

UK TRADE UNION BILL – POLICY MEMORANDUM

Background

1. Roseanna Cunningham, Cabinet Secretary for Fair Work Skills and Training, has asked the Further Powers Committee to consider the implications of the UK Government's Trade Union Bill in Scotland, in the face of the widespread political and civic opposition that has been demonstrated since the Bill was introduced in the House of Commons on 15 July 2015. The latest version of the Bill can be found at:

<http://services.parliament.uk/bills/2015-16/tradeunion.html>

2. The reasons why the Scottish Government does not support this Bill are detailed below. The Government also has concerns around the lack of consultation by the UK Government on the proposals set out in the Bill.

Content of the Trade Union Bill

3. The UK Government introduced this legislation with the aim of “reforming trade unions and protecting essential public services against strikes”. The Bill amends the Trade Union and Labour Relations (Consolidation Act) Act 1992 as follows:

- Clauses 2 and 3 set out the requirements for a minimum thresholds of a 50% turnout in all industrial action ballots, and for a higher level of support in favour of industrial action for specified important public services;
- Clauses 4 to 6 set out information requirements relating to industrial action: the information that must be included in the ballot paper; and information given to union members and to the Certification Officer following a ballot;
- Clauses 7 and 8 specify the arrangements for the timing and duration of industrial action, requiring two weeks' notice of any action to be given to an employer, and providing that a ballot mandate for industrial action expires after four months;
- Clause 9 sets out requirements on unions for the supervision of picketing;
- Clauses 10 and 11 replace the current arrangements for a union member to contribute to a union's political fund so that positive consent is required, and places requirements on unions to include more detailed information on expenditure from political funds in the annual return to the Certification Officer;
- Clauses 12 and 13 create regulation-making powers in respect of paid time off for trade union duties and activities in the public sector.
- Clause 14 sets out the prohibition on deduction of union subscriptions from wages in the public sector.
- Clauses 15 to 18 set out new investigatory powers and sanctions available to the Certification Officer and new arrangements for funding the Certification Clause, and the power of the Certification Officer to impose levy on Trade Unions.
- Clause 19 sets out minor and consequential amendments.
- Clause 20 sets out the financial provision of the act.
- Clauses 21 and 22 set out the extent of the Act and when each section of the act comes into force.

- Clause 23 sets out the short title.

Provisions Which Will Impact on Scotland

4. Clause 3 of the Bill imposes an additional threshold of 40% of those entitled to vote in the ballot to take industrial action in key public service areas including health services, education of those aged under 17, fire services and transport services. The additional threshold requirement (“at least 40% of those who were entitled to vote in the ballot answered “Yes” to the question”) applies where the majority of those entitled to vote in the ballot are normally engaged in the provision of important public services, or activities that are ancillary to the provision of important public services. Important public services will be specified in regulations made by the Secretary of State and must fall within one of six categories, including the public service areas listed in this paragraph.

5. Clause 12 of the Bill gives the power to require relevant public sector employers to publish information relating to facility time. The information includes the number of such reps by type, percentage of time spent on trade union activities, and information about the employers’ spending on trade union duties, facilities and activities.

6. Clause 13 is a reserve power which will enable UKG Ministers to make regulations for the purpose of imposing a statutory cap in relation to categories of public sector employers for the purpose of constraining:

- The percentage of the working time that any of its trade union officials can spend on paid facility time and/or
- The overall proportion of that employer’s pay bill that can be spent on facility time.

7. Clause 14 abolishes check-off in the public sector. Check off is a facility provided by employers for the deduction of trade union members’ subscriptions via payroll which is then paid over by the employer to the Trade Union.

8. The Scottish Government believes that these provisions will have a significant impact on the operations of the Scottish Government in the exercise of their devolved powers. For example, the additional threshold imposed by Clause 3 relates to matters within devolved competence insofar as it relates to health services, education, fire services and certain elements of transport services provided in Scotland. The additional threshold will have a negative impact on trade unions and their members working in the public sector in those devolved areas and it affects the delivery of those public services in Scotland.

9. Restricting facility time is likely to limit the Scottish Government’s ability to work effectively with trade unions on a range of issues as they will not have the capacity to engage.

10. The removal of check-off will have a negative financial impact on trade unions, again, limiting their capacity to engage in workplaces. The provisions of the Bill will require significant resources to be expended reducing the support that unions

can provide their members and limiting their ability to support the work of devolved public bodies in Scotland.

Reasons for lodging this memorandum

11. Our Economic strategy outlines our plans to develop a Scotland where everyone can reap the benefits of an inclusive, growing economy. Our commitment to fair work is central to these aspirations. This must be built on a progressive approach to industrial relations that delivers a fairer, more successful society. Trade Unions are key social partners. There is clear evidence that unionised workplaces have more engaged staff, have a higher level of staff training, and a progressive approach to staff wellbeing. Better workplace practices support and nurture greater levels of innovation and productivity. This can have positive impacts not only for businesses but our overall economic competitiveness. They also contribute to our social justice aims as unionised workplaces also tend to have better pay and equality. Since the start of this administration in 2007, industrial disputes in Scotland have decreased by 84%. The Scottish trend in days lost to industrial disputes is the lowest of all the UK nations. If enacted as it is the Bill has the potential to destabilise the balance of the employer/employee relationship. This will make it more difficult for employees to have their voice heard. It will encourage conflict with unions and make employees feel further removed from their working environment

12. We believe that there is a clear opposition to this legislation in Scotland and a furthermore, there is a clear desire for Scotland to be excluded from it. There is little or no evidence to support the Bill proposals – a view shared by the UK Government's own Regulatory Policy Committee which has described the impact assessments supporting the Bill as 'not fit for purpose' and highlights a severe lack of evidence to support the legislation. The UKG has made no attempt to consider the Bill's impact in Scotland and in particular for Scottish Public Services. On that basis, the Cabinet Secretary for Fair Work Skills and Training wrote to the lead UK Minister of State, Nick Boles, asking that Scotland be excluded from the Bill. That and a subsequent request have so far been ignored by the UK Government.

13. The breadth of opposition to the Bill in Scotland was clearly demonstrated during a debate on the Bill on 10 November, there was a significant majority of support in the Parliament for the motion against the Bill (104 voted for, and 14 against). We are also aware that a significant number of local authorities, Scottish trade unions and other stakeholders (such as NHS Scotland) have made the opposition to the Bill clear. That widespread opposition and the deep concern expressed over the wider impact of the Bill on Scotland's devolved public authorities and policy landscape confirms the Scottish Government belief that there is a clear case for Scotland to be removed from the Bill.

14. In addition to general opposition to the negative effects of the Bill there are some specific concerns on three devolved areas,. Those are:

- the responsibility for regulatory powers (clause 13),
- the impact on public authorities, and
- the impact on the Agricultural Wages (Scotland) Act 1949

Regulatory Powers

15. On 22 October, Nick Boles, the Minister of State for Skills, wrote to the Public Bill Committee suggesting that Secretaries of State should be given the responsibility to make regulations on facility time in relation to 'sectors and organisations they have responsibility for'. Consistent with the devolution settlement, Scottish Ministers would be responsible for making these decisions in Scotland, for example, in relation to health services bodies and local authorities. The Bill should be amended to reflect that position and, once done, a Legislative Consent Motion would be needed for the alteration of the executive functions of Scottish Ministers.

16. The Bill was subsequently amended and clause 13 of the Bill now states that a Minister of the Crown may exercise the reserve powers to make regulations on facility time if they consider it appropriate to do so. Scottish Government officials have sought clarification from BIS on how these reserve powers are intended to apply to Scotland on devolved issues, but this has not been provided.

17. This clause seems to put the responsibility in the hands of UK Ministers, so it may be that the Secretary of State for Scotland would decide whether to regulate in Scotland, or that the Secretary of State for Health would make regulations imposing publication requirements on NHS and other health employers across the UK. In either circumstance this would involve UK Ministers making decisions that would have a direct impact on the operation of public bodies in devolved areas. The Cabinet Secretary has sought as a minimum from UKG the exclusion of Scotland from clauses on Facility Time and 'Check Off'.

18. If the Bill were to be amended as we have requested and the regulation making powers conferred on the Scottish Ministers a Legislative Consent Motion would be required on that basis. This would enable the Scottish Parliament to limit the effect of the Bill in Scotland to some extent at least, while continuing to set out in the possible strongest terms the Scottish Government's opposition to the policy intentions behind the Bill.

Impact on Public Authorities

19. There will likely also be wider impacts on public authorities in Scotland, which are largely devolved. In particular, the impact on the assets of public authorities, including their employment contracts and good industrial relations.

20. Part III of Schedule 5 to the Scotland Act (which trumps specific reservations in Part II) provides that Scottish public authorities with mixed functions are not reserved, and so fall within the legislative competence of the Scottish Parliament. The most important of these are local authorities.

21. Such bodies are devolved as regards their constitution, including their establishment and dissolution, their assets and liabilities, and their funding and receipts.

22. In addition, Scottish public authorities with no reserved functions (such as Health Boards) – which deal with matters entirely within the devolved sphere - fall within the legislative competence of the Scottish Parliament.

23. The assets of a Scottish public authority include its buildings and equipment, but also incorporeal assets such as contracts, including employment contracts (particularly those for key staff) and good industrial relations.

24. Whilst clauses 7 and 8 of the Bill do not change the terms or conditions of employment contained in an employment contract, they do change the framework within which such employment contracts are made and operated, and so affect a matter within the legislative competence of the Scottish Parliament.

25. In addition, clause 13 of the Bill confers power on a Minister of the Crown to make regulations applying to relevant public sector employers and containing *any* provision that the Minister considers appropriate for the purpose of ensuring that a person's working time cannot include more than a specified percentage of paid facility time or ensuring that the employer's pay bill for facility time does not exceed a specified percentage. This power is therefore wide enough to affect the terms of employment which a Scottish public authority can offer, thereby affecting an asset of that authority.

26. The Scottish Government therefore considers that the material impact on public authorities should be something about which the views and consent of the Parliament should be sought.

Impact on Provision of Important Public Services in Scotland

27. Clause 3 confers power on the Secretary of State to make regulations specifying "important public services" that fall within categories including: health services, education of those aged under 17; fire services; and transport services, meaning that the additional threshold requirement of 40% will apply in order for industrial action to be taken in those key service areas. This power is wide enough to affect and have a negative impact on trade unions and their members who work in the public sector in Scotland in the important public services.

28. Put baldly, the purpose is to maintain the provision of essential public services, such as health services. But the provision of health services in Scotland is a matter within the responsibilities of Scottish Ministers. Therefore, clause 3 relates to the provision and delivery of public services in Scotland in areas in which such provision is devolved.

Consultation

29. The UK Government has held open consultation on three aspects of the Bill

- [Ballot thresholds in important public services](https://www.gov.uk/government/consultations/ballot-thresholds-in-important-public-services)
available at - <https://www.gov.uk/government/consultations/ballot-thresholds-in-important-public-services>
- [Hiring agency staff during strike action: reforming regulation](#)

available at - <https://www.gov.uk/government/consultations/hiring-agency-staff-during-strike-action-reforming-regulation>

- **[Tackling intimidation of non-striking workers](https://www.gov.uk/government/consultations/tackling-intimidation-of-non-striking-workers)**

available at - <https://www.gov.uk/government/consultations/tackling-intimidation-of-non-striking-workers>

30. A response has been published to the consultation on tackling intimidation of non-striking workers (the Government response is included in the link above), and changes have been made to the UK Government approach as a result. The Scottish Government has not responded formally to these consultations, but the Cabinet Secretary has written to the Minister of state on a number of occasions to detail our concerns with the Bill proposals.

31. However, the UK Government has made no attempt at any point before introduction, to discuss the impact of this legislation on Scotland. The Lead Bill Committee took evidence from the Cabinet Secretary for Fair Work and Grahame Smith of the STUC, and a short call has taken place between the Cabinet Secretary and the Minister of State, but that was well after the introduction on the Bill. The Cabinet Secretary has firmly put forward not only the Scottish Government concerns but highlighted the wide spread opposition in Scotland in particular from the Scottish Public Services sector.

Financial Implications

32. The UK Government has used financial efficiency as one of the justifications for the Bill. One area this has applied to is the abolition of check off in the public sector. For the Scottish Government there is a nominal cost of facilitating the check off process and therefore its abolition in itself would offer limited savings to the public purse.

33. This is one of a number of areas where we believe the case for the legislation is flawed as there is no clear evidence for the supposed benefits being set out. This is not just the view of the Scottish Government. The UK Government's Regulatory Policy Committee has described the impact assessments that support the bill as "not fit for purpose" and highlights a severe lack of evidence to support the legislation.

Conclusion

34. We conclude that there is clear and widespread opposition to this legislation in Scotland. The Scottish Government do not believe that the UK Trade Union Bill will bring any benefit to the people of Scotland and instead, will have a negative impact on Scottish public authorities, trade unions and the delivery of public services in Scotland.

35. It is the Scottish Government view that the best solution would be for the UK Government to devolve industrial relations to the Scottish Parliament, but ask that at the very least the UK Government remove Scotland from the territorial extent of the Bill.

36. The Scottish Government asks the Scottish Parliament to consider the arguments set out in Memorandum and on this basis, make a recommendation to the UK Government that Scotland should be removed from the extent of the Bill to that it should be amended appropriately in order to ensure the Bill's provisions should not undermine the generally positive industrial relations climate in Scotland nor restrict the wider activities of trade unions in Scotland.

37. The Scottish Parliament has already voiced strong opposition to this legislation in Scotland in its debate on 10 November and much viewed the legislation as impacting on devolved competence.

SCOTTISH GOVERNMENT

11 December 2015