

Vaughan Gething AC/AM
Ysgrifennydd y Cabinet dros Iechyd a Gwasanaethau
Cymdeithasol
Cabinet Secretary for Health and Social Services



Llywodraeth Cymru
Welsh Government

Ein cyf/Our ref: MA - L/VG/ 0709 /18

Lord James O'Shaughnessy
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15 November 2018

Dear James,

Thank you for your letter of 26 October following up on our telephone discussion on 24 October and the introduction of the Healthcare (International Arrangements) Bill on 26 October. I also spoke to your colleague Steve Barclay MP, Minister of State for Health, on 13 November.

The Welsh Government will want to play a constructive role in relation to the passage of this Bill, but our two governments are not starting from the best position. Whilst it is the case that the issue of reciprocal healthcare in broad terms has been the subject of discussion between officials for some time, the detailed provisions in the Bill certainly have not been. While a draft of the Bill was sent to my officials on 19 October, there was no suggestion that introduction of the Bill was imminent; the first indication of that came in the communication from your office on 22 October.

We need a much more effective process of discussion and negotiation if smooth progress is to be made with the Bill. However, we are where we are. I note the reassurances you have provided in your letter – most notably that there will be no additional costs to the Devolved Administrations associated with the Bill and a categorical assurance that in no way do you intend the Bill to impact on the existing devolution settlement.

Your letter recognises that the Bill as introduced does in part relate to Wales or to devolved matters and asks if I would begin the required Legislative Consent Process. I can confirm that the process is underway in accordance with the Assembly's Standing Orders, but I cannot say at this stage whether the Welsh Government will be prepared to recommend to the Assembly that legislative consent should be given.

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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.

The following issues of concern will need to be addressed:

Welsh Ministers' consent for regulations made under Clause 2 of the Bill

As discussed on the telephone, I believe that there should be provision, on the face of the Bill, requiring the consent of Welsh Ministers before regulations are made giving effect to healthcare agreements (and to any changes to those agreements in the future). This essentially is the crux of my concern, that the Bill may potentially have direct implications for the Welsh Government and the Welsh NHS, yet there is no provision for any involvement of Welsh Ministers in those decisions and commitments.

Consent of the National Assembly for Wales to regulations made under Clause 5 which have the effect of amending, repealing or revoking a Measure or Act of the National Assembly for Wales

During our telephone conversation I flagged up my concern about this provision in the Bill without any consent provision also included. As I am sure you are aware, the consent of the Assembly is needed where a UK statutory instrument amends primary legislation that is within the Assembly's devolved competence, irrespective of whether the primary legislation to be amended is a Measure or Act of the National Assembly for Wales or a UK Act such as the NHS (Wales) Act 2006. Any such statutory instrument would be subject to a Statutory Instrument Consent Motion in the Assembly (and it would be for the Welsh Government to decide whether to support such a motion). It would be appropriate for the Bill to recognise this, with the insertion of an amendment requiring the Assembly's consent for such instruments.

Secondly, as to the scope of the order-making power in clause 5, you will be aware that the EU (Withdrawal) Act 2018 powers are specifically constrained, in that the Government of Wales Act 2006 cannot be amended by statutory instrument made under that Act; consideration should be given to an equivalent limitation being established for the clause 5 powers in this Bill.

Costs

As I stated above, I note the reassurances you have provided that there will be no additional costs to the Devolved Administrations associated with the Bill. In this respect I look for confirmation from you that:

- the full costs of the exercise of the powers in Clause 1 will be met by the UK Government; and
- funding to cover the full costs to the Welsh NHS resulting from all healthcare agreements with EU Member States made under the Bill that go beyond existing provision, and from any healthcare agreements with countries outside of the EU (not currently subject to any reciprocal healthcare agreements), will be transferred to Wales from your Department, on the principle in the Statement of Funding Policy that additional costs resulting from policy decisions to another administration should be borne by the administration implementing the change.

While what we require in terms of changes on the face of the Bill relate principally to the need for Welsh Ministers' consent to any regulations made which are within devolved competence, I want to reiterate a point I made when we spoke. There is no reason why there should be any disagreement between us on the sort of international agreements which the UK might enter into to secure reciprocal health care rights and obligations. The way to ensure that we do not end up in any unforeseen conflicts over changes to the law within devolved competence as a result of agreements which have been concluded is to associate the devolved administrations fully with the process of negotiating such agreements – from the initial scoping of a negotiating mandate through to the conclusion of a draft agreement.

I look forward to hearing back from you on the issues set out in this letter so that we that we can make progress on the question of Legislative Consent. I am copying this letter to the First Minister of Wales, the Secretary of State for Wales and the Chancellor of the Duchy of Lancaster and Minister for the Cabinet Office. I am also copying it to the Minister of State for Health, to the Scottish Government's Cabinet Secretary for Health and Sport, the Permanent Secretary at the Department of Health in Northern Ireland and the Head of Civil Service in Northern Ireland.

Yours sincerely,

A handwritten signature in black ink that reads "Vaughan Gething". The signature is written in a cursive, slightly slanted style.

Vaughan Gething AC/AM

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Cabinet Secretary for Health and Social Services