

**LIBERTY**

PROTECTING CIVIL LIBERTIES  
PROMOTING HUMAN RIGHTS

**Liberty's briefing on the Trade Union Bill  
for Second Reading in the House of  
Commons**

**September 2015**

## **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. The Trade Union Bill received its First Reading in the House of Commons on 15 July 2015 and Second Reading is expected to take place in September 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. The Government has also published three consultation papers: Tackling intimidation of non-striking workers; Hiring agency staff during strike action; and, Ballot Thresholds in important public services. All three consultations – published shortly before summer recess with a deadline only six weeks later – have been condemned by the Regulatory Procedure Committee as being “not fit for purpose” and lacking sufficient evidence.

3. Liberty is extremely concerned that the proposals in the Bill and associated consultations represent a significant, unnecessary and unjustified intrusion by the State into the freedom of association and assembly of trade union members, undermine the right to private and family life, and jeopardise the UK's important history of supporting peaceful protest. We are also concerned that the proposals will make it harder for individuals to exercise the rights and entitlements that Parliament has decided should exist in the workplace. The Government has adduced no evidence that the changes in the Bill are required, and in fact it appears that the likely impact of the proposals will in a number of instances have the opposite effect of the stated aims. Ideological motivations of any Government are part and parcel of politics but should not imperil the protection of rights and freedoms of individuals. Yet this relatively short Bill has the potential to cause significant damage to fair and effective industrial relations in this country and would set a dangerous precedent for the wider curtailment of freedom of assembly and association.

**We strongly urge parliamentarians to resist the changes in the Bill.**

## Right to Freedom of Association

4. 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.”* States must not only refrain from taking steps to prevent individuals enjoying this freedom: there is also a “positive” obligation on the state to ensure that this right is practical and effective.

5. The right to freedom of assembly and association is the cornerstone of an open and free democracy. Most obviously, it allows us to participate in democracy by protecting the right to peaceful protest. But it also allows individuals to come together to develop, share, test and disseminate ideas about philosophy, politics, science, society, the arts. It allows political movements to begin and to grow and people to organise and campaign for a common cause. It is a close corollary of the right to freedom of expression,<sup>1</sup> conscience,<sup>2</sup> and private and family life,<sup>3</sup> which are also protected by the Convention. We are all entitled to seek friendship, solidarity, support and comfort without the interference of the state. It is for each of us to decide with whom we want to share our time, our energy and our ideas as well as to have the power to decline to associate with someone or something. Every member of society is empowered to take to our shared streets to raise awareness or to ask peacefully for change. This essential freedom is the preserve of no creed, no political persuasion, no nationality. Instead, it sits at the heart of what it means to be free.

6. The ECHR only permits freedom of association and assembly to be limited in the interest of national security or public safety, for the prevention of crime and disorder, for the protection of health and morals or for the protection of the rights and freedoms of others.<sup>4</sup> In these circumstances, only restrictions that are necessary, proportionate and in accordance with law may be introduced. States must not only refrain from taking steps to prevent individuals enjoying this freedom. There is also a “positive” obligation on the state to ensure that this right is practical and effective. For example, Court of Human Rights has stated that *“What the convention requires is that under national law trade unions should be enabled, in*

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<sup>1</sup> Article 10, European Convention on Human Rights.

<sup>2</sup> Article 9, European Convention on Human Rights.

<sup>3</sup> Article 8, European Convention on Human Rights.

<sup>4</sup> Article 11(2), European Convention on Human Rights.

*conditions not at variance with Article 11, to strive for protection of their members interests.*<sup>5</sup>

The court has considered whether individuals have the effective enjoyment of the right and recognises that there may be various ways in which the right can be enjoyed. The Court has accorded member states a margin of appreciation when determining how trade unions should be heard in this manner. In a more recent case it held that *"The terms of the Convention require that the law should allow trade unions, in any manner not contrary to article 11, to act in defence of their members' interests... Strike action, which enables a trade union to make its voice heard, constitutes an important aspect in the protection of trade union members' interests..."*<sup>6</sup> It is clear that measures short of an outright prohibition on the right to form a trade union come within the scope of article 11. Where the individual or cumulative impact of legislation is to render the right to form trade unions illusory and ineffective and cannot be justified in accordance with article 11 this will constitute a violation of the Convention.

7. Unless permitted by the article 11(2) exceptions, members of associations, groups and clubs must be left free to establish and implement their own rules of engagement, if indeed there are any. It is not for Government to interfere in the internal organisation of groupings of private individuals who otherwise operate within the law. However, the proposals in the Bill strike at the heart of the freedom of trade unions members to come together in an effective manner without demonstrating a need for any change at all, let alone one that corresponds with the permitted reasons listed above. The proposals subject the right of trade unions members to organise to a regime of excessive regulation in a manner not envisaged for other types of associations or groupings. It is both an illiberal and a discriminatory approach, and it augurs ill for freedoms of other groups who future governments may find inconvenient. Charities and NGOs have recently found themselves subject to regulation which many feel effectively silences them during the General Election period.<sup>7</sup> In light of the Government's forthcoming Extremism Bill, it seems that increasingly debate and dissent in the UK is not just discouraged, but actively prevented.

8. State regulation of this kind is not only unlawful, but it is not in the conservative tradition. Nor does it seem to fit with rhetoric of Government. In January 2014, the Coalition Government launched its Red Tape Challenge. It stated about regulation: *"This has hurt business, doing real damage to our economy. And it's done harm to our society too. When*

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<sup>5</sup> Swedish Engine Drivers Union v Sweden (1976) para 40.

<sup>6</sup> Enerji Yapi-Yol Sen v Turkey (2009).

<sup>7</sup> Under the changes made to the Political Parties, Elections and Referendums Act 2000 by the Transparency of Lobbying, Non-Party Campaigning and Trade Union Administration Act 2014.

*people are confronted by a raft of regulations whenever they try to volunteer or play a bigger part in their neighbourhood, they begin to think they shouldn't bother.*<sup>8</sup> It is clear that the Government understands the restrictive effects of regulation on freedom. What is not clear is why it seems to have been decided to take one to business and another approach to freedom of individuals.

## **Workplace rights**

9. The right to form and join a trade union is not only part and parcel of the freedom of association that all individuals should enjoy, but it also plays an important role in helping to defend labour rights. Over the course of history, the workplace has been the scene of many grave injustices. Slavery, child labour, squalid and dangerous working conditions, desperately low pay have long been eradicated for many in the UK but sadly not for all. Even in the modern workplace, there still exists an imbalance of power between the employer who can decide often unilaterally on terms, conditions and pay, and the employee who is dependent on the employer for work. Individuals who want to negotiate with their employer to improve their lot may not have direct access to their employer or may fear recriminations if they approach their employer alone. In a world where there is always someone else available to do a job, potentially for less money, this power structure can lead to poor pay, unsafe working conditions, discrimination, and exploitation.

10. In the UK, with the help of unions and other campaigning organisations significant progress has been made in employment rights: national minimum wage, health and safety, equal pay legislation, minimum holiday entitlement, and legislation to help combat modern slavery to name a few. However there are still huge strides to be made across the whole spectrum of employment rights. The Government itself has recently recognised the damaging impact of our low pay economy on workers and the nation's finances and has signalled that there must be change.<sup>9</sup> Against the backdrop of zero hour contracts in which employees are not guaranteed any set employment hours, almost 6% of all jobs are paid at the minimum wage (ranging from £6.50 to £2.73)<sup>10</sup> and 20% of workers earn less than the living wage (£9.15 in London and £7.85 elsewhere).<sup>11</sup> During 2014-2015, 142 people were

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<sup>8</sup> <http://www.redtapechallenge.cabinetoffice.gov.uk/about/>

<sup>9</sup> House of Commons Hansard, 8 July 2015, Chancellor of the Exchequer, column 337.

<sup>10</sup> <http://www.ons.gov.uk/ons/about-ons/business-transparency/freedom-of-information/what-can-i-request/previous-foi-requests/labour-market/workforce-statistics/index.html>

<sup>11</sup> <http://www.theguardian.com/money/2014/nov/03/more-than-one-fifth-earn-less-than-living-wage>

killed at work and there were 629,000 accidents at work. It is estimated that 28.2 million working days were lost due to work-related illness and workplace injury.<sup>12</sup>

11. The employment law enforcement framework gives limited right of redress to employees in today's workplace. If an employee is sacked within two years of starting employment she cannot claim unfair dismissal. An employee or ex-employee who wish to lodge a claim with the employment tribunal – be it to make a claim relating to pay, holidays, unfair dismissal – is required to pay a fee of either £160 or £250 to lodge a complaint plus a further fee of either £230 or £950 for a hearing.<sup>13</sup> Since these charges were introduced, the number of claims brought to the employment tribunals dropped by 70%.<sup>14</sup> There is no legal aid routinely available for those who wish to seek advice on their employment rights. Given the difficulty of employees taking legal action against employers, the value of employees having representatives and being able to take collective action to require employers to respect workplace rights is greatly increased.

## **Trade Unions**

12. Against this backdrop, trade unions perform a number of different roles in modern industrial relations. They provide individual support and representation for members, undertake and coordinate collective action on behalf of members, and effect changes to working rights and conditions by seeking changes at a legislative and political level. Pay, conditions, health and safety, dispute resolution, training, promotion of equality and diversity and enforcement of statutory employment rights all fall within their workload. Trade union officials often undertake health and safety functions that statute requires companies to fulfil. Over the course of this summer, a campaign by Unite to draw attention to restaurants deducting from staff an “administration” fee or keeping in their entirety tips paid via a credit card machine caused a change in policy in a number of national chains and has led to a consultation from BIS, the department responsible for this Bill. It is odd that a department that obviously recognises the contribution that trade unions can play in helping the Government to pursue its agenda also seeks to make it almost impossible for those unions to be effective.<sup>15</sup>

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<sup>12</sup> <http://www.hse.gov.uk/statistics/>

<sup>13</sup> The Employment Tribunals and the Employment Appeal Tribunal Fees Order 2013.

<sup>14</sup> <http://www.newstatesman.com/politics/uk/2014/09/new-fees-cause-70-cent-drop-employment-tribunal-cases>

<sup>15</sup> <http://www.unitetheunion.org/campaigning/fair-tips-for-waiting-staff/>

13. According to Government statistics, membership of trade unions in the UK is currently 6.4 million, which is roughly 25% of the workforce.<sup>16</sup> 14.2% of the workforce in the private sector belong to a trade union compared to 54.3% in the public sector. Female employees and employees born in the UK are more likely to be trade union members than male employees and those born outside the UK.

## Strikes

14. Strikes are perhaps the most discussed and vilified tool in the union toolkit, often receiving significant press coverage. However their use is in fact quite limited. In 2014, 64% of all stoppages lasted for only one or two days, and these accounted for 80% of all days lost to strike during that year. Since 2010 there has been on average 647,000 days lost to industrial action per year. This amounts to 0.02 days per working person, and compares to 7,213,000 days lost per year in the 80s. Last year, there were only 155 stoppages. This information sits ill with the government's assertion that it needs to take action to ensure that strikes are only used as a tool of last resort – it appears that is very much already the case.<sup>17</sup>

15. However, the ability of trade unions to organise lawful industrial action is a vital corrective to the imbalance of power in the workplace. Without the possibility of strike action, there would be very little reason for reluctant, recalcitrant or downright bad employers to engage with trade unions. The spectre of strikes - however rare they actually are in reality - is what allows trade union and their members to negotiate, bargain and resolve disputes in a fair, effective and proportionate manner. The right to join a trade union to protect one's interests is clearly breached if the union is undermined by legislation to such an extent that it cannot fulfil these functions.

16. This is not to deny that strikes can of course cause inconvenience for individuals who are not party to disputes, in both the public and private sector. However, the evidence shows that strikes are rare and time-limited, and in the public sector there are already in place measures to ensure that in essential public services a minimum level of service will still be provided during strike action. Preventing temporary inconvenience is not one of the permitted justifications for interference with the rights to freedom of association. And while the Government may claim to be acting in the wider public interest in restricting strikes and trade union freedom, there is evidence to suggest that the general public does not share its purported concern. Ipsos Mori report that around 8 in 10 people believe that trade unions are essential to protect workplace rights, a level of support that has been in place for over four

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<sup>16</sup> [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/431564/Trade\\_Union\\_Membership\\_Statistics\\_2014.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/431564/Trade_Union_Membership_Statistics_2014.pdf)

<sup>17</sup> ONS, Labour Disputes Annual Article.

decades.<sup>18</sup> It also reports that while in the 1970s strikes were cited as one of the most important issues facing the country, less than 1% report strikes as important issue now. It seems that the Government is out of step with both the reality of strikes and how people feel about them.

17. Those who represent and are represented by unions today are a broad and diverse constituency, and examples of the rare strike action that has taken place in recent years concern individuals viewed with sympathy and support. Over recent years, some of the highest profile union campaigns have involved: staff working at Brixton's Ritzy Cinema asking for a living wage; midwives in Northern Ireland challenging the decision not to award them the same, small, pay increase as granted to midwives in England and Wales; cleaners working at HMRC asking for a pay increase of less than £2 per hour to take their salary up to £8.80 and reflecting the pay of cleaners working in other HMRC buildings in London; firefighters concerned with changes to pensions and retirement age.

18. Individuals who do choose to go on strike do not do so risk free. They will almost certainly not be paid and they risk dismissal. The government's suggestion that strikes are currently undertaken lightly does not reflect the severity of consequences for the individuals involved.

### **Trade Unions, Government and Political Parties**

19. In this area of industrial relations, the Government is not impartial, simply seeking to regulate the area between employer and employee as a neutral observer. In fact, in its capacity as an employer the Government has a significant vested interest in undermining the actions and future of trade unions. The state is a huge employer, and 54.3% of public sector employees belong to a trade union. Over the past five years, the relationship between the Government and a number of public sector unions has been particularly difficult. In its role as employer, the Government would absolutely benefit from the proposals in the Bill and consultations. It would be to their great discredit – not to mention constituting a gross abuse of power – for the Government to use its slim legislative majority to implement changes that will allow it to be a worse employer. It is also discriminatory to make it harder – as these proposals would do - for those working in the public sector to implement their workplace rights than their private sector counterparts. In these circumstances it is more important than ever that Parliament exercises its proper function, independently and rigorously scrutinising and restraining the proposals put forward by a Government acting with its own interests in mind.

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<sup>18</sup> <https://www.ipsos-mori.com/researchpublications/researcharchive/3236/Trade-Unions-Poll.aspx>

20. Despite the evident tensions between the leadership of the modern Conservative party and some unions, it was in fact Disraeli in 1875 who recognised the inherently unequal bargaining strengths of employers and employees, introducing legislation to protect workers rights and to legalise picketing and other trade union activities. Similarly in 1947 Churchill stated “*The trade unions are a long-established and essential part of our national life*”, heralding “*the right of individual labouring men and women to adjust their wages and conditions by collective bargaining, including the right to strike*” as “*pillars of British Life.*”<sup>19</sup>

21. Parliamentarians of all colours must legislate to protect the fundamental rights and freedoms of their constituents, 30 million of whom are working men and women.<sup>20</sup> This Bill poses a serious threat to those rights. It is not legitimate to interfere with the right to freedoms of assembly, association and conscience – as this illiberal Bill certainly does – for party political expediency. The proposals in this Bill will impact on the protection of the workplace rights of all trade union members and their colleagues, regardless of the political persuasions of those members and without distinction between those unions with political ties and those without. Parliamentarians are trusted to look beyond the loyalties or enmity of those who currently govern their parties and legislate in the long-term best interests of the country.

22. In light of the overwhelming lack of evidence that change in this area is required, and when reflecting on the possible motivations that may be at play, it is difficult to escape the conclusion that when it claims it does not want to ban strikes, the Government is being disingenuous. Individually and cumulatively these proposals will fundamentally damage the capacity of unions to organise strikes by making them subject to excessive and costly regulation, imposing complex legislation that will open unions up to legal challenge, and by making it much easier for employers to escape the consequences of any strikes. If the Government does not wish to abolish – in law or in fact – the right to strike, it must reconsider its proposals. If it does wish to abolish strikes, it should have the courage to say so.

### **Legislative framework for strikes and industrial action**

23. The current legislative framework already imposes a hefty and confusing set of requirements and limitations on the way in which trade unions function. The rules governing trade unions are largely contained in the Trade Union and Labour Relations (Consolidation) Act as amended. In particular, there are wide ranging rules governing industrial action.

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<sup>19</sup> <https://books.google.co.uk/books?id=B8rw2vD92b4C&pg=PA44&lpg=PA44#v=onepage&q&f=false>

<sup>20</sup> <http://www.ons.gov.uk/ons/rel/lms/labour-market-statistics/may-2015/sty-labour-market-statistics--may-2015.html>

Strikes involve taking steps that may constitute an actionable wrong in civil law. A striking individual will ordinarily be acting in breach of their contract of employment. In addition, under tort law – common law wrongs which have been developed by the courts – it is unlawful to encourage others to break their contractual agreements, meaning that Trade Unions, their officials and their members would be committing a tort in calling on others to strike. As a result, individuals and trade unions could be liable to pay damages for their involvement in strikes. It is also possible to request from a court an injunction to prevent a civil wrong from occurring. This means that employers are able to seek an injunction to prohibit strikes in advance of them taking place. In this event, a union must call off or “repudiate” industrial action, rendering any industrial action taken by individuals as “unofficial”. Where a union does not comply with an injunction, the employer can go to court and ask to have the union declared to be in contempt of court. If this happens, the union may be liable to pay a fine currently up to £250,000. Trade union members are also able to ask the court to prohibit a strike or other industrial action on the basis that a ballot has not taken place or has not been conducted in accordance with a set of conditions laid out in legislation.<sup>21</sup>

24. The law sets out circumstances in which those participating in or calling for industrial action are exempted from certain liabilities and protected from action under contract and tort law. However the exemptions are limited and only apply when a range of complex procedural requirements are met. The current system already imposes significant limitations on the freedom of trade union members to take collective industrial action.

25. Individuals who participate in “official” industrial action will be able to claim that they have been unfairly dismissed if they have participated in industrial action which was “protected”- namely that the union complied with requirements relating to the ballot and provision of information - and lasted for less than twelve weeks.<sup>22</sup> If the action was “unprotected” or lasted longer than twelve weeks then the individual is not protected from unfair dismissal.

26. There are also tightly circumscribed exemptions for trade unions, their officials and members from tortious liability when calling on others to strike. Section 219 TULRCA allows that there will be no liability for the torts of inducing another person to break their contract, interfering with or inducing another person to interfere with the performance of a contract, or threatening to do either of these things when the person is acting in furtherance of a trade dispute, which is also narrowly defined in statute. Liability will remain for other torts, such as

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<sup>21</sup>TULCRA sections 17 and 18.

<sup>22</sup> TULCRA sections 238(A)(2)-(4).

trespass, and of course the criminal law applies at all times. This exemption from liability only applies where industrial action is “protected”.

27. Separately, an individual who participates in peaceful picketing is also protected from tortious liability if they participate in a picket at or near their place of work for the purpose of “*peacefully obtaining or communicating information, or peacefully persuading any person to work or abstain from working*”. A trade union official is similarly protected from liability if he or she attends a picket at the place of work of individuals who she represents. Again, this only applies if the industrial action is “*protected*”. These exemptions are provided by s220 TULCRA.

28. Industrial action is “*protected*” if it is called by a trade union in furtherance of a trade dispute and in accordance with a range of procedural requirements set out by the legislation.<sup>23</sup> Industrial action will not be “protected” when it is “secondary” industrial action – action by workers whose employer is not a party to the trade dispute, when it is in support of an employee dismissed while taking unofficial industrial action, or when it is in support of a closed shop system.

29. In order to ensure that neither an employer, someone else affected by the strike nor an employee has grounds to seek an injunction, the Union must comply with the following requirements. A strike or industrial action can only be called with the support of the majority of those questioned in a postal ballot.<sup>24</sup> No later than seven days before the ballot commences, the union must provide the employer with written notice that the union intends to hold a ballot<sup>25</sup> along with accurate lists indicating the categories, workplaces, and numbers of employees to be balloted.<sup>26</sup> Three days before the start of the ballot, the union must provide the employer with a copy of the ballot form to be sent to members.<sup>27</sup> For a ballot involving more than 50 people, the union must appoint an independent scrutineer to produce a report on the conduct of the ballot. The ballot paper must ask members whether they support strike action and/or whether they support industrial action less than a strike; must specify the names of the individuals authorised by the union to call industrial action if the members support it; and must contain a statement that the individual is at risk of breach of contract if they take part in industrial action. The union must take steps to inform all those entitled to vote and the employer of the number of votes in favour and against the motion. When industrial action is to be taken, notice of industrial action – including lists of categories,

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<sup>23</sup> TULCRA section 238A(1).

<sup>24</sup> TULCRA sections 226(1)(a) and s230(2).

<sup>25</sup> TULCRA sections 226A(1) and (2).

<sup>26</sup> TULCRA sections 226A2(A).

<sup>27</sup> TULCRA sections 226A (1)(b) and 2(F).

workplaces and number of employees - must also be given to an employer within 7 days of the intended action. If these requirements are not complied with, the union is liable to proceedings to stop the strike action, although the precise grounds on which an injunction can be sought vary between employer and trade union member.

### **Clause 2 and 3: required turnout and thresholds for ballots**

30. The Bill would add a number of other requirements that must be complied with in order for industrial action to have “protected” status. For a strike or other industrial action to be protected, it is already required that a ballot of the relevant membership takes place. Clause 2 would add that in this mandatory ballot the turnout must be at least 50% of those who were entitled to vote. If this threshold is not met, the ballot will not be protected and any ensuing industrial action will not be lawful. Clause 3 would add the additional threshold that in ballots involving staff in “important” public services – defined as health, education of those under 17, fire, transport, nuclear decommissioning and border security – 40% of those entitled to vote must support the industrial action. Within these boundaries, the Government would be able to determine the precise meaning of “important public service” in Regulations. The Government claims that these measures are intended *“to ensure that industrial action is only used as a measure of last resort and where there is clear and ongoing support for doing so.”*<sup>28</sup>

31. These provisions would mark a wholly unwarranted intrusion into the independence of union members to organise freely. The rules of a membership organisation as to how it wishes to organise itself can and should be determined by those members, not the state. If members wish to impose a requirement that a particular threshold be met before certain action is taken then it is for them rather than the Government to put such a threshold in place. Also, trade union members are not bound to follow a call from their union to take industrial action nor can they be sanctioned by their union in the event that they decide not to follow such a call. It therefore seems unnecessary for the Government to impose this requirement by claiming that it seeks to protect individuals from the consequences of a strike when individuals are already able to make an entirely independent decision as to whether they wish to participate or not even after the necessary ballot has taken place.

32. The proposal also takes a very simplistic view of the circumstances surrounding votes, why people choose to vote or otherwise, and inferences that can be drawn from their actions. It presumes that those who abstain from voting will always wish to vote against a proposal when there is absolutely no basis for thinking this is the case. It may be that an

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<sup>28</sup> BIS, Consultation on ballot thresholds in important public services, paragraph 1.

individual does not support the action proposed. But alternatively it may be the case that an individual supports a motion but thinks that it is likely to get enough votes in favour and that there is no need to vote. An individual may forget to vote or may not have the time to do so. An individual may not be able to afford going on strike themselves but would not wish to stop others from doing so. Given that individuals are not bound by the results of a ballot and cannot be sanctioned by their union for not adhering to any calls for industrial action that may follow from the ballot, there may be little incentive for members to participate in a vote in certain circumstances, but this should not be counted as a vote against industrial action. This provision is also likely to violate our international obligations. Schedule 4 Paragraph 13 (minor and consequential amendments) would set out that spoiled and blank ballots would count towards the thresholds, thereby effectively making abstentions count as no votes. This is contrary to common sense and basic notions of fairness, as well as international standards.

33. The Government states that *“none of these actions are about banning strikes”*.<sup>29</sup> As set out above, ballots are already hugely regulated and create a great expense for trade unions. The rules are complex and are an area ripe for legal challenge by employers who wish to prevent a strike from taking place. This new requirement would add another messy layer to the bureaucracy that trade unions must comply with in order to hold industrial action, gifting employers an additional opportunity to take to the courts, and significantly weakening the effectiveness of trade unions.

34. The Government also claims that the 40% threshold in public services is required as industrial action can have an adverse impact on those using and relying on public services. It is of course the case that members of the public may feel the impact of strikes in the public sector. However, this will not always be the case. There are a great number of roles – even in essential public services – where the impact of strike action will be felt only by the employer and not by the public. In addition, even where frontline staff are taking industrial action there are always minimum levels of service provided in essential public services. It is also noteworthy that the Government does not seek to restrict the right to strike only in “essential” public services, but in those it deems “important” ones. Therefore while strikes in these sectors may cause inconvenience, they are not endangering the health and safety of the general population.

35. Strikes are an important way of for employees to seek to influence how their employer treats them, and in the context of public services the employer is the state.

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<sup>29</sup> Ibid paragraph 7.

Therefore if the aim of Government is to reduce the impact of strikes by public sector employees on the public, the proper route for achieving this outcome is for the Government to ensure that it and other public sector employees treat employees in a lawful and fair manner, engage with workplace disputes at an early stage and participate in negotiations in good faith. Using the Government's privileged position of control over the legislature to insulate it from having to act as a responsible employer is nothing short of an abuse of power.

36. Trade Unions argue that the legislation governing their operation ties their hands in a number of important ways and they require legislative change to make certain improvements to their processes. For example, they have requested that the Government takes legislative steps to allow them to improve turnout in ballots, such as the use of e-balloting. These proposals have not been taken forward by Government. It is a bitter irony that the Government justifies interference with the freedom of association of trade union members under the guise of improving trade union democracy while blocking the requests made by trade unions themselves to improve their operations.

37. This type of threshold is not required in political elections. In the 2012 Police and Crime Commissioner elections there was on average a 15% turnout.<sup>30</sup> In the 2011 Alternative Vote Referendum, the turnout was 42.2%.<sup>31</sup> There are a number of Members of Parliament who would not have been able to proceed to Parliament if these conditions applied to General Elections. It is unthinkable that the state would seek to impose these types of thresholds on matters of arguably much more national significance than trade union ballots and it is unclear why it seeks to impose them here.

#### **Clause 4: Information to be included on voting paper**

38. Section 229(2) TULCRA sets out information that must be included on the ballot paper distributed to members when asking them whether they support action. The ballot form must ask whether an individual is prepared to take part in strike action and/or whether the individual is prepared to take part in industrial action that is less than a strike. The paper must include a statement alerting members that if they take industrial action they may be breaching their contract of employment, and that if they breach their contract of employment they have no protection from unfair dismissal if action is not protected and only twelve weeks of protection from unfair dismissal if the action is protected. The ballot paper must contain

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<sup>30</sup> The Electoral Commission, Police and Crime Commissioner elections in England and Wales, Report on the administration of the elections held on 15 November 2012.

<sup>31</sup> The Electoral Commission, Referendum on the voting system for UK parliamentary Elections, Report on the May 2011 referendum.

the name of those authorised on behalf of the union to call industrial action, although bizarrely the union will still be held legally responsible for a strike if someone other than those named calls the action. A union can only escape this responsibility when it “repudiates” an action. Clause 4 would add the requirement that unions also provide on the ballot form “a reasonably detailed indication” of the dispute with the employer, describe in more detail what action short of industrial action would constitute, and the expected timetable for the dispute.

39. The explanatory notes state that these provisions would allow trade union members to make an informed decision as to whether or not to support the proposed action. It is of course important that trade union members are equipped to make an informed choice as to industrial action. However, once again it is not the role for the state to mandate how this information is conveyed nor to assume that in the absence of information of a ballot paper the trade union member does not consider themselves to be suitably informed. If members do not consider that the union provides sufficient information they can take internal steps to remedy this, they can leave the union, or they can decline to follow a call to take industrial action. Trade union members may feel that the issues at stake have been more than adequately communicated via a whole range of other means. The fact that information is or is not on a ballot paper may have absolutely no impact on their understanding of the issue at all and to assume as a matter of law that it does is entirely arbitrary.

40. This provision is not simply a matter of creating an extra hurdle that unions must overcome in order to call a strike or other industrial action, although certainly the vague language used (the explanatory notes state that “*the amount of detail...will depend of the circumstances*”<sup>32</sup>) suggests that this will be another area ripe for confusion and legal challenge. This proposal will also significantly limit the flexibility with which trade unions and their members can respond to an industrial dispute by restricting actions to those listed precisely on the ballot paper. The impact of this on industrial relations will surely be to make workplaces disputes harder rather than easier to resolve. In the course of negotiations it may become clear that the most appropriate course of action is one not listed on the ballot paper, but that without any action at all an intransigent employer will not be persuaded to alter their approach. Given the bureaucracy and time requirements surrounding ballots in many cases it will not be possible to conduct another ballot. In this situation, the trade union may be compelled to call industrial action of a nature which they would not otherwise wish to do but which is the only step they can take. This will serve neither employer nor employee, not to mention the public that the Government is keen to protect.

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<sup>32</sup> Trade Union Bill Explanatory Notes, paragraph 23.

41. This proposal would also equip employers with significant prior warning of the negotiation strategy of the union and the tactics of industrial action likely to be employed. This will reduce the impact of industrial action as the employer will have time to work out how to respond and avoid the consequences of action rather than take steps to resolving the problem at hand, which seems certain to lengthen the duration and intensity of a dispute.

#### **Clause 5: Information to be provided about results of a ballot**

42. Clause 5 would flow from the changes made in clauses 2 and 3, adding the requirement that results of the ballot must contain detailed information as to whether and how the new thresholds have been met.

#### **Clause 6: Information to Certification Officer about industrial action**

43. Clause 6 would require a trade union to include details of any industrial action taken in the reporting period in its annual return to the Certification Officer, the regulatory body for trade unions and employers associations.

#### **Clause 7: Two weeks' notice to be given to employers of industrial action**

44. Clause 7 would require a trade union to give an employer 14 days' notice that it intends to take industrial action following a ballot. The current notice period is 7 days.

45. This proposal compounds the inequality of bargaining power between an employee and employer. Read in combination with proposals made separately in a consultation document to remove the prohibition on employers using temporary staff to replace those on strike, it would create a system by which the efficacy of industrial action will be significantly reduced by granting employers the time and means to prevent the strike from having an impact on their business. In practical terms, this will mean that there is no point in employees taking strike action and the right of individuals to associate freely, take action collectively and to withhold their labour will be rendered completely illusory. Strikes of course cause inconvenience for an employer – this is why they are used as a tool in industrial relations disputes. It is the purpose of strikes that an employer will be required to turn their mind to resolving the dispute because failure to do so impacts on their business. However if there is to be no impact on business, why would employers care about strike action? If employers are unaffected, strikes will become a completely useless tool. What would be the point in trade union members losing pay and jeopardising employment prospects if there is no corresponding detriment to the employer and if it will cause no change to the employer's attitude?

## **Clause 8: Expiry of mandate for industrial action four months after ballot date**

46. Under the current law, as long as industrial action starts within four weeks of a successful ballot, the mandate for industrial action remains in place for as long as the dispute with an employer is live. Under clause 7, action will no longer have to start within four weeks however the mandate for action will only last for four months, at which point a further successful ballot will have to be held if the union intends for industrial action to continue. This will extend the period within which action must start, but severely curtail the period during which action may take place, imposing further potential administrative and financial burdens on Unions in the process.

47. This again appears to be an unwarranted incursion into the freedom of trade union members to determine the terms of engagement of industrial action. If employees wish to limit the timescale of any industrial action or to require union officials to periodically check whether there is a mandate for continued action, this can be determined by the membership and put in the internal rules. Whether they do so is not the business of government.

48. It is not only deeply illiberal for the Government to interfere in internal union organisation in this manner, but it is also hugely irresponsible for it to play fast and loose with the ability of individuals to enforce their workplace rights. Employers will know that industrial action is significantly time limited and unions will not have limitless resources to spend on ballot. Employers may purposefully protract negotiations as each time a ballot is held there is more scope for an employer to seek an injunction and momentum developed in the time leading up to the ballot and the four months after will be reduced or completely lost while the union organises and awaits the results of the next ballot. Employers will know that if they are willing to give it long enough they will be able to outlast the union and employee's staying power. Employees will be forced either to sacrifice salary and risk job loss in the knowledge that their employer can play a waiting game or to put up with the situation and do nothing. Neither of these approaches will lead to a safe and secure working environment.

49. It is not difficult to understand why the Government has proposed this new limit on strike mandates. During the course of the last parliament the difficult relationship between some public sector unions and the Government as an employer was laid bare for all to see. On the basis of one ballot, the PCSU called out members on a series of strikes over a period of twelve months or so to the evident anger of Ministers. As frustrating and embarrassing as these public disputes may have been for the government, it is a constitutional abuse of power for them to exact revenge on public sector unions by using their legislative weight in such a partisan manner. Undermining the capacity of workers to require employers to engage in dispute resolution is not only a disproportionate response to the government's

problems with its employees, but also suggests contempt for the entire working population, with Government pride placed above fair workplace relations.

### **Clause 9: Union supervision of picketing**

50. As set out at paragraph 26, TULCRA 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. Clause 9 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.

51. Applied to any type of protest these proposals would be a mark of an authoritarian and controlling government. But in the particular context of trade union members, 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.<sup>33</sup> 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 would inevitably inhibit many from joining pickets and protests, and may even act as a disincentive to joining a union altogether.

52. The Government explains its rationale for implementing these changes in a separate consultation on picketing, which also contains proposals for further restrictions. Liberty's response to this document is available [here](#). All of these proposals must be firmly resisted.

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<sup>33</sup> Scottish Affairs Committee, Blacklisting in Employment: Final Report, published 27 March 2015.

The consultation document claims that changes to picketing and protest law is required because of instances of intimidation or criminal behaviour at pickets and industrial protests. It produces very little evidence that this is the case, nor that the changes it proposes would actually address any such problem.

### **Clauses 10 & 11: Opting in by union members to contribute to political funds; Union's annual returns to include details of political expenditure**

53. Legislation requires that if a trade union wishes to spend money on certain political activities, it can only do so if it: ballots its members every ten years on whether to adopt political objectives;<sup>34</sup> sets up a "political fund";<sup>35</sup> permits members to opt out of contributing to the political fund;<sup>36</sup> and, provides that a member who does opt out is not subject to discriminatory treatment as a result of this. Employees can make complaints to the regulator – the Certification Officer – or to the court about the ballot, the maintenance of a political fund and allegations that expenditure on political objects has been from the general rather than political fund.<sup>37</sup>

54. The activities that can only be undertaken (a) if the membership has approved of them via ballot and (b) if they are paid for via a political fund include: payment of expenses incurred by a political party; the selection of a candidate in the union in connection with any political office; the payment on maintenance of any holder of a political office; the production, publication or distribution of any literature, document, film, sound recording or advertisement the main purpose of which is to persuade people to vote or not to vote for a political party or candidate.<sup>38</sup>

55. Clause 10 reverses the way in which individual members choose whether to participate in the fund and will require a trade union member to opt in rather than opt out of the political fund. The member's opt-in will expire after 5 years at which point they will once again have to re-opt-in. The Trade Union will continue to have to hold a ballot every ten years if it wishes to maintain political objectives.

56. Clause 11 would insert a new requirement into TULCRA that unions who spend more than £2000 on political expenditure must set out detailed information about this spending in their annual return to the Certification Officer. Information must be provided relating to the recipient, the amount, and the nature of the expenditure under a variety of headings, such as payment of expenses to a political party, funding of party conferences; funding of political

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<sup>34</sup> TULCRA section 73.

<sup>35</sup> TULCRA section 82.

<sup>36</sup> TULCRA section 84.

<sup>37</sup> TULCRA section 87.

<sup>38</sup> TULCRA section 72.

election material. The explanatory notes do not give a reason for the inclusion of this provision in the Bill.

57. Transparency of political funding is essential in a healthy democracy. To this end, Parties have to record the donations and loans they receive, check they are from a source permitted in legislation, and report larger donations and loans to the Electoral Commission.<sup>39</sup> If the Government is concerned that this process does not offer sufficient transparency and accountability, this must surely apply to the whole system, not just contributions made by trade unions. Reform in this area should therefore apply to any individual, business, or association who makes a donation or contribution. No such proposal has been made. The fact that these reforms are targeted only at trade unions suggests that this does not stem from a genuine concern about corruption in politics, nor would it address an aim of greater transparency in politics. It would, on the other hand, be certain to cut political funding to the Government's political opponents, add to the costs of producing annual reports, and create another area where unions can be subject to legal challenge if mistakes are made.

#### **Clause 12: Publication requirement in relation to facility time**

58. Clause 12 would create a power for a Minister to demand via Regulations that public sector employers publish information relating to facility time. The type of information that may be requested include: how many of an employer's employees are union officials; the total amount spent by an employer on paying a union official while they undertook facility time; the percentage of an employer's total bill spent on paying officials on facility time; and information relating to facilities provided by an employer for use by union officials. These requests will be able to cover trade union officials, a learning representative of the trade union and a safety representative.

#### **Clause 13: Reserve powers in relation to facility time**

59. Clause 13 creates the power for a Minister to cap via Regulations the amount of money a public authority can spend on facility time. This may be done by limiting the paid time off taken by trade union representatives to a percentage of the representatives' working time. Alternatively, the Regulations may cap the percentage of the employers' pay bill that can be spent on facility time. The Regulations can also require the public authority to publish further information.

60. Facility time is time spent by employees who are also union representatives on activities involved in representing union membership.

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<sup>39</sup> See the Electoral Commission: <http://www.electoralcommission.org.uk/find-information-by-subject/political-parties-campaigning-and-donations>

61. The Explanatory Notes to the Bill explain that the purpose behind clauses 12 and 13 is *“to promote transparency and public scrutiny of facility time; and to encourage those employers to moderate the amount of money spent on facility time in light of that scrutiny.”*<sup>40</sup> This would appear to suggest that the Government thinks that an excessive amount of time is spent on facility time, and that facility time does not benefit the workplace. However, the Government has provided no evidence of its own to support its suggestion that there needs to be change, and in fact the publicly available evidence suggests that the contrary is true.

62. A review conducted by the then Department for Business, Enterprise and Regulatory Reform in 2007 into facilities and facility time found that the average amount of time taken by senior union representatives was just over 10 hours per week.<sup>41</sup> It also found that union representatives in the public sector contribute up to 100,000 unpaid hours of their own time each week.<sup>42</sup>

63. In terms of the activities undertaken during facility time, this includes providing informal advice to employees and employers, formally representing individuals in disputes with their employer, negotiating with management on behalf of the staff, undertaking health and safety activities to ensure businesses comply with legislation, facilitating learning and training of employees. The BERR review concluded that in fact the work of union representatives reduced the number of cases proceeding to an employment tribunal, creating savings to the tune of £22-£43 million, reducing working days lost due to workplace injury saving society between £136 and £371 million, and reducing workplace related illness, with a saving of £45-£207million.<sup>43</sup>

64. Employers also appear to recognise the benefits of facility time. In 2009 the Director General of the CBI said in the forward to a BERR report on union representatives stated: *“In today’s difficult economic climate, it is more important than ever that that resources available to the workplace are well deployed. Union reps constitute a major resource: there are approximately 200,000 workers who act as lay union representatives. We believe that modern representatives have a lots to give their fellow employees and to the organisations that employ them.”*<sup>44</sup> It is difficult to understand why the Government seems so keen to castigate facility time, when employees and employers in the private sector alike are alert to the significant benefits.

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<sup>40</sup> Trade Union Bill Explanatory Notes, paragraph 54.

<sup>41</sup> BERR, Workplace representatives: a review of their facilities and facility time.

<sup>42</sup> Ibid, page 92.

<sup>43</sup> Ibid page 97.

<sup>44</sup> BERR, Reps In Action, How workplaces can gain from modern union representation, May 2009.

65. It seems certain that if the Government succeeds in forcing public authorities to cut facility time, the repercussions will be felt by employees, their managers and ultimately the public purse. Given that union representatives undertake certain vital health and safety functions required by EU legislation, not only will a reduction in facility time risk causing more accidents at work but will leave the Government open to legal challenge on this basis. In addition, the discriminatory nature of these proposals in that they apply only to trade union members in the public sector will leave the Government open to legal challenge, as well as doing nothing to improve the increasingly strained relationship between Government and its trade union member employees.

66. Allowances for facility time are often contained in collective agreements reached between a union and the relevant employer. In the case of public bodies, this may be a Government Department, a local authority, a hospital, a school. It is gravely concerning that the Government seeks for itself the reserve power to intervene directly in agreements reached between an employer and its employees via collective action. Case law of the Court of Human Rights has found the annulment by the state of collective agreements contrary to article 11, and would surely do the same here.<sup>45</sup>

67. It is pertinent to compare the approach of the Government to workplace dispute resolution in these clauses with clauses 2 and 3. Earlier in the Bill, the Government introduces ballot thresholds claiming it is determined to take steps to stop strikes from taking place apart from in the most extreme circumstances. And yet here the proposals made by the Government would fundamentally undermine the capacity of trade unions to stop disputes arising in the first place and then to deal with them proportionately and prevent them escalating. It cannot be in the interests of positive industrial relations and effective labour rights enforcement for these proposals to be implemented.

#### **Clause 14: Investigatory Powers**

68. Clause 14 implements the provisions set in in two Schedules to the Bill. The effect of this would be to grant the Certification Officer own-initiative powers to investigate trade unions and to put in place a wide range of investigative powers for the Certification Officer.

69. The Certification Officer is the regulator for trade unions and employers associations. That such an office exists is an indication of the significant legislative requirements and constraints already imposed on trade unions. There is a statutory definition of trade unions and all organisations or associations that match this description are required to be named on

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<sup>45</sup> Demir and Baykara v Turkey, 12 November 2008 (34503/97).

a list maintained by the Certification Officer.<sup>46</sup> The Certification Officer is also responsible for determining complaints made by Trade Union members that trade unions have not conformed with the internal Rules of the trade union (which of course vary from union to union) and the wide-ranging statutory obligations placed upon them. Members can also raise concerns about financial irregularity.

70. Trade unions are voluntary membership organisations. They are not public bodies nor institutions in which individuals have a financial stake. On this basis, there is no reason for extending to the Certification Officer a power of own initiative investigation. If members are not content that what is essentially their own club is not adhering to the relevant rules then it is obvious why they would wish to make a complaint, although it is far from evident that an externally imposed regulator is required for this task. However the maintenance of effective internal democratic processes cannot be used to justify empowering external bodies to intervene entirely unasked in the affairs of a membership organisation. In addition, the own-initiative powers can be exercised at the request of third parties, such as an aggrieved employer. This is a clear intrusion into the right of trade union members to associate freely and to set their own terms of engagement.

71. Granting the Certification Officer investigative powers is extremely concerning not just from the perspective of freedom of association, but also poses challenges to the right to privacy of trade union members. The Certification Officer – or investigators that she appoints – will be able to require a trade union to provide documents in connection with an investigation. This may include disclosure of the name and address of trade union members. As noted previously, the history of blacklisting still casts a shadow over trade union activity. Many individuals do not wish their current or future employer to know that they belong to a union and trade unions should be able to guarantee to members that this information will not be disclosed except under the most stringent of controls and for purposes of investigating serious criminality. However these new investigatory powers will mean that trade unions can make no such assurances.

### **Clause 15: Enforcement of new annual return requirements**

72. This clause will give the Certification Officer the power to make a declaration that a trade union has not complied with the new annual return requirements set out in clause x.

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<sup>46</sup> TULRCA sections 1 and 2.

### **Clause 16 and Schedule 3: Power to impose financial penalties**

73. At the moment, once a Certification Officer makes a declaration that rules/statute obligation have not been adhered to, she then issues an enforcement notice requiring the trade union to take certain steps. These can be enforced like a court order by the Certification Officer herself, an employee or employer depending on which obligations have not been met. Clause 16 and schedule 3 give the Certification Officer power to issue financial penalties as well. The maximum and minimum penalty amounts will be set via regulations, but cannot be less than £200 or more than £20,000.

74. The cumulative impact of the new proposals would mean that the Certification Officer is responsible for making a complaint, investigating it, reaching a decision and setting a punishment. It is contrary to all notions of justice and best practice for each stage in a process of determining compliance with legal rules to be conducted by the one body. Taking this approach fundamentally undermines the fair administration of justice and the rule of law.

### **Clause 17: Power to impose levy**

75. The costs of the Certification Officer are currently covered by ACAS, a BIS funded non-departmental public body. Clause 17 would create a power for the Secretary of State to make Regulations to require trade unions and employers' associations to pay a levy to the Certification Officer.

76. Not only will these proposals create new costs for Trade Unions, but they would increase concerns about the constitutional role of the Certification Officer. As a quasi-judicial body, the Certification Officer should be entirely independent from the parties on which it can impose a judgment. Instead, this proposal would make it dependent on them for funding. This significantly impairs the independence of the Certification Officer and exacerbates concerns raised at paragraph 74.

### **Conclusion**

77. The proposals in the Bill would represent an unprecedented violation of the right to freedom of assembly and protest, as well as making it difficult for individuals to exercise their workplace rights and entitlements. The consequence would be to make it much harder to resolve workplace disputes in a fair and effective manner, if at all. The proposals on picketing would sully the reputation of the UK as a tolerant country where public dissent is permitted and would set a worrying precedent for the future curtailment of public debate, discussion and protest. The Government was elected to office on the promise of "*making*

*work pay*” and has recently sought to emphasise its support for working people.<sup>47</sup> We strongly encourage them to drop these plans, which undermine those claims entirely.

**Sara Ogilvie**

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<sup>47</sup> <http://www.conservativehome.com/thetorydiary/2015/05/halfon-is-out-to-build-a-new-party-and-he-stands-every-chance-of-doing-so.html>.