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Date: 5 November 2013
Our ref: HVT/1986/fgb
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Deu Jody

NATIONAL HEALTH SERVICE FINANCE (WALES) BILL - AMENDMENTS

Further to my letter of 16 October 2013, in which I offered my views on the National Health Service Finance (Wales) Bill (the Bill) to assist your Committee in its scrutiny of this proposed legislation, I have now had an opportunity to consider the proposed Government Amendments to the Bill which were tabled on 29 October.

My staff have met with Welsh Government officials to discuss the proposed Amendments, and I do have some observations upon them. I trust that these will be of assistance to your Committee during its consideration of these Amendments at its 7 November meeting.

Firstly, I wish to make it clear that I am wholly in support of **Amendment 9**, which clarifies that the term "expenditure" within the Bill is to include both the consumption and reduction in value of resources. This proposed definition is, in my view, essential, as the Bill repeals section 176 of the National Health Service (Wales) Act 2006 (the Act), which currently provides the statutory basis for a separate control on Welsh Local Health Boards' (LHBs) use of resources. Amendment 9, if carried, will put beyond doubt that this existing control on the use of resources has been incorporated into the new section 175 of the Act, and has not been dispensed with due to the repeal of section 176.

As regards **Amendment 8**, I have both general and specific comments. This Amendment empowers the Welsh Ministers to provide by direction that "due to unexpected circumstances" a LHB may exceed their approved resource limit by an amount or percentage so specified.

In general terms, the introduction of a tolerance provision such as this appears, from a financial control perspective, to be an unusual departure from UK-wide public sector practice. This is because the concept of 'tolerance' sits rather uneasily alongside that of using specific financial Resource Limits as a constraint on the level of expenditure that a public body may lawfully incur. Furthermore, the introduction of a power to issue directions would not provide the Welsh Ministers with any additional substantive powers than they currently possess under section 174(9) of the Act. This is because the Amendment essentially mirrors existing Health Department practice in respect of the use of 'year-end flexibility' and 'brokerage' for LHBs via Resource Limit adjustments. A Resource Limit adjustment under section 174(9) and a direction issued under this Amendment would have identical effect in practice. Therefore I would suggest that the Amendment is unnecessary as it does not provide for any new powers.

However, I can confirm that, although unusual and without practical effect, the inclusion of a tolerance provision in the Bill would not in principle present a problem with the conduct of my statutory audit of each LHB. The authority for my regularity opinion is Section 61 of the Public Audit (Wales) Act 2004, under which I must satisfy myself that the expenditure of each LHB has been "incurred lawfully". If a statutory provision clearly provides for certain circumstances in which it is lawful for a LHB to exceed their resource limit by an amount then, in those circumstances, as long as the LHB only exceeds their resource limit by an amount less than or equal to that amount, the expenditure will remain lawful and therefore my Regularity audit opinion will be unqualified.

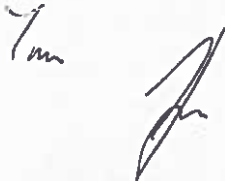
Turning to more specific comments, the very practical difficulty that the proposed Amendment 8 presents is that it could potentially be impossible for me to be able to identify the circumstances in which it is lawful for an LHB to exceed their resource limit. This is because it appears that, under the Amendment, the Welsh Ministers may only issue a direction permitting an over-spend by an LHB against its Resource Limit "*due to unexpected circumstances*". If so, then in order for me to be satisfied that an LHB's expenditure over their Resource Limit is lawful when a direction has been issued, this amendment necessitates me making a judgement as to whether or not there were indeed any "*unexpected circumstances*" leading to the over-spend, as only in those circumstances will the direction be lawfully issued and the over-spend therefore legally permitted.

There does not appear to be a common interpretation of what is meant by "*unexpected circumstances*" in law. The phrase is not used in other legislation or at common law, and raises the question "unexpected by whom?". It could easily be argued that a certain set of circumstances could have been expected to occur if only the LHB or Ministers had exercised foresight when setting the Resource Limit. Therefore, it is likely to be impossible for me to make a definitive audit judgement as to whether any direction issued under Amendment 8 is lawful, and consequently whether an overspending LHB has incurred its expenditure lawfully.

For these reasons, I would suggest the removal of the phrase "*due to unexpected circumstances*" from Amendment 8.

I have one further comment on Amendment 8, which is that the direction may specify "*an amount or percentage*" (my emphasis) by which an LHB may exceed their Resource Limit. It is my view that it would be more appropriate for the Welsh Ministers to only have the power to specify an *amount* of permitted overspend, and not a *percentage*. This would align the permitted overspend in both its manner and form with the Resource Limit calculated under subsection (1) of Section 175 of the Act. It also provides for a more meaningful amount of permitted spending, as in this context a percentage increase cannot be meaningful until it is converted into its monetary value.

I hope that this letter is of assistance to the Committee during its consideration of the Government Amendments, and I stand ready to give oral evidence if that would be helpful.



HUW VAUGHAN THOMAS
AUDITOR GENERAL FOR WALES