

## RESPONDING TO THE ENGLISH LANGUAGE REQUIREMENT

### Introduction

From October 2016, the government is set to introduce the “Code of Practice on the English Language Requirement for Public Sector Workers” as part of the 2016 Immigration Act. Since the proposals were first published, UNISON has highlighted major concerns about the potential discriminatory impact of the code and damaging consequences in the workplace. However, this guide seeks to explain the content of the code and the scope for ensuring that it is applied in a way that maximises transparently fair procedures and offers support to staff affected.



### Purpose and scope

The key requirement of the code is that “every public sector worker operating in a customer facing role must speak fluent English or (in Wales) Welsh.”

The code applies to “public authorities,” which covers central government, non departmental public bodies, councils and other local government bodies, NHS bodies, state funded schools, the police, armed forces and public corporations. All the indications UNISON has received so far are that the code does not cover higher or further education.

The code applies to all public authorities in England, but only public authorities exercising functions relating to non-devolved matters in [Scotland](#), [Wales](#) and [Northern Ireland](#).

Therefore, the stated scope does not include local government, education and health in Scotland, Wales and Northern Ireland because these are devolved parts of the public sector.



The code covers customer facing roles among permanent and fixed term employees, apprentices, self employed contractors, agency temps, police officers and service personnel. However, it does not currently cover workers employed directly by a private or voluntary sector provider of a public service, or whose work is carried out mainly or wholly outside the UK.

Given the scale of privatisation among some public service roles that would probably be considered as customer facing, such as home care workers or call centre operators, this represents a major exclusion.

However, the code does provide powers to extend the code to private and voluntary sector organisations engaged in delivering public services and, though UNISON would raise the same concerns highlighted about the original proposals, the

government has indicated that it intends extending the code to such organisations without as yet giving a timescale for its intentions.

### Source info

To check the legislation on which the code of practice is based, click [here](#)

To see the code of practice itself, click [here](#)

## Tests

The test that the code sets out for whether a member of staff is in a customer facing role is whether they are required to speak to members of the public in English or Welsh as a “regular and intrinsic part of their role.”

The code specifies local government employees in customer services and teaching assistants as examples of roles that fall into this category.

Where the need for interaction with the public is occasional, staff are not classified as customer facing. The code specifies local government street cleaners as an example of a role that falls into this category, along with clerical officers / IT user technicians, as they are typical of roles that are focused on internal support within an organisation.

In making a judgement over whether a role is customer facing, the code suggests the following considerations:

- The business need for interaction with the public;
- The frequency and form of the interaction;
- The level of service quality and responsiveness expected by the public;
- The proportion of a role which would require English or Welsh fluency;
- The nature of a role;
- Whether English or Welsh language is the primary language required for the role

If it is judged that a role is customer facing and therefore requires fluency, the next issue to determine is the standard of fluency required. The code recommends consideration of the following factors

- Frequency of spoken interaction;
- The topic of spoken interaction;
- Whether the communication is likely to include technical, profession-specific or specialist vocabulary;
- The typical duration of spoken interaction;
- Whether the communication is repeated in or supplemented by, written material provided to customers;
- The significance of the spoken interaction for service delivery.

The tests set out by the code clearly involve many judgement calls about an organisation’s roles and therefore provide scope for challenge where a branch believes that the criteria have not been applied fairly and equitably.

For instance, though teaching assistants are specified as customer facing as a general rule, UNISON has experienced cases where assistants are recruited specifically to encourage educational participation amongst pupils who may not have English as a first language, making their designation as customer facing inappropriate for the purposes of the code.

Though it is important to challenging inappropriate decisions on specific roles, problems can be avoided in the first place if the branch can establish early in the introduction of the English Language Requirement that consultation with the union will take place before final decisions are made about the requirements for roles.

## Definition of fluency

The code defines language fluency as follows:

“Fluency relates to a person’s language proficiency and their ability to speak with confidence and accuracy, using accurate sentence structures and vocabulary. In the context of a customer-facing role, a person should be able to choose the right kind of vocabulary for the situation at hand without a great deal of hesitation. They can listen to their customer and understand their needs. They can tailor their approach to each conversation appropriate to their customer, responding clearly with fine shades of meaning, even in complex situations.”

However, the code is also specific in defining what is **not** meant by fluency, stating that “fluency does not relate to regional or international accents, dialects, speech impediments or the tone of conversations.”

Branches need to be vigilant that the definition of fluency isn’t misapplied as there is clearly scope for confusion, particularly in relation to accents that some may not encounter frequently but do not hinder effective communication in the sense outlined by the code.

## Procedures

The code states that “the processes and methods used to determine whether a person has a command of spoken English or Welsh for effective performance in the role must be fair and transparent.”

However, it also leaves enormous leeway to the employer over how it seeks to apply the requirement to its existing staff, stating that no testing is required where staff are “clearly fluent” but implying that where there is doubt assessment should take place through a formal test or as part of an interview process.

The code suggests that fluency can be demonstrated through:

- Interview questions;
- A relevant qualification attained in the UK or recognised institution abroad;
- Passing a language competency test (the minimum level that can be set is the Common European Framework of Reference for Languages (CEFR) Level B1).

These arrangements can lead to injustice and resentment in the workplace if applied in a way that allows some managers to exercise prejudice and bias or fails to treat departments in a consistent way.

In order to minimise such an impact on staff, it is vital to press for full training of all managers in making appropriate judgements about the English Language Requirement, central checking procedures of departmental decisions and the application of consistent questions as part of any interviewing test adopted.

It is crucial throughout the process for training to ensure that managers have the skills necessary to make the judgements required in a way that avoids inconsistent and arbitrary decision making.

In selecting a method for assessing fluency, there is a danger that employers will seek to impose a blanket qualification threshold, particularly if they feel that they do not have the expertise or resources for developing their own interview questions. However, for staff the interview route may be preferable, requiring a lesser time and/or cost investment, to prove that they meet the necessary standards.

The code acknowledges that there are many areas of the public sector where an English Language Requirement applies already and the code makes clear that there is no assumption that a higher level of proficiency should apply as a result of the code's introduction. [For example, nurses and midwives trained outside the UK have to achieve level seven under International English Language Tests.]

Many assessments of whether an individual has the appropriate level of fluency may be a result of the complaints procedure.

The code states that any complaint must be investigated and receive a response

However, in line with the definition of fluency, it is clear that "a complaint about the strength of a public sector worker's accent, dialect, manner or tone of communication, origin or nationality would not be considered legitimate as a complaint about the fluency duty. Public authorities should make this clear in the terms of their complaints policy."

It also goes on to state that:

"Public authorities are not obliged by this code of practice to respond to complaints that are vexatious, oppressive, threatening or abusive. These should be given their usual dictionary meaning and could be defined as those complaints that are without foundation and/or which are intended to result in harsh or wrongful treatment of the person referred to in the complaint. In these types of circumstances a complaint should not be allowed to continue."

The abuse of the right to complain is a critical area for ensuring procedures protect staff against discrimination. Again, training of managers to ensure they understand when complaints should be ruled out and seeking union involvement in the complaints procedure will be key features of effective application.

Where a complaint is considered legitimate for investigations, the code rules that:

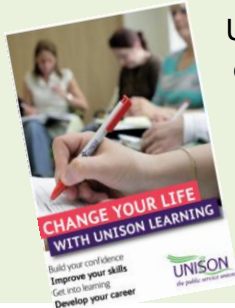
- Members of staff who are the subject of the complaint have to be notified of the complaint and the action being taken in relation to it;
- Receive the opportunity, as soon as practicable, to give their own account of the facts leading to the complaint.

To provide maximum assistance to staff during investigations, seek to ensure that the complaints procedure clearly states the right to be accompanied by a union rep, in line with standard capability procedures, along with similar time scales and appeal mechanisms. Throughout implementation, public authorities should be encouraged to review and amend existing recruitment, capability and complaints procedures to incorporate the English Language Requirement rather than setting up separate arrangements

Where a member of staff is judged to fall below the required fluency standards, the code states that public authorities should:

- Consider training or retraining to meet fluency duty (where appropriate, public authorities meet the cost of training and enable members of staff to undertake training and enable members of staff to undertake training during their working hours);
- Consider redeployment to a non customer facing role during training (adjustments to their role may also be considered, such as reducing the frequency of communications with the public or supplementing written communications with written material to customers);
- Give staff reasonable opportunity and time to develop necessary fluency.

These general principles can be fleshed out to provide the maximum level of support to staff. Procedures should be framed in a way that acknowledges the key role of the public authority in helping staff meet required standards and treats the issue as a matter for capability rather disciplinary procedures. Agreements should take the requirement for authorities to fund training “where appropriate” as a presumption that training will be funded and establish a firm commitment to provide necessary training and redeployment practices to enable a full return to the former role or continuation in the organisation under an adjusted role. Procedures should also clarify that redeployment will not involve any reductions in pay, terms and conditions over its duration.



UNISON Learning and Organising Services can assist branches in engaging employers in supporting staff members to improve their English language skills. For more information please contact 020 7121 5116 or email [LearningAndOrganising@unison.co.uk](mailto:LearningAndOrganising@unison.co.uk)

## Utilising equality legislation

Throughout the application of the code on the English Language Requirement, the Equality Act and Public Sector Equality Duty should act as a cornerstone of procedures to ensure staff are protected from discrimination.

The code itself reminds public authorities that “it is unlawful to discriminate directly against a person or persons on grounds of race. Authorities should ensure that people from particular nationalities or ethnic backgrounds, in a recruitment process or during employment, are treated in the same way as people from an English or Welsh ethnic background.”

UNISON’s summary of equality legislation across the four countries of the UK can be found [here](#) and the specifics of the public sector equality duty can be accessed [here](#).

The general public sector equality duty means that public sector employers must give “due regard” to the need to:

- Stop unlawful discrimination, harassment and victimisation;
- Promote equality of opportunity between people who share a protected characteristic (which includes race/nationality) and those who do not;
- Foster good relations between people who share a protected characteristic and those who do not.

Giving “due regard” means that a public authority has to give consideration (and show that they have given consideration) to the impact that a decision or change in policy has on groups that share a protected characteristics.



The most thorough way to ensure compliance during introduction of the English Language Requirement is to conduct a full equality impact assessment. However, the specific public sector equality duties also require public authorities to publish information showing how they have met compliance with the general duty and therefore offer an opportunity to force authorities to ensure they take a rigorous approach to avoiding discrimination in the operation of the English Language Requirement.

Some of those most fearful of the impact of the English Language Requirement may be migrant workers, so the branch's response could form part of a wider package of measures designed to offer support to migrant workers. UNISON's migrant worker resources are available [here](#) and for advice on organising contact [strategicorganising@unison.co.uk](mailto:strategicorganising@unison.co.uk)

### Branch checklist

This guide is mostly concerned with the detail of the code and negotiating with the employer over its implementation. However, the checklist below seeks to provide branches with a checklist for organising around the issues thrown up by the code.

1) Hold a branch meeting to raise awareness among activists of the code and the key safeguards for protecting staff	
2) Consider targets for recruiting new union learning reps to assist in responding to the English Language Requirement and appointing a lead to co-ordinate the union's response	
3) Assess where customer facing roles are liable to occur and set awareness raising sessions among members potentially affected	
4) Seek information on the size and make-up of the local population served by the organisation in comparison to the workforce, in order to better understand the language demands made on staff and ensure employers appreciate the advantages of multi-lingual staff;	
5) Raise the code and the key issues for ensuring fair and consistent implementation at the local joint staff forum;	
6) Seek to incorporate English language training within wider <a href="#">learning agreements</a> with the employer, highlighting <a href="#">ESOL (English for Speakers of Other Languages) courses</a> and ensuring the employer commits to funding training	
7) Highlight to private / voluntary employers that, though no timetable is as yet established, the government has stated its intention to extend the code to cover their staff engaged in delivery public services. In anticipation, a preparatory plan should incorporate steps toward making funded training available for staff who want to develop their English language skills and thereby help the organisation move toward compliance.	