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Llywodraeth Cymru
Welsh Government

Mike Hedges MS
Chair
Legislation, Justice and Constitution Committee

SeneddLJC@senedd.wales

28 February 2025

Dear Mike,

Legislative Consent Memoranda on the Mental Health Bill

Thank you for your letter of 4 February 2025, requesting further information to assist in the Legislation, Justice and Constitution Committee's consideration of the Welsh Government's Legislative Consent Memoranda on the Mental Health Bill. Please find my answers to your questions in the attached Annex.

Yours sincerely,

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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.

Annex

Question 1:

Why do you believe that it is appropriate to make these provisions for Wales in a UK Government Bill, rather than in a Bill introduced to the Senedd?

We follow the principle that primary legislation in devolved areas should be enacted by the Senedd. However, we remain willing to work with the UK Government on its legislative programme and are committed to achieving outcomes where they are in the best interest of Wales whilst respecting devolution.

The Mental Health Bill reflects this principle, with close collaboration taking place between officials to develop provisions in the Bill from the outset.

As noted in the LCM, whilst this Bill has regard to devolved matters, it also makes provision relating to reserved matters. The interrelationship between reserved matters and devolved matters is closely intertwined; for example, clause 34 (transfers from prison to hospital: conditions) and clause 35 (transfers from prison to hospital: time limits).

For that reason, I consider legislating through a UK Bill to offer the most coherent approach to the provisions delivered in this legislation

Question 2:

How did your involvement in the Bill occur, and when was the final decision made to seek provision for Wales in a UK Government Bill?

Question 3:

The Independent Review recommending reform to the Mental Health Act 1983 was concluded in 2018 and the UK Government published a draft Bill setting out planned changes to the 1983 Act in 2022, which was not taken forward in the last Parliament. Could you please outline:

- i. Whether the draft Bill published in 2022 made provision for Wales;**
- ii. What view the Welsh Government took of the draft Bill at the time;**
- iii. If you are aware of the reasons for the delays in relation to that UK Government Bill.**

I will respond to question 2 and 3 together because they relate to one another. In October 2017 the UK Government announced an independent review of the Mental Health Act 1983 ("the Act"). It looked at how the Act is used and how practice can be improved, specifically at why:

- rising numbers of people are being detained under the Act
- disproportionate numbers of people from black and minority ethnic groups are being detained.

Following the recommendations made in the independent review, the UK Government published a White Paper on the Bill including areas that are devolved to Wales. The UK Government sought agreement from the Welsh Government to include provision for Wales (subject to formal legislative consent).

Officials received copies of the Welsh consultation responses to the White Paper, and the summary report produced by the UK Government covering all the consultation responses. Officials also established a reference group, consisting of representatives from Royal College of Psychologists, NHS Wales, Health Inspectorate Wales and Social Care Wales to support the Welsh Government in reaching a policy position for Wales in response to the recommendations in the White Paper.

Officials held focused sessions to test proposed positions with key groups including the Wales Alliance for Mental Health, the Mental Health Partnership Board and the President of the Mental Health Tribunal for Wales.

On the basis of this work Ministers agreed that, subject to an LCM, Wales should be included in the following reforms:

- Revised principles for decision making
- Revised criteria for detention under the Act
- Changes to the regime for automatic referrals to a mental health tribunal
- More powers for the mental health tribunal to grant leave, transfers and community services, and to order that a specific treatment is not given
- Removal of the role of the managers' panel in reviewing a patient's case for discharge from detention or a community treatment order
- Introduction of advance choice documents
- A stronger right for patients with capacity to refuse treatment
- Additional powers for the Nominated Person and for Independent Mental Health Advocates
- Enhanced standards, accreditation and regulation of mental health advocacy.

It was also agreed that **Wales is excluded** from the following reforms:

- A statutory duty on health and local authorities to deliver on directions made by the mental health tribunal within a 5-week period
- Proposals relating to Care and Treatment Plans
- The new duty on local commissioners to ensure adequacy of supply of community services.

A Ministerial letter, from the then Deputy Minister for Mental Health and Well-being, was sent to the UK Government on 21 October 2021 to confirm the position for Wales. Questions about why the previous UK Government did not progress this legislation would need to be directed to members of that government.

In relation to the Mental Health Bill 2025, the Minister for Patient Safety, Women's Health and Mental Health wrote to the Minister for Mental Health and Well-being on 4 November 2024 informing the Welsh Government about the introduction to Parliament of the Mental Health Bill. The Minister for Mental Health and Well-being responded on 6 November confirming that a Legislative Consent Memorandum in respect of the Bill had been laid in the Senedd.

Question 4:

The Legislative Consent Memorandum laid on 10 January 2025 outlines the communication which has taken place between the Welsh Government and the UK Government in relation to this Bill.

- i. What policy development work has been undertaken by the Welsh Government in relation to mental health?**
- ii. What role did the Welsh Government play in the development of the proposals in the Bill, and how has its policy development work been reflected in the Bill.**

The policy work undertaken is covered in the response to question 2 and 3 above, particularly in relation to how the consultation on the White Paper was used to ensure voices from Wales informed the Bill.

Alongside the development of the Bill, the Welsh Government has consulted on both the Mental Health and Well-being Strategy, and the Suicide and Self-harm Strategies last year. The consultation report is available here: [Draft mental health and wellbeing strategy | GOV.WALES](#)

We aim to publish the strategies in April. The Mental Health and Well-being Strategy sets out our vision for person centred and needs led mental health support which aligns with the approach set out in the Mental Health Bill. The strategy will also set out our ambition for services to provide support earlier, with the ultimate aim of reducing the need for detention or admission to a mental health unit.

Question 5:

What evidence and/or data has been obtained from Welsh stakeholders or in relation to Welsh patients during the development of the Bill, and how is this reflected in the Bill?

The previous UK Government had planned to introduce the Mental Health Bill to deliver the recommendations in the Wessely Review. A draft Bill was published and the Welsh Government worked with the UK Government to ensure that voices from Wales were heard as part of the consultation on the Bill - the consultation was publicised widely with stakeholders in Wales.

Consultation responses to the White Paper were received directly by the UK Government, but responses from Wales were shared with the Welsh Government so we could consider them in relation to devolved matters. We also convened a Reference Group representing key stakeholders in Wales to inform this process.

Although the original Bill did not progress – and there was frustration and disappointment at the time - we had good engagement with stakeholders in Wales through a public consultation who broadly welcomed the proposals. This is reflected in the Mental Health Bill 2025.

Officials also meet routinely with stakeholders, service users and representatives of the third sector in Wales and discussions on the Bill have taken place in these meetings.

Question 6:

Which clauses in the Bill take account of specific Welsh circumstances?

Clause 2 of the Bill is a technical provision consequential upon the provision made by clause 1 (principles to inform decisions). Clause 2 confers the appropriate duties in section 118 of the Mental Health Act 1983 to ensure that the Welsh Ministers are subject to the duty to ensure the principles and matters to be addressed are included in the code of practice to be issued by the Welsh Ministers in respect of Wales.

Clause 18 of the Bill creates new regulation-making powers for the Welsh Ministers. These powers enable provision to be made to allow an Approved Clinician to certify urgent electro-convulsive therapy under specific circumstances, bypassing the need for a second opinion

appointed doctor (SOADs) approval in exceptional cases. This applies where the treatment in question is provided in Wales. The powers enable the imposition of duties on specified persons for the purpose of ensuring that the SOADs certificate of treatment is given within a specified time period.

Clause 51A (previously thought to be new clause 52) provides the Welsh Ministers with regulation-making powers to make consequential provision to amend primary legislation in relation to Welsh devolved areas. The Senedd procedure attached to regulations under this provision are the subject of question 12. In summary, while the negative resolution procedure currently applies under the Bill, plans are underway to amend this to the affirmative resolution procedure where primary legislation would be amended.

Question 7:

What are your views on a suggestion that the Welsh Government has piggybacked on a Bill that was designed for England?

The draft Bill was based on the recommendations made by Sir Simon Wessely in the independent review of the Mental Health Act. Whilst the review was commissioned by the Department of Health and Social Care in England, the findings are applicable to Wales. The Welsh Government also had representation on the advisory panel which was convened to gather evidence and insight throughout the course of the review.

The Bill also reflects practice we have led in Wales through our Mental Health (Wales) Measure, for instance statutory care and treatment planning and extending mental health advocacy.

As set out in the response to question 2 and 3, the Welsh Government has been engaged fully with the Bill since the publication of the White Paper. The official level response to the White Paper was based on views from stakeholders in Wales so we have had the opportunity to inform the draft Bill as it progresses.

I covered in my response to question 1 that the interrelationship between reserved matters and devolved matters is closely intertwined, and a UK Bill is the most coherent way of legislating in this area.

Welsh Government officials continue to meet on a weekly basis with UK Government officials and are working collaboratively on the Bill.

Question 8:

Paragraph 13 of the Legislative Consent Memorandum states that “There is a significant amount of cross-border provision of mental health services between Wales and England. Not taking provisions in this Bill risks increasing divergence between services available in the two countries.” What consideration did the Welsh Government give to legislating in parallel to the UK Parliament through a Bill introduced to the Senedd, to reduce the risk of divergence between services available in England and Wales?

As set out in my responses to previous questions, the views of stakeholders in Wales have informed the Bill through a public consultation on the White Paper. Whilst this Bill has regard to devolved matters, it also makes provision relating to reserved matters. For that reason, I consider legislating through a UK Bill to offer the most coherent approach to the provisions delivered in this legislation, particularly given the cross-border operation of the Mental Health Act 1983.

Question 9:

Paragraph 15 of the Legislative Consent Memorandum states that “Whilst this Bill has regard to devolved matters, it also makes provision relating to reserved matters. For that reason, I consider legislating through a UK Bill to offer the most coherent approach to the provisions delivered in this legislation”.

- i. What is the balance between reserved matters and devolved matters in the Bill?**
- ii. What is the interrelationship between reserved matters and devolved matters in the Bill and how intertwined are they?**

The balance between reserved matters and devolved matters in this Bill is fairly equal as reflected in the number of clauses included in the LCM. In many of the clauses, the interrelationship between reserved matters and devolved matters is closely intertwined; for example, clause 34 (transfers from prison to hospital: conditions) and clause 35 (transfers from prison to hospital: time limits).

Question 10:

Why does the Welsh Government not believe that consent is required in respect of clauses 9, 33, 47 and 48, particularly given that the Welsh Government believes that consent is required for other provisions of a similar nature, such as clauses 34 and 35 (relating to transfers of prisoners)?

The Welsh Government does not consider that consent is required in respect of the above clauses as they do not have regard to devolved matters.

Question 11:

It would appear that the Secretary of State will retain the power to make regulations in a devolved area under clause 51. Why is this necessary, and are you content with the Secretary of State having these powers?

Clause 51 of the Bill includes a consequential power for the Secretary of State to ensure that policy objectives under the Bill, including in reserved areas, can be implemented by the UK Government. The power to make consequential provision is limited in scope as it is consequential on the substantial provisions in the Bill for which the Senedd's consent has been sought. The Welsh Ministers have now been given equivalent powers in relation to Welsh devolved areas in new clause 51A.

Question 12:

New Clause 52 provides the Welsh Ministers with equivalent powers to make consequential provision to amend primary legislation in relation to Welsh devolved areas. This power is equivalent to that which is provided to the Secretary of State in clause 51.

- i. Did you request for the affirmative procedure to apply to this Henry VIII power and if not, why?**
- ii. Who would make the final decision on whether the affirmative procedure will apply – the UK Government or the Welsh Government?**
- iii. If the Welsh Government wanted to apply the affirmative procedure to this power, would there be any barrier to that happening? For example, does the fact that it is a UK Government Bill mean that the UK Government will have the final decision on the choice of the scrutiny procedure?**

The UK Government has confirmed its intention to table a further amendment to clauses 51 and 51A (previously understood to be new clause 52) shortly. This further proposed amendment will amend the procedure attached to regulations made. The Welsh Government is supportive of this proposal. Welsh Government understand that the amendment will provide that regulations made under the consequential amendment powers in the Bill that amend or repeal provision made by primary legislation are subject to the affirmative resolution procedure, with any other regulations made under the consequential amendment powers in the Bill (for example, to amend or revoke subordinate legislation) being subject to the negative resolution procedure.

Question 13: Clause 53(3) provides that many provisions in the Bill will not come into force until regulations are made to that effect by the Secretary of State.

- i. Why are there no commencement powers for the Welsh Ministers?**
- ii. Do you have any concerns about the fact that the Welsh Government does not have control to commence the provisions when they want to, to ensure that the NHS in Wales and other connected stakeholders are ready to implement these changes at the relevant time?**
- iv. Why are you not seeking consent for clause 53?**

No consent has been sought in relation to clause 53 as this is a technical provision clarifying commencement of the Bill rather than a substantive provision. The commencement provision ensures that policy objectives under the Bill can be implemented by the UK Government. This avoids potential complexity and impracticality that may arise if separate commencement provisions were included in the Bill in relation to Wales, which does not appear necessary within the context of this Bill.

My officials continue to meet on a weekly basis with UK Government officials and have developed effective and collaborative working relationships. This will ensure that provisions are commenced at an appropriate time.

Question 14:

Please can you explain how Committees of the Senedd can engage with the Welsh Government in order to propose amendments to the Bill, should they wish to do so?

I am keen to ensure the Senedd is involved and kept informed as early as possible on these issues and will continue to engage proactively with Committees. The Trefnydd will continue to engage with the Business Committee on any proposed revisions to Standing Orders.

Question 15:

Is the Welsh Government planning to request any other changes to be made to the Bill.

Officials are working closely with officials in the UK Government on this legislation and are together considering developments and issues as they emerge. Apart from the ongoing work to consider making an amendment to clauses 51 and 51A (as referenced in the answer to Question 12), we are not currently requesting any particular changes to the Bill.