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Y Dirprwy Weinidog Partneriaeth Gymdeithasol
Deputy Minister for Social Partnership



Llywodraeth Cymru
Welsh Government

Jenny Rathbone MS
Chair of the Equality & Social Justice Committee
Welsh Parliament
Cardiff Bay
Cardiff
CF99 1SN

15 December 2022

Dear Jenny,

Social Partnership and Public Procurement (Wales) Bill

During the General Principles debate on the Social Partnership and Public Procurement (Wales) Bill on 29 November 2022 I stated that I would write to you to confirm in more detail the Welsh Government's responses to your Committee's recommendations.

As I said during the debate, I am grateful to the Committee for its considered stage 1 scrutiny, and for recommendation 1 which confirmed that a majority of the Committee agreed that the Senedd should support the Bill's general principles.

Recommendation 2 is a broad-ranging recommendation which is accepted in principle on the basis that:

- i. The Welsh Government is already engaging with social partners as part of our Theory of Change refresh. The Theory of Change research will enable us to identify the key outputs and outcomes expected from the Bill and the data needed to monitor and evaluate progress. It will not be possible, however, to specify outcomes and key metrics relating to specific policy initiatives that may arise in future from the work of the Social Partnership Council ('SPC'); or in relation to the operation of the Social Partnership Duty by specified public bodies; or regarding how public bodies may operationalise the 'Fair Work' amendment to the "Prosperous Wales" goal within the Well-being of Future Generations (Wales) Act 2015 ('WFG Act'). This is because we simply do not know at this stage what issues Ministers may ask the SPC to provide advice on, or what issues the SPC may choose to focus on itself, nor how the new duties on public bodies will influence their decision-making and actions in future. Specifying metrics and outcomes would require that we prejudge all of these things or make assumptions that may not turn out to be correct;

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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.

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.

- ii. As far as the socially responsible procurement duties are concerned, we are currently in the process of working through outcomes and metrics as part of the Social Value project, although this work will not be completed in time for us to share the outcomes with the Committee as part of the scrutiny process. Our evaluation framework will, however, be published in due course; and
- iii. We are updating the Explanatory Memorandum and RIA, and whilst we are satisfied that we have clearly spelled out the overall vision of the Bill, as part of that work we will consider how we can develop further the narrative underpinning the Bill.

In relation to recommendation 3 which asks that we set out terms of reference for the SPC, I confirmed during the debate that the Welsh Government would not be accepting this recommendation on the basis that the Bill itself defines the functions of the SPC and how it will be constituted, as well as bestowing on it wide supplementary powers and functions in pursuit of those functions, which the Welsh Government believes is the right balance. Work is already under way with social partners, through the Social Partnership Forum, to prepare the ground for the SPC. This includes practical arrangements and discussions on an initial work programme. I will keep the Committee updated on the work of the Forum.

Recommendation 4 is accepted, and the Welsh Government will bring forward a stage 2 amendment to add a duty to consult with other Social Partnership Council members before making revisions to the Council's procedures.

Recommendations 5 and 6 are not accepted. As per my response to recommendation 3 above, and as I said during the debate, the Welsh Government's view is that the SPC should have flexibility to determine its own ways of working - in keeping with the principles of social partnership. Nothing in the Bill would prevent a task and finish approach to some, or perhaps all, of the SPC's work. Neither do we intend to provide in legislation for any additional sub-groups. Again, it will be a matter for the SPC to determine what sub-groups it wishes to establish in the context of its work programme which will change and develop over time.

Recommendation 7 is accepted in principle. I am currently considering potential approaches which would aim to ensure that non-Wales TUC affiliated union members are also represented on the Council. I will write to you again ahead of our stage 2 Committee session to inform you of my intentions in regard to this matter.

Recommendation 8 is accepted. The Welsh Government agrees that the SPC must reflect all walks of Welsh life, and we are already working with social partners, through the Social Partnership Forum, to ensure that appointments to the Council are as broad and representative as they can be.

Recommendation 9 is rejected. I set out in some detail during the general principles debate the reasons why the Welsh Government does not accept that a mediation or dispute resolution mechanism is necessary. The section 16 duty requires public bodies to seek rather than to achieve consensus or compromise with their recognised trade unions or their staff representatives in setting their well-being objectives. If, for whatever reason, it is not possible to reach agreement despite best efforts, the duty to seek consensus or compromise will nonetheless have been discharged. There would, in effect, be nothing to mediate between the two parties involved. Where there may be concerns about how a public body goes about discharging its statutory functions, the Public Services Ombudsman for Wales has powers to investigate complaints against public bodies, including complaints of maladministration, and the Auditor General for Wales's role includes examining how public bodies manage and spend public money, including how they achieve value in the delivery of public services. Ultimately, the actions of public bodies may be challenged in the

courts

Recommendation 10 is accepted on the basis that we have already committed to produce specific guidance on Fair Work. This will support public bodies to set objectives that maximise the body's contribution to fair work as part of the Prosperous Wales well-being goal and the steps and actions they may take, although as is the case now, it will continue to be for public bodies to decide their objectives and the steps they will take to meet those objectives as part of their well-being duty under the WFG Act.

The short time available to me to respond during the debate meant that I was unable to explain fully why the Welsh Government's is unable to accept recommendations 11 and 12 which relate to the Future Generations Commissioner's role and to public bodies' global responsibilities under the WFG Act.

In relation to recommendation 11, the Bill will not impose any additional duties, powers, or obligations on the Commissioner. The Commissioner's office, like any other body, will need to engage with the social partnership agenda as it becomes a central part of how public bodies work in Wales. It is for the Commissioner to determine their priorities in delivering their general duty to promote the sustainable development principle. Fair Work will be one of many outcomes described in the seven well-being goals which the Commissioner will contribute to through their work on promoting the sustainable development principle in guiding how public bodies work. As far as the Commissioner's funding is concerned, the Minister for Social Justice is currently considering the statutory estimate from the Commissioner's office as part of ongoing budget discussions. If it is decided that the Commissioner requires additional funding to support the proposed additional bodies subject to the well-being duty following the consultation, we will ensure that this information is conveyed to the Committee.

I would also like to add to what I said in plenary in relation to the Committee's recommendation 12, which asks that we bring forward an amendment to the Bill regarding the globally responsible well-being goal, and to address the issues raised by Fair Trade Wales et al in their briefing note to Members. These concerns relate to how a contracting organisation's "area" is defined in section 22(3) of the Bill as "the area by reference to which the authority primarily exercises its functions, disregarding any areas outside Wales" (in respect of which the Bill cannot make provision). To be clear, this "disregarding" provision refers to where the functions of a body can operate or be discharged, which, for legislation made by the Senedd, is Wales. It does not stop a contracting authority from considering issues such as modern slavery in supply chains overseas, or environmental matters across the world. And, to the extent that authorities are subject to the sustainable development duties under the Well-being of Future Generations Act, they will actively be required to take steps to contribute to the globally responsible Wales well-being goal, which means that in carrying out their well-being duties, they must take account of whether a particular action may make a positive contribution to global well-being. I said during the debate that I would arrange to meet with representatives of those organisations who submitted the briefing note. I will update the Committee on the outcome of that meeting once it has taken place.

In relation to recommendation 13, which the Welsh Government accepts, I will update the Committee once further discussions have been held with the Office for National Statistics and the Charity Commission in relation to the potential impacts of bringing these bodies within the scope of the socially responsible procurement duties of the Bill.

In relation to recommendation 14, which is also accepted, we will set out further detail in the revised Explanatory Memorandum to clarify how the Public Procurement duty, set out in the Regulations which are supplemental to the Public Sector Equality Duty, and the socially responsible procurement duty in the Bill, align.

In relation to recommendation 15, as I stated during the debate, the Welsh Government agrees with the premise that we should be using public procurement to support the Welsh economy and that this might potentially be achieved through setting targets. However, we do not necessarily agree with the Committee's view that including targets on the face of the Bill would 'ensure that the aims of the socially responsible procurement duty are realised'. Discussions with partners are continuing in relation to this issue, and I will provide the Committee with further information on the outcome of those discussions ahead of the stage 2 Committee session in January.

Recommendation 16 is accepted, subject to the outcome of the discussions currently under way in relation to recommendation 15. However, the Committee should note that whilst the Government will look to means to include the address of the contractor for each contract on the register, the inclusion of 'any other information required to facilitate data-gathering and monitoring needed for the setting' will be difficult to achieve at this stage given that we are not yet in a position to specify what we intend to measure and therefore what data will be required to assess the contribution of procurement to the Welsh economy. As in relation to recommendation 15, further information will be provided to the Committee on this point once a position has been reached following discussions with key stakeholders. It should also be noted that the purpose of the contracts register is to aid transparency for potential suppliers etc. Data will be collected and reported as part of the annual reporting process.

In relation to recommendation 17, which is accepted, I will ensure that the revised Explanatory Memorandum includes further detail on the procurement and contract management workforce training that will be put in place to support the sector ahead of implementation.

Recommendation 18 asks that the Welsh Government clarifies the roles and relationship between the Procurement Centre of Excellence and the SPC's procurement sub-group and how it intends to ensure that the Procurement Centre of Excellence and SPC's procurement sub-group will play a role in driving the collaboration and improvement agenda forward. A Procurement Centre of Excellence is in the process of being set up. Its establishment is not included in this Bill. However, if passed, this new legislation will require both challenge and support. The SPC's Procurement Sub-group will form part of the challenge function, along with other arrangements for oversight which will be needed to cover procurement reform more generally. The Centre of Excellence, once established, will be part of the support function. The two will work together in that the challenge function (SPC Sub-group and oversight function) will identify where more support is needed (including from the Centre of Excellence) to enable public bodies to meet their socially responsible procurement duties under this Bill. By providing this clarification I consider the Welsh Government to have accepted recommendation 18.

The Welsh Government also accepts recommendation 19. I can confirm that we will work with industry bodies and representatives involved in construction procurement to develop robust guidance on how socially responsible procurement obligations and risk should be shared through the whole of the supply chain. This is already an important consideration for the development of the social public works clauses and the supporting statutory guidance. Whilst cultural and behavioural issues are more difficult to address via legislation, the reporting requirements should help to identify good and poor performance.

We also accept recommendation 20 and will ensure that reporting requirements resulting from this legislation are streamlined to ensure an appropriate balance between the need to increase transparency, keep the administrative burden placed on public bodies to a minimum, and avoid duplication of reporting requirements from other duties.

Recommendation 21 asks that we provide more detail on how procurement investigations will interact with existing powers held by the Future Generations Commissioner. I said during the debate that the Welsh Government accepts this recommendation. I also mentioned, however, that we will need to wait until the subordinate legislation to be made under the UK Government's Procurement Act, and the oversight arrangements to be put in place under that Act, are introduced before we are able to describe fully how these various bodies will work together in Wales. So, whilst I commit to providing this clarification, it is highly unlikely that I will be able to do so before the completion of the Senedd's scrutiny of this Bill.

In relation to recommendation 22, I explained during the debate why it is that the Welsh Government is unable to support this recommendation. In our view it would not be appropriate to require Welsh Ministers to consult the auditor general before the announcement of every investigation as such decisions should be at the discretion of Ministers. Recommendation 22 also asks that we set out the criteria that would trigger an investigation under section 41. In response to this point, I will provide the Committee with more detailed examples of the types of circumstances that might trigger an investigation before the stage 2 Committee session.

I also set out during the debate why we would be rejecting recommendation 23. I explained our view that provisions on the face of the Bill detailing the criteria that would trigger an investigation under section 41 would be too restrictive. I will ensure, however, that a non-exhaustive list of criteria is included in the guidance we will be publishing in support of this part of the Bill, which is the appropriate place for it.

Recommendation 24 is accepted in principle only on the basis that whilst the Welsh Government is happy to make a commitment to publish the statutory guidance in draft form for a minimum of six weeks' consultation, we do not accept that there should be a specific requirement on Ministers to consult with the Senedd as part of that exercise. The Government considers that the consultation it will undertake with stakeholders on the draft statutory guidance will ensure that it is fit for purpose and targeted at the audience to which it will be addressed.

In relation to recommendation 25, I confirmed during the debate that this recommendation is accepted, and that work is already underway on updating the RIA – although as I made clear in plenary, there is a limit as to what is possible in terms of estimating financial costs and savings in such exercises. As is customary, we will of course engage with our key stakeholders in undertaking this further work.

Recommendation 26 is also accepted. As I said during the debate, the Welsh Government agrees with the Committee's view that it is important for us to consider whether extra facility time will be needed for trade unions to fulfil their obligations relating to the Bill. I mentioned that we are currently undertaking a project consulting with employers and union representatives to better understand current ways of working and to explore the possible impact these additional requirements might have at a local level. However, we already know that the level of facility time currently made available varies greatly across employers, and that this will continue to be the case after implementation. In addition, the costs associated with facility time release also vary significantly and are often dependant on the substantive role of particular individuals. Modelling the potential costs and benefits across the piece is therefore extremely difficult, but we will provide as much additional detail as we are able to capture in the time available before we are required to lay the revised RIA.

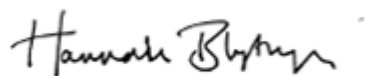
Recommendation 27 asked that we publish "the agenda, minutes and outputs for the Shadow Social Partnership Council since start of the pandemic in 2020. To enable transparency these documents should be published before the end of 2022". In the debate

I said that the Government rejected this recommendation, but in response to recommendation 28, which we accept in principle, we would provide to the Committee a summary report on the work of the SSPC. We do not accept recommendation 27 because we do not share the Committee's view that publishing these documents would be 'in line with what is being proposed for the SPC' and would "inform the work of the [Social Partnership] Forum". The SSPC was established very specifically as a forum to address the challenges of the pandemic, and as such the agendas and minutes of the meetings themselves would be of no practical benefit to those engaged in the work that is now underway in preparing the ground for the SPC. The report that I will provide to the Committee will, however, demonstrate how the social partnership approach proved effective in ensuring Ministers were able to consider a range of different perspectives when taking decisions on complex issues during the pandemic.

I trust that the information provided in this letter is useful to the Committee. I will write to you again before we reconvene for our stage 2 deliberations in January to provide more information in relation to recommendations 3, 7, 11, 12, 13, 15, 22 and 28. I will also ensure that the Committee Clerk is informed as soon as our stage 2 government amendments have been published on the Documents Laid webpage.

I have attached for information copies of the letters I have sent to the chairs of the Legislation, Justice and Constitution Committee and the Finance Committee, and I am sending a copy of this letter to the chairs of both of those Committees also.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Hannah Blythyn'.

Hannah Blythyn AS/MS

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Deputy Minister for Social Partnership