

SUPPLEMENTARY LEGISLATIVE CONSENT MEMORANDUM

CARE BILL: AMENDMENTS IN RELATION TO CROSS BORDER PLACEMENTS AND MENTAL HEALTH AFTER-CARE

1. This supplementary 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 in the House of Lords on the 9 May 2013. A number of amendments have been made to the Bill since its introduction. Some amendments have been included in the first Memorandum laid for the Bill (a revised version of which was laid on 22 July). This Memorandum sets out the proposed amendments to clause 39 and 71 of and to Schedules 1 and 4 to the Bill as tabled in Parliament on October 7. 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;
- powers to allow the Care Quality Commission to instigate a new failure regime for Foundation Trusts on quality grounds;
- 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 the 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 Part 1 of the Bill. Clauses 39 and 71 and Schedules 1 and 4 to the Bill refer.
- 5.1 The amendments in relation to clause 39 and Schedule 1 make further provision in relation to cross-border placements. Previous amendments in relation to these cross-border arrangements were the subject of a first Legislative Consent Motion and were considered in the first Legislative Consent Memorandum on the Care Bill. However that memorandum did not cover the later amendments and this further memorandum is therefore required.

Cross Border Placements

- 5.2 Clause 39 introduces Schedule 1 which makes provision for cross-border placements and extends to the whole of the United Kingdom and 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. Provision is also made to ensure that the local authority which made the arrangements continues to be responsible for meeting the cost of placements. Schedule 1 also provides for who is to determine disputes between local authorities as to which authority is responsible.
- 5.3 The proposed amendments to clause 39 will add a definition of **NHS accommodation** to include accommodation provided under the relevant Acts which apply to each of the respective nations responsibilities for the provision of health services; namely
- National Health Service Act 2006
 - National Health Service (Wales) Act 2006
 - National Health Services (Scotland) Act 1978
 - Article 5(1) of the Health and Personal Social Services (Northern Ireland) Order 1972

This definition will also apply to Schedule 1, as introduced by clause 39.

- 5.4 It is proposed to amend Schedule 1 in the following areas:

- Hospital stays – to ensure that in cases where people are placed across border (in accordance with Schedule 1 of the Care Bill) the placing authority continues to have responsibility for the provision of the adult's care and support if the person should spend time away from their accommodation because they are in hospital.
- Direct Payments – new regulation powers to enable cross border arrangements (in accordance with Schedule 1 of the Care Bill) to apply in circumstances where an adult's needs are met by a direct payment and the adult makes their own arrangements for accommodation. Powers will ensure that the authority which made the direct payment will remain responsible for the adult's care in the same way as if it arranged the accommodation itself.
- Other Residential and Extended Settings - to enable the application of Schedule 1 cross border arrangements to apply to other kinds of accommodation settings (to be prescribed in regulations) beyond residential care, for example supported living. This would enable the cross border arrangements to extend to situations where the local authority in one country is arranging to meet a person's care and support needs in another country but is not making the arrangements for accommodation. It is intended that the regulations would exclude situations where the adult is receiving care in their own home.
- Financial adjustments - Minor technical amendments are also made to the provisions in paragraph 6 and paragraph 7.

- 5.5 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.
- 5.6 These provisions do not include any powers for Welsh Ministers to make subordinate legislation.

Mental Health After-Care

- 5.7 Clause 71 makes amendments to section 117 of the Mental Health Act 1983 (the 1983 Act); section 117 applies and extends to England and Wales. The changes proposed by clause 71 will, with one exception, both apply and extend to England and Wales.
- 5.8 The amendments include a definition of "after-care services" and seek to remove anomalies in determining the responsible local authority in relation to the provision of after-care services under the 1983 Act by imposing the obligation to provide after-care services to people who have been detained in hospital for treatment of a mental disorder upon the local authority for the area in England or Wales in which the person is ordinarily resident.

- 5.9 Schedule 4 will insert a new Schedule A1 into the Social Services and Wellbeing (Wales) Act 2014 (the 2014 Act) to modify the application of sections 34, 36 and 37 of the 2014 Act (following Royal Assent and commencement of the Social Services and Well-being (Wales) Bill) for persons receiving direct payment to secure the provision of their after-care services under the 1983 Act.
- 5.10 Section 163 of the Social Services and Well-being (Wales) Act 2014 is also amended to clarify the ordinary residence status of a person who is provided with after-care services under the 1983 Act in accommodation which is not within the area of the local authority in which they are ordinarily resident.
- 5.11 Changes to clause 71 in respect of Wales will:
- Apply a definition of “after-care services” for the purposes of section 117 of the 1983 Act.
 - Change in the basis upon which the authority who will be responsible for the provision of after-care services under section 117 is determined; in the future it will be the authority for the area in England or Wales in which the person was ordinarily resident before they were detained in hospital. In the event that the person has no place of ordinary residence in England or Wales prior to their being detained in hospital, the current rules will continue to apply and the responsible authority will be the one in which the person was resident or that for the area to which he or she is discharged.
 - Where a person is being provided with accommodation under section 117 by a Welsh local authority, they are to be treated for the purposes of the Social Services and Well-being Bill as ordinarily resident in the area of the local authority which is responsible for their mental health after care in accordance with the (amended) provisions of section 117 (whether they are placed within a setting in England or Wales). Analogous provision will be made in the Care Bill so this means that where a local authority in England places a person in accommodation under section 117 of the 1983 Act, that authority will retain responsibility for the person whether they are placed in England or in Wales.
 - Direct payments may be provided by a Welsh local authority for persons (child or adult) who are ordinarily resident in Wales and receive after care services under the 1983 Act. Sections 34, 36 and 37 of the Social Services and Well-being (Wales) Act 2014 are modified by the Schedule A1, which will be inserted by clause 71 into that Act so that these provisions can apply in relation to the payment of direct

payments made to persons to secure services to meet their needs for after-care under section 117.

- The clause also makes provision for a dispute resolution procedure in the event of a dispute between local authorities about the ordinary residence status of person entitled to after-care services. If all parties subject to the dispute are local authorities in Wales, it will be for the Welsh Ministers to arbitrate. If all the parties subject to the dispute are local authorities in England, it will be the Secretary of State. In cases where the dispute as to who is the responsible authority for the provision of after-care services (under section 117) is between one or more local authorities in England and one or more local authorities in Wales, the dispute will be determined by either the Welsh Ministers or the Secretary of State, depending on the arrangements which are to be agreed and published by the Welsh Ministers and the Secretary of State.

5.12 Changes to clause 71 in that will not apply in relation to Wales will:

- Insert a new section 117A into the Mental Health Act 1983 which will give the Secretary of State a power to make regulations which, subject to the meeting of any prescribed conditions, will require a local authority in England to provide or arrange for the provision of accommodation for person who is in receipt of after-care services under section 117 which accords with their expressed preference.

5.13 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.

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

Interdependency with the Social Services & Wellbeing (Wales) Bill

6. 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. Following Royal Assent and commencement of the Social Services and Well-Being (Wales) Bill clause 71 will amend the Social Services and Well-being (Wales) Act 2014 to insert a new Schedule A1 to deal with direct payments to also apply to provision of mental health after care services required by section 117 of the MH Act 1983 as amended.

Advantages of utilising this Bill rather than Assembly legislation

Cross border placements

7. 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.

Mental Health After-Care

- 7.1 The amendments proposed by clause 71 of the Care Bill to the Mental Health Act 1983, in the main, represent changes which both Governments wish to make. It is imperative that the changes to the basis upon which the local authority which is responsible for providing after-care is determined are made in tandem to ensure the cross-border operation of the Mental Health legislation will continue to operate effectively.
- 7.2 Furthermore, as both the SSWB and the Care Bill are progressing at the same time, the process of drafting amendments to the same piece of legislation within two Bills, whilst fraught with complexity, would also result in legislation which is less accessible as a result of differential amendments being made in two different statutes, both seeking to achieve the same policy changes.

Financial implications

8. 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. This includes the provision of after care services as required under section 117 of the Mental Health Act 1983

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