HEALTHCARE (INTERNATIONAL ARRANGEMENTS) BILL

Memorandum concerning the Delegated Powers in the Bill for the Delegated Powers and Regulatory Reform Committee

A. INTRODUCTION

1. This memorandum has been prepared for the Delegated Powers and Regulatory Reform Committee by the Department of Health and Social Care to assist with its scrutiny of the Healthcare (International Arrangements) Bill ("the Bill"). The Bill was introduced on 26 October 2018. This memorandum identifies the provisions of the Bill that confer powers to make delegated legislation. It explains in each case why the power has been taken and explains the nature of, and the reason for, the procedure selected.

B. SUMMARY OF THE BILL

Context and purpose

2. The Bill is concerned with paying for healthcare abroad, giving effect to international healthcare agreements, and establishes the legal basis for data processing to support anything done under the Bill and Regulations made under it. Reciprocal healthcare agreements support people from the UK to obtain healthcare when they live in, work in or visit other countries (vice-versa people from other countries in the UK). They normally involve the UK and the other country agreeing to waive healthcare charges for migrants, workers or visitors. Some agreements involve the UK and other countries reimbursing one another for the costs of healthcare – an approach that underpins EU reciprocal healthcare. Reciprocal healthcare agreements can also facilitate co-operation on planned treatment or other areas of healthcare policy.

3. While this Bill is being brought forward as result of the UK's exit from the EU, it is forward-facing and not intended to deal only with EU Exit. The Bill enables the Secretary of State to:

    a) make, and arrange for payments to be made, in respect of the cost of healthcare provided outside the UK (Clause 1);

b) to make regulations for and in connection with the provision of healthcare abroad (including making and arranging payments), or to give effect to healthcare agreements with other countries or territories (both EU and non-EU) or supranational bodies such as the EU, depending on what is required after EU exit (Clause 2); and

c) lawfully process data where necessary for purposes of implementing, operating or facilitating the doing of anything under or by virtue of the Bill (Clause 4).

4. The Bill contains 4 clauses which relate to delegated powers:

- **Clause 2(1)** provides that the Secretary of State may by regulations make provision:

  (a) in relation to the exercise of the power to make payments or arrange for payments to be made in respect of healthcare access overseas;

  (b) for and in connection with the provision of healthcare abroad, or

  (c) to give effect to healthcare agreements with other countries or territories (both EU and non-EU) or international organisation such as the EU.

- **Clause 2(3)** provides that the Secretary of State may give directions to a person about the exercise any functions conferred on or delegated to that person by regulations made under Clause 2(1) (as set out above).

- **Clause 4(6)(e)** provides that the Secretary of State may by regulations add to the list of authorised persons who can process data where necessary for the purposes of the doing of anything under or by virtue of the Bill.

- **Clause 5** specifies the manner in which the power to make regulations and directions provided for above is to be exercised.

5. In deciding whether matters should be specified on the face of the Bill or dealt with in delegated legislation, the Department of Health and Social Care has carefully considered the need:

- to be able to respond flexibly and swiftly to changing and at present unknown circumstances as a result of the UK exiting the EU;
- to be able to support and give effect to other detailed healthcare arrangements, should this be desirable as part of future Government reciprocal healthcare policy and
- to avoid unnecessary technical and administrative detail on the face of the Bill.

6. In deciding what procedure is appropriate for the exercise of the powers in the Bill, the Department has carefully considered in particular:
    - whether the provisions amend primary legislation;
    - the importance of the matter to be addressed;
    - the technical and operational detail to be addressed; and
    - the level of Parliamentary scrutiny which will have applied to an underlying healthcare agreement.

Background and context: reciprocal healthcare

7. Prior to EU exit, reciprocal healthcare in the EU, EEA and Switzerland is governed by the EU Social Security Co-ordination Regulations ("EUCRs") (which have direct effect)[1]. Under this system publicly-funded healthcare based on a non-discretionary, defined legal entitlement is termed social security, and is generally referred to as "sickness benefits in kind".

8. In broad terms, the EUCRs provide access to healthcare on the same terms as nationals of the country in which treatment is sought for three categories of person:

[1] Regulation (EC) No 883/2004 of the European Parliament and of the Council on the co-ordination of social security systems and Regulation (EC) No 987/2009 of the European Parliament and of the Council laying down the procedure for the implementing Regulation (EC) No 883/2004 are the main Regulations but with Regulation (EEC) No 1408/71, Regulation (EEC) No 574/72 and Regulation (EC) No 859/2003 containing relevant provision.

a) those who are resident in a EU Member State other than the Member State competent for providing healthcare, including pensioners, posted workers, frontier workers, and their dependent relatives;

b) those who are authorized to receive pre-planned treatment in another EU Member State; and

c) European Health Insurance Card holders: temporary visitors, such as tourists, students and workers, entitled to 'needs-arising' treatment.

9. In addition to this, the Cross Border Healthcare Directive 2011/24/EU (as transposed into domestic legislation in the UK) enables reimbursement for certain healthcare provided to a person in another EU Member State. There are also some bilateral agreements between the UK and countries outside the EU/ EEA which deal with reciprocal healthcare. These do not, however, relate to country to country charging and are considerably less complex than existing EU/ EEA reciprocal healthcare arrangements.

10. The EUCRs and the domestic legislation which implement the Cross-Border Healthcare Directive will become retained EU law by virtue of sections 2 and 3 of the European Union (Withdrawal) Act 2018 (EUWA) after EU exit. These provisions insofar as they will be retained EU law, will require amendment in light of new arrangements, including those giving effect to new international healthcare agreements.

11. It is intended that the delegated powers in the Bill will be required regardless of the outcome of negotiations with relevant member states and/or the EU. The powers will be needed urgently in the event of no immediate deal being reached with relevant member states and/or the EU.

12. The policy intention for reciprocal healthcare in the context of exiting the EU in the short term is to maintain the current system of reciprocal healthcare with the EU on a transitional basis until the end of 2020. In a deal situation it is expected that this would be provided for by way of an implementation period, and in the event of a 'no deal' we are seeking to agree this individually with Member States.

13. In a no deal scenario the Bill would enable action to be taken swiftly. This may involve making regulations (and directions) which would give effect to any healthcare agreement that differ to the current arrangements with the EU made between the UK and other countries or territories). It may also involve supporting access to certain forms of healthcare outside the UK in certain circumstances.

14. If a deal is reached with the EU, it is intended that these powers will be used to give effect to any new reciprocal healthcare agreements agreed as part of a future relationship. The powers provide an implementation mechanism that can be used for any future comprehensive reciprocal healthcare agreements entered into by the UK with non-EU countries or territories as part of a global strategy following EU exit and to enable possible future partnerships.

C. ANALYSIS OF DELEGATED POWERS BY CLAUSE

15. **Clauses 2 (1) (a), (b) and (c): discretionary powers for the Secretary of State to make provision: (a) in relation to the exercise of the Secretary of State's power to make payments, and arrange for payments to be made, in respect of the cost of healthcare outside the UK; (b) for and in connection with the provision of healthcare outside the UK; (c) to give effect to a healthcare agreement.**

Powers conferred on: Secretary of State

Powers exercised by: Regulations

Parliamentary Procedure: Affirmative procedure where regulations amend, repeal or revoke primary legislation. Negative procedure in all other cases.

Context and purpose

16. Clause 2(1)(a) allows the Secretary of State by regulations to make provision in relation to the exercise of the power contained in clause 1, namely the power to make payments or arrange for payments to be made in respect of the costs of healthcare provided outside the UK. Clause 2 (1) (b) provides a separate power to the Secretary of State to make regulations for and in connection with the provision of healthcare outside the UK. Clause 2(1) (c) enables the Secretary of State to

make regulations to give effect to healthcare agreements entered into with another country/territory or international organisation.

17. Clause 2(2) provides a non-exhaustive list of examples of the type of provision that may be included in regulations made under clause 2, to give Parliament further clarity about how the regulation making power is intended to be exercised. This enables the Secretary of State to address essential matters relating to healthcare abroad, including defining individual entitlements to healthcare, and the operational and administrative matters that are necessary to facilitate the provision for payment of healthcare abroad. This also includes being able to reimburse other countries for healthcare costs, and to recover healthcare costs from them.

18. By virtue of clause 5, regulations made under clause 2(1) may amend, repeal or revoke primary legislation, for specified consequential purposes. Clause (4) provides for regulations under the Bill to amend, repeal or revoke retained EU law[2] – see clause 5, below.

19. The purpose of these powers is to ensure that the Secretary of State has sufficient powers available to him to take appropriate action to pay or arrange for payment of healthcare outside the UK or give effect to new reciprocal healthcare agreements, depending on what is required after EU exit.

Justification

Justification for taking the power

20. These powers are necessary to enable the Secretary of State to respond appropriately after EU exit. The powers enable the Secretary of State to make provision to fund or for and in connection with the provision of healthcare outside the UK, pending or, in addition to, new reciprocal healthcare agreements being put in place should this be desirable as part of future Government reciprocal healthcare policy. While the powers in the Bill are broad the subject matter to which they relate is narrow; they can only be used to arrange for provision of and payments relating

[2] By virtue of section 6(7) of the EU (Withdrawal) Act 2018, "retained EU law" means anything which, on or after exit day, continues to be, or forms part of, domestic law by virtue of sections 2, 3 or 4 of that Act.

to healthcare access abroad and to give effect to healthcare agreements. This remit is contained.

21. Funding powers such as that found in clause 1 are commonly seen in primary legislation. The Public Accounts Committee Concordat 1932 established the principle that where possible, the authority for Government expenditure should flow from a specific Act of Parliament, rather than relying solely authority of the Supply and Appropriation Acts.

22. Clause 1 provides the Secretary of State with the power to make payments, and arrange for payments to be made, in respect of the cost of healthcare provided outside the United Kingdom. This is not a delegated power and it is usual for Acts of Parliament to contain general spending powers on the face of the Act - examples of payments powers are found in the **Annex A**.

23. Spending powers are often widely drafted and frequently not limited in the amount of payments which can be made or the geographical location of such payees. To that extent clause 1 is not unusual, as this is because the spending of public money is closely monitored in ways which are not set out in the payment power provisions of a Bill/Act. For example, there is a need for all departmental expenditure to have Treasury approval, for all relevant expenditure to be authorised by the annual Supply process (which involves Parliament's consideration of Supply Estimates) and Government departments must prepare annual resource accounts with are audited by the Comptroller and Auditor General.

24. What is perhaps unusual is the exercise of clause 1 may be the subject of delegated legislation made under clause 2(1)(a). Statutory payment powers tend to operate without the need for such delegated legislation. As can be seen from the examples in Annex A, funding powers tend to be standalone primary powers. We have taken the approach of including a delegated power to support the payment powers in recognition of the fact that payment arrangements can be complex under reciprocal healthcare arrangements. For example, they may involve off-set arrangements, and the detail of those arrangements would be appropriately included in regulations. This also provides greater transparency of the payment system. However, generally funding powers are less commonly seen as the subject of secondary legislation.

25. While it will not always be necessary to make such regulations, the power in clause 2(1)(a) gives the Secretary of State the ability to make regulations to set out details concerning how payments may be made, which may include administrative and procedural aspects of payment arrangements. This is to assist Parliament and the general public and give opportunity for more scrutiny in relation to payment arrangements.

26. Clause 2(1)(b) allows the Secretary of State to make provision by regulations in relation to payments or for and in connection with the provision of healthcare outside the UK. Such regulations will by their nature be technical, operational and detailed and so better suited to secondary legislation.

27. The regulation making power at clause 2 (1)(c) allows the Secretary of State to make provision to give effect to comprehensive healthcare agreements. It would not be feasible that primary legislation be used to implement such agreements on an individual basis. Healthcare agreements will be re-negotiated and evolve over time and any domestic implementation legislation which is required may need to be adjusted more often than Parliament can be expected to legislate for by primary legislation.

28. Clause2(1)(c) will also enable the Secretary of State to implement any new reciprocal healthcare agreement agreed with the EU, as well as healthcare agreements between the UK and other countries or territories should this be desirable as part of future Government health policy. This regulation-making power is entirely linked to giving effect to international healthcare agreements. This therefore significantly limits the scope of the power.

29. Healthcare arrangements and reciprocal healthcare agreements may provide only certain types of healthcare will be funded. If so, any underlying implementing regulations made under clause 2(1)(b) or (c) that may be necessary must be able to provide for that. Each comprehensive agreement or specific complex healthcare arrangement may be different, and it is the Government's view that it would not be appropriate to indirectly limit the Government's negotiating position by placing limitations on the type of healthcare that may be covered by any agreement, on face of the Bill.

30. The powers under clause 2(1) (a), (b) and (c) are drawn in such a manner to enable logistical and technical arrangements relating to payment and healthcare provision to be addressed. The indicative list at clause 2(2) provides a good illustration of the nature of the provisions that may be made, but beyond this, it would not be appropriate or effective to seek to circumscribe or anticipate the provisions that will be needed to give effect to appropriate unilateral arrangements or reciprocal healthcare agreements agreed with the EU and/or other countries or territories in advance of those knowing what will be required. It is important that the Government has the ability to respond to the wide range of possible outcomes of EU exit and is in a position to put in place new and effective arrangements as quickly as possible.

31. The Secretary of State has limited existing domestic powers that could be used for these purposes. The powers in the EU (Withdrawal) Act 2018 do not provide sufficient vires to support new reciprocal healthcare arrangements.

Justification for the procedure

32. It is proposed that regulations made under clause 2 (1) should be subject to the affirmative procedure where they make consequential provisions to amend, repeal or revoke primary legislation. It is considered this is an appropriate level of scrutiny, befitting of Henry VIII powers. It is proposed regulations that do not make consequential changes to amend, repeal or revoke primary legislation should be subject to the negative procedure. As these regulations will be to make technical provision, it is considered the negative procedure is appropriate.

33. It is envisaged that complex legally binding international healthcare agreements will require ratification under the Constitutional Reform and Governance Act 2010[3] (the 2010 Act). The process under the 2010 Act is capable of providing a separate and additional opportunity for Parliamentary scrutiny in respect of the substance of complex healthcare agreements being given effect to in regulations; the most important elements of any such legally binding agreement would be expected to be included in the agreements themselves. The regulations implementing them, made under the Bill power, will not include anything fundamentally new, but would merely operate to give effect to and implement the agreement. As such, the

[3] c. 25.

negative procedure provides Parliament with an appropriate mechanism for scrutiny where the regulations implementing any comprehensive agreement does not amend, repeal or revoke primary legislation.

Clause 2(3): power to make directions

Powers conferred on: Secretary of State

Powers exercised by: Directions

Parliamentary Procedure: No procedure

Context and purpose

34. The Secretary of State may give directions to a person about the exercise of any functions conferred on or delegated to that person by regulations made under Clause 2(1). This would allow the Secretary of State to indicate to such body the manner in which the delegated or conferred functions should be carried out in order to remain compliant with international obligations (if in relation to a healthcare agreement) or compliant with any other arrangements put in place by regulations under Clause 2(1).

35. Directions would be addressed to the relevant body who had functions conferred on or delegated to it under regulations made under clause 2(1). Examples of bodies which the Secretary of State may direct under this power include the NHS Business Services Authority, clinical commissioning groups and the NHS Commissioning Board (known as NHS England)[4].

Justification

Justification for taking the power

36. The Secretary of State remains responsible for the UK's overall compliance with international obligations set out under any healthcare agreement regardless of whether functions are conferred on or delegated to another body under the regulations. It is therefore necessary for the Secretary of State to have the power

[4] Established under section 1H of the National Health Service Act 2006.

to give directions on the manner in which such conferred or delegated functions should be carried out, in order to ensure that they are being discharged effectively and in accordance with the relevant healthcare agreements.

37. Direction making powers are not uncommon in the context of the domestic healthcare landscape. Section 8 (Secretary of State's directions to certain health service bodies) of the National Health Service Act 2006 is concerned with directions about the exercise of functions and generally speaking (although not restricted to this) directions have been used to establish general restrictions or requirements about how functions are exercised.

38. Regulations made under clause 2(1)(a), and (b) which make provision in relation to payments or for and in connection with the provision of healthcare provided outside the UK may also delegate or confer such functions to another body. The Secretary of State may wish to direct such a body to ensure the arrangements enacted (for example processing of payment) are operated in a prescribed way. Such directions are likely to include details of an operational nature and hence less likely to warrant Parliamentary scrutiny and would be more appropriate for inclusion in written directions.

39. Furthermore, directions may be given as necessary and as circumstances require and so are not suitable to be included on the face of the legislation.

Justification for the procedure

40. The directions would not be subject to a Parliamentary procedure. This is appropriate given their content (which would be to ensure compliance with regulations made under the Bill and in some cases compliance with international obligations both of which will have been subject to Parliamentary scrutiny) and the possibility that action may need to be taken swiftly. This is also consistent with usual practice and there is precedent for making directions without procedure in respect of cross-border healthcare as set out at section 6D of the National Health Service Act 2006[5].

[5] c. 41.

Clause 4(6)(e): power to make regulations to authorise additional persons, or descriptions of persons, to process personal data for the purposes of the Bill.

Powers conferred on: Secretary of State

Powers exercised by: Regulations

Parliamentary Procedure: Negative procedure

Context and purpose

41. Clause 4 provides that an authorised person may process personal data for the purposes of implementing, operating or facilitating anything done under or by virtue of the Bill. Such processing must comply with UK data protection legislation, Investigatory Powers Act 2016 and the Regulation of Investigatory Powers Act 2000. Clause 4(6) defines an authorised person as meaning the Secretary of State, the Treasury, the Commissioners for HMRC, the executives of the devolved administrations, NHS bodies in England and in the Devolved Administrations, and other providers of healthcare. Clause 4(6)(e) enables the Secretary of State to make regulations adding other persons to this list of authorised persons.

Justification

Justification for taking the power

42. It is important to future proof the Bill so that the Secretary of State has power to add persons to the list of authorised persons in clause 4(6). As above, the Bill is designed to ensure the Government can respond appropriately to whatever the outcome of EU exit and to be in a position to implement future healthcare agreements. It is possible, depending on the nature of the healthcare arrangements, that there may be persons, including new bodies that may be established, in addition to those currently listed, who will need to be able to process personal data to enable those arrangements to operate effectively. The purpose of this power is to enable the Secretary of State to make regulations specifying such persons as authorised persons.

43. The main tenets of the data processing provision are set out on the face of the Bill; namely the purposes for which personal data may be processed and the relationship between this power and the common law duty of confidence and other legislative provisions on the protection of personal data.

Justification for the procedure

44. It is proposed that the negative procedure should apply to regulations made under clause 4(6)(e). The negative procedure is considered appropriate as the power is a limited power to add persons to the list of authorised persons in clause 4(6). It does not enable the Secretary of State to amend the purposes for which personal data may be processed or the relationship between data processing under the Bill and the common law duty of confidence and data protection legislation. Exercising this enabling power would not affect the policy intent of implementing, operating or facilitating anything done under or by virtue of the Bill and the negative procedure provides Parliament with the opportunity to scrutinise the persons who could process data for the purposes of the Bill.

Clause 5: power to make different provision for different purposes, make consequential, supplementary, incidental or transitional provisions etc.

Powers conferred on: Secretary of State

Powers exercised by: Regulations

Parliamentary Procedure: *Affirmative procedure where regulations amend, repeal or revoke primary legislation. Negative procedure in all other cases.*

Context and purpose

45. This clause sets out certain accompanying matters that may be contained in regulations made under the Bill. Subsection (2) enables the Secretary of State to make consequential, supplementary or incidental provision as well as transitional, transitory or saving provisions. It also provides that regulations under the Bill may make different provisions for different purposes, be exercised for all cases to which the power applies, for those cases subject to specified exceptions, or for any specified case or description of case; be exercised so as to make, for the cases for which the power is exercised, any provision either unconditionally, or subject to specified conditions; and provide for a person to exercise a discretion in dealing with any matter. These are standard provisions which are consistent with regulation making powers in many other Acts of Parliament such as Health and Social Care Act 2012[6], National Health Service Act 2006[7] or Water Act 2003[8].

46. Clauses 5(3) and 5(4) (insofar as it relates to primary legislation) create narrow Henry VIII powers.

47. Clause 5(3) provides that regulations made under Clause 2 of the Bill may amend, repeal or revoke primary legislation for the specified purposes in clauses 5(3)(a) and (b). Those purposes are the purpose of conferring functions on the Secretary of State or on any other person or to give effect to a healthcare agreement. The power is not available in respect of all regulations made under Clause 2 of the Bill

[6] C. 7.

[7] c. 41.

[8] c. 37.

but only for those limited purposes. The purpose of Clause 5(3) (a) is to ensure that any scheme enacted in regulations under Clause 2 is able to be administered by the most appropriate body in the circumstances. The purpose of Clause 5 (3)(b) is to ensure that the Secretary of State can do what is necessary and appropriate to give effect to new healthcare agreements agreed with other countries or territories or international organisations and ratified by Parliament.

48.

49. Clause 5(4) provides that regulations made under clause 2 of the Bill may amend, repeal or revoke retained EU law. It is important that the power extends to amending, repealing and revoking retained EU law[9] because the bulk of existing provision in healthcare abroad would be considered retained EU law. Therefore in order to give effect to new arrangements to fund or arrange for healthcare abroad (including international healthcare agreements), the Secretary of State needs the power to amend EU retained law.

50. Therefore the Henry VIII powers being taken are limited in two ways:

    a) regulations made under clause 2 are limited in terms of subject matter as regulations can only be used for and in connection with funding or making arrangements for healthcare abroad and giving effect to international healthcare agreements; and

    b) these regulations can only amend etc. primary legislation for the specified purposes in clauses 5(3)(a) and (b), namely for the purposes of conferring functions on the Secretary of State or any other person or to give effect to a healthcare agreement, or if it is retained EU law.

51. Regulations amending etc. primary legislation can go no further than this. These are not free-standing powers.

[9] As defined by section 6(7) the EU (Withdrawal) Act 2018.

Justification

Justification for taking the power

52. These Henry VIII powers are necessary to ensure proper administration of a scheme for the provision of healthcare outside the UK and the full implementation of new healthcare agreements. The powers are narrowly drawn and only able to be exercised for specific purposes. The current reciprocal healthcare arrangements with the EU are provided for by different forms of domestic legislation: EUCRs which currently have direct effect in domestic law, primary legislation such as the National Health Service Act 2006[10] and secondary legislation such as the regulations transposing the Cross Border Healthcare Directive[11]. This is a broad legislative landscape and so the powers in the Bill may be needed to amend all these different types of legislation.

53. It is recognised that the Henry VIII power extends to amendments to future Acts and that more usually with consequential powers to make amendments to primary legislation, such as in clause 5(3), that this is either limited to amendments to primary legislation that is not more recent/older that the primary legislation itself (section 180 of the Policing and Crime Act 2017 is an example of this) or there is an accompanying schedule with consequential amendments that have already been identified.

54. For this Bill, however, neither of these options are considered appropriate since placing express limitations on the consequential power could prevent it from being used to effectively implement and give effect to detailed healthcare agreements.

55. Clause 5(3)(a) ensures that where the Secretary of State enacts a scheme for the provision of healthcare outside the UK, such scheme is, in practice, able to be administered by an appropriate body, for example, the NHS Business Services Authority (BSA). This is consistent with existing practice: the BSA currently operates and administers existing reciprocal healthcare arrangements, including providing reimbursements for healthcare costs incurred outside the UK under the

[10] E.g. Section 6BA of National Health Service Act 2006.

[11] The National Health Service (Cross-Border Healthcare) Regulations 2013/2269.

Cross Border Healthcare Directive. However, it is important to future proof the Bill so that this power is not limited to conferring functions on the BSA, but allows such functions to be conferred on other bodies as appropriate, including new bodies that may be set up.

56. Similarly, new comprehensive healthcare agreements might require the implementation of new obligations or different administrative arrangements to be put in place that will require amending, repealing or revoking primary legislation, including retained EU law. It would be an oversight if this Bill did not provide for such amendments given that current reciprocal healthcare arrangements with the EU are entirely bound up in EU law. Until such agreements are agreed it is impossible to know what provision will be needed to give effect to them as they might not be on the same terms as existing EU reciprocal healthcare arrangements. So it is sensible and prudent to ensure the Secretary of State can fully implement such agreements.

57. Where the UK negotiates a comprehensive international healthcare agreement – whether multilaterally with the EU or bilaterally with EU Member States – most of the important elements setting out the terms of that agreement would be included in the agreement itself.

58. Regulations giving effect to such an agreement would likely focus on the procedural, administrative and technical details, such as the types of documents or forms to be used to administer the reciprocal healthcare arrangements.

59. In a scenario where a comprehensive healthcare agreement is being implemented by the regulations made under clause 2(1) (c) and clause 5(2) that agreement would be subject to Parliamentary scrutiny under the procedure in section 20 of the Constitutional Reform and Governance Act 2010.

60. That process provides an opportunity for Parliamentary scrutiny in respect of the substance of healthcare agreements being given effect to in regulations made under the Bill.

Justification for the procedure

61. The Department considers it appropriate to make a clear distinction between Henry VIII powers and normal delegated powers (that cannot be used to amend primary legislation) and provide for a different level of Parliamentary scrutiny which is befitting of Henry VIII powers. Therefore regulations that amend, repeal or revoke primary legislation, including retained EU law, are proposed to be subject to the affirmative procedure, as befitting a Henry VIII power.

62. Other regulations made under the Bill are proposed to be subject to the negative procedure. As regulations under the Bill will focus on process and technical and administrative arrangements the negative procedure is considered appropriate.

Department for Health and Social Care

[31 January 2019]

Annex A

Examples of general spending powers

1. There are many examples of wide payment powers on the face of primary legislation. Section 153 of the Environmental Protection Act 1990, for example, provides that the Secretary of State may give financial assistance to, or for the purposes of, a long list of programmes or bodies whose purpose relate to the protection, improvement or better understanding of the environment. The list includes the United Nationals Environment Programme, the Convention on International Trade in Endangered Species of Wild Fauna, the National Forest Company, the International Sustainable Development Fund and "*any national or international architectural award scheme or competition scheme relating to the protection, improvement or better understanding of the environment*"". There are no limits on the value of payments which can be made on the face of the Act and financial assistance may be given in respect of particular activities or generally in respect of all or some part of the activities carried on or supported by the recipient. There is no delegated powers provided for in relation to this expenditure. Clearly, this general power has a wide scope (and relates to international recipients) and does not provide for further specific Parliament scrutiny. This is often the nature of general spending powers.

2. Section 12A (Direct payments for health care) of the NHS Act 2006 provides a payment power which allows for direct payments to a patient (or to a person nominated by the patient) in respect of securing the provision to a patient of anything that the Secretary of State or local authority has a duty or power to provide or arrange under section 2 A or 2B or Schedule 1 (which generally relates to the protection of public health) and anything which NHS England or a clinical commissioning group may or must arrange for the provision of under the Act or any other enactment. The payments can therefore relate to a wide range of different healthcare provision and the power does not contain any financial limits on the payments which can be made. There are no statutory limits on whom a person may nominate for receiving the payments on their behalf.

3. Section 12B (Regulations about direct payments) of NHS Act 2006 is an example of where regulations are also provided for in relation to a payment power. Section 12B provides that the Secretary of State may make regulations about direct payments. This supplements the general payment power in a similar way to clause 2(1)(a) does in this Bill. The regulation-making power at section12B does not have any financial limits imposed, the power does not curtail the persons a patient may nominate to receive payment, nor does it seek to limit the services which may be paid for beyond the wide scope set out under the general power. Regulations made under section 12B are subject to the negative procedure.

4. Section 14 (Power of Secretary of State and National Assembly for Wales to give financial assistance for purposes related to education or children etc.) of the Education Act 2002 provides a single broad power to fund education, childcare and related activities – it replaces a wide variety of powers for making available funding/other forms of financial assistance. The assistance may be given through grants, loans, guarantees and incurring expenditure for the benefit of the person assisted. The Secretary of State (in relation to England) or the Welsh Ministers (in relation to Wales) may give, or make arrangements for the giving of, financial assistance for various purposes, including:

   - the provision or proposed provision in the United Kingdom or elsewhere, of education or of educational services;

   - enabling any person to undertake any course of education, or any course of higher education provided by an institution within the further education sector;

   - enabling any person to receive any training for teachers or for non-teaching staff; and

- providing for a person's maintenance while he undertakes such a course

5. Section 15 (Forms of assistance under section 14) provides a broad parameter on what form any assistance may take and section 16 (Terms on which assistance under section 14 is given) provides that the person receiving assistance must comply with the terms on which it is given, and compliance may be enforced by the Secretary of State or, as the case may be, the Welsh Ministers. Section 17 (delegation) clarifies that delegation and the conferral of functions in relation to assistance given under section 14 does not prevent those same functions from still being exercised by the Secretary of State. These clauses provide for a wide funding power and financial assistance can be paid to “any person” without limits being set and for very widely drafted purposes.