

Cyflwynwyd yr ymateb i ymgynghoriad y [Pwyllgor Cydraddoldeb a Chyfiawnder Cymdeithasol](#) ar [Y Bil Partneriaeth Gymdeithasol a Chaffael Cyhoeddus \(Cymru\)](#)

This response was submitted to the [Equality and Social Justice Committee](#) consultation on [Social Partnership and Public Procurement \(Wales\) Bill](#)

SPPP 04

Ymateb gan: FSB Cymru | Response from: FSB Wales

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## Social Partnership and Public Procurement (Wales) Bill

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### Stage 1 Scrutiny: Consultation Response to Equality and Social Justice Committee

FSB Wales is the authoritative voice of businesses in Wales. It campaigns for a better social, political, and economic environment in which to work and do business.

With a strong grassroots structure, a Wales Policy Unit and dedicated Welsh staff to deal with Welsh institutions, media and politicians, FSB Wales makes its members' voices heard at the heart of the decision-making process.

#### Introduction

As the authoritative voice for SMEs, FSB Wales has engaged constructively with the Social Partnership and Public Procurement agenda, including participation as part of the Welsh Government's Shadow Social Partnership Council.

The value of the social partnership approach was particularly evident during the pandemic, where a particular threat cut across business and society. However, this period was underpinned by a shared sense of urgency to collaborate. Ensuring that the value of this engagement is maintained as we consider broader challenges of economic development must now be the priority.

This paper will deal with the issues on which the Committee has requested responses in turn:

#### The establishment of a Social Partnership Council

FSB Wales has actively taken part in the Social Partnership approach on a voluntary basis so as to develop areas of common interest. We value the relationships and engagement that the Social Partnership model has allowed us to develop with organisations within that partnership and we agree with the suggestion that a partnership approach has allowed for valuable engagement, particularly over recent years when Coronavirus has so profoundly affected the economy and our communities.

While we do not think a statutory approach is a problem, the key question to ask is 'would the move to a formal structure balance against an approach that allows for agility and flexibility as issues and cases arise, and ensure that the system continues to work well for policy in Wales and for the voice of all partners?'

Social Partnership needs a cogent analysis of the current system and its problems. An analysis should include how bilateral links with business organisations and mechanisms such as the Business Scheme (as outlined in the Wales Act) have worked, which to our knowledge has not been comprehensively reviewed ahead of this process.



Given its tripartite aims of partnership, the membership makes sense as does the nomination process.

While imperfect, previous mechanisms of engagement with the wider business community and the range of general and specialist business organisations have allowed for a broader contribution of business view. There is little in the detail or narrative of the Draft Bill to indicate how the Welsh Government intends to engage the wider business community or improve its engagement with that community on a bilateral basis.

We would welcome clarity as to how the Welsh Government is going to consult and engage business organisations on issues around the economy and economic development. This new mechanism and structure of engagement must therefore sit alongside a vehicle for interaction on the economy specifically. The commitment to economic summits and quarterly meetings, referenced in the Welsh Government's publications, is welcomed.

As referenced in the oral evidence session, the [Scottish Government published a joint document with businesses](#) "setting out [their] shared commitment to co-development, collaborative delivery and collective assessment of policies impacting business. Based on trust and mutual respect it provides a framework for [their] engagement with business." In this vein, the Welsh Government would benefit from a more clearly articulated understanding of engagement principles with businesses, and likewise a recognition of the priorities of businesses.

**A statutory duty on certain public bodies to seek consensus or compromise with their recognised trade unions (or where there is no recognised trade union) other representatives of their staff, when setting their well-being objectives and delivering on those objectives under section 3(2) of the WFG Act 2015**

No general view.

The statutory burden of the bill is on the public sector rather than on the private sector, so there are clear opportunities for learning and best practice to be shared from the public sector to the private sector as we monitor development.

In a wider non-legislative sense, the social partnership approach needs to recognise the wide landscape of both formal and informal employee engagement mechanisms which already exist across organisations in Wales. What is appropriate for larger organisations may not be so for smaller organisations.

**A statutory duty on Welsh Ministers to consult social partners, employers and worker representatives through the Social Partnership Council when delivering on their well-being objectives under section 3(2)(b) of the WFG Act 2015.**



FSB would generally agree with this and look forward to working on this basis. The extent of the duty and the detail will be important to know.

However, it should be clear from the outset that membership of the Council cannot override the mandate under which the organisations are operating outside the council.

It is important that the role of partners is defined, alongside what they are providing when they are consulted. It is vital that it does not take as given that consultation leads to presumption of agreement. FSB's autonomy and independence as an impartial, non-political business organisation is fundamental to our operation. As such 'provide information and advice to Welsh Ministers' is an important remit.

The capacity of partners relative to the Welsh Government is also important to bear in mind. Over recent years, FSB Wales has made a substantial contribution and extended significant resource in engaging with the Social Partnership. The Welsh Government has far greater resources than other elements of the Social Partnership and there needs to be awareness of this fact from the start in ways of working and expectations on partners. Participation in activity under the umbrella of the partnership is often extensive and takes time away from other partners' own priorities and work and so may carry opportunity costs for organisations, including impact on development of other policy proposals. Should the resource demands of this process become too high, parts of the Social Partnership may be forced to disengage.

In this instance, expectation such as the consulting of a SPC sub-group for areas such as 'exception notifications' for model contracts (see para 104 Explanatory Memorandum) may be a concern, and this may also slow down procurement processes.

As such, it is important that the Partnership framework is clearly defined, that ways of working are tight and geared to partners' needs and does not stray into articulating wider policy which remains the role of Government. This needs definition and needs to be well understood and shared on all sides. We recognise Welsh Government's right to use the partnership to implement its policies in government. However, it needs to understand and respect the limitation of the business partners and others.

### **The amendment of section 4 of the WFG Act 2015 by substituting 'fair work' for 'decent work' within the existing "A prosperous Wales" goal**

The Welsh Government notes the aim of this activity is for consistency across the legislative landscape, and follows the Fair Work Wales report's recommendation that fair work is integrated into the WFG Act 2015. As such, the Welsh Government states 'This provision, which will mean 'fair work' takes on its ordinary meaning, and substituting 'fair work' for 'decent work' will ultimately avoid potential duplication and unhelpful mixed messaging.'



The 'name' of the agenda – whether 'fair' or 'decent' work – is secondary, the focus should be directed at what it represents and how we look to move change forward, aligned within a wider economic development agenda that places 'decent' work within the mutually reinforcing area of growth and building small businesses' capacity and capabilities for the future.

It should be noted (as in paragraph 10 of the explanatory memorandum) that the Fair Work Commission noted that there are limits to what can be achieved through legislation in the Welsh context and FSB Wales agrees with this view. If the 'decent work' naming fits better on legislative level, this is a rational change.

However, changing Social Partnership structures are not the only practical recommendations of the Fair Work report in delivery of this policy, which need to be delivered whether within or outside these mechanisms.

There may be also questions on devolved competence that may cause challenges to the agenda from a legislative point of view. An approach looking at particular devolved areas of competence for action may be better in the long run and looking at wider social norms and culture.

It is important that the agenda demonstrates the benefit of this approach to businesses themselves or to how it serves to help grow the economy. While we welcome the discussion of 'a growing commitment to use public sector spending to support home grown businesses and Welsh supply chains' and that 'Procurement plays an important role in maximising the amount of business won by Welsh firms to strengthen the economy and sustain and create employment', we feel that more emphasis should be placed on the role of Social Partnership in growing a more sustainable and productive economy.

There is a legitimate question about whether the 'fair work' definition should be viewed as needing legal force in this way, rather than as governing principles that then shapes the legislation to fit competence as possible.

The Fair Work Wales Commission's definition is one that does not fit statutory competence (at least across all areas) but is one that allows the pursuit of fair work in different ways of working, including cultural change, norms, incentives as well as law. FSB agrees with this approach as the best place to progress the agenda. The Fair Work Commission's definition also has the advantage of having already been broadly agreed by members of the Social Partnership and what work has been undertaken on Fair Work to-date has used this definition.

We would note that the Fair Work Commission's recommendation around the self-employed needing to be further explored within the Fair Work agenda has not happened. The vulnerabilities here have been made more explicit as a result of Covid-19 but are largely unaddressed in the discussion.

**A statutory duty on certain public bodies to consider socially responsible public procurement when carrying out procurement, to set objectives in relation to well-being goals, and to publish a procurement strategy**



We agree with all the measures set out, but would emphasise the importance of ensuring the strategy and the implementation work with 'think small business first' principles in mind.

At FSB, we encourage businesses into the public sector supply chain as a vehicle for growing businesses, so it needs to be accessible to navigate. However, it salient to note that, in many cases, there is limited resource for the smallest businesses to really engage effectively with the process. Ensuring that the guidance provided to SMEs on the ground – including through Business Wales – is effective will be crucial.

Many procurement professionals within the public sector are already significantly stretched, and within the new landscape of regional investment and development, that's going to be heightened. Allocating appropriate support where it's needed will prove central to effective working.

As well as opening up the process to SMEs from the demand side in the public sector, there is also a demand priming role in ensuring that SMEs are being built up to be competitive firms able to thrive in the wider marketplace. As the Fair Work Wales Commission recommended, there is room to look at fair work as 'progression' and not a 'fixed point'. The Fair Work Commission rightly highlighted the ambition to deliver progress through procurement. For instance, at our focus group with the Commission, businesses told us of their ambition to pay the higher Real Living Wage. For them, the only way to deliver on that was to win contracts for services to the public sector.

It is therefore important that procurement is a means at moving firms along that progression, and not as a barrier to entry. The latter could have unintended effects in taking away from a policy of building medium-sized firms and community wealth, and in the end be more detrimental to a policy for locally embedded firms with sustainable employment.

Scotland's Supplier Development Programme (<https://www.sdpscotland.co.uk/>) provides support for SMEs and third sector to build capacity and skills to bid for public contracts. Over 12,000 companies have participated, and so this seems to be a successful approach that could be replicated in Wales.

The programme's key objectives are to:

- Raise awareness of opportunities arising from public sector spend;
- Provide training and support on all aspects public sector tendering;
- Improve the tender readiness of local suppliers through early intervention;
- Support public sector bodies to meet the Sustainable Procurement Duty; and
- Promote links and integrate with other government business support services.

It is important too, that the legal status is clear here and that disputes around legality do not derail the fair work agenda. According to legal advice received by Scottish Parliament in 2015 during debate of Procurement Reform Scotland Act the "real Living Wage" is voluntary and incapable of being enforced. It is



important that the Welsh position does not come with legal challenge and that the legislation is within competence and takes account of wider changes to the procurement framework at the UK level as it replaces the EU regulations.

Regulation needs to be rational and universally applied and enforced, otherwise there is a perverse outcome of firms gaining competitive advantage by unethical means over the great majority of law-abiding firms. It is therefore important that analysis of how Welsh Government can monitor and manage compliance with new duties is made and that this has a practical benefit.

All steps should be taken to ensure compatibility alongside the UK procurement strategy, and under the new post-EU regime that it is not open to legal challenge.

### **On certain public bodies to carry out contract management duties to ensure that socially responsible outcomes are pursued through supply chains**

This is an area where detail, evaluation and monitoring will be crucial.

Obligations made by Tier 1 contractors are often met by putting significant pressure on SMEs further down the supply chain. This has the potential to seriously damage an SMEs' viability. This should be a consideration in the formation of any tender.

Monitoring and evaluation of supply chains to understand their impact on small businesses would also provide a better understanding of how we ensure value-added procurement for community wealth and local skills, alongside understanding social and environmental impact on these firms and diffusion of knowledge and technology from larger bodies and companies along the supply chain to support those ends. An economic development approach looking at building up smaller businesses can be aligned with this policy and better foreground the advantages to businesses in this regard too. Collecting and reporting data in this sense can help the wider success for the economic, social and environmental triple line.

Paragraph 114 and 115 of the Bill EM notes some of these concerns and those on the risk of less competition - we welcome the commitment to 'careful consideration of proportionality as statutory and other guidance is developed, and by effective engagement with stakeholders as guidance is developed', but this will require more detail in implementation and to ensure that there is no negative impact on these firms at a difficult time when margins are very tight.

It is important that there is a test for this throughout the procurement cycle as a social good. Any such duties must not get lost as we go through long and complex supply chains, or negated by the other duties set on contractors. It is vital that the asks are proportionate, promote progression, and do not have perverse outcomes and impact on opportunities for SMEs.



It is crucial that obligations such as these are based on the notion of progression – as noted by the Fair Work Commission and do not place unreasonable expectations on SMEs that could exclude them from the tendering process. Such a result arising from the contract management obligations would have a perverse effect in terms of social value and community wealth, building our SME sector and generating local skills.

The Welsh Government and its social partners should be aware of the limitations on SMEs (in terms of their capacity, expertise and margins), so the focus should be on business support and progression, rather than too stringent barriers to entry.

### **Reporting duties to be imposed on the public bodies and Welsh Ministers in relation to the Social Partnership Duty and Procurement duty**

This should also include monitoring on the effect on SMEs and on supply chain management, with a view to ensure that the principles outlined above in relation to impact on supply chains costs are accounted for, and steps taken to mitigate any effects or to make the system more effective and targeted properly.

