

The Welsh Government's Legislative Consent Memoranda on the Procurement Bill

November 2022



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3. Background

The UK Government's Procurement Bill

1. In December 2020, the UK Government proposed reform to procurement legislation following the end of the transition period of the UK's exit from the European Union (EU). In its Green Paper, *Transforming public procurement*, the UK Government set out its goal to:

*'[...] speed up and simplify our procurement processes, place value for money at their heart, and unleash opportunities for small businesses, charities and social enterprises to innovate in public service delivery.'*¹

2. In August 2021, Rebecca Evans MS, the Minister for Finance and Local Government (the Minister) announced she had accepted an offer from the UK Government to use the forthcoming legislation to "reform the basic processes underpinning procurement" in Wales.²

3. The Procurement Bill (the Bill) was subsequently introduced into the House of Lords on 11 May 2022.³ It is sponsored by the Cabinet Office. The Bill as introduced includes 116 clauses and 11 schedules; all of which, except for three clauses, apply to Wales.⁴

4. The Explanatory Notes to the Bill states:

*'The purpose of the Procurement Bill is to reform the United Kingdom's public procurement regime following its exit from the European Union (EU), to create a simpler and more transparent system not based on transposed EU Directives.'*⁵

5. The Bill had its second reading in the House Lords on 25 May 2022. At the time of writing this report, the Bill had completed the Committee Stage in the House of Lords with a date for reporting to be announced.

¹ UK Government, [Green Paper: Transforming public procurement](#), December 2020, paragraph 1

² Welsh Government, [Written Statement: The Way Forward for Procurement Reform in Wales](#), 18 August 2021

³ [Procurement Bill, as introduced](#) (HL Bill 4)

⁴ [Procurement Bill: Explanatory Notes](#), Annex A – Territorial extent and application in the United Kingdom

⁵ Procurement Bill: Explanatory Notes, paragraph 1

The Welsh Government's Legislative Consent Memorandum (Memorandum No. 1)

6. Standing Orders 29.1 and 29.2 provide that a legislative consent memorandum is required when a relevant UK Bill makes provision in relation to Wales for any purpose within the legislative competence of the Senedd or which modifies the Senedd's legislative competence.

7. On 9 June 2022, the Minister laid before the Senedd a Legislative Consent Memorandum (Memorandum No. 1) in respect of the Bill.⁶

8. The Business Committee agreed that the Legislation, Justice and Constitution Committee and the Public Accounts and Public Administration Committee should report on Memorandum No. 1 by 6 October 2022.⁷ This reporting date was later moved to 10 November,⁸ and then to 24 November 2022.⁹

Provisions for which the Senedd's consent is required

9. Paragraphs 17 to 102 of Memorandum No. 1 set out the Minister's assessment of which provisions in the Bill require the consent of the Senedd, namely:

- clauses 1 to 5; clauses 7 to 9; Schedules 1 to 4 (Key definitions);
- clauses 10, 11 and 13 (Principles and Objectives);
- clauses 14 to 43; Schedule 5; clauses 44 to 55; Schedule 6; Schedule 7; clauses 56 to 61 (Award of Public Contracts and Procedures);
- clauses 62 to 71; Schedule 8; clauses 72 and 73 (Management of public contracts);
- clauses 74 to 76 (Conflicts of interest);
- clause 77; clauses 79 and 80 (Below-threshold contracts);
- clauses 81 and 82; Schedule 9 (Implementation of international obligations);
- clauses 84 to 88 (Information and notices: general provision);

⁶ Welsh Government, [Legislative Consent Memorandum, Procurement Bill](#), June 2022

⁷ Business Committee, [Timetable for consideration: Legislative Consent Memorandum on the Procurement Bill](#), June 2022

⁸ Business Committee, [Revised timetable for consideration: Legislative Consent Memorandum on the Procurement Bill](#), June 2022

⁹ Business Committee, [Revised timetable for consideration: Legislative Consent Memorandum on the Procurement Bill](#), September 2022

- clauses 89 to 95 (Remedies for breach of statutory duty);
- clauses 96 to 98 (Procurement Oversight);
- clause 99; clauses 101 to 103 (Appropriate Authorities And Cross-Border Procurement);
- clause 104; clauses 106 and 107; Schedule 11 (Amendments and Repeals); and
- clauses 109 to 113; clause 115 (General).

10. The UK Government and the Minister agree that the Senedd's consent is not required for clauses 12, 78, 83, 100 and 108. The UK Government does not consider that the Senedd's consent is required for clauses 51 and 99, as opposed to the Minister's view that consent is required for those clauses. Conversely, the UK Government believes that consent is required to a series of other clauses – clauses 6, 105, 114 and 116 – while the Welsh Government does not.¹⁰

The Welsh Government's Supplementary Legislative Consent Memorandum (Memorandum No. 2)

11. On 11 July 2022 the Minister laid before the Senedd a Supplementary Legislative Consent Memorandum (Memorandum No. 2)¹¹ in respect of amendments considered at the House of Lords Committee Stage, which were tabled on 27 June 2022.¹²

12. The Business Committee agreed that the Legislation, Justice and Constitution Committee and the Public Accounts and Public Administration Committee should report on Memorandum No. 2 by 10 November 2022.¹³ This reporting date was later moved to 24 November 2022.¹⁴

Interaction of the Bill with other legislation

The Social Partnership and Public Procurement Bill

13. The Social Partnership and Public Procurement Bill (SPPP Bill) was introduced into the Senedd on 7 June 2022. The Minister explains at paragraph 11 of Memorandum No. 1 that the SPPP Bill "also proposes to place procurement obligations on defined Welsh public bodies".

¹⁰ Procurement Bill: Explanatory Notes, Annex A – Territorial extent and application in the United Kingdom

¹¹ Welsh Government, [Supplementary Legislative Consent Memorandum \(Memorandum No. 2\), Procurement Bill, 2022](#)

¹² Procurement Bill, [Amendments to be moved in Grand Committee](#), July 2022

¹³ Business Committee, [Timetable for consideration: Supplementary Legislative Consent Memorandum on the Procurement Bill](#), July 2022

¹⁴ Business Committee, [Revised timetable for consideration: Legislative Consent Memorandum on the Procurement Bill](#), September 2022

14. The Minister further explains the interaction between both Bills at paragraph 12 of Memorandum No. 1:

'Whilst the UK Government's Procurement Bill focuses on the processes underpinning procurement, the SPPP Bill focuses on ensuring socially responsible outcomes are achieved from our procurement. Together these two Bills will provide a new regime for procurement that delivers social, environmental, economic and cultural outcomes, including fair work.'

The Trade (Australia and New Zealand) Bill

15. The Trade (Australia and New Zealand) Bill was introduced into the UK Parliament on 11 May 2022. The Welsh Government laid a Legislative Consent Memorandum in respect of the Bill on 25 May 2022.

16. At paragraph 15 of Memorandum No. 1, the Minister states:

'The Trade (Australia and New Zealand) Bill is to be repealed by the Procurement Bill, as well as the amendments to the Government of Wales Act 2006 made by the Trade (Australia and New Zealand) Bill.'

17. The Minister sets out the perceived benefits of the Bill at paragraph 117 of Memorandum No. 1. They include simpler procedures, increased flexibility and increased transparency.

18. At paragraph 118 the Minister lists her reasons as to why opting to legislate on an England and Wales basis is "pragmatic". Those reasons include continuity for suppliers and buyers, particularly those which operate across borders, and policy alignment, but with derogations or carve-outs obtained where there is no alignment.

19. The Minister goes on to explain that, in her view, the Bill's provisions are "sensible and important", and suggests that the approach to legislating has timing and resource benefits:

- *"Timing: the UK Government have been able to introduce legislation to Parliament far sooner than the Senedd's timetable would allow. A joint approach will allow reforms to be enacted earlier in Wales than would otherwise be possible.*
- *Using the UK Bill allows the Welsh Government to focus resource on the other important aspects of procurement that enable social value and are key drivers of change, such as the SPPP Bill and Wales Procurement Policy Statement (WPPS), etc".¹⁵*

20. The Minister notes at paragraph 119 that, whilst she is “content to begin the legislative consent process”, there are a number of concerns to be resolved before consent can be recommended. Those concerns include:

- the inclusion of a concurrent power to add international agreements to the list in Schedule 9 of the Bill with no requirement to obtain the consent of the Welsh Ministers when UK Government Ministers are exercising it in devolved areas;
- the absence of commencement powers for the Welsh Ministers;
- the inclusion of concurrent powers to make consequential etc provision with no requirement to obtain the consent of the Welsh Ministers when UK Government Ministers are exercising them in devolved areas.

21. The Minister also states at paragraph 119 that she had written to the Minister for Brexit Opportunities and Government Efficiency on 18 May 2022 to consider an amendment to the Bill to change the definition of Welsh Contracting Authorities within the Bill, “with a view to ensuring that the clauses work more fairly in relation to some cross border procurements”.

22. The Minister’s conclusion at paragraph 123 summarises the her position on the Bill:

‘It is my view that it is appropriate to deal with these provisions in this UK Bill, as the Bill is the most effective way for these provisions to come into force. My officials have worked closely with officials in Cabinet Office to ensure that Welsh policy objectives have been included and I consider that these provisions would provide a simplified, transparent procurement regime in Wales. However, it is not appropriate to recommend consent until the matters of concern as outlined in paragraph 119 above have been resolved.’

Update on the position since the publication of Memorandum No. 1 and amendments for which consent is required

23. At paragraph 11 of Memorandum No. 2, the Minister confirms that official-level discussions to resolve the majority of the concerns outlined in Memorandum No. 1 were ongoing, including those in relation to the concurrent powers, commencement powers, and the definition of Welsh Contracting Authorities.

24. The Minister also states that the UK Government had tabled 320 amendments to the Bill on 27 June, the majority of which make provision which require the Senedd’s consent, and several of which were proposed for inclusion by the Welsh Government.¹⁶

25. The Minister sets out the amendments which make provision which require the Senedd's consent at paragraph 14; these are predominantly described as "minor" and "providing clarity". The Minister also states that, as the amendments relate to the provisions outlined in Memorandum No. 1, her rationale for making the provisions as set out in that memorandum continues to apply.¹⁷ The Minister concludes:

'It is my view that it is appropriate to deal with these provisions in this UK Bill, as the Bill is the most effective way for these provisions to come into force. My officials have worked closely with officials in Cabinet Office to ensure that Welsh Government's policy objectives have been included and I consider that these provisions would provide a simplified, transparent procurement regime in Wales.

*Although I consider the proposed amendments to be reasonable, both in the sense that they appear to make improvements to the Bill as introduced and do not give rise to any fresh areas of concern for me, I also consider that it is not appropriate to recommend consent until the outstanding matters of concern as outlined in paragraph 11 above have been resolved. My officials will continue to work with the UK Government to resolve these matters.'*¹⁸

4. Committee consideration

26. We considered Memorandum No. 1 at our meeting on 14 July 2022. On 28 July, we issued a joint letter with the Legislation, Justice and Constitution Committee seeking further information on Memorandum No. 1¹⁵. The Minister responded to the letter on 1 September.¹⁶

27. We invited Members of the Legislation, Justice and Constitution Committee to attend our evidence session with the Minister on both memoranda for the Bill, which was held on 21 September 2022.

28. We agreed our report on 10 November 2022.

¹⁵ [Joint Letter to the Minister for Finance and Local Government from the Public Accounts and Public Administration Committee and Legislation, Justice and Constitution Committee, 28 July 2022](#)

¹⁶ [Letter from the Minister for Finance and Local Government to the Public Accounts and Public Administration Committee, 1 September 2022](#)

General comments

29. We note the Welsh Government's reasons for making provision for Wales in the Bill, as set out in the memoranda. These matters are discussed below.

30. We note that there are some areas of disagreement between the Welsh Government and the UK Government on which clauses of the Bill require the Senedd's consent.

31. In particular, we note that the Welsh Government does not agree with the UK Government's view that clauses 114 (Extent) and 116 (Short title) of the Bill require the Senedd's consent. Although we note the Minister's explanation that these clauses "are technical provisions which are concerned with how the Bill works rather than substantive provisions"¹⁷, for the avoidance of doubt we believe the Senedd's consent should be sought for clauses 114 and 116.

Conclusion 1. Conclusion 1. We agree with the Welsh Government's assessment that all clauses and schedules listed in the Memoranda fall within a purpose within the legislative competence of the Senedd, as described in Standing Order 29.

Conclusion 2. Conclusion 2. We agree with the Welsh Government's assessment that clause 106 listed in the Memorandum modifies the legislative competence of the Senedd, as described in Standing Order 29.

Conclusion 3. Conclusion 3. We believe that clauses 114 and 116 of the Bill also fall within a purpose within the legislative competence of the Senedd, as described in Standing Order 29.

Recommendation 1. We recommend 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.

The decision not to include provisions within the Social Partnership and Public Procurement (Wales) Bill

32. In her letter to the Committee the Minister sets out her rationale for not legislating for procurement in Wales in a single, wider Bill that would have incorporated the provisions of both the UK Bill and the Welsh Government's SPPP Bill. The Minister suggests that doing so:

¹⁷ Letter from the Minister for Finance and Local Government, 1 September 2022, page 4

'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'.

33. The Minister also notes:

*'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.'*¹⁸

34. On the question of the impact this approach will have on the opportunities for Members of the Senedd to undertake detailed legislative scrutiny on the subject matter of the UK Bill, the Minister explained:

'The legislative consent process will ensure that scrutiny can be undertaken by the Senedd which will help to ensure UK Government stand by the assurances they made when we agreed to Welsh contracting authorities being included in the Bill.[.]

*The Welsh Ministers have equivalent powers in significant areas of the Bill so there will be a substantial level of secondary legislation which will be subject to detailed legislative scrutiny in the Senedd, as well as wider engagement and consultation with stakeholders across Wales.'*¹⁹

35. The scrutiny undertaken by the Senedd that is referenced by the Minister is the legislative consent memorandum process, culminating in a legislative consent motion debated in Plenary. We believe that process is very different when compared with the scrutiny of a Bill in the Senedd, where there are greater opportunities to engage with stakeholders, and the ability to table amendments to test and seek improvements to legislation.

36. In terms of the scrutiny process we asked if the Minister would acknowledge the reduced scale and scope of scrutiny involved in the legislative consent process, as compared to the much greater scope and scale of scrutiny of a Senedd Bill.

37. The Minister highlighted the scrutiny being undertaken by Senedd Committees, including our own Committee and the Legislation, Justice and Constitution Committee. She also explained

¹⁸ [Letter from the Minister for Finance and Local Government to the Public Accounts and Public Administration Committee, 1 September 2022](#)

¹⁹ [Letter from the Minister for Finance and Local Government to the Public Accounts and Public Administration Committee, 1 September 2022](#)

that Welsh stakeholders had been involved in the development of the Bill which had helped the Welsh Government understand their aspirations and concerns and effectively communicate these to the UK Government.²⁰ She added:

*'Because of the excellent working relationship that officials have had with the UK Government, we've been able to influence the Bill and to make changes to the Bill. And that is very much based on what our stakeholders have been telling us. So, I think that there has been an opportunity to influence.'*²¹

38. We are concerned about the limited opportunities for detailed scrutiny within the legislative consent process. We share the views of the Legislation, Justice and Constitution Committee and disagree with the Minister's suggestion that the legislative consent process is equal to that of the detailed legislative scrutiny of a Senedd Bill. Consideration of a Senedd Bill includes wide consultation on its general principles followed by line-by-line scrutiny in a committee and on the floor of the Senedd, elements which are completely absent from the legislative consent process.

39. While we note the Minister's view that Welsh stakeholders have been provided the opportunity to challenge, influence and scrutinise the Bill's provisions, in general we do not believe that such opportunities are as extensive and transparent as those afforded to stakeholders during Stage 1 scrutiny of a Senedd Bill.

40. We also do not believe that Welsh Government officials' ability to "scrutinise" the UK Government is a transparent method of scrutiny, particularly as it does not allow elected representatives an opportunity to influence.

41. We questioned the Minister on the decision not to bring forward a wider procurement Bill covering the scope of both the UK Procurement Bill and the SPPP (Wales) Bill and whether the benefits of pursuing a single Bill were considered in the Minister's decision-making process. The Minister stated:

'The two pieces of legislation are seeking to address two quite different things. The procurement Bill focuses on the processes that underpin procurement, and they will help to have that practical consistency of approach across England, Wales and Northern Ireland, whereas our Social Partnership and Public Procurement (Wales) Bill focuses very much on our

²⁰ PAPA Committee, 21 September 2022, RoP [55]

²¹ PAPA Committee, 21 September 2022, RoP [55]

policy aims and what we want to achieve through the activities of procurement."²²

42. We were also told that there were a number of benefits of having a consistent approach between Northern Ireland, England and Wales, especially for cross-border procurement and for businesses where they are going to be working in England and in Wales. A Welsh Government Official explained:

*'And Wales has only got about 5 per cent of the procurement spend of the whole of the UK, and we would be concerned that, if we had [a] totally different process than the UK, that could adversely impact on the willingness of suppliers to actually work in Wales.'*²³

43. Stakeholders raised concerns with us that the two separate bills could cause confusion. Caerphilly Council is of the view that "procurement reform should be formulated into one bill that covers all aspects of procurement across UK/Wales"²⁴. The Council suggest that "procurement within Wales may have long term confusion due to [the] process being covered by two Bills".²⁵

44. The Council is also concerned about the amount of process and reporting that could be generated by two bills "in an area of public procurement which is already over scrutinised and constantly reviewed within Wales".²⁶ The Council states further that there is "far too much duplication and uncertainty on procurement policy within Wales".²⁷

45. The WLGA agrees with Caerphilly Council that "one Bill would probably be clearer".²⁸ However the WLGA concedes that "the subject matter is [...] important, and we can understand how two Bills came to be formed".²⁹

46. We raised these issues with the Minister who assured us of the Welsh Government's:

²² PAPA Committee, 21 September 2022, RoP [26]

²³ PAPA Committee, 21 September 2022, RoP [28]

²⁴ [Written Evidence from Caerphilly County Borough Council](#)

²⁵ [Written Evidence from Caerphilly County Borough Council](#)

²⁶ [Written Evidence from Caerphilly County Borough Council](#)

²⁷ [Written Evidence from Caerphilly County Borough Council](#)

²⁸ [Written Evidence from Welsh Local Government Association \(WLGA\)](#)

²⁹ [Written Evidence from Welsh Local Government Association \(WLGA\)](#)

*'commitment to ensure that we work constructively and collaboratively with the UK Government to ensure that any training and guidance that comes forward from them is very much able to dovetail with what else we'll be requiring from people here in Wales in terms of thinking about the social values that we want to see achieved through procurement.'*³⁰

47. We pressed the Minister on the extent to which she acknowledged that a separate Welsh Bill would have overcome the need, and quoting a statement from her letter to us, to "call out areas where the Bill's proposed clauses did not align with Welsh policy objectives and would have resolved issues of concern that remain"³¹. The Minister responded:

*'...given the fact that the Bill itself is quite large—116 clauses across 11 schedules—but that we've only had to call out, as it were, a handful of areas in which to have derogations made, it does demonstrate that we see the way in which the Bill is moving forward takes us on towards a joint vision, I think, of procurement in the future, and I think that that's helpful in the sense that it will avoid having two entirely different Bills relating to procurement across the England and Wales border. So, I think that we've taken a pragmatic approach, recognising that what UK Government is setting out to achieve is something that we would want to achieve ourselves.'*³²

48. We note that the Bill provides Welsh Ministers with powers to make secondary legislation and asked the Minister how she believes that consistency can be achieved through separate secondary legislation being implemented in Wales and England but not separate primary legislation. We asked whether that would be covered through other means such as frameworks.

49. The Minister explained that the approach taken with this Bill is consistent with the overall principles for recommending consent to UK Bills. She explained that essential to those principles is the fact that the Welsh Ministers will always seek equivalent regulation-making and regulatory powers to UK Government Ministers, and Welsh Government Officials are working closely with UK Government officials to ensure that there is consistency.³³

³⁰ PAPA Committee, 21 September 2022, RoP [46]

³¹ [Letter from the Minister for Finance to the Public Accounts and Public Administration Committee, 1 September 2022, page 4](#)

³² PAPA Committee, 21 September 2022, RoP [51]

³³ PAPA Committee, 21 September 2022, RoP [53]

50. She added that any future changes under these powers would be small and subject to the common framework for procurement and she was confident that there would not be a great deal of confusion or divergence, either.³⁴

Conclusion 4. We are content with the Ministers decision not to include provisions within the Social Partnership and Public Procurement Bill and understand the logic for taking this approach in the interests of consistency. We believe that collaboration with the UK Government will maximise Welsh businesses' access to procurement opportunities alongside England and Northern Ireland and cross-border procurements.

Recommendation 2. We recommend that the Minister for Finance and Local Government provide the Public Accounts and Public Administration Committee with a timeframe for introducing and implementing secondary legislation, including regulations, which will contain the details of how procurement rules will operate.

Recommendation 3. We recommend the Minister for Finance and Local Government provide the Public Accounts and Public Administration Committee with an update in 12 months' time on the progress of the UK Government's Procurement Bill and its implementation within Wales.

Recommendation 4. We recommend the Minister for Finance and Local Government provides an update on the development of the project plan for secondary legislation that is necessary to put detail in place ahead of the Bill coming into force, the discussions with Cabinet Office to ensure a consistent approach and the timeframes for the secondary legislation.

Implementation of the new Procurement regime

51. We are keen to understand the views of stakeholders on the implementation of the new Procurement regime and it's future implementation and as part of our work undertook a written consultation to gauge the views of stakeholders on these issues.

52. Caerphilly Council highlighted that, as with the introduction of any new legislation, extensive regulations and training will be required. According to the Council, the current proposals of the UK Legislation and the Welsh Government Social Partnership & Procurement

³⁴ PAPA Committee, 21 September 2022, RoP [53]

Bill represent a “fundamental change in mind set and culture” and as such “dedicated support will be required on the buyer and supplier side”.³⁵

53. We followed up these concerns during oral evidence, asking the Minister whether there were plans for training and development of procurement professionals in Wales to ensure they have the necessary knowledge and understanding of the new regime. The Minister explained:

*'[There] will need to be a considerable amount of training and support provided, both to buyers and suppliers, as a result of the new legislation coming in to help them understand that, and I think that the role of guidance will also be really important. We will be ensuring that Business Wales is able to provide support for suppliers, particularly in terms of helping them understand how to bid for contracts within the new procurement system. That's going to include focused support for the changing requirements, so that they can understand what's going to be different in the future. At the same time, we'll have to ensure that procurement professionals themselves have a full range of support and training available to them. I know that the UK Government is already planning to have a range of support available. I think there will be videos, there will be training sessions and so on. What we'll need to do then, of course, is make sure that that is complemented by training on the Bill that we're bringing forward in Wales to help procurement professionals see the link-up across, really, and to ensure that they're able to operate in both senses.'*³⁶

54. The Minister also stated that “What's important to us, I think, is that they have the training and support to be able to move forward with confidence.”³⁷

55. In a written statement published on 5 October 2022, the Minister announced plans for the Commencement of the Procurement Centre of Excellence.³⁸

56. We welcome the Ministers commitment to the development of training and support to procurement professionals on both the suppliers and buyers side including her recent announcement on the commencement of the Procurement Centre of Excellence.

³⁵ [Written Evidence from Caerphilly County Borough Council](#)

³⁶ PAPA Committee, 21 September 2022, RoP [41]

³⁷ PAPA Committee, 21 September 2022, RoP [42]

³⁸ [Minister for Finance and Local Government, Written Statement: Commencement of the Procurement Centre of Excellence Alpha](#)

57. To help us better understand the views of Welsh stakeholders we asked the Minister to provide us with additional information on any divergences between the consultation responses put forward by Welsh local government and the English Local Government Association ("LGA") to the UK Government's "Transforming Public Procurement" consultation.

58. In a letter to the Committee, the Minister explained:

*'...there was broad alignment in the consultation responses provided, and a general consensus that procurement systems and processes could benefit from being reformed to secure better procurement outcomes. It was anticipated that there would be some areas of divergence in the responses provided due to geographical location and organisational and cultural differences, and these were largely reflected in the responses provided.'*³⁹

59. The letter also explains that in many cases the differences were requests for further information rather than points of real divergence from the key principles proposed adding that given:

*'The close relationship that has developed between officials in Cabinet Office and the Welsh Government during the development of this Bill, we have sought to highlight and address many of the concerns identified during the drafting process. Additionally Welsh Government have secured equivalent regulation-making powers in most areas of the legislation, meaning we are able to develop our own Welsh secondary legislation. This will help to address some of the specific differences highlighted.'*⁴⁰

Concurrent Powers

60. The Welsh Government's principles for UK Bills state that "UK Bills should not create concurrent powers".⁴¹ Definitions of concurrent and concurrent plus powers (from guidance for Welsh Government staff⁴²) is included at Box 1:

³⁹ Letter from the Minister for Finance and Local Government, 2 November 2022

⁴⁰ Letter from the Minister for Finance and Local Government, 2 November 2022

⁴¹ [Letter from the Counsel General and Minister for the Constitution](#), 22 October 2021, Annex B: Welsh Government's principles for UK Bills

⁴² [Letter from the Minister for Climate Change](#), 6 August 2021

Box 1: Definitions

A concurrent power is a power which can be exercised:

(a) by Welsh Ministers, in relation to Wales;

or (b) by UK Ministers in relation to Wales (for example, where UK Ministers are exercising powers in relation to the whole of the UK; or in relation to England and Wales).

UK Ministers should not normally exercise their powers in relation to Wales without the agreement of the Welsh Ministers, but (unless it is a concurrent plus power – see below) they are not legally required to obtain consent in order to legislate.

A “concurrent plus” power is a special type of concurrent power which can be exercised:

(a) by the Welsh Ministers, in relation to Wales; or

(b) provided that the Welsh Ministers consent, by UK Ministers in relation to Wales.

When the Welsh Ministers are considering whether to give consent to UK Ministers exercising a concurrent plus power, they are exercising a statutory function. If they do not consent, UK Ministers cannot exercise these powers in relation to Wales.

61. The guidance for Welsh Government staff includes the following principle:

*'Principle 8: New concurrent functions should only be created in very exceptional circumstances and teams should ensure that a carve out will apply such that no consent will be required when removing them (to protect Legislative competence), and that they are concurrent plus (to protect executive competence).'*⁴³

62. In our joint letter to the Minister we asked for a narrative on the concurrent powers contained within the Bill, and how the approach adopted complied with its guidance on concurrent powers.⁴⁴

⁴³ [Letter from the Minister for Climate Change](#), 6 August 2021, Annex B: Guidance for Welsh Government officials on concurrent powers

⁴⁴ [Letter from the Minister for Climate Change](#), 6 August 2021, Annex B: Guidance for Welsh Government officials on concurrent powers

63. In response, the Minister said:

'Welsh Ministers have secured standalone, equivalent regulation making powers for the vast majority of powers in the Bill.

*There is a concurrent plus power in the Bill, as introduced, in relation to section 62 (electronic invoicing). The Counsel General and I agreed that there is strong rationale for this position. A concurrent plus power was deemed appropriate, primarily to provide consistency to basic e-invoicing standards and syntaxes across the UK nations to avoid confusion and additional costs for suppliers. In line with the guidance, my officials have ensured that both the executive and legislative competence of the Senedd are protected as this is a concurrent plus power and a carve out has been included within section 106 of the Bill.'*⁴⁵

64. The Minister told us that other concurrent powers included in the Bill, which were raised as causes for concern in paragraph 119 of the Memorandum, were subject to ongoing discussions with the UK Government. She also said "there may be further concurrent powers as a result of potential amendments made".⁴⁶

65. In oral evidence, the Minister said that the Welsh Government was having discussions with the UK Government with a view to amending the concurrent power to add international agreements to the list in Schedule 9 of the Bill.⁴⁷ An official accompanying the Minister said:

*"... there's been a similar issue faced in relation to the Australia-New Zealand trade Bill that's also being considered as part of the LCM process at the moment, so it seems to be a DIT [Department for International Trade] clause rather than a Cabinet Office clause, and so there are discussions taking place at that level as well".*⁴⁸

66. The Minister explained that seeking to amend this power was "a point of principle" for the Welsh Government, rather than it resulting in any "major practical implications".⁴⁹ She also explained she had not engaged extensively with the Department for International Trade,

⁴⁵ Letter from the Minister for Finance and Local Government, 1 September 2022, page 5

⁴⁶ [Letter from the Minister for Finance and Local Government, 1 September 2022, page 5](#)

⁴⁷ PAPA Committee, 21 September 2022, RoP [133]

⁴⁸ PAPA Committee, 21 September 2022, RoP [143]

⁴⁹ PAPA Committee, 21 September 2022, RoP [145]

because such engagement was normally led by the Minister for Economy.⁵⁰ An official expanded upon this engagement:

"... the trade team is doing it on the Australia and New Zealand Bill and the intention is that whatever is agreed on that area will be reflected in the ... Procurement Bill. ... if, and when, we get an agreement with DIT on that area, then whatever's affected will be reflected in the Procurement Bill and that's the intention. We are carrying on to engage with our trade colleagues to make sure that they keep us informed of all the details of those engagements".⁵¹

67. We note the concerns raised by the Legislation, Justice and Constitution Committee regarding the complicated nature of inter-departmental responsibilities within the UK Government in respect of this power may negatively impact upon the likelihood of the Minister's concerns being resolved.⁵²

68. We also note from the Legislation, Justice and Constitution Committee's report that the Minister wrote to the Minister for Brexit Opportunities and Government Efficiency on 23 May 2022 to request that he consider an amendment to the Bill to address this issue and the lack of clarity around whether a response has been received.⁵³

69. Concurrent plus powers are powers for a Minister of the Crown to legislate for Wales in areas that are within the Senedd's competence, if given consent by the Welsh Ministers.

70. The Bill contains a concurrent plus power in relation to clause 62 (electronic invoicing), which provides a power for an appropriate authority to amend clause 62 of the Bill for the purpose of changing what it means for an invoice to be in the required electronic form.

71. In relation to this power, the Memorandum from the Cabinet Office to the Delegated Powers and Regulatory Reform Committee states the following as the justification for taking the power:

⁵⁰ PAPA Committee, 21 September 2022, RoP [171]

⁵¹ PAPA Committee, 21 September 2022, RoP [174]

⁵² [Legislation, Justice and Constitution Committee, Report on The Welsh Government's Legislative Consent Memoranda on the Procurement Bill](#), paragraph 75

⁵³ [Legislation, Justice and Constitution Committee, Report on The Welsh Government's Legislative Consent Memoranda on the Procurement Bill](#), paragraph 76

'The purpose of the power is to allow flexibility with respect to the minimum standards that an electronic invoice must meet, in order to meet the standard of an electronic invoice that a contracting authority has to accept and process. This will develop over time as technology and commercial practice develop. For example regulations would allow movement away from the BSI standard if the BSI standard ceases to be the European standard.'

72. Although not a regulation making power, a Minister of the Crown also requires the consent of the Welsh Ministers before it publishes guidance under clause 98 following a procurement investigation.

73. If the Welsh Government gave consent to a Minister of the Crown to make regulations under these concurrent plus powers, a Minister of the Crown would be able to make regulations in devolved areas, but these regulations would not be subject to Senedd scrutiny.

74. When asked for an update on the latest position regarding the concurrent plus powers in the Bill, an Official explained:

'We've chosen to take one concurrent plus power in the Bill. I think that's at clause 82, in relation to electronic invoicing. So, that was kind of a conscious choice to maintain consistency, that we'd take a concurrent plus power there. The rest that we're comfortable with are all stand-alone equivalent, and then the only others are these that we've just highlighted in terms of where we're still in a concurrent position or no powers'.⁵⁴

75. We welcome the commitment from the Minister to providing the Senedd with notice if it's the Welsh Government's intention to give consent to a Minister of the Crown making regulations under concurrent plus powers.⁵⁵

76. We also sought clarity as to whether clause 110(10) would be amended to ensure that regulations made by Welsh Ministers under clause 70 are subject to the draft affirmative procedure, as is the case with the power of a Minister of the Crown. It was explained that the UK Government had:

'...brought forward an amendment to give us equivalent powers under clause 70, but, as things stand, there is not an amendment being tabled to change the Welsh Ministers' procedure to affirmative. But it appears that that is an

⁵⁴ PAPA Committee, 21 September 2022, RoP [148]

⁵⁵ PAPA Committee, 21 September 2022, RoP [149]

oversight and there should be parity between the two procedures. That's something where we're having those conversations with them and would expect a further technical amendment to be tabled'.⁵⁶

Recommendation 5. We recommend the Minister for Finance and Local Government provide us with an update on discussions between the Welsh Government and the UK Government on bringing forward amendments to clause 110(10) to make regulations made by the Welsh Ministers under clause 70 subject to the affirmative procedure.

77. During oral evidence we asked the Minister to set out whether there were any further amendments expected while the Bill continues its passage through the UK Parliament and the timeframes for any further supplementary legislative consent memorandum. A Welsh Government Official confirmed that another supplementary LCM was expected.⁵⁷

78. We therefore welcome the commitments made by the Minister to ensure that future supplementary memoranda:

- set out clearly the Senedd procedure where a provision confers power on the Welsh Ministers to make subordinate legislation; and
- explain how they differ from previous memoranda.⁵⁸

⁵⁶ PAPA Committee, 21 September 2022, RoP [158]

⁵⁷ PAPA Committee, 21 September 2022, RoP [83]

⁵⁸ PAPA Committee, 21 September 2022, RoP [159]

5. Annex A: List of written evidence

The following people and organisations provided written evidence to the Committee. All Consultation responses and additional written information can be viewed on the Committee's website.

Reference	Organisation
1	Welsh Local Government Association (WLGA)
2	Caerphilly County Borough Council
3	Community Housing Cymru