

Mark Drakeford AM/AC  
Ysgrifennydd y Cabinet dros Gyllid a Llywodraeth Leol  
Cabinet Secretary for Finance and Local Government



Llywodraeth Cymru  
Welsh Government

Eich cyf/Your ref  
Ein cyf/Our ref

Huw Irranca-Davies AM  
Chair  
Constitutional and Legislative Affairs Committee  
National Assembly for Wales  
Cardiff  
CF99 1NA

27 March 2017

Dear Huw,

At my evidence session with the Constitutional and Legislative Affairs Committee on the 6 March I promised to write to the Committee to clarify some points of detail and share my decision following consideration of the responses to the 2016 consultation on the use of agency workers during strike action.

The Committee raised the constitutional and legal implications of any UK Government action to reverse the effect of the Bill.

Constitutionally Parliament remains the supreme legal authority and generally Acts of Parliament cannot be challenged in the courts. If Parliament voted to pass legislation there would be no recourse to the Courts simply because the will of the National Assembly had been overturned. That would not, of course, in any way remove our principled objections to such an attempt by the UK Government to go against the clear will of the National Assembly as a Legislature which has the democratic mandate of the people of Wales.

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.

Turning to the issue raised in relation to the European Convention on Human Rights, 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.

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Rydym yn croesawu derbyn gohebiaeth yn Gymraeg. Byddwn yn ateb gohebiaeth a dderbynnir yn Gymraeg yn Gymraeg ac ni fydd gohebu yn Gymraeg yn arwain at oedi.

We welcome receiving correspondence in Welsh. Any correspondence received in Welsh will be answered in Welsh and corresponding in Welsh will not lead to a delay in responding.

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.

The Welsh Government's belief is clear that the adversarial approach inherent in the Act does not protect public services and restrictions are entirely unnecessary and therefore cannot be justified. This approach is in contrast to social partnership which is a proven and effective means of delivering public services and which promotes Convention rights. The social partnership model relies on workers being able to protect their rights by freely participating in industrial action and recognises the valuable contribution of union representation in the workplace.

I will include a note in the Explanatory Memorandum to confirm that the Bill does not have an adverse effect of Convention Rights.

Finally, in relation to agency workers, as the Committee is aware, the UK Government consulted in 2015 on a proposal to revoke Regulation 7 of the Conduct of Employment Agencies and Employment Businesses Regulations 2003. Regulation 7 prohibits employment businesses from providing temporary workers to provide cover during industrial action. Whilst the UK Government has not yet acted following its consultation, 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.

In September 2016, I published a consultation on whether the legal position should continue unchanged in Wales – i.e. to sustain the position where devolved Welsh authorities in Wales are unable to use temporary workers to provide cover when their staff take industrial action. This would be achieved by prohibiting the authorities themselves from using agency workers in a mirror to Regulation 7 which applies to employment businesses.

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 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.

I have asked officials to ensure the future revision of the Explanatory Memorandum lists all Welsh public authorities contained in the Wales Act 2017.

Yours sincerely

A handwritten signature in blue ink that reads "Mark Drakeford". The signature is written in a cursive, slightly slanted style.

**Mark Drakeford AM/AC**

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