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Y Gweinidog Iechyd a Gwasanaethau Cymdeithasol
Minister for Health and Social Services



Llywodraeth Cymru
Welsh Government

Russell George MS
Chair,
Health and Social Care Committee
SeneddHealth@senedd.wales

18 May 2023

Dear Russell,

I refer to the Health and Social Care Committee's report published on the 28 April with their findings and recommendations as part of Stage 1 scrutiny of the Health Service Procurement (Wales) Bill.

I outlined my responses to the Committee's recommendations as part of the General Principles debate on the Bill in Plenary on the 9 May, where I also gave a commitment to provide a full written response. This can be found at Annex A.

I would like to reiterate my thanks to the Committee for scrutinising the Bill and its supporting documentation.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'M. E. Morgan'.

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Rydym yn croesawu derbyn gohebiaeth yn Gymraeg. Byddwn yn ateb gohebiaeth a dderbynnir yn Gymraeg yn Gymraeg ac ni fydd gohebu yn Gymraeg yn arwain at oedi.

We welcome receiving correspondence in Welsh. Any correspondence received in Welsh will be answered in Welsh and corresponding in Welsh will not lead to a delay in responding.

ANNEX A

HEALTH SERVICE PROCUREMENT (WALES) BILL

WELSH GOVERNMENT RESPONSE TO THE HEALTH AND SOCIAL CARE COMMITTEE'S STAGE 1 SCRUTINY REPORT 28 APRIL 2023.

Recommendation 1: The Senedd should agree the general principles of the Health Service Procurement (Wales) Bill, but throughout the scrutiny of the Bill and any regulations and guidance made under it, Members of the Senedd should have regard to the issues highlighted in our report.

Response: ACCEPT

I would like to thank the Committee for its considered scrutiny of the Bill. I am pleased that the Committee has recognised the need to bring this Bill forward and for recommending that the Senedd agrees the General Principles of the Bill.

Recommendation 2: In its response to our report, and during the Stage 1 debate, the Welsh Government should provide further information and assurance about how the provision in the new section 10A of the National Health Service (Wales) Act 2006 (to be inserted by section 3 of the Health Service Procurement (Wales) Bill) will ensure that there are sufficient arrangements embedded in any new health service procurement regime for Wales to ensure that it operates openly, transparently and in a manner that gives confidence to providers and potential providers as well as patients and service users. In providing this information and assurance, the Welsh Government should reflect and comment on the calls we have heard for the regulations to include provision for relevant authorities to consult and engage patients and service users when making procurement decisions.

Response: ACCEPT IN PRINCIPLE

I have considered the Committee's recommendation and its request to provide specific assurances that there are sufficient safeguards in place to ensure that the proposed new procurement regime operates in an open and transparent manner; and takes into account the views of patients and service users.

I am happy to accept in principle recommendation 2 from the Committee and would like to address these points raised under this recommendation individually:

- ***Provisions for openness and transparency under the proposed new health service procurement regime.***

I would like to assure the Committee that the issue of transparency under the proposed new procurement regime has been carefully considered during the development of the Bill.

The key procurement principles around openness and transparency are already covered under existing provisions on the face of the Bill. The new section 10A(3) of the National Health Service (Wales) Act 2006, as is to be inserted by section 3(2) of the Bill, places a duty on the Welsh Ministers to make provisions in the future regulations for the purpose of ensuring transparency, fairness and compliance, and to manage conflicts of interest. The detail of how these principles will be embedded throughout the proposed new regime will be developed and expressly set out in the future regulations and statutory guidance. An example of how this could work in practice, may include requirements for 'relevant authorities' to publish details of contract awards via agreed reporting mechanisms, the establishment and implementation of robust recording and decision making rationale, or the publishing of notices for competitive tendering.

As such, I am confident that the provisions already on the face of the Bill provide the necessary safeguards to ensure that the proposed new procurement regime will operate in an open and transparent manner.

- ***Views of patients and service users***

I note the Committee's comments in relation to consultation and engagement of patients and service users when making procurement decisions.

Delivering health services that work for patients and service users is paramount; however, we need to be cognisant of the practicalities of consulting the general public, alongside delivering individual service contracts, whilst seeking to reduce bureaucracy for 'relevant authorities' and service providers.

As such, I will further consider how the views of service users could be reflected during the development of the future regulations and statutory guidance. This could include for example, exploring the role of 'Llais' and how it could contribute towards this aim.

Recommendation 3: The Welsh Government should consider bringing forward amendments to the definition in the new section 10A(1)(b) of the National Health Service (Wales) Act 2006 (to be inserted by section 3 of the Health Service Procurement (Wales) Bill) to clarify that only goods and/or other services that are 'substantively' or 'directly' connected to the health service that is being procured may be procured under any new health service procurement regime.

Response: NOT ACCEPTED

I understand the committee's comments that 'mixed procurement' under the proposed new procurement regime needs to be clearly and narrowly defined.

Section 10A(1)(b) of the National Health Service (Wales) Act 2006, to be inserted by section 3(2) of the Bill allows the Welsh Ministers to make provision, via regulations, for the processes and objectives to be followed by 'relevant authorities' when procuring goods or other services that are 'connected to' health services (i.e. 'mixed procurement').

This aligns with the approach being taken by the Department of Health and Social Care's (DHSC) for their proposed Provider Selection Regime (PSR) in England, where the detailed tests for 'mixed procurement' will be included in their forthcoming regulations. I am aware that the PSR could include tests that will only allow in-scope health care services, to be mixed with other goods or services that are normally procured outside of the PSR, when these cannot reasonably be supplied under a separate contract, and where the PSR health care service element is the highest value.

It is our desire to maintain the option to align our proposed procurement regime with the proposed PSR in England. As such, I do not feel that it is sensible to place additional tests on the face of the Bill and diverge from the approach being undertaken by DHSC at this point in time. Therefore, I maintain my position that the best place to include provisions that deal with the detailed tests for 'mixed procurement' is in the future regulations, rather than adding additional criteria on the face of the Bill.

This approach will also align with proposals for 'mixed procurement' as part of the UK Government's Procurement Bill; ensuring that there is a clear and coherent approach and the correct application of the appropriate procurement regime.

Therefore, I do not accept this recommendation.

Recommendation 4: The Welsh Government should outline what steps it is taking to assess whether similar reforms to those proposed for health service procurement in Wales would also be beneficial for the procurement of social care services.

Response: ACCEPT

I note the Committee's recommendation to explore whether similar procurement reforms can benefit the future delivery of social care services in Wales.

Our policy in the first instance is to align with the DHSC's PSR in England, which doesn't currently include the procurement of social care services in isolation. There is also the added issue of a number of legal complexities in respect of social care procurement. For these reasons we are not considering widening the scope of the proposed new procurement regime at this point in time to include social care in isolation.

However, I am happy to accept the Committee's recommendation to assess and review our position in relation to the procurement of social care services at a future point in time.

Recommendation 5: The Welsh Government should bring forward amendments to include requirements on the face of the Health Service Procurement (Wales) Bill that the Welsh Ministers must consult stakeholders before the regulation making power in the new section 10A(1) of the National Health Service (Wales) Act 2006 (to be inserted by section 3 of the Bill) is used for the first time.

Response: ACCEPT IN PRINCIPLE

Recommendation 5 from the Committee in respect of consultation crosses over with recommendation 4 from the Legislation, Justice and Constitution Committee, both of which seek an amendment to the Bill to place a duty on Welsh Ministers to consult in respect of the future regulations.

As I outlined in the General Principles debate and in my response to the Legislation, Justice and Constitution Committee's report, we are fully committed to undertaking a public consultation on the operational principles to inform the development of future regulations for the proposed new procurement regime.

However, I note the comments from both Committees and the desire to ensure that appropriate individuals and groups are formally offered the opportunity to input into the process of preparing the regulations.

Therefore, whilst I am unable to fully accept the suggested wording set out in recommendation 5 of the Health and Social Care Committee's report and recommendation 4 of the Legislation, Justice and Constitution Committee's report, I am happy to accept in principle the recommendations and will seek to bring forward an amendment at Stage 2 which places consultation on the development of the regulations on the face of the Bill.

Recommendation 6: The Welsh Government should outline how it will ensure that the implementation, and requirements, of the new health service procurement regime (expected in spring 2024) are communicated effectively and accessibly to all relevant stakeholders, including relevant authorities, and providers or potential providers in the private sector and third sector.

Response: ACCEPT

I note and accept the Committee's recommendation in relation to communicating the requirements of the proposed new procurement regime to 'relevant authorities' and stakeholders. There is also cross over with recommendation 9 from the Committee in relation to engagement with people with protected characteristics (or their representatives).

The details of how we will undertake stakeholder engagement will be produced as part of a comprehensive stakeholder engagement plan for the development of the future regulations and implementation for the proposed new health service procurement regime in Wales. We are also mindful to align with proposed stakeholder engagement and training planned by DHSC for their proposed PSR and wider procurement reforms under the UK Government's Procurement Bill.

I am committed to providing more detail on the proposed stakeholder engagement in due course.

Recommendation 7: The Welsh Government should provide more information about how the impact and effectiveness of the Health Service Procurement (Wales) Bill, and any regulations and guidance made under it, will be monitored and reviewed. This should include clarity on the timescales for any actions, and confirmation that the outcomes of any review will be published.

Response: ACCEPT

Recommendation 7 from the Committee crosses over with recommendation 4 from the Finance Committee's report in respect of monitoring and reviewing the impact of the Bill.

I note and accept the recommendation from both committees and will seek to ensure that provisions are built into statutory guidance to monitor the use and effectiveness of the proposed new regime in a timely manner.

The Explanatory Memorandum to accompany the Bill sets out our commitment to monitor and review the implementation of this Bill, together with the impacts of its provisions, in the post implementation period.

During the development of the future regulations and statutory guidance, my officials and I will consider the most meaningful methods for monitoring the implementation of the Bill's outputs, being mindful of ongoing stakeholder feedback on the effectiveness of the proposed new regime, and the ability to adapt and align with any future changes instigated by DHSC under their proposed PSR.

Recommendation 8: The Welsh Government should update the Explanatory Memorandum after Stage 2 to provide further information about how the Health Service Procurement (Wales) Bill (and the anticipated regulations and statutory guidance) reflect, are consistent with, and contribute to the broader policy, legislative and strategic context, including the Well-being of Future Generations (Wales) Act 2015; the Social Partnership and Public Procurement (Wales) Bill; the programme for transforming and modernising planned care and reducing NHS waiting lists; and commitments to being a Fair Trade Nation and a Deforestation Free Nation, developing the Foundational Economy, eliminating modern slavery from public sector supply chains, measuring consumption emissions regarding carbon, and Net Zero and biodiversity loss targets.

Response: ACCEPT

I am happy to accept this recommendation from the Committee and will ensure that the Explanatory Memorandum is updated after Stage 2 scrutiny to reflect how the Bill and future regulations and statutory guidance consider the broader legislative, strategic and policy aims outlined above.

Recommendation 9: The Welsh Government should set out how it will ensure that the process of developing regulations and statutory guidance under the Health Service Procurement (Wales) Bill includes meaningful engagement and consultation with people with protected characteristics (or their representatives).

Response: ACCEPT

I am happy to accept this recommendation from the Committee. I am committed to providing more detail on the proposed stakeholder engagement in due course, as detailed above in my response to recommendation 6.

Recommendation 10: The Welsh Government should update the Explanatory Memorandum after Stage 2 to clarify that local authorities are subject to the Public Sector Equality Duty.

Response: ACCEPT

I am happy to accept this recommendation from the Committee and will ensure that the Explanatory Memorandum is updated after Stage 2 scrutiny to clarify that local authorities are subject to the Public Sector Equality Duty.

Recommendation 11: When the Welsh Government lays regulations under the new section 10A of the National Health Service (Wales) Act 2006 (to be inserted by section 3 of the Health Service Procurement (Wales) Bill) before the Senedd, the Explanatory Memorandum for the regulations should include an assessment of whether any of the objectives in the regulations engage the UK Internal Market Act 2020 as they relate to the procurement of goods connected to health services, and if so whether is a risk that the practical effect of the objectives could be undermined.

Response: ACCEPT

I am happy to accept this recommendation from the Committee and will ensure that the Explanatory Memorandum is updated after Stage 2 scrutiny to provide details on assessments in relation to whether any of the objectives in the regulations engage the UK Internal Market Act 2020.