

Welsh Parliament

**Legislation, Justice and Constitution Committee**

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

October 2022



# 1. Background

## The UK Government's Procurement Bill

1. The UK Government proposed reform to procurement legislation in December 2020, following the end of the transition period of the UK's exit from the 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."*<sup>1</sup>

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.<sup>2</sup>

3. The Procurement Bill (the Bill) was subsequently introduced into the House of Lords on 11 May 2022.<sup>3</sup> 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.<sup>4</sup>

4. The Explanatory Notes to the Bill state:

*"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."*<sup>5</sup>

5. The Bill had its second reading in the House Lords on 25 May 2022. At the time of writing this report, the Bill was at Committee Stage in the House of Lords.

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

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

<sup>3</sup> [Procurement Bill, as introduced](#) (HL Bill 4)

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

<sup>5</sup> Procurement Bill: Explanatory Notes, paragraph 1

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## The Welsh Government's Legislative Consent Memorandum

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 (the Memorandum) in respect of the Bill.<sup>6</sup>

8. The Business Committee agreed that the Legislation, Justice and Constitution Committee and the Public Accounts and Public Administration (PAPA) Committee should report on the Memorandum by 6 October 2022.<sup>7</sup> This reporting date was later extended to 10 November,<sup>8</sup> and then to 24 November 2022.<sup>9</sup>

### Provisions for which the Senedd's consent is required

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9. Paragraphs 17 to 102 of the Memorandum 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);
- clauses 77, 79 and 80 (Below-threshold contracts);
- clauses 81 and 82; Schedule 9 (Implementation of international obligations);

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<sup>6</sup> Welsh Government, [Legislative Consent Memorandum: Procurement Bill](#), June 2022

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

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

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

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- clauses 84 to 88 (Information and notices: general provision);
- 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 does not consider that the Senedd's consent is required for clauses 51 and 99, as opposed to the Minister's view. 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.<sup>10</sup>

## **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)<sup>11</sup> in respect of amendments considered at Lords Committee Stage which were tabled on 27 June 2022.<sup>12</sup>

**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.<sup>13</sup> This reporting date was later extended to 24 November 2022.<sup>14</sup>

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

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

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

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

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

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## Interaction of the Bill with other legislation

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

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**13.** The Social Partnership and Public Procurement (Wales) Bill (the SPPP Bill) was introduced into the Senedd on 7 June 2022. The Minister explains at paragraph 11 of the Memorandum that the SPPP Bill “also proposes to place procurement obligations on defined Welsh public bodies”.

**14.** The Minister further explains the interaction between both Bills at paragraph 12 of the Memorandum:

*“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

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**15.** The Trade (Australia and New Zealand) Bill was introduced into the UK Parliament on 11 May 2022.<sup>15</sup> The Welsh Government laid a Legislative Consent Memorandum in respect of the Bill on 25 May 2022.<sup>16</sup>

**16.** At paragraph 15 of the Memorandum, the Minister states:

*“The Trade (Australia and New Zealand) Bill is to be repealed by the Procurement Bill, as will the amendments to the GoWA [Government of Wales Act 2006] made by the Trade (Australia and New Zealand) Bill be.”*

## The Welsh Government's position on the Bill

**17.** The Minister sets out her view of the benefits of the Bill at paragraph 117 of the Memorandum. 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,

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<sup>15</sup> Trade (Australia and New Zealand) Bill, as introduced

<sup>16</sup> Welsh Government, Legislative Consent Memorandum: The Trade (Australia and New Zealand) Bill, May 2022

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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".<sup>17</sup>*

**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 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*

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<sup>17</sup> Memorandum, paragraph 118

*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 the Memorandum and amendments for which consent is required**

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**23.** At paragraph 11 of Memorandum No. 2, the Minister confirms that official-level discussions to resolve the majority of the concerns outlined in the original Memorandum were ongoing, including those in relation to the aforementioned 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 2022, the majority of which make provision which require the Senedd's consent, and several of which were proposed for inclusion by the Welsh Government.<sup>18</sup>

**25.** The Minister sets out the amendments which make provision requiring the Senedd's consent at paragraph 14 of Memorandum No. 2; these are predominantly described as "minor" and "providing clarity". The Minister also states that, as the amendments relate to the provisions outlined in the original Memorandum, her rationale for making the provisions as set out in that memorandum continues to apply.<sup>19</sup>

**26.** 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*

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<sup>18</sup> Memorandum No. 2, paragraph 12

<sup>19</sup> Memorandum No. 2, paragraph 16

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*concern ... have been resolved. My officials will continue to work with the UK Government to resolve these matters."*<sup>20</sup>

## 2. Committee consideration

**27.** We considered the Memorandum at our meeting on 11 July 2022.<sup>21</sup> On 28 July, we issued a joint letter with the PAPA Committee seeking further information in respect of the Memorandum.<sup>22</sup> The Minister responded to the letter on 1 September.<sup>23</sup> Members of the Committee were invited to attend the PAPA Committee's evidence session with the Minister on the memoranda for the Bill, which was held on 21 September.<sup>24</sup> We considered Memorandum No. 2 at our meeting on 26 September.<sup>25</sup> We agreed our report on both memoranda on 17 October<sup>26</sup> and 24 October 2022.<sup>27</sup>

### Our view

#### General comments

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**28.** 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.

**29.** 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.

**30.** 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",<sup>28</sup> for the avoidance of doubt we believe the Senedd's consent should be sought for clauses 114 and 116.

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<sup>20</sup> Welsh Government, Memorandum No. 2, paragraphs 19 and 20

<sup>21</sup> LJC Committee, [11 July 2022](#)

<sup>22</sup> [Letter from the Chair of LJC Committee and Chair of PAPA Committee to the Minister for Finance and Local Government](#), 28 July 2022

<sup>23</sup> [Letter from the Minister for Finance and Local Government](#), 1 September 2022

<sup>24</sup> PAPA Committee, [21 September 2022, Record of Proceedings](#)

<sup>25</sup> LJC Committee, [26 September 2022](#)

<sup>26</sup> LJC Committee, [17 October 2022](#)

<sup>27</sup> LJC Committee, [24 October 2022](#)

<sup>28</sup> Letter from the Minister for Finance and Local Government, 1 September 2022, page 4

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**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.** 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.** 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.** 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**

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**31.** We asked the Minister what consideration had the Welsh Government given to using the time it had identified for the SPPP Bill to bring forward a wider procurement Bill that covered the scope of both it and the UK Government's Procurement Bill. In response, the Minister explained:

*"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."*<sup>29</sup>

**32.** In evidence to the PAPA Committee, the Minister added:

*"I think that there are clear benefits for having that wider UK approach, or UK Government-led approach, to the nuts and bolts, if you like, of procurement, whilst at the same time procuring ourselves in Wales for the values that we want to see driven through procurement. And I can assure committee that we wouldn't be looking to UK Government to legislate in the space of values,*

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<sup>29</sup> Letter from the Minister for Finance and Local Government, 1 September 2022, page 2

*because our values are different in terms of what we would want to achieve through procurement.*"<sup>30</sup>

**33.** The Minister also reiterated the timing benefits provided by the inclusion of provisions within the Procurement Bill, instead of within the SPPP Bill:

*"There would also have been significant delays to laying the SPPP Bill in the Senedd due to another consultation process. This would have led to the Welsh Government implementing procurement legislation later than the UKG."*<sup>31</sup>

**34.** However, we note that in written evidence to the PAPA Committee, the Welsh Local Government Association has raised concerns around delays to the Procurement Bill's implementation:

*"... there were many queries around the legislation in England; with valid concerns highlighted by English Councils which would apply equally here. As a ready example, we noted strong views from the legal profession around the drafting, nature and operation of a centrally controlled debarment list.*

*The target for UK Government is to have the new Procurement Regulations enacted in late 2023. Given the number and nature of queries, we are concerned that the UK Government's timelines are looking ambitious and increasingly difficult to meet."*<sup>32</sup>

**35.** We note that, in response to this point, the Minister said that while the UK Government's timelines for implementation were "ambitious", she was "still confident that things will move ahead as planned".<sup>33</sup> An official accompanying the Minister said:

*"The implementation date is scheduled for early 2024 at the moment. Whether that is achievable or whether all of the implementation will be achievable by that date is still under discussion."*<sup>34</sup>

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<sup>30</sup> PAPA Committee, 21 September 2022, RoP [27]

<sup>31</sup> Letter from the Minister for Finance and Local Government, 1 September 2022, page 2

<sup>32</sup> PAPA Committee, [Legislative Consent Memorandum on the Procurement Bill: Evidence from the Welsh Local Government Association](#), page 18

<sup>33</sup> PAPA Committee, 21 September 2022, RoP [113]

<sup>34</sup> PAPA Committee, 21 September 2022, RoP [115]

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**36.** We are concerned that there already appear to be delays to the implementation of the Procurement Bill, which call into question the Minister's suggestion that including provisions within the SPPP Bill would have led to the Welsh Government implementing procurement legislation later than the UK Government.

**37.** We are similarly doubtful of the Minister's conclusion that there would have been significant delays to the introduction of the SPPP Bill if it had a wider scope which included provisions specifying the processes underpinning procurement. We note that:

- in July 2019, the previous Welsh Government announced its intention to bring forward a social partnership Bill, which would "embed fair work through public procurement";<sup>35</sup>
- in July 2020, the First Minister announced the Welsh Government's plans to publish a draft social partnership Bill at the start of 2021, with procurement "an important strand in it";<sup>36</sup> and
- in February 2021, the Welsh Government published a draft version of the SPPP Bill for consultation.<sup>37</sup>

**38.** In light of this timeline, and the fact that the Welsh Government decided to include provisions within the Procurement Bill in August 2021, it appears to us there were ample opportunities for it to incorporate provisions specifying processes underpinning procurement into the SPPP Bill.

**39.** We also note that the Welsh Government was able to undertake consultation with key stakeholders after the publication of the UK Government's *Transforming public procurement* Green Paper (as detailed below). Once again, the time it spent on a consultation exercise on the UK Government's proposals could have instead been used for consultation on Welsh Government proposals for inclusion within the SPPP Bill.

**40.** We also note the Minister's assertion that:

*"resourcing and capacity wasn't a consideration in the decision to move forward with the UK Government. It was taken following the engagement*

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<sup>35</sup> Plenary, 9 July 2019, RoP [186]

<sup>36</sup> Plenary, 15 July 2020, RoP [337]

<sup>37</sup> Welsh Government, Written Statement: Draft Social Partnership and Public Procurement (Wales) Bill, 26 February 2021

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*that we had with stakeholders, both on the buyer and supplier side, which had a strong preference for that consistent legislation across England, Wales and Northern Ireland."*<sup>38</sup>

## **Opportunities for scrutiny of the Bill's provisions**

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**41.** We asked the Minister to explain why she considered it appropriate to take a legislative approach which prevented Members of the Senedd from undertaking detailed legislative scrutiny of the Bill's provisions. In response, the Minister explained that the Welsh Government ran a series of "stakeholder engagement events" after the UK Government published its *Transforming public procurement* Green Paper.<sup>39</sup> The Minister explained that the role Welsh stakeholders had played in the development of the Bill had been "quite significant" and had "gone on to directly impact on the UK Government's approach."<sup>40</sup>

**42.** The Minister also suggested to us that there were sufficient opportunities for scrutiny provided by the legislative consent process:

*"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."*<sup>41</sup>

**43.** In the same vein, we note that in evidence to the PAPA Committee the Minister said:

*"... from a stakeholder perspective, there's definitely been that opportunity to challenge and to influence and to scrutinise ... and having our officials working so closely with the UK Government, we've been able to scrutinise there. And I know that, obviously, the Senedd will want to play its part in terms of scrutinising, which is why this process is so important in terms of the LCM. I think it's the first time a Minister has come to one of your committee meetings, and I think that demonstrates our keenness to be open and*

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<sup>38</sup> PAPA Committee, 21 September 2022, RoP [77]

<sup>39</sup> Letter from the Minister for Finance and Local Government, 1 September 2022, page 3

<sup>40</sup> PAPA Committee, 21 September 2022, RoP [55]

<sup>41</sup> Letter from the Minister for Finance and Local Government, 1 September 2022, page 3. See also PAPA Committee, 21 September 2022, RoP [54-55]

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*transparent and to provide as much information as we possibly can for you to take your views to the next steps and so on.*"<sup>42</sup>

**44.** The Minister also stated that there would be opportunities for scrutiny of subordinate legislation made under 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."*<sup>43</sup>

**45.** We strongly disagree with the Minister's suggestion that scrutiny within 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.

**46.** 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.

**47.** 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.

**48.** Furthermore, we do not agree with the Minister's suggestion that subordinate legislation to be made under the Bill will be subject to detailed legislative scrutiny. While we will undertake our role in the scrutiny of subordinate legislation made under the Bill in line with our remit and the Senedd's Standing Orders, there will be no opportunities for amendments to be tabled as is the case with the scrutiny of primary legislation.

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<sup>42</sup> PAPA Committee, 21 September 2022, RoP [57]. See also Letter from the Minister for Finance and Local Government, 1 September 2022, pages 3-4

<sup>43</sup> Letter from the Minister for Finance and Local Government, 1 September 2022, page 3

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## The accessibility of Welsh procurement law

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**49.** As part of our scrutiny of legislative consent memoranda, we are always mindful of the Counsel General's duty under section 1 of the *Legislation (Wales) Act 2019* to keep under review the accessibility of Welsh law, including the extent it is:

- available in Welsh and English; and
- clearly and logically organised (both within and between enactments).<sup>44</sup>

**50.** We asked the Minister how accessible the new procurement regime will be when it is split over two Bills: the Procurement Bill and the SPPP Bill. In response, the Minister reasserted her claim that the "purpose of the two Bills is different", and that "the new procurement regime will be accessible to suppliers as tenders are designed to cover the requirements of both Bills when required".<sup>45</sup>

**51.** The Minister rejected the suggestion that the new regime would be inaccessible for procurement professionals in Wales:

*"I don't think it's going to be too much of a challenge for them in terms of having two pieces of legislation to work to and to consider, because they're already doing that in the sense that we already have the existing EU legislation, which has preceded where we're moving to in future, but also we've got the Well-being of Future Generations (Wales) Act 2015, which they need to be considering in their processes as well."<sup>46</sup>*

**52.** However, we note that in written evidence to the PAPA Committee, Caerphilly County Borough Council claimed that "procurement within Wales may have long term confusion due to [the] process being covered by two Bills".<sup>47</sup> When asked to respond to that claim, the Minister said:

*"... it goes back to that point about already working to two sets of legislation, and our commitment to ensure that we work constructively and collaboratively with the UK Government to ensure that any training and*

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<sup>44</sup> [Legislation \(Wales\) Act 2019, section 1](#)

<sup>45</sup> Letter from the Minister for Finance and Local Government, 1 September 2022, page 3

<sup>46</sup> PAPA Committee, 21 September 2022, RoP [42]

<sup>47</sup> PAPA Committee, [Legislative Consent Memorandum on the Procurement Bill: Evidence from Caerphilly Council](#), page 2

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*guidance that comes forward from them is very much able to dovetail with what else we'll be requiring from people here in Wales".<sup>48</sup>*

**53.** With regard to the availability of Welsh procurement law in both Welsh and English, the Minister said:

*"... the substance of the [Procurement] Bill's enactment will be specified in bilingual secondary legislation and guidance that will be developed by Welsh Government as the Bill continues its legislative journey".<sup>49</sup>*

**54.** An official accompanying the Minister during her evidence to the PAPA Committee explained that the duty under section 1 of the *Legislation Act (Wales) 2019* had been "considered" and a decision had been made for practical reasons to include provisions within a UK-wide Bill.<sup>50</sup>

**55.** We are concerned that some stakeholders in Wales believe that there could be long-term confusion caused by the Welsh Government's decision to split the reform of Welsh procurement law over two Bills. This would be as unfortunate as it is unnecessary, since an option had always existed for the Welsh Government to include all relevant provisions within one Bill.

**56.** We would also contend that, while users of procurement law in Wales may be used to working across two sets of legislation, within the new procurement regime they will have three items of primary legislation for them to consider: the Procurement Bill, the Social Partnership and Public Procurement (Wales) Bill and the *Well-being of Future Generations (Wales) Act 2015*.

**57.** We are therefore concerned that, at a time when the Welsh Government is embarking on a programme to consolidate law in other important areas of Welsh law, it is travelling in the opposite direction in the area of procurement law. We believe the Welsh Government's approach to legislating in this area will have a negative impact on the accessibility of procurement law in Wales, which will be felt the most by those who wish to access the law through the medium of Welsh.

**Conclusion 4.** Where an option exists for the Welsh Government to introduce provisions within a forthcoming timetabled Senedd Bill we believe there should be a very strong

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<sup>48</sup> PAPA Committee, 21 September 2022, RoP [46]

<sup>49</sup> Letter from the Minister for Finance and Local Government, 1 September 2022, page 3

<sup>50</sup> PAPA Committee, 21 September 2022, RoP [68]

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presumption in favour of that option, to enable extensive scrutiny by the people of Wales and their elected Members of the Senedd, and accessible legislation, in both Welsh and English.

**58.** We also see no reason why the Welsh Government and the UK Government could not have legislated in parallel in the area of procurement law reform. We made this general point in our annual report for 2021/22.<sup>51</sup> Taking this approach would still allow for co-operation between governments and would not necessarily lead to inconsistencies in the processes being implemented for stakeholders.

**59.** Legislating in parallel would also allow the Welsh Government to ensure:

- all training and guidance provided for those stakeholders take account of its key values, which the Minister suggests are different to those of the UK Government;<sup>52</sup>
- all provisions are fair in relation to cross-border procurements, which the Minister has raised as an outstanding concern within the Procurement Bill;
- a Wales-specific impact assessment of a Bill to be undertaken, especially considering the Minister's statement that procurement spend in Wales amounts for only approximately 5 per cent of the spend across the UK.<sup>53</sup>

**60.** Importantly for us, legislating in parallel would allow the Senedd to undertake its legislative scrutiny role.

### **Engagement between the UK Government and the Welsh Government**

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**61.** We acknowledge that the Minister notified the Senedd of the Welsh Government's decision to include provisions for Wales within the Procurement Bill. We also note that within the announcement the Welsh Government explained that, to facilitate the UK Government's offer and to improve intergovernmental engagement, two Welsh Government officials had been seconded to the Cabinet Office for three days a week.<sup>54</sup>

**62.** We asked the Minister to set out the degree of involvement she and her officials had in shaping and drafting clauses of the Procurement Bill. In response, the Minister said:

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<sup>51</sup> Legislation, Justice and Constitution Committee, [Annual Report 2021/22](#), paragraph 53

<sup>52</sup> PAPA Committee, 21 September 2022, RoP [27]

<sup>53</sup> PAPA Committee, 21 September 2022, RoP [60]

<sup>54</sup> Welsh Government, [News story: Procurement reform in Wales](#), 23 August 2021

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*"My officials have, and continue to, work closely with their counterparts in the Cabinet Office on the development of the Procurement Bill to ensure it aligns to Welsh policy objectives and legislation. They meet frequently and will continue to interrogate any additional Government amendments to clauses as the Bill moves through scrutiny in UK Parliament."<sup>55</sup>*

**63.** In oral evidence, the Minister summarised the working relationship as follows:

*"... working on this Bill has been a really good example of how the UK Government can engage constructively with the Welsh Government. I think it's been a really positive overall experience in terms of working through the development of the Bill. You'll know that we've had a couple of members of staff seconded to the Cabinet Office for six months before the publication of the Bill and so on, and engagement has been very frequent and very good".<sup>56</sup>*

**64.** With regard to the role the provisional common framework for public procurement had in the development of the Bill, the Minister said:

*"A Working Group has already been established under the provisional common framework for public procurement. Monthly meetings are held and attended by the four Administrations and the development of the Bill is a standing item on the agenda."<sup>57</sup>*

**65.** We note the Welsh Government's comments on the positive engagement she and her officials have with the UK Government.

**66.** However, as we outline below, we are concerned that, despite this positive engagement, and after the UK Government's tabling of over 300 amendments, there continue to be unresolved areas of concern within the Bill.

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<sup>55</sup> Letter from the Minister for Finance and Local Government, 1 September 2022, page 3

<sup>56</sup> PAPA Committee, 21 September 2022, RoP [39]

<sup>57</sup> Letter from the Minister for Finance and Local Government, 1 September 2022, page 4

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## Concurrent powers

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**67.** The Welsh Government's principles for UK Bills state that "UK Bills should not create concurrent powers".<sup>58</sup> Definitions of concurrent and concurrent plus powers (from guidance for Welsh Government staff<sup>59</sup>) is included at Box 1:

### 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.

**68.** 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*

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<sup>58</sup> [Letter from the Counsel General and Minister for the Constitution](#), 22 October 2021, Annex B: Welsh Government's principles for UK Bills

<sup>59</sup> [Letter from the Minister for Climate Change](#), 6 August 2021

*legislative competence), and that they are concurrent plus (to protect executive competence)."*<sup>60</sup>

**69.** We asked the Minister to provide a narrative on the concurrent powers contained within the Bill, and how the approach adopted complied with its guidance on them.

**70.** 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."*<sup>61</sup>

**71.** We consider that the inclusion of powers for the Welsh Ministers in the Bill equivalent to those provided to the UK Ministers would be the best available option. We note the Minister's comments on why she is willing to accept the inclusion of this concurrent-plus regulation making power within the Bill. In this regard, we note that a carve out has been included within section 106 of the Bill, meaning that the Senedd could pass legislation to remove the concurrent power without Minister of the Crown consent.

**72.** 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".<sup>62</sup>

**73.** We note that in oral evidence to the PAPA Committee, the Minister said that the Welsh Government was having discussions with the UK Government with a view to amending the

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<sup>60</sup> ~~Letter from the Minister for Climate Change~~, 6 August 2021, Annex B: Guidance for Welsh Government officials on concurrent powers

<sup>61</sup> Letter from the Minister for Finance and Local Government, 1 September 2022, page 5

<sup>62</sup> Letter from the Minister for Finance and Local Government, 1 September 2022, page 5

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concurrent power to add international agreements to the list in Schedule 9 of the Bill.<sup>63</sup> 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."*<sup>64</sup>

**74.** 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".<sup>65</sup> She also explained she had not engaged extensively with the Department for International Trade, because such engagement was normally led by the Minister for Economy.<sup>66</sup> 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."*<sup>67</sup>

**75.** We acknowledge the Minister's explanation that the Welsh Government is seeking to amend this concurrent power. In line with our views at paragraph 71 above, we believe that the powers for the Welsh Ministers within the Bill should be equivalent to those provided to the UK Ministers, and at the very least they should be concurrent-plus powers with appropriate carve-outs, as the Welsh Government's guidance provide.

**76.** We are concerned that 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. We note that the Minister wrote to the Minister for Brexit

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<sup>63</sup> PAPA Committee, 21 September 2022, RoP [133]

<sup>64</sup> PAPA Committee, 21 September 2022, RoP [143]

<sup>65</sup> PAPA Committee, 21 September 2022, RoP [145]

<sup>66</sup> PAPA Committee, 21 September 2022, RoP [171]

<sup>67</sup> PAPA Committee, 21 September 2022, RoP [174]

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Opportunities and Government Efficiency on 23 May 2022 to request that he consider an amendment to the Bill to address this issue;<sup>68</sup> it is unclear to us if a response has been received.

### **Other outstanding areas of concern**

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**77.** The Minister explained to us that she had reached a “mutually agreeable position” with the UK Government regarding issues she had raised surrounding the disapplication power for healthcare services, as well as a concern raised surrounding a Welsh Contracting Authority’s duty to have regard to the Wales Procurement Policy Statement being “enforceable in civil proceedings”.<sup>69</sup>

**78.** We note that one of the main areas yet to be resolved, according to the Minister during her appearance before the PAPA Committee, is the definition of Welsh Contracting Authorities within the Bill.<sup>70</sup> Again, we note that the Minister wrote to the Minister for Brexit Opportunities and Government Efficiency on 18 May 2022 to raise this concern.<sup>71</sup> An official supporting the Minister said that, while the Welsh Government was working with the UK Government to seek to amend the definition, the “appetite for making a lot more amendments” at that point was “quite low”, although there would be further chances to make amendments when the Bill reaches the House of Commons.<sup>72</sup>

**79.** We are concerned that it seems the UK Government’s appetite for making further amendments to the Bill at this point in its passage is low.

**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;
- b. the definition of Welsh Contracting Authorities;

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<sup>68</sup> Memorandum, paragraph 119

<sup>69</sup> Letter from the Minister for Finance and Local Government, 1 September 2022, page 6

<sup>70</sup> PAPA Committee, 21 September 2022, RoP [123]

<sup>71</sup> Memorandum, paragraph 119

<sup>72</sup> PAPA Committee, 21 September 2022, RoP [125]

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

**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.

**80.** We asked the Minister whether she had engaged the mechanisms of the new intergovernmental relations agreements<sup>73</sup> to resolve matters of concern. In response, she said:

*"No, we have not engaged the new intergovernmental relations arrangements. Any matters of concern have been, and continue to be, dealt with via correspondence and meetings between officials and/or Ministers."<sup>74</sup>  
[original emphasis]*

**81.** We note that in oral evidence, the Minister shared her hope that she would not need to engage the dispute resolution mechanisms to resolve outstanding areas of concern:

*"I've got a list as long as my arm in terms of things I'd like to have a dispute with the UK Government on, but we're not at that point on this yet."<sup>75</sup>*

**82.** We asked the Minister to commit to not use an intergovernmental agreement with the UK Government as a mechanism for resolving areas of concern. The Minister committed not to, but would keep her decision "under review as discussions continue and the Bill's passage progresses."<sup>76</sup>

**83.** We believe the Minister should keep her options open as to whether to engage the intergovernmental relations mechanisms to resolve outstanding areas of concern. It is however unclear to us at which point in the Bill's passage the Minister may be open to use these mechanisms, or when she may decide to use an intergovernmental agreement to the same end.

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<sup>73</sup> UK Government, [Review of intergovernmental relations](#), 13 January 2022, Annex D: Dispute Avoidance and Resolution Process

<sup>74</sup> Letter from the Minister for Finance and Local Government, 1 September 2022, page 7

<sup>75</sup> PAPA Committee, 21 September 2022, RoP [162]

<sup>76</sup> Letter from the Minister for Finance and Local Government, 1 September 2022, page 7

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**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.

**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.

### **The choice of procedure for subordinate legislation made under the Bill, and detail provided in memoranda**

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**84.** We note that the House of Lords Delegated Powers and Regulatory Reform (DPRR) Committee laid its report on the Bill on 14 June 2022. Of the clauses identified in the Memorandum as requiring the Senedd's consent, the DPRR Committee considered that clause 79 of the Bill (which contains a Henry VIII power) should be subject to the affirmative procedure, instead of the negative procedure as currently drafted.<sup>77</sup>

**85.** We asked the Minister what role she had taken in choosing the negative procedure for clauses within the Bill which contain Henry VIII powers (clauses 50, 62, 63, 65, 79, 80 and 84), and whether she believed the procedure was appropriate for those powers. In response, she said:

*"My officials have considered the powers and the associated procedures as part of their review of the draft clauses provided by UKG and provided feedback as appropriate. Some concerns have been raised on the procedures for some of these clauses in the Delegated Powers and Regulatory Reform Committee's Report.*

*Discussions between my officials and their counterparts in the Cabinet Office are still ongoing in relation to the response to the Delegated Powers and Regulatory Reform Committee."*<sup>78</sup>

**86.** It continues to be unclear to us what the Minister's views are on the appropriateness of the procedures allocated to the Welsh Ministers' powers to make subordinate legislation under the Bill, and in particular those which are Henry VIII powers.

**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.

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<sup>77</sup> DPRR Committee, [3rd Report of Session 2022–23](#), paragraph 17

<sup>78</sup> Letter from the Minister for Finance and Local Government, 1 September 2022, pages 4-5

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**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.

**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.

**87.** Memorandum No. 2 states that an amendment has been made to clause 70 of the Bill (contract change notices and publication of modifications) which provides the Welsh Ministers with a power to make regulations to amend the clause for the purposes of changing the percentage thresholds. We note that this power is therefore a Henry VIII power. While Memorandum No. 2 does not identify the procedure that applies to this power, on examination of the Bill it appears to us to be the negative procedure. We note that during the PAPA Committee evidence session, an official accompanying the Minister explained that the incorrect procedure was allocated to this power due to an oversight, and that a further technical amendment was expected in order to make it subject to the affirmative procedure.<sup>79</sup>

**88.** On a separate matter, we found the detail in Memorandum No. 2 to be often lacking as to the effect of amendments made to the Bill. For example, it states that an amendment to clause 51 provides “greater clarity”,<sup>80</sup> although the effect of the amendment is to require a contracting authority to publish a light touch contract that has an estimated value of more than £2million within 180 days, rather than 90 days as was the case prior to the amendment. It is our view that such an amendment is a substantial change which provides more than “greater clarity”.

**89.** We therefore welcome the commitments made by the Minister during her evidence to the PAPA Committee 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.<sup>81</sup>

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<sup>79</sup> PAPA Committee, 21 September 2022, RoP [158]

<sup>80</sup> Memorandum No. 2, paragraph 14.3.18

<sup>81</sup> PAPA Committee, 21 September 2022, RoP [159]

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