December 2018

Dear Lewis,

THE EUROPEAN QUALIFICATIONS (HEALTH AND SOCIAL CARE PROFESSIONS) (AMENDMENT ETC.) (EU Exit) REGULATIONS 2018
EU EXIT LEGISLATION – PROTOCOL WITH SCOTTISH PARLIAMENT

I am writing to you under the agreed protocol for seeking the approval of the Scottish Parliament to the exercise of powers by UK Ministers under the European Union (Withdrawal) Act 2018, in relation to proposals within the legislative competence of the Scottish Parliament.

As you know, the Cabinet Secretary for Government Business and Constitutional Relations, Michael Russell MSP, wrote to the Conveners of the Finance & Constitution and Delegated Powers and Legislative Reform Committees on 11 September setting out the Scottish Government’s views on EU withdrawal. That letter also said that we must respond to the UK Government’s preparations for a No-Deal scenario as best we can, despite the inevitable widespread damage and disruption that would cause. It is our unwelcome responsibility to ensure that devolved law continues to function on and after EU withdrawal.

I attach a notification setting out the details of a UK Statutory Instrument (SI) that the UK Government proposes to make, as well as the reasons why I am content for matters within devolved competence to be included in this legislation.

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This SI provides continuity of powers, contingent to withdrawal from the EU without an agreement, for the UK “competent authorities” (the statutory regulators) to recognise non-UK professional qualifications currently within the scope of 2005/36/EC - the Directive on recognition of professional qualifications, for the purposes of professional registration in health and social care professions regulated in law. The provisions of the SI maintain the critical functions of the current system, which provides people who wish to work in the UK with the means by which to have their non-UK qualifications officially recognised.

The policy rationale for the proposed approach is primarily to:

- provide certainty for members of regulated health and social care professions who are currently practising in the UK with non-UK qualifications;
- maintain the legal recognition powers of UK statutory regulators; and
- give clarity on the treatment of registration applications underway on Exit day.

The statutory regulators have been involved in the drafting of the Regulations and concerns around the implications of failure to put in place mitigating measures are shared by professionals and employers in both private and independent health and care sectors across the UK. In preparing for a No-deal scenario, I am therefore confident that this provides the most effective means of dealing with cross-competence elements in the regulation of health and social care professionals.

Please note that the UK Government intends to lay these regulations in the week beginning 14 January 2019. I realise that I am therefore asking for approval within a shorter timescale than the 28 day period outlined in our protocol, and would be grateful for the committee’s forbearance in this matter.

I am copying this letter to the Convener of the Delegated Powers and Law Reform Committee.

Please note that a notification on The Recognition of Professional Qualifications (Amendment etc.) (EU Exit) Regulations 2018 is being sent to the Convener of the Economy, Energy and Fair Work Committee.

I look forward to hearing from you.

Kind regards,

JEANE FREEMAN

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NOTIFICATION TO THE SCOTTISH PARLIAMENT

The European Qualifications (Health and Social Care Professions) (Amendment etc.) (EU Exit) Regulations 2018 ("the Regulations")

A brief explanation of law that the proposals amend

The Regulations amend various enactments concerned with the regulation of health and social care professions. They reverse or modify the changes made by the European Qualifications (Health and Social Professions) Regulations of 2007 and 2016 which implemented, in part, Directive 2005/36/EC (as amended) on the recognition of professional qualifications ("the Directive").

The Directive sets out a reciprocal framework of rules for recognition of professional qualifications. This enables European Economic Area (EEA) and Swiss nationals to have their professional qualifications recognised and gain access to the regulated profession in which they are qualified in another EEA State to work on a permanent or temporary basis.

There are two different systems for recognising qualifications:

- the automatic system – which requires the relevant regulators to have a framework in place for dealing with applications. Health Professions currently in the automatic system have harmonised qualification standards and these are listed in Annex V of the Directive. These professions are: doctors, dentists, general care nurses, midwives and pharmacists (the "sectoral professions"). Holding an Annex V qualification obligates competent authorities to recognise those professionals on an automatic basis with no additional barriers to registration; and

- the general system – all other professions not listed in Annex V, including social workers and regulated healthcare professions who are not in a sectoral profession, are covered under the general system and their applications are considered on a case by case basis. In some cases a member of a sectoral profession might have a qualification recognised under the general system (for example a doctor’s postgraduate specialism outside of Annex V).

Following the UK’s exit from the EU, the Directive and Treaty rights of free movement of workers, freedom of establishment and the freedom to provide services will no longer apply to the UK. Therefore, health and social care legislation (as amended by the 2007 and 2016 Regulations) will not operate effectively after exit day. Some areas of the legislation will be inoperable as a consequence of exiting the EU and other areas will no longer be appropriate to retain, given that they are based on a reciprocal relationship with the EU which the UK will not be part of.
Summary of the proposals and how these correct deficiencies

The Regulations amend legislation which regulates medical practitioners, pharmacists and pharmacy technicians, dental and dental care professionals, nurses, midwives, and nursing associates, opticians, osteopaths, chiropractors, health professionals and social workers. They address failures of the domestic legislation to operate effectively and other deficiencies arising from the UK’s withdrawal from the EU.

These proposals are to retain a functional system for recognition of health and social care professional qualifications, so that individuals arriving in the UK with EEA/Swiss qualifications after exit day continue to have the means by which to seek recognition of their qualifications. The key points are:


- A review of the continued recognition of Annex V qualifications will be conducted two years after these regulations come into force.

- EEA qualifications listed in Annex V which were granted before the cut-off dates given in Annex V (each qualification has its own cut-off date) will not be automatically comparable. Similarly, other EEA qualifications (which are not listed in Annex V) will not automatically be treated as comparable. In either case, the EEA qualifications will be judged against the UK qualifications through the relevant regulator’s international systems. If a qualification is deemed to be comparable to the UK standards, applicants will be registered without additional testing.

- UK health regulatory bodies will have the discretion to decide how to treat non-comparable EEA qualifications.

- Regulations will no longer include obligations on regulators to abide by the Directive training standards when setting standards for UK qualifications. UK regulators may use future Directives as guidance when setting standards in the UK or may choose to pursue higher or lower standards subject to appropriate consultation and, where necessary, legislation.

- Social workers will no longer fall under the “general systems” process (as implemented in domestic law by the European Union (Recognition of Professional Qualifications) Regulations 2015), rather the Scottish Social Services Council will have the discretion to decide how to treat non-comparable EEA/Swiss qualifications in line with other non-Scottish qualifications.
The Regulations also contain transitional and saving provisions which protect recognition decisions already made, allow applications/appeals which have been made before exit day to be concluded under the same rules as far as possible, and allow individuals practising under temporary and occasional status or under the European Professional Card to continue to do so until such status expires.

Scottish Government categorisation of significance of proposals

The Scottish Government considers the proposals to fall into Category A on the basis that they (a) are minor and technical in detail, (b) ensure continuity of law, and (c) do not seek to enact new policies.

The Directive facilitates Treaty rights of free movement of workers, freedom of establishment and the freedom to provide services, where people providing services in the UK do so from another country (in this case the EEA and Switzerland) and must be able to demonstrate that they are suitably professionally qualified. As an EU member, services in the UK are currently subject to the Provision of Services Regulations (2009).

At its meeting on 20 November 2018, the Economy, Energy and Fair Work Committee considered the (category A) proposal by the Scottish Government to consent to the UK Government legislating using the powers under the European Union (Withdrawal) Act 2018 for the Provision of Services (Amendment etc.) (EU Exit) Regulations 2018. The Committee agreed that it was content with the Scottish Ministers' proposal.

Impact on devolved areas

Health professional groups first made subject to statutory regulation after devolution are within the competence of the Scottish Parliament by default. These professions and their UK regulators (or competent authorities, in terms of the Directive) include:

- operating department practitioners and practitioner psychologists - the Health and Care Professions Council;
- dental nurses, dental technicians, clinical dental technicians and orthodontic therapists - the General Dental Council; and
- pharmacy technicians - the General Pharmaceutical Council

Ordinarily, changes to UK legislation which affects these groups would be laid by agreement in both Parliaments simultaneously, commonly through an Order in Council.

The proposals also affect the regulation of social workers in Scotland, which is a devolved matter. As social workers will be removed from the “general systems” recognition process, the Regulations provide for applicants with EEA/Swiss qualifications to be treated in the same way as any other non-Scottish qualified applicant under the Regulation of Care (Scotland) Act 2001.
Summary of stakeholder engagement/consultation

There has been no formal public consultation on this SI as its provisions make technical changes to ensure continuity of law to reflect the UK withdrawal from the EU.

However, the Scottish Government has worked closely with the Scottish Social Services Council (SSSC), to ensure that the proposals concerning social workers in Scotland will work effectively in our devolved regulatory landscape. The SSSC is content with the approach being taken.

A note of other impact assessments, (if available)

In order to legislate, the UK Government was required to undertake a de minimis impact assessment (a full impact assessment was not necessary as this legislation fell below the £5m direct cost to business threshold). The impact assessment considered the direct impact that the revised regulations would have on those wishing to have their professional qualifications recognised. In addition, the impact on businesses, regulators, government and taxpayers was also considered. The outcome was that the impact would be very small.

Summary of reasons for Scottish Ministers’ proposing to consent to UK Ministers legislation

As implementation of the Directive was taken forward on a UK-wide basis in a UK SI, it is appropriate for no-deal EU exit contingencies to be made on the same basis. The policy interests of the UK and Scottish Governments are aligned in respect of these proposals and concerns in relation to continued recognition of qualifications are common to employers in the public and independent sectors across the four countries of the UK. We therefore believe it is a pragmatic and consistent approach for the UK Government to legislate on our behalf on this occasion.

Intended laying date (if known) of instruments likely to arise

The Department for Health and Social Care is the lead UK department for this SI which is due to be laid in draft (affirmative procedure) in the week beginning 14 January 2019.

If the Scottish Parliament does not have 28 days to scrutinise Scottish Minister’s proposal to consent, why not?

The timetable does not allow for the full 28 days scrutiny period and it would be very helpful if the Scottish Parliament could consider this notification within this shorter timescale.
Information about any time dependency associated with the proposal

The UK Government also plans to lay The Recognition of Professional Qualifications (Amendment etc.) (EU Exit) Regulations 2018. This closely-related Statutory Instrument amends the “general systems” recognition process set out in the European Union (Recognition of Professional Qualifications) Regulations 2015 which, subject to certain saving and transitional provisions, will no longer apply to social workers and health care workers, which now fall within the scope of the proposed European Qualifications (Health and Social Care Professions) (Amendment etc.) (EU Exit) Regulations 2018.

Are there any broader governance issues in relation to this proposal, and how will these be regulated and monitored post-withdrawal?

Provisions will be subject to further four-country oversight following exit day, including a legislative requirement for a review two years from that date.

Any significant financial implications?

Financial impacts beyond those already considered by the Committee under the Services Directive would largely be in relation to increased recruitment lead times for employers, as well as potentially increased costs for regulators with a knock-on impact on applicants, were these amendments to not be made.