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

Certification of trade union membership details – consultation response

Date: 16 August 2013

1. Introduction

Part 3 of the Transparency of Lobbying, Non-Party Campaigning and Trade Union Administration Bill (the Bill), which was put before Parliament on 17 July, 2013, gives far-reaching new powers to the Certification Officer (CO) in relation to trade union membership registers. The Bill has major implications, as the Government's explanatory notes acknowledge, in relation to the right to privacy and freedom of association of more than 7million trade union members under the European Convention on Human Rights (ECHR).

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 will have the power to require the production of relevant documents and to make copies of them, including membership records and private correspondence from 'anyone who appears…to be in possession of them' (38) (1) (2) if there is a 'good reason to do so'.
- The CO will also be able to appoint inspectors, including outside his own staff, to mount investigations with similarly wide-ranging powers to require the production of documents, including membership records.
- The CO will have enforcement powers that have the status of a court order.

The Bill is unprecedented in its intrusion into the privacy of union members, and yet:

- Less than four weeks has been allowed for consultation over the summer period, giving trade unions no meaningful opportunity to consult those most directly affected, their members,
- The consultation is framed in a way that assumes - without any attempt at justification - that this major change in the law is necessary and seeks views only on limited aspects of its impact and operation.

The second reading of the Bill is scheduled for 3 September. In this response, we set out our comments on what we consider to be the most important issues in the proposals, specifically the far-reaching questions surrounding privacy and freedom of association.

2. What is the rationale for the Bill?

The reason for the Bill, given by the Department of Business and Skills in its discussion paper, is the potential of trade union activity to affect people's daily lives. 'The general public', it says, 'should be confident that voting papers and other communications are reaching union members so that they have the opportunity to participate'.

However, no evidence is put forward in the discussion paper to demonstrate that communications are not reaching union members or that there are shortcomings in the existing law relating to a trade union's duty to maintain a register of members. Moreover, no evidence is produced to explain the need for government to acquire yet further (extensive) powers over the lives of its citizens (and voters).

It is axiomatic that trade unions want to have good membership records. It is in their own interests to engage with members in the same way any voluntary organisation wishes to maximise membership fees and ensure people want to remain in membership. Unions are nothing without their members. They exist to represent them. They invest in a wide array of ways of communicating with them, from printed magazines, leaflets and posters to websites, social media and e-newsletters. Such is the importance of member communication, the TUC itself runs the Trade Union Communication Awards annually, attracting intense competition in categories such as best journal, best photography, best campaign and best website.

At present, the standard for unions to meet in industrial action challenges is that membership data is as "accurate as is reasonably practicable in the light of the information in the union's possession". That is a significant hurdle in itself for unions to clear and one that has been endorsed by the courts in a series of landmark cases as sufficiently demanding, especially given the voluntary nature of union organisations and their reliance on lay activists for communication with members.

The absence of any rationale or *evidence* for the changes suggests that - rather than being about improving union administration or public confidence in union ballots - the Bill's authors are looking 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' (see below).

In the process, a major casualty is privacy. The CO's new powers - to require trade unions to hand over members' names, addresses and private correspondence - is unacceptably intrusive and (despite assurances on confidentiality) puts sensitive personal data at risk of being misused or misplaced.

3. Is the existing system working?

Under the 1992 Trade Union and Labour Relations Act (TULCRA), a trade union has a duty to maintain a register of the names and addresses of its members and a duty, so far as reasonably practicable, to ensure that entries in the register are accurate and kept up-to-date.

The 1992 Act provides that a trade union should allow any member on request, with reasonable notice, to ascertain from the register, free of charge, whether there is an entry on it relating to him or her. A failure to comply with the requirements of section 24 of the 1992 Act can be made the subject of an application to either the CO or the court.

The CO's annual report for 2012-13 says 166 trade unions submitted returns (note: not membership lists) recording a total of 7,197,415 members. This compares to 7,261,210 members the previous year. The largest reduction in membership was in the construction sector.

The annual return has to include a copy of the auditor's report on the accounts, allowing the CO to compare revenue from dues with the numbers reported. In 2012-13, the returns showed income from members increased by 1.3% to £873.11 million. The returns also showed the total number of contributing members was around 90.5%

of the total membership, compared to a figure of 89.4% in the preceding year (the balance being retired and unemployed members, members on long term sick and maternity/child care leave and those on career breaks).

We believe any independent person looking at the report would agree that the government already has extensive information-gathering powers on the finances and membership of trade unions. Significantly, not a single trade union member lodged a complaint with the Certification Officer in 2012-13 concerning the maintenance of the register of members' names and addresses.

This is clearly not about the rights of union members. There are no benefits to them, only the costs associated with extra government-initiated red tape.

4. If union members will not benefit, who does?

Employers have persistently attempted to use alleged deficiencies in union membership records as a pretext for seeking injunctions to stop industrial action.

In two landmark decisions on this issue in April 2011 - ***ASLEF v London Midland and RMT v Serco Docklands*** - the Court of Appeal upheld union appeals. In both cases the High Court had granted injunctions to the employers to prevent industrial action on the grounds that the notices given by the trade unions were defective; and that the explanations they gave to describe the steps they had taken were inadequate. The Court of Appeal allowed the unions' appeals and discharged the injunctions, saying the law should be given a "likely and workable construction". The employers were given permission to appeal to the Supreme Court, but neither did so.

In the ASLEF case, the Court of Appeal said that, although ASLEF had allowed two members to vote in a strike ballot who were not entitled to vote, the small 'accidental failures' provision in the legislation should apply and confirmed the 'de minimis' exception applied to ballot and strike notices. It found that the High Court judge was wrong when he held that ASLEF was under an obligation to obtain further information or set up systems to improve its record keeping and said the information given by the union in the ballot notification was as accurate as was reasonably practicable given the information in its possession at the material time.

In the RMT case, the employers had also obtained an injunction in the High Court, on the basis that the explanation was inadequate and that the job categories in the RMT notices were imprecise. The Court of Appeal found that the explanation was adequate and disagreed with SERCO that the purpose of the explanation was to

enable it to decide whether to take legal proceedings. The Court found there was no statutory obligation requiring the union to use any particular category of jobs and therefore no obligation on the union to adopt the categories used for pay purposes. It accepted that the approach adopted by the union - which was to notify the employer of the jobs identified by the workers themselves - was perfectly sensible and complied with the statutory obligation.

In a further landmark case, in February 2012, the High Court dismissed an application by Balfour Beatty for an interim injunction against Unite, following a ballot of some of its members on industrial action. Balfour Beatty alleged that some employees entitled to vote had not received a ballot paper, while others not entitled to vote had been sent one. However, Unite had taken a wide range of steps to alert members to the ballot, including sending out questionnaires to more than 9,000 members recorded as working for the Balfour Beatty to update its records. In ruling against Balfour Beatty, the Court took the RMT v Serco and ASLEF v London Midland ruling into account. It concluded Unite had gone to 'painstaking' lengths to verify the membership information in its possession and, as far as it was reasonably practicable, sent every person entitled to vote a ballot paper.

These cases demonstrate how some employers will go to considerable lengths to prevent employees from exercising their legitimate right to strike. As noted earlier, if this Bill becomes law, employers will try to use any defect thrown up by membership audits or CO investigations as evidence against unions in injunction proceedings. They will ride roughshod over genuine staff grievances using legal technicalities to avoid dealing with them.

The current debate on zero-hours contracts highlights how some employers will take advantage of their staff, exploiting fears about job security in a time of high unemployment to suit their own ends. People do not consider taking industrial action lightly. When they do, it is almost always because it is the only way they can force employers to concede legitimate demands. The Bill runs the risk of becoming an unscrupulous employers' charter.

5. Is there a wider need for change?

Existing laws already impose onerous requirements on trade unions before industrial action can take place. The Government has produced no evidence to show there is a need to make it even harder for union members to take industrial action.

The number of working days lost through strikes remains at historically low levels despite falling real wages, cuts in pensions and other issues. However, fewer strikes do not equate with fewer grievances. The dramatic reduction in strike activity in the last twenty years mirrors the introduction of ever increasing legal constraints on the right to strike. If those constraints are taken even further, it will simply mean that frustrations will build up.

The Government has failed to produce any evidence demonstrating any need for this legislation in terms of the wider economy. We would argue, far from being of benefit, it is potentially damaging to industrial relations by emboldening employers to disregard the views of their employees because they think they will never be able to use the ultimate sanction of taking industrial action.

6. Are there grounds to fear the improper use of sensitive personal information?

The right to join a trade union is a fundamental human right that is recognised in international and UK law as a private matter (see below). People who join a trade union are often genuinely concerned that membership of a union could be held against them by their existing employer or when they are seeking work. They have every right to expect that their personal details will not be disclosed by their union. However, the Bill gives the CO the power to compel disclosure, regardless of the personal wishes of the member.

It is ironic therefore that in the week after the Bill was published the business secretary, Vince Cable, referred evidence of on-going blacklisting of trade unionists at London's Crossrail project to the Information Commissioner's Office. Unite the Union says blacklisting of trade unionists has been going on within the contract for London's Crossrail project run by BFK (BAM, Ferrovial and Kier). The issue has also been taken up by the Scottish Affairs Select Committee, which has been investigating historic allegations of blacklisting in the construction industry and heard union evidence that the practice is still continuing. The committee chair wrote to the business secretary in July asking for a full investigation.

The 1998 Data Protection Act defines data relating to membership of a trade union as 'sensitive personal data'. The Bill provides that all those handling union membership information will have a duty of confidentiality, and explanatory note 186 says 'nothing in the Bill will disapply the safeguards provided by UK data protection legislation'.

However, under the Bill, the number of people with access to and the power to make copies of all or some of the data – sensitive personal information on potentially more than 7m people - could run to hundreds if not thousands. This will include Assurers for each large trade union, the CO's staff and external consultants appointed by the CO as inspectors. Clearly, the Bill creates a risk that membership information could be leaked for improper use.

7. Are there also risks of accidental disclosure of private information?

In addition to the potential for improper use of trade union membership information, this legislation would open up the possibility of sensitive personal information accidentally going astray.

The track record of public bodies in safeguarding data is not impressive. There have been cases of data being lost in postal systems, left on trains and sent to the wrong address. Data lost or misplaced has included patients' files and benefits records containing details such as dates of birth and National Insurance numbers.

We have no reason to believe the CO's office has poor systems. However, the more people that handle data, the more vulnerable it is to disclosure through human error. Trade union members have every right to be concerned about the increased risk of their personal details being accidentally disclosed as a result the wide ranging powers the Bill gives the CO, his staff, Assurers and inspectors to obtain membership lists and private correspondence.

8. Is the Bill compatible with international law?

The European Convention on Human Rights (ECHR, Article 11) provides that 'everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join a trade union for the protection of his interests'. Article 8.1 of the ECHR gives everyone the right to respect for 'his private and family life, his home and his correspondence'.

In both cases, these rights are qualified (Articles 11.2 and 8.2) by 'the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.'

The Bill's explanatory notes argue (note 185) that the rights in ECHR 8.1 and 11.1 are not infringed because the CO, his staff, the assurers and investigators appointed by the CO are subject to obligations of confidentiality and to act consistently with Convention rights. It says (188): 'the powers conferred to obtain and use these membership details are necessary and proportionate to enable the CO, assurer and inspector to carry out their functions under TULRCA and are therefore justified under article 8(2) of the ECHR'.

However, the Government has not produced any evidence to support its assertion that such far-reaching new powers to obtain and use sensitive personal information are 'necessary and proportionate'.

Is the government asserting that trade unions are a threat to national security, public safety, health and morals or linked to disorder and crime? If not then the Bill needs to be in the interests of 'the economic well-being of the country'. And yet, as noted earlier, the CO already has extensive powers to monitor trade union membership figures, the number of days lost through strikes is at its lowest level since records began and industrial action is tightly regulated to the satisfaction of the Court of Appeal.

Far from being a threat to economic well-being, we believe trade unions have a major role to play in the economy and should have their rights - as representatives of working people - respected.

We also believe the Bill infringes the right to privacy under ECHR 8.1 and creates a serious risk of sensitive personal data being lost or misused. In our view, people belonging to or considering joining a trade union will be so concerned by this that it could undermine the right of freedom of association itself.

The Bill is therefore contrary to international law and a serious infringement of the legitimate rights of millions of citizens.

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