

**From: Redacted**

**Sent:** 06 November 2017 11:30

**To: Redacted**

**Cc: Redacted**

**Subject:** RE: URGENT ADVICE - FW: Abortion care in Wales

Hi **Redacted**,

1. Thank you for this. It appears that the correspondent is asking the Minister to consider whether to introduce legislation to reform the law on abortion. Particularly (if I have understood **Redacted** paper correctly) to permit medical (as opposed to surgical) abortions to be carried out at home.

### Summary of advice

2. While abortion law is generally non-devolved in Wales\*, there is a specific power in section 1(3) and 1(3A) of the Abortion Act 1967 ("the 1967 Act") for the Welsh Ministers to approve places other than hospitals in which abortions may be lawfully performed. This includes a power to provide that abortion treatment by specified (named) drugs could be carried out in a certain class of places e.g. the pregnant woman's home.
3. So, the Welsh Ministers could do what the Scottish Ministers have done i.e. approve the second stage of early medical abortion (the taking of misoprostol) to be carried at home under certain circumstances. That approval could be given by (1) a Ministerial decision on an MA; (2) communicating that approval to relevant NHS bodies and private clinics/providers via a letter and a formal written approval document; and (3) publicising the approval more generally.
4. The Society for the Protection of Unborn Children has indicated that it is considering bringing a legal challenge (presumably, by way of judicial review) to the Scottish Ministers' approval. As such a challenge would have to be brought promptly, you may wish to see whether a challenge is brought (and, if so, to await its outcome) before proceeding. Legal Services can provide further advice once more details of the challenge emerge.

*\*Note: under the current devolution settlement, as set out in paragraph 9 of Schedule 7 to the Government of Wales Act 2006 ("GOWA 2006"), abortion is a specific exception to the Assembly's legislative competence over health and health services. This means that the Assembly cannot make law about abortion.*

*The devolution settlement will change on 1 April 2018, when the new Schedule 7A to GOWA 2006 comes into force. But the Assembly will still not be able to make law about abortion. Section J1, paragraph 144 of new Schedule 7A reserves the power to make law about "abortion" to the UK Parliament.*

*However, here is there is an executive power under section 1(3) and (3A) of the 1967 Act for the Welsh Ministers to approve medical abortions at home. SO, there is no need for the Assembly to make law if this is what Ministers want to do.*

5. The analysis underpinning this advice is set out below.

#### Current law

6. Section 1(1) of the Abortion Act 1967 (“the 1967 Act”) prescribes the grounds on which an abortion can lawfully be performed.

7. Section 1(3) of the 1967 Act provides that:

*(3) Except as provided by subsection (4) of this section, any treatment for the termination of pregnancy must be carried out in a hospital vested in the Secretary of State for the purposes of his functions under the National Health Service Act 2006 or the National Health Service (Scotland) Act 1978 or in a hospital vested in a National Health Service trust or an NHS foundation trust or in a place approved for the purposes of this section by the Secretary of State*

8. Section 1(3A) goes on to provide that:

*(3A) The power under subsection (3) of this section to approve a place includes power, in relation to treatment consisting primarily in the use of such medicines as may be specified in the approval and carried out in such manner as may be so specified, to approve a class of places.*

9. And section 1(4) says:

*(4) Subsection (3) of this section, and so much of subsection (1) as relates to the opinion of two registered medical practitioners, shall not apply to the termination of a pregnancy by a registered medical practitioner in a case where he is of the opinion, formed in good faith, that the termination is immediately necessary to save the life or to prevent grave permanent injury to the physical or mental health of the pregnant woman.*

10. So, section 1(4) is an emergency power to carry out abortion to save life and limb, which is not subject to the general rule under section 1(3) that abortions must generally be carried out in hospitals.

#### Welsh Ministers’ powers

11. Section 1 (3) and (3A), however, provide the Welsh Ministers\* with a power to make exceptions to the general rule under section 1(3) that abortions must be performed in hospitals.

12. Section 1(3) allows the Welsh Ministers to approve places other than hospitals for abortion treatment. Section 1(3A) was inserted into the 1967 Act by the Human Fertilisation and Embryology Act 1990. I don’t know the background to that Act, but I think that it may reflect the increasing prevalence of medical (as opposed to surgical) abortions by the early 1990s. Section 1(3A) specifically allows the

Welsh Ministers to approve specific places, or a class of places, in which abortion treatment may be performed by specific medicines.

13. This power allows the Welsh Ministers\*\* to provide that abortion treatment by specified (named) drugs could be carried out at e.g. the woman's home. It is the same power as has been relied upon by the Scottish Ministers (see below) to provide that misoprostol can, in certain circumstances, be taken at home. So, the Welsh Ministers could do likewise.

14. The 1967 Act doesn't specify a form in which approval must be given. It doesn't, e.g., require regulations or a statutory instrument to be made. Were the Welsh Ministers minded to give approval under section 1(3) and (3A), I think the appropriate form would be:

- (a) a Ministerial decision on an MA;
- (b) a formal document recording the approval, and the conditions to which it is subject (like the Scots have done – see below: note that this could be signed by an official, e.g. the CMO, on behalf of the Welsh Ministers if they are content to authorise this)
- (c) a letter to Local Health Boards, private providers/clinics, and any other bodies providing enclosing the formal approval document; and

\*\*Note: while the text of section 1(3) refers to the Secretary of State approving places in which abortion treatment can be carried out, Article 2 and Schedule 1 of the National Assembly for Wales (Transfer of Functions Order) 1999 (SI 1999/672) transferred the Secretary of State's functions under the 1967 Act to the Assembly. The functions transferred to the Assembly were then transferred to the Welsh Ministers by paragraph 30 of Schedule 11 to GOWA 2006.

#### Department of Health ("DH") guidance, and case law

15. DH Guidance on *Procedures for the Approval of Independent Sector Places for Termination of Pregnancy (Abortion)* states that (with my emphasis added by underlining):

##### ***Early Medical Abortion (EMA) – legal position***

*Under Section 1(3) of the Abortion Act 1967 treatment for EMA can only take place in a NHS hospital or approved independent sector place. The courts have decided that this means that both drugs (mifepristone and misoprostol) for the medical abortion must be taken in the hospital or approved place.*

*Women leave the premises after the first dose and may be given the choice to stay on the premises or to go home soon after taking the second tablet, to be in the privacy of their own home for the expulsion. This choice should be made as part of the process of obtaining informed consent. A protocol should be in place governing the care of women who choose the latter option and this should include follow up arrangements and analgesia in accordance with the RCOG guidance.*

16. The guidance refers to a case - *BPAS v Secretary of State for Health* (2011) *EWHC 235 (Admin)* – in which the BPAS wished to pilot and, if successful, adopt

a process of providing abortions whereby abortifacient drugs would be *prescribed* to the pregnant woman by a registered medical practitioner in a clinic or hospital, but *taken* by the woman at home.

17. BPAS sought a declaration from the court that, for the purposes of section 1 of the 1967 Act, a pregnancy was terminated by a registered medical practitioner where the practitioner *prescribed* an abortifacient drug with the intention of terminating the pregnancy; that the *administration* of that drug to the pregnant woman was not “any treatment for the termination of pregnancy”; and that the drug did not have to be taken in a hospital or place approved by the Secretary of State, so that the pregnant woman could self-administer the drug at home. What BPAS specifically wanted was for women to be able to be prescribed misoprostol at the same time as being given mifepristone, so that they could take the misoprostol home and self-administer there, in the comfort and support of their own home.
18. The court refused to make that declaration. It found that the “treatment for the termination of pregnancy” within section 1(3) of the 1967 Act was not restricted to the act of diagnosis and the prescription of the drug, but included the use or administration of that drug. So, the court found that a pregnant woman would not be permitted to take such a drug at home unless her home had been approved by the Secretary of State.

### Scotland

19. The law on abortion was originally reserved to the UK Parliament by Schedule 5 to the Scotland Act 1998. But that reservation was repealed by the Scotland Act 2016, so that abortion law is now *generally* devolved to Scotland (i.e. the Scottish Parliament can make *any* law about abortion, rather than just the narrow provision that the Welsh Ministers can make under sections 1(3) and (3A) of the 1967 Act).
20. But the Scottish Parliament didn't have to pass an Act in order to authorise medical abortions at home. That's because the Secretary of State's functions under sections 1(3) and (3A) of the 1967 Act transferred to the Scottish Ministers under section 53 of the Scotland Act 1998.
21. The Scottish Ministers have approved the taking of misoprostol (the second stage of early medical abortion) at home, subject to certain conditions, as set out in the terms of the written approval communicated to NHS bodies by a covering letter enclosing a formal written approval document (as per the documentation you helpfully sent to me via the link below – thank you).

[http://www.sehd.scot.nhs.uk/cmo/CMO\(2017\)14.pdf](http://www.sehd.scot.nhs.uk/cmo/CMO(2017)14.pdf)

22. I understand that the SPUC are threatening a legal challenge to the Scottish Ministers' approval. The detailed grounds on which a challenge would be brought are not yet known – there are vague references in The Times article below to public law and human rights.

<https://www.thetimes.co.uk/article/legal-row-over-home-abortions-7t5bq0t2w>

23. Presumably, such a challenge would have to be brought by way of judicial review, in which case it would have to be brought (a) promptly, and (b) in any event, within 3 months of the approval. In the circumstances, you may wish to wait to see whether a challenge emerges (and, if so, what are its prospects of success) before finalising policy.

Regulation of independent hospitals etc.

24. I have checked with LS Social Care team lawyers as to whether there is anything in the law on regulating independent hospitals (Care Standards Act 2000, Independent Health Care (Wales) Regulations 2011 etc.) which might prevent or inhibit the Welsh Ministers from doing what the Scottish Ministers have done. We do not think that there is. The law regulates those aspects of the termination process which take place *in* independent hospitals; we do not think that it would preclude the Welsh Ministers from approving the second stage of early medical termination to be carried out at home.

25. We can advise further on these issues as required, once more information comes to light.

Happy to discuss any issues in the meantime.

Best wishes,

**Redacted**

OFFICIAL – SENSITIVE / SWYDDOGOL – SENSITIF

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**From: Redacted**

**Sent:** 27 October 2017 16:24

**To: Redacted**

**Cc: Redacted Subject:** URGENT ADVICE - FW: Abortion care in Wales

Dear **Redacted**,

I'd be grateful if you could provide some advice please. The Cab Sec has received the following correspondence (and attachment) regarding Abortion and devolved matters. We need to provide a response by 3<sup>rd</sup> November.

I'm of the understanding that the matters raised by **Redacted** are not devolved to Welsh Ministers. This would include the provision of the type of treatment (i.e. the pills) used to perform the termination of pregnancy and how this is administered. Grateful if you would confirm this to be the case.

Thanks very much

**Redacted**

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Gofal Iechyd Poblogaethau | Population Healthcare

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