

Report on the Health Service Procurement (Wales) Bill

April 2023



The Welsh Parliament is the democratically elected body that represents the interests of Wales and its people. Commonly known as the Senedd, it makes laws for Wales, agrees Welsh taxes and holds the Welsh Government to account.

An electronic copy of this document can be found on the Senedd website:
www.senedd.wales/SeneddLJC

Copies of this document can also be obtained in accessible formats including Braille, large print, audio or hard copy from:

**Legislation, Justice and Constitution Committee
Welsh Parliament
Cardiff Bay
CF99 1SN**

Tel: **0300 200 6565**

Email: **SeneddLJC@senedd.wales**

Twitter: **[@SeneddLJC](https://twitter.com/SeneddLJC)**

© **Senedd Commission Copyright 2023**

The text of this document may be reproduced free of charge in any format or medium providing that it is reproduced accurately and not used in a misleading or derogatory context. The material must be acknowledged as copyright of the Senedd Commission and the title of the document specified.

Report on the Health Service Procurement (Wales) Bill

April 2023



About the Committee

The Committee was established on 26 May 2021. Its remit can be found at www.senedd.wales/SeneddLJC

Current Committee membership:



Committee Chair:
Huw Irranca-Davies MS
Welsh Labour



Alun Davies MS
Welsh Labour



James Evans MS
Welsh Conservatives



Peredur Owen Griffiths MS
Plaid Cymru

The following Member attended as a substitute during the scrutiny of the Bill.



Peter Fox MS
Welsh Conservatives

Contents

1. Introduction	5
The purpose of the Bill.....	5
Legislative background	6
The Committee’s remit	8
2. Legislative competence	10
General	10
Our view	10
3. General observations	11
The need for primary legislation.....	11
The accessibility of procurement law applicable in Wales	11
The UK Government’s Procurement Bill	11
The Social Partnership and Public Procurement (Wales) Bill	13
Balance between what is on the face of the Bill and what is left to subordinate legislation.....	15
Engagement with the UK Government.....	18
Consultation to inform the Bill’s development.....	20
Timing of the Bill’s introduction.....	20
Common frameworks	21
Interaction with the United Kingdom Internal Market Act 2020	22
Our view	24
4. Specific observations on particular and sections and powers to make subordinate legislation.....	27
Section 2 (Power to disapply procurement rules in relation to NHS procurement in Wales).....	27

Our view	28
Section 3 (Procurement of services etc. as part of the NHS in Wales).....	28
Power to make regulations.....	28
Power to publish guidance.....	31
Our view	34

1. Introduction

On 13 February 2023, Eluned Morgan MS, the Minister for Health and Social Services (the Minister), introduced the Health Service Procurement (Wales) Bill (the Bill),¹ and accompanying Explanatory Memorandum (the EM).²

1. The Senedd's Business Committee referred the Bill to the Health and Social Care (HSC) Committee on 24 January, and on 7 February set a deadline of 28 April 2023 for reporting on its general principles.³
2. On 13 February, the Minister issued a statement of policy intent for subordinate legislation to be made under the Bill.⁴

The purpose of the Bill

3. According to its overview section, the Bill will:
 - amend the UK Government's Procurement Bill,⁵ (the Procurement Bill) once enacted, to enable the Welsh Ministers to disapply its provisions in relation to the procurement of services provided as part of the health service in Wales (described as a "disapplication power" in the EM⁶);
 - amend the *National Health Service (Wales) Act 2006*⁷ (the NHS Wales Act) to enable the Welsh Ministers to make specific (alternative) provision for the procurement of those services (described as a "creation power" in the EM⁸).

¹ [Health Service Procurement \(Wales\) Bill](#), as introduced

² [Health Service Procurement \(Wales\) Bill, Explanatory Memorandum incorporating the Regulatory Impact Assessment and Explanatory Notes](#), February 2023

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

⁴ Welsh Government, [Health Service Procurement \(Wales\) Bill: Statement of Policy Intent for Subordinate Legislation](#), February 2023

⁵ [Procurement Bill](#), as amended in Commons Public Bill Committee (HC Bill 249), 24 February 2023

⁶ EM, paragraph 2

⁷ [National Health Service \(Wales\) Act 2006](#) (c 42)

⁸ EM, paragraph 2

Legislative background

4. The EM states that, currently:

*“... the main legal framework governing the procurement of health services in England and Wales is the so-called ‘light touch regime’ set out in regulations 74–78 of the Public Contracts Regulations 2015 (PCR 2015)”.*⁹

5. The Public Contracts Regulations 2015 implemented EU Directives on public procurement.¹⁰ Following the end of the transition period of the UK’s exit from the EU in December 2020, the UK Government proposed reform to procurement legislation.¹¹

6. As a result of those proposals, in May 2022 the UK Government introduced the Procurement Bill in the House of Lords. In 2021 the UK Government presented the Welsh Government with the option to use the Procurement Bill to reform procurement law applicable in Wales; an option which the Welsh Government decided to pursue.¹² The Procurement Bill has since completed Committee Stage proceedings in the House of Commons; its provisions are subject to the Senedd’s legislative consent process.¹³

7. The EM also states that, separately, there are proposals to change the way health care services will be procured in England as a result of the provisions of the *Health and Care Act 2022* (the Health and Care Act). It states that the Health and Care Act, which received Royal Assent in April 2022:

*“... amends the National Health Service Act 2006 and enables the procurement of healthcare services in England to be removed from the scope of currently applicable procurement rules (set out in the PCR 2015) and for a new set of procurement rules to be put in place to replace the PCR 2015.”*¹⁴

⁹ EM, paragraph 5

¹⁰ [The Public Contracts Regulations 2015](#)

¹¹ UK Government, [Green Paper: Transforming public procurement](#), December 2020

¹² Welsh Government, [Written Statement: The Way Forward for Procurement Reform in Wales](#), 18 August 2021

¹³ Senedd Cymru, [Legislative Consent: Procurement Bill](#)

¹⁴ EM, paragraph 8

8. In February 2021, NHS England issued a public consultation on proposals for a new provider selection regime (PSR) for the procurement of NHS healthcare services, as its consultees were of the view that:

“... the current competition and procurement rules, particularly the PCR, are not well suited to the way healthcare is arranged, and create barriers to integrating care, disrupt the development of stable collaborations, and cause protracted processes with wasteful legal and administration costs.”¹⁵

9. In February 2022, the UK Government’s Department of Health and Social Care (DHSC) issued a supplementary consultation on the detail of proposals for regulations to be made under the new power in the *National Health Service Act 2006*, to be inserted by the Health and Care Act,¹⁶ which would implement the PSR.¹⁷ As the EM states, the outcome of this consultation is yet to be published.¹⁸

10. The EM states that, to “manage the potential overlap” between the PSR and the Procurement Bill, the UK Government included a clause within the Procurement Bill to enable UK Government Ministers, by regulations, to “disapply provisions of the Bill where provisions made in regulations under the National Health Service Act 2006 applies.”¹⁹ While the EM notes that, at the time of its laying, the clause had “recently been removed by way of non-government amendment”,²⁰ on 31 January 2023 the clause was reinstated into the Procurement Bill.²¹

11. In light of these changes, the EM states that there will be “two distinct separate health care services procurement regimes” in operation in England and Wales, which, upon consideration of the UK Government’s PSR proposals, it claims could “potentially” bring about unintended consequences for the procurement of health services in Wales.²²

12. Therefore, according to the EM:

“... the Health Service Procurement (Wales) Bill will seek to bring forward the powers needed to create a new health service

¹⁵ NHS England, [NHS Provider Selection Regime: Consultation on proposals](#), February 2021

¹⁶ The enabling power in the Health and Care Act has ~~not yet been brought into force~~.

¹⁷ Department of Health and Social Care, [Provider Selection Regime: supplementary consultation on the detail of proposals for regulations](#), February 2022

¹⁸ EM, paragraph 32

¹⁹ EM, paragraph 8

²⁰ EM, paragraph 7

²¹ Hansard, [Public Bill Committee, Procurement Bill \(First sitting\)](#), 31 January 2023

²² EM, paragraphs 17-18

*procurement regime that can be developed in a way which both supports the delivery of Welsh Government's strategic Programme for Government objectives and reduces the potential for Wales to be disadvantaged as a result of procurement reforms being progressed for health services in England."*²³

The Committee's remit

13. The remit of the Legislation, Justice and Constitution Committee is to carry out the functions of the responsible committee set out in Standing Orders 21 and 26C. The Committee may also consider any matter relating to legislation, devolution, the constitution, justice, and external affairs, within or relating to the competence of the Senedd or the Welsh Ministers, including the quality of legislation.

14. In our scrutiny of Bills introduced into the Senedd, our approach is to consider:

- matters relating to the competence of the Senedd, including compatibility with the European Convention on Human Rights (ECHR);
- the balance between the information that is included on the face of the Bill and that which is left to subordinate legislation;
- whether an appropriate legislative procedure has been chosen, in relation to the granting of powers to the Welsh Ministers, to make subordinate legislation;
- any other matter we consider relevant to the quality of legislation.

15. We took evidence from the Minister on 6 March 2023.²⁴ Following the evidence session, we wrote to the Minister on 13 March 2023 including a series of additional questions in relation to the Bill.²⁵ The Minister responded on 24 March 2023.²⁶

²³ EM, paragraph 20

²⁴ LJC Committee, [6 March 2023](#), Record of Proceedings

²⁵ [Letter to the Minister for Health and Social Services, 13 March 2023](#)

²⁶ [Letter from the Minister for Health and Social Services, 24 March 2023](#)

16. As part of our consideration, we have also considered correspondence in respect of the Bill exchanged between the Health and Social Care Committee and the Minister during March 2023.²⁷

²⁷ See the [letter from the Health and Social Care Committee to the Minister for Health and Social Services, dated 9 March 2023](#), and the [Minister's response, dated 17 March 2023](#).

2. Legislative competence

The Welsh Government is satisfied that the Bill would be within the legislative competence of the Senedd.²⁸

General

17. We considered the Bill under the reserved powers model of legislative competence, as set out in section 108A of the *Government of Wales Act 2006*.

18. In her statement on legislative competence, the Llywydd, Elin Jones MS, stated that in her view:

“The provisions of the Health Service Procurement (Wales) Bill would be within the legislative competence of the Senedd.”²⁹

19. The Minister confirmed in oral evidence that she was satisfied the Bill is within the Senedd’s legislative competence.³⁰

Our view

20. We note the evidence received from the Minister in relation to matters of legislative competence. We also note the Llywydd’s statement that, in her view, the provisions in the Bill would be within the legislative competence of the Senedd.

²⁸ EM, Member’s Declaration, page 2

²⁹ [Presiding Officer’s Statement on Legislative Competence: Health Service Procurement \(Wales\) Bill](#), 13 February 2023

³⁰ LJC Committee, 6 March 2023, RoP [23]

3. General observations

The need for primary legislation

21. The EM states that:

“In order to address the inconsistent procurement regimes for health services between England and Wales which will result from the introduction of the PSR in England, the Welsh Ministers will need new primary legislative powers to enable them to make future subordinate legislation on the matter, as is now being done in England.

The powers sought through the Bill will enable the Welsh Ministers to bring forward secondary legislation for a new procurement regime for health services provided as part of the health service in Wales, which best meets the needs of the sector and is mindful of the potential effects of alignment with, or divergence from, the PSR approach being taken in England.

... If the ability to replace existing arrangements with a new procurement regime for health services in Wales is not secured, NHS Wales and local authorities in Wales who procure health services may be disadvantaged as a result of the effects of changes being progressed in England.”³¹

22. The Minister told us that “the primary purpose” of the Bill is “to make sure we’ve got as consistent a procurement regime as England” to ensure a “level playing field”.³²

The accessibility of procurement law applicable in Wales

The UK Government’s Procurement Bill

23. Over a period of 9 months, between July 2022 and March 2023, we have considered a series of legislative consent memoranda laid by the Welsh Government in respect of provisions within the UK Government’s Procurement Bill. We laid our first report, on the first memorandum and a supplementary

³¹ EM, paragraphs 21–22, 28

³² LJC Committee, 6 March 2023, RoP [27]

memorandum (Memorandum No. 2), on 26 October 2022.³³ Our second report, on further supplementary legislative consent memoranda (Memoranda No. 3, No. 4 and No. 5), was laid on 14 March 2023.³⁴

24. Within the Welsh Government’s first memorandum on the Procurement Bill, the Minister for Finance and Local Government stated that:

“An amendment is needed for a disapplication power for the Welsh Ministers to make regulations equivalent to the power of the UK Government in relation to healthcare services. UK Government has already committed to bringing forward this amendment at Lords Committee Stage in a letter received from the Minister for Brexit Opportunities and Government Efficiency on 11 May.”³⁵

25. However, in July 2022 and within Memorandum No. 2, the Minister for Finance and Local Government stated that:

“... the Welsh Ministers have since decided not to pursue the inclusion of this power in the Bill but are considering various options, which may include taking forward the powers required via Senedd legislation as this area is devolved.”³⁶

26. In a letter to us on 8 February 2023, the Minister for Finance and Local Government explained why the Welsh Government had decided not to pursue the disapplication power within the Procurement Bill, and had instead decided to introduce the Health Services Procurement (Wales) Bill:

“UK Government only committed to the disapplication power within the Procurement Bill. Ministers recognised that both powers [a “disapplication power” and a “creation power”] 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

³³ LJC Committee, [The Welsh Government’s Legislative Consent Memoranda on the Procurement Bill](#), October 2022

³⁴ LJC Committee, [The Welsh Government’s Supplementary Legislative Consent Memoranda \(Memoranda No. 3, No. 4 and No. 5\) on the Procurement Bill](#), March 2023

³⁵ Welsh Government, [Legislative Consent Memorandum: Procurement Bill](#), 9 June 2022, paragraph 119

³⁶ Welsh Government, [Supplementary Legislative Consent Memorandum \(Memorandum No. 2\): Procurement Bill](#), 11 July 2022, paragraph 11

necessary legislation and gave greater coherence and accessibility to the legislation.”³⁷

27. The Minister confirmed this position to us in oral evidence.³⁸

28. When asked for her view on the approach taken, which would involve the Bill amending provision in the Procurement Bill – a Bill which is yet to be enacted – the Minister said:

“It’s not ideal, but we’re fairly confident that it will land not far off where we are at the moment. It is getting to its final Stages. Again, what we’re anxious to avoid is a long time period where we will not be able to provide the kinds of service provisions that exist at the moment.”³⁹

29. An official accompanying the Minister said:

“... should there be any amendments to that Bill that affect things like the numbering of this Bill, then we’d be able to take those into account.”⁴⁰

The Social Partnership and Public Procurement (Wales) Bill

30. The Social Partnership and Public Procurement (Wales) Bill (the SPPP Bill), which was introduced into the Senedd in June 2022, includes provision in respect of socially responsible public procurement. It was passed by the Senedd on 14 March 2023.⁴¹

31. When asked why the Bill’s provisions could not have been inserted into the SPPP Bill, the Minister stated that the SPPP Bill was “mostly about organisational principles” while the Bill was “about how you do procurement.”⁴² The Minister went on to say:

“We’ve explored every avenue, if I’m honest. We found that it didn’t sit comfortably with other Bills, and that’s why we’ve

³⁷ Welsh Government, [Letter from the Minister for Finance and Local Government](#), 8 February 2023, response to question 2a

³⁸ LJC Committee, 6 March 2023, RoP [28]

³⁹ LJC Committee, 6 March 2023, RoP [60]

⁴⁰ LJC Committee, 6 March 2023, RoP [63]

⁴¹ Senedd Cymru, [Social Partnership and Public Procurement \(Wales\) Bill](#)

⁴² LJC Committee, 6 March 2023, RoP [40]

taken this route. We did explore that as an option and found that it wouldn't have worked.”⁴³

32. An official accompanying the Minister commented on the impact of the Bill's introduction on the accessibility of law:

“... it is a short Bill, with a couple of clauses. When its work will have been done—because, effectively, those two clauses then pass into the two other Acts, the Procurement Act 2023 and the National Health Service (Wales) Act 2006—it will be very accessible at the end of that. But as the Minister said, this was the only route, particularly when we couldn't get a route by joining the UK Government in having both those powers.”⁴⁴

33. When we suggested to the Minister that the inclusion of provisions on procurement law applicable in Wales within several legislative vehicles would have a negative impact on the accessibility of the law, she stated:

“I'd argue that it's the opposite of that. I would argue that, actually, what's going to happen is if you're interested in procurement in the NHS in future, you just go to the NHS Wales Act. That's where you go. You don't have to go to this Bill, it's done. So, I actually think it's much, much simpler following this route. ...

NHS procurement is fairly limited, it's fairly unique. The kind of people who are looking at this will know where to go for that information, and they'll know in future that they'll just go straight to the NHS Wales Act and look at what's been amended there.”⁴⁵

34. We also suggested to the Minister that viewing the newly amended NHS Wales Act, by means of the Bill, would require the legislation.gov.uk site to be updated quickly, which is not always the case.⁴⁶ In response, the Minister said:

“... I don't think this is very complicated. Once you've made the tweak—. You've seen how short the Bill is. It's not a difficult

⁴³ LJC Committee, 6 March 2023, RoP [43]

⁴⁴ LJC Committee, 6 March 2023, RoP [47]

⁴⁵ LJC Committee, 6 March 2023, RoP [53, 55]

⁴⁶ The National Archives' [editorial practice and timescales](#) in respect of the legislation.gov.uk site state that it aims to incorporate new amendments into the text of the legislation within three months of those amendments coming into force.

amendment to make, I don't think; it's a very small amendment, really."⁴⁷

Balance between what is on the face of the Bill and what is left to subordinate legislation

35. The Bill contains five sections, and includes two powers for the Welsh Ministers to make regulations, and one duty on them to publish guidance.

36. An overview of the powers delegated to the Welsh Ministers to make subordinate legislation is included at chapter 5 of the EM. As previously stated, the Welsh Government has also provided a statement of policy intent for subordinate legislation to be made under the Bill.

37. The Minister told us that the Bill is a “framework Bill” that gives the Welsh Government “permission to then do things when it comes to regulations.”⁴⁸

38. Concerns about the perceived increase in the number of framework Bills brought forward by governments – or at the extent of powers within such ‘enabling’ or ‘skeleton’ Bills as they are sometimes described – have been raised by:

- the Fourth Assembly’s Constitutional and Legislative Affairs Committee, in its 2015 report *Making Laws in Wales*;⁴⁹
- the House of Lords Constitution Committee, in its 2018 report *The Legislative Process: The Delegation of Powers*;⁵⁰
- the House of Lords Secondary Legislation Scrutiny Committee, in its 2021 report *Government by Diktat: A call to return power to Parliament*;⁵¹
- the House of Lords Delegated Powers and Regulatory Reform Committee, in its 2021 report *Democracy Denied? The urgent need to rebalance power between Parliament and the Executive*.⁵²

⁴⁷ LJC Committee, 6 March 2023, RoP [239]

⁴⁸ LJC Committee, 6 March 2023, RoP [37]

⁴⁹ Constitutional and Legislative Affairs Committee (Fourth Assembly), *Making Laws in Wales*, October 2015, paragraph 12

⁵⁰ House of Lords Constitution Committee, *The Legislative Process: The Delegation of Powers*, 16th Report of Session 2017-19, HL Paper 225, 20 November 2018, paragraphs 25, 26, 48 and 58

⁵¹ House of Lords, Secondary Legislation Scrutiny Committee, *Government by Diktat: A call to return power to Parliament*, 20th Report of Session 2021-22, HL Paper 105, 24 November 2021

⁵² House of Lords, Delegated Powers and Regulatory Reform Committee, *Democracy Denied? The urgent need to rebalance power between Parliament and the Executive*, 12th Report of Session 2021-22, HL Paper 106, 24

39. We have raised similar concerns in respect of framework Bills that have recently been introduced by the Welsh Government. We noted in our report on the Welsh Tax Acts etc. (Power to Modify) Bill that it was “profoundly disappointing” that the second piece of primary legislation introduced by the Welsh Government in the Sixth Senedd was “an enabling Bill which inherently leaves all significant policy development and implementation to be determined by subordinate legislation.”⁵³ Similarly, we found that the Minister for Rural Affairs and North Wales, and Trefnydd’s approach to legislating in respect of the Agriculture (Wales) Bill – a framework Bill which the Minister stated would respond to the need for futureproofing and flexibility – did not represent good legislative practice and was “not one that should be followed”.⁵⁴

40. As previously stated, the Bill includes a regulation-making power for the Welsh Ministers which corresponds to a power for UK Ministers contained within the Health and Care Act. The House of Lords Delegated Powers and Regulatory Reform (DPRR) Committee set out its view on the power contained within the then Health and Care Bill as follows:

“The Memorandum ... states that, although initial consultation has been carried out by NHS England on the content of the [PSR] regime, full analysis has not been completed and there has not been time to produce a more developed proposal.

We do not accept that the inclusion of regulation-making powers should be a cover for inadequately developed policy.”⁵⁵

41. In response, the UK Government disagreed with the DPRR Committee’s statement:

“There is a genuine need for the flexibility that will be achieved by the regime being set out in regulations; to allow it to be adapted to reflect the challenges the health services faces over time, and to allow it to be adapted in light of future changes in broader procurement law brought about by the Cabinet Office procurement Bill.”⁵⁶

⁵³ LJC Committee, [Report on the Welsh Tax Acts etc. \(Power to Modify\) Bill](#), April 2022, paragraph 88

⁵⁴ LJC Committee, [Report on the Agriculture \(Wales\) Bill](#), January 2023, paragraph 65

⁵⁵ House of Lords Delegated Powers and Regulatory Reform Committee, [15th Report of Session 2021-22](#), 16 December 2021

⁵⁶ House of Lords Delegated Powers and Regulatory Reform Committee, [16th Report of Session 2021-22](#), 12 January 2022

42. A justification for the inclusion of the regulation-making power for the Welsh Ministers within the Bill is provided in the EM:

“The current detail of this system is not yet known and therefore the Welsh Ministers need the flexibility to be able to implement a regime that takes account of the English system. Furthermore, there is also a need to enable flexibility in the regime for the future. As the nature of the health service and the challenges that it is facing may change over time, it may be appropriate to alter the regime as time goes on so that it is more appropriate for the health service at that point in time.”⁵⁷

43. The Minister reiterated these points when we asked why secondary legislation is considered to be the appropriate mechanism for bringing forward a new regime for the procurement of health services in Wales, and whether she had considered using an Act of the Senedd for this purpose. The Minister said:

“Just to remind ourselves, the primary purpose of this is to make sure we've got as consistent a procurement regime as England, and the problem is that, at the moment, we don't know what the detail of what that procurement [regime in England] will look like, and so what we need is flexibility. We need to be able to respond, and if we were to put things on the face of the Bill now, it's pretty clear we're unlikely to get that—to just guess that whatever they're going to put down in terms of regulations will provide us with that level playing field—which is why what we need to do now is to wait for those regulations to come through from England, and at that point we will decide. And the point is that we will have the flexibility to decide, 'Right, actually, maybe that bit of the level playing field we don't particularly like'. We will have the flexibility to decide that ourselves, whereas if we'd just hooked onto an English Bill, we wouldn't have had that flexibility at all.”⁵⁸

44. When we suggested that the DPRR Committee's comments in respect of the Health and Care Bill (now Act) may be applicable in respect of the inclusion of the power in the Bill, an official accompanying the Minister stated:

⁵⁷ EM, pages 18–19

⁵⁸ LJC Committee, 6 March 2023, RoP [83]

“... timing and urgency are the reasons for the inclusion of the regulation-making powers in this case, rather than poorly developed policy.”⁵⁹

45. When asked if she agreed that it would be beneficial if Members of the Senedd were able to put forward amendments to health procurement proposals, the Minister said:

“In an ideal world, I can see that would be useful, but what we're talking about is an affirmative procedure [for the regulations] where, obviously, committees like yours would have the opportunity to look at those in detail. But you're right ... it's not quite the same as the ability to amend.”⁶⁰

Engagement with the UK Government

46. The Minister told us that the UK Government had not “particularly helped” the Welsh Government during the development of the Bill, although it was not “obstructing”.⁶¹

47. The Minister also suggested that the UK Government was not giving the Welsh Government “much detail” of the draft regulations setting out the PSR which would apply in England.⁶² An official accompanying the Minister confirmed that the UK Government had shared “some” detail of the draft regulations, although:

“We don't know how many changes there will be from early discussions and early drafting work to, effectively, regulations that are laid. That's why we need to understand what regulations are laid, to understand what is in, what is out, what is different. What we don't want to try and do, effectively, is work on something that doesn't come to pass because we're trying to do this mirroring. So, yes, we're working with DHSC, but I think, as we said, we do need to understand where they finally settle, because there could be quite a few differences and changes in terms of those final regulations.”⁶³

⁵⁹ LJC Committee, 6 March 2023, RoP [104]

⁶⁰ LJC Committee, 6 March 2023, RoP [90]

⁶¹ LJC Committee, 6 March 2023, RoP [31, 33]

⁶² LJC Committee, 6 March 2023, RoP [121]

⁶³ LJC Committee, 6 March 2023, RoP [127]

48. The official also stated that there was nothing to suggest that the UK Government would not share final versions of the regulations with the Welsh Government.⁶⁴

49. We suggested to the Minister that a situation may arise where the UK Government shares final versions of its regulations within a short period of time ahead of their laying. An official accompanying the Minister stated:

*“We are having discussions with officials from DHSC, as you can imagine, but, in those discussions with officials, as the Minister has said, we do actually need to understand, finally, where that policy and regulations land, before acting or moving in Wales. So, whilst we understand it, we still need to understand where those regulations will lie, for Wales to understand how we respond”.*⁶⁵

50. In a letter to the Health and Social Care Committee, the Minister stated that DHSC is advising stakeholders that the PSR “is not expected to be in use before July 2023”.⁶⁶

51. In her correspondence to us, the Minister also stated that, at the time of the Health and Care Act receiving Royal Assent, there had been “limited interaction” between DHSC and her officials on the PSR and “limited appreciation by DHSC on the perceived operational impact for health service procurement in Wales.” However, since that time, the engagement had improved:

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

⁶⁴ LJC Committee, 6 March 2023, RoP [131]

⁶⁵ LJC Committee, 6 March 2023, RoP [119]

⁶⁶ Letter from the Minister for Health and Social Services to the Health and Social Care Committee, 17 March 2023, response to question 1a

DHSC will share copies of the completed regulations when finalised and ready for laying.”⁶⁷

Consultation to inform the Bill’s development

52. The EM states that while “focussed, proactive engagement” with key stakeholders had been undertaken during the Bill’s development, a formal open consultation on a draft version of Bill had not been undertaken due to:

- the specialised nature of the topic;
- the urgency to respond to the effects of the proposed procurement reforms in England; and
- the view that the powers created by the Bill only impact NHS Wales and specific sectors of the health service.⁶⁸

53. The EM also states that consultation with economic groups and industry will take place in Spring 2023.⁶⁹

54. When asked whether she considered the absence of an open formal consultation held during the Bill’s development to have any negative impacts, the Minister stated:

“I don't think so, because we have anticipated the kind of people who would be affected by this Bill, and we have consulted with them informally ... those people who will be affected by the legislation know that it's coming.”⁷⁰

55. The Minister also stated that there was “no point” holding a public consultation to inform the development of regulations to be made under the Bill “until we know where the regulations are going to land in Westminster.”⁷¹

Timing of the Bill’s introduction

56. As previously stated in Chapter 1, the Bill’s introduction in February 2023 was in response to the Procurement Bill’s introduction in May 2022, and the Health and Care Act’s passing in April 2022.

⁶⁷ Letter from the Minister for Health and Social Services, 24 March 2023, additional supplementary information

⁶⁸ EM, paragraphs 35–39

⁶⁹ EM, paragraph 50

⁷⁰ LJC Committee, 6 March 2023, RoP [73]

⁷¹ LJC Committee, 6 March 2023, RoP [79]

57. Ahead of the Bill's introduction, the Health and Social Care Committee raised concerns with the Business Committee in respect of the proposed shortened period for Stage 1 within the overall timetable for scrutiny of the Bill; a timetable which was later agreed without revision.⁷²

58. When asked to provide an explanation for the timing of the Bill's introduction, while also taking the curtailed timetable for its scrutiny into account, the Minister said:

"The Department of Health and Social Care consulted on their proposals last spring, and, since then, my officials have been spending their time consulting with the NHS, in terms of 'Right, what does this mean for us? What we need to do? How would any changes in England under the provider selection regime impact on health services in Wales?' What we've done here is to respond to that, and to find the earliest stand-alone legislative slot to minimise that time gap that I was talking about, to avoid having what is an unequal playing field.

*... this is a very, very short Bill, as you'll be aware. And this is a framework Bill, so the key thing to remember is that this gives us the permission to then do things when it comes to regulations. So, in terms of the real scrutiny, I think, the important bit will come when we're laying the regulations."*⁷³

Common frameworks

59. Following the UK's exit from the EU, UK-wide common frameworks were established to manage divergence in certain policy areas formerly governed or coordinated at EU level, but which otherwise fall within areas of devolved competence. We have been considering overarching issues arising from the scrutiny of common frameworks by Senedd committees.⁷⁴

60. The provisional Common Framework for Public Procurement was first published in March 2021, and subsequently updated in January 2022.⁷⁵

61. When asked about the Bill's interaction with the common framework and procurement law elsewhere in the UK, the Minister said:

⁷² Business Committee, [7 February 2023](#), minutes, item 4.1

⁷³ LJC Committee, 6 March 2023, RoP [35, 37]

⁷⁴ See the [common frameworks](#) webpage for details.

⁷⁵ UK Government, [Public Procurement: Provisional Common Framework](#)

“We are taking a different approach to Scotland. You'll be aware that Scotland is trying to keep as much of their rules alongside the rules of the EU, whereas, actually, we are now going to be moving towards trying to keep a level playing field with England, which is a different approach. Northern Ireland have decided to join the UK Government's procurement Bill, so they're going to be under the light-touch regime for public contracts. So, they're in a slightly different position again.”⁷⁶

62. An official accompanying the Minister said:

“The Bill itself doesn't directly impact on the common framework. 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.”⁷⁷

Interaction with the United Kingdom Internal Market Act 2020

63. The *United Kingdom Internal Market Act 2020* (the UK Internal Market Act) established two “market access principles” that apply to goods and services:

- the principle of mutual recognition ensures relevant requirements from one part of the UK do not prevent the sale of goods and services in that country from another part of the UK;
- the principle of non-discrimination supports companies trading in the UK, regardless of where in the UK they are based, by preventing unreasonably discriminatory regulation.⁷⁸

64. The Welsh Government sought application for a judicial review of the UK Internal Market Act; its application was later rejected by the Supreme Court on the grounds that it was premature.⁷⁹ The Welsh Government has repeatedly stated that the Act has no impact on the Senedd's legislative competence, and while we have argued that the Act will have a practical effect on legislation passed by the Senedd – the first example of which is the Environmental

⁷⁶ LJC Committee, 6 March 2023, RoP [57]

⁷⁷ LJC Committee, 6 March 2023, RoP [58]

⁷⁸ Welsh Government, *Law Wales: The UK Internal Market Act 2020*, June 2022

⁷⁹ Welsh Government, *Written Statement: Legal challenge to the UK Internal Market Act 2020*, 18 August 2022

Protection (Single-use Plastic Products) (Wales) Bill – the Welsh Government has stated that such legislation is “fully effective and enforceable”.⁸⁰

65. In respect of the impact of the UK Internal Market Act on the practical effect of the Bill’s provisions, an official accompanying the Minister stated:

“The Welsh Government’s clear position in relation to the UK internal market Act is that, when the Senedd legislates in a non-reserved area, it does so free from the requirements of the Act. This includes a situation where the Senedd legislates to confer regulation-making powers on the Welsh Ministers. Those regulation-making powers will in future also be exercisable free from the requirements of the Act. Therefore, whilst the detail of any future regulations have yet to be decided, we are clear that the provisions relating to the procurement of goods connected to healthcare services contained in both the Bill and any future regulations made using the powers in this Bill will not engage the UK internal market Act.”⁸¹

66. The Health and Social Care Committee sought further clarity from the Minister in respect of this statement; her response was as follows:

“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.”⁸²

⁸⁰ [Letter from the Minister for Climate Change, 9 December 2022](#)

⁸¹ LJC Committee, 6 March 2023, RoP [153]

⁸² Letter from the Minister for Health and Social Services to the Health and Social Care Committee, 17 March 2023, response to question 3

Our view

67. We acknowledge the Minister's explanations for the need for the Bill.

68. However, as we have stated in our reports on the legislative consent memoranda laid in respect of the Procurement Bill, we believe that the Welsh Government should have introduced primary legislation of its own to reform the processes underpinning procurement in Wales. Such provisions could have been included within the SPPP Bill during the period of that Bill's development, and the Welsh Government could have used the Common Framework on Public Procurement to ensure its proposals aligned with those of the Procurement Bill, while also allowing for divergence where the UK Government's proposals did not align with the Welsh Government's values. Legislating in parallel in this way would have ensured fully accessible legislation, available in both Welsh and English, and would have avoided the need for a separate discrete item of legislation on the statute book in the form of this Bill.

69. We believe that our view on the Welsh Government's approach is crystallised by the Minister's statement that it is "not ideal" that the Bill – unusually – amends provision which is not yet on the statute book.

70. The Minister's contention that those with an interest in this legislation will "know where to go" – to the NHS Wales Act, as amended by the Bill – is predicated on the legislation.gov.uk site being updated quickly. This is not always the case; the National Archives states it can take up to three months for amendments to legislation to appear, and the Welsh Government has stated elsewhere that "just under 6,000 items" of Welsh legislation potentially need updating on the site.⁸⁵ We therefore believe that when legislation is needed to be implemented urgently, as the Minister argues is the case here, ensuring the legislation is accessible is paramount.

71. Furthermore, we contend that those with an interest in healthcare procurement in Wales would be required to consider:

- the NHS Wales Act, as amended by the Bill, for the power which enables the Welsh Ministers to make regulations in respect of the procurement of health services;

⁸⁵ See paragraph 7 of Welsh Government's report, [The future of Welsh law: A programme for 2021 to 2026 – annual report 2021 to 22](#), dated November 2022. Paragraph 23 also states there are approximately 46,000 "effects" (changes to the statute book) yet to be applied to the texts of Welsh law on the site.

- the regulations to be made by the Welsh Ministers in respect of the procurement of health services;
- the Procurement Bill, for provisions in respect of the procurement of goods by the health service in Wales.

72. We therefore disagree with the Minister’s assertion that the approach taken by the introduction of the Bill will result in accessible law.

73. It is similarly regretful that the Bill is yet another framework Bill introduced by the Welsh Government in this Senedd. We believe that this approach continues to signal an unfortunate trend of the Welsh Ministers taking additional executive powers at the expense of reduced scrutiny by the Senedd. The Minister states that, in an “ideal world”, it would be useful for Members of the Senedd to be able to put forward amendments to the procedures underpinning the procurement of health services in Wales, as enabled by this Bill. To us, the approach the Welsh Government is taking means that we are continuously venturing further away from that ideal position.

74. We note the Minister’s arguments that flexibility is needed to enable the Welsh Ministers to respond with agility to changes to procurement law made over the border. However, it is concerning that it appears the Welsh Government feels compelled to legislate in a reactive manner to changes by the UK Government which apply to England. We hope this does not turn into a trend which may restrict available time in the Welsh Government’s legislative programme to legislate on its own initiative to improve the lives of the people of Wales.

75. Legislating in this reactive manner also creates a dependency on the UK Government’s goodwill in sharing its legislative proposals in a timely manner, to enable sufficient time for scrutiny of legislation introduced into the Senedd. It is therefore disappointing that the UK Government’s engagement was initially limited, and that it showed minimal appreciation of the potential impacts of its legislation on Wales. Although it is encouraging that it appears the level of intergovernmental engagement has improved, it is unclear to which degree this is: while the Minister told us in oral evidence that the UK Government had not “particularly helped” the Welsh Government during the Bill’s development, in subsequent correspondence she described the engagement as “excellent”.

76. We note the Minister’s reasons for not undertaking a consultation ahead of the Bill’s introduction. However, since the Bill’s provisions effectively mirror those in the Health and Care Act and the Procurement Bill, which were available in the public domain in some form from at least as early as May 2022, we contend that

the Minister could and should have consulted on those provisions ahead of the Bill's introduction.

77. In addition, as the UK Government shared its preferred principles to underpin the PSR in February 2022, we also contend that the Minister could have sought wider stakeholders' views on those principles, and the degree to which they may be applied to Wales. We believe that undertaking this consultation ahead of the Bill's introduction could have enabled more information about the scope of regulations to be placed on the face of the Bill.

78. We believe that the overall legislative approach taken by the Welsh Government towards the reform of procurement law which applies in Wales to be unsatisfactory. We believe that closely following an approach taken by the UK Government restricts the ability of the Welsh Government – and, more importantly, Welsh stakeholders – to influence that approach. In addition, it restricts the Welsh Government's ability to mainstream its core values within legislation which applies in Wales.

Conclusion 1. While we acknowledge the need for this Bill, it is regretful that this need has arisen as a result of what we believe is the unsatisfactory legislative approach taken by the Welsh Government towards the reform of procurement law which applies in Wales.

79. We note the evidence provided by the Minister and her officials in respect of the Bill's impact on common frameworks, in that it does not impact upon the frameworks, and that the Scottish Government and the Northern Ireland Executive are both adopting different approaches to procurement law to that of the UK Government and the Welsh Government.

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

4. Specific observations on particular and sections and powers to make subordinate legislation

Section 2 (Power to disapply procurement rules in relation to NHS procurement in Wales)

81. Section 2 of the Bill inserts a new section 116A into the Procurement Bill, once enacted, to enable the Welsh Ministers to disapply its provisions in relation to the procurement of services provided as part of the health service in Wales.

82. The new section 116A provides that such procurement includes that undertaken by a “relevant authority”, which is defined within the new section 10A of the NHS Wales Act to be inserted by section 3 of the Bill. A “relevant authority” is defined within the new section 10A as a local authority, a local health board, a NHS trust or a special health authority.

83. However, the heading of the new section 116A to be inserted into the Procurement Bill is as follows:

“Power to disapply this Act in relation to procurement by NHS in Wales” [our emphasis].

84. We therefore asked the Minister whether the heading accurately reflects the provision, given that the provisions of the Procurement Bill, once enacted, may be disapplied by the Bill in respect of health service procurement by local authorities, in addition to NHS organisations in Wales. In response, the Minister said:

“I think it's acknowledged that the powers in 116A apply to local authorities, but they only apply when they're procuring health services as a part of the NHS. So, it is, actually, quite limited, once again. It's very tightly defined. So, for example, a local authority may be working with a health board to procure services for veterans, for example—mental health support for veterans—so that would be an example where you might do that together, and they would, therefore, fall under this Bill.

... it just replicates what's being said in England, so the whole point is we're trying to replicate everything, so we're not going too far away from what they're suggesting there. So, it's all

about consistency, really; consistency in the drafting here and in Westminster.”⁸⁴

85. An official accompanying the Minister added:

“If we put something different here, people could ask the question, effectively: were we intending to do something different? So, as I say, it is for those health and NHS services, and we thought it sensible to have the same wording that England had used as well to make the accessibility easier, so people weren't confused.”⁸⁵

Our view

86. We note that the Minister appears to suggest that the Welsh Government's approach in respect of section 2 of the Bill is to replicate the provisions of the Procurement Bill to ensure consistency of drafting.

87. However, we believe that ensuring that legislation made in Wales is clear in its effect is of higher importance than seeking to replicate law made by another legislature, where it has been identified that the law may not be wholly clear in its effect.

88. As such, it is our view that the heading of the new section 116A should be amended to provide clarity that the provisions of the Procurement Bill, once enacted, may be disapplied in respect of health services procurement undertaken by NHS organisations and local authorities in Wales.

Recommendation 1. The Minister should table an amendment to the Bill to alter the heading of the new section 116A of the *National Health Service (Wales) Act 2006*, to be inserted by section 2 of the Bill, to clarify that the provisions of the Procurement Bill, once enacted, may be disapplied in respect of health services procurement undertaken by NHS organisations and local authorities in Wales.

Section 3 (Procurement of services etc. as part of the NHS in Wales)

Power to make regulations

89. Section 3 of the Bill inserts a new section 10A into the NHS Wales Act to enable the Welsh Ministers to make regulations, subject to the affirmative procedure. The regulations would establish the processes to be followed, and the

⁸⁴ LJC Committee, 6 March 2023, RoP [232, 234]

⁸⁵ LJC Committee, 6 March 2023, RoP [235]

objectives to be pursued, in the procurement of services provided as part of the health service in Wales.

90. We asked the Minister whether she believed the affirmative procedure provides sufficient scrutiny of the regulations, and whether consideration had been given to provide additional time on the face of the Bill for such scrutiny. In response, she said:

“... we'll follow the normal procedures that we use in the Senedd. So, this is not going to be exceptional, it's not going to be any different from any other framework agreements that have happened in the past. The kind of time frame we're talking about will be the same as consultation exercises elsewhere. So, there's nothing new, nothing interesting to see here.”⁸⁶

91. The Minister also confirmed that she was satisfied that regulations to be made under section 3 of the Bill would be fully within the Senedd's legislative competence.⁸⁷

92. The Minister set out the anticipated timings of the laying of regulations in correspondence:

“We anticipate laying regulations in early 2024 following the ‘draft affirmative procedure’ to allow the Senedd the opportunity to scrutinise the regulations, and aiming for those regulations coming into force in Spring 2024, subject to Senedd approval.

This proposed timeline aims to coincide as far possible with wider procurement reform changes as a result of the UK Government's Procurement Bill to minimise operational impact for the ‘relevant authorities’ who will be implementing the new procurement regimes.”⁸⁸

Consultation to inform the development of the regulations

93. The EM states that a “full open 12 week consultation exercise” will be used to inform the development of the regulations.⁸⁹

⁸⁶ LJC Committee, 6 March 2023, RoP [95]

⁸⁷ LJC Committee, 6 March 2023, RoP [96–97]

⁸⁸ Letter from the Minister for Health and Social Services, 24 March 2023, response to question 1

⁸⁹ EM, paragraph 36

94. In her letter of 24 March, the Minister shared her expectations for the timing of the consultation:

“At present and subject to Senedd approval, the expectation is for the Bill to receive Royal Assent in August.

Following Royal Assent, it is proposed to undertake a 12 week public consultation commencing as soon as practical, and likely to begin in early Autumn. However, this timing is predicated on having seen the final Regulations and statutory guidance on the Provider Selection Regime from DHSC in the next few months.”⁹⁰

95. The Minister also set out the approach the Welsh Government anticipated to take:

“The consultation will focus on the operational principles of the new procurement regime for Wales, 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 help inform the development of the future regulations and statutory guidance (which will be developed in partnership with NHS Wales). As such, we are not proposing to consult on the actual Welsh regulations and statutory guidance.”⁹¹

96. When we asked why a duty to consult on the regulations was not included on the face of the Bill, the Minister stated:

“I thought that was usual practice ... there's statutory guidance that you do a 12-week consultation, so we're doing a 12-week consultation. So, I didn't think it was needed on the face of the Bill.”⁹²

⁹⁰ Letter from the Minister for Health and Social Services, 24 March 2023, response to question 1

⁹¹ Letter from the Minister for Health and Social Services, 24 March 2023, response to question 1

⁹² LJC Committee, 6 March 2023, RoP [146]

Power to publish guidance

97. The new section 10A of the NHS Wales Act, to be inserted by the Bill, also provides that the Welsh Ministers must publish guidance about compliance with the regulations under the section.

98. The EM states that the 12-week consultation to inform the development of the regulations under section 3 would also be used to inform the preparation of the statutory guidance.⁹³

99. The Minister stated that the statutory guidance will encompass the “operational principles” underpinning the regulations, and an official accompanying the Minister provided further detail about the process of its development and its proposed contents:

“Again, we would look at the statutory guidance that England produced, and look to see what's different. But that guidance we would expect to make quite clear, for instance, when different parts of the provider selection regime could be used, and also that guidance would make clear how it related to the Procurement Bill as well.”⁹⁴

100. The Minister confirmed that the statutory guidance will be produced alongside the regulations,⁹⁵ and published on the Welsh Government’s website.⁹⁶

101. We asked the Minister to explain why a duty to consult with relevant authorities and other bodies during the development of the statutory guidance is not included on the face of the Bill, particularly given that the Bill provides that relevant authorities “must have regard to” the guidance. In response, the Minister said:

“... I think this is just usual consultation duties—we think that's sufficient under these circumstances ... The statutory guidance, obviously, is subject to that 12-week consultation.”⁹⁷

⁹³ EM, paragraph 36

⁹⁴ LJC Committee, 6 March 2023, RoP [163]

⁹⁵ LJC Committee, 6 March 2023, RoP [160]

⁹⁶ LJC Committee, 6 March 2023, RoP [237]

⁹⁷ LJC Committee, 6 March 2023, RoP [179]

‘Mixed procurement’

102. The 2022 consultation issued by the UK Government’s Department of Health and Social Care on its proposals for regulations setting out the PSR noted that:

“Inevitably, some procurements may contain multiple elements, some of which are clearly within the scope of the Provider Selection Regime, and other elements that are within the scope of the wider procurement regulations [or the Procurement Bill, once enacted].”⁹⁸

103. It therefore proposed the following:

“... the regulations setting out the Provider Selection Regime should allow for the arrangement of a service for which the primary aim is to deliver a healthcare service, even if some services within the contract are not healthcare but are essential to deliver the healthcare element of the contract safely and effectively.

We propose that mixed contracts of healthcare and social care services (when those services are provided directly to an individual) may be arranged under the Provider Selection Regime when both of the following apply:

- *the main subject matter of the contract is the delivery of healthcare services to individuals*
- *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”.⁹⁹*

104. An official accompanying the Minister provided an example of a mixed procurement which the main subject matter would be the delivery of healthcare services (procurement of an immunisation service), and stated that:

“... there is an element within the provider selection regime to have some mixed procurement, but that will be very specific,

⁹⁸ Department of Health and Social Care, Provider Selection Regime: supplementary consultation on the detail of proposals for regulations, February 2022, Proposals: mixed procurement

⁹⁹ Department of Health and Social Care, Provider Selection Regime: supplementary consultation on the detail of proposals for regulations, February 2022, Proposals: mixed procurement

because that is the part that needs to be very clear between what has been taken out and what will, for the vast majority of things, still be left in the Procurement Bill as goods and other services. So, they will need to sit tidily together, and the statutory guidance both in England and here will need to make it very clear as to when you're able to use the two routes.”¹⁰⁰

105. The Minister provided further information to us about the application of Bill's provisions in respect of mixed procurement:

*“The definition of ‘health services’ contained in the Bill relates to ‘**clinical**’ health services’ as described by sections 1 and 3 of the National Health Service (Wales) Act 2006. The clinical health services will be defined under future regulations by Common Procurement Vocabulary codes (“CPV codes”). For example, a **draft** list of proposed CPV codes under DHSC’s Provider Selection Regime in England can be found on the link [**here**](#). Once we have sight of the agreed list of CPV codes in DHSC’s final regulations, my officials and I will consider whether we choose to replicate the same CPV codes in the proposed future regulations.*

*The Bill therefore does not cover the procurement of ‘non-clinical services’ or goods **in isolation** (such as food). Goods and other services in isolation procured by the health sector in Wales will remain subject to the existing procurement regulations, until these are replaced by the wider procurement reforms under the forthcoming UK Government Procurement Bill.*

*The Health Service Procurement (Wales) Bill does however make provision for the procurement of goods or other services that are ‘**connected to**’ clinical health services (i.e. mixed procurement). Provisions around mixed procurement will need to be consistent with rules set out in provisions under existing procurement regulations and reforms under the forthcoming UK Government Procurement Bill.*

It is anticipated that ‘mixed procurement’ within the Health Service Procurement (Wales) Bill will only apply within a defined

¹⁰⁰ LJC Committee, 6 March 2023, RoP [205]

set of rules and under certain circumstances. For example, this could apply to arrangements where the main subject matter is a 'clinical health service' and the procurement of the connected goods or services are not reasonably separable, or procuring such goods and services separately would adversely impact the delivery of the 'clinical health service'.

DHSC are considering a similar position on 'mixed procurement' in their Provider Selection Regime and the circumstances and scope of when such rules will apply. Information on DHSC's approach to this matter is included on the link [here](#) and as detailed in the House of Lords debate on the UK Government's Procurement Bill last November.¹⁰¹

In summary, my officials and I will consider the operational detail around how 'mixed procurement' will work in practice as part of the development of future regulations and new health service procurement regime guidance in Wales."¹⁰² [original emphasis]

Our view

106. We note the Minister's comments that regulations to be made under the new section 10A of the NHS Wales Act, to be inserted by the Bill, would not be "exceptional" and that "there's nothing new, nothing interesting to see here". However, we believe that such regulations which govern how expenditure on services provided on behalf of the Welsh public sector is undertaken should be noteworthy and subject to enhanced scrutiny.

107. We note that the Minister's current intention is to undertake a public consultation on operational principles underpinning the regulations, once the Welsh Government has sight of final versions of the UK Government's regulations. However, in the absence of detail on the face of the Bill of the Welsh Government's proposals for health service procurement in Wales, we believe that the Welsh Government should consult on draft versions of its regulations given that they are likely to be substantial and complex. We believe that scrutiny of draft regulations would therefore help ensure they are fit for purpose, reflect Welsh values and ensure their smooth implementation within challenging timescales.

¹⁰¹ Hansard, [HL Deb. Vol. 825 Cols. 1588-1594](#), 28 November 2022

¹⁰² Letter from the Minister for Health and Social Services, 24 March 2023, response to question 3

Recommendation 2. The Minister should share for public consultation draft versions of regulations to be made under the new section 10A of the National Health Service (Wales) Act 2006, to inform their further development ahead of the laying of regulations subject to the draft affirmative procedure in the Senedd.

108. In addition, we believe that additional time should be afforded for scrutiny of the regulations in the Senedd. This would allow time for Senedd committees to undertake scrutiny of likely substantial and complex regulations, which will help inform the decision of Members of the Senedd on whether or not to approve the regulations in their current form.

Recommendation 3. The Minister should table an amendment to the Bill to require that regulations under the new section 10A of the *National Health Service (Wales) Act 2006* shall not be made until 60 days have elapsed since the laying of draft regulations.

109. We also note that the Minister is of the view that a duty to consult on the regulations and accompanying statutory guidance is not required on the face of the Bill, as it is “usual practice” that a 12-week consultation should be undertaken. However, since the Minister has committed to undertake such a consultation, we see no reason why a duty cannot therefore be added to the face of the Bill. Furthermore, we believe that the inclusion of such duties would align with those included within the SPPP Bill, as recently passed by the Senedd.¹⁰³

Recommendation 4. The Minister should table an amendment to the Bill to provide that the Welsh Ministers must consult such other persons as they consider appropriate in preparing regulations to be made under the new section 10A of the *National Health Service (Wales) Act 2006*, to be inserted by the Bill.

Recommendation 5. The Minister should table an amendment to the Bill to provide that the Welsh Ministers must consult such other persons as they consider appropriate in preparing guidance about complying with regulations made under section 10A of the *National Health Service (Wales) Act 2006*, to be inserted by the Bill.

110. We acknowledge the detail provided by the Minister in respect of the application of the Bill, and regulations to be made under it, to mixed procurement. We agree that statutory guidance accompanying the regulations will need to make it very clear as to the circumstances where a procurement is undertaken under the Procurement Bill regime, and where a procurement is

¹⁰³ Sections 16(4), 32(3) and 43(4) of the *Social Partnership and Public Procurement (Wales) Bill, as passed*, includes duties for the Welsh Ministers to consult before issuing guidance and a code.

undertaken in line with the processes established by regulations made under the Bill's provisions.