



Equality, Local Government and
Communities Committee

Trade Union (Wales) Bill: Committee Stage 1 Report

April 2017



National Assembly for Wales
Equality, Local Government and Communities Committee

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.

An electronic copy of this report can be found on the National Assembly's website:

www.assembly.wales/SeneddCommunities

Copies of this report can also be obtained in accessible formats including Braille, large print; audio or hard copy from:

Equality, Local Government and Communities Committee
National Assembly for Wales
Cardiff Bay
CF99 1NA

Tel: **0300 200 6565**

Email: **SeneddCommunities@assembly.wales**

Twitter: **[@SeneddELGC](https://twitter.com/SeneddELGC)**

© National Assembly for Wales Commission Copyright 2017

The text of this document may be reproduced free of charge in any format or medium providing that it is reproduced accurately and not used in a misleading or derogatory context. The material must be acknowledged as copyright of the National Assembly for Wales Commission and the title of the document specified.

Equality, Local Government and
Communities Committee

Trade Union (Wales) Bill: Committee Stage 1 Report

April 2017



National Assembly for Wales
Equality, Local Government and Communities Committee

Equality, Local Government and Communities Committee

The Committee was established on 28 June 2016 to examine legislation and hold the Welsh Government to account by scrutinising expenditure, administration and policy matters encompassing (but not restricted to): local government; housing, community regeneration, cohesion and safety; tackling poverty; equality of opportunity and human rights.

Current Committee membership:



John Griffiths AM (Chair)
Welsh Labour
Newport East



Gareth Bennett AM
UKIP Wales
South Wales Central



Janet Finch-Saunders AM
Welsh Conservative
Aberconwy



Siân Gwenllïan AM
Plaid Cymru
Arfon



Bethan Jenkins AM
Plaid Cymru
South Wales West



Rhianon Passmore AM
Welsh Labour
Islwyn



Jenny Rathbone AM
Welsh Labour
Cardiff Central



Joyce Watson AM
Welsh Labour
Mid and West Wales

Contents

01.	Introduction.....	5
02.	Background.....	7
03.	General principles and need for legislation.....	10
04.	Removal of restrictions on deduction of union subscriptions from wages in the public sector	18
05.	Disapplication of regulations about facility time to devolved Welsh authorities	26
06.	Disapplication of 40 % support threshold for industrial action affecting 'important public services'	37
07.	Prohibition of the use of agency workers as cover during industrial action.....	45

01. Introduction

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

2. The National Assembly's Business Committee agreed to refer the Bill to the Equality, Local Government and Communities Committee ('the Committee') for consideration of the general principles (Stage 1), in accordance with Standing Order 26.9. It also agreed that the Committee should report to the Assembly by 7 April 2017.

Terms of scrutiny

3. The Committee agreed the following framework within which to scrutinise the general principles of the Bill:

To consider:

1. the general principles of the Trade Union (Wales) Bill and the need for legislation to ensure the continued and effective delivery of public services by disapplying certain provisions of the UK Government's Trade Union Act 2016 as they apply to devolved Welsh authorities. The provisions to be disappplied are as follows:
 - the 40% ballot threshold for industrial action affecting important public services;
 - 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
 - restrictions on deduction of union subscriptions from wages by employers;
2. any potential barriers to the implementation of the Bill's provisions and whether the Bill takes account of them;
3. whether there are any unintended consequences arising from the Bill; and
4. the financial implications of the Bill (as set out in Part 2 of the Explanatory Memorandum).

The Committee's approach

4. The Committee conducted a **public consultation** to inform its work, based on the agreed terms of reference. 19 responses were received and published on the Assembly's website. The Committee heard oral evidence from a number of witnesses. The schedule of oral evidence sessions is published on the Assembly's website.

5. In addition, **focus groups** were held with Parent-Teacher Association (PTA) representatives and Community Health Council representatives.

6. The Committee would like to thank all those who have contributed to its work.

7. This report was agreed by 7 out of 8 Committee Members as representing their views on the evidence they considered and the recommendation they decided to make. One Member, Janet Finch-Saunders AM, did not agree the report.

Other Committees' consideration of the Bill

- 8.** The Assembly's Constitutional and Legislative Affairs Committee took evidence from the Cabinet Secretary on the Bill on 6 March. It is due to report its conclusions by 7 April 2017.
- 9.** The Assembly's Finance Committee wrote to the Cabinet Secretary on the financial implications of the Bill on 3 March 2017¹ and subsequently noted the Cabinet Secretary's response².

¹ Letter from the Chair of Finance Committee to the Cabinet Secretary for Finance and Local Government, dated 3 March 2017

² Letter from the Cabinet Secretary for Finance and Local Government to the Chair of Finance Committee, dated 17 March 2017

02. Background

Trade Union and Labour Relations (Consolidation) Act 1992

10. The current legislation on trade unions is principally in the Trade Union and Labour Relations (Consolidation) Act 1992 ('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 relationship with employers, such as the deduction of union subscription fees from employee's wages, facility time and ballots. These provisions are discussed in more detail below.

Provision relating to deduction of union subscriptions from wages

- 11.** 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'.
- 12.** Check-off is an agreement reached between employers and unions, and the arrangements agreed formed part of the employee's terms and conditions of employment.
- 13.** 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 if 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

- 14.** Trade union facility time and facilities are the time and resources that unions negotiate with employers so that they are able to represent members both individually and collectively in negotiations. The 1992 Act makes specific provision for facility time:
- 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

15. 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.

The UK Government's Trade Union Bill (now the Trade Union Act 2016)

16. 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 a number of ways, including to introduce new ballot thresholds for industrial action, to make provisions relating to facility time for trade union officials in the public sector, and to restrict the deduction of union subscriptions from wages in the public sector.

17. 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.”³

18. 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”.

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

20. The Fourth Assembly debated the **Legislative Consent Motion on 26 January 2016** and withheld legislative consent to the UK Bill. Despite this, the UK Government maintained its position that the provisions were not within the Assembly's legislative competence and ignored the refusal of consent.

21. The UK Bill received Royal Assent in May 2016. The sections for which the Assembly refused consent came into force on 1 March 2017. The regulations defining 'important public services' for the purpose of applying the 40% ballot threshold requirement are now in force in Wales. However, the UK Government has indicated that the regulations in relation to facility time and the deduction of union subscriptions from wages (check-off) will not include devolved Welsh authorities. The UK Government has reported that it will include devolved Welsh authorities once the 'reserved powers' provisions of the Wales Act 2017 come into force.

22. The Welsh Labour manifesto for the 2016 Assembly elections included a commitment to reverse the effect of the relevant sections of the Trade Union Act 2016 ('the 2016 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.

³ **Explanatory Notes to the UK Government's Trade Union Bill**, published July 2015

Welsh Government's Trade Union (Wales) Bill

23. According to the Explanatory Memorandum ('EM') accompanying the Trade Union (Wales) Bill ('the 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.

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

25. On 16 January 2017, the Llywydd laid a statement on legislative competence before the Assembly. The Llywydd subsequently wrote to the Committee on the issue of competence and stated that, while in her view the provisions of the Bill would be within competence, "[her] decision was not straight forward". She went on to state:

"I have received advice that there are credible arguments that some or all of 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 decision I have made is, therefore, a finely balanced one."⁴

26. The letter summarised the issues that the Llywydd considered in reaching her decision on competence.

The Wales Act 2017

27. 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.

28. 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.

⁴ Letter from the Llywydd to the Chair of Equality, Local Government and Committees Committee, dated 16 January 2017

03. General principles and need for legislation

Background

29. The Bill seeks to disapply certain provisions of the 2016 Act in relation to “devolved Welsh authorities”.⁵ 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% support threshold for industrial action affecting important public services.

30. According to the EM, the above provisions “have an adverse effect on the social partnership approach taken by the Welsh Government in Wales”.⁶

31. It expands on this, stating:

“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.”⁷

32. Finally, it states 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”.⁸

Evidence from respondents

33. There was overwhelming support in evidence for the general principles of the Bill. This support came not only from those representing trade unions but from those representing professional associations and public sector employers.

⁵ 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 Act 2017). 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.

⁶ Trade Union (Wales) Bill, Explanatory Memorandum, January 2017, para. 1.1. Further references to the Explanatory Memorandum will be to the ‘EM’.

⁷ EM, para. 3.7-3.9

⁸ EM, para 3.10

34. Respondents were, in the main, strongly opposed to the UK Government’s 2016 Act and to the provisions within the Act which the Bill seeks to disapply. There was consensus that the Welsh Government’s existing approach to industrial relations, based on the social partnership model, was working well and, given this, changes to the current legislative arrangements were not necessary.⁹

35. Additionally, on a point of principle, representatives of trade unions also opposed the provisions in the 2016 Act on the basis that they were a direct attempt, by the UK Government to destabilise trade unions. According to the Royal College of Nursing (RCN), the 2016 Act was “unnecessary” and “draconian”.¹⁰ The Social Workers’ Union (SWU) described it as “at best, divisive”,¹¹ while the Society of Radiographers (SoR) asserted it was “counter-productive” and “vindictive”.¹²

Effects of the provisions in the 2016 Act

36. According to respondents, the provisions in the 2016 Act:

- would undermine the rights of workers, including the right to withdraw labour at times of serious and legitimate industrial dispute;
- would undermine the balance in the relationship between social partners;
- would damage industrial relations in Wales, which are, in the main, operating effectively in resolving disputes;
- failed to recognise the role of trade unions in the delivery of public services;
- sought to curtail the role of trade unions and introduced barriers to their effective administration and operation.

37. Respondents believed that the above would damage the social partnership approach in Wales and impact on the continued delivery of public services. As such, there was consensus that the Bill was needed to disapply the provisions in the 2016 Act to mitigate this.

The social partnership model in Wales

38. In explaining their support for the Bill, the majority of respondents emphasised the importance of the social partnership model in managing industrial relations in the public sector in Wales. A few respondents cited the Workforce Partnership Council¹³ as an example of constructive partnership working.

39. Many respondents reported that, although not without difficulties, the social partnership model was working effectively and had helped overcome some significant challenges faced by the public sector in Wales in recent years.

40. In explaining how the social partnership model operates in Wales, Wales TUC Cymru stated:

“Across all elements of partnership, mutual respect and trust is essential. Difficult conversations are common and disagreement is addressed openly and

⁹ In this context, “current legislative arrangements” means those arrangements in place before the relevant provisions of the Trade Union Act 2016 came into force.

¹⁰ Written evidence, TUB 01

¹¹ Written evidence, TUB 02

¹² Written evidence, TUB 11

¹³ The Workforce Partnership Council brings together trade unions, public sector employers and the Welsh Government. It is chaired alternatively by the First Minister and the Cabinet Secretary for Finance and Local Government.

directly. Trade unions and employers continue to invest in this grown up partnership approach because the challenges facing our public services are huge and the workforce implications of these challenges are significant. While each partner brings their own priorities and perspective there is a shared commitment to our public service and a shared objective of delivering excellent services and fair employment. All partners also explicitly recognise that negotiated settlement of contested areas prevents the development of industrial disputes with all the consequences that would have for service disruption and income.”¹⁴

41. According to the Welsh Local Government Association (WLGA), social partnership was “one of the successes of devolution”. It stated:

“The WLGA has supported and embraced the concept of social partnership which has helped steer local government through severe financial difficulties...we firmly recognise as employers that engaging with the workforce through recognised trade unions played a significant part in ensuring that service continuity has been at the heart of some difficult decisions and fulfilling the Welsh Government’s strategic aim of having citizen-centred services.”¹⁵

42. In commenting specifically on the operation of the Workforce Partnership Council, UNISON reported that it “promotes productive dialogue and negotiation in a forum which recognises each stakeholder as equal” and had “without doubt, been of benefit” to all involved.¹⁶

43. The Welsh NHS Confederation and NHS Wales Employers explained that, in general, partnership working between employer organisations and trade unions “works well” in the NHS in Wales. It had “supported the development of effective and mutually beneficial solutions to a number of significant challenges which the service has addressed”.¹⁷ This view was echoed by Betsi Cadwaladr University Health Board.¹⁸

44. Similar views were expressed by the RCN, who believed partnership working had been “fundamental to the management and delivery of NHS services in Wales through extremely challenging times”.¹⁹

Impact of the 2016 Act on social partnership and public service delivery

45. The majority of respondents felt strongly that the effect of the provisions in the 2016 Act would be to undermine the social partnership, which would, in turn impact on the delivery of public services in Wales. They emphasised that equality between partners was key to the effective operation of the social partnership model and that the provisions in the 2016 Act would jeopardise this.

46. Wales TUC Cymru asserted that the provisions in the 2016 Act:

¹⁴ Written evidence, TUB 03

¹⁵ Written evidence, TUB 10

¹⁶ Written evidence, TUB 14

¹⁷ Written evidence, TUB 08

¹⁸ Written evidence, TUB 18

¹⁹ Written evidence, TUB 01

“...undermine the ability of social partnership to function as [they]; shift the balance towards the employer undermining equity between social partners...”²⁰

47. GMB highlighted that the “consequences [of the 2016 Act] would be to significantly weaken the social partnership model that operates in Welsh public services to the detriment of employers, trade unions and service users alike”. It also stated:

“The relationships that have been built up have been firm and productive, and helped overcome many of the serious challenges posed by the climate of austerity...the Trade Union Act would have the effect, if implemented, of increasing the barriers to providing effective and efficient services and the well-being needs of those who both supply and receive them.”²¹

48. The SoR stated that, “if certain provisions of the UK Government’s Trade Union Act 2016 (the Act) are not dis-applied, the partnership model in Wales would be at risk” and “it would be more difficult for our members to put patients first”, which would “adversely affect patient care”.²²

49. RCN was also strongly of the view that the 2016 Act would impact on the “culture of partnership” that has been developed in Wales.²³

50. Respondents believed that maintaining effective partnership working would be important for the continued delivery and improvement of public services in Wales. This was particularly important in the context of ongoing austerity, further transformational change in NHS Wales and, in the case of the local government sector, the Welsh Government’s planned programme of reform.

51. The WLGA believed that the Bill would “ensure that the mature and effective relationships that have been developed between employers and trade unions in local government continue to help improve public services in Wales”.²⁴ On the issue of local government reform, it acknowledged that reform proposals would inevitably impact on the local government workforce and suggested that the partnership approach provided “a firm foundation for moving forward”.²⁵

52. Similarly, in relation to the delivery of health services, the RCN stated:

“Reversing the effects of the Trade Union Act will also have the crucial effect of maintaining and strengthening the productive spirit and culture of partnership working in Wales that has been so fundamental to the management and delivery of NHS services in wales through extremely challenging times in recent years.”²⁶

Potential barriers to implementation

53. Both Public and Commercial Services (PCS) Union and Wales TUC Cymru referred to the different views of the Welsh Government and UK Government on the issue of legislative competence

²⁰ Written evidence, TUB 03

²¹ Written evidence, TUB 06

²² Written evidence, TUB 11

²³ Written evidence, TUB 01

²⁴ Written evidence, TUB 10

²⁵ Record of Proceedings (RoP), paragraph 227, 16 February 2017 (NB: unless otherwise stated, subsequent references in this report to ‘RoP’ refer to the proceedings of the Equality, Local Government and Communities Committee)

²⁶ Written evidence, TUB 01

in relation to the Bill (see Chapter 2), with PCS suggesting that this could be a potential barrier to the implementation of the legislation.

54. PCS stated:

“The main potential barrier to the implementation of the Bill’s provisions is presumably the UK Government’s purported belief that the National Assembly does not have the authority to legislate on this matter. This is contradicted, however, by legal advice to the UK Government that was leaked last year, which reinforced the view of the Welsh Government that the Assembly does have jurisdiction where legislation such as this impinges on staff in the devolved public sector.”²⁷

55. Wales TUC Cymru “strongly believe” that the Bill’s provisions were within the Assembly’s legislative competence and provided a detailed legal briefing on this matter.²⁸

56. On a related issue, Wales TUC Cymru explained that it had wanted to see an exception to the reservation on Employment and Industrial Relations in the Wales Bill (now the Wales Act 2017), which would have made clear the “ongoing ability” of the National Assembly to legislate in this area.

57. In commenting on the potential implications of the reservation on Employment and Industrial Relations for the Bill, if it were enacted, Wales TUC Cymru stated:

“The people of Wales elect AMs to the National Assembly to make decisions about running our devolved public services. That’s a very important element of the decisions they make...If the Bill is passed and enacted...it would be absolutely clear that our elected representatives do not want those provisions [in the 2016 Act] applied to our public services. And I think it would be a fundamentally unconstitutional, undemocratic act of the UK Government then to disapply that.”²⁹

Evidence from the Cabinet Secretary

58. In commenting on the need for the Bill, the Cabinet Secretary explained that he was seeking “to preserve the status quo”.³⁰ He elaborated on this, stating:

“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.”³¹

²⁷ Written evidence, TUB 16

²⁸ Written evidence, TUB 03

²⁹ RoP, para. 556, 16 February 2017

³⁰ RoP, para. 36, 2 February 2017

³¹ RoP, para. 27, 9 March 2017

59. The Cabinet Secretary asserted that “social partnership is central to the Bill and the purpose of bringing this Bill before the National Assembly”.³² He stated:

“Social partnership is absolutely at the heart of the debate here. Since devolution, we have developed in Wales a distinctive approach to the way in which we try and address some of the very significant issues that face all our public services.”³³

60. According to the Cabinet Secretary, social partnership in Wales “has a very successful track record”.³⁴ He provided several examples of where he believed the social partnership approach had resulted in the avoidance of strike action in Wales, including in the education sector in 2013, during the firefighters’ dispute in 2014, and in the NHS regarding junior doctor contracts and Agenda for Change staff.³⁵

61. On the issue of legislative competence, the Cabinet Secretary asserted that, in the Welsh Government’s view, the Bill was “squarely within the devolved competences of the National Assembly”.³⁶

62. The Cabinet Secretary subsequently referred to correspondence with the UK Government on the Bill, which was not publicly available but that he had shared with the Committee and with the Constitutional and Legislative Affairs Committee to assist with scrutiny of the Bill. He explained:

“...the penultimate paragraph [of the letter] does say that the UK Government will act at the earliest possible opportunity, following commencement of the Wales Act, to ensure the legislation protects our public services.

[...]

Well, there are very different ways you could read that paragraph, but I read it as an implicit threat that the UK Government would introduce a Bill at the UK Parliament to overturn the Bill that is in front of this committee today, should this Bill reach the statute book. These are all possibilities for the future, rather than things that are guaranteed to happen.”³⁷

Our view

63. The changes brought about by the UK Government’s Trade Union Act 2016 have been the subject of much political and public debate and elicited passionate responses not only from trade unions but from employers, the public sector, the business community and academics. The ideological arguments relating to trade unions are widely understood and were well-rehearsed during the passage of the UK Government’s Trade Union Bill through Parliament.

64. In undertaking our scrutiny of the Welsh Government’s Bill, we were clear that our role was not to assess the merits or otherwise of trade unions, although inevitably the role of unions within the workforce and as a social partner was an important part of our considerations. Instead, we sought to

³² RoP, para. 44, 2 February 2017

³³ RoP, para. 45, 2 February 2017

³⁴ RoP, para. 51, 2 February 2017

³⁵ RoP, para. 54-56, 2 February 2017

³⁶ RoP, para. 16, 2 February 2017

³⁷ RoP, para. 11-15, 9 March 2017

test the Welsh Government's assertion that the provisions in the 2016 Act that the Bill seeks to disapply would have an adverse impact on the social partnership in Wales, which it considers crucial in ensuring the effective delivery of devolved public services.

65. It is clear from the evidence we received that the 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.

66. Industrial action across the UK is at its lowest for years. Strikes have also been less prevalent in Wales than in England in recent years. When strike action has occurred in England, for example the junior doctors' strike, it was successfully averted in Wales. We have heard that this was, at least in part, as a result of the effective operation of social partnership. Notwithstanding this, agreement to resolve disputes is not always possible and in some instances industrial action has occurred in Wales. We recognise that the partnership approach is not without its tensions and difficulties and requires continual commitment from the partners.

67. Crucially, we heard that the social partnership approach is more than simply about maintaining positive industrial relations, or a tool to averting strike action. We received compelling evidence that partnership working has been essential to the management and delivery of public services in Wales, particularly against the backdrop of austerity. Public sector organisations were keen to emphasise the need to preserve the current partnership approach to enable them to continue to meet future service delivery challenges.

68. It is clear to us that the success of the social partnership is dependent on equality between partners and that the relevant provisions in the 2016 Act are likely, to varying degrees, to affect this. We are in no doubt that, collectively, these provisions will have a detrimental effect on the social partnership in Wales. At present, trade unions are very much viewed as valuable and equal partners who can, and do, engage effectively in all aspects of partnership working. However, it came across strongly in evidence that the relevant provisions in 2016 Act are likely to make it more difficult for trade unions to operate effectively, creating an imbalance between partners and therefore undermining the social partnership approach.

69. In view of the above, we support the general principle of the Bill and agree that it is needed to disapply the relevant provisions of the 2016 Act.

Recommendation 1. We recommend that the Assembly supports the general principles of the Bill.

70. However, we refer the Cabinet Secretary to our conclusion on the continued prohibition on the use of agency workers as cover during industrial action set out in Chapter 7.

71. On the matter of legislative competence; we note that the Welsh Government and UK Government appear to have different views about whether, under the current settlement, the Assembly has competence to legislate in relation to the Bill. We also note the views expressed in evidence on this matter. The issue of competence clearly has implications for the implementation of the Bill's provisions.

72. We note the Cabinet Secretary's view that the UK Government may seek to repeal the Assembly's legislation, if it is enacted, once the 'reserved powers' provisions of the Wales Act 2017

come into force. We also acknowledge that the Cabinet Secretary's immediate priority is to ensure the successful passage of the Bill through the Assembly under the current settlement.

73. We do not wish to second-guess the UK Government's future intentions in relation to the Bill, if it is enacted. However, we are concerned that the UK Government would seek to repeal legislation that was within the Assembly's legislative competence at the time that the legislation was passed.

74. We acknowledge that the Government of Wales Act 2006 makes arrangements for the referral of questions on competence to the Supreme Court. Indeed, the UK Government has relied on these arrangements to make a referral on two occasions since the Assembly first acquired primary legislative powers. We see no justifiable reason for the UK Government to deviate from this approach for this Bill.

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

Background

75. Section 15 of the 2016 Act further restricts the circumstances in which trade union subscriptions may be deducted from the wages of workers in the public sector (known as 'check-off'). 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.

76. 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'. The meaning of 'devolved Welsh authorities' for the purpose of this subsection and all other relevant subsections is set out in section 1(5) of the Bill.

77. There is limited information in the EM about the purpose and intended effect of section 1(2).

78. 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.”³⁸

Evidence from respondents

79. There was widespread support in evidence for section 1(2) of the Bill. Respondents widely reported that check-off arrangements were well-established, efficient, beneficial to all parties, and were of minimal cost to employers. As such, they could see no reason for restrictions on check-off to be imposed.

80. Flintshire County Council stated:

“This is convenient for the employee and the trade unions and generates a transaction handling income for the Council as the employer. This is a beneficial business arrangement for all three parties. There is no practical reason to discontinue with the arrangement.”³⁹

81. Several respondents pointed out that check-off was a voluntary agreement between employers and trade unions and therefore believed that the restrictions were inappropriate and unnecessary. The arrangements agreed formed part of the employee's terms and conditions of employment and, according to UNISON it was “not the place of Government to interfere in [these]”.⁴⁰

³⁸ EM, page 20

³⁹ Written evidence, TUB 07A

⁴⁰ Written evidence, TUB 14

82. On a wider point, the Welsh NHS Federation and NHS Wales Employers emphasised that check-off was “part of a broader service provided in support and acknowledgement of the NHS’s commitment to social partnership”.⁴¹

83. A number of respondents raised concern that removing check-off would impact on trade union membership, which could destabilise unions and alter the balance between social partners.

84. Linked to the above, some representatives of trade unions suggested that the restrictions were an attempt by the UK Government to introduce barriers to the effective administration and organisation of unions. On this issue, PCS stated that the restrictions were “an obvious attempt to undermine union organisation by interfering with recruitment and retention of members”.⁴²

Benefits of check-off

85. There was strong evidence from respondents that check-off arrangements benefited not only trade unions and individual employees, but also employers themselves.

86. Several respondents emphasised that check-off was a convenient method for individuals to pay their union subscriptions and was of particular benefit to those on low incomes.

87. On a related issue, Wales TUC Cymru stated that check off arrangements “allow for fair and equal access to trade unions representation”.⁴³ The WLGA explained that check-off allowed union members “to be quickly and appropriately signposted to their unions for help, support, advocacy and representation if necessary”.⁴⁴

88. Additionally, the WLGA highlighted the advantages of check-off for local authorities:

“...it does allow local authorities to have an appreciation of union membership and density. It assists with understanding level of turnout and voting in the event of a ballot being undertaken. This can also be used to inform the facility time arrangement if membership levels change.”⁴⁵

89. Similar points were made by the Welsh NHS Confederation and NHS Wales Employers:

“Where [check-off] is offered it enables employers to understand the numbers of members in any one union and gain an understanding of the relative trade union membership across the organisation.”⁴⁶

90. Both the Mid and West Wales Fire and Rescue Service and North Wales Fire and Rescue Service explained that, on a practical level, understanding union membership could assist them in contingency planning in the run-up to industrial action.⁴⁷

Costs of providing check-off

91. Those respondents who commented on the cost to employers of providing check-off reported that it was difficult, if not impossible, to provide accurate information on costs. They highlighted that

⁴¹ Written evidence, TUB 08

⁴² Written evidence, TUB 16

⁴³ Written evidence, TUB 03

⁴⁴ Written evidence, TUB 10

⁴⁵ Written evidence, TUB 10

⁴⁶ Written evidence, TUB 08

⁴⁷ RoP, para. 184-185, 1 March 2017

modern automated payroll systems were already established and arrangements for deductions in place. As such, the cost of check-off was minimal.

92. Respondents, including public sector employers who provide check-off, did not believe that cost was an issue that needed to be addressed through primary legislation.

93. UNISON stated:

“One of the claims from the UK Government that these changes have been introduced because of the cost of [check-off] and the strain on the public purse are entirely false. The cost of [check-off] is negligible.”⁴⁸

94. South Wales Fire and Rescue Service reported that it had 98% union membership in the Fire Brigades Union and that it provided check-off facilities for its employees. According to the Service, “it isn’t a problem, it isn’t a burden in any way at the moment”.⁴⁹

95. Similar views were expressed by Mid and West Wales Fire Service and North Wales Fire and Rescue Service, with the latter stating:

“[Check-off] has been in place for so long the impact for us [of providing it] is absolutely minimal. We make no charge to the representative bodies for the facility. We find it assists in terms of industrial relations...”⁵⁰

96. The WLGA reported that check-off arrangements within local authorities were “longstanding” and that, in cases where check-off was provided, “Service Level Agreements were in place that ensured authorities were recompensed for undertaking this”.⁵¹

97. When questioned about whether authorities should be required to seek recompense from trade unions, the WLGA stated:

“Frankly, you as a legislator shouldn’t be involved in this... This is something that we can sort out at a local level. I genuinely think that they are the preserve of local democracy and local government.”⁵²

98. Wales TUC Cymru explained that, while there were a number of agreements reached between employers and trade unions about payments for check-off, employers were unable to provide exact costings. As such, they were recompensed based on a percentage of the total union subscriptions deducted. Wales TUC Cymru believed that this approach, in most cases, was “unfair” as it meant unions would be paying more than the actual cost to employers of providing the service.⁵³

Other salary deduction schemes

99. Several respondents including BMA Cymru Wales, Wales TUC Cymru and GMB pointed out that many employers offered salary deductions schemes, such as for childcare vouchers and gym membership, but that these would not be subject to the same restrictions as union subscriptions.

⁴⁸ Written evidence, TUB 14

⁴⁹ RoP, para. 280, 16 February 2017

⁵⁰ RoP, para. 483, 16 February 2017

⁵¹ Written evidence, TUB 10

⁵² RoP, para.280, 16 February 2017

⁵³ RoP, para. 483, 16 February 2017

100. Wales TUC Cymru asserted that “trade unions are being singled out in the UK legislation and in attempts to ask for an administration fee in a way that others are not”. It stated:

“This is an equity issue and it’s not about whether it costs the employer substantial amounts of money to provide the check-off system, it’s about ‘is there a hurdle we can put in the way of encouraging people to join trade unions’.”⁵⁴

101. Similar views were expressed by GMB who stated that “such differential treatment is both unfair and unjustified and intended to hamper the ability of trade unions to represent the interests of their members”.⁵⁵

Impact of the 2016 Act on trade union membership

102. The concerns raised in evidence in relation to check-off were primarily about the potential impact of the removal of check-off on trade union membership. It should be noted that the 2016 Act does not remove check-off. However, it does make the provision of check-off conditional on trade unions providing workers with an option to pay subscriptions by other means and on unions making reasonable payments to the employer to cover the cost.

103. A number of respondents, including representatives of the Welsh NHS Confederation and NHS Wales Employers raised concern that, without access to check-off, some employees would be unable to become union members or to maintain their existing membership and that this could potentially destabilise trade unions.

104. The Welsh Ambulance Service reported that of the 86,500 working in NHS Wales, approximately 26,000 paid their union subscriptions through check-off.⁵⁶ As such, “a significant proportion” of its staff would be affected by the restrictions on check-off.⁵⁷

105. Linked to the above, Cwm Taf Health Board raised concern that the restrictions “would compromise and reduce union membership” at a time when it was actively seeking to encourage staff to join trade unions.⁵⁸

106. UNISON stated that check-off was of particular benefit to “low paid members” and reported:

“...some bank accounts designed to allow people to better manage their budgets do not have a direct debit or standing order facility. The removal of [check-off] would mean many low paid workers on precarious contracts losing their vital trade union representation.”⁵⁹

107. UNISON raised concern about the impact of removing check-off “on members who are isolated, are hard to reach, or have no access to IT either in both their working and personal lives”. It stated:

⁵⁴ RoP, para. 488, 16 February 2017

⁵⁵ Written evidence, TUB 06

⁵⁶ RoP, para. 26, 1 March 2017

⁵⁷ RoP, para. 28, 1 March 2017

⁵⁸ RoP, para. 23 and 32, 1 March 2017

⁵⁹ Written evidence, TUB 06

“This would unfairly disadvantage those individuals and would potentially deny them the option of being a member of a trade union, so precluding them from the social partnership approach fully endorsed by Welsh Government.”⁶⁰

108. In acknowledging that the 2016 Act does not remove the provision of check-off, as originally intended, GMB stated:

“The concerns regarding the effect of any prohibition [of check-off] upon employees on lower pay, primarily the prospect of them ceasing to be trade union members, or having to pay extra bank charges connected with direct debit payments have, therefore, been removed, but GMB remain opposed to the intrusion into voluntary arrangements agreed between employers and their recognised unions.”⁶¹

109. PCS explained that when check-off was removed across UK Government departments, although it retained the “vast majority” of affected members, “this tied up considerable resources that could have been deployed in addressing workplace issues instead”.⁶²

Impact of the 2016 Act on social partnership and public service delivery

110. Some respondents went on to suggest that the impact on trade union membership, as outlined in the previous section, in turn would impact on the social partnership approach in Wales.

111. Wales TUC Cymru asserted that the restrictions on check-off would undermine social partnership:

“Attempting to undermine the relationship between employers and trade unions they voluntarily join has the potential to fundamentally challenge the social partnership model in Wales...it is crucial that this form of payment is protected and promoted as a healthy facet of workplace democracy.”⁶³

112. It subsequently explained that the restrictions were likely to lead to a reduction in union membership, which would “impact on the social partnership...because the employers would then start to argue that [unions] are not representing the people that they employ”.⁶⁴ It also provided an example in the 1990s of where union membership had declined following a requirement by the UK Government for trade unions to re-sign their members:

“...it did impact on the relationship that we had with employers and the social partnership working that occurred within the workplace – not necessarily in the wider context of the social partnership, but specifically in the workplace, it had a massive impact. And that’s where most of the issues are discussed and resolved.”⁶⁵

113. In commenting on the impact of a decline in trade union membership, Velindre NHS Trust stated:

⁶⁰ Written evidence, TUB 14

⁶¹ Written evidence, TUB 06

⁶² Written evidence, TUB 16

⁶³ Written evidence, TUB 03

⁶⁴ RoP, para. 476, 16 February 2017

⁶⁵ RoP, para. 480, 16 February 2017

“...it would have significant impact because when you’re actually dealing with current issues, or when you’re actually talking about periods of change, which we all are, across NHS Wales at the moment, then having the earliest possible conversations within partnership working arrangements makes a huge difference to the direction of travel, and the ultimate outcomes that we can achieve through change...having a strong base of trade union membership helps us achieve what we need to achieve for NHS Wales.”⁶⁶

Evidence from the Cabinet Secretary

114. The Cabinet Secretary pointed out that “no employer is obliged to offer check-off facilities, and no employee is obliged to take advantage of them”.⁶⁷ He also pointed out that check-off was used for purposes other than trade union membership, including credit union membership and stated:

“The fact that this one example of check-off is being singled out tells you, I think, that this is not an argument about costs and mechanics and things. It is about trying to reduce the effectiveness of trade unions and their ability to carry out their legitimate role on behalf of their members.”⁶⁸

115. On the issue of trade unions reimbursing employers for check-off facilities, he stated:

“There are examples in Wales where trade unions make a contribution to the cost of covering it, but it is at a modest scale, and the modest scale reflects the modest costs to employers.”⁶⁹

116. When asked to provide figures on the number of public sector employers in Wales who provided check-off facilities and the number who were recompensed by trade unions, the Cabinet Secretary stated:

“...these are matters for local operational determination. We do not routinely collect information of the sort...nor do we see any reason to do so...these are arrangements that are for agreement between individual employers and trade unions, and I don’t seek to interfere in the successful way and the unproblematic way that those arrangements have continued in Wales for many, many years.”⁷⁰

117. When questioned about the impact of the restrictions on check-off on the social partnership and public service delivery, he stated:

“[Check-off arrangements] simply allow trade unionists to pay their dues in a way that is straightforward for them and comes at no significant cost to employers and means that trade unions are able to play the part we need them to play in the successful conduct of industrial relations. If you change those things, all of them have an impact on the conditions of employment in devolved

⁶⁶ RoP, para. 36, 1 March 2017

⁶⁷ RoP, para. 107, 2 February 2017

⁶⁸ RoP, para. 114, 2 February 2017

⁶⁹ RoP, para. 114, 2 February 2017

⁷⁰ RoP, para. 116, 2 February 2017

public services; all of them aim to impact on the way in which public services are provided.”⁷¹

118. He went on to state:

“The intentions of the latest UK Government and their Act of last year are clear. They are designed to try and make it more difficult for individual members of trade unions to sustain their membership, to remove a facility that has been there without difficulty for many, many, many years...our view is that these [restrictions] are both unnecessary and, if they were to take place, they would damage our ability to go on pursuing a social partnership model where all partners at the table are in a position to discharge their part of that bargain.”⁷²

119. While the Cabinet Secretary acknowledged that the provisions in the 2016 Act may not prevent check-off, he reiterated that they were “designed to put new hurdles—unnecessary hurdles and harmful hurdles—in the way of providing this very simple mechanism”. He stated that it “undermines trade unions and that makes the business of social partnership less effective”,⁷³ adding:

“It always starts with our belief that public services in Wales are best provided, best protected, and best advanced in the future by a strong partnership model in which employers and employees come, as equals, around the table to solve common problems. Barriers to that model make that achievement of those objectives more difficult and, therefore, put the future of our public services under greater strain than would otherwise be the case.”⁷⁴

Our view

120. We received strong evidence to suggest that the longstanding arrangements for check-off are working effectively throughout the public sector in Wales. We acknowledge that these arrangements are entirely voluntary and that employers are under no obligation to offer check-off. Where they do provide it, employers can seek recompense from trade unions for the service. Where check-off arrangements are in place, they are widely considered, along with a range of other deduction schemes, to be part and parcel of employers’ routine administrative and payroll functions.

121. While some public sector employers are recompensed by trade unions for check-off services, this is not the case across the board. We heard that the administrative burden and associated costs on employers of providing check-off were negligible. This possibly explains why so few seek recompense from trade unions, and more importantly, why there was no appetite among employers for the changes introduced by the 2016 Act. It is clear from the evidence we received that many employers recognise the benefits of check-off to them, particularly the ability to identify union membership which assists employers in planning for possible future industrial action. We have heard that the restrictions may make union members more difficult to identify and that, if check-off was removed (if the conditions in the 2016 Act were not met) it would become almost impossible.

122. It is difficult to assess the impact of the restrictions on check-off provided for in the 2016 Act with any degree of certainty. At best, meeting the conditions are likely to be an inconvenience for

⁷¹ RoP, para. 40, 2 February 2017

⁷² RoP, para. 104, 2 February 2017

⁷³ RoP, para. 44, 9 March 2017

⁷⁴ RoP, para. 46, 9 March 2017

trade unions and employers. Unions will have to make alternative arrangements to collect subscriptions and employers will have to calculate and agree with unions 'reasonable payments', as defined in the Act. At worst, the restrictions could result in the removal of check-off, if the conditions are not met. This would have practical implications for individuals in maintaining their union membership, and could even exclude certain groups of workers from membership altogether. Ultimately, it could impact on the density of union membership, which we have heard would hinder unions' ability to operate effectively as social partners.

123. In recognising the valuable role of trade unions within the workplace and as social partners, employers are, in some cases, seeking to increase union membership. We are concerned that the restrictions on check-off could introduce unnecessary barriers to participation and frustrate this aim.

124. In view of the above, 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.

05. Disapplication of regulations about facility time to devolved Welsh authorities

Background

125. Section 13 of the 2016 Act gives Ministers of the Crown power, by regulations, to require public sector employers to publish information relating to facility time spent by relevant trade union officials.

126. Section 14 provides power for the Secretary of State to cap 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.

127. Section 1(3) of the Bill would disapply regulations about facility time from affecting devolved Welsh authorities.

128. 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”.⁷⁵ It goes on to list the “established benefits” of facility time as 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.⁷⁶

129. 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.”⁷⁷

130. The Explanatory Notes to the UK TU Bill stated 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”.⁷⁸

131. During the passage of the UK Government’s Bill through Parliament, the UK Government pointed to considerable savings made following the introduction of reporting arrangements on facility time in Civil Service departments and stated it was “confident” that provisions relating to facility time would “deliver efficiency savings”.⁷⁹

132. In the RIA accompanying the Welsh Government’s Bill, the Cabinet Secretary acknowledges the above and states:

⁷⁵ EM, para. 3.12

⁷⁶ EM, para. 3.12

⁷⁷ EM, para. 3.13

⁷⁸ Explanatory Notes to UK Government’s Trade Union Bill, published July 2015

⁷⁹ House of Commons, Public Bill Committee, 22 October 2015, Col [343-345]

“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.”⁸⁰

Evidence from respondents

133. There was strong support in evidence for section 1(3) of the Bill. Respondents including those representing public sector employers reported that facility time was key to good industrial relations and supported the social partnership approach in Wales. As such, they were concerned that any reduction in the amount of facility time available as a result of the provisions would have a detrimental effect on these and, ultimately, on the delivery of public services.

134. A number of respondents explained the purpose of facility time and how it was used within public sector organisations in Wales.

135. Wales TUC Cymru stated:

“The ability of elected workplace union officials in the Welsh public sector to properly represent their members is in the interests of the effective delivery of Welsh public services in social partnership. This time is invested in the discharge of serious responsibilities including negotiating for fair pay and conditions, raising safety standards, promoting learning and equality as well as supporting members in grievance and disciplinary hearings. The ability to attend training in order to carry out this role effectively is also essential.”⁸¹

136. UNISON explained that facility time allowed trade union representatives to undertake “core duties”, which included those related to collective bargaining on issues such as terms and conditions of employment; redundancies; job evaluation; family friendly policies; discipline; as well as individual representation.⁸²

137. The Welsh NHS Confederation and NHS Wales Employers stated:

“Trade union representatives provide a vital role in developing and working with NHS workplace policies and procedures. They support staff and their members with mediation and navigation through policies and workplace issues which supports the smooth running of the service.”⁸³

138. In recognising that facility time was “fundamental” for partnership working, the Welsh Ambulance Service reported it would be reviewing facility time agreements with a view to increasing time available. This would ensure that trade unions were able to engage in the ongoing transformational change within the Service.⁸⁴

⁸⁰ EM, para 8.35

⁸¹ Written evidence, TUB 03

⁸² Written evidence, TUB 14

⁸³ Written evidence, TUB 08

⁸⁴ RoP, para. 58, 1 March 2017

139. Abertawe Bro Morgannwg University Health Board also reported that it was working with trade unions to identify how to increase paid facility time, given that the Board was “asking for more and more input [from unions]”.⁸⁵

140. The WLGA emphasised the importance of facility time, which it considered “a way of having a dialogue at a local level that allows us, at the local level, to test some of the ideas that councillors and officers are coming up with”. It reported that this was a means of testing “some of the more controversial issues” at an early stage.⁸⁶

Benefits of facility time

141. Respondents emphasised the benefits of facility time for both employees and employers with several reporting that the benefits outweighed the cost.

142. UNISON reported that facility time “improves industrial relations, productivity and efficiency”:

“[Staff] turnover is three times higher in non-unionised workplaces compared to unionised workplaces. Unionised workplaces are safer; they report less work-related injuries and illnesses. There is an obvious cost-benefit as a result of these factors.”⁸⁷

143. Similar points were raised by GMB who stated that facility time “brings benefits to workplace industrial relations, including the reduction in the number of cases proceeding to an employment tribunal, lower absenteeism and turnover rates and higher productivity levels”.⁸⁸

144. Wales TUC Cymru cited the 2007 review of the then UK Government’s Department for Business, Enterprise & Regulatory Reform into the cost of union representatives and the benefits accrued. The review found that facility time gave rise to significant savings to employers and to the government.

145. By way of example:

- Workplace-related injuries were lower in unionised workplace with union representatives resulting in savings to employers of £126-371 million per annum;
- Workplace-related illnesses were lower in unionised workplace with union representatives resulting in savings to employers of £45-207 million per annum;
- Employment tribunal cases were lower in unionised workplace with union representatives resulting in savings to government of £22-43 million per annum;
- Dismissal rates were lower in unionised workplace with union representatives resulting in savings related to recruitment costs of £107-213 million per annum; and
- Voluntary exit rates were lower in unionised workplace with union representatives resulting in savings related to recruitment costs of £72-143 million per annum.⁸⁹

146. The Welsh NHS Confederation and NHS Wales Employers stated:

⁸⁵ RoP, para. 61, 1 March 2017

⁸⁶ RoP, para. 217, 16 February 2017

⁸⁷ Written evidence, TUB 14

⁸⁸ Written evidence, TUB 06

⁸⁹ Written evidence, TUB 03

“Facilities time provides significant benefits to industrial relations, as well providing savings and benefits to organisations and the service as a whole.”⁹⁰

Publication of information

147. In general, respondents recognised the need for public sector organisations to be open and transparent in the use of public resources. However, they did not believe that the publication requirement in the 2016 Act was an appropriate way to achieve this. There was general concern that reporting on the cost of facility time without providing any context or information on corresponding benefit, would be misleading and unhelpful. Respondents also highlighted the significant amount of unpaid trade union work undertaken by representatives outside of their day job.

148. A few representatives of trade unions questioned the UK Government’s motivation for introducing the requirement, with GMB stating:

“The [UK] Government seems to think that an excessive amount from the public purse is being spent on [facility] time, but it has not provided any evidence to support the case for change.”⁹¹

149. The SWU stated:

“...whilst its apparent aim is to reduce the ‘cost to the tax payer’ for work that is undertaken for union business, it can also be seen as an attack on the trade union movement as a whole.”⁹²

150. In commenting on the need for transparency, the WLGA stated that it was not against the publication of information on facility time in principle.⁹³ However, it stated:

“Without a thorough understanding and insight into the issues and challenges that authority is facing, some of which will be confidential and sensitive, it would be impossible to compare [information] on a fair and consistent basis, and therefore it will not be in the public interest.”⁹⁴

151. By way of example, the WLGA reported that, in England, local authorities were already required to publish facility time agreements under the terms of the Local Government Transparency Code 2014. According to the WLGA, there were some unexpected anomalies within the figures that were most likely due to different accounting procedures. It went on to report that there was no common framework to account for facility time in local government in Wales, which would make it difficult to compare figures.⁹⁵

152. Wales TUC Cymru stated it was “in no way afraid of transparency”.⁹⁶ However, it asserted that the requirement in the 2016 Act was “about disregarding the benefits and, very specifically trying to identify costs”,⁹⁷ which “distorts the information”.⁹⁸ It stated that “the perception that facility time is

⁹⁰ Written evidence, TUB 08

⁹¹ Written evidence, TUB 06

⁹² Written evidence, TUB 02

⁹³ RoP, para. 234, 16 February 2017

⁹⁴ Written evidence, TUB 10

⁹⁵ RoP, para. 234, 16 February 2017

⁹⁶ RoP, para. 496, 16 February 2017

⁹⁷ RoP, para. 497, 16 February 2017

just a cost comes from a perspective of trying to prevent trade union activism, trade union engagement and social partnership”.⁹⁹

153. While the RCN supported the principle of transparency and the need to ensure value for money in the NHS, it raised concern that issues such as the cost of facility time could lead to the NHS being used as “a political football” and would detract from the “real challenges” around service delivery.¹⁰⁰

154. Linked to the above, UNISON stated:

“Without the removal of this provision, future focus will likely be on the cost of ‘tax-payer funded’ facility time and will not consider the importance of facility time, the right of workers to be properly represented by their recognised trade union, or the wider benefits workplaces with facility time agreements experience.”¹⁰¹

155. A number of respondents, including representatives of the Welsh NHS Confederation and NHS Wales Employers highlighted that, as well as failing to capture the benefits of facility time, the information published under the 2016 Act requirement would not take account of the additional, unpaid work undertaken by union representatives. According to GMB, across the UK public sector, this figure was up to 100,000 hours.¹⁰²

156. Wales TUC Cymru stated:

“What isn’t then produced is the amount of time that representatives spend over and above their standard working hours, which they do on a regular basis. That isn’t recorded, and the employer is then getting the benefit of a trade union representative working more hours than they pay them to work, for the benefit of the employer as well as the trade union members.”¹⁰³

157. When questioned by the Committee, representatives of public sector organisations were unable to provide detailed information on the amount or cost of facility time taken by trade union representatives. However, a few, including Mid and West Wales Fire and Rescue Service and Cwm Taf University Health Board were able to give an indication of the number of trade union staff or full-time equivalents within their organisations.¹⁰⁴

158. RCN reported that it had “12 whole time equivalents of staff” representing 25,000 members across every NHS organisation in Wales.¹⁰⁵ It reported that the cost of this was “recognised as money well spent in terms of engendering a culture of partnership and co-operation in a service that is really complex and dealing with extremely challenging issues”.¹⁰⁶

⁹⁸ RoP, para. 510, 16 February 2017

⁹⁹ RoP, para. 498, 16 February 2017

¹⁰⁰ RoP, para. 421, 16 February 2017

¹⁰¹ Written evidence, TUB 14

¹⁰² Written evidence, TUB 06

¹⁰³ RoP, para. 514, 16 February 2017

¹⁰⁴ RoP, para. 213 and para. 62, 1 March 2017

¹⁰⁵ RoP, para. 407, 16 February 2017

¹⁰⁶ RoP, para. 407, 16 February 2017

159. Although the WLGA was unable to provide detailed information on facility time taken, it emphasised that “internal processes...together with scrutiny arrangements provide robust opportunity to ensure that facility agreements are fair and reasonable in the context of each authority”.¹⁰⁷

160. A few respondents, including the Wales Fire and Rescue Services and the Universities and Colleges Employers Association suggested that the publication requirement in the 2016 Act could create an additional administrative burden on public sector employers.¹⁰⁸

161. Linked to the above, Cwm Taf University Health Board raised concerns that establishing a “bureaucratic mechanism” to record the information needed to meet the publication requirement would “undermine the relationship of trust [between employers and unions]” and would also take up staff time.¹⁰⁹

162. Velindre NHS Trust made a similar point stating:

“...we would have to set up a significant mechanism to capture that [information], which is then distracting people from what they should be achieving in that time. So, it is...actually about spending time on the things that add value for the trade union rep, and for us as an organisation.”¹¹⁰

Reserve power to limit facility time

163. Both GMB and Wales TUC Cymru strongly opposed the reserve power of the Ministers of the Crown provided in the 2016 Act to cap employers’ spending on and to restrict the rights of union representatives to facility time.

164. GMB stated:

“It is a grave concern that the [UK] Government wishes to provide itself with a reserve power to intervene in agreements reached consensually by other parties, and it cannot be in the interests of positive industrial relations in Welsh public services for those powers to be enforced here.”¹¹¹

165. Wales TUC Cymru stated:

“Let’s be clear: these are UK Government Ministers acting throughout the devolved public services of Wales. We elect our Assembly Members and the Welsh Government to deliver our public services, and they have agreed to deliver that on the basis of social partnership. It’s absolutely undemocratic for a UK Minister to decide to cap [facility time] and prevent it.”¹¹²

166. While other respondents did not refer specifically to the reserve power, they raised concern about, or were opposed to, potential limits on facility time.

¹⁰⁷ Written evidence, TUB 10

¹⁰⁸ RoP, para. 190-191, 1 March and Written evidence, TUB 13

¹⁰⁹ RoP, para. 70, 1 March 2017

¹¹⁰ RoP, para. 79, 1 March 2017

¹¹¹ Written evidence, TUB 06

¹¹² RoP, para. 502, 16 February 2017

167. A number of respondents emphasised that the amount of facility time taken by trade union representatives should be a matter for employers and trade unions and referred to the specific procedures in place within their organisations for agreeing facility time.

168. Wales TUC Cymru explained that, in the public sector in Wales, “employers reach agreement with unions over the degree of paid release from work appropriate for elected [representatives] to deliver social partnership”. It went on to emphasise that “the key issue is that facility time is a voluntary agreement between employer and union which identifies arrangements appropriate to the needs of specific workplaces and specific services”.¹¹³

169. The Welsh NHS Confederation and NHS Wales Employers had an “agreed key principles framework” for facility time in place, which “meets the needs of the service and supports our approach to social partnership”. As such, they suggested that the requirements in the 2016 Act were “[not] necessary or appropriate”.¹¹⁴

170. The WLGA explained that “different authorities have different facilities agreements” and believed that they “should be free to develop a facilities agreement that suits the need of the authority”. It went on to emphasise that it “[did] not support a top down, one size fits all approach that would impose requirements on individual local authorities”.¹¹⁵

171. Similarly, Flintshire County Council believed that “Facilities Agreements should be flexible, subject to local agreement, and are best based on recommended practice without requiring the imposition of law”.¹¹⁶

172. Linked to the above, the BMA Cymru Wales stated that the reserve power was “an unnecessary and unfair intrusion into the activities of trade unions that are legitimately representing the rights of their members”.¹¹⁷

Impact of the 2016 Act on social partnership and public service delivery

173. A number of respondents raised concerns that limiting facility time would impact on the ability of trade union representatives to carry out their duties effectively. Accordingly, they believed this would erode partnership working, lead to the potential escalation of disputes and, ultimately impact on the delivery of public services.

174. According to the WLGA, facility time was “essential” in enabling “mature conversations” between partners. As such, if it were restricted “the industrial relations landscape in Wales would change totally”.¹¹⁸

175. GMB stated:

“These proposals [in the 2016 Act] would hinder trade unions in preventing disputes arising in the first place and then to deal with them effectively to avoid

¹¹³ Written evidence, TUB 03

¹¹⁴ Written evidence, TUB 08

¹¹⁵ Written evidence, TUB 10

¹¹⁶ Written evidence, TUB 07A

¹¹⁷ Written evidence, TUB 04

¹¹⁸ RoP, para. 220, 16 February 2017

escalation. It cannot be in the interest of the successful tripartite approach to industrial relations in Wales for these proposals to be introduced.”¹¹⁹

176. RCN stated:

“The bulk of the work that the paid [union representatives] would undertake would be supporting the partnership agenda...So, inevitably, if there’s perceived to be an attack on facilities time, yes, it would have an impact in terms of partnership working, undoubtedly.”¹²⁰

177. It went on to emphasise that union representatives spend their paid facility time “engaging in work streams that are set up by the health boards to try and tackle the problems that we’re facing, and to move things forward”.¹²¹

178. The SoR stated:

“The concept of ensuring industrial relations issues are resolved closest to the people affected by them is a fundamental cornerstone of the partnership approach to good industrial relations. Time off for local representatives is therefore sensible, efficient and cost-effective. It ensures disputes are settled promptly without the need for escalation. Restricting facility time would damage this approach immeasurably. Conflict would inevitably increase and harm the partnership approach embedded within NHS Wales.”¹²²

179. In particular, the SoR raised concern about the impact of any restrictions on the work of Health and Safety Representatives and Union Learning Representatives. It reported that representatives “deliver significant savings to the NHS as we share the responsibility for ensuring members are working safely and able to maintain their professional registration”.¹²³

180. BMA Cymru Wales also provided a specific example of how limiting facility time may impact on partnership working. It raised concern that restrictions on facility time could impact on BMA members who are elected as representatives on Local Negotiating Committees, which would be “hugely detrimental”.¹²⁴

181. Wales TUC Cymru explained that the role of union representatives “has a major beneficial impact on the delivery of safer and better public services” and that their ability to represent members “is in the interest of the effective delivery of Welsh public services in social partnership.” It gave a specific example of the potential impact of limiting facility time on the safety of firefighters.¹²⁵

Evidence from the Cabinet Secretary

182. In explaining the need to disapply the provisions in the 2016 Act relating to facility time, the Cabinet Secretary stated:

¹¹⁹ Written evidence, TUB 06

¹²⁰ RoP, para. 387, 16 February 2017

¹²¹ RoP, para. 387, 16 February 2017

¹²² Written evidence, TUB 11

¹²³ Written evidence, TUB 11

¹²⁴ Written evidence, TUB 04

¹²⁵ Written evidence, TUB 03

“I don’t think we can be under any illusion about what the purpose of the facility time restrictions are in the [2016 Act]...[they] are there to reduce the amount of facility time available to trade union representatives, as though facility time were only a cost on the public purse...Facility time is a very valuable tool for employers as well as employees, and attempting artificially to cut down on it will make the conduct of industrial relations and the social partnership model more difficult, not easier.”¹²⁶

183. In commenting on the UK Government’s assertion that publishing information on facility time will improve transparency and public scrutiny, the Cabinet Secretary stated:

“...this is not, as sometimes it is portrayed, a sort of thirst for knowledge, in which UK Government Ministers are simply wishing to put information into the public domain. Their intention was clear—that it was to try to reduce the amount of time that trade union officials would have at their disposal to carry out that very important industrial relations work...”¹²⁷

184. He also stated:

“The problem is not a problem of transparency...because this information is available for anybody who wants it.”¹²⁸

185. The Cabinet Secretary later clarified:

“...capturing the paid facility time I believe is not a difficulty for employers, and a simple freedom of information request would produce that for any citizen who wanted to see it. Capturing the contribution of that much wider number of volunteers who carry out duties on behalf of trade unions, and contribute in the way that trade unions do, would be harder.”¹²⁹

186. He opposed the reporting requirement in the 2016 Act on the basis that it would provide “partial and distorted reporting of facility time”. While the Act required the reporting of facility time costs, there was “no obligation at all to make any assessment of the benefits that have been derived from it”. He added, that “it provides a distorted account of the way that proper industrial relations are conducted” and would be “misleading to the public”.¹³⁰

187. On the benefits of facility time, the Cabinet Secretary stated:

“...the record shows that when you have effective trade union representation, it works for the benefit of employers and the public services, and therefore the people who use those public services, just as much as it does for trade unions.”¹³¹

¹²⁶ RoP, para. 39, 2 February 2017

¹²⁷ RoP, para. 70, 2 February 2017

¹²⁸ RoP, para. 130, 2 February 2017

¹²⁹ RoP, para. 59, 9 March 2017

¹³⁰ RoP, para. 130, 2 February 2017

¹³¹ RoP, para. 171, 2 February 2017

188. He provided several examples of what he believed to be the benefits of facility time, including reductions in employment tribunals, days lost to work injury, loss of time through illness, dismissals and loss of people with scarce skills.¹³²

189. The Cabinet Secretary subsequently added:

“The UK Government’s Act is an attempt to suppress all of that information, to pretend that all the benefits that go with trade union membership for public services don’t exist. We have an opportunity in our Bill both to ensure that that way of thinking doesn’t undermine our public services social partnership model here in Wales, but also to allow for some promotion of the positive benefits of the way that we do things here in Wales, both for individuals who might be members of trade unions but, essentially, for our model of the way in which that membership translates into improved public services, reduced risks of industrial action and disruption. We think we can demonstrate that from the history of the period of devolution.”¹³³

Our view

190. We acknowledge the suggestion in evidence that the UK Government’s objective in legislating on facility time is to ensure a reduction in facility time in the longer term. We also acknowledge that this would be in direct conflict with the Welsh Government’s approach to managing industrial relations through the social partnership model, which we have heard is working effectively in Wales.

191. Access to adequate facility time is essential to enable trade union representatives to carry out their duties, which they are entitled to do in line with the arrangements set out in the 1992 Act. We heard strong evidence that as well as undertaking duties around individual representation and collective bargaining, unions are engaging in the wider public services improvement agenda and that public sector employers value this wider role. We were told about the significant number of unpaid hours given to union work by trade union representatives.

192. We also heard compelling evidence about the benefits of facility time, not only to trade unions and their members, but to public sector organisations. We believe it is important to ensure that employees are aware of these benefits to help them make an informed decision about whether to join trade unions and that the general public has some understanding of these realities. We heard that the benefits associated with facility time can give rise to significant cost-savings. As such, we are in no doubt that facility time is a prudent investment in public services and we believe it should be viewed as such. If trade unions are to continue to operate effectively as social partners and to contribute to the improvement agenda, then the existing arrangements for agreeing facility time must be safeguarded.

193. We share the concern raised in evidence about the risks associated with publishing crude data on the amount and cost of facility time taken without corresponding information on the benefits. We fail to see how this would be in the interests of the public or of partnership working.

194. We note that respondents were able to provide limited information on the amount of facility time taken by union representatives within their respective organisations and were unable to provide specific details of the associated cost. We understand that information on the number and cost of

¹³² RoP, para. 121-122, 2 February 2017

¹³³ RoP, para. 75, 9 March 2017

full-time equivalents within public sector organisations could be collated and made available, should it prove necessary. However, collating detailed information on employees who only spend a proportion of their time on union duties would be problematic in practical terms, and potentially costly. In view of this, we believe that the requirement in the 2016 Act to publish information about facility time would create unnecessary red tape and would place a financial burden on public sector employers.

195. 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.

196. 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.

197. We strongly oppose the reserve power for Ministers of the Crown provided in the 2016 Act to cap the cost of facility time and restrict the amount of facility time available to union representatives. We believe it is neither appropriate nor desirable for such a power to be provided to, or exercised by the UK Government in relation to devolved services in Wales. Any reduction in facility time would undoubtedly hinder trade unions' ability to function effectively and would interfere with the ability of employers to provide good human resource management. Further, in our view, a reduction in facility time would be to the detriment of the social partnership and, ultimately to the continued delivery and improvement of public services in Wales.

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

06. Disapplication of 40 % support threshold for industrial action affecting ‘important public services’

Background

199. Section 3 of the 2016 Act amends section 226 of the 1992 Act so as to provide that 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.

200. On 1 March 2017, the regulations defining ‘important public services’ came into force and now apply in Wales.

201. 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’ may not include services provided by devolved Welsh authorities.

202. 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”.¹³⁴

203. The cost savings contained in the UK Government’s RIA were used as a basis for the figures in the Welsh Government’s RIA. The Welsh Government’s RIA provides associated costs for disapplying the 40% ballot threshold requirement as less than £85,000 per annum. This is based on the estimated net impact of an increase in working days lost to industrial action.

Evidence from respondents

204. There was widespread support in evidence for section 1(4) of the Bill. Respondents believed that the threshold was, amongst other things, “inappropriate and unfounded”,¹³⁵ “arbitrary and cumbersome”,¹³⁶ and “unnecessary and unreasonable”.¹³⁷ However, Betsi Cadwaladr University Health Board stated that, in its view, the threshold did not seem unreasonable. It went on to suggest that further consideration should be given to disapplying the threshold.¹³⁸

205. The majority of respondents strongly objected to imposing the threshold in Wales on the basis that it undermined the right of workers to strike; it was discriminatory; would undermine the social

¹³⁴ EM, para. 311

¹³⁵ Written evidence, TUB 04

¹³⁶ Written evidence, TUB 09

¹³⁷ Written evidence, TUB 02

¹³⁸ Written evidence, TUB 18

partnership approach; damage industrial relations; and impact on service delivery. These issues are explored in more detail in the remainder of this chapter.

Right for individuals to take strike action as a last resort

206. A number of respondents opposed the ballot threshold requirements in the 2016 Act, in particular the 40% support threshold, on the basis that it impinged on an individual’s fundamental right to take industrial action. This right is set out in Article 11 of the European Union’s Convention on Human Rights:

207. GMB stated:

“The right to strike is an essential human right and an integral feature of a free and democratic society. It is unclear as to what problem the Act seeks to solve. The number of days lost to industrial action are at an historic low...these thresholds represent an unjustified and disproportionate restriction on the right to strike and that...will inevitably damage industrial relations within Welsh public service areas.”¹³⁹

208. UNISON and the WLGA also pointed out that strike action within the public sector in Wales was at its lowest for years.¹⁴⁰

209. The Welsh NHS Confederation and NHS Wales Employers explained that “strike action in the NHS in Wales over the last decade has been minimal, despite considerable organisational change and the introduction of significant changes to NHS contracts terms and conditions”.¹⁴¹

210. Both the RCN and SWU reported that their respective organisations had never been involved in strike action. However, they argued strongly that their members should retain the right to strike.¹⁴²

211. The SWU stated:

“Our service users are the most important people, but we want to reserve the right, as a last resort, to take action as necessary, in the same way as any other employee should be able to in this country.”¹⁴³

212. Notwithstanding the above, it suggested that imposing the 40% support threshold could potentially “make [union] members even more inclined towards militancy”.¹⁴⁴

213. Other respondents emphasised that their members would not undertake any form of industrial action lightly and that strike action was used as a last resort.

214. RCN explained that it had “severe restrictions in terms of what industrial action we can take.” It strongly refuted the UK Government’s assertion that unions take strike action without a strong democratic mandate from their members.¹⁴⁵

215. Similar points were made by Wales TUC Cymru.¹⁴⁶

¹³⁹ Written evidence, TUB 06

¹⁴⁰ Written evidence, TUB 14 and TUB 10

¹⁴¹ Written evidence, TUB 08

¹⁴² Written evidence, TUB 01 and TUB 02

¹⁴³ RoP, para. 426, 16 February 2017

¹⁴⁴ RoP, para. 426, 16 February 2017

¹⁴⁵ RoP, para. 427, 16 February 2017

‘Important public services’

216. Several respondents, including Wales TUC Cymru, RCN and UNISON raised concerns that the 40% ballot threshold requirement unfairly discriminated against workers in the public sector and in specific services within the sector. Some also pointed out that the threshold would have a disproportionate impact on women.

217. On the issue of the ‘important public services’ that would be subject to the 40% threshold, the WLGA “[did] not recognise the distinction between ‘health, education, fire and transport service’ and the other services provided by local authorities”. It believed that “all public services are important” and “[did] not recognise the need to differentiate between these services for ballot purposes”.¹⁴⁷

218. When questioned about whether a threshold should be imposed for those services where strike action could potentially impact on the public’s health and safety, the WLGA stated:

“...in a democratic society there are trade-offs aren’t there? It’s the right to strike versus the inconvenience to the public, and I think, from our point of view, what we want to make sure is that people don’t go on strike, and I think we have a system in Wales that, with a few exceptions...minimises the amount of days taken in terms of strike action.”¹⁴⁸

219. Wales TUC Cymru referred to the threshold as “discriminatory”, stating:

“[it] present[s] a clear disadvantage for workers in these services as compared with those on other parts of the public sector and those working in the private sector...Women will also be disproportionately affected by the UK threshold as the majority of union members working in the services concerned are female.”¹⁴⁹

220. RCN and UNISON made similar points.¹⁵⁰

221. Wales TUC Cymru pointed out that the 2016 Act did not define ‘important public services’ and, as a result “the effect of the legislation is to flout international standards”. It reported that the Employment Law Association had warned that the imposition of these thresholds could be challenged on the basis that they infringe Article 11 of the European Convention on Human Rights.¹⁵¹

222. Wales TUC Cymru went on to raise concern that the 40% support threshold would create administrative difficulties when trying to identify members within the ‘important public services’ to whom the threshold would apply. By way of example, it explained:

“It’s the administrative nightmare of trying to deliver the definition of what ‘important public services’ are, and how you would identify which groups of members you are balloting. So, for example, a teacher who spends 40 per cent of their time on GCSE, and 40 per cent of their time on A-level, and the rest on an administrative function: the GCSE is an ‘important public service’ under the

¹⁴⁶ RoP, para. 540-542, 16 February 2017

¹⁴⁷ Written evidence, TUB 10

¹⁴⁸ RoP, para. 306, 16 February 2017

¹⁴⁹ Written evidence, TUB 03

¹⁵⁰ RoP, para. 427, 16 February and Written evidence TUB 14

¹⁵¹ Written evidence, TUB 03

Act, but the A-level is not. Would you ballot them under the [Act's] requirements?"¹⁵²

Comparable thresholds

223. Several respondents, including GMB, Wales TUC Cymru, ATL Cymru, the WLGA and BMA Cymru Wales pointed out that comparable thresholds were not in place for political elections or referenda, with some suggesting that the threshold was therefore unfair and even discriminatory.

224. On this issue, the WLGA emphasised the need to apply "a principled approach" and stated:

"...if we're going to talk about thresholds, let's be consistent and let's do it across all elements of the public sector. I think to apply it solely to the trade union ballot is unfair...if we apply these principles across the way that we deliver democracy in the UK, it would forbid people from standing for public office, almost."¹⁵³

225. UNISON asserted that the 40% threshold was "undemocratic and deeply unfair when no politician is expected to meet such a threshold, nor has any referendum been expected to adhere to a threshold".¹⁵⁴

226. The BMA Cymru Wales expressed a similar view and stated it seemed "odd that [the 40% support threshold] would be applied only to the public sector when, arguably, even bigger decisions were made in referenda on devolution [and] on Brexit" without the need to reach any such threshold.¹⁵⁵

227. On a related issue, a number of respondents, including Wales TUC Cymru, BMA Cymru Wales, Wales Fire and Rescue Services and GMB pointed out that, in applying the threshold, abstentions would be treated as "no" votes, which they objected to.

228. UNISON highlighted that, "in the UK political arena, an absent vote is not regarded as a negative one" and that "there may be a range of reasons why trade union members might not vote".¹⁵⁶

Impact of the 2016 Act on social partnership and public service delivery

229. Several respondents raised concerns that the 40% ballot threshold requirement would alter the balance between trade unions and other social partners, which would undermine the social partnership in Wales. As such, they strongly supported the provision in the Bill to disapply the threshold in Wales.

230. Wales TUC Cymru stated:

"By repealing the new draconian restrictions on [strike] action in devolved public services, the Bill protects the existing balance between employers and unions in the Welsh public sector."¹⁵⁷

¹⁵² RoP, para. 539, 16 February 2017

¹⁵³ RoP, para. 294, 16 February 2017

¹⁵⁴ Written evidence, TUB 14

¹⁵⁵ RoP, para. 439, 16 February 2017

¹⁵⁶ Written evidence, TUB 14

231. According to Wales TUC Cymru, this balance is “crucial” to meet the Welsh Government’s aim of ensuring the continued delivery of public services in Wales.¹⁵⁸

232. GMB stated that the “arbitrary thresholds” in the 2016 Act “will inevitably damage industrial relations within Welsh public service areas”, explaining:

“The ability of unions to collectively bargain is supported by the right to organise industrial action. That right also ensures that employers take the views of the workforce seriously and practice constructive industrial relations. The social partnership model operated within Welsh public services is dependent for its efficacy upon an equality of bargaining power between the stakeholders which would be unsettled by the application of the terms of the [2016 Act].”¹⁵⁹

233. There was general concern that the imposition of the threshold would change the way in which trade unions approach industrial relations, with some respondents specifically suggesting that it could lead to escalation and lengthening of disputes.

234. Some respondents suggested that the provision in the 2016 Act may lead to trade unions focussing their energy on achieving the ballot threshold rather than resolving disputes. Those representing trade unions also suggested that employers may be less inclined to negotiate until the outcome of the ballot.

235. While the Welsh NHS Confederation and NHS Wales Employers “recognised and understood” the rationale for the threshold requirements in the 2016 Act, it raised concerns that they “may have unintended consequences on the conduct of industrial relations”:

“The requirement to reach both a 50% turnout and a 40% threshold may lead to trade unions concentrating more on tactical aspects of the management of a dispute e.g. targeting turnout in areas where support for strike action may be higher, rather than working with managers and employers (such as Local Health Boards and Trusts) to reach a resolution.”¹⁶⁰

236. Wales Fire and Rescue Services suggested that “unions may be forced to approach industrial action in a different way and issue more focussed ballots to specific locations or key job categories, where these would be more likely to meet the threshold”. It also suggested that unions “may be forced to spend more time and resource to bolster turnout and support than seeking settlement of disputes with the employer”.¹⁶¹

237. Wales TUC Cymru stated:

“The increased threshold may also have the effect of prolonging and escalating disputes in Welsh public services as unions take more time ahead of ballots in order to meet the threshold. At the same time, employers will have less of an incentive to move towards a solution and may increasingly choose to wait to

¹⁵⁷ Written evidence, TUB 03

¹⁵⁸ Written evidence, TUB 03

¹⁵⁹ Written evidence, TUB 06

¹⁶⁰ Written evidence, TUB 08

¹⁶¹ Written evidence, TUB 05

see if the additional threshold can be met. The effect will be to polarise the parties involved, making swift and amicable resolution more difficult to achieve.”¹⁶²

238. GMB expressed a similar view.¹⁶³

239. The Association of School and College Leaders (ASCL) Cymru did not explicitly support or oppose the provision in the Bill to disply the 40% support threshold. It highlighted concerns about the potential “unintended consequences” for education services:

“...there could arise a situation where a relatively small section of the staff (who are members of a single union), in pursuit of a legitimate outcome could adversely affect the education of all the children within the school.

School leaders could be placed in the unenviable position of having to take a decision whether it is safe to keep a school open... [We] wish to make it clear that the effects of any industrial action at a school have complex and far-reaching consequences that may impact upon the educational progress of our young people.”¹⁶⁴

240. Betsi Cadwaladr University Health Board stated:

“We understand the rationale behind [the 40%ballot threshold requirement] and what it is seeking to achieve in ensuring that “important public services” are maintained without disruption. At the same time, we value social partnership and the need to ensure that all parties remain solution focussed and work together to resolve any disputes which may arise.”¹⁶⁵

241. It went on to suggest that further consideration should be given to disapplying the additional ballot threshold:

“There is a balance between employers maintaining their duty to provide continuity of service to their local populations and ensuring good industrial relations which in itself, ensures the smooth running of NHS organisations. We suggest that further consideration is given to this matter, to ensure that the outcome is proportionate.”¹⁶⁶

Financial implications

242. Wales TUC Cymru and the Welsh NHS Confederation and NHS Employers Wales questioned the Welsh Government’s cost estimate of £85,000 for disapplying the 40% ballot threshold requirement.

243. Wales TUC Cymru disputed the cost savings contained in the UK Government’s RIA. It argued that the 40% threshold “risks provoking longer industrial action and more unresolved unrest in Welsh

¹⁶² Written evidence, TUB 03

¹⁶³ Written evidence, TUB 06

¹⁶⁴ Written evidence, TUB 17

¹⁶⁵ Written evidence, TUB 18

¹⁶⁶ Written evidence, TUB 18

public services”, which would “incur greater costs to the public rather than savings”. As such, it also disputed the Welsh Government’s cost estimate of £85,000 for disapplying the 40% threshold.¹⁶⁷

244. The Welsh NHS Confederation and NHS Wales Employers queried how the £85,000 had been calculated for Wales and suggested that the figure may have been underestimated:

“Whilst the level of industrial action within NHS Wales has been low in recent years, when it has occurred and we have had to recover lost activity through overtime and waiting list initiatives, this has resulted in significant costs to the NHS. Whilst we haven’t been able to provide an amount for this, it is our judgement that the costs will be in excess of £85,000 within the NHS alone.”¹⁶⁸

Evidence from the Cabinet Secretary

245. According to the Cabinet Secretary, the 40% ballot threshold requirement was “arbitrary”, “impacts on the democratic rights of workers” and was “the antithesis of social partnership”.¹⁶⁹

246. He stated that the threshold was “designed to make legitimate industrial action much, much more difficult”, which was “counter-productive, and it risks leading to longer-running other forms of protest that would, in fact, be even more damaging to services and to people”.¹⁷⁰

247. The Cabinet Secretary added:

“...if people find that courses of action that are fair and which they have a right to pursue are being closed off to them, then I think that will have perverse and unintended consequences.”

[...]

“Our view is that when you have an adversarial approach built into the way that industrial relations are conducted—and that’s what the UK Government Act does; it makes those relations more adversarial—that that is more likely to lead to poor industrial relations. That is more likely to lead to strikes. We think that the investment we make through the social partnership model, in avoiding those outcomes, is best secured by our Bill, and the costs will be lower, not higher, as a result.”¹⁷¹

248. In commenting on the differing views in evidence about the cost estimate of disapplying the threshold, he stated:

“...inevitably, when you are dealing with hypothetical costs, everybody is making an estimate of what they think might happen in the absence of concrete experience about it.”¹⁷²

¹⁶⁷ Written evidence, TUB 03

¹⁶⁸ Written evidence, TUB 08

¹⁶⁹ RoP, para. 38, 2 February 2017

¹⁷⁰ RoP, para. 152, 2 February 2017

¹⁷¹ RoP, para. 153-157, 2 February 2017

¹⁷² RoP, para. 101, 9 March 2017

Our view

249. We note that the UK Government's stated intention in introducing the ballot threshold requirements in the 2016 Act is to minimise industrial action to protect public services. It is clear to us that the UK Government and the Welsh Government have adopted very different approaches to industrial relations, with the Welsh Government choosing to work in partnership with trade unions and employers to ensure the continued delivery and improvement of public services in Wales. The UK Government's solution to minimising industrial action is by making it more difficult for workers to exercise their legitimate right to take action. We do not believe that this same solution is necessary or appropriate in Wales.

250. We question why the UK Government believes it is appropriate or fair to single out trade unions for such stringent ballot thresholds when comparable thresholds are not in place for political elections or referenda.

251. It is clear to us that the crux of any successful partnership is a balance between partners, and this was confirmed by the evidence we received. We heard that the additional 40% ballot threshold requirement in the 2016 Act will, undoubtedly, undermine the ability of trade unions to engage with employers as equal partners. We acknowledge that the right to undertake industrial action is an important element in the principle of collective bargaining. Without this right, or in the case of the 2016 Act, where this right is inhibited by means of the additional ballot threshold, it will be much more difficult for unions to bargain on behalf of their members collectively. We do not believe this to be in the best interest of partnership working or the wider public service delivery and improvement agenda.

252. 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.

253. 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.

07. Prohibition of the use of agency workers as cover during industrial action

254. Currently, employers are prohibited from deploying agency workers as cover during industrial action through regulation 7 of the Conduct of Employment Agencies and Employment Businesses Regulations 2003 (‘regulation 7’). The UK Government consulted on proposals to revoke these Regulations. If these proposals were implemented and the Regulations were revoked in Wales it would enable employers to use agency workers as cover during industrial action.

255. In his legislative statement on the Bill, the Cabinet Secretary reported that he was considering amending the Bill to include provisions to prohibit the use of agency workers as cover during industrial action.

Evidence from respondents

256. The majority of those respondents who commented supported continuing the current prohibition on the use of agency workers as cover during industrial action. While the WLGA reported that, as yet, it did not have a formal policy position on this issue, it “anticipated very clearly” that its Board would not want agency workers used in this way.¹⁷³

257. Reasons given by respondents in support of continuing the prohibition were that the use of agency workers would undermine the rights of workers to take industrial action; impact on industrial relations and potentially escalate disputes; and impact on the social partnership. Some respondents raised concern that using agency workers in this way, and in fact more generally, had implications for health and safety, particularly in health and education settings.

258. Wales TUC Cymru welcomed the Welsh Government’s intention to continue the current prohibition:

“The proposed change to regulation 7 of the UK Conduct of Employment Agencies and Employment Businesses Regulations 2003, while not part of the UK Trade Union Act itself, is nonetheless a significant part of the same agenda with the same detrimental impact on Welsh social partnership arrangements in the delivery of devolved public services in Wales.”¹⁷⁴

259. It also reported that the United Nations International Labour Organisation had raised “particular concerns about the impact [of revoking the regulations] on freedom of association and on UN conventions”.¹⁷⁵

260. RCN emphasised that the social partnership approach “is reinforced by workers having recourse to industrial action as a last resort”. It raised concern that the use of agency workers as cover during industrial action “would directly change the historical and legal basis of industrial disputes” and “it will no longer be that an employer has to seriously attempt to resolve a dispute in their workforce”.¹⁷⁶

¹⁷³ RoP, para. 310, 16 February 2017

¹⁷⁴ Written evidence, TUB 03

¹⁷⁵ Written evidence, TUB 03

¹⁷⁶ Written evidence, TUB 01A

261. ATL Cymru believed that revoking regulation 7 would “undermine the rights of hard-working public servants whose jobs may be threatened by the stretched circumstances schools and colleges find themselves in”. It raised concern that head teachers and principals would be pressurised to keep schools open during industrial action “despite the risk to children’s safety and there being a strong likelihood of the quality of public service being very hard to maintain.”¹⁷⁷

262. Linked to the above, Wales TUC Cymru suggested that agency workers used as cover during industrial action “would often not be familiar with procedures used in workplaces raising concerns over safety and quality of services”.¹⁷⁸ RCN expressed wider concerns about the use of agency staff in NHS Wales, particularly around clinical governance and continuity of care.¹⁷⁹

263. Following on from the above, the majority of respondents who commented on this issue, including the RCN, BMA Cymru Wales and Wales TUC Cymru pointed out that arrangements were in place with trade unions to ensure ‘life and limb’ cover during industrial action. There was general consensus that these were operating well.

264. In commenting on this, BMA Cymru Wales stated:

“...there are already safeguards which exist to protect certain essential services – e.g. agreements by employers, such as local authorities, regarding services which are regarded as “life and limb” ... We consider such arrangements already offer appropriate protection for the public without undermining the general right of public sector workers, including doctors, to strike.”¹⁸⁰

265. There were mixed views from respondents about whether the Welsh Government should use primary legislation to give effect to its intention to continue the current prohibition.

266. Wales TUC Cymru stated that prohibiting the use of agency workers as cover during industrial action was “a matter of fundamental principle” and, as such, specifically called for the Bill to be amended to address this issue.¹⁸¹ RCN took a more cautious view and stated that, while the use of agency workers was “an important matter of principle which deserves proper debate and scrutiny”, primary legislation should be used as a “last resort”.¹⁸²

267. BMA Cymru Wales stated it would support either the use of primary or secondary legislation but was less supportive of using the Agency Workers Procurement Framework as it would not cover clinical staff working within NHS Wales.¹⁸³

268. In their response to the Welsh Government’s consultation on the use of agency workers, the Welsh NHS Confederation and NHS Wales Employers expressed a preference for using guidance or Ministerial direction to ensure the prohibition continued.¹⁸⁴ However, subsequently, in evidence to the Committee, they reported that they would support the Bill being amended.¹⁸⁵

¹⁷⁷ Written evidence, TUB 09

¹⁷⁸ Written evidence, TUB 03

¹⁷⁹ RoP, para. 443, 16 February 2017

¹⁸⁰ Written evidence, TUB 04

¹⁸¹ Written evidence, TUB 03

¹⁸² Written evidence, TUB 01A

¹⁸³ Written evidence, TUB 04

¹⁸⁴ Written evidence, TUB 08A

¹⁸⁵ RoP, para. 132-133, 1 March 2017

Evidence from the Cabinet Secretary

269. When questioned 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”.¹⁸⁶

270. 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.

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

272. 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.”¹⁸⁷

273. The Cabinet Secretary outlined how he believed permitting agency workers to cover during industrial action would impact on the social partnership model in Wales:

“Anything that erodes the position of one side in that social partnership and that tilts the balance in favour of one partner against another, I think, undermines that fundamental principle of partnership. If the agency workers prohibition were to be overturned by a UK Government, then I think it would just make those relationships more difficult, and it would introduce resentment, potentially, between agency workers and full-time workers who are pursuing an industrial dispute with their employers. I just see it as creating a new series of potential areas of conflict that counteract the way we would like to do things here.”¹⁸⁸

274. On 27 March 2017, the Cabinet Secretary wrote 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 strike action on Welsh public authorities.¹⁸⁹

Our view

275. The Bill as introduced does not make provision to prohibit the use of agency workers as cover during industrial action and so we did not invite views on this issue as part of our general call for

¹⁸⁶ RoP, para. 97, 2 February 2017

¹⁸⁷ RoP, para. 121, 9 March 2017

¹⁸⁸ RoP, para. 119, 9 March 2017

¹⁸⁹ [Letter from the Cabinet Secretary for Finance and Local Government to the Chair of Equality, Local Government and Communities Committee, dated 27 March 2017](#)

evidence. However, following the Cabinet Secretary's announcement that he was considering amending the Bill to include such provision, we asked respondents who gave oral evidence for their views on this matter.

276. The social partnership in Wales has been built over many years and is valued and effective in the delivering public services. As previously stated, successful partnership working relies on a balance between partners. We have heard that lifting the current prohibition on the use of agency workers as cover during industrial action will have a similar effect as the additional 40% ballot threshold requirement. It will 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.

277. We note the differing views among respondents about whether the prohibition on the use of agency workers as cover during industrial action should be provided for in primary legislation and, in particular, in this Bill. We also note that it may be possible for the Welsh Government to achieve this intention by using powers in various pieces of existing legislation. Given that this is such a significant matter of policy, we believe it should be provided for by means of primary legislation. We believe this would strengthen the Bill and would be entirely consistent with its stated purpose and intended effect.

278. 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.