

T: 0300 244 4000
E: scottish.ministers@gov.scot

Stuart McMillan MSP
Convener of the Delegated Powers and Law
Reform Committee
Scottish Parliament

By e-mail

4 February 2022

Dear Stuart

HEALTH AND CARE BILL: SUPPLEMENTARY LEGISLATIVE CONSENT MEMORANDUM

Thank you for your letter of 2 February. I note that, at its meeting on 1 February, the Committee noted that the amendment in clause 136 of the Health and Care Bill confers a concurrent power on the Scottish Ministers in the Healthcare (European Economic Area and Switzerland Arrangements) Act 2019 (“the Act”), to make regulations giving effect to a healthcare agreement (insofar as within devolved competence), and that this partially addresses the concern the Committee raised when it considered the first LCM. The Committee has also noted that the UK Government retains the power to make regulations on a UK-wide basis and has sought 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.

As the Committee notes, whilst concurrent powers to implement healthcare agreements are now conferred on the Scottish Ministers, the Secretary of State retains the power to make regulations on a UK-wide basis. Section 5 of the Act continues to apply so that the consultation requirement for the UK power is retained and will also be subject to the Memorandum of Understanding between UKG and the Devolved Administrations. That sets out the process by which the Secretary of State will meet the consultation requirement, to ensure collaborative development of policy proposals which fall within devolved competence and ensure early engagement and dialogue.

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The Memorandum of Understanding, which is in the final stages of agreement, also contains an undertaking that *the UK Government will proceed in accordance with the convention that the UK Parliament would not normally legislate with regard to devolved matters except with the agreement of the devolved legislature.*

Although the Secretary of State's power has been retained, importantly, the Committee will note that the power at section 2 of the Act is re-cast and is now restricted so the power can no longer be used to confer functions on the Scottish Ministers.

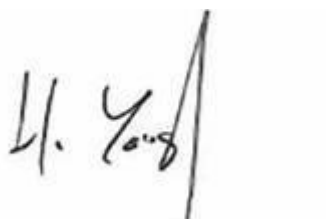
The concurrent powers in respect of implementation of international agreements allows regulations to be made by Scottish Ministers. The provision of concurrent powers acknowledges devolved competence and that the UK Government and devolved administrations all have different healthcare systems. The concurrent powers are particularly important if international reciprocal healthcare agreements contain provisions for planned treatment, allowing the appropriate bodies in Scotland to determine planned treatment applications for both outgoing and incoming patients.

I confirm that the understanding of the Committee is correct in that the power under section 2 of the Act (as currently proposed to be amended by the Health and Care Bill) remains within the scope of [SI Protocol 2](#) (Protocol on scrutiny by the Scottish Parliament of consent by Scottish Ministers to UK secondary legislation in devolved areas arising from EU Exit) as section 2 will continue to concern giving effect to a healthcare agreement and the genesis of the international healthcare legislation related to EU Exit. The Scottish Government recognises that parliamentary scrutiny is paramount and I am clear that by recommending acceptance of clause 136 I am not in any way diminishing the importance of the Protocol when UK secondary legislation is made which includes provisions within devolved competence.

Any secondary legislation that the UK Government proposes to bring forward under section 2 of the Act will remain subject to the terms of the Protocol, notwithstanding that I believe that the concurrent powers that we have secured are important in reflecting that these matters are within devolved competence.

A copy of this letter goes to:

Gillian Martin MSP, Convener, Health, Social Care and Sport Committee



HUMSA YOUSAF

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St Andrew's House, Regent Road, Edinburgh EH1 3DG
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