

Health Service Procurement (Wales) Bill: informal discussion

22 March 2023

Background

1. The Health Service Procurement (Wales) Bill is a Welsh Government Bill, introduced by the Minister for Health and Social Services. The Bill has been referred to the Health and Social Care Committee for Stage 1 scrutiny of the general principles of the Bill.
2. To inform its scrutiny, the Committee held a private informal discussion on 22 March 2023 to discuss with stakeholders their views on:
 - The need for the Bill and the scope of the legislation.
 - Engagement and consultation with stakeholders.
 - Any other issues stakeholders considered would aid scrutiny of the Bill.
3. A list of the organisations that participated in the event is attached at Annex 1. We are grateful to everyone who took part for sharing their views, experience and expertise with us.
4. This note summarises issues and themes discussed during the session. Reference to an issue does not necessarily represent endorsement either by all participants or by the Committee.

'Vision' for procurement in Wales

Objectives of the Bill

5. Stakeholders understood that the Minister for Health and Social Services ("the Minister") had described maintaining a 'level playing field' for health services procurement in Wales once the Provider Selection Regime ("PSR") in England was implemented as a key driver for the Bill.



They broadly agreed that not taking action could result in negative consequences and potentially service disruption.

6. They were not clear whether the Welsh Government would have brought forward legislation for Wales without the driver of reforms in England. But, as legislation is being introduced, they suggested the Welsh Government needed to ensure that when developing the Bill (and any regulations and guidance), it identifies and makes the most of any potential opportunities for Wales. Stakeholders were keen to hear the Minister outlining her vision for health service procurement in Wales, and the advantages and opportunities any new regime would provide, including:

- How any new regime would make a positive difference to service users and patients.
- Whether any new regime would lead to better and more stable contracts, and greater collaboration and flexibility.

7. Stakeholders highlighted the complexity of the commissioning landscape, describing a “patchwork” of contracting arrangements at local, regional and national levels with different commissioners and providers, a “blurring” of boundaries between health and social care, and the importance of ensuring there is space and support for innovation. There was a general consensus that the current regime created barriers, including expense for potential providers and an emphasis on obtaining the lowest price as opposed to service quality and value.

8. It can be difficult for local organisations to build relationships within this landscape. Some described the current procurement regime and commissioning landscape as “hostile” in some respects. It was suggested that a new procurement regime for health services in Wales **could** present an opportunity to create a friendlier environment for the third sector and SMEs by tackling challenges presented by the current regime. However, stakeholders were not clear **how** the Bill (and any regulations and guidance) would deliver a level playing field for the third sector, SMEs and micro-providers, particularly in comparison to large organisations, both within Wales and between Wales and England.

9. To help smaller providers (whether third or private sector) who may not have the expertise or capacity to deal with the complexity of different systems it was suggested that steps need to be taken to ensure that the regulations and guidance themselves are accessible and easy to understand so that providers and potential providers are clear about which services are within the scope of the health service procurement regime, which are within other public sector procurement regimes, and how the regimes operate. It was suggested that if people do not understand the rules, they are likely to be very cautious or shy away from potential

opportunities for health service providers to work collaboratively in multidisciplinary teams or with the third sector.

10. It was suggested that new legislation cannot be a substitute for developing, sharing and implementing good procurement practices.

Interaction with other legislation, strategies and plans

11. Stakeholders noted that the Bill, and the associated regulations and guidance, are being developed and will need to be implemented and operate within the broader policy, legislative and strategic context. The establishment of a social partnership council under the Social Partnerships and Public Procurement (Wales) Bill was raised, and stakeholders queried whether any new health service procurement regime under the HSP Bill would be within the social partnership council's remit. Stakeholders also highlighted the Welsh Government's commitment to make use of insourcing and outsourcing as part of its approach to tackling the waiting times backlog, and queried how this might be affected by the Bill (and any regulations and guidance).

12. The uncertainty about the legislative context was also raised, in particular the UK Government's Procurement Bill has not yet received Royal Assent, and the UK Government's Department for Health and Social Care has not yet announced the outcome of its consultation on a PSR. The Procurement Bill has been subject to amendment during its passage through the UK Parliament, and stakeholders noted that the Senedd and Welsh Government will need to monitor its progress carefully.

Cross-border issues

13. Cross-border service provision was discussed. Views were expressed that, without the flexibility to mirror the regime in England, there would be disruption to cross-border provision which would require more secondary services to be available in Wales. However, the opinion was also given that there is an opportunity to ensure that cross-border provision interacts effectively with Welsh-specific values.

Impact on different groups

14. Stakeholders noted that it was not clear how the Bill sat alongside equality, diversity and inclusion strategies, plans and commitments, including the Welsh Government's race action plan and plan for an anti-racist Wales. They highlighted the potential for opportunities to tackle existing inequalities to be missed, or, worse, that existing inequalities could inadvertently be reinforced.

Funding

15. Stakeholders were unclear whether the Bill would address issues regarding short-term funding or delayed funding decisions, which are a significant barrier for third and private sector providers.

16. Stakeholders noted that if these issues are not addressed, it may be difficult for certain providers, particularly in the private sector, to sustain their businesses. This could lead to contracts being “handed back”. Such disruption affects the quality and consistency of service provision, as well as creating added expense and resource implications for relevant authorities.

Scope of the legislation

Definition of health services

17. Stakeholders emphasised that under the PSR approach, it is the nature of the service (and any connected goods) that is being procured that determines whether the PSR regime or other procurement regime that applies, not the nature of the procuring authority. Relevant authorities, therefore, will all need to understand and be able to operate any regime introduced under the HSP Bill **and** any other procurement regimes.

18. Similarly, providers and potential providers will need to understand which services (and connected goods) are to be procured under which regime, and how those different regimes operate. Particular issues raised included implications for cost, efficiency and practical arrangements, although it was also noted that the anticipated distinctions between the PSR regime and the Procurement Bill regime have lessened over time.

Social care and integration with health

19. Stakeholders highlighted the progress made in the integration of health and social care, and noted that relevant authorities (health bodies and local authorities) often expect third sector and private sector providers to work collaboratively and deliver services that reflect health and social care integration.

20. Stakeholders noted that the scope of the Bill limits the procurement regime to be established through regulations and guidance to health services (and connected goods) only; social care services are outside scope. They were concerned this could hinder the integration agenda and the ability for relevant authorities to procure wraparound services and respond to increasing frailty and aging populations. They were also concerned it could increase the

complexity and costs of commissioning, procurement, partnership working between providers, health and local government, and service delivery.

21. It was also noted that it was not clear how this Bill might interact with the anticipated Welsh Government consultation on the commissioning framework for social care.

Collaboration and innovation

22. Stakeholders spoke about the role of third sector providers in identifying potential opportunities and solutions based on their local knowledge and subject expertise, and working collaboratively in partnership with relevant authorities to develop solutions (as opposed to a more formal commissioning or procurement approach). They wanted to see any new procurement regime for health services designed with a view to supporting and facilitating such approaches.

23. Specific examples of challenges were given for which solutions could be developed through increased collaboration, such as uplifts in expenditure often being shouldered by providers as opposed to equal distribution of burden. Opportunities through increased collaboration and innovation were also discussed, such as an encouragement of collaboration that results in joint bids where that would lead to better service value.

Criteria for the establishment of a new health service procurement regime

24. Stakeholders emphasised the need for the new regime to include appropriate governance and transparency arrangements to ensure that processes remained transparent, effective and focused on value for money. One participant summarised this as “efficiency is fine; lack of diligence is not”. Others emphasised that there will be circumstances when tendering is the appropriate approach.

25. Section 3 of the Bill inserts a new section 10A into the National Health Service (Wales) Act 2006. New subsection 10A(3) includes four criteria in respect of which regulations made under section 10A must make provision: ensuring transparency; ensuring fairness; ensuring that compliance can be verified; and managing conflicts of interest. When any regulations are laid, the Senedd may wish to consider whether they are satisfied with the provision made in respect of these criteria.

26. Suggestions for additional criteria for inclusion in section 10A included:

- Requiring any regulations to ensure that contracts are managed effectively and with due regard for value for money.
- Requirements in respect of public involvement and consultation about people's needs.
- Enabling different provision to be made for procurement from third sector and private sector providers, and/or between third sector and private SMEs or micro-providers, when compared to larger private sector organisations.
- Embedding partnership and collaboration with people who use services.

Timescales

27. When the Procurement Bill is implemented, it will replace the current arrangements under the Public Contracts Regulations 2015 with a new set of procurement arrangements. These will apply to the procurement of health services in Wales until such time as provisions in the Procurement Bill are disapplied through use of the 'disapplication power' in section 2 of the HSP Bill. If the PSR is implemented in England at the same time as the Procurement Bill is implemented, and before any regulations are brought forward for Wales under the HSP Bill, then there will be a period during which the procurement of health services in England is subject to the PSR and health services in Wales will be subject to the new arrangements under the Procurement Bill. If any relevant authority in Wales needs to procure health services during that period, they would need to decide either to delay the procurement until regulations are brought forward under the HSP Bill, or progress the procurement under the new arrangements under the Procurement Bill.

28. Stakeholders noted that the impact of this will depend on the specific timings and arrangements for individual contracts. Uncertainty over what services may be available and when procurement activity may take place could affect patients, for example if clinicians are not confident in making referrals to services that may be subject to contractual uncertainty.

29. Broadly, there was consensus that delay may be justified if it results in the development of a regime that is right for Wales, but a lengthy delay could result in disruption. It was suggested that the earlier there is clarity about the services that will be within the scope of regulations under the HSP Bill, the easier it will be for relevant authorities under the Bill, and providers or potential providers, to plan.

30. Some stakeholders also questioned why the HSP Bill had not been brought forward sooner, as the Health and Care Act 2022 had received Royal Assent in April 2022, and the UK Government's consultation on a PSR was published in February 2022.

Capacity and resourcing

31. We heard some concerns about whether relevant authorities have adequate capacity and resource to operate a new health service procurement regime in a way that makes the most of the potential opportunities and enables the development of a more collaborative approach. It was suggested that the will may be there, but the capacity and resource may not. There was consensus that appropriate training will also be required, and that effective procurement is a matter of good practice and not just the legal framework.

32. Local authorities in particular may need to procure health services in their corporate parent role, as well as their broader service delivery functions, which makes it challenging to identify the scale of potential procurement activity. It was also noted that there is a shortage of procurement practitioners within local government in Wales.

33. Concerns about capacity and resource also apply to contract management. It was acknowledged that regular contract change can be disruptive and may not lead to a better service value. However, it is important that the capacity and resource is available to manage any necessary changes in contracts or providers, as well as ensure effective service provision and relationship building during the course of a contract. Without this capacity and resource, there can be little assurance that services meet the needs of the people of Wales.

Engagement and consultation

Engagement and consultation to date

34. The Explanatory Memorandum acknowledges that there has been no formal consultation as part of the development of the Bill. It notes that:

- Informal consultation took place in summer 2022 with NHS Wales finance, procurement and commissioning leads.
- Health unions were consulted via the Wales Partnership Forum Business Committee in autumn 2022.

- Consultation has taken place with “a number of stakeholder groups including the Wales Council for Voluntary Action (WCVA), Welsh Local Government Association (WLGA)”.
- Consultation with “economic groups and industry” is planned for spring 2023.

35. Stakeholders told us their awareness of the Bill prior to its introduction varied. Some stakeholders said that they or their organisations had had informal meetings with Welsh Government officials, although the opportunities for discussion and dialogue during such meetings had varied. Others said they had been unaware either of the Bill or of the fact it may have potential implications for their organisations until they had been invited to contribute to our scrutiny. Some organisations had followed the development of arrangements in England, including the consultation on the PSR, but were unaware of its potential implications for Wales.

Consultation and engagement on the regulations and guidance

36. Stakeholders suggested that for consultation to inform the regulations and guidance to be effective, it would need to be accompanied by clear communication and accessible explainers to ensure that all relevant stakeholders can engage in an effective way with the consultation. Some of the issues involved are technical, and smaller third sector or private providers, or independent contractors such as GPs or dentists, may otherwise find it difficult to engage meaningfully with the consultation. It was suggested that the consultation should include informal discussion events (either before the formal consultation period or early within it) to help people and organisations to understand the issues before responding formally. It was also suggested that the consultation could be an opportunity to improve mutual understanding between health boards and the third sector.

37. They also suggested that the consultation needs to be clear about what any new regime would mean for different levels of commissioning (local, regional and national). Other issues they would like to see addressed in the consultation included:

- The impact of any new regime on relationships between relevant authorities and providers, especially if financial constraints are likely to result in more regional commissioning.
- How the new regime will accommodate and facilitate innovation, including through alternative funding sources such as charitable or lottery funding.

38. Stakeholders were not clear on the nature and content of the consultation that would be undertaken, and said that this could affect their view on whether a 12-week consultation was

sufficient. If the Welsh Government's intention is to mirror the PSR exactly, there may be limited scope for stakeholders to influence the new regime. However, if the Welsh Government intends to take a different approach for Wales, then this needs to be reflected in the consultation approach and timescales.

Annex 1: Organisations participating in the discussion event

The following organisations took part in the event:

- Association of Directors of Social Services Cymru
- British Dental Association
- Care and Repair Cymru
- Care Forum Wales
- Marie Curie
- Mind Cymru
- Royal College of General Practitioners
- Wales Council for Voluntary Action
- Wales TUC
- Welsh Local Government Association