

SUPPLEMENTARY LEGISLATIVE CONSENT MEMORANDUM (MEMORANDUM NO 2)

HEALTHCARE (INTERNATIONAL ARRANGEMENTS) 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 the National Assembly for Wales if a UK Parliamentary Bill makes provision in relation to Wales for any purpose within, or which modifies the legislative competence of the National Assembly.
2. The Healthcare (International Arrangements) Bill (the “Bill”) was introduced in the House of Commons on 26 October 2018 and can be found at: [Bill documents — Healthcare \(International Arrangements\) Bill 2017-19 — UK Parliament](#)

Policy Objectives

3. The UK Government’s stated policy objectives are to enable the Government to respond to the wider range of possible outcomes of EU Exit in relation to reciprocal healthcare including the implementation of new reciprocal healthcare agreements. This Bill forms part of the UK Government’s legislative response to EU Exit. Although the Bill is being introduced as a result of the decision to leave the EU, the legislation could also be used to give effect to healthcare agreements with other third countries.

Summary of the Bill

4. The Bill is sponsored by the Department of Health and Social Care.
5. The Bill makes provision:
 - To provide the Secretary of State with powers to fund and arrange healthcare outside the UK;
 - To make regulations to give effect to healthcare agreements between the UK and other countries, territories or international organisations, such as the European Union (EU); and
 - To enable the designation of authorised persons for the purpose of data processing, which is necessary to underpin these arrangements and agreements.

Changes to the Bill since the publication of the first Legislative Consent Memorandum

6. The Welsh Government laid a Legislative Consent Memorandum in respect of the Bill on 15 November 2018, based on the version of the Bill introduced to Parliament on 26 October 2018.
7. The Memorandum confirmed that the Welsh Government would not be able to recommend to the Assembly that it gives consent to the Bill as drafted at that stage. The Welsh Government explained that, while it believed there to be benefits to a UK-wide approach to reciprocal healthcare arrangements, there were concerns about the extent to which the Welsh Government would be involved in informing and shaping the arrangements made under the Bill.
8. Since the publication of the first Memorandum, the UK Government has committed to amend the Bill to address the Welsh Government's concerns. The Minister of State for Health announced in Lords Committee on 21 February that the Bill would be amended at Report Stage. This Supplementary Memorandum explains how the Bill will be amended and how the Welsh Government's concerns have been addressed. Annex 1 sets out the intended effect of the UK Government amendment.
9. The proposed amendment will place a requirement on the Secretary of State to consult with the Devolved Administrations, including the Welsh Ministers, before making regulations under Clause 2 that are within devolved competence. In addition to that requirement, a Memorandum of Understanding has been developed between the Devolved Administrations and the UK Government to underpin the amendment. The Memorandum of Understanding was agreed with the Minister of State for Health on 20 February 2019.
10. **Requirement for consultation** - Clause 2 of the Bill provides the Secretary of State with powers to make regulations in relation to Clause 1, in connection with the provision of healthcare outside the UK, and to give effect to healthcare agreements. It is envisaged that should the UK exit the EU in a deal scenario, this power would enable the implementation of future healthcare arrangements with the EU as a whole or individual Member States from January 2021 onwards or with third countries. In a no deal scenario, the Bill would enable the UK Government to give effect to new reciprocal healthcare arrangements on or after exit day. Whilst it is for the UK to make bilateral or multilateral agreements with other territories and international organisations, the Assembly may legislate for the purpose of observing and implementing the UK's international obligations relating to devolved matters, such as healthcare. The amendment tabled by the UK Government will require the Secretary of State to consult with the Welsh Ministers (and other Devolved Administrations) before making any regulations under Clause 2 that contain provision that is within the legislative competence of the National Assembly for Wales.

11. **Memorandum of Understanding** - the Welsh Government's position is that in order to provide the necessary assurance in respect of its involvement in reciprocal healthcare arrangements, the Memorandum agreed with the UK Government would need to state that:

- the Welsh Government would be consulted on the negotiation of agreements, with a role from the initial scoping through to the conclusion of a draft agreement;
- the Welsh Government would be consulted on the initial development and subsequent drafting of regulations under the Bill which implement these agreements, with the UK Government making every effort to proceed by consensus with the devolved administrations; and
- the Welsh Government would be consulted where an agreement applied to or had implications for Wales, and on regulations giving effect to that agreement.

12. In addition to fully meeting these points the Memorandum also states:

- the UK Government would not normally make regulations without securing agreement from Devolved Administration Ministers beforehand;
- a process for exchanging Ministerial letters in the event of Devolved Administration agreement not being reached where regulations under Clause 2 intersect with devolved competence; and
- that these letters be made available to both Houses of Parliament in the event that the regulations proceed to be made by the Secretary of State for Health and Social Care.

13. The Memorandum of Understanding is being provided at Annex 2.

14. The first Legislative Consent Memorandum set out that it is considered that Clauses 1, 2, 4 and 5 of the Bill require consent on the basis that they are making provision for a purpose that is either partially or wholly within the Assembly's legislative competence as they relate to health. (Clause 5 supplements and clarifies powers exercised under Clause 2. Clauses 3 and 6 make provision about interpretation, extent and commencement for the purposes of the other clauses in the Bill for which consent is required.) The detail of the clauses can be found in the first Memorandum at <http://www.senedd.assembly.wales/mgIssueHistoryHome.aspx?Id=23365>

15. In addition, the new clause which is to be inserted after Clause 4 is making provision for a purpose that is within the Assembly's legislative competence. Consent is therefore required.

Reasons for making these provisions for Wales in the Healthcare (International Arrangements) Bill

16. As set out in the first Legislative Consent Memorandum, the Welsh Government agrees that following EU Exit, legislation is necessary to make provision for reciprocal healthcare arrangements to give certainty and assurance to UK residents. These arrangements allow individuals to travel, work and receive treatment outside of the UK where this may not be otherwise possible. In the case of a no deal exit from the EU, it will be important to provide assurances for residents as soon as possible. There is, therefore, urgency to the timing of the Bill and the legislation made under it.
17. While the Welsh Government believes that there are benefits to having a UK-wide approach, any healthcare agreement entered into on behalf of the UK will affect the NHS in Wales and this legislation will therefore have a significant impact on a devolved policy area.

Welsh Government position on the Bill as amended

18. The importance of Welsh Government being involved in informing and shaping the healthcare agreements to be delivered under the Bill which will impact on the NHS in Wales has not changed. Welsh Government made it clear to the Department of Health and Social Care that legislative and non-legislative assurances from the UK Government were necessary to ensure that the Welsh Government is involved in matters that affect devolved areas in Wales. That assurance has been provided through the UK Government amendment to the Bill and the underpinning Memorandum of Understanding.
19. The Minister for Health and Social Services has stated that taken together, the amendment tabled by the UK Government and the underpinning Memorandum of Understanding are sufficient to enable the Welsh Government to recommend to the National Assembly to give its legislative consent to the Bill.
20. The proposed amendment and the Memorandum of Understanding ensure that Welsh Government will be meaningfully engaged in the development of new healthcare agreements and that UK Government will look to proceed on the basis of consensus. Where agreement on regulations cannot be reached there are strong mechanisms for the Welsh Ministers to express their views. This is a good outcome providing a strong role and flexibility for the Welsh Ministers following extensive and highly collaborative working between Governments. It provides a valuable model which could be used in other areas where intergovernmental cooperation is needed and demonstrates both governments' commitment to collaboration.

Financial implications

21. There are financial costs associated with reciprocal healthcare arrangements. These costs relate to arranging to pay for the treatment of UK residents abroad and to providing healthcare for non residents in the UK. There could be increased or decreased costs depending on the number of countries with which the UK establishes reciprocal healthcare arrangements and the nature of these agreements.
22. Lord O'Shaughnessy wrote to the Cabinet Secretary for Health and Social Services on 26 October 2018 to give assurances that there will be no additional costs to the devolved administrations associated with the Bill. This was clarified in discussion that any arrangements made at a UK level to pay for the provision of treatment to UK residents abroad would be met by the UK Government. However the costs of treatment by the Welsh NHS to UK citizens returning to the UK as ordinarily resident or for healthcare which is exempt from charging for non-residents would have to be met by the Welsh Government as is currently the case.

Conclusion

23. This Supplementary Legislative Consent Memorandum describes the relevant changes to be made to the Healthcare (International Arrangements) Bill since introduction, and confirms the Welsh Government position is now to recommend that consent to the Assembly.

Vaughan Gething AM
Minister for Health and Social Services
March 2019

**ANNEX 1 – SUPPLEMENTARY LEGISLATIVE CONSENT MEMORANDUM:
HEALTHCARE (INTERNATIONAL ARRANGEMENTS) BILL**

PROPOSED GOVERNMENT AMENDMENT FOR LORDS REPORT

| Clause amended | Effect |
|-----------------------|--|
| New Clause inserted | <p>Places a requirement on the Secretary of State to consult with relevant devolved authorities before making regulations under Clause 2 only where those regulations contain provision which is within the devolved competence of a devolved legislature.</p> <p>Defines devolved authorities.</p> <p>Defines devolved legislature.</p> <p>Defines provisions that are within the legislative competence of devolved authorities.</p> |

ANNEX 2 – MEMORANDUM OF UNDERSTANDING FOR CONSULTATION UNDER SECTION 5 OF THE HEALTHCARE (INTERNATIONAL ARRANGEMENTS) ACT

A. Introduction and overarching principles

1. This Memorandum of Understanding sets out the arrangements agreed between the Department of Health and Social Care (“DHSC”) and the devolved administrations to support meaningful consultation in line with Section 5 of the Healthcare (International Arrangements) Act (“HIA Act”). DHSC recognises that the devolved administrations have a significant role to play where arrangements to facilitate treatment outside the UK and implement healthcare agreements relate to devolved matters.
2. The UK Government and the devolved administrations are committed to delivering a reciprocal healthcare policy that works for all parts of the UK. DHSC will work with the devolved administrations, involving the Territorial Offices as appropriate, to achieve this objective.
3. The UK Government and devolved administrations will make every effort to proceed on the basis of consensus in order to achieve a consistent reciprocal healthcare system.
4. Section 5 of HIA Act requires the Secretary of State to consult the relevant devolved authority before making regulations under Section 2 that contain provision within the legislative competence of a devolved legislature.
5. Section B of this Memorandum of Understanding is not limited to consultation in line with Section 5 of HIA Act. Section C relates to the consultation requirement in Section 5 of HIA Act.
6. The arrangements set out in this Memorandum of Understanding will be underpinned by regular engagement between DHSC’s and the devolved administrations’ officials, which will support Ministerial engagement. It is acknowledged that these arrangements will rely for their effectiveness on mutual respect for the confidentiality of information exchanged.
7. This Memorandum of Understanding as far as it relates to reciprocal healthcare agreements, will apply where DHSC is the lead UK government department negotiating such an agreement. The principles of this Memorandum of Understanding will also apply to healthcare agreements which do not require the Secretary of State to make regulations under Section 2 of the Act. This Memorandum of Understanding is not legally

binding and the arrangements it sets out do not extend the statutory consultation duty in Section 5 of HIA Act.

8. This Memorandum of Understanding does not affect any healthcare agreements or arrangements entered into and/or to be entered into by a Minister of the Northern Ireland Executive with the Republic of Ireland.¹

B. Policy Formation and Negotiations

9. DHSC will discuss with DA officials its policy proposals on the strategic direction for new reciprocal healthcare arrangements and any projected quantitative impact assessments of those proposals. Such engagement will occur as soon as possible at a formative stage of policy development. DHSC Ministers will write to DA Ministers to set out the policy proposals they endorse in order to build consensus on the direction to be taken in negotiations. Sharing this policy does not bind UK Government decisions.
10. To support policy formation, the devolved administrations will provide DHSC with timely comments on the documents shared and any relevant information or analysis to inform DHSC's evaluations of existing arrangements and its projected impact assessments.
11. DHSC will seek the devolved administrations' input on its negotiating positions for new healthcare agreements insofar as they relate to matters within devolved competence. DHSC Ministers and DA Ministers should be prepared for short notice intergovernmental engagement to meet international deadlines.
12. DHSC will discuss any model agreements or initial drafts of agreements drafted by DHSC with the devolved administrations before they are shared with third countries.
13. DHSC will provide updates to the devolved administrations on the progress of negotiations.
14. DHSC will share relevant information pertaining to an agreement, once it has been reached, with the devolved administrations, to ensure appropriate and successful implementation.
15. DHSC officials will notify the DA officials as early as possible should any of its policy proposals or any healthcare agreements require the Secretary of

¹ In accordance with participation in the North South Ministerial Council, the British Irish Council or in relation to the activities of North South Implementation Bodies established on the basis of Strand Two of the Belfast Agreement.

State to make regulations under Section 2 of the Act and set out its reasons.

16. DHSC will discuss any proposals for the review or amendment of implemented healthcare agreements with the devolved administrations in accordance with the arrangements set out above. The devolved administrations will provide DHSC with timely comments and relevant data, information and analysis to inform reviews.

C. Drafting of Regulations under Section 2 of HIA Act

17. DHSC officials will share draft versions of any regulations to which Section 5 applies with devolved administrations prior to finalisation to provide the opportunity to discuss the content and drafting of the provisions that would be within the legislative competence of a devolved legislature.
18. A final draft of the regulations to which Section 5 applies, will be shared with the relevant DA Ministers as early as possible and before they are laid.
19. UK Government will make every effort in the making of regulations to which Section 5 of HIA Act applies to proceed on the basis of consensus and will not normally make regulations that have not been agreed with Ministers from the devolved administrations.
20. In the event that agreement cannot be reached, there will be an exchange of letters between Ministers. This would provide the opportunity for a devolved administration to set out its position, and for the Secretary of State to explain the reasons for the final form of the regulations and how the UK Government has sought to reach agreement. If the Secretary of State decides to proceed with making the regulations, and guided by the principles of the Intergovernmental Agreement, the exchange of letters should be made available to both Houses of Parliament when the regulations are laid.

D. Regulations made by the Devolved Administrations

21. The application of the principles in Section B of this Memorandum of Understanding will ensure that the devolved administrations are aware of any complementary regulations that will have to be made alongside the regulations made by the Secretary of State under Section 2 of HIA Act. Accordingly, the devolved administrations will make the required necessary legislative changes to ensure that there is a consistent reciprocal healthcare system.

22. To ensure UK-wide consistency where possible, the devolved administrations officials will discuss with DHSC officials the content and drafting of any regulations they intend to make to implement a reciprocal healthcare agreement as early as practicable before the regulations are laid.

E. Operational Implementation

23. DHSC officials will liaise with the DA officials to ensure that the operational implementation of reciprocal healthcare policy works for all parts of the UK. This may for example include developing and coordinating bespoke packages of communications to inform individuals and healthcare providers about new reciprocal healthcare agreements.

F. Review

24. This Memorandum of Understanding will be reviewed within 24 months of the date it is agreed, with any subsequent reviews to be scheduled in the course of the review. This review will be conducted by officials and agreed by Ministers.