

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.

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1 December 2015