



PROCUREMENT REFORM (SCOTLAND) BILL: STAGE 2

BRIEFING FROM CCPS

CCPS was pleased to give [written](#) and [oral](#) evidence to the Infrastructure and Capital Investment Committee during Stage 1 of the Procurement Reform (Scotland) Bill. We support the recommendations in the committee's [Stage 1 report](#) regarding social care procurement, and in particular, we welcome the committee's recommendation that "the Scottish Government [is asked to] consider how it might address the issues raised by CCPS and others relating to consultation and the continuity and standard of care."

We are very pleased that the Scottish Government has indeed considered such matters: this briefing accordingly articulates support for a series of key amendments in the name of Nicola Sturgeon, as well as providing commentary on a number of amendments in the name of ICI Committee members and other MSPs.

1. KEY AMENDMENTS

Amendment 10 (Nicola Sturgeon)

Exemption of contracts for health and care services from the requirement to advertise and compete

The Cabinet Secretary's commitment at Stage 1 to **exempt contracts for health and care services from the requirement to advertise and compete** was very welcome indeed. As we explained in our evidence to committee, many authorities consider themselves to be under a strict legal obligation to put care contracts and frameworks out to tender routinely, including existing contracts on expiry, regardless of the views of service users and/or whether there are any performance issues pertaining. This has led to major disruption and discontinuity in the provision of services, as well as putting severe pressure on workforce pay, terms and conditions; it also presents significant difficulties in relation to authorities' duties under the Social Care (Self-Directed Support) (Scotland) Act 2013, which is designed to enable service users, rather than authorities, to exercise choice and control over their care and support, including choice of provider.

We are therefore fully supportive of Amendment 10 in the name of Nicola Sturgeon:

10 After section 10, insert—

<Contracts for health or social care services

- (1) Despite section 8, a contracting authority may award a contract for a health or social care service without seeking offers in relation to the proposed contract.
- (2) In relation to a regulated procurement where, by virtue of subsection (1), a contracting authority does not seek offers, section 18(1) does not apply.
- (3) The Scottish Ministers may by regulations make provision specifying what is a health or social care service for the purposes of subsection (1) and section Guidance on procurements for health or social care services)(1).>

In our view, this amendment is crucial in addressing the difficulties caused by repeated re-tendering of care and support arrangements, and the incongruities between procurement legislation and self-directed support. Nevertheless, whilst we have argued strongly for care services to be exempt from the requirement to advertise and compete, we would argue equally strongly that the other provisions of the Bill should remain applicable: **we therefore support the technical amendments (including Amendments 4 and 24-27, again in the name of Nicola Sturgeon) intended to bring about this effect.**

Amendment 11 (Nicola Sturgeon)

Guidance on procurement of care and support services

As we outlined in our evidence to committee, the Scottish Government and COSLA jointly published guidance on procurement of care and support services in 2010. That guidance addressed a range of very significant issues, including **the need to involve and engage service users in designing service specifications; the need to conduct a risk/benefit analysis, focused on service users, before proceeding with any social care procurement activity;** and **the need for authorities to satisfy themselves that the price tendered for a contract is adequate in relation to the quality of service to be delivered.** Despite the importance of its content, the document does not have the status of statutory guidance and thus has no legislative force. Regrettably therefore, it has had little influence on procurement practice; it also needs to be updated in the light of subsequent legislation including the Social Care (Self-Directed Support) (Scotland) Act 2013 as noted above.

We are therefore fully supportive of Amendment 11 in the name of Nicola Sturgeon:

11 After section 10, insert—

<Guidance on procurements for health or social care services

- (1) The Scottish Ministers may publish guidance on the carrying out of regulation procurements relating to contracts for health or social care services.
- (2) Contracting authorities must have regard to any guidance published under this section.
- (3) The Scottish Ministers must lay a copy of any guidance published under this section before the Scottish Parliament.>

This amend will enable the existing guidance to be refreshed and reissued, with the considerable force of an Act of the Scottish Parliament to back it up. CCPS would then expect it to have a much greater influence on procurement practice with respect to care and support services.

Amendment 38 (Jim Eadie)

Consideration of improvements to the quality of service to, and the wellbeing of, service users

The sustainable procurement duty at Section 9 is an important new duty, and CCPS is generally supportive of its provisions. We believe however that it could be significantly enhanced by an additional provision requiring authorities to consider how procurement activity can improve not only the wellbeing of the *area*, but also **the wellbeing of the person(s) who use (or will use) the service to be procured**; and to publicly report on the extent to which this is achieved.

We are therefore fully supportive of Amendment 38 in the name of Jim Eadie:

38 In Section 9, page 4, line 12, after <innovation>, insert—

() before carrying out a regulated procurement relating to a health or social care service, to consider how in conducting the procurement process it can improve—

- (i) the quality of the service to, and,
- (ii) the wellbeing of,

Persons who use or will use the service and the families and carers of such persons,>

In our view, this provision would align the Bill with the ambitions of the Christie Commission, the Scottish Government's programme of public service reform and current imperatives in social care policy and practice, all of which promote person-centred approaches, personalisation, self-directed support and an approach to quality based on support for improvement.

2. ADDITIONAL AMENDMENTS OF INTEREST

Amendments 43–46 and 48–51 (Adam Ingram)

Linking the duty to prepare a procurement strategy to related duties in other legislation

Section 11 of the Bill places a duty on contracting authorities to prepare a procurement strategy. This is an important new duty and CCPS is generally supportive of its provisions. Nevertheless, given that procurement is a key activity for authorities in relation to the strategic commissioning of care and support services, the Bill could be strengthened by linking it explicitly to related pieces of legislation. Both the **Public Bodies (Joint Working) (Scotland) Act 2014** and the **Children and Young People (Scotland) Act 2014** place duties on public bodies regarding the planning and commissioning of services: the duty in the present Bill relating to the preparation of procurement strategies would be enhanced by linking it to these other duties to ensure that planning, commissioning and procurement activity is coherent and mutually supportive.

We therefore support amendments 43–46 and 48–51 in the name of Adam Ingram, and would refer members to the more detailed briefing on these matters issued by Barnardo's Scotland.

Amendment 47 (Adam Ingram)

Public Social Partnerships

Public Social Partnerships (PSPs) are emerging as a more collaborative third sector alternative to procurement approaches based on competitive tendering, insofar as PSPs proceed according to the principles of co-production and partnership. CCPS is keen to promote their wider use.

We therefore support amendment 47 in the name of Adam Ingram, and would refer members to the more detailed briefing on this matter issued by Barnardo's Scotland.

Amendment 39 (James Kelly)

Scottish Living Wage duty

As we pointed out in our evidence to committee, workforce costs in care and support services typically account for up to 85% of a third sector organisation's tender price, whilst price can account for between 30 and 70% of a tender evaluation score. Where a price cap is applied to a contract, the price element of the evaluation becomes in effect a 100% threshold, to be attained before quality is even considered. The result has been the application of severe downward pressure on pay, terms and conditions for care and support workers, as providers adjust their costs in order to remain in the market. The application by authorities of ever more stringent price caps means that more and more care providers are struggling to pay the Living Wage.

For this reason, CCPS is very supportive of **Section 24** of the Bill, which gives Scottish Ministers the power to issue guidance on workforce issues, including remuneration where it is likely to be relevant to the quality of service that will be delivered.

Amendment 39 in the name of James Kelly seeks to impose a Scottish Living Wage duty on contracting authorities, whereby authorities would have to specify in a contract notice that the successful tenderer must pay the Scottish Living Wage. Whilst we would be broadly supportive of such a duty, we would point out that in order for it to be fully effective, mindful of our evidence as above, a corresponding duty would have to be placed on authorities to the effect that **they must set the contract value at a sufficient level to enable the successful tenderer to pay the Scottish Living Wage**.

Amendment 58 (Jayne Baxter)

Zero hours contracts

This amendment seeks to ensure that providers employing staff on zero-hours contracts (as defined within the amendment) should be excluded from public procurement processes.

Again, CCPS is broadly supportive of this amendment, in particular subsection 4, which makes it clear that the contracts to which it refers are those that (a) require the employee to be available for work, even when there is no guarantee that they will be required to do so; and (b) require the employee to work exclusively for that provider.

Many care and support providers operate zero-hours contracts for relief and sessional staff: thanks to subsection 4, these would remain unaffected by this amendment because they do not contain these types of clauses: this is welcome.

We would want to point out however, that where care and support providers employ staff on zero-hours contracts more generally, they sometimes do so as a direct response to the terms of the public contract itself. Our research has shown that authorities are increasingly moving away from an approach to procurement based on the tendering of service contracts, towards the introduction of 'framework agreements' that offer no guarantee of business to providers. Indeed, our research shows that 37% of care providers got less work from a framework agreement than they had anticipated at the time of tendering.

In this sense, framework agreements can themselves be understood as zero-hours contracts: it therefore seems to us that **this amendment, in order to be fully effective, ought to be accompanied by a corresponding amendment seeking to restrict the use of framework agreements by contracting authorities.**

As in Amendment 39 (above), it is our view that as well as seeking to use this Bill to influence employment conditions in the market, we should also be using it to influence the behaviours of contracting authorities that impact on those conditions.

Amendment 31 (Nicola Sturgeon)

First-tier Tribunal proceedings

As CCPS pointed out in its evidence to committee, the only way in which providers are able to challenge procurement processes or decisions is through the courts. CCPS has consistently argued for **a route for appeal and/or arbitration at a less formal (and less expensive) level than court action** – indeed this was recommended by the McLelland review of public procurement in Scotland in 2006. Evidence suggests that there are still serious issues of competence in public procurement, and that although third sector providers have on occasion identified grounds for challenge, they are (understandably) reluctant to litigate.

We therefore support Amendment 31 in the name of Nicola Sturgeon, which seeks to give Scottish Ministers the power to enable proceedings to be brought before the First-tier Tribunal for Scotland, instead of the sheriff court or Court of Session.

CCPS will be following the Stage 2 proceedings with great interest, and would welcome contact from MSPs who would like to explore these issues in more detail. Meanwhile we would like to thank MSPs for taking the time to read this briefing.

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