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Llywodraeth Cymru
Welsh Government

Jenny Rathbone MS
Chair of the Equality and Social Justice Committee
Welsh Parliament
Cardiff Bay
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22 July 2022

Dear Jenny,

Social Partnership and Public Procurement (Wales) Bill

Following my appearance at Committee on the 20 June where the Social Partnership and Public Procurement Bill was scrutinised you requested some follow up information, which I am pleased to provide.

Please see the accompanying annex 1 which responds to the questions set out in your letter.

At the Committee I also agreed to provide information on the development of statutory guidance regarding contract clauses. Work is underway on wider plans for developing statutory guidance and for engaging with key stakeholders as part of that. I will be able to share more on this work when Senedd returns after the summer recess, including the development of construction and outsourcing services contract clauses and guidance are two important parts of this work.

I hope this information is useful to the Committee and I look forward to working with you and the committee during the scrutiny of the Bill.

Yours sincerely

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Rydym yn croesawu derbyn gohebiaeth yn Gymraeg. Byddwn yn ateb gohebiaeth a dderbynnir yn Gymraeg yn Gymraeg ac ni fydd gohebu yn Gymraeg yn arwain at oedi.

We welcome receiving correspondence in Welsh. Any correspondence received in Welsh will be answered in Welsh and corresponding in Welsh will not lead to a delay in responding.

Q&A – ESJ Committee – 4th July 2022

Overarching questions about the Bill

- 1) What tangible outcomes will you aim to deliver in order to achieve the Bill's overall objective of improving public services and better wellbeing for those providing them?**

The overall objective of the bill is to improve economic, environmental, social and cultural well-being – including by improving public services. The aims of the bill are wide, and rest on a way of working that will help public bodies to respond to the challenges that they face. Many of the objectives of the Bill are focused on implementing change that is not easily quantifiable, for example the social partnership duty focuses on implementing culture change in existing structures, including aims to instil system leadership, which includes a commitment to a common vision and consensus among stakeholders on mutual areas of interest. Measuring this objective and other non-financial benefits requires the use of qualitative inquiry with stakeholders to determine their views on the extent to which this has occurred, and how structures and opportunities to engage can be tailored to better achieve the long-term aims.

In line with the approach to the Well-being of Future Generations (Wales) Act, substantive and tangible outcomes in relation to public services will depend on how public bodies amend their well-being objectives to reflect the change to fair work

The theory of change work for the Bill was completed in December 2021 and suggested data for measuring the outcomes in the three main components of the bill – fair work, social partnership and socially responsible procurement. This work is being revisited to reflect the final form of the bill as introduced and will confirm outcomes in the spring of 2023.

For procurement, success will be measured in progress towards delivering outcomes in all of the wellbeing categories. This will require the collection and reporting of relevant data. Work is underway on developing the metrics that will be needed and identifying gaps in the data currently collected, including those relating to fair work

- 2) What specific indicators will you use to measure the success of the Bill in delivering these outcomes? Eg how would you assess whether the legislation had a positive impact on industrial relations or staff retention in public bodies?**

The refreshed theory of change will include a set of agreed outcomes, identified data that can measure the outcomes, and details of whether this is already collected by a third party and can be used to measure progress, or

whether no current data is available and would therefore require primary research as part of the evaluation of the Bill.

The evaluation will incorporate a mix of quantitative and qualitative measures depending on the nature of the outcome. For example, when looking at positive impacts on industrial relations, a qualitative exploration (using a case study approach, for example) of the extent to which the values of social partnership have been embedded within tripartite structures would be most appropriate. Qualitative approaches would also enable an understanding of other outcomes, such as the extent to which a culture change between employers and employees occurs in the way they resolve workplace issues. This is in contrast to other outcomes which may be evidenced by quantitative measures, for example the measurement of progress on 'creating high quality jobs' as an outcome can be assessed by measures such as % of employees earning at least the Real Living Wage, staff retention and employee surveys rating the quality of their job.

3) Please can you set out evidence of the need for greater consistency across public bodies to be achieved through this piece of legislation? Where do you think the key gaps are?

On procurement, recommendations have been made in reports, for example by Wales Audit office and in the Future Generations Commissioner's Section 20 report, calling for more consistent application of good practice in delivering socially responsible outcomes. The reports do not set out key gaps, however they are uniform in the call for greater consistency and this legislation will introduce a coherent framework and allow for greater transparency of outcomes.

With regards to social partnership, we are in the process of mapping all of the social partnership structures that are in place at the national level. Early work has indicated that there is a wealth of structures and approaches, at this level alone. Extrapolating this across the public sector indicates that there is a range of approaches. The legislation envisages a system of social partnership across Wales, and this requires there to be consistency and appropriate links between different fora.

4) You mentioned in your oral evidence that greater transparency will be a key mechanism for achieving the objectives of the Bill. Can you explain why you have chosen this mechanism, and why it will be more effective than other alternatives?

We sought views on enforcement mechanisms when we consulted on the draft Bill last Spring. Stakeholders had different views about the merits of any sort of legal enforcement mechanisms to ensure that those subject to the various duties adhered to them in order to ensure the outcomes sought. Views ranged from believing that no enforcement was needed, to those who believed that a fine regime should be introduced.

We considered the options and views carefully, in relation to the requirements that we were placing on public bodies. We have decided that it would run counter to the spirit of social partnership to try to impose a punitive enforcement regime of any kind. Specifically, introducing a fine regime could have a detrimental impact on the delivery of public services. The system we are creating through the Bill relies on transparency and regular reporting, and places an onus on each partner to fully engage and to hold one another to account. The SPC will be able to advise Welsh Ministers on how effectively the new arrangements are working and make recommendations for change if appropriate.

Social partnership

5) Can you give a practical example of a case when the social partnership duty would have delivered a better outcome in a public body when setting its well-being objectives or making strategic decisions?

It is difficult to address this question as written as it calls for a hypothetical response whereby I would need to assume an outcome which is unknown. I can, however, point to an example where the social partnership approach led to a positive outcome in relation to well-being through the co-creation of an all-Wales NHS Respect and Resolution policy.

In June 2021, NHS Wales launched a new Respect and Resolution policy across all NHS Wales employers to replace existing grievance and dignity at work policies. This policy was developed in partnership with employers and trade unions and signed off at the Welsh Partnership Forum (Health's tripartite social partnership body). Importantly, this policy cannot be varied without agreement from this forum, which helps to deliver consistency across NHS employers in Wales. The Respect and Resolution policy has been developed as part of a very different approach to traditional all Wales policies and procedures, with employers and unions coming together to co-design a new way of working based on their often negative or challenging experiences of dealing with grievances and dignity at work complaints. The policy puts the focus on early intervention from both unions and managers to prevent problems by building healthier working relationships and workplaces. This aligns with the broader work being undertaken across NHS Wales by organisations on values and behaviours as well as the approaches set out in the Workforce Strategy for Health and Social Care such as compassionate leadership. A joint review of the policy is currently underway.

6) What work has been done to understand and address capacity issues that may prevent smaller employer organisations and trade unions from engaging fully with the social partnership approach taken in the Bill?

Proposals for the Social Partnership and Public Procurement (Wales) Bill were developed in close collaboration with social partners and were the subject of formal consultation processes.

Wherever possible, they are looking to build on existing approaches that have been taken to social partnership and provide a certainty that arrangements will continue in the future. With regards to the SPC, the legislation sets out a minimum number of times that the Council will meet each year. Additional meetings, or the establishment of sub groups would be agreed in social partnership, which ensures that employer organisations and trade unions are fully engaged in developments and can agree in light of the capacity they have.

I understand that a significant number of social partnership structures have developed at a national level and I would anticipate that as part of its duties the SPC will provide advice to Ministers on whether these arrangements are appropriate. As preparation for that, we have been undertaking a process to map existing national level structures and are engaging social partners on that work.

The Welsh Government has previously delivered training to public bodies in Wales to help them develop social partnership relationships. We will keep under review the need for similar development in the future.

7) Do you plan to introduce a compliance mechanism for the social partnership duty? If so, please can you provide details of how this will operate.

The system we are creating through the Bill relies on transparency and regular reporting to support improvements in social partnership.

Public bodies covered by the duty will be required to produce and submit an annual report setting out how they have complied with the duty, agreed with their recognised trade unions or (where appropriate) other representatives of their staff and these will be considered by the SPC.

Welsh Ministers will also be required to produce an annual report setting out how they have complied with the social partnership duty and that report must be submitted to the SPC and laid before the Senedd for scrutiny. The report must be agreed with the SPC or contain a statement explaining why it was not agreed.

The SPC will be able to advise Welsh Ministers on how effectively the new arrangements are working and make recommendations for change if appropriate.

As we have laid out in question 4 above following an extensive consultation exercise on the draft Bill we decided that it would be counter to the spirit of social partnership to try to impose a punitive enforcement regime of any kind to ensure compliance with the duties imposed by the Bill.

Selection of Social Partnership Board members

- 8) You said that the selection process would be conducted in line with the way Public Appointments are made. The Committee would find it useful to see the PS and JD for such appointments to understand the impact the successful appointees are expected to make. When do you expect drafts to be available for the Committee to scrutinise?**

The intention is very much that the SPC's selection process follows broadly the same principles as those underpinning the Public Appointments process. Whilst we did consider adopting the full public appointments process for the SPC, this is not feasible because it would not be compatible with the nomination process set out in the Bill. It would not be possible to marry an employment-style process such as that required for Public Appointments with the nomination of individuals by representative bodies.

However, we are considering ways in which elements of the Public Appointments process can be mirrored or adopted in the selection process for SPC members. This includes considering whether person specifications and job descriptions would be needed for the selection process.

Socially responsible public procurement

- 9) How does this Bill interact with the UK Government's Procurement Bill, and what impact has this had on the development of this piece of legislation?**

The UK Procurement Reform Bill is primarily about the procurement process. In contrast the Socially Responsible Procurement Duties in the SPPP Bill are about how we use public procurement in the pursuit of the well-being goals and improved public service delivery.

In general terms the UK Bill replaces the previous procurement legislation, whereas the SPPP Bill focuses on well-being outcomes, reporting of outcomes, contract management, oversight and accountability.

We had already made considerable progress in shaping our Bill before the UK Government published its Green Paper on Procurement Reform. However, we have reflected on the UK approach and taken steps to ensure alignment where possible.

10)The Welsh Government wrote to the UK Government and other devolved administrations about this Bill as it is covered by the Public Procurement Common Framework. Did any of the other UK administrations raise concerns with you about the Bill? If so, what were their concerns and how did you respond?

No concerns have been raised by either the UK or the other devolved governments.

11)In developing this Bill, can you explain how the measures in place in Scotland have influenced the content of the Bill, and why you've chosen to take a different approach in some cases?

The Explanatory Memorandum explains that some procurement provisions in the Bill were inspired by the Procurement Reform (Scotland) Act 2014, in particular the sustainable procurement and reporting duties.

We have taken a different approach because the legislation in Scotland does not include duties relating to compliance and enforcement, and it is difficult to identify published information that allows time series comparisons of sustainable outcomes to be made. The Scottish legislation also does not include specific duties on contract management. These are priorities in Wales.

12)The explanatory memorandum (p.37) states that Scottish procurement legislation “demonstrates that even when regulations are in place it takes time for public bodies to consistently put new measures in place”. How long do you think it will take public bodies in Wales to consistently implement the measures in this Bill and why?

Implementation will begin with development of statutory guidance. Social partners and stakeholders will be invited to contribute to its development. Welsh Government will also put guidance and support in place for public bodies, and for suppliers via Business Wales.

Not all of the duties will come into force immediately and concurrently. For example, it will not be possible to report until the details of what is required by statutory guidance have been published and an annual cycle has been completed. Further details of this will be made available in due course.

13) How will you minimise the time that it takes public bodies to consistently implement the procurement measures in this Bill?

We will work to ensure public bodies and suppliers are prepared for this Bill and the UK Procurement Reform Bill coming into law. The Bill introduces improved transparency, the collection and reporting of data on processes and outcomes, and regular scrutiny by the Social Partnership Council and its procurement sub-group. These are the means by which we can speed up progress towards consistent application of the duties and delivery of expected outcomes.

14) Section 41 of the Bill provides Welsh Ministers with powers to investigate how a contracting authority carries out procurement. Can you set out the circumstances under which you would envisage using these powers?

The Bill makes provision for the Social Partnership Council, with the assistance of a public procurement sub-group, to review summaries of annual reports and provide advice to Ministers. Welsh Ministers will be able to identify organisations or sectors where progress against objectives is slower and carry out investigations. Other matters, such as lack of engagement with the construction and outsourcing services contract management duties, may also trigger an investigation.

15) The Explanatory Memorandum highlights that the construction duty will be used as a test of whether similar duties should be extended to other sectors at a later date. Which other sectors are you considering introducing contract management duties to, and what criteria will you use to determine whether to do this? Given the impending rollout of UFSM to all primary pupils, please can you explain why closer attention has not been paid to public procurement of food and strengthening the foundational economy to improve food security?

We included contract management duties for major construction projects because construction accounts for around a third of the overall procurement spend by public bodies in Wales, and because we know it has complex supply chains where there is significant risk and potential opportunity around delivering socially responsible outcomes. We will learn from the contract management duty, but we do not currently have any plans to extend it into other specific sectors. We recognise the opportunities in improving the amount of food sourced within Wales and we will explore how the statutory guidance can support this.

16) In the draft Bill consultation, public sector procurement staff set out concerns about their capacity to deliver on the Bill's requirements, particularly in relation to contract monitoring post-procurement. How do you intend to address these concerns?

Procurement and contract management staff in public bodies will be required to operate within a very different legislative framework when both this Bill and the UK Procurement Reform Bill come into force. This is one of the reasons for focusing on contract management in major construction contracts initially.

We will minimise difficulties and maximise positive outcomes if we ensure that the duties can be applied proportionately, which will be supported through the guidance, that we engage with stakeholders during the development of the guidance, and that we put sufficient resources in place within Welsh Government to support implementation. These are priorities for us.

17) Correspondence to Ministers from the Welsh Centre for International Affairs and Size of Wales questions why the global responsibility aspect of the WFGA has not been reflected in the draft legislation on public procurement. An initial indication of why this has been omitted from the draft Bill would be helpful.

The legislation links socially responsible procurement directly to the well-being goals, which include global responsibility.

In the WFGA global responsibility is set within the context of addressing outcomes within Wales. It is described as “when doing anything to improve the economic, social, environmental and cultural well-being of Wales, takes account of whether doing such a thing may make a positive contribution to global well-being.” The same will be true for the Socially Responsible Procurement Duty and this will be clarified in statutory guidance.

Coming into force

18) Section 48(1) of the Bill allows the Welsh Ministers to bring this legislation into force on a day of their choosing. Should it be passed by the Senedd, when do you intend this legislation to come into force?

The SPC will be established following relevant provisions coming into force and is expected to be implemented in the 2023/24 financial year. The Bill's other provisions are intended to be introduced as soon as reasonably practical after this.

Additional info the Deputy Minister and her officials agreed to provide

19) Further information on resources used to shape the legislation, including the international evidence used.

During the early stages of developing the SPPP Bill the team compared the role that legislation played in driving socially responsible procurement across the governments of the UK. This included parts of the Procurement Reform (Scotland) Act 2014, the Public Services (Social Value) Act 2012 that applies to English public bodies and our own Well-being of Future Generations (Wales) Act 2015.

The team also looked at oversight and compliance regimes for public procurement in different countries around the world, including in Europe, North America, Africa and Australia. The conclusion was that whilst most regimes appear to concentrate on compliance with tender requirements as set out in national procurement legislation, few appeared to concentrate on monitoring delivery of socially responsible outcomes through procurement, even where underlying procurement legislation includes these measures.

A later, separate piece of work was undertaken by the research team within Welsh Government into the academic literature on Socially Responsible (social, environmental, economic and cultural) outcomes through procurement, both in the public and private sectors. It is summarised in the Explanatory Memorandum. Very little was found on cultural outcomes, whilst there is more extensive literature on environmental outcomes.

20) Analysis of developments in relation to Scottish food and whether improvements have been caused by legislation or policy.

We have learned from the Scottish experience of implementing free school meals by considering their planning with Local Authorities, the challenges they have had with delivery, and the way in which they have managed communications with Local Authorities, schools, and families. Legislation is one means of giving effect to policy and it is not straightforward to identify how much improvement has been down to policy as opposed to the legislation which gives effect to that policy.

Further information on food procurement is provided in annex 2.

21) Whether the socially responsible procurement elements of the Bill apply to contract extensions.

The contract management duties will apply all to all new major construction and outsourcing services contracts. They will not be applied retrospectively to existing contracts. Contract extensions are based on existing contractual

terms. Any changes would need to be negotiated and carried out within the current legislative framework.

Annex – Food Procurement and learning from Scottish Government policy and legislation

The Equalities and Social justice Committee has asked for “*an analysis of developments in relation to Scottish food and whether improvements have been caused by legislation or policy*”.

Officials from the Foundational Economy and Free School Meals teams have provided the following information, which provides a response to the question above in relation to Free School Meals, and then gives an update on food procurement work more generally. Discussions are underway on how good practice on food procurement can be included in the statutory guidance supporting the SPPP Bill.

Learning from Scotland on Free School Meals

In considering the implementation of the commitment to universal free school meals Welsh Government has learned a lot from Scotland. Officials meet frequently with counterparts to learn about their planning with local authorities, the challenges they've had with delivery, how they have managed communications with LAs/schools and families and most recently a session with some of their dieticians around managing special diets.

A project board has been set up to ensure that work on the procurement of food in different parts of Welsh Government is drawn together. This includes the Foundational Economy programme which is supporting the Local Authorities Catering Association in making the transition to universal free school meals as well as considering what will need to be put in place to align policy priorities, including around public health, the climate and nature emergencies and moves to a more sustainable food system. The team is also working closely with Caerphilly Council to increase supply of Welsh food into school meals through the Welsh public sector food frameworks that they lead on.

Update on Food Procurement

The food sector is of fundamental importance in Wales, because:

- (a) it is a key part of the Foundational Economy, offering many high value employment opportunities and potential to strengthen our self-sufficiency in these volatile times;
- (b) it is vital to health and wellbeing; and
- (c) it can play a major role in helping the Welsh Government to realise its net zero ambitions.

Public sector procurement plays an important role in re-localising the food chain. The public sector in Wales spend around £94.4m on food and catering and while that may seem relatively small (being roughly equal to the turnover of a single Tesco hyper market) compared to the £3bn value of food retail, for our Welsh producers and suppliers it is still a desirable market that represents a huge opportunity for local supply.

There is substantial opportunity to reduce carbon emissions in public sector food supply chains by aiming to consume food as close to the point of production as possible. This ensures shorter supply chains and less CO2 emissions associated with long distribution and delivery arrangements. Sustainable food production is also important to minimise damage to the natural environment.

The Foundational Economy team has commissioned a Welsh public sector food procurement survey to build a picture of food procurement spend across Wales, the amount of Welsh food being supplied and attitudes/barriers to buying Welsh. The supply side have also been included to identify barriers to supplying the public sector. The survey results will provide a rich baseline of data that will strengthen our work in this area.

Welsh Government is developing “Buying Local and Sustainable Food” procurement guidance for all food contracts/framework agreements to ensure opportunities are maximised for Welsh food businesses and that social, economic, environmental and cultural outcomes are achieved. This guidance will promote a move away from lowest cost approaches in food tenders, greater weighting on social / wellbeing objectives and that contract award criteria includes wider benefits such as jobs/training, fair work, ethical trading, reduced CO2 emissions, food produced within a certain radius, etc. and all are scored reflecting their high importance.

A Backing Local Firms fund has been launched, with food being one of the sectors targeted. The Fund has enabled:-

- a sustainable workforce campaign in the Food & Drinks industry;
- a grant scheme to fund food safety accreditation for 46 Welsh food SMEs to increase their involvement in local supply chains; and
- the Welsh Fishermen’s Association to undertake a scoping study looking at infrastructure, logistics and distribution as well as a ‘New Entrant Scheme’ to future-proof the profession, build capacity and ensure more resilient fishing communities.

Other projects include:

Carmarthenshire Council Challenge Fund Project

- Carmarthenshire Council was funded in 2021 to develop a report to look at how to increase local food into schools, reduce CO2 emissions along with better understanding of capacity and capability of local producers. This work found matching food supply and demand is a significant part of the challenge in putting more local food on the public sector plate, with capacity of many local producers an issue.
- Several of the report’s recommendations are now being addressed. Through the Foundational Economy Programme’s Backing Local Firms Fund, Hywel Dda Health Board and Carmarthenshire Council are being funded to run a feasibility study on a cook/freeze delivery model for hospital / school meals using local food.

Cwm Taff Health Board

- The National Collaborative Commissioning Unit (hosted by Cwm Taff Health Board) has been supported by the Foundational Economy unit to apply social entrepreneurship strategies to the food sector undertaking supply chain analyses from farm to hospital patient. Options for replicating this on a wider basis across the public sector are being considered.