



**UNISON Submission to the Cabinet Office  
Consultation  
December 2015**

**Consultation on government's draft language  
requirements for a public sector workers' Code  
of Practice**



## **Consultation on draft language requirements for the public sector workers' Code of Practice**

### **UNISON response**

#### **Introduction**

UNISON is the UK's largest public service union with 1.26 million members. Our members are people working in the public sector and for private contractors providing vital public services and essential utilities. They include frontline staff, ancillary workers, and managers, working full or part time in local authorities, the NHS, the police service, colleges and schools, the electricity, gas and water industries, transport services and the voluntary sector. They provide help, care and support to some of the most vulnerable people in society.

A large proportion of public sector workers delivering good quality services are migrants, especially in the health and social care sectors. For example, the recent Independent Age report on social care showed that 1 in 5 of the adult social care workforce was born outside of the UK and of these, 72% were born outside of the EU.<sup>1</sup>

As a trade union which represents a large number of migrant workers, and which works to tackle exploitation, bad conditions of service and low pay for all workers, UNISON welcomes the opportunity to respond to this consultation on draft language requirements for the public sector workers' Code of Practice.

#### **General Points**

UNISON works closely with public sector employers, and employers in the private and voluntary sectors providing public services, to help our members and the wider workforce improve their skills. We do this because of our commitment to the quality of public services, and in response to our members' desire to enhance their individual performance (Skilled for Work: a survey of the literacy, numeracy and computer skills of UNISON members, NIACE, 2011). We work with specialist educators to support workers to improve their literacy and language skills with our programmes supported by the Union Learning Fund.

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<sup>1</sup> Independent Age, *Moved to Care: the impact of migration on the adult social care workforce*, by Ben Franklin and Cesira Urzi Brancati, November 2015

While we appreciate that the intention of the Code of Practice is to improve the public's experience of services by raising the levels of English fluency, we believe that this would be achieved more effectively by an approach based on skills development, workforce planning and job design. The proposed fluency duty has its roots in immigration policy and which uses mechanisms based on complaints procedures and performance appraisal rather than staff development and continuing support.

We believe that the fluency duty in English and Welsh which was introduced in Part 7 of the Immigration Bill 2015 is part of a broad agenda of politically driven immigration control. While effective communication and community cohesion are important aims for public services, the potential for discrimination towards anyone perceived as not appearing to be "British" or speaking English/Welsh (however fluently) with an accent, will undermine this intent and shows an underlying agenda of exclusion.

It is difficult to believe that public sector employers do not already assess a candidate's fluency in English as part of their recruitment process. Public sector employers already have robust recruitment procedures, including formal testing to ensure that they employ the best people for the job with sufficient language skills to perform their work. For example frontline health workers including nurses, midwives, doctors and therapists already have to meet very high levels, standards of English, such as IELTS 7, which are part of the recruitment process especially for migrants from non EU countries.

It is also worrying that the enforcement of the duty requirements is reliant to a large extent on complaints being made by members of the public. Yet members of the public will not usually be able to distinguish between non EU/ non EEA workers and other workers whose English they find hard to understand.

In April 2015, UNISON sent a Freedom of Information request to all English and Welsh county councils, metropolitan councils, unitary councils and London boroughs, to ask about the number of staff employed under the National Joint Council for Local Government Service National Agreement on Pay and Conditions of Service and in schools. 117 councils responded to the FOI request. We found that across England and Wales, around 10.4% of the staff employed in this sector came from Black, Asian and Minority Ethnic backgrounds. Many of these will speak English but perhaps with very different accents, which can be mistaken for a lack of fluency. Such workers might come under increased scrutiny and then indirectly face increased disciplinary measures on a host of issues. The overrepresentation of Black and Minority Ethnic workers on grievance and disciplinary procedures often comes down to the increased scrutiny they are subjected to due to various forms of discrimination.

UNISON believes that this new fluency duty is unnecessary. It has the potential for increasing discrimination against workers seen as not being British that goes beyond the groups which the consultation document outlines might be covered. This could lead to a breach of the more important Equality duty of public service bodies.

## Consultation Questions:

*Q1: Is the guidance in the Code of Practice sufficient to help you meet the duties imposed on public authorities by Part 7 of the Immigration Act [2016] and set the necessary standard of spoken English? If not, please suggest what additions are necessary.*

*Q2: Is the Code of Practice clear in its alignment with any existing legal obligations that you must adhere to, such as the Equality Act 2010 or Welsh Language (Wales) Measure 2011? If not, please suggest how it could be better aligned with those obligations or any others not already included.*

UNISON's FOI report showed that there is a lack of people who are Black, Asian and Minority Ethnic staff working in local authorities in some regions. For example, the FOI report showed that in the North West where the population of Black and Minority Ethnic backgrounds is 11.2% of the total population, only 6.3% of employees in local authorities are from these backgrounds. Likewise in Wales, the population of Black and Minority Ethnic is 5% of the total population but these employees make up only 1.8% of the workforce in local authorities. It is highly likely that people from these backgrounds will experience further discrimination because many employers may focus their more stringent English testing on employees and job applicants who are obviously of non UK origin and/or educated outside the UK.

The regulation of employment in the public sector already ensures levels of English fluency across many customer facing roles. That regulation does not just cover "professional" jobs such as doctors, nurses and teachers. UNISON has worked closely with governments and employers on the introduction of the Care Certificate, and the registration of learning support staff in Wales and care staff in Scotland. All these regulatory systems either already include elements of communication, or could be adapted.

The recent Independent Age report on social care stated that the UK will need to fill a gap of 200,000 workers in adult social care by 2020 and they argued that this could only be filled by allowing migrants from non EEA countries to come and work in this sector.<sup>2</sup> A significant proportion of this workforce will be workers for whom English isn't their first language and the fluency duty will be a significant barrier to employers recruiting these workers. The cost for non EEA migrants to come to the UK to work in the social care sector is increasingly becoming so prohibitive that many of these migrant workers will probably opt to go to other EU countries which are also struggling to increase their workforce in this sector.

The English fluency testing if applied to EEA workers is likely to be challenged by EEA workers as an unjustified barrier to free movement of labour within the EEA.

The document is right to recognise that staff should be able to communicate with clients and patients in their own language. However, for many public service users, English is not their first language, and it is vital that public service workers are able to communicate with them. In UNISON's view public sector workers who can speak

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<sup>2</sup> [http://www.ilcuk.org.uk/index.php/publications/publication\\_details/moved\\_to\\_care](http://www.ilcuk.org.uk/index.php/publications/publication_details/moved_to_care)

other languages should be seen as assets. On the other hand many of our migrant members tell us that their employers forbid them from speaking to clients in language similar to their own language.

It is also right to recognise the importance of accepting people with various accents. However, it is also worth noting that some British regional accents may be unintelligible to clients and patients.

*Q3: Do you have an existing minimum language standard for your customer-facing workers? If so, please provide details and confirm if you are satisfied that your existing standard meets your obligations under Part 7 of the Immigration Act [2016].*

*Q4: Do you have, or are you aware of, any existing best practice for establishing a necessary level of English or Welsh fluency that would be useful to reflect in the Code of Practice? If so, please give details.*

The interpretation of which workers are classified as “customer facing workers” or those in “regular and intrinsic contact with the public” is bound to be contested by employers, employees and service users. This might require a lengthy and expensive review of all the different posts in the public services in order to ensure that all posts are properly assessed before any fluency in English language is tested or imposed. For a government which is supposed to be committed to reducing red tape, this seems to go in rather the wrong direction.

The definition of 'fluent' has not been developed fully and is open to interpretation. The reference to CEFR and British General Qualifications is very broad from B1 to C2. Some employers may find it difficult to specify correctly the level of English/Welsh required for a particular job. In this respect, the reference to tests and qualifications may bring even more confusion.

It is also not clear as to what counts as a 'reasonable time' to attain the required level of English/Welsh fluency. Many employers need to be aware that it may take some time before an employee may reach the level as language skills are difficult to attain, and it is a very long process.

UNISON works closely with HR departments of public sector employers and we understand that they appoint people who have “a command of spoken English which is sufficient to enable the effective performance of the person’s role”. Our experience of working with public sector employers has also been that they are proactive in encouraging the development of English skills. This is not just about the customer interface. Good English skills are also essential for internal communication and staff development. Our survey showed that low levels of confidence in functional skills prevented 16% of people from applying for promotion, 14% of people from taking on extra responsibilities and 10% from applying for training courses.

However, the capacity of employers to engage with English training has been greatly curtailed in recent years by the reductions in public funding support for ESOL, in particular the withdrawal of support for workplace ESOL in 2011. Overall participation in ESOL has fallen by 22% since 2009/10. These funding cuts and more

general cuts in the provision of training and skills will lead to a loss of teaching capacity for ESOL provision.

*Q5: What would be the impact of extending the Code of Practice to voluntary and private sector suppliers that you contract with? Please explain your answer.*

UNISON recognises the importance that public sector workers in customer-facing roles should have the right level of English/Welsh. However, UNISON believes that the imposition of a fluency duty on public sector employees, whether employed by public bodies, voluntary and community organisations and private companies, is unnecessary, confusing and would create a lot of tension in workplaces.

The rights of the public under the Code will not always be clear. Insofar as public sector organisations will bear the brunt of training costs then this will also put them at a competitive disadvantage over those in the private sector. It will not, for example apply to general practitioners working under General Medical Services Contracts or most Out-of-Hours and locum providers.

*Q6a: What will be the additional cost to your organisation to implement this duty? Please provide detailed estimates.*

*Q6b: From your perspective, would implementing this policy have a specific impact on the country, region or business sector which you operate in? Please explain your answer.*

*Q6c: If you are a local government body, to what extent would this new duty constitute a New Burden for your organisation? Please explain your answer.*

UNISON believes that the proposals in the Bill and the Code of Practice will: lead to duplication, and to confusion in the regulation of workers and employers; in recruitment and training practice; in HR practice relating to discipline and employment law; and uncertainty in the wider labour market.

We are not convinced that the costs of this duplication and confusion will be outweighed by any benefits the proposals may bring. Indeed without clearer evidence that a problem exists, let alone the extent of it, it is hard to quantify these benefits. Our Skilled for Work survey found that 82% of our members were either “very confident” or “quite confident” about speaking to the public at work, and a high proportion of the remaining 18% are likely to be “fluent”.

Resources have been further squeezed by cuts to training budgets in the public sector, and by staff reductions which reduce the time available for teaching and study. We think it would be wrong for decisions on the allocation of the dwindling resources for ESOL training in the public sector to be overly influenced by complaints made against individuals and the need for consequent “remedial action”.

Employers such as an NHS Trust who are required to maintain ‘adequate’ staffing

levels, post Francis<sup>3</sup>, are likely to see this as another barrier to permanent recruitment and incentive to employ agency staff which the government says it wants to reduce. Training is vital but there appears little in the proposal to require employers to provide it. If anything the onus is on the employee to fund it before they apply for work. The main providers of ESOL Training are FE colleges and they have endured massive cuts: *Impact of cuts announced in July 2015*:

<https://www.tes.com/news/further-education/breaking-news/esol-funding-cuts-will-have-devastating-impact-thousands>; *Situation in 2014*

<https://www.aoc.co.uk/sites/default/files/ESOL.Qualifications%20Report%20%28Jan%202014%29.pdf>; *Institute of Fiscal Studies Report on funding cuts to FHE*

<http://www.ifs.org.uk/uploads/publications/bns/BN168.pdf#page=5>; *Alison Wolf on FE funding* <http://www.kcl.ac.uk/sspp/policy-institute/publications/Issuesandideas-alison-wolf-digital.pdf> .

We believe that the fluency duty will create anomalies across the UK. In Scotland it will apply only to those functions not devolved to the legislative competence of the Scottish Parliament so people not considered fluent in England will still be able to work in Scotland. It won't apply at all in Northern Ireland. These inconsistencies are dangerous and confusing.

*Q7: How many workers will this new duty affect in your organisation? Please provide details such as employment status.*

*Q8: If complaints handling were to remain at the discretion of your organisation, what do you envisage as the basic process for enforcing it and for dealing with workers who do not meet the requisite language standards? Please provide details of your current process for dealing with complaints and escalation route from members of the public; any complaints data you currently publish, and the likely cost of expanding the process to include language-related complaints.*

The range of potential sanctions on an employee (e.g. from training to possible dismissal) are clearer and seemingly more punitive than for an employer. The power given to the public to report employees providing services if they deem the employee's English to be inadequate is unequal and could potentially create tension in the way services are delivered. It is a power which some members of the public may abuse by making vexatious and unfounded complaints with the aim of removing migrants and Black and Minority Ethnic employees from their jobs. This could lead to lengthy and expensive employment tribunal cases.

An important aspect of good quality service is the ability to build trust between client and provider. The fluency duty could be used inadvertently by clients if the outcome from the services they received was not what they expected, and might have nothing to do with English fluency.

It is not clear in the guidance what will happen to an employer who fails to comply and how the public will know if employers are not required to keep records of

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<sup>3</sup> Report of the Mid Staffordshire NHS Foundation Trust Public Inquiry, Chaired by Robert Francis QC, February 2013

complaints and their outcomes. Public sector service providers have a duty to provide services that are safe and effective and this would seem to be an opportunity to make it clear that employing staff who can communicate with service users are part of that responsibility. In the cases involving doctors with poor English working in hospitals, the NHS Trusts are liable for the failure to provide adequate care but this does not clarify that linguistic fluency is part of adequate care.

UNISON is very concerned that migrants and Black and Minority Ethnic workers might come under increased scrutiny and then indirectly face increased disciplinary measures on a host of issues. The overrepresentation of Black workers on grievance and disciplinary procedures often comes down to the increased scrutiny they are subjected to due to various forms of discrimination.

To reiterate UNISON's position; the imposition of a fluency duty on public sector employees, whether employed by public bodies, voluntary and community organisations and private companies, is unnecessary, confusing and would create a lot of tension in workplaces.