



Eich cyf/Your ref  
Ein cyf/Our ref

Huw Irranca-Davies  
Chair, Legislation, Justice and Constitution Committee

14 November 2022

Dear Huw,

Thank you for the report on the Welsh Government's Legislative Consent Memoranda (LCM) on the Procurement Bill which was laid in the Senedd on 26 October.

I have considered the eight recommendations in the report and I am pleased to provide my response to each of them below.

**Recommendation 1.** The Senedd's consent should also be sought for clauses 114 and 116, and any future memoranda in respect of the Bill should identify them accordingly.

[I do not accept this recommendation.](#)

[I do not agree with the conclusion that clauses 114 and 116 of the Bill would amount to relevant provision for the purposes of Standing Order 29.](#)

[As I explained in response to the Committee's questions on the LCM, these clauses are technical provisions which are concerned with how the Bill works rather than substantive provisions, and as a matter of practice we do not generally include non-operative clauses within Legislative Consent Memoranda.](#)

**Recommendation 2.** The Minister should provide an update on engagement between the Welsh Government and the UK Government in respect of the following outstanding concerns raised at paragraph 119 of the Memorandum:

- a. the drafting of a power to add international agreements to the list in Schedule 9 as a concurrent power with no requirement to obtain the consent of Welsh Ministers when UK Government Ministers are exercising this power in relation to devolved areas;

[Detailed discussions are ongoing at official level on similar provisions contained in the Trade \(Australia and New Zealand\) Bill. Once any agreement has been achieved, it is expected that the outcome of those discussions will be reflected for this power in the Procurement Bill.](#)

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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.

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- b. the definition of Welsh Contracting Authorities;

My officials are regularly meeting with UK Cabinet Office officials to resolve this issue. Discussions have been positive, and we are hopeful for a successful outcome.

- c. the drafting of commencement powers as Minister of the Crown only powers;

There was an initial commitment from UK Government to Welsh Ministers having commencement powers in the Bill. Discussions are continuing between officials on the powers with an agreement on the way forward expected imminently.

- d. the inclusion of concurrent powers to make consequential etc provision no requirement to obtain the consent of Welsh Ministers when UK Government Ministers are exercising these powers in relation to devolved areas.

My officials have asked for the power to be amended to Concurrent plus powers and discussions are ongoing.

On all of these outstanding matters of concern, the door has not been closed and engagement is continuing with the UK Government at both Ministerial and official levels.

**Recommendation 3.** The Minister should, for reasons of transparency, publish her letters of 18 May and 23 May 2022 to the Minister for Brexit Opportunities and Government Efficiency, and the responses (if any) received.

The letters are attached as Annex 1.

**Recommendation 4.** The Minister should set out the point in the Bill's passage when she would consider using the intergovernmental relations mechanisms to resolve outstanding areas of concern within the Bill.

We have maintained a good working relationship with the UK Government on the Procurement Bill and, so far, we have been able to reach agreed solutions without needing to consider any dispute resolution mechanisms such as the inter-governmental agreement. Since discussions are ongoing with the UK Government, it would not be appropriate to use the intergovernmental relations mechanisms to resolve outstanding areas of concern within the Bill at this time.

This is in line with the Intergovernmental Relations Review agreement which states: *Escalation of a disagreement between governments as a dispute will only be considered after due and full consideration has been given at portfolio-level (including F:ISC regular engagement), where a disagreement cannot be resolved at portfolio level, and has significant implications for the relationship between two or more governments.*

Given the current relationship with UK Government on this Bill, and the guidance on using intergovernmental relations mechanisms, it is not possible (or appropriate) to predict when relationships would breakdown to the point that use of these mechanisms should be considered.

**Recommendation 5.** The Minister should set out any scenarios in which she would consider using an intergovernmental agreement to resolve outstanding areas of concern within the Bill.

It is not anticipated that the intergovernmental relations mechanism will be required to resolve any outstanding matters. However, should relationships breakdown in the future, we would look to escalate through the Inter-Ministerial Standing Committee in the first instance.

We will of course keep the situation under review and acknowledge that the inter-governmental dispute resolution mechanism is available to resolve any issues that cannot be resolved through the portfolio level engagement should it be needed.

**Recommendation 6.** The Minister should set out her views on the procedures applied to all powers for the Welsh Ministers to make subordinate legislation under the Bill.

**Recommendation 7.** The Minister should provide an update on discussions between the Welsh Government and the UK Government in relation to concerns raised by the Delegated Powers and Regulatory Reform Committee in respect of the Bill.

Considering the links between Recommendation 6 and 7, this response covers both recommendations.

My officials have discussed the concerns raised in the Delegated Powers and Regulatory Reform Committee's Report with their counterparts in the UK Cabinet Office. My officials have contributed to the response where there were Welsh policy considerations.

I was content with the procedures applied to all powers for the Welsh Ministers to make subordinate legislation under the Bill as introduced. However, some procedures will change as a result of some points raised in the Delegated Powers and Regulatory Reform Committee's report. We understand the response to the report is due to be published imminently.

I remain content with the procedures applied to the powers for the Welsh Ministers to make subordinate legislation under the Bill following the amendments agreed at official level.

**Recommendation 8.** The Minister should provide a response to all recommendations contained within this report within three weeks of its laid date, or ahead of any future laying of memoranda by the Welsh Government in respect of the Bill, whichever is the soonest.

Accepted.

I trust the responses provided are helpful. Please do not hesitate to contact me if you need anything further.

Yours sincerely,

A handwritten signature in black ink that reads "Rebecca Evans". The signature is written in a cursive, flowing style.

**Rebecca Evans AS/MS**  
Y Gweinidog Cyllid a Llywodraeth Leol  
Minister for Finance and Local Government



Rt. Hon. Jacob Rees-Mogg M.P.  
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By email to:

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Dear Minister,

Thank you for your letters dated 18 May and 23 May in response to the UK Government's request that the Welsh Government commence the legislative consent process for the Procurement Bill in the Senedd Cymru.

The Procurement Bill provides HM Government and the Devolved Administrations with an excellent opportunity to overhaul the public procurement regime and drive flexibility in our procurement processes. I have been pleased to see our officials working together on this important legislation.

I note from your correspondence, and the subsequent Legislative Consent Motion which was lodged with the Senedd on 9 June, that you have some concerns about the Bill as drafted. Regarding your concern about the Definition of Welsh Contracting Authorities within the Bill, it has always been the intention of HM Government to find a workable, practical solution which will be easy for affected Contracting Authorities to implement and follow.

Additionally, I have noted your concern regarding powers in respect of implementing future trade agreements. I understand the position and recognise that there are some cross-cutting Trade implications which need to be taken into account in this regard.

Since May our officials have continued to work closely together on identifying potential technical and legal solutions and I was pleased to see that some of these issues, for example, with regard to the disapplication power for healthcare services and the removal of the Wales Procurement Policy Statement from any civil proceedings remedies regime, have been resolved. I have asked my officials to continue working collaboratively with your officials throughout the summer and September in order to resolve the remaining issues whilst the Bill is going through the parliamentary process.

I want to thank you for your continued engagement and support of the Procurement Bill and assure you that I will respond in more depth in due course.

Yours sincerely,

Jan 2000

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Y Gweinidog Cyllid a Llywodraeth Leol  
Minister for Finance and Local Government



Llywodraeth Cymru  
Welsh Government

Eich cyf/Your ref  
Ein cyf/Our ref: RE/700/2022

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cc The Rt Hon Penny Mordaunt MP, Minister of State for Trade Policy  
Email: [Mordaunt.Correspondence@trade.gov.uk](mailto:Mordaunt.Correspondence@trade.gov.uk)

cc The Rt Hon Simon Hart MP, the Secretary of State for Wales  
Email: [secretary.state@ukgovwales.gov.uk](mailto:secretary.state@ukgovwales.gov.uk)

23 May 2022

Dear Jacob,

Thank you for your letter regarding the introduction of the Procurement Bill (the Bill) to Parliament on 11 May 2022.

I agree in principle that the Bill engages the legislative consent motion process in legislating for procurements undertaken by devolved Welsh authorities and certain private utilities as defined in the Bill. I am therefore content, in principle, to begin the legislative consent process in the Senedd Cymru.

I have written to you separately however regarding some issues with the definition of devolved Welsh authorities within the Bill and I look forward to receiving your response.

Due to the size of the Bill, my officials are continuing with the devolution analysis for the legislative consent memorandum. My officials are also working with yours to agree a list of government amendments required.

In relation to the section in your letter entitled "Power to implement procurement aspects of trade agreements", this is an area of significant concern with the Bill. Thank you for the assurance provided in your letter. However, the Welsh Government has been clear that the use of concurrent powers undermines the devolution settlement and that we cannot recommend consent to the Senedd where concurrent powers are proposed.

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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.

When the Welsh Ministers were considering their position regarding the Bill, the following assurances were made by Minister Lopez, the then Parliamentary Secretary for the Cabinet Office, in her letter of 16 July 2021:

- that the legislation will not fetter either the legislative competence of the Senedd or the executive competence of Welsh Ministers, e.g., no concurrent powers so as to engage Schedule 7B Government of Wales Act 2006, full autonomy in taking forward any secondary legislation for Welsh contracting authorities (i.e., those bodies with wholly or mainly devolved functions)
- that Welsh Ministers will be granted equivalent powers to UK Ministers in relation to those contracting authorities carrying out wholly or mainly devolved activities (Welsh contracting authorities).

In light of the assurances provided by Minister Lopez above, I ask that you reconsider your position and that the power to implement procurement aspects of trade agreements in the Bill are amended to give Welsh Ministers an equivalent power. This is a matter of grave importance to the Welsh Ministers, I have therefore copied this letter to the Minister of State for Trade Policy and the Secretary of State for Wales.

I look forward to hearing from you soon.

Yours sincerely,

A handwritten signature in black ink that reads "Rebecca Evans". The signature is written in a cursive, flowing style.

**Rebecca Evans AS/MS**

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Ein cyf/Our ref: RE/699/2022

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18 May 2022

Dear Jacob,

### **Procurement Bill: Cross Border Procurement**

Thank you for your letter of 11 May. I confirm that I will be providing a formal response to your letter in relation to those matters outlined under the heading of “Next steps.”

Meanwhile, I would like to draw your attention to a particular area of concern to Welsh Ministers in relation to cross border procurement.

An assurance was made by Minister Lopez, the then Parliamentary Secretary for the Cabinet Office, in her letter of 16 July 2021, that we agree the list of contracting authorities to which the “Welsh” elements of the Bill will apply (i.e., those bodies with wholly or mainly devolved functions) and to which the UK Government elements will not.

Since then, discussions have been ongoing between Welsh Government and UK Government Officials on the definition for Welsh Contracting Authorities (WCAs) in the Bill - with the draft wording being amended a number of times.

The Bill as introduced contains provision which restricts the exercise of Welsh Ministers’ powers under the Bill to the purpose of regulating (a) contracting authorities that are devolved Welsh authorities (within the meaning given in section 157A of the Government of Wales Act 2006) (b) contracting authorities that are not devolved Welsh authorities but are to be treated as devolved Welsh authorities or (c) the award of contracts under a devolved Welsh procurement arrangement, or the management of such contracts (see clause 99(1)). Any reference in the Bill to a “devolved Welsh authority” is to include a reference to an authority that is to be treated as a devolved Welsh authority (see clause 99(4)).

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We are mostly content with the definition as it stands for most Welsh Contracting Authorities. This goes some way towards addressing our concern that the “Welsh” rules (as a consequence of the exercise of the Welsh Ministers powers and the separate provision for Wales) should apply to a wider range of contracting authorities than would fall within the Government of Wales Act definition of “devolved Welsh authority”. Our main concern is about the implications for contracting authorities, other than utilities, which fall within category (b) (i.e. contracting authorities that are not devolved Welsh authorities but are to be treated as devolved Welsh authorities) when they carry out a cross border procurement i.e. a single procurement which relates to both Wales and England.

Our interpretation of clause 99(3) is that it would mean that in these circumstances, the authority will be bound by the ‘Welsh’ rules for procurements which are wholly in respect of Wales but not for any other procurements, including cross border procurements. Ultimately this means that for any cross border procurements which are for the supply of goods, services or works of which, say, 90% is for use in Wales and 10% is for use in England, then the ‘English’ elements of the rules would apply. Examples of what this might mean currently for Contracting Authorities falling within the wider definition of “devolved Welsh authority” (“category (b) authorities”) when carrying out cross-border procurements are currently as follows:

- Category (b) authorities carrying out a cross border procurement in Wales and England would have to have regard to the NPPS and not the WPPS, as the duty to have regard to the WPPS only applies to devolved Welsh authorities (clause 13). An example of this is registered social landlords (RSLs) procuring work in relation to their housing stock which they have in both Wales and England in one contract. The English NPPS would apply, even though the main element of their housing stock is based in Wales.
- Prohibition of a separate pre-qualification stage for procurements below GPA thresholds (clause 78) applies to contracting authorities other than devolved Welsh authorities. Category (b) authorities when carrying out a cross border procurement would be subject to this prohibition and would not be able to utilise the flexibility of using a pre-qualification stage.
- For any contracts valued above £2m let in Wales, category (b) authorities carrying out a cross border procurement will need to comply with the requirement to publish the contracts (clause 51(3)). But this requirement does not apply to devolved Welsh authorities so will not be a requirement for category (a) authorities when carrying out any procurement (including a cross border procurement) nor is it a requirement for a category (b) authority when carrying out a procurement only in relation to Wales.
- Category (b) authorities carrying out cross border procurement would also need to comply with the requirement to update published contracts valued over £2m when they have been modified, or to publish contracts if a modification has taken the value over £2m (clause 70(6)). This is not a requirement for category (a) authorities when carrying out any procurement (including a cross border procurement) nor is it a requirement for a category (b) authority when carrying out a procurement only in relation to Wales.

Both UKG Ministers and Welsh Ministers have regulation making powers within this Bill, and the Bill makes separate provision for Wales in some areas. As both Governments develop policies within their competence in the future there may be further divergence and the impact on category (b) authorities carrying out cross border procurements could therefore be much greater moving forward and could therefore have a real impact on the implementation of Welsh policies for the authorities affected. This would not be acceptable for Welsh Ministers.

The drafting of the definition of “devolved Welsh authority” in the Bill means that when category (b) authorities are carrying out a cross border procurement the English regulations take precedence, which is not what Welsh Ministers require for bodies undertaking wholly or mainly devolved functions.

The Explanatory Note (587) to this section in the Bill refers to this point, It explains that subsection (3) defines another category of contracting authority to be treated as a devolved Welsh authority and states:

”These are contracting authorities that operate to some extent outside Wales, but whose functions are both exercisable wholly or mainly in relation to Wales and are not wholly or mainly reserved. These authorities are only to be treated as devolved Welsh authorities when awarding or managing a contract in relation only to their functions in Wales. In respect of a contract that relates to more than just functions in Wales, the authority would not be a devolved Welsh authority.”

It is this last section that is not acceptable to Welsh Ministers if the procurement being undertaken relates mainly to Wales then we believe that they should be treated as a devolved Welsh authority for the purposes of this Bill.

You may be aware that my officials have already requested an approach, which would require contracts for services/goods/works for use in both Wales and England to be procured in accordance with the provisions applicable to the main geographical location and function of the contract in question. This is a similar approach to mixed procurements in the current PCR. However, we understand that you are not minded to accept this approach. It is important to ensure that we reach agreement on the scope of the Welsh Ministers powers to regulate in relation to Welsh Contracting Authorities (WCAs) and the application of separate provisions in relation to WCAs.

Given the above and the assurance provided by Minister Lopez, I would ask you to consider an amendment to the Bill so that the drafting of the definition of category (b) authorities would reflect where procurement undertaken by an authority is wholly or mainly in relation to Wales that they are treated as a devolved Welsh authority.

Yours sincerely,



**Rebecca Evans AS/MS**

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