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Senedd Cymru | Welsh Parliament

Y Pwyllgor Iechyd a Gofal Cymdeithasol | Health and Social Care Committee

Bil Caffael y Gwasanaeth Iechyd (Cymru) | Health Service Procurement (Wales) Bill

Ymateb gan Dr Mary Guy, Senior Lecturer in Public and EU Law, Liverpool John Moores University | Evidence from Dr Mary Guy, Senior Lecturer in Public and EU Law, Liverpool John Moores University

General principles of the Bill

What are your views on the general principles of the Health Service Procurement (Wales) Bill?

The general principles of the Health Service Procurement (Wales) Bill appear to have two aims: creating more flexibility as regards procurement for the Welsh NHS, and seeking to avoid potential inconsistency in the NHS procurement regimes proposed in England. These aims are important in underscoring the distinctive position of the Welsh NHS as commissioning services from England, and potentially having less access to independent sector providers which may undermine the Welsh government's health plans.

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

Overall, there is a clearly a need to understand how general procurement rules relate to the Welsh NHS, and where exceptions may be beneficial. A recent example of UK-wide law having application to the Welsh NHS context has been with the Competition Act 1998 (Health Services for Patients in Wales) (Coronavirus) (Public Policy Exclusion) Order (Coronavirus) 2020 to respond to the initial phases of the pandemic, with a more recent 2022 Order ostensibly addressed to England, but also referencing "UK".

As regards the evolution of the procurement test for the English NHS, it is important to note that this has developed in response to the chaos resulting from the "Lansley reforms"

of the Health and Social Care Act 2012 competition provisions and the associated National Health Service (Procurement, Patient Choice and Competition) Regulations (No.2) 2013, both now repealed by the Health and Care Act 2022.

The Welsh NHS has had a different level of interaction with independent healthcare providers than the more involved relationship between the NHS and private healthcare in England. Insofar as this may now be changing (as indicated by BMA findings of closer cooperation between NHS Wales and independent sector providers during the pandemic), it may prove beneficial to have a procurement practice which is more closely aligned.

Is there a need for legislation to deliver the Welsh Government's stated policy intention?

Don't know

I have responded "don't know" to indicate ambivalence (rather than a lack of awareness) about the need for legislation. Certainly lessons may be available here from the English experience of enacting the Health and Social Care Act 2012.

This attempted in part to offer clarification regarding the applicability of competition and procurement rules to the English NHS, by enshrining pre-existing New Labour policy on choice and competition. The passage of the legislation was beset by controversies which continued throughout attempted implementation of the legislation. Prior to the Health and Care Act 2022 a number of attempts were made to mitigate the logical effects of applying competition and procurement rules, both with further legislation, and within policy guidance. Happy to provide further analysis and provide specific examples which could be learned from as needed.

The Health and Social Care Act 2012 eventually operated in a space where UK (and formerly also EU) competition law did not, effectively creating an "NHS-specific" competition and procurement regime which did not function as intended. In previous research I have described this as "the worst of all worlds" - a competition (and procurement) policy which neither met the expectations of those in favour of competition as a principle for developing the NHS-private healthcare interaction; nor assuaged the concerns of those more sceptical about this interaction.

The Welsh Government should consider carefully how the proposed legislation is intended to operate, and whether the stated policy intention can be better achieved – with greater flexibility – at the level of policy.

Regulation making powers

What are your views on the ‘disapplication’ regulation-making power in section 2 of the Bill?

What are your views on the ‘creation’ regulation-making power in section 3 of the Bill?

Implementation and impact of the Bill

Are there any potential barriers to the implementation of the Bill’s provisions? If so, what are they, and are they adequately taken into account in the Bill and the accompanying Explanatory Memorandum and Regulatory Impact Assessment?

Are any unintended consequences likely to arise from the Bill?

What are your views on the Welsh Government’s assessment of the financial and other impacts of the Bill as set out in Part 2 of the Explanatory Memorandum?

Development of the policy and legislative proposals

What are your views on the approach taken by the Welsh Government to develop the policy and legislative proposals reflected in the Bill?

Any other issues

Are there any other issues that you would like to raise about the Bill, the accompanying Explanatory Memorandum and Regulatory Impact Assessment, or any related matters?

If the Bill proceeds, and secondary legislation to create a new procurement regime becomes feasible, then I would respectfully encourage all involved to see what can be learned from the English experience of doing this (and hopefully avoid the worst consequences).

I have written extensively on the Health and Social Care Act 2012 competition provisions and their recent repeal, as well as the wider NHS-private healthcare interaction and the effects of responding to the COVID-19 pandemic on this. I would be happy to share my findings and discuss as needed.
