

Report on supplementary Legislative Consent Memoranda for the Health and Care Bill (memoranda no.2 and no.3)

February 2022

1. Introduction

The LCM

1. On 16 December 2021, in line with the reporting deadline set by the Business Committee, we laid our report on the legislative consent memorandum ("the LCM") for the UK Government's Health and Care Bill ("the Bill").
2. In addition to making a number of observations about the LCM process and the importance of the Welsh Government providing timely and sufficient information to inform Senedd scrutiny, in our report we identified:
 - Provisions for which we had no objection to the Senedd granting its consent: clause 77 (Tidying up etc provisions about accounts of certain NHS bodies); clause 80 (Hospital patients with care and support needs: repeals etc); clause 87 (medicines information systems) as amended by the House of Commons on 23 November 2021; clause 142 (Regulation of health care and associated professions); and clause 146 (Food information for consumers - power to amend retained EU law).
 - Provisions in respect of which we had ongoing concerns: clause 136 (international healthcare arrangements); the consequential amendment powers in clauses 91, 144 and 149.
 - Provisions in respect of which the UK and Welsh Government had not yet reached agreement: clauses 88-94 relating to the Secretary of State's powers to transfer or delegate functions.



3. In the above paragraph, and throughout this report, we refer to clause numbers in the Bill as it was introduced to the House of Lords on 24 November 2021 after the completion of report stage in the House of Commons.

4. The Minister for Health and Social Services (“the Minister for HSS”) responded to our report on 3 February 2022.¹

Supplementary LCM: memorandum no.2

5. On 17 December 2021, the Minister for HSS laid before the Senedd an initial supplementary LCM (“sLCM no.2”). sLCM no.2 provides an update on a number of provisions that were included in the original LCM, and identifies three further provisions for which the Senedd’s consent is sought:

- Clauses 122-125: virginity testing offences.
- Clause 135: reimbursement to community pharmacies.
- Clause 143: medical examiners.

6. On 11 January 2022, the Business Committee referred sLCM no.2 to the Health and Social Care and Legislation, Justice and Constitution Committees for scrutiny, with a reporting deadline of 17 February 2022.

7. On 25 January 2022, at the request of the Welsh Government, the Business Committee revised the reporting deadline to 15 February 2022. This follows the Welsh Government’s decision to schedule the debate on the legislative consent motion for 15 February 2022. We understand that this is to ensure that the Senedd has the opportunity to vote on the legislative consent motion before the final amending stages take place in the UK Parliament, taking account in particular of the differences in the Senedd and UK Parliament recess dates.

Supplementary LCM: memorandum no.3

8. On 28 January 2022, the Minister for HSS laid a second sLCM before the Senedd (“sLCM no.3”). sLCM no.3 provides a further update on provisions that were included in the original LCM, and identifies two additional areas covered by amendments tabled by the UK Government on 24 January that would require the Senedd’s consent:

¹ Letter from the Minister for Health and Social Services, 3 February 2022

- Criminalisation of hymenoplasty.
- Mandatory reporting.

9. sLCM no.3 states:

"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".²

10. On 1 February 2022, the Business Committee referred sLCM no.3 to the Health and Social Care and Legislation, Justice and Constitution Committees for scrutiny, with a reporting deadline of 15 February 2022.

2. VirginitY testing and hymenoplasty

Clauses 122-125: virginitY testing offences

11. Clause 122, added to the Bill by amendment, defines 'virginitY testing' as "the examination of female genitalia, with or without consent, for the purpose (or purported purpose) of determining virginitY". Clauses 122-125 make it an offence in England and Wales to carry out virginitY testing, offer to carry out virginitY testing, or aid and abet another person to carry out virginitY testing.

12. sLCM no.2 explains that the position of the World Health Organisation and the Royal College of Obstetricians and Gynaecologists is that "virginitY tests have no scientific merit or clinical indication, as it is not possible to tell whether a woman has had intercourse through this type of examination".³ It adds that the procedure is not carried out by the NHS, and therefore seems to be carried out predominantly:

- In private healthcare settings by healthcare professionals.
- In other settings, such as the home, by family members or community leaders.

² Welsh Government, *Supplementary Legislative Consent Memorandum (Memorandum No 3) Health and Care Bill*, 28 January 2022

³ Welsh Government, *Supplementary Legislative Consent Memorandum (Memorandum No 2) Health and Care Bill*, 17 December 2021

13. sLCM no.2 states that the Welsh Government requested the extension of the provision to Wales because:

"...not to 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 and this would mean that women and girls in Wales have fewer protections than their counterparts in England".⁴

Criminalisation of hymenoplasty

14. sLCM no.3 explains that hymenoplasty is a form of female genital cosmetic surgery involving reconstruction of the hymen. It adds that the procedure, also known as 'hymen repair' is "not routinely carried out by the NHS and is usually confined to private clinics". It also states that the Royal College of Obstetricians and Gynaecologists, the British Society of Paediatric and Adolescent Gynaecology, the British Society of Urogynaecology and the British Society for Gynaecological Endoscopy all oppose the practice and support its criminalisation.⁵

15. The amendments tabled by the UK Government would make it an offence to carry out hymenoplasty, offer to do so, or to aid or abet another person to carry it out.

16. As for the provisions on virginity testing, sLCM no.3 notes that the Welsh Government has requested the extension of provisions on the criminalisation of hymenoplasty to avoid protections for women and girls in Wales falling behind those elsewhere in the UK.⁶

Our view

17. These provisions fall within the legislative competence of the Senedd, as their underpinning purpose is safeguarding and protecting the health and welfare of women and girls.

⁴ Welsh Government, *Supplementary Legislative Consent Memorandum (Memorandum No 2) Health and Care Bill*, 17 December 2021

⁵ Welsh Government, *Supplementary Legislative Consent Memorandum (Memorandum No 3) Health and Care Bill*, 28 January 2022

⁶ Welsh Government, *Supplementary Legislative Consent Memorandum (Memorandum No 3) Health and Care Bill*, 28 January 2022

18. We strongly agree that there is no merit whatsoever in virginity testing or hymenoplasty. It is clear that these practices should be brought to an end, and that those who persist in carrying them out, attempting to do so, or helping others to do so, should be subject to legal penalties.

19. We also agree with the Welsh Government that women and girls in Wales should receive no less protection than women and girls elsewhere in the UK. We therefore support the application of these provisions to Wales.

Conclusion 1. We have no objections to the Senedd giving its consent to clauses 122-125 (virginity testing offences), or to the provisions inserted by amendments 231H, 231J, 231L, 313ZA, 313ZB, 313ZE, 313ZJ, 313ZK and 313ZM in respect of the criminalisation of hymenoplasty.

3. Clause 135: reimbursement to community pharmacies

Background

20. sLCM no.2 states that clause 135 amends section 88 of the NHS (Wales) Act 2006 to create an exemption under which:

"...pharmacy contractors do not need to be reimbursed for medicinal products that are used for vaccines and immunisation or for the prevention and treatment of disease that could become a pandemic, where those products have been procured centrally".⁷

21. The Bill gives Welsh Ministers a regulation-making power to bring this exemption into force, and confers a power on them to make connected transitional provision. Statutory instruments made in respect of these powers would not be subject to any Senedd scrutiny procedure.

22. The Welsh Government's view is that the provision is required in order to address deficiencies in the current supply and reimbursement arrangements that may arise during health emergencies—such as the COVID-19 pandemic. It states that, in such circumstances:

⁷ Welsh Government, *Supplementary Legislative Consent Memorandum (Memorandum No 2) Health and Care Bill*, 17 December 2021

"There is no real 'competition' in the supply chain as there is not enough product for global demand and prices rise as health organisations worldwide try to source the same product. To ensure continuity of supply protecting UK stock intended for UK patients, the government may centrally purchase some stock. In these scenarios the Welsh Government wants to have the option to [be] able to supply the product 'directly' to pharmacies, without needing to sell into the supply chain. Welsh Government may use the typical pharmaceutical supply chain as a logistic service provider to deliver the medicine (the Welsh Government would need to pay them for this service) but the Welsh Government would retain title of the medicine.

This may involve supplying to pharmacies free of charge. In these circumstances the Welsh Government does not want to have to reimburse pharmacies, otherwise the government has to pay twice for the product -once to buy it in the first place and again in reimbursing the pharmacy.

We do not want to sell these centrally secured medicines as if it were a manufacturer into the supply chain to sell onto pharmacies in the usual way, as this would give rise to the opportunity for wholesalers, once they own the stock, to export it or sell at a much higher price than is usually paid."⁸

23. These provisions fall within the legislative competence of the Senedd. However, the view of the Welsh Government is that it is "prudent and timely" for the provision to be made within UK legislation. Reasons given for this view include:

- The Bill contains other provisions relating to medicines and devolved matters.
- The need to ensure that legislation applicable in Wales does not "preclude supply without reimbursement".
- The regulation-making power enables Welsh Ministers to determine the timescales for commencement of the exemption.⁹

⁸ Welsh Government, *Supplementary Legislative Consent Memorandum (Memorandum No 2) Health and Care Bill*, 17 December 2021

⁹ Ibid

24. We asked Community Pharmacy Wales (“CPW”) for its views on clause 135.

Acknowledging the challenges presented by the COVID-19 pandemic and the need to learn lessons, CPW said:

“CPW recognises that Welsh Government cannot predict what a future pandemic could look like, and it could well find itself facing a situation where there are limited stocks of vaccines or other medicines effective against a future virus or disease, and in these circumstances would need to carefully manage the supply. In this scenario, CPW understands that it could better control supply by taking ownership of the medicines.

CPW has no objections to Welsh Government adopting this approach, provided it can be assured that the powers would only be used when a pandemic or health emergency has been officially declared and appropriate remuneration is agreed which adequately reimburses pharmacy contractors for this ‘supply and administration only’ arrangement. CPW would not want to see these powers, which are designed to meet a health emergency, used as an opportunity to move to the central supply of existing medicines such as influenza vaccines”.¹⁰

Our view

25. We agree with CPW that it is sensible to learn and embed lessons arising from the experience of responding to the COVID-19 pandemic, and that this includes making sure that there are measures in place to ensure that during a pandemic or public health emergency appropriate controls could, if needed, be put on the supply of medicinal products used for vaccines and immunisation, or the prevention and treatment of diseases that could become pandemics. We also agree that it is important that such powers are only used in the limited circumstances for which they are intended.

Recommendation 1. Before the Senedd is asked whether or not to give its consent to clause 135 (reimbursement to community pharmacies), the Minister for Health and Social Services should provide assurances that: these powers can and will only be used in circumstances where a pandemic or public health emergency has been declared; and that the use of such powers will be accompanied by appropriate and adequate remuneration and reimbursement for pharmacy contractors.

¹⁰ Letter from Community Pharmacy Wales, 26 January 2022

Conclusion 2. Subject to these assurances being provided, we have no objections to the Senedd giving its consent to clause 135 (reimbursement to community pharmacies).

4. Clause 143: medical examiners

Background

26. Clause 143 was added to the Bill by amendment. It replaced clause 124 in the Bill on introduction, which made provision in relation to the appointment of medical examiners by NHS bodies in England. As amended, clause 143 now makes separate provision for England and Wales. It adds a new section 18B to the Coroners and Justice Act 2009 (“the 2009 Act”) in England and Wales, setting out a power for Welsh NHS bodies to appoint medical examiners. It also imposes a duty on the Welsh Ministers to ensure that:

- Enough medical examiners are appointed in the healthcare system in Wales.
- Enough funds and resources are made available to medical examiners to enable them to carry out their scrutiny functions to identify and deter poor practice.
- The performance of medical examiners is monitored.¹¹

27. sLCM no.2 notes that the provision was added to the Bill at the Welsh Government’s request in order to extend the power to appoint medical examiners to a range of NHS bodies in Wales rather than only health boards (as is currently the case). The Welsh Government’s view is that this will “enable more collaborative working across Welsh NHS bodies to ensure the effective delivery of the medical examiners scheme and bring provisions broadly into line [with] the position in England”.¹²

28. sLCM no.2 explains that the subject matter of Part 1 of the 2009 Act (where new section 18B will be inserted) is reserved by paragraph 167 of Schedule 7A to the Government of Wales Act 2006. However, the Senedd’s consent is required because the amendment imposes a reserved function on Welsh NHS bodies and places duties on the Welsh Ministers.

¹¹ Welsh Government, *Supplementary Legislative Consent Memorandum (Memorandum No.2) Health and Care Bill*, 17 December 2021

¹² Ibid

Our view

29. We agree with the Welsh Government that the Senedd's consent is required in respect of clause 143.

Conclusion 3. We have no objection to the Senedd giving its consent to clause 143 (medical examiners).

30. However, as a Committee, we do have concerns about the increasing use of LCMs as a mechanism for legislating on matters that are devolved to Wales. While we do not specifically object to this particular provision, we note that similar provision in respect of the appointment of medical examiners by English NHS bodies has been included in the Bill since its introduction. This means that the provision as it relates to England has rightly been subject to the full legislative scrutiny process in the UK Parliament. In contrast, the decision of the Welsh Government to seek the extension of a provision in UK legislation to Wales instead of addressing it in suitable Welsh legislation that would be scrutinised through the Senedd's own robust Bill scrutiny process, combined with the amendment being made at a late stage in the process, and the severely limited time available for scrutiny of LCMs and sLCMs, necessarily limits the ability of Senedd committees to undertake meaningful or detailed scrutiny of the potential implications that might arise from the specific policy, legislative and operational context in Wales. This approach not only increases the risk of unintended or unforeseen consequences that might otherwise be identified and mitigated through scrutiny, it also risks undermining the Senedd's role as a primary law-making body in areas of devolved legislative competence. It does not, therefore, represent an optimal approach to legislating.

5. Mandatory reporting

Background

31. sLCM no.3 explains that amendments have been tabled by the UK Government to:

"...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.

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".¹³

32. The Minister for HSS notes that the Welsh Government had requested the extension of the provision to Wales, on the basis that "it is important the policy of recording information on payments or other benefits applies across the UK". sLCM no.3 adds that the consent of the Welsh Ministers will be required when any provision in any regulations made under this power would be within the legislative competence of the Senedd. The amendments also provide that should such consent not be granted by the Welsh Ministers, the Secretary of State could make regulations which made different provision for different parts of the UK, for example to exclude Wales-based manufacturers from reporting.¹⁴

Our view

33. These provisions fall within the legislative competence of the Senedd as their purpose relates to the provision of healthcare which is devolved.

34. In principle, the requirement for information about payments or other benefits given to healthcare providers by manufacturers or commercial suppliers of healthcare products (or connected persons) to be reported and published should increase transparency in relation to clinical and care decision-making. However, as these amendments have been brought forward at so late a stage, we have not had sufficient time to gather any evidence or scrutinise them in depth.

35. Nevertheless, we welcome the inclusion of the requirement for consent to be secured before provision can be included in any regulations under these powers which would be within the legislative competence of the Senedd, and of a mechanism which provides a way forward should such consent be withheld. This is a pragmatic approach which balances the benefits of legislating on a UK-wide basis where it is desirable to do so, with appropriate protections for the devolution settlement by guarding against the exercise of powers within the Senedd's legislative competence without consent.

¹³ Welsh Government, *Supplementary Legislative Consent Memorandum (Memorandum No. 3) Health and Care Bill*, 28 January 2022

¹⁴ Welsh Government, *Supplementary Legislative Consent Memorandum (Memorandum No. 3) Health and Care Bill*, 28 January 2022

Conclusion 4. We have no objections to the Senedd giving its consent to the provisions inserted by amendments 312B, 312C, 312D, 313C and 314ZB in respect of mandatory reporting.

6. Update on provisions covered by the LCM

Clause 87: medicines information systems (formerly clause 85)

Update

36. As we noted in our report on the LCM, the Minister for HSS confirmed in November 2021 that amendments made to the Bill had addressed her concerns in respect of the gathering and use of Welsh patients' data.¹⁵ This included a requirement that Welsh Ministers must be consulted on any regulations or directions relating to medicine information systems which relate to Wales. In a letter to the Legislation, Justice and Constitution Committee in February 2022, the Minister for HSS said:

"This will be supported by a Memorandum of Understanding to be developed and agreed between the UK Government and the Devolved Governments. 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

Our view

37. It is vital that there are sufficient safeguards in place to protect Welsh patients' personal and medical data, and ensure that it is used appropriately.

38. We note that the Memorandum of Understanding which will underpin the approach to consultation with devolved administrations on regulations relating to medicine information systems has not yet been developed.

39. Matters relating to data ownership and data sharing are both sensitive and important, especially as different approaches may be taken in different parts of the UK. We would therefore

¹⁵ Health and Social Care Committee, *Report on the Legislative Consent Memorandum for the Health and Care Bill*, December 2021, p.8

¹⁶ Letter from the Minister for Health and Social Services to the Legislation, Justice and Constitution Committee, 3 February 2022

be concerned if the provisions in the Bill relating to medicine information systems were to come into force before the MoU is in place.

Recommendation 2. The Minister for Health and Social Services should set out the anticipated timescales for the development and agreement of the Memorandum of Understanding relating to medicine information systems, and should provide assurance that the MoU will be in place before the provisions come into force.

Clauses 88-94: arm's length bodies transfer of functions (formerly clauses 86-92)

Update

40. The Welsh Government had three main concerns with these provisions on the Bill's introduction. sLCM no.2 confirmed that the Welsh Government had reached agreement with the UK Government on proposed amendments to these clauses. However, the amendments had not then been tabled as agreement had not been reached with all devolved Governments.¹⁷

41. sLCM no.3 sets out the Welsh Government's initial concerns, and describes the amendments that have now been tabled to address them:

- The provisions in the Bill on introduction would have allowed the Secretary of State, 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. These bodies include Health Research Authority, the Human Tissue Authority and the parts of NHS Digital that relate to Medical Information Systems. The making of such provisions in relation to specific bodies would be within the legislative competence of the Senedd or modify functions exercisable by the Welsh Ministers.

The UK Government has subsequently tabled an amendment 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

¹⁷ Welsh Government, *Supplementary Legislative Consent Memorandum (Memorandum No.2) Health and Care Bill*, 17 December 2021

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).

- On introduction, the Bill would have given the Secretary of State the ability 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.

The UK Government has now tabled amendments removing the Welsh Ministers, Welsh NHS Trusts and Welsh Special Health Authorities from the list of "appropriate persons" in the clause.

- The Secretary of State's powers to make provision which is consequential on clauses 88 or 90 of the Bill. We discuss this issue further below.

Our view

42. We note that the Welsh Government is satisfied that the amendments tabled by the UK Government relating to arm's length bodies transfer of functions will resolve its concerns.

Conclusion 5. We have no objection to the Senedd giving its consent to clauses 88-94 (arm's length bodies transfer of functions) as amended by amendments 231C, 227A, 231A and 231B.

Clause 136: international healthcare arrangements (formerly clause 120)

Update

43. sLCM no.2 notes that, following amendments, the Welsh Government supports the inclusion of the provision in the Bill:

- The clause provides that the Secretary of State may confer or delegate functions to a "relevant public authority" when making regulations about international healthcare agreements under the Healthcare (European Economic Area and Switzerland Arrangements) Act 2019 (as amended) ("the 2019 Act"). The Bill has been amended to exclude the Welsh Ministers and other devolved Welsh authorities from that definition. Other amendments bring Welsh health boards into the scope of the Secretary of State's regulation-making power to ensure that existing functions already conferred on them regarding planned healthcare applications remain.
- Further amendments to the Bill will amend the 2019 Act to confer a power on the Welsh Ministers enabling them to make regulations in devolved areas for the

purpose of giving effect to international healthcare agreements. This includes the power to delegate functions to, and/or confer functions on, all devolved Welsh authorities. The regulations will be subject to the negative procedure. Should the Welsh Ministers fail to exercise this power to confer relevant functions onto the health boards regarding healthcare agreements, the Secretary of State may confer those functions.

44. When the Bill was introduced, the original provision gave only the Secretary of State regulation-making powers to implement healthcare agreements which would apply to Wales. The Senedd would not have had the right to scrutinise such regulations. The result of the amendments, and the inclusion of a new section 2A in the 2019 Act, is that the Senedd will retain its ability to scrutinise (via the negative procedure) regulations made by the Welsh Ministers in relation to international healthcare agreements.

45. sLCM no.2 states that the Welsh Government's view is:

"...the ability of the Welsh Ministers to have the power to place reciprocal healthcare function on Local Health Boards and other devolved Welsh authorities in Wales does not remove the ability for the UK Government to enter into reciprocal healthcare agreements that could lead to additional pressures on the Welsh NHS. However, I am of the view that the amendments are a significant shift from the position of the Bill as introduced and together with the Memorandum of Understanding on the engagement of the Devolved Administrations in the development of new and revised reciprocal healthcare agreements - which I will forward to the Committee in due course - provide sufficient protection of the devolution settlement."¹⁸

46. The Minister for HSS provided a copy of the reciprocal healthcare Memorandum of Understanding on 3 February 2022. She said:

"The MOU has been agreed by all four nations. The Committee will wish to note that the wider linkages in relation to the new intergovernmental relations (IGR) governance arrangements have not yet been included in the MOU but are being considered. The MOU will be updated to reflect the new IGR arrangements in due course."¹⁹

¹⁸ Welsh Government, *Supplementary Legislative Consent Memorandum (Memorandum No.2) Health and Care Bill*, 17 December 2021

¹⁹ Letter from the Minister for Health and Social Services, 3 February 2022

47. In our report on the LCM, we raised concerns that the Bill did not include a clear and proportionate test for what would qualify as ‘an exceptional circumstance’ for the purposes of the amount or type of healthcare that can be funded outside of an international healthcare agreement.²⁰ In her response to our report, the Minister stated that her view was that it would not be appropriate for such a test to be included, as this could have “a detrimental or limiting impact to provide support when needed”. She explained:

“The purpose of the power enabling the Secretary of State to fund healthcare outside of an international healthcare agreement in exceptional circumstances is to assist the UK Government in supporting the healthcare needs of British residents when they are abroad in circumstances which might otherwise narrowly fall outside of a reciprocal healthcare agreement.

The UK Government has previously, for example, used existing powers under HEEASAA to provide crisis mental healthcare support to a minor in the EU where the Member State stated that the treatment was not covered under the European Health Insurance Card (EHIC) scheme. The UK Government has also funded treatment in the EU for twins with infantile haemangiomas who were born to UK residents but were unable to easily travel back to the UK due to COVID-19 travel restrictions and the risks of travelling at the time. They would not otherwise have been in scope of the planned treatment provisions in the EU reciprocal healthcare agreements as they could have received the treatment in the UK without undue delay had they been in the UK at the time.

[...]

Exceptional circumstances are likely to be those in which the refusal to fund healthcare treatment would result in unjustifiably harsh consequences for the individual such that the refusal of an application for funding would not be proportionate. Determining whether a payment is justified by exceptional circumstances will necessarily require a balance to be struck between any competing public and individual interests involved. Attempting to define this further in primary legislation by reference to an amount or type of healthcare that can be funded would unduly restrict the Secretary of State's

²⁰ Health and Social Care Committee, *Report on the Legislative Consent Memorandum for the Health and Care Bill*, December 2021, p.16

*ability to exercise this discretion and hinder the ability to assist British residents when they most need it."*²¹

Our view

48. We note the Welsh Government's view on clause 136 (as amended), and the provision of the reciprocal healthcare Memorandum of Understanding agreed between the four governments in the UK.

49. In our report on the LCM, we set out our concerns about whether a non-statutory intergovernmental Memorandum of Understanding would be sufficiently transparent, and offer sufficient protection to the devolution settlement when it may not effectively bind successive UK Governments.²² We note that the MoU was only made available to Members of the Senedd on 3 February 2022, and that it has yet to be updated to reflect the new intergovernmental relations governance arrangements. This necessarily limits the potential for full and effective scrutiny before the Senedd is asked whether or not to consent to clause 136.

Clause 142: regulation of healthcare and associated professions (formerly clause 123)

Update

50. The regulation of healthcare professions is a reserved matter under the Government of Wales Act 2006 ("GOWA 2006"). However, the regulation of persons who are not professionals but who are concerned with the physical or mental health of individuals falls within devolved competence.

51. sLCM no.2 notes that the Welsh Government is content with the amendments made to the Bill to provide that the consent of the Welsh Ministers will be required when exercising in relation to Wales the regulation-making power under clause 142 as it relates to groups of workers concerned with the physical or mental health of individuals.²³

52. In our report on the LCM, we noted the importance of the roles of senior health leaders and managers within the health and social care sector. As the Welsh Government does not

²¹ Letter from the Minister for Health and Social Services, 3 February 2022

²² Health and Social Care Committee, *Report on the Legislative Consent Memorandum for the Health and Care Bill*, December 2021, p.16

²³ Welsh Government, *Supplementary Legislative Consent Memorandum (Memorandum No.2) Health and Care Bill*, 17 December 2021

currently intend to regulate these professions, we asked the Minister for HSS to outline what analysis has been undertaken by the Welsh Government of the risks and benefits associated with regulating, or not regulating, senior health leaders and managers in Wales, and what the rationale is for her decision not to introduce such regulation.²⁴

53. In her response to our report, the Minister for HSS said:

" No decision with regard to the regulation of these workers (which includes senior health leaders and managers in Wales) by Order in Council has yet been taken. Should the UK Government decide to regulate with regard to such professionals at a future point, if this was to also apply in Wales, then the Welsh Ministers will consider whether or not to consent to an Order making such provision. Such a decision would be supported by relevant evidence as to the risks, costs and benefits of applying the regulations within Wales.

*We have no plans to regulate senior health leaders and managers in Wales and the configuration of the NHS within Wales make this an unlikely event in the future. The Department of Health and Social Care has also indicated that it has no specific plans to regulate this group of workers in the near future."*²⁵

Consequential amendments (clauses 91, 144 and 149)

Update

54. sLCM no.2 reiterates the Minister for HSS's concerns in respect of these provisions, which provide the Secretary of State powers to make provision consequential on the Bill, including provision that amends, repeals, revokes, or otherwise modifies provision made by, or under, an Act or Measure of the Senedd.²⁶

55. The UK Government has provided some examples in correspondence of how it might envisage using these powers. This includes, for example, updating the names of English organisations where they are referred to in Senedd legislation.²⁷ However, sLCM no.2 notes that

²⁴ Health and Social Care Committee, *Report on the Legislative Consent Memorandum for the Health and Care Bill*, December 2021, p.20

²⁵ Letter from the Minister for Health and Social Services, 3 February 2022

²⁶ Welsh Government, *Supplementary Legislative Consent Memorandum (Memorandum No.2) Health and Care Bill*, 17 December 2021

²⁷ *Letter from the Minister for Health*, 25 November 2021

the UK Minister for Health had committed to make a statement in the House of Commons chamber about how the UK Government anticipates that the consequential amendment powers in the Bill might be used, but that this statement had not yet been made. It adds that the Minister for HSS would, once the statement has been made “determine whether, in the light of all the assurances given by the UK Government, the risk presented by the provisions is acceptable”.²⁸

56. sLCM no.3 indicates that the Welsh Government has now agreed with the UK Government the wording of the statement to be made by the UK Minister for Health in the House of Commons chamber. It also says that the UK Government has committed to the statement being made before the Senedd debates the LCM and sLCMs.

57. The Minister for HSS states:

*“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”.*²⁹

58. The scope of the statement will include clauses 91 and 149; it will not include clause 144. This is because:

“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 [of the] Dispatch Box Statement.

²⁸ Welsh Government, *Supplementary Legislative Consent Memorandum (Memorandum No.2) Health and Care Bill*, 17 December 2021

²⁹ Welsh Government, *Supplementary Legislative Consent Memorandum (Memorandum No.3) Health and Care Bill*, 28 January 2022

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"³⁰

Our view

59. While greater and more transparent protections for the devolution settlement in the longer term would be provided by the inclusion on the face of the Bill of consent requirements, we note that the Minister for HSS' view is that the assurances provided by the UK Minister reduce the associated risks arising from the potential breadth of the powers to an acceptable level. We also note the indication in the Minister for HSS' response to our report on the LCM that, as at 3 February 2022, the UK Minister for Health has not yet made the agreed Despatch Box statement.³¹

Recommendation 3. Before the Senedd is asked to decide whether to give its consent to the inclusion in the Bill of clauses 91, 144 and 149, the Minister for Health and Social Services should confirm that the UK Minister for Health has made the agreed statement in the House of Commons chamber.

³⁰ Welsh Government, *Supplementary Legislative Consent Memorandum (Memorandum No.3) Health and Care Bill*, 28 January 2022

³¹ Letter from the Minister for Health and Social Services, 3 February 2022
