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Health, Social Care and Sport Committee

Legislative Consent Memorandum on the Health and Care Bill (UK Parliament legislation)



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Health, Social Care and Sport Committee

To consider and report on matters falling within the responsibility of the Cabinet Secretary for Health and Social Care and matters relating to drugs policy.



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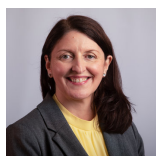
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Executive summary

1. This report details the Health, Social Care and Sport Committee's consideration of the [Legislative Consent Memorandum](#) on the [UK Health and Care Bill](#).

The Committee reserves its position on whether to recommend consent be given to the Health and Care Bill pending receipt of a further, supplementary memorandum from the Scottish Government.

Background

2. The [UK Health and Care Bill](#) ("the Bill") was introduced in the House of Commons on 6 July 2021.
3. The Cabinet Secretary for Health and Social Care, Humza Yousaf MSP, lodged a [Legislative Consent Memorandum](#) on the Health and Care Bill on 31 August 2021, under Rule 9.B.3.1(a) of the Parliament's Standing Orders.
4. The memorandum was referred to the Health, Social Care and Sport Committee as lead committee by the Parliamentary Bureau on 14 September 2021. The Bill was also considered by the Delegated Powers and Law Reform Committee, insofar as it affected its remit.
5. The LCM sets out the purpose of the Bill as follows:
 - ” The main purpose of the Bill is to give effect to the policies that were set out as part of the NHS's recommendations for legislative reform following the Long Term Plan and in the White Paper 'Integration and Innovation: Working together to improve Health and Social Care for all' published in February 2021.
6. As health is devolved in Scotland, the majority of the provisions in the Bill apply to England and Wales only. The main provisions of the Bill are broadly categorised under the four following themes:
 1. Working together collaboratively and supporting integration;
 2. Reducing Bureaucracy;
 3. Ensuring public confidence and accountability; and
 4. Additional proposals to support social care, public health, and quality and safety
7. The Bill contains the following provisions which apply to Scotland and where the UK Government has requested legislative consent:
 - The Secretary of State's power to transfer or delegate functions;
 - International healthcare arrangements;
 - Food information for consumers: power to amend retained EU law;
 - Regulation of healthcare and associated professions; and
 - Medicines Information Systems
8. It is the view of the Scottish Government that, in addition to those provisions listed above, the provisions in relation to the advertising of less healthy food and drinks also engages the legislative consent process.
9. Part 3 (clauses 86 to 92) of the Bill makes provisions to allow the Secretary of State to transfer health functions between specified Arm's Length Bodies ("ALBs") with

the aim of streamlining the health service in England. The clauses are designed to provide the Secretary of State with powers to streamline services. However, the Scottish Government believe they will impact on devolved areas in relation to:

” (a) the exercise of regulation making powers in respect of the transfer of functions which may make provision within legislative competence; and (b) the power to transfer property, rights and liabilities to the Scottish Ministers. The powers are wide ranging and the Secretary of State may modify functions, abolish any ALB affected and modify the funding and constitutional arrangements of the ALB.

10. Clause 120 amends the Healthcare (European Economic Area and Switzerland Arrangements) Act 2019 (HEESAA) and gives the Secretary of State powers to implement reciprocal healthcare agreements with countries outside the EEA and Switzerland, by removing the territorial restrictions of the HEESAA. The Secretary of State will also have a regulation-making power to make provision for discretionary payments for healthcare not under an agreement, but only in countries with which the UK has a reciprocal healthcare agreement, and where the Secretary of State considers that exceptional circumstances justify the payment.
11. Clause 127 includes provisions to amend section 16 of the Food Safety Act 1990 to give relevant Ministers, including Scottish Ministers, powers to amend the retained EU Food Information to Consumers (2011/1169) Regulation (EU FIC) through secondary legislation. Since the end of the EU Exit Implementation Period, this Regulation has been retained EU law in the UK. Existing powers in the Food (Scotland) Act 2015 would enable enforcement sanctions in Scotland for any new labelling regulations introduced by amending the retained EU FIC.
12. Clause 125 includes provisions to introduce, on 1 January 2023: a) a 5.30am to 9pm TV advertising watershed for “less healthy food or drink” products (in effect categories of foods high in fat, sugar or salt (HFSS foods)); b) a similar advertising restriction for on-demand programme services which are under the jurisdiction of the UK (and regulated by Ofcom); and c) a restriction of paid-for HFSS foods advertising online.
13. Clause 123 of the Bill provides the Secretary of State powers to enable reform of the overarching system of healthcare professional regulation. The provisions are consistent with UK-wide consultations on healthcare professional regulatory reform. The provisions will provide the Secretary of State with a power by secondary legislation to abolish individual health and care professional regulatory bodies where the professions concerned have been deregulated or are being regulated by another body. The Secretary of State will also be provided with a power to remove a profession from regulation where regulation of that profession is no longer required to protect the public.
14. Clause 85 confers a delegated power on the Secretary of State to make regulations providing for an information system in relation to human medicines to be established and managed by the Health and Social Care Information Centre (commonly called “NHS Digital”). The Secretary of State may specify in those regulations the information which must be provided to NHS Digital, the form in which information is to be provided, and, the person who must provide information. This delegated power can be used to create information systems for the purposes of enabling information on human medicines to be analysed and tracked. The


information system can be established and operated for purposes relating to (a) the safety, quality and efficacy of human medicines, and (b) the improvement of clinical decision-making in relation to human medicines. The clause also includes a direction making power which could allow the Secretary of State to issue a written direction setting out the type of information to be provided to NHS Digital.

15. Clause 85 also makes technical amendments to section 19 of the Medicines and Medical Devices Act 2021 which are intended to align with the proposed Medicines Information System (MIS) and which will enable NHS Digital to share information they receive which comes from data linkage; and to contain commercially sensitive technical information about devices. The Scottish Parliament indicated consent to the Medicines and Medical Devices Bill on 12 November 2020ⁱ. The Bill was enacted in February 2021.
16. In addition, Clause 85 includes amendments to section 43 of the Medicines and Medical Devices Act 2021. Section 43 is being amended to allow regulations made under the provision outlined above and the existing section 19 of the Medicines and Medical Devices Act 2021 (which relates to medical devices information systems) to amend the part of the Health and Social Care Act 2012 which establishes NHS Digital and sets its remit and powers.
17. At this time, the Scottish Government advises it cannot recommend to the Scottish Parliament that it gives its consent to the Bill. While noting aspects of the Bill are, in its view, not contentious (section 2 on pages 1 and 2), it believes that there are several powers within the Bill that impinge on the legislative competence of the Scottish Parliament and the executive competence of the Scottish Ministers but where there is no requirement for UK Government Ministers to gain the statutory consent of the Scottish Ministers before exercising those powers.
18. The Scottish Government has requested that the UK Government make amendments that would respect devolved competence by requiring the statutory consent of the Scottish Ministers is sought before new powers in these areas are exercised. The Scottish Government advises it has made this request:
 - ” as the new powers have implications for how policy is delivered in Scotland and for the transfer of Scottish patient data to another jurisdiction, where the Scottish Government’s and NHS Scotland’s ability to act in accordance with their responsibility for rights and freedoms of the population of Scotland (including confidentiality and security of such data) would be lost.
19. 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.

ⁱ [Legislative consent for the Medicines and Medical Devices Bill](#)

Consideration by the Delegated Powers and Law Reform Committee

20. The Delegated Powers and Law Reform (DPLR) Committee considered the delegated powers in the LCM at its meeting on [28 September](#) 2021 and published its recommendations in a [report](#).
21. In relation to Clause 127 the DPLR Committee notes that it is 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.
22. The Committee notes clauses 85 and 120 provide additional delegated powers in areas that were formerly within EU competence.
23. In relation to Clause 85 and Clause 120 the DPLR Committee raised a general concern about powers within the Bill that are delegated solely to the Secretary of State with requirement only to consult with the Scottish Ministers before exercising those powers, rather than a requirement to gain the statutory consent of the Scottish Ministers:

 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.
24. Clauses 87 and 123 include provisions conferring powers on UK Ministers in partially devolved areas. These are additional delegated powers which were not formerly under EU competence. As with Clauses 85 and 120, the DPLR Committee raises a concern that there is "no requirement that the Secretary of State seeks the consent of Scottish Ministers before making such regulations".
25. The DPLR 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 that do not fall within areas formerly within EU competence before the UK fully withdrew from the EU.
 - 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.
26. On 6 October 2021 the DPLR Committee [wrote to the Minister for Parliamentary Business](#) requesting further information. A response was received on 21 October.

(link to be updated once DPLR publish)

27. In respect of clause 87, the Minister for Parliamentary Business advises the Scottish Government is discussing this with the UK Government. It has asked the UK Government to amend this clause to ensure that the consent of the Scottish Ministers is obtained if the regulations contain any provision which falls within legislative competence.
28. In respect of clause 123, the Scottish Government does not consider that the powers conferred on the Secretary of State, insofar as within devolved competence, fall within areas formerly within EU competence before the UK fully withdrew from the EU and as such the protocol does not apply.
29. The Minister for Parliamentary Business highlights there is currently no protocol in place between the Scottish Government and the Scottish Parliament to facilitate scrutiny of proposals by the UK Government to legislate through subordinate legislation in devolved areas that were not formally within the competence of the EU before the UK fully withdrew from the EU. The Minister for Parliamentary Business advised:
 - ” Although I am happy to consider further 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 before the UK fully withdrew from the EU I do not have a specific proposal to offer.

Consideration by the Health, Social Care and Sport Committee

30. The Committee issued a targeted call for views on the LCM and received [four responses](#) from:
 - The Royal College of Surgeons of Edinburgh;
 - Obesity Action Scotland;
 - Royal College of Nursing Scotland; and
 - East Ayrshire Health and Social Care Partnership.
31. The Committee then took evidence on the LCM from the Cabinet Secretary for Health and Social Care and his officials on [5 October 2021](#).
32. The Cabinet Secretary noted the proposals in the Bill were a long-term plan for the NHS in England and as such are not contentious for the Scottish Government, because their effects are confined to England and the English National Health Service. However, the Cabinet Secretary raised concerns around possible "domino" effects
33. The Cabinet Secretary stated:

” The UK Secretary of State for Health and Social Care would be granted powers to act in Scotland without having to seek the consent of the Scottish ministers, even where the actions would impact on delivery of healthcare, which is the responsibility of the Scottish ministers. Moreover, some provisions ignore the reality of there being a separate NHS in Scotland and could, if unchallenged, enable the secretary of state to treat the NHS across the UK as a single unitary entity. That is unacceptable.
34. Due to this, the Cabinet Secretary confirmed his position that he still recommends that Parliament not grant legislative consent to the Bill as it stands.
35. Full details of the Committee's discussion with the Cabinet Secretary for Health and Social Care can be found in the Committee [Official Report](#) of 5 October 2021.
36. During the evidence session the Cabinet Secretary advised the Committee that he was due to meet with Edward Argar, Minister of State for Health, on Wednesday 6 October 2021 to discuss proposed amendments to the Bill.
37. Following this meeting, the Cabinet Secretary wrote to the Committee to provide an update on the outcome of the discussions. The letter can be viewed [here](#).
38. In the letter, the Cabinet Secretary advises that he and the Minister of State for Health "were not able to progress or settle any of the outstanding provisions in the Bill for which I have requested amendments to be made." However, the letter goes on to state that officials will continue to try and resolve the issues and the Cabinet Secretary and The Minister of State for Health intend to discuss the matter again in a few weeks.

39. In the letter the Cabinet Secretary also highlights an additional issue that has come to his attention in the intervening time since the Scottish Government began scrutinising the contents of the Bill. He notes that Clause 130 of the Bill gives the Secretary of State power to make consequential provision by regulation which can amend or repeal primary legislation (including Acts of the Scottish Parliament and the Senedd, and Northern Irish legislation).
40. The letter explains the clause did not initially cause the Cabinet Secretary any concerns on the basis that it does not encroach on the legislative competence of the Scottish Parliament and would therefore not trigger the need for legislative consent.
41. However, the letter advises:
- ” the language used in the clause is an unusually explicit way to describe what seems to be a relatively uncontroversial provision. I alerted Mr Argar to the fact that we may seek an amendment that will provide reassurance that this power will not be used to amend Acts of the Scottish Parliament without consulting Scottish Ministers.

The need for consent

42. Giving evidence to the Committee, the Cabinet Secretary emphasised that he had no objection in principle to UK Ministers exercising powers in those areas of devolved competence engaged by the Bill. Instead, he outlined the Scottish Government's view that there should be a statutory requirement for the Scottish Government's consent to be sought before exercising those powers:
- ” I could see us aligning with the policy intent in a lot of areas. However, this is about the principle that, with anything that falls within our devolved competence, we should not be treated simply as consultees. Instead, our consent as a Government should be sought, and the appropriate parliamentary processes should be followed.
43. The Cabinet Secretary agreed that, in a number of areas covered by the Bill, taking a four-nations approach would make sense. However, where policy affects its executive power, he argued it was not acceptable for the Scottish Government to be treated simply as consultees and that as a fundamental principle of the devolution settlement, securing the consent of Scottish Ministers must be a statutory requirement.
44. The LCM details the consultation work the Department of Health and Social Care has undertaken for the Bill. This includes engagement in round-table and smaller discussions, including with the NHS Confederation, which covers England, Wales and Northern Ireland. The Committee notes there appears to have been little to no consultation with Scottish organisations and stakeholders as part of this.
45. The Cabinet Secretary advised that the Scottish Government has been consulting but noted that "the UK Government's consultation with us has not been as good as the consultation that I have seen on other bills in the past". The Cabinet Secretary advised that the Scottish Government has undertaken consultation with the NHS and broader NHS and social care partners on the Bill, but has been hampered in doing so given the very late stage prior to its introduction at Westminster at which

the text of the Bill was provided to it.

46. In its submission, [the Royal College of Surgeons of Edinburgh](#) said, “We understand and support the Scottish government's desire to ensure that Scottish ministers are consulted on changes which impact upon the health service in Scotland”.

The Secretary of State's power to transfer or delegate functions

47. The LCM notes that the Scottish Government is of the view that the regulations should only be made if the consent of Scottish Ministers has been obtained in relation to any provision that falls within their legislative competence and has requested that the UK Government amend the clause to reflect this.
48. It further notes that the Scottish Government has requested that a Memorandum of Understanding (MoU) should underpin this requirement for statutory consent as well as the consultation requirement already included in the Bill (which the Scottish Government considers should also apply to the exercise of functions within areas of reserved competence).

Advertising of less healthy food and drinks

49. The LCM notes that the UK Government accepts that food labelling is a devolved subject-matter and, in its Explanatory Notes to the Bill, recognises that this provision requires the legislative consent of the Scottish Parliament.
50. Giving evidence to the Committee, the Cabinet Secretary advised there are, in effect, three provisions within the Bill related to the advertising of unhealthy food., namely:
- a watershed for television advertising of less healthy food and drink products, which would be prohibited between 5.30 am and 9 pm;
 - a similar restriction on advertising via on-demand programme services, which also come under the jurisdiction of the UK and are regulated by Ofcom; and
 - restriction of paid-for online advertising of less healthy food.
51. In the LCM, the Scottish Government accepts that the first two areas are wholly reserved. However, it takes a different view with respect to the proposed restriction of paid-for online advertising of less healthy food. The Scottish Government believes the primary purpose of the third provision is to tackle childhood obesity by preventing children's exposure to paid-for online advertising of less healthy food. Insofar as the primary purpose of this provision relates to public health, the Scottish Government therefore considers it to be a matter of devolved competence.
52. Giving evidence to the Committee, the Cabinet Secretary noted the importance of the underlying principle behind the Scottish Government's concerns, highlighting

how such an encroachment into areas of devolved competence could translate into other policy areas beyond health. Consequently, the Cabinet Secretary argued that conceding on this underlying principle could have implications for other aspects of Scottish Government policy.

53. In its written submission to the Committee, [Obesity Action Scotland](#) expressed support for the Scottish Government's position, stating:

” We acknowledge the Scottish Government position on this and would seek to ensure that a solution is found that allows the most effective implementation of action in this area in Scotland.

International healthcare arrangements

54. The Health and Care Bill seeks to amend the [Healthcare \(European Economic Area and Switzerland Arrangements\) Act 2019](#) (HEESAA) and to give the Secretary of State powers to implement reciprocal healthcare agreements with countries outside the EEA and Switzerland, by removing the territorial restrictions of the HEESAA.

55. The LCM notes that the:

” Scottish Government made representations about this issue when the HEESAA was making its parliamentary passage as a Bill, and remains of the view that the Scottish Ministers should not only be consulted, but should be required to consent before regulations are made in such circumstances. The UK Government has already declined this request, favouring an agreed governance structure in the form of a memorandum of understanding, agreed at ministerial level by all four nations, to enable Devolved Administration cooperation and influence. The Scottish Government, however, stands firm in the view that the consent of Scottish Ministers must be obtained where the UK Government proposes the introduction of regulations, under Section 5 of the HEESAA, that impinge on devolved competence.

56. The Cabinet Secretary indicated during evidence that he believes this is a policy area where he would be supportive of a four nations approach. However, as with other areas, he raised concerns around the UK Government entering into agreements without the statutory consent of Scottish Ministers.

57. The Cabinet Secretary asserted his view that reciprocal healthcare arrangements—that is, people coming from overseas to access our healthcare in this country and people from Scotland going abroad to access healthcare internationally—fall within devolved competence and that the Scottish Government and the Scottish Parliament should therefore have a say on such arrangements. He noted:

” We would not want the UK Government to enter without our consent an agreement that could affect Scottish patients, the Scottish public and the Scottish health service because of people from outside accessing our health service.

Regulation of healthcare and associated professions

58. The Bill aims to provide the Secretary of State powers to enable reform of the overarching system of healthcare professional regulation. The UK Government recognises that these provisions require the legislative consent of the Scottish Parliament insofar as they affect existing groups of healthcare professions brought into regulation after the commencement of the Scotland Act 1998, and those regulated groups which are within devolved competence.
59. In relation to a Committee question on professional regulation, the Cabinet Secretary advised the Bill's provisions form part of a much wider programme of reform of professional healthcare, which the UK Government is taking forward with the support of the devolved administrations.
60. The Cabinet Secretary further advised that he has undertaken discussions with statutory regulators and that they are generally supportive of the principles of reform. On that basis, he did not raise any particular concerns in this area.
61. In its response to the call for written evidence, [the Royal College of Surgeons of Edinburgh](#) argues: "it is vital that professional regulation is aligned within the four nations of the UK to ensure that there is no confusion or obstacle to clinicians moving to work between them".
62. [The Royal College of Nursing](#)'s written submission argues that legislative consent should be required for this provision and is equally supportive of consistent UK-wide regulation for nursing professionals. However, the submission goes on to raise concerns about Clause 123 in relation to the power it creates to remove a profession from regulation. It concludes by arguing for an extension to the delegation of standard setting functions to include professional bodies (such as the RCN) in addition to other medical bodies that already perform this role.

Medicines Information Systems

63. The Bill would enable the Secretary of State to make regulations for the establishment of a medicine information system to allow information on medicines to be analysed and tracked. This system would be managed by [NHS Digital](#).
64. The Bill seeks to make technical amendments to the [Medicines and Medical Devices Act 2021](#) which are intended to align with the proposed Medicines Information System (MIS) and which will enable NHS Digital to share information they receive which comes from data linkage; including commercially sensitive technical information about devices.
65. The Scottish Government is concerned that the proposals could allow an extension of the NHS Digital remit into Scotland in relation to the regulations for medicines registries and medical devices information systems but without Scottish Ministers' statutory consent.

66. Responding to Committee questions, the Cabinet Secretary recognised concerns around the confidentiality and safety of patient data and the potential risks of this data being passed to private companies. On this basis, he argued that this was an area where there should be a requirement for the Scottish Government to give its consent rather than purely being consulted. He noted the Scottish Government has what he describes as "robust" measures in place when it comes to pseudonymised—depersonalised—patient data.
67. The Cabinet Secretary concluded by arguing that a requirement for Scottish Ministers' consent would mean that should Scottish Ministers have concerns about how data is being used or about its confidentiality and personalisation, "they can stop any practice that they think is not within the values and ethos that they espouse when it comes to data protection".

Conclusions and recommendations

68. The Committee notes the position of the Scottish Government that it is not yet in a position to recommend consent be given to the Health and Care Bill and that if, during the remaining stages of the Bill, appropriate amendments are provided which address concerns, a supplementary memorandum with the Scottish Government's final position on consent may be lodged.
69. The Committee therefore reserves its position on whether to recommend consent be given to the Health and Care Bill pending receipt of a further, supplementary memorandum from the Scottish Government.

