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The Welsh Government's Legislative Consent Memorandum on the Healthcare (International Arrangements) Bill

January 2019



About the Committee

The Committee was established on 15 June 2016. Its remit can be found at:
www.assembly.wales/SeneddCLA

Committee Chair:



Mick Antoniw AM
Welsh Labour
Pontypridd

Current Committee membership:



Dawn Bowden AM
Welsh Labour
Merthyr Tydfil and Rhymney



Suzy Davies AM
Welsh Conservatives
South Wales West



Carwyn Jones AM
Welsh Labour
Bridgend



Mandy Jones AM
UKIP Wales
North Wales



Dai Lloyd AM
Plaid Cymru
South Wales West

The following Member was also a member of the Committee during this inquiry.



Lee Waters AM
Welsh Labour
Llanelli

Carwyn Jones AM substituted for Lee Waters AM at the Constitutional and Legislative Affairs Committee meetings on 7 and 14 January.

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Background

The Bill

Overview

1. The UK Government's Healthcare (International Arrangements) Bill¹ (the Bill) received its first reading in the House of Commons on 26 October 2018. The Committee Stage in the House of Commons ended on 29 November 2018, when it was reported without amendment. Report Stage in the House of Commons took place on 21 January 2019.

2. The explanatory notes to the Bill state that:

“The Bill provides the Secretary of State with powers to fund and arrange healthcare outside the UK, to give effect to healthcare agreements between the UK and other countries, territories or international organisations, such as the European Union (EU), and make provision in relation to data processing, which is necessary to underpin these arrangements and agreements.

The Bill is being introduced as a result of the decision to leave the EU and is intended to enable the Government to respond to the wider range of possible outcomes of EU Exit in relation to reciprocal healthcare including the implementation of new reciprocal healthcare agreements. It sits alongside the European Union (Withdrawal) Act 2018 and the European Union (Withdrawal Agreement) Bill as part of the Government's legislative response to EU Exit.”²

3. They also state that:

“Reciprocal Healthcare agreements support people from the UK to obtain healthcare when they live in, work in or visit other countries and vice versa, for people from other EU 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 cost of healthcare—an approach that underpins EU reciprocal healthcare.

¹ [Healthcare \(International Arrangements\) Bill 2017-19, HC 279](#)

² [Healthcare \(International Arrangements\) Bill: Explanatory Notes](#), October 2018, paragraphs 1-2

Reciprocal healthcare agreements can also facilitate co-operation on planned treatment or other areas of healthcare policy.”³

4. As regards the Bill's application to Wales, the explanatory notes state:

“The provisions of the Bill extend to the whole of the United Kingdom.

(...)

To the extent that the provisions of the Bill fall within the legislative competence of devolved legislatures, the legislative consent procedure would be appropriate.”⁴

5. Clause 1 provides the Secretary of State with a power to make payments, and arrange for payments to be made, to fund healthcare outside the United Kingdom. This clause enables the funding of reciprocal healthcare agreements with EU states and non-EU states and international organisations such as the EU, as well as unilateral funding of treatment abroad.

6. The Bill covers reciprocal healthcare arrangements outside the EU, in that it allows the UK to strengthen existing reciprocal agreements (for example with Australia and New Zealand) and also enables to the UK to implement new ones with third party countries.

7. Clause 2 provides the Secretary of State with discretionary powers to make regulations and directions (described in the next section), while clause 3 defines “healthcare” which is used in clause 1 and clause 2 and “healthcare agreement” which is used in clause 2.

8. Clause 4 of the Bill provides a legal basis for “authorised persons” to share data including medical data to facilitate reciprocal healthcare after Brexit. For the purposes of the Bill, an “authorised person” includes Welsh Ministers, providers of healthcare and other NHS bodies. This means that they share personal data with other states to support the operation of new reciprocal healthcare arrangements. Clause 4 also includes a regulation-making power for the Secretary of State to amend the list of authorised persons.

9. Clause 5 specifies the manner in which the power to make regulations and directions is to be exercised.

³ [Healthcare \(International Arrangements\) Bill: Explanatory Notes](#), October 2018, paragraph 3

⁴ [Healthcare \(International Arrangements\) Bill: Explanatory Notes](#), October 2018, paragraphs 18 and 20

10. The Bill does not propose any specific reciprocal healthcare arrangements, neither does it provide any detail about the operation of future reciprocal healthcare arrangements.

11. The UK Government's view is that the legislative consent process will be engaged for clauses 1, 2 and 4.⁵ The Welsh Government also believes that clause 5 requires consent, and this difference of opinion is considered later in the report.

Powers to make regulations and give directions

12. The Bill contains the following powers for the Secretary of State to make regulations and give directions:

- 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;
 - (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);
- 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.

13. All regulations made under the Bill will subject to the negative procedure, unless they amend, repeal or revoke primary legislation. In such cases, the regulations will be subject to the affirmative procedure.

⁵ Healthcare (International Arrangements) Bill: Explanatory Notes, October 2018, paragraphs 20-21 and Annex A

- 14.** The exercise of the regulation-making powers and the contents of the regulations will depend on the outcome of the Article 50 negotiations.
- 15.** In the event of a deal between the UK and EU that includes reciprocal healthcare similar to current arrangements, the powers in clause 1 could be used to fund and implement aspects of the deal alongside powers available in the European Union (Withdrawal) Act 2018 and/or the anticipated European Union (Withdrawal Agreement) Bill.
- 16.** If the final deal does not replicate the current arrangements or does not cover reciprocal healthcare, the regulation-making powers in clause 2 could be used to implement a new policy. Regulations could be made under this clause to implement new international agreements on reciprocal healthcare between the UK and countries or territories both within and outside the EU.
- 17.** In the event of no deal, the regulation-making powers in clause 2 of the Bill would also enable the UK Government to implement a new reciprocal healthcare agreement with EU member states, or to make unilateral arrangements for UK citizens to have access to healthcare abroad. In a no deal scenario, the Bill would need to receive Royal Assent before exit day on 29 March 2019 so that new reciprocal healthcare arrangements can be put in place.

The Welsh Government's Legislative Consent Memorandum

- 18.** On 15 November 2018, the Cabinet Secretary for Health and Social Services⁶ laid before the National Assembly a Legislative Consent Memorandum (LCM) in respect of the Bill⁷.
- 19.** On 20 November 2018, the Business Committee referred the LCM to this Committee and the Health, Social Care and Sport (HSCS) Committee for consideration. The Business Committee set a reporting deadline of 22 January 2019.⁸
- 20.** In accordance with Standing Orders 29.1 and 29.2, an LCM is required because provisions in the Bill modify or fall within the Assembly's legislative competence.

⁶ Following a Welsh Government Cabinet reshuffle on 13 December 2018, the Cabinet Secretary for Health and Social Services became the Minister for Health and Social Services.

⁷ Welsh Government, [Legislative Consent Memorandum, Healthcare \(International Arrangements\) Bill](#), November 2018

⁸ Business Committee, [Timetable for consideration of the Legislative Consent Memorandum on the Healthcare \(International Arrangements\) Bill](#), November 2018

21. Paragraphs 6 to 15 of the LCM set out the Welsh Government's assessment of which provisions in the Bill require consent:

"It is considered that Clauses 1, 2, 4 and 5 require consent on the basis that they are making provision for a purpose that is either partially or wholly within the Assembly's legislative competence as they relate to health. (Clauses 3 and 6 make provision about interpretation, extent and commencement for the purposes of the other clauses in the Bill for which consent is required.)

Clause 1 – provides the Secretary of State with a power to make payments and to arrange for payments to be made to fund healthcare outside of the UK.

Should new reciprocal healthcare arrangements be similar to current EU arrangements this could include, amongst other things, funding healthcare for state pensioners living outside the UK, providing healthcare for UK residents visiting countries outside the UK, funding healthcare for posted workers and funding for UK residents to receive planned treatment in other countries.

Clause 2 – provides the Secretary of State with powers to make regulations in relation to Clause 1, in connection with the provision of healthcare outside the UK, and to give effect to healthcare agreements.

It is envisaged that should the UK exit the EU in a deal scenario, this power would enable the implementation of future healthcare arrangements with the EU, individual Member States or third countries from January 2021 onwards. In a no deal scenario, then this would enable the UK Government to give effect to new reciprocal healthcare arrangements on or after exit day.

Whilst it is for the UK to make bilateral or multilateral agreements with other territories and international organisations, the Assembly may legislate for the purpose of observing and implementing the UK's international obligations relating to devolved matters, such as healthcare.

Clause 4 – provides powers to enable authorised persons to process personal data to facilitate reciprocal healthcare arrangements.

It may be necessary for authorised persons to share personal data, including medical data, with equivalent persons or bodies overseas to

facilitate any reciprocal healthcare arrangements. Currently EU law provides the necessary powers to do this. This data processing gateway would support the operation of payments and arrangements for healthcare outside the UK provided for under Clause 1.

Clause 5 – provides a power to amend, repeal or revoke primary legislation, including a Measure or Act of the Assembly, for the purpose of conferring functions on the Secretary of State or any other person, or to give effect to a healthcare agreement.

Consent is required for these provisions as they fall within the legislative competence of the National Assembly for Wales in so far as they relate to health and the observance and implementation of international obligations relating to healthcare.”⁹

22. Paragraphs 16 to 19 of the LCM set out the Welsh Government’s reasons why including provision for Wales in the Bill is appropriate. The Welsh Government believes that there are benefits to having a UK-wide approach and that it is appropriate to deal with reciprocal healthcare arrangements in a UK Bill due to the urgency of the legislation. However, it notes that:

“... any healthcare agreement entered into on behalf of the UK will affect the NHS in Wales and this legislation will therefore have a significant impact on a devolved policy area.”¹⁰

23. For that reason, the Welsh Government is concerned about the extent to which it will be involved in informing and shaping the healthcare agreements to be delivered under the Bill:

“Whether or not legislative consent should be given, therefore, needs to be considered in light of legislative and non-legislative assurances given by the UK Government to ensure that the Welsh Government is involved in matters that affect devolved areas in Wales.

⁹ Welsh Government, Legislative Consent Memorandum, Healthcare (International Arrangements) Bill, November 2018, paragraphs 6 to 15

¹⁰ Welsh Government, Legislative Consent Memorandum, Healthcare (International Arrangements) Bill, November 2018, paragraph 17

Further work to resolve our concerns will continue during the Bill's passage through Parliament and a supplementary Legislative Consent Memorandum will be brought forward if required."¹¹

24. The Welsh Government exchanged correspondence with the UK Government about the Bill between October 2018 and January 2019.¹²

Report by the House of Lords Delegated Powers and Regulatory Reform Committee

25. The House of Lords Delegated Powers and Regulatory Reform Committee published its report (the DPRR Committee's report) on the Bill on 15 November 2018.¹³

26. The DPRR Committee's report is critical of the Bill. It describes clause 2 of the Bill as having "breath-taking scope". The DPRR Committee concluded that the scope of the regulations "could hardly be wider" and highlighted that:

- there is no limit to the amount of the payments;
- there is no limit to who can be funded world-wide;

¹¹ Welsh Government, Legislative Consent Memorandum, Healthcare (International Arrangements) Bill, November 2018, paragraphs 18-19

¹² Letter from Vaughan Gething AM, Cabinet Secretary for Health and Social Services to Lord O'Shaughnessy, Parliamentary Secretary of State for Health and Social Care, 23 October 2018; Letter from Vaughan Gething AM, Cabinet Secretary for Health and Social Services to Lord O'Shaughnessy, Parliamentary Secretary of State for Health and Social Care, 25 October 2018; Letter from Lord O'Shaughnessy, Parliamentary Secretary of State for Health and Social Care to Vaughan Gething AM, Cabinet Secretary for Health and Social Services, 26 October 2018; Letter from Vaughan Gething AM, Cabinet Secretary for Health and Social Services to Lord O'Shaughnessy, Parliamentary Secretary of State for Health and Social Care, 15 November 2018; Letter from Vaughan Gething AM, Cabinet Secretary for Health and Social Services to Lord O'Shaughnessy, Parliamentary Secretary of State for Health and Social Care, 4 December 2018; Letter from Lord O'Shaughnessy, Parliamentary Secretary of State for Health and Social Care to Vaughan Gething AM, Cabinet Secretary for Health and Social Services, 14 December 2018; Letter from Vaughan Gething AM, Cabinet Secretary for Health and Social Services to Lord O'Shaughnessy, Parliamentary Secretary of State for Health and Social Care, 19 December 2018; Letter from Lord O'Shaughnessy, Parliamentary Secretary of State for Health and Social Care to Vaughan Gething AM, Cabinet Secretary for Health and Social Services, 19 December 2018; Letter from Vaughan Gething AM, the Minister for Health and Social Care to Stephen Hammond MP, Minister of State for Health Department of Health and Social Care, 9 January 2019.

¹³ House of Lords, Delegated Powers and Regulatory Reform Committee, 39th Report of Session 2017-2019, HL Paper 226, 15 November 2018

- there is no limit to the types of healthcare being funded;
- the regulations can confer functions on anyone anywhere;
- the regulations can delegate functions to anyone anywhere;
- the regulations can amend or repeal any Act of Parliament, for the purpose of conferring functions on people or for giving effect to a healthcare agreement;
- the UK Government says that clause 2 “enables the Secretary of State to address essential matters relating to healthcare abroad”, but the powers in the Bill go much wider than essential matters;
- the UK Government says that the clause 2 powers “are necessary to enable the Secretary of State to respond appropriately after EU exit, when the EU reciprocal healthcare arrangements will no longer apply in the UK in their current form”, but the Bill applies to countries throughout the world, not just to the EU;
- the scope of regulations made under clause 2—relating to the provision and funding of healthcare throughout the world—is exceedingly wide.¹⁴

27. The DPRR Committee concluded that:

“It is one thing to introduce skeletal legislation needed in the event of no EU withdrawal agreement. But this Bill is as much to do with implementing future reciprocal healthcare agreements entered with non-EU countries. Indeed, it goes much wider than merely giving effect to healthcare agreements and covers the provision of any healthcare provided by anyone anywhere in the world. **In our view, the powers in clause 2(1) are inappropriately wide and have not been adequately justified by the Department. It is particularly unsatisfactory that exceedingly wide powers should be subject only to the negative procedure.**”¹⁵

¹⁴ House of Lords, Delegated Powers and Regulatory Reform Committee, Agriculture Bill, [39th Report of Session 2017-2019](#), HL Paper 226, 15 November 2018, paragraph 10

¹⁵ House of Lords, Delegated Powers and Regulatory Reform Committee, Agriculture Bill, [39th Report of Session 2017-2019](#), HL Paper 226, 15 November 2018, paragraph 13

Committee consideration

Evidence from the Minister for Health and Social Services

28. We took evidence from the Minister on 7 January 2019.¹⁶

29. The Minister explained that:

“The Bill’s objective is to make sure that reciprocal healthcare arrangements can continue should the United Kingdom leave the European Union ... So, this provides powers to make sure that healthcare arrangements can continue and it’s why the Bill provides for the Secretary of State and United Kingdom Government to be able to make the necessary arrangements for payments to be made. The challenge, though, is that, obviously, it goes across the devolved areas of health, and so the United Kingdom Government themselves recognise that a legislative consent motion is required because it does affect a devolved competence.”¹⁷

30. He also noted that the Welsh Government “isn’t looking to try and interrupt or prevent these arrangements from continuing in the future”,¹⁸ saying:

“We think it’s a good thing for Welsh citizens to be able to have these reciprocal arrangements when people travel or, sometimes, live for a significant part of their time in other European countries, and, equally, we would not want to see that European citizens who come to this country somehow have alternative and less favourable arrangements. The challenge is how the Bill sets out that those should continue.”¹⁹

31. The Minister went on to describe the Welsh Government’s disappointment at not being informed about the Bill in good time.²⁰ He noted the UK Government’s acceptance of the need for the National Assembly to provide legislative consent because the Bill affects devolved areas of competence but added:

“The challenge comes in the way in which the regulation-making power is set out in section 2, because that, as drafted, doesn’t require

¹⁶ Constitutional and Legislative Affairs (CLA) Committee, RoP, 7 January 2019

¹⁷ CLA Committee, RoP [4], 7 January 2019

¹⁸ CLA Committee, RoP [8], 7 January 2019

¹⁹ CLA Committee, RoP [8], 7 January 2019

²⁰ CLA Committee, RoP [8], 7 January 2019

consultation or consent from Ministers in devolved administrations. That's poorly drafted, if you wanted to be generous and not see a conspiracy, or you could take the view that there is a deliberate attempt to try and have the widest array of powers possible for UK Ministers ... So, we've had correspondence about how clauses 2 and 5, in particular, are set out, because clause 2 sets out that, by regulation, the Secretary of State may make different arrangements and clause 5 then sets out the range of those areas and the detail of how they could be undertaken, and that includes, of course, a regulation-making power to potentially change primary legislation."²¹

32. He also stated:

"... this is a Bill drafted by the United Kingdom Government, and it's not one that we are currently content with. So I'm not here to defend the drafting of the Bill in front of us—far from it—but to set out the position as to how this could be a Bill that we could accept, and could recommend to the Assembly, which should be passed. Because, again, I don't think that anyone in any party wants to see reciprocal healthcare agreements fall away."²²

33. He clarified the Welsh Government's position regarding the circumstances under which it would recommend that the National Assembly provides its consent, this being:

"... that there is a clear consultation power with Welsh Ministers on the face of the Bill in section 2, to be accompanied by a satisfactory memorandum of understanding about the Welsh Government being engaged at an early stage before any agreements are entered into by the United Kingdom Government, so that we understand, from a negotiating mandate point of view, what was being proposed. And that's not unusual in other areas. For example, the way in which pricing mechanisms are set—with pharmaceutical companies, we already do that with the United Kingdom Government before any agreements are actually concluded."²³

34. He elaborated on why this was important:

²¹ CLA Committee, RoP [9], 7 January 2019

²² CLA Committee, RoP [26], 7 January 2019

²³ CLA Committee, RoP [11], 7 January 2019

“... should the memorandum provide the range of undertakings that we’re looking for, for the involvement of the Government at an early stage, before agreements are entered into, I would be prepared, in these extraordinary circumstances, where we understand we want to maintain reciprocal healthcare arrangements, to recommend a commitment on the face of the Bill to consult. Together with a satisfactory memorandum, that would be something I would recommend.

If the memorandum proposed or drafted is not satisfactory, then we go back to a position of requiring the consent of Welsh Ministers, and that, really, is in the hands of the UK Government. The letter from James O’Shaughnessy on the nineteenth suggests that I am prepared to recommend consent to the Bill, but, of course, that rather leaves out that it’s contingent upon conditions being met for that memorandum. If we don’t have the amendments from the UK Government to place that duty on the face of the Bill, if we don’t have a draft of the memorandum that we are content with, then we’re not going to be in a position to ultimately recommend to this place that its consent is given to the LCM.”²⁴

35. As regards the consent process, the Minister said:

“... in our current Standing Orders for this place—if a Minister in the United Kingdom Parliament wants to introduce secondary legislation that amends primary legislation here, whether it’s the legacy legislation, for example the NHS Act, or whether it’s a Measure or Act of this place, then there is already a process where the Assembly would have to give its consent for that to take place. So, if this went through, if there were regulations that wanted to affect primary law-making duties and responsibilities of this place, the Assembly would have to give its consent in any event. And, obviously, it’s the same process as now where the Welsh Government would provide a recommendation, but ultimately it would be for the Assembly to determine whether it wished to give its consent to the altering of primary legislative powers that this place has.”²⁵

²⁴ CLA Committee, RoP [50-51], 7 January 2019

²⁵ CLA Committee, RoP [29], 7 January 2019

36. He re-affirmed this point later saying “the Assembly would need to decide whether to consent to that amendment of primary legislative power”.²⁶

37. In response to questioning about the breadth of the powers contained in clause 2 and the use the negative procedure to make regulations under that clause, the Minister said:

“This is a UK Bill, and I’m not here to defend the current drafting of the Bill. What I would say is that should a Bill on similar issues of import be brought before this Assembly, I would be amazed if the Government did not agree, at the very least, to those matters being dealt with by the affirmative procedure. These are hugely important issues, and I would be surprised if, at the end of this Bill, the current arrangements are in place as drafted for the negative procedure.”²⁷

38. We closed our session by asking the Minister whether he was confident that the Bill will not impact on the devolution settlement for Wales. He replied:

“No, The Bill, as drafted, does affect the settlement potentially, and that’s the reason why we’re having this discussion and conversation about the width and breadth of the powers as drafted. And to be fair, the UK Government themselves recognise that consent is required. If the Bill isn’t amended to a satisfactory form, we’ll have a position where the UK Government recognises there’s a primary piece of legislation going through the UK Parliament that affects devolved competency and does not do so in a way where there’s agreement between the devolved Governments of the United Kingdom and the UK Government, and that would be a very unsatisfactory position to get into.

Parliament is sovereign in terms of the current UK constitution, but actually there is a political consequence to simply overriding the wishes of directly elected representatives here and in other UK nations. And, on an area where we all agree on the policy objective and maintaining these arrangements, that would be a poor fight to choose. So, I’m optimistic that, as I said, the pragmatic approach that James O’Shaughnessy took in our conversations will actually be made real in real amendments and a memorandum of understanding that we can

²⁶ CLA Committee, RoP [99], 7 January 2019

²⁷ CLA Committee, RoP [76], 7 January 2019

actually see and agree to, so that we don't have that wholly unnecessary and avoidable disagreement."²⁸

39. The Minister confirmed that supplementary LCMs will be laid where amendments are tabled to the Bill that affect devolved competence.²⁹

Our view

40. We share the concern of the Minister that the Welsh Government was only made aware of the Bill just before its introduction to the UK Parliament. At a time of such constitutional upheaval as a result of the UK's withdrawal from the European Union, the need for governments to work together in a spirit of trust and co-operation is paramount. The UK Government's approach in relation to this Bill is therefore unhelpful. It reinforces the concerns raised in our report *UK governance post-Brexit*,³⁰ which identifies changes and improvements that we believe are necessary to the way governments work together in the future.

41. We note the Minister's position on clause 2. We agree that there must be a formal mechanism for seeking the Welsh Minister's consent in the circumstances, within this Bill, where UK Ministers exercise the functions of the Welsh Ministers in devolved areas.

42. We consider that the most appropriate approach would be for the Minister to pursue an amendment to the Bill that requires the UK Ministers to seek the consent of the Welsh Ministers before exercising the functions of the Welsh Ministers (in devolved areas). This is a stronger requirement than including a statutory duty to consult in the Bill (albeit accompanied by a memorandum of understanding setting out arrangements to be undertaken between the Welsh and UK Governments). We believe this to be important. This is because the period of time over which the UK Ministers would retain the power to exercise the functions of the Welsh Ministers in this area is not known.

Recommendation 1. The Minister should pursue, with the UK Government, an amendment to the Bill that requires the UK Ministers to seek the consent of the Welsh Ministers before exercising the functions of the Welsh Ministers in devolved areas.

²⁸ CLA Committee, RoP [105-106], 7 January 2019

²⁹ CLA Committee, RoP [102-103], 7 January 2019

³⁰ CLA Committee, *UK governance post-Brexit*, February 2018

Recommendation 2. The Minister should keep the Committee updated with progress on the amendments he is seeking in respect of clause 2 of the Bill and notify the Committee when agreement has been reached.

43. In making recommendation 2, we recognise that any relevant changes to clause 2 will be the subject of a supplementary LCM.

44. Irrespective of the approach adopted, it is important that the Welsh Ministers notify the National Assembly when they give consent to UK Ministers exercising the functions of the Welsh Ministers in devolved areas. This is important to ensure that the National Assembly is in a position to scrutinise the exercise of the relevant functions by UK Ministers.

Recommendation 3. If a UK Minister is seeking to exercise the functions of the Welsh Ministers in devolved areas, the Welsh Ministers must:

- having made a decision on consent, lay a written statement notifying the National Assembly that it has either provided consent, or, refused to do so;
- include in that written statement, the reasons for the decision taken and if consent is given, information about the nature and terms of that consent.

45. We share the concerns of the House of Lords Delegated Powers and Regulatory Reform Committee regarding the breadth of clause 2 and agree with its conclusion that it is “unsatisfactory that exceedingly wide powers should be subject only to the negative procedure”. We therefore welcome the implications of the Minister’s comments that the regulation-making powers in clause 2 of the Bill should be subject to the affirmative procedure.

Recommendation 4. The Minister should pursue, with the UK Government, an amendment to the Bill that requires that all regulations made under clause 2 are subject to the affirmative procedure.

46. In his evidence, the Minister told us that any regulations made under clause 2 that amend primary legislation within the competence of the National Assembly would require the consent of the National Assembly in accordance with the National Assembly’s Standing Orders.

47. The relevant procedure, which involves the laying of a statutory instrument consent memorandum (SICM) setting out certain information, is set out in Standing Order 30A. However, Standing Order 30A.10 states that:

“After a statutory instrument consent memorandum has been laid, any member *may*, subject to Standing Order 30A.3, table a motion (a statutory instrument consent motion) seeking the Assembly’s agreement to the inclusion of a relevant provision in a relevant statutory instrument.” [Our emphasis]

48. There is therefore no obligation on a Minister to table a motion seeking the National Assembly’s consent to a statutory instrument laid before the UK Parliament that amends primary legislation within the competence of the National Assembly. Indeed, of the 17 SICMs laid in the Fifth Assembly none of them have been the subject of a consent motion tabled by the Welsh Government.

49. Moreover, UK Government Devolution Guidance Notes state:

“The consent of the Assembly is normally required where subordinate legislation introduced by the UK government amends primary legislation for which the Assembly has legislative competence. That consent is given by the Assembly through a Statutory Instrument Consent Motion (SICM).

There are however some exceptions to this general rule: for example, in the current session of Parliament several Bills relating to EU exit would enable UK Ministers to make SIs modifying Assembly legislation without the need for formal consent by the Assembly.

While UK Parliament Bills can be amended if an LCM is not passed by the Assembly, statutory instruments usually cannot. If a SICM is needed, Departments should allow adequate time to obtain the agreement of the Welsh Government before laying the secondary legislation in Parliament. The SICM should be passed in the Assembly before the SI is debated in Parliament. Departments should speak to the Wales Office if they are considering bringing forward subordinate legislation where an SICM may be required.”³¹

Recommendation 5. The Minister should write to the Committee providing a guarantee that the Welsh Government will:

³¹ [Devolution Guidance Note: Parliamentary and Assembly Primary Legislation Affecting Wales](#), Part 5: UKG SIs Modifying Primary Legislation within the Assembly’s Legislative Competence, paragraphs 108-110 [Accessed 11 January 2019]

- table a statutory instrument consent motion under Standing Order 30A.10, in circumstances where a statutory instrument consent memorandum is laid in accordance with Standing Order 30A.2 (in respect of a statutory instrument laid before the UK Parliament under the provisions of the Bill, if enacted).
- notify the National Assembly by written statement in circumstances where the UK Government engages paragraph 109 of its *Devolution Guidance Note: Parliamentary and Assembly Primary Legislation Affecting Wales* in relation to statutory instruments amending primary legislation for which the National Assembly has legislative competence.

50. While we note that any Assembly Member may table a motion under Standing Order 30A.3 in respect of a SICM laid by the Welsh Government, we believe that responsibility for doing so in respect of SICMs under the Bill must fall to the Welsh Ministers (particularly as any such Assembly Member would be obliged to lay their own SICM in accordance with Standing Order 30A.3).

51. We are unclear whether the Bill permits statutory instruments to be made by the UK Government that amend regulations made by the Welsh Ministers (and which the Welsh Ministers have made using powers delegated to them). Should this be the case, we believe that at the very least, the Welsh Ministers should notify the National Assembly that the UK Government is taking such action, given that a formal consent mechanism does not exist for such circumstances.

Recommendation 6. The Minister should write to the Committee:

- setting out its view on whether the Bill permits statutory instruments laid by the UK Government to amend regulations made by the Welsh Ministers;
- explaining whether it provides consent in such circumstances;
- committing the Welsh Government to notify the National Assembly of statutory instruments laid by the UK Government that amend regulations made by the Welsh Ministers, should the Bill permit such action.

52. We agree with the Welsh Government that consent is required for clause 5, as its provisions fall within the legislative competence of the National Assembly for Wales, in so far as they relate to health and the observance and implementation of international obligations relating to healthcare. We note that

the UK Government's explanatory notes suggest that consent is not required for clause 5 of the Bill.

Recommendation 7. It would be helpful if the Minister writes to the Committee explaining what discussions he has had with the UK Government regarding the UK Government's view that clause 5 does not require the National Assembly's consent and his view of the reasons why the UK Government has arrived at that conclusion.