

LEGISLATIVE CONSENT MEMORANDUM

HEALTHCARE (INTERNATIONAL ARRANGEMENTS) BILL

Introduction

1. The Healthcare (International Arrangements) Bill was introduced into the House of Commons on 26 October 2018. The Bill gives the UK Government broad powers to fund and arrange healthcare outside the UK, to give effect to reciprocal healthcare agreements between the UK, and other countries and territories or international organisations such as the European Union (EU). It also makes provision in relation to data processing. The Scottish Government considers that it is a relevant Bill under Rule 9B.1 of the Scottish Parliament's Standing Orders¹. This memorandum has been lodged by Jeane Freeman MSP, Cabinet Secretary for Health and Sport, in accordance with Rule 9B.3.1(a). The Bill and supporting documents can be found at <https://services.parliament.uk/Bills/2017-19/healthcareinternationalarrangements.html>. This memorandum relates to the Bill as introduced.

2. The Bill is necessary to make provisions to allow UK residents to continue to obtain healthcare when they move to or visit the European Economic Area (EEA) or Switzerland, regardless of the outcome of the EU exit negotiations. At this time, EU reciprocal healthcare legislation (that enables EEA and Swiss citizens to receive state healthcare throughout the EEA and Switzerland, paid for by their country of affiliation) is set out in EU Regulation (EC) No 883/2004, as amended, on the co-ordination of Social Security Systems, including healthcare. There is no underpinning UK or Scottish legislation.

3. The Scottish Government believes that the best option for the UK as a whole, and for Scotland, is to remain in the EU. Short of continued EU membership, the Scottish Government believes that membership of the European Single Market and Customs Union would be the least damaging option for the UK and Scotland. However, the Scottish Government accepts the need to make preparations for withdrawing from the EU under other circumstances, and in maintaining access to reciprocal healthcare in the EEA for Scotland's citizens, as far as that can be achieved.

Background

4. At this time EU reciprocal healthcare arrangements enable UK citizens to access healthcare when they live, study, work, or travel in the EEA (and Switzerland) and vice-versa for those countries' citizens when in the UK. The Department of Health and Social Care reimburses other EEA countries for the cost of providing treatment under EU Co-ordination of Social Security Regulations, which include healthcare. The UK spends around £630 million per annum on healthcare for current or former UK residents who are visiting or have retired to the EEA. It currently recovers £50 million per annum from EEA States in respect of NHS treatment provided for their residents while in the UK.

¹ <http://www.parliament.scot/parliamentarybusiness/26512.aspx>

5. The S1 scheme entitles EEA state pensioners to receive state healthcare when they reside in a country in the EEA other than their country of affiliation. The UK Government funds state healthcare, on a UK-wide basis for the 190,000 UK state pensioners, and their dependent relatives, living abroad (principally in Ireland, Spain, France and Cyprus) and registered for the S1 scheme. It also funds healthcare for certain posted workers (workers based in the UK, but working in the EEA) and those on transferable benefits under the scheme. The Scottish Government estimates that 15,000 state pensioners from Scotland benefit from this arrangement at a cost of around £48 million per annum.

6. The UK Government also funds emergency and necessary state healthcare when UK residents visit the EU/EEA on holiday under the European Health Insurance Card (EHIC) scheme and planned treatment in other EEA countries under the S2 scheme. The Scottish Government estimates that the cost of treatment for Scottish residents under the EHIC and S2 schemes account for around £2 million per annum. However, the Department for Work and Pensions, which administers the reciprocal healthcare schemes, cannot identify the number of Scottish residents that use their EHIC each year or the cost of funding their healthcare at this time.

7. The UK Government's stated position is that given the clear benefits to the public and wider society, it is important that reciprocal healthcare arrangements continue following the UK's withdrawal from the EU, whether this happens through an agreement with the EU or through agreements with individual Member States. This is consistent with the Scottish Government's position, although as mentioned above, the Scottish Government would protect future participation in reciprocal healthcare through continued membership of the Single Market and Customs Union.

Content of the Bill

8. The [Explanatory Notes](#)² to the Bill set out the UK Government's view of its purpose and main functions. It confers powers on the Secretary of State for Health and Social Care to fund and arrange healthcare outside the UK, to give effect to reciprocal healthcare agreements between the UK and other countries, territories or international organisations such as the European Union and to make provision in relation to data processing which is necessary to underpin these arrangements. The Bill is intended to sit alongside the European Union (Withdrawal) Act 2018 and the future European Union (Withdrawal Agreement) Bill as part of the Government's legislative response to EU Exit.

Reasons for seeking legislative consent

9. The Explanatory Notes set out the UK Government's view that Clauses 1, 2 and 4 of the Bill require the consent of the devolved administrations.

10. The Scottish Government also believes that the Bill is a relevant Bill in terms of Rule 9B.1.1 of 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 in the following ways.

² <https://publications.parliament.uk/pa/bills/cbill/2017-2019/0279/en/180279en.pdf>

11. Clause 1 of the Bill provides an overarching power for the Secretary of State to make payments and arrangements for payments to be made in respect of the cost of health care provided outside the UK.

12. Clause 2 is a wide regulation making power allowing the Secretary of State to make provision in relation to the exercise of that power but also for or in connection with the provision of health care outside the UK and to give effect to a healthcare agreement.

13. Clause 4 provides a basis for facilitating data processing to support the making of payments, or provision for payments to be made, for healthcare outside the UK, giving effect to healthcare agreements as provided for by the Bill.

14. “Healthcare agreement” is defined as an agreement made between the UK government and either the government of a territory outside the UK or an international organisation concerning either or both of—

(a) health care provided outside the UK, payments in respect of which may be made by the UK Government;

(b) health care provided in the UK, payments in respect of which may be made by a country or territory outside the UK.

15. The power to make regulations (clause 5(3)) includes a power to amend, repeal or revoke primary legislation for the purpose of conferring functions on the Secretary of State or on any other person (including conferring a discretion) or to give effect to a health care agreement. That includes an Act of the Scottish Parliament.

16. The Scottish Government’s view is that the subject matter of the Bill is not wholly reserved. In the Scottish Government’s view the general power at clause 1, the regulation making powers at clause 2 and the power to process data at clause 4 may be exercised within the scope of devolved competence.

17. The provision of health care in or as regards Scotland is a devolved matter. In particular health care services may be provided outwith the UK to persons who are ordinarily resident in Scotland through contractual arrangements made by Health Boards (see for example section 2CB of the National Health Service (Scotland) Act 1978).

18. The Bill provides a power more generally in respect of securing arrangements by making payments for services to be provided outside the UK. The Scottish Government’s view is that it would be within devolved competence for such a power to be exercised by Ministers, or Health Boards, in Scotland.

19. The legislative consent memorandum on the European Union (Withdrawal) Bill, submitted to the Scottish Parliament on 12 September 2017, set out the Scottish Government’s position that policy responsibility for matters within devolved competence lie with the Scottish Government, accountable to the Scottish Parliament.

Consultation

20. The UK Government has not undertaken a consultation on this legislation.

Financial Implications

21. There are no financial implications in regard to giving legislative consent to this Bill. The Bill does not create financial or other resource requirements beyond what is needed for on-going Scottish Government engagement on the Bill. The existing reciprocal healthcare schemes are funded and administered by the UK Government on a UK-wide basis. The Bill does not take powers to change that arrangement, which the UK Government has committed to continue regardless of the reciprocal / bilateral arrangements that are put in place following EU exit.

Conclusion

22. It remains a matter of regret to the Scottish Government that the UK plans to withdraw from the EU. The Scottish Government considers this will have widespread detrimental effects on the UK and Scotland.

23. However, the Scottish Government accepts that proper, responsible preparations should be made for withdrawal, including provisions to allow UK/Scottish citizens' to continue to exercise their rights to access healthcare when they work, study visit or reside in other European Economic Area countries.

24. The Scottish Government considers that Clauses 1, 2 and 4 of the Healthcare (International Arrangements) Bill makes provision applying to Scotland for purposes within the legislative competence of the Scottish Parliament and alters the executive competence of Scottish Ministers. The Scottish Government accepts the main purpose of the Bill and that on this occasion the UK Government has recognised Scottish competence by seeking legislative consent.

Draft Legislative Consent Motion

25. Following the UK Government's decision to continue the passage of the European Union (Withdrawal) Bill despite the Scottish Parliament withholding consent, the Scottish Government does not believe it should currently seek consent to provisions in UK legislation related to withdrawal from the EU except in exceptional circumstances.

26. The Scottish Government is seeking urgent discussions with the UK Government on how to strengthen and protect the Sewel Convention, and has set out proposals for how confidence in the operation of the legislative consent convention could be restored.

27. The Scottish Government remains committed to working with the UK Government to develop and improve legislation related to EU withdrawal, and to ensure that such legislation respects the devolution settlement. The Scottish Government will also fully support the Parliament's scrutiny of these Bills.

28. The Scottish Government has also considered whether there are exceptional circumstances that would alter its approach to formal legislative consent for this Bill. Many thousands of UK nationals, including Scots, benefit from EU reciprocal healthcare each year as state pensioners residing in other European Economic Area countries outside the UK or as travellers using the European Health Insurance Card. This Bill is required to enable existing reciprocal healthcare arrangements to continue or for new arrangements to be put in place after EU Exit, in the event of no deal or following the transition period. Given the purpose of this Bill in providing reassurance to those requiring healthcare, the Scottish Government believes that its application to Scotland should be put beyond any doubt, and therefore intends to seek the Scottish Parliament's formal legislative consent to the Bill in these exceptional circumstances.

29. The draft motion, which the Cabinet Secretary for Health and Sport intends to lodge is:

“That the Parliament agrees that the relevant provisions of the Healthcare (International Arrangements) Bill, introduced in the House of Commons on 26 October 2018, relating to powers to make healthcare payments; healthcare agreements and data processing, in so far as these matters fall within the legislative competence of the Scottish Parliament or alter the executive competence of Scottish Ministers, should be considered by the UK Parliament.”

Scottish Government
December 2018

This Legislative Consent Memorandum relates to the Healthcare (International Arrangements) Bill (UK legislation) and was lodged with the Scottish Parliament on 6 December 2018

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