

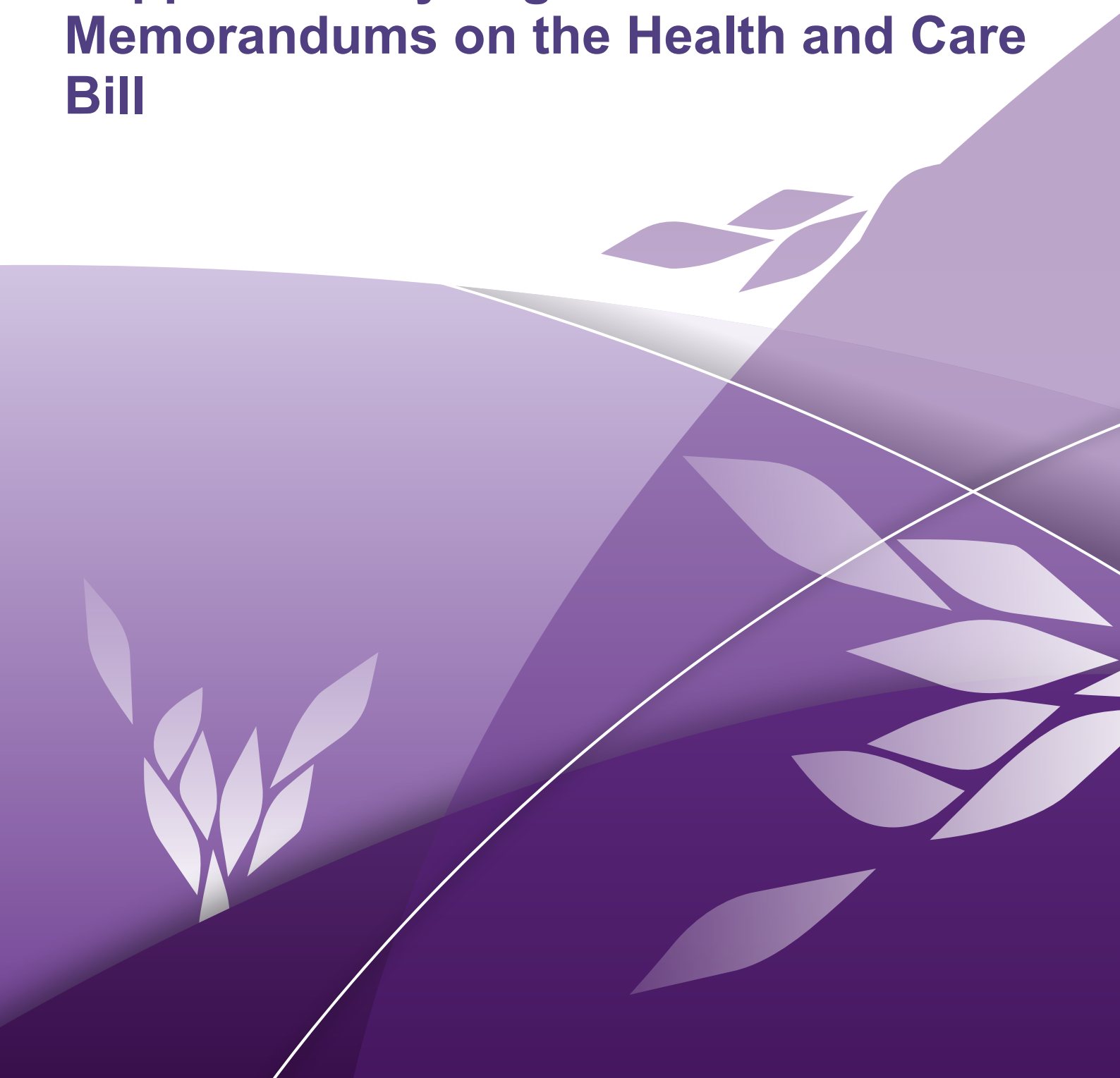


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Health, Social Care and Sport Committee

Supplementary Legislative Consent Memorandums on the Health and Care Bill



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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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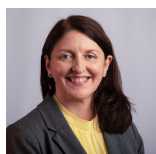
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Executive summary

1. This report details the Health, Social Care and Sport Committee's consideration of the two supplementary Legislative Consent Memorandums on the [UK Health and Care Bill](#), lodged on [9 December 2021](#) and [27 January 2022](#).

2. With respect to the relevant provisions of the Health and Care Bill, introduced in the House of Commons on 6 July 2021 relating to:

- regulation of healthcare and associated professions;
- food labelling for consumers;
- international healthcare arrangements;
- Medicine Information Systems;
- virginity testing offences: Scotland;
- Secretary of State's power to transfer or delegate functions;
- information about payments etc. to persons in the health care sector; and
- Hymenoplasty offences: Scotland;

the Committee agrees with the recommendations of the Scottish Government that, insofar as these matters fall within the legislative competence of the Scottish Parliament or alter the executive competence of the Scottish Ministers, they should be considered by the UK Parliament.

3. In relation to the provision on the advertising of less healthy food and drink, which the Scottish Government believes engages the legislative consent process, the Committee cannot recommend that the Scottish Parliament gives its consent in respect of that clause.

Background

4. The [UK Health and Care Bill](#) ("the Bill") was introduced in the House of Commons on 6 July 2021.
5. 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. That LCM withheld consent to the whole Bill, pending suitable amendments by the UK Government.
6. The LCM was considered by the Committee on [5 October 2021](#). The Committee's [report](#) on the LCM concluded:

” 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.
7. The Scottish Government lodged two supplementary LCMs on [9 December 2021](#) and on [27 January 2022](#), following amendments made to the Bill by the UK Government.
8. This report will consider and make a recommendation on both supplementary LCMs.
9. The original LCM advised the UK Government describes the principal 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.
10. 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
11. The Bill originally contained 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
12. Since publication of the Bill, additional provisions, which will apply to Scotland, have been added by amendment. The UK Government has requested legislative consent in the following additional areas:
- Virginity testing;
 - Hymenoplasty offences; and
 - Information about payments etc. to persons in the health care sector.

These provisions are included in the supplementary LCMs for consideration.

13. 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.
14. Clause 142 of the Bill (previously clause 123) 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. These provisions are consistent with the long-standing principle that healthcare professional regulation be proportionate.
15. Clause 146 of the Bill (previously 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.
16. Clause 136 of the Bill (previously clause 120) requires legislative consent insofar as the implementation of healthcare agreements may be exercised within devolved competence and the Scottish Ministers have certain powers to give effect to health

agreements under the NHS (Scotland) Act 1978.

17. Clause 87 of the Bill (originally clause 85) requires legislative consent insofar as the improvement of patient outcomes and the improvement of the health of the people of Scotland are devolved purposes, which are within the legislative competence of the Scottish Parliament. Clause 87 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 NHS Digital; it is the view of the Scottish Government that the delegated power could be used for devolved purposes. This also applies to the direction making power in clause 87, which could allow the Secretary of State to issue a written direction setting out the type of information to be provided to NHS Digital.
18. Part 5 of the Bill introduces criminal offences relating to the carrying out of virginity testing in England and Wales, in Scotland and in Northern Ireland; with clauses 126-129 making provision for those offences in Scotland. This is a new provision which was added to the Bill, via an amendment tabled by the UK Government on 17 November, and voted through during the House of Commons Report Stage on 23 November.
19. The second supplementary LCM highlights that amendments to clauses 88-94 were tabled by the UK Government on 24 January 2022 and provide the following: (1) the Secretary of State must obtain the consent of Scottish Ministers before making regulations that fall within the legislative competence of the Scottish Parliament or modify the functions of the Scottish Ministers (amendment 231C); (2) removes Scottish Ministers from the list of persons to whom property etc. can be transferred (amendment 231A). Scottish Government officials continue to work collaboratively on the MoU to outline the principles for engagement between administrations; this will include timescales according to which the UK Government should consult Scottish Ministers in relation to reserved matters.
20. Amendments 231M, 231N, 231P and 231Q insert new clauses into the Bill which introduces criminal offences for Scotland, relating to the carrying out of hymenoplasty. These are new provisions which were added to the Bill, via an amendment tabled by the UK Government, on 24 January 2022.
21. Amendment 231M creates an offence of carrying out hymenoplasty under the law of Scotland. An offence is committed not only where a hymenoplasty is carried out in Scotland, but also where the perpetrator carries out hymenoplasty outside of the UK and is either a UK national, or habitually resident in Scotland.
22. Amendment 231N makes it an offence for: (a) a person in Scotland to offer to carry out hymenoplasty anywhere in the UK, or outside of the UK where the proposed victim is a UK national, or lives in the UK; or (b) for a UK National, or person who lives in Scotland, to offer to carry out hymenoplasty, even if they make that offer when they are outside of Scotland.
23. Amendment 231P makes it an offence, under Scots law, to help, arrange, or encourage (aiding and abetting etc.) a person to carry out hymenoplasty that has sufficient jurisdictional connection. The offence is committed where the person is in Scotland, or if outwith, where the person is a UK national or lives in Scotland. Sufficient jurisdictional connection means that the hymenoplasty is carried out in relation to someone who is in the UK, is a UK National, or lives in the UK.

24. Amendment 231Q sets out the penalties. The offences are punishable by up to 12 months imprisonment and/or a statutory maximum fine (£10,000) in a trial without a jury, and up to 5 years and/or an unlimited fine in a trial with a jury.
25. As noted in the Committee's report on the original LCM, it was the view of the Scottish Government that legislative consent was also required for a further provision: the advertising of less healthy food and drink. The competence dispute over this provision was not resolved, with the Scottish Government maintaining it is devolved and the UK Government maintaining it is reserved.
26. The Scottish Government remains of the view that the 'Advertising of less healthy food and drink' clause engages the legislative consent process. The second supplementary LCM advises: "The UK Government has not recognised this assessment and, in any case, the Scottish Government cannot recommend that the Scottish Parliament gives its consent in respect of that clause."
27. As the Scottish Government is now recommending that the Parliament give its consent to the majority of clauses, the Cabinet Secretary for Health and Social Care lodged motion S6M-03054 on 2 February 2022. The motion states:
 That the Parliament agrees that the relevant provisions of the Health and Care Bill, introduced in the House of Commons on 6 July 2021, relating to regulation of healthcare and associated professions; food information for consumers: power to amend retained EU law; international healthcare arrangements; Medicine Information Systems; virginity testing offences: Scotland; hymenoplasty offences: Scotland; Secretary of State's power to transfer or delegate functions; and information about payments etc. to persons in the health care sector, so far as these matters fall within the legislative competence of the Scottish Parliament and alter the executive function of the Scottish Ministers, should be considered by the UK Parliament.

Consideration by the Delegated Powers and Law Reform Committee

28. The Delegated Powers and Law Reform (DPLR) Committee considered the delegated powers in the two supplementary LCMs at its meeting on [1 February 2022](#) and published its recommendations in a [report](#) on 3 February 2022.
29. The DPLR Committee reported on the power contained in Clause 120 (now Clause 136) of the Bill following its consideration of the original LCM at its meeting on 28 September 2021. 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 DPLR Committee noted its concerns regarding the lack of formal means by which the Scottish Parliament could scrutinise such regulations or be notified that they had been laid before the UK Parliament.
30. The DPLR Committee noted at its meeting on 1 February 2022 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 this falls within devolved competence) partially addresses the concern the Committee raised when it considered the first LCM.
31. However, the DPLR Committee noted that the UK Government retains the power to make regulations on a UK-wide basis. It will then be for the governments to decide between them on a case by case basis which body should exercise the power to implement healthcare agreements for Scotland. If the governments decide that the Secretary of State should exercise the power, the 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.
32. The DPLR Committee therefore agreed to write to the Cabinet Secretary for Health and Social Care to seek clarification on:
 - 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 section 2 of the Healthcare (European Economic Area and Switzerland Arrangements) Act 2019, as it currently applies, is listed in Annex A to that Protocol.
33. A response was received on 3 February 2022.
34. In his response, the Cabinet Secretary for Health and Social Care advised that, in relation to the first point raised by the DPLR Committee:

” Section 5 of the Act continues to apply so that the consultation requirement for the UK power is retained and will also be subject to the Memorandum of Understanding between UKG and the Devolved Administrations.
35. The Cabinet Secretary added that the Memorandum of Understanding is in the final

stages of agreement and contains an undertaking that “the UK Government will proceed in accordance with the convention that the UK Parliament would not normally legislate with regard to devolved matters except with the agreement of the devolved legislature”.

36. The Cabinet Secretary further advised “Although the Secretary of State’s power has been retained, importantly, the Committee will note that the power at section 2 of the Act is re-cast and is now restricted so the power can no longer be used to confer functions on the Scottish Ministers.”
37. In relation to the second point raised by the DPLR Committee, the Cabinet Secretary confirms the understanding of the DPLR Committee is correct in that:
 - ” the power under section 2 of the Act (as currently proposed to be amended by the Health and Care Bill) remains within the scope of [SI Protocol 2](#) (Protocol on scrutiny by the Scottish Parliament of consent by Scottish Ministers to UK secondary legislation in devolved areas arising from EU Exit) as section 2 will continue to concern giving effect to a healthcare agreement and the genesis of the international healthcare legislation related to EU Exit.

Consideration by the Health, Social Care and Sport Committee

38. The Committee took evidence on the two supplementary LCMs from the Cabinet Secretary for Health and Social Care and his officials on 8 February 2022.
39. During evidence to the Committee, the Cabinet Secretary highlighted how important it was to secure the consent of Scottish Ministers on devolved matters, stating “it is an integral pillar of the devolution settlement”. He noted he had “successfully negotiated consent requirements for key provisions within the Bill”.
40. Whilst noting he is always supportive of measures that seek to enhance and improve the health of the people of Scotland, the Cabinet Secretary stated it was:
- ” exceptionally important to note that the delivery of health care in Scotland is devolved and I will continue to challenge the UK Government on any perceived overreach into NHS Scotland.
41. 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 8 February 2022.

Provisions from the first LCM which relate to Scotland

42. Supplementary LCM 6-5a sets out the Scottish Government’s recommendation that the Scottish Parliament now gives its consent to provisions relating to:
- Medicine Information Systems;
 - International healthcare arrangements
 - Regulations of healthcare and associated professions;
 - Food information for consumers: power to amend retained EU law; and
 - Secretary of State’s power to transfer or delegate functions.
43. The LCM notes that a number of amendments were tabled by the UK Government on 18 November. These include:
- Granting concurrent powers to the devolved administrations to allow them to make their own regulations on the implementation of reciprocal healthcare agreements in their respective countries. The original regulation making power for the Secretary of State to implement healthcare agreements on a UK wide basis is retained (but, importantly, it is now restricted by the amendments so the power can no longer be used to confer functions on the Scottish Ministers).
 - Requiring 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; Narrowing the

purposes for which the information system can be used such that there are fewer devolved purposes for which the system could be used; Allowing NHS bodies in Scotland to supply their data to the information system via an intermediary body, which will allow for a single response on behalf of NHS Scotland as a whole.

- Providing that the Secretary of State must obtain the consent of the Scottish Ministers before exercising the power to transfer or delegate functions between specified arms-length bodies by making regulations that fall within the legislative competence of the Parliament.

44. Giving evidence to the Committee, the Cabinet Secretary advised that, wherever the Scottish Government can include some element of parliamentary scrutiny, its intention is to do so. He concluded: “It can only be to our advantage to have that scrutiny”
45. The Cabinet Secretary noted that in relation to regulations made in devolved areas where there is no consent required, concurrent powers in regulations made by the UK Government are subject to the terms of the SI protocol 2 and therefore take account of parliamentary scrutiny.
46. Where Scottish Ministers make regulations, the Cabinet Secretary advised that the Scottish Parliament will be notified by way of a Scottish Statutory Instrument.

Advertising of less healthy food and drink clause

47. The supplementary LCMs outline the Scottish Government’s view that legislative consent is required for the provision around the advertising of less healthy food and drink. The UK Government takes the contrary view.
48. The supplementary LCMs conclude that the Scottish Government cannot recommend that the Scottish Parliament gives its consent in respect of that clause.
49. The Cabinet Secretary advised that he remains supportive of any measures that are designed to tackle obesity and has no objection to the policy principle. He highlighted that although a lot of good can be done by tackling the advertising of less healthy food on a four nations basis, his concern related to “the overreach into public health, which I think we all agree is a devolved matter”.
50. In reference to the clause pertaining to the advertising of less healthy food and drink, he noted “with regret that the UK Government maintains it is entirely reserved”. This means there will be no requirement on the UK Government to consult with Scottish Ministers before making any secondary legislation in this area.
51. The Cabinet Secretary further noted that certain stakeholders, including Food Standards Scotland and Obesity Action Scotland, have criticised the UK Government’s definition of “less healthy”.
52. The Cabinet Secretary confirmed that discussions on this point will continue between the UK and Scottish Governments to see if a unified approach can be agreed. However, the Cabinet Secretary also expressed his own view that he did

not expect the UK Government to accede to the Scottish Government's position on the matter.

Virginity testing offences: Scotland

53. Supplementary LCM 6-5a notes that the UK Government has sought agreement from all devolved administrations to take action to criminalise the practice of virginity testing across all four nations. In addition to seeking a unified stance on the issue, the request from the UK Government also relates to their decision to attach extra territorial jurisdiction to the offence of virginity testing.
54. As with any new offence that is created, the Cabinet Secretary noted the Scottish Government will work with the Crown Office and Procurator Fiscal Service and Police Scotland on implementation.
55. The Cabinet Secretary advised that although the Scottish Government has been unable to find any evidence of virginity testing taking place in Scotland, the criminalisation of the practice at a UK level is intended to ensure a unified approach across all four nations.
56. The Cabinet Secretary further explained that the Scottish Government supports this approach because it would ensure a situation does not arise in which “the other nations of the UK legislate that that is an offence and that Scotland is seen as a safe haven for virginity testing.”
57. With regard to stakeholder engagement, the Cabinet Secretary advised that stakeholders were positive about legislating for the offence, The only note of caution from stakeholders was a danger of over criminalising offences that put a focus on black, Asian and minority ethnic communities.
58. The Cabinet Secretary highlighted that a number of groups have argued that legislation to criminalise activities in this area must be accompanied by education and cooperation with the communities potentially affected, noting:

” We have to get into those communities to eliminate the practice, if it is going on in Scotland in any way, shape or form.

Hymenoplasty offences: Scotland

59. Supplementary LCM 6-5b LCM notes the UK Government has sought agreement from the devolved administrations to take action to criminalise hymenoplasty offences across all four nations. As well as seeking a unified stance on the issue, the request from the UK Government also relates to their decision to attach extra-territorial jurisdiction to hymenoplasty offences introduced in England.
60. Giving evidence to the Committee, the Cabinet Secretary noted the Scottish Government were unable to gather evidence around whether virginity testing or hymenoplasty is happening in Scotland. However, he said there was evidence of these practices happening in England and other parts of the UK and as such,

argued it is vital that the Scottish Government work to gather data on any instances of the practice:

” ...by involving ourselves in the communities where we think that it could be happening. We have to work with and empower those communities to root out those practices which, as we all accept, are a form of violence against women and girls.

61. The Cabinet Secretary advised that, if the Bill passes in the House of Commons, there will be an awareness raising exercise undertaken, possibly on a four-nation basis. However, he added that, if the approach suggested by the UK Government “does not quite match the messaging that we feel is appropriate, we will take forward our own awareness raising”.

Information about payments etc. to persons in the health care sector

62. Amendments to the Bill would allow the Secretary of State 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. The clause also provides that regulations may make provision about when and how this information is to be published or provided. The Secretary of State is required to obtain the consent of Scottish Ministers before making regulations that would be within the legislative competence of the Scottish Parliament.
63. The UK Government intends to set out most of the detail in the regulations, rather than the Bill itself, to allow greater flexibility and continued consultation with stakeholders. The LCM notes that “stakeholder engagement is ongoing ahead of a planned public consultation”.
64. According to supplementary LCM 6-5b, the Scottish Government recognises that increased transparency around industry reporting may have a positive impact on patient outcomes and treatments.

Conclusions and recommendations

65. The Committee notes the recommendation of the Scottish Government, stated in the first supplementary LCM, that consent be given to clauses 87, 136, 142 and 146 of the Bill, as recently published, and clauses 126-129 as tabled on 17 November 2021.
66. The Committee further notes the recommendation of the Scottish Government, stated in the second supplementary LCM, that consent be given to clauses 88-94 of the Bill (as currently drafted), in light of amendments recently published, and its recommendation to consent to new clauses 'Hymenoplasty offences: Scotland' and 'Information about payments etc. to persons in the health care sector' as tabled on 24 January 2022.

67. With respect to the relevant provisions of the Health and Care Bill, introduced in the House of Commons on 6 July 2021 relating to:

- regulation of healthcare and associated professions;
- food labelling for consumers;
- international healthcare arrangements;
- Medicine Information Systems;
- virginity testing offences: Scotland;
- Secretary of State's power to transfer or delegate functions;
- information about payments etc. to persons in the health care sector; and
- Hymenoplasty offences: Scotland;

the Committee agrees with the recommendations of the Scottish Government that, insofar as these matters fall within the legislative competence of the Scottish Parliament or alter the executive competence of the Scottish Ministers, they should be considered by the UK Parliament.

68. In relation to the provision on the advertising of less healthy food and drink, which the Scottish Government believes engages the legislative consent process, the Committee cannot recommend that the Scottish Parliament gives its consent in respect of that clause.

