

SL(6)567 – The Health Services (Provider Selection Regime) (Wales) Regulations 2025

Background and Purpose

These Regulations change the way that health services, provided as part of the NHS in Wales, are procured.

The Regulations replace the existing public procurement regime provided by the Public Contracts Regulations 2015 (PCR 2015). The Regulations also respond to wider changes in the public procurement legal landscape in the United Kingdom, which has seen a number of changes since the United Kingdom left the European Union.

Key developments have included the Procurement Act 2023, which reforms the way in which public bodies procure goods and services and repeals the PCR 2015. Changes to the way health care services are procured in England have also occurred with the introduction of the Provider Selection Regime by the UK Government.

In light of these changes, the Health Service Procurement (Wales) Act 2024 provides the Welsh Ministers with powers to implement changes to health service procurement in Wales.

The Regulations provide for the introduction of a bespoke procurement regime, to be known as the 'Provider Selection Regime Wales' or 'PSR Wales', for the procurement of health services provided as part of the NHS in Wales. The Regulations broadly seek to restore the 'level playing field' for health service procurement across England and Wales, providing a new regime governing the procurement of these services in Wales.

The Regulations apply to the procurement of health services by relevant authorities in Wales, i.e.

- a county council or county borough council;
- a local health board;
- a National Health Service trust;
- a special health authority.

Schedule 1 to the Regulations sets out the relevant health services, by reference to Common Procurement Vocabulary (CPV) codes. Schedule 1 includes, for example:

- Surgical hospital services
- Rehabilitation hospital services
- Outpatient care services
- Cardiology services
- Services provided by nurses
- Physiotherapy services
- Ambulance services
- Residential nursing care services
- Optician services



Procedure

Draft Affirmative

The Welsh Ministers have laid a draft of the Regulations before the Senedd. The Welsh Ministers cannot make the Regulations unless the Senedd approves the draft Regulations.

Technical Scrutiny

The following point is identified for reporting under Standing Order 21.2 in respect of this instrument.

1. Standing Order 21.2(i) – that there appears to be doubt as to whether it is intra vires

Regulation 5(c) says that when procuring relevant health services, a relevant authority must act having regard to the Wales procurement policy statement published under section 14 of the Procurement Act 2023.

We make the following points:

- (a) The reference to the policy statement in regulation 5(c) does not appear to be a reference to a specific, existing policy statement. The reference appears to include future statements published under section 14.
- (b) Policy statements published under section 14 could change the effect of the Regulations. When procuring relevant health services (i.e. when implementing the Regulations), relevant authorities will not be able to ignore the policy statements – relevant authorities will have to consider the statements carefully and follow them unless there is a good reason not to. Therefore, the policy statements may have an effect on the Regulations.
- (c) There is a long-standing presumption against sub-delegation.
- (d) We are concerned that regulation 5(c) amounts to unauthorised sub-delegation because it could allow the Welsh Ministers to change the effect of the Regulations via policy statements.
- (e) The enabling powers are powers to make provision by Regulations, not by policy statements.
- (f) If anything is intended to change the effect of the Regulations, it must be set out clearly and precisely in the Regulations themselves. This ensures that the appropriate parliamentary procedure applies to anything that changes the effect of the Regulations.



(g) We agree with the following passage from Craies on Legislation (12th edition):

3.5.4 As well as making no difference for purposes of lawfulness on whom a power to delegate is conferred, it also makes no difference how it is framed or described. A power to make regulations is obviously identifiable as a sub-delegation; but a power to do anything that determines the ultimate effect of the law concerned is equally, but less obviously, a sub-delegation, and its lawfulness or otherwise will depend on the extent of the enabling power.

We ask the Welsh Government whether regulation 5(c) has any effect on the Regulations?

If not, why is regulation 5(c) included in the Regulations?

If yes, does the Welsh Government consider that regulation 5(c) amounts to sub-delegation, and if so, which power is the Welsh Government relying on to make that sub-delegation?

Merits Scrutiny

No points are identified for reporting under Standing Order 21.3 in respect of this instrument.

Welsh Government response

A Welsh Government response is required to the reporting point.

Legal Advisers

Legislation, Justice and Constitution Committee

15 January 2025



Senedd Cymru

Pwyllgor Deddfwriaeth, Cyfiawnder a'r Cyfansoddiad

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Welsh Parliament

Legislation, Justice and Constitution Committee