

## **SUPPLEMENTARY LEGISLATIVE CONSENT MEMORANDUM (MEMORANDUM NO 4)**

### **HEALTH AND CARE BILL**

1. This Legislative Consent Memorandum is laid under Standing Order (“SO”) 29.2. SO29 prescribes that a Legislative Consent Memorandum must be laid, and a Legislative Consent Motion may be tabled, before Senedd Cymru if a UK Parliamentary Bill makes provision in relation to Wales for any purpose within, or which modifies, the legislative competence of the Senedd.
2. The Health and Care Bill (“the Bill”) was introduced in the House of Commons on 6 July 2021. The Bill has concluded its passage through the House of Commons and the House of Lords. The Bill as amended on Report by the House of Lords can be found at:

<https://bills.parliament.uk/publications/45813/documents/1627>

3. On 28 March, the UK Government tabled in the House of Commons an amendment related to ‘organ tourism’ which make provision falling within the legislative competence of the Senedd. This is set out below.

#### **Policy Objective(s)**

4. The UK Government’s stated objective is to enact policies set out in the NHS’s recommendations for legislative reform, following the NHS Long Term Plan, and the White Paper, Integration and Innovation: working together to improve health and social care for all. The UK Government says that the Bill builds on the NHS’s own proposals for reform, aiming to make it less bureaucratic, more accountable, and more integrated, and to incorporate lessons learnt from the pandemic.

#### **Summary of the Bill**

5. The Bill is sponsored by the Department of Health and Social Care.
6. The key provisions of the Bill cover a number of areas, set out briefly below.
  - a) Addressing of concerns raised by NHS England, such as establishing existing Integrated Care Systems (ICSs) on a statutory footing, formally merging NHS England and NHS Improvement, and making changes to procurement and competition rules relating to health services. The Bill also includes proposals to give the Secretary of State for Health and Social Care powers to direct NHS England and to decide how some other health services are organised. It gives the Secretary of State powers to transfer functions between some of the ‘Arm’s Length Bodies’ that lead, support and regulate healthcare services in England and to delegate other functions of the Secretary of State to those

bodies both in relation to the health service in England, and to intervene in proposed changes to the way health services are delivered.

- b) The Bill does not cover wider reforms of the social care and public health systems, although it does provide for some changes in these areas; ICSs are intended to improve coordination between the NHS and local authority services. For social care, the Bill provides for the Care Quality Commission (CQC) to assess how local authorities in England deliver their adult social care functions and it aims to improve data sharing. There are also measures to streamline how people with ongoing care needs are discharged from hospitals.
- c) Public health measures in the Bill relate to food advertising, food information for consumers and water fluoridation.
- d) The Bill also addresses safety investigations and establishes the Health Services Safety Investigations Body as a statutory body, and makes changes to the system of medical examiners.
- e) Other matters covered by the Bill include the regulation of health and care professionals, the collection and sharing of data (including measures to support the development of new medicine registries), international healthcare, hospital food standards and, included through amendment, creating an offence of virginity testing.

### **Update on position since the publication of the third Legislative Consent Memorandum**

- 7. I laid a third Legislative Consent Memorandum (“Memorandum No. 3”) on 28 January 2022, following the tabling by UK Government of further amendments which made provision falling within the legislative competence of the Senedd. The UK Government amendments were agreed at Lords Committee stage and now form part of the Bill.
- 8. Following this, on 15 February, the provisions in the Bill falling within the competence of the Senedd were subject to a Legislative Consent Motion in the Senedd. The Senedd voted to consent to the Bill.
- 9. The Bill returned to the House of Commons on 28 March for the consideration of amendments.

### **Changes to the Bill since the publication of the third Legislative Consent Memorandum for which consent is required**

- 10. On 28 March, an amendment regarding ‘organ tourism’ was tabled by the UK Government in the House of Commons. The amendment which makes it an offence to pay, or offer to pay for an organ for transplant overseas, makes provision in relation to Wales and is within the legislative competence of the Senedd.

11. The amendment was voted through in the House of Commons on 30 March. The amendment can be found at:

[https://publications.parliament.uk/pa/bills/cbill/58-02/0293/amend/health\\_day\\_ccla\\_0330.pdf](https://publications.parliament.uk/pa/bills/cbill/58-02/0293/amend/health_day_ccla_0330.pdf)

12. The amendment is a UK Government amendment tabled in lieu of a new clause, clause 181, to the Bill. This clause was added by non-Government amendment, Lords amendment number 89, tabled at Lords Report stage by Lord Hunt of King's Heath and passed by the Lords on 16 March. The clause was regarded by the UK Government as unworkable and potentially having unintended consequences. The UK Government therefore proposed an amendment in lieu of Lord Hunt's amendment, which would have the same effect as Lord Hunt's amendment in terms of deterring people from seeking to obtain organs abroad unethically but would improve the areas of concern to the UK Government now in the Bill.

13. The detail of the UK Government amendment tabled in lieu of Lord Hunt's amendment is set out below.

#### **Clause 181 – Commercial dealings in organs for transplantation: extra-territorial offences**

14. The Human Tissue Act 2004 ("the 2004 Act") makes it a criminal offence to remove or store, for the purposes of transplantation, or to transplant, an organ without consent (section 5, read with section 1 and Schedule 1). It also makes it an offence to pay, or offer to pay, for an organ and to make arrangements for organ purchases (section 32(1)). Section 33 prohibits the removal and use of transplantable material from a living donor unless the requirements of regulations made under that section are met. These offences apply to those who carry out illicit removals and transplants (section 5) and those who make the arrangements for payment (section 32). They do not target the recipient of the transplanted material as such.

15. The 2004 Act applies to England, Wales and Northern Ireland, and covers illicit transplants and their arrangements that take place in this jurisdiction. It also covers cases where a substantial part of the elements of, or the arrangements for, an organ purchase happen in this jurisdiction, even if the arrangements conclude overseas. In relation to Scotland, there are similar provisions in sections 3 (consent), 17 (living donors) and 20(1) (commercial dealings) of the Human Tissue (Scotland) Act 2006.

16. Clause 181 focuses on the issue of commercial dealings in organs and makes it an offence to pay, or offer to pay for an organ overseas. The amendment inserts a new section 32A into the 2004 Act and a new section 20A into the Human Tissue (Scotland) Act 2006 to in effect extend what is already a criminal offence in England, Wales and Scotland to acts of this nature carried on outside the UK.

17. Lord Hunt's amendment sought to criminalise UK citizens who arrange transplants abroad without consent. However that would be much more complicated to achieve because existing offences in relation to consent apply to those carrying out the transplant, and not those who arrange or receive them. There will be very few, if any, situations where there is no financial gain involved and so the UK Government amendment has the effect desired by Lord Hunt, i.e. to deter people from travelling abroad to pay for an organ transplant, but without the complexities of having to prove consent. It also ensures that certain burdensome aspects of Lord Hunt's amendment affecting healthcare professionals, administrators, and those who legitimately receive an organ overseas, are removed.
18. We support this provision to extend to and apply in Wales. Whilst the number of cases of people seeking to pay for an organ overseas is low, this amendment sends an important message that this is unacceptable. Not to support the amendment extending to Wales would mean that this measure will 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.
19. The amendment falls within the legislative competence of the Senedd.

### **Welsh Government position on the Bill as amended**

20. As set out above, we agree with the UK Government amendment regarding payment for organs for transplant overseas.
21. My position is therefore that I will be able to recommend the consent of the Senedd be given to clause 181 relating to this matter.

### **Financial implications**

22. There are no identified financial implications for Wales in respect of this amendment. The purpose of the amendment is to deter people from travelling abroad to seek unethical, uncontrolled organ transplants. As obtaining transplants in this way could result in unplanned costs to the NHS, seeking to minimise such activity would potentially be of financial benefit to the NHS.

### **Conclusion**

23. I welcome the amendment the UK Government has made to the Bill regarding organ 'tourism' and the provision extending to Wales.
24. I am therefore able to recommend consent to this clause.

**Eluned Morgan MS**

**Minister for Health and Social Services**  
**5 April 2022**