

MEMORANDUM

HEALTH PROTECTION AGENCY BILL

Motion

"That the Parliament endorses the principle that the Health Protection Agency should be able to carry out, in Scotland, certain radiation protection functions and, subject to the prescribed statutory requirements and procedures, other devolved health protection functions as set out in the Health Protection Agency Bill; further agrees that the Bill should confer powers and functions on the Scottish Ministers and make provision for various other related matters in respect of the Health Protection Agency; and agrees that the Bill should be considered by the UK Parliament."

Purpose

1. In order to provide for certain functions in the health protection field, including radiation protection, to be carried out on a GB or UK basis, it is proposed that elements of the Health Protection Agency Bill should extend to Scotland. A Sewel Motion is, therefore, required to obtain the consent of the Scottish Parliament to this Bill.

Background

2. The purpose of the Health Protection Agency Bill is to establish the Health Protection Agency as a UK-wide non-departmental public body. The Agency will be able to undertake both health functions and radiation protection functions (including functions currently carried out by the National Radiological Protection Board, which will be wound up). These more integrated arrangements are intended to improve the UK's ability to tackle the problems posed by infectious disease and other hazards, including the UK's response to chemical, biological, radiological and nuclear (CBRN) terrorism.

3. The intention to create a Health Protection Agency was first announced in *Getting Ahead of the Curve*, the infectious disease strategy published by the UK Government's Department of Health in January 2002. Further details of the Agency's proposed role in England, Wales and Northern Ireland were set out in *Health Protection: A Consultation Document on creating a health protection agency* (June 2002). In November 2002 the Department of Health announced the decision to create the Agency:

- i. from 1 April 2003, as a special health authority in England and Wales, which would be able to carry out functions under the NHS Act 1977; and
- ii. subsequently, when legislative time allows, as a non-departmental public body, which would be able to carry out a wider range of functions.

4. The role of the Health Protection Agency in Scotland was one of the issues included in *Health Protection in Scotland: A Consultation Paper*, issued by the Scottish Executive (November 2002). The consultation was carried out as part of the Executive's drive to strengthen health protection functions in Scotland to ensure that we have in place arrangements which are capable of effectively monitoring, addressing and responding to a

widening spectrum of environmental, biological, chemical and infectious threats. In particular, views were sought on six options for structural change, which took into account the establishment of the Health Protection Agency in England and Wales. The option most favoured by respondents envisaged the Health Protection Agency assuming responsibility in Scotland for the functions at present discharged by the National Radiological Protection Board, for the services provided hitherto by the National Focus for Chemical Incidents, and for the commissioning of an integrated UK poisons service, which will include the Scottish Poisons Information Bureau, one of six centres of the National Poisons Information Service in the UK. The rationale for this approach is that delivering these specialised functions on this basis will help ensure common standards of efficiency and performance across the UK and facilitate the sharing of expertise and concerted working.

5. In the light of the consultation, , the Minister for Health and Community Care announced on 29th October 2003 that the Health Protection Agency should take responsibility for the functions which the National Radiological Protection Board currently carries out for the Scottish Executive, and should also be able to provide other services for Scotland. The text of that announcement is at Annex 1, for ease of reference.

Content of the Bill

6. The Health Protection Agency Bill has 12 clauses and 4 Schedules, which establish the Health Protection Agency as a UK-wide non-departmental public body, specify its functions, and set out lines of accountability to Ministers of the UK Government and devolved administrations.

Commentary on Clauses related to Scotland

Clause 1: Health Protection Agency

7. Clause 1 establishes the Agency as a body corporate and introduces Schedule 1 which sets out operational and structural details. These are relevant to Scottish interests as follows:

7.1 Paragraph 1(2) - requires the Secretary of State for Health to consult the Scottish Ministers about the appointment of a chairman of the Agency.

7.2 Paragraphs 1(3) - gives Scottish Ministers powers to appoint a non-executive member to the Board of the Health Protection Agency.

7.3 Paragraphs 1(7), 3(2), 8(4), 10(2), 11(6), 13(3) –requires the Secretary of State for Health to consult Scottish Ministers about respectively, the number of executive and non-executive members, conditions to be satisfied before members are appointed, the terms on which the chairman and non-executive members are to be appointed; the circumstances in which a person may be disqualified for being chairman or a non-executive member; the arrangements for the appointment of committees or sub-committees; and the regulation of the Agency's proceedings.

7.4 Paragraph 6 –deems the Agency to be a cross-border public authority for the purposes of section 23(2) (b) and 70(6) of the Scotland Act 1998 .

7.5 Paragraph 19(3) – is concerned with arrangements for reimbursement by the Scottish Ministers to the Agency in respect of services which they receive.

7.6 Paragraph 20(2) enables the Scottish Ministers to make loans to the Agency.

7.7 Paragraphs 22, 24 and 25 – are concerned with accounts and annual reports. Scottish Ministers must lay before the Scottish Parliament a copy of accounts and reports sent to them.

7.8 Paragraph 30 – makes clear that the term “devolved authority” includes the Scottish Ministers.

Clause 2: Health functions

8. Clause 2 subsection (1) gives the Health Protection Agency certain functions in the area of health protection. These include the protection of the community against infectious disease and other dangers to health, the prevention of the spread of infectious disease and the provision of assistance to others exercising similar functions. These are broadly equivalent to the functions currently exercised by the Health Protection Agency Special Health Authority.

9. Subsection (6) exempts from the application of clause 2(1) functions of the Scottish Ministers. Thus the Agency’s remit, aside from radiation protection as prescribed in Clause 3, does not extend to Scotland save in relation to reserved matters. However, the Scottish Ministers will be able to confer and remove devolved functions in the health protection field on the Agency, subject to specific procedures set out in subsections (7), (8) and (9). Essentially, following the agreement of the Secretary of State for Health, a negative resolution order specifying the function(s) to be conferred, would be laid before the Scottish Parliament. As foreshadowed in the announcement to the Parliament on 29 October, it is the Scottish Executive’s intention, using the procedures in the Bill, to confer on the Agency the functions set out in paragraph 4 in the poisons and chemicals fields. Radiation protection is already covered in the Bill, as described in the following paragraph. The Scottish Ministers may also remove a devolved function from the Agency, following consultation with the Secretary of State for Health and by order laid before the Scottish Parliament.

Clause 3: Radiation protection functions

10. Clause 3 subsection (1) gives the Agency certain functions in the area of radiation protection. These are similar to those currently given to the National Radiological Protection Board by the Radiological Protection Act 1970 (c.46), although they go wider than those functions in that the Health Protection Agency will also be able to undertake activities in relation to ultrasound.

11. Subsection (2) allows the appropriate authority (as defined in clause 6) to direct the Agency to take responsibility for functions which are carried out at the date of commencement by the National Radiological Protection Board. The National Radiological Protection Board currently provides a secretariat for one advisory non-departmental public body (the Committee on Medical Aspects of Radiation in the Environment) and a support unit for another (the Administration of Radioactive Substances Advisory Committee). This power will make it possible to direct the Agency to take over those functions. The power is subject to prior consultation as provided for by subsection (6).

12. Subsection (3) provides a power for the appropriate authority (as defined in clause 6) to direct the Agency to exercise additional radiation protection functions. The power is similar to that currently provided by section 1(6)(a) and (c) of the Radiological Protection Act

1970, under which the Secretary of State for Health is able to confer additional radiation protection functions on the National Radiological Protection Board. (Again, ultrasound is not excluded from the matters in which the Health Protection Agency may undertake a role). The new power is a direction-making power, whereas the power in the 1970 Act is exercisable by order subject to the affirmative resolution procedure. Subsection (6) qualifies the power in subsection (3) by making it subject to prior consultation.

13. Subsection (4) provides a power, similar to that currently provided by section 1(7A) of the Radiological Protection Act 1970. Under the old power, Health Ministers (as defined in the 1970 Act; in effect, the Secretary of State for Health, the Scottish Ministers, the National Assembly for Wales and the Department of Health, Social Services and Public Safety in Northern Ireland) may direct the National Radiological Protection Board to enter into an agreement with the Health and Safety Commission for the Board to carry out on behalf of the Commission certain of the Commission's functions. The new power applies also in respect of an agreement with the Health and Safety Executive for Northern Ireland. However, by subsection (9) the Scottish Ministers do not have the power, because the activities of the Health and Safety Commission bear substantively on reserved matters.

Clause 4: Functions: supplementary

14. Clause 4 subsections (1)-(5) set out various powers, including powers to work with other bodies, and to make charges, which the Agency may use in the exercise of its functions. Clause 4(5) deems the Agency to be a health body for the purposes of statutes applying in England and Wales which provide powers for local authorities, NHS bodies and health bodies to make arrangements with each other for the provision of services and to make payments for such services. It is necessary to make equivalent provision for Scotland and it is intended that amendments will be tabled as the Bill proceeds at Westminster.

15. Subsection (7) gives the appropriate authority (defined in clause 6) the power to direct the Agency about how it exercises its functions, after consultation. Scottish Ministers are to have the power to direct the Agency as to the exercise of its functions. Scottish Ministers are an "appropriate authority" for the purposes of the provision. In terms of clause 6(4) they will have the power to direct only insofar as the Agency is carrying out functions in relation to a devolved matter.

16. Subsection (9) ensures that a disclosure of confidential information to or by the Agency is lawful where the Agency is carrying out a function pursuant to an arrangement prescribed in regulations under section 31 of the Health Act 1999 (c.8) (arrangements between NHS bodies and local authorities), or where the Agency acts in accordance with its duty of co-operation in clause 5. It is necessary to make equivalent provision for Scotland and it is intended that amendments will be tabled as the Bill proceeds at Westminster.

Clause 5: Co-operation

17. Clause 5 puts the Agency and other bodies which exercise functions relating to the Agency's functions under a mutual duty of co-operation.

Clause 6: Appropriate authority

18. Clause 6 identifies the authorities which have the power to direct the Agency, and the functions in relation to which they have that power. Subsection (4) specifies that in relation to any function which is exercisable within devolved competence (within the meaning of the Scotland Act 1998 (c. 46)), the appropriate authority is the Scottish Ministers.

Clause 7: Publication of information

19. This clause is concerned with publication of information by the Agency and certain restrictions on publication of information, and gives the Agency a power to publish its advice and information. By dint of subsection (3)(a) it extends, as appropriate, to provisions or instruments made under an Act of the Scottish Parliament.

Clause 8: Transfer of property and staff etc

20. Clause 8 subsections (1) to (4) enable the Secretary of State to make one or more schemes for transferring property, rights and liabilities from the Agency's predecessor bodies to the Agency, subject to prior consultation with the relevant devolved administrations in each case. Subsections (5) and (6) enable the appropriate authority (defined in clause 6) to make such schemes in respect of non-statutory bodies. Clause 6 (4) specifies that in relation to any function which is exercisable within devolved competence (within the meaning of the Scotland Act 1998 (c. 46)), the appropriate authority is the Scottish Ministers. However, amendment may be needed to Clause 8 to clarify that the Scottish Minister have the necessary powers to make schemes for the transfer of property etc to and from the Agency. It is intended that amendments will be tabled as the Bill proceeds at Westminster.

Clause 10: Amendments

21. Clause 10 introduces Schedules 3 and 4 which contain amendments to and repeals of existing legislation. Schedule 3 includes the following provisions relevant to Scottish interests:

21.1 Paragraph 2 – the Radiological Protection Act 1970 (c.46) shall cease to have effect.

21.2 Paragraph 9 - the National Health Service (Scotland) Act 1978 (c.29) will be amended to allow NHS Boards the capacity to enter into contractual arrangements with the Agency.

21.3 Paragraph 17(4) – amends section 133 of the Nationality, Immigration and Asylum Act 2002 to allow medical inspectors to disclose certain information to the Agency.

21.4 Paragraph 18 - the Scottish Public Services Ombudsman Act 2002 will be amended to include the Agency within the ambit of the Ombudsman.

Clause 11: Commencement

22. Clause 11 (1) to (4) provides for the Bill to be brought into effect by order made by statutory instrument, subject to prior consultation with Scottish Ministers.

23. Subsections (5) – (7) provide order-making powers for the appropriate authority, including the Scottish Ministers, to make provision in consequence of the coming into effect of the Act, including amending, repealing, or revoking any enactment passed or made before the passing of the Act. These provisions are made because it is possible that not all the necessary supplementary and consequential legislative amendments will have become apparent until after the Bill is in force. The affirmative procedure chosen for an amendment to primary legislation within the legislative competence of the Scottish Parliament will enable the Parliament to debate any such amendment.

24. The predecessor bodies to the Agency are named in a substantial body of secondary legislation. It will be more efficient to make any necessary consequential amendments to secondary legislation by means of a power in this Act once it is in force. The negative resolution procedures chosen are appropriate for this purpose.

Conclusion

25. The Executive believes that it is appropriate for Westminster to legislate for Scotland on aspects of the Bill described above, in order to ensure that there is provision, subject to the will of the Scottish Parliament, to confer certain functions on the Health Protection Agency, which are best delivered on a GB or UK basis, thus helping to ensure common standards of efficiency and performance and facilitating the sharing of expertise and concerted working. Specifically, the Bill so provides in relation to radiation protection; and, subject to the passage of the Bill, it is proposed that certain functions in the poisons and chemicals fields, as described above, should be given to the Agency.

**Scottish Executive
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