

Draft for Consultation: Charter of Workers' Rights

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INTRODUCTION

- 1 Labour law as broadly defined is a reserved matter, though there has been a vigorous debate about its devolution by enhancing the powers of the Scottish Parliament. This is a debate that could continue for some time. In the meantime, Scottish workers' rights cannot stand still: there is a need for both a framework of workers' rights and consideration of how best it can be implemented within the current constitutional arrangements.
- 2 Although labour law generally may be a reserved matter, this does not mean that there is no opportunity for the Scottish Government to advance a programme for workers' rights. It is true that the nature of the devolution settlement is such that it would be difficult for the Scottish Parliament to legislate as the National Assembly for Wales has done recently in respect of agricultural workers and the Trade Union Act 2016 respectively.
- 3 While recognising that for the time being legislative authority continues to be based at Westminster, there is nonetheless more that can be done to advance workers' rights, in terms of bringing trade unions into the process of government, identifying a framework of workers' rights, and developing strategies for their effective implementation. In this document we set out the questions of institutional responsibility and opportunity.
- 4 In a devolved context, government has both a responsibility and an opportunity to take the initiative where there is need to be met. After almost 40 years of liberal economics, followed by austerity, there is clearly a need to be met. There is also an urgent need to deal with workers' rights in the imminent consequences of Brexit.

THE FAIR WORK ACTION PLAN

- 5 The long awaited Fair Work Action Plan was published in February 2019. There is much to be commended in the process by which it was made, and the sentiments which it embraces. However, there are concerns about the equivocal nature of the commitments, which in many respects are very weak in terms of protecting workers' rights.
- 6 At the heart of the Action Plan are proposals to:
 - extend the workplace equality fund to align with the fair work first commitment
 - continue to support strong trade unions
 - promote collective bargaining
 - promote fair work in the collaborative economy
 - promote fair work in the construction sector
 - take forward actions related to the fair work convention's social care report
 - increase the number of people employed who are paid the real living wage and in secure work
 - promote awareness of and flexibility for unpaid carers.
- 7 These are admirable goals which go well beyond the position of the UK Government on workers' rights. What is missing, however, is a sense of urgency about the implementation of these goals. The provisions of the Action Plan continue to be promotional and aspirational, constrained by a desire to please everyone, most notable in the wish to develop a business case for workers' rights.
- 8 The case for workers' rights does not depend on the wishes of employers. Bad employers will never be persuaded that it is good for business to pay workers a decent wage, provide regular hours, or recognise a trade union. There are two concerns, first the inadequacy of the standards, and second the lack of any effective means by which the Governments' commitments and the obligations of employers are to be monitored and enforced.

THE STRUCTURE OF GOVERNMENT

- 9 It is the responsibility of governments to protect workers' rights and the responsibility of employers to respect workers' rights. These rights are set out in a number of international treaties and other instruments, and cover a wide range of issues from pay and working time to the elimination of discrimination to trade union freedom and the right to strike.
- 10 Although these are not matters that fall within the legislative competence of the Scottish Parliament, there are various steps that the Scottish Government could take to promote and develop these rights. The Government is an employer and can lead by example; it can create government structures which promote workers' interests and give space to workers' organisations in the process of government.
- 11 And while bereft of legislative authority, the Scottish Government has administrative powers to encourage compliance with good practices. Apart from making clear public policy expectations, there are coercive powers available to the devolved Parliaments in the form of contracts and licences. As became clear during the trade union blacklisting scandal, Scottish public authorities have significant financial clout.
- 12 As part of the framework in which these various powers may be developed, it is important that there are in place the government structures that will help to move them forward. To this end, it is proposed that there should be a dedicated department within the Scottish Government, with its own Cabinet level minister, responsible for workers' rights. It is also proposed that there should be more highly developed forms of Social Dialogue.

Cabinet Secretary for Labour

- 13 If the promotion and the protection of workers' rights is to be taken seriously at the heart of government then workers themselves need a strong voice at the Cabinet table. This view is consistent with the Mather Report which proposed an end to the diffusion of responsibility for industrial relations across several portfolios and suggested instead the concentration of that responsibility in the hands of a single Cabinet-level Minister.
- 14 The Scottish Government has held out this recommendation as one to which it has responded positively and with action following the establishment of a Cabinet Secretary post for Fair Work, Skills and Training in 2014. With responsibility for employment policy, women's employment, youth employment, the living wage, skills and employment training, the implementation of the Wood Commission's recommendations,¹ as well as for Skills Development Scotland, the Cabinet Secretary's work was supported by a Junior Minister responsible for Youth and Women's Employment.
- 15 However, the impact of that move has been diluted somewhat by two related developments. First, there has since been a reallocation of responsibilities across posts:
 - the Cabinet Secretary post for Fair Work, Skills and Training was abolished in 2016 and its responsibilities were shared between the Cabinet Secretary for Economy, Jobs and Fair Work (those relating to employment); and
 - the Cabinet Secretary for Education and Skills (those relating to skills and training); the Cabinet Secretary post for Economy, Jobs and Fair work was itself abolished in 2018.The employment responsibilities of the latter were brought within the scope of the Cabinet Secretary for Finance, Economy and Fair Work.
- 16 Second, the representation of workers' rights now by the Minister responsible for Finance – whose responsibilities include, amongst other things, business, industry and the economy – brings with it inevitable tensions. Whilst it is to be hoped that a radical agenda for workers' rights will link with the economic, business, industry and other strategies developed within that portfolio, this is not inevitable.
- 17 A single Cabinet-level Minister responsible for industrial relations therefore remains an important priority: both to develop, co-ordinate and implement a coherent and radical vision for labour, and stand up for labour at Cabinet where those tensions emerge between the protection of workers on the one hand

1 The Report of the Commission for Developing Scotland's Young Workforce (June 2014)

and the economic, business and industry pressures that are represented by the Finance Secretary on the other.

Social Dialogue after Brexit

- 18 A Memorandum of Understanding (MoU) in place since 2002, most recently restated in 2015, sets out the terms of a consultative relationship between Scottish Government and STUC.² It includes a commitment from the First Minister to meet with the STUC twice a year for the purpose of exchanging views and information about policy issues, and a further commitment from Cabinet Secretaries and Ministers to meet with the STUC, as necessary, to discuss specific issues around their portfolios. In addition, either may request an ad hoc meeting on a specific subject at any time.
- 19 Union representatives are also involved in various ways in the policy process at Government (and agency) level in Scotland and the UK. Both the STUC and individual trade unions serve on a variety of boards and public bodies with responsibilities in the fields of economic policy, employment policy, and skills and training. Below the level of the First Minister/STUC talks, however, the extent and quality of union involvement in policy formation can come to depend on relations between the unions and individual Ministers or civil servants. Unions can be excluded.
- 20 Moreover, none of these arrangements between the unions and Government could be said to amount to 'social dialogue' in the usual sense of the term, since they don't involve employers' representatives in consultation or negotiation with the unions. The Mather Report recommended that the approach encompassed in the MoU be expanded to involve employers, while acknowledging that 'Scotland's employer community ... has displayed a degree of resistance to any policy engagement which could be construed as potentially impinging on managerial prerogative in the workplace'.
- 21 One of the consequences of Brexit is that the United Kingdom will cease to be part of the formal social dialogue procedures set out in the Treaty on the Functioning of the European Union (TFEU). This procedure has been productive in the past, and although it had fallen into disuse after the Euro financial crisis, active steps are now being taken to revive it. It would be open to the Scottish Government (as well as other devolved governments) to legislate for the establishment of a social dialogue framework. Brexit provides a compelling reason for this to be done.

CHARTER OF WORKERS' RIGHTS: Part 1

- 22 This Charter represents an IER Scotland contribution to an ongoing debate on the future of labour law in Scotland. It aims to demonstrate how workers' rights should be used to create fair, just, secure, democratic and productive conditions of work which will diminish inequality and benefit the national economy.

Single Employment Status

- 23 Everyone shall be protected by labour law, unless genuinely running a business on their own account. The distinction between employees and workers shall be abolished rather than 'clarified', and in the meantime employers shall not use false classifications of employment status. Everyone who works for a living shall be entitled to the protection of the State's labour laws, which set only minimum standards below which no one should fall. This includes not only the minimum wage and paid holidays, but also protection from unfair dismissal and redundancy, and all other employment rights.

Working Time and Zero Hours

- 24 Every worker shall have the right to transparent and predictable working hours. Anyone who is requested or required to work more than the hours prescribed in the contract shall be given proper notice, paid overtime rates for doing so, and paid for cancelled shifts. This will address the problem of zero-hours contracts, and in doing so will build upon but go beyond EU proposals in the Draft EU Directive on the Employment Relationship designed to overhaul the current law on what information employers are required to provide employees at the start of the employment relationship.

Scottish Living Wage

- 25 The Scottish Living Wage shall be set at the same rate as the national living wage, which the UK Labour Party proposes should be £10 per hour (Spring 2019). The living wage shall be the benchmark for both future legislation and collective agreements, with the aim being to establish a minimum weekly Scottish Living Wage, with overtime rates. The latter should be set by a process involving the Scottish Government and representatives of trade unions and employers in Scotland. The latter process shall require overtime rates to be set for those working in excess of their contractually prescribed hours.

Pay Equality – Race and Gender

- 26 The Scottish Government and employers in Scotland shall take steps in conjunction with trade unions representing Scottish workers to identify and eliminate the gender and racial pay gap.
 - In the private as well as the public sector, hiring practices, promotion procedures and compensation schemes shall be designed and assessed with this aim in mind.
 - The Government, employers and unions shall act to ensure that workers are paid equal wages for equal work, regardless of sex, race, disability or any other protected characteristic.Never again should it be necessary for a trade union to have to devote its time and resources, taking industrial action and/or legal action, in order to force an employer – in the public or the private sector – to respect the right of workers to equal pay.

Family and Carer Responsibilities

- 27 The rights of workers with family and carer responsibilities cannot be met by any single, simple solution. The matter cuts deep into stereotyping of roles that needs to be confronted, the responsibility of the State properly to fund child and social care, and the role of employers to facilitate flexible working. Employment law thus has a role in this respect, as acknowledged by ILO Convention 156 (Workers with Family Responsibilities), which requires all steps possible to be taken to facilitate employment by workers with family and carer responsibilities. Building on existing legislation, this means
 - enhancing the right of workers with family and carer responsibilities to flexible working practices; and
 - strengthening the protection for women who are pregnant or have recently given birth from discrimination or dismissal.

Health and Safety at Work

- 28 No worker should be required to face the risk of predictable injury or death, and no employer should be relieved of the obligation to provide effective health and safety standards. It has been some time since British law was the subject of detailed official scrutiny to determine whether it is still fit for purpose, while in the meantime the nature of the economy has changed and funding for enforcement has been cut. Pending the outcome of a long overdue strengthening of occupational health and safety law,
 - health and safety standards at both industry and company level shall be determined as a matter of collective bargaining, setting real world standards appropriate for the sector and enterprise involved;
 - employers shall recognise the right of access for 'roving' union safety representatives in the most remote and dangerous industries – particularly construction and agriculture; and
 - workers' representatives should have the right of serving provisional improvement notices on employers and, where there is a serious and imminent risk, to stop the job, a power which should apply wherever the union has a member.

Protection of Wages

- 29 There shall be greater pay transparency and an end to the use of intermediary pay-roll companies. Following the proposals in the backbench Workers (Definition and Rights) Bill 2017-2019, there will be full supply chain responsibility for unpaid wages, holiday pay and other benefits. Contractors must take greater care in the choice of sub-contractors, and following the precedent of the Posted Workers Regulations contractors must undertake to meet the liabilities of sub-contractors who flee without paying wages or other debts to their workers, subject to a defence of due diligence on the third party being sued.

CHARTER OF WORKERS' RIGHTS: Part 2

30 Collective rights and collective bargaining have a central and crucial role in this Charter. It is now no longer in doubt that an efficient and productive economy is critically associated with strong workers' rights and high levels of collective bargaining coverage. Over and above the contribution that it can make to economic goals, collective organisation is a necessary condition both of workers' freedom and of a free society more generally. Strong trade unions and collective bargaining improve democracy, help to achieve social justice, and help to ensure respect for the rule of law and the international standards that the UK is bound by.

Freedom of Association

31 Employers shall fully respect the right of their workers to form and join trade unions, and will not:

- participate in any formal or informal blacklisting of trade union activists,
- victimise trade union representatives at the workplace; nor
- engage in anti-union activities of any other kind, in accordance with ILO Convention 87.

In addition, trade unions shall have the right to appoint representatives at the workplace, and all employers shall fully respect the rights of workers' representatives as set out in ILO Convention 135 and ILO Recommendation 143. Special procedures shall be introduced to protect workers' representatives from dismissal.

Trade Union Access

32 Trade union representatives shall have the right of access to a workplace on giving reasonable notice to the employer for the purposes of organising, Trade union representatives shall have the right of access to a workplace on giving reasonable notice to the employer for the purposes of organising, meeting and representing workers on any matter relating to their employment, in accordance with ILO Convention 135 and ILO Recommendation 143. The employer shall be under a duty to provide an opportunity for meetings to be held on the premises, in conditions which are reasonable and appropriate, and which respect (i) the autonomy of the trade union, (ii) the freedom of any worker to meet a trade union representative, and (iii) the confidentiality of the employer's business.

Trade Union Facilities

33 Workers' representatives need protection from discrimination and dismissal, as well as access. But they also need facilities at the workplace, which have been cut back by the Westminster Government and subject to new statutory constraints in the Trade Union Act 2016. Building on ILO Convention 135 and ILO Recommendation 143, trade unions shall have the right to negotiate check off facilities with employers on whatever terms the parties deem appropriate, while trade union representatives at the workplace shall have the right to:

- such time off with pay as is necessary for them to perform their duties
- a dedicated private space to meet members individually and collectively
- access not only to the establishment, but to all parts of an establishment to the extent necessary for the performance of functions; and
- access to a secure email system protected from employer surveillance.

Trade Union Recognition

34 Trade unions shall have the right to recognition by an employer in accordance with ILO Convention 98. To this end:

- a union will be entitled to recognition by demonstrating majority support either by membership or by petition or other evidence without the need for a ballot
- once recognised a union will be entitled to bargain collectively on all matters relating to the employment relationship and
- these rights shall be available only to independent trade unions, and not also to 'employee associations', as suggested by the Fair Work Agenda.

It shall be open to trade unions and employers to negotiate supply chain agreements to impose obligations throughout the supply chain. The law should be changed to require such agreements and to remove impediments thereto.

Sectoral Collective Bargaining

35 Terms and conditions of employment shall be set by a process of sector wide collective bargaining, in order to raise wages and improve working conditions across the economy as a whole. The provisions of sectoral agreements shall be binding on all employers in the sector, including private sector contractors in the case of out-sourced public services. All employers shall comply with all relevant collective agreements. It shall remain possible for employers and trade unions to improve upon sectoral terms and conditions by means of enterprise agreements between an employer and a recognised trade union. Sectoral bargaining is dealt with more fully in paras 41-44 below.

Right to Strike/Solidarity Action

36 Workers and trade unions shall have the right to strike as an essential element in collective bargaining. That right shall be recognised in accordance with minimum standards set by international law to which the United Kingdom is a party, notably ILO Convention 87 and the European Social Charter of 1961. This means in part that the total ban on all forms of solidarity action should be lifted so that workers in Scotland are free again to register their support for workers in brutal regimes overseas. Scottish practice should recognise the principle of 'No Pasaran'.

IMPLEMENTATION: Part 1

37 As pointed out, the Fair Work Agenda is based mainly on promotion and encouragement. There is, however, a need for a coercive element as well, if this is not simply to be a waste of time. It is not enough to encourage employers to comply with various standards: it is essential that they must be required to comply. The STUC has rightly advocated the use of 'procurement, government support and economic development to all to play a role in promoting collective bargaining coverage wherever possible'. There is, however, a notable lack of detail in the Fair Work Action Plan as to how this might be done. There is also an alarming lack of any effective means by which the Government's commitments and the obligations of employers are to be monitored.

38 Implementation it seems is to be by benchmarking by which employers get to mark their own homework, and more generally by a vague commitment of the Scottish Government to monitor progress. The following commitment will strike many as lamentable:

Building on the National Performance Framework and working with the Fair Work Convention, the Scottish Government will develop and adopt a set of indicators to measure progress in delivering a Fair Work Nation.

The Fair Work and Gender Ministerial Working Group will provide a challenge function to the action being taken.

The Scottish Government will also seek to provide the Scottish Parliament with annual reports on progress in embedding Fair Work via the Economy, Jobs and Fair Work Committee and the Finance Committee in respect of the Fair Work budget, with the first report being provided in March 2020.

39 Our proposals are different. It is true that much of the Charter of Workers' Rights proposed above can be implemented as a matter of legal obligation only by legislation, which is currently beyond the competence of the Scottish Parliament. But that is no excuse for inaction. Legislation is necessary only because companies fail to accept their responsibilities as set out in various international texts addressed specifically to companies as well as to States. To this end, the proposed Scottish Cabinet Secretary for Labour shall, in collaboration with trade union and employer representatives,

- establish a register of employers which commit to the Charter and create a machinery for reporting and monitoring compliance by these employers. The model for this purpose would be the ILO monitoring machinery which requires States to submit regular reports about their compliance with the treaties by which they are bound, trade unions (and employers) having the right to comment on these reports.
- Ensure that registration and compliance with those provisions of the Charter that can be made mandatory without legislation are a relevant consideration in public procurement and licensing decisions. To this end, the Scottish Government shall

- encourage and where legally possible have regard to the extent to which prospective contractors, licensees and other public beneficiaries are (i) registered, and (ii) after due diligence found to comply with the relevant provisions of this Charter; and
- encourage by all means lawfully permitted all public authorities and public bodies to have regard to the extent to which prospective contractors, licensees and other public beneficiaries are (i) registered, and (ii) after due diligence found to comply with the relevant provisions of this Charter.

Any decision to award a contract or licence or other public benefit to a party which is either not registered, or registered but in breach of the relevant provisions of the Charter will require explanation on the part of the decision-maker in question.

- 40 In addition to the foregoing, however, there is also a need to establish a Scottish monitoring agency to encourage continuing compliance after a contract, licence or other public benefit is granted. Under the scheme proposed here,
- employers to which para 39 applies would report to the Scottish monitoring agency annually about their compliance with relevant provisions of the Charter, trade unions having the right to respond to these reports and
 - trade unions would have the right to make complaints to the monitoring agency where it is alleged that a particular employer to which para 39 applies has failed to comply with relevant Charter obligations.

The monitoring agency would be composed of experts in the field of labour rights, and an undertaking to accept their conclusions and recommendations would be a relevant consideration in awarding a contract, licence or other public benefit. The register would be public, as would be company reports and trade union responses.³

IMPLEMENTATION: Part 2

- 41 In addition to the monitoring mechanisms proposed above, the other step that should be taken to ensure that much of the Charter is implemented is by rolling out a programme of sectoral collective bargaining, beginning where necessary with sectors where there is the greatest need and the greatest opportunity. There is already a form of sectoral collective bargaining in Scottish agriculture (which survived the abolition of its counterpart in England and Wales). But although a modern equivalent could be introduced for social care (both residential and peripatetic); hospitality; and early learning and childcare, progress so far has been painfully slow and the Action Plan deeply disappointing.
- 42 Apart from further prevarication in the form of a proposal for a mapping exercise (what has been going on for the last five years?) all we have are undertakings to:

Consider and respond to the Fair Work Convention's recommendations for ensuring that Fair Work is embedded in the delivery of social care services including the procurement process.

Create a forum in Early Learning and Childcare to explore sectoral bargaining as a long-term aim with implementation of real Living Wage being the first step. Membership should include the Scottish Government, employers and trade unions.

Help to facilitate dialogue between key employers and trade unions in the hospitality sector to explore the benefits and challenges of implementing Fair Work practices, including establishing collective agreements. The [Fair Fringe Charter](#) is a good example of collective action to improve Fair Work practices in hospitality.

Support union access to workplaces, encourage adherence to existing agreements and support the development of new collective agreements as an integral part of Fair Work First.

- 43 It is true that there is also an additional recognition of Unite the Union's *Construction Charter* (and 'the right of all construction workers to be employed under and to be protected by the appropriate national industry collective agreement'). This important proposal needs to be formally adopted and built upon by the Scottish Government. Yet the Fair Work Agenda's proposals for Social Care are remarkably cautious, recommending that the Scottish Government establish a 'sector-level body responsible for ensuring that social care workers have effective voice in the design, development and delivery of social care services'. This, however, is not sectoral bargaining, the role of what would be a multi-stakeholder body being 'to provide leadership on Fair Work; scrutinise work and employment practices in the sector, provide a resource and information hub for the sector and its workforce, influence policy, and *may over time become a forum for sectoral bargaining*'.
- 44 It is difficult to exaggerate the need for a programme to revitalize collective bargaining, or the importance of the Scottish Government's role in making it happen. Apart from raising wages and enhancing worker protection, international evidence makes it clear that sectoral bargaining would help greatly to expand trade union impact with the coverage of collective bargaining. Sectoral collective bargaining is also associated with other benefits:
- closing the gender pay gap
 - enhancing worker voice and job security
 - eliminating private competition for public services on low wages alone and
 - preventing the exploitation of agency workers.

As acknowledged by Unite the Union in relation to the construction sector, all workers should be covered by the applicable collective agreement. That is a principle that applies to workers in every sector.

CONCLUSION

- 45 This document represents a contribution to debates about improving and enforcing workers' rights using existing devolved powers. It also provides an insight, however, into what a starting framework of workers' rights could look like in Scotland if legislative powers over labour law were to be enhanced or acquired by whatever means. As such, the foregoing is thus intended as the beginning of a discussion rather than the final word, and is presented for consultation with all sections of the Scottish Trade Union movement.
- 46 That said, we fully appreciate that the limits of the devolution settlement currently impose constraints on the Scottish Government in terms of what is possible. Our task is to test the limits of what is possible. We also fully appreciate that the foregoing does not address all issues of concern, a notable omission being the enforcement of employment rights by employment tribunals. Here we are unequivocal in our commitment to obligations under the rule of law, the common law, and human rights law.
- 47 Having regard to the foregoing:
- workers must be able to bring claims to employment tribunals without being charged fees for doing so;
 - when an award is made to a claimant, steps must be taken to ensure that the award is paid by the respondent in question;
 - employers must not be permitted to hide behind the corporate veil to avoid enforcement:
 - liability shall extend personally to those in control of small companies, and
 - to controlling enterprises in corporate groups.
- 48 There are thus matters to be addressed at both Westminster and Holyrood, all the more urgent in the light of Brexit. In the longer term, there also needs to be further consideration of the place of trade unions within Scottish society to acknowledge the role they play in the functioning of a decent society. Over the next six months we would like to invite trade union branches, trades councils, trade union executive committees, and other organisations invested in workers' rights to participate in the consultation.

To contribute to the debate please contact scot.ier@yahoo.com.

3 Consideration also needs to be given to the possibility of a third party beneficiary worker or trade union being able to enforce the contract between a public authority and a contractor for any losses caused by breach.