

Legislative Consent Memorandum: Healthcare (International Arrangements) Bill

January 2019

1. Background

1. On 15 November 2018, the Cabinet Secretary for Health and Social Services laid a Legislative Consent Memorandum (the LCM) for the Healthcare (International Arrangements) Bill currently before the UK Parliament.
2. On 20 November 2018, the Business Committee agreed, in accordance with Standing Order 29.4(i), to invite the Health, Social Care and Sport Committee and the Constitutional and Legislative Affairs Committee to consider and report on the Legislative Consent Memorandum for the Healthcare (International Arrangements) Bill. In referring the Memorandum, the Business Committee set a reporting deadline of 22 January 2019.
3. The Welsh Government is not proposing a date for the LCM debate while further discussions are underway although it is likely the debate will take place early in 2019 given the likelihood of the Bill moving quickly.

2. The LCM

4. Paragraphs 3 to 5 of the LCM summarise the Bill and its policy objectives. Paragraphs 6 to 15 set out the provisions in the Bill for which consent is sought. Paragraphs 16 to 19 set out the Welsh Government's view on using the UK's Bill to deal with these provisions.



Provisions in the Bill for which consent is sought

5. It is considered that Clauses 1, 2, 4 and 5 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. (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.)

Clause 1 Power to make healthcare payments

6. Clause 1 provides the Secretary of State with a power to make payments and to arrange for payments to be made to fund healthcare outside of the UK.

7. Should new reciprocal healthcare arrangements be similar to current EU arrangements this could include, amongst other things, funding healthcare for state pensioners living outside the UK, providing healthcare for UK residents visiting countries outside the UK, funding healthcare for posted workers and funding for UK residents to receive planned treatment in other countries.

Clause 2 Healthcare and healthcare agreements

8. Clause 2 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.

9. 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, individual Member States or third countries from January 2021 onwards. In a no deal scenario, then this would enable the UK Government to give effect to new reciprocal healthcare arrangements on or after exit day.

10. 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.

Clause 4 Data processing

11. Clause 4 provides powers to enable authorised persons to process personal data to facilitate reciprocal healthcare arrangements.

12. It may be necessary for authorised persons to share personal data, including medical data, with equivalent persons or bodies overseas to facilitate any

reciprocal healthcare arrangements. Currently EU law provides the necessary powers to do this. This data processing gateway would support the operation of payments and arrangements for healthcare outside the UK provided for under Clause 1.

Clause 5 Regulations and directions

13. Clause 5 provides a power to amend, repeal or revoke primary legislation, including a Measure or Act of the Assembly, for the purpose of conferring functions on the Secretary of State or any other person, or to give effect to a healthcare agreement.

14. Consent is required for these provisions as they fall within the legislative competence of the National Assembly for Wales in so far as they relate to health and the observance and implementation of international obligations relating to healthcare.

3. Reasons for making these provisions

15. 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.

16. 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.

17. There are outstanding concerns about the extent to which the Welsh Government will be involved in informing and shaping the healthcare agreements to be delivered under the Bill which will impact on the NHS in Wales. Whether or not legislative consent should be given, therefore, needs to be considered in light of legislative and non-legislative assurances given by the UK Government to ensure that the Welsh Government is involved in matters that affect devolved areas in Wales.

18. Further work to resolve the Welsh Government's concerns will continue during the Bill's passage through Parliament and a supplementary Legislative Consent Memorandum will be brought forward if required.

4. Committee consideration and conclusion

19. We considered the Memorandum at our meeting on 9 January 2019 and took evidence from the Minister for Health and Social Services (the Minister).

20. We support the Minister's view that the Healthcare (International Arrangements) Bill is necessary to ensure UK residents can continue to benefit from reciprocal healthcare arrangements, and share his preference for a consistent UK-wide approach.

21. We note and share the Minister's concerns that:

- The Bill does not include provision to seek the consent of Welsh Ministers to the making of regulations (under Clause 2(2)) which will implement the detail of new healthcare agreements even though these would place obligations on the Welsh NHS which would clearly be within devolved competence. Nor does the Bill include provision for consultation with the Welsh Ministers in advance of making regulations under this Clause (with a Memorandum of Understanding between the UK and Welsh Governments to govern how such consultation is to operate).
- The Bill includes a general provision (in Clause 5(3)) which will enable regulations to be made which can amend, repeal or revoke a Measure or Act of the National Assembly for Wales.

22. The Minister expressed his disappointment at the Bill being introduced without the Welsh Government having received sufficient notice of it from the UK Government. We agree that the process could have been improved by more notice having been provided, particularly given that the short notice resulted in the LCM process starting later than it otherwise would have.

23. We believe that, where a Bill makes provision in devolved areas or provides powers to UK Ministers to act in devolved areas, the UK Government must engage at an early stage with the Welsh Government. We consider that an agreement between the two Governments setting out a procedure for this would be helpful.

24. We are also concerned that there is now some uncertainty around the assurances previously given by the UK Government that no additional financial burdens will be placed on Devolved Administrations in relation to UK schemes.

25. We therefore note and support the Minister's position not to recommend consent until amendments and a Memorandum of Understanding are brought forward to address these concerns. The Memorandum of Understanding must provide satisfactory assurances about the process and nature of consultation with Welsh Government in relation to regulations made under this Bill.