



Department
for Business
Innovation & Skills

TRADE UNION BILL

DELEGATED POWERS

MEMORANDUM

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Introduction

This Memorandum identifies the provisions of the Trade Union Bill which confer powers to make delegated legislation, and explains in each case why the power has been taken and the nature of, and reason for, the procedure selected.

Each measure in the Bill is addressed individually. The material for the Memorandum was prepared by the Department for Business, Innovation and Skills with input from the Cabinet Office.

Overview of the Bill

The Trade Union Bill amends or inserts a number of provisions into the Trade Union and Labour Relations (Consolidation) Act 1992 (“the 1992 Act”).

The Bill contains 22 clauses and has 4 Schedules. The Bill covers the following areas:

- Clauses 2 and 3 make provisions for ballot thresholds for industrial action. Any action by a trade union will need a 50% turnout requirement, there will be an additional 40% support requirement in important public services in six key sectors.
- Clauses 4 to 6 make provisions about information requirements relating to industrial action including: changes to the information requirements on the ballot paper by requiring detail on the nature of the dispute and the type of industrial action to be taken, alongside a general indication of the time period for action; makes changes to the notice of ballot results provided to members and employers; and imposes new annual reporting requirements to the Certification Officer (‘CO’).
- Clauses 7 and 8 contain provisions about the timing and duration of industrial action. Two weeks’ notice is to be given to employers of industrial action (rather the current period of one week). In addition the mandate for industrial action is to expire four months after the date of ballot.
- Clause 9 requires union supervision of picketing – a number of provisions in the statutory Code of Practice on Picketing are to become legal obligations in the Bill.

- Clauses 10 and 11 make provision in relation to the payment of funds for political objects. Currently union members automatically contribute to these funds unless they choose not to. The clauses will require a union member to actively decide to contribute a proportion of their membership subscription to the union's political fund. A union member will also be required to renew the decision to contribute (to the political fund) every 5 years. Where the annual amount spent on political expenditure is over £2,000, unions will be required to provide details of expenditure in their annual returns.
- Clauses 12 and 13 will introduce two new regulation making powers. The first allows a Minister of the Crown to make regulations which require some or all public sector employers with one or more trade union representatives to publish information relating to time off taken by those representatives for trade union duties and activities. The second allows a Minister of the Crown to make regulations exercising reserve powers for the purpose of applying a statutory cap to relevant public sector employers, where the Minister considers it appropriate to do so having regard to information published in accordance with publication requirements.
- Clause 14 will prohibit relevant public sector employers from making deductions for trade union subscriptions from workers' wages (known as "check off"). The clause will apply to relevant public sector employers which will be specified in regulations made by a Minister of the Crown. The regulations will also allow consequential provision to be made to amend or otherwise modify existing legal entitlements to check off; and will additionally allow for transitional provisions in connection with the coming into force of any provision of the regulations.
- Clauses 15 to 17 expand the role of the CO. These provisions will allow the CO to investigate and enforce breaches of statutory requirements without having to act upon a complaint from union members and where there has been a breach the CO will have the power to impose financial penalties (or warn of their use if certain action is not taken).
- Clause 18 makes provision regarding a levy. This clause contains a regulation making power which will enable the Secretary of State to make affirmative regulations to provide for trade unions and employer associations to pay for the full recovery of the costs of running the Certification Office.
- Clauses 19 to 23 contain general provisions including minor and consequential amendments to other enactments, the extent, commencement and title.

- Schedule 1 – Investigatory powers of the CO: Schedule to be inserted into the 1992 Act.
- Schedule 2 – Certification Officer: exercise of powers without application etc.
- Schedule 3 – Certification Officer: powers to impose financial penalties: Schedule to be inserted into the 1992 Act.
- Schedule 4 – Minor and consequential amendments

Territorial coverage

The Bill extends to England, Wales and Scotland.

Devolution

Employment policy and industrial relations law are reserved. There are no devolution issues and therefore the Bill does not require legislative consent motions. In Northern Ireland employment and industrial relations are transferred. We are making a minor, consequential amendment to NI legislation on political funds, which deals with NI trade union members of GB unions. There is no substantive change to that legislation

Provisions which confer delegated powers

The Bill contains 11 delegated powers. The provisions in the Bill which confer these powers are identified below. The purpose of the delegated powers taken, and an explanation as to why the matter is to be left to delegated legislation and why the relevant department has chosen a particular procedure, are then set out in relation to each relevant clause.

Clause 3(2): 40% support requirement in important public services

Power conferred on: Secretary of State

Power exercisable by: Regulations

Parliamentary procedure: Affirmative procedure

Context and purpose

Clause 3 amends section 226 of the 1992 Act by introducing a new 40% threshold of support that must be satisfied in a ballot for industrial action where a majority of those balloted are engaged in the provision of important public services or activities that are ancillary to the provision of important public services. This threshold will only come into effect once the Secretary of State exercises the power to make provisions by regulations to list those who will be subject to the 40% threshold. The regulations may only specify services which fall within six key sectors: health services, education of those aged under 17, fire services, transport services, decommissioning of nuclear installations and management of radioactive waste and spent fuel and border security.

Justification for delegation

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.

Justification for procedure selected

The affirmative procedure is considered appropriate for this power as the effect of this clause will be to change a key aspect of the industrial action regime. Since exercising the power will introduce a new obligation on trade unions it is considered that this provides the appropriate level of parliamentary scrutiny.

Clause 11(1): Power to amend the prescribed amount above which political spending by unions must be included in the annual return

Power conferred on: Secretary of State

Power exercisable by: Regulations

Parliamentary procedure: Negative procedure

Context and purpose

Clause 11(1) inserts a new section 32ZB into the 1992 Act. It proposes that where trade unions spend more than £2,000 per annum on political expenditure, those unions are required to provide details of that political expenditure in their annual returns. Unions must identify the recipient for each different category of expenditures (the categories are set out in paragraphs (a) to (f) of section 72(1)). In addition, they must identify the amount paid and the nature of the expenditure.

These provisions will also apply to employers' associations.

Section 32ZB provides that a prescribed amount may be substituted for the sum of £2,000 but that sum must not be less than £2,000. The amount will be prescribed in accordance with section 293 of the 1992 Act. This states that regulations made by the Secretary of State may prescribe the amount and this may be done by the negative procedure.

Justification for delegation

The new section 32ZB requires details of political expenditure to be given in a trade union's annual return only where the total amount is more than £2,000. If this figure is increased, a union is less likely to be caught by the new requirement. The power in subsection (3) is a power to change the figure of £2,000 to a higher figure - in other words, it is a power to make the new requirement less burdensome. There is no power to specify a figure that is less than £2,000, which would make the requirement more burdensome on unions.

Justification for procedure selected

As regulations can only raise the amount of spending which will trigger the requirement for unions to provide political expenditure details, the government considers that the negative resolution procedure will provide the appropriate level of parliamentary scrutiny.

Clause 12: Power to impose publication requirements on relevant public sector employers

Power conferred on: a Minister of the Crown

Power exercisable by: Regulations

Parliamentary procedure: Negative procedure

Context and purpose

This clause inserts a new section 172A into the 1992 Act enabling a Minister of the Crown to make regulations requiring some or all public sector employers with one or more trade union representatives to publish information relating to time off taken by those representatives for trade union duties and activities (referred to as "facility time", which is

defined in subsection (8) of the new section). The information that could be required to be published includes the number of such representatives by type, how many of them spend a specified percentage of their time on trade union duties and activities, and information about the employers' spending on trade union duties and activities. The regulations may specify the form and timing of the publication.

The regulations may also specify which public sector bodies the requirements apply to, giving some flexibility to the Minister to identify particular sectors or bringing within scope bodies that are not public authorities but which, nevertheless, are performing functions of a public nature (172A(9)).

There is some flexibility in framing the precise nature and extent of the publication requirements although the parameters are outlined in new 172A(3).

Justification for delegation

The Government considers that a delegated power for the Minister to exercise is the most suitable mechanism for requiring public sector bodies to report on facility time. The publication requirement is being introduced as a tool to change behaviours and as such it is possible that, in time, the requirement may be relaxed or dispensed with either across the board or in relation to certain sectors. It is necessary and desirable to leave the detail of the publication requirement in secondary legislation. For instance, it could be that circumstances dictate that parallel sets of reporting regulations will be required for different sectors e.g. health, education. Over time the method or approach for pay bill calculations may need to be adjusted depending on the size and changing nature of the workforce.

The Government considers that the detailed form and timing requirements for publication are also more appropriate for secondary legislation. The detail of the requirement, and the fact that from time to time they may need to be changed in order to change the frequency and nature of publishing required can be more effectively dealt with in secondary legislation. If over time the publication requirements lead to desired changes in practice the form and timing requirements could also then be relaxed, updated or focused on particular sectors as necessary to meet the policy aim.

Justification for procedure selected

The parameters of the publication requirement will be set out in primary legislation (172(A)(3)), with the regulations providing for further detail of the specific arrangements.

Although the power can be exercised across a broad spectrum of public sector employers, the publication requirements relate to a narrow range of information similar to what is already published within the Civil Service following the introduction of the Cabinet Office's Facility Time Framework. Similar information is also targeted for publication by local authorities under the Local Government Transparency Code 2015 (paragraph 45).

Therefore, the publication requirement does not represent a fundamental departure from publication activities already being undertaken by a significant number public sector employers.

Regulations subject to the negative resolution procedure place analogous publication requirements upon local authorities under clause 3 of the Childcare Bill 2015-16.

The government therefore considers that the negative resolution procedure is appropriate in these circumstances and would provide the appropriate level of parliamentary scrutiny.

Clause 13: Power to enable the setting of a statutory cap on the overall amount of time and/or percentage of pay bill that can be spent on facility time

Power conferred on: a Minister of the Crown

Power exercisable by: Regulations

Parliamentary procedure: Affirmative procedure

Context and purpose

This clause inserts a new section 172B into the 1992 Act (immediately after the new section 172A inserted by clause 12). The new section allows a Minister of the Crown to make regulations exercising reserve powers, where the Minister considers it appropriate to do so having regard to information published in accordance with publication requirements (defined in subsection (10) of the new section).

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 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 re-negotiate 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.

Justification for delegation

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.

Justification for procedure selected

The affirmative procedure is considered necessary to provide the correct level of parliamentary scrutiny for new obligations placed upon affected employers. This will enable the provisions as to the level of the cap and adequacy of any exceptions to be fully debated. The existence of the Henry VIII power in the new section 172B(4) also justifies the level of scrutiny afforded by the affirmative procedure.

There is also the possibility that the application of a cap may have retrospective effect in relation to some employment-related contractual entitlements, which again suggests the affirmative procedure would provide the correct level of scrutiny. Whilst it is anticipated that the effect on current contractual arrangements in the employment sphere can be successfully managed in the same way as employers are accustomed to doing when making workforce changes (and the regulations provide for transitional arrangements in this respect at 172B(9)(c)), the potential impacts upon pre-existing contractual arrangements should be fully debated.

Clause 14: Power to prohibit the deduction of union subscriptions from wages in the public sector

Power conferred on: a Minister of the Crown

Power exercisable by: Regulations

Parliamentary procedure: Affirmative procedure

Context and purpose

This clause inserts a new section 116B into the 1992 Act. The new section prohibits relevant public sector employers from making trade union subscription deductions from the wages of their workers (a practice known as ‘check-off’). The prohibition will apply to relevant public sector employers as specified in the regulations. The regulations will allow consequential provision to be made to amend or otherwise modify existing legal entitlements to check off; and will additionally allow for transitional provisions in connection with the coming into force of any provision of the regulations.

Justification for delegation

The regulations will specify to which public sector bodies the requirements apply, giving some flexibility to the Minister to identify particular sectors or bringing within scope bodies that are not public authorities but which, nevertheless, are performing functions of a public nature (s116B(3)).

The regulations enable the Minister to include transitional provisions so as to enable trade unions to make alternative arrangements; and by doing this through regulations, the Minister can make different provision for different purposes (s116B(8)).

Justification for procedure selected

The affirmative procedure is considered necessary to provide the correct level of parliamentary scrutiny as to the public sector employers to which the prohibition should apply

There is also the possibility that the prohibition may impact upon some existing employment-related contractual entitlements, which again suggests the affirmative procedure would provide the correct level of scrutiny. Whilst it is anticipated that the effect on current contractual arrangements in the employment sphere can be successfully managed in the same way as employers are accustomed to doing when making workforce changes (and the regulations provide for transitional arrangements in this respect at 116B(6)(c)), the potential impact upon pre-existing contractual arrangements should be fully debated.

Clause 18: Power to impose levy

Power conferred on: Secretary of State

Power exercisable by: Regulations

Parliamentary Procedure: affirmative procedure

Clause 18 gives the Secretary of State power to make affirmative regulations to provide for trade unions and employer associations to pay a levy to the CO. The regulations must require that the CO aims to ensure that the amounts raised are not more than required to cover the expenses of the CO's functions. In addition the regulations may make provisions for determining the following: amount of levy payable including by reference to the relevant organisations (trade union, federated employers' association or an employers' association that is not a federated employers' association); by reference to a specified criteria (amount of members or income of the organisations, type of organisation and the different proportion of the CO's expenses that are referable to each organisation) and what is to count as expenses by the CO.

Justification for delegation

The Bill will make provisions to expand the role of the CO. Therefore it is only once the new expanded role of the CO has been established that it will be possible to establish exactly how the levy should best operate. It is therefore appropriate that the Secretary of State has this flexibility so that the regulations can reflect the requirements of the new expanded CO and set out the appropriate levy. It will also provide a level of flexibility to adapt the provisions in the future to take account of changes to the CO's functions or workload. The parameters for the levy scheme are set out on the face of the Bill. Before making any regulations under this clause the Secretary of State must consult with relevant organisations and ACAS. Therefore it is necessary to maintain a degree of flexibility in relation to this provision to consider the outcome of the consultation.

Justification for procedure selected

The regulations are subject to the affirmative procedure. The proposed approach will provide Parliament with the opportunity to scrutinise and debate the levy scheme created by the Secretary of State and it is considered that this procedure provides the appropriate level of scrutiny.

Clause 22: Power to commence by Commencement Order

Power conferred on: Secretary of State

Power exercisable by: Order

Parliamentary procedure: None

This clause contains a standard power to bring certain provisions of the Bill into force by Commencement Order.

Consistent with the usual practice, Commencement Orders under this clause are not subject to any Parliamentary procedure. Parliament will have approved the principle of the provisions in the Bill by enacting them; commencement by Order enables the provisions to be brought into force at a convenient time.

New Schedule A3 (contained in Schedule 1 to the Bill)

Paragraph 1 (3): Power to modify application of the Schedule to unincorporated employers' associations

Power conferred on: Secretary of State

Power exercisable by: Regulations

Parliamentary procedure: Negative resolution

Context and purpose

Paragraph 1 sets out the 'relevant obligations' on trade unions to which the new investigatory powers in new Schedule A3 will apply. Sub paragraph (2) then makes it clear that the Schedule also applies to unincorporated employers' associations where one of these obligations has been placed on them (obligations related to political funds; and amalgamations and transfers). Subsection (3) allows modifications of the application of the Schedule to be prescribed by regulations.

The obligations placed on employers' associations are not exactly the same as those placed on trade unions. Part 2 of the 1992 Act provides that only certain aspects of the various requirements placed on trade unions by Part 1 of the 1992 Act apply to employers' associations. Some do not apply at all while others are applied but with a number of modifications. At present it is intended to apply the Schedule without any further modifications; but the power allows the Secretary of State to prescribe such modifications in the future should it prove necessary to do so.

Justification for delegation

Most of the focus of the provisions in the 1992 Act is on the application of the various requirements on trade unions. Some are then applied with modifications to employers' associations. It is necessary for this power to be delegated to allow the Government to respond to any evidence about how the investigatory powers are working in practice in

relation to employers' associations. If the process works as envisaged then the power will not be exercised. However, if the provisions prove problematic for the CO or for employers' associations, it is desirable to have a mechanism to prescribe any necessary adjustments to the application of the powers without having to resort to primary legislation.

Justification for procedure selected

Regulations made under this power would not increase the scope of the regime or increase the CO's powers but rather deal with how the application of them will work in practice. The Government considers that the negative resolution procedure provides an adequate level of parliamentary scrutiny for a provision of this kind.

New Schedule A4 (contained in Schedule 3 to the Bill)

This Schedule builds on the CO's existing powers to make a declaration and order where the Officer finds that unions have breached statutory requirements or union rules. The Officer will be given the power to either issue a civil penalty immediately, or to notify the union that a penalty will be issued if the Officer's instructions are not complied with.

Paragraph 5: Power to prescribe grounds for appeal against decision of the Certification Officer

Power conferred on: Secretary of State

Power exercisable by: Regulations

Parliamentary procedure: Negative procedure

Context and purpose

Paragraph 5 provides for an appeal to the Employment Appeal Tribunal against a decision of the CO to impose a financial penalty on specified grounds. It also provides that the Secretary of State may prescribe other grounds of appeal by regulations, beyond that which is currently in the Schedule.

Justification for delegation

The ability to add additional grounds of appeal will provide the flexibility to respond in future in light of practical experience of what is the fairest and most effective way of dealing with appeals against the CO's decisions.

Justification for procedure selected

This provision does not increase the scope of the civil sanctions or increase the CO's powers but rather deals with how the penalty process will work in practice. As it is essentially procedural in nature the Government considers that it would be disproportionate to require a change of this nature to require debate in both Houses and that the negative resolution procedure provides an adequate level of parliamentary scrutiny for a provision of this kind.

Paragraph 6(1) to (3): Power to specify maximum and minimum amounts of penalty orders or conditional penalty orders

Power conferred on: Secretary of State

Power exercisable by: Regulations

Parliamentary procedure: Affirmative procedure

Context and purpose

The maximum penalty that can be imposed by the CO is to be set by regulations. Paragraph 6 also provides that regulations may set different amounts in relation to different enforcement orders or by reference to the number of members a trade union has or by whether the person in default is an individual or organisation. This would allow for penalty amounts to be set depending on which requirements had been breached, or to provide for different penalty amounts depending on the size of the trade union. The different amounts set in regulations cannot exceed the £20,000 maximum provided for in paragraph 6(3) of the Schedule.

Justification for delegation

The Government considers that an enabling power is appropriate for this sort of provision, as the precise manner in which financial penalty scheme will be utilised will be a matter for the Secretary of State to consider in discussion with the CO in due course. Allowing flexibility in the setting of the penalty amounts and providing for different levels depending on the nature of the obligation or the size of the trade union will allow for a more effective penalty scheme to be established; moreover, it will allow the flexibility to alter the way the penalty operates in the future in light of practical experience of how the scheme is operating. Accordingly, together with the enabling powers in paragraphs 5 and 7 of Schedule A4, the flexibility provided by this power will help to ensure that the sanctions regime put in place by Schedule A4 is, and continues to be, effective.

Justification for procedure selected

The affirmative procedure is considered appropriate for these powers as they will be used to provide for maximum penalty amounts. This is a key aspect of the new financial penalty regime.

Paragraph 6(4): Power to vary the minimum and maximum amount of a penalty order

Power conferred on: Secretary of State

Power exercisable by: Regulations

Parliamentary procedure: Affirmative procedure

Context and purpose

Paragraph 6 allows regulations to specify the minimum and maximum penalty order amounts that may be imposed by the CO. The amounts set in regulations may not be less than £200 or more than £20,000. Sub paragraph 4 provides the power to vary those minimum and maximum penalty amounts. This is a power to amend primary legislation.

Justification for delegation

As the effect of the regime cannot be precisely predicted at this stage it is considered desirable to have the power to make reactive changes by way of secondary legislation if necessary; in this case to vary the maximum penalty amount in future years without the need for further primary legislation. By way of example, there is a power to amend minimum and maximum penalty amounts in section 12A(12)(a) of the Employment Tribunals Act 1996 and section 19A(8) of the National Minimum Wage Act 1998.

Justification for procedure selected

The affirmative procedure is considered appropriate for this power as they can be used to be used to change a key aspect of the scheme (the level of the penalty) which is set in primary legislation. The affirmative procedure applies in the precedents cited above.

Paragraph 7(1): Power to make provision for early or late payment and enforcement

Power conferred on: Secretary of State

Power exercisable by: Regulations

Parliamentary procedure: Affirmative procedure

Context and purpose

Under paragraph 7 regulations may provide for the making of early payment discounts, payment of interest or financial penalties for late payments and for enforcement of payments in respect of any financial penalty imposed by the CO under Schedule A4. Any

provision regarding payment of interest or penalties for late payment must ensure that any amount levied for late payment does not exceed the amount of the original penalty. Under this paragraph regulations may also make provision that enforcement action may enable a late payment to be recovered as a civil debt or as if it were payable under a court order.

Justification for delegation

It is considered that an enabling power is appropriate for this sort of provision, as the precise manner in which financial penalties are handled in practice will be a matter for the Secretary of State to consider, in discussion with the CO, in due course and then develop over time in light of practical experience. Accordingly, the flexibility provided by this power will be an important component in ensuring that the financial penalties regime put in place by Schedule A4 works effectively.

Justification for procedure selected

The affirmative procedure is considered appropriate for these powers as will be used to introduce or later change key aspects of the new financial penalty regime.



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