

Supplementary Legislative Consent Memorandum

Health and Care Bill

Background

1. This memorandum has been lodged by Humza Yousaf, Cabinet Secretary for Health and Social Care, under Rule 9.B.3.1(a) and (c) of the Parliament's standing orders. This memorandum is supplementary to LCM-S6-5¹ and supplementary LCM-S6-5². The Health and Care Bill was introduced in the House of Commons on 6 July 2021 and the House of Lords on 24 November 2021; it is scheduled to start Report Stage on 24 February 2022, and it is the Scottish Government's understanding that the UK Government is aiming to achieve Royal Assent by 8 March 2022. The latest version of the Bill can be found at:

<https://bills.parliament.uk/publications/44008/documents/1051>

Content of the Health and Care Bill

2. The Explanatory Notes³ accompanying the Bill set out the UK Government's view of its purpose and main functions. The UK Government describes the principal 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 (paragraph 1 of the Explanatory Notes). As health is devolved, the majority of the provisions in the Bill apply to England only.

3. The main provisions of the Bill are broadly categorised under four themes:

- Working together collaboratively and supporting integration;
- Reducing bureaucracy;
- Ensuring public confidence and accountability; and,
- Additional proposals to support social care, public health, and quality and safety.

¹ <https://www.parliament.scot/-/media/files/legislation/bills/lcms/health-and-care-bill/splcms065.pdf>

² <https://www.parliament.scot/-/media/files/legislation/bills/lcms/health-and-care-bill/supplementary-splcms065a.pdf>

³ <https://publications.parliament.uk/pa/bills/cbill/58-02/0140/en/210140en.pdf>

Provisions which relate to Scotland

4. The UK Government initially requested legislative consent for five provisions within the Bill that apply to Scotland. As set out in LCM-S6-5, 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. The Scottish Government recommended that the Scottish Parliament withheld consent to all provisions and, subject to securing acceptable amendments, the Scottish Government would bring forward a supplementary LCM.

5. Following discussions with the UK Government, the Scottish Government was able to bring forward supplementary LCM-S6-5, on 10 December, recommending that the Scottish Parliament grants consent to the following provisions:

- Medicine Information Systems
- International healthcare arrangements
- Regulations of healthcare and associated professions
- Food information for consumers: power to amend retained EU law
- Virginity testing offences: Scotland (new clause)

6. In addition to the provisions in supplementary LCM-S6-5, and in light of securing acceptable amendments, the Scottish Government can now recommend consent to the following provision from the original LCM:

- Secretary of State's power to transfer or delegate functions (clauses 88-94 of the Bill as currently drafted).

7. Finally, the UK Government also tabled amendments to introduce two new clauses to the Bill, which also require legislative consent. The Scottish Government is content to recommend that the Scottish Parliament grants consent to:

- Hymenoplasty offences: Scotland
- Information about payments etc to persons in the health care sector

Procedural note

8. Amendments to the Bill were tabled on 24 January 2022, but haven't yet been voted on, so the final form of the Bill has not yet been published. Throughout this LCM, therefore, the newly introduced provisions (Hymenoplasty offences: Scotland and Information about payments etc to persons in the health care sector) are named, rather than referenced by clause number.

Reasons for seeking a legislative consent motion

9. The Bill is a relevant Bill under Rule 9B.1.1 of the Standing Orders, as it makes provision applying to Scotland for purposes within the legislative competence of the Scottish Parliament, and alters the executive function of the Scottish Ministers.

10. The elements of the Bill that make provision for a purpose within the legislative competence of the Scottish Parliament are:

Secretary of State's power to transfer or delegate functions

11. Part 3 (clauses 88 to 94) of the Bill makes provision to allow the Secretary of State to transfer health functions between specified Arm's Length Bodies (ALBs). The clauses are designed to provide the Secretary of State with powers to streamline services but will impact on devolved areas insofar as the exercise of regulation making powers, in respect of the transfer of functions, which may make provision within legislative competence. 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.

12. It is the view of the Scottish Government that legislative consent is required insofar as the regulation making powers may be exercised in relation to a purpose within the legislative competence of the Scottish Parliament, and insofar as these powers could be used to alter the executive competence of the Scottish Ministers. Aside from the fact that legislation which falls within the legislative competence of the Scottish Parliament can be amended by these regulation making powers, most of the relevant bodies listed in Part 3 either carry out functions on behalf of the Scottish Ministers, have a duty to cooperate with the Scottish Ministers in relation to certain matters, or the Scottish Ministers can enter into agreements with them for the provision of goods and services or other functions on their behalf.

13. The Bill, as originally drafted, placed a requirement on the Secretary of State to consult with Scottish Ministers if draft regulations were to be made which made provision within the legislative competence of the Scottish Parliament, or for a matter in relation to which functions were exercisable by the Scottish Ministers. It also provided the Secretary of State with powers to transfer property, rights and liabilities to the Scottish Ministers.

14. The Scottish Government, as outlined in the original LCM, requested that the Bill was amended to place a requirement on the Secretary of State to obtain the consent of Scottish Ministers when making regulations that fall within the legislative competence of the Scottish Parliament. The Scottish Government also requested that where the powers are being exercised in a way which relates to reserved matters, including conferring, altering or removing functions which the Scottish Ministers may exercise in relation to a reserved matter, consultation with the Scottish Ministers should be required. Furthermore, the Scottish Government requested that a Memorandum of Understanding (MoU), designed to outline the principles for engagement, underpins the consent requirement and the consultation requirement already included in the Bill (which the Scottish Government considered should also

apply to the exercise of functions within reserved matters). The Scottish Government also raised concerns, at official level, about the inclusion of Scottish Ministers in the list of recipients of the transfer of property, rights and liabilities.

15. 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 modifies 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). The UK Government did not table an amendment to include a consultation requirement, with Scottish Ministers, in relation to reserved matters. Scottish Government officials continue to work collaboratively on the MoU to outline the principles for engagement between administrations; this will include the timescales for when the UK Government should consult Scottish Ministers in relation to reserved matters.

16. The Scottish Government considers these amendments to be acceptable. Accordingly, the Scottish Government recommends that the Scottish Parliament grants legislative consent to the provisions.

Information about payments etc to persons in the health care sector

17. Amendments 312B, 312C, 312D, 313B and 314ZB, tabled by the UK Government on 24 January 2022, in the House of Lords Committee Stage, inserts a new clause in the Bill which provides the Secretary of State with delegated powers 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 policy intention is for the information to be published in a searchable and accessible form.

18. The clause is intended to increase transparency around the financial links that manufacturers and commercial suppliers of medicines, medical devices and other products supplied/prescribed in the course of the provision of health care, have with persons in the health care sector; eventuated as a result of a recommendation made by Baroness Cumberlege in the Independent Medicines and Medical Devices Safety Review.

19. The UK Government's view is that the legislative consent of the Scottish Parliament is required for the clause insofar as it relates to Scotland and is entirely within the legislative competence of the Scottish Parliament. The Scottish Government agrees that the legislative consent of the Scottish Parliament is required but is of the view that there are aspects to these proposals which appear to relate to reserved matters, most notably certain aspects of the provisions relating to the regulation of medicines and medical devices. Notwithstanding this, the Scottish Government understands that the primary policy intention of the provisions is the improvement of patient outcomes and the treatment of patients, which are devolved matters and within the legislative competence of the Scottish Parliament.

20. The clause confers a delegated power on the Secretary of State to make different provisions for different parts of the UK. The delegated power also enables the Secretary of State to enforce, through financial penalties, the requirement to record and report relevant information.

21. 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 following information will be specified in the regulations: operational management of the reporting scheme, information to be disclosed, categories of persons in receipt of payments, time and manner of reporting, and enforcement. The clause as initially drafted did not include a role for Scottish Ministers, or a requirement to obtain their consent before making regulations. Since the design and subsequent modification of the scheme will be left to the regulations, the Scottish Government requested and secured the inclusion of a requirement for the Secretary of State to obtain the consent of Scottish Ministers before making regulations that would be within the legislative competence of the Scottish Parliament.

22. Additionally, the Scottish Government has been assured by the UK Government that the processing of personal data will be compliant with Article 6(1)(c) of the UK GDPR, and that the Scottish Government will have an equal role in the development of proposals and public consultation.

23. The Scottish Government is supportive of the need for this, and recognises that increased transparency around industry reporting may have a positive impact on patient outcomes and treatments. Accordingly, the Scottish Government recommends that the Scottish Parliament grants legislative consent to the provisions.

Hymenoplasty Offences: Scotland

24. 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. Hymenoplasty is a procedure undertaken to reconstruct a hymen; the predominant aim of this surgery is to cause bleeding during post-nuptial intercourse which, in some cultures, is considered proof of virginity.

25. 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.

26. 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.

27. 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.

28. Finally, 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.

29. The UK Government has sought agreement from the Devolved Administrations to take action to criminalise the practice 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. If all four nations introduce the three proposed offences, and attach extra-territorial jurisdiction to them, this would mean that, for example, should a UK national, or a person who lives in the UK, carry out hymenoplasty abroad, they could be prosecuted upon their return to the UK. It also means it will be an offence, in each of the four nations, for a person living there, who is a UK national, to take another UK national, or a person who lives in the UK, abroad for hymenoplasty.

30. If these offences did not apply in Scotland then, as well as not protecting those who live in Scotland, and preventing those who live here from becoming involved in carrying out hymenoplasty, it would mean that it may be possible for a UK national, or resident, who lives in another part of the UK to come to Scotland and legally conduct hymenoplasty. Furthermore, it may be possible for a person from elsewhere in the UK (or the rest of the world) to be taken to Scotland to have hymenoplasty without committing an offence. This position applies similarly to the other proposed offences of offering to carry out hymenoplasty; and of helping, arranging, or encouraging this practice.

31. It is the view of the Scottish Government that, in some circumstances, hymenoplasty may be captured under existing laws on assault, for example, if carried out by a non-medically qualified person. However, it is likely that the existing law could not be used to prosecute those involved in carrying out all hymenoplasties. Furthermore, it is unlikely that the existing law of assault (where it would apply if the act took place in Scotland) would catch Scottish perpetrators operating abroad, if the country they operate in has not outlawed hymenoplasty; nor would it likely protect residents of Scotland being taken abroad for hymenoplasty, again, if the country the act takes place in has not outlawed hymenoplasty.

32. An LCM is required because the provisions relating to hymenoplasty fall within the legislative competence of the Scottish Parliament. The Scottish Government recognises hymenoplasty as a form of gender based, and honour based, violence and is supportive of the policy intentions of the legislation. Lastly, should the Scottish Government not consent to this amendment, Scotland may become the only nation in the UK where hymenoplasty is not expressly illegal.

33. Accordingly, the Scottish Government recommends that the Scottish Parliament grants legislative consent to the provisions.

Consultation

34. Full details of consultation for clauses 88-94 can be found in the original Legislative Consent Memorandum (LCM-S6-5).

35. In relation to 'Information about payments etc to persons in the health care sector', stakeholder engagement is ongoing ahead of a planned public consultation.

36. In relation to 'Hymenoplasty offences: Scotland', in-depth engagement with stakeholders has not been possible, given the short timescales for this work. Scottish Government officials have carried out some informal discussions and found that, in general, there is no strong opinion among stakeholders towards criminalising hymenoplasty. This is due to a lack of evidence showing that hymenoplasty is in fact being practised in Scotland.

37. The Scottish Government has also engaged with health stakeholders, including practicing doctors who are supportive of the introduction of new criminal offences in relation to hymenoplasty. Furthermore, the Royal College of Obstetricians and Gynaecologists have called for governments to criminalise the practice.

38. Lastly, the UK Government convened an expert advice panel to inform their approach to hymenoplasty. This included a wide range of stakeholders, including representation from Scotland. The panel has given a clear recommendation that the practice of hymenoplasty should be criminalised.

Financial implications

39. The Bill itself does not create immediate financial requirements beyond what is needed for ongoing Scottish Government engagement on the Bill.

Secretary of State's power to transfer or delegate functions (ALB)

40. Any transfer of functions to or from an ALB will incur administrative costs such as those associated with staff transfers, changes to websites and publicity of these changes to stakeholders. The UK Government cannot quantify the specific costs as it would depend on the extent of functions being transferred and the organisations involved.

Hymenoplasty offences: Scotland

41. In relation to hymenoplasty, the creation of new criminal offences may result in costs for Police Scotland, the Scottish Courts and Tribunals Service, and the Crown Office and Procurator Fiscal Service as they implement processes to introduce these

new offences in Scotland. Further costs may present should cases of hymenoplasty be investigated and prosecuted in the future.

42. There is no evidence of hymenoplasty taking place in Scotland, and the Scottish Government does not anticipate that there will be a high number of cases per annum to be investigated and prosecuted; therefore, any costs related to these new criminal offences will be minimal.

Information about payments etc to persons in the health care sector

43. As most of the detail of this clause will be left to regulations, including the design and operation of the reporting scheme, it is not possible to set out the financial implications in detail at this stage as costs depend on the IT architecture and maintenance expenses.

Conclusion

44. As set out in LCM-S6-5, the Scottish Government noted most aspects of the Bill are not contentious, but that it considered it fundamental that amendments were made to the Bill to provide reassurance on the intent and scope of the powers, most notably with the Secretary of State's power to transfer or delegate functions provision. The Scottish Government is content with the amendments tabled by the UK Government, and can now recommend that the Scottish Parliament gives its consent to:

- Secretary of State's power to transfer or delegate functions
- Information about payments etc to persons in the health care sector
- Hymenoplasty offences: Scotland

45. The Scottish Government remains of the view that the 'Advertising of less healthy food and drink' clause engages the legislative consent process. 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.

Draft Legislative Consent Motion

46. The draft motion, which will be lodged by the Cabinet Secretary for Health and Social Care, is:

"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 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; 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."

Scottish Government, January 2022

This Supplementary Legislative Consent Memorandum relates to the Health and Care Bill (UK legislation) and was lodged with the Scottish Parliament on 27 January 2022

Health and Care Bill – Supplementary Legislative Consent Memorandum

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