

## Annex B – Respondent Information Form



# Public Procurement: A Consultation on Changes to the Public Procurement Rules in Scotland

### RESPONDENT INFORMATION FORM

**Please Note** this form **must** be returned with your response to ensure that we handle your response appropriately

#### 1. Name/Organisation

##### Organisation Name

Citizens Advice Scotland

**Title** Mr  Ms  Mrs  Miss  Dr  **Please tick as appropriate**

##### Surname

McPhee

##### Forename

Susan

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#### 3. Type of Respondent

**Please tick as appropriate**

Executive Agencies and NDPBs

Local authority

NHS

Other statutory organisation

Representative body for private sector organisations

Representative body for third sector/equality organisations

Representative body for community organisations

Representative body for professionals

Private sector organisation

Third sector/equality organisation

Community group

Academic

Individual

#### 4. Permissions - I am responding as...

Individual

/

Group/Organisation

Please tick as appropriate

- (a) Do you agree to your response being made available to the public (in Scottish Government library and/or on the Scottish Government web site)?

Please tick as appropriate

Yes  No

- (b) Where confidentiality is not requested, we will make your responses available to the public on the following basis

Please tick **ONE** of the following boxes

Yes, make my response, name and address all available

or

Yes, make my response available, but not my name and address

or

Yes, make my response and name available, but not my address

- (c) The name and address of your organisation **will be** made available to the public (in the Scottish Government library and/or on the Scottish Government web site).

Are you content for your **response** to be made available?

Please tick as appropriate

Yes  No

- (d) We will share your response internally with other Scottish Government policy teams who may be addressing the issues you discuss. They may wish to contact you again in the future, but we require your permission to do so. Are you content for Scottish Government to contact you again in relation to this consultation exercise?

Please tick as appropriate

Yes

No

## Questions

Q1 What are your views about what should be included in this Statutory Guidance? Please explain your answer.

Citizens Advice Scotland (“CAS”) takes the view that the statutory guidance should include a requirement on public bodies to ensure that their organisational procurement strategies and annual reports contain information on how expected regulated procurements have delivered positive outcomes for the paying public, and delivered value for the service end users.

Q2 What are your views about what should be included in this Statutory Guidance? Please explain your answer.

We believe that the statutory guidance should highlight the need for public bodies to demonstrate, and evaluate, how their compliance with the sustainable procurement duty in the Procurement Reform (Scotland) Act 2014 has benefited consumers and delivered value for the service end users.

Q3 What are your views about what should be included in this Statutory Guidance? Please explain your answer.

CAS notes that the Scottish Government is proposing that the statutory guidance on community benefits in procurement will address ‘defining the appropriate community benefit through stakeholder engagement’. In this respect, we believe the statutory guidance should highlight that the stakeholder engagement to define community benefits must include engaging with Citizens Advice Bureaux (“CABs”). Local CABs make a significant contribution to communities across Scotland, and could make an important contribution to the process of defining appropriate community benefits. CABs would, for example, be able to contribute expert local knowledge, and to ensure that this process draws upon significant social policy data and evidence collected locally from their clients, including the latter’s experience of local services.

Q4 We believe that a statutory obligation on public bodies to include relevant clauses in their contracts is the best way to ensure that contractors comply with all relevant laws and collective agreements. This should also ensure that public bodies are able to end contracts where a contractor does not meet these requirements. Do you agree or disagree with this position? Please explain your answer.

Agree  Disagree

We believe these measures can play an important role in helping to safeguard public monies, and to ensure that reputable contractors with appropriate experience and expertise are engaged to undertake work paid for from the public purse.

Q5 Is there still a case for reserving contracts for supported businesses in Scotland?

Yes  No

Q6 Do you think that the definition of a “disadvantaged person” in this context should be “the unemployed, members of disadvantaged minorities or otherwise socially marginalised groups”?

Yes  No

If not, what do you think the definition should be and why?

CAS does not have an organisational position on the proposed definition.

Q7 Our view is that we are not aware of any arguments that currently support reserving contracts for mutual and other non-public sector bodies in Scotland, and we believe this is less of an issue in Scotland. Do you think there are any advantages or disadvantages to applying this provision to the procurement activities of public bodies in Scotland? Please explain your answer.

Advantages  Disadvantages

CAS does not have an organisational position on this issue.

Q8 Should the rules about labels which apply to contracts that are EU regulated procurements also apply to lower value regulated procurement contracts covered by the Act? Please explain your answer.

Yes  No

CAS would welcome further information about the support which will be available to support small businesses to comply with the rules about labels.

Q9 Do you think we should align the rules on technical specifications for all regulated procurements, including those lower value procurements regulated by the Act? Please explain your answer.

Yes  No

We believe this will help to promote a consistent approach, and to deliver better value for consumers.

Q10 We believe that contracts should not be awarded on the basis of price or cost alone? Do you agree or disagree? Please explain why.

Agree  Disagree

We believe that contracts should not be awarded on the basis of price or costs alone. Our concern is that public bodies which award contracts to the contractor with the lowest price or costs could make short-term savings, but subsequently incur higher long term costs if the quality of the goods or services provided are of a poor quality.

Q11 We believe that public bodies should retain discretion to split requirements into smaller lots and to award more than one lot to the same bidder. Do you agree or disagree with this? Please explain your answer.

Agree  Disagree

CAS believes that this practice would create greater opportunities for small businesses, and enable them to bid for specific types of work which they might otherwise have found inaccessible.

Q12 To avoid creating unnecessary confusion, we believe that public bodies should have the discretion to decide whether to request additional information about sub-contractors. What are your views about this?

As set out in our response to Q32 below, we recommend that the Scottish Government should promote fair employment through the public procurement process. In that context, CAS recommends that public bodies should be able to request information from sub-contractors about remuneration and the use of zero hours contracts, together with information about compliance with obligations relating to the National Minimum Wage, tax and social security contributions.

Q13 The Directives also make clear that public bodies are responsible for obtaining any information about sub-contractors from the main contractor. There is an option to transfer this obligation (to deliver the information) to the main contractor. We do not plan to transfer that obligation to the main contractor. What are your views about this?

CAS considers that there will be greater accountability and transparency if this responsibility remains with public bodies.

Q14 We believe that we should not apply similar provisions on sub-contracting to contracts covered by the Act, as we do not think this would be proportionate. Do you agree or disagree with this?

Agree  Disagree

CAS does not have an organisational position.

Q15 We believe that similar payment terms for sub-contractors, as for main contractors, is a good thing and there are some measures underway, or in place, to address this. We also believe that direct payments to sub-contractors could be complicated and could mean public bodies assuming some responsibilities that should arguably remain with the main contractor. In light of this, we believe that public bodies should be able to make direct payments to sub-contractors only where the contract allows this to happen and parties agree. Do you agree or disagree?

Agree  Disagree

CAS does not have an organisational position.

Q16 Do you think that the same rules on selection criteria should apply to lower value regulated contracts as to higher value EU regulated public contracts? In particular, should the same rules apply on:

- The use of turnover as a selection criterion?
- The right of a public body to assume that a business does not have the professional ability needed for the performance of a specific contract, if that business has a conflict of interest which might mean that it is less able to deliver the contract?

Please explain your answer.

Yes  No

We believe these proposals, by promoting a consistent approach, will help to safeguard the end service user and, as a result, deliver best value for consumers

Q17 Do you agree or disagree that public bodies should retain the flexibility to decide for themselves the basis upon which groups of businesses will be able to meet tests of economic and financial standing and technical and professional ability that will be necessary to perform a particular contract or should there be national standards? Please explain your answer.

Agree  Disagree

CAS considers that, whatever framework is put in place, must be open, transparent and fair, and open to public scrutiny. Ensuring these safeguards are in place will help to protect the end service user, and promote best value for consumers.

Q18 Should the list of criminal convictions which may result in exclusion from bidding be the same for all regulated contracts, regardless of value? Please explain your answer.

Yes  No

CAS believes that this will ensure that public bodies' contracts are awarded to reputable contractors with appropriate levels of experience and expertise. CAS believes these safeguards will help to protect the public purse by ensuring that the award of contracts is rigorous, and subject to robust procedures.

Q19 Should public bodies be required to exclude a business from bidding for lower value regulated contracts if it, or someone who holds a senior position in it, has been convicted of any of the offences on the list?

Yes  No

Please see answer to Q18 above.

Q20 Should public bodies retain the discretion to decide whether or not to exclude a business from bidding for a contract where the body can demonstrate by appropriate means, short of a court, tribunal or administrative decision, that the business has breached its obligations to do with paying tax or social security contributions?

Yes  No

As set out in our response to Q32 below, CAS recommends that breaching obligations relating to the payment of Income Tax and National Insurance contributions should exclude businesses from being awarded public contracts. In that context we would support public bodies being able to exclude businesses for this reason on contracts of all value.

Q21 Should public bodies be given the discretion not to exclude a business which has breached its obligations to do with paying tax or social security contributions, and where this has been established by a court, tribunal or administrative decision, if it would be disproportionate to do so?

Yes  No

Please see answer to Q20 above.

Q22 Should public bodies also have the discretion to exclude a business from bidding for lower value regulated contracts if it has breached its obligations in relation to the payment of tax?

Yes  No

Please see answer to Q20 above.

Q23 Should public bodies retain the discretion to decide whether or not to exclude a business which is bankrupt, or is in insolvency proceedings from bidding? Please explain your answer – in particular, if you think that public bodies should have discretion in these situations, do you think that discretion should apply in every circumstance?

Yes  No

CAS believes that bankrupt or insolvent companies should not be allowed to bid for public contracts if they owe outstanding Employment Tribunal awards to current or former employees. In many cases, employees will not receive part of all the money they are due, because an employer goes out of business or simply refuses to pay. According to research published by the UK Government, only 41% of claimants are paid their award in full. The majority of respondents are either not paid their award at all (46%) or are only paid in part (13%).<sup>1</sup>

If an employer goes out of business, the award can be very difficult to recover in full. Some CAB clients have experience of employers who close their business, only to emerge as a 'phoenix company', doing the same business from the same location, but with no liability to pay the client what they are owed.

- A North of Scotland CAB reports of a client who did not receive wages or holiday pay from his former employer. The client was successful in his Employment Tribunal claim and received an award of £3,283.34. The client waited 42 days but received no payment from his former employer. He then had to write to the Tribunal for 'an extract of the judgement' which caused further delay. In the interim his ex-employer attempted to get the company 'struck off' meaning the client had to write then to Companies House to object. The objection was successful but this only delays the process for two months. The client now has his extract of award and it is uncertain what enforcement action he will be able to achieve in the time scale, given that the ex-employer reports that the company has no money. The client is in a 'Catch 22' situation with a 'hollow victory' award - in that he is owed money but the respondent will not pay. The company will be struck off in two months' time meaning the client will have an award but no legal entity to pursue payment from thereafter. In order to see if Sheriff Officers can enforce payment, the client will need to pay further sums

<sup>1</sup> Payment of Tribunal Awards 2013 Study – IFF Research, Department for Business Innovation and Skills, October 2013  
[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/253558/bis-13-1270-enforcement-of-tribunal-awards.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/253558/bis-13-1270-enforcement-of-tribunal-awards.pdf)

of around £100 but this may not be successful if his ex-employer has no money. The company is not formally insolvent and so the client is unable to get payment from the National Insurance Fund. The client could trigger the insolvency of the Respondent but the cost for this is over £1,500 (non-refundable) and there would still be no guarantee of getting any money thereafter as the Redundancy Payments Service will only pay holiday pay due if it is within 12 months. The time taken to get to Employment Tribunal, then get the award and then to trigger an insolvency makes this impossible.

Q24 Should the same rules apply to EU regulated contracts and to lower value regulated contracts? Please explain your answer.

Yes  No

Please see answer to Q23 above

Q25 Should a public body be allowed not to exclude a business with disqualifying criminal convictions, or which has breached its obligations to pay tax or social security, in exceptional circumstances? Please explain your answer.

Yes  No

Please see answers to Questions 20 – 22 above.

Q26 Should the same rules apply to EU regulated contracts and to lower value regulated contracts? Please explain your answer.

Yes  No

As set out in our response to Q32 below, CAS recommends that breaching obligations relating to the payment of Income Tax and National Insurance contributions should exclude businesses from being awarded public contracts. In that context we would support public bodies being able to exclude businesses for this reason on contracts of all value.

Q27 Should the law allow public bodies the discretion to decide whether or not to exclude bidders in situations where there is evidence of a breach of environmental, social and labour law obligations, grave professional misconduct, distortion of competition, a conflict of interest, a significant failure to perform in an earlier contract, or a security risk (in the case of defence and security concessions)? Please explain your answer.

Yes  No

CAS does not have an organisational position.

Q28 Should the same rules apply to EU regulated contracts and to lower value regulated contracts? Please explain your answer.

Yes  No

CAS does not have an organisational position.

Q29 Do you agree or disagree with our proposed maximum periods of exclusion? Please explain your answer.

Agree  Disagree

CAS does not have an organisational position.

Q30 Should the same rules apply to EU regulated contracts and to lower value regulated contracts? Please explain your answer.

Yes  No

CAS does not have an organisational position.

Q31 Should public bodies be required to check that sub-contractors do not fail any of the exclusion criteria?

Yes  No

CAS believes this will help to protect consumers.

Q32 What are your views about what should be included in this Statutory Guidance? Please explain your answer.

The Citizens Advice Service is a major source of external advice for people who experience employment problems. In 2013/14, citizens advice bureaux in Scotland advised clients on 46,540 new employment issues. Some of these issues are examples of extremely unfair employment practices which place clients in a difficult, complex and miserable situation. CAS' recent report 'Fair Enough? Protecting Scotland's Workers from Unfair Treatment' presented numerous examples of unfair employment practices including clients being unfairly dismissed, not being paid by their employer, dismissed when they became pregnant and bullied and harassed at work.<sup>2</sup>

Promoting fair employment through public procurement is important. Poor quality employment not only has a negative impact on individual employees, but has a knock on impact on other areas of public spending. With growing

<sup>2</sup> Fair Enough? Protecting Scotland's Workers from Unfair Treatment – Citizens Advice Scotland, February 2015 <http://www.cas.org.uk/publications/fair-enough>

issues of in-work poverty, including cases of people in work being referred for emergency food aid, poor employment puts a strain on social security and public health services. Additionally, as part of a major study of poverty and social exclusion in Scotland and the UK, researchers found that people who worked in low quality, stressful and insecure jobs had poorer general health and a lower satisfaction with daily activities than those that were unemployed.<sup>3</sup> In that light, a strong commitment to promoting fair employment through statutory guidance would be welcome.

The proposals set out in the consultation document for what could be included in statutory guidance to promote ethical employment are all positive measures and CAS would recommend they are included. In particular, the following items are particularly important:

### **A positive package of remuneration measures**

In-work poverty in Scotland is growing and is a cause for real concerns. According to the latest research published by the Scottish Government, the majority of working-age adults in poverty (52%) were from working households, representing around 250,000 adults and 110,000 children experiencing in-work poverty.<sup>4</sup>

Whilst in-work benefits and tax credits and changes to the tax system have their part to play, key to reversing this worrying trend is tackling low pay. Citizens advice bureaux in Scotland have advised clients working full time earning the National Minimum Wage who are struggling to pay essential living costs and accumulating debt.

- A West of Scotland CAB reports of a client who is on maternity leave, earning statutory maternity pay. Her husband was working 35 hours per week on the National Minimum Wage. Despite receiving Child Benefit and Child Tax Credit, the couple are struggling to pay for essentials, but have no other entitlement to benefits.
- A West of Scotland CAB reports of a client who was on contribution-based Employment and Support Allowance (ESA) which has stopped. Her husband works, but only earns the National Minimum Wage, which is not enough to support them both. They have substantial Council Tax arrears which they cannot afford to repay.

In addition to paying at least the Scottish Living Wage to all contracted staff, key to ensuring parents can return to work after having children is that the income they would earn would comfortably exceed the costs of making sure

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<sup>3</sup> Employment, poverty and social exclusion – Poverty and Social Exclusion in the UK project, June 2014

[http://poverty.ac.uk/sites/default/files/attachments/Bailey%2C%20Employment%2C%20poverty%20and%20social%20exclusion\\_0.pdf](http://poverty.ac.uk/sites/default/files/attachments/Bailey%2C%20Employment%2C%20poverty%20and%20social%20exclusion_0.pdf)

<sup>4</sup> Poverty and Income Inequality in Scotland: 2012/13 – Scottish Government, July 2014.  
<http://www.scotland.gov.uk/Publications/2014/07/9247/4>

their children are cared for during their working hours. According to research by the Family and Childcare Trust, in Scotland the average cost of sending a child to nursery part time (25 hours per week) for two to five year-olds is £5,196 per year, rising to £5,721 for children under the age of two.<sup>5</sup>

- An East of Scotland CAB reports of a client whose first child attends nursery at a discounted price, but her second would not be entitled to any discount. The client cannot afford full-price childcare and is going to have to give up work.
- A West of Scotland CAB reports of a client who is a lone parent with a two year old. She has to leave for work every day at 5.30am so needs to rely on her father to take her daughter to a child minder early in the morning. The childminder costs £140 per week which the client is struggling to pay and has built up rent arrears and other debt. She feels the current arrangements are unsustainable and has looked for full-time work with a later start time, but without success. She wants to know if she would be better off giving up work and claiming Income Support.

### **Ensuring that zero hours contracts are not used inappropriately**

CAS strongly welcomes the proposal to include this in the statutory guidance. With an estimated 1.8 million zero hours contracts in the UK<sup>6</sup>, this rising figure has given cause for concern. Whilst working on a casual, zero hours basis may be suitable for some individuals, citizens advice bureaux in Scotland have reported a substantial number of problems caused by the misuse of zero hours contracts, which should be tackled. These problems include:

#### ***Lack of work causing hardship***

One of the key features of zero hours contracts is that no work is guaranteed in any week. For a growing number of workers, far from offering flexibility and choice in their working patterns, their zero hours contract has left them with very little, or no income whatsoever for a period of time. CAB in Scotland advised clients who found themselves in crisis and destitute as a result of a sustained period without work – in some cases being unable to afford to eat and requiring a referral to a food bank.

- An East of Scotland CAB reports of a client who is on a zero hours contract with two care agencies but is now getting hardly any work due to cut backs by care providers. She is paid a minimal amount of

<sup>5</sup> Childcare Costs Survey 2015 – Family and Childcare Trust

<sup>6</sup> Contracts with No Guaranteed Hours, Zero Hours Contracts, 2014 – Office for National Statistics, February 2015 <http://www.ons.gov.uk/ons/rel/lmac/contracts-with-no-guaranteed-hours/zero-hour-contracts--2014/index.html>

travelling costs when she does work and has to fund her own disclosures each time she goes to a new location. She is therefore often almost paying out more than she earns. She is “at the end of her tether”.

### ***Serious debt and budgeting difficulties due to a fluctuating income***

Workers on zero hours contracts can often find their working pattern - and therefore their income - unpredictable. CABs have advised clients on zero hours contracts whose working hours have dropped or fluctuated leaving it extremely difficult to budget and quickly accruing substantial debt.

- An East of Scotland CAB reports of a client whose employment varies significantly because of a zero hours contract. She can work between 7 and 13 hours per week and her income can vary from £60 to £100. The client struggles with her budget and to address her debt issues as she is not sure how many hours she will be working on a week to week basis and has no guarantee of any work.

### ***Difficulty accessing support from the benefits system***

Workers on zero hours contracts can slip through the benefits system as they have difficulty claiming in-work benefits and means tested benefits. To be eligible for Jobseeker’s Allowance (JSA) an individual must work less than 16 hours, and to be eligible for Working Tax Credit a claimant must work more than 30 hours a week (more than 24 hours a week for couples with children). If a person works between 16 and 24 hours, and those hours fluctuate, it is likely that their income will be very low – potentially lower than those in receipt of out of work benefits.

- An East of Scotland CAB reports of a client who is pregnant but because her hours vary week to week on a zero hours contract the CAB advisers are unable to tell her if she is entitled to Statutory Maternity Pay or has to claim Maternity Allowance. Also, the client is struggling with money due to not being able to predict or guarantee her income. She has applied for Housing Benefit and Council Tax Reduction but if her pay varies she may well end up being over or underpaid.

### ***Lack of entitlement to certain employment rights and confusion over employment status***

There is a problem with workers being unclear about the terms of their contract, and workers and employers being unclear on what rights they are entitled to on a zero hours contract. However, many of these difficulties are caused by misuse of zero hours contracts which, by accident or design, exploit weaknesses in the law in this area, rather than because information

and advice is not available.

- A West of Scotland CAB reports of a client who worked for a catering company on a zero hours contract. She was not given a contract to sign or given terms and conditions. She was originally told that overtime hours would be 'banked' and paid back to her at a later date but was then told that she owes them for 30 hours. She was also told by her employer that she is not entitled to holiday pay.

### ***'Zeroing down' – effective dismissal deterring workers from enforcing basic rights***

In a number of cases relating to the misuse of zero hours contracts, poor employment practices are reported by workers engaged on them. Whilst this is not necessarily because of the contract in itself, in practice employers have used their ability to cut their hours to the individual as a 'punishment' to deny them their basic statutory rights, deter them from asserting their rights, or in an attempt to make them resign. This has become known as 'zeroing down'.

- An East of Scotland CAB reports of a client who has been employed for four years on an 'as and when required' basis. Over the last six months he has worked around 50 hours per week. He has now been advised that there are no further hours for him, but that he is not being made redundant or his contract terminated. Two days later the client went online to see what work was available and the job which he did was advertised by his employer. The client has been advised by one manager that if he chooses to leave, he would receive a good reference, but does not wish to leave the job and has worked nearly every week whilst he has been employed there.

CAS would recommend the statutory guidance clearly defines what 'inappropriate' use of a zero hours contract would be considered to be. There is no commonly-used definition of this at present, though CAS would suggest the following uses of zero hours contracts should be considered inappropriate:

- Where a worker would prefer a more secure part-time or full-time contract
- If it causes hardship to individuals due to regularly changing patterns of work
- If it denies individuals basic employees' rights
- If it acts as a deterrent to workers asserting their basic employment rights
- If an exclusivity clause is used (although this is now banned by the

### **When a business has breached its obligations relating to the payment of tax or social security contributions**

In some cases reported by citizens advice bureaux, employees have discovered that their employer has not paid their Income Tax or National Insurance. In some cases, the employer has made the deduction but not passed it on, with the employee only discovering this when they are pursued by HMRC for an outstanding amount. This is sometimes years after the event.

- A West of Scotland CAB reports of a client who worked for an employer for five hours per week. The client trusted her employer to pay the employee's contribution towards Income Tax and National Insurance, but he failed to do this. Now the client has been left with a bill for unpaid tax from HMRC, dating back to 2010.

False or bogus self-employment is used by some employers to deny their employees basic rights and to avoid paying Income Tax or National Insurance, by declaring their staff to be 'self-employed' or 'independent contractors' when in practice they are paid employees. The practice has been particularly prevalent in the construction industry<sup>7</sup> and whilst not totally illegal, the rules in this area have been tightened in 2014.<sup>8</sup>

The practice has spread beyond the construction industry, however, with a number of CAB clients in different sectors reporting being declared as 'self-employed' against their wishes – or even without their knowledge.

- A North of Scotland CAB reports of a client who had worked in a beauty salon. She has now left, as her employer insisted that the client was actually 'self-employed' and consequently not entitled to the rights and protections that an employee has. The client engaged the CAB's help to come to a settlement with the employer over unpaid wages and to clarify her tax status with HMRC.

Ensuring this practice does not spread is important, and as a result CAS would recommend this would be included in statutory guidance, with failure to pay staff tax contributions by a contractor considered a breach of contract.

### **Additional measures**

<sup>7</sup> What is false self-employment? – UCATT <http://www.ucatt.org.uk/false-self-employment>

<sup>8</sup> Bogus self-employment: new government measures on false self-employment – Unite the Union, June 2014 <http://www.unitetheunion.org/how-we-help/list-of-sectors/construction/constructionnews/new-government-measures-on-false-self-employment/>

There are several other poor employment practices which CAS would recommend should be taken into account when determining if awarding a public contract to a business is appropriate.

### **Exclusion of businesses who fail to pay the National Minimum Wage**

Despite non-payment of the National Minimum Wage being illegal, with a 'name-and-shame' approach recently being adopted<sup>9</sup>, citizens advice bureaux regularly advise workers who are being paid less than the appropriate level of the National Minimum Wage. In some cases this is clearly a deliberate move on the employer's part, and can often go hand-in-hand with other poor employment practices.

- A West of Scotland CAB reports of a client who is employed in a franchise business but is facing poor working conditions, including no contract of employment, erratic wages sometimes falling well below the National Minimum Wage, and lack of information about statutory entitlements such as holidays or statutory sick pay. The client is unwilling to press further for statutory entitlements including a contract, due to possible vindictive behaviour from the employer such as reduced hours or dismissal.

CAS would recommend that businesses who have a recent track record of failing to pay the National Minimum Wage to staff should be ineligible to be awarded public contracts.

### **Exclusion of businesses who demonstrate evidence of unfair employment practices**

CABs in Scotland advise clients on employment problems on a daily basis. Often, the problems they experience are already illegal, but employees can experience significant barriers to upholding their rights. They may have attempted to seek justice in an Employment Tribunal, but been unable to afford fees of up to £1,200 to bring a case. Alternatively, they may not have been able to assert their rights due to fear of losing their job.

There is a role for the Scottish Government to lead by example in promoting fair work by using public procurement to make it hard for employers who carry out unfair practices from being awarded contracts for public works and services.

CAS recommends an Employment Commission should be established to bring together the functions currently carried out by HMRC, in investigating reports of non-payment of the National Minimum Wage, and employers not paying their employees' tax and National insurance contributions, and could

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<sup>9</sup> Government names and shames largest ever number of National Minimum Wage offenders – Department for Business, Innovation and Skills, February 2015  
<https://www.gov.uk/government/news/government-names-and-shames-largest-ever-number-of-national-minimum-wage-offenders>

roll out the same confidential reporting function to other areas and could use the same approach to tackle other unfair employment practices.

The Commission could allow workers to confidentially report unfair treatment such as breaches of their maternity, holiday, sickness, pay, dismissal, redundancy and other rights. They could bring this information together with outcomes of employment tribunal judgements, non-payment of the National Minimum Wage and tax and reports from other agencies, such as Acas, citizens advice bureaux, trade unions and other advice and representation agencies. The Commission could be empowered by legislation to take action on these reports.

As employment law is a reserved area, it would not be possible for the Scottish Government to establish a Commission along these lines. However, CAS would recommend the Scottish Government give consideration to how this information could be gathered with a view to promoting fair employment through the public procurement process.

Q33 We expect to apply only limited rules to contracts for social and other specific services to the person. These will require compliance with the basic Treaty Principles and publication of contract opportunity and award notices as described in this section. Do you agree or disagree that these rules will be sufficient for an effective light-touch regime? Please explain your answer.

Agree  Disagree

If a 'light-touch' regime for bidding for social care contracts is to be established, CAS believes it should not exempt companies from their obligations to demonstrate fair employment as outlined in Q32 above. CABs in Scotland have reported a number of issues with workers in the social care sector being employed on inappropriate zero hours contracts, or not paid for travel time – which in some cases can lead to employees being paid less than the National Minimum Wage

- A South of Scotland CAB reports of a client who would like to know if she is entitled to any benefits. She is currently working for a care agency on a zero hours contract but is not getting enough income to pay her bills. At interview she was promised 35 hours per week, but is currently averaging 27 - 30 hours, and next week she is only getting 20hrs. Her fuel allowance is £40 per month but she is spending £120 per month on fuel, driving only for her work.

Q34 We believe that contracts should not be awarded on the basis of price or cost alone? Do you agree or disagree with this position? Please explain why.

Agree  Disagree

Please see answer to Q33 above.

Q35 What are your views about what should be included in this Statutory Guidance? Please explain your answer

CAS does not have an organisational position.

Q36 Should provision be made for the use of a Prior Information Notice by non-central authorities (where they choose) as the call for competition in restricted procedures and competitive procedure with negotiation? Please explain your answer.

Agree  Disagree

CAS does not have an organisational position.

Q37 Do you agree or disagree that this provision should also apply to lower value regulated contracts, that is, those that are below European regulated thresholds and are regulated by the Act? Please explain your answer.

Agree  Disagree

CAS does not have an organisational position.

Q38 Do you agree or disagree that public bodies should be permitted to award a contract without competition in the circumstances permitted by the Directives? Please explain why.

Agree  Disagree

CAS does not have an organisational position.

Q39 Do you agree or disagree that public bodies should also be permitted to award lower value regulated contracts in similar situations? Please explain why.

Agree  Disagree

CAS does not have an organisational position.

Q40 Do you agree or disagree that all non-central authorities using the restricted procedure should be able to set the time limit for the receipt of tenders by agreement with candidates? Please explain why.

Agree  Disagree

CAS does not have an organisational position.

Q41 When using the open procedure, should public bodies retain the flexibility to determine whether to evaluate bids before evaluating qualification and exclusion criteria? Please explain your answer.

Yes  No

CAS does not have an organisational position.

Q42 Should public bodies be allowed to ask for supplementary or missing information and to ask a company to provide clarification of their bid?

Yes  No

CAS agrees that public bodies should be able to request supplementary or missing information, and that a company should be required to clarify certain aspects of their bid, providing they do so in an open, fair and non-discriminatory way.

Q43 Do you agree or disagree that the rules in the Directives about modifying contracts should not apply to contracts under the Act? Please explain why.

Agree  Disagree

CAS does not have an organisational position.

Q44 We believe we should continue to progress the work plan from the Construction Review report, rather than requiring the use of BIM or similar in works contracts and design contests. Do you agree or disagree? Please explain your answer.

Agree  Disagree

CAS does not have an organisational position.

Q45 Do you agree or disagree that we should establish an overall confidentiality and security framework which individual public bodies would use to inform their own approach to the security handling of electronic communication? Please explain your answer.

Agree  Disagree

CAS does not have an organisational position.

Q46 Do you agree or disagree that we should maximise the time available to implement fully electronic procurement processes and defer the requirement for full electronic communication for the maximum permissible time?

Agree  Disagree

CAS does not have an organisational position.

Q47 Do you agree or disagree that all communications about concession contracts in a procurement exercise should be by electronic means?

Agree  Disagree

CAS does not have an organisational position.

Q48 Do you think that public bodies should retain the flexibility to decide when the use of electronic catalogues is appropriate? Please explain your answer.

Yes  No

CAS does not have an organisational position.

Q49 Do you agree or disagree that we should defer the requirement to provide the European Single Procurement Document in electronic form only until 18 April 2018? Please explain your answer.

Agree  Disagree

CAS does not have an organisational position.

Q50 Do you agree or disagree that we should defer until 18 October 2018 the provision that says businesses should not have to submit supporting documents where the public body awarding the contract holds these? Please explain your answer.

Agree  Disagree

CAS does not have an organisational position.

Q51 Do you agree or disagree that we should defer the obligation on public bodies to use e-Certis until October 2018?

Agree  Disagree

CAS does not have an organisational position.

Q52 Do you agree or disagree that we adopt this option for utilities contracts? Please explain your answer.

Agree  Disagree

CAS does not have an organisational position.

Q53 Do you think that dynamic purchasing systems should be available as a tool for purchasers in respect of regulated procurements?

Yes  No

CAS does not have an organisational position.

Q54 Do you think that the same rules which apply in Article 34 of the Public Procurement Directive should be extended to lower value regulated procurements under the Act?

Yes  No

CAS does not have an organisational position.

Q55 Do you agree or disagree that we should continue to allow public bodies in Scotland to use central purchasing bodies as described in this section?

Agree  Disagree

CAS does not have an organisational position.

Q56 Do you agree or disagree that we should not require the use of central purchasing bodies for particular types of procurement, thereby allowing public bodies to exercise discretion as to when, and which, central purchasing body to use?

Agree  Disagree

CAS does not have an organisational position.

Q57 Do you agree or disagree that we should not restrict access by Scottish public bodies to European centralised purchasing activities? Please explain your answer.

Agree  Disagree

CAS does not have an organisational position.

Q58 Do you agree or disagree that the monitoring and enforcement body for Scotland should be the Scottish Ministers, acting through the existing Single Point of Enquiry? Please explain your answer.

Agree  Disagree

CAS considers that the Scottish Ministers, acting through the existing Single

Point of Enquiry, would be best placed to undertake a monitoring and enforcement role with regard to the procurement rules. Given the potential impact on end service users and on consumers generally CAS takes the view that the results of such monitoring should be publicised as widely as possible.

Q59 Do you agree or disagree that we should simply copy the provisions on applications to the court from the existing 2012 Regulations? Please explain your answer.

Agree  Disagree

CAS would in principle support the establishment of a tribunal.

Q60 Do you think there is a need for a review body which sits beneath the national courts?

Yes  No

Please see answer to Q59 above.

Q61 If so, do you think the review body should be established as a tribunal within the Scottish tribunals system?

Yes  No

CAS would in principle support the establishment of a tribunal. CAS is mindful, however, of the existing work which is being undertaken to establish the Scottish tribunal system. We, therefore, believe it would be essential to factor this proposal into existing work streams around establishing this system.

Q62 Or do you think it should take some other form, for example, a Scottish Procurement Ombudsman?

Yes  No

Please see answer to Q59 above.

Q63 What is your view of the Scottish Government's position to broadly endorse the principles of open contracting and commitment to work with civil society and wider stakeholder groups to improve transparency in its procurement practices as part of its continuing programme of procurement reform?

CAS welcomes the Scottish government's position on these issues.