

Hannah Blythyn AS/MS  
Y Dirprwy Weinidog Partneriaeth Gymdeithasol  
Deputy Minister for Social Partnership



Llywodraeth Cymru  
Welsh Government

Huw Irranca-Davies MS  
Chair of the Legislation, Justice and Constitution Committee  
Welsh Parliament  
Cardiff Bay  
Cardiff  
CF99 1SN

14 October 2022

Dear Huw,

### **Social Partnership and Public Procurement (Wales) Bill**

Further to your letter of 22 September to inform me the Legislation, Justice and Constitution Committee has decided to seek evidence in relation to the Social Partnership and Public Procurement (Wales) Bill in writing. Please see the accompanying annex 1 which responds to the questions set out in your letter.

I hope the Committee will find this information useful and I am happy to provide you with any additional information if required.

Yours sincerely

**Hannah Blythyn AS/MS**  
Y Dirprwy Weinidog Partneriaeth Gymdeithasol  
Deputy Minister for Social Partnership

Canolfan Cyswllt Cyntaf / First Point of Contact Centre:  
0300 0604400

Bae Caerdydd • Cardiff Bay  
Caerdydd • Cardiff  
CF99 1SN

[Gohebiaeth.Hannah.Blythyn@llyw.cymru](mailto:Gohebiaeth.Hannah.Blythyn@llyw.cymru)  
[Correspondence.Hannah.Blythyn@gov.wales](mailto:Correspondence.Hannah.Blythyn@gov.wales)

Rydym yn croesawu derbyn gohebiaeth yn Gymraeg. Byddwn yn ateb gohebiaeth a dderbynnir yn Gymraeg yn Gymraeg ac ni fydd gohebu yn Gymraeg yn arwain at oedi.

We welcome receiving correspondence in Welsh. Any correspondence received in Welsh will be answered in Welsh and corresponding in Welsh will not lead to a delay in responding.

## Annex 1

### General

**1. Are you content that all provisions of the Bill as introduced fall within the legislative competence of the Senedd?**

The Llywydd's letter of 06 June to the First Minister confirmed that in her view this Bill is within the legislative competence of the Senedd.

**2. Are there any human rights issues arising from the Bill?**

No issues have been identified.

**3. The draft Bill included a fair work duty on Welsh Ministers to set fair work objectives, to take steps to achieve these, and to annually report on progress. For what reasons have these proposals not been included in the Bill introduced into the Senedd? Have these elements of the draft Bill been removed due to the limits on the Senedd's legislative competence?**

We are on record as having accepted the Fair Work Commission's definition and characteristics of fair work in our policy work. We stand by that. But this does not mean we can legislate for that definition. The Fair Work Commission recognised their definition covers reserved as well as devolved areas and clearly there are the implications of this under the devolution settlement.

Drawing on the Well-being of Future Generations (Wales) Act 2015 ("WFG Act") is consistent with the overall approach across the Bill, where other provisions are linked to the sustainable development principle set out in that Act. Our approach also reflects the spirit of the Fair Work Commission recommendation to incorporate fair work within the WFG Act. This means public bodies will be under a legal requirement to consider fair work in the pursuit of the 'A Prosperous Wales' well-being goal.

This approach captures public bodies and so has a greater reach and could have greater effect than a standalone Fair Work Duty only on Welsh Ministers as previously proposed. I also think it important to avoid the continuation of the use of different terms that can be interpreted to cover broadly similar or overlapping activity i.e., decent work and fair work. We know from our engagement that consistency in terminology will be welcomed. All of this could help contribute to a more effective approach to the consideration of fair work in the pursuit of well-being.

Wales' seven well-being goals are the blueprint to achieve a better and more sustainable future for all. They address the global challenges that we face here in Wales, including poverty, inequality, climate change, biodiversity loss, community cohesion and securing fair work for all. Securing fair work within the interconnected and indivisible well-being goals will send out a strong message that a more sustainable future, in line with the well-being goals, cannot be achieved without promoting fair work.

**4. Can you set out why the Welsh Government has chosen to introduce legislation in relation to social partnership, fair work and socially responsible public procurement as opposed to following a non-statutory approach?**

The purpose of this legislation is to improve the economic, social, cultural and environmental well-being of people in Wales (including by improving public services). As the Explanatory Memorandum accompanying the Bill notes, social partnerships, and collaborative working more broadly, have been a defining feature of the way in which Wales has been governed for many years. Many existing social partnership arrangements in Wales have developed voluntarily and organically. They are not currently underpinned by a common framework and are not co-ordinated with a view to achieving maximum impact. The number and range of partnerships can put pressure on social partners and can affect their capacity to engage and fully contribute.

In the absence of legislation, the existing informal and ad-hoc social partnership arrangements could be expected to continue. The Welsh Government believes, however, that there are limitations on how effectively improvements in public service delivery and well-being can be coordinated unless the social partnership approach has a statutory underpinning. This legislation will promote greater consistency of approach and strengthen the effectiveness of social partnership arrangements in Wales with a very clear purpose in mind.

Several reviews of procurement by public bodies in recent years have commented on the lack of consistency with which well-being outcomes are pursued. Whilst there are many examples of good practice based on existing guidance, legislation, along with a system of oversight and accountability, will ensure that good practice is more widespread.

**5. The Welsh Government wrote to the UK Government and other devolved administrations about this Bill as it is covered by the Public Procurement Common Framework. Did any of the other UK administrations raise concerns with you about the Bill? If so, what were their concerns and how did you respond?**

No concerns have been raised.

**Relationship with the UK Government Procurement Bill**

**6. The Minister for Finance and Local Government confirmed that the Welsh Government would use the UK Government's Procurement Bill to reform public procurement processes in August 2021. In a letter from the Minister for Finance and Local Government on 1 September, the Minister says:**

**“Incorporating the Procurement Bill into the SPPP Bill would have required changing the scope of the SPPP Bill as it would have predominantly become a Procurement Bill, shifting the focus of the Bill away from Social Partnerships. Also, the Bills are aiming to achieve different things – the Procurement Bill focuses on the processes underpinning procurement, whilst the SPPP Bill will focus on ensuring socially responsible outcomes are achieved from our procurement.”**

**With regard to the Finance Minister's letter to us of 1 September, why would changing the scope of the Bill to include procurement processes be a problem, particularly if it mirrored what the UK Government proposed and led to more**

## **accessible bilingual legislation?**

Welsh Ministers considered that both Welsh contracting authorities and suppliers would have been likely to suffer increased transactional and bidding costs had a single Bill been pursued that would inevitably have resulted in divergence between Wales and the rest of the UK. Common procurement processes across the UK are likely to ensure that Welsh contracts remain accessible and attractive to potential bidders, impacting on value for money and innovation. This also makes it easier for Welsh suppliers to bid for contracts elsewhere in the UK.

If Welsh Ministers had made the decision to legislate independently of UK Government, given the complexity and need for alignment the Welsh legislation would have been implemented later. Legislating with UK Government helps to maintain continuity for suppliers and ensure that cross-border business with England can largely continue without confusion or potential additional costs for users.

Welsh language standards will continue, as now, to apply to procurement processes and systems in Wales, ensuring that procurement can be carried out through the medium of Welsh.

- 7. The Explanatory Memorandum (“EM”) states that one of the Bill’s objectives is to “improve the link between procurement processes and the delivery of outcomes through contract management.” Does this statement not suggest that there is a similarity between the Bills and that there may have been benefit to combining the two of them?**

No, this statement is not intended to mean that both Bills relate to procurement processes. It means that the UK Bill does not include similar or related duties on contract management to those in the Social Partnerships and Public Procurement (Wales) Bill, and we believe that these contract management duties are needed.

The UK Bill largely focuses on ensuring procurement processes are transparent and fair, whereas the Welsh Bill focuses on embedding socially responsible policy priorities into procurement processes and securing these through improved contract management, reporting and oversight.

- 8. Did you consider a separate Welsh Government Procurement Bill, mirroring provisions in the UK Government Bill which would have enabled scrutiny by Members of the Senedd, which would sit alongside the Social Partnership and Procurement Bill?**

Yes, all options were considered carefully before a decision was taken not to bring forward a separate Procurement Bill covering all aspects of public procurement for Wales. The benefits of achieving a coherent set of procurement processes across the UK are significant.

It is also important to note that the UK Bill is undergoing scrutiny by Members of the Senedd through the Legislative Consent process and this will continue with the development of secondary legislation in Wales. Legislative Consent Memorandums were

scrutinised by the Public Administration and Public Accounts Committee on 21 September.

**9. The Minister's letter of 1 September letter also referred to the need for consistency in procurement practice. The UK Bill provides the Welsh Ministers with powers to make secondary legislation. Why can consistency be achieved through separate secondary legislation being implemented in Wales and England, but not separate primary legislation?**

The approach with the Procurement Bill is consistent with our Principles for Recommending Consent to UK Bills, that have been shared with the Senedd.

These Principles include seeking equivalent regulation-making powers for Welsh Ministers as those exercisable in relation to England.

When taking forward secondary legislation, officials will continue to work closely with UKG officials to ensure consistency which is essential for both buyers and suppliers in the immediate term.

However, equivalent powers will allow the Welsh Ministers to make changes if Welsh policy changes in the future. Such changes would not represent a sea-change as they're likely to be done on one or two aspects rather than in all areas where there are equivalent powers. They would also be subject to the Common Framework, as development of policies and legislation are subject to discussion by the Common Framework for public procurement working group to manage potential divergence issues.

**10. Can you summarise how this Bill interacts with the UK Government legislation, and how the UK Government legislation impacted upon the development of this Bill?**

Work on the public procurement duties in this Bill began about a year before the UK Government published its Green Paper on transforming public procurement in December 2020. Once the Green Paper was published it was reassuring to note that whilst the UK Government proposals centre on procurement processes, both Bills share the high level aims of reducing the workload associated with procurement, increasing transparency and strengthening accountability.

As well as a need to ensure consistent terminology in the two Bills, the main areas of interaction between them are in:

- the overlap between the Wales Procurement Policy Statement that is referenced in the UK Bill and the well-being goals referenced in this Bill;
- the mechanism for tracking Key Performance indicators in the UK Bill and the annual reporting process in this Bill; and
- the oversight arrangements required for the UK Bill and the SPC's procurement subcommittee.

## Accessibility

- 11. One of the principles set out by the Counsel General is to aim for clear and accessible law on the statute book in Wales. If this Bill and the UK Government's Procurement Bill are passed, procurement law that is applicable to Welsh citizens will be contained in both Senedd and UK Parliament Acts. Why has the Welsh Government not adhered to its own principles of clear and accessible legislation?**

Procurement practitioners in Wales are already used to working to more than one set of legislation and the concept of embedding socially responsible policy priorities into procurement processes, for example they already need to consider the requirements under the Well-being of Future Generations (Wales) Act 2015.

The potential negative impact on buyers and suppliers of divergent procurement process legislation on procurement would have been significant. This additional complexity would also be experienced by Welsh suppliers bidding for public contracts outside Wales. As the two Bills are moving forward on similar timescales this will allow the guidance, training and support provided to buyers and suppliers to be developed so that it is clear and accessible. My officials are working closely with those in the Welsh Government's procurement reform team, who are working with counterparts in the UK Government to ensure consistency and cohesion between the two Bills.

- 12. Section 17 of the Bill provides that the Welsh Ministers must consult with the Social Partnership Council "when making decisions of a strategic nature" about the reasonable steps to take to meet their wellbeing objectives under the Well-being of Future Generations Act 2015. In written evidence to the Equality and Social Justice Committee, Audit Wales considers that the phrase "decisions of a strategic nature" could be clarified on the face of the Bill, "as it does not seem entirely appropriate for the Welsh Ministers to be providing guidance to themselves on the interpretation of this phrase." Have you considered clarifying this phrase on the face of the Bill?**

Recently, through the enactment of the socio-economic duty we have provided statutory guidance on what is meant by 'decisions of a strategic nature' as set out in section 1 of the Equality Act 2010. This guidance provides examples of strategic decisions that public bodies may make, including medium and long-term plans such as corporate plans, and of course the setting of objectives.

In general, strategic decisions will be those which affect how the public body fulfils its intended statutory purpose over a significant period of time and will not include routine 'day-to-day' decisions.

- 13. Section 20 of the Bill amends section 4 of the Well-being of Future Generations Act 2015 by substituting 'fair work' for 'decent work' within the existing "A prosperous Wales" goal. In written evidence to the Equality and Social Justice Committee, Professor Alan Felstead noted that "the Explanatory Memorandum attached to the tabled Bill suggests this will mean that 'fair work takes on its ordinary meaning', even though the term has very specific meaning which has been accepted by Welsh Government." Do you believe that the absence of this accepted definition within this Bill will have any impact on the accessibility and**

## **the clarity of the requirements of the Well-being of Future Generations Act?**

As I have made clear in my response to question 3 above, the Welsh Government has accepted the Fair Work Commission's definition and characteristics of fair work in our policy work. In my view, the approach to Fair Work is consistent with the drafting of the Well-being of Future Generations Act 2015. The treatment of fair work will not have a negative impact as the goals were intended to set out a long-term national framework to enable sustainable development to be embedded at the heart of public bodies.

### **Powers to make subordinate legislation**

#### **14. Are you satisfied that the Bill strikes the right balance of providing detail on the face of the Bill versus giving regulation-making powers to the Welsh Ministers?**

The only subordinate legislation-making powers in this Bill are those in part 3, which deals with socially responsible public procurement. They have been included for what are often referred to as 'future-proofing' reasons: that is, to enable us to make any operational changes which may be necessary in the future: for example, to amend the list of contracting authorities subject to the provisions of the legislation, or to tweak the list of matters those bodies are required to consider when producing their procurement strategies, which are likely to change over time as strategic priorities evolve.

#### **15. Section 32 requires the Welsh Ministers to publish a code of practice (the "public services outsourcing and workforce code") about employment and pensions matters related to outsourcing services contracts. The "social public workforce clauses" will be included as part of that code. Other sections (such as section 33) also provides that the code published under section 32 must include model contract clauses, that will underpin the aims of the Bill in ensuring socially responsible public procurement. The code of practice will therefore play a central role. With that in mind, why does the code have no scrutiny procedure attached to it, and why is there no duty to consult on the code? Will the Welsh Government publish a draft code of practice at the very least before the amending stages of the Bill in order that Members have an opportunity to scrutinise it?**

All statutory guidance will be developed in social partnership and will include open consultation with stakeholders. This process cannot begin formally until such time as the Bill receives Royal Assent, although preliminary work will be taking place beforehand. Given the quantity of statutory guidance that will be needed to support the procurement duties it would be difficult to prepare a draft Code of Practice in time for the amending stages of the Bill.

#### **16. Section 38(3) gives Welsh Ministers regulation-making powers to amend section 38(2) of the Bill to specify other matters which procurement strategies should address and to reduce the number of days specified in section 38(2)(c) (the maximum number of days within which invoices should be paid). This is a power that can amend primary legislation (a Henry VIII power) yet only the negative scrutiny procedure is applied. Welsh Government drafting guidelines recommend that any powers to make secondary legislation that have the ability to amend primary legislation should be subject to the affirmative procedure. In light of this,**

## **why have you decided only to apply the negative scrutiny procedure in this case?**

In keeping with the convention agreed between the Senedd and Counsel General, we have ensured that those subordinate legislation-making powers which allow for provisions in the Bill itself to be amended are all subject to the affirmative procedure. The exception being regulations under section 38 which are operational in nature dealing with matters which procurement strategies must address. Those that deal with operational or technical matters, which do not alter the purpose or effect of the primary legislation itself in any way, are those we have concluded should be made under the negative procedure.

### **17. Section 48(1) of the Bill states that “this Act comes into force on such day as the Welsh Ministers may by order appoint”. When do you intend for the Bill to come into force, should it be passed by the Senedd?**

It is our intention that the legislation should come into force as soon as is reasonably practicable. Members will appreciate that the four component parts of the Bill place a range of duties and requirements on various bodies – including Welsh Ministers. As such it will be necessary to sequence commencement of certain sections of the Act. For example, in relation to the Social Partnership Council, we would be looking to commence the appointment provisions by autumn 2023, with a view to those appointments having been made, and the Council able to meet, before the end of 2023.

In terms of the fair work and social partnership duties, we intend to publish initial advice during 2023 so that public bodies, including any additional bodies which may be brought within the scope of the WFG Act are able to plan appropriately for the introduction of the new duties and understand what may be expected of them. Statutory guidance issued under the relevant provisions of the Bill will need to be agreed by the Social Partnership Council and will be published as soon as possible after the Council is established in order that public bodies are able to set or review their well-being objectives in 2024 having given regard to that guidance. More broadly, we will also be looking to align the objective-setting and reporting cycles in this legislation as far as possible with those that our partners already work to under the WFG Act.

Turning to socially-responsible procurement, whilst the Social Partnership Council will be responsible for establishing the public procurement sub group itself, work is already under way to develop the necessary guidance, training and monitoring arrangements which will be required to support these provisions. This work is being and will continue to be undertaken in consultation with social partners and the public procurement community in Wales. We will also look to coordinate the changes resulting from the implementation of the UK Procurement Bill in Wales with the provisions in our Bill are implemented in a coherent way so as to avoid overburdening service providers with uncoordinated waves of statutory changes.