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Economy and Fair Work Committee

Report on the supplementary Legislative Consent Memorandum for the 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.



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Introduction

1. The [Professional Qualifications Bill](#) 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 first reading took place in the House of Commons on 18 November 2021 and the Bill completed committee stage on 18 January 2022. The Parliament must express a view by the last amending stage at Westminster. It is anticipated that this will be just after the February recess.
4. The Scottish Government lodged an LCM relating to the Bill on 12 July 2021 and recommended that the Scottish Parliament does not consent to legislation by the UK Parliament in this area.
5. The Scottish Government noted in its original LCM that—
 - ” if satisfactory amendments should be made to the Bill to respect the devolution settlement, the Scottish Government may be able to recommend that the Scottish Parliament consents to the Bill. If during the remaining stages of the Bill, appropriate amendments are provided which address concerns, a supplementary memorandum with a final position on consent may be lodged.
6. The Bill has subsequently been amended and The Scottish Government [lodged a supplementary LCM on 27 January 2022](#).¹

Initial Legislative Consent Memorandum

7. At the meeting on Wednesday 29 September 2021, the Committee considered a [Legislative Consent Memorandum](#) for the Professional Qualifications Bill. ²
8. At that meeting, the Committee took evidence from the Minister for Business, Trade, Tourism and Enterprise on the LCM. ³
9. Following this evidence session, the Committee [published its report](#) on 22 November 2021, ⁴ in anticipation of a further LCM being lodged following amendments to the Bill.
10. The Scottish Government stated in its initial LCM that—
 - ” At this time, the Scottish Government cannot recommend to the Scottish Parliament that it gives its consent to the Bill
11. It then continued—
 - ” while [as set out above] many aspects of the Bill are not contentious, the Scottish Government is concerned about the exercise of concurrent powers under the Bill conferred by the definition of appropriate national authority. In particular, the lack of a legislative requirement for UK Ministers to obtain consent from the Scottish Ministers when exercising the powers conferred by the Bill in devolved areas alters the executive competence of the Scottish Ministers ... The Scottish Government’s position, which has been explained to the UK Government, is that if satisfactory amendments should be made to the Bill to respect the devolution settlement, the Scottish Government may be able to recommend that the Scottish Parliament consents to the Bill. If during the remaining stages of the Bill, appropriate amendments are provided which address concerns, a supplementary memorandum with a final position on consent may be lodged. ²
12. The term "appropriate national authority" is defined in clause 16 of the Professional Qualifications Bill. In all circumstances, UK Ministers acting for the UK Government, are able to bring forward regulations. The devolved administrations, including Scottish Ministers, are also able to bring forward regulations where the subject matter is entirely within their devolved competence. However, the overall effect is that the UK Government can legislate in devolved areas without the consent of Scottish Ministers.

Amendments to the Bill

13. The amendments which are the subject of the supplementary LCM (referred to in the supplementary LCM as amendments 1, 12 and 13) were first brought to the Committee's attention in a letter from the Minister to the Committee on 23 November 2021. [The Minister's letter](#)⁵ outlines the progress made with regards to amendments to the Bill related to regulator autonomy and regulator consultation.
14. Amendment 1 makes two relatively minor modifications to clause 1 (the power to provide for individuals to be treated as having UK qualifications). The first modification relates to the additional conditions that may be specified in regulations made under this power. The second relates to determinations by a regulator of whether an overseas-qualified individual has skills equivalent to the UK qualification. The amendment provides that such determinations may be made either on the basis of those overseas qualifications alone, or on such other basis as the regulator considers appropriate (for example taking into account also the results of a test or assessment). The effect of the second amendment is to give regulators greater discretion in how they assess the skills of people with foreign qualifications. The supplementary LCM explains that the intention of the latter modification is to ensure that regulators' domestic standards are maintained, for example where the only route to registration is through a particular qualification.
15. Amendments 12 and 13 add two further Clauses (14 and 15) to the Bill. The purpose of these provisions is to protect the autonomy of regulators, and to require that regulators are consulted before new regulations are made that are likely to affect them. The lack of a requirement to consult with regulators was a matter of concern [noted by the DPLR Committee in its report](#)⁶ on the LCM and which this Committee pursued with the Scottish Government.
16. The new clause 14 would require regulations to meet two conditions to protect regulators' autonomy: i.e.
 - that they do not remove a regulator's ability to prevent someone who is unfit to practice a profession from doing so
 - that they will not have the effect of materially diluting the standards of the profession.
17. New clause 15 would require the government bringing forward the regulations to consult, including with any regulators likely to be affected.
18. The amendments made to the Bill address issues in relation to regulatory autonomy and regulator consultation. However, they do not address the other concerns highlighted by both the DPLRC and this Committee, including that the Bill, in its current form, allows the UK Government to legislate in devolved areas without the consent of the Scottish Ministers.
19. The Delegated Powers and Law Reform Committee considered the delegated powers in the supplementary LCM on 1 February and [issued a report on 4 February](#).⁷

Scottish Government response to the Committee's Report

20. On 18 December 2021, Ivan McKee [wrote to the Committee](#) responding to the recommendations contained within the report.⁸ This letter is included in the annexe.

Supplementary LCM

21. In its supplementary LCM, the Scottish Government states that, although some amendments to the Bill have been made, it still cannot recommend to the Parliament that it gives consent to the legislation.
22. The supplementary LCM states that—
 - ” While the Scottish Government can accept the main purpose of the Professional Qualifications Bill, in replacing retained EU Law, it does not accept that the approach taken to this Bill demonstrates sufficient respect for Devolved Governments’ responsibilities.

The absence of a statutory requirement for the consent of Scottish Ministers means that the Scottish Ministers cannot recommend to the Scottish Parliament that it gives its consent to the Bill.

23. It then reiterates a point from the initial LCM that—
 - ” While many aspects of the Bill are not contentious, the Scottish Government remains concerned about the exercise of concurrent powers under the Bill conferred by the definition of appropriate national authority and, in particular, the lack of a legislative requirement for UK Ministers to obtain consent from the Scottish Ministers before exercising the powers conferred by the Bill in devolved areas.

Committee Recommendations

24. There are five key recommendations from the Committee's report on the initial LCM still outstanding:
- A requirement on the face of the Bill to obtain the consent of the Scottish Ministers before making regulations in areas of devolved competence, which would enable the Scottish Parliament to have a scrutiny role in how these devolved powers are exercised.
 - That there should be a scrutiny role for the Scottish Parliament in relation to health and social care workforce planning to avoid unintended consequences where regulations are made by the UK Government that may impact, even inadvertently, upon the Scottish Government's policy in devolved areas.
 - The Scottish Government should set out how it will track, and keep the Parliament informed about, regulatory changes being made in another part of the UK which affect areas of devolved competence.
 - That a process should be put in place to ensure early notification and opportunities for parliamentary scrutiny of intra-government communications in areas where the activities of one UK administration may affect others.
 - The issues raised by the DPLRC in relation to the appropriateness of delegating the powers in clauses 1 and 3 should be pursued. Broadly, the committee was concerned that the powers were very widely drawn and there was insufficient justification for using secondary rather than primary legislation. There were a number of more specific points.

Committee Consideration

25. Under the standing orders, an LCM should be lodged by the Scottish Government “normally no later than 2 weeks after the amendments are tabled or agreed to”. In the case of the amendments made so far to the Bill, that deadline would have been 16 November 2021.

26. In his [letter of 23 November](#)⁵, the Minister for Business, Trade, Tourism and Enterprise noted that—

” The Scottish Government has not been able to meet this deadline for consideration of the amendments to the Bill because of continuing discussions with stakeholders and BEIS. Scottish Government and BEIS officials are still discussing the ability of the Secretary of State to exercise concurrent powers in areas of Devolved Competence without the consent of Scottish Ministers. We will lodge a supplementary memorandum as soon as possible with a final position and my officials will keep in contact with yours regarding anticipated timescales.

27. **The Scottish Government was aware of amendments requiring a supplementary LCM in November 2021. However, no supplementary LCM was lodged until 27 January 2022. It is regrettable that this gave the Committee only two weeks to formulate a position. The Scottish Government initiating a debate on this matter for this week further reduced the time available for Committee scrutiny. We bring this to the attention of the Conveners Group.**

28. **The Committee recommends that future LCMs be lodged within the deadline specified in the Standing Orders to allow for more detailed scrutiny by Committees.**

Conclusions and recommendations

29. The Committee considered the supplementary LCM at its meeting on 2 February 2022.

30. **The Committee welcomes the amendments made to the Bill which address some of the concerns highlighted in the report on the original LCM, however the Committee's substantive concerns remain.**

31. **The Committee notes that the UK Government has stated 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.**

32. **The Committee notes that, where regulations under this Bill that would be within the Scottish Parliament's competence are made by UK Ministers, there is no role for the Scottish Parliament in scrutinising them. A consent requirement would enable the Parliament to have a role, as it could then scrutinise the Scottish Government's decision whether or not to consent.**

33. **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.**

Annexe - Letter from the Minister for Business, Trade, Tourism and Enterprise, 18 December 2021

Letter from Ivan McKee MSP, Minister for Business, Trade, Tourism and Enterprise

18 December 2021

I am writing in response to your letter of 22 November and the report which your Committee published on the Legislative Consent Memorandum for the UK Professional Qualifications Bill (“the Bill”). I am grateful for the opportunity to attend the Committee to discuss the Bill, and to you for publishing the report and recommendations. I note the report refers to the Delegated Powers and Law Reform Committee report on the Bill and highlights similar concerns which my officials have already put to the UK Government.

Your report asks a number of questions, as follows:

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 UK Internal Market Act (UKIMA) provides for a system for the mutual recognition of professional qualifications that are regulated in law across the UK. It introduces an “automatic recognition” principle which applies to UK residents who are professionally qualified in one part of the UK to enable them to be treated automatically as qualified in respect of that profession in another part of the UK, as well as setting out the situations where the automatic recognition principle does not apply. Certain legal professions are excluded. School teaching is also excluded after considerable pressure from Scottish teaching organisations, the Scottish Government and Peers during the passage of the Bill.

UKIMA intends to set the rules by which regulators will have to operate in relation to standards set by equivalent bodies in other parts of the UK, including the requirement to offer routes to recognition. The Professional Qualifications Bill largely intends to set the rules for the recognition of qualifications gained outwith the UK.

However, the Professional Qualifications Bill does include clauses that impact on relationships within the UK such as information sharing requirements and the establishment of an information centre.

The UKIMA specifically excludes school teaching and the legal profession and these professions and their devolved regulators will be covered by the Professional Qualifications Bill. All other devolved professions, such as social workers, will be covered by both sets of legislation.

The UKIMA would not allow a non-UK qualified professional who would not have had their qualification recognised through direct application to a particular UK regulator (e.g. under the Professional Qualifications Bill) to rely on recognition through the UKIMA if they were recognised in another part of the UK, as it only applies to UK gained qualifications and experience. Equally, an individual who was UK qualified but not recognised as reaching the requirement standard for another part of the UK could not apply for recognition through

a route established to comply with the Professional Qualifications Bill.

36. 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.

The Scottish Government is actively considering how it monitors legislation made under powers in the UKIMA and how it would bring relevant changes to the attention of Parliament.

39. The Committee requests that the Scottish Government keeps the Committee updated on the outcome of these discussions.

I updated the Committee on amendments to the Bill addressing regulator autonomy and consultation in my letter of 23 November 2021 and will continue to keep members informed of any further developments.

42. The Committee requests confirmation from the Scottish Government on whether it will actively pursue these issues with UK counterparts.

Scottish Government Officials have established a regular discussion forum with BEIS and have no concerns with proposals relating to regulator to regulator agreements. Future issues relating to international treaties will be subject to further discussion through formally established 'four country working groups'.

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.

After committee stage on 9 June Lord Grimstone [wrote to Lord Purvis of Tweed](#), noting that Lord Tweed "raised questions regarding the variety of processes regulators must navigate to get approval for the level of fees charged to applicants, including the involvement of the Privy Council and, in some cases, the Scottish Parliament."

In his letter, Lord Grimstone states:

"Where regulations establish a unilateral recognition route, Clause 1(5)(e) allows the regulations to provide for fees to be paid by a person who applies under that route. Similarly, where regulations are used to implement an international recognition agreement, under Clause 3(2)(c) the regulations could include provisions about fees in connection with applications made under that agreement. Without these provisions, there could be doubt about the Government's ability to authorise regulators to charge fees in these circumstances.

So the Bill is an enabling Bill, including powers that can be used if necessary. The powers under the Bill could, in theory, be used to support regulators in disparate sectors, with varying needs and requirements and varying existing practices about fees. It is not practicable nor desirable to set a one-size-fits-all approach to fees in the Bill. Indeed, this would encroach on regulator autonomy.

Where the Government uses the Bill's powers, we would of course engage with the relevant regulator and all interested parties in deciding what to say about fees in the regulations. We believe that regulators should be able to charge appropriate fees to recover the costs of any applications they process."

In line with UK Government amendments tabled in the House of Lords, any implementing regulations under Clause 3 would have to be consulted on with relevant regulators and would need to be consistent with the conditions set out in the amended Bill.

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.

The list of regulators covered under the Bill has been published here on the UK Government's website. <https://www.gov.uk/government/publications/professions-regulated-by-law-in-the-uk-and-their-regulators/uk-regulated-professions-and-their-regulators>

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.

It remains the case that the Scottish Government and the UK Government are in discussions on potential amendments to the Bill in respect of the exercise of concurrent powers under the Bill. The Scottish Government will continue to keep the Committee updated on progress of the discussions.

DPLRC Report

70. The Committee also recommends that the lead committee pursues with the Scottish Government whether a statutory requirement to consult the affected regulator(s) before exercising the power should be included in this clause. This is particularly so given that the clause covers a multiplicity of different regulators.

Separately, clause 3(1)(c) enables regulations under this power to make provision for the charging of fees. The lead committee may also wish to explore whether this could be used to compel devolved regulators to charge (or not to charge) a fee, and what the implications of this might be.

In response to the DPLRC's issues above, the Professional Qualifications Bill went through Report Stage in the House of Lord on 9 November, with two amendments passed which address the DPLRC's concerns:

- **Regulatory Consultation:** the Bill has been amended to include a requirement for a national authority to consult with regulators who would be affected by a regulation;
- **Regulator Autonomy:** the Bill has been amended to give regulators the power to make a determination on the basis of qualification only, and to introduce a new 'Protection of regulator autonomy' clause, clarifying that regulations made under the Bill cannot remove the right of regulators to decide whether an individual is fit to practise or not, and "that the regulations will not have a material adverse effect on any regulated profession in terms of the knowledge, skills or experience of the individuals practising it."

With regards to Clause 3(2)(c) (Previously 3(1)(c)), this provision can empower a regulator to charge fees but this would only take place after the regulator had consulted.

Ivan McKee

18 December 2021

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