

# **Draft Social Partnership and Public Procurement (Wales) Bill**

**Wales TUC response to consultation  
April 2021**



## **Wales TUC consultation response: Draft Social Partnership and Public Procurement (Wales) Bill**

We strongly welcome the publication of the draft Social Partnership and Public Procurement (Wales) Bill. It offers significant opportunities to make work fairer in Wales, and ensure trade unions have a strengthened role in shaping the work of government and other public bodies to achieve this. We are also very grateful to Welsh Government for continuing to work on this draft legislation during the pandemic, and for producing the draft bill and consultation in social partnership with the Wales TUC's General Secretary seconded to work on it for the last 12 months.

### **About the Wales TUC**

The Wales TUC exists to improve the economic and social conditions of workers in Wales, regardless of if they are currently in a job or not. Its mandate and purpose builds on the role of its individual affiliated trade unions.

Workers join trade unions to represent their interests, and these unions affiliate to the TUC to establish a shared agenda, agreed democratically at a Congress held every two years and managed by the General Council which meets four times a year.

Around 400,000 people are trade union members in Wales. The vast majority of these people are members of trade unions which are affiliated to the Wales TUC.

### **Why the bill is required**

#### **Question 1: Do you agree with the reasons set out regarding the need for the Bill? Do you have any comments concerning the case for change?**

We welcome the positive case made for the bill in relation to areas like productivity and the effective delivery of public services, but we feel that the potential to improve individuals' socio-economic well-being is downplayed, and there is no recognition of people's labour rights. We are concerned that this suggests that fairer work and social partnership are only worth pursuing if there are 'business benefits', which risks suggesting that labour exploitation is also acceptable if it achieves the same outcomes. We set out some of our specific concerns below:

#### ***Social partnership***

We broadly accept the definition of social partnership and welcome its inclusion. It is imperative that this is communicated extensively as there is often a lot of confusion about this definition.

We think the definition could be strengthened to acknowledge that while it is important that social partners recognise and respect each other's interests, it is also important that each other's mandates and respective areas of expertise are recognised and respected. For example, an employer representative does not have a mandate to speak on behalf of workers and vice versa.

We are not sure what the basis of the social partnership principles are or what they are seeking to achieve. While they are clearly a set of positive principles, we should not approach social partnership as though it will always have purely positive outcomes for all partners. This is a misinterpretation of the process of negotiation. In particular, there are some employment practices which are extremely harmful for workers, damaging their economic, mental and physical well-being. Trade unions (reflecting the interest' of workers) want these practices to stop and we assume that government does too, given that these practices harm citizens and defer costs on to the state. But we must be realistic and recognise that some employers do not want to curb these practices, and not necessarily because of ignorance. Social partnership will not always be a zero-sum game if we are seeking to tackle harmful employment practices.

We would like to see the principles focus on practical issues such as information sharing, meaningful consultation at an early stage, and ensuring relevant issues are taken to social partnership arrangements before decisions are taken. It is also important that local and sectoral self-determination is not infringed upon – no SPC decision, for example, can supersede any local or sector agreement.

### ***Fair Work***

We also endorse the Fair Work Commission's definition, and believe it is very important that it is contextualised in the wider Fair Work Commission report. Often the individual characteristics are discussed in isolation, which was not the intention and nor would it be an appropriate way to understand Wales's labour market challenges. For example, the idea of 'fair reward' cannot be understood without determining what employee voice and collective representation looks like in a workplace, sector and/or occupation.

We would also welcome a case for change and a case for social partnership to be better grounded in a workers' right to a collective voice. This is a [fundamental and universal labour right](#) which we should not unpick. Employers do not do their workforce a favour by recognising this, and we should not frame the issue as though employers need to be persuaded or incentivised to uphold workers' rights. In relation to collective voice and social partnership, it is fairly binary – either employers recognise and uphold workers' rights or they do not (e.g. refusing a trade union access to organise workers is a clear example of an employer creating a barrier to workers' realising their rights). And this extends to the framing of the challenge. For example, we cannot understand why in par. 27, any reference to labour exploitation (or related to this) is missing from the list of challenges.

## ***Socially responsible procurement***

We propose a new definition of socially responsible public procurement which brings the focus to the outcomes of public procurement spend: *“Socially responsible public procurement is taking action, when purchasing goods, services and works to achieve the well-being goals, and the new fair work goal detailed below, to improve the economic, social, environmental and cultural outcomes that result from public procurement spend. These matters must be considered throughout the procurement and contract management processes.”* This is because the outcomes of procurement spend in relation to the well-being and fair work goals will be how success is measured, rather than the actions taken to achieve them, and it is linked to the principle that no worker should ever be exploited via public funds.

We are very concerned that the social value measures (par. 18) relating to employment and skills have not been produced in social partnership and believe the content of paragraph 18 undermines the purpose and content of the draft bill. We request that social partners review this work before it is finalised to ensure that they reflect the intention of the fair work duty in particular. Otherwise we will be in a situation whereby the work to measure social value takes primacy, and public bodies will merely map this work on to the duties rather than the other way around.

Similarly, the revised Wales Procurement Policy Statement (WPPS) (par. 19) was not taken to the relevant social partnership forum (the Shadow Social Partnership Council) for consultation and this again undermines the purpose and content of the draft bill. We would expect it to be reviewed once the legislation has passed in order to ensure the WPPS acknowledges the duties featured in the legislation, and that the work behind it reinforces the purpose of the legislation.

In terms of the codes referenced in par. 20 which refer to ethical procurement and blacklisting, an ongoing concern with these codes are that they were not mainstreamed in procurement in public bodies and have no proportionate resource behind them for implementation. This isn't simply a case of putting it on a statutory footing – it requires actions such as a training programme for procurement professionals and contextualising these codes into the wider procurement approach. Procurement professionals also need to understand the need for these codes – the nature of labour exploitation is very poorly understood, partly because there is not yet a broader 'fair work' movement in Welsh public bodies.

In relation to wider procurement objectives set out in par. 23, we should acknowledge that a will to support 'home grown businesses' may diverge spend away from a unionised workforce to an exploited one if the necessary measures are not in place. There is absolutely no benefit at all in an employer being 'home grown' if they do not deliver fairer work, otherwise only the business owners are benefitting. Fair work must be prioritised. There is a real opportunity to build on the approach taken in the WPPN 01/21: Sourcing steel in major construction and infrastructure projects in Wales to ensure that Welsh public spend is

directed to support the retention of good jobs which we would like to see built upon, combining the shared goals of using public spend to deliver fair work and sustain our key industries.

## **Key provisions of the draft Bill: Social partnership**

### **Question 2: What is your view on the social partnership duty set out in the draft Bill?**

We welcome the proposed duty as a new and important opportunity to achieve fairer outcomes from the work of our public bodies which are in-scope of the WFGA, while recognising its success is dependent on both the public bodies and unions cooperating in line with the values set out in the draft legislation. This is also a very important step to push the principle of social partnership (beyond existing collective bargaining and related arrangements) out into Wales's public bodies, which unions have long called for.

We hope government agrees that this duty is an opportunity to strengthen arrangements where social partnership is already working well, but also a chance to rebuild arrangements in public bodies where unions and employers do not have strong partnership working currently, including over matters beyond those covered by the duty. We would welcome some further discussions on what government's vision is for the duty, and which areas in particular they believe this sort of consultation will make a difference to.

Trade unions in these public bodies will need additional facilities time arrangements to carry out the work that results from the duty. It would not be fair to suggest that this work should be carried out in time allotted for unions' existing duties.

We are interested to know more about the proposal for ministerial guidance in relation to the duty, and how this would work in relation to local arrangements and the ability for public bodies and their unions to determine outcomes. We are unclear how prescriptive this guidance will be, but see it as a key opportunity for trade unions which are not recognised by public bodies to contribute to the duty (as there are concerns that unions which are not recognised by public bodies but are impacted by their decisions do not directly gain from the social partnership duty), and also set out expectations for how the duty applies in various scenarios (e.g. what is the vision for Welsh Government sponsored bodies and wholly-owned subsidiaries and their recognised trade unions?).

We support the proposal for annual reporting to the Social Partnership Council, co-signed by the relevant union(s) and public body. This will enable the SPC to identify good practice, and recognise where some public bodies and their recognised trade unions need additional support to deliver on the social partnership duty (and perhaps union and employer engagement more broadly).

Par. 56 states that *"the intention is that this way of working will support improving public services and engaging well-being, including fair work, and in particular enhance the consistency of the Welsh social partnership system."* However, the majority of public bodies have not committed to delivering fair work and "fair work" does not feature in the FGA or in the social partnership duty – is there a plan to amend the FGA to directly reference fair work? We are also unsure what is meant by *"consistency of the Welsh social partnership system"*? Is government's vision that each public body will have their own social partnership board

where they meet with all their recognised unions to deliver on the duty? This is then perhaps contradicted in paragraph 59 which states: *"the draft Bill does not stipulate how this consultation will take place. This is to ensure that public bodies will have flexibility and can utilise existing forums and processes through which they consult with their recognised trade union(s). It is, however, envisioned that this consultation would take place through meetings, either in-person or remotely, rather than through written communication only."* We are concerned that this is based on an oversimplistic idea of existing union arrangements within public bodies work. It would be particularly useful to understand if government expects that all unions recognised by a public body (e.g. a local authority) should be engaged on an equal footing, or if government expects that this should be linked and/or proportionate to their existing arrangements.

**Question 3: What is your view on the social partnership principles listed and defined in the table in this section?**

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As mentioned in the answer to Q.1, the principles have some limitations and downplay the importance of information sharing. Information sharing is absolutely critical to the collective bargaining process and a key way in which employers can keep their workforce and their unions relatively disempowered. We would welcome much more emphasis on this, including that any reasonable request for information which is held by the public body can be shared with the unions to aid the consultation process. If this emerges as an issue once the social partnership duty has been introduced, it may be necessary to further clarify these principles through Welsh Government guidance which results from the advice given by members of the Social Partnership Council.

We also welcome the suggestion that recognised unions need to be engaged at an early stage. This is a very important point which should be reinforced in guidance and the bill's explanatory memorandum. So often social partnership working falls down because social partners are not consulted at an early enough stage, or relevant issues aren't taken to social partners before decisions are taken. This is another reason why it is critical that social partners co-design statutory guidance and review it regularly to ensure it is helping to achieve effective implementation.

**Question 4: What is your view on the list of bodies that are subject to the social partnership duty in the draft Bill? Should the list of bodies be wider than those subject to the well-being duty in the Wellbeing of Future Generations (Wales) Act 2015?**

Trade unions would like the social partnership duty to extend through the devolved public sector at least, but unless the Future Generations (Wales) Act 2015 were amended to widen the list of public bodies it covers it does not seem possible to extend this list in isolation.

We are assuming that the duty continues to apply to the relevant public bodies when they are operating in partnerships (e.g. city region boards) and we would welcome some clarification on this. We are increasingly concerned that a lot of relevant activity by public

bodies is taking place because of inter-organisation arrangements without any engagement with unions, while private sector employers wield a huge amount of influence, such as through advisory boards which often only involve employer representatives and government. We would welcome a clear explanation as to how this duty could address this failure of social partnership working.

Similarly, we would welcome further clarification of how this applies in the case of Welsh Government sponsored bodies and wholly-owned subsidiaries like the Development Bank for Wales.



## **Key provisions of the draft Bill: Fair work**

### **Question 5: What is your view on the proposed duties on Welsh Ministers concerning fair work objectives?**

We strongly welcome the proposal to introduce a Fair Work Duty on Welsh Government, including a fair work goal, objectives and an annual reporting obligation. The suggestion that the objectives should be produced in consultation with the Social Partnership Council is also strongly welcomed, as it recognises that it is for unions, employer organisations and government to identify the best possible objectives to make work fairer. This does not preclude other relevant organisations from influencing social partners' positions, but it does mean that government acknowledges that decisions in relation to fair work must be based on the advice received from those who represent the key constituencies impacted by the decisions – workers and employers. We also agree with the statement in par. 65 that this process has the potential to maximise Welsh Government's contribution to achieving fair work.

We are concerned that par. 66-69 do not go as far as stating Welsh Government endorses the *full* definition of fair work as defined by the Fair Work Commission. It is very concerning that the references to promoting equality and inclusion, and tackling inequality have been omitted in the consultation document.

There is also no reference to the Commission's recommendations. These have previously been accepted by government 'in principle' but we would welcome a much clearer statement on what government means when it says it wishes to make Wales a 'fair work nation' with regard to this, particularly in a post-pandemic economy.

Considering the illustrative objectives in par. 72, these offer a good indication of why social partnership involvement is so important. Trade unions are likely to agree that an objective like (b) is desirable, while (a) or (c) risk cutting across collective arrangements. However, in keeping with the commitment that Welsh Government wishes to push the boundaries of devolution to achieve fairer work, we expect to be working on objectives which apply to areas of government activity like investment and grant support for businesses and other organisations. For example, one issue we may like to pursue is an agreement that no investment or grants go towards new technology which is detrimental to the workforce, and that there is corresponding funding for skills and retraining whenever new technology is funded.

### **Question 6: What is your view on key challenges and priority areas for pursuing and promoting fair work?**

Key levers to influence change, like employment and industrial relations law, are not devolved. Our labour market is characterised by very bad quality employment in many sectors and parts of Wales, and persistent inequalities experienced by some groups in our labour market. The nature of bad, unfair work and our devolution settlement mean that the

opportunities to make work fairer are not always straightforward, and given the very limited leverage over the private sector our best option is often to try to grow worker voice and power, rather than a top down approach. This will enable workers to make their jobs and workplaces fairer; and is far more sustainable than government attempting to out manoeuvre the many employers who build their business models on labour exploitation in particular.

The very negative impact of declining trade union membership and collective bargaining coverage throughout the UK is a key factor in widening inequality, but Wales's relatively higher membership rates and collective bargaining coverage, the continuing positive impact of this in many sectors and the Welsh state's commitment to social partnership are key opportunities for change.

The best opportunity to make work fairer is by growing trade union membership and a step change in collective bargaining coverage, so that workers in Wales can determine their own pay, terms and condition via negotiation within their employer and realise their labour rights and the full definition of 'fair work'. This can only be achieved by Welsh Government and other public bodies explicitly promoting trade unionism at every turn, including through the education system, the skills system and business support.

**Question 7: Do you have a view on how to frame a legal definition of fair work which meets the limits of our legislative competence and progresses our ambitions for a 'Fair Work Wales'?**

We believe the 'fair work goal' should be the delivery of fair work for all workers in Wales, as defined by the Fair Work Commission. While the ability to legislate on each aspect of the definition is not necessarily within competence, we do not believe this means that Welsh Ministers are unable to define it as a goal.

**Question 8: In addition to what is set out in the draft Bill, what other levers could be used by Welsh Ministers to promote and achieve fair work?**

Government should adopt the principle that no public funds should ever go towards labour exploitation, and then introduce measures which stem from this. While no one would ever say that it is acceptable that public funds go towards bad and illegal employment practices, without proper measures in place they invariably will (given the rate of labour exploitation) – and government must be proactive in minimising the risk in order to prevent public funds inadvertently going towards exploitation.

Grant funding is a key specific lever, along with tax rebates, skills policy and many public health interventions (like Healthy Working Wales). Levers such as these must urgently start to reinforce the importance of trade unionism, in addition to when government engages with workers (including in schools where they teach children and young people about work) and employers. And this approach must be hard-edged. If a firm is refusing trade union access as a principle, this is a clear intention that they are suppressing their workers' rights. A condition

of all public funds – regardless of through what means they are being spent – must be trade union access.

## **Key provisions of the draft Bill: Socially responsible public procurement**

### **Question 9: What are your overall views concerning the provisions and thresholds set out regarding the socially responsible procurement duties, including the categories listed within the social public works clauses?**

We welcome the proposed socially responsible procurement duty and the additional obligations in relation to major construction contracts and outsourcing services contracts, and note that they will be a significant step to achieving the intentions set out in par. 75. We also strongly welcome the intention that the 'socially responsible procurement goals' are based on the well-being and fair work goals (par.81). Linking the socially responsible procurement goals to the fair work goal is critical to delivering better labour outcomes from procurement spend, as will requiring the in-scope public bodies to set and publish objectives on how it will achieve the socially responsible procurement goals. We strongly endorse this approach and are interested in how we can ensure social partnership engagement at a local level influences this (particularly in relation to how a public bodies' well-being objectives link to the socially responsible procurement goals) and how social partners could support this process.

In relation to paragraph 85, we agree that it makes sense for the reporting requirement to form part of the existing reporting requirements of the Well-being of Future Generations (Wales) Act, including details of planned future procurements. However, we would also expect that a copy of this is shared with the SPC and with the local arrangements introduced as part of the Social Partnership Duty. We would also be interested to explore whether these local arrangements should also provide a role for the recognised trade unions to co-sign the reporting of the socially responsible procurement duties. Also, we are unclear if the process of producing the summary report (par. 86) will include consultation with the SPC. We would hope this were the case, as if the SPC's role is only in relation to producing guidance this may limit the impact of the council to the detriment of achieving the intended outcomes.

We strongly welcome the inclusion of contract management duties as a way to strengthen the impact of the specific construction and outsourced services duties set out in the draft bill. Implementing this will be challenging though, especially given wider budgetary and capacity challenges. Again, we believe that the implementation must respect the commitment to social partnership and harness the expertise of social partners' to ensure an efficient and effective approach throughout the in-scope public bodies.

We support the process set out in par. 92, but request that the SPC and procurement sub-group has sight of any of the reports of non-compliance submitted by public bodies and interventions made by Welsh Ministers to aid the SPC and sub-group's role as an advisory body. Without this insight, the SPC will only be able to advise on part of the process and this will hinder the implementation of the duties significantly. Similarly, the SPC and procurement sub-group should also receive exception notices and the response of any Welsh Ministers in relation to the Workforce (Two-tier) Code of Practice, as set out in par. 97.

In relation to par. 95-98 and the contract management duty which will provide a statutory basis to the Workforce (Two-tier) Code of Practice, we suggest that the SPC is presented with a comprehensive baseline report to indicate the extent to which outsourced services contracts are in use, the code has been applied and any other relevant information so that the SPC understands the current arrangements.

The categories covered by the social public works clauses (par. 91) appear to restate what is possible within EU law in relation to the workforce, albeit from a relatively cautious perspective (and perhaps more cautious than Scotland's approach in relation to fair work). While we accept that this is essentially a set of headline categories, this means that the detail (and therefore the ambition) is then left to the content of the model clauses. It is therefore essential that trade union representatives with procurement expertise are members of the SPC's procurement sub-group to advise on the model clauses, and that the government is committed to acting to the limit of competence and with the greatest ambition to deliver fair work outcomes from procurement spend.

This is because we believe that the socially responsible procurement duties could be more ambitious in relation to labour outcomes – particularly in relation to fair work – and ensure that the in-scope public bodies give due regard to insourcing when a contract come up for renewal. We therefore propose to additional duties to secure better labour outcomes:

A duty for '**In-house and in-sourced public services**' which sets out clearly the right for all public authorities to organise and deliver quality public services in the public interest, free from mandatory marketisation, privatisation and outsourcing. Welsh Government guidance should include the following recommendations by APSE<sup>1</sup> to instruct contracting authorities to review insourcing options first before outsourcing is considered:

- Insourcing should be considered by public policy makers as a viable delivery option when appraising the future of outsourced contracts
- Public bodies should have a rolling calendar review in advance of contract end dates or break clauses. This will ensure that adequate plans and arrangements can be put in place to ensure insourcing is a workable option
- Insourcing should embrace the principles of good governance, transparency and accountability over locally provided services.
- Insourcing should be viewed as a form of innovation in both service delivery and resource allocation
- Capacity to insource can be secured through the support of specialists such as interim managers, secondments from other councils and the returning workforce through the operation of TUPE
- Insourcing can be used to support local economies and the local environment through jobs, skills, supply chain management and local spend

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<sup>1</sup> [04b APSE - the case for insourcing - May 2019.pdf \(london.gov.uk\)](#)

- Trade union and workforce involvement in insourcing discussions are both essential and helpful and should be encouraged
- Getting the right people to drive insourcing is essential and a resilient project team will be critical to its success

A duty for '**Fair treatment of workers**' given their vital role and value in the delivery of public services. Public procurement contracts should include the right for contracting authorities to award contracts on fair treatment of workers criteria including:

- Recognition of trade unions and collective bargaining agreements in the UK and globally
- Obligations to UK domestic and International labour and social laws including digital, equality, environmental and human rights due diligence and other International social and labour standards
- Commitments to fair and equal pay including the living wage
- Fair employment terms and conditions, including pensions
- Good TUPE, equality, human rights and non- discrimination practices
- Removing zero hours abuses and gig economy platform insecure contracts
- Provide workers with complete information on the essential aspects and hours of their work, to be received early by the worker, in writing
- Limits to the length of probationary periods at the beginning of a job
- Commitments to safe complaints and whistleblowing procedures
- Allowing workers to seek additional employment, with a ban on exclusivity clauses and limits on incompatibility clauses
- Give workers a reasonable period in advance when work will take place, for workers with very unpredictable working schedules, as in the case of on-demand work
- Provide training and skilling and cost-free the mandatory training that the employer has a duty to provide
- Ensure that supply chains and subcontracted services and goods meet all of the above

**Note:** this does not apply to this draft bill specifically, but we note that the [Draft EU Minimum Wage Directive](#) (2021) provides that "Member States shall take appropriate measures to ensure that in the performance of public procurement or concession contracts economic operators comply with the wages set out by collective agreements for the relevant sector and geographical area and with the statutory minimum wages where they exist." The interpretation that collective agreements cannot be applied in public procurement tenders has held back the delivery of fair work in Wales. We would like Welsh Government to work to align Welsh procurement policy and law with this.

**Question 10: What is your view on other potential measures outside of those outlined that could be taken in pursuit of ensuring socially responsible public procurement?**

As stated above, we propose two additional socially responsible procurement duties to achieve fairer labour outcomes.

In addition, no employer should be in receipt of public funds and refuse trade unions physical and/or digital access to their workforce when they want to try to organise workers, and this obligation should extend through supply chains, outsourced services and any other relevant relationship with another employer. Refusing a trade union access to the workforce is clear evidence that an employer is suppressing their workers' fundamental right to a collective voice. Therefore, as part of any procurement exercise all bidders should agree to trade union access if and when requested, or else be excluded.

**Question 11: What is your view on the table of contracting authorities above concerning the socially responsible procurement and social public workforce (Two-tier Code) duties?**

We do not understand why they are excluding housing associations, HE and FE from the workforce duties. If there is no acceptable reason and it is a case of precedence, we would expect this to be extended to cover at least these three, if not the full list. We also believe the two-tier code duty should be extended to cover the full list of public bodies covered by the code currently. This would mean extending the list to include community councils, the governing bodies of maintained schools and the Local Democracy and Boundary Commission for Wales.

Our preference is for universalism – unequal treatment of workers should not be accepted just because the contracting authority is a smaller public body. We therefore have concerns about the policy intent expressed in par. 78.

**Question 12: Should the current list of contracting authorities included within the Two-tier Workforce Code be retained or should this be brought in line with the rest of the procurement duties? Should any additional changes be made to the way in which the Code operates?**

The first part of this question is answered above and we have not had any feedback from affiliates to indicate that the code should be updated.

**Question 13: How can greater due diligence be achieved in construction supply chain management whilst keeping costs to a minimum, especially for smaller contractors in supply chains?**

We believe the case for proportionality for smaller contractors has been overstated to the point that widescale labour abuse is now being excused.

There is a very high risk of worker exploitation in the construction in non-unionised sites. If we continue to spend public funds in this sector without recognising the way in which the nature of labour in this sector has changed over the last three decades or so then the state will undoubtedly be contributing to labour exploitation. We believe it will take a range of measures to achieve satisfactory due diligence, including empowering workers to understand their rights, eliminating false self-employment in publicly-funded supply chains, a well-resourced campaign to unionise workers and a universal model for auditing supply chains which involves unions.

It is a contradiction to aspire to socially responsible procurement but then worry that certain bidders may be put-off by this – surely if the bidders do not want to comply with the requirements of socially responsible procurement then they are not the sort of firms we want to bid? i.e. if social responsibility is burdensome then their business model relies on exploitation. We spend a lot of time as social partners entertaining these notions of proportionality and certain aspirations being especially burdensome for certain types of businesses, but we have never been presented with any evidence that this is actually the case for small businesses nor that there is any way to ensure that they would comply with socially responsible practices without a duty and contract management arrangements in place.

Consideration must also be given to the state's role and responsibilities to their citizens. Is the concern about leaving small businesses out so great and so important that it would rather risk labour exploitation than introduce a universal duty? Surely the state has a responsibility to protect its citizens and have equal aspirations for them, regardless of if they work for a micro business or a large employer?

We share Welsh Government's concerns set out in par. 98 in relation to the costs of certain contract management solutions offered by firms to aid public bodies' compliance with similar requirements to the duties set out in the draft bill. However, we have an even greater concern that these sorts of offers are typically at best poor at delivering improved labour outcomes, and often help bidders to circumvent many of the labour requirements while remaining eligible to tender. A particularly harmful outcome of enabling this sort of industry to thrive would be that these firms make a profit from public funds, which should have been invested in those workers delivering the contracts.

With this in mind, we strongly recommend that Welsh Government establishes a public sector solution to this, which includes and benefits from social partners' expertise and the particular 'Welsh way' of social partnership to support public bodies' obligations under the duties. This is especially important as an independent sector alternative risks undermining the social partnership approach, as many of the supply chain tools which exist are industry-owned. We are also interested in using statutory guidance to ensure a fair, worker-first approach to auditing could be introduced.

We understand that employers are already subject to high levels of administration as it is – the purpose of this policy is not to add to the information gathered at a central level, as



such. Rather, the purpose of Fair Work audits will be to begin a relationship with social partners to drive up the quality of work within that premises. Fair Work audits will be as much about giving funders and procurers an insight into the employment arrangements of a firm, as they will be about encouraging businesses to reflect on their employment practices and raise standards.

One option is to adapt the SMETA ethical trade audit framework – both in terms of the process they use and the focus on transparency for all involved. SMETA is an audit format which is a compilation of good practice in ethical audit techniques designed to help auditors conduct high quality audits that encompass all aspects of responsible business practice created by the Sedex Stakeholder Forum.<sup>2</sup> SMETA is the world’s most commonly used ethical audit format.

One of the key aspects which makes this audit model more suitable to supporting the delivery of Fair Work is that it can be conducted by government, a purchaser (i.e. someone higher up the supply chain) or a trade union. The next stage of the process then involves completing a corrective action plan report, and encouragement for better dialogue between workers and management.

The audit focuses on the quality of employment, compliance with legislation, and the environmental impact of the operation. Were a similar model to be adopted in Wales, it would be desirable to see a greater emphasis on equalities too.

**Question 14: What are your views on a potential future expansion of the contract management duty regarding the application, maintenance and monitoring through the supply chain of socially-responsible clauses to other sectors beyond construction (for example, social care)?**

We agree that the model could be expanded to other sectors, and believe this is something which the SPC’s procurement sub-group should keep under review. If it were being considered for a particular sector, consultation must also take place with the relevant sectoral social partnership forum(s).

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<sup>2</sup> <https://www.sedexglobal.com/smeta-audit/what-is-smeta/>

## **Key provisions of the draft Bill: Social Partnership Council**

### **Question 15: What is your view on the provisions set out in the draft Bill concerning:**

- a. Membership of the Social Partnership Council**
- b. The proposed nomination process?**

We support the proposed membership of the SPC and nomination process which is set out in the draft bill and consultation document. We also agree with the proposals set out in par. 106 in relation to additional stakeholders, on the basis that they are invited as guests to the council and not additional members.

### **Question 16: What is your view on the proposals concerning the establishment and operations of the Social Partnership Council and its subgroups?**

We welcome the vision set out for the Social Partnership Council in par. 99 of a "*national cross-sector forum chaired by the First Minister...that connects the social partnership, fair work and socially responsible public procurement visions of the draft bill.*" We also hope that the SPC can become a reference point for policy development and decisions which impact the workforce – building government capacity to understand how they can tailor their efforts to maximise Welsh Government's fair work outcomes. We support the majority of proposals put forward here and set out any differences below.

Par. 110 refers to the need for SPC representatives to reflect the diversity of the Welsh workforce. We believe this is a slight misrepresentation of what the SPC should reflect - the SPC needs to reflect the diversity of the Welsh population. Also, we are concerned that the reference to the Welsh workforce is assuming that diversity is only really important in relation to workforce (trade union) representation. We believe the emphasis on diversity should extend to all social partners, based on representatives' personal characteristics and their understanding and awareness of diversity issues, inequality and discrimination.

In addition to the provisions set out in par. 126-128, we would expect the sub-group membership to reflect the principle of social partnership to the extent that the SPC determines necessary, given the sub-group's purpose. In relation to the procurement sub-group, it is essential that trade union representatives with procurement expertise are members, and we would prefer this sub-group to have a membership based on tripartite social partnership. Sub-groups could be an important mechanism for taking forward more detailed work on particular issues, but it would not be the appropriate arrangement for a new sectoral social partnership body (e.g. the fair work forums recommended by the Fair Work Commission) as their arrangements and advice could always be overturned by the SPC, which would defeat the purpose of the sectoral arrangement. A sectoral social partnership arrangement should only become an SPC sub-group if its members request this.

The process for determining the SPC's terms of reference are not detailed in the consultation document but these should be produced in social partnership. We would also welcome

further information about how the SPC will operate in practice, particularly in relation to the work which will take place between meetings. We would like to understand what information sharing will look like and how work will be taken forward in social partnership. We are concerned that it could become very slow and procedural if lessons are not learnt from previous experiences of social partnership. We are unclear if there are plans for an executive, or how the secretariat will operate.

**Question 17: What is your view on the outlined social partnership system in Wales, including the system leadership role of the Social Partnership Council and the links between different levels of social partnership?**

We are not sure whether this is intending to outline the existing social partnership system in Wales which, by its very nature, will be constantly evolving and adapting to suit the needs of its members, or if it is attempting to define a particular model of social partnership.

We agree with objectives (b) and (c) set out in par. 100 but are very concerned about the suggested objective set out in (a) which states that the SPC will: *"provide leadership and promote consistency in the Welsh system of social partnership. The SPC will lead a system that connects local, regional, sectoral, cross-sectoral and national levels of social partnership, including through articulating a common vision and providing guidance and direction regarding social partnership in Wales."* Our concern relates to the risk that this could override any local, regional or sectoral social partnership and/or collective bargaining arrangement's right to self-determination. We understand that the complexity of current arrangements may be frustrating for people who want an overview of operations in Wales, but this should not take precedence over the right for any of these arrangement to self-determine how they operate, especially as they fulfil a purpose of realising people's right to a collective voice.

We would like to clarify what is mean by the SPC providing *"leadership"* and *"promoting consistency,"* and how the SPC would have a mandate from all local, regional and sectoral arrangements to *"articulat[e] as common vision and provid[e] guidance and direction regarding social partnership in Wales."* We would imagine that if the SPC were to have this role it would need a mandate that stems directly from these social partnership arrangements. This is because the trade union members elected to take seats at the SPC would have a mandate to represent the full union side at these meetings, and while they may even come from the same trade unions as their colleagues who sit on the NHS Welsh Partnership Forum, for example, they are not elected or appointed members of this forum and therefore do not have any mandate to speak on its behalf (unless additional arrangements are introduced).

We are not sure if this sort of relationship between the SPC and other social partnership and/or collective bargaining arrangements is wanted or particularly necessary given the SPC's role set out in par. 99 and objective (b) and (c).

Similarly, in par. 130 we are not sure what is meant by the SPC providing system leadership<sup>3</sup> at all. Perhaps there is a need to further clarify that this relates to the areas covered in the bill *only*, and the extent to which other social partnership arrangements are working on this, rather than a broader or less specific interpretation that the SPC provides leadership on social partnership more generally. Similarly, 'consistency' here would therefore only mean in relation to the extent that guidance produced in relation to the duties set out in the bill is complied with, rather than trying to bring about some sort of uniformity in social partnership arrangements.

We would also like to clarify if government believes the "*common strategic purpose*" across social partnership arrangements referenced in the consultation document is the delivery of the duties which the SPC advises on? Or if there is a broader common strategic purpose?

In terms of the representation of the social partnership system, we understand the logic of this proposal but are concerned that this could be an incredibly slow way to approach cross-sectoral issues. There are plenty of examples of where an issue would obviously be a cross-sectoral issue and would therefore be raised by a partner straight at the SPC level. We can also foresee that many SPC outputs in relation to the duties would only need to be sent to sectoral arrangements for reference as they apply to operations within individual public bodies.

Also, we are unclear if there is there an intention to link to private sector mechanisms in some way, or is there a risk of a purely public-sector SPC being established? Is the intention that any cross-public sector workforce issues (i.e. relating to those directly employed by the public sector) will still be determined at the WPC level?

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<sup>3</sup> <https://www.weforum.org/agenda/2019/09/systems-leadership-can-change-the-world-but-what-does-it-mean> We think this is the sort of thing that's being referenced but we've got no idea what it means in relation to the SPC

## **Supporting improvement and ensuring compliance**

**Question 18: Concerning the social partnership duty, should an improvement and compliance mechanism be developed to ensure that all bodies meet their duties and make a collective contribution to the delivery of the proposed outcomes? If yes, do you have any suggestions as to how this might work in practice?**

An independent office needs to be established, which is responsible for driving improvement in specific public bodies covered by the various duties in the bill and managing a compliance mechanism. The emphasis will be heavily on improvement over compliance, and it could have a broader focus (on improvement) than just the duties set out in the draft bill, including by strengthening industrial relations within our public bodies and building links with the relevant UK government labour market agencies. It would need a budget similar to that of the commissioners to have impact.

This would also recognise that some parts of the devolved public sector are much further away from being in a position to deliver on the duties. It would be especially important for building public bodies' understanding of the Fair Work Goal in relation to the Socially Responsible Procurement Duties, as beyond Welsh Government the in-scope public bodies may not have much understanding of this. It could have the power to mediate and provide training where social partnership is struggling. It could work with existing commissioners and inspectorates (linked to the recommendation below that specific regulations are still inspected by the relevant inspectorates) and their respective roles linked to other measures which impact the workforce, and also receive copies of the reports from public bodies and Welsh Government which are referenced in the bill.

In terms of a compliance mechanism, we would like to explore the feasibility of a mechanism similar to that of the [Welsh Language Commissioner's](#) quasi-judicial model. We are interested in the idea that there is an option issue non-compliance notices as a last resort, and the need for independent tribunal to ensure that any body subject to a notice can have a fair appeal.

We would also expect that responsibility for specific regulations (agreed and then recommended to Welsh Government via the SPC and sectoral SP arrangement, and issued as statutory guidance by Welsh Ministers) could sit with the existing relevant regulators. For example, in 2018 the Welsh Government introduced a regulation on social care providers to tackle the use of zero hours contracts ([regulation 42](#)) which is enforced by Care Inspectorate Wales as the sector's service regulator (with links to Social Care Wales as the workforce regulator).

While a compliance mechanism like this is essential to ensure a level playing field amongst public bodies covered by the bill's duties, it is imperative that it is independent and that there is an appeals mechanism. It is also important that it is viewed as a last resort, once improvement mechanisms have been truly exhausted. It is especially important that it is

viewed as a 'last resort' mechanism because the duties are all related to good partnership working – establishing this under duress is always the less preferable option.

We also believe that the office should not exclude Welsh Ministers from supporting the delivery of the bill based on advice from the SPC using existing levers, such as remit letters.

**Question 19: Should there be an adjudication mechanism at national Social Partnership Council level for the escalation of any failure to agree at sector level? If yes, do you have any suggestions as to how this might work in practice?**

As mentioned above, we believe an office which is partly responsible of supporting the implementation of the bill, improvement and enforcing it could have a mediation role similar to that which ACAS has had in relation to collective bargaining disputes, so do not see a role for the SPC here.

We are also struggling to see how the SPC could have a mandate to adjudicate over failures to agree at a sectoral level, or whether this is necessary. Based on the principle of self-determination, it would clearly be for the sector level arrangements (or any other relevant arrangements) to request and agree that the SPC could have this role and how it would work. It would not be appropriate for the SPC to design this role for itself.

**Question 20: What are your views on the enforcement and compliance measures proposed in the draft Bill concerning socially responsible procurement and contract management? What other measures could be applied? Do you have any suggestions as to how any additional enforcement and compliance measures might work in practice?**

Greater transparency and new opportunities for scrutiny present good opportunities to improve compliance with existing procurement objectives and the duties set out in the bill. We believe this should be accessible, so information such as estimated labour costs should be published alongside tenders. We also welcome the proposal to introduce contract management obligations which should be a key mechanism to ensure fairer work outcomes.

However, part of the function of the proposed office which is outlined above must be to ensure that those working on this understand the nature of labour exploitation and employment rights.

We would also like to understand some of the detail in relation to the procurement duties. For example, is there an intention for the construction duty to introduce a principal contractor model like the one which exists in relation to health and safety regulations?

We would also welcome greater use of financial penalties for non-delivery of services, as this can add weight to industrial action.

And, as set out above, we expect an audit model which respects the principles of fair work to be introduced alongside this legislation to reinforce compliance with the procurement duties.

## **Equalities and impacts**

**Question 21: Do you agree with the impacts that are outlined in this section? Are there potential unintended consequences on certain groups that should be considered?**

**Question 22: Concerning the Regulatory Impact Assessment, do you agree with the assessment of the likely costs and benefits associated with the provisions in the draft Bill? If not, please explain which specific element(s) you disagree with and why.**

**Question 23: Do you have any additional or alternative evidence which could help to inform the final Regulatory Impact Assessment?**

We are concerned that the RIA is assuming that social partnership working can be streamlined from above (i.e. the Social Partnership Council). As stated above, social partnership relies on the principle of self-determination – it would have to be the respective body's choice to alter how it works etc. as a result of this legislation and the SPC's work.

We are also concerned that the RIA appears to have been carried out with a relatively weak understanding of which trade unions are recognised in public bodies and how this means that the Social Partnership Duty will be met, and we are concerned that this reflects an overly-simplistic idea of how the legislation could be implemented in this respect. For example, local authorities typically recognise three trade unions who organise the majority of their staff, but they also recognise several trade unions in relation to school staff. And then there are also trade unions recognised by employers delivering outsourced contracts. We are concerned that there is an assumption that there are already structures in place where all relevant unions and management meet, when this is not the case in many instances. This has the biggest implications for Welsh Government, where many trade unions are recognised by particular sponsored bodies, wholly-owned subsidiaries and other forms of organisation.

We have two issues we must highlight which are difficult to apply a monetary value to. As stated above, adequate additional facilities time for trade union representatives is essential to ensure that trade unions can participate on behalf of the workforce in the delivery of the relevant duties.

Second, trade union participation in arrangement such as the SPC and the procurement sub-group rely on the secretariat being supported and resourced to provide briefing papers well in advance of meetings, and also guiding social partners on the sort of information and mandate they need to bring to each meeting. All these measures would ensure that we could consult with trade unions ahead of time, which has not been possible with the way that the SPC is currently arranged. As mentioned above, information sharing is critical to this arrangement being successful (requests should be answered swiftly and clearly) and consulting early on relevant issues (rather than information sharing after a decision has been taken) is important.

Linked to our response to the Race Equality Action Plan consultation and the work of groups such as the Social Care Forum task and finish group which is looking at Personal Assistants in social care as an occupation group, we are very interested in exploring how lived experience can play a role in social partnership structures, including the experiences of trade union reps and officers.

We are also concerned that (particularly given what we have learnt from the implementation of other duties) that the costs associated with implementation may be underestimated given that there is a proposal to introduce three new duties on a range of different public bodies. With this in mind, we believe an implementation plan must be a priority piece of work for the SPC once the legislation has passed, and that the external office we recommend creating (above) will be critical to ensuring that there is continued, dedicated resource to ensuring the legislation is universally implemented.

**Question 24: We would like to know your views on the effects that the proposals set out in the draft Bill would have on the Welsh language, specifically on opportunities for people to use Welsh and on treating the Welsh language no less favorably than English. What effects do you think there would be? How could positive effects be increased, or negative effects be mitigated?**

**Question 25: Please also explain how you believe the proposed policy in the draft Bill could be formulated or changed so as to have positive effects or increased positive effects on opportunities for people to use the Welsh language and on treating the Welsh language no less favorably than the English language, and no adverse effects on opportunities for people to use the Welsh language and on treating the Welsh language no less favorably than the English language.**

The Social Partnership Council should consider how the Welsh Government's ambitions for the Welsh Language apply to the workplace, and explore how they could be better embedded across the labour market and achieved in an inclusive, progressive way. The social partnership duty would be a mechanism to achieve this at a local level too, within the individual public bodies. This would give workers (and employers) a much greater say over this policy area, with the aim of achieving fairer policy outcomes.