

TRADE UNION ACT 2016

EXPLANATORY NOTES

What these notes do

These Explanatory Notes relate to the Trade Union Act 2016 (c. 15) which received Royal Assent on 4 May 2016.

- These Explanatory Notes have been prepared by the Department for Business, Innovation and Skills in order to assist the reader in understanding the Act. They do not form part of the Act and have not been endorsed by Parliament.
- These Explanatory Notes explain what each part of the Act will mean in practice; provide background information on the development of policy; and provide additional information on how the Act will affect existing legislation in this area.
- These Explanatory Notes should be read alongside the Act. They are not, and are not intended to be, a comprehensive description of the Act. So where a provision of the Act does not seem to require any explanation or comment, the Notes simply say in relation to it that the provision is self-explanatory.

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Overview of the Act

- 1 The Act amends the Trade Union and Labour Relations (Consolidation Act) Act 1992 as follows:
 - sections 2 and 3 set out the requirements for minimum ballot thresholds - a 50% turnout in all industrial action ballots, and a 40% support requirement in favour of industrial action for specified important public services in six sectors;
 - section 4 requires an independent review on the delivery of secure methods of electronic balloting in relation to industrial action ballots and for the Secretary of State to publish a response to the review. It also provides for a piloting scheme;
 - sections 5 to 7 set out information requirements relating to industrial action: the information that must be included in the ballot paper; and information to be given to union members and to the Certification Officer following a ballot;
 - sections 8 and 9 specify the arrangements for the timing and duration of industrial action. Section 8 requires two weeks' notice of any action to be given to an employer unless the union and the employer mutually agree to 7 days' notice. Section 9 provides that a ballot mandate for industrial action expires after six months or after nine months where there is a mutual agreement between the employer and the union;
 - section 10 sets out requirements on unions for the supervision of picketing;
 - sections 11 and 12 concern political funds. Section 11 provides that persons who join a trade union after commencement shall be required to make an active choice before contributing to a union's political fund. Section 12 places requirements on unions to include details of expenditure from political funds in the union's annual return to the Certification Officer;
 - sections 13 and 14 create regulation-making powers in respect of paid time off for trade union duties and activities in the public sector;
 - section 15 restricts the deduction of union subscriptions ("check off") from wages by relevant public sector employers where:-
 - workers do not have the option to pay subscriptions through other means and;
 - arrangements have not been made for a union to make reasonable payments to the employer for the making of those deductions.

There is a regulation making power to specify who is a relevant public sector employer;

 - sections 16 to 21 set out new investigatory powers and sanctions available to the Certification Officer and new arrangements for funding the Certification Office.
- 2 In addition section 4 does not amend legislation but introduces a provision which requires the Secretary of State to commission an independent review into industrial action ballots.

Policy background

- 3 This Act is intended to give effect to commitments in the Conservative Party's manifesto for the 2015 General Election. During the Queen's Speech on 27 May 2015 it was announced that the Government would introduce legislation to reform trade unions.

Legal background

- 4 A trade union is a membership-based organisation mainly made up of workers. One of its main objectives must include the regulation of relations between workers and employers or employers' associations. An employers' association is a body of employers, generally from the same sector of the economy, whose principal purposes include the regulation of relations between employers in that sector and workers or trade unions.
- 5 The current legislation relating to trade unions and employers' associations is set out in the Trade Union and Labour Relations (Consolidation) Act 1992 ("the 1992 Act"), in particular:
 - industrial action ballot requirements – sections 226 to 234;
 - industrial action notice requirements – sections 234A to 235;
 - recognition of peaceful picketing as a lawful activity – sections 219 to 220;
 - political funds – sections 71 to 96;
 - facility time – sections 168 to 173;
 - the role of the Certification Officer is set out in sections 254 to 258, and enforcement powers are contained in each provision setting out a relevant obligation
- 6 A trade union can apply to have its name included on the public list maintained by the Certification Officer, which provides the union with procedural and tax advantages. A trade union will acquire further rights including the ability to negotiate collective bargaining arrangements on behalf of a group of workers and for its workplace representatives to be eligible for time off to carry out union duties, if it is recognised by the employer for the purposes of collective bargaining. Recognition can either be negotiated by agreement with the employer or by following the statutory procedure for recognition under Part 1 of Schedule A1 to the 1992 Act by applying to the Central Arbitration Committee.
- 7 By organising industrial action, trade unions may become liable in tort. For example, where a trade union induces workers to take industrial action which amounts to a breach of their employment contract, the union commits the tort of inducing the breach of contract. If a trade union wishes to benefit from statutory immunity from liability for that tort, it must satisfy the circumstances set out in Part 5 of the 1992 Act. Part 5 also sets out the circumstances in which an employee taking industrial action loses their protection from unfair dismissal.

- 8 To establish that a trade union is not liable in tort it will need to show that:
- the action is in contemplation or furtherance of a trade dispute,
 - the union has the support of a valid ballot and has sent the appropriate notifications to union members and the employer,
 - the action does not amount to secondary action or unlawful picketing, and
 - it is not for a prohibited purpose, for example to support employees dismissed during unofficial industrial action.
- 9 The Certification Officer is the Registrar of trade unions and employers' associations. The Certification Officer has a range of powers and duties to ensure trade unions and employers' associations abide by various statutory requirements and their own internal rules, and that their finances are managed effectively. The Certification Officer is responsible for maintaining lists of trade unions and employers' associations and for issuing certificates of independence to trade unions. He also acts in a quasi-judicial capacity, for example in relation to breach of rule disputes. The Certification Officer's decisions, as well as further information about the Certification Officer's functions and annual report can be found on the website: <http://www.certoffice.org/>

Territorial extent and application

- 10 The provisions of the Act extend to Great Britain. In the view of the UK Government, the matters to which the provisions of the Act relate are not within the legislative competence of the Scottish Parliament or the National Assembly for Wales; accordingly no legislative consent motions are required. In Northern Ireland employment and industrial relations are transferred. The Act makes a minor, ancillary amendment to NI legislation on political funds which deals with NI trade union members in GB, which is consequential on the changes proposed on political funds in GB. As a result, the Government does not consider that the legislative consent of the Northern Ireland Assembly is required.

Commentary on provisions of Act

Section 1: Meaning of “the 1992 Act”

- 11 This section provides that references to the 1992 Act in the Act mean the Trade Union and Labour Relations (Consolidation) Act 1992. References in the section commentary below reflect this.

Section 2: Ballots: 50% turnout requirement

- 12 Currently, section 226 of the 1992 Act requires a simple majority for a ballot conducted by a trade union for industrial action to be successful. There are no requirements for any level of turnout. This section introduces a new requirement that in all ballots for industrial action, at least 50% of the trade union members entitled to vote must do so in order for the ballot to be valid. Whether or not the ballot is successful and creates a mandate for industrial action is unaffected: a simple majority (i.e. more than half) of the votes cast must be in favour of industrial action in order for action to go ahead.
- 13 In an example where 1000 union members constitute the bargaining unit affected by the dispute, this section means that at least 500 of those members would need to vote in order for the ballot to be valid. If 500 had voted, then a simple majority of them would need to vote in favour in order for the ballot to lead to industrial action: that would be 251 members. If all 1000 had voted, 501 would need to vote in favour.
- 14 The new 50% participation threshold comes into force for all ballots taking place after this section comes into effect. Ballots which have already opened would not be subject to the requirements in this section.

Section 3: Ballots: 40% support requirement in important public service

- 15 This section introduces a new minimum threshold of support that must be satisfied in ballots for industrial action in defined important public services. Important public services may be specified in six sectors: health, education of those aged under 17, fire, transport, decommissioning of nuclear installations and management of radioactive waste and spent fuel, and border security.
- 16 In order for a ballot in these important public services to lead to industrial action, a trade union must obtain the support of at least 40% of all union members entitled to vote in the ballot. This applies where the union reasonably believes that a majority of those balloted are workers who are normally engaged in the provision of important public services.
- 17 This threshold is in addition to the 50% participation threshold introduced by section 2. So ballots for industrial action in important public services require at least half of those entitled to vote to do so before the ballot is valid. In addition, these ballots would also need a simple majority (more than half of votes cast) and at least 40% of union members to vote in favour to obtain a mandate for industrial action.
- 18 In an example where 1000 union members make up the bargaining unit affected by the dispute, as per section 2 the 50% participation threshold would need to be met: so at least 500 members would need to vote. The next test would be to determine whether the dispute was within an important public service and subject to the 40%

threshold. If it was, then at least 40% of the 1000 members entitled to vote would need to vote in favour to enable industrial action. That means at least 400 members would need to vote in favour to enable action. A simple majority is still required in all ballots, so if all 1000 members had voted, then 501 votes in favour would be required to enable action.

- 19 This section confers a power on the Secretary of State to make regulations, subject to the affirmative procedure, to define “important public services”. These will be limited to those working in six sectors: health services, fire services, transport services, the education of those under the age of 17, decommissioning of nuclear installations and management of radioactive waste and spent fuel, and border security.
- 20 The new 40% important public services threshold comes into force for all ballots taking place after this section comes into effect. Ballots which have already opened would not be subject to the requirements in this section.

Section 4: Provision for electronic balloting: review and piloting scheme

- 21 This section introduces a requirement for the Secretary of State to commission an independent review of electronic balloting for all industrial action ballots within 6 months of Royal Assent. Pilot schemes may be used to inform the design of electronic balloting before it is rolled out for union strike ballots. The Secretary of State must consider the report and publish and lay before each House a response to the report. The Secretary of State is also required to consult with relevant organisations before preparing the response.

Section 5: Information to be included on voting paper

- 22 Section 229(2) of the 1992 Act sets out the information which a union must include on the ballot paper. It currently requires a trade union to ask its members on the ballot paper which type of industrial action they want to take part in, but this only need to be expressed in terms of whether this is strike action or action short of a strike. Only the type of action that a majority of members vote for will then be protected and immune from legal action by the employers or others.
- 23 This section makes changes to the information that must be included in a ballot paper.
- 24 *Subsection (2B)* requires a trade union to state in the ballot paper a summary of the issues that are in dispute between the employer and trade union and that have resulted in the ballot being called.
- 25 The summary that the trade union should supply should be sufficient to enable the union member who is voting to understand what issues remain unresolved.
- 26 *Subsections (2C) and (2D)* require a trade union to specify in the ballot paper the type or types of industrial action that amount to action short of a strike and to provide an indication of the time period during which it is expected that those specific types of action are to take place. This is to enable a member to make an informed decision about whether or not to support the proposed action when deciding how to vote. For example: work to rule October 2016; overtime ban November 2016; and strike action late December 2016. The clause also provides a trade union with the flexibility to decide whether the type or types of industrial action are best expressed as part of the question in the ballot paper or set out elsewhere on the ballot paper.

- 27 This section will only apply to ballots where ballot papers are sent to members on or after the day that this section comes into effect.

Section 6: Information to members etc about result of ballot

- 28 In addition to the existing requirements in section 231 of the 1992 Act about the number of votes cast and the number of those who voted yes or no to industrial action, this section requires trade unions to specify how many members were entitled to vote and whether the new minimum thresholds now required by section 226 of the 1992 Act have been met.
- 29 This additional information will also be provided to employers under section 231A of the 1992 Act.
- 30 Section 231 of the 1992 Act already requires trade unions to provide details, to those entitled to vote in the ballot, about the number of votes cast; the number who voted yes and the number who voted no; together with the number of spoiled ballot papers. Section 231A requires that this information is also provided to employers.

Section 7: Information to Certification Officer about industrial action etc

- 31 This section requires a trade union to include details of any industrial action taken in the reporting period in its annual return to the Certification Officer. This should include the nature of the trade dispute relating to the industrial action, the type of industrial action, when the industrial action was taken, as well as confirmation that the relevant thresholds introduced to section 226 of the 1992 Act have been met. It also requires that where a trade union held a ballot in respect of industrial action, the union's return under, section 32 for that period, shall contain the information mentioned in section 231 number of votes cast, the number of those who voted yes, the number who voted no, etc.).

Section 8: Two weeks' notice to be given to employers of industrial action

- 32 A trade union must provide an employer with notice of industrial action after it has secured a ballot mandate and before any such action is taken. This section extends the period of that notice from the current 7 days to 14 days, except where the union and the employer agree to 7 days' notice.

Section 9: Expiry of mandate for industrial action six months after the date of the ballot

- 33 This section removes the current requirement that there must be some industrial action within a period of 4 to 8 weeks following a ballot in order for the mandate to remain valid, and replaces it with a provision that the members' agreement to a union's proposed industrial action will automatically expire six months after the date of the ballot; or up to 9 months after the date of the ballot where the longer period is agreed between the union and the members' employer.

Section 10: Union supervision of picketing

- 34 Section 220 of the 1992 Act provides that a peaceful picket occurs where there is a trade dispute and a person attends at or near their own place of work, to peacefully obtain or communicate information to another, or peacefully persuade another person not to work. A trade union official may also attend at or near the place of work of a member they represent.

- 35 This section inserts a new section 220A into the 1992 Act which provides that when picketing, trade unions must comply with additional requirements. Section 219 is amended to provide that compliance with these additional requirements and the existing provisions in section 220 will mean that unions will continue to enjoy the protections from certain tort liabilities. The relevant torts are inducing another to person to break or interfere with a contract, or threatening that a contract will be broken or interfered with.
- 36 Picketing which is organised by a trade union, or which a trade union encourages its members to take part in, is only lawful when the requirements set out at section 220A(2) to (8) are met. These requirements are largely based on the relevant paragraphs (54 to 57) of the Code of Practice on picketing issued by the Secretary of State under section 203 of the 1992 Act.
- 37 Unions will be required to appoint a picket supervisor. That person should be familiar with the Code of Practice on Picketing and the police should be advised of the supervisor's name, where the picketing is taking place and how the police should contact the supervisor. The picket supervisor should have a letter confirming that the picket is approved by the union and where the employer, or the employer's agent, asks to see the letter, it should be shown, as soon as reasonable practicable. The supervisor should be present at the picket or be readily contactable by the union or the police and be able to attend the picket at short notice. When the supervisor is attending the picket, they should wear something so that they are readily identifiable.
- 38 Section 220A(10) provides that where two or more unions are organising a picket or encouraging members to take part in picketing, then the new requirements can be complied with by any one of those unions.
- 39 A failure to comply with these requirements will mean that a trade union and its members will not be protected from legal proceedings which claim that they have induced someone to break their contract or interfered with a person's performance of a contract, in the same way that a failure to comply with the current section 220 of the 1992 Act.

Section 11: Opting in by union members to contribute to political funds

- 40 Currently, in accordance with section 84 of the 1992 Act, members of a union automatically contribute to a union's political fund, unless they actively take a decision not to contribute. Once members are contributing to a political fund, they continue to do so until they decide to give an exemption notice to the union, confirming that they no longer wish to contribute.
- 41 The new section 84 provides that, members cannot contribute to a political fund unless they have opted in. This requirement will apply to all people who join a union after commencement, and after a transition period (to be decided by regulations, but not to be less than 12 months) (see section 11(5) and (6)). Where a union sets up a new political fund after commencement, and at the end of the transition period, then all members of that union must give express consent (opt in) in order to make contributions to the political fund (section 11(5)(b)).
- 42 Having opted in, a member may give notice at any time, to cancel their contribution. That notice must take effect at the end of the period of one month of it being given. Notices to contribute or to cease contributing to the political fund may be given in person, by agent or by post. They can also be given by e-mail or by using an

electronic form provided by the union. The e-mail and the electronic form are to be sent to an address that the union has told members that they can use.

- 43 Subsection (2) inserts a new section 84A to the 1992 Act. This requires unions to send information to all new members who join after the transition period about their right to withdraw their opt in decision. This information must be sent every year, not later than eight weeks after the annual return is sent to the Certification Officer. Unions can send individual copies of the information to members or they can choose to publish it by whatever means the union uses to communicate with its members. The union may also provide the information as part of the section 32A statement which is provided every year, eight weeks after the annual report is sent. The Certification Officer will monitor compliance with this requirement.
- 44 Subsection (3) creates a new section 85 which provides (as the previous section 85 provided) that the union is required to either collect a separate amount for the political fund from members, or provide a rebate for those members who are not contributing.
- 45 Subsection (4) amends section 82 (rules as to political fund) to provide that in any form (including an electronic form) that a person has to complete to join the union they are advised that they can opt to contribute to a political fund and that if they decide not to contribute, they will not suffer any disadvantage. The Certification Officer will continue to monitor compliance with these matters.
- 46 Those members who joined a trade union before commencement of section 11 will continue to be subject to the automatic opt in provisions of the 1992 Act. The amendments made by the Act will not apply to existing members.

Section 12: Union's annual returns to include details of political expenditure

- 47 Currently there are no requirements in the 1992 Act requiring unions to publish details of their political expenditure. This clause inserts a new section 32ZB into the 1992 Act. This requires trade unions to provide information about their political expenditure in their annual return (sent to the Certification Officer under section 32 of the 1992 Act). This information must be provided where a union spends more than £2,000 per annum from its political fund.
- 48 A union is required to provide particular information in relation to each category of spending as set out in section 72(1) (a) to (f) of the 1992 Act. In addition, unions are required to provide information for expenditure from the political fund, not falling within section 72(1). The information should provide the total amount paid to each party, organisation or candidate (as appropriate) within each category.

- 49 The required information for each category is different depending on the category. So for section 72(1) (a), (b) or (c), which covers the provision of funds or the provision of a service or property to a political party or the holding of a conference or a meeting which is connected to a political party, the information to be given is the name of each political party to which money is paid and the total amount for the year. Therefore if, in one year, a union pays for its members to attend a Labour Party conference and then also pays for members to attend a different Labour Party meeting, then the union should provide the total expenditure on all conferences and meetings and say that the monies were paid to the Labour Party. If, in the same year, a union also pays for members to attend conferences or meeting for another political party, then the union must provide the name of that political party and the total annual spend on conferences and meetings for that party.
- 50 Expenditure under section 72(1) (c) of the 1992 Act relates to spending on elections to a political office and in particular on the registration of electors, the candidature of a person or the holding of any ballot. The information unions should provide here is the information about the election concerned (for example, the local council elections in May 2016) and the name of each political party or organisation to which monies are paid. So, for example, for the registration of voters, payment may be made to an organisation which campaigns to increase electoral registration. In those circumstances the unions must provide the name of the organisation and the total amount per annum paid to that organisation. If money is given directly to a candidates' office, then the name of the candidate should be provided (see new section 32ZB (4) (iii)).
- 51 Where under section 72(1)(c) money is spent in general on candidates of a particular party, for example in a General Election, there will be no need to provide the names of all the candidates, but rather just the name of the political party or organisation, and again the total amount spent on each political party or organisation. That information may have already been provided under subsection 32ZB (4) (i) or (ii), in which case, it need not be provided again. The union must provide the total amount of any other expenditure under this category not already covered.
- 52 The category of spending in section 72(1) (d) relates to spending on the maintenance of a political office. For this category, unions should provide details of the names of the holders of the office and the total amount spent on each per annum.
- 53 For spending under section 72(1)(f) - the production and distribution of materials etc. which seek to persuade people to vote or not to vote for a political party or candidate, unions must provide the details of the organisation which may have received monies for these purposes and the total amount paid to each one (section 32ZB(6)(a)). Where money is not paid to an organisation, but monies are spend to persuade people to vote or not to vote for a particular candidate or party, then unions should give the details of each party or candidate being supported or not being supported as the case may be, and again, the total spend on each per annum. If that information has already been provided under section 32ZB (6) (a) then it does not need to be provided again.
- 54 Finally unions should also provide details of any other expenditure from the political fund which falls outside the categories in section 72(1). The union must provide information about the nature of each cause or campaign which is being funded and the total amount paid to each one per annum. The union must also provide details of

any organisation to which monies were paid (if not already covered by details of the cause or campaign), and the total amount paid to each one. The total of any other expenditure not already covered must be provided. Therefore, if a union provides money to a charitable organisation, that donation would be covered under this category.

- 55 The amount of £2,000 can be increased to a higher threshold by regulations to be made by the Secretary of State and these will be subject to the negative resolution procedure. However, having raised the threshold above £2,000, if the decision is taken to lower it again to a figure not less than £2,000, (making the threshold more onerous for trade unions) then the Secretary of State must make regulations which will be subject to the affirmative procedure.
- 56 Where the Certification Officer has directed that the annual reporting period is changed in accordance with section 32(4)(a) of the 1992 Act, then references to “calendar year” in this clause are changed to refer to that amended period. For example, if that reporting period is for 9 months, the amount is three-quarters of £2000 (i.e. £1500).
- 57 The clause amends section 131 of the 1992 Act so that these requirements also apply to employers’ associations. Section 135 is amended to provide that the new provisions do not apply to federated employers’ associations (who are not required to submit annual returns under the 1992 Act).
- 58 The provisions apply to annual returns for periods that begin after the commencement date.

Section13: Facility Time: publication requirements

- 59 This section inserts a new section 172A into the 1992 Act enabling a Minister of the Crown to make regulations requiring some or all public sector employers with one or more trade union representatives to publish information relating to time off taken by those representatives for trade union duties and activities (referred to as “facility time”, which is defined in subsection (8) of the new section). The information that could be required to be published includes the number of such representatives by type, information about the employers’ spending on trade union duties and activities and the percentage of the aggregate amount of facility time taken by representatives in a specified period attributable to specified categories of duties or activities. The regulations may specify the form and timing of the publication.
- 60 Public sector employers are employers that are either public authorities specified, or of a description specified, in regulations, or bodies that provide functions of a public nature that are wholly or mainly funded by public funds and are specified, in regulations. This would include central government bodies such as Civil Service departments including non-ministerial departments and their executive agencies, Non Departmental Public Bodies, local government bodies such as councils, fire and rescue authorities and Transport for London. It would also include NHS bodies (including trusts), state-funded schools (including academies and free schools) and public corporations such as the BBC. A public sector employer may be a body or may be an office holder.
- 61 This is a new provision designed to promote transparency and public scrutiny of facility time; and to encourage those public sector employers to moderate the amount of money spent on facility time in light of that scrutiny.

Section 14: Facility Time: Reserve powers

- 62 This section inserts a new section 172B into the 1992 Act (immediately after the new section 172A inserted by section 13). The new section allows a Minister of the Crown to make regulations exercising reserve powers after 3 years from when the regulations under section 172A come into force, where the Minister considers it appropriate to do so having regard to information published in accordance with publication requirements, the cost to public funds of facility time in relation to each employer, the nature or any particular features of the various undertakings carried on by those employers and any other matters the Minister thinks relevant (subsection (1) of the new section).
- 63 The reserve powers may not be exercised so as to apply to a public sector employer unless the Minister of the Crown has given notice in writing to the employer and the employer has had a reasonable period to respond to the notice and take any action that may be appropriate. The powers may not be exercised until after 12 months of the notice being given. The regulations are subject to the affirmative procedure and will apply to some or all public sector employers on whom publication requirements have been imposed under new section 172A. The reserve powers may be exercised so the regulations may cap the percentage of the employers' total pay bill spent on paying relevant union officials for facility time.
- 64 The regulations may require employers to publish additional information (subsection (6) of the new section), which can be a basis for a further exercise of the reserve powers. Subject to any exceptions set out in the regulations (subsection (8) of the new section), such as for time off necessary to meet an employer's duty to consult trade union representatives under section 188 of the 1992 Act, the regulations may also modify certain statutory or contractual rights of trade union representatives to time off for trade union duties or activities (subsections (4) and (10) (d) of the new section).

Section 15: Restriction on deduction of union subscriptions from wages in public sector

- 65 This section only permits public sector employers from providing a check off service if their workers have the option to pay their union subscriptions by other means and arrangements have been made for the union to make reasonable payments to the employer in respect of the making of the deductions. Check off involves the employer deducting trade union subscriptions from a union member's pay on behalf of that union and transferring the money deducted to the union.
- 66 For the purposes of this section, public sector employers are employers that are either public authorities specified, or of a description specified, in regulations, or bodies that provide functions of a public nature that are wholly or mainly funded by public funds and are specified in regulations (subsections (3) and (4) of the new section 116B inserted by the section). These would include central government bodies such as Civil Service departments including non-ministerial departments and their executive agencies, Non-Departmental Public Bodies, local government bodies such as councils, fire and rescue authorities and Transport for London. They would also include NHS bodies (including trusts), state-funded schools (including academies and free schools) and public corporations such as the BBC. A public sector employer may be a body or an office holder.
- 67 The regulations, which are subject to the affirmative procedure, may amend or otherwise modify existing legal entitlements, such as those contained in contracts of employment. The regulations may also make transitional provisions before the

prohibition takes effect, such as specifying a commencement date after a certain period of time to enable trade unions to make alternative arrangements to check-off and notify their members of these, encouraging them to switch to direct debit for example.

Section16: Certification Officer not subject ministerial direction

- 68 This provision makes it clear that the Certification Officer will be independent and not be subject to ministerial direction.

Section17: Investigatory powers etc

- 69 As the law currently stands the 1992 Act provides that the Certification Officer can act on a complaint from a trade union member about a range of alleged breaches of statutory provisions. On such an application being made to him the Certification can “make such enquiries as he sees fit” but the Certification Officer has no specific investigatory powers. The exception to this is that the Certification Officer has investigatory powers in relation to the investigation of financial affairs which allows him to require the productions of document, appoint an inspector to investigate etc (see section 37A to 37E of the 1992 Act). Similar investigative powers are also due to be made available to the Certification Officer in respect of failures to comply with duties relating to the register of members (see new sections 24ZH to 24ZK of the 1992 Act which are inserted, with effect from a date to be appointed, by section 42 of the Transparency of Lobbying, Non-Party Campaigning and Trade Union Administration Act 2014).
- 70 An investigation in relation to financial affairs or breaches of duties in relation to the register of members can also be commenced by the Certification Officer without the need for an application or complaint to be made by a trade union member. This is not the currently the case for other areas where the Certification Officer may make determinations about breaches.
- 71 The purpose of the changes made by section 15 and the associated Schedules is twofold. Firstly, it will grant the Certification Officer specific investigatory powers in respect of a number of statutory requirements where they are not currently available. Secondly, it will make a series of changes to the Certification Officer's enforcement powers so that action can be taken without the need for an application or complaint from a member to be received first. The Certification Officer will therefore be able to investigate and take enforcement action proactively in a number of areas where this is not currently possible. For example the Certification Officer could act upon information or concerns the Certification Officer had received from a third party or on the Certification Officer's own initiative.
- 72 This section inserts a new section 256C into the 1992 Act. This new section gives effect to new Schedule A3, which is inserted into the 1992 Act by *subsection (2)*, and is contained in Schedule 1 to the Act *Subsection (3)* introduces Schedule 2, which makes amendments to the 1992 Act to enable the Certification Officer to exercise certain powers without an application or complaint being made.

Schedule 1: Certification Officer: Investigatory Powers

- 73 This Schedule inserts a new Schedule A3 into the 1992 Act.
- 74 Paragraph 1(1) of the new Schedule specifies a number of “relevant obligations”. The provisions of the Schedule enable the Certification Officer to use his new investigatory powers to determine whether or not there has been compliance with

those obligations. The list includes obligations relating to the use of union funds for political purposes.

- 75 The investigatory powers provided by the Schedule also extend to the Certification Officer's role in relation to unincorporated employers' associations in so far as the obligations in sub-paragraphs 1 (d) to (g) of the new Schedule apply to them.
- 76 Paragraph 2 of the new Schedule A3 gives the Certification Officer power to direct a trade union (or branch or section) to produce documents in connection with an investigation, which the Certification Officer thinks might be relevant to an investigation of non-compliance with a relevant obligation.
- 77 Paragraph 3 of the new Schedule enables the Certification Officer to appoint an inspector where the Certification Officer has reasonable grounds to suspect that a trade union has failed to comply with a relevant obligation, and provides that the inspectors may require people to assist with the investigation and produce any documents that the inspector considers may be relevant to whether the union has complied with its duties. This paragraph also sets out the circumstances where disclosure of a member's name or address is permitted (i.e. where the member consents or for the purpose of allowing the Certification Officer, an inspector, or an assurer to carry out their functions or where such disclosure is required to investigate a crime or for criminal proceedings).
- 78 Paragraph 4 of the new Schedule sets out the arrangements for the inspector to provide written reports to the Certification Officer.
- 79 Paragraph 5 of the new Schedule allows the Certification Officer to make an enforcement order where the Certification Officer is satisfied that a trade union has not complied with the requirements imposed under paragraphs 2 or 3 (power to require production of documents etc. and investigation by inspectors). The enforcement order may require a union or person to comply with any requirement to produce documents, to supply information or to cooperate with inspectors. Such enforcement orders may be enforced in the same way as an order of the High Court or, in Scotland the Court of Session. Before making such an order the Certification Officer must give the union or any other person an opportunity to be heard. The Certification Officer can only make the order if satisfied that it is reasonably practicable for the union or person to comply with the duty and, where the order is for the production of documents, if the Certification Officer is satisfied that the documents are in the possession of that union or person.
- 80 Paragraph 6 contains limitations on the duties of disclosure contained in the Schedule, including on information subject to legal professional privilege (or, in Scotland, confidentiality of communications: see the amendment made by paragraph 14 of Schedule 4).

Schedule 2: Certification Officer: Exercise of Powers without Application etc

- 81 Schedule 2 makes a series of amendments to the 1992 Act to enable the Certification Officer to exercise a number of his existing enforcement powers without having to first receive an application from a trade union member. Amendments are made to ensure that this can occur in relation to other requirements of the 1992 Act as follows:
- A failure to comply with the requirements of 45B (duty to secure positions not held by certain offenders). This is achieved by amending section 45C (remedies and enforcement),

- A failure to comply with the requirements under Chapter 4 of Part 1 in relation to elections for certain positions. This is achieved by amending sections 54 (remedy for failure to comply with requirements) and 55 (application to the Certification Officer),
- An application of trade union funds in breach of the restriction in section 71 on the expenditure of money on political activities. This is achieved by amending section 72A (application of funds in breach of section 71),
- A failure to comply with the requirements of Chapter 6 of Part 1 in relation to political fund ballots rules. This is achieved by amending sections 79 (remedy for failure to comply with ballot rules) and 80 (application to the Certification Officer),
- A failure to comply with the requirements under section 82 in relation to trade union political fund rules (achieved by amending that section),
- A failure to comply with the requirements on the passing of resolutions on union amalgamations or transfers under section 99 to 100E. This is achieved by amending section 103 (complaints as to passing of resolution).

Section 18: Enforcement by Certification Officer of new annual return requirements

- 82 *Subsection (1)* of the section inserts a new section 32ZC into the 1992 Act to allow the Certification Officer to enforce the annual return requirements in new sections 32ZA and 32ZB (to be inserted into the 1992 Act by sections 6 and 11 of the Act respectively). It gives the Certification Officer the power to make a declaration that a trade union has failed to comply with the new annual return requirements in relation to details of industrial action and political expenditure. Before doing so the Certification Officer may make enquiries and may give the trade union an opportunity to make oral representations. The Certification Officer must give the union the opportunity to make written representations and must specify the reasons for making any declaration in writing. If the Certification Officer decides not to make a declaration he must give the union written notice of that determination.
- 83 Where a declaration is made then the Certification Officer must also make an enforcement order unless the Officer considers that it would be inappropriate to do so. Such order may be enforced as if were an order of the court.
- 84 *Subsection (2)* provides that the new enforcement powers only apply to annual returns for periods that begin after the day on which the section come into force.
- 85 *Subsection (3)* amends section 45 of the 1992 Act to make it clear that sections 32ZA and 32ZB do not give rise to new criminal offences. Enforcement is through the Certification Officer's civil enforcement powers under new section 32ZC.

Section 19: Further powers of Certification Officer where enforcement order made

- 86 As the law currently stands, where the Certification Officer determines that there has been a breach of a specified requirement or rule the Certification Officer has the power to make a declaration and an order requiring a trade union to take certain steps. If an order is not complied with then it can be enforced in the same way as a court order. The Certification Officer currently has no powers to impose any form of financial sanctions.

- 87 This section inserts a new section 256D into the 1992 Act to give effect to a new Schedule A4 contained in Schedule 3 of the Act. This will give the Certification Officer the power to impose financial penalties where he has the power to issue an enforcement order under a number of provisions specified in that Schedule.
- 88 *Subsection (4)* amends a number of provisions of the existing legislation to clarify that enforcement orders made by the Certification Officer may be enforced as an order of the court by the Certification Officer as well as the applicant or other persons mentioned in the relevant sections.

Schedule 3: Certification Officer: Power to impose financial penalties

- 89 This Schedule inserts a new Schedule A4 into the 1992 Act and gives the Certification Officer the power to impose financial penalties where he has the power to issue an enforcement order under specified provisions.
- 90 Paragraph 1 sets out those enforcement order provisions where financial penalty powers will also be available to the Certification Officer. This includes two new areas where the Certification Officer will be able to make an enforcement order (and therefore a financial penalty) as a result of other changes made by this Act. These are in relation to:
- new Section 32ZC(6) of the 1992 Act in relation to a failure by a union to provide details of industrial action etc or political expenditure in the annual return (see section 15 of the Act)
 - paragraph 5(1) of new Schedule A3 of the 1992 Act in relation to a failure to comply with investigatory requirements (see Schedule 1 to the Act).
- 91 Where the Certification Officer issues an enforcement order or has the power to do so but chooses not to exercise it, paragraph 2 of the new Schedule A4 allows the Certification Officer to:
- make a penalty order requiring the trade union to pay a financial penalty, or
 - make a conditional penalty order requiring the trade union to pay a financial penalty if they do not take particular action within a certain timescale.
- 92 Paragraph 3 of the new Schedule sets out how a conditional penalty will be enforced. If the Certification Officer is satisfied that the union has taken the necessary steps by the time specified, the Certification Officer must notify the union that the penalty is no longer payable. If the Certification Officer is not satisfied and the penalty has not been paid by the required date, the Certification Officer must issue a further order requiring payment of the original penalty amount or a lesser amount where the union has taken partial steps towards compliance. The Certification Officer will be able to utilise the Certification Office's investigatory powers conferred by new Schedule A3 in order to establish whether there has been compliance with a conditional penalty order (see paragraph 1(1) (h) of the new Schedule A3 to the 1992 Act).
- 93 Paragraph 4 of the new Schedule requires that before the Certification Officer makes a penalty order or conditional penalty order the Certification Officer must inform the trade union of the grounds upon which the Certification Officer proposes to make it and give the trade union an opportunity to make representations.

- 94 Paragraph 5 of the new Schedule provides for a right of appeal to the Employment Appeal Tribunal against a decision to impose a penalty or conditional penalty, and sets out the grounds of appeal. Paragraph 6 provides that the maximum and minimum penalty amounts can be set in regulations but they cannot be less than £200 and cannot exceed £20,000. The Secretary of State is also given a power to issue regulations setting different amounts in relation to different enforcement orders and to reference penalties by whether the person in default is an individual or an organisation and by the number of members that a trade union has. Power is given to the Secretary of State to amend the minimum and maximum level of financial penalty.
- 95 Paragraph 7 gives the Secretary of State power to make certain provisions by regulations. These are:
- Provisions to deal with discounts for early payment
 - Provisions to deal with further penalties for late payment and for interest on penalties, which must not exceed in total the amount of the penalty itself
 - Provisions to deal with the collection (enforcement) of the civil penalties that are owed as civil debts
- 96 Paragraph 8 sets out that regulations issued by the Secretary of State must be made following the affirmative procedure and allows those regulations to make supplemental or incidental as well as transitional or consequential provisions.

Section 20: Power to impose levy

- 97 The finance and support services necessary for the performance of the Certification Officer's statutory duties are provided by ACAS (see section 254(5) and (5A) of the 1992 Act). ACAS is an independent Crown Executive non-departmental public body funded by the Department for Business, Innovation and Skills (and also charges to recover the cost of some of its service).
- 98 This section provides for a levy to be introduced to cover the Certification Officer's costs from those organisations that the Certification Officer regulates.
- 99 *Subsection (1)* inserts a new section 257A into the 1992 Act.
- 100 *Subsection (1)* of that new section gives the Secretary of State the power to make affirmative (see new *subsection (9)*) regulations to provide for trade unions and employers' associations to pay a levy to the Certification Officer.
- 101 Those regulations must require that the Certification Officer aims to ensure that the amounts raised are not more than required to cover the expenses of the Certification Officer's functions.
- 102 What counts as the expenses of the functions of the Certification Officer may be determined by regulations and those regulations may also provide for the Certification Officer to determine any levy amount by a number of criteria, including: the membership size or income of the organisation, the type of organisation and the different proportion of the Certification Officer's expenses which relate to his functions in respect of those organisations.

103 The Regulations may provide flexibility by allowing the levy not to be payable, or for a reduced amount to be payable, in certain cases. They may also provide for interest to be charged if the levy payment is late and gives the Certification Officer power to recover any amount owed.

104 The Secretary of State must consult relevant organisations and ACAS before making regulations under new section 257A.

105 *Subsection (2)* amends section 258 of the 1992 Act so that the Certification Officer's annual report to Parliament must include detail on the amounts levied under new section 257A and how those amounts were determined.

Section 21: Rights of appeal not limited to questions of law.

106 Under the 1992 Act decisions of the Certification Officer may be appealed to the Employment Appeal Tribunal on a question of law, but this amendment provides that an appeal can also be on a question of fact.

Section 22: Minor and consequential amendments

107 This section gives effect to Schedule 4 which makes amendments to the 1992 Act and other enactments consequential upon the provisions of the Act.

Schedule 4: Minor and consequential amendments

108 The amendment made by paragraph 13 has particular significance for sections 2 and 3. Under the Act as amended by those sections, it is essential to know how many people voted in the ballot. This raises the question whether a person who returns a spoiled or blank ballot paper counts as someone who has voted. The amendment made by paragraph 13 is intended to remove any doubt about this and to establish that spoiled or blank ballots do count.

109 Paragraphs 3 to 9 set out the minor and consequential amendments as a result of the change to a requirement to opt into a political fund. The changes are in the following provisions:

- restriction on use of funds for political objects (section 71 of the 1992 Act);
- rules as to political fund (section 82 of the 1992 Act);
- employers not to deduct contributions where member gives certificate (section 86 of the 1992 Act);
- overseas members of trade unions (section 94 of the 1992 Act);
- federated trade unions (section 118 of the 1992 Act)
- federated employers' associations (section 135 of the 1992 Act); and
- Effect of amalgamation (section 93 of the 1992 Act)

110 Paragraphs 10 to 12 set out the minor and consequential amendments to the provisions in the 1992 Act concerning balloting to take account of the new provisions in the Act for ballots and information requirements. The changes are in the following provisions:

- requirement of ballot before action by trade union (section 226 of the 1992 Act);
- calling of industrial action with support of ballot (section 233 of the 1992 Act);
- period after which ballot ceases to be effective (section 234 of the 1992 Act).

111 The other amendments in this Schedule are consequential on other provisions of the Act or are minor amendments that do not actually alter the law.

Section 23: Financial provision

112 See paragraph 117 below.

Section 24: Extent

113 This section provides for the amendments made by the Act to have the same extent as the provisions amended. Almost all these provisions extend to England and Wales and Scotland. The exceptions are the amendments to provisions in Chapter 6 of Part 1 of the 1992 Act (application of funds for political objects), which extend also to Northern Ireland but in a merely incidental way (see section 301(2)(b) of the 1992 Act); and the consequential amendment at paragraph 16 of a provision that extends to Northern Ireland. As these amendments are minor, incidental changes which are consequential on the changes being made to the 1992 Act, the Government does not consider that a legislative consent motion from the Northern Ireland Assembly will be required.

Section 25: Commencement

114 See paragraph 116 below.

Section 26: Short title

115 This section is self-explanatory.

Commencement

116 The provisions of the Act (except the financial, extent, commencement and short title provisions) will come into force by means of commencement orders made by the Secretary of State. It is intended to commence the provisions of the Act two months after Royal Assent.

Financial implications of the Act

117 The Certification Officer's additional powers imply additional resourcing for them to be discharged. The implications will be considered as part of the Bill Impact Assessment. The Act provides for a levy on trade unions to fund (on a cost recovery basis) the costs of the Certification Officer.

Compatibility with the European Convention on Human Rights

118 Section 19 of the Human Rights Act requires a Minister in charge of a Bill in either House of Parliament to make a statement about the compatibility of the Bill with the Convention Rights (as defined by section 1 of that Act). The Parliamentary Under Secretary of State and Minister for Intellectual Property, Baroness Neville-Rolfe, has made the following statement: "In my view, the provisions of the Trade Union Bill are compatible with the Convention rights."

119 The Government has published a separate memorandum on ECHR issues with an assessment of compatibility of the Bill's provisions with the Convention rights. This memorandum is available on the Government website.

Related documents

120 The following documents are relevant to the Act and can be read at the stated locations:

- *The Conservative Party Manifesto 2015 on pages 18 - 19* <https://s3-eu-west-1.amazonaws.com/manifesto2015/ConservativeManifesto2015.pdf>
- The Certification Officer's functions and annual report can be found on the website: <http://www.certoffice.org/>
- Government Response to the Consultation on 40% ballot thresholds in important public services
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/493880/bis-16-15-consultation-on-ballot-thresholds-in-important-public-services-government-response.pdf

- Government Response to the consultation on tackling intimidation by non-striking workers
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/473515/BIS-15-621-government-response-document-to-tackling-intimidation-consultation.pdf

Annex A - Territorial extent and application

121 See the commentary on section 21. On that basis, the Government takes the view that no legislative consent motions are required because the subject-matter of the Act is not devolved to the Welsh Assembly or the Scottish Parliament. The minor, ancillary changes to Northern Ireland legislation consequential on the changes to the 1992 Act are not matters which will require the legislative consent of the Northern Ireland Assembly.

Annex B - Hansard References

122 The following table sets out the dates and Hansard references for each stage of the Act's passage through Parliament.

Stage	Date	Hansard Reference
House of Commons		
Introduction	15 July 2015	Vol. 598 Col. 927
Second Reading	14 September 2015	Vol 599 Col 760
Public Bill Committee	13 October 2015	First sitting
		Second sitting
	15 October 2015	Third sitting
		Fourth sitting
	20 October 2015	Fifth sitting
		Sixth sitting
	22 October 2015	Seventh sitting
		Eighth sitting
	27 October 2015	Ninth sitting
		Tenth sitting
Report and Third Reading	10 November 2015	Vol 602 Col 252
House of Lords		
Introduction	1 November 2015	No debate
Second Reading	11 January 2016	Vol 768 Col 12
Committee of the Whole House	8 February 2016	Vol 768 Col 2001 and Col 2064
	10 February 2016	Vol 768 Col 2244 and 2312
	23 February 2016	Vol 769 Col 147 and Col 224
	25 February 2016	Vol 769 Col 400 and Col 452
Report	16 March 2016	Vol 769 Col 1852
	19 April 2016	Vol 771 Col 583
Third Reading	25 April 2016	Vol 771 Col 896
Commons Consideration of Lords Amendments	27 April 2016	Vol 608 Col 1471
Lords Consideration of Commons Amendments	03 May 2016	Vol 771 Col 1344
Royal Assent	04 May 2016	House of Commons Vol. 609 Col. 184 House of Lords Vol. 771 Col. 1417

These Explanatory Notes relate to the Trade Union Act 2016 (c. 15) which received Royal Assent on 04 May

Annex C - Progress of Bill Table

123 This Annex shows how each section and Schedule of the Act was numbered during the passage of the Bill through Parliament.

Section of the Act	Bill as Introduced in the Commons	Bill as amended in Committee in the Commons	Bill as amended on Report in the Commons	Bill as introduced in the Lords	Bill as amended in Committee in the Lords	Bill as amended at Third Reading in the Lords
Section 1	Clause 1	Clause 1	Clause 1	Clause 1	Clause 1	Clause 1
Section 2	Clause 2	Clause 2	Clause 2	Clause 2	Clause 2	Clause 2
Section 3	Clause 3	Clause 3	Clause 3	Clause 3	Clause 3	Clause 3
Section 4						Clause 4
Section 5	Clause 4	Clause 4	Clause 4	Clause 4	Clause 4	Clause 5
Section 6	Clause 5	Clause 5	Clause 5	Clause 5	Clause 5	Clause 6
Section 7	Clause 6	Clause 6	Clause 6	Clause 6	Clause 6	Clause 7
Section 8	Clause 7	Clause 7	Clause 7	Clause 7	Clause 7	Clause 8
Section 9	Clause 8	Clause 8	Clause 8	Clause 8	Clause 8	Clause 9
Section 10	Clause 9	Clause 9	Clause 9	Clause 9	Clause 9	Clause 10
Section 11	Clause 10	Clause 10	Clause 10	Clause 10	Clause 10	Clause 11
Section 12	Clause 11	Clause 11	Clause 11	Clause 11	Clause 11	Clause 12
Section 13	Clause 12	Clause 12	Clause 12	Clause 12	Clause 12	Clause 13
Section 14	Clause 13	Clause 13	Clause 13	Clause 13	Clause 13	
Section 15		Clause 14	Clause 14	Clause 14	Clause 14	Clause 14
Section 16						Clause 16
Section 17	Clause 14	Clause 15	Clause 15	Clause 15	Clause 15	Clause 17
Section 18	Clause 15	Clause 16	Clause 16	Clause 16	Clause 16	Clause 18
Section 19	Clause 16	Clause 17	Clause 17	Clause 17	Clause 17	Clause 19
Section 20	Clause 17	Clause 18	Clause 18	Clause 18	Clause 18	Clause 20
Section 21						Clause 21
Section 22 minor and cons	Clause 18	Clause 19	Clause 19	Clause 19	Clause 19	Clause 22
Section 23	Clause 19	Clause 20	Clause 20	Clause 20	Clause 20	Clause 23
Section 24	Clause 20	Clause 21	Clause 21	Clause 21	Clause 21	Clause 24
Section 25	Clause 21	Clause 22	Clause 22	Clause 22	Clause 22	Clause 23
Section 26	Clause 22	Clause 23	Clause 23	Clause 23	Clause 23	Clause 24
Schedule 1	Schedule 1	Schedule 1	Schedule 1	Schedule 1	Schedule 1	Schedule 1
Schedule 2	Schedule 2	Schedule 2	Schedule 2	Schedule 2	Schedule 2	Schedule 2
Schedule 3	Schedule 3	Schedule 3	Schedule 3	Schedule 3	Schedule 3	Schedule 3

These Explanatory Notes relate to the Trade Union Act 2016 (c. 15) which received Royal Assent on 04 May

Section of the Act	Bill as Introduced in the Commons	Bill as amended in Committee in the Commons	Bill as amended on Report in the Commons	Bill as introduced in the Lords	Bill as amended in Committee in the Lords	Bill as amended at Third Reading in the Lords
Schedule 4	Schedule 4	Schedule 4	Schedule 4	Schedule 4	Schedule 4	Schedule 4

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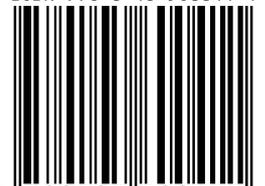
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