

Research Briefing

Trade Union (Wales) Bill

- Bill Summary
- Summary of Stage 2 changes
- Welsh Glossary



The National Assembly for Wales is the democratically elected body that represents the interests of Wales and its people, makes laws for Wales, agrees Welsh taxes and holds the Welsh Government to account.

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Research Briefing

Trade Union (Wales) Bill

On 16 January 2017, Mark Drakeford AM, Cabinet Secretary for Finance and Local Government introduced the Trade Union (Wales) Bill (the Bill) to the National Assembly. The Bill seeks to amend certain provisions within the Trade Union Act 2016 (UK TU Act) which the Welsh Government believe will have an “adverse effect on the social partnership approach taken by the Welsh Government in Wales”.

The provisions that Welsh Government are seeking to disapply relate to: the deduction of trade union subscriptions from wages, commonly referred to as ‘check-off’; provisions relating to facility time for trade union representatives; and provisions relating to ballot requirements for industrial action.

This paper summarises the Bill’s provisions and the background to its introduction.



Contents

1. Introduction	1
2. Trade Union and Labour Relations (Consolidation) Act 1992	1
Provision relating to deduction of union subscriptions from wages	1
Provision relating to ‘facility time’	2
Provisions relating to ballots	2
3. UK Government’s Trade Union Bill	2
The UK Trade Union Bill and Legislative Consent Motion	3
4. Legislative Competence	3
5. The Wales Act	4
6. Brief overview of the Trade Union (Wales) Bill	5
Structure of the Bill	5
Documentation accompanying the Bill	5
What the Bill seeks to amend	5
Social Partnership	6
Definition of “devolved Welsh authority”	6
Evidence from the Cabinet Secretary	6
Equality, Local Government and Communities Committee Recommendation	7
7. Purpose and intended effect of the Bill	8
Removal of restrictions on deduction of union subscriptions from wages in the public sector	8
ELGC Committee view on restrictions on deduction of union subscriptions	8
Disapplication of regulations about facility time to devolved Welsh authorities	9
ELGC Committee View on regulations about facility time	10
Disapplication of 40% support threshold for industrial action affecting “important public services”	10
ELGC Committee view on the disapplication of the 40% ballot threshold for ‘important public services’	11
8. Agency workers	11
Regulations that prevent the supply of agency workers to cover industrial action	11
Evidence from the Cabinet Secretary	12
ELGC Committee view on the prohibition of the use of agency workers as cover during industrial action	12
Constitutional and Legislative Affairs Committee Recommendations on agency workers	12
9. Consideration of the financial implications	13
Associated costs in introducing the Trade Union (Wales) Bill	13
Associated costs for the disapplication of the 40% ballot threshold	13

Associated costs of disappling provisions relating to 'facility time'	13
Associated costs of disappling provisions relating to 'check-off'	13
10. Assembly scrutiny process	14
Introduction of the Bill.....	14
Stage 1	14
Stage 2 and beyond.....	14
11. Changes to the Bill at Stage 2	14
Background	14
Amendments agreed at Stage 2	15
Drafting amendments	15
Prohibition on using temporary workers to cover industrial action.....	15
Order-making Powers.....	16
12. Glossary	17
Specific terms for the Bill	17

1. Introduction

On 16 January 2017, Mark Drakeford AM, Cabinet Secretary for Finance and Local Government (‘the Cabinet Secretary’) introduced the **Trade Union (Wales) Bill** (‘the Bill’) and accompanying **Explanatory Memorandum** (PDF 691KB).

The National Assembly’s Business Committee agreed to refer the Bill to the Equality, Local Government and Communities Committee for consideration of the general principles (Stage 1), and published its **report** (PDF 826KB) on 7 April 2017.

On 16 January 2017, the Llywydd laid a **statement on legislative competence** before the Assembly. She also wrote to the Equality, Local Government and Communities Committee (ELGC) and the Constitutional and Legislative Affairs Committee (CLAC) on the matter of **legislative competence**.

The Llywydd’s letter summarised the issues that she had considered in reaching her decision on competence (see section 4 – Legislative Competence), and confirmed that in her view that the Bill was within the Assembly’s competence:

In accordance with section 110(3) of the Government of Wales Act 2006 (GoWA), the Trade Union (Wales) Bill, would be within the legislative competence of the Assembly.

The Cabinet Secretary made a **statement on the Bill** in Plenary on 18 January 2017.

2. Trade Union and Labour Relations (Consolidation) Act 1992

The current legislation on trade unions and employers’ association is principally in the **Trade Union and Labour Relations (Consolidation) Act 1992** (PDF 2.75MB) (the 1992 Act).

The 1992 Act defines trade unions, sets out the framework (including legal rights and duties) under which they may operate, including the circumstances in which industrial action may be undertaken. It also contains provisions on the operational aspects of trade unions and their relationship with employers, such as the deduction of union subscription fees from employees’ wages, facility time and ballots.

Provision relating to deduction of union subscriptions from wages

Union members pay their subscription in one of two ways; either directly to their trade union, or via their employer who will deduct union subscriptions from the wages of their workers and pass the payment directly to the relevant union. This is commonly referred to as ‘check-off’.

Check-off is an agreement reached between employers and unions, and the agreed arrangements form part of the employee’s terms and conditions of employment.

Section 68 of the 1992 Act sets out the requirements that must be met before any employer can deduct union subscriptions from the wages of an employee. The employer may lawfully make deductions only where the employee has provided written consent to the employer for the deduction, and has not withdrawn such consent via written notice to the employer.

Provision relating to 'facility time'

Section 168 to 172 of the 1992 Act make provision about 'facility time'. This is the time permitted to employees for the purpose of carrying out trade union duties such as representing members, both individually, and collectively in negotiations. The specific provisions in relation to facility time in the 1992 Act are as follows:

- employees who are union representatives of an independent trade union recognised by their employer are to be permitted reasonable time off during working hours to carry out certain trade union duties (section 168);
- employees who are members of an independent trade union recognised by the employer can take reasonable time off to undertake the duties of a Union Learning Representative, provided that the union has given the employer notice in writing that the employee is a learning representative of the trade union and the training condition is met (section 168A);
- an employer who permits union representatives time off for trade union duties must pay them for the time off taken (section 169); and
- the Advisory, Conciliation and Arbitration Service (ACAS) must issue guidance on the time off permitted by an employer to a trade union official to carry out their duties (section 169(3)). This guidance is in the form of the **Code of Practice 3: Time off for trade union duties and activities**, which was revised in January 2010.

Provisions relating to ballots

Section 226 of the 1992 Act sets out requirements which must be met before industrial action may be taken, including a requirement that there must be a ballot of union members. There is no minimum requirement in relation to voter turnout, but at least 50% (a simple majority) of those who vote in the ballot must vote in support of taking industrial action.

3. UK Government's Trade Union Bill

The UK Government's Trade Union Bill (the UK Bill) was introduced in the House of Commons in July 2015. It sought to amend the 1992 Act to reform trade union law in several ways, including:

- to introduce new ballot thresholds for industrial action: a 50% turnout requirement for all industrial action ballots;
- an additional requirement that 40% of those entitled to vote must vote in support of industrial action in key sectors, including in devolved areas such as health, education (under 17) and fire services (in addition to the pre-existing requirement of majority support for industrial action from members who actually voted);
- to make provisions relating to facility time for trade union officials in the public sector; and
- restrictions on the deduction of union subscriptions from wages in the public sector (known as 'check-off').

The UK Trade Union Bill and Legislative Consent Motion

In the Explanatory Notes to the UK Bill, the UK Government stated:

The provisions of the Act extend to Great Britain. In the view of the UK Government, the matters to which the provisions of the Act relate are not within the legislative competence of the Scottish Parliament or the National Assembly for Wales; accordingly no legislative consent motions are required.

In September 2015, the First Minister issued a **written statement on the UK Bill** in which he referred to the Bill as having “the potential to cause significant damage to the social and economic fabric of the UK”.

As a result, the Welsh Government argued that because certain clauses of the UK Bill related to devolved public services in Wales, those provisions should be subject to the consent of the Assembly.¹ The Welsh Government laid a **Legislative Consent Memorandum (the Memorandum) in relation to the UK Bill** in November 2015. In doing so, it recommended that the Assembly withhold its consent.

The Fourth Assembly debated the **Legislative Consent Motion on 26 January 2016** and voted to withhold legislative consent to the UK Bill. The UK Government maintained its position that the provisions were not within the Assembly’s legislative competence and disregarded the refusal of consent.

The UK Bill received Royal Assent in May 2016 and became the Trade Union Act 2016 (the UK TU Act). Some sections for which the Assembly refused consent are yet to come into force, but will do so on whatever day or days the Secretary of State appoints by regulations made by statutory instrument. However, the provision for ballot thresholds came into force in Wales on 1 March 2017.

The remainder of this briefing will refer to the UK TU Act.

The Welsh Labour Assembly manifesto for the 2016 Assembly elections included a commitment to reverse the effect of the relevant sections of the UK TU Act. At the start of the Fifth Assembly, the **First Minister’s statement on the Welsh Government’s legislative programme** confirmed that legislation would be brought forward to give effect to that commitment.

4. Legislative Competence

According to the Welsh Government’s Explanatory Memorandum (EM) accompanying the Trade Union (Wales) Bill, the Assembly’s legislative competence to make the provisions of the Bill is derived from subjects under each of the 21 headings in Schedule 7 in so far as they relate to the delivery of public services.

The list of subjects is extensive and is therefore not replicated here. It can be found on pages 5 to 13 of the EM.

¹ When the UK Parliament wishes to legislate on a subject matter that has already been devolved to the Assembly, convention requires it to receive the consent of the Assembly before it may pass the legislation in question. Such consent is given by the Assembly through Legislative Consent Motions, which are accompanied by Legislative Consent Memoranda.

As previously stated, the Llywydd is of the view that the Bill is within the legislative competence of the National Assembly, however, her decision was considered a “finely balanced one”. She stated that she had received advice that there are:

Credible arguments that some or all the operative provisions of the Bill might be ruled outside the Assembly’s competence, if the Bill was referred to the Supreme Court under section 112 of the GOWA, or challenged after Royal Assent.

The Llywydd concludes that the provisions within the Bill can:

Reasonably be determined as being within the legislative competence of the Assembly...In previous devolution cases, the Supreme Court has expressed the view that reports of Assembly Committees can be some of the “clearest indication[s]” of the purpose of a Bill – and the purpose is, of course key to the question of whether a Bill is within competence or not.

The Cabinet Secretary, in giving evidence to the Constitutional and Legislative Affairs Committee stated his and the Welsh Government’s view that:

The Bill is within competence because it is about management, delivery and continuity of devolved public services...Significant elements in the UK Government’s Act relates specifically to public services, which, in Wales, are unambiguously devolved responsibilities.

While there is disagreement between the Welsh Government – and, subsequently the National Assembly for Wales – and the UK Government with regard to legislative competence, the provisions within the UK TU Act on facility time and deductions of union subscription payments from wages have not come into force in Wales.

In giving evidence to both Assembly Committees, the Cabinet Secretary referred to a letter received from the Rt Hon Ben Gummer MP, Minister for the Cabinet Office. The letter, in the Cabinet Secretary’s view was “material to the scrutiny of the Bill”. According to the Cabinet Secretary, the Welsh Government are “entirely confident that the Bill is within competence”, and that:

The Ben Gummer letter concedes arguments of competence in relation to the Bill, because we know that there was legal advice available to UK Ministers telling them that in attempting to impose their views on Wales, they were on very poor ground indeed legally.

5. The Wales Act

The Wales Act 2017, when in force, will change Wales’ devolution settlement from a ‘conferred powers’ model into a ‘reserved powers’ model. In a reserved powers model the Assembly can pass legislation provided it does not relate to a reserved matter (i.e. a matter which is reserved to the UK Parliament) and complies with other statutory requirements such as consistency with EU and human rights legislation

Employment and Industrial Relations (including the subject matter of the 1992 Act) will be a reserved matter when the relevant parts of the Wales Act 2017 come into force (anticipated to be April 2018), and therefore generally outside the Assembly’s legislative competence.

6. Brief overview of the Trade Union (Wales) Bill

Structure of the Bill

The Bill contains 3 sections. The principal section is Section 1.

- Section 1: makes five amendments to the 1992 Act;
- Section 2: concerns the commencement of the Act;
- Section 3: cites the short title of the Act.

The Cabinet Secretary told CLAC that in considering the legislative options:

In one sense, this is a free-standing Bill—it stands on its own merits—but it proceeds by amendment to other Bills. Of course, we did consider a number of different ways in which we could have given effect, as we believe we are doing, to the clear views of the fourth Assembly.

...

I understand that it could be thought of as a slightly complex way of constructing a Bill, but, given that the Bill is very short, very specific, very well understood amongst the audiences who will have the most direct interest to it, we thought this was the most straightforward way to achieve what we set out to achieve.

Documentation accompanying the Bill

The Welsh Government published an [Explanatory Memorandum](#) (PDF 691KB) alongside the Bill. This includes a Regulatory Impact Assessment (RIA), which details the policy options the Welsh Government considered and the associated costs and benefits of making the legislation, and Explanatory Notes for each section of the Bill.

What the Bill seeks to amend

The Bill seeks to amend the 1992 Act, as amended by the 2016 UK TU Act. The purpose and intended effect of the Bill are explained in section 7 below, but in short, the Bill seeks to disapply certain provisions of the 2016 Act in relation to “devolved Welsh authorities” (explained below). The provisions are as follows:

- restrictions on deduction of union subscriptions from wages by employers;
- powers to require the publication of information on facility time and to impose requirements on public sector employers in relation to paid facility time; and
- the 40% ballot support threshold for industrial action affecting important public services.

The policy objectives of this Bill are, according to Welsh Government, based on a vision for public services “rooted in the principles of social partnership”.

Social Partnership

According to the Explanatory Memorandum, the Bill “amends provisions in the [UK TU Act] that have an adverse effect on the **social partnership** approach taken by the Welsh Government in Wales”. It will, according to Welsh Government have the effect of reversing the effect of the provisions within the UK TU Act, with the aim of protecting the “continued delivery of public services in Wales”.

The Welsh Government’s approach to managing public sector staff and industrial relations in public services is characterised by social partnership.

The UK Trade Union Act restricts trade union activity and, in doing so, the Welsh Government believes that it undermines our model of social partnership and delivery of public services in Wales. The Welsh Government considers that when it comes into force the UK Act will be socially divisive; lead to more confrontational relationships between employers and workers and will undermine public service delivery and the economy in Wales rather than protect public services as asserted by the UK Government in the passage of the Trade Union Act.

The EM continues by stating that the Bill:

Reinforces and protects social partnership in Wales and its contribution to public service improvement. It does this by maintaining the existing settled arrangement within the public sector which has, over time, supported positive employer/employee relationships, including recognising trade union rights to organise and to take industrial action in extremis.

Definition of “devolved Welsh authority”

Section 1(5) defines the Welsh public authorities to which the Bill applies by reference to the definition of “devolved Welsh authority” in section 157A of the Government of Wales Act 2006 (GoWA) (inserted by section 4 of the Wales Bill now the **Wales Act 2017**).² In that section, a “devolved Welsh authority” means a **public authority specified in Schedule 9A of the Act or that exercises functions that (a) are only exercisable in relation to Wales and (b) are wholly or mainly functions that do not relate to reserved matters.**

The definition in GoWA may be amended by Order in Council approved by Parliament and the National Assembly for Wales.

As well as the ‘obvious’ devolved Welsh public authorities with large workforces, such as Welsh NHS bodies and local authorities, the definition includes the various Commissioners (e.g. the Children’s Commissioner for Wales), advisory panels (e.g. the Advisory Panel on Substance Misuse), Committees (e.g. the Welsh Pharmaceutical Committee), devolved tribunals (e.g. the Valuation Tribunal for Wales) and various other public bodies.

Evidence from the Cabinet Secretary

In commenting on the need for the Bill, the Cabinet Secretary explained that he was seeking “to preserve the status quo”. Elaborating on this during the first ELGC Committee scrutiny session, the Cabinet Secretary stated that:

² The Bill received Royal Assent on 31 January 2017.

Our Bill seeks to preserve the successful status quo, to preserve the investment that we have made in Wales on building up the social partnership model, where we think we can demonstrate its success in avoiding industrial action, in promoting good industrial relations. We think the UK Act will make that more difficult in future, that it will introduce conflictual relationships, where consensual relationships exist today. And our Bill is designed to prevent those bad consequences occurring here in Wales.

According to the Cabinet Secretary, the social partnership model in Wales has “a very successful track record”, providing examples in the process of where the social partnership approach has resulted in the avoidance of industrial action in Wales. Examples included the firefighters’ dispute in 2014, education sector in 2013 and the NHS regarding junior doctors and Agenda for Change staff.

Equality, Local Government and Communities (ELGC) Committee view on the general principles and need for the Bill

The ELGC Committee, during Stage 1 consideration, heard evidence from employers and trade unions, and came to the view that:

Arrangements under the 1992 Act (i.e. those in place before the 2016 Act) are working effectively in Wales and are conducive to the social partnership approach; an approach that the Welsh Government, trade unions and public sector employers have committed to and that seems to be serving Wales well.

Equality, Local Government and Communities Committee Recommendation

The Equality, Local Government and Communities Committee in its **Stage 1 Committee Report** recommended that the **Assembly supports the general principles of the Bill.**

7. Purpose and intended effect of the Bill

Removal of restrictions on deduction of union subscriptions from wages in the public sector

Section 15 of the UK TU Act restricts the circumstances in which trade union subscriptions may be deducted from the wages of workers in the public sector. Such deductions may not be made unless workers have the option to pay their union subscriptions by other means, and arrangements have been made for the union to make reasonable payments to the employer in respect of the making of deductions.

In the 1992 Act, “trade union subscriptions” is defined as “payments to a trade union in respect of a workers’ membership of the union”.

Payments are “reasonable” for the purposes of the provision if the employer is satisfied that the total amount of the payments is substantially equivalent to the total cost to public funds of making the deductions.

Section 1(2) of the Bill would provide that the restriction on deduction of union subscriptions from wages in the public sector does not apply to devolved Welsh authorities.

There is limited information provided in the EM about the purpose and intended effect of the provision to remove the restrictions on deduction of union subscriptions from wages in the public sector.

However, in relation to costs, the Regulatory Impact Assessment (RIA) states:

Monetised costs of removing conditions on check-off facilities are not included. These costs are not known, however, they are considered to be marginal to other human resource administration and public authorities are not obliged to provide the service should they consider the costs to be onerous.

The RIA also notes that “the UK Government impact assessment [accompanying the UK TU Bill] outlines that 22% of public sector employers are currently reimbursed for the provision of a check off service” and that “these modest payments (a median of 2.5% of the subscription collected) represent the administrative burden carried by publicly-funded employers”.

ELGC Committee view on restrictions on deduction of union subscriptions

The Committee view on the deduction of union subscription is as follows:

We believe that the provisions in the 2016 Act which seek to restrict check-off services are unnecessary and unwarranted. They also single out trade union subscriptions from other payments made by employers on behalf of employees. We see no valid reason to apply the provisions to devolved Welsh authorities in Wales. By destabilising the social partnership, the provisions may have an adverse impact on the effective delivery of public services in Wales. We therefore support section 1(2) of the Bill.

Disapplication of regulations about facility time to devolved Welsh authorities

Section 13 of the UK TU Act gives Ministers of the Crown (i.e. members of the UK Government) power, by regulations, to require public sector employers to publish information relating to facility time spent by relevant trade union officials.

'Facility time' is defined as:

"time off taken by a relevant union official that is permitted by the official's employer under—

- (a) section 168, section 168A or section 170(1)(b);
- (b) section 10(6) of the Employment Relations Act 1999 [accompanying a colleague to disciplinary and grievance hearings];
- (c) regulations made under section 2(4) of the Health and Safety at Work etc. Act 1974 [safety representatives]".

A "relevant union official" is defined as—

- (a) a trade union official;
- (b) a learning representative of a trade union, within the meaning given by section 168A(11);
- (c) a safety representative appointed under regulations made under section 2(4) of the Health and Safety at Work etc. Act 1974.

Section 14 of the UK TU Act provides power for Ministers of the Crown to cap by regulations the percentage of the employers' total pay bill spent on paying union officials for facility time and to restrict the rights of union officials to facility time.

Section 1(3) of the Bill would disapply regulations relating to the publication of information on facility time, and capping spend on or limiting facility time allowed by devolved Welsh authorities.

According to the EM, the disapplication of the regulations on facility time "*will contribute to the preservation of social partnership because it is an integral element of partnership working in the workplace*". It goes on to list the "established benefits", including savings to employers and the exchequer as a result of reduced employment tribunals; benefits as a result of reducing days lost to workplace injury; and benefits from reduced workplace illness.

The EM also points to the potential financial benefits associated with facility time:

While it is challenging to quantify, there is strong evidence which was presented during the passage of the UK Trade Union Act through Parliament, setting out the substantial financial benefits associated with facility time.

During the passage of the UK TU Act through Parliament, the UK Government asserted that the requirement on public sector employers to publish information relating to facility time was "designed to promote transparency and public scrutiny of facility time; and to encourage those public sector employers to moderate the amount of money spent on facility time in light of that scrutiny".

It pointed to considerable savings made following the introduction of reporting arrangements in Civil Service departments and stated it was "confident" that provisions relating to facility time would "deliver efficiency savings". The UK Government's view was that:

A reduction in spending on facility time across the wider public sector to levels similar to the civil service currently would deliver estimated savings of around £150 million annually—£150 million that could be spent on employing more nurses, on schools.

The Welsh Government's RIA acknowledges the UK Government's assertion and states:

It is not clear how benefits directly associated with reporting would, in and of themselves, reduce time spent on facility time without some further action or cultural change as an outcome of reporting. This cost/impact is therefore unknown.

ELGC Committee View on regulations about facility time

The Committee view on regulations about facility times is as follows:

For us, the critical issue is ensuring that suitable checks and balances are in place across public sector organisations so that the time available for facility time is fair, reasonable and helps maintain an effective functioning workforce.

On this issue, we heard evidence about a variety of arrangements in place across public sector organisations to agree and review facility time, and that they were working well. We received no evidence to suggest that there is concern about the amount of facility time taken by trade union representatives. On the contrary, we heard that some public sector organisations were considering increasing the amount of time available to union representatives in recognition of their positive role in helping prepare the workforce for further transformational change.

In view of the reasons outlined above, we support section 1(3) of the Bill.

Disapplication of 40% support threshold for industrial action affecting “important public services”

Section 3 of the UK TU Act provides that, in order for industrial action to be taken, at least 50% of all union members entitled to vote must exercise their right to vote, and at least 50% of those who vote must vote in support of taking industrial action. In addition, where the members are engaged in providing “important public services” (to be defined in regulations made by the Secretary of State), at least 40% of those members entitled to vote must vote in support of taking industrial action.

Section 1(4) of the Bill would disapply the 40% support threshold for industrial action affecting “important public services” provided by devolved Welsh authorities. It provides that regulations made by the Secretary of State which define “important public services” for the purpose of requirements which must be met before industrial action may be taken, may not include services provided by devolved Welsh authorities.

According to the EM,

The success of the [social partnership] model relies on a balance in the relationship between the social partners and particularly trade unions and employers. Inhibiting industrial action by requiring a 40% threshold alters that balance and without it the social partnership model is not effective. If trade unions are unable to collaborate with employers on an equal footing this will have a detrimental effect on the way in which they work together with social partners to deliver public services.

On the issue of the costs associated with disapplying the 40% support threshold the RIA states:

On the basis of the UK Government's impact assessment there would be a cost to the Welsh public sector associated with not applying the 40% ballot threshold provision of less than £85,000 per annum, which reflects the estimated net impact of an increase in working days lost to industrial action.

On 01 March 2017, the regulations defining 'important public services' came into force and now apply in Wales.

ELGC Committee view on the disapplication of the 40% ballot threshold for 'important public services'

The Committee view on the disapplication of the 40% ballot threshold is as follows:

The evidence we received suggests that seeking to inhibit industrial action by imposing the additional ballot threshold could change the way in which partners approach industrial relations, with trade unions and employers moving away from positive engagement to resolve disputes. We heard about the very real danger that the additional threshold would lead to heightened industrial tensions and have the inadvertent effect of increasing the likelihood and duration of industrial action. This prolonged industrial action would inevitably lead to increased costs for employers and workers, and would impact on the delivery of affected services.

Given the above, and the need to ensure that the social partnership approach is able to continue to operate effectively in Wales, we support section 1(4) of the Bill. We acknowledge that the regulations defining 'important public services' to which the 40% ballot threshold requirement applies are now in force in Wales. This is all the more reason for the Assembly to legislate on this matter as swiftly as possible.

8. Agency workers

Regulations that prevent the supply of agency workers to cover industrial action

During the Plenary statement on the Bill, the Cabinet Secretary referred to the UK Government's proposals to revoke regulations that prevent the supply of agency workers to cover industrial action. He reported that the Welsh Government had consulted on proposals to sustain the principle that agency workers should not be deployed to cover industrial action. He stated that there was an option to legislate for this in the Bill through the amendment process and that he would be making a further statement on the issue in due course.

The current prohibition is contained in regulation 7 of the **Conduct of Employment Agencies and Employment Businesses Regulations 2003** (PDF 152KB), made under the Employment Agencies Act 1973.

The Welsh Government **consultation document** (PDF 373KB) sets out the options available to the Welsh Government to achieve the proposal of ensuring that agency workers cannot be deployed to cover industrial action. The options are:

- to legislate through primary legislation

- to use secondary legislation to issue guidance and direction to employers to achieve the proposal
- using the Agency Workers Procurement Framework.

On the issue of primary legislation, the consultation document refers to the Welsh Government's commitment to introduce a Bill to reverse the effect of certain aspects of the UK TU Act.

Evidence from the Cabinet Secretary

When questioned by the ELGC Committee on why the Cabinet Secretary had not delayed the introduction of the Bill until he had made a definitive decision on this matter, he suggested there had been issues around timing and "*the uncertainty created by not being clear about what the UK Government itself intends to do in this area*".

The Welsh Government published its summary of responses to the consultation on the continued prohibition of the use of agency workers to cover during industrial action on 3 March 2017.

The Cabinet Secretary subsequently reported that he would be discussing the issue with the Workforce Partnership Council on 9 March.

In commenting on whether the Welsh Ministers already had secondary legislation making powers to enable the continued prohibition of agency workers to cover during industrial action, his official stated:

Existing powers that might exist for direction and so on, if that approach were taken, might lead to a fairly complicated set of arrangements with different applications to different employers, which of itself might create a little bit more of a complicated position that's difficult to understand. So, whilst there may be room within existing legislation, there is some argument, at least, for using a single piece of legislation in order to give a clear picture of the expectations that there would be.

On 27 March 2017, the **Cabinet Secretary wrote to ELGC Committee** (PDF 160KB) informing the Committee that he would **bring forward an amendment at Stage 2** to retain the status quo, which prohibits the use of agency workers as cover during industrial action for devolved Welsh authorities.

ELGC Committee view on the prohibition of the use of agency workers as cover during industrial action

The Committee's view on the use of agency workers during industrial action is as follows:

We welcome the Cabinet Secretary's commitment to bring forward an amendment at Stage 2 to include provision in the Bill to prohibit the use of agency workers as cover during industrial action involving devolved Welsh authorities.

Constitutional and Legislative Affairs Committee Recommendations on agency workers

The CLA Committee published its **report** (PDF 797KB) on the Trade Union (Wales) Bill on April 7 2017. In it, the Committee recommends the following in relation the use of agency workers during industrial action:

Recommendation 1: We recommend that the Cabinet Secretary explains during Stage 1 debate why the Bill did not include provisions related to agency workers on introduction, including why the Bill could not have been the subject of a short delay to accommodate such a position.

9. Consideration of the financial implications

Associated costs in introducing the Trade Union (Wales) Bill

The Welsh Government's Explanatory Memorandum (EM) states that there will be a:

Transitional cost to public bodies in Wales due to the need to familiarise themselves with the changes brought about by the Welsh legislation.

The Welsh Government estimates a one-off cost of £61,000 for the public sector in Wales to familiarise itself with the Bill. This, according to Welsh Government would be lower than the estimate in the UK Government's impact assessment, which assumed familiarisation activities would take approximately eight hours. The Welsh Government's impact assessment reduces this to three hours:

This has been reduced to three hours for familiarisation for this legislation in this RIA on the basis that there is less familiarisation required where provisions are being disapplied (including check-off arrangements) and this restores long-standing commonly-understood arrangements.

Associated costs for the disapplication of the 40% ballot threshold

The Welsh Government's RIA provides associated costs for disapplying the 40% ballot threshold requirement - **less than £85,000 per annum**. This is based on the estimated net impact of an **increase in working days lost** to industrial action. However, the Explanatory Memorandum accompanying the Bill states that:

*As little data relating to the content of the legislation is available at the Wales level, this [Regulatory Impact Assessment (RIA)] will draw **on content, assumptions and estimates** in the UK Government's documents.*

The UK Government's impact assessment for the Trade Union Act 2016 "does not include detailed review of the costs and benefits associated with implementing a 40% threshold for "important public services".

Associated costs of disapplying provisions relating to 'facility time'

The UK TU Act 2016 introduces the need for public sector organisations to publish an annual report on expenditure on 'facility time'. The Welsh Government assessed the cost to public sector bodies in Wales based on the UK Government's RIA. The total annual cost to the public sector in Wales of reporting on 'facility time' is estimated at **£171,700**. Disapplying this element of the UK legislation according to the Welsh Government "would remove this annual cost to the public sector".

Associated costs of disapplying provisions relating to 'check-off'

The UK TU Act 2016 places restrictions on the provision of check-off services, where trade unions are required to meet certain conditions. The UK Government's impact assessment states that 22% of public sector employers are currently reimbursed for providing a check-off service. The payment amount is agreed between the employer and the trade union.

The Welsh Government's EM states that it is difficult to calculate the cost of removing restrictions on check-off provisions as:

The decisions both to provide the facility and to seek reimbursement will be a matter for agreement between public sector employers and employees. In disapplying the provisions employers are not under a duty to provide check-off facilities, nor are they precluded from seeking reimbursement for costs where they do. The impact and cost of removing the restrictions on check-off provisions is therefore unknown.

10. Assembly scrutiny process

Introduction of the Bill

The Cabinet Secretary for Finance and Local Government, Mark Drakeford AM, made a **statement in Plenary on 18 January 2017** after the *Trade Union (Wales) Bill* was introduced on 16 January 2017.

Stage 1

The National Assembly's Business Committee agreed to refer the Bill to the Equality, Local Government and Communities Committee for consideration of the general principles (Stage 1).

On 16 January 2017, the Llywydd laid a **statement on legislative competence** before the Assembly. She also wrote to the Equality, Local Government and Communities Committee (ELGC) and the Constitutional and Legislative Affairs Committee (CLAC) on the matter of **legislative competence**.

The ELGC Committee conducted **5 oral witness sessions** with stakeholders, along with scrutiny sessions with the Cabinet Secretary for Finance and Local Government on **02 February 2017** and **09 March 2017**. The Committee also **consulted** with the public and stakeholders. The Committee published its **report** on 7 April 2017.

Further information on the Committee's scrutiny at Stage 1 is available on the **Bill webpage**.

The Bill also received Stage 1 oversight and scrutiny from the **Constitutional and Legislative Affairs Committee**.

Stage 2 and beyond

Should the Bill proceed past its Stage 1 debate, and Assembly Members support the general principles of the Bill, it will be subject to amendment by the Equality, Local Government and Communities Committee at Stage 2. The Business Committee set a deadline of 16 June 2017 for this stage to be completed.

The Bill will then be subject to further amendment by all Assembly Members in Plenary (Stage 3) before a final vote on whether to pass the legislation (Stage 4).

11. Changes to the Bill at Stage 2

Background

Stage 2 proceedings of the Trade Union (Wales) Bill were conducted on **15 June 2017** by the Equality, Local Government and Communities Committee.

The purpose and intended effect of the Bill as introduced (explained in detail in section 7) is to disapply certain provisions of the UK Trade Union Act 2016 in relation to "devolved Welsh authorities".

The three key provisions in the Bill are as follows:

- to disapply the restrictions on deduction of union subscriptions from wages by employers;
- to disapply powers to require the publication of information on facility time and to impose requirements on public sector employers in relation to paid facility time; and
- to disapply the 40% ballot support threshold for industrial action affecting important public services.

In all, **nine amendments were tabled:**

- three of the amendments had the intended effect of revoking the above provisions;
- three were drafting amendments tabled by the Welsh Government;
- two amendments tabled by the Welsh Government were in relation to the continued prohibition on the use of temporary workers to cover industrial action; and
- one amendment was tabled by the Welsh Government to remove Order-making powers from the Bill.

All amendments brought forward by the Welsh Government, moved by the Cabinet Secretary for Finance and Local Government were agreed. Opposition amendments brought forward by Janet Finch-Saunders AM were not agreed by the Committee.

Amendments agreed at Stage 2

Set out below are the key amendments agreed by **grouping of amendments**. As a result of the below amendments, the Welsh Government has published a revised **Explanatory Memorandum**.

Drafting amendments

Amendments 4, 5 and 6 were drafting amendments, described by the Cabinet Secretary as 'minor and technical amendments'. The Trade Union (Wales) Bill inserts a definition of devolved Welsh authority into the TULR (Consolidation) Act 1992. All three amendments were tabled to ensure the 'correct sequential numbering in the amended 1992 Act'.

All drafting amendments were agreed by the Committee.

Prohibition on using temporary workers to cover industrial action

Amendments 7 and 8 were the most significant of the amendments tabled by the Cabinet Secretary. The amendments related to the use of temporary workers (agency workers) to cover workers participating in industrial action.

Employers are currently prohibited from deploying agency workers to cover staff during periods of industrial action. Regulation 7 of the **Conduct of Employment Agencies and Employment Businesses Regulation 2003** states the following:

- 7.–(1) Subject to paragraph (2) an employment business shall not introduce or supply a work-seeker to a hirer to perform—
- (a) the duties normally performed by a worker who is taking part in a strike or other industrial action

The UK Government consulted on a proposal in 2015 to rescind the prohibition on the use of agency workers to cover staff who were participating in industrial action. In moving the amendment for the Trade Union (Wales) Bill, the Cabinet Secretary explained that:

No legislative measures have been taken as a result of that consultation, but what these amendments do is safeguard the existing position for Welsh devolved public bodies.

The Welsh Government had not included the provision in the Bill introduced on 16 January, and were consulting with stakeholders during Stage 1 scrutiny of the Bill. The Committee did however take evidence from witnesses and the Cabinet Secretary himself on the use of agency workers during industrial action, and came to the view that rescinding the prohibition would:

Undermine the ability of trade unions to engage as equal partners, which will, in turn, undermine the social partnership approach. As such, we believe it is important to ensure that the prohibition continues in Wales.

As a result, the **Committee's Stage 1 Report** welcomed the Cabinet Secretary's commitment to table an amendment at Stage 2 to:

Include provision in the Bill to prohibit the use of agency workers as cover during industrial action involving devolved Welsh authorities.

The amendments tabled to ensure the continuation of the prohibition to use agency workers as cover during industrial action were agreed.

Order-making Powers

Amendment 9 relates to Order-making powers in relation to transitional and saving provisions. In moving the amendment, the Cabinet Secretary explained that the Constitutional and Legislative Affairs Committee had asked the Welsh Government to

'Keep section 2(2) in this Bill under review during its passage in front of the Assembly to see whether transitional and saving provisions were still required by the time the Bill reached the statute book.'

This was in response to the fact the Trade Union Act 2016 had yet to commence.

On March 1 2017, during Stage 1 proceedings of the Trade Union (Wales) Bill, the UK Government **commenced the 2016 Act**. The powers set out in section 2(2) according to the Cabinet Secretary are 'no longer required' as a result. The amendment tabled therefore removes these powers from the Bill.

The amendment was agreed.

12. Glossary

Specific terms for the Bill

Ballot threshold for industrial action - Trothwy pleidlais ar gyfer gweithredu diwydiannol

Check-off - Didynnu drwy'r gyflogres

Deduction of union subscriptions - Didynnu taliadau tanysgrifio i undebau

Devolved Welsh authority - Awdurdod Ddatganoledig yng Nghymru

Disapply/Disapplication - Datgymhwyso

Facility Time - Amser cyfleuster

Government of Wales Act 2006 - Deddf Llywodraeth Cymru 2006

Important public services - Gwasanaethau cyhoeddus pwysig

Industrial Action - Gweithredu diwydiannol

Legislative Competence - Cymhwysedd Deddfwriaethol

Legislative Consent Motion (LCM) - Cynigion Cydsyniad Deddfwriaethol (MCD)

Regulatory Impact Assessment (RIA) - Asesiad Effaith Rheoleiddiol (AER)

Safety representative - Cynrychiolydd diogelwch

Social Partnership - Partneriaeth gymdeithasol

Trade Union - Undeb Llafur

Trade Union Act 2016 - Deddf yr Undebau Llafur 2016

Trade Union and Labour Relations (Consolidation) Act 1992 - Deddf yr Undebau Llafur a Chysylltiadau Llafur (Cydgrynhoi) 1992

Trade union learning representative - Cynrychiolydd dysgu undeb llafur

Trade union official - Swyddog yr undeb llafur

Trade Union (Wales) Bill - Bil yr Undebau Llafur (Cymru)