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Department for
**Employment
and Learning**
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Proposals to amend Trade Union Law: Departmental Response to Public Consultation

(April 2009)



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Departmental Response.*

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INTRODUCTION

Background

Between June and September 2008 the Department for Employment and Learning (the Department) consulted on 'Proposals to Amend Trade Union Law'. The consultation document was divided into three parts:-

Part 1 asked for feedback on the implications for trade union law as a result of the judgement of the European Court of Human Rights in the ASLEF v UK case; consideration of the NI legislation surrounding the expulsion of individual trade union members on the grounds of their political party membership and responses to the proposal suggested by the Department to amend trade union law in light of the judgement.

Part 2 outlined some proposed miscellaneous amendments to be made to primary legislation. Respondents were asked whether they supported or opposed the proposal to remove the restriction on legal representation in the Industrial Court.

Part 3 asked for consideration of the differences between NI and GB trade union law (i.e. Donations to trade union political funds and Exclusion from a trade union) and sought opinions on these differences.

The consultation document included a partial Regulatory Impact Assessment, a preliminary Equality Impact Assessment and Human Rights Impact Assessment. Copies of all relevant documents were and remain freely obtainable to the public from the 'Consultation Zone' on the Departmental website (www.delni.gov.uk/consultation-zone) or in hard copy from the address on page 3.

The consultation

The Department issued 177 copies of the Proposals to Amend Trade Union Law consultation document to trade unions, political parties, employers' representatives, employers and legal bodies.

The consultation launch was supported by a press release and was highlighted in the "Latest News" section of the Departmental website. The consultation document is available from the 'Consultation Zone' on the Departmental website (www.delni.gov.uk/consultation-zone), or in hard copy from the address given on page 3.

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Responses

At the closing date of consultation, the Department had received a total of 13 responses. A list of respondents is contained at **Annex A**.

The Department would like to thank all those organisations and individuals who took the time to respond to the consultation and to those stakeholders who met with officials to discuss the proposals. Your views have been carefully considered in order to arrive at the way forward as set out in this document.

Structure of this document

This document details the responses to the questions posed (including general comments that were made in respect of the overall policy proposals), and sets out the decisions on the way forward in light of the consultation responses.

Departmental contact details

All documents referred to in this response can be obtained from the Departmental website.

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Responses to the questions posed

Question 1: European Court of Human Rights: ASLEF V UK Judgement

What is your assessment of the Court's judgement?

In total, 8 respondents answered this question, 7 of whom, for varying reasons, broadly welcomed the European Court of Human Rights (ECtHR) judgement in the ASLEF V UK.

Both the Law Society of NI and the Law Reform Committee of the Bar Council assess the judgement as meaning that it is contrary to Article 11 of the European Convention on Human Rights (ECHR) to prevent a trade union from expelling a member on the ground of his past or present membership of a political party where that membership is in direct conflict with the union's aims and objectives. However, both of these bodies commented that whilst ECtHR recognised the importance of the rights of trade unions to freely choose their members, it also highlighted the need to ensure protection for an individual's human rights.

"...the judgement was not intended to provide unions with a carte blanche in relation to the expulsion and exclusion of members and individuals because of their political views and/or affiliations."

Law Reform Committee of the Bar Council

The Association of School and College Leaders (ASCL) believe the ECtHR to have been correct in its ruling, while the Alliance Party offered its support for the ECtHR decision.

The Irish National Teachers' Organisation (INTO) accept that the ruling of the ECtHR created a situation where clarity was required and consequently legislative change was necessary.

The Northern Ireland Committee – Irish Congress of Trade Unions (NIC-ICTU) and Thompsons McClure Solicitors both welcomed the ECtHR decision in this case. They both believe that the ECtHR judgement requires any restraint on the freedom of a trade union in this respect (i.e. expulsion of trade union members) to be justified as prescribed by law and necessary in a democratic society.

Thompsons McClure Solicitors and NIC-ICTU also feel that the ECtHR reasoning has implications for the whole of Article 38 of the Trade Union and Labour Relations (NI) Order 1995 (TULRO 1995);

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“More importantly, article 38 does not start from the position embedded in Article 11 i.e. unions’ freedom to associate subject to limitations. On the contrary, it assumes that a union is not free to associate and then qualifies that by listing permitted grounds for exclusion or expulsion.”

NIC-ICTU & Thompsons McClure Solicitors

Both NIC-ICTU and Thompsons McClure have interpreted the ECtHR ruling as providing that the structure and content of Article 38 of TULRO 1995 is incompatible with the right to freedom of association. Both respondents believe that Article 38 is unnecessary over-regulation and should be repealed in its entirety.

One respondent, who remained anonymous, expressed concern that as a result of the ECtHR decision Trade Unions will be allowed to pick and choose their membership based on political party membership. This respondent believed the fundamental problem with the ECtHR finding was that the expulsion (of Mr Lee) was not based on (his) conduct but on (his) membership of a particular political party.

Departmental response:

The Department notes that while the overwhelming majority of responses welcomed the judgement of the ECtHR, opinions were divided on the extent to which changes to trade union law should occur.

The Department acknowledges that the judgement concerns union autonomy and the rights of unions to set and apply their membership rules, and re-affirms its commitment to amend the relevant parts of trade union law to comply with the ECtHR judgement in this case.

Question 2: European Court of Human Rights: ASLEF V UK Judgement

Do you agree with the Department’s proposal to respond to the judgement by amending legislation to ensure there is no explicit reference to a category of conduct relating to political party membership or activities? If not, why?

Of the 8 responses to this question, the Alliance Party and ASCL agreed with the Department’s proposal, while the Law Reform Committee commented that in their view the proposal advanced (by the Department) is sound.

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The Law Society of Northern Ireland believes that the Department's proposal requires further amendment with regard to protections for individuals.

“The Society would ask that the proposed amendment to Article 38 of the Trade Union and Labour Relations (NI) Order 1995 be reviewed to ensure safeguards are in place to protect individuals against abuse.”

Law Society of Northern Ireland

Both Thompsons McClure Solicitors and NIC-ICTU opposed the Department's proposal, reiterating their view that Article 38 is convoluted and confusing, and should be repealed. Both respondents believe there are sufficient means for an aggrieved (trade union) member to seek legal redress for an expulsion by bringing a breach of rule claim before the courts or complaining to the Certification Office.

“If a dispute arises about discipline of a member, that member has the right to complain through the civil courts or the Certification Office. Article 90A of the Trade Union and Labour Relations (NI) Order 1995 sets out the Certification Officer's general jurisdiction for breaches of rules, including disciplinary rules.”

Thompsons McClure Solicitors

NIC-ICTU and Thompsons McClure also suggested that Government should take this opportunity to repeal Article 31 (TULRO 1995), which confers on union members a right not to be “unjustifiably disciplined”. They claim that this provision inhibits unions' disciplinary procedures where a prohibited ground forms even a subsidiary and minor element in the grounds for disciplinary action, and therefore infringes trade union rights to autonomy and undermines a union's efficacy in a way that breaches Article 11 ECHR (Freedom of assembly and association).

An anonymous respondent disagreed with the Department's proposal on the grounds that, as a result, Trade Unions will be allowed to pick and choose their membership based on political party membership.

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Departmental response:

The Department acknowledges that many of the respondents requested further amendments to Article 38 than that proposed, ranging from requests to include safeguards for individuals to repealing Article 38 in its entirety.

The Department considers that it is wrong to assert from the ECtHR judgement that the corresponding Article 38 in its entirety is incompatible with Article 11 of the European Convention on Human Rights.

The Department, following legal advice, will now seek amendment of Article 38 to provide limited conditions under which it would be lawful for a trade union to expel an individual on the grounds of their political party membership or activities.

The aim will be to maintain consistency between the law of GB and NI in the appropriate implementation of the ASLEF judgement, and provide individual union members in NI with the same safeguards as their counterparts in GB.

Question 3: European Court of Human Rights: ASLEF V UK Judgement

If the Department's proposal at Q2 is adopted; do you consider that there should be additional safeguards provided to protect the rights of individual union members and to guard against potential abuse by unions? If 'Yes', why?

Of the 7 respondents who commented on this question, INTO, Law Society of NI, Law Reform Committee and an anonymous individual believed that there should be additional safeguards provided to protect the rights of individual union members.

“To give full effect to the Court's judgement Government must ensure adequate regard is given to an individual's rights as recognised by the Court and adequate safeguards must be included to ensure protection of these rights.”

Law Society of NI

The Law Reform Committee highlighted the importance of ensuring that a union is not able to ban its members from joining a mainstream political party of their choice, by adopting the device of passing a resolution declaring a policy aim which is incompatible with one or more party manifestos. They suggest this could

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be safeguarded by a proviso within the legislation that the inconsistency between the aims and objectives of the union and of the relevant political party must be one which is fundamental to the aims and objectives of the union and/or which has a direct impact on the employment relationship.

The INTO believes it will be important that the internal rules of a trade union will reflect what is considered appropriate conduct and what is not considered appropriate conduct, and this may be required to be reflected in amended legislation.

An anonymous respondent stated that safeguards would be essential to ensure that an individual cannot be expelled on the basis of which political party they support.

The ASCL argued that additional safeguards were not necessary as existing legislation is adequate. Similarly both NIC-ICTU and Thompsons McClure Solicitors see no need for further legislation, stating that the Certification Officer's jurisdiction for complaints of breaches of unions' disciplinary rules works well and is explicitly designed to guard against abuse by unions.

Departmental response:

The Department acknowledges that the ASLEF judgement concerns striking a balance between the autonomy of trade unions and the rights of individual members.

The Department notes the concerns expressed by some respondents that additional safeguards be included to protect the rights of individual union members, and has agreed to introduce similar safeguards as in GB. These will specify that the union's decision to expel an individual on the grounds of political party membership or activity is not permitted if;

- **the decision to expel is taken otherwise than in accordance with the union's rules;**
- **the decision to expel is taken unfairly;**
- **the individual would lose his livelihood, or suffer other exceptional hardship, by reason of ceasing to be a member of the union.**

The Department has been advised that the provision of these safeguards is not within the legislative competence of the NI Assembly. The Department therefore will not be taking these proposals forward in the draft Employment Bill, and will investigate the most appropriate method to incorporate these safeguards into legislation.

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Question 4: Impact Assessments

Do you have any other comments on this issue or any views or information which could influence the conclusions of the Partial Regulatory Impact Assessment, Equality Impact Assessment or Human Rights Impact Assessment?

The Irish National Teachers' Organisation (INTO), Thompsons McClure Solicitors and NIC-ICTU were the only respondents to comment on this question. The INTO stated that cognisance must be taken by the Department of the relevant provisions of the Fair Employment and Treatment (NI) Order 1998 and in particular the rights and exceptions contained therein to political opinion, especially within the context of Northern Ireland.

Departmental response:

The Department notes the comments from respondents on this matter and has taken legal advice on whether the current proposals to change trade union law are compatible with the Fair Employment and Treatment (NI) Order 1998 (FETO).

The Department has been advised that the current proposals are not within the legislative competence of the NI Assembly. Legal advice also indicates that there may be some conflict with FETO. The Department is currently in discussions with the Office of the First Minister and Deputy First Minister, who have a particular interest in FETO, to ensure any conflict is eliminated. The Department will consider this issue when exploring the way forward.

Question 5: Amend Article 92(4) of the Industrial Relations (Northern Ireland) Order 1992

Do you have any comments on the proposals detailed in the Public Consultation?

There were 4 detailed responses to this question, from Law Society of NI, Law Reform Committee, INTO and NIC-ICTU.

The Law Society of NI welcomed the proposed amendment to Article 92(4) of the Industrial Relations (NI) Order to extend an individual's rights to legal representation before the Industrial Court. The Law Reform Committee considers that there is a reasonably strong prospect that the current arrangements offend against Article 6 (*Right to a fair trial*) of the European Convention on Human Rights (ECHR).

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NIC-ICTU expressed their concern that this proposal (and the change introduced in 2007) will lead to an unnecessary legal formality in the Industrial Court setting. NIC-ICTU believes that the purpose and intention of the restriction (on legal representation) and the establishment of the Industrial Court was to deal with issues as expeditiously as possible.

“From experience we fail to see how the introduction of legal representation on these matters would assist in this process and believe that it will only add a further restriction to the expeditious resolution of issues.”

NIC-ICTU

Departmental response:

The Department notes the concerns of those respondents opposed to the removal of the restriction on legal representatives in the Industrial Court.

However, on receipt of legal advice, the Department considers the failure to allow legal representation in relation to five jurisdictions derived from European directives could lead to a legal challenge under Article 6 of the ECHR. The Department therefore intends to proceed with the amendment to Article 92(4) of the Industrial Relations (Northern Ireland) Order 1992 as outlined in the consultation document.

Question 6: Amend Article 92(4) of the Industrial Relations (Northern Ireland) Order 1992

Do you support or oppose the removal of the restriction on legal representatives set out. Do you have any information that may support your views?

Of the 5 detailed responses to this question, NIC-ICTU, INTO and the Labour Relations Agency (LRA) opposed the removal of the restriction on legal representatives in the Industrial Court.

The LRA argued that from their experience legal representation in employment relations matters is normally best kept to a minimum to encourage parties to resolve their differences in a timely and effective manner. The INTO drew on their experience in dealing with the Fair Employment Tribunal, stating;

“The process of instruction of legal representatives has led to rising costs and a move from the principals which were considered when the tribunals were established. We therefore continue to believe that legal

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representation should not be permitted or encouraged in the Industrial Court.”

INTO

NIC-ICTU opposed the proposal to remove the restriction on legal representatives on the basis that it would add complications to a system that is working;

“The fact that there are no prohibitions to parties providing legal representation at the CAC in GB does not mean they are right and we are wrong. ICTU’s view is that it is working now and should not be interfered with for fear of a break down in the ability to resolve these issues at an early stage.”

NIC-ICTU

The Law Reform Committee highlighted the development of complex legislation and jurisprudence in the area of employment law as a reason to remove restrictions on legal representation. They further argued that the proposal did not go far enough, stating their support for the complete removal of the restriction on legal representation in the Industrial Court.

*“There is little, if any, justification to place a bar on legal representation in respect of **any** jurisdiction in the Industrial Courts.”*

Law Reform Committee

Departmental response:

The Department notes the varied responses to this question. As mentioned in response to the previous question, the Department considers the failure to allow legal representation in relation to five jurisdictions derived from European directives could lead to a legal challenge under Article 6 of the ECHR. The Department therefore intends to proceed with the amendment to Article 92(4) of the Industrial Relations (Northern Ireland) Order 1992 as outlined in the consultation document.

The Department also intends to extend the right to legal representation to one of the two remaining Industrial Court jurisdictions i.e. Disclosure of Information for Collective Bargaining.

The Department considers that the final jurisdiction, the Provision of Voluntary Arbitration, by its nature would not benefit from legal representation.

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Question 7: Donations to trade union political funds

What are your views on the effectiveness of the current ‘contracting in’ arrangements in NI? What evidence do you have to support your views?

There were 5 responses to this question, of whom 2 were content with the present arrangements in Northern Ireland.

INTO support the right of an individual member to subscribe to a political levy and believe that the present arrangement of “contracting in” to such a levy is appropriate for the circumstances prevailing in Northern Ireland.

The anonymous respondent stated their belief that the current arrangements (in Northern Ireland) are effective, honest and fair, and that individuals should have the right to choose whether they wish to fund the political activities of a trade union rather than simply being a member of a trade union for Industrial Relations / Employment Law reasons.

Thompsons McClure solicitors stated the view that the current arrangements are ineffective and have served to limit the potential participation of trade unions in political matters in Northern Ireland. They believe that the law should be changed to reflect the position in GB, where union members must ‘contract out’.

NIC-ICTU are of the opinion that trade union members have legitimate political aspirations, of no less in value to those of their colleagues in GB or the Republic of Ireland and that NI legislation restricts trade unions by imposing a unique and particular hurdle for them to jump through in respect of making and maintaining a political fund. NIC-ICTU believes that the ineffective nature of contracting-in greatly reduces the amount of monies that unions here can use for ‘political purposes’. They highlighted some instances where such actions by unions in Northern Ireland have necessarily been subsidised by their colleagues in GB or Republic of Ireland.

“There is no reason why the different treatment of trade unionists should be maintained. Trade unions are mature organisations with a very valuable role to play in our society. This needs to be respected and the additional discriminatory hurdle currently in place needs to be removed.”

NIC-ICTU

ASCL expressed the view that Trade Union law in NI should be the same as that in England.

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Departmental response:

The Department notes the views of respondents who are content with the present arrangements and those who believe Northern Ireland legislation in this area should be amended so that trade union members ‘contract out’ of trade union political funds.

There are no proposals at this time to amend this area of NI trade union law and any such change would require a further public consultation on the detail of any proposed changes.

The Department will keep this issue under review to monitor need for change in this area.

Question 8: Exclusion from a trade union

What are your views on the differences between GB law and the NI position regarding exclusion from a trade union? What evidence is there to support your views?

The INTO and ASCL were the only respondents to give their views on this question.

The INTO recognised that there are differences in trade union law between Northern Ireland and GB and that in some circumstances these differences have occurred because of the nature of industrial relations in Northern Ireland and/or the political context that has existed in Northern Ireland.

The ASCL stated that it was their belief that Trade Union law in Northern Ireland should be the same as that in England.

Departmental response:

The Department infers from the responses to this question that at this time there is no demand for change to this area of NI trade union law.

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NEXT STEPS AND THE WAY FORWARD

The Department is grateful to all those who took the time to respond to the consultation, and to those stakeholders who met with officials to discuss the proposals.

The Department now intends to take forward the proposals as set out in this document in a draft Employment Bill.

Departmental officials are currently liaising with relevant colleagues in Great Britain and the Departmental Solicitors' Office to discuss the most appropriate way to legislate for the other proposals concerning the ECtHR judgement in the ASLEF V UK case that are not within the legislative competence of the NI Assembly.

Annex A: List of respondents to the Consultation

Alliance Party
Anonymous (Individual)
Association of School and College Leaders
Irish National Teachers Organisation
Labour Relations Agency
Law Reform Committee
Law Society of NI
Northern Ireland Certification Office
Northern Ireland Committee – Irish Congress of Trade Unions
Northern Ireland Court Service
Northern Ireland Judicial Appointments Commission
Northern Ireland Ombudsman
Thompsons McClure Solicitors

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THE DEPARTMENT:

Our aim is to promote learning and skills, to prepare people for work and to support the economy.

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