

Department for Business,  
Innovation and Skills consultation  
- Trade Union Assured Register  
of Members

Thompsons Solicitors' response

December 2014



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STANDING UP FOR YOU

## About Thompsons Solicitors

Thompsons is the country's most experienced trade union law firm. Thompsons represents the majority of UK trade unions and, on employment and industrial relations issues, acts only for trade unions and their members.

Thompsons launched the Trade Union Law Group in 2008 to act as a specialist resource for trade unions in respect of institutional trade union law, TULRCA compliance, Certification Officer cases, collective labour law and many other aspects of trade union expertise.

## Membership Audit Certificate (MAC)

### **Question 1: Do you have any comments regarding the proposed operation of the MAC? Please indicate why.**

The government has manifestly failed to support with any proper evidence why the imposition of a MAC is justified. Indeed in its own Impact Assessment (page 36 of the consultation document) there is a statement that there is “no direct evidence that unions are not complying with the existing statutory duty to maintain their list of members”.

The implication that unions are presently seeking to ignore their duty to keep membership records up to date has no basis in fact. Why would any membership organisation dependent on subscription income not have as a priority the maintenance of an up to date membership database? Would the government say the same of the RAC or the National Trust or a health club chain?

If the government insists on imposing a requirement to submit an MAC for unions of over 10,000 members, then unions must be given sufficient time to consider a draft MAC prior to publication, to be able to make any representations to the assurer and the assurer must be required to formally consider them.

The reference to a process of formal comment is alluded to in Paragraph 7.3 of the consultation document (“It is open to a union to require an assurer to allow it an opportunity to comment on any draft certificate and to discuss any concerns...before the MAC is issued”). We say this provision should be a formal part of the process.

For large unions, the requirement to submit an annual MAC will be an onerous task and highly time and resource intensive. It is right that unions have the opportunity to make pre – publication representations.

## Assurer

### **Question 2: Do you agree with the Government's proposed approach? Please indicate why.**

We reject the notion that an MAC should be required at all but if the government will not be dissuaded from tying unions up in more red tape then it is essential that the assurer is a qualified independent person chosen by the union.

Article 11 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, and indeed other international instruments, regulate the extent to which the State can legitimately interfere in the administration of trade unions. We consider that these measures infringe upon those internationally recognised freedoms.

### **Question 3: Are there any other groups that should be able to act as an assurer? Please state who these should be and give your reasons why.**

See answer to Question 4.

## Content of the Order

### **Question 4: Which is your preferred option<sup>1</sup>? Please give your reasons why.**

Option 2 is our preferred option.

A public competition would be a waste of resources. There is an established body of professionals with the necessary skills, resources and experience to undertake the duties of assurer. Trade unions will be confident in and assured that independent scrutineers will respect the duty of confidentiality owed to the union, and the duties owed to a trade union's members.

### **Question 5: Do you have any other suggestions with regard to the content of the Order? Please explain your answer.**

There is legitimate concern over liability for the costs associated with the appointment of the assurer and the performance of their duties. In the event that a MAC discloses no failure on the part of the union to comply with any of the requirements of section 24 of the Act, we consider that the government should refund the costs unnecessarily incurred by the union.

<sup>1</sup> Option 1:

- To follow the structure of the Scrutineer Order and make an Order which lists professional qualifications which enable a person to act as a qualified independent person, e.g. solicitor / auditor, and also list named persons who meet the criteria (set out in paragraph 19 above) to be qualified independent persons.
- The list of named qualified independent persons would be compiled following a public competition and set out in the Order. The public competition will commence once the Government response to this consultation has been published.
- This list of qualified independent persons could only be amended by amending the Order. In other words, once the Order is made, should any of the qualified independent persons named in the Order cease to operate, the named list would have to be updated by way of statutory instrument following a further public competition. Similarly, any new organisations entering the market would have to wait until a further public competition is held before they could be included on the statutory list. We anticipate that the Secretary of State would review the list every time the Order was amended.

Option 2:

- To lay an Order which lists the professional or other qualifications which enable a person to act as an independent qualified person. This would include solicitors and auditors and potentially other groups such as scrutineers.
- This would forego the need to conduct a public competition for assurers and would simplify the procedure to update the Order.

# Guidance questions - Guidance for Trade Unions

**Question 6: Do you propose any amendments to the guidance for trade unions? Please clearly state what these are and set out your reasons for the proposed changes.**

Our concerns regarding the proposed guidance for trade unions are as follows:

## **Paragraph 2.3 (page 13)**

- The consultation document sets out that “Where a union does not have an address for a member, it must ask for one”. This is a tautology. How can a union (or indeed any membership organisation) contact a member for which it has no contact details? The guidance needs to remove any suggestion that a union might be sanctioned if it is not able to contact a member for a new address.
- The measures fail to appreciate the multiplicity of circumstances that can lead to a change in the details recorded for a member. A union may record not only a home address but a work address, job category, a member’s work history and other matters relevant to advising them. Any changes in those need to be recorded.
- We know from our experience that unions of any size will make tens of thousands of changes every year to their databases and are constantly seeking, in hard copy and electronic publications sent out to their members, updates from members on their contact details. But if a member does not want to provide such information or simply fails to do so a union is unable to make them.
- It is essential to appreciate that it is not in the interest of a union not to communicate with their members. It is self-evidently in their interests to do so.
- Provision already exists, exercisable by statutory instrument, in section 54 of the Employment Relations Act 2004, to enable unions to employ electronic voting in ballots. If the government’s concern is to ensure that union members have sufficient opportunity to submit their views about the running of their union, then why not enact section 54 and permit the use of electronic voting? By failing to do so it is the government that is holding back transparency and membership participation.

## **Paragraphs 3.1 to 3.3 (page 14)**

The guidance needs to make allowance for the fact that unions will need time to incorporate any necessary changes into their rules books.

## **Paragraph 4.2 (page 14)**

Unions can often only amend their rule books at particular times – typically at annual conference. The government must take into account the fact that changes to rule books, for example to allow for the appointment or removal of an assurer, may take some time to be made.

## **Paragraph 5.5 (page 15)**

Paragraph 13 (page 5) of the Impact Assessment envisages the prospect that ‘refreshing’ the membership records once per year should be sufficient for the union to comply with its obligations. That standard should be reflected throughout the guidance.

## **Paragraph 6.5 (page 16)**

By implying that unions do not already have a proper system for compiling and maintaining their membership registers the government is we can only presume deliberately choosing to ignore the fact that it would not be in unions’ interest to do otherwise and that no evidence has been put forward to show that unions do not already do so.

**Paragraph 7.5 (page 17)**

The government may believe that the MAC needs to be made publicly available, but fails to provide any justification for this belief.

**Paragraph 8.2 (page 17)**

The guidance should make it clear that any Inspectors appointed will have to abide by the same duties of confidentiality that the union owes to its members.

## Guidance for Assurers

**Question 7: Do you propose any amendments to the guidance for assurers? Please clearly state what these are and set out your reasons for the proposed changes.**

Our concerns regarding the proposed guidance for assurers are as follows:

**Paragraph 3.3**

Again there is the ludicrous suggestion that the union is to request addresses from members that it has no address for. This requirement together with the proposal that “unions could have in place a system which encourages members to notify it of any changes of addresses” reveals how out of touch the government is when it comes to trade unions and how little this exercise is really to do with any genuinely held concerns. Rather, it’s all about heaping irrelevant burdens on trade unions which, in any other sphere of the government’s operation, it would decry as red tape

**Section 4**

It is important that Section 4 mirrors the provisions of Paragraph 7.3. Assurers must be informed of the requirement that pre – publication a draft MAC should be shared with the union and the union given adequate time to comment upon it.

**Paragraph 7.2 (page 24)**

By referring to ‘simple inaccuracies’, the government is over-simplifying the burdens faced by trade unions in keeping their membership records up to date. Trade unions invariably collect a considerably wider category of information about their members than simply their names and addresses. That further information (and indeed the name of the employer on a takeover or a TUPE Transfer) can change for a whole host of reasons which are not necessarily notified to the union. This means that the burdens faced by trade unions are even greater than those faced by other membership organisations.

It is also worth considering the wider context within which these reforms are taking place. For example, the government is actively forcing the PCS union to re-contact all its members to notify them that the government has unilaterally and vindictively stopped check off and as a result all members are being forced onto a Direct Debit arrangement. This is an example of the government placing extra and wholly unnecessary burdens on well-administered unions and the proposals in this Act are another case in point.

**Section 8 (page 25)**

The guidance should emphasise the importance of the duty of confidentiality owed to the union, and state explicitly that the assurer will be bound to observe the Data Protection Act.

# Guidance for Employers

**Question 8: Do you propose any amendments to the guidance for employers? Please clearly state what these are and set out your reasons for the proposed changes.**

## **Paragraph 1.2 (page 26)**

It is noticeable and regrettable that the legislation does not contain a duty on employers to cooperate. If there were genuine concerns about the accuracy of a union's membership records, then such a duty would help to address them and it would be good for industrial relations generally. But, even in the absence of such a statutory duty, we can see no reason why the guidance should not contain stronger encouragement to employers to cooperate with trade unions.

## **Paragraph 3.2 (page 26)**

Employers can help and should be required to do so. Indeed, an employer providing - in a clear and timely manner - up to date check off lists would be a great assistance to unions in meeting their requirements.

Assurers should, in circumstances where an employer is in some way responsible for an inadequate Certificate, or for slowing down or disrupting the process, be able to refer to the employer in the Certificate and to be able to seek appropriate financial or other redress.

## **Questions 9 to 21**

Unions, rather than ourselves, are in the best position to respond to these questions.

## **For further information:**

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