

# LEGISLATIVE CONSENT MEMORANDUM

## 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 the National Assembly for Wales if a UK Parliamentary Bill makes provision in relation to Wales for a purpose that falls within, or modifies the legislative competence of the National Assembly.

2. The Care Bill (the “Bill”) was introduced into the House of Lords on the 9 May 2013. The Bill can be found at:

<http://services.parliament.uk/bills/2013-14/care.html>

### Summary of the Bill and its Policy Objectives

3. The Bill is sponsored by the Department for Health (DH) and the UK Government’s stated aims are to improve standards and quality across the care sector and to modernise the law so that it prioritises the well-being of individuals and enables all those needing health and social care to get good care. The Bill is in three parts:

Part 1 – key elements:

- reforms the care and support for adults to deliver the aspiration of the DH white paper, *Caring for our Future*;
- introduces a cap on the costs that people will have to pay for care in their lifetime, as recommended by the Commission on the Funding of Care and Support in England;
- consolidates and modernises the legal framework for adult social care as recommended by the Law Commission in the review of Adult Social Care.

Part 2 – new arrangement to strengthen the quality of care through:

- Ofsted-style ratings for hospitals and care homes;
- new Chief Inspector of Hospitals to instigate a process to tackle unresolved problems with the quality of care;
- criminal offence for providers to supply or publish false or misleading information.

Part 3 – provides for the establishment of two new bodies that will be independent from the Department of Health, namely:

- the Health Education England as a statutory body which will assist local healthcare providers and professionals to take responsibility for educating and training their staff; and
- the Health Research Authority which will similarly strengthen the ability to protect patients’ interests in health and social care research whilst promoting research and streamlining the approvals process.

4. With minor exceptions that are dealt with in this LCM (see below) provisions in the Bill apply to England only.

### **Provisions in the Bill for which consent is sought**

5. The provisions for which consent is sought are contained within Parts 1 and 3 of the Bill. Clauses 38, 48, 49 and 98 of, and Schedule 1 to the Bill refer.

#### *Cross Border Placements*

6. Clause 38 introduces Schedule 1 which makes provision for cross-border placements and extends to the whole of the United Kingdom. The provision enables continuity of care through reciprocal arrangements across the four nations of the United Kingdom for adults to be placed in residential care (care homes and other types of accommodation) in any of the other nations, if that is their wish.

7. Schedule 1 makes provision for a person ordinarily resident in England, who has care and support needs and requires residential accommodation to meet those needs, to be provided with that accommodation in another part of the UK. It also allows for such placements to be made in England for people who are ordinarily resident in Wales, or whose care and support is provided under the relevant Scottish or Northern Irish legislation. It also makes similar arrangements for cross border placements not involving England i.e. Wales-Scotland, Scotland-Northern Ireland and Northern Ireland-Wales.

8. This means that people who wish to move into residential accommodation across borders within the UK can choose to do so. The types of accommodation to which this provision applies may differ for each administration depending on the legislation of each jurisdiction. Regulations and guidance, setting out how the process will work for each administration, will be made available.

9. If a local authority which has made a cross border placement falls into dispute with the authority where that person is placed as to the ordinary residence of that person, and cannot resolve the question locally, the local authorities involved may request a determination of ordinary residence to be made. Such determinations will need to be made by the Secretary of State (or a person appointed by the Secretary of State) in relation to England or the relevant authority in Scotland, Wales or Northern Ireland, depending on the circumstances. Details specifying the dispute resolution process will be set out in regulations and guidance.

10. The provisions relate to the issues that are within the legislative competence of the Assembly, in that they concern the provision of accommodation for adults in need of care and support. This is within the competence of the Assembly under section 108 and Schedule 7 of the Government of Wales Act 2006 (GOWA 2006). Social welfare is a matter within subject heading 15 of Schedule 7, GOWA 2006.

11. These provisions do not include any powers for Welsh Ministers to make subordinate legislation.

## Provider Failure

12. Clauses 48 and 49 relate to provider failure and apply to local authorities in Wales. Drawing from lessons learned from the collapse of Southern Cross (a former major care provider in the UK), these provisions aim to strengthen local authorities duties in relation to adult care so that, if a care provider fails, local authorities will have ultimate responsibility for ensuring continuity of care for all adults receiving care regardless of who is funding the services.

13. These provisions apply where accommodation is provided by a care provider who is registered in Wales or England and the provider becomes unable to continue to provide that accommodation because of business failure. The meaning of “business failure” will be defined in regulations. This need not be limited to financial failure and could include other circumstances in which the provider ceases to provide care. It places a duty on the local authority of the area in which the accommodation is situated to meet the needs of an adult who is in that accommodation by reason of the fact that a local authority in England (in the case of provider failure in Wales) or in Wales (in the case of a provider failure in England) made the arrangements for the accommodation. But for this section the duty to meet the needs would lie with the local authority which made the accommodation arrangements.

14. *Subsection (1)* of Clause 48 makes clear that the section applies where:

- a person is in accommodation and receiving services from a care provider who is regulated in Wales, and
- is in that accommodation by reason of arrangements made by a local authority in England, and
- the care provider sustains a business failure.

15. *Subsection (2)* makes clear that the section applies where:

- a person is in accommodation and receiving services from a care provider who is regulated in England, and
- is in that accommodation by reason of arrangements made by a local authority in Wales, and
- the care provider sustains a business failure.

16. *Subsection (3)* makes clear that the local authority in which the accommodation is situated has a temporary duty to meet the needs which were being met by the failed accommodation provider.

17. *Subsection (4)* requires the local authority with the temporary duty to consult with the local authority in which the adult is ordinarily resident in respect of needs which were being met by that authority and to recover from that authority the costs incurred in meeting the needs during the temporary period. For needs which were not being met by the local authority in which the adult is ordinarily resident (if any) the local authority may recover costs from the adult.

18. *Subsection (5)* applies the dispute resolution procedure in Schedule 1 (cross border placements) to any disputes between local authorities about the application of this clause.

19. Linked clause 111(3) provides that before making an order bringing section 48 into force, so far as it applies to accommodation in Wales, the Secretary of State must obtain the consent of the Welsh Ministers.

20. Clause 49 provides a number of clarifications in relation to the duty on local authorities in England and Wales set out in clauses 47 and 48. This clause therefore needs to be read with clause 48 in so far as it imposes duties on local authorities in Wales.

21. In addition, subsection (10) requires regulations to make provision as to the interpretation of references to business failure or to being unable to do something because of business failure. The regulations may, in particular, specify circumstances in which a person is to be treated as unable to do something because of business failure.

22. Linked clause 109(8) provides that before making regulations under section 49(10), the Secretary of State must consult the Welsh Ministers.

23. Clauses 48 and 49 will place temporary duties on a local authority in Wales to meet the care and support needs of adults placed by English local authorities in a care home in Wales under arrangements made in accordance with the cross border placements provisions. It is therefore considered that these clauses will place responsibilities on local authorities in Wales of the kind which it is within the competence of the Assembly to legislate under its powers in section 108 and Schedule 7 of GOWA 2006. Social welfare is a matter within subject heading 15 of Schedule 7, GOWA 2006.

24. The provisions do not include any powers for Welsh Ministers to make subordinate legislation.

#### Health Research Authority

25. The Health Research Authority and certain specified bodies which carry out some devolved functions in relation to health and social care research will also be under a duty to co-operate with each other with a view to co-ordinating and promoting regulatory practice: clause 98(1).

26. Clause 98 (4) provides for reciprocal duties on the Welsh Ministers and the other devolved authorities to co-operate with the Health Research Authority in the exercise of their respective functions relating to the regulation of assessments of the ethics of health and social care research, with a view to co-ordinating and standardising practice in the United Kingdom relating to such regulation.

27. Clause 98(4) relates to matters that are within the legislative competence of the Assembly, in that they concern "*prevention, treatment and alleviation of disease*", and in relation to "*social welfare including social services*", in so far as this is within the competence of the Assembly under section 108 of and Schedule 7 to GOWA 2006. These matters are within subject headings 9 and 15 of Schedule 7. Therefore, the Assembly could legislate in relation to arrangements for health and social care research and could impose a duty on the Welsh Ministers to co-operate with others in relation to ethical aspects of health and social care research.

28. These provisions do not include any powers for Welsh Ministers to make subordinate legislation.

### **Interdependency with the Social Services & Wellbeing (Wales) Bill**

29. The Social Services and Well-being (Wales) Bill (SSWB Wales Bill) currently being considered by the Assembly's Health and Social Care Committee provides for the transformation of care and support to people in Wales with care and support need. It provides the legal architecture to enable the Welsh Government to deliver on its vision for a Sustainable Social Services (SSSW) for Wales. Unlike Part 1 of the Care Bill, the SSWB Wales Bill extends to people, that is children, adults and their carers.

30. To ensure people who depend on care providers, along with their families and carers, in Wales have an added level of assurance that their care needs will continue to be met in the event of provider failure, parallel provisions to that in clause 48 to address failure provider will be made in Wales. I will bring forward changes to the SSWB Wales Bill to ensure adults who receive care and support will be protected if the company in charge of their care ceases to provide care at short notice. This will mean where a provider fails the local authority where the provider is based will be responsible for the care and support of those adults affected. The changes will also contribute to the wider package of measures to improve standards and quality across the care sector including measures to oversee the financial stability of providers of care. These will be outlined in my White Paper on Regulation and Inspection that I will consult on later this summer.

### **Advantages of utilising this Bill rather than Assembly legislation**

#### *Cross border placements*

31. The advantage of utilising the UK Care Bill is that reciprocal arrangements can be made between Wales and England, Scotland and Northern Ireland which are not within the legislative competence of the Assembly to make, in particular in relation to dealing with cross border disputes and financial adjustments.

#### *Provider failure*

32. The advantage of utilising the UK Care Bill is that reciprocal arrangements can be made between Wales and England which are not within the legislative competence of the Assembly to make. The Assembly would not be able to legislate for local authorities in England to be required to compensate local authorities in Wales in cases where they are exercising a temporary duty to meet the needs of people who are ordinarily resident in England but placed in care homes in Wales. The Assembly would also not be able to legislate to impose a temporary duty on local authorities in England in cases where people who are ordinarily resident in Wales are placed in care homes in England.

#### *Health Research Authority*

33. The advantage of utilising the UK Care Bill is that reciprocal arrangements can be made between Wales and England and other devolved authorities which are not within the legislative competence of the Assembly to make.

### **Financial implications**

34. There are no anticipated financial implications for the Welsh Government or local authorities associated with the provisions discussed in this memorandum. Local authorities have duties to ensure continuity of care for adults with care and support need residing in their area.

35. In relation to provider failure the UK Care Bill places duties to co-operate on Welsh authorities and provides for Welsh authorities to be able to recoup costs from English placing authorities. In respect of self-funders, local authorities would recoup costs from the individuals who wished them to arrange alternative care should there be a provider failure in the care home in which they are accommodated. Similarly duties will also be placed on English Authorities and will provide for English authorities to recover costs from the Welsh placing authority.

**Gwenda Thomas**  
**Deputy Minister for Social Services**  
**May 2013**