

# 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(c) of the Parliament's standing orders. This memorandum is in addition to LCM-S6-5<sup>1</sup>, supplementary LCM-S6-5a<sup>2</sup> and supplementary LCM-S6-5b<sup>3</sup>. The Health and Care Bill was introduced in the House of Commons on 6 July 2021 and completed its passage through the House of Lords on 23 March 2022; it is the Scottish Government's understanding that the UK Government is aiming to achieve Royal Assent by the end of April 2022. The latest version of the Bill can be found at:

<https://bills.parliament.uk/publications/45813/documents/1627>

### Procedural note

2. Although the amendment was voted through in the first round of 'ping pong' in the House of Commons, on 30 March 2022, and subsequently passed in the House of Lords on 5 April 2022, the final form of the Bill has not yet been published. Throughout this paper, therefore, the newly introduced provision (commercial dealings in organs for transplantation: extra-territorial offences) is named, rather than referenced by clause number.

### Content of the Health and Care Bill

3. The Explanatory Notes<sup>4</sup> 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.

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

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

<sup>3</sup><https://www.parliament.scot/-/media/files/legislation/bills/lcms/health-and-care-bill/supplementarysplcms065b.pdf>

<sup>4</sup><https://bills.parliament.uk/publications/44120/documents/1082>

4. 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.

## Provisions Which Relate to Scotland

5. The Scottish Parliament passed Legislative Consent Motion S6M-03054<sup>5</sup> on 10 February 2022, and granted legislative 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
- Secretary of State's power to transfer or delegate functions
- Hymenoplasty offences: Scotland
- Information about payments etc to persons in the health care sector

6. Full details of the provisions listed above can be found in LCM-S6-5, supplementary LCM-S6-5a and supplementary LCM-S6-5b.

7. The UK Government tabled an amendment, on 28 March 2022, to insert a new clause into the Bill which extends to Scotland. The Scottish Government is content to recommend that the Scottish Parliament grants legislative consent to:

- Commercial dealings in organs for transplantation: extra-territorial offences

## Reasons for seeking a legislative consent motion

8. 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.

9. The Scottish Government is supportive of the policy intent of this amendment. Although there is little evidence of there being a significant issue with patients seeking to pay for organs abroad, there are long waiting times for some organs so it is always possible that some patients will be tempted to do so; and that those organs may come from donors who have been exploited in some way due to needing money (or possibly even being forced to donate an organ without consent), and may not be receiving the full care we would expect an organ donor to receive.

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<sup>5</sup><https://www.parliament.scot/chamber-and-committees/votes-and-motions/votes-and-motions-search/S6M-03054>

10. The Scottish Government therefore recommends the Scottish Parliament gives its consent to this amendment.

11. The new element of the Bill that makes provision for a purpose within the legislative competence of the Scottish Parliament is:

## Commercial dealings in organs for transplantation: extra-territorial offences

12. The amendment introduces additional criminal offences where a person who is habitually resident in Scotland or who is a UK national travels outside the UK to either buy or in any way arrange a form of reward for an organ; with the new clause making provision for those offences in Scotland via amendments to the Human Tissue (Scotland) Act 2006. This is a new provision which was added to the Bill, via an amendment tabled by the UK Government on 28 March 2022.

13. As offences in relation to the donation of organs or other body parts is a devolved matter, the legislative consent of the Scottish Parliament is needed for it to cover Scotland and appropriate amendments made to the Human Tissue (Scotland) Act 2006.

14. The Human Tissue (Scotland) Act 2006 already makes it an offence to make arrangements for a reward for the supply of an organ. The existing offence means it would be possible to prosecute someone travelling outside the UK for a transplant if they made arrangements while they were in Scotland. It would not however allow for prosecution of someone who travelled outside the UK for a transplant if all the arrangements were made while they were outside the UK. This amendment would allow for prosecution in such cases.

15. The proposed amendment would add a new section 20A to the Human Tissue (Scotland) Act 2006 to extend the coverage of section 20 of the Act to any offences committed outside the UK. This would mean that a person who arranges – through giving, receiving, seeking, offering, initiating or negotiating – a reward for the supply of an organ outside the UK commits an offence in Scotland. The amendment would allow for the Scottish courts to prosecute anyone who is habitually resident in Scotland for an offence which takes place outside the UK, but also they could prosecute any UK national as long as they are not habitually resident in Northern Ireland.

16. This amendment would allow for progress towards implementation of the Council of Europe Convention against Trafficking in Human Organs (which the UK signed in 2015, but has not as yet ratified).

17. Although there is little evidence of there being a significant issue in Scotland with patients seeking to pay for organs abroad, it is always possible that some patients will seek to do so and that those organs may come from donors who have been exploited in some way (or possibly even being forced to donate an organ without consent). We would hope that, if supported, this new clause would help to deter anyone from considering travelling outside of the UK to pay for an organ. Therefore, we anticipate prosecutions of offences to be minimal.

## Consultation

18. Due to the tight timescales and the fact that this amendment responds to an amendment initially lodged by Lord Hunt (and so this provision was not originally planned as part of the Bill), neither the UK nor the Scottish Government have had time to consult formally on this provision. The Scottish Government has however sought clinical advice and data from stakeholders to consider the implications of the proposal.

## Financial Implications

19. The creation of the new criminal offence may result in costs for Police Scotland and the Crown Office and Procurator Fiscal Service (COPFS) if they do investigate or prosecute anyone in relation to this new offence.

20. However, there is limited evidence of people who are resident in Scotland seeking organs illegally or unethically abroad. NHS Blood & Transplant figures for the UK suggest this is a relatively rare phenomenon that's been getting rarer. Only four patients living in Scotland are recorded as having received a transplant outside the UK in the past five years (although NHSBT noted that transplant units may not always report to them when a patient has received a transplant abroad). The Scottish Government does not anticipate that there will be many additional cases to be investigated and prosecuted; therefore, any costs related to this new criminal offence would be minimal.

21. There would, however, be some minor costs for the Scottish Government, for example in providing posters for waiting rooms in dialysis and transplant units and information for clinicians and relevant charities to help raise awareness of the new legislation among those waiting for a transplant, or who may need a transplant in future.

## Conclusion

22. The Scottish Government is content with the amendment tabled by the UK Government, and recommends that the Scottish Parliament gives its consent to:

- Commercial dealings in organs for transplantation: extra-territorial offences

## Draft Legislative Consent Motion

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

“That the Parliament agrees that the relevant provision of the Health and Care Bill, introduced in the House of Commons on 6 July 2021, relating to commercial dealings in organs for transplantation: extra-territorial offences, so

far as these matters fall within the legislative competence of the Scottish Parliament, should be considered by the UK Parliament.”

Scottish Government  
April 2022

This Supplementary Legislative Consent Memorandum relates to the Health and Care Bill (UK legislation) and was lodged with the Scottish Parliament on 12 April 2022

# Health and Care Bill – Supplementary Legislative Consent Memorandum

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