

Cyflwynwyd yr ymateb i ymgynghoriad y [Pwyllgor Cydraddoldeb a Chyfiawnder Cymdeithasol](#) ar [Y Bil Partneriaeth Gymdeithasol a Chaffael Cyhoeddus \(Cymru\)](#)

This response was submitted to the [Equality and Social Justice Committee](#) consultation on [Social Partnership and Public Procurement \(Wales\) Bill](#)

SPPP 29

Ymateb gan: Archwilio Cymru | Response from: Audit Wales



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Stage 1 - Social Partnership and Public Procurement (Wales) Bill

Audit Wales response

Introduction

- 1 Given our functions, it would not be appropriate for us to comment on the merits of the policy objectives of the Bill. We have, however, commented below on some matters from the perspective that they might have implications for cost-effective audit. We have also referred to our previous consultation response to Welsh Government of April 2021 in relation to the proposed introduction of this Bill, and we have made some comments arising from our work, including work in progress, that are potentially relevant to the Committee's remit.

Social partnership duty

Bodies subject to the duty

- 2 It is worth noting in relation to the social partnership duty (Part 2 of the Bill) that the Welsh Government is consulting on Additional public bodies subject to the well-being duty (Part 2) of the Well-being of Future Generations (Wales) Act 2015. The consultation indicates that the Welsh Government may increase by eight the number of bodies subject to sustainable development duties, which will likewise increase the number of bodies covered by the proposed social partnership duty.¹ Such an increase in coverage will cause the cost of the Bill to increase (see comments below on the Regulatory Impact Assessment (RIA)).

Well-being objectives

- 3 The section 16 social partnership duty intersects significantly with existing duties under the WFGWA 2015 in that it applies to public bodies when they are setting their well-being objectives (except in the case of the Welsh Government) and when taking decisions of a strategic nature about the reasonable steps to meet their well-being objectives under section 3(2)(a) of the WFGWA 2015. Among other things, the social partnership duty

¹ The Bill provides for the bodies listed under section 6(1) of the WFGWA 2015 to be subject to the social partnership duty.

requires bodies to seek consensus or compromise with recognised trade unions or (where there is no recognised trade union) other representatives of staff.

- 4 Achieving consensus or compromise may not be straightforward, and we note that the Welsh Government intends to issue guidance in respect of what is 'reasonable'. We think that very clear guidance will be needed on this to help bodies meet their obligations. Similarly, we think clear guidance is needed on what constitutes decisions of a 'strategic nature'.
- 5 Having good guidance on these matters seems likely to be a key factor in the success or failure of the legislation. It would therefore probably be beneficial in terms of responsible law-making for the Welsh Government to publish draft guidance, together with independent assessments of its likely effectiveness, for consultation and the Senedd's consideration. And it would be best if this were done before the Bill passes.
- 6 In relation to section 17, we wonder how the meaning of "decisions of a strategic nature" (about the reasonable steps to take under section 3(2)(b) of the WFGA 2015 to meet Welsh Ministers' wellbeing objectives), can be appropriately clarified. It does not seem entirely appropriate for the Welsh Ministers to be providing guidance to themselves on the interpretation of this phrase. Clarification of "strategic nature" on the face of the Bill may be more appropriate.
- 7 Welsh Ministers have a duty to apply the sustainable development principle when setting well-being objectives and taking steps to meet them, which includes carrying out involvement, and it would therefore need to be considered how the social partnership duty fits with this.
- 8 We note that a rationale is given for the separate social partnership duty on Welsh Government in section 17 being narrower in scope than the section 16 duty that applies to other bodies (para 67 of the [Explanatory Memorandum](#)):
"the setting of well-being objectives by the Welsh Ministers tak[ing] place immediately following each Senedd election. It would not be appropriate for an incoming Welsh Government with a clear policy mandate from the people of Wales then to be required to seek compromise or consensus on those same matters"
- 9 The Committee may wish to consider, assuming it accepts this rationale, whether it would be appropriate for legislation to make similar provisions for elected local government bodies where the controlling group has been elected after having issued a clear policy manifesto.

Socially responsible procurement

Bodies subject to the duty

- 10 Schedule 1 to the Bill lists bodies that are to be 'contracting authorities' subject to the socially responsible procurement duty. As this list extends beyond bodies designated

under section 6(1) of the WFGWA 2015, the set of bodies subject to the socially responsible procurement duty is different (broader) than the set of bodies subject to the social partnership duty. While the reasons for this difference might perhaps be deduced from the Explanatory Memorandum, if read alongside the consultation document on designating additional bodies for the WFGWA 2015 wellbeing duty, we are not sure that the difference is entirely appropriate. It appears that most of the bodies individually listed in Schedule 1 are fairly small in terms of procurement expenditure and therefore the requirements of the socially responsible procurement duty seem more likely to be disproportionately burdensome for those bodies. It may be helpful to explore whether the individual listings in Schedule 1 is justifiable in terms of costs and benefits.

Annual socially responsible procurement reports

- 11 We continue to have concerns about the requirement for annual socially responsible procurement reports. In particular, section 39(2)(d) requires a summary of the procurement the contracting authority expects to carry out over the next two financial years. This may be quite onerous for organisations, and we are not clear what the benefit of such a summary would be. Also, this particular requirement appears to apply to all expected procurement rather than just expected procurement with prescribed contracts.
- 12 We also continue to have concerns that the Bill's annual socially responsible reporting requirements for contracting authorities is "as soon as reasonably practicable after the end of that year" (section 39(1) of the Bill), and for Welsh Government "as soon as reasonably practicable after the end of a financial year" (section 42(1) of the Bill). Our view is that in the absence of any other time-scale requirement, this could lead to a lack of focus. A clear date-based deadline, such as four months after the end of the financial year, would seem more likely to result in timely reporting.
- 13 A slightly different approach would seem appropriate in respect of the Welsh Government's annual report on procurement. To allow sufficient time for the Welsh Government to report including information from the reports published by contracting authorities, it would make sense for the deadline that applies to the Welsh Government to be a few months later, such as eight months after the end of the financial year.

Procurement investigations

- 14 The Bill does not set out anything in the way of threshold criteria for initiating a procurement investigation, nor anything to steer the purpose of such investigations. To help ensure appropriate focus and prioritisation in the use of resources, we think it would be beneficial for criteria for initiating a procurement investigation to be defined. Such criteria might include Welsh Ministers having reasonable grounds to believe a contracting authority is substantially not complying with the socially responsible procurement duty. It may also be helpful to have examples of the situations that might lead to an investigation.

- 15 We should also like to draw the Committee's attention to our previous suggestion in response to the draft bill that to avoid unnecessary duplication or co-incidence with other inspections or audits, any such investigations should only be undertaken following consultation with the Auditor General (where the Auditor General is the external auditor). While this could sensibly be done on a voluntary basis, it would be consistent with Welsh Government approaches in other areas, such as co-ordination of inspection functions, for this to be required on the face of the legislation.

Procurement fitness checks

- 16 The Committee may find it relevant to consider a recommendation made in our [Public Procurement in Wales report 2017](#) relating to the Welsh Government's programme of procurement fitness checks (Recommendation 4, page 15). This concerned, among other things, the need for consistency of approach in undertaking such checks. We consider this Bill presents an opportunity for Welsh Government to consider how any future programme of fitness checks, if this is pursued, dovetails with investigations and reporting requirements set out in the draft Bill.

Publication requirements

- 17 We queried in our consultation response on the draft bill how the proposal for publishing contracts registers fits with other existing publication requirements, such as those relating to contract award notifications on the Welsh Government's Sell2Wales website and the FOIA publication scheme requirements. It may be helpful to consider whether any duplication can be reduced.

Regulatory Impact Assessment

- 18 While we have not undertaken an in-depth review of the RIA or the information underlying it, from reading it, we consider that, overall, it most likely underestimates the cost of the Bill.

Social partnership duty

- 19 It seems that while the RIA provides an estimate for Welsh Government costs of processing and analysing annual social partnership reports (section 18 of the Bill) (table 3.2 of the RIA), there is no estimate of the cost to public sector bodies of producing such reports.
- 20 The time estimate for public bodies meeting the social partnership duty itself (section 16 of the Bill) seems too short. Apart from 3 hours for initial familiarisation, the only estimate given for this duty is 9 hours a year for social partnership meetings (9 hours each for trade unions and employers). Given the fairly extensive nature of the social partnership duty,

which includes seeking consensus or compromise on well-being objectives, this seems rather optimistic for most bodies. Seeking and consensus or compromise requires consultation, including consideration of responses and taking account of Welsh Ministers' guidance.

21 In addition, it appears that the “additional costs of social partnership within public bodies” (paras 285 to 288 of the RIA) estimates are based on 44 public bodies. Aside from the issue of the likely increase in the number of designated bodies following consultation (see para 2), we understand that since December 2021, the four Corporate Joint Committees created by the Local Government & Elections (Wales) Act 2021 have been designated under section 6(1) of the WFG Act. An estimate based on 56 bodies, or at least 48, would be more appropriate.

22 Paragraph 274(b) of the RIA recognises to some extent that if the WFG Act coverage is extended, then there is the potential for the costs of the Bill to the Future Generations Commissioner to increase:

“should the list of ‘in-scope’ public bodies in section 6 of the WFG Act 2015 change after the formal review, this is likely to be a financial implication for the Commissioner.”

23 However, the same paragraph of the RIA goes on to say:

“Until a formal review has been conducted to determine if there is a change to the number of public bodies subject to the duty we are unable to quantify the cost.”

24 We do not consider that this omission of additional costs is a prudent approach to identifying the cost of the Bill. The Welsh Government’s consultation on designating additional bodies signals a reasonable likelihood of that development, and therefore the additional cost would also seem to be reasonably likely. The cost of the Bill is therefore probably understated.

25 Paragraph 274(a) of the RIA says that there is no intention to change the Auditor General’s sustainable development principle examination duty (s15 WFGWA 2015), and that the Bill is not intended to have financial implications for the Auditor General. However, while it is the case that the Bill does not provide specific amendment of the legislation setting out the Auditor General’s sustainable development principle examination functions (s15 of WFGWA 2015 provides both a power and a duty), it does seem likely to affect those functions in practice.

26 This is because the s15 WFGWA 2015 functions concern assessing the extent to which public bodies have acted in accordance with the sustainable development principle when setting and pursuing well-being objectives. The new social partnership duties (sections 16 and 17 of the Bill) sit alongside the duty to adhere to the sustainable development principle (s3 of WFGWA 2015). It therefore seems that it will be necessary for the Auditor General to take account of the new requirements to set and pursue well-being objectives in

consensus or compromise with trade unions or other staff representatives². While this may not be a major cause of additional expenditure, it is a complication that will tend to increase the cost of s15 sustainable development principle examinations, rather than reduce it.

Socially Responsible Procurement

- 27 For contract management costs, the RIA estimates such costs with respect to major construction contracts. However, it seems that the estimate covers only such contracts, and we cannot find any estimate in respect of outsourcing contracts.
- 28 Paragraph 370 of the RIA says:
“To allow for existing contract management arrangements, we have included a figure of 0.5% to estimated contact management costs.”
- 29 This leads to an estimate of increased annual Welsh public sector contract management cost of £5,173,100. Even allowing for this is only being an estimate in respect of major construction contracts, we are sceptical as to whether this estimate is sufficient. This is because the new duties require attention to such matters as fair employment practices in the supply chain (paragraph 106 of the RIA), which requires additional research into far less immediately accessible areas than construction progress.
- 30 We also note that the £5,173,100 estimate is the result of apportioning 25% of costs to the private sector (end of paragraph 370 of the RIA). We are sceptical as to whether this is prudent. While there may sometimes be scope for private sector operators to absorb additional contract management costs, we suspect that generally operators will seek to recover such costs from the client (the public sector).
- 31 In relation to procurement strategies (section 38), paragraph 345 of the RIA says:
“Most public bodies in Wales already have procurement strategies in place. Fitness checks undertaken by Value Wales in 2014 indicated that at the time, 21 local authorities had a procurement strategy, so additional costs in this area would be fairly minimal.”
- 32 However, as we noted in our response to the Welsh Government’s consultation on the draft bill:
“in our Public Procurement in Wales report 2017...‘It was clear from our sampling that some procurement strategies are out of date and there has also been a mixed response to new policy and legislation such as the Well-being of Future Generations (Wales) Act 2015.”
- 33 We do not therefore think it is prudent to regard the additional cost of the procurement strategies required by the Bill to be minimal.

² Except Welsh Government, where the section 17 social partnership duty only requires consultation with the Social Partnership Council in respect of steps to meet its well-being objectives. However, this different requirement will also need to be taken into account in s15 WFGWA 2015 sustainable development principle examinations.

- 34 Paragraph 351 provides an estimate for drafting procurement strategies of £98,400. However, this is based on 44 bodies, whereas it is likely that the duty will apply to between 48 and 56 bodies.
- 35 We also cannot identify any estimate in the RIA of the cost of Welsh Government procurement investigations. We recognise that some costs are hard to estimate, such as where activities are reactive, as is the case with procurement investigations. Clarity around the threshold for prompting an investigation may help with estimating the associated costs. But in any case, it would be prudent to provide a best guess figure rather than none at all.

Current work

Supporting social enterprise

- 36 It may be helpful for the Committee to be aware that we are in the process of study work that considers how local authorities are supporting the creation and development of social enterprises—delivering the requirements of section 16 of the Social Services and Well-Being (Wales) Act 2014. We have also been looking at whether authorities include “social value” in commissioning arrangements. (There is no single definition of social value, however Social Enterprise UK has defined social value in the context of procurement as ‘the additional benefit to the community of a commissioning/procurement process over and above the direct purchasing of goods, services and outcomes.’) Social Value in social care is about achieving the best outcomes for people and communities in both the short and longer-term.
- 37 While our work is not complete, and our findings may be subject to change, to date, we have found there is little progress being made in delivering the section 16 duties of the 2014 Act. Few local authorities have undertaken any work in creating, supporting, or developing social enterprises. Similarly, we have found less than half consider social value in current commissioning arrangements. These provisional findings indicate that while duties may have been in force for more than six years, those duties alone and that amount of time may not be sufficient to yield the benefits sought.
- 38 We should be happy to discuss any aspects of our audit work in more detail with the Committee, its clerking team or its researchers as the Committee scrutinises the Bill.