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## **Delegated Powers and Law Reform Committee**

# **Legislative Consent Memorandum: delegated powers relevant to Scotland in the Health and Care Bill**



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# Delegated Powers and Law Reform Committee

To consider and report on the following (and any additional matter added under Rule 6.1.5A)—

- a. matters relating to equal opportunities, and upon the observance of equal opportunities within the Parliament; and
- b. matters relating to human rights.
- c. matters relating to civil justice within the responsibility of the Cabinet Secretary for Justice and Veterans.

In these Rules

(a) “equal opportunities” includes the prevention, elimination or regulation of discrimination between persons on grounds of sex or marital status, on racial grounds or on grounds of disability, age, sexual orientation, language or social origin or of other personal attributes, including beliefs or opinions such as religious beliefs or political opinions; and

(b) “human rights” includes Convention rights (within the meaning of section 1 of the Human Rights Act 1998) and other human rights as for example contained in any international convention, treaty or other international instrument ratified by the United Kingdom.



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# Committee Membership



**Convener**  
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Scottish National Party



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**Bill Kidd**  
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**Graham Simpson**  
Scottish Conservative  
and Unionist Party



**Craig Hoy**  
Scottish Conservative  
and Unionist Party



**Paul Sweeney**  
Scottish Labour

# Introduction

1. This report considers the delegated powers that are relevant to Scotland in the [Health and Care Bill](#) (UK Parliament Legislation).
2. The Health and Care Bill ("the Bill") is a UK Government Bill introduced in the House of Commons on 6 July 2021 by the Secretary of State for Health and Social Care Sajid Javid MP. The Bill is currently at the Committee stage in the House of Commons. As the Bill is still progressing through the UK Parliament, it is still subject to amendment. The Committee may therefore need to consider a supplementary LCM in due course.
3. The core theme of the Bill is to improve how different parts of the health system in England can work together, by joining up health and care services, local government and NHS bodies.
4. The Scottish Government lodged a [Legislative Consent Memorandum](#) ("the LCM") on 31 August 2021. As health is devolved in Scotland, the majority of the provisions in the Bill apply to England only. There are, however, a number of other provisions that apply to Scotland. The provisions in the Bill relate to a mixture of devolved and reserved matters in Scotland, Wales and Northern Ireland.
5. There is one clause in the Bill which confers a delegated power on the Scottish Ministers. Paragraph 6 of Rule 9B.3 of the Standing Orders provides that where the Bill that is the subject of a legislative consent memorandum ("LCM") contains provisions conferring on the Scottish Ministers powers to make subordinate legislation, the Delegated Powers and Law Reform Committee ("the Committee") shall consider and may report to the lead committee on those provisions.
6. The lead committee for the LCM is the Health, Social Care and Sport Committee. The Scottish Government notes in the LCM that it is not currently recommending that the Parliament consents to the provisions of the Bill. It has written to the UK Government to request that amendments are made and notes in the LCM that a supplementary LCM may be submitted if such amendments are made.

# Review of relevant power

## Clause 127 – Amended section 16 of the Food Safety Act 1990: Power to amend the retained EU Food Information to Consumers (2011/1169) Regulation (EU FIC)

**Power conferred on: Scottish Ministers**

**Power exercisable by: Regulations made by SSI**

**Parliamentary procedure: Affirmative**

### *Provision*

7. Section 16 of the Food Safety Act 1990 provides the power to make regulations imposing requirements or prohibitions as to, or otherwise regulating, the labelling, marking, presenting or advertising of food, and the descriptions which may be applied to food. When the UK was a member of the EU, food labelling requirements were to a large extent harmonised across the EU under EU FIC.
8. The functions under section 16 of the 1990 Act in or as regards Scotland were transferred to the Scottish Ministers by virtue of the Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc.) Order 2005.
9. Clause 127 of the Bill amends section 16(1)(e) of the Food Safety Act 1990 to widen the power to enable the Scottish Ministers to amend retained EU law, allowing them to implement new policies regarding food information and labelling.
10. Instruments made by the Scottish Ministers under section 16 of the 1996 Act as modified by clause 127 of the Bill as enacted would be subject to the affirmative procedure.

### *Committee consideration*

11. The UK Government states in its DPM that the power is required in order to allow the Scottish Ministers to respond to the latest scientific and economic advice regarding the food sector. It notes that food safety law and the requirements around food labelling can be a fast developing area. It also states that the level of technical detail involved in amendments to the retained legislation in FIC is deemed too high for inclusion in primary legislation.
12. Regulations made under this power would be subject to the affirmative procedure, which allows a high level of scrutiny and is consistent with the procedure that applies to the existing power to make regulations under section 16 of the Food Safety Act 1990. Further, there is a general duty to consult in matters concerning food law.
13. The Committee is therefore content with the power conferred on Scottish Ministers in section 16 of the Food Safety Act 1990, as amended by clause 127 of the Bill.

# Additional Delegated Powers (Former EU Competence)

14. The Bill also confers powers solely on the Secretary of State to make provision in areas of former EU competence.
  15. Clause 85 makes amendments to the Medicines and Medical Devices Act 2021 which provides a power to require NHS Digital to collect information on the use of medicines on a UK-wide basis, including information from within devolved administrations and private healthcare providers regarding the safety, quality and efficacy of human medicines and the improvement of clinical decision-making in relation to human medicines. The UK Government has sought the consent of the Scottish Ministers in relation to this provision, as its view is that the power could be used to make provision in areas of devolved competence. There is no requirement for the Secretary of State to seek the consent of Scottish Ministers before making such regulations.
  16. Clause 120 amends the Healthcare (European Economic Area and Switzerland Arrangements) Act 2019 to enable the Secretary of State to implement reciprocal healthcare agreements with countries outside the EEA and Switzerland. The UK Government has sought the consent of the Scottish Ministers in relation to this provision, as its view is that power could be exercised so as to make provision in areas of devolved competence. The Secretary of State is required to consult with the Scottish Ministers before exercising the power. However, there is no requirement for the Secretary of State to seek the consent of the Scottish Ministers before making regulations.
  17. Rule 6.11.1(b) and (c) of Standing Orders provide that the remit of the Committee includes considering and reporting on proposed powers to make subordinate legislation in particular bills “or other proposed legislation”; and general questions relating to powers to make subordinate legislation. In Session 5 the Delegated Powers and Law Reform Committee considered powers conferred on UK Ministers in devolved areas in UK Parliament Bills relating to EU withdrawal, including the Environment Bill; the Fisheries Bill; Trade Bill; and United Kingdom Internal Market Bill. In Session 6, the Committee has also considered LCMs for the Environment Bill and the Professional Qualifications Bill, which also arise from EU withdrawal.
18. Given there is no statutory requirement for the UK Government to obtain the Scottish Ministers’ consent when exercising these powers within devolved competence, the Committee restates the approach adopted by its predecessor Committee in Session 5 Committee and more recently by this Committee. Therefore, in relation to delegated powers conferred on the Secretary of State which may be exercisable within devolved competence in relation to the delegated powers in clauses 85 and 120:
    - The Scottish Parliament should have the opportunity to effectively scrutinise the exercise of all legislative powers within devolved competence.
    - Where this power is exercised by the Secretary of State in devolved areas,



there would be no formal means by which the Scottish Parliament could scrutinise such regulations or be notified that they had been laid before the UK Parliament.

- The power conferred on Secretary of State should be subject to a requirement for the Scottish Ministers' consent when exercised within devolved competence.
- As a minimum, the power when exercised by Secretary of State in devolved areas should be subject to the process set out in the [SI Protocol 2](#).

## **Additional Delegated Powers (Non-Former EU Competence)**

19. Clauses 87 and 123 include provision conferring powers on UK Ministers in partially devolved areas.
  20. Clause 87 confers a regulation making power on the Secretary of state to enable the transfer of functions across six relevant bodies. Regulations made under the powers may repeal, revoke or amend provision made by or under an Act. The UK Government has identified that a legislative consent motion is required insofar as the regulation making powers may be used to deal with any devolved purpose. The Secretary of State is required to consult with Scottish Ministers before making regulations which will make provision within the legislative competence of the Scottish Parliament. However, there is no requirement that the Secretary of State seeks the consent of Scottish Ministers before making such regulations.
  21. Clause 123 confers a regulation making power on Her Majesty to make an Order to modify the regulation of existing regulated healthcare professions and for the introduction of healthcare professions into statutory regulation. Such an Order may repeal, amend, replace or revoke any enactment or instrument. The UK Government has identified that a legislative consent motion is required insofar as the power could be used in relation to groups of healthcare professions brought into regulation after the commencement of the Scotland Act 1998, and other groups regulated which are within devolved competence. There is no requirement that Scottish Ministers' consent is sought before making such an Order.
22. The Committee therefore agreed to write to the Minister for Parliamentary Business to ask:
    - whether the powers conferred on the Secretary of State by clauses 87 and 123, insofar as within devolved competence, fall within areas formerly within EU competence before the UK fully withdrew from the EU; and
    - how, where the process for scrutiny by the Scottish Parliament set out in SI Protocol 2 does not apply, the Parliament is to scrutinise the exercise of delegated powers conferred on UK Ministers in devolved areas do not fall within areas formerly within EU competence before the UK fully withdrew from the EU.
23. Clause 125 includes provision to enable the Secretary of State to make regulations in relation to the prohibition of paid for advertising of less healthy food and drink online.
  24. As stated in the LCM, the Scottish Government considers that the purpose of the provisions is the protection of public health, which is devolved matter, whilst the UK Government considers that the purpose of the provisions is to regulate online advertising. It therefore considers that the matter is reserved under reservation C10 of schedule 5 of the Scotland Act, specifically "internet services".

25. The Committee acknowledged the differing views between the UK Government and the Scottish Government as to whether the provisions are within the legislative competence of the Scottish Parliament. However, should the provisions be considered to be within the legislative competence of the Scottish Parliament, the Parliament would expect to have a role in scrutinising the exercise of delegated powers conferred on UK Ministers.

26. To the extent that the provisions in Clause 125 could be considered to be devolved, the Committee agreed to write to the Minister for Parliamentary Business to ask how it envisages that the Scottish Parliament is to scrutinise the exercise of delegated powers conferred on UK Ministers in devolved areas that do not fall within areas formerly within EU competence before the UK fully withdrew from the EU.

