

SUPPLEMENTARY LEGISLATIVE CONSENT MEMORANDUM (MEMORANDUM NO 3)

HEALTH AND CARE BILL

1. This legislative consent memorandum is laid under Standing Order (“SO”) 29.2. SO29 prescribes that a legislative consent memorandum must be laid, and a legislative consent motion may be tabled, before Senedd Cymru if a UK Parliamentary Bill makes provision in relation to Wales for any purpose within, or which modifies, the legislative competence of the Senedd.
2. The Health and Care Bill (“the Bill”) was introduced in the House of Commons on 6 July 2021. The Bill has concluded its passage through the House of Commons. Consideration of the Bill in the House of Lords commenced on 24 November, with Lords Committee stage beginning on 11 January 2022. The Bill as introduced to the Lords can be found at: <https://bills.parliament.uk/publications/44008/documents/1051>
3. On 24 January, the UK Government tabled a set of amendments in relation to Arm’s Length Bodies Transfer of Functions, Hymenoplasty and Mandatory Reporting as set out below which make provision falling within the legislative competence of the Senedd.

Policy Objective(s)

4. The UK Government’s stated objective is to enact policies set out in the NHS’s recommendations for legislative reform, following the NHS Long Term Plan, and the White Paper, Integration and Innovation: working together to improve health and social care for all. The UK Government says that the Bill builds on the NHS’s own proposals for reform, aiming to make it less bureaucratic, more accountable, and more integrated, and to incorporate lessons learnt from the pandemic.

Summary of the Bill

5. The Bill is sponsored by the Department of Health and Social Care.
6. The key provisions of the Bill cover a number of areas, set out briefly below.
 - a) Addressing of concerns raised by NHS England, such as establishing existing Integrated Care Systems (ICSs) on a statutory footing, formally merging NHS England and NHS Improvement, and making changes to procurement and competition rules relating to health services. The Bill also includes proposals to give the Secretary of State for Health and Social Care powers to direct NHS England and to decide how some other health services are organised. It gives the Secretary of State powers to transfer functions between some of the ‘Arm’s Length

Bodies' that lead, support and regulate healthcare services in England and to delegate other functions of the Secretary of State to those bodies both in relation to the health service in England, and to intervene in proposed changes to the way health services are delivered.

- b) The Bill does not cover wider reforms of the social care and public health systems, although it does provide for some changes in these areas; ICSs are intended to improve coordination between the NHS and local authority services. For social care, the Bill provides for the Care Quality Commission (CQC) to assess how local authorities in England deliver their adult social care functions and it aims to improve data sharing. There are also measures to streamline how people with ongoing care needs are discharged from hospitals.
- c) Public health measures in the Bill relate to food advertising, food information for consumers and water fluoridation.
- d) The Bill also addresses safety investigations and establishes the Health Services Safety Investigations Body as a statutory body, and makes changes to the system of medical examiners.
- e) Other matters covered by the Bill include the regulation of health and care professionals, the collection and sharing of data (including measures to support the development of new medicine registries), international healthcare, hospital food standards and, included through amendment, creating an offence of virginity testing.

Update on position since the publication of the second Legislative Consent Memorandum

- 7. I laid a second Legislative Consent Memorandum ("Memorandum No. 2") on 17 December 2021, following the tabling by UK Government on 18 November of 54 amendments, 24 of which made provision falling within the legislative competence of the Senedd. On 23 November the 24 UK Government amendments were agreed at Commons Report stage and now form part the Bill as introduced to the House of Lords.
- 8. Memorandum No. 2 outlined the areas of agreement reached between the Welsh Government and UK Government as a result of the introduction of negotiated amendments to the Bill agreed by the House of Commons.
- 9. It also provided an update on areas where we were still in disagreement with UK Government, the areas being Clauses 88-94: Arm's Length Bodies Transfer of Functions and Clauses 149, 144 and 91: Consequential Amendments to Senedd Legislation.
- 10. Since the publication of Memorandum No. 2, we have secured amendments from the UK Government which address our remaining concerns regarding Clauses 88-94: Arm's Length Bodies Transfer of

Functions, and have reached an agreed position with UK Government regarding Clauses 149, 144 and 91: Consequential Amendments to Senedd Legislation.

11. The UK Government has also tabled amendments including new clauses to the Bill in other areas and, at our request, extended the new provisions to Wales. The areas are the Criminalisation of Hymenoplasty and Mandatory Reporting. These are set out at paragraphs 38-50 below.

12. These amendments were tabled at House of Lords Committee Stage on 24 January 2022.

13. The Senedd will wish to note:

Memoranda of Understanding underpinning Clauses requiring the Secretary of State to Consult with the Welsh Ministers

14. There are three areas of the Bill where currently the UK Government is required to consult with the Welsh Ministers before making Regulations. These are:

- Clause 87: Medicines Information Systems
- Clauses 88-94: Arm's Length Bodies Transfer of Functions
- Clause 136: International healthcare arrangements

15. The Memorandum of Understanding concerning Medicines Information Systems is yet to be drafted by UK Government. We have communicated to UK Government the need to develop this Memorandum as soon as possible with a view to it being in place before the provisions come into force.

16. The Memorandum of Understanding concerning Arm's Length Bodies will no longer be required if the tabled amendment¹ as set out below in paragraphs 20 to 23 is agreed.

17. The Memorandum of Understanding concerning International Healthcare Agreements is at an advanced stage of agreement and it is our intention that a final draft can be provided to the Senedd Committees in relation to their consideration of the legislative consent memoranda on the Bill.

Changes to the Bill since the publication of the second Legislative Consent Memorandum for which consent is required

18. The following new clauses and amendments, which make provision in relation to Wales and are within the legislative competence of the Senedd, were tabled by the UK Government at House of Lords Committee stage on 24 January.

¹ Amendment 231C*

Clauses 88-94 (formerly Clauses 86-92): Arm's Length Bodies Transfer of Functions

19. The Welsh Government had three concerns regarding these clauses as introduced:
20. Firstly the provision to allow the Secretary of State to, without the consent of the Welsh Ministers, to make regulations which transfer functions between relevant bodies or provide for the exercise of functions of the Secretary of State by a relevant body, which make provision which would be within the legislative competence of the Senedd or which modify functions which are exercisable by the Welsh Ministers.
21. The bodies covered by the Bill provisions that could be impacted in this regard are the Health Research Authority, the Human Tissue Authority and the parts of NHS Digital that relate to Medical Information Systems/Medical Devices Information Systems (MDIS) and are within devolved competence.
22. To resolve this, the UK Government has now tabled an amendment² providing for a statutory consent requirement, whereby the consent of the Welsh Ministers is needed before the Secretary of State can make regulations under clauses 89 (Power to transfer functions between bodies) or 90 (Power to provide for exercise of functions of Secretary of State) where those regulations contain provision which would be within the legislative competence of the Senedd if contained in an Act of Senedd Cymru (and is not merely incidental to, or consequential on, provision which would be outside that legislative competence) or which modifies the functions of the Welsh Ministers (i.e. modifies their executive competence).
23. As the amendment, if passed, requires the Secretary of State to obtain the consent of the Welsh Ministers before making relevant regulations under section 89 or 90 rather than to consult (as on the face of the Bill), a Memorandum of Understanding underpinning the consultation process will no longer be required.
24. Secondly, our concern was the ability for the Secretary of State to transfer property, rights and other liabilities from Arm's Length Bodies to the Welsh Ministers, Welsh NHS Trusts and Wales-only Special Health Authorities in Clause 92.
25. To resolve this, the UK Government has now tabled amendments³ removing the Welsh Ministers, Welsh NHS Trusts and Welsh Special Health Authorities from the list of "appropriate persons" in the clause, thus fully addressing the concerns of the Welsh Government in this area.
26. Thirdly, Clause 91, which provides the Secretary of State with the powers to, by regulations, make provision which is consequential on clauses 88 or

² Amendment 231C*

³ Amendment 227A*; Amendment 231A*; Amendment 231B*

90 of the Bill. This includes provision that amends, repeals, revokes or otherwise modifies provision made by, or under, an Act or Measure of the Senedd.

27. This has now been addressed by the UK Government as set out in paragraphs 29 to 37 below.

28. As our concerns with regard to Clauses 88 to 94 have now been addressed I am now content to support inclusion these clauses in the Bill.

***Clauses 149, 144 and 91 (formerly clauses 89, 125 and 130):
Consequential Amendments to Senedd Legislation***

29. As set out in the first Legislative Consent Memorandum I laid on 1 September 2021, these clauses provide the Secretary of State with the powers to, by regulations, make provision which is consequential on the Bill. This includes provision that amends, repeals, revokes or otherwise modifies provision made by, or under, an Act or Measure of the Senedd.

30. I and my officials have met with Edward Argar MP, Minister of State for Health and his officials on a number of occasions to discuss these provisions. The UK Government are of the view that these are standard clauses and that we similarly take powers in Senedd Acts to make consequential amendments to UK Government legislation.

31. UK Government officials have provided examples of how these powers may be used – the amendments likely would be of a minor nature, for example the changing of the name of an English organisation which is referred to in Senedd legislation where a transfer of functions has occurred - and Minister Argar has also given a written commitment to making a Dispatch Box statement in relation to Clauses 91 and 149, the main provision of concern in this regard, on how these powers might be used.

32. Clause 144 refers to Schedule 17 which amends the Communications Act 2003 to restrict the advertising of certain food and drink products in relation to the UK. The Clause and Schedule are covered in the first Legislative Consent Memorandum on the Bill. Whilst this clause also contains provisions which enable consequential change to Senedd legislation, the UK Government has not identified this as a clause which requires the legislative consent of the Senedd and therefore will not include within the wording Dispatch Box Statement.

33. However, on the basis of the assurances provided by the UK Government on the possible use of the powers, we accept the consequential amendments which might arise from Clause 144 as an acceptable and minor constitutional risk.

34. The Welsh Government has agreed the wording of the Dispatch Box statement with UK Government.

35. The UK Government has committed to making the statement prior to the Legislative Consent Motion debate in the Senedd.
36. On the basis of the statement being made, and in the light of all the assurances given by the UK Government, I regard the risk presented by the provisions to be acceptable.
37. As our concerns with regard to Clauses 149, 144 and 91 have now been addressed I am content to support the inclusion of these clauses in the Bill.

Criminalisation of Hymenoplasty

38. Hymenoplasty, also called 'hymen repair', is a surgical intervention which involves reconstructing the hymen. In most cases, the purpose of a hymenoplasty is so that a woman can bleed the next time she has intercourse, although it should be noted that a non-intact hymen is not necessarily an indication of sexual activity. Hymenoplasty is a form of Female Genital Cosmetic Surgery. This procedure is not routinely carried out by the NHS and is usually confined to private clinics.
39. The practice is opposed by bodies such as the Royal College of Obstetricians and Gynaecologists (RCOG), the British Society for Paediatric and Adolescent Gynaecology (BritSPAG), the British Society of Urogynaecology (BSUG), and the British Society for Gynaecological Endoscopy (BSGE) who have called on the UK Government to introduce a ban on both virginity testing (subject of a previous amendment of the Bill and covered in Memorandum No. 2) and hymenoplasty.
40. The tabled amendments⁴ make carrying out hymenoplasty, as well as offering to carry out hymenoplasty or aiding or abetting a person to carry out hymenoplasty, an offence. The penalty for the offence is:
- on summary conviction, to imprisonment for a term not exceeding the maximum summary term for either-way offences or a fine (or both);
 - on conviction on indictment, to imprisonment for a term not exceeding 5 years or a fine (or both).
41. We have agreed for this provision to extend to and apply in Wales as to not do so would risk Wales being left behind on this important issue. Our Programme for Government commits to making Wales the safest place in Europe to be a woman ; if these offences did not extend to Wales it would mean that women and girls in Wales have fewer protections than their counterparts in England.
42. The amendment falls within the legislative competence of the Senedd. The purpose underpinning the amendment is safeguarding and protecting the health and welfare of women and girls. Both safeguarding and health and welfare are within the legislative competence of the Senedd.

⁴ 231H*; 231J*; 231K*; 231L*; 313ZA*; 313ZB*; *; 313ZE*; 313ZJ*; 313ZK*; 313ZM*

43. I support this amendment as it has been extended to Wales at the request of the Welsh Government.

Mandatory Reporting

44. The UK Government has tabled amendments⁵ which if passed make provision for the Secretary of State to make regulations which require manufacturers or commercial suppliers of health care products, or persons connected, to publish information about payments or other benefits (whether or not of a financial nature) made by them to health care providers, or provide such information to the Secretary of State for publication.

45. The purpose of the provisions is to ensure patients can check (or be reassured) that decisions about their treatment are being taken based on what is best for them clinically, rather than on what is profitable or beneficial for their healthcare provider. Information gathered will be available to the general public with the overarching aim of improving patient trust in healthcare providers.

46. I am of the view that it is important the policy of recording information on payments or other benefits applies across the UK.

47. The amendment falls within the legislative competence of the Senedd as their purpose relates to the provision of healthcare which is devolved.

48. Following negotiations with the Devolved Governments, UK Government has agreed that the Secretary of State must seek the consent of the Welsh Ministers before making provision in Regulations which would be within the legislative competence of the Senedd.

49. Should the consent of the Welsh Ministers not be forthcoming, the amendment also provides that the Secretary of State can in regulations make different provision for different parts of the UK in this area, which could allow for arrangements to exclude Wales-based manufacturers from reporting if necessary.

50. I support this amendment as it has been extended to Wales at the request of the Welsh Government.

Welsh Government position on the Bill as amended

51. As set out above, we have reached agreement with the UK Government regarding the remaining areas of concern, namely Arm's Length Bodies Transfer of Functions and Consequential Amendments to Senedd Legislation.

⁵ 312B*; 312C*; 312D*, 313C*, 314ZB*

52. In addition the UK Government has tabled amendments to the Bill which introduce provisions regarding the Criminalisation of Hymenoplasty and Mandatory Reporting and has, at our request, extended these provisions to Wales. I recommend consent in respect of both of these provisions.

53. My position is therefore, subject to the tabled amendments being passed by the House of Lords and the Dispatch Box Statement being committed to, I will be able to recommend the consent of the Senedd be given to all of the clauses in the Bill which relate to areas within devolved competence.

Financial implications

54. These are set out in the Memorandum No. 2.

Conclusion

55. I welcome the amendments the UK Government has made to the Bill to address the remaining areas of concern of the Welsh Government and the further amendments regarding the introduction of Criminalisation of Hymenoplasty and Mandatory Reporting provisions which, at our request, are to extend to Wales.

56. Subject to the tabled amendments being passed by the House of Lords and the making of the agreed Dispatch Box Statement, I am able to recommend consent to all of the clauses in the Bill which relate to areas within devolved competence as it is currently constituted.

Eluned Morgan MS
Minister for Health and Social Services
28 January 2022