



# Procurement Reform Bill

**The UNISON Scotland Response to the Scottish Government  
consultation on the Procurement Reform Bill**

**Nov 2012**

## Executive Summary

UNISON Scotland welcomes the Procurement Reform Bill as an opportunity to ensure that annual procurement spending of nearly £11 billion is used to deliver important social, economic and environmental benefits, including improved protections for workers.

We call on the Scottish Government to use the Bill to support innovative action against tax dodging and the use of tax havens.

We believe there would be strong public support for banning companies involved in tax dodging from public contracts. A number of European cities, including Helsinki and Paris, are already acting against companies that use tax havens<sup>1</sup>.

UNISON wants to see the Bill facilitate extending payment of the Scottish Living Wage to private sector employees working on public contracts, as also proposed in John Park MSP's proposed Living Wage (Scotland) Bill<sup>2</sup>.

We agree with the proposal in the consultation paper that there should be a general duty on public sector bodies to demonstrate the extent to which what is being procured will promote or improve the economic, social, health and environmental well-being of the relevant area.

We support the range of examples given<sup>3</sup> about how this will support economic growth, and how procurement, while complying with EU legislation, can “steer the market” in a more environmentally and socially responsible direction, thereby contributing to sustainable development.

In particular, we believe the Bill should be used to promote:

- labour rights and workforce protections, such as the PPP Protocol<sup>4</sup> and Section 52 Guidance<sup>5</sup> (both of which must now be urgently reviewed and extended), and compliance with the Equality Act
- a tax justice approach, where, using appropriate legal advice, the best options are found to bar companies using tax havens and/or other forms of tax dodging from being eligible for public contracts
- a positive employment agenda - with companies which do not comply with a range of other certain basic standards not permitted to tender for public contracts (a current example that should lead to exclusions would be the scandal over blacklisting of trade unionists in the construction industry<sup>6</sup>)

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<sup>1</sup> [www.ipsnews.net/2012/10/helsinki-boycotts-tax-havens/](http://www.ipsnews.net/2012/10/helsinki-boycotts-tax-havens/)

<sup>2</sup> [www.scottish.parliament.uk/S4\\_MembersBills/Living\\_Wage\\_Consultation\\_Final.pdf](http://www.scottish.parliament.uk/S4_MembersBills/Living_Wage_Consultation_Final.pdf)

<sup>3</sup> See paragraphs 52 and 125 of the consultation document.

<sup>4</sup> STUC/Scottish Executive Public Private Partnerships in Scotland – Protocol and Guidance Concerning Employment Issues  
[www.scotland.gov.uk/Resource/Doc/1069/0005205.pdf](http://www.scotland.gov.uk/Resource/Doc/1069/0005205.pdf)

<sup>5</sup> Statutory Guidance to Local Authorities on Contracting  
[www.scotland.gov.uk/Topics/Government/Procurement/policy/322554](http://www.scotland.gov.uk/Topics/Government/Procurement/policy/322554)

<sup>6</sup> [www.heraldscotland.com/news/home-news/companies-operated-a-blacklist-of-union-activists-they-took-peoples-livelihoods-away-they-should-be-jailed.192629](http://www.heraldscotland.com/news/home-news/companies-operated-a-blacklist-of-union-activists-they-took-peoples-livelihoods-away-they-should-be-jailed.192629)  
[www.tuc.org.uk/workplace/tuc-21359-f0.cfm](http://www.tuc.org.uk/workplace/tuc-21359-f0.cfm)

- the Scottish Living Wage, both for directly employed staff and for employees working for contractors
- sustainable procurement across the public sector, ensuring that public procurement policies contribute properly to Scotland meeting its climate change targets and support a 'Just Transition' to a low carbon economy

We will oppose calls from the CBI, and others, to introduce a so-called 'right to bid' and other right-wing attempts to seek a major increase in privatisation of vital public services.

We want to see the Scottish Government take full account of flexibility on forthcoming revised EU procurement rules for health and social care procurement, focusing decisions on service quality, not cost and a race to the bottom.

UNISON Scotland is disappointed that the Scottish Government has weakened the sustainability aspects of what was originally planned to be a Sustainable Procurement Bill, with a major part of the renamed Bill now focused on making procurement processes more "business-friendly."

The Bill must be strengthened to ensure Scotland delivers on its commitments on sustainability, climate justice and becoming a Fair Trade nation.

We believe that the aim and focus of the Procurement Reform Bill should be the proposal, in Part IV of the consultation document, to use procurement to deliver economic, social and environmental benefits. In addition, it should be ensuring that public procurement contributes properly to Scotland meeting its climate change targets and supports a 'Just Transition' to a low carbon economy.

As part of the Stop Climate Chaos Scotland (SCCS) coalition, we want the Bill to set a strategic intention and purpose of government that all public procurement of products, materials and services should be carried out sustainably. It should place a legal duty on all ministers and their departments and all public bodies to effect sustainable procurement. This must include a sustainability duty and the creation of additional facilitation, baseline and progress reporting functions towards sustainable procurement.

### **Introduction**

UNISON is Scotland's largest trade union representing more than 165,000 members delivering a wide range of services in the public, community and private sector. We welcome the opportunity to respond to the Scottish Government Consultation on the Procurement Reform Bill.

### **General comments**

UNISON Scotland welcomes some key proposals for the Bill as they provide opportunities to extend the ways in which procurement can be used to benefit the public good. Trade unionists have long argued that public procurement should be used to deliver economic, social and environmental benefits. Examples include contract clauses that specify the use of Fair Trade products or low carbon footprints or payment of the Living Wage. Given the political will, much can in fact

be done without new primary legislation. However, we are pleased to support the Bill, with some important provisos.

We believe it can be used as an opportunity to bring in real improvements in public procurement, in workforce protection, the Scottish Living Wage, training and employment and other community benefits, such as tax justice, as well as ensuring that public procurement policies contribute properly to Scotland meeting its climate change targets and support a 'Just Transition' to a low carbon economy.

Areas we have concerns about include the fact that a Bill that was supposed initially to be about sustainable procurement and community benefits has become a vehicle for making procurement processes and systems more 'business-friendly'. We agree that more should be done to have transparent, clear processes that local businesses are not excluded from by the use of very large contracts. However, we believe the aim and focus should be on strengthening the economic, social and environmental policy objectives, with suitably strong guidance following the legislation, to ensure they succeed. The Scottish Government's approach, as it tries to placate the small business lobby, has weakened the original intentions and the commitment to sustainability, which should be given proper importance alongside social and economic benefits. We would also point out that the Federation of Small Businesses report mentioned in the paper was drawn from a survey in which only about 5% of FSB members participated. We don't know how many of them have genuinely sought to bid for public contracts, so these findings should not be treated uncritically, as they are in the consultation paper. We agree with the STUC that the case has not been made for placing new general duties on public bodies to conduct procurement in an effective, transparent and proportionate manner and to consider for each and every requirement how the specification of requirements may impact on the ability of newer businesses, SMEs and Third Sector organisations to compete. The way to improve procurement and make it more accessible for smaller firms is to continue with elements of the current reform programme and invest in the skills and knowledge of procurement professionals. Saddling public authorities with potentially expensive, pointless duties at a time of austerity is most probably counter-productive.

In Scotland, the public service model is of co-operation, not competition, in contrast to the increasing pace of marketisation and privatisation in England. If there is pressure for more outsourcing in future, it will be important to have protections in place via the Bill. We work closely with the community and voluntary sector to protect services, jobs, pay and conditions. Charities and voluntary sector organisations delivering social care and other important public services are already under severe financial pressure. What must be avoided in Scotland is the way in which support for making it easier for them and social enterprises to bid for public contracts opens up services to the wider market, facilitating the private sector to then come in, motivated by profit, undercutting those with a public service ethos, in a race to the bottom that will drive down standards, pay and conditions.

#### **Purpose of the Bill – and a general duty**

We believe that the aim and focus of the Procurement Reform Bill should be the proposal, in Part IV of the consultation document, to use procurement to deliver economic, social and environmental benefits. In addition, it should be ensuring

that public procurement contributes properly to Scotland meeting its climate change targets and supports a 'Just Transition' to a low carbon economy.

As part of the Stop Climate Chaos Scotland (SCCS) coalition, we want the Bill to set a strategic intention and purpose of government that all public procurement of products, materials and services should be carried out sustainably. This fits with, and should reference, the Climate Change (Scotland) Act 2009 duty on public bodies that they must act in the way they consider most sustainable.

UNISON agrees that there should be a general duty on public sector bodies to demonstrate the extent to which what is being procured will promote or improve the economic, social, health and environmental well-being of the relevant area.

We support the range of examples provided in the consultation about types of benefits. This includes: promoting training and employment opportunities, often for under-represented groups, e.g. youth, women, long-term unemployed and people with disabilities; promoting compliance with social and labour law; assisting supported businesses; stimulating socially conscious markets and demand for environmentally-friendly goods, services and works; demonstrating socially responsive governance, promoting fair and ethical trading; contributing to health improvement priorities including the reduction of diet-related disease; stimulating social integration.

However, we also make specific points below on the two-tier workforce protections, the Scottish Living Wage, Freedom of Information, tax dodging, blacklisting, health and social care, and on climate change.

We support the use of community benefit clauses for these purposes.

### **Procurement in Scotland**

UNISON Scotland has worked hard to achieve important improvements such as the two-tier workforce provisions, essential to protect workers in outsourced companies, following the disastrous use of Compulsory Competitive Tendering in the 1980s and the introduction of PFI. However, we have been pushing for some years for the PPP Protocol and the Section 52 (of the Local Government in Scotland Act 2003) Guidance - Statutory Guidance to Local Authorities on Contracting - to be updated and extended, with frustratingly little progress from the Scottish Government. This must be addressed urgently now, alongside their work on this Bill.

We continue to highlight areas of ongoing and more recent concern, from the Scottish Government's commitment to continue with hugely expensive PPP projects<sup>7, 8</sup>, to issues around the integration of adult health and social care<sup>9</sup> and social care procurement<sup>10</sup>, as well as fears about the effects of personalisation if it is used as a cover for cuts, rather than to properly support people to live independently<sup>11</sup>.

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<sup>7</sup> UNISON Scotland PPP/PFI Briefing

[www.unison-scotland.org.uk/briefings/b016\\_PolicyBrief\\_PPPFFinScotland\\_December11.pdf](http://www.unison-scotland.org.uk/briefings/b016_PolicyBrief_PPPFFinScotland_December11.pdf)

<sup>8</sup> See also the Jimmy Reid Foundation report, in particular references to the hub contracts <http://reidfoundation.org/wp-content/uploads/2012/02/Procurement-Report.pdf>

<sup>9</sup> [www.unison-scotland.org.uk/response/IntegrationofAdultHealthandSocialCare\\_response\\_Sep2012.pdf](http://www.unison-scotland.org.uk/response/IntegrationofAdultHealthandSocialCare_response_Sep2012.pdf)

<sup>10</sup> [www.unison-scotland.org.uk/briefings/MSPBriefing\\_SocialCareProcurement\\_Sep2011.pdf](http://www.unison-scotland.org.uk/briefings/MSPBriefing_SocialCareProcurement_Sep2011.pdf)

<sup>11</sup> [www.unison-scotland.org.uk/socialwork/Personalisation\\_01\\_2012.pdf](http://www.unison-scotland.org.uk/socialwork/Personalisation_01_2012.pdf)

In all these areas, we start from the premise that quality public services, which are essential to a socially just Scotland, require democratic accountability and transparency. Freedom of Information rights should follow the public pound when services are provided by arms length bodies, Trusts, private companies etc<sup>12</sup>. Fairness is key and not enough is currently done to ensure that procurement processes fully comply with the Equality Act. Scottish Government guidance on this is needed for procuring authorities, but Ministers should examine the best ways for the Procurement Reform Bill to strengthen the procurement process so it takes full and proper cognisance of public duties.

### **UK Coalition Govt marketisation - anti-privatisation victories in Scotland**

Scotland's ongoing partnership approach to public services is in strong contrast to the marketisation and privatisation in England and the disgraceful dismantling of the NHS seen in the Health and Social Care Act 2012. The UK Coalition Government has been pushing to fully open up the procurement process of public services to market forces, through legislation such as the Localism Act 2011, Open Public Services White Paper 2011, the Academies Act 2012 and the Public Services (Social Value) Act 2012<sup>13</sup>. While Scottish public opinion would not support such blatant attacks on valued services, the scale of the current 'austerity' measures is seriously affecting quality, with more deep cuts on the way. UNISON will resist attempts to suggest that the answer to cutbacks is to outsource and privatise, driving down standards, pay and conditions and we will challenge extreme proposals such as the CBI's call for a 'right to bid' for public services or attempts to stretch 'competitive neutrality.' A key principle is that democratically accountable public bodies should be deciding what is procurable. This should not be undermined by devising 'back-door' ways to open up more services to privatisation. Successful recent anti-privatisation campaigns in Edinburgh and Aberdeen<sup>14</sup> showed how flawed the assumptions behind the proposals were, and demonstrated that communities react badly to the prospect of their services being privatised.

### **Procurement – EU – Living Wage**

There is of course plenty of legitimate procurement activity undertaken by the public sector in Scotland. And it is entirely legitimate to ensure that this is used to support economic, social and environmental policy. Good examples include the procurement of healthy, locally sourced, sustainable food, such as pioneered for school meals by East Ayrshire Council, and the 2007 contract for the Clyde and Hebrides Ferry Services, which, thanks to STUC input, stipulated minimum staffing levels, had provisions for a clawback if TUPE was found not to apply and savings accrued as a result of job or wage cuts, training requirements etc.

One major reason given for not currently doing more to use procurement to benefit local economies and workers' conditions, is the idea that EU procurement rules forbid this. That is not true. The rules are certainly strict, but there are many ways in which we can work within them on social and economic benefit clauses, including the Living Wage. Other member states also seem to be far better at ensuring their indigenous companies win a bigger share of public contracts. (The EU Public Procurement Directives are also currently undergoing a review which should result in at least limited improvements to enable public contracts to better

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<sup>12</sup> [www.unison-scotland.org.uk/response/FOIExtensionConsultationResponseNov%2010.pdf](http://www.unison-scotland.org.uk/response/FOIExtensionConsultationResponseNov%2010.pdf)

<sup>13</sup> UNISON report Protecting Public Service Workers – Procuring Employment Rights [www.epsu.org/IMG/pdf/UNISON\\_Report\\_Protecting\\_Public\\_Service\\_Workers\\_May\\_2011\\_FINAL\\_Report.pdf](http://www.epsu.org/IMG/pdf/UNISON_Report_Protecting_Public_Service_Workers_May_2011_FINAL_Report.pdf)

<sup>14</sup> [www.unison-scotland.org.uk/news/2012/marapr/0504.htm](http://www.unison-scotland.org.uk/news/2012/marapr/0504.htm)

support other policies. UNISON, as part of the informal Network for Sustainable Development in Public Procurement, has submitted proposals to support taking economic, social and environmental benefits into account.)

We disagree with the Scottish Government conclusion, detailed in Annex A, that it is not possible to mandate payment of the Living Wage through procurement activity. The Scottish Government does concede that public authorities can encourage payment of the Living Wage, but we believe that they can go further.

In London, the Greater London Authority's Conservative mayor, Boris Johnson, has continued with the strong London Living Wage policies introduced in 2006 by Ken Livingstone. The GLA has successfully introduced the LLW into existing and new contracts and has extended it to more than 3,000 employees working for GLA contractors<sup>15</sup>. This has been done by implementing it on a case by case basis for each contract, carefully taking account of EU Public Procurement Regulations and Best Value. UNISON Scotland believes that payment of the living wage can be included as a contract performance clause that sets out how the contract is to be performed and must be accepted by the successful tenderer<sup>16</sup>. While there is a theoretical risk of legal challenge, there have been no successful challenges to the policy in the UK. The Scottish Government should examine ways of extending the Scottish Living Wage to contractors' employees in this Bill and when consulting on new Public Contract Regulations after the European Commission completes its review of the Procurement Directives. One option, as proposed by Patrick Maguire, of Thompson's Solicitors, in evidence to the Local Government and Regeneration Committee's recent inquiry into the Living Wage in Scotland, could be to amend Regulations to include a requirement that all contracting authorities stipulate payment of the living wage as a condition for performance of the contract. This is similar to the approach John Park is proposing for his Living Wage (Scotland) Bill, which we support. We are keen to work with the Scottish Government on developing solutions. This would be aided by the establishment of a Scottish Government Living Wage Unit. Due to the complexity of some of the legal issues around procuring in the context of the Living Wage, a specialist unit of staff who understand their way around it could be a great assistance to public bodies involved in this area. They could develop, update and oversee a Code of Practice for the promotion of the Living Wage in procurement, giving guidance on the legal position, good practice, uprating and the Section 52 statutory guidance. They should also have a wider role in assisting the private sector to become Living Wage employers.

### **Procurement – tax dodging – positive employment agenda**

As part of our argument that 'There is a Better Way' than the UK Coalition Government's 'austerity' agenda, we argue for much stronger efforts to tackle tax dodging and tax avoidance, which could bring in much needed billions of pounds for the public purse. We believe that public procurement should and could play a part because it is entirely wrong that any companies seeking to avoid paying their fair share of tax should be awarded public contracts. Indeed, Chief Secretary to

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<sup>15</sup> UNISON report Protecting Public Service Workers – Procuring Employment Rights [www.epsu.org/IMG/pdf/UNISON\\_Report\\_Protecting\\_Public\\_Service\\_Workers\\_May\\_2011\\_FINAL\\_Report.pdf](http://www.epsu.org/IMG/pdf/UNISON_Report_Protecting_Public_Service_Workers_May_2011_FINAL_Report.pdf)

<sup>16</sup> [www.unison-scotland.org.uk/briefings/e-briefing\\_ScottishLivingWage\\_June2012.pdf](http://www.unison-scotland.org.uk/briefings/e-briefing_ScottishLivingWage_June2012.pdf) and the Local Government and Regeneration Committee Living Wage Report, Feb 2012 [www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/46601.aspx#report](http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/46601.aspx#report)

the Treasury Danny Alexander has suggested he wants to act on this<sup>17</sup>, although we do not believe he will deliver in any meaningful way. However, the Scottish Government has an opportunity with this Bill to follow the lead of excellent work in Paris, Helsinki and a number of other areas where local politicians have voted for measures to exclude or limit companies which operate in tax havens from bidding for public contracts<sup>18</sup>. Public opinion, we believe, would support such a move. There has been recent outrage at big-name companies such as Google, Amazon and Starbucks paying miniscule amounts of tax, despite making massive profits in this country<sup>19</sup>. And, of course, we know that many companies investing in PPP/PFI projects are registered in tax havens<sup>20</sup>, another reason for Freedom of Information legislation to be extended to cover all public services, regardless of who delivers them. (The consultation asks whether all contracts should be published. Yes, of course, but we also need the Scottish Government to use Section 5 of the Freedom of Information (Scotland) Act 2002 to include private companies and other organisations delivering public services or for amendments to be made to the Freedom of Information (Amendment (Scotland) Bill to secure this.)

As with the Living Wage, there are risks of a legal challenge to excluding companies that use tax havens and dodge tax in other ways. However, Richard Murphy, of Tax Research UK, and adviser to the Tax Justice Network, says that the fact there is legislation in England, in the Public Services (Social Value) Act 2012, provides councils there with ways to argue such action would not breach EU procurement rules. This would include councils being able to demonstrate that a large company paying tax would benefit the community through funding for better education, roads etc. This would allow them to choose a tender on the basis of which company pays tax or not<sup>21</sup>. We believe that the Procurement Reform Bill should provide similar support for action against tax dodging. We urge the Scottish Government to take this up and work with us and other interested parties on the best way to take this forward. If it can be done in Helsinki and Paris we should make sure Scotland can do it too. Similar initiatives are under way in two Swedish cities, a Norwegian one and Ile de France, covering Paris, is joined by another seven regions in France declaring themselves 'tax haven free zones'.

Similarly, we believe Scottish public opinion is outraged when construction companies blacklist workers simply for being involved in a trade union, and/or for promoting health and safety measures. We believe that such blacklisting is another example of the kinds of behaviours which should prohibit companies from being awarded publicly funded contracts. The consultation asks in Part V whether contractors that fail to adhere to appropriate standards of conduct, performance and business ethics should be excluded from competing for public contracts. This is where tax dodging and blacklisting and other unacceptable practices can be brought in as reasons to exclude companies. The examples given in the consultation of poor performance and conduct and failure to pay tax etc are too narrowly defined. Inappropriate conduct goes beyond what is illegal. Tax dodging includes both illegal tax evasion and tax avoidance, which, while widely seen as wrong, is not being tackled properly by governments. We need

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<sup>17</sup> <http://www.taxresearch.org.uk/Blog/2012/09/26/danny-alexanders-promise-to-tackle-tax-haven-suppliers-to-hm-treasury-has-a-hollow-ring-to-it/>

<sup>18</sup> [www.ipsnews.net/2012/10/helsinki-boycotts-tax-havens/](http://www.ipsnews.net/2012/10/helsinki-boycotts-tax-havens/)

<sup>19</sup> [www.guardian.co.uk/commentisfree/2012/oct/30/roll-call-corporate-rogues-tax](http://www.guardian.co.uk/commentisfree/2012/oct/30/roll-call-corporate-rogues-tax)

<sup>20</sup> <http://www.guardian.co.uk/politics/2011/sep/01/private-finance-initiatives-tax-havens-public-accounts-committee>

<sup>21</sup> [www.taxresearch.org.uk/Blog/2012/10/23/the-october-taxcast-from-the-tax-justice-network/](http://www.taxresearch.org.uk/Blog/2012/10/23/the-october-taxcast-from-the-tax-justice-network/)



strong enforceable measures here that send out a strong message about unacceptable business behaviour.

The consultation paper also refers to overcharging under a contract (where there is evidence to suggest that the company has exploited its position as an incumbent supplier to make excess profits from a public body). We believe this could be applied to some PPP/PFI contracts. New arrangements should specifically look at PPP/PFI as this policy is still being strongly pursued by the Scottish Government through the Scottish Futures Trust.

### **Health and Social Care – Shared Services**

Social care is a particularly important example to highlight what happens when privatisation leads to a race to the bottom<sup>22</sup>. Nobody can think it is right or healthy in a civilised society to have care services for vulnerable, elderly people with home visits restricted to 15 minutes, loss of employment rights, undermining of minimum wage and Living Wage levels by not paying for travel time, leading to a high turnover of staff and poor quality service.

We are also concerned about some of the proposals under plans to integrate Adult Health and Social Care. As we stated in our Sept 2012 response to the Scottish Government consultation, reference to the third and independent (private) sectors implies the privatisation of services, and more challenges under procurement regulations<sup>23</sup>. This does not fit with the current Scottish Government policy in relation to NHS privatisation and would be of great concern if it were to be extended to the NHS. We support integrated services and there is a role for the voluntary sector, particularly in providing innovative services. However, we don't think it would be the right approach to reserve a proportion of services to be provided by specific groups. We are also sceptical about the use of variant bids. These can confuse accountability and lead to longer and more expensive procurement process.

There is sometimes confusion between the engagement of the voluntary sector in the design of services and the interests of semi-commercial service delivery organisations. Many of the latter have been driven by the 'race to the bottom' in procurement into similar poor quality provision and employment standards as their fully commercial equivalents. While there remains a broad spectrum of providers, some have become indistinguishable from the commercial sector.

The European Commission proposals for a revised Procurement Directive acknowledge that health and social services are of limited cross-border interest and should be subject to much simpler rules. Proposals being negotiated include that member states could determine procedural rules applicable to procurements above €500,000 and would have the option of specifying that award decisions could not be based solely on 'lowest price'.

There is therefore scope for the Scottish Government to exempt aspects of health and social care from the new Regulations, once a final Directive text has been agreed. We would urge them to take full account of that flexibility and put a greater focus on quality of care, which is the fundamental issue. It should always be the public bodies that decide whether it is appropriate to procure externally.

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<sup>22</sup> [www.unison-scotland.org.uk/briefings/MSPBriefing\\_SocialCareProcurement\\_Sep2011.pdf](http://www.unison-scotland.org.uk/briefings/MSPBriefing_SocialCareProcurement_Sep2011.pdf)

<sup>23</sup> [www.unison-scotland.org.uk/response/IntegrationofAdultHealthandSocialCare\\_response\\_Sep2012.pdf](http://www.unison-scotland.org.uk/response/IntegrationofAdultHealthandSocialCare_response_Sep2012.pdf)

Where they do, the emphasis should be on quality, not price and a race to the bottom.

The consultation asks whether the Bill should make special provision for health and social services and whether the proposals in the paper should apply. We believe they largely should apply where relevant. There should be a different approach to key elements in the specification and evaluation of the tender, focusing on the quality of the service.

On shared services, we agree that the Bill should include provisions to exclude from coverage contracts between public bodies that are non-commercial. Where public bodies agree to do work for each other this should be covered by informal agreements rather than commercial contracts.

### **Procurement – Climate Change (Scotland) Act 2009**

Along with SCCS, we supported calls for a Sustainable Procurement Bill, but environmentalists have been dismayed that the re-named and re-focused Bill could indicate a weakening of the commitment to sustainable procurement.

The Bill must be strengthened to ensure Scotland delivers on its commitments on sustainability, climate justice and becoming a Fair Trade nation.

We want the Scottish Government to take on board the urgency of the need for action on climate change to meet the targets in the Act, in place to prevent dangerous runaway climate change. The fact that the first target was missed does not suggest that enough is being done on policies that will turn the Act, which had unanimous support in the Parliament, into sufficient action to meet the legally binding targets.

If any arguments are put forward that in constrained financial times we cannot afford action on climate change, it is important to note that the Stern Review said the costs of not acting are far greater<sup>24</sup>. Recently, businesses warned the UK Coalition Government that they were not doing enough to support the green economy. Climate change is the biggest challenge facing us, a literal and urgent 'health and safety' issue for the planet.

We support the SCCS response on the consultation and the call for the collection of data on the sustainability of all procurement, with the setting of baselines and targets for all products, materials and services and the reporting of performance annually to the Scottish Parliament.

We believe that the aim and focus of the Procurement Reform Bill should be the proposal, in Part IV of the consultation paper, to use procurement to deliver economic, social and environmental benefits. In addition, it should be ensuring that public procurement contributes properly to Scotland meeting its climate change targets and supports a 'Just Transition' to a low carbon economy.

As part of the Stop Climate Chaos Scotland (SCCS) coalition, we want the Bill to set a strategic intention and purpose of government that all public procurement of products, materials and services should be carried out sustainably. It should place a legal duty on all ministers and their departments and all public bodies to

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<sup>24</sup> [www.guardian.co.uk/environment/2008/jun/26/climatechange.scienceofclimatechange](http://www.guardian.co.uk/environment/2008/jun/26/climatechange.scienceofclimatechange)

effect sustainable procurement. This must include a sustainability duty and the creation of additional facilitation, baseline and progress reporting functions towards sustainable procurement.

### Consultation questionnaire

We have answered below the key relevant questions to the points we make above.

We are happy for our response to be made public.

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## CONSULTATION QUESTIONNAIRE

### AIM OF THE BILL

**Q1.** Do you agree with the proposed aim of the Bill?

Yes       No       Don't know/No view

– If you do not agree with the proposed aim, why not?

We believe that the aim and focus of the Procurement Reform Bill should be the proposal, in Part IV of the consultation document, to use procurement to deliver economic, social and environmental benefits. In addition, it should be ensuring that public procurement contributes properly to Scotland meeting its climate change targets and supports a 'Just Transition' to a low carbon economy.

As part of the Stop Climate Chaos Scotland (SCCS) coalition, we want the Bill to set a strategic intention and purpose of government that all public procurement of products, materials and services should be carried out sustainably. It should place a legal duty on all ministers and their departments and all public bodies to effect sustainable procurement. This must include a sustainability duty and the

creation of additional facilitation, baseline and progress reporting functions towards sustainable procurement.

**Q2.** Should we place upon public sector bodies a general duty to conduct procurement in an effective, transparent and proportionate manner?

Yes  No  Don't know/No view

If yes to Q2 –

a) To support this general duty and other requirements being proposed for public bodies, would it be appropriate for public bodies to be required to publish annual strategic procurement plans?

Yes  No  Don't know/No view

**Q9.** Should the Bill include a general duty on public bodies to consider, for each and every requirement, how the specification of requirements may impact on the ability of newer businesses, SMEs and Third Sector organisations to compete?

Yes  No  Don't know/No view

**Q14.** Should the Bill place a duty on public bodies to publish contract documentation?

Yes  No  Don't know/No view

**Q15.** What do you see as the advantages/disadvantages to requiring that public bodies publish contract documentation?

Information rights should follow the public pound. It is fundamental that the public has a right to know how its money is being spent. The Scottish Government should be extending the Freedom of Information (Scotland Act) 2002 to include private companies and other organisations delivering public services or there should be amendments to the Freedom of Information (Amendment) (Scotland) Bill to secure this.

**Q28.** Should the Procurement Reform Bill make it a requirement that purchasers must permit the submission of variant bids?

Yes  No  Don't know/No view

(Variant bid options should be used very sparingly to avoid additional unnecessary costs and risks. Proposals like this which add to the possible range of legal challenge should be avoided.)

**Q31.** Should those awarding major contracts<sup>25</sup> be required to consider including community benefits clauses?

Yes  No  Don't know/No view

If yes to Q31 –

a) Should those awarding major contracts be required to publish details of the benefits those clauses are intended to deliver and the outcomes **or** a statement explaining why the contract is not considered suitable for the inclusion of community benefit clauses?

Yes  No  Don't know/No view

b) Should those awarding major contracts be required to consult communities regarding Community Benefits they would wish to see delivered?

Yes  No  Don't know/No view

c) Should those awarding major contracts be required to consider extending community benefit clauses to sub-contractors?

Yes  No  Don't know/No view

**Q32.** Should those in receipt of major contracts be required to publish training and apprenticeship plans for those contracts?

Yes  No  Don't know/No view

**Q33.** Should we use the Procurement Reform Bill to promote greater use of supported businesses by the public sector?

Yes  No  Don't know/No view

**Q35.** Should public sector bodies be placed under a general duty which requires them to demonstrate the extent to which what is being procured will promote or improve the economic, social, health and environmental well-being of the relevant area?

Yes  No  Don't know/No view

If yes to Q35 –

a) In conducting the process of procurement, should public sector bodies act with a view to securing that improvement?

Yes  No  Don't know/No view

b) What are the key issues that should be set out in the guidance?

We need strong guidance that gives examples of the types of benefits that should be considered and the ways in which the legislation can support various policy objectives. This should include those we have listed above, including not allowing companies involved in tax dodging and tax havens to be eligible for public contracts.

<sup>25</sup> A question on defining a “major contract” features earlier in the document.

And Living Wage guidance, ideally taking the form of a Code of Practice for the promotion of the Living Wage in procurement, developed and overseen by a new Living Wage Unit.  
The guidance/Code must also refer to protections such as the PPP Protocol and S52, ideally updated and extended.

**Q36.** How could any new arrangements outlined in Part IV be fully enforced?

There would be the usual monitoring arrangements for each public body. We do not see that there needs to be any special arrangements beyond that. It is up to each public body to respond in line with the general duty.

**Q37.** Please use this space to give reasons for your responses or if you have any further comments on the proposals in Part IV. Please also use this space to give your thoughts on any definitions or potential impacts you would like us to consider in relation to this part of the Bill.

On sustainability, with Stop Climate Chaos Scotland, whose response we support, we would like to see the Bill:

set a strategic intention and purpose of government that all public procurement of products, materials and services should be carried out sustainably. It should place a legal duty on all ministers and their departments and all public bodies to effect sustainable procurement. This must include a sustainability duty and the creation of additional facilitation, baseline and progress reporting functions towards sustainable procurement

## ***PART V: DEALING WITH INAPPROPRIATE CONDUCT AND POOR PERFORMING SUPPLIERS***

**Q38.** Should the Bill include measures to ensure that the public sector deals appropriately with poor performance and poor standards of business ethics on the part of contractors?

Yes  No  Don't know/No view

**Q39.** Should contractors that fail to adhere to appropriate standards of conduct, performance and business ethics be excluded from competing for public contracts?

Yes  No  Don't know/No view

If yes to Q39–

a) What should that form of exclusion be?

Ineligible for a period and if considered again they must demonstrate compliance with acceptable standards etc.

**Q40.** How could any new arrangements outlined in Part V be fully enforced?

It has to be recognised that external procurement brings with it significant client side costs. Public bodies must ensure that they have rigorous monitoring mechanisms in place and that the cost of this is included in contract evaluation.

It is important to note that some of the examples given are about illegal conduct. Inappropriate conduct goes beyond what is illegal. Tax dodging includes both illegal tax evasion but also aggressive tax avoidance which, while widely seen as wrong, is not being tackled properly by governments.

The consultation paper also refers to overcharging under a contract (where there is evidence to suggest that the company has exploited its position as an incumbent supplier to make excess profits from a public body). We believe this could be applied to some PPP/PFI contracts. New arrangements should specifically look at PPP/PFI as this policy is still being strongly pursued by the Scottish Government through the Scottish Futures Trust.

**Q41.** Please use this space to give reasons for your responses or if you have any further comments on the proposals contained in Part V. Please also use this space to give your thoughts on any definitions or potential impacts you would like us to consider in relation to this part of the Bill.

We are keen to work with the Scottish Government and other interested parties on developing ways to use this Bill to bar companies using tax havens and/or other forms of tax dodging from being eligible for public contracts.

**Q42.** Should the Bill adopt the same approach to defining public contracts as in the EU Directive and implementing Scottish Regulations?

Yes       No     Don't know/No view

If yes to Q42 –

a)      What should our approach be to local exemptions?

There should be the power to move away from these definitions if they restrict the ability to take innovative actions in support of the public policy goals set out in our response.

**Q43.** Should we include specific provisions which explicitly exclude from coverage, contracts between public bodies which are non-commercial? (e.g. those that are in pursuit of shared service initiatives.)

Yes  No  Don't know/No view

**Q44.** Should all of the proposals discussed in this consultation paper apply to the procurement of health and social services?

Yes  No  Don't know/No view

If no to Q44 –

a) From which of the proposals should the procurement of health and social services be exempt and why?

See our comments above

b) Should the Bill include additional provisions which apply only to the procurement of health and social services?

It should make it very explicit that these services are about people and the people who work with them and that exploitation of these staff is highly detrimental to the service provided, which is just one reason why it is so important that such contracts are decided on quality - and not on cost, which invokes the damaging race to the bottom.

If yes to Q44 –

c) What should be included in the Bill to deliver its proposed aims in the context of health and social care procurement?

It should make it very explicit that these services are about people and the people who work with them and that exploitation of these staff is highly detrimental to the service provided, which is just one reason why it is so important that such contracts are decided on quality - and not on cost, which invokes the damaging race to the bottom.

**Q45.** Should the Bill apply to utility activities conducted by Private Sector bodies?

Yes  No  Don't know/No view

**Q46.** Should the Procurement Reform Bill apply in full or in part to contracts awarded by public bodies in furtherance of utility activities as defined in Directive 2004/17/EC, given effect in Scotland by the Utilities Contracts (Scotland) Regulations 2012?

We should take advantage of the exemptions for public utilities where that is appropriate to drive public service innovation. For example in the Hydro Nation proposals.



**Q47.** How could any new arrangements be fully enforced?

We are not in favour of extending compliance sanctions any further than is necessary under EU law. To do so simply adds to the costs and risks involved in procurement.

**Q48.** What sanctions might be appropriate for failure to comply?

We are not in favour of extending compliance sanctions any further than is necessary under EU law. To do so simply adds to the costs and risks involved in procurement.

**Q49.** Should the Single Point of Enquiry have a role in relation to enforcement of the provisions of the Bill?

Yes  No  Don't know/No view

If yes to Q49 –

a) Should it do so on the basis of statutory powers?

Yes  No  Don't know/No view

**Q50.** Please use this space to give reasons for your responses or if you have any further comments on the proposals in Part VI. Please also use this space to give your thoughts on any definitions or potential impacts you would like us to consider in relation to this part of the Bill.

### **Living Wage through procurement**

**Q51.** Should procurement activity be used to encourage contractors to pay the living wage to their employees engaged in the delivery of public sector contracts?

Yes  No  Don't know/No view

If yes to Q51 –

a) To what extent, in what form and at what stage should contractors be encouraged through procurement processes to pay a living wage?

As standard from the start. Through a clause that would require payment as a condition in the contract performance clauses.

- b) Would it be appropriate to promote payment of the living wage in all public contracts or only contracts of a certain type or of a certain value?

All

- c) What are the potential benefits and costs associated with promoting payment of the living wage through procurement activity?

Immense benefits to low paid, mainly women employees, and their families, to service quality/staff turnover and to local economies.

- d) What are the implications for private and voluntary sector suppliers, public bodies and the market?

It already works well in many parts of the country and is widely seen as beneficial by employers too.

- e) How can public bodies determine the wider social and economic implications of promoting payment of the living wage in a particular procurement process?

There is plenty of evidence available, including from the Scottish Living Wage campaign, of the overall benefits. However, we are saying this should be a condition of all contracts. Therefore, it is not necessary to examine the implications each time.