

Health Service Procurement (Wales) Bill: Stage 1 report

April 2023

1. Introduction

The Health Service Procurement (Wales) Bill

1. 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 (“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”.¹

2. The HSP Bill was subsequently introduced three and a half weeks later on 13 February 2023 with an accompanying Explanatory Memorandum (“EM”). The

¹ Letter from the Minister for Health and Social Services, 18 January 2023



Minister for HSS has also provided a Statement of Policy Intent for Subordinate Legislation.²

3. The HSP Bill is a framework Bill. It does not contain any substantive law; instead, it provides the Welsh Ministers with powers to make regulations:

- A ‘disapplication power’ which will enable the Welsh Ministers to disapply provisions of the anticipated Procurement Act 2023 (which is still currently a Bill progressing through the UK Parliament) which 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.

Our scrutiny

4. Business Committee agreed on 24 January 2023 to refer the Bill to us for Stage 1 scrutiny, with a reporting deadline of 28 April 2023.³ During the six sitting weeks available to us, we:

- Issued a call for written evidence.⁴ Due to the limited time available, our 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.⁵
- Wrote to the UK Government to seek further information about its proposed reforms to health service procurement in England.⁶
- Took oral evidence from the Minister for HSS. To inform this session, we also reviewed the oral evidence she had previously given to the Legislation, Justice and Constitution Committee (“the LJC Committee”)

² The Health Service Procurement (Wales) Bill, Explanatory Memorandum, Statement of Policy Intent for Subordinate Legislation and other information about the Bill and its passage through the Senedd are available on the [Senedd website](#).

³ Business Committee, [Timetable for consideration: The Health Service Procurement \(Wales\) Bill](#), February 2023

⁴ Health and Social Care Committee, [Consultation: Health Service Procurement \(Wales\) Bill](#)

⁵ Health and Social Care Committee, Health Service Procurement (Wales) Bill: informal discussion, 22 March 2023

⁶ [Letter to the UK Government Secretary of State for Health and Social Care](#), 16 February 2023

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.⁷

Our view

5. It is regrettable that the Welsh Government was not able to provide the Senedd with more notice of its intention to legislate on health service procurement, especially as the UK Government’s consultations on proposed reforms were published in February 2022, the Health and Care Act 2022 (from which the reforms primarily emanate) received Royal Assent in April 2022, and the Welsh Government consulted some stakeholders informally during 2022. The lack of notice precluded the potential for pre-legislative scrutiny, and disrupted our planned work programme.

6. 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.

7. We are grateful to everyone who has been able to contribute to our work.

2. Policy and legislative context

Background

8. The primary driver for the HSP Bill is UK Government proposals to change the way public bodies in the UK procure goods and services,⁸ especially proposed changes in the procurement regime for health services in England.

The ‘light touch regime’

9. 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 (as defined by Common Procurement Vocabulary codes (“CPV codes”)) in England and Wales that are not subject to the

⁷ Letter to health bodies, 4 April 2023

⁸ UK Government, [Policy paper: The Procurement Bill – a summary guide to the provisions](#), 16 June 2022

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's Procurement Bill

10. The UK Government is seeking to introduce a new procurement regime to replace the PCR 2015 through its Procurement Bill.⁹ At time of writing, the Procurement Bill is nearing the end of its passage through the UK Parliament.

11. 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.¹⁰ The EM to the HSP Bill states:

"The Procurement Bill does not retain the 'light touch regime' in its current form and will seek to introduce the concept of a 'light touch contract' (as defined in regulations) which benefits from exceptions to full competitive tendering under the main provisions of the Bill. The Bill will also allow the direct award of public contracts for the supply of user choice services in line with services designated under the light touch regime".¹¹

The Health and Care Act 2022 and the Provider Selection Regime

12. In addition to the broader reforms in the Procurement Bill, the UK Government also proposes changing the way in which health care services¹² 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 to put in place new rules relating to the procurement of health care services by defined relevant authorities.¹³ Section

⁹ [Procurement Bill \[HL\]](#) [accessed April 2023]

¹⁰ Information about the Procurement Bill Legislative Consent Memoranda is available on the [Senedd's website](#). The Senedd voted on [28 March 2023](#) on whether or not to give legislative consent to the provisions so far as they fall within the Senedd's legislative competence. Legislative consent was agreed for the majority of the provisions, with the exception of those relating to "Treaty state suppliers", "Trade Disputes" and related provisions in Schedule 9. The Scottish Government decided not to join the Procurement Bill, retaining instead its own procurement regulations in respect of devolved Scottish authorities.

¹¹ Welsh Government, [Health Service Procurement \(Wales\) Bill Explanatory Memorandum](#), February 2023, para 14

¹² Defined in Part 3 of the Health and Social Care Act 2012.

¹³ Defined as: a combined authority; an integrated care board; a local authority in England; NHS England; an NHS foundation trust; an NHS trust established under section 25 of NHS Act 2006.

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

13. 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 has consulted on proposals to use the power to introduce a new procurement regime for health care services: the Provider Selection Regime (“PSR”).¹⁴ The aim of the PSR is to move away from the previous competitive tendering environment towards a system of greater collaboration and partnership, although competitive tendering will still remain a procurement option should relevant authorities choose to use it.

14. As the UK Government intends health care services in England to be subject to the PSR rather than the Procurement Bill, the Procurement Bill includes a ‘disapplication power’ which enables a Minister of the Crown to disapply any provision of the Procurement Bill where provision made in regulations under the NHA 2006 apply.¹⁵ This will enable the PSR to operate in place of the Procurement Bill for the procurement of health care services in England.

15. In a letter dated 22 March 2023, the lead Minister for the PSR, Lord Markham, said:

“At this time, UK Government in partnership with NHS England is preparing its final draft of the regulations which will set out the detail of the PSR. We plan to lay the regulations for the PSR in UK Parliament once we have a final draft ready to lay.

*The date at which the regulations are laid will also inform our final planned target date to commence the PSR in England. The regulations will be subject to the affirmative parliamentary process before they can come into force”.*¹⁶

¹⁴ UK Government, [Consultation: Preview of proposals for the Provider Selection Regime](#), February 2022 and UK Government, [Consultation: Provider Selection Regime: supplementary consultation on the details of proposals for regulations](#), February 2022

¹⁵ Clause 119 of the Procurement Bill as amended in Public Bill Committee, 24 February 2023. This clause was included in the Bill on introduction. It was removed by non-Government amendment during its House of Lords stages, but was reinstated during committee stage in the House of Commons.

¹⁶ [Letter from the Parliamentary Under-Secretary of State, UK Government Department of Health and Social Care](#), 22 March 2023

The legislative context in Wales

16. 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. It will retain the ability for the NHS in Wales to commission independent health service providers on a co-compliant and collaborative basis, in turn supporting and optimising financial and staff resources, supporting the NHS in Wales to deliver efficiently and effectively”.¹⁷

17. The first supplementary Legislative Consent Memorandum for the Procurement Bill notes that the Welsh Government had initially requested that the powers in the HSP Bill be included in the Procurement Bill, but had subsequently decided to pursue other options instead.¹⁸ In a letter to the LJC Committee, the Minister for Finance and Local Government explained:

“UK Government only committed to the disapplication power within the Procurement Bill. Ministers recognised that both powers were required to effect change and therefore there remained a need to legislate in Wales. Given this need to legislate, Welsh Ministers decided bringing forward a Bill that included both the disapplication and creation powers together provided the necessary legislation and gave greater coherence and accessibility to the legislation”.¹⁹

18. The Social Partnership and Public Procurement (Wales) Bill (“the SPPP Bill”) was introduced by the Welsh Government in June 2022. The EM for the SPPP Bill states that the Bill:

¹⁷ Plenary RoP [para 236], 14 February 2023

¹⁸ Welsh Government, [Supplementary Legislative Consent Memorandum \(Memorandum No.2\): Procurement Bill](#), July 2022

¹⁹ [Letter from the Minister for Finance and Local Government to the Legislation, Justice and Constitution Committee](#), 8 February 2023

*“...provides for a framework to enhance the well-being of the people of Wales by improving public services through social partnership working, promoting fair work and social responsible public procurement”.*²⁰

19. 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”. She said this meant the provisions in the HSP Bill:

*“...didn't sit comfortably with other Bills, and that's why we've taken this route. We did explore [including the provisions in the SPPP Bill] as an option and found that it wouldn't have worked”.*²¹

20. The Minister for HSS explained further to us on 30 March 2023:

*“I think the key thing to remember in relation to the social partnership and public procurement Bill— So, what happened there is that they'd already started on that route before we started on this route. So, we were in a position where, by the time we realised that we'd have to act in this space, there was no scope for us to get involved in that particular Bill. So, the scope was quite limited. Had we got there earlier [...] we might have been able to put something into the social partnership Bill. But 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”.*²²

Timescales

21. Dr Mary Guy, Senior Lecturer in Public and EU Law at Liverpool John Moores University summarised the challenges associated with the scale of legislative change underway in relation to health service procurement:

“In view of the ongoing anticipation of changes both to the Procurement Bill in the UK, and while awaiting clarification of the






²⁰ Welsh Government, [Social Partnership and Public Procurement \(Wales\) Bill Explanatory Memorandum](#), June 2022

²¹ Legislation, Justice and Constitution Committee RoP [paras 43 and 45], 6 March 2023

²² RoP [para 86], 30 March 2023

new procurement regime for the English NHS, the Welsh government may find itself in a particularly challenging area of uncertainty. On the one hand, proposing legislation while not having the full picture relating to NHS procurement in England is particularly challenging as regards how this may be drafted with sufficient flexibility. On the other hand, it is prudent to recognise the potential for negative effects on procurement in the Welsh NHS and to take steps accordingly.”²³











22. Table 1 summarises the timescales for the development of legislative proposals, and identifies which proposals affect only Wales, which affect only England, and which affect England, Wales and Northern Ireland. It also identifies in which pieces of legislation the equivalent ‘creation’ and ‘disapplication’ powers in relation to Wales and England may be found. In the table:

-  = provision or use of a creation power
-  = provision or use of a disapplication power
-  = applies in England
-  = applies in Wales
-  = applies in Northern Ireland
-  = Royal Assent














²³ HSP8 Dr Mary Guy, Senior Lecturer in Public and EU Law at Liverpool John Moores University

Table 1 Summary of legislative timescales









2022

England-only		England, Wales and Northern Ireland	Wales-only
 <p>February 2022: (anticipating the Health and Care Act 2022 gaining Royal Assent) UK Government consults on proposals for an England-only (health care service procurement regime, to be known as the Provider Selection Regime (PSR).</p>	     <p>May 2022: UK Government introduces Procurement Bill to establish a new England, Wales and Northern Ireland sector procurement regime (subject to the Senedd’s consent). The Bill includes an England-only disapplication power for UK Ministers to exempt health care services in England from the new public sector procurement regime.</p>	 <p>July 2022: Welsh Government indicates it is considering how to respond to developments in England, and that options in relation to health services in Wales could include a Wales-only Bill.</p>	
   <p>April 2022: Health and Care Act 2022 receives Royal Assent, giving UK Ministers powers to create an England-only health care service procurement regime (once the relevant provisions are commenced).</p>			

2023

England-only	England, Wales and Northern Ireland	Wales-only
<p data-bbox="203 320 264 443">   </p> <p data-bbox="297 320 757 475"> Summer 2023 (TBC): UK Government expected to use the England-only creation power to: </p> <ul data-bbox="342 491 757 683" style="list-style-type: none"> - Establish an England-only health care service procurement regime. - Publish England-only statutory guidance. <p data-bbox="297 699 757 810"> Regulations will be subject to affirmative procedure in UK Parliament. </p>	<p data-bbox="824 320 884 443">     </p> <p data-bbox="907 320 1413 475"> Spring 2023 (TBC): Procurement Bill expected to receive Royal Assent but not be fully in force at this stage. </p>	<p data-bbox="1444 320 1505 443">  </p> <p data-bbox="1538 320 1998 475"> January 2023: Welsh Government tells HSC Committee it will introduce a Wales-only Bill. </p> <p data-bbox="1444 499 1505 683">    </p> <p data-bbox="1538 499 2020 930"> February 2023: Welsh Government introduces Health Service Procurement (Wales) Bill. The Bill includes Wales-only disapplication and creation powers for Welsh Ministers that are broadly equivalent to the England-only powers in the Procurement Bill and the Health and Care Act 2022. </p> <p data-bbox="1444 954 1505 1077">   </p> <p data-bbox="1538 954 1998 1109"> Summer 2023 (TBC): Health Service Procurement (Wales) Bill expected to receive Royal Assent. </p> <p data-bbox="1444 1133 1505 1192">  </p> <p data-bbox="1538 1133 2020 1369"> Autumn 2023 (TBC): Welsh Government expected to consult for 12 weeks during the development of Wales-only regulations and statutory guidance. </p>

2024

England-only	England, Wales and Northern Ireland	Wales-only
	<div style="display: flex; flex-direction: column; align-items: center;"> <div style="display: flex; align-items: center; margin-bottom: 5px;">  <div style="margin-left: 5px;">Spring 2024 (TBC): new</div> </div> <div style="display: flex; align-items: center; margin-bottom: 5px;">  <div style="margin-left: 5px;">England, Wales and Northern</div> </div> <div style="display: flex; align-items: center; margin-bottom: 5px;">  <div style="margin-left: 5px;">Ireland public sector</div> </div> <div style="display: flex; align-items: center; margin-bottom: 5px;">  <div style="margin-left: 5px;">procurement regime under the</div> </div> <div style="display: flex; align-items: center; margin-bottom: 5px;">  <div style="margin-left: 5px;">Procurement Bill expected to</div> </div> <div style="margin-left: 5px;">come into force. Health care</div> <div style="margin-left: 5px;">services in England expected to</div> <div style="margin-left: 5px;">be exempted through use of</div> <div style="margin-left: 5px;">the England-only disapplication</div> <div style="margin-left: 5px;">power.</div> </div>	<div style="display: flex; flex-direction: column; align-items: center;"> <div style="display: flex; align-items: center; margin-bottom: 5px;">  <div style="margin-left: 5px;">Spring 2024 (TBC): Welsh</div> </div> <div style="display: flex; align-items: center; margin-bottom: 5px;">  <div style="margin-left: 5px;">Government expected to use</div> </div> <div style="display: flex; align-items: center; margin-bottom: 5px;">  <div style="margin-left: 5px;">the Wales-only disapplication</div> </div> <div style="margin-left: 5px;">and creation regulation-</div> <div style="margin-left: 5px;">making powers to:</div> <ul style="list-style-type: none"> - Establish a Wales-only health service procurement regime. - Publish Wales-only statutory guidance. <div style="margin-top: 10px;">Regulations will be subject to affirmative procedure in the Senedd.</div> </div>

Rationale for the Bill

Evidence from the Welsh Government

23. On 30 March 2023 the Minister for HSS explained that her vision for health in Wales was set out in ‘A Healthier Wales’,²⁴ and that health service procurement arrangements should contribute to that. She explained:

“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.”²⁵

24. The Minister said that stakeholders were concerned about the implications of regulatory divergence following any implementation of the PSR in England.²⁶ She said the Bill was 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.²⁷ She said that regulatory alignment could provide benefits for NHS Wales by avoiding potential disruption in its ability to procure services from providers in England, and benefits for Welsh providers who may wish to provide services in England.²⁸

25. Dafydd Evans, the Welsh Government’s Deputy Director for Life Sciences and Innovation, and Senior Responsible Officer (“SRO”) for the Bill, added that NHS Wales procurement specialists had provided “a very clear message” about the “very real risk” that regulatory divergence could result in providers not wanting to provide services in Wales. He said that this could include specialist services including mental health and renal services.²⁹

Health bodies’ views

26. We asked health bodies about the potential risks of regulatory divergence. Jonathan Irvine, Director of Procurement and Health Courier Services at the NHS

²⁴ Welsh Government, [A healthier Wales: long term plan for health and social care](#), updated November 2022

²⁵ RoP [para 15], 30 March 2023

²⁶ RoP [para 28], 30 March 2023

²⁷ RoP [paras 12 and 25], 30 March 2023

²⁸ RoP [para 48], 30 March 2023

²⁹ RoP [para 36], 30 March 2023

Wales Shared Services Partnership (“NHSWSSP”), said that the Bill could help ensure that people and services in Wales were not disadvantaged by the reforms in England. He explained that if the Welsh Government did not legislate, health services in Wales would be subject to the new public sector procurement regime under the Procurement Bill when it comes into force in 2024. Health bodies in Wales, therefore, would need to follow a competitive tendering approach, whereas their counterparts in England would have greater flexibility under the PSR to roll over contracts, award contracts directly, or undertake competitive tendering. He added that a “less burdensome” regime in England could make it comparatively less attractive for providers to provide services in Wales, resulting in either “an exodus” or “slow drip feed away” of providers from the Welsh market.³⁰ He summarised:

“So, it is very much a real risk. [...] the market is becoming more consolidated, therefore we have fewer providers in the market, and that means that the capacity for those providers to provide services into Wales is challenged as it is. So, that is a risk. We also potentially have a risk in terms of current providers who maybe feel, then, they might want to give notice on services that they're currently providing into Wales to move into England.”³¹

27. Huw Thomas, Director of Finance at Hywel Dda University Health Board (“HDUHB”), agreed that regulatory divergence presented a risk whether such divergence resulted from health bodies in Wales being subject to the Procurement Bill, or from the Welsh Government legislating to introduce a Wales-only regime that was (or was perceived to be) significantly different from the PSR:

“...I would urge against diverging in terms of the regulations that we put in place in Wales from what England will develop, because any perceived complexity or difference in doing business in Wales could make it a lot more challenging for us to be able to secure cross-border activity.”³²

28. Risks identified by Huw Thomas included changes in traditional patterns of provision if the establishment of Integrated Care Boards in England under the HCA 2022 leads to tendering for more complex services across bigger

³⁰ RoP [paras 6, 56 and 141], 9 March 2023

³¹ RoP [para 11], 9 March 2023

³² RoP [para 21], 9 March 2023

geographical areas, or protection of local provider capacity for local or sub-regional needs.³³

29. Following the evidence session with the Minister for HSS on 30 March 2023, we wrote to health bodies to ask for any specific examples of contracts or services for health services that they procure, and that they were concerned could be lost or otherwise affected if the PSR proposals were implemented in England, and no equivalent regime were introduced in Wales. We indicated that we would treat any commercially sensitive information in confidence. We are grateful to those health bodies that were able to respond within the tight timescales available.

Potential implications of regulatory divergence: health bodies' views³⁴

NHSWSSP

- NHS Wales bodies currently access some specialist services through English procurement frameworks. NHSWSSP said it was not clear whether such NHS Wales would still be able to access such frameworks if there was regulatory divergence. It added that there has not been any indication to date that English framework providers are inclined to cease provision to NHS Wales through the frameworks, but said that it had become aware that a number of English frameworks were not being renewed.
- Developing equivalent Welsh frameworks (whether because of loss of access or frameworks not being renewed) would have associated costs, and providers already in English frameworks or with relationships with NHS England may be unwilling to engage in procurement processes to gain access to Welsh frameworks. Services that could be affected included proton beam therapy; PET scans; acute services; emergency secondary care services (complex/specialist care); and multiple patient services/surgery. This is potentially a substantial range of clinical services and highlights further the absolute necessity of clarity about the scope of services which are to be included within any new procurement regime.
- NHSWSSP noted that the changing relationships between NHS England bodies and third sector or private sector organisations could mean providers

³³ RoP [paras 8 and 57], 9 March 2023

³⁴ Letter from NHS Wales Shared Services Partnership, 17 April 2023; Letter from the Welsh Health Specialised Services Committee, 17 April 2023; Letter from Aneurin Bevan University Health Board; Letter from Cardiff and Vale University Health Board; Letter from Cwm Taf Morgannwg University Health Board

prioritised NHS England over NHS Wales, with implications for services including secure mental health and learning disability beds.

- There were also concerns for health boards engaged in cross-border arrangements.

Welsh Health Specialised Services Committee (“WHSSC”)

- WHSSC said the procurement environment had become “more difficult” in recent years as a result of upward pressure on prices and supply problems in some areas where there was dependence on a small number of providers. This had increased the competition between NHS Wales and NHS England where goods or services were in limited supply.
- Specific examples where significant regulatory divergence could present procurement risks included the Mental Health National Collaborative Commissioning Unit framework, dialysis and Home Parenteral Nutrition for Intestinal Failure.
- WHSSC said it had “a clear preference for a cautious approach where Wales remains in initial alignment with the new system in NHS England”, adding that this approach would provide opportunities to develop a “more localised Welsh approach” in the longer term.

Aneurin Bevan University Health Board (“ABUHB”)

- ABUHB said that the potential legislative changes in England did not “present a high level of risk”, but noted that this assessment would be kept under review.
- It described maintaining regulatory parity with England as “generally favourable” for health boards, suggesting it would allow them to access a “leaner” procurement mechanism, enable the ongoing use of NHS England frameworks, and avoid the loss of market share if the English procurement regime were to be (or be perceived to be) less rigorous. It emphasised the need for any new regime to include due diligence and local clinical governance.

Cardiff and Vale University Health Board (“CVUHB”)

- CVUHB supported maintaining a “level playing field” across England and Wales, but added that it had “no intelligence from existing providers that a

differing procurement regime would discourage providers from bidding for Welsh contracts”.

Cwm Taf Morgannwg University Health Board (“CTMUHB”)

- CTMUHB suggested regulatory divergence could result in additional bureaucracy and cost for providers and health bodies, although it is “difficult to estimate the potential extent of the risk”.
- It gave the example of a UK wide provider commissioned to provide mental health services for a twelve-month period, stating that if the PSR were implemented in England, and no legislative action were taken in Wales, then at the end of the period the health body in England would be able to roll over the contract if it were working well, whereas under the Procurement Bill, a health body in Wales would need to go through a formal tendering process.

Stakeholders’ views

30. Stakeholders were broadly supportive of what the Bill is aiming to achieve in terms of greater local flexibility for relevant authorities,³⁵ and stability and broad alignment between the Welsh and English procurement regimes. They understood the dependency between the PSR in England and any new regime for Wales, and that the Minister for HSS did not intend to take decisions about any new health service procurement arrangements for Wales until there was clarity on the PSR in England. However, they told us that they would welcome assurance that the Welsh Government would identify and make the most of potential opportunities for Wales, and more information about the Minister’s own vision for how she would like to see health service procurement operate in Wales.³⁶

31. We heard different views on the legislative approach and how the powers might be used. The Association of Directors of Social Services Cymru (“ADSS Cymru”) supported greater flexibility in procurement, but said it would have preferred for the Senedd’s consent to have been sought for including Wales within the PSR on the basis of the porous nature of the border, the extent of cross-

³⁵ Defined in the HSP Bill as a county council or county borough council in Wales; a local health board established under section 11 of the NHSWA 2006; a National Health Service trust established under section 18 of the NHSWA 2006; or a special health authority established under section 22 of the NHSWA 2006.

³⁶ Health and Social Care Committee, Health Service Procurement (Wales) Bill: informal discussion, 22 March 2023

border collaboration, and the difficulties that could result from regulatory divergence for NHS Wales or suppliers.³⁷

32. Conversely, the Wales Council for Voluntary Action (“WCVA”) saw the HSP Bill as an opportunity to avoid Wales being “locked into” a regime that had not been designed for the health and care landscape in Wales. It noted that a new health service procurement regime for Wales could allow greater flexibility and agility, and increase opportunities for co-production and collaborative working between the public sector and the third sector. But, it cautioned that the same flexibility could also be used to “pursue an agenda of outsourcing and privatisation”.³⁸ The Socialist Health Association Cymru supported the principle of Welsh legislation, but was similarly concerned that the Bill “leaves open the possibility that Welsh NHS could end up following the English NHS out-sourcing and privatisation agenda”.³⁹

33. Participants in our informal discussion event broadly agreed that not taking action could result in negative consequences, including potential service disruption (especially where services are procured or delivered on a cross-border basis). They suggested that a new regime could also provide opportunities to better facilitate and encourage innovation and collaboration between relevant authorities and providers (and potential providers), and between providers.⁴⁰

34. We also heard evidence that legislation cannot substitute for good procurement practice among relevant authorities or providers.⁴¹ For example, it was suggested that:

- Short term funding and delay in decision-making may result more from the design of transformation funds or failure to move successful pilots onto a sustainable footing.
- Poor or variable communication or failure to work collaboratively may be less about procurement processes, and more about a lack of capacity and resource.

³⁷ HSP12 Association of Directors of Social Services Cymru

³⁸ HSP4 Wales Council for Voluntary Action

³⁹ HSP11 Socialist Health Association Cymru

⁴⁰ Health and Social Care Committee, Health Service Procurement (Wales) Bill: informal discussion, 22 March 2023

⁴¹ See, for example, HSP3 Ceredigion County Council; HSP7 Care and Repair Cymru

Our view

35. The complexity of the policy and legislative context, and the interrelationships and dependencies between different procurement reforms has been a consistent theme during our scrutiny. The framework nature of the Bill compounds this complexity, as does the Welsh Government's intention to develop its own detailed proposals only after the PSR is available.

36. We do not consider it to be good legislative practice to bring forward primary legislation to delegate broad and significant powers without clarity about the purposes to which those powers will be put. While we understand the specific circumstances of the HSP Bill, it would have been preferable had the Minister for HSS been able to provide more information about her intentions and preferences for the scope and operation of any new health service procurement regime for Wales. For example, we are not yet assured that any new regime to be established using the powers in the HSP Bill could not potentially be used to facilitate a greater role for the private sector in the delivery of core NHS services in Wales—rather than for the purpose of enabling more flexible access to specialist services or facilitating co-production and collaboration with the third sector—than the Committee would want to see. We explore issues relating to how the powers might be used further in chapter 3.

37. We do believe it is appropriate for decisions about the health service procurement regime for Wales to be made in Wales. To this end, it is appropriate that the Welsh Government should have the powers it needs to ensure that health service procurement in Wales is not put at risk by reforms in England. On balance, therefore, we agree that the Senedd should agree the general principles of the Bill.

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.

3. Designing a health service procurement regime for Wales

Existing barriers and potential opportunities

38. During our scrutiny we have heard about the barriers and challenges presented by current procurement arrangements, and the opportunities to address these in the design of any new health service procurement regime.⁴²

39. Barriers identified included:

- The **complexity of the commissioning landscape** in health and social care in Wales, with a ‘patchwork’ of contracting arrangements at local, regional and national levels, a variety of procurement bodies involved, and a ‘blurring’ of boundaries between health and social care.
- **Insufficient joined up strategic thinking and joint working** across the health and social care sectors.
- **Short-term funding, delayed funding decisions, and inadequate transition planning.** It was suggested that failure to address this through this Bill or other means could lead to contracts being ‘handed back’ with potential implications for the quality and consistency of service provision and additional expense and resource implications for relevant authorities. The uncertainty may also affect the mental health and wellbeing of staff and service users.
- **Regulatory barriers** constraining relevant authorities’ ability to enter into longer-term contractual arrangements.
- **Variation across health boards** in approaches and ways of working, including transparency, communication, timely decision-making, and responses to the impact of inflation and the rising costs of living.

⁴² See, for example, Health and Social Care Committee, Health Service Procurement (Wales) Bill: informal discussion, 22 March 2023; HSP4 Wales Council for Voluntary Action; HSP6 Equality and Human Rights Commission Wales; HSP7 Care and Repair Cymru; HSP10 Platform; RoP [paras 13, 58, 77 and 33], 9 March 2023

- Difficulties for smaller or more local organisations in **building relationships** with relevant authorities, and in being treated by relevant authorities as **equal partners**.
- **Opportunities missed for co-production** with providers and/or service users.
- Increased focus on **non-service aspects of contracts being included within service quality scores** during tendering processes.
- Some **outsourcing and commissioning in health and social care has been found to result in more insecure work and poorer pay or terms and conditions**, with disproportionately detrimental effects for some groups and communities who may be more likely to work in these roles.

40. Opportunities identified included chances to:

- **Increase understanding and awareness** of procurement arrangements, and **address perceived barriers to entry** that may result from misunderstandings or uncertainty.
- Ensure the new regime accommodates and facilitates **innovation and collaboration** between relevant authorities, providers and potential providers to develop new services and find new ways to improve patient outcomes.
- Increase value for money and improve patient outcomes **by improving relationships between relevant authorities and providers and working more collaboratively** to develop services without the need to retender on periodic timescales (with associated service disruption and costs).
- Ensure the **third sector is meaningfully integrated into health service provision**
- Better **harness the knowledge and experience of existing and new providers**, especially those from the third sector
- Increase **co-production of services** with service users.
- **Simplify procurement processes and remove unnecessary complexity or bureaucracy** that could otherwise be a barrier to smaller third sector or private sector organisations.

- Develop markets, bring in new providers, and work differently with existing providers to **deliver value-based and patient outcome-focused procurement** as opposed to focusing solely on price. Rather than “going to the market”, Wales could seek to **add social and economic value** and a **distinctive Welsh framework** for procurement;

A new health service procurement regime for Wales

41. The HSP Bill provides broad powers for the Welsh Ministers to make (and subsequently amend or replace) regulations to establish a health service procurement regime for 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”). This ‘creation power’ enables Welsh Ministers to make regulations providing for the processes to be followed and objectives to be pursued by relevant authorities in the procurement of services provided as part of the health service in Wales (and goods or other services that are connected to those health services). The creation power is discretionary, but if used, will be subject to the affirmative secondary legislation scrutiny procedure.⁴³ 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.

42. The Minister for HSS has consistently indicated that she will not determine the detail of any new health service procurement regime for Wales until she has been able to consider the final details of the PSR.⁴⁴ She reiterated this on 30 March 2023, adding 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**” [emphasis added].⁴⁵ Options open to the Welsh Government would therefore include:

⁴³ The affirmative procedure provides that the Welsh Ministers cannot exercise their power to make subordinate legislation unless the Senedd has passed a resolution approving a draft of the subordinate legislation. The subordinate legislation is therefore laid before the Senedd in draft form, and cannot have effect unless the draft is approved by the Senedd. This procedure is often reserved for more significant subordinate legislation. Use of the powers is also subject to the parameters set out in the Bill, for example the requirement in the new section 10A(4) of the NHSWA 2006 (to be inserted by section 3 of the Bill), which requires the Welsh Ministers to publish such guidance as they consider appropriate about compliance with the regulations.

⁴⁴ See, for example, Plenary RoP [para 240], 14 February 2023; Legislation, Justice and Constitution Committee RoP [para 112], 6 March 2023; Finance Committee RoP [para 14], 8 March 2023; RoP [para 25], 30 March 2023

⁴⁵ RoP [para 10], 30 March 2023

- Making no use of the powers in the HSP Bill, in which case health services (and connected goods or services) in Wales would be subject to the Procurement Bill once in force).
- Making regulations to provide for a Wales-only health service procurement regime that mirrors the PSR exactly.⁴⁶
- Making regulations to provide for a Wales-only health service procurement regime that diverges from the PSR to a lesser or greater extent.

43. In oral evidence, the Minister for HSS acknowledged the barriers in the current procurement arrangements, and the potential for any new health service procurement regime to address them. She said she was keen to increase opportunities for the third sector,⁴⁷ 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.
- Proceed to competitive tendering where required.

44. She explained that this approach, in place of the current ‘competition-first’ arrangements, would provide greater flexibility and reduce unnecessary bureaucracy.⁴⁸ Expanding on this, Dafydd Evans, SRO for the Bill, said that a new PSR-style regime with a ‘competition-last’ approach could increase opportunities to work collaboratively, encourage relationship building, and free up capacity and resource to focus on monitoring performance and managing contracts.⁴⁹

Scope of the new health service procurement regime

45. The PSR proposals imply the scope of the new procurement regime in England may include all services covered under the NHS Act 2006, including primary and community care and hospital services.⁵⁰ The lack of clarity about the

⁴⁶ Some minimal divergence may be required, for example to reflect differences in the organisation of the health and social care sectors in Wales and England.

⁴⁷ RoP [para 117], 30 March 2023

⁴⁸ RoP [paras 19 and 21], 30 March 2023

⁴⁹ RoP [paras 20 and 120], 30 March 2023

⁵⁰ UK Government, [Consultation: Preview of proposals for the Provider Selection Regime](#), February 2022

scope of the health services to which any new regime in Wales would apply has been a source of continuing uncertainty throughout our scrutiny. For example, stakeholders have been uncertain whether the new regime would encompass NHS to NHS procurement (within Wales or cross-border⁵¹), or the extent to which it will include primary care services.

46. In a joint written submission, Cytun, Size of Wales, the Welsh Centre for International Affairs, and Fair Trade Wales said the definition of health services and good and services connected to those health services in the new section 10A(1) to be inserted into the NHSWA 2006 could be interpreted widely, and include services such as catering as well as the purchase of goods such as beds. The organisations noted that the EM indicates the Welsh Government intends any new regime to apply only to the procurement of health services within specified categories, but added:

“If the latter is the policy intention, the wording of the Bill should reflect that, as once the wider power is provided to Ministers it could be used without further need to legislate”.⁵²

47. We asked the Minister for HSS what her current expectations are about which health services will be within the scope of any new health service procurement regime for Wales. She said:

“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”.⁵³

48. Dafydd Evans, the Bill's SRO, added:

“...the Bill has been written so that the full scope of clinical services delivered by the NHS could in theory go into this provider selection regime”.⁵⁴

⁵¹ For example, according to its [annual report for 2021-22](#), in 2021-22 Powys Teaching Health Board spend £67.8m on goods and services from NHS bodies outside Wales.

⁵² HSP2 Cytun; Size of Wales; Welsh Centre for International Affairs; and Fair Trade Wales

⁵³ RoP [para 92], 30 March 2023

⁵⁴ RoP [para 94], 30 March 2023

49. He explained that a more specific definition would be included in the regulations on the basis of CPVs. He indicated that PSR consultation specified around 40 CPVs to be considered for inclusion with the scope of any new regime in England, and said that once the final PSR is available, the Minister will consider which CPVs are to be included in the scope of any new regime for Wales.⁵⁵

50. Health bodies told us 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.⁵⁶ This includes specialist services that are currently procured rather than delivered ‘in house’. It is not clear whether relevant authorities might take different decisions on the role of procurement in their approach to providing clinical services under any new health service procurement regime. For context, around £9 billion is spent annually on core NHS services in Wales.

Balancing flexibility and safeguards

51. There was consensus that any new health service procurement regime must include appropriate safeguards, governance and reporting arrangements to ensure that the increased flexibility does not result in procurement not being conducted openly and transparently, or lead to any reduction in service quality or value for money.⁵⁷ Among others, Huw Thomas of HDUHB stressed the importance of procurement arrangements being transparent, structured and properly-governed in avoiding any perception from the public or stakeholders that due process is not being followed.⁵⁸

52. Some stakeholders, including ADSS Cymru, welcomed the potential for greater flexibility, but noted that there will continue to be circumstances under which competitive tendering is the appropriate procurement approach.⁵⁹ The Minister for HSS agreed with this, noting that competitive tendering can help to test the market as well as achieving quality and cost efficiency. She said that the HSP Bill includes provision requiring the regulations to set out the steps to be followed in a competitive tendering exercise.⁶⁰

⁵⁵ RoP [para 94], 30 March 2023

⁵⁶ RoP [para 49], 9 March 2023

⁵⁷ Health and Social Care Committee, Health Service Procurement (Wales) Bill: informal discussion, 22 March 2023

⁵⁸ RoP [para 28], 9 March 2023

⁵⁹ HSP12 Association of Directors of Social Services Cymru

⁶⁰ RoP [para 146], 30 March 2023

53. We discussed with the Minister for HSS the need to balance maximising opportunities such as increased flexibility and stimulating and developing markets, with sufficient protections and safeguards against cronyism and corruption (or the perception of this). She agreed the balance must be right, so that any new regime achieves transparency and due diligence while avoiding unnecessary bureaucracy and overly-burdensome administration.⁶¹

54. Jonathan Irvine of NHSWSSP explained that the PSR consultation, while proposing greater flexibility, also includes elements of the current procurement regime such as requirements to record, justify and publish decisions and to implement standstill periods during which procurement decisions can be queried or challenged. He added that his expectation is that regulations establishing a new regime would include criteria for provider selection, including value, service accessibility and equality, and outcomes.⁶² Dafydd Evans, the Bill's SRO, similarly noted the proposals in the PSR to ensure good governance and transparency. He explained that further details of any proposed approach for Wales would be set out in the consultation planned for autumn 2023, and highlighted the requirements in the new section 10A(3) (to be inserted into the NHSWA 2006 by section 3 of the Bill) for the regulations to make provision for the purposes of ensuring transparency.⁶³

55. Section 3 of the Bill inserts a new section 10A into the NHSWA 2006. The new section 10A(2) provides that regulations must include provision setting out the steps to be taken when following a competitive tendering process. The new section 10A(3) sets out the following criteria for the purposes of which the regulations must make provision:

- Ensuring transparency.
- Ensuring fairness.
- Ensuring that compliance can be verified.
- Managing conflicts of interest.

56. We also note that the duty in the Health and Social Care (Quality and Engagement) Act 2020 for Welsh Ministers and health bodies to exercise their functions in a way that improves the quality of health services (including the

⁶¹ RoP [para 119], 30 March 2023

⁶² RoP [paras 47, 65 to 66 and 68], 9 March 2023

⁶³ RoP [para 188], 30 March 2023

experience of health service users) came into effect on 1 April 2023.⁶⁴ This duty would apply to health bodies exercising their procurement functions, but does not apply to local authorities.

57. During our scrutiny we heard a range of suggestions for criteria stakeholders thought could or should be part of the framework for a new procurement regime—whether on the face of the Bill, or in the regulations or guidance.⁶⁵ Suggestions made included:

- Compliance with the principles in the SPPP Bill and the Well-being of Future Generations (Wales) Act 2015.
- Opportunities for procurement to be used to “deliver a fairer Wales, enabling better equality outcomes by ensuring equality and human rights considerations are built into the procurement process”.
- Requirements for regulations to ensure that contracts are managed effectively and with due regard for value for money.
- Requirements in respect of patient and carer involvement in the co-design and review of services.
- Enabling different provision to be made for procurement from third sector and private sector providers, and/or between third sector and private SMEs or micro-providers, when compared to larger private sector organisations.

58. We asked the Minister for HSS for her view on whether any additional criteria should be added to the new section 10A(3) to provide for consultation and involvement in procurement decisions of people who use or would be affected by the services or goods. She said that she expected relevant authorities to consider their communities’ needs, but that she had concerns about including requirements for consultation with “a significant additional group”.⁶⁶ She added that the regulations and guidance may provide further detail about expectations on relevant authorities in this regard.⁶⁷

⁶⁴ **Statutory guidance** in respect of the duty was published in April 2023.

⁶⁵ See, for example, HSP2 Cytun; Size of Wales; Welsh Centre for International Affairs; and Fair Trade Wales; HSP6 Equality and Human Rights Commission Wales; HSP9 Marie Curie; Health and Social Care Committee, Health Service Procurement (Wales) Bill: informal discussion, 22 March 2023

⁶⁶ RoP [para 165], 30 March 2023

⁶⁷ RoP [para 187], 30 March 2023

59. We also asked the Minister for HSS for her view about whether any new procurement regime could include provision to enable different treatment for private sector and third sector providers. She agreed there could be potential for this: for example, she suggested that relevant authorities could be more open to rolling over contracts for third sector providers, and to competitive tendering where services are provided by private sector providers. However, she was reluctant for any provision to this effect to be included on the face of the Bill on the basis that:

“Well, again, until we know what we're talking about, it's really difficult. That's the problem. And I completely understand, but we don't know what's coming, you don't know what's coming, and I can see that's a frustration for you. It's a frustration for us.”⁶⁸

60. Dafydd Evans, the Bill's SRO, cautioned against the inclusion in the Bill of additional criteria. He said that the framework provided by the Bill should be kept sufficiently flexible to enable any new regime introduced under it to be reviewed and amended if needed. He argued that placing too many criteria on the face of the Bill could make it more difficult to adapt to reflect any learning.⁶⁹

Our view

61. The Minister for HSS characterised the HSP Bill as “not the most exciting Bill you will have had in front of you as a committee”,⁷⁰ and said that “the interesting bit of this legislation will come when we're looking at the regulations”.⁷¹

62. It is true that there is ongoing uncertainty about the detail of any new health service procurement regime to be introduced using the powers in the Bill, although we are clear as a Committee that any new regime must operate transparently, fairly and openly, and must ensure that relevant authorities take account in their procurement decisions of the needs of patients and service users, and the importance of improving services and patient outcomes.

63. During our scrutiny, we have heard about a range of barriers and challenges within the existing procurement arrangements, and the potential for a new regime to address these barriers and provide new opportunities in relation to health service procurement. We agree the Welsh Government should seek to do

⁶⁸ RoP [para 199], 30 March 2023

⁶⁹ RoP [paras 203 and 205], 30 March 2023

⁷⁰ RoP [para 9], 30 March 2023

⁷¹ RoP [para 32], 30 March 2023

this, and to avoid embedding any of the existing barriers within the design of any new regime.

64. We understand why the Minister intends to consider the final PSR before taking decisions on the scope or design of any arrangements for Wales. However, this approach makes it difficult to predict how relevant authorities might make use of any flexibility available to them; how the markets might respond to any new regime in Wales or to any regulatory divergence between Wales and England; or whether any new regime could result in increased roles in health service provision in Wales for either the private sector and/or the third sector.

65. This uncertainty results primarily from the framework nature of the Bill. In our scrutiny, we have been able to consider the powers, but not how they will be used. Our role, therefore, is to consider whether the framework powers in the Bill, on the one hand, delegate to the Welsh Government sufficient powers to establish and maintain an effective, transparent and flexible regime that provides an appropriately-level playing field within Wales and between Wales and England while also reflecting Welsh values and the structure of the Welsh health and care sector; while on the other hand, put in place sufficient safeguards to ensure that those powers may only be used by this Minister and subsequent Ministers in line with any principles, parameters or criteria that this Senedd considers appropriate.

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.

66. The definition of ‘health services’ in the Bill is very broad, potentially encompassing all clinical services delivered by the NHS in Wales. While the Minister has indicated that the Bill is primarily focused on the procurement of specialist service provision (currently estimated at around £550 million per year), the inclusion within the scope of any new procurement regime of the full range of clinical services provided by the NHS in Wales (estimated at around £9 billion per

year) could potentially—subject to decisions taken by relevant authorities about how they choose to provide services—significantly increase the scale of procurement activity. The breadth of the definition on the face of the Bill may be necessary in order to provide sufficient flexibility for the regulations to mirror or diverge from arrangements in England, but it is clear that stakeholders are keen to have clarity about which services may be included within the scope of any new procurement regime for Wales. 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.

4. Mixed procurement

Background

67. The primary focus of the HSP Bill is health services. However, 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 in relation to the procurement of health services **and** any goods or other services that are connected to those health services. This reflects the PSR consultation, which acknowledges that it is “inevitable” that some procurements will contain elements that are within the PSR’s scope and others that are not.⁷²

68. Under the current procurement arrangements, mixed procurements (i.e. those that contain elements that would otherwise be procured under different regimes) are conducted under the regime that applies to the element of the procurement that represents the greatest value. Jonathan Irvine of NHSWSSP explained:

“So, quite often, we buy products, but there are services wrapped around them. So, are we subject to the goods or are we subject to the services? And at present, the rule is, if more than 50 per cent of it is goods, it's under goods; if more than 50 per cent of that spend, on that contract, is services, it's services”⁷³

⁷² UK Government, [Consultation: Provider Selection Regime: supplementary consultation on the details of proposals for regulations](#), February 2022

⁷³ RoP [para 144], 9 March 2023

Definition of ‘connected to’

69. The new section 10A(1)(b) of the NHSWA 2006 defines goods which may be procured under any new health service procurement regime as part of a mixed procurement as “goods or other services that are **connected to** those health services” [emphasis added]. The EM indicates it is also anticipated that such goods may need to meet additional criteria specified in regulations “such as a limit on relative value”.⁷⁴ The equivalent definition in section 79 of the HCA 2022, which provides the ‘creation’ power underpinning the PSR in England, states: “other goods or services that are **procured together with** those health care services” [emphasis added]. The HSP Bill EM is silent on the reason for the different definitions.

70. Dafydd Evans, the Bill’s SRO, told us that he anticipated the new regime being “quite stringent” in relation to mixed procurement, and that details of any criteria that must be met would be set out in the regulations and guidance.⁷⁵ The Minister for HSS explained that the provisions were intended to facilitate procurement of services such as blood services, which could not be procured without connected goods such as tubes.⁷⁶

71. Dafydd Evans gave immunisation services as a further example of a mixed procurement, noting that the primary element of the service would be the provision of immunisations by clinicians, but that for the service to operate effectively, the procurement would be likely to include administrative services.⁷⁷ Noting that the definition in the new section 10A(1)(b) provided that any goods must be “connected to” the relevant health service, Mari Williams, a senior Welsh Government lawyer, said that this meant goods or services connected in a “substantive” way. In relation to the potential for vaccines to form part of a mixed procurement for immunisation services, she acknowledged that vaccines **could** be within the scope of the definition in the Bill, but emphasised that whether or not they **would** be within the scope of any new health service procurement regime would depend on the details of the criteria set out in the regulations and guidance.⁷⁸

⁷⁴ Welsh Government, [Health Service Procurement \(Wales\) Bill Explanatory Memorandum](#), February 2023, para 25

⁷⁵ RoP [para 53], 30 March 2023

⁷⁶ RoP [para 52], 30 March 2023

⁷⁷ RoP [para 56], 30 March 2023

⁷⁸ RoP [paras 66 and 68], 30 March 2023

Community pharmacy dispensing services

72. In written evidence, Community Pharmacy Wales (“CPW”) indicated it supported the aims of the Bill to reduce complexity and improve flexibility. However, it raised a specific concern in relation to dispensing services. CPW explained that its reading of the Bill was that medicines and appliances are procured goods that are ‘connected to’ the procured health service of dispensing of prescriptions. It suggested that this would be “a potential unintended consequence of a more flexible approach to procurement”:

“This has the potential, if not recognised and exempted in the Bill, to undermine the existing national community pharmacy contract. [...]

CPW would ask Welsh Government to make it clear in the legislation that the procurement flexibility provided to Welsh Health Boards does not extend to the purchase of medicines and appliances where central contracting arrangements are in place”.⁷⁹

73. The Minister for HSS told us that she did not want to undermine established community pharmacy contracts. She said that the PSR consultation had suggested that some pharmaceutical services would be within scope, while others would not. She said:

“So, once we’ve got a better sense of where their proposed regulations will lie, what I’m hoping to do is to make sure that our officials work with community pharmacy and the contractual framework to make sure that we’ve landed in a place that works for both of us.”⁸⁰

Social care

74. Integration of health and social care has been a key objective for the Welsh Government in recent years. Stakeholders told us about the progress that has been made in this respect, and explained that relevant authorities often expect providers to collaborate to deliver integrated services. They were concerned that a

⁷⁹ HSP1 Community Pharmacy Wales

⁸⁰ RoP [para 139], 30 March 2023

new health service procurement regime that excluded social care services could hinder this.⁸¹

75. ADSS Cymru explained that many of the health services procured by health boards—including services for people with a mental illness or learning disability, or people who need residential care, nursing homes or domiciliary care—are the same services local authorities commission in the context of their social care duties. It suggested that the flexibilities proposed for health services within the new regime could similarly be beneficial for social care services:

“A new regime would be beneficial for local authorities for the same reasons that it is said to be beneficial for the NHS. Moreover, it would support efforts to move at pace to deliver greater health and social care integration, and the creation of a co-ordinated, joined up and seamless system that supports people to live well. If the Welsh Government does not allow social services the opportunity to work under the same regime as our health colleagues, then there is a risk that we do not have a level playing field within Wales.”⁸²

76. Huw Thomas of HDUHB described social care services as an area of “real issue”:

“So, where does the boundary of a domiciliary care provider end—and increasingly so in the future—and health provision begin? I think that's perhaps an area that we need to explore further around that kind of boundary potential. We are working increasingly in integration with social care, so that does provide us with a real challenge. For care homes, I think, it's a real example.”⁸³

77. The UK Government’s PSR consultation proposes two criteria that, if both are met, would allow mixed contracts of healthcare and social care services (when provided directly to an individual) to be arranged under the PSR:

- *“the main subject matter of the contract is the delivery of healthcare services to individuals [and]*

⁸¹ Health and Social Care Committee, Health Service Procurement (Wales) Bill: informal discussion, 22 March 2023

⁸² HSP12 Association of Directors of Social Services Cymru

⁸³ RoP [para 73], 9 March 2023

- *procuring these services under separate regimes in separate contracts would adversely impact care quality, lead to overall contract aims remaining unfulfilled, or would not be in the best interests of patients, taxpayers, and the population”.*⁸⁴

78. The Minister for HSS told us that her expectation was that social care services could be procured as part of a mixed procurement under any new health service procurement regime for Wales. She said that the test for whether a procurement was a health service procurement or a social care procurement would be whether the health or social care elements had the “biggest value”.⁸⁵

79. When asked whether she should have gone further, and explicitly included social care services in their own right within the scope of the services to which the new procurement regime would apply, the Minister said:

*“I think what we're trying to achieve here in the first place is an opportunity, if we want, to have a level playing field. So, England is not going down that route. Now, I think they have an ambition also to integrate more their health and care services as well. So, they're in the same position as we are, effectively, but I think there are legal issues that constrain that.”*⁸⁶

Our view

80. It will be important for relevant authorities, providers and potential providers to have clarity about which procurement regime applies to which procurement exercises. This is especially important in relation to mixed procurements i.e. those that include different types of services, or elements of goods as well as services.

81. The definition in the new section 10A(1)(b) of the NHSWA 2006 provides that goods or other (i.e. non-health) services must be “connected to” the health service that is being procured. We note the evidence from the Welsh Government that this is intended to indicate a ‘substantive’ connection, and that further definition will be set out in any regulations and guidance. We note also that the wording in the HSP Bill differs from the definition in the HCA 2022, which provides that

⁸⁴ UK Government, [Consultation: Provider Selection Regime: supplementary consultation on the details of proposals for regulations](#), February 2022

⁸⁵ RoP [para 104], 30 March 2023

⁸⁶ RoP [para 102], 30 March 2023

goods or non-health services must be “procured together with” the relevant health service.

82. Our view is that the wording in the HSP Bill should be clear that the intention is for the connection between any goods and other services and the relevant health service to be substantive and direct. This will help to improve and clarify the framework set out in the Bill, as well as ensuring the powers can only be used now and in the future as this Senedd intends.

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.

83. We also note that the Minister for HSS does not intend pharmaceuticals to fall within the scope of connected goods under any new regime for health service procurement in Wales, and that this intention is also set out in the UK Government’s PSR consultation. However, it is not clear to us whether, if the PSR were to include the procurement of pharmaceuticals within mixed procurements, this would be an area in which the Minister for HSS would intend that any new regime for Wales would diverge. It is especially important to be clear on this point in relation to the potential for the procurement of pharmaceuticals as part of mixed procurements in relation to dispensing services. We do not want to see any new health service procurement undermining the community pharmacy contract in Wales. We welcome the Minister’s confirmation that she will work with community pharmacy representatives to ensure the new regime does not undermine existing contracts.

84. We support the Welsh Government’s commitment to health and social care integration, and would be concerned if any new health service procurement regime were to undermine this. We are reassured by the Minister’s indication that she intends that social care services that are connected to health services may be procured within the new health service procurement regime as part of mixed procurements. However, we note that this will only be the case if the health service element of the procurement represents a greater value within the contract than the social care element. While we understand that the scope and creation powers in the HSP Bill broadly mirror those in the HCA 2022 (which also excludes social care other than as part of mixed procurements), we note ADSS Cymru’s

concerns that this may result in an unequal playing field for social care in Wales when compared to health.

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.

5. Engagement and consultation

Engagement and consultation to date

85. The EM states that no formal consultation was carried out to inform the development of the HSP Bill. It explains that there has been informal engagement with some stakeholders, including NHS Wales finance, procurement and commissioning leads in summer 2022, and health unions via the Wales Partnership Forum Business Committee in autumn 2022. It adds that consultation has also taken place with “a number of stakeholder groups including the Wales Council for Voluntary Action (WCVA), Welsh Local Government Association (WLGA)”, and that consultation with “economic groups and industry” is planned for spring 2023.⁸⁷

86. In oral evidence, health bodies described “ongoing dialogue” and close working between NHSWSSP, health board finance directors, and the Welsh Government.⁸⁸ They acknowledged that the Welsh Government’s engagement on the Bill to date had been limited, but, highlighting the technical nature of the issues, described it as “suitable for the kind of work we’re discussing here”.⁸⁹ They told us they anticipated continuing to work with the Welsh Government as it developed and drafted the regulations and guidance.⁹⁰

87. Other stakeholders’ experiences were mixed. One submission from four third sector organisations contrasted the “intensive engagement” by Welsh Government on the SPPP Bill with their experience on the HSP Bill, the introduction of which they described as “a complete surprise to us”.⁹¹ Participants

⁸⁷ Welsh Government, [Health Service Procurement \(Wales\) Bill Explanatory Memorandum](#), February 2023, paras 39, 45, 48 and 50

⁸⁸ RoP [paras 97 and 98], 9 March 2023

⁸⁹ RoP [para 98], 9 March 2023

⁹⁰ RoP [paras 118 and 119], 9 March 2023

⁹¹ HSP2 Cytun; Size of Wales; Welsh Centre for International Affairs; and Fair Trade Wales

in our informal discussion event (some of whom represented organisations named in the EM) similarly described mixed experiences:

“Some stakeholders said that they or their organisations had had informal meetings with Welsh Government officials, although the opportunities for discussion and dialogue during such meetings had varied. Others said they had been unaware either of the Bill or of the fact it may have potential implications for their organisations until they had been invited to contribute to our scrutiny. Some organisations had followed the development of arrangements in England, including the consultation on the PSR, but were unaware of its potential implications for Wales”.⁹²

Engagement and consultation on the regulations and statutory guidance

88. In a letter dated 17 March 2023, the Minister for HSS outlined her intended approach and timescales for consultation with stakeholders to inform the development of regulations and statutory guidance:

“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.

[...]

Our current intention [is] 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

⁹² Health and Social Care Committee, Health Service Procurement (Wales) Bill: informal discussion, 22 March 2023

*Wales). As such, we are not at this stage proposing to consult on the detail of Welsh regulations and statutory guidance”.*⁹³

89. In oral evidence, the Minister for HSS confirmed that the consultation would focus on the extent to which stakeholders would like to see a new health service procurement regime for Wales mirror or diverge from the PSR in England:

*“We need to know, ‘Look, do you want to do a carbon copy or don't you?’”*⁹⁴

90. There is some uncertainty around the timing for the publication of the PSR. In a letter dated 22 March 2023, Lord Markham was able to tell us only that the final draft of the regulations is being prepared, and that it will be laid before the UK Parliament once the draft is complete.⁹⁵ The Minister for HSS confirmed that if there is a delay in the PSR timings, her intention would be to postpone the proposed implementation date for a new health service procurement regime in Wales so that she could maintain the planned twelve-week consultation period.⁹⁶

91. Stakeholders generally welcomed the Minister’s commitment to consult in autumn 2023. We received a number of suggestions for issues stakeholders would like to see addressed in the consultation in autumn 2023.⁹⁷ These included:

- What a Wales-only health service procurement regime would mean for commissioning at local, regional and national levels.
- What impact the new regime is expected to have on relationships between relevant authorities and providers (especially if financial constraints and/or Welsh Government policy result in more commissioning at a regional level).
- How the new regime will accommodate and facilitate innovation, including services funded via alternative sources such as grants, charitable or lottery funding.

⁹³ [Letter from the Minister for Health and Social Services](#), 17 March 2023

⁹⁴ RoP [para 154], 30 March 2023

⁹⁵ [Letter from the Parliamentary Under-Secretary of State, UK Government Department of Health and Social Care](#), 22 March 2023

⁹⁶ RoP [para 152], 30 March 2023

⁹⁷ See, for example, Health and Social Care Committee, Health Service Procurement (Wales) Bill: informal discussion, 22 March 2023; HSP10 Platform

- How the new procurement regime will address the barriers and challenges experienced in the current procurement arrangements.
- What will be in regulations and what will be in statutory guidance.

92. However, in a joint submission, Cytun, Size of Wales, the Welsh Centre for International Affairs, and Fair Trade Wales described themselves as “deeply concerned” that there was no requirement in the Bill for consultation before regulations or guidance are made, and suggested the Bill should be amended accordingly.⁹⁸

93. Reflecting on the technical nature of the issues, stakeholders called for the consultation to be accompanied by clear and accessible information and explanatory materials. They cautioned that without this, it could be difficult for smaller private providers, third sector organisations or independent contractors such as GPs or dentists to engage and respond meaningfully. They also suggested it could be helpful to arrange informal engagement events either before the formal consultation period, or early within it, to help stakeholders familiarise themselves with the issues before responding.⁹⁹ Such events could focus, for example, on explaining key points in the legislation and its potential impacts.¹⁰⁰

94. Dafydd Evans, the Bill’s SRO, said that in addition to the formal consultation, the Welsh Government planned to speak to stakeholders including the Welsh Local Government Association and voluntary organisations. He explained that the intention was to prepare the way for the formal consultation so “that it’s not a standing start and that they understand, effectively, what’s coming”.¹⁰¹

Intergovernmental engagement and consultation

95. During oral evidence, the Minister for HSS told us that the UK Government’s development of its PSR proposals had not initially included any consideration of the potential implications for Wales. She said that engagement between the Welsh and UK Governments to begin with “wasn’t great”, but added that the situation had “definitely improved”. She confirmed that the UK Government had shared an early draft of the proposed PSR regulations with the Welsh

⁹⁸ HSP2 Cytun; Size of Wales; Welsh Centre for International Affairs; and Fair Trade Wales

⁹⁹ Health and Social Care Committee, Health Service Procurement (Wales) Bill: informal discussion, 22 March 2023

¹⁰⁰ HSP7 Care and Repair Cymru

¹⁰¹ RoP [para 156], 30 March 2023

Government, and that there was agreement that officials would liaise on cross-border arrangements as guidelines were developed.¹⁰²

96. Dafydd Evans, the Bill’s SRO, told the LJC Committee on 6 March 2023 that while the HSP Bill does not directly impact on the Provisional Common Framework on Public Procurement, the mechanisms within the common framework had provided opportunities for discussion:

*“We have had discussions under the common frameworks, and they’re important methods for managing that. So, we recognise that, and we’ll continue to use the framework mechanisms for discussions with the other nations”.*¹⁰³

97. In a letter dated 22 March 2023, Lord Markham, the Parliamentary Under-Secretary of State for Health and Social Care confirmed that a draft of the PSR regulations had been shared in confidence with the Welsh Government. He said this had followed discussions at official and Ministerial level, and agreement between the Governments that they would “continue to work together on the outcomes of the Health and Care Act 2022—including the delivery of the PSR”.¹⁰⁴

Our view

98. The framework nature of the HSP Bill, and the technical issues it addresses, present challenges for consultation and engagement. These challenges have been exacerbated by the timescales for the Bill’s development and scrutiny. While health bodies have been working closely with the Welsh Government, the extent to which other stakeholders have been involved—or were even aware of the potential reforms—varies considerably. It is important that dialogue between the Welsh Government and stakeholders increases as proposals are developed and preparations are made for the formal consultation period.

99. We welcome the Minister for HSS’s commitment to a twelve-week consultation on the extent to which arrangements for Wales should mirror or diverge from the PSR in England. However, we note that the Minister does not intend to include draft regulations or guidance in the consultation. As stakeholders have told us, this is an issue where ‘the devil is in the detail’, so it will

¹⁰² RoP [paras 10 and 23], 30 March 2023

¹⁰³ Legislation, Justice and Constitution Committee RoP [para 58], 6 March 2023

¹⁰⁴ [Letter from the Parliamentary Under-Secretary of State, UK Government Department of Health and Social Care](#), 22 March 2023

be important that the consultation includes sufficient information to enable stakeholders to respond meaningfully.

100. We do not doubt the Minister's commitment to consult. However, we believe it would be clearer if a requirement to consult stakeholders before the regulation and statutory guidance making powers are used for the first time was included on the face of the Bill.

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.

101. We welcome the indications from the Welsh and UK Governments that they are now working together constructively; it is to be regretted that this does not seem to have been the case at an earlier stage. Earlier engagement could have allowed, for example, the provisions in the HSP Bill to have been incorporated into the development of the SPPP Bill.

102. The PSR regulations will be subject to scrutiny by the UK Parliament through the affirmative procedure. Should the Senedd agree the general principles of the HSP Bill, we will write to the UK Parliament Joint Committee on Statutory Instruments, the House of Lords Secondary Legislation Scrutiny Committee, and Welsh MPs to share a copy of this report and to ask them, when they scrutinise the PSR regulations, to consider any potential implications for Wales including cross-border issues.

6. Implementation of the new procurement regime

Capacity and training: relevant authorities

103. As set out in chapter 3, a new health service procurement regime could offer opportunities to improve procurement, contract management, market development, relationship building and collaborative working. However, the impact of any new regime, and the extent to which these opportunities can be realised, will depend in large part on how it is implemented and how relevant authorities respond.

104. Huw Thomas of HDUHB said it would be important to ensure that decision-makers in relevant authorities understood the potential opportunities, including making sure that patients and communities are “at the heart of decision-making” as well as “stimulating local opportunities and local businesses to enter the market, by reducing the barriers to entry.”¹⁰⁵

105. While the specific scope of any new health service procurement regime to be defined in regulations is not yet clear, it is certain that it will not include all relevant authorities’ procurement activity. As a minimum, the procurement of the following will be subject to other procurement regimes:

- Goods and/or services that are not connected with health services.
- Goods and/or services that are connected with health services, but which represent a greater proportion of the procurement value than the health service to which they are connected.
- Health services which are not among those specified in regulations under the new section 10A of the NHSWA 2006.

106. Relevant authorities will therefore need to understand and operate multiple procurement regimes.

107. Ceredigion County Council said that there has been confusion over the operation of the current regime, and described training on any new regime as “critical in order for the Welsh public sector to realise the optimum benefit from the Bill’s provisions”.¹⁰⁶

108. The Minister for HSS indicated that the Welsh Government would work collaboratively with relevant authorities to ensure they were prepared for any new health service procurement regime as well as the new public sector procurement regime which emerges from the Procurement Bill. She explained that she expects both new regimes being introduced at broadly the same time, making it preferable for training for relevant authorities on the two regimes to be coordinated.¹⁰⁷ This approach was welcomed by Jonathan Irvine of NHSWSSP, who said:

¹⁰⁵ RoP [paras 24 and 80], 9 March 2023

¹⁰⁶ HSP3 Ceredigion County Council

¹⁰⁷ RoP [para 104], 30 March 2023

“...we would rather just make the change of everything in the same sort of period of time so that we've got a full switch from the regulations, as they are now, to the new arrangements.”¹⁰⁸

109. Stakeholders told us that they did not doubt that relevant authorities would want to implement and operationalise the new regime in a way that maximised the potential opportunities for Wales. However, they were concerned that the ability to achieve this would be constrained by inadequate capacity and resource within relevant authorities' procurement functions.¹⁰⁹ Care and Repair Cymru described a need for improvements in transparency, communication and processes, but suggested that the issues it has experienced result less from the current legislative framework than from “capacity, resourcing issues and pressures from the [health board] side”.¹¹⁰

110. In relation to health bodies, Huw Thomas of HDUHB highlighted the scope for health boards to work with NHSWSSP to maximise the opportunities from the new regime.¹¹¹ Jonathan Irvine of NHSWSSP was confident that NHS Wales would be prepared for the implementation of any new regime provided there was sufficient investment available to get the right reporting and governance arrangements in place, and to plan and deliver training and other implementation work.¹¹² He suggested that a regime that increased flexibility for procurement, and moved away from requiring competitive tendering, could release some procurement capacity and expertise which could then be focused on ensuring good governance and value for money:

“At the minute, in terms of the area that we influence through competitive tendering procurement activity, we're just at about £60 million to £70 million-worth of expenditure per annum. Bear in mind, however, that the total spend on healthcare services that this Bill would cover for the whole of Wales is in the region of £550 million per annum. I have a dedicated team that looks after national, all-Wales projects on the healthcare service's procurement. I also have procurement teams embedded with the health boards around Wales [...] which look after the local requirements for healthcare services

¹⁰⁸ RoP [para 50], 9 March 2023

¹⁰⁹ Health and Social Care Committee, Health Service Procurement (Wales) Bill: informal discussion, 22 March 2023

¹¹⁰ HSP7 Care and Repair Cymru

¹¹¹ RoP [para 58], 9 March 2023

¹¹² RoP [para 52], 9 March 2023

provision in those areas. What this opportunity brings, then, is the opportunity to almost free up some time for my staff to look at some of the other areas of spend in that £550 million piece that we now need to focus on, and we can apply this much more flexible approach to ensuring that we have good governance and good transparency around that, and that we are getting good value for money in those areas as well".¹¹³

111. We heard particular concerns about whether there was sufficient capacity in local authorities' procurement functions. Ceredigion County Council acknowledged the intention for greater flexibility to reduce the pressure on procurement teams, but cautioned that too much reliance on direct award of contracts increased the risk of unfair practices, and also risked destabilising markets and reducing strategic thinking.¹¹⁴ ADSS Cymru highlighted the potential in the initial PSR proposals to improve administrative arrangements and reduce the burden on local authorities. However, it cautioned that the PSR appeared to be becoming more complex as it developed, adding:

"The operational freedoms promised by the PSR now seem to require additional process. We are concerned that the overall process for PSR is beginning to look onerous and it is something we would not want to see recreated in Wales".¹¹⁵

112. During our informal stakeholder event, it was noted that local authorities may be less able than health bodies to identify the scale of potential procurement activity under any new health service procurement regime, as some of their health service procurement may be in their role as corporate parents rather than broader planned service delivery.¹¹⁶

113. We asked the Minister for HSS about the capacity of relevant authorities' procurement teams to adapt to and operate the new regime, and what discussions she has had with the Minister for Finance and Local Government, within whose portfolio local government and public procurement sit. She acknowledged that training would be required, but said "there's no point for us to

¹¹³ RoP [para 49], 9 March 2023

¹¹⁴ HSP3 Ceredigion County Council

¹¹⁵ HSP12 Association of Directors of Social Services Cymru

¹¹⁶ Health and Social Care Committee, Health Service Procurement (Wales) Bill: informal discussion, 22 March 2023

go too far in putting those preparations in place until we know what the regulations will be”.¹¹⁷ When pressed on capacity in local authorities, she said:

*“So, they know that this is coming; they're gearing up for it, they know that they're going to have to gear up for the new Public Procurement (Wales) Bill anyway. The issue about whether there are enough of them is beyond the scope of what I'm able to deal with here. That's a matter for local authorities”.*¹¹⁸

Accessibility and communication

114. There was broad consensus that 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. The WCVA called for “an extensive stakeholder engagement programme around this Bill if enacted”. It said this would be needed to support the third sector, especially those offering cross-border services, and warned that if support is not available for providers and potential providers, smaller organisations may be at a disadvantage compared to larger ones.¹¹⁹ Marie Curie similarly emphasised the need for clear and accessible communication about the new regime when it is being implemented, highlighting that the capacity and procurement expertise varies across third sector organisations that provide, or may wish to provide, services.¹²⁰

115. Participants in our informal stakeholder discussion also highlighted the challenges for smaller third sector or private sector organisations in navigating the complexities of different procurement regimes. They called for the regulations and guidance to be clear, accessible and easy to understand, and cautioned that if this is not the case, or it is not clear which regimes apply to which services, then providers and relevant authorities may be cautious or reluctant to take up potential opportunities to work collaboratively in multidisciplinary teams or across sectors.¹²¹

116. Huw Thomas of HDUHB said that relevant authorities also have a role in educating providers and potential providers about the new regime. He suggested

¹¹⁷ RoP [para 106], 30 March 2023

¹¹⁸ RoP [para 112], 30 March 2023

¹¹⁹ HSP4 Wales Council for Voluntary Action

¹²⁰ HSP9 Marie Curie

¹²¹ Health and Social Care Committee, Health Service Procurement (Wales) Bill: informal discussion, 22 March 2023

that market engagement by relevant authorities could help “make sure that providers are aware of the changes and aware of the opportunity that could bring for them”.¹²²

117. We asked the Minister for HSS how she would ensure that relevant authorities, providers and potential providers understood the new regime. She told us that the consultation planned for autumn 2023 would assist this:

“So, as you've heard today, this is quite complex. It's quite technical, and, actually, the public don't really need to get engaged in all of this. This is quite a niche group of people who need to understand this, so they're the people that we're most keen to communicate with. We've already done an informal consultation with them. Once we get much more clarity, in terms of what the regulations look like in England, we will then be in a position to do our formal consultation—12-week consultation—that will make sure that we're really getting engaged and involved with the people who will be impacted by this. So, that's all ready to roll, once we've, obviously, got this through the Senedd and we get the bit more formal detail from Westminster.”¹²³

Implementation timescales

118. When it is implemented (expected to be in 2024) the Procurement Bill will replace the current public sector procurement arrangements under the PCR 2015. The UK Government intends to exempt health care service procurement in England from the new arrangements through the use of the England-only disapplication power in the Procurement Bill and the England-only creation power in the HCA 2022. If no legislative action were taken in Wales, the new arrangements under the Procurement Bill would apply to health service procurement in Wales. The Minister for HSS intends to use the disapplication and creation powers in the HSP Bill to exempt health service procurement in Wales from the Procurement Bill, and put in place a new, Wales-only health service procurement regime. However, if the Procurement Bill is implemented before any new regime for Wales under the HSP Bill, there will be a period during which health service procurement in Wales is subject to the Procurement Bill. During this period, it is likely that health service procurement in England will be subject to the PSR.

¹²² RoP [para 69], 9 March 2023

¹²³ RoP [para 143], 30 March 2023

119. We discussed the potential implications of this period with health bodies, and with stakeholders at our informal discussion event. Jonathan Irvine of NHSWSSP explained that there is an ongoing cycle of contracts, and that any that come to an end before any new health service procurement regime is introduced under the HSP Bill would be subject to either the current arrangements under the PCR 2015 or, once implemented, the new arrangements under the Procurement Bill. He explained:

“Under the current regulations, we’ll need to go out to the market under full competitive tendering. So, the timing of those will be critical to make sure that we don’t disadvantage the renewal or continuation of those services, because the timing of the Bill’s passage in Wales is significantly behind what England are doing.”¹²⁴

120. In written evidence, the WCVA noted that if the change in procurement regimes results in a delay in commissioning services, this could affect people relying on or waiting for such services and risk exacerbating issues relating to health or poverty in the short term.¹²⁵ There was broad consensus among participants in our stakeholder discussion that a lengthy delay between the implementation of the various regimes could be disruptive, but that some delay would be justifiable if it meant that any regime under the HSP Bill was right for Wales. They suggested that the nature and extent of the impact of any delay—which could include, for example, clinicians being uncertain about which services may be available and not being confident about making referrals—will depend on the length and timing of the period, and the specific timings and arrangements for individual contracts.¹²⁶

Review and evaluation

121. Some stakeholders have suggested that the implementation of the Bill, and any new health service procurement regime introduced under it, should remain subject to review to ensure it is working as intended:

- The WCVA noted the need for scrutiny to be sure that the opportunities presented by a new regime are being realised. In particular, it highlighted concerns raised by the British Red Cross that greater

¹²⁴ RoP [para 52], 9 March 2023

¹²⁵ HSP4 Wales Council for Voluntary Action

¹²⁶ Health and Social Care Committee, Health Service Procurement (Wales) Bill: informal discussion, 22 March 2023; RoP [para 54], 9 March 2023

flexibility for relevant authorities could lead to increased complexity for providers and potential providers, and suggested the introduction of a reporting mechanism to enable providers to give feedback.¹²⁷

- The Equality and Human Rights Commission Wales (“EHRCW”) said that the equality impact assessment should be an ongoing process, and that the Bill’s impact should be monitored and reviewed where required.¹²⁸

122. Dafydd Evans, the Bill’s SRO, said that the Welsh Government planned to monitor the implementation of the new procurement regime, and that it would “evaluate after a certain period of time how the procurement regime is working, and build that into any reviews”.¹²⁹

Our view

123. The extent to which any new health service procurement regime will achieve its intended objectives will depend on whether relevant authorities, providers and potential providers have the capacity, resource and understanding to operate under the new arrangements and to make the most of the potential opportunities that could arise. It is clear from the evidence that while there is the will to make the most of these opportunities, there are concerns about the extent to which the capacity is there. It is clear that the earlier there is clarity on the likely scope, design and timescales for any new regime, the more effectively relevant authorities, providers and potential providers will be able to plan, and the more likely it is that any service disruption can be minimised or avoided.

124. The position for health bodies is strengthened by the role of the NSWSSP, which we understand is already working closely with Welsh Government on the development of its proposals. We are more concerned about the extent to which there is adequate capacity in local authorities to enable them to adapt to a new health service procurement regime at the same time as a broader public sector procurement regime. We are not yet assured that the Minister for HSS and the Minister for Finance and Local Government are working together to ensure that local authorities are adequately prepared or will have the capacity that they need.

125. We agree with the Minister for HSS that the consultation she plans to undertake in autumn 2023 will provide a useful opportunity to raise awareness of the anticipated changes, and the broad outline of her proposed approach.

¹²⁷ HSP4 Wales Council for Voluntary Action

¹²⁸ HSP6 Equality and Human Rights Commission Wales

¹²⁹ RoP [para 120], 30 March 2023

However, the implementation of any new regime (expected in spring 2024) will need to be accompanied by a clear and accessible communication campaign to ensure that relevant authorities, providers and potential providers in the third sector and the private sector, and providers and potential providers of all sizes, understand the detail of the new arrangements.

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.

126. We welcome the indication from the Bill's SRO that the Welsh Government intends to monitor and review the implementation of any new regime to ensure it is operating as intended. This is especially important for this Bill, as it is still uncertain how much arrangements in Wales will mirror or diverge from arrangements in England (including not only the first arrangements that will be made in England, but also any changes that will be made to those arrangements in future), and what impact any divergence may have. However, as there is no provision in the legislation for review of the Bill or the regime to be introduced in regulations and guidance, we would welcome further clarity on how and when the regime will be reviewed, and confirmation that the outcomes of any review will be published.

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.

7. Alignment with the broader policy, legislative and strategic context

Policy, legislative and strategic context in Wales

127. Throughout our scrutiny, stakeholders have emphasised the need for any new health service procurement regime for Wales to reflect, be consistent with, and contribute to the broader policy, legislative and strategic context. We have heard calls for greater clarity about how any new regime will fit into the broader context, whether through the provision on the face of the Bill, in regulations, in

statutory guidance, or in the EM. Stakeholders were concerned that, otherwise, the new regime could undermine existing Welsh Government objectives. Specific issues raised included:¹³⁰

- Whether the new health service procurement regime will operate in accordance with the principles set out in the Social Partnership and Public Procurement (Wales) Bill (including those relating to the living wage and fair work), and whether the regime will be included within the ambit of the Social Partnership Council.
- Whether the new health service procurement regime will operate in accordance with the principles set out in the Well-being of Future Generations (Wales) Act 2015. It was suggested by Cytun, Size of Wales, the Welsh Centre for International Affairs, and Fair Trade Wales that an impact assessment should be prepared to demonstrate this.
- Any implications for the commitment in the Welsh Government's programme for transforming and modernising planned care and reducing NHS waiting lists to using insourcing and outsourcing to reduce waiting times.¹³¹
- Any interaction with the anticipated Welsh Government consultation on the social care commissioning framework, and the principles set out in the Social Services and Well-being (Wales) Act 2014.
- Potential implications for 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. It was also noted that where connected goods are procured as part of mixed procurements, there is a risk that supply chains could include "problematic practices" unless appropriate provision is made either on the face of the Bill, in regulations or in statutory guidance.
- Compliance with the Code of Practice for Funding the Third Sector.

¹³⁰ See, for example, Health and Social Care Committee, Health Service Procurement (Wales) Bill: informal discussion, 22 March 2023; HSP2 Cytun; Size of Wales; Welsh Centre for International Affairs; and Fair Trade Wales; HSP4 Wales Council for Voluntary Action; HSP6 Equality and Human Rights Commission Wales; HSP11 Socialist Health Alliance Cymru

¹³¹ Welsh Government, [Transforming and modernising planned care and reducing NHS waiting lists](#), April 2022

128. In oral evidence, the Minister for HSS acknowledged the need to ensure any new procurement regime fitted into the wider context. In respect of health and social care integration and how the Bill interacts with the social care commissioning framework, she committed to engaging with statutory partners as part of the development of the regulations and statutory guidance.¹³² Similarly, in respect of the Code of Practice for Funding the Third Sector, she said that consideration would be given to how future regulations aligned with the Code.¹³³

Equality, diversity and inclusion duties

129. The EM states:

“114. The Equality Impact Assessment has been considered and has identified that the proposed primary legislation will not have a direct positive or negative impact on equalities for the citizens of Wales.

115. The Equality Impact Assessment will be further considered during the development of regulations and guidance produced in relation to a new NHS health services procurement regime in Wales.”¹³⁴

130. The EHRCW acknowledged this. However, it emphasised the potential for procurement to advance equality and human rights and improve outcomes for people with protected characteristics, and called for the Welsh Government to consider further the potential positive impacts on people with protected characteristics, including opportunities to advance equality through procurement. It added that, as a public body subject to the Public Sector Equality Duty (“PSED”), the Welsh Government has statutory obligations to engage with people with or representatives of people with protected characteristics.¹³⁵

131. During our informal stakeholder discussions, stakeholders cautioned of the risks of failing to identify opportunities within the Bill (and any regulations or guidance) to tackle existing inequalities, or of inadvertently reinforcing existing inequalities.¹³⁶

¹³² RoP [para 109], 30 March 2023

¹³³ RoP [para 148], 30 March 2023

¹³⁴ Welsh Government, [Health Service Procurement \(Wales\) Bill Explanatory Memorandum](#), February 2023, paras 114 to 115

¹³⁵ HSP6 Equality and Human Rights Commission Wales

¹³⁶ Health and Social Care Committee, Health Service Procurement (Wales) Bill: informal discussion, 22 March 2023

132. Relevant authorities, as defined in new section 10A(6) to be inserted into the NHSWA 2006 by section 3 of the Bill, are subject to the PSED. The EM states that NHS Wales is subject to the PSED, and that this will not be affected by the Bill.¹³⁷ It is silent regarding local authorities, although local authorities are similarly subject to the PSED.

133. The EHRCW said that under the PSED:

*“Public bodies will need to have ‘due regard’ at all stages of the health service procurement process to the need to advance equality”.*¹³⁸

134. Relevant authorities, and the EHRCW as the regulator for the PSED, will need to understand how the PSED, the socially responsible public procurement duty in the SPPP Bill, and the duties under any new health service procurement regime introduced by regulations and guidance made under the HSP Bill interact with one another. The EHRCW suggested that it would be helpful for the EM to be updated, and for any statutory guidance produced under the new section 10A(4) to clarify:

*“...how the potential synergies in aligning the requirements under the PSED, SPPP(W)B and the proposed Health Service Procurement (Wales) Bill can combine to bring about the greatest impact. These may be lost, lead to confusion and duplication if the PSED is not positioned as a strong lever that can sit alongside other Wales specific legislation”.*¹³⁹

135. In oral evidence on 30 March 2023, the Minister for HSS told us that the consultation planned for autumn 2023 would include an integrated impact assessment, including an assessment of any equality impacts.¹⁴⁰ However, she also emphasised that the Bill and regulations were “a technical procurement issue” relating to how relevant authorities commission, and that matters of policy about what relevant authorities want to commission is for them to determine:

“So, I think it's really important we don't go down a policy route here; this is a technical procurement issue. What health boards want to do

¹³⁷ Welsh Government, [Health Service Procurement \(Wales\) Bill Explanatory Memorandum](#), February 2023, para 116

¹³⁸ HSP6 Equality and Human Rights Commission Wales

¹³⁹ HSP6 Equality and Human Rights Commission Wales

¹⁴⁰ RoP [para 86], 30 March 2023

*and what they want to commission is a separate issue. How they commission is what we're talking about here.*¹⁴¹

Interaction with the United Kingdom Internal Market Act 2020

136. The United Kingdom Internal Market Act 2020 (“UKIMA 2020”) establishes an internal market for goods and services in the UK, with the aim of ensuring that goods and services can be traded freely across the whole of the UK. Health services are excluded from UKIMA 2020; therefore, to the extent the HSP Bill applies to health services, there is no interaction with UKIMA 2020. There is no equivalent exclusion for connected goods procured as part of a mixed procurement.

137. The Minister for HSS explained in a letter dated 17 March 2023:

*“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.”*¹⁴²

138. We asked the Minister for HSS about any potential practical effects of the non-discrimination principle in UKIMA 2020 for the operation of any new health service procurement regime as it relates to the procurement of goods connected to health services. She responded:

“So, in respect of the UKIMA, I think where the Senedd legislates to confer regulation-making powers on Welsh Ministers, those regulation-making powers in the future will also be exercisable free

¹⁴¹ RoP [para 88], 30 March 2023

¹⁴² [Letter from the Minister for Health and Social Services](#), 17 March 2023

*from the requirements of the Act. So, whilst the detail of any future regulations has yet to be decided, we're clear that they will not engage the UK Internal Market Act.*¹⁴³

139. The new section 10A to be inserted into the NHSWA 2006 by section 3 of the Bill, would give the Welsh Ministers powers to make regulations that, among other things, set objectives to be pursued by relevant authorities when they procure health services and goods connected to health services. Among others, health bodies told us that the introduction of a new regime for procuring health services (and connected goods and services) could potentially provide opportunities to contribute to wider Welsh Government objectives and initiatives, including, for example:

*“...the lower carbon footprint associated with services provided within Wales and increasing the amount of spend that NHS Wales puts in place with local service providers”.*¹⁴⁴

140. We put to the Minister for HSS the hypothetical example of including within the regulations an objective of “supporting goods made in Wales”, and asked her whether this could engage the non-discrimination principle in UKIMA 2020 i.e. amount to discrimination against goods made in other parts of the UK, thereby restricting the free trade of goods across the UK.

141. Nick Lambert, a senior Welsh Government lawyer, said:

*“Just to reiterate what the Minister said, which was that, with UKIMA, the view is that UKIMA wouldn't apply, but just to point out that, currently, the Procurement Bill and, we understand, the provider selection regime and the current public contract regulations all contain provisions around non-discrimination in them already. So, that framework exists in procurement legislation.”*¹⁴⁵

Our view

142. While 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

¹⁴³ RoP [para 179], 30 March 2023

¹⁴⁴ RoP [para 19], 9 March 2023

¹⁴⁵ RoP [para 182], 30 March 2023

forward under the new section 10A(1) and statutory guidance under the new section 10A(4), no legislation exists in a vacuum. It is important, therefore, that the Senedd and stakeholders are able to see how the HSP Bill fits within the wider policy, legislative and strategic context. This is even more important when legislation is brought forward within an evolving landscape such as that of public procurement, where significant legislative changes are taking place via the UK Government's Procurement Bill and the Welsh Government's SPPP Bill at the same time that the HSP Bill is being taken through the Senedd.

143. It is disappointing that the EM makes no reference at all to the SPPP Bill, and how the principles and structures set out in that legislation will interact with and help shape any new health service procurement regime for Wales. It is similarly disappointing that the EM makes no reference to the Well-being of Future Generations (Wales) Act 2015, and how any new health service procurement regime could contribute to the goals and ways of working. The inclusion of this information in the EM on introduction could have usefully informed our scrutiny, and made it easier for stakeholders to engage with the HSP Bill.

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.

144. The EM notes that a number of impact assessments have been undertaken, including children's rights, equality, health impact, justice, Welsh language, and biodiversity. We welcome the Minister for HSS's indication that an integrated impact assessment will be prepared as part of the consultation planned for autumn 2023. But, it is regrettable that the impact assessments that have been undertaken to date have not been published, and are not therefore available to inform our scrutiny or to assist stakeholders in understanding the implications of the HSP Bill.

145. In respect of equality, diversity and inclusion, we acknowledge the Minister for HSS's view that decisions taken by relevant authorities on the aims and details

of specific procurements within the context of any new regime will be a matter for them. However, the purpose of this Bill is to establish the right framework within which the new regime will be developed, including any objectives the Minister for HSS considers that relevant authorities should pursue. We agree with the EHRCW that the Welsh Government should use the HSP Bill to “provide leadership to health boards/trusts and local authorities commissioning care services”.¹⁴⁶

146. We also agree with the EHRCW that the Minister for HSS must ensure that, during the consultation planned for autumn 2023 and such other engagement as may take place, the Welsh Government engages with people with, or representatives of people with, protected characteristics and uses their views to inform decision-making.¹⁴⁷ As the EHRCW explained in its written evidence, this is both a requirement under the PSED, and an important way to ensure that the HSP Bill, and any procurement regime introduced under it, is inclusive and promotes equality outcomes.

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).

147. While health bodies and local authorities are relevant authorities for the purposes of the HSP Bill, we note that the EM refers to NHS Wales’ duties under the PSED, but is silent on those of local authorities.

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.

148. We agree with the Welsh Government that UKIMA 2020 does not affect the Senedd’s competence to legislate in respect of the matters covered within the HSP Bill; in our view, these matters are clearly within the Senedd’s legislative competence. Healthcare services are excluded from the scope of UKIMA 2020, and there is, therefore, no interaction with UKIMA 2020 in respect of the procurement of such services under any new regime to be brought forward under the HSP Bill.

¹⁴⁶ HSP6 Equality and Human Rights Commission Wales

¹⁴⁷ HSP6 Equality and Human Rights Commission Wales

149. However, we are not yet assured that UKIMA 2020 will have no practical effect on the operation of the new procurement regime to be brought forward under the HSP Bill as it relates to any goods which are procured in connection with health services. Whether there is such a practical effect is likely to depend on the objectives to be specified in regulations made under the new section 10A of the NHSWA 2006 (to be inserted by section 3 of the Bill). As we do not yet know what objectives the Minister for HSS may specify, it is not therefore possible at this stage for us to assess definitively whether such objectives could engage UKIMA 2020 as they relate to the procurement of goods connected to health services. However, it will be important for this assessment to be undertaken before the Senedd is asked to vote on the regulations.

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 there is a risk that the practical effect of the objectives could be undermined.

List of recommendations

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..... 18

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. 28

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.34

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.....35

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..... 40

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. 48

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. 48

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services, and if so whether is a risk that the practical effect of the objectives could be undermined. 56