

HOUSE OF LORDS

Select Committee on the Constitution

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Healthcare (International Arrangements) Bill

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Committee staff

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Healthcare (International Arrangements) Bill

Introduction

1. The Healthcare (International Arrangements) Bill was introduced into the House of Commons on 26 October 2018 and passed third reading on 21 January 2019. It was brought to the House of Lords on 22 January and received second reading on 5 February. Committee stage is scheduled to begin on 19 February.
2. The Bill arises from the United Kingdom's scheduled departure from the European Union, whereupon (subject to any transitional or other negotiated arrangements) it will cease to participate in the EU's reciprocal healthcare framework. The Bill goes beyond responding to the consequences of Brexit, as it provides for the making of new policy relating to healthcare agreements with countries outside of the EU.

Delegated powers

3. Clause 1 empowers the Secretary of State to “make payments, and arrange for payments to be made, in respect of the cost of healthcare provided outside the United Kingdom.” Clause 2 authorises the Secretary of State to make regulations in relation to the exercise of the power granted by clause 1, for and in connection with the provision of healthcare outside the United Kingdom, and for the purpose of giving effect to healthcare agreements. Clause 5 makes further provision about such regulations, including the procedure by which they are to be made.
4. In its report on the Bill, the Delegated Powers and Regulatory Reform Committee (DPRRC) concluded that “Clause 2 has a breath-taking scope. Indeed, the scope of the regulations could hardly be wider.”¹ The powers in the Bill are not limited in the amount of payments that might be made, the countries to which payments might be made or the types of healthcare that might be funded. Regulations may confer functions on, or delegate functions to, anyone anywhere, and may amend or repeal any Act of Parliament for the purposes of conferring functions on people or giving effect to a healthcare agreement.²
5. The Government's justification for the powers is that they 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 to healthcare

1 Delegated Powers and Regulatory Reform Committee, *Thirty Ninth Report* (39th Report, Session 2017–19, HL Paper 226), para 10

2 *Ibid.*

access abroad and to give effect to healthcare agreements. This remit is contained.”³

6. The subject matter of the Bill may be narrow, but the application of its provisions is not. The Bill goes beyond providing the powers necessary to enable the Government to respond to the effect of Brexit on reciprocal healthcare arrangements: it allows for the creation of new policy relating to healthcare agreements with countries outside of the EU. **While the exceptional circumstances of the UK’s departure from the European Union might justify legislation containing broader powers than would otherwise be constitutionally acceptable, this does not extend to giving effect to new policy unrelated to Brexit. The Bill should be limited to the making of arrangements for future reciprocal healthcare arrangements with countries that participate in the existing European Health Insurance Card scheme. We also recommend that the broad powers in the Bill are subject to a sunset clause, so that Parliament can scrutinise the detail of the policy in future primary legislation.**
7. **We agree with the Delegated Powers and Regulatory Reform Committee that the powers in clause 2 are “inappropriately wide and have not been adequately justified.”⁴**

Amending retained EU law

8. Clause 5(4) provides that regulations may “amend, repeal or revoke retained EU law.” This formulation does not reflect the distinction between retained direct principal EU legislation and retained direct minor EU legislation set out in the European Union (Withdrawal) Act 2018.⁵ One of the purposes of drawing this distinction was to make it possible for subsequent Acts of Parliament to afford greater protection to retained direct principal legislation, such as by requiring delegated powers that amend it to be subject to the affirmative procedure. **We recommend that clause 5 be amended to reflect the distinction drawn in the European Union (Withdrawal) Act 2018 between principal and minor retained direct EU legislation.** We raised this recommendation in our report on the Trade Bill⁶ and the Government in its response accepted it.⁷ **We recommend that the Government ensures that all future bills that provide for the amendment or repeal of retained EU law include the distinction between principal and minor retained direct EU legislation.**
9. Clause 5(5) of the Bill states that regulations which amend, repeal or revoke primary legislation are subject to the affirmative procedure. **We recommend that clause 5(5) be amended to require that regulations amending retained direct principal EU legislation are also subject to the affirmative procedure.**

3 Department for Health and Social Care, [Healthcare \(International Arrangements\) Bill Delegated Powers Memorandum](#), para 20

4 Delegated Powers and Regulatory Reform Committee, [Thirty Ninth Report](#) (39th Report, Session 2017–19, HL Paper 226), para 13

5 European Union (Withdrawal) Act 2018, [section 7](#)

6 Constitution Committee, [Trade Bill](#) (13th Report, Session 2017–19, HL Paper 193), para 7

7 [Letter from Baroness Fairhead, Minister of State for Trade and Export Promotion, Department of Trade, to the Chairman](#), 22 January 2019

10. **We are concerned that this Bill, as with other Brexit-related bills, provides for elements of retained EU law to be amended by new powers which are not subject to the scrutiny safeguards set out in the European Union (Withdrawal) Act 2018, the operation of which were the result of careful and detailed consideration. The House may wish to consider whether the powers to amend retained EU law in this Bill should be subject to the same scrutiny procedures as those in the European Union (Withdrawal) Act.**

Devolution

11. The Scottish Government, in its Legislative Consent Memorandum, underlined what it considered to be the “exceptional circumstances” that required the Bill to be enacted and to apply to Scotland so as to provide “reassurance to those requiring healthcare.”⁸ The Scottish Parliament granted consent on 16 January.
12. The Welsh Government has so far declined to recommend that the Welsh Assembly give its legislative consent to the Bill.⁹ Vaughan Gething AM, the Welsh Minister for Health and Social Services, expressed particular concern about clause 2, because it “doesn’t require consultation or consent from Ministers in devolved administrations.”¹⁰
13. While the making of international agreements is a reserved matter for the UK Government, healthcare is a devolved matter. As powers are repatriated from the EU, the potential for overlapping competences increases, as does the scope for disagreement about how such issues should be managed. **We recommend that the Government sets out how it intends to manage overlapping competences in relation to this Bill and other policy areas.**

Conclusions

14. **We have raised a number of issues about this Bill that are typical of other bills under consideration in both Houses to address the consequences of Brexit. We are concerned that these bills include broad powers to amend primary legislation and significant elements of retained EU law with little or no detail of the policies to which these powers will give effect, without sunset clauses, and without the additional scrutiny safeguards set out in the European Union (Withdrawal) Act 2018. While the exceptional circumstances of Brexit may justify broader powers than would be constitutionally acceptable in normal circumstances, they do not obviate the need for detailed scrutiny and appropriate safeguards on their usage. We recommend that in its Brexit legislation, the Government seeks narrower powers, provides for additional scrutiny mechanisms, and includes sunset clauses.**

8 Scottish Government, *Legislative Consent Memorandum: Healthcare (International Arrangements) Bill*, December 2018, para 28: http://www.parliament.scot/S5_Bills/SPLCM-S05-21.pdf [accessed 13 February 2019]

9 Welsh Government, *Legislative Consent Memorandum: Healthcare (International Arrangements) Bill*, November 2018, paras 17–19: <http://www.assembly.wales/laid%20documents/lcm-ld11845/lcm-ld11845-e.pdf> [accessed 13 February 2019]

10 The National Assembly for Wales Constitutional and Legislative Affairs Committee, *The Welsh Government’s Legislative Consent Memorandum on the Healthcare (International Arrangements) Bill*, January 2019, para 31: <http://www.assembly.wales/laid%20documents/cr-ld12062/cr-ld12062-e.pdf> [accessed 13 February 2019]