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**Transparency of Lobbying, Non-Party Campaigning and
Trade Union Administration Bill-Certification of Trade
Union Membership Details**

Response from the Employment Lawyers Association

16 August 2013

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1. Introduction

The Employment Lawyers Association ("ELA") is a non-political group of lawyers working in the field of employment law. Our membership includes those who represent claimants and respondents in courts and employment tribunals. ELA does not comment on the political merits of proposed legislation, rather making observations from a purely 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.

The Legislative and Policy Committee of the ELA set up a working group under the chairmanship of Paul Statham of Pattinson & Brewer to consider and comment on the Discussion paper 'Transparency of Lobbying, Non-Party Campaigning and Trade Union Administration Bill-Certification of Trade Union Membership Details' published by BIS in July 2013. A full list of the members of the working group is annexed to the report.

Preliminary: Time scale of consultation

Before dealing with the consultation itself, ELA wishes to express our concern about its short time scale. This is a matter we have raised both formally and informally in the past, but it is important enough to repeat yet again.

The consultation launched on the 17th July 2013 and closes on the 16th August 2013. This is only four weeks. It is also the height of the holiday season. This is simply not enough time for ELA to consistently produce high quality responses.

Like many organisations ELA has a process for responding to government consultation. Primary responsibility lies with the Legislative and Policy Committee of ELA. Work on an individual consultation, however, is conducted by a working group made up of ELA members with interest in and expertise relating to the consultation.

A working group must meet to discuss the consultation and their views. In general, the consultation document is divided between the members of the group, who prepare draft answers. These drafts are then circulated between the working group for comment, before a final draft is prepared. The final draft must be approved by the Chair of the Legislative and Policy Committee and the Chair of ELA.

ELA believes that this process is best way of producing high quality responses. It allows us to take advantage of the wide range of experience and knowledge among our membership — and to reflect their range of views. Indeed, given that ELA has only a small paid staff in administrative roles, it is the only practical way of organising a response.

It does, however, take time. Furthermore, when a consultation raises important and complex issues members of the working party need time to consider and formulate their views. Substantial reform of the obligations on trade unions to maintain membership records and the introduction of the office of Assurer may be an obscure area of law but it is an important matter for trade unions and their members. The additional powers to be given to the Certification Officer may have significant Human Rights implications. An off the cuff answer is simply not good enough — yet it is all we have been given the opportunity to provide.

If the government persists in consulting under such short timescales, it is likely to undermine the purpose of consultation. Not only will the quality of responses drop, but stakeholders will become reluctant to engage. They may come to believe that the timescales being provided reflects the government's level of interest in the responses.

ELA has always been keen to assist the government in formulating policy. We hope that our expertise and experience is useful. But it is becoming increasingly difficult to make a meaningful contribution within the truncated timescales being required.

Answers to Questions

Q 1. Yes we would like you to publish or release our response.

Q 2. Employment Lawyers Association (“ELA”).

Q 3. See introduction above

Q 4. lindseyw@elaweb.org.uk

Q 5. See introduction above.

Q 6-12. Not applicable as ELA is not a trade union.

Independent Third Party Assurer

Q 13. Do you agree with the role and duties of the assurer set out in the Bill? If not, why not?

It is proposed to impose a requirement on a Union with a membership of more than 10,000 to secure from an assurer a membership audit certificate (“MAC”), confirming in particular that the trade union’s system for compiling the register of the names and addresses of its members is satisfactory. 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.

ELA would question whether these proposals go further than is ‘necessary’ in restricting the Article 11 rights to freedom of association and whether the Government would be able to justify the inclusion of an additional burden (both financial and administrative) beyond what is already contained in section 24 of TULR(C)A as being a proportionate response to a particular issue or concern.

In addition, we are concerned about whether there might be an infringement of the right to privacy in Article 8, on the basis that the proposals make provision for the Certification Officer (“CO”), a state body, to know who is or is not a union member and where they live.

ELA also note 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 would 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 at least comment on the alleged difficulties and for those comments to accompany the assurer’s report if the assurer is unwilling to change an adverse or qualified report.

ELA consider that some or all of the above points could form the basis of a successful challenge to the introduction of the role and duties of an assurer.

We would also point out that unions must already comply with very detailed requirements when conducting certain types of ballot (eg for industrial action), and some of these requirements already necessitate unions ensuring that their membership lists (which include names and addresses, but also extend to information about workplaces/job types) are accurate and up to date. This again therefore makes us question the purpose and need for these proposals and whether they will actually achieve any substantial benefit.

We are also concerned by the lack of detail within section 24ZD(3) of the Bill as to what constitutes a 'satisfactory' system for compiling and maintaining the register of names and addresses, and as to what constitutes 'necessary' information and explanations. A lack of guidance or detail on these points causes uncertainty, may lead to satellite litigation and may cause inconsistencies between different unions and their different assurers.

Finally, we note that these proposals will penalise unions for failing to keep membership information accurate and up to date, when the reality is that inaccuracies in records are often caused by members failing to notify their union when they change address (or job when occupation is an enforceable membership requirement to remain a member).

Q 14. Do you agree with our proposal that a solicitor, accountant, auditor or scrutineer should act as the assurer? If not, who do you think should do it? Why?

We do not have any specific objections to the proposal, however, we do have concerns as to how one could ensure that an assurer was independent. We also consider that it would be imperative for assurers to be familiar with unions, their functions, and how they work.

Impact on Unions

Q 15. What will be the costs and benefits to unions?

Costs/resources will be incurred by unions in identifying and securing the services of an appropriate person to undertake the role of assurer, paying for those services, and in ensuring that requests for information and documentation made by the assurer are complied with.

Whereas the fee for an assurer will be a matter for negotiation, it is to be anticipated that the cost may well be disproportionately higher for those unions with lower levels of membership than for those with high levels of membership; the focus in both cases being on the systems in place. An effective system could be the same for a union with 10,001 members as for one with 1,000,001 members, and the cost of an assurer determining whether the system was satisfactory may not be materially different between each organisation. The section 24 duty makes no distinction between unions of different membership numbers.

As mentioned in answer to question 13, it is questionable, in all the circumstances, whether this requirement is a proportionate and necessary interference with the freedom to associate, in light of the costs and resources required to comply. Although this is a matter for a policy decision, whether any perceived breach of section 24 might be more appropriately taken up through the existing enforcement powers of the Certification Officer (which might be supplemented by requiring in appropriate cases the provision of a MAC for a specified period of time).

The benefits to unions of MACs are unlikely to be significant beyond that achieved by the existing section 24 duty. Whereas, initially, the impact may be, in some limited instances, an improvement in membership record processes, any union, as ever, will be highly dependant on their membership to communicate changes of address or job and/or their personal representatives notifying the union of the member's passing, as mentioned at question 13 above. We understand that the definition of whom is treated as a member, such as differing rules about membership ending automatically or being suspended if a certain number of weeks of arrears of contributions, will not be affected by these proposals. Unions will be free to decide on their own rules to determine who is or is not a member.

The home address details for members, as required to be entered on the register, have become less important from the member's perspective (much union communication is, it is anticipated, now conducted by email with members). Of course, as there remains no provision for online balloting where trade union ballots are regulated by statute, home addresses (or nominated addresses) remain important for both members and unions in ballots for statutory elections, political fund ballots and industrial action ballots. However, most members' practical concern relates to securing information and participating in non-statutory consultation/ballots; and if they continue to receive emails they may not immediately send notification of address changes.

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.

Q 16. What is your estimate of any additional costs in meeting the proposed annual assurance requirements in relation to membership records?

The cost will be dependent on the trade union.

Where a trade union's membership is used to using the internet and social media, and the communication strategy of the union is through email, social media or the internet, implementing a system to seek to ensure that the membership database is accurate is likely to be, after initial cost for set-up which could be material, comparatively insignificant.

However, for some unions, where their membership does not generally communicate with their union via the Internet, social media or email, the cost of implementing an appropriate system may be more significant.

Q 17. Where do those costs come from?

The costs associated would arise from (in cases where a trade union does not have an existing process compliant with the likely annual assurance requirements):-

- Costs associated with set-up costs for any required link of the membership register with the website, for updating purposes;
- Resource costs of improving/updating any paper-based update system; and

- Costs associated with the process around the assurer's assessment of performance
- The costs of contracting an assurer.

Impact on Members

Q 18. What will be the costs and benefits to union members?

The additional costs of these proposals to unions, both in terms of resources to ensure compliance with the proposals and paying an assurer's fee on an annual basis, may be passed on to their members which may lead to an increase in subscriptions for members. Given the likely disproportionate impact of these proposals on smaller unions as set out above, it may be that the increase in subscriptions for members of smaller, less financially secure unions is greater than that for members of larger, better off unions. We can see limited benefits to members. These proposals might increase the efficiency of union record keeping, which could benefit members because the increased efficiency might make it easier for unions to organise generally and to ballot for industrial action. Better record-keeping might also benefit members because they would be more informed about their union's activities where the union sought to communicate with members by post. However, given the increasing propensity for communications in all walks of life to be via text message or email, this may be of very limited value.

Impact on Employers

Q 19. What consequences do these proposals have for employers? Why do these consequences arise?

It is not easy to identify any substantial consequences for employers in these requirements. The statutory duty imposed on trade unions to maintain a register already exist and these proposals seem to do no more than provide for additional regulation of the union and enforcement provisions by the CO. The only consequence that occurs to us is the possibility that in times of conflict between an employer and a trade union the employer may be able to have greater confidence that the register is accurate but otherwise the impact on employers is difficult to discern.

ELA anticipate that the CO may be become involved in industrial action ballots. Whether this is a good thing is a policy matter but the CO's reputation for political neutrality may well be lost if the office is drawn into industrial disputes. Where the employer challenges the validity of the ballot on the basis of breaches of section 226A, 227, 230(2)(a) and (b) of TUL(C)A where the evidence is that certain members entitled to vote did not receive a ballot paper at their home address then the employer may also refer the matter as a complaint to the CO and invite him to find there is "a good reason" to investigate in pursuant to section 24ZH as inserted by section 38 of the bill. They could also invite the court to grant an injunction to prevent any industrial action taking place until the CO's investigations are concluded.

ELA also anticipate that whenever an assurer qualifies a MAC, an employer faced with an industrial action ballot will use the qualification in evidence in support of injunctive relief even if in the meantime the union has remedied the defect identified (see also our point above in answer to question 13 about the lack of a pause before any qualified MAC is sent to the CO).

Q 20. What type of questions do unions ask employers in relation to union membership?

The relevance of this question to the specific proposals in the discussion paper is obscure. Usually questions raised by trade unions will arise from the difficulties they have experienced in maintaining an accurate record of the whereabouts of their members who have failed to keep them informed of changes of jobs. This is most often of immediate importance if industrial action is contemplated. It is not entirely unknown for a union to request that an employer state where union members are working within an organisation and neither is it unknown for that information to be supplied but both require the existing relationship to be cordial and supportive which is not the universal experience. Where industrial action is contemplated a union may request information about the number of members working in a particular bargaining unit but the usual response is to refuse to provide that information. If an employer is operating check-off then the union will know how many members are working for that employer but the number may be irreconcilable with the identity of the workers on the register.

ELA anticipate that unions will make more requests for information about members' workplaces and job titles if these provisions are introduced. Although the register only requires names and addresses, most union membership records contain a lot of additional information. If requests are made to update the register ELA anticipate requests will be made in respect of this other information at the same time.

Q 21. As an employer, how would you respond to requests from a recognised union for staff details that would help them update their membership record? Why would you respond to the requests in this way?

We reply to this question based on our experience of advising employers. As we have said it is not unknown for co-operation to take place but it is not common. The usual response would be either to ignore or refuse the request. The reasons are usually reflective of the reluctance of the employer to engage with the union even if it is recognised. This would be even more the case if the recognition had been statutorily obtained or any form of industrial action was in the contemplation of the employer. The reason given is often reference to the requirements of the data protection legislation but given the absence of any legal obligation to respond often no reason is given.

It may be considered whether requests for such information come within the scope of section 181 Trade Union & Labour Relations (Consolidation) Act 1992 (TULR(C) A) which places a general duty on employers to disclose information the

lack of which would ‘to a material extent’ impede the union in carrying on collective bargaining. That would be a matter of fact for a court to determine in each case but probably the better view is that it does not. There is an existing rule that information that relates specifically to an individual need not be disclosed without the consent of that individual (section 182(1)(d) TULR(C) A).

If the intent of government is to ensure the registers of trade unions are accurate then an extension of section 181 to include membership information within the scope of the information required to be disclosed would remove uncertainty in this area and provide an answer to any objections based on data protection laws. Issues of reciprocity are likely to arise, however, and create a demand by employers for a right to know which of their workers is a union member and such a request would be fiercely opposed. There are in any case many concerns with the general restrictions placed on the obligation to disclose information, which probably explains why it is a provision that used much less than one might expect. This is a complex and contested area of law and we stress that any changes contemplated would demand extensive consultation, far beyond that undertaken in respect of this discussion paper.

Compliance

Q 22. What is your view of the remedies for non-compliance with the clauses?

For the purposes of this response “the clauses” are taken to mean those in Part 3 of the Bill.

The remedies of a declaration and an enforcement order (unless an enforcement order is inappropriate), made either by the Certification Officer or the High Court are the same as those already existing for members who make a complaint relating to their own entry on the register. ELA notes with approval the fact that before making an enforcement order under section 24C the CO must give the union an opportunity to be heard.

The main difference introduced appears to be that the Certification Officer can, of his own volition, launch an investigation and make a declaration and enforcement order against the union. A member can then enforce this order against the union as though he or she had made the original application himself. The provisions relating to the assurer and the certificate make such an investigation more likely.

The clauses seek to align the remedies available with existing remedies in respect of complaints by members about the accuracy of the register. By allowing investigation ultimately leading to those potential remedies, even without a complaint having been raised by a member, the clauses increase the likelihood of their use.

In particular, the consequences of a declaration and an enforcement order are that any member may initiate contempt proceedings against the union in respect of an enforcement order which opens up the possibility of sequestration of the union’s assets. In ELA’s view this could be seen as a disproportionate response to what would essentially be an administrative problem. This is particularly the case where there are new obligations on a union which they may take time to adjust to.

The extension of the circumstances in which such orders can be made and enforced with such serious remedies serves, in ELA's view, to leave unions vulnerable to such proceedings, in circumstances where the purpose of the proposals is unclear.

Consideration will need to be given to how these proposals will be interpreted in order to ensure consistency with article 11 of the European Convention on Human Rights (see our answer to question 13 above). ELA do not consider the duty of confidentiality on the CO as set out in section 24A which is to be extended to assurers and inspectors by the new sections 24ZG and 24ZI is sufficient to counter the argument that the state has access to the names and addresses of every trade union member in the country as long as the CO "thinks there is a good reason to do so". Put this starkly, ELA anticipate challenges to the new powers using article 11 arguments as set out above.

If further clarity were given on the purpose of these proposals it would be easier to assess how appropriate/proportionate they are and how far they achieve their aims. In ELA's view, if any clarification or amendment were given/ made further detailed consultation would be necessary.

22. Will Unions need time to prepare before the new requirements come into force?

In ELA's view unions will need time to prepare and it is in the CO's interests that they also have time to prepare. It is ELA's understanding that the first membership audit certificate (if required to be provided to the CO at the same time as the annual return) cannot be due before 1 June 2015. This certificate would be in relation to the accounting period 1 January 2013 – 31 December 2014. The commencement provisions of the Bill provide that the provisions of Part 3 will come into force on "such day as the Minister may appoint by order".

How much time is needed will depend on the union and their existing systems and how long it takes those with over 10,000 members to arrange for a rule change to provide for the appointment and removal of an assurer to comply with section 24ZC. How rule changes are implemented in trade unions vary depending on the rulebook. ELA are aware of some unions where some rule changes require a referendum of all the members and others where rule changes can only be made at biennial rule change conferences.

All unions will need time to consider whether any changes to the way in which the register is stored and recorded are required to comply with the duty or for the convenience of arranging for the assurer to assess their compliance with their duties. Unions will also need time to consider whether any changes to their procedures should be made and, if so, they will need time to amend/draft and implement any such procedures as well as training staff where necessary.

Unions with over 10,000 members will also have to comply with their own rules in terms of considering the necessary budget and resources required for them to appoint an assurer. They will need time to consider and find an assurer.

ELA note that a qualified independent person is someone who satisfies the conditions set out in an order made by the Secretary of State or who is listed by name in the order. ELA note this is to be a recognised professional or an independent scrutineer from the statutory list of scrutineers. This means it may be possible for a scrutineer appointed by the union to also act for the same union as an assurer. ELA consider that to carry out the dual role may well compromise the independence of the scrutineer, which is a statutory requirement of both section 49(2) and section 49(4). The scrutineer must check the union register “whenever it appears appropriate to him to do so”. He must carry out a check if requested by a member or any candidate in an election who suspects the register is not up to date (section 49(3)(aa) and (3A)). If the suspicion proves accurate it would place the scrutineer in an embarrassing position if they had recently also carried out the role of assurer and issued a MAC without qualification. A complaint to the CO about their independence could follow from the member or candidate.

Unions with less than 10,000 members who will self-certify will need to explore and implement any changes necessary for them to assess themselves whether their systems are satisfactory for complying with their duty in respect of the register. Again, the more guidance that can be given as to the kinds of steps that will be required, the more easily and quickly unions will be able to comply with this.

23. In a guidance document what information would you find helpful in relation to the proposals?

For the purposes of this response “the proposals” has been taken to mean those in respect of Part 3 of the Bill only.

In ELA’s view it would be helpful to have guidance on the following matters:-

- a) information about who can/ cannot be appointed as an assurer.

In particular can a person/body corporate who is acting/has acted/may in the future act for the union as:-

- i) scrutineer in an union election or industrial action ballot; or
- ii) accountant preparing the union’s annual return;
- iii) auditor for the purposes of s33 of TULRA 1992

be the assurer?

- b) Any requirements on the assurer to make disclosures that may affect their independence, in particular any which may not be known to the union seeking to appoint them. For example, whether they have acted/are acting/ may in future act for any employer with whom the union is/ has been/ is likely to be in future in industrial or legal dispute with

- c) What might be examples of grounds for believing (under s24ZB(3)(b) that:-

- i) an assurer would carry out their functions otherwise than competently;
- ii) the assurer’s independence might reasonably be called into question

- d) Confirmation that the definition of who is a member for this purpose depends on the union's rulebook definition. ELA's understanding is that there are potentially different interpretations of the word "member" depending on the context being looked at: *National Union of Mineworkers (Yorkshire Area) v Millward* [1995] IRLR 411.
- e) The standard expected to meet the test that the union's system is "satisfactory" to secure that "so far as is reasonably practicable, that the entries are accurate and kept up-to-date". In ELA's view it would be helpful if this could include some guidance as to the kinds of steps unions are expected to take.
- f) Any limit on the number of times one person/body corporate can request a copy of the membership audit certificate as required under s24ZA(6)
- g) Guidance as to what level of charge for provision of the membership audit certificate would be viewed as reasonable

Impact Assessment

We have no additional comments on the Equality Impact Assessment. ELA are concerned to note that no full impact assessment accompanied the discussion paper.

List of Working Party Members

Paul Statham, Pattinson & Brewer (Chair)
Shubha Banerjee, Leigh Day
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