

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 07

Ymateb gan: Comisiwn Cydraddoldeb a Hawliau Dynol | Response from:
Equality and Human Rights Commission Wales



Consultation response

General Principles of the Social Partnership and Public Procurement (Wales) Bill

Consultation details

Title of consultation: General Principles of the Social Partnership and Public Procurement (Wales) Bill

Source of consultation: Equality and Social Justice Committee

Date: 21 July 2022

Introduction

1. The Equality and Human Rights Commission (the Commission) is a statutory body established under the Equality Act 2006. It operates independently to encourage equality and diversity, eliminate unlawful discrimination, and protect and promote human rights.

1.1 We welcome the opportunity to respond to the Equality and Social Justice Committee's consultation on the general principles of Social Partnerships and Public Procurement (Wales) Bill.

Key Provisions of the Bill

2. The establishment of a Social Partnership Council

2.1 The Equality and Human Rights Commission, (the Commission), agrees that the Social Partnership Council (SPC) has an invaluable role to play in supporting Ministers in their actions to improve public services and to increase well-being, particularly social and economic well-being.

Role of the SPC

2.2 We welcome the creation of the SPC as a tripartite statutory advisory body, with an explicit remit to provide information and advice to improve public services and the social, economic, environmental and cultural well-being of people in Wales.

2.3 However we recommend that the SPC should provide advice on the other well-being goals, specifically, ‘A More Equal Wales’. Equality cuts across the definition of fair work and so specific reference to ‘A More Equal Wales’ will support the principles of the Bill.

2.4 As included in our consultation response on the draft Social Partnerships and Public Procurement (Wales) Bill¹, **we also recommend that it should be the role of the SPC to challenge, scrutinise and hold the Welsh Government to account where necessary.**

Membership of the SPC

¹ Draft Social Partnerships and Public Procurement (Wales) Bill, March 2021.

2.5 The draft Bill consultation included an expectation that there would be diversity in nominations for membership of the SPC. Whilst welcoming this expectation, our consultation response on the draft Bill raised concerns at the lack of detail on how this would be realised. We are concerned that there is now no reference to this within the Bill or the explanatory memorandum. We note the evidence given to the Equality and Social Justice Committee by the Minister Hannah Blythyn MS², that there would be an expectation that nominations would be diverse. However, we remain unclear as to how this will be achieved in practice.

2.6 We are pleased that the SPC will collect data on its membership, but would stress the importance of collecting appropriate data on protected characteristics of members, as well as on those nominated to be members.

2.7 We recommend the Welsh Government works with nominating bodies to develop a shared understanding of the principles of positive action as a way of increasing the diversity of nominations. Our 2016 publication, ‘How to improve board diversity’³ may be helpful when considering how to ensure diversity of nominations.

² <https://record.senedd.wales/Committee/12861>

³ <https://www.equalityhumanrights.com/en/advice-and-guidance/how-improve-board-diversity-six-step-guide-good-practice>

2.8 We are concerned that the Welsh Government has not considered how the voices of non-unionised workforces can be heard within the SPC. Our evidence shows that there are significant issues for workers in non-unionised sectors such as health and social care. Our recent inquiry report, *Experiences from health and social care: the treatment of lower-paid ethnic minority workers*⁴, found that these workers face a range of challenges in the workplace and had limited opportunities to have their voices heard. Our report also found there were inadequate mechanisms for representation or channels for complaints to be made and addressed.

Sub-groups of the SPC

2.9 As included in our consultation response on the draft Bill⁵ we **recommend the creation of an equality and human rights sub-group**. This sub-group would provide an effective way of ensuring the promotion of equality and human rights is integral to all six characteristics of fair work. We are disappointed that this sub-group has not been included within the Bill. However we are pleased that section 8 of the Bill allows for the creation of additional sub-groups, and would encourage the SPC to establish an equality and human rights subgroup to help the SPC carry out its functions effectively. This would support and strengthen the achievement of the general principles of the Bill.

⁴ <https://equalityhumanrights.com/en/publication-download/experiences-health-and-social-care-treatment-lower-paid-ethnic-minority-workers>

⁵ Draft Social Partnerships and Public Procurement (Wales) Bill, March 2021.

3. 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

3.1 We welcome the recognition within the Bill of the importance of recognised trade unions and non-unionised worker voices being heard by public bodies. We raised concerns within our draft Bill consultation⁶ response, about the importance of ensuring non-unionised voices were heard.

3.2 Our recent inquiry report⁷, found that lower-paid ethnic minority workers in the health and adult social care sectors, particularly migrant workers, are less likely to be aware of their employment rights. Many barriers to awareness of employment rights were identified. The report recommends that the **Welsh Government should use national working groups, such as the SPC amongst others, to collaborate on promoting awareness of employment rights in the health and social care workforce.**

Public Sector Equality Duty (PSED)

⁶ Draft Social Partnerships and Public Procurement (Wales) Bill, March 2021.

⁷ <https://equalityhumanrights.com/en/publication-download/experiences-health-and-social-care-treatment-lower-paid-ethnic-minority-workers>

3.3 Listed public bodies in Wales are required under the PSED to set equality objectives. These objectives can support fair working practices. We are concerned that neither the Bill nor explanatory memorandum refers to the PSED. There are potential synergies in aligning the requirements under the PSED with the requirements under the SPPB. These may be lost, lead to confusion and duplication if the PSED is not positioned as a strong lever that can sit alongside the new social partnership duty.

3.4 There is also a lack of consistency with those bodies covered by the Equality Act 2010 (Statutory Duties) (Wales) Regulations 2011, and the PSED specific duties for Wales. We note that bodies subject to the social partnership duty are listed in section 6 of the Well-being of Future Generations (Wales) Act 2015. **We recommend consistency of coverage with the PSED in terms of listed public bodies.** Otherwise some bodies will be subject to the PSED regulation on procurement while others are not.

3.5 We note there is no detail included in the Bill on how public bodies should seek agreement with their recognised trade unions (or where there is no recognised trade union) other representatives of its staff, when setting and taking reasonable steps to meet their well-being objectives. **In developing detailed guidance on the approach to consultation on the Bill we recommend referring to the Equality Act 2010 (Statutory Duties) (Wales) Regulations 2011.** Regulation 5⁸ sets out obligations on public bodies listed in schedule 19 of the Equality Act 2010 in relation to engagement.

⁸ <https://www.legislation.gov.uk/wsi/2011/1064/contents/made>

4. 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

4.1 We welcome the introduction of a statutory duty on Welsh Ministers to consult social partners, employers and worker representatives through the SPC. However we are concerned that non-unionised worker voices are also heard by the Welsh Government, as part of the SPC.

4.2 Our recent inquiry report highlighted that adult social care is broadly a non-unionised sector and most workers (including low paid workers) are women. “Women make up 87% of local authority social care workers and 83% of commissioned-out care workers”.⁹ We know this is a largely low-paid and non-unionised workforce. **We recommend that the Welsh Government should also be required to take additional steps to ensure the voices and perspectives of non-unionised workers are heard and used to inform delivery against well-being objectives.**

Strategic Decisions

4.3 To ensure clarity for public bodies, **we recommend there should be guidance on what ‘decisions of a strategic nature’ means in practice.** Our experience as regulator of the PSED has shown that clarity within regulations can assist with compliance and the effectiveness of the duty in meeting its aims.

⁹ https://equalityhumanrights.com/sites/default/files/inquiry-experiences-and-treatment-of-lower-paid-ethnic-minority-workers-in-health-and-social-care-report_0.pdf

5. Amendment of section 4 of the WFG Act 2015 by substituting ‘fair work’ for ‘decent work’ within the existing “A prosperous Wales” goal

5.1 We welcome the actions by public bodies under the WFG Act 2015 to incorporate fair work, by amending the WFG Act 2015 to substitute fair work for decent work.

5.2 We welcome the work the Welsh Government is doing to put in place the recommendations of the Fair Work Commission’s report¹⁰. However, the definition of fair work is broad and spans six characteristics. Care should be taken to ensure work is targeted in order to address pressing inequalities such as employment gaps and pay gaps.

5.3 We note that the requirement for the Welsh Government to have a fair work objective, which was included in the draft Bill, has been removed. The reason for this and obligations on relevant public bodies (including the Welsh Government) should be made clearer. **We recommend the Welsh Government take the lead on this and that these obligations are made clearer in the Bill.**

6. 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

6.1 We welcome the intention to use the power of procurement to promote social partnership and fair work, and the requirement on relevant public bodies to publish a procurement strategy. It is important that the Welsh Government develop guidance for public bodies to ensure that procurement strategies are specific, measurable and that accountability for delivery of the strategy is clear.

¹⁰ <https://gov.wales/sites/default/files/publications/2019-05/fair-work-wales.pdf>

6.2 We welcome the flexibility within the Bill for new bodies to be listed in future. As outlined in our draft Bill consultation¹¹ response, we believe that there should be consistency in terms of which bodies are covered by the duties within the Bill and the part 2 of Schedule 19 of the 2010 Equality Act. **We recommend that both higher and further education institutions in Wales, are made subject to the socially responsible public procurement duty.**

PSED Procurement Duty

6.3 Under regulation 18 of the Equality Act 2010 (Statutory Duties) (Wales) Regulations 2011 listed public bodies in Wales are subject to a procurement specific duty.¹²

6.4 It is important for us as the regulator of the PSED and listed public bodies who are subject to the PSED, to understand how the socially responsible public procurement duty and PSED procurement regulation interrelate. **We recommend that this point is explicitly referenced within the explanatory memorandum to provide clarity.** Currently there is no reference to the PSED within the Bill or accompanying documentation.

¹¹ Draft Social Partnerships and Public Procurement (Wales) Bill, March 2021.

¹² This requires public bodies when procuring works, goods or services from other organisations on the basis of a relevant agreement, a listed body in Wales must:

- have due regard to whether it would be appropriate for the award criteria for that contract to include considerations to help meet the general duty
- have due regard to whether it would be appropriate to stipulate conditions relating to the performance of the contract to help meet the three aims of the general duty.

7. Certain public bodies to carry out contract management duties to ensure that socially responsible outcomes are pursued through supply chains.

7.1 We welcome the intention of the public procurement duties included within the Bill to improve the link between procurement processes and the delivery of outcomes through contract management. We believe these should be linked to equality objectives and outcomes.

7.2 We recommend the Welsh Government uses the PSED General Duty¹³ to advance equality of opportunity through procurement to ensure socially responsible outcomes are pursued through supply chains.

7.3 We support the inclusion of contract management duties, in so far as this provides an opportunity for contract managers to ensure that equality and human rights obligations and outcomes are considered and met. **We recommend that contract managers have an understanding of equality and human rights and how it applies in the context of the contract so there is a positive impact on equality and human rights outcomes.**

¹³ The majority of public authorities in Wales are covered by the general duty. These are listed in Part 2 of Schedule 19 of the Act as supplemented and amended.

The aim of the general duty is to ensure that public authorities and those carrying out a public function consider how they can positively contribute to a fairer society through advancing equality and good relations in their day-to-day activities. It is an integral and important part of the mechanisms for ensuring the fulfilment of the aims of the Equality Act 2010. The duty ensures that equality considerations are built into the design of policies and the delivery of services and that they are kept under review. This will achieve better outcomes for all.

7.4 Our recent inquiry report¹⁴, found that the commissioning out of adult social care, and outsourcing of some roles in health, has resulted in more insecure work and poorer pay and terms and conditions than for those directly working for the public sector, disproportionately affecting lower-paid ethnic minority workers who are more likely to be working in these indirectly employed roles in adult social care. **We recommend the Welsh Government extends the contract management provisions to the health and social care sectors in Wales, as well as construction.**

7.5 Welsh Government should use the Bill to

- provide leadership to public bodies commissioning care services and ensure that guidance relating to the commissioning of public services is in place to:
 - set out clear expectations for commissioners on the contractual obligations to provide detailed and consistent workforce datasets for all contracts;
 - ensure improvement-focused and transparent compliance with the PSED; and
 - ensure that commissioning helps address the poorer outcomes for groups of workers who share protected characteristics, including ethnic minority workers and disabled workers.

7.6 The effectiveness of this legislation in delivering improved outcomes for the people of Wales, will in part, be dependent upon the enforceability of the Bill. **We recommend that detail on how the Bill will be regulated and enforced should be set out.**

¹⁴ <https://equalityhumanrights.com/en/publication-download/experiences-health-and-social-care-treatment-lower-paid-ethnic-minority-workers>

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

8.1 We note from the Minister’s evidence to the Equality and Social Justice Committee¹⁵ that there is an intention that wherever possible reporting requirements will fit in within existing requirements, so as to not increase reporting burdens on relevant public bodies. We welcome this intention. **We recommend that when developing guidance, the Welsh Government reminds relevant public bodies of the existing requirement to report annually under the PSED which may provide such an opportunity.**

8.2 Our experience as regulator of the PSED is that where regulations are not sufficiently specific to provide clarity, this can lead to ambiguity which can affect compliance. For instance, the requirement within the Bill for contracting authorities to publish an annual Socially Responsible Procurement report “*as soon as possible at the end of each financial year*”. **We recommend a clear timetable is set out for all reporting requirements placed on Ministers and public bodies.**

¹⁵ <https://record.senedd.wales/Committee/12861>

Further Considerations

9. Any potential barriers to the implementation of the Bill's provisions and whether the Bill takes account of them

9.1 It is important that the Welsh Government uses intelligence and experience gleaned from other legislation. For example, the Welsh Government's current review of the PSED Specific Duties for Wales may provide invaluable insights that should inform the Bill development.

10. The appropriateness of the powers in the Bill for Welsh Ministers to make subordinate legislation (as set out in Chapter 5 of Part 1 of the Explanatory Memorandum)

Not answered

11. The financial implications of the Bill (as set out in Part 2 of the Explanatory Memorandum)

Not answered

Additional Points

12. Public Sector Equality Duty (PSED)

12.1 The General Public Sector Equality Duty applies to all public authorities in Wales, and the Specific Duties, apply to all public bodies listed in part 2, schedule 19 of the Equality Act 2010. The Specific Duties for Wales place obligations on listed public bodies in relation to procurement; engagement; assessing impact and data collection, amongst others. There are potential synergies in aligning the requirements under the PSED with the requirements under the SPPB (Wales) Bill. These may be lost and lead to confusion and duplication if the PSED is not positioned as a strong lever that can sit alongside the new social partnership duty. For example, we believe there is a missed opportunity in that there is no focus on equality objectives or the potential, of the Socio-economic duty (SED). Both can support the aims of the Bill and should be referred to in it.

12.2 We strongly recommend the Welsh Government includes the PSED and the potential synergies in relation to the Bill in any guidance and explanatory memorandum.

12.3 We strongly recommend the Welsh Government also recognises the opportunity presented by the Socio-economic duty (SED) to support the SPPP (Wales) Bill and that reference is made explicitly in the Bill and in any guidance and explanatory memorandum.

12.4 As a listed body in schedule 19 of the Equality Act 2010 (Statutory Duties) (Wales) Regulations 2011 regulation 8, the Welsh Government is required to conduct and publish an assessment of the impact of its policies/proposed policies on people with protected characteristics. We note the publication of the integrated impact assessment, within which there is a table recording the potential positive and negative impacts of the Bill, by protected characteristic group. We would remind the Welsh Government that an equality impact assessment (EIA) must address all three aims of the general duty. **We recommend the Integrated Impact Assessment (IIA) be reviewed to ensure that it addresses how due regard has been given to the three aims of the general duty.** Guidance on conducting an effective EIA can be found on our website.¹⁶

13. Social Partnership Duty Principles

13.1 Using the language of equality and human rights is important to ensure that when considering the requirements of the SPPP (Wales) Bill, the requirements of the Equality Act 2010 and the Human Rights Act 1998, are not overlooked. We welcome the introduction of principles upon which the social partnership duty is based and we **recommend the Welsh Government includes equality and human rights within these principles, as well as amend the third principle to become dignity and respect.**

14. Fair Work

14.1 It is important that the Bill goes beyond promoting fair work and ensures improved equality outcomes for workforces across Wales.

14.2 The Coronavirus pandemic highlighted particular areas that the Welsh Government should seek to address as a matter of priority whilst taking forward the fair work agenda.

¹⁶ <https://www.equalityhumanrights.com/en/publication-download/assessing-impact-and-equality-duty-guide-listed-public-authorities-wales>

14.3. Apprenticeship and skills provision has been severely affected by the pandemic and it is important that the Welsh Government fully understands the effects the pandemic is having on the skills sector, including apprentices and training providers. There are particular challenges for girls, disabled people and ethnic minority people in accessing and completing apprenticeships. To enable a true picture of apprenticeships in Wales, robust data disaggregated by protected characteristics including type of disability and race should be collected and analysed. **We recommend that apprenticeships be added to the list of challenges identified in the draft Bill consultation.**

14.4 We recommend the Welsh Government promotes the use of positive action¹⁷ as a way to further the fair work agenda and maximise the opportunities presented in its Employability plan, Stronger, fairer, greener Wales: a plan for employability and skills.¹⁸

¹⁷ <https://www.equalityhumanrights.com/en/advice-and-guidance/employers-what-positive-action-workplace>

¹⁸ <https://gov.wales/stronger-fairer-greener-wales-plan-employability-and-skills>