
Trade Union Bill
JCHR Report and ILO Committee of Experts
Opinion
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Joint Committee on Human Rights and ILO Reports

JOINT COMMITTEE ON HUMAN RIGHTS (JCHR) SETS OUT SERIOUS HUMAN RIGHTS CONCERNS ABOUT THE TRADE UNION BILL

On 5 February 2016, the Joint Committee on Human Rights (JCHR) published a [legislative scrutiny report](#) on the Trade Union Bill.

The report has been prepared to inform and assist the Lords in its consideration of the Bill at Committee Stage. The JCHR however commented that *"the lateness of the Government's response to our initial questions; combined with the fact that it did not answer all of our questions"* had not assisted their *"ability scrutinise the Bill before its Lords Committee Stage."* (Para 11)

Legal background

- The Committee recognised that ***"the right to strike ... is protected by Article 11 of the European Convention on Human Rights."***
- The Committee questioned the government's arguments that it is possible to justify the measures in the Bill because the European Convention on Human Rights and the decisions of the European Court of Human Rights have afforded governments "a wide margin of appreciation" in relation to restrictions on the right to strike. The Committee said:

*"While the Government notes in its ECHR Memorandum that it should be allowed a 'wide margin of appreciation' in implementing its policy, it has not acknowledged directly the fact that the Strasbourg case law also provides that: **"if a legislative restriction strikes at the core of trade union activity, a lesser margin of appreciation is to be recognised to the national legislature."***

The Committee concluded that the Trade Union Bill ***"raises a number of human rights concerns"***. *Some of the relevant proposals, particularly those relating to ballot thresholds and facility time, will be introduced by way of secondary legislation. This makes an assessment of the legality and proportionality of these measures more difficult at this stage."* However, the Committee did not accept the government's argument that each measure

should be considered individually. Rather they concluded it would be important **“to consider the accumulative impact of the Bill proposals on the right to strike.”** Assuming that the Bill passes through its remaining stages, they stated that the Bill should be **“a candidate for post-legislative scrutiny”** once the accompanying regulations had been introduced.

Ballot thresholds in important public services

The JCHR has questioned whether the proposed scope for the 40 per cent threshold in important public service is compatible with human rights standards, and in particular the inclusion of education and transport services. The Committee concluded that:

- “The human rights compatibility of any measures on ballot thresholds in important public services will depend upon whether the scope of the regulations used to implement the measure is **proportionate** and whether **the Government provides an objective justification for the difference in treatment between workers delivering an important public service and other workers.**

“In that context, while they have been delivered very late in the day, it is helpful that the Government has published skeleton Regulations prior to Committee stage...”

*“We note only that the draft Regulations include both staff working in emergency services, such as: the health service, fire service, and border security; and also teaching staff and a wide range of transport services (including buses and passenger railway services). **Although strikes by these latter staff may cause serious inconvenience, it is not clear that they cause a serious risk of harm to the public.**”*

Check-off

The Committee took the view that to date the government has failed to justify its proposals on check-off, which discriminate against trade union members, and therefore may breach European Convention rights. The Committee concluded:

- *“We draw to the attention of both Houses that Clause 14 of the Trade Union Bill, would, in some circumstances, remove from certain public sector workers a contractual right to have union subscriptions deducted from wages (known as check-off), which constitute “possessions” for the purposes of Article 1 Protocol 1. **This might amount to differential treatment of trade union members in their enjoyment of the right to property, which requires the Government to demonstrate objective justification for the difference of treatment which, so far, the Government has not yet provided.**”*
- These conclusions are reinforced by views expressed by Lord Pannick QC in an [article in The Times](#). On the proposed ban on check-off arrangements in the public services, he wrote, **“It is very difficult to see the justification for such**

a restriction, which would have a very damaging effect on the efficacy of trade unions.

Proposed cap on facility time for union workplace representatives

- The Committee noted the fact that *“the regulation-making power on facility time, under Clause 13 of the Bill would be a “power of last resort”. It is unfortunate that the Government has not been able to provide any further detail of the extent of the perceived problem before seeking to take these powers. We welcome the Government’s commitment to provide a new impact assessment before any regulations are laid under this provision.”*
- It will therefore be important for the JCHR and Parliament to reassess the human rights implications of the Bill, once the draft regulations on facilities are published.

ILO COMMITTEE OF EXPERTS CALLS ON THE GOVERNMENT TO MODIFY THE TRADE UNION BILL TO BRING IT INTO LINE WITH INTERNATIONAL STANDARDS

The ILO Committee of Experts has published its opinion and recommendations in relation to the Trade Union Bill. The Committee was responding to a submission made by the TUC which expressed concerns that the Bill flouted ILO Conventions, notably Conventions 87, 98 and 151. The ILO Committee of Experts has concluded that some of the proposed restrictions on the right strike would breach international law.

In summary:

- The ILO Committee of Experts has concluded that the 40 per cent threshold for ballots in important public service ***would constitute an obstacle to the right of workers’ organizations to carry out their activities without interference”***
- The Committee noted that the range of services covered by the 40 per cent threshold well exceeded the ILO narrow definition of essential services, where restrictions on the right to strike may be permissible.
- The Committee expressed particular concern that this restriction would apply to the entire primary and secondary education sector, as well as all transport services. The Committee ***“considers that such a restriction is likely to severely impede the right of these workers and their organizations to organize their activities in furtherance and defence of their occupational interests without interference.”***
- The Committee called on the government ***to modifying the Bill so as to ensure that the heightened requirement of support of 40 per cent of all workers does not apply to education and transport services.***
- The Committee has criticised the proposed removal of the ban on the use of agency workers during strikes. They have called on the government to review

its proposals and emphasised that any restrictions must be limited to essential services.

- The Committee has also called on the government to respond to TUC concerns, particularly in relation to their proposal to ban check-off in public services, the opt-in requirements for political fund contributions and new reporting requirements, the remaining provisions on picketing and the increased powers of the Certification Officer.

Ballot thresholds

The Committee of Experts reiterated its view that the 50 per cent threshold may be reasonable. However, the Committee was highly critical of the government's proposals for a 40 per cent threshold in important public services.

The Committee noted that if implemented proposed threshold would mean unions require "80 per cent support where only the 50 per cent participation threshold has been met.' The Committee continued that "*a requirement of the support of 40 per cent of all workers to carry out a strike **would constitute an obstacle to the right of workers' organizations to carry out their activities without interference***". The proposals were therefore not consider with ILO standards.

The Committee further observed that the range of services covered by the 40 per cent threshold exceeded the definition of essential services where restrictions were permissible. The Committee expressed "***concern that this restriction would also touch upon the entire primary and secondary education sector, as well as all transport services, and considers that such a restriction is likely to severely impede the right of these workers and their organizations to organize their activities in furtherance and defence of their occupational interests without interference.***"

The Committee called on the Government "*to review this matter with the social partners concerned **with a view to modifying the Bill so as to ensure that the heightened requirement of support of 40 per cent of all workers does not apply to education and transport services.***"

Modernising voting methods

The Committee of Experts also expressed concerns that unions were required to use postal-only ballots.

They recognised the TUC concerns that the proposed ballot thresholds are being introduced "*within a cumulated context of heavy procedural requirements for balloting, including the fact that balloting must be by postal voting only and that secret workplace voting and electronic voting are not allowed.*"

The Committee called on the Government "***to review the ballot method with the social partners concerned with a view to its possible modernization while bearing in mind the rights and interests of all parties concerned.***"

These views coincide with concerns expressed by Lord David Pannick QC, in the recent [article in *The Times*](#), where he argued ***“Where the proportionality of the balloting measures is vulnerable to challenge, however, is in relation to the government’s refusal to allow e-balloting. As trade unions have observed, to allow online balloting would promote the professed objective of the bill to enhance democratic decision-making on strikes. The government will need to present a strong case to persuade the House of Lords that online balloting is not capable of being secure.”***

Removal of the ban on the use of agency workers to replace striking workers

The ILO Committee of Experts has also criticised the government’s proposals to remove the ban on the use of agency workers to replace striking workers, which is currently set out in the Conduct of Employment Agencies and Employment Businesses Regulations 2003.

The Committee requested the Government ***“review this proposal with the social partners concerned bearing in mind its general consideration that the use of striker replacements should be limited to industrial action in essential services.”***

Wider measures within the Trade Union Bill

The ILO Committee of Experts has also held the UK government to account on a range of other measures within the Trade Union Bill, calling on the government to respond to the TUC’s concerns in particular relating to ***“i) the proposal to abolish dues check-off across all public sector organizations; (ii) the proposal for an opting-in clause (as opposed to an opting-out), with a limited time validity, for union member contributions to political funds accompanied by detailed reporting obligations; (iii) the remaining provisions on picketing; and (iv) the proposal to increase powers of the certification authority.”***