

**FROM THE MINISTER OF HEALTH**



Department of  
**Health**

An Roinn Sláinte

Mánnystrie O Poustie

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Our ref – SUB-0113-2022

Date: 26<sup>th</sup> January 2022

Dear

*Colleagues,*

**HEALTH AND CARE BILL – LEGISLATIVE CONSENT MEMORANDUM**

Under the provisions of Standing Order 42A (2), please find attached a Legislative Consent Memorandum relating to the Health and Care Bill.

Should the Business Office need to discuss the Memorandum with an official from my Department, the relevant contact is Seán Garland, Legislation Unit, Resource & Corporate Management Group at telephone number: 07816111255 .

**Robin Swann MLA**  
Minister of Health

# LEGISLATIVE CONSENT MEMORANDUM

## THE HEALTH AND CARE BILL – PART 3 ALB TRANSFER OF FUNCTIONS PROVISION

### Draft legislative Consent Motion

1. The draft motion, which will be tabled by the Minister of Health, is:

*“That this Assembly is asked to agree to the Health and Care Bill extending to Northern Ireland to provide for those provisions dealing with Arm’s Length Bodies (ALBs) – Transfer of Functions Power”*

### Background

2. This memorandum has been laid before the Assembly by the Minister of Health under Standing Order 42A(2) and (9). The Health and Care Bill was introduced in the House of Commons on 6 July 2021.
3. In a response received on 15 October 2021, Executive Agreement, via Urgent Decision Procedure, was not achieved for the ALB-Transfer of Function provision to be carried on behalf of NI. The decision reflected concerns on the lack of policy detail on potential future transfers of functions, the absence of a NI consent clause, and no discernible implication to current functions provided to NI by bodies in the scope of the power in the event of no agreement to proceed
4. On the 19th January 2022, DHSC proposed the tabling of a DA consent clause for the ALB-Transfer of Function, in relation to future transfers of function, which touch on DA legislative competency.
5. In light of the challenging tabling deadlines, on the 20 January, the Department of Health raised an urgent decision procedure request seeking Executive agreement, subject to the tabling of a DA consent clause, for this provision to be carried on behalf of NI, and the legislative consent process progressed.
6. On 24 January 2022, under the urgent decision procedure, the First Minister and deputy First Minister gave their agreement to the need for a Legislative Consent Motion for transferred matters within the Bill in respect of Part 3 – “Secretary of State’s’ powers to transfer or delegate functions”.

7. The latest version of the Bill can be found at:

[Health and Care Bill - Parliamentary Bills - UK Parliament](#)

### **Summary of the Bill and its policy objectives**

8. In February 2021, the Department of Health and Social Care (DHSC) published the HSC White Paper :

[Integration and innovation-Working together to improve health and social care for all.](#)

The paper described the intention to enact legislation setting out the UK Government's proposals for reform of the health and care sector. Its intention was to present a Bill to give effect to these proposals at the start of the 2021–22 parliamentary session. Should the Bill receive Royal Assent, implementation of the reforms will take place in 2022.

The Bill aims to do the following:

- a. Promote local collaboration;
- b. Reform the NHS Provider Selection Regime;
- c. Improve accountability and enhancing public confidence in the health and care system; and
- d. Deliver a range of targeted measures to support people at all stages of life.

The Bill also contains provisions to support social care, public health and quality and safety in the NHS. These are designed to address specific problems or remove barriers to delivery, maximise opportunities for improvement, and have, in most cases, been informed by the experience of the pandemic.

The Bill contains 7 parts with 17 Schedules addressing a range of issues relating to health and social care. Part 1 deals with the health service in England regarding integration, collaboration and other changes.

Part 2 of the Bill deals with health and adult social care information and Part 3 sets out the Secretary of State's powers to transfer or delegate functions of a relevant body to another relevant body.

Part 5 of the Bill deals with Virginity Testing Offences.

Part 6 of the Bill covers miscellaneous provisions including international healthcare arrangements and the regulation of health care and associated professions.

## Provisions which potentially impact on Devolved Matters

9. Five of the six “relevant bodies” listed in Part 3, clause 88 of the draft Bill (i.e. bodies between whom functions may be transferred or delegated) provide functions directly to, or relevant to Northern Ireland as follows:

**Health Education England**, Hosts the UK Foundation Programme Office (UKFPO)

**Health and Social Care Information Centre (NHS Digital)**, may collect data on behalf of DAs via non-mandatory requests

**Health Research Authority (HRA)**, has a statutory requirement to work with DAs. Some powers for some research UK-wide. Where the research relates to a devolved subject area, then the HRA has no remit. Must cooperate with DAs. IT systems are UK-wide. Acts for UK Ethics Committee Authority (UKECA)

**Human Fertilisation and Embryology Authority (HFEA)**, Reserved to Westminster, UK wide legislation. HFEA is the UK’s statutory independent regulator of fertility treatment and research using human embryos. Functions include licensing, monitoring and inspection of fertility clinics including to public and private fertility centres in NI.

**Human Tissue Authority (HTA)**, UK wide body – regulates activities concerning the removal, storage, use and disposal of human tissue and bone marrow and peripheral blood stem cell donation. The HTA produces various clinical codes of practice in line with the statutory requirements set out in the Human Tissue Act 2004. The role of the HTA includes regulation of activities by UK healthcare providers related to the donation of organs and tissues for transplantation, on which the HTA works in conjunction with NHS Blood and Transplant (further details below).

NB. The sixth listed relevant body listed in Part 3, Clause 86 - **NHS England** – is an England only body.

10. Clause 90(2)(b) allows the Secretary of State to transfer any functions of a Special Health Authority to any of the relevant bodies listed at Clause 88. NHS Blood and Transplant (NHSBT) is a Special Health Authority which manages blood donation services in England, and organ and tissue donation and transplantation services for all parts of the UK, including NI. This includes managing the donation, storage and transplantation of organs,

tissues, bone marrow and stem cells, managing the UK-wide NHS Organ Donor Register, and researching new treatments and processes. This work is underpinned by the Human Tissue Act 2004 and various Codes of Practice developed by the Human Tissue Authority. Whilst the Minister of Health is not aware of any proposed changes to the UK-wide functions of NHSBT at the present time, the Assembly should note the potential for future changes to be introduced under these powers. Any proposed changes in respect of NHSBT's functions outside of England would be subject to consent from devolved Health Departments and their Arm's Length Bodies, and would only be taken for the purposes of enhancing and improving current service provision in line with the UK Government's strategic objectives to increase organ donation and transplantation.

11. In connection with regulations under Clause 89 (Power to transfer functions between bodies), Clause 92(2) sets out that, where regulations provide for the transfer of functions between relevant bodies, the transfer scheme may make provision for the transfer of property, rights or liabilities to any appropriate person from the relevant body from which functions are being transferred.
12. In connection with regulations under Clause 90 (Power to provide for exercise of functions of SoS), Clause 92(3) sets out that, where regulations provide for the delegation of a function of the Secretary of State to a relevant body, the transfer scheme may make provision for the transfer of property, rights or liabilities from any of the list of persons or bodies set out at subsections (a) to (c) to an appropriate person.
13. The proposed amendment to Clause 92(10) removes a Northern Ireland department from the list under the definition of "appropriate person" and thus the provision for the transfer of property, rights or liabilities to it.
14. Clause 94 (Consultation on draft regulations), the proposed amendment makes a the complete substitution of paragraph (1), and now provides that the SoS must obtain consent from a Northern Ireland department rather than simply consult before making provision within devolved or executive legislative competence under Clauses 89 and 90.
15. Both the Scottish and Welsh Governments are content that the amendments to Part 3 of the Bill, which deals with ALB transfer of functions, are satisfactory, respect the devolution settlement and, as such, address previous concerns.

## **Reasons for making the Provisions**

10. Given the UK wide and specialist nature of the functions these Relevant Bodies and Special Agencies provide to Northern Ireland as detailed at paragraph 5 above, continuing alignment is considered beneficial in these matters.

### **Reasons for utilizing the Bill rather than an Act of the Assembly**

11. The provisions touch on transferred matters, and as such, fall with the legislative competence of the Northern Ireland Assembly, however given that these bodies provide specialist services on a UK wide basis it is considered appropriate to utilize the Bill for these provisions.
12. This enabling legislation will require further secondary legislation to enact any changes to functions or funding models that may impact on bodies that provide a function within the legislative competence of the NI Assembly.
13. Consultation is on-going with DHSC seeking agreement via a MoU to ensure appropriate consultation and engagement will take place in advance of any subsequent secondary legislation that will impact on any functions undertaken by these ALBs on behalf of Northern Ireland.

### **Consultation**

14. The Department of Health and Social Care (DHSC) in Great Britain has undertaken extensive engagement with stakeholders representing all parts of the health and care system through roundtables and smaller discussions. They have engaged with approximately 100 organisations from across the health and care system, whose contributions have fed into to their development of these proposals.
15. DHSC engagement with stakeholders has also been undertaken on specific proposals in the Bill. NHS England was consulted on the [Provider Selection Regime](#) and the DHSC consulted on the [data proposals](#) as part of the UK Government's draft data strategy. On professional regulation proposals the [Law Commission published proposals to reform the regulatory framework](#), which the 4 UK Governments responded to in 2014. The 4 UK Governments were consulted on high-level policy proposals to reform the regulatory framework for health professionals in [2019](#) and the UK Government consulted again on this [earlier this year](#) and will publish its response in due course.

## **Human Rights and Equality**

16. No Human Rights or Equality impacts have been identified within this enabling legislation.

## **Financial Implications**

17. As this is enabling legislation to allow transfer of powers between DHSC Arm's length bodies no current financial implications have been identified. Of the six relevant bodies listed in clause 86, only the Human Tissue Authority and Health Research Authority receive investment from Northern Ireland. Under current funding arrangements, NHS Blood and Transplant as a Special Health Authority receives financial contribution for the functions it undertakes on behalf of Northern Ireland.
18. Although it is not possible to identify positive or negative implications within the current Bill, any future proposals enacted by secondary legislation would need to consider financial safeguards for Northern Ireland.

## **Summary of Regulatory Impact**

19. There is no specific impact in Northern Ireland in respect of employment, costs to business, charities, social economy enterprises or the voluntary sector as a result of these provisions.

## **Engagement to date with the Committee for Health**

20. Minister wrote to the committee on 8<sup>th</sup> July 2021 advising of correspondence received from Minister of State for Health, Edward Egar regarding the Health and Care Bill and its introduction to Westminster. Further correspondence issued on 27 September 2021 advising that the Department was seeking Assembly approval to introduce four separate LCMs in respect of this Bill and the corresponding tight timescales.
21. Following its previous report, a supplementary letter has been sent to the Health Committee explaining the amendments to Part 3 of the Bill ALB with regards to transfer of functions, confirming that the First and deputy First Minister have now given their agreement on the basis of the amendments which now address their original concerns.

## **Conclusion**

22. The view of the Minister for Health is that in the interest of on-going alignment that so far as the provision of the Bill deals with a devolution matter they should extend to Northern Ireland and be considered by the UK Parliament.

**DEPARTMENT OF HEALTH**  
**26 JANUARY 2022**