

Health Service Procurement (Wales) Bill

Bill Summary

May 2023



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On 18 January 2023 the Minister for Health and Social Services (“the Minister for HSS”) **wrote to the Health and Social Care Committee** to advise that she intended to introduce a Health Service Procurement (Wales) Bill to “enable the introduction of a bespoke procurement regime which will apply to Welsh NHS services”.

The **Health Service Procurement (Wales) Bill** (“the HSP Bill”) was introduced to the Senedd on 13 February 2023. The Bill is a framework Bill. It does not contain any substantive law but provides Welsh Ministers with powers to make regulations:

- A ‘disapplication power’ which will enable the Welsh Ministers to disapply provisions of the UK Procurement Bill, currently progressing through Parliament, once enacted. That Bill would otherwise apply to the procurement of health services.
- A ‘creation power’ which will enable Welsh Ministers to introduce a new separate procurement regime for these health services in Wales.

The Bill was referred to the Health and Social Care (HSC) Committee for **Stage 1 scrutiny**. Ahead of the Stage 1 debate, **the Committee recommends that the Senedd agrees the general principles of the Bill**, whilst highlighting a number of issues that Members should have regard to throughout the scrutiny of the Bill and any regulations and guidance made under it.

The Bill was also the subject of scrutiny by the Senedd’s **Legislation, Justice and Constitution Committee** and **Finance Committee**. This briefing provides a background to the Bill, summarises its provisions and outlines the Senedd’s work on the Bill to date at Stage 1 of the legislative process, noting the views of the HSC Committee.

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1. Background

On 18 January 2023 the Minister for HSS wrote to the Health and Social Care Committee to advise that she intended to introduce a Health Service Procurement (Wales) Bill (“the HSP Bill”) to “enable the introduction of a bespoke procurement regime which will apply to Welsh NHS services”. She said:

The Bill and potential subordinate legislation will seek to give organisations such as the NHS and local authorities in Wales the ability to implement more flexible procurement practices when sourcing health services in Wales. To enable subordinate legislation to be brought forward as quickly as possible, the Government will propose an expedited timetable for the Bill that will enable it to reach Stage 4 prior to the summer recess.

The **HSP Bill** was subsequently introduced on 13 February 2023 with an accompanying **Explanatory Memorandum** (“EM”). The Minister for HSS also provided a **Statement of Policy Intent for Subordinate Legislation**.

2. Summary of provisions

The Bill provides powers in primary legislation to enable the Welsh Ministers to bring forward subordinate legislation to introduce a new procurement regime for Welsh health services. In developing subordinate legislation, the **Welsh Government has stated** it will “work closely with NHS Wales and stakeholders in order to ensure the provisions are relevant, valid and proportionate”. The powers are broad, enabling Ministers to make (and subsequently amend or replace) regulations.

In summary, the Bill provisions are based around the following two powers:

- Section 2: A ‘disapplication power’ which will enable the Welsh Ministers to disapply provisions of the Procurement Bill (which is still currently **progressing through the UK Parliament**) which would otherwise apply to the procurement of health services.
- Section 3: A ‘creation power’ which will enable Welsh Ministers to introduce a new separate procurement regime for these health services in Wales.

The primary power for establishing a new regime is contained in section 3 of the Bill, which inserts **a new section 10A** into the National Health Service (Wales) Act 2006 (“NHSWA 2006”). The creation power is discretionary, but if used, will be subject to the affirmative secondary legislation scrutiny procedure. Under this procedure, the draft regulations must secure the Senedd’s agreement before they

can be made by the Welsh Ministers, but there is no opportunity for Members to propose any amendments to the regulations.

The new section 10A also sets out that any new regulations made must include provision specifying steps to be taken when following a competitive tendering process and must also make provision in the procurement process for ensuring:

- Transparency.
- Fairness.
- That compliance can be verified.
- The management of conflicts of interest.

3. The scrutiny process

Business Committee agreed on **24 January 2023** to refer the Bill to the HSC Committee for Stage 1 scrutiny, with a reporting deadline of 28 April 2023. During the six sitting weeks available the Committee:

- Issued a **call for written evidence**. Due to the limited time available, its consultation was open for just under four weeks.
- Received a **private technical briefing** from Welsh Government officials.
- Took **oral evidence from health bodies**.
- Held a **private informal discussion** with local authorities, third sector and private sector providers, primary care representatives and unions.
- **Wrote to the UK Government** to seek further information about its proposed reforms to health service procurement in England.
- Took **oral evidence from the Minister for HSS**. To inform this session, the Committee also reviewed the oral evidence she had previously given to the **Legislation, Justice and Constitution Committee** (“the LJC Committee”) and the **Finance Committee**, and wrote to the Minister to seek clarity on specific issues.
- **Wrote to health bodies** in Wales to seek further information. The Committee received and noted the responses **at its meeting on 27 April**.

Committee view

The HSC Committee's report on the Bill notes its concerns about the lack of earlier notice and:

It is also regrettable that the expedited timescales for scrutiny of the HSP Bill have necessarily constrained our approach to scrutinising these technical and complex issues, and put pressure on us and stakeholders in the health and social care sectors.

Similar concerns were echoed in the reports on the Bill by the [Finance Committee](#) and [LJC Committee](#).

4. The legislative and policy context

The UK Government's Procurement Bill

The primary driver for the HSP Bill is UK Government proposals to change the way [public bodies in the UK procure goods and services](#), especially proposed changes in the procurement regime for health services in England.

The main legal framework currently governing public service procurement is provided by the *Public Contracts Regulations 2015* ("PCR 2015"). PCR 2015 includes provision for the so-called 'light touch regime', which includes certain social, health and education services in England and Wales that are not subject to the full PCR 2015 procurement regime. This is designed to allow greater flexibility for contracting authorities to adapt a procurement procedure to meet their individual needs while also maintaining transparency and equal treatment.

The UK Government is seeking to introduce a new procurement regime to replace PCR 2015 through its [Procurement Bill](#) which is currently nearing the end of its passage through the UK Parliament. The Welsh Government sought the inclusion of Welsh contracting authorities within the scope of the Procurement Bill, and laid a series of Legislative Consent Memoranda before the Senedd.

The [EM to the HSP Bill](#) notes that the Procurement Bill:

- Does not retain the 'light touch regime' but seeks to introduce the concept of a 'light touch contract' which benefits from exceptions to full competitive tendering under the main provisions of the Bill.
- Will allow the direct award of public contracts for user choice services in line with services designated under the light touch regime.

The Health and Care Act 2022 and the Provider Selection Regime

The UK Government also proposes changing the way in which health care services are procured in England. Section 79 of the **Health and Care Act 2022** (“HCA 2022”) amends the **National Health Service Act 2006** (“NHS Act 2006”) to provide a power for the Secretary of State to make regulations putting new rules in place relating to the procurement of health care services by defined relevant authorities.

Section 79 therefore provides the equivalent ‘creation power’ in relation to England that section 3 of the HSP Bill seeks to introduce for Wales.

HCA 2022 received Royal Assent in April 2022 but Section 79 has not yet come into force. However, the UK Government’s Department of Health and Social Care (DHSC) **has consulted on proposals** to use the power to introduce a new procurement regime for health care services: the Provider Selection Regime (“PSR”). The PSR aims to move away from the previous competitive tendering environment towards a system of greater collaboration and partnership.

As a result, the Procurement Bill includes a ‘disapplication power’ which enables a Minister to disapply any provision of the Procurement Bill where provision made in regulations under the NHS Act 2006 apply. This will enable the PSR to operate in place of the Procurement Bill for the procurement of health care services in England.

The legislative context in Wales

The Minister for HSS has consistently said the PSR reforms are a key driver for the HSP Bill, **on the basis that**:

The provisions in the Bill and the future regulations will facilitate that flexibility, providing a supportive mechanism that aims to maintain the current procurement level playing field for NHS health services between England and Wales. This will assist in mitigating the risk of NHS Wales being adversely affected by the operation of a different health service procurement regime in England.

The Social Partnership and Public Procurement (Wales) Bill (“the SPPP Bill”) was introduced by the Welsh Government in June 2022. The Minister for HSS told the LJC Committee on **6 March 2023** that the SPPP Bill sets out a way of working, whereas the HSP Bill makes provision for “quite technical changes when it comes to procurement” and stated to the HSC Committee **on 30 March** that “by the time we got there, our legal advice told us that we were out of scope, and so we couldn’t be involved in that particular Bill”.

Table 1 in the **HSC Committee's report on the HSP Bill** (at para.22) summarises the timescales for the development of legislation, and identifies which proposals affect only Wales, which affect only England, and which affect England, Wales and Northern Ireland.

5. Rationale for the Bill

In evidence to the **HSC Committee on 30 March 2023** the Minister for HSS explained some of the underlying basis for the HSP Bill was focused around:

What we have been advocating for a while is, perhaps more collaborative working, making sure we've got high-quality services that are delivered efficiently, that are focused on patient outcomes, but making sure we also have the right checks and balances, which ensures that we spend the little money that we have efficiently on services.

The Minister for HSS also said that stakeholders were concerned about regulatory divergence following any implementation of the PSR in England. The Bill was therefore necessary to give Welsh Government the option to decide, once the details of the PSR have been confirmed, whether or not it wants to introduce similar arrangements for Wales.

The HSC Committee asked health bodies about the potential risks of regulatory divergence and a number of themes emerged which are set out in more detail in the **HSC Committee report on the HSP Bill**. There was general support for ensuring a 'level playing field' between England and Wales on procurement, with some concern about the loss to Wales of specialist service capacity if procurement frameworks were not aligned, although one health board response noted that it is "difficult to estimate the potential extent of the risk".

Other stakeholders were also broadly supportive of the Bill's aims, especially in terms of potentially enabling greater local flexibility, co-production and collaboration with local, third sector, independent and smaller providers. At the same time, the **Wales Council for Voluntary Action** cautioned that this flexibility could also be used to "pursue an agenda of outsourcing and privatisation".

6. Designing a health procurement regime for Wales

Existing barriers and potential opportunities

The HSC Committee heard about the barriers and challenges presented by current procurement arrangements, and the opportunities to address these in any new regime. Barriers identified included:

- **The complexity of the health and social care** commissioning landscape in Wales, with a ‘patchwork’ of procurement arrangements and bodies.
- **Short-term funding**, delayed funding decisions, and inadequate transition planning, with this uncertainty impacting on organisations.
- **Variation of working practices across health boards** in ways of working, including timely decision-making, transparency, communication, and responses to rising costs.
- **Difficulties for smaller organisations in building relationships** with relevant authorities, and in being treated as equal partners, with **opportunities missed** for co-production with providers and service users.
- **Some outsourcing and commissioning** in health and social care has resulted in **more insecure work** and poorer pay or terms and conditions.

Opportunities identified included chances to:

- Increase **understanding and awareness of procurement arrangements**, address perceived barriers to entry, and simplify procurement processes.
- Ensure the new regime facilitates **innovation, co-production and collaboration** and helps find new ways to improve patient outcomes.
- Improve value for money and patient outcomes **by improving working relationships and collaboration** to develop services without the need to retender frequently (with associated disruption and costs).
- Better **harness the knowledge and experience** of existing and new providers, especially those from the third sector.

A new health service procurement regime for Wales

The Minister for HSS has indicated consistently that she will not determine details of any new regime for Wales until she has considered the final details of the PSR.

On 30 March 2023, she noted that the powers in the HSP Bill would provide “the

opportunity and the ability to be able to align, should we wish to do so”.

In **oral evidence**, the Minister for HSS acknowledged the current barriers and noted that if she were to introduce a PSR-style regime for Wales, it would give relevant authorities more flexibility to decide whether to roll over contracts that were working well and providing value for money, award contracts directly where appropriate or use competitive tendering where required.

In the same session officials said a new PSR-style regime with a ‘competition-last’ approach could increase opportunities to work collaboratively, and free up capacity to focus on monitoring performance and managing contracts.

Scope of the new health service procurement regime

The lack of clarity about the scope of services to which any new regime in Wales would apply has been a source of uncertainty throughout scrutiny. For example, stakeholders have been uncertain whether the new regime would encompass NHS to NHS procurement (within Wales or cross-border) or primary care services. The Minister for HSS **has stated that**:

We’re expecting that this will apply to clinical healthcare services that are defined under sections 1 and 3 of the National Health Service [Wales] Act 2006, and that covers, basically, prevention, treatment and diagnosis of illnesses. So, it’s very, very broad.

Health bodies **told the HSC Committee that** if arrangements in Wales were to be in line with those proposed for England in the PSR consultation, it would encompass around £550 million per year of current procurement activity. For context, around £9 billion is spent annually on core NHS services in Wales.

The **PSR proposals imply the** new procurement regime in England may include all services covered under the NHS Act 2006, including primary and community care and hospital services.

The HSC Committee’s report on the Bill states that:

It will be important for the consultation planned for autumn 2023 to be clear about the Welsh Government’s intentions in relation to the scope of any new regime.

Balancing flexibility and safeguards

Stakeholders and the HSC Committee were clear about **the importance of procurement arrangements being transparent, structured and properly-**

governed with no reduction in service quality or value for money. It was critical to avoid any perception from the public or stakeholders that due process is not being followed.

Section 3 of the Bill inserts a new section 10A into the NHSWA 2006 including section 10A(2) which provides that regulations must include provision setting out the steps to be taken when following a competitive tendering process, and section 10A(3) which sets out criteria for any new procurement process. The Minister for HSS noted that the regulations and guidance for the new regime may provide details about expectations around patient or community involvement in procurement decisions. But there was also caution from the Minister for HSS and officials about including additional criteria or requirements on the face of the Bill.

Mixed procurement

The new section 10A(1) to be inserted into the NHSWA 2006 by section 3 of the Bill gives Welsh Ministers powers to make regulations that make provision for the procurement of health services and any goods or other services connected to those health services.

The HSC Committee's view was that:

- **There was a need 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 regime.
- The Welsh Government should outline what steps it is taking to assess whether similar procurement reforms would also be **beneficial for the procurement of social care services**.

7. Engagement and consultation

No formal consultation was carried out to inform the development of the HSP Bill. The EM explains that there has been informal engagement with some stakeholders, including NHS Wales finance, procurement and commissioning leads in summer 2022. However, the experience of stakeholders was mixed.

Stakeholders generally welcomed the Minister for HSS's commitment to consult in autumn 2023 and called for the consultation to address how it would impact on commissioning processes, improve relationships between commissioners and providers, and facilitate innovation. They were also keen to understand what would be in regulations and statutory guidance, as well as the details of any new arrangements ahead of implementation.

Committee view

The HSC Committee welcomed the Minister's commitment to a twelve-week consultation, but noted that it would not include draft regulations or guidance. As a result it will be important that the consultation includes sufficient information to enable stakeholders to respond meaningfully.

If a new health service procurement regime is introduced in spring 2024, as the Minister for HSS has indicated is her intention, it will need to be clearly communicated to relevant authorities and stakeholders.

8. The broader policy and legislative context

This is a framework Bill, and much of the detailed design of any new health service procurement regime will be set out in any regulations brought forward under the new section 10A(1) and statutory guidance under the new section 10A(4). However, the HSC Committee heard how important it is that the HSP Bill fits visibly within the wider policy, legislative and strategic context.

The EM notes that a number of impact assessments have been undertaken, including children's rights, equality, health impact, justice, Welsh language, and biodiversity. However, these have not been published.

Committee view

The **HSC Committee welcomed the Minister** for HSS's indication that an integrated impact assessment will be prepared as part of the consultation planned for autumn 2023.

However, the Committee also noted their regret at the lack of published impact assessments which were available to inform scrutiny and also called for an updated EM to provide further information about how the Bill and anticipated regulations will be consistent with the broader policy and strategic context.

The EM 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.

9. Other Senedd committees' analysis

The **LJC Committee** considered the Bill in accordance with its remit. Its report raises several significant issues. It notes:

...we believe that the Welsh Government should have introduced primary legislation of its own to reform the processes underpinning procurement in Wales.

...the Bill is yet another framework Bill introduced by the Welsh Government in this Senedd. We believe that this approach continues to signal an unfortunate trend of the Welsh Ministers taking additional executive powers at the expense of reduced scrutiny by the Senedd.

The Committee also notes specifically that:

While the Minister notes that the Senedd's legislative competence is not impacted by the Internal Market Act, we have concerns about the potential impact of the Act on the practical effect of legislation passed by the Senedd. In this regard, it is unclear from the Minister's response whether regulations to be made under the Bill in respect of the procurement of goods connected to healthcare services may be limited in their practical effect if they trigger the non-discrimination principle for goods set out in the Internal Market Act.

The **Finance Committee** considered the financial implications of the Bill. Its report concludes that Welsh Government has provided its "best estimate for the cost of developing the regime and its initial implementation". This consists of £3.4 million in transitional costs to the Welsh Government and NHS Wales over a three year appraisal period. However, the report also states that:

The full financial implications of the new regime will not be known until the policy details are developed and brought forward in regulations. It is therefore disappointing that we are unable to take a view on many aspects of the financial implications arising from the Bill due to the lack of information available.

...we expect an RIA for any future regulations to fully cost the financial implications of the new health service procurement regime. However, it is disappointing that important elements of the financial implications of the change enabled by this Bill were not available to be scrutinised as part of this process, and that any future changes brought forward through regulations will not be subject to the same degree of scrutiny as those included alongside the Bill itself.

The Committee therefore recommends that:

...the Welsh Government provides a full and robust Regulatory Impact Assessment for any regulations made as a result of the Health Service Procurement (Wales) Bill and that sufficient time is provided to allow the Senedd to consider any related financial implications that will arise.

10. Next Steps

The Senedd will debate the general principles of the Bill (the Stage 1 debate) on 9 May 2023. Should the Senedd agree the general principles, the Bill will proceed to Stage 2 where the HSC Committee moves and votes on amendments.

The Business Committee's timetable for the Bill sets a deadline of 9 June 2023 for Stage 2 to be completed.

The Bill will then be subject to further amendment by all Members of the Senedd in Plenary (Stage 3) before a final Plenary vote on whether to pass the legislation (Stage 4).