

Health Procurement: major changes

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As part of the current changes in the New Zealand health sector, outlined in our [related article on broader changes](#), there are major procurement developments (in particular a more strategic and regional/national focus). These changes are facilitated by proposed amendments to health legislation.

The proposed changes to the New Zealand Public Health and Disability Act encourage DHBs to work through, voluntarily, local, regional and national procurement objectives. This is in relation to acquisition and provision of goods and services ranging from IT and HR services through to clinical supplies.

What procurement is covered?

The specific procurement requirements in the draft legislation stop short of applying to direct provision of care to patients and disabled people. Essentially, the requirements cover upstream inputs (the supply chain) into the ultimate provision of care to patients and disabled people. For example, it would apply to national bulk purchasing of the syringe used by a nurse, but not to what the nurse does with that syringe.

Overriding opportunities and obligations

However, by, for example, giving directions for all DHBs, or by multi-DHB plans, the Minister can have wider impact on both procurement and front-end provision of health and disability services, as we outline in our other article noted above.

In this note we address the specific process for procurement (e.g. up to supply of the syringe), within that wider context.

Process for procurement

BAU procurement can continue, but there must be a marked new focus toward considering regional and national issues. The new legislation has a specific mechanism to encourage shared services and other approaches. Proposals as to how goods and services should be procured can be submitted to the Minister of Health by the Ministry (or a party appointed by the Minister for this purpose).

If the Minister considers that the proposal would enhance efficiencies and effectiveness, he or she can consider whether the proposal can be implemented without a formal direction. The Minister is required to consult affected DHBs and other stakeholders.

It can be expected the Minister and the Ministry will be seeking to drive a more strategic regional and national approach with: better outcomes; better value for money; a trend toward shared services rather than just services acquired on a locally focussed basis; and so on.

If the Minister decides the proposal requires formal direction, he or she can (with the Minister of Finance's agreement) to require DHBs to:

- Obtain goods and services in a certain way (for example, by a particular process); or
- Obtain goods and services from specified suppliers.

The two options in turn ((a) direction as to process and (b) direction as to who will supply), are progressively stronger intrusions by the Minister into DHB territory. That raises governance issues. Generally, it's expected the Minister will only direct as to process (for example, that certain services are acquired nationally). Actually directing who supplies raises some risk, and is an incursion on DHB governance that is justified in only extreme cases.

As noted above, the ability to make directions is a back-stop right. Solutions should generally be sorted before things get to that point.

Second option: an issue?

For some reason that is not clear, that second option (require supply by particular suppliers) is hard to implement anyway. Remaining in the Act after this amendment would be the Section 33 restriction on the Minister being able to direct DHBs to buy particular goods and services. This issue seems to be left floating in the regulatory impact statement.

Harm competition and innovation?

The regulatory impact statement notes the changes don't impair competition and innovation. In a sense that's correct, but this assumes optimal application of the new approach. A more aggregated (or centralised) procurement strategy can lead to reduced competition and innovation if it is badly handled. What this means is that the procurement strategy must be carefully designed to achieve optimal outcomes.

For example, if there are three suppliers of syringes in New Zealand, and there ends up being only one national supplier following an RFP, this may destroy long term competition and benefits for syringes, creating long term problems. This is already a challenge in New Zealand (the Auckland path labs is an example): the problem crops up in a different and bigger way.

More strategic modelling and cost-benefit analysis

Many public sector procurement decisions have been marked by inadequate strategic planning and assessment. Maybe a more rigorous approach to the decision-making, including quantitative cost-benefit analyses

along the lines used by PHARMAC, would provide better outcomes as a result of this more regional and national focus. That is particularly so where there are trade-off decisions so that what is purchased/supplied, and where it is supplied (or not supplied), must be prioritised.

More localised procurement decision-making often doesn't have the benefit of detailed analyses such as this, if only because of the smaller scale of decision-making.

Although in a different, but overlapping context, this observation in Treasury's March 2010 *Infrastructure Plan* is useful

Prioritisation and decision-making

In a world of limited resources, we need to make choices. A choice in favour of one option means that something else misses out. It is therefore important to make good decisions.Given the importance of these decisions, decision makers need to be provided with high-quality analysis and they have an obligation to consider that analysis as objectively as possible. For publicly-funded projects, the aim of analysis is to determine how the project will impact on public welfare. The concept of welfare includes economic growth, environmental and health considerations. There are well-established methods to quantify these considerations in most situations. The value of equity or distributional effects cannot be quantified objectively or empirically and needs to be considered separately. However, even where a policy is promoted for distributional reasons, decision-makers should have an economic welfare analysis to support their decisions and ensure they understand the costs of any distributional decision.¹⁰

To be eligible for funding in future, projects need to demonstrate that they are consistent with government strategy, that they have net welfare benefits and that these are greater than alternative projects. Transparency in decision-making is a useful way of improving the quality of analysis. Publishing of analyses allows outside scrutiny and thereby encourages the public service to lift its game. It also creates pressure for the Government to justify its actions if it chooses a direction or investment not supported by the analysis. The Government is considering ways to increase the transparency of its decision-making and where it would be appropriate to

publish the decision support analysis it receives.

Legislation compliance

DHBs and Government will also need to be more vigilant about legislative compliance, such as the application of the Commerce Act. DHBs and government will need to carefully worked plans to manage Commerce Act risk, which is already a significant issue for the sector.

Conclusion

The new regime can help to facilitate –and coerce - a more strategic approach to procurement. That is also encouraged by best practice, reflected in applicable material such as the Auditor-General’s guidelines. Those broader procurement requirements continue to apply.

We welcome your feedback on this article and any enquiries in relation to its contents. This article is intended to provide a summary of the material covered and does not constitute legal advice. We can provide specialist legal advice on the full range of matters contained in this article.

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