

# **The Welsh Government's Supplementary Legislative Consent Memoranda (Memoranda No. 3, No. 4 and No. 5) on the Procurement Bill**

March 2023



# 1. Background

## The UK Government's Procurement Bill

1. The Procurement Bill was introduced into the House of Lords on 11 May 2022.<sup>1</sup> It is sponsored by the Cabinet Office.
2. 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>2</sup>

3. The Bill completed its passage through the House of Lords on 13 December 2022. The Bill received its First Reading in the House of Commons the next day,<sup>3</sup> and Committee Stage proceedings on the Bill were completed on 21 February 2023.<sup>4</sup> At the time of writing, a date for Commons Report Stage was to be announced.

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

4. 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.
5. On 9 June 2022, Rebecca Evans MS, Minister for Finance and Local Government (the Minister), laid before the Senedd a Legislative Consent Memorandum (the first Memorandum) in respect of the Bill.<sup>5</sup>

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<sup>1</sup> Procurement Bill, as introduced (HL Bill 4)

<sup>2</sup> Procurement Bill, Explanatory Notes, paragraph 1

<sup>3</sup> Procurement Bill, as brought from the House of Lords (HC Bill 218)

<sup>4</sup> Although a version of the Bill as amended in Public Bill Committee was published on 24 February 2023, this report refers to clause numbers as they appear in the version of the Bill as brought from the House of Lords on 14 December 2022.

<sup>5</sup> Welsh Government, Legislative Consent Memorandum, Procurement Bill, June 2022

**6.** Within the first Memorandum, the Minister listed the provisions in the Bill on its introduction for which the Senedd's consent is required,<sup>6</sup> as well as what she viewed as the main benefits of the Bill,<sup>7</sup> and her reasons for why opting to pursue procurement reform legislation on an England and Wales basis was "pragmatic".<sup>8</sup> However, the Minister also listed "key matters of concern" with the Bill which required resolution before she would be in a position to recommend that the Senedd should grant its consent to the Bill. These matters of concern were as follows:

- 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 the power in devolved areas;
- the definition of 'Welsh Contracting Authorities' (referred to as "devolved Welsh authorities" in the Bill), which the Minister was seeking to amend to ensure the relevant clauses "work more fairly" in relation to some cross-border procurements;
- 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 those powers in devolved areas;
- the absence of a disapplication power for the Welsh Ministers to make regulations equivalent to the power of the UK Government in relation to the procurement of healthcare services;
- the duty to have regard to the Wales Procurement Policy Statement enforceable in civil proceedings, which was in contrast with the Welsh Government's policy position.<sup>9</sup>

**7.** On 11 July 2022, the Minister laid a Supplementary Legislative Consent Memorandum (Memorandum No. 2) in respect of the Bill following amendments tabled for consideration at Lords Committee Stage.<sup>10</sup>

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<sup>6</sup> Legislative Consent Memorandum, paragraphs 16-102

<sup>7</sup> Legislative Consent Memorandum, paragraph 117

<sup>8</sup> Legislative Consent Memorandum, paragraph 118

<sup>9</sup> Legislative Consent Memorandum, paragraph 119

<sup>10</sup> Welsh Government, Supplementary Legislative Consent Memorandum (Memorandum No. 2), Procurement Bill, November 2022

**8.** As well as listing the provisions within those amendments which require consent,<sup>11</sup> the Minister provided an update on the key matters of concern listed in the first Memorandum. She stated that discussions were ongoing between Welsh Government and Cabinet Office officials in respect of the first four of the above six matters of concern. Of the remaining two, an amendment had been tabled to ensure that the duty to have regard to the Wales Procurement Policy Statement was not enforceable in civil proceedings; and, in respect of the absence of a disapplication power for the Welsh Ministers in respect of the procurement of healthcare services, she stated:

*"... the Welsh Ministers have since decided not to pursue the inclusion of this power in the Bill but are considering various options, which may include taking forward the powers required via Senedd legislation as this area is devolved."*<sup>12</sup>

**9.** We reported on both memoranda on 26 October 2022.<sup>13</sup> Within our report, we stated that we agreed with the Welsh Government's assessment that all clauses and schedules listed in the Memoranda required consent.<sup>14</sup> However, we recommended that the Senedd's consent should also be sought for clauses 114 (Extent) and 116 (Short title) of the Bill as introduced (now clauses 122 and 124).<sup>15</sup>

**10.** We also set out our view that, where an option exists for the Welsh Government to introduce provisions within a forthcoming timetabled Senedd Bill – in this case, there was opportunity for the inclusion of provisions on procurement within the Social Partnership and Public Procurement (Wales) Bill – there should be a very strong presumption in favour of that option.<sup>16</sup>

**11.** We also recommended that the Minister should provide an update on the engagement between the Welsh Government and the UK Government in respect of the outstanding matters of concern as listed in the first Memorandum, and publish the relevant correspondence.<sup>17</sup> In addition, we recommended that the Minister should set out the point in the Bill's passage when she would consider

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<sup>11</sup> Memorandum No. 2, paragraph 14

<sup>12</sup> Memorandum No. 2, paragraph 11

<sup>13</sup> Legislation, Justice and Constitution Committee, The Welsh Government's Legislative Consent Memoranda on the Procurement Bill, October 2022

<sup>14</sup> Legislation, Justice and Constitution Committee, The Welsh Government's Legislative Consent Memoranda on the Procurement Bill, October 2022, conclusion 1

<sup>15</sup> Legislation, Justice and Constitution Committee, The Welsh Government's Legislative Consent Memoranda on the Procurement Bill, October 2022, recommendation 1

<sup>16</sup> Legislation, Justice and Constitution Committee, The Welsh Government's Legislative Consent Memoranda on the Procurement Bill, October 2022, conclusion 4

<sup>17</sup> Legislation, Justice and Constitution Committee, The Welsh Government's Legislative Consent Memoranda on the Procurement Bill, October 2022, recommendations 2 and 3

using the intergovernmental relations dispute avoidance and resolution process<sup>18</sup> to resolve those areas of concern, and to set out any scenarios in which she would consider using an intergovernmental agreement for the same purpose.<sup>19</sup>

**12.** Our final recommendations requested the Minister to set out her views on the procedures applied to the powers for the Welsh Ministers to make subordinate legislation under the Bill, and to provide an update on the Welsh Government's discussions with the UK Government in relation to concerns raised by the House of Lords Delegated Powers and Regulatory Reform Committee in respect of these procedures.<sup>20</sup>

**13.** In response to our report, the Minister:

- rejected our recommendation for consent to be sought for clauses 114 and 116 of the Bill as introduced;
- provided an outline of the “continuing” engagement with the UK Government in respect of the aforementioned key matters concern;
- shared correspondence with the then Minister for Brexit Opportunities and Government Efficiency in respect of these matters;
- stated that it was “not anticipated” that the intergovernmental relations mechanisms would be required to resolve outstanding concerns, and, since discussions were ongoing with the UK Government, it was not possible (or appropriate) to predict when they may be required;
- stated that she remained content with the procedures applied to the powers for the Welsh Ministers to make subordinate legislation under the Bill.<sup>21</sup>

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<sup>18</sup> UK Government, Review of intergovernmental relations, January 2022, Annex D: Dispute Avoidance and Resolution Process

<sup>19</sup> Legislation, Justice and Constitution Committee, The Welsh Government's Legislative Consent Memoranda on the Procurement Bill, October 2022, recommendations 4 and 5

<sup>20</sup> Legislation, Justice and Constitution Committee, The Welsh Government's Legislative Consent Memoranda on the Procurement Bill, October 2022, recommendations 6 and 7

<sup>21</sup> Welsh Government, Letter from the Minister for Finance and Local Government, 14 November 2022

## **The Welsh Government's Supplementary Legislative Consent Memoranda (Memoranda No. 3, No. 4 and No. 5)**

- 14.** On 18 November 2022, the Minister wrote to the Llywydd to state that the UK Government had, on 15 November, tabled amendments for consideration at Lords Report Stage sittings on 28 and 30 November, and that further government amendments would be tabled on or by 21 November. The Minister explained that the Welsh Government would aim to lay a supplementary memorandum in respect of both batches of amendments by 5 December, and acknowledged that this would be more than two weeks after the tabling of the first batch of amendments.<sup>22</sup>
- 15.** On 6 December 2022 the Minister laid a Supplementary Legislative Consent Memorandum (Memorandum No. 3) in respect of these amendments.<sup>23</sup>
- 16.** On 19 December 2022, the Minister laid another Supplementary Legislative Consent Memorandum (Memorandum No. 4) in respect of non-government amendments which were agreed at the Lords Report Stage sittings of 28 and 30 November 2022.<sup>24</sup>
- 17.** On 6 February 2023, the Minister laid a further Supplementary Legislative Consent Memorandum (Memorandum No. 5) in respect of government amendments tabled on 25 January for consideration at Commons Committee Stage.<sup>25</sup>
- 18.** The Business Committee agreed that the Public Accounts and Public Administration Committee and the Legislation, Justice and Constitution Committee should report on these memoranda by 13 March 2023.<sup>26</sup> This deadline was later extended to 23 March 2023.<sup>27</sup>

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<sup>22</sup> Welsh Government, Letter from the Minister for Finance and Local Government, 18 November 2022

<sup>23</sup> Welsh Government, Supplementary Legislative Consent Memorandum (Memorandum No. 3), Procurement Bill, December 2022

<sup>24</sup> Although Memorandum No. 4 was first laid on 19 December 2022, on 24 January 2023 the Welsh Government replaced it with another version: Supplementary Legislative Consent Memorandum (Memorandum No. 4) Procurement Bill. The content of the English version was unchanged; the Welsh version was corrected to resolve discrepancies with the English version.

<sup>25</sup> Welsh Government, Supplementary Legislative Consent Memorandum (Memorandum No. 5), Procurement Bill, February 2023

<sup>26</sup> Business Committee, Timetable for consideration: Supplementary Legislative Consent Memorandum (Memorandum No. 5) on the Procurement Bill, February 2023

<sup>27</sup> Business Committee, Revised timetable for consideration: Supplementary Legislative Consent Memorandum (Memorandum No. 5) on the Procurement Bill, March 2023

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## **Update on the position since the publication of the first Memorandum and Memorandum No. 2**

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**19.** The Minister provides an update on the position since the publication of the earlier legislative consent memoranda at paragraphs 12 to 17 of Memorandum No. 3.

**20.** The Minister states that all amendments which were the subject of Memorandum No. 2 were moved and agreed to, apart from an amendment to add a new clause 1 (which aimed to define 'procurement' and 'covered procurement').<sup>28</sup>

**21.** Within Memorandum No. 3, the Minister explains that two of the six key matters of concern in respect of the Bill, as stated in the first Memorandum and Memorandum No. 2 (and detailed at paragraph 6), had been resolved. These two matters related to the disapplication power for healthcare services, and the duty to have regard to the Wales Procurement Policy Statement enforceable in civil proceedings. However, the remaining four other matters of concern – relating to the definition of Welsh Contracting Authorities, commencement powers, concurrent powers to make consequential provisions, and concurrent powers to add international agreements – were outstanding.<sup>29</sup>

**22.** Within Memorandum No. 4, the Minister states that the situation around these four outstanding matters was unchanged.<sup>30</sup>

**23.** However, within Memorandum No. 5, the Minister states that three of these matters have since been resolved, as the UK Government has:

- tabled an amendment to change the definition of 'Welsh Contracting Authorities' (referred to as "devolved Welsh authorities" in the Bill), to ensure clarity on which provisions apply to cross-border procurements;
- tabled an amendment to change the concurrent powers to make consequential etc provision to "concurrent plus" powers, which would require the UK Government to obtain the consent of the Welsh Ministers in these circumstances;

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<sup>28</sup> Memorandum No. 3, paragraph 13

<sup>29</sup> Memorandum No. 3, paragraph 17

<sup>30</sup> Memorandum No. 4, paragraph 14

- agreed to table an amendment to ensure a Minister of the Crown obtains the consent of the Welsh Ministers before commencing the Bill's provisions which regulate procurement by a devolved Welsh authority.<sup>31</sup>

**24.** According to the Minister, however, the remaining matter in relation to the concurrent power to add international agreements is still outstanding:

*"The power to add international agreements to the list in Schedule 9 to the Bill has been included as a concurrent power, with no requirement to obtain the consent of Welsh Ministers when UKG Ministers are exercising this power in relation to devolved areas, which is unacceptable to the Welsh Ministers. Similar provisions are also contained in the Trade (Australia and New Zealand) Bill. Detailed discussions are ongoing at official level, and it is expected that the outcome of those discussions will be reflected in the Procurement Bill."*<sup>32</sup>

**25.** In addition, the Minister states that a new matter of concern in respect of another concurrent power has arisen as a result of one of the amendments tabled by the UK Government at Commons Committee Stage:

*"It relates to trade disputes whereby a MoC [Minister of the Crown] can make regulations to deal with the procurement consequences of a trade dispute under a treaty implemented by way of Schedule 9 (other than the Trade and Cooperation Agreement with the EU, which is dealt with under existing legislation). This power is therefore a concurrent power, with no requirement to obtain the consent of Welsh Ministers when UKG Ministers are exercising this power in relation to devolved areas, which is unacceptable to the Welsh Ministers."*<sup>33</sup>

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<sup>31</sup> Memorandum No. 5, paragraph 14

<sup>32</sup> Memorandum No. 5, paragraph 15

<sup>33</sup> Memorandum No. 5, paragraph 15

## **The Welsh Government's position on the amendments made to the Bill**

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**26.** Within Memorandum No. 3, Memorandum No. 4, and Memorandum No. 5, the Minister states that amendments in respect of the following clauses of, and Schedules to the Bill, as they appear in the version as brought from the House of Lords,<sup>34</sup> make provision for a purpose within the legislative competence of the Senedd:

- clause 1 (Procurement and covered procurement – new clause) and consequential amendments to clauses which the Minister identified within the first Memorandum to make provision for a purpose within the legislative competence of the Senedd;
- clause 2 (Contracting authorities);
- clause 6 (Utilities contracts);
- clause 10 (Mixed procurement: special regime contracts);
- clause 12 (Procurement objectives);
- clause 13 (The national procurement policy statement);
- clause 19 (Award of public contracts following a competitive tendering procedure);
- clause 21 (Tender notices and associated tender documents);
- clause 22 (Conditions of participation);
- clause 32 (Reserving contracts to supported employment providers);
- clause 35 (Dynamic markets: establishment);
- clause 36 (Dynamic markets: membership);
- clause 40 (Qualifying utilities dynamic market notices: no duty to publish a tender notice – new clause);
- clause 46 (Frameworks);
- clause 51 (Standstill periods on the award of contracts);

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<sup>34</sup> Procurement Bill, as brought from the House of Lords (HC Bill 218)

- clause 52 (Key performance indicators);
- clause 53 (Contract details notices and publication of contracts);
- clause 54 (Time limits);
- clause 56 (Technical specifications);
- clause 62 (Debarment list);
- clause 63 (Debarment list: application for removal);
- clause 64 (Debarment decisions: appeals);<sup>35</sup>
- clause 65 (Timeline for removal of suppliers – new clause);<sup>36</sup>
- clause 66 (Electronic invoicing: implied term);
- clause 67 (Implied payment terms in public contracts);
- clause 68 (Payments compliance notices);
- clause 69 (Information about payments under public contracts);
- clause 72 (Implied payment terms in sub-contracts);
- clause 74 (Contract change notices);
- clause 76 (Publication of modifications);
- clause 82 (Conflicts assessments);
- clause 83(2)(a) (Regulated below-threshold contracts);
- clause 84 (Regulated below threshold contracts: procedure);
- clause 85 (Regulated below-threshold contracts: duty to consider small and medium-sized enterprises – new clause);
- clause 86 (Regulated below-threshold contracts: notices);
- clause 91 (Pipeline notices);

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<sup>35</sup> Amendments to this clause were subsequently withdrawn.

<sup>36</sup> In a letter to the Public Accounts and Public Administration Committee dated 6 February 2023, the Minister stated that this clause was likely to be removed. The clause was removed at the Commons Committee Stage sitting held on the next day.

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- clause 93 (Notices, documents and information: regulations and online system);
- clause 94 (Electronic communications);
- clause 95 (Information relating to a procurement);
- clause 97 (Duties under this Act enforceable in civil proceedings);
- clause 104 (Procurement investigations);
- clause 107 (Welsh Ministers: restrictions on the exercise of powers);
- clause 109 (Minister of the Crown: restrictions on the exercise of powers);
- clause 118 (Regulations);
- clause 119 (Interpretation);
- clause 120 (Index of defined expressions);
- clause 123 (Commencement);
- Schedule 1 (Threshold amounts);
- Schedule 2 (Exempted contracts);
- Schedule 4 (Utility activities);
- Schedule 6 (Mandatory exclusion grounds);
- Schedule 7 (Discretionary exclusion grounds);
- Schedule 11 (Repeals and revocations).

**27.** In addition, the Minister states in Memorandum No. 5 that amendments to insert the following new clauses also make provision for a purpose within the legislative competence of the Senedd:

- new clause 9 (Debarment decisions: interim relief), subsequently agreed and inserted after clause 62 of the Bill as brought from the House of Lords;

- new clause 11 (Trade disputes), subsequently agreed and inserted after clause 90 of the Bill.<sup>37</sup>

**28.** The Minister states in Memorandum No. 5 in respect of new clause 11:

*"This clause includes the power to make regulations to deal with the procurement consequences of trade disputes, which arise from a treaty listed in Schedule 9 (other than the Trade and Cooperation Agreement with the EU, which is dealt with under existing legislation). This power is conferred on an appropriate authority which includes the Welsh Ministers.*

*Amendment 69 will amend clause 109 to allow a Minister of the Crown to exercise the trade dispute power under NC11 in relation to devolved Welsh authorities and transferred Northern Ireland authorities.*

*The effect of this amendment is that a MoC is able to exercise this power without obtaining the consent of Welsh Ministers which is unacceptable to the Welsh Ministers."*<sup>38</sup>

### **Update on the Senedd procedures attached to regulations to be made under the powers within the Bill**

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**29.** The Minister states in Memorandum No. 3 that some amendments have been made to the Bill in response to the report<sup>39</sup> of the House of Lords Delegated Powers and Regulatory Reform (DPRR) Committee. The Minister provides a detailed overview of the relevant amendments, which:

- apply the affirmative procedure to the making of regulations (including by the Welsh Ministers) under an amended clause 5 (now clause 6 – Utilities contracts);
- change the procedure for the making of regulations under clauses 50, 65, 70, 81, 86 (now clauses 53, 69, 74, 76, 86 and 91) from the negative to the affirmative procedure, at least in some cases;
- remove a power contained within paragraph 17 of Schedule 7; and

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<sup>37</sup> Memorandum No. 5, paragraphs 18.3 and 18.12

<sup>38</sup> Memorandum No. 5, paragraph 18.2

<sup>39</sup> House of Lords Delegated Powers and Regulatory Reform Committee, 3<sup>rd</sup> Report of Session 2022-23, 14 June 2022

- “more clearly describes” an exemption to the use of the power within paragraph 34 of Schedule 2.<sup>40</sup>

**30.** However, the Minister states that the amendments do not change the procedure applied to regulations made under clause 80 (now clause 84), as the clause relates to thresholds set out under the Agreement on Government Procurement (GPA). The Memorandum notes that “maintaining the position is consistent with the approach taken to GPA thresholds elsewhere in the Bill”.<sup>41</sup>

**31.** The Minister also states that an amendment to clause 90 (now clause 95) “would remove an unnecessary power to establish and operate an online system, since it can be done using common law powers”.<sup>42</sup>

**32.** Furthermore, the Minister states in Memorandum No. 3 that an amendment to clause 113 (now clause 118 – Regulations) will require the making of regulations under clause 114 (now clause 119 – Interpretation) to change the definition of ‘small and medium sized enterprises’ to be subject to the affirmative procedure. The Minister notes that the Bill will enable the Welsh Ministers to hold this regulation-making power, in so far as it applies to the duties of Welsh contracting authorities.<sup>43</sup>

**33.** In Memorandum No. 5, the Minister states that amendments to clause 118 (Regulations) will apply the affirmative procedure to regulations made by the Welsh Ministers under NC 11 (Trade disputes, as noted in paragraphs 27–28) and clause 52 (Key performance indicators).<sup>44</sup>

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### **The Welsh Government's conclusions in Memoranda No. 3, No. 4 and No. 5)**

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**34.** Within Memorandum No. 3 and Memorandum No. 5, the Minister asserts her 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 Welsh Government's policy objectives have*

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<sup>40</sup> Memorandum No. 3, paragraph 20.9

<sup>41</sup> Memorandum No. 3, paragraph 20.9

<sup>42</sup> Memorandum No. 3, paragraph 20.11

<sup>43</sup> Memorandum No. 3, paragraph 20.2

<sup>44</sup> Memorandum No. 5, paragraphs 18.12 and 18.15

*been included and I consider these provisions would provide a simplified, transparent procurement regime in Wales.”<sup>45</sup>*

**35.** The Minister considers the proposed amendments subject to Memorandum No. 3 “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”.<sup>46</sup> Within Memorandum No. 5 the Minister states that she considers the “majority” of the proposed amendments subject to that memorandum to be reasonable.<sup>47</sup>

**36.** At the time of laying Memorandum No. 3 and No. 4, the Minister considered it was not appropriate to recommend consent to the Bill until the matters of concern referred to in those memoranda had been resolved.<sup>48</sup> However, within Memorandum No. 5 the Minister states:

*“Now that the majority of issues of concern have been resolved, I recommend consent to the core procurement elements of the Bill, which represent the majority of the Bill. However, I recommend that consent is withheld for the areas of the Bill which concern international trade, for the reasons outlined in paragraph 15 [as referenced in paragraph 25 of this report].”<sup>49</sup>*

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<sup>45</sup> Memorandum No. 3, paragraph 24; Memorandum No. 5, paragraph 22

<sup>46</sup> Memorandum No. 3, paragraph 25

<sup>47</sup> Memorandum No. 5, paragraph 23

<sup>48</sup> Memorandum No. 3, paragraph 25; Memorandum No. 4, paragraph 26

<sup>49</sup> Memorandum No. 5, paragraph 23

## 2. Committee consideration

**37.** We considered Memorandum No. 3 and Memorandum No. 4 at our meeting on 16 January 2023.<sup>50</sup>

**38.** We subsequently wrote to the Minister on 26 January to request clarity on matters raised in those memoranda.<sup>51</sup> The Minister responded to our letter on 8 February 2023.<sup>52</sup>

**39.** We considered Memorandum No. 5, and the Minister's response to our letter, on 27 February 2023.<sup>53</sup>

**40.** We agreed our report on the memoranda on 6 March 2023.<sup>54</sup>

### Our view

#### General comments

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**41.** We note the Welsh Government's reasons for making provision for Wales in the Bill, as set out in the memoranda.

**Conclusion 1.** We agree with the Welsh Government's assessment that the new clauses, and amendments to existing clauses and Schedules, listed in Memoranda No. 3, No. 4 and No. 5 fall within a purpose within the legislative competence of the Senedd, as described in Standing Order 29.

#### The approach to legislating on procurement reform in Wales

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**42.** Our report on the first Memorandum and Memorandum No. 2 considered the impact of the Welsh Government's decision to accept the UK Government's offer to include provisions to reform procurement law as it applies in Wales within the Procurement Bill, instead of including such provisions within the Social Partnership and Public Procurement (Wales) Bill (the SPPP Bill).<sup>55</sup>

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<sup>50</sup> Legislation, Justice and Constitution Committee, 16 January 2023

<sup>51</sup> Letter to the Minister for Finance and Local Government, 26 January 2023

<sup>52</sup> Letter from the Minister for Finance and Local Government, 8 February 2023

<sup>53</sup> Legislation, Justice and Constitution Committee, 27 February 2023

<sup>54</sup> Legislation, Justice and Constitution Committee, 6 March 2023

<sup>55</sup> Legislation, Justice and Constitution Committee, The Welsh Government's Legislative Consent Memoranda on the Procurement Bill, October 2022, paragraphs 31-60

**43.** We also noted the matters of concern highlighted by the Minister in respect of the Bill.<sup>56</sup> One of those matters was the absence of a power for the Welsh Ministers to disapply the Bill's provisions for the procurement of healthcare services (a disapplication power), although the UK Government had committed to its inclusion.<sup>57</sup> While the Minister noted in Memorandum No. 2 that the Welsh Ministers had decided not to pursue the inclusion of the power and were "considering various options", including Senedd legislation, in Memorandum No. 3 the Minister states that the matter had been "resolved".<sup>58</sup>

**44.** It appears this issue has been resolved by the introduction of the Health Service Procurement (Wales) Bill (the HSP Bill) on 13 February 2023.<sup>59</sup> The HSP Bill includes the disapplication power and a power for the Welsh Ministers to make regulations for a new procurement regime for health services in Wales (a creation power).

**45.** In our letter of 26 January 2023, we asked the Minister why the Welsh Government had changed its position on the inclusion of the disapplication power for healthcare within the Procurement Bill, considering a commitment to bring forward the required amendment had been secured. In response, the Minister said:

*"UK Government only committed to the disapplication power within the Procurement Bill. Ministers recognised that both powers were required to effect change and therefore there remained a need to legislate in Wales. Given this need to legislate, Welsh Ministers decided bringing forward a Bill that included both the disapplication and creation powers together provided the necessary legislation and gave greater coherence and accessibility to the legislation."*<sup>60</sup>

**46.** We shared with the Minister our assessment that, with the introduction of the HSP Bill, a Welsh contracting authority may have to consider:

- the Procurement Bill and subordinate legislation to be made under it;

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<sup>56</sup> Legislation, Justice and Constitution Committee, The Welsh Government's Legislative Consent Memoranda on the Procurement Bill, October 2022, paragraphs 72-78

<sup>57</sup> Memorandum, paragraph 119

<sup>58</sup> Memorandum No. 3, paragraph 17

<sup>59</sup> Senedd Cymru, [Health Service Procurement \(Wales\) Bill](#)

<sup>60</sup> Letter from the Minister for Finance and Local Government, 8 February 2023, response to question 2a

- the HSP Bill;
- the SPPP Bill; and
- the *Well-being of Future Generations (Wales) Act 2015*.

**47.** We therefore asked whether the Welsh Government had assessed the impact of its legislative approach on the accessibility of procurement law as it applies in Wales. In response, the Minister said:

*"The Welsh Government regularly assesses the accessibility implications of legislative proposals. This is a normal part of the Office of the Legislative Counsel's remit and it is also taken into account when deciding whether the UK Parliament or Government should legislate on Wales's behalf.*

*We do not consider it would be more accessible to use a single Act for the various provisions that relate to procurement.*

*The Social Partnership and Public Procurement (SPPP) Bill's provisions on procurement are essentially about social partnership and are a more accessible fit in an Act about social partnership (rather than in a Bill that is about public procurement procedures). This is designed to dovetail with the Well-being of Future Generation Act 2015, which sets out the wider organisational principles for public bodies in Wales. The social partnership principles involved are connected to the provisions about sustainable development, hence the need to refer to the 2015 Act."*<sup>61</sup>

**48.** Specifically in respect of the HSP Bill, the Minister set out its impact on the accessibility of Welsh law:

*"The Health Services Procurement (Wales) (HSPW) Bill is a temporary legislative vehicle as its provisions are designed to amend existing legislation, specifically:*

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<sup>61</sup> Letter from the Minister for Finance and Local Government, 8 February 2023, response to question 2b

- *the UK Procurement Act (by inserting a Welsh “disapplication power” immediately after a corresponding English disapplication power), and*
- *the NHS (Wales) Act 2006 (by inserting a “creation power”).*

*This is the most accessible approach because:*

- *once the HSPW Act has amended the UK Procurement Act and NHS (Wales) Act 2006, users will just read the two amended Acts – there will be no need to refer to the HSPW Act, its “work having been done”;*
- *the UK Procurement Act is the logical home for the disapplication power because it makes clear that health services are treated differently (and it will sit next to the corresponding English disapplication power);*
- *the NHS (Wales) Act 2006 is the logical home for the creation power, as the principal Act in Wales on health services (and similarly the corresponding English creation power is to be inserted into the equivalent piece of legislation applying in England, the National Health Service Act 2006).<sup>62</sup>*

**49.** We also asked whether the Welsh Government had considered broadening the scope of the HSP Bill to include wider provisions relating to the processes underpinning procurement law in Wales, which would largely mirror those in the UK Government's Procurement Bill, and seek for the removal from the Procurement Bill of provisions within the legislative competence of the Senedd . In response, the Minister stated that the HSP Bill:

*“... will establish a bespoke procurement regime for healthcare services in Wales which mirrors that provided for under the Health and Care Act ... [the Bill] will only apply to certain healthcare services and means that contracts for those services would not need to be procured in accordance with the Procurement Act.*

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<sup>62</sup> Letter from the Minister for Finance and Local Government, 8 February 2023, response to question 2b

*There are benefits of joining UKG's Procurement Bill including ensuring that there will be continuity for suppliers and cross-border businesses. It's unlikely Ministers would be able to completely replicate the cross-border provisions in a Senedd Bill as taking forward our own Bill would likely affect our ability to use the central platform and could lead to different procurement processes to England. The joint approach also means that these reforms can be enacted in Wales sooner than would otherwise have been possible.”<sup>63</sup>*

**50.** In addition, we asked the Minister whether she was of the view that legislating on procurement law via three Bills introduced in different legislatures in close succession to each other follows a logical approach to legislating. We also asked whether the Minister would undertake an internal review of the approach taken to inform future practice. In response, the Minister said:

*“Careful consideration will be given to ensure implementation plans [for the three Bills, once enacted] understand the wider context.*

*I do not consider an internal review would be appropriate or beneficial, as my officials have worked with colleagues across the organisation to ensure there is maximum alignment as each of these three Bills has developed. I am confident that the approach taken provides certainty and clarity for buyers and suppliers across Wales and will establish an effective and efficient regime for procurement that maximises opportunities to deliver social, environmental, economic and cultural outcomes for Wales.”<sup>64</sup>*

**51.** We acknowledge the Minister's explanation for the Welsh Government's decision to introduce into the Senedd the HSP Bill which will amend the Procurement Bill. While we agree that including the disapplication and creation powers together gives “greater coherence and accessibility to the legislation”, we believe that a Senedd Bill including these powers – and all the relevant provisions

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<sup>63</sup> Letter from the Minister for Finance and Local Government, 8 February 2023, response to question 2c

<sup>64</sup> Letter from the Minister for Finance and Local Government, 8 February 2023, response to question 2d

to reform procurement law as it applies in Wales – would give even greater coherence and accessibility to legislation applicable in Wales.

**52.** While the SPPP Bill's provisions on procurement are about social partnership and, as the Minister states "are a more accessible fit in an Act about social partnership", we fail to see a reason why the Bill's scope could not have been broadened during its development to also include provisions on public procurement procedures. As we noted in our first report, the Welsh Government first shared its plans for the development of the SPPP Bill in July 2019. There should therefore have been ample opportunities for the Welsh Government to incorporate provisions making reform to public procurement procedures within the legislative vehicle it had made available within in its own legislative programme.

**53.** The Minister has repeatedly described the very positive engagement between the UK Government and the Welsh Government during the development and the passage of the Bill. As we noted in our first report, the Minister has also stated that discussion on the Bill has been a standing item on monthly meetings held between all four administrations in the UK, established under the common framework on public procurement. In light of such a high level of engagement, it is unclear to us why the introduction of a Bill into the Senedd "would likely affect" the Welsh Government's ability to use the central platform established by the Procurement Bill, "and could lead to different procurement processes to England".

**54.** We are unconvinced with the Minister's argument that "reforms can be enacted in Wales sooner than would otherwise have been possible" by including provisions for Wales within the Procurement Bill. With the allocation of sufficient resources to develop a Bill within the Welsh Government, and regular engagement with the UK Government via the common framework's process to ensure alignment of procedures where necessary, we cannot see a reason why a delay as suggested by the Minister would occur.

**55.** The necessary introduction of the HSP Bill in itself suggests to us that the Welsh Government's approach to legislating in this area is neither sound nor coherent. We believe that any approach which may necessitate the use of "a temporary legislative vehicle" should be avoided, especially when that vehicle amends legislation which is not yet on the statute book. While we agree that the *Health Service (Wales) Act 2006* is "the logical home" for the creation power which the HSP Bill contains, a Welsh Procurement Bill could have amended the

Act in the same way, while also making all other provisions to reform procurement law as it applies in Wales.

**56.** As we made clear in our first report, including extensive provisions for Wales in a UK Bill also gives very limited opportunities for Senedd scrutiny of those provisions. While we acknowledge that amendments have been made to the Bill, as a result of the DPRR Committee's scrutiny, to ensure that the vast majority of the Welsh Ministers' regulation-making powers under it will be subject to the affirmative procedure rather than the negative procedure, the Bill itself has been subject to very limited detailed scrutiny via the legislative consent process.

**57.** For all these reasons, we are disappointed with the Minister's rejection of our suggestion for the Welsh Government to undertake an internal review of its approach to legislating on procurement law in order to inform future practice. We continue to believe the approach taken – and in particular the decision to include provisions within the UK Government's Procurement Bill – will lead to reduced accessibility of the law in this area, at a time when the Welsh Government is undertaking commendable work to improve the accessibility of law in the areas of the historic environment and planning.

**Conclusion 2.** Contrary to the view of the Minister, we consider it would have been more accessible to use a single Act of the Senedd for the various provisions that relate to procurement.

**Conclusion 3.** We are disappointed with the Minister's rejection of our suggestion for the Welsh Government to undertake an internal review of its approach to legislating on procurement law, to inform future practice.

## **Concurrent powers**

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**58.** We acknowledge that the Minister has secured an amendment to the Bill to ensure that that a Minister of the Crown obtains the consent of the Welsh Ministers before making consequential etc provision under the Bill.

**59.** While this 'concurrent plus' power<sup>65</sup> is to be favoured over what was previously a concurrent power, 'concurrent plus' powers are not optimal as they do not guarantee a role for the Senedd to undertake scrutiny of subordinate legislation made in devolved areas.

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<sup>65</sup> See Box 1, page 18 of our [report on the first Memorandum and Memorandum No. 2](#) for a definition of concurrent and 'concurrent plus' powers.

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**60.** We share the Minister's concerns with the continued inclusion of the concurrent power to add international agreements to the list in Schedule 9 to the Bill, and the new inclusion of the concurrent power to the power to make regulations to deal with the procurement consequences of trade disputes.

**61.** We note that the Minister is recommending that the Senedd withholds its consent for these clauses, while recommending that consent be granted for all other clauses of the Bill subject to consent memoranda. We identify this suboptimal position as another reason for why a Bill should have been introduced to the Senedd instead of including provisions within the Procurement Bill.

**62.** However, we note that the Minister has stated in her correspondence to us in relation to her outstanding concerns with these clauses:

*"... so far, we have been able to reach agreed solutions without needing to rely on the Dispute Avoidance and Resolution Process set out in the inter-governmental agreement. It is not anticipated that it will be necessary to resolve the outstanding matters using the Process, however, should relationships breakdown in the future, we would look to escalate through the Inter-Ministerial Standing Committee in the first instance."*<sup>66</sup>

**63.** Since the Minister's concerns in respect of the concurrent power to add international agreements the list in Schedule 9 to the Bill were first raised in correspondence with the UK Government in May 2022, and the corresponding power remained unamended in the Trade (New Zealand and Australia) Bill, it is unclear to us why this particular disagreement has not yet been escalated to the Inter-Ministerial Standing Committee.

### **Clause 93 of the Bill (Notices, documents and information: regulations and online system)**

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**64.** The Minister noted in Memorandum No. 3 that an amendment to clause 93 of the Bill (clause 88 as stated in Memorandum No. 3) requires a Minister of the Crown to "provide a freely accessible, central digital platform" for the purpose of publishing notices, documents and other information under the Bill.<sup>67</sup> We asked the Minister how this new platform will interact with, or replace, any existing

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<sup>66</sup> Letter from the Minister for Finance and Local Government, 8 February 2023, response to question 1

<sup>67</sup> Memorandum No. 3, paragraph 20.10

Welsh online systems, and if she was seeking amendments to provide the Welsh Ministers with an equivalent power.

**65.** In response, the Minister stated:

*"Sell2Wales will be used to publish procurement lifecycle notices produced by Welsh Contracting Authorities under the secondary legislation that will come into effect in Wales as a result of the Bill. Sell2Wales will then 'push' the relevant procurement lifecycle notices into the new UK online system established by the Minister of the Crown. This is the same way as Sell2Wales notice data is currently pushed into the UKGs existing Find a Tender Service. This will enable Wales to meet transparency requirements set out in the Bill and ensure compliance with obligations under international trade agreements which require all UK's procurements above certain thresholds to be advertised in a single place. The new UK online system will not replace the need for existing Welsh platforms which will be updated to support the new procurement lifecycle notices. Officials are working to ensure that the systems integrate as seamlessly as possible.*

*The Bill provides Welsh Ministers with an equivalent power to determine the "form and content of notices, documents or other information to be published". The approach that has been outlined enables Wales to collect additional procurement lifecycle notice information within Sell2Wales. We will not therefore be seeking an amendment to provide Welsh Ministers with an equivalent power to make arrangements to establish and operate an online system for the purpose of publishing notices, documents and other information under the Bill."*<sup>68</sup>

**66.** We acknowledge the Minister's clarification, and her justification for why the Welsh Government will not be seeking an amendment to provide the Welsh Ministers with equivalent powers to those of UK Ministers under clause 93 of the Bill.

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<sup>68</sup> Letter from the Minister for Finance and Local Government, 8 February 2023, response to question 4

## **Clause 123 of the Bill (Commencement)**

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**67.** The Minister states in Memorandum No. 5 that an amendment to clause 123 of the Bill makes UK Ministers' commencement of "devolved Welsh aspects of the Bill subject to the consent of Welsh Ministers". In addition, she notes:

*"In the event that such consent was refused, the amendment would make provision to allow UK Ministers to amend the Act resulting from this Bill so that the Act no longer applies in respect of devolved Welsh procurement and could be commenced without the consent of Welsh Ministers."*<sup>69</sup>

**68.** However, within the first Memorandum, the Minister stated that her intentions for seeking an amendment to this clause were as follows:

*"UK Government officials have committed to giving the Welsh Ministers commencement powers but the Bill as introduced provides for Minister of the Crown only powers. This will need to be amended to reflect powers for the Welsh Ministers in this area."*<sup>70</sup>

**69.** It does not therefore appear that the amendment achieves the Minister's intentions; the Welsh Ministers continue to have no powers to commence the Bill's provisions in relation to Welsh contracting authorities. The Welsh Ministers will be wholly dependent on the UK Government to commence legislation in this devolved area, which is not a satisfactory position for the Welsh Government or for the Senedd.

**70.** The Minister states that, in the event that the Welsh Ministers do not consent to UK Ministers commencing the Bill's provisions, the UK Ministers will be able to use their powers under the Bill to amend it so that it does not apply in respect of devolved Welsh procurement. The Minister does not state why this approach has been adopted and what the implications would be. It seems to us to be highly unsatisfactory that a disagreement on when to commence powers might result in the UK Government disapplying the provisions in the Act as they apply to Wales.

**71.** To us, if the UK Ministers decide to 'carve out' provisions for Wales from the Bill in this way, the only remaining option would be for the Welsh Government to introduce primary legislation in the Senedd to reform procurement law as it

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<sup>69</sup> Memorandum No. 5, paragraph 19.1

<sup>70</sup> Memorandum No. 1, paragraph 119

applies in Wales. We see this fact as another reason why the Welsh Government's approach to legislating in this area is unsatisfactory. It is also unclear to us whether the Minister has fully assessed the risks attached to the absence of commencement powers for the Welsh Ministers in the Bill.

**Recommendation 1.** The Minister should explain her reasons for being content with the absence of commencement powers for the Welsh Ministers in the Bill, when an amendment to ensure those powers was originally sought.

**Recommendation 2.** The Minister should set out the Welsh Government's assessment of the implications of a refusal to consent to the UK Government's commencement of the Bill's provisions in relation to Welsh contracting authorities, and a subsequent decision by the UK Government to remove those provisions from the Bill.

**72.** We also note that Memorandum No. 5 does not set out an assessment of the financial implications of the amendment to clause 123. It is therefore unclear what the financial implications would be for the Welsh Government, or the wider public sector in Wales, of not providing consent for the UK Government's commencement of the Bill's provisions in relation to Welsh contracting authorities. The financial implications of a possible subsequent removal of provisions in relation to Welsh contracting authorities from the Bill are similarly unclear, as are any steps the Welsh Government may be required to take to introduce its own primary legislation instead.

**Recommendation 3.** The Minister should set out the potential financial implications of clause 123, as amended, for the Welsh Government and the wider public sector in Wales.

### **Level of detail provided in the memoranda**

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**73.** Within our first report, we stated that we found the level of detail in Memorandum No. 2 to be often lacking as to the effect of amendments made to the Bill.<sup>71</sup>

**74.** We found this to be also the case during our consideration of Memorandum No. 5. For example, an amendment to clause 68 is described as a "minor technical amendment".<sup>72</sup> It appears to us, however, that the amendment is substantive as it exempts concession contracts from the scope of a payments compliance notice,

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<sup>71</sup> Legislation, Justice and Constitution Committee, The Welsh Government's Legislative Consent Memoranda on the Procurement Bill, October 2022, paragraph 88

<sup>72</sup> Memorandum No. 5, paragraph 18.8

although it is acknowledged that the amendment does result in consistency with other provisions in the Bill concerning concession contracts.

**75.** We also found that, while Memorandum No. 5 states that an amendment to Schedule 7 of the Bill would insert a definition of “event” for the purposes of paragraph 16 of the Schedule, no explanation is provided of the effect of inserting the definition.

**76.** We take the opportunity to remind the Minister – and all the Welsh Ministers – of the importance of providing sufficient detail to Members of the Senedd within legislative consent memoranda, so as not to add to the democratic deficiencies caused by UK Government Bills making provision for Wales in devolved areas and the associated consent process.