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BIS Consultation
Trade unions: assured registers of members

Response from the Employment Lawyers Association

4 December 2014

ELA Response to BIS Consultation:
Trade unions: assured registers of members

Introduction

The Employment Lawyers Association ("**ELA")** is an unaffiliated and non-political group of specialists in the field of employment law and includes those who represent and advise both employers and employees. It is therefore not our role to comment on the political merits or otherwise of proposed legislation, rather we make observations from a legal standpoint.

ELA's Legislative and Policy Committee is made up of both Barristers and Solicitors who meet regularly for a number of purposes including to consider and respond to proposed new legislation.

A working group was set up by the Legislative and Policy Committee of ELA under the chairmanship of Shubha Banerjee to consider and comment on the Government's "Consultation: Trade unions: assured registers of members". Our response is set out below. A full list of the members of the working group can be found at the end of this paper.

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

ELA notes the comment included in paragraphs 3 and 4 of the introduction to the consultation document which suggests that one of the reasons for introducing these changes is that it is of interest to the public that members have an opportunity to participate in union activities. We would at the outset comment that there is no source cited for this proposition, nor is there any evidence for it which ELA has otherwise seen. This is unfortunate given that the Government is consulting about how, rather than whether, to introduce these changes. Our overall view is that the legislation confers onerous responsibilities on trade unions but (absent any evidence to the contrary) little benefit to anyone, particularly members of the public. Trade unions are reliant upon their members to enable them to keep their membership records up to date and accurate: therefore penalising unions for not being able to do so, as these proposals will do, raises questions of appropriateness and fairness.

ELA would refer the Government to our response to the earlier consultation on the issue (question 13). In particular, we would refer you to our concerns set out in our earlier response that these proposals might constitute a disproportionate restriction upon Article 11 and Article 8 of the European Convention on Human Rights, which might therefore make them vulnerable to a successful challenge, particularly given the legislation already in existence (namely section 24 of the Trade Union and Labour Relations (Consolidation) Act 1992 ('section 24')) . ELA would also draw your attention to the concerns set out in our earlier response (at questions 13 and 15) about the cost-benefit analysis – the comparatively high financial and administrative costs involved in these proposals seemed to be wholly disproportionate when compared with the very low benefits obtained – as mentioned, and contrary to what is stated in the Government's introduction to this consultation, we do not consider that up to date union membership records is an issue that significantly concerns most members of the public.

ELA remains of the view that the costs to unions far outweigh the benefits which the proposals might confer on employers, employees, unions or their members of implementing this legislation. In particular, ELA notes that paragraph 34 of the Impact Assessment states:

> *"But we have no direct evidence that unions are not complying with the existing statutory duty to maintain their list of members."*

This begs the question as to why independent assurance is necessary, particularly in view of the additional cost in both time and money trade unions will be put to.

ELA notes that on page 5 of the Equality Duty document which looks at the Certification Officer's ('CO') powers of investigation, there is reference to another rationale for the legislation:

> *"These changes would complement but not replace the current mechanism by which employers can approach the court to seek an injunction to stop industrial action going ahead for reasons including erroneous balloting of non-members."*

ELA is surprised that this explanation does not also appear anywhere in the main consultation document this time. Whilst we note and accept that better information about members' names and addresses may lead to better organisation in general terms, given the fact that most communications with most organisations, including trade unions, is undertaken at the current time via email or telephone, we would question whether there will be a significant benefit.

Some specific concerns that arise include the following. First, ELA is concerned as to how consistency amongst assurers will be ensured. Secondly, we are concerned about there being no clear definition of a 'satisfactory system' for compiling and maintaining a membership register.

A further concern relates to delays in provision of the Membership Audit Certificate ('MAC') – if the assurer is late in providing the MAC to the union, some flexibility needs to be built in to allow it to be supplied to the CO at a date later than the date of filing the annual return, given that the delay may well be outside of the control of the union. We would also suggest that time needs to be built in to the process to allow for any challenges/discussions between the assurer and the union in cases of disagreement about the conclusion reached in the MAC. We elaborate upon this further below.

ELA would question the need for the distinction being made in the proposals between large and small unions, and instead suggest that all unions are required to self-certify, rather than involve the additional time and expense of a third party.

Finally, we would point out that for the first three or four years after introduction of the process, there should be a transitional period allowing some additional flexibility concerning the time for submission of the MAC to the CO, so that both assurers and unions have an opportunity to engage in dialogue about, and to understand, how the other works and what the assurer is looking for in the process.

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

ELA notes that it has been proposed that a trade union with in excess of 10,000 members be required to appoint a qualified independent person to act as an assurer who will be tasked to complete a MAC for the CO.

The purpose of the MAC would be to confirm, in particular, that the trade union's system for compiling the register of the names and addresses of its members is satisfactory. As mentioned, given the current legislative requirements in section 24, it is difficult to identify a policy justification for this proposal. Hence in our view, the proposals appear to be unnecessary.

ELA also noted in its previous submissions (at question 13) that the proposal that the assurer reports difficulties to the CO before the union has a right to challenge that decision, may constitute a breach of the principles of natural justice. We suggest that as a minimum, there should be some mechanism for a pause before any report is sent to the CO. This would allow the trade union to comment on the alleged difficulties and the CO should have regard to these where an assurer is unwilling to change an adverse or qualified report.

ELA's view is that unions must already comply with very detailed requirements when conducting certain types of ballot, and that some of these existing requirements necessitate unions ensuring that their membership lists (including names, addresses and information about work places and work types) are accurate and up to date. Hence the question arises again as to what the purpose and need for these proposals is and whether there will actually be any substantial benefit.

Question 3: Are there any other groups that should be able to act as an assurer? If so, please state who these should be and give your reasons why.

In addition to solicitors and auditors, ELA has no specific objection to qualified accountants or scrutineers being able to act as the assurer. However, we see no reason to extend this category further than this. We also have concerns about how one could ensure that an assurer is independent, which we elaborate upon below.

Question 4: Which is your preferred option? Please give your reasons why.

We see no obvious difficulty with option 1, namely that the Secretary of State follows the structure of the scrutineer's Order and makes an Order which lists the professional qualifications which enable a person to act as a qualified independent person and also lists named persons who meet the criteria. However, given that option 1 would require a public competition and the list of qualified independent persons could only be amended by a subsequent amendment to the Order (with consequential cost and delay), ELA considers that the better option is option 2 which benefits from not limiting those who may act and would involve a simpler procedure to appoint new assurers.

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

In our original response (at question 23) we indicated that it would be helpful to have guidance and information about who can/cannot be appointed as an assurer.

ELA also sought confirmation as to whether an accountant preparing the union's annual return or an auditor appointed for the purposes of s.33 of the Trade Union and Labour Relations (Consolidation) Act 1992 ('TULR(C)A') could act as an assurer.

We consider that there may be concerns about whether a scrutineer/auditor can also carry out the role of the assurer and this could lead to legal challenges by interested parties such as disaffected members or employers in industrial action ballots. However, ELA considers that such concerns could be assuaged by including wording in the guidance/statute to the effect that in normal circumstances, the independence of an assurer will not be called into question because they also act for the same union as scrutineer/auditor.

ELA was also concerned about whether there were any unknown factors that might make a particular candidate unsuitable, and we therefore consider that it would be useful to have guidance setting out the types of disclosures that an assurer should make which may affect their independence, in particular any which may not be known to the union seeking to appoint them e.g. whether they have acted/are acting/may in the future act for any employer with whom the union is/has been/is likely to be in the future in industrial or legal dispute. We consider that this obligation to disclose should be a continuing obligation, so that if an appointed assurer begins work for an employer with whom the union is or has been in dispute at any time after their appointment, this should also be disclosed to the union. If a subsequent disclosure is made such that a conflict of interest arises post appointment of the assurer, then the assurer will fail to meet the qualifications for appointment (one of which should, as set out below, be independence and impartiality) and there will be no obligation on the union to reappoint that individual.

We also consider it important that assurers are familiar with unions, their functions, how they work and the inherent difficulties for unions in keeping membership lists up to date given that they must in the main rely upon members to keep them updated of changes of address/other personal information.

We therefore consider that the content of the Order should include the following:

- The professional and/or other qualifications which enable a person to act as an independent qualified person.
- A requirement that the assurer be independent, impartial, competent, adequately resourced, adequately experienced and familiar with the union, their functions and how they work.
- A requirement that any person(s) who intends to act as an assurer for a union must disclose any matters that may affect their independence, in particular any matters which may not be known to the union seeking to appoint them, for example whether they have acted/are acting/may in the future act for any employer with whom the union is/has been/is likely in the future to be in industrial or legal dispute. The Order should specify that this is a continuing obligation.

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

We make the following comments about the specific provisions in the guidance.

Paragraph 1.8 – there should only be a power for the CO to require relevant documents/investigate circumstances if insufficient information has been supplied by the union to the assurer to complete the MAC, or if the assurer's decision on the MAC is that section 24 has not been complied with. The current wording of paragraph 1.8, enabling the CO to investigate or require documents in *other circumstances* which suggest non-compliance with section 24, seems to us to undermine the role of the MAC and the assurer, in that it would be inappropriate for the CO to investigate/seek further documentation where a MAC had been produced in accordance with the new requirements which confirmed that the section 24 duty had been complied with. It seems to us that delving further in such a situation would usurp the role of the MAC and the assurer and open up a strong possibility of successful challenge to these proposals on the basis of a breach of Article 11.

Paragraph 2.3 – as mentioned earlier, the union is dependent upon the member to provide an address, and it should be remembered that the union has no power to compel a member to do so. We would ask what type of system the Government envisages a union adopting to encourage members to notify of any changes of address. ELA would also point out that most types of incentive systems would not be able to counter what we consider to be the primary cause of members failing to keep their unions updated of changes of address, which is simply forgetting to do so. ELA suggests that the paragraph be amended to make clear that whilst the union does not have to keep records of job titles, branches, grades etc, it may wish to do so for its own record-keeping purposes as unions do need some of this additional information when conducting industrial action ballots.

Paragraph 2.5 - the last sentence of this paragraph suggests that unions are in a position to know when there will be a change of address of a member – which is a wholly inappropriate presumption in the circumstances. The words 'as and when appropriate' should be reconsidered in light of this.

Paragraph 2.8 – this paragraph should include a caveat making clear that members' names should only be removed once the union has been informed that the specific member/s do/es in fact wish to have their names removed.

Paragraph 2.9 – Reasonable practicability may also vary depending on the sector of membership involved, eg the means of regularly contacting and liaising with airline crew members who are rarely if ever all in the same place might be very different to the means used to contact home workers or workers who are based at the same site and who have similar working hours. This should be made clear in this paragraph. There is also a typographical error in the second sentence – 'reasonable' needs to be replaced by the word 'reasonably'.

Paragraph 3.1 – This provision takes no account of the different means by which unions update/amend their rule books. Practices vary significantly across unions – some require an election with a certain majority reached before a rule addition/amendment is passed, and some unions only consider rules changes at specific rules conferences which are often held in alternate years and therefore may not happen until a year or more after the legislation is implemented. This provision will need to be reconsidered and possibly recast to take account of these differences. Please also see our response to question 16 below, for further detail.

Paragraph 3.3 – As we mention in our response to question 1, no provision is made for what should happen if the assurer overruns and takes longer than is envisaged to prepare the MAC, thus resulting in a delay in its submission to the CO through no fault of the union.

Paragraph 5. 7 – we would question the inclusion of the words 'related to' any officer or employee of a trade union in the final sentence of this paragraph. We assume that this exclusion refers to any relative of any officer or employee of any trade union (even if an individual is an officer or employee of, or a relative of an officer or employee of, a different trade union to the one whose MAC is being considered). This is surely too vast an exclusion.

Paragraph 6 .1 – as mentioned in our earlier response (at question 13) and above, ELA is concerned about the concept of releasing memberships lists to the CO, a state body. In addition, and as mentioned in our comments upon paragraph 1.8 above, we are extremely concerned by how widely this paragraph is drafted – the CO should only require the production of documents in situations where there is a concern about the MAC – either because it has not been produced, or a member has complained to the CO and provided prima facie evidence to support the complaint or because the assurer's report contained therein highlights a particular concern with the membership lists.

Paragraph 6.2 – this section and the paragraphs that follow need to contain far more detail on data protection. This paragraph needs to clarify how member data is to be treated as confidential and how the limits on disclosure operate and to whom such limits apply.

Paragraph 6.3 – the reference to when the CO and inspectors can access data also needs to include provision as to what constraints there are upon the CO and inspectors in terms of what they can and cannot do with the data which they access.

Paragraph 6.4 –there should be an explanation of what the existing data protection rules provide for and what safeguards there are to prevent misuse of union members' names/addresses.

There is inconsistent use of CO, assurer and investigator in paragraphs 6.2, 6.3 and 6.4.

Paragraph 6.5 appears to set out quite clearly the requirements of which the assurer will need to be satisfied and it is suggested that these be set out in a separate paragraph under a heading such as 'Requirements with which the union must comply' or similar.

Paragraphs 7.3 and 7.4 – ELA considers that specific provision should be included affording a union an opportunity to challenge an assurer's decision. We do not consider that this should be a matter simply for agreement between a particular union and assurer, as we consider that the principles of natural justice require a right of challenge in every case, whether or not the union has specifically agreed this with the assurer. It would also be appropriate to include timescales within the guidance to allow for a challenge - for example, in the event of an assurer having concerns about section 24 compliance, the union will be given 28 days' notice of such concerns and an opportunity to make submissions to the assurer before the assurer reports its final decision to the CO. In addition, if any challenges raised by the union are not sufficient to change an assurer's mind in relation to their concerns and the matter is still reported to the CO, then there should also be provision for the union's challenges, or for 'their side of the story' to be reported to the CO at the same time.

Paragraph 8.3 – As mentioned above, it seems to us that the only situations in which the CO should be able to appoint an inspector or investigate a union are where there is a concern with the MAC, either because it has not been supplied or because the assurer's report highlights concerns with the maintaining of member records. It would be extremely draconian and heavy-handed if the CO could investigate a union where a MAC had been supplied timeously and which suggested that the union was in compliance with section 24. If individual members have specific concerns about membership records, then they can raise them in the usual way under existing processes and procedures, and there is no need for any further right to investigate to be introduced by the back door.

Paragraph 8.5 – it might be helpful to include some parameters for the inspector role.

Paragraph 8.10 – ELA would suggest the inclusion of wording such as 'without reasonable excuse' in this paragraph, in the event that a union has a compelling reason for not supplying the information requested.

Paragraph 9.5 – we would repeat the point made above and below about the difficulties of rule changes and how practices differ widely from institution to institution, which seems to us to make this paragraph unrealistic and unworkable.

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

We repeat the points made in our answer to question 6. Our concerns in relation to the guidance for trade unions apply equally to the guidance for assurers. We make the following additional comments about the specific provisions in the guidance for assurers.

Paragraph 6 - Guidance in relation to the role of the assurer and their duties should be expanded to include guidance in relation to how any delay in the provision of the MAC should be dealt with. No provision is currently made for what should happen if the assurer overruns and takes longer than is envisaged to prepare the MAC. Further, time needs to be built in to allow for any challenges / discussions between the assurer and the union in cases of disagreement.

Paragraph 6.3 - This paragraph is too vague and needs to be more precise. The guidance needs to prescribe exactly which documents or class of documents the assurer may access to fulfill their functions. Clear guidance will also be needed to ensure that unions and their officers do not inadvertently breach the Data Protection Act (see 8.1 to 8.3 below).

Paragraphs 6.2, 6.4, 6.5 and 6.6 - Taken together, these paragraphs cause us concern. Although paragraph 6.5 provides that a union will have the opportunity to engage with the assurer before a qualified MAC is sent to the CO, this does not assuage our concerns. A specific provision should be included to afford unions a statutory right to challenge an assurer's decision before it is sent to the CO. Principles of natural justice require a right of challenge in every case. There should be some mechanism for a pause before any report is sent to the CO.

Paragraphs 8.1, 8.2 and 8.3 - Taken together, these paragraphs are not sufficient to provide data protection guidance. There should be an explanation of what the existing date

protection rules provide for and what safeguards there are to prevent misuse of union members' names and addresses. We recommend that provisions be included to explain the constraints upon the assurer in terms of what they can and cannot do with the data which they access. There should also be an explanation / clarification as to how member data is to be treated as confidential, how the limits on disclosure operate and to whom such limits apply.

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

ELA notes that the proposed legislation does **not impose any obligations** on an employer to provide information about its employees to a union in relation to the union's duty to maintain its register of its members' names and addresses and we would refer to our comments in the earlier consultation response (at question 21) for our views about this.

However, we note that the guidance suggests ways in which the employer can help the union to comply with its section 24 duties. We consider that the guidance should seek to incentivise employers to assist unions to a greater extent than the current wording, perhaps by pointing out the potential benefits of assistance, such as better working relationships and understanding with the union, and also perhaps by pointing out that a failure by an employer to assist may be looked upon negatively in any later complaint that the employer raises about the union's failure to comply with its industrial action or other balloting obligations.

Question 9: Do you have any evidence that could help to refine the assessment of union familiarisation costs?

No

Questions 10 to 15 appear to be directed at unions.

We are an association for employment lawyers and are unable to answer these questions.

Question 16:Do you have any evidence that could help to refine the assessment of the costs to unions of implementing this legislation?

ELA has no direct significant evidence that could help to refine the assessment of the costs to unions of implementing this legislation. ELA notes from the footnote to Familiarisation Costs in Table 9 that the Government have been unable to establish the one-off familiarisation cost for amending union rule books for unions with over 10,000 members. It is the experience of ELA members who advise trade unions that rulebooks vary substantially but generally rules can only be changed by resolution at an annual (or biennial) conference or special rules revision conference. For example, the current rules for Equity (a union of over 10,000 members) provide in rule 46 that alteration of the rules can only be passed by resolution at an Annual Representative or Special Representative Conference, or by means of a ballot of the entire membership in respect of certain specific rules. For rule change

resolutions passed at conference, the majority must be 2/3 of representatives present and voting. Such provisions are fairly typical in ELA's experience.

Mindful of paragraph 3.3 of the draft Guidance for Trade Unions, that unions are required to

> *"appoint an assurer early enough (possibly at the beginning of the reporting year) so that the assurer can carry out the work to give the assurance required"*,

the timing of the implementation of the requirement can have a significant effect on the overall costs. Costs could spiral, for example, if a Special Representative Conference is required because there is no Annual Representative Conference where the rule change resolution can be passed in order to appoint an assurer at the beginning of the reporting year. ELA therefore urges the Government to provide as long a lead in time as possible to allow unions with over 10,000 members to follow their various democratic processes to make the relevant rule changes in the most cost effective way.

ELA notes that there is no provision in Table 9 for the cost of supplying members with a copy of the revised rulebook. Section 27 of TULR(C)A provides that:

> *"A trade union shall at the request of any person supply him with a copy of its rules either free of charge or on payment of a reasonable charge"*

It is the experience of ELA members who advise trade unions that rulebooks normally provide for members to be provided with a paper copy of the rules free of charge on joining and to receive copies of revisions when made or when the rulebook is consolidated, again at no cost. Rule 45 of Equity's rules provides precisely this. Whilst unions could amend their rules to provide for electronic dissemination of rulebook changes or to charge reasonable fees for supplying copies, not many unions currently do so. An estimate of the cost to unions of complying with their section 27 obligation should therefore be included in Table 9.

Question 17: Do you have any evidence that could help to refine the assessment of benefits of implementing this legislation?

ELA has no direct significant evidence that could help to refine the assessment of benefits of implementing the legislation. We said in response to question 13 of the initial consultation that:

> *"We struggle to discern the policy justification for this proposal in view of the current legislative requirements in section 24 TULR(C)A.*
> *Overall, we would question the need for the introduction of this role as it seems that from a cost-benefit perspective, the cost to unions far outweighs any benefits that these proposals confer on employers, employees, unions or their members, or employment law principles or industrial relations more generally.'*

We said in response to question 15 of the initial consultation that:

> *"ELA notes that the Minister has reserve powers to introduce different means of voting in section 54 of the Employment Relations Act 2004 in respect of any ballot or election held under TULR(C)A 1992. It is notable that the law has not yet been amended using these reserve powers to allow for electronic voting via secure websites. Electronic voting could also improve participation in elections."*

ELA remains of that view. We consider that the introduction of electronic voting would have far more significant benefits to ensure members are aware of communications from their unions and improve participation in any ballot or election and we are surprised that it has not been considered instead of or in addition to implementing the legislation.

Questions 18 and 19

We repeat our answer to question 10 here.

Question 20: Do you have any evidence that could help us assess whether there are any costs to employers of employees attending an additional conference to agree rule book change?

There is the possibility of additional costs to employers where employees are also senior lay officials of the union and would be in attendance at any such conferences. As the union will be required to implement these changes to its rules to comply with current legislation it is likely that this will be considered as time off with pay for trade union duties and/or activities. This will impact more on larger employers as they have more sophisticated collective bargaining and facility time arrangements.

Whilst the merits of these changes remain unclear a way to avoid these costs is to impose such provisions as a statutory term, but that might appear draconian and make these proposals even more susceptible to challenge.

Question 21

We repeat our answer to question 10 here.

ELA Working Group
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