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Llywodraeth Cymru  
Welsh Government

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Welsh Government

## Consultation Document

### **The Public Service Workforce**

Consultation on draft guidance and directions which include a Code of Practice on Workforce Matters

Date of issue: **26 September 2013**

Action required: Responses by **20 December 2013**

## Overview

This consultation is seeking views on the content, coverage and application of guidance and directions which include a revised Code of Practice on Workforce Matters.

The Code aims to make sure that new recruits would be employed on terms and conditions no less favourable than staff transferred to a new employer. It also covers pension arrangements and places a duty on the public body awarding the contract to monitor its implementation by the private contractor.

## How to respond

The closing date for responses is

**20 December 2013.**

Responses can be submitted via the response form on our website: [www.wales.gov.uk](http://www.wales.gov.uk)

Alternatively please use the response form at Annex E of this consultation document to respond. The responses should be returned either electronically to:  
[publicserviceworkforce@wales.gsi.gov.uk](mailto:publicserviceworkforce@wales.gsi.gov.uk)  
or by post to the address given below.

## Further information and related documents

**Large print, Braille and alternate language versions of this document are available on request.**

The consultation can be accessed from the Welsh Government website at:  
[www.wales.gov.uk/consultations](http://www.wales.gov.uk/consultations)

Related documents:

The Welsh Government Green Paper  
*'Consultation on Working Together for Wales: The Public Service Workforce'* (2012)  
*'Working Together for Wales – A Strategic Framework for the Public Service Workforce in Wales'* (2010)

## Contact details

For further information:  
Public Service Workforce Team  
Public Service Reform Division  
Welsh Government  
Cathays Park  
Cardiff  
CF10 3NQ  
e-mail: [publicserviceworkforce@wales.gsi.gov.uk](mailto:publicserviceworkforce@wales.gsi.gov.uk)

## Data protection

### How the views and information you give us will be used

Any response you send us will be seen in full by Welsh Government staff dealing with the issues which this consultation is about. It may also be seen by other Welsh Government staff to help them plan future consultations.

The Welsh Government intends to publish a summary of the responses to this document. We may also publish responses in full. Normally, the name and address (or part of the address) of the person or organisation who sent the response are published with the response. This helps to show that the consultation was carried out properly. If you do not want your name or address published, please tell us this in writing when you send your response. We will then blank them out.

Names or addresses we blank out might still get published later, though we do not think this would happen very often. The Freedom of Information Act 2000 and the Environmental Information Regulations 2004 allow the public to ask to see information held by many public bodies, including the Welsh Government. This includes information which has not been published. However, the law also allows us to withhold information in some circumstances. If anyone asks to see information we have withheld, we will have to decide whether to release it or not. If someone has asked for their name and address not to be published, that is an important fact we would take into account. However, there might sometimes be important reasons why we would have to reveal someone's name and address, even though they have asked for them not to be published. We would get in touch with the person and ask their views before we finally decided to reveal the information.

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## **Foreword by Lesley Griffiths AM, Minister for Local Government and Government Business.**

In our Programme for Government we set out a clear commitment to the delivery of efficient, effective and accessible public services across the whole of Wales. Protecting and supporting public services is vital because of the impact they have on the day to day quality of the lives of our communities, and particularly the most vulnerable individuals and families. The Code of Practice on Workforce Matters is a key part of the larger picture of our for the public sector workforce in Wales.

The Welsh Government is committed to ensuring that we deliver world class public services to the people of Wales. That starts with a world class workforce that has the skills and training needed to undertake their roles to the best of their ability.

Welsh Government is already making progress and developing a package of workforce partnership and empowerment in the public sector, working with employers and trade unions through key forums like the Workforce Partnership Council, building on the Strategic Workforce Framework.

Our vision is for a public sector workforce where our recruitment processes are robust enough to identify the right candidates for roles in the public service. A public sector workforce where we have appropriate training programmes in place to provide the support and information which our public service workforce needs. A public sector workforce that allows us to attract and retain the best talent to work in our public services. A public sector workforce built on the core principles that people should receive the same pay for the same job and a fair and reasonable salary for the work that they do.

All of our public service providers are making difficult choices about the provision they can offer against a backdrop of unprecedented pressure on public finances. Increasingly we will all be asked to consider which services we want to retain, and which we would be willing to see reduced. Despite these difficult choices, we are clear that where a decision is made to outsource a public service, the workforce delivering that service must be protected. The principles underpinning the Code are those of equality in the workplace and that is why we are issuing this consultation on ways in which we can strengthen the code and make it more effective.

I would welcome your views on these proposals .

## **Executive Summary**

### **Background**

1. This consultation is seeking views on the content, coverage and application of guidance and directions which include a revised Code of Practice on Workforce Matters. The existing Codes are part of a series of documents issued by the UK and Welsh Governments with a view to dealing with what were perceived as potential disadvantages to:
  - public sector staff who were transferred to a third party , usually as a result of an out-sourcing contract; and
  - staff recruited by the contractor to work alongside the transferred workforce.
2. The existing Codes aim to make sure that new recruits would be employed on terms and conditions no less favourable than staff transferred to a new employer. They also cover pension arrangements and place a duty on the public body awarding the contract to monitor implementation of the Code by the contractor.
3. There have been two Codes in place in Wales over the years: the 2003 Code issued under specific statutory authority for best value authorities (now improvement authorities) other than fire and rescue authorities and the 2005 Code issued for the remainder of the public service (this was reissued in 2008).
4. The increasing change in the way our public services are delivered has prompted questions about the application and coverage of the existing Codes. These intensified in light of the decision by the UK Government to remove the English Codes in 2010 and 2011, with some suggesting that the Welsh Codes had also been removed.

### **Consultation**

5. A draft Code of Practice on Workforce Matters is at Annex A for your consideration. It is intended that the proposed Code will apply to:
  - Local Health Boards and NHS Trusts;
  - Local Authorities (including community councils), National Park Authorities and Fire and Rescue Authorities;
  - Governing Bodies of Maintained Schools; and
  - The executive Welsh Government Sponsored Bodies.
6. This proposal would see application of the Code under specific statutory authority extended beyond the local government sector to include health and education bodies. A series of questions relating to the content, coverage and application of the proposed Code are posed within this consultation document. Views are invited by 20 December 2013.

## Introduction

### Public Service Delivery

7. The Welsh Government is committed to ensuring that people can access effective and efficient public services wherever they are in Wales. This commitment was underlined within the *Programme for Government*<sup>1</sup>, the second chapter of which is specifically concerned with public services in Wales and focuses on the following core aim:

*To support the delivery of effective and efficient public services that meet the needs of people in Wales.*

8. Central to the delivery of our public services is the public service workforce. Traditionally this is viewed as those employed by public service organisations, but increasingly other organisations are taking on responsibility for the delivery of public services. It is important that regardless of who is delivering our public services, the wider public service workforce is supported to provide the quality of service that the Welsh public expects.
9. In some cases those organisations also take on public service employees, with transfers taking place under the rules of TUPE<sup>2</sup> or otherwise.

### TUPE

10. The Transfer of Undertakings (Protection of Employment) Regulations 2006 (the Regulations) are intended to protect employees' employment rights in the event of transfer from one employer to another. The Regulations set out how the employees and the liabilities connected with them will move between employers.
11. The current Regulations date from 2006 and replace the original Regulations which date from 1981. The original Regulations were introduced to transpose the requirements of the 1977 EC Acquired Rights Directive, which was itself revised in 1988, with a consolidated version adopted in 2001. The UK Government has recently consulted on further changes to TUPE as part of their employment law review.
12. The Code of Practice on Workforce Matters operates alongside the requirements of TUPE.

### Public Service Reform

13. The principles underlying the Government's approach to public service reform in Wales are simplification, collaboration and accountability, enabling public service bodies to work together to deliver services at the

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<sup>1</sup> <http://wales.gov.uk/about/programmeforgov/?lang=en>

<sup>2</sup> Transfer of Undertakings (Protection of Employment) Regulations 2006 (SI 2006/246)  
<http://www.legislation.gov.uk/ukSI/2006/246/contents/made>

most effective and efficient level. This ensures that specialist services can be provided in ways which are cost effective and resilient.

14. In the coming years an increasing number of public service organisations are likely to consider outsourcing responsibility for public service delivery or working in partnership with organisations outside the public sector. The increasing change in the way our public services are delivered has prompted questions about the application and coverage of the Code of Practice on Workforce Matters. These intensified in light of the decision to remove the English Codes, with some suggesting that the Welsh Codes had also been removed.
15. The Welsh Government Green Paper '*Consultation on Working Together for Wales: The Public Service Workforce*'<sup>3</sup> set out proposals for reissuing and reconfirming the Code. This consultation includes a revised draft Code for consideration and seeks views on its content, coverage and application.

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<sup>3</sup> <http://wales.gov.uk/consultations/improving/workingtogether/?lang=en>

# The Code of Practice on Workforce Matters

## Purpose & Content

16. The existing Codes of Practice on Workforce Matters (the Codes) are part of a series of documents issued by the UK and Welsh Governments with a view to dealing with what were perceived as potential disadvantages to:

- public sector staff who were transferred to a third party, usually as a result of an out-sourcing contract; and
- staff recruited by the contractor to work alongside the transferred workforce.

17. The other documents include:

- the Cabinet Office Statement of Practice on Staff Transfers in the Public Sector (the Cabinet Office Statement) and the annex to it, A Fair Deal for Staff Pensions. The Cabinet Office Statement was first published in 2000 and then revised in 2007, largely to take account of changes to the TUPE Regulations. The Fair Deal guidance was published by HM Treasury in June 1999 as *A Fair Deal for Staff Pensions*. It was subsequently republished in January 2000 as an appendix to the Cabinet Office Statement of Practice;
- pension directions under section 101 of the Local Government Act 2003
- the UK Government's Principles of Good Employment Practice for Government, Contracting Authorities and Suppliers (2010) which include the principles of a commitment to fair and reasonable terms and conditions and dispute resolution.

18. In general, these outsourcing contracts began with the advent of compulsory competitive tendering and continued under the best value regime.

19. The Codes aimed to make sure that new recruits would be employed on terms and conditions no less favourable than staff transferred to a new employer under TUPE or otherwise. It also covered pension arrangements and placed a duty on the public body awarding the contract to monitor its implementation by the private contractor.

20. The Codes arose in response to concerns from trade unions. These concerns centred on:

- workforce matters not being given proper attention during the process of outsourcing public services; and



- new staff were being employed on pay and terms and conditions which were worse those applying to staff who had transferred out of the public sector.

21. This was considered not only to be grossly unfair to new staff but was used, over time, to erode the pay and terms and conditions of all staff employed by the contractor.

## History of the Code

22. There have been two Codes in place in Wales over the years; a Code issued under specific statutory authority for best value authorities (now improvement authorities) other than fire and rescue authorities and a Code issued under general statutory authority for the remainder of the public service. The Welsh Codes broadly replicated the equivalent Codes issued in England.

23. The aims of the Welsh Codes were to encourage the following where there was a transfer of public sector staff, particularly where this was done as part of an out-sourcing contract:

- to apply TUPE even where it does not apply in strict legal terms; and
- to give greater protection to the employees whom the contractor takes on to work with the transferred staff. This is in two areas - first, their terms and conditions and, secondly, their pension provision.

24. This is the provision which has given the Codes the moniker of the "Two-Tier Codes".

25. The issuing of the Codes in England and Wales followed the Cabinet Office Statement of Practice on Staff Transfers (2000); this was directed at all public sector staff transfers but had no specific statutory basis. The UK Government and Welsh Government issued the first Codes in 2003. There were separate Codes for England and Wales, but both were issued under Section 19(4) of the Local Government Act 1999. These were the Codes issued under specific statutory authority<sup>4</sup>.

26. In 2005 the UK Government and the Welsh Government each issued a further Code which dealt with public sector service contracts other than those emanating from local authorities. The Welsh Code was reissued in 2008<sup>5</sup>.

27. The existing Codes were followed by Pension Directions. The England Pension Direction 2007 was given under section 101 of the Local Government Act 2003 and provides protection for pensions of the transferred staff of best value authorities. The Wales Pension Direction 2012 was given under section 101 of the Local Government Act 2003 and

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<sup>4</sup> The 2003 Code – See Annex B

<sup>5</sup> The 2008 Code – See Annex C

provides pension protection for the transferred staff of improvement authorities and community councils in Wales

## Current Position

28. In late 2010 the UK Government announced that the English Code dating from 2003 was to be withdrawn. This was followed in March 2011 by the withdrawal of the English 2005 Code. The UK Government has published a set of “Principles of Good Employment Practice”. These are voluntary principles and are less rigorous than the Codes and should not be considered as a substitute for them.
29. The withdrawal of the English Codes has not affected the standing of the Welsh Codes, which remain in place and should be respected.

## 2012 Green Paper

30. In May 2012 the Welsh Government published the Green Paper ‘*Consultation on Working Together for Wales: The Public Service Workforce*’. The Green Paper set out the Welsh Government’s priorities for the public service workforce, and sought views on how, and in what areas, new legislative powers could be used to achieve the desire to provide world class public services through a valued and engaged workforce.
31. The Green Paper built on the provisions set out in ‘*Working Together for Wales – A Strategic Framework for the Public Service Workforce in Wales*’<sup>6</sup>, published in 2012. The key proposals in the Green Paper were:
- providing the Welsh Ministers with the power to issue statutory guidance on matters affecting the public service;
  - placing a duty on the public service to collaborate on workforce matters; and
  - confirming a Code of Practice on Workforce Matters for public service organisations in Wales.
32. In total 50 submissions were received from a range of stakeholders, with 47 of those consisting of formal consultation responses. Overall responses to the consultation were mixed and a Summary of Consultation Responses was published in May 2013<sup>7</sup>.
33. The Welsh Ministers have agreed to bring forward primary legislation in relation to some of the matters included within the Green Paper and a separate consultation on a draft Bill will issue in the autumn. Primary legislation is not required to reissue the Code.

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<sup>6</sup>

<http://wales.gov.uk/topics/improvingservices/publicationevents/publications/worktogether/?lang=en>

<sup>7</sup> <http://wales.gov.uk/consultations/improving/workingtogether/?lang=en>

## Reissuing of the Code

34. It is the intention of the Welsh Ministers that a revised Code will be issued which applies more broadly across the public service in Wales.

Specifically the proposed Code would apply to:

- Local Health Boards and NHS Trusts;
- Local Authorities (including community councils), National Park Authorities and Fire and Rescue Authorities;
- Governing Bodies of Maintained Schools<sup>8</sup>; and
- The executive Welsh Government Sponsored Bodies.

35. For some of these organisations the proposed Code will be issued under specific statutory authority. For others it will be issued under general statutory authority. Further details are contained in the next section. Regardless, the Welsh Ministers' proposal is that relevant public service organisations would be under an obligation, when entering into contracts for the out-sourcing of public services, (a) to have regard to the content of the Code and to apply it appropriately or (b) when subject to a direction, to apply the Code.

36. Subject to the outcome of this consultation and the responses to the questions posed in relation to the content and coverage of the proposed Code, it is intended that a revised Code will be issued in early 2014.

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<sup>8</sup> All references to Governing Bodies of Maintained Schools included Governing Bodies of federations of Maintained Schools.

## Proposals for Change: A Code for the Modern Workplace

### Proposed Coverage

37. It is proposed that the proposed Code is issued under specific statutory authority to the following public service organisations in Wales:
- Local Health Boards and NHS Trusts;
  - Local Authorities (including community councils), National Park Authorities and Fire and Rescue Authorities;
  - Maintained Schools; and
  - Natural Resources Wales
38. The Code would be issued to Local Health Boards and NHS Trusts by directions under Sections 12(3) and 19(1) respectively of the National Health Services (Wales) Act 2006.
39. The Code would be issued to Local Authorities (including Community Councils), National Parks Authorities and Fire and Rescue Authorities by guidance under Section 19 of the Local Government Act 1999.
40. The Code would initially be issued to governing bodies of maintained schools under the general powers of Section 60 of the Government of Wales Act 2006. This would then be followed by the making of Regulations under paragraph 4(a) of Schedule 1 to the Education Act 2002 requiring governing bodies to have regard to the Code.
41. The Code would be issued to Natural Resources Wales by a direction under article 11(1) of the Natural Resources Body for Wales (Establishment) Order 2012.
42. In addition, the following executive Welsh Government Sponsored Bodies would be subject to a Code issued under general statutory authority, by way of Section 60 of the Government of Wales Act 2006:
- Arts Council for Wales;
  - Care Council for Wales;
  - Higher Education Funding Council for Wales;
  - Local Democracy and Boundary Commission for Wales.
  - National Library of Wales;
  - National Museum for Wales;
  - Royal Commission on the Ancient and Historical Monuments of Wales; and
  - Sports Council for Wales.
43. This coverage is specified in the Draft Code of Practice on Workforce Matters at Annex A.

### *Further and Higher Education*

44. The Draft Code of Practice on Workforce Matters at Annex A does not include any reference to either Further Education Institutions or Higher Education Institutions.
45. Traditionally these Institutions have been classified by the Office of National Statistics as being Non Profit Institutions Serving Households (NPISH). Under that classification, only the funding which the Welsh Government provides to Further Education Institutions scores against our budget. If Further Education Institutions were instead to be classified as public sector bodies then their actual income and expenditure would score against the Welsh Government's budget, with significant financial implications.
46. The ONS uses 14 indicators to determine public sector control; in particular the "ability (of central government) to exert numerous minor controls over how the body is run". While it is the stated preference of the Welsh Ministers that the Code should apply to both Further Education Institutions and Higher Education Institutions, this can only be done if it would not affect their classification as NPISH.
47. Further discussions will be held with the ONS during the period of this consultation. If those discussions are favourable, and subject to the outcome of the consultation, the Code will apply at the time of issue. If the outcome of the discussions is not favourable the Code would not apply to Further Education Institutions or Higher Education Institutions.

#### **Questions**

In addition to those set out above, should the Code be issued to any other public service organisations?

#### **Proposed Content**

48. It is envisaged that the core content of the Code will be unchanged from the 2005 Code (reissued in 2008) and this is reflected in the Draft Code of Practice on Workforce Matters at Annex A. The Draft Code contains broadly identical provisions to its predecessors in respect of:
- The treatment of transferring staff; and
  - The treatment of new staff taken on after transfer of the service.
49. Where the primary service provider transfers staff originally in the employ of the public sector organisation to a sub-contractor, the primary service provider will be responsible for the observance of the Code by the sub-contractor.

### *The treatment of transferring staff*

50. In relation to staff transferring from a public service organisation to the employ of a service delivery body, the Draft Code requires application of the principles set out in the Cabinet Office *Statement of Practice on Staff Transfers in the Public Sector* and the annex to it, *A Fair Deal for Staff Pensions*<sup>9</sup>.
51. The intention of this is that staff will transfer and that TUPE should apply, and that in circumstances where TUPE does not apply in strict legal terms, the principles of TUPE should be followed and the staff involved should be treated no less favourably than had the Regulations applied.
52. The annex to the Statement requires the terms of a business transfer specifically to protect the pensions of transferees. With the changes brought by the Pensions Directions, this protection now means that the transferring employees should be offered either (a) (in the case of bodies subject to the Directions) continuing access to the Local Government Pension Scheme, or (b) a pension scheme which is at least broadly comparable to the pension scheme which they had with the public body.
53. The UK Government has recently consulted on possible changes to the terms of the Fair Deal policy<sup>10</sup>. The outcome of that consultation is not yet known, but may include changes which impact on the requirements of the Code. We will consider the UK Government's final position and consider whether any changes should be made to the Code.

### *The treatment of new joiners after the transfer of the service*

54. Where the service provider allocates staff to work on a public service contract alongside staff transferred from the public sector organisation, the Draft Code requires that it offer employment on fair and reasonable terms and conditions which are, overall, no less favourable than those of transferred employees.
55. The Draft Code defines a new joiner as including both new employees to the service provider and existing employees of the service provider who are transferred to work on a contract covered by the terms of the Code.
56. The terms and conditions to be offered to new recruits should be subject to consultation with representatives of a trade union where one is recognised, or other elected representatives of the employees where there

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[http://www.google.co.uk/url?sa=t&rct=j&q=Statement+of+Practice+on+Staff+Transfers+in+the+Public+Sector+and+the+annex+to+it,+A+Fair+Deal+for+Staff+Pensions&source=web&cd=1&ved=0CC8QFjAA&url=https%3A%2F%2Fwww.gov.uk%2Fgovernment%2Fuploads%2Fsistem%2Fuploads%2Fattachment\\_data%2Ffile%2F81339%2Fstaff\\_transfers\\_145.pdf&ei=DJQLUu2SHsSw7QaF5oCgBQ&usq=AFQjCNGnIjGS5vNXopcAc0vhlNWFmvdzfg&bvm=bv.50723672.d.ZGU](http://www.google.co.uk/url?sa=t&rct=j&q=Statement+of+Practice+on+Staff+Transfers+in+the+Public+Sector+and+the+annex+to+it,+A+Fair+Deal+for+Staff+Pensions&source=web&cd=1&ved=0CC8QFjAA&url=https%3A%2F%2Fwww.gov.uk%2Fgovernment%2Fuploads%2Fsistem%2Fuploads%2Fattachment_data%2Ffile%2F81339%2Fstaff_transfers_145.pdf&ei=DJQLUu2SHsSw7QaF5oCgBQ&usq=AFQjCNGnIjGS5vNXopcAc0vhlNWFmvdzfg&bvm=bv.50723672.d.ZGU)

<sup>10</sup> <https://www.gov.uk/government/consultations/the-fair-deal-policy-treatment-of-pensions-on-compulsory-transfer-of-staff-from-the-public-sector>

is no recognised trade union. The precise nature of the arrangements for consultation is for agreement between the service provider and the recognised trade unions.

57. The service provider will also offer reasonable pension arrangements as described within the Draft Code.

#### **Question**

Is it clear which organisations are covered by the Code and when the terms of the Code would apply?

#### **Enforcement and Alternative Dispute Resolution**

58. The Draft Code states that the public service organisation will enforce the obligations on the service provider created under this Code. Enforcement operates as follows:

59. Concerns and / or complaints are initially put to the service provider for resolution: These could be:

- complaints raised by employees and / or recognised trade unions about the way obligations under the Code are met;
- concerns held by the relevant public service organisation; or
- complaints referred to the relevant public service organisation by employees and / or recognised trade unions who have been unable to resolve their concerns with the service provider.

60. The relevant public service organisation will be responsible for enforcing the terms of their contract with the service provider. The contract should:

- incorporate the requirements of the Code which can then be enforced;
- include a provision for resolving disputes about the application of this Code in a fast, efficient and cost-effective way as an alternative to litigation, and which is designed to achieve a resolution to which all the parties are committed.

61. The service provider, public sector organisation and recognised trade unions or other staff representatives, shall all have access to this 'alternative dispute resolution' (ADR) process, which is set out in the annex to the Draft Code at Annex A.

62. Where a service provider has not complied with this Code, the public service organisation will not be bound to consider that provider for future work.

## Questions

Are the enforcement arrangements clear and appropriate?

Is the alternative dispute resolution process clear and appropriate?

## Contractual Content

63. The Welsh Ministers propose to publish a Procurement Advice Note alongside the revised Code. The Note will include draft terms and conditions in relation to the Code which can be inserted in any outsourcing contract.

## Monitoring Arrangements

64. The Draft Code requires the service provider to provide the public service organisation with information required to monitor compliance. This information will include the terms and conditions for transferred staff and the terms and conditions for employees within the definition of “new joiners”. This is the same as the requirements in both the 2003 Code and the 2008 Code.

65. In preparing the Draft Code it has become apparent that there is currently a shortage of evidence of both the implementation and impact of the current Codes. To address this, the Welsh Ministers are proposing placing certain additional reporting requirements on public service organisations. These are intended to provide a broader evidence base for the Code which would assist in future revisions or considerations related to the Code.

66. The Welsh Ministers propose that public service organisations should be required to report annually to Welsh Ministers setting out:

- The number of outsourcing contracts entered into;
- The number of outsourcing contracts entered into where the Code would apply;
- The number of outsourcing contracts entered into where the provisions of the Code were included in the contract;
- The number of outsourcing contracts entered into where the provisions of the Code were not included in the contract and the reasons why;
- Information on the implementation of the Code by service providers; and
- Information on any disputes entered into via the Alternative Dispute Resolution process.



## Questions

Are the monitoring arrangements reasonable and appropriate?

## Requirement to Consult

67. In respect of its application to Local Authorities (including community councils), National Parks Authorities and Fire Rescue Authorities, the proposed Code would form part of guidance issued under Section 19 of the Local Government Act 1999. Section 26 of that Act requires that any such guidance be the subject of consultation.
68. In respect of its application to Natural Resources Wales, the Code would form part of a direction given under article 11(1) of the Natural Resources Body for Wales (Establishment) Order 2012. The power to give a direction to Natural Resources Wales can be exercised (except in an emergency) only after consultation with Natural Resources Wales (article 11(4) of the Natural Resources Body for Wales (Establishment) Order 2012).
69. There is no statutory requirement for consultation in relation to the other legislative vehicles to be used to issue the Code.
70. The Draft Code on Workforce Matters at Annex A includes a commitment on the part of the Welsh Ministers to undertake a public consultation on the issuing, revising or revoking of the Code.

## Impact Assessments

71. Annex D to this consultation paper contains a number of impact assessments undertaken in relation to the proposed Code. These include:
- Equality Impact Assessment;
  - Privacy Screening Assessment;
  - Regulatory Impact Assessment (financial costs);
  - Rural-proofing Checklist;
  - Assessment against the requirements of the UN Convention on the Rights of the Child; and
  - Welsh Language Policy Impact Assessment.
72. Understanding the financial impacts of any legislation is important and we would welcome any comments you have on the consultation stage Regulator Impact Assessment, and specifically any evidence you have to support those comments.
73. A shortage of evidence in relation to the implementation and impact of the Code in respect of the nine protected characteristics under the Equalities Act 2010 has been noted. We would be interested in any information you hold in relation to the application of the Code in respect of these characteristics which are:

- Age;
- Disability;
- Gender reassignment;
- Marriage and civil partnership;
- Pregnancy and maternity;
- Race;
- Religion and Belief;
- Sex; and
- Sexual Orientation.

74. We would also welcome any comments you have on the other impact assessments.

**Questions**

Do you have any comments on the content of the impact assessments at Annex D?

Is there any other information that you are aware of that could be used to consider the equality impacts of the Code?

Are there any additional matters that you would like to bring to our attention?

## **ANNEX A**

### **Draft Guidance and Directions together with Code of Practice on Workforce matters.**

#### **SCOPE**

1. This circular is directed to the following public sector bodies in Wales –

- county and county borough councils
- community councils
- National Park authorities
- fire and rescue authorities
- Local Health Boards
- NHS trusts
- the governing bodies of maintained schools
- the Arts Council for Wales
- the Care Council for Wales
- the Higher Education Funding Council for Wales
- the Local Democracy and Boundary Commission for Wales
- the National Library for Wales
- the National Museum for Wales
- the National Resources Body for Wales
- the Royal Commission on Ancient and Historic Monuments in Wales
- the Sports Council for Wales.

2. It relates to the approach which those public bodies should take on certain workforce issues when proposing to enter into, or extend, contracts for the provision of services.

3. As indicated in paragraph 20, depending on the body to whom it is addressed, this circular constitutes either –

(a) guidance under sections 19 of the Local Government Act 1999 or section 60 of the Government of Wales Act 2006, or

(b) a direction under sections 12 or 19 of the National Health Service (Wales) Act 2006 or article 11 of the Natural Resources Body for Wales (Establishment) Order 2012.

4. In every case the Code of Practice on Workforce Matters in the Appendix constitutes part of the guidance or direction, as the case may be.

#### **WITHDRAWAL OF EXISTING CODES**

5. The Workforce Codes issued in Wales in 2003 in relation to local authority service contracts and in 2005 (and re-issued in 2008) in relation to other public sector service contracts are withdrawn, except in so far as they are incorporated in existing service contracts or are proposed to be incorporated

into future contracts i.e. those contracts where instructions to tenderers have already been issued.

## **STATUTORY BACKGROUND**

### **Section 17 of the Local Government Act 1988**

6. Section 17 of the Local Government Act 1988 prevents authorities from introducing political or other irrelevant considerations into the procurement process. It achieves this by defining certain matters as 'non-commercial' and prohibiting authorities from having regard to these matters in the contractual process. The relevant matters, as set out in Section 17(5) of the 1988 Act, include:

- *'the terms and conditions of employment by contractors of their workers or the composition of, the arrangements for the promotion, transfer or training of or other opportunities afforded to, their workforces'* (section 17(5)(a)); and
- *'the conduct of contractors or workers in industrial disputes between them'* (part of section 17(5)(d)).

### **Section 19 of the Local Government Act 1999**

7. Under Section 19 of the Local Government Act 1999 the Welsh Ministers<sup>1</sup> may by Order provide, in relation to relevant authorities, for a specified matter to cease to be 'non-commercial' for the purposes of Section 17 of the Local Government Act 1988.

8. Section 19(4) of the Local Government Act 1999 requires relevant authorities to have regard to guidance issued by the Welsh Ministers in exercising a function regulated by Section 17 of the 1988 Act, which is also the subject of an Order made under the 1999 Act.

9. For the purposes of section 19, "relevant authorities" in Wales are county and county borough councils, community councils, National Park authorities and fire and rescue authorities.

### **The Order**

10. In relation to Wales, the section 19 Order is the Local Government Best Value (Exclusion of Non-commercial Considerations) (Wales) Order 2002<sup>2</sup>. The Order provides for the workforce matters described above to cease to be defined as 'non-commercial' matters for the purposes of Part II of the *Local Government Act 1988*. The provisions of Section 17(5) of the 1988 Act that are not modified by the Order remain in force.

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<sup>1</sup> The section 19 functions were transferred, first, to the National Assembly for Wales and then, by virtue of the Government of Wales Act 2006 (Schedule 11, paragraph 30), to the Welsh Ministers.

<sup>2</sup> S.I. 2002/678 W.75.

## **Section 60 of the Government of Wales Act 2006**

11. Under section 60 of the Government of Wales Act 2006 the Welsh Ministers may do anything which they consider appropriate to achieve any one or more of the following objects-

- (a) the promotion or improvement of the economic well-being of Wales,
- (b) the promotion or improvement of the social well-being of Wales,  
and
- (c) the promotion or improvement of the environmental well-being of Wales.

12. The Welsh Ministers consider that the issue of guidance to those public bodies will contribute to the improvement of the social and economic well-being of Wales in that its purpose is –

- (i) better protection of the terms and conditions of transferred staff; and
- (ii) fairness for new joiners taken on to work on service contracts beside transferred workforces.

13. A body to whom guidance is issued under section 60 should take the guidance into account.

## **The National Health Service (Wales) Act 2006**

14. Under section 12(3) of the National Health Service (Wales) Act 2006 the Welsh Ministers may give directions to a Local Health Board about the exercise of any functions.

15. Under section 19(1) of the National Health Service (Wales) Act 2006 the Welsh Ministers may give directions to an NHS trust about its exercise of any functions.

16. A Local Health Board or NHS trust should comply with such a direction.

## **The Natural Resources Body for Wales (Establishment) Order 2012**

17. Under article 11(1) of the Natural Resources Body for Wales (Establishment) Order 2012 the Welsh Ministers may give the Natural Resources Body for Wales (NRB) general or specific directions as to the exercise of its functions.

18. Under article 11A(5) of that Order the NRB must comply with any such direction.

## **BACKGROUND TO THE 2003 AND 2005 CODES OF PRACTICE**

19. The first Code of Practice on Workforce Matters related to local authority service contracts and was issued in England in 2003<sup>3</sup>. This was replicated in Wales in 2003<sup>4</sup>. In 2005 similar Codes were issued, in England and in Wales, in relation to service contracts entered into by other elements of the public sector (and in Wales the 2005 Code was re-issued in 2008).

## **APPLICATION OF THE GUIDANCE OR DIRECTION AND CODE OF PRACTICE**

20. This circular has a different status and applicability depending upon the nature of the bodies in Wales to whom it is issued.

The Code of Practice applies to various public sector bodies in Wales in the following ways –

A. The Guidance below and the Code of Practice together constitute guidance issued by the Welsh Ministers under section 19 of the Local Government Act 1999 (and, to the extent that it is not covered by that Act, under section 60 of the Government of Wales Act 2006) to –

- county and county borough councils
- community councils
- National Park authorities
- fire and rescue authorities.

B. The Direction below and the Code of Practice together constitute a direction given by the Welsh Ministers, under the provisions indicated in the Direction, to –

- Local Health Boards
- NHS trusts
- the Natural Resources Body for Wales.

C. The Guidance below and the Code of Practice together constitute guidance issued by the Welsh Ministers under section 60 of the Government of Wales Act 2006 to –

- the governing bodies of maintained schools
- the Arts Council for Wales
- the Care Council for Wales
- the Higher Education Funding Council for Wales
- the Local Democracy and Boundary Commission for Wales
- the National Library for Wales
- the National Museum for Wales

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<sup>3</sup> ODPM Circular 03/2003.

<sup>4</sup> Issued by letter dated 2 April 2003.

- the Royal Commission on Ancient and Historic Monuments in Wales
- the Sports Council for Wales.

21. In relation to the governing bodies of maintained schools, it is the intention of the Welsh Ministers to make Regulations requiring the governing bodies of maintained schools to have regard to the Code but until those Regulations are in force, this guidance will apply to governing bodies.

## **GUIDANCE**

22. This guidance is consistent with Public Contracts Regulations 2006<sup>5</sup> and, in the case of Welsh improvement authorities, with the achievement of continuous improvement. This guidance does not purport to be an authoritative guide to public procurement law, and public bodies will continue to need to interpret the relevant legislation and seek legal advice as necessary. It will always be for public bodies to decide, in the light of their own legal advice, how to handle these matters in each individual contract.

### **Transferred staff**

23. The Cabinet Office Statement<sup>6</sup> (incorporated in the Code of Practice) provides that contracting exercises (including retendering<sup>7</sup>) should be conducted on the basis that the Transfer of Undertakings (Protection of Employment) Regulations 2006<sup>8</sup> (TUPE) should apply unless there are genuinely exceptional reasons for it not to do so. The Statement recommends that at the earliest appropriate stage in the contracting exercise, the contracting authority should state that staff should transfer and this should normally have the effect of causing TUPE to apply. The Statement says that the UK Government expects all contracting authorities to follow this policy, which also provides that in circumstances where TUPE may not strictly apply in legal terms, the principles of TUPE should be followed and the staff should be treated no less favourably than they would have been had the regulations applied. Whether TUPE applies is however a matter of law, to be decided on the facts of each case and legal advice should be sought to confirm the applicability of TUPE in individual cases.

24. The Welsh Ministers endorse the Cabinet Office Statement in its application to Wales.

25. Sections 100 and 101 in the Local Government Act 2003 ensure that the principles set out in the Cabinet Office Statement (with the accompanying HM

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<sup>5</sup> S.I. 2006/5.

<sup>6</sup> The Cabinet Office Statement was first published in 2000 and then revised in 2007, largely to take account of changes to the TUPE Regulations. The Fair Deal guidance was published by HM Treasury in June 1999 as *A Fair Deal for Staff Pensions*. It was subsequently republished in January 2000 as an appendix to the Cabinet Office Statement of Practice.

<sup>7</sup> "Retendering" in this Guidance also includes circumstances where the contract for services is terminated and the work is given to another service provider other than through a tendering process.

<sup>8</sup> S.I. 2006/246.

Treasury and Government Actuary's Department guidance) are given effect within local government.

26. Under section 101 of the 2003 Act the Welsh Authorities Staff Transfers (Direction) 2012 was given by the Welsh Ministers on 4 March 2012 (effective from 6 March 2012).

27. Under that direction, where the new employer does not seek admitted status under the Local Government Pension Scheme (LGPS), staff must be offered membership of an alternative scheme by the new employer which is actuarially certified as being 'broadly comparable' with the public service scheme (as defined in the Statement). Where the transfer to a broadly comparable scheme is offered, the relevant body must be in a position to offer bulk transfer terms to the scheme provided by the new employer.

28. Individuals are not required to be party to such a transfer, which should be sufficient to provide service credit in the new employer's scheme on a day for day basis (or such equivalence determined by actuaries taking account of differences between schemes) for those who wish to transfer their accrued rights from the LGPS.

29. Negotiations to establish fair treatment in respect of pensions for transferring staff as part of business transfers should be based from the outset of the procurement process on a careful identification of the appropriate pension options, the full costs, liabilities and actual transferee data. Throughout this whole process, public bodies should ensure that staff are treated fairly, that trades unions are informed and that the operation is open and transparent.

### **New Joiners**

30. The Code of Practice should be applied where a body transfers its employees to a service provider as part of a contract to provide any service to the body. It will ensure that new joiners to the transferred-out workforce are offered terms and conditions which are, overall, no less favourable than those of the transferred staff. This 'no less favourable' formula does not apply to pensions, but under the Code new joiners must also be offered a reasonable pension provision, which may be either membership of the LGPS (where available) or membership of a pension scheme which meets the auto-enrolment standards under the Pensions Act 2008 (whether or not the Act requires the service provider to offer membership to the new joiner).

31. The Code defines "new joiner" as any employee of the service provider who works alongside the transferred workforce in performing the service required under the contract.

32. The Code will ensure that the provision of quality services is not undermined by poor employment practices in respect to new joiners. It will prevent the damaging 'two-tier' situation where TUPE transferred staff on good conditions work beside other staff on much poorer terms and conditions.



The Welsh Ministers are clear that service providers should be selected where these will drive up service performance standards, not in order to drive down staff terms and conditions. Good value is more likely to be achieved in circumstances where all parties are focused on service improvements.

### **Incorporation of the Code of Practice in the service contract**

33. Where the contract for services is to be let by way of tender, the invitation to tender documents, sent to those organisations being invited to bid, would normally consist of the covering letter, instructions to tender, background information, terms and conditions of contract, specification and price schedule. The obligations in the Code of Practice on Workforce Matters should be incorporated in the terms and conditions of contract, whether the contract is let by tender or otherwise.

34. The Welsh Ministers will provide model contract clauses for this purpose.

### **DIRECTION**

35. The Guidance above applies by way of further introduction to this Direction.

36. This Direction is given to –

- Local Health Boards under section 12(3) of the National Health Services (Wales) Act 2006
- NHS trusts under section 19(1) of the National Health Services (Wales) Act 2006 and
- the Natural Resources Body for Wales under article 11(1) of the Natural Resources Body for Wales (Establishment) Order 2012

(each described as a Directed Body).

37. Where –

- (a) a Directed Body, in exercising its functions, proposes to enter into, or extend, a contract for the provision of any services to or for the Directed Body, and
- (b) before the contract is carried out, staff of the Directed Body are engaged in the provision of any of the services,

the Body must exercise those functions in accordance with the Code of Practice in the Appendix.

## APPENDIX

### CODE OF PRACTICE ON WORKFORCE MATTERS IN PUBLIC SECTOR SERVICE CONTRACTS

#### Treatment of transferees

1 In its contracting-out of services, the public sector organisation will apply the principles set out in the Cabinet Office Statement of Practice on Staff Transfers in the Public Sector (the Cabinet Office Statement) and the annex to it, *A Fair Deal for Staff Pensions*<sup>9</sup>. The service provider will be required to demonstrate its support for these principles and its willingness to work with the public sector organisation fully to implement them.

2 The intention of the Cabinet Office Statement is that staff will transfer and that the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE)<sup>10</sup> should apply, and that in circumstances where TUPE does not apply in strict legal terms, the principles of TUPE should be followed and the staff involved should be treated no less favourably than had TUPE applied.

3 The Fair Deal annex to the Cabinet Office Statement requires the terms of a business transfer specifically to protect the pensions of transferees. Transferring staff must have continuing access to the local government pension scheme or should be offered membership of a pension scheme which is broadly comparable to the public service pension scheme which they are leaving.

4 This Code has no application to staff in so far as their pension provision is secured under the Welsh Authorities Staff Transfers (Pensions) Direction 2012 (the 2012 Direction)<sup>11</sup>. The 2012 Direction only applies to staff of county and county borough councils, community councils, fire and rescue authorities and National Park authorities.

5 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.

In addition –

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<sup>9</sup> The Cabinet Office Statement was first published in 2000 and then revised in 2007, largely to take account of changes to the TUPE Regulations. The Fair Deal guidance was published by HM Treasury in June 1999 as *A Fair Deal for Staff Pensions*. It was subsequently republished in January 2000 as an appendix to the Cabinet Office Statement of Practice.

<sup>10</sup> S.I.2006/246.

<sup>11</sup> The Welsh Authorities Staff Transfers (Direction) 2012 was given by the Welsh Ministers on 4 March 2012 (effective from 6 March 2012).

- for the purposes of this Code, the Cabinet Office Statement will be deemed to remain in effect even if it is withdrawn by the UK Government;
- the Code is to have effect during any extension of a contract to which this Code applies.

#### Treatment of new joiners to an outsourced workforce

6 Where the service provider arranges for staff to work on a public service contract alongside staff transferred from the public sector organisation, it will offer employment on fair and reasonable terms and conditions which are, overall, no less favourable than those of transferred employees. The service provider will also offer reasonable pension arrangements (as described at paragraph 10 below).

In this Code “new joiners” means all staff of the service provider, whether they are recruited for the purpose of the public service contract or whether they are existing or future staff of the service provider who are allocated to work on the public service contract beside transferees.

7 The principle underpinning the provisions of paragraph 6 is to consider employees’ terms and conditions (other than pensions arrangements which are dealt with in paragraph 10) in the round – as a ‘package’. This Code does not prevent service providers from offering new joiners a package of non-pension terms and conditions which differs from that of transferred staff, so long as the overall impact of the changes to this package meets the conditions in paragraph 6. The aim is to provide a flexible framework under which the provider can design a package best suited to the delivery of the service, but which will exclude changes which would undermine the integrated nature of the team or the quality of the workforce.

8 The service provider will consult representatives of a trade union where one is recognised, or other elected representatives of the employees where there is no recognised trade union, on the terms and conditions to be offered to such new joiners.

(References to ‘trade unions’ throughout this code should be read to refer to other elected representatives of the employees where there is no recognised trade union.)

The arrangements for consultation will involve a genuine dialogue. The precise nature of the arrangements for consultation is for agreement between the service provider and the recognised trade unions. The intention is that contractors and recognised trade unions should be able to agree on a particular package of terms and conditions, in keeping with the terms of this Code, to be offered to new joiners.

9 The flexibility provided by this approach should enable solutions to be found for arrangements where, for example, two or more public sector organisations collaborate to enter into a single public service contract or similar contracts with the same service provider, without the need for recourse to ADR.

#### Pension arrangements for new joiners to an outsourced workforce

10 The service provider will be required to offer new joiners one of the following pension provision arrangements:

- membership of the local government pension scheme, where the employer has admitted body status within the scheme and makes the requisite contributions;
- membership of a pension scheme which meets the auto-enrolment standards under the Pensions Act 2008 (whether or not the Act requires the service provider to offer membership to the new joiner).

When a contract to which this Code applies is terminated and the work is given to another contractor, the new service provider will be required to offer one of these pensions options to any staff who transfer to it and who had prior to the transfer a right under the Code to one of these pension options.

#### Monitoring arrangements

11 The service provider will be required to provide the public sector organisation (throughout the term of the contract and any extension) with information as requested to enable the public sector organisation to monitor compliance with the conditions set out in this Code by the service provider and, where appropriate, its sub-contractors. This information will include the terms and conditions for transferred staff and the terms and conditions for the service provider's, and sub-contractors', employees allocated to work on the contract.

12 Such requests for information will be restricted to that required for the purpose of monitoring compliance; will be designed to place the minimum burden on the service provider commensurate with this, and will respect commercial confidentiality. The service provider and the public sector organisation will also support a review of the impact of the Code, drawn up in consultation with representatives of the public sector organisations, contractors, trade unions and will provide information as requested for this purpose. Such requests will follow the same principles of proportionality and confidentiality.

13 Public service organisations will report annually to the Welsh Ministers setting out:

- the number of outsourcing contracts entered into;
- the number of outsourcing contracts entered into where the Code would apply;
- the number of outsourcing contracts entered into where the provisions of the Code were included in the contract;
- the number of outsourcing contracts entered into where the provisions of the Code were not included in the contract and the reasons why;
- information on the implementation of the Code by service providers; and
- information on any disputes entered into via the Alternative Dispute Resolution process.

## Enforcement

14 The public sector organisation will enforce the obligations on the service provider created under the application of this Code. Employees and recognised trade unions should, in the first instance, seek to resolve any complaints they have about how the obligations under this Code are being met, directly with the service provider. Where it appears to the public sector organisation that the service provider is not meeting its obligations, or where an employee of the service provider or a recognised trade union writes to the public sector organisation to say that it has been unable to resolve a complaint directly with the service provider, the public sector organisation will first seek an explanation from the service provider. If the service provider's response satisfies the public sector organisation that the Code is being followed, the public sector organisation will inform any complainant of this. If the response does not satisfy the public sector organisation it will ask the service provider to take immediate action to remedy this. If, following such a request, the service provider still appears to the public sector organisation not to be complying with the Code, the public sector organisation will seek to enforce the terms of the contract, which will incorporate this Code. In addition, where a service provider has not complied with this Code, the public sector organisation will not be bound to consider that provider for future work.

15 The contract is to include a provision for resolving disputes about the application of this Code in a fast, efficient and cost effective way as an alternative to litigation, and which is designed to achieve a resolution to which all the parties are committed. The service provider, public sector organisation and recognised trade unions or other staff representatives, are all to have access to this 'Alternative Dispute Resolution' (ADR ) process (the Annex to this Code sets out the ADR procedure).

16 Employees or trade unions who need to seek advice in cases where they consider that the public sector organisation has failed to meet its responsibilities under paragraph 14, should contact the Welsh Government.

## Sub-contractors

17 This Code sets out procedures for handling matters between the public sector organisation and a primary service provider. Where the primary service provider transfers staff originally in the employ of the public sector organisation to a sub-contractor, the primary service provider will be responsible for the observance of this Code by the sub-contractor.

## Operation of the Code

18 The Welsh Government will monitor the operation of the Code, following consultation with relevant employers and trade unions.

ANNEX :

Code of Practice on Workforce Matters:  
Alternative Dispute Resolution (ADR ) Procedure

Introduction

This Annex sets out a procedure for resolving disputes arising from the application of the Code of Practice on Workforce Matters. The procedure should be a last resort and all parties will make their best efforts to resolve problems by agreement. The ADR procedure should be fast, efficient and cost-effective.

The need to exhaust local procedures

The parties must exhaust all normal local procedures as required by paragraph 8 and paragraph 14 of the Code before invoking the ADR procedure provided for in paragraph 15.

Who is responsible for resolving disputes?

The ADR procedure will be under the supervision of an independent person appointed from an approved list supplied by ACAS . If the parties so agree, they may appoint two “wing members” with an employer and trade union background to assist the independent person.

The dispute resolution process

Disputes will be resolved using the following three-stage procedure.

**Stage 1: The independent person**

The independent person will be invited to answer three questions:

i) Is this a dispute about the application of the Code?

If the answer is no, the matter can proceed no further. If yes, then the independent person will move to question (ii).

ii) Have the parties exhausted local procedures?

If the answer is no, then the parties will be invited to make further local efforts to resolve the dispute. If yes, then the independent person will conduct an independent assessment, by answering question (iii) and giving reasons for the answer.

(iii) Do the terms and conditions of employment on offer to new joiners comply with the Code?

If the answer is yes, then the matter is deemed to be concluded and the contractor can continue to offer the same package of conditions to new joiners. If the answer is no, then the dispute will proceed to Stage 2.

**Time limit:** Twenty working days.

**Stage 2: Discussions with a view to reaching an agreement on compliant terms and conditions**

Stage 2 begins with the parties being invited to seek to resolve the matter through further discussions. The independent person will make themselves available to the parties to facilitate the process. The parties also have the option of establishing other arrangements for mediation. If the parties can reach an agreement consistent with the Code then the matter is closed and the new package of conditions of employment will be applied both to new starters and to those employed during the dispute. If no agreement can be reached within the allotted time then the dispute will proceed to Stage 3.

**Time limit:** Ten working days, with the possibility that this might be extended by the agreement of the parties and with the consent of the independent person.

**Stage 3: Final reference to the independent person**

The independent person invites the parties to make final submissions. If the independent person then believes it would be worthwhile, the parties may be given a short period of further discussion. If there is no value in giving the parties more time - or if during any discussion the parties were unable to agree on how to bring the matter to a successful conclusion - then the independent person will proceed to a final binding arbitration. Having heard the evidence and reached a conclusion the independent person will impose a revised package of terms and conditions applicable to each of the affected employees.

**Time limit:** Ten working days

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## **ANNEX B**

### **The 2003 Code of Practice on Workforce Matters**

#### **CODE OF PRACTICE ON WORKFORCE MATTERS IN LOCAL AUTHORITY SERVICE CONTRACTS**

Workforce matters under Section 19 of the Local Government Act 1999 and the Wales Programme for Improvement

1. This document sets out an approach to workforce matters in local authority service contracts which involve a transfer of staff from the local authority to the service provider, or in which staff originally transferred out from the local authority as a result of an outsourcing are TUPE transferred to a new provider under a retender of a contract. This Code will form part of the service specification and conditions for all such contracts. It applies to county and county borough councils and national parks authorities in Wales from 2 April 2003 but cannot be applied retrospectively.
2. The Code recognises that there is no conflict between good employment practice, value for money and quality of service. On the contrary, quality and good value will not be provided by organisations who do not manage workforce issues well. The intention of the authority is therefore to select only those providers who offer staff a package of terms and conditions which will secure high quality service delivery throughout the life of the contract. These must be sufficient to recruit and motivate high quality staff to work on the contract and designed to prevent the emergence of a 'two-tier workforce', dividing transferees and new joiners working beside each other on the same contracts.
3. Contractors who intend to cut costs by driving down the terms and conditions for staff, whether for transferees or for new joiners taken on to work beside them, will not provide best value and will not be selected to provide services for the council. However, nothing in this Code should discourage local authorities or contractors from addressing productivity issues by working with their workforces in a positive manner to achieve continuous improvement in the services they deliver.

#### Treatment of transferees

4. In its contracting-out of services, the local authority will apply the principles set out in the Cabinet Office Statement of Practice on Staff Transfers in the Public Sector and the annex to it, A Fair Deal for Staff Pensions. The service provider will be required to demonstrate its support for these principles and its willingness to work with the local authority fully to implement them.



5. The intention of the Statement is that staff will transfer and that TUPE should apply, and that in circumstances where TUPE does not apply in strict legal terms, the principles of TUPE should be followed and the staff involved should be treated no less favourably than had the Regulations applied.
6. The annex to the Statement requires the terms of a business transfer specifically to protect the pensions of transferees. Staff must have ongoing access to the Local Government Pension Scheme or be offered an alternative good quality occupational pension scheme, as defined in the Code, under which they can continue to earn pension benefits through their future service. There must also be arrangements for handling the accrued benefits which staff have already earned.

#### Treatment of new joiners to an outsourced workforce

7. Where the service provider recruits new staff to work on a local authority contract alongside staff transferred from the local authority, it will offer employment on fair and reasonable terms and conditions which are, overall, no less favourable than those of transferred employees. The service provider will also offer reasonable pension arrangements (as described at paragraph 10 below).
8. The principle underpinning the provisions of paragraph 7 is to consider employees' terms and conditions (other than pensions arrangements which are dealt with in paragraph 10) in the round – as a 'package'. This Code does not prevent service providers from offering new recruits a package of non-pension terms and conditions which differs from that of transferred staff, so long as the overall impact of the changes to this package meets the conditions in paragraph 7. The aim is to provide a flexible framework under which the provider can design a package best suited to the delivery of the service, but which will exclude changes which would undermine the integrated nature of the team or the quality of the workforce.
9. The service provider will consult representatives of a trade union where one is recognised, or other elected representatives of the employees where there is no recognised trade union, on the terms and conditions to be offered to such new recruits. The arrangements for consultation will involve a genuine dialogue. The precise nature of the arrangements for consultation is for agreement between the service provider and the recognised trade unions. The intention is that contractors and recognised trade unions should be able to agree on a particular package of terms and conditions, in keeping with the terms of this Code, to be offered to new joiners.

#### Pension arrangements for new joiners to an outsourced workforce

10. The service provider will be required to offer new recruits taken on to work on the contract beside transferees one of the following pension provision arrangements:

- membership of the Local Government Pension Scheme (LGPS), where the employer has admitted body status within the scheme and makes the requisite contributions.
- membership of a good quality employer pension scheme, either being a contracted out, final-salary based defined benefit scheme, or a defined contribution scheme. For defined contribution schemes the employer must match employee contributions up to 6%, although either could pay more if they wished.
- a stakeholder pension scheme, under which the employer will match employee contributions up to 6%, although either could pay more if they wished.

On a retender of a contract to which this Code applies the new service provider will be required to offer one of these pensions options to any staff who transfer to it and who had prior to the transfer a right under the Code to one of these pension options.

#### Monitoring arrangements

11. Throughout the length of the contract, the service provider will provide the local authority with information as requested which is necessary to allow the local authority to monitor compliance with the conditions set out in this Code. This information will include the terms and conditions for transferred staff and the terms and conditions for employees recruited to work on the contract after the transfer.

12. Such requests for information will be restricted to that required for the purpose of monitoring compliance, will be designed to place the minimum burden on the service provider commensurate with this, and will respect commercial confidentiality. The National Assembly for Wales will also ask the service provider and the local authority to support a Government-sponsored review and monitoring programme on the impact of the Code, drawn up in consultation with representatives of local government, contractors, trade unions and the Audit Commission as described in paragraph 17, and to provide information as requested for this purpose. Such requests will follow the same principles of proportionality and confidentiality.

#### Enforcement

13. The local authority will enforce the obligations on the service provider created under this Code. Employees and recognised trade unions should in the first instance seek to resolve any complaints they have about how the obligations under this Code are being met, directly with the contractor.

Where it appears to the local authority that the service provider is not meeting its obligations, or where an employee of the contractor or a recognised trade union writes to the authority to say that it has been unable to resolve a complaint directly with the contractor, the local authority will first seek an explanation from the service provider. If the contractor's response satisfies the local authority that the Code is being followed, the local authority will inform any complainant of this. If the response does not satisfy the local authority, it will ask the service provider to take immediate action to remedy this. If, following such a request, the service provider still appears to the local authority not to be complying with the Code, the local authority will seek to enforce the terms of the contract, which will incorporate this Code. In addition, where a service provider has not complied with this Code, the local authority will not be bound to consider that provider for future work.

14. The contract shall include a provision for resolving disputes about the application of this Code in a fast, efficient and cost-effective way as an alternative to litigation, and which is designed to achieve a resolution to which all the parties are committed. The contractor, local authority and recognised trade unions or other staff representatives, shall all have access to this 'alternative dispute resolution' (ADR) process. The National Assembly for Wales and the UK Government have asked local authorities, trade unions and contractors to come forward with an ADR mechanism which is consistent with this Code, for inclusion in contracts. In the event that within a specified timescale the parties are unable to agree, the National Assembly for Wales will publish as an annex to the Code its proposed ADR mechanism.
15. Local authorities will have a duty in their Improvement plans to certify that individual contracts comply with Wales Programme for Improvement requirements, including workforce requirements in this Code and the accompanying statutory guidance. The Audit Commission's appointed auditor will through the audit of the Improvement Plan:
  - provide assurance that councils are meeting their statutory duty of certifying their compliance with the Code and that they have put in place adequate arrangements to ensure compliance;
  - receive information from third parties about any concerns with the council's compliance;
  - consider the information received and decide how to deal with those concerns;
  - where the subject of any concern is of material significance (e.g. large contracts or a major breach of this Code is alleged) the auditor will decide on a proportionate response to investigate the concerns.
16. If as a result of investigations the auditor has concerns about an authority's compliance with this Code, they may exercise their appropriate statutory powers, which include:
  - requiring the authority to respond publicly to a written recommendation;

- recommending that the National Assembly for Wales should give a direction under Section 15 of the Local Government Act 1999.

The Audit Commission will issue guidance to councils and auditors on how these matters will be dealt with.

### **Sub-contractors**

17. This Code sets out procedures for handling matters between the local authority and a primary contractor. Where the primary contractor to provide services to the local authority transfers staff originally in the employ of the local authority to a sub-contractor in consequence of the terms of the primary contractor's obligations to the local authority, the primary contractor will be responsible for the observance of this Code by the sub-contractor.

### Review of this Code

18. The National Assembly for Wales will monitor the operation of this Code and consult with representatives of local government, trade unions, contractors and the Audit Commission to assist in this process.

A decorative graphic consisting of several overlapping triangles in various shades of purple, arranged in a pattern that suggests a stylized 'W' or a cluster of shapes. The triangles are set against a white background.

# CODE OF PRACTICE ON WORKFORCE MATTERS IN PUBLIC SECTOR SERVICE CONTRACTS

[www.wales.gov.uk/psmw](http://www.wales.gov.uk/psmw)



Llywodraeth Cynulliad Cymru  
Welsh Assembly Government

# EXPLANATORY NOTE

**This explanatory note is issued to provide background and context to this Code.**

The Code was developed and agreed by a Task and Finish group following a ministerial commission in 2005. The task and finish group was constructed along partnership lines with representation from Welsh Local Government Association (WLGA), Wales Trade Union Congress (WTUC), Confederation of British Industry (CBI), National Health Service (NHS) and Assembly officials.

Whilst the Code was agreed by the group and the relevant minister its wider circulation was delayed to allow harmonisation with a similar code being issued by UK government.

This Code was tabled at the Wales Public Service Workforce forum on the 24th January 2008 and it was agreed there would be merit in re-issuing the document for reference purposes and to supplement the partnership and managing change agreement issued in March 2007.

**February 2008**

# CODE OF PRACTICE ON WORKFORCE MATTERS IN PUBLIC SECTOR SERVICE CONTRACTS

- 1** This document sets out an approach to workforce matters in public sector service contracts which involve a transfer of staff from the public sector organisation to the service provider, or in which staff originally transferred out from the public sector organisation as a result of an outsourcing are Transfer of undertakings (Protection of Employment Regulations) (TUPE) transferred to a new provider under a retender of a contract. This Code will form part of the service specification and conditions for all such contracts, except those where the Code of Practice on Workforce Matters in Local Authority Service Contracts applies, or where other exemptions have been announced.
- 2** The Code recognises that there is no conflict between good employment practice, value for money and quality of service. On the contrary, quality and good value will not be provided by organisations who do not manage workforce issues well. The intention of the public sector organisation is therefore to select only those providers who offer staff a package of terms and conditions which will secure high quality service delivery throughout the life of the contract. These must be sufficient to recruit and motivate high quality staff to work on the contract and designed to prevent the emergence of a
- 3** Service providers who intend to cut costs by driving down the terms and conditions for staff, whether for transferees or for new joiners taken on to work beside them, will not be selected to provide services for the public sector organisation. However, nothing in this Code should discourage public sector organisations or service providers from addressing productivity issues by working with their workforces in a positive manner to achieve continuous improvement in the services they deliver.

## TREATMENT OF TRANSFEREES

- 4** In its contracting-out of services, the public sector organisation will apply the principles set out in the Cabinet Office Statement of Practice on Staff Transfers in the Public Sector and the annex to it, A Fair Deal for Staff Pensions. The service provider will be required to demonstrate its support for these principles and its willingness to work with the public sector organisation fully to implement them.
- 5** The intention of the Statement is that staff will transfer and that TUPE should apply, and that in circumstances where TUPE does not apply in strict legal terms, the principles of TUPE should be followed and the staff involved should be treated no less favourably than had the Regulations applied.
- 6** The annex to the Statement requires the terms of a business transfer specifically to protect the pensions of transferees. Transferring staff should be offered membership of a pension scheme which is broadly comparable to the public service pension scheme which they are leaving.

## TREATMENT OF NEW JOINERS TO AN OUTSOURCED WORKFORCE

- 7** Where the service provider recruits new staff to work on a public service contract alongside staff transferred from the public sector organisation, it will offer employment on fair and reasonable terms and conditions which are, overall, no less favourable than those of transferred employees. The service provider will also offer reasonable pension arrangements (as described at paragraph 10 below).
- 8** The principle underpinning the provisions of paragraph 7 is to consider employees' terms and conditions (other than pensions arrangements which are dealt with in paragraph 10) in the round – as a 'package'. This Code does not prevent service providers from offering new recruits a package of non-pension terms and conditions which differs from that of transferred staff, so long as the overall impact of the changes to this package meets the conditions in paragraph 7. The aim is to provide a flexible framework under which the provider can design a package best suited to the delivery of the service, but which will exclude changes which would undermine the integrated nature of the team or the quality of the workforce.
- 9** The service provider will consult representatives of a trade union where one is recognised, or other elected representatives of the employees where there is no recognised trade union, on the terms and conditions to be offered to such new recruits.



(References to 'trade unions' throughout this code should be read to refer to other elected representatives of the employees where there is no recognised trade union.) The arrangements for consultation will involve a genuine dialogue. The precise nature of the arrangements for consultation is for agreement between the service provider and the recognised trade unions. The intention is that contractors and recognised trade unions should be able to agree on a particular package of terms and conditions, in keeping with the terms of this Code, to be offered to new joiners.

## PENSION ARRANGEMENTS FOR NEW JOINERS TO AN OUTSOURCED WORKFORCE

**10** The service provider will be required to offer new recruits taken on to work on the contract beside transferees one of the following pension provision arrangements:

- Membership of a good quality employer pension scheme, either being a contracted out, final-salary based defined benefit scheme, or a defined contribution scheme. For defined contribution schemes the employer must match employee contributions up to 6%, although either could pay more if they wished.
- A stakeholder pension scheme, under which the employer will match employee contributions up to 6%, although either could pay more if they wished.

On a retender of a contract to which this Code applies the new service provider will be required to offer one of these pensions options to any staff who transfer to it and

who had prior to the transfer a right under the Code to one of these pension options.

## MONITORING ARRANGEMENTS

**11** Throughout the length of the contract, the service provider will provide the public sector organisation with information as requested which is necessary to allow the public sector organisation to monitor compliance with the conditions set out in this Code. This information will include the terms and conditions for transferred staff and the terms and conditions for employees recruited to work on the contract after the transfer.

**12** Such requests for information will be restricted to that required for the purpose of monitoring compliance; will be designed to place the minimum burden on the service provider commensurate with this, and will respect commercial confidentiality. The service provider and the public sector organisation will also support a review of the impact of the Code, drawn up in consultation with representatives of the public sector organisations, contractors, trade unions and will provide information as requested for this purpose. Such requests will follow the same principles of proportionality and confidentiality.

## ENFORCEMENT

**13** The public sector organisation will enforce the obligations on the service provider created under this Code. Employees and recognised trade unions should, in the first instance, seek to resolve any complaints they have about how the

obligations under this Code are being met, directly with the service provider. Where it appears to the public sector organisation that the service provider is not meeting its obligations, or where an employee of the service provider or a recognised trade union writes to the authority to say that it has been unable to resolve a complaint directly with the service provider, the public sector organisation will first seek an explanation from the service provider. If the service provider's response satisfies the public sector organisation that the Code is being followed, the public sector organisation will inform any complainant of this. If the response does not satisfy the public sector organisation it will ask the service provider to take immediate action to remedy this. If, following such a request, the service provider still appears to the public sector organisation not to be complying with the Code, the public sector organisation will seek to enforce the terms of the contract, which will incorporate this Code. In addition, where a service provider has not complied with this Code, the public sector organisation will not be bound to consider that provider for future work.

**14** The contract shall include a provision for resolving disputes about the application of this Code in a fast, efficient and cost-effective way as an alternative to litigation, and which is designed to achieve a resolution to which all the parties are committed. The service provider, public sector organisation and recognised trade unions or other staff representatives, shall all have access to this 'Alternative Dispute Resolution' (ADR) process (Annex A to this Code sets out the ADR procedure).

**15** Employees or trade unions who need to seek advice in cases where they consider that the public sector organisation has failed to meet its responsibilities under paragraph 13, should contact the Welsh Assembly Government.

## SUB-CONTRACTORS

**16** This Code sets out procedures for handling matters between the public sector organisation and a primary service provider. Where the primary service provider transfers staff originally in the employ of the public sector organisation to a sub-contractor in consequence of the terms of the primary service provider's obligations to the public sector organisation, the primary service provider will be responsible for the observance of this Code by the sub-contractor.

## OPERATION OF THE CODE

**17** The Welsh Assembly Government will monitor the operation of the Code, following consultation with relevant employers and trade unions.

**Welsh Assembly Government  
March 2005**

# ANNEX A: CODE OF PRACTICE ON WORKFORCE MATTERS: ALTERNATIVE DISPUTE RESOLUTION (ADR) PROCEDURE

## INTRODUCTION

- ▶ This sets out a procedure for resolving disputes arising from the application of the Code of Practice on Workforce Matters. The procedure should be a last resort and all parties will make their best efforts to resolve problems by agreement. The ADR should be fast, efficient and cost-effective.

## THE NEED TO EXHAUST LOCAL PROCEDURES

- ▶ The parties must exhaust all normal local procedures as required by paragraph 9 and paragraph 13 of the Code before invoking the Alternative Dispute Resolution procedure (ADR) provided for in paragraph 14.

## WHO IS RESPONSIBLE FOR RESOLVING DISPUTES?

- ▶ The ADR procedure will be under the supervision of an independent person appointed from an approved list supplied by ACAS. If the parties so agree, they may appoint two “wing members” with an employer and trade union background to assist the independent person.

## THE DISPUTE RESOLUTION PROCESS

- ▶ Disputes will be resolved using the following three-stage procedure

### **Stage 1: The independent person**

The independent person will be invited to answer three questions:

- i) Is this a dispute about the application of the Code?

If the answer is no, the matter can proceed no further. If yes, then the independent person will move to question (ii).

- ii) Have the parties exhausted local procedures?

If the answer is no, then the parties will be invited to make further local efforts to resolve the dispute. If yes, then the independent person will conduct an independent assessment, by answering question (iii) and giving reasons for the answer.

- (iii) Do the terms and conditions of employment on offer to new employees comply with the Code?

If the answer is yes, then the matter is deemed to be concluded and the contractor can continue to offer the same package of conditions to new employees. If the answer is no, then the dispute will proceed to Stage 2.

**Time limit:** Twenty working days.

### **Stage 2: Discussions with a view to reaching an agreement on compliant terms and conditions**

Stage 2 begins with the parties being invited to seek to resolve the matter through further discussions.

The independent person will make themselves available to the parties to facilitate the process. The parties also have the option of establishing other arrangements for mediation.

If the parties can reach an agreement consistent with the Code then the matter is closed and the new package of conditions of employment will be applied both to new starters and to those employed during the dispute.

If no agreement can be reached within the allotted time then the dispute will proceed to Stage 3.

**Time limit:** Ten working days, with the possibility that this might be extended by the agreement of the parties and with the consent of the independent person.

### **Stage 3: Final reference to the independent person**

The independent person invites the parties to make final submissions. If the independent person then believes it would be worthwhile, the parties may be given a short period of further discussion.

If there is no value in giving the parties more time - or if during any discussion the parties were unable to agree on how to bring the matter to a successful conclusion - then the independent person will proceed to a final binding arbitration. Having heard the evidence and reached a conclusion the independent person will impose a revised package of terms and conditions applicable to each of the affected employees.

**Time limit:** Ten working days

## **ANNEX D**

### **Impact Assessments**

In undertaking this consultation the Welsh Government has prepared a number of impact assessments as part of the Delivering Results process. The impact assessments completed include:

- Equality Impact Assessment;
- Privacy Impact Assessment Screening – Tool;
- Regulatory Impact Assessment (financial costs);
- Rural-proofing Checklist;
- Assessment against the requirements of the UN Convention on the Rights of the Child; and
- Welsh Language Policy Impact Assessment.

#### Equality Impact Assessment

The Equality Impact Assessment completed in respect of the Code demonstrates either no impact or a negligible impact in respect of the nine protected characteristics. Where applied to a public service outsourcing contract, the provisions of the Code to apply to all employees equally. The Code make no differentiation between employees.

In preparing the Equality Impact Assessment we have noted a shortage of evidence in relation to the implementation and impact of the Code in respect of the nine protected characteristics under the Equalities Act 2010. In addition to any comments you have on the Assessment we would be interested in any information you have on these impacts.

#### Privacy Impact Assessment – Screening Tool

The Privacy Impact Assessment has been completed in respect of the proposal to revise and reissue the Code. The Code itself contains no personal data and the proposal to revise and reissue it does not require the processing of personal data. As a consequence it has been determined that it is not necessary to complete a full Impact Assessment.

The Code would only apply in relation to outsourcing arrangements where there is a transfer of staff under TUPE. The provisions of TUPE allow for the sharing of some data relating to specific employees.

We would be interested in any comments or information you have that are relevant to the Privacy Impact Assessment.

## Regulatory Impact Assessment

The Regulatory Impact Assessment is concerned with the possible financial implications of policy proposals. A consultation stage Impact Assessment has been completed in respect of the Code which sets out the four options considered and the costs and benefits of each.

As there are two existing Codes already in operation in Wales, and the proposed Code does not seek to place significant additional burdens on the public service organisations to which it applies, it is assumed that the proposals are cost neutral. However, it is recognised that as there are no reliable figures on the number or type of outsourcing contracts into, there is no way of estimating how many such contracts may be entered into in the future.

We would be interested in any comments or information you have that are relevant to the Regulatory Impact Assessment.

## Rural Proofing Checklist

The Checklist is designed to ensure that Welsh Government policies do not impact adversely on rural areas. In this instance the assessment demonstrates that there is no additional impact on rural areas as a consequence of the proposals in respect of the Code.

We would be interested in any comments or information you have that are relevant to the Privacy Impact Assessment.

## UN Convention on the Rights of the Child

The Welsh Government bound by law to consider how the UN Convention on the Rights of the Child applies to all policy and legislative decisions. Having completed the assessment, it is suggested that the Code helps to realise or affect three of the articles of the convention as follows:

- Article 13 Right to get and share information;
- Article 14 Right to think and believe what they want and to practise their religion; and
- Article 27 Children have a right to a standard of living that is good enough to meet their physical and mental needs. The Government should help families who cannot afford to provide this.

The Code is intended to apply equally to all affected by relevant public service outsourcing contracts. It does not prioritise the rights of employees aged 18 or under, but does not allow for them to be treated differently or discriminated against.

We would be interested in any comments or information you have that are relevant to the Assessment against the requirements of the UN Convention on the Rights of the Child.

## Welsh Language Policy Impact Assessment

The Welsh Language Policy Impact Assessment demonstrates that the provisions contained within the Code do not have a negative impact in respect of the Welsh Language. The terms and conditions of staff transferred from a public service organisation to a service provider as part of the outsourcing of public services are protected under the requirements of TUPE. Under the terms of the Code new joiners would be entitled to terms and conditions no less favourable than those of transferred staff, including, where appropriate, any provision in respect of the Welsh Language.

We would be interested in any comments or information you have that are relevant to the Welsh Language Policy Impact Assessment.