



## **Report on the revised and supplementary Legislative Consent Memoranda for the Care Bill**

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### **Background**

1. The UK Government's Care Bill<sup>1</sup> received its First Reading in the House of Lords on 9 May 2013. The main purpose of the Care Bill according to the UK Government is to improve standards and quality across the care sector.

2. In accordance with the National Assembly for Wales's Standing Order 29.2(i), the Welsh Government laid a legislative consent memorandum ("LCM") for the Care Bill ("the Bill") shortly after its introduction to the UK Parliament. This LCM was laid by the Welsh Government on 23 May as it deemed that the Bill made certain provisions within the legislative competence of the Assembly. The Health and Social Care Committee considered the LCM following its referral by the Business Committee. On 25 June the Health and Social Care Committee reported its findings on the LCM as tabled on 23 May - its report is attached at Annex A.

3. In addition to the requirement to lay an LCM on the introduction of a relevant Bill, the Welsh Government is required to table further LCMs when any amendments that make (or would make) relevant provision for the first time or beyond the limits of any consent previously given by the Assembly are:

- tabled or supported by a UK Minister; or
- agreed by the UK Parliament.<sup>2</sup>

4. A number of amendments have been made to the Bill since its introduction, requiring the Welsh Government to lay further LCMs on 22 July and 9 October. Both LCMs have been referred to the Health and Social Care Committee for consideration by the Business Committee and are the subject of this report.

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<sup>1</sup> Care Bill available at: <http://services.parliament.uk/bills/2013-14/care.html>

<sup>2</sup> National Assembly for Wales, Standing Order 29.2(iii)

## **Legislative Consent Memorandum laid on 22 July (the “revised LCM” on the Care Bill)**

5. The LCM laid by the Deputy Minister for Social Services on 22 July is a revised version of the original LCM laid on 23 May. It differs from the earlier LCM as it has been revised to take account of amendments tabled in the House of Lords on 9 July and agreed in the relevant Lords Committee on 16 July. The differences relate to arrangements for cross-border placements and provider failure. Areas covered in the Committee’s original report are not repeated here.

6. The Committee considered the revised LCM at its meetings on 25 September and 17 October 2013.

### ***Cross-border placements***

7. Paragraph 2 of Schedule 1 to the Bill as introduced provided for cross-border placements from Wales to England, Scotland or Northern Ireland where a Welsh local authority was under a duty to arrange accommodation for an adult in accordance with Section 21 or Section 26 of the Social Services and Well-being (Wales) Bill. The amendments will extend Schedule 1 to cases where Welsh local authorities are making a placement outside of Wales in accordance with their power under Section 22 or 29. Welsh local authorities will remain responsible for the costs of any such placements, whether this is in the exercise of a power or the discharge of a duty.

### ***Provider failure***

8. Clauses 48 and 49 of the Bill (as originally drafted) placed temporary duties on local authorities 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 in cases of provider failure. Similarly, temporary reciprocal duties are placed on local authorities in England to meet the care and support needs of adults, placed by Welsh local authorities in care homes in England.

9. The UK Government amendments to the Bill extend the nature and scope of the duties placed on local authorities in Wales to meet the care and support needs of adults in their area. The amendments make provision for the temporary duties to apply not only to meeting the needs of adults affected by the failure of a care home provider but also to adults affected by the failure of a domiciliary care provider. The amendments will further extend the temporary duties to include duties to meet the needs of adults

who are placed in Wales by authorities in Scotland and Northern Ireland. In addition, Health and Social Care Trusts in Northern Ireland will be required to ensure continuity of care services when providers fail for people placed there by English, Welsh and Scottish authorities.

10. In considering the revised LCM, the Committee noted that there is no requirement in the Bill for Scottish local authorities to ensure continuity of care services. The Committee wrote to the Deputy Minister to seek clarity on this matter – the Deputy Minister’s response is attached at Annex B.

11. In her response dated 10 October 2013, the Deputy Minister states that the Care Bill:

“...does not provide a specific provision to place temporary duties on local authorities in Scotland because this would cut across existing duties placed on Scottish local authorities by virtue of section 12 of the Social Work (Scotland) Act 1968 to provide assistance to individuals in their areas who are in need.”

12. The Deputy Minister goes on to provide that:

“The duty under Section 12 applies even if the individual is resident outside the authority’s area, including individuals placed in a Scottish local authority area by English, Welsh or Northern Irish authorities. So adult placements in regulated settings in Scotland by a local authority across the UK or arranged by the individuals themselves will have a **level of protection** (the Committee’s emphasis) should they be unfortunate to experience a breakdown in their care arrangements as a result of provider failure”.

13. The Committee believes it is important to note that Section 12 of the Social Work (Scotland) Act 1968 does not offer exactly the same level of protection as the Bill’s provisions and does not necessarily ensure continuity of care. This is because Section 12 does not place a duty on a local authority in Scotland (in the event of a business failure) to meet the needs that were being met by the registered provider. Instead it places a duty on the local authority to provide such assistance/facilities **as they consider** suitable and adequate to a person in need. The duty only arises where the giving of assistance would avoid the local authority being caused greater expense immediately or in the future. In addition, the local authority is entitled before giving assistance to a person in need, to have regard to the persons eligibility to receive assistance from another statutory body.

14. Neither the amendments relating to cross-border placements nor those relating to provider failure include powers for Welsh Ministers to make subordinate legislation.

15. The revised LCM provides that the advantage of utilising the Bill is that it is the most practicable legislative vehicle to ensure a coherent UK-wide approach. Furthermore, the revised LCM notes that the amendments proposed to the Bill for which consent is sought do not adversely affect the Social Services and Well-being (Wales) Bill and do not have any financial implications for local authorities.

#### ***Our view of the revised LCM***

We draw the Assembly's attention to the point raised in paragraph 13. We note the revised LCM and we have no objection to its use in the manner proposed in relation to cross-border placements and provider failure.

#### **Legislative Consent Memorandum laid on 9 October (the "supplementary LCM" on the Care Bill)**

16. The supplementary LCM laid by the Deputy Minister for Social Services on 9 October arises out of further amendments which were tabled to the Care Bill in the House of Lords on 7 October 2013, and agreed in the relevant Lords Committee on 14 October 2013. The amendments relate to mental health after-care and further matters on cross-border placements not covered by previous LCMs.

17. The Committee considered the supplementary LCM at its meeting on 7 November 2013.

#### ***Cross-border placements***

18. The amendments in relation to Clause 39 and Schedule 1 of the Care Bill make further provision about cross-border placements. The amendments to Clause 39 make a number of technical adjustments to the provisions that enable continuity of care through reciprocal arrangements across the four nations of the UK. The amendments seek to:

- ensure that the placing authority will continue to have responsibility for the provision of an adult's care and support if the person should spend time away from their accommodation because they are in hospital or other healthcare accommodation;

- enable regulations to provide for the cross-border placements provisions to apply to individuals who receive direct payments.
- provide a regulation-making power that would allow the cross-border provisions to be extended to settings other than traditional care homes, for example supported living. The Deputy Minister states that it is intended that the regulations would exclude situations where the adult is receiving care in their own home.

19. Technical amendments are also made in respect of financial adjustments.

20. There are no subordinate legislation making powers for Welsh Ministers contained in this part of the Bill, however paragraph 8 of Schedule 1 provides that where regulations include provision relating to Wales, they may not be made without the consent of Welsh Ministers.

21. The supplementary LCM provides that the advantages of utilising the Bill is that reciprocal arrangements can be made between Wales, England, Scotland and Northern Ireland which are not within the legislative competence of the Assembly.

### ***Mental health after-care***

22. Clause 71 of the Care Bill makes amendments to section 117 of the Mental Health Act 1983 (“the 1983 Act”) which, with one exception, will apply and extend to Wales.

23. The detail of the amendments is set out at paragraph 5.11 of the supplementary LCM. The amendments include a definition of “after-care services”. They also seek to remove anomalies in determining the responsible local authority in relation to the provision of after-care services under the 1983 Act. They do this 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 and Wales in which the person is ordinarily resident.

24. Schedule 4 of the Care Bill inserts a new Schedule A1 into the Social Services and Well-being (Wales) Bill following Royal Assent and commencement. This will allow persons to receive direct payments under the Social Services and Well-being (Wales) Bill to secure the provision of after-care services under the 1983 Act.

25. Section 163 of the Social Services and Well-being (Wales) Bill 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.

26. The amendments make provision for a dispute resolution procedure in the event of disputes about the ordinary residence status of persons entitled to after-care services. Where the disputes are between local authorities in Wales, the Welsh Ministers will arbitrate. If the dispute 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.

27. There are no subordinate legislation making powers for Welsh Ministers contained in this part of the Bill. An amendment has been tabled to the commencement provisions of the Bill, to provide that before making an order bringing Section 71 into force, the Secretary of State must obtain the consent of Welsh Ministers.

28. The supplementary LCM states that the advantage of utilising the Bill is:

“...because 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.”

29. The supplementary LCM goes on to state:

“... as both the SWWB (Social Services and Well-being (Wales) Bill) 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”.

30. Although the supplementary LCM provides the practical reasons for using the Care Bill in this manner, the Committee wishes to note that it is unusual for a Welsh Government Bill to be amended via amendments to a UK Bill. We remain concerned about the possible lack of scrutiny by Assembly Members of these provisions. As a consequence, we have written to the Deputy Minister to clarify what practical reasons prevent the use of the Stage

2 process and have requested that a response will be given to this point during the relevant Plenary debate.

***Our view of the supplementary LCM***

We note the supplementary LCM and we have no objection to its use in the manner proposed in relation to cross-border placements. With respect to the provisions for mental health after-care, we draw the Assembly's attention to the point raised in paragraph 30 of this report. We look forward to the Deputy Minister providing clarification during the relevant Plenary debate about the reasons for needing to take the unusual step of allowing a Welsh Government Bill to be amended by a UK Bill.

## Annex A – The Committee’s report on the original LCM (25 June 2013)

National Assembly for Wales  
Health and Social Care Committee  
25 June 2013

Cynulliad  
Cenedlaethol  
Cymru  
National  
Assembly for  
Wales



## Report on the Legislative Consent Memorandum for the Care Bill

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### Background

1. On 23 May 2013, the Deputy Minister Social Services laid a Legislative Consent Memorandum (LCM)<sup>3</sup> for the Care Bill<sup>4</sup>, which is currently before the UK Parliament.
2. On 4 June 2013, the Business Committee referred the LCM to the Health and Social Care Committee (“the Committee”) for consideration, in accordance with Standing Order 29.4. The Business Committee also agreed that the Committee should report on the relevant provisions by 4 July 2013. The LCM is due to be considered in plenary on 9 July 2013.

### The Care Bill (“the Bill”)

3. The LCM summarises the policy objectives of the Bill:

“The Bill is sponsored by the Department of 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.”

### Main effect of the provisions in the Bill for which consent is sought

4. Consent is being sought in relation to three provisions in the Bill relating to:
  - (i) reciprocal arrangements (across the United Kingdom) for cross-border placements of adults in residential care (clause 38 and Schedule 1);

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<sup>3</sup> Legislative Consent Memorandum available at: <http://www.assemblywales.org/bus-home/bus-business-fourth-assembly-laid-docs.htm?act=dis&id=246569&ds=6/2013>

<sup>4</sup> Care Bill available at: <http://services.parliament.uk/bills/2013-14/care.html>

## **Annex A – The Committee’s report on the original LCM (25 June 2013)**

- (ii) arrangements to ensure continuity of care for adults accommodated in registered care settings in Wales as a result of provider failure (clauses 48 and 49, clause 111(3) and clause 109(8)); and
- (iii) a requirement for Welsh Ministers to co-operate with the new, independent Health Research Authority (HRA) in the regulation of health and social care research in the UK (clause 98).

### ***Cross-border placements***

5. In relation to cross-border placements, the Bill seeks to make provision for an adult ordinarily resident in one part of the UK, 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. This means that people who wish to move into residential accommodation across borders within the UK can choose to do so. Provision is also made for resolution of disputes between local authorities and recovery of payments from a local authority that is liable to provide the adult with accommodation.

6. This part of the Bill does not contain subordinate legislation making powers for Welsh Ministers. There are powers, however, for the Secretary of State to prescribe – by way of regulations – for the resolution of disputes and for the types of arrangements to which the provisions will apply. Where regulations include provision relating to Wales, they may not be made without the consent of Welsh Ministers.

### ***Provider failure***

7. In relation to provider failure, the Bill seeks to strengthen local authorities’ duties in relation to adult care if a provider fails. The Bill 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. The Bill also places temporary duties on a local authority in England to meet the care and support needs of adults, placed by Welsh local authorities in a care home in England, under the cross border placements. The provisions apply where the provider becomes unable to continue to provide accommodation because of business failure, and are in response to lessons learned from the collapse of Southern Cross. Provision is made for the recovery of costs from the local authority in which the adult is ordinarily resident, or from the adult, where the care was arranged privately.

## **Annex A – The Committee’s report on the original LCM (25 June 2013)**

8. There are no subordinate legislation making powers for Welsh Ministers contained in this part of the Bill. The Secretary of State must make regulations providing for the interpretation of references to business failure or being unable to do something because of business failure, however he or she must consult the Welsh Ministers before making such regulations. In addition, the Bill provides that before making an order bringing arrangements for dealing with provider failure into force, so far as it applies to accommodation in Wales, the Secretary of State must obtain the consent of the Welsh Ministers.

### ***Health Research Authority***

9. In relation to the Health Research Authority, the Bill seeks to ensure that the Welsh Ministers and other devolved authorities co-operate with the Authority in the exercise of their functions in regulating and assessing the ethics of health and social care research. The aim of this clause is to ensure that practice relating to this regulation is coordinated, standardised and promoted across the UK.

### **Relationship with the Social Services and Well-being (Wales) Bill**

10. The LCM confirms that the Deputy Minister for Social Services intends to bring forward amendments to the Social Services and Well-being (Wales) Bill to ensure that parallel provisions to those contained within the Care Bill to address provider failure are made across all local authorities in Wales. This will mean that provision will be made for adults within Wales to be protected if the company in charge of their care ceases to provide care at short notice.

### **Consideration of the LCM**

11. We considered the LCM on 12 June. We did not believe it necessary to seek any further clarification on the LCM from the Deputy Minister.

### **Our view**

12. We note the LCM and we have no objection to its use in the manner proposed.

13. As noted in paragraph 10 of this paper, we are aware that the Deputy Minister for Social Services is seeking to make parallel provisions to those contained within the Care Bill to ensure that adults in Wales are protected in the case of provider failure. We would wish to emphasise the importance of discussions between the Welsh and UK Governments to ensure a consistent definition and understanding of “business failure” across borders.

Gwenda Thomas AC / AM  
Y Dirprwy Weinidog Gwasanaethau Cymdeithasol  
Deputy Minister for Social Services



Llywodraeth Cymru  
Welsh Government

Ein cyf/Our ref LFGT096313

David Rees AM  
Chair,  
Health and Social Care Committee  
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10 October 2013

Dear David,

### **Revised Legislative Consent Memorandum: Care Bill**

Thank you for your letter of September 30 requesting clarification on issues on the revised Legislative Consent Memorandum (“the revised LCM”). In particular that the Committee wanted to know why the LCM does not take account of reciprocal arrangements for local authorities in Scotland to ensure continuity of care services following provider failure.

The Care Bill does not provide a specific provision to place temporary duties on local authorities in Scotland because this would cut across the existing duties placed on Scottish local authorities by virtue of section 12 of the Social Work (Scotland) Act 1968 to provide assistance to individuals in their areas who are in need.

The duty under section 12 applies even if the individual is ordinarily resident outside the local authority’s area, including individuals placed in a Scottish local authority area by English, Welsh or Northern Irish authorities. So adult placements in regulated settings in Scotland by a local authority across the UK or arranged by the individuals themselves will have a level of protection should they be unfortunate to experience a breakdown in their care arrangements as a result of provider failure.

You may be aware that as a result of further changes to the Care Bill (tabled October 7) it has been necessary for me to table a Supplementary Memorandum and Motion on amendment to clause 39 and 71 of the Care Bill that impact on Wales and require the consent of the Assembly. These changes will enhance the reciprocal arrangements referred

to in revised LCM for continuity of care across our borders, and makes a number of amendments to section 117 of the Mental Health Act 1983 as it extend to Wales, in respect of local authorities duties for mental health after care .

Below is a link to the information that I that I laid on October 9.

<http://www.assemblywales.org/bus-home/bus-business-fourth-assembly-laid-docs.htm?act=dis&id=250840&ds=10/2013>

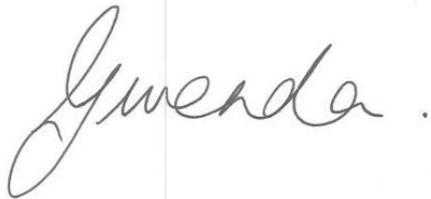
<http://www.assemblywales.org/bus-home/bus-business-fourth-assembly-laid-docs.htm?act=dis&id=250841&ds=10/2013>

I remain grateful to the Committee for their consideration of the LCMs in particular their overlap with the Social Services and Wellbeing (Wales) Bill. You will appreciate the complexity of the changes across both the Care and SSWB Bill.

We are also keen to ensure that reciprocal arrangements (as far as practical) that comprehensively address the differing scenarios individuals may find themselves in, this has unavoidably required a further Supplementary LCM.

I trust this letter provides the Committee with assurance about the legislative basis for the continuity of care arrangements in its application in Scotland. If the Business Committee decide to remit the Supplementary Legislative Consent Motion and Memorandum to the HSC Committee I will await consideration of the Report from the HSC Committee with interest.

Yours Sincerely

A handwritten signature in cursive script that reads "Gwenda".

**Gwenda Thomas AC / AM**

Y Dirprwy Weinidog Gwasanaethau Cymdeithasol  
Deputy Minister for Social Services