



Russell George MS
Chair
Health and Social Care Committee

SeneddHealth@senedd.wales

2 February 2022

Dear Russell

Thank you for the Health and Social Care Committee's report on the Legislative Consent Memorandum (LCM) on the Health and Care Bill, laid 16 December 2021.

The position has been superseded by a number of amendments made to the Bill and two Supplementary LCMs laid on 17 December 2021 and 28 January 2022 respectively. This letter therefore reflects the latest position on the Bill in responding to the Committee's recommendations.

Firstly, I welcome the Committee's confirmation that it has no objection to the Senedd giving its consent to the inclusion in the Bill of:

- Clause 77 (formerly Clause 75) (Tidying up etc provisions about accounts of certain NHS bodies);
- Clause 80 (formerly Clause 78) (Hospital patients with care and support needs: repeals etc);
- Clause 87 (formerly Clause 85) (Medicines information systems) as amended by the House of Commons on 23 November 2021;
- Clause 142 (formerly clause 123) (regulation of health care and associated professions) as amended by the House of Commons on 23 November 2021; and
- Clause 146 (formerly Clause 127) (Food information for consumers - power to amend retained EU law).

I note the Committee's views regarding clauses 88-94 (formerly clauses 86-92): Arm's Length Bodies Transfer of Functions and I consider the amendments tabled by the UK Government on 24 January 2022 will, if passed, address the Committee's concerns regarding these clauses. The detail of the amendments is set out in the Supplementary Legislative Consent Memorandum (Memorandum No 3) laid on 28 January 2022.

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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.

Please find my responses to your specific recommendations below.

Recommendations 1 and 2 - Clause 136 (formerly Clause 120): International Healthcare Arrangements

Recommendation 1

The Minister for Health and Social Services should make representations to the UK Government for an amendment to be brought forward to include on the face of the Bill 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.

Response

Section 1 of the Healthcare (European Economic Area and Switzerland) Act 2019 (HEEASAA) currently provides the Secretary of State with a power to make payments, and arrange for payments to be made, in respect of the cost of healthcare provided in an EEA State or Switzerland.

Clause 136 (formerly clause 120) of the Bill will remove the power in section 1 of HEEASAA and replace it with regulation making powers enabling the Secretary of State to make regulations (a) for the purpose of giving effect to a healthcare agreement (including about making payments) between the UK and either a country or territory outside the UK or an international organisation, and (b) authorising the Secretary of State to make a payment in respect of healthcare provided otherwise than under a healthcare agreement, in a country or territory with which the UK has a reciprocal healthcare agreement, but only where the Secretary of State considers that the payment is justified by exceptional circumstances.

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.

Payments for healthcare outside the UK is a reserved matter because it concerns the welfare of people outside of the UK, and has no material bearing on, or connection to the domestic provision of healthcare in the UK; it is a matter of international relations whether and to what extent the UK decides to arrange and fund healthcare for people outside the UK.

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

It is therefore my view that it is not appropriate to put a clear and proportionate test on the face of the Bill 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, as this could have a detrimental or limiting impact to provide support when needed.

Recommendation 2

Before the Senedd is asked to decide whether or not to give its consent to the inclusion in the Bill of clause 120 (now clause 136) (international healthcare agreements), the Minister for Health and Social Services should ensure that all Members have been provided with a copy of the final Memorandum of Understanding agreed between the UK Government and the Welsh Government in relation to the Healthcare (European Economic Area and Switzerland Arrangements) Act 2019.

Response

I am pleased to enclose the reciprocal healthcare Memorandum of Understanding (MOU) with this letter for the consideration of the Committee, which has been revised in the light of the Bill provisions. 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.

Recommendation 3 - Clause 142 (formerly Clause 123): Regulation of Healthcare and Associated Professions

Recommendation 3

The Minister for Health and Social Services should 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.

Response

Clause 142 (formerly clause 123) has been amended to provide that no recommendation is to be made to Her Majesty to make an Order in Council under section 60 of the Health Act 1999 which relates to any group of workers, who are not professionals but who are concerned with the physical or mental health of individuals, where the Order contains provision that is within the legislative competence of the Senedd, unless the Welsh Ministers have consented to that provision.

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.

I am content this amendment addresses our concerns in respect of this provision and consequently I can now support this Bill clause.

Recommendation 4 - Clauses 149, 144 and 91 (formerly clauses 89, 125 and 130): Consequential Amendments to Senedd Legislation

Recommendation 4

Before the Senedd is asked whether to give its consent to the Bill, the Minister for Health and Social Services should provide a further update on her discussions with the UK Government on the consequential amendment powers in clauses 89, 125 and 130 of the Bill (as introduced), including whether, in her view, the assurances she has received from the UK Government in respect of the proposed use of the powers reduce the associated risks to acceptable levels.

Response

These clauses provide the Secretary of State with the powers, by regulation, to make provision which is consequential on the Bill. This includes provision that amends, repeals, revokes or otherwise modifies provision made by, or under, an Act or Measure of the Senedd.

As set out in the Supplementary LCM (Memorandum No. 3) laid on 28 January 2022, I and my officials have met with the Minister of State for Health, Edward Argar MP and his officials on a number of occasions to discuss these provisions. The UK Government is of the view that these are standard clauses and it is the case that Wales similarly takes 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. The Minister of State for Health has also given a written commitment to making a Dispatch Box Statement in relation to clauses 91 and 149, on how these powers might be used.

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 LCM on the Bill. Whilst this clause also contains provisions which enable consequential change to Senedd legislation, the UK Government has not identified this as a clause which requires the legislative consent of the Senedd and therefore will not include within the wording Dispatch Box Statement. However, on the basis of the assurances provided by the UK Government on the possible use of the powers, I accept the consequential amendments which might arise from clause 144 as an acceptable and minor constitutional risk.

We have agreed the wording of the Dispatch Box Statement with UK Government and the UK Government has committed to making the statement prior to the Legislative Consent Motion debate in the Senedd scheduled to take place on 15 February.

On the basis of the statement being made, and in the light of all of the assurances given by the UK Government, I regard the risk presented by the provisions now to be acceptable.

Recommendations 5 and 6 – Laying of LCMs and Content of LCMs

Recommendation 5

The Welsh Government should ensure that LCMs are normally laid no more than two weeks after a Bill is introduced in accordance with Standing Order 29.2(i). Should circumstances require a delay before an LCM is laid, the relevant Minister should write to the appropriate Senedd committees to provide an estimate of when the LCM will be brought forward.

Response

The Standing Order deadline is potentially achievable for Bills on which the Welsh Government and the UK Government have worked closely together and are in agreement. The “normally” qualification recognises the realities of what is a highly variable process. The increasing size and complexity of Bills and whether the UK Government has shared draft provisions, which is at its discretion, in advance of publication, can impact our timing for laying LCMs.

We will consider the amendment of the formal guidance for completing LCMs as part of our engagement with the Business Committee’s review of the LCM process to make writing to the Senedd Committees as described a requirement. In the meantime, when laying LCMs in more recent times, we have included explanation regarding any delay in laying within the LCM itself, to ensure Members are informed.

In addition where possible we have laid LCMs within the two week deadline to ensure the Senedd Committees have as much time as possible to scrutinise the LCM. For example I laid Supplementary LCM, Memorandum No. 3 on this Bill on 28 January, just four days after the tabling of UK Government amendments to the Bill.

Recommendation 6

The Welsh Government should ensure that the LCMs it lays provide the relevant committees with sufficient information about the Welsh Government’s position, its concerns, any remedies it is seeking, and such other matters as may be appropriate to enable full and effective scrutiny.

Response

When preparing LCMs, the Welsh Government seeks to fully inform Members of the extent of its position with regard to clauses engaging the LCM process, and of the position with regard to negotiations with the UK Government. However, as you will appreciate, there is a need to respect confidentiality, and we may not always be in a position to share all the information we receive. The negotiations with regard to this Bill have been successfully completed and the outcomes are set out in the Supplementary LCMs (Memorandum No 2 and Memorandum No 3) laid on the Bill.

I trust this response will be helpful in the Committee’s scrutiny of the Legislative Consent Memoranda on the Bill.

I am copying this letter to Huw Irranca-Davies MS, Chair of the Legislation, Justice and Constitution Committee.

Yours sincerely

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

Eluned Morgan AS/MS

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