

# Health, Social Care and Sport Committee

## 7th Meeting, 2021 (Session 6), Tuesday, 8 February 2022

### Supplementary Legislative Consent Memorandums – Health and Care Bill

#### Introduction

1. The [Health and Care Bill](#) is a UK Government Bill introduced in the House of Commons on 6 July 2021.
2. The UK Parliament will not normally legislate on matters devolved to the Scottish Parliament without its consent; this is often referred to as the Sewel Convention. [Chapter 9B of the Parliament's Standing Orders](#) sets out the rules and procedures for seeking legislative consent under the convention.
3. The Health and Care Bill falls under Rule 9B.1.1 of the Standing Orders, as it will impact on areas devolved to the Scottish Parliament and on the executive competence of the Scottish Ministers.
4. For any views of the Parliament to be considered at Westminster, it must conclude its considerations before the last amending stage (report stage in the second house). At the time of writing, this is expected on 21 February.
5. The Scottish Government lodged the original [Legislative Consent Memorandum \(LCM\)](#) in relation to the Health and Care Bill on 31 August 2021. 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 stated:

*“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](#).
8. Humza Yousaf, Cabinet Secretary for Health and Social Care and Scottish Government officials will give evidence on both supplementary LCMs at today's meeting.

# Legislative Consent Process

## Legislative Consent Memorandum

9. When a Bill that will impact on areas devolved to the Scottish Parliament goes through the UK Parliament, the Scottish Government will normally prepare a Legislative Consent Memorandum (LCM). This explains how the Bill will affect Scotland and why, for example the Bill may:
  - change the law on a “devolved matter” (an area of policy which the UK Parliament has devolved to the Scottish Parliament); or
  - alter the “legislative competence” of the Scottish Parliament (its powers to make laws) or the “executive competence” of Scottish Ministers (their powers to govern).
10. The Health, Social Care and Sport Committee has been designated by the Parliamentary Bureau as lead committee to consider the Health and Care Bill supplementary LCMs and report its views to the Parliament.

## Supplementary Legislative Consent Motion

11. As with the original LCM, if the Scottish Government recommends in its supplementary LCMs that consent be given, it will normally be decided by a motion taken in the Chamber known as a Supplementary Legislative Consent Motion. This motion is usually drafted by the Scottish Government. If, however, the Scottish Government does not recommend consent be given, a debate on the supplementary LCMs may be scheduled in the Chamber.
12. In this case, the Scottish Government has noted in the first supplementary LCM, lodged on 9 December 2021, that it can now recommend consent to clauses 87, 136, 142 and 146 of the Bill, as recently published, and recommend consent to clauses 126-129 as tabled on 17 November 2021.
13. The second supplementary LCM, lodged on 27 January 2022, advises that in addition to the provisions in the first supplementary LCM, the Scottish Government can now recommend consent to clauses 88-94 of the Bill (as currently drafted), in light of amendments recently published, and recommend 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.
14. Further information on the Scottish Government’s reasons for the position outlined above is detailed below and in the LCMs themselves.

## Health and Care Bill

15. The [Explanatory Notes](#) on the Bill state that the “purpose of the Health and Care 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”.
16. The provisions in the Bill that apply to Scotland and where the UK Government has requested legislative consent relate to:
  - The Secretary of State’s power to transfer or delegate functions
  - International healthcare arrangements
  - Food information for consumers
  - Power to amend retained EU law
  - Professional regulation
  - Medicines Information Systems.

## Scrutiny by other Scottish Parliament Committees

### Delegated Powers and Law Reform Committee

17. The Delegated Powers and Law Reform Committee (DPLRC) considered both supplementary LCMs at its meeting on 1 February 2022 and published its [report](#) on 3 February 2022.
18. The DPLRC noted that the power in section 60 is exercisable by Order in Council; Orders in Council under section 60 which make provision within the legislative competence of the Scottish Parliament require to be laid for approval in the Scottish Parliament as well as in the UK Parliament. The Committee had not previously reported on this power in relation to the first LCM.
19. The DPLRC notes it is content with the power conferred on Her Majesty, given that Orders which make provision within the legislative competence of the Scottish Parliament will be laid before the Scottish Parliament, and will be subject to the affirmative procedure.
20. In relation to clause 136, the DPLRC notes 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 within devolved competence) partially addresses the concern the Committee raised when it considered the first LCM. Where the power is exercised by the Scottish Ministers, the regulations will be laid in the Scottish Parliament and will be subject to full scrutiny in the usual way.
21. However, it additionally notes that notwithstanding the amendment, the UK Government retains the power to make regulations on a UK-wide basis, and therefore if the Secretary of State should exercise the power to make regulations

within devolved competence, those 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.

22. The DPLRC therefore agreed to ask the Scottish Government 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 s.2 of the Healthcare (European Economic Area and Switzerland Arrangements) Act 2019, as it currently applies, is listed in Annex A to that Protocol.
23. In relation to Clause 87, the DPLRC highlights it has previously reported on this power and expressed its view that the power should be subject to a consent mechanism. The consultation requirement does not provide the Scottish Parliament with an opportunity to scrutinise the exercise of this power within devolved competence.
24. The DPLRC made the following points in relation to the delegated powers in clause 87:
  - The Scottish Parliament should have the opportunity to effectively scrutinise the exercise of all legislative powers within devolved competence.
  - Where this power is exercised by the Secretary of State in devolved areas, there would be no formal means by which the Scottish Parliament could scrutinise such regulations or be notified that they had been laid before the UK Parliament;
  - The power conferred on the Secretary of State should be subject to a requirement for the Scottish Ministers' consent when exercised within devolved competence;
  - As a minimum, the power when exercised by Secretary of State in devolved areas should be subject to the process set out in the SI Protocol.
25. Following the evidence session, the DPLRC wrote 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.
26. A response from the Cabinet Secretary has been requested by 7 February 2022.

## Scottish Government Legislative Consent Memorandums

### Supplementary LCM lodged 9 December 2021

27. A [supplementary LCM](#) was lodged by Humza Yousaf MSP, Cabinet Secretary for Health and Social Care, on 9 December 2021.

28. The LCM states—

“The Scottish Government previously withheld consent to the whole Bill, pending suitable amendments by the UK Government. The Scottish Government can now recommend consent to clauses 87, 136, 142 and 146 of the Bill, as recently published, and recommend consent to clauses 126-129 as tabled on 17 November 2021.”

29. It goes on to explain:

“It is the view of the Scottish Government that a further supplementary LCM may be required for Part 3 of the Bill, clauses 88-94 (Secretary of State’s Power to Transfer or Delegate Functions), as found in the version published on 24 November 2021, when, and if, suitable progress has been made.”

30. The LCM further states:

“The Scottish Government, as detailed in the original LCM, requested two amendments to the Bill in relation to these clauses. Discussions with the UK Government are still ongoing and, subject to securing an acceptable outcome, the Scottish Government will bring forward a supplementary LCM upon the tabling of agreed amendments”.

### Second supplementary LCM lodged 27 January 2022

31. A [second supplementary LCM](#) was lodged by Humza Yousaf MSP, Cabinet Secretary for Health and Social Care, on 27 January 2022.

32. The LCM states—

“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. Although this was not recognised by the UK Government, the Scottish Government maintains this assessment.”

33. It goes on to note that in addition to the previously noted provisions relevant to the Scottish Parliament and Scottish Ministers, the UK Government has:

“... tabled amendments to introduce ‘Hymenoplasty offences: Scotland’ and ‘Information about payments etc to persons in the health care sector’ as new clauses to the Bill, which also require legislative consent.”

34. The LCM further states:

“The Scottish Government previously withheld consent to the whole Bill, pending suitable amendments by the UK Government. In addition to the provisions in supplementary LCM-S6-5, the Scottish Government can now recommend consent to clauses 88-94 of the Bill (as currently drafted), in light of amendments recently published, and recommend 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.”.

35. 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.

36. The LCM notes the Scottish Government remains of the view that the ‘Advertising of less healthy food and drink’ clause (clause 125) engages the legislative consent process. It states, “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”.

37. 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.”

## Decisions

**38. After considering today’s evidence from the Cabinet Secretary, Members are invited to consider what views to include in the Committee report.**

**39. Members are invited to agree to consider a draft report on the supplementary LCMs by correspondence.**

**Clerks to the Committee**

**3 February 2022**