

Health, Social Care and Sport Committee

19th Meeting, 2023 (Session 6), 30 May 2022

UK statutory instrument

Introduction

1. This paper supports the Committee's consideration of 'type 1' consent notification sent by the Scottish Government relating to the following UK statutory instrument (SI) —

The Healthcare (International Arrangements) (EU Exit) Regulations 2023

2. The letter from the Cabinet Secretary for NHS Recovery, Health and Social Care containing the notification can be accessed in **Annexe A**.

Process for parliamentary scrutiny of consent notifications for UK statutory instruments

3. The process for the Scottish Parliament's consideration of consent notifications is set out in a [protocol](#) agreed between the Scottish Government and Scottish Parliament.
4. The protocol provides for the Scottish Parliament to scrutinise the Scottish Government's decisions to consent to certain secondary legislation made by the UK Government. Specifically, this relates to UK Government secondary legislation on matters which are within devolved competence and are in areas formerly governed by EU law.
5. The protocol establishes a proportionate scrutiny approach and categorises SIs into type 1 and type 2.
6. For type 1 SI notifications, the Scottish Parliament's agreement is sought before the Scottish Government gives consent to the UK Government making secondary legislation in devolved competence. Except in respect of urgent notifications, the Scottish Parliament will have a minimum of 28 days to consider type 1 notifications.
7. The Committee's *usual* role in relation to type 1 notifications is to decide whether it agrees with the Scottish Government's proposal to consent to the UK Government making regulations within devolved competence.

Note in relation to this notification

- 8. It should be noted that while this is a ‘type 1’ notification, in this case there is not a statutory requirement for the UK Ministers to obtain the consent of the Scottish Ministers before making this instrument, which contains provisions within devolved competence. In this instance, UK Ministers only have an obligation to consult with Scottish Ministers (as required by section 5 of the Healthcare (International Arrangements) Act 2019).**
- 9. As such, the consent of Scottish Ministers has not been sought, nor is it required, on this occasion. Scottish Ministers have been consulted and the UK Government will proceed with the SI without further recourse to the Scottish Government.**

For decision

- 10. The Committee is invited to consider whether to note the provisions set out in the notification.**

**Clerks to the Committee
25 May 2023**

10 May 2023

THE HEALTHCARE (INTERNATIONAL ARRANGEMENTS) (EU EXIT) REGULATIONS 2023

EU EXIT LEGISLATION – PROTOCOL WITH SCOTTISH PARLIAMENT

I am writing in relation to the protocol on scrutiny by the Scottish Parliament of consent by the Scottish Ministers to UK secondary legislation in devolved areas arising from EU Exit.

That protocol, as agreed between the Scottish Government and the Scottish Parliament, accompanied the letter from the then Cabinet Secretary for Government Business and Constitutional Relations, Michael Russell MSP, to the Conveners of the Finance & Constitution and Delegated Powers and Law Reform Committees on 4 November 2020 and replaced the previous protocol that was put in place in 2018.

I attach a Type 1 notification which sets out the details of the proposed SI (the Healthcare (International Arrangements) (EU Exit) Regulations 2023) which the UK Ministers propose to make and the reasons why I am content for the proposed SI, which contains provisions within devolved competence, to be made. While I am providing a Type 1 notification, please note this does not concern a proposal by Scottish Ministers to grant consent to UK Ministers making secondary legislation but, instead, a proposal on which the UK Ministers have consulted Scottish Ministers. This notification is required because the Healthcare (International Arrangements) (EU Exit) Regulations 2023 will be made under powers in section 2 of the Healthcare (European Economic Area and Switzerland Arrangements) Act 2019, which is listed under Annex A of the protocol.

We are yet to have sight of the final SI and it is not available in the public domain at this stage. We will, in accordance with the protocol, advise you when the final SI is laid and advise you as to whether the final SI is in keeping with the terms of this notification.

I am copying this letter to the Convener of the Delegated Powers and Law Reform Committee.

Grateful if the Committee could note the notification accompanying this letter.

Yours sincerely,
MICHAEL MATHESON MSP

NOTIFICATION TO THE SCOTTISH PARLIAMENT**Name of the instrument**

The Healthcare (International Arrangements) (EU Exit) Regulations 2023

Type of notification

Type 1 – although there is not a statutory requirement for the UK Ministers to obtain the consent of the Scottish Ministers before making this instrument, which contains provisions within devolved competence. In this instance, UK Ministers only have an obligation to consult with Scottish Ministers (as required by section 5 of the Healthcare (International Arrangements) Act 2019).

1. Summary of proposals

Section 162 of the Health and Care Act 2022 ('the Act') will (when it comes into force in summer 2023) amend the Healthcare (European Economic Area and Switzerland Arrangements) Act 2019 (HEEASAA), renaming it the Healthcare (International Arrangements) Act 2019. It will also amend section 2 of the HEEASAA to give the Secretary of State powers to implement reciprocal healthcare agreements with countries outside the EEA and Switzerland, by removing the territorial restrictions of the HEEASAA.

The amendment to section 2 of the HEEASAA will also provide the Secretary of State with a regulation-making power to make provision for discretionary payments for healthcare not under an agreement, but only in countries with which the UK has a reciprocal healthcare agreement, and where the Secretary of State considers that exceptional circumstances justify the payment. This funding power replaces a power under section 1 of the HEEASAA.

The Healthcare (International Arrangements) (EU Exit) Regulations 2023 ('the Regulations') will be the first exercise of this power. The Regulations will revoke the Healthcare (European Economic Area and Switzerland Arrangements) (EU Exit) Regulations 2019 and make provisions to enable the continued functioning of existing, and any future, reciprocal healthcare agreements.

The Regulations will make provision to;

- a) enable payments to be made pursuant to a reciprocal healthcare agreement, including the continuation of payments made under current reciprocal healthcare arrangements with the EU and Switzerland;
- b) enable payments to be made in exceptional circumstances;
- c) confer planned treatment functions on relevant Health Boards and NHS Business Services Authority (NHS BSA) (which include requirements in regard to establishing and publishing procedures for the determination of applications and the provision of information for applicants); oblige NHS BSA to assist the Secretary of State in relation to other reciprocal healthcare functions.

A schedule of the Regulations lists countries and territories with which the UK Government has reciprocal healthcare agreements.

2. Details of the provisions that Scottish Ministers are being consulted on.

The Regulations will confer functions on Health Boards in Scotland, as relevant health boards, in determining planned healthcare applications, in the same way as those functions are currently conferred by the Healthcare (European Economic Area and Switzerland Arrangements) (EU Exit) Regulations 2019. The Regulations do not confer any functions on the Scottish Ministers. (Section 2 of the HEEASAA, as amended by the Act, prevents such provision being made.) The Regulations also remove the function of the Secretary of State in determining planned treatment applications.

The Act inserts section 2A into the HEEASAA to provide a regulation making power, exercisable by the devolved authorities, to make provision for the purpose of giving effect to a healthcare agreement (including about payments), insofar as the provision is within devolved competence. The Scottish Government can, therefore, make regulations to implement a healthcare agreement, which may include provision to confer functions by a public authority.

3. Impact on devolved areas

The impact on the devolved administrations would be negligible. Reciprocal healthcare has always been funded and administered by the UK Government on a UK-wide basis. The UK Government and devolved administrations agreed that this should continue post EU exit. Any future reciprocal healthcare agreements, between the UK Government and other countries, will be scrutinised to ensure they take account of the way in which healthcare is delivered in Scotland.

3. Summary of stakeholder engagement/consultation

A UK-wide public consultation on a reciprocal healthcare policy framework, proposed by DHSC, regarding the funding of healthcare abroad in exceptional circumstances, is taking place from the 24 April 2023 to the 16 June 2023. This will inform the development of an exceptional circumstances policy framework, which the UK Government intend to publish 12 weeks after the consultation ends. We informed relevant Health Boards in Scotland of the consultation and have encouraged participation.

5. Any other impact assessments?

The UK Government confirms that no impact assessments were considered to be required.

6. Summary of reasons for Scottish Ministers' allowing UK Government to include provisions within devolved competence

The Scottish Ministers consider it is pragmatic to allow the UK Government to legislate on the Scottish Government's behalf on this occasion, as the Regulations will principally provide for the continuation of existing arrangements under the HEEASAA at this time. In practical terms, it makes sense for the UK Government to legislate on reciprocal healthcare matters on a UK-wide basis.

Furthermore, the provision made in respect of Health Boards in Scotland is only part of the broader provisions made in respect of international healthcare arrangements, which the UK Government will continue to administer and fund on a UK-wide basis. The power in section 2A of the HEEASAA for the Scottish Ministers to make

Regulations on the implementation of reciprocal healthcare agreements can be exercised in future should the need arise and Ministers choose to do so.

7. Intended laying date

The SI will be laid in draft and is subject to affirmative procedure. The expected laying date is 5 June 2023

8. Does the Scottish Parliament have 28 days to scrutinise Scottish Ministers' proposal?

Yes

8. Any significant financial implications

None. The legislation continues current arrangements so has no impacts on current financial assumptions for Scotland.

SI NOTIFICATION: SUMMARY

Title of Instrument	The Healthcare (International Arrangements) (EU Exit) Regulations 2023
Proposed laying date at Westminster	5 June 2023
Date by which Committee has been asked to respond	N/A
Power(s) under which SI is to be made	Section 2 and 7(2) of the Healthcare (International Arrangements) Act 2019. (Noting that section 162 of the Health and Care Act 2022 will, when it comes into force, amend the Healthcare (European Economic Area and Switzerland Arrangements) Act 2019, amending relevant provisions and changing the name of that Act to the Healthcare (International Arrangements) Act 2019.)
Categorisation under SI Protocol	Type 1 - Although this does not concern a proposal by Scottish Ministers to grant consent to UK Ministers but, instead, a proposed SI on which the UK Ministers have consulted Scottish Ministers. This notification is required because the Healthcare (International Arrangements) (EU Exit) Regulations 2023 will be made under the powers provided by section 2 of the Healthcare (European Economic Area and Switzerland Arrangements) Act 2019, which is currently listed in Annex A of the 'Protocol on scrutiny by the Scottish Parliament of consent by Scottish Ministers to UK secondary legislation in devolved areas arising from EU Exit'.
Purpose	The Regulations will revoke the Healthcare (European Economic Area and Switzerland Arrangements) (EU Exit) Regulations 2019, and make provisions to enable the functioning of existing, and any future, reciprocal healthcare agreements.
Other information	
SG Policy contact:	John Cameron Email: john.cameron@gov.scot