

LIBERTY

PROTECTING CIVIL LIBERTIES
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Liberty's Report Stage Briefing on the Trade Union Bill – Clause 9 and New Clause 1

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About Liberty

Liberty (The National Council for Civil Liberties) is one of the UK's leading civil liberties and human rights organisations. Liberty works to promote human rights and protect civil liberties through a combination of test case litigation, lobbying, campaigning and research.

Liberty Policy

Liberty provides policy responses to Government consultations on all issues which have implications for human rights and civil liberties. We also submit evidence to Select Committees, Inquiries and other policy fora, and undertake independent, funded research.

Liberty's policy papers are available at

<http://www.liberty-human-rights.org.uk/policy/>

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Introduction

1. Report Stage of the Trade Union Bill will take place in the House of Commons on Tuesday 10 November 2015. Clauses 2 and 3 set high voting thresholds which must be met before a trade union can lawfully call a strike. Clauses 4, 5 and 6 set restrictive requirements about the provision to trade union members, employers and the statutory regulator of information relating to industrial action, including stipulating information that must be contained on the ballot form. Clauses 7 and 8 impose significant limits on the timeframes in which industrial action can take place. Clause 9 restricts picketing. Clauses 10 and 11 restrict the collection and expenditure of funds for political purposes. Clause 12 relates to facility time. Clauses 14, 15 and 16 grant invasive new investigative powers to the regulator. Clause 17 introduces a new charging mechanism to make trade unions and employers' organisations pay for the augmented powers of the regulator.

2. Liberty is gravely concerned that the individual and cumulative impact of these measures will be to breach the right to freedom of association of trade union members as protected by the Human Rights Act and significantly restrict the capacity of individuals to enforce their workplace rights. Our full analysis of the Bill can be found [here](#). This briefing focuses solely on Clause 9 which sets out unnecessary regulation of picketing and proposed New Clause 1 of the Bill.

3. We urge MPs to vote in favour of New Clause 1, which would enshrine in primary legislation the prohibition (currently in Regulations) on employing agency staff to cover striking workers. We also ask MPs to vote for Amendment 6, which would remove Clause 9 from the Bill.

Picketing restrictions

Clause 9

4. The Trade Union and Labour Relations Consolidation Act currently exempts trade unions from liability for inducing an individual to breach their employment contract if they are participating in a peaceful picket, at or near their place of work, to peacefully obtain or communicate information to another or to persuade another person not to work. As drafted, Clause 9 of the Bill would create additional requirements which must be met if this exemption from liability is to stand. A union would have to appoint a picket

supervisor; take reasonable steps to tell the police the picket supervisor's name, where the picketing will take place, and how to contact the picket supervisor; and, provide the picket supervisor with a letter of authorisation. The picket supervisor must: show the letter of authorisation to any police officer and/or any other person who reasonably requests to see it; be present when the picket is taking place or be contactable by the union or police and able to attend the picket at short notice; and, wear a badge, armband, or other identifying item. If the union fails to comply with these requirements, an employer would be able to apply for an injunction to stop the picket or for damages.

Government amendments

5. The Government also consulted on additional proposals to restrict picketing and peaceful protest. These proposals included the creation of a new criminal offence of intimidation and requiring trade unions to provide picket plans to the police and employers two weeks in advance of strike action. Following the conclusion of Committee Stage consideration of the Bill, the Government dropped the proposals contained in this consultation. It stated that those who responded to the consultation agreed that *“Existing criminal and civil laws were considered sufficient for dealing with issues that could potentially arise during disputes.”*¹

6. In its response to the consultation, the Government also promised to table amendments to Clause 9 and subsequently tabled amendments 2 and 3. Amendment 2 clarifies that the purpose of the letter of authorisation is show that *“the picketing is approved by the union”* rather than that the picket supervisor *“is authorised by the union to act”*. Amendment 3 sets out that an individual who is or is acting on behalf of the employer can ask to see the letter of authorisation. This replaces the provision that any police officer or other person can reasonably demand to see the letter.

Analysis

7. While we welcome the Government's decision to drop proposals in the consultation paper, Clause 9 would continue to act as both a hurdle and disincentive to those who wish to exercise the right to freedom of association and assembly. For clarity, it will still be required that picket supervisors be appointed, that their personal details be submitted to the police in advance of a protest, that they carry a letter, and that they wear an armband. The failure of an individual to follow any one of these requirements

¹ BIS, Response to consultation on tackling intimidation of non-striking workers, Paragraph 27.

could have the effect of rendering the entire picket unlawful. This would leave the relevant Trade Union liable to pay the employer damages and would potentially make it easier in future for an employer to get an injunction against the union from taking further picket action.

8. The Government has adduced no evidence that there is any need for further regulation of pickets. Its consultation stated that *“As the main enforcement body dealing with picketing, the Government also engaged directly with police during this consultation. A small number of police forces responded separately and agreed that existing police powers were adequate in addressing most problems that can arise during picketing and protests related to industrial disputes.”*² In the absence of any evidence that these changes are needed, these bureaucratic proposals can only be construed as an attempt to create a situation whereby individuals and unions are set up to make mistakes, subjecting them to legal action and making strike action even more expensive and risky than it already is.

9. The history of blacklisting makes it even more important that these proposals are not pursued. Blacklisting was the shameful process – uncovered in 2009 – whereby individuals who were trade union members, were otherwise known to hold particular political views, or to be involved in defending workplace rights – were added to a database which was used by over 300 companies when recruiting. Many individuals found their lives fell apart as they struggled to find employment due to their inclusion on these lists. It also seems certain that the security services and police forces contributed information to the blacklists and were complicit in the discrimination and misery that ensued. Forcing trade union members to identify themselves as such and to hand over personal details such as phone number to the police in order to participate as a picket supervisor would inevitably inhibit many from joining pickets and protests, and may even act as a disincentive to joining a union altogether.

Prohibition of agency workers during strike action

New clause 1

10. Regulation 7 of the Conduct of Employment Agencies and Employment Business Regulations 2003 prohibits employment businesses from supplying temporary

² BIS, Response to consultation on tackling intimidation of non-striking workers, Paragraph 30.

staff to perform duties normally performed by workers on strike. New Clause 1 would put this prohibition in primary legislation.

Government consultation

11. The Government has carried out a consultation setting out that it intends to revoke Regulation 7 so that workers can be supplied during strikes to replace staff who have chosen to take industrial action. The consultation paper seeks to justify this proposal by stating that *“the Government is committed to ensuring that strikes only ever happen as the result of a clear, democratic decision and commits to tackling the disproportionate impact of strikes in important public services.”*³ The first part of this justification bears absolutely no relation to the nature of the proposal and its impact. Allowing agency workers to replace striking workers will make no difference at all to the democracy or legitimacy of a ballot held by trade union members. It is bizarre to suggest otherwise. If anything, if the Government genuinely considers that its proposed thresholds as set out at clauses 2 and 3 of the Bill will improve trade union democracy, there would be less rather than more justification for undermining legitimate strike action in this way.

12. The second part of this purported justification does not correlate with the justifications permitted under the European Convention on Human Rights. Article 11 of the European Convention on Human Rights guarantees to individuals the right to freedom of assembly and association. It explicitly protects the right to join a trade union, stating that *“Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.”* Article 11(2) sets out circumstances in which the right may be interfered with. These include for protection of national security and the prevention of serious crime. Temporary inconvenience is not listed as a basis for states to interfere with the right to freedom of association. There are many things in society that cause inconvenience. In human rights terms, the right to freedom of expression often causes the state embarrassment. The right to a fair trial certainly makes it slower and more expensive for the state to prosecute, convict and imprison those who break the law. However, we do not prohibit the exercise of these rights on that basis. During the Bill Committee’s consideration of this issue, members raised in particular the example of difficulties caused by strike action in the transport sector. However commuters in London

³ BIS, Hiring Agency Staff During Strike Action: Regulatory Reform, paragraph 18.

frequently face similar difficulties getting across the city due to train station closures as a result of Crossrail or due to the development of cycle lanes on Embankment. We accept these inconveniences as a short-lived and ultimately worthwhile irritation rather than action meriting a prohibition. It is difficult to understand why the right to take collective action differs. Also, while this justification purports to relate to reducing the impact of public sector strikes, the provision in fact applies to all sectors.

Regulatory Policy Committee

13. The Regulatory Policy Committee has also commented that the impact assessment on these proposals in fact *“provides reasons why it might be more beneficial to the employer to take the short term costs associated with a strike instead of seeking temporary workers.”*⁴ It is therefore exceptionally unclear why the Government is making this proposal.

Analysis

14. The Government has repeatedly claimed that it does not want to ban strikes. However permitting employers to hire supply workers during strikes will effectively have the same result as an outright ban. Strikes give employees a tool to get together to persuade employers to address problems in the workplace. Removing the prohibition on hiring supply workers during strikes will significantly reduce the impact that strikes can have on an employer. This will mean not only will there be no point in employees going on strike if their employer fails to respond to concerns, but it means that there is no reason for employers to engage with their workers at all in the multitude of disputes that are currently resolved long before a ballot is called. Industrial disputes will go unaddressed and workplace rights will be violated.

15. **We strongly encourage all Members of Parliament to vote in favour of New Clause 1.**

Sara Ogilvie

⁴ RPC, Opinion on Hiring agency staff during striker action: reforming regulation, published 18 August, page 1.