

Making Work Pay: Consultation on creating a modern framework for industrial relations

CONSULTATION RESPONSE by Thompsons Solicitors LLP

2 December 2024

Q1 – Do you agree or disagree that these principles should underpin a modern industrial relations framework? Is there anything else that needs consideration in the design of this framework? (ie ‘Collaboration’, ‘Proportionality’, ‘Accountability’ and ‘Balancing the interest of workers, businesses and the wider public’)

Q2 – How can we ensure that the new framework balances interests of workers, business and public?

We start from a different place.

We see it as essential that any framework for modern industrial relations is rooted in the internationally regarded and protected rights and freedoms of association and collective bargaining that the UK has signed up to. Full respect needs to be given to the UK’s obligations under ILO Conventions, the European Social Charter, and Article 11 of the European Convention on Human Rights.

We are prepared to accept the importance of the first three, and to a lesser degree the fourth, of the four listed principles in the consultation, but only to the extent that they entail justified and necessary restrictions on workers’ and trade unions’ freedom of association. That much is no more than ensuring compliance with the UK’s international legal obligations.

Just as ‘Labour’s Plan to Make Work Pay’ foreshadows the end of ‘one-sided flexibility’ on the part of workers, so must a modern industrial relations framework end ‘one-sided’ ‘collaboration’, ‘proportionality’ and ‘accountability’, and the ‘balancing of interest’ always in one direction.

To those four principles, we would add the principle of promotion of collective bargaining through good faith negotiation, as provided for in ‘Make Work Pay’, and also as provided for in Article 4 of ILO Convention No.98 on the Right to Organise and Collective Bargaining. To date, beyond the Fair Pay Agreement to be established in the social care sector, initial changes to the statutory recognition procedure and its proposals on access agreements, the government has not set out proposals for the promotion of collective bargaining.

So far as ensuring that our modern framework for industrial relations successfully delivers trade unions a meaningful mandate to support negotiation and dispute resolution, we also add the founding principles we describe in our answer to Question 17:

- a realistic assessment of where the UK sits compared to other countries in terms of restrictions on industrial action;
- re-framing the legislation in terms of positive trade union rights;
- de-weaponising industrial action notification and information obligations, and
- compliance in every respect with the UK’s international obligations

If all of these principles are applied in the ways described, we believe that the modern industrial relations framework, which is so important for this country, can reap real benefits.

A final point is that modern consideration of a State’s compliance with international freedom of association standards depends upon the overall package of measures and protections the State deploys. As the government builds a modern framework for industrial relations, we urge it not to lose sight of the derisory overall standards of protection that have been in place for decades and to keep that in mind in its overall assessment¹.

Q3 – Do you agree or disagree with the proposal to extend the Code of Practice on access and unfair practices during recognition and derecognition ballots to cover the entire recognition process from the point when the Central Arbitration Committee (CAC) accepts the union’s application for statutory recognition? Please explain your reasoning and provide any evidence on cases that support your view.

¹ See most recently *v Humpert v Germany* (Application No. 59433/18) [2024] IRLR 222.

We agree with the sentiment of the proposal. However, we believe that the protections should come into operation as soon as the trade union asks the employer in writing if it would agree to recognise it voluntarily. That is the first step in the statutory recognition process, unless voluntary recognition can be agreed.

The protections coming into force when the union asks the employer if it would agree to recognition should include not only the Code of Practice on Access and unfair practices during recognition and derecognition ballots, but also the employer's duties under paragraphs 26(1) to (4B) of Schedule A1 and the bilateral duties concerning unfair practices contained in paragraph 27A, on which the Code is based.

We also think paragraph 27A(2)(g) of Schedule A1 should be amended so as to cover the situation of undue influence over a voter to prevent them from influencing other voters (for example where that voter is excluded from meetings²).

We also think it is important to emphasise that whilst Article 11 of the European Convention protects the right of a trade union to decide whom it will admit into membership (by the criteria set out in its rule book)³, it does not create some parallel protected right on the part of the employer to 'dis-associate' from/with a union (i.e. not to recognise the union.)

Q4 – Do you agree or disagree with the proposal to introduce a requirement that, at the point the union submits its formal application for recognition to the Central Arbitration Committee (CAC), the union must provide the employer with a copy of its application? Please explain your reasoning

We can see the attraction of the proposal, provided that it is reciprocated in the form of a corresponding obligation on the employer to supply the number of workers in the bargaining unit to the union (Question 5).

However, there is a related problem crying out for remedy: the prospect of an employer entering into an agreement with a non-independent union before the date of acceptance of the first union's application to block the latter's admissibility. If the union is required to send a copy of its application to the employer, this loophole should be plugged at the same time⁴.

² See *United Voices of the World and OCS Group UK Ltd* (TUR1/116(2019)). 29 June 2020

³ See *ASLEF v United Kingdom* Application No.11002/05, European Court of Human Rights.

⁴ See also *R (on the application of the NUJ) v CAC* [2005] EWCA Civ 1309, where although the rival union was independent, there was no evidence that it had more than one member, or that the previous collective agreement had been used to conduct collective bargaining.

Q5 – Do you agree or disagree that the employer should then have 10 working days from that date to submit the number of workers in the proposed bargaining unit to the Central Arbitration Committee (CAC), which could not then be increased for the purpose of the recognition process? Please explain your reasoning.

We agree with the principle but are concerned about ensuring that the proposal actually prevents the opportunity for mass recruitment. It is within the realm of possibility to imagine an employer recruiting new workers within 10 days. This could largely be rectified by clarifying that the number to be supplied to the CAC is the number of workers in the bargaining unit as at the day the application is submitted to the CAC by the union. But that wouldn't prevent mass recruitment between the date of the original request and the date the union's application is submitted to the CAC.

We think that there should, in addition, be an express prohibition on an employer recruiting to influence the number of workers in a bargaining unit for the purpose of an application for statutory recognition. With our proposal for the application of the employer's duties under paragraph 26(1), the unfair practices in paragraph 27 and the Code of Practice to be extended to the initial written request submitted by the union, this would accommodate such a prohibition being inserted into paragraph 26(1).

Given that it is notoriously difficult for a Claimant to establish that they have been subjected to a detriment for a particular purpose, it is likely to be even more difficult for a union to establish that mass recruitment was 'to influence the number of workers in the bargaining unit for the purpose of an application for statutory recognition'. It will, therefore, be necessary to include a provision to the effect that if there are facts from which the CAC could conclude that the recruitment was for that purpose, then it must so conclude⁵.

As a further safeguard, only those workers in employment as of the date the union submits the application should be permitted to take part in any ballot.

Q6 – Can you provide any examples where there has been mass recruitment into a bargaining unit to thwart a trade union recognition claim? Please provide as much detail as you can.

We are aware of the problem arising in GMB's first recognition bid at Amazon in Coventry in April 2023. Trade unions will be better placed to respond to this question.

⁵ Compare regulations 5(3) and 6(3) The Employment Relations Act 1999 (Blacklists) Regulations 2010, SI 493/2010.

Q7 - Are there any alternative mechanisms that you consider would prevent mass recruitment into a bargaining unit for the purpose of thwarting union recognition applications? Please provide as much detail as you can.

See our answer to questions 3 and 5 – we think additional protections should exist.

Q8 - Do you have any views on a possible alternative to place a new obligation on employers not to recruit into a proposed bargaining unit for the purpose of seeking to prevent a union from being recognised? How would this alternative work in practice?

See our answer to Question 5.

Our suggestion in our answer to Question 5 is in addition to the requirement to be imposed on the employer to supply the number of workers in the bargaining unit. The difficulty would be in terms of enforcement, and delay to the recognition process. We would not want to see the determination of any complaint hold up the recognition process.

Q9 - Do you agree or disagree with the proposal to introduce a 20-working day window to reach a voluntary access agreement from the point when the Central Arbitration Committee (CAC) has notified the parties of its decision to hold a trade union recognition ballot?

We agree that there should be a finite period from when the CAC notifies the parties of its decision to hold a ballot to reach a voluntary access agreement. However, we think the period should be no longer than 10 working days – i.e. the same period before the CAC proceeds with arrangements for the ballot, with the two periods running concurrently.

However, we think that the proposal, if implemented, may still delay the start of the ballot—not least because the CAC could need a little time to adjudicate on the issue.

We think that stronger measures are required. One solution may be to provide that, in the event of no agreement as to access being reached, default access arrangements are to apply. A non-exhaustive list of matters to be covered would include types of access (meetings and e-access), frequency of meetings, disclosure of the employer's usual communication methods and cycles, nominated representatives and dispute resolution procedures.

We also think that there should be ‘mirroring’ of an employer’s access facilities and practices. So, if an employer uses a particular mode of communication, such as its email system, the union should be able to use the same email system and to the same extent. Employers should also not be permitted to make attendance compulsory at meetings at which its views on recognition will be expressed⁶.

We also think that a wholesale review of paragraphs 26(3), 27 and the Code of Practice is called for, not only to address new measures to be implemented as a result of the government’s proposals but also to address deficiencies in the current provisions. So far as the employer’s obligation in relation to access contained in paragraph 26(3) of Schedule A1, and corresponding sections of the Code of Practice are concerned, further matters to be addressed should include (non-exhaustively): (i) e-access and access to the employer’s email system; (ii) employers permitting full-time officials to enter the workplace and talk to workers, unless there are genuine health and safety reasons; (iii) the employer and the union exchanging plans for access and workforce communication simultaneously; (iv) the employer should give early disclosure of any special circumstance genuinely affecting the union’s ability to access, such as work and roster patterns, and workers working away from the premises; and (v) increase in the frequency and duration of union activities (the current one meeting of 30 minutes duration for every 10 days of the access period – see paragraph 30 of the Code of Practice- is too little);

Q10 – If no agreement has been reached after 20 working days, should the Central Arbitration Committee (CAC) be required to adjudicate and set out access terms by Order? If yes, how long should CAC be given to adjudicate?

If this proposal is implemented, it is important to minimise the opportunity for unfair practice. This means that the time for the CAC to adjudicate should be as short as possible. Ten days seems appropriate.

Q11 – Once 20 working days have expired, should the Committee (CAC) be allowed to delay its adjudication in instances where both parties agree to the delay? Should this delay be capped to a maximum of 10 working days?

We do not see how it would be in the interest of an effective process, with minimum opportunity for unfair practices to occur, to allow for a delay in adjudication. However, if

⁶ See decision of the US Labour Relations Board in Amazon.com Services LLC and Diana Joann Miller and Amazon Labour union, 13 November 2024: [https://www.nlr.gov/news-outreach/news-story/board-rules-captive-audience-meetings-unlawful#:~:text=Overruling%20Babcock%20%26%20Wilcox%](https://www.nlr.gov/news-outreach/news-story/board-rules-captive-audience-meetings-unlawful#:~:text=Overruling%20Babcock%20%26%20Wilcox%20)

both parties genuinely agree to a delay, why should it not be permitted? Yes, if there is a permitted period of delay, we think it should be capped at 10 working days.

Q12 – Which (if any) of the options provided do you agree with in terms of the tests set for making an unfair practice claim? Please explain your reasoning

We agree with Option one—removing the requirement for the CAC to be satisfied that the use of an unfair practice changed or was likely to change a voter’s intention. The concept is to deter unfair practices during the period of protection.

Consequential amendments will be needed, such as deleting paragraph 27B(4)(b).

Q13 – Should the Government extend the time a complaint can be made in relation to an unfair practice to within 3 months of the date the alleged unfair practice occurred?

Yes. However, that does give rise to a question as to the appropriate remedy in the event that a complaint is well-founded.

Q14 – Do you agree or disagree with the proposal to remove the 10-year requirement for unions to ballot their members on the maintenance of a political fund? Please provide your reasoning

We agree with the proposal. The State intervening in the rules of a trade union amounts to interference with freedom of association for the purpose of Article 11 of European Convention⁷. The imposition of a requirement for a ballot on the maintenance of political objects is neither prescribed by law nor necessary in a democratic society and, therefore, amounts to a violation of rights under Article 11.

⁷ See [ASLEF](#) case at footnote 3.

Q15 – Should trade union members continue to be reminded on a 10-year basis that they can opt out of the political fund? Please provide your reasoning

In light of our answer to question 14, we do not think it necessary to remind trade union members every 10 years of their right to opt out. It is a futile process, and, based on our experience, would yield very little result. Nonetheless, if there is to be some form of reminder, we consider that publication every 10 years on the union's website would suffice.

Q16 – Regulations on political fund ballot requirements are applicable across Great Britain and offices in Northern Ireland belonging to trade unions with a head or main office in Great Britain. Do you foresee any implications of removing the 10-year requirement for unions to ballot their members on the maintenance of a political fund across this territorial extent?

We don't foresee any particular implications in removing the 10-year requirement for unions to ballot their members on the maintenance of the political fund for unions with membership in Great Britain and Northern Ireland in terms of the legislation. Article 71 of the Trade Union and Labour Relations (Northern Ireland) Order 1995 – the application of certain aspects of the political fund rules in Northern Island to Northern Ireland members of unions based in Great Britain – does not apply to the 10-year renewal requirement contained in Article 47(3).

Unless the 10-year renewal requirement is removed in Northern Ireland at the same time as in Great Britain, there will be the situation of asymmetrical renewal requirements within the same union. However, we don't see that as objectionable.

Q17 – How should Government ensure that our modern framework for industrial relations successfully delivers trade unions a meaningful mandate to support negotiation and dispute resolution?

A modern framework for industrial relations needs the right founding principles to give trade unions a meaningful mandate to support negotiation and dispute resolution. It is inextricably linked to the encouragement of collective bargaining.

So far as trade union mandates are concerned, those founding principles need to include the following:

- 1. A realistic assessment of where the UK sits compared to other countries, as a starting point in terms of the restrictions placed on a union's ability to organise industrial action, and workers' rights to participate in it.**

Professor Alan Bogg, University of Bristol and Old Square Chambers, has recently undertaken much of that exercise in his paper 'The right to strike, Minimum Service Levels, and European Values'⁸. Recognising the importance of the cumulative effect of the totality of restrictions placed on the right to strike, the paper dispels once and for all the myths peddled by the last government that minimum service levels were justified by reference to a comparison with strike laws in Spain, Italy and France.

We welcome the abolition of minimum service levels and many of the restrictions contained in the Trade Union Act 2016. There must be no return to the turn-out and voting thresholds of the 2016 Act.

However, we are still left with so many areas, described by Professor Bogg, in which restrictions on the right to strike in the United Kingdom exceed those in other countries. These include:

- the narrow definition of a 'trade dispute', which excludes entirely disputes over political and socio-economic matters, and the total ban on secondary action;
- the extent of the balloting and procedural constraints; and
- the inadequate protection for workers taking part in industrial action.

Such an international comparison confirms just how far towards the most restrictive end of the spectrum UK trade union rights continue to be, even after the welcome forthcoming repeals announced by this government.

- 2. Re-framing the legislation in terms of positive trade union rights**

That comparison also shows that, unlike in most countries, the right to strike is still framed in the UK in terms of immunity from the economic torts. We have at last got over the legal device of that meaning that the legislation should be interpreted restrictively

⁸ Bogg, Alan L., The Right to Strike, Minimum Service Levels, and European Values (April 5, 2023). Available at SSRN: <https://ssrn.com/abstract=4410323> or <http://dx.doi.org/10.2139/ssrn.4410323>

against trade unions⁹. However, it is not the right place to start in terms of a modern framework for industrial relations, with the necessary respect for the principles we describe. We think that the ability of trade unions to organise industrial action needs to be given the positive legislative status it merits.

3. De-weaponise industrial action notification and information obligations

The notification and information provisions are the most frequently litigated area of the UK's industrial action legislation. Too often, they have been used to create 'traps and hurdles'¹⁰ for trade unions in litigation, which has been the antithesis of good industrial relations. Underlying much of that litigation has been the 'purpose', or 'rationale', for the notification and information provisions, as set out in successive versions of the legislation.

The rationale was stated in 1993 as being '... describing so that the employer can readily ascertain [the workers to be balloted or called]'¹¹.

In 1999, it became '... [such information in the union's possession] as would help the employer to make plans and bring the information to the attention of those of his employees... (the 'making plans formation')'¹².

Those formulations were used as the foundation for many of the legal challenges before 2011.

The 'making plans formulation' was removed from TULRCA¹³ in 2004. But some of its effect lives on. In the leading case in 2011, after the removal of that wording, the Court of Appeal held:

'the ['making plans formulation'] identified the purpose behind these statutory notices, and it accurately reflects the current rationale. It is so that the employer can make plans to minimise the effect of the strike and contact employees to seek to persuade them not to heed the strike call'¹⁴.

In a subsequent 2020 case¹⁵, the Court of Appeal detected another 'underlying policy' for enacting the statutory provision in its current form "that is, to achieve notification

⁹ See *National Union of Rail Maritime and Transport Workers v Serco Ltd* [2011] IRLR 399, at paragraph 9.

¹⁰ See *Serco* at footnote 9.

¹¹ s18 Trade Union Reform and Employment Rights Act 1993.

¹² s4 and para 3(1) Schedule 3 Employment Relations Act 1999.

¹³ by s22 Employment Relations Act 2004

¹⁴ *Serco*, at para 63 per Elias LJ.

¹⁵ *British Airways plc v British Airline Pilots' Association* [2019] EWCA 1663

requirements that are capable of being clearly and certainly applied by trade unions without creating too great a burden on them and without creating a series of traps and hurdles in the way of their exercise of rights to take industrial action. Somewhat confusingly, however, the Court of Appeal went on to hold that ‘...a continuing rationale underpinning the notice requirements is to enable employers to make plans to mitigate the effect of strike action¹⁶’.

The continuation of the old ‘rationale’, even though the wording on which it based has now been removed from 226A and s234A, and even though it is now relegated to a ‘continuing rationale underpinning the notification requirements’, continues to leave remnants of the perception that the industrial action legislation is intended to create that system of ‘traps and hurdles’ that enable employers to secure injunctions to stop industrial action.

Re-writing that rationale, setting out a clear legislative purpose that gives due prominence to the right to strike, is another key component of ensuring that our modern framework for industrial relations delivers for trade unions a meaningful mandate to support negotiation and dispute resolution. It would make a big contribution to de-weaponising the notification and information provisions.

Further steps should include re-addressing the extent to which a failure to comply with a legislative requirement should remove the protection of the ballot. Currently, unless the union complies with each and every one of the balloting and notice requirements, it will lose immunity¹⁷. Our view is that it is not appropriate for any and every failure on the part on the part of the union to meet the requirement of the legislation to lead to loss of its immunity. That outcome has always been, and remains, disproportionate.

4. Compliance in every respect with the UK’s international obligations

We think that the commitment in New Deal that UK industrial action law must comply in every respect with the international obligations ratified by the UK, including those of the International Labour Organisation and the European Charter, is a good place to start.

¹⁶ BALPA per Simler LJ, para 59.

¹⁷ See s219(4) TULRCA.

Q18 – Do you agree or disagree with the proposed changes to section 226A of the 1992 Act to simplify the information that unions are required to provide employers in the notice of ballot? Please explain your reasoning.

The starting point is that the European Committee of Social Rights has more than once declared that the requirement for a notice of ballot at all amounts to an excessive restraint on the right to take industrial action, given that the union must, in any event, give notice before actually taking industrial action¹⁸. Therefore, the European Committee on Social Rights has declared that UK law does not conform with Article 6 of the European Social Charter 1961.

On that basis, taking ‘New Deal’ at its word, the requirement for a s226A notice should be removed from the legislation.

The next stage is to get the ‘purpose’ and ‘rationale’ for the legislation right – see our answer to Question 17.

It is important that a new ‘purpose’ and ‘rationale’ is clear in (i) giving prominence to the right of trade unions and their members to organise and take part in collective action; (ii) not being weighted in favour of employers’ interests; and (iii) replacing the current underlying rationale perceived to endure by the courts. Referring to our answers to questions 1 and 17, that is how the principles of proportionality and balancing of interests should be properly applied.

That ‘purpose’ and ‘rationale’ should be set out in, or at the very least applied to, the notification and information provisions.

Otherwise, we agree with the proposal to remove the items referred to from the notification requirements for members who do not pay subscriptions by check-off.

However, we see no reason to remove the facility for unions to use the alternative current ‘check-off’ formulation of providing such information as would enable the employer readily to deduce the information that would have been contained in the lists of categories and workplaces. In that situation, and as currently, there is no reason why a generic description would not suffice.

¹⁸ ECSR Conclusions, XVIII–1 (2006), XIX–3 (2010), XX–3 (2014). The Charter was ratified by the UK in 1962.

Q19 – Do you have any views on the level of specificity section 226A of the 1992 Act should contain on the categories of worker to be balloted?

We have thought long and hard about a more suitable term than ‘category’. We can see the attraction of ‘class’, but do not believe it to be a significant improvement.

We think it is essential that the legislation makes clear the following:

- 1) that the union is permitted to list ‘categories’ by reference to its usual categorisation of members concerned;
- 2) that ‘general job categories’ are all that are required;
- 3) there are different ways in which that can be done – for example by profession, trade, occupation, grade or pay band. All are acceptable;
- 4) that just because a union may possess more specific information as to categories of worker, it is not required to provide, so long as it provides general.

So far as 2) is concerned, we think it would be helpful to follow the formula adopted by the Court of Appeal in the leading case¹⁹ and add that ‘general job categories will not reflect the more sophisticated job breakdown used in pay negotiations’.

As previously explained, it is important that any new information and notification provisions are underpinned by a replacement ‘purpose’ and ‘rationale’, giving prominence to the right to strike, and properly reflecting the principle of proportionality.

Consequently, we strongly believe that general categorisations, at the choice of the union, should suffice. No additional specificity should be required. In the case of workers to be balloted who pay their subscriptions by check-off, our view is that the current ‘alternative formulation’ should be retained, albeit with the requirement to give numbers in each category and at each workplace removed.

¹⁹ See Serco footnote 9.

Q20 – What are your views on the proposal to amend the requirement that unions should provide information on the results of the ballot to those entitled to vote and their employers ‘as soon as reasonably practicable’?

So long as it is sufficiently long, we agree with the proposal for a specific timeframe. But we think the equally important issue is confirmation as to how the notification is achieved.

Q21 – What do you consider is a reasonable time requirement for unions to inform members and their employers of the outcome of the ballot?

We think that three working days after the close of the ballot would be the minimum timeframe (and provided that placing the result in a prominent, publicly accessible, position on the union’s website was confirmed in the legislation as sufficient).

Q22 – What do you consider are suitable methods to inform employers and members of the ballot outcome? Should a specific mechanism be specified?

We can’t see how anyone could realistically object to the method of informing both members and employers by placing the result in a prominent position on the union’s website. If a union wants to use some other mechanism, then it would be permitted to do so, but placing the result in a prominent position on the union’s website would, in all cases, be sufficient.

The legislation as it stands requires unions to take ‘... such steps as are reasonably necessary to ensure that...’ It should be confirmed in the legislation that posting the result on the union’s website is a sufficient means of notifying both members and employers.

Employers and members will know when the ballot will close from the ballot paper, they have been provided with and will know when to find the result on the union’s website within the specified timeframe. Any other mechanism gives a strong suggestion of ‘trap or hurdle’.

We also don’t think that failure to comply with the requirement to notify the result within a particular timeframe should have the effect of invalidating the ballot. That is a disproportionate sanction.

Q23 – Do you agree or disagree with the proposal to simplify the amount of information that unions must provide employers in the industrial action notice? Please explain your reasoning.

In our answers to Questions 17 and 18, we repeat what we said about the section 226A notices.

Q24 – What are your views on the degree of specificity section 234A of the 1992 Act should contain on the categories of worker?

We repeat what we said in relation to the section 226A notices in our answer to Question 19.

Q25 – Do you agree or disagree with the proposal to extend the expiration date of a trade union’s legal mandate for industrial action from 6 to 12 months? Please explain your reasoning and provide any information to support your position.

We do not believe there should be a limit on the duration of the union’s mandate. However, if there is to be one, it should be at least 12 months.

Q26 – What time period for notice of industrial action is appropriate? Please explain your reasoning.

Our view is that the period of notice of 7 days is appropriate.

It is important to have in mind the duration of the ballot process, with the requirement for 7 days’ notice of ballot, then the ballot period, and then the period of notice of action. 14 days’ notice of action extends the length of the ballot process disproportionately. The cumulative effect of the restrictions placed on trade unions must be borne in mind.

Q27 – Which (if any) of the options provided do you agree with in terms of modifying the law on repudiation? Please explain your reasoning.

We believe a union should not be required to repudiate action for which liability is currently imputed to it by operation of s20 TULRCA. The operation of the current s20 TULRCA produces a disproportionate result. There is no justification for imputation of liability on the trade union, and the combined effect of ss20 and 21 TULRCA is to manoeuvre the union into a situation where it can be the subject of an application for an injunction or a claim damages.

Q28 – Currently the notice by the union is prescribed by legislation. Do you think that prescription of the notice should remain unchanged? If not, what changes do you propose?

It should be sufficient for there simply to be a statement that the industrial action is not authorised by the union, and that members should work as normal.

Q29 – Do you agree or disagree that the current legislation on repudiation should be left unchanged? Please explain your reasoning

We agree that the current legislation on repudiation should be changed.

Please see our answer to Question 27.

Q30 – Do you agree or disagree with the Government’s proposal to amend the law on ‘prior call’ to allow unions to ballot for official protected action where a ‘prior call’ has taken place in an emergency situation? Please explain your reasoning.

We assume this proposal relates to paragraph 122 of the Divisional Court’s judgment in Secretary of State for Justice v Prison Officers Association²⁰ :

‘122 As for the second question, there is a difference in treatment between prison officers and many other categories of workers. There is a blanket ban on the POA inducing prison officers to take industrial action (ie by walking off the job) even if the reason is a reasonable fear on the part of the officers of serious and imminent danger. There is no such blanket ban for most other workers, though it is worth making the point that nor is there complete freedom to induce other workers to walk out on the ground of a reasonable fear of serious and imminent danger. Section 44(1)(d) ERA 1996, does not

²⁰ [2019] EWHC 3553 (QB), [2020] IRLR 196

absolve trade unions of the need to comply with the balloting and notification requirements, set out in Pt V of the Trade Union and Labour Relations (Consolidation) Act 1992 if they are to advise their members to withhold their services because of a reasonable fear of serious and imminent danger. Nonetheless, we are satisfied that the position as regards prison officers is different’.

We agree with the principle of the proposal as far as it goes, but think that further reform is needed to the ‘prior call’ provisions.

However, we don’t think a ‘prior call’ should invalidate a subsequent ballot. It is another example of where the legislation is framed to prevent the union from taking industrial action. Again, this is a disproportionate legislative outcome, which does not properly reflect the balancing of interests between trade unions, workers and employers as we have described. There is no good reason why a subsequent ballot should not be effective.

In any event, the current ingredients of a ‘prior call’, or more particularly a ‘call’, need to be reformed to reflect a need for an actual and positive intention to induce a breach of contract. This is to remedy the situation of a union being held to have made a ‘prior call’ which invalidated a subsequent ballot, where the General Secretary, at the same time as informing them that a ballot was to take place, advised its members that a particular type of working was not covered by a collective agreement²¹.

Arising out of the POA case, the current position is that the exercise by members of rights under s44(1)(d) Employment Rights Act 1996 (right not to be subjected to any detriment on health and safety grounds in circumstances of serious and imminent danger) does not confer any immunity on their trade union for the purpose of industrial action law. It should.

Q31 – What are your views on what should be meant by an “emergency situation”?

We think that more widespread reform of the ‘prior call’ provisions is called for.

Notwithstanding that, we think that the appropriate threshold for an ‘emergency situation’ should be ‘circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health and safety’ (see section 44(1)(c) Employment Rights Act 1996).

²¹ Govia Thameslink Railway Ltd v ASLEF [2016] EWHC 1320 (QB), [2016] IRLR

Q32 – Are there any risks to the proposed approach? For example increased incidences of unofficial action or of official action which does not have the support of a ballot and is taken without the usual notice to employers? Please explain your reasoning and provide any information to support your position.

We don't see any particular risks.

Q33 – Do you agree or disagree with the proposed approach for the CAC to enforce access agreements? Please explain your reasoning.

As they stand, we have reservations about the access agreement provisions in the Bill. However, we understand that this consultation only seeks responses in relation to the enforcement provisions, and we confine our comments in this response to that aspect.

We think it is important to be clear about the starting point. Access agreements will be part of the measures adopted by the United Kingdom to comply with its obligation under Article 4 of ILO Convention No.98 on the Right to Organise and Collective Bargaining:

'Measures appropriate to national conditions shall be taken, where necessary, to encourage and promote the full development and utilisation of 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'.

This starting point should inform and guide both the substantive and the enforcement provisions.

We don't disagree with the CAC being the appropriate body to enforce access agreements. However, it will have to be properly resourced. By analogy with the access provisions in relation to statutory recognition, it will be important to avoid the type of delays seen in the GMB and Amazon access process. Avoiding delay is critically important to the success of access agreements.

Our comments in relation to the structure of the enforcement provisions are set out below.

First, we do not see the purpose of a two-stage enforcement process. Coupled potentially with a prior determination procedure by the CAC, we think that having a process of 'initial complaint' followed by 'subsequent complaint' is unnecessarily cumbersome and liable to impede effective enforcement. We think the approach should be for a one-stage

complaint procedure, with the CAC having the power to require payment of a sum (in the case of the employer, payable by it to the trade union), or to require payment if conditions are not satisfied, where it makes an enforcement order. We think the process should be:

- (i) where the CAC finds the (single/initial) complaint well founded, it should be required to issue a declaration to that effect and to make an order requiring the person in default to take the steps specified in the order to ensure that access takes place in accordance with the agreement, 'unless the CAC considers that to do so would be inappropriate'²²;
- (ii) that declaration or order made by the CAC at the conclusion of the single-stage enforcement procedure should then be capable of enforcement as if it were a declaration or order of the court;
- (iii) on the determination of a complaint, the CAC should also have power to order payment of a sum (in the case of the employer, payable by it to the trade union), or to require payment if conditions are not satisfied; and
- (iv) before the CAC makes an order for such payment, or conditional payment, the defaulting party should be given the opportunity to make representations to the CAC.

As the Bill stands, the process has to continue until the CAC's order is determined by the 'subsequent complaint' before either party can obtain an order that has alternative enforceability in the courts or provides for the defaulting party to make a payment. We don't think that is the best way to achieve the purpose of the new measures and it is not in accordance with good industrial relations.

We accept that the Certification Officer is not required to make an order granting or refusing the declaration asked for²³. However, we think that the circumstances of trade union access, by reference to an agreement made or treated as being made between the union and the employer, are different. We also think that the purpose of the legislation will best be served by making the CAC's determination of complaints mandatory unless the complaint is withdrawn in the meantime.

As with the provisions for determination of the content of the access agreement, the process for enforcement mustn't introduce delay. Speedy resolution of complaints is essential to avoid frustration with the access provisions' purpose, and in the interest of good industrial relations. We suggest that the CAC should be required to determine complaints within a specified time period, which we suggest should be no longer than 28 days.

²² By analogy with the Certification Officer's powers under, for example, s55(5A) TULRCA

²³ See for example s55(1) TULRCA

Otherwise, clarification is needed as to why, on a complaint being made, the CAC should have the power to vary an access agreement already made. If such a provision is to be retained, the circumstances in and the purpose for which the access agreement can be varied should be spelled out.

Q34 – Do you have any initial views on how the penalty fine system should work in practice? For example, do you have any views on how different levels of penalty fines could be set?

As above, we believe the payment system should be part of a one-stage enforcement procedure. Where the failure to comply is by the employer, the payment should be made to the trade union. The CAC should be required to give notice to a person against whom it is considering making an order for payment, and give that person the opportunity to make representations. We also think that the availability of conditional payments would assist effective enforcement by providing an ultimatum to a person to remedy their conduct.

We think that different levels of payments should apply according to (i) the size and resources of the person against whom it is proposed the order should be made and (ii) the seriousness of the breach and whether the breach complained of was a repetition as envisaged by the current proposed s7OZI(2)(b).

We think that fines under Part VI of the Data Protection Act 2018, by reference to worldwide turn-over provide a useful benchmark.

Q35 – Do you think the proposal for a penalty fine system is proportionate or not, and would it be effective? Please explain why.

Yes, we think a system of payments is proportionate. The government is implementing measures to comply with its obligations under ILO Convention No.98. There must be appropriately dissuasive sanctions for non-compliance. However, we think that the amounts payable in the event of default by the employer should be paid to the union.

We think that effectiveness would be increased by changing the process to a 'one-stage' process, leading to outcomes which (i) are enforceable in the same way as a declaration or order of the court and (ii) include the facility for the CAC to make conditional payment orders.

Q36 – Do you consider there to be any alternative enforcement approaches the government should consider? For example, should a Central Arbitration Committee (CAC) order requiring specific steps to be taken (Step 2 above) be able to be relied upon as if it were a court order? What other approaches would be suitable?

We favour a ‘one-stage’ process as above. But if there is to be a two-stage process, yes, we do think an order made at step 2 above should be capable of being relied upon as if it were an order of the court. Otherwise, until stage two is concluded, there is no opportunity for alternative enforcement.

Going Further and Next Steps

Q37 – Are there any wider modernising reforms relating to trade union legislation that you would like to see brought forward by the government? If yes, please state these and why.

For the reasons we have already given, we think the priority is to get the founding principles, and express ‘purpose’, right to start with.

We welcome the Employment Rights Bill, the consultations announced subsequently, and the ‘next steps’ identified in this consultation document. Our view is that, over time, the entirety of trade union legislation should be reviewed. This is because much of it is now over 40 years old and pre-dates the Human Rights Act. It was introduced at a time when less attention was paid to the requirements of Article 11 of the European Convention and other international instruments. Furthermore, the European Court of Human Rights has recently reiterated the principle that when assessing interference with trade union freedoms, the Court must carry out a proportionality assessment which take into account ‘the totality of the measures taken by the State to secure trade union freedom’²⁴.

That said we think that some further priorities are as follows:

Statutory recognition:

²⁴ See footnote 1, [Humpert](#) at paragraph 102

- remove the ‘50% test likely to support’ recognition test (Schedule A paragraph 14), as already committed to. The threshold is too high;
- remove the ‘40% of those eligible to vote’ threshold in the ballot, already recognised by government to be unfair;
- the scope of statutory recognition needs to be expanded to cover all terms and conditions of employment, not just pay, hours and holiday;
- the process needs to be speeded up. There is too much opportunity for delay by the employer, especially in relation to a ballot, which is likely to lead to a weakening of union support;
- an employer is currently able to defeat an application from recognition from an independent union by entering into a collective agreement with a different independent union (Schedule A1 para 35)²⁵;
- a representative union is currently blocked from making an admissible application where there is a recognised union covering the same bargaining unit, even where that second union has lost the support of the bargaining unit²⁶;
- the seven ‘unfair practices’, currently confined in their application to the ballot period, listed para 27A(2), are regularly abused – for example by mixing a message not to vote in favour of recognition with news that workers were to receive a bonus²⁷; see also the use of ‘one click to quit the union’ QR codes in GMB’s recognition bid at Amazon. Obligations should be imposed on employers, from the submission of the request for recognition not to attempt to interfere with the relationship between workers and their trade union, for example by encouraging or inducing them to resign their union membership;
- as per our answer to Question 9, we think that a wholesale review of paragraphs 26(3), 27 Schedule A1 and the Code of Practice is called for, not only to address new measures to be implemented as a result of government’s proposals in this consultation but also to address deficiencies in the current provisions.
- the small employer’s exemption, which should be removed (paragraph 7);

²⁵ See footnote 4, as well as BECTU and City Screen Ltd (TUR1/309/03, 10 December 2003), CAC, TGWU and Jacques Vert plc (TUR1/329/03, 23 January 2004), CAC; GMB and Wm Morrison Supermarkets plc (TUR1/478/05, 9 December 2005), CAC).

²⁶ See TGWU and Jacques Vert plc (TUR1/329/03, 23 January 2004), CAC; GMB and Wm Morrison Supermarkets plc (TUR1/478/05, 9 December 2005), CAC).

²⁷ See footnote 2, and CWU and Cable Wireless Services UK Ltd (TUR1/570/07, 19 June 2008)

- the categories of workers excluded from the statutory recognition process by s296(1) TULRCA; and
- the three-year ban on making a further application once an application has been declared inadmissible.

Industrial action:

- see our answer to Question 17. We think it is essential to set a clear purpose, or rationale, for the legislation, and the notification and information provisions in particular, giving due prominence to the right to take collective action;
- the definition of a ‘trade dispute’ is too limited, and fails to accommodate political disputes, or disputes with a future employer occasioned by a TUPE transfer, at all. The outright ban on secondary action should also be re-visited in light of the commitment to comply ‘in every respect’ with ILO Conventions;
- where the union substantially complies with an obligation, that should be capable of satisfying the requirement for compliance, building on the judgment in *Unite the Union v British Airways Plc* (no.2).
- the ‘small accidental failures’ savings²⁸ should be extended to all parts of the ballot process, including in particular the ballot and action notices;
- not every failure to satisfy one of the (currently) labyrinthine requirements of the industrial action legislation should lead to the union losing immunity. For example, if the union fails to serve notice of the result of the ballot within the specified timeframe, the employer should be able to serve a request for immediate compliance. However, the union losing immunity for the first infraction is disproportionate²⁹;
- amend the definition of ‘workplace’. The focus on ‘premises’ is disproportionately precise and ‘work location’ should generally be sufficient. Better accommodation should also be made for home workers and peripatetic workers;
- definition of ‘prior call’ – see our answer to Question 30;
- review of the Code of Practice for Picketing – especially to remove the recommended maximum number of pickets as 6, in light of the Human Rights Act;
- the last government increased the maximum amounts of damages which may be awarded against trade unions by a multiple (generally) of four – from £10,000 to £40,000 in the case of unions with fewer than 5000 members, from £50,000 to £200,000 for unions with 5000 or more but

²⁸ S232B TULRCA

²⁹ Notwithstanding *Metrobus v Unite the Union* [2009] EWCA Civ 829 [2009] IRLR 851

fewer than 25,000 members, from £125,000 to £500,000 for unions with 25,000 or more but fewer than 100,000 members, and from £250,000 to £1,000,000 in the case of unions with more than 100,000 members³⁰.

These increases should be reversed.

- reinstate the right to strike for prison officers³¹.

Collective bargaining:

- any further measures to encourage collective bargaining;
- confirmation of maintenance of the National Joint Council for Local Authority Fire and Rescue Services.

Certification Officer:

- we consider that all of the Certification Officer's jurisdictions should be reviewed in light of the Human Rights Act. A priority should be the right to inspect accounting records which places unduly onerous burden on trade unions.

³⁰ The Liability of Trade Unions I Proceedings in Tort (Increase of Limits on Damages) Order 2022

³¹ See *Prison Officers' Association v United Kingdom*, Application 29545/22, pending.