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Legislative Consent Memorandum - Professional Qualifications Bill



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Economy and Fair Work Committee

To consider and report on matters relating to the economy falling within the responsibility of the Cabinet Secretary for Finance and the Economy.



economyandfairwork.committee@parliament.scot

Committee Membership



Convener
Claire Baker
Scottish Labour



Deputy Convener
Colin Beattie
Scottish National Party



Alexander Burnett
Scottish Conservative
and Unionist Party



Maggie Chapman
Scottish Green Party



Jamie Halcro Johnston
Scottish Conservative
and Unionist Party



Fiona Hyslop
Scottish National Party



Gordon MacDonald
Scottish National Party



Colin Smyth
Scottish Labour



Michelle Thomson
Scottish National Party

Introduction

1. The Professional Qualifications Bill ¹ is a UK Government Bill introduced in the House of Lords on 12 May 2021.
2. The Bill would set up a framework which allows issues around the mutual recognition of overseas qualifications to be dealt with via regulations on a profession by profession basis.
3. The Bill completed House of Lords Committee stage on 22 June 2021. The Bill was amended at Committee stage and an amended version of the Bill was produced on 22 June 2021. The Bill, as amended, is currently at third reading stage in the House of Lords, which took place on 17 November. The first reading took place in the House of Commons on 18 November 2021.

International recognition of professional qualifications

4. Countries choose to regulate their professionals in different ways. Sometimes different qualifications and training may be required, depending on what country you are working in. However, in some cases, a form of work may be highly regulated in one country and not regulated at all in another.
5. When the UK was part of the European Union, there was a European Economic Area (EEA)ⁱ-wide process for the mutual recognition of trade and professional qualifications between countries. In many cases, qualifications gained in one country were automatically recognised by other countries. However, where there were significant differences in how an activity was practised between countries, an EEA national with relevant qualifications or training from one country would be offered a means to gain recognition as a professional in another country.
6. This system enabled people to practise their trade or profession with minimal barriers across the EEA. It increased the opportunities for exporting services as well as dealing with skills shortages between countries.
7. When the UK left the EU, it was no longer part of this system. The Session 5 Economy, Energy and Fair Work Committee dealt with several Brexit-related statutory instruments which changed the law to make it compatible with the UK no longer being an EU member state.
8. Currently, UK professionals wishing to work in the EEA must meet whatever requirements are set by the country they hope to work in. When dealing with EEA citizens, UK professional regulators must follow the requirements in the UK. In some cases, there will be scope to recognise qualifications, but in some cases there will not. This limits the opportunities for trade and for recruiting from abroad to deal with skills shortages in the UK.
9. The same is true at an international level. A qualification from the UK may or may not be recognised by another country, and people coming into the UK may or may not have their qualifications recognised here. UK regulators do provide routes for foreign nationals to work in regulated jobs in the UK in some cases, but there is no general system by which this happens.

ⁱ EU member states plus Norway, Iceland and Lichtenstein. In the case of mutual recognition of professional qualifications, the regime also applies to Switzerland.

UK Internal Market Act 2020

10. The UK Internal Market Act 2020² (UKIMA) is a piece of Westminster legislation which regulates how the markets in goods and services operate between the different nations of the UK.
 11. A key element of the Act is to establish two market access principles relating to the flow of goods and services in the UK's internal market:
 - the principle of mutual recognition; and
 - the principle of non-discrimination.
 12. The mutual recognition principle in effect means that if goods and services meet the required legal standards to be placed on the market in any one of the four nations of the United Kingdom, they can be placed on the market in all four nations. This is subject to exceptions.
 13. In addition, the non-discrimination principle means that authorities across the United Kingdom cannot discriminate (directly or indirectly) against goods and service providers from another part of the United Kingdom. Again, some exceptions apply.
 14. UKIMA also contains provisions on the recognition of professional qualifications which, very broadly, require a person who is qualified in one nation of the UK to be recognised as being qualified to practise in all the other nations. The school teaching and legal professions are exempt.
 15. It is currently unclear how the Professional Qualifications Bill will interact with UKIMA, and with future trade agreements which cover professional qualifications. However, should someone be able to meet the professional standard in one part of the UK, it is possible that they will be able to practise in all parts of the UK. This means that recognition of international qualifications by one part of the UK could affect the other nations.
16. The Committee asks the Scottish Government to provide further details on how UKIMA will interact with the Professional Qualifications Bill in relation to recognition of professional qualifications within devolved competence.

The provisions in the Professional Qualifications Bill

17. In general terms, the Bill establishes a framework which allows issues around the mutual recognition of qualifications to be dealt with via regulations on a profession by profession basis.
18. Professions in the UK are currently regulated in a variety of different ways. There are also a range of regulatory systems. Some regimes are set out in legislation or controlled by bodies created in legislation, for example architects, doctors and nursesⁱⁱ. Other bodies get their powers from royal charters or may be largely private bodies controlled by members.
19. The UK government has argued that, given the complexity of the current system, it is not possible to put in place an overarching regime that would meet the needs of all professional regulatory bodies. Instead, the Bill gives government the power to make regulations to amend the bespoke arrangements for each profession as required.
20. The main provisions in the Bill are:
 - A regulation-making power to require individuals with qualifications gained abroad to have their qualifications recognised in the UK. This can only be exercised where there are skills shortages in relation to the activity in question.
 - A regulation-making power in relation to the implementation of international agreements dealing with the mutual recognition of professional qualifications (state-to-state recognition).
 - A regulation-making power to authorise UK professional regulatory bodies to enter into agreements on the mutual recognition of professional qualifications with regulators in other countries (regulator-to-regulator recognition).
 - Requirements on information-sharing between regulators in different parts of the UK and between regulators in the UK and abroad.
 - The establishment of an “assistance centre” to provide support to people hoping to have their qualifications recognised in the UK and to UK nationals hoping to have their qualifications recognised abroad.

ⁱⁱ Legislation established the Architects Registration Board, General Medical Council, and the Nursing and Midwifery Council to regulate members of these professions

Devolved competence

21. The Bill deals with trade and professional regulation generally. It does not differentiate between trades and professions regulated at a UK-wide level and those within the competence of the devolved administrations. Regulation of the following professions is reserved to the UK Parliament: architects; auditors; and most (but not all) health professions. The regulation of all other professions is devolved to the Scottish Parliament. Examples of activities where regulation is within the competence of the Scottish Parliament therefore include lawyers, teachers and some health and social services professions.
22. Most of the Bill's provisions therefore cover areas of professional regulation that are within the competence of the Scottish Parliament. According to the Scottish Government's Legislative Consent Memorandum (paragraph 7), the UK government has sought consent for clauses 1 to 10 and 15 of the Bill. The Scottish Government believes that clauses 13, 14 and 16 also require consent.

Legislative Consent Memorandum

23. The Scottish Government lodged an LCM relating to the Bill on 12 July 2021; the Scottish Government has recommended that the Scottish Parliament does not consent to legislation by the UK Parliament in this area.³
24. This is because the regulation-making powers in the Bill would be exercisable by a UK Government Secretary of State (or the Lord Chancellor) in all cases. Where professional regulation is devolved, regulations can also be made by the relevant devolved administration.
25. However, there is no requirement for the UK Government to gain the consent of the devolved administrations before making regulations. Thus, the provisions would allow the UK government to legislate without the consent of the Scottish Government in devolved areas.
26. According to the LCM (paragraph 26), the UK government has stated that it does not intend to legislate in devolved areas without the consent of the relevant devolved administrations. The Scottish Government has requested that the Bill is amended to place this commitment on the face of the legislation.
27. The Scottish Government's position on consent as set out in the LCM is as follows (paragraph 26):
 - ” At this time, given the lack of safeguards, the Scottish Government do not recommend consent to this provision but may be willing to recommend consent should the requested amendments be tabled.³
28. As lead Committee, this Committee heard evidence on 29 September 2021 from Ivan McKee MSP, Minister for Business, Trade, Tourism and Enterprise on the LCM. During the Committee's evidence session, the Minister stated that the Scottish Government's position remains unchanged from that expressed in the Legislative Consent Memorandum, noting that:
 - ” The bill as drafted confers concurrent powers in devolved areas to both UK and Scottish ministers, but without a requirement to seek consent before exercising those powers. In addition, UK ministers could amend or disapply regulations that were legitimately made here and supported by this Parliament.

The issues around consent are relevant to a number of other UK Government bills, so I hope that the UK Government will take proper account of our legitimate concerns in this area. The Scottish ministers have asked UK ministers to amend the bill to include a requirement for consent before acting in devolved areas. If, as we were told, UK ministers do not intend to act without agreement, there is no problem that I can see in amending the bill.⁴
29. The Minister then went on to note that:

” a variety of UK-wide and devolved regulators have expressed concerns about the terms of the bill as it relates to professional standards; there is a risk that UK ministers might trade away existing high standards to secure free trade agreements. I understand that the Department for Business, Energy and Industrial Strategy has continued to engage with regulators across the UK and I hope that the department will seek to allay those fears about amendments to the bill. ⁴

Progress of the Bill

30. As noted above, the Bill started in the House of Lords. The first reading took place in the House of Commons on 18 November 2021. It is therefore still possible for the Bill to be amended.

Committee Consideration

Delegated Powers and Law Reform Committee

31. The Delegated Powers and Law Reform Committee (DPLRC) considered the delegated powers that are relevant to Scotland in the Bill at its meeting on 21 September 2021⁵. In its report⁶ on the LCM, it highlighted a number of issues.

Powers conferred on UK Ministers without a requirement for Scottish Ministers' consent

32. In its report, the DPLRC referred to its consideration of the Supplementary LCM for the Environment Bill (UK Parliament legislation). It subsequently wrote to both the UK and Scottish Governments highlighting a number of points of principle in relation to powers in the Environment Bill being conferred on UK Ministers without a corresponding power for Scottish Ministers and without a requirement to obtain the consent of Scottish Ministers. The DPLRC said:

” These points of principle were also consistent with the approach that the Committee's predecessor in session 5 of the Scottish Parliament took in relation to delegated powers conferred solely on UK Ministers which may be exercisable within devolved competence. This focuses on the Committee's interest in ensuring that when a power to make legislation within the Parliament's legislative competence is given to others, the power is appropriate, and that Parliamentary scrutiny is ensured. The Committee agreed to restate these principles in relation to the relevant powers in this Bill.⁶

33. The DPLRC set out these points in its report at paragraph 50⁶:

- ”
- The Scottish Parliament should have the opportunity to effectively scrutinise the exercise of all legislative powers within devolved competence.
 - Where the powers in the Bill are exercised by the Secretary of State/Lord Chancellor 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.
 - That powers which are conferred on Secretary of State/Lord Chancellor and are exercisable within devolved competence should be subject to a requirement for the Scottish Ministers' consent.
 - As a minimum, it is appropriate that all powers under the Bill exercisable by Secretary of State/Lord Chancellor in devolved areas are subject to the process set out in the SI Protocol agreed between the Scottish Parliament and the Scottish Government.

34. The DPLRC also noted that:

” no distinction has been made in the Bill between reserved and devolved professional qualifications. This is despite the regulation of many professions being devolved, including some social care professions and the teaching and legal professions. The United Kingdom Internal Market Act 2020 excluded the school teaching and legal professions in Scotland from its provisions on mutual recognition for the purpose of access to those professions between the different parts of UK. The Committee therefore questions why a different approach is being taken in this Bill. ⁵

35. The Committee shares the concerns raised by the DPLRC in its report, that the Scottish Parliament should have the opportunity to scrutinise the exercise of legislative powers within devolved competence. Under the current Bill, there is no formal means for the Scottish Parliament to do so where regulations are laid by the UK Government that fall within devolved competence. The Committee is concerned at the potential consequences of this lack of scrutiny by the Scottish Parliament.
36. Additionally, the Committee is concerned that the combined effect of UKIMA and this legislation means that it is possible that in some cases the Scottish Parliament may not be made aware of regulatory changes in another part of the UK affecting devolved areas. The Committee asks the Scottish Government to set out how it will track relevant changes made via this legislation and UKIMA and keep the Scottish Parliament informed of developments with relevance to policy in Scotland.
37. The Committee is aware of Devolution Guidance Notes 1 and 10 ⁷ and the provisions of the Memorandum of Understanding ⁸ between the UK Government and devolved administrations relating to communication and consultation, co-operation and exchange of information, which set out expectations on intra-government communications in areas where the activities of one UK administration may affect others. In the absence of a common framework this may form a starting point for a process which ensures early notification and opportunities for parliamentary scrutiny of such activity.
38. The Committee understands the Scottish Government is in ongoing discussions with the UK Government around amendments to ensure that the Scottish Government's consent is sought before any regulations in areas of devolved competence are made and that the mechanism for doing so is on the face of the Bill.
39. The Committee requests that the Scottish Government keeps the Committee updated on the outcome of these discussions.

Regulation Making Powers

40. The regulation-making powers contained in the Bill are wide-ranging and could be used to cover professional regulators in a variety of different circumstances. In this regard, in its report ⁶, the DPLRC considered specifically Clause 1 of the Bill, which delegates power to provide for individuals with overseas qualifications to be treated as having UK qualifications. It considered that insufficient justification has been

given for why such provision is suitable for secondary rather than primary legislation and in the absence of further specification in the Bill of how the power can be used, the power is too wide.

41. In relation to the power to make regulations to implement international treaties (clause 3 of the Bill), the DPLRC reported again that in the absence of further specification, it didn't consider it appropriate to delegate the general power to implement the professional qualifications aspects of agreements which have not yet been made. The DPLRC also recommended further exploration of whether a statutory requirement to consult with affected regulators should be included in respect of the powers included to make regulations to implement international treaties and to make regulations to enable UK regulators to enter into agreements with regulators in other countries (clause 4 of the Bill).⁶

42. The Committee notes the issues raised by the DPLRC regarding these wide-ranging regulation making powers and those in relation to international treaties and regulator to regulator agreements. The Committee requests confirmation from the Scottish Government on whether it will actively pursue these issues with UK counterparts.

Provision for charging fees

43. Clause 3(2)c) of the Bill would enable regulations made for the implementation of international treaties to make "provision for the charging of fees". The DPLRC recommended further exploration of the implications of this power – particularly if it could be used to compel a devolved regulator to charge a fee.
44. During the Committee's evidence session with the Minister, Members sought information on clause 3 of the Bill as highlighted by the DPLRC. In response, a Scottish Government official noted that the situation was unclear and the Minister agreed to look into the matter.

45. The Committee welcomes the Minister's agreement to look further into whether clause 3 of the Bill could be used to compel devolved regulators to charge fees. The Committee requests an update from the Scottish Government on this matter.

Professions and regulators covered by the legislation

46. The DPLRC wrote to the Scottish Government on 27 September 2021⁹ to ask which professions and regulators might be covered by the legislation as this information is not set out in any of the accompanying documents.
47. In the LCM, the Scottish Government highlighted the Law Society of Scotland's briefing¹⁰ on the Bill in which they stated that they would like a commitment to respecting the distinct nature of legal services across the UK and a more prominent reference to the fact that the regulation of a number of professions is devolved.

48. The Committee shares these concerns and requests that the Scottish

Government seek, and then share with the Committee, further information on which professions and regulators are covered by the Bill and how the distinct nature of certain professions, such as the Scottish legal profession, will be recognised.

Health, Social Care and Sport Committee

49. The Health, Social Care and Sport Committee considered the LCM at its meeting on 21 September 2021. Social work, social care and potentially some healthcare professions are among the areas of work within devolved competence which are affected by the Bill.
50. The Health, Social Care and Sport Committee wrote to this Committee ¹¹ to register its concern that the Bill, as currently drafted, would allow the UK Secretary of State to make regulations in areas of devolved competence without the prior consent of the Scottish Government.
51. It noted a number of challenges around workforce planning within the health and social care sectors. It said:
 - ” The Committee has heard recent evidence of the significant workforce planning and recruitment challenges currently facing Scotland’s health and social care workforce as it seeks to recover from the impact of the COVID-19 pandemic. In this context, the Committee would have serious concerns if the exercise of the regulation-making powers conferred on UK Ministers by the Professional Qualifications Bill were, even unintentionally, to contradict or interfere with the Scottish Government’s strategy for tackling these challenges in future. The Committee envisages that there is a risk of this happening by virtue of UK Ministers exercising the regulation making powers conferred by the Bill in areas of devolved competence without prior consultation with, and consent from, the Scottish Government. ¹²
52. During the evidence session with the Minister, the Committee raised the concerns expressed by the Health, Social Care and Sport Committee. The Minister agreed with these concerns, noting that the mutual recognition of professional qualifications:
 - ” affects the ability of Scottish professionals to work internationally, which is hugely important for their aspirations and career development, for business, and for, as you rightly said, the movement of professionally trained individuals to support our health and social care sector and a range of other sectors to which that applies. It directly impinges on our ability to respond to situations that arise. For a devolved Government with the responsibility for doing so, it is important that the power remains within the devolved remit. ⁴
53. The Committee shares the concerns raised by the Health, Social Care and Sport Committee regarding the potential for unintended consequences around health and social care workforce planning should regulations made by the UK Ministers

contradict or interfere with the Scottish Government's strategy. This is a very real possibility should regulations be made in devolved areas without prior consultation or scrutiny. A scrutiny role for the Scottish Parliament is vital in this regard including the ability to track regulatory changes being made in relation to the health and social care workforce in Scotland.

Conclusions

54. The Committee notes that the UK Government has stated that it does not intend to make regulations in areas of devolved competence without the agreement of the relevant devolved administrations. The Committee however shares the concerns raised by the Scottish Government in its Legislative Consent Memorandum, and during the evidence session with the Minister, that there is no requirement on the face of the Bill for the UK Government to obtain consent, were it to make such regulations. The Committee agrees that the legislation should require the UK Government to obtain the consent of the devolved administrations, rather than simply relying on the present UK Government's assurances that it will do so.
55. Additionally, the Committee is concerned to note that wide-ranging changes could potentially be made via regulation at a UK level in areas of devolved competence, without appropriate scrutiny by the Scottish Parliament. This has drawn the Committee's attention to the need for a process to identify any impacts on the devolved position as legislation proceeds through the UK Parliament. The Committee intends, through the Convener, to engage in discussion with other committees, and specifically with the Constitution, Europe, External Affairs and Culture Committee, around how best to ensure the Parliament is made aware of any impacts on devolved policy of legislation being made in the UK Parliament.
56. The Committee notes that the Scottish Government is currently in discussions with the UK Government on potential amendments to the Bill to include a requirement for consent from Scottish Ministers where regulations are to be made in devolved areas. The Committee requests that it be kept updated on the progress of these discussions.
57. The Committee requests a response from the Scottish Government to the issues raised in this and the DPLRC's report on the LCM.
58. Pending receipt of a response from the Scottish Government and an update on possible amendments to the Bill, the Committee is not currently in a position to take a view on this LCM and may report further on these matters at a later date.

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