

The Trade Union Bill TUC Submission to ILO Committee of Experts

I. Introduction

1 On 15 July 2015, the British government's Trade Union Bill was introduced to Parliament. The Bill contains a wide range of restrictions on trade union freedom, which the TUC believes contravene a number of ILO Conventions ratified by the United Kingdom. The government's Regulatory Policy Committee has said that the Bill is 'not fit for purpose'.¹

2 The Bill contains proposals that will impose new restrictions on the right to organise, the right to facilities at the workplace, and the right to bargain collectively. It also introduces new restrictions on both the right to strike, and trade union political freedom, while exposing trade union administration to unjustified levels of State supervision.

3 The government's attack on trade unions is to be seen in the context of a system in which trade unions are **already** very highly regulated, as a result of a number of restrictions on trade union freedom introduced by the Conservative governments from 1979 to 1997. The Committee of Experts has already critically examined some of these restrictions, as has the European Committee of Social Rights.²

4 It is to be pointed out, however, that it is not only the Trade Union Bill that contains proposals for change. On the same day that the Bill was published, the government published draft regulations to amend law introduced in 2003 relating to the use of agency workers in a strike or industrial action. It will now be possible for agency workers to be used as strike-breakers.³

5 In addition, on 6 August 2015, the British government announced that the Trade Union Bill would be amended. It is now proposed in addition to 'abolish the check off across all public sector organisations', as part of 'curtailing the public cost of 'facility time' subsidies. These latter proposals did not expressly appear in the government's election manifesto in 2015.⁴

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[https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/454855/RPC15-BIS-2402_3010 - Ballot thresholds in important public services - IA c - opinion.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/454855/RPC15-BIS-2402_3010_-_Ballot_thresholds_in_important_public_services_-_IA_c_-_opinion.pdf).

² On the Social Charter, see most recently European Committee of Social Rights, Conclusions XX-3 (2014).

³ Department for Business, Innovation and Skills, *Hiring Agency Staff During Strike Action*, 15 July 2015 (BIS/15/416).

⁴ The Conservative Party manifesto said only that a Conservative government would 'legislate to ensure trade unions use a transparent opt-in process for union subscriptions' (p 19).

6 The TUC considers the Bill and its accompanying proposals and announcements to be nothing less than a full frontal assault on the industrial and political freedoms of the British trade union Movement - a strategic part of the government's austerity policy. They demonstrate the government's contempt for the civil liberties of trade unions and their rights under international law.

II. Relevant ILO Conventions and Recommendations

7 The TUC believes that the government's proposals violate ILO Conventions 87, 98 and 151. They may also violate other treaties to which the United Kingdom is a party, including the European Social Charter.⁵ Before considering the government's proposals in detail, it will be useful at this stage to identify the key provisions of the foregoing ILO Conventions that are brought into play.⁶

- **ILO Convention 87**

8 Article 3 of ILO Convention 87 provides that

(1) Workers' and employers' organisations shall have the right to draw up their constitutions and rules, to elect their representatives in full freedom, to organise their administration and activities and to formulate their programmes.

(2) The public authorities shall refrain from any interference which would restrict this right or impede the lawful exercise thereof.

9 Also relevant is Article 11, which provides that 'Each Member of the International Labour Organisation for which this Convention is in force undertakes to take all necessary and appropriate measures to ensure that workers and employers may exercise freely the right to organise'. The TUC believes that the government is failing in this latter duty by proposing measures that compound existing violations of Article 3.

10 The TUC believes that provisions of the Bill and the accompanying regulations violate Article 3 of Convention 87 for a number of reasons:

- They impose ballot participation and support thresholds that must be met before industrial action may be taken, thresholds which violate ILO standards (clauses 2 and 3);
- They add additional procedural burdens to the already disproportionate procedural obligations with which trade unions must comply before industrial action may be taken (clauses 4-8);

⁵ Notably Articles 6(2) and (4), reinforcing existing failures in relation to the latter.

⁶ For a full account of their current state of play, the TUC relies to some extent on the ILO, *General Survey on the Fundamental Conventions Concerning Rights at Work in Light of the ILO Declaration on Social Justice and a Fair Globalisation, 2008* (ILO, 2012).

- They allow for the use of agency workers as strike-breakers during the course of protected strikes and industrial action (Draft Conduct of Employment Agencies and Employment Businesses Regulations 2015);
 - They impose disproportionate and discriminatory obligations on trade union in relation to picketing, and unacceptable levels of State supervision of picketing activity (clause 9);
 - They include an unjustified attack on trade union political freedom, reducing the ability of trade unions to campaign for new laws, such as the repeal of the Trade Union Bill (clauses 10 and 11);
 - They introduce unacceptable levels of State supervision of trade unions, which seriously undermine the principle of trade union autonomy, by giving the State regulator extensive, unnecessary and disproportionate powers (clauses 14-17).
- **ILO Conventions 98, 135 and 151**

11 Although Convention 87 bears the burden of the complaint, there are also important provisions relating to public sector employment that call into question both ILO Convention 98, and Convention 151. So far as relevant, Convention 98 provides that:

Measures appropriate to national conditions shall be taken, where necessary, to encourage and promote the full development and utilisation of machinery for voluntary negotiation between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements.

12 In view of the nature of the attack on public sector trade unionism in particular, the corresponding provisions of ILO Convention 151 are also engaged. So far as relevant, the provisions of the latter include –

Article 6

1. Such facilities shall be afforded to the representatives of recognised public employees' organisations as may be appropriate in order to enable them to carry out their functions promptly and efficiently, both during and outside their hours of work.
2. The granting of such facilities shall not impair the efficient operation of the administration or service concerned.
3. The nature and scope of these facilities shall be determined in accordance with the methods referred to in Article 7 of this Convention, or by other appropriate means.

Article 7

Measures appropriate to national conditions shall be taken, where necessary, to encourage and promote the full development and utilisation of machinery for negotiation of terms and conditions of employment between the public authorities concerned and public employees' organisations, or of such other methods as will allow representatives of public employees to participate in the determination of these matters.

Article 9

Public employees shall have, as other workers, the civil and political rights which are essential for the normal exercise of freedom of association, subject only to the obligations arising from their status and the nature of their functions.

13 Also relevant are ILO Convention 135 (the Workers' Representatives Convention, 1971), and the accompanying Workers' Representatives Recommendation 143. Together with Conventions 87, 98 and 151, these latter provisions are engaged by the provisions of the Bill dealing with trade union facilities (clauses 12-13), and the government's announcement on 6 August 2015 relating to the use of the check off (para 5 above). As already pointed out, the latter was not expressly included in the government's election manifesto, and is all the more pointed for having been announced shortly before a strike on the London Underground. It looks like a form of collective punishment, a retaliation against those who dared exercise a fundamental human right.⁷

14 It will be noted that the provisions in the foregoing paragraph are addressed specifically to public sector trade unionism. Most of the rest of the Bill has general application, though it seems clear that one of the main purposes of the Bill as a whole is to undermine and diminish public sector trade unionism. This is reflected also in the special thresholds required to validate industrial action, with special rules applying in six 'important public services'. The TUC would also draw attention to the fact that what is a sustained attack on public sector trade unionism was introduced shortly after the Budget on 8 July 2015. The Budget contained tight controls on public sector pay,⁸ and it is no coincidence that these additional controls on public sector trade unionism should have been introduced so shortly thereafter.

III. An Attack on the Right to Organise – Financial Security and Workplace Representation

15 As already pointed out, the government plans an onslaught on the right of workers to organise, particularly in the public sector. This will be advanced in two

⁷ For a good account, see N Watt and F Perraudin, 'Tories Accused of 'Mean-Spirited' Attack on Trade Union Funding', *The Guardian*, 6 August 2015.

⁸ See *The Guardian*, 8 July 2015: public sector pay to be capped for four years.

ways: first by hitting hard the financial security of trade unions by abolishing the check off; and secondly by undermining workplace representation by diminishing the right to facilities. In both cases, the government's advance cuts across obligations relating to collective bargaining and collective agreements, of which ministers appear either ignorant or indifferent.

- **Financial Security and the Check Off**

16 As already pointed out, on 6 August 2015 the government announced proposals to 'abolish the check off across all public sector organisations', as part of 'curtailing the public cost of 'facility time' subsidies'. These latter proposals were justified in the following terms:

Currently – under the check off process – many public sector workers who are union members have their subscriptions taken directly from their salary, administered by their employer. This was a practice introduced at a time when many people didn't have bank accounts, and before direct debits or digital payments existed as a convenient and secure way for people to transfer money.

The removal of check off will modernise the relationship between employees and their trade unions, while removing the burden of administration from the employer. The move also gives the employee greater control over their subscription, allowing them to set up their own direct debit with their chosen trade union, and giving them greater consumer protection under the Direct Debit Guarantee.⁹

17 The reasons given by the government for the ban on collective bargaining in relation to the check off are disingenuous. Whether or not people have bank accounts is as irrelevant to the way they pay their trade union subscription as it is the way they pay their income tax. The check off system provides an easy and convenient way for workers to pay their subscription to their union at minimal or no cost to their employer, who in the past will have charged the union a small administration fee for the costs incurred in dealing with the practice. The benefit to members was recently acknowledged by the High Court, which held unlawful a previous attempt to withdraw check off facilities in the civil service.¹⁰ In giving judgment, Mr Justice Supperstone said that

⁹ Cabinet Office, New Steps to Tackle Taxpayer-Funded Support to Trade Unions, 6 August 2015: <https://www.gov.uk/government/news/new-steps-to-tackle-taxpayer-funded-support-to-trade-unions>. It is not clear yet what counts as the public sector for this purpose and whether the changes will apply to workers employed in local government, the national health service, or in schools and universities. This is a measure that could affect millions of workers. One source estimates that 3.8 million workers will be affected: *The Guardian*, 6 August 2015

¹⁰ For an attack in facilities arrangements in the civil service under the Coalition government (2010-2015), see A Bogg and K D Ewing, *The Political Attack on Workplace Representation – A Legal Response* (Institute of Employment Rights, 2013) – this raises a number of concerns about compatibility with ILO Conventions.

I am not impressed by the argument that check off is only or primarily for the benefit of the union as such, rather than for its members in their capacity as employees. It seems to me that there is a real benefit to employees in the administrative convenience of not having to make their own arrangements for payments each month, or having to set up a direct debit or standing order and then change it or replace it from time to time as may be necessary. Moreover, the benefit to the union in the arrangement consists in part in the savings in time and cost in not having to undertake the administrative exercise of collecting payments individually from members. Any cost benefit to the union is necessarily a benefit to its members as such and in their capacity as employees. It also seems to me that an efficient and secure system of subscription collection for a union is in the interest of all its members. Each member benefits from the efficient and secure collection of dues from other members and check-off benefits each member in that way.¹¹

- **Abolition of the Check Off and ILO Standards**

18 The TUC believes that the unilateral abolition of the check off is a violation of the right to facilities, as provided for in Conventions 135 and 151. However, in the United Kingdom, check-off arrangements in the public sector are to be found in collective agreements, and as such are the product of collective bargaining. The government is thus proposing to invalidate existing collective agreements and to prevent negotiations about check off facilities in future agreements. In the TUC's view, the effect of the government's proposals escalates the matter, so that it is not only a concern about the violation of the right to organisational and financial security, but also a violation of the right to collective bargaining, being a clear breach of ILO Conventions 98, art 4, and 151, art 7, by which the British government accepted an obligation to promote collective bargaining, both generally (Convention 98), and in the public sector in particular.

19 It is true that neither of these latter provisions deals specifically with collective bargaining about check off arrangements specifically. Nevertheless such arrangements clearly cannot be excluded, and their inclusion is strongly implied by ILO Convention 154, which defines collective bargaining to include negotiations between an employer and a workers' organisation for 'regulating relations between employers or their organisations and a workers' organisation or workers' organisations'. In any event, however, it is made abundantly clear by the jurisprudence of the supervisory bodies that a refusal to bargain over check off arrangements is incompatible with the government's obligations under the foregoing treaty provisions. We refer to a long-running case before the Committee of Experts from Congo. In 2010 the Committee reported that

¹¹ *Hickey and Hughes v Secretary of State for Communities and Local Government*, 3 September 2013. We rely here on a very valuable account by Andrew James, *Check-Off Arrangements – The Law* (Thompsons Trade Union Law Service, 17 March 2014). Mr James also highlights the existing protections for workers who do not want to pay subscriptions by check-off. See especially Trade Union and Labour Relations (Consolidation) Act 1992, ss 68, 69 (hereafter TULRCA 1992).

since the check-off system was abandoned in 1991, there has been no procedure for deducting trade union dues from workers' pay. According to the Government, in practice, all unionized workers are expected to pay their dues to the trade union office. The Committee once again notes with regret that the Government has still not specified whether the abandonment of the check-off system in 1991 had the effect of barring trade unions from negotiating procedures allowing trade union dues to be deducted from members' pay. *The Committee once again reminds the Government that the deduction of trade union dues by employers and their transfer to the unions is not a matter that should be excluded from the scope of collective bargaining and requests the Government to indicate whether the abolition of the check-off system in 1991 has led to such an exclusion.*¹²

- **Workplace Representation and Trade Union Facilities**

20 The announcement that public sector employers will be prohibited from using the check off complements provisions already in the Trade Union Bill which mount a direct attack on workplace representation and trade union facilities in the public sector workplaces. Trade union representatives currently have the right (in line with ILO Conventions 135 and 151) to reasonable time off for trade union duties and to various other facilities referred to in an ACAS Code of Practice.¹³ The Bill, however, proposes two new major changes.

- The first is the requirement that public sector employers publish information about the amount of facility time granted to trade union representatives (clause 12);¹⁴
- The second is a unilateral power of the government to impose limits on the amount of facility time provided by any public sector employer, and the purposes for which that time may be used (clause 13).¹⁵

These latter powers in clause 13 are referred to as 'reserve powers', and the intention is no doubt that their exercise will be guided by the information provided as a result of the surveillance and monitoring provisions in clause 12.

¹² ILO Committee of Experts, *Observation Adopted 2010* (Congo) (ILO, 2011). Emphasis in original. More recently: 'The Committee hopes that the current reform of the Labour Code will provide the opportunity to ensure that the question of the deduction of trade union dues by employers and their transfer to trade unions can be included in the scope of collective bargaining ILO Committee of Experts, *Direct Request Adopted 2013* (Congo) (ILO, 2014).

¹³ TULRCA 1992, s 168 (hereafter TULRCA 1992).

¹⁴ Inserting a new TULRCA 1992, s 172A (publication requirements in relation to facility time).

¹⁵ Inserting a new TULRCA 1992, s 172B (reserve powers in relation to facility time).

21 These latter powers will enable ministers to make regulations that will restrict the right to facility time by amending or otherwise modifying any of the following legislation, notably legislation that gives

- Trade union representatives in the workplace the right to reasonable time off for trade union duties;
- Workers the right to be accompanied in disciplinary or grievance situations by a trade union official;
- Health and safety representatives in the workplace time off to perform duties under health and safety legislation.¹⁶

Not only are ministers empowered to amend the primary legislation dealing with facilities, but they are empowered to do so in a discriminatory manner. Thus the minister may

- (a) make provision in relation to certain categories of employers in relation to whom the reserve powers are exercisable, or in relation to all such employers;
- (b) make different provision in relation to different categories of employer in relation to whom the reserve powers are exercisable.¹⁷

- **Attack on Trade Union Facility Time and ILO Standards**

22 The TUC's concern here is obvious. The government is proposing not only to rewrite legislation, but to do so in a way that undermines workplace representation and in doing so violate obligations under ILO Conventions 135 and 151. The latter make it quite clear that 'facilities shall be afforded to the representatives of recognised public employees' organisations as may be appropriate in order to enable them to carry out their functions promptly and efficiently' (art 6). The facilities required will depend on the amount of work generated by the employer, and cannot be set at an arbitrary level in terms of number of hours as the government appears to anticipate. It is a matter of particular concern that in the exercise of their so-called 'reserve powers', ministers are not expressly required to act consistently with international treaty obligations. On the contrary, they are free to act in clear violation of these obligations.

23 But there is an even more fundamental concern, the Bill also giving ministers consequential powers to rewrite both contracts of employment and collective agreements.¹⁸ This is a clear breach of ILO Convention 151, article 6 of which also provides that facilities are to be determined 'in accordance with the methods referred to in article 7 of this Convention, or by other appropriate means'. As reproduced above, article 7 refers specifically to collective bargaining, so that facilities arrangements in the public sector are to be determined by collective agreement. We

¹⁶ Proposed new TULRCA 1992, s 172B(4).

¹⁷ Proposed new TULRCA 1992, s 172B(9).

¹⁸ Ibid.

refer additionally - and again - to ILO Conventions 98 and 135. Yet notwithstanding these clear and unequivocal obligations, here we have a government proposal, not only to legislate rather than to agree collectively about facilities at the workplace, but to do so in a way that undermines the very collective agreements it should be promoting. **This is the first time in peacetime that the British government has taken power to rewrite collective agreements of which it disapproves. It is wholly unacceptable, and would be rightly condemned were it to happen elsewhere.**

IV. Convention 87, the Trade Union Bill and the Right to Strike: Ballot Thresholds

24 As recognised by the General Survey in 2012, ‘strikes are essential means available to workers and their organisations to protect their interests’.¹⁹ British law nevertheless already imposes tight restrictions on the purposes for which industrial action may be taken, as well as the procedures that must be followed in advance, while also banning all forms of political and solidarity action, and denying unfair dismissal protection to those engaged in unofficial or wildcat action, regardless of the cause of the action.²⁰

- **Proposals for Change**

25 The Trade Union Bill proposes additional far-reaching restraints on the right to strike, and in particular does so by introducing new balloting thresholds and notice requirements. At the present time trade unions must hold a postal ballot before a strike is held, and a simple majority of those voting must vote in favour of the proposed action. Only those likely to take part in the action may be included in the ballot, in which all those likely to take part must be given an opportunity to vote.

26 The Bill proposes new obligations by prescribing both (i) minimum levels of participation in industrial action ballots in all sectors, and (ii) minimum levels of support for industrial action in six sectors set out in the Bill. Thus

- So far as **minimum levels of participation** are concerned, industrial action will be lawful only if 50% of those eligible to vote do so, and if a majority of those voting support the action in question (clause 2);
- So far as **minimum levels of approval** are concerned, in six sectors industrial action will be lawful only if it is supported by at least 40% of those eligible to vote in the ballot (clause 3).

27 The Bill provides specifically that the government will have the power by regulation to impose the 40% approval threshold in the following sectors: health

¹⁹ ILO, *General Survey on the Fundamental Conventions Concerning Rights at Work*, above, para 117.

²⁰ For a detailed account, see S Deakin and G Morris, *Labour Law* (6th ed, 2012).

services; education of those aged under 17; fire services; transport services; decommissioning of nuclear installations and management of radioactive waste and spent fuel; and border security. The new restrictions – which may be extended also to ancillary workers - have been justified on the ground that

4 Industrial action in important public services can have far reaching effects on significant numbers of ordinary people who have no association with the dispute. People have the right to expect that services on which they and their families rely are not going to be disrupted at short notice by strikes that have the support of only a small proportion of union members. Parents want to know that they can drop their children off at school because the schools will be open, and they can get to work on time because the buses and trains are operating normally.

5 This reflects the important public service these workers provide, and the numbers who rely on them. With regard to industrial action in these public services, the challenge is to get the balance right between the interests of union members and the interests of the majority of people who rely on the services they provide.²¹

28 This, however, has proved to be a weak and superficial justification for change, strong on assertion but weak on evidence. In an excoriating account, the government's own Regulatory Policy Committee (note 1 above) has demanded more evidence and has condemned the inadequate 'assessment of the costs and disruption caused, and its impact on the economy'. The Committee has also questioned the government's claim that industrial action can put the provision of public services at risk, demanding 'further evidence on the existence and likely scale of this effect'. To this the TUC would add that the government's disputed claims take no account of the fact that levels of industrial action have fallen sharply in recent years, partly as a result of existing legal restrictions, which make it relatively easy for employers to obtain injunctions to have action stopped. Indeed, it is reported that in the 12 months to April 2015, the number of working days lost to strikes had fallen to 704,000 from an annual average of nearly 13 million in the 1970s.²²

- **Impact of the Proposals**

29 The impact of these changes will be dramatic in depriving workers of their right to strike. Professor Ralph Darlington of Salford University and his colleague Dr John Dobson retrospectively applied the thresholds to 162 industrial action ballots involving 28 different trade unions from 1997 to 2015.²³ They found that while

²¹ Department of Business, Innovation and Skills, *Consultation on Ballot Thresholds in Important Public Services* (July 2015).

²² *The Guardian*, 8 August 2015.

²³ R Darlington and J Dobson, *The Conservative Government's Proposed Strike Ballot Thresholds: The Challenge to the Trade Unions* (August 2015). For a copy of the report see <http://www.slideshare.net/salfordbizsch/trade-union-bill-analysis-professor-ralph-darlington-report>. For a summary see <http://www.salford.ac.uk/news/conservative-trade-union-would-reduce-unions-ability-to-strike,-says-salford-research>.

unions ‘have generally been overwhelmingly successful in winning majority ‘yes’ votes in favour of strike action’, many unions would fail to achieve the ‘proposed 50 per cent participation threshold’.²⁴ Only 85 of the 158 strike ballots covered by the research met the 50 per cent participation target, and the number of workers involved in cases which failed to reach the target was completely disproportionate to those that did. While 444,000 workers could have taken strike action because they had a turnout rate of over 50 per cent, 3.3 million workers would have been ‘prevented from going on strike’.²⁵ These findings led the authors to conclude that ‘some major national strikes would have been deprived of legal protection under the proposed legislation, especially those relating to national bargaining in the public sector’.²⁶

30 But if the 50% participation threshold would have a dramatic impact, so would the 40% approval threshold in relation to workers engaged in important public services. Here Darlington and Dobson found that

Even when unions have succeeded in reaching the 50 per cent turnout, some would still fail to obtain the 40 per cent majority threshold of those eligible to vote. Out of 90 strike ballots in the ‘important public services’ covered by the database, 55 of them produced turnouts in which more than 40 per cent of the electorate voted ‘yes’, such that the proposed legislation would have reduced the number of strikes in these areas by nearly 40 per cent.²⁷

As the authors also point out, however, there were important differences by sector. For example:

- In education ‘only 19 of the 29 strike ballots would have been able to go ahead’. Thus ‘every ballot conducted in an individual school would have passed the 40 per cent threshold’. But ‘only two national strikes did so and neither of these involved the main teaching unions’.²⁸
- Only 23 of the 44 transport strikes cleared the 40 per cent threshold. Again there was variation: ‘while the proposed legislation would have little effect on strike ballots in the railway sector it would have prevented most strikes on London Underground’.²⁹

31 The government has already indicated that it will use the power to impose the 40% approval threshold in all the six public services listed in the Bill, and that it will do so to cover 27 widely defined occupational groups, for example including ‘local

²⁴ Ibid.

²⁵ This of course is subject to the important qualification made by the Regulatory Reform Committee (note 1 above) that conduct and behaviour may change under a different legal regime.

²⁶ Darlington and Dobson, above.

²⁷ Ibid..

²⁸ Ibid.

²⁹ Ibid.

bus services'.³⁰ The government has also indicated that it will take the power to include 'ancillary workers', including managers, administrators and cleaners.³¹ It is clear that this power to impose a 40% approval threshold will thus apply not only to those **providing** 'important public services', but also to those **employed in** 'important public services'. The government has announced further that the regulations made under the Bill will apply to private sector workers as well as public sector workers. Thus it is expressly stated that

Many public services in the UK are performed by private sector organisations and the staff working for them. This is particularly the case in the transport sector.

Existing employment and trade union law generally applies to both public and private sectors. The Government is proposing to maintain this equality of approach when legislating for the new balloting laws under consideration in this consultation.

This would mean that the 40% important public services threshold would apply to both public and private sector staff, so long as their occupations and/or functions were listed in the secondary legislation.³²

32 In extending these powers deep into the private sector, it is by no means clear how far they will go. In the case of bus services, will it include also those workers employed by contractors to the service provider, for example to maintain and service vehicles, or indeed to sub-contractors who supply necessary materials to the contractor? But the scope of the Bill is even wider and its impact even greater still. An obvious problem is that a dispute involving workers providing 'important public services' may involve other workers as well.³³ The government proposes that in such situations, all workers will be subject to the 40% approval threshold, if a majority are engaged in occupations and functions deemed to be an 'important public service'.³⁴ This means of course that workers who are not engaged in the delivery of 'important public services' will be treated as if they were so engaged, and their right to strike arbitrarily diminished as a result for no justifiable cause. This reinforces the point made above,³⁵ the 40% threshold will apply in practice to **all** workers employed in 'important public services', unions being placed in the impossible position of distinguishing which of their members are providing such services and which are not, risking costly litigation if they get it wrong.

- **Ballot Participation Thresholds and ILO Standards**

³⁰ Department of Business, Innovation and Skills, *Consultation on Ballot Thresholds in Important Public Services*, above, p 10.

³¹ *Ibid*, p 11.

³² *Ibid*, p 12.

³³ *Ibid*, pp 12-13

³⁴ *Ibid*

³⁵ See para 31.

33 In taking this dramatic step, the TUC believes that the government's proposals will violate ILO standards, as suggested by earlier findings of the Committee of Experts. The Committee's position regarding 'the quorum and requisite majority for taking strike decisions' has been explained as follows:

In many countries legislation subordinates the exercise of the right to strike to prior approval by a certain percentage of workers. Although this requirement does not, in principle, raise problems of compatibility with [Convention 87], the ballot method, the quorum and the majority required should not be such that the exercise of the right to strike becomes very difficult, or even impossible in practice.....If a Member State deems it appropriate to establish in its legislation provisions which require a vote by workers before a strike can be held, it should ensure that account is taken only of the votes cast, and that the required quorum and majority are fixed at a reasonable level.³⁶

34 The Bill contains two thresholds to which these established principles apply: the requirement in all sectors that 50% of those affected should vote, and the additional requirement in some sectors that at least 40% of those eligible to vote should do so in favour of the action. So far as the former is concerned, the TUC notes that the Committee of Experts has explained that 'the ballot method, the quorum and the majority required should not be such that the exercise of the right to strike becomes very difficult, or even impossible in practice'.³⁷ So in determining whether the quorum is 'fixed at a reasonable level', it is necessary to take into account 'the ballot method'. At this point, it has been a longstanding concern of the TUC that British law on strike ballots was drafted in the 1980s and continues to require postal voting only.

35 For a number of reasons, this is a system of voting that is calculated to produce a low return of ballot papers. Yet the government has refused to change the law to allow workers to vote at the workplace (even though secret workplace voting is permitted in the case of both trade union recognition ballots and the election of representatives for the purposes of information and consultation about a wide range of questions). The government has also refused to allow workers to vote by electronic means, insisting that voting must be conducted by the highly prescriptive postal balloting system, which not only militates against high voter participation but is also very expensive to operate, and in the view of the TUC itself a major violation of trade union autonomy.

36 The TUC has two concerns. In the first place the ballot participation threshold is too high: as Darlington and Dobson make clear it will have the effect of preventing thousands of workers throughout the economy from exercising their internationally recognized right to strike. In doing so, the ballot participation threshold violates the ILO principle that account should be taken only of votes cast.³⁸ Those who abstain

³⁶ See B Gernigon, A Odero and H Guido, 'ILO Principles Concerning the Right to Strike' (1998) 137 *Int Lab Rev* 441, where this passage from the 1994 General Survey is reproduced.

³⁷ *Ibid.*

³⁸ See para 39 below.

should not be treated as having voted against. Secondly, and reinforcing the first concern, the TUC draws attention to the rigid voting system in British law, which contrasts sharply with the position in other ILO member states. The TUC notes that even within a highly prescriptive system of strike ballots such as that in Australia,³⁹ it is possible to permit workplace voting (with postal voting as a default), and that it is also possible to permit electronic voting.⁴⁰

- **Ballot Approval Thresholds and ILO Standards**

37 The second threshold is the requirement that in six specified sectors there should be support from at least 40% of those eligible to vote for the action in question. This means that at least 50% of those eligible to vote must vote in the ballot, and that at least 40% of those eligible to vote must vote in favour of industrial action. The additional 40% applies to ‘important public services’, the restrictions being justified in one case on the ground that a strike would cause ‘significant inconvenience’.⁴¹

38 In assessing the compatibility of the 40% threshold with ILO standards, the TUC draws attention to a long-running complaint against Bulgaria where it is understood that the law permits industrial action only if it has the support of a majority of those eligible to vote (that it is to say 50% plus 1). Trade unions in Bulgaria complained that these statutorily imposed ballot thresholds were inconsistent with ILO Convention 87 and the Committee of Experts agreed, rejecting the Bulgarian government’s claim that its strike ballot threshold was ‘liberal in character’, and that ‘any attempt to amend it may infringe its democratic approach’.⁴²

39 The Committee pointed out that ‘*account should only be taken of the votes cast*’, while any ‘*required quorum and majority should be fixed at a reasonable level*’.⁴³ Consequently, the Bulgarian government was urged to change the law ‘*in order to bring it into closer conformity with the principles of freedom of association*’.⁴⁴ That request has been repeated on several occasions since.⁴⁵ Although the provisions of the Trade Union Bill differ from those of Bulgaria in several respects, the TUC nevertheless believes that the Bill fails the test posed by the Committee of Experts that the ‘*required quorum and majority should be fixed at a reasonable level*’, not least for reasons already considered in relation to the rigid balloting method required

³⁹ On which, see S McCrystal, *The Right to Strike in Australia* (2010).

⁴⁰ See most recently, *Construction, Forestry, Mining and Energy Union and Australian Manufacturing Workers' Union v CBI Constructors Pty Ltd*, Fair Work Commission (Commissioner Cloghan), 17 July 2015.

⁴¹ Department of Business, Innovation and Skills, *Consultation on Ballot Thresholds in Important Public Services*, above, para 8.

⁴² ILO Committee of Experts, *Observation Adopted 1998* (Bulgaria) (ILO, 1999).

⁴³ *Ibid.*

⁴⁴ *Ibid.*

⁴⁵ See most recently, ILO Committee of Experts, *Observation Adopted 2014* (Bulgaria) (ILO, 2015). For discussion of a recent case from El Salvador to similar effect, see A Bogg, ‘Case No. 2896 El Salvador CFA Complaint’, (2015) 1 *International Labor Rights Case-Law* (forthcoming)

in the United Kingdom.

40 The TUC is also concerned that what is being attempted here is a de facto ban on strikes in ‘important public services’, which elides ILO requirements that strikes may be banned only in essential services ‘in the strict sense of the term’. This is a term that does not include many of the public services that are the subject of the government’s proposed 40% threshold. As the research by Darlington and Dobson makes clear, the 40% threshold will effectively take away the right to strike from many workers delivering public services, and will do so without putting in place the ‘compensatory guarantees for workers deprived of the right to strike’, as demanded by the ILO supervisory bodies. The mischief is all the greater for the fact that the legislation will apply not only to ancillary workers, but also to workers not engaged in the delivery of public services, who will nevertheless be swept in.⁴⁶

V. The Right to Strike: Additional Procedural Burdens, Picketing Restrictions, and Agency Workers as Strikebreakers

41 The balloting thresholds are not the only contentious measures in a Bill that contains a number of other serious threats to the right to strike. In this section we deal with three other such threats, beginning with the enhanced procedural obligations which affect the various notice obligations of a trade union in a dispute (para 51 below), as well as the content of the ballot paper, and the duration of the ballot mandate. We also deal with further restrictions on the right to picket peacefully, as well as far-reaching proposals for the use of agency workers as strike-breakers.

• Notice and Timing Restrictions

42 Under the existing law, trade unions are required to give notices of various kinds to the employer involved in the dispute:

- Notice of intention to hold a ballot, which must be given at least seven days before the ballot opens. This notice must provide information about the numbers, categories and workplaces of the workers to be balloted;⁴⁷
- Notice of the ballot paper, which must be given to the employer at least three days before the ballot opens. The ballot paper must include information prescribed by the Act about the legal effects of the industrial action;⁴⁸
- Notice of the ballot result, which must be given both to the employer and to members entitled to vote, and which must be given as soon as reasonably practicable after the holding of the ballot;⁴⁹

⁴⁶ See para 32 above.

⁴⁷ TULRCA 1992, s 226A

⁴⁸ Ibid.

⁴⁹ Ibid, ss 231, 231A.

- Notice of intention to take industrial action, to be given at least seven days before the industrial action is due to start. This notice must also contain details of the numbers, categories and workplaces of those taking part.⁵⁰

43 These provisions are drafted in a very clumsy and complex manner, and have been the subject of extensive litigation, with trade unions being prohibited from taking industrial action for technical violations despite complying with the substance of the law. The TUC believes that these existing provisions are disproportionate in substance and over-bearing in detail, and the Council of Europe's Social Rights Committee has concluded that the duty to give notice of intention to ballot is 'excessive' in view of the obligation also to give notice of intention to take industrial action.⁵¹ So far as the TUC is aware, the ILO supervisory bodies have not yet commented on this matter, despite it having been raised by the TUC in Article 22 submissions.⁵²

44 The Bill adds to these obligations in five different ways:

- The ballot paper will have to contain additional information, including
 - a reasonably detailed indication of the matter or matters in issue in the trade dispute to which the proposed industrial action relates';
 - where workers are being balloted for action short of a strike, the nature of the action must be specified; and
 - further information must be given of the dates of the proposed action (clause 4);
- The notice of the ballot result to members will have to include information about whether the 50% voter participation was met, and in the case of the so called 'important public services' must include information about whether the 40% voter support threshold was met (clause 5);
- The union will have to include information about industrial action in its annual report to the Certification Officer (the statutory body established in 1976 to supervise trade unions):
 - The information must include details about each dispute in which the union has been engaged in the year in question, the action taken and its duration.
 - The information supplied annually to the Certification Officer must include the information provided in any notices of industrial action

⁵⁰ Ibid, s 234A.

⁵¹ On the Social Charter, see most recently European Committee of Social Rights, Conclusions XX-3 (2014).

⁵² ILO Constitution, article 22 (annual reports on ratified Conventions).

results issued in the year in question (clause 6);⁵³

- The union will have to give 14 days rather than 7 days notice to the employer before taking industrial action with the authority of a ballot (clause 7);
- A ballot mandate will be valid for only four months. If the dispute is not settled in that time and if the action is to continue, the union must hold a fresh ballot for authority to continue taking industrial action (clause 8).

45 The TUC takes the view that the **existing** procedural obligations in relation to industrial action in British law are excessive and disproportionate, and that the excessive and disproportionate nature of these obligations are compounded by the Trade Union Bill, clauses 4 – 8. The TUC believes that the cumulative impact of these provisions, and the opportunity they provide for harassing and expensive litigation by employers, are wholly inconsistent with the government's obligations under Convention 87, article 11 to 'take all necessary and appropriate measures to ensure that workers and employers may exercise freely the right to organise'.

46 In addition to the generally corrosive impact of these changes, there are specific proposals that call for separate attention:

- The Certification Officer is an official of the State, created by statute and appointed by the government.⁵⁴ There can be no justification for a trade union having to share with a State official the information that it must provide to its members. The provision of this information serves no purpose other than to provide a continuing sense of State supervision and intrusion into the affairs of voluntary associations, which is quite inconsistent with the idea of trade union autonomy.
- There can be no justification in the British context of extending the strike notice obligation from 7 to 14 days. Trade unions are already required to give 7 days' notice of their intention to hold a ballot, they are then required to conduct a postal ballot, which will normally take at least two weeks, and they are further required to give notice of the ballot result to the employer. Employers already have more than adequate notice of the possibility of industrial action and plenty opportunity to prepare for it.

47 Apart from the foregoing, there can be no justification for requiring a fresh ballot in an unresolved dispute after four months have passed. It introduces a new layer of procedural burden on trade unions (fresh notices of intention to ballot, notices of ballot paper to be given to the employer, notice of the ballot result to be given to various parties, and so on), and it adds significantly to the costs of the trade union in a system in which the ballot would again have to be a fully postal ballot at the union's

⁵³ This will all be public information, which crucially will be available to government for the purposes of official surveillance and monitoring.

⁵⁴ See para 72 below.

expense. This is not a case of refreshing a mandate so much as a case of disrupting by administrative burdens lawful and legitimate action.

- **Agency Workers as Strike-breakers**

48 In 2003, steps were taken (consistently with ILO obligations) to address the abuse whereby agency workers were being hired as strike-breakers. The Conduct of Employment Agencies and Employment Businesses Regulations 2003 prohibit employment businesses ‘from providing agency workers to cover the duties normally performed by an employee of an organisation who is taking part in a strike or other industrial action, or to cover the work of an employee covering the duties of an employee taking part in a strike or other industrial action’.⁵⁵

49 On the same day that the Trade Union Bill was published, however, the government also published proposals to revoke this regulation, explaining that:

18 The Government is committed to ensuring that strikes only ever happen as the result of a clear, democratic decision and commits to tackling the disproportionate impact of strikes in important public services. The Government thinks that removing regulation 7 from the Conduct Regulations will give the recruitment sector the opportunity to help employers to limit the impact to the wider economy and society of strike action, by ensuring that businesses can continue to operate to some extent.

19 There are sectors in which industrial action has a wider impact on members of the public that is disproportionate and unfair. Strikes can prevent people from getting to work and earning a living and prevent businesses from managing their workforce effectively.

20 For instance, strikes in important public services such as education will mean that the parents of school age children will need to look after their children rather than go to work because some schools would not be able to fulfill their duty of care for their pupils during the strike. This would also have a negative impact on some employers of the parents affected, whose workforce and productivity would be affected. Similarly, if postal workers were to strike, individuals and employers reliant on postal services would be placed at a disadvantage due to the resulting large backlog in deliveries.⁵⁶

50 It will be noted of course that the effect of the changes will allow agency workers as strike-breakers in all disputes (whether protected or not, and whether in the public sector or not). It is true that the Committee on Freedom of Association is said to consider the replacement of strikers justified ‘(a) in the event of a strike in an essential service in which strikes are forbidden by law, and (b) when a situation of acute

⁵⁵ SI 2003, No 3319, reg 7.

⁵⁶ Department for Business, Innovation and Skills, *Hiring Agency Staff During Strike Action*, above.

national crisis arises'.⁵⁷ But neither of the examples cited by the government (education and postal services) fall within the ILO definition of an essential service 'in the strict sense of the term', defined to mean a service 'the interruption of which would endanger the life, personal safety or health of the whole or part of the population'.⁵⁸

51 So far as the compatibility of the imminent change to the law, it will be noted that in 2012 the General Survey explains that

The Committee considers that provisions allowing employers to dismiss strikers or replace them temporarily or for an indefinite period are a serious impediment to the exercise of the right to strike, particularly where striking workers are not able in law to return to their employment at the end of the dispute.⁵⁹

This reinforces a similar passage in an earlier General Survey (1994) in which it is said that

A special problem rises when legislation or practice allows enterprises to recruit workers to replace their own employees on *legal* strike. The difficulty is even more serious if, under legislative provisions or case-law, strikers do not, as of right, find their job waiting for them at the end of the dispute. The Committee considers that this type of provision or practice seriously impairs the right to strike and affects the free exercise of trade union rights.⁶⁰

52 Similarly, in a complaint against the United States, where temporary replacements are permitted, the Committee on Freedom of Association has said that 'if a strike is otherwise legal, the use of labour drawn from outside the undertaking to replace strikers for an indeterminate period entails a risk of derogation from the right to strike which may affect the free exercise of trade union rights'.⁶¹ This is precisely the situation that the government will permit by revoking regulation 7 of the 2003 regulations.

53 The TUC notes that it is not formally suggested that workers replaced by agency strike-breakers will not be able to return to work. There are nevertheless two points to address here. The first is that the supervisory bodies have made it clear that the use of replacement labour during a strike is itself a threat to the right to strike, even if workers are entitled to return to work at the end of the dispute. And secondly, under the government's current proposals there is no guarantee that workers will ever be

⁵⁷ Gernigon, Odero and Guido, above.

⁵⁸ Ibid. See also ILO, *General Survey on the Fundamental Conventions Concerning Rights at Work*, above, para 131 - 134.

⁵⁹ ILO, *General Survey on the Fundamental Conventions Concerning Rights at Work*, above, para 52.

⁶⁰ See Gernigon, Odero and Guido, above, where this passage is reproduced.

⁶¹ ILO, Committee on Freedom of Association, Report No 284, Case No 1523 (United States) (ILO, 1992).

able to return to their work, as employers will be able to prolong disputes indefinitely by the use of agency workers, who may be used to undercut striking workers.

- **Additional Restrictions on Picketing**

54 The ILO supervisory bodies are quite clear that the right to picket peacefully is protected by Convention 87, article 3. According to the supervisory bodies, the right to picket peacefully 'should not be subject to interference by the public authorities', unless the restrictions are designed to protect public order or to prevent threats being made to workers who continue to work during a dispute.⁶² It is also permissible for the purposes of Convention 87 to restrict picketing to locations near the enterprise where the dispute is taking place. However, it has been asserted that 'restrictions on strike pickets should be limited to cases where the action ceases to be peaceful'.⁶³

55 It is already the case that picketing is subject to tight controls in British law. Those who engage in picketing risk civil liability if they induce workers not to cross the picket line, while any violence or disorder will attract criminal sanctions. There is, however, limited immunity for peaceful picketing where this is done in contemplation or furtherance of a trade dispute, provided that it

- is done for the limited purpose of peacefully communicating information or persuading people to abstain from working; and
- takes place outside the picket's own place of work (with some exceptions being permitted in the case of accompanying trade union officials).⁶⁴

56 The Trade Union Bill introduces additional obligations in the sense that where picketing takes place, a trade union will be under a statutory duty to appoint a picketing supervisor, who must be either an official of the union or member of the union who is familiar with the government's code of practice on picketing (clause 9). Thereafter, either the union or the picket supervisor must tell the police the picket supervisor's name, where the picketing will be taking place, and how to contact the picket supervisor. The Bill does not, however, define in any way the purpose of the picket supervisor, so that it is not clear what function this duty serves. Nevertheless the Bill also proposes that

- The union must provide the picket supervisor with a letter stating that he or she is authorised by the union to act as such;
- The picket supervisor must show the letter of authorisation to a police constable who asks to see it, and to 'any other person who reasonably asks to

⁶² Gernigon, Odero and Guido, above, citing the Digest of Decisions of the Freedom of Association Committee (1996).

⁶³ Ibid, referring to the 1994 General Survey. See now ILO, *General Survey on the Fundamental Conventions Concerning Rights at Work*, above, paras 149 – 150.

⁶⁴ TULRCA 1992, s 220.

see it’;

- The picket supervisor must be present when picketing is taking place, or be readily contactable by the union and the police, and able to attend at short notice;
- The picket supervisor must wear a badge, armband or other item that readily identifies the picket supervisor as such.⁶⁵

57 Failure to comply with these obligations will mean that the union loses legal protection for any picketing that takes place, even if peaceful. This means in turn that the picketing could be restrained by an injunction even if peaceful, and that the union could be liable in damages for economic loss suffered by the employer as a result of the picketing. The concern of the TUC is that a trade union could be made vicariously liable for the failures of individuals who have inadvertently failed to comply with any of the foregoing duties (such as the failure to wear armbands). It should not be overlooked that in British law even the most trivial oversight with no prejudicial effect is nevertheless enough to justify the granting of an injunction to an employer to have otherwise lawful conduct stopped.⁶⁶

58 Otherwise, there are two concerns with these new proposals on picketing:

- The first is that the legal obligation on the part of trade unions to appoint a picket supervisor is discriminatory. Trade unions are not the only organisations that engage in picketing activity, with the picketing of business premises by other organisations being controversial in recent years. Yet there is no obligation on these other organisations to appoint a picket supervisor, with a duty to produce his or her credentials to the police.
- The second is the duty to provide credentials to the police and to ‘any other person’, So far as the police are concerned, this is a duty that arises even though the picketing is peaceful and even though there is no reason to suspect that anyone has committed an offence. It is not only contrary to constitutional principle that the police can demand this information in the absence of an offence being suspected,⁶⁷ but utterly bizarre that failure to comply could lead to trade union liability to an employer.

59 Yet there are other liabilities being proposed, with the government now also ‘consulting’ on proposals (not yet in the Bill) for additional legislation requiring trade unions to publish plans in relation to picketing and protests each time industrial action

⁶⁵ The government may not stop there, having initiated consultations on whether other practices should be made ‘directly legally enforceable - for example, training or a requirement for all pickets to be properly identifiable in the same way as the supervisor?’: Department for Business, Innovation and Skills, *Consultation on Tackling Intimidation of Non-Striking Workers* (July, 2015).

⁶⁶ See for example *Metrobus Ltd v Unite the Union* [2009] EWCA Civ 829.

⁶⁷ See *Kenlin v Gardner* [1967] QB 510 (no common law power of the police to stop and question).

is called. Under these proposals, trade unions would have to give 14 days notice of these plans to the employer, the police and the Certification Officer, the information to include whether the union ‘will be using social media, specifically Facebook, Twitter, blogs, setting up websites and what those blogs and websites will set out’.⁶⁸ This is the modern equivalent of having give notice of an intention to use the telephone, or send a letter. Again, no other organisation has to comply with obligations of this kind, with no advance notice to the police of other protests being required.⁶⁹ These far-reaching provisions have been widely condemned on civil liberties grounds, particularly as there is a battery of legal powers already available.⁷⁰

VI. Convention 87, the Trade Union Bill and Political Freedoms

60 The Trade Union Bill contains provisions designed to undermine still further the political freedom of trade unions. The aim it seems is to reduce the income available to trade unions for political purposes, whether to make donations to political parties, or to campaign against the Conservative Party at elections. Political action is recognised by the General Survey as one of the ways by which trade unions can promote their interests,⁷¹ and indeed in some cases it is the only form of action that will secure the removal of restrictive laws such as the Trade Union Bill. The importance of political action is also acknowledged by the European Court of Human Rights, which recognised in *ASLEF v United Kingdom* that

Historically, trade unions in the United Kingdom, and elsewhere in Europe, were, and though perhaps to a lesser extent today are, commonly affiliated to political parties or movements, particularly those on the left. They are not bodies solely devoted to politically-neutral aspects of the well-being of their members, but are often ideological, with strongly held views on social and political issues.⁷²

- **Existing Controls**

⁶⁸ Department for Business, Innovation and Skills, *Consultation on Tackling Intimidation of Non-Striking Workers*, above.

⁶⁹ It may be noted that British public order law relating to protests distinguishes between demonstrations (marches) and assemblies (meetings). In the case of the former, six days notice must be given to the police (Public Order Act 1986, s 11); in the case of the latter, there is no duty to give notice. The government’s proposals would thus be quite exceptional and create a sub-class of assemblies directed exclusively at trade unions, without any evident justification for such discriminatory treatment.

⁷⁰ For a full account of these very full powers, see Department for Business, Innovation and Skills, *Consultation on Tackling Intimidation of Non-Striking Workers*, above.

⁷¹ ILO, *General Survey on the Fundamental Conventions Concerning Rights at Work*, above, para 115.

⁷² [2007] IRLR 361, para 50. See M Ford and J Henty QC, *ASLEF v UK, An IER Briefing* (2007).

<http://www.ier.org.uk/system/files/ASLEF+v+UK+final+for+website+corr+by+jh1.pdf>.

61 Trade union political activity is already subject to detailed legal restraints. Legislation prohibits the use of trade union funds unless a number of statutory requirements are met:

- A political resolution must be in force in relation to the trade union in question, whereby the members have approved the adoption of political objects within the preceding 10 years;
- Any political activity falling within the statutory definition of political objects must be funded from a separate political fund in accordance with the political fund rules of the union;
- Every member of the union must be free to claim exemption from contributing to the political fund and must not suffer discrimination or disability for doing so.⁷³

62 Trade union political fund legislation was first introduced in 1913, to reverse the infamous *Osborne* judgment that trade unions could not raise a compulsory levy of their members to fund parliamentary representation.⁷⁴ In reversing the decision, the Liberal government of the day struck a compromise: trade unions could engage in political activities, provided that members who supported other parties were not required to make a payment to a party or candidates to which they were opposed.⁷⁵ The existing regulatory framework which has evolved as result is sometimes said to have created a ‘triple lock’ of protection: the individual who does not want to associate with the political activities of his or her union can vote in the political fund ballot every 10 years, opt out of paying the levy, and ultimately leave the union; there is no compulsory membership.

- **A Legacy of Partisan Attacks**

63 The Liberal compromise was shattered by the Tories in the 1920s, with Tory backbenchers then as now demanding tighter restrictions on trade union political activity, no doubt as much to discomfit the Labour Party as to respond to any concern about the welfare of trade union members. The mood was caught in 1924 by the then Minister of Labour, who wrote to Cabinet colleagues in 1924 that

the major part of the outcry against the political levy is not motivated by a burning indignation for the trade unionist, who is forced to subscribe to the furtherance of political principles which he abhors..... It is based on a desire to hit the Socialist party through their pocket ... we should not delude ourselves as to our intentions.⁷⁶

The hawks — led by Churchill — nevertheless got their way and the law was changed as part of the reparations demanded after the General Strike of 1926. Trade union

⁷³ TULRCA 1992, ss 71-96.

⁷⁴ *Amalgamated Society of Railway Servants v Osborne* [1910] AC 87.

⁷⁵ Trade Union Act 1913, which created the framework of the modern law.

⁷⁶ This passage from the document is reproduced in K D Ewing, *Trade Unions, the Labour Party and the Law – A Study of the Trade Union Act 1913* (1983).

members were now required to opt in to the political levy rather than opt out.⁷⁷ Members were thus no longer presumed obliged to pay the levy in accordance with the decision of the union; they were presumed unwilling to pay the levy unless they expressly indicated a wish to do so.

64 The law was changed back by the Attlee government in 1946, and opting out has remained the practice ever since, despite 35 years of Tory or Tory-led governments in the period since 1946. The matter was examined by the Royal Commission on Trade Unions and Employers' Associations in 1965, which rejected proposals from Conservative Party sources to restore the system of contracting in as being unnecessary and based on a misconception.⁷⁸ The Thatcher government also examined the matter, but Cabinet records suggest that the idea of reintroducing opting in was vetoed by Thatcher herself for fear of its impact on the democratic process. As was recognised by Thatcher, a move to 'contracting in' would 'create great unease and should not be entered into lightly'.⁷⁹ The current Conservative Government appears to have no such understanding.

- **Partisan Re-engagement**

65 In introducing further restrictions on trade union political freedom, it is not clear what mischief the Trade Union Bill is seeking to address.⁸⁰ The Bill nevertheless contains two proposals, the first of which relates to opting in (clause 10).⁸¹ The effect of the changes to be introduced by the Bill is as follows:

- The opting in obligation applies to existing as well as new members, that is to say workers who are members at the time the Act is introduced as well as workers who become members after the Act is introduced;
- Trade unions will have three months from the date the Act comes into force to ensure that existing members opt in. If existing members do not opt in within three months their obligation to pay the political levy will lapse;
- Members who have opted in to the political levy may opt out at any time by

⁷⁷ Trade Disputes and Trade Unions Act 1927, s 4. For the effect, see Ewing, *ibid*.

⁷⁸ Report of the Royal Commission on Trade Unions and Employers' Associations 1965-1968, Cmnd 2623, 1968, paras 912-927.

⁷⁹ TNA, CAB 128/80 ('Most Confidential Record' of Ministerial Meeting, 9 February 1984).

⁸⁰ The TUC notes that the Committee on Standards in Public Life examined the question of trade union political activity as part of a wider study of party political funding in 1997, and reported that 'We have received no evidence to suggest that the legislation is not working satisfactorily, and no case has been made out for any reform. We do not propose any change in the law in this respect' (Committee on Standards in Public Life, *The Funding of Political Parties in the United Kingdom*, Cm 4057-1, 1997, para 6.23. This is consistent with findings thirty years earlier, on that occasion by the Royal Commission on Trade Unions and Employers' Associations. The TUC is not aware of any evidence that would call these judgments into question. Nor is the TUC aware of any evidence to suggest that the existing triple lock mechanism for the protection of trade unionists is ineffective.

⁸¹ Proposed new TULRCA 1992, s 84, 85.

giving notice to the union. Where a member gives notice to opt out, the opt out will take place within one month;

66 The opting in notice will lapse after five years and will have to be renewed by all those who have opted in, even though the members concerned are entitled to withdraw their notice at any time. This goes much further than the provisions of the 1927 Act, which made no provision for mandatory renewal in a regime that also enabled members to withdraw their opting in at any time. Consistently with the 1927 Act, however, these proposals transform the nature of trade union political engagement. By individualising this activity, the proposed changes separate the member from the organisation and undermine the principle of trade unionism that the collective power of the organisation is essential to represent the interests of the members as a whole. By enhancing the right of the individual, the government diminishes the power of the organisation, and contravenes the government's own duty to respect the right of workers **and** trade unions, for which ILO Convention 87, art 3 makes very explicit provision.⁸² It is also the case that no other organisations in the United Kingdom are restrained in the way now proposed for trade unions, the political freedoms of which are to be regulated in a wholly discriminatory fashion.⁸³

- **Disproportionate Reporting Obligations**

67 The other provision of the Bill relating to political objects seems also designed to burden the union with disproportionate administrative obligations (clause 11).⁸⁴ Thus, if the union spends more than £2,000 annually on political objects, it must

- identify the recipient of each item of expenditure under each different category, and
- in relation to each recipient, specify the amount and the nature of the expenditure.

The reference here to different categories of expenditure is a reference to the categories in TULRCA 1992, s 72(1)(a)-(f). These are respectively:

(a) on any contribution to the funds of, or on the payment of expenses incurred directly or indirectly by, a political party;

⁸² Indeed as the Conservative Party recognized in its evidence to the Committee on Standards in Public Life: 'The question of trade union funding of parties is not a matter of direct concern to the Conservative party The Conservative Party does not believe that it is illegitimate for the trade union movement to provide support for political parties' (Committee on Standards in Public Life, *The Funding of Political Parties in the United Kingdom*, above, p 238).

⁸³ The TUC notes that in a unanimous decision (6:0), the High Court of Australia recently struck down as unconstitutional discriminatory restrictions on trade union political freedom imposed by State law, on the ground that these were an unjustified restriction on the freedom of political communication: *Unions NSW v NSW* [2013] HCA 58. See T Ayres and K D Ewing, 'O'Farrell's funding flop ensures freedom', *The Australian*, 2 January 2014.

⁸⁴ Proposed new TULRCA 1992, s 32ZB.

(b) on the provision of any service or property for use by or on behalf of any political party;

(c) in connection with the registration of electors, the candidature of any person, the selection of any candidate or the holding of any ballot by the union in connection with any election to a political office;

(d) on the maintenance of any holder of a political office;

(e) on the holding of any conference or meeting by or on behalf of a political party or of any other meeting the main purpose of which is the transaction of business in connection with a political party;

(f) on the production, publication or distribution of any literature, document, film, sound recording or advertisement the main purpose of which is to persuade people to vote for a political party or candidate or to persuade them not to vote for a political party or candidate

68 There can be no objection to transparency of political or any other expenditure. But there can be serious objections to disproportionate obligations that serve no conceivable public interest. What is required here is that the union should itemise and publicise every payment (probably over £2,000) on any and all of the above purposes.⁸⁵ This contrasts with the obligations on political parties such as the Conservative Party, where the public interest in transparency is at least as great as the public in trade union transparency. Political parties are required by election law only to report donations received in excess of £7,500, a figure increased from the £5,000 set when the legislation was introduced in 2000.⁸⁶ In 1997 the Committee on Standards in Public Life rejected a proposal that even small political donations to political parties should be reported to the Electoral Commission, taking the view that it would be ‘unnecessarily intrusive and administratively burdensome’.⁸⁷

VII. The Changing Role of the Certification Officer

69 The final concern relates to the Certification Officer’s powers. The Certification Officer is a state official, the office having been created in 1976 as a low-key administrative position (albeit one occupied in the past by distinguished people). The Certification Officer occupied a benign position, with the principal responsibility being to issue certificates of independence to trade unions that met the statutory test of independence. A certificate of independence was necessary for trade unions wishing to make use of various rights, such as the right to be recognised for the purposes of collective bargaining, the right to the disclosure of information, and the right to facilities of the kind discussed above.

70 When the office was created, the Certification Officer had a number of other roles, such as receiving annual accounts and reports from trade unions, and dealing with complaints from trade union members about the operation of trade union

⁸⁵ Proposed new TULRCA 1992, s 32ZB(3).

⁸⁶ Political Parties, Elections and Referendums Act 2000 (as amended).

⁸⁷ Committee on Standards in Public Life, *The Funding of Political Parties in the United Kingdom*, above, para 4.30.

political funds. Since then, however, the role of the Certification Officer has gradually expanded, acquiring many more powers of adjudication as statutory regulation of trade unions has increased exponentially since 1979. For example, the Certification Officer deals with complaints about alleged breaches of the statutory rules for the election of trade union officers, and now has an extensive jurisdiction in relation to trade union rule-book disputes.

71 In addition to these administrative and adjudicatory functions, in 1993 the Certification Officer also acquired limited investigation powers in relation to alleged financial irregularities in trade unions. It has not been necessary for these powers to be widely used. Nevertheless, the role of the Certification Officer has thus gradually changed so that beneath the benign title of the office has developed what is now openly referred to as the 'trade union regulator'. That regulatory role will be much enhanced by the provisions of the Bill, which will subject trade unions to inappropriate and disproportionate levels of State supervision.

72 The Secretary of State appoints the Certification Officer: TULRCA 1992, s 254. There are no prescribed qualifications for appointment to this office (such as independence of government or party), and there is no guarantee that people appointed in the future will be free from the government's ideological bias. This is extremely important given the proposals in the Bill, which include extensive new powers of inspection, investigation, and imposition of penalties. It is also proposed that trade unions should pay for the costs of this new regulatory framework, by a trade union tax, which the Certification Officer will be authorised to levy against trade unions (clause 17).⁸⁸ This is offensive, and will seriously compromise the CO's independence.

73 The first of these new powers are powers of investigation relating to matters such as the register of members, elections, the political fund, and amalgamations.⁸⁹ Where he 'thinks there is good reasons to do so', the Certification Officer will be empowered to demand the production of any documents relevant to his investigation, without any prior formality. If the Certification Officer believes that the union has failed to comply with this duty, he may appoint inspectors who can require the production of documents, as well as the attendance and assistance of 'any persons' believed to have information relevant to the investigation. Failure to comply may lead to the CO imposing an enforcement order, which carries punitive sanctions.

74 The second of these new powers is entitled 'exercise of powers without application', and means that the CO may initiate action against a trade union even though there has not been a complaint by a member (clause 14(3)).⁹⁰ This applies specifically in relation to trade union elections, trade union political funds, and trade union amalgamations. It needs hardly be said that as a matter of constitutional

⁸⁸ Proposed new TULRCA 1992, s 257A. The levy can be charged to both unions and employers' associations, although it is likely the size will vary for different types of organisations – with unions facing a higher charge.

⁸⁹ Proposed new TULRCA 1992, s 256C, and Schedule A3.

⁹⁰ Along with Schedule 2 this makes multiple amendments to TULRCA 1992.

principle this is an extraordinary proposal, the Certification Officer being empowered on behalf of the State to

- bring a complaint against a trade union;
- make a decision over the very matter about which he has brought the complaint; and
- impose a fine on the trade union he has investigated and upon which he has decided (see para 75 below).⁹¹

75 These latter proposals reveal high levels of constitutional illiteracy, and low levels of respect for fundamental principles of justice.⁹² But this is not the end of it, with the third of the powers introducing what are effectively quasi-criminal sanctions relating to wide-ranging matters, including (i) breaches of union rules and (ii) trade union elections.⁹³ Hitherto civil matters only, these will now attract financial penalties that are indistinguishable from fines in criminal proceedings. It is crucial to point out, however, that this power to impose a fine arises after a finding that there has been a breach of obligation by the union, on the basis of the civil rather than the criminal standard of proof. No guidance is provided as to the circumstances in which a fine may be imposed, in what is an open-ended discretionary power.

VIII. Conclusion

76 The foregoing provisions relating to the powers of the Certification Officer are symptomatic of what is wrong with the Trade Union Bill generally. Trade unions are being exposed to a much greater burden of regulation which breaks new ground constitutionally and legally, and which is out of all proportion to any conceivable mischief, the existence of which the government has conspicuously failed to identify. Authoritarian in tone and content, the Bill is ideologically driven rather than evidence led, and has consequently drawn strong criticism from the government's own Regulatory Policy Committee as being 'not fit for purpose'.

77 In taking steps significantly to tighten the regulatory burden on trade unions, the TUC believes that what is being proposed is a clear breach of ILO obligations. Writing in 2007, one of the United Kingdom's most distinguished-ever judges said that

The existing principle of the rule of law requires compliance by the state with its obligations in international law, the law which whether deriving from treaty

⁹¹ The concern here of course is that by instigating a complaint against a particular trade union, the Certification Officer will be tainted by bias in **all** cases involving that trade union. On the rule against bias in adjudication, see Bradley et al, above, chapter 24.

⁹² *R v Sussex JJ, ex parte McCarthy* [1924] 1 KB 256, referring to the 'fundamental importance that justice should not only be done but should manifestly and undoubtedly be seen to be done' (Lord Hewart, LCJ).

⁹³ Proposed new TULRCA 1992, s 256D.

or international custom and practice governs the conduct of nations. I do not think this proposition is contentious.⁹⁴

Nor does the TUC regard that proposition to be contentious. The proposition applies to ILO Conventions ratified by the United Kingdom as it does to all other treaties, the Conventions in this case having been ratified by governments led by both Labour and Conservative Prime Ministers. Indeed it was the government of Mrs Thatcher that ratified ILO Convention 151.

78 The TUC believes that the provisions of the Bill and the accompanying regulations on employment agencies violate ILO Convention 87 for multiple reasons, including:

- They impose ballot participation and support thresholds that must be met before industrial action may be taken, thresholds which in the wider context of British law violate ILO standards (clauses 2 and 3);
- They add additional procedural burdens to the already disproportionate procedural obligations with which trade unions must comply before industrial action may be taken (clauses 4-8);
- They allow for the use of agency workers as strike-breakers during the course of protected strikes and industrial action (Draft Conduct of Employment Agencies and Employment Businesses Regulations 2015);
- They impose disproportionate and discriminatory obligations on trade union in relation to picketing, and unacceptable levels of State supervision of picketing activity (clause 9);
- They include an unjustified attack on trade union political freedom, reducing the ability of trade unions to campaign for new laws, such as the repeal of the Trade Union Bill (clauses 10 and 11);
- They introduce unacceptable levels of State supervision of trade unions, which seriously undermine the principle of trade union autonomy, by giving the State regulator improper, unnecessary and disproportionate powers (clauses 14-17).

79 The TUC also believes that other provisions of the Bill and subsequent announcements violate ILO Conventions 98 and 151 (invalidating and prohibiting collective bargaining on the use of the check off in the public sector). The TUC believes further that the provisions of the Bill dealing with trade union facilities (clauses 12-13), violate Conventions 135 and 151 to the extent that they empower ministers unilaterally to rewrite collective agreements dealing with facilities. However, although each of these various measures is to be seen as a violation of

⁹⁴ Lord Bingham, 'The Rule of Law' [2007] 66 *Cambridge Law Journal* 1. The existing principle of the rule of law to which Lord Bingham refers is to be found in the Constitutional Reform Act 2005, s 1.

Conventions 87, 98, 135 and 151, it is the cumulative impact that is also to be taken into account, as well as the impact of these provisions on top of 35 years of attacks on trade union freedom.

80 We conclude with this reflection. Such is the nature of the existing restrictions on trade union freedom that that it would be unlawful under British labour law for trade unions even to organise a half-day strike in protest against these laws. Such action would not fall within the narrow definition of a ‘trade dispute’.⁹⁵ But even if it did, the procedural burdens are such that the costs would be prohibitive, the requirement to conduct full postal ballots at the unions’ expense meaning that such protest action would cost millions of pounds to organise. Trade unions will of course campaign vigorously to change the Trade Union Bill once it is enacted. But that too has been made more difficult by the Transparency of Lobbying, Non-Party Campaigning and Trade Union Administration 2014, which among other things imposes tight controls on election campaigning by trade unions and other NGO’s (with exemptions for the newspaper industry).

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⁹⁵ *Express Newspapers Ltd v Keys* [1980] IRLR 247 (TUC Day of Action against the Employment Bill 1980 ruled unlawful as not being in contemplation or furtherance of a trade dispute).