

# **The Welsh Government's Legislative Consent Memorandum on the Health and Care Bill**

December 2021



# 1. Background

## The UK Government's Health and Care Bill

1. The UK Government's Health and Care Bill (the Bill)<sup>1</sup> was introduced into the House of Commons on 6 July 2021. It is sponsored by the Department of Health and Social Care.

2. The explanatory notes to the Bill state that its purpose is:

*"...to give effect to the policies that were set out as part of the NHS's recommendations for legislative reform following the Long Term Plan and in the White Paper 'Integration and Innovation: Working together to improve Health and Social Care for all' published in February 2021."*<sup>2</sup>

3. The Bill completed its passage through the House of Commons on 22 November 2021. First reading in the House of Lords took place on 24 November. Second reading is scheduled for 7 December.

## The Welsh Government's Legislative Consent Memorandum

4. Standing Orders 29.1 and 29.2 provide that a Legislative Consent Memorandum is required when a relevant UK Bill modifies or falls within the Senedd's legislative competence.

5. On 1 September 2021 Eluned Morgan MS, the Minister for Health and Social Services (the Minister), laid before the Senedd a Legislative Consent Memorandum<sup>3</sup> (the Memorandum) in respect of the Bill.

6. The Business Committee agreed that the Legislation, Justice and Constitution Committee and the Health and Social Care (HSC) Committee should report on the Memorandum by 4 November 2021. At its meeting on 28 September 2021, the Business Committee revised the reporting deadline to 11 November.<sup>4</sup> On 29 October 2021, we wrote to the Business Committee to advise it that, due to the volume of legislative consent memoranda we were considering and because we had written to the Minister for further information, we may not be in a position to

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<sup>1</sup> [Health and Care Bill, as introduced](#) [HC Bill 140]

<sup>2</sup> [Health and Care Bill, Explanatory Notes](#), July 2021

<sup>3</sup> Welsh Government, [Legislative Consent Memorandum, Health and Care Bill](#), September 2021

<sup>4</sup> Business Committee, [Timetable for consideration: Legislative Consent Memorandum on the Health and Care Bill](#), September 2021; Business Committee, [Revised timetable for consideration: Legislative Consent Memorandum on the Health and Care Bill](#), September 2021

report to the Senedd by 11 November.<sup>5</sup> On 4 November, the Business Committee agreed to further extend the deadline to 16 December.<sup>6</sup>

## **Provision for which the Senedd's consent is required**

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### **Welsh Government's view**

**7.** Paragraphs 7 to 67 of the Memorandum set out the Welsh Government's assessment of which provisions within the Bill it considers require the consent of the Senedd, as follows:

- clause 75 (Tidying up etc provisions about accounts of certain NHS bodies)
- clause 78 (Hospital patients with care and support needs: repeals etc)
- clause 85 (Medicines information systems)
- clauses 86 to 92 (Secretary of State's powers to transfer or delegate functions)
- clause 120 (International healthcare arrangements)
- clause 123 (Regulation of health care and associated professions)
- clause 125 and Schedule 16 (Advertising of less healthy food and drink)
- clause 127 (Food information for consumers: power to amend retained EU law)
- clause 130 (Power to make consequential provision)

### **UK Government's view**

**8.** The UK Government has also identified these clauses as provisions which require the legislative consent of the Senedd, with the exception of clauses 75, 123, 125 and 130.<sup>7</sup>

## **Reasons for making provision for Wales in the Bill**

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**9.** Paragraph 67 of the Memorandum sets out the Welsh Government's reasons for making the provisions for Wales in the Bill. It states:

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<sup>5</sup> [Letter to the Business Committee](#), 29 October 2021

<sup>6</sup> Business Committee, [Revised timetable for consideration: Legislative Consent Memorandum on the Health and Care Bill](#), November 2021

<sup>7</sup> See Health and Care Bill, Explanatory Notes

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*"The Welsh Government considers that although some of the provisions in the Bill have merit, for example in relation to obesity, food information for consumers and repealing redundant enactments (relating to patients' needs for care and support to be assessed before discharge from hospital), several of its provisions would have deleterious effects on the devolution settlement."*

**10.** The Memorandum sets out the Welsh Government's position on the Bill, and notes that a supplementary Legislative Consent Memorandum may be required:

*"The Welsh Government is not in a position to recommend consent to the Bill as introduced. This is on the basis that, despite some of the clauses being helpful to Wales, there are a number of clauses of concern:*

- clauses in the Bill which enable the Secretary of State to consequentially amend Senedd legislation;*
- clauses in the Bill which could negatively impact on NHS bodies in Wales (for example the clauses concerning Medicines Information Systems, International Healthcare Arrangements and regulation of healthcare professions).*

*There remains disagreement between UK Government and the Welsh Government on some of these issues and further work with the UK Government to resolve these concerns will continue during the Bill's passage through Parliament and a supplementary Legislative Consent Memorandum will be brought forward if required."*<sup>8</sup>

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<sup>8</sup> Welsh Government, Memorandum, paragraphs 69-71

## 2. Committee consideration

11. We considered the Memorandum at our meeting on 18 October 2021.<sup>9</sup>
12. We are also aware that the HSC Committee wrote to the Minister, the UK Government Minister for Health, Edward Argar MP, and to its stakeholders.<sup>10</sup>
13. We were not in a position to take oral evidence from the Minister on the Memorandum. However, following our meeting on 18 October, we wrote to the Minister to seek further detail with regard to a number of matters relating to the Memorandum.<sup>11</sup> The Minister responded on 28 October, and our consideration of the Minister's response is set out in detail below.<sup>12</sup>
14. We agreed our report on 22 November 2021.

### Our view

#### General comments

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15. Standing Order 29.2(i) requires a legislative consent memorandum to be laid normally no later than two weeks after the introduction to the UK Parliament of the relevant Bill. The Bill was introduced to the UK Parliament on 6 July 2021, but the Welsh Government did not lay the Memorandum before the Senedd until 1 September 2021. We are aware that the Minister told the HSC Committee that the UK Department of Health and Social Care was "very slow in providing [the Welsh Government] with draft Bill clauses for... consideration and analysis"<sup>13</sup>.
16. While we acknowledge the Minister's explanation that there was a delay in the Welsh Government receiving vital information from the UK Government, we nonetheless make three important observations.
17. First, we have previously highlighted that the Welsh Government's broad approach to utilising UK Bills to make provision for Wales inherently requires co-operation and good intergovernmental communication. Based on our consideration of legislative consent memoranda to date, good intergovernmental relations appear to be less than satisfactory and

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<sup>9</sup> [Legislation, Justice and Constitution Committee, 18 October 2021](#)

<sup>10</sup> The HSC Committee correspondence is available on the Senedd's [website](#)

<sup>11</sup> [Letter to the Minister for Health and Social Services, 20 October 2021](#)

<sup>12</sup> [Letter from the Minister for Health and Social Services, 28 October 2021](#)

<sup>13</sup> [Letter from the Minister for Health and Social Services to the Health and Social Care Committee](#), 19 October 2021

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patchy at best. Delays by the Welsh Government in laying legislative consent memoranda, whether as a consequence of poor intergovernmental relations or otherwise, directly impacts on the time available for the Senedd to undertake vital, albeit limited, scrutiny of such memoranda within timescales for which it has almost no control.

**18.** Secondly, given that the Welsh Government took additional weeks to “complete a full and thorough analysis of the Bill for its impact on Wales and any requirement for the legislative consent of the Senedd”<sup>14</sup>, greater detail should, and could, have been included in the Memorandum laid before the Senedd.

**19.** Thirdly, and related to the first two points, we point out, as we have done frequently already in the Sixth Senedd, that using UK Bills to make law in devolved areas disadvantages elected Senedd Members the opportunity to scrutinise proposals in detail. Delaying the publication of Memoranda exacerbates those disadvantages further, even for the limited scrutiny they provide.

**20.** Our concerns regarding the timeliness and quality of Welsh Government legislative consent memoranda being laid before the Senedd have been raised with the Senedd's Business Committee.<sup>15</sup>

**21.** We note the position of the Welsh Government as set out in the Memorandum with regards to its reasons for making provision for Wales in the Bill. These matters are discussed below as part of our consideration of specific clauses in the Bill.

**22.** We note that there are some areas of disagreement between the Welsh and UK Governments on which clauses in the Bill require the consent of the Senedd, and these matters are also discussed further in later paragraphs.

**23.** We also note that the Bill gives broad powers to the Secretary of State to amend Welsh law. Again, this issue is discussed in more detail later in the report.

## **Clause 75**

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**24.** Clause 75 inserts a new section 29A into the *National Health Service (Wales) Act 2006* (the 2006 NHS Act). This new section will place obligations on Special Health Authorities (SHAs) in relation to their accounts and auditing. The section also provides that the Secretary of State may give a SHA directions as to the form in which its accounts must be kept. SHAs are defined in this

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<sup>14</sup> Letter from the Minister for Health and Social Services to the Health and Social Care Committee, 19 October 2021

<sup>15</sup> Letter to the Business Committee, 29 October 2021

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section as SHAs that perform functions only or mainly in respect of England, or SHAs that exercise functions on a cross border basis.

**25.** The Welsh Government considers that consent is required as the Senedd has competence to legislate in respect of the NHS Business Services Authority and the NHS Blood and Transplant, both of which are cross border SHAs established under the 2006 NHS Act. Both are listed in paragraph 9(2) of Schedule 7B to the *Government of Wales Act 2006* (the 2006 Act) as exceptions to paragraphs 8 and 10 of Schedule 7B which contain restrictions on the Senedd in respect of conferring, imposing, removing or modifying functions on a public authority.

**26.** We note that the UK Government has not identified clause 75 as a clause that requires the legislative consent of the Senedd.

**27.** When considering whether a particular clause requires consent, we have applied the 'purpose test' set out in Standing Order 29.1(i), i.e. does the provision have a devolved purpose.

**Conclusion 1.** We agree with the Welsh Government's view that the consent of the Senedd should be sought as we consider that the relevant provisions in clause 75 fall within a devolved purpose as provided for by Standing Order 29(1).

## **Clause 85**

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**28.** Clause 85 of the Bill creates a power for the Secretary of State to make regulations providing for a system of information regarding medicines to be established and operated by the Health and Social Care Information Centre (known as NHS Digital) to allow for the creation of centrally held UK-wide medicine registries.

**29.** Whilst medicinal products are reserved under Schedule 7A to the 2006 Act, the power provided to the Secretary of State to make regulations making provision for the establishment and operation of information systems is a broad power.

**30.** The Welsh Government considers that the Senedd could legislate to give the Welsh Ministers some of the powers that are conferred on the Secretary of State in clause 85 (though the Senedd could not legislate to achieve all of it). We note that it is also possible that regulations made by the Secretary of State could confer functions and/or obligations on Devolved Welsh Authorities.

**31.** In our letter to the Minister, we asked for an update on her discussions with the UK Government, and asked for specific details on any amendments to the Bill which the Minister has sought. In relation to clause 85, the Minister told us that she had a number of concerns, as follows.

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**32.** The Minister said that “the purpose for which information can be collected under this clause is too broad, extending beyond safety matters and into areas within devolved competence”. The Minister does not consider that it is necessary for NHS Digital, which is an England body, to establish a system for the whole of the UK. As such, the Minister told us that she has requested that the UK Government amend clause 85 to place duties on the Welsh Ministers to enable them to set up equivalent systems to “avoid arrangements by-passing Welsh Ministers.” If the UK Government does not agree to this request, the Minister told us that she has requested that the Bill be amended to require the Secretary of State to obtain the consent of Welsh Ministers before regulations are made.<sup>16</sup>

**33.** The Minister also told us that regulations made under clause 85 “potentially enable a wide use of the information contained within these systems that may not be considered appropriate in relation to Welsh patients”. The Minister has again requested that the Bill be amended to address her concerns.<sup>17</sup>

**34.** We note the information provided by the Minister in relation to clause 85 and that she is seeking amendments to the Bill to address her concerns.

**Recommendation 1.** The Minister should, in advance of the Senedd’s debate on the relevant consent motion, provide further details of the intergovernmental discussions regarding clause 85 and confirm whether the amendments she has sought will be tabled to the Bill by the UK Government.

## **Clauses 86 to 92**

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**35.** Clauses 86 to 92 of the Bill provide the Secretary of State with regulation-making powers to transfer functions between relevant bodies and to delegate certain health functions of the Secretary of State to them. The relevant bodies are defined in clause 86 and are all health Non-Departmental Public Bodies, i.e. Arm’s Length Bodies.

**36.** Clause 89 of the Bill confers a Henry VIII power on the Secretary of State to make repealing, revoking or amending provision, to Senedd legislation, in regulations made by the Secretary of State under clauses 87 or 88. There is no express requirement within the provisions of the Bill itself for the Secretary of State to obtain the consent of the Senedd before exercising this power. However, the Statutory Instrument Consent Motion process under Standing Order 30A would be engaged and the Senedd’s consent would therefore be required should any

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<sup>16</sup> Letter from the Minister for Health and Social Services, 28 October 2021

<sup>17</sup> Letter from the Minister for Health and Social Services, 28 October 2021

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Statutory Instrument laid before the UK Parliament in relation to Wales, amend primary legislation within the legislative competence of the Senedd.

**37.** Clauses 90 and 91, related to transfer schemes in connection with the regulations, also extend to the Welsh Ministers. Clause 92 places a requirement on the Secretary of State to consult the Welsh Ministers where regulations are to be made in the exercise of the powers under section 87 and 88, if the regulations would apply in Wales.

**38.** The Hansard Society has raised four principal concerns with the power in clause 87 of the Bill:

- “the [UK] Government is correct that there are comparable powers, and precedent, in the *Public Bodies Act 2011* (the 2011 Act), which also applies to a wider range of bodies than the power in clause 87 of this Bill. However, there are limitations to the powers in the 2011 Act that have not been applied in clause 87”;
- “the test that the Secretary of State must fulfil before the power in clause 87 can be exercised is not clear and proportionate”;
- “there is no requirement on the Secretary of State to lay, together with the regulations, a report on the consultation which must be conducted before the clause 87 power may be used”;
- “the scope of the power in clause 87 is wider than the intended use put forward by the Department [of Health and Social Care] in the Delegated Powers Memorandum”.<sup>18</sup>

**39.** In her letter, the Minister told us of her concerns with these clauses. She started by saying:

*“Some of the Arm's Length Bodies in scope of the power undertake functions in Wales, Welsh Ministers have powers of direction in respect of some functions and Welsh Ministers have rights to appoint or nominate Welsh representation to them. Transferring or merging the functions of these bodies could therefore result in an erosion of Welsh Ministers' powers in relation to those bodies or impact on the functions of that body in Wales.”<sup>19</sup>*

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<sup>18</sup> [The Hansard Society, The Health and Care Bill: Delegated Powers, 3 September 2021](#)

<sup>19</sup> Letter from the Minister for Health and Social Services, 28 October 2021

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**40.** With regards to the power enabling the Secretary of State to delegate specified functions to these Arm's Length Bodies, the Minister told us that:

*"...reassurances have been provided that in relation to cross-border Special Health Authorities [SHAs], such as NHS Blood and Transplant, this does not include functions that they are directed to exercise by the Welsh Ministers in relation to Wales."<sup>20</sup>*

**41.** The Minister went on to set out specific concerns with clauses 90 and 92, as follows:

*"The clauses regarding the transfer of functions between specified Arm's Length Bodies provide for the Secretary of State to consult the Welsh Ministers on regulations made under clauses 87 or 88 if those regulations would apply in Wales. (...) I have requested that the Bill be amended to require that regulations made under the powers... should be with the consent of Welsh Ministers in order to protect the devolution settlement. (...)*

*Clause 90 provides the Secretary of State with the power to transfer property, rights and other liabilities to the Welsh Ministers or Welsh NHS Trusts. I have requested that Welsh Ministers and Welsh bodies are carved out of the Clause 90 provision and I am hopeful that this will happen."<sup>21</sup>*

**42.** The Minister also acknowledged the Henry VIII power in clause 89 that would permit the Secretary of State, when making regulations under clauses 87 or 88, to make consequential amendments to provisions in a Measure or Act of the Senedd. This matter is discussed further in later paragraphs.

**43.** We note the information provided by the Minister in relation to clauses 86 to 92 and that she is seeking amendments to the Bill to address her concerns.

**Recommendation 2.** The Minister should, in advance of the Senedd's debate on the relevant consent motion, provide further details of the intergovernmental discussions regarding clauses 86 to 92 and confirm whether the amendments she has sought will be tabled to the Bill by the UK Government.

**44.** In relation to the power being given to the Secretary of State to delegate specified functions to Arm's Length Bodies, we note the Minister's statement that reassurances have been

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<sup>20</sup> Letter from the Minister for Health and Social Services, 28 October 2021

<sup>21</sup> Letter from the Minister for Health and Social Services, 28 October 2021

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given by the UK Government that, in relation to SHAs, this does not include functions directed by the Welsh Ministers.

**45.** The Minister will be aware of previous concerns raised by both us and other Welsh Ministers<sup>22</sup> regarding the non-binding nature of such assurances. Indeed, the Counsel General has recently shared with us the Welsh Government's principles for UK Bills which states "Non-legislative intergovernmental agreements, such as Memorandums of Understanding and despatch box commitments, accompanying Bills should be avoided as they only bind the current UK Government to an extent, and they do not bind future UK Governments."<sup>23</sup> In line with this principle, the Minister herself is not satisfied with a non-binding Memorandum of Understanding which has been proposed by the UK Government in relation to the clause 123 of the Bill (discussed in paragraphs below).

**46.** As such, we are unclear why the Minister appears to be satisfied with reassurances given by the UK Government on this matter as opposed to a legislative commitment on the face of the Bill.

**Recommendation 3.** The Minister should seek an amendment to the Bill to address her concerns regarding clause 87 to the effect that the Secretary of State cannot use the powers therein to transfer and/or delegate functions in relation to Special Health Authorities where those functions were directed by the Welsh Ministers in relation to Wales.

## Clause 120

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**47.** Clause 120 amends the *Healthcare (European Economic Area and Switzerland Arrangements) Act 2019* (the 2019 Act) to enable the UK Government to implement international healthcare agreements with countries, territories and international organisations outside the European Economic Area and Switzerland. Clause 120, will also rename the 2019 Act to the Healthcare (International Agreements) Act 2019.

**48.** The 2019 Act was originally introduced as the Healthcare (International Arrangements) Bill but its title was later changed following amendments designed to confine the powers in the Bill which limited their geographical application to the European Economic Area and Switzerland only.

**49.** Clause 120 widens the scope of existing powers conferred on the Secretary of State relating to reciprocal healthcare, by removing these territorial restrictions. The Secretary of

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<sup>22</sup> See Welsh Government Legislative Consent Memorandum on the Professional Qualifications Bill, June 2021

<sup>23</sup> Letter from the Counsel General and Minister for the Constitution, 22 October 2021

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State's powers to make payments in relation to healthcare provided in a country or territory outside the UK, and to make related regulations, are also amended.

**50.** Clause 120 broadens the geography of, and makes permanent, existing temporary powers which currently enable the UK Government to authorise payments in European Economic Area countries and Switzerland for five years after Brexit. This arrangement was established on the grounds of the need for speed and flexibility as the UK withdrew from the EU.<sup>24</sup>

**51.** Clause 120 effectively enables the UK Government to implement healthcare arrangements with other countries, territories and international organisations using secondary legislation which is subject to the negative procedure. It applies in situations where the UK has in place an international healthcare agreement with another party. If an agreement is in place, clause 120 could be used to fund healthcare that falls within or outside the scope of that agreement.

**52.** The Secretary of State will still be required to consult with the Welsh Ministers before making relevant regulations, as is currently required by both the provisions in the 2019 Act and a supplementary Memorandum of Understanding<sup>25</sup> agreed between the UK Government and the Welsh Government.

**53.** With regards to the aforementioned Memorandum of Understanding (MoU), we have not been able to find the final version which reflects the Bill as enacted. We take the opportunity to highlight this matter as the version which was included in correspondence between the then Minister for Health and Social Services and our predecessor Committee in the Fifth Senedd reflects the drafting of the Bill as it was progressing through the UK Parliament. Subsequent amendments made to the Bill to limit its powers resulted in an Act not envisaged in the MoU.

**Recommendation 4.** The Minister should, in advance of the Senedd's debate on the relevant consent motion, provide the Committee and all Senedd Members with a copy of the final Memorandum of Understanding (MoU) in place between the Welsh and UK Government's in relation to the *Healthcare (European Economic Area and Switzerland Arrangements) Act 2019*, and confirm that the text of the MoU reflects the final, limited scope of the Bill as agreed by the UK Parliament.

**54.** The clause also makes other amendments to the 2019 Act, including enabling the Secretary of State to confer functions on and/or delegate functions to public authorities when

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<sup>24</sup> See Healthcare (International Arrangements) Bill (changed to Healthcare (European Economic Area and Switzerland Arrangements) Bill), [Explanatory Notes](#), March 2019, paragraph 11

<sup>25</sup> See [Letter from the Minister for Health and Social Service to the Fifth Senedd's Constitutional and Legislative Affairs Committee](#), 28 February 2019

making regulations to make provision for the purpose of giving effect to healthcare agreements. The definition of "public authority" includes the Welsh Ministers. The Senedd could legislate to confer a similar function on the Welsh Ministers.

**55.** While paragraph 10 of Schedule 7A to the 2006 Act provides that foreign affairs and international relations is a reserved matter, observing and implementing international obligations within devolved areas is not reserved. As the Bill relates to health - a devolved matter - the provisions inserted by clause 120 concerning making payments for healthcare overseas to give effect to healthcare agreements would fall within the exception to the reservation, and would therefore be within the Senedd's competence.

**56.** The Hansard Society has also raised concerns with clause 120 of the Bill, as follows:

- "clause 120 would see a further departure from the constitutional convention on the means of implementing international agreements in domestic law";
- "clear and proportionate criteria for what constitutes 'exceptional circumstances' have not been provided";
- "existing safeguards in the current section 2 [of the 2019 Act] are to be removed and the Department [of Health and Social Care] has not addressed some of the original concerns levelled at the Healthcare (International Agreements) Bill".<sup>26</sup>

**57.** In providing an update on intergovernmental discussions and details of any amendments sought to the Bill, on clause 120 the Minister said:

*"The main concern with Clause 120 is the requirement to only consult with the Welsh Ministers on draft regulations giving effect to international healthcare agreements. This means that should the Welsh Government have concerns regarding unreasonable or unfunded pressures on the NHS in Wales arising from such agreements, those concerns may not always be taken into account.*

*The clause also enables the Secretary of State to confer functions on and/or delegate functions to Welsh Ministers and public authorities in Wales, when*

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<sup>26</sup> The Hansard Society, The Health and Care Bill: Delegated Powers, 3 September 2021

*making regulations to make provision for the purpose of giving effect to healthcare agreements.”<sup>27</sup>*

**58.** The Minister told us that discussions are continuing on the wording of clause 120 that would address her key concerns and that she was “hopeful that a satisfactory position can be reached”.<sup>28</sup>

**59.** We drew the Minister’s attention to the fact that clause 120 of the Bill would constitute a departure from constitutional convention by permitting the UK Government to implement international agreements that require changes to domestic legislation via subordinate legislation rather than by primary legislation

**60.** We also suggested that this new approach to the scrutiny of international agreements would directly limit the Senedd’s involvement in a matter within the Senedd’s competence.

**61.** In her letter the Minister responded:

*“Whilst Welsh Government is not supportive of the principle of the use of Henry VIII powers in Bills, I consider this a matter for UK Parliament to consider in its scrutiny of this Bill. The role of Welsh Government is to seek to protect the devolved settlement where UK Bill proposals impact, or have the potential to impact, on it or on Welsh bodies.*

*Clause 120 does not per se introduce a new approach to the scrutiny of healthcare agreements which excludes the Senedd scrutiny of a devolved matter. International agreements are reserved and are binding on the UK as a whole to implement and observe irrespective of the legislation they are made under – and indeed can be entered into by the UK Government without making them under any specific legislation. With regard to healthcare agreements, there are a number of long-standing UK healthcare agreements in place with countries other than the EU which do not have a specific legislative basis and therefore have not been, nor necessarily will be, subject to Senedd scrutiny. Therefore whilst I have concerns about the implications of the use of the powers in Clause 120 for the Welsh NHS, I do not agree that the provisions in this Bill change the position on Senedd*

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<sup>27</sup> Letter from the Minister for Health and Social Services, 28 October 2021

<sup>28</sup> Letter from the Minister for Health and Social Services, 28 October 2021

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*scrutiny of healthcare agreements, as currently there is no such automatic right.*

*To be clear, the provisions in this Bill will extend the current Healthcare (European Economic Area and Switzerland Arrangements) Act 2019 to rest of the world countries. In some ways therefore by legislating in the area of rest of the world healthcare agreements, it has given the Senedd an opportunity to scrutinise such primary powers in an area where there previously was no such involvement of the Devolved Administrations. That said, I remain concerned about the ability in the Bill as introduced for the UK Government to make regulations giving effect to healthcare agreement that impact on Wales without the consent of Welsh Ministers. Discussions with DHSC on this matter to address my key concerns remain on-going and, as I have stated earlier, I am hopeful that a satisfactory position can be reached."<sup>29</sup>*

**62.** We are unconvinced by the Minister's response to the questioning in our letter regarding clause 120 of the Bill and, in some respects, we are disappointed in the position the Minister appears to have adopted.

**63.** The Minister states that the role of the Welsh Government is to seek to protect the devolved settlement and that while she may not support the Henry VIII power within clause 120, she considers this to be a matter for the UK Parliament. It is unclear to us why seeking to protect the Welsh devolved settlement is at odds with seeking to limit the UK Government's ability to amend domestic UK-wide legislation via regulations, as the Minister has implied. Furthermore, given that it is a UK Bill that is being used to make provision that would apply in Wales and the Senedd's formal role is therefore limited to the legislative consent process, it is unfortunate that the Minister does not appear to be demonstrating a willingness to also protect the devolution settlement in its fullest sense which would also include the role of the Senedd as the legislature in Wales.

**64.** We do not agree with the Minister's position that clause 120 of the Bill does not change the position on Senedd scrutiny of healthcare agreements.

**65.** Constitutional convention has emerged, whereby primary legislation is used when international agreements require changes to domestic legislation. This provides to Parliament the greatest opportunity to scrutinise. If such legislation engages devolved competence, as in the case of healthcare agreements, the consent of the Senedd, and its accompanying scrutiny, is

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<sup>29</sup> Letter from the Minister for Health and Social Services, 28 October 2021

required. The Bill departs from this convention by establishing the use of secondary legislation to implement healthcare agreements, limiting the role of the UK Parliament and, by extension, devolved legislatures in areas of devolved competence.

**66.** We are disappointed that the Minister's approach appears not to advocate for the Senedd to play its full part in safeguarding the devolution settlement as a whole in relation to devolved matters. As such we consider the Minister's approach to be unsatisfactory. We are also surprised by the Minister's views that the UK Government legislating by way of the Bill has given the Senedd an opportunity to scrutinise primary powers. This does not in our view provide an accurate reflection of the scrutiny available to the Senedd on this legislation.

**67.** While we acknowledge that there are limited circumstances in which primary legislation could be amended by virtue of clause 120, we nevertheless again note that the Statutory Instrument Consent Motion process under Standing Order 30A would be engaged. The Senedd's consent would therefore be required should any Statutory Instrument laid before the UK Parliament in relation to Wales, amend primary legislation within the legislative competence of the Senedd.

**68.** As noted by the Hansard Society, clause 120 provides broad scope to the Secretary of State to make payments for healthcare that falls outside of an international healthcare agreement in 'exceptional circumstances' which is not defined by the Bill.

**69.** The Minister told us that, in her view, this was a necessary power and "it would not be prudent to limit the use of the power on the face of the Bill in specific circumstances"<sup>30</sup>. The Minister added "in any case these provision do not extend to Welsh Ministers and the costs will fall solely to the UK Government to fund".

**70.** In light of the original intention of the UK Parliament to limit the powers provided by the 2019 Act during its passage through Parliament, we are surprised that the Minister supports the Bill's provisions not to limit the use of such powers.

**71.** We note the Minister's views but consider that they are not in line with the principles of good law-making. Given the already broad nature of the power in clause 120, we agree with the view expressed by the Hansard Society<sup>31</sup> that it would be appropriate for a clear and

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<sup>30</sup> Letter from the Minister for Health and Social Services, 28 October 2021

<sup>31</sup> The Hansard Society, The Health and Care Bill: Delegated Powers, 3 September 2021

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proportionate test for what qualifies as an 'exceptional circumstance' to be included on the face of the Bill.

**Recommendation 5.** The Minister should seek an amendment to the Bill to the effect that a clear and proportionate test for what qualifies as an 'exceptional circumstance' in clause 120 is included on the face of the Bill.

**72.** In summary, we consider that clause 120 of the Bill would:

- constitute a departure from constitutional convention of implementing international agreements requiring changes to domestic legislation via primary legislation, with its accompanying scrutiny;
- provide broad scope to the Secretary of State to make healthcare payments for healthcare that falls outside of an international healthcare agreement in "exceptional circumstances", which is not defined by the Bill, and we note that there are no limits on the amount or type of healthcare funded;
- reduce the UK Parliament's current limited role in the scrutiny of international agreements and accompanying primary legislation;
- place additional limitations on the involvement of the devolved legislatures in the scrutiny process of UK international agreements, including those in areas of devolved competence.

## Clause 123

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**73.** Clause 123 of the Bill makes a number of amendments to section 60 and Schedule 3 of the *Health Act 1999* (the 1999 Act) relating to the regulation of health professions. This includes an amendment that would change the existing provision allowing an Order in Council to be made regulating "any other profession" concerned with the physical or mental health of individuals, so that the reference to a profession is treated as including "any group of workers who are concerned with the physical or mental health of individuals", whether or not they are generally regarded as a profession.

**74.** Though the regulation of healthcare professions is a reserved matter under the 2006 Act, the Welsh Government has recognised that the regulation of persons who are not professionals but who are concerned with the physical or mental health of individuals falls within devolved competence.

**75.** The Minister told us that UK Government officials have proposed that clause 123 be amended to include a requirement to consult the Welsh Ministers which is supported by a Memorandum of Understanding, should the UK Government seek to regulate under section 60 of the 1999 Act in areas of devolved competence. The Minister confirmed that she has:

*"...requested that the Bill be amended such that the Secretary of State would require the consent of the Welsh Ministers to such regulations. Positive discussions in this area are continuing."<sup>32</sup>*

**76.** We note the information provided by the Minister in relation to clause 123 and that she is seeking an amendment to the Bill to address her concerns.

**77.** We further note that the UK Government appears to have not ruled out legislating in this devolved area.

**Recommendation 6.** The Minister should, in advance of the Senedd's debate on the relevant consent motion, provide further details of the intergovernmental discussions regarding clause 123 and confirm whether the amendment she has sought will be tabled to the Bill by the UK Government.

## **Clause 125 and Schedule 16**

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**78.** Clause 125 introduces Schedule 16 to the Bill which amends the *Communications Act 2003* (the 2003 Act) to restrict the advertising of certain food and drink products in relation to the UK. These products are to be identified by a two stage process: first they need to be included in one of the product categories that will be set out in regulations made by the Secretary of State, then the 'relevant guidance' - the 'Nutrient Profiling Technical Guidance' - will need to be applied. The Secretary of State may amend the definition of 'relevant guidance'.

**79.** The television programme services element of Schedule 16 imposes an obligation on OFCOM – a statutory corporation and the UK regulatory and competition authority for the broadcasting, telecommunications and postal industries – to set standards prohibiting television programme services provided between 5.30am and 9pm from including advertisements for identifiable unhealthy products, subject to exceptions. Schedule 16 also makes provision which prohibits the advertising of these products on demand television services shown between 5.30am and 9.00pm, and prohibiting a person from placing an advert for these products online.

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<sup>32</sup> Letter from the Minister for Health and Social Services, 28 October 2021

Both these prohibitions are subject to certain exemptions and there are powers for the Secretary of State to make regulations providing for further exemptions.

**80.** Clause 125 also contains a consequential power. It amends the 2003 Act to allow the Secretary of State to make consequential provision by way of regulations which amend, repeal or revoke provisions of an Act or Measure of the Senedd, or secondary legislation made under such provisions or under an Act of Parliament. This power is therefore a Henry VIII power and is limited to extending the prohibition on placing or arranging online advertising to persons not already covered under Part C of the 2003 Act.

**81.** The UK Government has not identified this as a clause which requires the legislative consent of the Senedd.

**82.** The Senedd does not have competence to confer functions on OFCOM unless the relevant Minister of the Crown consents to such provision, and it cannot legislate for purposes which relate to broadcasting and internet services (as these are reserved). However, the Welsh Government considers that the provisions fall within the competence of the Senedd because the purpose of the provisions primarily relate to public health (i.e. reducing obesity among the population and improving health outcomes) rather than broadcasting and internet services. Any engagement with those reservations is only incidental to the main, public health purpose of the clause which has the effect of reducing children's exposure to advertising of unhealthy food. The power to make consequential provision is also considered to be within the legislative competence of the Senedd.

**83.** There is no requirement for the Secretary of State to obtain the consent of the Senedd or the Welsh Ministers before exercising this Henry VIII power which could be used to amend Senedd legislation.

**84.** In her letter the Minister said:

*"Whilst the substantive content of the clauses covering restrictions on the advertising of unhealthy food on a 4 nations basis is welcomed, there is consequential power included enabling the Secretary of State to amend Welsh legislation. As with the same provision in relation to Arm's Length Bodies, this is an issue of on-going discussion with DHSC. However it should be noted that this is an area of the Bill DHSC do not accept is devolved and*

*do not agree should be subject to a requirement for the legislative consent of the Senedd.*"<sup>33</sup>

**85.** We note the information provided by the Minister in relation to clause 125 and Schedule 16 and that discussions with the UK Government are ongoing.

**Conclusion 2.** We agree with the Welsh Government's view that the consent of the Senedd should be sought as we consider that the relevant provisions in clause 125 and Schedule 16 fall within a devolved purpose as provided for by Standing Order 29(i).

**Recommendation 7.** The Minister should, in advance of the Senedd's debate on the relevant consent motion, provide further details of the intergovernmental discussions regarding clause 125 of and Schedule 16 to the Bill.

### **Clause 130**

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**86.** Clause 130 of the Bill provides the Secretary of State with a regulation-making power to make provision that is consequential on the Bill. This may include provision that amends, repeals, revokes or otherwise modifies any provision within the Bill or any provision made by, or under, an Act or Measure of the Senedd. It is therefore a Henry VIII power.

**87.** This is a Bill-wide provision, meaning that the Secretary of State could exercise this consequential power in relation to any aspect of the Bill so as to amend Senedd legislation without recourse to the Senedd or the Welsh Ministers. This clause is similar to clauses 89(6) and 125.

**88.** We asked the Minister how concerned she was with clause 130, given that it provides the Secretary of State with regulation-making powers to make consequential provision meaning that it could be used to amend Acts or Measures passed by the Senedd and subordinate legislation made by Welsh Ministers.

**89.** We note the Minister's response that she "remain[s] in discussion with [the Department for Health and Social Care] regarding these concerns, exploring options to reach an acceptable position".<sup>34</sup>

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<sup>33</sup> Letter from the Minister for Health and Social Services, 28 October 2021

<sup>34</sup> Letter from the Minister for Health and Social Services, 28 October 2021

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**90.** The UK Government has not identified clause 130 as a clause which requires the legislative consent of the Senedd. However, the Welsh Government considers that this provision falls within the Senedd's legislative competence and therefore requires its consent.

**Conclusion 3.** We agree with the Welsh Government's view that the consent of the Senedd should be sought as we consider that the relevant provisions in clause 130 fall within a devolved purpose as provided for by Standing Order 29(i).

### **Ability to amend Senedd Acts and Measures and, in particular, the 2006 Act**

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**91.** As we highlight above in respect of clauses 89, 125 and 130, the Bill contains broad Henry VIII powers that would enable the Secretary of State to use regulations to amend Senedd Acts and Measures. We do not consider this to be acceptable.

**92.** We have noted above in earlier paragraphs that the Statutory Instrument Consent Motion process under Standing Order 30A would be engaged and the Senedd's consent would be required should any Statutory Instrument laid before the UK Parliament in relation to Wales, amend primary legislation within the legislative competence of the Senedd.

**93.** We asked the Minister to confirm that there are no restrictions on the face of the Bill preventing the Secretary of State from using these regulation-making powers to amend the 2006 Act.

**94.** The Minister said:

*"There are no such restrictions on the face of the Bill therefore in theory, the consequential powers could be used by UK Ministers to amend GOWA as they allow for the amendment of primary legislation, which includes a UK Act and GOWA is a UK Act. However, the powers are limited to consequential changes, thus any amendments would have to be consequential on the Bill provisions or regulations made under them. In the view of the Welsh Government it is unlikely that it could be argued that any substantive provision in GOWA would require amendment in consequence of this Bill."*<sup>35</sup>

**Conclusion 4.** The legislative competence of the Senedd should not be modified by regulations made by the UK Ministers.

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<sup>35</sup> Letter from the Minister for Health and Social Services, 28 October 2021

**Recommendation 8.** The Minister should seek an amendment to the Bill to the effect that the powers in the Bill cannot be used by UK Ministers to make regulations that amend the *Government of Wales Act 2006*.