

**23/04/2021**

**Email only**

## **UCU Response to the Draft Social Partnership and Public Procurement (Wales) Bill Consultation**

The University and College Union (UCU Wales) represents almost 7,000 academics, lecturers, trainers, instructors, researchers, managers, administrators, computer staff, librarians, and postgraduates in universities, colleges, adult education and training organisations across Wales. UCU Wales is a politically autonomous but integral part of UCU, the largest post-school union in the world. We welcome this opportunity to respond to the Draft Social Partnership and Public Procurement (Wales) Bill Consultation.

### **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?**

UCU welcomes this Bill as both timely and necessary. Notwithstanding clauses in the withdrawal agreement, the UK's exit from the European Union removes Wales from a source of law which has, for the most part, supported the development of employment rights and consultation structures. Having little guarantee that this legacy will survive a single parliamentary session, it makes good sense to consolidate our own tradition of partnership so that it can evolve alongside future economic and social developments.

Partly for this reason, in addition to focusing on mechanisms for enforcement, UCU is keen to explore methods in which Wales can embed and develop a system of social partnership which is both resilient and responsive to change. Accepting that partnership is predicated upon trust and mutual advantage, this implies a creative use of incentives as well as duties.

UCU is surprised that the consultations narrative case takes no account of future unforeseen challenges. As is often argued, 85% of jobs that will exist in 2030 have not yet been invented. Moreover, with an unprecedented acceleration in digital and home working practises, the past 12 months have demonstrated how quickly change can come about.

Whilst UCU welcome the Bills' focus on essential contractual & bargaining issues, we feel that it misses other key drivers such as deskilling, underutilisation and automation.

To quote Professor Calvin Jones; "it is not about the technology, but the way in which it is applied". Crucially, all successful tripartite models engage partners in a

discussion around this issue of 'augmentation' (a quality focused approach to change).

Noting that the legislation seeks to build foundations by consolidating the best elements of what already exists, we need reassurance that the scope of social partnership will be sufficiently wide to allow for future adaptation. If the Bill is unable to impact upon questions of quality, there is the risk that it will simply serve to manage decline.

Crucially, we would like the principles to focus more on practical issues of planning and prevention such as information sharing, meaningful consultation at an early stage, and ensuring relevant issues feed through to social partnership forums before decisions are taken. Additionally, we feel that the scope can be extended to apply to all duties on public bodies.

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

In many respects, it makes perfect sense to align the duties with the Future Generations Act. After all, within the currently available scope of Welsh Government competencies, the framework (with its emphasis on Long Term, Prevention, Collaboration and Involvement) succeeds in providing a structure through which the duty can develop and evolve.

However, whilst broadly welcoming the system of social partnership envisaged in the Bill, we also question whether more could be done to usefully align the processes set out in both pieces of legislation.

UCU has little confidence in a duty to consult which applies only "as far as is reasonable". Accepting the need for flexibility and problem solving, trust must develop under conditions of certainty. If the duty is to stretch beyond simple voluntarism, we recommend either a strict duty or else a duty which appertains 'as far as is reasonably practicable'.

Similarly, 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, neither HEFCW nor the governing bodies of colleges and universities have committed to delivering fair work and "fair work" does not feature in the FGA or in the social partnership duty. UCU is eager to how this duty will align.

In line with the principle set out in our response to question 6, thought must be given to ways in which trade unions can be supported in expanding their capacity. For instance, in order to meet the duty there will be a need for additional facility time.

Finally, we are concerned by the apparent cul-de-sac in Clause 62 which allows for a trade union to withhold agreement but does not suggest what action will follow.

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

Accepting the principle that any tradition of social partnership must evolve over time and within its own context, UCU does not propose an extensive wish list.

Having said that, looking both to comparator systems and recent UK reports (Oxfam, Resolution Foundation, Equality Trust, LSE, CLES – hyper link), the aggregate recommendations strongly favour social bargaining around issues of 'control', professional autonomy and professional learning. The rationale for doing so is broadly as follows;

1: Wellbeing and productivity (caveat) is boosted in job-roles which allow for a degree of control and co-design

2: The process of iterative negotiation future proofs roles and enables positive transformation

3: Co-design enables 360 degree learning and radically cuts the damaging effects of underutilisation and managerialism.

To put it another way, what is the point of having fair work if it is not good work? Since all of these issues are captured by the term 'augmentation', UCU recommends its inclusion in the list of principles.

Similarly, our members will be familiar with the negative effects of decisions around which they were neither consulted nor properly advised. Information sharing is crucial to the collective bargaining process and a key way in which critical consensus can be reached. In the same way, meaningful consultation should always occur before the decision making stage.

In common with other trade union partners, UCU supports the principle that no public funds should ever go towards labour exploitation. This includes casualization and sharp practices in the FE and HE sector.

Finally, while the Social Partnership Council can show leadership and assist in lifting standards across the board, superior local agreements should not be superseded for the sake of consistency. For this reason, UCU would welcome the inclusion of a non-regression principle.

**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 Well-being of Future Generations (Wales) Act 2015?**

For the Bill to have its full desired effect, we feel that the governing bodies of HE & FE institutions should be covered in the Social Partnership Duty.

Similarly, and in terms of future development, serious consideration should be given to capturing Estyn, Qualifications Wales and the WJEC. In addition to carrying a substantial procurement spend, these bodies exercise a strategic function within the sector.

Whilst UCU welcomes the attempt to align the social partnership duty with the Future Generations Framework, we are concerned that the FG Acts' represents a natural limit on which organisations are covered. This issue can be addressed in one of three ways; 1: by legislating to extend the FG's coverage, 2: by legislating to

extend the framework for the sole purpose of social partnership or, 3: devising a means whereby organisations can voluntarily contract to discharge social partnership duties (see our response to question 8 - social licencing).

Estyn, Qualifications Wales and the WJEC are absolutely fundamental to promoting equality of opportunity in Wales. Consequently, if the Bills approach is to be one of consolidation and evolution, it is vital that government avoids maintaining barriers to the development of social partnership when these decisions fall firmly within its own competence.

Finally, UCU Wales recommends the inclusion of a clause on the face of the legislation which allows for the future incorporation of new or successor organisations i.e. The Commission for Tertiary Education and Research.

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

UCU broadly welcomes these proposals. However, in order to promote a framework in which these duties can develop, we feel that they should be supported by a further suite of reciprocal incentives, some of which are explored below.

As already mentioned, UCU believes that there is a need to focus on augmentation. Consequently, and in common with other trade unions, 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. As a rule, the introduction of new technologies should be discussed and impact assessed, with a managed focus on qualitative improvements which do not act to the detriment of the workforce. In the same fashion, without cutting across existing agreements, there should be some provision in the Bill to deal with professional learning and continuing professional development. This will be essential to support the changes that we know will be needed going forward. Consequently, management of significant change should be discussed in a timely manner with an emphasis on the skills and training which enhance existing and new roles.

UCU is concerned that par(s). 66-69 do not go as far as stating that 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.

UCU further suggests that the scope of the duty should be reviewed two years following implementation and every three years thereafter with a supporting consultation. This will allow for evolution with consent and the incorporation of further devolved powers.

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

UCU has already alluded to some of the external threats. These can be broadly summed up as an expansion of UK competency through mechanisms such as the Internal Market Bill and the erosion of existing employment rights.

In addition, the success of Welsh Governments regional investment framework and the new bodies which are charged with its delivery (Corporate Joint Committees and their subgroups) is also likely to impact upon the operation of the proposed model. Lessons drawn from other jurisdictions indicate that social partnership works best when collective bargaining is generalised across all sectors.

In terms of procurement, if the intention is to modify the behaviour of private sector providers, any plan must deal with the shape of the Welsh Economy as it exists today. Commonly compared to an 'hour-glass', it encompasses several large employers, a preponderance of micro businesses but comparatively little in the middle. Throughout Western and Northern Europe, social partnership structures rest upon the existence of this 'Mittelstand'. For this reason, thought must be given to how social partnership can contribute to nurturing medium SME's whilst also aligning with Welsh Government work in the foundational economy.

Finally, there is a question around objective capacity. UCU argues that meaningful social partnership must fulfil a social and economic purpose which will positively impact upon a wider ability to plan. However, whilst much has been said in England about learning from employers, it is a fact that many smaller businesses rarely plan from year to year.

In a similar fashion, trade unions will need to develop the capabilities and expertise to usefully contribute in this new environment. To put it more bluntly, whilst UCU argues for early information sharing, who determines what information is needed and what do we do once we receive it?

Rather than simply relying on the possibility that new opportunities will generate the required wherewithal, trade unions and businesses must be supported in creating this capacity. After all, we live in a world where the biggest budget frequently secures the best and brightest expertise. For example, we need only consider the misalignment between local authority procurement staff and multinational contractors so evident in England. The same mismatch is also found in UK legislative prefiguration where department 'Ministerial Salons' are dominated by PWC and well paid consultants. In contrast, TUC and NGO's are rarely able to field anybody enjoying sufficiently deep specialisation. This is one of the principle reasons why (as of 2017) £1 in every £3 of frontline government spend was delivered through the private sector – with all the associated disadvantages in terms of inequality, job quality, security and wages.

Whilst the extension of collective bargaining goes a long way to addressing this process of political capture, we must ensure that actors have the capabilities to make processes robust. Social partnership suggests a gradual re-negotiation of the current boundaries between public and private. This will require both a reimagining of the democratic space and a clear set of incentives to support the evolution of collaborative structures;

It also implies new specialisations and revised roles.

**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'?**

UCU believes that the scope of the Bill must carry the potential to evolve beyond the mere descriptive. 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. In order to meet the challenge of future transformation, we must strive for wider consultative powers and a focus on augmentation. This approach is very much in keeping with the Future Generation Frameworks focus on Long-term, Prevention and Involvement.

In addition to Future Generations, more consideration should also be given to the Equality Act and the ability to enact secondary legislation. Both the Socioeconomic Duty and reporting duties surrounding gender pay support an ability to go further as Wales develops social partnership within its own legal competence. UCU. We support extending the scope to apply to all duties on public bodies

**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?**

Believing that it would be fanciful to suggest that Wales can simply import a model outside its own traditions and competences, UCU is keen to identify practical policies suitable for use within the Welsh context;

**A Well Being Licence** - in line with the Future Generation Act and the social contract outlined in Prosperity for all, UCU Wales urges Welsh Government to develop and implement a Well Being Licence. A wellbeing license is a stipulation on hybrid bodies or providers to the public sector, that they can only enter the market for that good or service if there is pre-recognition that they have met criteria ensuring they meet wellbeing standards linked to wellbeing goals. This pan-Welsh scheme would only give enterprises the right to trade in public sector markets if they offer social and wellbeing returns, such as the Real Living Wage, no workforce precarity, or offering decent progression and training routes for staff. UCU does not advocate protectionism. Rather, in addition to the principle that no public funds should ever go towards labour exploitation, it is our belief that Welsh Government can make greater use of those incentives which sit within its competence. To that end, we are keen to identify policies which anchor public finance to benefit communities and strengthen the Welsh economy. After all, this is one of the crucial ways in which we demonstrate the material value of social partnership. UCU would welcome an opportunity to practically explore these policies.

**Collaborative Hubs** - Embedding fair work in the new curriculum is only the start. As the duty and Council embeds, evolution around autonomy and augmentation will need to feed back into Economy and Skills and FE & HE institutions. Enabling Renewal sketches out an excellent blueprint, which UCU would seek to enhance by enabling institutions and academic staff to become more adaptive through collaborative quality enhancement and increased specialisation. The object will be to develop a transformative and genuinely symbiotic relationship between the private and post 16 education sectors. Ultimately, this can feedback as an added incentive

through which participating or licenced businesses will have access to R&D and bespoke assistance in market development, technological and digital adaptation and a scale of long-term planning which is generally only encountered in cooperative enterprises. In adopting this method, social partnership can play a transformative role both in promoting a sustainable base for fair work and building the conditions for its future development.

Finally, free access to post-16 education up to the age of 25 will allow more young people to enhance their bargaining strength and promote the mixed, balanced economy that Wales needs.

**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 recognise rationale for the current thresholds but are pleased that there is space for developing a better fit to Welsh business going forward. In common with the Social Partnership Duty, UCU recommends that the threshold level should be reviewed two years following implementation and every three years thereafter with a supporting consultation. This will provide Welsh Government with an opportunity to extend the threshold within its own growing capacity.

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 common with other trade union partners, UCU is concerned by the cautious approach set out in par. 91. We recommend 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.

Likewise, UCU shares WTUC's view that insourcing can play a crucial role in securing better labour outcomes. Consequently, we support their call for a duty for 'In-house and in-sourced public services' and a duty for 'Fair treatment of workers'.

Finally, where private markets are failing to meet basic needs UCU supports the development of governance and management structures which enable workers and communities to take direct control of some common assets.

**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?**

In line with the Future Generations Act, UCU supports the creation of a unified, cross-public service board approach where pre-commissioning to procurement cycle maximises collective pooled spending. We feel that this could help develop a mainstreamed approach to social value, community benefit and wellbeing criteria for all local spending

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?**

UCU urges Welsh Government to ensure that HE and FE institutions are covered by the two tier code. Not only are colleges and universities recipients of substantial public funds but also key strategic anchors in their own right.

Given that social partnership determines a degree of certainty and reciprocal benefit, the everyday realities of staff casualization militates against HE & FE coverage by some aspects of the Bill but not others.

As stated throughout our response, UCU supports the principle that no public funds should ever go towards labour exploitation. This includes casualization and sharp practices in the FE and HE sector.

Consequently, if it is found that some impediment prevents their inclusion, we strongly recommend that an alternative mechanism is found. In the case of HE & FE, our proposals around social licensing can be adapted to provide a solution.

In the same fashion, UCU hopes that the approach will be extended to include City Deals, projects delivered by Welsh Government through the Joint Prosperity Fund, work funnelled through Corporate Joint Committees and post-Covid19 recovery funding.

In common with Wales TUC, UCU's 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?

See above



**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?

UCU agrees with Wales TUC in as far as the case for proportionality has been overstated in the legislation. "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."

However, we also acknowledge that resilient social partnership is iterative, agile and transformational; securing a race to the top through its focus on augmentation.

Our response to question 8 proposes additional levers through which contracting organisation can secure help and expertise to grow along socially beneficial lines. In this respect, rather than approaching the problem from the static standpoint of proportionality, Government needs to give more thought to how we mainstream principles of partnership and fair work. This implies real policies, active assistance and added value to build upon the aspirations in Prosperity for All.

**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)?**

UCU broadly supports this approach subject to the constructive suggestions and reservations expressed in our response to questions 7 and 14. We do not think that the mainstreaming of social partnership principles can just be left to the operation of the market. For this reason, sectors and organisations must be supported through the process of change.

If not covered in the primary legislation, Estyn, Qualifications Wales and WJEC should be incorporated at the earliest possible opportunity.

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

- a. Membership of the Social Partnership Council?

UCU notes the proposed inclusion of Universities Wales as an appointing body for the HE Sector. We wonder how this can be reconciled with the current absence of a national agreement, with all formal negotiation being directed through the UK employers body (UCEA).

- b. The proposed nomination process?

We feel that it is for Wales TUC and its affiliated unions to propose their representatives – not the First Minister. In the unlikely event that the First Minister objects to our collective choice, it is enough to allow for a discussion.

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

UCU broadly supports these proposals but strongly recommends that the membership of subgroups needs to be sufficiently flexible to include supported experts and specialists as the function of the council evolves. This suggestion is designed to address the issue around uneven expertise that we identify in our response to question 6.

With respect to Par. 110, UCU agrees with TUC Wales in as far as 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.

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?

UCU welcomes the new Council's ambition to provide "*leadership*" but is less enthusiastic around "*promoting consistency*". Recognizing the largely voluntarist foundations upon which the Welsh tradition of social partnership rests, consistency must not become the enemy of creativity. For that reason, where an existing relationship allows for a more extensive or deeper discussion than is allowed for in the Bill, this should not be hampered by a remit which we would like to see develop over time.

Similarly, nothing in this Bill should adversely affect positive local agreements or practise. For this reason, UCU feels that both the system and Council should operate on a 'no regression principle' to sit alongside augmentation. In a race to the top, it can never be necessary for one group of workers to surrender valuable rights for the sake of consistency or a neat fit.

We need to be clearer about the degree to which the proposed system connects to new regional development and delivery structures such as Corporate Joint Committees. The same also applies to organisations delivering the shared prosperity fund and Covid recovery projects.

As argued in our response to question 4, UCU Wales recommends the inclusion of a clause on the face of the legislation which allows for the future incorporation of new or successor organisations i.e. The Commission for Tertiary Education and Research.

**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?**

UCU Wales is concerned that too much focus is falling on compulsion and compliance. This tends to sustain a circular conversation in which we search for a way of 'making them do it' only to bemoan our relative lack of powers when exploring a solution.

Looking to international comparators, in France, where there is a very strict, lineated and frequently antagonistic relationship between unions and business, the 'peace' is kept through a carefully enforced rules based system. This allows for minimal agility and frequently explodes when threatened by neo-liberal reforms. In contrast, Germany maintains a corporative settlement whereby joint interests are expressed and developed through established structures under the auspice of a constitution. Norway, has developed an economic and social bargaining structure which, overtime, has settled into the nation's political DNA. In the case of latter two traditions, reciprocal tripartite processes respond to change through augmentation and longstanding sector trust. However, even Norway has experienced difficulty in incorporating new professions into its well established bargaining structures.

With respect to compliance, UCU would support Wales TUC's proposal around establishing a quasi-judicial body providing that it enjoys proper recourse to law within a clearly expressed set of devolved competencies.

**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?**

If we wish to see the development of genuine and organic social partnership, we need to trust partners to reach the right decisions within the framework that the Bill sets out. ACAS already exists for the purposes of dispute resolution. Consequently, whilst we are happy to have a discussion around conciliation and solution finding, UCU's members will not support the right to surrender their bargaining power to any third party.

**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?**

Please see our response to question 8.

**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?

**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?

See our response to question 26.

**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.

In addition to Welsh-language provision of services, UCU believes that there is value in emphasising Welsh-language administrative culture when considering the “social value outcomes” of procurement. In Bangor, Aberystwyth and Trinity St Davids, a lot of the internal administration of the institutions takes place bilingually, and socially responsible procurement should take this into account when buying-in any services

**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.