

**QUICK NOTE’ MAY 2017**

***A Manifesto for Labour Law*: what would it look like in Scotland?**

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**Summary**

This ‘Quick Note’ looks at how the Institute of Employment Rights’ *A Manifesto for Labour Law* might apply to Scotland and what hurdles exist to its implementation. It begins by laying out the context of the Manifesto before detailing its components such as the creation of a Labour Court and the right to sectorial collective bargaining. Then it moves to discuss the political conditions needed to implement the Manifesto *per se* and how this relates to the specific conditions relating to Scotland. It shows that far more radical change is needed than the SNP Scottish Government has been willing to accept with its Fair Work Framework (launched in April 2016).

**Introduction**

On 28 June 2016, the Institute of Employment Rights[[2]](#footnote-2) launched its *A Manifesto for Labour Law* (Ewing *et al.* 2016) at Westminster with Shadow Chancellor, John McDonnell MP, and Shadow Minister for Trade Unions, Ian Lavery MP, alongside leaders from several major unions. The 25 policy recommendations were warmly that day and since then almost all unions have supported them. Then, on 26 September 2016, John McDonnell, at the Labour Party conference, announced that the next Labour government would look to implement the IER's policies. The Manifesto then feeds into the Labour Party’s current [*Workforce 2020*](http://www.union-news.co.uk/unions-welcome-labours-workplace-2020-initiative/) consultation where the hope is that it will adopted in full and then implemented in full by a future Labour government. To help in this process, the Manifesto was condensed down into ‘A Twelve Point Plan for Labour’ to build upon and consolidate the Manifesto which included proposals for worker representation on company boards and works councils with binding rights.

This ‘Quick Note’ begins by summarising what the contents of the *Manifesto for Labour Law* are as well as what their context is. It then goes on to examine the critical issues of i) how can the *Manifesto for Labour Law* be implemented; and ii) what would this look like in Scotland? This consideration of the *Manifesto for Labour Law* builds upon the earlier papers of the Jimmy Reid Foundation on a vision for industrial democracy (Gall 2016a) and the assessment of the Fair Work Framework (Gall 2016b).

**Summary contents and rationale**

The premise of the *Manifesto for Labour Law* is to shift the focus of labour law from statutory minimum rights to collective bargaining, allowing workers to organise and negotiate for higher wages and conditions within not only their companies but across entire sectors. Such sectoral collective bargaining could lead to wage and condition floors being set across industries, which can be built on at company level. This should lead to higher pay and better conditions, adding to workers' job security and income. What this amounts to is using the law as an enabler rather than being wholly reliant upon it to deliver protection whilst recognising that without strong unions, individual employment rights are too difficult to enforce at a workplace level. Moreover, it also recognises that too strong a focus on individual employment rights wrongly suggests the only role of the state is to enforce minimum standards with everything else left to determination by the market.

However, the *Manifesto for Labour Law* also recommends that the definition of the legal term 'worker' is reviewed so that all workers are covered no matter the attempts to impose the bogus status of ‘self-employed’ upon them and that the repercussions for those employers who break the rules are both punitive and deterrent in nature. Part of this would involve rebuilding the regime of regulation and enforcement through having labour inspectors within workplaces to make sure the law is followed, labour courts specifically focused on employment cases, and sanctioning unscrupulous employers including through criminal proceedings.

Sectoral (industry-wide, multi-employer) collective bargaining along the lines deployed in Germany, Sweden, Norway and Denmark works by creating a floor of collectively bargained basic terms applicable to all employers in the sector. The terms are binding on all employers within the sector, whether or not they recognise unions or participate in the bargaining process. The minimum terms can be improved upon through local bargaining or in individual employment contracts, but they cannot be undercut. This forces employers to compete by innovating and investing in their workforce, rather than cutting wages. This works to improve productivity and increase wages, stimulating demand. The process can also help tackle some of the problems linked to immigration and the importing of cheap labour. To achieve this, the proposals include a new Ministry of Labour responsible for promoting collective bargaining, and Sectoral Employment Commissions that would set minimum terms and conditions for each industry, through the negotiation of sector-level agreements (see below on detailed proposals).

**Summary context**

The extent and coverage of union recognition and collective bargaining have fallen in Britain over the last thirty years as employers and the state have attacked them. The consequence has been workers in Britain work longer hours for less pay than in most other competitor economies in western Europe. The overall effect of this is shown in the proportion of GDP going to wages falling from a high of 65% in the mid-1970s to 53% by mid-2010s. And given that this is the total spent on wages, it does not take into account the extremely unequal way these wages are distributed. To quote from the manifesto:

*On average, British workers work more hours per week, more days per year, more years before they retire, after which they receive lower levels of pension than most of their European counterparts. In comparison to other European workers they have generally received less education and training, and (because of lack of employer investment) their productivity is lower. They get fewer paid holidays than almost all European comparators (the Working Time Directive notwithstanding). Their pay is so low that a great proportion of them are in poverty (and the State subsidises employers’ low wages in respect of a higher proportion of workers) than almost anywhere elsewhere in Europe. The gender pay gap is at a wholly unacceptable level ... [with] ‘the law has been moulded purposefully to achieve these outcomes … [so that] by 2011 Britain had fallen to the second lowest in Europe in terms of the level of collective bargaining coverage. Coverage is probably less than 20% today, lower than at any time since before the First World War.*

**Detailed proposals**

The following are the key detailed proposals to be found in the Manifesto:

* A new Ministry of Labour should be established – led by a Secretary of State with a seat in the Cabinet, and mandated to represent the interests of workers in government;
* A Labour Court should be established, with specialist judges and exclusive jurisdiction to deal with all employment and labour related matters;
* A National Economic Forum should be created to encourage greater tripartite engagement in and ownership of major economic decisions and the direction of economic policy;
* The Ministry of Labour should establish Sectoral Employment Commissions with responsibilities including to promote and negotiate Sectoral Collective Agreements, set minimum terms and conditions of employment, mechanisms for the resolution of collective and individual disputes, and health and safety standards for the sector as a whole;
* Sectoral based bargaining should be complemented by enterprise based bargaining, applying the principle of favourability so that workers are entitled to the most favourable terms and conditions;
* Regulatory legislation should underpin collective bargaining on a range of matters such as pay, working time (including zero hours contracts), discrimination, equality, and health and safety at work. Existing statutory standards should be universal in scope and effective in application;
* Steps should be taken to resolve more disputes without recourse to the law, under collectively agreed procedures, or summarily by labour inspectors with powers to cancel dismissal notices and order reinstatement;
* Reforms to the law on freedom of association should be made to ensure a better balance between trade union autonomy and trade union democracy (with trade union elections conducted in accordance with trade union rules and procedures);
* Recognised or representative trade unions should have the right to check off facilities on request;
* More effective legislation should be introduced to stamp out blacklisting, which has a ‘long and pernicious pedigree in the UK’. To this end, the Employment Relations Act 1999 (Blacklists) Regulations 2010 should be amended to ensure that it is always illegitimate to refuse to hire workers on grounds of past trade union activity;
* It should be made unlawful to dismiss a workplace representative except for good cause, requiring the prior approval of a senior labour inspector, whose decision should be subject to possible review;
* On the right to strike, it should be lawful for everyone to be able to take collective action with others in defence of their social and economic interests in the workplace, and for their trade unions to organise such action. The Manifesto calls for the repeal of the existing statutory duty to give notice of an intention to take industrial action, as well as the duty to give notice of an intention to ballot for industrial action. It proposes that a simple duty to give no less than 3 days strike notice would be ample;
* Unions should also be permitted to take or to call for ‘secondary’ or ‘solidarity’ industrial action in support of any other workers in dispute (including industrial action involving another employer) where the primary action is lawful. There should be a ‘presumption that solidarity action is lawful’, because ‘the whole point of trade unionism is not only collective strength, but mutual support in times of trouble’.
* Moreover, lawful industrial action should not be regarded as a breach of the contract of employment or service, but as a temporary suspension only. To this end, those participating in lawful collective action should have the right to be reinstated at the end of the strike, if it is their wish to be reinstated

**Implementation**

The IER has previously produced wide-ranging proposals for the radical reform of labour law (such as the Charter for Workers’ Rights in 2002). The contents of the Manifesto have many of the same components of these, showing, on the one hand, the IER has stood steadfast in its perspective of the need for radical change, and on the other, the lack of progressive change as well as the continued backward march of progress. Of its activities, the Trade Union Freedom Bill in the late 2000s (in both its incarnations) was the only proposal to make it directly to the floor of Parliament via John McDonnell’s Private Members’ Bill.

This indicates the easiest part of gaining support for new proposals is to garner validation from existing progressive unions and politicians. McGaughey (2017) has argued, in relation to the Manifesto, that:

*A successful manifesto often involves three main features. First, it must captivate public policy. It imagines a future to believe in, setting goals worth winning. … Second, there must be unifying principles. Principles, not rigid rules, are fundamental for collective action to achieve unity in a direction, minimum aims, rather than details in outcomes. Third, principles must have an order that can be remembered and rallied for.*

Some of this has been achieved already by the originators and supporters of the Manifesto. Arguably, it is the first which is most lacking though, where ‘captivating’ is taken to mean something more than merely making a big, first splash and then the ripples dispersing and dissipating away into nothing. But while these three characteristics are necessary, they are insufficient for seeing the implementation of the Manifesto in terms of i) making it on the statute book; and ii) being subsequently enforced by the state. The scale of the task is such that the union movement needs to be considerably stronger than it currently is in order to gain such an objective, and that is said without taking into account the present situation found with regard to the Labour Party (its poor poll ratings, attacks on Corbyn’s leadership and so on in the run up to the 8 June general election). To put it bluntly, the union movement needs to be as strong as it was in the late 1960s/early 1970s when it was capable of defeating two sets of government proposals on industrial relations laws (*In Place of Strife*, *Industrial Relations Act 1971*). Argument and evidence – as that represented by the Manifesto – are important in helping to play a part in the process of building such leverage and power but evidence on its own will not compel legislative change. At best, evidence and argument can help raise consciousness and confidence of workers *when they are in engaged in mass, collective struggle*.

**Situation in Scotland**

At one level, and as already alluded to, the prospect for implementing the Manifesto in Scotland is no more auspicious than it is south of the border – certainly in the short- to medium-term. As is widely known, employment law is a reserved matter (for Westminster and not Holyrood) and, somewhat more contentiously for some, the SNP in office as the Scottish Government since 2007 has not shown itself to be a radical or reforming administration. For example, its major initiative in regard of employment relations, the Fair Work Framework, has no statutory or regulatory underpinning so that no matter its good intentions it has no powers to be enforced. This has meant that on major Scottish Government or publicly funding building projects like the Southern General Hospital in Glasgow, the new Forth Road Bridge and the new Dumfries hospital of new Dumfries and Galloway NHS, for example, unions have been denied access to workers to recruit and represent them and worker representatives have been subject to blacklisting (which goes against the spirit and letter of the Fair Work Framework). Public procurement, in these examples, give the Scottish Government more than enough leeway to insist upon minimum conditions of employment without acting out with any devolved powers it has on employment law matters. This is, however, entirely in keeping with the SNP’s non-interventionist, voluntarist approach to matters of employment relations. So currently, neither the legal framework nor the (mainstream) political will exists to implement the Manifesto. It also shows how unwilling the SNP Scottish Government has been to act when contrasted with the much greater activity and actions of the Welsh Assembly Government on similar matters. Notwithstanding such limitations with the Fair Work Framework, some public sector unions like PCS and UNISON have been able to start using it to cajole employers when subject to ‘bottom up’ organising to concede sectoral collective bargaining agreements.

However, the possibility exists that in the longer-term under independence that the Manifesto could be implemented. With full power on matters of employment law and employment relations, a Scottish Parliament could decide to do so. The issue then becomes one of political will. Under the first scenario, the devolution of employment law could take place under a new constitutional system (such as federalism). Post-Brexit this becomes more possible and, indeed, some pressure is building for the devolution of employment with the STUC and the Unite union recently adopting this as policy. Under the second scenario, there is no need for devolution of employment law because independence as taken place. Here,the nature of the SNP as a political and ideological force is paramount. If the SNP continues to be the main force arguing for an independent Scotland, and if the SNP was to form the first governments under an independent Scotland the ideas contained in the Manifesto will not get a proper hearing and consideration, and it is highly unlikely on its existing record that it would implement the Manifesto without pressure from left parties at Holyrood and in civic Scotland. This is all the more so if the SNP sought to return Scotland after independence to membership of the neo-liberal dominated European Union. Yet the scale of the challenge to realise either scenario is on a par with that facing the British-wide unions supporting the Manifesto and seeking its implementation throughout Britain.

**References**

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1. Gregor Gall is Professor of Industrial Relations at the University of Bradford and Director of the Jimmy Reid Foundation. He is also editor of the Foundation’s sister organisation, *Scottish Left Review*. [↑](#footnote-ref-1)
2. The Institute of Employment Rights is a think tank for the labour movement and a charity. It exists to inform the debate around union rights and labour law by providing information, critical analysis, and policy ideas through our network of academics, researchers and lawyers. It was established in 1989 as an independent organisation to act as a focal point for the spread of new ideas in the field of labour law. In 1994, the Institute became a registered charity. See <http://www.ier.org.uk/> for its list of activities and publications. [↑](#footnote-ref-2)