LEGISLATIVE CONSENT MEMORANDUM

CARE BILL

Draft Legislative Consent Motion

1. The draft motion, which will be lodged by the Cabinet Secretary for Health and Wellbeing, is:

“That the Parliament agrees that the relevant provisions of the Care Bill, introduced in the House of Lords on 9 May 2013, relating to cross border provision for health care and for the establishment of the Health Research Authority, so far as these matters fall within the legislative competence of the Scottish Parliament or alter the executive competence of Scottish Ministers, should be considered by the UK Parliament.”

Background

2. This memorandum has been lodged by Alex Neil, Cabinet Secretary for Health and Wellbeing, under Rule 9.B.3.1(a) of the Parliament’s standing orders. The Care Bill (“the Bill”) was introduced in the House of Lords on 9 May 2013. The latest version of the Bill can be found at:

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

3. The Bill reforms the law relating to care and support for adults and the law relating to support for carers in England and Wales and establishes and makes provision about Health Education England and the Health Research Authority.

Content of the UK Care Bill

4. The Bill is generally concerned with care and support matters in England and makes provision for:

• reforming the law in relation to care and support for adults;
• the law relating to support for carers;
• safeguarding adults from abuse or neglect;
• care standards;
• establish and make provision about Health Education England;
• establish and make provision about the Health Research Authority and for connected purposes to regulate assessments of the ethics of health and social care research.

LCM(S4) 26.1
Provisions which relate to Scotland

5. The Bill also extends to Scotland in three areas, namely:

- Cross-border placement arrangements;
- Provider failure arrangements; and,
- The establishment of the Health Research Authority.

These areas are discussed in detail below.

Cross-border placement arrangements

6. At present, section 12 of the Social Work (Scotland) Act 1968 ("the 1968 Act"), places a duty on Scottish local authorities to provide community care services within their area. Eligibility for such services arises both from an individual having a physical presence in the local authority area and from the individual being assessed as having a need that requires the provision of care. An individual is not excluded from receiving community care services from a Scottish local authority by reason of being ordinarily resident outwith that local authority's area.

7. It is important to draw a distinction between the responsibility for providing care and the responsibility for funding it. Although a local authority may be responsible for providing care to someone in its area who is ordinarily resident elsewhere, Section 86 of the 1968 Act and related regulations also provide for certain expenditure incurred in so doing to be recoverable from the local authority in whose area the individual is ordinarily resident.

8. The policy intention of the cross-border placement arrangements is to ensure an appropriate division of financial and operational responsibility where local authorities in one part of the United Kingdom place adults for whom they have a responsibility under legislation into residential care or extended settings in another part.

9. Provisions already exist in section 5 of the Community Care and Health (Scotland) Act 2002 which would allow Scottish local authorities to make placements into accommodation elsewhere in the UK, and section 87A of the 1968 Act to modify Scottish legislation in relation to individuals placed by authorities from other jurisdictions within the UK. However, these provisions have not been commenced due to concerns over the lack of reciprocal arrangements with other UK jurisdictions or provisions existing to resolve any disputes which might arise in such cases. This issue has been highlighted by losses incurred by Scottish local authorities in a number of cross border disputes. Such costs can potentially have a serious effect on social care budgets and, consequently, can lead to an impact on services for local residents.

10. Schedule 1 extends to the whole of the UK and provides for a new framework which specifies which local authority is responsible for meeting the financial cost of
care in cross-border placements. In broad terms, the placing authority will remain responsible for the individual’s care for as long as the person continues to have care needs that require them to stay in that kind of accommodation. This could be a placement in a residential care home or, subject to the making of regulations, into ‘extended settings’ covering care establishments that have developed into supported living arrangements. This creates the required equitable arrangements for cross border placements and allowing Scottish local authorities to better plan and manage their local care budgets.

11. The Schedule confers powers on the Secretary of State to make further provision about the arrangements for cross-border placements by regulation. The Secretary of State may also make regulations to apply the provisions of the Schedule to accommodation purchased through direct payments, or to placements in ‘extended settings’ (where local authority care is provided to enable an adult to live in a particular type of non-local authority accommodation, including different types of accommodation such as supported living). The Secretary of State is required to obtain the consent of the Scottish Ministers before making any Regulations which include provision relating to Scotland.

12. The Schedule also amends the powers already conferred on the Scottish Ministers by section 5 of the Community Care and Health (Scotland) Act 2002 so that they could be used to authorise Scottish local authorities to make cross-border placements into extended settings.

13. Provision to make arrangements for care in Scotland falls within devolved competence. The legislative consent of the Scottish Parliament is therefore required to allow the arrangements set out in Schedule 1 of the Bill to apply in Scotland. Legislative consent is also required in relation to the changes to the executive competence of the Scottish Ministers made by the Schedule.

Provider failure arrangements

14. Clauses 50 to 53 of the Bill set out that, in the event of the failure of a provider of care services in a local authority area (through bankruptcy, entering administration etc), service users who are either temporarily or permanently located in another local authority area and who are using the services of a provider which fails are guaranteed to receive support in order to ensure that their service is not interrupted by the provider's failure.

15. Section 12 of the 1968 Act already places a duty on Scottish local authorities to provide or arrange care for any individual in their area who requires assistance in an emergency. The provisions in the Bill will place a similar duty on local authorities in England and Wales, and Health and Social Care Trusts in Northern Ireland, to meet the individual's needs of care and support for as long as is considered necessary in relation to an individual who is ordinarily resident in Scotland. It will
also allow those authorities to recover the costs of meeting those needs from the Scottish local authority in whose area the individual is ordinarily resident.

16. At present, Scottish local authorities also have the duty to ensure continuity of care for people ordinarily resident in Northern Ireland under the 1968 Act but have no power to recover costs (section 86 of the 1968 Act covers placements from England and Wales only). The Bill provides the legislative vehicle to extend the power for Scottish local authorities to recover costs to include Northern Ireland.

17. Social care is a devolved matter and falls within the legislative competence of the Scottish Parliament. The provisions on provider failure will therefore require the legislative consent of the Scottish Parliament.

Health Research Authority

18. The Bill also makes provision for the establishment of a new Health Research Authority (HRA). Chapter 2 sets out the remit and functions of the new body and Clause 109(4) places a duty on the HRA and each of the devolved authorities to co-operate with each other in the exercise of their respective functions relating to the regulation of assessments of the ethics of health and social care research. The definition of ‘devolved authority’ includes Scottish Ministers (clause 122).

19. The policy intention of the duty to co-operate with the HRA is to ensure that the current UK-wide research ethics system, where researchers are required to submit only a single ethics application to undertake research in multiple sites across different UK jurisdictions, continues. This will ensure that the process remains streamlined and continues to be attractive to researchers seeking to carry out their research across the UK.

20. By placing a duty of cooperation on Scottish Ministers, the Bill changes the executive competence of Scottish Ministers. This change to competence requires the legislative consent of the Scottish Parliament.

Reasons for seeking a legislative consent motion

21. As set out above, the provisions of the Bill generally extend to England and Wales with the exception of the provisions on cross border placements, provider failure and the establishment of the HRA. All three of these areas require the legislative consent of the Scottish Parliament.

22. Whilst these areas are within devolved competence, all three deal with UK-wide provisions which could not be wholly legislated for by the Scottish Parliament. It is therefore considered, given these changes are required to also be made for England, Wales and Northern Ireland, that it is appropriate for the changes to be made for Scotland at the same time through the UK Bill.
Consultation

23. The Department of Health consulted widely on the provisions of the Bill in England and Wales and also published a draft Bill to allow pre-legislative scrutiny. http://www.parliament.uk/business/committees/committees-a-z/joint-select/draft-care-and-support-bill

24. The Scottish Government has consulted key stakeholders, including COSLA, who are in agreement with the Scottish Government’s position to support legislative changes in relation to cross border placements and provider failure provisions.

Financial implications

25. It is expected that there will be no net cost to Scottish local authorities as a result of the relevant provisions of the Bill. Indeed, there may be some small savings associated with the administration of cross-border placements, due to improved clarity of the guidance setting out who is responsible for each element of an individual patient’s care and financial support.

Conclusion

26. It is the view of the Scottish Government that it is in the best interests of the Scottish people and of good governance that the relevant provisions of the Bill, which allow a cross-border placement regime, ensure against provider failure and establish the HRA, be extended to Scotland.

Scottish Government
November 2013