unlike commentaries on Westminster – such as those covered in parts 1- 4, the literature on the NI Assembly does not in any detail consider mainstreaming of human rights and related issues, good scrutiny practice, or specific case studies.

214 Murray, C. and Rice, C., 'Beyond Trade: Implementing the Ireland/Northern Ireland Protocol's Human Rights and Equality Provisions' *Northern Ireland Quarterly* (2021) 72(1).

215 A good example is, McCrudden, C. '[Parliamentary scrutiny of the Joint Committee and the application of the Northern Ireland Protocol](#)' Evidence to the European Scrutiny Committee; Exceptions include Murray and Rice, *Ibid.*, and de Mars, S., Murray, C., O'Donoghue, A. and Warwick, B. '[Continuing EU Citizenship "Rights, Opportunities and Benefits" in Northern Ireland after Brexit](#)' *Northern Ireland Human Rights Commission/Irish Human Rights and Equality Commission* (March 2020).

216 With exceptions in p216.

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