



Llywodraeth Cymru
Welsh Government

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Matters raised and addressed during discussions on the new Workforce Code

This note summarises the main issues raised, along with completed and proposed action points, in the following meetings.

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13. Scope of monitoring

- 29 February: HR and procurement representatives were invited from all local authorities and other public bodies (NRW, Fire and Rescue, RSL).
- 1 and 8 March: Union representatives, from TUC, Unison, NASuWT, PCS.
- 18 April: Peter Snow from the Businesses Services Association, who had sent copies of the draft Code and clauses to members for comments. BSA members are providers of outsourced services.

1. Clarity on in-force date of Code and Clauses and confirmation that the Code and Clauses will not have retrospective effect

It was felt by the WLGA representatives that further clarification was needed that the Workforce Code and Clauses would only apply to first generation outsourcing that took place after the date the new Code and Clauses take effect and that second or subsequent outsourcing where the public service or function was outsourced under a previous code would not be captured.

- Action completed – the wording of paragraph 1.4 has been further clarified.

2. Application to Schools and Community Councils

As discussed with both the WLGA and the Trade Unions Contracting Authorities as defined under the Social Partnership and Public Procurement (Wales) Act 2023 (the 'Act') does not include Schools and Community Councils. Attendees at all meetings, and Trade Unions in particular, expressed concern regarding the fact they fall outside the scope of the Code and the impact that may have on any outsourced workforce.

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In terms of the ability to include the governing bodies of maintained schools and community councils within the scope of the Workforce Code (or at least certain aspects of it), the current Code of Practice on Workforce Matters 2014 applies to different public sector bodies in Wales based on different statutory provisions. In respect of the governing bodies of maintained schools it is the provisions in section 60 of GOWA 2006 that are relied upon, for community councils it is section 19 of the Local Government Act 1999. Arguably therefore, a statutory basis can be established to expand the scope of the Code to include schools and community councils (separate from the obligations under the Act in relation to Contracting Authorities). The only aspect of the draft Workforce Code that could not be applicable to schools and community councils (because the legislation does not provide for it) would be the Notification Requirements under section 12 of the Draft Code.

The question therefore is whether Welsh Government consider that the definition of Contracting Authorities for the purpose of the Code and Social Public Workforce Clauses should be expanded to include the governing bodies of maintained schools and community councils.

- Action required (SH) – discussion and agreement on whether schools and community councils should continue to be included in the new Code, via the same guidance provision as under the previous Code. Not being Contracting Authorities they would not be subject to the notification requirements, and a decision is needed on whether the annual reporting requirement under the previous Code should be continued.

3. Clarity on which contracts will come within the scope of the Code and Clauses

It was felt by the WLGA representatives that further clarification would be helpful in relation to the contracts to which the Workforce Code applies. This had been

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included in the definition of Outsourcing Services Contract (which mirrors the definition under the Act).

- Action completed – an explanation has been included in paragraph 2 of the Workforce Code.

4. Transfer circumstances to which the Workforce Code will apply

The Cabinet Office Statement on Workforce Matters and the current Code of Practice on Workforce Matters 2014 apply to reorganisations and transfers from one part of the public sector to another:

“This Code of Practice (including the application of the Cabinet Office Statement and the accompanying Fair Deal guidance) also applies to transfers of a public service activity, whether permanently or not, and whether or not to a charity or another public service body.” (para 5). Save for the provisions in relation to New Joiners which provide:

“Where the service provider itself is a public body within the scope of this Code and new joiners are employed on the same terms and conditions as that body’s other staff, the provision about new joiners does not apply (and accordingly the “no less favourable comparison” is not required).”

In terms of the provision of the Act a “public contract” means a contract between one or more economic operators and one or more Contracting Authorities; and having as its object the execution of works, the supply of products or the provision of services (section 21).

Similarly, an outsourced services contact means a contract under which (a) a requirement to provide a public service provided by, or previously provided by a

Contracting Authority is transferred to another person, or (b) another person agrees to undertake any other function undertaken by or previously undertaken by a Contracting Authority. On the basis that Contracting Authorities are defined, an economic operator or another cannot also presumably be a Contracting Authority (it could however include a Teckal Company or other service delivery model on behalf of a Contracting Authority). To an extent the omission of a public sector to public sector body transfer will have limited impact on the basis that pension protection will be provided under Fair Deal or the Pensions Direction and the New Joiner/Other Staff provisions would not be applicable in the same way as they are currently excluded under the Code of Practice on Workforce Matters (as outlined above). The only potential impact from excluding them from the scope of the Workforce Code is that TUPE specifically excludes the “*administrative reorganisation of public administrative authorities or the transfer of administrative functions between public administrative authorities*” . This may mean for limited public sector to public sector arrangements TUPE will not strictly apply, however this would not prevent the public authorities involved from protecting the terms and conditions of transferring staff in any event.

- No action

5. Further information in relation to the principles of Fair Deal and the Pensions Direction

It was felt that a wider explanation and signposts should be included in the Workforce Code outlining the provisions of Fair Deal 2013 and the Welsh Authorities Staff Transfers (Pensions) Direction 2022 and their applicability.

- Action completed – an explanation of each of these pension provisions and the Contracting Authorities to whom each will apply has been included in paragraph 6.2.

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6. Trade Union consultation provisions

We reviewed the Trade Union consultation provisions under the Draft Code and representations were made that specific provision should be included in the Code which provides for Trade Union consultation as part of the mechanism for determining whether services or functions should be outsourced and presumably the inclusion of the Social Public Workforce Clauses within that outsourcing services contract. The current Trade Union Recognition and Consultation provisions of the Code provide for the information and consultation obligation under TUPE to be adhered to, but they would kick in once a decision to outsource has already been made. Reference was made to the provisions under section 16 of the Social Partnership and Public Procurement (Wales) Act 2023 which provides to public bodies so far as is reasonable to see consensus or compromise with its recognised Trade Unions.

- Action completed – for those bodies that are included in the procurement duties but not included in Section 16 of the Act, consultation with Trade Unions on a decision to outsource is not a statutory requirement. It is, however, good practice. The Code has been updated to make this clear in section 2.4

7. Ongoing collective bargaining rights

Representations were also made regarding the need for the Code and outsourcing service contracts to track the collectively agreed terms and conditions of Contracting Authority Staff for staff who have transferred as a result of an outsourcing of public services and functions. This would then have a knock-on effect on the terms and conditions of Other Staff who are also working on the outsourced services contract. We did discuss the fact that this goes above the legal obligations on a transferee post-TUPE however it was felt that

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this was essential to ensure that the terms and conditions of transferred staff were not eroded over time.

- Action completed and required – tracking the terms and conditions over time is part of “taking all reasonable steps” (sections 26(1)(c-d) and 25(c-d)) . This obligation has been included in the clauses (section 6), and also needs to be covered in guidance and/or regulations about Contracting Authorities’ Annual Procurement Reports 39(2)(b).

8. Additional data and monitoring obligations

The need to obtain extended data in relation to outsourced workforces was expressed strongly and representations made regarding the inclusion of additional data for Contracting Authorities to request from Contractors (and Sub-contractors) as part of their annual review on the implementation of the provisions of the Code and the Social Public Workforce Clauses. This data should reflect the data that public bodies are obligated to collect as part of their Public Sector Equality Duties (e.g. gender, ethnicity, disability etc.). This links with obligations under the Well-being of Future Generations (Wales) Act 2015 and the Anti-Racist Wales Action plan, data could in turn be provided to the Disparity Unit within Welsh Government and form a useful additional bank of data on outsourced workers. There was a suggestion that this could be linked with the Employee Liability Information required under TUPE, however the additional data suggested would not be captured by those provisions in the legislation and would therefore be an additional obligation on Contracting Authorities and Service Providers.

- No action – the Code will only require the tracking of terms, conditions, and pension arrangements of transferring and other staff. However, separate discussions are underway on whether to include equalities data are collected and reported within Contracting Authorities’ Annual Procurement Reports

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39(2)(b).

9. Insourcing

The harmonisation of terms and conditions for insourced workers with the terms and conditions provided by Contracting Authorities could present an equal pay risk for a Contracting Authority over time (although arguably there would be an initial defence to such a claim as a result of TUPE). Representations were made in relation to the inclusion in the Code of an overview of those risks and reference to potential liability under the Equal Pay provisions of the Equality Act 2010.

- Action completed – a note is included in the Code (section 13) to alert Contracting Authorities to potential equal pay risks in relation to insourced staff over time.

10. Personal data

Representations were also made in relation to ensuring that should the personal data of outsourced workers be utilised by a Service Provider for a profit (e.g. through the sale of data) that any profits resulting should be accounted for to the Contracting Authority effectively to avoid a scenario whereby a Service Provider is able to profit from the data of transferred staff.

- No action – existing requirements on the use of personal data are adequate.

11. Anonymisation of personal data

BSA representations were also made in relation to ensuring that where the contractor is required to provide details of terms and conditions annually to monitor compliance that this should be anonymised information only, to ensure no breach of GDPR.

- Action completed – reference to information being provided in anonymised form has been added to the Code and the clauses.

12. Clarifying that these clauses are in addition to other TUPE provisions, etc

BSA representations asked that the Code should be amended to clarify that these clauses are in addition to any general TUPE provisions, i.e. these clauses only deal with the Code and do not set out the usual TUPE indemnities etc.

- Action completed – an additional paragraph is added at 10.2.

13. Scope of monitoring

BSA representatives requested that the information requested from contractors to monitor compliance is restricted to the four categories listed in Section 6 of the clauses. We noted that this should not impact on the Contracting Authority's ability to request further information in the context of its wider reporting obligations under the SPPP Act. It was agreed that a small amendment could be made that links these four categories to the obligations under this Code.

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- Action completed – Section 6 of the clauses has been amended to link the four categories to the obligations under this Code.

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