



## Scottish Parliament Briefing

# Human Rights and the Trade Union Bill

Few played a greater role in the events leading up to devolution than the STUC, its affiliates and their individual members. The role of trade unions continues to evolve and expand under devolution as evidenced by Partnership Working in the NHS, joint working in local government, the drive for prosperity through the Fair Work Convention and new governance arrangements in Higher Education. Those programmes and initiatives are the lawful articulation of devolved powers, however, the Trade Union Bill places that civic, social and economic partnership under threat.

### **The Trade Union Bill - Key Points**

- The ban on payroll deduction of union dues (check-off) will terminate the lawful membership arrangements of up to 80% of union members in public services.
- The curbs on facility time will restrict the equality, safety, learning, advocacy, negotiating and partnership work of union reps.
- The regulator or "Certification Officer" will be funded by a new levy on trade unions and will enjoy new, wide ranging powers to police the internal affairs of trade unions
- All existing endorsements for political funds will have to be renewed, in person, on an individual basis, within very short timescales
- Revised industrial action rules will increase the frequency and intensity of ballots and damage, rather than improve, workplace relations

## Human Rights in Scotland

As with public services and employment relations, Scotland continues to develop a distinct approach to human rights. In defining human rights obligations the Scotland Act requires:

- (a) that the Parliament legislates in compliance with the European Convention on Human Rights (ECHR); and,
- (b) that every action of Scottish Government is compatible with convention rights.

The UK Human Rights Act contains a qualified requirement for ECHR compliance (below), but this qualification does not apply to the devolved institutions which take their legal authority from the Scotland Act 1998:

### **6. Acts of public authorities.**

*(1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.*

*(2) Subsection (1) does not apply to an act if—*

*(a) as the result of one or more provisions of primary legislation, the authority could not have acted differently; or*

*(b) in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights, the authority was acting so as to give effect to or enforce those provisions.*

The key provision in relation to Scottish Government is Section 57(2) of the Scotland Act 1998 which states:-

*"A member of the Scottish Executive has **no power** to make any subordinate legislation, or **to do any other act**, so far as the legislation or act is incompatible with any of the Convention Rights or EU Law"*

Although the requirement for ECHR compliance by Scottish Government is embedded in the devolved functions, it is not limited to devolved matters since **there is no power to "do any act" in breach of convention rights**. An obvious question arises in relation to the Trade Union Bill. If the Trade Union Bill is not compatible with the ECHR, and the devolved institutions have no power to do any act that is incompatible with Convention Rights, how does Scotland respond to the Trade Union Bill?

Several "bodies" who draw their vires powers or legal authority from the Scotland Act will be required to stop trade union subscriptions, regulate and reduce facility time and respond

to other curbs on trade union activity. And yet the Scotland Act has a clear prohibition on such actions if they are in breach of ECHR obligations.

One obvious observation is that the UK Government ought to have consulted with the Scottish Parliament and Scottish Government over the measures in the Trade Union Bill and the Scotland Act requirement for ECHR compliance.

Absent that consultation and any amendments to the Trade Union Bill, the question remains to be asked, what steps are required to ensure that the Scottish response to the Trade Union Bill is compatible with convention rights?

### **The Trade Union Bill - Key Human Rights Issues**

#### **Check Off**

The ban on payroll deduction of union dues (check-off) will terminate the lawful membership arrangements of up to 80% of union members in public services. Employers, employees and trade unions agree that this arrangement is a convenient and valued aspect of modern employment relations. Check off is, in our view, an asset or possession that attracts protection under Article 1 of the First Protocol to the ECHR - peaceful enjoyment of possessions.

The permitted grounds for interfering with this fundamental right are narrow. The UK Government is seeking to argue that convention rights are not engaged at all, and justification is therefore not required. However, the Parliamentary Joint Select Committee on Human Rights has taken the view that Convention rights are engaged and that justification is required.

In the event that the TU Bill becomes law, Scottish Government will face a legal conflict. A Westminster Act requiring abolition of check off and a Scotland Act prohibition on any act that is incompatible with the ECHR. If the well-founded concerns of the Human Rights Joint Select Committee are ignored the trade unions will call on MSPs to ensure that the Scotland Act s.57 duty of ECHR compliance is delivered in full.

#### **Facility Time for Public Sector Union Reps**

Most trade union work is conducted by lay reps. When this work is done during working hours it is referred to as "facility time". The Bill proposes that employers record and publish details of "facility time". Prior to defeat in the Lords the Bill also proposed a reserved power for UK ministers to regulate and restrict facility time.

Scotland has a flourishing network of learning reps, equality reps, employee directors and safety reps. These union members participate in Scottish Government funded initiatives to drive prosperity through education, skills, equality and partnership. Key projects include

Scottish Union Learning, Close the Gap, Fair Work Convention, Partnership Working in the NHS and revised governance arrangements for Higher Education.

None of these projects alter the substantive legal rights of employers and employees. Such issues clearly reserved to Westminster. These Scottish Government funded initiatives are intended to improve policy and practice in Scotland and they reflect the devolved administrative and executive powers of Scottish Government. Trade union participation in these partnerships is financed by DOCAS or check off and delivered through lay people using trade union facility time. All of that work is now at risk as a result of the Trade Union Bill.

The design, finance and delivery of equality and good governance in public services is a devolved matter. For example, promotion of equality through Union Learning, Fair Work, the Women's Convention and Close the Gap is expressly devolved to Scotland by Schedule 5, Part II of the Scotland Act which devolves "the encouragement (other than by prohibition or regulation) of equal opportunities, and in particular of the observance of the equal opportunity requirements".

In local government, for example, CoSLA and the trade unions recently agreed a package of measures to resolve the £1billion legacy of unequal pay in Scotland. This programme of work takes pay equality away from litigation and back to workplace partnership. It is of vital importance to equality, employment relations and the stability of local government finance. And it relies heavily on sustaining, and probably increasing, facility time for union reps.

Both the UK Government and the Parliamentary Joint Select Committee on Human Rights have identified that the curb on facility time engages the Article 11 right of free assembly and the Article 14 protection against discrimination.

As recently as 16th March the UK Government maintained its insistence with reference to facility time that "it is only right that there is a reserve power to ensure that wasteful use of taxpayer funding does not continue".<sup>1</sup>

Given that Scotland's Government and Parliament must respect convention rights, given the clear link to devolved matters such as equality and public sector governance, and given the absence of a justification for the breach of Articles 11 and 14, we shall, if required, call on MSPs to ensure continued compliance with Scotland Act duties in relation to convention rights.

### **Tackling ECHR Incompatibility**

This issue must be treated with caution since the situation is dynamic. Section 19 of the Human Rights Act requires a UK Government Statement on human rights compliance. The Memorandum on ECHR Compliance was incomplete and has been widely discredited. But it has also been superseded by events to a degree.

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<sup>1</sup> House of Lords 16 March 2016 c1873

Successful amendments in the House of Lords may mitigate some of the ECHR concerns. Leaked correspondence has suggested that more Government amendments may yet be tabled. Finally, some of the ECHR concerns relate to secondary legislation the scope and impact of which is not known.

However, the terms of the joint select committee report suggest that the Bill may not satisfy Westminster's internal human rights safeguards, far less those of external authorities or the courts. In that context, the position recommended to MSPs is one of broad principle rather than prescribed action. We are seeking a commitment to deliver ECHR rights.

### **The Pledge**

The aim of the pledge is to draw the attention of MSPs and parliamentary candidates to the nature of human rights obligations in Scotland and to alert signatories to the possibility that the Trade Union Bill may create a conflict of laws.

Faced with the possibility of legal conflict it is important for Government and public sector employees to know that MSPs are aware of the possible areas of conflict and have expressed a willingness to maintain ECHR compliance within Scottish Government, the Parliament and the wider "community" of devolved organisations, to the full extent required by the Scotland Act 1998.

It is in that context that current MSPs and future candidates are invited to pledge the following commitment:

- 1. I respect and value the requirement of devolution that any act of the Parliament or the Scottish Government must show direct compliance with the European Convention on Human Rights.*
- 2. If elected to the Scottish Parliament, or appointed to the Scottish Government, I pledge to support full human rights compliance from the heights of the legislative process down to the basics of how we employ staff appointed on my authority*
- 3. I therefore pledge to work to amend or disapply any provision of the Trade Union Bill which purports to require me to act in breach of the Scotland Act duty to uphold the European Convention on Human Rights*

Thank you for your interest in, and support for the work of trade unions in Scotland.