HOUSE OF COMMONS LIBRARY

BRIEFING PAPER

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Trade Union Bill

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Summary

The main provisions of the Bill are as follows.

Clause 1 defines the *Trade Union and Labour Relations (Consolidation Act 1992* as "the 1992 Act". The Bill would amend this Act.

Clause 2 would introduce a 50 per cent turnout requirement for industrial action ballots, in addition to the current requirement for a majority vote in favour of action.

Under **clause 3**, industrial action in "important public services" would require a positive vote by at least 40 per cent of those entitled to vote in the ballot. This would be in addition to the 50 per cent turnout threshold and the requirement for a majority vote. "Important public services" would be defined in subsequent regulations, but could fall only within the following categories:

- health services;
- education of those aged under 17;
- fire services;
- transport services;
- decommissioning of nuclear installations and management of radioactive waste and spent fuel; or
- border security.

Clause 4-6 would require unions to include new types of information on industrial action ballots. Following a ballot, unions would have to communicate more detailed information to union members, employers and the Certification Officer.

Clause 7 would extend the period of notice unions must give employers prior to industrial action, from the current seven days to 14 days.

Clause 8 of the Bill would provide that industrial action ballot mandates would expire after a four-month period; industrial action after this point would require a fresh ballot.

Clause 9 would introduce new legal requirements relating to the supervision of picketing. The requirements would include, for example, that a picket supervisor must take reasonable steps to communicate information to the police. The clause would incorporate into law provisions of the 1992 Code of Practice on Picketing.

Clause 10 would make it unlawful to require a member of a union to contribute to a political fund unless he has indicated in writing willingness to do so. This would change political fund contributions from an opt-out to an opt-in arrangement. The opt-in agreement would expire after five years, subject to the possibility of renewal.
Clause 11 would require unions to publish details of political expenditure in their annual returns if this expenditure exceeds £2,000 per annum. The annual return must detail the amount spent on political objects and the recipient(s) of each item of expenditure.

Clause 12 would introduce a power, whereby a Minister may by regulations require a relevant public sector employer to publish information relating to facility time taken by union officials. **Clause 13** would create a reserve power whereby a Minister may make regulations restrict facility time.

Clauses 14-17 and **Schedules 1-3** would reform the role of the Certification Officer. They would introduce investigatory and enforcement powers; the power to impose financial penalties of between £200 and £20,000; and the power to, by regulations, make provision for the Certification Officer to require trade unions and employers' associations to pay a levy, funding the performance of his role.

1. Introduction

The *Trade Union Bill 2015-16* was introduced in the House of Commons on 15 July 2015. The Bill, together with its Explanatory Notes, are available on the Parliament website, where one can follow the Bill's progress. The Bill would apply to England and Wales, and Scotland.

The Bill was announced during the Queen's Speech on 27 May 2015, described as "legislation to reform trade unions and to protect essential public services against strikes".[1] In the background briefing to the Queen's Speech, the Government described the main purposes of the Bill as being to:

- Pursue our ambition to become the most prosperous major economy in the world by 2030.
- Ensure hardworking people are not disrupted by little-supported strike action.[2]

The announcement followed commitments in the Conservative Party manifesto 2015, which set out many of the proposals which feature in the Bill.[3]

Alongside the Bill, the Department for Business, Innovation and Skills (BIS) is consulting on regulations that would be required to implement ballot thresholds in important public services. BIS is also consulting on measures which do not currently feature in the Bill:

- repealing the existing prohibition on hiring agency staff to replace workers participating in industrial action (which can be achieved by secondary legislation using existing powers); and
- changes to the law on picketing, including the possible creation of a new criminal offence of "intimidation on the picket line".

BIS has published a collection of documents on the Gov.uk website which acts as a useful central source of background government material.[4] The collection includes the aforementioned consultation documents together with impact assessments; a Delegated Powers Memorandum; and a European Convention on Human Rights memorandum.

In addition to the Bill's current provisions, the Government has indicated it intends to amend the Bill to abolish check-off in the public sector. Check-off is a system whereby union membership payments are deducted from union members' salaries by their employers and paid over to unions.

This briefing provides some background to the issues raised by the Bill, then deals individually with each of its clauses. The Schedules are considered alongside the associated clauses.

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1 HC Deb 27 May 2015 c31
2 Prime Minister's Office, *Queen's Speech 2015: background briefing notes*, 27 May 2015, p38
3 Conservative Party Manifesto 2015, pp18-19
4 Trade Union Bill collection, Gov.uk (accessed 1 September 2015)

2. Development of industrial action legislation

2.1 Current position

Industrial action induced by a trade union puts it a risk of legal sanction. While certain activities may be contrary to criminal law, the principal risk is liability under civil law. Specifically, union induced industrial action risks liability under the law of tort, an area of the law concerned with civil, as distinct from criminal, wrongs.

If proposed action is likely to be unlawful an employer may apply to a court for an injunction to prohibit the action. Injunctions can be ordered at an interim stage in court proceedings, i.e. before the matter goes to a full hearing. This means that injunctions are a powerful legal tool by which employers can prevent action going ahead. For this reason, and because there is no individual or collective right to strike in domestic law, unions depend on a framework of legal immunities developed throughout the 20th century. Over time, these immunities came to be contingent on the performance of statutory preconditions prior to industrial action.

2.2 Trade union immunities

In 1901 the House of Lords handed down judgment in the *Taff Vale* case,[5] establishing that unions could be liable in tort for the actions of their officials. The effect of *Taff Vale* was subsequently mitigated by the *Trade Disputes Act 1906,* section 4 of which prohibited actions of tort against trade unions. Section 3 of the Act removed union liability for acts that induced breaches of contract (calling a strike generally induces a breach of employment contracts), provided the act was done "in contemplation or furtherance of a trade dispute". The effect of this was to immunise unions against the normal legal consequences of inducing industrial action.

The 1906 Act is symbolic of a period during which government industrial relations policy favoured a "collective *laissez-faire*" approach: limiting the intervention of the law, provided the parties acted in a manner consistent with the successful operation of negotiating machinery.[6] Since the 1906 Act, a gradual accretion of law has made trade union immunities conditional on compliance with statutory requirements, such as the requirement to hold a pre-strike ballot.

In some instances the courts have enlarged the scope of union liability. For example, in *Rookes v Barnard* [1964][7] the House of Lords held that a threat to break a contract of employment by going on strike involved the tort of 'intimidation'. This prompted the Labour government at the time to introduce the *Trade Disputes Act 1965,* the single substantive

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5 *The Taff Vale Railway Company v The Amalgamated Society of Railway Servants* [1901] AC 426

6 See Davies, P., Freedland, M., *Labour Legislation and Public Policy*, 1993

7 [1964] AC 1129

section of which reversed the effect of the case, providing that an "act … shall not be actionable in tort on the ground" that it consists in threatening "that a contract of employment … will be broken" or induced to be broken.

When the Conservatives came to power in 1970 they introduced the *Industrial Relations Bill*, based on proposals in a policy paper they had published while in Opposition.[8] The detailed requirements of the *Industrial Relations Act 1971* departed from the preceding approach to the statutory regulation of industrial action, marking a profound change of direction:

> so far as labour law itself was concerned, in 1971 the whole post-war voluntarist legal structure … was both formally and substantively replaced by the Industrial Relations Act, and was not subsequently reconstituted in its previous form … collective *laissez-faire*, and the particular set of legal and corporatist dispositions which it involved or depended upon, were abandoned between 1970 and 1974.[9]

The 1971 Act's key provisions included a system of emergency powers based on American law[10] and a reduction in the scope of union immunity against liability in tort. Its passage through Parliament was accompanied by mass protests[11] and its powers little-used. Following widespread criticism the Heath government acknowledged the need for substantial amendment to its industrial action provisions.[12]

The 1971 Act was repealed in 1974 by the succeeding Labour government, although there was now an acceptance of interventionist industrial relations policy, based largely on concerns about unofficial or unsupported industrial action and the effect of wage demands on the wider economy. Proposals for intervention were advocated by both Labour and Conservative governments. For example, while the ultimately unsuccessful 1971 Act implemented a form of compulsory strike ballots, balloting had already been proposed by Labour in its 1969 White Paper *In Place of Strife*.[13] All these abortive attempts at reform were resisted by trade unions:

> In the course of bringing forward and attempting to operate the Industrial Relations Act, the government was learning that discarding collective *laissez-faire* and using the law in industrial relations was more difficult than anticipated, just as their predecessors had made the same discovery when they produced the White Paper, *In Place of Strife*. It involved the abandonment of a century old peace-time tradition defining the relationship between governments and industrial society ... Both Harold Wilson and Barbara Castle, and then later Edward Heath, wholly underestimated the resistance to law which would arise; they

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8 Conservative Political Centre, *Fair Deal at Work: the Conservative approach to modern industrial relations*, April 1968
9 Ibid., pp275-276
10 See below discussion of industrial action ballots
11 '1971: Workers down tools over union rights', BBC News archive, accessed 4 September 2015
12 Ibid., p1036
13 *In Place of Strife*, Cmnd. 3888, January 1969

> were testing the extent of submission to law in industrial society, and finding it wanting.[14]

Following its election in 1979, the Conservative government embarked on a legislative programme which made union immunities conditional on the performance of statutory obligations:

> immunity was removed for secondary industrial action and secondary picketing … the concept of a 'trade dispute' was confined to disputes between workers and their own employer which related 'wholly or mainly' to a protected purpose; increasingly prescriptive and complex balloting (and, latterly, notification) requirements were imposed … and unions lost their comprehensive immunity against liability in tort.[15]

The new laws came at a time of industrial unrest. The Conservatives had been returned to office following the Winter of Discontent, during which 29 million working days were lost to industrial action in response to public sector pay caps imposed by the Labour government. The *Trade Union Act 1984*, which implemented many of the reforms, passed through Parliament during the miners' strike. The *Employment Act 1988*, the *Employment Act 1990* and the *Trade Union Reform and Employment Rights Act 1993* then added to the procedural requirements for lawful industrial action.

Since 1980, union influence and membership has, on the whole, declined.[16] When Labour were elected to government in 1997 they

> inherited and maintained a low level of industrial conflict. At least since 1992 the UK strike rate had been below the average for both the European Union and the developed countries which were members of the OECD. Thus, the government elected in 1997 was free of significant political pressure from the electorate to 'do something' about strikes.[17]

The law of industrial action under Labour during 1997-2010 remained "intact in its essentials" although some changes were made.[18] These included provisions of the *Employment Relations Act 1999*, which made it unfair to dismiss an employee for participating in lawful industrial action; a simplification of the arrangements for ballots across multiple workplaces; and the possibility to extend the period during which industrial action must be commenced, provided the union and employer agree. Since 2010, industrial action legislation has remained unchanged.

2.3 European Convention on Human Rights

The *Human Rights Act 1998* requires that legislation must be read and given effect in a way which is compatible with rights contained in the European Convention on Human Rights (ECHR).[19] In determining a

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14 Davies and Freedland, op. cit., p350
15 Deakin and Morris, op. cit., p1037
16 Davies, P., Freedland, M., *Towards a Flexible Labour Market: Labour legislation and regulation since the 1990s*, 2007, p105; see below section on 'the effect of industrial action'
17 Ibid., p107
18 Deakin and Morris, op. cit., p1037
19 *Human Rights Act 1998*, section 3(1)

question that has arisen in connection with rights under the ECHR, courts must "take account of" judgments of the European Court of Human Rights (ECtHR).[20] The ECtHR has repeatedly held that the right to strike is implied by the Article 11 ECHR right to freedom of assembly and association.

Article 11 provides:

> 1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.
>
> 2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, 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. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

In *National Union of Rail, Maritime and Transport Workers v. The United Kingdom* [2014] ECHR 31045/10 the ECtHR recalled previous case law establishing that the right to strike is implied by Article 11:

> The Court will consider first the applicant's argument that the right to take strike action must be regarded as an essential element of trade union freedom under Article 11, so that to restrict it would be to impair the very essence of freedom of association. It recalls that it has already decided a number of cases in which restrictions on industrial action were found to have given rise to violations of Article 11 (see for example *Karaçay v. Turkey*, no. 6615/03, 27 March 2007; *Dilek and Others v. Turkey*, nos. 74611/01, 26876/02 and 27628/02, 17 July 2007; *Urcan and Others v. Turkey*, nos. 23018/04, 23034/04, 23042/04, 23071/04, 23073/04, 23081/04, 23086/04, 23091/04, 23094/04, 23444/04 and 23676/04, 17 July 2008; *Enerji Yapı-Yol Sen v. Turkey*, no. 68959/01, 21 April 2009) … what the above-mentioned cases illustrate is that strike action is clearly protected by Article 11.[21]

Article 11 is a qualified right, in that proportionate restrictions on its exercise may be justified under Article 11(2). A restriction on the right to strike implied by Article 11 would be judged by reference to whether or not it is "necessary in a democratic society". In this context, the ECtHR has noted that national legislatures should be

> allowed a wide margin of appreciation since, by virtue of their direct knowledge of their society and its needs, the national authorities, and in particular the democratically elected parliaments, are in principle better placed than the international judge to appreciate what is in the public interest on social or economic grounds and what are the legislative measures best suited for the conditions in their country in order to implement the chosen social, economic or industrial policy (see among many

[20] Ibid., section 2(1)
[21] Para 84

> authorities *Stummer v. Austria* [GC], no. 37452/02, §89, ECHR 2011).[22]

However

> If a legislative restriction strikes at the core of trade union activity, a lesser margin of appreciation is to be recognised to the national legislature and more is required to justify the proportionality of the resultant interference, in the general interest, with the exercise of trade union freedom.[23]

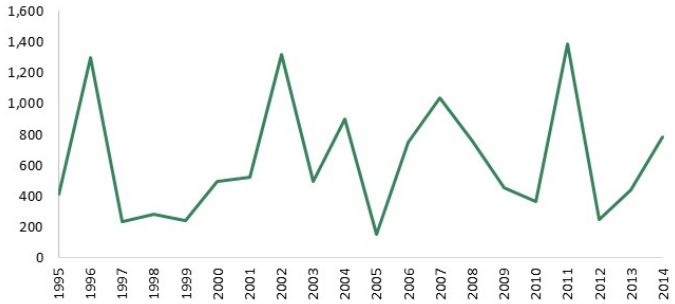
The Government recognises that several of the proposals in the Bill engage Article 11 and has discussed this in the European Convention on Human Rights Memorandum published alongside the Bill.

22 Para 89
23 Para 87

3. The effect of industrial action

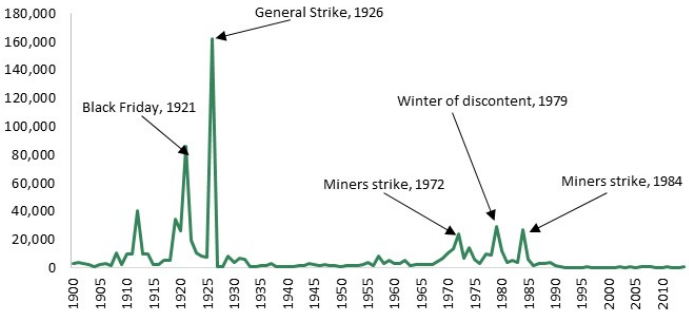
The Bill's proposals are set against a 77% increase in working days lost due to industrial action, from 440,000 days in 2013 to 788,000 in 2014.[24] The number of days lost in 2014 was higher than the average of the 1990s and the 2000s and can be attributed to a number of large-scale public sector strikes:[25]

Annual estimates of Labour Disputes in the UK, 1995-2014
Working days lost (000s)



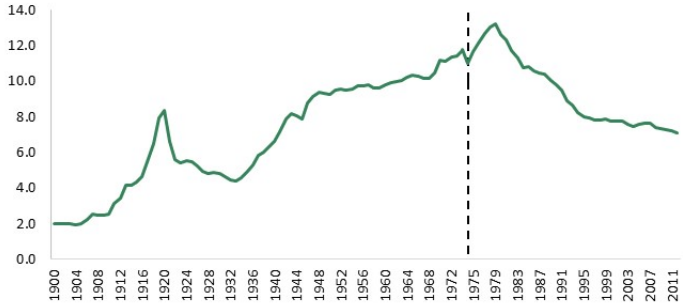
Almost 162 million working days were lost to labour disputes during the General Strike of 1926 – this is the highest number of days lost since 1900:

Annual estimates of Labour Disputes in the UK, 1900-2014
Working days lost (000s)



When looking at trade union membership, this reached its peak in 1979 during the Winter of Discontent. Since then, both trade union membership and the number of days lost to strikes has been declining.

Trade union membership, 1900-2012/13
Millions



24 ONS, *Labour disputes: annual article 2014*, 16 July 2015
25 'Strikes by public sector workers largest in three years', *The Guardian,* 10 July 2014; 'Public sector strikes hit schools and services around the UK', BBC News website, 10 July 2014

The Government is particularly concerned with the impact of industrial action in certain public services, namely the fire, health, education, transport, border security and nuclear decommissioning sectors. We can look at the number of working days lost to industrial action by industry, which gives some indication of the effect of industrial action in public services.

Working days lost by industry 2014

	Working days lost (000s)	Working days lost a % of total
Mining, quarrying and Electricity, gas, air conditioning	1.2	0.2%
Manufacturing	7.6	1.0%
Sewerage, Waste Management and Remediation Activities and Water Supply	0.4	0.1%
Construction	2.8	0.4%
Wholesale and retail trade; repair of motor vehicles, personal and household goods and Accommodation and Food Services	4.6	0.6%
Transport, storage, Information and Communication	24.9	3.2%
Financial and Insurance, Real estate, Professional, Scientific,		0.0%
Technical and Admin Activities	6.5	0.8%
Public administration and defence; compulsory social security	390.3	49.5%
Education	312.8	39.7%
Human Health and social work	36.3	4.6%
Arts Entertainment and Recreation Other community, social and personal service activities, private households with employed persons, extra-territorial organisations and bodies	0.8	0.1%
All industries and services	*788.3*	*100.0%*

Source: ONS, Labour disputes annual article, July 2015

Notes:

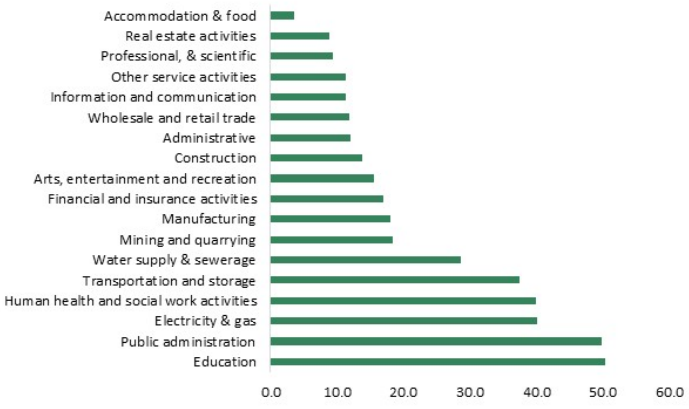
The figures for working days lost have been rounded and consequently the sums of constituent items may not agree precisely with the totals.

Some stoppages involved workers in more than one of the above industry groups, but have each been counted as only one stoppage in the totals for all industries and services.

The higher number of working days lost in the predominantly public sector industries of education, public administration, and health and social work may be due in part to the fact these have the greatest densities of union membership. Union membership is also high in the now principally privately-owned (but previously nationalised) utilities of electricity, gas, water and transport, each with membership of between 40% and 50% of employees. The lowest densities are in services such as accommodation and food (4%), estate agents (9%), wholesale and retail (12%), and construction (14%).

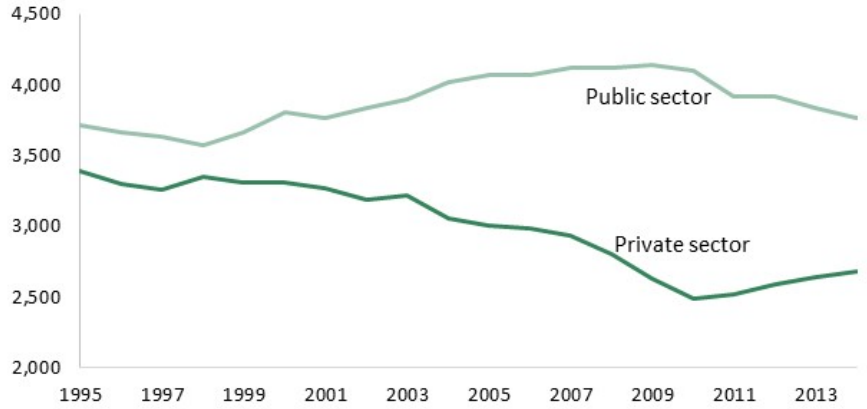
Trade union density by industry, 2014

% of UK employees who are trade union members



Union membership is much more common in the public than private sector; in the public sector 54% of employees are in a union compared with just 14% in the private sector. However, when comparing 2013 and 2014, we can see that membership levels in the public sector fell by almost 80,000 (although this was offset by an increase in the private sector):

Trade union membership by sector in the UK
Thousands



The Department for Business, Innovation and Skills (BIS) has produced its own estimates of working days lost in the sectors covered by the Bill's "important public services" provisions, based on the above ONS data on working days lost by industry as well as information received by the Department:

> The Labour Disputes Survey groups certain sectors together when collecting data. For example, working days lost in transport are collected with those lost in storage, information and communication. Health and social work are also amalgamated for these purposes. We will assume that working days lost in these groups are entirely in the sector affected by the 40% approval threshold. We will test this assumption through the consultation process, and it does not affect our data on the Border Force since it comes from an alternative source.[26]

The BIS estimates are set out in the impact assessment (IA) accompanying the Bill:

BIS: estimated working days lost per sector

	Transport, storage, information and communication	Education	Health and social work	Border force
2010	76,000	5,400	0	8,810
2011	18,600	654,500	221,400	5,342
2012	28,400	39,300	4,100	2,588
2013	23,700	215,000	3,700	1,551
2014	24,900	312,700	36,300	2,985
5 year total	171,600	1,226,900	265,500	21,276
5 year average	34,320	245,380	53,100	4,255

Source: BIS, *Ballot thresholds in important public services consultation: impact assessment*, July 2015, p10

[26] BIS, *Ballot thresholds in important public services consultation: impact assessment*, July 2015, p10

3.1 Impact on productivity

The IA also discussed the relationship between strikes and productivity:

> The Office for National Statistics (ONS) judgement is that the public sector strike on 30 November 2011 is likely to have had some impact on GDP in the fourth quarter. ONS did not measure the effect on GDP directly due to the difficulty around estimating the impact. Information from the ONS's Labour Disputes Inquiry, suggests that nearly one million working days were lost, representing about 0.2 per cent of the total number of working days for the public sector for the quarter.
>
> HM Treasury estimated prior to the strike that a closure of two-thirds of state schools would lead to a 3-4% decrease in private sector output for the duration of the strike.
>
> This formed part of an overall estimate of a £480 million decrease in output as a result of the strike. Around one third of this was caused by the knock-on impact of school closures, leading to an estimate of £160 million in these indirect impacts. This figure represents the scale of knock-on impact to the wider economy of a national education strike.[27]

The ONS analysis cited above, published after the strike, also discussed the impact of the November 2011 strike on[28]

> output or production of those businesses indirectly affected by the strike (for example, employees having to take a day off to provide child care).

The ONS concluded that the impact "is difficult to assess but is likely to have resulted only in moving activity within the quarter".[29] The ONS also looked at the "lost output or production of those sectors directly affected by the strike (for example, health, education, public administration)" and noted a small effect on output:

- health sector output is in part measured by the number of operations and there are reports of delays as a result of the strike, thus reducing the number of operations (and therefore output) in the month. The impact is likely to have been small, even if we assume that there was no catchup. A loss of one day's activity accounts for about 1.5 per cent of activity in the quarter and the extent of the disruption - looking at the number of operations which were postponed - was relatively small when considering the total number of operations in one day. In turn, this is quite a small part (about 16 per cent) of the health sector.
- education output is measured by the number of pupils, adjusted for attendance. In practice strike days are often made up or partly made up (for example, by adjusting teacher training days) so that the overall needs of the curriculum are still met. There is no specific adjustment made for strike days in the official estimates so there is no impact on education output.
- public administration is measured by the number of staff (on a full-time equivalent basis). The strike has no measured

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27 Ibid., p4

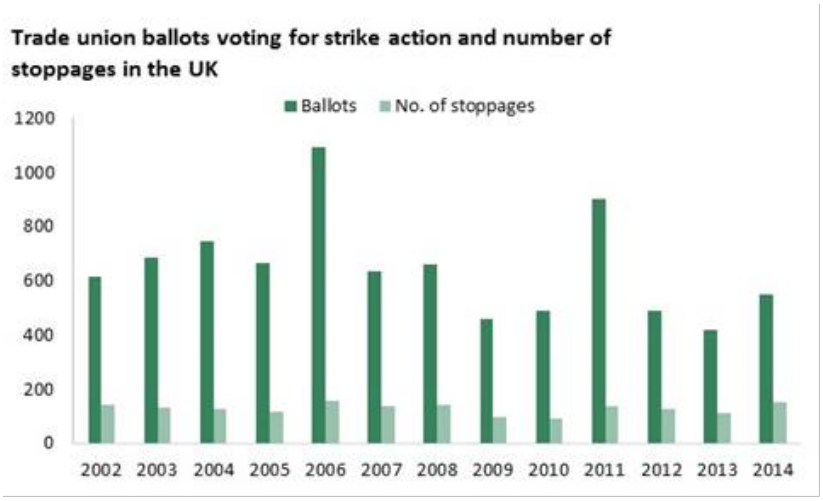
28 'Public sector strikes disrupt services across England', BBC News website, 30 November 2011

29 ONS, *Gross Domestic Product Preliminary Estimate, Q4 2011*, January 2012, pp2-3

> impact on the data. The overall impact … on GDP is therefore likely to be small.[30]

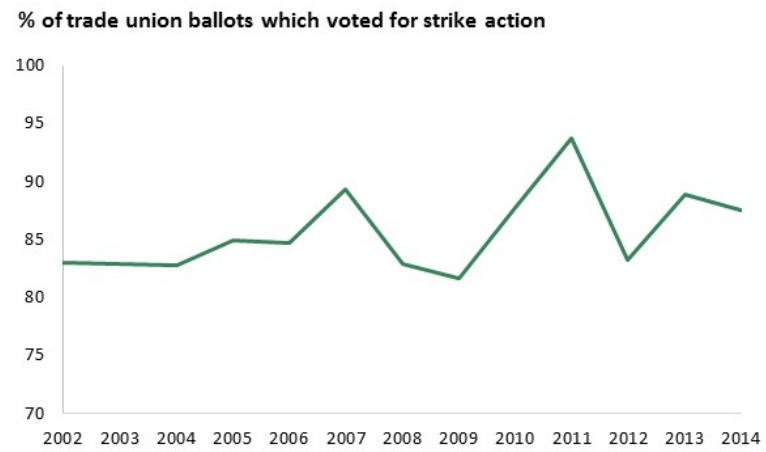
3.2 Work stoppages and strike ballots

Another way of assessing the impact of industrial action is to look at the number of work stoppages. By comparing the number of work stoppages with the number of successful strike ballots we can obtain a picture of how often votes for action translate into work stoppages.



The long-standing trend is that there are significantly fewer stoppages than ballots that vote for a strike, suggesting that ballots are often used as a negotiating tool without leading to industrial action. Between 2002 and 2014 the highest number of ballots voting for strike action was 1,094 in 2006, when there were just 155 stoppages; this represented 14.2% of the ballots which voted for strike action. The latest figures for 2014 show that there were 550 trade union ballots that voted for strike action as compared with 151 work stoppages; 27% of the number of ballots that voted for strike action.

In 2014 there were 650 industrial action ballots. Of these, 628 called for strike action; 550 of those saw union members vote for a strike. Since 2002, the highest proportion of ballots which voted for strike action when called was in 2011 when 94% of ballots voted for a strike.



30 ONS, *Gross Domestic Product Preliminary Estimate, Q4 2011*, January 2012, pp2-3

3.3 Benefits of industrial action

It is difficult to estimate the benefits of industrial action, as to do so relies on inferring a causal relationship between action, or the prospect of it, and changes to collectively bargained terms and conditions. While the data above showing fewer work stoppages than ballots voting for strikes suggests the threat of industrial action may be sufficient to help unions achieve their aims, those figures are not accompanied by qualitative data on the outcome of negotiations.

Moreover, whether or not a change to terms is seen as beneficial depends on one's perspective. For example, pay has been the principal cause of labour disputes for the past 10 years; "in 2014 89% of working days lost were due to disputes over pay, accounting for 57% of all stoppages".[31] While employees and unions might see the achievement of higher wages as beneficial, employers paying those wages may not. Indeed, this difference of perspective led to significant debate during the 1950s at a time of high employment, when union-driven wage growth was associated with a balance of payments problem.[32] It is, therefore, difficult to identify benefits of industrial action without being either speculative or partial.

However, there are some generally accepted benefits of collective bargaining associated with the ability to participate in industrial action. The most central of these is a rebalancing of power between workers and their employers. In their leading text on labour law, Deakin and Morris write:

> On the workers' side there are compelling reasons for collective action. In advanced industrial societies the employer almost always has greater economic and social power than any individual worker ... for workers in general to have any effective power in the employment relationship they must join together to further their demands on a collective basis; only then can they stand any chance of counterbalancing the power of the employer.[33]

Some argue that collective bargaining depends on the possibility of industrial action, as "The right of workmen to strike is an essential element in the principle of collective bargaining".[34] When the Royal Commission on Trade Unions and Employers' Associations reported in 1968 it noted that industrial action "gives reality to collective bargaining in a free society".[35] If that is so, the ability to coordinate industrial action can be seen as a precondition of the benefits of collective bargaining. It is for this reason that a positive right to strike is recognised in many national constitutions and seen by some as a component of *The Freedom of Association and Protection of the Right*

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31 ONS, *Labour disputes: annual article 2014*, 16 July 2015, p16
32 Davies and Freedland, 1993, op. cit., p116
33 Deakin and Morris, op. cit., pp771-772
34 *Crofter Hand Woven Harris Tweed v Veitch* [1942] AC 435, p463
35 *Report of the Royal Commission on Trade Unions and Employers' Associations*, Cmnd 9623, June 1968, p94

to Organise Convention, 1948 (No. 87), ratified by the United Kingdom on 27 June 1949.[36]

Some of the most significant employment rights have been linked to collective bargaining. For example, Deakin and Morris record that collective agreements were the "principal mechanism for the regulation of the basic working week for manual workers from the 1920s" and

> Sector-level collective bargaining also achieved gradual improvement to holiday and leave rights. In the early 1970s a basic entitlement to 8 days of paid public holidays and 3 weeks' paid leave per employee was established more or less throughout the economy by this route. A general 4-week entitlement was achieved in the early 1980s, and some sector agreements subsequently achieved a 5-week entitlement. It is largely thanks to collective bargaining that the tradition of respecting 'bank holidays' has been widely followed[37]

There have also been some changes to terms and conditions and the law which have been attributed to industrial action and are widely seen as beneficial. Perhaps the most famous example is the *Equal Pay Act 1970:*

> Despite the progress in Europe and internationally, the UK took its time in developing and implementing equal pay legislation that met international and European employment standards. While the Conservative Government implemented a policy of equal pay for 'like work' in the non-industrial Civil Service in 1955, it took the UK 19 years to ratify the ILO Convention and therefore be legally bound by its provisions ... The Labour Government finally entrenched equal pay into law in 1970. This followed significant organised action by female sewing machinists at the Ford factory in Dagenham in 1968 and the National Joint Action Campaign Committee for Women's Equal Rights in 1969. The Labour party had included a Charter of Rights for all employees in its 1964 manifesto that included the right to equal pay for equal work. After six years, this took the form of the Equal Pay Act….[38]

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36 Two of the International Labour Organisation's supervisory bodies consider Convention No. 87 to infer a right to strike, namely the Governing Body Committee on Freedom of Association and the Committee of Experts on the Application of Conventions and Recommendations

37 Deakin and Morris, op. cit., p334

38 New Joint Negotiating Committee for Higher Education Staff, *The Gender Pay Gap: A Literature Review*, 2011, p8

4. Industrial action ballots

Summary

The Bill proposes two reforms to industrial action ballots: a 50% minimum turnout requirement for all ballots, and a 40% minimum support requirement for industrial action in defined "important public services".

4.1 Introduction

The *Trade Union and Labour Relations (Consolidation) Act 1992* ("the 1992 Act") affords trade unions a statutory immunity against the normal legal consequences of organising industrial action, provided, among other things, the action is authorised by a postal ballot. Action will be authorised if a simple majority of those voting support it and the union has conducted the ballot in accordance with statutory procedural requirements.

The Conservative Party manifesto pledged that a Conservative government would introduce strike turnout thresholds for all ballots, and stricter requirements for strikes in "essential public services":

> Strikes should only ever be the result of a clear, positive decision based on a ballot in which at least half the workforce has voted. This turnout threshold will be an important and fair step to rebalance the interests of employers, employees, the public and the rights of trade unions. We will, in addition, tackle the disproportionate impact of strikes in essential public services by introducing a tougher threshold in health, education, fire and transport. Industrial action in these essential services would require the support of at least 40 per cent of all those entitled to take part in strike ballots – as well as a majority of those who actually turn out to vote.[39]

The Bill would introduce these thresholds, applying them to strikes and action short of a strike. **Clause 2** would introduce the 50% turnout requirement. In order for a ballot to authorise a strike or action short of a strike 50% of union members entitled to vote in the ballot must have done so. **Clause 3** would introduce a 40% support requirement for industrial action in defined "important public services" (e.g. health, education and fire services). Ballots in these services would need to secure the support of at least 40% of those eligible to vote; this would apply together with the 50% turnout requirement and the requirement for a simple majority of those who vote.

4.2 Current law

In the UK, trade unions and workers do not enjoy a right to strike insofar as the term "right" is conventionally understood. Rather, unions have a statutory immunity from liability for some of the normal legal consequences of industrial action provided certain criteria are met,

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[39] *Conservative Party Manifesto 2015*, p18

including that the action is "in contemplation or furtherance of a trade dispute"[40] and authorised by a properly conducted ballot.

The statutory provisions governing industrial action ballots were introduced by the *Trade Union Act 1984* and are now contained in sections 226 to 235 of the 1992 Act. For a union to be protected from liability it must conduct a secret postal ballot of "all the members of the trade union who it is reasonable at the time of the ballot for the union to believe will be induced by the union to take part" in the action, and no others.[41] The voting paper must contain at least one of two questions:

> 1. a question … which requires the person answering it to say, by answering "Yes" or "No", whether he is prepared to take part or, as the case may be, to continue to take part in a **strike**;
>
> 2. a question … which requires the person answering it to say, by answering "Yes" or "No", whether he is prepared to take part or, as the case may be, to continue to take part in industrial **action short of a strike**.[42]

In order for the vote to form the basis of immunity in the case of a strike, the relevant majority is the majority of those who vote on the first question, who must answer "Yes". This need not be a majority of those participating in the ballot (because some might vote only on the second question) nor does it need to be a majority of balloted union members.

The law is supplemented by *The Code of Practice on Industrial Action Ballots and Notices* (2005).[43] While the Code has no legal force it may be taken into account by courts when determining a union's compliance with the law. The Code deals with procedural and practical matters such as establishing the ballot constituency, distributing the ballot papers and communicating with union members.

Important public services

Aside from specific prohibitions of industrial action applying to certain groups of workers (e.g. the police and armed forces[44]) UK law does not make any distinction in the balloting process as between workers generally and workers in important public services. Deakin and Morris summarise the UK approach:

> In many countries workers in 'essential services', or in the public sector, have been subject to additional restrictions in relation to their capacity lawfully to take industrial action. Restrictions on the former are determined by reference to the importance of the service to the community; the latter are based upon the notion of the state as 'sovereign employer'. Labour law in Britain has never followed either of these approaches: there are particular groups of workers for whom the distinctive restrictions apply but these restrictions were introduced at differing times for different

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40 *Trade Union and Labour Relations (Consolidation) Act 1992,* section 219(1)
41 Ibid., section 227(2)
42 Ibid., section 229(2)
43 DTI, *Code of Practice: industrial action ballots and notice to employers*, July 2005
44 *Police Act 1996*; *Incitement to Disaffection Act 1934*

> reasons; they are not the product of an integrated strategy towards public or essential services.
>
> …
>
> The traditional British strategy in these areas centred upon invoking emergency powers to lessen the impact of industrial action once it had been taken rather than attempting to forestall in in the first place. The Emergency Powers Act 1920 empowered the government, on proclaiming a state of emergency, to introduce measures to 'secure the essentials of life to the community' when the supply and distribution of specified commodities was interrupted or transport dislocated. It has also legitimated the use of troops to replace striking workers.[45]

The *Emergency Powers Act 1920* created powers to ration resources during periods of emergency, including industrial action, and has since been replaced by the *Civil Contingencies Act 2004* which created further powers. Under the 2004 Act a Minister may make regulations to, for example, protect or restore facilities for transport or health, or to protect human life, health or safety. One of the preconditions for the exercise of this power is that an emergency has occurred, defined in section 1 to include "an event or situation which threatens serious damage to human welfare in a place in the United Kingdom". Alongside this, the government may replace striking workers with military personnel:

> Integral to contingency planning in the industrial sphere has been the use of troops to replace striking workers, a strategy dating back to the nineteenth century. Since 1939 the Government has had a standing power, now contained in the Emergency Powers Act 1964, to deploy troops on 'urgent work of national importance' without proclamation of emergency. Troops have been used to replace workers in dispute on over 30 occasions since 1945, most recently during a firefighters' dispute in 2002/2003. On some occasions (in 1979, 1981, 1982 and 1989-1990) the police have been used to replace ambulance workers in dispute, although their deployment for this purpose is of dubious legal and constitutional propriety.[46]

Employment Relations Act 2004

Although industrial action ballots must be conducted by post, section 54 of the *Employment Relations Act 2004* enables the Secretary of State to amend this requirement by order, subject to the affirmative resolution procedure. The order must list "permissible means" of voting in the ballot (which must include postal voting). A "responsible person" would be specified to determine whether or not one or more permissible means would apply to the conduct of the ballot. The Secretary of State must consider that the permissible means meet the "required standard", such that:

- those entitled to vote have an opportunity to do so;
- votes cast are secret; and
- the risk of any unfairness or malpractice is minimised.

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45 Deakin and Morris, op. cit., pp1116-1117, 1033
46 Ibid., p1118

4.3 Criticism of the current law

The law on industrial action ballots has been criticised, on the one hand, as being overly complex and prescriptive, and on the other, for authorising strikes on the basis of low voter turnout.

Business representatives have long argued that the law should protect industrial action only if it is supported by a significant proportion of those entitled to vote, particularly if the action interferes with the provision of public services. The Confederation of British Industry has for years argued that strike ballots should require the support of at least 40% of balloted members.[47] Recently, during strikes by workers on the London Underground, the Mayor of London argued that

> We need a ballot threshold – so that at least 50 per cent of the relevant workforce has to take the trouble to vote, or else the ballot is void.[48]

Trade unions respond that strike ballots are already highly vulnerable to being rendered void by technical errors, even if they show support from a substantial majority of their members. Len McCluskey, General Secretary of Unite, has said:

> judges, at the behest of employers eager to exploit every subclause and nuance in the deliberately complex legislation, handed down one injunction after another to the point where it is no exaggeration to say that the right to strike in this, the first country of free trade unionism, was, and is, hanging by a thread.[49]

John Hendy QC, a prominent trade union lawyer, said that new restrictions would add to the

> complex existing regulations on trade unions in general and industrial action in particular. Failure to comply – even on the smallest technical point – often results in a court injunction preventing strike action from taking place.[50]

The European Committee of Social Rights has concluded that "the scope for workers to defend their interests through lawful collective action is [in the UK] excessively circumscribed".[51] In addition to this complexity, unions argue that the requirement to ballot members by post engenders low voter turnout.[52] A number of unions and the Institute of Directors have argued for the implementation of electronic balloting, the latter advocating this in return for unions accepting ballot thresholds.[53]

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47 'Boris Johnson calls for new laws to curb strikes', *The Guardian*, 4 October 2010; 'Fit for purpose?', CBI website, 28 May 2015 (accessed 1 September 2015)

48 'I don't begrudge Bob Crow his holiday but I do mind his strike', *The Telegraph*, 2 February 2014

49 McCluskey, L., 'Can Unions Stay Within the Law Any Longer?', *Industrial Law Journal,* Vol.44, No.3, September 2015

50 'More anti-union legislation in the UK', *International Union Rights*, Vol. 22, Issue 2, 2015, p23

51 European Committee of Social Rights, *European Social Charter European Committee of Social Rights Conclusions XIX-3 (2010) (UNITED KINGDOM)*, December 2010, p15

52 'More anti-union legislation in the UK', *International Union Rights*, Vol. 22, Issue 2, 2015, p23

53 IoD, *Big Picture - Winter 2012*, p6

4.4 Recent government policy

The Government is consulting on some of the measures in the Bill, including the proposal to introduce a 40% support requirement in important public services. The consultation document sets out the policy behind both that proposal and the 50% turnout threshold:

> Disruptive industrial action should not take place on the basis of low ballot turnouts. Such action does not always represent the views of all the union members and is undemocratic. The Government therefore is introducing a new minimum requirement that at least 50% of union members entitled to vote must turn out for a ballot. A simple majority (i.e. over 50% of votes cast) must be in favour in order for action to go ahead. This ensures that strikes can only take place on the basis of clear support from union members.
>
> 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 that they can get to work on time because the buses and trains are operating normally.
>
> 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.[54]

The reference to "up to date and audited membership lists" concerns measures introduced by the Coalition government, in the *Transparency of Lobbying, Non-Party Campaigning and Trade Union Administration Act 2014*. Part 3 of the Act introduced a requirement for trade unions to send to the Certification Officer an audit certificate, stating whether the union had complied with its duty to maintain a register of members.[55]

4.5 Historical background

Early proposals to introduce ballots: 1920-1970

Prior to its introduction by the *Trade Union Act 1984*, compulsory balloting had been considered on various occasions since the 1920s.[56] The 1920s were a period of significant industrial unrest, with dockworker strikes in 1924 that led the newly formed Labour government to consider using emergency powers,[57] and strikes following wage reductions in the coal mining industry, culminating in

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54 BIS, *Trade Union Reform: Consultation on ballot thresholds in important public services*, 2015, pp3-4

55 For an explanation of the role of the Certification Officer, see section 10 below

56 For a more detailed overview of the history of strike ballots, see: Elgar, J., Simpson, B., *Industrial Action Ballots and the Law*, Institute of Employment Rights, January 1996

57 Cabinet Papers, 21 February 1924 (see p177, para 2(e)), National Archives website (accessed 26 August 2015)

the 1926 General Strike during which almost 162 million working days were lost. There was a growing concern among some Parliamentarians at the time that union members' views on strike action were overridden by those of their leaders. Conservative Members argued that a legal requirement to ballot union members prior to industrial action would free "the worker from the tyranny of trade union leaders."[58] Legislative proposals were brought forward to introduce ballots, including a proposed amendment to the 1927 *Trade Disputes and Trade Union Bill* which would have introduced ballots with a 60 per cent turnout requirement. The amendment failed to become law, largely because it was opposed by the Conservative government. The Attorney-General argued that union members would support calls for strikes, strengthening the "hands of extremists" and weakening

> the hands of the more moderate leaders who would be anxious to arrive at a settlement. The result would be that a strike, instead of being averted, would be rendered more probable by reason of this proposal.[59]

Strike ballots were considered again in 1958, when an influencial group of Conservative lawyers published a pamphlet on trade unions entitled *A Giant's Strength*.[60] The authors rejected the idea for essentially the same reasons as those advanced by the Attorney-General in 1927:

> Once a ballot is declared in favour of a strike or particular demand, it would be extremely difficult for the union to accept less favourable terms…. Furthermore, it would encourage unofficial strikes which, since the war have far exceeded official strikes in numbers and in the damage they have caused.[61]

The Conservative Opposition revisited the issue in a 1968 pamphlet entitled *Fair Deal at Work*, which argued for a system similar to that prevailing in North America under the 'Taft-Hartley Act' of 1947.[62] Taft-Hartley empowered the President, if he considered that an industrial dispute may "imperil national health or safety", to appoint a Board of Inquiry into the dispute and require the Attorney-General to issue an injunction prohibiting a strike or lockout for eighty days. If after sixty days the matter had not been settled a secret ballot would be conducted among employees to determine whether they accepted the employer's most recent offer. If the offer was rejected the parties would be free to resume industrial action once the injunction expired. *Fair Deal at Work* proposed broadly the same system to that under Taft-Hartley, along with a number of other proposals designed to pre-empt the report of a Royal Commission established in 1965 to inquire into the regulation of industrial relations, chaired by Lord Donovan. The Donovan Commission reported in June 1968, declining to recommend compulsory balloting:

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58 HC Deb 14 June 1927 c944
59 HC Deb 14 June 1927 c946
60 Inns of Court Conservative and Unionist Society, *A Giant's Strength: some thoughts on the constitutional and legal position of trade unions in England*, 1958
61 Ibid., p24
62 Conservative Political Centre, *Fair Deal at Work: the Conservative approach to modern industrial relations*, April 1968

> We do not recommend that it should be compulsory by law, either generally or in certain defined cases, to hold a ballot of the employees affected upon the question of whether strike action should be taken. We think it preferable that trade union leaders should bear, and be seen to bear, the responsibility of deciding when to call and strike and when to call it off.[63]

The Commission opposed the idea for the same reasons as those advanced by both the Conservative government in 1927 and Conservative lawyers in 1958:

- there was no evidence to suggest workers were less likely than their leaders to vote for strike action;
- ballot laws could not apply to unofficial strikes; and
- balloting workers could interfere with or delay settlement of disputes.[64]

In Parliamentary debate following publication of the report, the Conservative Opposition's employment spokesperson, Robert Carr MP, said "in the Opposition's view, the Commission's recommendations are in toto seriously inadequate to the scale and urgency of the problem".[65] Carr argued in support of the measures suggested in *Fair Deal at Work*. Two years later Carr became Secretary of State for Employment in Edward Heath's Conservative government and the *Fair Deal at Work* proposals resurfaced. Prior to that, the Labour government's response to Donovan, the 1969 White Paper *In Place of Strife,* recommended introducing strike ballots.

Barbara Castle, then Secretary of State for Employment, drafted *In Place of Strife* in some secrecy with the then Prime Minister, Harold Wilson.[66] Commentators have attributed to Wilson the inclusion of ballots among the paper's proposals. Peter Jenkins, a political journalist at the time, wrote the following in his 1970 book *The Battle of Downing Street*:

> There was one controversial proposal in Barbara Castle's White Paper which bore the imprimatur of the Prime Minister himself. This was the proposal for compulsory ballots before strikes could be called. The Donovan Commission had rejected the arguments in favour of this reform … Barbara Castle and her expert advisors were impressed by Donovan's arguments on this point but the Prime Minister had become strongly attached to the idea of ballots. The reason for this was the situation which had arisen when a national engineering strike had been threatened that October. The strike had been called by the Amalgamated Engineering and Foundry Worker's Union … According to Gallup 48 per cent of the AEF members were against the strike and 43 per cent in favour. Two other unions with large interests in engineering balloted their members and discovered substantial majorities against. The AEF refused to conduct a ballot. The strike was in the end averted … The significance of the incident was the effect on the thinking of Harold Wilson. Had it taken place the strike would have wrecked the Government's endeavours to swing into balance of payments surplus on the

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63 *Report of the Royal Commission on Trade Unions and Employers' Associations*, Cmnd 9623, June 1968, pp114-115
64 Ibid.
65 HC Deb 16 July 1968 c1260
66 Jack Straw, 'Socialism's First Lady', *New Statesman*, 28 July 2003

> basis of a devalued pound. This appalling damage to the economy could have been done against the wishes of the members of the chief union concerned. … For these reasons Harold Wilson pressed strongly for compulsory strike ballots to feature prominently in Barbara Castle's White Paper.[67]

In Place of Strife proposed to empower the Secretary of State to require ballots in cases where s/he believed a strike would threaten the economy or public interest and there was doubt as to whether it commanded union member support.[68] The proposal was subsequently dropped although the Conservative government, elected in 1970, introduced a form of compulsory balloting.

The Industrial Relations Act 1971

The *Industrial Relations Act 1971* enacted emergency powers to require strike ballots, based on the proposals in *Fair Deal at Work*:

> The Emergency Procedures in sections 138-145 of the IRA contained a wealth of complex detail. Like the provisions in the American federal 1947 'Taft-Hartley' Act on which they were based, they also included a provision for a 'cooling off period', but unlike the American law the cooling off period and strike ballot were separate procedures which the government could activate by way of application to the National Industrial Relations Court (NIRC). On the only occasion on which they were used, the pay dispute in British Rail in 1972, the government in fact successfully applied to the NIRC first for a cooling off period and then for a strike ballot. During the period while the Commission on Industrial Relations was carrying out the ballot, industrial action was proscribed and in the 1972 rail dispute no action took place. The result of the ballot was an overwhelming majority in favour of industrial action.[69]

The 1971 Act's provisions were repealed in 1974 by the succeeding Labour government. However, compulsory strike ballots were a prominent part of Conservative Party policy while in Opposition, particularly during the industrial unrest of the Winter of Discontent, and were enacted in 1984 under Margaret Thatcher's Conservative government.

Conservative government: 1979-1997

Following the election in 1979 of a Conservative government, a series of enactments first encouraged, then required, strike ballots. Section 1 of the *Employment Act 1980* provided for payments from public funds "towards the expenditure incurred by trade unions in respect of" ballots conducted for a range of purposes, including "obtaining a decision or ascertaining the views of members of a trade union as to the calling or ending of a strike or other industrial action".[70] Following this support for voluntary balloting, the 1981 Green Paper *Trade Union Immunities* proposed the possibility of legislating to require ballots:

> The increasing damage industrial action can inflict on the community has led to demands that the decision of a trade union

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67 Jenkins, P., *The Battle of Downing Street*, 1970, pp33-34
68 *In Place of Strife*, Cmnd 3888, January 1969, p30
69 Elgar, J., Simpson, B., *Industrial Action Ballots and the Law*, Institute of Employment Rights, 1996, p4
70 *Employment Act 1980*, section 1(3)

> to take such action should be reached only after fully consulting the wishes of its members. Too often in recent years it has seemed that employees have been called out on strike by their unions without proper consultation and sometimes against their express wishes … This has led to increasing demands for trade unions to hold secret ballots before a strike is called. A number of proposals have been advanced to ensure that industrial action is called by a trade union only when it demonstrably has the support of the union members concerned in a secret ballot. In particular, it has been proposed that immunity for calling industrial action should be made dependent in certain circumstances on the union having had a ballot of the members to determine whether the majority wish that industrial action to be taken.[71]

Compulsory strike ballots were proposed once again in 1983, in another Green Paper, *Democracy in Trade Unions*.[72] The government was by this point convinced of the case for compulsory ballots, although unsure of how to go about introducing them:

> The argument of principle for strike ballots is therefore simple and unanswerable. The rules of some trade unions already provide for them and there is evidence that union members increasingly wish and expect to be consulted by voting in secret before they are called out on strike. The need and the scope for unions to respond to this pressure from their members is clear. The Government has taken steps which enable unions to be relieved of the cost of holding such ballots. The questions to be examined … are whether strike ballots should be made compulsory by law, how this might be achieved and what the effects of such legislation might be in practice.[73]

The government decided that the best approach to introducing compulsory industrial action ballots was to make ballots a precondition of trade unions' statutory immunity for the tort of inducing a breach of contract (which union-organised industrial action invariably involves).[74]

Compulsory industrial action ballots were eventually introduced by the *Trade Union Act 1984*, which passed through Parliament during the early months of the miners' strike that ran from mid-1984 to March 1985. By making ballots a precondition of statutory immunity, employers would be able to enforce balloting by seeking an injunction against industrial action that was not supported by a ballot.

The law on industrial action ballots was amended on several further occasions. The *Employment Act 1988* provided for separate ballots at different places of work and added to the detail required on the ballot paper. The *Employment Act 1990* added to the matters for which unions lost immunity if they failed to hold ballots. The *Trade Union Reform and Employment Rights Act 1993* required ballots to be fully postal and that any ballot of more than 50 union members would require the appointment of a scrutineer. It also repealed the provision for state financial assistance in relation to ballot expenditure.

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71 *Trade Union Immunities*, Cmnd 8128, 1981, p62
72 *Democracy in Trade Unions,* Cmnd 8778, 1983
73 Ibid., p17
74 See above section on 'the development of industrial action legislation'

Labour government: 1997-2010

Labour was elected to government following a period that saw a substantial decline in trade union influence:

> In 1980 65% of workers were union members; by 1998 the figure had fallen to 36%. In 1980 64% of establishments recognised a union in respect of at least some of those working there; by 1998 the figure had fallen to 42%. In 1980 about 70% of employees' wages were set by collective bargaining; by the mid-nineties this had fallen to 45%.
>
> …
>
> whereas the Labour governments of 1964 to 1970 had to deal with a rising tide of concern, sometimes verging on panic, over levels of short unofficial action … whilst the government of 1974 to 1979 both inherited and bequeathed a number of high-profile and intractable official disputes, the Labour government of 1997 inherited and maintained a low level of industrial conflict. At least since 1992 the UK strike rate had been below the average for both the European Union and the developed countries which were members of OECD. Thus, government elected in 1997 was free of significant political pressure from the electorate to 'do something' about strikes.[75]

It was clear prior to the 1997 General Election that a Labour government would retain many of the features of industrial action law enacted under the previous Conservative governments, including the law on strike ballots. The Labour Party's 1997 manifesto stated:

> In industrial relations, we make it clear that there will be no return to flying pickets, secondary action, strikes with no ballots or the trade union law of the 1970s. There will instead be basic minimum rights for the individual at the workplace, where our aim is partnership not conflict between employers and employees.
>
> …
>
> The key elements of the trade union legislation of the 1980s will stay - on ballots, picketing and industrial action.[76]

Following Labour's election to government, this position was reiterated in the White Paper, *Fairness at Work*:

> Laws on picketing, on ballots before industrial action and for increasing democratic accountability in trade unions have all helped to improve employment relations. They will stay.[77]

Despite maintaining broad continuity in this area, there were some significant changes under Labour, particularly: repeal of the requirement for unions to provide employers with the names of those due to participate in industrial action, which had been introduced under John Major's government in 1993,[78] and the introduction of unfair dismissal rights for those who participate in industrial action.[79] There was also some simplification of the arrangements for aggregate ballots where disputes involved more than one workplace, and an extension of the

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75 Davies, P., Freedland, M., *Towards a Flexible Labour Market: Labour legislation and regulation since the 1990s*, 2007, pp105-107
76 *Labour Party Manifesto 1997*
77 *Fairness at Work*, Cm 3968, May 1998, p10, para 2.15
78 *Trade Union Reform and Employment Rights Act 1993*, section 21
79 By the *Employment Relations Act 1999,* section 16

period during which industrial action must be commenced following the ballot; if the union and employer agreed, unions could have eight weeks within which to commence action, rather than the default four weeks.[80]

4.6 Restricting strikes in important public services

The possibility of restricting strikes in important public services is regularly raised when public services are disrupted by strike action. Although the Bill uses the term "important public services" previous debate has concentrated on the term "essential services" and, when concrete proposals were made for legislation, they foundered on the difficulty of defining an "essential service" alongside fears that they would prove counter-productive.

Green Paper, 1981

The aforementioned 1981 Green Paper, *Trade Union Immunities*, discussed the possibility of making it unlawful for certain groups of workers to take industrial action. It highlighted some of the difficulties:

> First, there would be great difficulty in deciding which groups of workers should be chosen and on what criteria. There are clearly dangers in going too wide or appearing to be inequitable. There are many views on which groups should be restricted but very little agreement, not least amongst those industries which are most frequently mentioned…. the interdependent nature of industry means that a case can now be made for regarding a strike by most groups of workers as threatening essential services or supplies.
>
> Secondly, the likely effects on industrial relations must be assessed. No group of workers would welcome the removal of a freedom to strike which has been hard won and long held. There would be the possibility of resistance and even industrial disruption if the law were changed on an issue of deeply held principle; this might be supported by trade unionists not directly affected by such restrictions.
>
> …
>
> These considerations suggest that there might be very great difficulties in making strikes by key groups of workers illegal. It is possible to argue that the most effective way of making progress on this question is through voluntary "no strike" agreements between management and unions in those sectors of industry where strikes might threaten the national interest.[81]

The proposal was not taken forward.

Green Paper, 1996

On 19 November 1996, partly as a response to an increase in industrial action in public services such as the London Underground and the Post Office, the government published a Green Paper, *Industrial Action and*

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[80] For a further discussion, see: Ewing, K., 'Freedom of Association and the Employment Relations Act 1999', *Industrial Law Journal*, Vol 28, No 4, 1999, pp293-296

[81] *Trade Union Immunities*, Cmnd 8128, paras 334-337, 1981

Trade Unions, which favoured legislation to "remove immunity from industrial action which has disproportionate or excessive effects":

> The Green Paper considers a number of options for restricting the scope for strikes in essential services: compulsory arbitration, a statutory requirement to cooperate with conciliation services; giving the Government powers to ban specific strikes; and making the calling of strikes a statutory tort in specified sectors. All of these have disadvantages. The Government's preferred option is to remove immunity from industrial action which has disproportionate or excessive effects. Clear criteria would be laid down in statute to help the courts determine what is unacceptable action, and the courts would rule on the effects of industrial action rather than the merits of the dispute.[82]

The Green Paper suggested that "disproportionate or excessive effects" might be defined as involving one or a combination of:

- risk to life, health or safety;
- threats to national security;
- serious damage to property or the economy; or
- significant disruption of everyday life or activities in the whole or part of the country.[83]

These proposals were "not well-received even by employers".[84] The CBI feared that they would be unlikely to resolve disputes and "could lead to more uncertainty in the workplace" and the Institute of Directors thought they were "impractical, unworkable and liable to create a field day for lawyers".[85] The proposals were taken no further.

1997 Conservative manifesto

In its 1997 manifesto the Conservative Party committed to remove immunity from strikes that had disproportionate or excessive effects, and to require strike action to be supported by a majority of all union members eligible to vote:

> Industrial relations in this country have been transformed. In so far as there is a still a problem it is concentrated in a few essential services where the public has no easy alternative and strikers are able to impose massive costs and inconvenience out of all proportion to the issues at stake. We will protect ordinary members of the public from this abuse of power.
>
> We will legislate to remove legal immunity from industrial action which has disproportionate or excessive effect. Members of the public and employers will be able to seek injunctions to prevent industrial action in these circumstances. Any strike action will also have to be approved by a majority of all members eligible to vote and ballots will have to be repeated at regular intervals if negotiations are extended.[86]

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82 Department of Trade and Industry, *Industrial Action and Trade Unions,* Cm 3470, November 1996, paras 3-4,
83 Ibid., para 2.5
84 Deakin and Morris, op. cit., p1119 (see footnote 638)
85 'CBI spikes anti-union ploy', *The Guardian,* 30 January 1997
86 Conservative Party General Election Manifesto, *You can only be sure with the Conservatives*, 1997, p31

Public Services (Disruption) Bill 2002 – Private Members' Bill

In the 2001/02 session of Parliament, Lord Campbell of Alloway, a Conservative peer, introduced a Private Members' Bill - the *Public Services (Disruption) Bill* - designed to prohibit excessive or disproportionate disruption of a public service by collective industrial action. The Bill was introduced in the Lords on 16 April 2002,[87] given a Second Reading on 22 May 2002[88] and passed by the Lords on 23 July 2002.[89] Although the Labour Government took no formal view for or against Private Members' Bills, Lord McIntosh, the Government spokesperson in the Lords, expressed a number of doubts:

> I start with the nature of the problem that is claimed to be before us. We have figures for industrial disputes in 2001—they come in calendar years. In the year 2001, 510,000 days were lost in industrial disputes. That is the seventh lowest figure since statistics started to be collected in 1891. We had 181 stoppages. That is the second lowest figure since those figures started to be collected in 1920.
>
> I must ask the question: what is the problem being identified of industrial disputes in the public sector? Clearly, there are threats of disputes. There are new leaders of public sector trade unions who have been elected on the basis of threatening greater militancy. But the facts do not bear out the claim that there is a new problem of industrial disputes in the public sector.
>
> The noble Lord, Lord Tebbit, when he took part in the debate on the Unstarred Question last month, said that 20 years ago when he was responsible for these matters he did not take the view that special restrictions should be placed on industrial action in public services. If that were true then, how much more is it true now? He was talking at a time when disruption in the public services was many times greater than it is today.
>
> …
>
> Behind all this—and the noble Lord, Lord McNally, was right to remind us—there is something fundamental about the right to strike. That applies to all people working in our society. We must have a fair system of rights and responsibilities. It is right for the Leader of the Opposition to remind us that the responsibilities of the public services are to their users—to the patients, the public sector travellers and to the school users. That must be balanced against the rights of those who work in public services. It will not be overcome by discrimination in the right to strike between public services and the rest.[90]

The Bill was sent to the Commons the day before the summer recess and failed to progress before Parliament prorogued in November 2002.

Public Services (Disruption) Bill 2003 – Private Members' Bill

Lord Campbell re-introduced his Bill during the 2002-03 session; it received its Second Reading on 9 January 2003.[91] Several peers who spoke in the debate argued that, although the Bill might not be perfect, it was important to give serious consideration to ways of protecting the

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87 HL Deb 16 April 2002 c824
88 HL Deb 22 May 2002 cc863-74
89 HL Deb 23 July 2002 c190
90 HL Deb 22 May 2002 cc 871-873
91 HL Deb 9 January 2003 cc1165-176

public from the potentially damaging effects of industrial action. The firefighters' strikes, which started in November 2002, lent urgency to the debate.

Lord McIntosh again pointed out that the Government took no formal view on Private Members' Bills, and said the "Government's face is not set against legislative action which deals with problems that are raised, correctly analysed and recognised in a proper consultation process".[92] However, his Lordship highlighted four defects in Lord Campbell's Bill:

> First, the Bill is not about strikes in the public services; it is about disruption to public services. It therefore includes any industrial action that might affect public services, whether in the private or public sectors. It is almost impossible to imagine any industrial action that would not in some way affect the public sector, even if it is in the private sector, as almost all industry and services in this country are involved with the public sector as a customer or a supplier. So the Bill is far too widely drawn in that respect.
>
> Secondly, the Bill is not just about strikes; it is about strikes at the instigation of a trade union. Therefore, it is only about official strikes and not wildcat or unofficial strikes. I am sure that that issue will be recognised as being a very serious defect because that makes it not just possible but likely that the provisions of the Bill would be evaded.
>
> Thirdly, the Bill talks about disproportionate effects on the public. That is described as action that is excessive to the needs of a resolution of a dispute. That raises huge problems of definition. Most importantly, it leaves the courts to decide what are essentially economic or political issues and not legal issues. The noble Lord, Lord Campbell, as a distinguished lawyer himself, would in other circumstances be the first to resist such pressure.
>
> Fourthly, the Bill refers to mandatory arbitration by the Central Arbitration Committee. The whole point about the Central Arbitration Committee is that of course it protects employee's rights to strike, but it also protects an employers' right to manage. Turning the Central Arbitration Committee into the creature of a mandatory process would be a distortion of its work. There is no reference in the Bill to the work of ACAS. If any reference is made to ACAS, it will become clear that it is profoundly against compulsion.[93]

A Liberal Democrat peer, Lord McNally, accused the Government of complacency, arguing that there was a need to limit the impact of strikes on the general public:

> At the heart of the matter is the concern about the Government's attitude to the industrial action that causes most damage to the public rather than to the employer. That is what the public do not understand. There is a kind of secondary picketing that was not touched by the Thatcher reforms. Tube strikes do damage not the managers of London Tube but hundreds of thousands of commuters. Teachers' strikes do damage not directors of education but children, mums and parents who are trying to manage their families. Of course, the striking firefighters do not damage the fire authorities but endanger the public at large.

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92 HL Deb 9 January 2003 c1174
93 HL Deb 9 January 2003 cc 1174-5

> Without wanting to remove the right to strike, we must get into our framework of industrial relations some way of avoiding the innocent general public being dragged into the firing line of disputes. That is something that the Government have neglected to do. On the part of new Labour, there has been none of what I would describe as post-Thatcherite thinking on industrial relations. The Government are simply willing to take the benefits of the Thatcher legislation and let sleeping dogs lie. Unfortunately, the dogs are waking up and beginning to bark. What is needed from the Government is some sense of urgency and the holistic approach….[94]

The Bill was passed in the Lords and sent to the Commons on 25 March 2003; it failed to progress any further.

4.7 The Bill

Clause 2 would introduce the new 50% turnout requirement. It would amend section 226 of the 1992 Act, which requires a ballot prior to industrial action. It would insert a new provision into section 226(2)(a), the effect of which would be that the section would read in part:

> Industrial action shall be regarded as having the support of a ballot only if … *at least 50% of those who were entitled to vote in the ballot did so*, *and* in which the majority voting in the ballot answered "Yes" to the question applicable

Thus, industrial action would only be authorised by a ballot if at least 50% of those balloted turned out to vote and a majority of those who voted, voted in favour of the action. For example, if 1,000 members are balloted, 500 members would be required to vote, and at least 251 would need to vote for action. If only 499 voted, even if all in favour of action, the ballot would be invalid.

Clause 3 would introduce the 40% support requirement in "important public services". The clause would amend section 226 of the 1992 Act, inserting new subsections (2A)-(2F). Where the majority of those balloted "are normally engaged in the provision of important public services, or activities that are ancillary to the provision of important public services" there would be a requirement for the ballot to secure the support of 40% of those entitled to vote. This would be in addition to the 50% threshold introduced by clause 2. The Bill Explanatory Notes provide an example:

> where 1000 union members make up the bargaining unit affected by the dispute, as per clause 2 the 50% participation threshold would need to be met: so at least 500 members would need to vote. The next test would be to determine whether the dispute was within an important public service and subject to the 40% threshold. If it was, then at least 40% of the 1000 members entitled to vote would need to vote in favour to enable industrial action. That means at least 400 members would need to vote in favour to enable action. A simple majority is still required in all ballots, so if all 1000 members had voted, then 501 votes in favour would be required to enable action.[95]

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94 HL Deb 9 January 2003 c1170

95 *Trade Union Bill Explanatory Notes*, page 4, para 17

To take the example further: if 1,000 members were entitled to vote, requiring 400 members to vote in favour, yet the ballot achieved a 50% turnout (i.e. 500 members), the ballot would require the support of 80% of those voting members.

The 40% support requirement would only apply to "important public services" as specified in regulations, which would be subject to the affirmative resolution procedure.[96] Under new section 226(2E) the only services that may be specified in the regulations are those that fall within the following categories:

- health services;
- education of those aged under 17;
- fire services;
- transport services;
- decommissioning of nuclear installations and management of radioactive waste and spent fuel; or
- border security.

The Delegated Powers Memorandum published alongside the Bill provides the justification for relying on secondary legislation:

> It is necessary to maintain a degree of flexibility in relation to this provision, in order to allow the Secretary of State to make the decision at the appropriate time to specify which roles or occupations within the affected sectors should be covered. This will also be the subject of a consultation, which will take place during the early passage of the Bill and will build an evidence base for the regulations. This clause may then be amended in light of the outcome of the consultation.
>
> It is also appropriate to make this provision by secondary legislation to allow the Secretary of State to make modifications to the list of services covered as circumstances change over time.[97]

Expected impact

At the time of writing, BIS has published an impact assessment (IA) on the proposed 40% support requirement in important public services, but not on the 50% turnout threshold.[98] A number of policy documents refer to an IA on the Bill's proposals as a whole but this is not yet publicly available.

As to the 40% support requirement, BIS estimate that if this is applied together with the 50% turnout threshold there would be 65% reduction in work stoppages. The calculation is based on a sample of 78 ballots across five years:

> BIS analysts used a sample of around 78 ballots held in the education, transport, health and fire sectors and the Border Force in the past 5 years which were covered in the press. Using this sample we estimate a reduction of work stoppages of around 65% when both the 50% turnout threshold and the 40% approval threshold are applied in tandem.[99]

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96 New section 226(2D) & (2F)
97 BIS, *Trade Union Bill: Delegated Powers Memorandum*, July 2015, p5
98 BIS, *Ballot thresholds in important public services consultation: impact assessment*, July 2015
99 Ibid., p9

Although the estimate includes fire services, the IA notes:

> it appears that every strike in the fire service in the past 5 years would have met the 40% threshold. For the purposes of this impact assessment we assume no reduction in working days lost in fire services.[100]

In terms of the costs unions will face familiarising themselves with the new law and ensuring they are compliant, BIS estimate these would amount to £3,223 per union.[101]

In an Opinion published on 18 August 2015, the Regulatory Policy Committee rated BIS's IA as "not fit for purpose".[102] On the IA's estimate of a 65% reduction in work stoppages, the RPC said:

> The IA does not provide sufficient evidence of the likely impact of the proposals to support the consultation. The IA lacks evidence to support many of the quoted figures. In particular, the critical assumption provided for the percentage reduction in strikes of 65% seems to be based entirely on previous voting behaviour i.e. we understood that the analysis assumes there will be no change in voting patterns (paragraph 78) following implementation of the proposals. However, the IA seems to contradict this by stating that the impact of the 40% threshold would be "…that turnout levels are likely to rise…" (paragraph 80). The Department needs either to provide further evidence to support the use of the 65% assumption, or estimate to what extent this number is likely to fall.[103]

A Salford Business School working paper analysed the potential impact of both the 50% turnout threshold and the 40% support requirement, when applied either together or separately.[104] The paper based its analysis on a database of 162 ballots involving 28 different trade unions, and found:

> Only 85 of the 158 strike ballots covered by the database reached the 50 per cent target, and the number of workers who 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. Even if you take out the large-scale 2011 public sector strikes, it still means 880,000 workers would, under the proposed legislation, no longer have been able to go on strike.
>
> As a result 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.
>
> 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, although these would not necessarily be affected by the proposed legislation which only applies to the specified 'important public services'.

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100 Ibid.
101 Ibid., p8
102 RPC, *Opinion reference number: RPC15-BIS-2402*, August 2015
103 Ibid., p2
104 Darlington, R., Dobson, J., *The Conservative Government's Proposed Strike Ballot Thresholds: The Challenge to the Trade Unions*, Salford Business School Working Paper, August 2015

- 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.

However there are important differences by sector:

- The proposed legislation would have had no effect on the Fire Service because all 11 strike ballots cleared the 40 per cent threshold with an average of 54 per cent of balloted workers supporting strike action.
- The picture is completely different in Health where only 2 of the 5 national strikes would have cleared the 40 per cent threshold. Of those that failed to meet the 40 per cent, only 20 per cent of eligible voters supported the action. It is the small specialist unions that achieved the highest turnout and high support for strike action.
- The picture in education is more nuanced; only 19 of the 29 strike ballots would have been able to go ahead, but while every ballot conducted in an individual school would have passed the 40 per cent threshold, only two national strikes did so and neither of these involved the main teaching unions.
- In transport, only 23 of the 44 strikes cleared the 40 per cent threshold, so the proposed legislation would have prevented half of transport strikes. However, again there was variation, for example, while the BA cabin crew ballots easily cleared the 40 per cent hurdle, a recent Greater London bus workers ballot would not, and while the proposed legislation would have little effect on strike ballots in the railway sector it would have prevented most strikes on London Underground.
- The one strike ballot that could be regarded as border security would have been prevented by the new legislation.

On the basis of the database evidence available, while the 50 per cent threshold would dramatically reduce the number of legally protected strikes, the introduction of an additional 40 per cent threshold for the 'important public services' would have very little further effect. Nonetheless, overall many unions will find the legislation will make it very difficult for them to mount officially sanctioned strikes as a means of challenging employers in national negotiations and in response to government-initiated austerity measures, especially those relating to national bargaining in the public sector.

The paper identifies some important contributory factors to more positive voting participation rates:

- There is a clear overall tendency for workplace, area or single employer ballots to obtain 'higher' turnouts and national ballots to obtain 'lower' turnouts.
- Unions with members who have close occupational identities and solidaristic loyalties also appear to often be able to generate relatively higher strike ballot votes than more general unions.

- There is evidence the role of union leadership - specifically the influence of left-wing leadership - can also be a positive enabling factor.[105]

The paper goes on to note that one of the potential consequences of the ballot thresholds could be that unions would rely more on so-called 'leverage' campaigns, which can involve the use of protests, social media and other campaigning tools to exert pressure on the employer (leverage tactics are discussed further below, in the section on picketing).[106] Law firm Pinsent Masons noted that "tightening the rules on industrial action" may make leverage campaigns "even more a 'weapon of choice' for the unions.[107] Len McCluskey, General Secretary of the trade union Unite, has said "let me emphasise Unite's continuing ongoing determination to operate ever more effectively within the law. An example of that is our 'leverage' strategy".[108] Mr McCluskey described Unite's leverage strategy in the following terms:

> Unite Leverage is not an emotional outburst—it is a strategy to level the uneven playing field. Despite the cries of the right wing press and their friends in the Tory party, Unite Leverage is not delivered by intimidation. We fight with research, planning and the execution of tactical activity—within a strategy and within the law.[109]

Another potential consequence suggested by both the Salford Business School paper and Pinsent Masons, is the potential for an increase in unofficial strike action or strike action in breach of the law. Unite indicated the possibility of this when it voted to remove from its rule book the requirement at Rule 2.1 that the union should only pursue its objectives "so far as may be lawful".[110]

The National Institute of Economic and Social Research suggests that, aside from making industrial action more costly for unions, the higher ballot thresholds may in certain circumstances strengthen their bargaining position:

> it seems clear that some unions will have to give greater attention to participation rates and so, in general terms, the Bill will inevitably make industrial action more difficult and expensive to organise. One key reason is that anyone abstaining from the vote – for example because they are genuinely undecided as to the right course of action – will effectively be counted as voting 'no'. So any ballot which returns 50.1% of votes in favour will require 80% of eligible voters to turn out (or vice versa). This does not leave substantial margins for error on the part of the union.
>
> There may be unintended consequences however. When the rules requiring formal ballots for industrial action were first introduced in the 1980s, some union negotiators found that, if they could adhere to the new rules, their negotiating position was actually strengthened ... Similarly, if unions can attain the thresholds

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105 Ibid., pp2-3, reproduced with permission from the author
106 Ibid., p35
107 Pinsent Masons, *New Rules on Strike Ballots: Initial thoughts*, 14 May 2015
108 McCluskey, L., 'Can Unions Stay Within the Law Any Longer?', *Industrial Law Journal,* Vol.44, No.3, September 2015, pp445-446
109 Ibid.
110 Ibid.; see also Len McCluskey 'Unions must be able to fight for workers – even if it means breaking bad laws', *The Guardian*, 19 March 2015

> proposed in the new Bill, they may find that their negotiating position is stronger than it would be in the current environment when many public sector strikes are portrayed by public sector employers as unnecessary and unfair on the general public.[111]

Comment

Trade unions have criticised the proposals, particularly the essential services proposal, which they argue will make strikes in public services "close to impossible"[112] in large workforces, partly because the law requires a postal ballot. Frances O'Grady, General Secretary of the Trades Union Congress said:

> If ministers were really interested in improving workplace democracy they would commit to online balloting. However, they would rather silence protests against their cuts to children's centres, libraries and social care services.[113]

A group of industrial relations academics wrote an open letter to *The Guardian* criticising the proposals as amounting to a "sustained attack on trade union and workers' rights", stating that the minimum thresholds would "seriously curtail the possibility of legitimate strike action".[114] Peter Harwood, a former chief conciliator at Acas, has said that the introduction of thresholds risks encouraging unofficial strike action.[115]

A recent poll carried out by YouGov on behalf of the *London Evening Standard* found that 53% of people polled in London approved of the clause to set a minimum turnout and approval threshold.[116] The British Chambers of Commerce supported the proposals, stating that "higher standards should apply when a strike puts people at risk or affects the ability of large numbers of their fellow citizens to earn a living".[117] As noted above, the CBI have long advocated the introduction of a 40% support requirement for all strikes (i.e. not limited to industrial action in essential services). The CBI described the proposals as "an important — but fair — step to rebalance the interests of employers, employees, the public and the rights of trade unions".[118] Simon Walker, Director-General of the Institute of Directors called the proposals "pragmatic and long overdue".[119] The Institute has in the past advocated the introduction of minimum turnouts[120] and said that in return for this electronic voting should be permitted.[121]

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111 'The implications of the Trade Union Bill', NIESR website, 15 July 2015 (accessed 2 September 2015)
112 'Conservative proposals would make "legal strikes close to impossible", says TUC', TUC website, 12 May 2015 (accessed 1 September 2015)
113 'Trade Union Bill will shift the balance of power in the workplace, warns TUC', TUC website, 15 July 2015 (accessed 1 September 2015)
114 'Trade union bill not backed by evidence', *The Guardian*, 17 August 2015
115 Tories plan stricter rules on UK strike ballots', *Financial Times*, 12 May 2015
116 'Tube strike: Londoners want curb on public sector walkouts, exclusive poll reveals', *London Evening Standard*, 25 August 2015
117 'Queen's Speech is a step in the right direction for business', BCC website, 27 May 2015
118 Ibid.
119 'Tories plan stricter rules on UK strike ballots', *Financial Times*, 12 May 2015
120 '"Strikes should not be the plaything of union leaders" - says IoD', IoD website, 9 July 2014 (accessed 1 September 2015)
121 IoD, *Big Picture - Winter 2012*, p6

5. Information requirements

Summary

The law requires that industrial action ballots contain specific questions and information, and that certain details about the outcome of votes are communicated to union members. The Bill would require unions to provide more information on ballot papers and to union members and employers following the vote. It would also create a new requirement for unions to include details of industrial action in their annual returns.

Clauses 4-6 of the Bill would introduce provisions into the 1992 Act requiring unions to include new types of information on industrial action ballots. Following a ballot, unions would be required to communicate more detailed information to union members, employers and the Certification Officer. The proposals were not detailed in the Conservative Party's manifesto nor in the Queen's Speech. The proposed change to the law could have far-reaching effects, as injunctions can be obtained against strikes on the basis of improperly constituted ballot papers.

5.1 Background and current law

As noted above, industrial action ballots were introduced by the *Trade Union Act 1984*. The Act required ballot papers to include at least one of the two questions as to whether voters were prepared to take part in a strike or action short of a strike. As soon as reasonably practicable after the ballot, the union then had to ensure all persons entitled to vote were informed of the number of:

- votes cast in the ballot;
- individuals voting "Yes";
- individuals voting "No"; and
- spoiled voting papers.

The 1992 Act added further information requirements and was subsequently amended by the *Trade Union Reform and Employment Rights Act 1993* and the *Employment Relations Act 1999* which added more. Section 229 of the 1992 Act, as amended, currently requires the following to be included on a ballot paper:

- the name of the independent scrutineer;
- the address to which, and the date by which, the ballot must be returned;
- a unique number;
- at least one of the two questions about whether the member is willing to participate in a strike or action short of a strike;
- details of the person authorised to call upon members to take part or continue to take part in industrial action;
- a statement that participation in the action may involve a breach of the union member's contract of employment; and
- a statement identifying the union member's unfair dismissal rights in relation to participation in the industrial action.

Section 231 sets out information as to the result of ballots that unions must ensure those entitled to vote are aware of:

> As soon as is reasonably practicable after the holding of the ballot, the trade union shall take such steps as are reasonably necessary to ensure that all persons entitled to vote in the ballot are informed of the number of—
>
> (a) votes cast in the ballot,
>
> (b) individuals answering "Yes" to the question, or as the case may be, to each question,
>
> (c) individuals answering "No" to the question, or, as the case may be, to each question, and
>
> (d) spoiled voting papers.

Section 231A, added by the *Trade Union Reform and Employment Rights Act 1993,* requires unions to take "such steps as are reasonably necessary to ensure that every relevant employer is informed of the matters mentioned in section 231". A relevant employer is one

> who it is reasonable for the trade union to believe (at the time when the steps are taken) was at the time of the ballot the employer of any persons entitled to vote.

5.2 The Bill

Clause 4 would amend section 229 of the 1992 Act, introducing three new ballot paper requirements.

First, a requirement to include a "reasonably detailed" indication of the matters in issue in the trade dispute to which the proposed action relates. Current case law on ballots indicates that an error in this description - either by including matters that were not in dispute at the time of the ballot or by including matters that do not constitute a "trade dispute" - could nullify the ballot, providing grounds for an employer to seek an injunction against the action.[122]

Secondly, where the paper contains a question about taking part in action short of a strike, the type(s) of action must be specified. Examples of action short of a strike include work to rule, where workers only perform contractually required tasks, and overtime bans, where workers refuse to work voluntary overtime. The effect of this provision would be to prevent a union from embarking on a form of action short of a strike where this was not specified on the ballot paper.

Thirdly, the paper must indicate the period or periods within which the action, or each type of action, is expected to take place. The Explanatory Notes state:

> This is to enable a member to make an informed decision about whether or not to support the proposed action when deciding how to vote. For example: work to rule October 2016; overtime ban November 2016; and strike action late December 2016.[123]

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122 *University College London Hospitals NHS Trust v UNISON* [1999] IRLR 31; *London Underground Ltd v National Union of Railwaymen (No.1)* [1989] IRLR 341; see Deakin and Morris, op. cit., p1078

123 *Trade Union Bill Explanatory Notes*, para 24

Clause 5 would amend section 231 of the 1992 Act, adding to the voting information unions must ensure their members, and relevant employers, are informed of. The additional information would be:

- the number of individuals who were entitled to vote in the ballot;
- whether or not the number of votes cast reached the 50% turnout requirement; and
- if the 40% support requirement applies, whether that was met.

Clause 6 would introduce a wholly new requirement for unions to report, in their annual returns to the Certification Officer, on any industrial action induced by the union during the return period. Alongside details of the nature of the dispute and the action, the union would be required to include the information mentioned in section 231, as amended by clause 5.

6. Timing and duration of industrial action

Summary

The Bill proposes to extend the period of notice unions must give employers prior to industrial action, from the current seven days to 14 days. It would also set a four-month expiry date on ballot mandates; after this period industrial action would require a fresh ballot.

Unions are required to give employers seven days' notice prior to the commencement of industrial action. The action must commence within four weeks of the ballot, although this can be extended to eight weeks by agreement with the employer, or 12 weeks by a court. Once commenced, the action will be treated as supported by the ballot if it continues without substantial interruption; this allows for the action to be suspended temporarily (e.g. during negotiations) then recommenced without the need for a fresh ballot. The effect of this is to allow for prolonged intermittent industrial action, provided it is initiated within the time limit; this is sometimes described as a "rolling mandate".

The Conservative Party stated in their 2015 manifesto that they would introduce legislation to "ensure strikes cannot be called on the basis of ballots conducted years before".[124] The Queen's Speech background briefing indicated that this would involve "time limits on a mandate following a ballot for industrial action."[125] **Clause 8** of the Bill would introduce this time limit, setting a four-month expiry date on industrial action ballot mandates. **Clause 7** would extend the period of notice unions must give employers prior to industrial action, from the current seven days to 14 days.

6.1 Current law

Notice to employers of industrial action

Section 234A of the 1992 Act provides that "an act done by a trade union to induce a person to take part, or continue to take part, in industrial action" does not benefit from statutory immunity unless the union takes steps to ensure that the employer receives notification of the action "within the appropriate period".[126] Section 234A(4) defines the "appropriate period", the effect of which is to require unions to give employers at least seven days' notice of industrial action.

The notice cannot precede the day on which the union advises the employer of the outcome of the ballot.[127] The notice must, among other things, specify the total number of employees the union reasonably believes will be induced to take part in industrial action (the

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124 *Conservative Party Manifesto 2015,* p19
125 Prime Minister's Office, *Queen's Speech 2015: background briefing notes*, 27 May 2015, p39
126 *Trade Union and Labour Relations (Consolidation) Act 1992,* section 234A(1)
127 Ibid., section 234A(4)(b)

"affected employees") together with a list of categories of employee into which affected employees belong, and a list of the workplaces at which the affected employees work.

Period after which ballot ceases to be effective

Section 234 of the 1992 Act sets the time limit during which industrial action must be commenced following a ballot. A ballot does not protect industrial action unless it is commenced before the end of the period, beginning with the date of the ballot:

- of four weeks; or
- of such longer duration not exceeding eight weeks as is agreed between the union and the members' employer.[128]

If the industrial action is prohibited by a court order which subsequently ceases to apply, the union may apply to the court to have the period during which the order was in force disregarded, although this is subject to an absolute time limit of 12 weeks.[129]

6.2 Rolling mandates

If industrial action is commenced within the above time limits, it may continue for a prolonged period without the need for a fresh ballot, as explained by Mr Justice Mitting in *Westminster Kingsway College v University and College Union* [2014]:

> A ballot is, in principle, effective for four weeks from the date on which the ballot has occurred…. That period is subject to extension with the agreement of the employers. In respect of industrial action which comprises a rolling series of strikes, the period of four weeks only requires that the first of the series of strikes takes place within four weeks of the ballot, not that every single rolling strike is authorised by a separate ballot taking place no more than four weeks before the individual strike occurs.[130]

If a rolling series of strikes (or action short of a strike) is commenced within the time limit it will benefit from statutory immunity until such time as there is a "substantial interruption" in the action. The authority for that is the Court of Appeal's judgment in *Post Office v Union of Communication Workers* [1990], the key passage of which is:

> The intention of Parliament was quite clear that industrial action, whether taking the form of a strike or of industrial action short of a strike or both, should be begun, or its continuance endorsed, within a short period after the date of the ballot ... The reason is clear. Industrial relations are essentially fluid and attitudes change quickly. Accordingly, authority obtained from a ballot may in fact, as distinct from law, become invalid within a relatively short time. Although the Act in terms only requires the action to be begun in the specified period of four weeks, it is implicit that, once begun, it shall continue without substantial interruption, if reliance is to continue to be placed upon the verdict of the ballot. This is a question of fact and degree, but the question which the court has to ask itself is whether the average reasonable trade union member, looking at the matter at or shortly after any interruption

[128] Ibid., section 234(1)(b)
[129] Ibid., section 234(2)-(6)
[130] [2014] EWHC 4409 (QB), para 3

> in the industrial action, would say to himself: "the industrial action has now come to an end," even if he might also say: "the union may want to call us out again if the dispute continues." This is to be contrasted with a situation revealed in *Monsanto Plc. v. Transport and General Workers' Union* [1987] 1 W.L.R. 617, where industrial action was "suspended" for a short period (14 days) in order to enable active negotiations to take place. The negotiations failed and any reasonable union member would have said, and this court did say, that the termination of the period of suspension restored the original [mandate] and authorised industrial action.[131]

6.3 The Bill

Clause 7 of the Bill would amend section 234A of the 1992 Act, replacing the requirement to provide seven days' notice with a requirement to provide 14 days' notice. **Clause 8** would replace section 234(1), which currently provides the four week time limit by which industrial action must be commenced, and the possibility for this to be extended for up to eight weeks. It would replace it with the following:

> Industrial action that is regarded as having the support of a ballot shall cease to be so regarded at the end of the period of four months beginning with the date of the ballot.

The effect of this would be to:

- allow a longer period during which the union may initiate industrial action (four months, in place of the current four or eight week time limits); and
- cap the duration of that industrial action at four months – after this, action would require a fresh ballot.

Any period during which a court order is in force prohibiting industrial action would not count towards the four month time limit.[132]

6.4 Comment

The proposals on notice periods and mandates have received relatively little attention, as the main focus of comment has been the Bill's provisions on ballots and political funds. Employment law commentator Darren Newman said the proposal has the potential to transform the way in which both sides to a dispute behave."[133] Newman argues that the four month period would incentivise unions to hit employers "as hard as possible with more industrial action than it would otherwise have called" as there would be less point in patient negotiations with an employer who will have one eye on the calendar, waiting for the ballot mandate to expire. However, the CBI has said "Placing time limits on ballot mandates is an important measure to ensure industrial action is limited to the original dispute and not extended to other matters."[134]

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131 [1990] 1 WLR 981, 989-990
132 See *Trade Union Bill*, Schedule 4, para 12
133 Newman, D., 'Industrial action reform: the Trade Union Bill restrictions', XpertHR website, 3 September 2015 (accessed 3 September 2015)
134 'CBI response to strike law reforms', CBI website, 15 July 2015 (accessed 1 September 2015)

7. Picketing

Summary

The law provides immunity from certain civil law liabilities for those participating in peaceful picketing in contemplation or furtherance of a trade dispute. The law is supplemented by a Code of Practice on Picketing which, although not legally enforceable, sets out expected standards of conduct which courts may take into account if called to intervene in a dispute. The Bill would incorporate into law certain aspects of the Code as it relates to the supervision of union-organised picketing. Failure to comply with the new requirements would result in a loss of statutory immunity, meaning an employer could seek an injunction or damages against the union.

The Conservative manifesto said "We will tackle intimidation of non-striking workers".[135] The commitment follows allegations that unions used intimidation tactics during recent industrial disputes, notably Unite's dispute with INEOS at the Grangemouth refining plant in Scotland. A review into the alleged use of these tactics, undertaken by Bruce Carr QC (see below) did not produce any recommendations due to the reviewer's concerns that the issue had become politicised. The review received conflicting evidence; Transport for London and businesses commented that the legislation should be strengthened, while others including the Local Government Association and the Association of Chief Police Officers were satisfied with the existing law.

Clause 9 of the Bill would introduce new legal requirements relating to the supervision of picketing. The requirements would include, for example, that a picket supervisor must take reasonable steps to communicate information to the police. The provisions would incorporate into law Section F of the 1992 Code of Practice on Picketing (see below under 'current law').[136]

Alongside the Bill, the Government is consulting on further measures on "tackling intimidation of non-striking workers".[137] The consultation document suggests the possibility, among other things, of a new criminal offence:

> The Trade Union Bill makes key aspects of the Code of Practice on Picketing legally binding. The Government seeks evidence on whether there are further requirements that should be legally enforceable.
>
> It also seeks views on how to improve transparency and accountability for picketing and associated protests - where so-called 'leverage' tactics have sometimes been used. This includes a requirement to publish a plan of intended action, and an annual report to the Certification Officer of picketing and associated protest activity.
>
> A key aim is to ensure that workers are better protected from intimidation. This consultation welcomes further evidence of intimidatory behaviour experienced during picketing and protests linked to industrial disputes. It seeks views on gaps and

135 *Conservative Party Manifesto 2015*, p19
136 *Code of Practice Picketing PL928 (1st Revision)*, 1992
137 BIS, *Consultation on tackling intimidation of non-striking workers*, July 2015

> weaknesses in the framework governing these activities and how they can be remedied, including the case for a new criminal offence of intimidation on the picket line.[138]

7.1 Current law

Those who participate in or organise picketing outside a workplace may incur civil liability, typically for the tort of inducing a breach of contract on the part of employees they attempt to persuade to stop working. Section 219 of the 1992 Act protects pickets from liability on this ground provided the picketing is in contemplation of a trade dispute and "done in the course of attendance declared lawful by section 220".[139] Section 220(1) provides:

> (1) It is lawful for a person in contemplation or furtherance of a trade dispute to attend—
>
> (a) at or near his own place of work, or
>
> (b) if he is an official of a trade union, at or near the place of work of a member of the union whom he is accompanying and whom he represents,
>
> for the purpose only of peacefully obtaining or communicating information, or peacefully persuading any person to work or abstain from working.

This covers persons dismissed for a reason related to the dispute who picket their former workplace.[140]

The provisions in the 1992 Act are supplemented by a Code of Practice on Picketing, issued by the Secretary of State under section 203 of the Act. The current Code dates from 1992.[141] The provisions in the Code exceed the requirements of the law. For example, it states that:

> pickets and their organisers should ensure that in general the number of pickets does not exceed six at any entrance to, or exit from, a workplace; frequently a smaller number will be appropriate.[142]

Section F of the Code concerns the organisation of picketing and includes the following on union supervision:

> Wherever picketing is "official" (i.e. organised by a trade union), an experienced person, preferably a trade union official who represents those picketing, should always be in charge of the picket line. He should have a letter of authority from his union which he can show to the police officers or to the people who want to cross the picket line. Even when he is not on the pickets advice if a problem arises.
>
> …
>
> Whether a picket is "official" or "unofficial", an organiser of pickets should maintain close contact with the police. Advance consultation with the police is always in the best interests of all concerned. In particular the organiser and the pickets should seek directions from the police on the number of people who should

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138 Ibid., p3
139 *Trade Union and Labour Relations (Consolidation) Act 1992,* section 219(3)
140 Ibid., section 220(3)
141 *Code of Practice Picketing PL928 (1st Revision)*, 1992
142 Ibid., para 51

> be present on the picket line at any one time and on where they should stand in order to avoid obstructing the highway.
>
> The other main functions of the picket organiser should include ensuring that:
>
> - the pickets understand the law and are aware of the provisions of this Code, and that the picketing is conducted peacefully and lawfully;
> - badges or armbands, which authorised pickets should wear so that they are clearly identified, are distributed to such pickets and are worn while they are picketing;
> - workers from other places of work do not join the picket line, and that any offers of support on the picket line from outsiders are refused;
> - the number of pickets at any entrance to, or exit from, a place of work is not so great as to give rise to fear and resentment amongst those seeking to cross that picket line …
> - close contact with his own union office (if any), and with the offices of other unions if they are involved in the picketing, is established and maintained;
> - such special arrangements as may be necessary for essential supplies, services or operations … are understood and observed by the pickets.

As noted, the Bill would incorporate into law many of these requirements.

In addition to potential liability for inducing a breach of contract, pickets may incur other forms of liability, against which the Act provides no immunity. Other types of potential liability include trespass to the highway, private nuisance, public nuisance and liability for a statutory tort under the *Protection from Harassment Act 1997*.[143] Certain criminal offences are also relevant. In particular, section 241 of the 1992 Act includes an offence of "intimidation or annoyance by violence or otherwise", which prohibits, among other things, intimidating, following from place to place or besetting the house of a person with a view to compelling them to do/abstain from doing an act which they have a right to abstain from/do.

7.2 Background

During the October 2013 industrial dispute between Unite the Union and INEOS at the Grangemouth Chemicals and Refining Plant in Scotland, a number of press reports alleged that Unite had employed "bullying and intimidation" tactics. *The Telegraph* and the *Daily Mail* reported that a "mob of protestors" were sent to the home of a senior manager at the refinery, while the daughter of another received a "wanted poster" criticising her father.[144] The Grangemouth dispute is cited as an example of the use of "leverage tactics" although Unite

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[143] See Deakin and Morris, op. cit., pp1105-1116

[144] 'Unite union accused of using bully tactics in Grangemouth dispute', *The Telegraph*, 31 October 2013

denies this.[145] Leverage tactics have been described by Len McCluskey, General Secretary of Unite, as:

> the use of corporate campaigning tools, including peaceful protests, to bring pressure to bear on employers with whom we were in dispute.
>
> To defeat global corporate giants, we can't just mount the picket line and hope. The hostile employer must face a campaign of escalation in which brains as well as brawn are deployed. Unite Leverage is not an emotional outburst—it is a strategy to level the uneven playing field. Despite the cries of the right wing press and their friends in the Tory party, Unite Leverage is not delivered by intimidation. We fight with research, planning and the execution of tactical activity—within a strategy and within the law.[146]

The Carr Review

On 18 November 2013 the Prime Minister announced a review to investigate "union intimidation", to be led by an employment law barrister, Bruce Carr QC.[147] The Carr Review was formally announced on 4 April 2015, with the following terms of reference:

> to provide an assessment of the:
>
> - alleged use of extreme tactics in industrial disputes, including so-called leverage tactics
> - effectiveness of the existing legal framework to prevent inappropriate or intimidatory actions in trade disputes.[148]

The then Minister for the Cabinet Office, Francis Maude, said in the press release accompanying the announcement:

> Trade unions can play a constructive role in the modern workplace, but allegations of union industrial intimidation tactics – which include attempts to sabotage business supply chains – are very serious and may be damaging our economy's competitiveness, which would make our future less secure.
>
> That's why it's right to have this review to get to the bottom of these tactics and to determine whether the existing law is effective.[149]

The Review reported on 15 October 2014, with a report scaled down from that originally envisaged. Mr Carr had arrived at the view that the atmosphere in which he was expected to undertake his investigation had become politicised, inhibiting him from performing his role. He stated the following prior to the report's publication:

> I have become increasingly concerned about the quantity and breadth of evidence that the Review has been able to obtain from both employers and trade unions relevant to its terms of reference. In addition, I am also concerned about the ability of the Review to operate in a progressively politicised environment in the

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145 Bruce Carr QC, *The Carr Report: The Report of the Independent Review of the Law Governing Industrial Disputes,* 2014, p10, para 2.10

146 McCluskey, L., 'Can Unions Stay Within the Law Any Longer?', *Industrial Law Journal,* Vol.44, No.3, September 2015, pp445-446

147 Prime Minster's Office press briefing: morning 18 November 2013, Gov.uk, 20 November 2013 (accessed 27 August 2015)

148 Government review into the law governing industrial disputes, Gov.uk, 4 April 2014, (accessed 27 August 2015)

149 Ibid.

> run up to the general election and in circumstances in which the main parties will wish to legitimately set out their respective manifesto commitments and have already started to do so. Operating in such an environment is also likely to impact on the ability of the Review to obtain evidence in addition to that which it has already received.
>
> That being so, I have reached the conclusion that it will simply not be possible for the Review to put together a substantial enough body of evidence from which to provide a sound basis for making recommendations for change and therefore to deliver fully against its terms of reference. Any recommendations which might be put forward without the necessary factual underpinning would be capable of being construed as the Review making a political rather than an evidence based judgment, whichever direction such recommendations might take.[150]

Trade unions had refused to submit evidence to the Review. Frances O'Grady, General Secretary of the TUC, declined to meet Mr Carr,[151] while Steve Murphy, General Secretary of the Union of Construction, Allied Trades and Technicians, said UCATT considered the Review to be politically motivated, arguing that it is not credible that Mr Carr could be impartial in view of his previous representation of employers in his capacity as a barrister.[152]

Given these concerns and the difficulty gathering evidence, Bruce Carr published a largely factual report absent recommendations.

Carr Review: effectiveness of the current legal framework

Although Mr Carr did not himself make any findings or recommendations in his report, he did detail the limited evidence presented to the Review. Some of this concerned views on the effectiveness of the current legal framework as it applies to picketing.

The Review received five submissions which saw the current law as "effective in preventing the use of extreme and intimidating tactics".[153] These came from the Fire Officer's Association, Staffordshire Fire and Rescue, the Chartered Institute of Personnel and Development, the Local Government Association (LGA) and the Association of Chief Police Officers (ACPO). The LGA submission said:

> our view is there are no particular issues for local government in terms of alleged extreme tactics and the appropriateness of the legal framework to deal with inappropriate and intimidatory actions … we are very rarely contracted or hear of such alleged tactics, but if we are made aware of them and investigate further, we find that that the tactics do not amount to extreme ones.[154]

The ACPO submission included:

> In general the legislative framework is seen by the police as broadly fit for purpose and the range of criminal offences available to the police sufficient to deal with the situations

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150 Update from Bruce Carr QC, 5 August 2014, Carr Review website (accessed 28 August 2015)
151 TUC: email from TUC to Review Team 01-07-14, Carr Review website (accessed 28 August 2015)
152 UCATT letter 05-06-14, Carr Review website (accessed 28 August 2015)
153 Ibid., p92
154 Ibid., p93

> encountered. The challenges of policing in this area tend to arise from all the parties involved within the dispute having a proper understanding of the impartial role of the police, including that industrial disputes are predominantly governed by the civil not criminal law.[155]

Four submissions suggested that the Code of Practice could be updated or made legally binding. These came from Transport for London, ISS Group (a facility services supplier), the University of London and the CBI. The University of London submission said the "code on picketing is in need of review and should move from good practice into a legal framework".[156] The CBI submission said:

> CBI members also highlighted cases of non-associated individuals joining picket lines, overstepping official guidelines, and causing disruption and sometimes damage to businesses without facing serious consequences. More concerning, is the sense from some members that certain unions – including uncertified unions – may instigate supplementary action with the sole intention to cause disturbance in a way that lawful picketing cannot do. Members cited road blocks and blockading entrances as examples of activity additional to the official picket line intended to cause disruption and increase the impact of the industrial action. Where action is organised by an uncertified union, not affiliated to, nor governed by, the TUC they are not subject to the same regulations and guidelines as officially affiliated unions, leaving businesses vulnerable. CBI members would like to see this gap in the current legislation closed ... In order to ensure that the line between lawful activity and illegal activity is not crossed, businesses believe that the current picketing guidelines should be strengthened, and penalties increased, in order to provide a greater incentive to remain within the prescribed guidelines. Strengthening the guidelines would ensure that individuals involved in the official action were aware of what action was legal and what was not, and make it easier for authorities to identify and reprimand those who act otherwise.

7.3 The Bill

Clause 9 would introduce into law many of the provisions in Section F of the Code of Practice on Picketing. It would amend section 219 of the 1992 Act, limiting the existing immunity from tortious liability for inducing a breach of contract. In the case of union organised or encouraged picketing, the immunity would only apply to picketing that complies with the requirements of a new section 220A. The new section would introduce the following requirements:

- the union must appoint a person to supervise the picketing;
- the picket supervisor must be an official or member of the union familiar with the Code of Practice on Picketing;
- the supervisor must communicate to the police his name, his contact details and the picketing location;
- the picket supervisor must have a letter of authority from the union, which must be shown to any constable who asks to see it, or any other person who "reasonably asks to see it";

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155 Ibid.
156 Ibid.

- the picket supervisor must be present during picketing and contactable by the union and police; and
- the picket supervisor must wear an identifying item (e.g. armband).

7.4 Comment

The Bill's proposals on picketing have received relatively little attention. Such comment as there has been on picketing has focussed on the potential creation of a new criminal offence, which the Government is consulting on but at present does not form part of the Bill. Frances O'Grady, General Secretary of the TUC, said:

> Making it a criminal offence for seven people to be on a picket line is a waste of police time and not something you would expect in a country with a proud tradition of liberty.[157]

However, the CBI has said:

> We welcome the consultation on modernising picketing rules. Intimidation or harassment of individuals is never acceptable – and we want to see the current Code of Practice put on a statutory footing and penalties increased to drive out bad behaviour[158]

[157] 'Trade Union Bill will shift the balance of power in the workplace, warns TUC', TUC website, 15 July 2015 (accessed 1 September 2015)
[158] 'CBI response to strike law reforms', CBI website, 15 July 2015 (accessed 1 September 2015)

8. Political funds

Summary

If a trade union wishes to spend money on "political objects" it must do this from a political fund. Union members automatically contribute to this, with a right to contract out. The Bill proposes to change this to a contract-in arrangement.

Unions wishing to contribute to political parties or engage in certain political activities must establish a political fund. Union members may opt out of contributing to these funds but are contracted in by default. The Conservative's 2015 manifesto said a Conservative government would "legislate to ensure trade unions use a transparent opt-in process for union subscriptions",[159] clarified in the Queen's Speech background briefing to concern "the political fund element of trade unions subscriptions".[160] **Clause 10** of the Bill would take forward this commitment, making it unlawful to require a member of a union to contribute to a political fund unless he has indicated in writing willingness to do so.

8.1 Current law

The legislation on trade union political funds is contained in sections 71-96 of the 1992 Act.

Section 72 identifies "political objects"; union expenditure on these must be made out of a political fund. The political objects to which the Act applies are the expenditure of money:

- on any contribution to the funds of, or on the payment of expenses incurred directly or indirectly by, a political party;
- on the provision of any service or property for use by or on behalf of any political party;
- 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;
- on the maintenance of any holder of a political office;
- 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; or
- 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.

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159 *Conservative Party Manifesto 2015*, p19

160 Prime Minister's Office, *Queen's Speech 2015: background briefing notes*, Gov.uk May 2015, p39 (accessed 1 September 2015)

Case law indicates that publicity campaigns critical of government policy during an election period will be seen by the courts as political in nature and thus must be paid for out of political funds.[161]

Section 82 requires union rules to allow members to contract out of paying the political levy. Section 84 sets out the form that a contracting-out notice must take. Section 73 requires that union members are balloted at least once every ten years on the continuation of political funds. These ballots must be conducted by post[162]. If the ballot results in a "political resolution" approving the continuation of the fund, the union must notify all its members of their right to be exempt from contributing and that a form of exemption can be obtained from the union or the Certification Officer.[163]

8.2 Background

The law on union political funds originated with the *Trade Union Act 1913*, enacted to allow unions to spend money on political objects in the wake of a court decision deeming this to be unlawful.[164] A 1983 Green Paper described the background to the case:

> Since the 1860s, if not earlier, trade unions have used their funds to pursue political purposes. Since Disraeli extended the franchise in 1867, trade unions have put up candidates for Parliament. As early as 1873, a trade union had established a Parliamentary Candidate's Fund. In 1894 the Royal Commission on Labour noted that one of the nine purposes on which trade unions expended their funds was Parliamentary representation.
>
> In 1909, however, in the case of *The Amalgamated Society of Railway Servants v Osborne*, the House of Lords determined that the statutory definition of a trade union then to be found in the Trade Union Acts of 1871 and 1876 did not cover political objects and the their pursuit by unions was therefore unlawful.[165]

Professor Ewing's text, *Funding of political parties in Britain*, describes the *Osborne* case, its effect on the Labour Party and the Liberal government's response:

> In 1908 W.V. Osborne, the secretary of the Walthamstow branch of the railway workers' union, sought a declaration that the compulsory political levy of the union was unlawful and an injunction to restrain the union from raising and distributing money for political purposes. The case turned mainly on the Trade Union Acts 1871-76 - organised labour's charter of freedom – which for the first time conferred a legal status upon the unions and brought them within the law. For the purposes of this legislation trade unions were defined as meaning any combination for the regulation of relations between masters and men or for the imposition of restrictive conditions on any trade or employment. Both the Court of Appeal and the House of Lords held that because the definition did not make any reference to political action, this was not contemplated by Parliament as being a lawful object of trade unionism and was therefore beyond the

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161 *Paul and Fraser v NALGO* [1987] IRLR 413
162 Section 77(4)
163 Section 84(2)
164 *Amalgamated Society of Railway Servants v. Osborne* [1910] AC 87
165 *Democracy in Trade Unions,* Cmnd 8778, January 1983, p21

> powers of a union registered under the Acts. This was clearly a great threat to the future of the Labour Party, with injunctions being imposed subsequently on a considerable number of other unions. If this process had continued the party would have been slowly starved to death. However, the Liberal government of the day responded in two different ways. First, in 1911 public money was made available to provide salaries for the hitherto unpaid Members of Parliament. This at least provided Labour MPs with a guaranteed source of income and relieved the party of what had been a substantial burden. Secondly, the government introduced a bill to remove the legal restraints on trade union political spending, it being readily accepted the trade unions had a right to seek the realisation of their goals by representation in Parliament and that they should not be disabled from so doing by economic and legal barriers.[166]

The 1913 Act required unions to ballot their members on the establishment of political funds, to administer them separately from general funds and to allow members to contract out of the political levy. The Conservatives at the time opposed the principle of contracting-out contending that "intimidation was rampant in trade unions and that many trade unionists paid the levy because they were too frightened to contract out".[167] Conservative Members sought to amend the Bill which became the 1913 Act, to replace contracting-out with contracting-in, although this was opposed by the Liberal government.[168]

The 1927 and 1946 Acts

Following the election in 1924 of a Conservative Government and the General Strike in 1926, the *Trade Disputes and Trade Union Act 1927* was enacted which, among other things, replaced contracting-out with contracting-in. The Donovan Commission report commented that the result of contracting-in "was to diminish very considerably the amount of money received by the trade unions' political funds".[169] Ewing cites the 1927 Act as being the

> principal cause for the reduction in the proportion of trade unionists paying the political levy – from 75 per cent of the total number affiliated to the TUC in 1925 to 48 per cent in 1938.[170]

When Labour came to power in 1945 it repealed the 1927 Act, returning contracting-out. According to Lord Wedderburn, the reintroduction of contracting-out gave "the political fund the advantage of human apathy" and coincided with a rise in contributions to funds "from 38 per cent of members in TUC unions in 1945 to 60 per cent in 1948".[171]

The Donovan Report

As noted in the above section on industrial action ballots, during the 1960s a Royal Commission was appointed to consider the prevailing system of labour law and industrial relations. The Royal Commission on

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166 Ewing, K., *Funding of Political Parties in Britain*, 1987, pp49-50
167 Ibid., p51
168 Ibid.
169 *Royal Commission on Trade Unions and Employers' Associations 1965-1968*, Cmnd 3623, June 1968, p241, para 924
170 Ewing, op. cit., 1987, p51
171 Wedderburn, W., *The Worker and the Law,* 1986, p762

Trade Unions and Employers' Associations, chaired by Lord Donovan, reported in 1968. It recommended retaining contracting-out:

> When "contracting-in" was substituted in 1927 for "contracting-out" the result was to diminish very considerably the amount of money received by the trade unions' political funds; whereas when "contracting-out" was restored in 1946 the contributions rose again. We have no doubt that this is due very largely to the innate reluctance of people to take positive steps involving the filling up and despatch of a form when only a very small sum is involved: and that the problem of "contracting-in" or "contracting-out" is not so much a question of industrial relations as a political question, namely whether the Labour Party shall get the benefit of this reluctance or not. Parliament in 1913 enacted provisions (which were restored in 1946) in favour of members of trade unions who object to paying a political levy, enabling them to "contract out" if they wished, and we have no evidence to show that these are ineffective, and that the protection conferred by the Act of 1913 is illusory. In the circumstances, we do not recommend any change.[172]

The Trade Union Act 1984

The *Trade Union Act 1984* substantially reformed trade union law, including that relating to political funds. It required unions to ballot members at least once every 10 years on the continued existence of the funds,[173] and widened the definition of "political objects".[174] Formerly, the 1913 Act defined expenditure on "political objects" as expenditure directly in support of a political party or candidate.[175] The Act amended the 1913 Act, broadening the definition to encompass publicity material "the main purpose of which is to persuade" people to vote one way or another; this can cover material that is critical of government policy albeit not expressly supportive or critical of a particular party.[176]

A 1983 Green Paper, *Democracy in Trade Unions*, provided much of the impetus for the 1984 Act, and argued against the continuance of contracting-in:

> it is wrong in principle that a decision to contribute to a political fund should result from intertia or apathy rather than from a deliberate and positive choice.[177]

In the event, the Government agreed with the TUC that it would not reintroduce contracting-in, in return for the TUC issuing guidance emphasising to unions the importance of their members' rights to contract out. In response to a Parliamentary Question on the subject, the then Secretary of State for Employment, Tom King, said:

> The TUC has made it clear to me that it is willing to take such steps and put before me a draft statement which has subsequently been endorsed by the general council. I made it clear that provided this statement was endorsed and issued to its

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172 *Royal Commission on Trade Unions and Employers' Associations 1965-1968*, Cmnd 3623, June 1968, p241, para 924
173 Sections 12 and 13
174 Section 17
175 *Trade Union Act 1913*, section 3(3); *Coleman v Post Office Engineering Union* [1981] IRLR 427
176 Section 17(1)
177 *Democracy in Trade Unions,* Cmnd 8778, 1983, p27

> member unions with their committed support, then the Government would not propose to introduce any further changes in the law beyond those already contained in the Trade Union Bill. I also made it clear, however, that this undertaking was given on the understanding that the steps that the TUC was taking would prove effective. If they do not prove to be so, the Government reserve the right to introduce further measures.[178]

Prior to a reshuffle in which Tom King was appointed Employment Minister, Norman Tebbit had held the position and overseen both the 1983 Green Paper and the Bill that became the 1984 Act. In his memoirs, Mr Tebbit said he had favoured using the Bill to reintroduce contracting-in, but had been persuaded against this:

> Union members should not be required to contribute money to the Labour Party without their consent. In the end I had my way on the more important issues but I had to back down on the political levy. Indeed that was to be kicked into touch until after the election as it was made plain through the party whips' offices that any attempt to introduce a requirement for union members to give their personal consent to payment of the political levy would be met with really implacable opposition. That would include the deliberate disruption of parliamentary proceedings and the threat that any future Labour government would totally cut off financial support from industry to the Conservative Party.[179]

Notwithstanding the absence of contracting-in from the 1984 Act, the government continued to entertain the idea of introducing it:

> Ministers spoke of reconsidering 'contracting in'; and in 1986 Mr Bottomley, a junior Employment Minister, said he was 'not satisfied that all trade union members are being made aware of their rights to contract out'.[180]

Despite this opposition to contracting-out, neither the Thatcher nor Major governments proposed legislation to reintroduce contracting-in.

Contracting-in: Northern Ireland

In the background briefing to the Queen's Speech, the Government said contracting-in would "reflect the existing practice in Northern Ireland."[181] In Northern Ireland union members must contract-in to pay the political levy.[182]

The *Trade Disputes and Trade Unions Act 1927* did not extend to Northern Ireland,[183] although its contracting-in provisions were mirrored in the *Trade Disputes and Trade Union Act (Northern Ireland) 1927*.[184] When the *Trade Disputes and Trade Unions Act 1946* repealed the *Trade Disputes and Trade Unions Act 1927*, it left in place its Northern Ireland counterpart. This meant that contracting-in remained a part of the law of Northern Ireland.

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178 HC Deb 20 March 1984 c405W
179 Tebbit, N., *Upwardly Mobile*, 1988, pp197-198
180 Wedderburn, W., *The Worker and the Law,* 1986, p763
181 Prime Minister's Office, *The Queen's Speech 2015*, p39
182 For a summary of the legal position in Northern Ireland, see: NI Direct website, Trade union political funds (accessed 27 May 2015)
183 *Trade Disputes and Trade Unions Act 1927,* section 8
184 *Trade Disputes and Trade Union Act (Northern Ireland) 1927*, section 4

In 1958 the Stormont government chose to retain the Northern Ireland provisions on contracting-in, notwithstanding the fact those provisions had been repealed in Great Britain.[185] The broad reason given for retaining contracting-in was that the levy would go by default to left-wing parties. Mr Maginness, then Attorney General, said:

> We cannot bind ourselves to the political situation here where the majority of our trade union members support parties other than the Socialist Party, and there seems no good reason why the Socialist Party – which as far as I know is the sole recipient of such political funds – should be placed in any superior position to that of other parties.[186]

The *Financial Times* reports that in Northern Ireland only 39% of union members choose to pay into a political fund.[187]

Companies Act 2006

The *Companies Act 2006* contains provisions similar to those regulating trade union expenditure on political objects. Under Part 14 of the 2006 Act, political donations or expenditure by a company require authorisation by a shareholder resolution, which is valid for a period of four years.[188] Donations amounting to less than £5,000 are exempt from the requirements under Part 14. Section 365(1) defines political expenditure as expenditure incurred by the company on:

1. the preparation, publication or dissemination of advertising or other promotional or publicity material—
   (i) of whatever nature, and
   (ii) however published or otherwise disseminated,

   that, at the time of publication or dissemination, is capable of being reasonably regarded as intended to affect public support for a political party or other political organisation, or an independent election candidate, or
2. activities on the part of the company that are capable of being reasonably regarded as intended—
   (i) to affect public support for a political party or other political organisation, or an independent election candidate, or
   (ii) to influence voters in relation to any national or regional referendum held under the law of a member State.

Thus, the law on companies' political expenditure is similar to that on trade union political expenditure, although a shareholder resolution remains valid for less time (four years, compared to ten years for trade union political resolutions) and shareholders do not have a right to contract out of company political expenditure.

Policy under the Coalition Government

The Coalition Agreement committed the previous government to pursuing "a detailed agreement on limiting donations and reforming

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185 *Trade Disputes and Trade Union Act (Northern Ireland) 1958*
186 HC (Northern Ireland) Deb 18 November 1958 c651
187 'UK government to raise threshold for strike ballots', *Financial Times*, 27 May 2015
188 *Companies Act 2006*, s.366 & 368(1)

party funding in order to remove big money from party politics".[189] During a debate prior to publication of the *Transparency of Lobbying, Non-party Campaigning and Trade Union Administration Bill 2013-14* the then Deputy Prime Minister, Nick Clegg, offered to use the Bill to implement a requirement to contract-in to paying the levy:

> we are prepared to … use the forthcoming party funding Bill … to turn the principle of an opt-in on the political levy into law, and indeed to give trade union members the right to support other parties, if that is what they wish. I hope Labour Members will take that opportunity, because it is time to turn words into actions.
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> ....
>
> the fact is that the issue in British politics today is how on earth it is possible that the Labour party—a so-called progressive party—is funded to the tune of £11 million by Unite, which hand-picks its parliamentary questions and its parliamentary candidates. That is why I repeat my sincere offer to use forthcoming legislation to turn the promises being made by his leader into action.[190]

In the event, the Bill was silent on trade union political funds.

Certification Officer annual reports

The Certification Officer (CO) is the statutory authority that oversees trade union administration.[191] It reports annually on a range of union matters, including political funds. In its 2014-2015 annual report, the CO noted that 25 unions had political funds, out of a total of 163 unions covered by the report.[192] The report summarised fund income and expenditure, derived from annual returns with accounting periods ending mainly in December 2013:

> The relevant annual returns show the total income of political funds as £23.97 million compared with £24.07 million reported during the period 2013-2014, a decrease of 0.4%. The total expenditure from political funds was £19.89 million compared with £17.77 million in the preceding year, an increase of 11.9%. The returns received within the period also show that the total value of political funds during the reporting period was £29.14 million: up £4.11 million (16.4%) on the £25.03 million reported in 2013- 2014.[193]

As to the number of members that contribute to funds, this was:

> 4,954,606 compared with 4,791,211 reported in 2013-2014, an increase of 163,395 members or 3.4%.[194]

The report gives some indication of the number of union members who have contracted out of paying the levy:

> The annual returns recorded 619,174 members who belong to unions with a political fund but who do not make a political fund contribution, either because they have claimed exemption or they

189 HM Government, *The Coalition: our programme for government*, May 2010, p.21
190 HC Deb 9 July 2013 cc159-160
191 The Certification Officer's role is explained in section 10 below
192 CO, *Annual Report of the Certification Officer 2014-2015*, July 2015, p8 & 35
193 Ibid., p35
194 Ibid.

> belong to a category of membership which, under the rules of the union, does not contribute to the political fund.[195]

This would suggest around 11% of members do not contribute to a political fund where one exists.

As noted, unions are required to ballot members by post at least once every ten years on the continuation of political funds. The CO's annual reports detail the outcome of these ballots. The table in Annex 1 sets out political fund review ballot data contained in the CO's reports covering the period 1999-2015. Across this period, an average of 82.4% of voting union members favoured retaining political funds. Turnout data are available for the reporting periods 2002-2010, during which the average fund review ballot turnout was 31%.

8.3 The Bill

Clause 10(1) of the Bill would replace section 84 of the 1992 Act, which currently contains the contracting-out notification requirements. New section 84(1) would make it unlawful to require a union member to contribute to a political fund unless the member has given the union a written "opt-in notice".

The new section would set a shelf-life on opt-in notices: a notice would expire by the "renewal date" unless it had been renewed in writing. The first renewal date would be:

- for funds already in place, five years and three months after commencement of the provision; or
- for funds established afterwards, five years and three months after the date of the ballot establishing the fund.

Each subsequent renewal date would fall five years after the previous one. The reason for the initial addition of three months is to allow for a period during which the union can confirm with members whether they want to contribute to the political fund. Union members would then have a three-month window prior to the opt-in renewal date within which to renew their notice, unless the original opt-in notice had been given less than six months before.[196]

An opted-in union member may at any point give a "withdrawal notice" which will take effect one month after it is given.[197]

Opt-in notices, renewal notices and withdrawal notices must be delivered to a union's head office or a branch office, either personally, by an agent or by post.[198]

Clause 10(2) would replace section 85 of the 1992 Act, which deals with the effect of being exempt from contributing to the fund. It would retain the current arrangements whereby non-contributing members are exempt from payments towards the fund, either through exemption

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195 Ibid.
196 New section 84(2)(a)
197 New section 84(6)
198 New section 84(7)

from specific fund payments or a partial reduction in periodical payments to unions.

The new section would introduce transitional arrangements: union members contributing under the old system would have three months from the provision's commencement within which to contract-in, otherwise they will be treated as exempt from the political levy.

Clause 11 would insert a new section 32ZB into the 1992 Act. Currently unions are required to provide members with information about the total income and expenditure of a political fund. The Certification Officer may also require further information. However there is no specific legislative requirement to provide details of how the money is spent. New section 32ZB would require unions to provide this information in their annual returns if their expenditure exceeds £2,000 per annum. Regulations may subsequently increase (but not decrease) this threshold. The annual return must detail the amount spent on each of the political objects set out in section 72(1)[199] identifying the recipient(s) of each item of expenditure.

8.4 Comment

The Bill's proposals on union political funds were raised during Prime Minister's Questions on 15 July 2015 following a question from Harriet Harman MP:

> There is an issue about big money in politics, but it must be dealt with fairly. Will the Prime Minister commit not to go ahead with these changes unless it is on a cross-party basis? Will he include the issue of individual donation caps? It is not acceptable for him to be curbing funds from hard-working people to the Labour party while turning a blind eye to donations from hedge funds to the Tories.
>
> **The Prime Minister:**
>
> …
>
> Now she asks about the issue of trade union funding for the Labour party. There is a very simple principle here: giving money to a party should be an act of free will. Money should not be taken out of people's pay packets without them being told about it properly. If this was not happening in the trade unions, the Labour party would say that this was appalling miss-selling. It would say that it was time for consumer protection. Why is there such a blind spot—even with the right hon. and learned Lady—when it comes to the trade union paymasters?
>
> **Ms Harman:** There is a simple principle here—it must be fair. What the Prime Minister is doing amounts to one rule for the Labour party but something completely different for the Tories. To be democratic about this, the Prime Minister must not act in the interests of just the Tory party. Instead of helping working people, he spends his time rigging the rules of the game. Now he wants to go even further and attack the rights of working people to have a say about their pay and conditions. That is on top of the Government already having changed the rules to gag charities and trade unions from speaking out. The Prime Minister says he

[199] See above, section 8.1 on 'current law'

> wants to govern for one nation, but instead he is governing in the interests of just the Tory party.
>
> **The Prime Minister:** The law for company donations was changed years ago, but the law for trade union donations has been left untouched. The principle should be the same: whoever we give our money to, it should be an act of free will. It should be a decision that we have to take. The money should not be taken from people and sequestered away without them being asked.

Yvette Cooper MP has suggested the possibility of a legal challenge, stating that she had received legal advice indicating that the Bill's political fund provisions may breach human rights laws (specifically, the right to freedom of association under Article 11 of the European Convention on Human Rights).[200]

Iain Watson, political correspondent for the BBC, commented that

> while proposals to introduce an "opt in" process for these funds could hurt Labour financially, they would also restrict the ability of union leaders to campaign more widely on political issues.[201]

The Guardian's political editor, Patrick Wintour, said that Labour Party funding would be "hit hard" by an opt-in arrangement, noting that between May 2010 and December 2014 the Party received £48.6 million in donations from unions, accounting for nearly half the £110 million received during the period.[202] The *Financial Times* reported support for the proposal on the basis that union members may be paying towards a party they do not vote for, and that in Scotland, for example, many union members support the SNP rather than Labour.[203]

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200 'Yvette Cooper to raise prospect of legal challenge to trade union bill', *The Guardian,* 29 August 2015

201 'Trade Union Bill: How Labour party funding will be affected', BBC News, 15 July 2015

202 'Labour funding will be hit hard by changes to political levy system'

203 'Conservatives prepare for attack on trade union political funds', *Financial Times*, 10 July 2015

9. Facility time

Summary

The Bill would create reporting requirements in respect of the amount of time off for union duties or activities taken by union representatives in the public sector, and would create a power by which Ministers could limit this time off.

"Facility time" is time off from a person's normal work to undertake trade union duties, learning development or activities. There is a statutory right to paid time off for trade union "duties" or training and to unpaid time off for union "activities". The Conservative manifesto said that a Conservative government would "tighten the rules around taxpayer-funded paid 'facility time' for union representatives".[204]

The commitment follows Coalition Government changes to the arrangements for facility time in the Civil Service, the most important of which were that facility time must be closely monitored; there is a presumption that time off for union "activities" is always unpaid; and union representatives are expected to spend at least 50% of their working hours delivering their Civil Service role. The Government estimated that the reforms saved £17 million in their first year.[205]

9.1 Current law

Sections 168-173 of the 1992 Act provides a number of statutory rights to time off for union duties and activities. Representatives of recognised unions are entitled to paid time off to carry out specified trade union duties.[206] The duties are set out in section 168 as being "any duties … as such an official, concerned with":

- collective bargaining negotiations with the employer;
- the performance on behalf of employees of functions related to or connected with collective bargaining which the employer has agreed may be performed by the union;
- receipt of information from and consultation by the employer concerning redundancies;
- negotiations about - or the performance on behalf of employees of functions connected with – agreements to vary employees' contractual terms where there is a transfer of an undertaking, and the transferor is subject to insolvency proceedings; and
- to undergo industrial relations training, approved by the TUC or his union, related to performance of the above duties.

Union learning representatives are also entitled to paid time off for the following purposes in relation to union members:

- analysing learning or training needs;

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204 *Conservative Party Manifesto 2015*, p19

205 '£17 million estimated savings as cost of taxpayer-funded trade union representation halves', Gov.uk, 4 February 2014 (accessed 30 August 2015)

206 *Trade Union and Labour Relations (Consolidation) Act 1992*, section 169

- providing information and advice about learning or training matters;
- arranging learning or training;
- promoting the value of learning or training; and
- consulting the employer about carrying on any such activities in relation to such members of the trade union.[207]

The amount of paid time off for both duties and activities is qualified by the following:

> The amount of time off which an employee is to be permitted to take … and the purposes for which, the occasions on which and any conditions subject to which time off may be so taken are those that are reasonable in all the circumstances having regard to any relevant provision of a Code of Practice issued by ACAS or the Secretary of State.[208]

The current Acas *Code of Practice on Time Off for Trade Union Duties and Activities* has been in force since 1 January 2010.

Employers are also required to permit employees to a reasonable amount of unpaid time off to take part in certain union activities.[209] These might include, for example, attending union meetings, participating in union elections or attending conferences.

9.2 Background

The ACAS *Code of Practice on Time Off for Trade Union Duties and Activities* sets out the background to facility time rights:

> Union representatives have had a statutory right to reasonable paid time off from employment to carry out trade union duties and to undertake trade union training since the Employment Protection Act 1975. Union representatives and members were also given a statutory right to reasonable unpaid time off when taking part in trade union activities. Union duties must relate to matters covered by collective bargaining agreements between employers and trade unions and relate to the union representative's own employer, unless agreed otherwise in circumstances of multi-employer bargaining, and not, for example, to any associated employer. All the time off provisions were brought together in sections 168 – 170 of the Trade Union and Labour Relations (Consolidation) Act 1992. Section 43 of the Employment Act 2002 added a new right for Union Learning Representatives to take paid time off during working hours to undertake their duties and to undertake relevant training. The rights to time off for the purpose of carrying out trade union duties, and to take time off for training, were extended to union representatives engaged in duties related to redundancies under Section 188 of the amended 1992 Act and to duties relating to the Transfer of Undertakings (Protection of Employment) Regulations 2006.[210]

While Minister for the Cabinet Office in the Coalition Government, Francis Maude brought forward a number of proposals to restrict the

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207 Ibid., section 168A
208 Ibid., section s168(3) & 168A(8)
209 Ibid., section 170
210 Acas, *Code of Practice on Time Off for Trade Union Duties and Activities,* 2010, p4, para 3

use of facility time in the Civil Service, following an internal review.[211] At the time of the review, Mr Maude stated that:

> Total spend on trade union facility time across the civil service is estimated to be around £30 million a year, while in the public sector as a whole the estimate is £225 million.[212]

On 13 July 2012 the Cabinet Office began consulting recognised unions on reforms to facility time.[213] The consultation document set out the case for change:

> There are at least 6,800 trade union representatives across the Civil Service. At a time when departmental budgets are under great pressure we need to ensure the current provisions for trade unions facility time represent the best value for money. With annual estimated expenditure of £36 million we need to ensure that these arrangements align with the significant Civil Service wide workforce and business restructuring.
>
> Providing value for money is critical in all areas of business and this includes spending on facility time. We have to ensure that the time we pay for Civil Service trade union representatives to spend on their trade union duties and activities is appropriate, accountable and that the value is identifiable within a reformed and modernised Civil Service.
>
> However it is not just the responsibility of the Civil Service to justify how taxpayers' money is best and most efficiently spent. It is important that trade unions are able to do the same and are able to illustrate the same level of responsibility and care in how public money is used and spent and the value that they provide as a result.
>
> There are differences in the provision of facility time across the Civil Service that may not be justified. We want to ensure a more consistent, open and transparent approach in future.[214]

The consultation ran until 7 September 2012 and sought views on:

- facility time reporting procedures;
- ending the practice of Civil Service union representatives spending 100% of their time on union duties and activities;
- making time off for union activities unpaid by default (although the statutory entitlement is for unpaid time off, some Civil Service employers provided paid time off); and
- introducing more rigorous individual management of facility time.

The Government published its consultation response on 8 October 2012, stating that it would introduce immediately a number of changes to the facility time arrangements. The changes were effected through a facility time framework and associated guidance, which provided for the following:

- quarterly departmental reporting on facility time and annual Cabinet Office reporting;

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211 HC Deb 12 October 2011 c442W
212 HC Deb 2 November 2011 c909
213 Cabinet Office, *Consultation on reform to Trade Union facility time and facilities in the Civil Service*, 2012
214 Ibid., pp4-5

- a requirement for union representatives to spend at least 50% of their time delivering their Civil Service role, subject to a possible time-limited increase in exceptional circumstances with approval from the Secretary of State or Chief Executive;
- union members who had held 100% union-duty roles for more than three years would only be allowed to continue doing so for one further year, although if promoted would not be so permitted;
- a default position that participation in union activities would be unpaid; and
- a guide figure to monitor the spend on facility time, set at 0.1% of the pay bill, any spend in excess of which would require approval by the Secretary of State or Chief Executive.[215]

In December 2013 Mr Maude was asked about the effect of the reforms:

> **The Minister for the Cabinet Office and Paymaster General (Mr Francis Maude):** At the time of the last general election, there was no proper monitoring of trade union facility time in government. That has now changed, and paid time off for any trade union activities and full-time union officials now requires the specific consent of a senior Minister. We expect the cost to the taxpayer for paid time off for trade union duties to fall by 60% from the level we inherited.
>
> **Dr Offord:** I am very reassured by the Minister's response, but will he outline to the House how much money has been saved as a result of those reforms?
>
> **Mr Maude:** So far, by reducing significantly the number of full-time union officials who are paid by the taxpayer as civil servants, we have saved more than £2.3 million just from that element of the reforms. Overall, we are on course to meet our benchmark of spending no more than 0.1% of the civil service pay bill on facility time.[216]

Following the introduction of a requirement to report on the use of facility time, the Coalition Government announced on 4 February 2014 that:

- the number of full-time trade union representatives had fallen by 163 to 37 – a reduction of four-fifths;
- the overall number of trade union representatives had fallen by almost 1,000; and
- the average percentage of the pay bill that departments are spending on trade union activity has fallen from 0.26% to below the 0.1% benchmark – a reduction of two-thirds.[217]

The announcement claimed that the Government had "saved an estimated £17 million last year by controlling trade union representation in the civil service".

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215 Cabinet Office, *Government response: consultation on reform to trade union facility time*, October 2012, pp2-3

216 HC Deb 11 December 2013 c223

217 '£17 million estimated savings as cost of taxpayer-funded trade union representation halves', Gov.uk, 4 February 2014 (accessed 30 August 2015)

Since August 2013 the Department for Business, Innovation and Skills has published quarterly data on facility time in the civil service, showing a significant decline in the number of trade union representatives across government departments:[218]

	General TU Representatives	100% TU Representatives	% of Paybill
November 2011	6746	200	0.26%
1 January - 31 March 2013	6101	176	0.19%
1 April - 30 June 2013	6292	110	0.13%
1 July - 30 September 2013	5796	37	0.08%
1 October - 31 December 2013	5813	31	0.08%
1 January - 31 March 2014	5880	20	0.07%
1 April - 30 June 2014	5509	13	0.07%
1 July - 30 September 2014	5735	11	0.06%
1 October - 31 December 2014	5707	9	0.06%
Change since Nov 2011	-1039	-191	-0.20%

Source: BIS, Trade Union Facility Time 2011-2014

9.3 The Bill

Clause 12 would insert a new section 172A into the 1992 Act. The new section would introduce a power whereby a Minister may by regulations require a "relevant public sector employer" to publish information relating to facility time taken by "relevant union officials".[219] The regulations would be subject to the negative resolution procedure.[220]

An employer would be a relevant public sector employer if it is a public authority and has at least one relevant union official,[221] or has functions of a public nature and is funded from public funds.[222] A relevant union official would be

- a trade union official;
- a learning representative of a trade union; or
- a safety representative appointed under regulations made under section 2(4) of the *Health and Safety at Work etc Act 1974*.

Facility time would be defined in the new section as time off taken by a relevant union official:

- in relation to union duties/activities/learning development;
- to accompany another of the employer's workers to a disciplinary or grievance hearing; or
- to act as a health and safety representative.[223]

The types of information that a public sector employer could be required to publish include:

- the number of employees that are relevant union officials, or relevant union officials within specified categories;

218 BIS, Trade union facility time data, Gov.uk, March 2015 (accessed 1 September 2015). For archived facility time data see the UK Government Web Archive
219 New section 172A(1)
220 New section 172A(12)
221 New section 172A(2)
222 New section 172A(9)
223 New section 172A(8)

- information about the amount of money the employer spends on facility time, including the percentage of the total pay bill;
- the amount of facility time spent on specified categories of duties or activities; and
- information relating to facilities provided by an employer for use by relevant union officials in connection with facility time.[224]

Clause 13 would insert a new section 172B into the 1992 Act. The new section would create a reserve power whereby a Minister may make regulations that:

- set a percentage limit on the amount of facility time taken by relevant union officials at relevant public sector employers (e.g. introduce a cap limiting facility time to 50% of the official's working time); and/or
- set a cap on the percentage of the employer's pay bill that may be spent on facility time.[225]

The regulations would be subject to the affirmative resolution procedure.[226]

Clause 13 is includes a Henry VIII power, in that the regulations made under it could modify primary legislation. New section 172B(4) would state that regulations made under the power:

> may, in particular, make provision restricting rights of relevant union officials to facility time by amending or otherwise modifying any of the following—
>
> (a) section 168 or 168A;
>
> (b) section 10 of the Employment Relations Act 1999;
>
> (c) regulations made under section 2(4) of the Health and Safety at Work etc Act 1974

This would enable a Minister, with Parliamentary approval, to make secondary legislation to modify the existing statutory rights to facility time as it applies to public sector union officials. Similarly, the regulations could amend section 170 of the 1992 Act (the right to unpaid time off for union activities), as well as contracts of employment or collective agreements.[227] The regulations could also impose further publication requirements, in addition to those specified in clause 12.[228]

The Delegated Powers Memorandum published alongside the Bill explains the reason for creating a reserve power to set a statutory cap on facility time:

> This is a reserve power intended to be used only as a secondary measure if the primary measure (the publication requirements) do not achieve the policy aim of increasing public scrutiny of facility time and, ultimately, delivering value for money for the tax payer. It is therefore a longstop mechanism that would not be introduced before the publication requirements have been given time to work and where the data obtained under the publication

[224] New section 172A(3)
[225] New section 172B(3)
[226] New section 172B(13)
[227] New section 172B(9)(d)
[228] New section 172B(6)

> requirements demonstrates there is concern about value for money and efficiency sufficient to justify exercising the reserve power. By improving transparency through publication requirements and encouraging employers to review their existing arrangements, the expectation is that relevant public sector employers will voluntarily renegotiate facility time arrangements with their recognised trade unions. The power would therefore be kept in reserve and only used as a last resort where, having regard to information employers have published, they have consistently failed to reform practices that do not represent good value for money to the tax payer.
>
> It is not anticipated that the power would be used to target individual employers and the drafting at new section 172B (9) reflects the policy intention to apply a cap to 'categories' of employer rather than individual employers.
>
> The regulations can only apply to public sector employers on whom the publication requirements are imposed, limiting the ability to impose a cap on any public sector body not already within scope under the publication requirements.
>
> …
>
> Delegation facilitates the adoption of a staged approach – regulations on transparency would come first and, only where there has been a persistent refusal to reform practices that do not represent value for money for the tax payer (or which reveal unacceptable inefficiencies), would the reserve power be used.
>
> It will not be until data is available from publication requirements that an assessment can be made about the extent to which regulations setting a cap will be necessary, and the data will also inform decisions about the level of any cap set. This two-stage approach lends itself to secondary legislation and provides the flexibility needed.
>
> The details of how the cap will be applied and the level of the cap are best set out in secondary legislation because it will enable changes to be made that respond to the changing nature of the public sector, its employment practices and findings arising from ongoing monitoring of publication requirements.[229]

9.4 Comment

In a letter to *The Guardian* a group of industrial relations academics criticised the Bill's provisions on facility time as an attack "on the ability of unions to represent their members".[230]

Frances O'Grady, General Secretary of the TUC has said "these new restrictions on facility time will make it more much difficult for trade unions to solve problems at work before they escalate into dispute".[231]

The Scottish Trades Union Congress General Secretary, Grahame Smith, has urged the Scottish Government to defy any law that restricts facility time.[232]

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229 BIS, *Trade Union Bill: Delegated Powers Memorandum*, July 2015, pp8-9
230 'Trade union bill not backed by evidence', *The Guardian*, 17 August 2015
231 'Trade Union Bill will shift the balance of power in the workplace, warns TUC', TUC website, 15 July 2015 (accessed 1 September 2015)
232 'STUC calls on public bodies to ignore 'unacceptable' unions bill', STV News, 25 August 2015

While comment on the proposal has in the main been from unions, Jonathan Isaby Chief Executive of the TaxPayers' Alliance, has said:

> It is simply wrong that taxpayers continue to see their money used to pay thousands of trade union activists who organise strikes which disrupt the services that they rely on and pay for handsomely. Thousands of staff who should be working for the taxpayer are working for the trade unions instead. It's welcome that the number has fallen, but far more must be done.
>
> Tens of millions of pounds are being wasted and supporting aggressive political campaigns. The Government must crack down on this scandalous subsidy.[233]

[233] 'New research: Taxpayers fund trade unions to the tune of £108 million', TaxPayers' Alliance website, September 2014 (accessed 1 September 2015)

10. Certification Officer

Summary

The Bill would strengthen the role of the Certification Officer. It would create investigatory and enforcement powers, and enable regulations to require unions and employers' associations to fund the Certification Officer.

The Certification Officer (CO) is an independent officer, first appointed in 1975, with a statutory duty to oversee a range of administrative matters relating to trade unions and employers' associations. The CO is appointed by the Secretary of State, following consultation with the Advisory, Conciliation and Arbitration Service[234] and reports annually on his activities.[235]

The Conservative manifesto pledged to "reform the role of the Certification Officer".[236] **Clauses 14-17** and **Schedules 1-3** would implement these reforms. They would introduce investigatory and enforcement powers; the power to impose financial penalties of between £200 and £20,000; and the power to, by regulations, make provision for the CO to require trade unions and employers' associations to pay a levy, funding the performance of his role.

10.1 Current law

The CO's current duties are contained in various provisions of the 1992 Act, summarised in the latest CO annual report:

> The functions of the Certification Officer are contained in the Trade Union and Labour Relations (Consolidation) Act 1992 (as amended) (referred to in this report as "the 1992 Act" or "the Act"). They include responsibility:
>
> - under Part I, Chapter I – for maintaining a list of trade unions and for determining the independence of trade unions;
> - under Part I, Chapter III – for dealing with complaints by members that a trade union has failed to maintain an accurate register of members or failed to permit access to its accounting records; for seeing that trade unions keep proper accounting records, have their accounts properly audited and submit annual returns; for the investigation of the financial affairs of trade unions; for ensuring that the statutory requirements concerning the actuarial examination of members' superannuation schemes are observed; and for dealing with complaints that a trade union has failed in its duty to secure that positions in the union are not held by certain offenders;
> - under Part I, Chapter IV – for dealing with complaints by members that a trade union has failed to comply with one or more of the provisions of the Act which require a trade

234 *Trade Union and Labour Relations (Consolidation) Act 1992*, section 254
235 Certification Officer: annual reports, Gov.uk (accessed 4 September 2015)
236 *Conservative Party Manifesto 2015*, p19

union to secure that its president, general secretary and members of its executive are elected to those positions in accordance with the Act;

- under Part I, Chapter VI – for ensuring observance by trade unions of the statutory procedures governing the setting up, operation and review of political funds; and for dealing with complaints about breaches of political fund rules or about the conduct of political fund ballots or the application of general funds for political objects;
- under Part I, Chapter VII – for seeing that the statutory procedures for amalgamations, transfers of engagements and changes of name are complied with, and for dealing with complaints by members about the conduct of merger ballots;
- under Part I, Chapter VIIA – for dealing with complaints by members that there has been a breach, or threatened breach of the rules of a trade union relating to the appointment, election or removal of an office holder; disciplinary proceedings; ballots of members other than in respect of industrial action; or relating to the constitution or proceedings of an executive committee or decision making meeting; 1
- under Part II – for maintaining a list of employers' associations; for ensuring compliance with the statutory requirements concerning accounting records, annual returns, financial affairs and political funds; and for ensuring that the statutory procedures applying to amalgamations and transfers of engagements in respect of employers' associations are followed.

The CO can investigate unions' compliance with these statutory duties following the compliant of a union member, whereupon the CO may make such enquiries as he thinks fit.

10.2 The Bill

Clause 14 would amend the 1992 Act, inserting a new section 256C and new Schedule (**Schedule 1** of the Bill). It would also give effect to **Schedule 2** of the Bill, which includes further amendments.

The effect of this would be the introduction of new investigatory powers relating to unions' (and, where relevant, unincorporated employer's associations'[237]) compliance with a range of "relevant obligations" defined in Schedule 1. The relevant obligations concern:

- duties regarding unions' registers of members;
- the duty to secure positions not held by certain offenders;
- union elections;
- restrictions on the application of funds in the furtherance of political objects;
- compliance with rules as to ballots on political resolutions;
- requirements of rules as to political funds;
- ballots on amalgamations or transfers;

[237] An employer's association is an organisation whose principal purposes include the regulation of relations between employers and workers or trade unions; see *Trade Union and Labour Relations (Consolidation) Act 1992*, section 122

- any requirement of a conditional penalty order made under new penalty powers that would be introduced by the Bill.

The new investigatory powers are set out in detail in Schedule 1 and include powers to require the production of documents and to appoint inspectors. The powers would be exercisable following a complaint by a union member or without any application or complaint being made. The purpose of the changes is set out in the Explanatory Notes:

> The purpose of the changes made by clause 14 and the associated Schedules is twofold. Firstly, it will grant the Certification Officer specific investigatory powers in respect of a number of statutory requirements where they are not currently available. Secondly, it will make a series of changes to the Certification Officer's enforcement powers so that action can be taken without the need for an application or complaint from a member to be received first. The Certification Officer will therefore be able to investigate and take enforcement action proactively in a number of areas where this is not currently possible. For example the Certification Officer could act upon information or concerns he had received from a third party or on his own initiative.[238]

Clause 15 would insert a new section 32ZC into the 1992 Act, enabling the CO to enforce annual return requirements relating to details of industrial action and political expenditure. Both these requirements would be new, set out in clauses 6 and 11 of the Bill (see above). If the CO finds a union has failed to satisfy these requirements, he may make a declaration to that effect, following enquires and the opportunity for the union to make representations.

Clause 16 would insert a new section 256D into the 1992 Act, creating a power to impose a financial penalty when an enforcement order has or could be made. The clause would give effect to **Schedule 3**, which sets out the details of the power to make penalty orders or conditional penalty orders. The penalty would be set in regulations and could not be less than £200 or more than £20,000.[239] Should the penalty be paid late, a further penalty could be imposed, which could not exceed the amount of the penalty itself.[240] The regulations would be subject to the affirmative resolution procedure.

Clause 17 would insert a new section 257A into the 1992 Act, enabling the Secretary of State to by regulations make provision for the CO to require unions and employers' associations to pay a levy to the CO. Per new section 257A(2) the total amount levied should aim to ensure that, in any three year period, the amount does not exceed the CO's expenses in that period. The amount payable by particular organisations could, among other things, be set by reference to the number of its members or its income. Before making regulations, the Secretary of State would be required to consult with organisations and Acas. The regulations would be subject to the affirmative resolution procedure.

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238 Trade Union Bill Explanatory Notes, para 59
239 See Trade Union Bill, Schedule 3, para 6(3)
240 Ibid., Schedule 3, para 7

11. Check-off

Summary

Check-off is a system whereby union membership payments are deducted from union members' salaries by their employers and paid over to unions. At the time of writing, the Bill does not contain any provisions on check-off, although the Government has indicated it intends to amend the Bill to abolish check-off in the public sector.

The Bill was published on 15 July 2015 without any provisions on check-off. On 6 August 2015 the Government announced that the Bill will abolish check-off in the public sector.[241] Thus, it is expected that the Government will seek to amend the Bill. The announcement contained the following:

> 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.
>
> Cabinet Office Minister Matt Hancock said:
>
> > "In the 21st century era of direct debits and digital payments, public resources should not be used to support the collection of trade union subscriptions.
> >
> > It's time to get rid of this outdated practice and modernise the relationship between trade unions and their members. By ending check off we are bringing greater transparency to employees – making it easier for them to choose whether or not to pay subscriptions and which union to join."[242]

11.1 Background

During 2014 media reports indicated that the Cabinet Office had written to government departments asking them to review check-off.[243] When asked whether he would place the correspondence in the House of Commons Library, the then Minister for the Cabinet Office, Francis Maude, stated that internal discussions would not be disclosed:

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241 Cabinet Office, BIS and The Rt Hon Matt Hancock MP, Press release: New steps to tackle taxpayer-funded support to trade unions, Gov.uk, 6 August 2015 (accessed 28 August 2015)

242 Ibid.

243 'Francis Maude's check off letter', *The Guardian*, 3 October 2014

> **Helen Goodman**: To ask the Minister for the Cabinet Office if he will place in the Library all correspondence between his Department and other Departments on the matter of union subscription check off.
>
> **Mr Maude**: In line with the practice of successive Administrations, details of internal discussions and correspondence are not usually disclosed.[244]

Mr Maude was subsequently asked what his reasons were for writing to departments:

> **Mr Godsiff**: To ask the Minister for the Cabinet Office for what reasons his Department requested that government departments review the check-off system for union subscriptions.
>
> **Mr Maude**: The deduction of trade union subscriptions from payroll through check-off is a matter delegated to Departments. Departments should keep these arrangements under review to ensure that they are appropriate and meet the needs of a modern workplace, as per section 7.3.3 of the civil service management code.[245]

Following this, Members of the Opposition tabled a series of Parliamentary Questions asking Ministers whether they planned to end check-off in their departments.[246] The responses indicated that check-off arrangements were under review. Mr Maude was asked about the plans during Cabinet Office Questions on 12 March 2014:

> **The Minister for the Cabinet Office and Paymaster General (Mr Francis Maude):** The deduction of trade union subscriptions from payroll through check-off is a matter delegated to Departments in the civil service.
>
> **Ian Murray:** The civil service has used check-off for the last 30 years. Indeed, large companies such as BAE Systems and Rolls-Royce use it as a very efficient way to deduct trade union subscriptions from salary. Is this not just another ideological attack? Removing check-off from the civil service payroll will cost many times more than running the current system for hundreds of years.
>
> **Mr Maude:** As I say, it is a matter for Departments to decide for themselves. A number of trade unions take the view that it is much better to have a direct relationship with their members than have it intermediated through the employer—it is a rather more modern way to run things.
>
> **Priti Patel (Witham) (Con):** Does my right hon. Friend think that it is fair on hard-working British taxpayers that their money is used to subsidise the administration of trade unions, rather than that cash going to front-line services?
>
> **Mr Maude:** My hon. Friend has been a doughty campaigner for the use of facility time to be much better regulated. We inherited from Labour a position in which very large amounts of public money were being spent on subsidising 250 full-time officials in the civil service alone, let alone in the wider public sector. I am happy to tell her that we have got that under control.

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244 HC Deb 3 March 2014 c663W
245 HC Deb 1 May 2014 c806W
246 For example: HC Deb 14 May 2014 c729W; HC Deb 6 May 2014 c157W

> **Michael Dugher (Barnsley East) (Lab):** The Minister says that this is a matter for individual Departments, but the private secretary in his Department has written round to every Department in Whitehall asking them to review check-off. We know that the Government, for political reasons, want to scrap check-off, and I have seen a copy of an official letter from the Department for Work and Pensions, which was subsequently withheld by Ministers, that states:
>
> > "The department has concluded that the figure for the financial implications of ending check-off should be disclosed…The information held states: 'We estimate that implementation costs could exceed one million pounds'."
>
> In the light of that revelation, will he agree, in the interests of transparency, to publish the full financial implications of this misguided policy?
>
> **Mr Maude:** I am happy to bring the hon. Gentleman up to date. The DWP has subsequently said that that was a speculative and inaccurate figure—
>
> **Michael Dugher:** It did not say that.
>
> **Mr Maude:** Well, with respect, I have seen more recent correspondence than the hon. Gentleman has seen. The truth is that Ministers—as he will recall from his time in government—are sometimes given figures for the cost of making a change that turn out not to be true. This is such a case.[247]

The Cabinet Office's letters to departments led to a dispute between the Liberal Democrat and Conservative Coalition partners. On 8 July 2014 the then Chief Secretary to the Treasury, Danny Alexander, wrote to government departments stating that "there is no fiscal case" for ending check-off:

> It is my understanding that a number of Secretaries of State are considering ending check-off with their Departments despite some Ministers in those departments writing formally to register their opposition.
>
> Departments should be aware that there is no fiscal case for doing this, as the Unions have offered to pay any costs associated with check-off, which are in any case minimal. In addition, the experience of DCLG suggests that any attempt may ultimately fail as a result of legal action being brought by the unions, at considerable cost to the public purse.
>
> I am therefore writing to Secretaries of State and Permanent Secretaries in their role as Accounting Officers to make it clear that there is no public policy case to do this in any department across Whitehall. As such I want to make it clear that any department that pursues this policy is doing so at their own legal risk, leaving their department exposed to potential legal costs which they will be expected to meet in full.[248]

Legal challenge

The Department for Communities and Local Government attempted to end check-off in the Department, although were prevented from doing so by a successful legal challenge. The judgment, reported as *Hickey &*

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247 HC Deb 12 March 2014 c299

248 Danny Alexander's letter to Whitehall departments, *The Guardian,* 3 October 2014

Hughes v Secretary of State for Communities & Local Government [2013] EWHC 3163 (QB), summarised the background to the litigation:

> check-off arrangements are very widely used in the public sector and also, although less widely, in the private sector. DCLG and its predecessor departments have operated a check-off system for at least 20 years, and every member of a recognised union who had requested to be included within such a system has been so included by the Department. Some 94 per cent of the current PCS members employed by DCLG pay their subscriptions in this way by check-off.
>
> In about March 2013, DCLG informally notified the recognised trade unions that it was intending to terminate check-off arrangements. The unions protested and, in particular, at that stage sought to require a period of consultation over the issue. On about 15 July 2013, DCLG notified the trade unions and individual staff of the intended termination of check-off arrangements with effect from 1 September. It was confirmed at about the same time that only deductions of union subscriptions were to be terminated as opposed to other deductions made by DCLG from wages.[249]

Mr Justice Popplewell held that the check-off arrangements in the Department were incorporated into staff contracts of employment, concluding "that the Claimants are entitled to continue to pay their PCS subscriptions by deduction from pay by way of check-off".[250] According to the Public and Commercial Services Union, this resulted in approximately £90,000 in legal costs being awarded against the Government.[251]

The High Court's judgment was handed down on 3 September 2013. On 13 September 2013 Brandon Lewis, then Parliamentary Under Secretary of State at the Department for Communities and Local Government, responded to a Parliamentary Question about the costs of check-off in the Department. Mr Lewis stated that the costs were included in the overall costs of the managed payroll service used by the department and not billed as a separate cost, although:

> The additional cost of transferring credits to the three recognised unions currently amounts to £329 per annum. In this context, given the total cost will be higher and bundled within the managed payroll service, there is a hidden subsidy to the unions.[252]

Mr Lewis argued that the matter was one of principle, not cost:

> this is not an issue of money, but also of the broader principle of taxpayer-funding of trade unions. Ministers in this Department do not believe it is appropriate for public resources to be used to support the collection and administration of membership subscriptions and believe is an outdated and unnecessary 20th-century practice. It is also unsatisfactory that trade unions like PCS collect the political levy via check-off, but make no attempt to

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249 *Hickey & Hughes v Secretary of State for Communities & Local Government* [2013] EWHC 3163 (QB), paras 2-3

250 Ibid., para 25

251 'Union wins High Court battle with Pickles over collecting union subscriptions', Local Government Lawyer website, 4 September 2014 (accessed 28 August 2015)

252 HC Deb 13 September 2013 884W

> inform would-be members that the political levy is optional, or even mention the right to opt out of their membership forms. It is the view of Ministers in this Department that this is a misleading and dubious marketing practice through omission.[253]

11.2 Comment

An editorial in *The Telegraph* stated that "it is right that public sector employers stop collecting membership fees for trade unions".[254]

Jonathan Isaby, Chief Executive of the TaxPayers' Alliance, said that it is "not the business of public sector employers to be processing the union dues".[255]

The General Secretary of the Scottish Trades Union Congress, Grahame Smith, has called on the Scottish Government and all Scottish public bodies to "refuse to implement any instructions issued from Westminster on facility time or check-off."[256]

The trade union Unite has written to the Minister for the Cabinet Office, Matthew Hancock, asking for an explanation of the rationale behind abolishing check-off, stating in the letter:

> it is bewildering why you persist in denigrating deductions via payroll for trade union contributions when other deductions seem to be efficiently made such as charitable donations.[257]

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253 Ibid., c884W
254 'Trade union reforms are right and fair', *The Telegraph*, 6 July 2015
255 'Conservatives launch new assault on union funding', *The Telegraph*, 6 August 2015
256 'STUC calls on public bodies to ignore 'unacceptable' unions bill', STV News, 25 August 2015
257 'Come clean' on union 'check off' savings claim, says Unite', Unite website, 6 August 2015 (accessed 1 September 2015)

12. Hiring agency staff during industrial disputes

Summary

Alongside the provisions in the Bill, the Government is consulting on draft regulations which would repeal the restriction on providing agency staff during industrial disputes.

The Conservative manifesto committed to repealing "nonsensical restrictions banning employers from hiring agency staff to provide essential cover during strikes".[258] Although the Bill does not include provisions to achieve this the Government is consulting[259] on draft regulations which would, and could be made under existing powers.[260]

Currently, regulation 7 of the *Conduct of Employment Agencies and Employment Businesses Regulations 2003 (SI 2003/3319)* prohibits an employment business from supplying agency workers to cover duties normally performed by workers taking part in a strike or other industrial action. The draft regulations (at Annex A of the consultation) would repeal this restriction. The Government set out its reasons for the proposal as follows:

> 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.
>
> 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 workforces effectively.
>
> For instance, strikes in important public services such as education will mean that some 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 fulfil 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 of deliveries.[261]

The consultation is due to conclude on 9 September 2015; the Government intends to respond within six weeks of that date. Regulations implementing the proposal would be subject to the affirmative resolution procedure.[262]

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258 *Conservative Manifesto 2015*, p19
259 BIS, *Recruitment sector: Hiring agency staff during strike action: reforming regulation*, July 2015
260 *Employment Agencies Act 1973*, sections 5(1) and 12(3)
261 BIS, *Recruitment sector: Hiring agency staff during strike action: reforming regulation*, July 2015, p7
262 *Employment Agencies Act 1973*, 12(5)

Annex 1: Political fund ballots

Results of political fund review ballots (omitted periods indicate that no ballot was held)

2014-2015	Turnout (%)	Yes (%)	No (%)
Associated Society of Locomotive Engineers and Firemen		81	19
Bakers Food and Allied Workers Union		92	8
Broadcasting Entertainment Cinematograph and Theatre Union		90	10
Communication Workers Union		87	13
Community		94	6
Fire Brigades Union		84	16
GMB		94	6
Musicians Union		75	25
National Union of Rail Maritime and Transport Workers		97	3
Transport Salaried Staffs Association		89	11
UNISON: The Public Service Union		87	13
Unity		64	36
Union of Shop Distributive and Allied Workers		93	7
2013-2014			
Prospect		93.3	6.7
Unite the Union		87.4	12.6
2009-2010			
National Association of Schoolmasters Union of Women Teachers	14	79	21
Association of Revenue and Customs	40	75	25
2008-2009			
University and College Union	27	73	17
Union of Democratic Mineworkers	34	80	20
2007-2008			
POA	19	81	19
Educational Institute of Scotland	34	88	12
National Union of Mineworkers North Western Cheshire and Cumbria Miners Association	75	100	0
2005-2006			
National Association of Colliery Overmen Deputies and Shotfirers	46	71	29
National Union of Mineworkers	41	75	25
Union of Construction Allied Trades and Technicians	26	94	6
2004-2005			
Associated Society of Locomotive Engineers and Firemen	49	80	20
Bakers Food and Allied Workers Union	18	96	4
Broadcasting Entertainment Cinematograph and Theatre Union	29	75	25
Ceramic and Allied Trades Union	19	67	33
Communication Workers Union	33	73	27
Community	23	75	25
Fire Brigades Union	42	74	26
GMB	19	88	12
Graphical Paper and Media Union	23	67	33
Musicians Union	25	74	26
National Union of Rail Maritime and Transport Workers	37	88	12
Transport Salaried Staffs Association	26	78	22
Union of Shop Distributive and Allied Workers	18	81	19
UNISON	20	85	15
2002-2003			
Connect	38	81	19
2000-2001			
Association of University Teachers		77	23
1999-2000			
National Association of Schoolmasters and Union of Women Teachers		81	19
Association of Her Majesty's Inspectors of Taxes		80	20

Source: Certification Officer Annual Reports, 1999-2015.

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