



OFFICIAL REPORT
AITHISG OIFIGEIL

Health, Social Care and Sport Committee

Tuesday 5 October 2021

Session 6



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HEALTH, SOCIAL CARE AND SPORT COMMITTEE

7th Meeting 2021, Session 6

CONVENER

*Gillian Martin (Aberdeenshire East) (SNP)

DEPUTY CONVENER

*Paul O’Kane (West Scotland) (Lab)

COMMITTEE MEMBERS

*Stephanie Callaghan (Uddingston and Bellshill) (SNP)

*Sandesh Gulhane (Glasgow) (Con)

*Emma Harper (South Scotland) (SNP)

*Gillian Mackay (Central Scotland) (Green)

*Carol Mochan (South Scotland) (Lab)

*David Torrance (Kirkcaldy) (SNP)

Evelyn Tweed (Stirling) (SNP)

*Sue Webber (Lothian) (Con)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Marie McNair (Clydebank and Milngavie) (SNP) (Committee Substitute)

Humza Yousaf (Cabinet Secretary for Health and Social Care)

CLERK TO THE COMMITTEE

Alex Bruce

LOCATION

The Mary Fairfax Somerville Room (CR2)

Scottish Parliament

Health, Social Care and Sport Committee

Tuesday 5 October 2021

[The Convener opened the meeting at 11:30]

Decision on Taking Business in Private

The Convener (Gillian Martin): I welcome everyone to the seventh meeting in 2021 of the Health, Social Care and Sport Committee. I have received apologies from Evelyn Tweed, and I welcome to the meeting Marie McNair, who is attending as a substitute in Evelyn's absence.

Agenda item 1 is a decision on taking business in private. Does the committee agree to take in private agenda item 3, which is consideration of the evidence that we will hear in the following evidence-taking session with the Cabinet Secretary for Health and Social Care?

Members *indicated agreement.*

Health and Care Bill

11:30

The Convener: Agenda item 2 is an evidence-taking session with the Cabinet Secretary for Health and Social Care on the legislative consent memorandum to the Health and Care Bill. The cabinet secretary will be supported online by the following Scottish Government officials: Jane Hamilton is the head of business management and intergovernmental relations in the health workforce directorate; Robert Henderson is the head of health and social care in the intergovernmental relations unit; and John Paterson is the divisional solicitor for food, health and social care in the legal directorate. I welcome everyone to the meeting.

Cabinet secretary, I believe that you have an opening statement.

The Cabinet Secretary for Health and Social Care (Humza Yousaf): It is just a very brief one, convener.

I thank the committee for inviting me here to discuss the United Kingdom Government's Health and Care Bill. The bill broadly comprises three elements: provisions of the NHS England long-term plan, measures in response to Covid-19 and a rolling back of some of the competition elements of the Health and Social Care Act 2012.

The proposals in the long-term plan, which have been in development for a long time, are not contentious for us, because their effects are confined to England and the English national health service, although we are, of course, always worried about domino effects. Other provisions in the bill have not been as long in development or subject to the usual consultation, and some of them will affect Scotland.

In my LCM, I recommend that Parliament not grant legislative consent to the bill as it stands. The UK Secretary of State for Health and Social Care would be granted powers to act in Scotland without having to seek the consent of the Scottish ministers, even where the actions would impact on delivery of healthcare, which is the responsibility of the Scottish ministers. Moreover, some provisions ignore the reality of there being a separate NHS in Scotland and could, if unchallenged, enable the secretary of state to treat the NHS across the UK as a single unitary entity. That is unacceptable.

I have had a written response to my concerns from Edward Argar, the minister who is leading on the bill, and we are due to speak tomorrow. I hope to see some movement from the UK Government, but until I see willingness to respect the devolution settlement, I am not in a position to change my

recommendation to withhold legislative consent. If the UK Government makes suitable amendments, I will bring forward a supplementary LCM.

I look forward to going into the issues in more detail with committee members.

The Convener: Thank you, cabinet secretary. My colleagues have some detailed questions.

Whenever anything like this comes before a committee, my main thought is about the committee's scrutiny function in such matters. When the Scottish Government is not consulted on issues that affect healthcare and the NHS in Scotland, that means that we, too, are unable to scrutinise the decisions. Is that fair comment?

Humza Yousaf: Yes—that is a completely fair comment. The consultation process—or lack thereof, thus far—has been frustrating. We will, no doubt, go into the matter in more detail with members' questions, but the fundamental point and central concern is the difference between consultation and consent. Where we have, as the UK Government recognises, devolved competence in certain areas—the challenge, of course, is that we have competence in other areas, too—our simply being consulted as a Government is not good enough, particularly when it comes to the scrutiny processes of Parliament. This is about consent.

I should also point out that, from my conversations with the Welsh Government and the Welsh Minister for Health and Social Services, Eluned Morgan, I know that she is very much in the same space. The Welsh Government is frustrated because, in areas of devolved competence, it is being told that it will be consulted instead of its consent being sought. This is a very important issue not only for all of us who believe in the devolution settlement, which I suspect is everybody around the table and online, but for parliamentary scrutiny, as you have rightly pointed out, convener.

Paul O'Kane (West Scotland) (Lab): Good morning, cabinet secretary. In your opening remarks, you touched on the conversation that you will have with your counterpart tomorrow, but what dialogue has been going on so far and what response have you had from the UK Government on the issues that you have raised directly with it, as highlighted in your statement?

Humza Yousaf: I thank Paul O'Kane for that important question. There has been dialogue at official level for quite a while now, but the fact that we did not get the detail of what was in the bill until, I think, the day before it was introduced was a source of frustration for my officials. Just over two months ago I wrote to Minister Argar to highlight my concerns with regard to areas of devolved competence. I did not receive a

response until two months later, which I can understand—I myself am extremely busy with correspondence and have sometimes taken longer to respond than I would have liked to. However, although I understand that these things can take time, what I have found frustrating is the nature rather than the timing of the response.

I am happy and willing to go back to the UK Government to ask for its response to be shared and put in the Scottish Parliament information centre for Parliament's scrutiny, but even without doing that, I can safely tell the committee that the response that I received did not address the substantial points around devolved competence and the issue of consultation versus consent. In the meeting that I will have tomorrow, I will be fairly robust in that conversation about the fact that my expectations have not been met.

Finally, I should point out that there is not that much disagreement with regard to the policy areas; in fact, I could see us aligning with the policy intent in a lot of areas. However, this is about the principle that, with anything that falls within our devolved competence, we should not be treated simply as consultees. Instead, our consent as a Government should be sought, and the appropriate parliamentary processes should be followed.

The dialogue will continue, and I hope that we can reach some sort of agreement. If so, I will bring forward a supplementary LCM.

Paul O'Kane: What should the memorandum of understanding that the Scottish Government has requested include, and how broad and wide-ranging should it be?

Humza Yousaf: I am willing to discuss what that should look like in more detail with the UK Government, but its aim is to underpin any future discussions or consultation between the Scottish ministers and the UK Government on reserved matters. We should be asked for our consent on devolved issues—I do not think that anyone would argue that that would be inappropriate—and I hope that we would at least be consulted on reserved matters. After all, even where matters are fully reserved, there can be implications for the health service in Scotland. I am quite willing to enter into a memorandum of understanding with regard to reserved matters to ensure appropriate and full consultation between Scottish and UK Government ministers.

Marie McNair (Clydebank and Milngavie) (SNP): Good morning, cabinet secretary. I welcome your appearance here this morning.

What is the most compelling argument that the Westminster Government has made for introducing UK-wide legislation on the matter?

Humza Yousaf: I do not have a concern about trying to create policy across the four nations in many areas. I think that it makes sense to take, as best we can, a four-nations approach to advertisements for less healthy food, for example. Actually, I believe that the UK Government has not got that issue right; it thinks that it does not need an LCM, but we believe very strongly that it does. I can go into more detail on that later, if anyone so wishes. That said, the policy is one that I can agree with. In a number of areas in the bill, taking, as best we can, a four-nations approach would make sense. However, the Scottish Government's position—as I have said, the Welsh Government takes a similar position—is that, where policy affects our executive power as ministers, which has been agreed by the UK Government, we cannot be treated simply as consultees. Our consent must be gained. Indeed, that is a fundamental principle of the devolution settlement.

Emma Harper (South Scotland) (SNP): Good morning, cabinet secretary. I have a question on the advertising of food and drink products that are less healthy and might be harmful. You said that you want to have a four-nations approach, but I am interested in how we discern what is reserved and what is devolved. We want to take forward legislation that works for us in Scotland as we try to tackle obesity and reduce alcohol consumption. I note the recommendations in the recent report by the British Heart Foundation. How can we prevent legislation that we develop being impinged upon by UK Government legislation?

Humza Yousaf: Your question gets to the nub of the issue. In the bill, there are, in effect, three provisions on the advertising of unhealthy food. First, it proposes a watershed for television advertising of less healthy food and drink products, which would be prohibited between 5.30 am and 9 pm. Secondly, it proposes a similar restriction of advertising on on-demand programme services, which also come under the jurisdiction of the UK and are regulated by Ofcom. Thirdly, it proposes a restriction of paid-for online advertising of less healthy food.

We have a difference of opinion with the UK Government in the third area. We accept that the first two areas are wholly reserved; I do not think that there is any argument in that respect. However, we have a different view in respect of the proposed restriction of paid-for advertising online of less healthy food.

As Emma Harper mentioned, it is an important issue, particularly in relation to our target to reduce childhood obesity. I am the stepfather of a 12-year-old. Given the amount of time my stepdaughter spends on her phone, on screens and looking at apps—I must work harder to curtail that—she will end up seeing a lot of advertising on

any given day. I think that we can all agree that that is a really important space in which to try to legislate.

Again, we want to have a four-nations approach where possible, but our contention—this is a difference between us and the UK Government—is that we do not believe that online advertising in that respect is reserved. The primary purpose of the provision is to tackle childhood obesity by preventing children's exposure to paid-for online advertising of less healthy food. We consider that to be a public health purpose, and therefore consider the matter to be devolved. That is where the difference comes from.

I note that the principle is really important. From that perspective, we can see how that could translate into other policy areas, and not just health policy areas. I suspect that, if we were to concede on the principle, there could be implications for other Government policy, too. I have had conversations with the Welsh Government, which is also of the view that the purpose of the provision is a public health one. It believes that the Senedd—the Welsh Parliament, of course—should legislate in that domain. There is a shared position between us and the Welsh Government.

Emma Harper: Does that affect the labelling of products as well? Health-harming products might contain certain chemicals that are used in food production. I note that NFU Scotland is calling for clear country-of-origin labelling. Do the provisions in the bill bleed into those issues?

Humza Yousaf: They could. It is accepted that food labelling is a devolved subject, and the UK Government is seeking consent in respect of the clause that would give the Scottish ministers an equivalent power to that which the secretary of state would have for England. I do not think that there would be the same impact that would apply in relation to online advertising, but I will take that question away and ensure that the provisions could not, as Ms Harper described it, “bleed into” other policy areas in the bill.

11:45

Sue Webber (Lothian) (Con): Welcome, cabinet secretary. My question is about online advertising. You mentioned the reasons why you want to take that approach, but have you had any thoughts about what you might like to do that would be different from the approaches of the other UK nations?

Humza Yousaf: There would not necessarily be huge differences. We are all looking to restrict that advertising online, where possible. As I have said, there are a number of provisions in respect of which it would make sense to have a four-nations

approach. That is one of them, for very obvious reasons. However, the principle is that we and the Welsh Government, for example, believe that those are areas of devolved competence and that if we concede that principle on online advertising, it could have an effect on other areas of public health policy above and beyond that. We are all—including Ms Webber, of course—defenders of the devolution settlement, so it is important that those principles are robustly defended by all of us.

The Convener: We turn to questions from David Torrance.

David Torrance (Kirkcaldy) (SNP): My question was on advertising and has been answered.

The Convener: Okay. Gillian Mackay has the next question.

Gillian Mackay (Central Scotland) (Green): How much of a risk do the bill's provisions pose to the confidentiality and safety of patient data? Is it possible that Scottish patient data could be provided to private companies?

Humza Yousaf: Quite frankly, that is a significant concern. That is one of the areas that we think requires consent rather than just consultation. For example, we have robust measures in place when it comes to pseudonymised—depersonalised—patient data. However, at the stroke of a pen and through mere consultation of the Scottish ministers, that depersonalised and anonymised Scottish patient data could be used in a very different way. I have real concerns about that. That is why it is imperative that we are not just consulted and that our consent is sought.

Stephanie Callaghan (Uddingston and Bellshill) (SNP): Welcome, cabinet secretary. My question is similar to Gillian Mackay's question. Have there been any discussions about opting out when it comes to patient confidentiality and the sharing of data?

Humza Yousaf: A carve-out is certainly an option that could be discussed. However, there could absolutely be an advantage in working on a four-nations basis in a number of areas, as I have said throughout this session. I have no difficulty in doing that; I do not have any ideological opposition to that, at all. However, as Gillian Mackay rightly said, there are real concerns about how Scottish patient data could be used. It is therefore important that the Scottish ministers are not just consulted. Their consent is required so that, if they have concerns about how that data is being used or about its confidentiality and personalisation, they can effectively stop any practice that they think is not within the values and ethos that they espouse when it comes to data protection.

The Convener: Cabinet secretary, another issue that comes up is international healthcare arrangements. What are the issues when it comes to reciprocal arrangements with other countries? How might they be impacted if the Scottish Government does not have powers over them or if we, as the Scottish Parliament, do not have the ability to scrutinise them?

Humza Yousaf: For me, the important point about international healthcare—I am going to sound a bit like a broken record, but it is important for me to stress this—is that that is an area in which it makes perfect sense to adopt a four-nations approach. From a policy perspective, I absolutely would like to do that. However, from a principle perspective, the Scottish Government and the Scottish Parliament should have a say on such arrangements, because they impact on devolved competence. They impact because it is accepted, including by the UK Government, that reciprocal arrangements—people coming from overseas to access our healthcare and Scots going abroad to access healthcare internationally—are within our devolved competence.

We would not want the UK Government to enter without our consent an agreement that could affect Scottish patients, the Scottish public and the Scottish health service because of people from outside accessing our health service. It is not good enough simply to be consulted. We might then raise issues and concerns, but they could be ignored by the current UK Government or a future one. I know that we can sometimes get into a space in which we think about only the current Governments, but we have to think about future proofing the legislation. It is really important that we are not just consulted on those issues and that our consent is gained. That is a significant concern for me in relation to international healthcare.

The Convener: Emma Harper has a supplementary question. We are coming to the end of this session. If colleagues want to ask about anything, they should let me know, and I will come to them.

Emma Harper: I will be quick. What are the cabinet secretary's concerns about professional regulation? Our briefing paper says that the UK Government recognises that it might want to reform

"the overarching system of healthcare professional regulation."

Are there concerns about that? Obviously, we have our own healthcare workforce that we need to support, look after and protect.

Humza Yousaf: As I have come to find out, the regulation of healthcare is an extraordinarily complex landscape. Some of that regulation sits in

the reserved space and some it sits in the devolved space, depending on the body that is regulated. The bill's provisions form part of a much wider programme of reform of professional healthcare, which the UK Government is taking forward with the support of the devolved Administrations.

I know from my conversations that the statutory regulators, who would obviously be most affected by that, are generally supportive of the principles of reform. Therefore, I do not have any particular concerns in that area, but we always keep an eye on those matters as they progress.

Stephanie Callaghan: I noticed that, in relation to the legislative consent memorandum, the Department of Health and Social Care advised that it had undertaken engagement in round-table and smaller discussions, including with the NHS Confederation, which covers England, Wales and Northern Ireland. What consultation, if any, has taken place with NHS Scotland?

Humza Yousaf: Consultation has been limited. We encourage the UK Government to consult. Obviously, we are consulting, as members would imagine, but the UK Government's consultation with us has not been as good as the consultation that I have seen on other bills in the past. Our consultation with the NHS and broader NHS and social care partners has been as extensive as it can be, but it is difficult when the detail is given to us with not much advance notice.

I know that a number of stakeholders share our concern about some of the aspects that have been discussed and some aspects that have not been discussed but are in the LCM—for example, in relation to the Human Fertilisation and Embryology Authority. We have a number of concerns, and we will continue our consultation with the UK Government. I hope that we will come to a sensible resolution, and we will certainly do what we can to consult further with NHS colleagues and partners.

The Convener: No other member wants to come in, so I thank the cabinet secretary and his officials for their time this morning.

In our next meeting, on 26 October, the committee will consider the Transvaginal Mesh Removal (Cost Reimbursement) (Scotland) Bill and subordinate legislation. That concludes the public part of our meeting.

11:54

Meeting continued in private until 12:30.

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