



International Learning Lab
on Public Procurement and Human Rights

Inquiry into the Commonwealth Procurement Framework

Joint Select Committee on Government Procurement

Written Evidence Submitted by the International Learning Lab on Public Procurement and Human Rights

March 2017

1. Introduction

Launched in 2015, the *International Learning Lab on Public Procurement and Human Rights* ('the Lab') aims to be a global network of procurement stakeholders comprising procurement agencies and purchasing officers, regional and international organisations, members of procurement professional associations, non-governmental organizations (NGOs), national human rights institutions (NHRIs) and academics. The Lab is intended to serve as a platform and mechanism for:

- i. Experience-sharing among procurement actors on approaches to integrating respect for human rights into public purchasing;
- ii. Generating knowledge about public procurement law and policy and human rights;
- iii. Producing and disseminating tools and guidance to build capacity to integrate human rights issues among procurement professionals; and
- iv. Promoting coherence between procurement and human rights in international and regional policy frameworks and initiatives.¹

The Lab was established by the Danish Institute for Human Rights (Denmark's national human rights institution), the International Corporate Accountability Roundtable, and the Harrison Institute for Public Law at Georgetown University (USA), along with individuals from the University of Nottingham (UK), Business Human Rights and the Environment Research Group (BHRE) at the University of Greenwich (UK), and the UK's London Universities Purchasing Consortium (LUPC), amongst others.

The Lab's main activities to date include: undertaking research on law, policy, and practice relating to public and procurement and human rights²; organising international workshops³; capacity

¹ International Learning Lab on Public Procurement and Human Rights, <http://www.hrprocurementlab.org/>, (last visited 29 March, 2017).

² CLAIRE METHVEN O'BRIEN, NICOLE VANDER MEULEN, & AMOL MEHRA, PUBLIC PROCUREMENT AND HUMAN RIGHTS: A SURVEY OF TWENTY JURISDICTIONS (July 2016), available at <http://www.hrprocurementlab.org/blog/reports/public-procurement-and-human-rights-a-survey-of-twenty-jurisdictions/>

³ International Learning Lab on Public Procurement and Human Rights, Events, <http://www.hrprocurementlab.org/events/> (last visited 29 March, 2017).



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building and outreach⁴; and public policy advocacy.⁵ Current projects include the development of thematic reports on integration of human rights considerations into public purchasing of apparel, electronics, and security services, and into procurement by international financial institutions (IFIs) such as the World Bank,⁶ and the development of e-learning resources on human rights for public buyers.

2. Human rights risks in the public procurement context⁷

Public procurement represents a significant share of the total economy: globally, public procurement has a value of €1000 billion per year, while across OECD countries it accounts for 12% of GDP, on average.

Public procurement thus represents an enormous opportunity for governments to drive the transition to sustainable production and consumption, and to leverage its spending power to promote respect for human rights in the private sector.

Yet, like other consumers, governments currently procure goods and services via supply chains in which serious human rights abuses are widespread, and in recent years the implication of public buyers in such abuses has been frequently documented. For example:

- Child labour and forced labour have been found in Thai factories supplying [Finnish health authorities](#) with rubber gloves, alongside a range of other labour abuses including denial of

⁴ E.g. Lab representatives have spoken on procurement and human rights at meetings of the International Federation of Purchasing and Supply Management (IFPSM), the International Purchasing and Supply Research and Education Association (IPSERA), the Sustainable Purchasing Leadership Council and at the annual UN Forum on Business and Human Rights in 2014 and 2015.

⁵ E.g. Lab representatives have provided recommendations for the new ISO 20400 standard on sustainable public procurement, met with U.S. Congressional staff to discuss the topic of public procurement and human rights (particularly focused on implementation of a U.S. federal law on disclosure of supply chain information for federal contractors), engaged with staff at various U.S. agencies, and submitted recommendations to the U.S. National Action Plan on Responsible Business Conduct regarding public procurement, *see* ICAR, SUBMISSION FOR U.S. NATIONAL ACTION PLAN ON RESPONSIBLE BUSINESS CONDUCT REGARDING FEDERAL PROCUREMENT POLICY, *available at* <http://icar.ngo/analysis/submission-to-the-u-s-national-action-plan-on-responsible-business-conduct-regarding-public-procurement/>.

⁶ INTERNATIONAL LEARNING LAB ON PUBLIC PROCUREMENT AND HUMAN RIGHTS, THEMATIC HUBS, <http://www.hrprocurementlab.org/hubs/> (last visited 29 March, 2017).

⁷ This section and the next draw on the Lab's report: CLAIRE METHVEN O'BRIEN, AMOL MEHRA, & NICOLE VANDER MEULEN, PUBLIC PROCUREMENT AND HUMAN RIGHTS: A SURVEY OF 20 JURISDICTIONS (July 2016), *available at* <http://www.hrprocurementlab.org/blog/reports/public-procurement-and-human-rights-a-survey-of-twenty-jurisdictions/>; and Claire Methven O'Brien, *Public Procurement and Human Rights: Putting the House in Order*, LEARNING LAB BLOG (10 August, 2016), *available at* <http://www.hrprocurementlab.org/blog/public-procurement-and-human-rights-putting-the-house-in-order/#more-395>.



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legally required breaks and public holidays, discrimination against migrant workers, and unlawfully docking workers' pay for work permits and accommodation.⁸

- In 2010, the U.S. Department of State's [Trafficking in Persons Report](#) found that government subcontractors tasked with filling logistics positions on U.S. military bases in Iraq and Afghanistan were involved in human trafficking, forced labour, and sexual exploitation.⁹
- Labour organisers in facilities supplying governments are frequently subjected to harassment and abuse: in Bangladesh, a [labour advocate at a factory making clothing for the U.S. General Services Administration](#) was arrested and tortured by police in 2010 then found dead with clear signs of foul play in 2012.¹⁰
- Serious human rights abuses are present across ICT value chains from which public buyers source electronic goods. For example, forced labour was recently discovered in factories producing [servers for Danish universities](#),¹¹ and minerals needed for technology production such as cassiterite, coltan, and wolframite from the Democratic Republic of Congo appear on the U.S. Department of Labor ["List of Goods"](#) produced by forced labour.¹²
- Human trafficking and slavery have been discovered on a large scale amongst suppliers of everyday foodstuffs consumed by governments, such as fish and prawns, in countries from [Ireland](#)¹³ to [Thailand](#).¹⁴
- UK garment workers are subjected to wage theft worth an estimated £1million per week, bullying, harassment, and intimidation.¹⁵

⁸ *Glove Factory Siam Sempermed Suspected of Labour Rights Violations*, FINNWATCH (29 March, 2014), available at <http://www.finnwatch.org/en/news/186-glove-factory-siam-sempermed-suspected-of-labour-rights-violations-in-southern-thailand>.

⁹ UNITED STATES DEPARTMENT OF STATE, *TRAFFICKING IN PERSONS REPORT 2010* (June 2010), available at <http://www.state.gov/j/tip/rls/tiprpt/2010/>.

¹⁰ Ian Urbina, *U.S. Flouts Its Own Advice in Procuring Overseas Clothing*, N.Y. TIMES (Dec. 22, 2013), available at <http://www.nytimes.com/2013/12/23/world/americas/buying-overseas-clothing-us-flouts-its-own-advice.html>.

¹¹ DANWATCH, *SERVANTS OF SERVERS* (October 2015), available at <https://www.danwatch.dk/en/undersogelse/servants-of-servers/>.

¹² U.S. DEP'T OF LABOR, BUREAU OF INT'L LABOR AFFAIRS, *LIST OF GOODS PRODUCED BY CHILD LABOR* (2013), available at <http://www.dol.gov/ILAB/reports/child-labor/list-of-goods>.

¹³ Felicity Lawrence Et Al., *Revealed: Trafficked Migrant Workers Abused in Irish Fishing Industry*, THE GUARDIAN (2 November, 2015), available at <https://www.theguardian.com/global-development/2015/nov/02/revealed-trafficked-migrant-workers-abused-in-irish-fishing-industry>.

¹⁴ Kate Hodal Et Al., *Revealed: Asian Slave Labour Producing Prawns for Supermarkets in US, UK*, THE GUARDIAN (1- June, 2014), available at <https://www.theguardian.com/global-development/2014/jun/10/supermarket-prawns-thailand-produced-slave-labour>.

¹⁵ Dr Nik Hammer, *Rethinking Recovery: Growth and Degradation in UK Apparel Manufacturing*, ETHICAL TRADING INITIATIVE BLOG (17 August, 2016), <http://www.ethicaltrade.org/blog/rethinking-recovery-growth-and-degradation-in-uk-apparel-manufacturing>



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3. Public procurement and human rights: policy frameworks

The *United Nations Guiding Principles on Business and Human Rights* (UNGPs) affirm the duty of States to protect against human rights abuses by businesses; the responsibility of businesses, in turn, to respect human rights, including through the performance of human rights due diligence; and the right of victims to a remedy for any business-related human rights abuses.¹⁶

Unanimously endorsed by the UN Human Rights Council in 2011, the UNGPs have subsequently won support from the European Union,¹⁷ the Organisation for Economic Cooperation and Development,¹⁸ and the International Standards Organisation,¹⁹ as well as numerous businesses, civil society organisations, and government actors.

Under the UNGPs the “State duty to protect” extends to situations where a commercial “nexus” exists between public actors and businesses, such as when government bodies purchase goods and services through public procurement, and in connection with “contracting-out” and privatisation. GP 6 notes that States should promote awareness of and respect for human rights by business, including through the terms of procurement contracts, while according to GP 5, where States engage in privatization or “contracting out” of services that may impact on human rights, they must “exercise adequate oversight,” including by ensuring that contracts or enabling legislation communicate the State’s expectation that service providers will respect the human rights of service users. GP 8 provides that States must ensure ‘policy coherence,’ in other words, alignment with human rights obligations of standards and policies across all governmental departments, agencies, and other State-based institutions that shape business practices.

In addition, the *2030 Agenda for Sustainable Development* adopted by UN Member States in September 2015 has set new objectives on public procurement, as part of the drive towards sustainable production and consumption and more inclusive economies. Sustainable Development

¹⁶ John Ruggie, Special Representative of the Sec’y-Gen. on the Issue of Human Rights & Transnational Corps. & Other Bus. Enters., *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, U.N. Doc. A/HRC/17/31, (June 2011) [hereinafter *Guiding Principles*], available at http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf.

¹⁷ EUROPEAN COMM’N, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A Renewed EU Strategy 2011-14 for Corporate Social Responsibility*, COM (2011) 681 final (Oct. 25, 2011), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0681:FIN:EN:PDF>

¹⁸ The OECD Guidelines were updated in 2011 to align with the UNGPs: OECD, *OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES* (2011), available at <http://mneguidelines.oecd.org/text/>; see also OECD, *Ministerial Communiqué on Responsible Business Conduct* (June 26, 2014), available at <https://mneguidelines.oecd.org/2014-informal-ministerial-on-rbc.htm>

¹⁹ ISO 26000 was developed to align with the UNGPs: INTERNATIONAL ORGANIZATION FOR STANDARDIZATION, *ISO 26000 GUIDANCE ON SOCIAL RESPONSIBILITY* (2010), available at <http://www.iso.org/iso/home/standards/iso26000.htm>



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Goal 12.7 calls on all countries to promote sustainable public procurement practices and to implement sustainable public procurement policies and action plans.²⁰

In parallel, important global actors, including the G7, G20, OECD, EU, and ILO are promoting a renewed focus on “responsible global value chains” to support sustainable and inclusive growth – with a strong emphasis on the contribution of the private sector, through “responsible business conduct” and the Decent Work Agenda, in achieving this goal.²¹

4. Urgent need for government action on public procurement and human rights

Although the above frameworks highlight the need for States to take active steps to avoid involvement in human rights abuses through their purchasing practices, neither procurement law and policy, nor actual government purchasing practices, have yet been brought into alignment with the UNGPs, the 2030 Sustainable Development Agenda, or new initiatives on “responsible value chains”.

Indeed, while a handful of public buyers are innovating to integrate human rights considerations into the purchasing process,²² in large part, existing procurement laws and practices in most countries are still as likely to undermine human rights, as to promote them.

As highlighted by the Lab’s report *Public Procurement and Human Rights: A Survey of Twenty Jurisdictions*, across leading economies:

- i. International and national procurement laws and policies do not clearly and explicitly define the human rights responsibilities of public bodies in connection with their purchasing activities. At the same time, existing procurement laws and policies appear to have a ‘chilling effect’ on human rights and sustainability efforts by public buyers in some

²⁰ G.A. Res. 70/1, *Transforming our World: the 2030 Agenda for Sustainable Development* (Sept. 25, 2015), available at http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/70/1

²¹ G-7 Leaders' Declaration, Schloss Elmau, Germany (June 8, 2015), available at <https://www.whitehouse.gov/the-press-office/2015/06/08/g-7-leaders-declaration>; OECD, *Ministerial Communiqué on Responsible Business Conduct*, (June 26, 2014), <https://mneguidelines.oecd.org/2014-informal-ministerial-on-rbc.htm>; OECD, *PUBLIC PROCUREMENT FOR SUSTAINABLE AND INCLUSIVE GROWTH: ENABLING REFORM THROUGH EVIDENCE AND PEER REVIEWS*, available at <http://www.oecd.org/gov/ethics/PublicProcurementRev9.pdf>; Council of the European Union, *The EU and Responsible Global Value Chains – Council Conclusions*, (May 12, 2016), <http://www.consilium.europa.eu/en/press/press-releases/2016/05/12-conclusions-on-responsible-global-value-chains/>; *Europe 2020: A European Strategy for Smart, Sustainable and Inclusive growth* COM (2010) 2020 final (Apr. 3, 2010) available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52010DC2020&from=EN>; ILO, *Agenda of the 105th Session of the International Labour Conference*, (April 22, 2016), http://www.ilo.org/ilc/ILCSessions/105/reports/reports-to-the-conference/WCMS_473699/lang--en/index.htm; Judy Gearhart, *Global Supply Chains: Time for a Convention on Decent Work*, HUFFINGTON POST (June 2016), http://www.huffingtonpost.com/judy-gearhart/global-supply-chains-time_b_10228772.html

²² See further Section 5 below.



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jurisdictions, including within the EU, due to fear of litigation to contest procurement processes or decisions that include human rights-related conditions, for instance, in selection or award criteria.

- ii. In the small minority of cases where public procurement rules do explicitly address human rights issues, they generally single out specific issues such as child labour, rather than addressing the full range of human rights risks relevant to the supply chain in question
- iii. Monitoring of conditions in government supply chains is an extremely rare occurrence. This is true even where, as in the Netherlands, government policy requires the inclusion of “social conditions” addressing basic labour standards, to certain public contracts.
- iv. Mechanisms to facilitate effective access to remedy by victims of human rights abuses in government supply chains are lacking.
- v. There is an urgent need for guidance and capacity development support for public buyers on techniques and tools that they can lawfully deploy to avoid or reduce the incidence of human rights abuses in the delivery of government contracts. At the same time, new actions on public procurement and human rights must build on and capture synergies with existing sustainable, green, ethical, or social public procurement initiatives.
- vi. Given the scale of government spending within the overall economy, the lack of policy coherence in relation to public procurement and human rights poses a significant obstacle to the implementation of the UNGPs and achievement of the Sustainable Development Goals. It also undermines responsible business conduct, both directly, via contract terms for government purchases that fail to safeguard human rights of workers, service users, and communities, and indirectly, by denying a competitive advantage and market rewards to those companies that do seek to operate on a socially and environmentally sustainable basis. Finally, it represents a significant source of inefficiency in public expenditure, with regard to those resources allocated via development assistance to supporting, for example, improving working conditions in agriculture or industrial production in developing countries – goals which the terms of government contracts may in parallel undermine.

5. Innovation and good practices

Despite the general lack of efforts to detect and address human rights risks in government supply chains, as already noted, innovative practices are emerging amongst first-movers in this area internationally.

- **Electronics Watch** is an EU-wide collaboration of public bodies seeking to address human rights abuses in their ICT supply chains.²³ Electronics Watch provides template contract performance

²³ ELECTRONICS WATCH, <http://electronicswatch.org/en/> (last visited 29 March, 2017).



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clauses that meet procurement law requirements while also including a Code of Labour Practices for suppliers containing human rights and labour standards safeguards. Electronics Watch contracts *inter alia* encourage suppliers to disclose factory locations to purchasers so that labour conditions can be monitored, and the organisation also produces country profiles, thematic research, factory surveys, and investigative reports to evaluate whether codes of conduct are being met.

- In the **United Kingdom**:
 - Led by **London Universities Purchasing Consortium (LUPC)** and awarded by **Higher Education Purchasing Consortium, Wales (HEPCW)** the new agreement for Apple Equipment and Services for the UK higher education sector's for the purchase of devices using the iOS operating system includes of Electronics Watch contract clauses, requiring suppliers to adopt transparent supply chain management practices and respond to reports of labour rights abuses.²⁴
 - Universities in Scotland along with student representatives and NGOs have established, through **Advanced Procurement for Universities and Colleges (APUC)**, the Sustain Project. This has led to development of a Code of Conduct for suppliers covering social, ethical, economic, and environmental issues.²⁵ The project uses sector spend and supplier information to identify areas of risk and opportunities for scope and influence, and assesses suppliers through a single site assessment free to suppliers.
 - The **Scottish Government** has developed a Sustainable Procurement Prioritisation Tool for public buyers to support adoption of a consistent structured assessment of spend categories according to social and environmental sustainability parameters.²⁶ The tool is part of a suite of approaches, which also includes methodologies for evaluating life cycle impacts and designing appropriate sustainability measures for contracts.²⁷
 - With input from stakeholders including the Scottish Human Rights Commission, the **Scottish Government and COSLA** developed *Guidance the Procurement of Care and Support Services* which includes advice on how human rights can be included in the

²⁴ ELECTRONICS WATCH, *The UK Higher Education and National Apple Equipment and Services Framework Agreement* (2016), available at http://electronicswatch.org/the-uk-higher-education-and-national-apple-equipment-and-services-framework-agreement_2455571.pdf

²⁵ ADVANCED PROCUREMENT FOR UNIVERSITIES AND COLLEGES, *APUC Supply Chain Code of Conduct*, <http://www.apuc-scot.ac.uk/#!/suscode.php> (last visited 29 March, 2017).

²⁶ SCOTTISH GOVERNMENT, *THE SUSTAINABLE PUBLIC PROCUREMENT PRIORITISATION TOOL*, available at <http://www.gov.scot/Topics/Government/Procurement/policy/corporate-responsibility/Sustainability/ScottishProcess/SustainableProcurementTools/SustainablePublicProcurementPrioritisationTool>

²⁷ SCOTTISH GOVERNMENT, *Sustainable Procurement Duty Tools*, <http://www.gov.scot/Topics/Government/Procurement/policy/corporate-responsibility/Sustainability/ScottishProcess/SustainableProcurementTools> (last visited 29 March, 2017).



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commissioning and procurement of care services, with particular reference to service specifications, selection and award criteria and contractual clauses relating to services.²⁸

- The **UK Equality and Human Rights Commission** developed guidance for public authorities on how to comply with public sector equality duty obligations at different stages of the procurement cycle.²⁹
- **Transport for London** (TfL) has adopted an Ethical Sourcing Policy, linked to the Ethical Trading Initiative's Base Code, according to which: TfL aims to improve labour conditions in the supply chain of relevant product categories or specific products; suppliers under contracts that include ethical sourcing provisions should monitor conditions via third party audits and provide TfL with results; TfL will collaborate with suppliers to remedy breaches.³⁰ Transport for London is also the first mayor public authority to join Electronics Watch in Europe.
- The **British Medical Association** in collaboration with the **Royal College of General Practitioners** has published guidance on how to introduce ethical and sustainable criteria into procurement by general practitioners and clinical commissioning groups.³¹
- The **Northern Ireland Human Rights Commission** and the **Central Procurement Directorate** (within the Department for Finance in Northern Ireland) are undertaking a pilot project on how to embed a human rights based approach to public procurement in relation to temporary worker contracts.³²
- **UK Universities** have had to produce statements in compliance with the Transparency in Supply Chains section of the **UK Modern Slavery Act (2015)** for the financial year 2015-2016 to report on their efforts to identify, prevent and mitigate modern slavery and human trafficking in their own supply chains.³³

²⁸ SCOTTISH GOVERNMENT, *updated Guidance on the Procurement of Care and Support Services*, <http://www.gov.scot/Topics/Government/Procurement/policy/SocialCareProcurement> (last visited 29 March, 2017).

²⁹ EQUALITY AND HUMAN RIGHTS COMMISSION, *Guidance on Procurement*, <https://www.equalityhumanrights.com/en/advice-and-guidance/guidance-procurement> (last visited 29 March, 2017).

³⁰ TRANSPORT FOR LONDON, *ETHICAL SOURCING POLICY*, available at <http://content.tfl.gov.uk/tfl-ethical-sourcing-policy.pdf>

³¹ BRITISH MEDICAL ASSOCIATION, *Ethical Procurement Guidance for GPs and CCGs*, <https://www.bma.org.uk/collective-voice/influence/international-work/fair-medical-trade/tools-and-resources/ethical-procurement-guidance> (last visited 29 March, 2017).

³² NORTHERN IRELAND HUMAN RIGHTS COMMISSION, *WRITTEN EVIDENCE ON BUSINESS AND HUMAN RIGHTS (July 2016)*, available at <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/human-rights-committee/human-rights-and-business/written/35141.pdf>

³³ OLGA MARTIN-ORTEGA, *MODERN SLAVERY AND HUMAN RIGHTS IN GLOBAL SUPPLY CHAINS: ROLES AND RESPONSIBILITIES OF PUBLIC BUYERS. POLICY AND PRACTICE INSIGHTS FOR HIGHER EDUCATION INSTITUTIONS IN THE FRAMEWORK OF THEIR OBLIGATIONS UNDER THE UK*



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- **United States - federal level:** The U.S. federal government prohibits contractors and subcontractors from supporting or engaging in human trafficking, which is defined to include, amongst other things, forced labour and fraudulent or coercive recruitment or employment practices.³⁴ Contractors are required to report any credible allegations of trafficking to the contracting agency's Inspector General, and must cooperate with government investigations.³⁵ For contracts for goods (excluding commercially available off-the-shelf items³⁶) or services sourced outside of the United States that exceed \$500,000, the Government also requires that contracting businesses prepare compliance plans detailing due diligence procedures to assess, prevent, mitigate, and remediate any suspected involvement.³⁷

The U.S. federal government prohibits forced child labour in contracts sourced abroad that exceed a "micro" purchase threshold.³⁸ The U.S. Department of Labor is required to prepare a "List of Products Requiring Contractor Certification as to Forced or Indentured Child Labor."³⁹ Contractors must certify that they either (a) will not sell a product on the list, or (b) they have made a good-faith effort to determine whether forced child labour was used.⁴⁰

Additionally, the U.S. federal government prohibits federal agencies from purchasing sweatshop goods for contracts of a value greater than \$10,000.⁴¹ However, the U.S. Secretary of Labor has

MODERN SLAVERY ACT. BHRE RESEARCH SERIES. POLICY PAPER N.2 (2016), available at <http://www.bhre.org/policy-papers/> (last visited 29 March, 2017).

³⁴ Federal Acquisition Regulation (FAR), 48 CFR § 101 et. Seq., at 22.17 (Combating Trafficking in Persons). The Far provisions on trafficking derive from the Trafficking Victims Protection Act of 2000 (TVPA), 22 U.S.C. 7102, and Exec. Order No. 13,672, 77 Fed. Reg. 60029 (Oct. 2, 2012) ("Strengthening Protections Against Trafficking in Persons in Federal Contracts").

³⁵ Federal Acquisition Regulation (FAR), 48 CFR § 101 et. Seq., at 22.17 (Combating Trafficking in Persons).

³⁶ "Commercially Available Off-The-Shelf Item" is a subset of the definition of "commercial item." It is available in substantial quantities and sold without modification. "Commercial Item" is defined in part as "any item, other than real property, that is of a type customarily used by the general public or by non-governmental entities for purposes other than governmental purposes" and has been sold, leased, or licensed to the general public, or offered for sale, lease or license to the general public. For full definitions of both terms, see FAR 2.101 (Definitions, "Commercial item," and "Commercially available off-the-shelf-item" (COTS)).

³⁷ Federal Acquisition Regulation (FAR), 48 CFR § 101 et. Seq., at 22.17 (Combating Trafficking in Persons).

³⁸ Federal Acquisition Regulation (FAR), 48 CFR § 101 et. Seq., at 22.15 (Prohibition of Acquisition of Products Produced by Forced or Indentured Child Labor), which implements the Child Labor Exec. Order No. 13, 126, 64 Fed. Reg. 32383 (June 12, 1999) ("Prohibition of Acquisition of Products Produced by Forced or Indentured Child Labor"), and laws that prohibit manufacture or import of goods made with forced or indentured child labor. These include 19 U.S.C. 1307, 29 U.S.C. 201, et. Seq., and 41 U.S.C. Chapter 65.

³⁹ 22 U.S.C.A. § 7112, Additional activities to monitor and combat forced labor and child labor.

⁴⁰ Federal Acquisition Regulation (FAR), 48 CFR § 101 et. Seq., at 22.1503 (Procedures for acquiring end products on the List of Products Requiring Contractor Certification as to Forced or Indentured Child Labor).

⁴¹ Sweatshop Labour is defined with respect to compliance in the country of production with applicable rules regarding minimum wages, maximum working hours, child and convict labour, and health and safety. Walsh-Healy Act, 41 U.S.C. § 65; Pub. L. No. 74-846; 49 Stat. 2036 (1936); H.R. Rep. No. 74-2946, at 4 (1936).



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exempted imported goods, thus the Act only applies to goods produced in the United States, Puerto Rico, and the Virgin Islands.⁴² This exemption should not be replicated.

Finally, for contracts performed within the U.S, the federal government requires contractors to pay the prevailing wages and benefits for the locality in which the work is performed. This applies to construction contracts over \$2,000 and all other contracts over \$2,500.⁴³

- **United States, state and local level:** The Sweatfree Purchasing Consortium (SPC) comprises 14 U.S. cities and 3 U.S. states that seek to ensure that the apparel products they buy are made without sweatshop labour.⁴⁴ The municipal government of San Francisco, for example, requires their apparel suppliers to comply with laws in the country of production as well as ILO core labour standards.⁴⁵ San Francisco has, in the past, retained the Worker Rights Consortium (an independent labour rights monitoring organisation) to monitor its apparel supply chains and report on contractors' compliance with their code.⁴⁶ Another example is Madison, Wisconsin, which released a request for proposals for uniforms for its police, fire, and metro workers in 2014.⁴⁷ Madison required all bidders to disclose information on factory location, wages, and hours, for a minimum of 60% of factories to be used in production of goods for the contract.⁴⁸ The awarded contractor was required to increase this disclosure by 10% each year and provide compliance action plans from all manufacturers producing goods for the contract above a certain value threshold.⁴⁹ Finally, the SPC has created an online database (Sweatfree LinkUp!) where information about apparel vendors, manufacturers, and factories in government supply chains is publically available.⁵⁰ The information is sourced from apparel vendors and

⁴² 41 C.F.R. § 50-201.603(b). While the CFR provides Dec. 8, 1960 as the date on which the current regulation was finalized and posted in the Federal Register that is merely the date of the most recent revision of the exemption. The exemption has existed, in some form, since the very first regulations ever promulgated under the Act. See 1 Fed. Reg. 1405.

⁴³ Federal Acquisition Regulation (FAR), 48 CFR § 101 et. Seq., at 22.403-1 (Construction Wage Rate Requirements statute); Davis-Bacon Act, 40 U.S.C. § 3141 (2012); McNamara-O'Hara Service Contract Act, 41 U.S.C. §§ 6701-6707 (2012).

⁴⁴ SWEATFREE PURCHASING CONSORTIUM, *Members*, <http://buysweatfree.org/members> (last visited 29 March, 2017); SWEATFREE PURCHASING CONSORTIUM, *About*, <http://buysweatfree.org/about> (last visited 29 March, 2017).

⁴⁵ SWEATFREE PURCHASING CONSORTIUM, *Ending Public Procurement from Sweatshops*, <http://buysweatfree.org/> (last visited 29 March, 2017).

⁴⁶ CITY OF SAN FRANCISCO, CALIFORNIA SWEATFREE PURCHASING ADVISORY GROUP, ANNUAL REPORT 4 (2014), *available at* <http://sfgov.org/olse/sweatfree-contracting-ordinance>

⁴⁷ CITY OF MADISON, WISCONSIN, UNIFORM MANAGEMENT PROGRAM REQUEST FOR PROPOSALS (2014), *available at* http://buysweatfree.org/uniform_management_program

⁴⁸ *Id.* This applied to manufacturers where the total aggregate value of items produced under the contract is \$5,000 or more per year.

⁴⁹ *Id.* This applied to manufacturers where the total aggregate value of items produced under the contract is \$25,000 or more per year.

⁵⁰ SWEATFREE PURCHASING CONSORTIUM, *Sweatfree LinkUp!*, <http://buysweatfree.org/linkup> (last visited 29 March, 2017).



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manufacturers themselves, in and some cases government entities that require supply chain disclosures as part of the procurement process.⁵¹

- **Netherlands:** According to the Netherlands' NAP, the Dutch national sustainable procurement policy requires companies supplying goods and services to public bodies in the Netherlands to respect human rights as part of the "social conditions" applicable to all central government EU contract award procedures since 1 January 2013.⁵² Suppliers may meet the social conditions by a variety of means, such as participating in a multi-stakeholder supply chain initiative or undertaking risk analysis. PIANOo, the government's tendering expertise centre, has published a step-by-step guide addressing how to meet the Social Conditions at each phase of the tender-procedure.⁵³ However, various studies have questioned the effectiveness of the "social conditions" in practice, due to failure to incorporate them into public contracts, lack of contract performance monitoring, and low awareness by both public buyers and suppliers of relevant risks.⁵⁴ In this context, the Dutch NAP commits to evaluate the social conditions for consistency with the OECD Guidelines and UNGPs, and their potential extension to municipal, provincial, and water authorities.
- **Sweden:** Sweden's County Councils are responsible for healthcare, public transportation, and regional planning, and they spend about 13 billion euros per year through procurement.⁵⁵ Since 2010, the County Councils started to collaborate in using a common code of conduct for suppliers, follow-up questions to review suppliers' compliance with the code, and targeted factory audits conducted either by the County Councils themselves or by an independent party. In 2012 the Councils established a formalised structure with a National Coordinator for social responsibility, Steering Committee, National Coordinator, Expert Group, and point of contact at each county council. The Councils have prioritized seven categories of goods for social criteria in public procurement, including surgical instruments worth approximately €267,000 annually.⁵⁶ A

⁵¹ SWEATFREE PURCHASING CONSORTIUM, *Questions About Sweatfree LinkUp!*, <http://buysweatfree.org/faq> (last visited 29 March, 2017).

⁵² DUTCH MINISTRY OF FOREIGN AFFAIRS, NATIONAL ACTION PLAN ON BUSINESS AND HUMAN RIGHTS 5 (April 2014), *available at* <https://business-humanrights.org/sites/default/files/documents/netherlands-national-action-plan.pdf>

⁵³ PIANOo, *Social Conditions in Global Supply Chains*, <https://www.pianoo.nl/about-pianoo/sustainable-public-procurement-spp/spp-themes/social-conditions-in-global-supply-chains> (last visited 29 March, 2017); PIANOo, *Getting Started with Social Conditions in Global Supply Chains*, <https://www.pianoo.nl/about-pianoo/sustainable-public-procurement-spp/spp-themes/social-conditions-in-global-supply-chains/getting-started-with-social> (last visited 29 March, 2017)

⁵⁴ *See further* CLAIRE METHVEN O'BRIEN, AMOL MEHRA, & NICOLE VANDER MEULEN, PUBLIC PROCUREMENT AND HUMAN RIGHTS: A SURVEY OF 20 JURISDICTIONS (July 2016), *available at* <http://www.hrprocurementlab.org/blog/reports/public-procurement-and-human-rights-a-survey-of-twenty-jurisdictions/>

⁵⁵ Kristian Hemstrom, TCO development webinar: Sustainable IT Webinar Series, *Best Practice Sustainable IT Procurement* (16 March, 2016), *available at* <http://tcodevelopment.com/news/watch-webinar-on-demand-best-practice-sustainable-it-procurement/>; ELECTRONICS WATCH, PUBLIC PROCUREMENT AND HUMAN RIGHTS DUE DILIGENCE TO ACHIEVE RESPECT FOR LABOUR RIGHTS STANDARDS IN ELECTRONICS FACTORIES: A CASE STUDY OF THE SWEDISH COUNTY COUNCILS AND THE DELL COMPUTER CORPORATION 4 (February 2016), *available at* http://electronicswatch.org/en/publications_1633

⁵⁶ For a case study describing recent interactions related to violations of the Code of Conduct between Stockholm County Council and one of its IT suppliers, see ELECTRONICS WATCH, PUBLIC PROCUREMENT AND HUMAN RIGHTS DUE DILIGENCE



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2015 study found that the measures mentioned had a substantial impact in reducing serious labour rights abuses, including child labour, amongst surgical instruments workshops in the County Council's supply chain.⁵⁷

- **Norway:** Public authorities are obliged to advance contract clauses on wages and decent working conditions when purchasing services such as construction, facility management, and cleaning services. Public authorities are also required to follow up with suppliers on performance of such clauses, for instance by requiring the supplier to make a self-declaration.⁵⁸

6. Recommendations

As highlighted in this submission, alignment of national rules on public procurement such as the Commonwealth Procurement Framework with human rights as counselled by the UNGPs is currently lacking. In addition to any changes at the level of policy, addressing this gap in “policy coherence” will require sustained efforts to support the development of relevant knowledge and technical capacity amongst public buyers, as well as an appropriate repurposing of resources. While such progress cannot be achieved overnight, in the immediate term, the Learning Lab offers the Joint Select Committee on Government Procurement the following as possible recommendations:

- i. Aligning the new Framework with Australia's international responsibilities to respect, promote and protect human rights. Towards this objective, guidance should be developed with reference to relevant policy frameworks including the UN Guiding Principles on Business and Human Rights, OECD Guidelines for Multinational Enterprises and UN Sustainable Development Goals, highlighting practical means by which public buyers can incorporate human rights safeguards into the public contracting process while still complying with other legal requirements and meeting their organisations' purchasing needs.

In particular, guidance for public buyers should address how to integrate respect for human rights into the public procurement process, in line with national and international standards

- during the planning stage;
- in outlining technical specifications or criteria;
- in identifying qualifying bids, evaluating, and selecting bids;
- while monitoring and reviewing contracts.

TO ACHIEVE RESPECT FOR LABOUR RIGHTS STANDARDS IN ELECTRONICS FACTORIES: A CASE STUDY OF THE SWEDISH COUNTY COUNCILS AND THE DELL COMPUTER CORPORATION 4 (February 2016), available at http://electronicswatch.org/en/publications_1633

⁵⁷ SWEDWATCH ET AL., HEALTHIER PROCUREMENT: IMPROVEMENTS FOR WORKING CONDITIONS FOR SURGICAL INSTRUMENT MANUFACTURE IN PAKISTAN (March 2015), available at http://www.swedwatch.org/sites/default/files/healthier_procurement.pdf

⁵⁸ CLAIRE METHVEN O'BRIEN, AMOL MEHRA, & NICOLE VANDER MEULEN, PUBLIC PROCUREMENT AND HUMAN RIGHTS: A SURVEY OF 20 JURISDICTIONS 25 (July 2016), available at <http://www.hrprocurementlab.org/blog/reports/public-procurement-and-human-rights-a-survey-of-twenty-jurisdictions/>



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Guidance should also be provided on how to include requirements on suppliers to undertake human rights due diligence in the supply chain, and permitting public buyers to be involved in monitoring and remediation processes.

The Electronics Watch Model of due diligence in the supply chain provides good practice in this regard. Guidance should also address how to establish grounds for exclusion from eligibility for public contracts when suppliers do not respect human rights or develop appropriate due diligence in their supply chain.

- ii. Knowledge and capacity development of public sector procurement professionals on human rights risks and measures to address them should be supported, e.g. through the development of online tools to identify higher risk product categories and countries of origin; e-learning courses; and/or an online hub or portal for Australian public buyers to share good practices and experiences on human rights.
- iii. A public procurement and human rights working group should be established to include relevant public administration departments, procurement professional associations, buyers from large public bodies, representatives of relevant sustainable procurement initiatives and civil society organisations, and procurement law professionals, to develop proposals for relevant and practical initiatives as part of a work plan on procurement and human rights on an ongoing basis;
- iv. A process of assessment of current knowledge, needs, challenges and opportunities amongst central government public buyers in relation to integration of human rights safeguards in public procurement should be undertaken; a similar exercise might be undertaken in relation to state-level and local government procurement functions.
- v. The current initiative to establish an Australian Modern Slavery Act should be seized as an opportunity to strengthen the human rights dimensions of public procurement by introducing an obligation to all public bodies over a defined threshold size to publish an annual Slavery and Human Trafficking Statement or equivalent statement on supply chain transparency and reporting on their efforts to identify, prevent and mitigate risks of modern slavery in their supply chains. Any new modern slavery and human trafficking legislation should also permit public buyers to exclude suppliers that fail to uphold their human rights in the supply chain obligations from tendering processes.

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