

ECONOMY AND FAIR WORK COMMITTEE

**6th Meeting, 2021 (Session 6), Wednesday 29
September 2021**

Legislative Consent Memorandum – Professional Qualifications Bill

Note by the Clerk

Introduction

1. The [Professional Qualifications Bill](#) is a UK Government Bill introduced in the House of Lords on 12 May 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 Professional Qualifications 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). However, best practice is for the Committee to report ahead of the last amending stage in the first house where possible. At the time of writing this has not yet been scheduled; it may however begin by mid-October.
5. Ivan McKee, Minister for Business, Trade, Tourism and Enterprise and Scottish Government officials will attend the meeting to give evidence on the LCM.

Legislative Consent Process

Legislative Consent Memorandum

6. 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).

7. The Economy and Fair Work Committee has been designated by the Parliamentary Bureau as lead committee to consider the Professional Qualifications Bill LCM and report its views to the Parliament.

8. The Scottish Government’s Legislative Consent Memorandum can be found at Annexe A.

Legislative Consent Motion

9. If the Scottish Government recommends in its LCM that consent be given, it will normally be decided by a motion taken in the Chamber known as a 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 LCM may be scheduled in the Chamber.

10. In this case, the Scottish Government has noted in its Legislative Consent Memorandum that it does not intend to lodge a Legislative Consent Motion for the Bill, recommending that legislative consent should not be given on this occasion. Further information on the Scottish Government’s reasons for this is detailed below and in the LCM itself.

11. The Scottish Government has noted in its LCM that, if during the remaining stages of the Bill at Westminster, appropriate amendments are provided which address the concerns raised, a supplementary LCM with a final position on consent may be lodged. This would come back to the Committee for further consideration.

Professional Qualifications Bill

12. The Bill is intended to revoke and replace the interim system for the recognition of professional qualifications that derives from the UK’s membership of the EU. The Bill creates a framework to enable the recognition of professional qualifications from overseas professions in the UK, or part of the UK, to meet the needs of the professions.

13. The main provisions of the Bill are as follows:

- a) End the interim system for professional qualifications that derives from the UK’s membership of the EU.
- b) Create a framework for the recognition of professional qualifications and experience from overseas by professions in the UK, or a part of the UK, to meet the needs and demands for the services provided by those professions.
- c) Enable Government to implement international agreements or parts of international agreements that the UK strikes with partners so far as they relate to the recognition of professional qualifications.

- d) Enable Government to provide regulators with a consistent set of powers to enter into agreements with regulators overseas to recognise professional qualifications.
- e) Maintain a designated 'Assistance Centre' with which regulators must cooperate, to provide advice and guidance to the public.
- f) Require regulators in the UK to provide certain information to overseas regulators where an individual is or has been entitled to practise that profession in the UK, or a part of the UK, and is seeking entitlement to practise overseas.
- g) Require regulators of professions in all parts of the UK to publish information on the entry and practice requirements of their profession.
- h) Require regulators in the UK to, where requested, provide certain information to counterpart regulators in other parts of the UK.
- i) Amend the Architects Act 1997 to allow a new recognition system for architects, alongside adjustments to the administration of the Architects Registration Board to support efficiency.

Scrutiny by other Scottish Parliament Committees

Delegated Powers and Law Reform Committee

14. The Delegated Powers and Law Reform Committee (DPLRC) considered the LCM on 21 September 2021 and [published a report](#) on 23 September 2021 and noting in respect of the Bill that—

“there is no statutory requirement for the UK Government to obtain the Scottish Ministers’ consent when exercising the power within devolved competence, although the UK Government has stated in the UK DPM that UK Ministers will not normally use the powers conferred by the Bill in devolved areas without the agreement of the Scottish Ministers”.

15. In its report, the DPLRC maintains the approach adopted by the Session 5 DPLRC in relation to delegated powers conferred solely on the Secretary of State/Lord Chancellor which may be exercisable within devolved competence. It makes the following points in relation to the delegated power in clause 1 of the Bill:

- The Scottish Parliament should have the opportunity to effectively scrutinise the exercise of all legislative powers within devolved competence.
- Where the powers in the Bill are exercised by the Secretary of State/Lord Chancellor 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.
- That powers conferred on Secretary of State/Lord Chancellor, exercisable within devolved competence, should be subject to a requirement for the Scottish Ministers’ consent.
- As a minimum, it is appropriate that all powers under the Bill exercisable by Secretary of State/Lord Chancellor in devolved areas are subject to the process set out in the SI Protocol agreed between the Scottish Parliament and the Scottish Government.

Health and Sport Committee

16. The Health and Sport Committee also considered the LCM on 21 September 2021 and [wrote to the Economy and Fair Work Committee](#) with its findings. The Committee expressed concern about the UK Parliament legislating in devolved areas, without the prior consent of the Scottish Government, noting that—

“The Committee has heard recent evidence of the significant workforce planning and recruitment challenges currently facing Scotland’s health and social care workforce as it seeks to recover from the impact of the COVID-19 pandemic. In this context, the Committee would have serious concerns if the exercise of the regulation-making powers conferred on UK Ministers by the Professional Qualifications Bill were, even unintentionally, to contradict or interfere with the Scottish Government’s strategy for tackling these challenges in future. The Committee envisages that there is a risk of this happening by virtue of UK Ministers exercising the regulation making powers conferred by the Bill in areas of devolved competence without prior consultation with, and consent from, the Scottish Government.”

Scottish Government Legislative Consent Memorandum

17. A legislative consent memorandum was lodged by Kate Forbes MSP, Cabinet Secretary for the Finance and the Economy, supported by Ivan McKee MSP, Minister for Business, Trade, Tourism and Enterprise, on 12 July 2021.

18. The LCM states—

“At this time, the Scottish Government cannot recommend to the Scottish Parliament that it gives its consent to the Bill”

19. It then continues—

“while [as set out above] many aspects of the Bill are not contentious, the Scottish Government is concerned about the exercise of concurrent powers under the Bill conferred by the definition of appropriate national authority. In particular, the lack of a legislative requirement for UK Ministers to obtain consent from the Scottish Ministers when exercising the powers conferred by the Bill in devolved areas alters the executive competence of the Scottish Ministers”

.... The Scottish Government’s position, which has been explained to the UK Government, is that if satisfactory amendments should be made to the Bill to respect the devolution settlement, the Scottish Government may be able to recommend that the Scottish Parliament consents to the Bill. If during the remaining stages of the Bill, appropriate amendments are provided which address concerns, a supplementary memorandum with a final position on consent may be lodged”

20. As the Scottish Government is not recommending that the Parliament give its consent, a draft legislative consent motion is not included with the LCM.

Decisions

- 21. After considering today's evidence from the Minister, Members are invited to consider what views to include in the Committee report.**
- 22. Members are invited to agree to consider a draft report on the LCM in private at a future meeting.**

LEGISLATIVE CONSENT MEMORANDUM

PROFESSIONAL QUALIFICATIONS BILL

Background

1. This memorandum has been lodged by Kate Forbes, Cabinet Secretary for Finance and the Economy, supported by Ivan McKee MSP, Minister for Business, Trade, Tourism and Enterprise, under Rule 9.B.3.1(a) of the Parliament's standing orders. The Professional Qualifications Bill was introduced in the House of Lords on 12 May 2021. The Bill can be found <https://bills.parliament.uk/bills/2865/publications>.

Content of the Professional Qualifications Bill

2. The UK Government has set out the aims and purpose of the proposed legislation in the Explanatory Notes which accompany the Bill. The Bill is intended to revoke and replace the interim system for the recognition of professional qualifications that derives from the UK's membership of the EU. The Bill creates a framework to enable the recognition of professional qualifications ("RPQ") from overseas professions in the UK or part of the UK to meet the needs of the professions. The main provisions of the Bill are as follows:

- Creating a power for the "appropriate national authority" (for the definition of appropriate authority, please see below) to make regulations requiring regulators to enable RPQ, where certain conditions are met. The Bill also confers a regulation-making power on the appropriate national authority to implement international agreements (or parts of international agreements) on RPQ (State-State Mutual Recognition Agreements "MRAs" for the Mutual Recognition of Professional Qualifications or MRPQ);
- Creating a power for the appropriate national authority to make regulations authorising regulators to enter into regulator recognition agreements with regulators overseas, to enable mutual recognition of professional qualifications;
- Revoking the system for professional qualifications that derives from the UK's membership of the EU and creating a power for the appropriate national authority to make regulations to modify or revoke any retained EU recognition law;
- Imposing duties on regulators to: provide information to overseas regulators where an individual is or has been entitled to practise that profession in the UK; publish information on the entry and practice requirements; and provide certain information to counterpart regulators in other parts of the UK; and
- Providing for the establishment of an 'Assistance Centre' for the UK to assist both individuals, businesses and regulators with matters concerning RPQ. Regulators must cooperate with the Assistance Centre to provide advice and guidance to the public and publish information on the entry and practice requirements for their profession.

3. The appropriate national authority is defined as the Secretary of State (or Lord Chancellor). Where a provision would be within the competence of the Scottish Parliament, the appropriate national authority also includes the Scottish Ministers. In

devolved areas, powers conferred on the appropriate national authority may be exercised either by the Secretary of State (or Lord Chancellor) or the Scottish Ministers. There is corresponding provision for the Welsh Government and Northern Irish Executive where a provision would fall within the devolution settlements of Wales and Northern Ireland. Provisions Which Relate to Scotland

4. All provisions in the Bill relate to Scotland, as MRPQ is critical not just to the trade in services, but also the domestic provision of services even where they are regulated at a UK level. For example, the food and drink industry has been heavily reliant on vets qualified in the EU, who were able to work in Scotland under the terms of the EU's rules on MRPQ. The Bill applies to the regulation of Scottish professions which are reserved and the regulation of professions which are devolved. Reasons for seeking a legislative consent

5. 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 Parliament and alters the executive competence of the Scottish Ministers.

6. The devolution of regulated professions is mixed. Some professions are reserved. The regulation of other professions is within devolved competence. These include the teaching profession, the legal profession and some social care professions. The extent of the Bill is UK wide and the Bill does not make separate provision for devolved and reserved professions and so the Bill applies to all regulated professions active in Scotland whether they are reserved or devolved.

7. The UK Government have requested legislative consent in relation to clauses 1-10 and clause 15. However, the view of the Scottish Government is that clause 13, 14, and 16 are also subject to legislative consent. The remaining clauses extend to Scotland, but we do not consider them to fall under devolved competence.

8. The UK Government has sought consent for the following clauses:

Clause 1 - Power to provide for individuals to be treated as having UK qualifications

9. This clause provides a power for the "appropriate national authority" (defined in clause 14, see below) to provide by regulations which professional qualifications or other experience obtained outside the UK may be recognised within the UK. Regulations may only provide for individuals who satisfy the criteria specified in this clause, namely that they have (i) received overseas qualifications or experience and (ii) that a regulator has determined their qualifications or experience is substantially the same as that required by the regulator or, if not, that they have taken such other experience or qualifications as necessary. This clause is within legislative competence of Scottish Parliament.

Clause 2 - Power conferred by section 1 exercisable only if necessary to meet demand

10. This clause provides that regulations can only be made under clause 1 if the appropriate national authority considers that they are necessary to meet the demand for the services of the profession in question. This would primarily include areas where there are skills shortages in the UK. This provision is within the legislative competence

of Scottish Parliament and this power could be exercised by a devolved administration in response to issues within their jurisdiction.

Clause 3 - Implementation of international recognition agreements

11. This clause provides an implementation power in respect of international agreement (for example a Free Trade Agreement) to which the UK is a party, so far as it relates to the recognition of overseas qualifications or overseas experience for the purposes of determining whether individuals are entitled to practise a profession. This clause could be used to implement a standalone agreement that solely addressed the recognition of professional qualifications, or to implement the professional qualifications aspects of a wider agreement such as a Free Trade Agreement. This provision is within legislative competence of Scottish Parliament.

Clause 4 - Regulator recognition agreements

12. Clause 4 enables the appropriate national authority to make regulations to provide that UK regulators may enter into agreements (known as “regulator recognition agreements”) with foreign regulators. A regulator recognition agreement would allow the regulators to agree the conditions by which they will recognise the professional qualifications that the other regulates in the absence of an inter-governmental agreement. This clause is within legislative competence of Scottish Parliament. Regulator to regulator dialogue is an important aspect of RPQ / MRPQ but not all regulators currently have the power to enter into these agreements.

Clause 5 - Revocation of EU system of recognition of overseas qualifications

13. This clause revokes the European Union (Recognition of Professional Qualifications) Regulations 2015 (S.I. 2015/2059) (“the 2015 Regulations”). The 2015 regulations implement the existing EU scheme for recognising professional qualifications as a member state. The 2015 regulations became retained EU law on IP completion day subject to deficiency fixes to enable them to function outside of EU membership. These deficiency fixes were made by UK Ministers with the consent of the Scottish Ministers and were intended to be an interim measure.

14. This clause confers a power on the appropriate national authority to make consequential amendments to other legislation, including primary legislation and is within the legislative competence of Scottish Parliament and alters the executive competence of the Scottish Ministers.

Clause 6 - Revocation of other retained EU recognition law

15. As well as the 2015 Regulations, a variety of legislation implemented EU law on qualification recognition for specific sectors, such as health and care, and transport. In many cases this legislation was amended to deal with deficiencies at the end of the transition period but continues to provide preferential recognition routes for those with EEA and Swiss qualifications. Some of this legislation is primary legislation, including the Medical Act 1983, the Dentists Act 1984, the Opticians Act 1989, the Osteopaths Act 1993, the Chiropractors Act 1994, Part 3 of the Regulation of Care (Scotland) Act 2001, Part 4 of the Regulation and Inspection of Social Care (Wales) Act 2016. This power will enable the appropriate national authority to revoke or amend retained EU

law that relates to the preferential recognition of overseas qualifications or overseas experience. This provision is within the legislative competence of Scottish Parliament.

Clause 7 – Assistance Centre

16. This clause places an obligation on the Secretary of State to ensure there is a designated person, known as an “assistance centre”, to provide advice and guidance to individuals wishing to gain recognition in and practice in a regulated profession in the UK, as well as for UK qualified professionals who wish to practice abroad. It also places an obligation on regulators of professions in the UK to provide information when requested to assist in providing the functions of the assistance centre, which should not breach data protection legislation.

17. The purpose of such provisions is to facilitate transparency in qualification recognition policy and to provide for an effective advisory service for foreign professionals who want to practise in the UK and UK professionals who want to practise abroad. It continues the provision of this type of service to professionals, as was required under EU rules and is within the legislative competence of Scottish Parliament.

Clause 8 - Duty of regulator to publish information on requirements to practice

18. This clause requires regulators to publish on their website information relating to the qualification and practice requirements of their profession. The clause contains a list of the information that must be published, and the appropriate national authority may provide other information to be specified in secondary legislation in the future. It is within the legislative competence of Scottish Parliament.

Clause 9 - Duty of regulator to provide information to regulator in another part of UK

19. This clause places a duty on professional regulators who operate in one or more of the four UK nations to share relevant information, when requested, with their counterpart in another part of the UK (if such a regulator exists). This provision ensures that regulators in all parts of the UK have access to information that would help them fulfil their obligations. This clause provides a power for the appropriate national authority to make regulations about the information which must be provided. It is within the legislative competence of Scottish Parliament and alters the executive competence of the Scottish Ministers.

Clause 10 - Duty of regulator to provide information to overseas regulator

20. This clause places a duty on professional regulators who operate in one or more of the four UK nations to share relevant information, when requested, with their counterpart overseas. There is a delegated power enabling the appropriate national authority to make such provision as they consider appropriate in relation to this duty, including to limit its effect. It is within the legislative competence of the Scottish Parliament.

Clause 15 – Parliamentary procedure for making regulations

21. This clause sets out the procedure by which the powers conferred by the Bill may be exercised and is within the legislative competence of Scottish Parliament.

22. In addition, the Scottish Government believes clauses 13, 14 and 16 require consent as follows:

Clause 13 – Regulations: General

23. This clause makes general provision about the regulation making powers in the Bill. In particular, clause 13(1) provides that a power under the Bill includes power to make consequential and savings provision (among other things) and the Scottish Government consider it to be within the legislative competence of Scottish Parliament.

Clause 14 - Authority by whom regulations can be made

24. This clause defines the “appropriate national authority” for the purposes of the Bill. The appropriate national authority is conferred delegated legislation making powers under clauses 1, 3, 4, 5, 6, 8(2)(j) and 10(4). The appropriate national authority is defined as the Secretary of State or the Lord Chancellor. However, where regulations would be within the legislative competence of the Scottish Parliament, the appropriate national authority is the Secretary of State (or Lord Chancellor) or the Scottish Ministers concurrently. There is corresponding provision for the Welsh Ministers or Northern Ireland departments in respect of the devolution settlements in Wales and NI respectively.

25. This clause means that any power conferred on the appropriate national authority in devolved areas can be exercised by the UK Ministers. There is no legislative requirement for UK Ministers to seek the consent of the Scottish Ministers when exercising those powers. Where the Secretary of State makes regulations under these powers they would be subject to procedure in the UK Parliament and not scrutiny by the Scottish Parliament.

26. This is similar in effect to other recent UK Bills, including aspects of the UK Internal Market Act, and alters the executive competence of the Scottish Ministers by enabling the Secretary of State to act in devolved areas without having consent to do so. In correspondence, the UK Government has stated that it does not intend to use the concurrent powers in the areas of devolved competence without the agreement of the relevant Devolved Administrations. As such, the Scottish Government has requested that amendments should be made to the Bill to ensure there is a legislative requirement to do so. At this time, given the lack of safeguards, the Scottish Government do not recommend consent to this provision but may be willing to recommend consent should the requested amendments be tabled.

Clause 16 – Interpretation

27. This clause provides the definitions which are used throughout the Bill including the definitions are used in the clauses which it is agreed are within devolved competence and as such the Scottish Government consider it is within the legislative competence of Scottish Parliament.

Consultation

28. The Department for Business, Energy and Industrial Strategy (BEIS) carried out a UK wide consultation exercise to gather evidence on the regulation of professions and experience of individuals and regulators of professional qualification recognition applications in the UK and in other countries¹. The principal findings of this exercise were:

- There is not a ‘one size fits all’ approach to the regulation of professions.
- Over half of respondents regulate by accrediting their profession. Around a third regulate by licensing, and a few by certification. Some respondents regulate by a mixture of approaches.
- Licensed and certified professions typically had the highest qualification requirements in terms of years of study and qualification level. They were less likely to have an access route for professionals who do not have a higher education qualification.
- Responses indicated that more could be done to encourage regulatory bodies to support innovation within their profession and their processes.
- More could be done to increase consistency in the methods used by regulatory bodies to monitor, review, and report their processes and standards.

29. The Law Society of Scotland have also provided a briefing on the Bill as it makes its way through the House of Lords². This sets out the position the Law Society of Scotland have on the Bill, highlighting which clauses they are content with and where they have some issues surrounding the Bill. In particular they would like a commitment to respecting the distinct nature of legal services across the UK and a more prominent reference to the fact that the regulation of a number of professions is devolved. Financial Implications

30. Not consenting to the Bill may have financial implications, should the Scottish Government allocate resources to legislation or policy development, although further consideration and analysis would be needed. Consenting to the Bill would have no financial implications. There may be some additional costs for regulators in complying with the information provision and sharing requirements of the Bill, should these require changes to existing processes. However, as the Bill largely replaces existing requirements, this should be minimal in most cases.

Draft Legislative Consent Motion

31. Under Rule 9B.3.3 (d) of the Parliament’s Standing Orders, if a member of the Scottish Government does not propose to include a draft motion in the Memorandum, the Memorandum must explain why not. Paragraphs 25, 26 and 32 set out the Scottish Government’s reasons for not including a draft motion in this Memorandum for the purposes of that rule.

Conclusion and Scottish Government position

¹ <https://www.gov.uk/government/consultations/recognition-of-professional-qualifications-and-regulation-of-professions-call-for-evidence>

² <https://www.lawscof.org.uk/media/371056/pq-bill-second-reading-briefing.pdf>

32. At this time, the Scottish Government cannot recommend to the Scottish Parliament that it gives its consent to the Bill. The provisions of the Bill are only required because of EU Exit, which was opposed by the people of Scotland and the Scottish Government. While, as set out above, many aspects of the Bill are not contentious, the Scottish Government is concerned about the exercise of concurrent powers under the Bill conferred by the definition of appropriate national authority. In particular, the lack of a legislative requirement for UK Ministers to obtain consent from the Scottish Ministers when exercising the powers conferred by the Bill in devolved areas alters the executive competence of the Scottish Ministers by:

- i. enabling UK Ministers to act in devolved areas without consent; and
- ii. enabling UK ministers to amend or disapply Scottish Ministers' actions legitimately made under the Bill in devolved areas.

33. The Scottish Government's position, which has been explained to the UK Government, is that if satisfactory amendments should be made to the Bill to respect the devolution settlement, the Scottish Government may be able to recommend that the Scottish Parliament consents to the Bill. If during the remaining stages of the Bill, appropriate amendments are provided which address concerns, a supplementary memorandum with a final position on consent may be lodged.

SCOTTISH GOVERNMENT
July 2021