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Y Gweinidog Iechyd a Gwasanaethau Cymdeithasol
Minister for Health and Social Services



Llywodraeth Cymru
Welsh Government

Russell George MS
Chair
Health and Social Care Committee

SeneddHealth@senedd.wales

25 November 2021

Dear Russell

Thank you for your letter of 8 November requesting further information and an update regarding the Legislative Consent Memorandum (LCM) for the UK Government Health and Care Bill.

You will wish to note that, on 18 November, following constructive negotiations between my officials and officials in the Department of Health and Social Care, as well as between myself and the Minister of State for Health, the UK Government laid a number of amendments which address the majority of the key concerns of the Devolved Governments with regard to the Bill. I wrote to Minister Argar in this regard on the 17 November and will supply the letter to the Committee under separate cover.

The amendments were voted through in the House of Commons on 23 November. I will therefore be tabling a Supplementary Legislative Consent Memorandum with regard to the Bill to reflect those changes.

I have addressed your questions below.

Consequential powers, and consultation with the Welsh Ministers on the exercise of powers

We note that a number of the outstanding issues outlined in the LCM relate to whether Welsh Ministers should be consulted or required to consent before powers under the Bill are exercised by the Secretary of State, and to the inclusion in the Bill of powers to make consequential amendments to Welsh legislation.

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Rydym yn croesawu derbyn gohebiaeth yn Gymraeg. Byddwn yn ateb gohebiaeth a dderbynnir yn Gymraeg yn Gymraeg ac ni fydd gohebu yn Gymraeg yn arwain at oedi.

We welcome receiving correspondence in Welsh. Any correspondence received in Welsh will be answered in Welsh and corresponding in Welsh will not lead to a delay in responding.

1. Please provide an update on your discussions with the UK Government on these matters, including any amendments the UK Government has agreed to bring forward, or any assurances you have received in relation to the proposed use of these powers.

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

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

I am currently giving consideration as to whether, given the assurances received from the UK Government, the risk presented by the provisions is acceptable.

Clause 85: medicines information systems

While we recognise that there are merits in a UK-wide medicine registry, 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. We note that you have proposed to the UK Government that the Bill should be amended to put in place an alternative arrangement for Wales under which Welsh patient data is collated by a suitable digital authority, which would then provide the UK-wide system with such information as was required for the specific purpose of the registry.

2. Please provide an update on your discussions with the UK Government, including whether the concerns you have outlined in respect of overlap with data gathering in Wales, any proposed alternative arrangements, provision for the use of data by Welsh Ministers, and the potential for inappropriate use of Welsh patient data have been resolved.

I can confirm following constructive discussions with the UK Government and the Medicines and Healthcare Products Regulatory Agency (MHRA), we reached agreement on amendments which address the concerns raised in my previous correspondence with the Committee.

In relation to inappropriate use of data, the amendments to the Bill laid on 18 November limit the scope of the purposes for which medicine information systems regulations can be made. The amendment makes it clear that any provision in the regulations for a purpose in relation to clinical decision making is only where there is a connection with the safety of such decisions relating to human medicines. On arrangements that overlap with data collection in Wales, the Bill now requires that secondary legislation made under it must provide for information to be collected by the Welsh Ministers or a person designated by them such as Digital Health and Care Wales (DHCW), subject to specified exceptions in that secondary legislation. This ensures where appropriate, data remains available for use by Welsh Ministers. Finally, in addition to the safeguards agreed on the face of the Bill, the Welsh Ministers will need to be consulted on any regulations or directions relating to medicine information systems.

Clauses 86-92: Arm's Length Bodies Transfer of Functions

We note you have requested that the Welsh Ministers and Welsh bodies should be “carved out of the clause 90 provision” which gives the Secretary of State powers to transfer property, rights and liabilities to the Welsh Ministers or Welsh NHS trusts.

3. Please provide further information about why you are seeking this carve out, and what the implications would be if such a carve out is not secured.

The clause is potentially problematic as although the UK Government included provision in the Bill at introduction (in clause 92) that a transfer would be subject to the consultation of Welsh Ministers, unwanted properties, rights or liabilities could be transferred to the Welsh Ministers, Local Health Boards or Welsh Special Health Authorities in respect of bodies over which the Welsh Ministers have no influence, with no option for the Welsh Ministers to prevent such a transfer, or to make such a transfer to UK Government. Officials did not envisage a scenario in which property, rights and liabilities of a body would need to be transferred to the Welsh Ministers in conjunction with a transfer of functions made under the powers in clauses 87 and 88. Officials in the Department of Health and Social Care agreed that this would be unlikely but the ability to do so in the Bill provisions was still an area of concern.

Following constructive conversations between my officials and officials in the Department of Health and Social Care, as well as between myself and the Minister of State for Health, an amendment regarding this provision was agreed which would have removed the Welsh Ministers, Welsh NHS Trusts and Welsh Special Health Authorities from the list of ‘appropriate persons’ for transfer to transfer property, rights and other liabilities in Clause 90, thus addressing my concerns this area.

However, this amendment was not tabled as whilst this aspect of the amendment was agreed by the UK Government and all three Devolved Administrations, there were further amendments to the Arm's Length Bodies' provisions proposed which met my concerns but which the UK Government was unable to secure agreement to from all the Devolved Administrations.

Discussions with the Department for Health and Social Care on this matter are continuing to seek to ensure that an acceptable position for Wales is reached.

Clause 120: International healthcare arrangements

In your letter you note that you have concerns in respect of the power in clause 120 for the Secretary of State to confer functions on and/or delegate functions to the Welsh Ministers and public authorities in Wales, but that you are hopeful that agreement can be reached on alternative wording.

4. Please provide an update on your discussions with the UK Government, including whether you have secured agreement for an amendment to be brought forward, and what the implications for Wales will be if no change to the wording is made.

I can confirm that we have reached agreement with the UK Government with regard to addressing my concerns regarding this provision.

To address this issue the UK Government agreed an amendment to the clause so that the Welsh Ministers and other Welsh organisations, except for Welsh Local Health Boards (to ensure that existing functions already conferred on Local Health Boards regarding planned healthcare applications remain), are not caught under the definition of “Public Authority” in respect of the Secretary of State’s power.

In addition, it has further amended the clause to provide a power to the Welsh Ministers enabling them make regulations in devolved areas for the purpose of giving effect to health agreements, which includes the power to confer functions on all devolved Welsh organisations. Should the Welsh Ministers fail to confer relevant functions onto the Local Health Boards regarding healthcare agreements, the Secretary of State may confer those functions.

I am of the view that the amendments are a significant shift from the position of the Bill as introduced and that they provide sufficient protection of the devolution settlement.

Clause 123: Regulation of health care and associated professions

5. Please outline the Welsh Government’s view on the concerns raised by stakeholders about a lack of clarity on how clause 123 will be implemented.

The Bill proposes through Clause 123 a new subsection 2ZZA is inserted into Section 60 of the Health Act 1999.

The Department for Health and Social Care has advised that the provision is intended to clarify not change the existing position and, at present, there is no intention to use this power to regulate any additional persons. I further understand the provision is intended to target senior health managers and leaders in event the UK Government wanted to regulate these in the future.

There are no plans to regulate senior health leaders and managers in Wales and due to the configuration of the NHS within Wales I do not consider this to be a likely event in the future. There are no set qualifications that are required prior to senior NHS Leaders/Managers taking up their post, this furthers my view that they are not regarded as a ‘profession’.

These powers were of concern to Welsh Government as, although the regulation of healthcare professions is a reserved matter under paragraph 140 of Schedule 7A to the Government of Wales Act 2006 (GoWA), the reservation is limited to specified regulated professions and “*any other profession concerned with the physical or mental health of individuals*”. Clause 123 went beyond that and could in theory enable “*any group of workers*” working in the field of physical and mental health to be regulated under the Health Act 1999 powers “*whether or not they are generally regarded as a profession*”. The wording was therefore wider than the GoWA reservation and thus the concern was that the power could be used to regulate “any group of workers” who are not health professionals, an area which it could be argued is within the legislative competence of the Senedd.

6. Please also explain what involvement or engagement you expect for the Welsh Government in the anticipated UK Government review of which professions require regulation.

On 18 November, the UK Government tabled an amendment which requires the Secretary of State to obtain the consent of the Welsh Ministers when bringing into regulation in Wales a group of workers who are not professionals but are concerned with the physical or mental health of individuals, under Section 60 of the Health Act 1999.

The Welsh Ministers will therefore be fully consulted on any regulation proposal and only if they agree to those areas that are subject to the legislative consent requirement, will approval be given.

Financial implications

7. Please provide an update on whether you have received assurance from the UK Government that the costs falling to Wales as a result of the Bill will be met by the UK Government, and on the discussions between officials about the appropriate reimbursement mechanism.

There have been continuing discussions with UK Government regarding costs, and I have received some assurances. Broadly, Minister Argar has confirmed that the Barnett Formula will apply to additional costs arising from provisions in the Bill impacting on Wales as set out in the Statement of Funding Policy.

In relation to reciprocal healthcare specifically, the UK Government has confirmed that it will continue to fund the costs of treatment provided overseas to Wales' residents under any new healthcare agreements.

Supplementary LCM

8. We note that you are seeking an amendment to the Bill in respect of medical examiners, and that such an amendment, and other amendments proposed, would be subject to a supplementary LCM. Please indicate when you anticipate such a supplementary LCM might be brought forward.

As stated at the start of this letter, following the amendments to the Bill tabled on 18 November and subsequently voted through, which includes the medical examiners amendment, I will be bringing forward a Supplementary LCM as soon as possible.

Should there be subsequent amendment to clauses 88 to 92 (Arms' Length Bodies) or any other amendments impacting on devolved competence it is likely it will be necessary to bring forward a further Supplementary LCM.

9. We would also welcome further information about the amendment you are seeking in respect of medical examiners, including why you are seeking its inclusion in UK legislation rather than Welsh legislation.

The amendment, which was tabled on 18 November, enables the establishment of a system for medical examiners in Wales that is broadly in line with what was proposed in the Bill in relation to England and ensures that the legislation accurately reflects the way in which it is envisaged the medical examiner system will operate in Wales.

The amendment amends the Coroners and Justice Act 2009 (“the 2009 Act”) in England and Wales to set out a power for Welsh NHS bodies to appoint medical examiners. A duty will also be imposed upon the Welsh Ministers to ensure that enough medical examiners are appointed in the healthcare system in Wales, that enough funds and resources are made available to medical examiners to enable them to carry out their functions of scrutiny to identify and deter poor practice, and to ensure that their performance is monitored.

The purpose of the amendment is to introduce a statutory scheme of medical examiners within the NHS with appointment being by a range of Welsh NHS bodies rather than only Local Health Boards in Wales. This will enable more collaborative working across Welsh NHS bodies to ensure the effective delivery of the medical examiners scheme.

Medical examiners will introduce an additional level of scrutiny to those deaths not reviewed by a coroner, improve engagement with the bereaved in the process of death certification and offer them an opportunity to raise any concerns as well as improving the quality and accuracy of Medical Certificates of Cause of Death. Independent scrutiny of deaths will reduce the potential for malpractice by doctors to go unchecked. The level of scrutiny will be proportionate so as not to impose undue delays on the bereaved or undue burdens on medical practitioners and others involved in the process. Enabling the responsibility for appointment of medical examiners to rest with a range of Welsh NHS bodies rather than solely with local health boards in Wales will allow the medical examiners system to be more robust.

The amendment has been introduced through UK legislation rather than in Welsh legislation as the subject matter of Part 1 of the 2009 Act is reserved by paragraph 167 of Schedule 7A to the Government of Wales Act 2006. The 2009 Act does however currently contain provision which allow the Welsh Ministers to develop and consult upon their own regulations in respect of key aspects of the new system, including the terms for the appointment of medical examiners and their functions and the charging of fees. These provisions will remain and will enable the appointment of medical examiners by a wider definition of Welsh NHS bodies, ensure that the medical examiners system for Wales is fit for purpose.

Additional Amendments

The Committee will also wish to note that in addition to the amendments detailed above, the UK Government laid on 17 and 18 November respectively amendments to include the following provisions in the Bill and, at my request, to extend the provisions to Wales:

Virginity Testing

This includes provision in the Bill to make virginity testing, a practice carried out on women and girls involving an examination of the genitalia purportedly to reach a view as to their virginity or otherwise, an offence.

Reimbursement to Community Pharmacies

This amends section 88 of the NHS (Wales) Act 2006, creating an exemption where 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.

Both the above will be included in a Supplementary LCM.

I trust this response will be helpful in the Committee's scrutiny of the LCM and forthcoming Supplementary LCM.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'M. E. Morgan'.

Eluned Morgan AS/MS

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Minister for Health and Social Services