Northern Ireland
Assembly

# COMMITTEE FOR EMPLOYMENT AND LEARNING

# OFFICIAL REPORT (Hansard)

## Agency Workers Directive

1 June 2011

# NORTHERN IRELAND ASSEMBLY

# COMMITTEE FOR EMPLOYMENT AND LEARNING

## Agency Workers Directive

1 June 2011

**Members present for all or part of the proceedings:**
Mr Basil McCrea (Chairperson)
Mr Thomas Buchanan (Deputy Chairperson)
Mr Jim Allister
Mr Sammy Douglas
Ms Michelle Gildernew
Mr Chris Lyttle
Mr Barry McElduff
Mr David McIlveen
Mrs Sandra Overend
Mr Pat Ramsey
Mr Alastair Ross

**Witnesses:**
Mr Conor Brady )
Mr Tom Evans ) Department for Employment and Learning
Ms Deirdre Walsh )

**The Chairperson:**

I invite Tom Evans, Conor Brady and Deirdre Walsh to make their presentation. You are welcome.

**Mr Tom Evans (Department for Employment and Learning):**

Thank you very much for inviting us here for an opportunity to talk about an important and

complex policy area and piece of legislation. We provided a background paper that sets out some of the issues around the transposition of the directive. We have provided material on what we hope are the sort of issues that may be raised today.

I will take you through the context, the public consultation and the financial implications. Conor will pick up on the key issues that emerged from the consultation, and the critical path. The three of us will then be available to answer questions. We will try to move at a fairly brisk pace.

In December 2008, the European Parliament and the Council of the European Union agreed a directive on conditions for temporary agency workers, known as the agency workers directive. A key issue is the need to transpose the directive here by 5 December 2011. Employment is a devolved matter here so this is something that is very much within our territory.

The aim of the directive is to ensure the protection of temporary agency workers by applying the principle of equal treatment, as set out in article 5 of the directive. The directive provides that the basic working and employment conditions of temporary agency workers, which includes duration of working time, overtime, breaks, rest periods, night work, holidays, public holidays and pay, should be, for the duration of their assignment, at least those that would apply if they had been recruited directly by a hirer to occupy the same job. That is quite a broad scope.

It is important to focus on the GB developments. Our sister Department, the Department for Business, Innovation and Skills, completed a public consultation in July 2009 on the general policy proposals to implement the directive. It then conducted a second consultation on the draft regulations, which closed in December 2009. The Agency Workers Regulations 2010 were laid before Parliament in January 2010, and are due to come into force in October of this year. Those consultations were helpful in that we were able to talk to colleagues about anything that they moved forward on between the consultations.

A key issue in the directive is that the default position is that equal treatment rights should apply from day one of an assignment. However, article 5 of the directive provides for a qualifying period for equal treatment, on the basis of an agreement between the social partners at a national level. In the UK, the Confederation of British Industry (CBI) and the Trades Union Congress (TUC) entered into discussions with the UK Government and, in May 2008, agreed to a

12-week derogation before the temporary agency workers' entitlement to equal treatment would apply.

In the Northern Ireland situation, the early considerations were that the social partnership agreement on which we had taken legal advice may not have applied because the TUC does not represent Northern Ireland trade unions. That was the view from our initial legal advice. Obviously, we then instigated discussions with social partners in Northern Ireland, the CBI and the Northern Ireland Committee of the Irish Congress of Trade Unions (NICICTU), and were not able to reach agreement. However, we did take further legal advice on the interpretation of article 5, which concluded that the agreement made between the social partners at national level in May 2008 extends to Northern Ireland, and that the Department can rely on that national agreement. Our advice stated that NICICTU would be a regional partner and that if we reached agreement, it would not satisfy the requirements, and we would not be fulfilling our responsibilities in the transposition if we made an agreement at only regional level.

I can understand the frustrations that the local trade unions had, and the Northern Ireland Committee of the Irish Congress of Trade Unions met the former Minister, Minister Kennedy, and raised concerns. The Minister had to come back and put it to them that it was really out of his and the Department's hands — that in taking forward and transposing the directive, we needed to abide by the national social partner agreement. That takes us on to the public consultation —

**The Chairperson:**
Before you move on, Michelle has a question.

**Ms Gildernew:**
I can wait until the end.

**Mr Evans:**
The public consultation ran from 15 December 2010 until 11 March 2011, and the Department's policy proposal reflected the position that the UK Government have operated on, particularly the reliance on the 12-week derogation.

In summary, the Department sought views on the draft regulations, taking account of the

following proposals: the definition of "pay"; the definition of "agency worker"; equal treatment on the duration of working time and paid holiday entitlement; provision to determine when a new qualifying period will begin in the treatment of breaks between assignments in the same job before the qualifying period should start; anti-avoidance measures to deter any intention to deprive agency workers of their equal treatment rights; and mechanisms for establishing equal treatment for an agency worker, which will, in practice, be a comparison with a comparable worker doing broadly similar work in the same organisation. The consultation also looked at the question of where primary liability for compliance with obligations under the directive will rest, and at the provisions for the resolutions of disputes. We have previously been in front of this Committee to discuss the wider issue of dispute resolution. We are trying to apply the principles of early resolution, but we took soundings as part of this consultation.

The consultation also invited views from stakeholders on other areas including access to employment, collective facilities and vocational training opportunities for agency workers; the protection of pregnant women and new mothers; the thresholds for bodies representing agency workers; and the provision of information on the use of agency staff to workers' representation.

We received 18 responses to the consultation, 13 of which were substantive. The responses came from eight public bodies, three employer organisations, three advice bodies, two local authorities, a student body and an employment agency. If members want to see which organisations those are, I have that information available.

We conducted a partial regulatory impact assessment, which is a standard process when taking forward a major policy review. That assessment was based on two options for providing equal treatment: application from day one; or availing of the 12-week derogation. Under both options, the agency workers and HM Treasury would benefit financially. Agency workers would benefit from enhanced conditions and the Treasury through the increased contributions that come back into the general pot of money, while private and public sector hirers would face increased costs.

It is assumed that employment businesses that place temporary agency workers would be able to pass on probably between 85% and 100% of the cost of the higher wage and holiday costs to hirers. So, the fee and the remuneration will be passed on to hirers. The impact assessment demonstrates that the implementation of the directive from day one would result in estimated costs of £716 million with benefits of £550 million over a 10-year period, resulting in net costs of

£166 million over the same period. A very detailed impact assessment was conducted on that, and significant amounts of money were involved. Based on the 12-week qualifying period, the indicated costs would be reduced to £300 million and the benefits to £220 million over 10 years, resulting in an £80 million net cost over 10 years. Private and public sector employers faced an annual increased cost of £27 million and £6·5 million respectively, while the main annual benefits run at £19·2 million and £6·4 million. Those benefits will fall to the agency workers and, as I said, to Treasury.

There is a national agreement with the social partners to move forward on the basis of a 12-week derogation, which, from a financial perspective, is fairly compelling because, by basing the implementation on a 12-week derogation, costs would be reduced by about 60%. In addition, a preliminary equality impact assessment concluded the proposals had a neutral effect on all section 75 groups. We have provided a short table that gives a breakdown of costs against the various stakeholders, from agency workers to hirers.

That is the background to where we are today. We have completed the consultation, and Conor will take us through the key issues that emerged from that.

**Mr Conor Brady (Department for Employment and Learning):**
We have already provided the Committee with a detailed summary of responses to the consultation, but I will briefly take you through what we think are the key issues, either for ministerial decision or for further work by departmental officials. We will take questions at the end.

The first issue, which was raised by a couple of consultees, was the proposed definition of "agency worker" that we are proposing to put into legislation. In light of recent case law, specifically with regard to access to equality legislation for temporary agency workers, a couple of respondents asked us whether our proposed definition was accurate. We are seeking further legal advice to clarify that.

The second issue relates to working time and holiday entitlement. One of the questions about our proposal during the consultation was whether a temporary agency worker's entitlement would have a direct correlation to that of a comparable worker. For example, where company employees are entitled to holiday time over the statutory minimum, should agency workers also

have that entitlement? Some people, particularly those from the recruitment agency and industry side, suggested that we may wish to restrict that entitlement to the national statutory minimum, rather than to whatever a company's policy may be over and above the statutory minimum. The Minister will take a decision on that issue.

Not unrelated to that is the definition of "pay", particularly whether bonuses should be included. Our initial consideration was that simply restricting the definition to an hourly rate would not be sufficient to meet the equality requirement of the directive. We proposed to include certain bonuses that relate to work completed, whether piecework bonuses or bonuses based on team achievement, rather than long-term bonuses that may be dependent on the longer-term financial success or otherwise of a company. We restricted the definition of bonuses, but a number of people suggested either that our proposal was not restrictive enough or that it needs to go further. That is another matter for a ministerial decision in due course.

The next issue is breaks between assignments. This is ostensibly to look at what we term anti-avoidance measures, such as putting in place a system whereby any agency worker could ultimately be prevented from ever reaching the stage where he or she may have equal treatment rights. We suggested that a six-week period between assignments would be appropriate to effectively reset the clock. Again, as one might expect, different sides came back to say that period was either not sufficient or too long. We will look at that on balance, and the Minister will make a decision in due course.

The next point relates to permanent contracts of employment and payment between assignments. This is generally known as the Swedish derogation because it is a derogation that is often used in the recruitment sectors of our Scandinavian counterparts. In effect, it relates to temporary agency workers who are on a contract of employment whereby they are paid regardless of whether they are working. Our proposal was to ask whether we should include that derogation and, therefore, allow organisations in Northern Ireland to take on agency workers under such a contract. The general response was that, although that derogation may not be used much because it would place a great deal of financial implications on an agency and, therefore, only the bigger ones could use it, nevertheless, it would be welcomed. Again, it is a matter for a ministerial decision.

The next point relates to pregnant women and new mothers, and the implications of

protections that are put in place to allow them to have access to antenatal appointments, as well as protections in cases where, for example, a hirer is unable to provide them with a reasonable adjustment for them to carry on with their work while pregnant. The responsibility will then fall on the agency to try to find them alternative work that is not financially disadvantageous with a different hirer. During that period, they will continue to be paid. Again, it is about the balance between the protections for pregnant women and the additional costs that will apply to businesses.

The next point relates to access to employment vacancies. This is a right from day one to know about the availability of vacancies, not a right to the vacancies. We have just been lobbied about how employers might go about displaying vacancies to people. We will cover that comprehensively in the guidance to the directive, which we will subsequently produce.

Similarly, with regard to information to workers' representatives, there is a raft of trade union and information and consultation employment law which requires employers to provide certain information about employees to workers' representatives, be that in-house workers' representatives or official trade unions. We are looking at amending certain pieces of trade union law to include agency workers in that definition so that employers will be required to provide information on agency workers to the workers' representatives as well. We have been asked for greater clarity on how to go about that and what an appropriate level of information will be, as well as the content of that information.

One of the key points that will be looked at in case law in due course is how to establish equal treatment. As Tom mentioned, after 12 weeks, any agency worker has the right to be compared to a comparable worker and to receive equal treatment. As with some other legislation, we cannot be too prescriptive as to how that equal treatment can be defined. However, in subsequent guidance, we will try to provide as much guidance and information as possible to employers to remove some of that burden.

The next point relates to liability in relation to an equal treatment claim. This directive is unlike other employment law in that there is a distinctive triangular relationship between the agency worker, the recruitment agency or employment business, and the hirer. With that in mind, we decided to place the liability on the agency, although, based on whether information was forthcoming from the hirer in an equality case, liability can transfer to the hirer.

Agency workers in an equality case have the ability to ask for information with regard to equal treatment, and we propose that that should be provided by the agency after 28 days. If it is not forthcoming from the agency after that period, the worker can go to the hirer and ask for it. People simply want further clarity on what that information should be and how it should be processed, and we aim to provide that in the guidance.

The next point relates to dispute resolution. The Department is taking forward a much wider agenda with regard to alternative dispute resolution. The Department, along with the Labour Relations Agency, will provide more information in our guidance as to what we will do and what pathways people should follow to try to avoid all those cases ending up in tribunals. We would hope that many of them can be dealt with directly between the agency worker and the agency and the hirer.

I will quickly cover the critical path, which is my last point, and then we will answer any questions. Tom mentioned at the outset that the transposition date for the directive is 5 December. Therefore, it is a very challenging timeline for us. We hope to have the Committee's agreement to our policy proposals, and subsequently agreement from the Executive, before the summer recess. Over the summer months, we will finalise the regulations, which we hope to lay before the Assembly in September, with a view to their coming into effect in early December. During that time, we will work with a group of key stakeholders to develop the guidance to accompany that directive.

I apologise for having taken longer than I had intended to. I wanted to cover some of the detail.

**The Chairperson:**

Let us start at the end and work backwards. What about the critical path — the timescale? Explain to me why we have to get the negative resolution before the Assembly in September for an operational date of 1 December.

**Mr C Brady:**

That is to give the stakeholders an idea of what is formally coming in under the regulations. Let me compare the situation to that of the GB regulations. They were introduced in March 2010,

even though they are not to come into effect until December of this year. The whole point is, as far as possible, to give anyone who is going to be affected by the regulations as much time as possible to adjust to the implications. Standard processes suggest that regulations be introduced 12 weeks in advance of the date when they come into effect. Given the complexity of these regulations, we aim to have them introduced as early as possible, simply to allow people who work in the recruitment sector and their counterparts to make any necessary adjustments.

**Mr Evans:**

Just to add to that, we have done a fair bit of work with the various stakeholder groups on the detail. A number of conferences have been run by the Recruitment and Employment Confederation to talk through the detail. As you can see, they are a complex set of provisions. The earlier the regulations can be made, the more time there will be for those affected to make adjustments.

**The Chairperson:**

I do not want to prejudge what members of the Committee will say. I will be interested to see how the debate goes. There are some strong opinions on both sides of the argument, judging from the evidence in the consultation. I am a little concerned that we are bringing this through the secondary legislation route without giving adequate opportunity to debate the matter in the Assembly. The issue is that you are looking for us to have a little chat here, agree with what you say, and get an SL1 out by 15 June. Given changes of this magnitude — and this is significant — some debate on the issue in the legislative Assembly would have been preferable.

**Mr C Brady:**

I absolutely take your point. My response is that we do not have a choice. The manner in which secondary legislation comes through the Assembly is often dictated by the primary legislation under which that secondary legislation is brought through. If that is the case, the primary legislation will define the process by which the secondary legislation comes through, whether by negative resolution or confirmatory procedure. We are bringing this legislation under section 2(2) of the European Communities Act 1972. Under that Act, any secondary legislation must be subject to the negative resolution procedure. For that reason, and that alone, this particular legislative path has been taken.

**The Chairperson:**

I have no particular problem with it being a negative resolution, but the Committee and the Members of the Assembly need to have the opportunity to debate it. This is not just an increase of certain costs by inflation; it is a major change to working and employment practices which will affect many people in Northern Ireland. It is right, whatever way we look at it, that there be a proper and full debate on the matter. I put that marker down at this stage because I want to hear what colleagues have to say. We will come back and look at ways by which we may address any perceived deficiency.

**Ms Gildernew:**

You are all very welcome. Tom, it is good to see you again. How is the form? Given that the nucleus of all of this was at European level, to what extent have you looked at the issues in the South? Presumably, if there are differences in recruitment practices, etc, we could put one side or the other at a disadvantage when it comes to recruitment agency workers if the terms and conditions are very different. That is a particular issue in my constituency, given that we have a big border area. I would like to tease that out.

I am very glad that protection is there for pregnant women. I expect it to be no less than what is available for all workers. I am glad that that was given consideration. The new mothers issue gives me a wee bit of concern because the six-week break that you talked about is clearly to cover maternity leave. Is there a specific entitlement for maternity leave for agency workers? Is it the same for all workers?

I am a bit concerned that there was no formal agreement in the trade union issue. It will be interesting to see more detail on the Irish Congress of Trade Unions view.

**Mr C Brady:**

I will take the first point on engagement and what is happening in the Republic of Ireland at the moment. It is in a very different position from us, specifically in respect of a key point, which is the qualifying period of 12 weeks before equal rights come in. The default position of the directive is that if social partners are unable to agree at a national level any derogation, the default will be that all equal rights will come into place from day one.

You may know the background in Ireland of the framework agreements that have historically

been in place between trade union side and industry side and their — day I say — relative collapse over recent years, to the point at which our Irish counterparts are not in a position to establish a similar social partner agreement at this point. They are looking at the issue. We will probably meet them within the next month or so. They are in a slightly different position from us in that they need to bring in primary legislation first of all, and secondary legislation subsequently. Their developments have not been fully fleshed out at this point because of the lack of a framework agreement and the uncertainty of the primary followed by secondary legislation route that they have to take. That is a rather long-winded way of saying that we are not in a position to answer your question because Ireland is not fully in a position to know what its policy objectives are at this point.

**Mr Evans:**

The Irish Business and Employers Confederation (IBEC) withdrew from the social partnership because of not signing up to the national wage agreements. Sadly, the whole social partnership broke down.

**Ms Gildernew:**

Perhaps we could get more information on the trade union position on all of that. The other issue was the maternity arrangements. I am concerned about the six weeks, as opposed to six months.

**Ms Deirdre Walsh (Department for Employment and Learning):**

With regard to pregnant women and new mothers, is the issue the breaks between assignments — the pausing of the clock?

**Ms Gildernew:**

An alarm bell went off in my head because I cannot see where the directive states that mothers were entitled to the same maternity leave as full-time workers. There is a bit of detail about temporary adjustments to working conditions. I agree with all of that, but there is a lack of a caveat concerning new mothers. The fact that I cannot see in the summary where maternity arrangements are being provided for makes me wonder whether they are provided for.

**Ms Walsh:**

The equal treatment provisions provide for equality in respect of basic pay, plus some other payments. They do not extend to maternity pay, for example. In respect of the 12-week

qualifying period, if a woman is absent from work for maternity reasons, her qualifying period will continue to accrue for a period of up to 28 weeks. Does that answer your question?

**Ms Gildernew:**

Not really. I do not think that covers it. Agency workers are given similar entitlements to full-time workers in the same organisation. Those full-time workers take for granted that they would be entitled to maternity cover. There is a gap in that agency workers need to be covered to the same extent.

**Ms Walsh:**

The argument is that maternity pay does not count as basic pay in the same way that an occupational pension, for example, does not count as basic pay. There were exclusions in the equal treatment framework, and that is one of them.

**Mr Evans:**

The directive sets out what is not included, and maternity pay is not covered. As I said, it extends to what is called the basic entitlement, which includes paid holidays and bonuses linked directly to the job. However, it does not go into some of the other entitlements of someone in full-time employment, such as occupational pension schemes. Our hands are somewhat tied on the issue. The same arrangements apply in the rest of the UK. That is the proposal but, obviously, it is something that the Committee may want to raise. It will be for the Minister to take account of that. However, maternity pay was not planned to be part of the entitlement under the directive.

**Mr C Brady:**

To paraphrase, the point was made earlier —

**The Chairperson:**

Hold on a tick. We do not need three goes at answering the question.

**Ms Gildernew:**

We will want to come back to it and discuss it with the Minister.

**The Chairperson:**

I thought that that is what you would say. I will be bringing a proposal on this to the Committee;

I am checking the wording. Our hands are not tied, in a sense. Although there is a directive with which we have to comply, Michelle's point is that agency workers should have similar rights to full-time workers. If we wish to incorporate that, there is a debate to be had in the Assembly. We understand that we have to do what is required by the directive as a minimum, but there are certain other issues that we may want to look at.

I will come back to the points that you raised at the end of the session. Members, do not feel that you have to ask all your questions in one go. We will deal with issues at the time and move on. I will then go round the table again and deal with any issues that remain. You are welcome to come back in.

**Mr Allister:**

We hear a lot of talk about rebalancing our economy and helping the private sector, and that that is where the future is and where growth is. However, the inevitable consequence of the agency workers directive is the placing of an annual cost of £27 million on private business in Northern Ireland, and an annual cost of £6 million on the public sector. This bureaucracy is passing on a cost of £27 million a year to the private sector. Is that right?

**Mr Evans:**

I assume that you quote those figures from the impact assessment. That cost, in global terms, is correct. The reality is that we are required to transpose the directive and give agency workers enhanced rights, which ultimately costs money. There will be the benefit of a more free-flowing labour supply, but the reality is that there will be a net cost. Even though the social partnership agreement was made at a national level through the CBI and TUC in London, in looking at how to implement it, we were persuaded to move forward on the basis of the 12-week derogation because of the cost saving.

**Mr Allister:**

But, as a Department for employment, you cannot be comfortable with the fact that you are putting a whopping £27 million a year burden on private industry.

**Mr C Brady:**

In employment law generally there is always the argument to which you have referred, which is that of balancing rights for employees and agency workers, and not wishing to be overly

burdensome on industry in either a financial or regulatory sense. As Tom mentioned, the directive has been agreed. We have signed up to it, and we have to transpose it. However, within that, I think that we have sought, in keeping with our consultation response, to try to establish the balance between what is required by the directive and seeking, as far as possible, while still meeting the requirements of the directive, to ensure that the full financial impact is not placed on industry. The 12-week qualifying period is a significant step in that direction.

**Mr Allister:**

That £27 million is within the 12-week period. The figure is a lot larger if it were straight away.

**Mr C Brady:**

Absolutely.

**Mr Allister:**

Just carrying on with a different cost dimension, getting to this point has, of course, imposed a very considerable cost on the public purse through staff processes, consultations, and all of that. Yet, at the end of the day, will we end up with secondary legislation that is any different from the GB regulations?

**Mr C Brady:**

Ultimately, that will be a decision for the Minister. What we can do is respond as far as possible to the responses that were made to the consultation.

**Mr Allister:**

Do you identify anything at present that will distinguish any possible NI regulations from the GB regulations?

**Mr C Brady:**

The two areas that we have looked at where significant cost savings could be made are bonuses and holidays. However, according to our interpretation of the directive and its requirements, we think that we cannot exclude bonuses entirely from the definition of pay simply because, if we look at any other equality legislation either in Northern Ireland or throughout GB, pay is inextricably linked with bonuses. Therefore, by removing that one particular element, we would be in grave danger of automatically facing a challenge. The same is the case with holiday time.

We have looked at those as areas where the cost burden on industry could be reduced. However, again, unless we transpose the directive as proposed, we are in grave danger of facing either —

**Mr Allister:**

The bottom line is, therefore, that we go through all of this process, with all of its manifestations, we rack up costs in doing so, and we end up with identical regulations to those of GB. Why do we not simply say to GB that, although this is a devolved matter: extend your regulations to Northern Ireland, please.

**Mr Evans:**

We have to take issues raised today to the Minister. I understand the point that you are making, Mr Allister. Obviously, we have benefited from the GB consultation. They explored some of those issues to see whether there was any latitude. At this stage, they have implemented on the basis of full implementation. However, we will take the issues that you have surfaced and those we have raised with you, particularly those of bonuses and holiday time, to the Minister. The Minister will take the decision on balancing between the needs of the economy and not diluting individuals' employment rights. I take the point. Previously, the Committee raised concerns about the regulatory burden. I am sure that the Committee in this new mandate will do likewise. We have tried to look at that issue.

**The Chairperson:**

Actually, Jim, it does not have to be identical. The point that Michelle made earlier was that she sought an extension to look at maternity issues, for example.

**Mr Allister:**

We could increase the burden, but the directive does not require us to do so.

**The Chairperson:**

That is correct. However, looking at the general ethos of what was brought forward, I suspect that there will be a debate and a difference of opinion. Certainly, in what I saw of the consultation, it was brought out that agency workers may have been used to reduce costs unfairly and to take employment rights away from citizens. Other people say no, it provides suitable flexibility in developing the economy. That is the argument.

There is a timescale, and I would like to see some form of a debate in the Assembly on the issues so that people who want to be able to bring forward their points of view can do so. I will check about wording and issues like that to see if that is possible. It will probably be done through a take-note debate, where the issues can be properly raised, a proper debate can take place and the points can be put forward. You will get support for some of the points that you have put forward, but so will other people for other points of view. Such issues need to be discussed because these are fundamental changes.

**Mr Allister:**

I am quite happy with that. I am simply making the point that, at the end of the process, it would be interesting to see an audit of the difference, if any, between the GB regulations and the NI regulations, given the constraints of article 5 and the fact that we can move only on a national agreement. That is why what happened in the South might be interesting but is totally irrelevant; it cannot be aped at all.

**The Chairperson:**

This is where we can go into detail in discussion, but there comes a point where we would be better doing that as part of a proper piece of work.

You quite correctly raised the point that the cost is £27·6 million if you have a 12-week qualifying period, but it is £66·1 million if you do not. The current representation, as I understand it, is that the local or regional social partners are not in agreement on that, but a process has been gone through whereby we can use the national agreement with the TUC.

**Mr Allister:**

We have to use it.

**Mr B McCrea:**

I am just saying that that is the debate.

**Mr Allister:**

I remember very well the debate about article 5 in Europe. The whole issue was about whether there should be a right for regional variation or whether there should be a national threshold. The debate was very firmly settled on the point that partnership agreements had to be on a national

basis. That is why we are tied in on the article 5 agreement to what has been agreed nationally.

**The Chairperson:**

I am not actually arguing that point. I am saying that there needs to be a facility for those arguments about what we will do to at least be brought to the surface. We will be guided by a directive and constrained by legal requirements, but ultimately this is an issue that is a little bit too important to allow it to go through by negative resolution in September. We need to have some form of debate that informs the Minister and gains support for the Minister's position but does not compromise the timescales that we have to meet. I propose to do that.

There are many views on the issue that many people want to raise, and it is right that that debate should happen in the appropriate place. Is it OK if I move on?

**Mr Allister:**

Yes, those were the two points that I wanted to make.

**Mr D McIlveen:**

Broadly speaking, everybody agrees that there need to be rights in place for agency workers. I do quite a lot of work with the Northern Ireland Council for Ethnic Minorities, which would particularly welcome those steps.

In this case, I have to agree with the Chairperson: this is a much bigger issue than what is happening in this room. If we are going to go out to and try to sell additional penalties to our constituents, which is effectively what our private sector constituents will be faced with, we have to make a very strong business case. That has to go wider than this room.

There are some cases in which positive discrimination is not always a bad thing. I do not know if you are aware of the debate that is going on in the education sector, where newly qualified teachers are quite often penalised as a result of retired teachers coming back into work, often through agencies, which is the sector that we are talking about. I am curious to know the Department's position on that. Will there be cross-departmental discussion about that? Are discussions under way to try to go against that tide of what this document will implement? We are talking about agency employees having the same employment rights in 12 weeks of someone recruited directly. If a retired teacher goes in to cover a maternity period, the school concerned

can effectively embargo recruitment while that agency staff is in place. How can the Department balance those two things?

**Ms Walsh:**

We understand that agencies do not place supply teachers and that there is a central register that supply teachers register with, and that communicates with the school. GB addressed that issue with supply teachers but we left that out of the consultation because, as far as we could tell, it is not done in the same way in Northern Ireland.

**Mr C Brady:**

Effectively, in the supply teacher sector there is a specific definition as to what constitutes a temporary agency worker. We understand that the supply teacher relationship falls outside the definition of an "agency worker", so it does not come within the directive.

**Mr D McIlveen:**

After speaking with school principals and so on, I understand that there has been a particular issue with the register in that it has not been kept up to date. Often, a school needs to find a supply teacher within half an hour. Sometimes, a call is made at 8.30 am for a 9.00 am class.

**The Chairperson:**

David, given the specific nature of that issue, would it be appropriate for the Committee to write, on your behalf, to the Department to get clarification on that point?

**Mr D McIlveen:**

I will finish my point in 10 seconds. I just want to address what has come back to me. Because of the problem with the register not being updated, we will find that a lot of schools will revert to an agency approach, so I think that this issue will come up again.

**Mr Evans:**

These are cross-departmental issues, and the Minister will take a paper to the Executive meeting, which I think will be on 30 June. You can certainly write to the Department, but the issue may be more appropriately raised with the Department of Education. I just want to confirm that the whole basis of this is on equal treatment; it is not about —

**The Chairperson:**

OK. I am trying to get things moving forward. The point has been made by David. If the Committee is content, we will write to the Department and to the Department of Education. David can talk to the Committee Clerk after the meeting to verify the detail, but I would like to get that letter out and to get a response, after which we will deal with things on a matter-of-fact basis.

**Mr McElduff:**

I suppose one man's increase in the burden is another's extension of rights, but I will say, in respect of —

**Ms Gildernew:**

Or a woman's.

**Mr McElduff:**

Exactly. In respect of the pension side of things, I want to know whether there is some way of dealing with employers who come up with mechanisms to prevent temporary workers from accruing pension rights. Secondly, will the definition of "pay" be extended or expanded to include expenses — the reimbursement of legitimate expenses — which is a concern that I believe was raised by the Law Centre and the Law Society.

**Ms Walsh:**

Pensions are specifically excluded from the application of equal treatment. What was your point about the definition of "pay"?

**Mr McElduff:**

The reimbursement of legitimate expenses.

**Ms Walsh:**

The proposal was to exclude expenses. I think that the Law Centre did make that point. We have been trying to strike a balance between the burden that will be placed on the agency and the employer, and the benefits of equal-treatment rights to workers, which is why those distinctions have been made.

**Mr Douglas:**

I have a general point about directives, some of which I am sure we will have to deal with from time to time. You said that we may be able to change or add to them. When it comes to the devolution of employment law, what scope for making changes does the Assembly have?

**The Chairperson:**

I could give you the answer, but we may as well hear from the expert.

**Mr C Brady:**

You raise a valid point. There are obviously two arguments to this. In employment law, there are always two sides. Directives are always negotiated on a UK-wide basis. One school of thought is that they should be transposed on a UK-wide basis. The other school of thought asks: what is the point in devolution here in Northern Ireland if we are not able to come up with a local solution?

The answer to that question is well above my pay grade, but it is an issue that we have been aware of because there is sometimes an inconsistency in the transposition of directives. There are times when we will transpose a directive with our Great Britain counterparts on a UK-wide basis. On other occasions, such as in the case of this directive, we will look at the matter very specifically with regard to Northern Ireland. The point is well made and well taken, but a wider discussion is to be had in our and maybe other Departments.

**Mr Evans:**

EU directives afford less flexibility, but we brought forward other employment legislation, including the Employment Bill, which moves away from the GB arrangements in respect of dispute resolution. We decided not to repeal elements of the dispute resolution system because stakeholders fed back that parts of it were working well. Therefore, we diverted from the GB position. There is the potential to do that, and working with the Committee was quite helpful in moving that forward.

**The Chairperson:**

I think that that is a debate worth having. Are you content, Sammy?

**Mr Douglas:**

Yes.

**The Chairperson:**

No other member wishes to speak. Before I thank and release the officials, I indicated, and it is apparent from the discussion, that this issue would benefit from some debate in the Assembly. First, may I check whether we agree to discuss the issue in some sort of take-note debate? In that way, we can at least raise the issues. You all know that a precise form of words must be used, otherwise the Business Committee is not terribly happy. The Committee Clerk has been trying to formulate a form of words, but we cannot finalise it at this stage. May I have the Committee's permission to agree a set of words and circulate it? It will be something along the lines of:

"That this Assembly notes and calls on the Minister to —"

and then it will be whatever we call on the Minister to do, but it will be to take up the issues that we have raised. So, it will be a note-and-call-upon motion. We will make sure that the wording is acceptable to the Business Committee to take forward. Do I have members' approval for that?

*Members indicated assent.*

**The Chairperson:**

We will get that e-mailed out this afternoon.

I thank the officials for a very useful interaction. Some very good points were put across. You will understand that our trying to put forward a motion is not in any way to hinder the timescale that you have to deal with, but there are issues that I think that, given devolution, we should at least consider in some detail. There will be issues to be brought forward. Thank you all very much.