

HSP6 Equality and Human Rights Commission Wales

Senedd Cymru | Welsh Parliament

Y Pwyllgor Iechyd a Gofal Cymdeithasol | Health and Social Care Committee

Bil Caffael y Gwasanaeth Iechyd (Cymru) | Health Service Procurement (Wales) Bill

Ymateb gan Equality and Human Rights Commission Wales | Evidence from Equality and Human Rights Commission Wales

General principles of the Bill

What are your views on the general principles of the Health Service Procurement (Wales) Bill?

The Public Sector Equality Duty (PSED) General Equality Duty requires listed public bodies in Wales, including health boards/trusts and local authorities to have due regard to the need to eliminate unlawful discrimination, harassment and victimisation and other conduct that is prohibited by the Equality Act; advance equality of opportunity between people who share a relevant protected characteristic and those who do not and foster good relations between people who share a protected characteristic and those who do not, when spending public money. Public bodies will need to have 'due regard' at all stages of the health service procurement process to the need to advance equality.

The Equality and Human Rights Commission (the Commission) believes that procurement has the potential to advance equality and human rights in Wales, to lead to improved outcomes for people with protected characteristics. The general principles of the Health Service Procurement (Wales) Bill, (hereafter called "the Bill", should include the need to advance equality of opportunity by using procurement as a means to deliver a fairer Wales, enabling better equality outcomes by ensuring equality and human rights considerations are built into the procurement process.

We recommend the general principles of the Bill should include the need to advance equality of opportunity by using procurement as a means to deliver a fairer Wales.

Under regulation 18 of the Equality Act 2010 (Statutory Duties) (Wales) Regulations 2011 health boards/trusts and local authorities in Wales are subject to a procurement specific duty. It is important for the Commission as the regulator of the PSED and the affected public bodies to understand how the specific duty on procurement, the proposed Health Service Procurement (Wales) Bill and the socially responsible public procurement duty

included in the Social Partnerships and Public Procurement (Wales) Bill (SPPP(W)B) interrelate.

We welcome the inclusion within the current explanatory memorandum that “NHS Wales is one of the organisations subject to the Public Service Equality Duty (PSED) which forms part of the Equality Act 2010. This duty will not be affected by Health Service Procurement (Wales) Bill the proposed primary legislative powers and any changes for a new NHS health services procurement regime in Wales”. However, we recommend the explanatory memorandum and any guidance goes further than this, to explain how the potential synergies in aligning the requirements under the PSED, SPPP(W)B and the proposed Health Service Procurement (Wales) Bill can combine to bring about the greatest impact. These may be lost, lead to confusion and duplication if the PSED is not positioned as a strong lever that can sit alongside other Wales specific legislation.

Is there a need for legislation to deliver the Welsh Government’s stated policy intention?

Don't have a view

N/A

Regulation making powers

What are your views on the ‘disapplication’ regulation-making power in section 2 of the Bill?

N/A

What are your views on the ‘creation’ regulation-making power in section 3 of the Bill?

The Commission recommends that Minister’s ensure that equality and human rights considerations are built into the use of the creation power in section 3 of the Bill, and that this power is used to advance equality of opportunity.

Implementation and impact of the Bill

Are there any potential barriers to the implementation of the Bill’s provisions? If so, what are they, and are they adequately taken into account in the Bill and the accompanying Explanatory Memorandum and Regulatory Impact Assessment?

It is important that the Welsh Government uses intelligence and experience gleaned from other legislation. For example, the Welsh Government's current review of the PSED Specific Duties for Wales may provide an opportunity to inform the Bill development.

As a listed body in schedule 19 of the Equality Act 2010 (Statutory Duties) (Wales) Regulations 2011 regulation 8, the Welsh Government is required to conduct and publish an assessment of the impact of its policies/proposed policies on people with protected characteristics. We note the comment within the explanatory memorandum that an "Equality Impact Assessment (EIA) has been considered and has identified that the proposed primary legislation will not have a direct positive or negative impact on equalities for the citizens of Wales. The EIA will be further considered during the development of regulations and guidance produced in relation to a new NHS Health Services procurement regime in Wales". We would suggest that the potential positive impacts on protected characteristic groups are further considered and identified, particularly considering the opportunities to advance equality through procurement.

We would remind the Welsh Government that an EIA must address all three aims of the general duty and as set out in regulation 8, should be published where an impact or likely impact (as the case may be) is substantial. Guidance on conducting an effective EIA can be found on our website: www.equalityhumanrights.com

Are any unintended consequences likely to arise from the Bill?

If Welsh Minister's do not give due regard to the three aims of the General Equality Duty then they will not have met their statutory obligations under the PSED and would therefore not be compliant with the legislation. This will result in a lost opportunity to ensure equality and human rights are fully considered through the development of the Health Service Procurement (Wales) Bill.

The Welsh Government needs to ensure a robust, effective equality impact assessment (EIA) of the proposed Bill is carried out. This EIA must use the relevant information and engagement specific duties to ensure unintended consequences are identified and mitigated. The EIA should be an ongoing process. The impact of the Bill should be monitored and reviewed where required.

What are your views on the Welsh Government's assessment of the financial and other impacts of the Bill as set out in Part 2 of the Explanatory Memorandum?

N/A

Development of the policy and legislative proposals

What are your views on the approach taken by the Welsh Government to develop the policy and legislative proposals reflected in the Bill?

As a listed body in schedule 19 of the Equality Act 2010 (Statutory Duties) (Wales) Regulations 2011 regulation 5, the Welsh Government is required to involve such persons as the authority considers represent the interests of persons who share one or more of the protected characteristics and have an interest in the way that the authority carries out its functions.

We note the engagement to date with key stakeholders in Wales such as NHS Wales, trade unions, WLGA, commissioners and the third sector and the plans to engage with economic groups and industry during Spring 2023. We would remind the Welsh Government of their statutory obligations to engage with people with or representatives of people with protected characteristics. Not only is this a requirement under the PSED but it will also help the Welsh Government to ensure that the Bill will be inclusive and promote equality outcomes. As well as engaging with these groups, including protected characteristic groups, throughout the development of the Bill it is important to ensure that the intelligence gathered is used to inform decision-making, including the mitigation of any potential negative impacts on particular protected groups.

Any other issues

Are there any other issues that you would like to raise about the Bill, the accompanying Explanatory Memorandum and Regulatory Impact Assessment, or any related matters?

Fair Work

We welcome the work the Welsh Government is doing to put in place the recommendations of the Fair Work Commission's report and are pleased that the latest Fair Work Commission Recommendations annual report shows that all 48 recommendations have either been delivered or are in progress.

The Social Partnership and Public Procurement (Wales) Bill amends section 4 of the Well-being and Future Generations Act 2015 by substituting 'fair work' for 'decent work' within the exiting "A prosperous Wales" goal. This requires public bodies, including health boards/trusts and local authorities to consider fair work in pursuing the "A prosperous Wales" well-being goal. It will enable fair work to be pursued through the process of setting and publishing well-being objectives and reporting on progress against them.

It is important that fair work is a core element of the Health and Social Services Procurement (Wales) Bill and accompanying guidance, to ensure fair work outcomes for all workers, including those with protected characteristics, employed via contracts awarded through the new procurement process.

The definition of fair work is broad and spans six characteristics. Care should be taken to ensure work is targeted in order to address pressing inequalities such as employment gaps and pay gaps.

Commissioning

Our recent inquiry report 'Experiences from health and social care – treatment of workers from ethnic minorities on lower pay', found that the commissioning out of adult social care, and outsourcing of some roles in health, has resulted in more insecure work and poorer pay and terms and conditions than for those directly working for the public sector, disproportionately affecting lower-paid ethnic minority workers who are more likely to be working in these indirectly employed roles in adult social care.

The Health Service Procurement (Wales) Bill explanatory memorandum suggests this bill will provide opportunities to focus on more "value adding" activities (such as contract management), whilst maintaining key principles around value for money considerations.

We recommend the Welsh Government includes contract management provisions within the Bill and ensures that contract managers have an understanding of equality and human rights and how it applies in the context of the contract so there is a positive impact on equality and human rights outcomes.

The Welsh Government should use the Bill to provide leadership to health boards/trusts and local authorities commissioning care services. Guidance relating to the commissioning of affected goods and services in place should set out clear expectations for commissioners. These expectations should relate to the contractual obligations to provide detailed and consistent workforce datasets for all contracts; ensure improvement-focused and transparent compliance with the PSED; and ensure that commissioning helps address the poorer outcomes for groups of workers who share protected characteristics, including ethnic minority workers and disabled workers.