Vetoing The Protocol

Restoring Cross-Community Consent Protections

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About Unionist Voice Policy Studies

Unionist Voice Policy Studies ('UVPS') is an organisation established with the following objectives:

(i) To promote the constitutional position of Northern Ireland as a full and integral part of the United Kingdom in line with the Acts of Union 1800

(ii) To advocate for the interests of the Unionist/Loyalist community in Northern Ireland with specific focus on the areas of Media, Law and Public Policy

In line with these objectives, UVPS brings together a network of groups and individuals from within the pro-Union community to engage in research, academia, media engagement, Law and Public Policy.

Our high level strategic advisory panel is responsible for identifying areas of importance, which are then tasked by our management committee to one of our three working groups (Law and Human Rights/Media/Public Policy) for focused actions.

This focused work includes both producing and commissioning reports, formulating written submissions to public consultations, and developing policy/legal papers focusing on areas of importance identified by our strategic advisory group.

Foreword

By Baroness Kate Hoey

This latest report by Unionist Voice Policy Studies is an important contribution to the ongoing campaign against the Protocol, which the Government argued before the Court of Appeal 'subjugated' the Acts of Union.

The Government appear to at times fundamentally misunderstand the fundamental issue with the Protocol, hence their focus is primarily upon resolving albeit outrageous bureaucratic barriers to trade, without ever really confronting the salient point.

Northern Ireland being left in the single market, whilst the rest of the UK is outside of it, is- and always will be- incompatible with the foundational constitutional integrity of the United Kingdom, set forth in the Acts of Union 1800. It follows that save for Northern Ireland being removed from the single market, and restored to an equal footing in matters of trade with GB, then there has been fundamental constitutional change. I urge the Government to grapple with that issue.

This report sets out a clear pathway for using political and legal action to impede and thwart the Protocol. That is to be welcomed, as is the concession by Minister Poots that the implementation of the Protocol will now go to the Executive, and presumably in the absence of authority being granted for continuing with the implementation, then all forms of Protocol implementation will be halted.

It is of course trite to point out that cross community protections remain in existence in the Executive, and therefore unionist Ministers can veto Minister Poots request for the continuation of checks. It is their duty as unionists to do so. That entire process may indeed be viewed as 'gaming' the system, but what shouldn't unionists do so given the manner by which the Belfast Agreement has been used against them, and cross community consent in the Assembly for the key Protocol vote disapplied in order to neutralise unionists.

For my part, I will continue, in partnership with Lord Dodds and other pro Union peers, to bring forward appropriate amendments to relevant legislation to seek to restore the fundamental balance to the Belfast Agreement. I would hope that once the matters return to the Commons, that all those who value the Union will adopt these amendments.

I support the increasingly strategic activism of young (and not so young) people within the pro-Union community, who are coming together in various ways to develop networks and sharing of ideas and intellectual capital for the collective objective of advancing the cause of the Union. I also entirely support the ongoing work to encourage those, especially from working class loyalist communities, to engage in education and to seek entry to professional vocations such as journalism, law and public service. There are very justified concerns that many professional vocations have become dominated by those of a nationalist persuasion, and this positioning of activists is then used to exert influence on those in power.

The work of Unionist Voice Policy Studies is crucial, both as a network for the sharing of pro-Union ideas and for the development of policies, legal arguments, and political strategies. I know that fellow peers and MPs have gained much from previous papers published and submitted to House of Lords and Parliamentary committees by this group.

I would urge the Government, and all those with an interest in restoring Northern Ireland's place as an integral part of the United Kingdom to study this report.

Baroness Kate Hoey is a member of the House of Lords. She was a Labour MP from 1989-2019 and served in Government as Parliamentary Under-Secretary for Home Affairs from 1998-1999 and Minister for Sport from 1999-2001.

Introduction

By Jamie Bryson

In 1987 something significant happened in the United States. In an significant move, Democrats politicised and weaponised the confirmation procedure for nominations to the United States Supreme Court. It had traditionally been the case that the procedure operated with goodwill, and the President's nominees were approved on a bi-partisan basis. The balanced and reasonable operation of the constitutional procedure ensured that both major political sides (Republicans and Democrats) had the same fair opportunity to put a nominee of their choosing on the Court when they were in power, and a vacancy arose.

However, when it came to the nomination of Robert Bork, Democrats decided to throw the convention and balance out of the window. They weaponised the confirmation procedure for their own political ends, upending the fundamental balance and reasonableness that had until that point- *for the most part*- underpinned the confirmation procedure.

That was a turning point for many in the Republican party. The moment seared on the collective conservative conscience in America, with the promise of revenge. The realisation that goodwill had been set alight by Democrats. Remarkably (and not unlike Northern Ireland), the aggressors of the weaponisation of the process somehow believed that they could do as they pleased, but everyone else would continue to operate the procedure with goodwill. That was naivety bordering on stupidity. And so began the Judicial Wars. I should of course skip to the end of this story- there is now a solid Conservative majority on the Court, put there after the Republican party (assisted by the Federalist Society) returned the serve over a period of thirty years in brutal fashion.

There have been a few recent moments in Northern Ireland that are of significance, to me personally in any event. In 2015 it was apparent there was an inherent media bias, sometimes subtle, in favour of nationalism. There was a self-appointed elite who governed what was 'acceptable' public discourse, and thus shaped media output in line with their collective objectives, which were for the most part heavily pro-nationalist.

And so, I decided to join the National Union of Journalists to flush out their elitism and nationalist bias. It is well documented the Union had prominent republicans such as

Danny Morrison and Anthony McIntyre (who had served a life sentence for IRA offences) as members. No objection was raised to those members.

The reaction to my application exposed the bias more than I could have ever imagined. There were tantrums, resignations and generally all out chaos. The notion that a loyalist would dare to interfere with this pro-nationalist media elite was simply too much for some to cope with. The reactions of some adults would not have been out of place in a nursery school. Pleasingly, I appealed their attempted rejection of my membership (*which was denied not on grounds that I did not fit the criteria for membership- I did (and do), but rather because they simply hated me because I was a loyalist*) to the central NUJ in London and won.

Not to be outdone, some of the most fanatical nationalists decided I would not be notified of meetings, denied access to minutes and they refused to place me on their email list for members. This, of course, was all somewhat comical, but there was a more important purpose in challenging them: to smash the glass ceiling a self-appointed nationalist elite believed they had imposed upon unionism and loyalism.

In 2018 a coalition of nationalist activists, operating as surrogates within the media and legal profession, conspired together to try and force the recusal of a High Court judge. That deserves a book all on its own. Nevertheless, for me personally that was a watershed moment. It was clear that the greening of the professional class had provided nationalism with a weapon they could powerfully deploy against anyone (even High Court judges) who stood in the way of their agenda. That couldn't be allowed to continue.

The impact of that incident was solidified by the contrived letters to the Irish Prime Minister in relation to Brexit. The same network mobilised surrogates in the professional class to identify themselves with the political cause of nationalism in an open letter. The real purpose was clear; to display dominance within the media, academia and legal profession and cow any unionists within such professions into obedience.

That which I have set out above are personal experiences, albeit with much wider application for unionism and loyalism. However, the imposition of the Northern Ireland Protocol, and specifically the disapplying of cross community consent, is the collective defining moment. That was when it seared on the minds of a significant majority of the unionist and loyalist community that the so-called 'peace process' was really simply a vehicle for the advancement of nationalism's ultimate objective.

A key pillar, we were told, of the Belfast Agreement was the principle of cross community consent. The need to govern with the consent of both communities, and for "key decisions" specifically to command such support.

However, when it came to the point the cross community consent mechanisms were required by unionists in order to reject the Protocol, those mechanisms were simply disapplied. The deceitful manner by which that was perpetrated will be seared on the very soul of the collective unionist consciousness.

The arrogance of nationalists, and their surrogates in the Alliance party and Irish Government, who put the boot on the neck of unionism even as they lectured us all on the Belfast Agreement, whilst disarming its key cross community protections, is striking, whatever its apologists might say. The Belfast Agreement resolves itself to a simple idea- *unionism must give, and nationalism must get.*

Thus every constructive ambiguity and provision within the Agreement must be resolved in favour of nationalism. I call this the principle of nationalist interpretation.

The prevailing situation is unsustainable. As helpfully set out by Scoffield J in the second judgement in the politically motivated legal case brought in recent months by Sinn Fein activist Sean Napier, the institutions require goodwill, and in the absence of goodwill there is nothing that even the Court can do. In that regard, Mr Napier has succeeded in securing a number of significant judgements- all of which in the long-term favour unionism and provide necessary judicial grounding for various actions which must now be taken to impede the institutions. A classic case of politically motivated litigation backfiring.

Unionism must weaponise the mechanisms and procedures of the institutions (for so long as they remain in existence) to benefit unionism. There can be no goodwill or balance, unionism must ruthlessly and relentlessly exploit the institutions for the benefit of unionism. And that means weaponising section 28A of the Northern Ireland Act and the Ministerial Code to assist in the fight against the Union-subjugating Protocol. And those provisions should be weaponised without a hint of shame or embarrassment; it is simply returning the serve. It cannot, and will not, be the case whereby nationalism can weaponise the Agreement and the law more generally, without the inevitable political and legal retaliation. It is time to return the serve.

This report provides a legal basis for returning the serve by using the mechanisms within the 1998 Act against the Union-subjugating Protocol. It is welcome that DUP Minister Edwin Poots' department has conceded on the challenge from Unionist Voice Policy Studies, and will now bring the implementation of the Protocol to the Executive. At that point, unionism must wield the veto to blow a hole in the heart of the Protocol.

Finally, it is imperative that civil servants accept their constitutional role. They serve democratically elected and accountable Ministers, they are not Ministers. Therefore, it would be an incendiary constitutional development if there were to be any attempted coup by unelected officials trying to undermine the direction and authority of the elected Minister.

In any event, I am quite sure all civil servants would be alert to the optics of adopting the mantle of chief Protocol implementers, acting in defiance of democratically elected unionist politicians.

As we head into 2022 it is imperative that unionism and loyalism collectively weaponise the power of the law, and engage in a strategic concerted campaign to rebalance the professional class and public policy in Northern Ireland, alongside securing an end of the Union-subjugating Protocol.

To achieve those objectives, the creation of a conveyor belt of activists focused on (i) entering the professional class and using their position to advance the pro-Union cause and (ii) churning out ideas, arguments and legal positions which can form a deep canyon of intellectual capital, to be drawn upon by those presently in positions of power within the political institutions, judiciary, media, academia, and legal profession.

Jamie Bryson works in Public Relations and Law. He is author of Brexit Betrayed and the forthcoming Justice, Law and Human Rights handbook. He is Editor of UnionistVoice.com and a trustee of Unionist Voice Policy Studies.

Executive Summary

This report focuses on the strategic objective of restoring cross community consent protections in regards the Northern Ireland Protocol, in order that it can be vetoed. It recommends a series of actions, without prejudice to this group's overriding belief that the institutions should be (and should have been long ago) brought down unless and until such times as there is a balanced Agreement which respects the rights and aspirations of all communities in Northern Ireland, rather than simply operating purely for the benefit of the nationalist community.

- The bringing of amendments to the NI (Ministers, Elections and Petitions of Concern) Bill to (i) repeal section 56A and Schedule 6A of the NI Act 1998; (ii) to insert into section 42 of the NI Act 1998 a 'notwithstanding clause' to expressly make clear that the European Union (Withdrawal Act) 2020 can not override the constitutional protections. It is of course not conceded that the present direct effect mechanism (section 7A) has such an effect, so the amendment should also include a sub-section making clear that the insertion of the notwithstanding clause is without prejudice to that position.

- Following legal action initiated by UVPS, DEARA Minister Edwin Poots has conceded on the substantive point, and confirmed in writing that he will seek Executive approval pursuant to section 28A (5) of the NI Act 1998 in relation to the continuing, and any future, implementation of the Protocol. Unionist Ministers will be at liberty to veto such approval, and thus halt all Protocol implementation. The effect of the referral is to acknowledge that the Minister has no authority for implementing the Protocol, and therefore all forms of Protocol implementation (both those which are ongoing and any prospective actions) should be immediately halted from the point of the referral pursuant to section 28A (10) of the NI Act 1998.

- Unionism should recover and use the provisions of the NI Act and Assembly/Executive procedures (for so long as the institutions remain) in order to frustrate and impede all aspects of the NI Protocol, and non-emergency Government business for so long as the Protocol remains and thereafter until such times as appropriate amendments are made to the Belfast Agreement to reflect the substance of the principle of consent, and to further ensure that any devolved governance arrangements are fair and equitable.

The Northern Ireland Protocol

***Note**: This brief overview of the Protocol only seeks to address points relevant to the purpose of this report, which is designed to explore the cross-community consent mechanisms. Our full report provided to the House of Lords sub-committee on the Protocol which addresses the Protocol issues in their entirety is accessible on Unionist Voice or on the House of Lords website.*

[1] The Northern Ireland Protocol ('the Protocol') is imposed upon the people of Northern Ireland as a result of the Brexit Withdrawal Agreement between the United Kingdom Government and the European Union. This Agreement is (so say the Government) transported in its entirety into domestic law via the general words in section 7A of the European Union (Withdrawal) Act 2018[1] ('the 2018 Act').

[2] The extent to which the Withdrawal Agreement has direct effect in domestic law is presently being litigated in the Northern Ireland Court of Appeal in the challenge brought by *Allister et al*. It is unnecessary for the purposes of this paper to dilate on the nature of that challenge, however it is prudent to briefly highlight some of its salient points.[2]

[3] It is the appellant's case that in so far as that Withdrawal Agreement conflicts with provisions of domestic law (such as the Acts of Union 1800), the constraints on the use of the prerogative power (namely that the prerogative can not be deployed in a manner which conflicts with any statutory provision- *see paragraph 55 of Miller 1*) operate to deprive the Government of lawful authority to have made the Agreement at all. It would have been open to Parliament to have absolved the Government of the unlawful use of the prerogative by express words, however they did not do so.

[4] Put simply; all that should flow into domestic law via the direct effect provisions of section 7A of the 2018 Act is the parts of the treaty which were lawfully made (in so far as they did not conflict with any statutory provision).

[5] The Government's response to that ground of challenge, and the interconnected issue of the Acts of Union acting as a barrier to the imposition of the conflicting Protocol, is that section 7A impliedly repeals the Acts of Union. This was

[1] As amended by the 2020 Act.
[2] This brief overview of selected parts of the applicant's case do not reflect the entirety of the grounds of challenge

contentiously accepted at first instance by Colton J, however when the case moved to the Court of Appeal the Government developed a new entirely novel argument. They now say the Acts of Union are merely subjugated under the Protocol for so long as it remains in force.

[6] The implication of arguing that the core constitutional statute is subjugated by the Protocol is clear. The Union itself is under the jackboot of an arrangement which grants a foreign power significant law-making powers over one (and only one) part of the United Kingdom, and crucially whilst the subjugation continues, an economic United Ireland becomes further embedded. That is the real objective underpinning the Protocol; to speed the 'process' of incrementally easing Northern Ireland out of the United Kingdom, and into a United Ireland.

[7] The core problem with the Protocol however is its foundational misconception that leaving Northern Ireland within the single market, whilst the rest of the United Kingdom is outside of that single market is compatible with the constitutional integrity of the Union.

[8] It is entirety at variance with the equal footing guarantee in Article VI of the Acts of Union to impose different trading and other arrangements on Northern Ireland.

[9] Therefore, regardless of any practical changes that could free up trade going from NI to GB, and vice versa, that will be insufficient to restore Northern Ireland's place within the United Kingdom in line with the Acts of Union. The only means by which to achieve that objective is for Northern Ireland to be removed from the EU single market, and restored to a full and integral part of the UK Internal Market in line with the rest of the Union.

[10] In order to implement the Protocol, the Withdrawal Agreement had to contrive a mechanism for circumventing the principle in the Belfast Agreement of cross community consent, otherwise unionism could have vetoed the Protocol. The means by which this deceit was perpetrated was by creating a loud pretence of protecting the Belfast Agreement in all its parts, whilst simultaneously taking a scalpel to the parts of the Agreement which could be utilised by unionists in opposition to the Protocol.

Executive Mechanisms- section 28A and Ministerial Code

[11] On 21 December 2021 Unionist Voice Policy Studies issued a pre-action protocol letter against the Department of Environment, Agriculture and Rural Affairs challenging the failure to secure Executive approval for the implementation of the Protocol in line with section 28A (5) of the Northern Ireland Act 1998 ('the 1998 Act') and associated paragraph 2.4 of the Ministerial Code.

[12] Any matters which are significant and/or controversial must be brought to the Executive Committee for approval. In circumstances whereby in the Minister's mind (or because it is patently obvious) a decision is- or becomes- significant and/or controversial, it is at that point the Minister's obligation to refer to the Executive pursuant to section 28A (5) and paragraph 2.4 (v) of the Ministerial Code crystallises.

[13] It is worth setting out an extract from the UVPS pre-action legal correspondence addressing the substantive issue:

> "The first named respondent is, on a continuing basis, unlawfully exercising Ministerial powers by implementing the Northern Ireland Protocol ('the Protocol'), including *inter alia* the intensification of checks on goods travelling between Great Britain and Northern Ireland, without securing Executive approval for same.
>
> It is trite to point out that the imposition of the Protocol is highly significant and controversial. That this is so, is beyond any rational dispute. However, the following reasons for this contention appear especially prudent to illuminate:
>
> (i) there is ongoing litigation (presently before the Court of Appeal) as to whether the Protocol is in of itself lawful. The applicants in the case of *Allister et al* contend that *inter alia* the Protocol's general direct effect provisions in section 7A of the European Union (Withdrawal) Act 2018 do not, and cannot, impliedly repeal or subjugate the United Kingdom's foundational constitutional statute, namely the Acts of Union 1800. The key provision for present purposes is Article VI of same. It is a point of some note (in regards just how significant and controversial this matter is) that the respondent's former party leader is one of the applicants in *Allister* (and

is so as a representative of the respondent's party).

(ii) The United Kingdom Government in repeated public statements, and in a detailed Command Paper in July 2021, acknowledged the significant political and societal instability, alongside economic diversion of trade, being caused by the Protocol. This is compounded by unfortunate and thankfully thus far merely sporadic street disturbances. In recent months there have been a number of high-profile attacks on public transport vehicles, worryingly on one occasion involving a firearm with the perpetrators claiming to be from the 'PAF'. The direct effect of the Protocol, and its controversial nature, can be deduced from these unwanted events alongside the entirely justifiable peaceful protests which signal the disapproval of a large section of society to the implementation of the Protocol.

(iii) The implementation of the Protocol is opposed by every unionist party in Northern Ireland. This is well-known but is crystalised by the Joint Unionist Declaration issued by the leaders of all Unionist parties (DUP, UUP, TUV and PUP). Two of the relevant parties are in the Northern Ireland Executive. Given the general overarching emphasis on cross community consent inherent within the Belfast Agreement, it seems obvious to point out that in circumstances whereby an entire community does not consent to the imposition of the offending instrument, that the imposition would therefore be significant and controversial.

(iv) The Protocol has been recognised by a High Court Judge as a matter of "*significant political contention*" (see Scoffield J in *Re Chuinneagain (Caoimhe Ni's) Application* [2021] NIQB 79, paragraph 24).

On the irresistible footing, crystalised by the matters outlined at (i) to (iv) *supra*, that the imposition of the Protocol (in all forms) is significant and controversial, it is therefore incumbent upon the Minister to bring the matter to the Executive Committee pursuant to section 28A (5) and paragraph 2.4 of the associated Ministerial Code.

Section 28A (5) of the 1998 Act provides:

(5) The Ministerial Code must include provision for requiring Ministers or junior Ministers to bring to the attention of the Executive Committee any matter that ought, by virtue of section 20(3) or (4), to be considered by the Committee.
It is further provided in s20 (4) (a) of the 1998 Act:

(4) The Committee shall also have the function of discussing and agreeing upon—

(a)where the agreed programme referred to in paragraph 20 of Strand One of that Agreement has been approved by the Assembly and is in force, any significant or controversial matters that are clearly outside the scope of that programme; (emphasis added)

The Ministerial Code at 2.4 provides inter alia that a matter must be brought to the Executive Committee if it:

"(i) Cuts across the responsibilities of two or more Ministers;
…

(iii) Requires the adoption of a common position;

…
(v) is significant and controversial and is clearly outside the scope of the agreed programme referred to in paragraph 20 of Strand One of the Agreement

Shall be brought to the attention of the Executive Committee by the responsible Minister to be considered by the Committee." (emphasis added).

The mandatory nature of the requirement to bring significant and/or controversial matters (as well as those matters which fall into other categories) to the attention of the Executive Committee is illuminated by the word "*shall*". This is not a discretionary choice.

In circumstances whereby the requirements of section 28A (5) are not adhered to, subsection (10) deprives the relevant Minister of authority to act. The Department acts, at all times, subject to the direction and control of the Minister, and as it seems is clear from Morgan LCJ's judgment in *Buick*,

the deprivation of authority also extends to department officials.

In present circumstances the respondent has failed to refer the significant and controversial matter of the imposition of the Protocol, via his department, to the Executive Committee pursuant to the requirements of section 28A (5) and associated paragraph 2.4 (v) of the Ministerial Code. Accordingly, the respondent is acting unlawfully, specifically *ultra vires* of section 28A (5) and (10) of the 1998 Act.

It is no defence for the respondent to say that because no other Minister has called the matter in that it is not significant or controversial. That contention would be wrong as a matter of law in any event, but even if it were not it is confounded by the Minister himself. As is apparent from *Re Napier's application*[3] and the positions adopted by the respondents in that case (one of whom was the Minister who is the proposed respondent in the instant case) the DUP Ministers view the Protocol as so significant and controversial, that they have willingly accepted they are acting unlawfully (notwithstanding that I am not sure that they are in fact acting unlawfully despite their concessions) in protest at the imposition of the Protocol. This makes abundantly clear that in the Minister's mind he views the Protocol as significant and controversial, so much so that he- along with colleagues- feels sufficiently moved to engage in the protest action which has given rise to the declarations arising in *Napier*. Therefore, there is simply no credible (or logical) defence for failing to refer the matter to the Executive Committee.

It is trite law to point out that the requirements set forth in the 1998 Act persist notwithstanding any other obligations. If Parliament wishes to disapply the mechanisms required to be followed in order to obtain Ministerial authority to act on significant and controversial issues, then it would be required to do so expressly. It has not done so.

The issue of the overriding constitutional obligations of the 1998 Act was recently addressed, in the context of the obligations to bring forward abortion provision, by Colton J in *Re NIHRC's Application* [2021] NIQB 91 at

[3] *Re Napier's application* [2021] NIQB 120

paragraph 68:

"[68] It recognises that this will inevitably take some time. It will further be constrained by the fact that ultimately the Executive Committee will have to agree to the commissioning proposals when complete. This is because the introduction of any new service would require Executive approval, in accordance with sections 20 and 28A of the Northern Ireland Act 1998 and the Ministerial Code contained in the Act. I should add that none of the parties in this application disputed this contention. For the purposes of these proceedings the court has proceeded on the basis that this is an accurate statement of the law." (emphasis added)

Delay

I deal pre-emptively with the issue of delay. The duty to refer a matter to the Executive is an ongoing one: if, for example, a matter begins entirely benign but develops in substance, or due to extraneous circumstances, into a matter of significance or controversy, then the duty crystalises. The failure to refer the matter is an ongoing one.

In terms of identifying a clear moment whereby it can be demonstrably shown that the Minister himself was aware, or formed the view, that the matter was significant and controversial, then that arises at the point of the Napier application. In this regard it is clear at this point that the Minister himself viewed the matter as significant and controversial, so much so that he adopted the defence in the Napier proceedings of accepting (in my view wrongly) that DUP Ministers were acting unlawfully as an act of protest against the imposition of the Protocol.

In light of the foregoing, the point whereby it can be shown the realisation definitively dawns, is when the Minister adopts the approach set out supra in the Napier case. It is that point the duty crystalises, as it is only at that point it can be definitively shown the Minister views the matter as significant and controversial. It should then have been referred.

In any event, further checks and Protocol requirements are due to be imposed. These steps require departmental planning. On each occasion

such a decision is to be taken, there should be referral pursuant to section 28A (5), save for if the Executive grants general approval to proceed per se."

[14] The relief sought was as follows:

> ***(i)*** *Confirm within fourteen days that the* ***continued and future implementation*** *of the Protocol (inclusive of all functions exercised by the Department in relation to same) will be brought to the Executive Committee pursuant to section 28A (5) of the 1998 Act and paragraph 2.4 of the associated Ministerial Code.*

[15] On 31 December 2021, DEARA formally conceded the substantive point raised within our pre-action correspondence, and confirmed they would comply with the relief sought. In a letter signed by Minister Edwin Poots, it was stated on behalf of the Department:

> *"I can confirm that it is my intention to bring a paper to the Executive in the coming weeks (and not later than the end of January) in relation to the* ***continued and future*** *implementation of the Protocol."* (emphasis added)

[16] This significant concession represents an important stage in the fight against the Protocol. As requested, the remedy for the unlawful implementation of the Protocol without Executive approval is to recognise that error by now bringing not only any future intensification of the Protocol to the Executive, but also the continued (ongoing) implementation of the Protocol.

[17] The Ministerial Code at paragraph 2.15 envisages circumstances whereby a Minister could retrospectively bring a decision to the Executive for approval. In any event, given that the Minister appears now to accept that the initial implementation of the Protocol (which is continuing) should have sought Executive approval, he is now (or will be at the point of formal referral to the Executive) deprived of Ministerial authority pursuant to section 28A (10) of the 1998 Act. The implication is clear; without Ministerial authority for the continuation of the implementation of the Protocol, there is no lawful basis for the checks to continue.

[18] In bringing the matter to the Executive pursuant to section 28A (5) Minister

Poots must ensure that the veto works in favour of, rather than against unionists. If, for example, the Minister were to bring a paper requesting Ministerial authority for halting checks, then a positive resolution would be required to grant that authority. The veto would therefore work in favour of nationalists. Accordingly (and somewhat ironically) as a matter of common-sense Minister Poots will have to bring to the Executive a paper which seeks Executive authority to continue the checks. Naturally therefore, the veto works in favour of unionism given unionist Ministers can block any positive resolution granting such retrospective and/or prospective authority.

[19] The decision of the Minister, set out in his correspondence of 31 December 2021, must be respected by officials. There has been deep unionist concern for quite some time about the greening of the civil service. Officials must remember their place in the constitutional order. They work for democratically elected Ministers, they aren't Ministers themselves.

[20] In any event this position should be abundantly clear. Article 4 of the Departments (Northern Ireland) Order 1999 ('the 1999 Order') deals with the exercise of the functions of a Department. Article 4(1) provides that the functions of the Department "*shall at all times be exercised subject to the direction and control of the Minister".*

[21] In *Buick*[4] at first instance Keegan J (as she then was) dealt with the interpretation of Article 4 (1) of the 1999 order at paragraph 42:

> *"[42] In my view the provisions of the 1999 Order are clear. The language is expressed in mandatory terms by inclusion of the word shall. The other words are also clear. However, the issue is really whether they should be qualified to take into account current circumstances. The Respondent is effectively asking the Court to read Article 4(1) of the 1999 Order to mean that direction and control only applies when a Minister is in place and at all times is also subject to that qualification. I am not attracted to this argument for the following reasons. Firstly, it offends the ordinary and natural meaning of the provision. Secondly, it is not in keeping with the legislative context namely the 1998 Act which forms the*

[4] *Buick's Application (ARC21*) [2018] NIQB 43

> *basis for government in Northern Ireland and which provides for ministerial oversight. Thirdly, I do not consider that Parliament can have intended that such decision making would continue in Northern Ireland in the absence of Ministers without the protection of democratic accountability. Fourthly, in terms of effect, the rubric suggested by the Department would mean that civil servants in Northern Ireland could effectively take major policy decisions such as this one for an indefinite period. This is not a purdah situation where there is a short gap. Rather there is a protracted vacuum in existence pending the restoration of executive and legislative institutions or direct rule."*

[22] In the Court of Appeal in *Buick*[5], Morgan LCJ sought to give a more flexible view of Article 4 (1) of the 1999 Order. However, in a dissent in relation to this discrete issue Treacy LJ- agreeing with Keegan J (as she then was) at first instance- said the following at paragraphs [64]-[65]:

> *"[64] I consider that it is clear from the terms of the Agreement set out above that the Department's argument that executive authority may be exercised by Departments in the absence of a Minister is inconsistent with the express terms of the Agreement. The default position contended for by the Department is profoundly undemocratic. If correct Departments in NI would be empowered, in breach of fundamental constitutional principle, to act without being accountable to Ministers. This would be a striking consequence for an Agreement which was intended to usher in a new era of accountable governance and power sharing.*
>
> *[65] The Department's argument is also inconsistent with the Civil Service view of the constitutional arrangements by which it is governed, contained in NI in its Code of Ethics. At paragraph 1 the Code states that the "Civil Service supports Ministers in developing and implementing their policies, and in delivering public services. Civil servants are accountable to*

[5] Buick's Application (ARC21) [2018] NICA 26

> *Ministers". This is in keeping with the traditional UK constitutional model as set out in the Civil Service Code [see also Halsbury page 36]"*

[23] Whatever about Morgan LCJ's view- which in any event only related to circumstances whereby there was no Minister in place- it is unlikely to prevail in the present judicial context. Keegan J is now Keegan LCJ and Treacy LJ remains as a Lord Justice of Appeal. If the emphatic reasoning of Treacy LJ in *Buick* was apt in relation to a period whereby there were no Ministers in place, then it does not take much to imagine how much stronger the point is when there is in fact democratic Ministers in place.

[24] Any efforts by civil servants to defy the approach of the Minister and continue implementing the Protocol would be an attempted constitutional coup. As is clear from paragraph 65 of Treacy LJ in *Buick: "Civil servants are accountable to Ministers".*

Cross community consent – Strand One (5) (d) and section 42 (1) of the NI Act 1998

[25] The cross-community consent mechanism for matters coming before the Assembly has been a key cornerstone of the Belfast Agreement, and Northern Ireland Act 1998.

[26] Strand One (5) (d) of the Belfast Agreement provides:

> *"5. There will be safeguards to ensure that all sections of the community can participate and work together successfully in the operation of these institutions and that all sections of the community are protected, including:*
> ..
> ..
> ..
>
> *(d) arrangements to ensure key decisions are taken on a cross community basis"* (emphasis added)

[27] This is then given effect in domestic law by section 42 of the Northern Ireland Act 1998 which provides:

> *"(1) If 30 members petition the Assembly expressing their concern about a matter which is to be voted on by the Assembly, the vote on that matter shall require cross-community support."* (emphasis added)

[28] It will be noted that neither Strand One (5) (d) or section 42 (1) of the 1998 Act constrain the cross-community mechanisms only to devolved matters. The provisions address "*key decisions*" and "*a matter which is to be voted on by the Assembly*".

[29] The consent mechanism within the Northern Ireland Protocol (Article 18) provides for a majority vote for the continued imposition of the Protocol, therefore allowing for nationalism to join with the Alliance party to ensure the continuation of an economic United Ireland.

[30] In order to expressly reconcile Article 18 of the Protocol with the conflicting provisions of the Northern Ireland Act 1998 and Belfast Agreement, the Secretary of State unilaterally brought forward regulations to disapply cross community consent when it comes to the vote on the Protocol.

[31] These regulations inserted section 56A and the associated Schedule 6A into the 1998 Act. In Schedule 6A paragraph 18 (5) the following provision was slipped in:

> *"18.*
>
> *(5) Section 42 does not apply in relation to a motion for a consent resolution"*

[32] Several issues arise. Firstly, the Government's argument that the key decision being voted on by the Assembly in regard to whether to continue the Protocol is not devolved and therefore doesn't attract cross community consent protections, simply defies logic. If that were to be true, then why was it necessary to disapply provisions which- according to the Government- would not apply anyway?

[33] Secondly, section 10 (1) (a) of the 2018 Act required any Government Minister making regulations pursuant to the powers conferred by the 2018 Act to act in a manner compatible with 1998 Act. Section 10 (1) (a) provides:

> *"In exercising any of the powers under this Act, a Minister of the Crown or devolved authority must:*
>
> *(a) act in a way that is compatible with the terms of the Northern Ireland Act 1998."*

[34] It would seem, as a matter of irresistible logic, to be obvious that you do not act in a manner consistent with the Agreement, by disapplying one of its fundamental planks.

[35] The commitment within section 10 (1) of the 2018 Act finds similar expression in the preamble to the Protocol itself whereby it states the following:

> *AFFIRMING that the Good Friday or Belfast Agreement of 10 April 1998 between the Government of the United Kingdom, the Government of Ireland and the other participants in the*

> *multi-party negotiations (the '1998 Agreement'), which is annexed to the British-Irish Agreement of the same date (the 'British-Irish Agreement'), including its subsequent implementation agreements and arrangements, should be protected in all its parts,* (emphasis added)

[36] It again appears trite to point out that protecting the Agreement in all its parts is wholly inconsistent with unilaterally disapplying key provisions of same.

[37] In addition, Article 18 (2) of the Protocol itself again provides:

> *"…the United Kingdom shall seek democratic consent in Northern Ireland in a manner consistent with the 1998 Agreement"*

[38] This, again, illuminates the trickery and sleight of hand required to try and reconcile this clear commitment- and the others set out above- with disapplying cross community consent provisions within section 42 (1) for the purpose of neutralising unionism. It is plain that the commitment to act in a manner consistent with the Belfast Agreement should actually contain an asterisk making clear 'save for if such would impede nationalism's objectives'.

[39] The Belfast Agreement is, and always has been, implemented via the principle of nationalist interpretation. In short, every constructive (or other) ambiguity (of which there are many in the Belfast Agreement) and provision must be resolved in favour of nationalism. That has never been more evident than in the deception and injustice perpetrated upon the unionist community by the disapplication of cross community consent.

[40] The weaponisation of the provisions of the 1998 Act and Belfast Agreement to advance nationalism's all-Ireland agenda forms part of the legal challenge presently awaiting judgment from the Court of Appeal.

[41] However, amendments brought by Baroness Kate Hoey and supported by Lord Dodds and Lord Trimble (the key unionist advocate for the Belfast Agreement in 1998) to the NI (Ministers, Elections and Petitions of Concern) Bill, seek to restore the fundamental balance at the heart of the Agreement.

[42] It is worth setting out the amendments brought forward in full:

To clause 5

add after subsection (8):

(9) This section has effect notwithstanding section 7A of the European Union (Withdrawal) Act 2018.

(10) No inference is to be drawn from subsection (9) as to whether this section would otherwise have effect subject to section 7A of the European Union (Withdrawal) Act 2018.

Amend the title of clause to 'Repeals'

In clause 6:

Add after 6 (1) (b)

(c) Section 56A of the Northern Ireland Act 1998 and schedule 6A to that Act

Explanatory:

Clause 5*: This amendment at subsection (9) would ensure that s7A of the 2018 Act cannot transport the requirements within the Protocol into domestic law, and thus nullify the cross community consent mechanisms.*

At subsection (10) it simply makes clear that it should not be assumed that in any event s7A would have had such an effect, but if it did it is nevertheless nullified by subsection (9).

Clause 6*: This repeals the Protocol consent mechanisms which were made, without consent, by regulation by the NI Secretary of State. These consent mechanisms expressly transport the Protocol into domestic law by ensuring the consent of the NI Assembly for its continuation requires only a majority vote (and expressly disapplies cross community consent protections of s42 of the 1998 Act), rather than cross community consent protections applying, as they should pursuant to Strand One (5) (d) of the Belfast Agreement.*

The Protocol requires (at least in respect Articles 5-10) that positive consent be given for its onward existence. If no consent is given (or no vote is taken) then Articles 5-10 lapse. In short, if there is no mechanism for giving consent (due to the repeal of section 56A and Schedule 6A), then Articles 5-10 would simply cease to apply at the conclusion of the initial four-year period.

[43] The amendments would have the effect of restoring the cross-community consent mechanisms to the vote on the Protocol within the Assembly in 2024, and thus enable unionism to veto the continuation of the Protocol, in a manner entirely consistent with the Belfast Agreement and 1998 Act.

[44] This amendment was supplemented by a detailed speech delivered by Baroness Hoey. The full text of that speech can be found at **Annex 1** of this report.

Conclusion

This report outlines a series of strategic actions which can, and should, be taken by political unionism in an effort to frustrate and impede the continued implementation of the Northern Ireland Protocol.

The fundamental ethos which must underpin these efforts is the realisation that the utopia of balance and goodwill promised by the Belfast Agreement does not (and never did) exist. It is folly for unionism continuing to act in good faith operating the political institutions, and the mechanisms therein, when nationalists have shown beyond all doubt that- to them- the Belfast Agreement is simply a weapon for the advancement of their partisan political objectives.

When the chance came to put the foot on the neck of unionists- by joining with the anti-unionist Alliance party to form a pan-nationalist coalition to impose the Protocol- there was no equivocation, or concern about cross community consent or balance. The sole motivation was ensuring the imposition of an economic United Ireland as a staging post for nationalism's ultimate objective.

And so, unionism must- without any reticence- weaponise the political institutions, and the mechanisms therein, to advance the cause of unionism. The cause of unionism can only be advanced by removing the existential threat to the Union in the form of the Protocol.

However, the Protocol 'wars' has illuminated the frailty and fundamental imbalance of the Belfast Agreement as a whole. To continue with such a system, even if the Protocol was removed, would be a historic self-deceit. There must be fundamental reform of the NI Act 1998, not least in relation to ensuring the principle of consent (given effect by section 1 (1) of the NI Act 1998) protects the substance rather than merely the symbolism of the Union.

Rather than the principle of consent merely meaning *you can change everything but the last thing* in regards Northern Ireland's place in the United Kingdom, instead it must mean *you can't change anything, until you change the last thing.* This requires legislative amendment in order to protect the substance rather than merely the symbolism of the Union.

The onus is now on those in positions of political leadership in Unionism to take steps to ensure that the Protocol will not be permitted to embed, or to survive in any shape or form. There are no opportunities, or best of both worlds, within the Protocol and any suggestion to the contrary is naïve at best. If we don't kill the Protocol, the Protocol will kill the Union.

One of the core reasons why the Protocol was imposed, was because the Government believed unionism was weak and would not deliver any substantive consequences. It is necessary to confound that belief by taking robust political action to reinforce the message that there will be no political institutions in Northern Ireland unless and until the Protocol is removed in its entirety and Northern Ireland's position as an integral part of the United Kingdom (with the Acts of Union the objective standard by which that is judged) is restored.

We judge that the DUP have been too slow to deliver promised consequences, however welcome the steps now being taken to deploy section 28A of the 1998 Act to impede the Protocol. That assault on the Protocol must be deliberate, calculated and carried out without further delay. If this is done, then there is an argument for remaining- for a short period of time- the institutions for the **sole purpose** of creating maximum instability and damage to the Protocol from within.

In our view the position of the UUP lacks any coherence, or genuine strong foundational opposition to the Protocol. The suggested implementation of the Protocol- in any guise- via North South bodies is nonsensical. The notion that unionism should respond to the demolition of the East West element of the Belfast Agreement (and subjugation of the Union) via more North South engagement is absurd and entirely illogical.

In equal terms, the UUP's Stockholm syndrome-like commitment to the institutions and North South arrangements, no matter the cost to unionism, is entirely without logic. Their position is effectively to yield, in the hope that eventually nationalism will abandon their objective of a United Ireland and join with unionists in Belfast Agreement utopia (notwithstanding this would require nationalists to treat the Agreement as a settlement rather than a process).

We welcome the continued opposition to the Protocol, and institutions by the TUV. It is unsurprising to see the TUV surge in the polls, given that their uncompromising stand

on the fundamental principles of the Union is reflective of the thinking of many within the pro-Union community in Northern Ireland.

In equal terms the resurgence of the PUP (with an influx of young activists) in which the party has taken a firm stand against what the Belfast Agreement has become and the fundamental imbalance inherent within it, is to be welcomed. The publication of a far reaching and detailed constitutional statement, and the PUP's later constitutional position paper demonstrates a depth of intellectual and legal analysis which has been strikingly absent within the unionist family for quite some time.

It is the hope of this group that in 2022 unionism will remain united in an uncompromising stand against the Union-subjugating Protocol. The crossing of the unionist picket line- with suggestions such as the Protocol presenting 'opportunities'- is to be condemned in the strongest possible terms.

Annex 1-
Baroness Hoey speech on legislative amendments – 13 December 21

The amendments laid today are designed to restore the balance which is at the heart of the Belfast Agreement. That Agreement has been unbalanced by the manner by which the Protocol has sought to nullify cross community protections to prevent them being utilised by unionists in order to vote down the Protocol which has been accepted by the Government's own barristers as "subjugating the Acts of Union". The very essence of the Union subjugated by the Protocol, how can any MP or peer who values the Union stand over that approach?

The Government, in the command paper, and in subsequent contributions by Lord Frost, have conceded the Protocol has no consent from the unionist community and identified that as a core problem. It is time therefore to restore the fundamental balance and cross community protections inherent within the Belfast Agreement. In the absence of those core pillars being restored, there is no basis for any unionist to continue to support the Agreement.

This amendment would restore the principle of cross community consent for key decisions which is a core commitment in Strand One (5) (d) of the Belfast Agreement. The House will note this relates to any "key decision" coming before the Assembly. The later efforts to create some technical loophole to justify demolishing this cross community consent mechanism for the Protocol vote because, it is claimed, it is not devolved.

As the house will know, the Secretary of State by Regulations unilaterally amended the 1998 Act inserting s56A and Schedule 6A. That has the effect of disapplying cross community consent, and in practical terms it is designed to nullify cross community protections being utilised by unionists. Can this House imagine for one moment the outcry if the Northern Ireland Act was unilaterally amended to nullify cross community protections for nationalists?

We have heard much talk of protecting the Belfast Agreement, but what that really seems to mean is protecting nationalist interests. So, all those who claim adherence to the Belfast Agreement should support it in all its parts, and that means the protections must apply for unionists every bit as much as to nationalists.

These amendments restore the fundamental principle of cross community consent, and the ultimate outworking of that is that if these amendments are passed then the Protocol, come 2024, can not continue in the absence of a resolution which commands cross community support. A simple majority vote of nationalists would not suffice.

A vote against such a restoration of balance is to send a message to the unionist community that cross community protections are really just nationalist protections. I need not point out how corrosive that is.

If the Government wish to be loyal to their command paper, and their New Decade New Approach promise to protect the UK Internal Market, then the way to do that is to insert these amendments and correct the monumental error in disapplying cross community consent.

Repealing s56A and Schedule 6A would cut out the corrosive infection which has been injected into the Belfast Agreement by the Protocol.

It is also important to restore the primacy of the cross-community protections and to make very clear that the constitutional statute in the form of the Northern Ireland Act can not be subjugated by the general words in section 7A of the Withdrawal Agreement. Of course, we say section 7A has no such effect in any event, but given the Government have come to the High Court and made that case, these amendments will make it expressly clear the primacy of the key cross community protections.


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