

Research Briefing **Trade Union (Wales) Act 2017**

- Act Summary



National Assembly for Wales
Research Service

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Research Briefing

Trade Union (Wales) Act 2017

The Trade Union (Wales) Bill received Royal Assent on 07 September 2017.

The Act makes provisions about industrial action and trade union activity in relation to the operations of, and services provided by, devolved public authorities.

This paper summarises the provisions within the Act, the background to its introduction, and information about its passage through the National Assembly for Wales.



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1. Introduction

The Trade Union (Wales) Act 2017 ('the Act') amends provisions within the Trade Union Act 2016 ("the UK TU Act") regarding industrial action and trade union activity in relation to the operations of, and services provided by devolved public authorities in Wales. According to the Welsh Government, the Act will have the effect of reversing the adverse effects of the provisions within the UK TU Act, with the aim of protecting the continued delivery of public services in Wales.

The Act is intended to amend the Trade Union and Labour Relations (Consolidation) Act 1992 ("the 1992 Act"), as amended by the 2016 UK TU Act. The purpose and intended effect of the Act seek to disapply certain provisions of the 2016 Act in relation to "devolved Welsh authorities". 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 per cent ballot support threshold for industrial action affecting important public services.

The policy objectives of the Act according to Welsh Government are based on a vision for public services "rooted in the principles of social partnership".

2. Background

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

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

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

The Llywydd's letter summarised the issues that she had considered in reaching her decision on competence, and confirmed that in her view that the Bill was within the Assembly's competence:

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

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

Trade Union and Labour Relations (Consolidation) Act 1992

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

The 1992 Act defines trade unions, sets out the framework (including legal rights and duties) under which they may operate, including the circumstances in which industrial action may be undertaken. It also contains provisions on the operational aspects of trade unions and their relationship with employers, such as the deduction of union subscription fees from employees' wages, facility time and ballots. (See **Bill Summary** for detailed information on the provisions within the Trade Union and Labour Relations (Consolidation) Act 1992).

UK Government's Trade Union Bill

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

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

The UK Trade Union Bill and Legislative Consent Motion

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

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

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

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

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

The UK Bill received Royal Assent in May 2016 and became the Trade Union Act 2016 (the UK TU Act). Some sections for which the Assembly refused consent are yet to come into force. However, the provision for ballot thresholds came into force in Wales on 1 March 2017.

Legislative Competence

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

The list of subjects is extensive and is therefore not replicated here. It can be found on pages 5 to 13 of the EM. (See **Bill Summary** for more detailed background on Legislative Competence)

The Wales Act

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

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

Social Partnership

The social partnership model is the approach taken by Welsh Government to managing public sector workers and industrial relations. It does this by working with public authorities, employees and recognised trade unions in Wales that represent them in an 'inclusive' way.

The Explanatory Memorandum for the Bill notes that the approach is '*distinctly different to the more adversarial approach to industrial relations taken in England*'. The success of the model according to Welsh Government is dependent on ensuring a balance in the relationship between social partners, and particularly trade unions and employers.

The Welsh Government through this Act seek to amend '*provisions in the [UK TU Act] that have an adverse effect on the **social partnership** approach taken by the Welsh Government in Wales*'. It will, according to Welsh Government have the effect of reversing the effect of the provisions within the UK TU Act, with the aim of protecting the "continued delivery of public services in Wales".

Definition of "devolved Welsh authority"

Section 1(5) of the Trade Union (Wales) Act 2017 defines the Welsh public authorities to which the Act applies. The definition of "devolved Welsh authority" is referenced in section 157A of the Government of Wales Act 2006 (GoWA).

In that section of GoWA, a "devolved Welsh authority" means a **public authority specified in Schedule 9A of the Act or that exercises functions that (a) are only exercisable in relation to Wales and (b) are wholly or mainly functions that do not relate to reserved matters.**

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

The definition of "devolved Welsh authorities has since been inserted into section 4 of the [Wales Act 2017](#).

While the definition includes the 'obvious' devolved Welsh public authorities with large workforces, such as Welsh NHS bodies and local authorities, the definition also includes the various Commissioners, advisory panels, Committees (e.g. the Welsh Pharmaceutical Committee), devolved tribunals and various other public bodies.

3. What the Trade Union (Wales) Act 2017 does

Structure of the Act

The Act contains 4 sections. The principal sections are Section 1 and 2.

Section 1: seeks to amend provisions in the Trade Union Act 2016 that will, according to Welsh Government, have an adverse effect on the social partnership approach taken in Wales. Sections 3, 13, 14 and 15 of the UK TU Act which amend the Trade Union and Labour Relations (Consolidation) Act 1992 (TULR(C)A) impose new requirements in relation to **balloting for industrial action, facility time** and **check off** (payment of trade union subscription fees by way of a deduction by the employer from the employee's wages). The Act seeks to reverse the effect of these provisions, which in Welsh Government's opinion will protect the continued delivery of public services in Wales;

Section 2: makes provision to ensure the prohibition that prevents devolved Welsh public authorities from using workers supplied by employment agencies to provide cover during industrial action cannot be lifted;

Section 3: concerns the commencement of the Act;

Section 4: cites the short title of the Act.

Documentation accompanying the Bill

The Welsh Government published an [Explanatory Memorandum](#) (PDF 691KB) alongside the Bill. This includes a Regulatory Impact Assessment (RIA), which details the policy options the Welsh Government considered and the associated costs and benefits of making the legislation, and Explanatory Notes for each section of the Bill. A revised [Explanatory Memorandum](#) was published after Stage 2 of Committee Considerations to include information on amendments made to the Bill after Stage 2.

Removal of restrictions on deduction of union subscriptions from wages in the public sector (check-off)

Section 1(2) of the Act provides that the restrictions on the deduction of union subscriptions from wages in the public sector does not apply to devolved Welsh authorities.

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

The Equalities, Local Government and Communities Committee were of the view that the provisions within the 2016 Act to restrict check-off services were 'unnecessary and unwarranted':

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

Disapplication of regulations about facility time to devolved Welsh authorities

The aim of Section 1(3) of the Trade Union (Wales) Act 2017 is to disapply regulations relating to the publication of information on facility time. It also seeks to disapply regulations on capping spend on, or limiting facility time allowed by devolved Welsh authorities.

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

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

Disapplication of 40 per cent support threshold for industrial action affecting "important public services"

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

Section 3 of the 2016 TU Act provides that, in order for industrial action to be taken, at least 50% of all union members entitled to vote must exercise their right to vote. In addition, **at least 50%** of those who vote must vote **in support** of taking industrial action. Where 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.

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

Regulations to preserve the prohibition of use of agency workers to cover industrial action

Section (2) of the Trade Union (Wales) Act 2017 makes provision to preserve the prohibition currently in place on the use of agency workers, by employers, to cover staff during periods of authorised industrial action.

During a Plenary statement on the Bill, the Cabinet Secretary referred to the UK Government's proposals to revoke regulations that prevent the supply of agency workers to cover industrial action.

The Welsh Government consulted on proposals to preserve the principle that agency workers should not be deployed to cover industrial action.

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

The UK Government has not acted on the proposal to revoke these regulations as of yet. Section 2 of the Act would prevent devolved Welsh authorities from using agency workers in Wales during industrial action if the UK Government did decide to revoke the regulations.

4. Estimated costs of implementing the Act

Associated administrative costs of introducing the Act

A Regulatory Impact Assessment (RIA) was contained within the Explanatory Memorandum (as amended after Stage 1) (EM) published by Welsh Government.

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

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

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

According to the Welsh Government, there is an estimated total net administrative cost-saving of **£797,500** in implementing the Act for devolved Welsh authorities.

Other costs to devolved Welsh authorities

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

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

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

Unquantified costs

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

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

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

5. Reception from Stakeholders

As part of its scrutiny of the Bill at Stage 1 of the Assembly's legislative process, the Equality, Local Government and Communities Committee issued a **call for evidence**.

The consultation sought views on the need for the legislation, and evidence of the impact of dis-applying certain provisions within the 2016 Act for devolved Welsh authorities. It also sought views on unintended consequences arising from the Bill and any financial implications for public services.

In addition to the written consultation, **4 evidence sessions** were conducted with representatives from trades unions, public sector employers in Wales and the Cabinet Secretary for Finance and Local Government.

There was **overwhelming support** in evidence for the general principles of the Bill and for each of the provisions in the 2016 Act the Welsh Government were seeking to dis-apply. There was also **strong support**, from those who commented, for continuing the prohibition on the use and deployment of agency workers as cover during industrial action.

Responses focussed primarily on the success of the current model of working, particularly the social partnership, which trade unions and employers alike believe is working well. Many of the respondents stressed the potential negative impact of the provisions in the 2016 Act on industrial relations in Wales, and, although the model is not without its difficulties, the social partnership model, on the whole, was working effectively to overcome some significant challenges faced by the public sector in Wales.

The Committee heard evidence that the social partnership approach taken in Wales had played a significant part in averting industrial action such as that experienced in England. The evidence received confirmed the view that the partnership approach is not without its tensions and difficulties, and requires a commitment from partners in order to make it work. However, there was strong evidence that the partnership working has been essential to the management and delivery of public services in Wales, against a backdrop of austerity.

There was belief among many that the 40 per cent ballot threshold for 'important public services' would alter the balance of power between employers, trade unions and other social partners, and would damage industrial relations within Welsh public service areas. One of the potential unintended consequences of the new threshold according to one employer was that the trade unions would concentrate on reaching the required threshold rather than working with public service managers to reach solutions.

6. Passage through the Assembly

Stage 1

The Bill was scrutinised at Stage 1 of the Assembly's legislative process by both the Equality, Local Government and Communities Committee (ELGC) and the Constitutional and Legislative Affairs (CLA) Committee.

The ELGC Committee considered the **general principles** of the Bill and heard oral evidence from employers and trade unions, written evidence via a public consultation and scrutiny of the Cabinet Secretary, Mark Drakeford AM.

The Committee report stated that:

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.

The Committee found that respondents were on the whole 'strongly opposed to the UK Government's 2016 Act' and therefore were opposed to the provisions within the Act which the Trade Union (Wales) Act 2017 intends to disapply.

There was consensus among all but one member of the Committee 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

The Committee came to the view that:

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

The Committee in its **Stage 1 Committee Report** recommended that the **Assembly supports the general principles of the Bill**.

The CLA Committee took evidence from the Cabinet Secretary on the Bill on 6 March 2017. The Committee had a specific focus on matters relating to the legislative competence of the National Assembly to pass the Bill, the drafting of the Bill, and observations on specific powers to make subordinate legislation.

The CLA Committee in its **Stage 1 Report** made three recommendations, one of which asking the Cabinet Secretary to explain at the Stage 1 debate why the Bill did not include provisions related to agency workers.

The **Finance Committee wrote** to the Cabinet Secretary on the financial implications of the Bill on 3 March 2017 and notes the Cabinet Secretary's **response**.

The motion to agree the general principles of the Bill were agreed in **Plenary on 09 May 2017**.

Stage 2

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

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

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

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

Amendments agreed at Stage 2

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

Drafting amendments

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

All drafting amendments were agreed by the Committee.

Prohibition on using temporary workers to cover industrial action

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

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

7.–(1) Subject to paragraph (2) an employment business shall not introduce or supply a work-seeker to a hirer to perform—

(a) the duties normally performed by a worker who is taking part in a strike or other industrial action

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

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

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

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

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

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

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

Order-making Powers

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

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

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

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

The amendment was agreed.

Stage 3

Stage 3 consideration of the Bill took place in Plenary on **11 July 2017**. In all, **eight amendments** were tabled. All amendments were in the name of Janet Finch-Saunders AM who moved the amendments.

Amendments 1 to 3 had the intended effect of revoking the three key provisions of the Bill:

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

Amendments 1-3 were defeated (In favour: 12; against: 43; no abstentions).

Amendment 6 was seeking to amend a provision in the Bill that has the effect of retaining the 'status quo' in respect of the prohibition of the use of agency workers to cover workers on industrial action. The UK Government consulted on the possibility of revoking Regulation 7 of the Conduct of Employment Businesses and Employment Agency Regulations 2003 which would remove the prohibition on the use of agency workers during industrial action. As it stands, the UK Government has not revoked the Regulation in question. The amendment was defeated (In favour: 12; against: 42; no abstentions).

Amendment 8 called on the Welsh Government to conduct a 'full analysis of the true impact of this Bill' before it is enacted. The amendment was defeated (In favour: 12; against: 42; no abstentions)

Amendments 4 and 5 were withdrawn, and amendment 7 was not moved by the Assembly Member for Aberconwy.

Stage 4

Following a short debate in Plenary on 18 July 2017, the final Bill was approved by Members.

Royal Assent

Once a Bill is passed by the Assembly at Stage 4, the *Government of Wales Act 2006* provides that it may be submitted for Royal Assent by the Clerk of the Assembly, but only after the expiry of a four week window known as the 'period of intimation'.

During this period, the 2006 Act allows an Assembly Bill to be challenged through one of two ways:

- A referral to the Supreme Court by either the Counsel General of the Welsh Government or the Attorney General of the UK Government.
- An order made by the Secretary of State prohibiting the Clerk of the Assembly from submitting a Bill for Royal Assent

No such challenge took place in respect of the Trade Union (Wales) Bill. It received Royal Assent and became an Act of the National Assembly for Wales on 7 September 2017.

Commencement of the Act

All provisions in the Act come into force on 13 September 2017.