

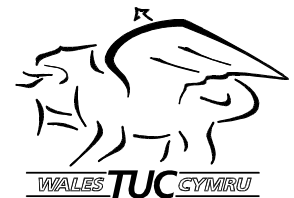
TUB 03

Bil yr Undebau Llafur (Cymru)

Trade Union (Wales) Bill

Ymateb gan: TUC Cymru

Response from: Wales TUC



National Assembly for Wales Equalities Local Government & Communities Committee scrutiny of the Trade Union (Wales) Bill

1. The Wales TUC

1.1 The Wales TUC is the collective voice of the Welsh trade union movement and is the largest democratic civic membership organisation in Wales. With over 50 affiliated trades unions representing around 400,000 workers across the public, private and third sectors, the Wales TUC represents the views of workers in communities across the whole of Wales. A constituent part of the British TUC, the Wales TUC has devolved responsibility for Welsh issues, including all matters within the remit of the National Assembly for Wales and the Welsh government.

1.2 Unions in Wales elect delegates to the Wales TUC Conference which decides on policy for Wales and itself elects the Wales TUC General Council to oversee the delivery of Welsh policy. The Wales TUC also delivers UK wide and international matters as part of the TUC.

1.3 The Wales TUC plays an integral role in the social partnership model of governance developed with the Welsh Government and employers in Wales. Our aim is to make Wales a fair work nation. We support the Trade Union Wales Bill ('the Bill') which will serve to protect the model of social partnership developed between unions, employers and the Welsh government by acting to repeal sections of the UK Trade Union Act 2016.

1.4 Our evidence will provide details of the social partnership approach in the devolved public services and the rationale for and benefits of disapplying sections of the UK Act as it specifically applies to these services. We have also been asked to include our associated response to the consultation on agency workers regulations and this is attached.

1.5 We recognise there has been some discussion regarding whether this Bill is within the competence of the National Assembly for Wales. We strongly believe that the content of the Bill, in dealing with aspects which specifically impact the provision of devolved public services, is firmly within competence. Indeed it is central to what Welsh voters elect Assembly Members to deliver. While the rest of this evidence does not deal with that matter we have attached for information the detailed legal opinion obtained by the Wales TUC in this regard.

2. Social Partnership

2.1 Welsh government is committed to working through social partnership to achieve the best possible outcomes for public services and the economy of Wales. Successive Wales TUC Conferences have democratically endorsed this approach for Welsh unions and agreed that the Wales TUC should fully participate in the relevant structures. We bring our specific workforce perspective and priorities to these partnership arrangements, as the employer and government representatives bring theirs.

2.2 The social partnership approach applies across the public services and the economic interests of Wales. The Council for Economic Development and the Social Partners Strategy Group fully engage partners in the whole range of government policies and interventions which impact the economy. Employer organisations - such as the CBI, EEF, IOD and FSB -work as equal partners with unions through the Wales TUC and with government ministers and officials. All sides see the benefit of a joint approach to addressing mutual problems by delivering a shared response.

2.3 The Workforce Partnership Council (WPC) carries out the same role in Welsh public services and is the structure most relevant to the Committee's considerations. The Wales TUC co-ordinates the WPC involvement of the elected representatives of trade unions with members in the public sector. Employers in the devolved public sector are equal partners and the tripartite approach is completed by the full participation of Welsh government ministers and officials. The WPC considers all Wales, cross sector matters and arrives at agreements and guidance as required. The partnership approach is also reflected in collective bargaining arrangements for the devolved public services (eg the NHS Partnership Forum and the Local Government JNC) where sector specific terms and conditions matters are dealt with in the context of relevant UK or Wales agreements.

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

2.5 True social partnership is not an easy process of superficial unanimous agreement - it is a hard, contested and robust process which deals with challenging issues to the satisfaction of the partners involved. There will be occasions where agreement is not possible but the partnership process exists to ensure that is a rare event, that all possible avenues are exhausted prior to any dispute occurring and that any dispute is speedily resolved.

2.6 To achieve a mutually beneficial agreement at the earliest possible stage, it is essential that a partnership of equals exists and one 'side' is not hamstrung in its ability pursue the interests of their constituency and to deal with the consequences of a failure to find agreement.

2.7 A good example of the social partnership approach is the (attached) WPC Partnership and Managing Change Agreement 2012 which remains in force. The agreement sets out the principles, process and method of working which should be adopted to manage change in a manner which promotes partnership and prevents conflict. It should be noted that the agreement concerns the fair delivery of change. Social partnership does not seek to block or delay change but rather deals with any necessary change fairly. It brings the expertise of the workforce to the table in designing effective systems of service delivery and ensuring any change benefits service users without disadvantaging employees.

As the agreement states;

'High quality public service delivery must be synonymous with high quality employment practice. The Social Partners agree to adopt the principle of good practice on service improvement, delivery and employment to underpin this Agreement.'

2.8 Trade unions have invested heavily in these structures with senior union employees - funded by membership subscriptions – dedicating their time and expertise to supporting positive social partnership. These resources are part of the democratic function of trade unions which also serve to significantly benefit the delivery and improvement of public services. Delivery of the social partnership approach relies heavily on the ability of unions to operate effectively at workplace level with members fully engaged in the democratic decision making process and the elected workplace representatives able to receive training to carry out their role and allowed sufficient time to carry out the representative function.

2.9 Sections 3, 13, 14 and 15 of the UK Trade Union Act 2016, undermine the ability of social partnership to function as these provisions; shift the balance towards the employer undermining equity between social partners; they restrict the ability of union members to have their views represented effectively at the workplace and they place significant barriers in the individual choice in and smooth administration of union membership.

2.10 In order to safeguard our social partnership approach, the Trade Union (Wales) Bill addresses these issues as they impact the devolved public services. The rest of this evidence covers the three significant aspects of the bill.

3. Strike action and the 40% ballot threshold

3.1 Strike action is the last resort if extensive negotiation has not achieved a fair agreement on matters crucial to workers and their families, including jobs, pay and conditions. By repealing the new draconian restrictions on such action in devolved public services, the Bill protects the existing balance between employers and unions in the Welsh public sector. This balance is crucial to 'recruiting, retaining, developing and empowering a stable and committed workforce' which the Bill's Explanatory Memorandum (EM) cites as 'essential' to the delivery of services to the people of Wales.

3.2 The Wales TUC supports the Bill's provision which removes the 40% ballot threshold for industrial action affecting 'important public services.' This arbitrary threshold will make it more difficult for many thousands of public sector workers to organise collectively in defence of their jobs, their livelihoods and the quality of their working lives.

3.3 The threshold is also discriminatory, presenting a clear disadvantage for workers in these services as compared with those in other parts of the public sector and those working in the private sector. The right to strike is a fundamental human right which should be enjoyed equally by all working people regardless of their job and whether they work in the private or public sector. Women will also be disproportionately affected by the UK threshold as the majority of union members working in the services concerned are female.

3.4 The UK Act's 40% threshold provision also fails to define the term 'important public services' or its rationale and instead lists the areas to be covered. As a result the effect of the legislation is to flout international standards. The Employment Law Association (ELA) warned against specific thresholds for services not covered by the International Labour Organisation's (ILO) 'essential services' definition, stating that this could be challenged 'on the basis that raised thresholds infringes Article 11 of the European Convention on Human Rights.' The ILO's Committee on Freedom of Association also states that it is not legitimate for governments to restrict the right to strike on the grounds that industrial action will impair wider economic activity.

3.5 The [UK Regulatory Policy Committee](#) (RPC) described the 40% threshold provision as not fit for purpose in 2015 and stated that the UK government's impact assessment 'does not explain the rationale for the proposals in a straight forward and logical way.' It further found that 'the Impact Assessment does not provide sufficient evidence of the likely impact of the proposals' and 'lacks evidence to support many of the quoted figures.' The report further

criticised the UK government for failing to show evidence that alternatives to raised thresholds had been considered.

3.6 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 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.

3.7 The enmity which naturally arises from prolonged and escalated disputes makes the resolution process harder still. Such continuing contested situations can cause lasting damage to organisations which rely on a committed and engaged workforce. As a result, the UK Act could lead to unrest and demoralisation without resolution within the Welsh public sector, as new restrictions make it far harder to access the right to strike.

3.8 We dispute the quoted estimate of £85,000 annual savings through ‘reduced days lost to strike action’. This estimate originates from the UK government’s evidence in support of the UK Act. We believe that the new restrictions risk provoking longer industrial action and more unresolved unrest in Welsh public services meaning that the 40% threshold would incur greater costs to the public rather than savings.

3.9 Wales TUC also firmly believes that the effect of the 40% threshold which counts abstentions as no votes sets a dangerous and undemocratic precedent which is not applied to any other democratic vote. Similar rules were not applied to the decision to establish Welsh devolution, nor the decision to give the National Assembly law making powers, nor the vote on the UK’s membership of the EU. Furthermore, not a single Assembly Member or Member of Parliament in Wales would have been elected on the basis of this undemocratic and unnecessary hurdle.

3.10 Paragraph 8.7 of the EM points to some examples of the industrial action prevented in Wales. It should also be noted that ongoing dialogue reaches beyond directly comparable England examples. While it is not possible to quantify this work, the investment of all social partners in ongoing partnership talks prevents other disagreements from developing into disputes.

4. The deduction of union subscriptions from wages (Check off)

4.1 Wales TUC supports The Bill’s provision to remove restrictions on the collection of union membership fees known as ‘check off’ or ‘DOCAS’. There is a misperception that this system is an arrangement between employers and unions ‘above the heads’ of individual members

– this is the opposite of the truth. It is not possible under statute to force an individual to join or pay subscriptions to a union. Where a worker decides to join a union they make an individual signed application for membership and make a choice in how they wish their subscription payments to be made. The direct deduction from salary is often the most convenient choice for the individual member. When setting out their opposition to the UK Act, Welsh public sector employers also expressed satisfaction with existing arrangements which are not considered onerous or controversial.

4.2 The benefits of check off for individual members have also been acknowledged by [the High Court](#) when a previous attempt to withdraw check off facilities across the civil service was held as unlawful. In giving judgement, Mr Justice Supperstone stated: ‘I am not impressed by the argument that check off is only or primarily for the benefit of the union as such, rather than for its members in their capacity as employees.’

4.3 Many employers offer similar salary deduction schemes covering childcare, travel, bicycle or gym payments. It is not logical or fair to exclude or restrict access to payroll deduction on the basis of its use for trade union membership. This interferes with the individual’s freedom to choose how to arrange his/her voluntary payments to a union. It is also not reasonable to suggest that the costs of managing general payroll deduction systems are attributable solely to check off.

4.4 The cost of providing a check off option for an individual employee is not easily definable. Modern automated public sector payroll systems are already established with the capacity to offer the wide range of deductions from salary referred to above and therefore no new I.T. investment is required. The costs associated with inputting an individual choice to have any particular deduction made is certainly not a specific source of increased dedicated staff cost for employers. Paragraph 8.40 of the EM further states that discussions with public sector employers reveal that the cost of check off is ‘minimal.’

4.5 Welsh public sector employers and unions agree that the smooth operation of check off provides a convenience for employees and stability for trade unions. Attempting to undermine the relationship between employees and the trade unions they voluntarily join has the potential to fundamentally challenge the social partnership model in Wales. In order to protect a partnership approach that respects and upholds the benefits of independent representation at work, it is crucial that this form of payment is protected and promoted as a healthy facet of workplace democracy.

4.6 Check off arrangements also allow for fair and equal access to trade union representation at work which could otherwise be undermined by digital exclusion. By providing a simple, consistent and manageable payment system check off ensures equal access for workers, regardless of whether they use ICT systems at work or at home and regardless of whether they have access to a bank account.

5. Facility Time

5.1 Wales TUC supports the Bill's proposal to protect existing arrangements for trade union facility time in the Welsh public sector. 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.

5.2 Facility time in the form of paid release agreed with an employer should not be confused with other trade union functions. Almost all officials working fulltime on union matters are directly employed by unions and funded from membership subscriptions to negotiate and represent members on a wide range of issues at no cost to the public. These officials engage in social partnership structures, investing union resources in bodies which are integral to delivery and change management in Welsh public services.

5.3 The Workplace Employment Relations Study (WERS) - the authoritative UK government backed report - found that only 2.8% of workplaces with a recognised union have a union representative that spends all, or nearly all, of their working time on representative duties. In both the public and private sectors this degree of paid release is found in workplaces with an average of over 500 employees. In health, the equivalent figure stands at around 2,500 employees.

5.4 Elected union representatives in public sector workplaces throughout Wales are civic minded volunteers who work tirelessly to support their colleagues and enhance services. This means managing challenging and complex issues, often outside of working hours with no extra pay or in working hours on an unpaid basis. Occasionally, in a period of significant organisational change, employers may agree a temporary increase in paid release to ensure that they can access the full benefit of collective union representation in the delivery of change.

5.5 In the devolved public sector, employers reach agreement with unions over the degree of paid release from work appropriate for elected reps to deliver social partnership. Mostly this involves release for training in their role, attending occasional meetings with their employers to establish and present the collective workforce view or to represent individual employees. The role has a major beneficial impact on the delivery of safer and better public services. 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 or specific services.

5.6 As an example the Fire Brigades Union (FBU) utilises facility time to train highly qualified Serious Accident Investigators who work with fire authorities to investigate incidents where firefighters are killed on duty and to identify and implement service improvements which can prevent future fatalities. Caps on facility time could restrict the ability of FBU representatives to participate. This would further endanger firefighters and could mean any new safety critical problems identified are left unresolved.

5.7 In 2007, the then UK Dept for Business, Enterprise & Regulatory Reform (BERR) conducted a review into the cost of union representatives and the benefits accrued. The report found significant benefits in the areas identified in paragraph 3.12 of the EM:

- a) Workplace-related injuries were lower in unionised workplace with union reps resulting in savings to employers of £126–371m a year.
- b) Workplace-related illnesses were lower in unionised workplace with union reps resulting in savings to employers of £45–207m a year.
- c) Employment tribunal cases were lower in unionised workplaces with union reps resulting in savings to government of £22–43m a year.
- d) Dismissal rates were lower in unionised workplaces with union reps – this resulted in savings related to recruitment costs of £107–213m a year.
- e) Voluntary exit rates were lower in unionised workplaces with union reps, which again resulted in savings related to recruitment costs of £72–143m a year.

5.8 The UK government has not fully updated these figures since but TUC analysis of the 2011 WERS study finds that similar savings have continued to be realised by facility time. In protecting the existing arrangements rather than accepting unnecessary imposed change; the Bill will allow the Welsh public sector to realise the benefits brought about by a trained and effective network union representatives working in partnership with their employers on behalf of their work colleagues.

5.9 The benefits of facility time cited in the EM are further supported by the decision of all Welsh public sector employers represented on the WPC to oppose the UK Act. This included NHS Wales and the Welsh Local Government Association (WLGA). The WLGA's [evidence](#) to Westminster's Business Innovation & Skills (BIS) Committee described facility time as essential during a time of growing pressure and constant change: 'Facility time enables councils to consult and negotiate with the trades unions officials representing the workforce, and therefore actually saves considerable time and resources. It is therefore essential in our view, and very much in the interests of council tax payers to see it maintained.'

5.10 As unions and public sector employers in Wales all oppose restrictions on facility time, it is correct that The Bill should maintain the existing Welsh arrangements which allow employers and unions to negotiate appropriate arrangements on this matter. This provision will also save public bodies £171,700 in needless reporting costs as set out in the EM.

6. Conclusion

The Wales TUC will be happy to provide oral evidence to support our position on the Bill along with further written background information should the Committee find this useful.

The use of agency workers during strike action

Wales TUC response

December 2016

1. The Wales TUC

1.1 The Wales TUC is the collective voice of the Welsh trade union movement and is the largest democratic civic membership organisation in Wales.

1.2 With over 50 affiliated trades unions representing around 400,000 workers across the public, private and third sectors, the Wales TUC represents the views of workers in communities across the whole of Wales. A constituent part of the British TUC, the Wales TUC has devolved responsibility for Welsh issues, including all matters within the remit of the National Assembly for Wales and the Welsh government.

1.3 Unions in Wales elect delegates to the Wales TUC Conference which decides on policy for Wales and itself elects the Wales TUC General Council to oversee the delivery of Welsh policy. The Wales TUC also delivers UK wide and international matters as part of the TUC.

1.4 The Wales TUC plays an integral role in the social partnership model of governance developed with the Welsh Government and employers in Wales. Our aim is to make Wales a fair work nation.

2. Concerns about the use of agency workers to replace strikers

2.1 The UK government plan to lift the ban on the supply of agency workers during strikes is opposed by the Wales TUC, unions and many employers on the grounds it is likely to escalate disputes and will place agency workers in the invidious position of needing to choose whether to cross a picket line.

2.2 Agency workers will often not be familiar with procedures used in workplaces, raising concerns over safety and the quality of services. The use of agency workers to break strikes could also damage ongoing employment relations, especially in workplaces where agency workers are used on a regular basis.

2.3 The ILO Committee of Experts concluded that the proposals breached international standards, notably ILO Convention 87. The Committee requested that the UK Government *“review this proposal with the social partners concerned”*

2.4 The agency industry faces significant reputational damage if it is seen to fuel and prolong difficult industrial disputes. The UK government’s proposals have attracted criticism within the agency sector.

- The International Confederation of Private Employment Agencies Code of Conduct prohibits the supply of agency workers during strikes.
- Several UK employment businesses have signed international framework agreements which prohibit the supply of agency workers during strikes.
- Kate Shoemith, Head of Policy at the UK Recruitment and Employment Confederation, said: *“We are not convinced that putting agencies and temporary workers into the middle of difficult industrial relations situations is a good idea for agencies, workers or their clients. Our members want to provide the best possible levels of service to their clients but they also have a duty of care to the workers they provide.”*

3. Social partnership in Wales

3.1 The Wales TUC fully supports the social partnership approach adopted by Welsh government. We welcome the ability to work in formal tripartite (government, employers and unions) structures to deliver more effective services and fair outcomes for all. While advisory groups/commissions, bilateral discussions and open consultations may have a role but they cannot replace or replicate the workforce engagement made possible by the direct, formal tripartite social partnership such as that developed in the Welsh public sector Workforce Partnership Council.

3.2 The Wales TUC strongly welcomes and endorses the approach adopted by Welsh government and the National Assembly as a whole in acting to protect Welsh social partnership from the negative impacts of the UK Trade Union Act – at least insofar as the devolved public services are concerned.

3.3 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.

3.4 The Wales TUC therefore welcomes the action proposed in this Welsh government consultation to prevent the Welsh social partnership approach being undermined by UK legislation.

4. The consultation questions

Q1. The Welsh Government believes that the effect of the law currently in place should continue, in which Welsh public service employers are not be able to use workers employed by an employment business to provide cover for staff taking industrial or providing cover for them.

Do you agree? **Yes**

Q2. The Welsh Government believes that the current voluntary arrangements are adequate to ensure that 'life and limb' continues to be protected by public services during industrial action.

Do you agree? **Yes**

Q3. The Welsh Government does not anticipate that the proposal would significantly affect the financial position of employment agencies and businesses.

Do you agree? **Yes**

Q4. Do you agree that the option to use primary legislation to create a duty on Welsh public service employers not to use agency workers best achieves our intention?

And

Q5. Do you agree that the option to use guidance or Ministerial direction to Welsh public service employers best achieves the intention?

The Wales TUC believes that preventing the use of agency workers during strike action is a matter of fundamental principle and should be clearly identified in statute as such.

There is certainly a place for such a clause in the proposed Welsh primary legislation to dis-apply aspects of the UK Trade Union Act.

Enshrining the principle in statute would also make less possible any easy repeal at some future point.

We do however recognise that the specific detail of the regulation may be better delivered in secondary legislation/ministerial direction.

This would avoid unnecessary delay at primary legislation stage. It would also allow any necessary amendment dealing with new circumstances to be made quickly.

The consultation document says that a legal duty ‘carries the same weight’ whether delivered through primary or secondary routes and that each route is equally binding on employers and each is equally enforceable.

The Wales TUC would be content for the specifics of the duty to be delivered through secondary legislation if the principle is set out in primary statute and the full terms of the duty are equally binding and fully enforceable in all areas of the devolved public service.

Complications of the devolution settlement and varying ministerial powers in different sectors must not interfere with the full and equal application of the duty to all employers and all sectors in the devolved services.

Q6. Are there any circumstances which should be exempted from the duty and if so what do you think would be the consequences of not exempting them?

No/none.

Q7. We have asked a number of specific questions. If you have any related issues which we have not specifically addressed, please use this space to report them.

See above.

IN THE MATTER OF
THE UK GOVERNMENT'S TRADE UNION BILL
AND THE NEED TO OBTAIN THE LEGISLATIVE CONSENT
OF THE NATIONAL ASSEMBLY FOR WALES

OPINION

INTRODUCTION

1. We are instructed to provide a legal Opinion to Wales TUC Cymru with regard to the UK Government's proposed draft Trade Union Bill 2015. In particular, we are asked to provide our Opinion in relation to the following questions:

(1) Do any provisions of the Trade Union Bill fall within the legislative competence of the National Assembly for Wales?

(2) Is the legislative consent of the National Assembly for Wales required for the Trade Union Bill?

(3) If the Trade Union Bill, as currently drafted, were enacted, could the National Assembly for Wales enact legislation to disapply provisions of the Trade Union Bill in Wales?

SUMMARY

2. This advice is structured as follows. We begin by setting out the background to the Trade Union Bill and outlining the Welsh Government's opposition to the Bill. We then set out the legal and constitutional framework that governs the relationship between the Westminster Parliament and the National Assembly for Wales ("**the Assembly**"), before providing our Opinion on the questions identified in paragraph 1 above.

BACKGROUND TO THE TRADE UNION BILL 2015

3. The Trade Union Bill was announced during the Queen's Speech on 27 May 2015, and subsequently introduced in the House of Commons on 15 July 2015.

(i) A summary of the proposals contained in the Trade Union Bill

4. The Trade Union Bill amends the Trade Union and Labour Relations (Consolidation) Act 1992. The following is a summary of the proposals contained in the most recent version of the Bill (Bill 86) ("**the Bill**").

Changes Relating to Industrial Action Ballots:

5. The Bill makes provision for:
 - a. A new 50% turnout requirement in all industrial action ballots (clause 2);
 - b. An additional requirement for a positive vote by at least 40% in ballots where those entitled to vote are normally engaged in the provision of "important public services" or activities ancillary to the provision of such services (clause 3); "Important public services" would be defined in regulations which may specify only services that fall within (a) health services, (b) education of those under 17 (c) fire services (d) transporting services (e) decommissioning of nuclear installations and (f) border security;
 - c. New requirements for information to be included on the voting paper (clause 4);
 - d. A new requirement to provide members with information about the ballot (clause 5);
 - e. A requirement to provide additional information to the Certification Officer about industrial action (clause 6).

Changes Relating to the Timing and Duration of Industrial Action:

6. The Bill makes provision for:
 - a. Extending the period of notice required from 7 to 14 days (clause 7);

- b. Expiry of the mandate for industrial action four months after the date of the ballot (clause 8);
- c. A new requirement for picket supervisors to take reasonable steps to communicate information to police (clause 9).

Contributions to political funds

- 7. Clause 10 of the Bill makes it unlawful to require a member of a union to contribute to a political fund unless he/she has indicated in writing his/her willingness to do so, abolishing the “opt-out” scheme that operates under the 1992 Act.

Facility Time:

- 8. Clause 13 of the Bill would confer power to make regulations that set a percentage limit on the amount of facility time taken by relevant union officials at relevant public sector employers (e.g. to introduce a cap limiting facility time to 50% of the official’s working time) and/or set a cap on the percentage of the employer’s pay bill that may be spent on facility time.

Check Off:

- 9. Clause 14 introduces a prohibition on a public sector employer deducting trade union subscriptions from wages payable to workers.

Investigatory Powers and Sanctions:

- 10. Clauses 15 to 18 and Schedules 1 to 3 would introduce investigatory and enforcement powers, including the power to impose financial penalties of between £200 and £20,000, as well as the power to, by regulations, make provision for the Certification Officer to require trade unions and employers’ associations to pay a levy, funding the performance of his role.

(ii) The UK Government's position on the legislative consent of the National Assembly for Wales

11. Paragraph 9 of the Explanatory Note to the Bill deals with the territorial extent and application of the Bill, and says:

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

12. Further, in the Explanatory Note to clause 20 of the Bill, the UK Government expresses the view that no legislative consent motion is required because the subject matter of the Bill is not devolved to the Assembly.

13. During a Public Bill Committee debate on 27 October 2015, Nick Boles, the Minister for Skills, provided the following explanation for the position that the legislative consent of the Assembly is not required¹:

“All the provisions in the Bill relate to employment and industrial relations law, which are clearly reserved matters under the devolution settlements for Scotland and Wales. New clause 11 relates to the same reserved matters, so it is entirely in order for the Government to propose that its provisions should also apply to the whole of Great Britain. I see no reason why the Government should seek consent before applying those provisions in particular areas.”

WELSH GOVERNMENT'S OPPOSITION TO THE TRADE UNION BILL

14. The Welsh Government's position on the Bill was set out in a Written Statement to the Assembly on 9 September 2015.² The statement condemned the Bill as having “*the potential to cause significant damage to the social and economic fabric of the UK*” and expressed the concern that the proposed measures “*will prove socially divisive, lead to more confrontational relationships between employers and workers, and ultimately undermine rather than support public services and the economy*”. The statement went on to set out the Welsh Government's view that the Bill relates to devolved responsibilities

¹ <http://www.publications.parliament.uk/pa/cm201516/cmpublic/tradeunion/151027/pm/151027s01.htm>

² <http://gov.wales/about/cabinet/cabinetstatements/2015/tradeunionbill/?lang=en>

and stated that the Welsh Government reserved its position on whether a legislative consent motion is required.

15. On 14 October 2015, a cross-party motion (sponsored by Mick Antoniw AM) was agreed by the Assembly (40 votes to 11)³ which held that the Assembly believes that:

- a. *“the UK Government's Trade Union Bill is an unnecessary attack on the democratic rights of working people and will undermine the good and constructive industrial relations that have been established in Wales since 1999”;*
- b. *“the Bill risks contravening the Human Rights Act 1998 and International Labour Organisation's Conventions 87, 98 and 151”;* and
- c. *“the Bill intrudes in areas that are the responsibility of the Welsh Government and that it should not be applied to Wales without the consent of the National Assembly of Wales”.*

16. On 20 November 2015, a legislative consent memorandum was laid in the Assembly by Leighton Andrews AM, Minister for Public Services, on behalf of the Welsh Government. The memorandum sets out the Welsh Government's view that the Assembly's consent would be required for clauses 3, 12, 13 and 14 as they relate to devolved matters. The memorandum sets out the view that these clauses fall within the legislative competence of the Assembly in so far as they relate to public sector employers in Wales involved in the provision of a range of public services including:

- a. Education and training;
- b. Fire and rescue services;
- c. Provision of health services;
- d. Local government; and
- e. Transport facilities and services.

17. The memorandum also states an intention to table a legislative consent motion under Standing Order 29.6 seeking Assembly Members' consent to the inclusion of clauses 3, 12, 13 and 14 in the Bill and explains that the Welsh Government's view is that consent should not be given.

³ <http://www.senedd.assembly.wales/ieDecisionDetails.aspx?id=2440>

LEGAL AND CONSTITUTIONAL FRAMEWORK

(i) The scope of the Assembly's devolved legislative competence

18. The competence of the Assembly is determined by section 108 of the Government of Wales Act 2006 ("**the GWA**"). Section 108 GWA provides:

(1) Subject to the provisions of this Part, an Act of the Assembly may make any provision that could be made by an Act of Parliament.

(2) An Act of the Assembly is not law so far as any provision of the Act is outside the Assembly's legislative competence.

(3) A provision of an Act of the Assembly is within the Assembly's legislative competence only if it falls within subsection (4) or (5).

(4) A provision of an Act of the Assembly falls within this subsection if–

(a) it relates to one or more of the subjects listed under any of the headings in Part 1 of Schedule 7 and, subject to subsection (4A), does not fall within any of the exceptions specified in that Part of that Schedule (whether or not under that heading or any of those headings), and

(b) it neither applies otherwise than in relation to Wales nor confers, imposes, modifies or removes (or gives power to confer, impose, modify or remove) functions exercisable otherwise than in relation to Wales.

(4A) Provision relating to a devolved tax (as listed under the heading "Taxation" in Part 1 of Schedule 7) is not outside the Assembly's legislative competence by reason only of the fact that it falls within an exception specified under another heading in that Part of that Schedule.

(5) A provision of an Act of the Assembly falls within this subsection if–

(a) it provides for the enforcement of a provision (of that or any other Act of the Assembly)

which falls within subsection (4) or a provision of an Assembly Measure or it is otherwise

appropriate for making such a provision effective, or

(b) it is otherwise incidental to, or consequential on, such a provision.

(6) But a provision which falls within subsection (4) or (5) is outside the Assembly's legislative competence if–

(a) it breaches any of the restrictions in Part 2 of Schedule 7, having regard to any exception

in Part 3 of that Schedule from those restrictions,

(b) it extends otherwise than only to England and Wales, or

(c) it is incompatible with the Convention rights or with EU law.

(7) For the purposes of this section the question whether a provision of an Act of the Assembly relates to one or more of the subjects listed in Part 1 of Schedule 7 (or falls within any of the exceptions specified in that Part of that Schedule) is to be determined by reference to the purpose of the provision, having regard (among other things) to its effect in all the circumstances.

19. In summary, section 108(1) GWA confers on the Assembly the power to pass without recourse to Parliament primary legislation which relates to one or more of the subjects listed in Part I of Schedule 7 and which does not fall within any of the exceptions specified in that Part of the Schedule. Under section 108(2), an Act of the Assembly is not law so far as any provision of the Act is outside the Assembly's legislative competence. Under section 108(3), a provision is within the Assembly's competence only if it falls within subsections (4) or (5) of that section and complies with the requirements of subsection (6). It must also relate to one or more of the subjects listed in Schedule 7 to be within the Assembly's competence.

20. Part I of Schedule 7 sets out 21 subject areas falling within the legislative competence of the Assembly. In our Opinion, the following devolved subject areas relate to provisions contained within the Bill:
 - a. Para. 5 - Education and training;
 - b. Para. 7 - Fire and rescue services and fire safety;
 - c. Para. 9 - Health and health services;
 - d. Para. 10 - Highways and transport;
 - e. Para. 12 - Local government;
 - f. Para. 14 - Public administration.

21. It is important to note that Part 2 of Schedule 7 sets out "general restrictions" on the Assembly's legislative competence and Part 3 of Schedule 7 sets out exceptions to the general restrictions contained in Part 2.

(ii) The approach to determining whether legislative provisions fall within the Assembly's legislative competence under GWA

22. The question of whether a provision is outside the competence of the Assembly must be determined by the provisions contained in section 108 of, and Schedule 7 to, GWA: see *In re Agricultural Sector (Wales) Bill* [2014] UKSC 43; [2014] 1 WLR 2622 at [6] and *Attorney General v National Assembly for Wales Commission* [2012] UKSC 53; [2013] 1 AC 792 at [78]-[81].
23. In accordance with the terms of section 108(4) GWA, it is necessary to examine whether any provision of the Bill relates to one or more of the subjects listed under the headings in Part I of Schedule 7, and then whether the provisions fall within any of the exceptions specified in that Part of Schedule 7. Finally, it is necessary to consider whether it is outside the Assembly's legislative competence by reason of any other provisions of the GWA.
24. The first question is whether a provision "relates to" one of the subjects in Schedule 7. The expression "relates to" has been held to indicate "*more than a loose or consequential connection*": *In re Agricultural Sector* at [50] and *In re Recovery of Medical Costs for Asbestos Diseases (Wales) Bill* [2015] UKSC 3 at [25] applying *Martin v Most* [2010] UKSC at [49] and *Imperial Tobacco Ltd v Lord Advocate* [2013] UKSC 153.
25. Two recent decisions of the Supreme Court apply this test in a Welsh context.
26. The first is *In re Agricultural Sector*. In that case:
- a. The Supreme Court adopted a broad approach to the interpretation of the Assembly's legislative competence. Lords Reed and Thomas, giving the judgment of the Supreme Court, held that when determining the meaning of the relevant subject within Schedule 7, the court should consider that "*each is intended to designate a subject matter which is the object of legislative activity*". In the context of determining the meaning of "agriculture" as a subject heading, this justified a broad interpretation "*as designating the industry or economic activity of agriculture in all*

its aspects, including the business and other constituent elements of that industry”:
[49].

- b. The Supreme Court went on to say that whether a Bill “relates to” a subject matter is to be determined under section 108(7) “*by reference to the purpose of the provision, having regard (among other things) to its effect in all the circumstances*”; and the clearest indication of the purpose of legislation may be found in a report that gave rise to the legislation, or in the report of an Assembly committee: [50]. The Supreme Court found that the Agricultural Sector (Wages) Bill had as its purpose the regulation of agricultural wages so that the agricultural industry in Wales would be supported and protected [52] and therefore was aptly classified as relating to agriculture [54].

27. The second case is *In re Recovery of Medical Costs*. In that case the Supreme Court followed the same approach as in *In re Agricultural Sector* to determine the scope of the Assembly’s legislative competence, [25], but a majority (supporting a judgment delivered by Lord Mance) held that provisions in the Recovery of Medical Costs for Asbestos Diseases (Wales) Bill which imposed on persons making compensation payments in respect of victims of asbestos-related diseases (i.e. insurers) a liability to pay charges in respect of Welsh NHS services provided to the victim as a result of the disease fell outside the Assembly’s competence. The issue in that case was whether the provisions imposing liability on insurers related to the provision, organisation and funding of the Welsh NHS. Lord Mance (with whom Lords Neuberger and Hodges agreed) concluded that they did not, setting out the following reasons for his conclusion at [27]:

“any raising of charges permissible under paragraph 9 would have, in my opinion, to be more directly connected with the service provided and its funding. The mere purpose and effect of raising money which can or will be used to cover part of the costs of the Welsh NHS could not constitute a sufficiently close connection. In the case of prescription or other charges to users of the Welsh NHS service, a direct connection with the service and its funding exists, in that users are directly involved with and benefitting by the service. In the case of charges under section 2, the argument would have to be that a sufficient connection can be found in the actual or alleged wrongdoing that led to a compensator making a compensation payment to or in respect of a sufferer from an asbestos-related disease. But that is at best an indirect, loose or consequential connection. The expression “organisation and funding of national health service” could not, in my

opinion, have been conceived with a view to covering what would amount in reality to rewriting the law of tort and breach of statutory duty by imposing on third persons (the compensators) having no other direct connection in law with the NHS, liability towards the West Ministers to meet costs of NHS services provide to sufferers from asbestos-related diseases towards whom such third persons decide to make a compensation payment for liability which may or may not exist or have been established or admitted.”

28. It is important to note that the Supreme Court in *In re Recovery of Medical Costs* adopted and applied the same test for determining whether a provision “relates to” a devolved subject matter as the Supreme Court in *In re Agricultural Sector*. What Lord Mance’s judgment illustrates is that the court will carefully analyse the statutory and factual context of any provision to determine whether the purpose and effect of a legislative provision has a sufficiently close connection to a devolved subject matter to fall within the Assembly’s legislative competence.

29. A further principle of law can be identified from the case law. Where a Bill relates to a devolved subject matter and a subject matter which has not been devolved but in respect of which there is no express exception specified in Schedule 7, it nonetheless falls within the scope of the Assembly’s legislative competence: see *In re Agricultural Sector*.

a. In that case, the Attorney General had argued that the Agricultural Sector (Wales) Bill 2013 related to “employment” and “industrial relations” and that the 2013 Bill was outside the Assembly’s legislative competence as neither employment nor industrial relations is listed as a subject in schedule 7 to the GWA. The Supreme Court noted, however, at [59] that:

“employment and industrial relations are not specified in Schedule 7, or elsewhere in the Act, as exceptions to the legislative competence of the Assembly. Certain aspects of employment are specified as exceptions, as we have explained in para 33, but the very fact that those particular aspects are specified tends to suggest that there was no intention to create a more general limitation on legislative competence.”

b. The Supreme Court accepted that the Bill related to agriculture as well as employment and industrial relations: [65]. However, it held that as the 2013 Bill

related to a devolved subject matter, and did not fall within any of the specified exceptions, the fact that it was also capable of being classified as relating to a subject matter which is not devolved did not bring it outside the Assembly's legislative competence. The Court's reasoning is summarised at [67]:

“As we have explained, the scheme of the conferred powers model adopted for Welsh devolution, as embodied in the 2006 Act, is to limit the legislative powers of the Assembly in relation to subjects listed in Schedule 7 by reference to the express exceptions and limitations contained in the Act, rather than via some dividing up of the subjects in Schedule 7 along lines not prescribed in the legislation. Under section 108(4) and (7), the Assembly has legislative competence if the Bill relates to one of the subjects listed in Part 1 of Schedule 7, provided it is not within one of the exceptions. In most cases, an exception will resolve the issue. Where however there is no exception, as in the present case, the legislative competence is to be determined in the manner set out in section 108. Provided that the Bill fairly and realistically satisfies the test set out in section 108(4) and (7) and is not within an exception, it does not matter whether in principle it might also be capable of being classified as relating to a subject which has not been devolved. The legislation does not require that a provision should only be capable of being characterised as relating to a devolved subject.”

(iii) The Sewel Convention

30. The Sewel Convention provides that the UK Parliament may not legislate for devolved matters without the consent of the devolved legislature affected.
31. A Memorandum of Understanding between the UK government and the devolved administrations was agreed in September 2012 (“**the MoU**”). The MoU is incorporated in the paper ‘*The Memorandum of Understanding and Supplementary Agreements between the UK Government, the Scottish Ministers, the Welsh Ministers and the Northern Ireland Executive Committee*’ (October 2013).
32. Paragraph 14 of the MoU sets out the Sewel Convention which provides that the UK Government will not normally invite the UK Parliament to legislate with regard to devolved matters except with the agreement of the relevant devolved legislature.

“The United Kingdom Parliament retains authority to legislate on any issue, whether devolved or not. It is ultimately for Parliament to decide what use to make of that power. However, the UK Government will proceed in accordance

with the convention that the UK Parliament would not normally legislate with regard to devolved matters except with the agreement of the devolved legislature. The devolved administrations will be responsible for seeking such agreement as may be required for this purpose on an approach from the UK Government.”

33. Devolution Guidance Note 9, ‘*Parliamentary and Assembly Primary Legislation Affecting Wales*’ (“**DGN 9**”), confirms that the UK Government understands that the convention applies to matters within the legislative competence of the Assembly. This understanding is set out at paragraph 36 of DGN 9 which states:

“The UK Government would not normally ask Parliament to legislate in relation to Wales on subjects which have been devolved to the Assembly without the consent of the Assembly. The Assembly grants consent by approving Legislative Consent Motions (LCMs).”

(iv) Procedure in the event that the provision of UK Bill falls within the scope of the Assembly’s legislative competence

34. In cases where the UK Parliament plans to legislate in devolved areas, the UK Government must seek the Assembly’s agreement. The Assembly will provide or refuse to provide such agreement by considering and voting on a legislative consent motion.
35. Under Standing Order 29, ‘*Consent in relation to UK Parliament Bills*’⁴, the Welsh Government is required to bring forward a legislative consent motion and an accompanying memorandum in relation to any UK Bill that makes provision in relation to Wales for any purpose within the legislative competence of the Assembly or that negatively affects those powers.

⁴
http://www.assembly.wales/NAFW%20Documents/Assembly%20Business%20section%20documents/Standing_Orders/Clean_SOs.eng.pdf

Do any provisions of the Trade Union Bill fall within the Welsh Assembly’s legislative competence?

36. We have set out above the approach that is to be followed when determining if a provision falls within the Assembly’s legislative competence. In summary:

- a. A provision will fall within the scope of the Assembly’s legislative competence if it “relates to” a devolved subject matter; and,
- b. Whether a provision “relates to” a subject matter is to be determined by reference to the purpose of the provision *“having regard (among other things) to its effect in all the circumstances”*.

37. In *In Re Agricultural Sector*, the Supreme Court stated at [50] that the clearest indication of the purpose of proposed legislation may be found in a report that gave rise to the legislation. We therefore begin by setting out evidence of the policy objectives underpinning the Bill as well as evidence of the effect that its provisions would have if implemented in Wales.

(i) Evidence of purpose and effect of Trade Union Bill

38. On the purpose of the Bill, the following documents are important to have regard to:

- a. The Explanatory Notes to the Bill, paragraph 2 of which states:

“This Bill is intended to give effect to commitments in the Conservative Party’s manifesto for the 2015 General Election. During the Queen’s Speech on 27 May 2015, it was announced that the Government would introduce legislation to reform trade unions and to protect essential public services against strikes.”

- b. The September 2015 House of Commons Briefing Paper (**“the Briefing Paper”**),⁵ which describes the main purposes of the Bill as being to:

“• Pursue our ambition to become the most prosperous major economy in the world by 2030.

⁵ Briefing Paper number CBP 7295, 7 September 2015.

- *Ensure hardworking people are not disrupted by little-supported strike action.*⁶

and states that a key aim of the Bill is to reduce the impact of industrial action on key public services:

*“The Government is particularly concerned with the impact of industrial action in certain public services, namely the fire, health, education, transport, border security and nuclear decommissioning sectors. We can look at the number of working days lost to industrial action by industry, which gives some indication of the effect of industrial action in public services.”*⁷

39. A principal aim of the Bill, therefore, appears to be to reduce the effects of public sector industrial action.⁸

40. As explained above, when seeking to understand the Bill’s purpose, it is also relevant to consider the effect of its provisions. The Welsh Government’s position is that the Bill will undermine the ability of public sector employers to give effect to the social partnership model for the provision of public services and that this will adversely impact on the delivery of devolved public services in Wales. The following documents are relevant to understanding the Welsh Government’s position:

- a. *‘Working Together for Wales: A Strategic Framework for the Public Service Workforce in Wales’*, which sets out the Welsh Government’s social partnership model for supporting the delivery of public services in Wales, and includes: (i) a recognition of the “vital role” of trade unions in providing a fair deal for the public service workforce; (ii) a commitment to partnership working with trade unions; (iii) a commitment to the Workforce Partnership Council as a mechanism for bringing together public service employers and trade unions throughout Wales.⁹

⁶ Briefing Paper p. 6.

⁷ Briefing Paper, p. 13

⁸ On this, see also, at p. 12, the Briefing Papers states that *The Bill’s proposals are set against a 77% increase in working days lost due to industrial action, from 440,000 days in 2013 to 788,000 in 2014. The number of days lost in 2014 was higher than the average of the 1990s and the 2000s and can be attributed to a number of large-scale public sector strikes, and at p. 14 refers to the Impact Assessment accompanying the Trade Union Bill as showing the likely impact of industrial action on UK GDP, the resultant loss of working days and the impact on output or production of business indirectly affected by the strike.*

⁹ Paragraph 1.4 <http://gov.wales/docs/dpsp/publications/120525worktogetheren.pdf>.

- b. The Workforce Partnership Council's '*Partnership and Managing Change*' agreement, which sets out the expectation that public sector employers will: (i) engage in "*meaningful consultation and negotiation with trade unions*" in respect of changes to working conditions; (ii) create a communication plan in which joint employer and union communication with the workforce plays a significant part ; and, (iii) commit to "*full and lasting obligation to trades union recognition*" and to advocate the benefits of trade union membership in reducing labour turnover, increasing staff moral and commitment and improving productivity.
- c. The Welsh Government's 9 September 2015 Written Statement, which states:

"In relation to the Trade Union Bill, the first three categories of "important public services" subject to the additional 40% overall membership support threshold for industrial action are health services, education of those aged under 17, and fire services, all of which are plainly devolved. The policy background section of the explanatory notes to the Bill sets a clear context for the Bill in seeking to 'protect essential public services' against strikes, and this context is also reflected in the consultation document on ballot thresholds in "important public services". Policy on how to support, or 'protect', the delivery of devolved public services such as health, education and fire is, however, for the Welsh Government and the National Assembly for Wales. This includes the way public sector bodies in such devolved services work with trade unions to ensure effective delivery of services to the public.

There is an increasing divergence in approach to delivery of public services between England and Wales and it would be wrong, and potentially damaging to the UK Government's stated aim of 'protecting' public services, for decisions based on English structures and approaches to be imposed on different service delivery models in Wales. As an illustration, in relation to which specific functions and ancillary roles would be subject to the 40% threshold, it would be wholly wrong to assume that roles in a devolved public service in Wales are identical to roles in that service area in England. Similarly, it cannot be right for the UK Government – blind to policy priorities and devolved service delivery reforms in Wales – to specify how much union 'facility time' devolved public sector employers should allow. Nor am I convinced that the intention to end 'check off' arrangements for trade union subscriptions in the public sector is necessary or appropriate. The Welsh Government operates these arrangements as part of its approach to effective social partnership and is not seeking to change this."

41. Evidence submitted to the Public Bill Committee supports the position that the Bill will undermine the Welsh Government's social partnership approach to the provision of public services in Wales. See in particular:

- a. The Welsh Local Government Association's submission ¹⁰ that:

“Facility time enables councils to consult and negotiate with the trades unions officials representing the workforce, and therefore actually saves considerable time and resources”

[...]

“If councils had to consult with and negotiate with employees on an individual basis on all these matters the time resource required would be huge” expressing the view that it is *“essential”* and *“very much in the interests of council tax payers to see it maintained”*.

The evidence also states that outlawing the ‘check off’ system would be contrary to its social partnership approach.

- b. The Royal College of Midwives' evidence¹¹ that:

“the Government's proposals will fundamentally damage employment relations and make it more difficult to resolve disputes.”

- c. The Fire Brigades Union's evidence¹² that the limits on facility time will undermine unions' ability to effectively protect their member's interests by negotiating on pay and condition, raising safety standards and ensuring access to skills and training. It also states that:

“firefighters' safety will be directly threatened if this change comes into force. The FBU's Serious Accident Investigations involve hundreds of hours of work by union reps to undertake careful investigations of firefighter fatalities and other serious incidents. Lessons are also learned from the work of safety reps on injuries and near misses. This

¹⁰ <http://www.publications.parliament.uk/pa/cm201516/cmpublic/tradeunion/memo/tub08.htm>

¹¹ <http://www.publications.parliament.uk/pa/cm201516/cmpublic/tradeunion/memo/tub07.htm>

¹² <http://www.publications.parliament.uk/pa/cm201516/cmpublic/tradeunion/memo/tub52.htm>

work has been absolutely essential to UK firefighter safety over generations, making the fire and rescue service far safer for firefighters and for the public. Restricting time off for trade union reps puts this in jeopardy”.

- d. Evidence from NHS Wales,¹³ which explains that NHS Wales has its own agreed key principles framework for time off and facilities for trade union representatives in place which “*meets the needs of the service and supports our approach to social partnership*”.

(ii) Analysis of the Trade Union Bill

42. Taking those materials together, we agree with the Welsh Government’s position that clauses 3, 12, 13 and 14 of the Trade Union Bill relate to the following devolved subject matters:

- a. “education and training”;
- b. “fire and rescues services”;
- c. “health and health services”;
- d. “highways and transport”;
- e. “local government”; and
- f. “public administration”

Hereafter, these subject matters will be referred to collectively as “devolved public services”.

Clause 3

43. Clause 3 introduces a new 40% support requirement in ballots for industrial action in “important public services”, to be defined in regulations which may specify only services that fall within (a) health services, (b) education of those under 17, (c) fire services, (d)

¹³ <http://www.publications.parliament.uk/pa/cm201516/cmpublic/tradeunion/memo/tub40.htm>

transport services, (e) decommissioning of nuclear installations and management of radioactive waste and spent fuel, and (f) border security.

44. The 40% requirement will make it more difficult for industrial action to take place in “important public services”. That this is the purpose behind clause 3 is clear from the Explanatory Notes to the Bill and the Briefing Paper, both of which explain that the Bill aims to protect the provision of “important public services” by making it harder to strike. This was also the explanation given during the Bill’s second reading in the House of Commons.¹⁴

45. Four of the “important public services” listed in the Bill are devolved subject matters: (a) health services, (b) education of those under 17 (c) fire services (d) transport services. Again, whether a provision relates to a devolved subject matter is to be determined by reference to its purpose: see section 108(7). In our view, where the sole aim of a measure is to protect the provision of public services, the measure must be said to “relate to” that public service for the purposes of section 108 GOWA.

46. For those reasons, in our view the arguments that support the proposition that clause 3 relates to a devolved subject matter are strong.

Clauses 12, 13 and 14

47. Further, there are strong arguments that clauses 12, 13 and 14 relate to devolved public services to the extent that they apply to devolved public sector employers and employees.

48. Clause 12 confers a power on UK Ministers to make regulations requiring public sector employers to publish information relating to time taken by trade union representatives for trade union duties and activities. The Explanatory Note to clause 12 explains that the provision is “*designed to promote transparency and public scrutiny of facility time; and to*

¹⁴ Sajid Javid, Secretary of State for Business explained: “*I also wish to highlight the additional requirement for ballots of staff in six key sectors: the health service, the fire service, border security and nuclear decommissioning—because of the obvious risks to public safety and security—and education and transport. A ballot is required because of the massive disproportionate disruption that stoppages in those areas can cause*”: Hansard 14 Sep 2015: Column 763-764.

*encourage employers to moderate the amount of money spent on facility time in light of that scrutiny”.*¹⁵

49. Clause 13 confers powers on UK Ministers to make regulations that set a percentage limit on the amount of facility time taken by relevant union officials at public sector employers and/or set a cap on the percentage of the employer’s pay bill that may be spent on facility time. The Explanatory Note to clause 13 explains that *“the reserve powers may be exercised so as to limit the paid time off taken by the employers’ trade union representatives for facility time to a percentage of the representatives’ working time”*, for example by prohibiting the employment of full-time trade union representatives. Regulations made under this clause may also modify the statutory right under section 170 of the Trade Union and Labour Relations (Consolidation) Act 1992 for trade union members to take time off for union activities, as well rights contained in contracts or collective agreements.
50. Clause 14 introduces a prohibition on public sector employers deducting trade union subscriptions from wages payable to workers, a process known as ‘check-off’.
51. The purpose behind clauses 12 and 13 is to reduce the amount of facility time made available for trade union members and trade union representatives employed in the public sector. This is clear from the Delegated Powers Memorandum published alongside the Bill which provides the following explanation for the creation of a reserve power to set a statutory cap on facility time:

“This is a reserve power intended to be used only as a secondary measure if the primary measure (the publication requirements) do not achieve the policy aim of increasing public scrutiny of facility time and, ultimately, delivering value for money for the tax payer.

[...] By improving transparency through publication requirements and encouraging employers to review their existing arrangements, the expectation is that relevant public sector employers will voluntarily renegotiate facility time arrangements with their recognised trade unions. The power would therefore be kept in reserve and only used as a last resort where, having regard to information employers have published, they have consistently failed to reform practices that do not represent good value for money to the tax payer.”¹⁶

¹⁵ Explanatory Note, paragraph 54.

¹⁶ BIS, Trade Union Bill: Delegated Powers Memorandum, July 2015, page 8-9. This view was reiterated by Sajid Javid, Secretary of State for Business, during the Bill’s second reading, when he stated: *“There are nurses, teachers and other public servants being paid a salary by the taxpayer while working for their union under the banner of facility time. There is no*

52. Taking account of the explanations for clauses 12, 13 and 14 set out above, as well as the evidence of the impact that these provisions will have on devolved public services, we have concluded that these provisions “relate to” devolved public services in two ways.

53. First, the provisions will have an effect on the conditions of employment in the devolved public services:

- a. As noted above, in *In re Agricultural Sector* the Supreme Court held that the devolved subject area “agriculture” should be interpreted broadly “*as designating the industry or economic activity of agriculture in all its aspects*” [49] and that it encompassed measures affecting conditions of employment within the agricultural industry, including measures regulating agricultural wages: [54]. Applying this reasoning, measures affecting the conditions of employment in the devolved public sector fall within the Assembly’s devolved legislative competence.
- b. It is clear from the statements set out above, that clauses 12, 13 and 14 will have the effect of changing the conditions of employment in relevant public sectors: the measures may impact on the statutory and contractual rights of public sector employees to facility time, the availability of representation by trade union representatives and the procedure for subscribing to a trade union. All of the devolved public services constitute public sector employers for the purposes of clauses 12, 13, 14. We are therefore of the view that clauses 12, 13 and 14 relate to these devolved public services.

54. Second, clauses 12, 13 and 14 will affect the provision of these devolved public services:

- a. The UK Government’s aim in introducing these provisions is to restrict the amount of facility time available for public sector employees: see the Explanatory Notes to clauses 12 and 13 as well as the Delegated Powers Memorandum. That aim appears

transparency around how much time they spend on union work and no controls in place to ensure that the taxpayer is getting value for money”: Hansard 14 Sep 2015 : Column 770

to be predicated on the view that public services will be delivered more effectively and efficiently if the amount of facility time available to employees is reduced.

- b. The Welsh Government and Welsh public sector employers and employees have provided evidence that restrictions on facility time and the prohibition on check-off will undermine the efficient and effective delivery of devolved public services in Wales.
- c. The UK Government's position and the Welsh Government's position both demonstrate that clauses 12, 13 and 14 will have an effect on the provision of devolved public services. Again, we express the view that measures which aim to impact on the way in which public services are provided must be said to relate to those services for the purposes of section 108 GOWA.

(iii) Conclusions on section 108 GWA

55. For those reasons, we think it strongly arguable that clauses 3, 12, 13 and 14 relate to (i) devolved public services for the purposes of section 108 GWA, and (ii) "industrial relations" and "employment" matters, as they clearly affect conditions under which industrial action is permitted in the UK.
56. It follows that provisions of the Bill relate to subject matters that are devolved (i.e. devolved public services) as well as to subject matters which are not devolved (industrial relations and employment).
57. The UK Government's position is that as the provisions of the Bill relate to employment and industrial relations, they are reserve matters for Scotland and Wales. This position elides the distinction between Scotland (where "employment and industrial relations" are listed as reserved matters in the Scotland Act 1998 (as amended)) and in Wales where they are currently neither expressly devolved subject matters nor exceptions.
58. As the Supreme Court found in *In re Agricultural Sector*, so long as the provisions of a bill "fairly and realistically" fall within the scope of a devolved subject matter, it does not matter that they might also be capable of being classified as relating to a subject which has not been devolved, such as employment or industrial relations: [67].

59. By ignoring the possibility that under the devolution arrangements for Wales, a legislative provision may relate to both a devolved and a non-devolved subject matter, the UK Government has fallen into error in concluding that the provisions of the Bill are not within the legislative competence of the Assembly.

Is the Assembly's legislative consent required in relation to the Trade Union Bill?

60. In so far as provisions of the Bill fall within the Assembly's legislative competence, the UK Government would be acting in breach of the Sewel Convention, and therefore unconstitutionally, to enact such provisions without first obtaining the consent of the Assembly.

61. That is so even where a provision relates both to (i) a devolved subject matter and (ii) a non-devolved subject matter, because the Sewel Convention requires that the Assembly's consent is obtained in relation to legislation on subjects which have been devolved to the Assembly. The test for determining whether the Sewel Convention applies is therefore whether a provision of a UK bill would be within the Assembly's competence if passed by the Assembly.

62. As above, a legislative provision which relates to both devolved and non-devolved areas falls within the Assembly's legislative competence. Therefore, consent should be obtained in relation to a provision of a UK bill that relates to both a devolved subject matter and a non-devolved subject matter.

63. Support for this position is provided by DGN 9 which states, at paragraph 11:

“The UK Government and the Welsh Government may not necessarily take the same view about whether a proposal is devolved or non-devolved. It should be borne in mind that the boundaries between devolved and non-devolved issues are not always clear cut, especially given the wider breadth of legislative competence the Assembly now exercises and the more general descriptions of devolved subjects listed in Schedule 7. A specific proposal could appear to be both devolved and non-devolved, depending on perspective. For example, time off from work for training purposes could relate to the subject of employment, which is generally non-devolved, or to skills, which is devolved, depending on the specific nature of the proposed provision. Departments should speak to the Wales Office in the first instance if in any doubt as to whether a proposal is devolved or non-devolved, and may then wish to speak to the Welsh Government to gain a better understanding of its view”.

64. This paragraph clearly recognises the possibility that legislative provisions can relate to both devolved and non-devolved subject matters and envisages that a UK Government department should consider whether, from the Welsh Government’s perspective, a proposal could be considered to be both devolved and non-devolved when determining whether legislative consent is required.

65. We note, however, that in the event that the UK Government does not seek the agreement of the Assembly for legislation within the legislative powers of the Assembly, UK legislation would be validly enacted and have the status of primary legislation applicable in Wales: see section 107(5) GWA, which provides that *“This Part does not affect the power of Parliament of the United Kingdom to make laws for Wales”*. It follows that, even if the Bill is enacted without obtaining the legislative consent of the Assembly, it will be valid and have effect in Wales.

66. However, the Sewel Convention carries considerable political weight, enshrining the important political settlement that protects the autonomy of the Assembly. A UK Government that proceeded in breach of that important Convention would be acting unconstitutionally.

If the Trade Union Bill, as currently drafted, were enacted, could the Welsh Assembly enact legislation to disapply provisions of the Trade Union Bill in Wales?

67. The Assembly has the power to legislate in relation to subject matters where the UK Parliament has already legislated. The Assembly's legislative powers will be unaffected by the enactment of the Trade Union Bill: the Assembly can legislate in relation to subjects listed in Schedule 7.

68. This means that if the Trade Union Bill is enacted, the Assembly could introduce legislation that either expressly or impliedly repeals the Bill. This is made clear by section 108(1) GWA which provides that within its area of competence the Assembly can make any provision which could be made by an Act of the Parliament.

69. It is also possible for the Assembly to amend acts of Parliament, without requiring the consent of the UK Government or Parliament, so long as the amendment falls within the Assembly's legislative competence. On this see DGN 9 which states at paragraph 61 that:

"The Assembly cannot legislate about subjects outside its legislative competence - i.e. subjects which are non-devolved. Assembly Bills can relate only to Wales and fall within the ambit of the devolved subjects listed in Schedule 7. Whether a provision relates to a subject is determined by applying the purpose test, summarised in paragraph 9 of this guidance. However, Departments should also be alive to the fact that Assembly Acts can amend Acts of Parliament without the consent of the UK Government or Parliament. Indeed, GoWA provides that within its area of competence the Assembly can make any provision that could be made in a parliamentary Act. It is expected that the Welsh Government would consult Departments in cases where such provision could have potentially significant effects as early as practicable in the legislative process."

70. In summary, if the Bill is enacted, there is nothing to prevent the Welsh Government and Assembly from enacting legislation that disapplies, in full or in part, the legislation in Wales. The UK Government could, however, refer such a Bill to the Supreme Court pursuant to section 112(1) GWA for determination as to whether it falls within the legislative competence of the Assembly. This could have a significant delaying impact on any such legislation.

CONCLUSIONS

71. In summary, in our view it is strongly arguable that clauses 3, 12, 13 and 14 of the Bill relate to the following devolved subject matters: “education and training”; “fire and rescues services”; “health and health services”; “highways and transport”; “local government”; and “public administration”.
72. Further, the Bill relates to “industrial relations” and “employment”, matters which are neither devolved subjects nor specified exceptions to devolved subjects.
73. In these circumstances, the UK Government’s conclusion that the Bill’s provisions are not within the legislative competence of the Assembly is flawed; a legislative provision may relate to *both* a devolved and a non-devolved subject matter: see *In re Agricultural Sector*.
74. In so far as the Bill’s provisions fall within the Assembly’s legislative competence, enacting it without the Assembly’s consent would be a breach of the Sewel Convention. However, the Sewel Convention is not legally enforceable; legislation enacted without prior consent of the Assembly is valid and will have effect in Wales.
75. If the Bill is enacted, there is nothing to prevent the Welsh Government and Assembly from enacting legislation that disapplies, in full or in part, the effect of the Bill in Wales, so long as that legislation relates to a devolved subject matter.

Hefin Rees QC
Catherine Dobson
39 Essex Chambers
1 December 2015



Llywodraeth Cymru
Welsh Government

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Workforce Partnership Council: Partnership and Managing Change (2012)



Partnership and Managing Change is an Agreement of the Workforce Partnership Council and will be annually reviewed by the Council to ensure it is up-to-date, remains fit for purpose and is operating effectively.

It is an Agreement regarding the process by which the social partners (employers and trades unions) work in partnership to manage change as a fundamental part of how we improve the delivery of public services in Wales.

It captures the ethos of the Welsh Government's *Working Together for Wales – A Strategic Framework for the Public Service Workforce in Wales*, agreed by Cabinet in March 2012, as part of how we establish One Public Service in Wales.

Shared Vision

The vision for Public Services in Wales is shared by Social Partners and can be summarised as public services which are:

- efficient, effective and delivered through collaboration;
- world class and exemplars of outstanding small country governance;
- designed with citizens at the centre and promote social justice and equality;
- provided by model employers and regarded as offering first choice careers; and
- delivered by a well-trained, well-rewarded and an engaged and motivated workforce.

The Public Service transformation agenda has evolved considerably over recent years from Making the Connections through Beecham, to Simpson and sharing services. This Agreement reflects these developments and provides the overarching framework for contemporary practice and progress across sectors including:

- the *Memorandum of Understanding 2011* (between Trade Unions and the Welsh Local Government Association (WLGA));
- *Working Differently - Working Together A Workforce and Organisation Development Framework 2012* (NHS); and
- *Managing Change in Partnership 2011* (Joint Council for Wales).

Principles

High quality public services delivery must be synonymous with high quality employment practice. The Social Partners agree to adopt principles of good practice on service improvement, delivery and employment to underpin this Agreement.

Social Partners are committed to a set of principles directly relevant to managing change. At the same time nothing in this Agreement will formally substitute for, replace, or otherwise take precedence over established collective bargaining arrangements between Trade Unions and employers.

1. The partnership approach is between the Welsh public sector employers and recognised trades unions represented within the Workforce Partnership Council structures.
2. All Social Partners will use best endeavours to ensure employment continuity. Change can be very unsettling for staff. Social Partners agree that employment continuity is an important element of the change process. However, change need not be seen to be a barrier to employment continuity and can generate opportunities for the achievement of potential through rewarding, renewed and refreshed careers.
3. The Social Partners will support the use of the best standards of employment practice, such as systematic workforce planning, to manage deficits and surpluses in a planned way as we shape the future delivery of services.
4. Public service organisations embarking on change, which impacts on the workforce, will consult Trade Unions at the earliest appropriate opportunity and before any irreversible decisions are made. Any change should be properly planned and delivered through partnership. It is accepted that external factors may on occasion dictate the speed of the process but it is crucial that full consultation and negotiation amongst the social partners is followed in an open and timely manner with the aim of reaching mutual agreement. Equally it is crucial that this process is not constrained by either partner. High quality public services delivery must be synonymous with high quality employment practice. The Social Partners agree to adopt principles of good practice on service improvement, delivery and employment to underpin this Agreement.

Our way of working

Social Partners are committed to work in the following areas.

1. Workforce Engagement

The Social Partners are committed to supporting the Welsh Government's Strategic Workforce Framework which underpins the ambition that Public Services in Wales should be provided by exemplar employers.

In delivering their commitment the social partners will jointly:

- consult, negotiate and, in good faith, commit every effort to achieving agreement over proposed changes
- subsequently communicate any agreed change process to all stakeholders including the workforce.

2. Workforce Learning

Lifelong learning is central to securing the progressive improvement in public services which we seek. It is recognised that initiatives such as the "Wales Union Learning Fund" and partnership training continue to make a significant contribution to workplace change. It is essential that employers and trade unions at all levels fully engage in the partnership process.

3. Career Development

The development of careers that add value to the outcomes they achieve for Welsh communities and the Welsh economy is a key part of the public service policy agenda. The work undertaken by Welsh Government and others on secondments, management and leadership training is critical to this.

4. Equality and Well-being

The Social Partners support the implementation of equality-proofed pay and grading systems within the public service. The need for ongoing work to track and reflect legislative policy changes is recognised. There is commitment to develop good practice in partnership with the Equality community. The need to develop social justice in work, including equal pay, health and well-being issues, an ageing workforce, work life balance, and flexibility is recognised.

The Process

The following expectations will need to be fully met in order to implement this partnership agreement:

1. We expect employers and trade unions to agree a **Policy Statement** at the outset regarding managing change. The statement should include a clear vision supported by both parties which emphasises a corporate approach to managing change. It is the aim of the Social Partners that a culture of shared objectives and joint ownership of problem solving will become commonplace throughout.
2. We expect Social Partners to adopt early **planning** of change with clear and realistic timescales. It is essential that due process is followed which allows for all parties to properly consider and shape any proposals which may be under consideration.
3. We expect meaningful **consultation** and negotiation with Trade Unions to be mainstreamed into the change process. Cross sector and cross organisational working may lead to complex lines of accountability and particular attention should be paid to operating in a collaborative context. Employers and Trade Unions should seek to ensure the process is integrated and seamless.
4. We expect **communication** with all stakeholders, including the workforce, to be a key component of any change process. Social Partners should agree a communication plan in advance of any change process. In a properly functioning partnership joint employer and union communication with the workforce will play a significant part.
5. We expect Social Partners to facilitate and encourage **training** both in partnership working and change management to underpin the process. The training should include knowledge and application of this Agreement and any locally agreed arrangements.
6. We expect employers to commit to a full and lasting obligation to trades union recognition. In this setting, social partners will advocate **the benefits of trade union membership**, not least in assisting to help reduce labour turnover, increase staff morale and commitment, and improve productivity. This will involve local arrangements to facilitate and encourage trades union membership throughout the workforce

Disputes

This is a formal agreement of the Workforce Partnership Council which will be annually reviewed.

Any disputes relating to the terms of the agreement or its implementation should be taken through the appropriate joint sector disputes resolution procedure. In case of failure to resolve matters at this level, disputes may then be taken to the Joint Secretariat of the Workforce Partnership Council made up of the employer side secretary and the trades union side secretary.

