

Report on the Social Partnership and Public Procurement (Wales) Bill

November 2022



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November 2022



About the Committee

The Committee was established on 26 May 2021. Its remit can be found at www.senedd.wales/SeneddLJC

Current Committee membership:



Committee Chair:
Huw Irranca-Davies MS
Welsh Labour



Alun Davies MS
Welsh Labour



James Evans MS
Welsh Conservatives



Peredur Owen Griffiths MS *
Plaid Cymru

*Peredur Owen Griffiths MS was not a member of the Committee during the scrutiny of the Bill.

The following Member was also a member of the Committee during the scrutiny of the Bill.



Rhys ab Owen MS
Independent Plaid Cymru
Member

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1. Introduction

On 7 June 2022 Hannah Blythyn MS, the Deputy Minister for Social Partnership (the Deputy Minister) introduced the Social Partnership and Public Procurement (Wales) Bill (the Bill),¹ and accompanying Explanatory Memorandum (the EM).²

1. The Senedd's Business Committee referred the Bill to the Equality and Social Justice Committee on 24 May 2022, and on 14 June 2022 set a deadline of 18 November 2022 for reporting on its general principles.³
2. On 13 June 2022, the Deputy Minister issued a statement of policy intent for subordinate legislation to be made under the Bill.⁴

Background to the Bill

3. In February 2021, the Welsh Government issued a draft version of the Bill for public consultation.⁵
4. The EM states that there was "substantial support for the provisions" within the draft Bill and "overall agreement" that legislation would strengthen current social partnership arrangements in Wales.⁶ The EM also confirms that following the consultation a number of policy changes were made, which are now reflected in the Bill.⁷

The purpose of the Bill

5. The long title of the Bill is:

"An Act of Senedd Cymru to make provision about sustainable development in accordance with a principle of social partnership; about socially responsible

¹ Social Partnership and Public Procurement (Wales) Bill, as introduced

² Social Partnership and Public Procurement (Wales) Bill, Explanatory Memorandum incorporating the Regulatory Impact Assessment and Explanatory Notes, June 2022

³ Business Committee, Timetable for consideration: The Social Partnership and Public Procurement (Wales) Bill, June 2022

⁴ Welsh Government, Social Partnership and Public Procurement (Wales) Bill: Policy intent for regulations, directions and guidance, June 2022

⁵ Welsh Government, Draft Social Partnership and Public Procurement (Wales) Bill, February 2021

⁶ EM, paragraph 147

⁷ EM, paragraph 150

public procurement; establishing a Social Partnership Council for Wales; and for connected purposes."

6. The EM states that the Bill "provides for a framework to enhance the well-being of the people of Wales by improving public services through social partnership working, promoting fair work and social responsible public procurement."⁸

The Committee's remit

7. The remit of the Legislation, Justice and Constitution Committee is to carry out the functions of the responsible committee set out in Standing Orders 21 and 26C. The Committee may also consider any matter relating to legislation, devolution, the constitution, justice, and external affairs, within or relating to the competence of the Senedd or the Welsh Ministers, including the quality of legislation.

8. In our scrutiny of Bills introduced in the Senedd, our approach is to consider:

- matters relating to the competence of the Senedd, including compatibility with the European Convention on Human Rights (the Convention rights);
- the balance between the information that is included on the face of the Bill and that which is left to subordinate legislation;
- whether an appropriate legislative procedure has been chosen in relation to the granting of powers to the Welsh Ministers to make subordinate legislation; and
- any other matter we consider relevant to the quality of legislation.

9. We were due to take evidence from the Deputy Minister at our meeting on 12 September 2022.⁹ However, in light of the Senedd observing a period of national mourning following the death of Her Majesty The Queen, Senedd business was suspended on this date. In lieu of the evidence session, the Committee wrote to the Deputy Minister on 22 September 2022;¹⁰ the Deputy Minister responded on 14 October 2022.¹¹

10. We have also taken account of written and oral evidence provided to the Equality and Social Justice Committee.¹²

⁸ EM, paragraph 1

⁹ [Legislation, Justice and Constitution Committee, 12 September 2022](#)

¹⁰ [Letter to the Deputy Minister for Social Partnership](#), 20 September 2022

¹¹ [Letter from the Deputy Minister for Social Partnership](#), 14 October 2022

¹² See the [webpage for the Bill](#).

2. Legislative competence

The Welsh Government is satisfied that the Bill would be within the legislative competence of the Senedd.¹³

General

11. We considered the Bill under the reserved powers model of legislative competence, as set out in section 108A of the **Government of Wales Act 2006** (the 2006 Act).

12. In her statement on legislative competence, the Llywydd, Elin Jones MS, stated that the Bill as introduced would be within the legislative competence of the Senedd.¹⁴

13. We asked the Deputy Minister to confirm that she was content that all provisions of the Bill as introduced fall within the legislative competence of the Senedd. In response, the Deputy Minister said:

"The Llywydd's letter of 06 June to the First Minister confirmed that in her view this Bill is within the legislative competence of the Senedd."¹⁵

Human rights

14. One of the requirements which must be met for a Bill to be within the legislative competence of the Senedd is set out in section 108A(2)(e) of the 2006 Act and requires all provisions of a Bill to comply with the Convention rights.

15. The Deputy Minister told us that no human rights issues have been identified as arising from the Bill.¹⁶

Our view

16. We note that the Llywydd has stated that, in her view, the provisions of the Bill would be within the legislative competence of the Senedd.

¹³ EM, Member's Declaration, page 2

¹⁴ Presiding Officer's Statement on Legislative Competence, 7 June 2022

¹⁵ Welsh Government, Letter from the Deputy Minister for Social Partnership, 14 October 2022, response to question 1

¹⁶ Welsh Government, Letter from the Deputy Minister for Social Partnership, 14 October 2022, response to question 2

17. We note that the Deputy Minister has, within the EM, also set out her view that the provisions of the Bill would be within the legislative competence of the Senedd. However, we are disappointed that she has been unable to confirm this view to us in correspondence, and has instead directed us to the Llywydd's view.

18. We note the Deputy Minister's view that no human rights issues have been identified as arising from the Bill.

3. General observations

The need for primary legislation

19. We asked the Deputy Minister to set out why the Welsh Government had chosen to introduce legislation in relation to social partnership, fair work and socially responsible public procurement as opposed to following a non-statutory approach. In response, the Deputy Minister said:

"Many existing social partnership arrangements in Wales have developed voluntarily and organically. They are not currently underpinned by a common framework and are not co-ordinated with a view to achieving maximum impact. ...

In the absence of legislation, the existing informal and ad-hoc social partnership arrangements could be expected to continue. The Welsh Government believes, however, that there are limitations on how effectively improvements in public service delivery and well-being can be coordinated unless the social partnership approach has a statutory underpinning. This legislation will promote greater consistency of approach and strengthen the effectiveness of social partnership arrangements in Wales with a very clear purpose in mind.

Several reviews of procurement by public bodies in recent years have commented on the lack of consistency with which well-being outcomes are pursued. Whilst there are many examples of good practice based on existing guidance, legislation, along with a system of oversight and accountability, will ensure that good practice is more widespread."¹⁷

Interaction with the UK Government's Procurement Bill

20. In August 2021, the Minister for Finance and Local Government announced that the Welsh Government had accepted an offer from the UK Government to "use UK Government legislation as we leave the EU to reform the basic processes underpinning procurement". The Minister also stated that the Welsh Government had sought "very clear safeguards" that doing so would not fetter its ability to achieve the policy outcomes of the Bill.¹⁸

¹⁷ Welsh Government, Letter from the Deputy Minister for Social Partnership, 14 October 2022, response to question 4

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

21. The UK Government's Procurement Bill was subsequently introduced into the UK Parliament on 11 May 2022.¹⁹ The Welsh Government tabled legislative consent memoranda in respect of the Bill on 9 June 2022²⁰ and 11 July 2022,²¹ which were referred to us and the Public Accounts and Public Administration Committee for scrutiny.²²

22. The Deputy Minister set out the interaction between both Bills as follows:

"... whilst the UK Government proposals centre on procurement processes, both Bills share the high level aims of reducing the workload associated with procurement, increasing transparency and strengthening accountability.

As well as a need to ensure consistent terminology in the two Bills, the main areas of interaction between them are in:

- *the overlap between the Wales Procurement Policy Statement that is referenced in the UK Bill and the well-being goals referenced in this Bill;*
- *the mechanism for tracking Key Performance indicators in the UK Bill and the annual reporting process in this Bill; and*
- *the oversight arrangements required for the UK Bill and the SPC's procurement subcommittee."*²³

23. As part of our scrutiny of the Welsh Government's Legislative Consent Memorandum on the Procurement Bill, we asked the Minister for Finance and Local Government what consideration had the Welsh Government given to using the time it had identified for the Social Partnership and Public Procurement (Wales) 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 said:

"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

¹⁹ UK Parliament, [Procurement Bill \[HL\]](#)

²⁰ Welsh Government, [Legislative Consent Memorandum: Procurement Bill](#), 9 June 2022

²¹ Welsh Government, [Supplementary Legislative Consent Memorandum \(Memorandum No. 2\): Procurement Bill](#), 9 June 2022

²² See the webpage: [Legislative Consent: Procurement Bill](#)

²³ Welsh Government, Letter from the Deputy Minister for Social Partnership, 14 October 2022, response to question 10

*the SPPP Bill will focus on ensuring socially responsible outcomes are achieved from our procurement."*²⁴

24. We therefore asked the Deputy Minister to explain why changing the scope of the Social Partnership and Public Procurement (Wales) Bill to include procurement processes would cause an issue, particularly if the Bill mirrored what the UK Government proposed and led to more accessible bilingual legislation. In response, the Deputy Minister said:

"Welsh Ministers considered that both Welsh contracting authorities and suppliers would have been likely to suffer increased transactional and bidding costs had a single Bill been pursued that would inevitably have resulted in divergence between Wales and the rest of the UK. ...

If Welsh Ministers had made the decision to legislate independently of UK Government, given the complexity and need for alignment the Welsh legislation would have been implemented later. ...

*Welsh language standards will continue, as now, to apply to procurement processes and systems in Wales, ensuring that procurement can be carried out through the medium of Welsh."*²⁵

25. We also asked the Deputy Minister if the Welsh Government had considered introducing a separate procurement Bill which mirrored the provisions in the UK Government's Procurement Bill, subject to scrutiny by Members of the Senedd, which would sit alongside the Social Partnership and Procurement Bill. In response the Deputy Minister told us that "all options were considered carefully", and that:

*"It is also important to note that the UK Bill is undergoing scrutiny by Members of the Senedd through the Legislative Consent process and this will continue with the development of secondary legislation in Wales."*²⁶

26. In addition, in light of the fact that the UK Government's Procurement Bill provides the Welsh Ministers with powers to make subordinate legislation, we asked the Deputy Minister why it is possible for consistency to be achieved through separate secondary legislation being

²⁴ Welsh Government, Letter from the Minister for Finance and Local Government, 1 September 2022, response to question 1

²⁵ Welsh Government, Letter from the Deputy Minister for Social Partnership, 14 October 2022, response to question 6

²⁶ Welsh Government, Letter from the Deputy Minister for Social Partnership, 14 October 2022, response to question 8

implemented in Wales and England, but not by separate primary legislation. The Deputy Minister told us in response:

"When taking forward secondary legislation, officials will continue to work closely with UKG officials to ensure consistency which is essential for both buyers and suppliers in the immediate term ...

*However, equivalent powers will allow the Welsh Ministers to make changes if Welsh policy changes in the future. Such changes would not represent a sea-change as they're likely to be done on one or two aspects rather than in all areas where there are equivalent powers. They would also be subject to the Common Framework, as development of policies and legislation are subject to discussion by the Common Framework for public procurement working group to manage potential divergence issues."*²⁷

27. The Welsh Government has set out its aim to produce good law which is "necessary, clear, coherent, effective and accessible".²⁸ The *Legislation (Wales) Act 2019* also places a duty on the Counsel General to keep under review the accessibility of Welsh law, including the extent it is available in Welsh and English, and the extent it is clearly and logically organised (both within and between enactments).²⁹

28. If the Bill and the UK Government's Procurement Bill are passed, procurement law that is applicable to Welsh citizens will be contained within both Senedd and UK Parliament Acts. With this in mind, we asked the Deputy Minister to explain why the Welsh Government had not adhered to its own principles of clear and accessible legislation by following this approach to legislating on procurement law. In response, the Deputy Minister told us:

"Procurement practitioners in Wales are already used to working to more than one set of legislation ... for example they already need to consider the requirements under the Well-being of Future Generations (Wales) Act 2015.

The potential negative impact on buyers and suppliers of divergent procurement process legislation on procurement would have been significant. This additional complexity would also be experienced by Welsh suppliers bidding for public contracts outside Wales. As the two Bills are moving forward on similar timescales this will allow the guidance, training and

²⁷ Welsh Government, Letter from the Deputy Minister for Social Partnership, 14 October 2022, response to question 9

²⁸ Welsh Government, *Legislation handbook on Assembly bills*, May 2019, paragraph 1.8

²⁹ *Legislation (Wales) Act 2019*, section 1

support provided to buyers and suppliers to be developed so that it is clear and accessible. My officials are working closely with those in the Welsh Government's procurement reform team, who are working with counterparts in the UK Government to ensure consistency and cohesion between the two Bills."³⁰

Balance between what is on the face of the Bill and what is left to subordinate legislation

29. The Bill contains 49 sections and two Schedules, and is divided into four Parts. The Bill also contains:

- five powers for the Welsh Ministers to make regulations,
- one power for the Welsh Ministers to issue a code, and
- two powers for the Welsh Ministers to issue directions.

30. An overview of the Bill's powers to make subordinate legislation is included at chapter 5 of the EM. As previously mentioned, the Welsh Government has also provided a statement of policy intent for subordinate legislation to be made under the Bill.

31. We asked the Deputy Minister if she was satisfied that the Bill strikes the right balance of providing detail on the face of the Bill against providing regulation-making powers to the Welsh Ministers. In response, she said:

*"The only subordinate legislation-making powers in this Bill are those in part 3, which deals with socially responsible public procurement. They have been included for what are often referred to as 'future-proofing' reasons: that is, to enable us to make any operational changes which may be necessary in the future: for example, to amend the list of contracting authorities subject to the provisions of the legislation, or to tweak the list of matters those bodies are required to consider when producing their procurement strategies, which are likely to change over time as strategic priorities evolve."*³¹

³⁰ Welsh Government, Letter from the Deputy Minister for Social Partnership, 14 October 2022, response to question 11

³¹ Welsh Government, Letter from the Deputy Minister for Social Partnership, 14 October 2022, response to question 14

Our view

- 32.** We welcome the Welsh Government's decision to consult on a draft version of the Bill ahead of its introduction. We agree with the views of our predecessor committees³² that this is good practice and, given the potential benefits to the quality of law produced, there should be a presumption in favour of draft bills being published and consulted upon.
- 33.** We acknowledge the Deputy Minister's explanation as to why she considered it appropriate to introduce legislation rather than follow a non-statutory approach.
- 34.** We also acknowledge the Deputy Minister's evidence in relation to the subordinate legislation which may be made under the Bill and the information provided in the statement of policy intent for subordinate legislation to be made under the Bill. While we do not believe that "future-proofing" should be used as a justification for including powers to make subordinate legislation within primary legislation, we acknowledge the examples the Deputy Minister has provided of how the powers within this Bill may be used. We are therefore content with the balance between what is on the face of the Bill and what is left to subordinate legislation.
- 35.** We do not agree with the Deputy Minister's view that the introduction of a wider procurement Bill that would include the scope of both the UK Government's Procurement Bill and the Social Partnership and Public Procurement (Wales) Bill would "inevitably have resulted in divergence" between Wales and the rest of the UK. Indeed, divergence already exists between Scotland and the rest of the UK by virtue of the *Procurement Reform (Scotland) Act 2014*.³³ We are of the view that the Welsh Government could have introduced legislation which would ensure minimal divergence in the areas of procurement processes, while enabling as much divergence as necessary in the area of the procurement outcomes, and the reflection of Welsh Government values in those.
- 36.** We also note that there already appear to be delays to the implementation of the Procurement Bill,³⁴ which call into question the Deputy Minister's suggestion that including provisions within the Social Partnership and Public Procurement (Wales) Bill would have led to the Welsh Government implementing Welsh legislation later.

³² See for example, Constitutional and Legislative Affairs Committee (Fourth Assembly), *Making Laws in Wales*, October 2015, Recommendation 3; Constitutional and Legislative Affairs Committee (Fifth Senedd), *Report on the Children (Abolition of Defence of Reasonable Punishment) (Wales) Bill*, August 2019 paragraph 62

³³ The Scottish Government opted not to join the UK Government's Procurement Bill, as stated in the *UK Government's policy paper on the Bill* (published 16 June 2022)

³⁴ See: PAPA Committee, *Legislative Consent Memorandum on the Procurement Bill: Evidence from the Welsh Local Government Association*, page 18; PAPA Committee, 21 September 2022, RoP [115]

37. We would also like to respectfully assert that, while the UK Government's Procurement Bill is "undergoing scrutiny by Members of the Senedd through the Legislative Consent process", such scrutiny is far removed from the legislative scrutiny of a Bill introduced into the Senedd. Consideration of such a 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.

38. We note the Deputy Minister's comment that the Welsh language standards³⁵ will continue to apply to procurement processes and systems in Wales, ensuring that procurement can be carried out through the medium of Welsh. However, we believe that as the primary legislation which underpins all such procurement processes and systems is the authoritative means to understanding those, the fact that this legislation will only be available through the medium of English within the UK Government's Procurement Bill will not contribute to the accessibility of procurement processes and systems to Welsh speakers.

39. Furthermore, we would like to highlight that it will be the UK Government which will deliver the required training and guidance on the new procurement processes and systems provided by the Procurement Bill, as the Minister for Finance and Local Government has confirmed.³⁶ At the time of writing, the UK Government is not subject to any Welsh language standards; it therefore has no enforceable duty to provide such guidance and training through the medium of Welsh.

40. We make some of these points in our report on the Welsh Government's Legislative Consent Memoranda on the Procurement Bill, and would like to take this opportunity to repeat the conclusion we arrived at within that report.

Conclusion 1. 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 presumption in favour of that option, to enable extensive scrutiny by the people of Wales and their elected Members of the Senedd, and to enable accessible legislation in both Welsh and English.

³⁵ [Welsh Language \(Wales\) Measure 2011, Part 4; List of Welsh language standards regulations](#) (legislation.gov.uk)

³⁶ PAPA Committee, 21 September 2022, RoP [46]

4. Specific observations on particular sections and powers to make subordinate legislation

Section 17 (Social partnership duty: Welsh Ministers)

41. Section 17 of the Bill provides that the Welsh Ministers must consult with the Social Partnership Council for Wales (to be created by section 1 of the Bill) “when making decisions of a strategic nature” about the reasonable steps to take to meet their wellbeing objectives under the *Well-being of Future Generations (Wales) Act 2015*.

42. In written evidence to the Equality and Social Justice Committee, Audit Wales said in respect of section 17:

“...we wonder how the meaning of “decisions of a strategic nature” (about the reasonable steps to take under section 3(2)(b) of the WFGA 2015 to meet Welsh Ministers’ wellbeing objectives), can be appropriately clarified. It does not seem entirely appropriate for the Welsh Ministers to be providing guidance to themselves on the interpretation of this phrase. Clarification of “strategic nature” on the face of the Bill may be more appropriate.”³⁷

43. We asked the Deputy Minister if she had considered clarifying the phrase “decisions of a strategic nature” on the face of the Bill. In response, she said:

“Recently, through the enactment of the socio-economic duty we have provided statutory guidance on what is meant by ‘decisions of a strategic nature’ as set out in section 1 of the Equality Act 2010. This guidance provides examples of strategic decisions that public bodies may make, including medium and long-term plans such as corporate plans, and of course the setting of objectives.

In general, strategic decisions will be those which affect how the public body fulfils its intended statutory purpose over a significant period of time and will not include routine ‘day-to-day’ decisions.”³⁸

³⁷ Equality and Social Justice Committee, *SPPP Bill 29 – Audit Wales*, paragraph 6

³⁸ Welsh Government, Letter from the Deputy Minister for Social Partnership, 14 October 2022, response to question 12

Our view

44. We acknowledge the Deputy Minister's statement that the Welsh Government has published statutory guidance on the meaning of the phrase "decisions of a strategic nature", and examples of such decisions.³⁹

45. However, for reasons of accessibility, we believe that the interpretation section of the Bill should include a signpost to the definition contained within the statutory guidance.

Recommendation 1. The Deputy Minister should table an amendment to the Bill to include, within its interpretation section, a signpost to the definition of "decisions of a strategic nature" within the statutory guidance on the socio-economic duty made under the *Well-being of Future Generation (Wales) Act 2015*.

Section 20 (Fair work)

46. Section 20 of the Bill amends section 4 of the *Well-being of Future Generations (Wales) Act 2015* by substituting "fair work" for "decent work" within the existing "A prosperous Wales" goal.

47. According to the EM, this provision replaces a "place holder" for fair work provisions which were included in the draft Bill.⁴⁰ The consultation document which accompanied the draft Bill explained the rationale for the inclusion of a place holder:

"The Welsh Government wishes to see Wales become a 'fair work nation'. We endorse the widely accepted definition of fair work set out in the report of the Fair Work Commission: 'Fair work is where workers are fairly rewarded, heard and represented, secure and able to progress in a healthy, inclusive environment where rights are respected.'

The Fair Work Commission's report, Fair Work Wales, recognised that there are limits on what the Welsh Government can do legislatively within the current devolution settlement as set out in the Government of Wales Act. Fair Work Wales also recommended that the Welsh Government explores and takes all opportunities within its legislative competence to take forward fair work.

Therefore, in keeping with the recommendations, we are seeking to explore through this draft Bill how we can take forward fair work, within our

³⁹ Welsh Government, *The Socio-economic Duty: statutory guidance*, March 2021

⁴⁰ Explanatory Memorandum, paragraph 150

legislative competence, whilst retaining Government's ambition to make Wales a 'fair work nation'."⁴¹

48. The EM states that the consultation exercise found there was "no clear consensus on the definition of fair work that should be enshrined in law", but there was "strong support for full adoption of the definition of fair work given in the Fair Work Commission's report from some respondents."⁴²

49. In written evidence to the Equality and Social Justice Committee, Professor Alan Felstead from Cardiff University noted that:

*"The accompanying Explanatory Memorandum attached to the tabled Bill suggests that the integration fair work into the Well-being of Future Generations Act 2015 ... will mean that 'fair work takes on its ordinary meaning', even though the term has very specific meaning which has been accepted by Welsh Government. No definition of fair work is provided in either the tabled Bill or the Explanatory Memorandum."*⁴³

50. There were also provisions within the draft Bill which placed a duty on the Welsh Ministers to set fair work objectives, to take all reasonable steps to meet those objectives, and to report annually on their progress in that regard.⁴⁴

51. We asked the Deputy Minister why these provisions had not been included in the Bill as introduced, and whether they had been removed due to the limits on the Senedd's legislative competence. In response, the Deputy Minister told us:

"We are on record as having accepted the Fair Work Commission's definition and characteristics of fair work in our policy work. We stand by that. But this does not mean we can legislate for that definition. ...

Drawing on the Well-being of Future Generations (Wales) Act 2015 ("WFG Act") is consistent with the overall approach across the Bill, where other provisions are linked to the sustainable development principle set out in that Act. Our approach also reflects the spirit of the Fair Work Commission recommendation to incorporate fair work within the WFG Act.

⁴¹ Welsh Government, Consultation document: Draft Social Partnership and Public Procurement (Wales) Bill, paragraphs 66-69

⁴² EM, paragraph 148

⁴³ Equality and Social Justice Committee, SPPP Bill 02 – Professor Alan Felstead, Cardiff University, page 4

⁴⁴ Welsh Government, Consultation document: Draft Social Partnership and Public Procurement (Wales) Bill, paragraph 63

*This approach captures public bodies and so has a greater reach and could have greater effect than a standalone Fair Work Duty only on Welsh Ministers as previously proposed. I also think it important to avoid the continuation of the use of different terms that can be interpreted to cover broadly similar or overlapping activity i.e., decent work and fair work. We know from our engagement that consistency in terminology will be welcomed. All of this could help contribute to a more effective approach to the consideration of fair work in the pursuit of well-being."*⁴⁵

Our view

52. We acknowledge the Deputy Minister's explanation that, because of restrictions on the Senedd's legislative competence, the Welsh Government was not able to provide a definition of "fair work" within the Bill.

53. We also acknowledge the Deputy Minister's statement that the approach taken within the Bill "has a greater reach and could have greater effect" than a standalone fair work duty placed on the Welsh Ministers only, as proposed within the draft Bill.

54. We however note Professor Alan Felstead's comments in relation to the absence of a definition of "fair work", either on the face of the Bill or within the EM. We believe that the explanation within the EM that "'fair work' takes its ordinary meaning" is insufficient and could be a source of confusion.

Recommendation 2. The Fair Work Commission's definition of "fair work", with appropriate commentary, should be included within non-statutory guidance for stakeholders and bodies subject to the duties under the *Well-being of Future Generation (Wales) Act 2015*.

Section 22 (Contracting authorities); section 24 (Socially responsible procurement duty); section 25 (Socially responsible procurement duty: major construction contracts); section 39 (Annual socially responsible procurement reports)

55. Section 22(4) of the Bill includes a power for the Welsh Ministers to make regulations, subject to the affirmative procedure, to amend section 22 and Schedule 1 which lists "contracting authorities". This is therefore a Henry VIII power. According to the EM, this power

⁴⁵ Welsh Government, Letter from the Deputy Minister for Social Partnership, 14 October 2022, response to question 3

will allow the Welsh Ministers “to list or delist contracting authorities, who are subject to the socially responsible procurement duty, in future.”⁴⁶

56. Section 24(8) includes a power for the Welsh Ministers to make regulations, subject to the affirmative procedure, to prescribe contracts which are “prescribed contracts” for the purposes of Part 3 of the Act. According to the EM, this power will enable the Welsh Ministers to “respond in light of the need to impose duties in respect of certain contracts in future.”⁴⁷

57. Section 25(3) includes a power for the Welsh Ministers to make regulations, subject to the affirmative procedure, to amend section 25 (which defines major construction contracts). Again, this is a Henry VIII power. According to the EM, this power will enable the Welsh Ministers “to respond to future changes.”⁴⁸

58. We note that the Minister explains that the reason for the use of the affirmative procedure for regulation-making powers under sections 22(4), 24(8) and 25(3) is because the regulations will amend primary legislation.⁴⁹

59. Section 39(2) includes a power for the Welsh Ministers to make regulations, subject to the negative procedure, to prescribe other information which socially responsible procurement reports should contain.

Our view

60. We are content with the application of the affirmative procedure to the Henry VIII powers contained within sections 22(4), 24(8) and 25(3), and the negative procedure to the power within section 39(2) of the Bill.

Section 32 (Public services outsourcing and workforce code)

61. Section 32 requires the Welsh Ministers to publish a code of practice (the “public services outsourcing and workforce code”) about employment and pensions matters related to outsourcing services contracts. The “social public workforce clauses” will be included as part of that code. Other sections (such as section 33) also provide that the code published under section 32 must include model contract clauses, that will underpin the aims of the Bill in ensuring socially responsible public procurement. The code will not be subject to any scrutiny procedure in the Senedd.

⁴⁶ EM, page 44

⁴⁷ EM, page 44

⁴⁸ EM, page 44

⁴⁹ EM, page 44

62. The justification provided in the EM for the absence of a procedure to the power under section 32 is because the code of practice covers “operational matters connected with outsourcing services contracts”.⁵⁰

63. We asked the Deputy Minister for further detail as to why no procedure has been applied to this power, why there is no duty to consult on the code, and whether the Welsh Government would publish a draft code of practice ahead of the Bill’s amending stages. In response, she said:

“All statutory guidance will be developed in social partnership and will include open consultation with stakeholders. This process cannot begin formally until such time as the Bill receives Royal Assent, although preliminary work will be taking place beforehand. Given the quantity of statutory guidance that will be needed to support the procurement duties it would be difficult to prepare a draft Code of Practice in time for the amending stages of the Bill.”⁵¹

Our view

64. We note the Deputy Minister’s comments in relation to section 32 of the Bill. However, it continues to be unclear to us why no procedure has been applied to the Welsh Ministers’ power to issue the public services outsourcing and workforce code. We are of the view that the code will play a central role within the aims of the Bill in ensuring socially responsible public procurement, and as such it should be subject to the negative procedure at the very least.

Recommendation 3. The Deputy Minister should table an amendment to the Bill to apply the negative procedure to the power to issue the public services outsourcing and workforce code within section 32 of the Bill, and any future revisions to it.

65. We note the Deputy Minister’s comment that all statutory guidance will be developed in partnership and will include open consultation with stakeholders. Since the Deputy Minister has committed to consult on all statutory guidance in this way, we see no reason why a duty to consult on the code, and future revisions to it, cannot therefore be included on the face of the Bill.

⁵⁰ EM, page 46

⁵¹ Welsh Government, Letter from the Deputy Minister for Social Partnership, 14 October 2022, response to question 15

Recommendation 4. The Deputy Minister should table an amendment to the Bill to include a duty to consult on the public services outsourcing and workforce code within section 32, and any future revisions to the code.

66. Furthermore, since all statutory guidance under the Bill will be developed in partnership and subject to consultation, we also believe it would be appropriate to include on the face of the Bill a duty to consult on guidance issued under section 43.

Recommendation 5. The Deputy Minister should table an amendment to the Bill to include a duty to consult on guidance issued under section 43, and any future revisions to such guidance.

67. We acknowledge the Deputy Minister's statement that it would be "difficult" to prepare a draft code in time for the amending stages of the Bill. As previously stated, we are of the view the code has a central role within the aims of the Bill, and for that reason we believe that Members of the Senedd ought to have an opportunity to scrutinise a draft version of it as part of their scrutiny of the Bill.

Recommendation 6. The Deputy Minister should publish a draft version of the public services outsourcing and workforce code ahead of the start of Stage 3 of the Bill.

Section 38 (Procurement strategy)

68. Section 38(3) includes a power for the Welsh Ministers to make regulations, subject to the negative procedure, to amend section 38(2) to:

- specify other matters which procurement strategies should address; and
- to reduce the number of days specified in section 38(2)(c) (the maximum number of days within which invoices should be paid).

69. The Deputy Minister justifies the application of the negative procedure to this Henry VIII power to amend primary legislation by saying:

*"Whilst regulations will amend primary legislation, the specific nature of procurement strategies is an operational matter for determination by the Welsh Ministers."*⁵²

⁵² EM, page 44

70. We asked the Deputy Minister why she had decided to apply the negative procedure to this Henry VIII power, instead of the affirmative procedure as the Welsh Government drafting guidelines would ordinarily recommend.⁵³ In response, she said:

*"In keeping with the convention agreed between the Senedd and Counsel General, we have ensured that those subordinate legislation-making powers which allow for provisions in the Bill itself to be amended are all subject to the affirmative procedure. The exception being regulations under section 38 which are operational in nature dealing with matters which procurement strategies must address. Those that deal with operational or technical matters, which do not alter the purpose or effect of the primary legislation itself in any way, are those we have concluded should be made under the negative procedure."*⁵⁴

Our view

71. We believe that the power within section 38(3)(a) of the Bill is a wide, unlimited Henry VIII power to amend section 38(2) to "specify other matters which procurement strategies must address". We therefore do not agree with the Deputy Minister's view that the power deals "with operational or technical matters", and consequently do not believe that the negative procedure is appropriate for this power. We also do not believe that the power within section 38(3)(b), to reduce the number of days provided in a procurement strategy by when an invoice may be paid, is appropriate to be exercised under the negative procedure.

Recommendation 7. The Deputy Minister should table an amendment to the Bill to apply the affirmative procedure to the power within section 38(3)(a).

Recommendation 8. The Deputy Minister should table an amendment to the Bill to apply the affirmative procedure to the power within section 38(3)(b).

72. We also note the Deputy Minister's reference to the "convention agreed between the Senedd and Counsel General" in respect of subordinate legislation-making powers. It is unclear to us which convention this is.

Recommendation 9. The Deputy Minister should clarify which convention she is referring to in her letter of 15 October 2022 to the Committee.

⁵³ Welsh Government, Guidelines on subordinate legislation: draft affirmative or negative assembly procedure, 11 April 2012

⁵⁴ Welsh Government, Letter from the Deputy Minister for Social Partnership, 14 October 2022, response to question 16

Section 48 (Coming into force)

73. Section 48(1) of the Bill states that, if passed and enacted, the Bill would come into force “on such day as the Welsh Ministers may by order appoint”.

74. We asked the Deputy Minister when she intends for the Bill to come into force, should it be passed by the Senedd. In response, she said that it was the Welsh Government’s intention for it to come into force “as soon as is reasonably practicable”, and as follows:

“...the four component parts of the Bill place a range of duties and requirements on various bodies – including Welsh Ministers. As such it will be necessary to sequence commencement of certain sections of the Act. For example, in relation to the Social Partnership Council, we would be looking to commence the appointment provisions by autumn 2023, with a view to those appointments having been made, and the Council able to meet, before the end of 2023.

In terms of the fair work and social partnership duties, we intend to publish initial advice during 2023 so that public bodies, including any additional bodies which may be brought within the scope of the WFG Act are able to plan appropriately for the introduction of the new duties and understand what may be expected of them. Statutory guidance issued under the relevant provisions of the Bill will need to be agreed by the Social Partnership Council and will be published as soon as possible after the Council is established in order that public bodies are able to set or review their well-being objectives in 2024 having given regard to that guidance. More broadly, we will also be looking to align the objective-setting and reporting cycles in this legislation as far as possible with those that our partners already work to under the WFG Act.

Turning to socially-responsible procurement, whilst the Social Partnership Council will be responsible for establishing the public procurement sub group itself, work is already under way to develop the necessary guidance, training and monitoring arrangements which will be required to support these provisions. This work is being and will continue to be undertaken in consultation with social partners and the public procurement community in Wales. We will also look to coordinate the changes resulting from the implementation of the UK Procurement Bill in Wales with the provisions in

our Bill are implemented in a coherent way so as to avoid overburdening service providers with uncoordinated waves of statutory changes.”⁵⁵

Our view

75. We acknowledge the Deputy Minister’s comprehensive explanation of when she expects the Bill’s provisions to be implemented.

⁵⁵ Welsh Government, Letter from the Deputy Minister for Social Partnership, 14 October 2022, response to question 17
