

Report on supplementary Legislative Consent Memoranda for the Health and Care Bill (memorandum no.4)

April 2022

1. Background

1. The Senedd debated and agreed a legislative consent motion for the UK Government's Health and Care Bill ("the Bill") on 15 February 2022. Provisions for which the Senedd's consent was sought were set out in the legislative consent memorandum ("the LCM") and two supplementary LCMs ("sLCM no.2" and "sLCM no.3"). Our reports on the LCM and the two sLCMs are available on the Senedd's website.

2. Supplementary LCM: memorandum no.4

sLCM no.4

2. On 5 April 2022, the Minister for Health and Social Services ("the Minister for HSS") laid before the Senedd a further sLCM ("sLCM no.4"). sLCM no.4 addresses an amendment made to the Bill by the House of Commons on 30 March 2022 in respect of 'organ tourism'.

3. On 29 March 2022, the Business Committee agreed to refer sLCM no.4 to the Health and Social Care and Legislation, Justice and Constitution Committees for scrutiny, with a reporting deadline of 26 April 2022.

Clause 181

4. A non-government amendment tabled by Lord Hunt of King's Heath seeking to deter people from seeking to obtain organs unethically abroad, described as 'organ tourism', was agreed by the House of Lords on 16 March 2022. However, the sLCM notes that:



"The clause was regarded by the UK Government as unworkable and potentially having unintended consequences".¹

- 5.** The UK Government subsequently tabled an amendment to replace the provision with an alternative approach to achieve the same end.
- 6.** Following agreement of the UK Government's amendment by the House of Commons on 30 March 2022, clause 181 amends the Human Tissue Act 2004 ("the 2004 Act"). Section 32 of the 2004 Act already provides that it is an offence to pay, or offer to pay, for an organ and to make arrangements for organ purchases in England, Wales and Northern Ireland.² Clause 181 inserts a new section 32A into the 2004 Act to make it an offence to carry out such activities outside the UK.
- 7.** The Welsh Government's view is that clause 181 falls within the Senedd's legislative competence. sLCM no.4 states that the Welsh Government supports the application of the provision to Wales, and adds that:

"Not to support the amendment extending to Wales would mean that this measure would not apply to Welsh residents seeking to pay for organs for transplant abroad and we would be left in the position of seeking another legislative opportunity to achieve the same measure. On this occasion, therefore, I believe it is right to agree to the UK Government legislating on behalf of Wales".³

Financial implications

- 8.** sLCM no.4 explains that no financial implications for Wales have been identified, although it adds that deterring people from travelling abroad for "unethical, uncontrolled organ transplants" could avoid unplanned costs for NHS Wales which might otherwise arise.⁴

¹ Welsh Government, *Supplementary Legislative Consent Memorandum (Memorandum No 4) Health and Care Bill*, 5 April 2022

² Provision for Scotland is set out in the Human Tissue (Scotland) Act 2006. Clause 181 makes similar amendments to that legislation.

³ Welsh Government, *Supplementary Legislative Consent Memorandum (Memorandum No 4) Health and Care Bill*, 5 April 2022

⁴ Welsh Government, *Supplementary Legislative Consent Memorandum (Memorandum No 4) Health and Care Bill*, 5 April 2022

Our view

- 9.** We agree that the Senedd's consent is required, because clause 181 relates to health, which is not reserved under Schedule 7A to the Government of Wales Act 2006. The purpose of the provision is therefore within the Senedd's legislative competence.
- 10.** The sLCM was laid during recess with a reporting deadline of just three weeks. This has significantly curtailed the scope for any scrutiny, or for us to reach a conclusion as a Committee as to whether or not the Senedd should give its consent to the application of clause 181 to Wales.
- 11.** We recognise that this is a consequence of the amendment being made to the Bill at a late stage, and the need to ensure that the Senedd has the opportunity to consider whether or not to give its consent before the Bill completes its final consideration of amendment stages in Westminster.
- 12.** Nevertheless, we reiterate the concerns we set out in our report on sLCMs no. 2 and no.3 about the increasing use of LCMs as a mechanism for legislating on matters that are devolved for Wales:

"...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

⁵ Health and Social Care Committee, *Report on supplementary Legislative Consent Memoranda for the Health and Care Bill (memoranda no.2 and no.3)*, February 2022
