



Constitutional and Legislative Affairs Committee **Report on the Trade Union (Wales) Bill**

April 2017



National Assembly for Wales
Constitutional and Legislative Affairs Committee

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Constitutional and Legislative Affairs Committee
National Assembly for Wales
Cardiff Bay
CF99 1NA

Tel: **0300 200 6565**

Email: **SeneddCLA@assembly.wales**

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

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Constitutional and Legislative
Affairs Committee
**Report on the Trade Union (Wales)
Bill**

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National Assembly for Wales
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The committee was established on 15 June 2016 to carry out the functions of the responsible committee set out in Standing Order 21 and to carry out the functions of the responsible committee set out in Standing Order 21 and to consider any other constitutional, legislative or governmental matter within or relating to the competence of the Assembly or the Welsh Ministers, including the quality of legislation.

Current Committee membership:



Huw Irranca-Davies AM (Chair)
Welsh Labour
Ogmore



Nathan Gill AM
Independent
North Wales



Dai Lloyd AM
Plaid Cymru
South Wales West



David Melding AM
Welsh Conservative
South Wales Central



Dafydd Elis-Thomas AM
Independent
Dwyfor Meirionnydd

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Recommendations

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Recommendation 2. We recommend that the Cabinet Secretary provides an update during the Stage 1 debate on whether or not he believes saving, transitional or transitory provision may be necessary to give full effect to the Bill, and accordingly whether it would be appropriate to include commencement provisions on the face of the Bill only..... Page 18

Recommendation 3. If the Cabinet Secretary intends to retain the power in section 2(2), we recommend that he should table an amendment to the Bill to apply the negative procedure to the making of an order in accordance with that provision. Page 19

01. Introduction

The Committee's remit

1. The remit of the **Constitutional and Legislative Affairs Committee** (the Committee) is to carry out the functions of the responsible committee set out in Standing Order 21¹ (with the exception of Standing Order 21.8²) and to consider any other constitutional, legislative or governmental matter within or relating to the competence of the National Assembly or the Welsh Ministers, including the quality of legislation.
2. In our scrutiny of Bills introduced in the National Assembly our approach is to consider:
 - matters relating to the competence of the National Assembly, including compatibility with the European Convention on Human Rights (ECHR);
 - the balance between the information that is included on the face of the Bill and that which is left to subordinate legislation;
 - whether an appropriate legislative procedure has been chosen, in relation to the granting of powers to Welsh Ministers, to make subordinate legislation; and
 - any other matter we consider relevant to the quality of legislation.

Introduction of the Bill

3. On 16 January 2017, Mark Drakeford AM, the Cabinet Secretary for Finance and Local Government (Cabinet Secretary) introduced the **Trade Union (Wales) Bill** (the Bill) and accompanying **Explanatory Memorandum**.³
4. On 6 December 2016, the National Assembly's **Business Committee** referred the Bill to the Equality, Local Government and Communities Committee and, on 13 December 2016, set a deadline of 7 April 2017 for reporting on its general principles.⁴
5. On 16 January 2017, the **Llywydd wrote to us** about the legislative competence of the National Assembly to make the Bill.
6. We also received a copy of a **letter dated 15 February 2017** from the Cabinet Secretary to John Griffiths AM, Chair of the Equality, Local Government and Communities Committee.
7. On 23 February 2017, the Welsh Government sent us an exchange of correspondence between the Cabinet Secretary and the Rt Hon Ben Gummer MP, Minister for the Cabinet Office and Paymaster General. We were advised that the correspondence was not in the public domain and was for our information only.⁵
8. We considered the Bill at our meeting on **6 March 2017**, taking evidence from the Cabinet Secretary and two Welsh Government officials.

¹ National Assembly for Wales, *Standing Orders of the National Assembly for Wales*, September 2016.

² Functions under Standing Order 21.8 are the responsibility of the **External Affairs and Additional Legislation Committee**.

³ Welsh Government, Trade Union (Wales) Bill, *Explanatory Memorandum Incorporating the Regulatory Impact Assessment and Explanatory Notes*, January 2017.

⁴ Business Committee, *Report on the timetable for consideration of the Trade Union (Wales) Bill*, January 2017

⁵ By e-mail.

9. The Cabinet Secretary provided further information about the Bill by letter dated 27 March 2017.

Background

10. The Explanatory Notes to the Bill state that:

“During the passage through the United Kingdom Parliament of the Bill that became the Trade Union Act 2016 the National Assembly for Wales considered and opposed a Legislative Consent Motion, withholding consent for the UK Government to legislate on clauses pertaining to Welsh public authorities. The provisions that the Assembly withheld consent for related to an overall support threshold for ‘important public services’, facility time and check-off arrangements.”⁶

11. The Explanatory Memorandum states that the:

“The Trade Union (Wales) Bill (the Bill) amends provisions in the Trade Union Act 2016 (c.15) (UK TU Act) that have an adverse effect on the social partnership approach taken by the Welsh Government 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 Bill will reverse the effect of these provisions to protect the continued delivery of public services in Wales.”⁷

12. The *Trade Union Act 2016* (‘the 2016 Act’) amends the *Trade Union and Labour Relations (Consolidation) Act 1992* (‘the 1992 Act’). Those amendments were commenced on 1 March 2017. The present Bill is therefore seeking to reverse the application of those amendments to devolved Welsh authorities. The following table summarises the relationship between the Bill and UK legislation.

Subject matter	Trade Union Bill provision	Trade Union Act 2016 provision	Consolidation Act 1992 provision
Deduction of subscriptions by employer	Section 1(2)	Section 15	Section 116B
Facility time	Section 1(3)	Section 13 and in consequence 14	Section 172A and in consequence 172B
Ballot threshold	Section 1(4)	Section 3	Section 226

13. Some employers deduct trade union subscription from the wages of their workers (referred to as “check off”). Section 116B of the 1992 Act (inserted by section 15 of the 2016 Act), imposes restrictions so that 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

⁶ Explanatory Memorandum, Annex 1 – Explanatory Notes, paragraph 5.

⁷ Explanatory Memorandum, paragraph 1.1.

reasonable payments to the employer in respect of the making of the deductions. Section 1(2) of the Bill provides that section 116B of the 1992 Act does not apply to devolved Welsh authorities.

14. Sections 172A and 172B of the 1992 Act (as inserted by sections 13 and 14 of the 2016 Act) confer powers on a Minister of the Crown to make regulations about facility time, which is time off permitted for the purpose of employees carrying out trade union duties. Regulations made under section 172A may require public sector employers to publish information about the amount of facility time allowed. Section 172B provides that where a Minister of the Crown considers it appropriate to do so, and having regard to matters in section 172B(1), he or she may make regulations to cap the percentage of the employers' total pay bill spent on paying union officials for facility time and to restrict the rights of union officials to facility time by amending provisions in section 172B(4). Section 1(3) of the Bill provides that sections 172A and 172B of the 1992 Act do not apply to devolved Welsh authorities.

15. Section 1(4) provides that regulations made by the Secretary of State that define "important public services" for the purpose of section 226 of the 1992 Act may not include services provided by devolved Welsh authorities. Section 1(5) defines the devolved Welsh authorities to which the Bill applies by reference to the definition of "a devolved Welsh authority" in section 157A of the *Government of Wales Act 2006*.

16. The Explanatory Memorandum also states that:

"The policy objectives of this Bill are based on the Welsh Government's vision for public services ... one which is rooted in the principles of social partnership."⁸

17. In addition, the Explanatory Notes state:

"The Welsh Government considers that the effect of the Trade Union Act 2016 will prove socially divisive, lead to more confrontational relationships between employers and employees, and ultimately undermine public service delivery. The success of the social partnership model relies on an appropriate balance in the relationships between the partners and particularly between trade unions and employers."⁹

⁸ Explanatory Memorandum, paragraph 3.5.

⁹ Explanatory Memorandum, Annex 1 – Explanatory Notes, paragraph 7.

02. Legislative competence

18. The Explanatory Memorandum states that:

“The National Assembly for Wales ... has the legislative competence to make the provisions in the Trade Union (Wales) Bill (the Bill) pursuant to Part 4 of the Government of Wales Act 2006 (GoWA 2006). The relevant provisions of GOWA 2006 in so far as they involve the delivery of public services are set out in section 108 and Schedule 7.”¹⁰

19. The Explanatory Memorandum cites all 21 subject areas in Schedule 7 to the 2006 Act as being relied on to provide the National Assembly with legislative competence in so far as they relate to the delivery of public services.¹¹ The Cabinet Secretary said that this was done “to demonstrate the comprehensive way in which we believe that public services are reflected in Schedule 7 of the 2006 Act”.¹²

20. In her letter about legislative competence, the Llywydd said:

“However, my decision in this case was not straightforward. I have received advice that there are credible arguments that some or all of the operative provisions of the Bill might be ruled outside the Assembly’s competence, if the Bill was referred to the Supreme Court under section 112 of the GOWA, or challenged after Royal Assent. The decision I have made is, therefore, a finely balanced one.

...

I must stress that the advice I have received, and on which I have based my decision, is that the provisions of the Bill can reasonably be determined as being within the legislative competence of the Assembly. Nevertheless, I wish to ensure that the issues I have considered are shared with Committees so that further consideration can be given to them during scrutiny of the Bill, if Members so wish.”

21. The Llywydd’s letter annexed a summary of the legislative competence issues she had considered.

22. The Cabinet Secretary told us:

“The Bill is within competence because it is about the management, delivery and continuity of devolved public services. The Supreme Court has made it clear that, provided a Bill provision fairly and realistically relates to one or more of the subjects in Schedule 7 to the Government of Wales Act 2006 and does not fall within any exception to that Schedule, it does not matter whether a provision might also be classified as relating to a subject that has not been devolved, such as employment rights and industrial relations.

¹⁰ Explanatory Memorandum, paragraph 2.1.

¹¹ Explanatory Memorandum, pages 5-13.

¹² Constitutional and Legislative Affairs (CLA) Committee, 6 March 2017, RoP [68]

Significant elements in the UK Government’s Act relate specifically to public services, which, in Wales, are unambiguously devolved responsibilities. The Act refers explicitly to health services and the education of those aged under 17 and fire services, all of which are plainly devolved. It is this Government’s view that the relevant provisions of the Government of Wales Act 2006, insofar as they involve the delivery of public services, are to be found set out in section 108 in Schedule 7 to that Act, and that they bring the provisions of this Bill squarely within the devolved competence of the National Assembly.”¹³

23. When it was suggested that the real purpose of the Bill was to deal with the rights of trade unions and their members in a series of significant areas, the Cabinet Secretary said:

“No ... it’s not. The Bill is here to protect public services in Wales. It is a public services Bill. It refers to the part played by trade unions, the very important part played by trade unions, in the successful maintenance of public services in Wales. That’s what this Bill is about. It is about securing the continuity of the very successful model of social partnership that we have here in Wales. Our Bill simply seeks to allow the law as it has been since 1992 to continue uninterrupted and to build on the successful model we have here in Wales of delivering public services on a social partnership basis.”¹⁴

24. In pursuing this point, we asked why, if the primary purpose of the Bill was public service delivery, the Cabinet Secretary did not introduce a Bill on public service delivery. He replied by saying:

“What we have done in the Bill ... is to focus on those aspects of the UK Government’s Act that were from the very beginning the subject of dispute between the Welsh Government—and, subsequently, the National Assembly for Wales—and the UK Government ... we constructed our Bill in a way that draws its parameters around those aspects that are most closely related to public services and therefore most closely within the competence of the National Assembly, and then focused on those matters that, as I say, from the very beginning, were the subject of discussions with the UK Government, were the subject of a legislative consent motion laid before this National Assembly in January of last year, and which continue to be a matter of correspondence between ourselves and UK Ministers.”¹⁵

25. In reply to further questioning, he added:

“We believe that our Bill ensures that the trade unions are able to go on playing their part in that successful model of social partnership that supports our public services. That’s why this is a Bill about public service delivery and that’s why it is clearly, we believe, within the competence of the National Assembly for Wales.”¹⁶

¹³ CLA Committee, 6 March 2017, RoP [6-7]

¹⁴ CLA Committee, 6 March 2017, RoP [18]

¹⁵ CLA Committee, 6 March 2017, RoP [20]

¹⁶ CLA Committee, 6 March 2017, RoP [26]

and

“The Bill is designed to avoid the most egregious efforts of the UK Government to undermine the sort of model that we have devised here in Wales in support of our public services. That’s the purpose of the Bill and that’s why it’s been drawn up in the way that it has ...”¹⁷

26. We also asked what discussions the Welsh Government had had with the UK Government about the Bill. In explaining the nature of these discussions, the Cabinet Secretary referred to correspondence between the First Minister and former Prime Minister, saying:

“We are not attempting to impose our view on anybody else. We simply ask that they don’t attempt to impose their view on us. That was the nature of that correspondence. It continued up to the point of the LCM being put in front of the National Assembly for Wales. So, there was extensive correspondence that lies behind our decision to have to bring a Bill in front of the Assembly.”¹⁸

27. The Cabinet Secretary felt that the letter from the Rt Hon Ben Gummer MP was “material to the scrutiny of the Bill”¹⁹ and outlined its contents.²⁰ In his view, the UK Government would not refer the Bill to the Supreme Court because they were conceding the issue of competence.²¹ He added:

“I think what they’re saying is that they will pass a Westminster Bill to overturn the Bill that will be passed in this National Assembly.”²²

28. As indicated in Chapter 1, section 116B of the 1992 Act restricts the circumstances in which public sector employers can ‘check off’ so that it will be possible only in certain circumstances. Regulations made by a Minister of the Crown (subject to the affirmative procedure in both Houses of Parliament) may specify the public sector employers to which this provision applies. Section 1(2) of the Bill would disapply this provision in respect of devolved Welsh authorities. Therefore, those authorities could continue to deduct union subscriptions from employees’ wages, without making payment arrangements with unions, if they so wish (the Bill does not force them to do so and there is no other legal obligation on them to do so). The authorities would then not receive payment from the unions for checking off in all cases, though some may do so by agreement.

29. We pursued the issue of legislative competence specifically in the context of section 1(2) of the Bill because in her letter, the Llywydd felt that, in respect of this provision, “the arguments in favour of competence were least strong”. The Cabinet Secretary told us:

“... what I would like to do would be to draw the committee’s attention to the evidence received from NHS employers by the equality and local government committee in this regard ... they encourage their employees to join a trade union, because the ability to carry out very important day-to-day duties relies on them being able to have a proper conversation with people whose views are able to be expressed to them in that way, and that offering facility time and

¹⁷ CLA Committee, 6 March 2017, RoP [30]

¹⁸ CLA Committee, 6 March 2017, RoP [36]

¹⁹ CLA Committee, 6 March 2017, RoP [42]

²⁰ CLA Committee, 6 March 2017, RoP [44 and 48]

²¹ CLA Committee, 6 March 2017, RoP [47 and 51]

²² CLA Committee, 6 March 2017, RoP [51]

check-off ... is an investment by them in making sure that they are able to go on delivering public services, because this means that trade unions are able to go about their business ... They said that from an employer's point of view, it is very helpful to them to know who are members of trade unions, and the check-off helps them to do that, so that that way of conducting industrial relations in a social partnership model can be enhanced. So, the link between check-off, trade union membership, social partnership and public services was one that they were absolutely able to articulate."²³

30. When questioned further on whether this was more of a reasonable point of policy, rather than a matter of legislative competence, the Cabinet Secretary said:

"When employers were asked about the check-off matter, their understanding of it was exactly that by having this facility that allowed trade unions to carry out the job that trade unions are there to carry out, and allowing trade unions to carry out the job that they do, leads to better public services. That's the competence issue ... that's why check-off is not just a matter of an individual citizen in a relationship with an employer. It is a foundational way of the way that trade unions collectively are able to operate, and the proper operation of organised trade unions is a foundation of the way that we provide public services in Wales. The competence issue is clear."²⁴

31. In his [letter of 27 March 2017](#) the Cabinet Secretary told us that:

"... the Bill is not only compatible with the European Convention on Human Rights but, in my view, protects the rights of workers which are undermined by the stringent restrictions in the Trade Union Act.

When the Trade Union Act was introduced in Parliament the UK Government published a memorandum on the impact on Convention Rights. That memorandum acknowledged that Articles 11 and 14 were engaged in the case of provisions on the 40% ballot threshold and facility time. Article 11 of the Convention protects the right to freedom of assembly and association and includes a right to join a trade union for the protection of workers' interests. Article 14 which must be parasitic on another Convention right is a right not to be discriminated against. The memorandum concluded that any interference with these rights was justified because the purpose of the Act was to protect the delivery of public services."

32. The Cabinet Secretary's letter also stated that he would include a note in the Explanatory Memorandum to confirm that the Bill does not have an adverse effect on Convention Rights.

Our view

33. It is not our role to express a view on whether a Bill is within or outside the legislative competence of the National Assembly. Under the *Government of Wales Act 2006*, that is a matter for the person in charge of the Bill (section 110(2)) and the Llywydd (section 110(3)). Ultimately, any

²³ CLA Committee, 6 March 2017, RoP [78]

²⁴ CLA Committee, 6 March 2017, RoP [80]

question about whether a Bill is within the legislative competence of the National Assembly is a matter for the Supreme Court to decide.

34. We have explored the issues of legislative competence with a view to providing information for Assembly Members to take into account when deciding:

- (i) whether to agree to the general principles of the Bill at Stage 1 of the legislative process;
- (ii) whether or not to table amendments, or to support tabled amendments, at Stages 2 and 3 of the Bill's scrutiny.

35. Whether or not the UK Government decides to repeal the Bill (if enacted) following the introduction of the *Wales Act 2017* is a matter of speculation.

36. We have indicated in previous reports that it is our intention to monitor the impact of the 2017 Act on the ability of the National Assembly to make laws for Wales and it is on that basis that we will monitor any future action related to the Bill, should it become an Act of the Assembly.

37. We note the Cabinet Secretary's comments regarding human rights and welcome his intention to confirm, in a revised Explanatory Memorandum, that the Bill does not have an adverse effect on Convention Rights.

38. We would encourage statements about the human rights aspects of a Bill to be included in the Explanatory Memorandum that accompanies a Bill on its introduction.

03. General observations

Approach to the Bill

39. The Bill contains 3 sections. The principal section, section 1, makes five amendments to the 1992 Act. Section 2 concerns the commencement of the Act, while section 3 cites the short title of the Act.

40. The Cabinet Secretary told us:

“I suppose, in one sense, this is a free-standing Bill—it stands on its own merits—but it proceeds by amendment to other Bills. Of course, we did consider a number of different ways in which we could have given effect, as we believe we are doing, to the clear views of the fourth Assembly, and which were affected in the manifesto put in last May’s elections by my party, and by some other parties at the Assembly as well.

...

I understand that it could be thought of as a slightly complex way of constructing a Bill, but, given that the Bill is very short, very specific, very well understood amongst the audiences who will have the most direct interest to it, we thought this was the most straightforward way to achieve what we set out to achieve.”²⁵

Agency Workers

41. During his statement introducing the Bill, the Cabinet Secretary said:

“Alongside its Trade Union Act, the UK Government consulted on proposals to rescind regulations that prevent the supply of agency workers to cover industrial action. We have therefore consulted on proposals to sustain the principle that agency workers should not be deployed in that way. The consultation has now closed and the results are being analysed. One option would be for us to include provision in this legislation by way of amendment in later stages, provided the Bill makes progress. I will provide a further statement to Members as consultation analysis comes to an end.”²⁶

42. In his [letter dated 15 February 2017](#) to the Chair of the Equality, Local Government and Communities Committee, the Cabinet Secretary noted that the UK Government had not yet acted since its consultation in July 2015 and stated:

“... should it revoke the regulation this would apply to industrial action taken by workers in all sectors, including workers employed in the public sector in Wales.”

²⁵ CLA Committee, 6 March 2017, RoP [70]

²⁶ National Assembly for Wales, Plenary, Record of Proceedings, 18 January 2017

43. The letter added that in respect of the Welsh Government’s September 2016 consultation:

“I am yet to announce my policy on this but, as I mentioned in my legislative statement, one option would be to seek legislation in this Bill to affect devolved Welsh authorities.”

44. When questioned about why there was a public consultation on agency workers but not on the Bill, the Cabinet Secretary told us that issues around agency workers had not been part of the original policy discussions:

“The agency workers issue, however, had not been part of that conversation; it wasn’t part of the original Westminster proposals. And I thought, therefore, that that was a different issue, and deserved a different sort of public airing, because it hadn’t got the background—the depth of background of discussion—that the Bill in front of the committee today had already gathered.”²⁷

45. As regards tabling amendments to the Bill in respect of agency workers, he said:

“... that’s actively under consideration at the moment. I wanted to publish the results of the consultation in advance of this committee, so that they would be available to you. There is a workforce partnership council on Thursday of this week. This matter is, again, on the agenda there. I want to have the opportunity to hear from members of the council—now that they will have had a chance to look at the results of the consultation as well—and then I will need to come to a conclusion as to whether or not to bring forward a Stage 2 amendment.”²⁸

46. The Welsh Government published the outcome of its consultation on 3 March 2017.²⁹ In response to questions about how best to create a duty on Welsh public service employers not to use agency workers, the document states:

“However, support for the two options suggested for achieving the proposal to retain the current effect of the law was less strong – 60% agreeing with primary legislation and 43% with guidance or Ministerial direction.

In relation to primary legislation, there were significant differences between the views of trade unions and public sector employers – 77% of trade union responses agreeing but only 29% of public sector employer responses.”³⁰

47. In his **letter to us of 27 March**, the Cabinet Secretary told us he had reached a decision on the issue of agency workers:

“Following the consultation, I have decided to bring forward a Government amendment at Stage 2 to sustain the current position which prohibits the use of

²⁷ CLA Committee, 6 March 2017, RoP [95]

²⁸ CLA Committee, 6 March 2017, RoP [100]

²⁹ Welsh Government, *Consultation – Summary of responses, The use of agency workers during strike action*, March 2017.

³⁰ Welsh Government, *Consultation – Summary of responses, The use of agency workers during strike action*. March 2017, page 3.

agency workers during strike action on Welsh public authorities. Should the UK Government subsequently decide to revoke Regulation 7, the effect of doing so would apply to all other employers in Wales.”

Devolved Welsh authorities

48. Subsections (2) to (6) of section 1, in amending various provisions of the 1992 Act, make reference to devolved Welsh authorities, including defining them in subsection (5) as having the same meaning as in section 157A of the *Government of Wales Act 2006*.

49. We asked the Cabinet Secretary why the Explanatory Memorandum didn't include a list of the devolved Welsh authorities that would be subject to the Bill. He said:

“... when the Wales Bill was going through the House of Commons, there were a number of debates about the list of bodies contained within the original Bill. So, it does make sense, in my view, to refer in this Bill to that legislation, because that's where that list that we all agreed on is.

When we were preparing the explanatory memorandum, those discussions were still ongoing. Now, if the committee believes that it would be of assistance, when we do draw up the second version of the explanatory memorandum, just to transpose that agreed list into it, just for the sake of clarity, then I am more than content to do that.”³¹

50. He confirmed to us in his **letter of 27 March 2017** that any future revision to the Explanatory Memorandum will list all Welsh public authorities contained in the *Wales Act 2017*.

Our view

51. We are content with the approach to drafting the Bill by amendment of existing UK legislation.

52. We note that the Welsh Government is considering tabling an amendment to the Bill in relation to agency workers. In its report, *Making Laws in Wales*, our predecessor committee said:

“In our view, the process of amending Bills at Stages 2 and 3 should be used as a means to debate and suggest improvements to a Bill that has been introduced. It should not be used (except in exceptional circumstances or to deliver a committee recommendation made at Stage 1) to introduce large and significant amounts of legislative text that were, for whatever reason, not ready or unavailable at the time the Bill was introduced.”³²

53. While we acknowledge that the Welsh Government has consulted on the issues relating to agency workers, that is a very different process from a committee of the National Assembly engaging with the principles and actual wording of a Bill as part of the Stage 1 legislative scrutiny process. This is particularly important in respect of the Bill before us given the difference of opinion that exists on certain matters as indicated in paragraph 46 above.

54. It would have been our preference for provisions about agency workers to have been included within a Bill on its introduction given their policy significance. This would have allowed the Cabinet

³¹ CLA Committee, RoP [91-92]

³² Constitutional and Legislative Affairs Committee (Fourth Assembly), *Making Laws in Wales*, paragraph 114.

Secretary to take account of a committee report that explores and considers the views of stakeholders on agency workers and then, if necessary, to table amendments to change or delete the wording in the Bill as a consequence.

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

55. However, we agree with the Cabinet Secretary that primary legislation is the most appropriate vehicle to achieve the policy objective in relation to agency workers, rather than by means of guidance or Ministerial direction.

56. We note the Cabinet Secretary's offer of changing the Explanatory Memorandum to include a list of the devolved Welsh authorities that would be subject to the Bill. However, it would have been preferable to include this information, however incomplete and with whatever caveats, in the Explanatory Memorandum accompanying the Bill on its introduction for the purposes of Stage 1 scrutiny. Such an approach would have aided transparency and accessibility of the law to citizens. It is vital that public sector employers are in no doubt about whether or not they are subject to a piece of law proposed by the Welsh Government.

57. While the information would have had more value if included in the Explanatory Memorandum at the time of the Bill's introduction, we still think there would be merit in including a list of the devolved Welsh authorities subject to the Bill in any revised Explanatory Memorandum produced following Stage 2 proceedings. We therefore welcome the commitment to do so contained in the Cabinet Secretary's letter of 27 March 2017.

04. Observations on specific powers to make subordinate legislation

Background

58. The Bill contains one power to make subordinate legislation. Section 2(1) provides for provisions in section 1 of the Bill to come into force by order. Section 2(2) states that such an order may include saving, transitional or transitory provision. Sections 2 and 3 come into force on the day after the Bill receives Royal Assent.

59. The Explanatory Memorandum states:

“The Bill will be commenced by regulations made by Welsh Ministers. It does not contain any other powers to make subordinate legislation. The regulations require no procedure because the provisions which are the subject of the power have already been subject to Assembly scrutiny during the legislative process.”³³

60. The Bill has the effect of removing the delegated powers contained in relevant sections of the 1992 Act that are being dis-applied in Wales.

61. We questioned the Cabinet Secretary about how the powers in section 2(2) would be used. In his response, the Cabinet Secretary first provided an overview of section 2. He said:

“... there are two section 2 issued powers ... The first is to do with Royal Assent and whether the Bill should be commenced immediately on Royal Assent. Section 2, subsection (1) allows that to happen. It doesn't prevent it from happening ... But it also takes account of the convention—the Counsel General's convention—that a period of two months is allowed following the passage of the Bill through the Assembly ... Now, in this Bill, given its very specific focus, and limited extent, there may well be a case for the Counsel General to be willing to waive that convention. But that's not for me to do on his or her behalf ...”³⁴

62. He then added:

“Then there are the powers in relation to transitional and saving provisions ... if I was just able to make decisions today, then I can see that we may not need transitional or saving provisions in this particular Bill, because we should be able to get straight on with it, if and when the National Assembly agrees to it. The reason why the powers are there is because the UK Government might yet take actions between now and the Bill receiving Royal Assent that might have to change that position. We know, as I said earlier, that as of 1 March, the regulation-making powers have been made available to the Secretary of State, so that he can bring forward proposals in relation to check-off and facility time. If there were things in what the Secretary of State does that means that we

³³ Explanatory Memorandum, paragraph 5.1.

³⁴ CLA Committee, 6 March 2017, RoP [84]

would need a transitional arrangement, this section allows for that to happen. As of today, I would be hopeful that that wouldn't be necessary, but they're there to allow us to make decisions in the light of the changing actions that the UK Government might yet take while this Bill is in front of the National Assembly."³⁵

63. He agreed to provide further views on this issue and did so by **letter of 27 March 2017**:

"The Committee asked why the Bill does not provide for the order in section 2 to be subject to a procedure. We do not normally draft Bills to include procedures for commencement orders because their purpose is only to enact law that has already been subject to the fullest scrutiny by the Assembly. As in this Bill, commencement orders will often include saving and transitional provisions which enable us to manage the smooth transition to the change in law and minimise the disruption that change may cause. At this time I do not anticipate that transitional provisions will be necessary. This power is still needed however to manage any unforeseen matters that might arise, in particular, from the implementation of the Trade Union Act 2016. If there are any transitional provisions they will not be significant."

Our view

64. *Craies on Legislation*³⁶ explains that the convention referred to by the Cabinet Secretary in its present form goes back to 1982. It is no more than a convention to give "those affected by new legislation time to acclimatise and adapt". Craies says that there are two methods of giving effect to the convention: for the Bill to contain express provision about commencement or for it to be commenced by order.

65. We note the Cabinet Secretary's comments that the use of transitional or saving provisions is dependent on the actions of the UK Government.

Recommendation 2. We recommend that the Cabinet Secretary provides an update during the Stage 1 debate on whether or not he believes saving, transitional or transitory provision may be necessary to give full effect to the Bill, and accordingly whether it would be appropriate to include commencement provisions on the face of the Bill only.

66. If the Cabinet Secretary decides to retain the order-making power, we believe it should be subject to the negative procedure.

67. In reaching this view, we note the apparent contradiction between the evidence of the Cabinet Secretary and the information in the Explanatory Memorandum. The latter says that regulations (*sic*) are subject to no procedure because the provisions have "already been subject to Assembly scrutiny during the legislative process"; but the Cabinet Secretary indicated that the powers were being taken because of possible future action by the UK Government, which is clearly not yet fully known. It is unclear how the Cabinet Secretary can refer to "unforeseen matters" but then suggest that such matters "will not be significant".

³⁵ CLA Committee, 6 March 2017, RoP [85]

³⁶ Sweet & Maxwell, *Craies on Legislation: A Practitioner's Guide to the Nature, Process, Effect and Interpretation of Legislation*, Daniel Greenberg, 9th Revised edition, 2008.

68. Should the UK Government decide to bring forward regulations in the future, such regulations would be subject to scrutiny in both Houses of Parliament. It is not for the Welsh Government to be the sole arbiter of the impact on Assembly legislation of the UK Government's action. For that reason, it is wholly appropriate that the National Assembly has the right to scrutinise the impact of the UK Government's decisions on this Bill if enacted.

Recommendation 3. If the Cabinet Secretary intends to retain the power in section 2(2), we recommend that he should table an amendment to the Bill to apply the negative procedure to the making of an order in accordance with that provision.