parliamentary brief

Transparency of Lobbying, non-Party Campaigning and Trade Union Administration Bill

Lobbying Bill – 'a badly drafted ill-thought through Bill full of unintended consequences'

In a nutshell

- *Part one of the Bill (register of lobbyists) fails to deal with a real problem – lack of transparency in lobbying.*
- *Part two (third party campaigners) limits freedom of speech and moves to exclude voices that are not political parties from contributing to democratic debate. Ministers have not made clear why it is needed.*
- *Part three (trade union membership) is a solution in search of a problem – nowhere has the government made a case that these new bureaucratic burdens on unions are needed or deal with anything anyone considers a problem.*

This is a constitutional Bill on which there has been no consultation, no effort to secure a consensus, no pre-legislative scrutiny and extremely limited scrutiny of substantial amendments in the House of Commons. If the government will not withdraw or pause it and start a proper consultation, then the House of Lords will need to give it careful and extensive scrutiny.

We should perhaps apologise for the length of this brief, but this reflects just how bad the Bill is in principle and practice.

The Bill's genesis

The coalition agreement promised a Bill to regulate lobbying. Following a poorly received consultation on earlier proposals the government promised a draft bill and pre-legislative scrutiny for any further proposals.

Yet when 'cash for influence' allegations against parliamentarians were made in the press, the government promised, and then published, this Bill as its response (although the Bill's proposals have no relevance to the alleged behaviour.)

In addition to a very limited register confined to consultant lobbyists, the Bill contains two additional sections – on third party campaigning and trade union membership – on which there no consultation or even warning.

Progress of the Bill

The Bill was published as the summer recess started and was rushed through the Commons with undue haste. Three days on the floor of the House was not an adequate Committee Stage to allow proper scrutiny, and the rushed timetable

meant that substantial government amendments were not available at Committee and were steamrollered through at Report Stage.

The Bill has proved highly controversial with opposition across the Commons in all parties to key measures at every stage.

While we recognise that the government amendments introduced at Report Stage meet some concerns, their scale reinforces what we have said about the Bill from the start – that it is badly drafted and ill-thought through. It is likely to be full of unintended consequences – not least in the new amendments.There is wide support for greater lobbying transparency – but this Bill does not deliver it. It is also right to have rules that strike the right balance between free speech and keeping big money out of politics, but that should be done through consultation and consensus building not through arbitrary rules that have already had to be substantially rewritten.

Unions already have a legal obligation to maintain accurate membership systems. It is in their own interests to do so, and the Certification Officer already has sufficient powers to deal with inaccurate membership records though has not needed to do so for many years.

A hat trick of committees

It is rare for three separate Parliamentary Committees to express serious reservations about a government bill.

Yet the House of Commons Political and Constitutional Reform Select Committee, the House of Lords Constitutional Committee and the Joint Committee on Human Rights have all expressed major reservations about the Bill that echo the issues raised by civil society groups.

> *It is worth quoting Dr Hywel Francis MP, the Chair of the Joint Committee:*
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> *"My Committee accepts that measures to protect the electoral process are, in principle, a clear legitimate aim. We welcome the amendments brought forward by the Government at Commons Report stage, insofar as they improve the clarity of the Bill. However, we remain concerned about a number of issues raised by this Bill.*
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> *"My Committee also finds it unacceptable that it has not been able to report on a Bill that raises significant human rights issues before it has left the first House, on account of the unnecessary speed at which the Bill is being taken. This amounts to an abuse of the Parliamentary legislative and scrutiny process – and this is not the first time that this has happened during this Parliament.*
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> *"We call on the Government to 'pause' this Bill to allow for further scrutiny and consultation, particularly with the Electoral Commission, the Commission on Civil Society and Democratic Engagement and other stakeholders. If this does not happen, we recommend that the Bill should*

be amended to remove both the lower thresholds for registration and reduced spending limits, and leave them at their current level pending further detailed work on whether the current limits are appropriate".

The House of Lords Constitutional Committee says:

> *The provisions of Part 2 directly affect the fundamental common law right to freedom of political expression. The House will wish to ensure that there is appropriate justification for interfering with that right.*

Part one – Transparency of Lobbying

This part of the Bill adds little or nothing to lobbying transparency. It confines registration to consultant lobbyists though requing less disclosure than the vast majority already make voluntarily. It defines lobbying as only contact with ministers and Permanent Secretaries, and excludes special advisers and the officials who deal with policy and legislation. Only one per cent of lobbying meetings will be regulated by this Bill.

We support the call for comprehensive disclosure by all who lobby, and also want to see new obligations on those being lobbied to declare all their contacts and what was raised.

We leave detailed briefing on this part of the Bill to others as we wish to concentrate on parts two and three where we have a direct interest, but note how its measures have managed to unite almost everyone involved in the lobbying debate in opposition.

Part two – non-Party Campaigning

The law rightly regulates how groups other than political parties campaign in elections. It is right to have regulations that keep big money out of elections. But getting the balance right between free speech and fair election rules will never be easy. That is why the government should have had a period of consultation, tried to build a consensus and allowed proper pre-legislative scrutiny. We also needed a clearer statement from the government about why the law needs to change, and an explicit statement of what activities that have occurred in previous elections they wish to stop.

The major amendments introduced at Report Stage in the House of Commons redefining what counts as election campaigning was a humiliating retreat from the draconian implications in their first version of thre Bill which could, for example, criminalised conversations between campaigners and journalists and banned the TUC Congress in a pre-election year.

While we welcome some of these changes (such as an explicit exemption for annual conferences), the need for such a major rewrite of the key clause and schedule highlight the partisan nature, lack of consultation and poor drafting of

the Bill. Regulating such an important part of our democratic life should not be done through running repairs on a badly drafted Bill. Even if there is a case for revising the provisions for third party campaigners in the Political Parties, Elections and Referendums Act it would be better to conduct the next election under the existing rules than rush into badly thought through replacement.

Rather then repeat the detailed legal critique of the changes produced by the NCVO we would refer peers to their briefing.

Our concern – in any case – has never been confined to the definition of what counts as election campaigning, it has always been about how all the changes work together.

Part two of the Bill makes changes in four areas:

- *Changes in the definition of what counts as election campaigning. The amendments signal a welcome retreat from the very broad and vague definition in the original Bill, but the NCVO's detailed legal analysis of the new wording shows that the definityions remain vague and hard for organisations to interpret.*
- *An extension of the activities that had to be costed, declared and counted against the spending cap. Many of the new activities outlined such as policy work are both staff intensive and hard to account for.*
- *A spending caps reduced by up to 70 per cent. The limit for England is to be reduced from £793k to £320k. In Wales the total is reduced to £24k. That still may buy quite a lot of "vote for x" leaflets, but as many more activities would have to be declared (including their staff time) these are draconian limits. The existing rule that organisations who work together have to add all their individual costs and count this grand total against each of their caps will deter organisations working in coalition – odd from a coalition government.*
- *New limits at the constituency leve.l It will limit total spending to £9,750 per constituency in the 12 months before the election. When including staff and design costs this will significantly limit grassroots campaigning activity whether against extremist parties or against (or for) local controversies such as HS2, fracking or hospital closures.*

Breaching these limits or failing to declare any relevant expenditure is a criminal offence.

At present if an organisation like the TUC or a charity were to carry out campaign activities which we did not register with the Electoral Commission but were subsequently ruled to count as third-party campaigning the worst that would happen is that the group would have to register, declare their expenditure and suffer reputational damage.

Given the problems of definition in any control regime it is always possible that people could genuinely believe they were not third party campaigning, but still be ruled to have done so. If this happens at present it is highly unlikely that the cost of such activities would breach the limit.

However in the new regime the reduced limit and longer list of activities that have to be costed would work together to make it highly likely that groups who are found to have carried out third party campaigning will also have inadvertently bust the cap and thus committed a criminal offence.

This will have two likely consequences:

- *It will become much more tempting to accuse groups with whom you disagree of third party campaigning. This will lead to challenges to the Electoral Commission, court cases and inevitably calling in the police as criminal offences may have been committed.*
- *All organisations that do not wish to become third party campaigners which will include many charities and trade unions that do not have political funds (the majority) will become extremely risk averse and will gag themselves – even if activities are likely to be legal. It will discourage organisations working together as they risk becoming liable for each other's costs.*

While we welcome the exemption for annual conferences such as the TUC Congress we are still concerned about whether a TUC national demonstration aimed at securing policy changes would count as third party campaigning. This concern is sharwed by the Electoral Commission.

It is no secret that the TUC is a strong critic of the economic policies of the coalition. We have held two national demonstrations in recent years – the first of which attracted 500,000 and the second 150,000. Putting on safe and well-organised national demonstrations that are family friendly and as accessible as possible is an expensive logistical challenge, and with transport from across the country often subsidised by unions, the total cost is considerable. Many people who do not agree with our views, including MPs of all the major parties, as well as the official agencies with whom we need to work, have praised our organisational efforts.

But the total cost for the TUC and our member unions in direct spending and staff time would breach the cap. The TUC and every union who contributed would be legally responsible for having breached the annual third party limit. Banning well-organised and responsible demonstrations for a year before each general election strikes us as something we would condemn as n abuse of human rights and free speech in other countries.

We know that our colleagues in Northern Ireland - where the trade union movement is one of the few cross-community, mass non-sectarian movements - are also very concerned about this Bill. At crucial stages in the peace process they have brought people together to campaign against extremism. Yet altering the public perception of fringe extremist parties counts as election campaigning under this Bill. The TUC and unions are also involved in many cross-community anti-racist campaigns, which may affect the perception of extremist racist parties, and are therefore now capped.

Part three – trade union administration

Union membership is already regulated by the Trade Union Labour Relations Consolidation Act. Section 24(1) puts a duty on unions to maintain a register of members' names and addresses so far as is reasonably practicable, accurate and up-to-date.

We are not aware of any calls having been made to the government to extend this provision. BIS, the Certification Officer (CO) and ACAS have all confirmed under FoI that they have received no representations for such a measure. Not even those employer and right wing groups that consistently call for further legal restrictions on unions have ever campaigned for such a change.

The Bill's provisions include:

- *Creation of a new role of an Assurer from among 'qualified independent persons' as defined by the Secretary of State.*
- *A requirement for unions with more than 10,000 members to submit to the CO an annual 'Membership Audit Certificate' prepared by an Assurer, in addition to the current duty to submit an annual return.*
- *The Assurer will have the right to access union membership records at all 'reasonable' times and powers to require officers, including branch officers, to provide information.*
- *The CO – or his/her inspectors - will have the power to require the production of relevant documents and to make copies of membership records and private correspondence. Enforcement powers will have the status of a court order.*

The proposed legislation will place onerous and unjustified additional administrative burdens on unions, which often duplicate existing regulations. The legislation also appears to violate fundamental rights to privacy and freedom of association which are safeguarded by the European Convention on Human Rights.

The TUC is also concerned that in introducing this legislation the government is singling out trade unions for unfair regulation. No other membership organisations, voluntary sector groups or businesses in the UK are subject to equivalent rules.

Why this change?

As with Part two of this Bill we are unable to work out exactly what problem the government is trying to remedy. Unions already have a legal duty to keep accurate membership records. And it is in their interests to do so. Not only do good membership records increase income and minimise expense, any union involved in an industrial action ballot know that an employer is likely to legally challenge the ballot if there is a suspicion of inaccurate records. The legal phrase is "accurate as is reasonably practicable in the light of the information in the union's possession". Unions also need accurate membership records in order to carry out their internal democratic processes such as elections.

We can find two stated reasons for part 3. The BIS consultations says:

> *Trade union activity has the potential to affect the daily lives of members and non-members. The general public should be confident that voting papers and other communications are reaching union members so that they have the opportunity to participate, even if they choose not to exercise it. As a result, unions also have a responsibility to give public assurance that they are keeping up-to-date registers.*

It is possible that this section is aimed at making industrial action more difficult. Employers will now be able to complain directly to the Certification Officer about union membership systems. It may be that Bill aims to help employers to mount injunction proceedings when union members have voted for industrial action, seizing on minor flaws the Court of Appeal would previously have considered 'de minimis' or 'accidental'. But this could be an uncertain legal strategy as union with "assured" membership will argue that this should make challenges to their membership harder to sustain. And ministers have assured us that this measure is not intended to affect industrial action ballots.

Another explanation for this part of the Bill is that it is about the role that some unions play in the Labour Party.

This is supported by what Lord (Paul) Tyler, the Liberal Democrat spokesperson on constitutional affairs, has written about the Bill:

> *The third arm of the Bill is about ensuring that trade unions have accurate membership lists. We will listen carefully to what people have to say about how the detail of this is set up, but the principle seems beyond dispute. The membership numbers of a trade union have a bearing on how much money they can give to a political party through their political funds. In this sense, the trade unions have a unique role in UK politics. It is therefore important for transparency's sake that the membership lists are accurate.*

Yet only 15 unions of the 166 unions who supplied returns to the Certification Officer affiliate to the Labour Party.

And if unions are to be regulated because of the role that fewer than one in ten play in one political party, why shouldn't the membership systems of all political parties be subject to regulation and scrutiny in the same way? Shouldn't third parties also be given powers to make complaints to a regulator about political party membership? Shouldn't a new party regulator be given the same access to political party membership lists as the Certification Officer, CO investigators and assurers be given for unions.

Most people would object to this on the grounds that people should not have to reveal whether they were members of a political party to arms of the government. Yet this is what the Bill proposes for trade union membership. Each union's assurer, the Certification Officer (appointed by government) and an investigators appointed by the CO will have access to private membership data. At a time of

growing revelations about the blacklisting of trade union members, unions are extremely concerned about this breach of their members' privacy.

No organisation's membership list can be guaranteed to be 100% accurate at all times – people die, move and change jobs without telling all the organisations of which they are a member. Examples include the retail sector, where staff turnover is very high; the construction industry where there is widespread use of casual and agency working; and the railway industry, again where there is casualised working.

The TUC believes that if this change to the law is to be made there will need to be a similar specific requirement in the legislation for employers to give unions the most recent data on those employed, those on sick leave, etc, so that the word "reasonable", which we understand is to be used for the new union audits, can more fairly be applied.

Unions otherwise have no way of knowing to the necessary degree of accuracy who is currently working in the bargaining unit. Employers should be under a duty to co-operate, when requested by the union, by supplying relevant information needed to enable the union to comply with notice and balloting requirements. Where the employers refuse to supply the necessary information, a subsequent application for an interim injunction to prevent industrial action should fail.

As with Part two of this Bill, there is no obvious justification for part three. Again it is hard not to conclude that this is anything other than partisan union bashing, designed to impose red-tape on unions to solve a non-existent problem.

Yet the basic role of trade unions is overwhelmingly supported by voters. According to a recent MORI poll there is 78% to 14% support for "Trade unions are essential to protect workers' interests". This extra membership red-tape can only hinder unions carrying out their proper role.

Part 3 in detail Excessive administrative burdens on trade unions

Part 3 of the Bill will impose significant administrative and financial burdens on trade unions.

Trade unions are already extensively regulated in the way that they manage membership records. Unions are already required:

- *to comply with the duty to ensure that membership records are accurate, as far as is reasonably practicable (section 24 of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULR(C)A 1992)).*
- *to comply with the provisions and principles set out in the Data Protection Act 1998 (DPA) – a fact which apparently has been disregarded by the government when drafting the Bill*
- *to comply with very onerous notice and balloting rules when balloting for trade union elections, political funds, industrial action and mergers. These rules include the appointment of a qualified independent person as a scruitineer to supervise the voting process.*

The government has failed to produce any evidence of problems which necessitate additional regulation. According to their website, the Certification Office has received no complaints from trade union members relating to registers of members since 2004. Between 2000 and 2004, a total of 6 complaints were received, 5 of which were dismissed and in the sixth case the Certification Officer decided not to issue the declaration sought. If union members were concerned about the way in which unions manage membership lists, the number of complaints would be far higher and if there were serious administrative problems, the Certification Officer would have issued declarations to this effect.

The government has estimated that the combined annual total costs for all unions of complying with new regulations will be £461,225. The TUC believes this is a massive under-estimate. This estimate fails to take into account the costs which unions will incur in order to make necessary changes to union rule books allowing for the appointment of an assurer. In some unions, a change in the rulebook will require a referendum of all members which is both time consuming and costly. Some unions which only hold biennial rule change conferences may be required to organise a special emergency conference. This is likely to involve significant expenditure.

The new regulations increases workload and costs for the Certification Office. It is far from clear what benefits the increased regulation will yield for the wider public, including businesses, and how the increased costs to the taxpayer can be justified.

In recent years the coalition government have signed up to a "one-in, two-out" approach to regulation. If Part 3 of the Bill is implemented, the TUC would call on the government to demonstrate what measures will be adopted to alleviate the "burden" of regulation on unions, which are civil society organisations.

Human rights issues

Part 3 of the Bill represents an unjustified interference with trade union members' right to privacy (Article 8) and trade unions' rights to freedom of association (Article 11) as protected by the European Convention on Human Rights.

a) Rights to privacy

The Bill provides the Certification Officer (CO) with extensive new powers to access retain and registers of members' names and addresses s/he 'thinks there is a good reason to do. The CO is also given a corresponding power to access other documents which s/he considers may be relevant. This may include correspondence between a member and the union.

Many individuals choose not to disclose their trade union membership to their employer or to the State. Some individuals will have a legitimate fear of blacklisting. Other may fear that they will be victimised by their current or future employer. Some individuals will also have joined a union on the understanding that their membership will be kept confidential, under the Data Protection Act.

This is a serious interference with individuals' rights to privacy, as safeguarded by Article 8(1) of European Convention. The government has also failed to identify a

legitimate aim or a 'pressing social need' for such measures and that the proposals are proportionate to that aim, as required by Article 8(2) of the Convention.

The government has argued that the rules relating to confidentiality contained within the Bill will provide union members with safeguards. But it is not the business of the state or any agent of the state to know who is or who is not a trade union member. Second, the rules relating to confidentiality only currently apply to the assurer and to any inspectors appointed by the Certification Officer. This duty has not been extended to the CO. Thirdly, public authorities do not have a strong track record in protecting confidential documentation.

b) Right to Freedom of Association

The TUC also believes that Part 3 of the Bill also represents an unjustified interference with trade unions' rights to freedom of association:

- *The Bill interferes with a trade union's rights to autonomy in the way they govern their internal affairs by requiring trade unions to amend their rule books to require the appointment and removal of an assurer.*
- *The Bill provides the Certification Officer with wide-ranging powers to access and retain sensitive information relating to trade union membership and other related documents including internal union communications with members relating to campaigns. In our opinion this provides the Certification Officer with unprecedented powers to scrutinise trade union activities.*
- *The new provisions may deter individuals from joining trade unions and exercising their rights to representation at work*
- *The new provisions may interfere with the ability of unions to organise industrial action. It is anticipated that employers will seek to rely on information provided on audit certificates in applications for interim injunctions in an attempt to prevent or delay industrial action. Employers, involved in a dispute with a trade union, may also contact the Certification Officer, requesting an investigation into the unions' membership records. They may subsequently argue in the High Court that an interim injunction should be imposed pending the outcome of the Certification Officer's investigation.*

The TUC's concerns have been shared by Parliamentary Committees. In its report on the Government's Lobbying Bill published on 5 September 2013, the Political and Constitutional Reform Committee also highlighted the TUC and trade unions' concerns about the confidentiality of membership details and that Part 3 of the Bill is not compatible with Articles 8 and 11 of the European Convention. The Committee concluded that 'The Government must address these concerns during the course of proceedings on the Bill.'

Part 3 of the Bill is unnecessary. Its provisions have not even been called for by those most hostile to unions. Along with the other parts of the Bill it should be withdrawn, but unlike the other parte where there are genuine issues at stake it should quietly disappear.