



Elin Jones AC, Llywydd

Cynulliad Cenedlaethol Cymru

Elin Jones AM, Presiding Officer

National Assembly for Wales

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

Your ref:
Our ref: EJ/EW

16 January 2017

Dear Huw

Trade Union (Wales) Bill

I wrote on 13 January 2017 to the First Minister to confirm my view that, in accordance with section 110(3) of the Government of Wales Act 2006 (GoWA), the Trade Union (Wales) Bill, would be within the legislative competence of the Assembly.

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 enclose, for your information, a summary of the issues I considered in reaching my view on legislative competence. I feel it is appropriate, and important, to share this with you, so as to recognise and facilitate the role of Assembly Members on your Committee in scrutinising the Bill. Although legislative competence is likely to be more of a focus for the Constitutional and Legislative Affairs Committee, the information in this letter may be relevant to the Equality, Local Government and Communities Committee in the context of satisfying the Committee that the purpose of the Bill is clear and achieves it aims. The lawyer

Croesewir gohebiaeth yn Gymraeg neu Saesneg / We welcome correspondence in Welsh or English

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and Clerk supporting the Committee in that scrutiny will be able to provide more detailed information on the issues.

I am writing in similar terms to John Griffiths, as Chair of the Equality, Local Government and Communities Committee.

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. In previous devolution cases, the Supreme Court has expressed the view that reports of Assembly Committees can be some of the "clearest indication[s]" of the purpose of a Bill¹ – and the purpose is, of course, key to the question of whether a Bill is within competence or not.

Yours sincerely

Elin Jones AM
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¹ Judgment of the Supreme Court in the case of the Agricultural Sector (Wales) Bill [2014] UKSC 43, paragraph 50.



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Annex

Trade Union (Wales) Bill

Summary of Legislative Competence Issues considered by the Llywydd

•Background

The Trade Union (Wales) Bill has been submitted to the Llywydd by the Welsh Government to enable the Llywydd to state her view on whether the Bill is within the legislative competence of the Assembly. In accordance with section 110(3) of the Government of Wales Act 2006 (GoWA), and Standing Order 26.4, this statement must be made on or before the Bill being introduced.

After receiving advice from the Assembly's legal advisers, the Llywydd has decided that, in her view, the Bill would be within competence. However, the Llywydd considers it appropriate to bring an issue relating to competence, which she considered in reaching her view, to the attention of the Committees that will be scrutinising the Bill, so that they can decide whether or not to probe it further as part of the scrutiny process.

• Overview of the Bill

The Bill disapplies four sections of the UK Parliament's Trade Union Act 2016 (the 2016 Act) in relation to 'devolved Welsh authorities' (see below for the meaning of this term). Those sections of the 2016 Act changed trade union law – including for Wales - in the following ways:

- restricted the deduction of union subscriptions from wages in the public sector (section 15 of the 2016 Act);
- imposed publication requirements in relation to facility time given to trade union officials (section 13 of the 2016 Act)
- gave UK Ministers the power to restrict paid facility time after the publication requirements have been in force for 3 years, and to require publication of further information (section 14 of the 2016 Act);



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- amended the requirements for ballots before action by trade unions in ‘important public services’, including health, education for under-17s and fire services; the result being to require more challenging conditions to be met before lawful industrial action can be taken (section 3 of the 2016 Act).

‘Devolved Welsh authorities’ is defined in the Bill by reference to the Wales Bill. An authority will be a ‘devolved Welsh authority’ if either it is listed in a Schedule to the Wales Bill², or if it meets criteria set out in that Bill (this is intended to catch any omissions from the Schedule and also to cover new bodies created, or changes of name). As well as the ‘obvious’ devolved Welsh public authorities with large workforces, such as Welsh NHS bodies, local authorities and education bodies, it includes the various Commissioners (e.g. the Children’s Commissioner for Wales), advisory panels (e.g. the Advisory Panel on Substance Misuse), Committees (e.g. the Welsh Pharmaceutical Committee), devolved tribunals (e.g. the Valuation Tribunal for Wales) and other types of body.

- **Competence Issue considered by the Llywydd**

The issue which caused the Llywydd to say that her decision on competence was finely balanced concerns whether the operative provisions of the Bill relate sufficiently closely to one or more subjects listed in Schedule 7 to the GoWA. The operative provisions are section 1, subsections (2), (3) and (4) of the Bill; these subsections disapply the sections of the 2016 Act referred to above, as far as devolved Welsh authorities are concerned.

The Welsh Government rely on a large range of subjects in Schedule 7 to establish competence for this Bill. They are listed on pages 5-13 of the Explanatory Memorandum (in the pre-Introduction version seen by the Llywydd).

Section 108(7) of the GoWA provides that whether an Assembly Bill provision relates to a subject must be determined by reference to the **purpose** of the Bill provision. Regard must also be had to the **effect** of the Bill provision in all the circumstances. The courts can also have regard to ‘other things’, provided of course that those things are relevant.

A Bill provision will be outside competence, even if it ‘relates to’ a subject in Schedule 7, if it also ‘falls within’ an exception set out in that Schedule. There are no relevant exceptions in the case of the Trade Union (Wales) Bill.

² Currently, Schedule 3 (we are currently in the course of Report Stage in the House of Lords, so there is one more substantive amending stage to come). Schedule 3 to the Wales Bill inserts a new Schedule 9A into the GOWA.



The Supreme Court's decisions so far on the Welsh and Scottish devolution settlements have produced important guidance on how the 'relates to' test will be interpreted. In particular:

- The Supreme Court has consistently held that whether a provision of a Bill 'relates to' a subject is to be made **primarily** by reference to the purpose of the provision. To determine the purpose, the Court will not merely look objectively at the drafting of the Bill. 'Purpose' means what the person introducing the Bill – and the legislature scrutinising it - actually intended the Bill to achieve. The Supreme Court has said that the clearest indication of this is reports that gave rise to the Bill (such as Government proposals and consultation documents) and reports of Assembly Committees³. But the court will go on to look at the legal and practical effects of the Bill to see if they are consistent with the stated purpose⁴.
- Once the purpose has been established, the Supreme Court has consistently held that the 'relates to' test requires more than a 'loose or consequential connection' between the Bill provision and the Schedule 7 subject⁵.
- Crucially for this Bill, the Supreme Court has held that, if a Bill provision 'relates to' a Schedule 7 subject, it does not matter whether it could also be classified as relating to a 'silent subject' – a subject which is not listed as devolved in Schedule 7 but which is not listed as an exception there either. These 'silent subjects' include employment and industrial relations⁶.
- In this context, where a Bill provision can be said to have more than one purpose and effect, some of which relate to silent subjects, the Supreme Court has expressly said that seeking the 'real' purpose is not the correct approach under the GoWA⁷. So long as the provision 'fairly and realistically' 'relates to' a subject in Schedule 7, by reference to its purpose – i.e., so long as the connection between the provision and the subject is not merely 'loose or consequential', by reference to the provision's purpose – it will be within competence, however close its connection may also be to a silent subject.

³ Imperial Tobacco v Lord Advocate [2012] UKSC 61, para 16; Agricultural Sector (Wales) Bill judgment [2014] UKSC 43, para. 50.

⁴ Agricultural Sector (Wales) Bill judgment [2014] UKSC 43, para. 53.

⁵ Agricultural Sector (Wales) Bill judgment [2014] UKSC 43, para. 50.

⁶ Agricultural Sector (Wales) Bill judgment [2014] UKSC 43, para. 67.

⁷ Agricultural Sector (Wales) Bill judgment [2014] UKSC 43, para. 64.



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This Bill clearly falls into the category of Bills that have a connection with a silent subject: in this case, industrial relations, or in other words the law relating to trade unions.

The Llywydd had to consider, therefore, whether all the Bill's provisions also 'fairly and realistically' related to subjects in Schedule 7.

As set out above, a key issue in this regard is the purpose of the Bill. The Welsh Government has set out its description of the purpose and effect of the Bill in Chapter 3 of the Explanatory Memorandum. Chapter 3 of the Memorandum starts by linking the provisions in the Bill to the Assembly's competence over a range of Schedule 7 subjects which can be said to cover public services, and the bodies that deliver or contribute to the delivery of those services.

The Memorandum goes on to explain the purpose of the Bill as seeking to avoid the undermining of the delivery of public services in Wales by the public bodies it will affect. It explains that the Welsh Government sees social partnership as a basis for effective public service delivery and improvement. The Welsh Government see the 2016 Act as detrimental to the social partnership model, and therefore to the delivery of public services in Wales and to the economy of Wales. The intention of the Bill is to restore the balance in the social partnership, and particularly between trade unions and employers, that existed before the UK Parliament passed the 2016 Act.

The Memorandum briefly describes how two of the operative provisions of the Bill (the provisions relating to trade union facility time, and to ballots before industrial action in key public services) fit into the context of that overall purpose. The Memorandum deals very briefly with the operative provision concerning deduction of union members' subscriptions from their wages by their public sector employers, simply saying that the Bill would remove "unnecessary restrictions" on public sector employers continuing to make these deductions.

The other key issue in the Llywydd's decision on the 'relates to' test was whether the connection between each of the Bill's operative provisions, and Schedule 7 subjects, was close enough – i.e., whether it was more than merely 'loose or consequential'.

The Llywydd decided that, on balance, and in the light of the Supreme Court's judgment in the case of the Agricultural Sector (Wales) Bill, there were reasonable arguments that all the operative provisions of the Bill 'fairly and realistically' related to one more subjects in Schedule 7. In doing so, she took into account both the Welsh Government's stated purpose for the Bill - the protection of public



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service delivery in the devolved subject areas listed in the Explanatory Memorandum - and the scope of those subject areas more generally.

However, Assembly Committees scrutinising the Bill may wish to probe further as to the purpose of each of the Bill's provisions, and their relationship with the devolved subjects. Committees may wish to look particularly closely at section 1(2) of the Bill, where the Llywydd felt that the arguments in favour of competence were least strong.

In reaching her decision that the provisions of the Bill were within competence, the Llywydd also considered all the other tests for competence set out in the GoWA. These are territorial extent and applicability; compatibility with the Convention rights; compatibility with EU law; protection of certain other enactments; protection of the position of the Comptroller and Auditor General and of HM Revenue and Customs; and the test that the Bill must not have a prohibited effect on the Welsh Consolidated Fund. She was satisfied that the Bill met all these tests.

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