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Consultation – summary of response

The use of agency workers during strike action

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Mae'r ddogfen yma hefyd ar gael yn Gymraeg.
This document is also available in Welsh.

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The use of agency workers during strike action

Summary of consultation responses

1. Introduction

The Welsh Government published a consultation on the use of agency workers during strike action on 13 September 2016. The consultation sought views relating to the principles of disallowing the use of temporary agency staff to cover for employees undertaking official industrial action in Welsh public services.

The Welsh Government approach to managing public services in Wales is characterised by social partnership. Social partnership is the partnership between the Welsh Government, trade unions and public bodies. Currently, Regulation 7 of the Conduct of Employment Agencies and Employment Businesses Regulations 2003 prohibits employment businesses from providing agency workers to cover the following:

duties normally performed by an employee of an organisation who is taking part in a strike or other industrial action, or to cover the work of an employee covering the duties of an employee taking part in a strike or other industrial action.

The UK Government consulted on a proposal to rescind Regulation 7. This would allow employers facing industrial action to hire temporary agency workers from employment businesses who would then be able to perform some of the functions not being carried out due to industrial action.

The Welsh Government believes the use of agency workers in this way would undermine the right to strike by reducing the impact of industrial action, and affect the balance between employer and trade unions, which underlies the social partnership approach in Wales.

The consultation document can be accessed here:

<https://consultations.gov.wales/consultations/use-agency-workers-during-strike-action-welsh-public-services>

The consultation period ended on 6 December 2016. 42 written responses were received. The list of respondents is at annex A, with anonymity protected where requested. Copies of the responses can be provided on request.

This document presents respondents' views to the questions contained in the consultation document. Respondents represented a range of types, from individuals to employers and the Wales TUC, which represents over 400,000 workers.

The quantitative analysis set out here counts each response as a single entity. Thus a response from a single individual is treated in the same way as a response from a public sector body employing many thousands of workers or the Wales TUC representing some 400,000 trade union members. The figures should not be taken as representing the weight to be attached to responses for that reason.

2. Methodology

The consultation asked participants for their views in relation to five questions that asked whether respondents agreed to a given statement and offered the opportunity to provide comments to explain the Yes / No response given. A sixth question invited comments on a specific issue and the seventh provided the opportunity to note any related issues not specifically addressed by the questions.

All responses were returned using either the online response form or the downloadable response form and emailed to the Welsh Government. 42 responses to the consultation were received by the Welsh Government. 11 of the respondents requested their responses remain anonymous and two were submitted anonymously.

One of the responses that was submitted anonymously noted in comments that the respondent works for an employment business supplying locum social workers. However, as the response was not provided on behalf of the business, it has been classed as coming from an individual.

The following table provides a breakdown of the number of respondents into types based on category.

Category	Number
Individuals (did not specify organisation or responded anonymously)	20
Trade Unions	13
Public Sector employers	7
Private sector employer	1
Other respondent	1

The majority of individual responses provided answers to the Yes / No questions but did not provide substantive comments so the majority of the qualitative analysis in section 4 is based on the comments from respondents who identified their organisations.

The following points should be noted:

- Not all respondents ticked a box in response to each Yes / No question: where this is the case, the percentages in section 4 will not add to 100%.
- The one respondent classed as 'Other' in the table above provides comments in relation to the questions but did not tick any Yes / No boxes.

3. Key Messages

Comments from a number of responses – and in response to a number of the questions posed in the consultation document – highlighted the importance of the social partnership approach in Wales and its effectiveness in reaching consensus and avoiding strike action.

The majority of respondents (79%) agreed with the Welsh Government's proposal that the effect of the law currently in place should continue, in which Welsh public service employers are not be able to use workers employed by an employment business to provide cover for staff taking industrial or providing cover for them.

Similarly, the majority of respondents (79%) agreed that the current voluntary arrangements are adequate to ensure that 'life and limb' continues to be protected by public services during industrial action and that the proposal would not significantly affect the financial position of employment agencies and businesses (86%).

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.

The option to use of guidance or Ministerial direction saw greater consistency between responses from trade unions and public sector employers, with only 31% of trade union responses and 29% of public sector employer responses agreeing with the option.

4. Response to Questions

Question 1

The Welsh Government believes that the effect of the law currently in place should continue, in which Welsh public service employers are not be able to use workers employed by an employment business to provide cover for staff taking industrial or providing cover for them. Do you agree?

Agree	79%
Disagree	19%

	Individuals	Trade Unions	Public Sector Employers
Agree	65%	100%	86%
Disagree	35%		14%

The majority of respondents supported the Welsh Government's proposal to retain the effect of the current law in relation to the use of agency workers during industrial action.

Coping successfully with industrial action remains a challenge for many employers and managers, but as they accept operating with the current legal situation the respondent assumed they could continue to do so.

All responses from Trade Unions supported the current position, as did the majority of responses from public sector employers. 65% of responses from individuals supported the current position with the other 35% disagreeing.

One public sector employer respondent suggested the use of agency staff would undermine public workers' rights to use lawful industrial action and could lead to avoidable conflict. One trade union response suggested that changes to the current situation might risk damaging the constructive relationship built through a social partnership approach.

However, a response from an organisation representing a part of the public sector considered organisations should have the right to make business decisions in order to avoid any negative impact on their clients.

Responses from individuals were more likely to disagree with the proposal for reasons including the view that service providers should have a '*duty to maintain continuity of services to the public*' and the option to use any appropriate means to do so. One individual respondent agreed with proposal but highlighted the impact of education strikes on working parents.

Question 2

Welsh Government believes that the current voluntary arrangements are adequate to ensure that 'life and limb' continues to be protected by public services during industrial action. Do you agree?

Agree	79%
Disagree	14%

	Individuals	Trade Unions	Public Sector Employers
Agree	65%	100%	86%
Disagree	30%		

The majority of respondents agreed that the current voluntary arrangements are adequate to ensure that 'life and limb' continues to be protected by public services during industrial action.

All responses from Trade Unions supported the current position, as did the majority of responses from public sector employers. 65% of responses from individuals supported the current position with the other 35% disagreeing.

There was considerable support for the way the current voluntary agreements are working. One trade union response suggested making 'life and limb' arrangements mandatory could damage industrial relations by creating an imbalance of power in the workplace.

Respondents from the Fire and Rescue Services noted their current arrangements derive from the Fire Services act 2004 and considered them to be "suitable and sufficient".

An organisation representing parts of the public sector suggested there are occasions when voluntary arrangements are not always enforceable to protect service provision, but did not give any specific example. Conversely, one union response suggested the use of inexperienced and inadequately trained agency workers could represent a risk to public safety.

Question 3

The Welsh Government does not anticipate that the proposal would significantly affect the financial position of employment agencies and businesses. Do you agree?

Agree	86%
Disagree	7%

	Individuals	Trade Unions	Public Sector Employers
Agree	85%	92%	86%
Disagree	10%		14%

The majority of respondents agreed that the proposal would not significantly affect the financial position of employment agencies and businesses. The majority agreeing with the Welsh Government was common across responses from trade unions, the public sector and individuals.

A number of respondents from each category agreed there would be no detrimental affect as keeping the current arrangements means employers are not currently able to employ agency workers so there is no current financial gain for employment agencies. It was suggested such cover would be additional non-core / unplanned business for employment agencies, which would not be expected and so would have benefit to their financial position. It was also noted this could have a detrimental affect on the financial position of the public sector organisation employing agency workers.

A number of respondents highlighted concerns relating to the likelihood of agency workers having the specific skills to cover roles during strike action unless the roles are administrative or manual ones.

One respondent referred to the potential difference in position between Wales and England, should the UK Government rescind the Regulation and noted Welsh employment agencies could provide agency workers to cover industrial action in England.

Question 4

Do you agree that the option to use primary legislation to create a duty on Welsh public service employers not to use agency workers best achieves our intention?

Agree	60%
Disagree	36%

	Individuals	Trade Unions	Public Sector Employers
Agree	65%	77%	29%
Disagree	35%	15%	71%

60% of all responses agreed the option to use primary legislation best achieves the Welsh Government's intention.

The use of primary legislation to create a duty on Welsh public service employers not to use agency workers was strongly favoured by trade union (77%) and individual (65%) respondents. However, the public sector employer responses were equally strongly against the proposal to use primary legislation (29% in favour and 71% against).

Three public sector employer respondents, who had consulted with each other on their responses, considered that neither primary legislation nor guidance is required, with one suggesting the use of the Agency Workers Procurement Framework.

An organisation representing parts of the public sector considered current voluntary arrangements were adequate without legislation, citing partnership working as a key component in the way the NHS operates.

Wales TUC indicated they would be content for the specifics of the duty to be delivered through secondary legislation if the principle is set out in primary legislation. This option was also supported by other responses from trade unions, although UNISON considered primary legislation to be required to ensure a legal duty on employers.

A number of individual, union and public sector employer responses suggested the use of primary legislation would show greater support for upholding the right to strike than the use of guidance or direction would or would provide greater transparency.

A legal sector respondent suggested most clarity and certainty could be provided by the use of legislation (primary or secondary) rather than relying on guidance, which may be optional or involve uncertainty as to its application.

Question 5

Do you agree that the option to use guidance or Ministerial direction to Welsh public service employers best achieves the intention?

Agree	43%
Disagree	50%

	Individuals	Trade Unions	Public Sector Employers
Agree	55%	31%	29%
Disagree	45%	62%	57%

Less than half of all respondents (43%) agreed the option to use guidance or Ministerial direction best achieves the Welsh Government's intention.

This was particularly the case for respondents from trade unions (31%) and the public sector employers (29%). Individual respondents were more in favour of the use of guidance or direction (55%).

Three public sector employer respondents, who had consulted with each other on their responses, considered that neither primary legislation nor guidance is required, with one suggesting the use of the Agency Workers Procurement Framework. The potential use of the Framework was also welcomed by one trade union response.

There were conflicting views from different respondents. A public sector employer respondent considered the current successful partnership working approach in the public sector, meant guidance and direction was more appropriate than primary legislation. However, responses from UNISON and some other trade unions suggested employers may choose to ignore guidance or direction. There was also concern that this option could be misused or challenged by Ministers or employers.

Some individual responses opposed the use of guidance or direction as it would require support from Ministers and there were concerns they would not choose to exercise the powers, or there would be less transparency than through using primary legislation.

A legal sector respondent suggested most clarity and certainty could be provided by the use of legislation (primary or secondary) rather than relying on guidance, which may be optional or involve uncertainty as to its application.

Question 6

Are there any circumstances which should be exempt from the duty and if so what do you think would be the consequences of not exempting them?

There were few substantive responses to this question, many of which suggested the existing “life and limb endangerment” or where “public safety can be proven to be at risk”.

One individual respondent, who was supportive of maintaining the current position, suggested provision should be made to support those low-paid working parents who experience childcare difficulties when affected by strike action.

Individual responses included the suggestions that emergency services, medical practitioners and the army should not have the right to strike. However, one respondent suggested no public sector employee should be able to strike and another considered all circumstances should be exempt as the consequences could harm the public.

It was suggested by one respondent that, should there be any exemptions from the duty, the exemptions and the rationale for proposing them should be the subject of further consultation.

Question 7

We have asked a number of specific questions. If you have any related issues which we have not specifically addressed, please use this space to report them.

No public sector employer respondents gave a response.

The private sector respondent noted they were aware of some education recruitment agencies that offer cover during industrial action.

Trade union responses included general comments about the importance of workers’ rights and trade union representation, as well as the effectiveness of social partnership arrangements and good relationships between employers and trade unions.

The response from Voice – a non-striking union – highlighted concerns the removal of the current Regulation, or failure to replace it with commensurate legislation, may lead to their members being pressured to cover for striking colleagues.

5. Next Steps

The responses received to this consultation on the use of agency workers during strike action are being considered and used to inform the development of Welsh Government policy. Further announcements will be made in relation to future action.

Annex 1: List of Respondents

We have allocated each response to one of the following categories:

Individual	Responses where no organisation was listed or the response was submitted anonymously
Public sector	Responses from public sector bodies or representative organisations covering the public sector
Private sector	Responses from the private sector
Trade Union	Responses from unions
Other	Other responses

Ref	Category	Respondent	Organisation
1	Individual	Stephen Marks	
2	Individual	Respondent requested anonymity	
3	Individual	Respondent requested anonymity	
4	Individual	Keith Ingram	
5	Individual	Respondent requested anonymity	
6	Individual	Respondent requested anonymity	
7	Individual	Stephen Phillips	
8	Individual	Jill Rossiter	
9	Private sector	Gary Williams	New Directions Education Ltd
10	Public sector	Respondent requested anonymity	
11	Individual	Gavin Burke	
12	Individual	Pete Blakemore	
13	Individual	Anonymous response	
14	Union	Alyn Thomas	GMB
15	Union	Owen Hathway	NUT Cymru
16	Individual	Alan Hoskins	
17	Union	Respondent requested anonymity	

18	Individual	Anonymous response	
19	Union	Respondent requested anonymity	
20	Individual	Mike Perkins	
21	Individual	Nigel Doyle	
22	Individual	Respondent requested anonymity	
23	Union	Tim Pratt	ASCL Cymru
24	Individual	Respondent requested anonymity	
25	Individual	Dave Fildes	
26	Public sector	Phil Davies	Conwy County Borough Council
27	Union	Lisa Edwards	UCU Wales
28	Union	Ian Toone	Voice
29	Public sector	Andrew Davies	NHS Wales Employers
30	Public sector	Respondent requested anonymity	
31	Union	Martin Mansfield	Wales TUC
32	Individual	Respondent requested anonymity	
33	Union		Welsh Government Trade Union Side
34	Individual	Thomas Hugh Prosser	
35	Public sector	Kevin Jones	Mid and West Wales fire & Rescue Service
36	Public sector	Philip Haynes	South Wales Fire and Rescue Authority
37	Other	Lindsey Woods	Employment Lawyers Association
38	Union	Lisa Turnbull	Royal College of Nursing Wales
39	Union	Elaine Edwards	UCAC / NUT Wales
40	Public sector	Dr Rachel Bowen	ColegauCymru
41	Union	Amber Courtney	UNISON Cymru / Wales
42	Union	Rex Phillips	NASUWT Cymru