

**Welsh Government consultation
Draft Social Partnership and Public Procurement (Wales) Bill
Response by Universities Wales**

1. Introduction

- 1.1. Universities Wales represents the interests of universities in Wales and is a National Council of Universities UK. Universities Wales' Governing Council consists of the Vice-Chancellors of all the universities in Wales and the Director of the Open University in Wales.
- 1.2. The following comments are submitted in response to the Welsh Government's consultation on its draft Social Partnership and Public Procurement (Wales) Bill, published on 26th February 2021 (see [here](#)).

2. General principles

***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?*

- 2.1. We support the aims of the Bill in principle and look forward to working with the Welsh Government on its further development so that higher education may contribute appropriately.
- 2.2. Although Welsh universities are not public bodies they have made a significant contribution to the shared agenda of social partnership, including working with the Workforce Partnership Council, implementing the Code of Practice on Ethical Employment in Supply Chains and leading on the implementation of the Real Living Wage, with all universities in Wales having signed up to adopt it.

3. Social partnership provisions and Fair Work Provisions (Q2-8)

- 3.1. The social partnership and fair work provisions do not apply directly to higher education for the reasons outlined in the consultation. We also recognise that the complexities of devolved legislative competence pose a significant challenge for the drafting in this area as highlighted by the Welsh Government. However, Welsh universities take their social responsibilities and civic mission very seriously and expect to continue to make a significant contribution to these agendas, building on their work with the Workforce Partnership Council, implementation of the Code of Practice on Ethical Employment in Supply Chains and the Real Living Wage. It is hoped that the Social Partnership Council, as discussed below, will provide enhanced opportunities for voluntary cooperation, information sharing and collaboration between sectors.

4. 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?*

- 4.1. We recognise the important contribution that procurement strategies can make to the fair work agenda, and universities would support most of the proposals in this area in principle. Universities already have well developed procurement arrangements and provide detailed monitoring information which is consolidated in HEFCW's annual report submitted to the Welsh

Government. However, the draft Bill proposes some significant legislative changes for universities in relation to procurement, that will need to be worked through carefully.

- 4.2. In relation to universities, some of the proposals may need further investigation to ensure there are no unintended conflicts with charity status or charity law obligations. As the Charity Commission makes clear, a charity must exclusively pursue its charitable purposes, and not the policies or directions of a governmental authority. Placing a direct requirement on universities to pursue the Welsh Government's well-being or fair work objectives in relation to prescribed contracts as proposed, and the proposed power of the Ministers to require universities to implement works clauses if they disagree with a university's decision not to include them in a major construction contract, would both appear to cause potential problems for universities in meeting their charitable obligations or maintaining their charitable status, and status for purposes of national accounting. Placing a direct requirement on universities in relation the WBFGA 2015 has previously been avoided for this reason. As the draft Bill stands, we think these provisions may need to be redrafted or universities exempted from their direct application to avoid serious adverse consequences.
- 4.3. We also have significant concerns from a practical perspective about the proposed arrangements – particularly the arrangements for notifying Welsh Ministers in relation to major construction projects and potential exercise of the Welsh Ministers' consequential power of intervention. The £2m threshold would catch a very significant number of university construction projects. As currently drafted, there would be a concern that this system could require a significant increase in administration, for both universities and Welsh government, and lead to uncertainty and delays in the process. The draft legislation does not currently provide a formal sign-off process, and the Welsh Ministers may decide to intervene at their discretion at any stage. We note that this would make contractual arrangements very difficult to make without formal clearance, the potential for subsequent intervention that could unpick the contractual arrangements would introduce uncertainty that may increase costs or contractual risks, introduce delay, or simply deter potential contractors altogether.
- 4.4. We are also concerned about the impact for collaborative procurement and UK-wide procurement arrangements for universities. Universities in Wales benefit from collaborative procurement arrangements across the UK HE sector, including for instance the UKUPC, and these arrangements could make such partnerships much harder and significantly disadvantage universities in Wales. We are not yet certain what this would mean for research contracts or similar – but it would be a major concern for universities in Wales if they were prevented from accessing or using UK funding for research and innovation properly (e.g. because of conflict with terms and conditions of funding awards), at a time that this becomes a major source of UK income for Wales.
- 4.5. The new reporting and register maintenance requirements will also add significantly to the administrative burden for universities. This appears unnecessary given the well-developed arrangements with HEFCW already in place.
- 4.6. The implementation of these provisions is also likely to have significant resource implications for universities. This is a particular concern at this time due to the ongoing challenges of dealing with COVID-19 and priority for providing support for students, and we note there are no transitional provisions in the Bill that could help with this as drafted. The Welsh Government may wish to consider how it can support the additional costs for all participating institutions

including those which are not public bodies and may not receive the same level of support under the proposed new arrangements. We note, for instance, universities have recently had to bear the costs of major increases in employer contributions for pensions, for which employers in the public sector have received compensation.

- 4.7. Lastly, further investigation may also be needed to clarify how far this change in relation to universities fully falls within the legislative competence of the Welsh Ministers, and to make sure that this approach is consistent with the application of existing UK/retained-EU procurement legislation. For instance, the draft Bill makes universities automatically contracting authorities, i.e. subject to its procurement provisions, irrespective of whether they are considered to be so for UK/retained-EU legislation or not. Universities are currently not automatically contracting authorities for purposes of the Procurement Contract Regulations 2015, and an individual assessment must be made against criteria which in particular requires the majority of the funding to be deemed public funding. BEIS, for instance, has previously recorded its view that it did not consider student loans as public funding.
- 4.8. It is also not clear that the proposals in so far as they place additional requirements on Welsh universities (but not other HE providers operating in Wales) are fully compatible with the UK Internal Market Act 2020. Universities are only exempt from its application in so far as they perform functions of a public nature, which is generally considered to include teaching but not so obviously, for instance, procurement activities. The UK Government has acknowledged this may need to be clarified in regulations (see [here](#)). If the activities are caught by the provisions, the principle of direct discrimination in particular means that regulatory requirements must apply equally to all providers operating in that area, irrespective of where they are connected to in the UK. At the moment, the internal market provisions do not apply to arrangements under existing legislation but would apply to any new provisions, which means that there is a risk that changes to the legislation could have unintended consequences in this respect. We ask that the Welsh Government satisfies itself as to the impact of this before making any legislative changes in relation to universities.

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?*

- 4.9. In relation to universities, we wonder if many of the issues identified under question 9 could not be more easily addressed through existing higher education arrangements, including financial reporting and notification arrangements with HEFCW.

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?*

- 4.10. We agree that universities cannot be subject to the social public workforce clauses.

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?*

- 4.11. We agree that universities, and potentially other contracting authorities who are not public bodies, need to be exempted from the workforce clauses to prevent potential risk to their charity and national accounting status, as previously recognised by the Welsh Government.

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?*

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)?*

5. 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?

- 5.1. We note the proposed membership and nomination arrangements, which will enable the participation of universities and other social partners who are not public bodies.

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

- 5.2. We note that it will be very important to get the procedures right in order to function well. The procedures are not specified in the draft Bill itself which instead provides for the Welsh Ministers to determine and publish the procedures within six months of the relevant section coming into force.
- 5.3. We are pleased to note from the consultation document (para 124) that the intention is that agreements will be made at the SPC with the consensus of all members and will be voluntary in nature, and recognition that organisations cannot be legally bound by decisions reached by the SPC. We would like to ensure that universities can continue to collaborate on the basis of social partnership, and that arrangements are flexible enough to allow it.
- 5.4. The processes for cooperative decision-making in particular are critical. It is essential that different stakeholders and sectors can participate with the decision-making process with confidence that their own arrangements, constitutional requirements, and operating contexts will be respected. Our work with the Workforce Partnership Council on its processes, including on collaborative decision-making and process for reaching agreements, perhaps points to a way in which this might be achieved in going forward in a way that can embrace a varied membership with different legal requirements and operating contexts. This is an area we would be happy to work with the Welsh Government further in developing.

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?*

- 5.5. We support the emphasis on the Social Partnership Council's role in cross-sector leadership, in establishing relations and collaboration, and its important statutory role in advising the Welsh Ministers. There may be further work to consider how a local/regional partnership structure could work best in practice given the varied membership and different sectors, without generating an unnecessary administrative edifice or introducing unhelpful complexity. Again, experience of e.g. WPC arrangements may provide a help starting point in finding the right balance.

6. 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?*

- 6.1. Universities are not directly subject to the social partnership duty, but the current emphasis in the Bill appears to be right and we are not convinced adding additional compliance mechanisms in the legislation is required.

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?*

- 6.2. No. We recognise the importance of reaching collective decisions and ensuring that, where they have been agreed, they are implemented. We are not convinced that a mechanism to impose decisions in absence of agreement would provide a helpful approach at this stage and is likely to be technically problematic, as the consultation paper notes. It may in fact increase the barriers to cooperation and agreement and undermine the principles of mutual respect and cooperation, particularly for bodies working with the Council which are not part of the public sector. It is essential that different stakeholders and sectors can participate with the decision-making process with confidence that their own arrangements and operating contexts will be respected.
- 6.3. As universities have shown, it is perfectly possible to implement major changes and workforce decisions universally across a sector through cooperation. We think that the focus should be on refining and strengthening the processes for cooperative decision-making, as discussed under question 16 above.

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?*

- 6.4. Please see our comments under question 9. Although universities support the general aims in this section and are leading in good practice in socially responsible procurement in many ways already, the proposed compliance and enforcement measures throw up a range of potentially complex issues in terms of legislative competence, and compatibility with charity law obligations. We would suggest that we explore the use of existing arrangements for universities to achieve the same effect.

7. 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.*

- 7.1. The bulk of the costs identified are costs to the Welsh Government relating to the implementation arrangements including the set-up and ongoing administration of the Social Partnership Council. The RIA identifies attendee opportunity costs (which are relatively minimal). However it is the implementation of new duties and policies that are likely to have the most impact on the social partners covered by the provisions of the draft Bill. In particular, under question 9 we identify some significant additional duties in terms of procurement for universities that could increase administrative costs or affect contract prices.

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

- 7.2. See our comments under question 22.

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.

- 7.3. The Bill does not contain specific provisions relating to the Welsh language, but we would expect the partnership and collaboration in workforce matters to provide positive opportunities for promoting the use of the Welsh language.

8. Other comments

Question 26: We have asked a number of specific questions. If you have any related issues which we have not specifically addressed, please use this space to report them.

- 8.1. Please see our concerns about the potential impact of the UK Internal Market Act on the provisions of this draft Bill, as discussed under question 9. We assume that this is a more general issue that the Welsh Government will wish to investigate and address, if need be, before a Bill is introduced.
- 8.2. We confirm that we are happy for this response to be made public, on the internet or in a report.

**Universities Wales
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