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Delegated Powers and Law Reform Committee

Supplementary Legislative Consent Memoranda: delegated powers relevant to Scotland in the Health and Care Bill



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For information on the Scottish Parliament contact Public Information on:
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Textphone: 0800 092 7100
Email: sp.info@parliament.scot

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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) any—

(i) subordinate legislation laid before the Parliament or requiring the consent of the Parliament under section 9 of the Public Bodies Act 2011;

(ii) [deleted]

(iii) pension or grants motion as described in Rule 8.11A.1; and, in particular, to determine whether the attention of the Parliament should be drawn to any of the matters mentioned in Rule 10.3.1;

(b) proposed powers to make subordinate legislation in particular Bills or other proposed legislation;

(c) general questions relating to powers to make subordinate legislation;

(d) whether any proposed delegated powers in particular Bills or other legislation should be expressed as a power to make subordinate legislation;

(e) any failure to lay an instrument in accordance with section 28(2), 30(2) or 31 of the 2010 Act;

(f) proposed changes to the procedure to which subordinate legislation laid before the Parliament is subject;

(g) any Scottish Law Commission Bill as defined in Rule 9.17A.1;

(h) any draft proposal for a Scottish Law Commission Bill as defined in that Rule; and

(i) any Consolidation Bill as defined in Rule 9.18.1 referred to it in accordance with Rule 9.18.3.



dplr.committee@parliament.scot

Committee Membership



Convener
Stuart McMillan
Scottish National Party



Deputy Convener
Bill Kidd
Scottish National Party



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 Lords.
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 the original [Legislative Consent Memorandum](#) (“LCM”) on 31 August 2021. The Committee reported on the delegated powers relevant to Scotland on [4 October 2021](#).
5. The Bill has since been amended, and on 10 December 2021, the Scottish Government lodged a [Supplementary LCM](#) for the Bill. Further amendments were then tabled by the UK Government and therefore the Scottish Government lodged a second Supplementary LCM on 27 January 2022.
6. The lead committee for both Supplementary LCMs is the Health, Social Care and Sport Committee.

Outline of Supplementary LCMs

7. The first Supplementary LCM was lodged on 10 December 2021. It indicates that amendments have been made to the provision regarding the power to make regulations on the implementation of reciprocal healthcare agreements, which provide a concurrent power for Scottish Ministers. This power was in clause 120 of the Bill that was the subject of the original LCM and was conferred on the Secretary of State only. The power is now contained in clause 136.
8. The first Supplementary LCM also indicates that amendments have been made to the power to make regulations to require NHS digital to collect information on the issue of medicines on a UK wide basis, which was in clause 85 of the Bill that was the subject of the original LCM and is now contained in clause 87. This power does not confer new powers on the Scottish Ministers.
9. The second Supplementary, lodged on 27 January 2022, highlights that amendments have been tabled in respect of the Secretary of State's power to make regulations to transfer function between bodies. The amendment provides that the Secretary of State must obtain the consent of the Scottish Ministers before exercising the power within devolved competence. The amendment does not confer new powers on the Scottish Ministers.
10. The second Supplementary LCM also provides that an amendment has been tabled which provides a new power for the Secretary of State to make regulations to mandate the reporting and publication of payments, and other benefits, from manufacturers or commercial suppliers of health care products, to persons or bodies providing health care. Again, this amendment contains a consent requirement where the power is exercised within devolved competence but does not confer new powers of the Scottish Ministers.

Review of relevant powers

Clause 142 – Regulation of health care and associated professions – amending section 60 of the Health Act 1999, powers to make changes to legislation regulation health care professions

Power conferred on: Her Majesty

Power exercisable by: Orders in Council

Parliamentary procedure: Affirmative

Provision

11. Clause 142 amends section 60 (regulation of health professions and social workers etc.) of the Health Act 1999.
12. Section 60(1) permits modification to the regulation of existing regulated healthcare professions and for the introduction of healthcare professions into statutory regulation. An Order made under section 60 may repeal, amend, replace or revoke any enactment or instrument (subject to Schedule 3 of the 1999 Act).
13. Clause 142 extends the scope of section 60 and Schedule 3 of the 1999 Act so that:
 1. a regulated healthcare profession can be deregulated by an Order in Council where it appears that it no longer requires regulation for the purposes of public protection,
 2. a regulatory body can be abolished by an Order in Council where the profession concerned has been deregulated as described above or will continue to be regulated by another regulatory body,
 3. groups of workers can be brought into regulations, and
 4. reserved functions of regulatory bodies can be delegated to other regulatory bodies by an Order in Council.
14. Regulations made under this power are subject to the affirmative procedure.

Committee consideration

15. The Committee noted that the power in section 60 is exercisable by Order in Council; Orders in Council under section 60 which make provision within the legislative competence of the Scottish Parliament require to be laid for approval in the Scottish Parliament as well as in the UK Parliament. The Committee had not previously reported on this power in relation to the first LCM.

16. **The Committee is content with the power conferred on Her Majesty, given that Orders which make provision within the legislative competence of the Scottish Parliament will be laid before the Scottish Parliament, and will be**

subject to the affirmative procedure.

Clause 136 – International healthcare agreements – power by regulations to make provision for the purpose of giving effect to a healthcare agreement

Power conferred on: Secretary of State and Scottish Ministers

Power exercisable by: Regulations

Parliamentary procedure: Negative

Provision

17. The power in Clause 136 amends the Healthcare (European Economic Area and Switzerland Arrangements) Act 2019 to enable the Secretary of State and the Scottish Ministers to implement reciprocal healthcare agreements with countries outside the EEA and Switzerland.
18. The Committee reported on the power contained in Clause 136 during its consideration of the power in the original LCM. At that point, the power to make regulations for the purpose of giving effect to a healthcare agreement was conferred on the Secretary of State only. The UK Government tabled amendments on 18 November 2021 in order to additionally confer that power on the Scottish Ministers.
19. Regulations made under this power are subject to the negative procedure.

Committee consideration

20. The Committee noted that the amendment conferring a concurrent power on the Scottish Ministers in the Healthcare (European Economic Area and Switzerland Arrangements) Act 2019 to make regulations giving effect to a healthcare agreement (insofar as within devolved competence) partially addresses the concern the Committee raised when it considered the first LCM. Where the power is exercised by the Scottish Ministers, the regulations will be laid in the Scottish Parliament and will be subject to full scrutiny in the usual way.
21. Notwithstanding the amendment, the UK Government retains the power to make regulations on a UK-wide basis, and therefore if the Secretary of State should exercise the power to make regulations within devolved competence, those regulations will be laid in the UK Parliament alone. The Bill has not been amended to require the Secretary of State to obtain the Scottish Ministers' consent before making regulations for Scotland.

22. **The Committee therefore agreed to ask the Scottish Government whether the UK Government has committed, informally or otherwise, to seeking the Scottish Ministers' consent before exercising the power, and whether the Scottish Government agrees that the power remains within the scope of SI Protocol 2, given that s.2 of the Healthcare (European Economic Area and Switzerland Arrangements) Act 2019, as it currently applies, is listed in Annex A to that Protocol.**

Additional delegated powers (Former EU Competence)

Clause 87 – Medicine information systems: power to make provision for the establishment and operation of medicine information systems by the Health and Social Care Information Centre

Power conferred on: Secretary of State

Power exercisable by: Regulations

Parliamentary procedure: Affirmative

Provision

23. Clause 87 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.
24. The amendments as tabled by the UK Government on 18 November 2021, require the UK Government to consult with the Scottish Ministers before making Medicine Information Systems regulations or issuing a direction setting out the type of information to be provided to NHS Digital.
25. Regulations made under this power are subject to the affirmative procedure.

Committee consideration

26. The Committee previously reported on this power and expressed its view that the power should be subject to a consent mechanism. The consultation requirement does not provide the Scottish Parliament with an opportunity to scrutinise the exercise of this power within devolved competence.
27. **The Committee reiterates that there is no statutory requirement for the UK Government to obtain the Scottish Ministers' consent when exercising these powers within devolved competence. The Committee maintains the approach adopted by its predecessor Committee in Session 5 and more recently by this Committee in relation to the Environment Bill LCM and the Professional Qualifications LCM in relation to delegated powers conferred on the Secretary of State which may be exercisable within devolved competence. The Committee makes the following points in relation to the delegated powers in clause 87:**
 - **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 the 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.**

Additional delegated powers (Non-former EU Competence)

Clause 89 – power to transfer functions between bodies

Power conferred on: Secretary of State

Power exercisable by: Regulations

Parliamentary procedure: Affirmative

Provision

28. The Scottish Government lodged a further Supplementary LCM on 27 January 2022, which comments on amendments that have been tabled in respect of Clauses 88-94. Clause 89 makes provision for the Secretary of State to transfer health functions between specified Arm's Length Bodies. The power may be exercised to make provision within legislative competence or to transfer property, rights and liabilities to the Scottish Ministers. The amendment requires that the Secretary of State obtains the consent of the Scottish Ministers before making regulations which will make provision within the legislative competence of the Scottish Parliament.
29. Regulations made under this power are subject to the affirmative procedure.

Committee consideration

30. The Committee noted that the requirement on the Secretary of State to obtain the consent of the Scottish Ministers before exercising this power within devolved competence does not provide the Scottish Parliament with an opportunity to scrutinise the exercise of this power.
31. Following the initial consideration of this power, the Committee agreed to ask how the Parliament is to scrutinise the exercise of delegated powers conferred on UK Ministers in devolved areas where SI Protocol 2 does not apply. The Minister for Parliamentary Business replied that he would be happy to consider how the Scottish Parliament could best scrutinise the exercise of delegated powers in devolved areas that do not fall within areas formerly within EU competence, but that he did not have a proposal to offer.

Amendment 312B – power to make regulations to require manufacturers or commercial suppliers of health care products, or connected person, to publish information about payments or other benefits provided by them to relevant persons or provide such information

Power conferred on: Secretary of State

Power exercisable by: Regulations

Parliamentary procedure: Affirmative

Provisions

32. This amendment provides the Secretary of State with a power to make regulations to require manufacturers and commercial suppliers of health care products to publish information about payments or other benefits provided by them to relevant persons. A relevant person is a person who provides health care in the United Kingdom or any part of it or another person who carried on activities connected with health care provided in the United Kingdom or a part of it and is of a description specified in regulations. It is explained that this amendment is intended to increase transparency around the financial links that manufacturers and commercial suppliers of health care products have with persons in the health care sector.
33. Regulations made under this power are subject to the affirmative procedure.

Committee consideration

34. The Committee noted that the Scottish Government states in the second Supplementary LCM that it understands that the primary policy intention of the provisions is the improvement of patient outcomes and the treatment of patients, which are devolved matters and within the legislative competence of the Scottish Parliament.
35. As with Clause 89, the Committee noted that the requirement to obtain the consent of the Scottish Ministers does not provide the Scottish Parliament with an opportunity to scrutinise the exercise of that power within devolved competence where SI Protocol 2 does not apply.

36. **In relation to Clause 89 and Amendment 312B, and in keeping with the approach taken in relation to its reports on the LCMs for the [Police, Crime, Sentencing and Courts Bill](#), the first [Health and Care Bill](#), the [Elections Bill](#), and the [Public Services Pensions and Judicial Offices Bill](#), the Committee considers that:**
- 1. the Scottish Parliament should have the opportunity to effectively scrutinise the exercise of all legislative powers within devolved competence;**
 - 2. the power amended by the Bill is conferred on the Secretary of State, and not on the Scottish Ministers; and**
 - 3. there is no formal means by which the Scottish Parliament could scrutinise the order or be notified that they had been laid before the UK Parliament.**
37. **The Committee notes that while the consent of the Scottish Ministers is required before the Secretary of State may make regulations falling within the legislative competence of the Scottish Parliament or modifying the functions of the Scottish Ministers, the process set out in the SI Protocol 2 would not apply to the exercise of this power by the Secretary of State on the basis that it does not appear to relate to an area formerly within EU competence before the UK fully withdrew from the EU. Accordingly, the lead committee may wish to consider seeking a commitment from the Scottish Ministers to notify that committee in writing where it proposes to consent to such regulations.**

38. The Committee highlights the correspondence between the Committee and the Minister for Parliamentary Business dated 6 October 2021ⁱ and 21 October 2021ⁱⁱ, in relation to options for Parliamentary scrutiny of the exercise of such powers.

39. In concluding its consideration of the LCM, the Committee noted that the Scottish Government states in its LCM that it still considers provisions in the Bill relating to the advertising of less healthy food and drink falls within the legislative competence of the Parliament, but that this has not been recognised by the UK Government. The Committee commented on this in its report and asked the Minister for Parliamentary Business how it envisage that the exercise of this power within devolved could be scrutinised by the Parliament. The Minister replied that as it stands, the Secretary of State would exercise powers for the whole of the UK. No amendment has been made to these provisions and therefore, if these provisions are passed without amendment, the Scottish Parliament will not have an opportunity to scrutinise the exercise of this power should it be exercised within devolved competence.

ⁱ Letter from Convener to Minister of Parliamentary Business dated 6 October 2021

ⁱⁱ Letter from the Minister of Parliamentary Business to the Convener dated 21 October 2021

