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Dear Chair

Ministerial Direction: NHS Pension Tax proposals

As you will be aware, on 18 December 2019 the First Minister issued a Ministerial Direction to the Permanent Secretary. She had requested this from him via a letter of the same date, in her capacity as Principal Accounting Officer for the Welsh Government.

The purpose of this letter is to aid your Committee's consideration of the Ministerial Direction, in accordance with paragraph 3.4.3 of *Managing Welsh Public Money* and Standing Order 18.3(ii).

The nature and purpose of Ministerial Directions

As this is the first occasion that a Ministerial Direction has been sought and issued in Wales since devolution in 1999, it may be helpful to your Committee if I briefly set out the nature and purpose of such Directions.

Accounting Officers are personally responsible for their actions and must be able to assure the National Assembly and the public of high standards of probity in the management of public funds. They are required to have regard to:

- **Regularity** – ensuring that expenditure is within legal powers and complies with parliamentary authority, including budget ambits;
- **Propriety** – ensuring that expenditure is in accordance with the values and behaviour expected of the public sector;
- **Value for money** – ensuring economy, efficiency and effectiveness in public expenditure decisions; and
- **Feasibility** – ensuring that spending proposals can be implemented accurately, sustainably or to the intended timetable.

A Ministerial Direction is a written instruction to an Accounting Officer to proceed with expenditure that the Accounting Officer considers breach one or more of these four criteria.

An Accounting Officer in receipt of a Ministerial Direction is required to comply with its instructions promptly, and to copy the relevant papers to the Auditor General. The Accounting Officer should be prepared to explain the Minister's course of action, if asked, but does not bear personal responsibility for the actions taken to comply with the Direction or for the associated expenditure.

Ministerial Directions are a relatively rare occurrence in Whitehall, and only 60 were issued between 1990 and 2017. They generally arise in situations where the relevant Minister wishes to proceed with spending that is contrary to the formal written advice provided to that Minister by their departmental Accounting Officer.

The Ministerial Direction issued on 18 December 2019 to the Permanent Secretary for the Welsh Government

Section 3.4 of '*Managing Welsh Public Money*' sets out the arrangements under which a Ministerial Direction can be issued in Wales. It is triggered by the Principal Accounting Officer and is sought in writing from the First Minister.

In this case, the issue has arisen in respect of potentially irregular expenditure by the Welsh Government and NHS Wales employer bodies (the local health boards and NHS Trusts in Wales) on reimbursing NHS Wales clinical staff for any pension tax charges that they may incur whilst undertaking additional shifts during the 2019-20 tax year.

NHS Pension scheme and pension tax legislation is not devolved to Wales, and HM Treasury has made several changes to the tax arrangements on pension contributions in recent years. These include the introduction of tapering, and also a reduction in the Annual Allowance limit from over £200k in 2011-12 to £40k in 2018-19. As a result, in cases where an individual's pension contributions exceed certain annual and / or lifetime pension contribution allowance limits, then they are taxed at a higher rate on the whole of their contributions, creating a sudden 'cliff edge' increase in tax liability.

In a Written Statement on 13 November 2019, the Minister for Health and Social Services had noted that NHS Wales bodies were:

'regularly reporting that senior clinical staff are unwilling to take on additional work and sessions due to the potentially punitive tax liability. In certain circumstances this could lead to additional tax charges in excess of any additional income earned'.

These personal tax implications have driven a significant behavioural change which the Welsh Government considers is impacting on the ability to deliver NHS services to patients. Across the UK, the NHS relies very heavily on clinicians undertaking additional hours to support the delivery of services, to fill gaps in rotas and cover for colleagues who are absent. Undertaking these additional hours results in increased pay and hence increased pension contributions. As this additional pay is generally variable, it can tip those contributions over the 'cliff edge' and result in significant additional tax liability. As it is difficult for individual doctors to work out which individual extra shift will push them over the additional

tax threshold, NHS Wales has found that they are simply declining to take the extra shifts.

The Minister noted in his 13 November statement that:

‘This has led to some appointments and operations being delayed, with information provided by health boards to officials suggesting that between April and August 2019, over 2,000 outpatient, diagnostic, inpatient or day-case sessions have been lost affecting over 15,000 patients. Other areas impacted by the very real concern over the additional tax implications include:

- Senior clinical staff not putting themselves forward for additional responsibilities and clinical leadership roles such as Clinical Directors;
- Senior clinical staff bringing forward their planned retirement dates thereby, in times of material levels of vacancies, reducing clinical capacity in the NHS.’

Whilst the UK Government has committed to looking to change the tax and pension arrangements to avoid this issue in the future, any such changes are highly unlikely to address the service delivery impact over the remainder of the current financial year, which is also the period of greatest annual pressure on NHS services.

In addressing this issue, the Welsh Government has had to take account of the way in which the Department for Health and NHS England has opted to act. On 22 November 2019, the Secretary of State for Health and Social Care issued a [Direction](#) to the Accounting Officer for NHS England to proceed with plans to commit to making payments to clinical staff outside of the NHS pension schemes to restore the value of their pensions benefits packages. In essence, if NHS England clinicians opt to use the ‘Scheme Pays’ facility to settle annual allowance tax charges arising from their 2019-20 NHS pension savings (ie settling the charge by way of reduced annual pension, rather than by making an immediate one-off payment), then their NHS employers will meet those tax charges on their behalf.

This solution required the issue of a Direction because it could be viewed by HMRC to constitute tax avoidance and *Managing Public Money* (which is mirrored by its Welsh equivalent) specifically states that ‘public sector organisations should not engage in...tax evasion, tax avoidance or tax planning’.

The First Minister’s Direction of 18 December therefore serves to bring NHS Wales into line with the position in England, by replicating the solution adopted by the NHS Executive under the Secretary of State’s Direction. It is clear from the 18 December exchange of letters that, given the potentially adverse impacts on NHS Wales of the English decision, both the Permanent Secretary and the First Minister considered that the Welsh Government had little alternative but to follow suit.

Further information regarding the NHS Pension Scheme and the mechanics of the tax mitigation measures covered by the Ministerial Direction can be found on the website of the [NHS Wales Confederation](#).

Potential Assembly examination of the Ministerial Direction

I am pleased to see that the Welsh Government has taken the initiative in providing copies of the correspondence to the Chairs of the Public Accounts, Finance and Health, Social Care & Sport Committees of the National Assembly. It is for the Assembly to determine how best to scrutinise Ministerial Directions and I suggest that some co-ordination of activity may well be needed.

Whilst the Direction has been issued by the First Minister at the request of the Principal Accounting Officer, this is because that is the mechanism specified under Managing Welsh Public Money. However, it may be the case that any detailed Assembly scrutiny is best directed towards the Minister for Health and Social Services and to the Director General of the Health and Social Services Group, as the proposals covered by the Direction sit within their portfolio and budget.

The following areas may, in particular, warrant further examination by the Assembly:

Effectiveness of inter-governmental communications

1. The UK Government's Ministerial Direction was issued on 22 November, but the First Minister's Direction was not issued until 18 December. Why is there a four-week time gap between the two Directions?
2. When did the Welsh Government first become aware of the UK Government's intention to implement the 'Scheme Pays' NHS pensions solution?
3. The Permanent Secretary's 18 December letter to the First Minister explains that officials had not identified the regularity issue regarding potential tax avoidance within their 26 November submission to the Minister for Health and Social Services. Why was this key point omitted from their consideration, given that the regularity issue had already been specifically addressed within the UK Government's Direction issued on 22 November?
4. The Permanent Secretary's letter of 18 December encloses an extract from 'Managing Welsh Public Money', which notes at para 5.6.1 that *'it should be standard practice to consult HMRC about transactions involving non-standard approaches to tax before going ahead'*. However, the letter is silent on this point. Did the Welsh Government consult HMRC, or has it relied on the UK Government to do so on its behalf? If the latter, what assurances did the Welsh Government receive?

Budgetary implications

5. The Direction provides no indication of expected cost. What estimates have the Welsh Government made regarding the potential level of irregular expenditure that it may incur in the 2019-20 financial year and beyond? How confident is it in those estimates?
6. How will the expenditure be funded? Will NHS Wales bodies receive additional in-year funding to cover the costs of the scheme, or will they be expected to meet this from within their existing resource allocations?
7. Does the Welsh Government intend to continue with these arrangements in future years, in the event that the UK Government's proposed April 2020 consultation on changes to NHS pension legislation is either delayed or does not result in changes to that legislation?

The Welsh Government's process for issuing Ministerial Directions

8. Are there lessons for the Welsh Government from this first experience of issuing a Ministerial Direction since devolution in 1999? What are they?
9. What changes (if any) could usefully be made to the requirements set out in 'Managing Welsh Public Money' for any future Directions?

I understand that the Public Accounts Committee intends to consider the Ministerial Direction at its 6 January meeting, and I hope that this advice is helpful to the Committee in its deliberations.

I am copying this letter to the Chair of the Finance Committee and the Chair of the Health, Social Care & Sport Committee. Given this is the first time that a Ministerial Direction has been issued since the start of devolution, I am also copying to the Llywydd so that she can consider any procedural precedents it may set or issues that arise.

Yours sincerely



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