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Llywodraeth Cymru
Welsh Government

Russell George MS
Chair,
Health and Social Care Committee

SeneddHealth@senedd.wales

17 March 2023

Dear Russell,

Thank you for your letter and the questions put forward by your Committee relating to the Health Service Procurement (Wales) Bill. I am pleased to provide my response which is attached at Annex A.

In your letter, you also offered the opportunity to provide supplementary written evidence in relation to the Bill. As such, I have provided additional information on liaison with the Department of Health and Social Care to support the Committee with the scrutiny of the Bill.

I trust the responses in Annex A answer your questions. However if there are any further questions or areas requiring clarification, my officials and I are happy to provide further information in writing, or as part of a technical briefing session.

I am copying this letter to the Chair of the Legislation, Justice and Constitution Committee and Chair of the Finance Committee for information.

Yours sincerely

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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 - RESPONSE TO QUESTIONS FROM THE HEALTH AND SOCIAL CARE COMMITTEE, 9 MARCH 2023

Q1: Please provide a timeline setting out key milestones and your current best estimates of the timescales associated with the HSP Bill, regulations and other associated events, including:

- a. Your understanding of when the UK Government's Procurement Bill is likely to get Royal Assent and come into force; when the UK Government is expected to publish the outcomes of its consultation on a Provider Selection Regime (PSR); and when the UK Government is expected to lay draft regulations to give effect to the PSR before Parliament.**

UK Government's Procurement Bill

Following its introduction in May 2022, the UK Government's Procurement Bill has completed its passage through the House of Lords and is now well on its way through the House of Commons. It is expected to receive Royal Assent in late Spring 2023, after which, secondary legislation will be made to bring some elements of the Bill and the wider regime into effect. This means the Bill is likely to 'go live' in early 2024.

Department of Health and Social Care's (DHSC) Provider Selection Regime

DHSC and NHS England are working to establish the Provider Selection Regime and will provide an update on delivery in due course, including the publication of the consultation responses, which are expected to be made public prior to the laying of the regulations. The regulations are anticipated, with DHSC advising stakeholders that the Provider Selection Regime is not expected to be in use before July 2023 – see information on link [here](#).

- b. When you anticipate the 12 week consultation to which you have committed will take place?**

At present, the expectation is for the consultation to take place as soon as is practical, following Royal Assent, subject to Senedd approval. This would mean the consultation period is likely to begin in early Autumn. However, this timing is predicated on having seen the final Regulations and guidance on the Provider Selection Regime from the DHSC in the next few months, to enable us to develop operational principles for Wales, on which we intend to consult.

- c. When do you anticipate laying draft regulations and publishing statutory guidance under the Bill, and when do you anticipate them coming into force?**

Notwithstanding the assumptions of the successful passage of both the UK Government's Procurement Bill and the Health Service Procurement (Wales) Bill, and the receipt of the detail of the Provider Selection Regime from DHSC, we

anticipate consulting on the operation principles of a new health service procurement regime for Wales as detailed above in Q1(b). We anticipate laying regulations in early 2024 and those regulations and coming into force in Spring 2024.

This proposed timeline aims to coincide as far as is possible with wider procurement reform changes as a result of the UK Government's Procurement Bill to minimise operational impact for the 'relevant authorities' who will be implementing the new procurement regimes.

Q2: A broad summary of the approach you anticipate taking in your 12 week consultation. For example, will the consultation focus on the suitability of the UK Government's PSR for application in Wales, on the principles that might underpin new arrangements in Wales, or on specific draft regulations or draft statutory guidance.

Our current intention to undertake a 12 week public consultation on the operational principles of the new procurement regime, based on how the Provider Selection Regime will operate in England and whether this is an approach we should replicate in Wales to a greater or lesser degree where appropriate.

The outcome of the consultation exercise will inform the development of the future regulations and statutory guidance (which will be developed in partnership with NHS Wales). As such, we are not at this stage proposing to consult on the detail of Welsh regulations and statutory guidance.

Q3: In your session with the Legislation, Justice and Constitution Committee on 6 March, the committee Chair, Huw Irranca-Davies MS, questioned the interaction between the United Kingdom Internal Market Act 2020 and goods connected to health services that are procured following regulations made under the Bill's 'creation' power. In response, one of your officials explained that the Welsh Government's position is that "when the Senedd legislates in a non-reserved area, it does so free from the requirements of the Act." As this includes where primary legislation provides regulation-making powers, "provisions relating to the procurement of goods connected to healthcare services contained in both the Bill and any future regulations made using the powers in this Bill will not engage the UK Internal Market Act." Are you able to provide further analysis that demonstrates how and why the Welsh Government has reached this view?

The Welsh Government's position is that the Senedd's legislative competence is not impacted by the UK Internal Market Act - i.e. it does not prevent the Senedd from, for example, banning or regulating the sale of a variety of goods in Wales, unless those same items are also subject to equivalent bans or regulation across the UK, or because the UK Government has agreed to a specific exclusion on an issue. To achieve this, given the status of the Government of Wales Act 2006 as a constitutional statute, would require express amendment to large areas of the Senedd's existing competence. The UK Internal Market Act does not do this. To do otherwise – to impliedly amend competence – is contrary to the principle of legality. This is why both the Bill and any future regulations will not engage the UK Internal Market Act.

Supplementary information

Ongoing relationship with the Department of Health and Social Care on the Provider Selection Regime

I would like to take the opportunity to outline the position in relation to previous and ongoing dialogue with DHSC on the introduction of the Provider Selection Regime in England.

The UK Government's Health and Care Act received Royal Assent in April 2022 and the provisions in the Act relating to health service procurement applied to England only. There had been limited interaction between DHSC and my officials on the Provider Selection Regime at this time as DHSC's policy was being developed, and there was limited appreciation by DHSC on the perceived operational impact for health service procurement in Wales.

However, as policy was further developed and interaction increased, the potential impact of the proposed Provider Selection Regime on health service procurement in Wales was recognised. As a result, in July 2022 I wrote to the then UK Government's Minister for Health, Maria Caulfield MP, to express my desire to better understand how the planned introduction on the Provider Selection Regime in England would impact health service procurement in Wales. I stressed the importance of strengthening the existing relationship between our officials; continuing engagement on the matter and requesting sight of the draft Provider Selection Regime regulations at the earliest opportunity.

My officials and their counterparts in DHSC have since fostered an excellent working relationship. DHSC have maintained regular contact with my officials on the progress of the Provider Selection Regime and my officials have discussed the introduction of the Health Service Procurement (Wales) Bill. Where appropriate to do so, DHSC have provided my officials with draft information on the Provider Selection Regime proposals, including sight of draft regulations, which were shared in confidence early in their development. This close working relationship remains in place and we anticipate that DHSC will share copies of the completed regulations when finalised and ready for laying.